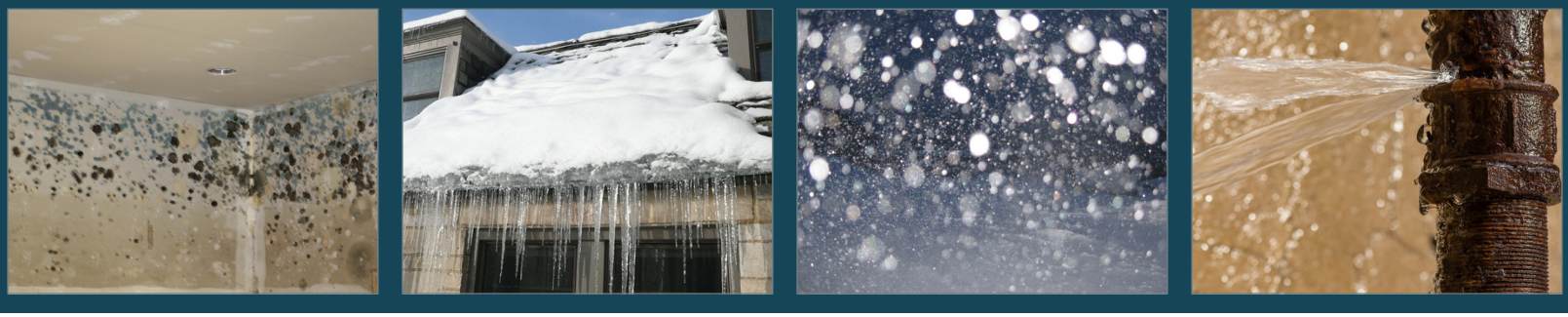

STANDARDS FOR DETERMINING WHETHER AN INSURED USED REASONABLE CARE TO MAINTAIN HEAT

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For those facing coverage issues arising from damage caused by cold weather and frozen pipe bursts, this article will provide an analysis of common reasonable care to maintain heat provisions, highlighting principal cases addressing the issue across various jurisdictions in the county.

Many courts have enforced "reasonable care to maintain heat" provisions. Issues regarding an insured's duty to use reasonable care to maintain heat often impact landlords and individuals who own unoccupied properties. Generally, insurance policies exclude coverage for damage resulting from an insured's failure to use reasonable care to maintain heat within the property. Understanding the factors considered when determining whether an insured used reasonable care to maintain heat within a property is equally critical throughout the winter months, when the risk of loss due to issues such as frozen pipes increases, as it is during the warmer months, when coverage disputes frequently culminate.

When issues of coverage arise, the insurer bears the burden of proof in establishing that the insured did not exercise "reasonable care to maintain heat," or any other coverage exemption upon which it relies in any particular case. See *Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704, 708 (2012). Courts have enforced the "reasonable care to maintain heat" provision within insurance policies when there is significant evidence of the insured's negligence in failing to maintain adequate heat on the property. See *Chow v. Merrimack Mut. Fire Ins. Co.*, 83 Mass. App. Ct. 622, 629 (2013). Thus, it is paramount for property owners to avoid coverage conflicts by maintaining their property in such a way that a reasonable person would to ensure that their pipes do not freeze.

This article serves to highlight issues in particular issues in jurisdictions throughout the country. The information contained herein shall not be considered legal advice and shall not be relied on as a definitive statement of the law in any one jurisdiction. This information is a brief, nonexhaustive overview of a discrete area of insurance law and related cases. This document does not address all potential claim scenarios. Each claim must be considered on its own unique and individual merits, and the application of any information within this document will depend on specific facts, circumstances, policy language, and applicable law.

MASSACHUSETTS

ISSUE: DELEGATION OF DUTY

Massachusetts courts have primarily interpreted the issue of reasonable care to maintain heat in the context of the delegation of duties. In *Chow v. Merrimack Mutual Fire Insurance Co.*, the Appeals Court analyzed whether the requisite reasonable care to maintain heat may exist if the insured delegates the duty to a third party. 83 Mass. App. Ct. 622, 623 (2013). For nineteen years, Chow owned a four-bedroom home in

Massachusetts that served as living quarters for the employees of his restaurant, while Chow resided in New York. *Id.* The restaurant manager, Richard Lau, was charged with maintaining the property; including addressing maintenance needs at the home, paying utility bills, and generally caring for the property. *Id.*

The loss occurred on the property after Lau moved out, leaving the property unoccupied. *Id.* However, in a prior meeting, Chow had instructed Lau to maintain heat at the property during the winter, maintaining the thermostats at sixty degrees. *Id. at* 624. Due to cold weather, pipes within the residence froze and burst, causing extensive water damage. *Id.* The property insurer denied coverage for the insured's claim for water damage caused by frozen pipes that burst. *Id.* The applicable property insurance policy excluded coverage for a loss caused by:

freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing . . . while the dwelling is vacant, unoccupied or being constructed unless [the insured] ha[s] used reasonable care to: (1) maintain heat in the building; or (2) shut off the water supply and drain the system and appliances of water.

Id. at 624-25.

As an initial matter, the court noted that "the question [of] whether a party to a contract has satisfied a contractually imposed duty to use reasonable care is tested by reference to ordinary principles of negligence." *Id. at* 627. The court further noted that the "question [of] whether a principal may be held vicariously liable for the failure of his agent to use reasonable care depends on the nature of the relationship between the principal and his agent. When a master-servant relationship exists between a principal and his agent, the principal may be held liable for the acts of his agent under the doctrine of respondeat superior." *Id.*

However, "'[g]enerally speaking, the employer of an independent contractor is not liable for harm caused to another by the independent contractor's negligence, except where the employer retained some control over the manner in which the work was performed.'" *Id. at* 627-28. "Whether an employer has sufficient control over part of the work of an independent contractor to render him liable . . . is a question of fact for the jury." *Id. at* 628. As a separate issue, "if a principal has actual knowledge of the unsuitability of an agent, the principal may be held liable for his own negligence in the selection of an unsuitable agent to take action on his behalf." *Id.*

The Appeals Court noted that although the trial court "correctly recognized that the question whether [the insured] used reasonable care to maintain heat in the building turned in part on the extent to which [the former employee's] actions could be imputed to [the insured]," the trial court did not ask the jury to determine whether the relationship between the insured and the former employee was one of master-servant or whether the former employee acted as an independent contractor. *Id. at* 627-28. Additionally, the Appeals Court held that the trial court's instruction improperly "advised the jury to impute to the [insured] any and all negligence by [the former employee] in carrying out the caretaking duties the [insured] assigned to him, without regard to the degree of control the [insured] retained over [the former employee]'s actions on the [insured]'s behalf." *Id. at* 628.

The Appeals Court reversed the judgment, set aside the verdict, and remanded the case to the trial court for further proceedings consistent with the Appeals Court's opinion. *Id. at* 630. Ultimately, Chow established that the delegation of the responsibility to maintain heat will likely satisfy an insureds' reasonable care requirement if: (1) the individual delegated with the responsibility of maintaining heat is not a servant/employee; (2) the insured does not maintain control over how the individual maintains the heat; and (3) the insured is not negligent in selecting the individual who is to maintain the heat. *Id.* The requisite reasonable care to maintain heat may exist even if the insured delegates the responsibility to a third-party; it is immaterial whether or not the individual tasked with the responsibility is compensated or performing the service gratuitously. *Id.*

ISSUE: WHETHER THE "DISCOVERY RULE" APPLIES TO THE TWO-YEAR STATUTE OF LIMITATIONS SET FORTH UNDER MASS. GEN. LAWS CH. 175, § 99

In Nurse v. Omega U.S. Ins., Inc., the Appeals Court considered whether the so-called "discovery rule," applies to toll the two-year statute of limitations set forth in Mass. Gen. Laws ch. 175, § 99. 88 Mass. App. Ct. 458, 459 (2015). The case arose from the insurer's denial of coverage for water damage to the insured's multi-unit residence caused by a frozen pipe burst. *Id.* The insured filed an action for declaratory judgment and breach of contract against his insurer, arguing that the statute of limitations did not begin to run until the actual discovery of the loss. *Id.* The trial court granted the insurer summary judgment on the basis that the insured's complaint was barred by the two-year statute of limitations and the insured appealed. *Id.*

As background, the insured's property was vacant in December of 2009, but the plumbing supplying water to the third-floor unit remained active for construction purposes. *Id.* On December 19, 2009, records show that the average rate of water usage at the property increased from 15 cubic feet of water every 6 hours to 260 cubic feet of water every 6 hours. *Id. at* 460. This rate of water usage continued at the property until December 28, 2009, when the local water and sewer commission notified the insured concerning the increased rate of water usage. *Id.* On December 28, the insured visited the property and discovered substantial water damage to the building. *Id.* The insured traced the damage to a leak under a sink in the third-floor unit. *Id.* The insurer denied the insured's claim on January 14, 2011, following a year-long investigation. *Id.* Subsequently, the insured filed his complaint against the insurer on December 28, 2011. *Id.*

The Appeals Court held that the discovery rule does not apply to claims governed by Mass. Gen. Laws ch. 175, § 99. *Id. at* 764. The Appeals Court stated that the phrase "loss occurred" in the statute is unambiguous and "denotes the time at which the damage to the property happens." *Id.* Because the parties did not dispute that the water damage occurred on December 19, 2009, the Appeals Court upheld the trial court's ruling that the statute of limitations began to run on this date and not the date the insured discovered the damage. *Id.*

ISSUE: RELIANCE ON LICENSED PROFESSIONAL

In *Palmer v. Pawtucket Mutual Insurance Co.*, the Massachusetts Supreme Judicial Court interpreted a coverage exclusion for reasonable care to maintain heat, specifically addressing whether an insured can avoid the preclusion of coverage due to a reasonable reliance on a licensed contractor. 352 Mass. 304, 306 (1967). The insureds owned a summer home in Marshfield, Massachusetts, and consulted with a licensed heating contractor who advised them that they could turn off the heat in the home and add antifreeze to the hot water heating system instead of draining the system entirely. *Id. at* 305- 306. The insureds successfully implemented this approach during three winters. *Id.* In April 1963, having been away from the property for two months, the insureds discovered freeze-up conditions. *Id.* During the time in which the home was unoccupied, a pipe froze and burst, causing water damage to the insureds' home. *Id.*

The insureds' homeowners' policy contained a provision "excluding loss resulting from freezing while building is vacant or unoccupied unless insured shall have exercised due diligence with respect to maintaining heat." *Id. at* 304. Although at the time of the loss, the insureds had turned off the heat and not drained the pipes, the Court held that the insureds exercised due diligence with respect to the maintenance of heat, avoiding the preclusion of coverage, reasoning that it was proper for the insureds to rely on the advice of a licensed heater contractor when believing that heat was not required when anti-freeze was used. *Id* at 306-07.

MAINE

ISSUE: WHAT IS REASONABLE CARE?

In Williams v. Allstate Ins. Co., the insureds owned a summer home that was unoccupied in the winter months. 2009 WL 2703662 (Sup. Ct. Me. June 25, 2009). The insureds left the residence unoccupied between September of 2006 and April 12, 2007. *Id.* Upon arrival, the insureds discovered that water pipes inside the residence had frozen and ruptured, releasing water into the house. *Id.*

The insureds alleged that they maintained heat during the winter months and installed a "Winter Watchman," a device that illuminates a red light if the temperature in the residence drops to a certain level, in a window visible to the street. *Id.* The

insureds also had an informal agreement with two contractors, who would check the residence's window to see if the Winter Watchman indicated that the temperature was too low. *Id.* Additionally, the insureds had oil delivered to the property. *Id.* Between October of 2006 and February of 2007, the insureds' heating oil supplier delivered oil as follows: 14 gallons on October 19; 8.9 gallons on December 27, 2006; and 4.4 gallons on February 21, 2007. *Id.* The oil delivery company placed a handwritten note on the December 27 invoice advising the insureds of his concern that the heating system was not burning fuel oil. *Id.* The insured took no action in response to the note. *Id.* After the water loss, a contractor repaired the furnace. *Id.*

The trial court denied the insurer's motion for summary judgment, finding that as a result of the conflicted factual record, it was unable to conclude as a matter of law that the insureds failed to exercise reasonable care to maintain heat in the house. *Id.*

RHODE ISLAND

ISSUE: WHETHER EXPERT REPORTS ARE PRIVILEGED

In Rhode Island, a dispute arose between the insured and its insurer following a freeze up of pipes that resulted in water damage. *Milder v. Farm Family Cas. Ins. Co.*, No. 08-310S, 2008 U.S. Dist. LEXIS 84665 (D.R.I. Oct. 21, 2008). The insured filed a discovery motion for the purposes of obtaining a copy of the insurer's expert engineer report. *Id. at* *3. The insurer argued that the report was prepared in anticipation of litigation, and therefore, was protected from discovery. *Id.* However, the insured contended that they had a "substantial need" for the report, which would overcome the insurer's argument of work product privilege. *Id.*

The court assessed the difficulty of distinguishing "materials are prepared in the ordinary course of business" and "work product prepared in anticipation of litigation." *Id.* The court relied upon an approach quoted by Magistrate Judge Kravchuk of the District of Maine, who stated:

[U]nless and until an insurance company can demonstrate that it reasonably considered a claim to be more likely than not headed for litigation, the natural inference is that the documents in its claim file that predate this realization were prepared in the ordinary course of business, i.e., the business of providing insurance coverage to insureds.

See S.D. Warren Co. v. Eastern Elec. Corp., 201 F.R.D. 280 (D. Me. 2001).

The court found that the insurer had not met its burden of establishing that the engineer's report constituted work product because it did not make any "particularized showing that it reasonably considered [the insureds'] claim to be more likely than not headed for litigation when [the engineer] prepared its report shortly after the loss in question." Milder, 2008 U.S. Dist. LEXIS and *5. The court ordered the insurer to produce the engineer report to the insureds.

TEXAS

ISSUE: "DO YOUR BEST" PROVISIONS

Recently, the United States District Court for the Eastern District of Texas analyzed whether an insured did its "best to maintain heat," an exception to a freezing exclusion in the insured's commercial property insurance policy. *Brandy Ventures, LLC v. Mesa Underwriters Specialty Ins. Co.*, No. 4:18-CV-641-ALM-KPJ, 2019 WL 6492522 (E.D. Tex. Dec. 3, 2019). The insurer denied the insured's claim following substantial water damage resulting from a plumbing leak in the attic. *Id.* After the insured filed suit, the insurer moved for summary judgment based on the frozen plumbing exclusion contained in the commercial policy. *Id.* The court found that the insurer established the exclusion applied to the facts of the loss; however, the summary judgment motion was denied because the burden shifted back to the insured, who was able to show that there was a genuine issue of material fact with regard to whether the insured did its best to maintain heat. *Id.* Specifically, the insured presented evidence that it had transferred utilities to its name after the commercial tenants vacated, commenced construction and renovations, regularly sent employees and representatives to the property for updates, and diligently maintained heat in its other forty-seven rental properties. *Id.* The court noted in its findings that "do your best" standard differs from that of "reasonable care," and is analogous to negligence, in the sense that there typically lies a factual question that is best left to a jury to resolve. *Id.*

NEW YORK

ISSUE: BURDEN OF PROOF IN ESTABLISHING FAILURE TO MAINTAIN ADEQUATE HEAT

In *Stephenson v. Allstate Indemnity Co.*, the Supreme Court of New York considered whether an insured homeowner failed to use reasonable care to maintain heat within her home when she left it unoccupied for three months during the winter season. 73 N.Y.S.3d 804, 805 (2018). In order to disclaim coverage, an insurer bears the burden of proof in establishing that exclusions or exemptions contained in the policy apply to the subject loss. *Id.* The policy at issue excluded coverage for damage caused by "[f]reezing of plumbing, fire protective sprinkler systems, heating or air conditioning systems or household appliances, or discharge, leakage or overflow from within the systems or appliances caused by freezing, while the building structure is vacant, unoccupied or being constructed unless you have used reasonable care to: (a) maintain heat in the building structure; or (b) shut off the water supply and drain the system and appliances." *Id* at 805-06.

The insurer was able to establish that the residence was unoccupied, and relied on an affidavit from an expert representing that the consumption of natural gas between December 2013 and January 2014 was insufficient to have maintained an adequate level of heat to prevent freezing. *Id. at* 806. When the insurer met its burden by establishing that the exclusion under the policy applied, the burden shifted to the insured to overcome the exclusion and establish a triable issue of fact. *Id.*

The insured contended she had made arrangements for maintenance of her property, but there was no proof regarding arrangements made to inspect the interior of the premises and ensure adequate heat was being provided. *Id.* The court found that the insured failed to use reasonable care, as a matter of law, to maintain heat within the unoccupied home. *Id.* In response to the insured's argument that the heating system had unknowingly failed, the court further reasoned that the insured's failure to arrange for inspection or of the premises to ensure adequate heat negated any such argument. *Id.*

CONNECTICUT

ISSUE: DETERMINING WHETHER AN INSURED "USED REASONABLE CARE TO MAINTAIN HEAT"

Connecticut courts have analyzed that the determination of whether an insured's actions constitute "reasonable care to maintain heat" is typically a question of fact reserved for the jury because "[r]easonableness inherently is a difficult issue to resolve." Fusaro v. Safeco Ins., No. FSTCV116009015S, 2014 WL 4056712, at *4 (Conn. Super. Ct. July 2, 2014). The duty to use reasonable care requires "the care which the ordinary prudent person under the circumstances would exercise." *McCartney v. Pawtucket Mut. Ins. Co.*, 1994 WL 723056, No. 301572, at *2 (Conn. Super. Dec. 12, 1994). "Reasonable care is care proportionate to the nature of the instrumentalities involved and the circumstances ordinarily attending. It is always to be proportionate to the hazards reasonably to be apprehended." *Id.* "However, the standard of reasonable care is an objective one, not subjective." *Id.*

In *McCartney*, the trial court considered whether the insured "'used reasonable care to . . . maintain heat in [her] building . . .'" *Id.* The insured, a woman in her mid-eighties, owned a two-family house, residing with her sister in one unit and renting out the other. *Id.* In spring of 1991, the insured decided to sell the house and engaged a real estate agent. *Id.* A buyer signed a contract of sale. *Id.* In anticipation of the closing, the insured and her sister moved out of the house in August of 1991 and the tenants vacated by October 15, 1991. *Id.* Upon leaving, prior to closing, the insured set the thermostat in the house to fifty-five degrees and cancelled her automatic fuel delivery contract. *Id.* The closing did not take place because the buyers could not obtain a mortgage. *Id.* In November of 1991, the insured's son checked the volume of fuel oil in the house's oil tanks and confirmed that the tanks remained full. *Id.* In December of 1991, the insured contacted her real estate agent on two occasions and asked the real estate agent to check the supply of oil. *Id.* The real estate agent declined on both occasions. *Id.* The insured also requested that her former oil company check the amount of oil, but the company was unable to gain access to the house and check the tanks. *Id.* At that time, the oil tanks had emptied. *Id.* In January of 1992, the insured mailed house keys to

her former neighbor who entered the house and discovered the extensive water damage due to frozen pipes that ruptured. *Id.*

In considering these facts for the purpose of determining whether the insured used reasonable care to maintain heat in her house, the court stated "[w]hile the application of the term 'reasonable care' to specific factual circumstances may at times be difficult, the meaning of that term is not ambiguous. It is well established. 'The duty to use reasonable care . . . is the care which the ordinary prudent person under the circumstances would exercise.'" *Id. at* *2. "'Reasonable care is care proportionate to the nature of the instrumentalities involved and the circumstances ordinarily attending. It is always to be proportionate to the hazards reasonably to be apprehended.'" *Id.* The trial court also noted that the standard of reasonable care is an objective standard, not subjective. *Id. at* *3.

The court found that the insured failed to use reasonable care to maintain heat in her vacant and unoccupied house after November of 1991. The trial court took judicial notice concerning the freezing temperatures of the state in December and January. *Id. at* *3. The court stated that the insured had a duty to check, or have others check, the volume of oil in the storage tanks, finding it unreasonable for her to have left the tanks unmonitored for several months. *Id.*

On the other hand, in *Bordiere v. Utica First Ins. Co.*, the court held that a freezing exclusion did not apply where an insured landlord had no knowledge that the tenant in the upper unit of a two-unit dwelling failed to maintain heat, thereby resulting in pipes bursting and damaging the vacant unit below. No. HHBCV095011086S 2011 WL 783614, at *2 (Conn. Super. Ct. Feb. 8, 2011). There, the insured owned a two family home. *Id. at* *1. The first floor was vacant and unheated and the second floor was occupied by a tenant. *Id.* The lease required that the tenant supply heat to the second floor apartment. *Id.* However, the tenant turned down the heat when she left to visit her mother for eleven days. *Id.*

The court held that coverage was afforded under the policy because the insured used reasonable care to maintain heat. *Id. at* *2. Due to the fact that the insured was not aware that the tenant was away visiting her mother, "it was not reasonable for the [insured] to be aware of the need to check the heat in her apartment." *Id.* "Additionally, the tenant was responsible for maintaining heat in the apartment and failed to do so." *Id.* Even though the first floor was not heated, the first floor pipes did not burst and the first floor did not contribute to the loss on the second floor. *Id.* Thus, the court held that the insured complied with all policy terms and acted reasonably in maintaining heat. *Id.*

OHIO

ISSUE: REASONABLE CARE BY A LANDOWNER AND TENANT

In *Ferrell v. Nationwide Mut. Ins. Co.*, the Court of Appeals held that both the landowner and her tenant, who were in a principal-agent relationship, did not act with reasonable care in maintaining heat, which led to the freezing and bursting of pipes. 2011 WL 2640263, at *5 (Ohio Ct. App. Jul. 7, 2011). The landowner relinquished all control of her property to her brother, who proclaimed himself the property manager. *Id. at* *1. The landlord had health issues and wanted to be uninvolved with the care and maintenance of the subject property. *Id.* The landlord's brother, who lived out of town, decided to rent the property to his nephew; however, the nephew stopped paying rent and the landlord's brother requested that he vacate. *Id.*

On January 25, 2007, the landlord asked her brother to visit the property, but it appeared his nephew was still living there because his belongings were still inside the property. *Id.* The next day, the service was disconnected. *Id.* Less than one month later, the landlord's brother visited the property and discovered pipes had frozen and burst, resulting in extensive damage to the property. *Id. at* *2. The landlord submitted a claim to her insurer. *Id.*

The insurer informed the landlord that they were denying her claim because her policy contained an exclusion for when landowners did not exercise reasonable care in maintaining heat in the building. *Id. at* *2-3. The relevant portion of the policy read:

> 14. Freezingof a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance.

This peril does not include loss on the Described Location while the dwelling is vacant, unoccupied or being constructed, unless you have used reasonable care to:

1. maintainheat in the building; or
2. shut off the water supply and drain the system and appliances of water.

Id.

The landlord and her brother filed suit against the insurer. *Id. at* *3. The court held that the landlord and her brother were in an agency relationship and the landlord's brother did not have standing to sue the insurer as the property manager. *Id.* The court noted that the insured was uninvolved with all aspects of the property; she was unaware of specifics of the agreement between her brother and his nephew, and that her brother had asked the nephew to vacate. *Id. at* 5. Ultimately, the court held that there was no genuine issue of material fact and it was clear that neither party used reasonable care in maintaining heat in the building. *Id.*

PENNSYLVANIA

ISSUE: WHETHER A "LEGAL REPRESENTATIVE" OF AN ESTATE OWES A DUTY TO USE REASONABLE CARE TO MAINTAIN HEAT

In *Lombardi v. Allstate Ins. Co.*, the United States District Court for the Western District of Pennsylvania considered whether a legal representative of an estate must comply with the obligation under a homeowner's insurance policy to use reasonable care to maintain heat. No. 8-949, 2011 WL 294506, at *1 (W.D.Pa. Apr. 7, 2011).

In July of 2007, Nancy Morocco, who owned a residence in Pittsburgh, Pennsylvania, died. *Id. at* *1. Ms. Morocco's brother, Anthony Lombardi, was appointed Administrator of the Estate. *Id.* On December 24, 2007, Mr. Lombardi discovered a water loss at Ms. Morocco's house. *Id.* Mr. Lombardi made a claim under the homeowner's policy and the homeowner's insurer denied the claim on the basis that Mr. Lombardi failed to use reasonable care to maintain heat in a vacant or unoccupied house. *Id. at* *1, *5. The insurer contended that a frozen and burst water pipe caused the loss. *Id. at* *5.

Although Mr. Lombardi disputed the insurer's contention concerning the cause of the loss, he contended that, because he was not the "named insured" under the homeowner's policy, he was not obligated to comply with the obligations imposed under the following exclusion which removed from coverage losses caused by:

14. Freezing of plumbing, fire protective sprinkler systems, heating or air conditioning systems, or household appliances, or discharge, leakage or overflow from within the systems or appliances caused by freezing, while the building structure is vacant, unoccupied or being constructed unless you have used reasonable care to: (a) maintain heat in the building structure; or (b) shut off the water supply and drain the system and appliances.

Id. at *3. Mr. Lombardi contended that these obligations applied only to the named insured and insured's resident spouse. *Id.*

Mr. Lombardi also argued that a legal representative is a separate category of person left undefined by the policy. *Id. at* *4. The court disagreed with Mr. Lombardi, explaining that a legal representative is equivalent to "you" as defined by the policy. *Id.* The court stated that Mr. Lombardi "does not assert a claim in his own right; he asserts one only in his capacity as the Administrator of the insured's estate." *Id.* The court also stated that there is:

no meaningful distinction between Nancy Morocco and the Estate of Nancy Morocco. Upon the death of the insured, the named insured on the Policy becomes the Estate of Nancy Morocco. Because the Estate is incapable of acting on its own, it must act – or fail to act – through its administrator – here, Anthony Lombardi.

Id. Additionally, Mr. Lombardi argued that he did not fit the definition of "insured person" because he was not a relative residing in the insured's household or a dependent person in her care. *Id.* The policy defined "insured person" as "you and if a resident of your household: a) Any relative; and b) Any dependent person in your care." *Id.* Accordingly, the court found the exclusion applicable to Mr. Lombardi as the estate's legal representative. *Id. at* *5.

ISSUE: WHETHER UNEXPECTED ABSENCES PRECLUDE COVERAGE

In *Pazianas v. Allstate Insurance Company*, the property owner planned to leave the country for two months, but his trip got extended further into the winter. No. 16-2018, 2016 WL 3878185, at *1 (E.D. Penn. Jul. 18, 2016). The court evaluated whether his unexpected absence and attempts to have his daughter check on his home constituted reasonable care in maintaining heat in his home. *Id.*

The owner left the property in October 2014 and planned on returning two months later in December. *Id. at* *3. When he left, he set the temperature to 55 degrees and did not note any problems with the thermostat or heating system. *Id.* The thermostat's instructions stated that the batteries should be replaced once a year or when leaving for more than one month, but the owner did not abide by these instructions and assumed his home was safe. *Id.* The homeowner asked his daughter to check in on the home in December, but she informed him that she failed to do so. *Id.* He did not ask any neighbors or anyone else to check in on his home. *Id.*

The owner returned in February 2015 to find his home in a state of disarray; the heat was off, thermostat screen was blank, and water was flowing from the ceilings. *Id.* After an investigation by the owner's plumber and insurance company's own experts, they concluded the damage could only have been caused by the freezing and bursting of pipes in the garage and living room. *Id.* The insurer denied the owner's claim due to an exclusion for failing to use reasonable care to maintain heat. *Id. at* *4.

After denial, the owner contended that he used reasonable care because he set the thermostat to 55 degrees, asked his daughter to check in on the home, and only intended on leaving the house unoccupied for two months. *Id.* However, Pennsylvania follows an objective standard of reasonableness – how would a person of ordinary intelligence and prudence exercise care under these circumstances? *Id. at* *5. Under this standard, the court held that no reasonable juror could find that he exercised reasonable care to maintain heat in the property while he was gone because he: (1) left the property unoccupied for several months in the fall and winter; (2) did not make other arrangements when his daughter told him she could not inspect the property; (3) did not change the batteries before leaving; and (4) did not shut off water or drain appliances. *Id.*

DELAWARE

ISSUE: BATTLE OF THE EXPERTS

In *Henlopen Hotel Inc. v. United National Insurance Company*, the insured's commercial policy endorsement required the insured to:

[M]aintain heat at a level sufficient in buildings and other structures covered by [the] policy to prevent freezing of plumbing, heating, air conditioning and fire protection systems.

No. N18C-09-212 PRW, 2020 WL 233333, at *7 (Del. Super. Jan. 10, 2020). The insured retained an expert who opined that the pipe did not suffer a freeze-related failure, and the insurer retained an expert who opined that the pipe did fail due to cold weather. *Id. at* *5. The court found that the experts' testimonies were admissible, due to their education, training, experience, relevancy of opinions, and the use of professionally reasonable methods of study. *Id. at* *2-5.

In light of these findings, the court denied each of the parties' cross-motions for summary judgment, as there were genuine issues of material fact regarding whether the insured complied with the policy provisions, noting that "proving a freeze is not per se conclusive, as the fact finder could determine that the freeze occurred due to a supervening cause so extreme and unpredictable as to excuse the failure of [the insured's] efforts to overcome and prevent such an occurrence." *Id. at* *8.

NEW JERSEY

ISSUE: WHETHER AN INSURED USES REASONABLE CARE TO MAINTAIN HEAT IS AN OBJECTIVE STANDARD

In *Dooley v. Scottsdale Ins. Co.*, the United States District Court for the District of New Jersey considered, in part, whether it should apply an objective or subjective standard to the terms "'reasonable care' to 'maintain heat'" contained in a surplus

lines homeowners policy. No. 12-1838,2015 WL 685811, at *6 (D.N.J. Feb. 18, 2015).

The insureds owned a two-story vacation home in Ocean City, New Jersey. *Id. at* *1. The insureds stayed in the home from December 11 – 12, 2010, and planned to return on December 31, 2010. *Id.* Upon returning to the house on December 31, 2010, the insureds discovered that water had discharged from a second floor bathroom, where several pipes had frozen and burst. *Id.* The insureds subsequently made a claim under their homeowners' policy. *Id.* The policy excluded coverage:

caused by: . . . [f]reezing of a plumbing, heating, air condition or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing.

Id. at *2. This exclusion did not apply if the named insured used "reasonable care to: (a) [m]aintain heat in the building; or (b) [s]hut off the water supply and drain all systems and appliances of water." *Id.* The insurer's investigation identified utility records showing that the insureds used 125 kWhs of electricity from November 16, 2010, to December 16, 2010. *Id. at* *3. The insurer contended that 125 kWhs of electricity was "'very low usage' during the billing period . . . [and] 'indicates that the heat [in the house] was entirely off after the [insureds] departed [the house] on December 12.'" *Id.*

The insureds testified at depositions that they turned all thermostats in the house to low and closed all interior and exterior plumbing with the exception of the main valve, before departing on December 12, 2010. *Id.* The insureds also testified that they completed the same routine each time they left the house during the prior winter months and the pipes had never frozen. *Id.* The insurer denied the insureds' claim based on the evidence concerning electrical usage in the house. *Id.* The insureds filed suit against the insurer. *Id.*

The insurer moved for summary judgment with respect to the insureds' complaint. *Id.* In part, the insureds argued that the court should deny the summary judgment motion on the basis that: (1) the terms "'reasonable care' to 'maintain heat'" are ambiguous because they are not defined in the policy; and (2) there was a genuine dispute of material fact as to whether the insureds took reasonable care to maintain heat in their house. *Id. at* *4, *6. The insureds asked the court to apply a subjective standard to the terms "'reasonable care' to 'maintain heat.'" *Id. at* *6. The insureds contended that "an insured person took 'reasonable care' to 'maintain heat' if his actions were reasonable in his own mind." *Id.* On the other hand, the insurer contended that the terms are unambiguous and should be given their plain and ordinary meaning. *Id.* The insurer also contended that the court should determine "whether an insured . . . acted reasonably based on the outcome of that [insured]'s acts, not by the acts themselves." *Id. at* *7.

The court rejected the policy interpretations argued by the insurer and insureds, except for agreeing with the insurer that the terms "'reasonable care' to 'maintain heat'" are unambiguous. *Id. at* *6. The Court noted, "the terms, taken together, by their ordinary meaning: an insured individual would not be excluded from coverage for losses caused by freezing if he took objectively reasonable steps, i.e. steps an ordinary person in his position would have taken, to ensure that the temperature in his home remained above freezing." *Id.* The court stated that the insureds' "subjective understanding of 'reasonable care' to 'maintain heat' is unworkable [and] [f]orcing [the insurer] to provide coverage whenever an insured person thought he did enough, whether or not that belief was objectively reasonable, would vitiate the exclusionary provision." *Id. at* *7. The Court also stated, "when evaluating the objective reasonableness of an individual's behavior, one must look at how an ordinary reasonable person would have acted at that time [and] [d]etermining whether an individual exercised 'reasonable care' by the result, rather than by the person's actions, would not be a reasonable reading of the policy." *Id.* Applying this standard to the factual record, the court denied the insurer's motion for summary judgment on the issue of whether the insured used reasonable care to maintain heat and held that "a reasonable jury could find that [the insureds] took 'reasonable care' to 'maintain heat' and their losses should have been covered under their policy." *Id. at* *8.

MINNESOTA

ISSUE: "SUDDEN AND ACCIDENTAL" LOSS

In *Tinucci v. Allstate Ins. Co.*, the insureds' policy only covered "sudden and accidental" loss. 487 F.Supp.2d 1058, 1060 (D.

Minn. 2007). When they were preparing to sell their home, the insureds hired several inspectors to assess the home and possible damages. *Id. at* 1059-60. As a result of "construction deficiencies, inadequate maintenance and window defects," the home had extensive water damage and decay, which could have been attributed to ice dams. *Id. at* 1059. The insurer denied the claim on the basis that it was not a "sudden and accidental" loss, as required by their selected policy. *Id.* As a result, the insureds threatened legal action and hired a contractor to repair the home and its deficiencies. *Id. at* 1060.

The insureds argued their policy was ambiguous as to what "sudden and accidental" meant; they believed a "gradual loss occurring over an extended period of time can be discovered suddenly." *Id. at* 1061. They further insisted the policy language could mean "sudden discovery of accidental direct physical loss." *Id. at* 1062 (emphasis added). The court rejected this reasoning, strictly construing the policy language and refusing to find ambiguity where none existed. *Id. at* 1062.

ISSUE: AN INSURED'S UTTER FAILURE TO USE REASONABLE CARE TO MAINTAIN HEAT

In *Elkin v. State Farm Ins. Co.*, the insureds moved from Rochester, Minnesota to New York City in early 2010. No. 11-3652, 2013 WL 3340126, at *1 (D. Minn. 2013). The insureds had not sold their house by the time they moved. *Id.* On March 9, 2010, the Minnesota gas utility notified the insureds that their gas bill was past due and the gas to their house would be shut off on March 24, 2010. *Id.* The insureds had not notified the gas utility of their new mailing address and the gas utility mailed the notice to their Minnesota address. *Id.* The insureds stated that they called the gas utility on March 8, 2010, and arranged a payment plan, but the gas utility had no record of this call. *Id.* The gas utility shut off the gas to the insureds' house on March 24, 2010. *Id.* Subsequently, the gas utility placed a lock on the gas meter and door tags on the front and back doors concerning the gas shut-off. *Id.*

In October of 2010, the insureds' realtor called the insureds and informed them that their house was cold. *Id. at* *2. The insureds did not act. *Id.* The realtor e-mailed the insureds in November of 2010 and urged them to check on the heat in their house because there appeared to be no heat. *Id.* The realtor also suggested that the insureds engage a caretaker to keep an eye on their house. *Id.* Instead, the insureds asked a neighbor to check the water level in the house's boiler. *Id.* The neighbor reported the water level as okay. *Id.*

The gas utility continued to send monthly bills to the insureds reflecting no gas usage and charged only a nominal service fee. *Id.* On Saturday, November 27, 2010, the realtor contacted the insureds and informed them that there was no heat in the house. *Id.* On the same day, the neighbor observed the lock on the gas meter. *Id.* In response, the neighbor contacted the gas utility and learned that it had turned off the gas in March of 2010. *Id.* The insureds attempted to contact the gas utility the same day by calling the emergency number to report gas leaks. *Id.* The insureds claim that the gas utility informed them that they would have to wait until Monday to have the gas reconnected. *Id.* The insureds also called the toll-free number for the gas utility that would have allowed them to speak with someone concerning reconnection of her gas. *Id.* However, the insureds disconnected the call without reaching the customer service representative. *Id.* The insureds did not call the gas utility until Tuesday, November 30. *Id.* During the call, the gas utility informed the insureds that it turned off the gas for non-payment. *Id.* The insureds scheduled the gas to be reconnected on December 2, the first available service appointment. *Id.* On December 1, 2010, the realtor's assistant visited the house and discovered that pipes had frozen and burst causing significant damage to the house. *Id. at* *3. The insureds made a claim under their homeowners' policy. *Id.* The insurer denied the claim and the insureds filed a lawsuit against the insurer. *Id.*

The insurer moved for summary judgment on the insureds' complaint. *Id.* The homeowners' policy provided that, "if the home is "vacant, unoccupied or being constructed," the insurer will not pay for any damage "caused by . . . freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing" unless the insured "used reasonable care to maintain heat in the building" or has "shut off the water supply and drain[ed] the system and appliances of water." *Id. at* *4. The insurer contended that the insureds failed to use reasonable care to maintain heat in their house. *Id.*

The court held that "[t]he evidence in this case compels the conclusion that the [insureds] did not use reasonable care to maintain the heat in the house. They ignored warnings from [the gas utility], they ignored bills showing no gas usage, and they did not respond with any urgency when their realtor told them in October that the house was very cold. The [insureds] attempt to blame their failures on others, but it was their responsibility under the policy to ensure that the home was heated. They utterly failed to do this." *Id. at* *5.

WISCONSIN

ISSUE: ICE DAM LIABILITY & THE DUTY TO DEFEND

In *Hagopian v. Lind*, the plaintiffs purchased their home in Milwaukee from the defendants, not knowing there was significant damage from ice dams. 234 Wis.2d 525 (2000). The plaintiffs asserted several claims, including negligent construction of the garage and roof. *Id.* The defendants argued the trial court erred in finding that their insurer did not cover these claims. *Id.*

The plaintiffs alleged that after they moved in, they noticed water leaking and a buildup of ice and snow on the roof directly above the leak. *Id. at* *3-4. They further alleged the defendants had prior knowledge of the ice dams and leaks. *Id. at* *4.

The Court of Appeals held that the language of the defendants' new homeowner's policy clearly and unambiguously did not offer coverage for the plaintiffs' negligence claims. *Id.* The defendants' insurer only had a duty to defend if the complaint gave rise to liability covered under the policy. *Id.* The defendants' insurer, therefore, did not have a duty to defend or indemnify the defendants. *Id.*

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