

# Insurance - Proof of Mysterious Disappearance Under Theft Policies

Richard B. Wilkins Jr.

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## INSURANCE — PROOF OF MYSTERIOUS DISAPPEARANCE UNDER THEFT POLICIES

Policies protecting against the loss of movable property have followed a trend toward expanding insurance coverage.<sup>1</sup> Before 1943, there could be no recovery under theft policies unless the insured produced satisfactory evidence that the insured property was feloniously taken.<sup>2</sup> Although the felonious taking could be established by circumstantial evidence,<sup>3</sup> the insured who was unable to prove theft could not recover even though theft was a reasonable explanation of the property's disappearance.<sup>4</sup> To alleviate this burden on the insured, the mysterious disappearance clause was introduced in 1943; it provided that any mysterious disappearance of property was *presumed* to be due to theft.<sup>5</sup>

The mysterious disappearance clause was not designed to

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1. Compare the Residence and Outside Theft Policy with its replacement, the Broad Form Personal Theft Policy. See the Homeowners Policy — Comprehensive Form, Form MLC-5 (ed. 12-59) (Louisiana). See generally MEHR & CAMMACK, PRINCIPLES OF INSURANCE (3d ed. 1961).

2. See 1 RICHARDS, INSURANCE § 28 (1952).

3. See National Surety Co. v. Fox, 174 Ark. 827, 296 S.W. 718 (1927); Sowden v. United States Fid. & Guar. Ins. Co., 122 Kan. 375, 252 Pac. 208 (1927); Fidelity & Cas. Co. v. Walthen, 205 Ky. 511, 277 S.W. 4 (1924); Caldwell v. St. Paul Mercury & Indem. Co., 210 Miss. 320, 49 So.2d 570 (1950); Wolf v. Aetna Acc. & Liab. Co., 183 App. Div. 409, 170 N.Y.S. 787 (1918), *aff'd*, 228 N.Y. 724, 126 N.E. 925 (1920); Fienglas v. New Amsterdam Cas. Co., 151 N.Y.S. 371 (1915); Miller v. Massachusetts Bonding & Ins. Co., 247 Pa. 182, 93 Atl. 320 (1915); McDuff v. General Acc. Fire & Life Assur. Corp., 47 R.I. 172, 131 Atl. 550 (1925); 8 COUCH, INSURANCE § 2241 (1931); 1 RICHARDS, INSURANCE § 28 (1952).

4. See, e.g., National Surety Co. v. Redmon, 173 Ky. 294, 190 S.W. 1081 (1917) (diamond stud placed on dresser; evidence of marks on window screen and footprints on roof discovered three weeks after loss insufficient to establish theft); Rosen v. Royal Indem. Co., 259 Mass. 194, 156 N.E. 52 (1927) (ring placed in bag in closet; house left open with servant present; in holding for the insurer, the court stated that it was necessary to show that the ring was stolen by some person for whose larceny the insurer would be liable under the policy); Bachman v. New Amsterdam Cas. Co., 194 N.Y.S. 89 (1922), *aff'd*, 204 App. Div. 871, 197 N.Y.S. 897 (1922) (diamond brooch left in drawer; front door left open with servant present; proof of theft insufficient in view of insured's original position that it was lost during trip home); Marks v. New Jersey Fid. & Plate Glass Ins. Co., 168 N.Y.S. 627 (1918) (negligence of insured in moving goods or innocent act of maid in losing key to home inconsistent with loss by theft); Gordon v. Aetna Indem. Co., 116 N.Y.S. 558 (1909) (proof of disappearance of diamond locket from insured's home, presence of two servants, and futile search by detectives insufficient to establish theft). See 8 COUCH, INSURANCE § 2241 (1931).

5. As it appeared in the Residence and Outside Theft policy, it read: "The word theft includes larceny, burglary, and robbery. Mysterious disappearance of any insured property shall be presumed to be due to theft." In 1948 the clause was revised to read: "The word theft includes larceny, burglary, and robbery. Mysterious disappearance, except a precious or semiprecious stone from its setting in any watch or piece of jewelry, shall be presumed to be due to theft."

provide coverage for perils other than theft; rather, it was designed to clarify the kind and amount of proof necessary to permit recovery under the policy.<sup>6</sup> In the first case to consider a claim under the mysterious disappearance clause,<sup>7</sup> the court defined mysterious disappearance as "any disappearance of loss under unknown, puzzling, or baffling circumstances, which are difficult to understand."<sup>8</sup> In conformity with the purpose of the clause,<sup>9</sup> the court determined that once the insured proved the mysterious disappearance, the presumption of theft arose; and it fell upon the insurer to negative the presumption.<sup>10</sup> In subsequent cases the burden of rebutting the presumption of theft varied with the probability of theft under the circumstances of the disappearance. If the insured failed to show more than a remote possibility of theft, the presumption of theft was readily rebuttable by other circumstantial evidence<sup>11</sup> or even by cross-examination of the plaintiff without affirmative evidence.<sup>12</sup> A Louisiana court held that "where there is no fact which can be pointed to as evidencing the remotest possibility of theft, we find it impossible to classify the disappearance as

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6. See *Davis v. St. Paul Mercury & Indem. Co.*, 227 N.C. 80, 40 S.E.2d 609 (1946). See also *Loop v. United States Fid. & Guar. Ins. Co.*, 63 So.2d 247 (La. App. 4th Cir. 1953); *Casey v. London & Lancashire Indem. Co. of America*, 3 Misc.2d 918, 160 N.Y.S.2d 114 (1956); *Sigel v. American Guar. & Liab. Ins. Co.*, 173 Pa. Super. 434, 98 A.2d 376 (1953); *Field*, "Mysterious Disappearance" Under the New Theft Policy, 1945 INS. L.J. 3; *Kelly*, "Mysterious Disappearance" Defined, 28 INS. COUNSEL J. 72 (1961); *Opgenorth*, *Mysterious Disappearance and Presumption of Theft Clause*, 1952 INS. L.J. 97.

7. *Davis v. St. Paul Mercury & Indem. Co.*, 227 N.C. 80, 40 S.E.2d 609, 169 A.L.R. 224 (1946). The insured claimed for \$97 in currency which he had in his pocket and which disappeared when he fell into the water while on a fishing trip with a friend. The trial court declined to submit the issue of theft to the jury which found in a special verdict that there was a mysterious disappearance; judgment was rendered for the insured. On appeal, the court reversed, ordering a new trial for determination whether the disappearance occurred by theft within the meaning of the policy.

8. *Id.* at 83, 40 S.E.2d at 611.

9. See note 6 *supra*.

10. *Davis v. St. Paul Mercury & Indem. Co.*, 227 N.C. 80, 40 S.E.2d 609 (1946); *accord*, *Loop v. United States Fid. & Guar. Ins. Co.*, 63 So.2d 247 (La. App. 4th Cir. 1953); *Caldwell v. St. Paul Mercury & Indem. Co.*, 210 Miss. 320, 49 So.2d 570 (1950); *Casey v. London & Lancashire Indem. Co. of America*, 204 Misc. 1106, 124 N.Y.S.2d 726 (1953), *aff'd*, 3 Misc.2d 918, 160 N.Y.S.2d 114 (1956), *aff'd*, 5 A.D.2d 724, 168 N.Y.S.2d 692 (1957); *Levine v. Accident & Cas. Ins. Co.*, 203 Misc. 135, 112 N.Y.S.2d 397 (1952); *Gordon v. Eureka Cas. Co.*, 187 Pa. Super. 636, 146 A.2d 379 (1958); *Sigel v. American Guar. & Liab. Ins. Co.*, 173 Pa. Super. 434, 98 A.2d 376 (1953); *Ruby v. Farmers Mut. Auto. Ins. Co.*, 274 Wis. 158, 79 N.W.2d 644 (1956).

11. See *Casey v. London & Lancashire Indem. Co. of America*, 3 Misc.2d 918, 160 N.Y.S.2d 114 (1956), *aff'd*, 5 A.D.2d 724, 168 N.Y.S.2d 692 (1957); *Sigel v. American Guar. & Liab. Ins. Co.*, 173 Pa. Super. 434, 98 A.2d 376 (1953).

12. See *Ruby v. Farmers Mut. Auto. Ins. Co.*, 274 Wis. 158, 79 N.W.2d 644 (1956).

mysterious and to accept the presumption that there was a theft."<sup>13</sup>

Complexity in the litigation of the dual issues of mysterious disappearance and the presumption of theft was partially responsible for the 1956 revision<sup>14</sup> which did away with the presumption of theft language and made mysterious disappearance a separate insured peril.<sup>15</sup> A Louisiana case was the first to consider a claim under the new coverage.<sup>16</sup> The plaintiff last remembered seeing his ring on a dresser at his daughter's home in Baton Rouge on the day before he flew to Shreveport. The following day he missed his ring, whereupon he searched his home, inquired at a cleaning establishment where he had left the suit which he had worn the previous day,<sup>17</sup> checked the airline office, and telephoned his daughter, all to no avail. On original hearing the insurer was successful: the court stated that the coverage remained theft and relied on an earlier case which had held that where there was no fact pointing to theft, the disappearance

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13. *Loop v. United States Fid. & Guar. Ins. Co.*, 63 So.2d 247 (La. App. 4th Cir. 1953).

14. Another factor responsible for the revision was the introduction of the Broad Form Personal Theft Policy which was designed to provide a more liberal policy to meet the needs of a rapidly growing, insurance-minded public by broadening certain areas of protection. See Kelly, "*Mysterious Disappearance*" *Defined*, 28 INS. COUNSEL J. 72 (1961).

The mysterious disappearance clause of the Broad Form Personal Theft Policy reads: "This company agrees to pay for loss by theft or attempt thereat or mysterious disappearance away from the premises of personal property which is owned or used by an insured . . ." To the same effect are the Homeowners Policy — Form B, Louisiana Form MPB 323 (ed. 7-56) and the Extended Theft Coverage endorsement, Form HO-103 (ed. 9-58), to Homeowners Policy — Broad Form, Forms MIC-2 (ed. 12-59) (Louisiana) and MIC-4 (ed. 12-59) (Louisiana).

15. See RIEGAL & MILLER, *INSURANCE PRINCIPLES AND PRACTICE* 754 (4th ed. 1959); RODDA, *FIRE AND PROPERTY INSURANCE* 421-22 (1956); NATIONAL UNDERWRITER CO., *FIDELITY, CASUALTY AND SURETY BULLETINS*, Pb-3 (re-numbered March 1956); Kelly, "*Mysterious Disappearance*" *Defined*, 28 INS. COUNSEL J. 72, 82 (1961).

It may be noted that the 1956 revision also added coverage for attempted theft. That this is a separate insured peril is easily seen for the peril insured against is necessarily damage to or destruction of the property rather than its absolute loss. See *Midlo v. Indiana Lumbermen's Mut. Ins. Co.*, 160 So.2d 314 (La. App. 4th Cir. 1964).

16. *Englehart v. Assurance Co. of America*, 139 So.2d 108 (La. App. 2d Cir. 1962).

17. When plaintiff submitted his Proof of Loss to defendant he stated to defendant's adjuster that he left his ring in the watch pocket of his suit when left at the cleaners. This statement formed the basis of defendant's denial of coverage under a special exclusion which provided: "This insurance does not apply: . . . (C) to property while in the charge of any laundry, cleaner, dyer, tailor or presser except by robbery or by theft through breaking and entering at their premises." 139 So.2d at 113. At trial, plaintiff produced testimony that the ring was not in the suit when left at the cleaners and the court found that the insurer had failed to bear the burden of proving that the loss came within the exclusion.

could not be classified as mysterious within the coverage of the policy.<sup>18</sup> On rehearing the court recognized the difference between the language of the clause at issue in the earlier case and that in the instant case, and held for the plaintiff. Thus, the increased coverage provided by the deletion of the presumption of theft language was made effective:

“[Plaintiff’s] ring disappeared under unknown, puzzling, and baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain. Having proved such, we think he is entitled to recover under the provisions of this policy *without the necessity of further showing the loss was either ‘possibly or probably’ a theft.*”<sup>19</sup> (Emphasis added.)

Two subsequent cases decided almost simultaneously and on strikingly similar facts reached opposite conclusions under the new clause.<sup>20</sup> To resolve the uncertainty likely to be generated by these two cases, the coverage of mysterious disappearance as an insured peril should be clearly delineated.<sup>21</sup> It should be observed that the coverage is not as extensive as that of the “all risk” policies.<sup>22</sup> Mere loss, such as dropping property over the side of a boat,<sup>23</sup> having the diamond plucked from a ring while

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18. *Loop v. United States Fid. & Guar. Ins. Co.*, 63 So.2d 247 (La. App. 4th Cir. 1953).

19. 139 So. 2d at 113.

20. *Seward v. Assurance Co. of America*, 32 Cal. Rptr. 821 (1963); *Austin v. American Cas. Co.*, 193 A.2d 741 (D.C. Mun. App. 1963). Although the *Austin* case was decided two months later, it does not appear that the court was aware of the decision in *Seward*. The insured in *Seward* put her diamond-studded wrist watch on and went on a shopping tour. After going to several stores and making several purchases, she discovered her watch was missing. Similarly, the insured in *Austin* was aware of the bracelet on her wrist when she entered a clothing store. She tried on several coats, left the store, and went to her home. The next day she discovered her bracelet was missing. Mrs. Seward recovered, but Mrs. Austin did not.

21. The suggestion has been made by Kelly, “*Mysterious Disappearance*” *Defined*, 28 INS. COUNSEL J. 72, 77 (1961), that two conditions should be met: (1) the disappearance must be from a clearly identified location, and (2) the circumstances should suggest theft as the logical explanation. While helpful under earlier policies in which mysterious disappearance is properly used to raise a presumption of theft, this test seems too tightly drawn under the 1956 clause in which mysterious disappearance is covered as a separate insured peril. If theft can be shown, the insured can recover under that particular coverage and reliance on the mysterious disappearance clause is unnecessary. See cases cited in note 3 *supra*.

22. With reference to insurance coverage, the term “all risk” is often used interchangeably with the term “comprehensive.” An “all risk” policy, strictly speaking, would be one that covers a particular piece of personal property against loss resulting from any and all perils. See MEHR & CAMMACK, *PRINCIPLES OF INSURANCE* 137 (3d ed. 1961). An example of an “all risk” jewelry policy is the *Personal Jewelry and Fur Floater*.

23. See NATIONAL UNDERWRITER CO., *FIRE, CASUALTY AND SURETY BULLE-*

feeding a horse,<sup>24</sup> or dropping a ring into a garbage disposal<sup>25</sup> is not within the ambit of mysterious disappearance. The best criterion for a mysterious disappearance is whether the loss or disappearance of property was under circumstances which are "inexplicable, enigmatical, puzzling and the like," coupled with the idea that "there is nothing mysterious about the disappearance of property which is lost or mislaid."<sup>26</sup> Such definition correctly focuses attention on the mysteriousness of the disappearance. Thus, without regard to when or where the disappearance occurred,<sup>27</sup> the disappearances covered are those from whose surrounding circumstances no satisfactory explanation can be found<sup>28</sup> — those which are inexplicable, unaccountable, or enigmatic. A 1964 Louisiana case<sup>29</sup> seems to go one step further by saying that the mysterious disappearance clause "eliminate[s] the necessity of speculating upon and weighing the probabilities of various conceivable explanations of such a disappearance."<sup>30</sup> This further step may have the effect of negating the necessity of the insured's proving that the disappearance is in fact mysterious. The better view would seem to require the insured to prove affirmatively that his loss comes within the coverage of the policy, and when he has shown the enigma, to require the insurer to come forward with an explanation, or to pay under his contract.

*Richard B. Wilkins, Jr.*

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TINS Pb-3 (re-numbered March 1956).

24. See *Erskine v. Glens Falls Indem. Co.*, 76 D. & C. 172 (Pa. Dist. Ct. 1951).

25. See *Deckler v. Travelers Indem. Co.*, 94 So.2d 55 (La. App. 1st Cir. 1957).

26. See *Opgenorth, Mysterious Disappearance and Presumption of Theft Clause*, 1952 *Ins. L.J.* 97, 98.

27. The court in *Seward v. Assurance Co. of America*, 32 Cal. Rptr. 821 (1963) takes this view explicitly.

28. The answer to the objection that all the insured need do is show that he cannot prove anything is that the view taken does not in any way lessen the insured's burden of showing affirmatively that his loss falls within the policy coverage — loss by mysterious disappearance.

29. *Midlo v. Indiana Lumbermen's Mut. Ins. Co.*, 160 So.2d 314 (La. App. 4th Cir. 1964). Insured placed his wife's ring on his handkerchief in his pocket prior to his wife's admission to a hospital. He went about his affairs for a day or two, and when he went to remove the ring and the handkerchief they were not where he had put them. The court concluded that the evidence established a mysterious disappearance.

30. *Id.* at 316.