

The Claims Corner: Trespass and Nuisance

Description

While the Homeowner's Policy provides expansive coverage, it still does not cover every problem that may arise with a property. In particular, it does not provide coverage for use of the property that is found to constitute either a trespass on or a nuisance to a neighboring property. The following provides an example of this:

In 2018, the developer conveyed the property to the insureds, who were issued a Homeowner's Policy. Subsequently, the neighboring property owners filed suit against the insureds. The neighbors' complaint alleged that the improvements on the insured property were constructed in a manner that resulted in "excessive flow of swales of water, plant erosion, and sediment" on the neighbors' property. While the first count sought relief against the developer, counts two and three were directed against the insureds. In count two, the neighbors asserted that the continuing excessive flow of water, plant erosion, and sediment upon the neighbors' property constituted a continued trespass and an intentional interference with the neighbors' use of the neighbors' property. In count three, the neighbors alleged that the insureds' failure to remedy the storm water runoff amounted to a continuing common law nuisance. For both counts two and three, the neighbors requested the court to issue an injunction enjoining and ordering the insureds to "abate the trespass and to be responsible for the artificially altered storm waters" coming upon the neighbors' property and for the insureds "to take all proper steps to correct and manage the storm water flowing from [the property]."•

The insureds tendered a defense of the lawsuit to the title insurance company. However, the company denied the insureds' claim under the policy based on the allegations of the complaint. The company does not have a duty to defend under the policy if it is clear that the insurer would not be liable under the policy for a judgment based upon the allegations in the complaint. See *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 189 (1990).

In this instance, count two of the complaints concerned the insureds' alleged trespass onto the Neighbors' Property. A trespass is a tort involving an intentional or negligent intrusion upon or to the possessory interest in property of another. Since the policy does not insure that the insureds have a right to intrude upon the neighbors' property, or any property outside the land as defined in Schedule A of the policy, the company would not have had any liability for a judgment rendered under that count. Additionally, count three of the complaints concerned the insureds' alleged use of the property amounting to a private nuisance. A private nuisance is a nontrespassory invasion of another's interest in the private use or enjoyment of land. Since the policy does not insure that the insureds can interfere in the neighbors' private use or enjoyment of the neighbors' property, the Company would not be liable under the policy for any judgment rendered under that count either.

The insureds attempted to argue that relief requested in the complaint, if granted, would limit their use of the insured property, thus implicating coverage under Covered Risk 5 of the policy. However, the company rejected this argument. Covered Risk 5 insures against loss or damages incurred because someone else has a right to limit the insureds' use of the insured property. However, no property

owner has the right to trespass onto a neighbor's property or use their own property in a manner that is regarded as an invasion of another's use or enjoyment of their land. Thus, the insured's use of the insured property would not be limited if the court entered an order requiring the insureds to abate the alleged trespass or nuisance. Instead, the court would declare that the insureds are using the property in a manner that was never permitted by law. Furthermore, if the neighbors were to prevail in the litigation, the insureds would still have the right to full use of the insured property. *See Zhong Lin Wei v. Stewart Title Guaranty Co.*, 2018 WL 1870400 (Cal. App. 2nd 2018) (holding that neighbor's suit seeking removal of insured's improvements encroaching on neighbor's property did not invoke Covered Risk 5 because insured has full use of its land, and dispute was over the insured's use of the neighbor's land).

Thus, while the Homeowner's Policy does provide an expansive set of coverages and specifically protects against a party's right to limit the insured's use of the property, it does not go as far as guaranteeing that the insured can use the property in any manner it wishes, particularly if such use interferes with the rights of others to use neighboring property.



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