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Practice Tips
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APPLICATIONS & COMPLICATIONS
RECOVERY UNDER THE VALUED POLICY LAW

The first valued policy law was enacted by Wisconsin in 1874, [1] and many states followed suit, adopting their own during the early 1900s. Although they have been on the books for decades, these valued policy laws continue to cause dismay and confusion among insurance carriers and their insureds.

States enacted valued policy laws to curb the perceived practice of insurance carriers deliberately overestimating the value of insured property to boost the premiums they could collect. The overvaluing, which was thought to encourage arson for profit, resulted in litigation over the value of the insured property. Valued policy laws were created to fix in advance the value of property being insured and to place upon the insurer the burden of inspecting the property to assure its proper valuation. [2]

Currently, valued policy laws are in effect in 17 states: Arkansas, Florida, Georgia, Kansas, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, South Carolina, Tennessee, Texas, West Virginia and Wisconsin. [3] The laws in these jurisdictions vary, applying to different perils (from fire only to all perils) and to different property (from one- or two-family dwellings to all structures). [4] Georgia, Kansas, and Tennessee have laws which allow the insurer a specific period of time during which an inspection of the insured property may occur.

The perils outlined by a statute are the only perils to which the statute applies. [5] Notwithstanding these differences, all valued policy laws maintain the common goal of fixing the amount of insurance recoverable when an enumerated peril results in a total loss. A good example is the Florida statute, Section 6.702(1) of which provides:

> In the event of the total loss of any building, structure, mobile home . . . or manufactured building . . . located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in his behalf, the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

In addition to the above listed jurisdictions, California [6] has a valued policy law that is optional for the insured with payment for the inspection. Iowa [7] has a statute that is not valued but the policy amount is “prima facie”' evidence of the value of the property.

Valued policies can, in addition to being created by statute, be created by agreement. A valued policy may be found where it was the clear intent of the parties to agree on a certain value in the event of a loss. Therefore, insurance contracts involving a variety of property, including citrus fruit, a shrimp boat and horses, have been held to be valued even where no statute was applicable. [8]

Given the purpose of valued policy laws, virtually every jurisdiction holds that the amount of insurance on property subject to valued policy laws cannot be questioned after a loss. If an owner has given an “opinion”' as to a value, that value will control what is owing under the policy notwithstanding any ***46** claim that the amount was inaccurate or even fraudulent if accepted by the insurer. The burden is clearly placed on the insurer to review and evaluate the risk that is the subject of the insurance contract before agreeing to issue a policy for a specified sum.

Determination of Loss

An elementary consideration in the application of valued policy laws is whether a loss to a structure by an insured peril is a total or partial loss. In cases in which a structure is involved, the courts have applied two tests: the “identity”' test and the “restoration”' test. Under the identity test, a structure is a total loss if it has lost its identity and character as a building, even though a portion of the building's components remain and could be utilized for some useful purpose. [9] Under the restoration test, a structure is a total loss if a reasonably prudent owner would not use the remains of the structure after a fire loss as a basis for restoring the building to its pre-loss condition. [10]

Both tests involve factual issues which require evidentiary hearings, and a broad range of evidence is admissible including the cost of reconstruction, debris removal and salvage, as well as any other evidence bearing on the loss. [11] If there is a dispute over whether a structure is a total or partial loss, one must obtain an analysis of the remnants by a structural engineer and the estimate of a contractor willing and able to conduct the repair work. Some commonly raised questions include: Has the fire destroyed the integrity of the walls, requiring removal and replacement of the entire wall? Can the concrete slab be utilized by simply pouring a new concrete layer? Is the wood merely smoke-damaged or does it require replacement? A competent fire reconstruction contractor will be familiar with these considerations.

A substantial reduction in the value after an insured loss is *not* evidence of a total loss. [12] However, a “permanent”' injury has been found where the cost of restoration exceeds the market value of a building prior to an injury. [13] Also, the valued policy law can apply to a building severed from the land for removal to another site. [14]

Constructive Total Loss

If an insured building is damaged to the extent that repairs are prohibited by condemnation proceedings under a local ordinance, the structure is deemed a constructive total loss and the full amount of the valued policy is payable. [15] This doctrine has been applied in states with and without valued policy laws.

When a condemnation order is issued, it has been held that it is the duty of an insurer to contest that order if the insurer feels that repairs can be made. [16] The case of *Reliance Insurance Co. v. Harris* [17] is particularly interesting. In that case, the building authority would have permitted the repair of the subject premises, as long as repairs were to be commenced within a certain period; otherwise, the building would be demolished. No action was taken to commence repairs since the insurer invoked the appraisal provision of its policy to determine the amount due for repair. While the appraisal was in process, the building was demolished by order of the county. The court held that the building became a constructive total loss once demolished, and the full amount of the policy was awarded, even though repairs initially could have been made. The court clearly put the burden on the company not only to contest the order, but also to start repairs.

The application of the doctrine of constructive total loss, although causing many insurers consternation, is relatively straightforward when an insured peril leads to a condemnation of the building. However, the issue is much more interesting when damage caused by the insured peril is such that repairs would have been permitted had the building not been condemned as a result of other problems, such as termite damage. Two cases which addressed this situation and, not surprisingly, reached directly opposite results are *Rutherford v. Royal Insurance Co*. [18] and *Security Insurance Co. v. Rosenburg*. [19] In *Rosenburg*, the court held the company was only responsible for partial damage as a result of fire. In *Rutherford*, the company was held liable for the entire loss. [20]

The argument which is typically presented in the situation described above, is that the insured peril was the “proximate cause”' of the condemnation. However, the cause in fact for the condemnation can be specifically determined, since the individual ordering the building to be condemned can be questioned. Under a proximate cause analysis such as that set forth in *Garvey v.*

State Farm Fire and Casualty Co.,[21] any inquiry would depend on whether the condemnation was caused in fact by an insured peril or by non-insured events. If a non-insured event caused the condemnation there should be no coverage for a total loss.

Limitations on Recovery

The amount of insurance provided for a full ownership interest in property totally destroyed by a covered peril is fixed and not subject to question. Even if the insured “misrepresents”' the value of the property, the courts have held that the amount given is ***47** merely an “opinion”' since it is the insurer's duty to inspect the property being insured.[22] One jurisdiction, though, has failed to follow this otherwise unanimous rule. In *Zuraff v. Empire Fire & Marine Insurance Co*.,[23] a North Dakota court held that a fraudulent overvaluation could be grounds to contest the amount due under a policy.

The courts have also found that other policy provisions are waived to the extent those provisions contradict the purpose of the valued policy laws, particularly regarding the establishment of damages in the event of a total loss. Therefore, a proof of loss is not a necessary prerequisite to payment of policy limits,[24] and the arbitration or appraisal provision of a policy has no application.[25] With regard to the award of prejudgment interest, two courts from the same state have reached different results--interest being payable from the date of the loss and interest being payable from the date it is due under the contract.[26]

Although the amount of insurance cannot be contested, other fraudulent conduct in the application or procurement of the insurance can be raised as a defense.[27] The case of *Romain v. Twin City Fire Insurance Co*.[28] involved the failure to disclose that the structure, an icehouse, was to be destroyed. The court found this to be fraud in the application and held the policy to be void.

With regard to the arson defense, the overvaluation of the property, although not subject to being contested as the amount due under the policy, is admissible as evidence of motive.[29] Regarding fraudulent misrepresentation, the value of household furnishings will invalidate the entire policy of insurance even though the valued policy statute fixes the amount due for the dwelling.[30]

There are two defenses which should be noted that may be specifically raised to contest payment in the event of a total loss: “increase in risk”' and “‘wagering contract.”DD’

With respect to the “increase in risk”' defense, in the Florida valued policy statute,[31] the application of the law is specifically contingent upon “the absence of any change increasing the risk without the insurer's consent. . . ” This contingency is contained in many valued policy laws and is specifically recognized as a defense which serves to void the policy. In *Nathan v. St. Paul Mutual Insurance Co*.,[32] the court held the policy to be void based upon the defense of “increase in risk.”' In that case, after issuance of the policy, the insured dwelling was changed from a residential structure to a restaurant. The court, however, limited the defense to those changes which occurred after issuance of the policy, noting that any deficiencies in the building at the time of issuance of the policy could have been subject to inspection.

Another defense which may be raised is the “wagering contract”' defense which recognizes that, if the policy of insurance provides an amount which is so disproportionate to the value of the insured's interest as to be tantamount to a wagering contract, no recovery may be had.[33] Two cases from the 7th U.S. Circuit Court of Appeals, applying Illinois law, a non-valued policy state, are quite instructive--*Chicago Title and Trust v. United States Fidelity Guaranty Co*.[34] and *Garcy Corporation v. Home Insurance Co*.[35] In those cases, the court held that an insured owner who irrevocably committed to abandon a building, such as entering a contract to have the building demolished, is not entitled to recovery. The court, in reaching this conclusion, found that the policy of insurance was a wager contract as the building had no economic value. Therefore, the insurable interest of the owner was greatly disproportionate to the insured value of the building. However, the court specifically distinguishes cases in which an irrevocable decision to abandon has not been made, and in which case recovery was allowed.

These cases present rather unique situations; however, the principle should be applicable in valued policy law jurisdictions. If the abandonment occurred after inception of the policy, the defense of “increase in risk”' should be raised. If the building was insured initially without disclosure of the intent to abandon and destroy it, the defense of “wagering contract”' could be raised, as it was in the abovecited cases. [36]

Insureds with Partial Interest

Some of the most perplexing and confusing problems that have arisen in the application of valued policy laws concern insureds with only partial interest in the subject property, such as mortgage interest, leasehold interest, a vendor or vendee interest, and co-ownership interest.

Three separate approaches have evolved in the application of valued policy laws to interests such as those.

The first approach compensates the insured only for the value of his or her interest in the property at the time of the loss, not exceeding the amount of coverage provided. This approach is taken by Florida, [37] Louisiana, [38] Nebraska, [39] and North Dakota. [40] This appears to be the best approach, since an insurer should have the opportunity, under a valued policy law, to inspect the insured property and determine at the time the policy is issued the amount payable in the event of a loss. If the insured has a ***48** partial interest in the property, this purpose cannot be achieved since some types of partial interests may change from day to day. A mortgagee, for example, can have a greater or lesser interest after the inception of the policy depending upon the amount of repayment or the mortgagor's failure to make payments. A leasee may make improvements to the premises or may renegotiate a lease, thereby altering the extent of that interest. Additionally, a vendor or vendee may have a changing interest as payments are received. Since the interest of the insured may change with time, the underlying purpose of the valued policy law simply cannot be achieved.

In *South Carolina Insurance Co. v. Pensacola Home Savings Association*, [41] the court limited the recovery of the mortgagee to the amount due on the underlying debt. The court further held that any subsequent payment of that debt, by the mortgagor or through foreclosure, even if after the date of loss, is to be taken into account in determining the mortgagee's amount of recovery under a policy of insurance.

The second approach employed by certain courts is to permit the insured recovery of the full value of the policy even though the value of the insured's actual interest is less than the amount of insurance. This approach has been followed in Arkansas, [42] Mississippi, [43] and Missouri. [44] In *Gravning v. American Druggists' Insurance Co*., [45] title to the property had been transferred from the insured to her brother, but the insured remained liable on certain promissory notes. The insured had moved from the area, and after the loss, the insurer paid the promissory notes on which the insured was obligated. The court held that the insured was entitled to recover the full amount of the policy limits, and recognized that any insurable interest would permit recovery of the full policy limits.

In *Mississippi Farm Bureau Mutual Insurance Co. v. Todd*, [46] the insured had an option to purchase the subject dwelling and had started moving items into it. The fire occurred before the closing, and the court acknowledged that the insurable interest of the insured was the $1 paid for the option. Nonetheless, the court not only upheld payment of full policy limits, but upheld payment of punitive damages in the amount of $250,000.

A third approach is to pay full policy limits when there has been full disclosure by the insured of the partial interest in the subject property at the time the insurance was obtained. This has been followed in South Carolina, [47] South Dakota, [48] and Wisconsin. [49]

An additional area of concern involves the sale or transfer of the property. In *Kilpatrick v. Hartford Fire Insurance Co*., [50] the court recognized that title could be transferred for a variety of reasons, including the securing of a mortgage. Therefore, even though the insured did not have title-- evidence was presented to show that title was held by the mortgagee--the court treated the insured as an owner.

Another perplexing area arises when the subject property is being sold and both the seller and buyer maintain insurance. Courts in that situation are inclined to permit recovery under each policy. [51] This should be viewed as a multiple policy situation, and not simply as a question of insurable interest.

Whenever an insured with a partial interest in the subject property is involved, the case law of the applicable jurisdiction should be scrutinized. The extent of recovery permitted can vary extensively.

Multiple Policies Covering One Property

When several policies of insurance are procured by an insured, the first policy obtained will be effective until cancelled. Subsequent policies, if obtained without disclosing that the property is insured, are void if disclosure is required. [52] If there is full disclosure to each carrier, in the event of a total loss, full payment may be required under each policy in effect, even if the amount paid exceeds the value of the property. [53]

Policy provisions, and sometimes court decisions, may call for a pro-rata distribution of liability. However, in *Millers' Mutual Insurance Assoc. v. LaPota*, the court specifically held that the pro-rata provision is inapplicable in the event of a total loss since the valued policy statute requires full payment. [54]

The pro-rata situation has been addressed statutorily in some jurisdictions. Florida and Georgia require disclosure of other policies while South Carolina and West Virginia permit pro-rata adjustment of the loss. In *Bumann v. St. Paul Fire and Marine Co*., [55] the court held that the North Dakota statute concerning pro-rata recovery superseded the valued policy statute.

There are several instances in which the valued policy law is not applied, because the structure is either not the primary structure covered by the policy (such as an adjacent structure) or because the structure cannot be inspected, as in the case of a builder's risk policy.

The valued policy laws should not apply to “other structures”' that exist on the subject premises for which the policy of insurance provides additional, but not specific coverage, for example, where coverage is provided up to a maximum of 10 percent of the limit of liability on the main structure. It is the ***49** responsibility of the insured to prove the amount of loss, and valued policy statutes will not fix that loss. The valuation contained in the policy is simply applicable to the main structure and not other ones. [56]

Although a policy insuring several structures specifies an aggregate amount of insurance in the declarations, payment under the valued policy law is limited to the amount of insurance provided in the schedule of locations if one structure suffers a total loss. [57]

With certain exceptions, valued policy laws have not been applied to builder's risk policies. [58] As the court noted in *White v. New Hampshire Insurance Co*., [59] it makes little sense to require application of the valued policy law to builder's risk policies, since a company cannot inspect a risk which has not yet been built. The purpose of the valued policy law is to fix the value when the insurer is able to conduct an inspection of the structure. In the case of a structure being built, the purpose of these laws cannot be achieved since the value of the structure changes each day additional work is completed.

Option to Repair or Restore

The valued policy laws of Florida, Georgia and Louisiana specifically provide that, in the event of a total loss, the insurer has the option to replace the subject building. Unless the valued policy law provides this option, any right to rebuild contained in the policy may not be given effect in the event of a total loss. [60]

Several jurisdictions have valued policies which specifically apply to partial losses. In those jurisdictions, depreciation is not permitted when repairs are undertaken after a partial loss. [61] Additionally, there is authority which indicates that if one undertakes to repair or replace a building, the repairs and restoration must be to code, notwithstanding what is otherwise deemed a code-upgrade exclusion in the policy. [62]

Florida, Minnesota, Ohio, South Carolina and Wisconsin have valued policy laws that contain provisions arguably limiting the application of each respective law when a replacement cost policy has been issued. A very interesting case concerning a replacement cost policy was decided by the court in *Patterson v. Grange Mutual Casualty Co*. [63] The court held that the valued policy statute was not applicable to a replacement cost policy. In applying the provisions of the policy, it was the duty of the insured to commence repairs in order to obtain recovery. The insured did not initiate any repairs, and therefore was limited in recovery to replacement costs less depreciation (or actual cash value).

If a total loss occurs requiring payment of full policy limits under a valued policy law, an insurer cannot bargain with the insured for the payment of a lesser amount than the full policy limits, and any attempt to settle for a lesser amount will be void. [64] As the court in *Britton v. Farmers Insurance Group* [65] held, if the insurer creates an issue of a total loss simply to avoid the application of the valued policy law, the insurer can be found to have committed bad faith. This case is interesting in many respects. During the investigation of an arson loss, the company attempted to negotiate for payment of an amount less than the full policy limits for a total loss. The court, in upholding the award of punitive damages, specifically held that the insurer was free to investigate the merits of the claim and to defend it if warranted. However, the insurer could not contest the amount due in the event of a total loss nor create an issue of a total loss.

The lesson of the *Britton* case is to evaluate the merits of the claim and make a decision based thereupon before any attempt to negotiate the claim. This case does not imply that an insurer cannot contest whether a structure is a total or a partial loss, if there is a legitimate factual question. When contesting, as noted above, the carrier is well advised to have available the testimony of a contractor and a structural engineer to support the insurer's contention.

Footnotes

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1 That statute was repealed in 1976 and reenacted in limited form in 1979.

2 Nathan v. St. Paul Mutual Ins. Co., 68 N.W.2d 385 (Minn. 1955); Heady v. Farmers Mut. Ins., 217 Neb. 172, 349 N.W.2d 366 (1984).

3 ARK. STAT. ANN. §66-3901 (1987); FLA. STAT. §627.702 (1984); GA. CODE ANN. §33-32-5 (1982); KAN. STAT. ANN. §40.905 (1986); MINN. STAT. §§ 65A.01-.08 (1986); MISS. CODE ANN. §83.13.5 (1972); MO. REV. STAT. §§ 379.140, -.145, -. 160 (1968); MONT. CODE ANN. §§33-24-102 to -103 (1968); NEB. REV. STAT. § 44.380 (1988); N.H. REV. STAT. ANN. §407.11 (1983); N.D. CENT. CODE §26.1-39-05 (1989); OHIO REV. CODE ANN. §3929.25 Anderson (1989); S.C. CODE ANN. §§38-9-190, -41-20 (Law Co-op); S.D. CODIFIED LAWS ANN. §31.2213; TENN. CODE ANN. §§ 56-7-801 to 803 (1989); TEX. §6.13 (1981); W.V. §33-17-9 (1988); WIS. § 632.05(2) (1980).

4 For example, Georgia's valued policy law applies to only one- or two-family residential structures and the only peril subject to the law is fire. This can be contrasted with Florida's valued policy law applicable to all structures. Also, California and Missouri have laws that apply to personal property.

5 Kenmore Const. Co. v. Maryland Casualty Co., 46 Ohio App. 2d 229, 348 N.E.2d 374 (1973); McNeely v. South Carolina Farm Bureau Mut. Ins. Co., 259 S.C. 39, 190 S.E.2d 499 (1972).

6 CAL. INS. CODE §2052.53, -.55, .-56, .-75. (1989)

7 IOWA CODE ANN. §515.96-.98. (1988)

8 American Ins. Co. v. Gentile Bros., 109 F.2d 732 (5th Cir. 1940), *cert. denied*., 310 U.S. 633 (1940); Perez v. Los Fresnos State Bank, 512 S.W.2d 796 (Tex. App. 1974); Haftford Live Stock Ins. Co. v. Gibson, 256 Ky. 338, 76 S.W.2d 17 (1934).

9 Paterson-Leitch Co. v. Insurance Co. of N. America, 366 F.Supp. 749 (N.D. Ohio 1973); Group Von Graupen v. Employers Mutual Fire Ins., 259 F. Supp. 934 (D. P.R. 1966); LaFayette Fire Ins. Co. v. Camnitz, 111 Fla. 556, 149 So. 653 (1953); Security Ins. v. Rosenburg, 227 Ky. 314, 12 S.W.2d 688 (1928); Meccage v. Spartenburg Ins. Co., 156 Mont. 135, 477 P.2d 115 (1970); Stahlberg v. Travelers Indem. Co., 568 S.W. 2d 79 (Mo. App. 1978).

10 Phoenix Ins. Co. v. Loetscher, 215 Ark. 23, 219 S.W.2d 629 (1949); McManus v. Travelers Ins. Co., 360 So.2d 207 (La. App. 1978); Home Ins. v. Greene, 229 So. 2d 576 (Miss. 1969); Hochheim Prairie Mut. Ins. v. Burnett, 698 S.W.2d 271 (Tex. App. 1985); Bennett v. Imperial Ins. Co., 606 S.W.2d 7 (Tex. App. 1980).

11 Brooks Realty, Inc. v. Aetna Ins. Co., 276 Minn. 245, 149 N.W.2d 494 (1967).

12 Bennett v. Imperial Ins. Co., 606 S.W.2d 7 (Tex. App. 1980).

13 Kelly v. Commercial Union Ins. Co., 709 F.2d 973 (5th Cir. 1983); Dumond v. Mobile Ins. Co., 309 So. 2d 776 (La. App. 1975).

14 Magrath v. Mechanics and Traders Ins. Co., 249 F.2d 98 (10th Cir. 1957).

15 New Hampshire Fire Ins. Co. v. Murray, 105 F.2d 212 (7th Cir. 1939); Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses, 96 F.2d 30 (8th Cir. 1938); City of New York Fire Ins. Co. v. Chapman, 76 F.2d 76 (7th Cir. 1935); Fidelity & Guaranty Ins. Corp. v. Mondzelewski, 49 Del. 306, 115 A.2d 697 (1955); Netherlands Ins. Co. v. Fowler, 181 So. 2d 692 (Fla. 2d Dist. Ct. App. 1966) Occhipinti v. Boston Ins. Co., 72 So. 2d 326 (La. App. 1954); Meccage v. Spartan Ins. Co., 156 Mont. 135, 477 P.2d 115 (1970); Stahlberg v. Travelers Indem. Co., 568 S.W.2d 79 (Mo. App. 1978); Maryland Casualty Co. v. Frank, 85 Nev. 209, 452 P.2d 919 (1969); Allen v. American Sec. Ins. Co., 53 N.C. App. 239, 280 S.E.2d 471 (1981); Stevick v. Northwest G.F. Mut. Ins. Co., 281 N.W.2d 60 (N.D. 1979); Scanlan v. Home Ins. Co., 79 S.W.2d 186 (Tex. App. 1935); Grandview Inland Fruit Co. v. Hartford Fire Ins. Co., 189 Wash. 590, 66 P.2d 827 (1937); Gambrell v. Campbellsport Mut. Ins. Co., 47 Wis. 2d 483, 177 N.W.2d 313 (1970); Eck v. Netherlands Ins. Co., 203 Wis. 515, 234 N.W. 718 (1931).

16 Reliance Ins. Co. v. Harris, 503 So. 2d 1321 (Fla. Dist. Ct. App. 1987), *review denied*, 513 So. 2d 1063 (Fla. 1987); Gimbels Midwest v. Northwestern Nat'l Ins. Co., 72 Wis. 2d 84, 240 N.W.2d 140 (1976); *but see* Glenn Falls Ins. Co. v. Peters, 379 S.W.2d 946 (Tex. 1965)(insured voluntarily demolished building).

17 503 So. 2d 1321 (Fla. Dist. Ct. App. 1987), *review denied*, 513 So. 2d 1063 (Fla. 1987).

18 12 F.2d 880 (4th Cir. 1926).

19 227 Ky. 314, 12 S.W.2d 688 (1929).

20 *See* Lincoln County Mut. Fire Ins. Co. v. Smith, 232 S.W.2d 637 (Tex. App. 1950)(although loss was total from a combined fire and flood, court found that the fire would have consumed the entire house had the flood not extinguished it and therefore permitted full recovery by the insured).

21 181 Cal. App. 3d 929, 190 Cal. App. 3d 1248, 227 Cal. Rptr. 209 (1986), *review granted*, 229 Cal. Rptr. 663, 723 P.2d 1248 (1986).

22 United States Fire Ins. Co. v. Sullivan, 25 F.2d 40 (8th Cir. 1928); Ehlart v. Graue, 292 Minn. 393, 195 N.W. 2d 823 (1972); Hartford Fire Ins. Co. v. Williams, 165 Miss. 233, 145 So. 94 (1933); Wells v. Missouri Prop. Ins. Placement Factory, 653 S.W.2d 207 (Mo. 1983)(en banc); American Ins. Co. of Newark v. Robinson, 120 Fla. 674, 163 So. 17 (1935); Barrick v. Ohio State Grange Mut. Ins. Assoc., 169 N.E.2d 141 (Ohio Com. Pl. 1959); Hunt v. General Ins. Co., 227 S.C. 125, 87 S.E.2d 34 (1955).

23 252 N.W. 2d 302 (N.D. 1977).

24 Foremost Ins. Co. v. Lowery, 617 F. Supp. 521 (S.D. Miss. 1985); Aetna Casualty and Surety Co. v. Clark, 427 S.W.2d 649 (Tex. App. 1968).

25 Nicholas v. Granite State Fire Ins. Co., 125 W.Va. 349, 24 S.E.2d 280 (1943).

26 Underwriters Ins. Co. v. Kirkland, 490 So. 2d 149 (Fla. Dist. Ct. App. 1986); Warren v. Old Dominion Co., 465 So. 2d 1376 (Fla. Dist. Ct. App. 1985), *review den*., 476 So. 2d 675 (Fla. 1985)(interest is payable from time it is due under the policy; i.e. within the 30 or 60 day period).

27 Hodge v. Cimmarron Ins. Co., 338 F. Supp. 910 (E.D. Mo. 1972); American Ins. Co. of Newark v. Robinson, 120 Fla. 674, 163 So. 17 (1935); Ehlert v. Graue, 292 Minn. 393, 195 N.W.2d 823 (1972); Gamel v. Continential Ins. Co., 463 S.W.2d 590 (Mo. App. 1971).

28 193 Minn. 1, 258 N.W. 289 (1934).

29 Heady v. Farmers Mut. Ins. Co., 217 Neb. 172, 349 N.W.2d 366 (1984).

30 Home Ins. Co. v. Hardin, 528 S.W.2d 723 (Ky. 1975)

31 FLA. STAT. §627.702(1) (1987).

32 243 Minn. 430, 68 N.W.2d 385 (1955).

33 Lumberman's Mut. Ins. Co. v. Edminister, 412 F.2d 351 (8th Cir.); Ellis v. Hartford Livestock Ins. Co., 293 Ky. 683, 170 S.W.2d. 51 (1943); Casablanca Concerts, Inc. v. American Nat'l Gen. Agencies, Inc., 407 N.W.2d 440 (Minn. 1987).

34 511 F.2d 241 (7th Cir. 1975).

35 496 F.2d 479 (7th Cir. 1974), *cert. den*., 419 U.S. 843 (1974).

36 In Board of Education of Hancock County v. Hartford Fire Insurance, 124 W.Va. 163, 19 S.E.2d 448 (1942), the court held that, when the insured stopped using the building and began preparing for physical demolition and construction of a new building, recovery was limited to the salvage of the building.

37 Travelers Indem. Co. v. Duffy's Little Tavern, 478 So. 2d 1095 (Fla. Dist. Ct. App. 1985), *review den.*, 488 So. 2d 68 (Fla. 1986); South Carolina Ins. Co. v. Pensacola Home and Savings Assoc., 393 So. 2d 1124 (Fla. Dist. Ct. App. 1980); Rutherford v. Pearl Assurance Co., 164 So. 2d 213 (Fla. Dist. Ct. App. 1964). *But see*, Smith v. Nationwide Mut. Fire Ins. Co., 564 F. Supp. 350 (N.D. Fla. 1983)(noted that Florida favored limiting recovery to the insured's interest in the property, but declined to follow that finding).

38 Roberts v. Houston Fire and Casualty Co., 168 So. 2d 457 (La. App. 1964); and Louisiana's valued policy statute.

39 Insurance Co. of N. America v. County of Hall, 188 Neb. 609, 198 N.W.2d 490 (1972); Note, though, that the Nebraska Legislature's reacted by amending the valued policy statute.

40 Koppinger v. Implement Dealers Mut. Ins. Co., 122 N.W.2d 134 (N.D. 1963).

41 393 So. 2d 1124 (Fla. Dist. Ct. App. 1980).

42 Gravning v. American Druggists' Ins. Co., 259 Ark. 523, 534 S.W.2d 754 (1976).

43 Mississippi Farm Bureau Mut. Ins. Co. v. Todd, 492 So. 2d 919 (Miss. 1986).

44 DeWitt v. American Family Mut. Co., 667 S.W.2d 700 (Mo. 1984) (en banc)(court found also that insurer acted in bad faith by not paying full policy limits to one who held partial insurable interest).

45 259 Ark. 523, 534 S.W.2d 754 (1976).

46 492 So. 2d 919 (Miss. 1986).

47 Holden v. Hanover Fire Ins. Co., 128 F. Supp. 527 (W.D. S.C. 1955).

48 Hight v. Maryland Ins. Co., 69 S.D. 320, 10 N.W.2d 285 (1943).

49 Gimbels Midwest, Inc. v. Northwestern Nat'l Ins. Co., 72 Wis. 2d 84, 240 N.W.2d 140 (1976).

50 701 S.W.2d 755 (Mo. App. 1985).

51 Smigiel v. Aetna Casualty and Sur. Co., 785 F.2d 922 (11th Cir. 1986).

52 Grace v. Westchester Fire Ins. Co., 7 Ohio App. 2d 156, 219 N.E.2d 227 (1964).

53 Millers' Mut. Ins. Assoc. v. LaPota, 197 So. 2d 21 (Fla. Dist. Ct. App. 1967); Dixie Fire Ins. Co. v. Minick, 226 Ky. 498, 11 S.W.2d 141 (1928); Republic Ins. Co. v. American Pub. Life Ins. Co., 246 So. 2d 410 (La. 1971); Harvey v. General

Guar. Ins. Co., 201 So. 2d 689 (La. App. 1967); American Cent. Ins. Co. v. Meredith, 228 Miss. 402, 87 So. 2d 871 (1956); Ciokewizc v. Lynn Mut. Fire Ins. Co., 212 Wis. 44, 248 N.W. 778 (1933).

54 197 So. 2d 21 (Fla. Dist. Ct. App. 1967).

55 312 N.W.2d 459 (N.D. 1981).

56 Independent Presbyterian Church v. American Employers Ins. Co., 280 So. 2d. 393 (La. App. 1973), *cert. den*., 281 So. 2d 756 (La. 1973); Morris v. American and Foreign Ins. Co., 150 Neb. 765, 35 N.W.2d 832 (1949); Trible v. Tower Ins. Co., 43 Wis. 2d 172, 168 N.W.2d 148 (1969).

57 Bratton v. St. Paul Surplus Lines Ins. 17 Ark. App. 193, 706 S.W.2d 189 (1986); Columbia College v. Pennsylvania Ins. Co., 250 S.C. 237, 157 S.E.2d 416 (1967).

58 White v. New Hampshire Ins. Co., 390 N.W.2d 313 (Minn. App. 1986); Century Corp. v. Phoenix of Hartford, 157 Mont. 16, 482 P.2d 1020 (1971); American Gen. Fire & Casualty Co. v. Buford, 716 S.W.2d 86 (Texas App. 1986); *contra*, Phoenix Assurance Co. v. Loetscher, 215 Ark. 23, 219 S.W.2d 629 (1949).

59 390 N.W.2d 313 (Minn. App. 1986).

60 *See* cases cited *supra* note 2; Prestige Casualty Ins. Co. v. Eldre 721 S.W.2d 242 (Mo. App. 1986)(replacement of personal property prohibited under valued policy).

61 Sperling v. Liberty Mut. Ins.Co., 281 So. 2d 297 (Fla. 1973); Great American Ins.Co. v. Crume, 266 Ky. 729, 99 S.W.2d 742 (1936); Arnold v. Liberty Mut. Ins. Co, 469 So. 2d 1155 (La. App. 1985).

62 A. H. Jacobson Co. v. Commercial Union Assurance, 83 F. Supp. 674 (D. Minn. 1949); Regency Baptist Temple v. Insurance Co. of N. America, 352 So. 2d 1242 (Fla. Dist. Ct. App. 1977).

63 27 Ohio Misc. 2d 28, 501 N.E.2d 691 (1986).

64 Hart v. North British and Mercantile Ins. Co., 182 La. 551, 162 So. 177 (1935); Meccage v. Spartan Ins. Co., 156 Mont. 135, 477 P.2d 115 (1970); Gimbels Midwest, Inc. v. Northwestern Nat'l Ins. Co. of Milwaukee, 72 Wis. 2d 84, 240 N.W.2d 140 (1976).

65 721 P.2d 303 (Mont. 1986).

Appendix

1. Under valued policy laws, if a total loss occurs to the insured structure, it appears relatively simple to conclude that full payment of the amount agreed to in the policy will be due to someone with a full ownership ownership interest.

2. Remember that, although only 17 states have valued policy statutes on the books, valued policies can be created by agreement where it was the clear intent of the parties to agree on a certain value in the event of a loss.

3. The burden of valued policy laws falls clearly on the insurer to inspect the property covered by the policy before agreeing on the insured value as virtually every jurisdiction holds that the amount of insurance cannot be questioned after a loss.

4. It may not matter that the owner only gave an “opinion”' of the value of the property if it is accepted by the insurer. That value will control what is owed under the policy notwithstanding any claim that the amount was inaccurate or even fraudulent

5. If there is a dispute over whether a structure is a total or partial loss, one must obtain an analysis of the remnants by a structural engineer and the estimate of a contractor willing and able to conduct the repair work.

6. Two of the defenses an insurer may raise to the application of the valued policy law are to allege an “increase of risk”' to the insurer after the inception of the policy, or to contend that the policy constituted a “wagering contract”' if the building was insured initially without disclosure of the insured's intent to abandon and destroy it.

7. Whenever an insured with a partial interest in the subject property is involved, the case law of the applicable jurisdiction should be scrutinized. The extent of recovery permitted can vary extensively.

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