IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARCH SPECIALTY INSURANCE COMPANY	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
ALFRED J. ANTONINI, D/B/A ANTONINI & ASSOCIATES,	§	
	§	
	§	**CIVIL ACTION NO. 4:07-cv-01154**
Defendant/Third-Party Plaintiff	§	
	§	
v.	§	
	§	
HAMANN INSURANCE AGENCY, LLC	§	
	§	
Third-Party Defendant	§	

MEMORANDUM OF LAW IN SUPPORT OF ANTONINI'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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I. NATURE AND STAGE OF THE PROCEEDING

Al Antonini's insurance policy with Arch Specialty Insurance Company commenced on September 19, 2005. Antonini's insured building at 2100 Travis Street was vacant at the time he insured it, and Arch insured it as a vacant building.

No matter how vigilant an owner is, vacant buildings are susceptible to vandalism. Mike Miller, Antonini's maintenance and security person, was present on December 23, 2005 when the police arrested two persons for attempting to steal materials from the building. Exhibit B, Affidavit of Mike Miller. Miller testified that he had been in the buildings many times between September 19, 2005 and December 23, 2005 and that the bulk of the damage claimed under the policy had occurred on or around December 23, 2005. Id. *See also* Exhibits C, D, E and F, Police Reports.

The vandalism included breaking the exterior windows; breaking interior glass windows and doors; breaking marble and tile slabs; smashing built-in cabinets; painting graffiti; breaking plumbing fixtures such as toilets, sinks and water fountains; tearing off doorknobs; gouging and breaking doors and woodwork; cutting wires in walls and electrical equipment; gouging and ripping sheetrock walls and tile ceilings; smashing the telecommunications panel; cutting pipes; breaking light fixtures and thermostats; and much more. A great deal of the damage was caused by persons breaking into rooms, offices and suites by tearing through interior doors, walls, floors, windows and ceilings. On one or more of these occasions, a person or persons stole some wiring and pipes, presumably to sell as scrap. Exhibit G, Affidavit of Alfred Antonini.

Antonini timely made a claim for the loss under the vandalism provision of the policy. The policy states that "We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." *See* Exhibit H. Vandalism is a Covered Cause of Loss:

A. Covered Causes of Loss
***
8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

We will not pay for loss or damage caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars.

See Exhibit I. The plain language of the policy obligated Arch to pay Antonini for the vandalism loss.

Arch, however, refused to pay for any of the damage whatsoever because of the relatively small amount of materials that had been stolen from the building. Arch asserted that, because a small amount of materials had been stolen, the theft exclusion applied to exclude coverage for all of the damages caused by vandalism. As explained below, that interpretation is inconsistent the policy and with Texas law.

II. STATEMENT OF THE ISSUES

A. Under the Arch insurance policy, if a vandal destroys or damages parts of an insured building, thereby vandalizing the building, then subsequently steals some of the component parts of the building, the theft exclusion does not exclude the vandalism which preceded the theft.

B. If the theft exclusion does exclude vandalism which preceded the theft, the "breaking in and exiting of burglars" exception provides coverage for breaking/exiting within the building.

III. SUMMARY OF THE ARGUMENT

A. Under the Arch insurance policy, if a vandal destroys or damages parts of an insured building, thereby vandalizing the building, then subsequently steals some of the component parts of the building, the theft exclusion does not exclude the vandalism which preceded the theft. As explained below, a plain reading of the insurance policy in this case shows that vandalism is covered by the policy and the theft exclusion operates so narrowly that it does not exclude the vandalism which precedes the theft. In fact, the issue of vandalism coverage versus theft exclusion has already been decided by the Texas Supreme Court in favor of coverage. That decision follows the majority rule in the United States.

B. If the theft exclusion does exclude vandalism which preceded the theft, the "breaking in and exiting of burglars" exception provides coverage for breaking/exiting within the building. A plain reading of the policy shows that this exception to the theft exclusion is not restricted to the breaking/entering into the building envelope, but covers damage inside the building caused by burglars breaking into locked rooms, suites or offices by tearing through internal walls, windows, ceilings and floors.

IV. DISCUSSION

A. Under the Arch insurance policy, if a vandal destroys or damages parts of an insured building, thereby vandalizing the building, then subsequently steals some of the component parts of the building, the theft exclusion does not exclude the vandalism which preceded the theft.

All of the vandalism damage to Antonini's insured building is covered by the policy. The vandalism provision provides broad coverage for vandalism, while the theft exclusion is a narrow exception to that coverage. A plain reading of the insurance policy in this case shows that vandalism is covered by the policy and the theft exclusion operates so narrowly that it does not exclude the vandalism which precedes the theft. In fact, the issue of vandalism coverage versus theft exclusion has already been decided by the Texas Supreme Court in favor of coverage. United States Fidelity & Cas. Co. v. Bimco, 464 S.W.2d 353 (Tex. 1971).

Arch represents in its Motion for Partial Summary Judgment that Bimco is not controlling and the matter is still undecided under Texas law, arguing that the insuring clause in that case is different enough as to make it distinguishable. However, Arch's argument fails. The Texas Supreme Court made it patently clear in Bimco that Texas follows the same rule adopted by the majority of jurisdictions in this country, which provides insurance for the vandalism which preceded the theft.

1. The Unambiguous Policy Language Shows that the Vandalism Preceding the Theft is Covered by Insurance.

The policy language in this case is not ambiguous. A plain reading of the vandalism coverage provision shows that it is actually very broad coverage. A plain reading of the theft exclusion shows that it is actually a very narrow exclusion that does not exclude coverage for the overwhelming majority of damage in this case.

Texas law is clear on the interpretation of insurance policies. When an insurance contract provision is unambiguous, the court must give the words their plain and generally accepted meaning, and enforce the policy as written. Puckett v. United States Fire Ins. Co., 678 S.W.2d 936, 938 (Tex. 1984). An insurance contract will be construed in favor of the insured. State Farm Fire and Cas. Co. v Vaughn, 968 S.W.2d 931,933 (Tex. 1998).

Under Texas law, coverage is interpreted broadly and exclusions are interpreted narrowly. Gore Designs Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365 (5th Cir. 2008). Texas law places the burden of proving an exclusion on the insurance company. Id., citing Tex. Ins. Code Ann.. § 554.002 (Vernon 2005). Exclusions are narrowly construed, and all reasonable inferences must be drawn in the insured's favor. Id. Insurance policies are governed by a special rule of construction. "Under it the insurer may not escape liability merely because his or its interpretation should appear to us a more likely reflection of the intent of the parties than the interpretation urged by the insured. The latter has to be no more than one which is not itself unreasonable." Bimco, 464 S.W.2d at 356.

In this case, the policy language is unambiguous. The policy provides coverage for vandalism and plainly defines that term in a manner that is broad enough to cover all of the vandalism damage to Antonini's insured property. The theft exclusion, also written plainly, defines the exclusion precisely and narrowly. A plain reading of these provisions does not give rise to any ambiguity --- vandalism is covered and the theft exclusion does not exclude coverage for the vandalism which precedes the theft.

Arch suggests that there is no coverage for vandalism in this case because of the meaning of the term "vandalism." Arch contends that the definition of vandalism stated in the policy is not controlling, and argues for a different meaning. Second, Arch argues that the plain language of the theft exclusion should be disregarded and a broader, more inferential meaning applied to the exclusion. As discussed below, both of those arguments fail under a plain reading of the policy.

Arch argues for an esoteric and entirely unjustified definition of "vandalism" which just happens to exclude coverage for Antonini's loss. However, under Texas law, when construing provisions in an insurance policy, all terms are given their ordinary and generally accepted meaning, unless the policy shows the words are meant in a technical or defined sense. Security Mut. Cas. Co. v. Johnson, 584 S.W.2d 703, 704 (Tex. 1979).

In this case, the policy itself defines vandalism:

Covered Causes of Loss
***
8. **Vandalism, meaning willful and malicious damage to, or destruction of, the described property.**

Exhibit I. Under the plain language of the policy, "vandalism" means willful and malicious damage to, or destruction of, Antonini's insured property. "Willful" and "malicious" are not defined in the policy. Under Texas law, those terms must be given their ordinary and generally accepted meaning. Johnson, 584 S.W.2d 703 at 704.

Arch's argument does not address the plain and generally accepted meaning of those terms, primarily because the plain and generally accepted meaning of those terms would result in coverage for Antonini's loss. Instead, Arch argues that "willful and malicious" means that the person causing the damage must have acted solely out of

animosity toward the property owner. As support for its contention, Arch cites a Texas case which Arch claims establishes that vandalism is characterized by a personal animus toward the owner of the insured property. Arch's Motion at 11, citing Imperial Cas. & Indem. Co. v. Terry, 451 S.W.2d 303 (Tex.App.—Tyler 1970).

However, Terry does not define vandalism in the way that Arch asserts. Terry involved an automobile damage policy that excluded coverage for vandalism *or* malicious mischief. Id. The court in that case engaged in a long discussion of the definition of "malicious mischief" but never considered the definition of "vandalism." Id. Therefore, the Terry definition which Arch urges the court to adopt for "vandalism" in this case is actually the definition of "malicious mischief" in an automobile policy. Arch's suggestion that we define "vandalism" in this real property insurance case to have the same meaning as "malicious mischief" in an automobile case is an unsupported leap of logic that is inconsistent with Texas law. In fact, the Texas Supreme Court considered an almost identical vandalism provision[1] and found that it provided coverage where vandal/thieves had damaged the electrical system in a warehouse while attempted to steal wiring. United State Fidelity and Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353 (Tex. 1971). Therefore, Arch's argument that "vandalism" requires a personal animus has no merit.

When, as here, the policy itself defines the term, we must look to the policy language for meaning. In the Arch policy, the definition of vandalism is damage or destruction that is "willful" and "malicious." When interpreting insurance policies, Texas law requires the court to apply the generally accepted meaning of the words.

[1] "The term 'Vandalism and Malicious Mischief' as used herein is restricted to and includes only willful or malicious physical injury to or destruction of the described property."

Johnson, 584 S.W.2d 703 at 704. The dictionary states that the meaning of "willful" means "done deliberately." www.mirriam-webster.com. The dictionary defines "malicious" as "done with malice", then further defines "malice" as "intent to commit an unlawful act or cause harm without legal justification or excuse." Id. Therefore, the definition of "vandalism", using the definition in the policy and applying the plain and accepted meaning of the words, means damage done deliberately and with the intent to commit an unlawful act or cause harm without legal justification or excuse.

Accordingly, under the definition in the policy itself, "vandalism" coverage is actually broad enough to cover losses due to burglary, theft, arson, graffiti, rocks thrown through windows, faucets left on to create water damage, and a host of other bad acts. Any loss to the insured property caused by an act done deliberately and with the intent to cause harm without excuse or justification is covered by the vandalism coverage clause. It is almost difficult to imagine a deliberate act which would result in damage to Antonini's insured property which is *not* covered by the vandalism provision. The vandalism provision is written broadly and, under Texas law, such coverage provisions must be construed broadly. Gore Designs Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365 (5th Cir. 2008).

The theft exclusion to the vandalism coverage is written narrowly and, under Texas law, must be construed narrowly. The theft exclusion only excludes coverage for damage or loss **"caused by or resulting from theft."**

"Theft", when it is used in an insurance policy, has the same meaning as it does under the criminal law. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc., 628 S.W.2d 844, 847 (Tex. App. Amarillo 1982); see also Hudiberg Chevrolet Inc. v. Globe

Indem. Co., 394 S.W.2d (Tex. 1965); and Allstate Insurance Co. v. Dykes, 461 S.W.2d 519 (Tex.Civ.App.-Tyler 1971). "Under our criminal law, theft can take the many forms set out in chapter 31 of the Texas Penal Code." Paul Mercury Ins. Co, 628 S.W.2d at 847.

A person commits theft if he "unlawfully appropriates property with intent to deprive the owner of property." Texas Penal Code § 31.03(a). "Appropriate" means to acquire or otherwise exercise control over property. Tex. Penal Code § 31.01(4)(B). Accordingly, a "theft" does not occur until the person appropriates, or takes into his possession, the property. The mere act of cutting wires or pipes is not theft. There is no theft until the person takes the materials into his possession. Therefore, "theft" requires an element of asportation.

The theft clause in the Arch policy contains important causation language --- "*caused by or resulting from* theft." Applying the plain and generally accepted meaning of the words, the definition of "cause" is "something that precedes and brings about an effect or a result." Black's Law Dictionary at 221, 6th Ed. Therefore, the causation language of the theft exclusion requires that the theft *precede* the loss. Under a plain reading of the policy language, the theft exclusion only excludes coverage for damage that occurs *after* the theft. In fact, the exact same theft exclusion has been interpreted by other jurisdictions as only excluding coverage for damage that occurs subsequent to the theft. "[T]he theft exception does not exclude vandalism damage caused prior to or concurrently with a theft." Haas v. Audubon Indem. Co., 722 So. 2d 1022, 1027 (La.App. 3 Cir. Oct. 21, 1998).

A theft occurred when the intruder left the building with the materials, thereby taking them into his possession and satisfying the asportation element. The act of theft necessarily occurred *after* the act of vandalism.

In this case, an act of vandalism, as defined by the policy, was completed when the intruder forcibly removed component parts from the building. For example, a completed act of vandalism, as it is defined in the policy, occurred when a vandal cut and pulled wires out of the electrical panel in the building. That act of vandalism was complete and existed regardless of events subsequent to the vandalism. If the vandal had dropped the wires on the floor and walked away, then Arch would have been unquestionably liable for the entire cost of repairing the vandalism to the electrical panel. The fact that the vandal subsequently took some of the wiring with him does not relieve Arch of the liability for repairing the vandalism. The subsequent theft did not change the character of the preceding vandalism. The Arch policy provided coverage for the vandalism which *preceded* the theft, and the theft exclusion did not apply because it was restricted to damages which occurred *subsequent to* the theft.

If Arch had intended to exclude coverage for vandalism which preceded or occurred concurrently with a theft, Arch could have written the policy differently. The insurance industry is no stranger to such clauses. Arch, however, chose to use language that restricted the theft exclusion to losses that occurred *subsequent* to the theft. A plain reading of the theft exclusion as it is written shows that vandalism which precedes theft is not excluded.

Under Texas law, clauses in an insurance policy providing coverage must be construed broadly, while clauses excluding coverage must be construed narrowly. In this

case, there is no problem applying that standard, because the insuring clause for vandalism is written broadly, and the clause excluding damage from theft is written narrowly. A plain reading of the policy, applying generally accepted meanings to the terms, shows that the vandalism which preceded the theft is covered by the insurance policy.

2. Under Texas Law, Vandalism Which Precedes Theft is Covered.

Contrary to Arch's assertion, the Texas Supreme Court has already spoken to the general issue of vandalism coverage versus theft exclusion. United State Fidelity and Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353 (Tex. 1971). The Court noted that the construction of the vandalism clause versus the theft exclusion was one of first impression in Texas. Id. at 355. In that case, the Texas Supreme Court established the general rule that **"under a policy insuring against vandalism and malicious mischief but generally excluding theft losses, recovery may be had for such vandalism even though some of the property was stolen."** Id. at 355-6 (quoting 5 Appleman Insurance Law & Practice, § 3182.25 at 591 (1970)).

In Bimco, intruders broke into an insured warehouse and stole electrical wiring and transformers that were part of the building. Id. Bimco made a claim for damage to the building and the insurer denied the claim under the theft exclusion. The pertinent policy language read as follows:

> 1. In consideration of $10.00 (Incl.) premium and subject to the provisions of this policy and this endorsement, the liability of this Company hereunder for loss or damage resulting from the peril of Riot and Civil Commotion is hereby extended to include loss caused by damage to or destruction of the property described by Vandalism and Malicious Mischief, including damage to the (buildings) covered hereunder caused by burglars.

> 2. The term 'Vandalism and Malicious Mischief' as used herein is restricted to and includes only willful or malicious physical injury to or destruction of the described property.
> 3. When this endorsement is attached to a policy covering direct loss to the described property, this Company shall not be liable under this endorsement for any loss:
> (b) by pilferage, theft, burglary or larceny.

Bimco, 464 S.W.2d at 355. The Texas Supreme Court first considered whether the vandalism clause covered the act of vandalism which occurred when the intruders removed the wiring and transformers from the insured building. The Court found that "the loss occurred when the burglars dismantled and destroyed the electrical system of the building which was a part of the realty." Bimco, 464 S.W.2d at 355. Accordingly, vandalism occurs when component parts are severed from a building or its fixtures. The act of vandalism is complete at the time of removal or damage --- regardless of whether the severed parts are left on the floor or subsequently taken by the vandal as an act of theft. The subsequent act of theft does not diminish the vandalism. The Court ruled that, "standing alone, the loss is unquestionably covered by the insuring clause." Id.

Arch attempts to distinguish the Bimco insuring clause from the insuring clause in this case because the vandalism clause in Bimco expressly stated that vandalism under that policy included damage to the building caused by burglars. However, the vandalism clause in Bimco was not otherwise defined in that policy. The *only* explanation of the insuring clause in that policy was the phrase stating that damage caused by burglars was included.

In the Arch policy, the vandalism clause defines vandalism much more broadly. Arch chose to define vandalism in such a way as to include damage from burglars,

arsonists, rock throwers, graffiti artists, and so on. Accordingly, the insuring clause in Antonini's policy is actually broader in scope than the insuring clause in Bimco.

Moreover, in Bimco, the Texas Supreme Court itself clarified that the phrase "caused by burglars" was not crucial to its analysis. The Court cited with approval a Kentucky case that found that coverage under the vandalism clause was not excluded by the theft provision, where the policy did not contain the "caused by burglars" phrase. Id., citing State Aut. Mut. Ins. Co. v. Trautwein, 414 S.W.2d 587 (Ky. 1967). The Texas court noted that, in the Kentucky case, "Paragraph 1 does not contain the 'damage to the (buildings) . . . caused by burglars' phrase, but recites coverage is extended '. . . to include direct loss to the described property by Vandalism.' The Texas Supreme Court noted that the Kentucky court found coverage even in the absence of the "caused by burglars" phrase which Arch argues makes the difference in this case. Therefore, Texas Supreme Court made it clear that the phrase "caused by burglars" in the Bimco case did not make a significant difference to the vandalism coverage issue. Accordingly, consistent with the ruling of the Texas Supreme Court in Bimco, the vandalism to Antonini's insured building "is unquestionably covered by the insuring clause." Id.

After finding coverage for vandalism to the insured building, the Bimco court went on to consider what effect, if any that the theft exclusion had on the vandalism coverage. The court cited the longstanding rule that provisions in the insurance policy should be construed liberally in favor of the insured:

> But for the fact that insurance policies are governed by the special rule of construction, which is a familiar part of our jurisprudence, we might, indeed, hold either that the interpretation against liability of the insurer should prevail or that, the policy being ambiguous, there is a fact issue as to what was intended. Yet the rule, of course, applies, and under it the insurer may not escape liability merely because his or its interpretation

> should appear to us a more likely reflection of the intent of the parties than the interpretation urged by the insured. The latter has to be no more than one which is not itself unreasonable.

Id. The Texas Supreme Court then discussed with approval two cases from other jurisdictions which involved the same issue, and where the courts had determined that damage to insured property was covered although it occurred in the course of an actual or attempted theft or burglary. Id.

In Bimco, after finding coverage for the preceding vandalism under the vandalism clause, the Texas Supreme Court then considered how to interpret the theft exclusion. The theft exclusion in Bimco was actually written more broadly than the theft exclusion in the Arch policy:

> [T]his Company shall not be liable under this endorsement for any loss:
> (b) by pilferage, theft, burglary or larceny.

Id. Missing from the Bimco theft exclusion is the "caused by or resulting from" language in the Arch policy which restricts the exclusion to damage which occurs subsequent to the theft.

Even though faced with a less narrow theft exclusion than in the Arch policy, the Texas Supreme Court still refused to find that the theft exclusion negated the vandalism coverage. Id. Instead, the Court chose to harmonize the theft exclusion with the vandalism coverage by finding that the theft exclusion applied only to personal property, not damage to realty. Id. The Texas Supreme Court concluded its analysis by stating, "We hold that by reason of the [vandalism] endorsement the policy covers all of the loss sustained by the insured as the result of willful damage to the buildings. . . including all costs of material and labor necessary to repair the building." Id.

The theft exclusion in the Arch policy is much narrower than the exclusion in the Bimco policy. The Bimco theft exclusion was written in such a way that it could be interpreted to exclude all vandalism even remotely related to theft. Arch wrote the theft exclusion so that it only applies to damage which occurs subsequent to the theft. Consequently, the vandalism coverage and the theft exclusion in the Arch policy already harmonize. The rule established by the Texas Supreme Court in Bimco --- that a theft exclusion to vandalism coverage does not negate coverage for damage to the building preceding the theft --- applies neatly to this case. The legal gymnastics in which the Texas Supreme Court engaged in Bimco to avoid negation of the vandalism coverage is not required in this case.

The Texas rule is the majority rule in the United States: **"[U]nder a policy insuring against vandalism and malicious mischief but generally excluding theft losses, recovery may be had for such vandalism even though some of the property was stolen."** Bimco, 464 S.W.2d at 355-6 (quoting 5 Appleman Insurance Law & Practice, § 3182.25 at 591 (1970)). An Alabama case provides an excellent discussion of the reasoning behind the majority rule liberally construing coverage for vandalism and narrowly interpreting the theft exclusion. Aetna Cas. & Sur. Co. v. Ardizone, 481 So.2d 380 (Ala. 1985). "Most of these courts have concluded that the acts complained of were acts of 'vandalism', as that term is understood in common parlance. . . . We do not feel that we should here construe the word 'vandalism' in its narrowest sense, but hold that the proper construction should be such as is considered in the popular mind." Id. at 384. In that case, intruders broke into a commercial warehouse. The intruders removed and stole some wiring and tubing from refrigeration equipment. The Alabama Supreme Court

explained that the removal of the wiring and tubing from the refrigeration equipment was an act of vandalism which damaged that equipment regardless of whether the intruders subsequently took the wiring and tubing with them. "Had the tubing not been removed from the warehouse, given the acts of vandalism, the insurance company nevertheless would be liable for the entire amount -- the tubing and labor costs. The simple fact that the tubing was removed after the vandalism occurred should not relieve the insurance company of that liability." Id. at 385. In short, the vandalism was completed when the wiring and tubing was cut or removed from the refrigeration equipment.

In State Auto Mutual Insurance Co. v. Trautwein, 414 S. W. 2d 587 (Ky. 1967), the case cited with approval by the Texas Supreme Court in Bimco, some apartments were broken into and air conditioning units which had been permanently affixed to the walls were stolen. The court found that, because the walls were injured by the process of removing the units, the apartment owner could recover. Recovery was not limited to the cost of repairing the injury to the walls, but included the cost of replacing the air conditioning units.

In Parnell v. Rohrer Chevrolet Co., 95 N. J. Super. 471, 231 A. 2d 824 (1967), a car was stripped of its parts, and the policy insuring the car provided coverage for vandalism but not for the theft of the parts. The court determined that insurance policies must be interpreted to conform to the understanding of the general public. Therefore, it held, vandalism in the furtherance of a theft was still vandalism and subject to coverage by the policy.

Beauty Supplies, Inc. v. Hanover Insurance Co., 526 S. W. 2d 75 (Mo. App. 1975), concerned property stored in a warehouse that was covered by an insurance contract

provision similar to the one in this case. Burglars broke into the unoccupied second floor of the warehouse and stole some of the plumbing fixtures. The Missouri Court of Appeals concluded that the damage was due to vandalism and was covered by the policy, notwithstanding the fact that a burglary preceded the vandalism and a theft immediately followed.

Similarly, in Cresthill Industries v. Providence Washington Insurance Co, 53 A. D. 2d 488, 385 N.Y.S. 2d 797 (1976), the unoccupied third floor of a warehouse was broken into and the plumbing fixtures were taken. The Appellate Division of the Supreme Court of New York concluded that the damage was done by a completed act of vandalism, the character of which was not changed by the precedent burglary nor the subsequent theft. The court concluded that defendant had failed to prove the applicability of the exclusion within the policy and, thus, allowed recovery for the insured.

In Pryor v. State Farm Fire & Casualty Co., 74 Cal. App. 3d 183, 141 Cal. Rptr. 394 (1977), thieves broke into three houses which were being readied for sale. The major built-in appliances, as well as many of the light fixtures and much of the carpeting, were removed. The court determined that, because no structural damage was done to the houses, the loss of the appliances was the result of a theft, which was expressly excluded from the policy's coverage. The court held, however, that their forcible removal was the result of vandalism, and the court determined the correct measure of damages to be the installation costs after new appliances, carpeting, and light fixtures were purchased by the owner/insured.

In Benson Holding Corp. v. New York Prop. Ins. Underwriting Ass'n, 124 Misc. 2d 955, 478 N.Y.S. 2d 570 (1984), the plaintiff's building was broken into and the elevator

control panel was removed from above the ceiling of the elevator. The New York City municipal court found this removal of the device to be an act of vandalism covered by the insurance contract, despite the subsequent act of theft.

Sterling v. Audubon Ins.Co., 452 So. 2d 709 (La. App.), cert. denied, 456 So. 2d 169 (La. 1984), dealt with an unoccupied residence broken into on three separate occasions. In addition to perpetrating various acts of vandalism, the burglars removed some of the light fixtures, the air conditioner compressor, and the kitchen range and also ripped up a certain amount of the carpeting. The Louisiana court adopted the position held by the California court in Pryor, and determined that the correct measure of damages was the cost necessary to install the replacement items, but not the cost of the items themselves. In addition, the court allowed recovery for incidental damage done by the burglars in the act of removing the items which were stolen.

Arch points to two cases from other states for the proposition that vandalism is not covered --- one from Tennessee and one from Florida. Tennessee represents the minority rule on this issue in the United States and is, in fact, the only state that follows that rule. In Florida, there is a split in authority on this issue. The Texas Supreme Court, in Bimco, cited with approval the Florida case which ruled in favor of coverage. Bimco, 464 S.W.2d at 356, citing Allstate Ins. Co. v. Coin-O-Mat, Inc., 202 So.2d 598 (Dist. Ct. App. Fla., 1967). The plaintiff in Coin-O-Mat recovered for a loss when someone broke into its laundry and damaged twelve washing machines which required the laundry owner to expend substantial sums for repairs. The insurer claimed that the loss was not covered by the policy because of the theft exclusion clause. The Texas Supreme Court quoted with approval the Florida court's finding: "The evidence before the court was sufficient

to establish without conflicting inferences that the plaintiff suffered a direct loss to its insured property through vandalism or malicious mischief, which loss is not excluded from the coverage even though it may have occurred in the course of an actual or attempted theft or burglary." Id. Therefore, the cases cited by Arch for the opposing view represent a minority of one (Tennessee) and a jurisdiction where the courts are split on the issue (Florida).

The majority of jurisdictions in the United States side follow the Texas rule when it comes to the vandalism versus theft issue. The fact that Arch has discovered a single jurisdiction --- Tennessee --- that disagrees with the general rule is of no moment. Most jurisdictions agree with the Texas Supreme Court's rule that the theft exclusion does not exclude coverage for the vandalism that precedes the theft.

3. If the Policy Language is Ambiguous, It Must Be Construed in Favor of Coverage.

The language of the vandalism coverage provision and the theft exclusion is not ambiguous. However, if it is ambiguous, it must be construed in favor of coverage. "Ambiguities in insurance contracts giving rise to two reasonable interpretations, one providing and the other denying coverage, are read *contra proferentem* and in favor of the insured." Carrizales v. State Farm Lloyds, 518 F.3d 343, 346 (5th Cir. Tex. 2008)(citing Puckett v. U.S. Fire Ins. Co., 678 S.W.2d 936, 938 (Tex. 1984)). Ambiguous policy provisions are construed in favor of the insured. Carrizales, 518 F.3d at 350 (citing Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462, 464 (Tex. 1998) and Empire Fire & Marine Ins. Co. v. Brantley Trucking, Inc., 220 F.3d 679, 681 (5th Cir. 2000)).

In a recent case, the Louisiana Court of Appeals interpreted *the exact same policy*

provisions that we have in this case, found them ambiguous, and interpreted the policy to cover all damage. Haas v. Audubon Indem. Co., 722 So.2d 1022 (La.App. 3 Cir. 1998). The facts of that case are almost eerily analogous to this one. Unknown persons broke into a vacant commercial building and removed wires and pipes, damaging the building in the process. The intruders had turned off the water to remove the pipes and, when the water was turned back on, the building flooded. Audubon refused to pay anything on the loss except for the damage to the door caused by the intruders' forced entry into the building, asserting that almost all of the damage to the building was caused by theft. Id. at 1023-4. The Court of Appeals, in considering whether the removal of the pipes and wire were vandalism, noted that:

> There is no question of coverage should the removed materials have been simply pulled out and left in the building. The basic definition of theft requires asportation, that is the taking of the thing into possession of the thief. . . . Vandalism coverage in this policy is the rule. The incidence of the theft does not diminish the acts of vandalism in this case. The theft damage is a narrow exception to the vandalism coverage. It is not an independent exclusion. The trial court correctly held that the theft exception does not exclude vandalism damage caused prior to or concurrently with a theft. . . . The trial court recognized the patent ambiguity of the theft exclusion. Specifically, did it mean all damages to the building relating to the theft are subject to the exclusion, or did it mean that just the value of the materials carried away from the building shall be excluded? It correctly interpreted the policy in favor of coverage, excluding the replacement costs of the stolen materials from the judgment. The trial court strictly construed the theft exception.

Id. at 1027. In finding the theft exclusion ambiguous, the Louisiana Court of Appeals questioned whether it meant that all damages relating to the theft are subject to the exclusion or did it mean that just the value of the materials carried away from the building were excluded? The Louisiana Court of Appeals found the theft exclusion ambiguous, and then construed it narrowly and in favor of coverage.

To the extent that the language in the Arch policy is ambiguous, it must be construed in favor of coverage. Accordingly, the vandalism which preceded the theft is covered under the policy.

B. If the theft exclusion does exclude vandalism which preceded the theft, the "breaking in and exiting of burglars" exception provides coverage for breaking/exiting within the building.

If it is determined that the theft exclusion does exclude the vandalism which preceded the theft, then the exception to the exclusion brings a large portion of the damages back within coverage. Much damage to the insured property was caused by persons who gained access to locked rooms, offices and suites by breaking through doors, windows, walls, ceilings and floors. Exhibit G, Affidavit of Alfred Antonini. All of that damage is brought back within coverage by the breaking/exiting exception.

The Arch policy provides that damages caused by the "breaking in and exiting of burglars" is covered:

We will not pay for loss or damage caused by or resulting from theft, **except for building damage caused by the breaking in or exiting of burglars.**

A plain reading of the words used in the breaking/exiting exception shows that the exception brings a large portion of the damage back within coverage.

Under Texas law, coverage is interpreted broadly and exclusions are interpreted narrowly. Gore Designs Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365 (5th Cir. 2008). Texas law places the burden of proving an exclusion on the insurance company. Id., citing Tex. Ins. Code Ann.. § 554.002 (Vernon 2005). Exclusions are narrowly construed, and all reasonable inferences must be drawn in the insured's favor. Id. Insurance policies are governed by a special rule of construction. "Under it the

insurer may not escape liability merely because his or its interpretation should appear to us a more likely reflection of the intent of the parties than the interpretation urged by the insured. The latter has to be no more than one which is not itself unreasonable." Bimco, 464 S.W.2d at 356.

Arch contends that the "breaking and exiting of burglars" exception is restricted to the entry and exiting of the burglars to and from the building envelope. Arch cites a Tennessee case, the sole jurisdiction in the United States that holds the restrictive, minority view on the theft exclusion, for the proposition that the exception is restricted to the building envelope. However, that is not what the policy says. The words of the policy extend the exception to all breaking and exiting of burglars, not just the breaking of the building envelope.

Under Texas law, when construing provisions in an insurance policy, all terms are given their ordinary and generally accepted meaning, unless the policy shows the words are meant in a technical or defined sense. Security Mut. Cas. Co. v. Johnson, 584 S.W.2d 703, 704 (Tex. 1979). The terms "breaking", "exiting" and "burglars" are not defined in the policy.

"Breaking" does not have a technical meaning under the policy. In 1973, the Texas legislature eliminated the requirement of "breaking" from the burglary statute in the Texas Penal Code. Tex. Pen.Code § 30.02 (Vernon 2003); *see also* Griffin v. State, 815 S.W.2d 576, 579 (Tex.Crim.App. 1991). Therefore, the ordinary and generally accepted meaning of "breaking" applies.

The ordinary meaning of the term "breaking in" is to use force to get inside of, within or gain entry to a place. Griffin, 815 S.W.2d at 578. It can also mean a non-

specific forcible entry. Webster's New College Dictionary 179 (2005). Neither of those definitions restrict the term to the entry of a building envelope. Therefore, "breaking" means only to gain access through force.

The term "exiting" means the act of going away or out. www.dictionary.com. The term is not restricted to building envelopes.

It is interesting to note that, in the breaking/exiting exception, Arch did not use the term theft, but extended the exception to "burglars." A burglar is a person who, without the effective consent of the owner enters a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault. Tex. Pen. Code § 30.02. The term "burglars" includes not only thieves, but intruders intending to commit other crimes such as malicious mischief and graffiti.[2] Therefore, the very term "burglars" contemplates that the burglar will cause damage *inside* the building. There is nothing in the term "burglars" which would restrict the breaking/exiting exception to the building envelope.

Applying the ordinary and generally accepted meaning of the terms of the phrase "breaking in and exiting of burglars", it means the forcible entry and exit of persons with a felonious intent. There is nothing in the policy language to support Arch's assertion that the exception is restricted to the building envelope. Since, under Texas law, coverage provisions are interpreted broadly, Arch's suggestion that the exception be restricted to the building envelope must fail. If Arch had intended to restrict the breaking/exiting exception to the building envelope, it could have easily done so by adding just a few words to the policy. As the policy stands, the breaking/exiting

[2] Graffiti can be a felonious crime. Tex. Pen. Code § 28.08.

exception is not restricted to the building envelope, but brings back into coverage all damage caused by burglars breaking into rooms, suites and offices within the building.

CONCLUSION

A plain reading of the insurance policy in this case shows that vandalism is covered by the policy and the theft exclusion operates so narrowly that it does not exclude the vandalism which precedes the theft. The vandalism insuring clause is written broadly and, under Texas law, must be interpreted broadly. The vandalism insuring clause covers damage to the insured property caused by any deliberate, unjustified act.

The theft exclusion is written narrowly and, under Texas law, must be interpreted narrowly. A plain reading of the theft exclusion shows that the exclusion only applies to damage which occurs subsequent to the theft. The exclusion does not exclude vandalism which precedes the theft.

The Texas Supreme Court has already ruled on the issue and found in favor of coverage for vandalism, in line with the majority of jurisdictions in this country. The case in which the Texas Supreme Court set down that rule actually involved a case in which the insuring clause was not as broad as the one in the Arch policy, and a theft exclusion clause which was not as narrow as the one in the Arch policy. Therefore, this case falls squarely within the rule set out by the Texas Supreme Court: **"[U]nder a policy insuring against vandalism and malicious mischief but generally excluding theft losses, recovery may be had for such vandalism even though some of the property was stolen."**

If the Texas rule does not apply, and the vandalism is excluded, then the breaking/exiting exception brings a large portion of the damage back within coverage.

That exception provides coverage for all damage inside the building caused by intruders breaking through doors, walls, windows, ceilings and floors to gain access to locked rooms, suites and offices.

Respectfully submitted this the 23rd day of October, 2008.

ALFRED J. ANTONINI D/B/A
ANTONINI & ASSOCIATES, PLAINTIFF

BY: */s/ Tina L. Nicholson*
TINA L. NICHOLSON, TXB# 24061336

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Court via the CM/ECF system which will forward a true and correct copy to all counsel of record in this case.

This the 23rd day of October, 2008.

BY: */s/ Tina L. Nicholson*
TINA L. NICHOLSON, TXB# 24061336

MERLIN LAW GROUP
Three Riverway,
Suite 1375
Houston, TX 77056
Tel: (713) 626-8880
Fax: (713) 626-8881
tnicholson@merlinlawgroup.com

Exhibit B

AFFIDAVIT OF MIKE MILLER

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day, personally appeared Mike Miller, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed:

"My name is Mike Miller. I am above the age of eighteen (18) years and competent to make this affidavit. I swear or affirm that I have personal knowledge of the facts and information contained in this affidavit and that they are true and correct.

My name is Mike Miller and I have worked as construction supervisor for Alfred Antonini at various times in the past several years. My most recent period of employment with Mr. Antonini was from early 2005 to present. I have watched the Central Bank building at 2100 Travis Street, Houston, Texas during the entire time of my current employment period. This included property drive- bys, walking the perimeter of the building and on occasion walking through the building and performing other maintenance and security tasks such as maintaining security barriers, providing portable power as needed. I worked on the sixth floor demolition project at 2100 Travis, demolishing interior walls, boarding up broken windows, removing graffiti from the property. From September 2005 through December 2005 I was there Monday through Saturday, most days working ten hours.

I was in close contact with, and communicated with both HPD and the Precinct 7 Constables regarding their daily drive- bys of the building and to gain there assistance in arresting vagrants loitering on the premises. On several occasions I called police to accompany me inside the building when there was evidence that there were intruders.

I was present in December 2005 when vandals were arrested and it was apparent that they severely damaged telecommunication cables, mechanical, electrical and plumbing systems. The elevators were even severely damaged. Because I am so familiar with the property I am the person who assists insurance and building representatives with walk throughs, pointing out damage due to vandalism that occurred during the period of September 19, 2005 through December 31.

SUBSCRIBED AND SWORN TO BEFORE ME on the 22 day of August 2006. by MIKE MILLER to certify this which witness my hand and seal of office.

Affiant's Signature

Mike C Miller
Printed Name

MARIA G. ALVARADO
Notary Public, State of Texas
Harris County
My Comm. Expires July 28, 2009

(seal)

Signature of Notary, State of Texas

My Commission expires: 7/25/2009

Exhibit C

PUBLIC RELEASE INFORMATION

HOUSTON POLICE DEPARTMENT FRONT PAGE
OFFENSE REPORT Incident no. 165804005 H

Offense- BURGLARY BUILDING
Premises- VACANT BUILDING (COMMERCI Weather- CLOUDY
Location: Street no- 002100 Name- TRAVIS
City-HOUSTON County-HARRIS Kmap-493P Dist-10 Beat-10H40
Neighborhood code-00232 Desc-MID TOWN
Begin date- MO 10/31/05 Time- 0915 End date- / / Time-
Received/Employee: Name-LAPTOP No.-000000 Date-11/01/05 Time-0427

COMPLAINANT(S)

No-01 Name: Last-RASPBERRY First-CEDRIC Middle-
Race-B Sex-M Age-45 Hispanic-N
Address-5303 ATASCOCTIA #513;HUMBLE,TX 77346
Phone: Home-(713) 807-5350 Business-(000) 000-0000 Ext-

ARTICLES

No- 01 Disposition-DAMAGED Property tag no-0-0000-00 Complainant no-01
Item type-WINDOW UCR class-00
Serial number- Value-$ 250.00
No- 02 Disposition-STOLEN Property tag no-0-0000-00 Complainant no-01
Item type-ALUMINUM UCR class-11

DETAILS OF OFFENSE

MINOR OFFENSE 1-CRIMINAL MISCHIEF
COMPL. STATED HE OBSERVED THE WINDOWS BUSTED AND OBSERVED A MALE LEAVING FROM THE SCENE WITH PROPERTIES.

ONE SUSPECT AND NO ARREST. COMPL. WILL PRESS CHARGES.
Officer1: Name-R.A.NELLIPPALLIL Employee no-118664 Shift-3
Division/Station #-S.CENTRAL Unit #-10H56
Call received: Date-10/31/05 Time-2230 Report made: Date-11/01/05 Time-0431

END OF PAGE ONE

Exhibit D

PUBLIC RELEASE INFORMATION

HOUSTON POLICE DEPARTMENT FRONT PAGE
OFFENSE REPORT Incident no. 172831205 T

Offense- CRIMINAL MISCHIEF
Premises- VACANT BUILDING (COMMERCI Weather- UNKNOWN
Location: Street no- 002100 Name- TRAVIS
City-HOUSTON County-HARRIS Kmap-493P Dist-10 Beat-10H40
Neighborhood code-00232 Desc-MID TOWN
Begin date- FR 11/11/05 Time- 1800 End date- SA 11/12/05 Time- 0730
Received/Employee: Name-LAPTOP No.-000000 Date-11/14/05 Time-1505

COMPLAINANT(S)

No-01 Name: Last-MILLER First-MIKE Middle-C
Race-W Sex-M Age-42 Hispanic-N
Address-325 RISNER RD;NEWWAVE,TX 77358
Phone: Home-(281) 914-8679 Business-(000) 000-0000 Ext-

ARTICLES

No- 01 Disposition-DAMAGED Property tag no-0-0000-00 Complainant no-01
Item type-BUILDING UCR class-00
Description-THE EAST SIDE OF THE BUILDING WAS VANDALIZED WITH SPRAY PAINT - GRAFFITI.

DETAILS OF OFFENSE

LISTED LOCATION WAS VANDALIZED WITH GRAFFITI.

Officer1: Name-E.J. REYES Employee no-102648 Shift-1
Division/Station #-SC I/STA 9 Unit #-92H21
Call received: Date-11/14/05 Time-1000 Report made: Date-11/14/05 Time-1520

END OF PAGE ONE

Exhibit D

PUBLIC RELEASE INFORMATION

HOUSTON POLICE DEPARTMENT FRONT PAGE
OFFENSE REPORT Incident no. 172831205 T

Offense- CRIMINAL MISCHIEF
Premises- VACANT BUILDING (COMMERCI Weather- UNKNOWN
Location: Street no- 002100 Name- TRAVIS
City-HOUSTON County-HARRIS Kmap-493P Dist-10 Beat-10H40
Neighborhood code-00232 Desc-MID TOWN
Begin date- FR 11/11/05 Time- 1800 End date- SA 11/12/05 Time- 0730
Received/Employee: Name-LAPTOP No.-000000 Date-11/14/05 Time-1505

COMPLAINANT(S)

No-01 Name: Last-MILLER First-MIKE Middle-C
Race-W Sex-M Age-42 Hispanic-N
Address-325 RISNER RD;NEWWAVE,TX 77358
Phone: Home-(281) 914-8679 Business-(000) 000-0000 Ext-

ARTICLES

No- 01 Disposition-DAMAGED Property tag no-0-0000-00 Complainant no-01
Item type-BUILDING UCR class-00
Description-THE EAST SIDE OF THE BUILDING WAS VANDALIZED WITH SPRAY PAINT - GRAFFITI.

DETAILS OF OFFENSE

LISTED LOCATION WAS VANDALIZED WITH GRAFFITI.

Officer1: Name-E.J. REYES Employee no-102648 Shift-1
Division/Station #-SC I/STA 9 Unit #-92H21
Call received: Date-11/14/05 Time-1000 Report made: Date-11/14/05 Time-1520

END OF PAGE ONE

Exhibit E

PUBLIC RELEASE INFORMATION

HOUSTON POLICE DEPARTMENT FRONT PAGE
OFFENSE REPORT Incident no. 17985700S Z

Offense- BURGLARY BUILDING
Premises- VACANT BUILDING (COMMERCI Weather- CLEAR
Location: Street no- 002100 Name- TRAVIS
City-HOUSTON County-HARRIS Kmap-493P Dist-10 Beat-10H40
Neighborhood code-00232 Desc-MID TOWN
Begin date- SA 11/26/05 Time- 1900 End date- / / Time-
Received/Employee: Name-LAPTOP No.-000000 Date-11/28/05 Time-1354

COMPLAINANT(S)

No-01 Name: Last-RASBERRY First-CEDRIC Middle-
Race-B Sex-M Age-45 Hispanic-N
Address-1703 GRAY;HOUSTON,TX 77004
Phone: Home-(713) 807-5350 Business-(000) 000-0000 Ext-

ARTICLES

No- 01 Disposition-RECOVERED Property tag no-0-0000-00 Complainant no-01
Item type-METAL UCR class-11
Description-10'X 10' SECTION OF ALUMINUM RAILS
Recovery date-11/26/05 Recovery value-$ 0.00

DETAILS OF OFFENSE

Entry-WINDOW-REMOVE
Exit-SAME AS ENTRY Instrument used-
MINOR OFFENSE 1-ASSAULT (CONTACT)
COMPL. STATED SUSP. WAS COMING OUT OF THE WINDOW COVERED WITH PLYWOOD.

Officer1: Name-RL THACKER Employee no-086060 Shift-1
Division/Station #-S. CEN.PAT. Unit #-10H41
Call received: Date-11/28/05 Time-1210 Report made: Date-11/28/05 Time-1529

END OF PAGE ONE

Exhibit E

PUBLIC RELEASE INFORMATION

HOUSTON POLICE DEPARTMENT FRONT PAGE
OFFENSE REPORT Incident no. 179857005 Z

Offense- BURGLARY BUILDING
Premises- VACANT BUILDING (COMMERCI Weather- CLEAR
Location: Street no- 002100 Name- TRAVIS
City-HOUSTON County-HARRIS Kmap-493P Dist-10 Beat-10H40
Neighborhood code-00232 Desc-MID TOWN
Begin date- SA 11/26/05 Time- 1900 End date- / / Time-
Received/Employee: Name-LAPTOP No.-000000 Date-11/28/05 Time-1354

COMPLAINANT(S)

No-01 Name: Last-RASBERRY First-CEDRIC Middle-
Race-B Sex-M Age-45 Hispanic-N
Address-1703 GRAY;HOUSTON,TX 77004
Phone: Home-(713) 807-5350 Business-(000) 000-0000 Ext-

ARTICLES

No- 01 Disposition-RECOVERED Property tag no-0-0000-00 Complainant no-01
Item type-METAL UCR class-11
Description-10'X 10' SECTION OF ALUMINUM RAILS
Recovery date-11/26/05 Recovery value-$ 0.00

DETAILS OF OFFENSE

Entry-WINDOW-REMOVE
Exit-SAME AS ENTRY Instrument used-
MINOR OFFENSE 1-ASSAULT (CONTACT)
COMPL. STATED SUSP. WAS COMING OUT OF THE WINDOW COVERED WITH PLYWOOD.

Officer1: Name-RL THACKER Employee no-086060 Shift-1
Division/Station #-S. CEN.PAT. Unit #-10H41
Call received: Date-11/28/05 Time-1210 Report made: Date-11/28/05 Time-1529

END OF PAGE ONE

Exhibit F

PUBLIC RELEASE INFORMATION

HOUSTON POLICE DEPARTMENT FRONT PAGE
OFFENSE REPORT Incident no. 192830605 V

Offense- BURGLARY BUILDING
Premises- HIGH RISE Weather- CLEAR
Location: Street no- 002100 Name- TRAVIS
City-HOUSTON County-HARRIS Kmap-493P Dist-10 Beat-10H40
Neighborhood code-00232 Desc-MID TOWN
Begin date- FR 12/23/05 Time- 1300 End date- / / Time-
Received/Employee: Name-LAPTOP No.-000000 Date-12/23/05 Time-1919

COMPLAINANT(S)

No-01 Name: Last-MILLER First-MIKE Middle-C
Race-W Sex-M Age-42 Hispanic-N
Address-325 RISNER RD;WAVERLY,TX 77358
Phone: Home-(181) 914-8679 Business-(000) 000-0000 Ext-

ARTICLES

No- 01 Disposition-DAMAGED Property tag no-0-0000-00 Complainant no-01
Item type-WINDOW UCR class-00
Brand-NO BRA Model-
Serial number- Value-$ 200.00

DETAILS OF OFFENSE

Entry-WINDOW-GLASS BREAK

SUSP6 ARRESTED FOR BURG/BUILDING AT THE LISTED TIME AND LISTED LOCATION.

2 SUSP/ 2 ARREST/ CHARGED/ EVIDENCE TAGGED.
Officer1: Name-F. BASHIR Employee no-118629 Shift-1
Division/Station #-BC PAT 9 Unit #-10H49
Call received: Date-12/23/05 Time-1333 Report made: Date-12/23/05 Time-1922

END OF PAGE ONE

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARCH SPECIALTY INSURANCE COMPANY	§	
Plaintiff,	§	
v.	§	
ALFRED J. ANTONINI, D/B/A ANTONINI & ASSOCIATES,	§	
	§	**CIVIL ACTION NO. 4:07-cv-01154**
Defendant/Third-Party Plaintiff	§	
v.	§	
HAMANN INSURANCE AGENCY, LLC	§	
Third-Party Defendant	§	

AFFIDAVIT OF ALFRED ANTONINI

STATE OF TEXAS
COUNTY OF Harris

1. My name is Alfred Antonini. I am an adult resident citizen of the state of Texas. I have personal knowledge of the facts stated in this affidavit.

2. I am familiar with the vandalism which is at issue in the above referenced case. The vandalism included, but was not limited to: breaking the exterior windows; breaking interior glass windows and doors; breaking marble and tile slabs; smashing built-in cabinets; painting graffiti; breaking plumbing fixtures such as toilets, sinks and water fountains; tearing off doorknobs; gouging and breaking doors and woodwork; cutting wires in walls and electrical equipment; gouging and ripping sheetrock walls and tile

ceilings; smashing the telecommunications panel and cutting the main telecommunications cable services to the building; cutting pipes; breaking light fixtures and thermostats; and much more. A great deal of the damage was caused by persons breaking into rooms, offices and suites by tearing through interior doors, walls, floors, windows and ceilings. On one or more occasions, a person or person stole some wiring and pipes, presumably to sell as scrap.

FURTHER, AFFIANT SAYETH NOT.

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named Alfred Antonini who, being by me first duly sworn, states on his oath that he signed, executed, and delivered the above and foregoing Affidavit and that the facts and things contained therein are true and correct, to the best of his knowledge and belief.

ALFRED ANTONINI

SWORN TO AND SUBSCRIBED BEFORE ME, this the 22 day of October, 2008.

NOTARY PUBLIC

My commission expires:

2/17/2012

(Seal)

THELMA AMARO NOTARY PUBLIC STATE OF TEXAS EXPIRES FEB. 17, 2012

Exhibit H

BUILDING AND PERSONAL PROPERTY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section H. – **Definitions.**

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the type of property described in this Section, A.1., and limited in A.2., Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

a. Building, meaning the building or structure described in the Declarations, including:

(1) Completed additions;

(2) Fixtures, including outdoor fixtures;

(3) Permanently installed:

(a) Machinery and

(b) Equipment;

(4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:

(a) Fire extinguishing equipment;

(b) Outdoor furniture;

(c) Floor coverings; and

(d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;

(5) If not covered by other insurance:

(a) Additions under construction, alterations and repairs to the building or structure;

(b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

Exhibit I

CAUSES OF LOSS – BASIC FORM

A. Covered Causes Of Loss

When Basic is shown in the Declarations, Covered Causes of Loss means the following:

1. Fire.

2. Lightning.

3. Explosion, including the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass. This cause of loss does not include loss or damage by:

   a. Rupture, bursting or operation of pressure relief devices; or

   b. Rupture or bursting due to expansion or swelling of the contents of any building or structure, caused by or resulting from water.

4. Windstorm or Hail, but not including:

   a. Frost or cold weather;

   b. Ice (other than hail), snow or sleet, whether driven by wind or not; or

   c. Loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not, unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dust enters.

5. Smoke causing sudden and accidental loss or damage. This cause of loss does not include smoke from agricultural smudging or industrial operations.

6. Aircraft or Vehicles, meaning only physical contact of an aircraft, a spacecraft, a self-propelled missile, a vehicle or an object thrown up by a vehicle with the described property or with the building or structure containing the described property. This cause of loss includes loss or damage by objects falling from aircraft.

   We will not pay for loss or damage caused by or resulting from vehicles you own or which are operated in the course of your business.

7. Riot or Civil Commotion, including:

   a. Acts of striking employees while occupying the described premises; and

   b. Looting occurring at the time and place of a riot or civil commotion.

8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

   We will not pay for loss or damage caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars.

9. Sprinkler Leakage, meaning leakage or discharge of any substance from an Automatic Sprinkler System, including collapse of a tank that is part of the system.

Exhibit J

88 of 100 DOCUMENTS

Aetna Casualty & Surety Co. v. Gilbert J. Ardizone, et al., d/b/a Waterfront Joint Venture; Gilbert J. Ardizone, et al., d/b/a Waterfront Joint Venture v. Aetna Casualty & Surety Co.

Nos. 84-42, 84-44

Supreme Court of Alabama

481 So. 2d 380; 1985 Ala. LEXIS 4250

December 20, 1985

PRIOR HISTORY: [**1] Appeals from Mobile Circuit Court, Edward B. McDermott, Judge.

DISPOSITION: AFFIRMED AS TO THE APPEAL; REVERSED AND REMANDED AS TO THE CROSS-APPEAL.

COUNSEL: E. J. Saad for Brown, Hudgens, Richardson, Mobile.

Peter F. Burns for Morgan & Burns, Mobile.

JUDGES: Jones, Justice wrote the opinion. Torbert, C.J., and Maddox, Faulkner, Shores, Beatty, Adams, and Houston, JJ., concur.

OPINION BY: JONES

OPINION

[*381] Plaintiffs are members of an investment group that purchased a warehouse outfitted with refrigeration equipment. Initially, the warehouse was leased back to the original owner, who was charged with providing the insurance on the building. After the lease expired, however, Plaintiffs were faced with procuring insurance on the property.

One of the investors, John Theiss, who operated a separate business, Gulf Coast Paint & Supply Company (Gulf Coast), contacted the insurance agent who had provided coverage for his separate business and requested the agent's help in acquiring insurance on the warehouse. That agent, in turn, contacted Aetna's local representative, who, according to the agent, assured him that Aetna would provide coverage for the warehouse if Gulf Coast would store in it [**2] at least $2,000 worth of its material.

The trial judge held that this condition was met and that a policy was issued by Aetna covering the warehouse. This policy specifically covered damage due to vandalism, but did not cover losses due to theft.

The trial court entered the following judgment:

> "This matter was tried without a jury on the 13th and 14th days of August, 1984. Thereafter, the parties submitted briefs which have been carefully reviewed by the Court. Based upon the testimony offered in open Court, the exhibits, the deposition testimony read into evidence, the demeanor of the witnesses, and the briefs and arguments of the parties, this Court makes the following findings of fact and conclusions of law:
>
> "FINDINGS
>
> "A. On February 11, 1983, the defendant issued a binder and, subsequently, on March 14, 1983, a policy of insurance covering a building known locally as the "Warley Building."
>
> "B. Thereafter, on and shortly before April 15, 1983, the building suffered extensive damage at the hands of vandals who destroyed and/or removed electrical and refrigeration fixtures insured under the policy.
>
> "C. The building was occupied at the time of the loss with Gulf [**3] Coast Paint & Supply, Inc., storing a quantity of aggregate material loaded on a pallet in the premises.

"D. The damage to the insured property totalled $80,617.00. Of that figure, $9,618.00 represents the cost of fixtures that were removed.

"CONCLUSIONS OF LAW

"A. This Court has reviewed the applicable cases dealing with vandalism damage and theft of fixtures. Those authorities include the following:

"[Herein the court cited essentially those cases reviewed in the instant opinion.]

"Having reviewed these authorities, this Court concludes that the loss as described in plaintiff's Exhibit 10, with the exception of the $1,000.00 deductible, is covered under the vandalism clause of the policy and with the further exception of the $9,618.00 worth of fixtures that were removed from the premises after the vandalism.

"THEREFORE, it is ORDERED, ADJUDGED and DECREED that a judgment be and hereby is awarded in favor of the plaintiffs and against the defendant in the amount of $69,999.00, plus $4,199.94 in interest for a total judgment of $74,198.94 plus costs."

[*382] I.

Aetna seeks to have the policy declared void *ab initio*, because the issuance of the [**4] policy was based on information which it claims was fraudulent. Primarily, it argues that Gulf Coast was storing some of its goods in the warehouse for the sole purpose of deceiving the Company into issuing a policy with lower premiums and greater coverage. The Company makes this assertion in the face of evidence that its own agent actually suggested this arrangement. The trial judge, after hearing the testimony and the depositions read into the record, and after observing the demeanor of the witnesses, concluded that the evidence presented to him *ore tenus* did not support Aetna's contention. The evidence of record amply supports this finding.

Alternatively, Aetna contends that the amount of its liability ought to be reduced to $25,000 (the damages which, according to Aetna, resulted exclusively from the acts of vandalism), because the policy, by its own terms, excludes all other losses. Specifically, the policy provides that Aetna should not be liable for loss:

"2. by pilferage, theft, burglary or larceny except that this Company shall be liable for willful damages to the building(s) covered caused by burglars in gaining entrance to or exit from such building(s) or [**5] any part of the building(s)."

The interpretation of this provision of an insurance contract (the exclusion of coverage applicable to theft in the context of coverage for vandalism) presents an issue of first impression in this jurisdiction. Our review of the excellent briefs of counsel, as well as our independent search, reveals several cases from other jurisdictions relating to this issue. We now review those cases briefly as a preface to our holding. While each case may be distinguished upon its facts, all are related by a similar insurance contract provision.

II.

In *Theo v. National Union Fire Insurance Co., 99 Ga. App. 342, 109 S. E. 2d 53 (1959)*, a homeowner sought to recover on two houses that were damaged by vandalism and which were insured against vandalism and malicious mischief, but not against theft or burglary. An inspection after the vandalism revealed that some items were "missing." Among the missing items were bathroom fixtures, plumbing, an electric water heater, an electric refrigerator, window frames, and the kitchen sink. The Georgia Court of Appeals concluded that the missing items must be considered to have been stolen, an event for which coverage [**6] was expressly excluded, and thus denied recovery.

Another Georgia case, *Pacific Indemnity Co. v. N. A., Inc., 120 Ga. App. 793, 172 S. E. 2d 192 (1969)*, interpreted a similar provision in a multi-peril insurance policy as it applied to a commercial building. In that case, someone removed a large amount of copper flashing from the roofs of buildings within a shopping center. The flashing was a permanent part of the roof, and removal of the copper caused serious damage to the roof. The court held that because the injury occurred in connection with a theft, and theft was a part of the express exclusionary clause, there could be no recovery.

In *State Auto Mutual Insurance Co. v. Trautwein, 414 S. W. 2d 587 (Ky. 1967)*, the Kentucky Court of Appeals, then the state's highest court, came to an opposite conclusion. In that case, some apartments were broken into and air conditioning units which had been permanently affixed to the walls were stolen. The court found that, because the walls were injured by the process of removing the units, the apartment owner could recover.

Recovery was not limited to the cost of repairing the injury to the walls, but included the cost of replacing [**7] the air conditioning units.

Similarly, in *Allstate Insurance Co. v. Coin-O-Mat, Inc., 202 So. 2d 598 (Fla. App. 1967)*, the Florida court said, where coin operated washing machines were damaged (presumably the coin boxes were broken into), that the damage was due to vandalism. [*383] Even though the damage occurred in connection with a theft, the damage was not excluded from coverage.

Another case in the same vein is *Parnell v. Rohrer Chevrolet Co., 95 N. J. Super. 471, 231 A. 2d 824 (1967)*, heavily relied upon by Plaintiffs. In that case a car was stripped of its parts, and the policy insuring the car provided coverage for vandalism but not for the theft of the parts. The court determined that insurance policies must be interpreted to conform to the understanding of the general public. Therefore, it held, vandalism in the furtherance of a theft was still vandalism and subject to coverage by the policy.

Two other cases deal with injuries caused by more remote burglaries. The first, *Beauty Supplies, Inc. v. Hanover Insurance Co., 526 S. W. 2d 75 (Mo. App. 1975)*, concerned property stored in a warehouse that was covered by a similar insurance contract provision. [**8] Burglars broke into the unoccupied second floor of the warehouse and stole some of the plumbing fixtures, leaving the water flowing from the pipes. The insured property on the first floor was subsequently damaged by the water. Water damage was not a risk specifically insured against. The Missouri Court of Appeals concluded that the damage was due to vandalism and was covered by the policy, notwithstanding the fact that a burglary preceded the vandalism and a theft immediately followed.

Similarly, in *Cresthill Industries v. Providence Washington Insurance Co., 53 A. D. 2d 488, 385 N.Y.S. 2d 797 (1976)*, the unoccupied third floor of a warehouse was broken into and the plumbing fixtures were taken. Again, the water found its way to the first floor and caused considerable damage to the insured goods. The Appellate Division of the Supreme Court of New York formulated a three-part test in which a plaintiff was required to show:

> "(1) the occurrence of an act of vandalism or malicious mischief within the meaning of the policy, (2) proximate cause resulting in a 'direct loss' to his property and (3) the inapplicability of the cited exclusionary clause (actually the burden of [**9] proof on the issue of 'exclusion' is on the insurer rather than upon the insured)." 53 A.D. at 496-497, 385 N.Y.S. 2d at 802.

The court concluded that the damage was done by a completed act of vandalism, the character of which was not changed by the precedent burglary nor the subsequent theft. Applying its three-part test, the court concluded that plaintiff had met its burden with respect to the first two parts, and that defendant had failed to prove the applicability of the exclusion within the policy, and, thus, allowed recovery.

In *Pryor v. State Farm Fire & Casualty Co., 74 Cal. App. 3d 183, 141 Cal. Rptr. 394 (1977)*, three houses which were being readied for sale were broken into. The major built-in appliances, as well as many of the light fixtures and much of the carpeting, were removed. The court determined that, because no structural damage was done to the houses, the loss of the appliances was the result of a theft, which was expressly excluded from the policy's coverage. The court held, however, that their forcible removal was the result of vandalism, and the court determined the correct measure of damages to be the installation costs after new appliances, [**10] carpeting, and light fixtures were purchased by the owner/insured.

A more recent case, *Sterling v. Audubon Insurance Co., 452 So. 2d 709* (La. App.), cert. denied, *456 So. 2d 169 (La. 1984)*, again dealt with damage done to a private residence insured by a similar provision. The unoccupied residence was broken into on three separate occasions. In addition to perpetrating various acts of vandalism, the burglars removed some of the light fixtures, the air conditioner compressor, and the kitchen range and also ripped up a certain amount of the carpeting. The Louisiana court adopted the position held by the California court in *Pryor*, and determined that the correct measure of damages was the cost necessary to install the replacement items, but not the cost of the items themselves. In addition, the court allowed [*384] recovery for incidental damage done by the burglars in the act of removing the items which were stolen.

A case more similar to the one at bar is *United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp., 464 S. W. 2d 353 (Tex. 1971)*. In that case, a warehouse was broken into and the building's own high voltage electrical wiring was removed. Again, [**11] the insurance policy provided coverage for losses due to vandalism or malicious mischief, but not for those due to pilferage, theft, burglary, or larceny. The Supreme Court of Texas interpreted the provision to provide coverage for losses to the building even though those losses were in connection with a burglary. The taking of the wiring caused damage to the building, so that the correct meas-

ure of damages, according to the court, was all costs of material and labor required to repair the building. Incidental items, such as tools, which were also taken, were held not to be covered.

The most recent case uncovered by our research also dealt with a commercial building. In *Benson Holding Corp. v. New York Property Insurance Underwriting Association, 124 Misc. 2d 955, 478 N.Y.S. 2d 570 (1984)*, an insurance contract provision almost identical to the one at bar was in effect. The plaintiff's building was broken into and the elevator control panel was removed from above the ceiling of the elevator. The New York City municipal court found this removal of the device to be an act of vandalism covered by the insurance contract, citing some of the cases mentioned above. See, also, Annot., [**12] *23 A.L.R. 3d 1259 (1969)*.

III.

The common denominator of these cases is their interpretation of an insurance contract provision very similar, if not identical, to the one here presented. Aside from that, most of the courts have made an attempt to define the term "vandalism" in connection with their interpretation of the insurance provision. Most of these courts have concluded that the acts complained of were acts of "vandalism," as that term is understood in common parlance. See, generally, 44 *Words and Phrases*, "Vandalism" (1962), and the discussion of the term "vandalism" in *Parnell v. Rohrer Chevrolet Co., supra, 95 N. J. Super. at 480, 231 A. 2d at 828-829*.

This Court is aided in this area by one of its earlier opinions. In *Great American Insurance Co. v. Dedmon, 260 Ala. 330, 70 So. 2d 421 (1953)*, Justice Clayton, speaking for the majority, stated: "We do not feel that we should here construe the word 'vandalism' in its narrowest sense, but hold that the proper construction should be such as is considered in the popular mind."

Further, it is by now a firmly established principle that words and phrases of an insurance contract which are reasonably susceptible [**13] to different interpretations are to be construed liberally in favor of the insured and strictly against the insurer. The basis for such a rule is that the insurance company drew up the language of the contract, and the purchaser of the policy had no voice in the selection or arrangement of the words employed. *Unkelsbee v. Homestead Fire Insurance Co., 41 A. 2d 168 (D.C. Mun. App. 1945)*.

IV.

After reviewing the above cases, we approve the interpretation adopted by the California and Louisiana courts: that the insurance contract provision before us for interpretation provides coverage for acts of vandalism or damage done to the building in connection with a burglary or theft. This policy provision does not provide coverage for the cost of replacing stolen items, except to the extent noted, but does cover the costs associated with the reinstallation of the items.

Applying this interpretation to the case at bar, we find that some of the items related to the subject warehouse were stolen, and that the insurance company should not be liable for the replacement cost of those items. On the other hand, it is equally clear that some of the damage of which Plaintiffs complain was the [**14] direct result of [*385] vandalism; thus, the insurance company will be liable for the total cost, both of materials and labor, for the repair of that damage. Specifically, much of the copper wiring and copper tubing used in the warehouse refrigeration system was removed. The damage for which Aetna is required to pay, however, stems not from the taking of this wire and tubing, but from the damage to the equipment which occurred when these items were removed.

According to expert testimony, once the wiring and tubing were broken or separated, damage occurred to the refrigeration equipment; and, thus, damages for such loss are recoverable whether or not these items were removed after being torn from the equipment. The incident of the theft in no way diminishes the act of vandalism, and the insurer is liable for the diminution in value of the wire and tubing caused by the vandalism. Plaintiffs have the burden of proving the value of the wiring and tubing which were taken, which they have already done; but the insurance company is entitled to a reduction to the extent, if any, of the reasonable salvage value of the wiring and tubing after it was taken from the refrigeration equipment.

[**15] V.

After reviewing the applicable law relating to vandalism damage and the theft of fixtures, the trial judge determined the measure of damages by deducting the cost of the missing equipment from the total cost of repairs occasioned by the theft and vandalism, so that the insurance company would not be paying for the stolen equipment in contradiction to the express terms of the insurance policy. After deducting the cost of the missing equipment from the total cost of repairs, the trial judge retained in that figure the labor costs related to the installation which will be required once the missing equipment is replaced. Although the trial judge was essentially correct in his effort to separate the loss incurred by theft (excluded by the policy) from the loss incurred by vandalism (covered by the policy), we hold that the trial judge was in error in including the cost of the copper tubing in the missing equipment category, and deducting the cost of that tubing from the total cost of repairs. Had

the tubing not been removed from the warehouse, given the acts of vandalism, the insurance company nevertheless would be liable for the entire amount -- the tubing and labor costs. The simple [**16] fact that the tubing was removed after the vandalism occurred should not relieve the insurance company of that liability. The intent of the vandals at the time of the destructive act is irrelevant to this issue of liability. Had the tubing not been removed, however, the insurance company would have been entitled to the damaged tubing for resale of the copper scrap metal for salvage. Consequently, the insurance company must be afforded the opportunity to prove that the tubing which was taken would have had some salvage value, and to prove what that value would be.

The Decision

1. On the Appeal

As to the appeal, we find no error prejudicial to the Appellant.

2. On the Cross-Appeal

As to the cross-appeal, we find that the trial judge's conclusions of law and his award of damages based thereon are substantially in compliance with the legal principles set forth above, with the following exception: We find that the "exception [from the total amount of damages proved by Plaintiff] of the $9618.00 worth of fixtures that were removed" is in error to the extent that it includes the value of the copper wiring and tubing damaged and removed from the premises after the vandalism. [**17] To that limited extent, the judgment of the trial court is reversed; and on remand, with or without additional testimony, as the trial court may deem appropriate, the trial court shall determine the value of the copper wiring, if any, [1] and the value of [*386] the copper tubing necessary for the reinstallation of the damaged refrigeration equipment here involved, less, of course, the salvage value.

1 While it is clear from the record that the removed *copper tubing* was damaged beyond reuse for the reinstallation of the refrigeration equipment, it is not clear whether, factually, the damaged and removed *copper wiring* falls within this same category. This, of course, will be for the trial court's determination on remand.

AFFIRMED AS TO THE APPEAL; REVERSED AND REMANDED AS TO THE CROSS-APPEAL.

Torbert, CJ., and Maddox, Faulkner, Shores, Beatty, Adams, and Houston, JJ., concur.

1 of 100 DOCUMENTS

ALLSTATE INSURANCE COMPANY, a corporation, Appellant, v. COIN-O-MAT, INC., a Florida corporation, Appellee

No. H-310

Court of Appeal of Florida, First District

202 So. 2d 598; 1967 Fla. App. LEXIS 4304

September 26, 1967

DISPOSITION: [**1] Affirmed.

COUNSEL: Wallace W. Kennedy, of Beggs, Lane, Daniel, Gaines & Davis, Pensacola, for Appellant.

Joseph Q. Tarbuck, Pensacola, for Appellee.

JUDGES: Wigginton, C.J., and Carroll, Donald K., and Johnson, JJ., concur.

OPINION BY: PER CURIAM

OPINION

[*599] The defendant in an action upon an insurance policy has appealed from a final summary judgment entered by the Circuit Court for Escambia County.

The question presented for our determination is whether that judgment was entered pursuant to *Rule 1.510, Florida Rules of Civil Procedure*, as amended, 31 F.S.A. - that is, whether there was no genuine issue as to any material fact and whether the plaintiff was entitled to such a judgment as a matter of law.

The policy in question includes vandalism and malicious mischief insurance, covering the contents of an automatic coin-operated laundry owned and operated by the plaintiff.

On the date in question, while the policy was in force, one or more persons entered the said laundry and severely damaged 12 washing machines, requiring the plaintiff to expend substantial funds in order to repair the damaged machines. The defendant, the insurer, however, refused to pay for the loss on the [**2] ground that the loss was not covered by the policy. This position of the defendant was founded upon an exception clause of the policy providing that the policy does not cover any loss by theft or burglary.

The evidence before the court was sufficient to establish without conflicting inferences that the plaintiff suffered a direct loss to its insured property through vandalism or malicious mischief, which loss is not excluded from coverage even though it may have occurred in the course of an actual or attempted theft or burglary. The burden was on the defendant to prove that the plaintiff's loss came under some exclusionary clause of the policy, which burden was not carried. Fla.Jur., Insurance, Sec. 437. Under these circumstances we think the Circuit Court was justified under our procedural rules in entering the final summary judgment appealed from.

Affirmed.

WIGGINTON, C.J., and CARROLL, DONALD K., and JOHNSON, JJ., concur.

1 of 99 DOCUMENTS

Beauty Supplies, Inc., a Corporation, a/k/a National Beauty Supplies, Inc., a Corporation, Plaintiff-Respondent, v. The Hanover Insurance Co., a Corporation, Fireman's Insurance Co., a Corporation, National Fire Insurance Co. of Hartford, a Corporation, American States Insurance Co., a Corporation, and United States Fidelity and Guaranty Co., Defendants-Appellants

No. 36470

Court of Appeals of Missouri, St. Louis District, Division Four

526 S.W.2d 75; 1975 Mo. App. LEXIS 1732

July 8, 1975

SUBSEQUENT HISTORY: [**1] Motion for Rehearing Overruled August 7, 1975.

PRIOR HISTORY: From the Circuit Court of the City of St. Louis, Missouri

Civil Appeal

Judge James S. Corcoran

DISPOSITION: Affirmed.

COUNSEL: J. H. Cunningham, Jr., St. Louis, Missouri, Attorney for Appellant; Burton H. Shostak, St. Louis, Missouri, Attorney for Respondent.

JUDGES: Before Smith, C.J., Houser, Sp.J., Stockard, Sp.J. Houser, Sp.J..

OPINION BY: HOUSER

OPINION

[*75] Action for damages to property belonging to Beauty Supplies, Inc. under the vandalism and malicious mischief coverages of policies of insurance issued by five insurance companies. Following trial to the court without a jury judgment was rendered for insured for $14,388.90. The five insurers appeal on the sole ground that the loss was not covered because it resulted from thieves or burglars breaking into the building and causing the damage and the policies expressly exclude loss by pilferage, theft, burglary or larceny. We affirm.

[*76] The five policies are not all-risk policies but insure only specific perils such as fire, lightning, sprinkler leakage and the perils listed in the extended coverage endorsement, which do not include water damage. The five identical vandalism [**2] and malicious mischief endorsements read as follows:

> "In consideration of the premium for this coverage, and subject to the provisions of this policy and the Extended Coverage Endorsement attached thereto, the coverage under said Extended Coverage Endorsement is extended to include direct loss by Vandalism and Malicious Mischief.
>
> "Provisions Applicable Only to Vandalism and Malicious Mischief: The terms 'vandalism' and 'malicious mischief' as used in this endorsement mean only willful and malicious damage to or destruction of the property covered hereunder.
>
> * * *
>
> "2. This Company shall not be liable for loss --
>
> * * *
>
> (b) by pilferage, theft, burglary or larceny, except that this Company shall be liable for willful damage to the building(s) covered hereunder caused by burglars;
>
> * * *."

On May 20, 1970 insured was a tenant occupying the ground floor of the building located at 5605-07 Delmar Boulevard in the City of St. Louis. The building in which insured's property was located was not covered by these policies. On that date unauthorized persons entered the vacant second floor of the building, which was not rented to or occupied by insured, and stole [**3] plumbing fixtures therefrom by tearing them out of the walls and flooring of the second floor, breaking them loose from the connected water pipes, thereby permitting water to flow continuously over the floor of the second story, from whence the water leaked and came down through the ceiling of the first floor occupied by insured, damaging insured's goods, wares and merchandise in the sum of $14,388.90. Insured made claim against all insurers. Liability was denied by each insurer. Judgment was entered for that sum plus $1,500 attorneys' fees and court costs. Insurers' motion for new trial was overruled, except as to the item of attorneys' fees, whereupon this appeal was taken.

Insurers argue that the loss was the direct and proximate result of the acts of thieves and burglars, and since the vandalism endorsement excludes liability for loss caused by theft or burglary the loss is not covered.

This is a question of proximate cause. While the means and method by which the unauthorized persons entered the building are not disclosed by the stipulation of facts, we assume there was a sufficient breaking to constitute a burglary. What happened, then, was (1) a burglary, (2) acts of vandalism, [**4] *Romanych v. Liverpool & London & Globe Ins. Co., 8 Misc.2d 269, 167 N.Y.S.2d 398, 402*, and (3) a theft. In our view the loss was directly caused by acts of vandalism, a specifically covered risk, notwithstanding a peril expressly excluded (burglary) was an antecedent contributing circumstance, and another peril expressly excluded (theft) was an independent concurring cause.

The burglary is not a factor in determining the proximate cause of the damage from water leakage. "An antecedent contributing circumstance is generally ignored in determining the proximate cause. That is to say, a situation which merely sets the stage for the later event is not regarded as being the proximate cause merely because it made possible the subsequent loss. For example, the explosion of gas, and not the lighting of a match, is the proximate cause of loss, where the explosion is caused by the lighting of a match in a room filled with gas. Likewise, the destruction of a plate-glass window, shattered when gas exploded upon its ignition by a lighted match being used to locate a gas leak, is by explosion, and not by fire, within an exception in a [*77] policy insuring the window against loss by fire." [**5] 18 Couch on Insurance 2d § 74:714, p. 618.

Insurers cite *Frisbie v. Fidelity & Casualty Co., 133 Mo.App. 30, 112 S.W. 1024 (1908)*, as a case squarely in point. Frisbie sued on a plate glass insurance policy which excepted loss in consequence of fire. A fire was started elsewhere and burned up to the insured building, which was dynamited, either by town authorities or a concerted action of the property owners (including the rental agent of the building dynamited) to prevent the further spread of the fire. Pointing out that the people who wrecked the building were not actuated by wrongful motive but by apprehension that the building if not removed would be destroyed by fire and would be the vehicle for spreading the fire, the court held that the proximate cause of the plate glass loss was the fire; that the dynamiting was a natural and necessary result of the fire and not an independent, supervening cause. The court cited from another case in which property was intentionally destroyed, in which it was stated that the proximate cause is the efficient cause, "the one that necessarily sets the other causes in operation." Frisbie is to be distinguished on the ground that two elements [**6] present in that case are absent here, namely, necessity and consent.

In *Fawcett House, Inc. v. Great Central Insurance Co., 280 Minn. 325, 159 N.W.2d 268 (1968)* an insured recovered under a casualty insurance policy which excluded any loss resulting from change in temperature, where a specifically covered risk (the act of vandals in shutting off insured's heating system during freezing temperatures) directly caused the condition which permitted the heating and plumbing system to freeze. The court said, 159 N.W.2d l.c. 270: "* * * the loss here is covered because it was directly caused by a specifically covered risk, even though indirectly and incidentally enhanced by another peril expressly excluded from coverage. *Anderson v. Connecticut Fire Ins. Co., 231 Minn. 469, 43 N.W.2d 807.*" In *Hatley v. Truck Insurance Exchange, 261 Ore. 606, 494 P.2d 426* (banc 1972), adhered to and *rehear. den., 261 Or. 622, 495 P.2d 1196*, an insured recovered under a policy of property insurance containing a vandalism and malicious mischief endorsement but excluding loss caused by surface water and water below the surface of the ground, where sometime during the night unknown persons took [**7] a hose lying on the ground near the building, turned on the hose full force and placed the hose near the building at the bottom of a sloping area and left it running for a protracted period, resulting in considerable damage. The court said, 494 P.2d l.c. 432: "The vandalism and malicious mischief endorsement was added to the policy to give coverage for damage caused by just such acts. Where the act of vandalism or malicious mischief con-

sists of turning water against the building, and where there is water damage as a direct and immediate result of that act, the general policy exclusion for certain types of water damage does not apply."

Nor is the theft a controlling factor. If the theft be considered as a concurring cause of the loss, it was not the predominating, efficient one. The stealing and carrying away of the plumbing fixtures, after their severance, did not cause the damage to the goods of the insured. To the extent that the taking was concomitant with the vandalism, that element of stealing was a concurrent cause of the loss, but "* * * when there are two concurrent causes of a loss, the predominating, efficient one must be regarded as the proximate [cause], * * *." *Howard* [**8] *Ins. Co. v. Norwich & N. Y. Trans. Co., 79 U.S. (12 Wall.) 194, 20 L. Ed. 378 (1870).* In *Allstate Ins. Co. v. Coin-O-Mat, Inc., 202 So.2d 598 (Fla. App. 1967),* it was held that loss suffered when persons entered a laundry owned and operated by insured and severely damaged 12 washing machines was not excepted from policy coverage of direct loss to insured's property through vandalism and malicious mischief by a clause in the policy excluding loss by theft or burglary even though it occurred in [*78] the course of an actual or attempted theft or burglary.

If it be contended that the chain of causation was set in motion by the burglary and intent to steal, insured nevertheless should prevail under the rule that "* * * recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, * * *." Revised Vol 5, Appleman Insurance Law and Practice § 3083, p. 311.

We conclude that the burglary was an antecedent contributing circumstance but not a proximate cause; that the theft, while a concurrent cause, was not the predominating, efficient cause; that the proximate cause of the loss was the vandalism, a specifically [**9] insured risk. Accordingly the judgment is affirmed.

All concur.

62 of 100 DOCUMENTS

Benson Holding Corp., Plaintiff, v. New York Property Insurance Underwriting Association, Defendant

[NO NUMBER IN ORIGINAL]

Civil Court of the City of New York, Bronx County

124 Misc. 2d 955; 478 N.Y.S.2d 570; 1984 N.Y. Misc. LEXIS 3279

July 23, 1984

HEADNOTES

[*1] Insurance -- Exclusions -- Vandalism and Malicious Mischief Endorsement**

The forcible removal of an elevator control panel from an elevator in plaintiff's building constitutes vandalism and the loss is covered under a policy issued by defendant which includes direct loss by vandalism and malicious mischief but excludes loss by pilferage or theft; a forceful or violent severing and removal of property that has been affixed to the insured premises constitutes vandalism.

COUNSEL: *Kohn & Doynow* (*Roger W. Kohn* of counsel), for plaintiff.

Francis X. Wade for defendant.

JUDGES: Alan J. Saks, J.

OPINION BY: SAKS

OPINION

[*955] OPINION OF THE COURT

[**571] In this action to recover on an insurance policy, the parties have submitted the issue of liability to the court on an agreed stipulation of facts, in lieu of trial.

The basic facts are that: defendant has insured plaintiff's building under a general risk policy including a Vandalism and Malicious Mischief Endorsement. That endorsement provides, in pertinent part:

"The coverage under said Extended Coverage Endorsement is extended to include direct loss by Vandalism and Malicious Mischief * * *

"1. *Provision applicable* [***2] *only to Vandalism and Malicious Mischief*: The terms 'vandalism' and 'malicious mischief' as used in this endorsement mean only willful and malicious damage to or destruction of the property covered hereunder * * *

"2. This company shall not be liable for loss * * *

"b. by pilferage, theft, burglary or larceny, except that this company shall be liable for willful damage to the building (s) covered hereunder caused by burglars."

On October 8, 1980, perpetrators broke into the plaintiff's premises, broke into the elevator, severed the wires leading to the elevator control panel and removed the same [*956] in its entirety. (Said panel was located above the ceiling of the elevator.)

The question is whether the exclusion for pilferage, theft, etc., is applicable. Although there are no New York cases directly in point, the weight of authority in other jurisdictions holds that such an exclusion is not applicable to losses of this character. *Cresthill Inds. v Providence Wn. Ins. Co. (53 AD2d 488)*, relied on by plaintiff, is readily distinguishable on its facts. There, the action was by a commercial tenant to recover for consequential water damage to its property sustained [***3] when plumbing fixtures elsewhere in the building had been stolen. It did not seek to recover the value of the stolen fixtures. However, it cited with approval the three cases in other jurisdictions that involved facts akin to the instant case. (*Parnell v Rohrer Chevrolet Co., 95 NJ Super 471*; *United States Fid. & Guar. Co. v Bimco Iron & Metal Corp., 464 SW2d 353* [Tex]; *State Auto. Mut. Ins. Co. v Trautwein, 414 SW2d 587* [Ky].) Moreover, *Cresthill* (*supra*) expressed disapproval of the one authority directly in point that is contra, namely, *Pacific Ind. Co. v N. A., Inc. (120 Ga App 793)*. Moreover, while *Cresthill* is distinguishable on its facts, it is a valuable guide in that it contains a learned discussion of judicial treatment of the clauses in question, concludes that they

contain ambiguities, and holds that the latter should be construed in favor of the insured. (See *53 AD2d, at pp 499-500.*)

In sum, if the foregoing authorities, other than *Pacific Ind. Co. v N. A., Inc.* (*supra*) are regarded as persuasive, it would seem that any forceful or violent severing and removal of property that had been affixed to the premises constitutes vandalism [***4] and the loss of the property thus removed is not excluded as pilferage, theft, etc. It is of course philosophically arguable that, where the destruction to the freehold is relatively minor and the gravamen of the loss is in the value of the removed equipment, what is involved is essentially theft and not vandalism. However, it could be argued with equal force that the exclusion would be generally understood by a lay person purchasing this type of policy to refer only to property that is not attached to the freehold. (A much closer case would be [*957] presented had the control panel been extracted simply by removing some screws.)

In any event, in the absence of controlling authority in the positive and in the presence of persuasive authority in the [**572] negative, application of the principles of *stare decisis* leads this court to conclude that the instant loss is not subject to the exclusion in question.

By submission of the stipulated facts and its failure to allude to any issue other than coverage, the court assumes that defendant has waived the boilerplate first affirmative defense alleging that the plaintiff has failed to comply with the requirements of the [***5] policy. Accordingly, the court hereby decides that policy coverage is present and that defendant is liable for the loss in question. This case is hereby restored to the September 25, 1984 Trial Term, Part 13, Calendar for jury trial as to damages.

3 of 100 DOCUMENTS

Cresthill Industries, Inc., Appellant, v. Providence Washington Insurance Company, Respondent

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, Second Department

53 A.D.2d 488; 385 N.Y.S.2d 797; 1976 N.Y. App. Div. LEXIS 13080

July 19, 1976

PRIOR HISTORY: [***1] Appeal from a judgment of the Supreme Court in favor of defendant, entered February 25, 1976 in Westchester County, upon a decision of the court (John P. Donohoe, J.) upon submitted facts.

DISPOSITION: Judgment of the Supreme Court, Westchester County, entered February 25, 1976, reversed, on the law, with $ 50 costs and disbursements, and action remanded to Trial Term for an assessment of damages and the entry of an appropriate judgment, in accordance with the opinion of Mrs. Justice Shapiro herein.

HEADNOTES

Insurance -- vandalism insurance -- where goods belonging to plaintiff insured which were stored in leased portion of warehouse were damaged when water pipes on upper floor were taken and water left running, damage constitutes vandalism under policy of insurance issued by defendant despite occurrence of theft, since severing of pipes prior to removal was completed act of vandalism, character of which could not be changed by subsequent removal -- while policy defines vandalism as "willful and malicious damage to or destruction of the property covered", and damage resulted from activity directed at property of another, occurrence nevertheless is vandalism, since maliciousness may be predicated [*2] upon wanton conduct in disregard of rights of others -- vandalism was proximate cause of damage, since volume and direction of water flow and construction of building were factual framework for loss, rather than intervening causes, and vandalism was insured peril which, in unbroken causal chain, produced loss -- insurer failed to prove that its construction, which would place loss within policy exclusion for theft and burglary, is only fair one, since such construction would absurdly exclude any vandalism inside building, and language may reasonably be construed to exclude theft of insured's property -- accordingly, damage sustained is covered by policy of insurance.**

1. Where goods belonging to the plaintiff insured, which were stored in a leased portion of a warehouse, were damaged when water pipes on an upper floor were taken and the water left running, the damage constitutes vandalism as defined by a policy of insurance issued by defendant, despite the occurrence of the theft. A finding of vandalism is consistent with a finding of a subsequent theft, since the severing of the pipes prior to their removal constituted a completed act of vandalism, the essential character of which [***3] could not be changed by their subsequent removal. The policy, in fact, expressly covers building damage sustained in a burglary, in tacit recognition that burglars may commit vandalism.

2. While the policy defines vandalism as "willful and malicious damage to or destruction of the property covered", and the damage resulted from activity directed at the property of another, the occurrence nevertheless falls within the policy definition, since maliciousness may be predicated on the existence of wanton conduct marked by disregard of the rights of others.

3. The act of vandalism was the proximate cause of the damage, since the volume and direction of the water flow and the construction of the building were not intervening causes, but were the factual framework in which the loss occurred, and the vandalism was an insured peril which, in an unbroken causal chain, produced the loss.

4. The insurer has failed to sustain its burden of proving that its construction, which would place the loss within a policy exclusion for theft and burglary, is the only one which can fairly be placed thereon. Such construction would absurdly exclude recovery for any vandalism committed inside a building, [***4] since any unlawful entry would be a burglary. The language may

reasonably be construed to exclude the theft of the insured's property.

5. Accordingly, the damage sustained is covered by the policy of insurance.

COUNSEL: *David Romanoff* for appellant.

Rein, Mound & Cotton (Arthur N. Brook of counsel), for respondent.

JUDGES: Shapiro, J. Martuscello, Acting P.J., Cohalan, Damiani and Titone, JJ., concur.

OPINION BY: SHAPIRO

OPINION

[*490] [**798] In an action to recover on a policy of insurance for damages allegedly sustained as a result of vandalism or malicious mischief practiced upon the property of the insured, the plaintiff appeals from a judgment of the Supreme Court, Westchester County, which dismissed the complaint. We reverse, direct judgment for the plaintiff and remand to the Trial Term for the fixation of its damages. The single question to be decided is whether the damage sustained by the plaintiff is covered by the defendant's policy of insurance.

According to the stipulation of facts upon which this case was determined (see *CPLR 3222*), the plaintiff, Cresthill Industries, Inc., leased a portion of the ground floor of a three-story warehouse located at 289 Nepperhan [***5] Avenue, Yonkers, New York, during May, 1973, for the storage of buttons and button fixtures manufactured by it. Over the Memorial Day weekend of that year, persons described in the stipulation as "perpetrators" apparently broke into the unoccupied third floor of the warehouse, uncoupled the pipes carrying water to the bathroom fixture, carried away the fixtures and left the water running from the severed connections. It does not appear that the "perpetrators" entered the ground floor where the plaintiff's goods were stored but, eventually, the water did, in quantities sufficient to cause considerable damage to the plaintiff's buttons and button fixtures.

At the time of the occurrence the plaintiff was a policy-holder with the defendant, Providence Washington Insurance Company, having obtained a policy of insurance providing coverage against fire, lightning and various other hazards, including vandalism and malicious mischief. The plaintiff's claim for compensation under the "vandalism and malicious mischief" provision was rejected by the insurer in reliance on the policy language. The subject policy provides, in pertinent part, as follows:

"This policy is also extended to insure [***6] against direct loss by the following perils as hereinafter provided * * *

"8. Vandalism and malicious mischief, meaning only willful and malicious damage to or destruction of the property covered hereunder. * * *

"b. This Company shall not be liable for loss -- * * *

"(2) by pilferage, theft, burglary or larceny, except that this [*491] Company shall be liable for willful damage to the building(s) covered hereunder caused by burglars".

The Trial Term dismissed the plaintiff's complaint on the ground, *inter alia*, that the loss sustained by it was an *indirect* loss, [**799] rather than a *direct* loss as provided for in the policy, because: "The eventual damage to plaintiff's property depended not only on the initial act of destruction on the third floor, but upon the volume of the flow, the manner of construction of the building, the direction of the flow and perhaps other intervening causes."

Thus, the court concluded:

"It would strain the meaning of the word 'direct' beyond any recognized understanding of it to say that the damage to plaintiff's goods was direct. The language of the policy plainly and unambiguously clarified its meaning when it said further, [***7] 'only wilful and malicious damage to or destruction of the property covered hereunder.' The wilfulness and malice in this case, as the stipulation of facts makes clear, were exerted upon plumbing fixtures, distant from and out of sight of the damaged property.

"Furthermore, the exclusion of coverage for loss by pilferage, theft, burglary or larceny, except for wilful damage to buildings, clarified the point. The origin of the causes resulting in the loss was a theft, burglary and larceny. The exclusion of coverage for such causes applies except in cases where burglaries damage a building.

"The facts are clear that there was no wilful or malicious damage to or destruction of the plaintiff's property. The terms of the policy are sufficiently plain and unambiguous that strict construction against the insurer is not applicable."

The defendant contends that the trial court's determination was proper because (1) the loss was not brought about as the result of vandalism or malicious mischief practiced against the property of the insured and therefore was not a "direct loss", (2) the "intent" of the "perpetrators" was never to damage the plaintiff's property, but solely to steal piping [***8] and fixtures from the third floor of the building (thus negating any claim of "vandalism" or "malicious mischief" as defined in the policy),

(3) the specific "cause" of the loss was neither vandalism nor malicious mischief, but a remote burglary and theft, and (4) the policy, as written, "excludes liability for [losses] caused by 'theft, burglary or larceny' with a single exception relating solely to 'damage to the *buildings covered hereunder* caused [*492] by burglars'" (defendant's emphasis). Since no claim for damage to the buildings has been made (the plaintiff is not the owner of the building, nor is the building covered under the subject policy), the defendant contends that there is *no* coverage for *any* of the losses sustained.

The plaintiff, of course, argues to the contrary, stating, in effect, that (1) the "cause" of the damage was the severance of the pipes and fixtures *prior* to their removal, (2) such severance constituted an act of vandalism or malicious mischief within the policy definition and (3) the flow of water engendered thereby resulted in a "direct" (as opposed to "consequential") "loss" to property insured under the policy. Moreover, the [***9] plaintiff contends, the theft of the pipes and fixtures after their severance would not trigger the so-called "exclusionary" clause (excluding losses through "pilferage, theft, burglary or larceny") since the acts of vandalism or malicious mischief occurred prior thereto. Finally, it is the plaintiff's contention that the exclusionary clause is unclear as written, and that any ambiguity must be resolved *against* the insurer and in favor of it.

There is no controlling New York precedent and the decisions of other States are not uniform in their approach. However, we are of the opinion that the sounder authorities point to a recovery by the plaintiff.

In *Beauty Supplies v Hanover Ins. Co.* (*526 SW2d 75, 76* [Mo.]), upon which the plaintiff chiefly relies, the intermediate appellate court in Missouri found coverage upon a state of facts strikingly similar to those here present:

"[Plaintiff] insured was a tenant occupying the ground floor of * * * [a warehouse] building located * * * in the City of St. Louis. The building in which [the] insured's property was located [**800] was not covered by * * * [the] policies [in dispute]. On [May 20, 1970] * * * unauthorized [***10] persons entered the vacant second floor of the building, which was not rented to or occupied by [the] insured, and stole plumbing fixtures therefrom by tearing them out of the walls and flooring of the second floor, breaking them loose from the connected water pipes, thereby permitting water to flow continuously over the floor of the second story, from whence the water leaked and came down though the ceiling of the first floor occupied by [the] insured, damaging [its] * * * goods, wares and merchandise in the sum of $ 14,388.90". The insured thereupon made claim against its insurer, which disclaimed coverage on the [*493] ground "that the loss was the direct and proximate result of the acts of thieves and burglars, and since the vandalism endorsement [of the plaintiff's 'contents' policy] *excludes* liability for [losses] caused by theft or burglary the loss is not covered [thereby]" *(supra, p 76*; emphasis supplied). The plaintiff was successful and, on appeal, the judgment in its favor was affirmed. The policy there in suit was identical (insofar as is here pertinent) with the policy at bar.

The court there wrote (pp 76-78):

"This is a question of proximate [***11] cause. While the means and method by which the unauthorized persons entered the building are not disclosed by the stipulation of facts, we assume there was a sufficient breaking to constitute a burglary. What happened, then, was (1) a burglary, (2) acts of vandalism, *Romanych v. Liverpool & London & Globe Ins. Co., 8 Misc 2d 269, 167 N.Y.S.2d 398, 402,* and (3) a theft. *In our view the loss was directly caused by acts of vandalism, a specifically covered risk, notwithstanding a peril expressly excluded* (burglary) *was an antecedent contributing circumstance, and another peril expressly excluded* (theft) *was an independent concurring cause.*

"*The burglary is not a factor in determining the proximate cause of the damage from water leakage.* 'An antecedent contributing circumstance is generally ignored in determining the proximate cause. That is to say, a situation which merely sets the stage for the later event is not regarded as being the proximate cause merely because it made possible the subsequent loss. For example, the explosion of gas, and not the lighting of a match, is the proximate cause of loss, where the explosion is caused by the lighting of a match [***12] in a room filled with gas. Likewise, the destruction of a plateglass window, shattered when gas exploded upon its ignition by a lighted match being used to locate a gas leak, is by explosion, and not by fire, within an exception in a policy insuring the window against loss by fire.' 18 Couch on Insurance 2d § 74:714, p. 618. * * *

"*Nor is the theft a controlling factor.* If the theft be considered as a concurring cause of the loss, it was not the predominating, efficient one. The stealing and carrying away of the plumbing fixtures, after their severance, did not cause the damage to the goods of the insured. To the extent that the taking was concomitant with the vandalism, that element of stealing was a concurrent cause of the loss, but ' * * * when [*494] there are two concurrent causes of a loss, the predominating, efficient one must be regarded as the proximate [cause], * * *' *Howard Ins. Co. v. Norwich & N. Y. Trans. Co., 12 Wall. 194, 20 L. Ed. 378 (1870).* * * *

* * *

"*We conclude that the burglary was an antecedent contributing circumstance but not a proximate cause; that the theft, while a concurrent cause, was not the predominating, efficient cause;* [***13] *that the proximate cause of the loss was the vandalism, a specifically insured risk.* Accordingly the judgment is affirmed (emphasis supplied).

[**801] In *Parnell v Rohrer Chevrolet Co. (95 NJ Super 471)*, the court held that the carrying-away by miscreants of parts "stripped" from an insured automobile did not change the essential character of their act from one of "vandalism" to "theft", and that the car's owner *could* recover under a policy of insurance insuring against "loss to an automobile caused by riot, civil commotion, malicious mischief *or vandalism" (supra, pp 479, 481*; emphasis supplied). Said the court (p 481):

"We are not here called upon to decide whether there would be liability under this policy if a spare tire were removed from the trunk of the car, or a cigar lighter from the dashboard. The issue here is whether, when a car is stripped by miscreants of practically every component which goes into its function as a self-propelled vehicle, many other portions of it damaged substantially, and the remnant left is a useless shell, the resulting condition of the chattel, for which the insured is liable in damages to the owner, is not still fairly to [***14] be deemed a covered loss by vandalism notwithstanding that after the stripping the vandals trucked some of the parts away. Our answer to this question must be in the affirmative within the fundamental precepts for construction of insurance policies cited above by which we must be guided.

"Had the removed parts of this car been strewn along the ground rather than carted off the insurance company would be without an argument. But in that state of facts the condition of the remnant of the car itself (before repair) would be no different in any regard from that in which it was actually here left * * *. The fact that the availability of the ripped-out parts would, as to the case supposed, lessen the cost of repair, is irrelevant to the issue of coverage. *As well stated by Judge Rizzi below, 'The finding of an act of vandalism is entirely consistent with a finding of a subsequent theft after the act of* [*495] *vandalism has been completed.'* If the insurer desires not to be liable in such circumstances, it must express its intent to that effect in the policy so plainly that it cannot be misunderstood" (emphasis supplied). However, it should be noted that, under the policy there [***15] in suit, there was no specific exclusion for losses resulting from theft, and that the argument of the insurer was simply that the existence of a provision obligating the company to pay losses arising from the "theft of the entire automobile" implied an intent "*not* to be liable under the vandalism clause for [losses] due to [the] thefts of parts" *(supra, p 479*; emphasis supplied).

In *Hatley v Truck Ins. Exch. (261 Ore 606*, rehearing den *261 Ore 606)*, recovery was permitted under a policy of property insurance which contained a vandalism and malicious mischief indorsement, but which excluded losses caused by surface water and water below the surface of the ground, where, during the night, unknown persons took a hose lying near the plaintiff's building, turned it on "full force" and placed it near the base of the building, at the bottom of a sloping area, thus causing considerable water damage therein. The court there stated (p 620): "Where the act of vandalism or malicious mischief consists of turning water against the building, and where there is water damage as a direct and immediate result of that act, the general policy exclusion for certain types of water damage [***16] does not apply".

Other cases holding to the same effect are *Allstate Ins. Co. v Coin-O-Mat (202 So 2d 598* [Fla.] [loss suffered when persons entered a laundromat owned by the insured and severely damaged 12 washing machines, held *not excepted* from policy covering direct loss to property through vandalism or malicious mischief despite clause excluding loss by theft or burglary *even though* it might have occurred during the course of an actual or attempted theft or burglary]); *Lanza Enterprises v Continental Ins. Co. (142 So 2d 580* [La.] [recovery permitted under a vandalism [**802] and malicious mischief indorsement where, over a week-end, unknown persons turned on a water faucet leading, by hose, to the fourth floor of a building under construction, thereby causing substantial water damage]); and *General Accident Fire & Life Assur. Corp. v Azar (103 Ga. App. 215* [damages resulting from leakage through plaintiff's roof held compensable under vandalism and malicious mischief indorsement, where damage to the roof itself was caused by children throwing rocks]. Cf. *United States Fid. & Guar.* [*496] *Co. v Bimco Iron & Metal Corp., 464 SW2d 353* [***17] [Tex.]; *State Auto. Mut. Ins. Co. v Trautwein, 414 SW2d 587* [Ky.], distinguishing *Frisbie v Fidelity Cas. Co., 133 Mo. App. 30* [recovery for the destruction of plate glass windows *denied*, where the policy in question excluded compensation for loss by fire, and the facts revealed that the insured's building was voluntarily "dynamited" to halt the spread of fire in block of row houses; the court stated that the "*causa causans*" of the loss was the fire itself, and that "the dynamiting of plaintiff's building was one of its natural and necessary results, not an independent, supervening cause"].)

There is, however, authority to the contrary (see *Pacific Ind. Co. v N.A., 120 Ga App 793*). In the *Pacific Ind.* case the court held that an insurer was *not* liable under a vandalism and malicious mischief indorsement where unknown individuals had cut or torn copper flash-

ing from the roof of the plaintiff's building, thus inflicting substantial property damage thereto. The court stated that the removal of such flashing (which had a considerable "scrap" value) constituted an act of "theft" on the part of the perpetrators, the losses from which were specifically [***18] excluded by policy language virtually identical to that at bar.

It is clear that the reasoning and conclusion in the *Pacific Indemity* case is diametrically opposed to that of the *Beauty Supplies* and *Parnell* cases *(supra)*, in both of which the prior act of "severance" was distinguished from the subsequent "carrying away" or theft.

In analyzing the cases seemingly supporting the plaintiff's position, we recognize that with the exception of the *Beauty Supplies* case *(supra)*, all of the other cited cases involved acts of vandalism or malicious mischief *directed against* the property of the insured *directly*, while in our case (as in the *Beauty Supplies* case) the purported acts of vandalism, etc., were *directed against* the property of another, although the property of the insured was ultimately damaged thereby.

Applying the foregoing considerations to the case at bar, it is apparent that the present plaintiff has three major obstacles to overcome in order to establish coverage as it is incumbent upon him to show (1) the occurrence of an act of vandalism or malicious mischief within the meaning of the policy, (2) proximate cause resulting in a "direct [***19] loss" to his property and (3) the inapplicability of the cited exclusionary clause (actually, the burden of proof on the issue of "exclusion" is on [*497] the insurer rather than upon the insured) (see *Sincoff v Liberty Mut. Fire Ins. Co., 11 NY2d 386, 390)*. We shall consider these elements *seriatim*.

Despite the protestations of the defendant to the contrary, it seems undeniably clear that there was an act of vandalism or malicious mischief committed, since the severing of the pipes and fixtures *prior* to their removal constituted a completed act of vandalism, etc., the essential character of which could not be changed by what was subsequently done with them -- their removal from the premises (see *Beauty Supplies v Hanover Ins. Co., 526 SW2d 75, supra; Parnell v Rohrer Chevrolet Co., 95 NJ Super 471, supra*; but contra, see *Pacific Ind. Co. v N.A., Inc., 120 Ga App 793, supra)*. The policy, in fact, recognizes as much, as it provides at paragraph 8, subdivision b, clause (2) of section III that "[this] Company *shall not* be liable for loss * * * by pilferage, theft, burglary or larceny, *except that* * * * [it] [**803] *shall* be liable [***20] for willful damage to the building(s) covered hereunder caused by burglars" (emphasis supplied). The foregoing is nothing if it is not a tacit recognition of the fact that burglars may, indeed, "vandalize" a building in the course of committing their misdeeds. The "sounder" view therefore seems to be that adopted in the *Beauty Supplies* and *Parnell* cases, which recognize the essential severability of the conduct involved.

Concluding, as we have, that the stipulated facts show the existence of "vandalism" or "malicious mischief", the more difficult question generated thereby is whether, in point of fact, the occurrence falls within the policy definition, as the latter restricts the meaning of "vandalism" and "malicious mischief" to include "only willful and malicious damage to or destruction of the property covered hereunder." The problem is posed by a substantial body of sister State law which holds, in effect, that the quoted language is limited to acts of destruction or intentional injury *directed against* the property of the insured (see, e.g., *Imperial Cas. & Ind. Co. of Omaha, Neb. v Terry, 451 SW2d 303, 305* [Tex.]; *Lanza Enterprises v Continental Ins. Co* [***21] *., 142 So 2d 580, 581, supra; Ducote v United States Fid. & Guar. Co., 241 La 677, 684-685*; *General Acc. Fire & Life Assur. Corp. v Azar, 103 Ga App 215, 219, supra; Rich v United Mut. Fire Ins. Co., 328 Mass 133, 135)*, a circumstance which would preclude a finding of coverage here since the acts of vandalism were not directed against the property of the insured.

[*498] However, there is a substantial body of case law to the contrary, standing broadly for the proposition that the policy provision in dispute denotes "the wilful injury or destruction of property from ill will toward its owner *or from mere wantonness*" (see *Romanych v Liverpool & London & Globe Ins. Co., 8 Misc 2d 269, 272* [emphasis supplied]; see, also, *Lamb v Cheney & Son, 227 NY 418, 422*; *De Marasse v Wolf, 140 NYS2d 235, 238*; *Livaditis v American Cas. Co. of Reading, Pa., 117 Ga App 297*; *Cruse v Government Employees Ins. Co., 391 SW2d 1, 4* [Mo.]; *Vort v Westbrook, 221 Ga. 39*; 5 Appleman, Insurance Law and Practice, § 3182.25, pp 588-589; cf. *Hatley v Truck Ins. Exch., 261 Ore 606, 615-616, supra)*. Thus, even were we unwilling to infer actual malice toward [***22] all those who might foreseeably be affected, including the plaintiff, from the act of severing the plumbing fixtures on the third floor and permitting the water to run unchecked, a finding of vandalism or malicious mischief within the policy definition could still be predicated on the existence of "wanton conduct", i.e. conduct (as here) "marked by or manifesting [a] heedless disregard of justice or of the rights * * * of others" (Webster's Third New International Dictionary [Unabridged ed., 1964], p 2575; accord *Livaditis v American Cas. Co. of Reading, Pa., supra*; 5 Appleman, Insurance Law and Practice, § 3182.25, pp 588-589; cf. *Penal Law, § 145.00 et seq.* [criminal mischief] and § 15.05, subd 3).

The first precondition being satisfied, it is submitted that the finding of "proximate" or "legal" cause is estab-

lished, for once the acts of the perpetrators are deemed to be covered by the policy language, it cannot reasonably be maintained that the damage which plaintiff suffered was (as the Trial Term held) "indirect" by reason of the stated "fact" that "[the] eventual damage to plaintiff's property depended not only on the initial act of destruction on the third [***23] floor, but upon the volume of the flow, the manner of construction of the building, the direction of the flow *and perhaps other intervening causes*" (emphasis supplied).

In our opinion, the enumerated factors do not constitute "intervening" or "supervening" causes, but rather the factual framework in which the loss occurred, and can no more be said to be "causally related" to the plaintiff's damage (in a legal sense) than may the injuries of an accident victim be said to be "causally related" to his age or [**804] the rigidity of his bones. Moreover, in the context of property insurance: "Where [*499] a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into the motion the chain of events producing the loss. An incidental peril outside the policy, contributing to the risk insured against, will not defeat [***24] recovery, nor may the insurer defend by showing that an earlier cause brought the loss within a peril insured against, where the insured peril was the last step prior to loss. In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk" (5 Appleman, Insurance Law and Practice, § 3083, pp 309-311, and cases cited therein; footnotes omitted).

Turning, finally, to the question of the exclusionary language incorporated into the policy, we hold that the insurer defendant has failed to sustain its burden of proving that the construction which it seeks to place on the policy is the only one which can "fairly be placed thereon" (see *Sincoff v Liberty Mut. Fire Ins. Co., 11 NY2d 386, 390, supra)*, for to read the policy as the insurer would have us do would be to exclude all losses resulting from "pilferage, theft, burglary or larceny", except for those damages willfully inflicted upon the building "by burglars" during the commission of their crime. The [***25] fallacy in such a construction becomes apparent under the facts of this case, as it means, in effect, that someone in the plaintiff's stead (a mere tenant with a "contents" policy) would never recover for vandalism or malicious mischief committed *inside* the premises, as one who enters unlawfully with such an intent would be a "burglar" (see Black's Law Dictionary [4th ed], p 247), thus rendering any loss sustained, a loss resulting from an excluded "burglary".

Clearly, the parties to the contract could never have intended such an absurd result, and a construction which requires it should not be adopted. There is, however, a method of construing the exclusionary language so as to effect a reasonable result, as it may be held that the clause was intended to exclude the *theft* of the insured's personal property [*500] from coverage, an act which is sometimes categorized as "vandalism", and at other times as "burglary" [1] (see, e.g., *Parnell v Rohrer Chevrolet Co., 95 NJ Super 471, supra* [where the insurer attempted to argue that the "stripping" of an automobile by vandals constituted an act of thievery rather than vandalism]; see, also, *United States Fid. &* [***26] *Guar. Co. v Bimco Iron & Metal Corp., 464 SW2d 353, supra* [identical language construed to exclude coverage for property *stolen* from a warehouse]; 5 Appleman, Insurance Law and Practice, § 3182.25, p 591 ["under a policy insuring against vandalism and malicious mischief but generally excluding theft losses, recovery may be had for such vandalism even though some of the property was stolen"]). As for the subsequent language specifically incorporating coverage for damage to the building committed by "burglars", this can perhaps best be explained as a recognition of the overbreadth of the preceding language, and of the essential severability of acts of antecedent vandalism and the theft. The specificity of this particular provision may simply be the result of the observed fact that during most acts of burglary, theft, etc., the only "vandalism" which would ordinarily occur would be to the building itself in the course of effecting an entry or escape (see, e.g., *United States Fid. & Guar. Co. v Bimco Iron & Metal* [**805] *Corp., supra; State Auto, Mut. Ins. Co. v Trautwein, 414 SW2d 587, supra)*. In any event, the least that can be said is that the exclusionary [***27] language is ambiguous, thus rendering the defendant-insurer liable (see *Sincoff v Liberty Mut. Fire Ins. Co., supra, p 390*, and the cases cited thereat.).

1 Insurance against such an occurrence may be purchased separately.

The decision of the First Department in *Halsey Drug Co. v American Mfrs. Mut. Ins. Co. (30 AD2d 946)* is not inconsistent herewith, as the court there merely held that a finding of "vandalism" under the clear language of a policy insuring against vandalism and malicious mischief could not be made in the absence of any "willful or malicious intent".

Accordingly, the judgment appealed from should be reversed and the case remanded to the Supreme Court for

the entry of a judgment in the plaintiff's favor, after an assessment of the damages sustained by it. [1]

2 The agreed stipulation of facts provides, in paragraph 21, that: "The issues of the amount of damage sustained by plaintiff as result of the aforesaid loss are excluded from this stipulation and are reserved for resolution after a judicial determination has been had of the issue of liability of the defendant for coverage under the aforesaid policy."

[***28] [*501] Judgment of the Supreme Court, Westchester County, entered February 25, 1976, reversed, on the law, with $ 50 costs and disbursements, and action remanded to Trial Term for an assessment of damages and the entry of an appropriate judgment, in accordance with the opinion of Mrs. Justice Shapiro herein.

1 of 100 DOCUMENTS

JOSEPH M. HAAS, ET AL., Plaintiffs - Appellees Versus AUDUBON INDEMNITY COMPANY, Defendant - Appellant

NUMBER 98-565

COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

98-565 (La.App. 3 Cir. 10/21/98); *722 So. 2d 1022*; *1998 La. App. LEXIS 2947*

October 21, 1998, Decided

PRIOR HISTORY: [**1] On appeal from the Ninth Judicial District Court [No. 178,955], for the Parish of Rapides, State of Louisiana; the Honorable B. C. Bennett, Judge Pro Tempore, presiding.

DISPOSITION: AFFIRMED.

JUDGES: BEFORE: THIBODEAUX, COOKS, and WOODARD, Judges.

OPINION BY: WOODARD

OPINION

[*1023] WOODARD, Judge.

This is an insurance coverage dispute. Joseph M. Haas and his family (Haas) are one-half owners of a large building in Alexandria, Louisiana. Audubon Indemnity Company (Audubon) insured their interest in the building. Unknown persons broke into the building and caused massive damage to its interior. Haas made demands for coverage under the policy for the losses. Audubon paid $ 149,101.00 but denied further payment, citing exclusions for theft and other provisions of the policy. Haas filed suit, recovering $ 174,448.00, less $ 3,784.00 for the salvage value of the stolen materials, plus penalties of ten percent of the claim and attorney's fees in the amount of $ 24,850.52. Audubon appeals. We affirm the judgment, increasing the attorney's fees award by $ 5,000.00 for this appeal and awarding $ 5,000.00 in penalties.

[**2] **FACTS**

On March 15, 1994, unknown persons broke into the Old Sears Building in Alexandria, Louisiana. It had been vacant since 1990. The intruders removed pipes and wires presumably for their salvage value. The next day, surrounding residents called the City of Alexandria, complaining that they had no water. City workers discovered that the main water valve had been shut-off. The water main was turned on and two days [*1024] later, residents reported that water was pouring out of the Old Sears Building. An investigation revealed the theft and massive damage to the interior of the building. The intruders removed the pipes while the water valve was shut-off, and when the water was turned back on, it flooded the building. The intruders did major damage to the walls, flooring, fixtures, and duct system of the building. After the flood, the floor had to be removed and replaced. The flooring contained asbestos which had been contained and was completely safe prior to the flooding. After the tiles were loosened by the water, they had to be treated as *asbestos containing materials* (ACM). This required techniques to be used which were considerably more expensive than techniques for removal [**3] of non-ACM materials.

Haas insured his one-half interest in the building with Audubon under a Building and Personal Property Coverage Form and paid Haas $ 149,101.00 for water damage but refused to pay other damages amounting to over $ 340,000.00. Haas demanded that Audubon pay for his one-half of the loss. Audubon refused to pay based on a clause in Haas' insurance policy which covered vandalism, but excluded theft. Audubon claimed that all the damage, except the water damage, was excluded from coverage by this theft exclusion. Further, Audubon refused to pay for the removal of the asbestos containing flooring based on an asbestos exclusion in Haas' Commercial General Liability Coverage Form.

Haas filed suit against Audubon, claiming that the building's damage should be covered as vandalism. Haas was willing to concede that the theft exception was applicable to his claim but only for the salvage value of the raw materials actually removed from the building, not the damage to the building itself. Audubon rejected that view, claiming that the only covered loss, other than wa-

ter damage, was damage to a door, presumably used by the thieves to enter and exit the building. However, since [**4] the damage to the door amounted to less than $ 400.00, this damage fell under Haas' $ 1,000.00 deductible and was not covered. The most contested issue of this trial was whether the damage to the building was the result of vandalism or theft.

Audubon was willing to pay for the cost of removing non-ACM flooring but contended that any additional cost was excluded under the asbestos exclusion of Haas' Commercial General Liability policy. Audubon's own witness admitted that, despite his initial decision to deny coverage based on the asbestos exclusion, he had later informed the lawyers that the asbestos exclusion did not apply to this case. Audubon's incorrect interpretation of the policy was part of the reason for the trial court's award of penalties and attorney's fees to Haas.

Audubon argued, in the alternative, that if the asbestos exclusion did not apply to the policy, the cost of the asbestos abatement should be limited to $ 10,000.00. It based this argument on a Pollutant clean-up and removal clause. At trial, it relied on the pollution exclusion to limit coverage to $ 10,000.00. Haas claimed that the "pollution exclusion" did not apply to the loss for two reasons. First, the [**5] asbestos was completely contained prior to the break-in and flood; therefore, the asbestos was not a pollutant. Second, asbestos abatement was required of the building not of "land or water." If either of these were correct, the "pollution exclusion" would not apply.

Before trial in June of 1997, the parties entered into an extensive stipulation. This agreement resolved all issues except Haas' allegation that Audubon acted in bad faith when it denied coverage for the damages and: (1) Whether or not Audubon could exclude coverage for the asbestos abatement based on either the asbestos exclusion or the pollution exclusion; (2) Whether or not Audubon was responsible for the damage to the building as a result of theft; and (3) Whether or not Audubon was responsible for the architectural engineering design fee.

A bench trial was held on July 15, 1997 in Alexandria, Louisiana. At the trial, both sides made arguments concerning the definitions of theft and vandalism. The trial court considered the stipulation which stated, "While removing the materials the unknown persons caused property damage to the building's walls, systems and fixtures." This [*1025] does not mean that all the damage was done [**6] for the purpose of removing the materials, only that the removal and the damage happened at the same time. The trial court commented that there was no way to determine what damage had occurred in furtherance of the theft and what damage had been the result of pure vandalism. Based on the extensive destruction of fixtures and the spreading of debris throughout the building, the trial court believed that at least some damage must have been the result of vandalism. Vandalism does not by definition exclude the taking of property, but it does require more than the taking of property. The policy definition of vandalism requires the "willful and malicious destruction of property." The trial court saw this as an ambiguity in the policy which must be construed against the insurer. Accordingly, Audubon was ordered to pay $ 174,448.00, the cost of one-half the damage to the building less $ 3,784.00 for the salvage value of the stolen materials.

The trial court refused to apply the asbestos exclusion to the asbestos abatement because the asbestos was not a "pollutant" that must be extracted from the land or water. It was wholly contained in the building. Therefore, Audubon could not claim the [**7] limitation of $ 10,000.00 under the "pollution exclusion." The exclusion also applied to the "enforcement of any ordinance or law: (1) regulating the construction, use or repair of any property; or (2) requiring the tearing down or repair of any property including the cost of removing debris." Audubon was willing to pay for the removal of the debris but not the disposal of it. The disposal costs were considerable because the debris consisted of asbestos containing materials.

Although Haas argued that since he voluntarily complied with asbestos disposal regulations, there was never any "enforcement," the trial court said this was irrelevant. Even assuming that enforcement includes compliance, Audubon must pay for the removal and the disposal of the debris because the debris was a result of vandalism. Since the debris was the result of vandalism, not the result of construction and repair, this exclusion provision was not applicable to this claim.

Also, Haas claimed coverage for an architectural engineering fee in the amount of $ 74,000.00. This was a detailed set of plans for the repairs to the building. Haas claimed the plans were vital for an accurate bid on the needed repairs. Audubon [**8] denied this expense, arguing that all repair bids had been submitted prior to the architectural engineering design. Haas did not introduce any evidence to prove that this fee was part of the loss. The trial court refused to order Audubon to pay for it.

Audubon appealed the trial court's order that it pay Haas the $ 174,448.00, less $ 3,784.00 for the salvage value of the stolen materials, for damage to the Old Sears Building, as well as the award of penalties of ten percent of the claim and attorney's fees of $ 24,850.52. Haas answers the appeal, seeking penalties under *La.R.S. 22:1220* and an increase in attorney's fees for the work in this appeal.

ASSIGNMENTS OF ERROR

Audubon alleges that the trial court erred in:

1. Its interpretation of the insurance policy, which resulted in a failure to apply a policy exclusion for damages which were "caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars."

2. Holding that the defendant failed to prove that all of the damages at issue were the result of theft and that some theft-related damages could still be covered under the vandalism provision.

3. Holding that the [**9] cost of the removal of asbestos is covered where a coverage exclusion specifically provides that the removal of debris or tearing down of property will not be covered when done pursuant to the enforcement of any ordinance or law.

4. Holding that the plaintiff was entitled to penalties and attorney's fees where Audubon's interpretation of its policy was, if not correct, reasonable.

5. Taxing as costs of court expenses incurred by "numerous architects, engineers, and an asbestos specialist" who [*1026] did not testify at trial, either live or by deposition.

Haas answered the appeal. He contends that:

1. The trial court erred in failing to award a $ 5,000.00 penalty under *La.R.S. 22:1220.*

2. Appellees are entitled to an increased award of attorney's fees for defending this appeal.

LAW

THE INSURANCE CONTRACT INTERPRETATION QUESTIONS

As the first three assignments of error concern interpretation of the insurance contract, they will be discussed in this portion of the opinion. In *Dubois v. Parish Gov't Risk Management Agency-Group Health,* 95-546 (La.App. 3 Cir. 1/24/96); *670 So. 2d 258, 260,* we stated the law to be applied to the issues in this case. We said:

It is well [**10] settled that an insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts as set forth in the Civil Code. *Crabtree v. State Farm Insurance Co.,* 93-509 (La. 2/28/94); *632 So. 2d 736.* Interpretation of a contract is the determination of the common intent of the parties. *La.Civ.Code art. 2045.* If the words of an insurance policy are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the party's intent and the agreement must be enforced as written. *See La.Civ.Code art. 2046.* The policy should be construed as a whole and one portion thereof should not be construed separately at the expense of disregarding another. *See La.Civ.Code art. 2050.* A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties. *La.Civ.Code art. 2053.*

Regarding the interpretation of an exclusion in an insurance policy, the Louisiana Supreme Court stated in *Garcia v. St. Bernard Parish School Board,* [**11] *576 So. 2d 975, 976 (La.1991):*

Exclusionary provisions in insurance contracts are strictly construed against the insurer, and any ambiguity is construed in favor of the insured. *Capital Bank & Trust Co. v. Equitable Life Assurance Society, 542 So. 2d 494 (La.1989); Albritton v. Fireman's Fund Insurance Co., 224 La. 522, 70 So. 2d 111 (1953).* Equivocal provisions seeking to narrow the insurer's obligation are strictly construed against the insurer, since these are prepared by the insurer and the insured has no voice in the preparation. 13 J. Appleman, *Insurance Law and Practice* § 7427 (rev. ed. 1976). If the language of the exclusion is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. *Carney v. American Fire & Indemnity Co., 371 So. 2d 815 (La.1979);* W. McKenzie & H. Johnson, 15 Louisiana Civil Law Treatise, *Insurance Law and Practice* § 4 (1986). The judicial responsibility in the interpretation of an insurance policy is the determination of the common intent of the parties. W. McKenzie & H. Johnson, *supra.*

Additionally, the burden is on the insurer to prove the applicability of an exclusionary [**12] clause in a policy of insurance. *Landry v. Louisiana Hospital Service, Inc., 449 So. 2d 584 (La.App. 1 Cir.1984).*

With these principles firmly in mind, we now address the insurance contract interpretation questions in this case.

Vandalism or Theft?

The language of the insurance policy for this issue stated:

A. COVERED CAUSES OF LOSS

. . . .

8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

We will not pay for loss or damage:

. . . .

b. *Caused by or resulting from theft,* except for building damage caused by the breaking in or exiting of burglars.

(Emphasis added.)

Audubon contends that the exclusionary language relating to theft is applicable to all [*1027] of the damages claimed by Haas except for damage to the building caused by the burglars when "breaking in" or "exiting;" that all the damages to the building were theft related and, therefore, subject to the theft exclusion, except for the limited coverage specifically provided.

The trial court opined:

Does this mean [with reference to the theft provision of the policy]:

The Insurer will not pay for the value of items removed from the building [**13] by theft, although these items may be part of the building? The Insurer reiterates that it will pay for building damage caused by breaking and entering (which may or may not constitute vandalism)?

Does this mean that the Company will not pay for damage other than breaking and entering caused in furtherance of or in the course of the commitment of theft?

What of vandalism and the willful and malicious damaging of property which was unnecessary for the commission of the theft?

. . . .

But another question:

What part of the damage was caused in the course of perpetration of a theft, and what part was pure vandalism?

In view of extensiveness of the utter destruction of fixtures and spreading of debris in the building, there must necessarily have been pure vandalism either by the persons who perpetrated the theft and/or some other persons. There is nothing in the record on which to base a finding that the entire damage inside the building was caused in furtherance of theft. The destruction may well have been caused by the thieves but not all would have been in the furtherance of the theft unless that is specifically proved. Some damages may have been caused prior to the theft. . . . [**14] It is certainly possible that there were entries by the same persons on more than one occasion, although the removal of water pipes was planned because the water main had been cut off and it was only after the water was turned on that the asbestos problem arose.

. . . .

There is no question of coverage should the removed materials have been simply pulled out and left in the building. The basic definition of theft requires asportation, that is the taking of the thing into possession by the thief.

Vandalism coverage in this policy is the rule. The incidence of the theft does not diminish the acts of vandalism in this case. The theft damage is a narrow exception to the vandalism coverage. It is not an independent exclusion. The trial court correctly held that the theft exception does not exclude vandalism damage caused prior to or concurrently with a theft. The trial court correctly found that, in view of the utter destruction done to the building, the acts should be considered vandalism. The record establishes sufficient circumstantial evidence to infer the required degree of malice for the destruction to meet the definition of vandalism in the policy. *See Lanza Enters., Inc.* [**15] *v. Continental Ins. Co., 142 So. 2d 580 (La.App. 3 Cir. 1962).* This finding of fact is not manifestly erroneous.

The trial court recognized the patent ambiguity of the theft exclusion. Specifically, did it mean all damages to the building relating to the theft are subject to the exclusion, or did it mean that just the value of the materials carried away from the building shall be excluded? It correctly interpreted the policy in favor of coverage, excluding the replacement costs of the stolen materials from the judgment. The trial court strictly construed the theft exception. *See generally, Sterling v. Audubon Ins. Co., 452 So. 2d 709* (La.App. 3 Cir.), *writ denied, 456 So. 2d 169 (La.1984).* The burden of proof was on Audubon to prove its entitlement to greater benefit of the theft exclusion than granted by the trial court. *Dubois, 670 So. 2d 258.* This it failed to do.

The trial court did not err on this issue. Audubon's assignment of error is without merit.

WERE All Damages the Result of Theft?

Audubon contends that all the damages were the result of theft, including the stolen piping which was encased in asbestos. It [*1028] contends that only because of the [**16] theft of the piping was the asbestos rendered a hazard and that there was no vandalism, which was covered by the policy, for vandalism's sake.

As discussed in the above assignment, the trial court found that the degree of destruction to the building was indicative of vandalism. After reviewing the record, this factual finding is not manifestly erroneous, and will not be disturbed on appeal.

This argument of Audubon is without merit.

Removal of Asbestos

The relevant language of the exclusion is as follows:

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence of loss.

a. Ordinance or law.

The *enforcement of any ordinance or law:*

(1) Regulating the construction, use or repair of any property; or

(2) Requiring the tearing down of any property, including the cost of removing its debris.

(Emphasis added.)

First, Audubon contends that this element of damage arises solely from theft-related activities and therefore is subject to that exclusion. For the reasons discussed above, [**17] this contention is without merit. Second, it maintains that, pursuant to the "ordinance or law" exclusion, it is not liable for the increased costs of abatement of asbestos in the flooring which was required by the United States Environmental Protection Agency regulations concerning asbestos.

The trial court opined:

The flooding caused extensive damage to the building. Coverage of part of these damages is not contested. A substantial part to the damage, however, is contested. When the flooding occurred, asbestos floor tile and asbestos from the interior of the building walls was soaked. It became necessary to "abate" the asbestos. This required the following regulations of the United State Environmental Protection Agency. There was no move by the EPA to enforce its regulations. The regulations were voluntarily complied with making enforcement proceedings unnecessary.

. . . .

ASBESTOS ABATEMENT.

There is very little jurisprudence in Louisiana which would assist us on this question.

. . . .

B. Enforcement of an Ordinance or Law.

The exclusion in the policy relates "the enforcement of any ordinance or law: (1) regulating the construction, use or repair of any property or (2) [**18] requiring the tearing down or repair of any property including the cost of removing debris."

Assuming that "enforcement" includes "compliance," this provision is subject to careful interpretation.

The abatement of asbestos is in no way synonymous with "construction, use or repair." This is removal of debris as a result of pure vandalism.

The phrase "tearing down or repair of any property including the cost of removing debris" is subject to interpretation by the rule of ejusdem generis. The part of that phrase "including cost of removing debris" is limited by and is defined by the terms "construction and repair." It must be read as "the removal of debris in the course of construction and repair."

CFR Sec 61.141 et seq sets standards for the disposal of such products as asbestos. The enforcement of these regulations which have the force of law takes many forms, some of which apply after the fact. Let us assume a simple fact. Suppose the material, instead of being asbestos, was broken masonry and other debris? It could not have been disposed of by dumping in the street or in public places. There are specific ordinances against such action, and relegating the matter to specific [**19] disposal areas and must be disposed of in compliance with the laws and ordinances of [*1029] the locality. The fact that the disposal of "abatement" of asbestos is apparently considerably more expensive does not exclude this expense from coverage of the policy.

P [sic] The supervisor, Mr. Bizette, testified that the company would pay for the removal but not the abatement of asbestos. The removal of debris certainly includes disposing of it.

Compliance is not enforcement.

"Insurance policies are liberally construed in favor of coverage, and exceptions to coverage are strictly construed against the insurer." *Capital Bank & Trust Co. v. Equitable Life, 542 So. 2d 494, 496 (La.1989). La.Civ.Code art. 2056.* The burden was on Audubon to prove its entitlement to this exclusion. *Dubois, 670 So. 2d 258.* As the trial court correctly found, it was the vandalism that caused damage to the Haas' building, not the enforcement of any ordinance or law. The costs of asbestos abatement were necessary because of the flooding which arose out of the vandalism to the building. The trial court correctly held Audubon responsible for these costs.

This assignment of error is without merit.

PENALTIES [**20] AND ATTORNEY'S FEES

Audubon contends that its interpretation of the insurance policy was reasonable, and therefore, not arbitrary and capricious as to require the imposition of penalties and attorney's fees and that because the issues in the

case *sub judice* are *res nova* in Louisiana, it should not have been assessed penalties and attorney's fees.

Concerning penalties and attorneys fees the trial court opined:

The decision to deny the claims under this policy was made at the supervisory level of the Insurer's adjustment system. This decision was arbitrary and capricious. The defendant is entitled to a penalty of 10% of the amount of the claim and attorneys fees which are fixed at $ 24,850.52.

The trial court's decision regarding the award of penalties and attorneys' fees under *La.R.S. 22:658* is partly a factual determination. It will not be disturbed unless manifestly erroneous. *Stewart v. La. Farm Bureau Mut. Ins. Co., 420 So. 2d 1217 (La.App. 3 Cir. 1982)*; *Holland v. Golden Rule Ins. Co.*, 96-264 (La.App.3 Cir. 10/9/96); *688 So. 2d 1186*. In the instant case, Audubon made erroneous interpretations of its policy. Even assuming that the issues were *res nova*, it [**21] is abundantly clear to any impartial reader of the vandalism provisions of the policy that the theft exclusion was patently ambiguous. Given that it is well known within the insurance industry that ambiguities in insurance policies will be construed against the drafter of the contract and since Audubon drafted the contract, it certainly had constructive knowledge that Haas was entitled to coverage for the damages to the building. Yet, it denied same and put Haas through the expense and unnecessary delays of a lawsuit to enforce the contract. Concerning the asbestos claim, Audubon's attempt to defend itself based upon an exclusion not applicable is likewise additional evidence of bad faith.

Audubon knowingly took the risk of misinterpreting its policy. *Holland, 688 So. 2d 1186*; *Sanders v. Home Indem. Ins. Co., 594 So. 2d 1345* (La.App. 3 Cir.), *writ denied, 598 So. 2d 377 (La.1992)*. A *possible* interpretation does not equate to a *reasonable* interpretation as the law requires. In this circumstance, the trial court was correct in finding that Audubon was sufficiently arbitrary and capricious in adjusting this claim to warrant the award of penalties and attorney's fees [**22] to Haas. This assignment of error is without merit.

EXPERT COSTS

It is unnecessary to address this issue in this opinion as it is the subject of a separate published opinion. *See Haas v. Audubon Indem. Co., 98-566 (La.App. 3 Cir. 10/21/98) 722 So. 2d 1020.*

PENALTIES PURSUANT TO *LA.R.S. 22:1220*

In his petition, Haas requested penalties under *La.R.S. 22:1220* and *22:658*. The trial court awarded penalties for arbitrary and capricious handling of the claims under *La.R.S. 22:658* but did not award penalties under *La.R.S. 22:1220*. Haas answered the appeal, seeking penalties under *La.R.S. 22:1220*.

[*1030] It is clear from the record that Audubon's actions were in violation of *La.R.S. 22:1220(B)(1)* by "misrepresenting . . . [the] insurance policy provisions relating to the coverages at issue" for the reasons discussed above. But, the record does not disclose any proof of actual damages caused by Audubon's actions in breaching *La.R.S. 22:1220*. However, we have held that proof of actual damages is not required for a court to award a claimant up to $ 5,000.00 in penalties pursuant to *La.R.S. 22:1220(C)* for an insurance company's breach of its duty of good faith and fair dealing [**23] in violation of *La.R.S. 22:1220*(A and B). *Hall v. State Farm Mut. Auto. Ins. Co.*, 94-867 (La.App. 3 Cir. 5/31/95); *658 So. 2d 204*; *Midland Risk Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 93-1611 (La.App. 3 Cir. 9/21/94); *643 So. 2d 242*. See also *Robichaux v. Jackson Nat'l Life Ins. Co., 821 F. Supp. 429 (E.D. La. 1993), affirmed, 20 F.3d 1169 (5th Cir. 1994)*.

Accordingly, we award Haas $ 5,000.00 in penalties for Audubon's violation of *La.R.S. 22:1220*.

INCREASED ATTORNEY'S FEES

As the trial court properly awarded attorney's fees, Haas would be entitled to an increased award of attorney's fees "when the defendant appeals and obtains no relief and when the appeal has necessitated additional work on the part of plaintiff's counsel, provided that plaintiff has requested the increase in accordance with the proper appellate procedure." *Carbon v. Allstate Ins. Co.*, 96-2109 (La.App. 1 Cir 9/23/97); *701 So. 2d 462, 474, writ granted*, 97-3085 (La. 3/27/98); *716 So. 2d 365*.

Haas properly requested an increase in attorney's fees in a timely answer to the appeal. Considering the complexity of this case and its extensive brief, we award an increase in attorney's [**24] fees to Haas in the amount of $ 5,000.00 for this appeal.

CONCLUSION

The trial court did not err in finding the theft exclusions and the enforcement of any ordinance or law exclusion of the insurance contract inapplicable to the damages sustained to the building in which Haas owned a one-half interest. The trial court's decision is affirmed. We modify the judgment to award Haas increased attorney's fees of $ 5,000.00 for this appeal. Haas' claim for penalties under *La.R.S. 22:1220* is granted in the amount of $ 5,000.00. Audubon is cast for all costs of this appeal.

AFFIRMED.

1 of 100 DOCUMENTS

JOHN PARNELL, PLAINTIFF - RESPONDENT, v. ROHRER CHEVROLET CO., INC., DEFENDANT AND THIRD-PARTY PLAINTIFF-RESPONDENT, v. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP., LTD., THIRD-PARTY DEFENDANT-APPELLANT

[NO NUMBER IN ORIGINAL]

Superior Court of New Jersey, Appellate Division

95 N.J. Super. 471; 231 A.2d 824; 1967 N.J. Super. LEXIS 570

May 1, 1967, Argued
June 29, 1967, Decided

COUNSEL: [***1] *Mr. James A. Mullen, Jr.* argued the cause for third-party defendant-appellant (*Messrs. Kisselman, Devine, Delghan & Montano*, attorneys).

Mr. James J. Casby, Jr. argued the cause for defendant and third-party plaintiff-cross-appellant.

Mr. Paul R. Melletz argued the cause for plaintiff-respondent (*Mr. Albert J. Klein*, attorney).

JUDGES: Conford, Foley and Leonard. The opinion of the court was delivered by Conford, S.J.A.D.

OPINION BY: CONFORD

OPINION

[*476] [**826] This action was instituted by the owner of an automobile to recover damages for its being stripped of its most essential parts while in the custody of defendant automobile agency. The latter, which had had possession of the vehicle while repairing it for plaintiff, brought a third-party claim against the third-party defendant insurance company on a liability policy which it deemed to cover it for liability on plaintiff's claim. Judge Rizzi, sitting in the county district court without a jury, found for [**827] plaintiff against the automobile agency ("Rohrer," *post*), and also for the latter against the insurance company ("General Accident," *post*). Rohrer appeals the determination in [***2] favor of plaintiff; General Accident, that in favor of Rohrer on the third party claim.

The statement of evidence certified by the trial court shows the following.

Plaintiff had purchased a 1962 Chevrolet automobile in September 1964 for $ 1,995. On October 9, 1964 he left it with Rohrer for repairs, and a "valve job" was performed on it at a charge of $ 134.88. Plaintiff was notified October 14 that the car was ready but he did not call for it because he did not have the funds to pay the bill and Rohrer refused to deliver the car without payment.

Plaintiff did not come to pay for and pick up the vehicle until November 9, 1964. In the meantime, it was kept in a large cyclone-fenced enclosure behind the Rohrer building which was apparently locked at night. When plaintiff called on that date for the car he was told that it had been "stripped." It appeared that a hole had been cut in the fence sometime during the previous three days (including a weekend) and that several cars had been stripped. Removed from plaintiff's automobile were four wheels and tires, the rear axle and rear end, the battery, transmission, carburetor, radiator and manifold distributor valve cover. A stipulated [***3] repair bill for labor and parts to rehabilitate the vehicle was $ 1,662.84. The bill shows that a great many other portions [*477] and parts of the car in addition to the major parts removed were damaged in varying degrees and required repair or replacement. There was evidence that the parts removed had been dragged through the fence hole and carted away by the miscreants.

Further reference to the material facts is reserved for the discussion of the legal issues involved.

I

The action against Rohrer is predicated on its asserted negligence as a bailee in safekeeping plaintiff's car. The degree of care owing by a bailee depends on the nature of the bailment. If, as here found by the trial court, the bailment is one for the mutual benefit of bailor and bailee, the duty is to exercise reasonable care for the safekeeping of the chattel bailed. *Rodgers v. Reid Oldsmobile, Inc., 58 N.J. Super. 375, 380 (App. Div.*

1959). As to the lesser duty of a gratuitous bailee, see *Nelson v. Fruehauf Trailer Co., 20 N.J. Super. 198 (App. Div.* 1952), affirmed on other grounds *11 N.J. 413 (1953).*

Rohrer contends it was merely a gratuitous bailee at the time [***4] of the loss because a reasonable time after completion of the repairs had elapsed without retaking of the car and thereafter the bailment was only for the benefit of the bailor. We disagree. The bailment was still one for mutual benefit since Rohrer had the security interest in the car of a garagekeeper's lien for the amount due it. *N.J.S. 2A:44-21.* The case of *Robinson v. Southern Cotton Oil Co., 108 S.C. 92, 93 S.E. 395 (Sup. Ct.* 1917), does not support Rohrer's argument that once a reasonable time for the bailor to pick up the chattel has expired the duty of the bailee changes to that of a gratuitous bailee regardless of any other circumstances. On the special facts of this case Rohrer retained sufficient interest in the property to continue the character of the bailment as one for mutual benefit until the loss. Moreover, lienors in possession are generally under [*478] a duty of reasonable care. *Cf. Zanzonico v. Zanzonico, 2 N.J. 309, 316 (1949).*

We find sufficient in the proofs to justify the trial court finding of negligence by Rohrer notwithstanding that the burden of persuasion on the issue remained with plaintiff throughout the case. [***5] See *Rodgers v. Reid Oldsmobile, Inc., supra, 58 N.J. Super., at p. 380.* [**828] In this regard the court referred to evidence that the storage enclosure was completely dark at night, there was no watchman during the period when the depredation occurred although Rohrer had had a watchman previously, and no burglar alarm or other system for protection of the property was maintained. Nor do we think Rohrer was prejudiced in the court's formulation of the basis for its conclusion in terms of the failure of defendant to "overcome the presumption of negligence which existed in favor of plaintiff."

It is true that the bailee has only the burden of coming forward to meet the "procedural presumption" of negligence which arises upon the plaintiff's showing of the bailment and that the goods were damaged while in possession of the bailee, the bailor retaining the ultimate burden of persuasion on the issue of negligence. *Rodgers v. Reid Oldsmobile, Inc., supra, at p. 380.* But we are satisfied the court's finding of negligence was based on a weighing of the proofs and that it did not accord the presumption any artificial probative weight.

Finally, we agree with the [***6] court that plaintiff could not reasonably be accounted contributorily negligent by mere reason of his financial inability to reclaim his car sooner.

We affirm the determination of Rohrer's liability to plaintiff.

II

General Accident contends that the terms of the policy did not on the facts shown justify a determination of coverage of Rohrer's liability to plaintiff.

[*479] The insurer undertook to "pay on behalf of the insured [Rohrer] all sums which the insured shall become legally obligated to pay as damages because of:

"* * *

THEFT, loss to an automobile caused by theft of the entire automobile;

RIOT AND VANDALISM. loss to an automobile caused by riot, civil commotion, malicious mischief or vandalism."

Rohrer argues that its liability to plaintiff arose from acts of vandalism within the policy coverage; alternatively, that the extent of the damage to the car fairly connotes theft of the entire automobile. General Accident contends that the loss here was basically the result of theft; and that the express coverage of "theft of the entire automobile" implies the intent of the company not to be liable under the vandalism clause for loss due to thefts [***7] of parts of an automobile, as here.

We first consider whether the vandalism clause justifies the claim of coverage, considered independently of the effect of the theft clause. General Accident's brief practically concedes that without the theft clause coverage could be founded on the assertedly "ambiguous" vandalism clause. Without regard to the concession, we are of the view that in the average layman's understanding despoliation of a motor vehicle such as here occurred is vandalism. No one argues that this policy should be construed in terms of the restricted classical concept of vandalism as "Willful or ignorant destruction of artistic or literary treasures; hostility to or contempt for what is beautiful or venerable." *Black's Law Dictionary (4th ed.* 1951), *p.* 1722. The subject of vandalism in its modern, common acceptation can be any type of property. The pinpoint question posed is whether, if the destruction be gross and deliberate, as here, the executed intent of the spoiler to steal affects the fair signification of the term as it would be understood by the average purchaser of insurance. We think not.

[*480] Insurance policies should be interpreted [***8] in a manner which would conform to the understanding of the general public which purchases them. *Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 488*

(1961). And doubts are to be [**829] resolved in favor of the insured. *Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 513 (1965)*. These precepts impel the view that vandalism done in order to perpetrate theft is nonetheless vandalism within such a policy as this.

Two modern cases have defined vandalism as "any unusual destruction wrought in the doing of a wrongful act." *Great American Ins. Co. v. Dedmon, 260 Ala. 330, 70 So. 2d 421, 423, 43 A.L.R.2d 599 (Sup. Ct.* 1953); *Unkelsbee v. Homestead Fire Ins. Co., 41 A.2d 168, 170 (D.C. Mun. Ct. App.* 1945). Without necessarily subscribing to the points decided in those cases, we regard the definition as substantially comporting with the general present-day understanding of the term "vandalism." Rohrer has marshalled an impressive array of current news reports wherein despoliation of property is commonly referred to as vandalism in the context of thievery of portions of the despoiled property (*e.g.*, light bulbs taken [***9] from outdoor Christmas display; coin boxes ripped from pay telephones; taking of plumbing valves from fixtures in school building). The common concept thus illustrated is that while the items taken have been stolen, the property or article as a whole has been vandalized by the damaging stripping antecedent to the theft.

We therefore conclude that the plaintiff's car was, in common parlance, vandalized; thus the loss for which Rohrer was held liable to plaintiff was due to vandalism.

We are then brought to the question whether the "theft" clause of the policy warrantably generates the inference of exclusion of coverage, the loss being argued to be attributable to theft of *parts of the car* rather than "theft of the *entire* automobile." At the outset, it is clear that there is no express exclusion in the policy, and the rule is that even express exclusion clauses are construed strictly against [*481] the insurer. *Ohio Cas. Ins. Co. v. Flanagin, supra, 44 N.J., at p. 514. A fortiori* as to asserted implied exclusions.

The argument of the insurer must be weighed against the precise set of facts presented. We are not here called upon to decide whether [***10] there would be liability under this policy if a spare tire were removed from the trunk of the car, or a cigar lighter from the dashboard. The issue here is whether, when a car is stripped by miscreants of practically every component which goes into its function as a self-propelled vehicle, many other portions of it damaged substantially, and the remnant left a useless shell, the resulting condition of the chattel, for which the insured is liable in damages to the owner, is not still fairly to be deemed a covered loss by vandalism notwithstanding that after the stripping the vandals trucked some of the parts away. Our answer to this question must be in the affirmative within the fundamental precepts for construction of insurance policies cited above by which we must be guided.

Had the removed parts of this car been strewn along the ground rather than carted off the insurance company would be without an argument. But in that state of facts the condition of the remnant of the car itself (before repair) would be no different in any regard from that in which it was actually here left. In either case, the car is properly to be regarded as vandalized and coverage therefor not refuted [***11] by the fact that the policy also covers theft of the entire automobile. The fact that the availability of the ripped-out parts would, as to the case supposed, lessen the cost of repair, is irrelevant to the issue of coverage. As well stated by Judge Rizzi below, "The finding of an act of vandalism is entirely consistent with a finding of a subsequent theft after the act of vandalism has been completed." If the insurer desires not to be liable in such circumstances, it must express its intent to that effect in the policy so plainly that it cannot be misunderstood. This it has not here done.

[**830] In view of the foregoing conclusions, we need not consider Rohrer's alternative contention that where the damage to [*482] the car by the thieves is so thoroughgoing that the cost of repair is practically equal to its resale value, the loss may fairly be regarded as one consisting of "theft of the entire automobile" within that coverage clause of the policy.

Judgment affirmed as to all parties.

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ROBERT PRYOR et al., Plaintiffs and Appellants, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant and Respondent

Civ. No. 3096

Court of Appeal of California, Fifth Appellate District

74 Cal. App. 3d 183; 141 Cal. Rptr. 394; 1977 Cal. App. LEXIS 1906

October 19, 1977

SUBSEQUENT HISTORY: [***1] Appellants' petition for a hearing by the Supreme Court was denied December 15, 1977.

PRIOR HISTORY: Superior Court of Madera County, No. 20239, Matt Goldstein, Judge. *

* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

DISPOSITION: That part of the judgment fixing appellant's damages only in the sum of $ 46.20 is reversed with directions to the trial court, on the basis of evidence previously presented and such additional evidence as either side may wish to present, to redetermine damages for the labor costs incurred in reinstallation, in addition to the $ 46.20, in conformity with the views expressed herein. In all other respects the judgment is affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action by an insured against its insurer under a standard fire insurance policy with extended coverage for vandalism and malicious mischief, the trial court awarded a small amount of damages for wilful damage by burglars to three homes covered by the insurance, but denied recovery for appliances, carpeting, light fixtures and mirrors removed by the burglars. The insurance contract provided that the insurer was not liable for loss by pilferage, theft, burglary or larceny except for wilful damage to the buildings caused by burglars. The trial court had held that removal of the items came clearly within the definition of pilferage, theft, burglary and larceny, and was not recoverable under the policy. The court also did not allow recovery for labor costs incurred in reinstalling new items. (Superior Court of Madera County, No. 20239, Matt Goldstein, Judge. *)

* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

The trial court reversed that portion of the judgment awarding damages only for wilful damage by the burglars with directions to the trial court to redetermine damages for the labor costs incurred in installation of replacement items, in addition to the award for wilful damage by the burglars, and in all other respects the judgment was affirmed. The court held that the taking of built-in appliances and carpeting from the homes clearly constituted theft under the terms of the policy, and thus plaintiff could not recover under the policy for loss of those items. However, the court held that plaintiff could recover for the wilful damage caused by the burglars in removing the goods from the houses and for the labor costs incurred in installation of replacement items. (Opinion by Hopper, J., with Gargano, Acting P. J., and Hanson, J., + concurring.)

+ Assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1a) (1b) Insurance Contracts and Coverage § 65--Fire and Other Casualty Insurance--Risks and Causes of Loss--Extended Coverage for Vandalism and Malicious Mischief. --An insured could not recover under a standard fire insurance policy with extended coverage for vandalism and malicious mischief for major

built-in appliances, carpeting, light fixtures and mirrors removed from three houses by burglars, where the insurance contract clearly and unambiguously stated that the insurer was not liable for loss by pilferage, theft, burglary or larceny except for wilful damage to the buildings caused by the burglars.

(2) Malicious Mischief § 2--Definitions and Distinctions. --Vandalism and malicious mischief are usually defined as wilful and malicious damage to, or destruction of, property. Historically, the words malicious mischief were added because a dictionary definition often limited vandalism to the wilful destruction of a thing of beauty.

(3) Insurance Contracts and Coverage § 45--Coverage of Contracts--Risks and Exclusions--Coverage of Property for Vandalism and Malicious Mischief. --Under a fire insurance policy with extended coverage for vandalism and malicious mischief, the insured was entitled to recover damages to several houses caused by burglars in removing goods from the houses and to recover the labor costs incurred in installation of replacement items, where the insurance contract provided that the insurer was liable for wilful damage to the buildings caused by burglars.

COUNSEL: Eugene L. Adams for Plaintiffs and Appellants.

Stutsman & Nagel and John T. Nagel for Defendant and Respondent.

JUDGES: Opinion by Hopper, J., with Gargano, Acting P. J., and Hanson, J., + concurring.

+ Assigned by the Chairperson of the Judicial Council.

OPINION BY: HOPPER

OPINION

[*185] [**395] **(1a)** This case requires the interpretation of a standard fire insurance policy with extended coverage for vandalism and malicious mischief. The issue raised by the agreed statement of [***2] facts appears to be one of first impression in California.

Appellants were owners of three parcels of real estate in Madera County upon which they planned to build three houses for profit. On August 22, 1973, appellants purchased insurance policies covering each of the parcels and the buildings to be constructed on them. Each policy was a standard course of construction policy covering fire, lightning, and extended coverage for vandalism and malicious mischief. Appellants paid the premiums and there is no dispute as to the existence of the contracts.

On January 6, 1975, unknown persons broke into each of the three houses, which were being readied for sale, disconnected and removed the major built-in appliances, took up the carpeting, and removed various light fixtures and mirrors. The total amount lost, including replacement costs and labor, was approximately $ 5,000. Each of the policies was in effect and appellants promptly reported the losses to the respondent. The respondent refused the claim, and this action was instituted.

The pertinent language of the insurance (identical in all three policies) is:

"This policy is extended to insure against loss by the following perils [***3] as hereinafter provided, only when premium for extended coverage and vandalism and malicious mischief is inserted in the space provided on the first page of this policy or endorsed hereon.

"9. Vandalism And Malicious Mischief meaning only willful and malicious damage to or destruction of the property covered hereunder.

"This Company Shall Not Be Liable For Loss:

"(a). . . .

"(b). . . .

[*186] "(c) By pilferage, theft, burglary or larceny, except that this company shall be liable for willful damage to the building(s) covered hereunder caused by burglars.

"(d). . . .

"(e). . . .

The trial judge awarded damages only in the sum of $ 46.20 for willful damage by the burglars. The court held that the removal of the items came within the definition of pilferage, theft, burglary and larceny and were, therefore, not recoverable under the policy. The correctness of the trial court's interpretation is the sole issue before us.

We hold that the taking of built-in appliances and carpeting constituted theft under the terms of the policy. However, we reverse for retrial solely on the amount of damages suffered by the appellant by reason of the removal.

The clause in question is an [***4] extended coverage endorsement to the standard fire contract. The endorsement extended the fire policy to include coverage for vandalism and malicious mischief. **(2)** Vandalism and malicious mischief are usually defined as willful and

malicious damage to, or destruction of, the described property. Historically, the words malicious mischief were added because a dictionary definition often limited vandalism to the willful destruction of a thing of beauty (*Unkelsbee v. Homestead Fire Insurance Co. (D.C.Mun.App. 1945) 41 A.2d 168, 170*; Annot. *(1969) 23 A.L.R.3d 1259, 1263*; Huebner, et al., Property and Liability Insurance (2d ed. 1976) pp. 132-133).

(1b) The language in the three policies excludes loss by pilfering, theft, burglary, or [**396] larceny, but covers damages brought about by burglars. The trial court determined that this was clear and unambiguous; therefore, plaintiff could not recover for either the theft of the items removed from the houses or the labor costs incurred in installing replacements. Appellants contend that the act of removing the items from the houses constituted damage to the houses themselves. Consequently, they believe that they are covered under the [***5] policy. Respondent states that no structural damage was done to the houses; hence, only a theft occurred, and since theft is explicitly excluded from coverage, appellants have no claim.

[*187] Appellants urge that we follow the interpretation of *State Auto Mutual Insurance Co. v. Trautwein (Ky. 1967) 414 S.W.2d 587 [23 A.L.R.3d 1254]* and *United States Fidelity and Guaranty Co. v. Bimco Iron and Metal Corp. (Tex.Civ.App. 1970) 455 S.W.2d 828*. We are not persuaded by the apparent ratio decidendi of those cases. In *Trautwein*, unknown persons entered a four-unit apartment complex and removed the air conditioning units. The insurance contract contained a provision similar to the one in the case before us. The Kentucky court allowed recovery on the theory that the taking of the units damaged the building. In *Bimco*, unknown persons entered a building and removed all of the electric wiring from the building conduits. The insurance policy was different from that before the *Trautwein* court, and the court in *Bimco* refused to consider *Trautwein*. However, recovery was permitted for the complete loss on the ground that the wiring was part of the [***6] building and its removal by burglars caused compensable damage. Conceptually, we cannot accept such an analysis made in either case. In both *Bimco* and *Trautwein* there was a theft. Even if the appliances or wiring are designated as fixtures (an artificial and unnecessary distinction), they are still susceptible to theft. At common law, once severed from the realty the property became personalty and, as personalty, was capable of being stolen. Furthermore, by statute in California, part or all of the realty or a building can be the subject of theft (see *Pen. Code, §§ 487b* and *487c*).

If *Trautwein* or *Bimco* theories are followed, recovery would be permitted if, the item taken was a fixture, but denied if it was not a fixture. The law as to fixtures is already somewhat artificial and conducive to considerable litigation (see 3 Witkin, Summary of Cal. Law (8th ed. 1973) Personal Property, § 57, pp. 1664-1669). We see no reason based upon history or logic to justify an addition to the problems already resulting from that distinction. While any uncertainty or ambiguity in an insurance policy is to be resolved against the insurer (*Gray v. Zurich Insurance Company* [***7] *(1966) 65 Cal.2d 263, 269 [54 Cal.Rptr. 104, 419 P.2d 168]*), the clause in the policies in this case is clear on its face -- *replacement cost* of the stolen items is not compensable. We decline to follow the holdings of *Trautwein* and *Bimco* as to replacement costs.

(3) Nevertheless, we do believe that there are compensable damages under the clause in the policies which were not considered by the trial court in this case. The policy on each house allows recovery for willful damage to the building caused by burglars. The testimony indicated that, while no structural damage was detected, the removal of the various [*188] items left holes and gaps in the cabinetry, walls and floors which had to be repaired before the houses would be marketable. Thus, in the act of removing goods from the house, the burglars caused willful damage that is compensable under the policies.

The correct measure of damages in this case is the installation costs after new appliances, carpeting, and light fixtures have been purchased. Therefore, we conclude that the trial court erred in not construing the policies in the broadest way possible for the appellant so as to allow recovery against [***8] respondent for the labor costs incurred in reinstalling the items.

That part of the judgment fixing appellant's damages only in the sum of $ 46.20 is reversed with directions to the trial court, on the basis of evidence previously presented [**397] and such additional evidence as either side may wish to present, to redetermine damages for the labor costs incurred in reinstallation, in addition to the $ 46.20, in conformity with the views expressed herein. In all other respects the judgment is affirmed.

1 of 100 DOCUMENTS

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, Appellant, v. E. T. TRAUTWEIN, Appellee

[NO NUMBER IN ORIGINAL]

Court of Appeals of Kentucky

414 S.W.2d 587; 1967 Ky. LEXIS 362; 23 A.L.R.3d 1254

March 24, 1967

SUBSEQUENT HISTORY: [**1] Rehearing Denied June 2, 1967.

COUNSEL: John G. Crutchfield, Jones, Ewen & Mackenzie, Louisville, for appellant.

Richard M. Trautwein, Rubin & Trautwein, Louisville, for appellee.

JUDGES: John J. Winn, Special Commissioner. Williams, C.J., and Montgomery, Milliken, Steinfeld and Palmore, JJ., concur.

OPINION BY: WINN

OPINION

[*588] The plaintiff, E. T. Trautwein, had just completed constructing a four-unit apartment building. Vandals or thieves forcibly entered three of the units by jimmying the entrance doors. The fourth unit had already been rented and its entrance door was not locked. An air conditioning unit had been permanently installed in each apartment by Trautwein and these units were removed and carried off by a person or persons whose identity has never been discovered.

It is agreed that the replacement value of the air conditioners is $648.00 and that other damage to the apartments amounted to $194.50. Trautwein sued the State Automobile Mutual Insurance Company claiming that his total loss was covered by his insurance policy with that company. The case was submitted by agreement for summary judgment on the respective motions of the litigants. The trial court awarded [**2] Trautwein the full amount of the loss and this appeal is from that judgment.

The policy contained a "Vandalism and Malicious Mischief Endorsement," which in its pertinent part reads as follows:

> "1. In consideration of the premium for this coverage shown on the first page of this policy, and subject to the provisions of this policy of fire insurance and the Extended Coverage Endorsement attached thereto and of this endorsement, the coverage under said Extended Coverage Endorsement is hereby extended *to include direct loss to the described property by Vandalism and Malicious Mischief.*
>
> "2. The term '*Vandalism and Malicious Mischief*' as used herein is restricted *to and includes only wilful and malicious physical injury to or destruction of the described property.*
>
> "3. When this endorsement is attached to a policy covering direct loss to the described property, this Company shall not be liable under this endorsement for any loss
>
> (a) * * *
>
> (b) *by pilferage, theft, burglary or larceny, except loss by wilful and malicious physical injury to or destruction of a building described and insured hereunder.*"

The sole question to be decided is whether or [**3] not all or any of claimant's loss was covered by the policy. The facts are not in dispute since the only testimony in the case is the deposition of E. T. Trautwein taken by the company. According to this testimony an opening in the wall of each apartment was provided for [*589] the permanent attachment of a sleeve and an air conditioner was placed in this sleeve and fastened by screws and a rubber seal. The air conditioners were intended to remain permanently fixed in place. They could not be removed without considerable force and probable damage to the sleeves and the sleeves could not be removed without serious damage to the walls. These air conditioners were fixtures and part of the building insured by appellant. *Doll v. Guthrie, 233 Ky. 77, 24 S.W.2d 947.* As pointed out in the opinion rendered by the trial judge, malice may be presumed from the unlawful act itself. Had these trespassers merely damaged or destroyed the air conditioners without carrying them off, malice still would have to be presumed because it would be unreasonable to require that some particular personal animosity of the unknown predators against the owner be proven to exist before recovery could be [**4] had on the policy. There can be no doubt that theft was the purpose of the burglars and that they did steal the property of the insured. It is equally certain that the insured realty, of which the air conditioners were integral parts, was damaged in the process.

It will be noted that the restrictions provide that the term "Vandalism and Malicious Mischief" as used in the endorsement is restricted to and includes only wilful and malicious physical injury to or destruction of the described property. Yet this is enlarged or limited, as the case may be, by 3(b) which provides that the company shall not be liable for any loss by "pilferage, theft, burglary or larceny, *except loss by wilful and malicious physical injury to or destruction of a building described and insured hereunder.*" This provision must have been inserted for some purpose and we feel it is reasonable to conclude that the purpose was to recognize that injury to or destruction of the building was covered although occurring in connection with a burglary.

In accordance with the general legal principle that exceptions and exclusions should be strictly construed so as to make insurance effective, we believe that it is [**5] fair to construe this policy as covering the entire loss claimed, and we do so construe it.

The judgment is affirmed.

WILLIAMS, C.J., and MONTGOMERY, MILLIKEN, STEINFELD and PALMORE, JJ., concur.

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F. E. STERLING, ET UX, Plaintiffs-Appellants v. AUDUBON INSURANCE COMPANY, Defendant-Appellee

No. 83-694

Court of Appeal of Louisiana, Third Circuit

452 So. 2d 709; 1984 La. App. LEXIS 8716

May 16, 1984

SUBSEQUENT HISTORY: [**1] Writ Denied September 14, 1984.

PRIOR HISTORY: Appeal from the Ninth Judicial District Court, Parish of Rapides, State of Louisiana, the Honorable Lloyd G. Teekell, District Judge, presiding.

COUNSEL: Ford and Nugent, Howard N. Nugent, Jr., Alexandria, Louisiana, for Plaintiff-Appellant.

Bolen and Erwin Marsha Hopper and James A. Bolen, Jr., Alexandria, Louisiana, for Defendant-Appellee.

JUDGES: Cutrer, Stoker and Knoll, Judges.

OPINION BY: STOKER

OPINION

[*710] Plaintiff homeowners seek to recover for alleged insured losses to a house owned by them under a vandalism and malicious mischief endorsement to a homeowner's policy. Some of the loss consists of appliances or equipment attached to the house which were taken from the house and which have not been found. The basic policy provides no coverage for theft of items from the insured premises. The primary issue in this case is whether the detachment and removal of items from the house structure is a covered loss under the vandalism and malicious mischief endorsement of the insurance policy.

Another issue consists of the amount of recovery plaintiffs should have. (Plaintiffs are entitled to some recovery in any event, as some damages done [**2] to the premises clearly were caused by acts of vandalism and malicious mischief.) A final issue is whether plaintiffs are entitled to penalties and attorney's fees.

[*711] The trial court's reasons for judgment do not make any ruling on the primary issue, but the trial court did hold that plaintiffs were entitled to $1500 in "damages." Penalties and attorney's fees were denied.

FACTS

Plaintiffs owned a residence building at 800 Lafitte Drive in Alexandria, Louisiana, which they rented to tenants. The building was unfurnished but was equipped with a gas fueled kitchen range. It was centrally heated and air-conditioned. Plaintiffs' tenants vacated the premises by February 14, 1982, and plaintiffs inspected the premises on that day and found them to be in excellent condition. Thereafter the house was broken into on three separate occasions, March 7, March 9 and April 18, 1982. On the three occasions parties unknown committed acts of vandalism including soiling carpets and marking or writing on walls. Light fixtures were torn and removed from the premises and in at least one instance a fixture was left hanging as if the parties had abandoned the attempt to remove the fixture. [**3] The hood over the kitchen range was badly damaged. Various other acts of vandalism causing damage could be catalogued.

In addition to light fixtures taken, the unknown parties also took the air-conditioner compressor, the kitchen range, and ripped up a certain amount of carpeting which was carried away. A number of smaller items were taken. None of the items taken from the premises were ever found.

Plaintiffs' rent house was insured by defendant Audubon Insurance Company (Audubon) for fire and other perils but the policy did not insure theft from the premises. The policy contained an endorsement to cover losses resulting from vandalism and malicious mischief. The provisions of this endorsement pertinent here are:

> "B. The perils of Vandalism and Malicious Mischief, as defined and limited

herein, are added to and made a part of the 'Perils Insured Against' section of the form(s) of which this endorsement is made a part.

"C. Loss by vandalism or malicious mischief shall mean only the willful and malicious damage to or destruction of the property covered. The Company shall not be liable, as respects, these perils, for any loss:

* * *

"2. By pilferage, theft, burglary [**4] or larceny, except that this Company shall be liable for willful damage to the building(s) covered hereunder caused by burglars; . . ."

Audubon concluded that plaintiffs' insured loss, as defined and limited, amounted to $695.40. After applying deductibles amounting to $200, Audubon sent plaintiffs a draft or check for $495.40. Audubon took the position that it was liable for damage to the building but not for replacement of items completely removed from the building. It regarded items removed from the building as subjects of theft or burglary and as excluded losses under the endorsement for vandalism and malicious mischief.

Plaintiffs brought this suit for the amount of all of their loss, taking the position that removal of items attached to the building constituted damage to the building. Generally the items carried away were detached with some force and violence. The air-conditioner compresser was on a concrete slab base outside of the house. Tubing running into the equipment inside the house was cut in the process of removing the compressor from the base.

TRIAL COURT ACTION

The basis for the trial court's award of $1500 is not at all clear. In the trial [**5] court's brief reasons for judgment it stated:

"A strict and literal interpretation of the policy provisions would clearly support the provisions (sic) taken by the defendant. On the other hand, it is understandable that the plaintiffs feel that they should have more protection under their insurance policy.

[*712] "The tender of $495.40 appears to be adequate for the specific items reflected in that aspect of the coverage. The Court feels inclined to give some relief to the plaintiffs in the form of damages occasioned by the vandalism, and awards the amount of FIFTEEN HUNDRED ($1500.00) DOLLARS."

MATTERS ON APPEAL

The plaintiffs appealed the trial court's judgment and urge on appeal (1) that the award is grossly inadequate (2) and that the trial court erred in not awarding penalties and attorney's fees. The appellee, Audubon, answered the appeal and asserted that the award of $1500 was "incorrect as a matter of law." Audubon prayed that the judgment be reversed and set aside and dismissed at plaintiffs' costs.

INSURANCE COVERAGE

The basic policy in question here provides insurance for fire and lightning and extended coverage. No coverage is provided [**6] for theft, burglary or pilferage. By endorsement, coverage for vandalism and malicious mischief is added, the provisions of which are quoted above.

Preliminarily we note that before there can be a recovery for either vandalism or malicious mischief it must be shown that there was an actual purpose or design, an intent, to injure, damage or destroy. *Ducote v. United States Fidelity & Guaranty Co., 241 La. 677, 130 So. 2d 649 (1961)*; *Thomas v. Pennsylvania Fire Insurance Company, 163 So. 2d 202 (La. App. 4th Cir. 1964)*, writ refused, *246 La. 583, 165 So. 2d 481 (1964)* and *Lanza Enterprises, Inc. v. Continental Insurance Co., 142 So. 2d 580 (La. App. 3rd Cir. 1962)*. Thus, *intent* becomes a key factor in an action to recover for loss through alleged acts of vandalism or malicious mischief.

In the *Lanza* case two significant holdings were announced. First, it was held that an insured is not required to show that destructive acts were motivated by malice against the property owner himself in order for an owner to recover against the insurer. Second, it was held that in suits for recovery of loss under a vandalism and malicious mischief policy, direct proof of intention [**7] to damage property is not required; such intention may be established by circumstantial evidence. Although the *Lanza* case establishes a broad and liberal test for determining intention, it is of little help to plaintiffs as insureds in this case because no taking or theft was involved in *Lanza*.

In *Lanza* this court of appeal, affirming the trial court, was faced with these facts. Over a week-end unknown parties entered a building under construction and turned on a water hose which led up to the fourth floor of

the building for temporary use in laying terrazzo tile floors. The water was left running and damaged the building through flooding of the floors beneath the fourth floor. This Court concluded that, since the unknown parties who turned on the water and left it running would know the probable consequences of their act, the intention to cause damage to the building could be presumed.

In *Ducote v. USF&G Co.*, supra, the Louisiana Supreme Court held that damage to a motor vehicle resulting from the operator's negligence did not constitute vandalism or malicious mischief within insurance coverage for losses sustained in a vehicular collision. In *Ducote* the [**8] Supreme Court held that intentional damage was required as opposed to negligently caused damage.

Beyond the general principles of law announced in *Ducote* and *Lanza*, these two cases are not factually apposite to the case of Mr. and Mrs. Sterling before us. The facts of this case bear some similarity to *Thomas v. Pennsylvania Fire Insurance Company, supra.* In *Thomas* the insured owner sought to recover the replacement value of a bulldozer blade and the cost of repairing damage to the radiator core of a D-7 caterpillar tractor. There was no evidence as to how and by whose action the bulldozer blade came to be missing. The Court of Appeal for the Fourth Circuit concluded there was no evidence that any intent, purpose or design to commit vandalism or malicious mischief was involved in the loss of the blade or the damage to the radiator. (The blade was approximately 10 [*713] feet in width, 3 or 3 1/2 feet in height and weighed about 4,000 pounds.)

In *Thomas* the policy of the insurer provided insurance coverage against loss or damage directly caused by theft, vandalism or malicious mischief but did not cover mysterious disappearance. After concluding that [**9] Thomas could not recover under the vandalism or malicious mischief provisions of the policy, the court concluded that he could recover under the theft provision. In concluding that a theft had occurred the court said in part:

> "A recovery by the plaintiff can only be had under the policy provision relative to theft. That insured peril includes an intent to permanently deprive the owner of the blade. *Ducote v. United States Fidelity & Guaranty Co., supra.*
>
> "We are of the opinion that the facts proved by the plaintiff, as found by the trial court are sufficient to establish that the loss of the blade was occasioned by theft. Considering all of the circumstances no other conclusion is tenable. The size and weight of the blade negative any possibility of misplacement, disappearance or simple loss in the usual sense. It had to be removed by a human agency which not only intended to remove it from the tractor and take it away but was also prepared with the equipment necessary for the accomplishment of that purpose. The fact that the blade has never been found is, under the circumstances peculiar to this case, a sufficient indication that it was removed and taken away [**10] with the intention of permanently depriving the owner of the same."

In the case before us it might very well be that the issue of recovery for the items taken from plaintiffs' house could be decided on the basis of the absence of any manifest intent in taking these items to vandalize or do malicious mischief. Certainly considerable effort and power (manpower, machine power or both) was required to detach and carry away such items as the air-conditioner compressor and the kitchen range. Considerable effort was evidently involved in ripping up carpeting in two rooms and transporting it away. Tearing out light fixtures may require less effort, but to do so and carry items away is indicative of some fixed purpose more consistent with theft than vandalism or malicious mischief.

Admittedly, the parties who entered on the three occasions did commit pure acts of vandalism. Consequently, there may have been mixed motives. Nevertheless, there is no evidence to show that the same parties acted on each occasion or that the parties who carried away items were the same who committed the undisputed acts of vandalism. If the same parties were involved throughout, there is a question [**11] as to whether vandalism may have been merely incidental to a purpose to commit theft. They may have been committed as separate acts.

The defendant Audubon admits that it is liable for certain items or things in the premises damaged but not removed. Audubon denies that it is liable for the replacement value of items completely removed from the premises.

Despite the possibility that we might pitch our decision on the question of intent, we decline to do so. In their briefs the parties have focused on the meaning of the policy endorsement providing coverage for vandalism and malicious mischief. As we think the legal issue of coverage can be decided on the basis of the policy language, we consider it important that we do so.

INTERPRETATION OF ENDORSEMENT LANGUAGE

Apparently no Louisiana case has considered language such as that quoted above which provides insurance against loss from vandalism or malicious mischief. Of the cases from other states cited in the briefs of the parties we find only three have actually considered such language in a context of facts similar to those involved here. Plaintiffs rely on one Kentucky case and one Texas case. *State Automobile Mutual* [**12] *Insurance Co. v. Trautwein, 414 S.W. 2d 587 (Ky. 1967)* and *United States Fidelity & Guaranty Co. v. Bimco Iron and Metal Corp., 464 S.W. 2d 353 (Tex.* [*714] *1971)*. Defendant relies on the California case of *Pryor v. State Farm Fire & Cas. Co., 74 Cal. App. 3rd 183, 141 Cal. Rptr. 394 (5th Dist. 1977)*. Each of these cases construe provisions the same, or quite similar to, those involved in the Audubon policy.

In the Kentucky case, vandals or thieves forceably entered three newly constructed unoccupied apartments owned by Trautwein and entered a fourth which had been rented, the entrance door of which was not locked. A person or persons whose identity was never discovered removed air conditioning units permanently installed in each apartment unit. The air conditioning units were installed in openings in the walls and could not be removed without damage to the building. The Kentucky court found coverage for all Trautwein's damages, including the replacement value of the air conditioners taken. The Kentucky court stated: "There can be no doubt that theft was the purpose of the burglars and that they did steal the property of the insured. It is equally certain that [**13] the insured realty, of which the air conditioners were integral parts, was damaged in the process."

In *Trautwein*, the Kentucky court theorized that taking the units damaged the building and since it occurred during a burglary, the loss was covered. The language construed was as follows:

> "2. The term 'Vandalism and Malicious Mischief' as used herein is restricted to and includes only wilful and malicious physical injury to or destruction of the described property.
>
> "3. When this endorsement is attached to a policy covering direct loss to the described property, this Company shall not be liable under this endorsement for any loss
>
> "(a) * * *
>
> "(b) by pilferage, theft, burglary or larceny, except loss by wilful and malicious physical injury to or destruction of a building described and insured hereunder."

In the *Bimco Iron and Metal Corporation* case, the Supreme Court of Texas split with reference to the rationale for recovery where burglars entered the insured plaintiff's warehouse, dismantled the electrical system and removed high voltage wiring and transformers. The majority allowed recovery under a restricted or narrow construction of policy language. [**14] Relative to the policy issued to Bimco the Texas Supreme Court stated:

> "Attached to the policy was the vandalism and malicious mischief endorsement. The relevant portions of the vandalism and malicious mischief endorsement provide (emphasis ours):
>
> "'1. In consideration of $10.00 (Incl.) premium and subject to the provisions of this policy and this endorsement, the liability of this Company hereunder for loss or damage resulting from the peril of Riot and Civil Commotion is hereby extended to include loss caused by damage to or destruction of the property described by Vandalism and Malicious Mischief, *including damage to the building(s) covered hereunder caused by burglars.*
>
> "'2. The term "Vandalism and Malicious Mischief" as used herein is restricted to and includes only willful or malicious physical injury to or destruction of the described property.
>
> "'3. When this endorsement is attached to a policy covering direct loss to the described property, *this Company shall not be liable under this endorsement for any loss*:
>
> * * *
>
> "'(b) by pilferage, theft, *burglary* or larceny.
>
> * * *.'"

The majority concluded that if paragraph 1 quoted above [**15] covered the loss, and if paragraph 3(b) took it away, the insurance contract was ambiguous.

Therefore, the contract should be construed liberally in favor of the insured and strictly against the insurer. However, the court majority concluded there was no ambiguity by interpreting paragraph 3(b) to apply only to personal property stolen from the warehouse, such as tools, gauges and miscellaneous materials.

[*715] In *Bimco* four justices, including the Chief Justice, concurred, disagreeing entirely with the rationale of the majority. The author of the concurring opinion (in which the other justices joined) disagreed with the majority opinion insofar as it held "that Bimco was insured against the loss by theft of copper wiring and transformers not shown to have been damaged in the burglary." The concurring justices found no ambiguity in the provisions of the policy endorsement relative to vandalism and malicious mischief. They were of the opinion that theft was not covered. The concurring justices nevertheless thought that the endorsement covered direct damage or destruction to the building itself caused by burglars and the recovery was measured by the "cost of labor and [**16] materials required to restore the damage to the building itself." The concurring opinion seems to hold that theft itself as a bare proposition is not a covered loss, but insofar as burglary caused damage to an insured building (albeit by theft), the cost of repair was covered.

In *Pryor v. State Farm Fire & Cas. Co., supra*, a California Court of Appeal came to an entirely different conclusion from *Trautwein* and *Bimco* after considering both opinions. In *Pryor* the plaintiffs commenced construction of three houses for sale. When the houses were being readied for placement on the market unknown persons broke into each of the houses. They disconnected and removed the major built-in appliances, took up the carpeting, and removed various light fixtures and mirrors. The policy endorsement provisions providing vandalism and malicious mischief coverage were virtually identical to those contained in Audubon's endorsement to the Sterlings' policy. Apparently three separate policies with endorsements were issued the plaintiffs in *Pryor*.

In *Pryor* the California court said:

> "The pertinent language of the insurance (identical in all three policies) is:
>
> > 'This [**17] policy is extended to insure against loss by the following perils as hereinafter provided, only when premium for extended coverage and vandalism and malicious mischief is inserted in the space provided on the first page of this policy or endorsed hereon.
> >
> > '9. VANDALISM AND MALICIOUS MISCHIEF meaning only willful and malicious damage to or destruction of the property covered hereunder.
> >
> > 'THIS COMPANY SHALL NOT BE LIABLE FOR LOSS:
> >
> > '(a) * * *
> >
> > '(b) * * *
> >
> > '(c) By pilferage, theft, burglary or n186 larceny, except that this company shall be liable for willful damage to the building(s) covered hereunder caused by burglars.
> >
> > '(d) * * *
> >
> > '(e) * * * '
>
> "The trial judge awarded damages only in the sum of $46.20 for willful damage by the burglars. The court held that the removal of the items came within the definition of pilferage, theft, burglary and larceny and were, therefore, not recoverable under the policy. The correctness of the trial court's interpretation is the sole issue before us.
>
> "We hold that the taking of built-in appliances and carpeting constituted theft under the terms of the policy. However, we reverse for retrial solely on the amount of damages [**18] suffered by the appellant by reason of the removal.
>
> "The clause in question is an extended coverage endorsement to the standard fire contract. The endorsement extended the fire policy to include coverage for vandalism and malicious mischief. Vandalism and malicious mischief are usually defined as willful and malicious damage to, or destruction of, the described property. Historically, the words malicious mischief were added because a

dictionary definition often limited vandalism to the willful destruction of a thing of beauty (*Unkelsbee v. Homestead Fire Insurance Co.* (1945), *D.C.Mun.App., 41 A.2d 168, 170*; Annot. *(1969) 23 A.L.R.3d 1259, 1263*; Heubner, Black, Cline, Property [*716] and Liability Insurance (1976) (2d ed.) pp. 132-133)."

"The language in the three policies excludes loss by pilfering, theft, burglary, or larceny, but covers damages brought about by burglars. The trial court determined that this was clear and unambiguous; therefore, plaintiff could not recover for either the theft of the items removed from the houses or the labor costs incurred in installing replacements. Appellants contend that the act of removing the items from the houses constituted [**19] damage to the houses themselves. Consequently, they believe that they are covered under the policy. Respondent states that no structural damage was done to the houses; hence, only a theft occurred, and since theft is explicitly excluded from coverage, appellants have no claim."

The California court then referred to the *Trautwein* and *Bimco* cases and stated that it was not persuaded by the ratio decidendi of those cases. (As to *Bimco* the California court referred to the opinion in the *Texas Court of Civil Appeals, 455 S.W. 2d 828*, rather than the Texas Supreme Court opinion in *Bimco*.) The California court found no ambiguity in the policy language and held that "the clause in the policies in this case is clear on its face - *replacement cost* of the stolen items is not compensable." And further: "We decline to follow the holdings of *Trautwein* and *Bimco* as to replacement costs."

Although it rejected the cost of replacement concept, the California court held that damage to the houses caused by removing the items was covered under the policies. It held that the trial court erred in not allowing recovery against the insurer for the labor costs incurred [**20] in reinstalling the replacement items. For another opinion involving similar policy language in which coverage was found for *damage* caused by vandals, but not for items *taken* from the insured property, see *Theo v. National Union Fire Insurance Company, 99 Ga. App. 342, 109 S.E. 2d 53 (1959)*.

After considering the wisdom set forth in the three cases from Kentucky, Texas (majority and concurring opinion), and California, we consider that the interpretation given by the California court in *Pryor v. State Farm Fire & Cas. Co.* to represent the correct interpretation of the policy endorsement language under consideration by us. As we see the matter, there would be no coverage at all were it not for the addition of the language "except that this Company [Audubon] shall be liable for willful damage to the building(s) covered hereunder caused by burglars." In other words, a theft or burglary is a theft or burglary and is excluded from coverage insofar as replacement cost of the stolen items is concerned. Because of the added language allowing coverage for damage caused by burglars, the insureds are entitled to the cost necessary to install replacement items but not the [**21] costs of the items themselves.

In *Pryor* the California court stated:

"The correct measure of damages in this case is the installation costs after new appliances, carpeting, and light fixtures have been purchased. Therefore, we conclude that the trial court erred in not construing the policies in the broadest way possible for the appellant so as to allow recovery against respondent for the labor costs incurred in reinstalling the items."

The paragraph preceding the above makes it clear, however, that incidental damage done by burglars in the act of removing stolen property is also covered.

DETERMINATION OF AMOUNT OF RECOVERY

The trial court's conclusion that plaintiffs are entitled to recovery "in the form of damages" is clearly wrong. This present suit is a suit on an insurance contract and is neither a suit for damages for breach of contract nor damages in tort. The written reasons for judgment are also unclear, if not inconsistent, in that the trial court first states the tender of $495.40 "appears to be adequate for the specific items reflected in that aspect of the coverage" [*717] and then awards $1500 in damages. Under the circumstances, [**22] we must consider the record to determine ourselves what amount plaintiffs are entitled to recover consistent with our interpretation of the endorsement covering vandalism and malicious mischief as outlined above.

Exclusive of their claim for lost rent, plaintiffs' claims are set forth on Plaintiffs' Exhibit No. 5, a copy of which was submitted by them at the time they made their insurance claim. It was used by the insurance adjusters in considering and processing the claim and their copy was introduced as Defendant's Exhibit No. 2. Because it

will be necessary to discuss individual items, we set forth in its entirety Plaintiffs' Exhibit No. 5. It reads:

"Summary of Replacement and Repair Estimates 800 Lafitte Street Alexandria, Louisiana		
1. Replacement and installation of A/C Compressor	$1109.00	
Carrier #38EB036		
Air Conditioning Appliance Corporation		
1901 Lee		
Alexandria, Louisiana 71301		
2. Replacement and installation of carpeting	$ 961.03	
44.18 Square Yards at $17.95/sq. yd.		
Clark-Dunbar		
3600 Jackson		
Alexandria, Louisiana 71301		
3. Replacement and installation of kitchen range	$ 600.55	
Kenmore range #72424		
Sears and Roebuck Co.		
3401 Masonic Drive		
Alexandria, Louisiana 71301		
4. Replacement of window screen	$ 14.70	
	.74	(tax)
31" x 51 1/2" aluminum frames,		
fiberglass screen		
Lemoine's Blind and Awning		
1712 Van Street		
Alexandria, Louisiana 71301		
5. Replace 5 window panes		
Paint one wall and touch-up		
paint in front bedroom		
Finish and install bi-fold closet		
doors in master bed-		
room		
Repair range vent hood	$ 55.00	
	10.00	(estimated fee)
	3.25	(tax)
Total	$ 68.25	
6. Strip and refinish kitchen-dining and living		
room and hallway floors		
Clean window sills in three bedrooms (damaged or		
soiled by vandals)		
Clean door facings soiled by vandals	$ 150.00	
	7.50	(tax)
Service Master of Alexandria		
6604 Masonic Drive		
Alexandria, Louisiana 71301		
7. Replacement of 1 pair of curtains	$ 25.00	
	1.25	(tax)
Montgomery Ward		

1804 McArthur Drive		
Alexandria, Louisiana 71301		
8. Replace one dummy door knob	$ 3.77	
Stock #A12A (Weiser)		
One pair two-panel bi-fold doors for closet in master		
bedroom	$ 73.49	
80 3/4" x 48" opening		
One light fixture (living room)	$ 199.49	
Two light fixtures (bathroom) at $21.99	$ 46.18	
One light fixture (kitchen)	$ 52.49	
One light fixture (dining room)	$ 59.24	
One light fixture (kitchen sink)	$ 11.06	
Two door stops at.59 each	$ 1.24	
Three curtain rod brackets at.39 each	$ 1.23	
Lowe's Building Materials		
1819 Memorial Drive		
Alexandria, Louisiana 71301		
9. Replace light bulbs (stolen by vandals)		
Eight 60 Watt bulbs at $2.47 for package of 4	$ 5.19	
Howard's Department Discount Store		
616 McArthur Drive		
Alexandria, Louisiana 71301		
10. Replace stolen closet rods (4)	$ 28.88	
17'- 1" pipe cut to appropriate lengths		
John Ward Hardware		
1734 Lee -- Alexandria, Louisiana 71301"		

[**23] [*718] Mr. Robert W. McDaniel, who has his own insurance claims adjusting firm, testified to explain how the figure of $495.40 was derived as the amount to offer to the plaintiffs. He explained that after excluding items missing and identifying damaged items the total came to $695.40. He applied two deductibles of $100 each or a total of $200. Thus, the amount of the claim allowed by Audubon less deductibles was $495.40.

The items which Mr. McDaniel testified he recommended as being covered under the vandalism and malicious mischief endorsement were:

Item 2 in part, specifically 20	$376.95
yards of carpeting at	
$17.95 per square yard	
Item 4: Replacement of window	
screen	15.44
Item 5: Replacement of 5 win-	
dow panes	
Paint one wall	
Touch-up paint in front	
bedroom	
Finish and install bi-fold	
doors in master bed-	
room	
Repair range vent hood	68.25
Item 6: Strip and refinish kitch-	

en-dining and living	
room and hallway floors	
Clean window sills in	
three bedrooms (dam-	
aged or soiled by van-	
dals)	
Clean door facings	
soiled by vandals	157.50
Item 8 to the extent of:	
Replacement of 1 dum-	
my door knob	3.77
Replacement of 1 pair	
of bi-fold doors for clos-	
et in master bedroom	73.49
Total for items allowed	$695.40

[**24] [*719] Plaintiffs contend that Audubon is not in good faith in maintaining that it is not liable for items apparently stolen but is liable for items not removed from the premises. Plaintiffs testified that three items Audubon allowed were actually taken from the premises. These were the window screen (Item 4), the dining door knob (included in Item 8), and the bi-fold closet doors replacement (included in Item 8 and finishing and installing included in Item 5). The testimony of Mr. McDaniel and of Arthur L. McGee, who also testified on behalf of Audubon, made it clear that they were of the impression that these items were left on the premises. Otherwise, these items would not have been included in the items to be paid for. If they were in error, their misinformation or mistaken impression resulted in error in plaintiffs' favor, insofar as amount is concerned. (Actually, the bi-fold doors were taken or torn down but on the premises at the time of the first discovery of the acts of vandalism; it was after the next visit that they were missing.)

In any event, we cannot see that plaintiffs' argument concerning these three items changes the result of this case. It does not [**25] change the policy interpretation we follow. If defendant's application of that policy is not consistent, it does not change the law. The only change which would result is that Audubon's liability would be lessened, but Audubon has made it clear that it will not concern itself over the difference and is willing to admit liability for $695.40, less the deductible amounts.

Plaintiffs' largest single claim is Item 1 covering replacement and installation of the air-conditioner compressor. There is no breakdown showing how much is for replacement cost and how much is for installation. Hence, no allowance may be made for Item 1.

With respect to Item 2, replacement and installation of carpeting, Mr. McDaniel explained that 20 yards was allowed because that was the amount of carpeting not taken away but which was damaged. Thus, recovery for replacement of 24.18 yards should be disallowed. However, the quotation furnished by Clark-Dunbar shows a break down of $793.05 for materials, $128.33 for labor and $39.65 for tax. The total of these three elements comes to $961, which is the full amount plaintiffs claimed. Plaintiffs' claim list (P-5) shows the total yardage of carpeting to [**26] be 44.18. The figure of $17.95 times 44.18 square yards equals $793.03, which was within two cents of the amount listed by Clark-Dunbar for materials. McDaniel allowed 20 yards (20 x $17.95 = $359.00, plus tax of $17.95 of 5%) for a total of $376.95. It may be seen that nothing was allowed for labor to install the carpeting. Moreover, under our holding plaintiffs are entitled to the full amount of the labor costs estimated to install 44.18 square yards of carpeting. This amount is $128.33. Plaintiffs' recovery should reflect this additional amount.

In all other respects the disallowances by Audubon appear to be proper, based on our conclusion as to the interpretation to be given the insurance policy endorsement. At oral argument counsel for the plaintiffs urged that Audubon had never made any tender or offer for the cost of "cleaning up" the premises and taking care of the littering, soiling, marking and writing on walls and so forth. Plaintiffs submitted P-5 as their statement of damages. We presume it listed all of plaintiffs' claims for such clean up and it certainly should have. Exhibit P-5 was made a part of plaintiffs' petition. (See paragraph 8.) We note that [*720] [**27] Item 6 consists of a proposal by Service Master of Alexandria which presumably covers this type of work. Also, Item 5 includes painting of one wall and touch up painting in the front bedroom.

Accordingly, we are not persuaded that Audubon has refused to pay for "clean up" work.

In their petition (paragraph 11), plaintiffs allege they lost rental income of $1,125, and some testimony regarding lost rent was given at the trial. No mention of this claim is made in plaintiffs' brief, but as we see it, the matter is of no moment in this suit. Regardless of what may have been proved, the endorsement in question provides: "Loss by vandalism or malicious mischief shall mean only the willful and malicious damage to or destruction of the property covered." Hence, inability to rent the premises because of the condition of the premises would not be covered. Only the cost of direct damage or destruction is included in the definition.

PENALTIES AND ATTORNEYS' FEES

From our review of this case we conclude that the trial court correctly denied penalties and attorneys' fees to plaintiffs. The legal position adopted by the defendant insurer is the position which we deem to be the correct position. [**28] Consistent with that position defendant sent plaintiffs a draft or check for $495.40 without requiring any release of their rights. Although we find that the amount should be increased by $128.33, the failure to include this amount was not arbitrary or capricious in the sense of justifying penalties and attorneys' fees.

CONCLUSION

Both parties in this appeal complain that the trial court's award of $1,500 to plaintiffs was error, and we agree. The award will be amended to change the award to the amount of $623.73 so as to include the amount tendered of $495.40 plus the sum of $128.33. As thus amended, the judgment is affirmed.

The costs of this appeal are assessed equally to appellants and appellee.

AMENDED AND AFFIRMED.