



Harmonizing the Mortgage Clause and Vacancy Exclusion

By John Neal, Attorney

Willenbring, Dahl, Wocken & Zimmermann, PLLC

On October 28, 2015, the Minnesota Supreme Court issued a long-awaited decision in *Commerce Bank v. West Bend Mutual Insurance Company*. This case addressed two competing clauses in an insurance policy, namely the mortgage clause (which allows coverage to a mortgagee, regardless of the acts of an insured) and a vacancy clause (which excludes coverage after a certain period of time when the building is vacant). The question was whether the vacancy clause excludes coverage for a mortgagee’s vandalism claim when the vacancy, as alleged, resulted from an act of the insured (namely vacating the building). The Court held that “a mortgagee has coverage for vandalism damage to a vacant building only if the building was only vacant because of the ‘acts’ of the owner or if the owner ‘failed to comply with’ the policy terms, and the mortgagee was unaware of such acts or failure.”

BACKGROUND

Commerce Bank was the mortgagee on a commercial building located in Burnsville, Minnesota. West Bend insured the property. Seven months after Commerce Bank was added as a mortgagee to the policy, the building was vandalized. At the time, the building was vacant for 60 or more days. Commerce Bank knew the building was vacant. However, West Bend did not.

Commerce Bank submitted a claim under the mortgage clause, seeking coverage for the vandalism. West Bend denied the claim on the basis that the building was vacant.

The policy contained two competing clauses. The first was the “standard mortgage clause.” That clause, in summary, allowed coverage for a mortgagee, regardless of the acts of an insured. The second clause was a vacancy clause, which excluded coverage for vandalism when the property was vacant for 60 days or more prior to the loss.

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West Bend asserted that the vacancy provision applies to the mortgagee, regardless of any act of the insured. Commerce Bank, however, asserted that the vacancy was an act created by the insured (namely, the insured vacating the premises) and accordingly coverage exists under the standard mortgage clause.

THE RULING

Before the case reached the Minnesota Supreme Court, the Court of Appeals ruled that an insured's "failure to occupy the property (or secure a tenant) was an act by the insured, which necessitated the vacancy." Accordingly, the mortgagee - so long as it did not breach the policy - was entitled to coverage. The Minnesota Supreme Court accepted review of the decision. (A competing case from Wisconsin's Court of Appeals concluded an opposite outcome, which may have prompted the Minnesota Supreme Court to take a look at this case.)

The Supreme Court tried to harmonize the mortgage clause and the vacancy clause. The Court failed to adopt Commerce Bank's interpretation, finding that it would essentially defeat the purpose of the vacancy clause. Under Commerce Bank's position, a vacancy would always be the act of an insured in failing to secure a tenant or occupy the building. The Court noted that a vacancy can be created by matters outside the control of the tenant or insured, such as a severe economic downturn.

The Court also disagreed with West Bend's interpretation that the vacancy clause is a condition of the building and not an act created by the insured. The Court provided examples whereby an act of an insured could create a vacancy, such as charging grossly above market rents or making the building uninhabitable. Accordingly, under certain circumstances the acts of an insured can create a vacancy.

The Court, having determined the parties' respective positions, found that the mortgagee has coverage so long as the vacancy was created by the acts of the owner, which is a fact-intensive question. If the owner's acts caused the vacancy, the second question is whether the mortgagee was aware of the acts.

However, the Court made an interesting statement in its decision. The Court noted that the vacancy clause, like every term and condition in the policy, applies to the mortgagee. This seems to suggest that all policy exclusions—so long as they are not created by the acts of an insured—would apply to a mortgagee to defeat coverage.

CONCLUSION

Often times, we see mortgagee claims through third-party vendors. There was a significant increase in claims during the economic downturn and at the height of foreclosures. We still see these claims today and this case will provide guidance moving forward. Generally, third-party vendors, submitting claims on behalf of a mortgagee, are continuously monitoring the property to determine whether it is vacant. Often times, the third-party vendor knows of the vacancy but was put on notice of the vacancy prior to any vandalism or theft claims. These are important facts to consider when reviewing a mortgagee claim in light of the *Commerce Bank* case.

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Year Again !!
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for **Short Course!**

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Cilla Hughes,
Manager

We were founded in 1890 by a group of local Danish farmers. We celebrated 125 years of service in 2015. Hope Mutual is partnered with “premiere” farm and home insurers – Grinnell Mutual and North Star Mutual to provide Farm Package, Home-Owners, Liability, and Inland Marine policies.



Hope Mutual has 5 employees (see the photo below). We work with 26 local agencies and a total of 89 appointed agents. Hope Mutual is committed to Greater Minnesota. We strive to continue to improve our company, protect our policyholders and to be a good employer. We are selling personal service at the best price possible.

To celebrate our 125th year, we made a contribution to the Avera Cancer Institute Marshall. We are involved with all local Fire Departments, Community Chest, Tyler and Lake Benton Chambers of Commerce, and Pheasants Forever.

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Congratulations Hope Mutual on celebrating 125 years of service!



Staff from the left: Don Hughes, Stacy Keifer, Cilla Hughes, Lisa Willert and Jeff Van Dyke



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Joke of the Day
“My problem is that it takes me 6 weeks to read the book of the month.”

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December 2015 Board Meeting Synopsis *Greg Parent, Secretary-Treasurer*

The MAFMIC Board of Directors held their final quarterly meeting of the year on December 10 at the MAFMIC office in St. Joseph. A number of items were on the agenda, as the board wrapped up its work for the year and began looking forward to 2016. In addition to the financial and management reports, district updates, and board liaison committee reports, the board took action on several items requiring approval.

Districts 2 & 3 recently held elections to elect new directors to begin serving four year terms in February. Eric Johnson of Woodland Mutual will be the new District 2 director while Karen Erickson of Holmes City Mutual will serve as director in District 3. Immediate Past-Chairman Paul Larson provided an update on the nominations for the Vice-Chairman and Secretary-Treasurer positions for 2016. The board held an election to select the recipient for the Robert C. Seipp Service Award which will be announced at the convention in February.

The board reviewed membership dues for 2016. The 2016 MAFMIC Budget was presented by Secretary-Treasurer Greg Parent. The board approved the budget. The board also approved three new Associate members for 2016.

The board tabled the discussion on Key Employee Life Insurance to the March 2016 meeting. The board also discussed how to handle convention registration costs regarding members who have distinguished service to MAFMIC, but who are not Past Chairmen and who are no longer affiliated with a MAFMIC member company.

The Strategic Plan Committee had met in October to review and renew the current plan. The board approved the updated Strategic Plan. CEO Aaron Cocking reviewed several recent changes and updates to the MAFMIC Articles & Bylaws. The board approved the revisions and moved the changes forward for approval by the membership at the Annual Meeting in February.

CEO Aaron Cocking prepared a Document Destruction and Retention Policy, so MAFMIC could have a set guideline to follow. The board reviewed and approved the document.

The next scheduled board meeting is the annual financial review meeting held at the Convention on February 7, 2016. The first quarter 2016 board meeting will be held at the Short Course in Alexandria on March 15. Please contact your district director or an association officer if you have any items of concern that you would like to discuss.



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Aaron Cocking, MAFMIC CEO / Director of Government Affairs



2016 Legislative Session

The 2016 legislative session will kick off on March 8th. This is the latest date for a regular legislative session to start in the history of the state. House and Senate leaders have already announced deadlines which will force early action and consideration of bills. We will know by April 8th what issues are still alive and what we need to be concerned with.

2016 will focus much attention on a bonding bill, which is money the state borrows to pay for capital improvements around the state. It is likely the legislature will pass a bonding bill in excess of \$1 billion. The state announced in early December that legislators will likely have nearly \$1.9 billion in surplus to figure out how to spend or save. That was an early Christmas present for legislators in an election year. Speaking of elections, it is unlikely anything major will get done in 2016 with all 201 legislators on the ballot. With the shortened session, legislators will be eager to hit the campaign trail to blame the other side for what didn't get done or pat themselves on the back for what did.

The MAFMIC Government Affairs Committee met in early December and decided there were not any proactive issues we needed to address this year on a legislative front. We will remain vigilant as always to prevent any bad legislation from becoming law. As always, if you have an issue or question, feel free to contact me.



The 2016 Congressional Contact Program (CCP)
trip to Washington D.C. will take place on
February 24-25, 2016.

It is much earlier in 2016 due to the timing of the Minnesota legislative session and when congress will be around, since it is an election year. The CCP is a great opportunity to raise awareness of the mutual insurance industry with our elected officials. If you have any questions about the trip or if you are planning on attending, please email MAFMIC CEO Aaron Cocking (aaron@mafmic.org).



Thank You To Our Sponsors



Chairman's theme this year is
"Success through Service"



Please join our MAFMIC Chairman,
Deb Liden and her husband, Brian
for the 2016 Chairman's Reception.
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Minnesota Mutual Insurance. With the Super
Bowl on the big screen's, the food at the
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to be the perfect way to start our 2016
convention.

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2016 MAFMIC Short Course

March 16 & 17, 2016

Arrowwood Resort, Alexandria, MN

This educational seminar is for mutual officers, directors, managers, office staff, agents, adjusters and inspectors. Registration fee includes attendance at eight sessions, a continental breakfast and hot breakfast buffet, two lunches, breaks, all classroom material and a social hour. Application has been made for **7.0 hours** of non-company continuing education credits. We do not give partial credit for any portion of this seminar. **(APPROVAL IS PENDING)**

Cost and Registration

Early Bird Registration fee (before Wednesday, February 24th): \$220 per member & \$277 per non-member. Late Registration fee (after Wednesday, February 24th): \$252 per member & \$309 per non-member. One Day Registration Fee: Please call MAFMIC office for details. There is NO additional fee for FMDC sessions going forward. Please still mark the box if you plan to obtain FMDC credit. Spouses wishing to attend sessions must be registered and paid as a delegate. Those spouses wishing to attend only the breakfasts, lunches or adjustment hours must purchase tickets by prices listed below.

Cancellation Policy

Cancellation notices received *on or before March 4, 2016* are 75 percent refundable. • Cancellation notices received *March 5-14, 2016* are 50 percent refundable. • No refunds are available *after March 14*. • A company may substitute a participant at no additional charge. All registration cancellations and substitutions must be made in writing and sent to info@mafmic.org or faxed to (320) 271-0912.

Hotel Reservations

A block of rooms is being held until *February 23rd* at Arrowwood Resort with the rate of \$89 plus tax. Reservations can be made online at <http://www.arrowwoodresort.com> using the Group Code **MAFMIC** or by calling (320) 762-1124 or (866) 386-5263. Alternative reservations may also be made at the following hotels:

Holiday Inn, Alexandria

5637 Hwy. 29 South
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Reservations: (320) 763-6577

Country Inn & Suites

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Reservations: (320) 763-9900

2016 SHORT COURSE REGISTRATION

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“Public Adjuster’s Role”

By Jeff Brinkman, Brinkman Claim Service



So, your insured has hired a public adjuster. Now what?

Minnesota was once the land of few public insurance adjusters. In recent years, Minnesota case law involving material matching on replacement cost policies and expanding the authority of the appraisal panel in the appraisal process has increased the average cost of many types of losses.

This has prompted many public adjusters to view Minnesota as a lucrative and relatively untapped market for their services. As a result, mutual insurance companies have seen an increase in public adjuster involvement with claims amongst their policyholders.

When mutual adjusters or managers receive notice that a public adjuster has been hired, oftentimes they become guarded and communications becomes formalized and therefore limit communication with the Insured.

In most cases, the public adjuster is hired as a result of the Insured’s unfamiliarity and discomfort with handling an insurance related loss. On other occasions they are hired because an Insured is in dispute of the total amount of the claim or the extent of damage determined by the carrier.

The public adjuster’s role is supposed to include that of managing the Insured’s claim by ensuring the claim is filed appropriately, review all available coverages and benefits provided by the policy and either reach agreed figures with the Insured and their carrier or present their own opinion of claims values for all coverages to the insurance carrier via a proof of loss and supporting documentation. Many public adjusters approach their service in an overtly assertive manner, which can be intimidating at times.

The public adjuster’s involvement should not change anything in the process of claims handling other than the negotiation of the loss must involve the public adjuster. The loss should still be fully investigated, the coverage or denial properly qualified and then addressed accordingly.

If the loss is covered, the Insured and public adjuster should be provided with policy information to include all of the applicable coverage information as well as the related limitations and exclusions so there are few, if any surprises as the claim process progresses. Consistent communication with the Insured and public adjuster throughout the claims process is important to encourage a “meeting of the minds” to conclusion.

Furthermore, when a claim is presented, it is imperative that the damage or lack thereof be thoroughly documented and early use and involvement of expert estimators, mitigation contractors, or inventory experts should not be avoided if the loss is significant. This assists in solidifying the loss amounts offered by the carrier and helps the carrier ensure the scope of damage is proper. The Insured and public adjuster should be made aware of any expert involvement and joint inspections should be encouraged to address concerns and the results of those inspections should be documented. The scope of damage and repair costs should then accurately reflect the results of those inspections subject to any coverage limitations.

Notably, many public adjusters will submit their own loss valuations based on Xactimate estimates, however, these estimates are merely estimates to establish a gross figure and may not incorporate a thorough

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“Public Adjuster’s Role” By Jeff Brinkman, Brinkman Claim Service



evaluation as to the necessity of the estimated scope of damage or accurate repair costs. Some are submitted with no supporting documentation. The experts noted above should review, document, and report the disparities to the carrier and those items should be addressed with public adjuster and the Insured in an effort to resolve the disparities or decline any amounts that do not accurately reflect the scope of damage or reasonable cost of repairs.

With an informed approach to the claim facts, policy coverages and a thorough understanding of the scope of damage, most claims involving a public adjuster can be resolved amicably and the Insured can often be retained long term.

However, in the event of vast differences between what the carrier believes is the true value of the claim and those submitted by the public adjuster, the appraisal clause should be utilized. Negotiation between two disputed amounts that are largely different should be avoided prior to any appraisal.

If an appraisal is initiated by either party, the information and testimony gathered by the experts familiar with the loss can and should be utilized in support of the carrier’s position so far as the carrier has taken all efforts to assure the loss amounts are accurate.

The involvement of a public adjuster should not automatically become adversarial and good faith efforts should always be made to resolve the claim in a fair and reasonable manner. If this cannot be done, the policy provides a fair avenue of resolution through the appraisal process.

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2015 Year End Financial Markets / What can we Expect in 2016 Dan Baasen, Portfolio Manager, Northland Securities

Well, the Federal Reserve finally did it! The long awaited vote of confidence for the recovery from the Great Recession has been predicted by experts for months and delayed often finally got to the point the Fed and financial markets feared market repercussions if they didn't get it done. So, it was seven years to the day after lowering the Fed Funds rate to almost zero that we get to experience rising rates. The reaction from financial markets had a small increase in extremely short term rates with little, if any, response in the 10 year US Treasury sitting at 2.18% and the 20 year at 2.55%. This reaction confirms belief that the risk of rapid inflation is minimal and the longer term perspective remains cautious. The rest of the world is still facing economic struggles. Canada and Australia are "resource economies" and with most worldwide commodity prices still facing challenges we don't anticipate pressure there. Europe is still lowering rates and China is growing economically, but many don't trust their numbers.

What can we expect in 2016? Consensus again says probably 2-3 more modest bumps to the Fed rate! The next one will most likely be in April. The Fed is conscious of its effects on markets and is striving to reduce or eliminate major surprises. For an investment program for MAFMIC companies and individual investors, I encourage you to stay consistent with past investment policy and try not to chase yields through either lower rated bonds or longer term maturities. A 10 year maturity purchased today becomes a 5 year in a relatively short period of time. We expect that it will be a long time to wait until rates return to more normal 3-5% rates we experienced over a decade ago.

Have a prosperous New Year and feel free to call me at 612-851-5916 if you have any questions.



Join us in Vancouver, Canada
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NAMIC ANNUAL CONVENTION
September 25-28, 2016
Vancouver Convention Center
Vancouver, BC, Canada



By Richard Holm,
Priority Data

TECH CORNER



Holiday Phishing Alert

OK, this scam is widespread enough to alert your users about it. The email claims to be from Apple Support and says your Apple ID and iCloud are both going to be suspended because you did not complete verification on time. With the massive amount of new Apple devices being sold during the holidays, this attack may hit many employees.

Supposedly Apple sent you an earlier email about this but they did not receive a response. The email has a "Verify now" link that allows you to complete the verification process and save your account from suspension. (Yeah, sure.) If an employee clicks the link, they land on a bogus Apple login page asking for their credentials. But wait, there's more!

You will be taken to a second fake page that asks for a large amount of your personal and financial information including credit card and banking details. The page is designed to look like a real Apple webpage and even includes seemingly legitimate information explaining in detail why you need to complete the verification process.

This scam even has retaliation against investigators testing the phish. If you enter false data that includes words such as 'scam' into fields on the fake form, your browser will automatically redirect you to a preconfigured Google search for pornography.

I suggest you send the following to all employees, and while you are at it, friends and family will also benefit.

"You need to watch out for a phishing scam that seems to come from Apple. The email is supposedly from Apple Support and they threaten that your account is going to be suspended because you did not reply to an earlier verification email. The phishing email has a link that allows you to "verify now" but if you click the link, you land on a bogus webpage that looks like it's Apple but is a fake, and it tries to manipulate you into giving out your password, credit card and other personal information.

Don't fall for this scam.

Always go direct to the website of your vendor and do not click on links in emails that look like they are legit.

Think Before You Click!" Happy and Safe Holidays."

CyberheistNews



2016 MAFMIC

- Feb 7-9** MAFMIC Annual Convention
DoubleTree by Hilton, Bloomington
- Feb 24-25** CCP Visit, Washington DC
- Mar 16-17** Short Course
Arrowwood, Alexandria
- April 6 – 7** Spring Agents' Meeting,
Fergus Falls (6th) & Mankato (7th)
- May 10 - 11** Manager's Workshop,
Grandview Lodge, Nisswa
- May 23-25** NAMIC Farm Mutual Forum
Milwaukee, WI
- July 13** Manager & Director Seminar,
St. Cloud
- July 14** MAFMIC Golf Outing
Little Crow, Spicer
- August 2-3** Leadership Development
Workshop (NAMIC) – Chicago, IL
- Sept 8** PIA, Education Day & Trade Show
Location: TBD
- Sept 25-28** NAMIC 121st Annual Convention
Vancouver, Canada



To submit an article to be published in the Mutual Link please send them to Mutual Link, PO Box 880, St. Joseph, MN 56374 or email them to info@mafmic.org.

Happy Valentines

Financial Statements



Financial Statements

It is also time again to collect company financial statements.

PLEASE send them to:

PO Box 880, St. Joseph, MN 56374

or fax to: (320) 271-0912

Dues must be paid in full in order for a member to vote at the Annual Meeting, held at the MAFMIC Convention, February 7-9, 2016

Please submit your Membership Dues to:

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