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Insurance - Risks and Causes of Loss - Payment of Reward by Insured Constitutes a Loss by Theft

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looking to the future trends in the areas of parent-child tort immunity and guest statute application to young children. First of all, although a majority of states still adhere to the doctrine of parent-child tort immunity, it appears that this doctrine will receive less emphasis in the future. Under the principles of modern tort law, the social value of allowing a cause of action for every plaintiff seems to outweigh the desirability of allowing parents to be immune from all tort actions brought by their unemancipated child.[42] The second area, involving the liberalized interpretation of guest law application to young children, will not undergo a rapid change. Guest laws are statutory creations and hence, a strong argument can be made that such laws should not be judicially interpreted to exclude young children, but rather should be changed only by legislative action.[43] Notwithstanding the problems involved in judicial liberalization of guest statutes,[44] future decisions may show a willingness of courts to exclude minor children from guest statute application due to the seeming injustice of allowing a very young child to legally bind himself in a 'guest' status.

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INSURANCE—RISKS AND CAUSES OF LOSS—PAYMENT OF REWARD BY INSURED CONSTITUTES A "LOSS BY THEFT"—The plaintiffs had jewelry stolen, which was insured under defendant's insurance policy providing coverage for loss by theft. The value of the stolen property exceeded the $2,000 coverage limit. Plaintiffs, in attempting to recover the property, offered a reward in excess of the policy limits. Voluntary payment was made by the plaintiffs with knowledge that the company refused to participate in offering such a reward. Upon defendant's refusal to reimburse, the plaintiffs sued defendant claiming that payment of the reward was a loss by theft. The trial court found in favor of the defendants. The question considered on appeal by the Supreme Court of Oregon was whether a payment of a reward is covered under a provision in an insurance policy

42. In most cases, the parent would still be immune from tort liability for activities involving parental control and authority. This immunity, however, would not extend to all types of tort actions, i.e., injuries sustained by an unemancipated child to the parent's negligent operation of a motor vehicle. *See generally* W. PROSSER, *supra* note 3, § 122.

43. *See generally* Note, *supra* note 39.

44. The problems involved in judicial liberalization of guest laws include: (1) determining what affect the liberalization would have on present automobile accident insurance policies; and, (2) determining what age group should be excluded from guest statute application. *See generally* Note, *supra* note 22.

providing for a "loss by theft." In an unprecedented decision, the court reversed the trial court and *held* that the term "loss by theft" should be given a broad interpretation to embrace a reward paid for the return of stolen property. *Gowans v. Northwestern Pacific Indemnity Co.*, —Or.—, 489 P.2d 947 (1971).

In prior cases, the Supreme Court of Oregon had determined that if there was any ambiguity or doubt in the meaning of terms in an insurance policy, such terms were to be resolved in favor of the insured.[1] In adhering to this policy, the majority in *Gowans* based its decision on the fact that "loss by theft" is legally ambiguous and therefore must be liberally construed in favor of the insured.[2] The court further reasoned that the loss sustained by the plaintiffs in paying the reward would not have occurred if not for the original theft, and therefore the payment was a loss by theft.[3]

The *Gowans'* analysis is consistent with the trend of other courts in deciding what should be considered a loss by theft. They have interpreted loss to mean more than just the direct loss resulting from nonrecovery of stolen articles.[4] Examples of the extension by the courts to cover indirect losses are numerous. Some courts have ruled that expenses incurred by the insured to restore goods to their former condition, which were damaged while stolen, is deemed recoverable unless the policy expressly excludes this expense.[5] Other courts have interpreted loss by theft to include less consequential expenses such as expenses of recovering the stolen property[6] and also of its transportation back to the place stolen.[7] Courts have not only allowed costs of restoration or property, but also losses such as the diminution of value of an automobile during continuance of theft,[8] as well as money paid to detective agencies in attempting to recover stolen property.[9] The extent of coverage of indirect losses seems to know no limit. How-

1. Farmers Mut. Ins. Co. v. United Pac. Ins. Co., 206 Or. 298, 292 P.2d 492, 495 (1956); Nugent v. Union Auto. Ins. Co., 140 Or. 61, 13 P.2d 343, 345 (1932).
2. Gowans v. Northwestern Pac. Indem. Co., ___Ore.___, 489 P.2d 947, 948 (1971).
3. *Id.* at 949.
4. Buxton v. International Indem. Co., 47 Cal. App. 583, 191 P. 84 (1920); Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S.W. 210 (1915); Bolling v. Northern Ins. Co., 253 App. Div. 633, 3 N.Y.S.2d 599, *appeal denied* 254 App. Div. 736, 6 N.Y.S.2d 94 (1938), *aff'd* 280 N.Y. 510, 19 N.E.2d 920 (1939); Alamo Cas. Co. v. Laird, 229 S.W.2d 214 (Tex. Civ. App. 1950); Housner v. Baltimore-American Ins. Co., 205 Wis. 23, 236 N.W. 546 (1931).
5. *See, e.g.*, Housner v. Baltimore-American Ins. Co., 205 Wis. 23, 236 N.W. 546, 548 (1931).
6. Alamo Cas. Co. v. Laird, 229 S.W.2d 214, 218 (Tex. Civ. App. 1950).
7. Kansas City Regal Auto Co. v. Old Colony Ins. Co., 196 Mo. App. 255, 195 S.W. 579, 580 (1917).
8. Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S.W. 210, 211 (1915); Bolling v. Northern Ins. Co., 253 App. Div. 633, 3 N.Y.S.2d 599, 601 (1938), *appeal denied* 254 App. Div. 736, 6 N.Y.S.2d 94 (1938), *aff'd* 280 N.Y. 510, 19 N.E.2d 920 (1939).
9. Buxton v. Int'l. Indem. Co., 47 Cal. App. 583, 191 P. 84, 88 (1920).

ever, there has been disagreement as to whether or not a person who purchases a stolen automobile in good faith, and later has it repossessed by the rightful owner, is covered under a theft insurance policy.[10] The courts, in favoring non-liability, contend in such a case that a person who has the right to possession can not be considered a thief.[11]

The defendant in *Gowans* contended that a voluntary payment of a reward by the plaintiffs was not a loss by theft.[12] The majority ruled that this contention had no merit and mentioned that defendant had cited no cases to support his theory.[13] However, a prior federal court, in determining what would be considered a loss, used a definition from Webster's Dictionary which defined it as "the unintentional parting with something of value."[14] From this it is logical to assume that a voluntary payment was an intentional parting with something of value, and therefore does not constitute a loss by theft. Another court, in deciding the extent of coverage included in a theft insurance policy, reasoned that: "It is one thing to insure against the happening of a contingency, but still another to insure against loss occasioned by the happening of a contingency."[15] Consequently, a person could conclude that to insure against a loss by theft is one thing, but it is still another to insure against a voluntary payment of a reward occasioned by it.

Chief Justice O'Connell, dissenting in *Gowans*, believed that because the defendant insurance company is under an obligation to pay for the loss of the jewelry if not recovered, it should be given the privilege of determining whether it wants to offer a reward for the property's return.[16] This seems to be sound logic when considering the fact, as in the present case, that most insurance companies might not want to offer a reward which is in excess of the policy limit, but would rather offer a smaller reward hoping that this will be sufficient to recover the stolen property. The Chief Justice also expressed the fear that the holding is likely to induce people to offer large rewards for the return

10. Kelley Kar Co. v. Finkler, 155 Ohio St. 541, 99 N.E.2d 665 (1951); Hudiberg Chevrolet, Inc. v. Globe Indem. Co., 394 S.W.2d 792 (Tex. 1965); Barnett v. London Assur. Corp., 138 Wash. 673, 245 P. 3 (1926). *Contra,* Talasek v. Travelers Fire Ins. Co., 242 F.2d 748 (5th Cir. 1957); Riley v. Motorists Mut. Ins. Co., 176 Ohio St. 16, 197 N.E.2d 362 (1964); Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co., 454 S.W.2d 465 (Tex. Civ. App. 1970).

11. Talasek v. Travelers Fire Ins. Co., 242 F.2d 748 (5th Cir. 1957); Riley v. Motorists Mut. Ins. Co., 176 Ohio St. 16, 197 N.E.2d 362 (1964); Phil Phillips Ford Inc. v. St. Paul Fire & Marine Ins. Co., 454 S.W.2d 465 (Tex. Civ. App. 1970).

12. Gowans v. Northwestern Pac. Indem. Co., ——Ore.——, 489 P.2d 947, 948 (1971).

13. *Id.* at 949.

14. Providence Journal Co. v. Broderick, 104 F.2d 614, 616 (1st Cir. 1939).

15. Frank v. State Farm Mut. Auto. Ins. Co., 109 So. 2d 594, 596 (Fla. 1959).

16. Gowans v. Northwestern Pac. Indem. Co., ——Ore.——, 489 P.2d 947, 950 (1971).

of property of great sentimental, but little economic value.[17] However, he failed to cite any cases supporting this line of reasoning.[18]

A study of North Dakota statutory[19] and case law[20] seems to indicate that, if a case with a fact situation similar to *Gowans* arises in this state, the holding will probably follow that of the present case as long as the insurance clause is found to be ambiguous. It is an established rule of construction in North Dakota that any ambiguous clause in a contract will be construed against the party writing it.[21] The North Dakota Supreme Court has stated that if there is a possibility of interpreting terms of an insurance policy in two different ways, the interpretation imposing liability will be adopted.[22]

Gowans does not clearly state a solution to defendant's problem of the endless limit of coverage of indirect losses under a "loss by theft" policy. However, North Dakota courts and other state courts have indirectly provided an answer to this dilemma. They have consistently held that unambiguous terms of an insurance policy will be given their ordinary meaning.[23] It would appear insurance companies could eliminate their problem by providing coverage for only "direct" losses. In a New Jersey case a provision for "direct loss by theft" enabled an insurance company to avoid liability where clothes were damaged by moths after thieves removed them from their packages and abandoned them in the owner's summer cottage.[24] The court reasoned that in an ordinary interpretation, "direct loss by burglary, theft or larceny" does not include this type of loss.[25] In a similar instance,[26] the cost of the services of a private fire department called to extinguish a fire was also nonrecoverable since the cost was not considered a "direct loss by fire." In comparing the terms of the policies and the holdings of the above two cases with the term and holding in *Gowans*, it is apparent that the insertion of one word into the policy could alleviate the defendant's problem.

In conclusion, it should be noted that in *Gowans* neither party

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17. *Id.*
18. *Id.*
19. N.D. CENT. CODE § 9-07-19 (1960).
20. Baurle v. State Farm Mut. Auto. Ins. of Bloomington, Ill., 153 N.W.2d 92 (N.D. 1967); Prince v Universal Underwriters Ins. Co., 143 N.W.2d 708 (N.D. 1966).
21. Baurle v. State Farm Mut. Auto Ins. of Bloomington, Ill., 153 N.W.2d 92, 95 (N.D. 1967); Anderson v. Standard Life & Acc. Ins. Co., 149 N.W.2d 378, 381 (N.D. 1967).
22. Schmitt v. Paramount Fire Ins. Co., 92 N.W.2d 177, 178 (N.D. 1958).
23. Miller Elec. Co. v. Employers Liab. Assur. Corp., 171 So. 2d 40 (Fla. 1965); Schmitt v. Paramount Fire Ins. Co., 92 N.W.2d 177 (N.D. 1958); Conlin v. North American Life & Cas. Co., 88 N.W.2d 825 (N.D. 1958); Farmers Mut. Fire Ins. Co. v. McMillan, 217 Tenn. 125, 395 S.W.2d 798 (1965).
24. Downs v. New Jersey Fidelity & Plate Glass Ins. Co., 91 N.J. Law 523, 103 A. 205 (1918).
25. *Id.* at 206.
26. Farmers Mut. Fire Ins. Co. v. McMillan, 217 Tenn. 125, 395 S.W.2d 798, 799 (1965).

cite any cases that were directly in point and that the court was also unable to find any supporting cases.[27] This emphasizes the point that where theft insurance terms are ambiguous the courts have never specified the limit of coverage. Even though there seems to be some sound reasons for not extending loss by theft to cover all indirect losses, at present, insurance companies must rely on proper drafting to clearly define the limit of coverage for theft losses.

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27. Gowans v. Northwestern Pac. Indem. Co., ____Ore.____, 489 P.2d 947, 948 (1971).