

**THE PARADOX OF INSURANCE COVERAGE FOR  
VANDALISM BUT NOT THEFT**

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I. INTRODUCTION

Standard commercial property insurance policies often include coverage for vandalism, but not theft: “Covered Causes of Loss means the following: . . . 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.”<sup>1</sup> Provisions like these, covering vandalism but not theft, have been frequently litigated; the result has been a jumble of confused and conflicting judicial decisions. The present article begins with a case the author litigated and uses it as a springboard to illustrate, and hopefully illuminate, murky issues relating to property insurance that covers vandalism but not theft.

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1. *Causes of Loss—Basic Form, CP 10 10 04 02*, ISO COMMERCIAL PROP., available at [http://www.coxspecialty.com/policyforms/iso/CP1010\(0402\).pdf](http://www.coxspecialty.com/policyforms/iso/CP1010(0402).pdf) (last visited Mar. 29, 2011); *Causes of Loss—Broad Form, CP 10 20 04 02*, ISO COMMERCIAL PROP., available at [http://www.coxspecialty.com/policyforms/iso/CP1020\(0402\).pdf](http://www.coxspecialty.com/policyforms/iso/CP1020(0402).pdf) (last visited Mar. 29, 2011).

## II. DISCUSSION

A. *The Case*<sup>2</sup>

Our case arose when criminals broke into a large refrigerated warehouse in Highland Park, Mich. They ripped apart the roof, ceiling, walls and refrigeration units in order to take copper wiring, flashing and tubing.<sup>3</sup> This caused over a million dollars in damage to the building.<sup>4</sup>

The warehouse's commercial property insurance policy contained a "Causes of Loss—Basic Form,"<sup>5</sup> which defined "Covered Causes of Loss" to include: "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."<sup>6</sup>

While the proof of loss showed \$1,029,216 in damage (after the deductible), the insurance company offered \$6,348, covering only the damage done in entering and exiting of the building.<sup>7</sup> The insurance company denied coverage for the remainder of the loss, contending that the damage was due to theft of copper materials—not vandalism—and was therefore excluded.<sup>8</sup> The insurance company argued that all the damages were caused by theft, because the damage to the building only occurred in order to carry out the theft.<sup>9</sup>

The insured brought a federal court action for breach of the insurance policy.<sup>10</sup> The federal district court held that the policy covered the full amount of the building damage.<sup>11</sup> The court found that the insurance clause covering vandalism but not theft was ambiguous in a situation where the losses were arguably caused by vandalism *and* theft.<sup>12</sup> Further,

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2. *Detroit City Dairy, Inc. v. United Nat'l Ins. Co.*, No. 07-CV-11228-DT, 2007 WL 3333020 (E.D. Mich. Nov. 8, 2007).

3. *Id.* at \*1.

4. *Id.* As discussed below, much of the case law involving insurance for vandalism-but-not-theft stems from a recent wave of copper theft. See *Copper Theft Threatens US Critical Infrastructure*, FED. BUREAU OF INVEST. (Sept. 15, 2008), <http://www.fbi.gov/news/stories/2008/december/copper-theft-intel-report-unclass>.

5. *Causes of Loss-Basic Form*, *supra* note 1.

6. *Id.*

7. *Detroit City Dairy*, 2007 WL 3333020, at \*1.

8. Complaint at ¶ 18, *Detroit City Dairy, Inc.*, 2007 WL 1338642.

9. *Id.* Transcript of Summary Judgment Hearing at 20, *Detroit City Dairy, Inc.*, 2007 WL 3333020.

10. *Detroit City Dairy*, 2007 WL 3333020, at \*1.

11. Transcript of Summary Judgment Hearing at 33-37, *Detroit City Dairy, Inc.*, 2007 WL 3333020.

12. *Id.* at 35-36.

the court noted that the insurance policy contained no definition of “theft;” therefore the theft exclusion was itself ambiguous in light of published definitions, restricting theft to taking personal property but not fixtures.<sup>13</sup> Construing the ambiguities against the insurance company, the court held that the theft exclusion did not defeat coverage for the million-dollar vandalism damage to the building.<sup>14</sup>

This case highlights some unresolved issues in property insurance, discussed more fully in the remainder of this article:

First, when an insurance policy covers loss caused by vandalism, but excludes loss caused by theft, does the policy cover a loss incurred when criminals willfully damage a building in order to take items from the building? As shown below, there is a split of authority as to whether in this situation the insurance policy covers willful property damage committed as a means to accomplish theft. Some of the courts denying coverage in these circumstances reason that the theft is the real or predominant cause of the vandalism, while others reason that there is not really any “vandalism” when property is destroyed solely to commit theft.<sup>15</sup> Courts granting coverage generally hold that the provision is ambiguous, so the insured is covered for any building damage but not for the loss of items taken by the thieves.<sup>16</sup>

Second, there is a possible ambiguity in the theft exclusion because some definitions of theft refer solely to the unlawful taking of goods or personal property.<sup>17</sup> Does the extraction of materials from the structure and fixtures—the real estate—qualify as theft? This issue has rarely been addressed in published cases; almost all the courts that have ruled on the issue assume that taking copper fixtures is theft.<sup>18</sup>

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13. *Id.* at 36-37.

14. *Id.* at 37.

15. See Section C2 *infra*.

16. See Section C1 *infra*.

17. See Section D *infra*.

18. It is well settled that any ambiguity in an insurance policy (drafted by the insurer) must be construed liberally in favor of the insured and strictly against the insurance company. 2 COUCH ON INSURANCE 3d § 22:14; *Citizens Ins. Co. of Am. v. MidMichigan Health ConnectCare Network Plan*, 449 F.3d 688, 692 (6th Cir. 2006); *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 61 (2003). Thus, if there is any ambiguity as to whether a loss is caused by vandalism or by theft, or by both, it would have to be resolved against the insurance company. Similarly, if there is ambiguity as to whether “theft” means taking personal property or includes taking fixtures, it would have to be resolved against the insurance company.

*B. The Threshold Question: What is Vandalism?*

The policy in our case defined “vandalism” as “willful and malicious damage to, or destruction of” the covered property.<sup>19</sup> Under this standard definition, some authorities hold that the “malicious” element of vandalism merely requires a deliberate wrongful act that would be expected to cause property damage.<sup>20</sup> In *Louisville & Jefferson County*,<sup>21</sup> the Sixth Circuit noted that there was a split of authority, but the majority of courts supported the broad interpretation of the malice requirement for vandalism coverage.<sup>22</sup> Further, Black’s Law Dictionary defines “malicious” as “1. Substantially certain to cause injury. 2. Without just cause or excuse.”<sup>23</sup> This definition supports the broader interpretation of vandalism because it suggests that wrongful, unjustified, or inexcusable intent is enough to make the act of damaging property “malicious.”

Courts deciding “copper crime” cases involving vandalism-but-not-theft provisions have varied widely in their analysis, using either a narrow or broad interpretation of malice. For example, *Aetna Casualty & Surety Co. v. Ardizone*,<sup>24</sup> held that the broader definition of malice should be applied, in light of the rule that ambiguities must be “construed liberally in favor of the insured,” and thus deliberate building damage done in furtherance of a theft constituted vandalism.<sup>25</sup>

However, other courts deciding copper-theft cases use the narrow interpretation of what constitutes “malicious” destruction of property. These courts avoided the problem that exists when both theft and vandalism are involved; they simply found there was no vandalism at all and thus no coverage in the first place. For example, in *Smith v. Shelby Insurance Co.*,<sup>26</sup> the court defined vandalism “. . . as that concept is ordinarily understood, i.e., damaging something simply for the sake of damaging it.”<sup>27</sup> The court found that “[t]he damage to the building occurred because the thief or thieves wanted to get to the copper,” and

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19. Complaint at ¶ 14, *Detroit City Dairy, Inc.*, 2007 WL 31338642.

20. *Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Travelers Ins. Co.*, 753 F.2d 533, 537-38 (6th Cir. 1985) (to show “willful and malicious” vandalism, no animosity need be shown, and malice may be inferred from the unlawful act itself). See also 11 LEE R. RUSS, COUCH ON INSURANCE 3d § 155:92 (3d ed. 1995) (“ . . . malice may be inferred from the act of destruction”).

21. *Louisville & Jefferson Cnty.*, 753 F.2d at 533.

22. *Id.* at 538 (“Though some courts require proof of personal animosity to establish malice, that appears to be the minority view.”).

23. BLACK’S LAW DICTIONARY 1043 (9th ed. 2009).

24. *Aetna Cas. & Sur. Co. v. Ardizone*, 481 So.2d 380 (Ala. 1985).

25. *Id.* at 384-85.

26. *Smith v. Shelby Ins. Co.*, 936 S.W.2d 261 (Tenn. Ct. App. 1996).

27. *Id.* at 265.

thus there was no vandalism—i.e. there was no “damage simply for its own sake.”<sup>28</sup>

Similarly, in *Certain Underwriters at Lloyds, London v. Law*,<sup>29</sup> copper tubing was taken from commercial air-conditioning units permanently installed on the insured’s roof.<sup>30</sup> The court noted that “[d]amage done for no purpose other than to destroy property for destruction’s sake is ‘vandalism.’”<sup>31</sup> The court held that the insured’s vandalism coverage was inapplicable as a threshold matter, because “. . . the damage was done solely to further the theft and was not vandalism as that term is used in the policy.”<sup>32</sup>

The courts in copper theft cases that have adopted the narrower interpretation do not cite any authority for the proposition that “malicious” vandalism means damage for its own sake or for spite. To support this narrow interpretation, the court in *Certain Underwriters* simply cited *Smith*’s statement that this is how the word is “ordinarily understood;”<sup>33</sup> however, *Smith* did not cite any authority or evidence to support that assertion.<sup>34</sup>

In construing vandalism coverage, the broad interpretation of malice is more supportable because of the rule that ambiguities must be resolved in favor of coverage. An insurance provision is ambiguous when it is reasonably susceptible to different interpretations.<sup>35</sup> As quoted above, Black’s Law Dictionary supports the broad interpretation, and several courts have adopted the broad interpretation of malicious vandalism as well, indicating that the term may reasonably be understood in different

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28. *Id.* at 266.

29. *Certain Underwriters at Lloyds, London v. Law*, 570 F.3d 574 (5th Cir. 2009).

30. *Id.* at 575.

31. *Id.* at 578 (citing *Smith*, 936 S.W.2d at 265).

32. *Id.* at 579. Some of the copper theft cases finding coverage did so because there was evidence that the criminals engaged in destructiveness for its own sake (unnecessary, gratuitous damage) in the course of the theft. *See Haas v. Audubon Indem. Co.*, 722 So.2d 1022, 1027-28 (La. Ct. App. 1998) (extent and degree of damage indicated “pure vandalism” not necessary to accomplish theft, therefore satisfying “the required degree of malice” under the policy); *Sharplin v. Cas. Reciprocal Exch.*, 628 So.2d 217, 220 (La. Ct. App. 1993) (evidence that motive of mortgagors who had been foreclosed was malicious by their stripping the warehouse of improvements). These courts thus did not face a pure case of building damage done solely to accomplish theft, but rather vandalism of a building combined with theft.

33. *Certain Underwriters*, 570 F.3d at 578 (citing *Smith*, 936 S.W.2d at 265).

34. *Smith*, 936 S.W.2d at 265.

35. *Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So.2d 528, 532 (Fla. 2005); *Carlson v. Allstate Ins. Grp.*, 749 N.W.2d 41, 45 (Minn. 2008); *Raska v. Farm Bureau Mut. Ins. Co.*, 412 Mich. 355, 362 (1982).

ways.<sup>36</sup> Because an ambiguity therefore exists, it should be construed in favor of coverage.

*C. Survey of Court Decisions Applying Vandalism-But-Not-Theft Provisions*

We have already seen that there is a split of authority in the courts addressing vandalism-but-not-theft provisions. Some courts hold that an insurance company must pay for the damage to a building committed in the course of theft. These courts find that the vandalism-but-not-theft provision grants coverage for the vandalism loss (willful, malicious damage to the building), but denies coverage for the theft loss (lost value of materials taken out of the building).<sup>37</sup> Other courts hold that because the whole purpose was theft, the policy provision excludes damage to the building that was done in order to accomplish the theft. These courts either deny that there is vandalism in this situation, or suggest that the vandalism was caused by the theft.<sup>38</sup>

*1. Cases Finding Coverage for Vandalism In Furtherance of Theft*

What follows is a summary of leading cases holding that where a loss involves both vandalism and theft, the building damage (vandalism) loss is covered while the value of the stolen items (theft) is not covered.

In *Aetna*, the plaintiffs' insurance policy covered loss caused by vandalism but not loss caused by "pilferage, theft, burglary or larceny . . . ."<sup>39</sup> A refrigeration warehouse suffered extensive damage when trespassers removed copper wiring.<sup>40</sup> The Alabama Supreme Court held that the insurance company was liable for the damage to the property, even though the damage occurred in the course of theft.<sup>41</sup>

The court began by acknowledging the "firmly established principle that words and phrases of an insurance contract which are reasonably

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36. See *C & J Commercial Driveway, Inc. v. Fid. & Guar. Fire Corp.*, 258 Mich. 624, 629 (1932) (split of judicial opinion "shows at least that language like that we are here considering is of doubtful meaning and requires construction. In construing it, we must adopt that construction which is most favorable to the insured and most consistent with the purpose for which the policy was issued."); *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.*, 445 Mich. 558, 568 n.8; 519 N.W.2d 864 (1994) ("we do find the division of authority to be instructive and to at least lend credence to the position that more than one reasonable interpretation of the term exists").

37. See *Aetna*, 481 So.2d 384-85.

38. See *Smith*, 936 S.W.2d at 266.

39. *Aetna*, 481 So.2d at 382.

40. *Id.* at 385.

41. *Id.* at 384-85.

susceptible to different interpretations are to be construed liberally in favor of the insured and strictly against the insurer.”<sup>42</sup> After analyzing an array of cases involving similar policy provisions, the court ruled:

[T]he 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* . . . . [w]e 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 direct result of 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. . . . The simple 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.<sup>43</sup>

Similarly, in *Allstate Ins. Co. v. Coin-O-Mat, Inc.*,<sup>44</sup> the insured’s policy covered vandalism loss but not “any loss by theft or burglary.”<sup>45</sup> The Florida District Court of Appeals held that the policy covered damage to the property that occurred during the theft: “[T]he 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.”<sup>46</sup> Likewise, *Haas v. Audubon Indemnity Co.*,<sup>47</sup> involved a vandalism-but-not-theft policy provision. The court ruled:

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42. *Id.* at 384.

43. *Id.* at 384-385 (emphasis added).

44. *Allstate Ins. Co. v. Coin-O-Mat, Inc.*, 202 So.2d 598 (Fla. Dist. Ct. App. 1967) (per curiam).

45. *Id.* at 599.

46. *Id.*

47. *Haas v. Audubon Indem. Co.*, 722 So.2d 1022 (La. Ct. App. 1998).

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* . . . It correctly interpreted the policy in favor of coverage, excluding the replacement costs of the stolen materials from the judgment.<sup>48</sup>

A number of other cases have also held that, under policies with somewhat similar provisions, the insurance company was required to pay for building damage that occurred during a theft, but not for the loss of the stolen items. For example, *Camacho v. Alliance Ins. Co.*,<sup>49</sup> also involved a policy that covered vandalism but did not cover any loss “from pilferage, theft, burglary, or larceny.”<sup>50</sup> The court held:

Plaintiff’s interpretation of the policy—that the theft exclusion applies to articles removed from the premises, not those damaged during the commission of the acts—is entirely reasonable. No insurer wishes to open itself to unknown liability for theft of items that might be inside a safe or vault. However, furnishings, structures are easily valued and the insurer knows the extent of any liability in advance of its loss . . . 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.<sup>51</sup>

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48. *Id.* at 1027 (emphasis added). *See also* *Sharplin v. Cas. Reciprocal Exch.*, 628 So.2d 217, 220 (La. Ct. App. 1993) (where the policy said that vandalism was covered but theft was not, the insured was entitled to recover “for those items that he proved were either destroyed or damaged, but not those which were merely removed from the premises.”).

49. *Camacho v. Alliance Ins. Co.*, 13 V.I. 219 (1977).

50. *Id.* at 222.

51. *Id.* at 223-224. *See also* *Pryor v. State Farm Fire & Cas. Co.*, 74 Cal. App. 3d 183, 188 (1977) (insurer held liable for costs to repair damage where, “. . . in the act of removing goods from the house, the burglars caused willful damage that is compensable under the policies.”); *U.S. Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 355-56 (Tex. 1971) (ambiguities in the policy meant that it provided coverage for the damages to the building even though it occurred in connection with a burglary); *State Auto. Mut. Ins. Co. v. E.T. Trautwein*, 414 S.W.2d 587, 589 (Ky. Ct. App. 1967) (affirming summary judgment for the insured for damage that occurred even though “[t]here can be no doubt that theft was the purpose of the burglars . . .”); *Cresthill Indus. Inc. v. Providence Washington Ins. Co.*, 385 N.Y.S.2d 797 (N.Y. App. Div. 1976) (“. . . it



In sum, these cases generally hold that in policies covering vandalism losses but excluding theft losses, the insurance company is liable for damages to the building in the course of a theft, but not liable for the loss of the stolen property.

## 2. Cases Denying Coverage for Vandalism in Furtherance of Theft

Some courts hold that if there is coverage for vandalism but not theft, that means there is no coverage for any damage done in order to accomplish the theft. As noted above, *Smith v. Shelby Ins. Co.*,<sup>52</sup> and *Certain Underwriters at Lloyds, London v. Law*,<sup>53</sup> held there was no vandalism “for its own sake” because the willful building damage was done for the sake of the theft, i.e. it was necessary to carry out the theft. By narrowly construing vandalism as wreckage, these courts avoided any need to reconcile the vandalism coverage with the theft exclusion.

Other courts deciding copper theft cases denied coverage based on different rationales from court decisions previously discussed. For example, in *General Star Indemnity Co. v. Zelonker*,<sup>54</sup> unknown persons broke open an electric meter box in a warehouse and took copper wire.<sup>55</sup> The Florida District Court of Appeals held that the damage was “created in order to allow the thieves to pull out the copper wiring” and the policy “excluded payment for damage caused by or resulting from theft . . . .”<sup>56</sup> In other words, but for the theft, no building damage would have occurred; the building damage was caused by theft and thus not covered.<sup>57</sup>

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seems undeniably clear that there was an act of vandalism or malicious mischief committed, since the severing of the pipes and fixtures [p]rior 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.”); *Beauty Supplies, Inc. v. Hanover Ins. Co.*, 526 S.W.2d 75, 76 (Mo. Ct. App. 1975) (“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.”) See also John Alan Appleman, *APPLEMAN INSURANCE LAW AND PRACTICE* § 3182.25 (1<sup>st</sup> ed. 1973). (“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”).

52. *Smith*, 936 S.W.2d at 266.

53. *Certain Underwriters*, 570 F.3d at 578-79.

54. *Gen. Star Indem. Co. v. Zelonker*, 769 So.2d 1093 (Fla. Dist. Ct. App. 2000).

55. *Id.* at 1094.

56. *Id.*

57. *Id.* at 1094-95. Other cases have reached different conclusions on the question of causation, e.g. *Beauty Supplies, Inc. v. Hanover Ins. Co.*, 525 S.W.2d 75, 76 (“In our view the loss was directly caused by acts of vandalism, a specifically covered risk,

Further, in *Pacific Indemnity Co. v. N.A., Inc.*,<sup>58</sup> the court held that cutting and tearing away the copper flashing may have caused other damage to the building, but “if injury to the premises occurred incident to a theft, the loss is clearly not covered.”<sup>59</sup> The court gave no further explanation for its conclusion.

Finally, some decisions hint at another theory or rationale for denying coverage, such as *Certain Underwriters*.<sup>60</sup> The insurance policy provision at issue in *Certain Underwriters* first states that vandalism is covered and then states that theft is excluded; but the theft exclusion itself contains an exception: “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.*”<sup>61</sup> This exception to the theft exclusion in effect carves out certain vandalism damage that is still covered even when there is theft, i.e. damage done by burglars while entering and exiting the building.<sup>62</sup> This logically implies that, except for damage to the building while entering and exiting, *no other building damage is covered when there is theft*. In light of this specified type of damage that is expressly covered when there is vandalism and theft, on what basis can one conclude that other types of building damage is covered? If there was coverage for all willful malicious building damage done in the course of carrying out theft, then there would be no need to specify that a certain subset of such damage (entering and exiting) was covered despite the theft exclusion. Although not developed in the case law, this may be the strongest argument against coverage for general building damage when there is vandalism in furtherance of theft.

*D. Does “Theft” Encompass Fixtures or Is It Restricted to Moveable Personal Property?*

There is a possible alternative argument for coverage in vandalism-but-not-theft scenarios. In our case, *Detroit City Dairy, Inc. v. United National Insurance Co.*, we argued that even if vandalism in furtherance of theft is excluded, there was no theft in the first place; thus the theft exclusion was inapplicable and the vandalism was covered. The argument went as follows: 1) The policy does not define “theft,” 2)

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notwithstanding a . . . peril expressly excluded (theft) was an independent concurring cause.”).

58. *Pacific Indem. Co. v. N.A., Inc.*, 172 S.E.2d 192, 194 (Ga. Ct. App. 1969).

59. *Id.* at 194.

60. *Certain Underwriters*, 570 F.3d at 576.

61. *Id.* at 576 (emphasis added).

62. *See id.* at 580-81.

“theft” is often defined as wrongful taking of personal property, 3) the copper materials that were taken were embedded in the building walls, ceiling, roofing, and refrigeration units, 4) thus, the copper materials were fixtures, which are considered to be part of the real property, not personal property, and therefore, 5) there was no theft.<sup>63</sup> Although the argument worked in our case, it has some problems.

First, there is support for the notion that “theft” by definition applies only to taking personal property.<sup>64</sup> Black’s Law Dictionary first defines “theft” as “1. The felonious taking and removing of another’s personal property with the intent of depriving the true owner of it; larceny.”<sup>65</sup> Similarly, the first definition of “theft” in Webster’s Dictionary is: “[T]he act of stealing; specifically: the felonious taking and removing of personal property with intent to deprive the rightful owner of it.”<sup>66</sup>

On the other hand, there are broader definitions of “theft” that encompass on their face all forms of property. For example, after the first definition of “theft” (quoted above), Webster’s Dictionary next defines “theft” as “the taking of property unlawfully,” without limiting the definition to personal property.<sup>67</sup> Similarly, federal courts have embraced a “generic definition of theft,” which refers simply to wrongful taking of or exercise control over property, without restricting it to personal property.<sup>68</sup> Moreover, some courts specifically recognize theft of real property as a separate species of theft.<sup>69</sup> However, given the various definitions of “theft,” the theft exclusion in the policy appears to be ambiguous. Thus, the theft exclusion would have to be construed in favor of the insured, *i.e.* as limited to the wrongful taking of personal property.<sup>70</sup>

Despite the fact that any ambiguities are to be construed in favor of the insured, an insurance company might argue that copper wiring and tubing are personal property. In *Detroit City Dairy*, the copper wiring

63. Plaintiff’s Brief in Support of Motion for Summary Judgment, *Detroit City Dairy, Inc.*, 2007 WL 3333020.

64. See *United States v. Villanueva*, 515 F.3d 1234, 1247 (D.C. Cir. 2008) (stating that the “everyday definition” of theft applies solely to personal property); 10A LEE R. RUSS, COUCH ON INSURANCE § 151:14 (3d ed. 1995) (“Theft as used in an insurance policy is synonymous with ‘larceny.’”) and § 151:23 (“Larceny is the wrongful or fraudulent taking and carrying away by any person of the personal property of another...”).

65. BLACK’S LAW DICTIONARY 1615 (9th ed. 2009).

66. WEBSTER’S NEW INT’L DICTIONARY 2369 (3d ed. 2002).

67. *Id.*

68. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (noting that several federal circuits accept the “generic definition of theft”).

69. *E.g.*, *People v. Jensen*, 172 P.3d 946, 948 (Col. App. 2007).

70. See COUCH ON INSURANCE, *supra* note 18.

and tubing, however, had become part of and affixed to the building.<sup>71</sup> When moveable personal property is affixed to or made part of a structure, i.e. it is part of the walls, refrigeration units, or HVAC systems, does it become real property? Does dismantling parts of the building to get copper cable convert the copper back into personal property? An item is usually said to become part of real property (i.e., a fixture), when it is annexed to or adapted to the real property with the intention to make it a permanent part of the real property.<sup>72</sup>

In at least one insurance case, *Benson Holding Corp. v. New York Property Insurers Underwriting Association*, a New York court held that theft does not encompass stealing fixtures.<sup>73</sup> The court held that the insurer was liable to pay coverage because removing and taking an elevator control panel was not theft.<sup>74</sup> The court further held that “any forceful or violent severing and removal of property that [has] been affixed to the premises constitutes vandalism and the loss of the property thus removed is not excluded as pilferage, theft, etc.”<sup>75</sup> The court concluded that there was ambiguity in the policy language because the theft exclusion “would be generally understood by a lay person . . . to refer only to property that is not attached to the freehold.”<sup>76</sup>

Nonetheless, there is a serious obstacle to the argument that taking fixtures does not constitute “theft.” Virtually all of the cases involving vandalism-but-not-theft clauses either state or assume that extracting copper from the building structure is theft.<sup>77</sup> None of these copper theft cases analyze whether “theft” applies to fixtures or real property, because the argument apparently was not raised. However, cases allowing coverage and cases denying coverage in these circumstances all understand “theft” to encompass extraction of copper materials from building structures.<sup>78</sup> Thus, as of this writing, there is apparently no case

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71. Complaint ¶ 15, *Detroit City Dairy, Inc.*, 2007 WL 1338642.

72. *Wayne Cnty. v. Britton Trust*, 454 Mich. 608, 615 (Mich. Ct. App. 1997). Fixtures are articles which were personal property that have become so connected or annexed to realty as to become a part of the realty. *ATC P’ship v. Town of Windham*, 845 A.2d 389, 400 (Conn. 2004); *Garrett v. Valley Sand & Gravel, Inc.*, 800 So.2d 600, 602 (Ala. Cir. App. 2000).

73. *Benson Holding Corp. v. New York Property Ins. Underwriting Ass’n*, 124 Misc.2d 955 (N.Y. 1984).

74. *Id.* at 955-57.

75. *Id.* at 956.

76. *Id.*

77. *See Aetna*, 481 So.2d at 380-85; *Smith*, 936 S.W.2d at 266; *Certain Underwriters*, 570 F.3d 574-79.

78. *See Hass v. Audubon Indem. Co.*, 722 So.2d 1022 (La. Ct. App. 1998); *Aetna*, 481 So.2d at 380; *Smith*, 936 S.W.2d at 261; *Sharplin v. Cas. Reciprocal Exch.*, 628 So.2d 217 (La. Ct. App. 1993); *State Auto. Mut. Ins. Co. v. Troutwein*, 414 S.W.2d 587

that has held that a theft exclusion in an insurance policy only applies to wrongful taking of personal property. In short, it seems unlikely that insureds will be able to recover in such cases by arguing that taking copper fixtures is not theft.

### III. CONCLUSION

After decades of litigation, the courts are still split on how to interpret clauses that cover vandalism but not theft. This article has reviewed several possible ways to untangle the knot.

Some courts have resolved the “vandalism-but-not-theft” problem by narrowly defining vandalism as destruction for its own sake.<sup>79</sup> Thus, according to this approach, there cannot possibly be vandalism if the damage or destruction is done as a means to accomplish theft. However, this solution is flawed because reputable dictionaries and cases broadly define vandalism as damage done with wrongful intent. The resulting ambiguity must be construed in favor of the insured.<sup>80</sup>

Other courts have tried to give effect both to the vandalism coverage and the theft exclusion by holding that the building damage is covered, but the loss of the stolen items is not.<sup>81</sup> This “split-the-baby” approach is sensible in light of the presumption favoring coverage when the provisions are ambiguous. However, this result is difficult to reconcile with the standard policy language which includes an exception to the theft exclusion, allowing coverage for damage caused by burglars entering and exiting the building. This language arguably dispels the ambiguity; it strongly suggests that entering-and-exiting damage is the **only** building damage that is covered when there is theft. However, the courts have not considered this argument, thus there is no precedent supporting it.

Finally, the problem can of course be fixed by clarifying the policy language in the insurance policy itself. The standard policy definition of vandalism could be modified to say “willful and malicious damage or destruction of property, but not if done for the purpose of accomplishing theft.” Alternatively, the theft exclusion could be modified to expressly state that there is no coverage for vandalism or building damage done in

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(Tex. 1971); *Pryor v. State Farm Fire & Cas. Co.*, 74 Cal. App.3d 183 (1977); *Beauty Supplies, Inc. v. Hanover Ins. Co.*, 526 S.W.2d 75 (Mo. Ct. App. 1975).

79. See *Smith*, 936 S.W.2d at 265-66; *Certain Underwriters*, 570 F.3d at 578-79.

80. See *Citizens Ins. Co. of Am. v. MidMichigan Health ConnectCare Network Plan*, 449 F.3d 688, 692 (6th Cir. 2006); *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 786-87 (Mich. 2003).

81. See *Allstate*, 202 So.2d at 599 (per curiam); *Sharplin*, 628 So.2d at 217.

order to carry out a theft. To eliminate one last ambiguity pertinent to copper theft and similar crimes, the provision could be modified to make clear that theft includes wrongful taking of any property, including but not limited to fixtures.

For now, it is likely that court decisions will continue to be inconsistent, at least until standard insurance policy provisions are amended to clarify the coverage questions that have continued to confuse policyholders, insurance companies and the courts.