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Illinois Supreme Court: Insureds' Negligence Claim Against Insurance Agent Accrued When Policy Was Issued, Not Later When Insureds Were Sued

The Illinois Supreme Court, reversing an appellate court's decision, has ruled that a couples' claim against an insurance agent for allegedly selling them a deficient insurance policy accrued when their insurance policy was issued and not years later when they were sued and their insurer denied coverage.

The Case

In early 2012, an Illinois couple asked an insurance agent to provide them with a new homeowner's insurance policy. The couple asserted that they gave the agent a copy of their old policy and requested a new policy that was "equal to" the coverages in their old policy. They also contended that the agent promised to provide them with a new policy from the insurer he represented that was equal to or better than their old policy for a similar price.

The insurer issued the couple a policy on March 21, 2012, which the couple renewed for the next three years.

In mid-2014, the insureds were sued for defamation, invasion of privacy, and intentional infliction of emotional distress. On August 20, 2014, their insurer denied coverage for the lawsuit. The insurer then asked an Illinois state court to declare that it had no duty to provide a defense to the insureds.

On September 3, 2015, the insureds responded with a third-party complaint against the agent. They alleged that the agent had negligently failed to provide them with an insurance policy equal to their prior policy, as they had requested.

The agent moved to dismiss, contending that the insureds' counterclaim was barred by the two year statute of limitations in Illinois law for claims against insurance producers. The agent argued that the two year period accrued as soon as the insureds purchased their policy in March 2012 and, as a result, that their claims were untimely after March 2014.

The insureds contended that under the "discovery rule," their claims did not accrue until they were sued.

The trial court dismissed the insureds' counterclaims, an appellate court reversed, and the dispute reached the Illinois Supreme Court.

The Illinois Supreme Court's Decision

The court reversed, holding that a cause of action for negligent failure to procure insurance accrued as soon as the customers received their policy.

In its decision, the court explained that, under Illinois law, insurance producers only had a general duty to exercise ordinary care, and as a result, the agent in this case "owed no fiduciary obligations" to the insureds. The court added that because a claim for negligent failure to procure insurance did not involve a fiduciary duty, insurance customers' obligation "to read their policies" controlled.

The court reasoned that expecting customers to read their policies and understand the terms incentivized them "to act in good faith to purchase the policy they actually want, rather than to delay raising an issue until after the insurer has already denied coverage." Moreover, the court observed, insurance customers frequently maintained the same insurance policy for years. If a cause of action did not accrue until the insurance producer notified the customer of an uninsured liability, "insurance customers would benefit from their policy throughout the intervening period, while evidence potentially relevant to the insurer's defense would be at risk of deterioration."

The court ruled, because insurance customers could read their policies and learn of any defects, the discovery rule would "not delay the start of the two-year limitations period for negligent failure to procure insurance" other than in the "exceptional" case where a customer reasonably should not be expected to understand the terms of the policy.

Here, the insureds filed their complaint over two years after receiving their policy and did not plead facts that would support any recognized exception to the expectation that customers would read their policy and understand its terms. Therefore, the court concluded that their claim was untimely.

The case is *American Family Mutual Ins. Co. v. Krop*, No. 122556 (Ill. Oct. 18, 2018).

Wisconsin Supreme Court: Fire Was One Occurrence

The Wisconsin Supreme Court, reversing a court of appeals decision, has ruled that a fire that burned 7,442 acres belonging to different property owners constituted a single occurrence and not multiple occurrences under the insured's commercial general liability insurance policy.

The Case

On May 16, 2013, a fire broke out on forest land owned by Lyme St. Croix Forest Company, burning 7,442 acres over the course of three days and damaging real and personal property belonging to many individuals and businesses.

The fire allegedly began in logging equipment owned by Ray Duerr Logging, LLC.

The insurer that issued a commercial general liability insurance policy to Duerr asked a Wisconsin court to rule that the fire was a single occurrence, and therefore, that a $500,000 limit applied.

The trial court concluded that "although there was one uninterrupted cause of the fire, each 'seepage' of fire onto another's property constitute[d] a separate occurrence for purposes of the policy." Therefore, the $2 million aggregate policy limit applied.

An appellate court agreed that the $2 million limit applied, reasoning that "there was an 'occurrence' each time the fire – fueled and expanded by the consumption of new materials – spread to a new piece of real property and caused damage."

The insurer appealed to the Wisconsin Supreme Court.

The Wisconsin Supreme Court's Decision

The court reversed.

In its decision, the court explained that it looked to the "cause" theory to determine whether an event constituted a single occurrence or multiple occurrences. Under the cause theory, the court continued, if the cause and result were "so simultaneous or so closely linked in time and space as to be considered by the average person as one event," then there was only a single occurrence. If, however, the cause was interrupted or replaced by another cause, then the "chain of causation" was broken and there was more than one occurrence.

The court then applied the cause theory and decided that the fire was one occurrence. It reasoned that a three-day fire in a discrete area caused by a single precipitating event "would reasonably be considered by the average person to be one event." Regardless of how many property lines the fire crossed, the court said, the damage closely followed the cause in both time and space.

The court said that it would be "arbitrary" to determine the number of occurrences solely from the number of owners whose property was damaged. Doing so, the court concluded, would force the insurer to pay more in the event that the same amount of land burned was split among several owners.

The case is *SECURA Ins. v. Lyme St. Croix Forest Co., LLC*, No. 2016AP299 (Wisc. Oct. 30, 2018).

Ohio Supreme Court: Property Damage Allegedly Caused by Subcontractor's Faulty Work Was Not an Occurrence

The Ohio Supreme Court has ruled that property damage allegedly caused by a subcontractor's faulty work was not an "occurrence" under the contractor's commercial general liability insurance policy.

The Case

Ohio Northern University sued the contractor that built a luxury hotel and conference center for the university after it said it discovered water damage from hidden leaks.

The contractor, asserting that the damage had been caused by a subcontractor's faulty work, sought coverage for the lawsuit under its commercial general liability ("CGL") insurance policy.

In response, the insurer asked an Ohio court to declare that it did not have to defend or indemnify the contractor.

The trial court granted summary judgment in favor of the insurer, relying on the Ohio Supreme Court's 2012 decision in *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, in which the Ohio Supreme Court held that an insurance claim filed by a contractor under its CGL insurance policy for property damage caused by the contractor's own faulty workmanship did not involve an "occurrence" such that the CGL policy covered the loss.

An appellate court reversed the trial court's decision, reading *Custom Agri* narrowly and ruling that the CGL policy language was ambiguous as to whether it covered claims for property damage caused by a subcontractor's defective work.

The insurer appealed to the Ohio Supreme Court.

The Ohio Supreme Court's Decision

The court reversed.

The court, relying on its reasoning and conclusion in *Custom Agri*, ruled that property damage caused by a subcontractor's faulty work was not an "occurrence" under the insurance policy's "plain language" because it could "not be deemed fortuitous." CGL policies, the court said, are not intended to protect an insured from ordinary "business risks" that are normal, frequent, or predictable consequences of doing business that the insured could manage.

Therefore, the court ruled the insurer was not required to defend the contractor against the university's suit or indemnify the insured against any damage caused by the insured's subcontractor.

Accordingly, the court reversed the judgment of the court of appeals and reinstated the judgment of the trial court.

The case is *Ohio Northern University v. Charles Construction Services, Inc.*, No. 2017-0514 (Ohio Oct. 9, 2018).

Third Circuit: Once District Court Decided There Was No Occurrence, It Should Not Have Looked at Self-Defense Exception to Exclusion to Find Coverage

The U.S. Court of Appeals for the Third Circuit has ruled that a district court that decided that a state court complaint against the insured did not assert an occurrence erred when it then found coverage under the self-defense exception to the policy's "expected or intended injury" exclusion.

The Case

After the insured was sued in a Pennsylvania state court for negligence and assault and battery in connection with a bar fight, he sought defense under his homeowner's insurance policy.

The insurer asked the U.S. District Court for the Eastern District of Pennsylvania to declare that it had no duty to defend and indemnify the insured in the state court action. The insured filed an answer, denying that he had assaulted another patron but asserting that there had been an altercation at the bar in which he "was required to defend himself and his wife against an attack."

The district court determined that the insurer had to defend the insured. It reasoned that although the conduct alleged in the state court complaint was not an "occurrence" under the policy, the insured was entitled to coverage because the conduct fell within the self-defense exception to the policy's "expected or intended injury" exclusion.

The insurer appealed to the Third Circuit.

The Third Circuit's Decision

The Third Circuit reversed.

In its decision, the circuit court pointed out that the district court had concluded that because the state court complaint alleged that the insured had acted intentionally and not accidentally, there was "no occurrence triggering personal liability coverage" – a conclusion that the insured did not challenge on appeal.

The Third Circuit then ruled that, after finding no coverage under the policy, the district court should not have considered whether any of the policy's exclusions (or exceptions thereto) applied. Simply put, the Third Circuit stated, "exceptions to policy exclusions cannot create or expand insurance coverage."

Therefore, the circuit court concluded, once the district court found no coverage under the policy, it had no need to consider whether any exclusions to coverage applied and it erred by looking beyond the allegations of the state court complaint to consider the insured's claim that he had acted in self-defense.

The case is *Unitrin Direct Ins. Co. v. Esposito*, No. 17-3810 (3d Cir. Oct. 17, 2018).

Tenth Circuit: Indoor Air Pollution Exclusion Did Not Bar Coverage of Claims Alleging Release of Carbon Monoxide

The U.S. Court of Appeals for the Tenth Circuit, reversing a district court's decision, has ruled that an insurance policy's indoor air pollution exclusion did not preclude coverage of claims against a hotel alleging injuries due to the release of carbon monoxide from a swimming pool heater.

The Case

Several guests at an Oklahoma hotel allegedly sustained injuries due to carbon monoxide poisoning stemming from a swimming pool heater that recently had been serviced.

The hotel sought coverage for their claims from its insurer. The insurer denied coverage based on the exclusion for injuries "arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause." The hotel sued.

The U.S. District Court for the Western District of Oklahoma held that the policy unambiguously excluded claims based on the release of carbon monoxide into the air and granted summary judgment in favor of the insurer.

The dispute reached the Tenth Circuit.

The Tenth Circuit's Decision

The circuit court reversed.

The Tenth Circuit began by noting that the Oklahoma Supreme Court had not interpreted the exclusion. Therefore, it had to predict how that court would rule.

The circuit court observed that the exclusion could be interpreted to refer to any substance ever found in the air, no matter how ephemeral its existence as a component of the air. The circuit court pointed out, however, that the exclusion was limited to "qualities or characteristics" of air, and it reasoned that the exclusion also might reasonably be interpreted to refer only to an inherent feature or other longer-lasting trait of the air.

The Tenth Circuit then predicted that the Oklahoma Supreme Court would find that the exclusion was ambiguous. It also predicted that the Oklahoma Supreme Court would construe the exclusion in favor of the insured, making the exclusion inapplicable in this case, in which the claims of injury arose from a "sudden, isolated, and temporary" release of a substance into the air, not an "ongoing condition" or inherent feature of the air.

Accordingly, the circuit court held that the hotel was entitled to coverage under the policy.

The case is *Siloam Springs Hotel, L.L.C. v. Century Surety Co.*, No. 17-6208 (10th Cir. Oct. 16, 2018).

Ohio Appeals Court: Motor Vehicle Exclusion in Homeowner's Policy Precluded Coverage of Lawsuit

An appellate court in Ohio, affirming a trial court's decision, has ruled that the motor vehicle exclusion in a homeowner's insurance policy precluded coverage of a lawsuit alleging that the insured supplied drugs to a driver before she was involved in an accident.

The Case

A pedestrian struck by an automobile in a construction zone sued the insured for allegedly slipping drugs into the driver's beverage or supplying the driver with marijuana, marijuana metabolite, or Alprazolam that the driver ingested prior to the accident.

The insured tendered his defense to his homeowner's insurance carrier. The insurer then asked an Ohio state court to declare that it did not have to defend or indemnify the insured in the pedestrian's lawsuit.

The trial court granted summary judgment in favor of the insurer, finding that the claims asserted against the insured were excluded under the policy's motor vehicle exclusion.

The pedestrian appealed, arguing that the motor vehicle exclusion did not apply because the insured did not own, and was not operating, the vehicle that was involved in the accident.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that the policy excluded coverage for bodily injury or property damage arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of "any" motor vehicle.

The appellate court then ruled that the motor vehicle exclusion was not ambiguous and had to be enforced "as written." It added that the pedestrian had not provided any persuasive authority to find either that the motor vehicle exclusion was ambiguous or that the language reasonably could be construed to apply only to those vehicles to which the insured had some connection.

Accordingly, the appellate court concluded that the trial court had not erred in granting summary judgment in favor of the insurer.

The case is *Allstate Ins. Co. v. Bowman*, No. 17-18-05 (Ohio Ct. App. Oct. 15, 2018).

Illinois Federal District Court: Exclusions Barred Coverage of Claims Under TCPA and FDCPA

A federal district court in Illinois has ruled that two exclusions in an insurance policy barred coverage of claims against the insured under the Telephone Consumer Protection Act and the Fair Debt Collection Practices Act.

The Case

Ocwen Financial Corporation and Ocwen Loan Servicing LLC (together, "Ocwen") were sued by individuals who claimed, among other things, that:

(1) Ocwen violated the Telephone Consumer Protection Act ("TCPA") by making calls to cellular telephone numbers using an automatic telephone dialing system ("ATDS") "and/or artificial or prerecorded voice," without "express prior consent";

(2) Ocwen's TCPA violations were "knowing or willful, or both"; and

(3) Ocwen violated the Fair Debt Collection Practices Act ("FDCPA") by, among other things, placing calls in violation of the TCPA to collect a consumer debt.

Ocwen's insurance carriers asked the district court to declare that they had no duty to defend and indemnify Ocwen against these claims.

The parties moved for judgment on the pleadings.

The District Court's Decision

The district court granted the insurers' motion.

In its decision, the district court ruled that coverage was precluded under the exclusion for bodily injury, property damage, and personal and advertising damage resulting directly or indirectly from the TCPA or "any federal . . . statute . . . at common law . . . that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, use of, sending, transmitting, communicating, or distribution of material or information."

The district court found that Ocwen's calls fell "squarely" within the TCPA and that Ocwen's calls to a cell phone fell within the FDCPA.

The district court reached the same result with respect to the exclusion for bodily injury resulting from or arising out of "any other federal . . . statute . . . that imposes liability for . . .unlawful use of telephone or transmission device . . . unlawful use . . . disclosure or redisclosure of personal information in any manner by any insured or on behalf of any insured."

That "catch-all" provision, the district court said, contemplated the unlawful use of telephones, and it concluded that the provision barred coverage of the FDCPA claims against Ocwen.

The case is *Zurich American Ins. Co. v. Ocwen Financial Corp.*, No. 17 C 2873 (N.D. Ill. Oct. 11, 2018).

Insurers Obtain Summary Judgment in Connecticut Basement Cracking Case

A Connecticut court has granted summary judgment to insurers in a first-party coverage case, holding that cracked basement walls in a home that were deteriorating over time did not qualify for "abrupt collapse" coverage.

The Case

The case involved claims of coverage under first-party homeowners policies for a home whose concrete basement walls exhibited pattern cracking.

The policyholder owned the home since 1997. The policyholder first noticed the cracks in 2014, but they did not concern her at the time because they appeared to be limited to the "skim coat" on the walls.

In 2016, when the policyholder began exploring the idea of selling the home, she consulted a structural engineer before listing the home. The structural engineer concluded that the concrete in the wall was beyond repair. Another engineer concluded that the walls would progressively deteriorate over time to the point that they could no longer support the structure above them. The engineer concluded that the only solution was the complete removal and replacement of the basement walls. The engineer, however, could not predict with any certainty when the walls would no longer support the structure above them.

The policyholder sought first-party coverage under the "collapse" provisions of her insurance policies. The policies provided coverage for direct physical loss to covered property caused by a "collapse," defined as "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose."

All the insurers who insured the home since 1997 denied coverage. The policyholder sued her insurers for breach of contract and related claims. At the time of the suit, she still occupied the home and she had not replaced the basement walls.

The insurers moved for summary judgment on several grounds. The insurers argued that there had been no "abrupt falling down or caving in" of the policyholder's home or a part of it. The insurers further argued that the home was "occupied for its [current] intended purpose" at the time of the alleged loss and continued to be occupied to the present time.

In response, the policyholder argued that the policy's requirement that the building be unfit for occupancy was ambiguous, and should be construed to require only that the home did not conform to its original design. Otherwise, the policyholder contended, an insured would have to wait for an inevitable catastrophic failure before being able to access coverage.

The Decision

The court granted the insurers' summary judgment motions and dismissed all of the policyholder's causes of action.

As an initial matter, the court applied a manifestation trigger. The court concluded that because the policyholder did not discover the cracks until 2014, only the policies in effect during that time were potentially triggered.

The court next found that the cracking did not amount to a "collapse" under the policy. It reasoned that neither the home nor part of it had fallen down or caved in "with the result that the building or part of the building cannot be occupied for its [current] intended purpose." As the court observed, the policyholder continued to occupy the house from the time she became aware of the problem to the present.

The court noted that the word "abrupt" in the "collapse" provisions of the policies has a "temporal meaning." There was no evidence that the house was in imminent danger of falling down or caving in. Rather, according to the court, the deterioration was "a gradual progressive process" that could take years before resulting in a collapse.

The court rejected the policyholder's argument that "occupied for its intended purpose" meant only that the home did not conform to its original design. The court reasoned that adopting the policyholder's position would transform the policy into a construction warranty contract.

Finally, the court rejected the policyholder's argument that coverage was illusory if it did not apply to the circumstances presented. The court reasoned that the policy "does not cover hidden decay or defective construction in the abstract." Instead, coverage was available only when those conditions caused a "collapse" as defined by the policy. The court concluded that the policyholder failed to show that the building or part of it "cannot be occupied for its [current] intended purpose."

The case is *Lisa B. Martin v. Travelers Indemnity Company of America et al.,* Superior Court of Connecticut, Judicial District of Tolland At Rockville, Docket No. CV-17-60111809-S (Oct. 19, 2018).

***Rivkin Comment*:** There are hundreds of homes with cracking concrete basement walls in Northeastern Connecticut. The problem has received a significant amount of media and government attention. Rivkin Radler's own Paul Gorfinkel successfully argued the motion for one of the insurers. Paul had previously obtained summary judgment in a basement cracking case involving similar but not identical policy language.

Georgia Appellate Court Refuses to Apply Non-Cumulation Clause in Asbestos Case

A Georgia appellate court, siding with the insured in an asbestos coverage case, has held that a non-cumulation provision was ambiguous, allowing the insured to stack the limits of each of its primary policies.

The Case

The case involved a claim for insurance coverage by a manufacturer of asbestos-containing dryer fabrics. The policyholder, Scapa Dryer Fabrics, purchased five consecutive primary annual policies from National Union Fire Insurance Company from 1983 through 1987. The 1983, 1984, and 1985 policies had limits of $1 million for each occurrence and $1 in the aggregate. For the 1986 and 1987 renewal policies, the liability limits were amended by two endorsements – one which set the total liability for "Ultimate Net Loss" resulting from any one occurrence to $7.2 million, and another which contained a non-cumulation provision. The relevant endorsement provided:

> If … for any reason [Scapa] has been provided with more than one policy by [National Union] covering the same loss/losses, the limit of liability stated in the schedule of this endorsement is the total limit of [National Union's] liability for all damages which are payable under such policies. Any loss incurred under this policy shall serve to reduce and shall therefore be deducted from the total limit of [National Union's] liability.

The policyholder also purchased annual excess liability coverage from New Hampshire Insurance Company, National Union's sister company.

In 2014, National Union, through its third-party administrator, advised the policyholder that it was close to exhausting what National Union contended were its $7.2 million policy limits. National Union asserted that, under the non-cumulation provisions in the 1986 and 1987 policies, liability was capped at $7.2 million, rather than the $17.4 million aggregate coverage for all five policies. National Union also argued that defense costs eroded policy limits.

The policyholder sued National Union, seeking damages for breach of contract based upon National Union's discontinuance and denial of insurance claims. The parties filed cross-motions for summary judgment.

The trial court granted the motions in part and denied them in part, holding that (1) the non-cumulation provision in the National Union policy was ambiguous, and therefore, the policyholder could "stack" the limits of each primary policy; (2) New Hampshire's obligations under the excess policies were triggered by exhaustion of the National Union policies covering

the same policy periods; and (3) the insured's defense costs eroded the policy limits of the 1986 and 1987 National Union policies. The parties filed cross-appeals.

The Appeal

The appellate court ruled in favor of the insured on all three issues.

First, the appellate court rejected National Union's contention that the limits of the 1983-87 primary policies could not be stacked because the non-cumulation provision in the 1986-87 policies were ambiguous. The appellate court held that the non-cumulation provision did not indicate whether the limit applies to the policy period only or to aggregate period under the original and renewed policies. The appellate court ruled that any such ambiguity must be construed in favor of the insured.

Second, the appellate court rejected National Union's contention that the trial court erred by concluding that New Hampshire's obligations under its policies were triggered by exhaustion of the National Union primary policies issued during the same periods. National Union argued that, under the "other insurance" clause of its policies, it had no obligation to defend or indemnify the policyholder until every other policy issued to the policyholder for any time period was exhausted. The appellate court disagreed, reasoning that the policy does not state that the policyholder must exhaust all other policies issued at any other time before its defense and indemnity duties were triggered. The appellate court noted that the "other insurance" provision required the policyholder to maintain its underlying policies in force at the commencement of the New Hampshire policies. Thus, the appellate court ruled, New Hampshire was obligated to defend and indemnify the policyholder upon exhaustion of all primary coverage that overlapped in time with the excess policy periods.

Third, the appellate court agreed with the policyholder that the trial court erred by finding that the insured's defense costs eroded the policy limits of the 1986 and 1987 National Union policies. National Union argued that Ultimate Net Loss was defined to include "all expenses incurred by National Union." However, the appellate court ruled that, even if that phrase included defense costs, the policy limit was eroded only by sums which the policyholder (or National Union, as its insurer) became legally obligated because of the policyholder's liability. The appellate court ruled that the Ultimate Net Loss endorsement was ambiguous as to whether such expenses included defense costs National Union was obligated to pay solely as part of its contractual duty to defend. Again, the appellate court found that any ambiguity must be construed in favor of the insured. As such, it ruled that the policy limits of the 1986 and 1987 National Union policies were not eroded by the insured's defense costs.

The case is *National Union Fire Ins. Co. v. Scapa Dryer Fabrics*, Court of Appeals of Georgia, Fourth Division, A18A1173 and A18A1174 (Oct. 26, 2018).

California Court of Appeal: Conditional Use Permit Revocation Resulted in a Covered Loss of Use

A California appeals court, reversing a trial court decision, has ruled that the revocation of a conditional use permit for a commercial property was a covered "loss of use" of tangible property under a liability policy.

The Case

Lessees of a commercial property operated a nightclub under a conditional use permit (CUP). The insured provided security guard services at the nightclub. In 2007, there was a fatal shooting at the nightclub. The security company had converted a storage area into a "VIP entrance" to the club, which had no metal detector. The gunman entered the club through the VIP entrance. Following the shooting, the CUP was revoked and replaced with a modified permit, which provided that the property could be operated only as a banquet hall.

The property owner sued the security company for breach of contract and negligence. The property owned alleged that the security company failed to frisk the shooter, that this failure caused the revocation of the conditional use permit, and that the revocation of the CUP lowered the resale and rental value of the property. The property owner sought damages measured by the reduction in fair market value of the property and lost income.

The property owner secured a default judgment against the security company. The property owner then brought a direct action against the security company's liability insurer.

The policy covered the security company's liability for "property damage" caused by an "occurrence." "Property damage" was defined as either: (a) "[p]hysical injury to tangible property, including all resulting loss of use of that property," or (b) "[l]oss of use of tangible property that is not physically injured."

The insurer moved for summary judgment. The insurer argued that the loss of the CUP was not a loss of use of tangible property but merely the loss of an intangible right to use property in a certain way. It also argued that property damage does not include economic loss.

In opposition, the property owner argued that it lost the use of tangible property due to the revocation of the CUP. The property owner also argued that, when an economic loss results from the loss of use of tangible property, it is covered as property damage.

The trial court granted the insured's motion for summary judgment. The trial court reasoned that the property owner sought lost value after the permit was revoked, which is economic loss, not loss of use of tangible property. The insured appealed.

The Appeal

The appellate court reversed. It held that the appropriate inquiry is not whether the property owner lost an entitlement (*i.e.*, the permit), but rather whether the loss of that entitlement resulted in the "loss of use" of tangible property. The court noted that the owner of the property had an interest in tangible property. The revocation of the CUP – that is, the loss of the ability to use the property as a nightclub – was necessarily a "loss of use" of that tangible property.

The appellate court acknowledged that loss of use damages, by nature, constitute economic loss. But it found only those "losses that are exclusively economic, without any accompanying physical damage or loss of use of tangible property, do not constitute property damage." The court ruled that the diminution in value of the property was a proper measure of the damages from that loss of use.

Finally, the court held that "loss of use" means loss of *any* significant use of the premises, not necessarily the total loss of all uses. The fact that the property owner could still use the premises for another purpose (*i.e.*, a banquet hall), did not defeat coverage.

The case is *Three Sombrero, Inc. v. Scottsdale Ins. Co.*, Court of Appeal of California, Fourth Appellate Division, Division Two, Appeal No. E067505 (Oct. 25, 2018).

Indiana Court of Appeals: Insured's Notice of Environmental Claim Was Too Late

An Indiana Appellate Court, affirming a trial court order, has ruled that an insured was not entitled to coverage for environmental liabilities where it waited at least nine years after it knew of the claims and after it fully settled its liabilities before notifying its insurer of its loss.

The Case

The insured, Franke Plating Works Inc., ("Franke") had metal finishing, plating, and coating operations that cover parts in zinc and other constituents. Its operations had generated various hazardous and nonhazardous wastes that were shipped to several waste-handling facilities for disposal. Franke was a potentially responsible party in actions involving environmental cleanups at three landfill sites and was named in a citizen suit. Franke investigated, defended, settled, and paid each of these claims.

Franke's policy provided that, in the event of an occurrence, written notice containing particulars must be given to its insurer, Cincinnati Insurance Company ("Cincinnati"), "as soon as practicable" and that, if a claim is made or suit is brought against Franke, it "shall immediately forward to [Cincinnati] every demand, notice, summons or other process received."

However, Franke failed to provide notice to Cincinnati until it filed a declaratory judgment against the insurer. At the time the complaint was filed, there was no ongoing defense being

undertaken for any of underlying claims. Rather, Franke had paid all sums resulting from the underlying claims before Cincinnati was notified of the claims. The trial court found that Franke's late notice excused Cincinnati from any obligation to indemnify Franke for settlement costs or interest.

The Appeal

The Indiana Court of Appeals affirmed the trial court's order, finding that the Franke had failed to satisfy the policy's notice provisions.

It held that Franke's delay in giving notice to its insurer was unreasonable. Franke knew about the first underlying liabilities at least nine years before it sued its insurer. Nothing prevented Franke from giving notice except a lack of understanding of its legal rights.

The court noted that, under Indiana law, where the delay in giving notice to an insurer is unreasonable, there is a rebuttable presumption of prejudice against the insurer. The court found that Franke failed to submit sufficient evidence that prejudice did not occur in the particular situation.

The court also rejected Franke's argument that denying coverage under these circumstances would result in a disproportionate forfeiture. Under the Restatement, a disproportionate forfeiture only occurs when an obligee loses his right to a promise that he substantially relied upon, for example, by preparing to perform in exchange for that promise. Here, however, the appellate court ruled that Franke did not prepare to perform or perform in any way. Rather, it waited until after it had fully investigated, defended, settled, and paid on each of the claims before eventually notifying its insurer of its losses. As such, the court ruled that forfeiture principles were inapplicable.

The case is *Franke Plating Works, Inc. v. Cincinnati Ins. Co.*, Court of Appeals of Indiana, Case No. 49A02-1710-PL-2462 (Oct. 18, 2018).