



Jeffrey S. Bolender

Property Damage Claims:

Distinguishing Between Tangible & Intangible Property

Claims professionals must often adjust claims under the provisions of an insurance policy's coverage for property damage. Evaluating claims of property damage is usually a straightforward process. But distinguishing property damage from other types of loss can prove difficult where a claim relates to tangible property, but the loss itself primarily concerns intangible rights.

Liability policies typically afford coverage for physical injury to tangible property or loss of use of tangible property that is not physically injured. Similarly, property insurance typically affords coverage for direct physical loss. A survey of recent case law, as summarized below, shows that courts will examine the precise loss at issue and determine if the claim involves damage to something having physical substance apparent to the senses.

A claim arising out of a neighbor's lawsuit to enforce an easement across the insured's real estate was rejected. An easement represents only a nonpossessory right to use another's property and is not tangible property. Rendering the easement unusable by paving, and the ability to recover damages for obstruction, did not change its intangible nature.

A claim based on the insured's

unauthorized use of copyrighted text from a book was rejected. The author made no claim for injury to the books, claiming only a loss of their economic value due to the plagiarism. This was a non-covered economic loss arising from the violation of an intangible property right.

A claim arising out of the distribution of videotapes of a children's show, from which pornographic images had not been fully erased, was rejected. The videotapes were the only tangible property involved. The "concept" or the "production" of the show was not a tangible item, and the only damage was to the insured's intangible profits or good will: "videotapes are tangible, concepts are intangible."

Claims for damage to data bases and computer software arising from defects in AOL's access programs were rejected. Instructions to the computer and the data and information processed by it are ideas in the minds of the programmer and the user. Loss or damage to software is damage to the idea, its logic, and its consistency with other ideas and logic. These are abstract and intangible, and damage to them is not damage to tangible property.

A claim for wrongful removal of certain documents from the trash was rejected, even though the docu-

ments were tangible personal property. The real damage complained of was the loss, or more accurately the acquisition by defendant, of the information in the documents, which constituted at most an intangible economic loss.

A claim for the costs resulting from a computer crash was rejected. The claims all related to the corruption or destruction of the information in the insured's database, which was not tangible. Information does not have a material existence, is not formed out of tangible matter, and is not perceptible to the sense of touch. "The loss of the sequence of ones and zeros stored by aligning small domains of magnetic material on the computer's hard drive in a machine readable manner is not the loss of tangible material."

In conclusion, claims that involve tangible property may in some instances actually involve losses relating to intangible rights that are not covered by liability or property insurance. If you have any further questions, Bolender & Associates has available a detailed written analysis of the case law summarized above. Please call or email Jeffrey S. Bolender for a free copy at jbolender@bolender-firm.com.

