

No Liability Insurance During Building Repairs

By D.Carlos Kaslow, esq., SSA General Counsel

From time to time every self storage operator must make repairs to the facility. It may involve roof repairs, new doors or a security system. Sometimes it becomes necessary to have access to rented storage units and even to remove the property in the unit to conduct necessary repairs. Whenever a storage operator is considering facility repairs that may involve moving property from a tenant storage space, it is a good idea to call your insurance agent before the project begins.

In *Zurich American Insurance Company v. Public Storage*, 2010 U.S. Dist. LEXIS 97907, a United States District Court in Virginia was asked to resolve a dispute over insurance coverage for a claim that took place during repairs. Public Storage needed access to a storage space to conduct necessary repairs. The tenant agreed to provide the facility with the key. Six hundred boxes of business records were removed from the space. The business records were lost during the construction period and there were contradictory accounts of what happened. The tenant was advised of the problem but the business records were never recovered. Suit was filed. Public Storage turned the suit over to its insurance carrier. Zurich American provided a defense but also filed a declaratory relief action, alleging that its policy did not cover the tenant's claim. The complaint alleged:

“Zurich alleges that Coverage A of the CGL form does not cover the allegations in the Underlying Complaint because: (i) destruction of the medical records was not an “occurrence”; (ii) diminution in value of Nsouli’s medical practice does not constitute “property damage”; (iii) Exclusion (j) (4) applies because the Underlying Complaint alleges that the medical records were destroyed while in the care, custody, or control of Public Storage; and (iv) Exclusion (a) relieves Zurich of the duty to defend because the documents were destroyed through a conscious decision of Public Storage. Zurich further argues that Section I of the Customer Goods Endorsement does not impose a duty to defend because the factual allegations in the Underlying Complaint trigger Exclusion (3), which excludes claims for damages

arising from the destruction of a customer’s property by the insured’s employees or agents. Finally, Zurich asserts that there is no duty to defend pursuant to Section II of the Customer Goods Endorsement because that section only provides coverage for damages arising from “sale and disposal operations,” and there are no allegations in the Underlying Complaint suggesting that Nsouli’s records were destroyed pursuant to such operations.”

Mistaken Action Not Covered

Zurich contended that its policy did not cover Public Storage under any of the policy’s liability coverages including Customer’s Goods Legal Liability, which is specifically designed to cover customer claims for loss of or damage to property. Its primary allegation was that since the tenant’s property was either thrown away by someone working for Public Storage or by the contractor, it was not covered because it was done by or at the direction of the insured, conduct that the policy excludes. The district court ruled in favor of the insurer on all but one claim made against Public Storage. While Public Storage is a large company that is in a position to defend itself against such lawsuits, this could be a financially devastating decision for a smaller storage operator. So before conducting repairs to the facility that involve removing tenant property, make a call to your insurance agent and make sure that you have insurance for loss of or damage to the tenant’s property, even if that property disappears during the chaos of construction.

Zurich American was not satisfied with a ruling that it would not have to defend or indemnify Public Storage for most of the claims against the company. The insurer also asked the court to order Public Storage to reimburse it for all uncovered litigations expenses it had incurred. The court refused to grant such an order. One optimistic note: We asked two long time self storage insurers about this claim and without knowing the exact details both thought it would be covered by the Customer Goods Legal Liability section of their policy. Both companies have much deeper roots in the self storage industry than Zurich American. ❖