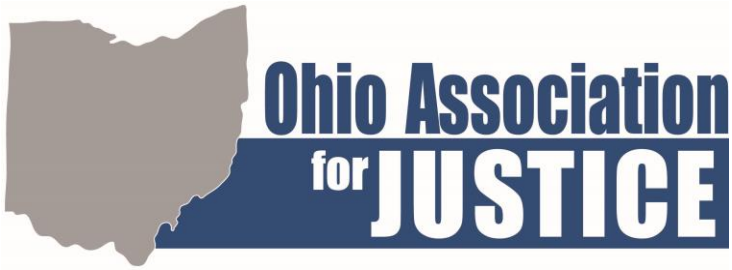

2014 Navigating Through Statutes, Insurance Policies, and Regulations

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The Ins-and-Outs of a Property Damage Claim

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PROPERTY CLAIMS – TIPS, TRICKS, AND UPDATES

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I. WHAT "PROPERTY" IS COVERED?

The first issue, which may seem self-evident, when evaluating property coverage is to determine what property a Commercial or Homeowner's Insurance Policy covers. Under the typical Commercial Property Insurance Policy, there is an entire section defining "covered property." This section includes buildings and fixtures, outdoor signs, outdoor fences, and business personal property (including furniture, machinery and equipment, stock, and any other personal property used in connection with the business).

It is also important to note under the Commercial Property Coverage the specific description of all of the types of property not covered under the policy. Most commercial policies will include a description of anywhere from ten to fifteen different types of business personal property and other items that are specifically not covered. These include: (1) accounts, deeds, money, and securities, (2) animals, (3) automobiles, (4) contraband, (5) electronic data, (6) excavations, grading, and backfilling, (7) foundations, (8) land, water, or growing crops, (9) paved surfaces, (10) property while airborne or waterborne, (11) pilings or piers, (12) property specifically insured under another form or policy, (13) retaining walls, (14) underground pipes, or flues or drains, (15) valuable papers and records, (16) vehicles or self-propelled machines, and (17) property that is outside the building, except signs and fences that are otherwise covered. Therefore, while the policy covers a broad scope of property, there are a significant number of items that are specifically not covered under the typical Commercial Property Policy.

The typical Homeowner's Insurance Policy covers the following described property under the terms of coverage: (1) the dwelling or residence, (2) other unattached structures (not used for rental or a business or storage of business property), and (3) personal property of the

insured. Policies may cover particular items of other property within a specific limit of insurance, e.g. $1,500 for theft of jewelry, watches, furs and precious stones.

Homeowner's policies usually do not cover: (1) articles separately insured, (2) animals, (3) motor vehicles, (4) aircraft, (5) hovercraft, (6) property of unrelated roomer, boarders, or tenants, (7) property in an apartment regularly rented to others, (8) business data (books, records, computers, electronic data), (9) credit cards, and (10) water or steam.

II. WHAT ARE COVERED CAUSES OF LOSS?

A. Commercial Policy

In the typical Commercial Property Insurance Policy, the "covered causes of loss" provision usually states that covered cause of loss means risks of direct physical loss, unless the loss is otherwise excluded under the policy or limited under the policy. Then the policy will include several pages of exclusions and limitations to coverage.

1. Exclusions

In the policy attached to the materials there are over 20 specific exclusions to what is a covered cause of loss. These include the enforcement of ordinances or laws, earth movement, any type of governmental action, a nuclear hazard, interruption of utility services, war or military action, water damage, wet rot/dry rot or bacteria, electrical current, smoke vapors or gas, wear and tear, corrosion, any type of settling, shrinking, or cracking of foundations or walls, water seepage, freezing of plumbing, exposure to weather collapse, pollutants, or neglect. These are just a few of the items the policy excludes. If the loss occurs as the result of any of those items, the loss will not be covered.

2. Limitations

Within a Commercial Property Insurance Policy, there are typically a number of areas in which the policy provides coverage, but limits, either by scope or dollar amount, any damage that results from those particular types of losses. Many times these limitations will reduce coverage unless the incident results from another type of loss that is not otherwise excluded or limited. For example, the policy will typically exclude or limit coverage for any loss to the interior of a building or structure because of any rain, snow, sleet, and/or ice. However, if the building first sustains damage by a covered cause of loss to the roof or walls through which the rain, snow, sleet, and/or ice enters, or the loss is caused or results from the thawing of snow, sleet, ice on the building or structure then the loss is not excluded.

B. Homeowner's Policy

The typical Homeowner's Policy will provide coverage for "risks of direct physical loss" of covered property unless specifically excluded under the policy. Many of the exclusions and limitations are similar to the exclusions and limitations in a commercial insurance policy.

C. Frequently Litigated Issues Involving Causes of Loss

1. Water Damage

One area that is frequently a topic of litigation in the insurance arena relates to water damage and water seepage. This issue exemplified in *Boughan v. Nationwide Property & Cas. Co.* 3rd Dist. No. 1-04-57, 2005-Ohio-244. Homeowners (Jennifer & Richard Boughan) sued their insurer (Nationwide Property & Casualty) to recover for damage caused by water infiltration. The trial court held that the rotting of the home's floor joists and central beam, caused by repeated water seepage through cracks in brickwork, came within a specific homeowner's policy exclusion for "wet or dry rot." The water seepage, though not itself

excluded from coverage, was merely an intermediary cause of loss for which the insureds sought recovery.

The Boughans argued that the exclusions in the policy did not specify this type of water damage, and therefore the policy should be read to cover the damage to the home. They pointed to the exclusions contained in the amendatory endorsement modifying the coverage of the policy. Item 5 in the endorsement excluded direct physical loss caused by "continuous and repeated seepage or leakage of water or steam over a period of time from a heating, air conditioning, or automatic protective sprinkler system; household appliance; or plumbing system that results in deterioration, rust, mold, or wet or dry rot." The Boughans argued that repeated water leakage through cracks in the brickwork caused the damage, not the mechanical systems specifically mentioned in Item 5. Thus, according to the Boughans, the damage was not specifically excluded from coverage because it was not clearly stated in that exclusion. See *Am. Fin. Corp. v. Fireman's Fund Ins. Co.* (1968), 15 Ohio St.2d 171, 174, 239 N.E.2d 33. ("an exclusion from liability must be clear and exact in order to be given effect").

However, the Boughans' argument ignored another provision in the amendatory endorsement. Item six of that endorsement provided that "direct physical loss to property" is not covered when caused by:

> 6. wear and tear; marring, deterioration; inherent vice; latent defect; mechanical breakdown; rust; mold; *wet or dry rot;* contamination; ... settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floor, roofs, or ceilings....

The policy also provided that "any ensuing loss *not excluded* is covered." (Emphasis added). The cause of the damage to the home was wet or dry rot resulting from the faulty brickwork, which is specifically excluded. In other words, the "ensuing loss"-the settling of the floor and

the rotting floorboards-was specifically excluded under Item 6. Accordingly, the policy did not cover the damage to the home.

The Boughans argued that the underlying cause of the damage was not the rotting of the floorboards but instead was the water seepage through the brick, making the exclusion in Item 6 inapplicable to their claim. The Court held that even if it granted the Boughans' argument that the water seepage was the underlying cause of the rotting floorboards, the water seepage occurred because of "deterioration," "latent defect," or "settling, cracking ... of ... [the] foundation [or] walls...." Accordingly, the exclusion in Item 6 still applied, excluding the damage from coverage. The Court found that the Boughans were not attempting to recover for the water seepage, but for the cause of the seepage and the damage that resulted. Ultimately, the repairs they paid for out-of-pocket were to repair the brickwork and the rotted floorboards, both of which were damages specifically excluded from coverage under the policy. In other words, both the underlying cause of the damage-the deterioration of the brickwork-and the ensuing loss-the rotted floorboards-are excluded from coverage. The Boughans' attempt to argue that the water seepage, an intermediary cause, was not excluded was an attempt to circumvent the plain language of the policy, which the Court rejected.

In *Schrock v. Feazel Roofing Co.* 2007 WL 4227457 (Ohio App. 5 Dist.), 2007 -Ohio-6448 the insureds brought a declaratory judgment action against their homeowner's insurer seeking coverage for rot damage to their house resulting from faulty roof repair. The trial court, granted summary judgment for insurer, and the insured appealed. The Court of Appeals held that: policy exclusion for "smog, rust or other corrosion, mold, wet or dry rot" precluded coverage for rot damage to the house resulting from faulty roof repair. The insurance policy contained language similar to the policy in the *Boughan* case, excluding "[w]ear and tear,

marring, deterioration; ... [s]mog, rust or other corrosion, mold, [or] wet and dry rot," but covering "any ensuing loss ... not excluded or excepted" in the policy. Id. at ¶ 41-50.

In the *Schrock* case, both parties' experts concluded that there was extensive rot and deterioration to appellants' home due to water seepage that was caused by faulty roof work. In support of their argument that such damage is not excluded, Appellants pointed to the "ensuing loss clause" contained in their homeowner's insurance policy.

> …the ensuing loss clause, by its very terms, only covers losses to property "not excluded or excepted in this policy.." As noted by the trial court in its decision, "[b]ecause damage caused by rot and deterioration is excluded under the Defendant's policy, the Plaintiffs' loss is not an ensuing loss not excluded or excepted in the policy."

The Court of Appeals concurred with the trial court that, based upon the language set forth above in the homeowner's insurance policy, the damage to appellants' residence was excluded and the "ensuing loss" language did not save the Schrocks' claim for water damage to their property.

2. Concurrent Causes Of Loss/Anti-Concurrent Causation Clauses

Another common issue arises when two forces unite to cause a loss. This is referred too as concurrent causation. It is a well-recognized insurance doctrine that refers to losses caused jointly by two perils, one of which is covered and one of which is not. For example, rain water accumulating on a roof and causing it to collapse, or a flood causing a mudslide.

Coverage in concurrent causation depends on which of the two causes of the loss was the efficient, or dominant, cause of the loss. The general rule is stated in 7 *Couch on Insurance*, §101:57 (Third Edition):

> In cases involving multiple causes that act to produce a loss, with at least one cause falling within the policy coverage and at least one falling outside it, the most common approaches to determining

> whether recovery should be allowed on the insurance contract are the efficient proximate cause rule and the concurrent causation rule. The efficient proximate cause rule allows recovery for a loss caused by a combination of a covered risk and an excluded risk only if the covered risk was the efficient proximate cause of the loss . . . meaning that the covered risk set the other causes in motion which, in an unbroken sequence, produced the result for which recovery is sought.

The dominant cause is not necessarily the cause nearest in point of time to the loss. As pointed out in Stempel, *Law of Insurance Contract Disputes*, §7.02, p. 7-8 (2000):

> The better reasoned decisions implicitly use dominance analysis in preference to proximity analysis where they find an event causing the loss most important, even though it is significantly more remote from the loss than other nontrivial causes.

Insurance contracts may include language negating the effect of the concurrent causation rule. Although such "anti-concurrent causation" clauses have been determined to be against public policy in some states, no Ohio court has so held.

Ohio follows the efficient proximate cause rule in concurrent causation cases. See:

- *Florea v. Nationwide Mutual*, 1983 WL 5030 (2nd Dist.):[I]n determining the cause of a loss for the purpose of fixing insurance liability when concurring causes of damage appear, the proximate cause to which the loss is to be attributed is or may be the dominant or efficient cause—the one that sets others in motion, although other and incidental causes may be nearer in time to the result and may operate more immediately in producing the loss.

- *Yunker v. Republic-Franklin Ins. Co.* (6th Dist. 1982), 2 Ohio App.3d 339, 442 N.E.2d 108, (holding that insured has burden of proving that the covered cause of loss "was the dominant, direct and efficient cause of the loss and damage to the insured property");

- *Goodrich Corp. v. Commercial Union Ins. Co.* 9th Dist. No. 23585, 2008–Ohio–3200 (Goodrich maintains, with supporting authority, that Ohio courts follow a "concurrent cause" theory of insurance recovery. Where property damage results from more than one contributing cause, and the insurance policy "expressly insures against direct loss and damage by one element but excludes loss or damage by another element, the coverage extends to the loss even though the excluded element is a contributory cause." *Andray v. Elling*,

6th Dist. No. L-04-1150, 2005-Ohio-1026, at ¶ 34, quoting *Gen. Am. Transp. Corp. v. Sun Ins. Office, Ltd.* (C.A.6, 1966), 369 F.2d 906, 908.)

- *Tom Harrison Tennis Center, Ltd. v. Indoor Courts of America, Inc.* Warren App. No. CA2002-03-034, 2002-Ohio-7150, provision of commercial property insurance policy, granting coverage for loss or damage resulting from the collapse of a building "caused only by one or more" of specified causes, including a "windstorm," did not provide coverage for collapsed roof insulation and liner allegedly resulting from a combination of excessive wind and the negligence of, or breach of express or implied warranties by, roofing contractor and subcontractor; the loss was not caused only by the risks enumerated in the provision at issue.

- *Boughan v. Nationwide Property & Cas. Co.* 3rd Dist. No. 1-04-57, 2005-Ohio-244, rotting of home's floor joists and central beam, caused by repeated water seepage through cracks in brickwork, came within specific homeowners' policy exclusion for "wet or dry rot"; water seepage, though not itself excluded from coverage, was mere intermediary cause of loss for which insureds sought recovery.

III. CLAIMS PROCESS: INSURED'S CONDITIONS UPON LOSS

A typical policy contains the following language detailing what an insured must do when a loss takes place:

Conditions

What to do in case of a loss

1. give us notice as soon as reasonably possible;

2. notify the police;

3. protect the property from further damage, making necessary and reasonable repairs to protect the property;

4. make a list of all damaged, or destroyed property, showing in detail quantities, description, replacement cost and amount of loss claimed.

5. send to us, within 60 days after the notice of loss, the above list and a proof of loss;

6. show us the property when requested;

7. submit to Examination Under Oath;

8. provide us information requested

9. produce receipts for any increased costs to maintain your standard of living;

Below we discuss the meaning of these duties and issues that arise.

A. Notice

Notice provisions in insurance contracts serve many purposes; they allow an insurer to become aware of occurrences early enough that it can have a meaningful opportunity to investigate, and provide the insurer the ability to determine whether the allegations state a claim that is covered by the policy. See *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, ¶ 77, citing *Ruby v. Midwestern Indemn. Co.*, 40 Ohio St. 3d 159, 161, 532 N.E.2d 730 (1988). Notice provisions further allow the insurer to step in and control the potential litigation, protect its interests, maintain the proper reserves in its accounts, and pursue possible subrogation claims. *Id.*, citing *Am. Ins. Co. v. Fairchild Industries, Inc.*, 852 F. Supp. 1173, 1179 (E.D.N.Y.1994). Further, it allows insurers to make timely investigations of occurrences in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. Id.

When an insurance contract contains a notice provision, the insured must comply with the provision, whereby they are considered “conditions precedent to coverage, so an insured's failure to give its insurer notice in a timely fashion bars coverage." *Goodyear*, supra at ¶14. The Supreme Court of Ohio has held that "[a] provision in an insurance policy requiring 'prompt' notice to the insurer requires notice within a reasonable time in light of all of the surrounding facts and circumstances." See *Ruby*, supra, syllabus. An insured's unreasonable delay in giving

notice is presumed prejudicial to the insurer absent evidence to the contrary. *Pa. Gen. Ins. Co. v. Park-Ohio Indus.*, 126 Ohio St. 3d 98, 2010-Ohio-2745 citing *Ferrando*, supra, syllabus.

B. Cooperation

The failure of an insured to comply with provisions in a policy requiring cooperation in the claims investigation process or defense may bar the insured from recovery. *Conold v. Stern*, 138 Ohio St. 352, 35 N.E.2d 133 (1941). When cooperation is a condition precedent to the fulfillment of an insurance policy, an insurer is relieved of its obligation if the insured fails to cooperate. *Luntz v. Stern*, 135 Ohio St. 225, 20 N.E.2d 241 (1935). Consequently, if an insurance company demands information, the insured is required to make a fair and frank disclosure of information demanded by the company. *Id.*

"Cancellation of an insurance policy is warranted only if (1) the failure to cooperate prejudices the right of the insurer and (2) the failure to cooperate is material and substantial." *State Farm Mut. Auto. Ins. Co. v. Holcomb*, 9 Ohio App.3d 79, 458 N.E.2d 441 (9th Dist. 1983); *Weller v. Farris.*, 125 Ohio App.3d 270, 708 N.E.2d 271 (2nd Dist. 1998). If both conditions are met, the lack of an insured's cooperation constitutes a sufficient defense to liability. *Templin v. Grange Mut. Cas. Co.*, 81 Ohio App.3d 572, 611 N.E.2d 944 (2nd Dist. 1992).

Where there is no showing of both material and substantial prejudice resulting from an insured's non-cooperation, Ohio courts hold there is no breach of a cooperation clause as a matter of law. *See, e.g., id.* at 576–78 (holding insured's failure to submit all requested documentation to the insurer constituted only partial compliance with the cooperation clause and material prejudice, but this did not nullify insurer's contractual obligations as a matter of law because there was no showing of substantial prejudice)

C. Proof of Loss

One provision that is an insured's duty in the event of any loss or damage is to submit a signed and sworn proof of loss to the insurance company, containing the information it requests to investigate the claim. Typically, this must be completed within a set period of days after the insurance company makes the request. The insurance company typically supplies the forms that the insured must then fill out and return to the insurance company. This proof of loss usually includes a description of the loss, the event, the description of the items that are damaged or claims to have been damaged and also dollar amounts if the insured has them yet to repair or replace the items that are damaged. This may include the insured being required to provide other documentation of the insurance company to substantiate the loss as well as providing a sworn statement under oath.

Under both the Commercial Property Policy and homeowner's policy, the proof of loss is listed as a contractual duty that the insured must comply with if requested by the insurance company. Denial of coverage could result if the insured does not comply with the request for the proof of loss as specified under the insurance policy.

IV. CLAIMS PROCESS: THE UNFAIR CLAIM SETTLEMENT PRACTICES ACT

In Ohio, there are specific provisions in the administrative code detailing some activities of an insurance company in handling, adjusting, investigating property and casualty claims that contain guidelines and requirements for how those claims are to be processed. That is found in OAC 3901-1-54. A copy of the regulation is attached to the materials for your reference.

What is important to note is that the Claims Settlement Practices Act does not create a private cause of action by any policyholder against an insurance company. It is used as a requirement that an insurance company must comply which or possibly result in a complaint to the Department of Insurance. It does not provide a cause of action that the policyholder may file

suit against the insurance company if the insurance company supposedly does not comply with all of the requirements under Act.

V. EXCLUSIONS

Typically, insurance policies exclude coverage for action of civil authorities, earthquake, water damage, freezing of plumbing, war, nuclear action, intentional loss, wear and tear, continuous seepage of water, vandalism of a "vacant" property.

These exclusions are affirmative defenses that must be proven by the insurer. We focus on these and others below.

A. Fraud, Concealment, and Material Misrepresentation

Concealment or fraud clauses are fully enforceable under Ohio law. *Taylor v. State Farm Fire & Cas. Co.*, N.D.Ohio No. 3:11-CV-1714, 2012 WL 1643877 (May 10, 2012) (citing *Smith v. Allstate Indem. Co.* 304 Fed.Appx. 430, 431-32 (6th Cir.2008)). For an insurer to void the contract due to fraud or concealment, the misrepresentation must be material and made intentionally by the insured. *Id.* "[A] misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented." *Latimore v. State Farm Fire & Cas., Co.*, N.D.Ohio No. 1:11-CV-272, 2012 WL 3061263 (2012). "The materiality of a misrepresentation [however] is a mixed question of law and fact that under most circumstances should be determined by the trier of fact." *Id.*

B. Arson

In Ohio, the general law regarding an insurance company's burden in a civil arson case is stated in *Caserta v. Allstate Ins. Co.*, 14 Ohio App.3d 167, 470 N.E.2d 430 (10th Dist.1983):

> Where an insured seeks to recover on a fire insurance policy and the insurer claims arson, the defense of arson is an affirmative defense to be established, by a

> preponderance of the evidence, that the insured participated in the burning of the property to obtain the insurance proceeds either by personally setting the fire or having someone else set it for him.

Arson may be proven by circumstantial evidence, but to overcome a motion for a directed verdict, the circumstantial evidence must establish:

> [T]hat the fire was of incendiary origin, that the insured has a motive to burn the property to obtain the insurance proceeds and that the insured had the opportunity to participate in the arson; however, almost all the cases indicate that mere proof of incendiary origin and motive is insufficient.

Id. When the evidence is circumstantial, it must be so convincing as to be irreconcilable with the claim of innocence and admit of no other hypothesis than that the insured was responsible for the fire. *Carter v. Ohio*, 4 Ohio App.193, 22 Ohio C.C.(N.S.) 154 (5th Dist.1915). Evidence raising a mere conjecture the insured was responsible for the fire is not sufficient. *Verrastro v. Middlesex Ins. Co.*, 540 A.2d 693 (Conn.1988); *see also Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St. 329, 332, 130 N.E. 2d 280 (1955) (finding "[f]or the purpose of supporting a proposition, it is not permissible to draw an inference from a deduction which is itself purely speculative and unsupported by an established fact. . . . Such a process may be described as drawing an inference from an inference, and is not allowable. At the beginning of every line of legitimate inferences there must be a fact, known or proved.").

For example, in *Mize v. Hartford Ins. Co.*, 567 F. Supp. 550 (Va.1982), the insurer relied on the following circumstantial evidence to justify its denial of an insured's claim for fire damage done to her house:

1.) The insured had previously lived with the admitted arsonist;

2.) The insured was on vacation at the time of the fire and had taken her jewelry with her;

3.) The insured had placed her pets in a kennel instead of leaving them at home;

4.) The insured was slightly behind in her mortgage payment;

5.) The insured had her important papers at her mother's house; and,

6.) The insured had been trying to sell the house.

The trial court summarily dismissed the points that the insurer argued had constituted circumstantial evidence of arson as follows:

> The insurance company's view of the circumstances, whether viewed singularly or as a whole, is not impressive. Every circumstance listed by the company was perfectly normal, everyday act and was fully explained by the plaintiff as such. When circumstances admit of two equally plausible interpretations, they are insufficient to carry the burden of proof.

1. NFPA 921 – "Human Act"

NFPA 921 is the leading fire investigation publication in the world, and courts have uniformly recognized it as such. NFPA has been described as "a lengthy and specific document that contains detailed discussions on investigations of everything from motor vehicles and Molotov cocktails to explosions and electrical fires." *Booth v. Black & Decker, Inc.*, 166 F. Supp. 2d 215, 220 (E.D. Pa. 2001). See also *Abon, Ltd. v. Transcontinental Ins. Co.*, 2005-Ohio-3052, 2005 WL 1414486 (5th District), ("agreeing that NFPA 921 "is a peer reviewed and generally accepted standard in the fire investigation community."); *Indiana Ins. Co. v. General Electric Co.*, 326 F.Supp.2d 844 (N.D. Ohio 2004), ("NFPA-921 is a recognized guide for assessing the reliability of expert testimony in fire investigations."); *Travelers Indemnity Co. v. Indiana Paper & Packaging Corp.*, 2006 WL 1788967 (E.D. Tenn.), (recognizing "that NFPA 921 is a peer reviewed and generally accepted standard in the fire investigation community."); *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054, 1057-58 (8th Cir. 2005) ("[NFPA 921] qualifies as a reliable method endorsed by a professional organization."); *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 653 (D. Kan. 2003) (describing NFPA 921 as the "gold standard" for fire investigations).

NFPA 921 states that there are four classifications or causes of fire: accidental, natural, intentional, and undetermined.[1] In order to determine the cause of a fire, an investigator should employ the scientific method. NFPA details the steps of the scientific method. In order to classify a cause of fire, NFPA states that the investigator must determine the ignition source and the first fuel ignited. NFPA 921, ¶19.2.1.4 requires the cause of the fire to be classified as undetermined:

> Whenever the cause cannot be proven to an acceptable level of certainty, the proper classification is undetermined.

C. Vacancy

The exact language varies from policy to policy, here are some common provisions:

> If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage, we will:
>
> a. Not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
>
> (1) Vandalism; * * *
>
> (5) Theft * * *
>
> b. A building is vacant when it <u>does not contain enough business personal property to conduct customary operations.</u>
>
> A building under construction is not Vacant.

Or

> We will not pay for vandalism or mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately preceding the loss. A building under construction is not considered vacant.

1. Meaning of Vacancy

[1] NFPA 921, ¶19.2.1; Lawless, p. 59.

"Vacancy" has been held to mean empty and may be treated synonymously with "abandoned." 6A COUCH ON INSURANCE § 94:131. "Vacant" does not mean "unoccupied." Courts have interpreted "vacant" in the following ways.

- *Jerry v. Kentucky Cent. Ins. Co.*, 836 S.W.2d 812 (Tex. App. 1992). Entire abandonment, deprived of contents, empty, that is, without contents of substantial utility.

- *Nat'l Sec. Fire & Cas. Co. v. James*, 358 So.2d 737 (Ala. Civ. App. 1978). Empty, without inanimate object, containing nothing.

- *Drummond v. Hartford Fire Ins. Co.*, 343 S.W.2d 84 (Mo. Ct. App. 1960). Empty and without inanimate objects . . . entire abandonment, non-occupancy for any purpose.

- *Vushaj v. Farm Bureau Gen. Ins. Co.*, N.W.2d 758 (Mich. App. Ct. 2009). Vacant means completely empty.

2. Meaning of "Under Construction"

Some federal district courts have construed the term "under construction" in an insurance contract to refer to "the building or erection of something new, whereby "[u]nder construction" does not include repairs or renovations to property which already exists. *Salem v. First Fin. Ins. Co.*, 8th Dist. No. 73593, 1998 Ohio App. LEXIS 5576 at *11 (Nov. 25, 1998); see also *Auto-Owners Ins. Co. v. Madison at Park West Prop. Owners Assoc, Inc.*, 834 F. Supp. 2d 437, 447 (D.S.C. 2011), citing *LTV Steel Co., Inc. v. Nw. Eng'g & Const., Inc.*, 845 F.Supp. 1295, 1300 (N.D. Ind.1994); see also *Myers v. Merrimack Mut. Fire Ins. Co.*, 601 F. Supp. 620, 623 (C.D. Ill. 1985); see also *Travelers Indemnity Co. v. Wilkes County*, 102 Ga.App. 362, 116 S.E.2d 314, 317 (1960). While others have adopted the rationale *Belich v. Westfield Insurance Company*, vacancy provisions in insurance contracts reflect the commonplace observation that the risk of casualty is higher when premises remain unattended, whereby "'construction' can be taken to include remodeling or refurbishing, [since] the phrase looks to some substantial continuing

activities of that sort on * * * the property." *Belich v. Westfield Ins. Co.*, 11th Dist. No. 99-L-163, 2000 Ohio App. LEXIS 6212 at * 7 (Dec. 29, 2000).

In adopting Belich, the United States District Court for the Southern District of Ohio held that work performed to convert a former occupied space into a newly occupied space is best characterized as "remodeling[,]" whereby when space is generally reconfigured on the property, such activities "go far beyond what would commonly be considered 'renovation.'" *New Mkt. Acquisitions v. Powerhouse Gym*, 212 F. Supp. 2d 763, 772-773 (S.D. Ohio 2002). Similarly, the Missouri Southern District Court of Appeals held that by "[c]onstruing the reasonable definition in favor of the insured, * * * activities encompassing the renovation of a building [is] construction." *Warren Davis Props. V, L.L.C. v. United Fire & Cas. Co.*, 111 S.W.3d 515, 522 (Mo. App. S.D. 2003). In any case, if a court determines that the meaning of the word "construction" in an insurance policy is ambiguous, the policy must be construed against the insurer. *Baker v. Nationwide Mut.*, 9th Dist. No. 12CA010236, 2013-Ohio-1856, ¶ 11.

VI. DAMAGES

A. Damage Clauses

Under a Commercial Insurance Policy, it usually states that in the event of an insured and covered loss, the insurance company has the option to either (1) pay the value of the lost or damaged property; (2) pay the cost of repairing or replacing the lost or damaged property; (3) taking all or any part of the property at an agreed or appraised value; or (4) repairing, rebuilding or replacing the property with other property of like kind or quality. The value determination is made based on other provisions in the policy whether there would be replacement costs or actual cash value or an agreed value. Similar provisions are contained in a homeowner's insurance policy.

Most insured's have a replacement cost policy stating the insurance company would pay the actual cash value (replacement cost less depreciation) of a damaged item until the item was repaired or replaced, and then pay the remainder (the withheld depreciation) once the repair or replacement was completed.

Under most Commercial Property Insurance policies, the value of covered property that has been damaged by a covered loss is typically determined on the basis of actual cash value at the time of the loss. Actual cash value is usually defined as the replacement cost less a deduction reflecting amount for depreciation, age, condition, and obsolescence. For an additional premium, a Commercial Insurance Policy may provide payment on a replacement cost basis which is typically the amount to repair place with property or materials of a like kind in quality. In many Commercial Property Insurance policies, the insured has the option of selecting an agreed value method to value the amount of loss and the amount for which the insurance company would pay to replace or repair property. Under the agreed value coverage provision, there is no deduction or application of a co-insurance provision, which will be covered later and the amount of loss, the insurance policy says that the insurance company will pay for loss to property at an amount that is no more than the proportion that the limitative insurance stated in the declaration bares to the agreed value shown for it in the declarations.

B. Replacement Cost issues

Under a Commercial Property Insurance policy, if the insured has purchased replacement cost coverage, the insurance company then pays for the replacement cost as defined under the policy. In that event, the insured can elect to have the loss covered on an actual cash value basis, but then still can make a claim for the additional replacement costs if it does so within 180 days after the lost. Also under replacement cost coverage, the insurance company will not pay for the loss until the lost or damaged property is actually repaired or replaced with other property of the same construction and used for the same purpose and usually that must be completed within two years following the date of loss. Replacement cost coverage usually provides that the insurance company will (1) pay the least of one of the limitative insurance declarations that applies to the lost or damaged property; (2) the costs to replace the lost or damaged property with others of comparable material and quality used for the same purpose; or (3) the amount that the insured actually spends, that is necessary to repair or replace the lost or damaged property. So under replacement cost coverage, there are various conditions and limitations and requirements that must be met for the insured to receive replacement cost, and there is also a limit on how much the insurance company will pay based on the lesser of the three items mentioned above. So in that situation, even though a policyholder may have replacement cost coverage, that does not mean that the policy holder automatically receives what it believes to be the amount that it takes to repair or replace the damaged or lost property.

C. Actual Cash Value

Actual cash value is usually defined as the replacement cost less a deduction reflecting amount for depreciation, age, condition, and obsolescence. Issues arise over the amount of depreciation to be taken on structures and contents.

D. Loss Appraisal Provisions

Commercial Property and Homeowner's insurance policies contain a provision for an appraisal process if the insured and the insurance company disagree on either the value of property or the amount of loss or the amount of any net income or operating expense in relation to a business interruption claim. Under that provision, either party may make a written demand and for an appraisal of the loss and then at that point both sides must submit to the appraisal process that is set forth in the policy. At that point, both parties will each select an appraiser, those two will select a third, who is the umpire, then the appraisers are required to state separately the value of the property and the amount of loss. If they do not agree, the umpire that the two appraisers shows will make the decision agreed to by any two is binding.

Under the appraisal provision, most policies do not contain a time frame in which the appraisal must be demanded, they do not specify what information must be provided or can be requested by the appraisers, nor do they set forth any time frame in which the appraisers must act or render their decision. This could be a source of dispute between the insurance company and the insured under the appraisal provision that it is not specific enough on the procedure that has to be followed. However, under the appraisal provision, once a decision is made, that at least two of the appraisers, either both appraisers or an appraiser and umpire agree on, it is binding on both the insurance company and the insured. However, under the policy, even if there is an

appraisal, the insurance company still retains the right to deny the claim if either some or all of the property is not covered or they dispute whether the loss is covered under the terms of the property or whether the insured has complied with any other duties or conditions under the terms of the policy.

Stuckman v. Westfield Insurance Co. (3rd Dist. 2011), 986 N.E.2d 1012, 2011-Ohio-2338 illustrates an insured's challenge to a loss appraisal provision in their insurance policy. In 2008, the Stuckmans suffered damages as a result of a fire at their home in Bucyrus, Ohio. The Stuckmans and Westfield were unable to agree on the amount of loss, and consequently, Westfield demanded an appraisal under the terms of the insurance policy. The parties chose appraisers and followed the general appraisal process provided for under the policy.

The Stuckmans challenged the appraisal process and award because the provisions in the policy were vague and ambiguous; the Court of Appeals rejected that argument. The Court also held that statutes relating to arbitration proceedings and awards did not apply to the contractual appraisal process. The Court also rejected the trial court's modification of the appraisers' decision in the absence of evidence of fraud, mistake, or misfeasance.

E. The Measure of Damages at Trial

Jury instruction:

> We, the jury duly impaneled in the captioned case, find in favor of Plaintiffs Douglas and Teresa Lowe and against Defendant Allstate Property and Casualty Insurance Co., and award them the sum of:
>
> _____$327,872.00_____ Dwelling
>
> _____$88,198.52_____ Contents
>
> _____ Other

> We further find that Douglas and Teresa Lowe should/should not (circle one) be awarded their attorney fees in an amount to be set by the Court following the conclusion of this case.

When an insurer denies payment of a claim, an insured never has an opportunity to recover the actual cash value nor to file an additional claim for the replacement cost of the loss. The insured typically has no funds to replace property unless payment is made by the insurance company of the actual cash value of the loss. However, when an insured files a lawsuit, the insurance company typically tries to limit the recoverable damages to the actual cash value of the loss by arguing the insured is not entitled to replacement cost under the terms of the policy since the insured never actually replaced any property.

This argument is fallacious. The insurance company, by breaching the insurance policy, cannot rely on the policy to limit its liability in this manner. *Zaitchick v. Am. Motorists Ins. Co.*, 554 F.Supp. 209 (S.D.N.Y.1982). In *Zaitchick*, the insurer denied the insured's claim based on evidence of arson. *Id.* at 213. The court held the insurer failed to prove arson on the part of the insured, and then considered the issue of the damages recoverable by the insured. *Id.* The court's opinion summarized the positions of the parties as follows:

> Plaintiffs assert that they should be awarded damages to cover the replacement of their house, commonly referred to as replacement cost. Defendant, on the other hand, claims that it is liable only for the actual cash value of the house immediately before the fire. The defendant's argument is based on the insurance contract between the defendant and the plaintiffs. The contract permits recovery of replacement cost instead of actual cash value, but not "unless or until repair or replacement is completed." "It is well settled," the defendant maintains, "that the actual repair or replacement of the damaged property is a condition precedent to recovery of replacement of the damaged property is a condition precedent to recovery of replacement costs."
>
> Plaintiffs, on the other hand, assert that various equitable axioms preclude defendant's reliance on the contractual provisions. The Zaitchicks contend that the defendant's refusal to tender payment to them under the contract made

> replacement of their home and possessions financially impossible. Therefore, plaintiffs conclude, defendant "cannot profit from its own breach of the agreement," and is "estopped . . . [since] the company prevented[ed] the insured from repairing or rebuilding by refusing payment. . . ." Plaintiffs forcefully argue that defendant's refusal to pay any money prevented them from rebuilding their home.

Id. at 216. After considering the arguments of the parties to the court, *Zaitchick* came down squarely in favor of the insureds:

> I find that both case law and equitable considerations render replacement cost the appropriate method of valuing plaintiffs' damages.
>
> * * *
>
> In the instant case, plaintiffs were refused any monies under the insurance contract. Not surprisingly, they were unable to replace their home. This conduct by defendant made it impossible for plaintiffs to fulfill the condition precedent, and therefore, excuses plaintiffs from performance of the replacement condition.

Id. at 217. The same conclusion was reached in *McCahill v. Commercial Union Ins. Co.*, 446 N.W.2d 579 (Mich.App.1989), where the court stated in a similar fire case:

> We are persuaded that, under the facts of this case plaintiff was excused from performing the condition precedent. Without the necessary funds being advanced by defendant, plaintiff would have little likelihood of being able to secure financing to repair or replace his property.
>
> * * *
>
> Therefore, we conclude that plaintiff established that he was entitled to recovery for replacement costs without actually replacing his property.

Id. at 585; *See also Vantage View, Inc. v. QBE Ins. Corp.*, S.D. Fla. No. 07-61038-CIV, 2009 WL 536546 (Mar. 3, 2009) (quoting *Restatement [Second] of Contracts*, Section 245 – "[w]here a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused."); *see also Pollock v. Fire Ins. Exch.*, 423 N.W.2d 234 (Mich.App.1988) ("[w]e will not now allow defendant to raise as a defense plaintiff's failure to perform an act which defendant itself greatly hindered plaintiff from

performing."); *see also Bailey v. Farmers Union Co-Op Ins. Co of Neb.*, N.W.2d 591 (Neb.App.1992); *State Farm v. Miceli*, 518 N.E.2d 357 (Ill.App.1987).

This ruling is consistent with Ohio law because in breach of contract cases the measure of the plaintiff's damages is the amount the plaintiffs would have recovered if the contract had been honored. Plaintiffs are entitled to replacement cost if they can establish they would have replaced the property if the insurance company had honored the contract.