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TECHNICAL ADVISORY

TA 292

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Subject: When Is Land “Vacant”?

Background: Few would disagree that insurance is complex. Yet ironically, TV advertising and much of the consumer-media usually portray insurance as little more than a commodity which can be selected based almost exclusively on price. This unfortunate characterization of insurance stands in stark contrast to the many issues, exposures, and coverage options that are listed on any good insurance coverage checklist. One of the most telling examples of the gap between the popular conception of insurance, and the reality of its complexity, is the ongoing struggle by the industry to make the public aware that flood losses are not covered by standard property insurance. After years of countless public information efforts by the industry, FEMA, and others, surveys continue to show that the needle has barely moved in measuring public understanding of this important issue.

So it is no great surprise that many of the lesser-known exposures go unnoticed and often uncovered. One of these is the considerable liability exposure arising out of vacant land. This issue has two problems in gaining the notice of the public. First, most people find it hard to believe that they could be sued because they own a piece of vacant land. Second, the characteristics that make a piece of land “vacant” are not universally agreed upon, and thus are unpredictable.

Main Points: In the standard Homeowners Policy, there is Section II Liability coverage for any bodily injury or property for which an insured becomes legally liable, except for exposures which are excluded. Among the exclusions in Section II is the following:

SECTION II – EXCLUSIONS

E. Coverage E – Personal Liability And Coverage F – Medical Payments To Others

4. "Insured's" Premises Not An "Insured Location"

"Bodily injury" or "property damage" arising out of a premises

- a. Owned by an "insured";
 - b. Rented to an "insured"; or
 - c. Rented to others by an "insured";
- that is not an "insured location."

The key to whether or not there is Section II liability coverage arising out of an owned or rented premises lies in the definition of "*insured location*." Among the eight subparts of the definition is the following:

DEFINITIONS

- 6. "Insured location" means:
 - e. Vacant land, other than farm land, owned by or rented to an "insured";

Unfortunately, the coverage form does not specifically define what "*vacant*" means, other than to say that "*farm land*" is not considered "*vacant*." In a nutshell, the issue boils down to: when is land "*vacant*"?

Dictionaries. Since the coverage form does not provide a definition, courts generally turn to both legal and standard dictionaries. For example, Black's Law Dictionary (9th edition) defines "*vacant*" as "*empty; unoccupied <vacant office>*"; "*absolutely free, unclaimed, and unoccupied <vacant land>*." Various standard dictionaries offer that the definition of "*vacant*" includes "*not put to use <vacant land>*"; "*containing nothing; empty*"; "*land in the natural state*."

Jurisprudence. For our purposes, those definitions don't really address some of the finer shades of gray involving litigation over vacant land. In insurance parlance, one of the most common rule-of-thumb definitions of vacant land is "*having no manmade structures*." Much of the jurisprudence supports that very narrow definition, although some courts have accepted a less stringent condition of vacancy. Here is a sampling of jurisprudence on when land is "*vacant*."

Case #1: Road built by former owner of the land, current owner sued.
Verdict: Not vacant.

Case #2: Wide pathways and trails made by animals and erosion over time, being used by small recreational vehicles, land owner sued.
Verdict: Vacant.

Case #3: Acreage with natural pond and dock.
Verdict: Not vacant.

Case #4: Acreage with only an abandoned well, which was covered with concrete pad.

Verdict: Not vacant.

Case #5: Acreage with only an irrigation pump.

Verdict: Vacant.

Case #6: Acreage with manmade dam.

Verdict: Not vacant.

Case #7: Acreage with pond and manmade canal connecting pond to intracoastal waterway; injury arising out of the canal.

Verdict: Vacant.

Case #8: Acreage with natural caves; owner gave permission for cave explorers to enter caves at no charge. Owner did not know that the cave explorers had installed an iron gate over the cave entrance for safety. Land owner sued over injury.

Verdict: Vacant. Court cited a definition of “vacant” which included “*unoccupied and unused,*” and ruled that the landowner was not *using* the land for his benefit.

Case #9: ATV accident on acreage where wild alfalfa was growing. Landowner had allowed neighbor to harvest some of the alfalfa. Landowner had claimed a “farmland loss” on his tax return.

Verdict: Not vacant.

Case #10: Cattle on insured’s pasture cause injury. Insured argued that “farmland” refers only to planting and harvesting of crops. Court disagreed.

Verdict: Not vacant.

Insurance issues. As this sampling of court cases illustrates, it is impossible to know with absolute certainty exactly how a court will rule on the status of supposedly vacant land. In fact, most experts advise that the automatic coverage granted to “vacant land” not be relied on, and that specific coverage be procured on any land the insured owns or rents. As the above cases demonstrate, something as simple as a fence, well, power pole, or other seemingly insignificant structure could jeopardize coverage for the landowner. In addition, in situations where a piece of land has even been inspected by the insurer and is deemed to be vacant, there is no guarantee that the landowner won’t add some structure to the property at a later date.

Also, farmland (including timberland) should be assumed excluded from the automatic coverage for “vacant” land, unless the insurer agrees in writing to provide coverage. Especially in the case of timberland, there is occasionally maintenance activity taking place, such as keeping firebreaks clear, or controlled burns, and possible spraying for insects and disease. As suggested by some of the 10 court cases above, courts often consider whether land is being used in any manner that is beneficial to the owner, and also view any sort of farmland which has an active crop present as not being vacant. In addition, the “business” exclusion must be recognized as probably applying to timberland, since there is the anticipation of selling the timber in the future, thus the occasional maintenance activities noted above might be considered “business” activities. Therefore a coverage solution should be sought.

There is one other issue which could come into play with vacant land. Another of the eight subparts of the definition of “insured location” includes the following:

DEFINITIONS

6. *"Insured location" means:*

f. Land owned by or rented to an "insured" on which a one, two, three or four family dwelling is being built as a residence for an "insured";

;

Where the insured owns a piece of land (subdivision lot or acreage) which is currently totally vacant, and puts up a power pole, pours a slab, etc. as construction begins, there is automatic premises liability. However, note the phrase “*being built*” in the above definition. That suggests active construction is taking place. On the other hand, where the piece of land is perhaps intended as the site of a home in the future, and the insured builds a dock, or adds a power pole and concrete pad to park his camper trailer during weekend visits, it seems unlikely that a court would consider that a residence is “being built.” Therefore, specific coverage on the land should be obtained.

Some insurers will add certain pieces of land to the Homeowners Policy as “additional insured locations for Section II,” subject to underwriting. If this cannot be done, separate coverage is required. Personal umbrellas vary widely in coverage, and must be examined individually to determine if coverage applies to vacant and non-vacant land.

Necessary Action: Circulate this Technical Advisory to all appropriate staff.