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Trial  
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Insurance

FILLING THE VACANT PREMISES VOID

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Many insurance companies will try to deny a property damage claim when the insured premises are vacant or unoccupied. You need to know how to get around the pitfalls that your client may face and how to navigate the minefields of policy provisions.

**VACANT AND UNOCCUPIED** properties continue to be a problem in today's real estate market. As of June 2014, more than 14 million homes in the United States were vacant.<sup>1</sup> Residential and commercial properties that are empty for long periods of time are at increased risk of property crime, such as arson, theft, and vandalism, as well as late discovery of property damage.<sup>2</sup> Most insurance policies exclude or limit coverage if the premises are vacant for more than 30, 60, or 90 consecutive days before the loss occurs. Most policies contain provisions that allow insurers to cancel or void the policy if the property has been vacant for more than 60 consecutive days.

When a carrier denies an insured's claim for property loss, the resulting litigation can involve issues from ambiguous policy terms to underwriting decisions. Before you tackle these challenges, you should be aware of the types of vacancy provisions that homeowners and commercial property policies typically include and how courts have interpreted them.

The typical vacancy provision in a homeowners property policy is patterned after the Insurance Services Office (ISO) Homeowners 3-Special Form (HO-3 form) and excludes coverage for damage caused by vandalism if the dwelling has been vacant for more than 30 consecutive days before the damage occurs. The HO-3 form also excludes coverage for any damage caused by water that freezes in a system or appliance while the dwelling is vacant, unoccupied, or under construction, unless the insured has used reasonable care to maintain heat in the premises or shut off the water supply and drain the water.<sup>3</sup>

\***37** The typical vacancy provision in a commercial property policy is patterned after the ISO Building and Personal Property Form (BPP form). It excludes loss or damage caused by vandalism, sprinkler leakage, glass breakage, water damage, and theft or attempted theft if the building has been vacant for more than 60 consecutive days. For all other covered causes of loss, including fire, the carrier will reduce payment by 15 percent if the building has been vacant for more than 60 consecutive days before the loss occurs.<sup>4</sup>

Disputes invariably arise between policyholders and insurers over the following issues: whether the property was "vacant" or "unoccupied"; the meaning of "vandalism" and whether it includes an "incendiary" or "arson" fire; what the insured must do to protect a sprinkler system against freezing or what constitutes reasonable care to maintain heat to prevent a water-containing system from freezing; calculating the vacancy period; and whether the carrier is precluded from asserting a vacancy defense based on waiver or estoppel.

### Defining Vacant and Unoccupied

Homeowners property policies usually do not define "vacant" or "unoccupied," so courts give those terms their plain and ordinary meaning. Although they are frequently used interchangeably, the terms have different meanings: Vacant means

empty or without contents, and unoccupied means the lack of people's habitual presence.<sup>5</sup> A dwelling may be unoccupied even though it is not vacant, such as when the insured is absent from the property for reasons involving health or travel. In those situations, courts have declined to conclude the insured dwelling is unoccupied if there is an intention to return.<sup>6</sup>

Rental dwellings also may be temporarily uninhabited without running afoul of an occupancy requirement, such as temporary lags between renters or periods of renovation for anticipated renters.<sup>7</sup> And it is possible for two dwellings to be occupied at the same time by the same person.<sup>8</sup>

However, courts do not agree on how the definitions of vacant and unoccupied apply under various circumstances. For instance, one court held that stoves, refrigerators, kitchen chairs, and an air conditioner were sufficient to raise an issue of fact about whether a two-unit rental dwelling was vacant,<sup>9</sup> while another court concluded that a 10-unit apartment building was vacant despite the presence of stoves and refrigerators.<sup>10</sup> Likewise, one court found an issue of fact regarding unoccupancy where the insureds moved out of the house and discontinued electricity and phone service, but returned periodically to mow the lawn and dust the remaining furniture.<sup>11</sup> In contrast, another court held that although the insureds stored some personal property, visited the home to care for their dogs and garden, \*38 and spent the night on several occasions, the residence was unoccupied.<sup>12</sup>

**-o Residential properties.** The key factor in a residential vacancy determination is whether contents are present that are consistent with the property's use as a dwelling, such as a bed, refrigerator, stove, washer, dryer, dishwasher, hot water heater, and electrical and plumbing fixtures.<sup>13</sup> With respect to occupancy, if the insured was not living or sleeping in the home, focus on the contact your client had with the premises while he or she was absent, including regular or periodic visits to clean, maintain, inspect, and secure the dwelling.<sup>14</sup> Those facts establish that your client intended the dwelling to be his or her home, was in control of the property, and maintained an unfettered right to access and possession.

**-o Commercial buildings.** Under the current BPP form, the definition of vacant depends on whether the policy is issued to a building owner or a tenant. For owners, the property is considered the entire building, and it is vacant unless a lessee or sub-lessee rents at least 31 percent of its total square footage and uses it to conduct customary business operations, or the building owner uses it to conduct customary operations.<sup>15</sup> For tenants, the building is the unit the tenant rents, and it is vacant when the premises do not contain enough business personal property to conduct customary operations.<sup>16</sup> Most of the reported decisions interpreting the definitions of vacancy in these cases involve the meaning of the undefined phrase "conduct[ing] customary operations." The plain and ordinary meaning of "customary" is "commonly practiced/used, or observed."<sup>17</sup> Thus, courts have looked at whether the insured used the premises to conduct its commonly practiced business activities. If, for example, instead of using the premises to conduct high school classes, operate a restaurant, or package meat, the insured simply maintained an office or stored equipment in the building after ceasing these business operations, such activities do not constitute conducting customary operations.<sup>18</sup>

## Property Under Construction

Vacancy provisions in homeowners and commercial policies typically state that properties under construction or renovation are not considered vacant. "Construction" is not limited to the erection of a new structure; it contemplates "renovation," "remodeling," and "additions," although those terms usually are not defined.<sup>19</sup> Courts have held that when "renovation" is used in conjunction with "construction," it includes any activity that restores the property to its former condition, such as repairing broken waterlines, damaged ceiling tiles, toilets, and porches, and replacing drywall or a roof.<sup>20</sup> Under this interpretation, a broad range of construction or renovation activity would prevent a property from being deemed vacant.

To support your argument that the loss is covered, you must present evidence that shows substantial, continuous construction or renovation activity at the premises. Sporadic entry is insufficient. Ask about the ongoing presence of construction personnel, including the number of people who worked on the project, the amount of time they spent in the building, and how much of the building they occupied.<sup>21</sup>

## Vandalism and Fire

If vandalism or fire occurs at any residential or commercial non-vacant property, the policy covers the loss, assuming no

other exclusions apply. If the commercial building is vacant for 60 consecutive days or the residential dwelling is vacant for 30 consecutive days before the loss, then there is no coverage for damages due to vandalism. If a fire is to blame, then the policy affords coverage regardless of whether the residential or commercial property was vacant. In fire loss cases where the commercial building is vacant for 60 consecutive days, the insured's recovery is reduced by 15 percent.

When a vacant building or residence is deliberately set ablaze, the issue is whether the carrier considers the fire an act of vandalism, excluding the loss from coverage. There is no one common meaning of vandalism, and property policies rarely define it. It can mean willful or malicious destruction of property, but it also can be interpreted narrowly as a \*39 type of behavior directed at property with artistic, historical, architectural, or personal significance.<sup>22</sup>

Courts differ on the meaning of vandalism in the context of an incendiary or arson fire. An incendiary fire is usually defined as a fire deliberately ignited by a person who knows that the fire should not be ignited.<sup>23</sup> Under most criminal statutes, an arson fire is defined as the intentional burning of someone else's property or one's own property.<sup>24</sup> Some courts have concluded that an incendiary or arson fire constitutes vandalism, because it involves willful, wanton, or reckless damage of another's property.<sup>25</sup> Others have held that vandalism does not include such damage.<sup>26</sup> Investigate whether the fire was an incendiary or arson fire. Some deliberately ignited fires can be accidental. For example, trespassers might break into a building and light a candle, fall asleep, and wake to find the place ablaze.<sup>27</sup> Obtain reports from local authorities as to the cause and origin of the fire, and retain a fire investigation expert.

You must be familiar with arguments supporting the position that arson and vandalism have different meanings for purposes of a vacancy provision. One successful argument you can raise is that the insurer should have drafted its vacancy provision in clear, explicit, and conspicuous language if it intended to exclude coverage for an arson fire. Some insurers define vandalism (willful or malicious conduct resulting in damage or destruction of property) in their vacancy provisions, and in some cases, they explicitly exclude a fire loss caused by an intentional and wrongful act committed in the course of vandalism.<sup>28</sup>

## **Vacancy and Freezing**

Even if a property is vacant or unoccupied, most policies do not automatically exclude coverage for water damage due to a plumbing, heating, air conditioning, or fire sprinkler system freezing. Coverage will be provided if the insured either "protected the system against freezing" or "used reasonable care" or "exercised due diligence" to maintain heat in the building or to shut off the water supply and drain the system and appliances of water. Property policies do not define any of these terms or specify what measures the insured must take to prevent freezing, but reasonable care and due diligence imply exercising whatever precautions are reasonably necessary. Courts have held that whether certain precautions--such as maintaining the heat at 42 degrees Fahrenheit<sup>29</sup> or arranging for an automatic fuel oil delivery service<sup>30</sup>--constitute reasonable care or due diligence is an issue for the factfinder unless reasonable minds could not differ over the result.<sup>31</sup>

## **Calculating the Vacancy Period**

You may face disputes over when the clock starts running for the vacancy period, particularly for a commercial building. Some commercial property insurers claim that the vacancy period includes any vacancy existing before the policyholder owned the building and before the carrier issued or renewed coverage.

For example: A policyholder who owns and insures several commercial properties for his business purchases another building that has been vacant for more than 60 days. The day after the closing, someone steals the building's wiring and compressor. During the one-day period between the closing and the theft, the policyholder moved no equipment or personal property into the building. The insurer denies the claim under a provision that does not cover theft losses when the building is vacant for more than 60 consecutive days.

Most courts have rejected the insurer's position that the vacancy period includes any vacancy existing prior to the policyholder's ownership of the building and prior to the insurer issuing or renewing a coverage, reasoning that a previous vacancy condition under a prior owner is disregarded unless specific policy language provides otherwise, and vacancy is measured from the inception of coverage, not the inception of the vacancy.<sup>32</sup>

The current BPP form also measures the vacancy period from coverage inception. This is because of how the term vacant is defined. When a policy is issued to the building's owner, the property is considered vacant when the owner uses less than 31 percent of its total square footage to conduct customary business operations. Thus, the earliest the 60-day vacancy period can start to run is when a policy is issued. At that point, the building owner has 60 days to conduct customary operations in at least 31 percent of the total square footage to avoid the vacancy provision applying to losses during this 60-day period.

### **Waiver and Estoppel**

Technically, there is a distinction between the doctrines of waiver and estoppel,<sup>33</sup> but in insurance law, the distinction is difficult to discern. Courts have found it unnecessary to distinguish between them and have used the terms interchangeably. They use these terms \*40 to avoid a forfeiture of coverage where an insurer or its authorized agent knows the premises are vacant or unoccupied when the policy becomes effective. A carrier that issues a policy knowing the premises is vacant or unoccupied waives the existing vacancy or unoccupancy provision and is estopped from asserting it as a defense to coverage.<sup>34</sup>

Because waiver and estoppel focus on the insurer's knowledge of vacancy before issuing or renewing a policy, you should investigate the policy's underwriting. Request a copy of the underwriting file during discovery so that you can examine the carrier's criteria for insuring and inspecting vacant property risks and evaluate all communications between the carrier and the insurance producers involved in the policy procurement process. Find out whether an agency relationship exists between the insurance producers and the carrier; if so, the insurance producers' undisclosed knowledge of the property's vacant condition will be imputed to the insurer.<sup>35</sup>

Vacant and unoccupied commercial and residential properties present numerous insurance issues. But if you know what to look for, you can fight back against insurance carriers that wrongfully deny property damage claims.

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Footnotes

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<sup>2</sup> See e.g. *Catalina Enters., Inc., Pen. Trust v. Hartford Fire Ins. Co.*, 67 F.3d 63 (4th Cir. 1995).

<sup>3</sup> Diane W. Richardson, *Homeowners Coverage Guide* (Natl. Underwriting Co. 1999).

<sup>4</sup> Donald S. Malecki, *Commercial Property Coverage Guide* (5th ed., Natl. Underwriting Co. 2013).

<sup>5</sup> See generally Allan E. Korpela, *What Constitutes "Vacant or Unoccupied" Dwelling Within Exclusionary Provision of Fire Insurance Policy*, 47 A.L.R.3d 398 (1973); see also Joseph E. Edwards, *What Constitutes "Vacancy" or "Unoccupancy" Within Fire Insurance Policy on Building Other Than Dwelling*, 36 A.L.R.3d 505 (1971).

<sup>6</sup> See e.g. *Maldonado v. Allstate Ins. Co.*, 849 F. Supp. 2d 1080 (D. Colo. 2012); but see *Est. of Luster v. Allstate Ins. Co.*, 598 F.3d 903, 907 (7th Cir. 2010).

<sup>7</sup> See e.g. *Smith v. Lumbermen's Mut. Ins. Co.*, 300 N.W.2d 457 (Mich. App. 1980); but see *Rojas v. Scottsdale Ins. Co.*, 678 N.W.2d 527 (Neb. 2004).

<sup>8</sup> See e.g. *Farmer's Mut. Prot. Assn. of Tex. v. Wright*, 702 S.W.2d 295 (Tex. App. 1985).

<sup>9</sup> *Thompson v. Green Garden Mut. Ins. Co.*, 633 N.E.2d 1327, 1330-31 (Ill. App. 3d Dist. 1994); see also *Shaffner v. Farmers Mut. Ins. Co. of St. Clair Co.*, 859 S.W.2d 902, 907-08 (Mo. App. S. Dist. 1993).

<sup>10</sup> *Myers v. Merrimack Mut. Fire Ins. Co.*, 788 F.2d 468 (7th Cir. 1986); see also *Speth v. State Farm Fire & Cas. Co.*, 35 P.3d 860 (Kan. 2001).

<sup>11</sup> *Graves v. M.F.A. Mut. Ins. Co.*, 446 S.W.2d 154 (Mo. App. 1969); see also *Keelen v. Metro. Prop. & Cas. Ins. Co.*, 2012 WL 1933747 at \*8 (E.D. La. May 29, 2012).

<sup>12</sup> *Carroll v. Tenn. Farmers Mut. Ins. Co.*, 592 S.W.2d 894 (Tenn. App. 1979); see also *Vushaj v. Farm Bureau Gen. Ins. Co of Mich.*, 773 N.W.2d 758, 760 (Mich. App. 2009).

<sup>13</sup> See e.g. *West Am. Ins. Co. v. Hernandez*, 669 F. Supp. 2d 1211 (D. Or. 2009); *Lundquist v. Allstate Ins. Co.*, 732 N.E.2d 627 (Ill. App. 2d Dist. 2000).

<sup>14</sup> See *Indep. Fire Ins. Co. v. Butler*, 362 So.2d 980 (Fin. 1st Dist. App. 1978); *Burrell v. Seguros Am. Banamex, S.A.*, 316 So.2d 177 (La. App. 4th Cir. 1975).

<sup>15</sup> See e.g. *Holmes v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, 756 S.E.2d 848 (N.C. App. 2014); *ACGS Marine Ins. Co. v. Spring Center, Inc.*, 2014 WL 1713938 (Tex. App. 14th Dist. Apr. 29, 2014) (mem.).

<sup>16</sup> See e.g. *Heartland Capital Invs., Inc. v. Grange Mut. Cas. Co.*, 2010 WL 432333 (CD. Ill. Feb. 2, 2010); *Nationwide Mut. Ins. Co. v. Pinnacle Baking Co., Inc.*, 2014 WL 1347092 (Ohio App. 10th Dist. Mar. 27, 2014).

<sup>17</sup> *Saiz v. Charter Oak Fire Ins. Co.*, 299 Fed. Appx. 836, 840 (10th Cir. 2008).

<sup>18</sup> See e.g. *Saiz*, 299 Fed. Appx. 836; *Mollis v. Travelers Indent. Co. of Conn.*, 2010 WL 1050991 at \*\*7-9 (W.D. Tenn. Mar. 19, 2010); *Sorema N. Am. Reinsurance Co. v. Johnson*, 574 S.E.2d 377, 379-80 (Ga. App. 2002).

<sup>19</sup> See e.g. *TRB Invs., Inc. v. Fireman's Fund Ins. Co.*, 145 P.3d 472 (Cal. 2006).

<sup>20</sup> See e.g. *Farbman Group v. Travelers Ins. Co.*, 2006 WL 2805646 (E.D. Mich. Sept. 28, 2006); *Baker v. Nationwide Mut.*, 2013 WL 1905334 (Ohio App. 9th Dist. May 6, 2013); but see *Suder-Benore Co., Ltd. v. Motorists Mut. Ins. Co.*, 995 N.E.2d 1279 (Ohio App. 6th Dist. 2013).

<sup>21</sup> *TRB Invs.*, 145 P.3d at 478-79.

<sup>22</sup> See e.g. *Battishill v. Farmers Alliance Ins. Co.*, 97 P.3d 620, 623-26 (N.M. App. 2004), *rev'd*, 127 P.3d 1111 (N.M. 2006).

<sup>23</sup> Natl. Fire Protec. Assn., *NFPA 921, Guide for Fire and Explosion Investigations*, 20.1.3, www.nfpa.org/921.

<sup>24</sup> See *Black's Law Dictionary* 118 (Bryan A. Garner, ed., 8th ed., West 1999).

<sup>25</sup> See e.g. *Estes v. St. Paul Fire & Marine Ins. Co.*, 45 F. Supp. 2d 1227, 1229 (D. Kan. 1999); *Bear River Mut. Ins. Co. v. Williams*, 153 P.3d 798, 800-01 (Utah App. 2006).

<sup>26</sup> See e.g. *Bellington Realty v. Phila. Ins. Co.*, 2013 WL 2403620 (N.D. Ill. May 31, 2013); *R&J Dev. Co., LLC v. Travelers Prop. Cas. Co. of Am.*, 2012 WL 1598088 (E.D. Ky. May 7, 2012); *Leander Land & Livestock, Inc. v. Am. Econ. Ins. Co.*, 2013 WL 1786348 at \*\*8-9 (D. Ore. Apr. 21, 2013); *Mut. Fire Ins. Co. of Calvert Co. v. Ackerman*, 872 A.2d 110, 117 (Md. Spec. App. 2005).

<sup>27</sup> See e.g. *Garcia v. Farmers Ins. Exch.*, 122 F. Supp. 2d 926 (N.D. Ill. 2000).

<sup>28</sup> See *McPherson v. Allstate Indem. Co.*, 2012 WL 1448049 (M.D. Ala. Apr. 26, 2012).

<sup>29</sup> *Short v. N. Pointe Ins. Co.*, 2013 WL 1828024 at \*9 (S.D. Ind. Apr. 29, 2013).

<sup>30</sup> *McCabe v. Allstate Ins. Co.*, 688 N.Y.S.2d 764 (N.Y. App. Div. 3d Dept. 1999).

<sup>31</sup> See e.g. *7th & Allen Eqs. v. Hartford Cas. Ins. Co.*, 2012 WL 5392167 at \*\*7-8 (E.D. Pa. Nov. 2, 2012).

<sup>32</sup> See *Kolivera v. Hartford Fire Ins. Co.*, 290 N.E.2d 356 (Ill. App. 1st Dist. 1972); *Bledsoe v. Farm Bureau Mut. Ins. Co.*, 341

S.W.2d 626 (Mo. App. 1960); but see *Gas Kwick, Inc. v. United P. Ins. Co.*, 58 F.3d 1536 (11th Cir. 1995); *Babandi v. Allstate Indem. Ins. Co.*, 2008 WL 906116 (N.D. Ohio 2008).

<sup>33</sup> See generally Steven Plitt et al., *Couch on Insurance*, vol. 17, § 238:12, 238:14 (3d ed., West 2005). Waiver is the intentional or voluntary relinquishment of a known right, can be express or implied, and arises from acts, words, conduct, notice, or knowledge by the insurer. Estoppel rests on words or conduct that cause another person to believe a certain state of things exists and to consequently change his or her position in an adverse way.

<sup>34</sup> See e.g. *Poland v. Phillips*, 371 So. 2d 1053 (Fla. 3d Dist. App. 1979); *Zweygarde v. Farmers Mut. Ins. Co. of Neb.*, 241 N.W.2d 323 (Neb. 1976); see also Plitt et al., *id.*, at vol. 6A, §94:147-151.

<sup>35</sup> See *Wells v. N.C. Farm Bureau Mut. Ins. Co.*, 258 S.E.2d 831 (N.C. App. 1979).

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