



ADJUSTINGTODAY

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FROM THE EDITOR

True or false: an item must be damaged or destroyed to qualify for reimbursement under a property insurance policy.

While this might seem to be true, it is not — always.

An exception comes when the property's value is derived from the pair or set to which it belongs. In such cases, a policyholder can be compensated for the overall value of the set, even when only one of its members has been damaged or destroyed.

Although that principle is woven into many policies, it has been subject to various interpretations by insurers, insureds and the courts. Yet its application can be critical in returning a business to normal operating conditions.

In this issue of Adjusting Today, attorney Gary Thompson discusses key aspects of the coverage, situations where it often comes into play, and how it has been interpreted. We hope you find it to be interesting and informative reading.

Sheila E. Salvatore
Editor



Making the Policyholder Whole: Property Insurance Coverage for Both the Damaged and Undamaged Parts of a “Pair or Set”

By Gary Thompson

First-party property insurance generally covers the replacement cost of property that is *actually damaged*, such as in a fire or hurricane. But related property that is undamaged can also result in a financial loss. In such situations, there is standard coverage available for an entire “pair or set” of personal property when parts of it are damaged but other parts are not damaged.

The classic example is a “pair” of matching chandeliers — one damaged, one not damaged — or a “set” of matching table chairs, where the table



and half the chairs are damaged. Many policies contain the following clause:

... in the event of loss or damage by a peril insured against to any article or articles which are part of a pair or set, the measure of loss or damage to such article or articles shall be, at the Insured's option:

- A. the reasonable and fair proportion of the total value of the pair or set, giving consideration to the importance of said article or articles, but in no event shall such loss or damage be construed to mean total loss of the pair or set; or
- B. the full value of the pair or set provided that the Insured surrenders the remaining article or articles of the pair or set to the Company.

Option B expressly allows the insured to claim replacement of the entire pair or set, providing that all items are surrendered to the insurer for salvage.

Some policies address the "pair and set" issue in what is called a "Consequential Loss" or "Consequential Reduction In Value" clause, which usually provides in relevant part:

This policy also insures the reduction in value to the remaining part or parts of any lot merchandise usually sold by lots or sizes, color ranges, or other classifications due to damage to or destruction of a part of such lots or other classifications due to a cause of loss not otherwise excluded.



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The policyholder's particular business provides the context for considering the issue of what qualifies as a 'set' for insurance purposes.

Uniformity

Claims by corporate policyholders can sometimes cause debate as to what constitutes a “pair” or “set” for purposes of these clauses. Each case will depend on context. For example, most hotel rooms (especially in branded hotels) contain a “set” of matching furniture, whereby each item in the room complements the whole and provides the room with the look and feel of a uniform décor — which is important in the hotel business.

Hotels periodically replace all the furniture in a room at the same time, and so if a storm has damaged half the furniture (say, the desk and credenza), the hotel will replace the entire room. Or consider a hotel where 60 percent of the rooms have damaged furniture and the hotel replaces all the furniture in the entire hotel so as to maintain an overall uniformity in décor. Uniformity throughout the entire hotel is also important in the hotel business (especially for branded hotels) as guests expect to have the same basic room wherever they're situated in the hotel.

On the other hand, a dog kennel probably does not care if each pen or cage matches the other. A storage

business may or may not care — although some well-branded storage companies may care very much about each storage shed having precisely the same look. The policyholder's particular business provides the context for considering the issue of what qualifies as a “set” for insurance purposes.



Other common adjustment issues include: the replacement of an entire roof when part of it is damaged where necessary to maintain uniform quality or appearance; the replacement of all the tile in a bathroom when some tiles are damaged where necessary to maintain uniformity; and the

The basic Webster's definition of a 'set' is 'a number of things of the same kind that belong or are used together.'

(Merriam-Webster's on-line dictionary 2015)



replacement of an entire hall or floor of carpeting where part of it is damaged where necessary to maintain uniformity.

These are issues that adjusters debate frequently. Economic factors sometimes favor full replacement, for example, where it is actually cheaper simply to remove and replace all carpeting instead of incurring the time and expense to test, select and stage a partial carpet replacement. Such economic efficiency arguments can be persuasive with an insurer's adjuster, but where there is debate, the policyholder or their public adjuster may gain leverage by quoting the "pair and set" clause.

There is little case law addressing the 'pair and set' clause, but what there is generally favors the policyholder.





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Definitions

A policy will rarely define what qualifies as a “set.” The basic Webster’s definition of “set” is “a number of things of the same kind that belong or are used together.” (*Merriam-Webster’s* on-line dictionary 2015). Under a “plain reading” and common sense, a hotel owner or manager could rightfully argue that all of the furnishings in the hotel are part of one “set” as they are “things of the same kind that ... are used together” throughout a hotel. This is an example of where an insurer should understand its policyholder client’s business so as to appreciate the coverage it is providing.

There is little case law addressing the “pair and set” clause, but what there is generally favors the policyholder. For example, in *Employers Ins. of Wausau v. Avondale Shipyards, Inc.*, Civ. A. Nos. 82-4034, 82-4185 and 82-4186, 1991 WL 329580 (E.D. La. Sept. 6, 1991), a tug boat that sank was part of an integrated tug barge (“ITB”), with the tug and the barge it moved connected and designed to operate together. The court awarded coverage for both the tug and barge, holding that because the entire “ITB was insured under a ‘pair and set’ clause . . . the loss of [the tug] resulted in the constructive total loss of the ITB under the relevant hull policies.” *Id.* Thus the insurers were liable for the entire value of the barge, notwithstanding that the barge was not lost.

In the examples discussed above of undamaged furniture that is part of a larger matching set, the furniture becomes useless if it cannot be paired with identical furniture to furnish the entire hotel. A couch of a certain design style, standing alone (or worse, clashing with a new décor), is useless in the hotel world. In such cases, there is, as the *Avondale Shipyards* case provides, a “constructive loss” of the entire set.

Indeed, the concept of a “constructive loss” is inherent in the idea of “replacement cost” coverage, such that it may not be necessary to rely on specific “pair and set” coverage for the clause to be found in the policy. Replacement cost coverage implies “pair and set” coverage, which would normally be covered unless specifically excluded. This was the court’s conclusion in *Holloway v. Liberty Mut. Fire Ins. Co.*, 290 So.2d 791 (La. Ct. App. 1974), where despite the absence of the “pair and set” clause, the court found coverage for replacement of an entire carpet even though only part of the carpet was damaged. See also, *Cedar Bluff Townhome Condo. Assoc. Inc. v. American Family Mut. Ins. Co.*, 2013 WL 6223454 (Minn. Ct. App. Dec. 2, 2013) (the court upheld an appraisal award that covered both damaged siding and its matching components under the “like kind and quality” provision of the standard replacement cost valuation clause); *Trout Brook South Condo.*

Assoc. v. Harleysville Worcester Ins. Co., 995 F.Supp.2d 1035 (D.Minn. 2014) (the court allowed to go to the jury the issue of coverage for matching shingles on a roof, where certain shingles were damaged and others were not).

Indeed, an all-risk policy can contain an *anti-pair* and set clause, whereby the policy expressly disavows paying for any value beyond the specific damaged item. See *Karcher v.*

Philadelphia Fire & Marine Ins. Co., 108 A.2d 638 (N.J. Super. 1954) (no coverage beyond a lost diamond



set within a more elaborate ring where a jewelry policy limited recovery to the value of a single part of a set). The existence of such anti-pair and set clauses confirms that in the absence of such a clause, all-risk RCV coverage *inherently* includes pair and set coverage without the need for an express grant of coverage through a pair and set clause.

Be Aware

For good measure, a policyholder should be sure that their policy includes the pair and set clause, as other courts have applied a stricter approach in its absence. See *Jaskierny v. Mutual of Omaha Ins. Co.*, No. Civ. A. 96-1841, 1996 WL 736975 (E.D. La. Dec. 19, 1996) (in the absence of the clause, there was no coverage for undamaged custom-made



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cabinets that matched other cabinets that were destroyed in a flood); *St. Paul Fire and Marine Ins. Co. v. Darlak Motor Inns, Inc.*, No. 3:97-CV-1559 TIV (M.D. Pa. Mar. 9, 1999) (in the absence of the clause, coverage was limited to property “directly damaged” by a fire at a low-budget roadside motel).

The issue may also be affected if a policy lacks the “pair and set” clause but contains the similar “consequential loss” or “consequential-reduction-in value” clauses. These clauses all have the same intent — to extend coverage to the lost value of the undamaged property that is bound to the damaged property. The word “merchandise” in the consequential loss clause, however, may cause the insurer to restrict the coverage to retail store inventory merchandise. But in the absence of any definition, the word should receive a broad reading based on context.



For example, the relevant “merchandise” to a hotel is what it sells — the use of a hotel room — and in that context, the hotel furniture is “merchandise” that is part of a set. This was the holding in *Hartwell v. California Ins. Co.*, 24 A. 954 (Me. 1892), where years ago the court addressed the meaning of “merchandise” in an insurance policy sold to a painter and concluded that the term “has no fixed legal or technical signification” and that for non-merchants, “merchandise” includes items held for use rather than sale — because to hold otherwise would render coverage meaningless. *Id.* at 954. Similarly, “merchandise” coverage for a hotel would be meaningless if it did not apply to rooms and their contents, including furniture. This result is consistent with the plain meaning of the word “merchandise.”

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Black’s Law Dictionary (8th ed. 2004) defines “merchandise” as, among other things, “a movable object involved in trade or traffic ...” *Black’s Law Dictionary* (8th ed.) at 1008. Hotel furniture obviously fits that definition.

Moreover, the cardinal rule of insurance contract interpretation is that where language is ambiguous, as written or as applied in context, any ambiguity is interpreted in favor of coverage for the insured; or similarly, when there are two reasonable interpretations of the same language, the tie goes to the policyholder. See Jeffrey W. Stempel, *Stempel on Insurance Contracts* at §§ 4.08, 4.09 (3d ed. 2006) (discussing the rule and citing case law across the country).

Finally, a policyholder might ask to change policy language to address their own anticipated pair and

set issues. For example, in the options presented by the pair and set clause, one might add: "In the event that more than 50 percent of a set is damaged, the insurer will pay the full replacement value of the entire set" or "in the event more than 50 percent of hotel furnishings are damaged, the insurer will pay the full replacement of all similar hotel furnishings to allow the hotel to maintain a uniform décor."

More often than not, however, the policyholder and insurer may struggle to apply standard-form pair and set language to a context where there is no definitive guidance from the policy. Such cases become fair game for reasonable dispute — and the policyholder may invoke the pair and set clause as well as the concept generally inherent in RCV coverage in order to make up for the policyholder's overall loss. The goal that all should accept is to make the policyholder whole.

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