DOCKET NUMBER: 94-12661
ADV. NUMBER: 97-1127
JUDGE: M. A. Mahoney
PARTIES: Samuel Robert Brooks, Linda Bender Brooks, United Services Automobile Association
CHAPTER: 13
ATTORNEYS: M. J. Upton, L. B. Voit, S. R. Brooks (pro se), L. B. Brooks (pro se)
DATE: 3/24/98
KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

SAMUEL ROBERT BROOKS, III
LINDA BENDER BROOKS

Case No. 94-12661-MAM-13

Debtors.

UNITED SERVICES AUTOMOBILE ASSOCIATION

Plaintiff,

v.

Adv. No. 97-1127

SAMUEL ROBERT BROOKS, III
LINDA BENDER BROOKS

Defendants.

ORDER AND JUDGMENT

Mark J. Upton, Mobile, AL, Attorney for Plaintiff
Lawrence B. Voit, Mobile, AL, Attorney for Plaintiff
S. Robert Brooks III, Mobile, AL, Defendant pro se
Linda Bender Brooks, Mobile, AL, Defendant pro se

This matter is before the Court for trial of the complaint which is the basis of this adversary proceeding. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1) and 1334 and the Order of Reference of the District Court. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A). The plaintiff, United Services Automobile Association, is suing the defendants seeking a declaratory judgment. USAA alleges that Mr. and Mrs. Brooks should recover nothing from USAA as a result of a claim filed for personal property losses after an eviction and subsequent storage of household goods. USAA alleges that the Brooks failed to file proper proofs of loss, made misrepresentations or false statements in the

proofs filed; and, if the proofs of loss were proper, they suffered no loss. The Brooks deny these allegations. Based upon the evidence presented during two days of trial, the Court concludes that judgment should not be awarded plaintiff on Counts Two and Three but should be partially awarded on Count Four.

FACTS

Debtor S. Robert Brooks and his wife, debtor Linda Brooks, filed their current joint Chapter 13 case on December 19, 1994. They were no strangers to the bankruptcy process. They had filed for themselves and Mr. Brooks' law firm professional corporation four previous bankruptcies. The Brooks were no strangers to the law. Mr. Brooks was an attorney practicing in Mobile until 1993 when he was disbarred for theft of property. The Brooks were no strangers to insurance. Mr. Brooks had commenced work as a flood or catastrophe insurance adjuster prior to this bankruptcy case and he still is an insurance adjuster. The Brooks were no strangers to evictions, both of them having been evicted at least once prior to the eviction at issue in this case.[1] Finally, the Brooks were no strangers to valuing their household goods and personal property. In their three prior individual bankruptcies and this bankruptcy case, they had the duty to value their assets at "current market value" under penalty of perjury. Against this general background, it is appropriate to catalogue the facts specifically relevant to this case.

THE EVICTION

This case arises from the eviction of the debtor/defendants from their home at 6496 Bellwood Drive East, Theodore, Alabama, on January 18, 1995. For reasons not relevant

[1]Sgt. Hurm testified that he was involved in four or five evictions of Mr. Brooks or his businesses. He testified that Mr. Brooks had claimed property was missing after some or all of these evictions too.

to this matter, the Brooks were surprised by the eviction. Mr. Brooks was out of town. Mrs. Brooks came home around noon to check on her dogs and found the Sheriff's Department of Mobile County supervising the eviction. The dogcatchers were there to take the three Brooks' dogs to the pound. Two sheriffs were present. The evicting owners (the Tillmans) were present with Mr. Tillman's brother. The Tillmans had hired Better Ben's Moving & Storage to perform the physical moving job with them. There were three or four Better Ben's employees present. The Brooks had four to six vehicles at the house; some working, some not. The sheriff had hired Hammac's Garage & Wrecker Service to remove the vehicles and parts.

According to Mobile County's eviction procedure, all of the Brooks' property had to be moved out of the house and placed off the property on the right-of-way by 5:00 p.m., except the vehicles and parts which were to be removed to Hammac's. After the eviction was complete, the Brooks could make whatever arrangements they wished as to the personal property. Consequently, all of the personal property (except the automobiles and parts) was moved to the right-of-way that day. The movers from Better Ben's and the Tillmans hurriedly packed some items in available boxes. Other items were placed in pillowcases and bags. Larger items and the boxes were simply stacked on top of one another along the property line.

The edge of the property had a ditch about three to four feet off the roadway. The movers and the sheriff all testified that care was taken not to place items in the ditch because it contained water. Pictures of the scene at the time of eviction show this. There was also a videotape made of part of the eviction process and the personal property at that time was not in the ditch.

Mrs. Brooks, upon seeing the eviction process proceeding and talking with people present, including the Better Ben's manager overseeing the eviction, Martin Taylor, decided to

contract with Better Ben's to load, move and store the Brooks personal property through Better Ben's. Mrs. Brooks and Mr. Taylor left the eviction and the contract was signed at Better Ben's offices. At around 5:00 p.m., Better Ben's began loading the personal property. The loading was completed by 10-10:30 p.m. The trucks returned to Better Ben's. The property was left on the locked trucks overnight. The trucks were backed up to the building at Better Ben's overnight to prevent opening and they were unloaded the morning of January 19, 1995.

It began to rain during the move on January 18, 1995. Some items got wet. Better Ben's refused to load a wet sofa. There was not room in the trucks for a freezer or numerous boxes of papers and books either. Mrs. Brooks removed some of these items in her car that night. Some boxes, the sofa and the freezer were still on the right-of-way several days later. The sofa slid into the ditch during the eviction or subsequent move, and also got waterlogged from rain. No one who was at the eviction testified that it was intentionally placed in the ditch.

Pictures of the move show that a riding lawnmower, executive chair, and some stereo components (speakers) were removed from the house. The other parts of the stereo are not in any pictures. Mrs. Brooks did not believe the stereo was loaded by Better Ben's. Mr. Taylor does not remember it. It is not on Better Ben's inventory of items. The same is true of the executive chair. Mrs. Brooks believes the riding lawnmower did get to Better Ben's because she saw it there. Mr. Taylor does not remember it nor is it on the Better Ben's inventory. It was not left on the right-of-way. No one saw anyone steal any items. The sheriff testified that Hammac's placed a large air compressor on the right-of-way, and possibly a battery charger too.

Hammac's removed all vehicles and related parts from the premises. Many of the cars were partially disassembled so that it was difficult to know what pieces belonged together. The vehicles were held by the Brooks because Mrs. Brooks owned and Mr. Brooks operated a

business called Bama Auto Sales & Service, Inc. When the business moved from its prior location, all of the "inventory" was moved to the Brook's home. A mechanic who had worked for Bama Auto Service, Walter Steerman, came to the house when called by Mrs. Brooks. She gave him permission to take a red tool box, a vehicle, and other items for which he signed a receipt. The Brooks do not know which red tool box he took. A videotape of part of the eviction shows Hammac's also removing some non-vehicle items such as tanks. Hammac's may have some of the items the Brooks claim are stolen. The Brooks have never been to Hammac's to determine what items Hammac's has. It prepared an inventory list of items taken which was in evidence. The list speaks generally of "assorted scrap engines and metal" after specifically listing the autos taken.

On January 19, 1995, Better Ben's unloaded the debtors' goods. It placed the large items in the main storage facility. It placed the loose items (and maybe other boxes) in a smaller facility. The debtors' clothes were piled on the floor. Mrs. Brooks was allowed access to the clothes and personal items of the parties several times. She took items so that she and Mr. Brooks could be suitably clothed.

At some point around the beginning of February 1995, Better Ben's placed the loose items in boxes. There is a dispute about the date. Mr. Taylor testified that the items were boxed before the Brooks were informed because fire code regulations required it. Some letters place the date at a later point. The date is not important to this ruling. At the time of the packing, the Brooks' property was inventoried. The boxes already packed were not unpacked, just counted. They were marked and stacked together with the newly packed items and other furniture and non-boxed items. The inventory indicates extensive damage to the stored items prior to packing and inventory, including water damage which obviously occurred at the eviction.

Mr. Taylor testified that he called Mr. Brooks about going over the inventory but he refused. Mr. Brooks testified that he was never asked to go over the inventory. The Court concludes the inventory was created and it was offered to the Brooks for review.[2] The items were left in storage for over 15 months until May 1996. Better Ben's required payment in full by certified check before release of the items. Upon receipt of the items, the Brooks discovered that the condition of much of the property was not good. Items were broken, scratched, mildewed, torn, or dirty. Many items smelled of urine or had rat feces in or on them. The Brooks allege that some items stored at Better Ben's were not returned. These items are the ones listed on Plaintiff's Exhibit 5. Mr. Taylor testified that the items were properly stored and maintained. The Brooks allege the contrary. It was clear that there was animosity between the Brooks and Better Ben's.

THE INSURANCE CLAIM

The Brooks had a homeowner's insurance policy with USAA at the time of the eviction. They reported the eviction and losses they allege occurred on the day of the eviction on February 22, 1995, by telephone. Mr. Brooks reported:

> That most of the furniture had been thrown in the ditch out in front which had about two and a half feet of water about two feet of water in it and a large number of our items were damaged and that's about it.

USAA Exhibit 37. Mr. Brooks also stated that the stereo had disappeared. He stated that the remaining items were in storage and until the items were taken out of storage the Brooks were not absolutely certain as to what was damaged or missing.

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[2]The Brooks have never gone to Hammac's to view their property or retrieve it. This is consistent with Taylor's experience with the Brooks to May 1996. It makes Taylor's story more credible than the Brooks'.

After the eviction, the Brooks obtained a renter's insurance policy from USAA to cover their personal property. It appears that the Brooks claimed the alleged loss on the date of the eviction on the homeowner's policy and claimed the alleged loss at Better Ben's on the renter's policy. The policies are similar.

On June 20, 1995, the Brooks submitted a written proof of loss. It claimed that the Brooks has sustained losses by "theft, negligence and other causes during the eviction." The amount of the loss was listed as "to be determined." On August 2, 1996, a second and third proof of loss were filed. One listed items damaged or missing due to "theft/vandalism" at Better Ben's. The attachment to the loss indicated a loss of $43,134.44 based on unit prices which appear to be replacement value, not depreciated cash value. For example, a microwave is listed at $599.00. "CDS" are listed at $10 each. A 25" console television is listed at $1,600.00. The second proof of loss lists items damaged or lost due to "theft/vandalism" at the house the day of the eviction. These items are also listed at what appears to be replacement value. The total loss is $6,282.50. On January 6, 1997, the Brooks filed two more proofs of loss. One gave a detailed list of items stolen or damaged at the house on January 18, 1995. It listed $6,102.50 in stolen items and $1,900 in items "damaged beyond repair." Again the items appear to be valued at replacement cost, not actual cash value. A second proof of loss detailed the items allegedly stolen from Better Ben's and damaged at Better Ben's. The stolen items, at replacement cost, were valued at $38,653.84. The damaged items were valued at $25,398.00.

Mr. Brooks testified that he used replacement value in the proofs of loss. Mrs. Brooks, at one point, indicated she had used original purchase price. Overall the facts support the finding that the August 2, 1996 proofs of loss were filed using replacement values for all items.

USAA wrote to the Brooks on June 27, 1995, and informed them that their June 20, 1995 proof of loss was incomplete for several reasons, including that no value was placed on the loss.

On December 7, 1995, USAA again wrote the Brooks indicating that their proofs of loss were incomplete. Values of the loss and documentation had not been provided. A more detailed list of missing information was forwarded to the Brooks on August 27, 1996. USAA has paid no amount to the Brooks on the proofs of loss.

THE BANKRUPTCIES

The Brooks (either individually, jointly, or as owner of the corporation) have been involved with five bankruptcies since 1987. On September 8, 1988, Mr. Brooks filed a Chapter 7 case (Case No. 88-00029). On June 17, 1993, Mrs. Brooks filed a Chapter 13 case (Case No. 93-10996). On January 19, 1994, Mr. Brooks filed a Chapter 13 case (Case No. 94-10092). On March 5, 1987, S. Robert Brooks, III, P.C. filed a Chapter 7 case (Case No. 87-10312). On December 19, 1994, the Brooks jointly filed a Chapter 13 case (Case No. 94-12661).[3]

In their prior bankruptcy schedules, the Brooks listed the values of their household goods and furnishings, including audio, video, and computer equipment. The property was to be valued at "current market value." The schedules state:

1988 Mr. Brooks	1993 Mrs. Brooks	1994 Mr. Brooks

[3]It was possible for the Brooks to file four different individual bankruptcy cases because (1) the Chapter 7 case of Mr. Brooks resulted in a discharge on July 26, 1989. He could file again so long as he receives no discharge until 1996 or after; and (2) the two individual Chapter 13 cases of Mr. and Mrs. Brooks were dismissed without a discharge so they were eligible to refile. They did in 1994 and are debtors in the pending case.

"All household goods belong to wife" $0.00 "Two sets of golf clubs" $50.00 each	"Furnishings, TVS, VCRs, Tools, Gardening Equipment, Household Goods, Bedding" $8,000 "Japanese Silk Tapestry" $5,000 "Clothes, shoes, purses, other apparel" $500 "Miscellaneous Jewelry" $200	"Stereo-$300 Bookcase-$100 Fuseball (sic) table-$50 Desk and bookcase-$150" $600 "Books - $100" "Clothes - $200" "Tools - $400"

On December 19, 1994, the Brooks jointly filed the pending Chapter 13 case (Case No. 94-12661). In it, the debtors listed their personal property as follows:

Furnishing, TVS, VCRs, stereo, Gardening equipment, Household goods, computers, bedding	$9,000.00
Japanese Tapestry	3,000.00
Clothes, shoes, purses other than apparel	1,000.00
Miscellaneous jewelry	400.00

This totals $13,400.00. The schedules were filed January 3, 1995, 15 days prior to the eviction.

Mr. Brooks admits their personal property is worth $30-40,000 at current market value. He admits he substantially undervalued the property on the bankruptcy schedule. He used liquidation values, not market values. Mr. Brooks testified that he did not know market value was required and he and Mrs. Brooks had drastically underestimated the value of their property in all of their petitions. Mrs. Brooks testified that Mr. Brooks completed the schedules and she looked them over quickly but did not study them in detail.

LAW

The parties agreed prior to trial that Count One of the complaint was withdrawn. Only Counts 2, 3 and 4 were tried. USAA alleges that it should not have to pay any insurance proceeds to the Brooks for three reasons:

1) Count Two - Under the policy, no loss is covered unless the insureds submit a proof of loss detailing the loss if requested to do so by USAA. USAA alleges that the Brooks have never submitted a fully complete proof of loss.

2) Count Three - The policy is void if the insureds make material misrepresentations or false statements in the claims process. USAA alleges the Brooks misrepresented the value of their personal property loss.

3) Count Four - Covered losses under the policy possibly applicable to the Brooks loss are theft or vandalism. USAA alleges that the losses were not caused by theft or vandalism and should not be paid.

The Court will discuss each count separately.[4]

The insurance company has the burden of proving Counts Two, Three and Four by a preponderance of the evidence.

COUNT TWO

The Brooks' homeowner's insurance policy required them to, *inter alia*:

> [P]repare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory.

Section I-Conditions, 2.g(6), incorporating 2.e, Policy No. 00113 37 24 93A, Homeowner's Policy of the debtors.

The Brooks' homeowner's policy also had a rider called a "Home Replacement Plus" rider. It gave the Brooks the right to receive full replacement cost for covered personal property.

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[4]The Brooks moved for judgment in their favor under Fed. R. Bankr. P. 7052(c) on partial findings after the plaintiff's case in chief. The court took the matter under advisement. After a review of the evidence, the Court concludes that USAA established a prima facie case and the motion for judgment on partial findings should be denied.

Home Replacement Plus Rider, p.1, paragraph 3, Personal Property. It stated that insureds "may make a claim for loss to . . . personal property on an actual cash value basis and then make claim within 180 days after the loss for any additional amount due under the terms of the endorsement." The section is titled, "Your Option." The rider then states that "all other provisions of this policy apply." The policy also stated:

> When the cost to repair or replace is more than $500, we will pay no more than the actual cash value until repair or replacement is completed.

The Renter's Policy stated:

> Give us the price and date of purchase, actual cash value and a complete description of the articles involved.

Personal Property Conditions, Duties After Loss, paragraph 3, p. 8, Policy No. 00113 37 24 REN001, Renter's Policy of the debtors. It also provided that "we will pay the full cost of repair or replacement." Loss Settlement, p. 19. It too stated:

> When the cost to repair or replace an item is more than $500, no more than the actual cash value will be paid until repair or replacement is completed. You may make a claim for loss on an actual cash value basis and then make claim within 180 days after the loss for any additional liability.

Loss Settlement, paragraph 4, p. 19.

The policies therefore required an insured to submit proofs of loss (if requested) listing the actual cash value of items lost or damaged AND the replacement cost when determined. An amended proof of loss could be submitted in regard to replacement cost after purchase of a replacement if actual cash value was paid first. The Brooks were provided with proof of loss forms by USAA. The proof of loss form, at schedule B, asked for both types of values or the facts necessary to determine both values.

The purpose of the proof of loss is to provide the insurance company with sufficient information for its investigation. "Substantial and reasonable" compliance with the insurance company information request is required. "Substantial as distinguished from strict compliance of the proof of loss requirement is all that is required. 14 COUCH CYCLOPEDIA OF INSURANCE LAW (2d ed.) § 49:390; 3 RICHARDS INSURANCE § 547 (5th ed. 1952); VANCE INSURANCE, 798-898 (3d ed. 1951)." *Zions First Nat'l Bank, N.A. v. National Am. Title Ins. Co.*, 749 P.2d 651, 655 (Utah 1988). *See also, Daniel v. Pawtucket Mut. Ins. Co.*, 506 A.2d 1032, 1033 (R.I. 1986); *Canyon Country Store v. Bracey*, 781 P.2d 414, 418 (Utah 1989). Substantial and reasonable compliance is judged by whether the insurance company was prejudiced by the lack of completion of the proofs of loss. *Smith v. North Carolina Farm Bureau Mut. Ins. Co.*, 351 S.E. 2d 774, 777 (N.C. App. 1987).

In the third set of proofs of loss, the Brooks gave USAA a list of missing or damaged items. The items were valued at "unit cost." The ages of the items were listed. The Brooks did not provide (1) replacement receipts or sources of information about replacement cost; (2) date of purchase of original item; (3) place of purchase; or (4) owner. The earlier proofs had provided less information due to the fact that the items—other than those allegedly stolen on eviction day—were in storage and unavailable for inspection.

The information given in the proofs of loss, although certainly not complete, was "substantial and reasonable." It gave USAA enough information to look at the damaged items and begin determining replacement cost or actual cash value. As an insurance adjuster, Mr. Brooks probably could have done a better job of compliance. The Brooks need to provide more information but have not breached their policy with what was provided. The proofs provided as much information as the Brooks had and were reasonable under the circumstances.

The Court found no case in which an insured produced as much information as the Brooks did in which coverage was denied, except in cases involving federal insurance programs like the National Flood Insurance Program. Federal law requires stricter compliance. *Canyon Country Store v. Bracey*, 781 P.2d 414, 418 (Utah 1989) (no proof of loss and incomplete proof of loss sufficient where insurer could and did investigate loss); *Smith v. North Carolina Farm Bureau Mut. Ins. Co.*, 351 S.E. 2d 774 (N.C. App. 1987) (proof of loss without actual cash values, total loss claimed, time and origin of loss and signature of insured sufficient to preclude summary judgment). *See also*, *Daniel Pawtucket Mut. Ins. Co.*, 506 A.2d 1032 (R.I. 1986) (proof of loss without depreciation, actual cash value, purchase place and notarization would have been enough if she had appeared at a scheduled sworn statement); *contra*, *Durkin v. State Farm Mut. Ins. Co.*, 1997 WL 358120 (E.D. La. 1997) (federal flood insurer not liable where insured furnished fourteen page handwritten inventory list without stating value, ownership or purchase price); *Gowland v. Aetna Cas. & Sur. Co.*, 960 F.Supp. 101 (W.D. La. 1997) (no proof of loss in federal insurer case but later cost estimates were not sufficient to require coverage).

The Court concludes that the Brooks' proofs of loss were substantially in compliance with USAA's requirements. The Brooks did not breach their insurance contract.

COUNT THREE

The Homeowners and Renters policies state that the policies are void if an insured "whether before or after a loss has . . . intentionally concealed or misrepresented any material fact or circumstance . . . or . . . made false statements . . . relating to this insurance." Sections I and II-Conditions, p. 17, section 2 of the Homeowner's Policy; General Provisions, p. GP-2, Concealment, Misrepresentation or Fraud, Renters Policy. The issue is whether the value statements of the Brooks were false statements or misrepresentations. The insurance policies ask

the Brooks to submit the "cash value" of the loss at item 8. The form also included a "Schedule B" form which asked for:

Description of Property Comprising Claim	Owner of Property	Original Cost	Present Cost of Identical Item or Repair Cost	Date of Purchase. If gift or inheritance, give date acquired	Place of Purchase (store & location). Attach receipts or proof of purchase	FOR HOME OFFICE USE	
						Depreciation taken	Allowance

The form says "the Company requires this schedule to be completely filled out." The Brooks did not fill it out. They marked "see attached" on the schedule and did a listing which left out many of the categories. Their schedule stated the values at "unit cost" which the Court concluded was replacement cost. Mr. Brooks' testimony supported this. Mrs. Brooks stated she had listed original cost but the Court believes her to be mistaken. Even if the values stated are original cost values, the reasoning is the same. The real issue is whether the discrepancy between the bankruptcy schedule values of $13,140 and the proof of loss values of $70,000 indicate that the Brooks made a false or fraudulent statement to USAA as to the value of their personal property.

A misrepresentation in a proof of loss sufficient to void the policy must be made with "actual intent to deceive as to a matter material to the insured's rights under the policy." ALA. CODE § 27-14-28. *Martin Motors, Inc. v. State Farm Fire & Cas. Co. (Ex parte State Farm Fire and Cas. Co.)*, 523 So. 2d 119 (Ala. 1988); *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556 (11th Cir. 1983). A "slight exaggeration" of the value of property will not defeat a claim. Any overvaluation must be so "extravagant" that the valuation could only have been an intentional fraud. *Hartford Fire Ins. Co. v. Clark*, 258 Ala. 141, 61 So. 2d 19 (Ala. 1952).

The Court believes the Brooks used replacement or original cost value in their proofs of loss. The values are too high to be anything else. The Brooks' testimony is consistent with this. The values are at least facially credible as replacement value or original cost. They are not overly exaggerated. Therefore, no false or fraudulent statement was made to USAA.[5]

Based upon these facts, the Court cannot conclude that the Brooks misrepresented or concealed from USAA any material facts. They omitted facts they should have included which made their proof of loss incomplete, but they did not misstate any facts.

COUNT FOUR

The Brooks allege that they suffered three types of losses covered by their policies:

1) Theft and damage on the date of the eviction (January 18, 1995) of items listed on scheduled attached to Plaintiff's Exhibit 4 - covered under homeowner's policy.

2) Theft at Better Ben's in February 1995 of items listed in Plaintiff's Exhibit 5 - covered under renter's policy.

3) Damage at Better Ben's in February 1995 to items listed in Plaintiff's Exhibit 5 - covered under renter's policy.

The policies state that insured losses include theft and vandalism or malicious mischief. Covered losses do not include neglect of the insured or negligence of other parties.

Theft includes "loss from a known place when it is likely the property has been stolen." Renter's Policy, p. 3, Theft; Homeowner's Policy p. 8, Coverage C-Personal Property, 9.

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[5]The same is not true of the Bankruptcy Court. The Brooks did misstate the values of their personal property on their bankruptcy schedules. Mr. Brooks admitted at trial that the property was worth $30-40,000. The Court finds incredible Mr. Brooks' statement that he thought liquidation value was correct. The form clearly states "current market value." They also did not list several vehicles in which they had an interest through Bama Auto Sales & Service Co. As an attorney during most of the cases and an insurance adjuster in the last one, Mr. Brooks knew what "current market value" meant. The Brooks still have not amended their schedules even though they were aware of the problem in at least 1996.

Vandalism is "willful or malicious destruction or defacement of public or private property." Webster's Ninth new Collegiate Dictionary, 1985.

Due to the posture of this adversary case, USAA had the burden of proof. As to the vandalism issue, USAA needed to show by a preponderance of the evidence that intentional destruction or damage to Brooks' property did not occur. As to the theft issue, USAA needed to show by a preponderance of the evidence that it was not highly probable a theft occurred.

The Court will discuss specific proof offered as to each type of loss below. However, in general, USAA proved its case with a few exceptions. No witness witnessed or testified to viewing any acts of vandalism. The rushed eviction in the rain and nearly 1-1/2 years of storage in the condition items arrived at storage is ample explanation for the damage to sustain a preponderance standard.

As to the thefts, the credibility of witnesses was crucial. For theft, the Court concluded that more than the Brooks' testimony was necessary. Likeliness requires more than an insured simple statement that a theft occurred. The Court only found "likely" theft where evidence other than the Brooks' own testimony corroborated the existence of the item and its absence after the eviction or storage. Pictures of items on the day of the eviction, lack of inclusion on the Better Ben's inventory, or other witnesses' statements supporting existence and loss were sufficient. When USAA offered any evidence that put the existence or loss of an item or group of items in doubt, there was no longer a likelihood of theft. Mr. and Mrs. Brooks needed to offer more than their statements to rebut USAA's proof. Without an inventory when items went into Better Ben's and when items were released from Better Ben's, the Brooks' ability to prove likely losses was severely limited.

VANDALISM ON EVICTION DAY

On the day of the eviction, the Brooks claim $6,102.50 of personal property was stolen and $1,900.00 was "damaged beyond repair." Mrs. Brooks and every other witness stated that they saw no evidence of vandalism during the eviction or move by Better Ben's. No one intentionally harmed any of the Brooks' assets. The evidence showed that some items did end up in the drainage ditch at some point, but no one put them there. They slipped in. This is not vandalism, so the items damaged at the house on the day of the eviction are not insured losses.

THEFT ON EVICTION DAY

The Brooks claim seven stereo and sound equipment items were stolen. The evidence shows that they were removed from the house and placed on the right-of-way. (The videotape of the eviction shows the speakers.) They are not listed in Better Ben's inventory, nor did the movers remember loading them. The court concludes that it is likely the stereo equipment was stolen and is an insured loss. The same is true of the 25" television, 27" television and three 19" televisions, battery charger, air compressor and pushmower. The existence of these items was verified by someone besides the Brooks and the items did not appear on any Better Ben's inventory.

The Brooks claim that 83 tools and a large tool box were stolen. The Court concludes that the evidence does not establish that it was "likely" a theft of these items occurred. First, Hammac's Towing took all of the autos and parts to their lot. They also loaded some torches as shown in the videotape. Mr. and Mrs. Brooks have never gone to Hammac's to determine what items it holds. It is very possible the items are at Hammac's. Second, Mrs. Brooks gave Walter Steerman permission to remove a red tool box from the property. It is very possible it is the allegedly missing one and the tools are in the tool box.

The Brooks claim that an executive desk chair was stolen. The chair is in pictures of the move. It is not listed in the inventory done at Better Ben's unless it is listed simply as "chair." Martin Taylor did not remember it. Since its existence was shown and it was not inventoried, the Brooks have proven it is likely it was stolen.

THEFT AT BETTER BEN'S

The second proof of loss alleges that $38,653.84 of items were stolen at Better Ben's. Some of the items are specifically seen on the video, such as the riding lawnmower, the wheelbarrow and an oriental rug. The Better Ben's inventory does not reference them. They were too large to be packed in boxes so they would have been listed individually on the inventory if stored at Better Ben's. Whether stolen at the eviction or Better Ben's, the evidence showed they were gone. A theft was likely.

The Brooks also allege laser art animal pictures were stolen. The evidence showed at least one of these in Better Ben's offices. This establishes that it is likely all three were stolen after they were moved to Better Ben's.

The Brooks alleged that numerous other items were stolen such as Japanese wall hangings and jewelry. The Brooks offered evidence of the existence of some of these items before the eviction with pictures or testimony of a friend. However, the Court had no independent verification of loss after the release of the items from storage. Better Ben's inventory did not itemize any of the specific items in boxes packed by it or by the parties on eviction day. Items went to two locations and Ms. Moore, a friend of the Brooks, did not know what went to Mr. Brooks' residence. She was also not present as Mrs. Brooks unpacked all of the items delivered to Mrs. Brooks' residence. For the reasons stated above, the uncorroborated

testimony of the Brooks was insufficient. USAA established that there was not a high probability of theft. The items may still exist.

VANDALISM AT BETTER BEN'S

The Brooks offered extensive evidence as to the items returned from Better Ben's in damaged condition. They claim a $25,398 loss on this personal property. No party offered any direct evidence of vandalism. Much of the property was packed by nonprofessional movers and movers without packing materials on the day of the eviction. The items, when left so packed for over 15 months, are understandably damaged. The items are also understandably mildewed from sitting in the rain prior to loading. The items packed at Better Ben's were also first left in the rain unpacked, then moved to a dry place but stacked on the floor. It is understandable that they were damaged and mildewed. No one saw anyone mar or chip or scratch or break any items intentionally. The Court concludes the damage to the goods was not vandalism. The hurried nature of the move resulted in unfortunate but unintentional massive depreciation and damage to household goods.

CONCLUSION

The Court concludes that the defendants should be awarded a judgment declaring that they suffered a theft loss of the specific items mentioned above which are covered by their insurance policies. The Brooks may recover the sums allowable to them under the terms of the USAA policies if they provide to USAA, within sixty days of the date of this order, specific evidence of replacement cost of each stolen item, original cost information, place of purchase and actual cash value of each stolen item.

THEREFORE, IT IS ORDERED that the plaintiff, United Services Automobile Association, is awarded a judgment against the defendants, Samuel Robert Brooks, III and Linda

Bender Brooks, declaring that the plaintiff is required to pay any sums required by the defendants' insurance policies to the defendants for losses sustained as a result of their eviction on January 18, 1995 and subsequent storage of goods from January 1995 through May 1996 as to the following items:

1. Kenwood 200 amp receiver
2. Teac reel to reel
3. Dual cassette recorder
4. Turntable
5. Executive desk chair
6. Riding lawnmower (whichever one was in Defendants' Exhibit 47).
7. Wheelbarrow
8. Oriental rug
9. Three laser art pictures
10. Four speakers
11. 27" television
12. 25" television
13 Three 19" televisions
14. Pushmower
15. Battery charger
16. Air compressor

IT IS FURTHER ORDERED that the defendants shall provide to USAA within sixty days of the date of this order, the information listed below as to each item listed above.

1. Replacement or repair cost
2. Original cost
3. Place of purchase
4. Actual cash value

IT IS FURTHER ORDERED that USAA shall pay all sums owed by the defendants to the Chapter 13 trustee who shall disburse the funds to the defendants' creditors unless the debtors file a motion prior to the disbursement seeking other allocation of the funds.

Dated: March 24, 1998

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE