

The
JOURNAL
of
CIVIL LITIGATION

*Published Quarterly by the
Virginia Association of Defense Attorneys*

**WHEN ARE YOUR PREMISES “VACANT” FOR
PURPOSES OF INSURANCE COVERAGE?**

*E. Scott Austin
Macel H. Janoschka*

VOL. XX, NO. 1

SPRING 2008

WHEN ARE YOUR PREMISES “VACANT” FOR PURPOSES OF INSURANCE COVERAGE?

E. Scott Austin*
Macel H. Janoschka*

Fire insurance policies usually contain provisions voiding the policy or limiting liability should an insured building become vacant and/or unoccupied beyond a stated number of consecutive days. The effect of this provision on a homeowner or landlord can be quite costly if the homeowner or landlord is unaware of the provision or its applicability. These provisions are frequently litigated because of the ambiguity of the term “vacant.”

Where the policy exclusion does not expressly define a particular term or provision, a court will apply the common and ordinary meaning of the term.¹ Where the common and ordinary meaning of a term in a policy exclusion renders a particular incident within the purview of the policy’s exclusionary language, a court will enforce the exclusion as written and deny coverage.² Ambiguous vacancy exclusions will be construed in favor of the insured.³

The terms “vacant” and “unoccupied,” as used in an insurance policy, are not synonymous.⁴ Courts have sometimes distinguished vacant from unoccupied, holding that vacant means completely empty while unoccupied means not routinely characterized by the presence of human beings.⁵ In a fire insurance policy insuring a dwelling, the term “vacant” means empty, without inanimate objects, deprived of contents; a thing is vacant when there is nothing in it.⁶ “Vacant” means abandoned and not used for any purpose.⁷ On the other hand, a dwelling is “unoccupied” when it has ceased to be a customary place of habitation or abode.⁸ For the purposes of this article, the focus is only on the definition of “vacant.”

* Mr. Austin and Mrs. Janoschka are with the Roanoke firm of Gentry Locke Rakes & Moore and are members of the Virginia Association of Defense Attorneys.

¹ United States Fid. & Guar. Co. v. McGlothlin, 240 Va. 21, 392 S.E.2d 814 (1990).

² *Id.*

³ Nationwide Mut. Fire Ins. Co. v. Nationwide Furniture, Inc., 932 F. Supp. 655 (E.D. Pa. 1996).

⁴ COUCH ON INSURANCE 2D § 42:10.

⁵ Rojas v. Scottsdale Ins. Co., 267 Neb. 922, 927, 678 N.W. 2d 527, 531 (2004).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

There is little Virginia authority defining the term “vacancy” in the context of an insurance policy. Over a century ago, the Supreme Court of Virginia found a premises to be “vacant” within the meaning of a policy exclusion where the “dwelling and other buildings were vacated and abandoned and unprotected at the time of the fire.”⁹ The District Court for the Western District of Virginia has held that a house was “vacant” when all of its contents were removed except a rug, a few mattresses, window curtains, and a gas range.¹⁰ This decision would suggest that a home must include all of the amenities that are necessary for one to live there. Even this conclusion does not shed very much light on the definition of vacancy. In this case, the court did not specify the basis for its decision or what the house needed to include in order for it to be considered not “vacant.”

Courts in other jurisdictions have focused on various factors in determining whether a dwelling was vacant for purposes of insurance exclusions. More specifically, courts have tended to focus on three distinct factors: (1) duration of the occupant’s absence, (2) whether there were periodic or regular visits to the premises, and (3) whether household goods and other personal property were present on the premises.¹¹ Still, many cases adopt the position that the outcome depends upon all the facts and circumstances of each individual case.¹² It is also important to note that courts have held that the degree of emptiness or deprivation of contents must be viewed in conjunction with the purpose for which the dwelling was insured.¹³ Moreover, the single most decisive factor in the determination may be whether a building other than a dwelling is vacant is the type of building involved.¹⁴ Normally, courts determine that a building is “vacant” in the absence of any contents in the building pertaining to operations or activities customary to the occupancy of the building.¹⁵

I. DURATION OF OCCUPANT’S ABSENCE

The reasonableness of the duration of the absence has been considered an important factor in the decision.¹⁶ When circumstances are such that the occupants are away for a period of time, the factors that the courts rely on are the intended duration of their absence, whether the occupants left their furniture in

⁹ *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 75-76, 3 S.E. 876 (1887).

¹⁰ *Frazier v. State Farm Fire & Cas. Co.*, 957 F. Supp. 816, 818 (W.D. Va. 1997).

¹¹ Allan E. Korpela, Annotation, *What Constitutes “Vacant or Unoccupied” Dwelling within Exclusionary Provision of Fire Insurance Policy*, 47 A.L.R.3d 398 (1973) (updated 2004).

¹² *Id.*

¹³ *Knight v. United States Fid. & Guar. Co.*, 123 Ga. App. 833, 182 S.E.2d 693 (Ga. Ct. App. 1971).

¹⁴ Joseph E. Edwards, Annotation, *What Constitutes “Vacancy” or “Unoccupancy” within Fire Insurance Policy on Building Other Than Dwelling*, 36 A.L.R.3d 505 (1997).

¹⁵ *Cameron v. Frances Slocum Bank & Trust Co.*, 247 F.2d 921 (9th Cir. 1957) (building that used to house a water pumping facility was vacant because the building was used for storage and any water pumping equipment present was left behind by water company when it ceased operations and was clearly not on the property as part of a pumping operation).

¹⁶ Allan E. Korpela, Annotation, *What Constitutes “Vacant or Unoccupied” Dwelling within Exclusionary Provision of Fire Insurance Policy*, 47 A.L.R.3d 398 (1973) (updated 2004).

the home, and whether they intended to return after the absence.¹⁷ However, courts are split on determining how long is too long to be away from a dwelling without its being termed “vacant.” Some courts have held that an absence for the duration of “winter” was a temporary absence and therefore the insurance policy was still in effect,¹⁸ while others have reached the opposite conclusion.¹⁹ Therefore, an absence of more than three months may render the dwelling “vacant” and void the policy. Nonetheless, the intention of the owner or occupant to return is a recurring factor on which many courts focus.

II. PERIODIC OR REGULAR VISITS TO THE PREMISES

Some courts make the decision of what constitutes a vacant dwelling primarily on the basis of the nature or degree of presence of some person or persons upon the premises.²⁰ Notwithstanding the fact that someone usually slept and maintained contacts associated with occupancy elsewhere, courts have found some dwellings to be not “vacant” when there was evidence that a person visited the premises on numerous occasions or spent considerable time upon the premises.²¹ Courts have also held that an owner’s return to a dwelling “frequently” or daily is enough to maintain its nonvacancy status.²² Intent is a key factor in this analysis as well because it appears that courts are more reluctant to find a dwelling to be “vacant” when the owner intends to rent the home or live there in the near future.²³ In addition, when the facts suggest that an insured dwelling

¹⁷ See *McMurray v. Capital Ins. Co.*, 87 Iowa 453, 54 N.W. 354 (1893) (premises was not vacant since the occupants had left all their furniture in the home and intended to return after the visit, and left neighbors to look after the premises during their absence); *Stupetzki v. Transatlantic Fire Ins. Co.*, 43 Mich. 373, 5 N.W. 401 (1880) (an absence by the owner and his family did not render the premises vacant where they went to visit a sick daughter and intended to return when circumstances permitted); *Hill v. Ohio Ins. Co.*, 99 Mich. 466, 58 N.W. 359 (1894) (owner had been absent from insured home for two months before fire so as to work in a city 30 miles away and where her intention to return was evidenced by the facts that she had left behind her household goods and wearing apparel, and had left livestock in the care of a neighbor); *Foley v. Sonoma County Farmers’ Mut. Fire Ins. Co.*, 18 Cal. 2d 232, 115 P.2d 1 (1941) (premises was not vacant where occupants left all of their furniture therein and intended to return after a short absence of three or four days spent visiting a daughter in a nearby town, but where they decided to extend such absence by also visiting another daughter, at whose house the occupants were present when the fire occurred 13 days after their departure from their dwelling).

¹⁸ See *Monarch Ins. Co. v. Rippey*, 369 P.2d 622 (1962) (owners absence on a Florida vacation trip, extending from November 22 to February 19 was held not to result in the premises being unoccupied and therefore was only a temporary absence).

¹⁹ See *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N.W. 40 (1902) (even when occupants left their furniture in their home and intended to return, their dwelling was vacant because they left in the fall and intended to stay away all winter, which the court found was not a temporary absence).

²⁰ Allan E. Korpela, Annotation, *What Constitutes “Vacant or Unoccupied” Dwelling within Exclusionary Provision of Fire Insurance Policy*, 47 A.L.R.3d 398 (1973) (updated 2004).

²¹ *Id.*

²² See *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64 (1879) (owner returned to home daily); *Graves v. M.F.A. Mut. Ins. Co.*, 446 S.W.2d 154 (Mo. Ct. App. 1969) (owner left furniture in the house pending its sale and returned to it frequently for inspection and caretaking).

²³ See *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64 (1879) (dwelling did not become vacant, notwithstanding that the owner had moved his family out of the dwelling because he intended to turn it over to a tenant, retained some

is being used only for storage purposes, courts will typically find that the house is not being used for ordinary living purposes and is therefore “vacant.”²⁴ As a result, the purpose for which the owner or occupant returns to the premises is also important.

III. PRESENCE OF HOUSEHOLD GOODS OR OTHER PERSONAL PROPERTY ON PREMISES

Courts differ on the amount of furniture or personal property that must be present in a dwelling in order for it to be considered “nonvacant.” Courts are more likely to find dwellings to be “vacant” when there are no items of personal property, such as clothing or basic necessities, on the premises.²⁵ In addition, the furniture and personal belongings must be arranged in an ordinary manner within the dwelling.²⁶ Nonetheless, courts consistently analyze the intent of the owner or occupant when making decisions regarding vacancy under this factor as well. Despite the existence of furniture and personal property on the premises, if the owner or occupant has no intention of returning to the premises, then the court will most likely conclude that the dwelling is “vacant.”²⁷ Oftentimes courts will cite the phrase “minimal amenities needed for human habitation” when determining whether a house is or is not vacant.²⁸ However, whether this phrase clears up any uncertainty on the issue is debatable. Nonetheless, it provides courts with a starting point when analyzing the facts and circumstances of each individual case.

Even though Virginia courts offer no controlling authority regarding the definition of “vacant” in insurance policies, other jurisdictions have provided courts with several factors to explore. The factors to consider include (1) the duration of the occupant’s absence, (2) whether the owner or occupant made periodic visits to the premises, and (3) the extent of furniture and personal belongings

furniture there, and stayed on the premises during the day); *Robinson v. Mennonite Mut. Fire Ins. Co.*, 91 Kan. 850, 139 P. 420 (1914) (premises would not be considered to be vacant where it appeared that, after a tenant had moved out, the owner immediately placed a stove, beds and bedding, a sofa, and some clothing in the house with the intention of moving in within six months).

²⁴ See *Vennemann v. Badger Mut. Ins. Co.*, 2002 U.S. Dist. LEXIS 18681 (D. Minn. Sept. 26, 2002) (*aff’d*, *Vennemann v. Badger Mut. Ins. Co.*, 2003 U.S. App. LEXIS 13454 (8th Cir. Minn. July 2, 2003) (house was vacant even though the insured stayed overnight at the house on some occasions, 99% of his belongings were stored in the garage and a telephone was never hooked up).

²⁵ See *Lamoureux v. New York Cent. Mut. Fire Ins. Co.*, 244 A.D.2d 645, 663 N.Y.S.2d 914 (N.Y. App. Div. 1997) (house was vacant even though it had a few appliances and pieces of furniture because the tenant had removed all of his own personal property when he moved); *Cavin v. Charter Oak Fire Ins. Co.*, 66 Ill. App. 3d 808, 384 N.E.2d 441, 23 Ill. Dec. 647 (Ill. App. Ct. 1978) (building is not vacant if personal property is left behind and it is of sufficient value to make it reasonable to believe that the owner has not abandoned it).

²⁶ *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N.E. 285 (Ind. Ct. App. 1898) (house was vacant when tenant left behind furniture in only one room and did not intend to return to the house to live).

²⁷ Allan E. Korpela, Annotation, *What Constitutes “Vacant or Unoccupied” Dwelling within Exclusionary Provision of Fire Insurance Policy*, 47 A.L.R.3d 398 (1973) (updated 2004).

²⁸ *Estes v. St. Paul Fire & Marine Ins. Co.*, 45 F. Supp. 2d 1227 (D. Kan. 1999); *American Mut. Fire Ins. Co. v. Durrence*, 872 F.2d 378 (11th Cir. 1989).

WHEN ARE PREMISES “VACANT” FOR PURPOSES OF COVERAGE?

29

that were left on the premises. Each of these factors assist in ascertaining whether the owner or occupant intended to abandon the premises, or if the owner or occupant merely intended to take a temporary absence. Of these three factors, the intention of the owner or occupant to return to the premises is perhaps the most frequently cited as the basis for a court’s decision on this issue. However, it is evident the courts have struggled to adequately define the term “vacant.” As the Supreme Court of Kansas noted in its decision, “[a] reasonable person walking up to the house and looking through a window would have concluded that it [the house] was vacant.”²⁹ However, the court still struggled with pinpointing the factual basis for its decision. Perhaps this statement echoes that of Justice Stewart’s when he concluded, “I could never succeed in [defining it] intelligibly” but “I know it when I see it.”³⁰

²⁹ Speth v. State Farm Fire & Cas. Co., 272 Kan. 751, 35 P.3d 860 (2001).

³⁰ Miller v. California, 413 U.S. 15, 39 (1973).