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FROM THE EDITOR

In everyday use, the terms "vacant" and "unoccupied" are often taken to mean the same thing. When it comes to recovering from an insured property loss involving a premises determined to be one or the other, however, the differences between the two not only become apparent, they can be significant. Add the fact that policy provisions for coverage can vary — and be subject to interpretation by the courts — and the need for a clear understanding of vacancy/occupancy clauses is obvious.

An equally strong case can be made for better understanding how protective safeguards endorsements work. While they might offer businesses a premium discount when attached to their policy, they also carry responsibilities for seeing to it that loss-deterring devices such as fire and theft alarms are functioning as they should — and consequences when they are not.

In this issue of Adjusting Today, *experienced insurance claims professional and respected author Robert J. Prahl, CPCU, examines both of these subjects in an enlightening discussion of each. It is valuable information for owners and managers, agents and brokers, and all who have an interest in protecting a property in today's business world.*

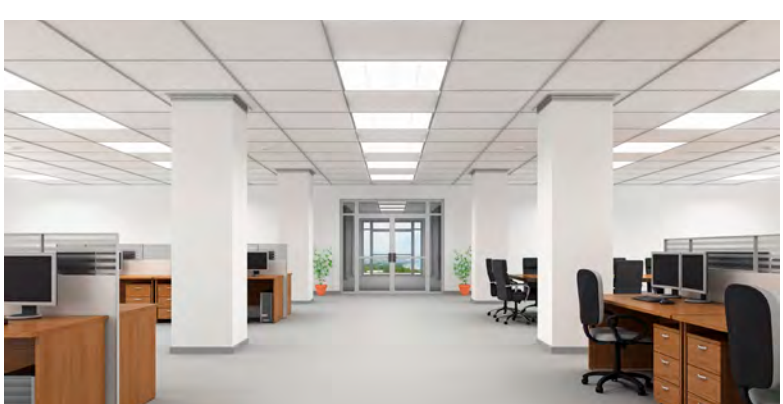
Sheila E. Salvatore
Editor

Vacancy/Occupancy Clauses in Property Insurance – An Often Overlooked but Significant Limitation

By Robert J. Prahl, CPCU

The *vacancy and occupancy* provision in insurance policies often is not recognized by insureds until a loss occurs and is denied by the insurer. The provision, which is commonly found in commercial property and homeowners policies, has been the source of frequent litigation.

Although dictionary definitions of the terms *vacant* and *unoccupied* vary slightly, "vacant" typically means *empty, having nothing in it, devoid of contents*. "Unoccupied" ordinarily means *without occupants, but with furniture and personal effects being present*. The term implies a temporary



absence of the occupant(s). Insurers are generally more concerned with vacancy than unoccupancy.

When these terms are included in the policy, but not defined, adjusters need to refer to common dictionary meanings of the terms. Even when the term "vacant" is defined in the policy, it is not always clear from the facts of the situation whether the structure is actually vacant at the time of loss.

Following economic downturns, many businesses close and many homeowners suffer foreclosure, which increases the number of unoccupied or vacant structures. Insurers have always been concerned about such buildings or dwellings — particularly vacant structures — because of the increased exposures to loss they represent. A vacant or unoccupied structure increases the loss potential from a number of perils because typically no one is tending to the building or dwelling. For this reason, a vacant structure poses higher risks of loss from perils such as fire, vandalism, theft and other criminal activity, water damage from leaking or burst pipes, mold, and weather-related damages. In vacant or unoccupied buildings, damage caused by these perils can go undetected for some time, thus increasing the severity of the loss.

"Buildings under construction or renovation are NOT considered vacant."

The vacancy provision in standard commercial property policies[1] demonstrates the significance of the vacancy limitation. The limitation, which appears under Loss Conditions in the policy form, contains two parts, which define "building" and describe what constitutes vacancy. When the policy is issued to a tenant, *building* means the unit or suite rented or leased to the tenant. The building is vacant when it does not contain enough business personal property to conduct customary operations.[2]

When the policy is issued to an owner or general lessee[3], *building* means the entire building. The building is considered vacant unless at least 31 percent of its total square footage is rented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; and/or used by the building owner to conduct customary operations.

Buildings under construction or renovation are NOT considered vacant. Prior to 1995, only buildings under construction were exempt from the vacancy provision. An exemption for buildings under *renovation* was added at that time.

The policy goes on to say that if the building has been vacant for more than 60 consecutive days before loss or damage occurs, the insurer will not pay for a loss by any of the following perils:

1. Vandalism
2. Sprinkler leakage (unless the insured has protected the system against freezing)
3. Building glass breakage
4. Water damage
5. Theft, or
6. Attempted theft.

It is also significant that even where there is coverage for other perils, the insurer will reduce the amount of the loss or damage by 15 percent. So, for instance, a covered windstorm or vehicle damage loss to the building would be reduced by 15 percent if the building were vacant for more than 60 consecutive days.

Note that the preceding comments refer to a standard commercial property form. Non-standard or independently filed forms, as well as earlier or later editions of standard forms, may read differently — and for this reason agents and adjusters need to read and understand the vacancy provision of the particular policy form that applies.

The vacancy provision can pose problems for commercial insureds where, say, one retail shop is the only operating business in a strip mall or multiple unit building. Although the retail shop is conducting business, unless at least 31 percent of the building is rented and/or used for customary operations, the building will be considered vacant as far as the building owner is concerned, and the coverage restrictions will apply. (Another way to look at this is if 70 percent of the building is determined to be vacant for more than 60 consecutive days, the vacancy provision will apply to exclude or limit coverage.)

Seasonal businesses such as vacation resorts, ski lodges, and golf courses, motels and restaurants that close during the winter can also be vulnerable to the vacancy provision. Since the customary operations of these seasonal businesses are not being carried out during the months that they are closed, seemingly the buildings would meet the definition of vacant as expressed in the policy and the coverage restrictions would apply. Some insurers may be willing to provide the seasonal insured with a vacancy permit endorsement (explained later in this article) for the period during which the business is closed, while others may require the insured to purchase a policy with limited perils from an excess and surplus lines insurer.

In standard homeowners policies, specifically the HO-3 Special Form[4], coverage for glass breakage and vandalism/malicious mischief ceases if the dwelling has been vacant for more than 60 consecutive days before the loss. (Note that in earlier editions, the policy limits vacancy to 30 days.)

In addition, there is no coverage for leakage from within a plumbing, heating, air conditioning or automatic sprinkler system, or appliance, caused by freezing, unless heat is maintained in the building or the water supply is shut off. However, if the building is protected by an automatic sprinkler system, the insured is required to continue the water supply and maintain heat in the building for coverage to apply. (The standard commercial property Causes of Loss Forms contain a similar provision.) While vacancy or unoccupancy is not specifically mentioned, the provision implies that the dwelling is unoccupied. In fact, some earlier editions of the homeowners forms specifically stated that the exclusion for loss by freezing applied while the dwelling is vacant or unoccupied, unless the insured has maintained heat or shut off the water supply. While more current forms have eliminated the reference to vacant or unoccupied, the inference is that the dwelling is unoccupied or event vacant, for why else would the insured be required to maintain heat in the dwelling or shut off the water supply, unless he or she were to be out of the dwelling for a temporary or extended period?

> ***The term vacant has been defined by case law as an entire abandonment, deprived of contents, empty – that is, without contents of substantial utility.***

Once again, it is important to review the vacancy wording of the particular policy in question, as policy language can and does vary.

Vacancy Permit Endorsement

What is the recourse for building owners, tenants, or homeowners whose property will be vacant for longer than the typical 30 or 60 day limitation in the policy? For example, an individual might have moved into a new home while the former home is for sale and vacant, or someone takes an extended vacation or moves into a senior or assisted living facility while the home is vacant and for sale. Another example is a business owner who has moved the operation to a more central location while the previous location is vacant and for sale. The recourse for these insureds, if the insurer is willing, is a *vacancy permit endorsement,* which ordinarily requires an additional premium. The vacancy permit endorsement essentially suspends the exclusions noted on page 2 (vandalism, water damage, theft, etc.) and continues the insurance for a specified period of time. It also negates the 15 percent reduction in coverage for all other perils. In the standard ISO form (CP 04 50 07 88), two perils — vandalism and sprinkler leakage — can be excluded from the vacancy permit.

Court Cases

Most courts considering whether "vacant" and "unoccupied" are ambiguous terms and can mean different things hold that they are not ambiguous.[5] But in some cases, the facts surrounding the status of the structure at the time of loss are not conclusive enough to easily determine whether vacancy applies. A sampling of court decisions demonstrates how some courts have viewed the vacancy or unoccupancy provision.

In *Vushaj v. Farm Bureau General Ins. Co. of Mich.,* 773 N.W. 2d 758 (Mich. App. 2009), a fire damaged the insured's home. Coverage did not apply if the dwelling was vacant or unoccupied for more than 30 consecutive days. The insured argued that the dwelling was occupied because over the course of two years, his father usually spent one night every other week at the home. The court countered that the father slept somewhere else well over 600 times during that two-year period. The court concluded that the use of the dwelling roughly 52 times in two years did not constitute a dwelling characterized by the presence of human beings, which was what the court believed necessary to demonstrate that someone occupied the home. The court also was not persuaded by the insured's position that the existence of furniture kept the dwelling from being vacant because it was not completely empty. Influencing the court in this case was its interpretation of the purpose of the vacancy provision, which was to protect the insurer from an increase in hazard that typically results when structures are vacant or unoccupied.

In *Columbia Lloyds Ins. Co. v. Mao*, 2011 WL 1103814 (Tex. App. Fort Worth, Mar. 24, 2011 no pet.), a fire loss resulted in a trial court granting summary judgment in favor of the insured, finding that the building was not vacant for 60 consecutive days prior to the fire. Columbia Lloyds appealed the trial court's decision. The case ultimately went to the Texas Supreme Court for a decision.

Since the policy did not define "vacant" or "vacancy," the Appellate Court reviewed case law for a definition. The term vacant has been defined by case law as an entire abandonment, deprived of contents, empty — that is, without contents of substantial utility. The Supreme Court concluded that there was no clear evidence that the dwelling was vacant since the property was neither abandoned nor empty, and contained items of personal property. There were other issues in this case, but with respect to the vacancy issue, the Supreme Court concluded that a fact issue existed as to whether the dwelling was vacant.

Farbman Grp. v. Travelers Ins. Cos., No. 03-74975 (E.D. Mich. 2006) dealt with the issue of renovation. As noted earlier, later editions of the commercial property policy exempted buildings under construction and renovation from the vacancy provision. This case involved extensive water damage from the bursting of a frozen pipe. Travelers denied coverage, citing the lack of tenants in the building for at least 60 days prior to the damage. The insured countered that the building was under renovation, but Travelers contended that the walkway removal project in which the insured was involved could not be considered construction or renovation, but rather was merely some minor repairs to the exterior of the building.

Since renovation was not defined in the policy, the court looked to several dictionary definitions of the term. Essentially, the definitions for renovation referred to the words, *renovate, restore to a former, better state, repairing or remodeling, and to renew materially, to create anew.* Based on these definitions, the court concluded that the walkway removal

project was a renovation. However, the court ruled in favor of Travelers because the record failed to disclose that any renovation efforts had actually been made and, therefore, did not establish that any such activities had occurred within the 60-day period prior to the water damage.

The issue of buildings under construction or renovation seems to come up fairly frequently in litigation, and the meaning of these terms sometimes generates debate as to their applicability to a given loss situation, as demonstrated by the *Farbman Grp.* case.

Conclusion

How the courts decide cases involving a vacancy or unoccupancy provision will depend on the applicable policy language and the circumstances

surrounding the vacancy or unoccupancy. Hence, a detailed investigation will be necessary to gather sufficient information to make an intelligent and fact-based decision.

For those who wish to further explore court rulings involving the subject of vacancy and unoccupancy, here are some cases that might be of interest:

- *Farmers Insurance Exchange, Appellant v. Bob Greene,* 376 S.W. 3d 278 (Texas Court of Appeals 2012)
- *Oakdale Mall Associates, Appellant v. Cincinnati Insurance Company, Defendant-Appellee*, 702 F. 3d 1119 (U.S. Court of Appeals Eighth Circuit 2013). This case involved the theft of copper piping and coils, which seems to be a fairly common kind of loss when a building is vacant.
- *Camelback Properties, Terry Wilbourn and James Lantz v. Phoenix Insurance Company,* Case No. 10 C 01467 (United States District Court for the Northern District of Illinois Western Division 2012). This case includes some commentary on the meaning of "customary operations" as that term is used in the commercial property policy in reference to the requirement that at least 31 percent of the building is used by the building owner to conduct customary operations.
- *Travelers Casualty Insurance Company of America v. Wild Waters, LLC,* Case No. 2:12-cv-00481-CWD (United States District Court for the District of Idaho 2013)
- *D & S Realty, Inc., appellant, v. Markel Insurance Company,* 789 N.W.2d 1 (Supreme Court of Nebraska 2010)
- *Fidelity Co-operative Bank, individually and as assignee of Matthew Knowles and Sondra Knowles, Appellant, v. Nova Casualty Company, Appellee,* No. 12-1572 and No. 12-2150 (United States Court of Appeals For the First Circuit 2013)
- *TRB Investments, Inc. v. Fireman's Fund Insurance Company,* 50 Cal. Rptr. 597 (California Supreme Court 2006)
- *7th & Allen Equities v. Hartford Casualty Insurance Company,* No. 11-cv-01567 (U.S. District Court for the Eastern District of Pennsylvania 2012). This case also discussed the meaning of "customary operations."
- *Keren Habinyon Hachudosh D'Rabeinu Yoel of Satmar BP v. Philadelphia Indemnity Insurance Company,* No. 08-CV-4726 (RRM) (JMA) (U.S. District Court Eastern District of New York 2011). Here is another discussion of "customary operations."
- *Suder-Benore Co., LTD v. Motorists Mutual Insurance Co.,* WL 5211421 (Court of Appeals of Ohio, Sixth District, Lucas County 2013). This case examined the meaning of "renovation."

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[1] Insurance Services Office (ISO) Building and Personal Property Coverage Form, CP 00 10 06 07.

[2] The term "customary operations" is not defined in the commercial property policy, so courts often have had to deal with the meaning of that term. Those cases are identified in the list of court decisions included at the conclusion of this article. In one case, *Camelback Properties, Terry Wilbourn and James Lantz v. Phoenix Insurance Company,* the court comments that the term is not defined in the policy. Consequently, the court will look to the intent of the policy based on the policy language. The declarations page in this case indicated that the property was listed as an office. It is reasonable to expect, therefore, that the insured would conduct operations customary for an office building. The court cites another case in which the insured was a restaurant where continued use of the building for office space did not constitute customary operations of a restaurant.

[3] Although not defined in the policy, a general lessee is a lessee or tenant who has control of the building as an owner and typically contracts with sub-lessees.

[4] Insurance Services Office (ISO), Homeowners Form HO 00 03 10 00.

[5] Property Insurance Coverage Insights, Robinson & Cole, LLP, Attorneys at Law.

Protective Safeguards Endorsements – Issues and Implications

By Robert J. Prahl, CPCU

What is a *protective safeguards endorsement* and what are its implications for an insured? Typically, a protective safeguards endorsement states that insurance will be suspended if the insured fails to provide immediate notice to the insurer when it becomes aware of any lapse or impairment of any protective safeguard device identified in the policy. It also suspends insurance if the insured fails to maintain any such protective device. The attachment of this endorsement, therefore, imposes a responsibility on the insured to ensure that the device will be operational if and when a loss occurs. Clearly then, there are implications for the insured if the device is for some reason inoperable at the time of a loss.

In an effort to demonstrate how the courts view these endorsements, a sampling of court cases is included later in this article.

> ***Usually, when a commercial building is equipped with a protective safeguard device, an underwriter will attach a protective safeguards endorsement to the policy.***

Usually, when a commercial building is equipped with a protective safeguard device, an underwriter will attach a protective safeguards endorsement to the policy. Protective safeguard devices or services may include automatic sprinkler systems, automatic fire alarms, security guard services, fire or burglar alarms, or similar devices. Many insurers offer a discount when such an endorsement is attached to the policy.

Both the American Association of Insurance Services (AAIS) and the Insurance Services Office (ISO) offer standard protective safeguards endorsements. The ISO endorsement (Form CP 04 11 10 12, formerly IL 04 15 04 98), for example, includes a schedule identifying the specific protective devices involved. The devices are identified by symbol. For example, P1 refers to automatic sprinkler systems, P2 to automatic fire alarms, and P3 to a security service with a recording system or watch clock, and so on.

> ***In some cases, property that ordinarily might not be insurable may qualify for insurance with the installation of protective safeguard devices.***

The AAIS endorsement (CP 0614 12 99) contains a schedule that identifies the kind of protective device or service and its location, i.e., premises and building number. It contains a section relating specifically to devices or services providing fire protection, and a section relating to devices or services providing theft protection.

Nonstandard endorsements also are available. One such endorsement includes protective safeguards related to an automatic extinguishing system and hood and duct cleaning, and a UL-approved spray paint booth, as well as the more common automatic sprinkler systems and fire and burglar alarms. Nonstandard endorsements may vary according to the commercial enterprise insured.

It needs to be emphasized that these endorsements make it a condition of insurance that the insured is required to maintain the protective devices or services listed in the schedule. The ISO endorsement states that the insurer will not pay for loss caused by or resulting from fire if, prior to the fire, the insured: (1) knew of any suspension or impairment of any protective safeguards device listed and failed to notify the insurer; or (2) failed to maintain any protective device over which it had control in complete working order. In either case, the insurer can deny coverage for the loss. The AAIS endorsement reads essentially the same.

As noted earlier, the endorsements impose a critical responsibility on the insured to ensure that these devices or services are operational and maintained on a continuous basis. Thus, the insured has a duty to *notify* the insurer if the insured knows of any suspension or impairment of any such device or service, and a duty to *maintain* the device or service, over which the insured has control, in complete working order. Generally speaking, the wording of these endorsements is quite clear and there is little room for ambiguity.

There is, however, a reprieve of sorts for the insured in both the AAIS and ISO endorsements which indicates that if part of an *automatic sprinkler system* is shut off and the insured restores *full protection* within 48 hours, the insured need not notify the insurer. Note that the reprieve is limited. It applies only to the notice requirement for sprinkler systems, and only if part of the system, rather than the entire system, is affected.

Considerations for the Insured

In view of the substantial responsibility such an endorsement imposes on an insured, one might ask why not simply avoid or reject such an endorsement and eliminate the risk that an inoperable safeguard device could lead to a denial of coverage? Good question! An important consideration for an insured is whether the discount offered by an insurer is worth the potential risk that a claim for a fire or theft loss may be denied if, for some reason, the particular safeguard device does not operate properly. That is, of course, if the insured has the option of rejecting the endorsement. Rejecting the endorsement may not be an option with some insurers, when the insured has in place protective safeguard devices. Furthermore, an insurer may be unwilling to insure a particular property without safeguard devices. In some cases, property that ordinarily might not be insurable may qualify for insurance with the installation of protective safeguard devices.

Even when an insured has the option of rejecting the endorsement, which may be more the exception rather than the rule, insureds should not feel that they are immune to problems in the event of a loss where a safeguard device is inoperable. Keep in mind that not all insurance policies are based on standard AAIS or ISO forms. There are many nonstandard forms out there that could exclude coverage for reasons other than those specifically involving a protective safeguards endorsement. One example is a policy containing an *increase in hazard* provision.

Veteran insurance people will remember the Standard Fire Policy (SFP) (aka the 165 lines policy) that was replaced by the simplified, more readable language forms in the mid 1980s. The SFP policy stated that the company will not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured, a clause that is no longer found in most current property policies. The SFP is not entirely dead, however, as it appears in many state FAIR plan policies, and the increase in hazard provision is also found in the mortgage clause of many property policies, although not with exactly the same wording.

Although the SFP was long ago withdrawn as far as it relates to standard property policies, it or a similar increase in hazard provision may be included with some nonstandard property forms. The point is that if an increase in hazard provision were to be part of a property policy *without* a protective safeguards endorsement, and a loss were to involve an inoperable or defective device or service, the insured could still be denied coverage based on the increased hazard resulting from the inoperable safeguard device.

Agents and brokers can provide an important service to insureds when applications for insurance include questions about sprinkler systems, fire and burglar alarms, or other devices, by explaining the potential consequences of not maintaining these devices or services. By providing such service and periodically inquiring with insureds about the maintenance of safeguard devices, they may not only avoid coverage problems, but could also contribute to the prevention of losses and minimize the risk that they might be sued for not sufficiently advising an insured of the potential repercussions for failing to maintain such devices.

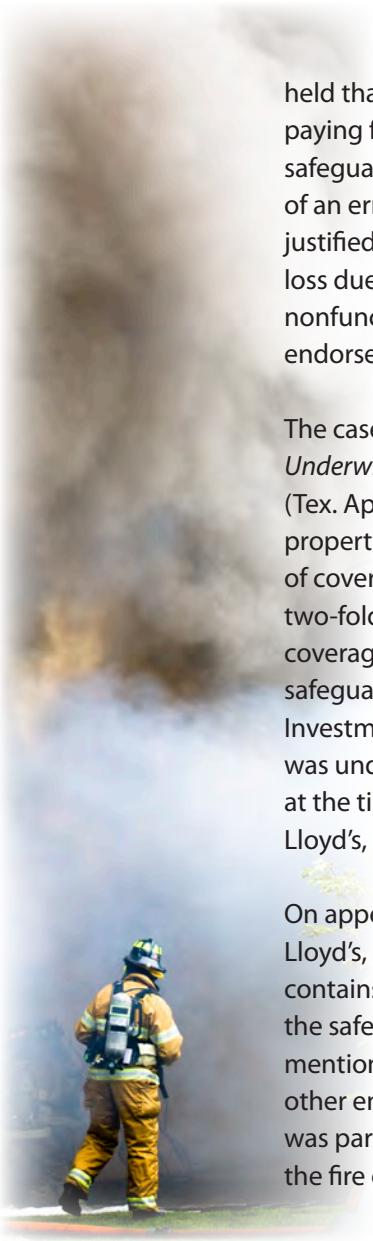
The Courts and the Protective Safeguards Endorsement

Generally, the language of these endorsements is considered clear and unambiguous. Insurers are usually successful in denying coverage when protective devices are required, but not installed or maintained, or the insured has indicated that a device exists when, in fact, it does not.

In the case of *Burmac Metal Finishing Co. v. West Bend Mutual,* 2005, the insurance company denied coverage for damage caused by a natural gas explosion since the insured failed to properly maintain its automatic sprinkler system as required by the protective safeguards endorsement. The Illinois Appellate Court ruled in favor of West Bend Mutual that no coverage applied under these circumstances because the insured failed to comply with the endorsement.

In *Goldstein v. Fidelity & Guaranty Insurance Underwriters,* 1996, a U.S. Circuit Court of Appeals

> ***Insureds should keep detailed records concerning when and how safeguard devices have been serviced and maintained.***



held that while the insurer was responsible for paying for a fire loss during a period when the safeguards endorsement had been waived because of an error by the insurer's agent, the insurer was justified in denying coverage for subsequent loss due to the owner's failure to restore a nonfunctioning sprinkler system, as required by the endorsement.[1]

The case of *QB Investments, LLC v. Certain Underwriters at Lloyd's, London*, No. 01-10-00718 (Tex. App. Houston, August 4, 2011) involved a property insurance dispute resulting from a denial of coverage for a warehouse fire. The issues were two-fold; one being what effect a binder has on coverage, and the other dealing with a protective safeguards endorsement. Lloyd's denied QB Investment's claim for the fire damage because it was undisputed that the fire alarm was not installed at the time of the fire. The trial court ruled in favor of Lloyd's, and QB Investments appealed.

On appeal, the Court of Appeals ruled in favor of Lloyd's, noting that it is undisputed that the policy contains a safeguards endorsement, and that while the safeguards endorsement is not specifically mentioned in the binder, the binder stated that other endorsements may apply. The endorsement was part of the policy when it was issued and when the fire occurred.

Although the above cited cases ruled for the insurer when it was undisputed that a protective safeguards endorsement applied, and that the device or service was inoperable at the time of loss, there are exceptions. One case, where the court did not hold in favor of the insurer despite the existence of a protective safeguards endorsement, is *Brookwood, LLC v. Scottsdale Insurance Co.,* No. 08-4793 (U.S. Dist. Ct. E. Dist LA. 2009)[2]. The case involved an unoccupied retail store located in a shopping center. The retail store had an inoperable burglar alarm system. Burglars broke through a locked door to the store and stole copper wire and other electrical equipment. The insurer denied the claim because the insured (the shopping center owner) failed to maintain a centrally monitored burglar alarm system after indicating to the insurer that the shopping center was protected by such a system. The insurer claimed that this constituted a material misrepresentation by the insured who had indicated on the insurance application that a centrally monitored burglar alarm system was operable.

The insured countered that the protective safeguards endorsement was ambiguous and that the insurer had waived its right to enforcement of its endorsement by continuing to accept premiums after being put on notice that there was no functioning alarm system in the retail unit. To fortify its position, the insured pointed to a report prepared for the insurer after the property was inspected — just after the policy's inception — that noted there was either no burglar alarm system or only a local one, i.e., not a centrally monitored system. Thus, the insured contended that the insurer had been notified that a centrally monitored alarm system was not operable and had waived its right to enforcement.

The applicable protective safeguards endorsement indicated that the insurer would not pay for loss caused by or resulting from theft if, prior to the theft: (1) the insured knew of any suspension or impairment of any safeguard identified in the

schedule and failed to notify the insurer; or (2) failed to maintain any protective safeguard listed in the schedule, over which the insured had control, in complete working order.

The U.S. District Court found that the endorsement was ambiguous, adding that this particular endorsement has three consequences:

1. If such a system has been installed and is operative at the time the endorsement becomes effective, the system must be kept operative through the policy period;

2. If such a system has not been installed by the inception date of the endorsement, it must be installed and operational through the policy period;

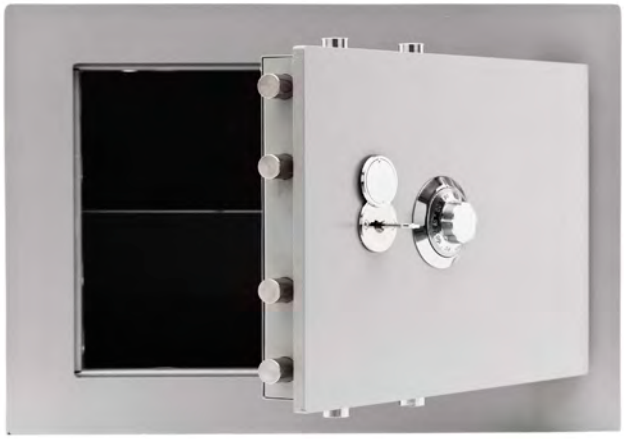
3. If such a system has been installed but is not operational at the time the endorsement becomes effective, it must be made operational.

The court then stated that if, prior to a theft, the insured knew that the store's burglar alarm system had failed to function or was impaired, the theft loss would be excluded.

Although the language of the protective safeguards endorsement in this case was quite clear, the court denied the insurer's motion for a summary judgment because the endorsement's condition was waived by the insurer's acceptance of premiums and continuing coverage after it became aware that the building lacked a functioning burglar alarm system.

The insurer then countered that the report was not conclusive as to its knowledge of a non-functioning burglar alarm system, since it relied on the insured's statement in the application that the building had a monitored alarm system. The insurer also asserted that it did not accept any premium payments after the date that it had received the report. Nevertheless, the court concluded that there was still a genuine issue of material fact whether the insurer had waived its defense and, thus, denied the insurer's motion for summary judgment.

In *Nunez v. U.S. Underwriters Ins. Co.,* 2011 NY Slip Op21050, the plaintiff sued for damages caused by water damage to her retail store as a result of a fire that occurred on the second floor residential unit above the store. The plaintiff's businessowners insurance policy contained a protective safeguards endorsement identifying smoke detectors as the safeguard device. Upon investigation of the loss, no smoke detectors were found in the plaintiff's store and the claim was denied for failure to comply with the endorsement, although the plaintiff alleged that at the time the insurance application was signed, a smoke detector was operable. In response to the denial, the plaintiff reasoned that the loss sustained was not a result of the fire itself, but rather of water damage used to extinguish the fire above the store, and that the failure to have a smoke detector was immaterial and could not be used as a basis of denial. Both the plaintiff and U.S. Underwriters Ins. Co. moved for summary judgments. In short, the Supreme Court, Queens County, NY, denied the plaintiff's motion for summary judgment, as well as the cross motion for summary judgment by U.S. Underwriters Ins. Co., but did rule that U.S. Underwriters cannot deny coverage based on a violation of the protective safeguards provision as a result of a lack of a smoke detector — and that it



was not entitled to summary judgment[3] on this ground. This case was settled prior to depositions for $55,000.

Conclusion

Admittedly, there are cases when a court will rule in favor of an insured with a protective safeguard device or service that was inoperable, where extenuating circumstances exist. But such cases appear to be rare. This should be a warning to commercial insureds as well as to agents and brokers, that they need to understand — and the latter needs to explain — the implications of this endorsement if the safeguards device is not installed or is inoperable at the time of loss.

Insureds should keep detailed records concerning when and how safeguard devices have been serviced and maintained. Being able to demonstrate a consistent maintenance schedule for such devices, while not a guarantee that the insured will prevail should a safeguard device fail or become impaired, may at least reduce the risk that a loss will occur.

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[1] *Protective Safeguards Endorsements to Property Insurance Policies May Pose Unanticipated Risks for Landlords, Tenants, and Others,* August 1, 2009, Charles D. Calvin, Rikke A. Dierssen-Morice, Charles S. Ferrell, Faegre & Benson, LLP, Attorneys at Law.

[2] This case was discussed in the March 2010 issue of *Malecki On Insurance,* Volume 19, Number 5.

[3] Expressed simply, a summary judgment is a determination made by a court without a full trial. Such a judgment may be issued as to the merits of an entire case, or of specific issues in that case. Any party may move for summary judgment; it is not uncommon for both parties to seek it. If the court denies the summary judgment, the litigation may continue, a party may withdraw, the parties settle, or another summary judgment or later motion ends the lawsuit.

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