



**STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004**

**Circular Letter No. 23 (2008)
Supplement No. 1
April 7, 2009**

TO: All Insurers Writing Homeowners' Policies in New York

RE: Mid-Term Cancellation of Policies Based Upon Residence Becoming Unoccupied

STATUTORY REFERENCE: Insurance Law Section 3425

Circular Letter No. 23 (2008), issued November 23, 2008, noted that the lack of occupancy of an insured home does not constitute a "physical change" within the meaning of New York Insurance Law § 3425(c)(2)(E). Circular Letter No. 23 further advised that the fact that an insured is not occupying a residence does not, standing alone, constitute grounds for cancellation of a homeowners' policy under Insurance Law § 3425(c)(2)(D); rather, the insurer must consider the totality of the circumstances. The circular letter also stated that an insurer may not use the existence of a foreclosure action as a basis to cancel a homeowners' insurance policy under Insurance Law § 3425(c)(2)(D) or (E).

The Department issues this Supplement to Circular Letter No. 23 to respond to questions that the Department received after the circular letter was issued. Specifically, the Department was asked to distinguish between the terms "vacant" and "unoccupied"; whether an absence from the property can itself constitute a physical change; whether an insurer may cancel a vacant or unoccupied property based upon an exclusion in the underlying policy for damage that occurs when the property is vacant or unoccupied; and whether the circular letter applies to foreclosure actions that have culminated in the sale of the insured property.

I. "Vacant" and "Unoccupied"

Subsequent to the Department's issuance of Circular Letter No. 23, the Department received inquiries about the circular letter's application in circumstances where the insurer discovers that a property is "vacant" or "unoccupied." Those terms are not defined in the Insurance Law, including in the standard fire insurance policy set forth in Insurance Law § 3404, which permits an exclusion for losses that occur when a property has been vacant or unoccupied for more than 60 days. Although the term "vacant" is found in Insurance Service Organization (ISO) Form HO3, it is not defined there, either.

According to the common meaning of these terms, a "vacant" residence is one that typically contains no personal property and no inhabitants, whereas an "unoccupied" residence is one that, at that moment, is neither in use nor being lived in. See New Oxford American

Dictionary: Second Edition (2005) at 1841, 1856 (defining “vacant” as “having no fixtures, furniture, or inhabitants; empty” and “unoccupied” as “having fixtures and furniture but no inhabitants or occupants”). Similarly, in Lamourex v. NY Central Mutual Fire Ins., 244 A.D.2d 645 (3d Dept. 1997), the policy defined “vacant” as a property in which the “occupants have moved leaving the building empty except for limited personal property,” and “unoccupied” as “not being lived in but personal property has not been removed.” In Gallo v. Travelers, 21 A.D.3d 1379 (4th Dept 2005), the policy defined as “vacant” a property that “does not contain business personal property to conduct customary operations,” and “unoccupied” as containing no “personal property usual to the occupancy of the building while customary activity and operations are suspended.” Likewise, in Coutu v. Exchange Insurance Co., 174 A.D.2d 241 (3d Dept 1992), the policy defined “vacant” as “containing no contents pertaining to operations or activities customary to the occupancy of the building.”

Insurance Law § 3425(c)(2)(D) permits an insurer to cancel coverage upon “discovery of willful or reckless acts or omissions increasing the hazard insured against.” Circular Letter No. 23 notes whether an insurer may lawfully cancel a homeowners’ policy pursuant to Insurance Law § 3425(c)(2)(D) because of “nonoccupancy” or “vacancy” is a question of fact that depends on the totality of the circumstances. The insurer, in such instance, must establish that under the particular facts, the nonoccupancy or vacancy is a willful or reckless act or omission, and that it increases the hazard insured against.

Thus, where, for instance, an insured enters a nursing home or other health care facility intending for the stay to be temporary and takes steps to protect or maintain the property by having a neighbor or relative routinely check the property, nonoccupancy alone would likely not constitute a permissible ground for cancelling the policy. But where a nonoccupancy were to result from the “abandonment” of the property (where “abandonment” means that the insured has left the property empty or uninhabited, without any intention to return, see New Oxford American Dictionary: Second Edition (2005) at 2), the insurer would likely be justified in cancelling the policy in accordance with Insurance Law § 3425(c)(2)(D).

II. Absence as Physical Change

The Department received inquiries about whether absence from the property itself can constitute a “physical change” within the meaning of Insurance Law § 3425(c)(2)(E), which permits an insurer to cancel when there has been a “physical change” to the property that occurs after the policy’s issuance or last renewal date and that renders the property uninsurable in accordance with the insurer’s underwriting guidelines in effect at the time the policy was issued or renewed.

Nowhere does the Insurance Law define the term “physical change.” Nor does a survey of other states’ laws reveal a uniform answer. At least nine states countenance “physical change” as a basis for cancellation, but four of them – Alaska, California, Maine, and New Hampshire – expressly distinguish between “physical change” and occupancy, which suggests that they are mutually exclusive. Only one state, Massachusetts, appears to equate a change in occupancy with a physical change.

In the absence of any statutory definition or clear guidance from other states, the Department interprets the term “physical change” as used in Insurance Law § 3425(e)(2)(E) in accord with its “ordinary and accepted meaning.” See N.Y. Statutes § 94 (McKinney Supp. 2009). The word “physical” is commonly defined to mean something of concrete material or matter, as opposed to an abstract concept. See Webster’s NewWorld Dictionary: Second College Edition (1980) at 1074 (“of nature and all matter; natural; material”); New Oxford American Dictionary: Second Edition (2005) at 1282 (“of or relating to things perceived through the senses as opposed to the mind; tangible or concrete”). Thus, a “physical change” within the meaning of the statute is one in which the dwelling or property is altered or changed in a tangible manner. See Opinion of Office of General Counsel (OGC) No. 04-11-20 (November 29, 2004). For instance, the addition of an in-ground pool constitutes a tangible alteration to the permanent structure of the property that satisfies the “physical change” requirement of Insurance Law § 3425(c)(2)(E). OGC Opinion No. 04-11-20 (November 29, 2004). But nonoccupancy is not a tangible change to the property.

Nevertheless, if the nonoccupancy leads to a physical change, such as the deterioration of the property’s condition, the insurer could conceivably cancel the policy pursuant to Insurance Law § 3425(c)(2)(E) where the insurer determines, based upon the specific facts of the situation, that a change occurred after the latter of the policy issuance or the latest policy renewal that renders the property uninsurable in accordance with the insurer’s objective, uniformly applied underwriting standards in effect at such time of policy issuance or last renewal. In applying the underwriting standards to determine whether to cancel the policy, the insurer must ensure that underwriting standards are reasonably related to the risks insured. See OGC Opinion No. 04-09-14 (September 22, 2004).

III. Exclusions Based on Vacancy or Lack of Occupancy

After the issuance of Circular Letter No. 23, the Department also received comments asserting that an insurer should be permitted to cancel a homeowners policy that sets forth an exclusion for damages that occur while a property is vacant or unoccupied when the criteria for the exclusion are met. These exclusions typically apply once the nonoccupancy has existed for a certain period of time, and only for losses that occur after the specified time period has passed. For instance, the standard fire insurance policy, which is set forth in Insurance Law § 3404 and establishes the minimum provisions in this state for a policy or contract of fire insurance, states that the insurer shall not be liable for loss that occurs “while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days.” Similarly, ISO Form HO 3 excludes coverage for the breakage of glass or safety glazing material if the property has been vacant for a period of more than 60 days, and damages from vandalism or malicious mischief if the property has been vacant for more than 30 days.

Although the standard fire insurance policy and the ISO policy permit an insurer to exclude certain losses that occur after the property has been “vacant or unoccupied” for more than a prescribed period of time, it does not follow that an insurer therefore has the right to cancel the policy pursuant to Insurance Law § 3425(c)(2) solely based upon nonoccupancy. Rather, the insurer must meet the criteria of one of the specific grounds set out in Insurance Law

§ 3425(c)(2). That statute does not specify nonoccupancy as a ground for cancellation. Nor does it specify that an insurer may predicate cancellation upon the same criteria that might trigger a policy exclusion.

Indeed, the application of an exclusion and the cancellation of the policy are distinctly different events. A cancellation results in all coverage ending due to the termination of the policy, whereas an exclusion only limits coverage to the extent of the exclusion, which, where vacancy or nonoccupancy is concerned, may be limited to particular types of losses. Further, a homeowner may remedy a vacancy or lack of occupancy simply by reoccupying the property, making the exclusion no longer operative for prospective losses. Moreover, exclusions are “given a strict and narrow construction, with any ambiguity resolved against the insurer.” Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377 (2003). And, the insurer has the burden to prove that the exclusion applies. See Westview Assocs. v. Guar. Nat’l Ins. Co., 95 N.Y.2d 334 (2000) (“To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case[.]”) (citation omitted).

IV. Foreclosures

Finally, the Department received queries asking whether Circular Letter No. 23 applies to a completed foreclosure action. The circular letter only speaks to pending foreclosure actions, not ones that already have concluded and resulted in the insured’s loss of title to the property.

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Questions regarding this Circular Letter should be addressed to Deborah Jewell, Senior Examiner, New York State Insurance Department, One Commerce Plaza, Albany, New York, 12257, 518-402-2312, djewell@ins.state.ny.us.

Very Truly Yours,

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