

2021 WL 2118173 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

REALPAGE, INCORPORATED, Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,
PENNSYLVANIA; Beazley Insurance Company, Incorporated, Defendants-Appellees.

No. 21-10299.

May 24, 2021.

On Appeal from the United States District Court for the Northern District
of Texas Case No. 3:19-CV-1350, Jane J. Boyle, U.S. District Judge

Brief for Plaintiff-Appellant

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***iii STATEMENT REGARDING ORAL ARGUMENT**

This insurance recovery case involves a novel issue that is fundamental to how companies are doing business in the 21st century and is likely to recur in future cases involving software applications used to manage funds. Oral argument should be permitted because it would significantly aid this Court in deciding this appeal.

The key legal issue turns on the interpretation and application of a policy provision stating that the policy covers property that the policyholder “holds for others.” In this case the policyholder collects funds from residents in rental housing units and then transfers those funds to the owners of the units, who are the policyholder's clients. The policyholder uses an electronic payment application provided by a third-party to implement the policyholder's collection of funds on behalf of, and subsequent transfer of funds to, its clients. The insurer has argued the funds were not covered property under the policy because the policyholder did not physically “hold” the funds for its clients when the funds were stolen. However, the policyholder managed, directed, and controlled the funds, using the third-party software application for that purpose, and to limit the word “hold” only to instances where a corporate policyholder conducts business through its own personal bank account ignores the reality of how modern businesses engage in digital payment processing, and is inconsistent with the terms of the policy.

***iv** Oral argument would aid this Court in understanding this factual context and its implications for coverage issues in future cases.

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***1 JURISDICTIONAL STATEMENT**

I. District Court's Jurisdiction

The district court had subject matter jurisdiction over this action under [28 U.S.C. § 1332\(a\)\(1\)](#) because there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs. (ROA.20)

II. Court of Appeals' Jurisdiction

This Court has jurisdiction pursuant to [28 U.S.C. § 1291](#) because the judgment below is a final judgment of the United States District Court.

III. Timeliness of Appeal

The district court entered judgment on February 25, 2021. (ROA.2515) Appellant timely filed its appeal within 30 days, on March 26, 2021. (ROA.2516-17).

IV. Final Judgment

This appeal is from a final judgment that disposed of all parties' claims.

***2 STATEMENT OF THE ISSUES**

1. Whether the district court erred in granting summary judgment against RealPage.
2. Whether the district court also erred in denying RealPage's motion for partial summary judgment.

***3 STATEMENT OF THE CASE**

I. The Crime Policies

National Union sold RealPage a Commercial Crime Policy, No. 01-317-15-74, for the policy period from March 31, 2018 to March 31, 2019 (the “Primary Crime Policy”).¹ (ROA.998) The Primary Crime Policy provides several Insuring Agreements, including “Computer Fraud” and “Funds Transfer Fraud,” with a \$5 million Limit of Insurance Per Occurrence and a \$50,000 deductible. (ROA.998)

The Computer Fraud Insuring Agreement provides coverage as follows:

6. Computer Fraud

We will pay for loss of or damage to “money”, “securities” and “other property” resulting directly from the use of any computer to fraudulently cause a transfer of that property from inside the “premises” or “banking premises”

- a. To a person (other than a “messenger”) outside those “premises”; or
- b. To a place outside those “premises”.²

(ROA.1002) The Primary Crime Policy defines “money” to include “[c]urrency, coins and bank notes in current use and having a face value,” while “other property” includes any other tangible property “that has an intrinsic value.” (ROA.1013) *4 “Banking premises” is defined as “the interior of that portion of any building occupied by a banking institution or similar safe depository.” (ROA.1012) “Funds” includes “money” as that term is defined in the Primary Crime Policy. (ROA.1012) The Primary Crime Policy also includes the following condition:

p. Ownership Of Property; Interests Covered

The property covered under this policy is limited to property:

- (1) That you own or lease; or
- (2) That you hold for others whether or not you are legally liable for the loss of such property.

However, this policy is for your benefit only. It provides no rights or benefits to any other person or organization. Any claim for loss that is covered under this policy must be presented by you.

(ROA.1008, the “Loss Provision.”)

Beazley sold RealPage an Excess Fidelity and Crime Policy, No. V227E9180101, for the policy period of March 31, 2018 to March 31, 2019 (the “Excess Crime Policy” and, together with the Primary Crime Policy, the “Commercial Crime Policies”). (ROA.1059) The Excess Crime Policy provides coverage excess of the Primary Crime Policy's limits “for any loss which triggers coverage under the [Primary Crime Policy].” (ROA.1066)

***5 II. RealPage's Arrangement for Transferring Money on Behalf of Its Clients.**

RealPage provides software and data analytics to the real estate industry. (ROA.2579) It also provides back-office management services for owners and managers of various property types that assist those clients with property management, resident services, and revenue management. (ROA.2579) One of the services that RealPage provides to its clients is the collection of rental and other payments from residents and the transfer of those payments to clients. (ROA.1166, 1199, 1288:3-1289:19) RealPage's clients expressly authorize RealPage to manage, to collect, and to process the residents' payments, for ultimate delivery to the clients. (ROA.1166, 1199) In order to collect these payments, RealPage's wholly-owned subsidiary, RP On-Site, LLC (“On-Site”),³ provides a web portal that residents at certain of its client properties can access to make their payments. (ROA.2560-68, 1165-67, 1278:20-1279:2, 1285:12-1286:13) RealPage's clients offer the On-Site web portal as a payment service to its residents, who authorize RealPage to transfer funds from their bank accounts for the purpose of making payments. (ROA.1200, 1299:14-1300:2)

For the portion of RealPage's services relevant in this case, RealPage uses a *6 third-party software application from Stripe as a tool to allocate and to direct the resident payments received through the web portal. (ROA.1261, 1285:12-1286:13, 1287:3-1292:21) RealPage's clients authorize RealPage to set up accounts in Stripe's software application on their behalf and agree to provide their bank account information and settlement bank account instructions to RealPage. (ROA.1200, 1856:23-1857:23) In turn, RealPage is responsible for ensuring its clients' data and payment instructions are provided to Stripe. (ROA.1262, 1296:9-1297:9) Pursuant to the instructions provided by RealPage, Stripe facilitates the settlement of funds received from the residents into the client depository accounts designated by RealPage. (ROA.1242, 1275:7-10, 1885:7-12) Stripe transfers the funds to an account “for the benefit of” (“FBO”) its merchants, meaning RealPage and other Stripe users, which is consistent with Stripe's role as agent for its users. (ROA.1341:4-1342:11, 1345:7-1346:10, 1884:10-23) By designating the account “FBO” its users, like RealPage, Stripe is required to use the funds to fulfill RealPage's obligations to its clients. (ROA.1346:2-10, 1876:17-1878:11) Transaction fees owed to RealPage for its services are also directed to RealPage's bank account in accordance with instructions given to Stripe by RealPage, either directly through manual input into Stripe or through an application programming interface (“API”) created and owned by RealPage. (ROA.1237:8-1238:18, 1282, 1290:11-1292:21, 1303:10-1306:8)

*7 RealPage is the only entity that interfaces with (i) the client owners and (ii) paying residents. The residents rely on RealPage to receive the payments and transfer them to the owners; the owners rely on RealPage to collect the resident payments and forward them to the owners. The software programming arrangement that facilitates the transfers is solely between RealPage and Stripe, with Stripe acting at the command of RealPage's transfer of funds instructions. (ROA.1275:7-10, 1231, 1296:9-1297:9, 1891:6-25, 1892:11-1893:12) Thus, neither RealPage's clients nor the residents have access to the application, or any relationship with Stripe, the third-party application provider. (ROA.1263, 1288:12-16, 1296:9-1297:9, 1343:24-1344:5)

RealPage obtains bank account information from residents and clients (ROA.1240-41, 1300-01), and is responsible for ensuring the funds are delivered to its clients. (ROA.1268) This is made clear by the terms of Stripe, which expressly provide that RealPage is responsible for initiating refunds for its clients (ROA.1231, 1240-41), changing its clients' depository information (ROA.1267), and supplying payment instructions to Stripe. (ROA.1262) RealPage is also responsible for actions taken on the application using RealPage credentials. (ROA.1262) The only thing for which Stripe is responsible is to settle funds paid by the residents to RealPage's clients' destination accounts. (ROA.1245) Accordingly, Stripe's role is limited to facilitating payments – at RealPage's direction – from residents to the appropriate *8 clients. (ROA.1275:7-10, 1290:11-1292:21) Stripe thereby is simply the digital pipeline that RealPage uses to complete its collection of payments from residents and its transfer of those payments to clients.

III. The Fraud Incident.

In May 2018, one or more unauthorized parties used a targeted phishing scheme to obtain and to alter the account credentials of a RealPage employee. (ROA.2580, 2592-93, 1151, 1168) The unauthorized parties used those credentials to access Stripe in order to change certain bank account disbursement instructions provided by RealPage to Stripe. (ROA.2592-93, 1151, 1168)

By changing those instructions, the unauthorized parties diverted more than \$10 million that had been collected by RealPage through the web portal before the funds were disbursed to several clients. (ROA.2592-93)

RealPage was alerted to the fraudulent activity by the unauthorized-parties' financial institutions and immediately began efforts to claw back the funds. (ROA.1080-83) That same day, RealPage informed Stripe of the fraudulent activity and directed Stripe to reverse the fraudulent payments and stop any ongoing transfers of its clients' funds. (ROA.1076-79) In accordance with RealPage's direction, Stripe took steps to stop or reverse the fraudulent activity. (ROA.1070-75)

Despite RealPage's loss as a result of the Fraud Incident, RealPage credited each of the affected clients' accounts with the full amount of the stolen funds *9 promptly after detection of the fraudulent transfer. (ROA.1140-41, 2579) At the time RealPage filed its claim for coverage, RealPage had lost more than \$6 million. (ROA.1140-41, 1161-62) Though the entire \$6 million has never been fully recovered, RealPage worked with the United States Secret Service and Department of Justice in the two-and-a-half years since the Fraud Incident to recover a portion of the stolen funds.

IV. RealPage's Claim for Coverage Under the Crime Policies.

RealPage provided notice of the Fraud Incident under the Policies. RealPage gave extensive information to National Union as requested, orally and in writing, and submitted a formal proof of loss in September 2018. (ROA.1140-41) After submitting its proof of loss, RealPage responded to multiple requests for information and documents from National Union. (ROA.2658-62, 2876-87)

In January 2019, National Union admitted that the Fraud Incident triggered coverage under the Primary Crime Policy's Computer Fraud Insuring Agreement. (ROA.1151-52) However, National Union only accepted coverage for a limited portion of RealPage's losses consisting of diverted funds that it calculated as representing transaction fees owed to RealPage by its clients. (ROA.1152) National Union denied coverage for a majority of RealPage's losses consisting of diverted funds that would have been sent to client bank accounts, claiming that RealPage did not "own" the funds or "hold the funds for others." (ROA.1152) National Union *10 confirmed its denial of coverage on April 25, 2019. (ROA.1168) Beazley also denied coverage for RealPage's claim. (ROA.137, 1957-59)

V. The District Court Proceedings.

RealPage brought this lawsuit, seeking damages from National Union for breach of contract and violations of the Texas Insurance Code, including the Prompt Payment Act, and damages from Beazley for its anticipatory breach of contract. (ROA.18-110)

RealPage moved for partial summary judgment on its claims for breach of contract and declaratory judgment. (ROA.950-52.) Because National Union had admitted that the Fraud Incident triggered coverage under the Computer Fraud Insuring Agreement, the only issues on RealPage's motion for partial summary judgment were (1) whether RealPage was "hold[ing] for others" its clients' funds under the Loss Provision when they were diverted during the Fraud Incident and (2) whether National Union and Beazley breached the Commercial Crime Policies by denying coverage to RealPage. (ROA.968-78)

Defendants filed motions for summary judgment. National Union asserted in its motion that RealPage's claims fail as a matter of law, making several arguments, including that: (1) RealPage did not hold the funds; (2) the loss of funds and RealPage's reimbursement of those funds are outside the scope of the policies because they are indirect losses; (3) coverage for reimbursement paid by RealPage *11 was precluded by Endorsement 16 of the policy (the "Indirect Loss Exclusion"); and (4) there is no coverage because the transfer account at issue did not belong to RealPage. (ROA.1359-60) In its motion, Beazley asserted, among other things, that RealPage is not entitled to declaratory relief because: (1) the payments did not involve funds held by RealPage; (2) the alleged loss is excluded by the Indirect Loss Exclusion; and (3) the payments were not made from an account maintained by RealPage at a financial institution. (ROA.681-82)

The district court denied RealPage's motion for partial summary judgment and granted National Union's and Beazley's summary judgment motions. (ROA.2488-2514) The district court summarized its ruling:

These cross-motions require the Court to determine whether RealPage is entitled to coverage under commercial-crime insurance policies for the loss of its clients' funds, which were diverted through a phishing scheme. The central issue to the coverage determination is whether RealPage held these funds despite its use of a third-party payment processor, Stripe, Inc. ("Stripe").

Because the Court concludes that RealPage did not hold the stolen funds at issue, the Court **GRANTS** summary judgment in favor of National Union and Beazley on all claims against them.

(ROA.2488-89)

***12 STANDARD OF REVIEW**

This Court reviews *de novo* a district court's grant of summary judgment, guided by the same summary judgment as the district court. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001).

RealPage and the Defendants filed cross-motions for summary judgment on (i) the interpretation of the Commercial Crime Policies' Loss Provision and its application to RealPage's claim for coverage and (ii) whether the insurers breached the Commercial Crime Policies. With respect to those issues, the Court must "review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Id.* Further, under Texas law, Defendants "bear the burden" of proving that their interpretation of the Indirect Loss Exclusion applies to RealPage's losses. *Guaranty Nat'l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998).

In seeking summary judgment, Defendants had the burden to first "show that no genuine issue of material fact exists, and [they are] entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). On those issues, "all evidence and reasonable inferences must be viewed in the light most favorable to the nonmovant, and all disputed facts resolved in favor of the nonmovant," *i.e.*, RealPage. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

***13 SUMMARY OF ARGUMENT**

RealPage seeks coverage under the Commercial Crime Policies for losses it sustained as a direct result of a targeted phishing incident in which malicious bad actors stole a RealPage employee's credentials to fraudulently divert RealPage-controlled funds that RealPage was obligated to transfer to its clients (the "Fraud Incident"). Such an incident is precisely the type of activity the Commercial Crime Policies are intended to cover. Indeed, National Union acknowledged that the fraudulent diversion of funds through use of RealPage's computer system triggered the coverage under its policy, and "unconditionally" paid for a portion of the losses tied to transaction fees owed to RealPage. As to the majority of RealPage's losses, however, National Union has denied coverage and taken the position that funds RealPage collected, controlled, and managed on behalf of its clients do not fall within the definition of covered property under the policies because the funds allegedly were not property that RealPage "own[s]" or "hold[s] for others."

National Union and Beazley have argued that because RealPage used an electronic payment application provided by Stripe to implement the transfer of funds to its clients, RealPage did not "hold" the funds for RealPage's clients when they were stolen. This is wrong as a matter of law. The term "hold for others" is not defined in the Primary Crime Policy. A plain reading of the Primary Crime Policy shows that RealPage's management, direction, and control of the stolen funds *14 satisfies the undefined standard that covered property be "h[e]ld" for RealPage clients.

RealPage and its clients agreed by contract that RealPage would collect payments from residents at client properties and transfer that money to the clients. RealPage's clients understood and expected that RealPage would receive and administer the funds in accordance with the payment instructions they provided to RealPage. Stripe has no relationship with RealPage's clients, and RealPage is responsible for the security of the credentials used to access Stripe, any losses arising from theft or misuse of such credentials, and any unauthorized access to RealPage's account within Stripe. RealPage's management, direction, and control of the funds on behalf of its clients show that it held the funds for them, while Stripe simply implemented the transfer of funds pursuant to RealPage's instructions and under RealPage's direction and control.

The electronic payment application provider, Stripe, owned the bank account for the benefit of RealPage, and RealPage controlled the application to manage its clients' money. RealPage controlled and directed the funds through the use of the third-party software application, which is a mere conduit and had no relationship with RealPage's clients. In the clients' view, RealPage held the funds because the clients only had contracts with RealPage, and in Stripe's view, RealPage held the funds because it could only move funds based on directions from RealPage. *15 Moreover, the residents viewed RealPage as the holder of the payments and the party transferring the payments to the owners. As such, everyone involved in the commercial transaction and payment processing arrangement viewed RealPage as the holder of the funds until they reached their final destination.

Even if the Court finds that the term “hold for others” is ambiguous, then the term must be construed strictly against the carriers and liberally in favor of coverage, and RealPage is entitled to coverage under the Commercial Crime Policies.

ARGUMENT

I. The District Court Erred in Granting Summary Judgment Against RealPage.

The district court recognized that the central issue in this insurance coverage case is whether RealPage “held” the stolen funds at issue. If those funds were being “held” by RealPage for others, then RealPage is entitled to coverage under the policies.

A. RealPage Had Sole Control of the Stolen Funds, Which Were Being “Held” On Behalf of Its Clients.

1. Principles Governing Interpretation of a Policy.

Insurance policies interpreted under Texas law are controlled by the same rules of construction that apply to contracts. *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738 (Tex. 1998). The primary goal “is to give effect to the written expression of the parties' intent.” *Id.* at 741 All parts of the contract must be read together, “striving to give meaning to every sentence, clause, and word to avoid *16 rendering any portion inoperative.” *Id.* Further, courts should generally “construe contractual provisions in a manner that is consistent with the labels the parties have given them.” *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 121 (Tex. 2015).

Insurance contract terms are given their plain and ordinary meaning unless the policy itself shows that the parties intended the terms to have a different and technical meaning. *Crenshaw v. State Farm Lloyds*, 425 F. Supp. 3d 729, 733 (N.D. Tex. 2019). “Unless the policy dictates otherwise, [courts] give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage.” *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 258 (Tex. 2017) (per curiam). “When the terms of an insurance policy are clear and unambiguous a court may not vary those terms.” *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695, 701 (5th Cir. 1996) (applying Texas law). If an insurance contract is ambiguous however, a court construes an ambiguous insurance policy “strictly against the insurer and liberally in favor of the insured.” *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987).

2. The Broad Definition of “Hold for Others” in the Loss Provision.

The Primary Crime Policy covers losses involving property that RealPage (1) owns or leases, or (2) holds for others, whether or not RealPage is “legally liable for *17 the loss of such property.” (ROA.1008) The policy provides in a provision with the heading “Ownership Of Property; Interests Covered” that:

The property covered under this policy is limited to property:

- (1) That you own or lease; or
- (2) That you hold for others whether or not you are legally liable for the loss of such property.

(ROA.1008)

“Own” is not a defined term in the policy. According to Black's Law Dictionary, to “own” means to “rightfully have or possess as property; to have legal title to.” BLACK'S LAW DICTIONARY 1280 (10th ed. 2014).

“Hold” also is not a defined term in the policy. Black's Law Dictionary defines “hold” in a variety of ways, including “(3) to *direct* and bring about officially ... [and] (4) to keep in custody or *under an obligation*; ...” BLACK'S LAW DICTIONARY 848 (10th ed. 2014) (emphasis added). Merriam Webster's states the verb “hold” means “to ... *have at one's disposal*.” MERRIAM-WEBSTER DICTIONARY (online ed.) available at <https://www.merriam-webster.com/dictionary/hold> (last visited Nov. 6, 2020) (emphasis added). The Cambridge Dictionary⁴ defines “hold” as “to have something, especially a position *18 or money, or to *control* something.” CAMBRIDGE DICTIONARY (online ed.) available at [http:// dictionary.cambridge.org/us/dictionary/english/hold](http://dictionary.cambridge.org/us/dictionary/english/hold) (last visited Nov. 6, 2020) (emphasis added).

The district court recognized that the word “hold” has a variety of different meanings, including having control. (ROA.2503) However, the district court found those meanings to be limited to select specific contexts appearing in the dictionaries' example sentences. For instance, the district court interpreted the Cambridge Dictionary's definition of “to control something” as applicable only to occupying land because that was the context of one example sentence, even though another example sentence for the same definition applies to money. (ROA.2503) The many meanings of the term “hold” demonstrate that RealPage's interpretation in this context is a reasonable one. Given there are many meanings of the word “hold,” Texas law places the burden on the carrier to define any specific meaning that it intended. *See Lynd*, 466 S.W.3d at 118-119.

The Primary Crime Policy clearly intends for “own” and “hold” to have separate and distinct meanings - it uses the terms in describing two separate types of covered property. As used in the policy, the term “hold” must mean something other than to “own” or “have or possess as property.” Indeed, the Primary Crime *19 Policy explains that it covers property that RealPage “hold[s] for others.”⁵

Nonetheless, the district court held that “[t]he plain meaning of the term ‘hold,’ as used in the Policy, connotes possession.” (ROA.2499) The district court reasoned that:

[U]nder the Court's interpretation, “own” and “hold” remain distinct - “own” encompasses a situation in which the insured “rightfully” possesses property, such as by “legal title”; with ownership, the property belongs to the insured. *See Own*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Own*, OXFORD ENGLISH DICTIONARY (online ed.). “Hold,” on the other hand, captures the situation in which the insured cannot claim that the property belongs to it - rather, the insured possesses the property owned by another. This distinction is reinforced by the fact that the Policy covers property “h[e]ld for others”: the property is owned by, and belongs to, “others.”

(ROA.2501)

The textual context of “hold for others” confirms that the phrase “hold for others” is to be interpreted broadly - “hold for others *whether or not you are legally liable for the loss of such property.*” Covered losses under the Primary Crime Policy includes property that RealPage “hold[s]” for others even if it owes no duties to the others (e.g., contractual duties) and has no liability whatsoever to the owners of the property.

*20 The district court acknowledged that “this language suggests that “RealPage enjoys broad coverage under the Policy.” (ROA.2501) However, the district court cited this Court's opinion in *Cooper Indus., Lt. v. Nat'l Union Fire Ins Co of Pittsburgh*, 876 F.3d 119, 125 (5th Cir. 2017), and noted that “when analyzing the term ‘own’ in a ‘Covered Property’ provision identical to RealPage's” this Court “relied upon the ‘common understanding of ‘ownership’” (ROA.2501) That misses a critical aspect of *Cooper* - this Court noted “the common understanding of ‘ownership’ - i.e., the possession or control of property.” *Cooper*, 876 F.3d at 125. If the district court is right that *Cooper* decides that the term “own” in a policy provision identical to RealPage's must be interpreted consistent with “the common understanding of ‘ownership’ - i.e., the possession or control of property,” then there would be coverage here. As discussed below, RealPage controlled the property in question, the stolen funds. By the district court's reasoning, RealPage owned the property, and there would be no need for RealPage to “hold” the property as well.

Moreover, construing the Primary Crime Policy as a whole confirms that “hold” has a different meaning than “own” or “possess.” For example, the policy provides in one of its exclusions that the policy covers losses resulting from “[t]he unauthorized use or disclosure of confidential information of another person or entity *which is held by you* including, but not limited to, financial information, personal information, credit card information or similar non-public information.” *21 (ROA.1003) The confidential information “held” by RealPage is not limited to information “held” on servers owned by RealPage.⁶ This confirms that a broad, inclusive definition of “hold” is clearly intended in the policy.

Thus, the Primary Crime Policy expresses an intent that the term “hold,” is broad and inclusive. The term “hold” means to control, direct, have at one's disposal, and keep under an obligation.

3. RealPage Controlled, and Thereby Held, the Funds of Its Clients.

As set forth in the Statement of the Case, RealPage's clients expressly entrusted RealPage – and only RealPage – to collect and to manage the funds paid by residents, to hold that money, and then to transfer that money to the clients. *Supra*, p. 5. The residents similarly entrusted RealPage – and only RealPage – to accept their money and to transfer that money to RealPage's clients. RealPage had sole responsibility for effectuating those directions.

RealPage engaged Stripe, a third-party payment processor, to implement the transfer of funds - to be the digital pipeline that effectuates the transfer - but RealPage itself (i) set up the client accounts in Stripe (which the clients could not access), (ii) collected payment information for the clients and residents, (iii) *22 interfaced directly with the residents and the clients,⁷ and (iv) controlled all payment instructions sent to Stripe.⁸ *Supra*, pp. 5-7. Not a single penny of RealPage client money could be transferred out of the Stripe account without the express authorization, approval, and instruction from RealPage.⁹ Accordingly, from the perspective of both RealPage's clients and Stripe (as well as the residents), only RealPage was controlling the clients' money, and therefore RealPage held the funds for its clients. This is what the contracts between RealPage and its clients called for. *Supra*, p. 5.

Also, the information fraudulently acquired and utilized to steal the money was RealPage's information– namely, RealPage's passwords that allowed access to the movement of client money out of the bank account. *Supra*, p. 8. In their criminal scheme, unauthorized parties unlawfully acquired the means by which RealPage exercised its control over its clients' money; they

accomplished their criminal scheme by acquiring access to RealPage's control over those funds. *Supra*, p 8. *23 Thus, RealPage – and not Stripe – was the direct victim of the Fraud Incident, and the purpose of purchasing the Commercial Crime Policies was to provide coverage when RealPage was the victim of “Computer Fraud” or “Funds Transfer Fraud,” which is exactly what happened here.

RealPage's control of its clients' money is sufficient to meet the “hold for others” language in the Loss Provision. The policy language provides coverage because the stolen money was being held by RealPage “for others,” namely, its clients. Coverage is clear.¹⁰

B. Also, RealPage “Held” the Funds in Bailment for Its Clients and the Residents.

In its denial of coverage, National Union relied primarily upon the district court decision in *Lynch Properties Inc. v. Potomac Insurance Co. of Illinois*, 962 F. Supp. 956 (N.D. Tex. 1996) (“*Lynch I*”), *aff'd* 140 F.3d 622 (5th Cir. 1998) (“*Lynch II*”). (ROA.1168-70). In that case, the district court held that the facts presented there were insufficient to show that the policyholder “held” the funds at issue. In affirming the district court, this Court noted “[o]n the facts of this case, ... [the appellant] never had a bailment over the cash or the funds” in the accounts at issue. *Lynch II* at 627. This Court recognized, without deciding, that “an insured may very well ‘hold’ property in ways other than a bailment” but that the policyholder in that *24 case failed to suggest any other way other than a bailment it may have “held” the funds at issue. *Lynch II* at 628, n.2.¹¹

The key facts that distinguish *Lynch II* from RealPage's case is that *the client* in *Lynch II* owned the account in which the funds were located, *the client* never relinquished control over the funds to the insured, and the funds remained in *the client's* account at the time the funds were stolen. In RealPage's case, it was the opposite, and once the residents relinquished control over the funds for delivery to RealPage's clients, *only* RealPage had control over where the money moved, which is precisely the reason the criminal scheme was successful in the first place.

Under Texas law, the three elements of a bailment are (i) delivery of personal property by one person to another to be used for a specific purpose, (ii) acceptance of such delivery, and (iii) an express or implied contract that the purpose will be carried out and the property will then be returned or dealt with as otherwise directed. *Id.* at 627.¹²

Here, RealPage's arrangement with its clients and the residents was a bailment. As explained above, RealPage's clients “knowingly” authorized RealPage to take “possession” and “control” of funds paid by the residents, and then to use *25 that possession and control to deliver those funds to the appropriate client. *See State v. \$281,420.00 in United States Currency*, 312 S.W.3d 547, 551 (Tex. 2010) (“The bailee must, at a minimum, knowingly [take the] property into possession *or* control for there to be a bailment.”); *see also Russell v. Am. Real Estate Corp.*, 89 S.W.3d 204, 211 (Tex. App. - Corpus Christi 2002, no *pet.*). A bailment relationship may be conducted through agents. *See Russell*, 89 S.W.3d at 211 (noting that it was undisputed that the bailee, “through its agents,” knowingly took control of the bailor's possessions).

The district court rejected RealPage's bailment argument, finding that:

RealPage has not established that it was a bailee of the client funds under Texas law. The funds were delivered to Stripe, not RealPage. And RealPage has not demonstrated that it had the right to control Stripe's means of payment processing. Further, even if Stripe were an agent of RealPage under Texas law, the relationship between RealPage, its clients, and its clients' residents does not fall within Texas' definition of a bailment. Finally, Real Page has not established that it contracted to create a bailment.

(ROA.2509) Each of those conclusions is wrong.

The Delivery of Funds to Stripe. A bailment relationship may be conducted through agents. See *Russell*, 89 S.W.3d at 211.

RealPage's Right to Control. RealPage, not Stripe, was holding the funds both for residents and clients under a bailment. RealPage's account with Stripe is designated “for the benefit” of RealPage, and its sole purpose is to effectuate *26 the obligations RealPage and other Stripe users have to their clients. Stripe was able to provide its services if and when RealPage instructed Stripe to route funds from one point to another. RealPage had the ability to move the funds wherever it wanted; indeed, Stripe could not move funds without RealPage's instructions, as Stripe would have no independent knowledge of where the funds were meant to go. (ROA.1343:10-1344:5, 1876:17-1878:11, 1890-94)

The Relationship Between RealPage, Its Clients, and the Residents. In RealPage's contracts with its clients, each client “authorizes [RealPage] to act as an agent on [the] Client's behalf” and to “manage and collect monies debited from the [residents'] accounts, and to credit [the] Client's identified bank account less any transaction fees” (ROA.1199). Residents logged onto RealPage's web portal in order to initiate the transfer of funds. (ROA.2560-68, 1167-68, 1282:8-17, 1285:12-1286:13, 1287:3-23)

Contract to Create a Bailment. RealPage's agreements with its clients contain express language that says that (i) “[RealPage] will provide [the] Client with Payment Processing Services as a third-party processor of ACH, debit and card transactions;” (ii) “[the] Client authorizes [RealPage] to manage and collect monies from the Client's customers' [] accounts, and to credit Client's identified bank account less any transaction fees; and (ii) the client will provide “[a]uthority to open a merchant account.” (ROA.1220) With these agreements in place, those residents *27 living at properties owned or managed by RealPage's clients would log into RealPage's web portal to provide payment information to RealPage to send to Stripe in order to initiate payment to the clients. (ROA.1287:3-23, 1288:20-1289:2, 1299:14-1300:2, 1303:10-1305:24)

RealPage's arrangement squarely fits into the definition of bailment under Texas law and, in accordance with *Lynch II*, demonstrates that RealPage “held” the funds under the terms of the Commercial Crime Policies. RealPage controlled the entire payment process in accordance with its responsibility to its clients, and therefore is the only entity that held the funds at the time of the Fraud Incident. This control is reflected in the payment instructions that RealPage gave to Stripe, without which the funds would simply sit in the Stripe account, as Stripe had no other way to know where the funds were meant to go. Pursuant to RealPage's agreement with Stripe, Stripe directed the funds to its account “for the benefit” of RealPage and Stripe's other users, which limited what Stripe could do with those funds. *Supra*, p. 6. Stripe could *only* use the funds in the “FBO” account to satisfy RealPage's obligations to its clients, and the only way that Stripe could accomplish this would be through RealPage's instructions.

Accordingly, RealPage “held” the funds in bailment for its clients (and the residents), within the meaning of “held” in the Commercial Crime Policies. That is *28 an additional reason why the stolen funds are within the broad definition of the “hold for others” term in the Loss Provision.

C. The Loss Provision Must be Construed in Favor of Coverage if the Term “Hold” Is Ambiguous.

A basic principle of contract law is that any ambiguity must be construed against the drafter. See *Companion Prop. & Cas. Ins. Co. v. Ophelm*, 92 F. Supp. 3d 539, 547 (N.D. Tex. 2015). The same approach is true under insurance law, but it applies with even more force. A policy is ambiguous if it is genuinely subject to two or more reasonable interpretations, and if so, must be construed against the insurer. *Id.* “If a contract is truly ambiguous, then Texas law requires a court to adopt ‘the construction most favorable to the insured.’” *Id.*

Here, the term “hold” is undefined, and if this Court finds that the term is ambiguous, then the policy language must be construed “strictly against” National Union and Beazley and “liberally in favor of” RealPage in order to find coverage under the Commercial Crime Policies.¹³ *Am. Intern. Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F.3d 558, 562 (5th Cir. 2010).

D. RealPage Suffered a Direct Loss.

RealPage sustained a direct loss under the Commercial Crime Policies. Because the stolen funds were “h[e]ld for others” by RealPage, there can be no *29 argument that the loss of those funds was “indirect.” The issue of control is dispositive to determining whether an insured sustained a “direct loss” in these types of situations. RealPage's control is the very reason why the bad actors were able to gain access to the application in the first place and divert the funds – the bad actor stole RealPage credentials in order to access the application and provide it with different directions – i.e., the control – in order to take the money. Under Texas law, RealPage “h[e]ld for others” the diverted funds when they were stolen because it completely controlled the movement of funds through the Stripe system.

In *BJ Servs. S.R.L. v. Great Am. Ins. Co.*, 539 Fed. Appx. 545 (5th Cir. 2013), this Court reversed a lower court decision that an insured did not have a direct loss when it had to repay fraudulent loans taken out by employees. The employees had obtained the loans under the insured's name, but then used the proceeds for their own purposes without entering the loan into the insured's corporate accounting. *Id.* at 547. The insurer argued that the policyholder never controlled the funds and only had a loss when the lenders sought to collect repayment. *Id.* at 545. The insurer argued that the assets were not included in BJ Services' accounting books or deposited into an account in BJ Services' name. *Id.* at 550. This Court disagreed, holding that if the employees received the assets on behalf of the insured, BJ *30 Services, then the employees took the assets from the insured and there was a direct loss. *Id.* This Court held that “[t]he only reasonable conclusion is that ... BJ Services received the money and bonds when they were accepted by [BJ's employees]. If BJ Services did not receive the assets, it is difficult to understand how the lenders could have performed their end of the contract.” *Id.* at 551.

Here, RealPage authorizes Stripe to act as its agent and receive client funds on RealPage's behalf.¹⁴ But this does not change the fact that only RealPage has a relationship, contractual or otherwise, with its clients, and only RealPage controls the information that tells Stripe where to send the funds. Because only RealPage has a relationship with its clients, when Stripe receives funds on behalf of RealPage, then RealPage receives the money. And when the funds were diverted by unauthorized parties, the funds were taken from RealPage. RealPage suffered a direct loss when the bad actors diverted its clients' funds.

Under similar circumstances, one court concluded that a policyholder held its clients' funds. In *Cedar Lake Homeowners Assoc. v. Northwest Empire Community *31 Mgmt.*, 3:14-cv-599-Pk, 2015 WL 9690846, at *4 (D. Or. Nov. 13, 2015), the court distinguished this Court's opinion in *Lynch II* and concluded that the insured held and was legally liable for its clients' funds where the insured had a management agreement with its clients providing for the insured to be the sole account holder with exclusive authority to sign checks and gave the clients no access over the accounts. The court found that the insured's clients clearly intended to relinquish control of their property to the policyholder, which clearly intended to exercise control over the accounts. Indeed, the insured's fee was contingent, at least in part, on its management of its clients' account. *Id.* That is similar to RealPage's contracts with its clients. Analyzing these facts, the *Cedar Lake* court found that the insured suffered a direct loss under its policy.

Here, too, RealPage suffered a direct loss.¹⁵

E. There Are Genuine Issues of Material Fact That Preclude Summary Judgment Against RealPage's Claims Against National Union Under Chapter 542 of the Texas Insurance Code.

National Union moved for summary judgment on RealPage's claims against it under Chapters 541 and 542 of the Texas Insurance Code. The district court only granted summary judgment on these claims based on its view that RealPage was not *32 entitled to coverage. (ROA.2513-14) However, material facts remain in dispute between the parties.

When National Union Received all “Items, Statements, and Forms” Under the Prompt Payment Act (“PPA”). “To prevail under a claim for [PPA] damages under section 542.060, the insured must establish: (1) the insurer's liability under the insurance policy, and (2) that the insurer has failed to comply with one or more sections of the [PPA] in processing or paying the claim.” *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 813 (Tex. 2019). “Nothing in the [PPA] would excuse an insurer from liability for [PPA] damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline[.]” *Id.* Put another way, it is not necessary for a plaintiff to prove that the insurer acted wrongfully or in bad faith. See *Biasatti v. GuideOne Nat'l Ins. Co.*, 601 S.W.3d 792, 794-95 (Tex. 2020) (analyzing the plaintiff's PPA claim separately from its bad faith claim). The statute requires only liability under the policy and a failure to comply with the timing requirements of the PPA. See *Agredano v. State Farm Lloyds*, 975 F.3d 504, 506-507 (5th Cir. 2020). When an insurer “merely contends that there is no evidence that [the insurer] violated the Prompt Payment Statute,” it “fail[s] to meet [the] summary judgment burden ...” *Carter Tool Co., Inc. v. United Fire & Cas. Co.*, MO:18-CV-163-DC, 2019 WL 7759499, at *6 (W.D. Tex. Nov. 7, 2019).

*33 Section 542.056 of the Texas Insurance Code says that “[e]xcept as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.” Subsection (d) provides that if an insurer is unable to accept or reject a claim within 15 business days, the insurer “within that same period, shall notify the claimant of the reasons that the insurer needs additional time. The insurer shall accept or reject the claim not later than the 45th day after the date the insurer notifies a claimant under this subsection.”

National Union contends that it complied with all timing requirements of Sections 542.056 and 542.058 of the Texas Insurance Code, pointing to evidence of certain communications as proof that it complied with the PPA. (ROA.1385) However, National Union (i) failed to identify when it determined it had enough information to accept coverage for part of RealPage's claim on January 4, 2019, (ii) failed to identify what information it needed from RealPage in order to make a coverage decision on the remaining portion of RealPage's claim, and (iii) failed to cite to Texas law that supports its apparent position that an insurer can toll the strict deadlines of the PPA by simply stating that it needs more information without an actual request for information.

*34 National Union's evidence is inadequate to show that it complied with the PPA. For example, National Union cites to the following evidence:

National Union ... identified [its] engagement of a forensic accountant, requested a meeting of the parties' respective forensic accountants, and received RealPage's unconditional agreement that this was the best path forward on October 22, 2018. (ROA.1368)

National Union's characterization of RealPage's agreement to retain a forensic accountant as “unconditional” is irrelevant for a strict liability statute like the PPA and National Union does not explain why this evidence is relevant for the Court's analysis, so the Court should not consider it. See *Agredano*, 975 F.3d at 507 (observing that the Texas Supreme Court “clearly treated the [PPA] as a strict liability provision”). National Union has not met its burden.¹⁶

Accordingly, National Union's motion for summary judgment on the issue of Chapter 542 must be denied.

***35 II. The District Court Erred in Denying RealPage's Motion for Partial Summary Judgment.**

Because RealPage is entitled to coverage for its losses under the Commercial Crime Policies, National Union and Beazley breached their insuring agreements by denying coverage to RealPage for its losses.

In its motion for partial summary judgment, RealPage sought a declaration that RealPage suffered covered losses that National Union and Beazley are obligated to pay under the Commercial Crime Policies because RealPage “h[e]ld for others” the funds for its clients and its losses are therefore covered under the Commercial Crime Policies.

RealPage's motion also sought summary judgment on its claims that National Union breached and Beazley anticipatorily breached the Commercial Crime Policies by denying coverage to RealPage for these losses. RealPage demonstrated that it was “hold[ing]” the funds at the time the funds were diverted. National Union acknowledged that the Fraud Incident triggered coverage under the Computer Fraud Insuring Agreement in the Primary Crime Policy. Accordingly, the Defendants breached their insuring agreements by denying coverage to RealPage under their respective policies.

The essential elements of a breach of contract claim in Texas are: (1) the existence of a valid contract; (2) breach of the contract by the defendant; (3) performance or tendered performance by the plaintiff; and (4) damages sustained by *36 the plaintiff as a result of the defendant's breach. *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 418 (5th Cir. 2009) (citing *Aguiar v. Segal*, 167 S.W.3d 443, 450 (Tex. App.–Houston [14th Dist.] 2005, pet. denied)). “A breach occurs when a party fails or refuses to do something he has promised to do.” *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App. - Houston [1st Dist.] 2003, pet. denied).

If the Fraud Incident triggered coverage for the diverted funds representing client payments, then National Union and Beazley were required to indemnify RealPage for its losses resulting from the Fraud Incident under the terms of the Commercial Crime Policies. National Union and Beazley have breached their insurance contracts by wrongfully denying coverage to RealPage for losses resulting from the Fraud Incident.¹⁷

CONCLUSION AND PRAYER

Appellants respectfully request that this Court reverse the district court's judgment and direct the district court to enter an order granting RealPage's motion for partial summary judgment.

*37 Dated: May 24, 2021.

Respectfully submitted,

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Footnotes

- 1 A copy of the Primary Crime Policy appears at ROA.990-1057.
- 2 Terms in **bold** reflect the way they appear in the excerpts quoted from the Policies. Terms in quotation marks are further defined in the Policies.
- 3 As used herein, “RealPage” refers to both RealPage and its subsidiary, On-Site, unless otherwise indicated. In September 2017, RealPage acquired certain assets of On-Site Manager, Inc. and formed On-Site.
- 4 The Cambridge Dictionary is widely accepted by courts attempting to distinguish the plain meaning of terms and phrases. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 19 (2011); *Houston Aquarium, Inc. v. Occupational Safety & Health Review Comm’n*, 965 F.3d 433, 441 (5th Cir. 2020).
- 5 The definitions of “funds,” “money,” and “other property” are not expressly limited to the insured’s property. The funds at issue were owned by RealPage’s clients, who contracted with RealPage to collect funds from residents and direct those funds (after deduction of a fee in accordance with contracts) to RealPage’s clients. (ROA.1166, 1199)
- 6 Indeed, it would be far-fetched to maintain that information controlled by RealPage but hosted by a third-party service provider on a different company’s servers nevertheless is not “held” by RealPage.
- 7 *See* ROA.1282:8-18 (Q: “From a renter’s perspective, there were two ways to make a payment of rent through the On-Site platform. That was either a request for an ACH deduction from his or her bank account or a payment through his or her credit card; is that right? A: That’s right.”); *see also* ROA.1285:22-1286:7, 1288:23-1289:7).
- 8 *See* ROA.1275:7-10 (“Stripe was [] designed as ... an application programming interfaced-based system for allowing companies to facilitate payments.”); *see also* ROA.1880:5-1881:5, 1888:9-1889:20.
- 9 *See* ROA.1343:10-1344:5 (Stripe “would not know where these funds are ... meant to go [T]hat was outside of [Stripe’s] purview, where [Stripe] wait[s] [for] the instruction from the merchants about where those funds should land.”).
- 10 The district court implicitly recognized that RealPage had control of its clients’ funds but, applying its interpretation of “hold,” the district court found that “RealPage’s authority to direct the transfer of the funds does not amount to holding the funds.” (ROA.2503)
- 11 The district court recognized that “by analyzing the existence of a bailment, the Fifth Circuit suggested that a bailee can ‘hold’ property” but concluded that RealPage “has not shown the existence of a bailment under Texas law.” (ROA.2506)
- 12 Texas law recognizes that money is “personal” property. *See Lopez v. Lopez*, 271 S.W.3d 780, 789 (Tex. App. - Waco 2008, no pet.).
- 13 By virtue of the district court’s holding that the term “held” was not ambiguous (ROA.2503), and its companion ruling that National Union’s motions to exclude expert testimony were moot (ROA.2514), RealPage was denied the opportunity

to demonstrate at trial that the common usage of the term “held” in the Fintech industry contemplates the type of control RealPage had over the transfer of funds between residents and RealPage clients.

- 14 Whether RealPage and Stripe had an agency relationship is irrelevant to the question of whether RealPage “h[e]ld” the stolen funds “for others” under the plain meaning of the Primary Crime Policy. It is instructive, however, that Stripe's corporate representative explicitly testified that RealPage's control over the funds was necessary for Stripe's ability to function. (*see* ROA. 1343:10-1344:5); (*see, e.g.*, ROA.1884:10-23 (“We're acting as agent; so we are moving the funds, but [RealPage is] instructing us when to do that.”)) Moreover, the Fifth Circuit has held that “[i]t is the facts and circumstances of the case, not just the words of the parties' agreement, that establishes an agency relationship.” (ROA.2507) (citing *In re Carolin Paxson Advert., Inc.*, 938 F.2d 595, 598 (5th Cir. 1991)).
- 15 The district court held that RealPage did not suffer a direct loss, based on the district court's view that RealPage did not hold the funds. (ROA.2510)
- 16 National Union also argues that it “explicitly apprised RealPage on October 8, 2018 that it had questions and needed additional time.” (ROA.1368) However, National Union's own expert opined that National Union did not request additional time. (ROA.1962-64.) Even if the October 8 email was an explicit request for additional time, National Union was required to accept or deny RealPage's claim within 45 days of October 8 under Subsection (d) because the PPA is a strict liability statute. However, National Union admits that it did not accept or deny a portion of RealPage's claim until January 4, 2019, which is well past November 22, 2018, or 45 days after October 8, 2018, and then did not deny the majority of RealPage's losses until April 25, 2019.
- 17 RealPage only moved for summary judgment on the liability portion of its causes of action for breach of contract against National Union and anticipatory breach of contract against Beazley. RealPage did not move for summary judgment on the damages portion of its breach of contact claims.