Liability Insurance Coverage for the Tort of Conversion

Conversion is not generally covered by liability policies, although there are exceptions, and it is not "personal injury"

BY SCOTT O. REED

THE TORT of conversion, or the wrongful withholding of property, has received little attention from the standpoint of liability insurance coverage issues. Prosser called it the "forgotten tort."[1] Apparently it is not well understood and therefore not popular with the plaintiffs' bar. Few reported decisions have determined whether the tort imposes a duty on a liability insurer to defend or indemnify its insured in an action for conversion.

But this is beginning to change. "Shotgun" complaints in business and employment disputes often now include conversion allegations—that the defendant wrongfully withheld such items as customer lists, securities or even a former employee's personal papers or effects. Landlord-tenant disputes or feuds among neighbors also breed conversion allegations. If a complaint consists of other clearly non-covered counts, such as breach of contract, the existence of a duty to defend conversion allegations would be of critical importance to the liability insurer's duty to defend the entire case.

In the body of law on a liability insurer's duty to defend or indemnify its insured for conversion allegations, the vast majority of the decisions involve commercial general liability policies.[2] The courts conclude, by and large, that allegations of conversion are not covered, although a minority view permits coverage under certain circumstances.

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THE TORT OF CONVERSION

Conversion is a common law tort, being derived from the ancient common law action in trover.[3] The Restatement of Torts (Second) defines it in Section 222(A)(1):

> Conversion is the intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it so that the actor may justly be required to pay the other the full value of the chattel.

The gist of the tort is that the defendant's interference with the plaintiff's property rights is so severe that recompense for the damage to the property will not suffice, and the plaintiff is not required to accept the property back if tendered. Mere assertion of an ownership interest in the property without disturbance of possession or other interference with possessory rights is not severe enough to be classified as conversion. According to the common law, the plaintiff is awarded the full value of the property as damages, and the defendant is given title to the property. Essentially, the result of a successful conversion action is a forced sale of the property to the defendant. The tort does not include interference with rights to real property. It can include interference with a plaintiff's rights in tangible and intangible personal property, although to date the tort has primarily involved tangible property.[4]

1. William Prosser, *The Nature of Conversion*, 42 CORNELL L. REV. 168 (1957).

2. This article deals only with third-party claims and not with whether conversion of insured property is a covered loss in a first-party claim. *See, e.g.*, Johnston v. Am. Reliable Ins. Co., 833 P.2d 176 (Mont. 1992) (conversion by landlord in removing mobile home from site covered loss under homeowners policy); *Fruehauf Corp. v. Royal Exch. Assurance of Am.*, 704 F.2d 1168 (9th Cir. 1983) (conversion by third party not covered under casualty policy).

3. W. PAGE KEETON et al., PROSSER AND KEETON ON THE LAW OF TORTS, at 89 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

4. *See id.* at 89-90, 102 for statements in this paragraph.

Given the increasing number of instruments of intangible property, it can be expected that this tort may involve intangible property in a greater degree in the future.[5] Section 242 of the Restatement acknowledges that documents can be converted.

The Restatement gives several examples of the tort. Under Section 226, a party can commit conversion of property by intentional destruction or material alteration of the property "so as to change its identity or character." Under Section 227, a party can use property in a manner that is a serious violation of the owner's right to control his use of it, or which, under Section 228, exceeds the owner's authorization. A party may commit conversion pursuant to Section 229 by receiving property with the intent to acquire (either for himself or for a third party) an interest the donor does not have the power to transfer. Another example of conversion (Section 237) is the recipient's refusal to surrender possession of property to the owner, and, according to Section 241A, a negotiable instrument is converted "when it is paid on a false endorsement."

All these examples involve either alteration of the property or exercise over its control to the exclusion of the rights of the owner. In other words, property can be damaged and therefore converted, but it also can be converted without being damaged.

For insurance coverage purposes, an important question is the defendant's intent in holding or altering the property. It is clear that conversion is an "intentional" tort in that, as Section 224 of the Restatement puts it, one "who does not intentionally exercise dominion or control over a chattel is not liable for conversion even though his act or omission is negligent." But the difficult question is whether a party commits the tort of conversion by exercising control over property in the belief that he or she has the authority to do so.

The scholarly authorities are unanimous that parties who exercise unauthorized control over property in the belief that they were entitled to do so are still liable for conversion. Section 244 of the Restatement emphasizes that a defendant is not relieved from liability for conversion by a belief that the party (1) has possession of the property or is entitled to its possession, (2) has the owner's consent or (3) is otherwise privileged to act.

One commentator notes that the intent required to commit the tort "is not necessarily a matter of conscious wrongdoing," but is rather the intent to exercise control or dominion over the goods which is in fact inconsistent with the plaintiff's rights.[6] In other words, a good faith purchaser or auctioneer of stolen goods is still liable in conversion, and a mistake of law or fact is no defense.

General Liability Policies

Most of the reported decisions dealing with coverage for the tort of conversion have arisen under commercial general liability and similar liability policies. The threshold question for coverage under these policies is whether the intentional tort of conversion constitutes a covered "occurrence." Other issues are whether covered "property damage" or "personal injury" is presented under these policies, and whether certain exclusions apply.

Although case law is not consistent on some of these issues, the weight of authority imposes on an insurer no duty to defend or indemnify its insured for conversion allegations against it, at least where the conversion arises from "loss of use" of property rather than its destruction or alteration.

A. Is Conversion an "Occurrence"?

As a general proposition, the act of taking or retaining possession of property is intentional. One can think of few situations in which a party possesses property negligently, or without the intent to do so. The tort of conversion is premised on the intentional exercise of control over property, and even if the defendant is mistaken about his or her right to exercise control, the tort of conversion has still been committed.

An "occurrence" is defined in standard general liability policies as property damage or bodily injury that is neither expected nor intended from the standpoint of the insured. Bodily injury is not at issue in conversion. In a

5. *See generally*, Note, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, 1991 B.Y.U. L. Rev. 1681 (recommending that historical limitations on tort of conversion be discarded to accommodate wrongful possession of intangible property or that new tort be created for that purpose).

6. Prosser and Keeton, at 92-93.

situation having all the elements of common law conversion, the insured normally "expected or intended" to possess the property.

Insurers can argue that acts of conversion cannot have resulted in an occurrence because the possession of the property must, by definition, have been intentional. Insureds can argue in response that, where the evidence shows that they were mistaken or negligent about the extent of their rights in the property, they did not "expect or intend" to commit the tort of conversion and therefore did not expect or intend to cause the plaintiff any damages resulting from the tort.

These positions have been weighed by the courts in a number of factual contexts. The result has been that most courts accept the insurer's view that no "occurrence" is involved if the converted property has not been damaged or destroyed, although there is a sizeable minority view to the contrary.[7]

One of the more frequently cited early cases on this issue helped to establish the majority view. In *Corvallis Sand & Gravel Co. v. Oregon Automobile Insurance Co.*[8] the State of Oregon brought a statutory ejectment action against the insured for "wrongfully withholding" possession of a portion of the bed of the Willamette River. The state sought possession of the property, as well as rents and profits representing the land's value during the time the insured allegedly wrongfully withheld it.

The insurer declined the insured's tender of defense. Its declination letter was not specific, advising the insured only that there was no coverage. The policy contained an exclusion for bodily injury or property damage "caused intentionally by or at the direction of the insured."

The Oregon Supreme Court affirmed a judgment for the insurer, adopting the reasoning of the trial court. That court had concluded that there was no covered "occurrence or accident" and that "liability for property damage" does not include "an intentional withholding of possession and consequent damages which arise only from a wrongful taking or withholding."

Because real property was at issue in *Corvallis*, the tort of conversion was not technically alleged against the insured. However, the court's analysis of the "occurrence" issue has been applied in the closely analogous context of conversion of personal property. Whether real or personal property is the subject of the action makes little difference in determining whether an "occurrence" is involved, but it is frequently determinative of whether "personal injury" has been alleged under a number of policies.[9]

Another earlier decision reaching the same result on "occurrence" is *Nortex Oil & Gas Corp. v. Harbor Insurance Co.*[10] The insured operated producing oil wells whose bore holes slanted at a deviation from vertical. As a result, the insured's wells drew oil and gas from underneath neighboring land that was subject to producing leases. The owners of those leases sued the insured for trespass on the leasehold estates and conversion of the oil and gas from beneath the neighboring land.

The general liability policy covered property damage, which included "loss of property" caused by an occurrence. Based on this language, the insurer declined to indemnify the insured for a settlement it reached in the conversion action, as well as the costs it incurred in defending that action.

The Texas Court of Civil Appeals in the coverage suit described the claim against the insured as one for conversion, rather than trespass, although the term "trespass" had been used in the complaint against the insured. It noted that the plaintiffs did not seek to recover the diminution in the value of their land, but instead sought the value of the oil wrongfully taken by the insured.

The *Nortex* court, unlike the *Corvallis* court, did not expressly rely on the lack of an occurrence. It found that the insured did not suffer a covered "loss" when it settled the action against it. An insured does not sustain such a loss, the court explained, "by restoring to its rightful owners that which the insured, having no right thereto, has inadvertently acquired." It noted that the insurer "did not contract to in-

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7. "It is clear that the vast majority of cases throughout the country hold that conversion is not an 'occurrence' or 'accident.'" Collin v. Am. Empire Ins. Co., 26 Cal.Rptr.2d 391, 406 (Cal.App. 1994).

8. 521 P.2d 1044 (Or. 1974).

9. *See, e.g.*, Nat'l Farmers Union Prop. & Casualty Co. v. Kovash, 452 N.W.2d 307 (N.D. 1990) (no "occurrence" in trespass allegations arising from alleged wrongful closing of road); Argonaut Southwest Ins. Co. v. Maupin, 500 S.W.2d 633 (Tex. 1973) (no "occurrence" in trespass allegations arising from wrongful removal of fill dirt).

10. 456 S.W.2d 489 (Tex.Civ.App. 1970).

demnify the insured for disgorging that to which it was not entitled in the first place, or for being deprived of profits to which it was not entitled."

Other decisions in the 1970s found in favor of insurers on the issue of the duty to defend and indemnify insureds for conversion actions, but they did not have to reach the issue of whether an "occurrence" was alleged. These decisions interpreted earlier Insurance Services Office form policies that did not expressly include "loss of use" as an element of property damage. Obviously, property which is wrongfully retained is not necessarily "physically damaged," although it can be damaged. Therefore, if an insured retains property without damaging it, which is one form of the tort of conversion, there is no "property damage" under a liability policy that does not include "loss of use."[11]

These decisions are primarily of historical interest since current standard general liability policies include "loss of use" within the definition of "property damage." These decisions suggest, however, an analytical framework that is useful in addressing the "occurrence" issue where the property is not physically damaged. If an occurrence is defined as "property damage" which is neither expected nor intended from the standpoint of the insured, and if "property damage" includes loss of use of property, then an insured should not commit an "occurrence" by intentionally exercising dominion or control over property, because the expected or intended result of that act is the loss of use of that property by anyone other than the insured. This result should follow, whether or not the insured acted in a mistaken belief of being entitled to possess the property.

This reasoning was applied in *Federated Mutual Insurance Co. v. Madden Oil Co.*[12] The insured received possession of a trailer and its title from a person who had defaulted on a promissory note to a third party, which was secured by the trailer. The third party brought a replevin action against the insured, asserting that the insured was not a bona fide purchaser of the trailer because it knew that the third party had a security interest in the trailer. The general liability policy covered loss of use of property.

The Missouri Court of Appeals in the coverage action noted that the fact that the insured possessed and used the trailer and resisted the replevin action "demonstrates beyond doubt that [the insured] expected and intended that [the plaintiff] suffer the loss of use of the trailer." It stated that it was irrelevant that the insured may not have expected the outcome of the replevin action, because the loss of use did not stem from the outcome of the litigation, but from the insured's conduct giving rise to that outcome. As the court put it, the "conduct was not an accident."

Other cases in a wide variety of factual settings have found that an insured's conversion of property is not a covered occurrence, even when the insured believes that it had the right to possess the property. In *Red Ball Leasing Inc. v. Hartford Accident & Indemnity Co.*[13] the insured sold four trucks to an individual who financed the purchase through the insured, granting the insured a security interest in the trucks. The insured's accounting system wrongly showed that the purchaser had defaulted on his payments, and the insured repossessed them. The purchaser then sued the insured for conversion, intentional interference with business and conspiracy to interfere with business.

The Seventh Circuit, applying Indiana law, found no covered "occurrence" because the decision to take the trucks, which was an intentional act of the insured, was not an "accident."

This principle has been applied to conversion actions arising from an insured's unknowing purchase of stolén gold;[14] an insured's removal of lighting, bathroom and kitchen fixtures from a condominium;[15] an insured seed company's removal of soybeans from a farmer-client's property;[16] an insured's failure

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11. Inland Constr. Corp. v. Continental Casualty Co., 258 N.W.2d 881 (Minn. 1977); B&L Furniture Co. v. Transam. Ins. Co., 480 P.2d 711 (Or. 1971); Gen. Ins. Co. of Am. v. Palmetto Bank, 233 S.E. 2d 699 (S.C. 977).

12. 734 S.W.2d 258 (Mo.App. 1987).

13. 915 F.2d 306 (7th Cir. 1990).

14. Simmons Refining Co. v. Royal Globe Ins. Co., 543 F.2d 1195 (7th Cir. 1976). The court described this act as "merely a simple mercantile transaction," distinguishing several cases which found a duty to defend where the wrongful acts were committed by the insured rather than by a third party.

15. State Farm Fire & Casualty Co. v. Hatherley, 621 N.E.2d 39 (Ill.App. 1993) (applying exclusion for property damage expected or intended by insured, as well as "care, custody or control" exclusion).

16. Proctor Seed & Feed Co. v. Hartford Accident & Indem. Co., 491 S.W.2d 62 (Ark. 1973) (counterclaim to collection action).

to convey stock pursuant to an agreement to purchase a business;[17] an insured's refusal to return trade secrets;[18] an insured hauler's mistaken removal of construction equipment from land from which other junk was to be removed;[19] and an insured contractor's placement of household items in a storage locker, from which they were misplaced.[20]

In all these cases, an insured's wrongful withholding of property, without physically damaging it, was held not to be a covered "occurrence." These cases illustrate the variety of business and employment disputes to which a conversion claim is often appended. Many of those disputes center on breach of contract allegations or claims of fraudulent conduct. Thus, if the conversion counts are not covered, the likely outcome is that the insurer is not involved in the dispute.

Some courts that follow the view that there is no "occurrence" in conversion allegations rely in part on public policy considerations. As one court explained:

> If the insured could demand that his insurer defend a conversion action, casual conversion of another's property might be approached with much less trepidation. The insured would not necessarily be risking much because the insurance company would have to pay the costs of defense and, ultimately, the property would simply have to be returned. It is possible an insured might even seek defense of a criminal action for conversion.[21]

While it does not appear that any court has relied exclusively on these public policy grounds to find no liability coverage for the tort of conversion, these grounds may support many of the decisions discussed above, either explicitly or implicitly.

B. "Occurrences": A Contrary View

This is not to say that all jurisdictions are unanimous in viewing the tort of conversion as a non-"occurrence" under liability policies. Some cases do not focus on the intent of the insured in possessing the property. Instead, they ask whether an insured acted under a mistaken belief in withholding or possessing property, and if so, find that the insured's acts in possessing the property were covered negligence.

One example of this view is *Spodek v. Liberty Mutual Insurance Co.*,[22] which arose from a landlord-tenant dispute. The landlord allegedly changed the locks for an apartment and appropriated the tenants' personal property. The landlord's insurer declined to defend him in the tenants' conversion action to recover damages for loss of use of the personal property and the apartment, noting that any injuries suffered by the tenants were intended by the landlord.

The New York Appellate Division disagreed with the insurer, holding that loss of use of property was covered "property damage" if caused by an occurrence. It concluded that the tenants' complaint could allege an occurrence because the tort of conversion "can occur even though there is no wrongful intent to possess the property of another."

Other cases also have found an occurrence to have been alleged in complaints for conversion, based on the theory that possession of property in the mistaken belief to be entitled it could be unintentional. In *Lumber Insurance Cos. v. Allen*[23] the insureds cut down trees and built a driveway on a neighbor's property. Although the insureds had an easement for that purpose on the property, the driveway apparently extended beyond the easement. The neighbors sued for "negligent trespass and conversion" and for violation of a New Hampshire statute prohibiting the willful cutting of trees on their property.

The federal district court, applying New Hampshire law, observed that an insured's intentional acts may be considered "accidental" under a liability policy if the insured did not intend to inflict injury or if the insured's actions were not "inherently injurious."[24] It reasoned that if the insureds mistakenly believed

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17. Providence Washington Ins. Group v. Albarello, 784 F.Supp. 950 (D.Conn. 1992). The court explained that the most important reason to find no coverage for this and related acts would be that such a duty would be inconsistent with the economics of occurrence-based liability policies, in that an insured could act willfully, as in breaching a contract, and seek insurance coverage under the theory that it did not expect or intend any damages to result.

18. Aerosafe Int'l Inc. v. ITT Hartford of the Midwest, 1993 U.S. Dist. LEXIS 10443 (N.D. Cal. 1993) (action in trover), relying on Red Ball Leasing, 915 F.2d 306.

19. Reisig v. Union Ins. Co., 870 P.2d 1066 (Wyo. 1994).

20. Collin, 26 Cal.Rptr.2d 391.

21. Reisig, 870 P.2d at 1070.

22. 547 N.Y.S.2d 100 (App. Div. 2d Dep't 1989).

23. 820 F.Supp. 33 (D. N.H. 1993).

24. Citing Vermont Mut. Ins. Co. v. Malcolm, 517 A.2d 800 (N.H. 1986).

that they had the right to cut the trees, their acts were accidental, not intentional. On the other hand, if an insured had cut down a tree on property that was clearly marked with "no trespassing" signs, the insured could not claim to have acted accidentally, "because injury will certainly follow from the insured's acts."

The court went on to hold that the insurer had the duty to defend the insureds on the "negligent trespass and conversion" count of the complaint, even though New Hampshire law appears not to recognize a cause of action for negligent trespass and conversion. The court reasoned that even if it deemed this count to be one for intentional trespass and conversation, those allegations would still be covered because the neighbors could recover even if the insureds acted in the mistaken belief of being entitled to cut the trees. It found no duty to defend or indemnify the insureds for the statutory violations, because the neighbors could not recover unless they proved that the insureds knew that they had no right to cut the trees.

A final example of conversion held to be an occurrence is *Alert Centre Inc. v. Alarm Protection Services Inc.*[25] The insured sold and leased security alarms to homes and businesses. The claimant was in the business of monitoring those alarms. The insured sold the claimant several of the "alarm accounts" it had installed, which gave the claimant the right to own and monitor those alarms for a fee. The claimant sued the insured, alleging that the insured had changed computer chips in the alarm systems so that they would report to the insured and not the claimant, converted alarm equipment belonging to the claimant under the contract, and converted customer payments.

Because the parties to the dispute had a contract, much of the Fifth Circuit's analysis in the coverage dispute centered upon an exclusion for loss of use of tangible property "resulting from a delay in or lack of performance by or on behalf of the named insured of any contract or agreement." The district court had found that this exclusion barred coverage for all causes of action against the insured, including those for breach of contract, tortious interference with existing and prospective contracts, and fraud, as well as the conversion cause of action.

However, the Fifth Circuit held that the conversion allegations triggered the insurer's duty to defend. It reasoned that the "breach of contract" exclusion did not apply to the conversion of property because the duty not to convert another's property arises by virtue of tort law, without regard to the existence of a contract. It held that the complaint against the insured could allege an "occurrence" because the conversion count did not specify whether the insured expected or intended the damage to the claimant. The complaint included allegations that the insured acted wantonly or recklessly.

In finding the conversion allegations to impose a duty to defend upon the insurer, the court also referred to Louisiana law interpreting the definition of occurrence as excluding "all damages expected or intended by the insured, not damages from all acts intentionally committed by the insured."[26] These cases found an "occurrence" in allegations of mistaken possession of property on the assumption that the insured did not expect or intend the "damage" to the plaintiff. But this reasoning only begs the question: What is the "damage" that the insured did not expect or intend? These cases seem to conclude, without stating as much, that no "damage" is expected or intended if the insured does not anticipate being held liable for money damages.

However, this reasoning disregards the language of the common definitions of an "occurrence" and "property damage." The definition of "property damage" includes "loss of use" of property. Without that portion of the definition, conversion resulting from wrongful possession could not be "property damage" where the property is not physically damaged. If an insured intentionally possesses property, then the insured intends to prevent all others from possessing it. That is the essence of possession. Thus, an insured who possesses property

25. 967 F.2d 161 (5th Cir. 1992) (applying Louisiana law).

26. *Id.* at 164, citing Breland v. Schilling, 550 So.2d 609 (La. 1989). The court did not, however, mention a Louisiana case that found no occurrence under an employee's homeowners policy and therefore no duty to defend the employee in a suit by the employer for the employee's alleged conversion of business funds. Young Oil Co. of Louisiana Inc. v. Durbin, 412 So.2d 620 (La.App. 1982). This omission may diminish the value of the federal court's *Alert Centre* opinion as a predictor of the Louisiana courts' view of the issue.

of another, even if the possession is undertaken under the mistaken belief that the insured is entitled to it, intends to cause the other party to lose the use of it. In other words, by intentionally possessing another's property, an insured must expect the other to suffer "loss of use," which is property damage as defined in the policy.

Cases like *Spodek*, *Allen* and *Alert Centre* miss the point of the definition of "occurrence" when they find that an insured does not intend to cause property damage by possessing the property of another. The definition of "occurrence" must be read together with the full definition of "property damage," including "loss of use." This line of cases does not examine the definition of property damage in great detail, which may explain why these cases reached the results they did.[27]

There is, therefore, authority for the view that conversion of property under a mistaken belief of ownership is an occurrence under a general liability policy. These cases represent the minority position on this issue, and they do not appear to give a natural reading to the standard definitions of "occurrence" and "property damage," which were meant to be read together.

C. Is Conversion "Personal Injury"?

Although the majority of cases to have considered the question of liability coverage for the tort of conversion have analyzed the issues under "property damage" coverage, a few cases have discussed whether this tort would trigger an insurer's duty to defend or indemnify the insured under "personal injury" coverage. This litigation has centered on the portion of the definition of personal injury covering "wrongful entry or eviction, or other invasion of the right of private occupancy." The decisions addressing this issue have reached different results under similar facts, using highly different lines of reasoning.

For example, at least one case, *Inland Construction Co. v. Continental Casualty Co.*,[28] held that a landlord's changing of the locks on leased property did not involve "personal injury" because no injuries to a person were alleged in the tenant's suit against the landlord. The Minnesota Supreme Court concluded that not only was the personal injury coverage limited to specific torts apart from conversion, but it also stated that "it is readily apparent that the coverage extended was for personal injuries and not for property damage."

Another case, involving the wrongful repossession of personal property, concluded that the language "other invasion of the right of private occupancy" referred only to damage to real property. The Seventh Circuit in *Red Ball Leasing*[29] reasoned that because the two preceding torts—wrongful entry and wrongful eviction—could arise only from damage to real property, the doctrine of ejusdem generis required the "other invasion of the right of private occupancy" to be similarly limited. The court relied on other authority finding no coverage for the tort of conversion under similar language,[30] but acknowledged that other cases have found this language ambiguous.[31]

The most difficult situation to analyze under "personal injury" coverage is when conversion is alleged against a landlord who withholds possession of a defaulting tenant's personal property. The insurer can argue that no "personal injury" is involved because the tort of conversion protects the tenant's interests only in personal property, while the landlord can argue that the conversion could only have arisen if allegations of an invasion of the leasehold interests are made by the tenant. There is support for both views.

In *Cincinnati Insurance Co. v. Davis*[32] a landlord removed television sets stored in

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27. The *Spodek* opinion quoted the language of both provisions, but its holding is conclusionary. Alert Centre quoted the definition of "occurrence," but not the definition of "property damage." The *Allen* court relied on a number of early, pre-"loss of use" decisions in support of its conclusion that unintentional conversion or trespass involved an "occurrence" arising from unexpected or unintended "property damage." 820 F.Supp. at 35-36, citing, inter alia, Ferguson v. Birmingham Fire Ins. Co., 460 P.2d 342 (Or. 1969) (policy at issue did not require that "bodily injury" or "property damage" be caused by "occurrence"); York Indus. Center Inc. v. Michigan Mut. Liab. Co., 155 S.E.2d 501 (N.C. 1967) (destruction of trees on adjoining property as result of surveyor's error); J. D'Amico Inc. v. City of Boston, 186 N.E.2d 716 (Mass. 1962) (same); Firco Inc. v. Fireman's Fund Insurance Co., 343 P.2d 311 (Cal.App. 1959) (destruction of trees on adjoining property).

28. 258 N.W.2d 881 (Minn. 1977).

29. 915 F.2d 306 (7th Cir. 1990) (applying Indiana law).

30. Waranch v. Gulf Ins. Co., 266 Cal.Rptr. 827 (Cal.App. 1990); Harbor Ins. Co. v. Anderson Leasing Inc., 1989 WL 112532 (Del. Super. 1989) (both involving automobile repossessions).

31. Gardner v. Romano, 688 F.Supp. 489 (E.D. Wis. 1988).

32. 265 S.E.2d 102 (Ga. 1980).

warehouse space leased to a tenant who defaulted on rent payments. The Georgia Supreme Court found a question of fact as to whether the tenant's conversion action against the landlord was covered under the policy's definition of personal injury. The court observed that Georgia follows the "reasonable expectations" doctrine in interpreting an insurance policy according to what a reasonable person in the position of the insured would expect it to mean. This is not the majority rule in construing insurance policies.

In *Western Casualty & Surety Co. v. Intentional Spas of Arizona Inc.*[33] a health spa's termination of a lease with a juice bar operator and alleged conversion of the operator's personal property were held to be covered under the spa's personal injury coverage. The Arizona Court of Appeals found coverage because the conversion allegations were based on wrongful exclusion from the spa's premises.

On the other hand, a real estate developer's personal injury coverage was held not to be implicated by allegations that the developer converted architectural designs and plans when be backed out of a real estate deal. In *Toombs, N.J. Inc. v. Aetna Casualty & Surety Co.*[34] the Pennsylvania Superior Court noted that the tort of conversion was not among the enumerated torts in the policy's personal injury coverage. It also observed that "other invasion of the right of private occupancy" could be involved only if there was a landlord-tenant relationship between the insured and the claimant, which the plaintiff in that case did not have with the developer.

The rule that emerges from these cases is that where only personal property is the subject of the conversion allegations and the parties are not in a landlord-tenant relationship, conversion does not trigger "personal injury" coverage because "other invasion of the right of private occupancy" means only injury to real property. But if some type of real property interest, such as a landlord-tenant relationship, is the cause of the conversion of personal property, a court may find personal injury coverage for the conversion allegations.

33. 634 P.2d 3 (Ariz.App. 1981).
34. 591 A.2d 304 (Pa.Super. 1991).
35. 534 So.2d 1187 (Fla.App. 1988).
36. 809 F.2d 891 (D.C. Cir. 1987) (applying D.C. law).

Coverage under Other Liability Policies

While the vast majority of cases considering coverage issues related to the tort of conversion have involved general liability policies, there are a few cases dealing with coverage for conversion allegations under other liability policies, including directors and officers policies and professional liability policies of various sorts. Under these non-"occurrence" based policies, the coverage issues often depend on whether the tort of conversion is considered a "wrongful act" under the policy's insuring agreements. The few cases to have addressed this issue have established no consistent rule.

In *Country Manors Associates Inc. v. Master Antenna Systems Inc.*[35] a condominium association terminated its relationship with the provider of a television antenna service on the association's premises. The association then disconnected parts of the system and moved it into storage. It also instructed its members to call the police if personnel from the service provider came onto the property. The service provider sued the association and its directors and officers for tortious interference with the provider's contracts with several cable companies, for conversion, and for civil theft.

The Florida Court of Appeal found no coverage under the association's D&O policy. It did not reach the question of whether the complaint against the association alleged a "wrongful act," because it found that, under the facts of the case, the conversion was an act of "active and deliberate dishonesty," which was excluded from coverage. The court relied on the trial testimony of one of the directors, who stated that the directors knew that the antenna system was not theirs when they dismantled it.

By contrast, a professional liability insurer was found to have a duty to,defend its insured against conversion allegations in *Continental Casualty Co. v. Cole.*[36] The insured was a law firm that agreed with another lawyer, Berger, to represent a group of teachers in an employment dispute. The agreement required the insured to obtain Berger's consent to any proposed settlement of the dispute and to share any fees awarded. The insured settled the suit without obtaining Berger's consent and without sharing the fees with him.

Berger sued the insured, alleging that it had

committed breach of contract, breach of fiduciary duty and conversion of the fees. The insured's legal malpractice insurer declined to defend it. The policy covered damages "arising from the performance of professional services for others in the insured's capacity as a lawyer" if the damages resulted from "an error, negligent omission or negligent act of the insured."

The insurer argued that this insuring agreement extended only to negligent conduct, which was not alleged in any of the causes of action against the insured. The D.C. Circuit disagreed, commenting that because the policy specified "error," not "negligent error," it therefore covered intentional acts.

This reasoning, while possibly persuasive in interpreting a similarly worded insuring agreement, would not be of assistance in construing insuring agreements that limit coverage to negligent acts, errors or omissions.

In *Adamo v. State Farm Lloyd's Co.*[38] an insured attempted to obtain coverage under a homeowners policy for legal malpractice actions made against him, including conversion allegations resulting from the sale of the client's home and property by the insured while the client was out of the country. The Texas Court of Appeals held that the homeowners policy did not respond because the allegations arose from an attorney-client relationship, even if the claimant and the insured had been friends before entering into that relationship.

While the authorities on coverage for the tort of conversion under policies other than general liability policies are scarce, several generalizations can be made. First, whether conversion is deemed to be a "wrongful act" will depend on whether the policy's language clearly limits coverage to negligent errors or omissions. Second, coverage for conversion under these other liability policies will involve highly factual inquiries, not only because some of these policies, such as D&O, are indemnity-only policies that require coverage issues to be resolved after development of the facts in the underlying case, but also because many of these policies contain exclusions for dishonest or fraudulent acts. Allegations of "unknowing" conversion, which impose a duty to defend on the liability insurer in certain jurisdictions, may turn into proof of deliberate and dishonest conversion during discovery or trial, thereby relieving the indemnity-only insurer from any obligations for this cause of action.

Other Issues

Where conversion is deemed not to be an "occurrence" or a "wrongful act," no other issues need be considered. But in those jurisdictions and under those facts that allow coverage for this tort, several issues may remain in a coverage dispute. Among them are whether any exclusions apply, when coverage for conversion is triggered and how many "occurrences" or "wrongful acts" are presented by an insured's course of conduct.

A. Applicable Exclusions

Depending on the facts alleged against the insured, several exclusions could be applicable under various types of liability policies. The most common of these exclusions is that for damage to property in the "care, custody or control of the insured or as to which the insured is for any purpose exercising physical control." Several cases have found this exclusion applicable to bar coverage, either when they have found an "occurrence," or as an alternative holding.

In *Karpe v. Great American Indemnity Co.*[39] the insured was a cattle rancher who was entrusted with a cow to use for breeding purposes. The rancher sent the cow to the slaughterhouse by mistake, and the cow's owner sued for conversion. Even though the California Court of Appeal in the coverage action found that a mistaken conversion could be a covered "occurrence,"[40] it held that the "care, custody or control" exclusion applied. The court reasoned that if an "accident" had happened, it occurred when the rancher sent the cow to the slaughterhouse. At that time, the cow was in the rancher's possession, and therefore the exclusion applied.

Other cases have applied the "care, custody or control" exclusion to conversion actions

37. E.g., Golf Course Superintendents v. Underwriters at LIoyd's, 761 F.Supp. 1485 (D. Kan. 1991).
38. 853 S.W.2d 673 (Tex.App. 1993),
39. 11 Cal.Rptr. 908 (Cal.App. 1961).
40. This holding is suspect in light of the recent opinion to the contrary in Collin, 26 Cal.Rptr.2d 391.

arising from an insured's wrongful sale of property[41] and from an insured's purchase of stolen goods.[42] Similarly, a "bailment" exclusion in a tenant's policy was held to bar coverage for a landlord's claim that the tenants converted his property when they vacated the premises.[43]

Where an "occurrence" is found, the "care, custody or control" exclusion should be sufficiently broad to exclude coverage for conversion allegations in standard liability policies that contain that exclusion. That exclusion has been limited by the courts in certain circumstances, including situations in which the insured interferes with real property[44] or does not exercise sufficient control over the property.[45] However, those limitations are not relevant to the tort of conversion, first, because the tort does not involve real property, and second, because the very nature of the offense is an exercise of dominion or control over property so as to interfere with the rights of others.

It is conceivable that other specific exclusions could apply to bar coverage for the tort of conversion.[46] The application of these exclusions is likely to be highly fact-based.

B. Timing and Multiple Occurrences

If a court were to find conversion allegations to be covered and not excluded, it may have to reach issues related to the trigger of coverage under the policy. When the policy is occurrence based, the court may have to determine when the occurrence happened. When the policy provides coverage for a wrongful act, error or omission, the court may need to decide when the insured committed that act, error or omission.

If multiple items of property are possessed at different times, the court may need to determine if multiple occurrences or wrongful acts are involved. This may further implicate the operation of interrelated acts clauses and multiple deductibles.

All these issues present the question of when does "conversion" of property occur. Few cases have addressed this issue with reference to liability coverage, but several cases provide some indirect guidance on the issue.

In a first-party case, *Fruehauf Corp. v. Royal Exchange Assurance of America*,[47] a party that claimed to be an insured under the policy held a security interest on construction equipment which was sold by the mortgagee to a third party. The mortgagee went bankrupt, and the mortgagor filed a complaint in bankruptcy court to recover the equipment. The bankruptcy court entered an order requiring the purchaser to turn the equipment over to the mortgagor. When the purchaser did not do so, the mortgagor submitted a claim under the mortgagee's policy.

The Ninth Circuit found no coverage under that policy for two reasons. First, the mortgagor was never properly named as a co-insured under the policy, and second, there was no "property damage" during the policy period. The court noted that there could be no conversion until after the date the bankruptcy court ordered the purchaser to return the equipment, which date was after the expiration of the policy.

Another case providing guidance on timing is *Karpe*, cited at footnote 39. As noted, that case found that an "accident" happened when the rancher tendered the cow to the slaughterhouse by mistake, not when the cow was slaughtered.

Fruehauf and *Karpe* stand for the proposition that property is not converted when it is rightfully possessed by the insured. Of course, if the insured's initial possession is wrongful, then the conversion will probably be deemed to take place when the possession begins. But in the situations presented by Fruehauf and Karpe, the conversion occurs when the insured exceeds its authorization with respect to the property—by not returning the property on demand and by sending the cow to be slaughtered.

These cases show that timing issues are difficult to generalize when the tort of conversion is involved. They will have to be addressed by

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41. Adamo, 853 S.W.2d 673.
42. Simmons Refining, 543 F.2d 1195.
43. Holman v. Transam. Ins. Co., 616 N.E.2d 499 (N.Y. 1993).
44. United States Fire Ins. Co. v. Schnabel, 504 P.2d 847 (Alaska 1972).
45. Bolanowski v. McKinney, 581 N.E.2d 345 (Ill.App. 1991), citing Shankle v. VIP Lounge Inc., 468 So.2d 548 (Fla.App. 1985).
46. One case found a "business pursuits" exclusion applicable to bar coverage for conversion allegations made against an insured by her employer. Young Oil Co., 412 So.2d 620.
47. 704 F.2d 1168 (9th Cir. 1983).

future case law in jurisdictions where conversion is covered and not excluded.

Conclusions

The tort of conversion is not generally covered under "occurrence"-based liability policies, although there are exceptions to that general rule. It is likewise usually not deemed to be "personal injury" under the standard definition of that term. Whether the tort is covered under other types of policies, including D&O, professional liability and others, will depend on the language of the insuring agreements.

Finally, exclusions, such as the "care, custody or control," are likely to relieve an insurer from a duty to defend or indemnify its insured in connection with conversion allegations.