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## **California Court Expands CGL Definition of Loss of Use Property Damage**

By Andrew B. Downs

Late last week, the California District Court of Appeal for the Fourth Appellate District held that the reduction of uses permitted by a Conditional Use Permit constitutes loss of use of tangible property, and thus "property damage" under a Commercial General Liability policy.

*Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, (# E067505, 10/25/18) was a direct action against a CGL insurer after entry of a default judgment against its policyholder. In reaching its pro-coverage conclusion, the court used the doctrine of reasonable expectations to disregard substantial contrary case law, in favor of what it viewed as the only "common sense" result.

Sombrero operated a nightclub. Scottsdale's policyholder provided security services. After a shooting at the property, Sombrero sued the policyholder, and obtained a default judgment. The default judgment was based on the loss of value of the property due to the local government's modification of the use permit to prohibit use as a nightclub, permitting use only as a banquet hall. After obtaining the default judgment, it filed a direct action against Scottsdale. The trial court granted summary judgment in favor of Scottsdale. The appellate court reversed, finding there was covered property damage.

The Scottsdale property included a fairly standard definition of "property damage" which included "loss of use of property that is not physically injured." Sombrero argued the downgrade of the Conditional Use Permit constituted a loss of use which made the property less valuable. Scottsdale argued the diminution in value was a purely economic loss not covered by the property damage coverage grant of the General Liability policy.

The appellate court disagreed with Scottsdale:

The loss of the ability to use the property as a nightclub is, by definition, a "loss of use" of "tangible property." It defies common sense to argue otherwise.

The court then went out of its way to distinguish the rather substantial body of law holding that the loss of a legal entitlement to use a property in a particular way is not loss of use of that property. Rather than focus on the lost entitlement, the appellate court here chose to focus on the object of that entitlement, the property to which it applied.

In reaching these conclusions, the appellate court relied heavily on the reasonable expectations doctrine. But, it appears to have done so from the perspective of Sombrero, who was *not* the insured.

*Thee Sombrero*, if followed by other courts, could lead to a significant expansion of the scope of property damage coverage under Commercial General Liability policies. While it is possible the California Supreme Court will grant review or will decertify the decision for publication, both of those outcomes are statistically unlikely.