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## "Visible Marks" Insurance Exclusion Clauses: *Cochran v. MFA Mutual Insurance Co.*, 201 Neb. 631, 271 N.W.2d 331 (1978)

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## “Visible Marks” Insurance Exclusion Clauses

*Cochran v. MFA Mutual Insurance Co.*, 201 Neb. 631, 271 N.W.2d 331 (1978).

### I. INTRODUCTION

In *Cochran v. MFA Mutual Insurance Co.*<sup>1</sup> the Supreme Court of Nebraska considered the validity of the “visible marks of forcible entry” variety of insurance policy exclusions.<sup>2</sup> The court affirmed the validity of this type of exclusion while adhering to its opinion in *Hazuka v. Maryland Casualty Co.*<sup>3</sup>

In upholding the defendant insurer’s denial of liability in

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1. 201 Neb. 631, 271 N.W.2d 331 (1978).

2. The “visible marks” exclusion in the plaintiff’s policy read as follows:

HOMEOWNER’S POLICY—BROAD FORM

SECTION I

DESCRIPTION OF PROPERTY AND INTERESTS COVERED

.....

PERILS INSURED AGAINST

.....

11. Theft, meaning any act of stealing or attempt thereat, including loss of property from a known place under circumstances when a probability of theft exists.

.....

c. Theft Exclusions applicable to property away from the described premises:

This policy does not apply to loss away from the described premises of: . . .

(2) Property while unattended in or on any motor vehicle or trailer, other than a public conveyance unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry upon the exterior of such vehicle or the loss is the result of the theft of such vehicle which is not recovered within thirty days, but property shall not be considered unattended when the insured is required to surrender the keys of such vehicle to a bailee; . . .

Record, vol 1, at 29-30 (Exhibit A), *Cochran v. MFA Mutual Ins. Co.*, 201 Neb. 631, 271 N.W.2d 331 (1978).

3. 183 Neb. 336, 160 N.W.2d 174 (1968). This was an action to recover a loss

*Hazuka* and *Cochran*, the court enunciated the following philosophies regarding "visible marks" exclusions: that as a general rule these exclusion clauses are not ambiguous;<sup>4</sup> that they are coverage provisions that limit the liability of the insurer; that they are not an attempt to determine the character of evidence to show liability;<sup>5</sup> and, that they are not unconscionable.<sup>6</sup> The extreme brevity of the opinion in *Cochran* leaves the status of the doctrines of unconscionability and reasonable expectations regarding insurance policies in Nebraska in considerable doubt. A close examination of *Cochran*, in light of the rationale outlined in *Hazuka* and set against the background of recent "visible marks" exclusion decisions in other jurisdictions, reveals the underpinnings of the Nebraska Supreme Court's current position on these doctrines.

## II. THE FACTS OF *COCHRAN*

On June 16, 1976, plaintiff was insured by a homeowner's insurance policy which contained a "Coverage C, Unscheduled Personal Property Provision." This provision contained a general theft clause which excluded "property while unattended in or on any motor vehicle . . . unless the loss is the result of forcible entry into such vehicle while all doors, windows and other openings thereof are closed and locked, provided there are *visible marks of forcible entry upon the exterior of such vehicle . . .*"<sup>7</sup>

Plaintiff alleged that his station wagon was parked at his place of employment with all the doors, windows and other openings

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alleged to have occurred under the provisions of a safe burglary policy of insurance. The policy provision provided that:

"Safe Burglary" means (1) the felonious abstraction of insured property from within a vault or safe described in the declarations and located within the premises by a person making felonious entry into such vault or such safe and any vault containing the safe, when all doors thereof are duly closed and locked by all combination locks thereon, provided such entry shall be made by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon the exterior of (a) all of said doors of such vault or such safe and any vault containing a safe, if entry is made through such doors, or (b) the top, bottom or walls of such vault or such safe and any vault containing the safe through which entry is made, if not made through such doors, or (2) the felonious extraction of such safe from within the premises.

183 Neb. at 339, 160 N.W.2d at 177.

4. 201 Neb. at 634, 271 N.W.2d at 333; 183 Neb. at 341, 160 N.W.2d at 177.

5. 201 Neb. at 634, 271 N.W.2d at 333; 183 Neb. at 339-41, 160 N.W.2d at 177.

6. 201 Neb. at 634, 271 N.W.2d at 333.

7. *Id.* at 632, 271 N.W.2d at 332 (emphasis added). For full text of policy provisions, see note 2 *supra*.

closed and locked.<sup>8</sup> He stated that on numerous occasions he carried tools, hardware and other personal property in the vehicle.<sup>9</sup> At some point after 1:30 p.m., on June 16, 1976, the automobile was removed from this location, and plaintiff reported the vehicle stolen. It was discovered by several children the same afternoon a few miles from where it had been parked,<sup>10</sup> in the middle of a cornfield.<sup>11</sup> The tools were missing from the car and a "jiggle" key was found in the ignition switch. The insured, a locksmith and hardwareman, testified as an expert witness on his own behalf that a jiggle key is a type of key used to gain entry into cars by proper and knowledgeable manipulation of the key. The plaintiff stated that entry to and removal of the tools from the car had been gained by use of the jiggle key.<sup>12</sup> It was his opinion that the thieves, having been scared away by the children playing in the cornfield, apparently forgot to remove the jiggle key from the ignition.<sup>13</sup>

The case was originally tried in municipal court and judgment was rendered for the defendant insurer. This judgment was affirmed on appeal to the district court. The defendant's position was that since there were no visible marks of forcible entry on the exterior of the vehicle,<sup>14</sup> the "visible marks" exclusion exempted coverage. The district court found that the use of the jiggle key constituted a forcible entry, but held that the defendant was entitled to rely upon the exclusion because there were no "visible marks of forcible entry upon the exterior of the vehicle."<sup>15</sup> The plaintiff then appealed to the Nebraska Supreme Court and urged that forced entry through use of a jiggle key should have come within the coverage of the policy.

### III. DECISION OF THE NEBRASKA SUPREME COURT

In *Cochran*, the plaintiff relied principally upon the case of *C. & J. Fertilizer, Inc. v. Allied Mutual Insurance Co.*,<sup>16</sup> in which the Iowa Supreme Court construed similar "visible marks" language in a policy covering burglary losses. In *Allied*, the court allowed recovery under the policy although there were no visible marks of forcible entry on the exterior doors, basing its decision on the doctrines of reasonable expectations of the insured, unconscionabil-

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8. Brief for Appellant at 6-7, Brief for Appellee at 4, *Cochran v. MFA Mutual Ins. Co.*, 201 Neb. 631, 271 N.W.2d 331 (1978).

9. Brief for Appellant at 6.

10. 201 Neb. at 632, 271 N.W.2d at 332-33.

11. Brief for Appellant at 7.

12. 201 Neb. at 633, 271 N.W.2d at 333.

13. Brief for Appellant at 7.

14. 201 Neb. at 633, 271 N.W.2d at 333.

15. Brief for Appellant at 3.

16. 227 N.W.2d 169 (Iowa 1975).

ity, and breach of an implied warranty.<sup>17</sup> The plaintiff had relied upon a line of cases holding such exclusions ambiguous, and mere attempts to determine the character of evidence required to prove the burglary was not an inside job.<sup>18</sup>

The Nebraska Supreme Court devoted one paragraph of its opinion to the principles of *C. & J. Fertilizer*. The court then quoted language from *Hazuka v. Maryland Casualty Co.* to demonstrate that such "visible marks" requirements were justifiably intended to be a limitation on liability and not an attempt to determine the character of evidence to show liability. According to the court, such limited liability provisions were not ambiguous and therefore left no room for the rule that insurance contracts be construed most favorably to the insured.<sup>19</sup>

The court then pronounced that a theft exclusion in a homeowner's policy applicable to property away from the described premises with a "visible marks" exclusion, was "unambiguous and the provision requiring visible marks of forced entry [was] not unconscionable."<sup>20</sup> The court gave no suggestion as to what type of provisions would be ambiguous or unconscionable.

#### IV. ANALYSIS

On its face, the *Cochran* decision appears to leave the hapless insured saddled with an extremely harsh result. The "jiggle" key left in the ignition, buttressed by the uncontradicted expert testimony regarding use of such a key<sup>21</sup> appear to be sufficient proof that a theft occurred and that the insured should have recovered. However, a detailed analysis of the rationale behind such "visible marks" exclusion clauses demonstrates that the court was correct in its decision, but failed to give an adequate explanation. The following discussion will contrast the doctrines favoring and opposing such "visible marks" exclusions and outline how the courts have construed them.

##### A. Doctrines Opposing "Visible Marks" Exclusions

The four major doctrines in opposition to "visible marks" exclusions are: (1) reasonable expectations, (2) rule of evidence, (3) unconscionability, and (4) implied warranty.

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17. *Id.*

18. See *Ferguson v. Phoenix Assurance Co.*, 189 Kan. 459, 370 P.2d 379 (1962); *Rosenthal v. American Bonding Co.*, 124 N.Y.S. 905 (1910), *aff'd*, 143 App. Div. 362, 128 N.Y.S. 553 (1911), *rev'd*, 207 N.Y. 162, 100 N.E. 716.

19. 201 Neb. at 634, 271 N.W.2d at 333.

20. *Id.*

21. See text accompanying note 12 *supra*.

The doctrine of reasonable expectations provides that a contract of insurance will be construed to provide the coverage that was reasonably expected by the insured, even if a painstaking study of the policy provisions would have negated those expectations.<sup>22</sup> The *Restatement of Contracts* provides the following analysis of the doctrine of reasonable expectations:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. A debtor who delivers a check to his creditor with the amount blank does not authorize the insertion of an infinite figure. Similarly, a party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule was closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.<sup>23</sup>

The central issue in this reasonable expectations doctrine is what is "reasonable." Is it reasonable for an insured to expect that his homeowner's policy covers theft of items from his automobile? Is it reasonable to believe that any such recovery would be contingent upon evidence of "visible marks of forcible entry upon the exterior of the vehicle?"<sup>24</sup>

The complexity and length of the average insurance policy is the foundation of this reasonable expectations doctrine,<sup>25</sup> which works to rescue the insured from fine print exclusions that deny expected coverage.<sup>26</sup> An insured might reasonably anticipate a policy requirement of visual evidence indicating the burglary was an "outside", not an "inside job,"<sup>27</sup> but it is unlikely that he would

22. *Rodman v. State Farm Mut. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973).

23. *RESTATEMENT (SECOND) OF CONTRACTS* § 237, Comment f, at 540-41 (Tent. Draft Nos. 1-7, 1973).

24. See policy provisions at note 2 *supra*.

25. Some courts, recognizing that very few insureds even try to read and understand the policy or application, have declared that the insured is justified in assuming that the policy which is delivered to him has been faithfully prepared by the company to provide the protection against the risk which he had asked for. . . . Obviously this judicial attitude is a far cry from the old motto 'caveat emptor.'

7 WILLISTON ON CONTRACTS § 900, at 33-34 (3d ed. 1963).

26. *Id.*

27. *C. & J. Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d at 177. The court continued as follows: "The exclusion in issue [a "visible marks" exclusion],

anticipate a physical requirement of marks on the vehicle.

It is interesting to note that the court in *Cochran* did not mention the doctrine of reasonable expectations in its opinion or its discussion of the Iowa Supreme Court's decision in *C. & J. Fertilizer*, even though this was the first and foremost doctrine discussed by the Iowa court. The coverage of "certain" thefts from automobiles<sup>28</sup> in the *Cochran* homeowner's policy coupled with the evidence of the jiggle key indicate that the reasonable expectations doctrine would have applied if the Nebraska Supreme Court had desired to adopt it.

The second doctrine typically relied upon by insureds in "visible marks" exclusion cases is one through which this type of exclusion is intended to be a mere rule of evidence.<sup>29</sup> The majority of jurisdictions have not followed this "rule of evidence" doctrine.<sup>30</sup> The rationale behind it is that the insurance companies implement this type of exclusion to protect themselves from "inside jobs" and frauds.<sup>31</sup> Consequently, there should be coverage only if there is sufficient evidence to dispell any "inside job" or fraud contention. The Nebraska Supreme Court in *Cochran* and *Hazuka* followed the majority position in denying that "visible marks" exclusions were merely rules of evidence, stating that these exclusions were actually limitations on liability.<sup>32</sup>

In *Cochran*, the Nebraska Supreme Court summarily dismissed the third doctrine opposing "visible marks" exclusions, that of unconscionability, by stating that "the provision requiring visible

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masking as a definition, makes insurer's obligation to pay turn on the skill of the burglar, not on the event the parties bargained for: a bonafide third party burglary resulting in loss of plaintiff's chemicals and equipment." *Id.* For a discussion of the rule of evidence doctrine, see text accompanying notes 28-32 *infra*.

28. For specific policy provisions, see note 2 *supra*. Coverage was provided for property while attended in or on any motor vehicle or trailer and coverage was provided if there were "visible marks of forcible entry upon the exterior" of an unattended vehicle. *Id.*
29. See *Rosie O'Grady's Warehouse, Inc. v. Charter Oak Fire Ins. Co.*, 319 So. 2d 632, 633 (Fla. Dist. Ct. App. 1975); *Lichtentag v. Millers Mut. Fire Ins. Co.*, 250 So. 2d 105, 107 (La. Ct. App. 1971); *Artress v. State Farm Fire & Cas. Co.*, 221 Tenn. 636, 639, 429 S.W.2d 430, 432 (1968); *Continental Ins. Co. v. Cooper*, 58 Tenn. App. 316, 319, 430 S.W.2d 661, 662 (1968). *Contra*, *Kretschmer's House of Appliances, Inc. v. United States Fidelity & Guar. Co.*, 410 S.W.2d 617, 618 (Ky. 1966).
30. See note 29 *supra*.
31. See *Kretschmer's House of Appliances, Inc. v. United States Fidelity & Guar. Co.*, 410 S.W.2d 617 (Ky. 1966); *Ferguson v. Phoenix Assurance Co.*, 189 Kan. 459, 470 P.2d 379 (1962); *Edgar's Warehouse, Inc. v. United States Fidelity & Guar. Co.*, 375 Mich. 598, 134 N.W.2d 746 (1965); 10 COUCH ON INSURANCE LAW § 42.129 (2d ed. 1962).
32. See text accompanying notes 45-51 *infra*.

marks of forced entry is not unconscionable."<sup>33</sup> In *C. & J. Fertilizer* however, the primary decision analyzing this theory, the Iowa court devoted more discussion to this doctrine. While construing a policy covering burglary losses, the Iowa court discussed various policy arguments underlying the unconscionability doctrine regarding the fine print provisions,<sup>34</sup> standardized contracts offered on an "accept this or get nothing basis,"<sup>35</sup> and weakness in the bargaining process.<sup>36</sup> The Iowa court endorsed the policy of selective elimination of unconscionable provisions in insurance contracts<sup>37</sup> and suggested that "[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."<sup>38</sup>

The plaintiff's evidence in *C. & J. Fertilizer* demonstrated that the "visible marks" exclusion was unconscionable. The defendant offered no evidence to show whether the exclusion was a reasonable limitation on the protection offered in the policy. As a result, the court held the exclusion unconscionable.<sup>39</sup>

In *C. & J. Fertilizer* the court also held that the burglary insurance policy provided by the defendant breached an implied warranty of fitness for its intended purpose.<sup>40</sup> The opinion initially analyzed implied warranties for particular purposes for goods sold under the auspices of the Uniform Commercial Code. The court then attempted to bridge the long gap from the Uniform Commercial Code concept of "goods" to the entity of insurance policies with the following "protection" concept of insurance policies:

The final and perhaps most significant characteristic of insurance contracts differentiating them from ordinary, negotiated commercial contract, is the increasing tendency of the public to look upon the insurance policy not as a contract but as a special form of chattel. The typical applicant buys "protection" much as he buys groceries.<sup>41</sup>

Justice Legrand, in his dissenting opinion, vigorously opposed the majority's attempted transposition of the Uniform Commercial

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33. 201 Neb. at 634, 271 N.W.2d at 333.

34. 227 N.W.2d at 179.

35. *Id.* at 180.

36. *Id.*

37. *Id.*

38. *Id.* at 181 (quoting IOWA CODE § 554.2302(2) (1967) (Iowa Uniform Commercial Code)).

39. *Id.* For further information concerning the doctrine of unconscionability, see Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

40. 227 N.W.2d at 177-79.

41. *Id.* at 178 (quoting 7 WILLISTON ON CONTRACTS § 900, at 34 (3d ed. 1963)).

Code provisions.<sup>42</sup> The dearth of authority supporting this application of the implied warranty doctrine to insurance policies demonstrates that the Nebraska Supreme Court was justified in not mentioning the implied warranty doctrine in its *Cochran* opinion.

As evidenced above, the jurisdictions opposing "visible marks" exclusions are akin to the proverbial pioneers of the law, at times venturing into the wilderness only to be met by the arrows of criticism. The following analysis of doctrines favoring "visible marks" exclusions will demonstrate that the opponent "pioneers" definitely hold the minority viewpoint.<sup>43</sup>

## B. Doctrines Favoring "Visible Marks" Exclusions

The primary doctrines favoring "visible marks" exclusions are those of (1) limitation on liability, and (2) mysterious disappearance coverage.

The overwhelming majority of jurisdictions have held that "visible marks" exclusion provisions are not ambiguous.<sup>44</sup> This con-

42. These same observations should dispose of plaintiff's claim of implied warranty, a theory incidentally for which there is no case authority at all. The majority apparently seeks to bring insurance contracts within the ambit of the Uniform Commercial Code governing sales of *goods*. I believe the definitional section of the Code itself precludes that notion. See § 554.2105, The Code. This *should* put an end to the majority's argument that buying insurance protection is the same as buying groceries. The complete absence of support from other jurisdictions would also suggest it is indefensible. 227 N.W.2d at 184 (dissenting opinion).

43. It is not uncommon for insurance companies to include in their burglary or theft policies a provision that there exist visible marks or visible evidence of force and violence in effecting a felonious entry. Such a provision is inserted for the protection of the insurer and clearly favors the insurer over the insured. Since it is ordinarily held that such a provision is unambiguous, the rule requiring construction in favor of the insured does not apply.

The policy requirement has been considered as a limitation on the liability of the insurer or as a rule characterizing the evidence upon which liability must be predicated, but in either event, the validity of the requirement has rarely been questioned, although in at least one instance such a requirement has been held in contravention of public policy under the particular terms of the policy involved and the particular circumstances involved.

Annot., 99 A.L.R.2d 129, 131 (1965) (footnotes omitted). *See also* Annot., 2 A.L.R.3d 809 (1965).

44. *See* American Mut. Fire Ins. Co. v. Llewellyn, 142 Ga. App. 824, 237 S.E.2d 227 (1977); *Limberis v. Aetna Cas. & Sur. Co.*, 263 A.2d 83 (Me. 1970); *Hazuka v. Maryland Cas. Co.*, 183 Neb. 336, 160 N.W.2d 174 (1968); *Flatow v. Lumbermen's Mut. Cas. Co.*, 56 Misc. 2d 618, 289 N.Y.S.2d 279 (1968); *Clemmons v. Glen Falls Ins. Co.*, 2 N.C. App. 479, 163 S.E.2d 425 (1968); *Artress v. State Farm Fire & Cas. Co.*, 221 Tenn. 636, 429 S.W.2d 430 (1968). *Contra*, *United States Fidelity & Guar. Co. v. Woodward*, 118 Ga. App. 591, 164 S.E.2d 878 (1968) (The policy's definition of safe burglary required that there be forcible

cept is significant in that it is the stepping-stone to the doctrine of limited liability, which is the key doctrine favoring "visible marks" exclusions. Reflecting this view, the Nebraska court has stated:

It is not every burglary which constitutes a basis for liability, but a burglary as defined in the contract of insurance. The language of the contract is not unclear or ambiguous and consequently does not require construction. It is therefore to be given effect in accordance with the ordinary and generally accepted meaning of its words. It is not a policy which insures against *mysterious disappearance*, nor does it cover manual operation of the safe's combination in the absence of visible evidence of the use of force thereon. It establishes liability under the insuring clause of the contract only for loss of property extracted from a safe which has been duly locked by use of a combination or time lock, has been entered by force and violence, and as a result of the force and violence there is visible evidence upon the exterior doors or outer walls of the safe of that force and violence which either affected the entry or contributed to effecting the entry.<sup>45</sup>

Since the majority of courts have determined that visible marks exclusions are not ambiguous, several jurisdictions have construed such exclusions as limitations on liability or coverage provisions as opposed to rules of evidence.<sup>46</sup> This limitation on liability, or coverage approach, assumes that the insurer was attempting to restrict coverage rather than define the amount of evidence needed to preclude recovery for "inside jobs" and frauds.

The insurer's desire to limit coverage is understandable. It is a matter of universal knowledge that articles in automobiles are more likely to be stolen than those located in a home.<sup>47</sup> Moreover, many models of automobiles are more susceptible to theft than others since there are various degrees of lock-security.<sup>48</sup>

With these well-known facts in mind, it is quite logical and understandable that an insurer might be quite willing to insure the contents of an automobile which could not be entered except by force as would mar the exterior, but would be unwilling to insure the contents of an automobile which could be entered with far less effort. *Certainly the cost of the insurance on the latter risk would be justifiably higher.*<sup>49</sup>

This limitation on liability doctrine is the foundation of the Ne-

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and violent entry, but coverage under the policy included loss "by safe burglary or attempt thereat." *Id.* at 594, 164 S.E.2d at 880. This language created ambiguity since presumably loss would not occur from an attempt where there was no actual entry by force and violence).

45. *Hazuka v. Maryland Cas. Co.*, 183 Neb. at 341, 160 N.W.2d at 178 (emphasis added).

46. See *Lichtentag v. Millers Mut. Fire Ins. Co.*, 250 So. 2d 105 (La. Ct. App. 1971); *Hazuka v. Maryland Cas. Co.*, 183 Neb. 336, 160 N.W.2d 174 (1968); *Artress v. State Farm Fire & Cas. Co.*, 221 Tenn. 636, 429 S.W.2d 430 (1968). For the discussion of the "rule of evidence" doctrine, see text accompanying notes 28-32 *supra*.

47. *Continental Ins. Co. v. Cooper*, 58 Tenn. App. 316, 322-23, 430 S.W.2d 661, 664 (1968).

48. *Id.*

49. *Id.* (emphasis added).

braska court's approach to "visible marks" exclusions in *Cochran* and *Hazuka*.<sup>50</sup> The court explicitly stated that "[s]uch [a] limited liability provision is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured."<sup>51</sup> The court also stated that the insurance policy in question was "not a policy which insures against mysterious disappearances,"<sup>52</sup> the second doctrine favoring "visible marks" exclusions.

Generally, to recover on a policy insuring against theft or burglary, something more than the fact that the property is missing must be shown.<sup>53</sup> An obvious example is a requirement of "visible marks of forcible entry upon the exterior of the vehicle."<sup>54</sup> Occasionally, burglary or theft insurance policies contain a provision that the mere disappearance of the insured object shall not be deemed evidence that the loss was due to theft or burglary.<sup>55</sup> This was the situation in *Raff v. Farm Bureau Insurance Co.*,<sup>56</sup> where the Nebraska Supreme Court defined "mysterious disappearance" under the terms of a theft policy as "disappearance under unknown, puzzling, and baffling circumstances which arouse wonder, curiosity, or speculation, or under circumstances which are difficult or hard to explain."<sup>57</sup>

The mysterious disappearance coverage referred to in *Hazuka*<sup>58</sup> covers the insured for thefts of the mysterious disappearance character. The following is an example of such a mysterious disappearance clause: "The word 'theft' includes larceny, burglary and robbery. Mysterious disappearance of any insured property shall be presumed to be due to theft."<sup>59</sup> If an insured wishes to assure himself of coverage, he should purchase an insur-

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50. See text accompanying note 45 *supra*.

51. 201 Neb. at 634, 271 N.W.2d at 333. See *Hazuka v. Maryland Cas. Co.*, 183 Neb. at 341, 160 N.W.2d at 177 (quoting *Swanson, Inc. v. Central Sur. & Ins. Corp.*, 343 Mo. 350, 121 S.W.2d 783 (1938)).

52. 183 Neb. at 341, 160 N.W.2d at 178.

53. 44 AM. JUR. 2d *Insurance* § 1399 (1969); 5 J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 3173.25 (rev. 5th ed. 1970).

54. See note 2 *supra*.

55. 44 AM. JUR. 2d *Insurance* § 2047 (1969); 5 J. APPLEMAN, *supra* note 53, § 3173.25.

56. 181 Neb. 444, 149 N.W.2d 52 (1967). The material provisions in the farmers and ranchers insurance policy were as follows: "(f) Theft and overturn. This insurance is extended to include direct loss by theft (but excluding escape, *mysterious disappearance*, inventory shortages, wrongful conversion and embezzlement), and overturn." *Id.* at 445, 149 N.W.2d at 54 (emphasis added).

57. *Id.* at 447, 149 N.W.2d at 55. For further discussion of mysterious disappearance insurance, see Annot., 12 A.L.R.3d 865 (1967); 22 WASH. & LEE L. REV. 291 (1965).

58. See text accompanying note 52 *supra*.

59. Kelly, "*Mysterious Disappearance*" *Defined*, 28 INS. COUNSEL J. 72 (1961).

ance policy with such a mysterious disappearance clause. The mysterious disappearance itself should then be sufficient evidence to recover under the policy. This would avoid having to depend upon a requirement for visible marks of force and violence similar to that found in *Cochran*.

### C. Construction of "Visible Marks" Clauses

If the insured's policy does not contain mysterious disappearance coverage and instead has a "visible marks" exclusion, and a theft occurs, the battle has just begun. What degree of evidence is sufficient to overcome the "visible marks" exclusion? Courts have pondered over: the degree of force required;<sup>60</sup> whether exterior or interior marks are required;<sup>61</sup> whether the property must be in the vehicle; what constitutes "in the vehicle;"<sup>62</sup> and the effect of using a master key or picking a lock.<sup>63</sup> These decisions illustrate that the

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This mysterious disappearance coverage is available at low cost as a rider to many conventional homeowner's policies.

60. See *Ross v. Travelers Indem. Co.*, 325 A.2d 768 (Me. 1974) (no particular degree of force is a prerequisite—the only requirement is that whatever force was used must be illegitimate); *Klein & Brown, Inc. v. Fidelity & Deposit Co.*, 59 Misc. 2d 395, 299 N.Y.S.2d 298 (1969), *rev'd per curiam*, 64 Misc. 2d 908, 316 N.Y.S.2d 552 (1970) (picking lock with instrumentality which left "numerous," "pronounced" and "distinctive" marks on cylinder amounted to force and violence within the policy language); *Weldcraft Equip. Co. v. Crum & Forster Ins. Cos.*, 225 Pa. Super. Ct. 420, 312 A.2d 68 (1973) ("little marks" indicated the use of actual force and violence and met the requirement that there be visible marks made by tools).
61. See *Gray v. Great Cent. Ins. Co.*, 4 Ill. App. 3d 1084, 283 N.E.2d 261 (1972) (entrance to service station was gained by punching hole through walls separating restroom from storage area; restroom wall was not part of the "exterior" of premises, therefore recovery on the policy was denied); *Klein & Brown, Inc. v. Fidelity & Deposit Co.*, 59 Misc. 2d 395, 299 N.Y.S.2d 298 (1969), *rev'd per curiam*, 64 Misc. 2d 908, 316 N.Y.S. 552 (1970) (cylinder lock installed on exterior entrance of premises was part of "exterior" of premises); *Continental Ins. Co v. Cooper*, 58 Tenn. App. 316, 430 S.W.2d 661 (1968) (fact that exterior door of automobile was ajar, that glove compartment had been jimmied open, that glove compartment lock was inoperative and that mud was on rear seat did not satisfy requirement of visible marks on "exterior" of automobile).
62. See *Travelers Indem. Co. v. Spector*, 303 So. 2d 365 (Fla. Dist. Ct. App. 1974) ("visible marks upon the exterior of vehicle" language only applied to locked luggage compartments and not to entire vehicle); *Juarez v. General Accident Fire & Life Assurance Corp.*, 320 So. 2d 277 (La. Ct. App. 1975) (coverage not afforded to loss resulting from theft of luggage from factory-installed luggage rack on insured's automobile which had no luggage compartment).
63. See *Johnson v. Pacific Indem. Co.*, 242 Cal. App. 2d 878, 52 Cal. Rpt. 76 (1966) (opening of padlock with a key is not the force and violence contemplated by the policy); *Offutt v. Liberty Mut. Ins. Co.*, 251 Md. 262, 247 A.2d 272 (1968) (picking lock or using master key did not constitute "forcible entry"); *Weldcraft Equip. Co. v. Crum & Forster Ins. Cos.*, 225 Pa. Super. Ct. 420, 312 A.2d 68 (1973) (if lock is picked or even if the key designed to fit the lock has been used, there has been an application of force).

ultimate determination of coverage depends upon the individual policy language and the particular facts and circumstances of each situation.

## V. CONCLUSION

The decisions in *Cochran* and *Hazuka* indicate a conservative stance by the Nebraska Supreme Court on "visible marks" exclusion clauses. The court has taken a firm position that such "visible marks" exclusions are a limitation on liability, not a mere rule of evidence; that such clauses are unambiguous; and consequently, that they will not trigger the rule that insurance contracts should be construed in favor of the insured.

The status of the doctrines of reasonable expectations and unconscionability regarding insurance contracts in Nebraska remains in doubt. The Nebraska court has not addressed the doctrine of reasonable expectations and has merely commented on unconscionability by stating that the "visible marks" exclusion in *Cochran* was not unconscionable. It remains to be seen whether any such clause in a Nebraska insurance contract would be deemed unconscionable.

The insured in Nebraska is left with two choices: (1) obtain mysterious disappearance coverage and avoid the entire "visible marks" issue, or (2) subject any theft recovery possibilities to the intricacies of the applicability and construction of "visible marks" exclusion clauses.

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