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Damage Occurring from Theft of Copper

Is the damage covered as vandalism or excluded as theft?

BY WAYNE D. TAYLOR, ESQ. &
RUTH M. PAWLAK, ESQ.

Incidents of copper theft are a matter of growing concern throughout the country. Thieves are stealing copper coils and wiring from houses, businesses, electrical substations, utility poles and trucks, and warehouses. Copper is valued by both thieves as well as legitimate entities because it is an effective conductor of electricity and works for almost all types of wiring. Stolen copper is redeemed for quick cash from scrap yards before it is shipped to developing nations, such as China, India and South Korea, where it is in high demand.

Copper prices have increased from approximately \$0.77 per pound in 2003 to \$4.00 per pound in 2011. Beyond the direct loss costs, theft of copper causes

damages to residential and commercial buildings that can exceed the value of the stolen metal.

Many of these copper thefts result in claims submitted under property insurance policies. But, under a first-party insurance policy, is damage caused during theft covered as vandalism or excluded as theft? Most first-party property policies contain an exclusion for theft that generally provides that the insurer "will not pay for loss or damage caused by or resulting from theft." The theft exclusion endorsement CP1033 0695 adds: "But we will pay for: (1) Loss or damage that occurs due to looting at the time and place of a riot or civil commotion; or (2) Building damage caused by the breaking in or exiting of burglars. And if a theft

results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss."

What the Courts Have Said

Many courts have examined whether claims for damage caused by the removal of copper are classified as "vandalism," which typically is covered, or "theft," which largely is excluded. The court decisions generally fall in two categories: (a) courts which hold that property damage caused during theft of copper is considered theft because the damage was inflicted in the process of gaining access to the copper that was stolen; and (b) courts which hold that property damage caused during theft of copper is considered vandalism regardless of whether

the metal was removed from the insured premises.

The first line of cases holds that property damage caused during the removal of copper is considered theft, which is not a covered loss, for example: *Essex Ins. Co. v. Eldridge Land, L.L.C.*—no coverage for damage caused by or resulting from theft; *Certain Underwriters at Lloyds London v. Law*—damage “in furtherance of a theft or attempted theft is damage that falls within the theft exclusion”; *General Star Indemnity Co. v. Zelonker*—damage caused to a meter box and conduits when electric wiring is stolen is not covered because it was “caused by or resulting from theft”; *Smith v. Shelby Ins. Co. of the Shelby Ins. Group*—no coverage for damage to a building’s interior that was caused when electrical wiring, plumbing pipes and condenser coils in air conditioning system were removed and stolen. In each of these cases, the insured’s property was damaged in the process of a theft, and the damage was inflicted during the course of gaining access to the copper that was the object of the theft.

Important to these courts was the reason for the damage. The courts in this set of cases have referred to a strict definition of vandalism—that is, damaging something simply for the sake of damaging it. Under the facts of these cases, the courts noted that the damage to the insured property occurred during the thieves’ efforts to access and remove the copper. In short, the courts in these cases looked to the perpetrators’ intent when causing the damage. According to the *Smith v. Shelby* court:

This definition [of vandalism] refers to the type of damage caused by vandals as that concept is ordinarily understood, i.e., damaging something simply for the sake of damaging it. The concept of theft is entirely different. A thief enters a building in order to steal something; certainly a thief’s primary focus is not the malicious defacing, destroying, or damaging of property. If the motivation and end result is that of theft and the claimed loss is “caused by or result[s] from [that] theft,” there is no coverage.

Where the motivation was to steal copper, these courts concluded that any

damage caused in the commission of the theft is considered theft, not vandalism. All of these courts also noted that an exception to the theft exclusion for damage caused during entry and exiting the insured’s building did not apply to damage caused during the course of removing the copper.

The other line of cases, which appears to be a slight majority, holds that property damage that results during the theft of copper is to be treated as vandalism, which is a covered loss, for example: *Aetna Casualty & Sur. Co. v. Ardizzone*—damage to a structure which occurred during theft of copper is covered as vandalism; *Sterling v. Audubon Ins. Co.*—damage to building during a burglary is covered under clear language of the policy; *Pryor v. State Farm Fire & Cas. Co.*—the policy allows recovery for willful damage to a structure caused by burglars; *Acorn Inv. Co. v. Mich. Basic Prop. Ins. Ass’n.*—water damage caused by removal of plumbing fixtures falls within the common understanding of term vandalism; *Cresthill Industries, Inc. v. Providence Washington Ins. Co.*—damage from a water leak caused by the removal of plumbing fixtures resulted from act of vandalism; *Beauty Supplies, Inc. v. Hanover Ins. Co.*—vandalism was the proximate cause of loss while the theft of plumbing fixtures was only concurrent cause; *State Auto. Mut. Ins. Co. v. Trautwein*—the unlawful act of theft established the malice required under the policy’s vandalism provision.

The courts in this series of cases have taken a more expansive view of what is considered vandalism, which includes damage that occurred during the commission of the theft. Most of these courts determined that the proximate cause of the loss was vandalism, which is an insured risk. The *Cresthill* court found:

...[i]t seems undeniably clear that there was an act of vandalism or malicious mischief committed, since the severing of the pipes and fixtures prior to their removal constituted a completed act of vandalism, etc., the essential character of which could not be changed by what was subsequently done with them—their removal from the premises.

Considerations for Future Cases

It is worth noting that none of the second series of cases discussed above have been followed by any court in many years because the policy language considered (some of which specifically covered willful damage caused to structures during theft) is different than the theft exclusion typically found in current policies. It is this difference in policy language, as well as the application of the efficient proximate cause rule, which persuaded the courts in this line of cases to take a more expansive view of what is considered vandalism.

When a structure is vacant, there is no coverage for theft or vandalism. Most current policies contain a vacancy provision that precludes coverage for all damages caused by vandalism, theft or attempted theft when the insured premises has been vacant (as that term is defined in the policy) for more than 60 days before the loss or damage occurs. Generally, the only exception to the vacancy provision arises when the vacant structure is in the process of undergoing construction or renovation activities.

With the dramatic increase in incidents of copper theft, the existence of coverage for damage caused during the course of the theft will be a significant coverage issue. Claims for damage under property insurance policies for losses arising out of the theft of copper should fall within the policy’s theft exclusion, with the result that there is no coverage for the theft or any damage to the property occurring as a consequence of the theft. Only “[b]uilding damage caused by the breaking in or exiting of burglars” should be covered, as provided in the exception to the theft exclusion. Of course, determining whether there is coverage for damage occurring in the course of a theft of copper will depend on the specific language of the policy at issue and the jurisdiction where the loss occurred.

Wayne D. Taylor (wtaylor@mflaw.com) is a partner at Mozley, Finlayson & Loggins L.L.P. in Atlanta, Ga. Ruth M. Pawlak (rpawlak@mflaw.com) is a senior associate at the firm. Their practice focuses on insurance coverage advice and litigation, primarily involving catastrophic losses and bad faith. For more call (404) 256-0700 or visit www.mflaw.com.