

EDITOR'S NOTE

At the core of insurance recovery is the principle to return to conditions prior to a disaster. For those involved with the hotel industry, a compelling question is that of matching décor.

This issue of *Adjusting Today*, "Pair, Set and Match: Replacement of Undamaged Hotel Furnishings to Ensure a Uniform Look," by Michael Raibman, sets the table for a discussion of why a hotelier has the ability to make a claim for the replacement of both damaged and undamaged furnishings.

Raibman examines case law and policy language to put together examples that show how hotels can recover a uniform look to their hotel after a disaster has damaged a portion of the property. Raibman demonstrates, "The question thus should not be whether there is 'pair and set' coverage when hotel furniture is damaged, but rather the scope of that coverage."

Our readers—not just those directly involved in the hospitality industry, or the agents and brokers servicing them—should value this issue for its insight into the implicit logic of the property insurance damage recovery process.

Pair, Set and Match



Replacement of Undamaged Hotel Furnishings to Ensure a Uniform Look

By Michael Raibman

What would you think if you walked into your hotel room and the furniture did not match? Unless you were staying at a hip New York or Los Angeles hotel that prides itself on its "eclectic" furnishings, you would not be impressed. Similarly, would you be a happy customer if you stayed in a lovely room in a hotel on one trip, but on the next trip you stayed in a different room in the same hotel, and found it filled with older, different furnishings? Of course not.

Hotels understand this, and thus ensure that all of the rooms in a given hotel are furnished the same way (excepting suites or other "specialty" rooms). Moreover, hotels have responded to customer demands for better furnishings not by changing the "case goods" in random rooms, but instead by announcing with great fanfare that they will change over all of their rooms to include stylish new furniture, flat panel TVs, and improved



bedding. See, for example, “Marriott Unveils Hot New Room Design @ the mSpot,” an article describing Marriott’s launch of its new room décor by building a sample room in New York’s Times Square.¹

In all instances, the brand approves a hotel’s furnishings, whether or not it requires identical furniture in all of its hotels. And no quality brand will approve mismatched furniture. So it should come as no surprise that when a hotel is damaged by a hurricane or other major disaster, the hotel seeks to ensure the furnishings in the repaired hotel match throughout the hotel. Nor should it be any surprise that hotel owners purchase insurance that covers the

cost of doing so.

Insurance companies, however, suggest that hotel owners seek a “windfall” when they claim the replacement cost of matching hotel furnishings. This article explains why the insurers are wrong and proposes policy language designed to minimize disputes regarding this issue.

Hotel Furniture: Unique and Not Reasonably Replaced

In considering the matching furniture issue, it is important to understand how hotel furniture is purchased. Hotel owners do not go to their local Ikea to purchase furniture. Nor do they go to a store that aims to supply hotels; rather, hotel

furniture is made to order.

That is not to say that all such furniture is custom designed; in some instances, furniture is ordered from “stock,” but even that furniture is not manufactured until it is ordered.²

Thus, even “brand standard” furniture such as that comprising the new Marriott room mentioned above cannot simply be purchased from stock.

As a result, once a manufacturer or a brand moves on to new furniture lines, it often becomes impossible to match a hotel’s current furniture. It is for this reason that hotels usually keep “attic stock,” that is, some spare furniture that matches a hotel’s décor.

1. “Marriott Unveils Hot New Room Design @ the mSpot” (Sept. 21, 2005) can be found at <http://www.hospitalitynet.org/news/154000346/4024651.search?query=marriott+%22new+room%22+%22times+square%22>.

2. For an example visit <http://cascade-furniture.com/> (website featuring limited line hotel furniture, and explaining “All of our furniture is custom made to order....”).

And it is for this reason that there is a thriving industry in repairing and cleaning damaged and stained hotel furniture. “Before and after” photographs from one furniture repair company, which show repair to damaged and stained furniture, are posted at www.hotelfurniturerepair.com.

If too much furniture in a given hotel is damaged too badly to be repaired or cleaned, and the furniture at issue can no longer be purchased, the hotel can preserve its matching décor only by replacing all of its furniture, damaged or not.

That is exactly what policyholders seek to do when they pursue their matching furniture coverage after a disaster.

“Pair and Set” Replacement of Matching Furniture

The language that requires replacement of matching furniture in a given first party property damage policy generally is found in one of two clauses—the “pair and set” clause or the “consequential damages” clause that incorporates similar “pair and set” language. Each of these clauses is based on a form, and thus may be discussed without reference to a given policy.

The “pair and set” clause included in most first party property damage policies provides:

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

- A. the reasonable and fair proportion of the pair or set’s total value, giving consideration to the importance of said article or articles, but in no event shall the loss or damage be construed to mean total loss of the pair or set; or

- B. the full value of the pair or set provided that the Insured surrenders the remaining article or articles of the pair or set to the Company.

It is readily apparent that this language provides for the replacement of all furnishings necessary to ensure uniformity in hotel décor.

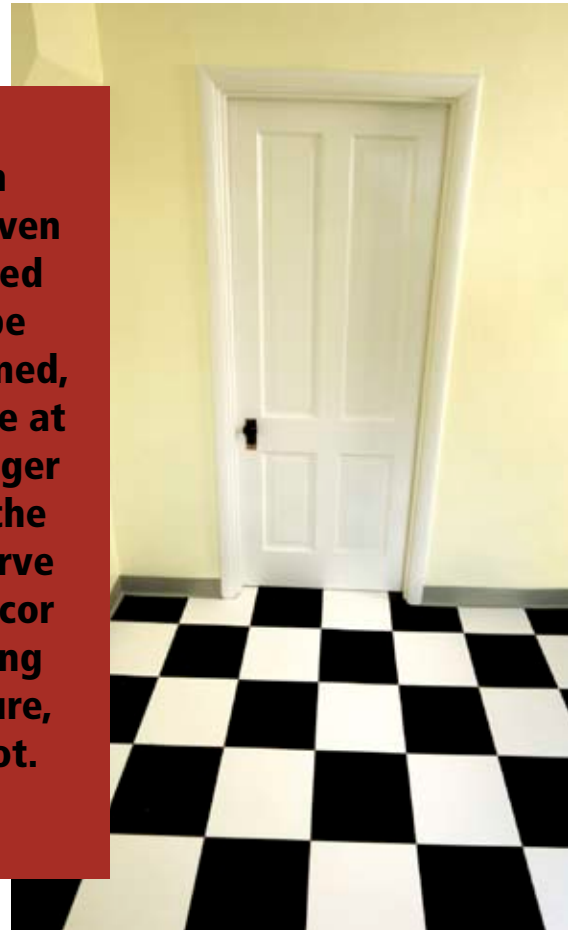
As an initial matter, it is obvious that hotel furniture is “part of a pair or set.” The relevant Webster’s definition of “set” is “a number of things of the same kind that belong or are used together.” Webster’s Ninth New Collegiate Dictionary (1984) at 1077. Given that definition, there is little doubt that hotel furniture is a “set,” as room furnishings are obviously “things of the same kind that . . . are used together” throughout a hotel.

The question thus should not be whether there is “pair and set” coverage when hotel furniture is damaged, but rather the scope of that coverage.

The “pair and set” clause expressly provides that the “Insured” is entitled to elect one of two measures of loss when part of a set is damaged: (a) the value of that part of the set that was damaged or (b) the value of the entire set, as long as the policyholder gives the remainder of the set to its insurer.

It is the latter option that entitles a policyholder to full replacement of all the furniture in a hotel should some of the furniture be rendered unusable by a natural disaster. Moreover, in light of the insurer’s cry of “windfall,” it is of note that such option is expressly

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designed to reduce the burden on the insurer by giving it the right to receive the remainder of the set, which it can then sell for salvage.

Further support for a policyholder's entitlement to matching furniture coverage under the "pair and set" clause may be found in the limited case law addressing that clause.

Although there appear to be only four opinions that even mention the concept of "pair and set" coverage, none of which are directly on point, the only case that is analogous supports the position set forth in this article. That case is *Employers Ins. of Wausau v. Avondale Shipyards, Inc.*, Civ. A. Nos. 82-4034, 82-4185 and 82-4186, 1991 WL 329580 (E.D. La. Sept. 6, 1991).

Avondale Shipyards arose from the sinking of a tug boat. The tug was part of an integrated tug barge ("ITB"), which means that the tug and the barge it moved were connected so that they moved as a single unit. The tug, but not the

barge, sunk. 1991 WL 329580 at *1. Because the entire "ITB was insured under a 'pair and set' clause...the loss of the OXY PRODUCER [the tug] resulted in the constructive total loss of the ITB under the relevant hull policies." *Id.* In other words, the insurers

were liable for the full value of the barge, even though it was not lost and presumably could be mated with another tug. Here, the undamaged furniture is less useful than the tug, because by definition the undamaged furniture cannot be paired with identical furniture



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to furnish the entire hotel. That the same result should obtain as in *Avondale Shipyards*—that is, treatment of the undamaged furniture as a constructive loss—is readily apparent.³

This reading of the “pair and set” clause is bolstered by the fact that recovery in the case of matching is not necessarily a function of “pair and set” coverage, but can follow directly from the nature of replacement insurance.

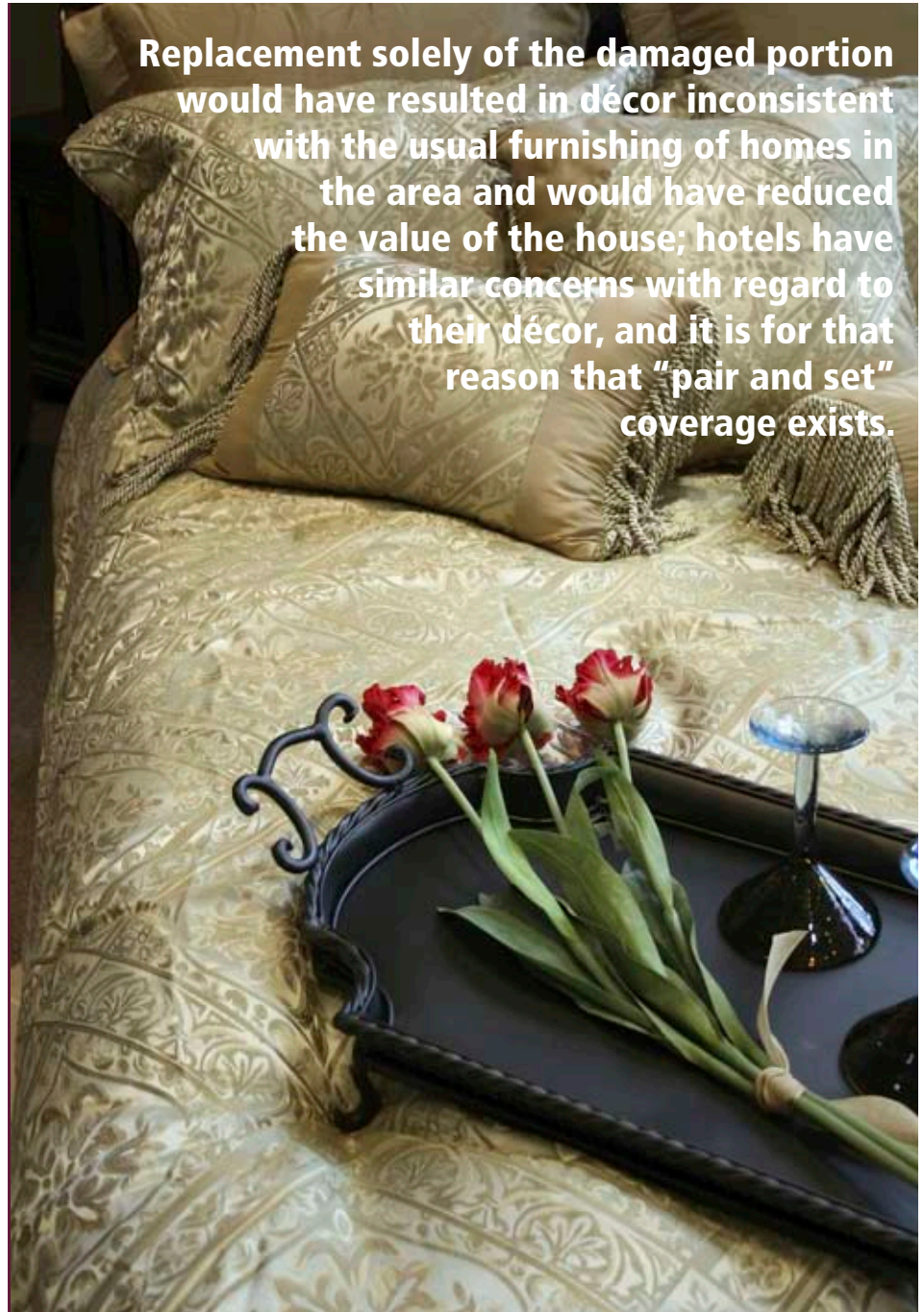
For example, in *Holloway v. Liberty Mut. Fire Ins. Co.*, the apparent absence of “pair and set” language did not give the court pause in ordering replacement of an entire carpet even though only part of the carpet was damaged. 290 So.2d 791 (La. Ct. App. 1974).

The Court did so because replacement solely of the damaged portion would have resulted in décor inconsistent with the usual furnishing of homes in the area and would have reduced the value of the house; hotels have similar concerns with regard to their décor, and it is for that reason that “pair and set” coverage exists.

“Consequential Loss” Covers Replacement Merchandise

Some policies address the “pair and set” issue in a different and less common fashion. Those policies address the issue through

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3. Insurers may argue that the unpublished opinion issued in *Jaskierny v. Mutual of Omaha Ins. Co.*, No. Civ. A. 96-1841, 1996 WL 736975 (E.D. La. Dec. 19, 1996), is on point. It is not. *Jaskierny* involved, among other things, an insurer’s refusal to replace an undamaged upper set of twenty-year old custom made cabinets when the lower set of cabinets was destroyed by a flood. *Id.* at *4. The pair and set language in that case, however, is very different from the language in the standard commercial first party property policy, as it does not give the policyholder the option of demanding replacement of the entire set, but instead provides the insurer with the option of choosing to pay either the replacement cost of the lost part of the pair or set or the value of that property as a proportion of the total value of the pair or set. *Id.* To the extent *Jaskierny* is relevant, it supports the existence of coverage for matching furniture where there is a “pair and set” clause, because the difference in policy language is rendered meaningless if it does not compel a different result than that reached in *Jaskierny*.

Similarly, insurers may argue that the unpublished opinion issued in *St. Paul Fire and Marine Ins. Co. v. Darlak Motor Inns, Inc.*, No. 3:97-CV-1559 TIV (M.D. Pa. Mar. 9, 1999), is on point. But the policy at issue in that case did not include a pair and set clause. Thus, the court reached the unremarkable conclusion that the policy only covered property “directly damaged” by the fire at issue, and thus the insurer was not required to pay to redecorate the undamaged two-thirds of the policyholder’s roadside motel to match the repaired one-third that was damaged by the fire. *Id.* at *6, 7. It is also of note that whereas matching furniture is crucial in high-end hotels such as those with which this article is primarily concerned, *Darlak* arose in the context of a roadside motel—a far less upscale type of property.

the “Consequential Loss” or “Consequential Reduction In Value” clause, which provides in relevant part:

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

The answer is still obvious—the policy covers matching furniture.

A hotel’s primary source of revenue is the rooms it sells. In the context of a policy sold to a hotel, the relevant “merchandise” is the hotel’s rooms and their contents, and in that context there can be little doubt that furniture is “merchandise” that is part of a set. Further, there is an after-market for used hotel furniture, on which it is bought and sold as merchandise

on a regular basis. Nor does hotel furniture fail to satisfy the second prong of the “consequential loss” clause, as it is sold by “classifications”—room rates vary based on, among other things, the quality of the furnishings.

The holding in *Hartwell v. California Ins. Co.*, is consistent with the conclusion that hotel furniture is “merchandise.” 24 A. 954 (Me. 1892). *Hartwell* addressed the meaning of “merchandise” in an insurance policy sold to a painter, and concluded (a) that the term “has no fixed legal or technical signification” and (b) that for non-merchants, such as a painter, “merchandise” must include items held for use rather than sale, because to hold otherwise would render coverage meaningless. *Id.* at 954.

Similarly, “merchandise” coverage for a hotel is essentially meaningless if it does not apply to rooms and their contents, including furniture.

This result also is consistent with common sense, because hotels generally have very little in the way of retail operations. If the “merchandise” coverage sold to a hotel is to have any meaning, it must cover hotel furniture. Furthermore, this result is not unfair, because the insurer is protected by its salvage rights, as per the general salvage provision of the policy.

Contrary to standard insurer objections, this result is not contrary to the plain meaning of the word “merchandise.” For example, Black’s Law Dictionary (8th ed.) defines “merchandise” as, among other things, “a movable object involved in trade or traffic” Black’s Law Dictionary (8th ed. 2004) at 1008. Hotel furniture obviously fits that definition. Similarly, insurers argue that “merchandise” means “the commodities or goods that are bought and sold in business.” (A definition they find in Webster’s Third New International



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Dictionary.) But that is exactly what hotel furniture is—not only is it sold nightly as part of a room, but it is bought and sold daily on the new and used market.

The “consequential loss” provision says nothing to the contrary; in fact, it neither requires that the damaged “merchandise” have been held for sale by a policyholder at the time damage occurred, nor that the “commodities or goods” be considered “merchandise” only if offered for sale. The lack of such limitations is with good reason—it is nonsensical to argue that hotel furniture loses its status as “merchandise” depending upon its use at a given moment in time.

The Tie Goes to the Policyholder

In addressing the scope of the “pair and set” or “consequential loss” clauses, the issue can be one of a strict, limiting construction (by the insurers) versus a broader one (by the policyholder). It is important to bear in mind the well-settled rules of insurance contract interpretation in considering which position should win that fight.

Where insurance language is ambiguous, the language is interpreted in favor of policyholders. See Jeffrey W. Stempel, *Stempel on Insurance Contracts* at §§ 4.08, 4.09 (3d ed. 2006) (discussing the two canons of insurance policy interpretation—“*contra proferentem*” and “reasonable expectations”—that lead to that result). Thus, if the clauses at issue are ambiguous with respect to coverage for matching furniture, the ambiguity must be resolved in favor of the policyholder and matching furniture coverage thus exists.

A policy term is ambiguous if



“it is reasonably susceptible of more than one construction.” *Id.* at 4-75 (footnote omitted). There can be no serious question that the position set forth above is, at a minimum, one of two reasonable views. And if that is the case, the policyholder wins. See *Green Lawn Systems, Inc. v. American Economy Ins. Co.*, 620 So.2d 1290 (Fla. Dist. Ct. App. 1993) (holding “merchandise” to be an ambiguous term that should be construed as necessary to maximize coverage).

One Solution: Revised Policy Language

Hotel policyholders and their brokers might consider purchasing

coverage that expressly provides for replacement of matching hotel case goods. It is easy to imagine many ways to word such coverage. For example, the following is based on language incorporated into a major hotel owner’s policy:

This Policy insures . . . The reduction in value or cost to replace undamaged insured articles that are part of pairs or sets, including components or parts of similar inventory-type property and including furnishings, fixtures and equipment of a uniform design scheme or merchandise usually sold by lots, sizes, color ranges or other classifications, when such reduction in value, replacement or repair results from loss, damage

In many cases the insurer and policyholder will have differing views as to whether more than 50% of the furnishings were damaged or destroyed.



or destruction of other insured articles, components or parts of such property including furnishings, fixtures, or equipment of a uniform design scheme by a peril insured by this Policy;

In the event of such physical loss, damage or destruction, the measure of recovery for such articles shall be, at the Insured's option:

- i. The reduction in value of undamaged insured components or parts of property resulting from physical loss or damage Insured

by this Policy to other insured components or parts of such property; or

- ii. In the event that more than 50% of the furnishings, fixtures, or equipment within a single hotel are damaged or destroyed, the full replacement value of the damaged and undamaged furnishings, fixtures and equipment to maintain a uniform design scheme throughout the hotel.

The incorporation of such language in a policy should reduce the scope of any coverage dispute should the client be forced to avail itself of its matching furniture coverage. Do not assume, however, that adoption of such language will foreclose all dispute in this regard; in many cases the adjusters hired by the insurer and policyholder will have differing views as to whether more than 50% of the furnishings, fixtures, or equipment were in fact damaged or destroyed. But at least the terms of the coverage will not be in dispute.

Conclusion

If damage covered by a form property damage insurance policy includes damage to hotel furniture, the policy provides for the replacement of all damaged and undamaged furniture to ensure uniformity in the hotel's décor. Insurers, however, refuse to recognize this coverage, even though to leave a hotel with mismatched furniture

is to leave the hotel in a condition inferior to that which it was in before the hotel was damaged—a result antithetical to the purpose of insurance. Policyholders thus should not accept their insurers' position, but should instead stand ground for their matched furnishings. To do otherwise is to risk either unhappy guests or the expense of being forced to refurnish a hotel out-of-pocket. In addition, policyholders should bear in mind that they can avoid such fights in the future by seeking coverage that expressly underlines their right to matching furniture.

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