

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| HENRY F. and ANNE MARIE FRIGON, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. 05 C 6214 |
| |) | |
| PACIFIC INDEMNITY COMPANY, a Wisconsin |) | Judge Robert W. Gettleman |
| corporation, |) | |
| |) | Magistrate Judge Morton Denlow |
| Defendant. |) | |

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT
ON LIABILITY OF PACIFIC INDEMNITY COMPANY**

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT
ON LIABILITY OF PACIFIC INDEMNITY COMPANY**

Plaintiffs Henry F. and Anne Marie Frigon (collectively, the "Frigons") hereby submit their Memorandum of Law in Support of their motion, filed herewith, seeking partial summary judgment in their favor with respect to the liability of Pacific Indemnity Company ("Insurer") for failure to provide the Frigons with coverage under their All-Risk policy.

INTRODUCTION

In the spring of 2003, Henry and Anne Marie Frigon discovered that the trust they had placed in a prominent Chicago art dealer over the past decade had been betrayed. This dealer, Richard H. Love ("Mr. Love"), ran his gallery, R.H. Love Galleries, Inc. ("Gallery") from posh and prominent locations: first the Nickerson Mansion and now, North Michigan Avenue. In the spring of 2003, the Frigons asked the Gallery to return the valuable paintings they previously had consigned to the Gallery. Only then did Mr. Love break down and admit that he had sold or traded eleven of the Frigons' paintings – which had been consigned for minimum sales aggregating \$1,600,000 – but had not paid the Frigons for a single one.

Over time, and through recent litigation, the ugly truth emerged. The Frigons were victims of a nefarious, unlawful scheme: the Gallery had been insolvent for years; it had disposed of the eleven paintings owned by the Frigons contrary to the consignment agreements, both through trades and in sales for less than the consigned minimum prices; the Gallery concealed from the Frigons the fact that it had disposed of the paintings – in one case, for as long as five years after sale; the Gallery and Mr. Love personally had been sued numerous times by other consignors; in short, the Gallery was in the business of making paintings disappear by any means necessary to pay its immediate operating expenses and to continue paying exorbitant salaries to its founder, president and owner, Richard H. Love.

The defendant Insurer issued an All-Risk policy to the Frigons, which clearly covers their loss. The Insurer even listed the paintings as stolen on the Art Loss Register, but has now refused to provide coverage for the loss despite the disappearance of the eleven paintings and the overwhelming evidence that the paintings were converted by the Gallery for its own purposes.

FACTS

A. The Art of Making Paintings Disappear

Beginning in the early 1990s, the Frigons formed a close business and personal relationship with Richard H. Love of Chicago's R.H. Love Galleries, who tutored Mr. Frigon in art history, appreciation, and in art collecting and investment, while the Frigons bought most of their collection of early American impressionist art from the Gallery, including the eleven paintings at issue here. SOF 1, 2, 3.¹ As a result, the Frigons at times placed a painting they had previously purchased from the Gallery back in the hands of the Gallery for re-sale under a consignment agreement. SOF 6. The Frigon Collection was exhibited by the Gallery at several museums nationwide in the late 1990s, but the traveling exhibition ended with the Gallery having sold only two of the paintings. SOF 4, 5. Apparently upset over the outcome and cost of the traveling exhibition, Mr. Love wrote Mr. Frigon in 1996, complaining about the cost and the low commission the Gallery had agreed to take for the sale of just the two paintings. SOF 5.

At this point, the Gallery dispensed with merely taking commissions on the paintings it sold for the Frigons, and simply began taking all of the sale proceeds for itself. Unbeknownst to the Frigons, the Gallery began violating the trust Mr. Love had encouraged them to place in him. A series of dishonest transactions followed, each concealed from the Frigons, including:

- In August 1997, the Frigons consigned a painting, *Harborside Reflections*, to the Gallery with a minimum consignment price of \$120,000. SOF 6. The Gallery quickly sold the painting, but for only \$80,000. SOF 25. The Gallery did not inform the Frigons of the sale (SOF 23) and deposited the entire \$80,000 in the Gallery's bank account, never to be paid to the Frigons. SOF 25.
- In November 2000, the painting *The Bath* was consigned to the Gallery with a minimum consignment sale price of \$225,000. SOF 6. The Gallery under-sold it for \$125,000. SOF 25. The Frigons were not informed of the sale and have never seen the proceeds. SOF 23, 36.
- The Gallery even managed to sell one of the Frigons' consigned paintings, *A Summer Visit*, twice: selling it in May 2002 for \$150,000 (although it was consigned for a minimum \$175,000 sale), re-acquiring it, according to the Gallery's invoice, for \$215,000 on October 28, 2002, and then selling it again for \$160,000 three days later. SOF 25. The Gallery kept each transaction secret from the Frigons, and never paid them any of the proceeds. SOF 23, 36.

¹ Plaintiff's Statement of Undisputed Facts in Support of Their Motion for Partial Summary Judgment on Liability of Pacific Indemnity Company, filed herewith, is cited to herein at "SOF" followed by the relevant paragraph number(s).

By September 2002, the Gallery had disposed of six Frigon paintings, each for less than the minimum sale price under the consignment agreement. SOF 25. At that point, according to Mr. Love, the art market was in a down-turn, and sales were slow. SOF 18. The Gallery compiled a list of paintings it knew the Frigons owned, dated September 4, 2002. SOF 13. Mr. Frigon believes this list was sent to him as one of the periodic updates the Gallery provided him regarding the status of his consigned paintings. SOF 14. The list states that the Gallery is “NEGOTIATING A SALE” of several paintings, even though each of the paintings already had been sold and the funds deposited into the Gallery’s bank account. SOF 14, 25. It acknowledges the sale of another of the paintings – Griffin’s *Afternoon Sunlight Stroudwater*, but states, “WAITING \$\$\$,” although the Gallery already had deposited in its own bank account the full proceeds from that sale back in May 2002. SOF 14, 25.

Having trusted Mr. Love in making art purchases and sales for nearly a decade and in conducting a national tour of their paintings, the Frigons had no reason to distrust him, and believed the Gallery was making the proper efforts to sell their paintings. SOF 15. On this basis, when urged to do so by Mr. Love, the Frigons consigned five more of their paintings on November 15, 2002 – representing an aggregate of \$725,500 in agreed minimum sale prices. SOF 16, 6. Despite the allegedly tight art market, it took the Gallery only six weeks – until December 27 – to dispose of all six paintings. SOF 18, 17, 25. Unlike the previous six Frigon paintings, which the Gallery sold at below the minimum consignment sale prices, the Gallery traded away these five paintings. SOF 17, 25.

By the end of 2002, the Gallery had made eleven of the Frigons’ paintings disappear, and received and deposited the full consideration for each of them into the Gallery’s bank account. SOF 25. Not a dollar had ever been paid to the Frigons; in fact, they still had no reason to suspect that any but one of the paintings – *Afternoon Sunlight Stroudwater* – had been disposed of. SOF 15, 22, 23, 25, 36.

The Gallery also lied to the Frigons about waiting for payment from the purchaser of the highest-priced of the eleven paintings, Butler’s *Brooklyn Bridge*. This painting was consigned for a minimum sale price of \$300,000 in mid-November 2002 (SOF 6), but the Gallery traded it for a cash payment of \$150,000 and another painting in December. SOF 20, 25. Over the holidays, Mr. Frigon was told the painting had been sold, but he was not informed about the

details. SOF 18. The Gallery wrote him on January 6, 2003 to “formalize the agreement” they had reached by telephone. SOF 18. Mr. Love lied to Mr. Frigon in the letter: “We have sold your painting on an installment basis with you receiving twelve equal installments of \$36,250 . . . for a total of \$435,000 As we discussed on the phone, these payments will be made to you in a timely manner whether or not my other client makes the payments to the gallery. . . . I am glad we could get this worked out.” SOF 18.

Mr. Love did not disclose that the Gallery had already deposited in its bank account the full \$150,000 payment for the painting on December 20, 2002. SOF 20, 25. In the spring, after receiving two payments of \$36,250, the payments on *Brooklyn Bridge* had faltered and stopped. SOF 21. Mr. Frigon became seriously concerned and insisted upon seeing his paintings, and then demanded that all remaining paintings be returned. SOF 21. When many of the paintings were not returned, on April 8, 2003, Mr. Love finally admitted to him that they had all been sold, but that the Gallery had spent all of the proceeds and could not pay the Frigons the minimum consignment prices totaling \$1.6 million. SOF 6, 21, 22.

The Gallery has been insolvent for years. Its debts past due over 60 days have [REDACTED] in August, 1997 (when the first of the eleven paintings were sold) [REDACTED] on May 31, 2002, and then [REDACTED] as of November 30, 2002. SOF 26. [REDACTED] the Gallery’s total assets in August, 1997 were valued at [REDACTED]; at [REDACTED] in May, 2002, and [REDACTED] at the end of November, 2002 – less than a third of its stated 60-day past-due debts.² SOF 26. At the same time, Mr. Love took over [REDACTED] in annual salary (exclusive of benefits) until 2003. SOF 27. In addition, by May, 2002 Mr. Love and his wife (as sole shareholders) had [REDACTED] to his Gallery, which had [REDACTED] by the end of November. SOF 28, 29. Back in 1997, the Gallery had [REDACTED] SOF 28. Thus, in salary [REDACTED] – not even counting the value of insurance and other benefits they obtained – Mr. and Mrs. Love [REDACTED] during the period the Gallery perpetrated its scheme to deprive the Frigons of their art collection.

The money the Loves took came largely from consignors. In fact, Mr. Frigon recently received a grand jury subpoena indicating that the United States Attorney for the Southern

² These asset valuations are from the Gallery’s own balance sheets, which are apparently unaudited, and not based on any independent valuation or appraisal. SOF 26.

District of New York is investigating Mr. Love and the Gallery for wide-scale consignment fraud. SOF 32. The Gallery has reaped the benefits from its scheme of consignment fraud and conversion on many occasions – disposing of other people’s consigned paintings and keeping the proceeds.³ SOF 30. And the public court records likely only show the tip of the iceberg, because of the mandatory arbitration clause in the Gallery’s form consignment agreement. SOF 31.

This repeated pattern of disappearing consignments and deceptions leads to the unescapable conclusion that the Gallery, and Mr. Love himself, never had any intention whatsoever of paying the Frigons for their paintings. Any intention that Mr. Love may claim to have had was nothing more than pure fiction.

B. The Frigons’ Loss

By early April 2003, Mr. Frigon had demanded that all the paintings be returned from the Gallery, and Mr. Love had confessed to Mr. Frigon that all eleven paintings were sold under the minimum sale prices, or traded away. SOF 22. On or about May 2, 2003, the Frigons made their loss report to the Insurer, with details of how they were lost while at the Gallery. SOF 43.

Although attempts have been made to recover paintings converted by the Gallery, and to mitigate the Frigons’ damages, only one painting, Childe Hassam’s *Sunset, Little Hills*, was

³ Litigation follows Love in docket-loads. This is only one of many, many cases filed against Love for not only making its clients’ art disappear by selling consigned art for its own benefit, but also for selling fakes, forgeries and worthless art, and selling paintings it had no right to sell (and then fraudulently inducing the buyer to return the painting under false pretenses).

The endless insolvency of the Love Gallery has resulted in litigation replete with allegations of unpaid bills, bounced checks, and renegeing on shady financing agreements involving series of post-dated checks. See, in this Court, *Berger v. Richard H. Love and R.H. the Gallery, Inc.*, 03 C 9374 (consignment conversion); in the Southern District of New York, *Spanierman Gallery v. Richard Love, R.H. the Gallery, Inc.* et al., 03 C 3188; in the Circuit Court of Cook County, *Fifield v. R.H. the Gallery and Richard H. Love*, 03 L 50290 (consignment conversion); *Kalin v. R.H. the Gallery, Inc.*, 97 L 02611 (consignment conversion); *The Trustees of Indiana University v. Smiley v. R.H. the Gallery, Inc.*, 95 L 50679; *GM2BBA Parkway Photo Lab, Inc. v. R.H. the Gallery, Inc.*, 96 M1 153032; *Gage v. R.H. the Gallery and Richard H. Love*, 99 L 11056; *Bank One Trust Company v. R.H. the Gallery, Inc. and Richard H. Love*, 99 L 51151 (consignment conversion); *DMVS v. R.H. the Gallery, Inc., Richard H. Love*, et al., 93 CH 9338; *Northern Realty Group v. R.H. the Gallery, Inc.*, 03 M1 4517; *Elwell v. Richard H. Love*; *Brant Publications v. R.H. the Gallery*, 04 M1 167858; *Perritt v. R.H. the Gallery, Inc., Richard H. Love*, et al., 93 CH 9262; *Trans World Publishing, Inc. v. R.H. the Gallery, Inc.*, 04 M1 141499; *Federal Express Corp. v. R.H. the Gallery, Inc.*, 04 M1 139841. The list goes on, this being far from exhaustive, and includes cases in many other jurisdictions, as far away as New Mexico.

The Court may take judicial notice of these public court files. *Doherty v. City of Chicago*, 75 F.3d 318, 324 n.4 (7th Cir. 1996); *DH2, Inc. v. Athanassiades*, 404 F. Supp. 2d 1083, 1092 (N.D. Ill. 2005).

recovered in settlement following costly litigation against another gallery that acquired it from the Gallery. SOF 33. Another painting is the subject of litigation to clear title, brought by the New York City gallery that now has possession of it, against the Frigons. SOF 33. Those who acquired the paintings from the Gallery, and those downstream from them in the chain of possession, either claim or are expected to claim, that they now hold title to the paintings because they or their predecessors in possession are *bona fide* purchasers. SOF 35.

The eleven consigned paintings, with the exception of Childe Hassam's *Sunset, Little Hills*, have been lost entirely to the Frigons, and the Frigons have no reasonable expectation of recovering possession of the paintings. SOF 36.

C. The Consignment Agreements

Three of the eleven paintings were consigned orally, while the parties used the Gallery's form "Consignment Agreement" for the other eight. SOF 6, 9. The Frigons and the Gallery reached an agreement with respect to the minimum sale price for each of the consigned paintings. SOF 10. The written consignment agreements consist mainly of pre-printed terms, all identical and none of which were altered. Information identifying the painting(s) consigned, as well as the minimum sale price (referred to as the "Consignment Price") and the terms for commission and costs of sale were typewritten by the Gallery. SOF 9. Each of the Consignment Agreement forms was sent to Mr. Frigon with these terms and Mr. Love's stamped signature affixed. SOF 9. In each case, the Consignment Price typed in by the Gallery reflected the amount the Frigons had originally paid the Gallery upon purchasing the painting, rather than the minimum sale price Mr. Love and Mr. Frigon had previously agreed upon. SOF 10.

After talking to Mr. Love about this, Mr. Frigon lined out the prices the Gallery had suggested, wrote in higher minimum prices, signed the form and sent it back to the Gallery. SOF 10. The Gallery accepted these terms by picking up the paintings from the Frigons' residence. SOF 10. The consignment agreements, with Mr. Frigon's handwritten changes, were kept in the Gallery's files and produced by the Gallery as the governing agreements. Paragraph 4 of each of the form agreements states that the identified work of art "may be **sold** by Gallery **at an amount equal to or greater than** the amount respecting that work set forth as the 'Consignment Price'" (emphasis added). SOF 11. The consignment agreements also state that "Each sale shall be promptly reported to Consignor." SOF 11. Nothing in the consignment agreements authorized

the Gallery to pocket the cash realized from the sales, to trade away any of the paintings, or to sell them for less than their individual minimum consignment prices. SOF 11, 24.

D. The Insurance Policy

The Insurer, one of the Chubb family of insurance companies, issued its Masterpiece policy, referred to here as the “Policy.” SOF 37. The Policy’s introduction states, “your Masterpiece Policy provides you with coverage against all risk of physical loss to your valuable articles anywhere in the world unless stated otherwise or an exclusion applies” (emphasis added). SOF 38. In the following section, “Valuable Articles Coverage,” the Policy uses the same “all risk” language, this time in bold, as follows: “In Valuable Articles Coverage, a “covered loss” excludes **all risk** of physical loss to valuable articles, unless stated otherwise or an exclusion applies” (emphasis in original). SOF 38. All eleven paintings are scheduled in the Policy. SOF 40.

ARGUMENT

I. The All-Risk Policy Covers the Frigons’ Loss, and There Are No Applicable Exclusions.

An All-Risk policy covers all causes of loss to the insured property except those causes which are specifically excepted or excluded in the policy. See APPELMAN ON INSURANCE LAW, § 1.6. This type of insurance policy is differentiated from a “specified risk” policy, which usually serves a restrictive function and which is drafted to cover damage or harm to the insured property only for damage or harm that results from causes or risks expressly specified in the policy. *Id.*

An All-Risk policy “creates coverage of a type not ordinarily present under other types of insurance, and recovery is allowed for fortuitous losses unless the loss is excluded by a specific policy provision; the effect of such a policy is to broaden coverage, and a fortuitous event is one which, to the knowledge of the parties, is dependent upon chance.” COUCH ON INSURANCE 3d, § 148:50.

In interpreting an All-Risk insurance policy, the insured initially has burden of showing the existence of a loss; the burden then shifts to the insurer to show an exception to coverage. *Harbor House Condominium Ass’n v. Massachusetts Bay Ins. Co.*, 915 F.2d 316 (7th Cir. 1990). It is undisputed that a loss occurred here—indeed, the Frigons have established the “nature, extent and amount of their loss to a reasonable degree of certainty.” *Id.*, citing *S.C. Johnson & Son, Inc. v. Louisville R. Co.*, 695 F.2d 253, 261 (7th Cir. 1982).

The Insurer has not and cannot point to any applicable exclusion. In fact, the Insurer did not plead a single affirmative defense in its Answer to the Complaint. SOF 48. This is not surprising, given that there is no exclusion in the Policy for a loss due to theft, misappropriation, conversion or fraud by persons entrusted with possession of the insured's goods.⁴ SOF 42. The Insurer's inability to raise a particular exclusion means that it cannot sustain its burden of proving that the Frigons' loss is not covered by the All-Risk Policy. *See Farr Man Coffee v. Chester*, 1993 U.S. Dist. LEXIS 8992 (S.D.N.Y. 1993) (insured entitled to recover from insurer because insured established a prima facie case that the policy was an All Risk policy, there existed an insurable interest in the covered item, and it was a fortuitous loss; insurer did not sustain its burden to prove that the claimed loss had been proximately caused by a peril not covered under the policy or from fraud by the insured).

In a very similar case, *Great Northern Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, 350-51 (S.D.N.Y. 1985), a manufacturer of rubber and plastic belts and hoses (used in automobiles, trucks and tractors) argued that to the extent it did not receive full payment for several shipments to Russia, the goods were lost and it was entitled to reimbursement under an All-Risk insurance policy. The insurance company argued that the policy only covered "direct *physical* loss" and that the insured's loss was in the nature of a credit loss due to theft (i.e., the manufacturer's loss was not the actual products, but the money it expected to receive from the sale of those products). The court, however, found that the insurer had "totally ignore[d] the nature and plain meaning of an 'all risks' policy which creates 'a special type of coverage extending to risks not usually covered under other insurance.'" 620 F. Supp. at 352. The *Dayco* court also found that the manufacturer physically lost the goods because it no longer had control over them and had received no compensation for them. Moreover, the court reasoned an insured who procures an All-Risk policy which does *not* expressly exclude theft losses has a right to assume that he has purchased coverage for loss by theft.

The *Dayco* decision is directly on point and the Frigons are entitled to coverage.

⁴ The only exclusions in the Policy are as follows: musical and photographic articles used for profit; intentional acts and misappropriation by the insured, a family member or those directed by the insured or a family member; gradual losses; fungi and mold; computer error; acts of war; nuclear or radiation hazard; and special inapplicable exclusions for fine arts (i.e., repairing, restoring, retouching, or loss while fine arts are exhibited at a fairground or a national or international exposition). SOF 42. No exclusion is even remotely implicated here.

II. An All-Risk Policy Covers Loss by Conversion.

As previously noted, there are no exclusions in the Policy for theft, misappropriation, conversion or fraud by persons entrusted with possession of the insured's goods. SOF 42. Accordingly, since each of the eleven paintings at issue are scheduled in the Policy (SOF 40), and since no exclusion applies, each painting is specifically covered for all losses.

Courts that have analyzed conversion of property protected by an All-Risk insurance policy have found that such loss is covered by the policy (unless, of course, a specific exclusion exists). For example, in *Intermetal Mexicana, S.A. v. Insurance Co. of North America*, 866 F.2d 71 (3rd Cir. 1988), the Third Circuit examined a written insurance contract for machinery and equipment that covered "all risks of direct physical loss or damage." When plaintiff's equipment was not returned pursuant to a valid court order, a conversion was found to have occurred. The court in *Intermetal* explained that "ample authority exists for the proposition that such 'all-risk' language [such as the policy at issue in this case] covers conversion." 866 F.2d at 78; *see also* *Buckey Cellulose Corp. v. Atlantic Mut. Ins. Co.*, 643 F. Supp. 1030, 1036 (S.D.N.Y. 1986) (recognizing that a provision insuring "against all risks of physical loss or damage from external cause . . ." would provide coverage against conversion).

Moreover, in *Consolidated Int'l Corp. v. Pakistan Nat'l Shipping Corp.*, 1989 U.S. Dist. LEXIS 9050 (N.D. Ill. 1989) (attached hereto as Exhibit 1), the court examined an insurance policy that provided coverage "against all risks of physical loss or damage from any external cause" in light of an insurer's refusal to honor a conversion claim. In *Consolidated*, the plaintiff agreed to sell printing equipment to another company in exchange for partial payment and a letter of credit drawn on the Arab National Bank upon receipt. Consolidated transported the equipment and obtained an all-risk insurance policy from Lloyd's. While the printing equipment arrived intact and undamaged, Arab National refused to honor Consolidated's request for the remaining money, allegedly because the purchaser's letter of credit had expired. A month later, the purchaser informed Consolidated that it had obtained possession of the equipment by posting a bond; when they refused to replace the bond with a new letter of credit, Consolidated filed a claim with Lloyd's, contending that the purchaser had wrongfully converted the equipment. The court found that "[r]ecovery under an all-risk policy extends to any fortuitous loss that is not specifically excluded under the terms of the policy." 1989 U.S. Dist. LEXIS 9050 at *4. Moreover, the court found that "under Illinois law, exclusionary clauses are construed narrowly

against the insurer.” *Id* at *5. Citing *Intermetal* and *Dayco*, the court found that “conversion is a fortuitous loss encompassed by an all-risk policy.” *Id*.

One year ago, the Insurer admitted to the Frigons that, “should [the Frigons] receive a judgment indicating a particular painting was converted, we recognize that there may be coverage under the Policy for such a conversion loss.” SOF 49. Furthermore, the Insurer registered each of the paintings to be listed on the Art Loss Register (“ALR”). SOF 44. The Chubb insurance companies, of which the Insurer is one (SOF 37), advertise on the Internet at www.chubb.com that they “work closely with the Art Loss Register.” SOF 45. Chubb’s Internet sites also include a description of the ALR authored by the Director of the ALR, which states that ALR registration is specifically limited to stolen works of art. SOF 46. In fact, registration of a work of art on ALR seriously inhibits the sale of the work, and an individual who acquired four of the eleven Frigon paintings from the Gallery has alleged that his sale of the paintings he acquired. SOF 47. The listing of the Frigons’ paintings on the ALR is a tacit admission that the paintings were lost or stolen because the ALR’s mission is limited to listing lost and stolen art. The Insurer now wants to do an about-face, but to argue that the Frigons’ paintings were not lost or stolen, and therefore not covered by the Policy, is simply disingenuous.

In this case, the Frigons’ paintings were converted by Love. As in *Dayco* and *Consolidated*, the Frigons no longer have control over their paintings, and have received no compensation for them. Since there is no exclusion in the Insurer’s All-Risk Policy for conversion or theft by false pretenses, the Frigons’ loss is covered by the terms of the Policy, and the Frigons can recover as a matter of law.

III. Conversion Under Illinois Law.

There are two types of common-law conversion in Illinois law relevant to this case: innocent conversion by a bailee and intentional conversion. The Gallery converted the paintings by exceeding its authority as a bailee (“innocent conversion”), and, alternatively, by intentionally depriving the Frigons of their property through the sale of the paintings for the Gallery’s own benefit (“intentional conversion”). The Gallery’s disposition of the paintings was not authorized by the consignment agreements, and was therefore beyond its authority as bailee; the fact that the Frigons were deprived of the paintings thereby is, as a matter of law, conversion. Also, Mr. Love’s self-serving denials of intent to sell the paintings for the Gallery’s benefit, rather than the Frigons’, create no issue of fact given the plethora of facts proving that intent. At the end of the

day, the facts of this case, and the law of Illinois, require entry of judgment finding both forms of conversion as a matter of law – and either one individually triggers coverage under the All-Risk Policy.

A. As Bailee, the Gallery Converted the Paintings, Regardless of Intent.

Under Illinois law, property has been “innocently converted” by a bailee when it is lost due to the bailee’s unauthorized use of the property, or from going beyond the specific terms of the bailment – regardless of the bailee’s good faith or lack of intent. *Knight v. Seney*, 290 Ill. 11, 124 N.E. 813 (Ill. 1919). As a consignor, the Gallery acted as bailee of the Frigons’ valuable paintings, and converted the paintings by disposing of them in a manner inconsistent with the consignment agreements, resulting in the loss of the paintings, and this is conversion regardless of whether of not the Gallery or Mr. Love had any intent to deprive the Frigons of their property.⁵

1. The Gallery Exceeded Its Authority as Bailee.

Under Illinois law, a consignment is a form of bailment, and a consignee is a bailee. “As a general matter, a consignment is a bailment coupled with agency. Consigned goods remain the property of the consignor and are entrusted to the consignee under the consignor’s continued direction, usually for sale to a third party.” *In re Aaura, Inc.* 2006 WL 2568048 at *3 (No. 06 B 01853 N.D. Ill. Bankr. Sept. 1, 2006) (slip copy; a copy is attached as Exhibit 2); *see also Nelson v. Sotheby’s, Inc.*, 128 F. Supp. 2d 1172, 1175 (N.D. Ill. 2001) (“A consignment is therefore a type of bailment.”); *W.O. Dean Co. v. F.G. Lombard*, 61 Ill. App. 94 (Ill. App. 1895) (consignment is a bailment in which no title passes to consignee).

A bailee is guilty of converting the bailed property where it asserts some right or act of dominion over the property inconsistent with the bailor’s right of ownership, or where the bailee commits an unauthorized act which deprives the bailor of his property. *Knight v. Seney*, 290 Ill. 11, 124 N.E. 813 (Ill. 1919). Thus, the bailee has converted the property if it puts the property into the hands of a third person contrary to orders and the property is lost, even though the bailee had no wrongful intent. *Id.*, citing *Puerto Rico Industrial Development Co. v. J.H. Miller Mfg. Corp.*, 173 F. Supp. 596 (S.D. Ill. 1959); *Hercules Powder Co. v. Rowan*, 245 Ill. App. 291 (Ill. App. 1924); *Taylor v. Welsh*, 138 Ill. App. 190 (Ill. App. 1907).

⁵ The Gallery and Mr. Love, of course, are far from “innocent” here. We use that term only because it is used in the Illinois cases to refer to conversion that does not require proof of intent.

On facts nearly identical to those in the present case, the Supreme Court of Illinois found that the bailee/consignee in *Knight* had converted property by disposing of it in a manner inconsistent with the instructions of the consignor. In *Knight*, the plaintiff entrusted its securities to the defendant, with the stipulation that they be used in a \$300,000 deal with a bank in Toledo, for which the securities would constitute consideration. The defendant-consignee, however, “immediately disposed of” the securities, without closing the deal in Toledo.

Just as the Gallery did here, the defendant in *Knight* ignored the limitations placed on the disposition of the consigned goods, disposed of the goods, concealed that fact, then finally admitted that it had used the goods for its own purposes, and could not return the goods:

When neither the securities nor the proceeds from their disposition were returned to the [plaintiff], he demanded the return of the securities, but was informed that the sale in Toledo has not been concluded, but would be in a few days, and other similar assurances were given him, until finally he was told that the plaintiffs in error had been obliged to use a part of the securities as collateral for their indebtedness and were unable to return them to him.

The Court found the bailee had acted unlawfully:

The authority of a bailee is limited by the terms of the contract by which he acquired the possession of the property. Though he has the bailor’s authority to use it for one purpose, this confers no right to use it for another

Finally, the Illinois Supreme Court ruled that the bailee, by disposing of the consigned property in an unauthorized manner and for its own purposes, had converted the property:

[T]he unauthorized sale was a conversion by the [defendant]. The [plaintiff] had the right to limit the authority to sell to a sale at a certain place, or to a certain person, or for a certain purpose, and the sale by the bailees in disregard of such limitation of authority was a conversion. The contract of bailment was to return the securities within a designated time, if they were not sold or otherwise disposed of They were not returned, and were not so sold or disposed of, but were disposed of in an unauthorized way.

Similarly, the Gallery converted the Frigons’ paintings by disposing of them through trades and in sales for less than the minimum sale price permitted by the consignment agreements, by not paying the proceeds to the Frigons, and by using the proceeds for its own purposes.

2. *The Gallery's Disposal of the Paintings Was an Unauthorized Permanent Deprivation of the Frigons' Property.*

The Gallery disposed of each of the Frigons' eleven paintings in ways unauthorized by the Frigons. The authority the Gallery possessed to deal with the paintings was defined and limited by the consignment agreements. Each of the written and oral consignment agreements had two essential terms in common: (1) that Love was only permitted to sell the consigned artwork; and (2) that the sale must be for a monetary amount equal to or greater than the agreed-upon consignment price. SOF 6, 8, 11. Not a single one of the paintings was disposed of in exchange for a monetary amount equal to or exceeding the consignment price. SOF 25. Instead, the paintings were disposed of as follows:

| Consigned Painting | Minimum sale price | Terms of Love's disposal |
|--|---------------------------|---|
| Breck, Rocky Neck, Gloucester | \$225,000 | \$0 plus four paintings |
| Butler, Brooklyn Bridge | \$300,000 | \$150,000 plus one painting |
| Butler, The Bath | \$225,000 | \$125,000 |
| Enneking, Trout Brook | \$95,000 | \$80,000 |
| Griffin, Afternoon Sunlight Stroudwater | \$85,000 | \$60,000 |
| Hale, A Summer Visit | \$175,000 | \$150,000 (later re-acquired by Love in a trade, then resold by Love for \$160,000) |
| Hassam, Sunset Little Hills | \$100,000 | \$50,000 plus two paintings |
| Peters, Harborside Reflections | \$120,000 | \$80,000 |
| Reid, The Pond in Early Autumn | \$175,000 | \$85,000 |
| Ritman, Boats on the Water | \$100,000 | \$15,000 plus one painting |
| Ritman, Grove of Trees | \$100,000 | \$12,500 plus one painting |

SOF 6, 25.

The primary legal definition of "sale" is "A contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer' (or purchaser), by which the former, in consideration of the payment or promise of **payment of a certain price in money**, transfers to the latter the title and the possession of property." BLACK'S LAW DICTIONARY 6TH ED., "Sale". (emphasis added). Black's goes on to distinguish the Gallery's trades of paintings for paintings from a "sale":

The contract of "sale" is distinguished from "barter" (which applies only to goods) and "exchange" (which is used of both land and goods), in that both the latter terms denote a commutation of property for property; *i.e.*, **the price or consideration is always paid in money if the transaction is**

a sale, but, if it is a barter or exchange, it is paid in specific property susceptible of valuation.

Id. (“Sale – Other Terms Distinguished”) (emphasis added).

Each of the transactions by which the Gallery disposed of the eleven paintings was a sale for less than the minimum sale price agreed to by the Gallery and the Frigons. SOF 6, 25. In late 2002, Love resorted to disposing of the paintings through trades – the five paintings Love took on consignment on November 15, 2002 were the five that were traded away, all in the six remaining weeks of the year. SOF 17. These trades were not transactions permitted under the consignment agreements. The Gallery drafted the form consignment agreements, and could have included authority to trade or barter, but failed to do so. SOF 9. The contracts must be construed against the Gallery, as drafter, and cannot be construed to permit trades or barter. *Duldulao v. St. Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 493 (1987).

Each of the transactions was intentionally entered into by the Gallery, and clearly unauthorized under the consignment agreements. Each transaction also permanently deprived the Frigons of the possession of their paintings. SOF 34, 35, 36.

B. The Gallery and Mr. Love Intended to Take the Paintings for Their Own Use.

Besides the “innocent conversion” by the Gallery as a bailee, it is simply indisputable that the Gallery, in the person of Mr. Love, had the intent, at the time of each sale and trade, to deprive the Frigons of their paintings. In fact, the evidence is strong that Mr. Love and the Gallery fraudulently induced the Frigons to consign many, if not all eleven, of their paintings in the first place, with the intent to dispose of them for its own purposes – to keep the Gallery open and to continue paying Mr. Love his hefty salary. There can be no coincidence that in less than a year following the 1996 letter complaining that the Frigons allegedly had benefited from the traveling exhibition while the Gallery paid for it, and complaining that the Gallery allegedly received too little for the sale of the two paintings from that exhibition, the Gallery began selling the Frigons’ paintings without telling them and without remitting the proceeds. SOF 5, 6, 25. There also can be no coincidence that in September 2002, the Gallery prepared a status list that fraudulently represented the status of four of the previously-consigned paintings, before the Gallery took five more paintings (and then disposed of them as quickly as possible). SOF 13, 14, 16.

But the Frigons do not even need to prove that Mr. Love had an intent to convert their paintings when the gallery took the paintings on consignment (although the evidence shows such an intent); rather, the Gallery intentionally converted a painting whenever Mr. Love intended, at the time of disposing of the painting, to keep the proceeds or not pay the Frigons.

“Intentional conversion” is defined in Illinois as an “intentional, unauthorized deprivation of property from another, permanently or for an indefinite time.” *Pasulka v. Koob*, 170 Ill App 3d 191 (3d Dist. 1988). Illinois law does not require subjective intent to prove an intentional tort such as conversion; rather, following the Restatement (Second) of Torts (“R2T”) § 8A (comment), intent is established where the defendant knew that the consequences are substantially certain to result from its act. *Rockford Redi-Mix v. Teamsters Local 325*, 195 Ill. App. 3d 294, 306-07, 551 N.E.2d 1333, 1340 (2d Dist. 1990) (quoting comment to R2T § 8A and holding that “regardless of whether the defendants ‘intended’ the result, they knew that letting the cement sit in the drums without turning would result in damage to the trucks. Therefore, . . . the defendants had committed an intentional tort.”); *see also In re Cox*, 243 B.R. 713, 718 (Bankr. N.D. Ill. 2000) (“under the common law the word ‘intent . . . denote[s] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.’ ”) (quoting *Conte v. Gautam*, 33 F.3d 303, 308 (3d Cir.1994), and citing comment to R2T § 8A).

The Insurer may point to Mr. Love’s self-serving protestations that he intended, every time a painting was sold or traded, to pay the Frigons every penny of the consignment prices. Frankly, if Mr. Love did not disclaim such intent, he would have admitted committing theft, mail fraud, wire fraud and inter-state transportation of stolen property. The Insurer thereby sides with the thief, and hopes Mr. Love’s absurd denials can stand up in court, despite the facts showing the history of his deceit and his utter lack of credibility. The undisputed facts show that the Frigons’ paintings were converted by the Gallery, not only “innocently” by overstepping its authority as a bailee and consignee, and not only by knowing with substantial certainty that the Frigons would lose their paintings, but also through Mr. Love’s subjective intent to use the paintings to raise funds for his own Gallery’s purposes.

Mr. Love's self-serving denial of intent to wrongfully deprive the Frigons of their property fails to create a fact question on the issue of intent.⁶ Such self-serving statements in affidavits without factual support in the record carry no weight on summary judgment. *Thanongsinh v. Board of Education*, 2006 U.S. App. LEXIS 23287, *46 (7th Cir., September 13, 2006) (a copy of which is attached), citing *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 925 (7th Cir. 2004). Only when the affidavit is "supported by facts in the record," can it be relied on to survive summary judgment. *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 504 (7th Cir. 2004) (holding that the court may consider self-serving statements in an affidavit at summary judgment if they: (a) "have factual support in the record"; and (b) are based on "personal knowledge" (internal quotation marks omitted)).

Self-serving statements of intent do not generally hold up in the face of contradictory evidence. For instance, in *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 294 (5th Cir. 2004), the court found that intent is considered by an objective test (the court said that this proposition "is too well settled to require citation") and that statements by defendant that "he hoped to return" were insufficient to overcome "overwhelming evidence of abandonment." The court held that the statement in *Vais* did not create a genuine issue as to the intent to abandon. Similarly, Mr. Love's assertions of intent to pay for the paintings cannot create an issue of fact with respect to Love's conversion of the paintings.

Furthermore, preposterous factual assertions will not prevent entry of summary judgment. *Jeffrey M. Goldberg & Assocs., Ltd. v. Holstein (In re Holstein)*, 299 B.R. 211, 233 (Bankr. N.D. Ill. 2003), citing *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998). The Seventh Circuit, in *In re Chavin*, held that summary judgment is proper, despite a debtor's self-serving testimony of his honest intent, where the testimony is "utterly implausible in light of all relevant circumstances." See also *Rogers v. Boba*, 280 B.R. 430, 435 (Bankr. N.D. Ill. 2002) (citing *Chavin* and granting summary judgment where no fact finder "could credit Debtor's statements for why he acted as he did").

The facts render "utterly implausible" Mr. Love's protestations of good intentions at the times the Gallery entered into transactions disposing of the paintings. In addition to what we all

⁶ Of course, intent is not even a material issue, and cannot form a question of fact in finding that the Gallery converted the paintings as a bailee/consignee acting beyond its authority.

know as common sense and human behavior, each of the following facts flies in the face of Love's ridiculous story of a lack of intent to steal the Frigons' property:

- Each of the transactions was unauthorized under the consignment agreement, either because it was a trade rather than a sale, or because it was for less than the minimum sale price permitted by the consignment agreement. SOF 6, 7, 8, 9, 10, 11, 17, 24, 25.
- The Gallery never informed the Frigons of a proposed or potential disposition of any of the eleven paintings before the transaction. SOF 12, 24.
- The Gallery concealed the fact of each of the sales from the Frigons even though the consignment agreements required the Gallery to "promptly" report each sale to the Frigons. Instead, the Gallery kept selling the paintings, one after another, without telling the Frigons about any of them – and even lied to the Frigons about the status of their paintings to cover up sales. SOF 12, 15, 23, 24, 25.
- On November 15, 2002, the Gallery solicited and obtained five more paintings on consignment from the Frigons, having already sold six Frigon paintings (and one of them twice!) without paying a dime of the proceeds to the Frigons. SOF 12, 13, 14, 15, 16. It is well beyond any stretch of the imagination that Mr. Love could have taken these paintings with the intention to sell them for the Frigons', rather than the Gallery's, benefit.
- The Gallery sold all five of these paintings within just a six-week period. SOF 17, 25. The revolving-door theory of Mr. Love's alternating intent (between transactions, evidenced by not paying the Frigons, or even telling them about a sale or trade) and lack of intent (at each point in time when the Gallery was actually disposing of a painting) makes no sense given the quick turnaround of these paintings and the Gallery's theft of the proceeds.
- Throughout the entire period, the Gallery was insolvent, and had ██████████ ██████████ SOF 26. It is unbelievable that Mr. Love had a sincere belief that the Gallery would be able to pay the proceeds to the Frigons each time he disposed of a painting.
- The five paintings traded away so quickly in the last six weeks of 2002 were disposed of during a time when, according to Mr. Love, the art market was slow. SOF 17, 18, 25 Each brought significantly less cash than the minimum consignment sale price. SOF 25.
- Not only is there a pattern present involving the eleven thefts from the Frigons – the pattern extends to other consignor lawsuits brought against the Gallery, for making other collectors' paintings disappear as well, and the interest of the U.S. Attorney in New York suggests that this is just the tip of the iceberg. SOF 30, 31, 32.

- Mr. Love's protestations of always intending to pay the Frigons are obliterated by the Gallery's pattern of bold deceptions – representing three sold paintings as being in negotiation and a fourth that had been paid for as being unpaid in September 2002 (which was followed by the Gallery taking and disposing of five more of the Frigons' paintings), and the January 6, 2003 letter lying to Mr. Frigon about the circumstances of the disposition of *Brooklyn Bridge*. SOF 13, 14, 16, 19, 20, 25.

Love's intent to defraud the Frigons and convert their property is simply incontrovertible under the weight of these facts – and Richard H. Love's self-serving denials of that intent can be given no weight.

CONCLUSION

The Frigons' loss is a total loss under the Policy; the entire paintings were placed beyond the Frigons' reach and they cannot recover them. The Policy provides that upon total loss of a scheduled valuable article, the Insurer must indemnify the Frigons for no less than the entire insured value of the article, as listed in the Policy. SOF 40, 41. With the exception of *Sunset Little Hills*, which has been recovered,⁷ (SOF 33) the Insurer must indemnify the Frigons for the full insured value of the paintings. This totals \$1,243,500, minus \$40,000 for *Sunset Little Hills* and \$72,500 for the two payments made for *Brooklyn Bridge* – resulting in a minimum of \$1,170,960 due from the Insurer. SOF 21, 33, 36, 40, 41.

WHEREFORE, for all of the above reasons, Plaintiffs Henry F. and Anne Marie Frigon respectfully move this Honorable Court to enter partial summary judgment in their favor and against the Insurer, Pacific Indemnity Company, with respect to Counts I and II of the Complaint, for Declaratory Judgment and for Breach of Insurance Contract, as follows:

- (a) That conversion of articles itemized in the Policy, if established, is a covered loss for which the Insurer must indemnify the Frigons;
- (b) That R.H. Love Galleries, Inc. and Richard H. Love converted the eleven paintings at issue and itemized in the Policy;
- (c) That Pacific Indemnity Company is liable under the Policy, in an amount to be determined at trial, for indemnification of the Frigons' loss of the eleven paintings; and

⁷ Although significant efforts, and litigation, were required to do so (SOF 33), and the Frigons do not waive any right to seek recovery of the fees and expenses incurred in those efforts in mitigation of their damages.

- (d) That the Frigons are entitled to indemnification by Pacific Indemnity Company under the Policy of no less than \$1,170,960.

Respectfully submitted,

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