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FURTHERING THE HIGHEST STANDARDS OF CLAIMS AND LITIGATION MANAGEMENT

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OF FROZEN PIPES



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HANDLING THE BOMB CYCLONE'S FLURRY OF FROZEN PIPES

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January's "bomb cyclone" brought heavy snow, ice, and bitter cold to most of the East Coast. Winter storm warnings were issued from Massachusetts to Florida, the latter of which issued a rare freeze warning for most of the state. In the days and weeks that followed, dangerously low temperatures were experienced in the mid-Atlantic and New England, with the epic winter freeze seemingly reluctant to release its grip on several states as temperatures were well below freezing for multiple days.

With the temperatures in the single digits for most Northern states, it is no surprise that the arctic blast brought with it a slew of insurance claims related to freezing and bursting pipes. As insurers well know, just a simple split in a pipe can result in thousands of dollars of damage, including removing carpets or hardwood floors, tearing out drywall and insulation, and costly mold remediation if the damage is not promptly addressed.

Even with the heat operating inside a home, openings in the structure can allow cold air to come in contact with pipes, causing them to freeze and burst. Pipes that are located in attics, unfinished basements, or crawl spaces are particularly vulnerable to freezing, especially when they are located along or near an exterior wall.

Most insurance policies provide coverage for "sudden and accidental" or fortuitous losses. A pipe that splits or bursts from freezing generally falls within



the policy's initial grant of coverage, since it almost always qualifies as sudden and accidental damage. However, almost all insurance policies also include an exclusion for coverage for freezing of the pipes unless the insured has used reasonable care to maintain heat in the building or shut off the water supply and drain the systems of water. Some insurance policies limit the exclusion to situations in which the building is vacant, unoccupied, or under construction.

Whether or not your insurance policy limits the exclusion to situations in which the building is vacant, unoccupied, or under construction, insurance companies are well-served to conduct a thorough investigation on coverage, given the exorbitant costs associated with water losses from freezing pipes.

VACANCY, UNOCCUPIED, OR UNDER CONSTRUCTION

If the insurance policy is one that limits the exclusion for frozen pipes to situations in which the building is vacant, unoccupied, or under construction, then the insurance company should begin by resolving this issue. It should first look to see whether the policy defines the terms "vacant," "unoccupied," or "under construction."

Generally, words of common usage in an insurance policy are to be construed in their natural, plain, and ordinary sense. Moreover, courts will construe the terms of an insurance policy as written and may not modify the plain meaning of the words under the guise of interpreting the policy. However, if the insurance policy does not define terms, then the insurer should look to how the cases in its state define those terms, as each state may have different definitions or meanings.

Nonetheless, it is generally understood in most states that the terms "vacant" and "unoccupied" are not synonymous. "Vacant" has generally been defined by the courts as a building that is empty; without inanimate objects or contents. Conversely, "unoccupied"

has been understood to mean a house without an occupant—that is, without a person living in it. Additionally, insurance companies should look closely to determine whether its provisions require the property to be either vacant and unoccupied, or vacant or unoccupied. If the exclusion reads "vacant and unoccupied," then the insurer will have the burden of showing that not only was no one living at the property, but also that the property did not have any personal contents inside it.

Moreover, the term "under construction" has largely been interpreted by courts to mean "new construction," but could also extend to all building endeavors such as repairs, renovations, or additions to an existing structure. Of course, insurers should consult the law in a particular

jurisdiction or confer with counsel before making any final coverage decision on whether a structure was, in fact, under construction.

While interpretation of the words "vacant," "unoccupied," and "under construction" as used in an insurance policy is a question of law, whether the dwelling was vacant or unoccupied at the time of the loss is undoubtedly a question of fact. Therefore, the facts of the claim are critical and the insurance adjuster should make every effort to collect and document the essential details of the loss.

With respect to whether the property is vacant, taking photographs of a home without any furnishings can be vital evidence. However, insurance claims professionals should not stop there when documenting a loss. They

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should delve further and photograph some relatively non-invasive areas of the home, such as coat closets, kitchen cabinets and drawers, and the pantry. For instance, if an insured has no utensils or cookware in the kitchen cabinets or drawers, then the insured will have difficulty asserting that he regularly lives at the property. Photographic evidence that shows a lack of personal contents and items needed for daily life will be helpful in any coverage defense.

Additionally, on the issue of occupancy, claims professionals should obtain utility records either from their insureds or through a signed authorization. The utility records can be reviewed by an expert and will often show whether someone was living at the property. Also, if the house is heated with oil, then the claims professional should request the records from the oil company to determine such factors as how much oil is being used per delivery cycle and when the last oil delivery occurred. Finally, claims professionals or their experts can inquire with neighbors about whether anyone was living at the property, or determine when the last time the neighbors witnessed someone at the property on a regular basis. Gathering and obtaining this information will certainly assist the insurer in making a proper coverage decision.

Unoccupied homes are common in the Midwest and Northeast during the winter, especially after the holiday season, and usually stay that way until late spring as snowbirds head south to avoid the harsh, winter weather. Far too often, homeowners fail to winterize their homes and instead opt for setting the temperature somewhere around 50 degrees Fahrenheit. When this approach is taken, a power outage from a storm, a simple malfunction of the heating system, or even a vulnerable pipe exposed to extremely cold temperatures can destroy a home. Since the home is unoccupied, the damage can go unnoticed for an extended period of time, causing even further damage to the property.

Insurance companies are well

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served to investigate and document any evidence of vacancy or occupancy. It will prove invaluable if the denial of a claim results in litigation.

REASONABLE CARE TO MAINTAIN HEAT

Almost all exclusions for freezing or bursting pipes preclude coverage unless the insured used “reasonable care to maintain heat in the building.” Unlike the vacancy and occupancy issue, determining whether or not the insured used reasonable care to maintain heat in the structure is a much more difficult task. In many states, the reasonableness of the insured is measured by an objective standard, which analyzes the degree of care an ordinary person of intelligence and prudence would use in the same or similar circumstance. Most often, when a home experiences a water loss from a frozen pipe, the insured will provide the steps taken to show the insurance carrier that he used reasonable care to maintain heat in the property. The common arguments include that the insured routinely services the heater, schedules automatic oil delivery, or regularly changes the batteries in the thermostat.

In addition, if a property is left unoccupied, then the insured will often assert that he had a friend, family member, or even a hired third party to routinely inspect the property to ensure the structure was heated. Importantly, some states do not allow the insured to circumvent the requirement of using reasonable care to maintain heat in the property by delegating that obligation to a third

party. If your insured attempts to claim that he exercised reasonable care to maintain heat by asking a friend or hiring a third party to regularly check on the property, then it is important to confirm whether the law in your jurisdiction allows the insured’s duty to be delegated to third parties.

Given that reasonable care is usually dependent on the facts and circumstances of each case, judges are reluctant to decide the coverage dispute absent clear evidence. Instead, courts often elect to have the jury determine whether the insured used reasonable care to protect the property. In light of this fact, insurance companies should always inquire with their insureds about each and every step they took to make certain that the property maintained heat. In the event litigation begins and progresses, such information will be useful in arguing your case.

Like most insurance companies over the past several months, your company is likely inundated with water losses resulting from frozen or bursting pipes after an extended period of near-record low temperatures across much of the country. If you are dealing with claims that involve frozen pipes, then it may be beneficial to consider the issues raised here. As with most claims, it’s important to ensure that these claims are being paid in accordance with the insurance contract, and to assist in gathering critical evidence if the claim is ultimately pursued in litigation. ■

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