



Loss of Use

Credit to Smith, Smith and Feeley, Newport Beach, CA

Policy Covering “Loss of Use of Tangible Property Not Physically Injured” Covers Insured’s Liability for Claimant’s Loss of Ability to Use Property as Nightclub
 A general liability policy covering “loss of use of property that is not physically injured” covered an insured whose negligence led to the claimant’s loss of ability to continue using its property as a nightclub. (Thee Sombrero, Inc. v. Scottsdale Insurance Company (2018) 28 Cal.App.5th 729)

Facts

Thee Sombrero, Inc. (Sombrero) owned a piece of commercial property in the City of Colton (City). The City issued a conditional use permit (CUP) authorizing the use of the property as a nightclub. The CUP required the nightclub to have a single entrance door equipped with a metal detector.

Sombrero leased the property to tenants who operated it as a nightclub. Crime Enforcement Services (CES) provided security guard services at the nightclub. At some point CES converted a storage area at the property into a “VIP entrance” that did not have a metal detector.

A nightclub patron armed with a weapon gained entrance to the nightclub through the VIP entrance and shot and killed another patron. Following the shooting, the City revoked the original CUP and replaced it with a modified CUP which provided that the property could be operated only as a banquet hall.

Sombrero sued CES, alleging that CES’s negligence caused the shooting, which in turn led to the revocation of the original CUP, which in turn lowered the rental value of the property and caused “lost income.” Sombrero obtained a default judgment against CES for \$923,078, which represented the difference between the value of the property when used as a nightclub (per the original CUP) and the value of the property when used as a banquet hall (per the modified CUP).

Thereafter, Sombrero brought a “direct action” to collect the judgment from CES’s general liability insurer, Scottsdale Insurance Company (Scottsdale). The Scottsdale policy covered damages CES owed because of “property damage,” which was defined as “physical injury to tangible property” or “loss of use of tangible property that is not physically injured.” The trial court entered summary judgment in favor of Scottsdale, finding that the judgment Sombrero had obtained against CES in the underlying action did not represent damages because of “property damage” as defined in the Scottsdale policy. Sombrero appealed.

Holding

The California Court of Appeal reversed. In the underlying action, Sombrero alleged that CES’s negligence caused the revocation of the original CUP, which caused Sombrero to lose the ability to use its property as a nightclub. According to the appellate court, Sombrero’s “loss of the ability to use the property as a nightclub is, by definition, a ‘loss of use’ of ‘tangible property.’”

Although revocation of the CUP itself was an injury to intangible property rights, revocation of the CUP led to an inability to use Sombrero’s premises, which was a loss of use of tangible property not physically injured. The appellate court reasoned that a loss of use of tangible property does not require a total loss of all use of the property, but rather only a loss of any significant use of the property. Further, once there is covered property damage, the policy covers any ensuing economic losses as damages “because of” property damage.

In short, Sombrero’s loss of the ability to use its property as a nightclub did constitute “property damage” within the meaning of the Scottsdale policy. Thus, the trial court had erred in granting summary judgment in favor of Scottsdale.

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President's Message

Presidents Message – February 2020

Okay here go the ramblings....

Wow! We are almost a month into the New Year and we literally just put our Christmas tree out on the sidewalk last Tuesday. Part of the delays in “tidying up” was that we were so busy during the holidays we wanted to hold on to them as much as possible. It’s a bit sad in January, which reminds me of every time I think of Christmas lights in January I think of the song (wait for it, wait for it) “No” my 12-year old daughter, it’s not Taylor Swift, it’s the Dawes song “Most People”. If you haven’t heard them, I like this LA based band. Fun fact, ex-Dawes keyboardist Tay Strathairn is son of actor David Strathairn!



John Ratto
CAIIA President

What the heck does this have to do with the independent adjusting business!? Damn it! We can’t continue our claims handling until Ratto gives us something to hold onto that will carry us for the month!

Ok calm down!

I was recently looking back at one of past president, Paul Camacho’s president’s messages and noting how he was saying that this was the toughest part of the job. When I first started these messages early on in my role as president, I didn’t believe that. But, boy, is it true now!

One of the hardest things I have to remember as an IA/business owner is that I don’t know everything about this job and not to bulldoze through believing that I am absolutely right about something. If I consistently try to humble myself and keep an open mind, it makes me a better adjuster (and person). At the same time, it’s also important to take a stand and form a solid but concise opinion about an item you are adjusting. To the latter, it is what I believe our clients count on. I can’t tell you how many times I speak to clients who handle claims nationally, wherein they discuss the reports that they receive from other IA’s around the country. Oftentimes I hear the same thing “this report doesn’t tell me anything”.

Early on in my handling of claims while at DL Glaze, I would be somewhat cautious in my opinions about certain items related to the claim (to the point of being wishy-washy). I will never forget what large loss adjuster at Fireman’s Fund, Dave Greenwald once said to me after getting one of my reports, “We count on you to be our eyes and ears and to tell us what you not only see but what you think”. Up to that point in my short adjusting career I used to say words like “maybe” and “could have happened”, instead and often times now reporting words like “the leak clearly appears to have been developing for a period of several months, if not years”. I have had a few clients recently forward to me their handling instructions wherein they have asked that we refrain from providing an “opinion” as to a cause. This makes it very difficult and somewhat of a fine line when it comes to handling claims. For obvious reasons I think the clients do not want these opinions in our reports for fear of litigation. Simple solution - pick up the phone and call them! Remember that device that has a handset and a cord? In my opinion it is still one of the most effective methods of communication.

Reminder: The CAIIA is proud to be exhibiting and sponsoring at the following upcoming event: March 3 & 4, 2019 Combined Claims Conference, Hyatt Regency, Orange County.

And if it couldn’t be easier, because it’s right next to the Burbank airport , April 23 & 24 is the CAIIA Midterm Meeting at the Hilton Garden Inn in Burbank. We will have more details under separate cover including educational courses for that morning of the 24th. I would love to see you there for all or part of our mid – term!

John Ratto
CAIIA President



NEWS OF AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming event:
March 3 & 4, 2019 Combined Claims Conference, Hyatt Regency, Orange County
April 23 & 24 CAIIA Midterm Meeting, Hilton Garden Inn, Burbank

Important Amendment to the Insurance Code:

Assembly Bill No. 188
CHAPTER 59

An act to amend Section 2051 of the Insurance Code, relating to insurance.

[Approved by Governor July 09, 2019. Filed with Secretary of State July 09, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 188, Daly. Fire insurance: valuation of loss.

Existing law generally regulates classes of insurance, including fire insurance. Existing law provides that the measure of indemnity in fire insurance under an open policy is the expense to replace the thing lost or injured in its condition at the time of the injury, with the expense computed as of the start of the fire. Existing law also provides that under an open policy that requires payment of actual cash value, the measure of the actual cash value recovery is the policy limit or the fair market value of the structure, whichever is less, in the case of a total loss to the structure. In the case of a partial loss to the structure or loss to its contents, the actual cash value recovery under existing law is the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. Under existing law, in the case of a partial loss to the structure, a deduction for physical depreciation applies only to components of a structure that are normally subject to repair and replacement during the useful life of that structure.

This bill would delete the provisions regarding the actual cash value of the claim of total loss to the structure and would instead require that the actual cash value of the claim, for either a total or partial loss to the structure or its contents, be the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. The bill would extend the restrictions that apply to a deduction for physical depreciation to a total loss to a structure.

DIGEST KEY

Vote: MAJORITY Appropriation: NO Fiscal Committee: NO Local Program: NO

BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

Section 2051 of the Insurance Code is amended to read:

- 2051.**
- (a) Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, the expense being computed as of the time of the commencement of the fire.
 - (b) Under an open policy that requires payment of actual cash value, the measure of the actual cash value recovery, in whole or partial settlement of the claim, for either a total or partial loss to the structure or its contents, shall be the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. A deduction for physical depreciation shall apply only to components of a structure that are normally subject to repair and replacement during the useful life of that structure.

CA DOI Press Release**\$3.2 Million Sober Living Home Fraud Scheme Shut Down****Five defendants charged with multiple felonies for preying on vulnerable substance abuse patients to bilk insurance company out of millions**

SANTA ANA, Calif. — A joint effort by the Orange County District Attorney's Office and the California Department of Insurance has shut down an alleged \$3.2 million health care fraud ring which preyed on vulnerable substance abuse patients in order to bilk an insurance company out of millions.

Steven Lomonaco, 61, of Laguna Beach, Mahyar "Christian" Mohases, 37, of Santa Ana, Robert Williams, 41, of Murrieta, Nicholas Reeves, 42, of Aliso Viejo, and James Frageau, 29, of Temecula have been charged with multiple felony counts including insurance fraud and money laundering in connection with the scheme.

Mohases, Williams, Reeves, and Frageau have each been charged with two counts of committing medical insurance fraud, one count of fraudulent written claim to an insurance company, two counts of money laundering in excess of \$150,000, four counts of money laundering, and one enhancement for aggravated white collar crime over \$200,000. They each face a maximum sentence of 14 years if convicted on all charges.

Lomonaco has been charged with two counts of committing medical insurance fraud, one count of fraudulent written claim to an insurance company, one count of medical insurance fraud, and one enhancement for aggravated white collar crime over \$200,000. He faces a maximum sentence of 8 years 4 months if convicted on all charges.

"The heartless nature of these alleged crimes are appalling," said Insurance Commissioner Ricardo Lara. "These suspects trafficked vulnerable substance abuse patients to California just to make a quick buck from the insurance company, with no regard for their lives, health or recovery. Thanks to the efforts of Department of Insurance investigators, and our close work with District Attorney Todd Spitzer's office, there is one less fraud ring preying on unsuspecting patients."

Mohases, Frageau, Williams and Reeves are accused of finding patients across the country who were seeking help for substance use recovery and flying them to California to enter treatment at Casa Bella International Inc., which was owned and operated by Lomonaco. In order to obtain payment from the insurance company for these patients, Mohases, Frageau, Williams and Reeves directed employees to fill out policies for the patients using false information.

They are accused of lying on the insurance applications, stating that patients lived in California, when in actuality the addresses were for employees or businesses related to the co-conspirators. Lomonaco paid the other co-conspirators upwards of \$10,000 per patient who stayed enrolled in treatment for more than 30 days.

"Sober living homes are valuable resources designed to facilitate recovery and healing for patients battling potentially life-threatening addiction issues," said Orange County District Attorney Todd Spitzer. "Instead of helping these patients, these individuals preyed on extremely susceptible people and exploited their addictions for profit. Working closely with the California Department of Insurance, we are cracking down on these criminals and their predatory operations in order to protect substance abuse patients from unknowingly being trafficked, as well as protect their loved ones and insurance companies from these unscrupulous operators."

In order to pay the insurance premiums, the defendants are accused of developing a massive money laundering scheme in which they filtered money through non-profit, StopB4UStart, by providing "donations" from Mohases, Frageau, Williams and Reeves under their corporation, Nationwide Recovery. These "donations" would be cashed out, and the owner of StopB4UStart would receive cashier's checks in specified amounts based on the information he received from one of the other co-conspirators. More than 800 checks in total were used to pay the insurance premiums on the fraudulent policies.

Mohases was arrested on January 13, 2020 and arraigned on January 14, 2020, he has pleaded not guilty. He is out on \$250,000 bail and is scheduled for a pre-trial on February 5, 2020 in Department C-57. Reeves was arrested on January 14, 2020 and arraigned on January 15, 2020, he has pleaded not guilty. He is out on \$100,000 bail and is scheduled for a pre-trial on January 22, 2020 in Department C-55. A preliminary hearing for this suspect is scheduled for February 13, 2020 in Department C-55. Frageau appeared in Court on warrant on January 15, 2020, he was arraigned on January 15, 2020. He is out on \$250,000 bail and is scheduled for a continued arraignment on February 7, 2020. Williams turned himself into Huntington Beach Police Department on January 15, 2020. No arraignment date has been scheduled for him yet. Lomonaco was arrested on January 16, 2020. He is scheduled to be arraigned January 17, 2020.

Deputy District Attorney James Bilek of the Insurance Fraud Unit at the Orange County District Attorney's Office is prosecuting this case.

Case Law Update

Credit to Tyson & Mendes, La Jolla, CA

***Justin Kiluk v. Mercedes Benz USA, LLC*, Cal. Ct. App., Dec. 12, 2019**

Background

This matter involved the sale of a certified preowned Mercedes Benz with a portion of the new vehicle warranty remaining. It was also accompanied by an additional used vehicle warranty issued by the manufacturer. An incurable defect manifested after the expiration of the new vehicle warranty, but during the coverage period of the used vehicle warranty. Mercedes Benz refused to repurchase the vehicle, and the plaintiff sued under the Song-Beverly Act for breach of express warranty and the implied warranty of merchantability. The jury found in favor of the plaintiff on both of those claims.

Mercedes Benz filed an appeal, contending the Song-Beverly Act does not apply to an express warranty issued by a manufacturer on a used vehicle.

Holding and Reasoning

The Court of Appeal affirmed the judgment, holding that while the Song-Beverly Act generally binds only distributors and retail sellers in the sale of used goods, Mercedes Benz stepped into that role by issuing an express warranty on the sale of a used vehicle.

The Court explained the Song-Beverly Act requires, pursuant to Civil Code section 1793.2, that where a manufacturer sells “consumer goods” accompanied by an express warranty, it must maintain local repair facilities “to carry out the terms of those warranties.” Where the manufacturer cannot service or repair a new motor vehicle to conform to the express warranties after a reasonable number of attempts, the manufacturer shall either replace the vehicle or make restitution to the buyer. “The Song Beverly Act provides similar remedies in the context of used goods, except that the manufacturer is generally off the hook.” Under this scenario, the distributor or retail seller makes express warranties to maintain sufficient service and repair facilities to carry out the terms of the express warranties as opposed to the manufacturer. (See Civil Code Section 1795.5.)

In the present case, the parties disputed whether the subject vehicle was a new motor vehicle or a used good under Song-Beverly. In support of its position, Mercedes Benz argued Civil Code section 1795.5 does not apply because that section specifically exempts manufacturers. However, according to the Court, “baked into section 1795.5 is that the manufacturer and the distributor/retailer are distinct entities. Where the manufacturer sells directly to the public, however, it takes on the role of a retailer.”

Thus, because Mercedes Benz partnered with a dealership to sell used vehicles directly to the public by offering an express warranty as part of the sales package, Mercedes Benz stepped into the role of a retailer and was subject to the obligations of a retailer under Civil Code section 1795.5.

Takeaway

Automobile manufacturers step into the role of “retailer” for purposes of the Song-Beverly Act when they insert themselves into the sale of used vehicles by issuing express warranties on the sale of these used vehicles. Thus, they must be cognizant of their duties under Song-Beverly as a retailer when incurable defects arise during the pendency of the express warranty period, or otherwise risk penalties under the Act.

***Guo Zhang Chen v. Jane Lin*, Cal. App. Dep’t Super. Ct., Nov. 14, 2019**

In this landlord tenant case, the defendant was sued to evict her from her home by the landlord. Defendant proceeded in pro per and filed a demand for jury trial, but appeared on the trial date without complying with a Los Angeles County Superior Court, Civil Division, unlawful detainer standing order. The trial court determined the defendant waived jury by not preparing for a jury trial. After the court trial, judgment was entered against her. Plaintiff appealed.

Holding and Reasoning

On appeal, the Court addressed the issue of whether defendant’s failure to prepare for trial, where it was undisputed she showed up to the trial date having failed to produce proposed jury instructions and other documents, and having not met and conferred with opposing counsel, amounts to a lawful ground to deprive a defendant of the right to jury trial.

The Court explained that in a civil case, waiver of the right to jury must occur “by the consent of the parties expressed as prescribed by statute.” (Cal. Const., art. I, sect. 16.) Code of Civil Procedure section 631(f) states, “A party waives trial by jury in any of the following ways: (1) by failing to appear at trial; (2) by written consent filed with the clerk or judge; (3) by oral consent, in an open court, entered in the minutes; (4) by failing to announce that a jury is required at the time the cause is first set for trial, if it is set upon notice of stipulation, or within five days after notice of setting if it is set without notice or stipulation; (5) by failing to deposit with the clerk, or judge, advance jury fees provided in subdivision (b); and (6) by failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day’s session [jury fees].”

The Court went on to explain the statute is the *exclusive* authority governing civil jury waivers, and the words of the statute are “crystal clear” on the issue before it. Nothing in Code of Civil Procedure section 631 even alludes to a party’s failure to prepare for trial as a proper basis for finding a waiver of the right to a jury trial. The Court further addressed that plaintiff’s failure to comply with the trial court’s General Order of the Los Angeles Superior Court also does not provide failure to prepare for trial, and that even if it did, it would be unenforceable as the Legislature, alone per the Constitution, prescribes the conditions under which a jury may be waived.

Takeaway

The grounds for finding a jury trial waiver are exclusively within the purview of the Legislature. Therefore, when demanding the court find such a waiver, or defending against the allegation that a jury trial has been waived, it is imperative to determine whether grounds for finding a waiver occurred are supported by Code of Civil Procedure section 631(f).

Combined Claims Conference

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Hyatt Regency Orange County – Royal Ballroom**

The Roaring 20's Prohibition Party is included for ALL conference registrants (including Wednesday only passes). "Roaring 20's Prohibition Party only passes" are not available except for sponsors.

On the Lighter Side :

9 Ideas for an unpredictable Valentines Day (Credit to yourtango.com)

Like birthdays, Valentine's Day celebrations become repetitive after a few years. If you've grown disenchanted with the fancy dinners, chocolates, and roses, worry not, because we've rounded up a series of [unique Valentine's Day ideas](#) to combat the season's predictability. After all, what's [romance](#) without a little mystery, surprise, and adventure?

These unique Valentine's Day ideas will put some fresh energy into your date this year:

1. Learn about "love" in a new culture.

Every culture celebrates the day of [love](#) a little differently. For instance, in Japan, [women give men chocolates](#) on February 14th, while some parts of [Britain serve buns](#) baked with caraway seeds and raisins. Need more global inspiration? Check out [YourTango's feature on Valentine's Day around the world](#), and then try mixing a couple of fun new traditions into your own date night.

2. Throw a "Quirkyalone Day" party.

As much as we love battling heart-shaped piñatas during "Singles Awareness" parties, we'll concede that hating Valentine's Day feels just as trite and obnoxious as the day itself. Instead of throwing an anti-Valentine's party, participate in [International Quirkyalone Day](#), when singles around the world throw feel-good parties celebrating empowerment, romance and gratitude.

Sometimes, these get-togethers encourage mingling; other times, they're just an excuse to enjoy Valentine's Day without the collective self-pity that often accompanies other singles' parties. For ideas, check out the movement's website, which recommends hosting an event at a public place, such as a library, and advertising it a few weeks ahead of time on [Craigslist](#) or [Flavorpill](#).

3. Do touristy things in your own town

Since plenty of people already dismiss Valentine's Day as corny, plan a few touristy activities that you and your honey have never done. And don't feel shy, take a zillion couple-y pictures while visiting those attractions. For example, if you live in New York City, ride a carriage through [Central Park](#), have dinner at [Serendipity](#), and play arcade games at [Dave & Buster's](#) in Times Square. Actually sounds pretty fun *and* romantic, eh?

4. Have a group date at someone's house.

Gather a bunch of people for a stay-at-home group date and split the duties. For instance, the men buy flowers, cook and serve the women dinner, while the women plan games, decorate or provide gifts (we suggest baked goods!). Keep in mind that if your party consists of both singles and couples, invite an even number of single men and women so that no one ends up feeling like a third wheel.

5. Volunteer to help those needing some love.

Day is a celebration of love, so consider branching out from romance into charity and friendship. Volunteer at a soup kitchen, send flowers to nursing home residents, or check online listings for Valentine-themed fundraisers for reputable non-profits. Contact local women's and domestic violence shelters to ask how you can best show love to those who live and work there. Baking cookies or sending letters of appreciation to caregivers can make all the difference for people who have suffered because of corrupted relationships. (Find volunteer opportunities in your area at [VolunteerMatch](#).)

6. Make a DIY gift.

By do-it-yourself, we don't just mean cooking dinner and making mixed CDs. Scout around for a personalized present she won't expect. For instance, [Blends For Friends](#), creates a blend of loose leaf tea based on the recipient's personality. Simply provide your S.O.'s date of birth, hobbies, personality and physical appearance and see what the service comes up with once the box arrives in the mail. Or put a contemporary spin on homemade scrapbooks, by using [Blurb.com](#) to compile a book of [love poems](#) or [love quotes](#), photographs or literary passages that describe your relationship.

7. Have a date at the dog park.

A [global poll](#) conducted by Reuters/Ipsos revealed that one in five people would rather spend Valentine's Day with their pet than a partner. If you're having a hard time picking between the two, spend the afternoon at a local pet park before hitting the town on date night. Or, if you're single, forego the ice cream-laden night alone and take Fido out to play in your city's dog run. Who knows, you might just meet the dog-lover of your dreams.

8. Celebrate on a different day.

Restaurants sure are expensive and crowded on Valentine's Day, so postpone your date night to February 15th and spend the holiday itself indoors, relaxing with takeout and a couple of romantic movies. Go all-out the following night with bouquets and a reservation at a classy restaurant you've always wanted to try.

9. Give an alternative bouquet.

Roses may be the symbol of love, but they're also rather generic. If your lady's down with non-traditional presents, try substituting roses — heck, even flowers — with a different kind of "bouquet." Send a potted plant, a bonsai or even a miniature tree to her home or workplace. If she's got a sweet tooth, send her a [candy bouquet](#), and if you're good with crafts, make flower bouquet [using origami](#).