



## Current Articles 2007 –October

### Vacancy Clauses and the Courts

Exclusions relating to vacant properties have been common to property policies for many years. The Commercial Properties exclude coverage if the property is vacant, unoccupied or all operations cease for 30 consecutive days. Habitational policies have an exclusion for vacancy only and which is defined to mean *“whether partially or fully furnished, the occupant(s) have moved out with no intent to return ..”*

Over the past several months, I have been involved with 3 cases where coverage was denied because the risk was vacant but the courts found in favour for the plaintiffs and the plaintiffs recovered from either their insurer or by the broker’s Errors and Omissions insurer.

The first case involved the purchase of a commercial and profitable hotel by an uninformed and inexperienced insurance buyer. The purchaser had never bought insurance personally. He lived with his parents and drove the parent’s automobiles. He learned the hotel business from his parent’s hotel and ventured out on his own. On the same property was a rented four unit apartment building. After several months he decided to close the apartment and after evicting the 4 tenants he shut off the services. Some 4 months later the building burned and the insurer denied coverage because of the vacancy exclusion.

His defence was that he was never made aware of the vacancy exclusion and with regard to insurance policies did not understand the meaning of vacancy. He was successful in obtaining an ACV settlement plus the cost of debris removal from the broker.

The second case involved a farmer who, in addition to his farming duties, owned two rented dwellings on adjacent property. The insured decided to upgrade this location and was in the process of replacing tiled floors, kitchen cabinets and appliances, painting and other improvements. There was also some furniture in the house which belonged to the owner. The farmer was at this location every day and occasionally would have an afternoon nap while there. The house was torched and seriously damaged. The previous tenants had moved out some 3 months earlier. It was vacant.

The broker admitted that he told the client that if any of the properties should ever become vacant to call him immediately. The client admitted that the broker gave him this advice regarding vacancy but in the mind of the client the house was not vacant because he was there every day and there was furniture and appliances in the house. The provisions of the vacancy clause were not explained – just the term “vacancy”.

In another situation a couple bought a house that needed work and remained living in their home while the work was being done. The broker effected coverage on the new location on a fire and extended coverage basis **including a vacancy permit**. Some three weeks after they purchased the new location, there was a serious water leak on the second floor creating a water loss of

approximately \$85,000.00. Although the vacancy clause does not exclude coverage for the first 30 consecutive days, this 30 day permission does not apply to water damage (and vandalism). The insurer denied the claim. The vacancy permit stated *"Please read your policy as certain perils may not apply during vacancy or unoccupancy"*. The insurer had not forwarded the policy and the vacancy permit at the time of the loss! The broker has been found negligent in not explaining the policy and vacancy provisions.

A recent American decision was used as defense. In TRB Investments v. Fireman's Fund there was extensive water damage while the building was being renovated. The insurer denied because of the vacancy. TRB argued that buildings under construction are not considered vacant. **The judge agreed!** "We believe the proper inquiry for determining whether a building is under construction for purposes of defining an exception to the vacancy exclusion is whether the building project, however characterized, results in substantial continuing activities by persons associated with the project at the premises during the relevant time period," the judge began.

The message here is that a broker must make the client aware of the vacancy exclusion and all of the relevant conditions that apply, along with explaining to the client the insurance particulars relating to a vacant building.

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