

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. That interpretation is inconsistent the policy and with Texas law.

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).

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.

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.

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.

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.**”

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.

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). 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)). The Texas rule is the majority rule in the United States.

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.

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).

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). 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.

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.

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 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.

In sum, 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. 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.

WHEREFORE, PREMISES CONSIDERED, Alfred Antonini moves this Court to deny Arch Specialty Insurance Company's Motion for Partial Summary Judgment.

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
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