# EXPLORING THE APPLICATION OF ACTUAL CASH VALUE VERSUS REPLACEMENT COST VALUE IN FLORIDA PROPERTY INSURANCE CLAIMS

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## INTRODUCTION

In the past two decades, there are perhaps no other contracts that have been subject to as much rigorous scrutiny by Florida courts as property insurance policies. Such policies are contracts of indemnity which provide coverage for the amount necessary to return damaged properties to their pre-loss conditions.[1] The terms, conditions, and other provisions contained within these policies embody the agreement between the parties,[2] and courts interpret them under the standard principles of contract interpretation;[3] however, despite the extensive litigation touching on seemingly all of the long standing, quotidian provisions contained nearly uniformly in every policy, there are still commonly found provisions to these contracts which warrant further examination. Such is the case with the Loss Settlement provision which has been the subject of a number of recent legal opinions.

In this exploration, we will consider the terms of the standard and generally uniform Loss Settlement provision, specifically as it relates to the definitions of the replacement cost value and actual cash value of losses, looking at the both the history of such terms and the more recent

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[1] *See generally Glens Falls Ins. Co. v. Gulf Breeze Cottages*, 38 So. 2d 828, 829 (Fla. 1949); *Sperling v. Liberty Mut. Ins. Co.*, 281 So. 2d 297, 298 (Fla. 1973).

[2] *Imperial Fire Ins. Co. of London v. Coos County*, 151 U.S. 452, 462 (1894).

[3] *American Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d DCA 2006).

applications by courts throughout the state. In doing so, we will attempt to reconcile the various inconsistencies in existing precedent, both inter- and intra-district, examine aspects related to the enforcement of the provision on which no opinions exist, and provide potential solutions to an issue that has quickly become the most hotly contested topic in first party property litigation.

## THE LOSS SETTLEMENT PROVISION

### a. Policy interpretation, generally

Florida law is clear that "insurance contracts must be construed in accordance with the plain language of the policy," and "coverage under an insurance contract is defined by the language and terms of the policy."[4] The Court must construe the homeowner's insurance policy in a reasonable, practical, sensible, and just manner.[5] When interpreting the insurance policy, the Court shall read the policy as a whole to give every provision its "full meaning and operative effect."[6] Absent ambiguity, the Court must give full effect to the terms of the policy through its plain meaning, and the failure to define a term does not create ambiguity.[7] In this light, the Court must give everyday meanings to undefined words, reading the terms of the policy in light of the skill and experience of everyday people, and not create ambiguity in otherwise clear contract provisions.[8]

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[4] *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003) citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *Prudential Property & Casualty Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993); *Seigle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 359 (Fla. 4th DCA 2001); *see also East Florida Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673 (Fla. 3d DCA 2005) and *Commerce Nat'l Bank in Lake Worth v. Safeco Ins. Co. of Am.*, 252 So. 2d 248, 252 (Fla. 4th DCA 1971) (contracts should be construed to give effect to the intent of the parties and the insured's knowledge and understanding of the extent of coverage).

[5] *First Profs. Ins. Co., Inc. v. McKinney*, 973 So. 2d 510, 514 (Fla. 1st DCA 2008).

[6] *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *Riverroll v. Winterthur Int'l Ltd.*, 787 So. 2d 891, 892 (Fla. 3d DCA 2001).

[7] *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005); *Itnor Corp. v. Markel Int'l Ins. Co. Ltd.*, 981 So. 2d 661, 663 (Fla. 3d DCA 2008); *Arias v. Affirmative Ins. Co.*, 944 So. 2d 1195, 1197 (Fla. 4th DCA 2006).

[8] *Direct Gen'l Ins. Co. v. Morris*, 884 So. 2d 1077, 1080 (Fla. 1st DCA 2004); *Siegle v. Progressive Cons. Ins. Co.*, 788 So. 2d 355, 359-60 (Fla. 4th DCA 2001); *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4th DCA 1997).

**b. The Loss Settlement Provision**

The payment of actual cash value until repairs are completed is provided for by Florida statute. Prior to 2011, Section 627.7011, Florida Statutes required payment of "replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property."[9] However, the legislature sought to change same subject to the following analysis:

> Insurance companies assert that the current replacement cost and holdback provisions allow some homeowners to file inflated or even fraudulent claims because they are not required to make needed repairs to their dwellings or replace their personal property if they sustain a loss. Many states require the insurer to pay initially only the actual cash value, and then provide the balance of the replacement cost once the insured has replaced or repaired the property.[10]

Subsequently, the operative statute was amended to read, in pertinent part, as follows:

> (3) In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:
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> (a) For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred.[11]

Insurance policies mirror the sentiment of this statute in their Loss Settlement provisions. A typical the Loss Settlement provision provides, in pertinent part, as follows:

> D. Loss Settlement
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> In this Condition D., the terms "cost to repair or replace" and "replacement cost" do not include the increased costs incurred to comply with the enforcement of any ordinance or law, except to the extent that coverage for these increased costs is provided in E.11. Ordinance Or Law under Section I – Property Coverages. Covered property losses are settled as follows:
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> * * *

[9] Fla. Stat. § 627.7011(3) (2010); *see also Haynes v. Universal Prop. and Cas. Ins. Co.*, 120 So. 3d 651 (Fla. 1st DCA 2013).
[10] Fla. S. Comm. On Banking & Ins., SB 408 (2011) Staff Analysis 5 (Jan. 24, 2011).
[11] Fla. Stat. § 627.7011(3)(a) (2011)-(2022).

2. Buildings covered under Coverage A or B at replacement cost [value] without deduction for depreciation, subject to the following:

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d. "We" will initially pay at least the actual cash value of the damage, less any applicable deductible. "We" will then pay any remaining amounts necessary to perform such repairs as the work is performed and the expenses are incurred . . .[12]

Two terms in this Loss Settlement provision stand out: replacement cost value and actual cash value. While this provision has been deemed unambiguous by courts,[13] these terms, and how to define and apply them, have become subject to extensive litigation. This has resulted in rulings which require a more in-depth examination to determine the legally correct method with which to apply the Loss Settlement provision.

**c. Defining Replacement Cost Value and Actual Cash Value**

In the context of property insurance policies, the replacement cost value, or RCV, is the amount "it would cost to replace the damaged structure on the same premises";[14] however, logic dictates that, as a property ages, so too does it depreciate in value. To that point, "[r]eplacement cost insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property."[15] But insurers are reluctant to issue payment for the full replacement cost disregarding depreciation when there is no requirement that such funds need be utilized for repairs. Enter actual cash value, or ACV, which takes depreciation into consideration.

Historically, the definition of actual cash value, sometimes referred to as the "sound value," referenced the calculation of "replacement cost, less depreciation."[16] This sentiment has held true

[12] *Marquez v. Natl. Fire and Marine Ins. Co.*, 551 F. Supp. 3d 1313, 1318 (S.D. Fla. 2021).
[13] *See*, *e.g.*, *Slayton v. Universal Property & Casualty Insurance Co.*, 103 So. 3d 934 (Fla. 5th DCA 2013).
[14] *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013) *quoting Davis v. Allstate Ins. Co.,* 781 So. 2d 1143, 1144 (Fla. 3d DCA 2001) (*quoting Kumar v. Travelers Ins. Co.,* 211 A.D.2d 128, 627 N.Y.S.2d 185, 187 (1995)).
[15] *Id. quoting State Farm Fire & Cas. Co. v. Patrick,* 647 So. 2d 983, 983 (Fla. 3d DCA 1994).
[16] *Glens Falls Ins. Co. v. Gulf Breeze Cottages*, *supra* at 829.

for years. In *Trinidad v. Fla. Peninsula Inc. Co.*, the Supreme Court of Florida solidified this sentiment holding that "actual cash value is generally defined as 'fair market value' or '[r]eplacement cost minus normal depreciation'"[17] while defining depreciation in this context as the "decline in an asset's value because of use, wear, obsolescence, or age."[18] Put more succinctly, the ACV is the RCV less the decline in value due to age and all that comes with it.

In *Trinidad*, the Court analyzed whether allotment for a contractor's overhead and profit could be considered as part of the actual cash value of the claim. There, the Court held that any cost reasonably necessary to bring the insured property back to its pre-loss state was recoverable as actual cash value.[19] This was done in approval of the Second District's decision in *Goff v. State Farm Florida Insurance Co.*,[20] regarding which the *Trinidad* Court held as follows:

> In *Goff*, the Second District concluded that overhead and profit are included in the scope of an actual cash value policy "where the insured is reasonably likely to need a general contractor for repairs." The Second District correctly determined, in essence, that overhead and profit are like all other costs of a repair, such as labor and materials, the insured is reasonably likely to incur. The Second District therefore held that a portion of overhead and profit, like a portion of all other costs, was included but could be depreciated in an actual cash value policy.[21]

Based on this precedent, it is clear that the Supreme Court of Florida intended actual cash value to encompass all costs of repair, including those only reasonably likely to be incurred.

## THE RECENT SHIFT IN THE DEFINITION AND APPLICATION OF "DEPRECIATION"

While the categorization of damages seems clear enough, recently, courts have expanded the analysis used to determine the actual cash value of the claim. The most noteworthy example

[17] *Trinidad,* 121 So. 3d at 438 (Fla. 2013) *quoting Goff v. State Farm Fla. Ins. Co.,* 999 So. 2d 684, 690 (Fla. 2d DCA 2008).
[18] *Id. quoting* Black's Law Dictionary 506, 1690 (9th ed. 2009).
[19] *Trinidad,* 121 So. 3d at 443 (Fla. 2013).
[20] *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008).
[21] *Trinidad*, 121 so. 3d at 438.

was the Third District's ruling in *Vazquez v. Citizens Prop. Ins. Corp.*[22] where the court held that matching costs, meaning the costs necessary to achieve the aesthetic uniformity present before the loss, should not be considered part of the actual cash value calculation despite same being reasonably necessary to place the insured property back to its pre-loss state. Before analyzing *Vazquez*, it is important to understand the history of matching damages in the context of Florida insurance claims.

**a. A History of Florida's Matching Requirement**

Florida based its matching requirement on the National Association of Insurance Commissioners' Unfair Property/Casualty Claims Settlement Practices Model Regulation.[23] The Florida Insurance Code[24] incorporated the NAIC's groundwork into Section 626.9744, Florida Statutes, also known as the "Matching Statute," which provides, in pertinent part, as follows:

> When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.[25]

For years, seemingly since its enaction, it has been undisputable that the Matching Statute "requires insurers to provide coverage for 'matching'" in residential, but not commercial, insurance policies.[26]

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[22] *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280 (Fla. 3d DCA 2020).
[23] Unfair Property/Casualty Claims Settlement Practices Model Regulation § 9(A)(1)&(2) (1997).
[24] The Florida Insurance Code is comprised of Chapters 624-632, 634, 635, 636, 641, 642, 648, and 651 of the Florida Statutes.
[25] Fla. Stat. § 626.9744(2) (2022).
[26] *Plaza S. Ass'n, Inc. v. QBE Ins. Corp.*, 11-60048-CIV, 2012 WL 13005529, at *3 (S.D. Fla. Jan. 24, 2012). *See also Strasser v. Nationwide Mutual Ins. Co.*, No. 09–60314, 2010 WL 667945, at * 1 (S.D. Fla. Feb.22, 2010); *Ocean View Towers Ass'n, Inc. v. QBE Ins. Corp.*, No. 11–60447, 2011 WL 6754063, at *10 (S.D. Fla. Dec. 22, 2011); *Palm Bay Yacht Club Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 10-23685-CV, 2012 WL 13012457, at *4 (S.D. Fla. May 8, 2012).

While most insurance policies do not have specific requirements for matching, any "all-risk" policy[27] which does not otherwise exclude matching necessarily includes coverage for same. This is due to the liberalization standard encompassed in the Florida Insurance Code[28] which "codifies the principle that insurance policies that are inconsistent with the Insurance Code must be harmonized with the Code."[29] As such, "[w]hen an insurance policy does not conform to the requirements of statutory law, a court must write a provision into the policy to comply with the law, or construe the policy as providing the coverage required by law."[30] Accordingly, any residential insurance policy issued in the state of Florida not specifically excluding matching must be read as providing coverage for "matching for the purpose of achieving aesthetic uniformity is appropriate where repairs concern 'any continuous run of an item or adjoining area.'"[31]

Prior to *Vazquez*, the application, and implications, of the Matching Statute remained unaddressed, so looking to court decisions on other states' similar matching requirements provides insight on the function of Florida's Matching Statute.[32] The Supreme Court of Minnesota[33] upheld the matching requirement in the strictest of manners when it determined that the color of minimally

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[27] *See generally Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671 (Fla. 2d DCA 2014) (An "All Risk" policy insures against all direct losses except those explicitly excluded.); *Phx. Ins. Co. v. Branch*, 234 So. 2d 396, 398 (Fla. 4th DCA 1970) ([T]he very nature of the term 'all risks' must be given a broad and comprehensive meaning as to the covering of any loss other than a willful and fraudulent act of the insured [or if] the loss . . . comes within any specific exclusion contained in the policy.").

[28] Fla. Stat. § 627.418(1) (2021) ("[a]ny insurance policy. . . which contains any condition or provision not in compliance with the requirements of this code . . . shall be construed and applied . . . [as if] such policy . . . [had] been in full compliance with this code.").

[29] *Sawyer v. Transamerica Life Ins. Co.*, 09-CV-61288, 2010 WL 1372447, at *6 (S.D. Fla. Mar. 31, 2010).

[30] *Auto-Owners Ins. Co. v. DeJohn*, 640 So. 2d 158, 161 (Fla. 5th DCA 1994) *citing United States Fire Ins. Co. v. Van Iderstyne*, 347 So. 2d 672 (Fla. 4th DCA 1977); *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 896 (Fla. 2003); *Standard Marine Insurance Co. v. Allyn*, 333 So. 2d 497 (Fla. 1st DCA 1976). *See also State Farm Mut. Auto. Ins. Co. v. Swearingen,* 590 So. 2d 506, 507 (Fla. 4th DCA 1991) (finding that the policy's three-year limitation on med pay coverage was invalid because in conflict with the statute). *Young v. Progressive Southeastern Ins. Co.,* 753 So. 2d 80, 83 (Fla.2000) (holding that provisions in uninsured motorist policies which provide less coverage than required by the statute are void as contrary to public policy).

[31] *Great Am. Ins. Co. of New York v. Towers of Quayside No. 4 Condo. Ass'n.*, 2015 WL 6773870, at *3 (S.D. Fla. 2015).

[32] *See State v. Aiuppa*, 298 So. 2d 391 (Fla.1974); *Flammer v. Patton*, 245 So. 2d 854, 858–59 (Fla.1971); *Dunn v. Doskocz*, 590 So. 2d 521, 523 (Fla. 3d DCA 1991).

[33] *See Cedar Bluff Townhome Condo. Ass'n, Inc. v. American Family Mut. Ins. Co.*, 857 N.W.2d 290 (Minn. 2014).

damaged siding to 20 commercial building prevented matching despite the availability of substantially similar, albeit different color, siding from the same manufacturer.[34] In Missouri,[35] the Court of Appeals also held a strict interpretation in a matching requirement noting that vinyl siding damaged on one side of a property was required to be "equal in value" and "virtually identical"[36, 37] while deciding that the question of ability to match remaining a factual issue for the jury. Finally, the United States District Court for the District of Columbia[38] has held that a requirement for "like kind and quality" material to be used in repairs inherently holds that the property must "look the same" as it did before the loss.

**b. How "Matching" became "Depreciation"**

As can be discerned, the requirement for an insurance carrier to cover matching could be utilized to take advantage of insurance carriers in line with the legislative analysis related to the Loss Settlement statute *surpa*.[39] For that reason, insurance carriers have been attempting to limit exposure to matching costs for years.

**i. Matching as Ordinance and Law Coverage**

In the wake of Hurricane Irma,[40] many insurance carriers were attempting to avoid payment of damages for matching under the theory that such damages need to be incurred in order to trigger Ordinance and Law coverage.

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[34] *Id.* at 292. *See also Trout Brook South Condominium Ass'n v. Harleysville Worcester Ins. Co.*, 995 F.Supp.2d 1035, 1044 (D. Minn. 2014) ("The terms 'similar materials' and 'material of like kind and quality' simply cannot be defined, as a matter of law, to preclude consideration of color.").
[35] *See Alessi v. Mid-Century Ins. Co., Inc.*, 464 S.W.3d 529, 532-33 (Mo. Ct. App. 2015).
[36] *Id*. at 532.
[37] It must also be noted that the insurer in *Alessi* raised the issue that a matching requirement conflicts with the policy requirement that "direct physical loss" occur in order to trigger coverage; however, the *Alessi* court explained that "[w]here a risk specifically insured against sets other causes in motion in an unbroken sequence between the insured risk and the ultimate loss, the insured risk is regarded as the proximate, or direct, cause of the entire loss." *Alessi* at 532. *See also Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694 (Fla. 2016), reh'g denied; *Jones v. Federated*, 235 So. 3d 936 (4th DCA 2018).
[38] *National Presbyterian Church, Inc. v. Guideone Mut. Ins. Co.*, 82 F. Supp. 3d. (2015).
[39] *See* fn. 10, *supra*.
[40] Hurricane Irma made landfall in Florida on September 10, 2017.

Ordinance and Law coverage is a supplemental/additional coverage that must be offered to insured which serves to cover the costs necessary to meet applicable law and ordinances regulating the construction, use, or repair of any property or requiring the tearing down of any property, including the costs of removing debris.[41] "[L]aw and ordinance coverage under [a property insurance] policy provides reimbursement for . . . increased repair and replacement costs incurred by the insured to comply with the requirements of the applicable laws and ordinances regulating construction or repair of property."[42] Said simply, "'Ordinance and Law' is the cost of bringing any structure . . . into compliance with applicable ordinances or laws."[43] Insureds are entitled to Ordinance and Law coverage "only if they actually incur the covered expenses."[44] "[T]o incur" means to become liable for the expense, but not necessarily to have actually expended it.[45] The question then becomes whether the matching statute, a statute which looks like it deals with a proposed increased cost of construction to conform with a law, falls under Ordinance and Law coverage.

Compliance with the Matching Statute is not, however, a cost necessary to bring a damaged property up to code; instead, it is a necessary element to fully indemnify the insured. While there is no precedent directly on point, the statute regarding Florida's Valued Policy Law provides some guidance.[46] "The plain language of Florida's [Valued Policy Law] . . . requires an insurer to pay that amount listed on the face of the policy in the event of a total loss without the necessity of any additional proof of the actual value of the loss incurred."[47] While this too seems like it could fall

[41] Fla. Stat. § 627.7011(1)(a) (2020).
[42] *Citizens Prop. Ins. Corp. v. Mallett*, 7 So. 3d 552, 554 n. 1 (Fla. 1st DCA 2009).
[43] *Jossfolk v. United Prop. & Cas. Ins. Co.*, 110 So. 3d 110, 111 (Fla. 4th DCA 2013).
[44] *Citizens Prop. Ins. Corp. v. Ceballo*, 934 So. 2d 536, 538 (Fla. 3d DCA 2006), *approved*, 967 So. 2d 811 (Fla. 2007).
[45] *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007); *see also Jossfolk*, 110 So. 3d at 113 (Fla. 4th DCA 2013).
[46] Fla. Stat. § 627.702 (2020).
[47] *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d at 814 (Fla. 2007).

under Ordinance and Law coverage, courts have uniformly held that it does not. Specifically, Florida's Valued Policy Law "has no application other than to conclusively establish the property's value when there is a total loss."[48]

The Matching Statute similarly provides insight into its intent as it is titled "[c]laim settlement practices relating to property insurance."[49] Just like Valued Policy Law deals only with valuation, the Matching Statute pertains to claim settlement practices and not the increased cost of construction to conform to code. Furthermore, no building department would fail an inspection solely due to a lack of uniformity. As such, there is no argument that can be made that the Matching Statute falls under Ordinance and Law coverage as it is not an increased cost of construction but rather relates only to claim settlement practices and indemnification of a loss. Put differently, for Ordinance and Law coverage to apply, the property inherently needs to be different after the repairs are completed whereas matching only requires that everything look the same as it did before the loss.

**ii. *Vazquez v. Citizens***

When the carriers did not gain any traction regarding their Ordinance and Law coverage argument, they shifted laterally to another argument claiming that, because matching damages were not a direct physical loss, they need not be paid under an actual cash value theory until such a time as the repairs have been effectuated. This was the argument successfully put forth in *Vazquez.*

In *Vazquez*, the insured sustained a loss to her kitchen cabinets and twelve ceramic floor tiles as a result of water intrusion. Citizens paid $33,759.52 for the damages based on the actual

[48] *Florida Farm Bureau Cas. Ins. Co. v. Cox*, 943 So. 2d 823, 837 (Fla. 1st DCA 2006)(Polston, J., dissenting), *decision quashed*, 967 So. 2d 815 (Fla. 2007)(citing to the dissenting opinion).
[49] Fla. Stat. § 626.9744 (2020).

cash value of the loss. The insured presented an estimate in the amount of $84,542.93 and, when same was not paid, the insured filed suit. During litigation, an affidavit was executed by the consultant who drafted the insured's estimate stating that $70,000 of the estimate was included for matching costs. Citizens then moved to exclude evidence and testimony of these repairs stating that matching costs were not due as actual cash value damages until the repairs were performed. In no small party due to the fact that the insured's lawsuit only specifically alleged the insufficiency of the actual cash value payment, the trial court agreed with Citizens.[50]

Originally,[51] the *Vazquez* court determined that payment for the cost to match like kind and quality materials under the Matching Statute was not due until "the repairs are made." Their rational was essentially that the policy only provides coverage for direct and physical loss until such a time as the remaining work is performed and expenses are incurred.[52] This was also due to the court's analysis of the term "replaced items" as included in the Matching Statute - because "replaced" was past tense, the legislative intent was such that the repairs for items needed to actually be completed.[53] On motion for rehearing, the court withdrew its prior opinion and justified its original reasoning through a somewhat different analysis. To that point, the grammatical discussion regarding the Matching Statute was removed and the only reference to same was relegated to a passing statement and a footnote; however, the court did maintain that "matching" was not a direct physical loss[54] and, therefore, did not need to be paid under an actual cash value analysis unless the repairs were performed. Because the insured's complaint only

[50] *Vazquez*, 304 So. 3d 1280 (Fla. 3d DCA 2020).
[51] *Vazquez v. Citizens Prop. Ins. Corp.*, 3D18-769, 2019 WL 5406523 (Fla. 3d DCA Oct. 23, 2019), *opinion withdrawn and superseded on clarification,* 304 So. 3d 1280 (Fla. 3d DCA 2020).
[52] *Id.* at 2.
[53] *Id.* at 4.
[54] *See Ocean View Towers Ass'n, Inc. v. QBE Insurance Corp.*, No. 11-60447-Civ., 2011 WL 6754063 (S.D. Fla. Dec. 22, 2011).

alleged a failure to pay actual cash value, the appellate court upheld the decision to exclude reference to matching until such a time as the repairs were performed as irrelevant evidence.[55]

### iii. *Tio v. Citizens*

Interestingly, on the same date that the final *Vazquez* opinion was released, the Third District also released their opinion in *Citizens Prop. Ins. Corp. v. Tio*.[56] In *Tio*, the insured sustained a loss caused by a collapsed drain line. She reported the claim to Citizens who adjusted the loss and denied the claim. The insured filed a lawsuit alleging a breach of contract. During litigation, Citizens stipulated as to coverage but filed a motion for summary judgment alleging that the actual cash value of the loss fell below the policy's deductible. The trial court denied their motion for summary judgment and allowed the case to proceed to trial on damages only. Like in *Vasquez*, the trial court also limited the evidence to a presentation of actual cash value; however, in *Tio* the court granted the insureds motion for rehearing and allowed the jury to consider the full extent of loss. Ultimately, the jury rendered a finding of $70,000.00 in favor of the insured and a final judgment was entered accordingly.[57]

On appeal, Citizens asserted that, even when an insurer wrongfully denies coverage of a claim, Section 627.7011, Florida Statutes, still only requires payment of the actual cash value until such time as the repairs are performed.[58] The appellate court did not accept this argument; instead, the *Tio* court stated that the above referenced statute "governs an insurer's post-loss obligations in adjusting and settling claims covered by a replacement cost policy, and does not operate as a limitation on a policyholder's remedies for an insurer's breach of an insurance contract. . . . After

[55] *Vazquez* at 1285 citing to Fla. Stat. § 90.401 (2019).
[56] *Citizens Prop. Ins. Corp. v. Tio*, 304 So. 3d 1278 (Fla. 3d DCA 2020), *reh'g denied* (June 5, 2020), *review denied,* SC20-959, 2020 WL 7230480 (Fla. Dec. 8, 2020).
[57] *Id.*
[58] Fla. Stat. § 627.7011(3)(a) (2011)-(2022).

Citizens breached that contractual obligation, the trial court properly instructed the jury on how to value the insured's relevant damages."[59] The appellate court further distinguished the case from *Vazquez* stating that the denial of coverage prevented Section 627.7011, Florida Statutes, from controlling the damages of the lawsuit, and qualified *Vazquez* by stating that the only dispute at issue was whether coverage was due for the actual cash value of the undamaged matching floor tiles.[60]

**c. What constitutes a Breach of Contract under *Tio* entitling an insured to Replacement Cost Damages?**

This begs the question as to whether *Vazquez* should truly affect the damages presented as part of a lawsuit. As noted, the *Vazquez* complaint only requested actual cash value damages and the *Tio* court dealt with a fully denied claim. A complete denial is not the only manner in which a carrier can breach an insurance policy.

In Florida, there are three elements required to establish that there has been a breach of contract: 1) a valid contract; 2) a material breach; and 3) damages.[61] A payment from an insurance company is performance under an insurance policy and typically not sufficient to be considered a breach of contract.[62] For there to be a breach on an otherwise covered claim, the carrier must first be placed on notice of a dispute.[63] In order to present such a dispute, the insured must, at a minimum, present the carrier with an estimate evidencing a discrepancy of the scope or pricing of

[59] *Tio*, 304 So. 3d at 1280, *supra*.
[60] *Id*.
[61] *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008).
[62] *See Rizo v. State Farm Fla. Ins. Co.*, 133 So. 3d 1114, 1115 (Fla. 3d DCA 2014). *See also Quiroz v. Tower Hill Select Ins. Co.*, 178 So. 3d 963 (Fla. 4th DCA 2015) *citing Slayton v. Universal Prop. & Cas. Ins. Co.*, 103 So. 3d 934 (Fla. 5th DCA 2012); *Luciano v. United Prop. & Cas. Ins. Co.*, 156 So. 3d 1108, 1110 (Fla. 4th DCA 2015).
[63] *Siegel v. Tower Hill Signature Ins. Co.*, 225 So. 3d 974, 979 (Fla. 3d DCA 2017).

damages[64] as "a homeowner is entitled to dispute the scope of repairs before the repairs are completed."[65]

One cannot simply send an estimate along with a lawsuit as insurers have a right and a duty to adjust claims within certain time frames.[66] To that end, "[w]hen an insurer is aware that an insured disputes the settlement of a claim and the insurer fails to respond in any fashion to the insured's demands for further action, that failure has the legal effect of denying coverage."[67] This means an insurer's failure to provide a timely response to a dispute over the scope or pricing of a claim can be deemed a breach of the insurance contract. Taking this into consideration, along with a reading of both *Vazquez* and *Tio*, the restrictions set forth in the *Vazquez* opinion should only apply in situations where there is a total agreement on the scope and pricing of the actual cash value of the claim; otherwise, when a valid dispute exists and the insurer has either explicitly or constructively denied the insured further indemnification, a breach of the insurance policy has occurred. This it because, "[a]s replacement cost policies are intended to operate, following a loss, both actual cash value and the full replacement cost are determined. The difference between those figures is withheld as depreciation until the insured actually repairs or replaces the damaged structure."[68] Said another way "ACV equals RCV minus depreciation, and so an RCV calculation

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[64] *See Sanchez v. Tower Hill Signature Ins.*, 181 So. 3d 1211 (Fla. 5th DCA 2015) (where above-ground sinkhole coverage required insurer to pay actual cash value, competing estimates of actual cash value created jury question; new trial required on that question due to evidentiary and jury instruction error); *D.R. Mead & Co. v. Cheshire of Florida, Inc.*, 489 So. 2d 830, 832 (Fla. 3d DCA 1986) (the amount of the actual cash value of property loss is a question of fact for the jury to determine).

[65] *Diaz v. Fla. Peninsula Ins. Co.*, 204 So. 3d 460, 462 (Fla. 4th DCA 2016) *reh'g denied* August 16, 2016. *See also Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 143 (Fla. 2d DCA 2014).

[66] *See* Fla. Stat. § 627.70131 (2021).

[67] *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826, 832 (Fla. 2d DCA 2010); *see also Sanchez v. Am. Ambassador Cas. Co.*, 559 So. 2d 344, 346 (Fla. 2d DCA 1990) (holding that when an insurer was aware of its insured's demand for either payment or arbitration and it chose not to respond to the demand until after suit was filed, the insurer's actions amounted to a denial of coverage).

[68] *Fla. Ins. Guar. Ass'n v. Somerset Homeowners Ass'n, Inc.*, 83 So. 3d 850, 851 (Fla. 4th DCA 2011) *quoting Goff*, *supra,* 999 So. 2d at 690; *see also* Restatement (Second) of Torts § 903(a) (1979) ("When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.").

must be made to arrive at ACV."[69] It is not enough to pay the actual cash value of a claim; instead, the full claim must be adjusted as the insured is entitled to know exactly how much will be reimbursed after repairs and what such reimbursements represent.

This sentiment falls directly in line with the types of damages available in a breach of contract lawsuit. As consequential and extra-contractual bad faith damages are not available in a first party breach of contract action,[70] the only type of damages available is compensatory damages. "The objective of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money."[71] This is echoed in the standard jury instruction regarding damages in a case involving property damages which states, in pertinent part, as follows:

> [I]f the greater weight of the evidence supports [the plaintiff's] claim, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or damage which the greater weight of the evidence shows will fairly and adequately compensate him for his injury or damage, including any damages that [the plaintiff] is reasonably certain to incur or experience in the future."[72]

Because a Plaintiff may seek damages which it is "reasonably certain to incur or experience in the future," it stands to reason that any breach of the insurance policy allows adjudication and recovery of full replacement cost damages.

Of course, there must be an actual breach of the contract in order to trigger this remedy. If, under *Vazquez*, an insurer withholds payment for matching as depreciation but provides a scope of coverage that includes all undamaged items which require replacement to achieve uniformity

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[69] *Breakwater Commons Assn., Inc. v. Empire Indem. Ins. Co.*, 2:20-CV-31-JLB-NPM, 2021 WL 1214888, at *4 (M.D. Fla. Mar. 31, 2021).
[70] *Citizens Prop. Ins. Corp. v. Manor H., LLC*, 313 So. 3d 579 (Fla. 2021), *reh'g denied*, SC19-1394, 2021 WL 1027485 (Fla. Mar. 17, 2021).
[71] *Mercury Motors Exp., Inc. v. Smith*, 393 So. 2d 545, 547 (Fla. 1981).
[72] Fla. Standard Jury Instructions (Civil) 501.1(b); *see also* Fla. Standard Jury Instructions (Civil) 504.2(a)("Compensatory damages is that amount of money which will put (claimant) in as good a position as [he] [she] [it] would have been if (defendant) had not breached the contract and which naturally result from the breach.").

as part of their replacement cost calculation, there does not seem to be any viable cause of action for breach of contract as the insurer has adjusted in a manner consistent with the policy. It is only when the carrier fails to account for the totality of damages that a breach of contract occurs.

## ISSUES RELATED TO THE LOSS SETTLEMENT PROVISION WHICH REMAIN UNRESOLVED

### a. Who has the burden to prove the value of depreciation?

Knowing now when the replacement cost and actual cash values of a claim are available, we must examine how each party's burden of proof factors into the equation.

In general, "the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails."[73] Because the party who is asserting the affirmative of the issue has the burden of presenting evidence on that issue, the policyholder in a property insurance lawsuit has the burden of proving each essential element of a breach of contract action,[74] to wit, 1) a valid contract; 2) a material breach; and 3) damages.[75]

The most often cited to burden of proof related to actions stemming from a property insurance contract is allocated as follows: under an "all-risk" policy, "an insured seeking coverage . . . must prove that a loss occurred to the property during the policy period. If the insured meets this initial burden, the burden shifts to the insurer to show that the loss resulted from an excluded cause."[76] "If the policy is a named perils policy, however, the insured has the burden of proving

[73] *In re Ziy's Est.*, 223 So. 2d 42, 43 (Fla. 1969).
[74] *Weissman v. K-Mart Corp.*, 396 So. 2d 1164 (Fla. 3d DCA 1981)(holding that it was the plaintiffs' burden to prove the essential element of their claim for malicious prosecution.).
[75] *Friedman v. N.Y. Life Ins. Co.*, *surpa*.
[76] *Citizens Prop. Ins. Corp. v. Munoz*, *supra* (Fla. 2d DCA 2014).

that the damage occurred by a covered cause of loss."[77] Regardless of the initial burden of proof allocated to the policyholder, if the burden of proof is met, the carrier is then tasked with the burden of proving its defenses.[78] This analysis, however, deals only with the coverage of a claim regarding the material breach element. It does not apply to the burden of proving damages.

Because the policyholder seeks to recover damages, it is his or her burden to proffer evidence on the issue. Fortunately for policyholders, the burden of proffering evidence related to damages is subject to the "broad evidence rule" which allows fluidity in the manner in which an insured must present said evidence. "Under this rule, any evidence logically tending to establish a correct estimate of the value of the damaged or destroyed property may be considered by the trier of facts to determine 'actual cash value' at the time of loss."[79] This rule has been noted to provide "a flexible test to determine the actual cash value of an insured's property, and has been adopted by a number of other jurisdictions as well."[80] In Florida, this has been mostly discussed at the Federal level subject to the *Erie* doctrine.[81] As such, Federal Court rulings on this issue are applicable to the State courts as they apply Florida state law.

In *J & H Auto Trim Co., Inc. v. Bellefonte Ins. Co.*,[82] the 11th Circuit Court of Appeals noted that, under the "broad evidence rule," a fact-finder was able to consider a number of factors, including, but not limited to, replacement cost, wholesale cost, and the owner's testimony in order

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[77] *See Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 429 (5th Cir.1980); *Royale Green Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 07-21404-CIV-COOKE, 2009 WL 799429, at *2 (S.D. Fla. Mar. 24, 2009).
[78] *Jones v. Federated Nat'l Ins. Co.*, 235 So. 3d 936, 941 (Fla. 4th DCA 2018).
[79] *Worcester Mut. Fire Ins. Co. v. Eisenberg*, 147 So. 2d 575, 576 (Fla. 3d DCA 1962); *see also* 17 Fla. Jur 2d Damages § 57.
[80] *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967) *citing* Test or criterion of "actual cash value" under insurance policy insuring to extent of actual cash value at time of loss, Annotation, 61 A.L.R.2d 711, 718-719.
[81] The *Erie* Doctrine stands for the principle that, when a federal court exercises diversity jurisdiction, said court must apply the substantive law of the forum state whilst adhering to federal procedural law. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *see also Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1257 (11th Cir. 2011), *certified question answered,* 107 So. 3d 362 (Fla. 2013); *Burger King Corp. v. E–Z Eating, 41 Corp.,* 572 F.3d 1306, 1313 n. 9 (11th Cir.2009).
[82] *J & H Auto Trim Co., Inc. v. Bellefonte Ins. Co.*, 677 F.2d 1365 (11th Cir.1982).

to determine the actual cash value of property damaged in a fire. In *Barrett v. Prudential Property and Casualty Ins. Co.*,[83] the 11th Circuit Court of Appeals found that "[t]he original purchase price of the house, its rental value, the proof of loss statement, and the contractor's estimate all constituted relevant, probative evidence from which a jury could logically base a determination as to the actual cash value of the destroyed property."). In *Berkshire Mut. Ins. Co. v. Moffett*,[84] the Fifth Circuit Court of Appeals[85] held as follows:

> Where the existence of damages has been established, recovery will not be denied because such damages are difficult to ascertain. While damages may not be determined by mere speculation or guess, it is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference. A reasonable basis of computation and the best evidence which is obtainable under the circumstances of the case and which will enable the trier of the facts to arrive at an approximate estimate of the loss is sufficient.[86]

Thus, it is clear that the standard under which a policyholder must travel in order to proffer evidence of damages is quite liberal and certainly allows the policyholder to present the higher replacement cost value in order to prove damages under an actual cash value policy.

On the other hand, once the insured has submitted evidence, in as broad a manner as is permissible, regarding the replacement cost of the damaged property, the burden would likely then fall on the carrier to reduce the damages. In *Bray & Gillespie IX, LLC v. Hartford Fire Ins. Co.*, in response to the presentation of evidence that meets the "liberal admissibility standard under the broad evidence rule," the Middle District of Florida held that the carrier "is free to counter that evidence with rebuttal of the testimony or their own estimates."[87] This falls in line with the

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[83] *Barrett v. Prudential Property and Casualty Ins. Co.*, 790 F.2d 842, 845 (11th Cir.1986).
[84] *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007 (5th Cir. 1967).
[85] On October 1, 1981, the Fifth Circuit Court of Appeals split and formed the 11th Circuit Court of Appeals and, as such, all Fifth Circuit decisions before October 1981 are binding precedent in the 11th Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).
[86] *Moffet*, 378 F.2d at 1011–12.
[87] *Bray & Gillespie IX, LLC v. Hartford Fire Ins. Co.*, 6:07-CV-326-ORL-DAB, 2009 WL 1513400, at *17 (M.D. Fla. May 27, 2009).

coverage analysis which shifts the burden of limiting coverage to the carrier once the insured has met its burden of proof. Taking this maxim, along with the standard regarding burdens of proof that mandate the party acting in the affirmative must proffer evidence to prove their position, it seems only logical to hold that the insurance carrier has the burden of proving depreciation to reduce the replacement cost evidence to actual cash value. Should the carrier fail to refute the replacement cost value of the loss, it is entirely plausible that the court would be able to enter a directed verdict on damages in favor of the Plaintiff leaving only issues of coverage to be decided by the trier of fact. The only time the policyholder would need to offer any evidence regarding the calculation of depreciation would be when the carrier has presented their position and the insured seeks to rebut such calculations.

Said more simply, all losses in an all-risk policy, or certain losses in a named perils policy, are covered unless otherwise excepted or excluded. Similarly, when such policies are replacement cost policies, the replacement cost is covered unless otherwise excepted or excluded. If the loss payment provision provides coverage for replacement cost but reduces such coverage until certain conditions are met, that is an exception to the initial payment of replacement costs. Because it is an exception to coverage, it is the insurer's duty to plead and prove same.

**b. Does the application of depreciation need to be pled as an affirmative defense?**

This begs the question of whether the Loss Settlement provision, and with it the calculation of damages based on an actual cash value theory, must be affirmatively pled as defenses. An affirmative defense is one that admits the cause of action asserted by the preceding pleading, but avoids liability, wholly or partly, by allegations of excuse, justification or other matter negating the cause of action.[88] In cases regarding insurance policy disputes, "[p]arties are entitled to be

[88] *See Fla. East Coast Ry. Co. v. Peters*, 73 So. 151, 165 (Fla. 1916); *Patterson v. Austin*, 728 F.2d 1389, 1392 (11th Cir. 1984); *Storchwerke, GMBH v. Mr. Thiessen's Wallpapering Supplies, Inc.*, 538 So. 2d 1382 (Fla. 5th DCA 1989).

fairly placed on notice of specific language which is sought to be applied by one party to a contract to avoid liability for payment, in whole or in part."[89] Accordingly, it is only equitable to mandate that the Loss Settlement provision be plead as an affirmative defense in order to ensure disclosure of reliance on such provisions.

There is precedent, however, which may support the opposite viewpoint. Similar to a reduction of damages by depreciation, the deductible provisions of insurance policies serve to limit the payment due and owing to an insured. A "deductible" is "a clause in an insurance policy that relieves the insurer of responsibility for an initial specified loss of the kind insured against."[90] "Generally, the functional purpose of a deductible, which is frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay will ripen."[91] "The application of the deductible provision in a policy of insurance is not a defense which must be raised as an affirmative defense but is, in fact, a basic part of the policy of insurance."[92]

However, in most, if not all policies, a deductible applies no matter what and only fluctuates based on the type of loss sustained.[93] The withholding of depreciation is subject to numerous caveats and conditions. While a truncated version of a common Loss Settlement was sufficient for our purposes throughout this exploration, a complete recitation of a typical provision is required to complete this aspect of the analysis. The standard property insurance policy form, form HO 00 03 10 00,[94] contains the following Loss Settlement provision, *in toto*:

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[89] *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002).
[90] *Gen. Star Indem. Co. v. W. Florida Vill. Inn, Inc.*, 874 So. 2d 26, 33–34 (Fla. 2d DCA 2004) citing *Merriam–Webster's Collegiate Dictionary* 471 (deluxe ed. 1998).
[91] *Int'l Bankers Ins. Co. v. Arnone,* 552 So. 2d 908, 911 (Fla. 1989).
[92] *Digital Med. Diagnostics v. United Auto. Ins. Co.*, 958 So. 2d 505, 507 (Fla. 3d DCA 2007); *see also Appalachian Ins. Co. v. United Postal Sav. Ass'n*, 422 So. 2d 332, 334 (Fla. 3d DCA 1982)("a deductible provision, being as much a basic part of the policy as the provision which sets the maximum amount of money recoverable under the policy, is not an affirmative defense which must be proved by the insurer").
[93] *See, generally, S. Am. Fire Ins. Co. v. Rinzler*, 324 So. 2d 133 (Fla. 1st DCA 1975).
[94] Insurance Information Institute, Homeowners 3 – Special Form: https://www.iii.org/sites/default/files/docs/pdf/HO3_sample.pdf.

**Loss Settlement.**

The terms "cost to repair or replace" and "replacement cost" do not include the increased costs incurred to comply with the enforcement of any ordinance or law, except to the extent that coverage for these increased costs is provided under Section **I** – Property Coverages – Additional Coverages **11.** Ordinance or Law. Covered property losses are settled as follows:

**a.** Subject to **c.** below, property of the following types:

**(1)** Personal property;

**(2)** Awnings, carpeting, household appliances, outdoor antennas and outdoor equipment, whether or not attached to buildings; and

**(3)** Structures that are not buildings; will be settled at the cost to repair or replace, except for property listed in **b.** below.

**b.** We will pay market value at the time of loss for:

**(1)** Antiques, fine arts, paintings, statuary and similar articles which by their inherent nature cannot be replaced with new articles;

**(2)** Articles whose age or history contribute substantially to their value including, but not limited to, memorabilia, souvenirs and collectors items; and

**(3)** Property not useful for its intended purpose; subject to **c.** below.

**c.** We will not pay an amount exceeding the smallest of the following for **a.** and **b.** above:

**(1)** Our cost to replace at the time of loss;

**(2)** The full cost of repair;

**(3)** Any special limit of liability described in the policy; or

**(4)** Any applicable Coverage C limit of liability.

**d.** Buildings under Coverage A or B are settled at replacement cost without deduction for depreciation, subject to the following:

**(1)** If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

**(a)** The limit of liability under this policy that applies to the building;

**(b)** The replacement cost of that part of the building damaged for like construction and use on the same premises; or

**(c)** The necessary amount actually spent to repair or replace the damaged building.

If the building is rebuilt at a new premises, the cost described in **(b)** above is limited to the cost which would have been incurred if the building had been built at the original premises.

**(2)** If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

**(a)** The actual cash value of that part of the building damaged; or

**(b)** That proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.

**(3)** To determine the amount of insurance required to equal 80% of the full replacement cost of the building immediately before the loss, do not include the value of:

**(a)** Excavations, foundations, piers or any supports which are below the undersurface of the lowest basement floor;

**(b)** Those supports in **(a)** above which are below the surface of the ground inside the foundation walls, if there is no basement; and

**(c)** Underground flues, pipes, wiring and drains.[95]

Compare this Loss Settlement provision to the deductible provision contained within the same policy form which states, *in toto*, as follows:

**Deductible**

Unless otherwise noted in this policy, the following deductible provision applies:

[95] *Id.* at HO 03 10 00, pgs. 13-14, Section I -Conditions, Section C.

> Subject to the policy limits that apply, we will pay only that part of the total of all loss payable under Section I that exceeds the deductible amount shown in the Declarations.[96]

In performing such a comparison, it is clear that the deductible provision included prior to all of the coverage provisions in the policy is vastly different than the extensive Loss Settlement provision and should be treated in an entirely different manner. As such, regardless of the precedent which holds that the deductible need not be plead as a defense, the Loss Settlement provision more likely requires affirmative pleading.

**c. How should a court bifurcate a jury verdict awarding ACV and RCV calculation before repairs are performed and costs incurred?**

Finally, the question of how to handle a situation where a jury enters a verdict including a determination of both replacement cost and actual cash values, along with a calculation of the depreciation to be withheld until repairs occur must be explored.

In *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*,[97] the commercial policyholder sought payment under a replacement cost valuation claiming that the carrier's breach of contract due to the insurer's failure to pay or deny the claim constituted a prevention of performance thereby entitling them to full benefits under the policy. The 11th Circuit Court of Appeals rejected this argument stating as follows:

> Applying the doctrine of prevention of performance in this case would impermissibly rewrite the insurance contract on the equitable theory that it would be too costly for Buckley Towers to comply with the terms of the agreement. . . . Allowing Buckley Towers to claim RCV damages without repairing or replacing entirely removes the plaintiff's obligations under the Replacement Cost Value section of the contract. The parties freely negotiated for that contractual provision and it is not the place of a court to red-line that obligation from the contract.[98]

[96] *Id.* at HO 03 10 00, pg. 3, Deductible.
[97] *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, 395 Fed. Appx. 659 (11th Cir. 2010)(unpublished).
[98] *Id*. at 663.

Interestingly, to arrive at this conclusion, the court in *Buckley Towers* relied on non-insurance contract cases which noted, in pertinent part, that "[i]nconvenience or the cost of compliance [with contractual terms], though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful."[99] Of note, however, is that the case cited to by the *Buckely Towers* court for this sentiment, *N. Am. Van Lines v. Collyer*, also discusses the fact that "a party who, by his own acts, prevents performance of a contract provision cannot take advantage of his own wrong."[100] This falls directly in line with long existing precedent that an insurer's breach of contract relieves additional compliance with policy conditions,[101] a precedent ignored by *Buckley Towers*. The court also noted that "[t]he parties freely negotiated for that contractual provision [mandating repairs before RCV is owed] and it is not the place of a court to red-line that obligation from the contract."[102] This disregards one of the most clear-cut tenants of insurance contracts – they are contracts of adhesion which do not allow the free negotiation of terms and conditions.[103]

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[99] *Id*. *quoting N. Am. Van Lines v. Collyer*, 616 So. 2d 177, 179 (Fla. 5th DCA 1993) (*quoting City of Tampa v. City of Port Tampa,* 127 So. 2d 119, 120 (Fla. 2d DCA 1961) *quoting* 12 Am. Jur., Contracts, § 362).

[100] *N. Am. Van Lines v. Collyer*, *supra*, *citing Hart v. Pierce,* 98 Fla. 1087, 125 So. 243 (1929); *Walker v. Chancey,* 96 Fla. 82, 117 So. 705 (1928).

[101] *See, e.g.*, *Wegener v. Int'l Bankers Inc. Co.*, 494 So. 2d 259, 259-60 (Fla. 3d DCA 1986) *citing Indian River State Bank v. Hartford Fire Ins. Co.*, 46 Fla. 283, 35 So. 228 (1903); *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 35 So. 171 (1903); *Paz v. Allstate Insurance Co.*, 478 So. 2d 849 (Fla. 3d DCA 1985); *Aristonico Infante v. Preferred Risk Mutual Insurance Co.*, 364 So. 2d 874 (Fla. 3d DCA 1978); *Cunningham v. Austin Ford*, *Inc.*, 189 So. 2d 661 (Fla. 3d DCA 1966), *cert. dismissed*, 198 So. 2d 829 (Fla. 1967); *American Fidelity Fire Insurance Co. v. Johnson*, 177 So. 2d 679 (Fla. 1st DCA 1965), *cert. denied*, 183 So. 2d 835 (Fla. 1966).; *Castro v. Homeowners Choice Prop. & Cas. Ins. Co.*, 228 So. 3d 596 (Fla. 2d DCA 2017); *Ifergane v. Citizens Prop. Ins. Corp.*, 232 So 3d. 1063 (Fla. 3d DCA 2017); *American Integrity v. Estrada*, 276 So. 3d 905 (Fla. 3d DCA 2019); *Nacoochee Corp. v.Pickett*, 948 So. 2d 26, 30 (Fla. 1st DCA 2006); *Mercury Ins. Co. of Fla. v. Anatkov*, 929 So. 2d 624, 627 (Fla. 3d DCA 2006).

[102] *Buckley Towers* at 663.

[103] *Seaboard Fin. Co. v. Mutual Bankers Corp.*, 223 So. 2d 778, 782 (Fla. 2d DCA 1969) ("Such insurance policies are known in law as 'contracts of adhesion,' meaning 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength [insurer], relegates to the subscribing party [insured] only the opportunity to adhere to the contract or reject it.'") (emphasis in original) (citations omitted).

While *Tio* seemingly reverses this stance, the court in *Citizens Prop. Ins. Corp. v. Amat*[104] distinguished the compliance with policy conditions from the enforcement of the Loss Settlement provision. In *Amat*, the insured was, pursuant to the Loss Settlement provision of the sinkhole endorsement, required to enter into a contract for building stabilization or foundation repairs prior to obtaining a replacement cost payment. Citing to case law related to sale and purchase of real estate and construction contracts, not existing law related to insurance policies, the *Amat* court noted that the precedent supporting a waiver of compliance with policy conditions necessarily involved the nonbreaching party seeking to rescind an entire contract based on a total breach of same.[105] The reasoning behind this holding was that a denial may excuse compliance with acts required under the policy but does not expand the coverages provided for by the policy.[106]

Assuming courts rely on similar justification and hold that no depreciation is owed under a replacement cost theory until "the work is performed and the expenses are incurred," even in light of a breach of the insurance contract, the question arises as to whether it is possible to challenge an underpayment or under-adjustment of a claim in court at all. Obviously, under *Tio*, an insured can do so in an entirely denied claim but, under *Vazquez*, a covered loss does not allow the court to ignore the terms of the Loss Settlement provision. Absent the requirement or, when not invocable unilaterally, willingness to utilize the appraisal process,[107] litigation is the only means to hold an insurer accountable to complete the adjustment of a loss. The requirement that an insured file two lawsuits, one to determine actual cash value only and then one to enforce

[104] *Citizens Prop. Ins. Corp. v. Amat*, 198 So. 3d 730 (Fla. 2d DCA 2016).
[105] *Id*. at 733-4.
[106] *Id*. at 734 *citing Six L's Packing Co. v. Fla. Farm Bureau Mut. Ins. Co.*, 268 So. 2d 560, 563 (Fla. 4th DCA 1972) ("The general rule is well established that the doctrine of waiver and estoppel based upon the conduct or action of the insurer (or his agent) is not applicable to matters of coverage as distinguished from grounds for forfeiture.").
[107] *See*, *generally*, *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002) (Appraisal provides for a method to determine causation and amount of loss in claims which are not fully denied.).

replacement cost value after a supplemental claim, if permissible, is filed, implicates a number of legal issues.

**i. *Res Judicata***

First, the issue of *res judicata* may arise. *Res judicata* serves as a "bar to a subsequent action or suit involving the same cause of action or subject matter."[108] In *Chavez v. Tower Hill Signature Ins. Co.*,[109] the court addressed this in a property insurance scenario. In *Chavez*, the insured submitted a claim for water damage in the amount of $106,347.00 while the insurer estimated damages in the amount of $30,785.91. The carrier issued payment in the amount of $25,894.58 after applying the deductible and subtracting depreciation. Based on the disagreement, the insured filed a lawsuit. Ultimately, the trial court entered an order of summary judgment in favor of the carrier based on the presumably undisputed assertions that 1) the insured was paid for all of the covered damages, 2) there was no evidence or any repairs taking place, and 3) there were no other damages that remained outstanding. In rendering this finding, the trial judge held that the insured was not precluded from filing a supplemental claim.[110]

Subsequently, the insured submitted an executed repair contract for $110,050.00 with an addendum providing that the proposal was contingent upon coverage being provided. No repairs were actually performed and no additional damages were discovered or presented. The carrier then tendered an additional payment of $7,099.64.[111] Due to the obvious disagreement, the insured filed another suit; however, because the insured did not perform repairs, going so far as to say he did not intend to do so, and did not present any new damages, the claim was dismissed under the

[108] *ICC Chem. Corp. v. Freeman*, 640 So. 2d 92, 93 (Fla. 3d DCA 1994).
[109] *Chavez v. Tower Hill Signature Ins. Co.*, 278 So. 3d 231 (Fla. 3d DCA 2019).
[110] *Chavez v. Tower Hill Signature Ins. Co.*, 278 So. 3d at 233-4 *citing Slayton v. Universal Property & Casualty Insurance Co.*, fn. 9, *supra* (Fla. 5th DCA 2013) (finding payment of an insurance claim did not constitute breach of contract as insured was allowed to submit a supplemental claim).
[111] It is unclear how the carrier could say it paid enough during the first presentation of the claim yet pay more when they undertook adjustment of the second presentation of the claim.

theory of *res judicata* because both lawsuits were "mirror images of one another."[112] Ostensibly, this would not have been the case had repairs been performed which allows us to make the logical leap that a trial on actual cash value and then a subsequent trial on replacement cost after repairs were performed would not trigger *res judicata*.

**ii. The Statute of Repose and Statute of Limitations**

With that said, the statutes of repose and limitations related to property damage claims may prevent supplemental claims from being filed where an insured is required to first sue for a determination of the total amount of the claim and then submit additional documentation once the repairs have been performed. A claim for property insurance benefits is barred unless initially reported within two years of the date of loss.[113, 114] This includes requests for "additional costs for loss or damage previously disclosed to the insurer."[115] The "supplemental claim" that considers costs which have been incurred after the initial adjustment[116] must be submitted within three years of the date of loss.[117] Of course, if the litigation over the initial claim exceeds the timeline set forth in the statute of repose, the insured may be left without any recourse after completing the repairs. The same is true with the statute of limitations which mandates that a lawsuit stemming from the breach of a property insurance policy be filed within five years of the date of loss.[118]

**d. When is depreciation owed?**

The Loss Settlement provision notes that the replacement cost value will be paid "as the work is performed and the expenses are incurred."[119] This does not mean that the insured must

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[112] *Id*. at 237.
[113] Fla. Stat. § 627.70132(2) (2021).
[114] Section 627.70132, Florida Statutes, was changed in 2021 to include all claims where the prior iteration of the statute only applied to windstorm or hurricane losses. *See* Fla. Stat. § 627.70132 (2020).
[115] Fla. Stat. § 627.70132(1)(a) (2021).
[116] Fla. Stat. § 627.70132(1)(b) (2021).
[117] Fla. Stat. § 627.70132(2) (2021).
[118] Fla. Stat. § 95.11(2)(e) (2021).
[119] *Marquez v. Natl. Fire and Marine Ins. Co.*, *surpa*.

perform all of the work out of pocket and then submit for reimbursement. Instead, because "to incur" means to become liable for the expense, but not necessarily to have actually expended it,[120] some may argue that, like Ordinance and Law coverage, the insured need only enter into a contract for the repairs in order to be paid the outstanding depreciation owed; however, the Loss Settlement provision does not stop there and, instead, provides a concurrence of events which both must take place in order for depreciation to be recovered.[121] It must be noted that the Loss Settlement provision does not mandate that the repairs must be completed before reimbursement is due, only that "work is performed." Most contractors will enter into agreements which provide for draws and distributions as work is performed. If the insured enters into a contract for repairs, the insured has incurred the costs and, as such, should be able to recover the amount of each draw as long as work is being performed. That will prevent the insured from having to come out of pocket and seek reimbursement in full as the average insured likely does not have the dispensable income to issue payments without the assistance of their insurance carrier. For this reason, the insured must know exactly what is covered before becoming liable to a contractor which means it is of paramount importance for the carrier to adequately adjust the scope of the loss at the onset of the claim.

**e. Potential Solutions**

The Florida Rules of Civil Procedure provide a potential solution for this issue, although perhaps not without additional legislative action or precedent. Rule 1.600, Florida Rules of Civil Procedure, allows a party to deposit money into the court registry with the court retaining jurisdiction over the withdrawals of same.[122] While such deposits are generally voluntary in

[120] *Ceballo v. Citizens Prop. Ins. Corp.*, *surpa*.
[121] *See Harrington v. Citizens Property Ins. Corp.*, 54 So. 3d 999, 1003 (Fla. 4th DCA 2010) ("The word 'and'. . . is a conjunction to mean that [all] elements must be met.").
[122] Fla. R. Civ. P. 1.600 (2021).

nature,[123] authority may be granted upon the court to authorize the involuntary depositing of money into the court registry through other means.[124] If, after a final judgment was entered, the court was imbued with the power to order that all depreciation withheld from the actual cash value be placed into the court registry, and the court could set a certain amount of time for the insured to submit its repair receipts before the funds are released back to the insurer, there would be no issues with trials moving forward on a replacement cost basis whilst allowing the carriers to maintain compliance with, and enforceability over, the terms and conditions of the Loss Settlement provision.

Absent such legislative changes, modifying the language used in final judgments will allow both the insured to fully adjudicate a claim and the carrier to withhold the depreciated amount until owed under the Loss Settlement provision. This notation is not unfounded. While subject to different rules of procedure,[125] child support and alimony payments contained within final judgments place durational conditions upon the payments of amounts contained within same.[126] Additionally, "[o]nce a final judgment is entered and the time allowed by the rules of procedure for altering, modifying, or vacating the judgment has passed, the trial court loses jurisdiction over the case 'except for the purpose of enforcing the judgment.'"[127] A trial court also "retains jurisdiction to the extent such is specifically reserved in the final judgment . . ."[128] To that point, there is nothing preventing a court from entering a final judgment which specifies the replacement cost value, the depreciation, and the actual cash value, mandating that the actual cash value be paid

[123] *First States Investors 3300, LLC v. Pheil*, App. 2 Dist., 52 So. 3d 845 (2011).
[124] *Williams v. First Union Nat. Bank of Fla.*, 591 So. 2d 1137 (Fla. 4th DCA 1992) (Holding that the legislature enacted a statute that vested the court authority to require deposits into the registry of the court.).
[125] *Cf*., *generally*, Fla. R. Civ. P. and Fla. Fam. L. R. P.
[126] *See*, *generally*, Forms 12.990(b)(1) and 12.993(c), Florida Supreme Court Family Law Forms.
[127] *PLCA Condo. Ass'n v. AmTrust-NP SFR Venture, LLC*, 182 So. 3d 668, 669–70 (Fla. 4th DCA 2015) *quoting Town of Palm Beach v. State ex rel. Steinhardt,* 321 So. 2d 567, 568 (Fla. 4th DCA 1975).
[128] *Id*. *quoting Cent. Park A Metrowest Condo. Ass*'n *v. AmTrust REO I, LLC,* 169 So. 3d 1223, 1225 (Fla. 5th DCA 2015).

forthwith, and setting a reasonable timeline through which the insured may submit for reimbursement based on proof of repairs. This solution seems extremely viable as it would, without legislative changes, alleviate the need for insureds to file subsequent claims/lawsuits thereby solving any issues related to *res judicata* or the statutes of repose/limitation.

## CONCLUSION

Take this example: an insured suffers a water loss which damages, in pertinent part, her 20% of her unique and unmatchable kitchen floor. The replacement of the entire kitchen floor costs $50,000 but the replacement of only the damaged portions of the floor cost $10,000. Because the floor cannot be matched, the entire floor must be replaced in order to place the insured back in her pre-loss condition. The insurance company adjusts the loss and writes an estimate that includes only the damaged portions of the floor at a replacement cost valuation of $10,000, depreciates the estimate based on their calculation of 10% depreciation, and issues payment based on the actual cash value in the amount of $9,000.00. Based on the caselaw discussed *infra*, that would constitute a breach of contract thereby ripening litigation. Alternatively, if the insurance carrier writes an estimate for $50,000, removes the portions of the floor included as necessary to achieve matching thereby leaving the 20% of the floor at $10,000, further reduces that amount by their calculation of depreciation, and issues payment, the carrier has accurately adjusted both the replacement cost and actual cash values of the loss. In such a situation, no breach of contract has taken place unless the insurer, for some reason, later refuses to issue payment for the outstanding depreciation.

As is clear, the most important take away regarding replacement cost value versus actual cash value relates to the manner in which the claim is adjusted. An insurance carrier cannot simply ignore the replacement cost of claimed damages because they do not owe replacement cost at the onset of the claim; instead, as discussed above, "[a]s replacement cost policies are intended to

operate, following a loss, both actual cash value and the full replacement cost are determined.[129] Of course, and again, this is all reliant on the carrier adequately adjusting the scope of the loss at the onset of the claim which, unfortunately, does not occur nearly as often as it should.

[129] *See Fla. Ins. Guar. Ass'n v. Somerset Homeowners Ass'n, Inc.*, fn. 68, *supra*.