

Is It Vacant or **OCCUPIED?**

Policy Language and Jurisdiction Play Key Roles in the Determination of Occupancy and Arson

By Patricia J. Trombetta and Frank T. Zeigon

Frequently, property adjusters must determine whether a claim is covered by an insurance policy when there is a question as to whether anyone inhabited the premises at the time of the loss. When the home is unoccupied or when there is very limited use of a commercial building, the question becomes that much more difficult for the front-line property adjuster.

To make the coverage determination properly, the adjuster needs to know what the policy states and the applicable laws in the jurisdiction. The purpose of this article is to lend a hand in making the determination of coverage; however, it is important to consult the pertinent policy for the loss and the laws in the jurisdiction where the property is located before coming to a final determination using the tools set out below.

Policy Language

In a homeowners' policy, the coverage at issue due to vacancy is contained in the exclusions portion of the policy, while the commercial policy will limit coverage for certain perils if the property is vacant under certain conditions. Although the commercial policies and the homeowners' policies contain the limiting language in different portions of the policy and the effect of vacancy will be the same, the method of making that determination will differ depending on the language of the policy and interpretation in the jurisdiction where the property lies.

The ISO language used in a homeowners' policy will exclude coverage for (1) vandalism, (2) sprinkler leakage unless the system has been protected against freezing,

(3) glass breakage, (4) water damage, and (5) theft or attempted theft, while other losses will be reduced by 15 percent if the house has been vacant for more than 60 (or 30) consecutive days.

The commercial policy ISO-recommended language excludes coverage for a tenant's loss if the building does not contain enough business personal property (BPP) to conduct its customary operations. The policy will exclude coverage to the owner or lessee of an entire building where the building is vacant if less than 31 percent of its total square footage is either leased for the lessee to conduct customary operations or used by the business owner to conduct customary operations.

The intent of a vacancy provision is to limit the exposure of risk to the company. Obviously, a vacant building or residence is a greater risk for some causes of loss. However, the intent of the provision must be balanced by providing the coverage the insured has bargained for in obtaining the policy.

Effect of Policy Language

Whether the vacancy clause in a policy is ambiguous is dependent on the wording of the contract. Vacancy and occupancy clauses are to be construed in conjunction with common coverage terms within the policy. Such clauses are not construed literally or rigidly; rather, courts take into consideration all the attendant circumstances and attribute such intention to the parties in entering into the contract as would appear consistent with reason.

When regarded as ambiguous, vacancy and occupancy provisions will be construed most strongly against the insurer and in favor of the damages for which the parties

contracted. To determine whether an insurance contract is ambiguous, most courts do not consider what the insurer intends the language to mean; instead, the courts view the language from the perspective of what a reasonably prudent insured would understand the language to mean. Like any contract, ambiguity is avoided by clearly drafting the vacancy clause.

Certain homeowners' policies contain a "vacancy" exclusion and others a "vacant, unoccupied, or uninhabited" exclusion. The latter is much more common and constitutes a much broader exclusion. Some courts allow these terms to be used interchangeably if the specific exclusion is within the policy. However, "vacant" and "unoccupied" are not synonymous. "Vacant" means entirely empty (i.e., lack of animate or inanimate objects), while "unoccupied" means the lack of habitual presence of human beings (i.e., lack of animate objects). This distinction has been followed by courts throughout the country. The difference between the definitions of the terms is critical when a policy contains a "vacancy" exclusion but not a "vacant and unoccupied" exclusion.

Context of a Homeowners' Policy

The occupancy of a home, within the meaning of a vacant or unoccupied clause, means the use of the home, in good faith, as the insured's residence. A dwelling is likely to come within the vacancy exclusion if it is not occupied or does not contain items or amenities customarily found in a home being used as a residence.

The adjuster's investigation into coverage for a loss will necessarily revolve around the wording of the exclusion to determine what needs to be shown in order for coverage to be provided under the policy terms. However, there are important areas for investigation that should be undertaken to assist with that determination:

- Take the recorded statements of the insured and any other residents of the household.
- Obtain utility statements for electric, water, gas, and telephone to determine the billing address and usage in the months preceding the loss going

back six months to a year.

- Check with the post office for any mail-forwarding orders.
- If the loss involves theft or fire, interview the investigating officers or firemen to determine what contents were in the house at the time of the investigation and what they were told by the interviewees regarding their whereabouts at the time of the loss. Be sure to get their contact information for further questions. If photographs were taken, obtain copies to assist with determining if the normal objects for residency were in the home at the time of the loss.
- Interview neighbors regarding their observations of the house prior to the date of loss and any conversations they may have had with the insureds or other residents of the household.
- Contact cellular providers for address and billing purposes.
- Determine whether the property was up for sale at or around the time of the loss and, if so, interview the real estate agent.

Commercial Policy Investigations

Occupancy of a commercial building depends on the type of building involved, whether the policy was issued to a tenant of space within a building or the whole building, and whether the policy coverage is for the owner of the entire building. Once that determination is made, the next step is an investigation into what constitutes "customary operations" of the insured and, in some cases even if the insured is the owner of the entire building, what the customary operations are of the tenants within the building to determine whether the loss to the owner is covered. The latter is necessary where, for example, an insured property is a shopping mall. If some of the tenants have rented space but were not putting that space to use for the intended purpose of selling their wares, then that space likely will not be considered as part of the percentage of space being used for customary operations in calculating whether the mall was 31 percent occupied at the time of the loss. To fully investigate whether there is

coverage under the policy, the adjuster should consider the following areas of investigation:

- Secure a copy of the lease
- Interview the tenant
 - ▶ *Do they still maintain the covered area?*
 - ▶ *Do they still have it furnished, or is it totally empty?*
 - ▶ *If partially empty, what percentage?*
- Determine when the property was last used for the tenant's customary operations
 - ▶ *Secure utility records*
 - ▶ *Are furnishings necessary for the customary operations present?*
- Obtain information on the rest of the building and its tenants
 - ▶ *Is 31 percent leased to tenants conducting their customary operations?*
 - ▶ *How many people still work and occupy the space?*
 - ▶ *Are they full-time or part-time?*

Does Vandalism Include Arson?

Whether the "vandalism" exclusion includes losses caused by arson depends upon the jurisdiction in which the loss occurred. As we have seen, the ISO homeowners' policy does not provide vandalism coverage for a dwelling and other structures if the dwelling has been vacant for 30 or 60 consecutive days. However, where the loss involves an arson fire, the first question an adjuster must deal with is whether the policy will exclude the fire loss where the property has been vacant beyond the limitations in the policy. If the insurance policy does not specifically exclude arson fires where the dwelling has been vacant for the specified period of time stated in the exclusion, then the adjuster must determine whether the jurisdiction in which the fire occurred has interpreted the vacancy provision for vandalism as inclusive of arson fires.

Two recent cases confronting this issue have concluded that the definition of vandalism includes arson. In *Battishill v. Farmers Alliance Insurance Company*, the

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New Mexico Supreme Court addressed whether a policy exclusion for vandalism included losses caused by arson. In interpreting the common and ordinary meaning of such terms, the *Battishill* court concluded that arson is a form of vandalism. The court also noted that the definitions of “arson” and “vandalism” specify a certain state of mind (willful, intentional, malicious, wanton, or reckless) and address a certain type of result (destruction, defacement, or damage) to property but do not limit the type of property or extent of damage.

A thorough investigation of the use of the property will protect the adjuster from claims of bad faith.

In *Bear River Mutual Insurance Company v. Williams*, the Utah Court of Appeals held that the policy language excluded coverage of losses caused by vandalism or malicious mischief regardless of the means used to inflict those losses, even when a loss could be characterized as arson. The court looked to the “usually accepted meaning” and did not find any ambiguity. The Kansas courts have agreed with the interpretation of vandalism being inclusive of arson in *Estes v. St. Paul Fire and Marine Ins. Co.*, as did an Illinois court in *Potomac Ins. Co. of Ill. v. NCUA*.

However, other jurisdictions have determined arson is not included in vandalism in an insurance policy, with the majority of the jurisdictions finding that, in other coverages under the policy, fire and vandalism are defined as different perils and a reasonable person would not understand them to be the same peril under the vacancy exclusion. Some of these cases include *Cipriano v. Patrons Mutual Ins. Co. of Ct.*; *United Capital*

Corp. v. Travelers Indemnity Co. of Ill.; *MDW Enterprises, Inc. v. CNA Ins. Co.*; *Mutual Fire Ins. Co. of Calvert County v. Ackerman*; and *American States Ins. Co. v. Rancho San Marcos Properties LLC*.

Other Issues: Waiver and Estoppel

A vacancy clause may be waived by the insurer or its authorized agent, or the insurer may be estopped from relying on a vacancy clause as a defense. Waiver by an insurer is an expression of intent by words or conduct that a particular provision of the policy shall not bind the insured. It arises in cases where the insurer has actual or implied knowledge of the facts constituting the insured’s breach of the provision in question. Estoppel of the insurer to assert the vacancy exclusion requires that the insured prejudicially rely on the insurer’s conduct, and an estoppel may arise where there are declarations, acts, or omissions dispensing with performance of the clause. Courts commonly use the terms “waiver” and “estoppel” interchangeably, although they are technically distinguishable.

It is important when investigating a loss that involves the potential application of the vacancy provisions in a homeowner’s or commercial insurance policy that

the adjuster investigate the loss keeping in mind the specific policy language used and the interpretation within the loss jurisdiction as to that provision.

Knowing whether the jurisdiction requires all items necessary to the normal use of a dwelling as a residence or whether minimal items in the dwelling are enough to trigger coverage under the policy is important to properly adjust the loss. A thorough investigation of the use of the property will protect the adjuster from claims of bad faith. As long as there is a good-faith reason to believe in the loss jurisdiction, the loss will not be covered due to vacancy of the property. **CLM**

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