

DETERMINING WHETHER AN INSURED USED REASONABLE CARE TO MAINTAIN HEAT IN HER BUILDING

During the winter, many areas in the country experience severe lows in temperature. If the building/home owner does not take necessary measures to maintain its heat, the result can be catastrophic.



THE INSURANCE POLICY

Insurance policies generally exclude coverage for water damage caused by freezing unless the insured used *reasonable care* to maintain heat in the building or shut off the water supply to the system/appliance and drained the water from it.

SECTION I – PERILS INSURED AGAINST

A. Coverage A – Dwelling And Coverage B – Other Structures

1. We insure against risk of direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:

...

c. Caused by:

(1) Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This provision does not apply if you have used reasonable care to:

(a) Maintain heat in the building; or

(b) Shut off the water supply and drain all systems and appliances of water.

However, if the building is protected by an automatic fire protective sprinkler system, you must use reasonable care to continue the water supply and maintain heat in the building for coverage to apply.

For purposes of this provision a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment;

HO 00 03 10 00 Insurance Services (1999).

WHAT DOES REASONABLE CARE TO MAINTAIN HEAT MEAN?

Courts enforce the “reasonable care to maintain heat” provision, excluding coverage to the insured, where there is significant evidence of the insured’s negligence in failing to maintain heat. *See, e.g., Khoshmukhamedov v. State Farm Fire & Cas. Co.*, 946 F. Supp. 2d 443, 444-45 (D. Md. 2013) (owner, believing house would not have heat and water would not flow through pipes, left for winter and instructed caretaker to shut electricity off); *Fulton v. Beacon Nat. Ins. Co.*, 2012 Ark. App. 320 at *2, 5-7 (2012) (property owner did nothing to heat the building for seventeen days after tenant shut off utility service and notified owner that she was moving); *Evangelista v. Hingham Mut. Fire Ins. Co.*, 19 Mass.L.Rptr. 105 at *1-3 (Mass. Super. Ct. Feb. 15, 2005) (boiler not serviced for nine years, no freeze alarms in place, and failure to check on home, despite setting thermostat to 63 degrees); *McCartney v. Pawtucket Mut. Ins. Co.*, 1994 WL 723056 at *3 (Conn. Super. Ct. Dec. 23, 1994) (elderly, wheelchair bound owner failed to check on property for two months during winter). However, courts have

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required coverage where the insured shows that it has exercised its due diligence in attempting to maintain heat. *See Palmer v. Pawtucket Mut. Ins. Co.*, 225 N.E.2d 331 (Mass. 1967) (consultation with a heating contractor and application of contractor's advice to protect pipes satisfies reasonable care); *Hidalgo v. Mason Ins. Agency, Inc.*, 2005 WL 1313828 at *2 (Mich. Ct. App. June 2, 2005) (reasonable care taken where heat was left on and furnace working when last resident left house two weeks prior to water loss).

In the case of multi-unit buildings, a water loss resulting from the failure to maintain heat in one unit is likely non-excludable where the property owner provided utilities to keep the building heated and heat was maintained in another unit. *See Am. Nat'l Prop. & Cas. Co. v. Frederich 2 Partners, LTD*, 408 S.W.3d 610, 614 (Tex. App. 2013) (explaining policy requires maintenance of heat *in the building*, not in each unit).

Additionally, the requisite reasonable care to maintain heat may exist if the insured delegates the responsibility to a third party. *See, e.g., Chow v. Merrimack Mut. Fire Ins. Co.*, 83 Mass. App. Ct. 622, 627-28 (2013); *JMB Enters. V. Atl. Emp'rs Ins. Co.*, 550 A.2d 764,768 (N.J. Super. Ct. App. Div. 1988) (reasonableness can be satisfied by hiring someone to maintain heat); *Int'l Ins. Co. v. Reid*, 400 S.W.2d 939, 941 (Tex. Civ. App. 1966) (recognizing ability to delegate responsibility to maintain heat to a building's foreman). *But see Ferrell v. Nationwide Mut. Ins. Co.*, 2011 WL 2640263 at *3-5 (Ohio Ct. App. July 7, 2011) (owner unreasonable where entirely unaware of sub-leasing arrangement of property despite delegation). Delegation of the responsibility to maintain heat will likely satisfy the reasonable care requirement if:

1. the individual delegated with the responsibility to maintain heat is not a servant/employee;
2. the insured does not maintain control over *how* the individual maintains the heat; and
3. the insured is not negligent in selecting the individual who is to maintain the heat.


See Chow, 83 Mass. App. Ct. at 627-28 & 628 n.12 (it is immaterial whether the individual that is delegated with the responsibility is compensated or is merely doing it gratuitously).

***IT IS IMPORTANT TO
HAVE YOUR
EXPERIENCED LEGAL
COUNSEL IN PLACE
PRIOR TO THE LOSS***



Sloane and Walsh is available 24-hours per day, every day. We understand that having a team of skilled attorneys at the beginning of and throughout any major first-party claim is **CRUCIAL** for damage mitigation and a successful resolution. Our services go well beyond the first 24-hours. We are an aggressive and dedicated team of attorneys practicing in all of the New England states. We are proficient in first and third-party insurance coverage issues, alternative dispute resolution, civil litigation, and appellate advocacy.

QUESTIONS TO CONSIDER IN YOUR SITUATION:

- Was the loss caused by a lack of heat at the insured's property?
 - Was there a power outage at the property?
 - At what temperature was the thermostat left at the property?
 - Did the insured delegate the responsibility of maintenance of the property to someone that should have been capable of maintaining the heat?
 - Did the insured physically check to see if heat was on at the property?
 - How long had it been since either the insured or the delegated person last checked on the property?
 - Did the insured contact her heating provider to ensure service was being provided and that no problems occurred with the service?
- If the insured had automatic renewal service for heating fuel, did the insured ensure that service would continue uninterrupted?
 - If there were concerns with any of the above, did the insured provide an alternate interim heat source?
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- In most cases, had the insured not been able to maintain heat, did the insured drain the plumbing and shut the water supply off?
 - Did the insured have low temperature/freeze alarms in place prior to the loss and were the alarms working properly?

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