

ORIGINAL

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.,)	
)	Case No. 2015-1252
Plaintiff-Respondent,)	
)	On Order of Certification of Question
vs.)	of State Law from the United States
)	District Court for the Northern District
ALLSTATE INSURANCE COMPANY,)	of Ohio, Eastern Division, Case No.
)	15-cv-00239
Defendant-Petitioner.)	

MERIT BRIEF OF RESPONDENT WELLS FARGO BANK, N.A.

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INTRODUCTION

Allstate Insurance Company (“Allstate”) has impermissibly expanded the scope of a “vandalism and malicious mischief” exclusion to deny Wells Fargo Bank, N.A.’s (“Wells Fargo”) claim for arson damage under a Policy (as defined below) providing dwelling protection for homeowners. Although Allstate disguises the dispositive issue between the parties as a novel question of state law, it calls only for the District Court to apply well-established Ohio principles of contract interpretation to decide the parties’ dispute. However, those principles—in conjunction with established Ohio policies favoring insurance coverage—dictate that “arson” should be an included “fire loss,” and not an excluded act of “vandalism or malicious mischief,” in a homeowner’s insurance policy.

COUNTERSTATEMENT OF FACTS

A. The Insurance Claim

Wells Fargo is the insured mortgagee under an insurance policy Allstate executed with Antoniano Delsignore for a single-family home located in Poland, Ohio (the “Property”). (A50)¹ Mr. Delsignore defaulted on his mortgage payments in 2013, and by the end of that year, had vacated the Property. *Id.* On February 6, 2014, a fire damaged the Property and an independent third-party later determined that an unknown arsonist caused the fire. *Id.* Wells Fargo timely filed an insurance claim with Allstate for the fire damage, which Allstate denied on the grounds that arson fell within the Policy’s exclusion for “Vandalism or Malicious Mischief,” despite the Policy’s express coverage of damage caused by “Fire.” (A51)

¹ References to A__ are to the Appendix attached to the Brief of Petitioner Allstate Insurance Company With Respect To Certification Of A State Law Question filed on November 9, 2015 (“Allstate Br.”)

B. The Insurance Policy

Allstate Property and Casualty Insurance Company Homeowners Policy No. 9080584930 09/20 (the “Policy” or “Allstate Policy”) provides coverage in three parts: (a) dwelling protection, (b) other structures protection, and (c) personal property protection. (A18-19) Wells Fargo seeks to enforce Allstate’s coverage for dwelling protection.

C. The Policy Excludes “Vandalism or Malicious Mischief” From Dwelling Protection Without Defining Those Terms.

The Policy provides coverage for “sudden and accidental direct physical loss to property described in **Coverage A—Dwelling Protection** . . . except as limited or excluded in this policy.” (A19) (emphasis in original). Without defining the terms “vandalism” or “malicious mischief,” the Policy excludes the following from its dwelling protection:

6. Vandalism or Malicious Mischief if **your dwelling** is vacant or unoccupied for more than 30 consecutive days immediately prior to the vandalism or malicious mischief. A **dwelling** under construction is not considered vacant or unoccupied.

(A26)

D. The Policy Excludes “Vandalism and Malicious Mischief” From Personal Property Protection Without Defining Those Terms.

The Policy also leaves the terms “vandalism” and “malicious mischief” undefined with respect to its coverage for personal property, and describes the exclusion in the same manner as the “Vandalism or Malicious Mischief” exclusion for dwelling protection. With respect to losses to personal property, the Policy states, in relevant part:

- Losses We Cover Under Coverage C:**
We will cover sudden and accidental direct physical loss to the property described in **Coverage C—Personal Property Protection**, except as limited or excluded in this policy, caused by:
1. Fire or Lightning.

- ...
4. Riot or Civil Commotion, including pillage and looting during, and at the site of, the riot or civil commotion.

- ...
8. Vandalism and Malicious Mischief.

We do not cover vandalism or malicious mischief if **your dwelling** has been vacant or unoccupied for more than 30 consecutive days immediately prior to the vandalism or malicious mischief. A **dwelling** under construction is not considered vacant or unoccupied.

- ...
15. Theft, or attempted theft, including disappearance of property from a known place when it is likely that a theft has occurred. Any theft must be promptly reported to the police.

- ...
16. Breakage of glass, meaning damage to covered personal property caused by breakage of glass constituting a part of any **building structure** on the **residence premises**. This does not include damage to the glass.

(A20-22) Notably, "Fire" is listed separately from "Vandalism and Malicious Mischief" as a covered loss.

E. The Policy's Only Mention Of "Arson" Is In Connection With A "Fire Loss."

The Policy further provides an "Arson Reward" for information leading to the conviction of an arsonist. Specifically, the Policy states:

10. **Arson Reward**
We will pay up to \$5,000 for information leading to an arson conviction in connection with a fire loss to property covered under **Section I** of this policy. The \$5,000 limit applies regardless of the number of persons providing information.

(A24) The Arson Reward applies whether the insured's fire loss is under either the Policy's coverage for dwelling protection or personal property protection.

ARGUMENT

I. RESPONSE TO ALLSTATE'S PROPOSITION OF LAW

A. Allstate Attempts To Recast The Certified Question Of Law.

Allstate ignores the common sense and basic understanding of the Policy that if "arson" is a "fire," and "fire" is not "vandalism or malicious mischief," then "arson" cannot be "vandalism or malicious mischief." Rather than acknowledge this simple syllogism and answer the Certified Question of Law posed by the U.S. District Court, Allstate draws an arbitrary distinction between the Policy's "dwelling" and "personal property" provisions and urges the Court to find that arson falls within the vandalism and malicious mischief exclusion in the "dwelling coverage portion of the policy." Allstate Br. at 5. To reach this conclusion, Allstate suggests that the Court ignore how Allstate uses the terms "vandalism and malicious mischief" elsewhere in the Policy in direct contravention of well-established Ohio precedent. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St. 3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶ 17 ("We have long held that a contract is to be read as a whole and the intent of *each part* gathered from a consideration of *the whole*") (emphasis added); *see also Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11 ("We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy.").

By asking the Court to ignore the "personal property" provision of the Policy, Allstate concedes that "arson" is considered a "fire" under that provision. At the end of the day, Allstate is really asking for this Court to overturn decades of Ohio contract law to find that "vandalism and malicious mischief" can mean different things depending on where those terms are used in an insurance policy, rendering Ohio insurance policies vulnerable to insurance companies

ascribing inconsistent meanings to policy terms at their whim.

The principal authority Allstate relies on, *Botee v. Southern Fid. Ins. Co.*, does not support this position. Allstate Br. at 9-10. In *Botee*, a Florida appellate court reviewed an insurance policy that, like the Allstate Policy, did not define “vandalism and malicious mischief” in its dwelling and personal property coverage provisions, but listed “fire” as a covered peril in its personal property coverage provision. 162 So. 3d 183, 185 (Fla. App. 2015). However, unlike the Allstate Policy, “[a]rson is not mentioned in the [*Botee*] Policy under any section.” *Id.*

The Allstate Policy does mention “arson.” As a general provision applicable to all coverage, the Allstate Policy provides an “Arson Reward” for “information leading to an arson conviction in connection with a fire loss.” (A24) (emphasis added). Notably, Allstate did not offer the arson reward in connection with a “vandalism loss.”

Botee would have been decided differently had it included a similar provision. Under *Botee*, because the loss “was only to the structure and not to any personal property, it is only necessary to read Coverage A and the general conditions and definitions applicable to the entire Policy.” *Botee*, 162 So. 3d at 188 (emphasis added). So, even *Botee* urges this Court to consider the “Arson Reward” provision in the Allstate Policy. Because “arson” is only mentioned in the context of “fire” and never mentioned in the context of “vandalism or malicious mischief,” the plain and ordinary meaning of “arson” must be that it is a “fire.”

For the same reason, Allstate’s reliance on *Battishill v. Farmers Alliance Ins. Co.*, 127 P.3d 1111 (N.M. 2006) and *Bear River Mut. Ins. Co. v. Williams*, 153 P.3d 798 (Utah 2006) are misplaced. In both cases, the courts reviewed insurance policies that failed to mention arson. *Battishill*, 127 P.3d at 1113; *Bear River*, 153 P.3d at 800. In *Battishill*, the court recognized that the definition of “arson” was “essential in determining whether the exclusion was applicable[.]”

127 P.3d at 1113. Unlike *Botee*, the *Battishill* court looked at the relevant policy “as a whole,” but reached the same conclusion that there was no basis for interpreting the exclusion in the insured’s favor. *Id.* at 1116. Had the *Battishill* court examined the Allstate Policy, it would have likely interpreted the exclusion in Wells Fargo’s favor because the Allstate Policy does mention “arson” and only refers to “arson” in connection with a “fire loss.” (A24)

Following *Battishill*, *Bear River* also found that in a policy where “arson” is not mentioned, there was no “tension between the various terms” and that “arson” could reasonably be deemed an act of “vandalism.” 153 P.3d at 801. But, the *Bear River* holding is limited to policies in which “arson” is not used. *Fort Lane Vill., LLC v. Travelers Indem. Co. of Am.*, 805 F. Supp. 2d 1236, 1241 (D. Utah 2011) (finding “vandalism” to be ambiguous and interpreting the insurance policy to cover arson, the court stated that “[*Bear River*] does not provide enough information on the policy’s provisions, so it is not certain that the *Bear River* court’s finding of no ambiguity would transfer as a matter of law or fact to the case here.”) Thus, *Bear River* is irrelevant to the Policy.

B. Allstate Concedes That The Dispositive Issue In This Action Is A Matter Of Established Ohio Contract Law.

Despite its earlier insistence that the resolution of the parties’ dispute requires this Court to answer a novel question of state law, Allstate now asks this Court to use existing Ohio contract law to interpret the Policy. Allstate Br. at 6-7. For this reason, this Court need not answer the certified question of law because, as Allstate concedes, well-settled Ohio precedent on contract interpretation directs the U.S. District Court how to resolve the parties’ dispute. Nevertheless, while Wells Fargo certainly agrees that established Ohio principles of contract interpretation govern the outcome of this action, Allstate’s application of those principles are demonstrably wrong.

1. Ohio Courts Look To See How Undefined Terms Are Used In The Entire Insurance Policy To Construe Their Meaning.

As Allstate recognizes, this Court has already decided that under Ohio law, the meaning of terms in an insurance policy is informed by their use throughout the entire policy. *See Galatis*, 2003-Ohio-5849, at ¶ 11. In *Galatis*, this Court held that “[w]e examine the insurance contract as a whole . . . and look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy.” *Id.* Thus, the meaning of the term “vandalism and malicious mischief” under the dwelling protection provision of the Policy is, under Ohio law, informed by its use under the personal property provision.

Courts look at the insurance policy “as a whole” to ensure words are given the same meaning throughout the policy. *Hall v. Kemper Ins. Cos.*, 4th Dist. Pickaway No. 02CA17, 2003-Ohio-5457, ¶ 66 (stating that the preferred interpretation of a term is to apply it consistently throughout an insurance policy); *De Uzhca v. Derham*, 2d Dist. Montgomery No. 19106, 2002-Ohio-1814, ¶ 28 (“We believe that a consistent interpretation of the word is preferable to ascribing it different meaning depending on where in the policy it appears.”). Thus, despite the interpretation of Florida law in *Botee*, Ohio law dictates that “vandalism and malicious mischief” be given the same meaning under both the dwelling coverage and personal property coverage provisions of a single insurance policy.

2. When Looking At the Policy As A Whole, “Vandalism and Malicious Mischief” Refers To Something Other Than “Fire.”

Ohio contract law is clear that different words indicate a drafter’s intent for them to have separate meanings, and that courts should not interpret contracts to have superfluous provisions. *State v. Bethel*, 110 Ohio St. 3d 416, 423 (2006); *Andover Vill. Ret. Cmty. v. Cole*, 11th Dist. Ashtabula No. 2013-A-00057, 2014-Ohio-4983, ¶ 15. The Policy lists “fire”, “riot or civil commotion,” “theft,” “breakage of glass” and “vandalism and malicious mischief” as separate

perils under its personal property coverage. (A20-22) As a matter of Ohio law, then, neither “fire,” “riot or civil commotion,” “theft,” nor “breakage of glass” can mean the same thing as “vandalism and malicious mischief.” Otherwise, the “vandalism and malicious mischief” provision would be superfluous. To give meaning to the “vandalism and malicious mischief” provision, courts must construe it to mean something not already enumerated in the Policy, such as defacing property, graffiti, spray-painting, or ransacking. *Kenney v. Chesapeake Appalachia, LLC*, 2015-Ohio-1278, 31 N.E.3d 136, ¶¶ 29-40 (7th Dist.). By distinguishing “fire” damage from “vandalism and malicious mischief” damage, Allstate must have intended for “vandalism and malicious mischief” not to include fire.

The Policy later describes “arson” as a “fire loss.” (A24) Since “arson” is a “fire,” and “fire” is different from “vandalism and malicious mischief,” then “arson” cannot be subsumed under “vandalism and malicious mischief.” Indeed, as further discussed *infra*, defining “arson” as a separate act from “vandalism and malicious mischief” is consistent with the plain and ordinary meaning of those terms to Ohio citizens, and consistent with the Ohio Revised Code.

3. Even If The Policy Were Somehow Ambiguous, Ohio Law Is Well-Established That Any Ambiguities In Insurance Policies Are Resolved In Favor Of The Insured.

The most Allstate can argue is that the Court could reasonably interpret “vandalism and malicious mischief” to include acts of “arson.” If the Court finds this definition reasonable, then, under Ohio law, the Policy is ambiguous. *See Safeco Ins. Co. v. White*, 122 Ohio St. 3d 562, 2009-Ohio-3718, 913 N.E.2d 426, ¶ 49 (“An ambiguous provision is one that has more than one reasonable interpretation.”).

Yet Ohio law is abundantly clear that when faced with an ambiguous insurance policy, courts should resolve the ambiguity in favor of the insured. *Id.*; *Rinehart v. Dillard*, 10th Dist. Franklin No. 06AP-977, 2007-Ohio-4310, ¶ 56; *Knapp v. Nationwide Agribusiness Ins. Co.*, 2d

Dist. Montgomery No. 20613, 2005-Ohio-3060, ¶ 18. As the Tenth District Court of Appeals has stated, “[b]ecause the policy provisions at issue are reasonably susceptible of more than one interpretation, we must liberally construe these ambiguous provisions in favor of the insureds, and must strictly construe these provisions against the insurer, Allstate Insurance.” *Rinehart*, 2007-Ohio-4310 at ¶ 56. Indeed, this Court has held that exclusions in an insurance policy should be interpreted narrowly and only apply to that which is clearly intended to be excluded. *Westfield Ins. Co. v. Hunter*, 2011-Ohio-1818, 948 N.E.2d 931, ¶ 11. Thus, under principles of Ohio contract law, the inescapable conclusion is that the Policy provides dwelling coverage for arson.

II. WELLS FARGO’S PROPOSITION OF LAW

Unless otherwise stated in a homeowner’s insurance contract, “arson” must be considered a “fire” and is therefore a covered loss under a policy that insures homeowners from the costs of repairing fire damage.

A. Ohio Law Should Continue To Favor Insureds.

Ohio law favors insurance coverage. As Allstate correctly points out, any ambiguity in an insurance contract should be interpreted against the insurance company. Allstate Br. at 6-7. That is because as the drafter of insurance policies, insurance companies control the ambiguity in a policy. *See generally Rinehart*, 2007-Ohio-4310 at ¶ 53.

The Tenth District’s analysis in *Rinehart* is instructive. In that case, the insured was riding a motorcycle that he modified for off-street racing when he struck and killed a pedestrian. The deceased’s estate filed an insurance claim against Allstate. *Id.* at ¶¶ 5-8. The Allstate policy at issue did not cover injury or damage arising out of the “ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any **motor vehicle**” except for “any **motor vehicle designed principally for recreational use off public roads.**” *Id.* at ¶ 45 (emphasis added).

Allstate wrongfully denied coverage on the basis that a modified motorcycle did not fall within the policy's coverage. *Id.* at ¶ 49. Allstate suggested that coverage only extended to motor vehicles "originally" manufactured for recreational use or for motor vehicles that were designed principally "by a manufacturer" for recreational use. *Id.* at ¶ 53. The court disagreed, stating that "[i]f Allstate Insurance intended such limitations, it presumably could have drafted the policies to reflect such restrictions. Since it did not, we find the express language of the policies does not support such limitations." *Id.*; see also *United Capital Corp. v. Travelers Indem. Co.*, 237 F. Supp. 270, 276 (E.D.N.Y. 2002) ("As the drafter of the Policy, Defendant could have clearly excluded coverage for the fire at issue by defining 'Vandalism' in the Policy to include arson, or conversely, to define 'Fire' as accidental fires only.") (cited by Allstate).

In the present matter, had Allstate intended to exclude arson from coverage, it should have drafted the Policy to reflect such a restriction. *Hunter*, 2011-Ohio-1818 at ¶ 27 ("An insurer can use other exclusionary language to effectuate a broader bar to coverage. Indeed, other insurers evidently have done so for decades."). Allstate's position that "it is not necessary to have listed every conceivable act of vandalism in the policy" (Allstate Br. at 10) is simply not well-taken under Ohio law. If Allstate was required to specify whether a "motor vehicle designed principally for recreational use" meant only those motor vehicles designed by manufacturers for recreational use—and not those altered by their owners for recreational use—then it stands to reason that Allstate should similarly be required to specify whether "arson" is an excluded form of "vandalism or malicious mischief." Such requirement is consistent with sound Ohio public policy that liberally construes insurance policies in favor of the insureds, strictly construes exclusionary provisions against the insurer, and considers the policy as a whole. *Rinehart*, 2007-Ohio-4310 at ¶ 58.

B. Allstate Offers No Reason For Ohio To Follow The Authorities It Misconstrues In Its Brief When, Instead, Ohio Should Follow The Law Across The Region That Decidedly Favors Insurance Coverage For Arson Losses To Promote The Retention Of Ohio's Population And Stability Of Ohio's Economy.

1. Allstate Exaggerates The Split Among Jurisdictions By Misconstruing The Cases On Which It Relies.

Allstate cites cases from across the country supposedly holding that arson is an act of “vandalism or malicious mischief.” Allstate Br. at 7-8. Presumably, Allstate references those cases to demonstrate what this Court already knows—i.e., that there is no governing precedent in Ohio. But Allstate offers no reason why Ohio should follow those decisions. Furthermore, Allstate has misconstrued several of those cases.

a. Allstate Cites To Cases That Extend Insurance Coverage To Loss Caused By Arson.

In *United Capital Corp. v. Travelers Indem. Co.*, the Eastern District of New York granted summary judgment in favor of insurance coverage for an arson loss. 237 F. Supp. 2d at 278. Like the present case, the “determinative issue” in *United Capital* was whether “arson fire” is an excluded act of “vandalism” or an included “fire” loss. *Id.* at 273. The court found that the policy was ambiguous as to whether “vandalism” included “arson,” and resolved the ambiguity in favor of the insured. *Id.* at 278. Indeed, Allstate selectively misquotes *United Capital* in its brief (Allstate Br. at 8) where the Eastern District’s full statement was:

Although there is somewhat conflicting case law on the issue, courts generally agree that the ordinary use of the word vandalism would include an arson. Nonetheless, under the specific wording and format of the Policy, the Court finds that the Policy is at least ambiguous as to whether “Vandalism” in the Vacancy Exclusion includes arson. Because any ambiguity must be construed against the insurer as the drafter of the Policy, the Court finds for Plaintiffs on this issue and holds that the Vacancy Exclusion does not provide a basis for the denial of coverage.

Id. at 274 (italics added to show what Allstate excluded from its citation).

Similarly, in *Brinker v. Guiffrida*, the Eastern District of Pennsylvania also granted summary judgment in favor of insurance coverage. 629 F. Supp. 130, 136 (E.D. Pa. 1985). There, the issue was whether “arson” was within the insurance policy’s *coverage* for “vandalism and malicious mischief.” *Id.* The insurer suggested that arson was not included in “vandalism and malicious mischief” *coverage* because the policy was not a fire policy. *Id.* Adopting the general rule “to construe the policy in favor of coverage,” the Eastern District found that “arson” was “vandalism and malicious mischief” to *extend* coverage. *Id.* The holding of *Brinker*, then, is not that “arson” is act of “vandalism and malicious mischief,” but rather that courts should interpret insurance policies in favor of extending coverage to the insured. *See also Hunter*, 2010-Ohio-1818 at ¶¶ 31-32 (stating that liability *coverage* provision should be interpreted broadly, while liability *exclusion* provisions should be interpreted narrowly) (Cupp, J., concurring) (citing *Couch on Insurance* (3d ed. 2010) at § 101:52).

b. Allstate Cites A Case Where The Policy At Issue Specifically Defined “Vandalism” To Include “Fire.”

Allstate’s reliance on *McPherson v. Allstate Indemn. Co.*, No. 3:11cv638, 2012 U.S. Dist. LEXIS 58557 (M.D. Ala. Apr. 26, 2012) is equally misinformed. Allstate Br. at 8. In *McPherson*, Allstate Indemnity (an Allstate affiliate) issued an insurance policy for dwelling coverage that included the following provision:

Losses We Do Not Cover Under Coverages A and B:

18. **Vandalism.** However, **we** do cover sudden and accidental direct physical loss *caused by fire resulting from vandalism* unless **your dwelling** has been vacant or unoccupied for more than 90 consecutive days immediately prior to the **vandalism**.

Id. at *4 (boldface in original, italics added). A further provision stated:

Under Coverage A—Dwelling Protection and Coverage B—Other Structures Protection, Losses We Do Not Cover Under Coverages A and

B . . .

18. **Vandalism**, or loss *caused by fire resulting from vandalism*, if **your dwelling** is vacant or unoccupied for more than 90 consecutive days immediately prior to the **vandalism**.

Id. (boldface in original, italics added). The court predictably found “arson” to be within the “vandalism” exclusion because the provisions were specifically drafted to include “loss caused by fire.” *Id.* at *14. *McPherson* demonstrates that, in the present case, Allstate could have drafted the “vandalism and malicious mischief” exclusion in such a way that includes arson and fire loss. Because it did not, however, it must be that Allstate did not intend to include arson within the definition of “vandalism and malicious mischief” in the Policy.

c. Allstate Cites To Cases That Do Not Address Whether “Arson” Is Properly Considered A “Fire” Or “Vandalism or Malicious Mischief.”

Several cases Allstate relies on do not even address the question of whether “arson” is a properly excluded act of “vandalism and malicious mischief” when there is separate coverage for “fire.” Instead, they solely address whether a vacancy exclusion in an insurance policy is enforceable, regardless of whether the loss was caused by fire. *See, e.g., American Mut. Fire Ins. Co. v. Durrence*, 872 F.2d 378, 379 (11th Cir. 1989) (addressing whether insurance company could orally waive the vacancy exclusion by extending insurance coverage over a property it knew to be vacant); *Gov’t Emples. Ins. Co. v. Medley*, No. 96-0964, 1998 U.S. Dist. LEXIS 8085, at *2 (W.D. Va. Jan. 14, 1998) (“Defendant does not dispute these findings, and has produced no evidence that vandalism was not the cause of the fire.”; enforcing vacancy exclusion); *Frazier v. State Farm Fire & Cas. Co.*, 957 F. Supp. 816, 818 (W.D. Va. 1997) (“The court notes that the parties do not dispute the finding that the fire was intentionally set and that such a cause would qualify as vandalism under the policy in question.”; deciding whether

the vacancy exclusion was applicable when insurer knew that property was vacant but continued to collect insurance premiums). Because none of these cases examined the relevant policies, it is unclear whether those policies were similar to the *McPherson* insurance policy—i.e., were policies that defined “vandalism” to include arson or fire loss. In other words, if the policies in these cases defined “vandalism” to include arson, then their holdings are of no consequence to the issue at hand.

For the same reason, Allstate’s reference to *Estes v. St. Paul Fire & Marine Ins. Co.*, 45 F. Supp. 2d 1227, 1229-30 (D. Kan. 1999) is also unhelpful. Allstate Br. at 8. Although the court rejected the plaintiff’s argument that “‘vandalism’ does not include arson because the crime of arson requires the additional element of burning,” it did not address whether the policy listed fire as a separate peril. If it did not, then Allstate’s reliance on *Estes* is similarly unavailing.

d. Allstate Cites To Cases That Are No Longer Good Law.

Finally, several of Allstate’s authorities have been called into doubt by later decisions. Allstate relies on *Potomac Ins. Co. v. NCUA*, No. 96 C 1044, 1996 U.S. Dist. LEXIS 9844 (N.D. Ill. July 11, 1996) for the notion that the ordinary meaning of “vandalism” includes arson (Allstate Br. at 8), even though the same court subsequently held that arson “should fall under the umbrella of ‘fire’ (as opposed to ‘vandalism’) and thus qualifies as a covered loss under [an insurance] policy.” *Bellington Realty v. Phila. Ins. Co.*, No. 10 C 7224, 2013 U.S. Dist. LEXIS 76533, *11 (N.D. Ill. May 31, 2013). In *Bellington*, the court examined a policy that listed “fire” and “vandalism” as separate perils and did not define “vandalism” in its vacancy exclusion. *Id.* at *10. The court reasoned that the insurance company failed to show that “arson may only be reasonably equated with ‘vandalism’” and, under Illinois law, construed the policy against the insurer as the policy’s drafter. *Id.* at *10-11 (emphasis in original).

Similarly, the Superior Court of Connecticut expressly declined to follow *Costabile v. Metro Prop. and Casualty Ins. Co.*, 193 F. Supp. 2d 465 (D. Conn. 2002). *Cipriano v. Patrons Mut. Ins. Co.*, No. 4100708, 2005 Conn. Super. LEXIS 3577, *10 (Dec. 23, 2005), *reh'g denied*, 2006 Conn. Super. LEXIS 1176 (Apr. 18, 2006). In *Cipriano*, the court rejected the *Costabile* approach (Allstate Br. at 10) of interpreting insurance policies in piecemeal fashion “within the context of the distinct sections of the insurance policy in which [the terms] were found.” *Id.* at *9-10. Instead, it held that, under Connecticut law, it should look at the contract as a whole and consider all relevant portions together. *Id.* at *10. Like Ohio, in Connecticut, if the insurance contract is “susceptible of two equally reasonable interpretations, the one sustaining the claim and coverage for the loss prevails.” *Id.*

2. As A Matter Of Public Policy, Ohio Should Follow The Law Of Neighboring States That “Arson” Is A Covered “Fire” In Similar Insurance Policies.

Despite Allstate’s misconstruction of its own authorities, the majority rule across the country is that “arson” falls within the dwelling protection coverage for fire losses. The law of the other states within the U.S. Court of Appeals for the Sixth Circuit follows this majority rule. See *R&J Dev. Co., LLC v. Travelers Prop.*, No. 11-47, 2012 U.S. Dist. LEXIS 64102, at *6-7 (E.D. Ky. May 7, 2012) (finding no general insurance industry practice to treat “arson” as “vandalism” unless insurers expressly exclude arson damage to vacant property); *Bates v. Hartford Ins. Co.*, 787 F. Supp. 2d 657, 662-63 (E.D. Mich. 2011) (“Although Hartford could have included a *vacancy* provision with respect to fire losses in the policy, it did not do so. Hartford is not permitted to transform an exclusion from its *vandalism* coverage into an exclusion from its *fire* coverage.”; finding that “arson” does not fall within the “vandalism and malicious mischief” provision) (emphasis in original); *Southern Trust Ins. Co. v. Phillips*, No. E2014-01581, 2015 Tenn. App. LEXIS 457 at *26 (Tenn. App. June 10, 2015) (finding that the

“all-risk” dwelling coverage provision of an insurance policy “unambiguously provides coverage for fire and/or arson but does not cover vandalism or malicious mischief at a vacant dwelling”).

Pennsylvania law is the same. *Nationwide Mut. Fire Ins. Co. v. Nationwide Furniture*, 932 F. Supp. 655, 657 (E.D. Pa. 1996) (“[W]e interpret the policy to provide coverage when fire damages a vacant building even though vandals may have set the blaze. If Nationwide Insurance had wished the result to be otherwise, it could easily have defined vandalism to include non-accidental fires.”). Neither Indiana nor West Virginia have addressed this issue.

This Court has recently acknowledged that, when considering certified questions of state law, the law of neighboring states is persuasive. See *Chesapeake Exploration, LLC v. Buell*, No. 2014-0067, 2015-Ohio-4551 at ¶ 22 (Sup. Ct. Nov. 5, 2015). As a matter of public policy, consistent law across a region is good for the economy because it promotes stability and predictability. Furthermore, it is in Ohio’s best interests to adopt a similar approach with respect to insurance coverage to retain Ohio residents and prevent migration to neighboring states where the laws are more favorable to homeowners.

The court in *Southern Trust* collected and analyzed the case law addressing the same issue that is before this Court. *Southern Trust*, 2015 Tenn. App. LEXIS 457, at *12-16. Despite Allstate’s contention to the contrary, the overwhelming majority of cases that have considered the issue have found in favor of coverage—either because the courts found that the policies’ use of “arson” unambiguously falls within “fire” or, at worst, is ambiguous and should be resolved in favor of the insured. *Id.* (discussing cases decided under California, Connecticut, Illinois, Kentucky, Maryland, Michigan, New York, South Carolina, Oregon, Pennsylvania, Utah, Washington law). The *Southern Trust* court also considered the cases Allstate cited to support its position, and rejected the *Botee* approach of limiting “consideration to the section of the policy

addressing dwelling coverage under Coverage A and ignor[ing] the sections, on the very same page, addressing other types of coverage.” *Id.* at *25. When construing an insurance policy, courts should consider the entire written agreement, and not look at the vacancy exclusion in an “all-risk” provision in isolation. *Id.* at *25-26. Thus, the *Botee* approach is a minority view, and Allstate’s efforts to draw arbitrary distinctions between an “all-risk” policy and a “named-peril” policy are not well-taken.

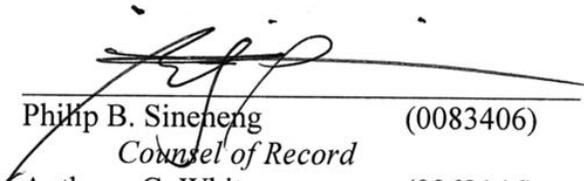
C. As A Matter Of Public Policy, “Arson” Should Be Distinguished From “Vandalism or Malicious Mischief” To Be Consistent With Ohio Statutory Law.

Finally, Ohio’s Revised Code already treats “arson,” “vandalism” and “mischief” as separate and distinct acts. *See* Ohio Rev. Code 2909.03 (Arson), 2909.05 (Vandalism), 2909.07 (Criminal Mischief). Thus, Ohio residents are already subject to laws differentiating between “arson” and “vandalism and malicious mischief.” Arguably, then, the plain and ordinary meaning of “arson” to an Ohio resident is that it is a separate act from “vandalism.” As a matter of public policy, Ohio’s common law should be consistent with its statutory law by not confusing or disrupting the common, natural understanding of “arson” and “vandalism.” *See Southern Trust*, 2015 Tenn. App. LEXIS 457, at *21 and n.4 (recognizing that criminal statutes provide the context for the common and ordinary meaning ascribed to terms in their everyday use).

CONCLUSION

For the foregoing reasons, Wells Fargo Bank, N.A. respectfully requests that should this Supreme Court of Ohio answer the Certified Question of Law, it should find that unless otherwise stated in a homeowner’s insurance contract, “arson” is a “fire” and therefore a covered loss under a policy that insures homeowners from the costs of repairing fire damage.

Respectfully submitted,



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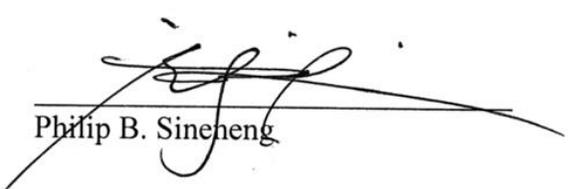
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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, I caused a true and copy of the foregoing *Preliminary Memorandum of Respondent Wells Fargo Bank, N.A.* to be filed with the Clerk of Court and mailed (via electronic means and via First-Class mail, postage pre-paid) to the following counsel of record:

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