

California Insurance Law Coverage Newsletter for Attorneys

Bruce Cornblum - Insurance Coverage Scholar-Attorney-Litigator
11665 Avena Place, Suite 202A, San Diego CA 92128
858-485-8770 email cornblum@pacbell.net

June 23, 2011

website: www.brucecornblum.com

PERMANENT ENCROACHMENT NOT AN “ACCIDENT” UNDER CGL POLICY; TEMPORARY ENCROACHMENT CAN BE COVERED UNDER A CGL POLICY

Encroachments; coverage under liability policy

An encroachment onto an *adjacent* owner's property [see **§ A26 ADJACENT (ADJOINING) PROPERTY**] can be either a permanent encroachment or a temporary encroachment. The former (permanent encroachment) is treated as a 'permanent trespass'. Where the encroachment is able to be removed thereby restoring the adjoining owner's property to the condition immediately prior to the encroachment, the encroachment is a 'temporary encroachment'. [*Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 459, 54 Cal.Rptr.2d 811]

◆ ILLUSTRATION [Permanent and temporary encroachment]

1. *Permanent encroachment.* The foundation of a two story office building encroaching on an adjoining owner's property is a permanent encroachment (permanent trespass). [*American Empire Surplus Lines v. G. E. Leach* (1990) 223 Cal.App.3d 226, 228-229, 272 Cal.Rptr. 704]
2. *Permanent encroachment.* A homeowner's action in building a house on a particular spot consistent with public records (which were ultimately shown to be erroneous) encroaching on an adjacent property is not an "accident" where the neighbor is suing for adverse possession. [*Fire Ins. Exchange v. Superior Court* (2010)]

181 Cal.App.4th 338, 104 Cal.Rptr.3d 534]

3. *Temporary encroachment.* A deck extending out from a house is a temporary encroachment if the suit is for removal of the deck plus requesting damages for *loss of use*. [*Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 459, 54 Cal.Rptr.2d 811]

Duty to defend

Under a CGL policy, an "occurrence" is an accident, *including exposure to conditions* [**§ C100 CONTINUOUS OR REPEATED EXPOSURE TO CONDITIONS [§ C100:1 In general]**] which causes property damage or loss of use during the policy period. *Potential coverage* and a duty to defend exists *where* a complaint sues for an injunction compelling an insured to remove an encroachment, to restore the plaintiff's property to a pre-encroachment condition, and seeking *loss of use* damages. [*Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 459, 461, 54 Cal.Rptr.2d 811]

"Good faith but mistaken belief" – building a permanent encroachment

Building a structure that encroaches onto another's property is not an "accident" even if the owner acted in the good faith but mistaken belief that they were legally entitled to build where they did. [*Fire Ins. Exchange v. Superior Court* (2010) 181 Cal.App.4th 388, 104 Cal.Rptr.3d 534] See **§ A26**

ADJACENT (ADJOINING) PROPERTY; § F44 FORTUITOUS [§ F44:7]; § I58 INTENTIONAL ACT [§ I58:7]; § M38 MISTAKE [§ M38:3.1].

◆ **OBSERVATION [Fire Ins. Exchange v. Superior Court (2010) 181 Cal.App.4th 388, 104 Cal.Rptr.3d 534, questionable dictum]:**

Fire Ins. Exchange v. Superior Court involved a *permanent encroachment* upon another's land. See § **E15 ENCROACHMENT [§ E15:1 In general]**. As such there existed a *permanent trespass*, and no coverage. But the *Fire Ins. Exchange* opinion did not stop there. The court thereafter discussed *Collin v. American Empire* (1994) 21 Cal.App.4th 787, 810 (a conversion case which barred coverage under Insurance Code § 533), *Merced Mutual v. Mendez* (1989) 213 Cal.App.3d 41 (sexual acts case), *Quan v. Truck Ins.* (1998) 67 Cal.App.4th 583, 598 (sexual assault case). See § **S32 SEXUAL ACTS**. All three cases implicated Insurance Code § 533. See § **W15 WILLFUL ACT [§ W15:1 Generally]**. [*Fire Ins. Exchange*, supra, at 181 Cal.App.4th 388, 392-393, citing *Collin*, *Merced Mutual*, *Quan*] The *Fire Ins. Exchange* court paid no attention to the distinction between an intentional act (coverage for) and a deliberate act (no coverage) as discussed in *Hogan v. Midland Nat. Ins.* (1970) 3 Cal.3d 533, 560, 91 Cal.Rptr. 153. See § **D24 DELIBERATE ACT [§ D24:2 Deliberate act defined]**. The

consequence of an act is an important factor in considering whether an accident occurred or did not occur under California law [see § **C80 CONSEQUENCES OF ACT**], and cannot be ignored by mere citation to Insurance Code § 533 opinions. See analysis of all cases at § **I58 INTENTIONAL ACTS [§ I58:1 Categories of intentional acts]**.

Failure to comprehend the decisions of *Hogan v. Midland Nat. Ins.*, supra, *Gray v. Zurich* (1966) 55 Cal.2d 263 at fn. 12, *Meyer v. Pacific Employers* (1965) 233 Cal.App.2d 32, *Chu v. Canadian Indem.* (1990) 224 Cal.App.3d 86, 97-99, renders the discussion of "accident" in *Fire Ins. Exchange v. Superior Court* mere dictum. See § **D24 DELIBERATE ACT [§ D24:1]**. It has long been established that under a CGL policy, the *state of mind of the actor* is a valid consideration when determining the existence of an occurrence. See 7A Appleman INSURANCE LAW § 4492-4492.02 (1979) discussed at § **D24 DELIBERATE ACT [§ D24:2.1]**. The rationale in *Collin*, supra, is erroneous as discussed at § **I58 INTENTIONAL ACT [§ I58:1 (d. 2. Error of Collin v. American Empire Ins.)]**

Bolds references are to sections in Volumes 1, 2 and 3 of CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE, 2011 Edition available June 15, 2011 through Thomson West Publishing at 1-800-344-5008.

If there are subjects you'd like discussed in future *California Insurance Law Coverage Newsletter for Attorneys* please contact Chris at 858-485-8770 to submit those subjects or email Mr. Cornblum at cornblum@pacbell.net We would like to make this newsletter relevant to your practice and current cases.



The 2011 Three-Volume Edition of *CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE* (17th Edition, 4500 pages) – authored by Attorney Cornblum is now available through Thomson West.

To order this 3-Volume text call West (a Thomson Reuters business) at:

1-800-344-5008

Author BRUCE CORNBUM, Attorney at Law

Bruce Cornblum is an acknowledged insurance coverage trial and appellate attorney who specializes in California insurance law. For 46 years Mr. Cornblum has specialized in proving to California courts that insurance companies do not understand the meaning of their own policies.

To obtain coverage opinions, preparation of pleadings, supervision of discovery, pre-trial conference, preparation of motions in liminae, preparation of appellate briefs contact Bruce Cornblum at **858-485-8770** or E-mail: cornblum@pacbell.net

WESTLAW RESEARCH – Subscribers to WestLaw can research all volumes of *California Insurance Law Dictionary and Desk Reference* on WestLaw by referencing **CAINLAWDDR**.

Mr. Cornblum has been appellate counsel in the Courts of Appeal and Supreme Court in over 100 litigated matters. Our website contains additional information regarding Mr. Cornblum and his law practice.

BRUCE CORNBUM
11665 Avena Place, Suite 202A
San Diego (Rancho Bernardo), California 92128
858-485-8770
Website: www.brucecornblum.com
Blog: www.californiainsurancelawblog.wordpress.com
Email: cornblum@pacbell.net