



Andrew B. Downs
San Francisco,
Shareholder

Direct Dial: 415.352.2716
Fax: 415.352.2701
Email Attorney

Theft of Money is not "Loss of Use" Under a Commercial General Liability Policy

By Andrew B. Downs

Last week, the California Court of Appeal reaffirmed the rule that the theft of money is not "loss of use" of that property for purposes of the property damage coverage grant of a Commercial General Liability policy. *Advanced Network, Inc. v. Peerless Ins. Co.* 2010 WL 5030082 (December 10, 2010). The significance of this decision for the insurance industry is that it precludes many policyholder attempts to shift fidelity losses to general liability policies.

Advanced Network resulted from thefts by one of its employees of cash intended for automated teller machines. The crime insurer of the bank whose money was stolen sought to recover its value from Advanced Network. Advanced Network sought a defense and indemnity from its general liability insurers on the theory that the bank was not seeking to recover the money itself (which would be excluded by the general liability policy's care, custody or control exclusion), but for the loss of use of that money, thus bringing the loss within the definition of property damage of (1) "Physical injury to tangible property, including all resulting loss of use of that property," and (2) "Loss of use of tangible property that is not physically injured."

The Court of Appeal held that the theft of the money was not loss of use under the policy definition and it did so in clear terms: "Peerless' CGL policy does not define 'loss of use,' but it is established in California that the term cannot reasonably be interpreted to include the permanent *loss* of property through conversion."

Advanced Network is only the most recent of a series of decisions in California and elsewhere that have rejected policyholder attempts to broaden "loss of use" coverage under general liability policies. One of the leading decisions finding a loss not to be loss of use is *Collin v. American Empire Ins. Co.*, 21 Cal.App.4th 787, 26 Cal.Rptr.2d 391 (1994). The *Advanced Network* court relied heavily upon and followed *Collin*.

For the insurance industry, *Advanced Network* is a positive development. The Court of Appeal rejected the policyholder's effort to stretch the concept of loss of use to at least trigger a duty to defend. The appellate court reversed a judgment of over \$2 million in the policyholder's favor based upon Peerless' refusal to defend the underlying action.