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# THE 1960 TEXAS STANDARD HOMEOWNERS POLICY

*by*

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The standard homeowners policy has been in existence in Texas for a decade. During this period, many cases have reached the appellate courts of this state construing the terms of this standard policy. Although the policy form by no means can be considered mature at this time, the judicial decisions are quite adequate in most areas to allow counsel to determine with reasonable certainty whether a particular property loss is covered by

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the contract, and, if so, the amount of coverage thereunder.<sup>1</sup> This Article will review the decisions during the last ten years interpreting the property section of the Texas homeowners policy.<sup>2</sup> Because an understanding of the contractual language involved is essential to a proper evaluation of the decisions, reference will first be made to the available policy forms.

### I. THE TEXAS HOMEOWNERS FORMS GENERALLY

The homeowners policy may be described as an insurance policy for an individual resident of a dwelling which provides indemnity against both property loss and personal liability to third parties. It may be issued to either the resident owner of the dwelling or a tenant.<sup>3</sup> Pursuant to statutory authority,<sup>4</sup> the State Board of Insurance has promulgated a uniform homeowners policy, and has prescribed standard forms or endorsements for attachment thereto.<sup>5</sup> The first homeowners policy approved by the State Board of Insurance became effective April 15, 1957. Although combining the features of both a property and a liability policy, the original 1957 homeowners policy was not a total re-creation. It was a composite of then-existing and new provisions, and the basic conditions of the policy were taken verbatim from those of the Texas standard fire policy.<sup>6</sup>

The present homeowners policy was originally approved for use effective July 1, 1960. This policy actually consists only of a jacket<sup>7</sup> or shell onto which the more important coverage provisions are attached. The insuring clause and the actual coverage provisions are contained in the various homeowners forms which are attached to the policy. These homeowners forms come in five varieties: limited form, broad form, all risk form, tenants broad form, and tenants all risk form.<sup>8</sup> These are pure Texas forms, and, although similar terms are found in homeowners policies else-

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<sup>1</sup> This Article deals only with section I, the property section of the homeowners policy; no effort will be made to consider section II (liability coverage).

<sup>2</sup> Primarily, decisions construing the Texas homeowners policy will be relied on, but, where helpful, reference will also be made to non-homeowners Texas authorities and to cases from other jurisdictions.

<sup>3</sup> The tenant homeowners form is the same in every respect as the owner-occupant form, except that the tenant's property coverage is limited to personal property. See Texas General Basis Schedules, Homeowners Section, approved by the State Board of Insurance, Austin, Texas, July 1, 1964.

<sup>4</sup> TEX. INS. CODE ANN. arts. 5.35, 5.36 (1951). The mandate of these statutes actually applies only to the property portion of the policy.

<sup>5</sup> Only standard forms approved by the Board may be used. See Texas General Basis Schedules, Homeowners Section, *supra* note 3.

<sup>6</sup> These basic conditions are found in the Texas standard fire policy (1949 revision), and are still in use.

<sup>7</sup> The jacket consists of the declarations page, referred to as the daily report by the insurance industry, and the basic conditions. These basic conditions were entirely rewritten in 1960, and are no longer the same as those of the Texas standard fire policy.

<sup>8</sup> The limited form (A) covers the dwelling and unscheduled personal property against loss by fire, extended coverage, vandalism, and theft. The broad form (B) covers the dwelling against all risks of physical loss (with certain exceptions), and covers unscheduled personal property against the same named perils as form A. The all-risk form (C) covers the dwelling and unscheduled personal property against all risks of physical loss (with certain exceptions). The tenants broad form (form B-T) and the tenant all-risk form (form C-T) are similar to the regular B and C forms respectively, except that there is no dwelling coverage. See Texas General Basis Schedules, Homeowners Section, *supra* note 3. The liability sections of these five homeowners forms are identical. *Id.*

where, the Texas policy is different in many respects from those policies in use in other jurisdictions. Out-of-state authorities must be evaluated with this in mind.

The homeowners broad form (form HO-B) will be analyzed below in accordance with the existing case law. An understanding of the homeowners broad-form coverages generally will be useful in deciding coverage questions under any of the other homeowners forms (the "property insured" portions being practically the same), as well as under the similar farm and ranch owners policy or other Texas all risk policies, such as the multi-peril policy used for commercial risks.<sup>9</sup> The homeowners broad form is set out hereinafter as an appendix<sup>10</sup> to avoid any confusion as to the terms of the contract discussed.

## II. THE HOMEOWNERS BROAD FORM

### A. *Property Insured*

1. *Dwelling.* Decisions regarding what property is insured by the homeowners policy are practically non-existent. Coverage A provides that the dwelling described on the jacket of the policy, "while occupied by the Insured principally for dwelling purposes," is the property insured. This has required no further clarification by the courts, although the quoted phrase could well be the subject of later judicial clarification.<sup>11</sup> The policy specifically provides that wall-to-wall carpeting attached to a building shall be considered a part of the dwelling.<sup>12</sup> The policy also contains a dwelling extension which provides that ten per cent of the dwelling coverage may be applied as additional insurance to cover unconnected private structures located on the premises and used in connection with the occupancy of the described dwelling.<sup>13</sup>

<sup>9</sup> The broad form is chosen for detailed analysis because it is by far the most popular form with the insurance agents and their customers; thus, practically all the reported decisions have concerned that form. In discussing the broad form, this Article will proceed through the form in the order in which the provisions appear. Relevant portions of cases will be noted and analyzed when they concern the particular contractual provision under discussion.

<sup>10</sup> The Appendix sets out most of the property section, including the "property insured," the "perils insured against," and the "extensions of coverage" portions of the form, and should be considered in conjunction with the interpretive decisions. The homeowners broad form was first revised effective Nov. 1, 1960, and again effective July 1, 1963. The 1963 revision is presently used. However, there are no important differences between the 1960 form and the present form with regard to the "property insured" and "perils insured against" portions of the policy. Thus, all decisions, regardless of the date, involving the broad form are construing the identical contractual language.

<sup>11</sup> The phrase "principally for dwelling purposes" is not further defined in the policy or by the decisions. There is, however, additional guidance on the meaning of the term "occupied by the Insured." The vacancy clause contained in the basic conditions of the policy jacket provides that if the insured ceases to reside in the dwelling and the personal property or a substantial part thereof is removed, the dwelling shall be deemed vacant and the dwelling coverage shall be suspended sixty days thereafter. A vast body of law defining vacancy has developed under the Texas fire policy. In *Phoenix Assur. Co. v. Shepherd*, 134 Tex. 669, 137 S.W.2d 996 (1940), which was recently followed in *Knoff v. United States Fid. & Guar. Co.*, 447 S.W.2d 497 (Tex. Civ. App. 1969), the court defined "vacant" as meaning without inanimate objects, as opposed to "un-occupied," which means without human beings. The present homeowners vacancy clause thus incorporates both of these definitions.

<sup>12</sup> This contractual provision changes the contrary holding in *Ruby v. Cambridge Mut. Fire Ins. Co.*, 358 S.W.2d 943 (Tex. Civ. App. 1962) (fire policy with a physical loss form attached).

<sup>13</sup> The dwelling extension contains an exclusion for structures used for commercial, manufacturing, or farming purposes, or wholly rented to others. This makes the homeowner's dwelling ex-

2. *Unscheduled Personal Property.* Although there are many potential areas for litigation under the unscheduled personal property coverage (Coverage B), to date, such litigation reaching the Texas appellate courts has been negligible. The definition of the personal property insured is very broad, including all property owned, worn, or used by the insured, or any member of his family of the same household, and property of others<sup>14</sup> while on the premises of the described dwelling. The off-premises coverage provides that one thousand dollars or ten per cent of the personal property coverage, whichever is greater, is applicable worldwide. There are, however, various exclusions for animals and birds, aircraft, motor vehicles, trailers and semi-trailers; outboard motors, watercraft and their furnishings;<sup>15</sup> loss of numismatic property in excess of one hundred dollars; and loss of documents, jewelry, furs, and business property in excess of five hundred dollars.<sup>16</sup>

In Texas, the exclusion for business property will undoubtedly produce litigation, as it has elsewhere. That provision excludes "loss in excess of \$500 . . . of property pertaining to a ranch, farm, business, trade, profession or occupation of the Insured," and further excludes all such loss if the property consists of samples or articles for sale or delivery, or property away from the described premises. Apparently, there are no Texas cases deciding when property pertains to a business of the insured. However, that question has received attention elsewhere, generally under personal property floater policies.<sup>17</sup> The business property exclusion is,

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tension more specific in meaning than the fire policy dwelling extension, which has been construed on at least two occasions. In *Manhattan Fire & Marine Ins. Co. v. Holloway*, 359 S.W.2d 203 (Tex. Civ. App. 1962), *error ref. n.r.e.*, the court held that a servant's house was covered even though it had been rented for twenty months to a paying tenant. The result would presumably be the contrary under the homeowners policy. In *Zurich Ins. Co. v. Bass*, 443 S.W.2d 371 (Tex. Civ. App. 1969), it was held that there was no coverage for a barn which was under a lease to a separate tenant. This holding would apply to the homeowners policy.

<sup>14</sup> Property of roomers or tenants is, however, excepted from the definition of property of others.

<sup>15</sup> In *Employers Fire Ins. Co. v. Howsley*, 432 S.W.2d 578 (Tex. Civ. App. 1968), it was held that personal property consisting of camping and fishing equipment, clothes, and camera equipment, lost when two rubber rafts overturned in the Rio Grande River, could not be considered furnishings or equipment of the rubber raft within the meaning of this exclusion.

<sup>16</sup> These monetary limitations raise an interesting problem where there is a small loss, since the policy also normally contains a \$50 or \$100 deductible clause. For example, suppose that the policy contains a \$100 deductible clause and the insured sustains a \$200 loss of numismatic property. The loss of numismatic property in excess of \$100 is excluded by the policy. It could be asserted by the insurer that under such circumstances it owed nothing since there was only a \$100 covered loss under the policy and application of the \$100 deductible reduced the amount due the insured to zero. This problem may never be answered by the judiciary, since adjustment is usually made by first applying the deductible to the entire loss, even though such loss is above the monetary exclusion, and then making payment up to the policy limitation.

<sup>17</sup> There are four decisions which might be of use in predicting which way a Texas court will decide on this business property exclusion. In *Swanstrom v. Insurance Co. of N. America*, 100 F. Supp. 374 (S.D. Cal. 1951), there was held to be no coverage under a personal property floater policy where the insured placed some of his art objects in his restaurant as decorations. It was held that the character of the use and not the nature of the property determines whether or not property pertains to a business. In *Jerrel v. Hartford Fire Ins. Co.*, 251 Iowa 816, 103 N.W.2d 83 (1960), the property consisted of various newsreel films stored on business premises, and the court affirmed a jury verdict for the insured on the basis that on the date of the fire, the news film, having been merely stored there for over ten years, had no essential relationship to the business of the insured. The court also held that there was coverage for a second fire loss because the first fire put the insured "out of business permanently." 103 N.W.2d at 86. This reasoning in *Jerrel* is not particularly persuasive. In *American Motorist Ins. Co. v. Vermont*, 115 Ga. App. 663, 155 S.E.2d 675 (1967), it was held that a diamond ring was excluded because it was held for sale,

however, apparently inapplicable where the property pertains to the business of someone other than the insured and is on the premises of the described dwelling. In such a case coverage is provided at the insured's option, even for the benefit of others.

### B. Perils Insured Against

1. *Dwelling.* The dwelling, as defined in Coverage A of the policy, is insured against "ALL RISKS OF PHYSICAL LOSS except as otherwise excluded." Thus, it is the policy exclusions which are generally determinative of peril-coverage questions. However, the question does arise as to whether a loss comes within the all risks insuring clause. It has been stated that there is no Texas case that defines the term "All Risks of Physical Loss," and that it should not be given a restrictive meaning.<sup>18</sup> However, the authorities generally<sup>19</sup> support two implied prerequisites for a loss to qualify under this clause: (1) that it be of a fortuitous nature, and (2) that it not be caused by willful or fraudulent conduct of the insured.<sup>20</sup>

In *Millers Mutual Fire Insurance Co. v. Murrell*,<sup>21</sup> a suit based on the now-extinct Texas standard comprehensive dwelling policy, a loss was alleged to have been caused by earth movement or landslide underneath a dwelling. The court was faced with the insurer's contention that such damage was not a "risk" because it was not fortuitous. It was asserted that from the day the house was built it was certain that the damage would occur, and that it was therefore inevitable. The court rejected this contention, apparently on the basis that no one had knowledge that the damage was inevitable at the time the contract was executed.

The *Murrell* decision was followed in *Employers Casualty Co. v. Holm*,<sup>22</sup> an action upon a homeowners policy. In *Holm* a shower stall was constructed without a shower pan, which, as the parties stipulated, made it inevitable that water would pass into and under the insured's flooring. This was held to be a fortuitous risk-of-loss, since the parties also stipulated that neither the insurer nor the insured knew at the time the contract of insurance was made that there was no shower pan.<sup>23</sup> This holding represents an extension of *Murrell*, in which the risk was held to be for-

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notwithstanding the fact that the ring had no relationship to the usual business of the insured. In *Riddle v. Allstate Ins. Co.*, 203 So. 2d 820 (La. Ct. App. 1968), coverage was afforded where the manager of a retail merchandising establishment placed his own bookends, lamp, and desk set in his office to "spruce it up." *Id.* at 823.

<sup>18</sup> *Fidelity S. Fire Ins. Co. v. Crow*, 390 S.W.2d 788, 792 (Tex. Civ. App. 1965), *error ref. n.r.e.*

<sup>19</sup> *See* Annot., 88 A.L.R.2d 1122, 1125 (1963).

<sup>20</sup> Texas would undoubtedly follow the rule that fraudulent losses are impliedly excluded from an all risks policy as a matter of public policy, since this has always been the rule under a fire insurance policy. *Greenfeld v. San Jacinto Ins. Co.*, 319 S.W.2d 134 (Tex. Civ. App. 1958); *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511 (Tex. Civ. App. 1952); *Jones v. Fid. & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952), *error ref.* *See also* *Bryant v. Trinity Universal Ins. Co.*, 411 S.W.2d 945 (Tex. Civ. App. 1967), *error ref. n.r.e.*

<sup>21</sup> 362 S.W.2d 868 (Tex. Civ. App. 1962), *error ref. n.r.e.*, 367 S.W.2d 667 (Tex. 1963).

<sup>22</sup> 393 S.W.2d 363 (Tex. Civ. App. 1965).

<sup>23</sup> The sole dissenting judge in *Holm* was of the opinion that the loss lacked the element of chance required to make it a risk of loss. 393 S.W.2d at 368.

tuitous because the court was not shown that anyone knew, at the time the insurance contract was executed, that the loss was inevitable. In *Holm* the court was interested only in the absence of knowledge by the insured and the insurer.<sup>24</sup> Thus, it can be seen that, as a practical matter, the requisite knowledge needed to keep a risk from being fortuitous has evolved from general knowledge, to specific knowledge in the mind of the insured or the insurer.

The *Holm* decision demonstrates that it will be a rare case indeed where a Texas court will find that a loss is not covered under the all risks clause because it was nonfortuitous. However, *Holm* does tend to combine the risk-of-loss issue with the question of whether the loss is excluded by the inherent vice provision contained within the policy,<sup>25</sup> making it difficult at times to know which the court is really discussing. It seems to this writer that the inherent vice exclusion, as well as the other exclusions, are far more comprehensive than the nonfortuitous risk argument rejected in *Holm*. Thus, it is actually the exclusions which define the coverage, and if an insured can escape successfully the effect of the excluded perils, then his chances of recovery under the all risks clause are good.

2. *Unscheduled Personal Property*. Unlike the all risk coverage on the dwelling, the homeowners broad form provides personal property coverage only against loss from specific and separately named perils. Because most of these perils are the same as those found in a fire insurance policy and its special endorsements, or in a personal property floater policy, they will not be separately considered in this Article.

Loss from "collapse of building or any part thereof" is, however, an important peril listed in the homeowners policy which merits discussion. This peril is important not only as a personal-property-coverage peril, but also in understanding the ensuing loss exception to the exclusions, which is applicable to both the dwelling and personal property coverages. In *Employers Mutual Casualty Co. v. Nelson*<sup>26</sup> the supreme court held that the term "collapse" is not a word of art, but is generally understood to mean to fall or shrink together, cave in, or fall into a flattened, distorted, or disorganized state. The court defined the collapse of a dwelling as follows: "[A] sinking, bulging, breaking or pulling away of the foun-

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<sup>24</sup>The correctness of this result under Texas law as it then existed is questionable. The court quoted from the *Restatement of Contracts* as follows: "A fortuitous event within the meaning of the present and subsequent [s]ections, is an event which so far as the parties to the contract are aware, is dependent on chance . . . ; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties." 393 S.W.2d at 368. Texas law was to the contrary, as the cases indicate that it was against the public policy of Texas to allow insurance to be written after a loss had occurred, and this was true even though both parties were ignorant of the true facts. *H. Schumacker Oil Works, Inc. v. Hartford Fire Ins. Co.*, 239 F.2d 836 (5th Cir. 1957); *Hulen v. American Cent. Ins. Co.*, 45 S.W.2d 570 (Tex. Comm'n App. 1932), *holding approved*; *Alliance Ins. Co. v. Continental Gin Co.*, 285 S.W. 257 (Tex. Comm'n App. 1926), *holding approved*; *Trinity Universal Ins. Co. v. Rogers*, 215 S.W.2d 349 (Tex. Civ. App. 1948). *Contra*, *Burch v. Commonwealth County Mut. Ins. Co.*, 450 S.W.2d 838 (Tex. 1970) (adopting new rule for Texas).

<sup>25</sup>See text accompanying notes 55-58 *infra*.

<sup>26</sup>361 S.W.2d 704 (Tex. 1962).

dation or walls or other support so as materially to impair their function and to render the house unfit for habitation."<sup>27</sup> Although the above definition was applied to a non-homeowners insurance contract, it seems equally applicable to the homeowners policy.

One other peril in the homeowners policy which has been particularly troublesome is "mysterious disappearance." This term, like "collapse of building," is used both in defining an insured peril and in expressing the limits of an exclusion. Although much has been written on mysterious disappearance in other jurisdictions,<sup>28</sup> the appellate courts of Texas have not yet reported a decision defining the term. It is expected that we have not heard the last from the underwriters' draftsmen concerning this subject.

### III. THE EXCLUDED PERILS

Under the general heading of "Perils Insured Against," the policy provides that the insurance does not cover loss caused by eleven, separately-lettered exclusions, *a* through *k*, some of which have many subparts and all of which are subject to further exceptions. These eleven exclusions apply to both dwelling and personal property coverages, unless the exclusion itself expressly states otherwise. The important exclusions will be treated separately below, and the discussion under each will be preceded by the actual wording of the exclusion.

#### A. Water

*d. Loss caused by or resulting from:*

- (1) flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
- (2) water which backs up through sewers or drains;
- (3) water below the surface of the ground including that which exerts pressure on (or flows, seeps or leaks through) sidewalks, driveways, swimming pools, foundations, walls, basements or other floors, or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

1. *Surface Water.* In *Hardware Dealers Mutual Insurance Co. v. Berglund*<sup>29</sup> the supreme court re-affirmed the vitality of the surface water exclusion. *Berglund* developed out of the damage caused by Hurricane Carla in 1961. The suit was based on both a "named peril" and an all risks policy. Both policies had somewhat similar surface water exclusions, and as concerns the homeowners all risks policy, exclusion *d*(1) was as above quoted. The court was confronted not only with conflicting civil appeals decisions growing out of the Hurricane Carla disaster, but also with the argument that under an all risks policy the burden of proof should be on the insurer to establish that the loss came within an exclusion, notwith-

<sup>27</sup> *Id.* at 709.

<sup>28</sup> See, e.g., Annot., 12 A.L.R.3d 865 (1967).

<sup>29</sup> 393 S.W.2d 309 (Tex. 1965).

standing rule 94 and the prior case law tacitly recognized by that rule.<sup>30</sup> It was also contended by the insured that loss proximately caused by hurricane should not be construed as coming within the surface water exclusion. The court, however, relying upon mature Texas authority,<sup>31</sup> rejected these arguments and held that the surface water exclusion was applicable to loss caused by a hurricane. The submission of the case to the jury in *Berglund* is interesting in that the parties stipulated the total amount of damages caused by the hurricane. The jury was then asked to determine the percentage of damage which was caused by water, and the trial court then rendered judgment for the remainder of the stipulated damages. Such a submission had the effect of placing on the insurer the burden of proof in establishing that the damage was within the exclusion. The supreme court in *Berglund* re-affirmed the proposition that the burden of producing evidence to demonstrate that the loss is not attributable to the excluded hazards is on the insured.<sup>32</sup> Because the burden of persuading the jury is a consequence of the burden of going forward with the evidence,<sup>33</sup> the trial court's submission was actually erroneous.<sup>34</sup>

Since the *Berglund* decision, the appellate courts seem to have applied the surface water exclusion with little difficulty. *Cambridge Mutual Fire Insurance Co. v. Shoemaker*<sup>35</sup> was decided by the burden of proof. There, the insured drowned in a lake, and there were no eyewitnesses available to testify to the incident. Presumably, items of personal property were lost in the lake. The evidence indicated that on the day in question there were high winds and waves on the lake. Because of the absence of eyewitness testimony or other competent evidence, the court held that the plaintiff

<sup>30</sup> TEX. R. CIV. P. 94 provides in part:

Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; *provided that nothing herein shall be construed to change the burden of proof on such issues as it now exists.* (Emphasis added.)

<sup>31</sup> The court relied principally upon *Coyle v. Palatine Ins. Co.*, 222 S.W. 973 (Tex. Comm'n App. 1920), *holding approved*, and then stated: "The exclusion clauses involved in this suit have been used as a part of property insurance policies for many years. . . . Since the decision in the Coyle case, the construction of the exclusionary clause must be regarded as settled in Texas." 393 S.W.2d at 311.

<sup>32</sup> This same rule was stated in *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316 (Tex. 1965), decided the same day as *Berglund*, and was well established prior to that date. *See, e.g.*, *Shaver v. National Title & Abstract Co.*, 361 S.W.2d 867 (Tex. 1962); *T.I.M.E., Inc. v. Maryland Cas. Co.*, 157 Tex. 121, 300 S.W.2d 68 (1957).

<sup>33</sup> *Boswell v. Pannell*, 107 Tex. 433, 180 S.W. 593 (1915). The affirmative of the issue means the legal affirmative, not the literal affirmative, and thus includes the proving of a material negative. *Rosenthal Dry Goods Co. v. Hillebrahd*, 7 S.W.2d 521 (Tex. Comm'n App. 1928), *holding approved*.

<sup>34</sup> *Cf., e.g.*, *Twin City Fire Ins. Co. v. Guthrie*, 427 S.W.2d 901 (Tex. Civ. App. 1968) (trial court's judgment for the insured upon a jury verdict was reversed and remanded because of the failure of the special issues to exclude loss coming within the policy exclusions); *Wheelock v. American Fire & Cas. Co.*, 414 S.W.2d 61 (Tex. Civ. App. 1967), *error ref. n.r.e.* (alternative holding to the effect that the insured had the duty under TEX. R. CIV. P. 279 to tender requested issues excluding loss from an excluded peril, since such was a part of his basis for recovery). *Wheelock* is interesting since the insured, under a fire and extended coverage policy, unsuccessfully contended that loss by waves did not come within the high water exclusion. The homeowners form remedies this problem by expressly excluding loss from waves in *d(1)*.

<sup>35</sup> 403 S.W.2d 858 (Tex. Civ. App. 1966).

failed to sustain her burden of proving that the loss was not caused by water. The court concluded that it was logical to assume that an ordinary boat would not capsize due to the action of wind without corresponding rough waves. An interesting variation on this theme is found in *Employers Fire Insurance Co. v. Howsley*,<sup>36</sup> where the insured was using two rubber rafts which overturned and deposited various items of personal property into the Rio Grande River. The insured testified that the two life rafts in question came to rest on a rock and that a gust of wind flipped them over. The appellate court, in affirming a summary judgment, held that the wind, not the water, caused the loss. The court stated that the water was involved only as the recipient of the goods when the rafts capsized, and, in effect, held that such was "friendly water," which does not come within the exclusion.

2. *Sewer Water*. Apparently a Texas appellate court has not had occasion to apply the sewer back-up exclusion. However, applying the rationale of *Berglund*, that loss in any way caused by water is excluded, there should be little difficulty in deciding when this exclusion is applicable.<sup>37</sup>

3. *Sub-Surface Water*. In *Twin City Fire Insurance Co. v. Guthrie*<sup>38</sup> the above, sub-surface water exclusion was considered for the first time. The insured's position was that an air conditioner leaked condensated water on the floor of his dwelling, and the water drained through the floor and down into the ground around the foundation, causing portions of his house to sink. The court held that the sub-surface water exclusion was effective as applied to this loss, and that the insured failed to establish the amount of his loss not so excluded.<sup>39</sup>

*Guthrie* was followed and cited with approval in *Park v. Hanover Insurance Co.*,<sup>40</sup> where a water line was split underneath the foundation of a house, causing a softening of the sub-soil and a shifting of the dwelling's foundation. The insureds asserted that exclusion *d*(3) did not apply, arguing that it was applicable only to water of natural origin. They also contended that the initial and proximate cause of the loss was the accidental leakage of the water, and that the water below the surface of the ground was merely a successive link in the chain of causation between the initial cause and the loss. The court rejected both of these contentions,

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<sup>36</sup> 432 S.W.2d 578 (Tex. Civ. App. 1968).

<sup>37</sup> See, e.g., *Kane v. St. Paul Fire & Marine Ins. Co.*, 214 F. Supp. 178 (W.D. Tex. 1963), where, in a suit on a non-homeowners policy, it was alleged that the insured's damage was caused by an overflow from defective or obstructed sewage lines. The court seemed to be impressed with the fact that the policy contained no such exclusion, although a renewal policy, effective after the loss, contained an exclusion for loss caused by water which backs up through sewers or drains. In *Jackson v. American Mut. Fire Ins. Co.*, 299 F. Supp. 151 (M.D.N.C. 1968), *aff'd*, 410 F.2d 395 (4th Cir. 1969), the above quoted exclusion in a homeowners insurance policy was held applicable to a North Carolina loss.

<sup>38</sup> 427 S.W.2d 901 (Tex. Civ. App. 1968).

<sup>39</sup> The court also relied upon exclusion *k* in reaching its result. See text accompanying note 64 *infra*.

<sup>40</sup> 443 S.W.2d 940 (Tex. Civ. App. 1969), *error ref. n.r.e.*

observing that the water came from below the surface of the ground and remained below the surface, and that the underground water was the direct, and not a remote, cause.

Considering both *Guthrie* and *Park* together, a couple of definite rules concerning the sub-surface water exclusion are apparent. The exclusion is applicable to all sources of water, whether natural or artificial, and to water which originates either above or below the ground, provided the damage results from the water's being below the surface of the ground. Thus, if the underground water's source is an above-ground plumbing or air-conditioning system,<sup>41</sup> a rusted underground pipe,<sup>42</sup> or merely a leaky outdoor water faucet,<sup>43</sup> any loss resulting therefrom is excluded.

### B. Freezing

*e. Loss caused by or resulting from freezing while the building is unoccupied unless the Insured shall have exercised due diligence with respect to maintaining heat in the building or unless plumbing, heating and air-conditioning systems had been drained and the water supply shut off during such unoccupancy;*

It was held in *International Insurance Co. v. Reid*<sup>44</sup> that the phrase "unless the Insured shall have exercised due diligence" requires only that the insured personally use due diligence. Thus, the insured can entrust responsibility to an agent and recover under the policy, even though his agent fails to exercise due diligence. In the opinion of this writer, the *Reid* case is wrong on both principle and authority,<sup>45</sup> and a contrary result by a different court of civil appeals<sup>46</sup> under a similar policy considerably weakens its persuasiveness. Therefore, serious doubt exists concerning whether an insured can merely delegate the authority to protect his unoccupied dwelling to an agent and then not be bound by that agent's conduct. In *Reid* it was agreed by the parties that the building was un-

<sup>41</sup> *Twin City Fire Ins. Co. v. Guthrie*, 427 S.W.2d 901 (Tex. Civ. App. 1968).

<sup>42</sup> *Park v. Hanover Ins. Co.*, 443 S.W.2d 940 (Tex. Civ. App. 1969).

<sup>43</sup> *Sharp v. Safeco Ins. Co. of America*, Cause No. 66-7247-A (14th Judicial Dist. Ct., Dallas County, Texas, Dec. 8, 1967). In that case the court rendered a summary judgment based on exclusion *d*(3) prior to the *Guthrie* case or any other reported decision on this exclusion.

<sup>44</sup> 400 S.W.2d 939 (Tex. Civ. App. 1966), *error ref. n.r.e.*

<sup>45</sup> Without any analysis, the court in *Reid* merely stated that insurance policies should be interpreted strictly against the insurer, citing *Provident Wash. Ins. Co. v. Proffitt*, 150 Tex. 207, 239 S.W.2d 379 (1951), and that such a strict construction required that only the insured use due diligence. That rule of construction has long since been repudiated, with the correct rule being that strict construction against the insurer applies only when the policy is ambiguous. Thus, in construing an unambiguous contract, neither party is favored over the other simply because the agreement is one of indemnity. *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965); *Employers Mut. Cas. Co. v. Nelson*, 361 S.W.2d 704 (Tex. 1962); *Transport Ins. Co. v. Standard Oil Co.*, 161 Tex. 93, 337 S.W.2d 284 (1960); *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 303 S.W.2d 775 (1957).

<sup>46</sup> In *Fort Worth Lloyds Ins. Co. v. Willham*, 406 S.W.2d 76 (Tex. Civ. App. 1966), *error ref. n.r.e.*, a judgment for the insured was reversed and remanded where the evidence showed that although the water was once turned off, someone turned it back on prior to a freeze. The court held that it was incumbent on the insured to show that whoever turned the water back on was not under his control. Although *Willham* was decided under a fire insurance policy with a physical loss form attached and containing a provision that "this insurance shall not be prejudiced by any act or neglect of any person . . . when such act or neglect is not within the control of the named insured," [*Id.* at 80] such a provision, which is only in the negative, can not by itself account for the opposite result in this case.

occupied; thus, a definition of that term as applied to the pipe-freezing exclusion will have to await another decision.<sup>47</sup>

In one case the insured relied upon exclusion *e* to show that his freezing loss was covered.<sup>48</sup> He reasoned that the "extremes of temperature" language in exclusion *i* was incompatible with exclusion *e*, and that exclusion *e* indicated that freezing was an insured peril in certain circumstances. However, the court held that exclusions do not create coverage, and that the loss was otherwise excluded by the policy.

### C. Inherent Defects

*i. Loss caused by inherent vice, wear and tear, deterioration; rust, rot, mould, or other fungi; dampness of atmosphere, extremes of temperature; contamination; vermin, termites, moths or other insects;*

Of all the exclusions in the homeowners policy, exclusion *i* has probably been the most troublesome. In part, this has been due to the fact that it actually consists of a number of separate, but related, exclusions. It has also on occasion been confused with the nonfortuitous risk argument,<sup>49</sup> and it has created more difficulties with regard to the ensuing loss exception to the exclusions than has any other exclusion.<sup>50</sup>

1. *Deterioration.* In perhaps the first decision under this exclusion, *Travelers Indemnity Co. v. Jarrett*,<sup>51</sup> the court seemed more concerned with deciding what was the proximate cause of the loss than with understanding the exclusion. In that case lightning opened a circuit breaker in the insured's house, causing food to spoil and damage the refrigerator. Although the court seemed to recognize that the damage to the food was caused by deterioration, rot, and mould, it held that the policy excluded only loss from "inherent" deterioration of the property insured. Thus, the exclusion prevented recovery for the damaged food, but not for the damaged refrigerator. *Jarrett* has never been cited nor followed on this point, and is clearly wrong. The adjective "inherent" does not modify every noun in the exclusion, and certainly not those past the first semicolon. This was a clear case for the application of the "rust, rot, mould, or other fungi" exclusion.

2. *Rust, Rot, Mould or Other Fungi.* In *Aetna Casualty & Surety Co. v.*

<sup>47</sup> In *Fort Worth Lloyds Ins. Co. v. Willham*, 406 S.W.2d 76 (Tex. Civ. App. 1966), there also was no question but that the dwelling was unoccupied. Texas will probably follow *Phoenix Assur. Co. v. Shepherd*, 115 S.W.2d 992 (Tex. Civ. App. 1938), *aff'd*, 134 Tex. 669, 137 S.W.2d 996 (1940), which defined "unoccupied" as meaning "without persons using the [building] for the purposes for which it was adopted." *Id.* at 671, 137 S.W.2d at 997. The question of how permanent the absence must be in order to make this exclusion applicable has not yet been decided in Texas. Logically, the test for unoccupancy under this exclusion should not be as strict as under the vacancy clause, discussed in note 11 *supra*, since a vacancy suspends all dwelling coverage and there is no requirement under this exclusion that the personal property be removed.

<sup>48</sup> *State Farm Fire & Cas. Co. v. Volding*, 426 S.W.2d 907 (Tex. Civ. App. 1968), *error ref. n.r.e.*

<sup>49</sup> See text accompanying notes 21-25 *supra*.

<sup>50</sup> The ensuing loss exception is discussed below in text accompanying notes 75-89 *infra*.

<sup>51</sup> 369 S.W.2d 653 (Tex. Civ. App. 1963).

*Yates*<sup>52</sup> a United States court of appeals had no difficulty in finding that exclusion *i* was applicable to a situation where the joists, sills, and sub-flooring of the insured's home were almost completely rotted away because the crawl space underneath the house was inadequately vented. The court indicated that this loss fell within just about any part of exclusion *i* that one cared to mention. However, it is clear that the court found that the rot exclusion was most applicable.

3. *Inherent Vice.* In *Employers Casualty Co. v. Holm*<sup>53</sup> the application of exclusion *i* to damage resulting from a shower stall constructed without a shower pan was considered. It was admitted by both parties that this was an inherent vice. Thus, the case was actually decided upon the application of the ensuing loss exception to this exclusion, which is discussed later in this Article. The court in *Holm* had occasion to define the term "inherent vice": "[It] does not relate to an extraneous cause but to a loss entirely from internal decomposition or some quality which brings about its own injury or destruction. The vice must be inherent in the property for which recovery is sought."<sup>54</sup>

This inherent vice definition<sup>55</sup> was accepted verbatim and applied in *State Farm Fire & Casualty Co. v. Volding*.<sup>56</sup> There, the insured's bricks, which were too porous, became saturated with water and cracked or spalled when the temperature dropped below freezing. The court held that the porous condition of the brick was a fault or defect which may properly be labeled an "inherent vice" in the insured property and which was a cause of its own injury or destruction, in that such injury or destruction would not have occurred except for the vice.

The application of the inherent vice exclusion to the facts of the above case has not gone without criticism. One writer has suggested that since, in addition to the porous condition of the bricks, it took the water and a freeze to cause the damage, it did not appear that the loss was caused entirely from some internal quality of the property within the *Holm* inherent vice definition.<sup>57</sup> This same argument was presented by the insured in *Volding* and rejected by the court without comment. It is submitted that in determining the inherent vice question, the insured object may not be considered in an absolute vacuum in which not even rot or decomposition could occur, but rather the object must be considered in its normal, customary environment. *Volding's* brick was used on exterior surfaces in Dallas, Texas, inevitably exposing it to both rain and freezing temperatures. Therefore, it was certain from the moment that the brick

<sup>52</sup> 344 F.2d 939 (5th Cir. 1965).

<sup>53</sup> 393 S.W.2d 363 (Tex. Civ. App. 1965).

<sup>54</sup> *Id.* at 367.

<sup>55</sup> It should be noted that the policy also contains a specific inherent vice definition for mechanical devices. Exclusion *b* excludes loss to such devices caused by their own mechanical breakdown. In *Twin City Fire Ins. Co. v. Guthrie*, 427 S.W.2d 901 (Tex. Civ. App. 1968), repair costs for an air-conditioning unit were claimed when they were necessitated by the air conditioner's malfunction. The court held that this was excluded without stating which exclusion it was relying on.

<sup>56</sup> 426 S.W.2d 907 (Tex. Civ. App. 1968), *error ref. n.r.e.*

<sup>57</sup> Davis, *Insurance Law, Annual Survey of Texas Law*, 23 Sw. L.J. 122, 132-33 (1969).

walls were constructed that the very damage sued for would occur. Hence, it was inevitable, and, in the opinion of this writer, constituted a loss caused by an inherent vice.

One troublesome and unanswered problem concerning the inherent vice exclusion is its application to those parts of the insured property surrounding the vice. For example, if Volding's falling brick from his chimney had damaged his roof, would this be excluded as being caused by inherent vice, or would that exclusion apply only to the brick? In other words, is the inherent vice exclusion so different from the other exclusions that its breadth is limited to that very item of property containing the vice and to no others? The indications of the authorities are conflicting.<sup>58</sup> The writer feels that the exclusion has some application to parts of the insured property other than the one containing the vice, particularly if the parts are contiguous. If this were not the case, then there would be no need for the ensuing loss exception to the inherent vice exclusion.

4. *Extremes of Temperature.* The court in *State Farm Fire & Casualty Co. v. Volding*<sup>59</sup> also held that "the extremes of temperature" portion of exclusion *i* was applicable. This application was foretold by the earlier decision of the same court in *McKool v. Reliance Insurance Co.*<sup>60</sup> In that case the same exclusion was held applicable to a loss which was caused by the freezing of water in a swimming pool and the cracking of ceramic tile affixed to the walls of the pool.

5. *Contamination.* The contamination portion of exclusion *i* will undoubtedly be construed in the same manner as was done by the supreme court in *McConnell Construction Co. v. Insurance Co. of St. Louis*,<sup>61</sup> which involved an "all risks" builders risk policy. In that case the damage resulted from the application of muriatic acid to brick flooring, which emitted chemical fumes and adversely affected the metal structure of the dwelling. The court held that contamination means a mixing of substances which results in an impure mixture, and that it was not to be confused with corrosion. The court noted that although it may be possible under certain situations for corrosion to also be classified as contamination, such was not the case in *McConnell*. Oxidation was given as an example of corrosion. Of course, exclusion *i* also excludes loss from rust; thus, this form of corrosion would be excluded by the homeowners policy. However, as in *McConnell*, it would seem possible under the homeowners

<sup>58</sup> *Travelers Indem. Co. v. Jarrett*, 369 S.W.2d 653 (Tex. Civ. App. 1963), erroneously limits all of exclusion *i* to items containing the vice, making the ensuing loss exception to exclusion *i* an unwarranted duplication. *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. 1965), only appears to so limit the inherent vice exclusion, because the court actually found coverage only after invoking the ensuing water damage exception. This would, of course, have been unnecessary if the inherent vice exclusion had application only to the defective item, the absent shower pan. *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939 (5th Cir. 1965), and *Park v. Hanover Ins. Co.*, 443 S.W.2d 940 (Tex. Civ. App. 1969), lend support for the idea that a loss caused by inherent vice in another part of the structure is nevertheless excluded.

<sup>59</sup> 426 S.W.2d 907 (Tex. Civ. App. 1968), *error ref. n.r.e.*

<sup>60</sup> 386 S.W.2d 344 (Tex. Civ. App. 1965), *error dismissed*.

<sup>61</sup> 428 S.W.2d 659 (Tex. 1968).

policy to have a loss caused by some type of corrosion which would not come within the provisions of exclusion *i*, and thus would be covered by the policy.

#### D. *Settling, Cracking, etc.*

*k. Loss [to the dwelling] caused by settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings, roof structures, walks, drives, curbs, fences, retaining walls or swimming pools.*

Surprising as it may seem, exclusion *k* has not been particularly troublesome for the courts. This exclusion, unlike any of the other lettered exclusions, applies only to the dwelling coverage. As to the application of this exclusion the die was well cast when the supreme court decided *Employers Mutual Casualty Co. v. Nelson*.<sup>63</sup> Although that case did not involve a homeowners policy, it did define "settling" in an exclusion similar to that in the homeowners policy. The trial court had submitted an issue on settling which did not include the other words of the exclusion, such as "expansion," and the supreme court found this to be reversible error. Further, the insured took the position that if anything expanded, it was the soil under the foundation, and not the foundation itself. The supreme court disagreed, stating that for the purpose of this exclusion, the supporting soil must be considered an integral part of the foundation.

The supreme court having apparently indicated its thinking on a settling exclusion,<sup>63</sup> six years passed without an appellate opinion on the specific settling exclusion contained in the homeowners policy. Then, in *Twin City Fire Insurance Co. v. Guthrie*,<sup>64</sup> the question was presented whether the homeowners settling exclusion was applicable where the settling was caused by a sudden, accidental, fortuitous, and unanticipated overflow of water from an air conditioning unit which saturated the subsoil beneath the foundation of a dwelling. It was held that the exclusion was applicable. *Guthrie* was cited recently with approval in *Park v. Hanover Insurance Co.*,<sup>65</sup> wherein the initial cause of the settlement was a break in an underground water line. In these two cases, the contention of each insured was not that the facts did not literally come within the exclusion, but rather that the settling was actually the result of some other cause, which should be considered the proximate cause of the loss, thus making the exclusion inapplicable. It can be seen from these two cases that such an argument has been unsuccessful, and that if the damages

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<sup>63</sup> 361 S.W.2d 704 (Tex. 1962). In *Nelson* the exclusion only related to "normal" settling. Thus, the settling exclusion in the present homeowners policy must be considered broader than the one in *Nelson*.

<sup>64</sup> Shortly after *Nelson*, the court again expressed itself on a similar problem under a non-homeowners policy. See *Miller's Mut. Fire Ins. Co. v. Murrell*, 367 S.W.2d 667 (Tex. 1963), which was a suit upon the now-obsolete, comprehensive dwelling policy. The court, in a per curiam opinion, refused the application for writ of error, n.r.e., and stated that its refusal was not to be construed as an approval of the intermediate court's holding [362 S.W.2d 868 (Tex. Civ. App. 1962)] that loss due to expansion of earth beneath a slab foundation was not excluded by the terms of the policy.

<sup>64</sup> 427 S.W.2d 901 (Tex. Civ. App. 1968).

<sup>65</sup> 443 S.W.2d 940 (Tex. Civ. App. 1969).

claimed constitute settling, then there is no coverage, regardless of the reason why the house in fact settled.

The correctness of this proposition is demonstrated by an analysis of the *Berglund* decision. In *Berglund* loss from wind was covered, but loss from water was specifically excluded. The insured contended that Hurricane Carla was the proximate cause of the loss, including the loss from water, and thus all the hurricane damage was covered. This contention was rejected by the court, which stated that there is a great deal of difference between a hazard that is merely not covered by a policy (that is, a risk upon which the policy is silent or for which no coverage has been purchased), and a hazard expressly excluded by the policy. Thus, the particular hazard which might be considered the initial cause is unimportant; if the loss is directly caused by the excluded hazard, then there is no coverage under the policy. Applying this to the settling situation, it can be concluded that if the insured's loss is caused by settling—that is, if the damage consists of settling damage—then there is no coverage under the homeowners policy, regardless of what initially causes the house to settle.<sup>66</sup>

One additional feature of exclusion *k* is that it excludes loss caused solely by cracking or any of the other excluded hazards mentioned therein, notwithstanding the absence of settling. In *McKool v. Reliance Insurance Co.*,<sup>67</sup> where water froze in a swimming pool and caused the pool wall to crack, it was held that such loss was excluded by the cracking portion of exclusion *k*. In *State Farm Fire & Casualty Co. v. Volding*<sup>68</sup> the same court, and the same judge writing the opinion, reached what at first reading might be considered a contrary holding. It will be recalled that in *Volding* the separation of bricks was due to water absorption and freezing. The court's entire opinion on this point was as follows: "We do not agree with the appellant's contention that the loss was caused by 'cracking' and therefore within the purview of Exclusion k."<sup>69</sup> The explanation for this seemingly inconsistent result is that although the parties spoke of the bricks cracking, they in fact "spalled," so that only the exposed face of the brick chipped off leaving the greater portion intact and in no way affecting the structural integrity of the walls. The insured argued that there was no cracking, since the definition of "crack" is to break or split, usually without complete separation of parts; that is, a flaw, a partial fracture, or a fissure. Ironically, this definition is correct.<sup>70</sup> Thus, it must be admitted that the court was likewise correct in holding that there was no cracking. This distinction between cracking and spalling is indeed

<sup>66</sup> It should perhaps be noted that the above analysis is not universally accepted by the courts, and, in particular, it seems to have been partially rejected in California. A California homeowners policy covering all risks of physical loss but excluding settling still covers the settling damage if the dominant or proximate cause of the settling is a non-excluded peril. *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). This is the same proximate cause argument that was rejected by the Supreme Court of Texas in *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965), and *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316 (Tex. 1965).

<sup>67</sup> 386 S.W.2d 344 (Tex. Civ. App. 1965), error dismissed.

<sup>68</sup> 426 S.W.2d 907 (Tex. Civ. App. 1968), error ref. n.r.e.

<sup>69</sup> *Id.* at 909.

<sup>70</sup> WEBSTER'S NEW WORLD DICTIONARY 342 (College ed. 1964).

a fine one, and the two could, in some cases, tend to overlap. If, however, a loss consists of true cracking, as properly defined, then *McKool* controls, and no coverage is afforded by the policy.

#### IV. THE ENSUING LOSS EXCEPTION TO THE EXCLUSIONS

*The foregoing Exclusions a through k shall not apply to ensuing loss caused by fire, smoke or explosion and Exclusions i, j and k shall not apply to ensuing loss caused by collapse of building, or any part thereof, water damage or breakage of glass which constitutes a part of the building, provided such losses would otherwise be covered under this policy.*

The application of the above "ensuing loss" exception to the exclusions presents one of the most difficult areas in construing the homeowners policy. It has caused many an attorney to jump to the conclusion that an insured's water damage is covered, although as shown by many of the cases discussed above, this is not necessarily the case. This ensuing loss exception was construed apparently for the first time in Texas in *McKool v. Reliance Insurance Co.*<sup>71</sup>

##### A. *Ensuing Water Damage*

In *McKool* it was contended that ice in a swimming pool which cracked the pool walls was actually solidified water, thus making the ensuing water damage portion of the exception applicable. The court disagreed, stating that "ensuing losses" are only those losses which follow or come afterwards as a consequence. The court explained its holding with the following illustration:

In other words, the tile having cracked because of the extreme cold or ice, there could be no recovery therefor, but if water had entered through the cracks thus caused, the ensuing damage caused by the entry of the water would be recoverable. That would be a loss caused by water damage ensuing after the uninsured cracking of the tile.<sup>72</sup>

It has been indicated that the meaning of the phrase "ensuing loss caused by . . . water damage" is not the same as ensuing loss caused by water. In other words, the phrase "water damage" conveys the meaning of direct intrusion of water, rather than mere steam, moisture in the air, or water vapor, which are insufficient to invoke the exception.<sup>73</sup> Also, if the excluded hazard and the water damage occur at the same time, then the ensuing loss exception is inapplicable, since it requires that these two events be at least in some sense separate.<sup>74</sup>

The insured's argument in *Park v. Hanover Insurance Co.*<sup>75</sup> presents the classical illustration of a backward application of the ensuing loss exception. As will be recalled, that case resulted from a broken underground water line that caused the dwelling to settle. The insured argued that there

<sup>71</sup> 386 S.W.2d 344 (Tex. Civ. App. 1965), error dismissed.

<sup>72</sup> *Id.* at 345-46.

<sup>73</sup> See *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939 (5th Cir. 1965).

<sup>74</sup> *Id.*

<sup>75</sup> 443 S.W.2d 940 (Tex. Civ. App. 1969).

was ensuing water damage and thus coverage afforded by the policy. But this argument reverses the required causation. The water damage caused the settling; the settling did not cause the water damage. If, for example, settling had caused an above-ground pipe to break, which caused above-the-ground water damage, then there would be loss caused by ensuing water damage, and the settling exclusion would not exclude the ensuing water damage. This, however, does not mean that the settling damage would then be covered, because *only* the ensuing direct water damage is covered under the policy.<sup>76</sup>

The most questionable application of the ensuing loss exception occurred in *Employers Casualty Co. v. Holm*,<sup>77</sup> where the builder failed to install a shower pan under the shower stall. The court treated this as an inherent vice within the meaning of exclusion *i*, but allowed recovery for what it considered the ensuing water damage. The parties had stipulated that water passing into and under the wood flooring caused the flooring to rot and deteriorate, and the court observed that it was a matter of common knowledge that the continual application of water to wooden flooring would cause warping, cracking, and water damage thereto, which would finally result in rot and deterioration. The court then made this curious statement: "The loss which ensued or followed the water damage grew out of and was caused by water damage. Hence the exception or exclusion to the exclusion (i) should apply."<sup>78</sup>

The *Holm* case actually presents the problem of the damage being one more length down the line in the chain of causation. Admittedly, water damage, or damage resulting from the direct intrusion of water, ensuing from an inherent vice, in this case the absence of a shower pan, is covered because of the exception to the exclusion. But the court allowed coverage for the ensuing rot and deterioration, about which the exception says nothing. In the opinion of this writer, if ensuing water damage causes rot, mould, or deterioration, then the case is back within exclusion *i* and the loss is not covered.<sup>79</sup> Because of the exception, the insured is allowed to recover only for the water damage, such as a wet or water-stained carpet

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<sup>76</sup> *McKool v. Reliance Ins. Co.*, 386 S.W.2d 344 (Tex. Civ. App. 1965), *error dismissed*; *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. 1965).

<sup>77</sup> 393 S.W.2d 363 (Tex. Civ. App. 1965).

<sup>78</sup> *Id.* at 366.

<sup>79</sup> The writer's position is supported by *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939 (5th Cir. 1965), wherein the court indicated that a construction of the policy as in *Holm* would make the exclusions practically meaningless, since in a philosophical sense it would not be easy to find a case of rot which could not also be classified as water damage. The court stated "[i]n our case the rot may have ensued from water but not from water damage . . ." *Id.* at 941. Thus, *Yates* demonstrates that the exception is limited to water damage, and that other damage which ensues therefrom, or more appropriately, from the water itself, must be tested as to coverage by the exclusions themselves. In other words, the key word in the phrase "ensuing loss caused by water damage" is "damage." The insurer is not stating that it will pay for all loss caused by water, but rather only for that loss caused by water damage, such as wet or stained property. Damage that occurs considerably after the water event, such as rot or settling, is not covered. Also, the settling cases of *Twin City Fire Ins. Co. v. Guthrie*, 427 S.W.2d 901 (Tex. Civ. App. 1968), and *Park v. Hanover*, 443 S.W.2d 940 (Tex. Civ. App. 1969), demonstrate conclusively that where a vice causes a water leak which causes settling, the loss is excluded. Obviously, the result must be the same where a vice causes a water leak which causes rot or deterioration.

or floor,<sup>80</sup> but not for losses further ensuing therefrom.<sup>81</sup> As the amount there in controversy was small and one judge dissented,<sup>82</sup> one should place little reliance upon this portion of *Holm*.

### B. Other Ensuing Loss

All of the above cases have concerned ensuing water damage. However, the ensuing loss exception is not limited to water damage. It provides that none of the exclusions apply to ensuing loss caused by fire, smoke, or explosion. Thus, if any of the excluded hazards cause, for example, a fire, then the fire damage is covered. Also, exclusions *i*, *j*, and *k* do not apply to ensuing loss caused by the collapse of a building or breakage of glass. Thus, in order to circumvent the settling exclusion, it is occasionally argued in a settling case that the dwelling has actually suffered a collapse.<sup>83</sup> But this is not an easy task, because to establish a collapse one must establish a sinking, bulging, breaking, or pulling away of the foundation or walls or other support so as materially to impair their function and render the house unfit for habitation.<sup>84</sup> If the insured continues to live in the house, or could live in same, then there is no collapse.

### C. The Proviso

Although it probably adds little to the result achieved in any given case, mention should perhaps be made of the proviso to the exception to the exclusions, which states that the exception is applicable only if the loss would otherwise be covered by the policy. Regarding the water damage portion of the exception, it has been mentioned that the exception is applicable where the particular water did not come within any portion of exclusion *d* (the water exclusion).<sup>85</sup> Likewise, in *Park v. Hanover Insurance Co.*<sup>86</sup> it was mentioned that the exception, there also called a saving clause, did not remove exclusion *k* from the case, since the loss was not "otherwise covered" because the sub-surface water came within exclusion *d*(3). Of course, if a loss is not fortuitous, then the loss also would not be "otherwise covered" within the proviso.<sup>87</sup> The proviso is really only helpful in clarifying the intent of the exception, as it will never, by itself, vary the coverage result in a particular case. This is because there is never any coverage for a nonfortuitous loss, and the water exclusion (*d*) is expressly made not subject to the ensuing water damage exception. There-

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<sup>80</sup> *Twin City Fire Ins. Co. v. Guthrie*, 427 S.W.2d 901 (Tex. Civ. App. 1968).

<sup>81</sup> *Holm* thus reverses the proper causation chain on this last item of damage. There was rot and deterioration ensuing after water damage, but the policy states that it will cover water damage ensuing from rot, deterioration, or other vices. Thus, *Holm* is inconsistent with *McKool v. Reliance Ins. Co.*, 386 S.W.2d 344 (Tex. Civ. App. 1965), *error dismissed*. Further, it was specifically held in *Park v. Hanover Ins. Co.*, 443 S.W.2d 940, 942 (Tex. Civ. App. 1969), that where a vice caused a water leak which caused settling, it could not be said that the insured's loss resulted from "ensuing water damage."

<sup>82</sup> See note 23 *supra*.

<sup>83</sup> See, e.g., *Twin City Fire Ins. Co. v. Guthrie*, 427 S.W.2d 901 (Tex. Civ. App. 1968).

<sup>84</sup> *Employers Mut. Cas. Co. v. Nelson*, 361 S.W.2d 704 (Tex. 1962).

<sup>85</sup> *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. 1965).

<sup>86</sup> 443 S.W.2d 940 (Tex. Civ. App. 1969).

<sup>87</sup> *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. 1965) (dissenting opinion, Coleman, J.).

fore, if the water exclusion applies, there is no coverage and the inquiry ends.

However, it is precisely this idea, that some exclusions are subject to the water damage or collapse portion of the ensuing loss exception while others are not, that causes the apparent inconsistency between exclusion *e* (freezing in an unoccupied building) and the extremes of temperature exclusion as construed in *McKool v. Reliance Insurance Co.*<sup>88</sup> As mentioned above, it has been argued that the extremes of temperature exclusion as construed in *McKool* is incompatible with the language of exclusion *e*, which impliedly indicates that freezing is a peril insured against under certain circumstances.<sup>89</sup> This argument is, however, erroneous. It is suggested that the reason for this apparent inconsistency is the ensuing water damage exception. Exclusion *e* is quite obviously directed towards a pipe-freezing situation. The major damage from a frozen pipe in an unoccupied house is the ensuing water damage that results from the breaking of the pipe. In fact, without such a broken pipe there is normally no damage. Exclusion *e* is not subject to the ensuing water exception; thus, if a loss comes within exclusion *e*, both the broken pipe and the water damage resulting therefrom are excluded. However, in any other situation, such as where the house is occupied, although freezing is excluded by exclusion *i* (that is, the loss to the pipe itself is excluded), the ensuing water damage is covered since exclusion *i* is subject to the exception. The underwriter is willing to accept the risk of water damage from an above-the-ground frozen pipe in an occupied dwelling, but he is not willing to accept this risk in an unoccupied dwelling without proper precautions. Thus, exclusion *e* was necessary to eliminate from the coverage the major portion of damage in the latter situation.

## V. THE EXTENSIONS OF COVERAGE

The homeowners policy contains four extensions of coverage,<sup>90</sup> two of which will be mentioned here.

1. *Additional Living Expense.* Under the additional living expense extension, an insured is entitled, for living expenses, to a maximum of an additional twenty per cent of the limit of liability applicable to the described dwelling, where the loss renders the dwelling untenable.<sup>91</sup> This is additional insurance giving the insured the possibility of a 120 per cent recovery of the amount of insurance.<sup>92</sup>

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<sup>88</sup> 386 S.W.2d 344 (Tex. Civ. App. 1965), *error dismissed*.

<sup>89</sup> This was the insured's argument in *State Farm Fire & Cas. Co. v. Volding*, 426 S.W.2d 907, 909 (Tex. Civ. App. 1968), *error ref. n.r.e.*

<sup>90</sup> The four extensions of coverage are entitled: additional living expense and rental value; trees, shrubs, plants and lawns; replacement cost coverage; consequential loss coverage.

<sup>91</sup> By this extension, the insured is able to recover the reasonable increase in his living expenses, but only during the period of time reasonably needed to repair the damaged dwelling. Thus, if the insured fails to prove the time for which substitute lodging is necessary, then he is entitled to no recovery under this extension. *Commercial Ins. Co. v. Colvert*, 425 S.W.2d 34, 39 (Tex. Civ. App. 1968).

<sup>92</sup> This is contrary to the wording of the Texas standard fire insurance physical loss form which

2. *Replacement Cost Coverage.* The replacement cost coverage is one of the real benefits to an insured under the homeowners policy. If certain conditions are met, it allows the insured to recover the full cost of repair or replacement of the dwelling (without deduction for depreciation), regardless of the age of the dwelling.<sup>93</sup> In order to be entitled to this coverage, an adequate amount of insurance in relation to the full replacement cost of the dwelling must be maintained, and actual repairs to or replacement of the building must be performed. The insured cannot recover more than the amount actually and necessarily expended in so repairing or replacing the building. The policy forms currently in use<sup>94</sup> require that such repairs or replacement be accomplished within 180 days of the loss, but that the company, when requested in writing, will extend such period for a time not to exceed 360 days after the loss. No Texas case construing this coverage extension has been found. However, the limitations and conditions therein are clear and do not seem to require construction. The provision requiring repairs within a certain time limit is undoubtedly a binding provision of the contract.<sup>95</sup>

## VI. THE APPRAISAL PROVISION

Space does not permit a discussion of each of the basic conditions<sup>96</sup> in the homeowners policy; however, one basic condition worth mentioning is the appraisal provision. The appraisal provision requires the insured and the insurer to have the amount of any property loss determined by two appraisers and an umpire upon an appropriate request by either party.<sup>97</sup>

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extends 10% of the insurance to additional living expense, but which is a part of the basic insurance and not in addition thereto.

<sup>93</sup> Under the Texas fire insurance policy, much confusion has arisen as to when the insurer is entitled to a deduction for depreciation. Some cases indicate that the insurer is not entitled to such a deduction under a fire policy where the loss is only partial. *Farmers Mut. Protective Ass'n v. Cmerck*, 404 S.W.2d 599 (Tex. Civ. App. 1966); *Implement Dealers Mut. Ins. Co. v. Cox*, 376 S.W.2d 384 (Tex. Civ. App. 1964); *Gulf Ins. Co. v. Carroll*, 330 S.W.2d 227 (Tex. Civ. App. 1959). Regardless of the correctness of these decisions, the homeowners form provides in the basic insuring clause that the company's liability shall not exceed "the amount it would cost to repair or replace the property with material of like kind and quality, with proper deduction for depreciation." Thus, as far as the dwelling coverage is concerned, in order to prevent the insurance company from depreciating the repair costs, the insured must rely upon the replacement cost coverage.

<sup>94</sup> Those forms currently in use bear the effective date of July 1, 1963.

<sup>95</sup> *Cf. Ruter v. Northwestern Fire & Marine Ins. Co.*, 72 N.J. Super. 467, 178 A.2d 640 (Super. Ct.), *cert. denied*, 37 N.J. 229, 181 A.2d 12 (1962).

<sup>96</sup> These basic conditions are contained in the homeowners policy jacket, and thus are the same regardless of the particular homeowners form attached thereto.

<sup>97</sup> That appraisal provision provides:

If, under Section 1, the Insured and the Company shall fail to agree as to the actual cash value, the amount of loss, or the cost of repair or replacement, then on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. Such appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the Insured or the Company, such umpire shall be selected by a judge of a district court of a judicial district where the loss occurred. Such appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and if the Insured or the Company requests that they do so, the appraisers shall also appraise (a) the full replacement cost of the described dwelling, (b) the full replacement cost of any building upon which loss is claimed, and (c) the full cost of repair or replacement of loss (without deduction for depreciation) to such building; and, failing to agree, shall submit their

A similar appraisal provision in *Glens Falls Insurance Co. v. Peters*<sup>98</sup> was upheld and found to be a condition precedent to a suit upon the policy, if properly invoked. The enforceability of the appraisal provision is noteworthy since it is sometimes confused with arbitration of liability, upon which Texas has a very restrictive law.<sup>99</sup>

Although it has been stated that the appraisal provision was inserted in the policy wholly for the benefit and protection of the insurer,<sup>100</sup> this is not always the case, and an insured should not overlook this simple procedure for determining the amount of his loss when it may be used to his advantage. Where the only dispute with the company is the extent of loss, appraisal under the policy without the expense and delay of litigation should be considered. However, one word of caution is in order. Many adjusters and insurance companies like to use a printed form entitled an "Agreement for Submission to Appraisers" when conducting an appraisal proceeding. This form is signed by both parties and may not contain a direction to the appraisers to determine the values necessary to give the insured credit for the replacement cost coverage mentioned above. Therefore, care should be used to make certain that in addition to ascertaining the actual case value and loss to each item, the appraisers also determine: (a) the full replacement cost of the described dwelling; (b) the full replacement cost of any building upon which loss is claimed; and (c) the full cost of repair or replacement of loss (without deduction for depreciation) to such building.

## VII. CONCLUSION

We are fortunate to have a standard homeowners form with all risks dwelling coverage in such wide use in this state. Precedent is necessarily a highly important factor when parties use contractual clauses which have been judicially construed.<sup>101</sup> Thus, it can be expected that many future decisions will build upon the solid foundation that has been laid to date. In most of the past decisions, where an exclusion has been held applicable, it will be seen upon mature reflection that the loss clearly came within a particular exclusionary clause. Most of these cases have been decided as a

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differences only to the umpire. An award in writing, so itemized, of any two when filed with the Company, shall determine to the extent so itemized the amount of actual cash value and loss, the full replacement cost, and the cost of repair or replacement. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally. Such award shall be binding as between the Insured and the Company.

<sup>98</sup> 386 S.W.2d 529 (Tex. 1965) (a suit upon a fire insurance policy). The enforceability of the appraisal provision has been established by many Texas decisions beginning with *Scottish Union & Nat'l Ins. Co. v. Clancey*, 71 Tex. 5, 8 S.W. 630 (1888). See also *Fire Ass'n v. Ballard*, 112 S.W.2d 532 (Tex. Civ. App. 1938) (upholding the appointment of an umpire by a judge in accordance with the policy provision).

<sup>99</sup> See *Huntington Corp. v. Inwood Construction Co.*, 348 S.W.2d 442 (Tex. Civ. App. 1961), error ref. n.r.e.; TEX. REV. CIV. STAT. ANN. art. 224 (1965); Carrington, *The 1965 General Arbitration Statute of Texas*, 20 Sw. L.J. 21 (1966).

<sup>100</sup> *International Serv. Ins. Co. v. Brodie*, 337 S.W.2d 414, 417 (Tex. Civ. App. 1960), error ref. n.r.e.

<sup>101</sup> *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309, 315 (Tex. 1965) (on motion for rehearing).

matter of law. As the insurance selling agents begin to appreciate the significance of these exclusions, they will probably be more inclined to sell, for an additional premium, the homeowners policy with special standard endorsements eliminating one or more of these exclusions.<sup>102</sup>

The really difficult and factually involved cases, as well as those with highly-contested, complex factual issues, have yet to reach the courts. In fact, the proper or best way to submit the special issues to a jury where a large number of unrelated exclusions are raised by the evidence or where there is pre-existent damage has yet to develop.<sup>103</sup> It is to be expected that, in time, cases will be decided where a specific exclusion has been deleted from the contract, varying the result to a certain extent from the decisions to date.<sup>104</sup> Proximate cause as applied to the exclusions will undoubtedly be clarified in the future decisions, so that it will become clear exactly which exclusions apply to damage "caused by" the excluded peril, such as the water exclusion, and which exclusions also apply to loss *consisting of* the excluded hazard, such as the settling exclusion. The outer limits of the inherent vice exclusion as to causation may be authoritatively declared. Some of these more troublesome problems will undoubtedly be answered in the next ten-year period in the history of the Texas homeowners policy.

### VIII. APPENDIX

FORM HO-B

HOMEOWNERS BROAD FORM

Effective

July 1, 1963

SECTION I — PROPERTY SECTION

Subject to the provisions and conditions of the policy, and of this form and endorsements attached, the Company insures the Named Insured and legal representatives against loss (including expenses incurred in the removal of debris of property insured resulting from such loss) from any of the Perils Insured Against to the property hereinafter described. Unless otherwise provided, this insurance shall apply only at the premises of the dwelling described on Page 1, and liability of the Company shall not exceed: the specified Limits of Liability; nor, the actual cash value of the property at the time of loss ascertained with proper deduction for depreciation; nor, the amount it would cost to repair or replace the property with material of like kind and quality, with proper deduction for depreciation, within a reasonable time after the loss without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair; nor shall it exceed the interest of the Insured.

#### PROPERTY INSURED

COVERAGE A—DWELLING, as described on Page 1 of this policy, while occupied by the Insured principally for dwelling purposes.

Wall-to-wall carpeting attached to a building shall be considered a part of such building.

DWELLING EXTENSION—The Insured may apply up to 10% (in the aggregate) of the Limit of Liability applicable to the described dwelling as additional insurance to cover other private structures on the premises used in connection with the occupancy of the dwelling and not in contact therewith.

EXCLUSION: This dwelling extension does not cover any structure used for commercial,

<sup>102</sup> E.g., form No. HO-353 is available to eliminate exclusions *d*(2) and *d*(3), the sewer back-up and sub-surface water exclusions.

<sup>103</sup> See, e.g., *Commercial Ins. Co. v. Colvert*, 425 S.W.2d 34 (Tex. Civ. App. 1968) (involving pre-existing damage). From that case it seems clear that the insured's recovery was not properly reduced by pre-existing damage considerations or other factors, yet it is extremely difficult to decide where or how the error was made.

<sup>104</sup> E.g., if the sub-surface water exclusion is eliminated, as mentioned in note 102 *supra*, this does not mean that settling thereby becomes covered. That is, exclusion *k* still excludes such loss, but it would mean that because of the ensuing loss exception, any ensuing collapse caused by the settling would be covered.

manufacturing or farming purposes; nor any structure wholly rented to others, except private garages used exclusively as such.

**COVERAGE B—UNSCHEDULED PERSONAL PROPERTY** owned, worn or used by the Insured, including members of his family of the same household and, at the option of the Insured, property of others (except roomers or tenants) while on the premises of the described dwelling.

Window or wall air-conditioning units shall be considered personal property.

**EXCLUSIONS—**Coverage B does not cover:

- a. Animals and birds; aircraft; motor vehicles, except power mowers, golf buggies and farm equipment not designed for use principally on public roads; trailers and semi-trailers, except such vehicles (other than house trailers) designed for use principally off public roads and except boat trailers while on the premises of the described dwelling;
- b. Outboard motors, watercraft, their furnishings and equipment except while on land on the premises of the described dwelling;
- c. Loss of money or numismatic property in excess of \$100 (any one loss);
- d. Loss in excess of \$500 (any one loss) of manuscripts, notes, securities, stamps including philatelic property, accounts, bills, deeds, evidences of debt, letters of credit, passports, documents, or transportation or other tickets;
- e. Loss in excess of \$500 (any one loss) of gems, watches, jewelry or furs. This exclusion, however, shall not apply to loss by the Perils of Fire and Lightning; Smoke; Explosion; Riot and Civil Commotion; Windstorm, Hurricane and Hail; Aircraft and Vehicles; as these perils are hereinafter conditioned and limited;
- f. Loss in excess of \$500 (any one loss) of property pertaining to a ranch, farm, business, trade, profession or occupation of the Insured but all loss to such property is excluded:
  - (1) if the property consists of samples or articles for sale or delivery, or
  - (2) if the property is away from the described premises;
- g. Property separately described and specifically insured under this or any other policy.

**OFF PREMISES COVERAGE—**Subject to the provisions and conditions of this policy and the exclusions and limitations therein, Coverage B also covers, as additional insurance, unscheduled personal property (except property usually rented to others) owned, worn or used by the Insured, including members of his family of the same household, anywhere in the world.

Such Off Premises Coverage, however, shall be limited to \$1,000 or 10% of the Limit of Liability applicable to Coverage B, whichever is greater. The Insured may, at his option, include in this Off Premises Coverage personal property of a residence employee at locations other than the employee's residence, but only while the employee is actually engaged in the service of the Insured and such property is in the physical custody of such employee.

#### PERILS INSURED AGAINST

Property as described and limited under Coverage A is insured against:

ALL RISKS OF PHYSICAL LOSS except as otherwise excluded.

Unscheduled Personal Property as described and limited under Coverage B is insured against loss by:

FIRE AND LIGHTNING;

SUDDEN AND ACCIDENTAL DAMAGE FROM SMOKE;

WINDSTORM, HURRICANE AND HAIL;

EXPLOSION;

AIRCRAFT AND VEHICLES;

VANDALISM AND MALICIOUS MISCHIEF—meaning only the willful and malicious damage to or destruction of the property insured;

RIOT AND CIVIL COMMOTION—including direct loss from pillage and looting occurring during and at the immediate place of a riot or civil commotion;

COLLAPSE OF BUILDING or any part thereof;

ACCIDENTAL DISCHARGE, LEAKAGE OR OVERFLOW OF WATER OR STEAM used within a plumbing, heating or air-conditioning system or a domestic appliance;

FALLING OBJECTS—provided the building containing the property covered shall first sustain an actual damage to the exterior of the building by the falling object;

FREEZING of domestic appliances;

THEFT, larceny, burglary, robbery, or attempts thereat, and mysterious disappearance.

**EXCLUSIONS (Applicable to Property Insured under Coverages A and B and Perils Insured Against)—**This insurance does not cover:

- a. Loss to electrical appliances, devices, or wiring caused by electricity, other than lightning;
- b. Loss caused by smog; nor by smoke from industrial or agricultural operations;
- c. Loss caused by Windstorm, Hurricane and Hail to:
  - (1) cloth awnings; greenhouses and their contents; buildings or structures located wholly or partially over water and property therein or thereon;
  - (2) radio and television towers, masts and antennas, including lead-in wiring; wind chargers and windmills;

- (3) personal property within a building caused by rain, snow, sand or dust, all whether driven by wind or not, unless the wind or hail shall first make an opening in the walls or roof of the building, and the Company shall then be liable only for loss to the insured property therein, caused immediately by rain, snow, sand or dust entering the building through such opening;
- d. Loss caused by or resulting from:
- (1) flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
  - (2) water which backs up through sewers or drains;
  - (3) water below the surface of the ground including that which exerts pressure on (or flows, seeps or leaks through) sidewalks, driveways, swimming pools, foundations, walls, basement or other floors, or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;
- Exclusion d does not apply to loss by theft, larceny, burglary, robbery or attempts thereat;
- e. Loss caused by or resulting from freezing while the building is unoccupied unless the Insured shall have exercised due diligence with respect to maintaining heat in the building or unless plumbing, heating and air-conditioning systems had been drained and the water supply shut off during such unoccupancy;
- f. Loss by:
- (1) theft, larceny, burglary, robbery, or attempts thereat, or by mysterious disappearance, of:
    - (a) personal property while in or on, or on the premises of, any dwelling (other than the described dwelling) owned, rented or occupied by an Insured, except while an Insured is temporarily residing therein;
    - (b) building materials and supplies not on the premises of the described dwelling;
  - (2) mysterious disappearance of an unmounted gem or a gem from its setting;
- g. Loss caused by earthquake, landslide or other earth movement;
- h. Loss to machinery, appliances and mechanical devices caused by mechanical breakdown;
- i. Loss caused by inherent vice, wear and tear, deterioration; rust, rot, mould or other fungi; dampness of atmosphere, extremes of temperature; contamination; vermin, termites, moths or other insects;
- j. Loss caused by animals or birds owned or kept by the Insured, a member of his household or an occupant of the premises;
- k. Loss under Coverage A caused by settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings, roof structures, walks, drives, curbs, fences, retaining walls or swimming pools.

The foregoing Exclusions a through k shall not apply to ensuing loss caused by fire, smoke or explosion and Exclusions i, j and k shall not apply to ensuing loss caused by collapse of building, or any part thereof, water damage or breakage of glass which constitutes a part of the building, provided such losses would otherwise be covered under this policy.

#### EXTENSIONS OF COVERAGE

**ADDITIONAL LIVING EXPENSE AND RENTAL VALUE:** If loss resulting from any of the Perils Insured Against hereunder renders the insured property wholly or partially untenable, the Company agrees to pay, not to exceed 20% of the Limit of Liability applicable to the described dwelling, as additional insurance:

- a. the necessary and reasonable increase in living expense to continue as nearly as practicable the normal standard of living of the Insured's household caused by such untenability;
- b. an amount to cover the loss of fair rental value (less expenses which do not continue) of that portion of the described dwelling or private structure usually rented to others, caused by such untenability.

Loss hereunder shall be computed commencing with the date of loss and extend for (but not limited by the expiration of this policy) the time required, with the exercise of due diligence and dispatch, to repair or replace such damaged or destroyed property, but it shall not extend beyond the time required for the Insured's household to become settled in permanent quarters.

**TREES, SHRUBS, PLANTS AND LAWNS**—within the specified Limit of Liability applicable to the described dwelling, the Insured may apply up to 5% of such limit to trees, shrubs, plants and lawns on the described premises against loss by fire and lightning, explosion, aircraft and vehicles, vandalism and malicious mischief, riot and civil commotion, theft and attempted theft. Trees, shrubs, plants and lawns are not otherwise insured under this policy.

**EXCLUSIONS**—This insurance shall not cover:

- a. Trees, shrubs, plants or lawns grown for commercial purposes;
- b. Loss in excess of \$250 on any one tree, shrub or plant, including cost of removal thereof;
- c. Loss caused by a vehicle owned or operated by an occupant of the premises of the described dwelling.

**REPLACEMENT COST COVERAGE**—If at the time of loss the limit of liability applicable to the described dwelling is 80% or more of the full replacement cost of said dwelling, the coverage of the policy applicable to the building structure suffering loss is extended to include the full cost of repair or replacement (without deduction for depreciation).

If at the time of loss the Limit of Liability applicable to the described dwelling is less than 80% of the full replacement cost of such described dwelling, the Company shall be liable for that proportion of the full cost of repair or replacement (without deduction for depreciation) of that part of the building damaged or destroyed which the Limit of Liability applicable to the described dwelling bears to 80% of the full replacement cost of said described dwelling.

In no event shall the Company's liability be less than its liability under the terms and conditions of this policy disregarding this replacement cost coverage.

In determining full replacement cost, the value of excavations, underground pipes, wiring and foundations which are below the surface of the ground may be disregarded. This replacement cost coverage shall not apply to wall-to-wall carpeting attached to such building structure or to cloth awnings.

The Insured shall elect in writing at the time Proof of Loss is made in accordance with the provisions of this policy whether claim is made under the policy for the loss disregarding this replacement cost coverage, or whether claim is made under the policy including this replacement cost coverage.

In accordance with the provisions of this form and of the policy at the time Proof of Loss is made, the Insured shall specify the amount claimed under the policy for the loss disregarding this replacement cost coverage and, if applicable, shall also specify the amount claimed under this extension of coverage.

The amount of loss, disregarding replacement cost coverage, for which the Company may be liable shall be payable as provided in the Basic Conditions of the policy.

Such additional amount as may be claimed under this extension of coverage shall not become payable until actual repair or replacement of the damaged or destroyed building structure is completed, which repair or replacement shall be identical with such building structure and on the same premises and intended for the same use and occupancy, within 180 days after the loss. If requested in writing by the Insured the Company will extend such period for a time not to exceed 360 days after loss.

If the Insured elects to make claim under this replacement cost coverage, the Company shall not be liable for more than the amount actually and necessarily expended in repairing or replacing such building structure damaged or destroyed or any part thereof identical with such building and on the same premises and intended for the same use and occupancy, and in no event shall the Company be liable beyond the limit of liability of this policy applicable to the damaged or destroyed building structure(s).

**CONSEQUENTIAL LOSS COVERAGE**—Property insured hereunder while contained inside a building on the premises of the described dwelling, is insured against loss due to change of temperature as the direct result of physical damage to the said dwelling, or equipment therein, caused by a peril insured against.