

THEFT OF YOUR PROPERTY WHILE CONTRACTORS HAVE ACCESS TO YOUR FACILITY: DOES YOUR INSURANCE COVER IT? *By Geoffrey B. Fehling*

Business owners routinely grant access to company facilities and property to third-parties for many reasons, from cleaning and organizing a warehouse to inspecting and repairing machinery. In the course of these business dealings, however, property may unexpectedly be misplaced, damaged, or even stolen. Recently, police reported that a large amount of insulated copper piping, valued at over \$4,000, was stolen from the construction site of the new Bishop McDevitt High School in Harrisburg. Are unexpected losses like this covered by the owner's commercial property damage policy?

Surprisingly, the answer sometimes may be no, due to a provision in many commercial property policies commonly referred to as an "entrustment" exclusion. Generally, entrustment exclusions bar insurance coverage arising from a loss that occurs while an insured's property is entrusted to the care of another party. A standard "entrustment" exclusion provision reads as follows:

This policy does not insure against loss or damage . . . [c]aused by . . . misappropriation, secretion, conversion, fraud, infidelity or any dishonest act or omission on the part of the insured or other party of interest, his, her or their trustees, directors, officers, employees, agents **or others to whom the property may be entrusted;** this exclusion does not apply to a carrier for hire, nor to acts of destruction by your employees; but theft by employees is not covered . . .

A federal court recently highlighted the difficulty entrustment exclusions may impose on businesses. In *3039 B Street Associates, Inc. v. Lexington Insurance Co.*, a federal appeals court addressed a claim that arose following theft of more than sixty industrial radiators from a warehouse by a third-party who was granted access to the property by his former employer. According to the employer, the ex-employee was given permission to scavenge "loose" metal from the warehouse "to clean the place up." Conflicting testimony about the scope of the authority granted by the employer agreed only that the end result was that the ex-employee left with sixty-six radiators worth more than \$160,000.00.

The company filed a claim for the radiators under its property insurance policy, but the carrier denied coverage under the policy's entrustment exclusion, due to the employer's testimony that he had

entrusted the property in question to the alleged thief. The company subsequently filed suit in federal court alleging claims of breach of contract and bad faith. The court agreed with the insurance carrier that coverage should be denied. The company entrusted the warehouse to a third party, who took advantage of the opportunity to steal the building's radiators, and, therefore, the carrier properly denied coverage.

In order to avoid losses like those found in *B Street*, business owners should review their insurance policies to determine whether they include entrustment or other exclusions that may affect their coverage in the event of a theft. If an entrustment exclusion is found and theft is a risk in your particular business, speak with your insurance agent about supplementing your coverage to include specific property in your care and control.

If additional insurance coverage is unavailable, business owners may also consider entering into a written agreement with third-party contractors—or anyone else who will be on the property—clearly stating the scope of their authority and that the property owner is not entrusting all of its property to the third party. An agreement specifically limiting the scope of property entrusted to a third party may avoid the kind of ambiguities faced in *B Street* and, therefore, prevent a similarly unfortunate coverage exclusion. Alternatively, in situations where a third party is given unsupervised access to high-value property, business owners may ask that the third party provide a fidelity bond or other financial assurance that would cover any dishonest acts with respect to the owner's property.

If you have any questions about any of the coverage issues discussed in this article or would like someone to review your policies, please contact any member of the McNees Wallace & Nurick Insurance Recovery and Counseling practice group. ■

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FINDING INSURANCE COVERAGE FOR THE COST OF GOVERNMENT INVESTIGATIONS

By Michael R. Kelley

Many businesses are subject to government regulation. From time to time, these government regulators conduct investigations into these business' operations, which can be very costly and time consuming.

In light of these financial burdens, are the costs of government investigations covered by insurance? Two recent court decisions conclude that the answer is YES – if a formal or informal government proceeding has been commenced.

In *Home Depot v. National Union Fire Insurance Co.*, Home Depot spent \$23 million in internal investigation costs, including counsel and forensic accountant fees, in response to a notice of “impending inquiry” from the Securities and Exchange Commission (“SEC”). In *MBIA, Inc. v. Federal Insurance Company*, the financial services company incurred costs of more than \$6.5 million in responding to subpoenas from the SEC and the New York Attorney General.

The court found that most of Home Depot’s costs were not covered under its Director’s & Officer’s (“D&O”) insurance policy because most of the expenses were incurred before any formal or informal government inquiry actually commenced. On the other hand, since

MBIA’s costs were incurred after subpoena’s were issued, its D&O policy did cover the costs of the investigation.

The cases were very fact specific and dependent on the specific policy language. Not all D&O policies will be triggered in the same fashion. But, here are some practical takeaways:



1) Your business may have insurance coverage for government investigations under its D&O, fiduciary liability, or other specialized coverages;

2) Part of the strategy in responding to government inquiries should take into consideration the language of the potentially applicable insurance policy;

3) If government inquiries and actions are a part of the risks that your business faces, you should consider those risks now and negotiate and obtain insurance coverage tailored to those risks. ■

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