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VALUED POLICY LAWS: A COMPARATIVE ANALYSIS

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*1068 I. INTRODUCTION

Numerous states have enacted valued policy statutes, including Arkansas, California, Florida, Georgia, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. [1] In general, valued policy laws require a property insurer to pay the face amount of an insurance policy when there is a total loss to qualifying insured property caused by a covered peril, irrespective of the actual value of the property at the time of the loss. Although valued policy laws generally have the same applications and purposes, they can have significant differences in regard to covered perils, the type of property covered, the test for determining a total loss, and the amount recoverable. This article analyzes the similarities and differences among the various valued policy statutes and case law interpreting those statutes. As part of the discussion of covered perils, this article examines the litigation that has resulted from the apparent lack of clarity in the Louisiana statute as to whether it applies only to the peril of fire. Within the discussion of the amount recoverable under the statutes, this article also examines the issue of whether valued policy laws permit insureds to recover the face amount of their policies when a total loss to insured property is caused only partially by a covered peril by focusing on the jurisprudence and statutory law that has developed in Florida and Louisiana as a result of hurricane-related litigation.

II. GENERAL APPLICATIONS AND PURPOSES OF VALUED POLICY STATUTES

In general, valued policy statutes are not optional and provide that the value of the insured property is fixed at the limit set forth in the policy and that such valuation is conclusive in the event of a total loss and in the absence of fraud. [2] These statutes

are, as a matter of law, incorporated into all ***1069** contracts of insurance in the state.[3] As such, the insurer is prevented from paying anything other than the face value of the policy when a total loss is caused by a covered peril, even when the face amount of the policy exceeds the actual value of the property at the time of loss.[4] Additionally, the statute controls when it conflicts with the provisions of the insurance policy at issue, in particular those provisions relating to valuation of the loss, such as arbitration and appraisal provisions.[5] In *Tedder v. Hartford Fire Insurance Co.*,[6] for example, the insurer was required to pay the policy limit pursuant to the valued policy statute, notwithstanding a policy provision limiting liability to the cost of rebuilding or replacing the damaged property.

Furthermore, the insured cannot waive the statutory provisions. The Supreme Court of Montana held in *Britton v. Farmers Insurance Group*[7] that a settlement agreement between the insurer and the insured whereby the insurer paid less than the face value of the policy upon total destruction of the insured property was void *ab initio* as against public policy and in contravention to the valued policy statute.

Valued policy statutes have a number of purposes. One purpose is to relieve the insured from having to prove the value of the property, through a formal proof of loss or otherwise, after being totally destroyed.[8] The rationale being that, at the time of total loss, the value of the property is difficult to determine because the usual evidence relied upon for such valuation is gone.[9] The statutes also prevent insurers from collecting premiums on overvalued properties and then limiting payment to a lesser amount when a loss occurs.[10] In essence, the statutes prevent the insurer from receiving premiums on one basis and paying losses on another, thereby promoting inspection and discouraging overvaluation of the insured property.[11] Elimination of overvaluation has the effect of protecting insureds from the payment of inflated or excessive premiums and insurers from the ***1070** moral hazards that may arise when property is insured in excess of its actual value.[12] In addition, the statutes simplify and facilitate prompt settlement when a total loss occurs, as disputes and litigation are theoretically avoided when insureds and insurers agree in advance to the value of the insured property.[13] The insured limits the recovery to the face amount of the policy and the insurer charges a premium commensurate with its maximum exposure.[14] Consequently, when a total loss occurs, neither the insured nor the insurer can contend that the value of the total loss is different from what was previously specified in the policy.[15]

III. STATUTORY REQUIREMENTS

In order for the valued policy laws to apply, the required elements of the statute must be satisfied. In general, the insured must sustain a total loss to eligible insured property caused by a covered peril. The Nebraska valued policy law, by way of example, demonstrates the presence of each of these elements. It provides as follows:

> Whenever any policy of insurance is written to insure any *real property* in this state against *loss by fire, tornado, windstorm, lightning, or explosion* and the property insured is *wholly destroyed* without criminal fault on the part of the insured or his or her assignee, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property and the true amount of loss and measure of damages.[16]

A. *Perils Subject to Statutes*

A valued policy statute will not be triggered unless there is a loss caused by a covered peril. As noted above, the perils to which the valued policy statutes apply can vary. Virtually all valued policy laws apply to the peril of fire.[17] Some statutes, however, apply *only* to the peril of fire.[18] In contrast, the statutes in Florida, Iowa, Minnesota, Montana, North Dakota, West Virginia, and Wisconsin apply to any peril covered by the applicable insurance ***1071** policy.[19] The remaining statutes apply to specifically enumerated perils in addition to fire, including tornado, windstorm, lightning, explosion, and natural disaster.[20]

Most valued policy laws will not apply to a total loss caused by a peril other than the peril or perils specified in the statutes, even if the peril is otherwise covered by a homeowner's policy. In *Bennett v. Allstate Insurance Co.*,[21] for example, the Eighth

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Circuit, applying Arkansas law, held that the valued policy statute was only applicable to fire damage and, therefore, it did not apply to a loss covered under a homeowner's policy resulting from the perils of wind and snow accumulation.

Similarly, in *Kenmore Construction Co. v. Maryland Casualty Co.*,[22] the Ohio Court of Appeals concluded that a total loss caused by windstorm did not qualify for recovery under the Ohio valued policy statute, as the statute limits recovery only to losses caused by fire or lightning. The insured had argued that the words "fire or lightning" are simply descriptive of the types of insurance policies to which the statute applies. It also argued that the statute was never intended to be limited in application to two risks, as such an interpretation would defeat the statutory purpose and result in a situation where, under a single policy (fire and extended coverage insurance policy), a loss by fire would provide a greater recovery than a loss caused by windstorm, even though both were covered perils under the same policy. The court disagreed, finding that the plain language of the statute and the legislative history led to a contrary result.[23]

It may not always be readily apparent on the face of a statute whether it applies to a single peril or multiple perils. Whether the Louisiana valued policy law only applies to the single peril of fire was at issue in *Chauvin v. State Farm Fire and Casualty Co*.[24] On its face, the Louisiana statute appears to apply only to the peril of fire, given its reference to "any fire insurance policy." The defendant insurers asserted that the plain language of the statute, its history, and federal court decisions show that it applies only to the peril of fire. The plaintiff insureds, on the other hand, contended that there is no such thing as a single-peril fire policy in Louisiana, the term "fire ***1072** policy" is broadly used within the insurance industry to include multiperil homeowner's policies, and Louisiana courts have applied the valued policy law to losses caused by perils other than fire. The U.S. District Court for the Eastern District of Louisiana concluded that it was not necessary to address the "fire policy" issue in order to resolve the dispute between the parties.[25] The court, while assuming arguendo that the statute applies to nonfire perils, ultimately dismissed the insureds' claims predicated on the valued policy law and the view that they are entitled to the full value of their policies, notwithstanding that the total loss resulted from a noncov-ered peril (flood), so long as a covered peril (wind) caused some amount, no matter how small, of loss to their property.[26] The court concluded that the Louisiana valued policy law does not apply when a total loss is not caused by a covered peril (e.g., wind).[27] The insureds appealed the decision to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the district court.[28]

While Judge Sarah Vance of the federal district court passed on the issue of whether the Louisiana valued policy law applies to perils other than fire in *Chauvin* on grounds that the issue presented a significant question of unsettled state law that would best be resolved initially by Louisiana state courts, she later addressed it in *Caruso v. Allstate Insurance Co.*[29] In *Caruso*, the court found that the term "any fire insurance policy," as used in the valued policy law, was ambiguous in that it could be interpreted as both the plaintiffs and defendants contended.[30] The court concluded that Louisiana's rules of statutory construction, the legislative intent, the relevant state and federal jurisprudence, and common sense compel the holding that the valued policy law applies to any policy that includes the peril of fire, but not exclusively to the peril of fire.[31] The court, in reaching this conclusion, recognized that "the ambiguous language of the VPL cries out for legislative clarification."[32]

It remains to be seen whether the Louisiana appellate courts will directly address the issue of whether the valued policy law applies to policies covering perils other than fire. It was believed that the issue might be decided by the Supreme Court of Louisiana in *Landry v. Louisiana Citizens Property Insurance Co.*,[33] but that did not occur. In *Landry*, the Louisiana Court of ***1073** Appeal did not address the issue because it was not raised in the trial court, as the insurer did not "wish to burden the court with resolving that issue."[34] The court, however, acknowledged in a footnote that, although the issue was not raised in the trial court, the term "fire policy," as found in the Louisiana valued policy law, is broadly used in the insurance industry to refer to a homeowners policy and state and federal courts have applied the valued policy law to claims under policies for damage other than fire.[35] On appeal, the Supreme Court of Louisiana also declined to rule on whether the valued policy law was intended to apply only to the peril of fire, even though it had requested additional briefing on the issue from the parties.[36] Instead, in a lengthy footnote constituting dicta, the court examined both sides of the issue, seemingly suggesting in the process that the statute was only intended to apply to fire policies, and urged the Louisiana legislature to consider the issue and amend the statutory language if warranted.[37]

B. ***Property Subject to Statutes***

In addition to loss caused by a covered peril, the valued policy laws only apply to specified property, and the types of property can differ from one state to another. The statutes in Arkansas, Iowa, Minnesota, and New Hampshire apply to buildings. [38] The California, Mississippi, Ohio, and Tennessee statutes apply to buildings or structures. [39] Real property is the type of property covered under the Kansas, Nebraska, North Dakota, South Dakota, Texas, and West Virginia valued policy laws. [40] The Florida statute applies to buildings, structures, mobile homes, and manufactured buildings. [41] Inanimate, immovable property is encompassed within the Louisiana statute. [42] The Montana statute covers improvements on real property. [43] Missouri and South Carolina valued policy statutes apply to property. [44]

In general, valued policy laws apply to real property and are sufficiently broad in scope to include both commercial and residential property. Some ***1074** statutes, however, do not cover commercial property. For example, the Georgia and Wisconsin statutes apply respectively to one- or two-family residential buildings and real property used as a dwelling. [45]

Furthermore, while most valued policy laws apply to some form of real property, they typically do not apply to personal property. Some statutes, including those in Arkansas, Florida, North Dakota, South Carolina, and Texas expressly state that they do not apply to personal property. [46] Other jurisdictions have excluded personal property through court decisions interpreting their statutes. In *Clift v. Fulton Fire Insurance Co.*, [47] for example, the Tennessee Court of Appeals held that a fire policy covering only personal property did not come within the Tennessee valued policy law where the statute only applied to insurance on buildings or structures. Similarly, in *Home Insurance Co. v. Greene*, [48] the Mississippi Supreme Court held that the valued policy statute does not apply to personal property contained in a building.

Unlike most valued policy laws, however, the Missouri statute, with its general reference to “property,” has been judicially interpreted, in conjunction with other related statutes, to apply to personal property. [49] In addition, some states have separate valued policy statutes for real property and personal property. In Louisiana, for example, LA. REV. STAT. ANN. § 22:695 governs realty and LA. REV. STAT. ANN. § 22:667 applies to personalty.

When insureds faced with recovering the full policy limit if their property is covered by the valued policy statute or some lesser amount if it is not, there naturally has been extensive litigation over whether the damaged property qualifies for recovery under the statute. In *British-America Assurance Co. v. Bradford*, [50] the insurer contended that mill machinery and fixtures within a mill building totally destroyed by fire were not real property, but rather personal property, and, therefore, did not fall within the purview of the valued policy law. The jury, however, agreed with the insured and determined that the damaged property was firmly fixed to, attached to, and connected with the building, and therefore intended to be a part of the building. [51] These factual findings by the jury, which were upheld on appeal, ***1075** established that the machinery and fixtures were real property within the meaning of the valued policy law. [52]

In *Staggers v. USF&G*, [53] the insurer disputed that the insured's trailer house, which was rendered a total loss by fire, qualified as an improvement upon real property under the valued policy law. The Montana Supreme Court concluded that, since the trailer was fully set up to live in, was connected to a cesspool and oil and propane tanks, and was hooked up to a light plant, it was an “improvement on real property” under the valued policy law. [54]

C. *Total Loss*

For the valued policy statutes to apply, the insured must also sustain a “total loss” (or its functional equivalent) to covered property. Most statutes, however, do not define the term “total loss.” As such, the courts have been called upon to decide the meaning of the term. Predictably, those courts addressing the issue have not always applied the same test. Indeed, four judicially created tests have emerged for determining a total loss. Those tests are the identify test, the restoration to use test, the absence of value test, and the composite or combined test. [55] In general, none of these tests requires a complete annihilation of the property. [56] Whether a loss is total or partial under any particular test is a question of fact for the jury. [57] The burden of proof is usually on the insured to prove the nature and extent of its loss, whether “total” or not. [58]

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1. Identity Test

Under the identity test, a building or structure is a total loss if it loses its identity and specific character, even though the materials or component parts are left standing.[59] This test was used by the court in *Group Von Graupen v. Employers Mutual Fire Insurance Co. of Wausau, Wisconsin*[60] to determine whether the insured had sustained a total loss. In *Group Von* ***1076** *Graupen*, a fire completely destroyed a building and its contents, leaving it completely uninhabitable. All that was left of the building was the foundation, certain concrete walls, and pillars. Applying the identity test, the court held that the building had lost its identity and specific character and, therefore, the building was a total loss, notwithstanding that some parts of the building remained standing.[61] The court recognized that the insurance was on the building itself, not the materials of which it was constructed.[62]

In *Lafayette Fire Insurance Co. v. Camnitz*,[63] the Florida Supreme Court concluded that the trial court, in charging the jury, used the correct standard (the identity test) in determining whether the insured had sustained a total loss. The trial court charged the jury:

> That in construing a fire insurance policy, by a total loss, is meant that the building has lost its identity and specific character as a building, and becomes so far disintegrated, it cannot be possibly designated as a building, although some part of it may remain standing. It matters not that some debris remains which may be useful or valuable for some purposes. A policy of insurance upon a building is an insurance upon the building as such, and not upon the material of which it is composed. The Court further charges you that if the identity and specific character of the insured building was destroyed by fire, although there was not an absolute extinction of all parts thereof, it would still be a total loss within the policy of insurance herein.[64]

The identity test also has been used to establish a total loss even where some portion of the insured property had value or was useful for some other purpose. In *Meccage v. Spartan Insurance Co.*,[65] the Montana Supreme Court applied the identity test in determining whether a trailer home had sustained a total loss ("wholly destroyed" under the valued policy statute as it existed at that time) under the valued policy statute. The insured's trailer home had been burned by fire. The floor was burned out of it and the frame buckled and sagged as a result of being subjected to intense heat. The refrigerator, stove, sinks, and bathtub, which were not covered by insurance, were salvaged by the insured and traded in for credit on a new trailer. The salvage on the trailer house and the wheels, which were not damaged in the fire, were sold by the insurer back to the insured. The insurer argued that the trailer home was not wholly destroyed in that many items, such as the refrigerator, stove, bathtub, and two sinks, survived the fire, and the trailer itself and the undamaged wheels still had value. The court concluded that the trailer was "wholly destroyed" within the meaning of the valued policy ***1077** statute even though individual materials or components of it were salvaged and had some value.[66] As in *Group Von Graupen*, the court noted that the subject of the insurance policy was the trailer, not the materials of which it was constructed.[67]

A total loss also can exist under the identity test where a building is partially destroyed, but the remainder is ordered to be destroyed by municipal authorities. In *Security Insurance Co. v. Rosenberg*,[68] for example, the physical portion of the insured building was still standing after the fire, but it was torn down after having been condemned and ordered destroyed by the commissioners of the City of Covington. The insured contended that the building was a total loss. In response, the insurer argued that the loss was partial, not total, because the condemnation did not result from conditions related to the fire. Since the hazard insured against (fire) only caused a partial loss, the insurer contended that it should not be responsible for that portion of the loss attributable to the action of public authorities. The Kentucky Court of Appeals stated that the identity test was the proper test for assessing whether a total loss had occurred and described it as follows:

> If as a matter of fact appellee's building was so far injured or damaged by the fire of March 3d as that its identity or specific character as a building was thereby destroyed, or its parts and materials were thereby rendered unsafe or without value as they remained after the fire for the purpose of reconstructing the building substantially as it existed before the fire, the loss was a total one within the meaning of the policy.[69]

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In applying the test, the court acknowledged that, although the insured's building was, as a matter of physical fact, only partially destroyed by fire, if it could not be repaired or restored due to building laws or regulations in force at the time of the fire, the loss was a total one under the policy.[70] The court further noted, however, that there would not be a total loss under the policy if the order of condemnation were premised on a condition not caused by the fire.[71] The court ultimately reversed the trial court's entry of directed verdict for the insured.[72] The court ordered a new trial where the insured would be permitted to show that the commissioners entered the order of condemnation due to conditions created wholly or partially by ***1078** fire, rendering repairs or restoration impracticable or illegal.[73] The burden would then shift to the insurer to show that the order of condemnation was not supported by the facts, the building was only partially destroyed by fire, and, therefore, the conditions giving rise to condemnation were not connected to the fire.[74]

Similarly, the application of the identity test resulted in a finding that the insured had sustained a constructive total loss in *Stahlberg v. Travelers Indemnity Co*.[75] In *Stahlberg*, the Missouri Court of Appeals reversed the trial court for applying the incorrect test in determining whether a building damaged by fire was a total loss.[76] The trial court interpreted “total loss” to mean actual total physical loss wherein any remaining portion is not subject to use as a basis for reconstruction and concluded that the insured did not sustain a total loss, making the Missouri valued policy statute inapplicable.[77] According to the court of appeals, the trial court ignored the long-settled rule in Missouri (the identity test) that “total loss,” as used in the valued policy statute, means “that the building has lost its identity and specific character as a building, and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing.”[78] Even though it was undisputed that the insured's property was only partially destroyed, the appellate court ultimately concluded that the insured had suffered a total loss pursuant to the doctrine of constructive total loss.[79] Under this doctrine, where an insured's building is partially destroyed by fire and a subsequent municipal ordinance orders demolition of the structure, the insured has sustained a constructive total loss within the meaning of the valued policy law.[80] The court determined that the demolition order itself was sufficient to support a finding of total loss on the apparent basis that the order was causally connected to the fire damage.[81] The court further held that, to the extent an exclusion in the insurance policy precluding coverage for loss resulting directly or indirectly from enforcement of a local ordinance regulating the repair or demolition of buildings attempted to limit the insurer's liability to less than the face value of the policy in the event of a total loss, the exclusion was contrary to the valued policy law and void.[82]

***1079 2. Restoration to Use Test**

The standard under the restoration to use test is whether a reasonably prudent uninsured owner would use the remains of the insured property after a loss to restore it to its original condition.[83] The remnants must have formed a substantial part of the building.[84] If a reasonably prudent owner would not use the remains of the property as a basis for restoring it, the property is a total loss.[85] On the other hand, in order for there to be only a partial loss within the terms of the valued policy statute, there must be a substantial, usable remnant of a building surviving and such part must be susceptible to reasonable repairs and reconstruction.[86]

In *Home Ins. Co. v. Greene*,[87] the Mississippi Supreme Court relied upon its prior decision in *Franklin Fire Insurance v. Brewer*[88] to reject the identity test and apply the restoration to use test for purposes of determining what constitutes a total loss or destruction of a building by fire. The court stated in *Brewer*:

> Where the line is to be drawn between these two conditions is, in each particular case a question of fact. It adds nothing to say that a total loss occurs when the identity and specific character of the structure is destroyed. We receive no aid from the suggestion that total loss ensues when the reconstructed building would be recognized as a new, rather than old structure. No light is thrown on the situation by the declaration that total loss follows from the fact that the remnants constitute a mass of ruins for amidst the ruins may remain a substantial part of the building .... In arriving at a determination of what a prudent owner would do under such circumstances, it is proper to consider not only the condition of the walls standing, whether they are suitable, in place, to be used as a part

> of the reconstruction, but also the relative value of such walls, in place, as compared with the cost of rebuilding. It does not follow that, because some part of the remnants may be utilized, in place, there is not substantial and total destruction and loss. The law will not take notice of trifles in this respect. It follows that there must remain a substantial part of the building in place, which, with reasonable repairs, can be used in reconstruction. What such substantial part is a question of fact depending upon the nature and cost of the structure and character and condition of the remaining parts. [89]

> ***1080** It only remains to be said that substantial parts of a building must remain in place, above the foundation in order to prevent the destruction of the building from being total. If only the foundation of the building remains in place, the building is totally destroyed within the meaning of the policies, although some parts of the building remain in such condition as to be of value as salvage. [90]

Upon establishing the restoration to use test as the proper test, the court concluded that, based on evidence showing that the dwelling had two walls burned down, roof damage, all windows broken out, and smoke and water damage, the jury was justified in finding that the house was completely destroyed by fire. [91]

The Texas Court of Appeals also applied the restoration to use test in *Hochheim Prairie Farm Mutual Insurance Ass'n v. Burnett*. [92] In that case, the court described the test as: "[W]hether a reasonably prudent owner, uninsured, desiring a structure like the one in question before the fire, would use the remnants of the structure to rebuild." [93]

The court also stated that the mere fact that some of the charred structure might have been used in the new construction does not make the loss a partial one. [94] The jury determined that a reasonably prudent owner would not use the remnants to rebuild the fire-damaged structure because (1) the remaining portions of the house were leaning and barely standing; (2) the roof was burned in two and would have to be replaced; (3) the rafters, interior wall coverings, sheetrock, and ceilings would have to be replaced; (4) the only salvageable remnants were the aluminum windows and steel siding; and (5) the house was a "shell." [95] Pursuant to its review of the record, the court found that there was sufficient evidence to support the jury's finding that the insured's house was a total loss. [96]

In *Bennett v. Imperial Insurance Co.*, [97] the restoration to use test was applied to find that an apartment building damaged by fire was a partial loss. The insureds insisted that the jury could infer from photographs that the building was a total loss, triggering the Texas valued policy statute. The court concluded that the jury could not infer total loss solely from the photographs in light of the direct testimony of the insureds and their witnesses. [98] While the photographs showed charred remains of parts of the ***1081** interior of the structure, the insureds and their witnesses testified that substantial parts of the building were virtually untouched by the fire. Given that no witness testified that the building was a total loss and all witnesses testified that a substantial part of the building remained untouched and sound judgment dictated use of the remnants to build if the owner still desired an apartment building on the property, the court, applying the restoration to use test, found that the structure was a partial loss and, therefore, the insureds were not entitled to the face amount of the policy under the valued policy law. [99]

3. Absence of Value Test

The absence of value test involves an assessment of whether the cost to repair the damaged property exceeds the value of the property. [100] If the cost to repair the property exceeds its value, the damaged property is a total loss. [101] The Louisiana Court of Appeal in *Dumond v. Mobile Insurance Co*. [102] applied the absence of value test to a mobile home that was blown off its blocks by a hurricane, causing damage to the home. The insurer claimed that it was error to find that the mobile home was a total loss. The court, applying the test, found that there was sufficient evidence supporting the trial court's conclusion that it would cost more to repair the mobile home than replace it and, therefore, a total loss was sustained. [103]

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The absence of value test has not been limited in application to the building or structure itself. It also has been applied to the materials comprising a building that survive the covered peril. In such an application, a total loss occurs where the cost of saving and utilizing the materials that survived the fire exceeds their value. The value of building materials for purposes of determining total loss under the Wisconsin valued policy law was at issue in *Harriman v. Queen Insurance Co. of London and Liverpool*.[104] There, a three-story brick hotel building was damaged by fire. A question to be decided by the jury was whether the building was wholly destroyed within the meaning of the valued policy law. Among the findings that supported the jury's conclusion that the insured building was totally destroyed were that the expense of removing the worthless fragments of the old building would at least equal the value of all material left after the fire and such materials were worth less than the cost of removing them from the ***1082** burned building. The Wisconsin Supreme Court concluded that the jury's specific factual findings were supported by the evidence.[105]

The value of the surviving materials, however, is measured in terms of the utility of the insured property for the particular purpose it was used or intended to be used at the time the loss occurred, not their economic worth or value for some other purpose. This principle is illustrated in *Rogers v. Connecticut Insurance Co. of Hartford*.[106] In *Rogers*, the insured was the owner and operator of an electric light plant. The insurer issued a fire policy covering the gas engine and dynamo that were in the powerhouse, which were so attached to the facility as to be considered realty. The powerhouse was destroyed by fire, and the machinery, comprised principally of the engine and dynamo, was badly damaged. The insured claimed that the engine and dynamo were valueless for purposes of their use as an integral part of the power station. In essence, the insured argued that the machinery had no value after the fire, except what might be obtained from selling it as “junk.” The insurer contended that by an outlay of $2,500, for the replacement of destroyed or worthless parts and repairing of damaged parts, the engine and dynamo could be restored to usefulness. The insurer disputed the definition of “total loss” in the jury instruction proposed by the insured. The instruction provided:

> The court instructs the jury, if they find for the plaintiff, under the instructions given in this case, and they further believe from the evidence that the plaintiff has suffered a total loss of the property insured, by reason of said fire, you will then find in favor of the plaintiff, for the full amount named in the policy, to wit, $1,000, and in this connection you are instructed that the term “total loss” does not mean an entire destruction of the property insured, but such a destruction as would render the property insured of no value for the purpose of which it was used or intended to be used at the time the policy was issued and the fire occurred.[107]

The Kansas City Court of Appeals viewed the definition of “total loss” in the instruction to mean:

> [I]f the machinery was so damaged that it had no value as part of the power plant of plaintiff--that is to say, if it could not by repairs or replacements be restored to its intended use as an integral part of the factory--then the fact that it might be sold as junk, or even repaired in a way to make it useful for other purposes, and therefore of some value, would not alter its status as property totally destroyed.[108]

***1083** The court emphasized that the issue for purposes of determining total loss is not whether the engine and dynamo in their damaged state have some value for other purposes, but whether they have any value left in them for the purposes of the factory, should it be restored to operation.[109] The court found it untenable that injured machinery, which cannot be restored to its intended use, is only partially destroyed if it possesses value for any use.[110] Ultimately, the court held that the jury instruction at issue properly defined the term “total loss” and affirmed the jury's finding that the engine and dynamo were a total loss.[111]

4. Composite Test

A number of states have not adopted a specific test for determining total loss, but rather consider some or all of the aforementioned tests and find a total loss where any one of the tests is satisfied.[112] For example, a composite test was used in *Nicholas v. Granite State Fire Insurance Co*.[113] In *Nicholas*, the evidence presented a jury question as to whether the insured sustained a “total loss” due to fire so as to be entitled to recover the face value of a valued fire policy. As a result of the fire,

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the insured's building was damaged badly on the inside; windows were destroyed; most of the studding, rafters, and joists were charred; inside walls were damaged and burned; and the galvanized roof so heated and burned from the inside that it was raised in several places. The West Virginia Supreme Court of Appeals observed that the courts in the state have utilized the identity and restoration to use tests to determine total loss. [114] The court concluded that the jury was justified in finding that the insured sustained a total loss by fire based on testimony satisfying the restoration to use test. [115]

In *Eck v. Netherlands Insurance Co.*, [116] the Wisconsin Supreme Court found that there was sufficient evidence on the record to support a finding of total loss under the Wisconsin valued policy law based on both the identity and restoration to use tests. Applying the identity test, the trial court concluded that the structure had sustained a total loss. The court determined that there was sufficient evidence to support the trial court's conclusion, including testimony that the combustible material in the building was destroyed or rendered useless by the fire and heat, and that, although ***1084** the walls remained, their utility and identity as walls were completely destroyed. [117] The court also found that there was sufficient evidence under the restoration to use test to conclude that a prudent owner, uninsured, wanting a building like the one damaged, would not, in restoring it, have used the remnants of the building. [118] The court expressly rejected the absence of value test on the basis that the Wisconsin valued policy statute deals with the tangible thing insured, not solely its value. [119]

A composite test also was used in *Liverpool if L. if G. Insurance Co. v. Heckman*. [120] There, the Kansas Supreme Court, applying the identity and absence of value tests, determined that there was sufficient evidence to support the jury's finding of total loss.

IV. AMOUNT RECOVERABLE

Although the valued policy laws generally require the payment of the face amount of the policy in the case of a total loss irrespective of the actual value of the property, some jurisdictions, under certain circumstances, do permit insurers to pay less than the stated amount in the policy. Some jurisdictions, by statute, limit recovery to the actual value of the insured property when the insurer is afforded an opportunity to inspect the property within a certain time period and a total loss occurs within that period or the loss otherwise occurs too soon after the issuance of the policy. In at least one jurisdiction, the limit stated in the policy constitutes only prima facie evidence of the value of the property.

Statutory and/or judicial exceptions also have been created in some jurisdictions to limit recovery under valued policy statutes where the insured has committed fraud or otherwise increased the risk without the insurer's consent, the property has depreciated in value from the time the policy was issued until the time of loss, the insured only has a partial interest in the property, and multiple policies cover a single property.

There also has been considerable debate in Louisiana and Florida over whether an insured who sustains a total loss caused only partially by a covered peril is entitled to recover the face amount of the policy.

A. *Recovery Limited to Actual Value of Property*

Given the obligation of the insurer to pay the face amount of the policy in the case of a total loss, the burden is on the insurer to inspect and evaluate the property that is the subject of the insurance contract before agreeing to ***1085** issue a policy for a specific value. [121] The statutes in Georgia, Kansas, and Tennessee afford an insurer a specified period of time during which the insured property can be inspected and evaluated. [122] The inspection allows the insurer to examine the nature and use of the property and its condition, including its state of repair. [123] The failure of the insurer or its agent to examine the insured property and request modification as to its value within the specified inspection period generally does not nullify the statutory mandate of payment of the face amount of the policy in the event of a total loss. [124] If, however, the insured property is destroyed within the time period that the insurer is allowed to inspect and value the property, the valued policy law does not apply and the insured must establish the actual value of the property. [125]

The Tennessee valued policy statute expressly limits the insurer's liability to the actual value of the insured property in the case of a loss by fire. [126] The insurer, however, is afforded the opportunity to inspect the property within ninety days of making or

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writing a fire insurance policy to set the fair value of the property. [127] If the insurer fails to place a reasonable value on the property within the inspection period and a total loss occurs, the value as shown in the policy is conclusively presumed to be reasonable and the insurer is required to pay the face amount of the policy to the insured. [128]

Under the Kansas valued policy statute, the provision that requires the insurer to pay the policy limit in the event of a total loss does not apply to new fire policies or existing fire policies where there has been an increase of coverage of 25 percent or more until the policies have been in effect for at least sixty days. [129] Similarly, the Georgia statute permits valuation at ***1086** actual value of the property if the loss occurs within thirty days of the original effective date of the policy not exceeding the limit on the policy. [130]

When the insurer pays the actual value of the insured property at an amount less than the face amount of the policy and the insured has paid premiums in excess of the actual value, some statutes require the insurer to reimburse the insured for the excess premiums, and at least one statute also requires the payment of interest. Under the Tennessee statute, if the insured paid premiums for a policy limit in excess of the actual value of the property, the insured is entitled to be reimbursed the proportionate excess or premiums paid on the difference between the policy limit and the actual value with interest of 6 percent per annum from the date of issuance of the policy. [131] The Kansas statute requires a refund of the difference between the cost of the amount of insurance purchased and the premium associated with the amount of the loss actually paid. [132]

Under the Iowa statute, the face value of the policy constitutes only “prima facie” evidence of the value of the insured property at the time of the loss. [133] As such, nothing in the statute prevents the insurer from showing the actual value of the insured property as of the date the policy was issued. [134]

B. *Fraud/Increase in Risk*

1. Fraud

As previously noted, the valued policy laws generally operate to fix the insurer's payment obligations under the policy when a total loss occurs. They do not, however, prohibit the insurer from raising defenses it might otherwise have under the policy, including the defense of fraud when the insured property has been fraudulently destroyed. In fact, most valued policy laws expressly afford an insurer a defense to paying the face amount of the policy where fraud is involved. For example, the Ohio valued policy statute provides, in relevant part, that:

> [a] person, company, or association insuring a building or structure against loss or damage by fire or lightning shall have such building or structure examined by his or its agent, and a full description thereof made, and its insurable value fixed, by such agent. In the absence of any change increasing the risk without the consent of the insurers, and in the absence of *intentional fraud* on the part of ***1087** the insured, in the case of total loss, the whole amount mentioned in the policy or renewal, upon which the insurer received a premium shall be paid. [135]

A successful defense of fraud may bar recovery altogether under the policy. The defense, however, will generally not be available where the insured's valuation of the property, even if fraudulent, is accepted by the insurer without investigation. Under these circumstances, the insurer cannot argue that the property at issue was fraudulently overvalued. In *U.S. Fire Insurance Co. of the City of New York v. Sullivan*, [136] for example, the Eighth Circuit held that, where an insurer issues a fire insurance policy without inspection, the insured can recover the agreed value in the event of a total loss, even though the insured procured the insurance policy by misrepresenting the value of the property. The court found that the fraud asserted by the insurer could not have been perpetrated if the insurer had performed its statutory duty of inspection. [137] In support of its decision, the court stated:

> But the insurer cannot close its eyes, make no reasonable investigation, take the bare word of the insured as to value and thereafter challenge such value. To permit this would be to nullify the good effect intended by the

> statute. It would reinstate the very situation and condition which the statute sought to destroy and prevent. It could encourage conscious overvaluation and, possibly, result in arson. [138]

The fraud defense also has been rejected when the insured's overvaluation of the property is viewed as a mere opinion. In *Gamel v. Continental Insurance Co.*, [139] the insured bought a property for $800 and insured it for $10,000. The insurer issued the policy without inspecting the premises and did not raise any questions regarding the value of the property until the property was damaged. The insured sought the face value of the insurance policy under the Missouri valued policy law. The insurer raised the defense of fraud. The court held that, where the insurer and insured are on equal footing to determine the value of the insured property, the insured's representation, even if false, was merely an expression of opinion as to the value and could not serve as the basis for a defense of fraud. [140]

In *Zuraff v. Empire Fire & Marine Insurance Co.*, [141] the North Dakota Supreme Court was confronted with the issue of whether the reference to ***1088** fraud in its state's valued policy law applied only to fraud in connection with the destruction of the insured property or whether it also included fraud in the procurement of the insurance. The insured in *Zuraff* obtained $60,000 in fire insurance for a building he recently purchased for $50,000. Within one month of the effective date of the policy, the property was completely destroyed by fire. The fire occurred before the insurer inspected the property. The insurer refused payment on grounds that the insured obtained insurance coverage through fraud and misrepresentation in regard to the value of the building. The insurer claimed that the insured knew, when he obtained the policy, that the building was not worth $60,000. The insured contended that substantial improvements were made to the building after purchase, but not prior to the issuance of the policy.

The North Dakota valued policy statute only applies when "the insured property shall be destroyed by fire without fraud on the part of the insured or his assigns." [142] The insured argued that the fraud referenced in the statute only applied to fraudulent destruction of the premises. The trial court agreed with the insured. The state high court, however, ruled that the trial court erroneously construed the valued policy statute to prohibit the raising of the defense of fraud under the facts and circumstances of the case. [143] The court determined that the valued policy statute's reference to fraud included the insured's fraudulent conduct in procuring the insurance. [144] The court also found that the insurer's failure to inspect the property may not create an estoppel in light of the one-month interval between the effective date of the policy and the occurrence of the fire. [145] The court reversed and remanded the case for trial on the merits after concluding that the trial court erred by not allowing the defense of fraud in the procurement to be raised and granting summary judgment to the insured. [146]

At least one court, however, has allowed the insurer to challenge the insured's valuation of the property on the basis of misrepresentation or fraud, even where the insurer failed to inspect the property. In *Hodge v. Cimmarron Insurance Co.*, [147] the U.S. District Court for the Eastern District of Missouri held that, under the Missouri valued policy statute, the insurer may not defend against a total loss on the basis that the property was worth less than the amount of insurance, but it may assert the defense of misrepresentation in regard to the procurement of the policy, even though the insurer had not inspected the premises prior to issuing the policy.

***1089** While an insurer may be prohibited from asserting the defense of fraud with regard to the insured's overvaluation of the insured property, particularly where the insurer fails to inspect the property prior to the loss, the insurer may be able to use the disparity between the insured's excessive valuation and the actual value of the property for some other purpose. In *Heady v. Farmers Mutual Insurance Co.*, [148] for example, the insurer was prohibited by the Nebraska valued policy statute from asserting the defense of misrepresentation in connection with the alleged overvaluation of the insured property, but was allowed to introduce evidence of the actual value of the property to establish the insured's motive for arson.

2. Increase in Risk

An insurer also may avail itself to a defense, and thereby defeat recovery, where the insured has increased the risk on the insured property without the insurer's knowledge or consent. The Ohio valued policy statute, for example, expressly affords the increase in risk defense when it states that "[i]n the absence of *any change increasing the risk without the consent of the insurers ...*

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in the case of total loss, the whole amount mentioned in the policy or renewal, upon which the insurer received a premium shall be paid."[149]

The insurer raised the increase in risk defense in *Nathan v. St. Paul Mutual Insurance Co.*[150] pursuant to the Minnesota valued policy law, which contained language similar to that found in the Ohio statute referenced above.[151] There, the insured brought an action to recover under a fire policy. The insurer raised several defenses, including that, without its assent, the insured operated a restaurant on the premises, which was insured as a dwelling. The insurer claimed that the operation of the restaurant either altered the situation so as to increase the risk or constituted an attempt to defraud the company. The insurer failed to make an inspection prior to the loss, and it was determined that much of the unfavorable conditions relating to the insured property existed before or at the time the insured applied for insurance and could have been discovered if an inspection had been performed. Accordingly, the insurer was prohibited from using evidence that could have been obtained through an inspection to prove a misrepresentation increasing the risk. The court concluded that the failure ***1090** to inspect cannot put the insurer in any better position than if an inspection had been made.[152] The court further stated, however, that the insurer would not be prevented from introducing evidence relating to any changes subsequent to the date the insurance was issued if the change resulted in an increase in the risk of loss that existed at the time the loss occurred.[153] The court noted that what qualifies as an increase of risk is a question of fact for the jury.[154]

The change in risk, however, must, in general, relate to the physical condition of the insured property. In *Grace v. Westchester Fire Insurance Co.*,[155] the Ohio Court of Appeals held that the mere purchase of additional insurance for a property does not create an increase in risk. The court interpreted the phrase "change increasing the risk" in the Ohio valued policy statute to refer solely to a change in the physical condition of the premises insured.[156]

Those courts addressing the change in risk defense have held that, in order to invoke the defense, there must be a causal connection between the increase in risk and the peril causing the loss.[157] The burden of proving the change in risk defense is on the insurer.[158]

C. *Depreciation*

The face amount of a valued policy also may be reduced by the amount the insured property has depreciated between the time the policy was issued and the loss occurs. The Georgia and Missouri valued policy statues, for example, expressly permit the face amount of the policy to be reduced by whatever depreciation in value may have occurred between the time the policy was issued and the time of loss.[159]

The burden of proving depreciation is on the insurer.[160] Accordingly, if the insurer cannot prove any depreciation in value during the relevant period, there should be a finding that the property is reasonably worth the amount of insurance at the time of loss.[161] Although the insurer may be entitled to reduce the face amount of the policy by the amount of depreciation ***1091** occurring over the relevant period, to the extent it can be proven, the insurer is not allowed to consider the actual value of the property at the time the policy was issued.[162] Accordingly, in the case of overvaluation, depreciation is deducted from the face amount of the policy, not the actual value of the property at the time of loss.[163] It also has been held that the depreciation allowed by a valued policy statute applies only to physical depreciation, as opposed to depreciation in value due to market or economic conditions.[164]

In contrast, some jurisdictions have not allowed the face amount of a valued policy to be reduced by depreciation. In *Arnold v. Liberty Mutual Insurance Co.*,[165] for example, the Louisiana Court of Appeal was called upon to address the issue of depreciation. After studying the statute and cases cited by the insurer, the court concluded that the applicable section of the valued policy law does not allow a deduction for depreciation.[166] Consequently, the trial court's award of a $9,000 depreciation allowance was set aside.[167]

Similarly, in *American Insurance Co. of Newark, N.J. v. Robinson*, [168] the Florida Supreme Court held that the valued policy law does not permit a reduction in the face amount of the policy by reason of depreciation in value due to use, decay, accident, casualties, or otherwise, where the change in conditions was a supervening cause occurring subsequent to delivery of the policy.

D. *Partial Interest of the Insured*

A common issue arising under valued policy statutes is whether an insured with only a partial interest in the insured property is entitled to payment of the face value of the policy in the case of a total loss. Statutes and case decisions that allow a full recovery have been criticized for violating the principle of indemnity, as insureds are essentially permitted to profit from their loss. The counterargument is that, if the insured is paying the insurer a premium equating to the face amount of the policy, the insured should be permitted to recover the policy limit. Those insureds with a partial interest include mortgage, leasehold, vendor, and co-ownership interests. The statutory and case law in the various jurisdictions addressing this issue has not followed a single approach. Rather, three distinct approaches have developed for applying valued policy statutes to insureds with less than a full interest in the insured property.

***1092** Under the first approach, described by certain courts as the North Dakota Rule, [169] insureds receive compensation based on their interest in the property at the time of loss, not to exceed the limit of the policy. This approach has been followed in Florida, Louisiana, Nebraska, and North Dakota. [170]

The North Dakota case that established the Rule is *Koppinger v. Implement Dealers Mutual Insurance*. [171] In *Koppinger*, the insured sold the dwelling at issue to the purchasers, who paid $2,000 cash and gave the insured a note for the $1,500 balance, payable in monthly installments of not less than $25. Subsequent to the purchase, the dwelling was severely damaged by fire. The insurer denied payment to the insured on grounds that the insured no longer owned the property at issue and, therefore, he did not have an insurable interest in the property. In effectuating the sale, however, the insured reserved a vendor's lien to secure the unpaid portion of the note. The Supreme Court of North Dakota determined that, as a result of the vendor's lien, the insured had an insurable interest in the dwelling to the extent of $1,475 at the time of the fire. [172] According to the court, the fact that the insured's interest in the property was less at the time of the fire than it was at the time the policy was issued did not bar recovery by the insured. [173] The court held that the amount of the insured's recovery is the value of his interest in the property at the time of the loss, not to exceed the amount of coverage provided by the policy. [174] Therefore, the insured's interest was the amount of his vendor's lien for the unpaid portion of the note at the time of the fire. [175]

Pursuant to a 1964 amendment to a prior version of the Louisiana valued policy law, the Louisiana legislature expressly adopted the North Dakota Rule. The amendment remains in the statute today and provides that:

> [t]he liability of the insurer of a policy of fire insurance, in the event of total or partial loss, shall not exceed the insurable interest of the insured in the property unless otherwise provided by law. Nothing in this Section shall be ***1093** construed as to preclude the insurer from questioning or contesting the insurable interest of the insured. [176]

The second approach, labeled the Minnesota Rule [177] by certain courts, provides that insureds may recover the full value of the policy, even though their interest is worth less than the amount of the insurance. Under this approach, which has been followed by Arkansas, Minnesota, Mississippi, and Missouri, the insurer cannot go behind the policy to show that the insured's interest is worth less than the amount of the policy. [178]

The Minnesota Rule derives its name from the Supreme Court of Minnesota's decision in *Board of Trustees of First Congregational Church of Austin v. Cream City Insurance Co. of Milwaukee, Wisconsin*. [179] In *Cream City*, the insured church was completely destroyed by a fire of incendiary origin on April 9, 1956. Prior to the fire, the church was sold to the City of Austin on a contract that would remain executory until June 1, 1956. The church reserved the right to possess the premises until that date. On the date of the fire, the remaining unpaid balance on the contract of deed was $75,000. The church sought to recover the full amount on six fire insurance policies, which exceeded the sum remaining under the contract with the city. The

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insurers argued that the church was not entitled to the full policy limits under the policies because its interest in the property at the time of loss was only $75,000. The court held that, even though the church's actual interest in the destroyed property was less than the amount of the policies, the insured was entitled to be paid the full value of the policies and the insurers were prohibited from going around the polices to show that the insured's interest was less than the full amount of the policies. [180]

This approach has been held not to be inequitable or constitute a wager or gambling contract where the insurer enters into the contract of insurance "with its eyes open" and receives a premium from the insured with full knowledge of the situation. In *Mississippi Fire Insurance Co. v. Planters Bank*, [181] the Supreme Court of Mississippi stated:

> ***1094** In the case before us, the insurance company accepted the risk, received the premium, with full information that it was insuring the leased premises in favor of the lessee, and knew the amount named in the face of the policy would, under the statute, be recoverable in the event of a total loss. In such a case we are not prepared to say there exists a public evil that should vitiate the contract as being against public policy. [182]

The final approach also allows for the payment of the full policy limits, but only where insureds have fully disclosed their interest in the insured property to the insurer at the time the insurance was purchased. This approach has been followed in South Carolina, South Dakota, and Wisconsin. [183] The Supreme Court of South Dakota utilized this approach in *Hight v. Maryland Insurance Co*. [184] In *Hight*, the insured's building was totally destroyed by fire. The insurer issuing the fire policy that covered the building argued that the policy was void because, among other things, the insured did not own the building in fee simple. The insured contended that he communicated all facts relating to his interest in the building to the insurer's general agent and, therefore, the insurer had full knowledge of the situation when it issued the policy. The insured also claimed that he was entitled to the $1,000 face value of the policy. Finding that the insurer was estopped from arguing that the policy was void and the face amount of the policy was owed to the insured, the Supreme Court of South Dakota stated:

> In the case at bar the insurer knew the status of the title, having received the letter giving the particulars. It would, therefore, seem that the amount of coverage of $1,000 was the value intended by both the parties to be paid by the insurer in case of a total loss, and it fixed a just standard and measure of the indemnity. This is not a case of fraud in the over-valuation and we must, therefore, hold that the respondent was entitled to recover the whole amount as found by the trial court. [185]

E. *Multiple Policies Covering a Single Property*

When multiple property insurers insure the same risk in the same property and a total loss occurs under the valued policy law, the issue arises as to whether the insured is entitled to recover the aggregate amount of insurance or whether the insurer is entitled to prorate payment under the policy's ***1095** "other insurance" provision. The various valued policy jurisdictions have not taken a consistent view on the issue and three approaches have emerged, which are similar to those used where an insured has only a partial insurable interest. As with the partial insurable interest, the question arises as to whether the insured should be allowed to profit by recovering the full limit of all policies when the actual value of the insured property is much less, thereby violating the principle of indemnity. The countervailing question is whether the insurer should be spared of paying its full limit, particularly where it has charged a premium to the insured commensurate with that limit.

One approach, which adheres strictly to the nature and purpose of the valued policy laws, is that the insured is entitled to aggregate all policies, irrespective of whether the insurer is aware of the other insurance, with each insurer liable for the full amount of its policy, even if the amount paid exceeds the value of the property. This approach is based on the view that the insurer consented to the policy limit and collected a premium from the insured commensurate with that amount. It is also based on valued policy doctrine that the amount of insurance is fixed and conflicting policy provisions, such as the "other insurance" provision, are void.

St. Paul Reinsurance Co., Inc. v. Irons [186] is illustrative of this first view or approach. In *Irons*, the insured bought two insurance policies to cover her bar and grill. Following the destruction of the insured building by fire, the insured sought to collect on both

policies. Both insurers agreed to pay, but only their pro-rata shares pursuant to the other insurance clauses in their respective policies. The insured brought suit against both insurers in separate actions, arguing that the existence of other insurance did not prevent the insurers from being obligated to pay the face value of the policies under the Arkansas valued policy statute. The trial court granted summary judgment to the insured in both actions and only one insurer appealed. The insurer's sole argument on appeal was that, notwithstanding the language of the valued policy statute, it would be against public policy to allow the insured to receive a double recovery by insuring property with multiple policies. The insured counterargued that there was no authority in Arkansas to support the view that the valued policy statute is suspended in cases of concurrent insurance insuring the same insurable interest.

The Supreme Court of Arkansas, acknowledging that the issue before the court was one of first impression, was urged by the insurer to adopt the reasoning of an Arkansas federal district court decision, which had distinguished a prior Arkansas federal district court case and Arkansas Supreme ***1096** Court decision interpreting the Arkansas valued policy statute to permit payment of the face amount of all policies where a single piece of property was insured by multiple policies. In distinguishing the cases, the federal district court reasoned:

> In spite of the all-inclusive language of those cases, the court doubts that the Arkansas Supreme Court, when squarely faced with this issue, would allow what is clearly and blatantly a double recovery of the loss of one insurable interest. To do so would be to allow something akin to a lottery or wager. One property owner with one insurable interest could obtain multiple policies insuring the property at its full value and then wait for (and perhaps hope for) a fire, with the attendant temptation to "help the odds." [187]

The Arkansas high court found that the federal district court's distinction was flawed in that it failed to consider that, in each of those cases, like the case before it, there was one parcel of property insured by multiple policies. [188] The court ruled that, under the valued policy statute, it is immaterial who applies for coverage or who recovers under the policy when there is a total loss. [189] The court held that the insurer's attempt to go behind its policy and limit the insured's recovery was in direct conflict with the valued policy statute and ultimately affirmed the trial court's order of summary judgment for the insured. [190] The court also noted that any objections to the court's application of the valued policy statute should be taken up with the legislature, not the courts. [191]

The rationale for allowing recovery of the aggregate amount of insurance was succinctly explained in *Millers' Mutual Insurance Ass'n of Illinois v. La Pota*: [192]

> This is not an unfair scheme, as the insured is stating the limits of his recovery and at the same time the insurer is basing his premium charges on the extent of his maximum exposure. When the total loss occurs neither can contend the value of the destroyed property is any different from what they had previously specified. When multiple policies are permissible, as here, the same principles apply. The aggregate liability is the total of the various values specified and for which an appropriate premium has been paid. [193]

A second approach is to allow recovery of the aggregate amount of insurance, but only after full disclosure by the insured to each insurer. The ***1097** Florida and Georgia valued policy statutes expressly address this issue, requiring disclosure of other policies in order to recover the aggregate amount of insurance. [194] The Florida statute, for example, provides, in pertinent part, as follows:

> (3) The provisions of subsections (1) (payment of face amount of the policy) and (2) do not apply when:
>
> (a) Insurance policies are issued or renewed by more than one company insuring the same building, structure, mobile home, or manufactured building and the existence of such additional insurance is not disclosed by the insured to all insurers issuing such policies. [195]

Therefore, under this second approach, if several property insurance policies are written in connection with a building after full disclosure by the insured and the building is totally destroyed by fire, the policies are governed by the valued policy statute and the aggregate amount of insurance is conclusive as to the true value of the property. Consequently, each insurer is liable for the face amount of its policy, notwithstanding "other insurance" clauses in the policies attempting to limit the liability of the insurer to a lesser amount. On the other hand, if the insured fails to make disclosure, the aggregate policy limits are unavailable and recovery will likely be on a pro-rata basis in accordance with the policy provisions.

A third approach is that the valued policy law does not apply under such circumstances, and the "other insurance" provision in the policy controls, generally allowing for a proportionate share of the loss among the policies. The West Virginia valued policy statute, for example, states that "[t]his section does not apply where such insurance has been procured from two or more insurers covering the same interest in such real property." [196]

South Carolina also views multiple policies as being contributory or pro rata. [197] The South Carolina valued policy statute states, in relevant part:

> If two or more policies are written upon the same property, they are considered to be contributive insurance, and, if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insurer and the insured, each insurer, in the event of a total or partial loss, is liable for its pro rata share of insurance. [198]

Under North Dakota's valued policy statute, "[i]n case of double insurance, each insurer shall contribute proportionally toward the loss without ***1098** regard to dates of insurance policies." [199] Similarly, South Dakota's statute provides that "[i]f two or more policies are written upon the same property interest, each insurer shall pay only the proportion of the cost of the loss that the limit of liability under its policy bears to the total amount of insurance covering the loss." [200]

F. *Total Loss Caused Partially by a Covered Peril*

The issue of whether a valued policy statute applies to a total loss caused only partially by covered peril came to prominence on a large scale as a result of the relatively recent hurricane activity in Florida and Louisiana. The vast devastation caused by these storms generated enormous uninsured loss exposures. Faced with inadequate or no flood insurance, many insureds with total losses in Florida and Louisiana attempted to use their respective valued policy statutes to pay policy limits under wind and homeowners policies even though their losses were caused primarily by a peril not covered by their policies, namely flood. The insurers opposed the insureds' efforts in this regard, arguing that the valued policy laws do not apply unless the total loss is caused entirely by a covered peril. As a result of the dispute, numerous lawsuits, including class and mass actions, were spawned. The defining Florida case, *Mierzwa v. Flood Windstorm Underwriting Ass'n*, [201] agreed with the insureds, while the leading Louisiana case, *Chauvin v. State Farm Fire & Casualty Co.*, [202] ruled in favor of the insurers.

This issue came to the forefront in Florida after Hurricane Irene in *Mierzwa*. In *Mierzwa*, the insured homeowner had wind insurance with one insurer and flood with another. The wind insurer's policy expressly excluded damage by flood and contained an anti-concurrent causation clause excluding coverage for any damage other than wind. The insured's home was severely damaged by wind and water as a result of Hurricane Irene and subsequently condemned by local authorities on the basis that the cost of repairs for the damage exceeded half the value of the building. The insured made claims under both policies. The insured claimed that Florida's valued policy law obligated the wind insurer to pay the face amount of the policy, notwithstanding the fact that multiple policies covered the home and the wind only partially caused the total damage to the property. The wind insurer argued that it was liable only for the damage caused by wind, its contractually covered peril. The trial court agreed with the insurer.

***1099** On appeal, the Florida district court of appeal reversed the trial court and ruled for the insured. The court found that the trial court erred by limiting the insurer's responsibility to a pro-rata apportionment based on the portion of the loss attributable

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to wind, the covered peril. The court awarded the insured the face value of the policy. In awarding the insured the policy limit, the court determined that the language of the valued policy statute did not require that the covered peril cause the entire loss. [203] Accordingly, the court ruled that if the insurer has any liability, even a fractional share of the total damage, it is liable for policy limits pursuant to the valued policy law. [204]

The wind insurer also argued that it had no liability for the face value of the policy pursuant to the anti-concurrent causation clause, which precludes coverage for perils excluded under the policy, such as the peril of water, when they combine with perils covered by the policy. Because wind only caused 57 percent of the damage, with the remainder caused by flood, the insurer argued that it was only responsible for paying a pro-rata portion of the total damage to the insured's home. The court disagreed, finding that the anti-concurrent causation clause does not state that it takes precedence over the requirements of the valued policy law. [205] The court concluded that, because the anti-concurrent causation clause is silent on whether it overrides the valued policy law, there is a conflict between the valued policy law and the anti-concurrent causation clause, which creates an ambiguity in the policy. [206] The court adopted the interpretation that would give the greatest indemnity to the insured, which meant applying the valued policy law as written. [207]

The wind insurer further argued that the anti-concurrent causation clause addresses causation and not valuation of damages and, therefore, it is not in conflict with the valued policy law. The court also rejected this argument, pointing out that there was no expressly worded limitation in the policy. [208] The court made it clear, however, that it was not deciding whether such a limitation, if it existed, would be allowed under the valued policy statute. [209]

The court also determined that, because the wind insurer failed to produce any evidence showing that wind damage alone could not have possibly resulted in the home's condemnation, the insured was entitled to the face value of the policy due to wind damage. [210]

***1100** The *Mierzwa* decision conveyed the message to insureds in Florida that flood insurance was not necessary in the case of a total loss, as water damage could be covered under a wind or homeowners policy when any portion of the loss was caused by a covered peril. It also led to the prospect of insurer withdrawal from the state and dramatic rate/premium increases under wind and homeowners policies due to the new exposure for water/flood damage. In response, the Florida legislature amended the valued policy statute in 2005 to provide for a proportional sharing of damages when a total loss results, in part, from a noncovered peril. [211] In addition, the amendment specifically provides that if a covered peril alone would have caused the total loss, the requirement to pay the face value of the policy still applies. [212] Furthermore, the amendment to the statute does not apply retroactively, but rather only to claims filed after June 1, 2005, the effective date of the amendment. [213]

While the Florida legislature dealt with *Mierzwa* on a prospective basis, the Supreme Court of Florida addressed it retroactively. In *Florida Farm Bureau Casualty Insurance Co. v. Cox*, [214] the Supreme Court of Florida disapproved of *Mierzwa*, holding that the plain meaning of the 2004 version of the Florida valued policy law (pre-June 1, 2005, amendment), which was intended to address valuation of a total loss and not causation, did not require a homeowner insurer to pay the face amount of the policy for a total loss caused by the covered peril of wind and the excluded peril of water, as the insurer did not receive a premium to cover damages caused by water.

As discussed above, the U.S. District Court for the Eastern District of Louisiana in *Chauvin* ruled in favor of the insurers, finding the decision in *Mierzwa* unpersuasive, repudiated by the Florida legislature, and rejected by a sister court. [215] In *Chauvin*, the insureds, following the rationale of the court of appeals in *Mierzwa*, contended that the Louisiana valued policy law entitled them to the face value of their policies, irrespective of the proximate cause of their losses, so long as a covered peril caused some damage to the insured property. The insurers argued, among other things, like the insurers in *Mierzwa* and *Turk v. Louisiana Citizens Property Insurance Corp.*, [216] that the valued policy law does not allow recovery of the full value of the insureds' policies where a covered peril caused only a partial loss to the property.

***1101** The court concluded that the valued policy law, with its reference to "any covered loss," was ambiguous, as the statute could be interpreted to support the positions of both the insureds and the insurers. [217] A literal reading of the statute supported

the insureds' view that the statute requires insurers to pay any amount of covered loss at the full value of the policy.[218] It also could be read to require that the total loss also be a covered loss, as argued by the insurers.[219]

The court also noted that, even if the valued policy law were clear and unambiguous, rules of statutory construction require the court to avoid an interpretation that would lead to absurd consequences.[220] The court determined that the plaintiffs' interpretation of the statute would lead to absurd consequences or results, which must be rejected. By way of example, the court stated:

> If the VPL has the meaning plaintiffs ascribe to it, an insured holding a valued homeowner's policy that covered wind damage but specifically excluded flood losses could recover the full value of his policy if he lost 20 shingles in a windstorm and was simultaneously flooded under 10 feet of water. The insurer would thus have to compensate the covered loss of a few shingles at the value of the entire house. In effect, the insurer would be required to pay for damage not covered by the policy and for which it did not charge a premium. Such a result would be well outside the boundaries of any party's reasonable expectation of the operation of the insurance contract. The Court seriously doubts that the Louisiana legislature intended such a commercially unreasonable result when it adopted the VPL.[221]

The court recognized that the design and intent of the valued policy law was to fix the valuation of losses and not expand coverage to excluded perils.[222] As such, the insureds' interpretation of the statute would run afoul of this intent.[223] The court also noted that, if insurers were required to pay the full amount of the policy for partially covered losses, the likely result would be dramatically higher premiums.[224] The insureds appealed the federal district court's decision to the U.S. Court of Appeals for the Fifth Circuit and the Fifth Circuit affirmed.[225]

Given that the Fifth Circuit's decision in *Ckauvin* is not binding on the Louisiana state courts, insureds have attempted to bring the "total loss ***1102** caused only partially by a covered peril" issue to the Louisiana appellate courts with the hope that an intermediate appellate court and/or the state high court would reject the reasoning in *Chauvin* and hold in their favor. To date, the Supreme Court of Louisiana has not had the opportunity to address the issue, even though it appeared that it might in *Landry*. In *Landry*, the trial court granted summary judgment to the insureds, ruling that the insurer is liable to the insureds for the face amount of the policy even though the covered peril of wind was not the sole cause of the total loss. The Louisiana Court of Appeal reversed the trial court's grant of summary judgment to the insureds and amended, rendered, and remanded the case for a determination of whether the insurer could prove that flood water (a noncovered peril) was the "efficient proximate cause" of the insureds' total loss.[226] On appeal, the Supreme Court of Louisiana did not need to reach the issue of whether a total loss must be caused solely by a covered peril. Because the homeowners policy and insurance application provided for an alternative method of valuing the insured's loss, the court ruled that the valued policy law did not apply to the insureds' claims.[227] The court affirmed the court of appeal's judgment reversing the judgment of the trial court, but the portion of the court of appeal's judgment interpreting and applying the valuation provisions of the Louisiana valued policy law to the facts of the case was vacated.[228] The case was remanded to the trial court for a determination consistent with the high court's opinion.[229]

It remains to be seen how the Supreme Court of Louisiana will address this issue if presented with it or whether the Louisiana legislature will react like the Florida legislature, in response to *Mierzwa*, and amend the statute to clarify the issue.

V. CONCLUSION

Although valued policy statutes have the same general applications and purposes, as demonstrated in this article, they can have significant differences with regard to covered perils, covered property, the test for determining total loss, and the amount recoverable. As such, the practitioner should closely examine the valued policy statute and interpretative case law of the applicable jurisdiction.

As discussed in this article, a lack of clarity in the statutes with regard to covered perils and the amount recoverable can lead to disputes and litigation. ***1103** The apparent lack of clarity in the Louisiana valued policy statute as to whether it applies only

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to the peril of fire or permits an insured to recover the face amount of the policy when a total loss is caused only partially by a covered peril has led to a tremendous amount of litigation in Louisiana between insurers and their policyholders in the aftermath of Hurricane Katrina. These issues remain unresolved as a matter of Louisiana law to this day. Valued policy jurisdictions outside of Florida, where there has already been legislative and judicial clarification, that are prone to hurricane losses may wish to reexamine their valued policy statutes to ensure that they are clear and unambiguous with regard to applicable perils and total loss caused by covered and noncovered perils so as to avoid the large-scale litigation that has occurred in Louisiana. For those jurisdictions with statutes that are less than clear and where there has been no judicial clarification, it may be prudent for their legislatures to be proactive, rather than reactive like the Florida legislature after *Mierzwa* or perhaps the Louisiana legislature if it should choose to amend its statute in response to the urgings of the courts in *Caruso* and *Landry*, and clarify their statutes by amendment prior to the next catastrophic hurricane.

Footnotes

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1 AKK. CODE ANN. § 23-88-101 (2006); CAL. INS. CODE § 2052 (West 2007); FLA. STAT. ANN. § 627.702 (2006); GA. CODE ANN. § 33-32-5 (2006); IOWA CODE ANN. § 515.135 (2007); KAN. STAT. ANN. § 40-905 (2005); LA. REV. STAT. ANN. § 22:695 (2006); MINN. STAT. ANN. § 65A.08 (2006); MISS. CODE ANN. § 83-13-5 (2006); MO. REV. STAT. § 379.140 (2006); MONT. CODE ANN. § 33-24-102 (2005); NEB. REV. STAT. § 44-501-02 (2006); N.H. REV. STAT. ANN. § 407:11 (2006); N.D. CENT. CODE § 26.1-39-05 (2005); OHIO REV. CODE ANN. § 3929.25 (LexisNexis 2006); S.C. CODE ANN. § 38-75-20 (2006); S.D. CODIFIED LAWS § 58-10-10 (2006); TENN. CODE ANN. § 56-7-802 (2006); VT. STAT. ANN. INS. CODE § 862.053 (2006); W.VA. CODE § 33-17-9 (2007); WIS. STAT. ANN. § 632.05 (2005).

2 *See, e.g.*, Harvey v. Gen. Guar. Ins. Co., 201 So. 2d 689, 691 (La. Ct. App. 1967). By way of contrast, California's valued policy law can be invoked at the option of the insured by paying the cost of an examination by the insurer. *See* CAL. INS. CODE § 2052. The current Louisiana statute has an exception when the insurance policy and application provide for an alternative method of loss computation. *See* LA. REV. STAT. ANN. § 22:695(A).

3 *See, e.g.*, Riddick v. Yorkshire Ins. Co., 52 S.W.2d 166, 167 (Tenn. 1932); *see also* Harrison v. Am. Motorists Ins. Co., 245 So. 2d 577, 578 (Miss. 1971).

4 *See, e.g.*, Aetna Ins. Co. v. Heidelberg, 72 So. 852, 854 (Miss. 1916).

5 *See, e.g.*, Hensley v. Farm Bureau Mut. Ins. Co., 420 S.W.2d 76, 80-81 (Ark. 1967); *see also* Republic Ins. Co. v. Am. Pub. Life Ins. Co., 246 So. 2d 410 (La. Ct. App. 1971); Nicholas v. Granite Fire Ins. Co., 24 S.E.2d 280, 283 (W. Va. 1943) (insurance company has no right to arbitrate amount of loss, even though policy provides for it).

6 143 S.E.2d 122 (S.C. 1965).

7 721 P.2d 303, 307 (Mont. 1986).

8 *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Griffin Constr. Co., 993 S.W.2d 485, 487 (Ark. 1999); *see also* Foremost Ins. Co. v. Lowery, 617 F. Supp 521, 525 (S.D. Miss. 1985).

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9 *See, e.g.*, Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. Dist. Ct. App. 1964).

10 *See, e.g., Griffin Constr. Co.*, 993 S.W.2d at 487; *see also* Heady v. Farmers Mut. Ins. Co., 349 N.W.2d 366 (Neb. 1984).

11 *See, e.g., Lowery*, 617 F. Supp at 525.

12 *See, e.g., Heady*, 349 N.W.2d at 370.

13 *See, e.g.*, Nathan v. St. Paul Mut. Ins. Co., 68 N.W.2d 385, 387 (Minn. 1955); *see also Boswell*, 167 So. 2d at 784.

14 *See, e.g., Boswell*, 167 So. 2d at 784.

15 *Id*.

16 NEB. REV. STAT. § 44-501-02 (2006) (emphasis added).

17 *See, e.g.*, TENN. CODE ANN. § 56-7-802 (2006).

18 CAL. INS. CODE § 2052 (West 2007); GA. CODE ANN. § 33-32-5(a) (2006); LA. REV. STAT. ANN. § 22:695(A) (2006); MISS. CODE ANN. § 83-13-5 (2006); MO. REV. STAT. § 379.140 (2006); S.C CODE ANN. § 38-75-20 (2006); TENN. CODE ANN. § 56-7-802 (2006); VT. STAT. ANN. INS. CODE § 862.053(a) (2006). Whether the Louisiana statute applies only to the peril of fire is a disputed issue under Louisiana law.

19 FLA. STAT. ANN. § 627.702(1)(a) (2006); IOWA CODE ANN. § 515.135 (2007); MINN. STAT. ANN. § 65A.08 subd. 2(a) (2006); MONT. CODE ANN. § 33-24-102 (2005); N.D. CENT. CODE § 26.1-39-05(1) (2005); W. VA. CODE § 33-17-9 (2007); WIS. STAT. ANN. § 632.05(1) (2005).

20 ARK. CODE ANN. § 23-88-10(A) (2006); KAN. STAT. ANN. § 40-905(a)(1) (2005); NEB. REV. STAT. § 44-501-02 (2006); N.H. REV. STAT. ANN. § 407:11(1) (2006); OHIO REV. CODE ANN. § 3929.25 (LexisNexis 2006); S.D. CODIFIED LAWS § 58-10-10 (2006).

21 889 F.2d 776, 780 (8th Cir. 1989) (applying Arkansas law).

22 348 N.E.2d 374, 378 (Ohio Ct. App. 1973).

23 *Id*.

24 450 F. Supp. 2d 660 (E.D. La. 2006).

25 *Id*. at 664.

26 *Id*. at 662.

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27 *Id*. at 669.

28 Chauvin v. State Farm Fire & Cas. Co., 495 F.3d 232 (5th Cir. 2007).

29 No. 06-2613, 2007 WL 625830 (E.D. La. Feb. 26, 2007).

30 *Id*. at *5.

31 *Id*. at *10.

32 *Id*.

33 983 So. 2d 66 (La. 2008).

34 *Id*. at 73.

35 Landry v. Louisiana Citizens Prop. Ins. Co., 964 So. 2d 463, 468 n.2 (La. App. 2007).

36 *Landry*, 983 So. 2d at 66.

37 *Id*. at 76 n.10.

38 ARK. CODE ANN. § 23-88-101(a) (2006); IOWA CODE ANN. § 515.135 (2007); MINN. STAT. ANN. § 65A.08 subd. 2(a) (2006); N.H. REV. STAT. ANN. § 407:11(I) (2006).

39 CAL. INS. CODE § 2052 (West 2007); MISS. CODE ANN. § 83-13-5 (2006); OHIO REV. CODE ANN. § 3929.25 (LexisNexis 2006); TENN. CODE ANN. § 56-7-802 (2006).

40 KAN. STAT. ANN. § 40-905(a)(1) (2005); NEB. REV. STAT. § 44-501-02 (2006); N.D. CENT. CODE § 26.1-39-05(1) (2005); S.D. CODIFIED LAWS § 58-10-10 (2006); VT. STAT. ANN. INS. CODE § 862.053(a) (2006); W.VA. CODE § 33-17-9 (2007).

41 FLA. STAT. ANN. § 627.702(1)(a) (2006).

42 LA. REV. STAT. ANN. § 22:695(A) (2006).

43 MONT. CODE ANN. § 33-24-102 (2005).

44 MO. REV. STAT. § 379.140 (2006); S.C CODE ANN. § 38-75-20 (2006).

45 GA. CODE ANN. § 33-32-5(a) (2006); WIS. STAT. ANN. § 632.05(1) (2005).

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46 ARK. CODE ANN. § 23-88-101(b) (2006); FLA. STAT. ANN. § 627.702(1)(a) (2006); N.D. CENT. CODE § 26.1-39-05(2) (2005); S.C. CODE ANN. § 38-75-20 (2006); VT. STAT. ANN. INS. CODE § 862.053(a). The Florida statute's exclusion of personal property does not apply to mobile homes and manufactured buildings as statutorily defined. *See* FLA. STAT. ANN. § 627.702(5) (2006).

47 315 S.W.2d 9 (Tenn. Ct. App. 1958).

48 229 So. 2d 576 (Miss. 1969).

49 Stahlberg v. Travelers Indem. Co., 568 S.W.2d 79, 83 (Mo. Ct. App. 1978); Duckworth v. USF&G, 452 S.W.2d 280, 282-85 (Mo. Ct. App. 1970).

50 55 P. 335 (Kan. 1898).

51 *Id*. at 335-36.

52 *Id*.

53 496 P.2d 1161 (Mont. 1972).

54 *Id*. at 1168.

55 *See* 12 COUCH ON INSURANCE § 175:65 (3d ed. 2006).

56 Greer v. Owners Ins. Co., 434 F. Supp. 2d 1267, 1279 (N.D. Fla. 2006): McManus v. Travelers Ins. Co., 360 So. 2d 207, 211 (La. Ct. App. 1978).

57 Bennett v. Imperial Ins. Co., 606 S.W.2d 7, 9 (Tex. App. 1980); Home Ins. Co. of New York v. Cole, 115 S.W.2d 267, 269 (Ark. 1938).

58 Unified Sch. Dist. v. St. Paul Fire & Marine Ins. Co., 627 P.2d 1147, 1150 (Kan. Ct. App. 1981).

59 *See, e.g.*, Lafayette Fire Ins. Co. v. Camnitz, 149 So. 653, 654-55 (Fla. 1933); *see also* 12 COUCH ON INSURANCE, *supra* note 55, §§ 175:70, 175:72.

60 259 F. Supp. 934 (D.P.R. 1966) (applying the law of various U.S. jurisdictions).

61 *Id*. at 936.

62 *Id*.

63 *Lafayette Fire Ins.*, 149 So. at 654-55.

64 *Id*. at 654.

65 477 P.2d 115 (Mont. 1970).

66 *Id*. at 118.

67 *Id*.

68 12 S.W.2d 688 (Ky. Ct. App. 1928).

69 *Id*. at 690.

70 *Id*.

71 *Id*. at 691.

72 *Id*.

73 *Id*.

74 *Id*.

75 575 S.W.2d 79 (Mo. Ct. App. 1978).

76 *Id*. at 83.

77 *Id*.

78 *Id*. at 84.

79 *Id*.

80 *Id*.

81 *Id*.

82 *Id*. at 85.

83 *See, e.g.*, Bennett v. Imperial Ins. Co., 606 S.W.2d 7, 9 (Tex. App. 1980); *see also* 12 COUCH ON INSURANCE, *supra* note 55, § 175:74.

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84 *See, e.g.*, Home Ins. Co. of New York v. Cole, 115 S.W.2d 267, 269 (Ark. 1938); *see also* 12 COUCH ON INSURANCE, *supra* note 55, § 175:74.

85 *Id*.

86 *See, e.g.*, Home Ins. Co. v. Greene, 229 So. 2d 576, 579 (Miss. 1969).

87 *Id.*.

88 159 So. 545 (Miss. 1935).

89 *Id*. at 548 (quoting Nw. Mut. Life Ins. Co. v. Rochester German Ins. Co., 88 N.W. 265, 271 (Minn. 1901)).

90 *Id*.

91 *Greene*, 229 So. 2d at 579.

92 698 S.W.2d 271 (Tex. App. 1985).

93 *Id*. at 275.

94 *Id*.

95 *Id*.

96 *Id*.

97 606 S.W.2d 7 (Tex. App. 1980).

98 *Id*. at 10-11.

99 *Id*. at 11.

100 *See generally* 12 COUCH ON INSURANCE, *supra* note 55, § 175:80.

101 *Id*.

102 309 So. 2d 776 (La. Ct. App. 1975).

103 *Id*. at 778.

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104 5 N.W. 12 (Wis. 1880).

105 *Id*. at 23.

106 139 S.W. 265 (Mo. Ct. App. 1911).

107 *Id*. at 267.

108 *Id*.

109 *Id*.

110 *Id*. at 268.

111 *Id*.

112 *See* 12 COUCH ON INSURANCE, *supra* note 55, § 175:79.

113 24 S.E.2d 280 (W. Va. 1943).

114 *Id*. at 283.

115 *Id*. at 284.

116 234 N.W. 718, 719 (Wis. 1931).

117 *Id*.

118 *Id*.

119 *Id*.

120 67 P. 879, 882 (Kan. 1902).

121 Lewis v. W. Assurance Co., 130 S.W.2d 982, 984 (Term. 1939); Riddick v. Yorkshire Ins. Co., 52 S.W.2d 166, 169 (Tenn. 1932).

122 GA. CODE ANN. § 33-32-5(a) (2006); KAN. STAT. ANN. § 40-905(b)(1) (2005); TENN. CODE ANN. § 56-7-802 (2006).

123 Nathan v. St. Paul Mut. Ins. Co., 68 N.W.2d 385 (Minn. 1955); *see also* TENN. CODE ANN. § 56-7-803 (2006).

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124 *See, e.g., Lewis*, 130 S.W.2d at 983-84.

125 *See, e.g.*, Newark Fire Ins. Co. v. Martineau, 170 S.W.2d 927, 930-31 (Tenn. Ct. App. 1943).

126 TENN. CODE ANN. § 56-7-802 (2006).

127 *Id*. § 56-7-803.

128 *Id*.

129 KAN. STAT. ANN. § 40-905(b)(1) (2005) (this paragraph does not apply to a loss by fire caused by lightning). Similarly, under the North Dakota statute, except for unchanged renewal policies or policies with inflation adjustment limits, if the covered loss occurs within ninety days after the issuance of the policy or after the policy limits were increased by 25 percent or more at the insured's request, the loss payable to the insured is the full value of the policy, or the actual cash value or replacement cost of the property, whichever is less. *See* N.D. CENT. CODE § 26.1-39-05(1)(a) (2005).

130 GA. CODE ANN. § 33-32-5(a) (2006).

131 TENN. CODE ANN. § 56-7-802 (2006).

132 *See* KAN. STAT. ANN. § 40-905(b)(1) (2005).

133 IOWA CODE ANN. § 515.135 (2007).

134 *See id*. § 515.136; *see also* Joy et al. v. Security Fire Ins. Co. of Davenport, 48 N.W. 1049 (Iowa 1891).

135 OHIO REV. CODE ANN. § 3929.25 (LexisNexis 2006) (emphasis added).

136 25 F.2d 40 (8th Cir. 1928) (applying Nebraska law).

137 *Id*. at 42.

138 *Id*.

139 463 S.W.2d 590 (Mo. Ct. App. 1971).

140 *Id*. at 595.

141 252 N.W.2d 302 (N.D. 1977).

142 N.D. CENT. CODE § 26.1-39-05(1) (2005).

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143 *Zuraff*, 252 N.W.2d at 306-07.

144 *Id*. at 307.

145 *Id*. at 309.

146 *Id*.

147 338 F. Supp. 910 (E.D. Mo. 1972).

148 349 N.W.2d 366 (Neb. 1984).

149 OHIO REV. CODE ANN. § 3929.25 (LexisNexis 2006).

150 68 N.W.2d 385 (Minn. 1955).

151 MINN. STAT. ANN. § 65A.08(2)(a) (2006) (providing, in relevant part, that "[i]n the absence of any change increasing the risk, without the consent of the insurer, of which the burden of proof shall be upon it, ... the insurer shall pay the whole amount mentioned in the policy ... upon which it receives a premium, in case of total loss, and in case of partial loss, the full amount thereof").

152 *Nathan*, 68 N.W.2d at 390.

153 *Id*.

154 *Id*.

155 219 N.E.2d 227 (Ohio Ct. App. 1964).

156 *Id*. at 231.

157 *See, e.g.*, Marino v. Nat'l Fire Ins. Co. of Hartford, Conn., 172 N.E.2d 141, 143 (Ohio Ct. App. 1959).

158 Nathan v. St. Paul Mut. Ins. Co., 68 N.W.2d 385, 390 (Minn. 1955).

159 GA. CODE ANN. § 33-32-5(a) (2006); MO. REV. STAT. § 379.140 (2006).

160 *See, e.g.*, MO. REV. STAT. § 379.140 (2006); *see also* Duckworth v. USF&G, 452 S.W.2d 280 (Mo. Ct. App. 1970).

161 See, *e.g., Duckworth*, 452 S.W.2d at 285.

162 *See, e.g.*, Crewse v. Shelter Mut. Ins. Co., 706 S.W.2d 35, 42 (Mo. Ct. App. 1985).

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163 *See, e.g., id*.

164 *See, e.g.*, London & Provincial Marine & Fire Ins. Co. of London, England v. Mullins, 105 S.W.2d 1057, 1061-62 (Ky. Ct. App. 1937).

165 469 So. 2d 1155 (La. Ct. App. 1985).

166 *Id*. at 1158.

167 *Id*.

168 163 So. 17, 19 (Fla. 1935).

169 *See* Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 783 (Fla. Dist. Ct. App. 1964); *see also* Smith v. Nationwide Fire Ins. Co., 564 F. Supp. 350, 351 (D.C. Fla. 1983).

170 *See* Travelers Indem. Co. v. Duffy's Little Tavern, 478 So. 2d 1095 (Fla. Dist. Ct. App. 1985); *see also* Roberts v. Houston Fire & Cas. Co., 168 So. 2d 457 (La. Ct. App. 1964); Ins. Co. of N. Am. v. County of Hall, 198 N.W.2d 490 (Neb. 1972); Koppinger v. Implement Dealers Mut. Ins., 122 N.W.2d 134 (N.D. 1963).

171 *Koppinger*, 122 N.W.2d at 134.

172 *Id*. at 138.

173 *Id*.

174 *Id*. at 139.

175 *Id*.

176 LA. REV. STAT. ANN. § 22:695(C) (2006).

177 *See* Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 783 (Fla. Dist. Ct. App. 1964); *see also* Smith v. Nationwide Fire Ins. Co., 564 F. Supp. 350, 351 (N.D. Fla. 1983).

178 *See* Gravaning v. Am. Druggists' Ins. Co., 534 S.W.2d 754 (Ark. 1976); Mississippi Farm Bureau Mut. Ins. Co. v. Todd, 492 So. 2d 919 (Miss. 1986); DeWitt v. Am. Family Mut. Ins. Co., 667 S.W.2d 700 (Mo. 1984); Bd. of Trs. of First Congregational Church of Austin v. Cream City Mut. Ins. Co. of Milwaukee, Wisconsin, 96 N.W.2d 690 (Minn. 1959).

179 *Cream City*, 96 N.W.2d 690.

180 *Id*. at 695.

181 103 So. 84 (Miss. 1925).

182 *Id*. at 86.

183 *See* Holden v. Hanover Fire Ins. Co., 128 F. Supp. 527 (W.D.S.C. 1955); Hight v. Maryland Ins. Co., 10 N.W.2d 285 (S.D. 1943); Gimbels Midwest, Inc. v. Nw. Nat'l Ins. Co. of Milwaukee, 240 N.W.2d 140 (Wis. 1976).

184 10 N.W.2d 285.

185 *Id*. at 287.

186 45 S.W.3d 366 (Ark. 2001).

187 Underwriters at Lloyd's London v. Pike, 812 F. Supp. 146, 150 (W.D. Ark. 1993).

188 *Irons*, 45 S.W.2d at 371.

189 *Id*.

190 *Id*.

191 *Id*.

192 197 So. 2d 21 (Fla. Dist. Ct. App. 1967).

193 *Id*. at 24.

194 FLA. STAT. ANN. § 627.702(3)(a) (2006); GA. CODE ANN. § 33-32-5(b)(2) (2006).

195 FLA. STAT. ANN. § 627.702(3)(a) (2006).

196 W.VA. CODE § 33-17-9 (2007).

197 S.C. CODE ANN. § 38-75-20 (2006).

198 *Id*.

199 N.D. CENT. CODE § 26.1-39-05(1)(c) (2005).

200 S.D. CODIFIED LAWS § 58-10-10(4) (2006).

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201 877 So. 2d 774 (Fla. Dist. Ct. App. 2004).

202 450 F. Supp. 2d 660 (E.D. La. 2006).

203 *Mierzwa*, 877 So. 2d at 775-76.

204 *Id*.

205 *Id*. at 777.

206 *Id*.

207 *Id*. at 777-78.

208 *Id*. at 778.

209 *Id*.

210 *Id*. at 779.

211 FLA. STAT ANN. § 627.702(1)(b) (2006).

212 *Id*.

213 *Id*. § 627.702(1)(c).

214 967 So. 2d 815 (Fla. 2007).

215 Chauvin v. State Farm Fire & Cas. Co., 450 F. Supp. 2d 660, 668 (E.D. La. 2006).

216 No. 06-144, 2006 WL 1635677 (W.D. La. June 7, 2006).

217 *Chauvin*, 450 F. Supp. 2d at 666.

218 *Id*.

219 *Id*.

220 *Id*.

221 *Id*.

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222 *Id*. at 667.

223 *Id*.

224 *Id*.

225 Chauvin v. State Farm Fire & Cas. Co., 495 F.3d 232 (5th Cir. 2007).

226 Landry v. Louisiana Citizens Prop. Ins. Co., 964 So. 2d 463, 484 (La. Ct. App. 2007).

227 Landry v. Louisiana Citizens Prop. Ins. Co., 983 So. 2d 66, 83 (La. 2008).

228 *Id*. at 83.

229 *Id*. at 84.

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