

Understanding the “vacancy” provisions in your building insurance policy

The recent decision in *Oakdale Mall Associates vs. Cincinnati Insurance Company*, 702 F3d 1119 (8th Cir. 2013) reminds landlords to check their insurance coverage, especially for vacant buildings. *Oakdale* shows that determining whether your building is vacant is a technical task. “Vacancy” may permit your insurance carrier to assert reduced coverages or deny claim payment altogether. The terms of your insurance policy control whether “vacant” buildings are covered. You must understand the policy’s definition of “vacant”.

Many insurance policies contain exclusions for buildings vacant for more than 60 consecutive days before the loss, unless the policy contains the appropriate endorsement. A typical list of exclusions includes:

- Glass breakage
- Vandalism
- Fire loss
- Water damage
- Sprinkler leakage
- Theft/Damage caused by attempted theft
- 15% reduction in payment for loss or damage caused by other insured perils.

Oakdale Mall Associates shows the importance of technical policy definitions. *Oakdale Mall* had a total area of 180,000 sq. ft. The owner’s insurance policy required occupancy of at least 55,800 sq. ft. to avoid the loss of insurance coverage because of vacancy. The policy defined “occupancy” as

space used by either a tenant or the Owner in their “customary operations.”

After a copper theft, the Owner filed a claim with its Insurer. The Owner claimed 58,741 sq. ft. occupied, consisting of (a) four operating tenants totaling 18,715 sq. ft., (b) two tenants not operating but with valid leases totaling 3,931 sq. ft., (c) Owner’s rental office totaling 1,500 sq. ft., and (d) necessary common areas totaling 34,595 sq. ft.

The insurance carrier denied coverage for the copper theft, because the Owner incorrectly counted the two tenants who had nominal leases but had not occupied their premises for more than a year. The Court held that coverage for the loss was excluded under the policy’s vacancy provisions. Excluding the two nominal tenants reduced the mall’s occupancy to 54,810 sq. ft., slightly below the policy’s full coverage threshold of 55,800 sq. ft. The Owner then tried to reach the threshold by arguing that the “occupied space” should include vacant space that the Owner was actively trying to lease. The Court rejected the argument, based on policy language.

The lesson to be learned is that landlords should work with their insurance agents and attorneys to understand the vacancy provisions in their building insurance policies, and obtain a “vacancy endorsement” if appropriate.

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