

## **Good Fences Don't Always Make Good Neighbors: California Court of Appeal Holds that "Invasion of the Right of Private Occupancy" May Include Non-Physical Invasion of Rights in Real Property**

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In [\*Albert v. Truck Insurance Exchange\*](#), No. B278295 (Cal. Ct. App. May 15, 2018), the [California Court of Appeal, Second District](#), considered whether an insurer owed a duty to defend an insured who was sued for erecting a fence that partially blocked an easement providing access to a neighbor's property. The Court of Appeal concluded that the insurer owed a duty to defend because the policy provided coverage for personal injuries arising out of a wrongful "invasion of the right of private occupancy." According to the Court, such coverage may include a non-physical invasion of rights in real property.

Truck Insurance Exchange ("Truck") insured Albert under an umbrella policy that provided coverage for personal injuries "arising out of . . . wrongful eviction, wrongful entry, or invasion of the right of private occupancy." Albert was sued by her neighbor because she erected and refused to remove a fence that obstructed an easement to the neighbor's property. Albert asked Truck to defend the suit. Truck denied coverage on the ground that Albert could not have "invas[ed her neighbor's] right to private occupancy" because the neighbor never had a right to private occupancy of the easement in the first place. Albert sued Truck, claiming that the denial was improper. The lower court granted Truck's summary judgment motion, agreeing that Albert's maintenance of the fence could not be an "invasion of the right of private occupancy" because her neighbor did not control the easement. According to the lower court, occupancy means having possession, which in turn, requires having control.

The Court of Appeal reversed, holding that there was a potential for coverage, which triggered Truck's duty to defend. While the Court agreed that coverage could not have existed for "wrongful entry" because Albert entered onto her own property, the Court held that "invasion of the right of private occupancy" may include non-physical invasion to real property rights. It explained that, while actual physical interference with land constitutes the most obvious and common type of nuisance, an invasion of the right of private occupancy may also consist of an interference with the use and enjoyment of real property. The Court compared nuisance complaints to zoning, pollution, and landlord-tenant disputes where courts have found the potential for personal injury coverage.

In reaching its conclusion, the Court relied on the neighbor's allegations that Albert caused a nuisance by interfering with the neighbor's right to the free enjoyment of his property. The Court reasoned that this was similar to a municipality whose zoning ordinance affects a property owner's ability to develop property or a polluter whose odor or noise restricts an owner's use and enjoyment of property. The Court, therefore, concluded that Albert's alleged interference with her neighbor's ability to access, use, develop, and enjoy his own property triggered Truck's duty to defend because "invasion" need not be physical.

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