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LOSS VALUATION ISSUES ARISNG FROM PROPERTY INSURANCE CLAIMS

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A. Actual Cash Value

It is universally accepted that the basis and foundation of property insurance is to indemnify or restore the insured to as good a position, so far as practical, as he was in prior to the loss or damage of his property.[1] Nevertheless, there continues to be considerable disagreement as to how indemnity is defined. [2] Over the years, two distinct concepts of indemnity have been embraced by the insurance industry and the courts. On the one hand, there is "theoretical indemnity"; the idea that after recovering the insurance proceeds for a loss, the insured should be neither better off, nor worse off, than he was prior to the loss. On the other hand, there is "practical indemnity"; the idea that unless the insurance proceeds for a loss enable the insured to restore his property to as nearly as possible the same condition as it was before the loss, the insured, as a practical matter, will be worse off than he was prior to the loss. [3]

The disagreement as to the meaning of the term indemnity has culminated into disputes as to the measure of actual cash value. Standard property insurance policies provide compensation to the insured for the actual cash value of property damaged or lost. For example, the New York 1943 Standard Fire Policy, the form mandated for such policies by many states, provides the insured shall be compensated:

[t]o the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss….

Over the years, three methods of determining actual cash value have emerged: A) Replacement Cost Less Depreciation, under which a deduction is made from the cost of replacement so as to accomplish theoretical indemnity; B) Fair Market Value, under which the insured receives the difference between the fair market value of the property before and after the loss; and C) The Broad Evidence Rule, under which all evidence relevant to ascertaining the true extent of the insured's loss may be considered in fixing the actual cash value of the damaged property. As will be seen by the analysis below, none of these valuation formulas are free from criticism or easily apply to all fact situations.

1. Replacement Cost Loss Depreciation

In adjusting losses, it is very common for insurance companies to define actual cash value as "replacement cost less depreciation". Under this standard, a deduction is made from the cost of replacement so as to accomplish "theoretical indemnity"; that is, to prevent the insured whose old building has been damaged from obtaining, in effect, a new one.[4] The concern is that unless depreciation and similar factors that lessen the value are considered during loss adjustment, the principle of indemnity is violated, because the insured would be able to recover a new building in place of the old building that was destroyed. Despite its general acceptance by the insurance industry, however, this valuation method has had its share of detractors. One argument against the use of this formula is based upon a reading of the New York 1943 Standard Fire Policy itself. [5] As set forth above, the Standard Policy provides, in pertinent part, that the insured may recover actual cash value for a loss, "But not exceeding the amount which it cost to repair or replace the property." It has been argued that the limiting clause would be meaningless were it not contemplated by the drafters that on some occasion's actual cash value would exceed replacement cost. By definition, however, "replacement cost less depreciation" can never exceed replacementcost. Therefore, as some courts have argued, actual cash value and "replacement cost less depreciation" must be two different things.

The argument against using the "replacement cost less depreciation" formula for determining an insured's recovery under a policy insuring the actual cash value of the lost or damaged property

seems to make the most sense when the property is only partially lost or damaged. In fact many courts have held that when the insured's property has only been partially lost or destroyed, the insured is entitled to recover an amount that will enable him to fully restore the property, without allowing any deduction for depreciation with regard to the materials used.[6] The common rationale underlying these decisions is that if depreciation is deducted from the cost to restore the partially damaged property, the insured will not be able to completely restore his property, thus falling short of the objective of property insurance; which is indemnity. [7] For example, in Thomas v. American Family Mutual Ins. Co. [8] , the Supreme Court of Kansas squarely held that the term "actual cash value", when applied to a partial loss, means the cost to repair without any deduction for depreciation.

The insurance policy in that case provided, in pertinent part, as follows:

"[T]his company...does insure the insured…to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss…" In response to the insurer's appeal regarding the trial court's holding that depreciation could not be considered in arriving at the amount of plaintiff's recovery, the Supreme Court of Kansas explained, in pertinent part, as follows:
Nowhere in the policy does it provide that the cost of repair is to be reduced by a depreciation factor… The instant policy does not appear to us to be ambiguous. It does not provide for any reduction in the cost of repairs based upon depreciation and it is not for us to read such a provision into the policy…

* * * *

We think the better rule, absent policy provisions to the contrary, is that set forth in Sperling v. Liberty Mutual Ins. Co., 281 So2d 297 (Fla. 1973). In Sperling, the court was called upon to determine the meaning of the "actual amount" of a partial loss…The court stated:

"[S]ince the purpose of an insurance contract is to indemnify the owner of property against loss, the measure of value of partial destruction of a building by fire should be the cost of placing the building in as nearly as possible the same condition that it was before the loss, without allowing depreciation for the materials used" (Emphasis added) . Id. At 298.

* * * *

Under our rules of construction governing insurance contracts we are of the opinion [that] a reasonable person in the same predicament…would not expect depreciation to be considered to reduce and impair his ability to repair his partially damaged dwelling…[9]

2. Fair Market Value

Despite the insurance industries embracement of 'replacement cost less depreciation', courts have not uniformly subscribed to this formula for determining the actual cash value of lost or damaged property. Another method that has been used by the courts is known as the "fair market value test", under which the insured receives the difference between the fair market value of the property before and after the loss.[10] This method, however, also has its share of critics.

Criticism of the "fair market value test" usually begins with the recognition that a building has no recognized market value in the ordinary sense. Therefore, the argument goes, were fair market value the sole measure of actual cash value, buildings, for which there is no actual market, would have no insurable value.[11]

Some courts have suggested that a hypothetical market value could be used.[12] However, the courts, which have advanced the arguments against the full market value test, have an apparent aversion to the use of a hypothetical standard. The problem, in their view, with the use of a hypothetical market value is that it does not guarantee the insured's ability to replace the property destroyed. In other words, while payment by the insurer of actual market value practically guarantees that the insured will be able to make the replacement, i.e. form the actual market, the payment of a hypothetical market value does not at all guarantee that the insured will be able to make the replacement. [13] Accordingly,

the protection, which the insurance ostensibly provided, would be illusory and not fulfill the purpose of obtaining insurance in the first place.

3. Broad Evidence Rule

Dissatisfaction with the foregoing methods of measuring actual cash value has led many courts to adopt what has come to be known as the broad evidence rule, under which all evidence relevant to ascertaining the true extent of the insured's loss may be considered in fixing the actual cash value of the damaged property.[14] In McAnarney v. Newark Fire Ins. Co. , [15] the case in which the broad evidence rule was first proposed, the New York Court of Appeals rejected both market value and 'replacement cost less depreciation' as exclusive formulas for the measuring of actual cash value. Instead, the Court held that in determining actual cash value, the trier of fact should consider 'every fact and circumstance which would logically tend to the formation of a correct estimate of the loss', including, inter alia, the physical deterioration of the building and the suitability for the purposes for which it was erected. [16]

In essence, therefore, the broad evidence rule is a hybrid method of determining actual cash value which is meant to be flexible. Indeed, courts have made it clear that fair market value and 'replacement cost less depreciation' are properly considered when applying the rule.[17] In addition, the rule is meant to permit the trier of fact to consider all evidence relevant to the value of the property. For example, at least one court held that a letter written by the insured, which asserted the amount of the loss is relevant, particularly where the claim is for an amount in excess of that statement. [18]

Not surprisingly, however, the broad evidence rule has been criticized as well. Its lack of certainty or predictability are the most common complaints.[19]

B. Replacement Cost Coverage: Does the Insured Have to Actually Repair or Replace the Lost or Damaged Property in Order to Recover the Full Replacement Cost?

While standard property insurance policies provide compensation to the insured for the actual cash value of property damaged or lost, the insured may secure increased compensation through a replacement cost endorsement which provides coverage for any expenses in replacing the property. Replacement cost coverage was devised to remedy the shortfall in coverage, which results under a property insurance policy compensating the insured for actual cash value alone.[20] That is, while a standard policy compensating an insured for the actual cash value of damaged or destroyed property makes the insured responsible for bearing the cash difference necessary to replace old property with new property, replacement cost insurance allows recovery for the actual value of property at the time of the loss, without deduction for deterioration, obsolescence, and similar depreciation of the property's value. [21] Thus, while replacement cost coverage is designed, as much as possible, to place the insured in the position he would have been in but for the loss, it reimburses the insured for the full cost of repairs, even if that results in putting the insured in a better position he was in before the loss.

Such coverage, however, is more often than not accompanied by a qualification that the insurer is at first only obligated to pay the actual cash value of the property [22] , and is to pay the remainder of full replacement cost only upon the completion of the actual repair or replacement within a reasonable time [23] . Therefore, the requirement of actual repair or replacement does not affect the insurer's liability to pay for the actual cash value of the loss. It only effects that difference between that figure and the higher replacement cost amount. The obvious purpose of the precondition is to ensure that the insured is in need of the practical indemnity that replacement cost coverage is designed to accomplish, and to prevent the insured from directly profiting through the receipt of cash funds beyond the actual cash value of the loss. Thus, the insured is forced to repair and/or replace in order to recover the amount held back for depreciation.

Despite the facial attractiveness of the sound policies enunciated above, several courts have refused to enforce the precondition of actual repair or replacement. In rejecting this precondition, courts have reasoned that if the insured lacks the funds necessary to make up the difference between actual cash value and full replacement cost, it will be, as a practical matter, prevented from making replacement,

and thus denied the practical indemnity that replacement cost coverage is designed to provide. This argument is even more compelling in a case where the insurer has not even paid the actual cash value yet. [24] In Zaitchick v. American Motorists Ins. Co. , [25] the insurer refused to pay anything to the insured - - not even actual cash value - - because the insured had not yet restored the property in question. In Zaitchick , the court excused the insured from the pre-condition of actual repair or replacement on the ground of impossibility. Those cases cited by the insurer in favor of its position were declared by the Zaitchick court to be distinguishable because of a common fact. In those cases, the insurer had paid the actual cash value. The only issue, therefore, was whether or not the insurer was further obligated to pay the additional replacement cost amount. [26]

In Coblentz et ux. V. Oklahoma Farm Bureau Mt. Ins. Co. , [27] the Oklahoma Court of Appeals went even further when it to refused to enforce the pre-condition of actual repair or replacement. In that case that such a pre-condition is "unconscionable" in light of the fact that an insurance contract, by its very nature, is a contract of adhesion. [28] The reasoning behind this decision was explained by the court as follows:

[T}he challenged provision unreasonably favors the stronger party…Insurer required Plaintiff's to pay an extra premium to obtain replacement value coverage. Insurer then, by the terms of its insurance policy, required Plaintiff's to replace their lost property before Insurer would become obligated to pay full replacement cost. Insurer, by means of this condition precedent placed Plaintiffs, who lacked the financial wherewithal to replace the propert, in a legal "Catch 22." Because Plaintiffs lacked the resources to provide for the loss (which was the purpose of their insurance contract), Insurer was able to compel them to accept the lower actual cash value of the property instead of the full replacement value coverage they expected and for which they paid. [29]

Those courts that have enforced the pre-condition of actual repair or replacement have stressed what they felt was the clearly expressed intent of the insurer that full replacement cost would not be paid unless and until actual repair or replacement had been made. [30] One of the earliest of these cases was Tamco Corp. v. Federal Ins. Co. of New York . [31] In that case, the court agreed with the insurer and held that the insured could only recover the depreciation holdback amount upon compliance with the rebuilding and replacement condition expressed in the policy. Until that time, explained the court, the insurer was only obligated to pay the actual cash value. Similarly, in Bourazak v. North River Insurance Co. [32] , the policy's extended coverage for replacement cost provided that the insurer would not be liable for loss "unless and until actual repair or replacement is completed". The 7th Circuit upheld dismissal of the complaint against the insurer based on the insured's failure to demonstrate compliance with the clearly expressed policy conditions.

Another recurring issue, with regard to repairs as a pre-condition to an insurers obligation to pay full replacement cost, has been whether or not the insured can recover the replacement cost when someone other than the insured makes the repairs at no cost to the insured and for no consideration. [33] Not surprisingly, the answer to that question is not so clear. While a number of courts have held that an insurer is not obligated to pay any more than actual cash value unless the insured has actually incurred replacement "costs", [34] there is certainly authority to the contrary. [35] Indeed, the issue has yet to be resolved by the highest court of any state, and many of the decisions concerning the issue include a dissenting opinion setting forth the contrary view.

Therefore, this issue continues to be the subject of considerable debate.

The recent case of Harrington v. Amica Mut. Ins. Co. [36] provides a poignant example of the contradicting views regarding this issue. In that case, a fire totally destroyed the insured's home. The fire policy insuring the home provided that the insurance carrier would pay no more than the actual cash value of the damage unless "actual repair or replacement [was} complete." Following the fire, the insured sold the premises in its damaged condition. It was undisputed that the insured had not made any repairs following the fire. In fact, it was the purchasers of the property who rebuilt the dwelling. Therefore, the insurer refused to pay any more than the actual cash value. In response, the insured sued to recover the difference between the actual cash value and the full replacement cost amount arguing that the policy did not require him to perform the repairs himself. The insurer, on the

other hand, argued that it had satisfied its obligation under the policy when it paid the insured the actual cash value of the property, and that the insured was not entitled to replacement cost benefits because he did not sustain any pecuniary loss in connection with repairing or replacing the dwelling. In affirming an order of summary judgment in favor of the insurer, the Harrington court ruled as follows:

Replacement cost coverage inherently Requires a replacement (a substitute Structure for the insured) and costs (expenses incurred by the insured in obtaining replacement); without them, the replacement cost provision becomes a mere wager. Because plaintiff's loss is defined by the building's actual cash value. [37]

However, the Harrington opinion was not without dissent. Justice Green was of the opinion that the subject insurance policy clearly obligated the insurer to pay full replacement cost once actual repair or replacement was complete. Therefore, with respect to the insurers contention that the insured is not entitled to replacement cost benefits since the insured did not sustain any pecuniary loss in connection with repairing or replacing the property, the dissent responded as follows:

Nothing in the policy imposes the additional condition that the repair or replacement be made by the [insured] himself. Had [the insurer] intended to place that further limitation upon plaintiff's recovery, it could have done so explicitly. (citing Ruter v. Northwestern Fire & Marine Ins. Co. of N.Y., 207 Pa.Super. 19, 215 A2d 640, cert denied 37 NJ 229, 181 A2d 12; Reese v. Northern Ins. Co. of N.Y., 207 P.A. super 19, 215 A2d 266). The average policy holder would not read that unstated limitation on the right to recover repair or replacement costs into the policy. (citations omitted)

C. Conclusion

While the insurance practitioner may initially be of the opinion that after issues of coverage are resolved, the insurance claim itself is easily resolvable, issues concerning valuation may still cause enough division between the carrier and its insured as to require litigation, arbitration or appraisal. Because no hard and fast valuation rules exist, valuation issues may end up being harder to resolve than coverage issues. In addition, when the question of coverage can go either way, the approach utilized for loss valuation can and often is leveraged together with the coverage issues. Such situations will be eliminated only when there exists some uniform body of insurance law resolving the age old question of what is actual cash value and what is replacement cost.

II. ACTUAL CASH VALUE COVERAGE - DONNA WILLIS DARROCH

A. Introduction

Most insurance contracts contain a general loss provision limiting the reimbursement of the loss to "actual cash value". Often, these clauses do not specifically define the term. An example of a loss limitation clause is as follows:

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. [38]

Some states have enacted standard policy statutes that contain general loss definitions; however, they are generally subject to nearly unlimited interpretation because of their vagueness. [39] A specific definition of actual cash value, however, is usually not found in the policy or the statute, except that sometimes the policy may mention that depreciation will be taken into account. [40] Courts have developed several methods of determining the actual cash value of insured property.

B. Calculation of Actual Cash Value

"What constitutes actual cash value depends on the type of property, its condition at the time of the damage or loss, and the jurisdiction where the damage or loss occurs." [41] Several tests have developed in various jurisdictions to determine this value, including fair market value, replacement cost, replacement cost minus depreciation, and broad evidence (any combination of the above factors and any other evidence available). [42]

Market value is frequently used in determining the value of real or personal property. It is especially useful for those items where there is a ready market and value can be easily determined. The common definition of fair market value is the price a willing buyer would pay a willing seller. This value is determined as the difference between the fair market value before and after the loss. [43] For example, in a Nebraska case concerning the actual cash value of the damage to a motel, the Court determined actual cash value to mean "the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it...." [44] The jury should consider the condition of the property at the time of the loss and any other facts that would help establish the property's value. [45]

Another way the courts determine actual cash value is calculating the replacement cost to the insured. Many standard policies contain a provision limiting the liability of the insurer to the cost of repair or replacement. This provision is usually not considered a way to measure damages, however, some courts consider it in the calculation of actual loss. [46] For instance, in a partial loss situation, the Supreme Court of Kansas held that "the term 'actual cash value', when applied to a partial loss under the insurance policy and facts in this case, means the cost to repair without any reduction for depreciation". [47] The Court rationalized that a reasonable insured would expect his losses to be covered and would not expect depreciation to affect his ability to repair or rebuild. In addition, the court concluded that depreciation was not contemplated by the parties when the contract was formed. [48] Therefore, depreciation would not be considered in the calculation.

Most courts, however, when using replacement cost as a basis for determining actual value, take depreciation into account. [49] This equation of replacement cost minus depreciation is yet another method used by courts to calculate actual cash value. This method is favored because it comes closer

to reimbursing an insured for the actual loss. In loss situations, an insured will normally repair or replace property with new materials. In most instances, this will increase the value of the property and if the insured were reimbursed the full amount of the repair costs, the insured would recognize a gain. Therefore, a reduction for depreciation is proper in calculating the actual cash value of the loss.

Finally, the modern trend in determining actual value is the "broad evidence rule" test. [50] "Under this rule, the trier of fact may consider any evidence logically tending to the formation of a correct estimate of the value of the insured property at the time of loss." [51] This broad rule would allow a jury to consider such items as market value, replacement cost, depreciation, age of the property, original cost, condition of the property, location, use, and possible profit. [52] This method is seen as a fair way of calculating actual value. However, the criticism of the test is that it is too complex a method to employ to arrive at a reasonable calculation of loss. [53]

Though there are other methods for determining actual cash value, the four methods discussed are by far the most prevalent. In most complex cases involving business property, more in-depth methods for calculating actual cash value are employed, such as the income approach and the divide-by-four approach that are beyond the scope of this paper. [54]

C. Application to Total and Partial Loss

The various methods for determining actual cash value are each, at time, applied to both partial and total losses. Certain methods, however, are more applicable to one type of loss than another. Courts, therefore, often employ different methods for determining actual cash value for partial and total losses.

1. Total Loss

When calculating the actual cash value of property that has been completely destroyed, the tests differ based on several factors, including jurisdiction and the type of property lost. Although there is no uniform test concerning total loss, each method will be discussed with specific examples provided.

a. Market Value

The market value test is most often used when the value of the property can be easily determined. In other words, it is more easily applied when there is an actual market for the property that was destroyed. If the loss was total, the trier of face should determine the actual market value of the property at the time the loss occurs. [55]

In certain types of cases, market value has been held to be the proper method of determining actual cash value. For example, when determining the value of general merchandise, machinery and farm products, market value is often used because there is a ready market for these type items and value can be easily determined. [56] One must simply look to the marketplace to discover the value. In contrast, market value is generally not accepted when determining the actual cash value of buildings, household furniture and personal effects. [57] As to buildings, one court stated that the rationale for rejecting market value was that "buildings, independently of the land upon which they stand, are never the subject of market sale." [58] Thus, there is no available market to determine the value of the building when destroyed. As to furniture and personal effects, most courts hold that it is well-recognized that these items have no real market value on the open market. The correct measure of value for these items should be the amount of damage suffered by the owner due to his being deprived of the use of such property. [59]

These general rules, however, are not dispositive on market valuation. There are reported decisions on both sides of the issue. For example, some courts hold that market value is the proper determination of actual cash value for buildings. [60] Other cases hold that market value is not the appropriate measure of value for general merchandise. [61] As stated earlier, there is no uniform measure across jurisdictions for any type of property.

b. Replacement Value

In the instances where market value was held to be an inadequate measure of actual cash value, courts often looked to replacement value as a guide. When using this method, the cost of depreciation is normally factored in. [62] The courts considered the fact that replacing property without deducting depreciation, in most cases, would lead to a windfall for the insured. [63] Several factors are used when calculating replacement value and depreciation. Obvious considerations in determining the actual cash value include the age and condition of the property at the time of loss. However, the courts often consider other factors. For example, in determining depreciation, obsolescence of the building, that is no longer suitable for its intended purpose at the time of loss, may be considered. [64] Along the same lines, economically useless buildings may have no value at all. [65] In an Illinois case, the court defined actual cash value for buildings as the cost of reproduction minus depreciation. However, the insured building that was destroyed by fire was economically useless at the time of the loss. Therefore, there was no insurable interest in the building and it had no value. [66] Conversely, courts will often ignore other evidence. For Example, the fact that the owner is going to demolish a building is a collateral matter and has no bearing on the actual cash value of the loss.

c. Broad Evidence Rule

Under the broad evidence rule, the court may consider any evidence that tends to assist in correctly estimating the value of the property at the time of the loss. [68] This includes the market value calculation and the replacement value minus depreciation calculation. These two methods, however, are merely two of the standards and the courts is not bound to them. [69] Several other factors have been determined applicable by the courts.

In Cardona v. Home Indem. Co. , [70] the New York appellate court held it was error to instruct the jury that the sole measure of actual cash value is reproduction costs minus depreciation. The trier of fact, the court determined, is allowed to consider the reproduction cost, original cost, the use the building may have been put to, qualified witness opinions on value, and any other fact that would shed light on the subject of value. [71]

In a similar case, the Indiana appellate court held that when a fire policy limited the insurer's liability to the actual cash value at the time of loss, the trier of fact could take into account any evidence that established the economic value of the property. [72] Items the court allowed to be considered included market value, reproduction cost and depreciation, obsolescence, income generated by the property, declarations against interest and opinions of valuation experts. [73] The broad evidence rule, simply stated, allows the trier of fact to consider any reasonable measure of value to determine the actual cash value of property.

2. Partial Loss

The actual cash value of partial losses is more difficult to determine than that of total losses. When an item is a total loss, it is easier to determine the market value or replacement value of the property. Often one must simply determine the price of a replacement good and use that as the actual cash value. With partial losses, however, it is difficult to determine what percentage of the property is damaged and how much it will cost to repair or replace.

a. Market Value

The market value of a partial loss is determined by calculating the difference between the fair market value of the property before and after the loss. [74] This amount is normally limited to the cost of repair or replacement. [75] Some courts have determined that the reasonable market value before and after the loss is the proper measure of actual cash value. [76] Market value, however, appears to be the minority method of determining the actual cash value of partial losses. Courts seldom apply the market value test in partial loss situations because it is often difficult to calculate the market value of damaged property. This difficulty results from the nearly complete lack of market for damaged

property, especially for property such as building sand personal items. For this reason, one of the two following tests is generally applied to a partial loss.

b. Replacement or Repair Cost

Many jurisdictions hold that the appropriate measure of damages for a partial property loss is the reasonable cost of replacement or repair. [77] The cost of the replacement or repair should be determined as of the date of loss. However, the insurer may be held responsible for any damage due to delay in payment. [78] There is some division, however, on whether depreciation should be factored into the equation.

Some courts contend that a building should be restored to the same condition it was in before the loss and depreciation should not be considered. [79] The rationale is that the insured will be unable to complete repairs if depreciation is deducted from the amount awarded to the insured. The building would then remain unfinished and the insured would not be indemnified mandated by the policy. [80]

Conversely, other courts hold that the proper method for determining the actual cash value of a partial loss is to calculate the amount it would take to put the property in the same condition as prior to the loss. [81] These courts' definition of "same condition", however, differs from that above. The rationale here is that depreciation should be factored in to determine the actual value of the property at the time of loss. [82] If the property is not depreciated, the insured obtains increased value eon his property over what it was at the time of the loss. This is due to the fact that new material used to repair or replace the property are more valuable than the older materials that were destroyed. A re-built building is normally more valuable than the building before the loss, if depreciation is not considered.

c. Broad Evidence Rule

In partial loss situations, courts frequently employ the broad evidence rule. [83] Again, under this rule, the trier of fact may consider any evidence logically tending to aid in the determination of an accurate estimate of actual cash value. [84] In a New Jersey case concerning an appraisal award for a partial fire loss, the court adopted the broad evidence rule. [85] The court held that under this rule, both fair market value and replacement cost minus depreciation could be considered. A decision as to value could be based on either of these tests, both tests, or on any other evidence "an expert would consider relevant to an evaluation". [86] The court went on to state the "[t]he wider the range of evidence considered by the fact-finder, the more reasonable it is for a court to accept his conclusions. A result reached under the broad evidence rule is more likely to be reliable than one based on either of the other standards alone." [87]

D. Constructive Total Loss

When property is only partially damaged, it will be considered a total loss if a government ordinance or law prevents the insured from rebuilding or repairing the property. This is what is known as a "constructive total loss". [88] Often, repairs to the building may be possible and even economically feasible, however, government action will render the building a total loss because of a prohibition against repair or rebuilding. [89]

This situation may arise for various reasons. First, an ordinance may require a damaged building to be destroyed or removed for safety purposes. [90] Second, a total loss may be found when the damaged building is condemned, even if the building was unsound when it was insured. [91] Finally, a constructive total loss may be found when the cost to improve to new code regulations is greater than the value of the total loss. [92]

The courts have used two basic principles to determine whether a total loss has occurred. First, a total loss is sustained when there is not a substantial remnant upon which a prudent uninsured person would rebuild. [93] In Stahlberg v. Travelers Indemnity Co. [94] , the insured building was partially damaged by fire and an order for demolition was issued per a local ordinance. The court held that the

building was, therefore, a constructive total loss. The court stated a building is considered a total loss if the damage results in "no substantial remnant remain[ing] that a prudent uninsured person would use in rebuilding". [95] The insured suffered a total loss due to the demolition order and he was to be indemnified as such.

The second method to determine total loss is the "loss of identity rule. [96] In Occhipinti v. Boston Ins. Co. , [97] the court stated that a "constructive total loss has occurred…when the building has been so damaged as to lose its identity." [98] The court held that even when repairs could be made, if there was a possibility that future repairs would be called for, the insured should not assume this risk. In other words, if the structural integrity of the building is questionable, then a constructive total loss should be found because the insured should not be forced to assume the risk of hidden dangers. [99]

Many insurance contracts provide for an exclusion attempting to limit liability from government regulations on repair and reconstruction, usually called an "ordinance or law exclusion". The typical exclusion states: "We do not cover loss…resulting in any manner from…enforcement of any ordinance or law regulating the construction, reconstruction, maintenance, repair or demolition of buildings or other structures". [100] There is a split of authority on whether these provisions are enforceable in determining the actual cash value of the loss. One of the first cases interpreting constructive total loss and an ordinance or law exclusion is Hewins v. London Assurance Corp. [101] In this case, twelve different insurers contended that building laws should not be considered in the valuation of damages. Only one of the insurers had ordinance or law exclusion. The court held that a loss is total if an ordinance prevents the repair of the building, even if the cost to repair is less than the total loss. [102] However, the exclusion of the one insurer was enforced and it was not liable for the increased cost due to the building ordinance. [103]

In Feinbloom v. Camden Fire Ins. Assn. , [104] a local ordinance required that the damaged building be brought up to code if it was repaired. The insurance policy on the building had ordinance or law exclusion. The court held that if "by reason of public regulations rebuilding is prohibited the loss is total". [105] The court went on to state that the policy exclusion simply stated that the insurer would not be responsible for the "increased cost of repair or reconstruction by reason of any ordinance." [106] It does not limit liability for "loss caused by the operation of ordinance or law." [107] In other words, because the loss is total in light of the ordinance, there is no increased cost of repair. "The court reasoned that where the loss was total, repairs are not permitted; therefore, there is nothing to which costs may be added." [108]

There is, therefore, some question as to whether ordinance or law exclusion limits liability of the insurer in cases of constructive total loss.

III. REPLACEMENT COST COVERAGE - THOMAS S. BROWN WILLIAM J. PARENTE, JR.

A. Introduction

The underlying purpose of property insurance is indemnity; however, insurers recognized that actual cash value payments for damaged and/or destroyed property did not fully restore insured's to their original financial position. Thus, insurers created [109] replacement cost coverage that sought to insure not only the market value of the property, but also the expected depreciation of the property.

Generally, replacement cost provisions in first-party property insurance policies can be divided into three types. [110] The first is a valuation provision that attempts to restrict the insured's recovery of replacement cost to the smallest of several amounts. [111] For example, the provision might restrict an insured to the lesser of (1) the cost to replace the property with equivalent property, (2) the amount actually spent for replacement property, or (3) the policy liability limit applicable to the property. [112] The second gives the insured the option of foregoing replacement cost recovery and instead receiving payment of the actual cash value of the damaged property. The third, which is the most controversial and most often litigated, requires the insured to actually repair or replace the damaged or destroyed property before being entitled to recover the full replacement cost.

A recent variation of replacement cost coverage, which raises scope of indemnity issues, is the "Guaranteed Replacement Cost" coverage endorsement. This optional coverage provides for replacement cost coverage above and beyond the policy limit subject to certain policy restrictions.

A typical Guaranteed Replacement Cost endorsement might provide:

We will settle covered loss to buildings under [Coverages] at replacement cost regardless of the limits of insurance shown on your Declarations Page, Subject to the following provisions [113] . . .

The issue of the scope of indemnity pursuant to a guaranteed replacement cost endorsement was addressed in Roberts v. Allied Group Ins. Co. , 79 Wash. App. 323, 901 P.2d 317 (1995). In Roberts , the plaintiff had all-risk homeowners insurance with a guaranteed replacement cost endorsement. After Robert's property was destroyed by fire, he contended that he was entitled to recover the cost of a stepped foundation and a containment wall recommended by an engineer.

The court simply explained:

Prior to the fire, the land did not have a containment wall and the house was built without the benefit of a stepped foundation… [the improvements] are not physically required fro reconstruction. Nor did the fire in any way cause such soil stabilization measures to be more necessary than before the fire….these costs are not covered by the policy.

Id. at 326. See also, Bischel v. Fire Insurance Exchange , 1 Cal. App. 4th 1168 , 2 Cal. Rptr. 2d 575 (1991) (holding no coverage for cost of reconstruction of a dock under a guaranteed replacement cost endorsement because policy's ordinance and law exclusion foreclosed recovery).

Roberts should not be interpreted to stand for the proposition that other courts would not permit insured's to recover for earth stabilization claims pursuant to a policy's replacement cost endorsements. In fact, California courts, in addressing the scope of coverage for land movement claims, have held that insurers are liable for the cost of stabilizing the soil under the insured's dwelling up to the limits of the policy when earth movement is an insured peril. See e.g., Pfeiffer General Ins. Corp. , 185 F. Supp. 605 (N.D. Cal. 1960); Hughes v. Potomac Ins. Co. , 199 Cal. App. 2d 239, 18 Cal. Rptr. 650 (1962); Strickland v. Federal Ins. Co. , 200 Cal. App. 3d 792, 246 Cal. Rptr. 345 (1988). Thus, in some jurisdictions, an insured who complies with the restrictions of the policy's

guaranteed replacement cost coverage would be entitled to recover for a one million dollar earth stabilization claim even if the policy contained a $100,000 limit of liability.

Through a review of federal and state court decision, this paper seeks to examine the issues raised by replacement cost coverage provisions, including: (1) the enforceability of the requirement of actual repair or replacement of damaged or destroyed property; (2) the problem of partial losses; (3) the enforceability of contractual time limitations on replacement; (4) quality issues; and (5) location restrictions.

B. Requirement of Actual Repair or Replacement

1. Holdbacks - Generally

The replacement cost coverage provision that requires an insured to repair or replace the damaged or destroyed property after a loss is commonly known in the industry as a "holdback". The term literally means that an insurer, after paying the actual cash value of the property, withholds or "holds back" an amount equal to the property's calculated depreciation until the property is actually repaired or replaced. Although the term "holdback" will not be found in an insurance policy, this valuation of loss concept is found in a variety of replacement cost coverage provisions. For example, a standard replacement cost endorsement might contain the following provision:

We will not pay on a replacement cost basis for any loss or damage:

(1) Until the lost or damaged property is actually repaired or replaced...

The intent of this and similar "holdback" language is to prevent insured's, who do not replace damaged property, from realizing a profit on the depreciation of their property. For example, insured purchases homeowners insurance with replacement cost coverage on a twenty year old cottage that has an actual cash value of $20,000. Subsequently, the cottage is destroyed by fire and will now cost $43,000 to rebuild. If the insurer forwards a payment for the replacement value of the cottage and the insured elects not to rebuild, the insured will realize a profit of $23,000. Thus, there lies an inherent "moral hazard" [114] , in providing replacement cost coverage payments to insured's prior to the actual repair, reconstruction or replacement of the covered property.

In response to this moral hazard, underwriters drafted policy language that attempts to minimize the temptation of the insured by imposing conditions precedent before full replacement costs can be recovered. Although the policy permits as an option the restoration of the insured to the same position enjoyed prior to the loss, I simultaneously precludes the insured from becoming unjustly enriched through the claim adjustment process.

Critics of holdback provision argue that at the time of a loss, the insurer forces the insured between the proverbial rock and a hard place. Returning to our hypothetical case, the insured will not receive the holdback of $23,000 until that amount is expended on reconstruction costs. However, the insured my not have readily available funds or sufficient credit to finance a $23,000 reconstruction project. Thus, critics argue, holdback provisions place the insured in an unequal bargaining position that forces the financially weaker insured to accept lesser settlements of actual cash value as opposed to the substantially higher replacement cost value of the damaged property.

2. Validity of Holdbacks - Actual Replacement Required

The validity of holdbacks or, stated differently, the requirement of actual repair or replacement of damaged property after a loss, is the most litigated aspect of replacement cost coverage. To date, a majority of courts have upheld both the validity and enforceability of policy language that permits insurers to withhold partial disbursement of policy proceeds [115] until actual replacement of the damaged property is complete. For example, in Hess v. North Pacific Ins. Co. , 122 Wash. 2d 180, 859 P. 2d 586 (1993), the Supreme Court of Washington reversed the Court of Appeals and granted

judgement in favor of the insurer, holding that a homeowner's insurance policy unambiguously limited coverage to actual cash value if the insured chose not to replace the structure. The policy at issue contained the following provision:

[Insurer] will pay no more than the actual cash value of the damage: unless (a) actual repair or replacement is complete. Id. at 589.

Thus, the court concluded since the policy language was clear and unambiguous, the court would follow the majority rule enforcing the plain language of the policy. Numerous other courts have concluded that similar holdback provisions are valid and enforceable. See e.g., Tamco Corp v. Federal Insurance Co. of New York , 216 F.Supp. 767 (N.D. Ill. 1963); Bourzak v. North River Ins. Co. , 379 F. 2d 530 (7th Cir 1967); Maryland Casualty Co. v. Knight , 95 F.3d 1284 (9th Cir. 1996) (insured was not entitled to replacement cost recovery for fire damaged building until building was either repaired or replaced and then only for the lesser of the policy limit, the actual replacement cost, or the appraised replacement cost); Landes v. State Farm Fire & Cas. Co. , 907 S.W.2d 349 (Mo. App. 1995) (replacement cost holdback was permissible where insured elected property repair instead of payment for property damage); Davis v. United Fire & Cas. Co. , 500 N.W.2d 725 (Iowa App. 1993) (actual cash value rather than replacement cost was the measure of recovery when insured's provided no evidence of repair to hail damaged roof); O-So Detroit, Inc. v. Home Ins. Co. , 973 F.2d 498 (6th Cir. 1992); Smith v. Michigan Basic Property Ins. Assoc. , 441 Mich. 181, 490 N.W.2d 864 (1992) (although insurer's denied coverage on grounds that the fire was caused by the insured's and the insured's had committed fraud in reporting the loss and the jury found the fire was not caused by the insured's and there was no fraud, the insured's must nevertheless actually repair, rebuild or replace at the same or another site before the insurer becomes liable to pay the difference between actual cash value and replacement cost); Whitmer v. Graphic Arts Mutual Ins. Co. , 410 S.E.2d 642 (Va. 1991) (holding actual replacement required before insured could recover replacement cost under Homeowner's policy).

In some instances, courts have also precluded insured's from recovering withheld payments for depreciation after a loss when a third party replaces the damaged property. See e.g., Harrington v. Amica Mutual Insurance Co. , 645 N.W.S.2d 221, leave to appeal denied , 647 N.Y.S.2d 650 (1996) (insured not entitled to holdback amount when a third party took possession of insured premises and reconstructed the same); Palusek v. Safeco Ins. Co. , 517 N.E.2d 565 (Ill. App. 1987); Aethena Restaurant, Inc. v. Shetfield Ins. Co. , 681 F.Supp. 561 (N.D. Ill. 1988)

3. Validity of Holdbacks - Actual Repair or Replacement not Required

Although courts have generally supported insurers' efforts to limit their liability for replacement cost coverage by requiring insured's to actually repair or replace the property, a growing minority of courts have permitted insured's to enjoy full recovery of replacement costs without complying with the condition precedent of the holdback provisions.

In most of these cases, courts will choose to ignore the policy language and will instead focus on the conduct of the insurer, the circumstances of the claim, or locate a suitable statutory or public policy consideration in order to create a rationale for the departure from the general rule.

A good example of this approach is McCahill v. Commercial Union Ins. Co. , 179 Mich. app. 761, 446 N.W.2d 579 (1989). In McCahill , Commercial Union insured the plaintiff's home and contents which were destroyed by fire. The insurer's representative engaged in questionable conduct during the investigation of the claim and a jury later decided that the insurer had wrongfully denied the plaintiff's claim. On appeal, the insurer argued that the insured could not recover replacement costs for his dwelling and contents as he failed to repair or replace his property. Id. at 583. The court, while refusing to address the issue, did acknowledge the insurer's argument that the policy and Michigan legislation [116] required that as a condition precedent to replacement cost recovery the insured must repair or replace the property. In spite of the plain language of the contract and statute, the court held that the insured was entitled to recover the full replacement value of his property without actually replacing the damaged property since Commercial Unions' conduct - non-payment of the claim -

hindered the insured's performance of the condition precedent. See also, Pollock v. Fire Ins. Exchange , 167 Mich. App. 415, 423 N.W.2d 234 (1988) (insured entitled to full replacement cost when insurer's twenty-five month delay in adjusting a fire loss claim hindered insured from replacing damaged property); Cortez v. Fire Insurance Exchange , 196 Mich. App. 666, 493 N.W.2d 505 (1992) (insurer's holdback of funds for replacement cost coverage was improper because insured could not rebuild without payment of funds); Misselman v. Allstate Ins. Co. , 560 N.Y.S.2d 845 (App. Div. 2nd Dept. 1990) (insurer's holdback of replacement cost coverage funds improper, but jury could have found the insured not entitled to recovery since scheduled repairs not completed).

Bailey v. Farmer Union Co-operative Ins. Co. of Neb. , 1 Neb. App. 408, 498 N..W.2d 591 (1992) is another case where an insurer's conduct during he claim handling process ultimately resulted in an adverse interpretation of policy language. The underlying claim arose after the insured's home collapsed during a reconstruction project. Although the insurer knew that the insured's claim was covered under the policy and that the property was insured at replacement cost, its representative would only commit to an actual cash value settlement. Moreover, the insured was a chronically ill single mother with virtually no means of financial support. After settlement negotiations failed, the insured suit to recover the replacement cost of her home under the policy. The Nebraska Court of Appeals affirmed the trial court's finding that the "intransigence" of the insurer prevented the insured from complying with the policy's provision requiring reconstruction within 180 days of the loss. Id. at 597. The Bailey court, highlighting the dilemma faced by financially challenged insured's, stated:

Bailey could not proceed with the building as long as Farmers Union Refused to commit itself to future reimbursement of Bailey for Rebuilding cost. She did not have the money to initiate rebuilding On her own, and she would not have been able to secure a loan Without the assurance by Farmers Union that additional replacement Costs would be covered up to the policy limit. Id. at 598.

More recently, an Oklahoma court, relying on public policy considerations, has gone a step further and vitiated a holdback provision contained in a replacement-cost endorsement of a homeowner's policy. In Coblentz v. Oklahoma Farm Bureau Mutual Ins. Co. , 915 P.2d 938 (1995), the court held that the replacement cost endorsement provision [117] was void as unconscionable. In Coblentz , the insured's had lost all of their personal property in a tornado. The insurer paid the insured's $16,855, the actual cash value of their losses, but withheld approximately $10,000 arguing that the insured's had failed to comply with the policy's conditions precedent of actual repair or replacement of the damaged property. The Coblentz court found that the policy was unconscionable because (1) the insured's lacked a reasonable choice, and (2) the challenged provision unreasonably favored the insurer. Id. at 939. Thus, it concluded the holdback provision was not enforceable because it violated public policy. The court reasoned that the insurer, by forcing the insured's to replace their property, placed the insured's in a "legal Catch-22", Id.

To illustrate this point further, the court stated:

This [holdback] provision is offensive for yet another reason. In order to obtain replacement value under the terms of the contract, Insurer requires [insured]to expend replacement funds without any assurances that they will be reimbursed. For instance, even if [insured] were to replace the property, Insurer might still deny payment contending the replacement property procured was not a similar item of like kind and quality as required by the policy or that the property was not covered by the terms of the policy. Id.

See also, Ferguson v. Lakeland Mututal Ins. Co. , 596 A.2d 883 (Pa. Super. 1991) (holding replacement cost holdback provision was unconscionable as applied to insured's contents loss because it unreasonably favored insurer).

Other courts have found "ambiguity" in the language of the holdback provision and, therefore, have determined the holdback provision is unenforceable. See, Ballard v. Lee , 671 So.2d 1368 (Ala. 1995) (replacement cost proceeds owed to insured before actual replacement because policy failed to define the term "actual cash value"); Saves v. Safeco Ins. Co. , 567 So.2d 687 (La. App. 1990). At least one court has prevented insurers from withholding a specified percentage in all replacement cost coverage

claims. In Gilderman v. State Farm Ins. Co. , 659 A.2d 941 (Pa. Super. 1994), the court ruled that an insurer may not automatically withhold a flat twenty percent of the repair or replacement costs of a covered loss, representing contractor overhead and profit, in calculating its advance payment to its insured of the actual cash value of the covered loss. In reversing the trial court's granting of summary judgement in favor of the insurer, the court reasoned that "the actual cost of repair or replacement" logically and necessarily includes any cost that an insured could be expected to incur in repairing or replacing a covered loss. Thus, the court concluded the insurer's automatic twenty percent holdback impermissibly benefited the insurer.

It is clear from the above highlighted decisions that replacement cost holdback provisions are under increasing attack from a growing minority of courts.

C. Related Replacement Cost Valuation Problems: Partial Loss

Occasionally, the partial destruction of an insured's real or personal property raises interesting issues regarding replacement cost coverage. In Kolls v. Aetna Casualty & Surety Co. , 503 F.2d 569 (8th Cir. 1974), the court held (a) that under the terms of a replacement cost endorsement to a fire policy, the insured's were required to repair and replace the partially damaged structure and expend an amount in excess of actual cash value before they could recover under the endorsement; and, (2) where the insured's expended, in repairing and replacing the partially damaged structure, less than the insurer had already paid on the claim for actual cash value, the insured's were not entitled to recover under the replacement cost endorsement. See also, State Farm Fire & Casualty Co. v. Patrick , 647 So.2d 983 (Fla. 3rd DCA 1994) (insurer not prohibited by Florida law from withholding amount for depreciation on a partial windstorm loss and insurer is not obligated to pay estimated amount of reconstruction if insured completes work for a lesser amount). The Kolls and Patrick decisions are consistent with the majority rule with regard to holdbacks in that insured's are required to actually repair or replace the damaged property and are not entitled to a windfall recovery.

However, some courts view the issue of partial losses in a completely different light. For example, a Pennsylvania insurer's practice of deducting for depreciation for partial losses was successfully challenged by actual cash value policyholder. In London v. Insurance Placement Facility of Pennsylvania , 1996 Pa. Super. LEXIS 1182 (Pa. Super. Ct., 1996); decision vacated; reversed and remanded , 1996 Pa. Super. LEXIS 3657 [118] , the Pennsylvania Superior court upheld a lower court decision rejecting an insurer's deduction for depreciation on a partial fire loss. In London, the plaintiffs had suffered partial fire losses at their respective properties. The insurance Placement Facility ("Facility") provided the plaintiffs with basic property insurance on an actual cash value basis as prescribed by statute. After the parties agreed on the repairs, the Facility deducted depreciation from the repair costs to arrive at the actual cash value of the partially damaged property. While acknowledging that a deduction for depreciation would be allowed in the case of a total loss, the court, placing reliance on Fedas v. State Ins. Co. of Pa. , 300 Pa. 555, 151 A.2d 285 (1930), concluded:

To allow a deduction for depreciation for partial losses would often leave the insured without sufficient funds to repair their property. Id. at 2.

The true effect of the London decision was that the court converted policyholders' actual cash value coverage into full replacement coverage for no additional premium. Notably the London court did not make any attempt to reconcile the distinction between the two different types of coverage. If the London decision is permitted to stand, insured's with actual cash value coverage, who suffer total losses, could conceivably recover the full replacement value of their property while paying premiums based on actual cash value coverage. A possible result of this type of court decision is an overall increase in cost for basic property insurance coverage.

D. Contractual Time Limits on Replacement of Damaged Property

Generally, replacement cost coverage includes language that requires an insured to make a claim for replacement cost within a specified time period, usually 180 days after the loss. A typical replacement cost endorsement might provide, for example:

You may make a claim for loss or damage covered by this insurance on an actual value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us with your intent to do so within 180 days after the loss or damage. [119]

Some insurers have unsuccessfully contended that to "make a claim" means to actually complete reconstruction or repair in the given time period. Bourrie v. United Stated Fidelity Guarantee Ins. Co. , 75 Or. App. 241, 707 P.2d 60 (1985), is an example of one court's unwillingness to adopt this interpretation of the time limitation provision. The Bourrie court agreed with the insured that he was only required to notify the insurer of his intent to replace the building within 180 days of the loss and that he should be allowed a reasonable time to complete the reconstruction. See also, Maine Mut. Fire Ins. Co. v. Watson , 532 A.2d 682 (Me. 1987) (insurer must allow a reasonable time for reconstruction, if insured provided notice of claim within 180 days); F.B. Ins. Co. v. Jones , 864 S.W.2d 926 (Ky. App. 1993) (replacement cost available under homeowners policy so long as claim for replacement cost was asserted within 180 days of the loss; and the insured was not required to complete construction within that time period, but rather should be allowed a reasonable time to rebuild). Cf., Hilley v. Allstate Ins. Co. , 562, So.2d 184 (Ala. 1990), (insured's failure to satisfy the policy's condition precedent of notice of intent to reconstruct within 180 days precluded insured's from recovering full replacement costs for their fire damaged personal and real property).

Thus, the majority of courts have interpreted replacement cost coverage time limitation language according to its plain and ordinary meaning. Since mere intent to replace property is insufficient to satisfy this condition precedent, policyholders who intend to seek full replacement cost coverage after a loss should provide their insurer with prompt written notice of their intention to replace their damaged property.

E. Quality Issues

1. Materials of Like Kind and Quality

Replacement cost coverage can raise interesting yet challenging valuation issues when insured's opt to reconstruct their property after a loss. For example, an insured's home may have had a simple single pane windows prior to a loss; however, the insured may choose to install more expensive triple insulated thermopane windows. Is the insurer obligated pursuant to a replacement cost coverage provision to pay the insured for this enhancement to the property?

Some insurers have attempted to address this valuation issue by adopting policy language that provides:

[insurer} will pay the least of the following amounts: (c) The amount which it would cost to repair or replace that part of the building structure damaged or destroyed with material of like kind and quality less allowance for physical deterioration and depreciation. [120]

Generally, courts have found that "like kind and quality" and "like construction" do not include differences in the new structure necessitated by law. See e.g., Gouin v. Northwest National Ins. Co. , 145 Wash. 199, 208-09, 259 P. 387 (1927); Cf., Strait School Dist. V. RLI Ins. Co. , 873 P.2d 1292 (Alaska 1994) (holding that "like kind and quality" does not mean built under the building standards of the original construction). As stated, some insured's will reconstruct damaged property with less expensive materials, while others might choose to reconstruct with better materials than existed in the original construction. Both of these options tend to undermine the intent of replacement cost coverage, which is to restore the insured to same position he enjoyed prior to the loss. An insurer may require an insured to use the same or similar materials as in the original construction in order to prevent the insured from experiencing a windfall.

a. Replacement with Less Expensive Materials

Courts, have reached different results, when addressing the issue of whether to permit recovery of full replacement cost when insured's choose to reconstruct with cheaper materials than those used in the original construction. For example, in Ambercombie v. Allstate Ins. Co. , 841 S.W.2d 838 (mo> App. 1994), the insured's home was partially destroyed by fire. A dispute developed between the insured and the insurer as to the amount of the loss; therefore, the insured demanded an appraisal as provided for in her policy. The appraisers valued the loss at $52,621. Ambercrombie then hired a contractor to rebuild her home for the appraised amount, but she allowed for the substitution for cheaper materials and then applied the savings to add new features to her home. Upon learning of the change in the reconstruction plans, the insurer paid $36,970 or the actual cash value of the loss, since the insured had not restored the house to its pre-fire condition. The insured filed suit in an effort to recover the amount withheld for depreciation. The appellate court, reversing the trial court's grant of summary judgment in favor of the insurer, held that the insurer was not permitted to withhold payment for depreciation because Missouri statutory law [121] required, in cases of partial losses, the insurer to either provide payment for the amount of the loss or repair the property. The court reasoned that by not challenging the appraisal, the insurer had elected to provide payment and could not holdback an amount for depreciation. Id. at 840. Similarly, in State Farm Fire & Casualty Co. v. Ponder , 499 So.2d 1262 (Ala. 1985), the court allowed the insured to recover $74,430, the actual cash value of the home, despite the fact the insured had opted for replacement cost coverage and completed the repairs for $45,000.

A different result was reached in Estes v. State Farm Fire & Cas. Co. , 358 N.W.2d 123 (Minn. App. 1984), modified , 365 N.W.2d 769 (Minn. 1985), where the court held that a homeowner who repaired slate roof with less expensive shingles was only entitled to recover the amount of actual expenditure and not the replacement value of the slate roof. Thus, the courts remain divided on this valuation of loss issue.

b. Replacement with More Expensive Materials

Somewhat consistent with those decisions prohibiting insured's from recovering full replacement costs when using cheaper materials, some courts have prohibited insured's from profiting from a loss bye utilizing better materials. For example, in Higgenbottom v. New Hamshire Indem. Co. , 498 So.2d 1149 (La. App. 3d 1986), cert. denied , 501 So.2d 236, the court held that an insurer was not required to compensate an insured for the cost of replacing a roof with more expensive shingles than were used in the original construction; see also, McCorkle v. State Farm Ins. Co. , 221 Cal. App. 3d 610, 270 Cal. Rptr. 492, review den. , (1990), (loss settlement claims requiring replacement with "equivalent construction" did not include additional costs which were mandated by a building code that required a wooden floored garage to be replaced with a concrete floor). This issue often arises when changes in the local building code occur. (See section c below).

Similarly, insured's will claim that improvements or repairs to "non-covered property" are necessary to effect repairs to "covered" property. See, Roberts v. Allied Group Ins. Co. , 79 Wash. App. 323, 901 P.2d 317 (1995) (holding insured could not recover for retaining wall used to shore up land surrounding fire damaged property).

Although courts have generally disallowed insured's from upgrading their properties after a loss by using better materials, the facts of a particular claim might in some instances allow such a recovery. See, State Farm Fire & Casualty v. Ponder , supra.

F. Location Restrictions

The drafters of replacement cost coverage originally south to require insured's to rebuild on the same site after a loss. [122] This requirement, designed to limit the "moral hazard" presented by replacement cost insurance, would prevent the insured from reaping a windfall by being able to replace a destroyed older building with a newer structure at an improved location. [123] However, most courts have declined to enforce this condition precedent to coverage. As a result, there have been a number of decisions that permit an insured to recover replacement cost proceeds by simply rebuilding on a different site or, in the alternative purchasing an existing structure at another location. See Blanchette v. New York

Mut. Ins. Co. , 455 A.2d 426 (Me. 1982) (replacement at another location permissible); Huggins v. Hanover Ins. Co. , 423 So.2d 147 (Ala. 1982); S and S Tobacco and Candy Co. v. Greater New York Mutual Ins. Co. , 617 A.2d 1388 (Conn. 1992) (replacement on the same site was not required in order for an insured to recover under replacement cost provision of multi-peril policy; furthermore, erection of a larger warehouse at another location constituted a replacement); Conway v. Farmers Home Mutual Ins. Co. , 26 Cal. App. 4th 1185, 31 Cal. Rptr. 2d 883 (1994) (replacement of fire damaged home on same site not required for insured to recover replacement cost coverage, even though home repairable).

In Kumar v. Travelers Ins. Co. , 211 A.D. 2d 128, 627 N.W.S.2d 185 (1995), the appellate court affirmed a trial court decision that an insured is not required to rebuild on the same site. The Kumar court refused to interpret literally the policy's replacement cost endorsement's requirement that the insured repair or replace "on the same premises" in order to recover replacement costs. Rather, the court reasoned that this language merely served as a measure for limiting the amount recoverable to what it would cost to replace the structure on the same premises.

G. Effect of Code Changes - Donna Willis Darrouch

The effect of government code changes can also be found in a couple of situations different from those above. First, a building may sustain a partial loss and government regulations may require that the building be improved to code when repaired. The cost of this type of repair are greater than returning the building to its pre-loss condition. Second, there is the situation where a building is completely destroyed and the insured has a "replacement" insurance policy. Again, however, a change in building codes may make the replacement much more expensive than rebuilding to original specifications. In both of these situations, there is some question as to whether the insurer is responsible for the increased costs. A few recent cases have dealt with this issue, however, no general rule has emerged.

In 1995, a Washington appellate court decided a case involving a home destroyed by fire. In Roberts v. Allied Group Ins. Co. [124] , the court focused on policy provisions to deny increased construction costs. The insurance contract provided that the insurer would "pay the cost of repair or replacement, but not exceeding the replacement cost of that part of the building damaged for like construction and the use on the same premises". [125] The policy then defined replacement cost as "the cost, at the time of loss, to repair or replace the damaged property with new materials of like kind and quality, without deduction for depreciation". [126] The court held that "'like kind and quality' and 'like construction' do not include differences in the new structure necessitated by law". [127] The court distinguished a previous case [128] that held the insurer should cover the increased cost of complying with building codes on the fact that the policy in the previous case did not contain the "like kind and quality" terms. [129] Although the average person may believe that replacement cost would cover increased costs from building codes, the contract contained a provition limiting recovery to "like kind and quality". This exclusion denies recovery for improvements required by law. A Washington appellate court confirmed this rationale in the November 1996 case of Dombrosky v. Farmers Ins. Co. of Washington . [130] In this case, the insured's home was damaged by fire and compliance with new building codes added additional costs to the repair. The insurer refused to pay the additional costs andthe insured's filed suit. The court again relied on the policy provisions in deciding for the insurer. In this case, the policy limited recovery to the cost of "equivalent construction". The court held that this phrase had the same effect as "like kind and quality" and the expenses related to the new building codes were not covered. [131]

The issue was also addressed recently by the Florida District Court of Appeal. [132] In this case, Dade County sued the insurer of homeowners affected by Hurricane Andrew. The County required that many homeowners upgrade their damaged homes to comply with the building codes and elevate their homes to prevent flooding. The County sought a declaratory judgment that "replacement cost insurance" covered the code upgrades. State Farm claimed that these improvements were specifically excluded in its policies. The insurance contracts contained an "Ordinance or Law" clause excluding any increased costs incurred due to "enforsement of any ordinance or law regulating construction, repair, or demolition of a building or other structure...". [133] The trial court granted summary judgment in favor of the County on the basis that the clause was ambiguous and it was interpreted to cover the

increased costs. The appellate court, however, held that the clause was not ambiguous. The clause specifically provided that no coverage would be extended for increased costs due to enforcement of an ordinance or law regulating construction. "The exclusionary clauses are plain and unambiguous on their faces, allowing no room for interpretation." [134] The summary judgment was reversed and judgment was rendered for the insurer. The additional costs were not covered by the policy.

The above three cases seem to follow the same rationale and may establish a general rule. However, there is case law on the other side of the issue. In a recent Alaska decision, the Supreme Court determined that the increased costs resulting from building code requirements should be covered, despite policy provisions to the contrary. [135] In this case, a school building was destroyed by fire and additional costs would be incurred to rebuild the school to meet with current building codes. The insurer paid the replacement cost but refused to pay the additional costs of code upgrades. The trial court granted a judgment on the pleadings for the insurer, basing the decision on the fact that the insurance policy contained clauses excluding loss "occasioned by an Civil Authorities enforcement of any ordinance or law regulating the reconstruction..." [136]

The policy also contained clauses limiting the replacement cost to "the amount which it would cost to repair or replace the property with material of like kind and quality" and to the "replacement cost of the property or any part thereof identical with such property...". [137]

On appeal, the insurer argued that these provisions were not ambiguous and specifically excluded the increased cost of code upgrades. The court, however, ruled in favor of the insured's in a somewhat convoluted decision. First, the Court determined that insurance contracts are contracts of adhesion and should be construed according to the principle of reasonable expectations". [138] The reasonable expectation of the school, according to the court, was that the replacement cost insurance would cover the increased costs. The court explained that the exclusion clauses were ambiguous and limited recovery to increased costs "occasioned" by Civil Authority is enforcement of an ordinance. [139] Here, the loss was not occasioned by the ordinance, but by the fire. "In other words, the school district reads this group of exclusions to apply only when the loss is solely caused by enforcement of an ordinance and not where a covered event such as a fire triggers enforcement". [140]

As to the "like kind and quality clause," the court concluded that this clause does not come into play until "a fundamental and quantum difference in the nature of the building is sought to be made or when a totally new component is sought to be added to the building which was not present in its predecessor." [141] The replacement building did not have to be a clone and a reasonable insured would expect the building to be replaced with the improvements. [142] The court concluded that the increased costs of code upgrades are covered by the policies. [143] The issue of coverage for code upgrades is an unsettled area of law. Insurers should attempt to draft policies to include exclusions that have been recognized by the courts. Additionally, an attempt should be made to make exclusionary language as specific as possible. This perusal of recent decisions in the area should provide a basic guideline. However, there are times when no amount of careful drafting can save the insurer from the court.

H. Conclusion

There are no uniform rules concerning determining the actual cash value of property covered by insurance. However, general trends do show that three major tests have developed: Market value, replacement cost and the broad evidence rule. Also, the current trend seems to be toward the application of the broad evidence rule. Insurers and insured's should look to the decisions in their jurisdiction to determine the method courts use to determine value of specific items.

As to determining constructive total loss and coverage code upgrades, again the courts are split. Although, there is no way to assure an exclusion will apply, insurers should look to exclusions that have been upheld in drafting policy language. This area of the law is muddled, but careful policy drafting may eliminate some of the distinctions.

Footnotes:

1. 6 APPLEMAN, INSURANCE LAW AND PRACTICE §3823 (1942); VANCE INSURANCE 77, 760-61 (2d Ed. 1930); and see, e.g., Ingram and Giroux, Illinois Should Adopt the 'Broad Evidence Rule' in Insurance Indemnity Cases, 71 Ill. B.J. 41 (1982); Dykes, 'Actual Cash Value': The Magic Words - - What Do They Mean?, 16 FORUM 397 (1981).

2. Fisher, The Rule of Insurable Interest and the Principle of Indemnity: Are They Measures of Damages in Property Insurance?, 56 IND. L>J> 448 (1981) ("[N]o universal agreement exists as to the meaning of the word indemnity, either conceptually or definition ally.")

3. Reader III, Modern Day Actual Cash Value, 22 TORT & INS. L. J. 282.

4. Vetich, Property Insurance Considerations for the Practicing Attorney, 47 TEX. B.J. 374 (1984) (the insurance defines actual cash value as "replacement cost minus depreciation").

5. Herr, Commercial and Residential Property and Liability Insurance 17 REAL PROP., PPROB. & TR.J. 638 (1982).

5. Jefferson Ins. Co. v. Superior Court of Alameda County , 3 Cal. 3d 398, 475 P.2d 880, 90 Cal. Rptr. 608, 611 (1970) (noting, however, that if the policy were required to read "not exceeding the amount which it cost to repair the property," then "actual cash value" could be construed as meaning "replacement cost minus depreciation"); Citizens Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co. , 86 Vt. 267, 84 A. 970, 974, (1912).

6. Eshan Realty Corp. v. Stuyvesant Insurance Company of New York , 202 N.W.S.2d 899, aff'd 12 A.d.2d 818, 210 N.W.S.2d 256 (1961), aff'd 11 N.Y.2d 708 (1962) (Under fire insurance policy limiting amount recoverable to actual cash value at time of loss but not exceeding amount it would cost to repair or replace property with material of like kind and quality, insured suffering partial fire loss was entitled to replacement with new materials with out any deduction for depreciation); Gibsland Supply Co., v. American Employers Ins. Co. (1970, La. App.) 242 So. 2d 310, cert den 257 La. 987, 244 So. 2d 858 (Insured under fire policy covering partially destroyed building was entitled to sum necessary to place building in substantially the same condition it was in at time of and immediatelypreceding the fire, as against a contention that the measure of damages was cost of restoration less depreciation); American States Ins. Co. v. Molex, Inc. , (1968, Ky.) 427 S.W.2d 236 (usual measure of damages for partial loss of a building by fire is such sum as is sufficient to restore the building to the same condition it was in prior to the fire).

7. See e.g. , Couch on Insurance 2d §54:101 ("depreciation should not be deducted from the cost of replacement, because that would make the sum insufficient to complete the repairs and would leave the building unfinished so that the amount would fall short of the indemnity contracted for in the policy. Consequently, under fire policies insuring against loss to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality, the percentage of depreciation applicable to the building as a whole in case of total loss could not be used to depreciate the cost to repair and thus reduce the loss, notwithstanding that the cost to repair exceeded the depreciated value of the building").

8. 233 Kan. 775, 666 P.2d 676 (Kan. 1983).

9. Id. at 679

10. See generally Dykes, supra note 1.

11. McAnarney v. Newark Fire Ins. Co. , 247 N.Y. 176, 159 N.E. 902 (1928); Boise Ass'n of Credit Men v. United States Fire Ins. Co. , 44 Idaho 249, 256 P. 523 (1927).

12. E. g., Bartindale v. Aetna Ins. Co. , 7 NJ Misc. 399, 145 A. 633 (1929).

13. See, McAnarney, infra.

14. McAnarney , 247 N.Y. 176m 159 N.E. 902 (1928).

15. Id.

16. Id. 59 N.E. at 905.

17. See e.g., Surratt v. Grain Dealers Mut. Ins. Co. , (1985) 74 N.C. App. 288, 328 S.E.2d 16; Mamou Farm Services, Inc. v. Hudson Ins. Co. , (1986, La. App. 3rd Cir.) 488 So.2d 259; Elberon Bathing Co., Inc. v. Ambassador Ins. Co. , (1978), 389 A.2d 439, 77 N.J. 1 (Whether the loss is total or partial, the standard for evaluating actual cash value under New Jersey standard form fire policy is the broad evidence rule, which requires the fact finder to consider all evidence an expert would consider relevant to evaluation; particularly both fair market value and replacement cost less depreciation. But, such criterion do not bind the fact finder but are instead guidelines, along with other relevant evidence).

18. Aetna Casualty & Surety Co. v. Florentine Marble & Tile Corp. , (1977, Tex, Civ. App. 8th Dist.) 549 S.W.2d 24.

19. Ohio Casualty , 439 N.E. 2d at 1169 (noting, at 1169 note 4, the suggestion that "replacement cost less depreciation should be the touchstone in the ordinary case, limiting the broad evidence test to unusual fact situations.")

20. Higgins v. Insurance Co., of N. America , 256 Or. 151, 469 P.2d 766,772 (1970) (replacement cost coverage, which obligates the insurer, in the event of a loss, to pay the full cost of repair or replacement, arose from a recognition on the part of insurers that the payment of actual cash value might in some cases leave the insured with insufficient funds to restore his property, and so fail to provide practical indemnity).

21. Jordan, Pwhat price rebuilding? A look at replacement cost policies", 19 The Brief 17 (Spring 1990).

22. One slight variation of this is when the policy provides that actual cash value will replace replacement cost coverage unless and until actual repair or replacement is made. As a practical matter, this language will operate in the same way as the other.

23. See e.g., BSF, Inc. v Cason , (1985) 175 Ga. App. 271, 333 S.E.2d 154; Tamco Corp. v. Federal Ins. Co. , (1963, N.D. Ill.) 216 F. Supp. 767 (applying Illinois law); Bourazak v. N. River Ins. Co. , 379 F.2d 530 (7th Cir. 1967).

24. See Zaitchick, infra.

25. 554 F. Supp. 209 (S.D.N.Y. 1982), Aff'd without opinion , 742 F.2d 1441 (2nd Cir. 1983), cert. Denied, 456 U.S. 851 (1983).

26. American Universal Ins. Co. v. Falzone , 644 F.2d 65 (1st Cir. 1981); Kolls v. Aetna Cas. & Sur. Co. , 503 F.2d 569 (8th Cir. 1974); Bourazak, supra ; and Higgins, supra.

27. 915 P.2d 938.

28. In this regard, the Coblentz court cited Rodgers v. Tecumseh Bank , 756 P.2d 1223 (Okla. 1988), a case which also provided the following definition of an adhesion contract:

"The Terms [adhesion contract] refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected bye the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement. Id. (quoting Steven v. Fidelity & Cas. Co. of New York, 58 Cal.2d 862 27 Cal. Rptr. 172, 185, 377 P.2d 284, 297 (1963)).

29. Coblentz , 915 P.2d 938.

30. Bourazak , 379 F.2d 530 (7th Circ. 1967); Lerer Realty Corp. v. MFB Mut. Ins. Co. , 474 F.2d 410 (5th Cir. 1973); Huggins v. Hanover Ins. Co. , 423 So.2d 147 (Ala. 1982).

31. 16 F.Supp 767 (N.D. Ill. 1963).

32. 379 F.2d 530 (7th Cir. 1967).

33. See e.g., C&S Mfg. V. United States Fire Ins. Co. , (C.A. Wis. 993), 993 F.2d 1304 (insurer did not have to pay to insured the cost to repair where the aircraft manufacturer replaced the aircraft wing at no charge to the insured).

34. See e.g., Harrington v. Amica Mut. Ins. Co. , __A.D. 2d__, 645 N.Y.S.2d 221 (1996); Dickler v. Cigna Prop. & Cas. Co. , 957 F.2d 1088 (3rd Cir. 1992) (applying New York law); Holley v. Allstate Ins. Co. , 562 So.2d 184 (Ala. 1990); Ferrara v. Insurance Co. of N. America , 135 A.D.2d 366, 521 N.Y.S.2d 668.

35. See, Ruter v. Northwestern Fire & Marine Ins. Co. of N.Y. , 72 N.J. Super. 467, 178 A.2d 640, cert denied 37 N.J. 229, 181 A.2d 12; Reese v. Northern Ins. Co. of N.Y. , 207 Pa. Super. 19, 215 A.2d 266.

36. Harrington, supra.

37. Id. at 225.

38. Couch on Insurance, §54:129, 514 (2nd rev. ed. 1983).

39. Id. (Including, but not limited to, Oklahoma, the actual value of the property at the time of the loss; Nebraska, the actual cash value of the property at the time of the loss; Massachusetts, the actual cash value of the property at the time of the loss; North Dakota, the actual value of the property insured; Oregon, the actual cash value, not to exceed the actual cost of repair or replacement).

40. Id. at 518.

41. Homeowners Annotations, Property Loss Research Bureau, Key 94. 1-95.1 (1991).

42 Id.

43. Id.

44. Erin Rancho Motels, Inc. v. United States Fidelity & Guar. Co. , 218 Neb 9, 13, 352 N.w.2d 561, 564 (1984).

45. Id. at 14.

46. Couch on Insurance, §54:138, 526 (2nd rev. ed. 1983).

47. Thomas v. American Family Mut. Ins. Co. , 233 Kan. 775, 778; 666 P.2d 676,679 (1983).

48. Id.

49. Homeowners Annotations, Property Loss Research Bureau, Key 94.1-95.1 (1991).

50. Couch on Insurance, §54:137, 523 (2nd rev. ed. 1983).

51. Id.

52. Eagle Fire Co. v. Snyder , 392 F.2d 570 (Okla. C.A. 1968).

53. Homeowners Annotations, Property Loss Research Bureau, Key 94.2-95.2 (1991).

54. Id.

55. Butler v. Aetna Ins. Co. , 64 N.D. 764, 256 N.W. 214 (1934).

56. See, Keer v. Continental Ins. Co. , 250 S.W. 631 (Mo. App. 1923) (for recovery for grain, crops, etc., destroyed by fire, actual market value is sufficient evidence of actual cash value).

57. 61 A.L.R.2d 711, 717 (1958).

58. McAnarney v. Newwark F. Ins. Co. , 247 N.Y. 176, 159 N.E. 902 (1928).

59. See, Featherston v. Hartford Fire Ins. Co. , 146 F.Supp. 535 (D.C.Ark. 1956); McAnarney, supra , note 22.

60. Butler v. Aetna, supra , note 19. (Market value must be estimated by probably amount building would have sold for. Based on hypothetical sale).

61. Texas Moline Plow Co. v. Niagara F. Ins. Co. , 39 Tex. Civ. App. 168, 87 S.w. 192 (1905).

62. See, Aetna Ins. Co. v. Johnson , 74 Ky. (11 Bush) 587, 21 Am. Rep. 223 (1874).; Britven v. Occidental Ins. Co. , 234 Iowa 682, 13 N.W. 2d 791 (1944).

63. See, Britven, supra , note 26.

64. First Nat. Ins. Co. of America v. Norton , 238 F.2d 949 (Okla. Ct. App. 1956).

65. Chicago Title & Trust Co. v. United Stated Fidelity & Guaranty Co. , 376 F.Supp. 767 (N.D. Ill. 1973).

66. Id.

67. Knuppel v. American Ins. Co., 269 F.2d 163 (C.A. Ill. 1959);

68. Couch on Insurance, 54:137, 523 (2nd rev. ed. 1983).

69. Eagle Square Mfg. Co. v. Vermont Mut. Fire Ins. Co. , 125 Vt. 221, 212 A.2d 636 (1965).

70. 60 A.D.2d 749, 400 N.Y.S.2d 944 (1977).

71. Id.

72. Ohio Casualty Ins. Co. v. Ramsey , 439 N.E.2d 1162, (Ind.App. 1982).

73. Id.

74. 6 Appleman Ins. L. & P., §3861, 294 (1972).

75. Nebraska Drillers v. Westchester Fire Ins. Co. of New York , 123 F.Supp. 678 (D.C. Colo. 1954).

76. Stokes v. Huddleston , 13 S.W.2d 784, 227 Ky. 613 (1929).

77. Appleman, supra , note 38.

78. Id.

79. Third Nat. Bank v. American Equitable Ins. Co. of New York , 27 Tenn. App. 249, 178 S.W.2d 915 (1943).

80. Id. See also, Sperling v. Liberty Mutual Ins. Co. , 281 So.2d 297 (Fla. 1973).

81. Paterson-Leitch Co. v. Insurance Co. of North America , 366 F.Supp 749 (D.C. Ohio 1973).

82. Asmaro v. Jefferson Ins. Co. , 574 N.E.2d 1118, Ohio App. 3d 110 (1989).

83. 8 A.L.R. 4th, 533, 537 (1981).

84. Id.

85. Elberon Bathing Co., Inc. v. Ambassador Insurance Co., Inc. , 77 N.J. , 389 A.2d 439 (1978).

86. Id. at 527.

87. Id. at 528.

88. See, Stahlberb v. Travlers , 568 S.W.2d 79, 84 (Mo. Ct. App. 1978); Hertog v. Milwaukee Mutual Ins. Co. , 415 N.W.2d 370, 372 (Minn. Ct. App. 1987).

89. Hugh L. Wood, Jr., Comment, The Insurance Fallout Following Hurricane Andrew: Whether Insurance companies are Legally Obligated to Pay for Building Code Upgrades Despite the "Ordinance or Law" Exclusion Contained in Most Homeowners Policies, 48 U.Miami L. Rev. 949, 967 (1994).

90. Appleman, supra , note 38.

91. Id.

92. Hood, supra note 53, at 973-975.

93. Id. at 973.

94. 568 S.W.2d 79 (Mo. Ct. App. 1978).

95. Id. at 84.

96. Hood, supra note 53, at 973.

97. 72 So.2d 326 (La. Ct. App. 1954).

98. Id. at 330.

99. See, Sensat v. State Farm Fire and Casualty Co. , 176 So.2d 804 (La. Ct. App. 1965).

100. Hood, supra note 53, at 951. (citing Allstate Deluxe Homeowners Policy 6-7).

101. 68 N.E. 62 (Mass. 1903).

102. Id.

103. Id.

104. 149 A.2d 616 (N.J. Super. Ct. App. Div. 1959).

105. Id. at 618.

106. Id.

107. Id.

108. Wood, supra note 53, at 970-971, citing Id.

109. The first use of replacement cost insurance, or depreciation insurance as it was known then, came in 1943 when the Factory Mutual companies began issuing their form. Jordan, Leo J., "What is the Price of Rebuilding: A Look at Replacement Cost Policies," 19 The Brief 17, 19 (spring 1990).

110. Randy R. Koenders, Annotations, Construction and Effect of Property Inurance Provision Permitting Recovery of Replacement Cost of Property , 1 A.L.R. 5th 817, 2a (1996).

111. Id.

112. Id.

113. The provisions limiting coverage are as follow:

a. You have insured your dwellings and separate structures to 100% of their replacement cost….
b. You have accepted each annual adjustment in building amounts in accordance with the Value Protection clause in the policy.

c. You have notified us within 90 days of the start of any physical changes which increase the value of your insured buildings by $5000. or more, and paid any additional premium….
d. You have complied with all the "Loss settlement" provisions….

114. The concept of moral hazard is premised on the theory that replacement cost coverage provides the insured with an incentive to destroy his or her own property and collect on a potential insurance windfall. Insuring Real Property , section 25.02 (1996).

115. This amount is invariably the difference between the actual cash value and the replacement cost value of the insured property.

116. MCL 500.2826; MSA 24.12826.

117. The policy provided:

If the replacement cost of the entire loss under section is greater than $500, We will not be liable for full replacement cost until actual repair or replacement is completed.

118. Rehearing has occurred and a decision is pending.

119. Commercial Risk Services, Inc. (1994).

120. Insurance Services Office, Inc., 1984 (emphasis added).

121. Section 379.150 RSMo 1986.

122. Standard policy language would typically provide coverage for "the replacement cost for the property…on the same premises…"

123. Insuring Real Property , section 25.04 [3] (1996).

124. 79 Wash. App. 323, 901 P.2d 317 (1995).

125. Id. at 318.

126. Id.

127. Id. (emphasis added).

128. Starzewski v. Unigard Ins. Group , 61 Wash. App. 267, 810 P.2d 58 (1991).

129. 901 P2d. 317, 319.

130. 1996 WL 743825 (Wash. App. Div. 2).

131. Id. at 7.

132. State Farm Fire and Cas. Co. v. Metropolitan Dade County , 639 So.2d 63 (1994).

133. Id. at 65.

134. Id. at 66.

135. Bering Strait School District v. RLO Ins. Co., 873 P.2d 1292 (1994).

136. Id.

137. Id. at 1294 (emphasis added).

138. Id.

139. Id. at 1295.

140. Id. at 1296; See also Farmers Union Mut. Ins. Co. v. Oakland , 251 Mont. 352, 825 P.2d 554 (1992).

141. Id. at 1297; see also, Tenley Enterprises v. Harbor Ins. Co., 1996 WL 11471 (E.D. Pa.)

142. Id.

143. Id.