

The Subtleties of Insuring Agreement (C) of the Financial Institution Bond

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I. Introduction

The special perils to property while in transit from one place to another are a part of human history.¹ As T.S. Eliot, a one-time banker, wrote:

We cannot think of a time that is oceanless.
Or of an ocean not littered with wastage.²

Financial institutions, like other businesses, must on occasion arrange for the transportation of their property outside of their premises. Thus, brokers' and bankers' bonds have, for many years, included some form of "in transit" protection. Such coverage is currently found in Insuring Agreement (C) of the Financial Institution Bond, Standard Form No. 24.³ While fairly straightforward on its face, application of the language of Insuring Agreement (C) to the multiplicity of factual scenarios that may occur with respect to property once it has left the doors of the insured can sometimes prove to be a subtle task. The purpose of this article is to explore some of those subtleties, both by examining precedent and by way of application to a specific variety of possible "in transit" claims, such as those involving companies that provide cash replenishment services to automated teller machines.⁴

II. Background

A. THE HISTORY OF INSURING AGREEMENT (C)

Marine insurance was the first to address the problems of goods in transit and under the control of someone other than the owner. In the early part of this century, insurers began to extend coverage to include goods while they continued their transit inland, leading to the distinction between ocean marine and inland marine insurance.⁵

¹ See, e.g., *Jonah* 1:5 ("Then the mariners were afraid, and cried every man unto his god, and cast forth the wares that were in the ship into the sea, to lighten it of them").

² T.S. ELIOT, *FOUR QUARTETS, The Dry Salvages*, lines 69-70 (1944).

³ Hereinafter FIB. Reprinted in *STANDARD FORMS OF THE SURETY ASSOCIATION OF AMERICA* (Surety Ass'n of America).

⁴ Hereinafter ATMs.

⁵ *COUCH ON INSURANCE* § 154:3 (1995).

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The history of the Financial Institution Bond as a whole has been comprehensively discussed in other sources.⁶ In transit coverage was provided for in the first Bankers Blanket Bond, Standard Form No. 1, promulgated in 1916 by the Surety Association of America, the American Bankers Association, and various carriers. Such coverage continued in the various iterations of the bond during the twentieth century, culminating in the 1986 standard form Financial Institution Bond, as follows:

IN TRANSIT

(C) Loss of Property resulting directly from robbery, common-law or statutory larceny, theft, misplacement, mysterious unexplainable disappearance, being lost or made away with, and damage thereto or destruction thereof, while the Property is in transit anywhere in the custody of

(a) a natural person acting as a messenger of the Insured (or another natural person acting as messenger or custodian during an emergency arising from the incapacity of the original messenger), or

(b) a Transportation Company and being transported in an armored motor vehicle, or

(c) a Transportation Company and being transported in a conveyance other than an armored motor vehicle provided that covered Property transported in such manner is limited to the following:

- (i) records, whether recorded in writing or electronically, and
- (ii) Certificated Securities issued in registered form and not endorsed, or with restrictive endorsements, and
- (iii) Negotiable Instruments not payable to bearer, or not endorsed, or with restrictive endorsements.

Coverage under this Insuring Agreement begins immediately upon the receipt of such Property by the natural person or Transportation Company and ends immediately upon delivery to the designated recipient or its agent.

In past years, the scope and particulars of Insuring Agreement (C) appear not to have been litigated to any great extent. In fact, the authoritative *Annotated Bankers Blanket Bond, First Supplement*, published in 1983, discussed all of the Insuring Agreements in the Bond except Insuring Agreement (C).⁷ This omission was partly

⁶ Robin V. Weldy, *History of the Bankers Blanket Bond and the Financial Institution Bond Standard Form No. 24 with Comments on the Drafting Process*, in SECOND SUPPLEMENT: ANNOTATED BANKERS BLANKET BOND, 3 (Harvey C. Koch ed., 1988); Edward G. Gallagher, James L. Knoll, & Linda M. Bolduan, *A Brief History of the Financial Institution Bond*, in FINANCIAL INSTITUTION BONDS, Ch. 1 (Duncan L. Clore ed., 2d ed. 1998).

⁷ FIRST SUPPLEMENT: ANNOTATED BANKERS BLANKET BOND (Frank L. Skillern ed., 1983).

remedied in 1988, with the publication of the *Second Supplement*.⁸ But even then, although the text of the Insuring Agreement was set out, and a comment and one secondary source included, the Annotations section merely read: None.

B. THE LANGUAGE OF INSURING AGREEMENT (C) AND THE BOND

A number of terms used in Insuring Agreement (C) are used in other Insuring Agreements in the bond, with some being specifically defined and some not. Such defined phrases and terms as “Loss of Property,” “Certificated Securities,” and “Negotiable Instruments” are used in other places. Another specifically defined term, “Transportation Company,” is unique to Insuring Agreement (C); it means “any organization which provides its own or leased vehicles for transportation or which provides freight forwarding or air express services.”⁹

Other phrases, although not specifically defined, also are ubiquitous in the bond and not unique to Insuring Agreement (C). For example, the bond requirement that a loss must be one “resulting directly from” a specified peril, in order to be covered, is present in every Insuring Agreement, at least since 1980.¹⁰

Other language appears only in Insuring Agreements (B) and (C), and a comparison of that language is interesting. Insuring Agreement (B), On Premises, covers Loss of Property resulting directly from:

Robbery, burglary, misplacement, mysterious unexplainable disappearance and damage thereto or destruction thereof, or

Theft, false pretenses, common-law or statutory larceny, committed by a person present in an office or on the premises of the Insured.¹¹

The analogous language from Insuring Agreement (C) is not verbatim but is more than merely reminiscent; it covers Loss of Property resulting directly from:

robbery, common-law or statutory larceny, theft, misplacement, mysterious unexplainable disappearance, being lost or made away with, and damage thereto or destruction thereof, while the Property is in transit anywhere in the custody of [three different categories of people or entities].¹²

False pretenses, then, is an act that can result in coverage, but not one for which In Transit coverage will inure.¹³ And “being lost or made away with” appears as a

⁸ SECOND SUPPLEMENT: ANNOTATED FINANCIAL INSTITUTION BOND (Harvey C. Koch ed., 1988).

⁹ FIB, Definition(s).

¹⁰ See generally William T. Bogart & Andrew F. Caplan, *Loss and Causation Under the Financial Institution Bond*, in FINANCIAL INSTITUTION BONDS, Ch. 1 (Duncan L. Clore ed., 2d ed. 1998).

¹¹ FIB, Insuring Agreement (B).

¹² FIB, Insuring Agreement (C).

¹³ But see *Underwood v. Globe Indem. Co.*, 156 N.E. 632, 635 (N.Y. 1927) (theft “by trick and device” is “larceny”). Accord *Hanson v. Nat’l Sur. Co.*, 177 N.E. 425, 426 (N.Y. 1931) (referencing

covered cause of loss under Insuring Agreement (C), but does not so appear under Insuring Agreement (B).

C. APPLICABLE EXCLUSIONS

Standard Form 24 includes twenty-six separate exclusions, numbered (a) through (z). Under the right facts, nearly any of those exclusions could apply to a claim for an In Transit loss. The most likely applicable exclusions are (r), (b), and (m). Exclusion (r) provides:

- (r) loss of Property while
 - (1) in the mail, or
 - (2) in the custody of any Transportation Company, unless covered under Insuring Agreement (C) except when covered under Insuring Agreement (A).

As discussed below, Exclusion (r), subpart (2), provides additional support for a finding of no coverage for a loss of property from the custody of a Transportation Company when that property is not “being transported” in an appropriate vehicle as required by subsections (b) and (c) of Insuring Agreement (C).

Exclusion (b) excludes coverage when the Insured knowingly sends its messenger or Transportation Company into a riot or war zone outside of the United States or Canada.

Exclusion (m), subpart (1), excludes coverage for losses caused by threats to do bodily harm, except the loss of property in transit in the custody of a messenger provided that the Insured did not know of the threat when such transit was initiated. This exclusion would, for example, appear to cut off any argument for in transit or other coverage when the insured is extorted to drop off ransom money.¹⁴

III. The Construction and Application of the Central Terms of Insuring Agreement (C)

The causes of loss covered by Insuring Agreement (C) almost overlap with those covered by Insuring Agreement (B). As the significance and construction of these common terms has been thoroughly set forth elsewhere in publications discussing Insuring Agreement (B),¹⁵ this article will instead focus on the following central terms

common law larceny); Fuller v. The Home Indem. Co., 60 N.E.2d 1, 8 (Mass. 1945) (referencing Massachusetts statute defining “larceny” to include the act of passing a bad check with intent to defraud).

¹⁴ See generally Wayne F. Foster Annotation, *Loss Through Payment Of Extortion Demand At Place Other Than Insured's Premises As Within Coverage Of Theft Policy Insuring Losses Incurred On Premises*, 85 A.L.R.3d 1103 (1978).

¹⁵ See James F. Crowder and Kenneth C. Borden, *On Premises Coverage*, in FINANCIAL INSTITUTION BONDS, Ch. 5 (Duncan L. Clore ed., 2d ed. 1998).

unique to Insuring Agreement (C): “in transit” and/or “being transported,” “delivery,”¹⁶ “a natural person acting as messenger of the Insured,” and “in the custody of.” None of these terms are defined in Standard Form No. 24.

A note of caution is warranted. As stated above, case law construing Insuring Agreement (C) is limited. Some of the cases discussed below construe “in transit” provisions in paymaster policies, broker’s bonds, or other policies that are fairly analogous to modern financial institution bonds. Other cases construe similarly worded provisions in marine or cargo policies. While the language of a policy should generally control, in cases of perceived ambiguities or uncertainty courts will often attempt to divine the intentions of the parties and particularly the reasonable expectations of the insured. The intentions and reasonable expectations of a financial institution in obtaining “in transit” coverage under a financial institution bond may well vary from those of a shipper obtaining a marine policy. As such, in close cases, a court may look to industry practices and reach different results construing identical provisions in two different types of policies. However, as the courts will generally attempt to enforce policy terms according to their plain meaning, it is worthwhile to examine the courts’ construction of relevant terms to the extent those terms are used in any kind of policy.

A. “IN TRANSIT” AND/OR “BEING TRANSPORTED”

Coverage under Insuring Agreement (C) exists for the loss of Property resulting from a covered risk “while the Property is in transit anywhere” Subparts (b) and (c), dealing with Property in the custody of a Transportation Company, also specify that coverage exists while the property is “being transported,” either in an armored motor vehicle, or, with respect to certain types of property, in another “conveyance.” Courts construing “in transit” and similar transportation clauses “have been essentially concerned with questions of when transportation is to be deemed as having commenced, been interrupted, or terminated, under various types of policies, and in different factual circumstances.”¹⁷

1. The Significance of the Last Sentence of Insuring Agreement (C)

The last sentence of Insuring Agreement (C) provides:

Coverage under this Insuring Agreement begins immediately upon the receipt of such Property by the natural person or Transportation Company and ends immediately upon delivery to the designated recipient or its agent.

There appears to be a distinction between when “coverage” begins and ends under the above clause and when property is “in transit.” This distinction was less evident in the pre-1986 editions of Insuring Agreement (C), which stated that “transit” begins upon

¹⁶ Note that Insuring Agreements (D) and (E) utilize the terms “delivering” and “delivered,” respectively.

¹⁷ C.C. Marvel, Annotation, *Construction of terms ‘in transit,’ ‘transportation,’ and the like, within coverage or exclusion clauses of insurance policy*, 80 A.L.R. 2d 445, 447 (1961).

receipt and ends upon delivery. The reason for the switch to the term “coverage” is not set forth in the Surety Association of America’s 1986 Statement of Change.¹⁸

It appears clear from the complete text of Insuring Agreement (C) that not all losses occurring between the receipt and delivery of property are intended to be regarded as “in transit” losses so as to trigger coverage. For example, under subpart (b), a theft of cash while stored in the office of a Transportation Company would not be covered, despite the fact that the theft occurred after receipt and before delivery of the property by the Transportation Company. Likewise, under subpart (a), a loss occurring after a messenger, for his own convenience and not as a result of an incapacitating emergency, voluntarily hands off his consignment to a substitute messenger, would not be covered. Thus, while the last sentence of Insuring Agreement (C) stipulates a point in time when coverage begins and ends, it does not preclude the failure of other express conditions precedent for coverage, nor does it preclude the possibility of interruptions in coverage.¹⁹

It is conceivable that some courts would hold, based upon the last sentence of Insuring Agreement (C), that any property received by a messenger is automatically “in transit” until actually delivered, regardless of any intervening stoppage of the property.²⁰ However, such a construction would be inappropriate as it would effectively read the “in transit” requirement out of the bond. In any event, the relation of some form of actual movement to coverage would appear to remain a viable concept at the very least under the “being transported” provisions in subparts (b) and (c) of Insuring Agreement (C).²¹ As set forth below, in close cases, that concept can be tricky.

¹⁸ See Surety Association of America, Statement of Change—Bankers Blanket Bond, Standard Form No. 24 (Revised July, 1980). A copy of this and other such Statements of Change, as well as the 1969, 1980, and 1986 versions of Standard Form No. 24, may be found in the master appendix of FINANCIAL INSTITUTION BONDS, Appendix (Duncan L. Clore ed., 2d ed. 1998).

¹⁹ See *San-Nap-Pak Mfg. Co., Inc. v. Firemen’s Ins. Co. of Newark, N.J.*, 47 N.Y.S.2d 542, 544-545 (Ct. Ct. of N.Y. 1944), *aff’d*, 51 N.Y.S.2d 754 (App. Div. 1944), stating:

The word ‘transit’ has a significance of activity, of motion and direction[.] Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined . . . to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be . . . the point of time at which it arrives at its destination. But intermediate between these points questions may arise. (citations omitted).

²⁰ One court, in dicta, appeared to take this position with respect to the term “in transit,” even in the absence of any provision along the lines of the final sentence of Insuring Agreement (C). See *J&C Drug Co., Inc. v. Md. Cas. Co.*, 298 S.W.2d 516, 519 (Mo. Ct. App. 1957) (comparing terms “while being conveyed” with “in transit,” and stating with respect to the latter that it “has acquired broad significance. Its meaning has been described as follows: ‘Goods shipped from one person to another are said to be in transit from the time when delivered to the carrier by the consignor to that when actually or constructively delivered to the consignee.’”). Other courts, however, have applied essentially the same analysis to policies including “in transit” clauses as is applied to policies with “while being conveyed” clauses. See, e.g., *Deleson Steel Co., Inc. v. The Hartford Ins. Group*, 372 A.2d 663, 666 (N.J. Super. Ct. App. Div. 1977); *O.K. Express Corp. v. Md. Cas. Co.*, 198 N.Y.S.2d 105, 108 (App. Div. 1960).

²¹ It is significant that Exclusion (r), subpart (2), excludes coverage for the loss of Property “in the custody of any Transportation Company, unless covered under Insuring Agreement (C).” This provision, to be rendered meaningful, must be understood to presuppose the possibility of a loss of Property in the

Note also that Exclusion (m) excludes coverage for the “surrender of Property away from an office of the Insured as a result of a threat” to do bodily harm, “except loss of Property in transit in the custody of any person acting as a messenger provided that when such transit was initiated there was no knowledge by the Insured of any such threat.” At least with respect to robberies, Exclusion (m) appears to impose an “in transit” requirement that is textually independent from the last sentence of Insuring Agreement (C), and that, therefore, is not subject to the argument that coverage exists merely because the loss occurred between the receipt by, and delivery of, the Property by a messenger.

2. When “Transit” or “Being Transported” Begins

Most of the court cases discussing when transit begins have involved marine or other cargo policies. For example, the case of *Pacific Tall Ships Co. v. Kuehne & Nagel, Inc.*²² involved cargo that was damaged by a chemical fumigant that was placed and sealed into a container along with the cargo. A trucker picked up the shipment later the same day. The court, noting that “transit involves movement,” which had not yet commenced, found no in transit coverage under the subject cargo policy.²³ In *Den Gre Plastics Co., Inc. v. Travelers Indemity Co.*,²⁴ the insured loaded a truck and then parked it for the night at a distance of ten feet from where it was loaded. That evening, the truck and its contents were stolen. The court found that the property was not yet in transit at the time of the loss, observing that “[t]o be considered “in transit,” cargo must be in the process of movement toward its destination; the act of delivery must have begun.”²⁵ Similarly, New York’s highest court, in the case of *Starlight Fabrics, Inc. v. Glen Falls Insurance Co.*,²⁶ held that goods were not lost “in transit” when an employee of the insured carried the goods down the stairs and helped load them onto the truck of an imposter posing as a deliveryman.²⁷

Under financial institution bonds, when transit is said to commence should be less often a relevant issue than under cargo policies. This is because a loss that occurs (arguably) just prior to the commencement of transit would likely be covered in any event by the “on premises” coverage of Insuring Agreement (B), at least in cases of property intended for transit from the offices of an insured financial institution.

Also, pursuant to the last sentence of Insuring Agreement (C), coverage begins immediately upon the receipt of property by either a natural person (acting as messenger

hands of a Transportation Company that is *not* covered by Insuring Agreement (C). This observation supports the argument that the last sentence of Insuring Agreement (C) should not be interpreted, through the construction of perceived ambiguities, to extend coverage to all losses between the receipt, and the delivery, of Property by a Transportation Company, regardless of whether Property was the “being transported” in an appropriate conveyance as expressly required by subparts (b) and (c) of Insuring Agreement (C).

²² 76 F. Supp. 2d 886 (N.D.Ill. 1999).

²³ *Id.* at 892-93.

²⁴ 259 A.2d 485 (N.J. Super. Ct. Law Div. 1969).

²⁵ *Id.* at 490.

²⁶ 79 N.E.2d 812 (N.Y. 1948).

²⁷ *Id.* at 815.

of the Insured) or by a Transportation Company. Provided only that this receipt corresponds with the process of moving the property, as would normally be the case, coverage would commence. However, where this is not so, such as where the property is received for the purpose of storage or safekeeping for any significant length of time prior to its actual movement, the property may not be considered in transit as required for coverage under the Bond, as discussed in the next section.

3. Interruptions in Transit

Although transit and transportation involve movement, it seems clear that those terms do not “exclude temporary stops, incidental delays, or some deviation from the planned route of travel.”²⁸ For example, courts have held that property was “in transit” when the property was loaded into a vehicle for the purpose of transportation, but was stolen while the vehicle was parked and the driver was sleeping in a nearby home or hotel with the intention of resuming the transportation in the morning.²⁹ Likewise, property is still considered in transit for the purposes of coverage during a temporary interruption of movement due to an accident or mechanical difficulties.³⁰

However, “[a]s an interruption or stoppage is protracted, its relation to transit falls off sharply and independent, unrelated purposes may develop and predominate.”³¹ Thus, “[w]hen a prolonged delay is coupled with a reason for the delay that is other than incidental to the delivery, courts do not find coverage.”³² In such cases, “[t]he true test is whether the goods, even though temporarily at rest, were still on their way, with the stoppage being merely incidental to the main purpose of delivery.”³³ Under the above-recited standards, whether or not an interruption of the movement of property is sufficient to render the property no longer in transit will turn on the facts and circumstances of the case.

²⁸ *Boonton Handbag Co., Inc. v. Home Ins. Co.*, 310 A.2d 510, 511 (N.J. Super. Ct. App. Div. 1973), quoting *Lariviere v. New Hampshire Fire Ins. Co.*, 193 A.2d 13, 15 (N.H. 1963).

²⁹ See, e.g., *Home Ins. Co. v. F&F Clothing Co.*, 243 A.2d 572 (Md. 1968); *Penns. Nat. Mut. Cas. Co. v. Murphy*, 579 S.W.2d 58 (Tex. Civ. App. 1979). See also *Aetna Cas. and Sur. Co. v. Burbank Generators, Inc.*, 121 Cal App. 3d 813 (Cal. 1981) (property “in transit” when trailers were moved to, and unhitched and left for 8 hours at, a parking lot to facilitate pick up by the insured’s other drivers); *Atlanta Tallow Co., Inc. v. Fireman’s Fund Ins. Co.*, 167 S.E.2d 361 (Ga. Ct. App. 1969) (property “being conveyed” by messenger when stolen from glove compartment in locked vehicle while messenger stopped for a short interval and went into a restaurant to buy a sandwich); *The Home Indem. Co. v. Desert Palace, Inc.*, 468 P.2d 19 (Nev. 1970) (property “being conveyed” when property stolen from the parked vehicle of messenger during a stop made as part of his regular rounds). But see *State Liquor Stores #1 v. U. S. Fire Ins. Co.*, 243 So. 2d 228 (Fla. Ct. App. 1971) (funds brought home after the close of business on Saturday for deposit at a bank on Monday were not “being conveyed by a messenger.”); *Hawkins Iron & Metal Co., Inc. v. Cont’l Ins. Co.*, 196 S.E.2d 903 (Ga. Ct. App. 1973) (property stored overnight in a locked car on the messenger’s driveway was not lost “while being conveyed by a messenger” or “within the living quarters in the home of any messenger” as required by the policy).

³⁰ See *Stein-McMurray Ins., Inc. v. Highlands Ins. Co.*, 520 P.2d 865 (Idaho 1974); *Gulf Ins. Co. v. Ball*, 324 S.W.2d 605 (Tex. Civ. App. 1959).

³¹ *Ore & Chem. Corp. v. Eagle Star Ins.*, 489 F.2d 455, 458 (2d Cir. 1973).

³² *Hartford Cas. Ins. Co. v. Banker’s Note, Inc.*, 817 F. Supp. 1567, 1577 (N.D.Ga. 1993), *aff’d*, 53 F.3d 1287 (11th Cir. 1995).

³³ *Ore. & Chem. Corp.*, 489 F.2d at 457 (N.Y. Sup. Ct. 1970) (quoting *Franklin v. Wa. Gen. Ins. Corp.*, 310 N.Y.S.2d 648, 650), *aff’d*, 319 N.Y.S.2d 383 (App. Div. 1971).

In *Hartford Casualty Insurance Co. v. Banker's Note, Inc.*,³⁴ for example, a delivery of goods was delayed for a period of several days “so that disparate shipments could be transferred from third-party trailers and consolidated on [the insured’s] trailer.”³⁵ While that consolidation occurred, the insured unhitched its only tractor from the trailer and used the tractor to perform other services. During that period, property was stolen from the stationary trailer. On these facts, the court observed that the interruption of the initial shipment was not incidental to the trailer’s delivery but was rather “more accurately seen as being due to [the insured’s] other unrelated business needs.”³⁶ Accordingly, the court held that loss did not occur to property that was “in due course of transit,” as required by the policy in that case. The court further held that “[e]ven if [the insured] was not using its tractor for other tasks, the length of the trailer’s delay . . . was too long to have been merely incidental to or in facilitation of its pickup.”³⁷

Similarly, in *Dealers Dairy Products Co. v. Royal Insurance Co., Ltd.*,³⁸ the Ohio Supreme Court held that a shipment of ice cream was not in transit or in the process of transportation when, “for the convenience of the insured and to divert the transporting conveyance to other business of the insured, the goods are unloaded and deposited on designated premises and left there at rest while the transporting conveyance departs and is used on another transportation project foreign to the original shipment.”³⁹ Note, however, that while the decision in *Dealers Dairy* directly addressed the terms “in transit” and “transportation,” the policy at issue included an express endorsement stating that coverage attached from the time the goods were loaded upon vehicles and continuously thereafter until delivery, “but only while incidental to transportation.” Thus, it could be argued that the holding in *Dealers Dairy* was limited to the policy language at issue.

Another case in which coverage was found lacking is *Pointe Coupee Lumber Co. v. Aetna Cas. Co.*⁴⁰ There, an employee of the insured, when leaving the company vehicle to buy a drink, hid a deposit bag under the truck seat behind a hard hat. Thereafter, the messenger forgot about the property for more than two days. During that time, the truck was used by several other persons on missions unrelated to the deposit of the funds in a bank. On those facts, the court held that the messenger “had turned aside from his mission, and the funds were not being ‘conveyed by a messenger’ when they were stolen.”⁴¹

In contrast, stretching perhaps to the breaking point the length of a permissible pause during which property may still be regarded as in transit was the holding in *O'Brien Machinery Co. v. Fireman's Fund Insurance Co.*,⁴² construing a policy covering

³⁴ 817 F. Supp. 1567 (N.D. Ga. 1993), *aff'd*, 53 F.3d 1287 (11th Cir. 1995).

³⁵ *Id.* at 1574.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 164 N.E.2d 745 (Ohio 1960).

³⁹ *Id.* at 747.

⁴⁰ 424 So. 2d 1096 (La. Ct. App. 1982).

⁴¹ *Id.* at 1097.

⁴² 41 Pa. D. & C.2d 785 (Pa. Ct. Com. Pl. 1967).

equipment while “in ordinary course of transit.” In that case, the plaintiff purchased a generator and engaged a rigger to transport it to plaintiff’s warehouse. The extreme weight of the generator, however, required a special moveable crane, which was already engaged on other jobs, including one for the plaintiff. The generator was, therefore, moved to the rigger’s warehouse, where it remained for three months until it was destroyed by a fire. The court, discussing the probable “contemplation of the parties,” concluded that a party turning its goods over to an independent carrier “will want ‘in transit’ protection from the time the goods leave his custody until such time as the goods reach their final destination.”⁴³ Based upon that conclusion, and noting that the policy did not expressly exclude protection for goods “in storage,” the court held that loss was covered by the policy.

In *Ore & Chemical Corp. v. Eagle Star Insurance*,⁴⁴ the Second Circuit, applying New York law, displayed just how far a court may go in favor of finding “in transit” coverage with respect to the purpose of an interruption in the movement of insured property. The case concerned an All Risks Inland Marine Floater policy, covering ingoing or outgoing shipments of goods “while in due course of transit until delivered.”⁴⁵ Sales agents of the insured, pursuant to an arrangement with a prospective purchaser of gold, brought the gold to a motel room in Wyoming for inspection by that purchaser. The inspection took place, as planned, but the parties did not agree on a price. The next morning, an hour before the agents planned to commence their return trip, the “purchaser” returned and removed the gold at gunpoint. Finding coverage, the Second Circuit explained as follows: “Whether the stoppage be viewed as one in a continuing shipment with alternative destinations or as one in a bifurcated journey with an outgoing and incoming segment, it remains a stoppage incidental to the carriage and hence within the coverage of the due-course-of-transit clause.”⁴⁶ The court, however, cautioned that its reasoning would not necessarily apply to longer, less transit-related stops:

That the clause must be flexibly interpreted does not license every stoppage as a mere interruption incidental to carriage. As an interruption or stoppage is protracted, its relation to the transit falls off sharply and independent, unrelated purposes may develop and predominate. If the purpose of a junket, for instance, were to induce anyone with a general interest to inspect a product, the role of the transit would become more attenuated. If, in addition, this resulted in a four or five day sojourn, with interested parties queuing up outside the motel room, the point of non-coverage might well be reached.⁴⁷

One sort of stoppage that appears to create an interruption in coverage is a “frolic and detour.” When a loss occurs while an alleged messenger takes time off from his role in moving insured property for the purpose of partying and drinks, the property is not considered to be in transit or, alternatively, the person is no longer viewed as acting as a

⁴³ *Id.* at 792.

⁴⁴ 489 F.2d 455 (2d Cir. 1973).

⁴⁵ *Id.* at 455.

⁴⁶ *Id.* at 458.

⁴⁷ *Id.*

messenger. Thus, the court in *Central School District No. 3 v. Insurance Co. of North America*⁴⁸ denied coverage, noting that “[w]hen this theft occurred, Sandor was engaged in social activities at the tavern that were neither related nor incidental to the conveyance of the funds.”⁴⁹ Likewise, funds lost from the pocket of the checked coat of an employee while playing dice at a social club were held not to have disappeared “while being conveyed by a messenger.”⁵⁰ The rule applied in such circumstances was stated in *Deleson Steel Co. v. The Hartford Insurance Group*⁵¹ as follows:

This court holds that in those instances in which a messenger is engaged in a “frolic of his own”—that is, he has substantially deviated from the reasonable course of carrying out his delivery—then the insured employer cannot look to his insurer under a policy similar to this “Paymaster Policy” for indemnification of any theft loss. This seems to be in accord with our public policy of meeting the reasonable coverage expectations of the insured.⁵²

4. When Transit And/Or Coverage Ends

Coverage under Insuring Agreement (C) “ends immediately upon delivery to the designated recipient or its agent.” This language was changed from the former versions of Standard Form 24, under which such “transit” (as opposed to “coverage” as Form 24 currently states) ended “immediately upon delivery [of the subject property] at destination.” This change was intended to make it “clear that transit coverage ceases when Property is delivered to the agent of the recipient, even if that agent is not within the office of the recipient.”⁵³

The above-described change was apparently prompted by cases such as *United Bank of Pueblo v. Hartford Accident & Indemnity Co.*⁵⁴ In that case, an insured bank sent certain financial documents for delivery, by a bus company, to another bank in Denver. When the bus company notified the Denver bank of the arrival of the package, the Denver bank sent a mail room employee to retrieve it. While returning to the Denver bank, in fact having reached the Denver bank’s outdoor mall, the employee was robbed

⁴⁸ 391 N.Y.S.2d 492 (App. Div. 1977)

⁴⁹ *Id.* at 495.

⁵⁰ *Sansone v. The Am. Ins. Co.*, 160 So. 2d 575, 576 (La. 1964). *See also* *Trad Television Corp. v. Hartford Accident & Indem. Co.*, 113 A.2d 47 (N.J. Super. Ct. App. Div. 1955) (holding that where a corporate officer took funds on a Friday evening with the intent of transporting the funds the following Monday, but lost the funds Friday evening while participating “in the gaiety of [a] surprise party with high spirits and a merry heart until 4:00 a.m. on the following morning,” the “transportation” for purposes of coverage under the policy “had not begun”).

⁵¹ 372 A.2d 663 (N.J. Super. Ct. App. Div. 1977).

⁵² *Id.* at 666. Note that the referenced policy in *Deleson Steel* was fairly similar to Insuring Agreement (C), in that the insurer undertook “[t]o pay for loss of payroll funds and other money and securities by actual destruction, disappearance or wrongful abstraction thereof outside the premises while being conveyed by a messenger or any armored motor vehicle company, or while within the living quarters in the home of any messenger.” *Id.* at 665.

⁵³ *See* *Surety Association of America, Statement of Change—Bankers Blanket Bond, Standard Form No. 24*, (revised July, 1980).

⁵⁴ 529 F.2d 490 (10th Cir. 1976).

of the package. Based on these facts, the insured bank brought a claim under Insuring Agreement (C). Construing perceived ambiguities against the insurer, the court concluded that the package was still “in transit” at the time of the theft because the intended “destination” was the interior of the Denver bank’s building. The court further found that the Denver bank’s employee was a “messenger” as that term was used in the policy (a pre-1980 version thereof), reasoning that “if the insurance company had intended that a ‘messenger’ must be an agent or bailee of the insured, it would have employed such a term of art to describe the relationship.”⁵⁵ Under the current version of Insuring Agreement (C), coverage would not be found under the facts in *Bank of Pueblo*, because coverage ceases and the risk of loss shifts to the recipient upon delivery of the subject property to that recipient or its agent.

B. “DELIVERY”

Undefined by the bond is the term “delivery.” While in the context of “in transit” coverage, “delivery” would appear to be accomplished when the property is actually received by the intended recipient, some courts have applied a more legalistic definition to the term. In *Underwood v. Globe Indemnity Co.*,⁵⁶ New York’s highest court held that a loss occurred “in transit” when a bond salesman physically delivered bonds to the intended recipient in exchange for what appeared to be a certified check but which was only “stamped as certified, being unsigned . . . a mere trick[.]”⁵⁷ Viewing “in transit” as “while going to make a delivery,” the court held that, since the bonds were obtained by trickery, title to the bonds never passed, as “delivery, in the legal sense of the word,” had not occurred.⁵⁸ The policy in *Underwood* did not include an express “delivery” provision; the court simply imposed a legalistic “delivery” requirement as a prerequisite for the termination of “transit”.⁵⁹ However, the same court in *Hanson v. National Surety Co.*⁶⁰ applied the same reasoning and reached the same result under a Broker’s Basic Bond providing “in transit” coverage and expressly providing that “such transit risk to begin immediately upon receipt of such Property by the . . . messenger . . . and to end immediately upon delivery thereof at destination.”⁶¹ *Hanson* involved the physical delivery of shares of stock to the intended purchaser. The sale agreement, however, reserved “title” to the seller until payment was made. Promptly upon receipt of the stock, the recipient company abandoned its office and its officers absconded with the stock, as it appeared in the case to have at all times been their intent. While the messenger successfully completed his task without incident, the court viewed the loss as a covered “transit risk” because *legal* “delivery” was not made. The highest court of Massachusetts held similarly construing the same relevant policy language in a case where stock was

⁵⁵ *Id.* 529 F.2d at 494.

⁵⁶ 245 N.Y. 111, 156 N.E. 632 (N.Y. 1927).

⁵⁷ *Id.* at 114.

⁵⁸ *Id.* at 115.

⁵⁹ The Appellate Division, which was reversed in *Underwood*, had, in contrast, applied a less legalistic meaning of the term “transit.” “‘Transit’ in common speech is the act or process of causing to pass from one place to another. Here the act of passing had totally ceased. The place of stoppage had been attained. There was no longer transit.” *Underwood v. Globe Indem. Co.*, 216 N.Y.S.2d 109 (App. Div. 1926).

⁶⁰ 177 N.E. 425 (N.Y. 1931).

⁶¹ *Id.* at 426.

delivered to the intended purchaser in exchange for a check for which the purchaser knew there were insufficient funds.⁶²

The strained reasoning of these cases, however, appears to have its limits. Thus, the Second Circuit in *Sutro Bros. & Co. v. Indemnity Insurance Co. of North America*,⁶³ declined to find “in transit” coverage for a loss resulting from the collapse of the check kiting/ponzi scheme of a regular, high volume, purchaser of stock. Distinguishing *Hanson* and *Underwood* from the case before it, the Second Circuit explained as follows:

An important factual difference is immediately observed. In *Underwood* and *Hanson* there were single transactions with deliveries by no means in the manner anticipated. Here the deliveries were completed in exactly the manner approved by Sutro—expressly by Friedman and impliedly by the knowing acceptance of some 838 uncertified checks. The loss was not occasioned by the taking of the delivered securities which Arlee forthwith turned into cash but by the subsequent non-payment of the checks which Sutro was satisfied to accept at the time.⁶⁴

Note that under the current version of the Financial Institution Bond, cases involving facts similar to *Hanson*, *Underwood* or *Sutro Bros.* would most likely be determined by examining the terms of Insuring Agreements (D) (forgery or alteration) and (E) (securities) (if such coverage is purchased by the insured) and/or the terms of various exclusions, including exclusions (a) (limiting the scope of forgery or alteration coverage), (e) (loan exclusion), (i) (trading exclusion),⁶⁵ and/or (p) (counterfeiting). For example, the physical delivery of loan proceeds in reliance upon a knowingly false *promise* that the borrower has or will provide collateral or the documentation thereof (as opposed to reliance upon the actual physical receipt of forged, altered or counterfeit documents) would be excluded from coverage under Exclusion (e). However, as Insuring Agreements (D) and (E) employ the terms “delivering” and “delivered,” the holdings in the referenced cases may still come into play under certain facts.

Finally, on the subject of “delivery” in its physical sense, it should be noted that merely leaving a package at the premises of the intended recipient may not constitute delivery. Thus, an intermediate appellate court in *Budco Associates, Inc. v. Royal Exchange Assurance of America*⁶⁶ held that it was for the jury to decide whether goods had been “delivered” to their “final destination” where the goods were left in a trailer at the intended recipient’s parking lot, and where there was evidence that previous shipments were brought an additional distance to a specific site in the recipient’s facilities.

⁶² Fuller v. The Home Indem. Co., 60 N.E.2d 1 (Mass. 1945).

⁶³ 386 F.2d 798 (2d Cir. 1967) (applying New York law).

⁶⁴ *Id.* at 802.

⁶⁵ It is noteworthy that the concurring opinion in *Sutro Bros.* states that coverage was precluded in that case in view of a trading exclusion in the policy. *Id.* 386 F.2d at 802-03.

⁶⁶ 384 N.Y.S.2d 819 (App. Div. 1976).

C. “A NATURAL PERSON ACTING AS A MESSENGER OF THE INSURED”

For coverage under subsection (a) of Insuring Agreement (C) to arise, a loss must occur to property while in the custody of a “messenger.” The exact wording of the messenger clause has evolved over the years, changing from “any person acting as messenger” to “person designated by the Insured to act as its messenger,” and later to the current “natural person acting as a messenger of the Insured[.]”⁶⁷

Not all persons carrying a financial institution’s property outside of its premises are “acting as a messenger of the Insured.” For example, it was held by the court in *O.K. Express Corp. v. Maryland Cas. Co.*⁶⁸ that in order for a person to be acting as a messenger, that person must be “taking the money from the [insured’s office] to a *specific place.*”⁶⁹ Where, in contrast, a person is “carrying the money solely for safekeeping,” that person is not acting as a messenger.⁷⁰ A similar construction of the term “messenger” was applied in *KMC Management. Corp. v. Certain Underwriters at Lloyd’s London*, an unpublished opinion in the Court of Appeals of Minnesota,⁷¹ which held that the facts before it did “not support a finding that CFM was a messenger, or was acting as a messenger, for appellant, because appellant did not entrust specific funds to CFM for transmission to a *specific destination.*”⁷² The same conclusion finds support in the final sentence of Insuring Agreement (C), under which coverage “ends immediately upon delivery to the designated recipient or its agent.” The mere act of carrying or moving property therefore, without the purpose of delivering same to a “designated” recipient, does not trigger coverage. Thus, for example, if an executive of a financial institution is robbed of cash that he is carrying for the general purpose of entertaining clients with a night on the town, the loss would not be covered.

Also, pursuant to the express terms of Insuring Agreement (C), subsection (a), a messenger must be a natural person. Corporations or similar entities do not count. Thus, as the court in *Utica Mut. Insurance Co. v. Precedent Cos., LLC*⁷³ recently observed:

Fidelity is a corporation, not a natural person acting as a messenger on Precedent’s behalf. While we agree with Precedent that a corporation

⁶⁷ Both the 1980 and 1986 versions qualify the description of “messenger” to include other persons acting as a messenger or custodian during an emergency arising from the incapacity of the original messenger.

⁶⁸ 198 N.Y.S.2d 105 (App. Div. 1960).

⁶⁹ *Id.* at 108.

⁷⁰ *Id.* Note that the distinction between acting as a messenger and simply holding property is further supported by the provision of subsection (a) of Insuring Agreement (C), extending coverage where, due to an emergency, the original messenger transfers custody of his consignment to another person acting as “messenger or custodian” (emphasis supplied). Clearly, there is no “in transit” coverage with respect to property that, in the first instance, is stored or held off premises by a person merely acting as a “custodian” thereof.

⁷¹ No. C7-00-1148, 2000 Minn. App. LEXIS 1183 (Minn. Ct. App. Nov. 28, 2000).

⁷² *Id.* at *5. Note that the term “messenger” in the policy in *KMC Management* was not expressly limited to “natural” persons.

⁷³ 782 N.E.2d 470 (Ind. Ct. App. 2003).

acts through its officers and agents, the plain and ordinary meaning of natural person expressly excludes legally created entities.⁷⁴

An employee of the insured, however, can qualify as a covered messenger. While an argument could once be made that an employee, particularly an executive, acts in the capacity of the insured itself, as opposed to the insured's messenger,⁷⁵ the policy now precludes that view. Specifically, Exclusion (h), which excludes certain losses "caused by an Employee," expressly does *not* apply to losses covered under Insuring Agreement (C) "and resulting directly from misplacement, mysterious unexplainable disappearance or destruction of or damage to Property." Note that the quoted provision of Exclusion (h), while not mentioning theft or larceny, should not be read to exclude coverage for property stolen from an employee-messenger, as such a loss is not "caused by" the employee, nor thefts by employee-messengers, which may be covered under Insuring Agreement (A).

Finally, a non-employee criminal who, in the course of his scheme to deceive a financial institution, arguably "delivers" property to or from the institution, cannot be viewed as a "messenger of the Insured." Rather, such a person must be viewed as "acting on his own behalf."⁷⁶

D. "IN THE CUSTODY OF"

Insuring Agreement (C) also requires that the property have been "in the custody of" a messenger or Transportation Company. While a few courts have interpreted certain "custody" or "care and custody" clauses to require actual personal custody,⁷⁷ the import of those decisions may be limited to the facts and language of the particular policies at issue in those cases.⁷⁸ The more prevalent view appears to be that "custody" means "protective custody, which may be satisfied by reasonable attempts to protect and secure the insured property."⁷⁹ Thus, the court in *Deleson Steel Co. v. The Hartford Insurance Group*,⁸⁰ defining "custody" as "immediate charge and control exercised by a person,"⁸¹ found that property stolen from the messenger's van was in his custody, "even though it was left unattended, in that [the messenger] locked the van, placed the keys in his pocket and remained near the place where the van was parked."⁸² However, at the point that a

⁷⁴ *Id.* at 477.

⁷⁵ Such was the holding, for example, in *Trad Television Corp. v. Hartford Accident and Indem. Co.*, 113 A.2d 47 (N.J. Super. Ct. App. Div. 1955).

⁷⁶ *Bank of the Southwest v. Nat'l Sur. Co.*, 477 F.2d 73, 76 (5th Cir. 1973).

⁷⁷ See *Cleveland Ave. Liquor Store, Inc. v. Home Ins. Co.*, 156 S.E.2d 202 (Ga. Ct. App. 1967); *Monteleone v. Am. Employers' Ins. Co.*, 120 So. 2d 70 (La. 1960); *Guarisco v. Mass. Bonding & Ins. Co.*, 4 N.Y.S.2d 788 (City Ct. of N.Y. 1938), *aff'd*, 16 N.Y.S.2d 208 (App. Div. 1939).

⁷⁸ See *Am. Indem. Co. v. Swartz*, 250 F.2d 532, 537 (8th Cir. 1957).

⁷⁹ *Atlanta Tallow Co., Inc. v. Fireman's Fund Ins. Co.*, 167 S.E.2d 361, 363 (Ga. Ct. App. 1969). Note that the *Atlanta Tallow* case includes two separate concurring opinions and a dissenting opinion, which collectively closely examine the expanse and limitations of the terms "custody" and "while being conveyed." See also *The Home Indem. Co. v. Desert Palace, Inc.*, 468 P.2d 19, 21 (Nev. 1970); *accord Cameron State Bank v. Am. Employers' Ins. Co.*, 401 So. 2d 1090, 1093 (La. Ct. App. 1981).

⁸⁰ 372 A.2d 663 (N.J. Super. Ct. App. Div. 1977).

⁸¹ *Id.* at 665.

⁸² *Id.*

messenger, even temporarily, without justification abandons the property to the elements and/or to passersby, such property is no longer in his protective custody. As one judge observed:

Realism and common sense tell us that a messenger in the process of conveying a package does not have to eat, perform his daily body functions and at the same time be grasping his package in order for the same to be in his custody. Realism and common sense also tell us that when a messenger leaves his package totally unprotected in an open car on a public street while he eats lunch in his home, it cannot be said that the messenger has protective custody of the package and is thereby in the process of conveying the same.⁸³

IV. Transportation Companies Acting to Service ATMs

Insuring Agreement (C) may come into play with respect to funds lost while in the custody of companies providing cash replenishment services to automated teller machines (ATMs). Such services require the physical transportation of cash to and from ATMs, a function normally employing the use of armored vehicles.⁸⁴ Whether or not such losses are covered under Insuring Agreement (C), however, will be highly dependent upon the specific facts of each case.

Just how an ATM service company receives money from its customer, how it treats or handles such money once so received, and how money is directed back to the customer can be of critical importance in determining coverage under Insuring Agreement (C). Determining the manner in which the ATM service company obtains the funds for distribution to the ATMs, stuffs the ATM canisters, retrieves canisters, and returns funds to the insured financial institution will require investigation beyond simply reading the agreements between a financial institution and its ATM service company, as it should not be assumed that the parties will have followed the letter of those agreements. Precisely where or when along the money trail an alleged loss occurred must also be established. As shall be set forth below, of specific importance is identifying whether and when, in relation to the time and place of the alleged loss, the alleged Property (i.e., money) of the insured was intermingled with the money of others.

The basic physical mechanics of ATM cash replenishment services were recently described in *Carrollton Bank v. Fujitsu Transaction Solutions, Inc.*,⁸⁵ a case not involving an insurance claim, as follows:

⁸³ Atlanta Tallow Co., Inc. v. Fireman's Fund Ins. Co., 167 S.E.2d 361, 365 (Ga. Ct. App. 1969) (Hall, J., concurring).

⁸⁴ Note that pursuant to Section 9 of the Conditions and Limitations of the Bond, coverage under the Bond, if any, "shall apply only as excess over any valid and collectible insurance or indemnity obtained by the Insured . . . or by a Transportation Company." Thus, the adjustment of any "in transit" claim involving a Transportation Company should start with the search for other available insurance, if any.

⁸⁵ 56 Fed. Appx. 603, 2003 U.S. App. LEXIS 1067 (4th Cir. 2003).

The cash replenishment services consisted of removing depleted cassettes of cash on a weekly basis and replacing them with ones filled with cash transferred to Fujitsu by wire transfers. Also, Fujitsu agreed to wire back to Carrollton Bank any cash remaining in the removed cassettes.⁸⁶

The route taken by money in the hands of an ATM servicing company, however, can vary. Depending upon the agreements between a financial institution and the ATM service company, funds for replenishment of ATMs may originate from wire transfers to a segregated customer account, or may simply be wired to the ATM servicing company's commingled business account. In either case, it may be expected that the ATM service company will then make large cash withdrawals from the bank into which such funds were wired and, utilizing an armored vehicle, will transport that cash to the ATM service company's own facilities for counting and stuffing into canisters as requested by its customer. Alternatively, the ATM servicing company may physically pick up cash, in or out of canisters, directly from the premises of a financial institution customer.

Once an ATM servicing company brings cash to its own facilities, that cash may or may not be physically segregated and treated as the property of specific customers. At the ATM servicing company's sorting facility, cash will be inserted into ATM canisters, which may or may not be marked and treated by the ATM servicing company as belonging to specific customers.

The ATM serving company will then, utilizing armored vehicles, bring full cash canisters to the ATMs of its various customers. Depleted canisters will then be retrieved and transported by the same armored vehicles back to the facilities of the ATM servicing company. There, the canisters will likely be emptied (except in the case of a financial institution customer that requires the physical return to it of its depleted canisters).

Funds emptied from depleted canisters on the premises of the ATM servicing company, again, may or may not be physically segregated and treated as the property of specific customers. These funds could also be used to fill other canisters for installation into other ATMs, either for the same customer from whose ATMs the cash was retrieved or for different customers.

An ATM servicing company will also, utilizing armored vehicles, bring cash to its own bank, for deposit in segregated customer accounts, or its own business account. Depending upon the facts, cash so transported to the ATM servicing company's bank may or may not be packaged or marked and treated as belonging to specific customers and/or may or may not be intended by the ATM servicing company to be deposited for the purpose of wire transfers to specific customers.

An alleged "in transit" claim involving an ATM servicing company could arise under any of numerous possible scenarios. Where an ATM servicing company collapses

⁸⁶ *Id.* at 605. Note that Fujitsu subcontracted the physical transportation arm of its ATM services to an armored car company. For the purposes of the discussion in this paper, however, it is assumed that the company providing ATM service is a Transportation Company as defined in Standard Form 24.

or, alternatively, simply comes up “short,” it may be impossible to establish how, when, or where a loss occurred, if a loss of covered Property occurred at all.

For coverage to exist with respect to such claims, two central facts must first be established: (1) that a covered cause of loss (theft, misplacement, etc.) occurred while the subject money was “being transported in an armored motor vehicle,” and (2) that the alleged loss was to covered Property under the Bond.

A. “BEING TRANSPORTED IN AN ARMORED MOTOR VEHICLE”

As discussed in Section III of this article, where a loss occurs to funds that are on deposit in a bank or that are being stored or sorted in an office, those funds may not be considered as “being transported in armored motor vehicle.” Also, funds lost from an ATM itself are not recoverable under the Bond’s “in transit” coverage. In addition to such funds being neither “in transit”⁸⁷ nor “in the custody of” a Transportation Company nor “in an armored vehicle,” most losses from off-premises ATMs are expressly excluded by Exclusion (1)(3).

What of a situation where the time and circumstances of the alleged loss is not known and/or knowable? Conceivably, the insured in such a case could demonstrate a covered cause of loss in the form of a “mysterious unexplainable disappearance.” As to this cause of loss, at least one court has found “persuasive” the argument that “the nature of a ‘mysterious unexplainable disappearance’ defies any requirement or burden that [the insured] explain or demonstrate the nature of or precise reason for the loss.”⁸⁸ However, in this example, the insured may not be able to prove the facts necessary to satisfy other requirements of the policy, i.e., that the loss occurred to property that was “in transit” and “being transported in an armored vehicle.” Generally, it is the *burden of the insured* to show the facts necessary to prove that its claim is covered by the basic terms of an insurance policy.⁸⁹ The loss may well have occurred to money stored in the ATM servicing company’s vault, or that was in an ATM. Alternatively, the ATM servicing company may have simply spent more money from its business account than it should have in order to meet its obligations to wire funds to its customers.

B. LOSS OF COVERED “PROPERTY”

Even where an insured can prove that a loss occurred to money while being transported in an armored vehicle, coverage also requires that, at the time of the loss, the

⁸⁷ As the ATM will usually belong to the financial institution itself, the insertion of an insured’s cash canisters into its ATM would constitute “delivery to the designated recipient or its agent” so as to end “coverage” under the last sentence of Insuring Agreement (C).

⁸⁸ First Fed. Sav. & Loan Ass’n of Toledo v. Fid. & Deposit Co. of Md., 895 F.2d 254, 259 (6th Cir. 1990).

⁸⁹ See, e.g., Morgan Stanley Group, Inc. v. New England Ins. Co., 225 F.3d 270, 276 (2d Cir. 2000) (“It is well established under New York law that a policyholder bears the burden of showing that the insurance contract covers the loss.”); see also In Re Wallace & Gale Co., 275 B.R. 223, 230 (D. Md. 2002) (“In an action on an insurance policy, the plaintiff has the burden of proving every fact essential to his or her right to recover.”). As to the applicability of exclusions, however, the burden is on the insurer. *In Re Wallace & Gale*, 275 B.R. at 230.

subject money was actually owned by the insured. Specifically, Section 10 of the Conditions and Limitations of the Bond states as follows:

This bond shall apply to the loss of Property (1) owned by the insured, (2) held by the insured in any capacity, or (3) for which the insured is legally liable. This bond shall be for the sole use and benefit of the Insured named in the Declarations.

As stated above, depending upon the agreement(s) and/or practices of the parties, a financial institution may provide funds to an ATM servicing company by way of wire transfers to the ATM servicing company's bank account. Where such a procedure is followed, the wired funds may lose their identity as money "owned" by the insured.

As a legal matter, title to funds on general deposit in an ATM servicing company's bank account (or any general deposit account) rests with the depository bank, not with the depositor or its customers.⁹⁰ Funds taken or misappropriated from an ATM servicing company's bank account, in addition to not being lost while "being transported in an armored motor vehicle," are also not funds "owned" by the insured as required for coverage.

Cash may be lost while being transported in an armored motor vehicle from the ATM servicing company's bank to the ATM servicing company's office or vault. While such a case would appear to meet the "being transported" requirements of subsection (b) of Insuring Agreement (C), an additional inquiry must be made to establish whether the loss was to funds "owned" by the insured. Merely because the ATM servicing company withdrew cash from its own bank account with the (alleged) intention of later separating that cash and placing some of it in canisters for the insured's ATMs does not establish that any of the lost cash was "owned" by the insured at the time of the loss. Nor does the fact that, as the direct or indirect result of such a loss, the ATM servicing company fails to meet its contractual obligations to the insured (i.e., fill its ATMs) constitute a loss of covered "Property" under the Bond. Note also that such a breach of contract by an ATM servicing company would not be considered a "mysterious unexplainable loss."⁹¹

The above-described ownership problem could also exist with respect to cash lost while being transported from the ATM servicing company to deposit in its own bank. Where such cash was commingled at the ATM servicing company's own facilities, absent genuine indicia of ownership of the specific cash by the insured, the loss would have to be viewed as having occurred to the property of the ATM servicing company. After all, the cash once deposited in the ATM servicing companies' bank account could be used for any purpose, including the payment of the ATM servicing company's general obligations.

⁹⁰ See, e.g., *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 560-61 (2d Cir. 1976); *IBM Poughkeepsie Employees Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 590 F. Supp. 769, 776-77 (S.D.N.Y. 1984) (explaining that title to money on "general deposit" at a bank, not segregated from other funds, rests with the bank, whereas the depositor owns "the indebtedness of the bank to it, a mere chose in action").

⁹¹ *First Fed. Savings & Loan Ass'n of Toledo*, 895 F.2d at 260.

Cash lost in transit from marked canisters retrieved from the insured's ATMs would probably satisfy the ownership requirement. Conversely, commingled cash loaded into unmarked canisters at the ATM servicing company's facilities and lost while being transported to the ATMs of assorted customers on the ATM servicing company's route might not be considered "owned" by any particular customer.

Evidence of the ownership of money by the insured at the time of a loss could include an agreement by the ATM servicing company to segregate the insured's funds, with wire transfers occurring to and from an account in the name of the insured and with title to the cash being specified as remaining at all times with the insured. In such a case, the money may be viewed as a "bailment" and therefore "owned" by the insured.⁹² Alternatively, where the issue of ownership of the money is not expressly or impliedly⁹³ addressed in the parties' agreement(s), and the ATM servicing company merely undertakes a contractual obligation to deliver and insert certain dollar amounts into the insured's ATMs, and to transmit a dollar amount to the insured equal to that retrieved from its ATMs, a bailment, and hence ownership of the cash by the insured, may be absent. In such circumstances, the theft of such money may not be a loss of covered "Property" under the bond.

V. Conclusion

As long as physical cash, negotiable instruments, and securities exist, such property will continue to journey to, from, and between financial institutions. Such journeys entail risks but, as discussed above, not all of those risks are covered by the terms of Insuring Agreement (C). The foregoing discussion has set forth some of the subtleties that may arise when one compares the facts of a given In Transit claim to the conditions for coverage under the current standard form Financial Institution Bond. Determining whether a specific claim is covered will require an investigation and analysis of the facts of the claim, including who was in possession of the Property at the time of the loss, in what capacity that person or entity took and/or maintained possession of the Property and for what purpose, whether the Property continued "in transit," and the facts and circumstances of the loss itself. Where the Property left the insured's premises but thereafter remained at rest for any substantial length of time before the alleged loss, that should send up a red flag calling for closer analysis. Where issues of interpretation arise, a review of the precedents discussed in this article will, hopefully, be of assistance. Of course, coverage for each claim will turn upon its own facts, as well as upon the precedents and legal standards of the applicable jurisdiction.

⁹² See generally 8A AM. JUR. 2d *Bailments* (West 1997).

⁹³ See *Rozsa v. May Davis Group, Inc.*, 152 F. Supp. 2d 526, 533 (S.D.N.Y. 2001) (quoting *Coons v. First Nat. Bank of Philmont, aff'd*, 218 N.Y.S. 189, 189-90 (App. Div. 1926)), and stating: "The relation between a bailor and a bailee is fixed by contract, either express or implied, and the rights and liabilities of the parties must be determined of the terms of the contract, or, if implied, under the general principles of law and the surroundings and attending circumstances; but always liability is grounded in contract."