"Where You Reside" – The "Where's Waldo®?" Catastrophic Homeowners Policy 'Exclusion' That Could Bankrupt Your Insureds

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The purpose of this paper is to assist agents and brokers in considering issues relevant to the issue being addressed. The paper includes only general information, and is not intended to provide advice tailored to any specific insurance situations. It was prepared solely as a guide, and is not a substitute for agents and brokers independently evaluating any relevant business, legal or other issues, and is not a recommendation that a particular course of action be adopted. If specific advice is required or desired, the services of an appropriate, competent professional should be sought.

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Abstract

Most homeowners policies, including the "ISO standard" HO-3 examined in this paper, cover damage to the dwelling on the "residence premises" shown in the policy declarations. The term "residence premises" is defined to include the dwelling "where you reside." According to some interpretations and court decisions, if the named insured and/or resident spouse no longer reside in the dwelling, coverage on that structure immediately terminates. If this school of thought is correct, this gives rise to a number of circumstances that may lead to a catastrophic coverage gap for such insureds. The purpose of this paper is to explore these circumstances, the rationale for/against coverage, and possible solutions to avoid potentially catastrophic coverage gaps.

Introduction

Do you ever have insureds go into nursing homes and not come out, insureds who unexpectedly relocate, insureds who move out in the night during a foreclosure, insureds who rent their homes, insureds who buy homes for their parents/children, insureds who allow a home purchaser to move in before the closing, insureds who renovate a newly purchased home before moving in…often without your knowledge? Did you know that all of these insureds may have NO coverage on their dwellings?

Would you feel comfortable telling an elderly insured who unexpectedly was permanently admitted to a nursing home that her homeowners policy won't cover her $350,000 home that was destroyed by a tornado three days after she was admitted, BUT it WOULD have covered a total loss due to an explosion if she was operating a meth lab in her basement?

According to a February 2009 *Forbes* article, the national homeowner vacancy rate was 2.9% (over 15 million homes) with a high in excess of 7% in some parts of the country. A February 12, 2009, *USA Today* story estimated that one in nine (14 million) housing units were vacant. More than 9% of homes built since 2000 were vacant compared to about 2% of older homes. Homes priced at $500,000 are just as likely to be vacant as homes that cost less than $100,000.

In December 2008, the Big "I" commissioned and published a survey by International Communications Research (ICR), an independent research company in Media, Pennsylvania. Interviews of a nationally representative sample of 1,021 households were conducted in November 2008. One of the findings of this survey was that 54% of homeowners thought their current policies would cover them if they suddenly had to put their home up for sale during the period of time between when they vacated to when the sale was finalized and 73% either thought they would have coverage or didn't know.

What was interesting about the survey was that the more affluent and/or educated the consumer, the more likely s/he was to believe that there was coverage: 64% for households with income over $75,000 and 63% for college graduates. Even more interesting was that only 30% of consumers thought there would be coverage if they rented their home temporarily. The fact is that temporary rentals are normally covered but the permanent "for sale" example just provided is not.

Clearly, consumers are largely unaware that there may be a coverage gap in certain unoccupancy situations, and most insurance agents are similarly oblivious to this potentially catastrophic exposure. This issue was first brought to our attention by a Florida agent in January 2001. The agent wrote an HO-3 homeowners policy for an insured who moved out and rented the house to someone else on a full-time basis. The agent asked if the HO policy would cover claims since the house was rented out full-time.

Clearly, there is no Section II liability coverage since the policy excludes premises rental for other than an occasional or in-part basis. The question is whether there is coverage on the dwelling itself. The agent's reading of the policy gave rise to concern that there might not be coverage. Specifically, he referenced the "where you reside" wording cited above and discussed later.

Not long after this issue was raised, our Virtual University's "Ask an Expert" service began to receive what has proven to be dozens of similar questions from agents. For example:

> "Consider the following scenarios:
>
> "1) Insured moves out of existing home, builds a new home, and puts existing home up for sale. Insured fails to notify us of this change. Is there coverage if lightning strikes the existing home, burning it to the ground?
>
> "2) Insured builds a new home, moves out of existing home, and puts existing home up for sale. Insured notifies agency of this change. We in turn notify insurance carrier which allows policy to stay in force for a limited amount of time. Is there coverage if lightning strikes the home, burning it to the ground?
>
> "3) Elderly individual moves into a nursing home and leaves most personal property (furniture, clothing, etc.) in existing home. Relatives of the elderly individual look after the existing home on a regular basis. House burns down six months after elderly individual moves into nursing home...lightning struck again! Is there coverage?
>
> "We are getting different explanations from our insurance companies on this issue. Our biggest hang-up is the definition of 'residence premises,' in particular, the part that states 'where you reside.' Does it void all coverage in the policy if the insured no longer resides at this residence?"

This was followed by another question:

> "A Florida insured moved out of his home and was letting a caretaker live on the premises. Then the caretaker left and the house was vacant until the house was put on the market and the realtor was 'staging' it with furnishings. Luckily no loss has occurred but we are concerned about HO coverage if no one is living there. The value of the home is $779,000. Do you see any exclusions that might apply?"

One more example:

> "Our insured has bought a new house and is moving into it in a week. We've already placed coverage on the new home. Our insured also has a purchaser for his existing home and the closing is scheduled in about three weeks. Our insured has agreed to allow the purchaser to go ahead and move in as soon as he moves out. The existing HO-3 policy expiration date is three months from now. Are there any coverage problems in leaving the existing policy in force until ownership of the home is transferred? What if the closing is delayed for over 60 days...are there any coverage limitations that might apply under the existing HO policy? What if the house remains vacant until closing...would that change your answer?"

To gauge the awareness of agents about this nonresidency issue, in February 2004 the Big "I" Virtual University conducted an informal poll of its 25,000 newsletter readers, posing the question immediately above.

Only 1 responder in 100 had considered the "where you reside" language. As a result, we published an article (see Appendix) entitled *"Rent Your Home, Void Your Insurance Policy?"* Since that time, we have published several related articles leading up to this paper which attempts to consolidate all of this information into one document.

Policy Language

In this paper, we are using the ISO HO 00 03 10 00 (aka, the "HO-3") homeowners policy as the model form for language review. Our examination of the HO policies of all of the major homeowners insurers in the country indicated that this language was identical in almost all of them; in a few proprietary company policies, the language was largely equivalent.

The "where you reside" issue rests within three HO-3 policy provisions: the Coverage A insuring agreement and two definitions excerpted below (with emphasis added).

Here is an excerpt from the Coverage A insuring agreement:

> **SECTION I – PROPERTY COVERAGES**
> **A. Coverage A – Dwelling**
> **1.** We cover:
> **a.** The dwelling on the **"residence premises"** shown in the Declarations….

This is the definition of "residence premises":

> **"Residence premises"** means:
> **a.** The one family dwelling **where 'you' reside**;
> **b.** The two, three or four family dwelling **where 'you' reside** in at least one of the family units; or
> **c.** That part of any other building **where 'you' reside**;
> and which is shown as the "residence premises" in the Declarations.

This is the definition of "you":

> In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a **resident of the same household**.

One school of thought, supported by a body of case law, is that the "where 'you' reside" stipulation means that, if "you" no longer resides in the dwelling, it isn't a "residence premises," and thus there is no Coverage A, B or D since each hinge on the existence of a "residence premises." In fact, one argument says that since the Coverage C limit is a percentage of the Coverage A limit and Coverage A no longer exists, then the Coverage C limit vanishes. We choose to disregard this viewpoint since a specific limit is typically shown on the Declarations page and Coverage C applies on a worldwide basis without restriction to a "residence premises."

Our research indicates that the ISO "where you reside" language first appeared in their 1976 HO forms. The 1970 ISO HO-3 form included this language [emphasis added]:

> **Coverage A – Dwelling**
> This policy covers the described dwelling building, including additions in contact therewith, **occupied primarily as a private residence**.

While it can be argued that there is an occupancy requirement in the 1970 form, occupancy by a tenant would appear to meet this requirement, so a rental exposure would not result in a lack of coverage even if it violated an "owner-occupant" eligibility rule. We found no mention in ISO's 1976 filing memorandum of this change in wording, which we took to mean there was no change in coverage intent.

What Does "Reside" Mean?

Webster defines **"reside"** to mean "to dwell permanently or continuously," and defines **"residence"** to mean "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn." The *American Heritage* dictionary defines **"reside"** to mean "to live in a place permanently or for an extended period."

Black's Law defines **"reside"** to mean "live, dwell, abide, sojourn, stay, remain, lodge. To settle oneself or a thing in a place to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically to be present in residence, to have an abiding place…."

Black's Law defines **"residence"** to include a:

> "Place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one's home is; a dwelling house. Personal presence at some place of abode with **no present intention of definite and early removal** and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently. Residence implies something more than mere physical presence and something less than domicile. **The terms 'resident' and 'residence' have no precise legal meaning**; sometimes they mean domicile plus physical presence; sometimes they mean domicile; and sometimes the mean something less than domicile."

Black's goes on to say, "As 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the same city and country, but only one domicile."

Does "no present *intention* of definite and early removal" mean that residence ends when you "intend" or decide to move? Or does it only end when someone physically moves? Under certain situations discussed later, the insured for all practical purposes is already gone from the premises with the only issue being whether the insured intends to return.

In one illustrative case, *Vinet v. Hano*, the Louisiana Court of Appeals found that the word **"resident"** was "flexible, elastic, slippery, somewhat ambiguous, obscure, and nebulous in meaning, has many definitions and is difficult of exact or satisfactory interpretation.

Like the age-old debate about whether a child at college is still a resident of his or her parents' household, what is often considered material to residency is the intent to return. Similar circumstances regarding residency arise when an insured is on military duty assignment, working and living in another city, separated from a spouse, incarcerated, etc. In "where you reside," the word "reside" is present tense so, presumably, "you" must reside in the home at the time of loss. These and other issues are addressed in the court cases in the Appendix.

Exposure Scenarios

There are many ways in which “nonresidency” can arise, including the following 16 situations:

- Nursing Homes
- Relocations
- Foreclosures
- Rentals
- Child Occupies Parents’ Home
- Parent Occupies Child’s Home
- Divorce
- Illness or Infirmary of Insured
- Death of Insured
- Trusts
- Homes Owned by LLCs and Corporations
- Seller Remains After Closing
- Seller Moves Out Before Closing
- Buyer Moves In or Takes Possession Before Closing
- Renovations / Homes Under Construction
- Vacancy and/or Unoccupancy

Nursing Homes

This scenario has been raised several times via our Virtual University’s “Ask an Expert” service:

> “An elderly widow had some health problems and went to a nursing home with every intention of returning to her home when her health improved. Her home was looked after by her nonresident children and they cut the grass, shoveled the snow, etc. Her home address was still her legal address, her voting address was still her home address, and legally her home address was still the address of the home she was temporarily not residing in. After several months, there was a fire which was a total loss. Her home was destroyed. She has carried an HO-5 homeowners policy with the same agent and carrier for many years.

> “Her insurance carrier paid the contents loss but denied the dwelling claim because they insisted that the home she owned and was temporarily away from was not her ‘residence premises.’ I think this is crazy and would liken this situation to one where a person called into the military is gone from their primary residence for a short time. The real issue then is: when an elderly person is temporarily away from their home with every intention of returning, how can the carrier deny the property claim by stating that the home which was insured and at which the loss occurred was not the insured’s residence premises?”

Another question:

> “I have a situation where our insured is moving to a nursing home and having to sell her house. Is there any reduction in coverage for liability if it is vacant or unoccupied for over 30 days? The main concern of the insured is the realtor showing their place when trying to sell it and a potential buyer could trip or whatever. Houses and especially condominiums are staying on the market for such a long time, this is becoming a recurring question in our agency. Please advise.”

The first question above is a real-life example, several of which we’re aware of, where adjusters have denied major or total losses due to the “where you reside” wording. The second is an example of how many agents are not even cognizant of the potential exposure to loss of the dwelling.

Relocations

This is a common relocation question:

> "We just learned this morning that one of our homeowner insureds was transferred suddenly several months ago. He literally got the word on a Friday to start work the next Monday morning at the company's office 500 miles away. He's been living at an extended stay hotel while a realtor has been trying to sell his house but with the current market that could take a long time. He finally thought to call us and ask about his insurance. We think he needs to move his coverage from an HO policy to a dwelling form. What do you think?"

Here is another question from our "Ask an Expert" archive that, while perhaps unusual, is real:

> "Consider this situation. The husband is being relocated to another city. He gets an apartment there (and an HO-4) while his wife and children remain in the original house until the end of the school year. There is an HO-3 on the house where the family is living. Let's say the husband is the only named insured. So, 'you' means the named insured husband but, since the spouse is not a resident of the SAME household as 'you' (the named insured now lives in another city), she's not a 'you.' Therefore, the house isn't occupied by 'you' because 'you' (only the husband) lives somewhere else and his wife is not a 'you' since he no longer lives there. (I'd complicate things by saying he comes home to 'visit' every other weekend, but this is complicated enough as is.) Based on your article, is it true there's no coverage on the house?"

No doubt in an increasingly mobile society, given current economic conditions, many agencies have personal lines accounts where one or both spouses have relocated without notice. This may give rise to the perceived "where you reside" gap.

Foreclosures

The most recent Census data indicate that there are approximately 50 million *mortgaged* owner-occupied housing units in the U.S. According to RealtyTrac, Inc., the national foreclosure rate in 2008 was one filing per 194 households, though this rate in Nevada is 1 for every 54 households. In Detroit, the foreclosure rate approached 1 in 20. In the first half of 2009, foreclosures increased by 15% are not expected to peak until at least mid-2010.

Foreclosure questions sent to our "Ask an Expert" service include:

> "We have a client that has an HO-3. She has moved out of the house and into another apartment and did not purchase an HO-4. The HO-3 is still in force and the home is in the process of foreclosing. When moving out of the dwelling insured under the HO-3, she put some of her items in storage. My question is how would the policy respond if she had a personal property loss at either her new apartment or a personal property loss at the storage location?"

This is another example of how obscure this issue is to most agents. In this question, the focus was on Coverage C for personal property, not Coverage A on the dwelling. Foreclosure and repossession are one thing, but a total uncovered loss is another and would obviously create a far worse financial obligation for the mortgagor. Again, according to one school of thought (apparently held by multiple adjusters) and several court decisions, if someone moves out of their home while a foreclosure progresses, coverage ceases at the point they move out with the conscious intent not to return.

Keep in mind too that "nonresidency" does not necessarily mean "vacancy." It is conceivable that a dwelling could be fully furnished yet no one resides there. If that logic is accepted, then coverage could vanish long before the moving van shows up.

Since this scenario typically involves a mortgagee foreclosing on a homeowner, now is a good time to examine how the "where you reside" interpretation might affect the *lender's* coverage under a mortgage clause. Here is the mortgage clause excerpted from the ISO HO-3 policy:

> **Mortgage Clause**
> 1. If a mortgagee is named in this policy, **any loss payable under Coverage A or B** will be paid to the mortgagee and you, as interests appear….
> 2. If we deny your claim, that denial will not apply to a **valid claim** of the mortgagee

The mortgagee has no greater rights under the policy than the insured, absent fraud by the insured that otherwise voids the policy or neglect by the insured, e.g., in filing proof of loss. For example, if the insured commits arson, provision 2. of the Mortgagee Clause enables the mortgagee to collect because fire is a covered peril for which the mortgagee has a valid claim. However, if the property is damaged by earthquake, unless the peril of earthquake is covered by endorsement, the mortgagee, like the insured, has no coverage. Presumably this is the case if the "where you reside" issue results in a lack of coverage for the insured – this lack of coverage would extend to the mortgagee's claim as well.

(Foreclosures are addressed again in the Vacancy discussion later, including citation of a state Supreme Court decision and a state insurance department decree that foreclosure does not constitute an increase in risk to the extent that notice is required by the mortgagee to the insurer or that warrants mid-term cancellation by the insurer.)

Rentals

The following question is indicative of many received by our "Ask an Expert" service:

> "Sometimes an HO insured will decide to rent his home. I'm not talking about a situation where the insured goes into the coverage acknowledging that it is a rental property and a DP3 is issued. Also I'm not talking about where there has been a material misrepresentation on the application. A lot of times the agent never knows about it but sometimes we find out after the tenant as moved in. Looking at the HO policy, I see no outright exclusion for rental of the home. There do seem to be some minor restrictions but the implication on the house is at best ambiguous. Are you aware of any problems?"

Another example:

> "If an insured currently carries an HO-3 form on their property but no longer resides in the house and chooses to rent out the house but does not provide the agency with this information and therefore is not rewritten on to a Dwelling Fire form, what part of their coverage would be in jeopardy or denied, if any, and what would the standard payout option be in the case of a total and/or partial loss to the dwelling and contents?"

HO-3 Section II Exclusion E.2.(b)(1) excludes liability and medical payments coverage for the rental exposure except that the following are covered:

> (1) The rental or holding for rental of an "insured location";
> - (a) On an occasional basis if used only as a residence;
> - (b) In part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or
> - (c) In part, as an office, school, studio or private garage....

So, while you can rent *part* of your house on a *permanent* basis and *all* of your house on an *occasional* basis, there would be no liability or medical payments coverage for a full scale rental dwelling. However, there is no comparable exclusion for Coverage A on the dwelling itself. There are restrictions for certain losses (e.g., glass breakage and V&MM) for continuous *vacancy* in excess of 60 days (although a rental usually does not involve a

vacancy), but for the most part nothing other than that. Keep in mind that a home can be fully furnished (i.e., not vacant) yet still be unoccupied so that no one is residing there.

In another of our "Ask an Expert" questions, the renter of a condo perished in a fire arising from his own negligence that destroyed the condo unit. The condo owner's HO-6 carrier initially denied the claim, citing the "where you reside" language. This denial came despite the attachment of the HO 17 33 – Unit Owners Rental to Others since it does not modify the "where you reside" language. The fact that an HO-6, unlike the HO-3, does not have an owner-occupancy requirement and the fact that the premium-bearing rental endorsement was attached weighed heavily in favor of there being coverage, so the insurer ultimately paid the claim. Otherwise, the coverage under the policy that the insurer had issued would be largely illusionary.

Child Occupies Parents' Home

It is very common for older homeowners to move permanently into a secondary home, retirement community, assisted living facility, or a nursing home, or allow a family member to occupy a secondary home while the owners stick to the primary residence.

> "We are agents for an insured couple who have two HO-3 policies - one in a resort area where they live 12 months of the year and another in the city which used to be their primary residence, but is now occupied by their daughter as her primary residence. Both properties are located in Maryland. The city residence was burglarized and the daughter made a claim for loss of her personal property. The company denied the claim because she is not a resident of the named insureds' household, even though she is a relative. The daughter is not a named insured on any policy. Do you see coverage?"

Another almost identical example:

> "Several years ago, my parents moved permanently to their vacation home insured by an HO-3. Their former primary residence has been occupied by my sister since that time. Recently she was burglarized and the adjuster has denied the claim because the HO-3 policy is in the name of our parents and my sister is not a named insured and, according to the adjuster, not a 'family member' since she doesn't reside in our parents' household. Do you agree?"

Still another example:

> "Mrs. Jones owns two homes. One is her primary residence and the other is her son's. Our standard practice is to write an HO-3 on both houses in the mother's name. We have a new underwriter that says we must write a Dwelling Fire and HO-4 policies. My contention is that the Dwelling Fire and the HO-4 cost twice the premium and provide less coverage. Do you agree it is in the best interest of the insured to do it this way or write an HO-3 since it is a resident relative living in the home and not a tenant?"

In these cases, the children occupying the homes do not have any Coverage C on personal property. The question is, do the parents have any Coverage A on the dwelling since "you" (the parents/named insureds) do not reside in the home? Since this wasn't an issue in the first two claims, the presumption is that the adjusters believe there is Coverage A, the homes were located in legal jurisdictions that have ruled that the "where you reside" interpretation does not apply, or (more likely), they are simply not aware of this policy language quirk. In the third scenario, to be specific, (1) the son is not a resident relative of his mother since she does not live in the house he occupies, and (2) the company should hang on to this underwriter.

Again, situations like this are common. In another instance, a couple owned five dwellings on a "Walton's Mountain" type situation…they occupied the large home on the top of the hill and their children occupied the other four homes, all insured on HO-3 policies with the parents as the sole named insureds.

In another case, an agent's friend separated from his wife. She moved in with her sister and he shared a house with a friend. The couple let their daughter and her husband and three children live in the house while still insured under an HO-3 policy in the separated couple's names. The agent discovered this situation three years after it began and this was a close friend. No doubt agencies have scores of similar situations sitting in their books of business.

While not as common as an apartment rental, parents sometimes purchase a condo for a child to reside in while going to college. The HO-6 policy is often written in the parents' names. Like the HO-3, the HO-6 includes the "where you reside" language; however, unlike the HO-3, the HO-6 has no owner-occupant eligibility requirement. More on this later.

Parent Occupies Child's Home

As parents age, a child may own or purchase a home and move his or her parents into it. Here are two examples from our "Ask an Expert" archives:

> "A client owns several homes, one of which is improperly insured. The client's mother lives in the home but the home is in the name of my client and his spouse. Someone wrote an HO-3 under the mother's name on this dwelling. My contention is that they should have a DP-3 under their name (my client) with an HO-4 under the mother's name. The HO-3 leaves my client completely bare on the dwelling and personal liability, correct? The client's current agent contends that a claim would be paid for a covered peril in any event. I am wondering if there is any truth to this agent's contention at all."

From an eligibility standpoint under the ISO HO program, the DP-3 and HO-4 are appropriate in this situation. In addition, in jurisdictions that have upheld the "where you reside" language and/or where the carrier would hold the restrictive interpretation, use of an HO-3 without the express permission of the insurer could result in a Coverage A claim denial, not to mention a Coverage C denial. The liability exposure may not be a problem as long as no rent is being charged to the tenant. As for the current agent's contention that a claim would be paid, that is virtually guaranteed…assuming the agent has E&O coverage.

> "We are seeing an increase in kids buying houses or condos for/from their parents and letting their parents live there. It appears to me that you can technically write an HO-3 or HO-6 and the parent still qualifies as a named insured since they reside there and are resident relatives but are not on the deed. What do you think?"

If the PARENT is the named insured on the HO-3, there should not be a problem since they ("you") reside there. The issue here is insurable interest since the owner (the child) is not a named insured. A possible solution, insurer willing, is to write an HO-3 in the parents' name and add an HO 04 41 additional insured endorsement in the child's name to protect his or her ownership interest under Coverages A and B and extend liability coverage to the premises. However, the eligibility requirements under a pure ISO HO program do not permit issuing an HO-3 to anyone who does not own the dwelling except under a life estate.

Divorce

With divorce, the potential for "where you reside" problems most often arises when the home is insured in only one of the couple's names since the definition of "you" is the named insured and resident spouse. For that reason (and others), both spouses should usually be named on all insurance policies.

In one instance, a couple married and the husband moved into the wife's home which was insured only in her name. He is a "you" because he's a spouse who is a resident of the named insured's household. They separated many years later and she moved out. The HO-3 was still issued with only her as the named insured. However, since she no longer resides there, he is no longer a resident of her household and, thus, no longer a "you." Since no "you" continues to reside there, it is possible that Coverage A vanished when the named insured moved out.

This is similar to the situation in *Georgia Farm Bureau Mutual Ins. Co. v. Kephart (Georgia, 1993)* which is discussed in the Appendix.

The ISO Personal Auto Policy (PAP) provides a grace period for separation or divorce when one person moves out of the house whereby they can take the coverage with them for a limited period of time. However, the ISO Homeowners program provides no such grace period for the remaining dwelling occupant.

Illness or Infirmary of Insured

This is related to the "Nursing Home" circumstance discussed earlier and extends the discussion to assisted living facilities, rehab centers, and similar institutions. For example, from our "Ask an Expert" file:

> "A condo was insured on an HO-6 only in the husband's name. Due to a stroke, he had to move permanently to an assisted living facility but his wife continued to reside at the condo. According to your 'where you reside' articles, some courts and adjusters say that Coverage A leaves with him because 'you' (the husband) no longer resides there. The wife was a 'you' while a resident of the named insured's household but now that he's moved out, she's no longer a resident of his household and, thus, no longer a 'you.' The situation would be the same if the policy was an HO-3. Is this right?"

It is quite common for an insured to enter a medical or recuperative facility with the belief that rehabilitation will enable her to return home. However, later it is determined that her temporary residency in the facility will become permanent. It is not clear at what point, if any, her former residency (and HO Coverage A) terminates.

Death of Insured

The ISO HO policies include the following condition:

> **Death**
> If any person named in the Declarations or the spouse, if a resident of the same household, dies, the following apply:
> 1. We insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death; and
> 2. "Insured" includes:
>   a. An "insured" who is a member of your household at the time of your death, but only while a resident of the "residence premises"; and
>   b. With respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

The condition extends coverage to the legal representative of the deceased and it redefines "insured." However, it does not redefine "your," which is the sticking point of the "where **you** reside" issue. One agent reported that a client continued paying his mother's HO premium for two years after she passed away and the agency didn't know it. Even if the Death condition above is accepted as an indication for coverage, the question is whether it extends to subsequent policy renewals indefinitely. While the language does say the provision applies if a named insured or resident spouse "dies," as opposed to "dies during the policy period," it's questionable how long an insurer would honor this circumstance. And again, at the risk of being repetitive, this condition does nothing to modify the "where you reside" language.

Trusts

Our "Ask an Expert" service receives frequent questions about transferring ownership of dwellings to trusts which are typically set up as LLCs or corporations. For example:

> "A husband and wife create a trust, with their eldest daughter as the Trustee and their youngest son the Beneficiary. They pass legal title of their home exclusively to the trust. The ISO manual rule allows an HO policy to be issued in the name of both the trust and Trustee if at least one of the Trustees (daughter), Grantors (husband and wife), or Beneficiaries (son) resides there. In this case, an HO-3 shows the trust and Trustee (daughter) as named insureds. The Grantors (husband and wife) reside there and have coverage extended to them by attaching the HO 05 43 trust endorsement."

This appears to take care of most trust issues. However, note that "you" in this arrangement is the trust and Trustee, neither of which reside in the home. The HO 05 43 trust endorsement, like the "Death" condition discussed earlier does not modify the "where you reside" language. At best, this creates an ambiguity.

Homes Owned by LLCs and Corporations

It is allegedly a common practice, for tax and liability (and probably other) reasons, to transfer ownership of a home to an LLC or corporation. This is especially true for upscale properties, as this "Ask an Expert" question illustrates:

> "A consulting client owns a house with a value in excess of $2,000,000. It is titled in the name of a corporation he owns. He has been insuring it on an HO-5 with him as the sole named insured. It is occupied by his ex-wife, their children, and her current husband. Don't you agree that he has a problem?"

In this situation, there are several potential problems. First, the home is owned by a corporation, yet an individual is the named insured. Where is his insurable interest unless created by some sort of legal document with the corporation? Second, "you" (the named insured) does not reside in the home. In this example, neither the corporation nor the corporation owner (the ex-husband) resides on the premises. More commonly, the corporation owns the dwelling and the corporation owner resides on the premises.

If an HO policy is issued in the name of an LLC or corporation, then "you" cannot reside on the premises because a nonhuman entity cannot "live" anywhere, nor can it have a resident spouse. ISO manual rules don't permit issuing an HO policy to a run of the mill LLC or corporation, though some carriers allegedly do (the problems this creates aside from this one are the subject of an article listed in the Appendix).

If there is a solution in the ISO program, it is to issue the policy in the individual names of the LLC/corporation owner(s) who reside there and attach the HO 04 41 additional insured endorsement naming the LLC/corporation itself to give it real property coverage and on-premises liability coverage.

Seller Remains After Closing

Question:

> "Our client is buying a home, but will not be moving in until a few weeks after the closing date. The seller of the home will be renting back the home from the buyer for approximately three weeks. If we insure the home on a standard owner-occupied HO-3 form, will the policy respond if there is a major property loss while the seller is still living in the home (before the owner moves in)? How do we insure this home to satisfy the buyer and the lender? It seems obvious the seller's policy would not respond since they no longer have an insurable interest. This 'rent back' situation seems like a common situation. What is the best way to handle it?"

Technically, the purchaser cannot insure this property on an HO policy because it is not owner-occupied. ISO eligibility would necessitate that the purchaser insure the property via the Dwelling Policy (DP) program (and the seller could convert his HO-3 to an HO-4) for three weeks, then the purchaser can place the property on an HO form. Needless to say, this creates a lot of work and inefficiency for the insured, agent and insurer, so some

insurers reportedly will issue an HO policy at the time of closing (which the lender may demand as well). Hopefully, such insurers will not attempt to impose the "where you reside" wording later to deny a claim…this assumes, of course, that the insurer is even aware of the situation.

Important: If an insurer is aware of situations such as this but agrees to waive any exclusionary or limiting policy language, it is critical to get this in writing in order to estop them from asserting the language later in an attempt to deny a claim. The ISO HO "Waiver Or Change Of Policy Provisions" clause that says, *"A waiver or change of a provision of this policy must be in writing by us to be valid."* Again, this may work only to the extent that the agent is aware of this or similar situations, which unfortunately is often is not the case.

Seller Moves Out Before Closing

The following is a VERY common question involving an even more common situation:

> "We have been in contact with an insurance carrier regarding coverage on a home where the home is vacant (for sale), as the owner has purchased another home and is waiting for the first home to sell. Both homes are covered by HO-5 policies as they were both owner-occupied *at the time policies were issued*. The carrier states that the vacant (for sale) home is not covered as the homeowners form covers the dwelling on the 'residence premises.' Since the definition of 'residence premises' means the one family dwelling where you reside and the insured no longer resides at the vacant (for sale) location, coverage is not in force on that location as of the day they move out of the vacant (for sale) location. What are your thoughts? This is an upscale client and the asking price of the home is over $1 million."

Here is another common scenario: A homeowner buys or builds a new home that is ready for occupancy. She has an approved purchaser for her existing home, but it will be several days before they can close. The current owner agrees to move into her new home and to allow the purchaser to access her current home for painting, recarpeting and other remodeling prior to the closing. The seller leaves her HO-3 policy in place until the closing.

These are situations that no doubt exist right now in hundreds or thousands of instances across the country. A literal reading and interpretation of the "where you reside" wording, according to some, would preclude coverage if the dwelling is damaged or destroyed after the current owner ends her residency. Note, though, in some of the cases in the Appendix, some courts consider the residency requirement fulfilled if the insured resides there at policy inception.

Buyer Moves In or Takes Possession Before Closing

Here is yet another "Ask an Expert" question that mirrors the situation above:

> "A person has entered into a binding agreement to purchase a home. The current owner has let their insurance policy lapse and since the deed to the home is in the process of being changed from one person to the next (within 60 days), they are not placing new coverage on the home. The purchaser is currently remodeling the home before the actual closing date and he wants to protect his vested interest in the dwelling so he wished to place homeowners insurance on the house. He will occupy and close on the house within 60 days. Can a policy be issued for the purchaser prior to the closing date?"

The buy/sell agreement could create an insurable interest. For example, under the common law doctrine of equitable conversion, an insurable interest may attach. However, we still have the owner-occupancy eligibility dilemma. The prospective insured is not yet the owner and has not taken up residency while remodeling takes place.

Going strictly by ISO manual rules, this property isn't eligible for an HO policy, just the DP program. Again, to avoid the hassle and expense of writing and rewriting coverage, some carriers may issue an HO policy. So, keep

in mind the critical importance of having the carrier sign off in writing that they acknowledge the situation and waive the “where you reside” provision (along with other limitations as warranted).

Renovations / Homes Under Construction

Below are three of many questions involving newly constructed or renovated homes, two of which involved five- and six-figure claim denials that cited the “where you reside” language.

> “Is a newly purchased home insured on an HO-3 form vacant if the insured has not moved into the home but is there every day renovating the interior 61 or more days after the purchase date?”

The question alludes to the 60-day vacancy exclusions involving glass breakage and V&MM in the HO-3 form. What is interesting is that these exclusions do not apply to a home under construction [emphasis added]:

> Vandalism and malicious mischief, and any ensuing loss caused by any intentional and wrongful act committed in the course of the vandalism or malicious mischief, if the dwelling has been vacant for more than 60 consecutive days immediately before the loss. **A dwelling being constructed is not considered vacant**;

However, no mention is made of a home under *renovation* where the risk is probably less. This inconsistency has been brought to ISO’s attention.

However, the issue we are concerned with is the “where you reside” language, something not even acknowledged by the agent asking the question above (and something that would probably not trigger a question of coverage in the minds of most agents). If the strict and exclusionary interpretation of “where you reside” is applied, there is no coverage…”where you reside” is present tense. That is, it doesn’t say “where you PLAN OR INTEND to reside.” Note: This may vary in non-ISO forms. For example, the Texas HOA form defines “residence premises” as follows [emphasis added]:

> "Residence premises" means the residence premises shown in the declarations page. This includes the one or two family dwelling, including other structures, and grounds where you reside **or intend to reside within 60 days after the effective date of this policy**.

On the other hand, some courts look at “residency” from the standpoint of an insured’s intention to resume residency at some point. With that broader view, since the insured does plan on residing there, one could argue that it is a residency in progress. The opposing and more limited view, would take the position that residency has never been established so it’s impossible to resume what doesn’t exist and has never existed. This is the position taken in the following two claim denials.

Fortunately, in the preceding example, no loss had occurred. That was not the case with this five-figure claim:

> “During Hurricane Gustav, a tree fell through the roof of our insured’s house. The home was being remodeled and he visited daily during the renovation. The insurance company denied the claim based on the ‘where you reside’ wording in that he was not residing there when the damage happened. Can this wording be used to deny a claim for a covered peril?”

Note that, by contrast, Coverage C on the personal property provides an exception to the 10% limit for property that usually stays at an insured’s residence, in situations like this, as follows: “However, this limitation does not apply to personal property: a. Moved from the ‘residence premises’ because it is being repaired, renovated or rebuilt and is not fit to live in or store property in….”

The following claim denial involved a fire loss well in excess of $100,000. At the time of publication, the claim was still being negotiated and, according to the agent, litigation appears to be the likely means of rectifying the denial.

> "Our insured purchased a house in Little Neck, NY back in December 2006 and was planning on renovating it. He allowed his son who was a resident of his household in Flushing, NY to move into the new house so it would not be vacant and unattended. His son moved out when the renovations started in August of 2007 and returned to his parents' house at the old location. While at the new location his son never changed his address. He lived at the new location, again so it would not be vacant basically as a house sitter for his parents.
>
> "Unfortunately, there was a fire at the house during renovations (not the fault of a contractor). [The HO insurer] is denying the claim based on the fact that it does not meet the definition of 'residence premises' since the owner/insured did not move in. However, since his son was and is a resident of his household, would he not be considered insured in this instance? They were advised that the son lived there during that time before renovation. [The insurer] advised their legal department but they came back with a denial. [The insurer] is constructing a letter to the insured regarding the denial. Please advise ASAP. Thank You."

To answer the question in the last claim, unless named on the HO policy, the son is not a "you" and the language "where 'you' reside" requires that the named insured or resident spouse ("you") be a resident. In addition, looking at these two claim denials, the insurers appear to be looking at the "where you reside" 'requirement' as present tense such that it presumably "requires" residency at the time of loss. Not only is that an extremely restrictive interpretation, but residency would be impossible for a home under construction even though ISO eligibility rules permit issuing an HO form on homes under construction.

Vacancy and/or Unoccupancy

One dichotomy of the "where you reside" issue is that there are already limitations on coverage when a dwelling has been vacant for more than 60 consecutive days. This "Ask an Expert" question illustrates:

> "Do you or anyone know of any other exclusions in the HO-3 policy that would prevent a claim from being paid on a vacant home other than the glass breakage and vandalism exclusions?"

So the question is, what is the purpose of these specific limitations if there's already no coverage under the "where you reside" language for ANY loss if no one is residing there? Those that support the "where you reside" claim denial premise respond that a dwelling can be temporarily vacant or unoccupied without the owners relinquishing residency. That is, residency is a long-term situation and if the owners intended to return momentarily, then the vacancy is not final. However, if the vacancy or unoccupancy is permanent, then there are insurers and courts that would uphold the "where you reside" exclusionary wording.

In addition, even if claims are not denied, some insurers may issue mid-term cancellations, usually based on the grounds that there is a material increase in risk. In a December 2, 2008 *Bloomberg* (www.bloomberg.com) story, a woman moved to upstate New York to live with her parents. She intended to sell her Long Island home. She, her parents, or a neighbor checked on the still furnished house every other weekend. The insurer sent a cancellation notice for unoccupancy. (As discussed below, the NY insurance department has now issued a bulletin on this type of cancellation.)

This situation has increased dramatically with the number of foreclosures over the past year or more and is expected to continue for some time in the form of denied claims or mid-term cancellations. With regard to denied claims, in January 2009, the Tennessee Supreme Court ruled that a claim could not be denied for a mortgagee's interests based on the premise that foreclosure proceedings constitute an increase in risk:

U.S. Bank, N.A., as servicer for the Tennessee Housing Development Agency v. Tennessee Farmers Mutual Insurance Company - W2006-02536-SC-R11-CV - January 29, 2009

The issue presented in this case is whether the commencement of foreclosure proceedings constitutes an increase in hazard for notice purposes under a standard mortgage clause in an insurance policy. The parties to this dispute are the bank that loaned funds to a homeowner for the purchase of a house and the insurance company that issued a personal fire and extended coverage insurance policy on the premises. After the homeowner became delinquent on her payments, the bank began foreclosure proceedings by notifying the homeowner of its intent to foreclose on the house.

No notification of the foreclosure was given to the insurance company which insured the house against fire loss. Before the foreclosure process was complete, the homeowner filed for bankruptcy, which stayed the foreclosure proceedings. Thereafter, the house was destroyed by fire due to a meth lab operation being conducted by her husband.

The insurance company refused to pay the insurance proceeds to the bank on the theory that the commencement of foreclosure proceedings constituted an increase in hazard of which the bank was required to notify the insurance company under the policy. The bank filed suit against the insurance company for breach of contract, bad faith refusal to pay an insurance claim, and violation of the Tennessee Consumer Protection Act. The trial court granted partial summary judgment to the bank, concluding that the bank's failure to give the insurer notice of the foreclosure proceedings did not invalidate the insurance coverage.

The Court of Appeals reversed, finding that the bank's initiation of foreclosure proceedings amounted to an increase in hazard under the policy and the bank's failure to provide notice precluded coverage. However, the Supreme Court ruled, "After careful review, we conclude that commencement of foreclosure proceedings does not constitute an increase in hazard under the terms of the insurance policy or the applicable statutory provisions, and therefore, no notice was required to be given to the insurance company. Accordingly, we reverse the judgment of the Court of Appeals."

http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/091/USBankOPNCorr.pdf

With regard to mid-term cancellations, the New York Department of Insurance (DOI) has taken a position that a policy cannot be cancelled because of foreclosure proceedings. In Circular Letter No. 23 (2008) dated November 19, 2008, the DOI had received numerous complaints from consumer whose homeowners policies were cancelled after insurers claimed that their residences became unoccupied. According to the DOI:

"[T]he fact that an insured is not occupying a residence does not, standing alone, constitute grounds for cancellation of a homeowner's policy under Insurance Law § 3425(c)(2)(D)."

The DOI went on to say:

"Nor may insurers use the existence of a foreclosure action as a basis to cancel a homeowner's insurance policy under Insurance Law § 3425(c)(2)(D) or (E). The filing of a foreclosure action does not constitute a willful or reckless act or omission or increase the hazard insured against, nor does it constitute a physical change in the property."

http://www.ins.state.ny.us/circltr/2008/cl08_23.htm

This notice brings into question whether the prohibition of a cancellation for foreclosure or unoccupancy is meaningful if the carrier can simply deny any Coverage A claim due to the "where you reside" provision. While Coverage C on personal property and Section II liability should continue, the policy would lose its most significant coverage grant in such situations.

Some carriers have a vacancy endorsement that permits continuation of coverage with a premium charge. Even with these endorsements, the question is do they modify the "where you reside" language? We've not seen one

that does, though one vacant Dwelling endorsement included the following copyrighted language which seems to do the trick:

> "Any exclusion, condition or other reference in the policy that effectively reduces or limits coverage as a result of a vacancy is nullified by this endorsement."

As we can see, when the "where you reside" language is interpreted literally and restrictively, it opens up a can of coverage worms with regard to a number of situations ranging from homes under construction to rented condos to trusts that we thought were properly covered.

Case Law

We have not made a comprehensive, in-depth attempt at discovering case law on this issue but even the cursory examinations performed in developing several articles on this subject have uncovered 18 appeals level court cases. The problem is that there is nothing conclusive about these decisions when viewed as a whole. There is exactly a 50/50 split on whether or not the "where you reside" (or similar) language precludes coverage:

NO COVERAGE

- *Bryan v. United States Fire Ins. Co. (Texas, 1970)*
- *Fisher v. Indiana Lumbermens Mutual Ins. Co. (Texas, 1972)*
- *Doyle v. Members Mutual Ins. Co. (Texas, 1984)*
- *Epps v. Nicholson (Georgia, 1988)*
- *Shepard v. Keystone (Maryland 1990)*
- *Nancarrow v. Aetna Casualty & Surety Co. (Arkansas, 1991)*
- *Georgia Farm Bureau Mutual Ins. co. v. Kephart (Georgia, 1993)*
- *Heniser v. Frankenmuth Mutual Ins. Co. (Michigan, 1995)*
- *Ivanov v. Phenix Mutual Ins. Co. (Maine, 2007)*

COVERAGE

- *O'Neil v. Buffalo Fire Ins. Co. (New York, 1849)*
- *Joyce v. Maine Ins. Co. (Maine, 1858)*
- *German Ins. Co. v. Russell (Kansas, 1902)*
- *Reid v. Hardware Mutual Ins. Co. (South Carolina, 1969)*
- *Insurance Co. of North America v. Howard (Oregon, 1982)*
- *Farmers Ins. Co. v. Trutanick (Oregon, 1993)*
- *FBS Mortgage Corporation v. State Farm (Illinois, 1993)*
- *Hill v. Nationwide Mutual Fire Ins. Co. (Georgia, 1994)*
- *Lundquist v. Allstate Ins. Co. (Illinois, 2000)*

These cases are summarized in the Appendix with the reasons for the decisions, but we favor those decisions that *found* coverage for several reasons.

First, in each of these cases, the primary basis for the decision in finding coverage was that words such as "where you reside" were words of *description* and not a continuing warranty of occupancy, or that the residency requirement was only applicable at the time the contract was entered into.

In an October 1997 article entitled *"Does Rented Home Qualify as Residence Premises Under HO Policy?"* Elizabeth Sterne of the Property Loss Research Bureau (PLRB) says:

> "It has been PLRB's position that the most reasonable approach to this issue is to consider the definition of residence premises to be an affirmative warranty that the insured occupy the home at the beginning of the policy term, but that it does not require the insured to remain at the premises indefinitely. However, based on the number of cases to the contrary, one with language identical to the HO 00 03, it seems that each claim of this nature should be considered on an individual basis with consideration given to the particular policy language, and even perhaps to the jurisdiction in which the claim arises."

Second, they include more precedent-setting state Supreme Court and U.S. Court of Appeals decisions.

Third, they span a broader time period (over 150 years) and geographic/jurisdictional area.

Fourth, they support a more conscionable conclusion that an insured should not suffer a catastrophic loss because of a "technicality" in policy language that arises from a phrase in a definition indirectly referenced in an insuring agreement. The requirement that exclusionary language be clear and conspicuous is supported by enumerable court decisions, as discussed in the next section.

Reasons FOR Coverage

Above we mentioned why we favor court decisions that have refused to apply the "where you reside" language. In a more general sense, the following are supporting or additional reasons why we believe a Coverage A claim should not be denied based on the "where you reside" language.

- **"Where you reside" are words of *description*, not a warranty of continuing occupancy.** The "where you reside" language is not intended literally to require residency at the time of loss. This viewpoint was expressed in *Joyce v. Maine Ins. Co. (Maine, 1858)*, *Reid v. Hardware Mutual Ins. Co. (South Carolina, 1969)*, and *Farmers Ins. Co. v. Trutanick (Oregon, 1993)*, all of which are discussed in the Appendix.

- **The "where you reside" language is not clear and conspicuous.** While Section II of the HO-3 expressly excludes liability while a dwelling is being rented, Section I Coverage A has no similar clear and unambiguous *exclusion* while a dwelling is being rented by the owner.

  There is extensive case law that exclusions must be conspicuous, plain and clear to be enforceable. For example, in *Meraz v. Farmers Ins. Exchange (2001)*, the California court of appeals held that, "An insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. [T]he burden rests on the insurer to phrase exceptions in clear and unmistakable language."

  We believe that the "where you reside" claim denial relies on vague, nebulous wording buried in a definition and indirectly referenced in the Coverage A insuring agreement.

  If the intent of the policy is to exclude coverage under these circumstances, the contract should more clearly communicate, via *exclusion*, that complete nonresidency suspends coverage. For example, in one proprietary insurer form, an attempt is made to clarify an absolute exclusion of ANY direct property damage (Coverages A, B, or C) if, at the time of loss, the insured does not "occupy" the residence premises for dwelling purposes. The form uses an unambiguous exclusion. While this still seems to be a potentially onerous or unconscionable exclusion, given the potential magnitude of an uncovered Coverage A loss and the usual worldwide coverage for personal property, at least an effort is made to clarify the insurer's intent and clearly express it in the form of an exclusion.

- **Insureds have a reasonable expectation of coverage given the limited exclusions that apply to Coverage A and the implications of other policy provisions.** There are very few "usage" exclusions that apply to Coverage A. For example, there are limitations in Coverage C and an exclusion in Coverage B when those types of property are used for business purposes. However, there is no similar business use exclusion for damage to the dwelling itself under Coverage A.

  As discussed earlier, the Death condition in the HO-3, the limited vacancy exclusions, and the trust endorsement, among other policy provision, imply that there is coverage for estate executors, parties to a trust arrangement, etc. Yet, these provisions do not modify the "where you reside" language, so the presumption is that if this language precludes coverage, these conflicting provisions provide only illusionary coverage.

- **Owner-occupancy is an *eligibility* issue, not a coverage issue.** No one denies that the coverage and premium structures of the ISO HO program contemplate simultaneous ownership and occupancy under the HO-2, HO-3, HO-5, and HO-8 policies. So, it is not unreasonable that this should be a condition in order for one of these HO forms to be issued. However, eligibility should be distinguished from coverage.

  For example, under ISO's Personal Auto program, only a private passenger auto, pickup truck, van, or trailer is eligible for declaration under a PAP. However, absent any other exclusion, a dump truck being driven for nonbusiness reasons is covered for liability. It is not covered for physical damage because there is clear and conspicuous exclusionary wording that precludes coverage. However, for liability it is an eligibility issue, not a coverage issue.

Similarly, while the ISO homeowners manual eligibility rule clearly forbids the issuance of, for example, an HO-3 policy unless the dwelling is owner-occupied, the policy does not as clearly exclude coverage on the dwelling.

- **ISO programs have precedents that supersede the ownership-occupancy/residency requirement.** Those in favor of using the "where you reside" language to exclude coverage for damage to dwellings that are not owner-occupied support that position using the premise that that the "where you *reside*" wording reflects the intent of the policy to cover only owner-occupied dwellings.

  However, that viewpoint can be refuted by examining the eligibility guidelines for the HO-6 policy which say:

  > "A Homeowners Policy may be issued to the owner(s) of a condominium or cooperative unit which is used exclusively for residential purposes (except as provided in Paragraphs F. and H.). The unit may not be occupied by more than one additional family or two boarders or roomers."

  Note that this does not require that the owner occupy the dwelling unit, but rather that the unit simply be used for residential purposes. However, the HO-6 has the same "where you reside" wording as the HO-3. Therefore, it doesn't follow that this wording reflects an intent that the dwelling be owner-occupied in order for coverage to apply.

  The ISO HO program allows a policy to be issued on a home under construction. It goes without saying that a home under construction cannot be (and is not) occupied. Therefore, the "where you reside" language makes no sense as a condition for coverage since the owner(s) are physically unable to reside in the dwelling during much of the course of construction.

  As a related example, ISO's Dwelling program, while it can be used to insure owner-occupied properties, is more commonly used to insure tenant-occupied properties. The DL 24 01 Personal Liability form includes the same "where you reside" language as the HO forms despite the fact that the named insured rarely resides on the premises.

  In addition, a secondary HO policy can be written for vacation homes where the insured technically resides in both at different times of the year.

- **Any perceived increase in risk of loss is immaterial or inconsequential compared to the potential for catastrophic loss.** It is quite likely that the prolonged unoccupancy or vacancy of a dwelling increases the risk of loss…for some perils. That is evidenced by the exclusions for glass breakage and V&MM in the HO-3 policy for continuous vacancy in excess of 60 days. Yet even a home that has been vacant for 9 months would have no greater coverage restrictions than these UNLESS the vacancy arises from a permanent discontinuation of residency by the owners. In that case, we're led to believe that the "where you reside" language precludes coverage for ANY cause of loss. Yet any corresponding increase in risk that would warrant such an absolute exclusion of coverage is almost as invisible as the exclusionary "where you reside" wording.

  The "increased risk" argument for imposing the "where you reside" language on an exclusionary basis doesn't hold water when you consider that it would apply to a tornado that destroys a dwelling one minute after the owners vacate the premises. Yet residency or nonresidency has nothing to do with the loss, so why exclude it in such a punitive way?

  Referencing the prior discussion about reasonable expectations, it's also hard to explain to an insured why moving out of your house three days before a closing results in its destruction by a tornado not being covered, yet if the insured's home was destroyed in a meth lab explosion while the insured resided there, it *would* be covered. True, there is no exclusion that applies to Coverage A in the ISO HO-3 if the dwelling is destroyed by a meth lab explosion, but if an elderly insured has to unexpectedly permanently relocate to a nursing home and that night her home is destroyed by an otherwise covered loss, the "where you reside" language precludes coverage.

- **It is onerous, unconscionable, and against public policy to exclude all losses to a dwelling on the basis that there is a minor increase in risk for *some* perils.** A catastrophic, bankrupting and life-changing loss is not a suitable or appropriate "punishment" for a consumer's ignorance of insurance contracts or that person's inability to identify and understand obscure exclusionary language buried in the policy, particularly given that the majority of insurance professionals in the industry are apparently not aware of this either.

Possible Solutions

The following potential solutions to the complete and immediate loss of Coverage A due to nonresidency are proposed, beginning with a preferred solution and followed by increasingly less desirable measures.

- **Remove the "where you reside" language and rely on underwriting.** Ideally, the "where you reside" or comparable language should be removed from HO policies. Ownership-occupancy should be an eligibility, not a coverage, issue. It should be governed, not by the policy, but by the application process at the time of new business procurement and renewal. The new and renewal application should ask the residency question, remind the insured of the residency requirement for eligibility, and require a signed acknowledgement. If it is subsequently determined following a loss that the dwelling was not occupied by the owner(s) at the time of loss, the insured(s) could be assessed an additional premium commensurate with rating at the time of loss under the DP program or some other specified premium penalty.

- **Modify and introduce penalties for nonresidency.** If necessary and in conjunction with the above, existing exclusions for extended vacancy (glass breakage and V&MM losses) may apply to any form of vacancy, unoccupancy or nonresidency. Losses which are independent of residency (e.g., tornado/windstorm) should not be excluded at all. Other claims where there is an actuarial basis for connecting the frequency or severity of loss to a lack of residency may be limited as to the amount paid. For example, ISO's commercial lines CP 00 10 – Building and Personal Property Coverage Form excludes some losses in their entirety but the loss payments for other types of losses are simply reduced by 15% for vacant properties.

- **Extend coverage throughout a grace period.** Make this an *exclusion*, then absent the suggested changes above, similar to the ISO PAP, a grace period of at least 90 days should apply before the exclusion is applied to Coverage A. The premise that nonresidency increases the risk of loss to the extent that warrants a complete loss of coverage immediately makes no sense given that ISO currently does not impose a vacancy penalty for glass breakage and vandalism until 60 days has passed. While we've seen instances of nonresidency by the owners that extends across multiple policy periods, hopefully with widespread education, insureds will learn to provide notice of changes of this type.

- **Provide a nonresidency endorsement.** As an alternative to, or in conjunction with, the above possible changes, a "nonresidency" endorsement could be provided that extends coverage on a short-term basis. The ISO Dwelling program is simply not a practical short-term solution for brief periods of nonresidency and it is possible that lenders will not accept a DP form. The downside to this approach is that the agent would have to be notified immediately to bind coverage under the endorsement and, as we have seen, often the agents has no notice until the time of the claim.

- **Educate the industry and the public about this potential coverage gap.** Regardless of any of the potential solutions mentioned above, there is a HUGE need for education about this potentially catastrophic coverage gap. It is probably safe to say that not 1 insured in 10,000 is aware of this coverage quirk. Perhaps 1 insurance practitioner in 100 is cognizant of the issue.

- **Consider regulatory or legislative intervention.** As previously noted, at least one state insurance department has issued a bulletin regarding mid-term cancellations for foreclosures or unoccupancy. Quite possibly the only reason no regulator or legislature has addressed the "where you reside" issue is because they are unaware of this issue.

Appendix

Case Law

NO COVERAGE

***Bryan v. United States Fire Ins. Co. (Texas, 1970)* – Rented Dwelling**
A Texas ranchowners policy insured a dwelling "while occupied by the Insured principally for dwelling purposes." The owner was renting an apartment in Houston where he had business interests on a month-to-month basis. During this time he rented the dwelling to a third party on a month-to-month basis. According to Bryan's testimony, he intended to move back to the dwelling when he had finished his Houston business affairs. The Texas Court of Appeals ruled that the "***while*** occupied by" wording was a statement of coverage, not a representation, particularly given the use of the word "while."

***Fisher v. Indiana Lumbermens Mutual Ins. Co. (Texas, 1972)* – Dwelling Under Renovation**
A Texas homeowners policy insured a dwelling "while occupied by the Insured principally for dwelling purposes." Prior to a fire, the dwelling was undergoing extensive alterations and repairs in preparation for its eventual occupancy by the insured. In the interim, the insured was living in a dwelling several miles away. The insured pleaded waiver and estoppel with regard to the occupancy requirement on the basis that the insurance agent knew the house was uninhabitable and in need of repair at the inception of the policy. The U.S. Court of Appeals for the 5th Circuit ruled that coverage was explicitly conditioned on occupancy, not possession or ownership.

***Doyle v. Members Mutual Ins. Co. (Texas, 1984)* – Dwelling Occupied by Son**
A Texas homeowners policy insured a dwelling "while occupied by the Insured principally for dwelling purposes." The insured and his wife had moved from one town to another and the dwelling was occupied by their son at the time of the loss. There was no evidence that the insured or his wife ever intended to return to the home. The Texas Court of Appeals ruled that there was no coverage since the dwelling was not occupied by the insured.

***Epps v. Nicholson (Georgia, 1988)* – Rental Dwelling**
Nicholson owned a rental home down the street from her residence. She had asked her insurance agent, who knew both her and her tenant, to procure a policy covering the rental premises. The agent obtained a homeowners policy that covered the "residence premises," defined as "the one or two family dwelling, other structures, and grounds or that part of any other building *where you reside*…." The Georgia Court of Appeals effectively ruled that the insured failed to read the policy where she would have discovered the occupancy requirement.

***Shepard v. Keystone (Maryland 1990)* – Unoccupied Dwelling**
The insured's mother was unable to make mortgage payments so she transferred title in the dwelling to her son (the insured) to avoid foreclosure. The house had not been occupied for two years when it burned and the insurer denied the claim on the basis that it was not a "residence premises" which was defined as "the one or two family dwelling and grounds, or that part of any other building *where you reside*…." The court ruled that "residence" requires "bodily presence as an inhabitant of a given place." The U.S. District Court effectively ruled that the insured failed to read the policy where he would have discovered the occupancy requirement.

***Nancarrow v. Aetna Casualty & Surety Co. (Arkansas, 1991)* – Dwelling Under Renovation**
The insured moved out of their home of 14 years and into an apartment (and later a newly purchased home to accommodate an ill mother-in-law) in order to renovate the house which they intended to reoccupy. Furniture and other personal belongings remained at the house. Renovations were delayed due to family illness and ultimately the death of the insured's wife. In the meantime, the original home was burglarized and later destroyed by fire. A renewal notice had been sent to the old residence address and not forwarded. The insurer denied the fire loss based on the policy being cancelled, material increase in risk, neglect, and lack of occupancy and the denial was upheld by the U.S. Court of Appeals for the 8th District.

***Georgia Farm Bureau Mutual Ins. co. v. Kephart (Georgia, 1993)* – Dwelling Occupied by Ex-Husband**
Kephart and her husband Walter lived in the subject home until they separated. The tentative divorce agreement was for Kephart to retain the house, so Walter's name was removed from the homeowners policy. Kephart and her son moved out of state to her mother's house and Walter and his girlfriend remained in the home. The house was destroyed by fire and Kephart made claim based on a 50% interest even though the final divorce decree provided that Walter was to keep the house. The policy defined "residence premises" as the place *"where you reside."* Kephart was the only named insured on the policy. In addition, the policy said, "the residence premises [must be] the only premises where the named insured or spouse maintains a residence other than business or farm properties." The Georgia Supreme Court ruled that coverage was lacking due to the named insured's lack of occupancy at the time of loss.

***Heniser v. Frankenmuth Mutual Ins. Co. (Michigan, 1995)* – Unoccupied Dwelling**
Heniser and his wife owned a vacation home and lived there intermittently for years until they divorced, whereupon Heniser retained ownership of the property (and insured it on a homeowners policy effective in September 1988) until he sold the property on a land contract in November 1988. The home was destroyed by fire in January 1989. The claim was denied because the policy contained the *"where you reside"* language and the insured was not residing there at the time of loss.

Heniser claimed the contract was ambiguous for three reasons: (1) the definitions section of the policy and the conditions section were internally inconsistent, (2) it is unclear whether he had to reside there only at the time of policy inception or throughout the term of the policy, and (3) an exclusion from coverage was deceptively placed in the definitional section of the policy.

According to the Michigan Supreme Court, when Heniser signed the land contract, he affirmatively manifested his intent to no longer reside at the residence premises in the future and relinquished his right to do so. The court pointed out that, "We might be faced with a different situation if the insured has not affirmatively engaged in behavior that indicates an intent to no longer reside at the insured premises, such as if the insured were to die, or if the insured continues to retain the right to reside at the residence premises, such as the period between when an insured places his home for sale but has not yet completed the transaction. These are not the facts of this case, however, and we express no opinion on how we would resolve those scenarios."

With regard to the "where you reside" language, the court acknowledged that while other courts have concluded that similar language is merely *descriptive* of the property covered by the policy (e.g., see *Hill v. Nationwide* below), no court has found this or similar language to be ambiguous. While the definition of "reside" may be ambiguous in other contexts, there is no ambiguity in this case. Michigan courts have found the term to have two different meanings: a legal or technical meaning and a general or popular meaning. In some contexts, the legal term means something more than actual physical presence; it includes the intent to live at that location at some time in the future, a meaning similar to the legal concept of domicile. In other contexts, the term requires actual physical presence.

Heniser contended that several courts (e.g., see *Reid v. Hardware Mutual* and *INA v. Howard* below) have found similar ("where you reside") language to require only that the insured fulfill the policy requirement at the time the policy was entered. In these cases, the language was viewed as an affirmative warranty and not a continuing warranty. However, the Michigan Supreme Court in this case ruled that the phrase "where you reside" is not a warranty but a statement of coverage and that, "***While it might not occur to an insured that rental of his property could affect his homeowner's policy***, it is a vastly different case when the insured sells the property." The court went on to distinguish this case from others down to the placement of semi-colons in the policies.

With regard to Heniser's contention that the definition of "residence premises" deceptively places a coverage exclusion in the definitions section of the policy, the court ruled that premise was without merit, stating that "residence premises" meant the property was used as a residence. The court cited, but disagreed with, several cases below that had ruled in favor of coverage.

DISSENT

A strong dissent was provided by one of the justices on several of the points and some that were not considered by the majority. For example, while he acknowledged that an insured should be aware of a change in occupancy/residency, an insured should also be aware that he has failed to pay the premium on a timely basis. Yet in the latter case, the insurer is still obligated to give advance written notice of cancellation.

With regard to the "where you reside" and similar language of policies, the dissent cited *Rush v. Hartford Mut. Ins. Co. (Virginia, 1987)* where the U.S. District Court said, "the mere statement that the insured property is a dwelling used principally for dwelling purposes is not clear and explicit enough to create a warranty." The Court characterized the clause as a representation required to be true at the time the policyholder applied for insurance.

***Ivanov v. Phenix Mutual Ins. Co. (Maine, 2007)* – Dwelling Under Renovation**
Ivanov's father-in-law purchased a home in Ivanov's name that required extensive renovations before Ivanov was allegedly to move from Russia to the home. Subsequently the property burned down and the claim was denied by the insurer, citing the homeowners "residence premises" definition which included, "(a) The one family dwelling, other structures, and grounds; or (b) That part of any other building" in which the insured lives "and which is shown as the residence premises in the Declarations." The court, citing the Maine case of *Wheeler v. The Hartford Ins. Co.* for support, ruled that the residency requirement was not ambiguous and the loss was not covered. [Note: This decision conflicts with *Joyce v. Maine Ins. Co.* below.]

COVERAGE

***O'Neil v. Buffalo Fire Ins. Co. (New York, 1849)* – Unoccupied Dwelling**
This case involved a fire policy on a house that because unoccupied three weeks prior to a fire. While there was apparently no contract language to the effect, the application and policy described the premises as "occupied by a certain individual as a private residence." The NY Court of Appeals ruled that this did not amount to a warranty for the continuance of the occupation during the risk but rather a warranty of the fact that the insured was the occupant at the date of the policy, and nothing more. In other words, it was an affirmative stipulation that the house was occupied at the time of policy inception, but not a promissory agreement that the insured should continue to occupy it.

***Joyce v. Maine Ins. Co. (Maine, 1858)* – Unoccupied Dwelling**
When the fire policy was procured by the insured, he occupied the dwelling but subsequently moved out so that it was unoccupied at the time of the fire. The Maine Supreme Court ruled that the policy language "one story dwellinghouse *occupied by*" the insured were words of description and did not imply a warranty that it should be occupied by him throughout the term of the policy.

***German Ins. Co. v. Russell (Kansas, 1902)* – Vacant Dwelling**
The Kansas Supreme Court ruled that a statement in the application that the dwelling was occupied by the insured and family was only a warranty of the situation at the time the insurance was effected. However, a failure to notify the carrier of the circumstances as required by this contract voided coverage.

***Reid v. Hardware Mutual Ins. Co. (South Carolina, 1969)* – Sold/Rented Dwelling**
The insureds purchased a homeowners policy for a "one story frame constructed, approved roof, *owner occupied*, one family dwelling." The Reids sold the property (but remained liable on the mortgage) which subsequently burned down and the claim under their still effective policy was denied on the basis that the dwelling was no longer owner occupied. The South Carolina Supreme Court found in favor of the Reids on the basis that "owner occupied" was only an affirmative warranty that the Reids occupied the home at the time the policy was issued. Specifically, the court stated, that the term was a "description merely and is not an agreement that the insured should continue in the occupation of it. There is no provision in the policy contract that the dwelling would be "owner occupied" during the term of the insurance contract nor any requirement that if the premises are otherwise occupied than by the owner, notice of such change of occupancy or use would be given to the insurer."

Insurance Co. of North America v. Howard (Oregon, 1982) **– Rented Dwelling**
Howard split time between the subject residence and another residence, moving some furniture to the other residence, but leaving a substantial amount in the subject residence. She subsequently rented the subject dwelling because she was planning a trip and did not want the house to be vacant for any length of time. She testified that she did not want to give this dwelling up as a home but had not made a final decision whether to do so or not. Two weeks after renting the home, it burned down. The homeowners policy covered the residence "owned and occupied by the insured exclusively for residential purposes." The U.S. Court of Appeals for the 9th District found that the term was a representation that did not impose a condition requiring the policyholder to continue to live in the residence. The insurer cited *Bryan v. United States Fire Ins. Co.* (see above) and Howard cited *Reid v. Hardware Mutual Ins. Co.* (see above). The court found Reid to be "far more pertinent and persuasive" because Bryan expressly provided that coverage was afforded "while" occupied by the insured.

The court also opined that, "…if an insurance company wishes to have a homeowner's policy terminate upon rental of his home, it must so provide explicitly and unambiguously in the policy of insurance, and that a mere statement in the policy that he is the owner and occupant is wholly insufficient for this purpose. Under any property view of the law, a homeowner is entitled to be given specific and unequivocal notice in the insurance policy that his coverage will be forfeited upon his rental of his home so that if a death in the family, other changes in family or economic circumstances, or even just a desire to change his way of life, causes him to move from his home, he may make whatever other insurance arrangements are necessary to protect the asset which often represents all the remaining proceeds of a lifetime of labor."

The court also made reference to a "business" exclusion later in the policy that excepted "the occasional rental or holding for rental of the whole or any portion of the residential premises for dwelling purposes." The court opined that if this was an issue that a recent widow who leased her home for a one-year period while she attempted to resolve her future plans was not in the business of renting homes.

Farmers Ins. Co. v. Trutanick (Oregon, 1993) **– Rental Dwelling**
The insured rented the dwelling to two successive tenants, the latter who sublet the lower floor to someone who ran a meth lab. Subsequent damage was denied by the carrier on several grounds, including "contamination" and the fact that the owner did not occupy the dwelling, citing the "where you reside" language. The Oregon Court of Appeals ruled in favor of the insured on all counts and reasoned, citing the *INA v. Howard* case (see above) that the "where you reside" language "is a description merely and is not an agreement that the insured should continue in the occupation of it."

FBS Mortgage Corporation v. State Farm (Illinois, 1993) **– Rented Dwelling**
The insureds bought a two-story house with separate living quarters upstairs and down and rented out the bottom floor. The couple divorced and the husband was incarcerated but rented out the top floor while in jail. The upstairs tenant then moved out and the incarcerated insured put someone in charge of overseeing the house which was then totally destroyed by fire. The mortgage company foreclosed on the insureds and filed a claim with the insurer. The insurer denied the claim because the mortgage company was aware of the change in occupancy but failed to notify the insurer as required by the policy's mortgage clause. The court ruled against that motion then focused on the "where you reside" issue, opining that it was ambiguous because it wasn't clear if it required continuous physical presence or forbid temporary absences by the insured; that is, it fails to establish when and for how long the insured must be physically present in order to "reside" there. The court ruled that it is generally understood to include intent and permanency of abode in addition to mere presence. With regard to the "where you reside" ambiguity, the court ruled that the language is unenforceable since it is inconsistent with the Standard Fire Policy (SFP) law of the state. The only exclusion in the SFP involving occupancy provides that an insurer will not be liable for losses occurring when "a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days."

Hill v. Nationwide Mutual Fire Ins. Co. (Georgia, 1994) **– Unoccupied Dwelling**
The insureds moved out of their house two months before it suffered damage in a fire. The insurer cited the "where you reside" language and contended that it was tantamount to a clause that states coverage will cease when the premises re no longer used as the residence of the insured. The Georgia Court of Appeals responded, "In construing an insurance policy, the test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean. The policy should be read as a

layman would read it and not as it might be analyzed by an insurance expert or an attorney." The court held that the phrase "where you reside" does not impose residency requirements but rather "may be viewed as relating only to identification of the [covered premises]." The court also said that removing all coverage for the dwelling due to nonresidency would render other portions of the policy ineffectual, such as the exclusions for certain perils due to vacancy or unoccupancy, noting that these provisions are the only references to vacancy in the policy.

***Lundquist v. Allstate Ins. Co. (Illinois, 2000)* – Unoccupied Dwelling**
The Lundquists moved to a new house and signed a contract to sell the subject home. Prior to closing, arsonists burned the subject house down. The insurer denied the claim based on the lack of residency and a vacancy exclusion, citing *Heniser v. Frankenmuth*, *George Farm Bureau v. Kephart*, and *Doyle v. Members Mutual* (see above). The insureds cited *FBS Mortgage v. State Farm*. The Illinois Court of Appeals found the FBS case most compelling and remanded the case for further proceedings on the issues of vacancy and occupancy.

Additional Reading

The following articles formed the basis for this paper and are recommended for more in-depth reading on this and related topics. They are available only to Big "I" member agencies or paid Virtual University subscribers and require a login to access. If you work for a member agency but do not know your personal login, please email logon@iiaba.net and provide your name and agency name and contact information.

- **"Rent Your Home, Void Your Insurance Policy"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/WilsonRentVoid.htm
- **"Renting Condos (and Homes) to Others"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/WilsonRentCondos.htm
- **"Moving May Bankrupt Your Insureds…or You!"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyWhereYouReside.htm
- **"HO Coverage for Homes in Foreclosure"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/WilsonForeclosures.htm
- **"When Residents Have No Contents Coverage (and Worse)"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyResident.htm
- **"There's No Place Like Home…for an E&O Claim"**
  http://www.iiaba.net/VU/Lib/Ins/PL/InHomeBusiness/WilsonIHBEO.htm
- **"Homeowners in Transition"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/EdwardsTransition.htm
- **"HO Policies Are NOT for Corporations"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyCorporations.htm
- **"Insuring Homes Owned by LLCs"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyLLCs.htm
- **"Complications from a Named Insured's Death"**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyDeath.htm

- **“Dealing with Divorce”**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyDivorce.htm
- **“Insuring Personal Trusts”**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyTrusts.htm
- **“Personal Trusts and the HO Policy”**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/ThompsonTrusts.htm
- **“Another Look at Personal Trusts”**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/EdwardsTrusts.htm
- **“Building Your Own Home…Insurance Implications”**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyHomebuilder.htm
- **“Insuring Rental Dwellings”**
  http://www.iiaba.net/VU/Lib/Ins/PL/Homeowners/FacultyRentalDwgs.htm