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THE WIND AND THE WAVES: THE EVOLUTION OF FLORIDA PROPERTY INSURANCE LAW IN RESPONSE TO MULTIPLE-CAUSATON HURRICANE DAMAGE

SCOTT EDWARDS*

I. INTRODUCTION

Property insurance in Florida has long been regulated by the Valued Policy Law.[1] Its aim is simple: to prevent litigation and promote fairness to consumers of insurance by requiring that, in the event of a total loss to a building, an insurer pay the full value of the policy limits under the insurance contract. The law protects homeowners and facilitates the quick settlement of claims by preventing the insurer from claiming that the structure was, in fact, worth less than the amount it was insured for.

The application of the Valued Policy Law in Florida has led to a great deal of controversy in the aftermath of recent busy hurricane seasons. In the summer of 2004, the state of Florida was pummeled by four strong hurricanes, leading to massive losses to property and

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1. FLA. STAT. § 627.702 (2005).

placing great strain on the continued ability of insurers to provide property coverage in the state. The insurance system's problems following such a devastating hurricane season have been exacerbated by the Florida District Court of Appeal decisions in *Mierzwa v. Florida Windstorm Underwriting Ass'n*[2] and *Florida Farm Bureau Casualty Insurance Co. v. Cox*,[3] which have exposed the insurers by making them potentially liable for a large amount of damage not covered under most homeowners' insurance contracts.

The typical homeowners property insurance policy protects against damages caused by windstorm, but excludes coverage for damages caused by flooding.[4] Thus, in order to be covered for losses caused by flood, a homeowner must obtain a separate flood insurance policy. Hurricanes pose a unique problem to the settling of property claims because they frequently cause damage by two major perils: wind, which is covered, and flood, which is typically not. Conflict thus frequently ensues over the extent a given property was damaged by flood, rather than by wind. The *Mierzwa* court, however, applied the Valued Policy Law in a manner that will require windstorm insurers to pay out their full policy limits on a property, despite flooding being a significant factor in the damage caused by the hurricane.[5] Even when homeowners have received payments from separate flood insurance, they are still allowed to collect the full value of the property from the windstorm insurer under the *Mierzwa* ruling. This creates two possible problems: either the insured homeowner gets coverage for damage caused by flooding without having to purchase flood insurance or the homeowner who has elected to purchase flood insurance will receive a windfall payment in excess of the total value of its loss.

This Comment analyzes how the property insurance landscape of Florida has been reshaped by the impact of recent hurricanes. Part II explores the history, initial equitable justifications, and intended applications of the Valued Policy Law. This Part also demonstrates that the original Valued Policy Law did not contemplate concurrent causation generally or hurricane damages specifically. Part III examines the majority's decision in *Mierzwa*, as well as the insurance industry's reaction to the case. This part also considers legislation that has ensued in response to *Mierzwa*. Part IV takes a deeper look at the

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2. 877 So. 2d 774 (Fla. 4th DCA 2004).

3. 943 So. 2d 823(Fla. 1st DCA 2006).

4. "Virtually all homeowners' insurance policies exclude flood, which has traditionally been a separately insured risk." *Id.* at 836 n.11 (Polston, J., dissenting). The Federal Government has noted that private insurers rarely provide flood insurance, as they are unable to make it available at reasonable rates. *See* Flick v. Liberty Mut. Fire Ins. Co., 205 F.3d 386, 387-89 (9th Cir. 2000).

5. *Mierzwa*, 877 So. 2d at 776-80.

Mierzwa decision, considering the negative consequences of applying its holding in various hurricane damage scenarios. Part V evaluates alternative interpretations to the Valued Policy Law which would achieve the goals of the law in a fair and just way, with emphasis on Judge Gross's concurring opinion in *Mierzwa*. Part VI explains the amendments the Florida Legislature made in response to *Mierzwa* and examines how the amendments change the interpretation of the Valued Policy Law. Part VII concludes.

II. THE VALUED POLICY LAW

A. Florida's Valued Policy Law

Florida's Valued Policy Law was first enacted in 1899.[6] Prior to its amendment in 2005,[7] it stated in relevant part that "[i]n the event of the total loss of any building . . . located in this state and insured by any insurer as to a covered peril, . . . the insurer's liability, if any, . . . shall be in the amount of money for which such property was so insured as specified in the policy."[8] The law serves to "simplify and facilitate prompt settlement of insurance claims when a total loss occurs" by setting the property's value before a loss occurs.[9] A proper valuation of property after a total loss is often difficult to ascertain, because most evidence of the property's worth has been destroyed.[10] The statute also facilitates the settling of claims by making matters such as depreciation of the property irrelevant.[11] The state of the law before the Valued Policy Law led to "suspicions of and opportunities for false or exaggerated claims on the one hand," and to "accusations, minimizations and oppressions on the other."[12] The Valued Policy Law reduces this potential for conflict over the value of the property by acting as a measure of liquidated damages.[13] The Valued Policy Law also benefits insureds by discouraging insurers from writing policies with excessive coverage in order to charge higher premiums.[14]

A "total loss" to the covered property is required to trigger the Valued Policy Law.[15] A property can also be deemed a "constructive

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6. John V. Garaffa, *Florida's "Valued Policy" Law:* The Eye of the Storm, FLA. B.J., Apr. 2005, at 8, 8.

7. *See* Act effective June 1, 2005, ch. 2005-111, 2005 Fla. Laws 1063, 1092-93; *see also* discussion *infra* Part VI.

8. FLA. STAT. § 627.702 (2003).

9. Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. 1st DCA 1964).

10. *Id.*

11. *See* Am. Ins. Co. of Newark, N.J. v. Robinson, 163 So. 17, 19 (1935).

12. *Boswell*, 167 So. 2d at 784; *see also* Am. Ins. Co. v. Gentile Bros. Co., 109 F.2d 732 (5th Cir. 1940).

13. *Boswell*, 167 So. 2d at 784.

14. Mierzwa v. Fla. Windstorm Underwriting Ass'n, 877 So. 2d 774, 780 (Fla. 4th DCA 2004) (Gross, J., concurring specially) (citing 44 AM. JUR. 2D *Insurance* § 1500 (2003)).

15. FLA. STAT. § 627.702 (2005).

total loss" if the demolition of the structure is required by statute or local ordinance.[16] Many municipalities have ordinances requiring damaged buildings to be reconstructed in conformance with building codes in force at the time of repairs when these repairs and alterations cost more than fifty percent of the existing building's value.[17] In such situations, a constructive total loss occurs because "the building has been so damaged as to lose its identity, or has been so nearly completely destroyed that a reasonably prudent owner would not care to take the chance of using those parts which remain standing."[18] Constructive total losses frequently occur in properties damaged by hurricanes, because laws in many flood-prone areas require that property which suffers substantial loss be elevated to heights required by building codes in effect at the time of reconstruction.[19] For example, approximately three thousand homeowners in Dade County whose homes were damaged by Hurricane Andrew in 1992 were ineligible for building permits because their homes were at elevations below those required by subsequent federal guidelines.[20] An existing structure must almost always be demolished before the land can be elevated to conform to building codes.[21]

B. The Valued Policy Law in Other States

Eighteen states, in addition to Florida, have valued policy laws.[22] These laws differ, however, in both the covered perils that trigger the valued policy law and the method of recovery in the event of concurrent policies.[23] As to covered perils, Florida is fairly unique in its application of its Valued Policy Law to any covered peril—only Mon-

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16. *Mierzwa*, 877 So. 2d at 780 (Gross, J., concurring).

17. *See, e.g.*, FORT LAUDERDALE, FLA., ORDINANCES § 104.3(e), *quoted in Mierzwa*, 877 So. 2d at 776 n.3.

18. Occhipinti v. Boston Ins. Co., 72 So. 2d 326, 330 (La. Ct. App. 1954).

19. *See* Hugh L. Wood, Jr., Comment, *The Insurance Fallout Following Hurricane Andrew: Whether Insurance Companies Are Legally Obligated to Pay for Building Code Upgrades Despite the "Ordinance or Law" Exclusion Contained in Most Homeowners Policies*, 48 U. MIAMI L. REV. 949, 952-54 (1994).

20. *Id.* at 954 (citing Don Fine Frock, *Insurance Could Pay to Elevate Houses*, MIAMI HERALD, Nov. 18, 1992, at 1A).

21. *See Mierzwa*, 877 So. 2d at 776 n.3.

22. ARK. CODE ANN. § 23-88-101 (2006); GA. CODE ANN. § 33-32-5 (2006); KAN. STAT. ANN. § 40-905 (2005); LA. REV. STAT. ANN § 22:695 (2006); MINN. STAT. § 654.01 (2006); MISS. CODE ANN. § 83-13-5 (2006); MO. REV. STAT. § 379.140 (2006); MONT. CODE ANN. § 33-24-102 (2005); NEB. REV. STAT. § 44-501.02 (2006); N.H. REV. STAT. ANN. § 407:11 (2006); N.D. CENT. CODE § 26.1-39-05 (2006); OHIO REV. CODE ANN. § 3929.25-.26 (2006); OKLA. STAT. tit. 36, § 4804 (2006); S.C. CODE ANN. § 38-75-20 (2005); S.D. CODIFIED LAWS § 58-10-10 (2006); TENN. CODE ANN. § 56-7-802 (2006); W. VA. CODE ANN. § 33-17-9 (2006); WIS. STAT. § 632.05 (2005).

23. *See* Kristin Hual & Michael Schofield, *Valued Policy Law: A Historical Perspective on the Compounding Equation*, TRIAL ADVOCATE Q., Summer 2005, at 29, 31.

tana,[24] Nebraska,[25] North Dakota,[26] Wisconsin,[27] and arguably West Virginia[28] have statutes applicable to such a broad range of covered perils. Most states limit their valued policy laws to losses caused by fire.[29]

Florida is the only coastal state where the Valued Policy Law is broad enough to encompass losses caused by hurricane. Other states which frequently experience hurricanes have narrow valued policy laws, or none at all.[30] Most significantly, valued policy laws will not be an issue in Louisiana or Mississippi, the states hardest hit by Hurricane Katrina in 2005. Both states' valued policy laws are explicitly limited to loss caused by fire.[31] Concurrent causation, though, is still a major issue in settling claims arising out of Hurricane Katrina.[32]

The second way in which valued policy laws differ is how they address recovery in respect to concurrent policies by addressing different perils or causes of loss. Most states' valued policy laws follow Florida's "aggregate" system, which requires multiple insurers who insure the same property for the same covered peril to both tender

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24. MONT. CODE ANN. § 33-24-102 (2005) ("Whenever any policy of insurance shall be written to insure any improvements upon real property in this state against loss or damage and the property insured is considered to be a total loss, . . . the amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.").

25. NEB. REV. STAT. § 44-501.02 (2006) ("Whenever any policy of insurance is written to insure any real property in this state against loss by fire, tornado, windstorm, lightning, or explosion and the property insured is wholly destroyed . . . the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.").

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

27. WIS. STAT. § 632.05 (2005). Chapter 632, subsection I, applies to "Fire and Other Property Insurance." *Id.*

28. West Virginia's valued policy law is somewhat ambiguous: "All insurers providing fire insurance on real property in West Virginia shall be liable, in case of total loss by fire or *otherwise* . . . ." W. VA. CODE § 33-17-9 (2006) (emphasis added). All reported cases from West Virginia, however, have only involved fire damage. *See id*.

29. *See, e.g.*, GA. CODE ANN. § 33-32-5 (2006).

30. Georgia, Louisiana, Mississippi, and South Carolina are states vulnerable to hurricanes which have Valued Policy Laws which apply only to fire insurance. *See supra* note 22 and accompanying text.

31. LA. REV. STAT. ANN. § 22:695 (2006), MISS. CODE ANN. § 83-13-5 (2006); *see also* Reliance Ins. Co. v. Orleans Parish School Bd., 322 F.2d 803, 808-09 (5th Cir. 1963) (noting that losses caused by windstorm do not fall under Louisiana's valued policy law). *But see* Fran Matso Lysiak, *Coverage Disputes Inevitable After Katrina*, BEST'S REV., Oct. 1, 2005, at 11, *available at* 2005 WLNR 17050317 (quoting Louisiana insurance expert W. Shelby McKenzie's claims that "Louisiana's 'Valued Policy Law' is similar to Florida's" and that the language of its Valued Policy Law has not been interpreted since the law's reenactment in 1992. Thus, "Louisiana courts 'would certainly have access to the Florida decision [in *Mierzwa*] . . . . They could either follow that decision or make their own determination of the meaning of the Louisiana statute.' ").

32. *See, e.g.*, Michael Kunzelman, *State Farm Accused of Destroying Evidence*, MIAMI HERALD, Apr. 11, 2006, at C3 (describing U.S. Senator Trent Lott's accusations that State Farm manipulated engineering reports to interpret losses in Mississippi from Hurricane Katrina to be caused by flood, in spite of evidence indicating that losses were due to windstorm).

full policy limits.[33] Under this approach, if the insured has overinsured himself with the knowledge of both insurers, the insurers are still liable to pay full liabilities. Several states, however, take a pro rata approach to the allocation of recovery when multiple policies cover the same loss.[34] Under the pro rata approach, all the insurers are liable for a percentage of the overall loss, resulting in the insured being compensated for the actual value of the loss and nothing more.[35]

III. *MIERZWA* AND ITS AFTERMATH

Florida's Valued Policy Law was designed to address losses involving a single, covered peril. Since the Valued Policy Law was first enacted in 1899, the nature of property insurance and the Valued Policy Law have both changed. Property insurance has expanded from its origin as fire insurance to "all risks" insurance,[36] and the Valued Policy Law has likewise been expanded to apply to all covered perils, not just fire.[37] The Valued Policy Law's application in the context of concurrent causation—combining a covered peril and an excluded peril—was first explored by Florida courts in *Mierzwa v. Florida Windstorm Underwriting Ass'n*.[38] Part III.A will examine the *Mierzwa* court's application of the Valued Policy Law and its holding, which requires an insurer pay its full policy limits under the Valued Policy Law so long as there is *any* loss caused by *any* covered peril. Part III.B details the reaction to the *Mierzwa* case, from the perspective of both the insurance industry and advocates of property owners. Part III.C explores the implications for the insurance industry arising out of increased hurricane frequency and denser populations in hurricane-prone areas. Part III.D will examine the litigation that has arisen in the aftermath of the *Mierzwa* holding, most notably the case of *Florida Farm Bureau Casualty Insurance Co. v. Cox*.[39]

A. The Mierzwa *Case*

Florida's Valued Policy law was first applied in the context of multiple-causation hurricane damages in *Mierzwa v. Florida Windstorm*

33. *See, e.g.*, FLA. STAT. § 627.702 (2005); GA. CODE. ANN. § 33-32-5 (2006); *see also* Springfield Fire and Marine Ins. Co. v. Boswell, 167 So. 2d 780 (Fla. 1st DCA 1964).

34. *See, e.g.*, N.D. CENT. CODE § 26.1-39-05(1)(c) (2005) ("In case of double insurance, each insurer shall contribute proportionally toward the loss without regard to the dates of the insurance policies."); *see also* Bumann v. St. Paul Fire & Marine Ins. Co., 312 N.W.2d 459, 463 (N.D. 1981) (requiring pro rata distribution of loss among policies when multiple policies cover the same property).

35. *Bumann*, 312 N.W.2d at 463 n.5 (setting forth the pro rata formula for determining each insurer's individual liability to the insured).

36. KENNETH S. ABRAHAM, INSURANCE LAW & REGULATION 173 (4th ed. 2005).

37. Garaffa, *supra* note 6, at 8.

38. 877 So. 2d 774 (Fla. 4th DCA 2004).

39. 31 Fla. L. Weekly D2679 (Fla. 1st DCA 2006).

Underwriting Ass'n.[40] In that case, the insured's property suffered extensive wind and flood damage caused by Hurricane Irene.[41] The insured had separate insurance policies provided by different insurers: one for wind damage and a second for flood damage.[42] The policy covering wind damage specifically excluded coverage for any damages not caused by wind.[43]

The wind insurer valued the damage due to wind at $73,177,[44] while the flood insurer valued damage due to flooding at $54,485.[45] Although the property was not totally destroyed, it was deemed to have suffered damage which would cost more than fifty percent of its existing value to replace.[46] An ordinance of the City of Fort Lauderdale required it to be repaired in a manner that brought it into conformance with current building codes.[47] Most importantly, bringing the property up to code required demolishing the existing structure in order to elevate the site.[48] Because the structure had to be demolished under the code, the property was rendered a "constructive total loss."[49]

The insured brought suit, claiming that the Florida Valued Policy Law[50] required that the windstorm insurer tender its full policy limits due under the policy.[51] The insurer argued, and the trial court agreed, that the insurer was liable only for its pro rata share of the damage because flooding was also a factor in the loss.[52] The Fourth District Court of Appeal reversed the trial court's ruling, however, holding that the Valued Policy Law required tendering of the full policy limits[53] notwithstanding the flood damage exclusion and the existence of a separate flood insurer.

The *Mierzwa* court arrived at its decision largely by interpreting the language of the Valued Policy Law and the insurance policy at issue. The court found the meaning of the Valued Policy Law to be "simple and straightforward."[54] It found that two elements were necessary to find that the Valued Policy Law applied. First, the struc-

40. 877 So. 2d 774.
41. *Id.* at 775-76.
42. *Id.* at 775.
43. *Id.*
44. *Id.* at 776 (totaling $64,807 for damages, plus $8370 for debris removal and other costs).
45. *Id.*
46. *Id.*
47. *Id.* (citing FORT LAUDERDALE, FLA., ORDINANCES § 104.3(e)).
48. *Id.* at 776 n.3.
49. *Id.* at 780 (Gross, J., concurring specially).
50. FLA. STAT. § 627.702(1) (2003); see Part VI, *infra*, for discussion on the Valued Policy Law's 2005 amendment in response to *Mierzwa*.
51. *See Mierzwa*, 877 So. 2d at 775.
52. *Id.*
53. *Id.* at 775, 777-79.
54. *Id.* at 775.

ture must be "insured by [an] insurer as to *a* . . . covered peril."[55] Second, the building must be a total loss.[56] If both these elements exist, the court held the Valued Policy Law applies without regard to any other fact that may be present in the case. That means that "if the insurance carrier has *any* liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy."[57] Thus, the court held, the covered peril need not be the sole cause, or even the major cause, of the damage in order for the Valued Policy Law to apply.[58]

Furthermore, the court held that the policy's anticoncurrent cause clause (ACCC), which specifically excluded flood damage, did not serve to override the Valued Policy Law. The policy was silent as to the insurer's liability when coverage for other perils was provided by different carriers.[59] Therefore, the court reasoned that there was a conflict between the ACCC and the Valued Policy Law.[60] The court resolved this ambiguity by referring to a long-standing maxim of insurance policy construction: when there are two fair interpretations of an insurance policy, it will be construed in favor of providing coverage.[61] Thus, the court held that the Valued Policy Law must supercede any exclusion in the policy.[62]

The *Mierzwa* court also rejected the insurer's proposition that a pro rata apportionment of damages would be appropriate under the Valued Policy Law. Relying on *Millers' Mutual Insurance Ass'n of Illinois v. La Pota*,[63] the court held that pro rata apportionment is contrary to the Valued Policy Law.[64] Under *La Pota*, when an insured is permitted to seek coverage from multiple insurers, the insured is able to recover the full policy limits from all policies that may exist

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55. *Id.* (quoting FLA. STAT. § 627.702(1) (2003)).

56. *Id.* at 775.

57. *Id.* at 775-76.

58. *Id.* at 776. The court declined to consider arguments made by the insurer regarding the potential "parade of horribles" that would result if the Valued Policy Law were to be applied when the covered peril is responsible for a miniscule fraction of the overall loss. *Id.* at 778 n.5; *see* discussion at *infra* Part IV.

59. Mierzwa, 877 So. 2d at 777.

60. *Id.*

61. *Id.* at 777-78.

62. *Id.* at 778.

63. 197 So. 2d 21 (Fla. 2d DCA 1967).

64. *Mierzwa*, 877 So. 2d at 778. In *La Pota*, the Second DCA found that a pro rata clause in an insurance contract, which purported to limit the insurer's liability to its fractional share of insurance on the building, was not permissible under the Valued Policy Law. *La Pota*, 197 So. 2d at 22. The purpose behind the Valued Policy Law, the court held, was to form an agreement on the value of the insurance on the property at the time it is written. *Id.* at 24. Thus, "[e]ach insurer is liable for the full amount of his policy, provided, of course, there is no fraud or other conduct of the insured which would constitute a valid defense to an action to recover for [the full value of the policy]." *Id.* When there are multiple policies covering a given property, "[t]he aggregate liability is the total of the various values specified and for which an appropriate premium has been paid." *Id.*

on the property.[65] Had the insurer in *Mierzwa* desired to restrict its exposure so that it would not be liable for other damages under the Valued Policy Law, it should have included an explicit clause in the policy making such a limitation.[66]

B. Reaction to and Criticism of Mierzwa

Representatives of property owners had an overwhelmingly positive reaction to the *Mierzwa* decision. Commentators noted that the meaning of the Valued Policy Law was clear as written and that the *Mierzwa* court simply interpreted the statute as written.[67] Jason Richards, writing in the Florida Bar Journal, argued that the courts did not have the authority "to find 'unjust' something that the statute specifically permits," thus any complaints about the *Mierzwa* case should be addressed to the legislature.[68]

The thrust of the argument in favor of *Mierzwa* lies in the interpretation of the Valued Policy Law as a "calculated risk." Under this interpretation of Florida's Valued Policy Law, the law acts as a liquidated damages clause, rendering unimportant any insurance the insured has procured from other parties.[69] When an insurer does not explicitly limit additional coverage on a structure, "it does so at its own risk, and the company cannot then take the position that there should be a narrow, restrictive interpretation of the coverage to avoid its contractual (and statutory) duties."[70]

But representatives of the insurance industry counter that such interpretations of calculated risk will have an extremely adverse impact on the availability and affordability of property insurance in Florida. The *Mierzwa* decision has caused a great deal of panic within Florida's insurance industry, especially in the aftermath of 2004's catastrophic hurricane season.[71] According to those who represent the insurance industry, *Mierzwa*'s broad interpretation of the responsibilities of an insurer under the Valued Policy Law will "open the floodgates" to a "significant amount of litigation."[72]

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65. *Mierzwa*, 877 So. 2d at 778 (citing *La Pota*, 197 So. 2d at 24).

66. *Id*. The court held that the limitation would be necessary to make the insurer's interpretation "arguably possible," due to the rule of construction that interprets ambiguities in insurance policies in favor of the insured. *Id.* The court declined to address whether such a limiting clause would be legal under the Valued Policy Law. *Id.* at 778-79.

67. *See, e.g.*, R. Jason Richards, *Florida's "Valued Policy Law": Clarifying Some Recent Misconceptions*, FLA. B.J., Dec. 2005, at 18, 18-19.

68. *Id*. at 20.

69. *Id*.

70. *Id*.

71. Robert Groelle, *Florida's Valued Policy Law: An Insurer's Obligations for Additional Coverages After* Mierzwa v. FWUA, TRIAL ADVOCATE Q., Winter 2005, at 19.

72. *Id*. at 22.

One commentator considers the *Mierzwa* decision to be a "Category Five"[73] to the insurance industry, contrary to established principles of insurance and contract law.[74] The *Mierzwa* decision, he argues, greatly increases the likelihood of litigation over the Valued Policy Law.[75] Even absent the *Mierzwa* case, the legal system is structured to favor litigation in insurance coverage cases. Insurance litigation frequently involves a large sum of money; thus, "the insurer's costs of litigation are often substantially less than its exposure," while the insured has incentive to litigate (and to reject insufficient settlements) because its costs are usually borne by the attorney under the contingent fee system, rather than the insured itself.[76] These incentives have been exacerbated by *Mierzwa* and its progeny. Insureds now have a greater incentive to seek their property to be declared an actual or constructive total loss because such a determination may afford the insured "a windfall of double policy limits."[77] Likewise, insurers now have a greater resolve to vigorously litigate claims under the Valued Policy Law in hopes of avoiding the potential of "tender[ing] policy limits even when virtually all the damage has been caused by a peril which is excluded under the policy."[78] Because of this, the *Mierzwa* decision will result in "an unfortunate economic impact on the cost of property insurance in Florida."[79]

Representatives of the insurance industry advocate interpreting the Valued Policy Law under the indemnity theory, rather than the calculated risk theory. As long as an obligation to pay full policy limits for damage caused primarily by an excluded peril "is now a 'calculated risk,' the carriers could be excused if they decided that future premiums should be raised to reflect the risk of all possible perils."[80] Garaffa notes that the cases relied upon by Richards[81] all involve cases in which insureds had multiple policies covering the *same* peril.[82] *Mierzwa* and its progeny are distinguishable because they address loss caused by two separate perils, insured under two separate policies.[83]

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73. Garaffa, *supra* note 6, at 13.
74. *Id.* at 18.
75. *Id.* at 20.
76. Banks McDowell, *Causation in Contracts & Insurance*, 20 CONN. L. REV. 569, 591 (1988).
77. Garaffa, *supra* note 6, at 20.
78. *Id.*
79. *Id.* at 18, 20.
80. John V. Garaffa, *Author's Response to Valued Policy Law Article*, FLA. B.J., Jan. 2006, at 4, 30.
81. *See, e.g.*, Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780 (Fla. 1st DCA 1964). *See generally* Richards, *supra* note 67, at 19-20.
82. Garaffa, *supra* note 80, at 4.
83. *Id.*

C. The Impact of Recent Busy Hurricane Seasons on the Valued Policy Law

Recent severe hurricane seasons have had an immense impact on the insurance industry. A major problem is that many current insurance regimes were implemented during a lull in the cycle of hurricanes. A report by the Insurance Services Offices (ISO) notes that "[f]or many years, insurers and their customers benefited from a lull in major storm activity."[84] Between 1969 and 1989, for example, the United States did not experience a single "severe" hurricane[85] and only experienced nine "intense" hurricanes from 1970-1989.[86] A string of severe hurricanes has hit the United States in the last fifteen years: Hurricane Hugo in 1989, Hurricane Andrew in 1992, and Hurricane Charley in 2004.[87] In addition to Charley, Florida was struck by three other major hurricanes in 2004: Frances (Category Two),[88] Ivan (Category Three),[89] and Jeanne (Category Three).[90] The 2005 Hurricane Season was also highly active, represented most notably by Hurricane Katrina, a Category Three storm upon landfall that was "the costliest" and "one of the most devastating natural disasters in United States history."[91] Because of high rates of building in hurricane-prone areas and market forces during the "lull" period, "[t]he favorable experience during the lull, compounded by the pressures for market share and the dynamics of competition, may have led some insurers and reinsurers to be overexposed to severe catastrophes."[92] The insurance industry will continue to be vexed by prob-

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84. INS. SERVS. OFFICE, INC., THE IMPACT OF CATASTROPHES ON PROPERTY INSURANCE 6 (1994).

85. *Id.* at 7. A "severe hurricane" is defined by the ISO as a Category Four or Five storm on the Saffir-Simpson scale, with sustained wind speeds exceeding 130 miles per hour. *Id.*

86. *Id.* at 6. An "intense hurricane" is defined as a Category Three or higher storm, with sustained wind speeds exceeding 110 miles per hour. *Id.*

87. *Id.*; RICHARD J. PASCH ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE CHARLEY 1 (2005), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL032004_Charley.pdf.

88. JOHN L. BEVEN II, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE FRANCES 1 (2004), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL062004_Frances.pdf.

89. STACY R. STEWART, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE IVAN 2 (2005), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL092004_Ivan.pdf.

90. MILES B. LAWRENCE & HUGH D. COBB, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE JEANNE 1 (2005), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL112004_Jeanne.pdf.

91. RICHARD D. KNABB ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 1 (2005), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.

92. INS. SERVS. OFFICE, INC., *supra* note 84, at 6.

lems with hurricanes as population densities increase on hurricane-prone lands.[93]

In light of the increasing frequency and intensity of hurricanes—as well as increased population on the coast—the philosophy of property insurance as applied to hurricanes may have to be readjusted. Many of the problems in applying the Valued Policy Law, in the context of insured hurricane losses, arise from the law's original limitation to damages caused by fire or lightning.[94] In 1969, the Florida Legislature amended the Valued Policy Law to cover total losses caused by any covered peril.[95] This opened the door to recovery for losses caused by hurricanes; however, it is likely that the legislature did not contemplate the complexities that would arise out of hurricane disputes. As one commentator notes: "The problem with *Mierzwa* is clear: The court is trying to fit a 2004 fact pattern into a 100-year-old statute."[96]

Outmoded insurance policy language frequently has to be adapted to conform to changes in the law, technology, and society. Because of the insurance industry's own reluctance to change the language of these policies, however, coverage and payment mechanisms that made sense in years past grow unwieldy and unworkable as time progresses. A particularly poignant analysis of such dilemmas can be found in the pollution exclusion cases. *American States Insurance Co. v. Koloms*[97] provides a comprehensive review of the problems associated with the exclusion and addresses how courts should interpret insurance contracts in light of changing societal conditions. In holding that the language of an insurance contract should not be strictly construed when doing so would lead to an absurd result, the court noted that it "would be remiss, therefore, if [the court] were to simply look to the bare words of the exclusion, ignore its *raison d' être*, and apply it to situations which do not remotely resemble traditional environmental contamination."[98] Judge Richard A. Posner, noting that the law is malleable and has a "pragmatic rather than dogmatic character," has also warned against the dangers of blind strict construction of the law leading to absurd results:

> The law is not absolute, and the slogan . . . 'Let justice be done though the heavens fall'[] is dangerous nonsense. The law is a human creation rather than a divine gift, a tool of government rather

93. *Id.* at 9. The population density of hurricane-prone lands in the United States has risen from 259 people per square mile in 1960 to a projected 421 people per square mile in 2010. *Id.*

94. *See* Garaffa, *supra* note 6, at 8.

95. *Id.*

96. *Id.* at 16.

97. 687 N.E.2d 72 (Ill. 1997).

98. *Id.* at 81.

> than a mandarin mystery. It is an instrument for promoting social welfare, and as the conditions essential to that welfare change, so must it change.[99]

Similarly, the maxims of statutory construction in Florida could have guided the *Mierzwa* court to rule in a manner more consistent with the purposes and intent of the Valued Policy Law. The court in *Childers v. Cape Canaveral Hospital, Inc.*[100] explained the duty of a court interpreting ambiguous laws:

> Courts should not construe a statute so as to achieve an absurd result. A literal interpretation of the statutory language used is not required when to do so would lead to an unreasonable conclusion, defeat legislative intent or result in a manifest incongruity. "[I]f from a view of the whole law, or from other laws in pari materia the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature."[101]

The court in *Mierzwa* would have been justified in recognizing that the situation at issue was a matter of first impression, and it could have applied the Valued Policy Law in a manner that would have been fair and consistent with the expectations of all parties to the insurance contract.

D. Litigation Resulting from the Mierzwa *Decision*

Although courts have considered the cases in this section to be a "narrow class,"[102] the *Mierzwa* decision has indeed spawned a great deal of litigation concerning the application of the Valued Policy Law in the aftermath of the 2004 hurricane season.

1. Scylla Properties, LLC v. Citizens Property Insurance Corp.[103]

Scylla Properties is a class action involving Valued Policy Claims arising from the 2004 hurricane season. The trial court certified the class as

> All persons whose Citizens-insured structures were damaged in the 2004 hurricanes by a combination of wind and flood in an amount giving rise to an actual or constructive total loss of the insured structures, other than those whose . . . structures were lo-

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99. Richard A. Posner, *Security Versus Civil Liberties*, *in* PERSPECTIVES ON TERRORISM: HOW 9/11 CHANGED U.S. POLITICS 61-62 (Allan J. Cigler ed., 2002).

100. 898 So. 2d 973 (Fla. 5th DCA 2005).

101. *Id.* at 975 (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452 (Fla. 1992) (citations omitted).

102. Florida Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 827 (Fla. 1st DCA 2006).

103. No. 05 CA 01 (Fla. 2d Cir. Ct. 2005).

> cated in the counties of Broward, Indian River, Martin, Okeechobee, Palm Beach or St. Lucie.[104]

The plaintiffs argued that the Valued Policy Law as interpreted by the *Mierzwa* court defines Citizens' liability "from the first scintilla of 'loss' or 'damage' to its '[l]imit of [l]iability.' "[105]

Citizens contended that the *Mierzwa* court misinterpreted the Valued Policy Law statute: "Citizens submits that [the] 'if any' [language in the statute] refers to whether the carrier has liability under the policy for a *total loss*."[106] Thus, "[i]f a carrier has liability for a total loss, its liability is for the face amount of the policy"; however, "if a carrier does not have liability for a total loss, the valued policy law simply does not apply."[107]

Citizens also argued that the trial court was not bound by *Mierzwa* because of a First District Court of Appeal opinion that addressed the issue of coverage in hurricanes.[108] Citizens relied upon *Opar v. Allstate Insurance Co.*[109] to argue the inapplicability of *Mierzwa* in the trial court's jurisdiction. In *Opar*, the plaintiff's' beachfront home was destroyed by Hurricane Opal.[110] The plaintiffs argued that their home was destroyed in part or whole by windstorm damage, a covered peril under the insurance contract.[111] However, Allstate denied coverage on the grounds that the property was destroyed by storm surge, an excluded peril.[112] The *Opar* court noted that, on remand to the trial court, "[i]f, on the other hand, a coverage defense is determined successful in whole or in part," determining that the loss was caused at least in part by storm surge, "then Allstate would either not be liable, or would be liable only in part for the amount."[113] The court's ruling in *Opar*, however, was based upon the validity of appraisal provisions in insurance contracts.[114] The court did not address the Valued Policy Law. Its silence can be interpreted in two ways: either the Valued Policy Law doesn't apply in

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104. Findings and Order Certifying Class at 9-10, *Scylla Props.* (No. 05 CA 01). The excluded counties are under the jurisdiction of Florida's Fourth District Court of Appeal, where *Mierzwa* controls.

105. Plaintiff's Motion for Summary Judgment Re: Class a at 7, *Scylla Props.* (No. 05 CA 01).

106. Defendant's Motion for Summary Judgment at 16, *Scylla Props.* (No. 05 CA 01).

107. *Id.*

108. *Id.* at 17-18.

109. 751 So. 2d 758 (Fla. 1st DCA 2000), *disapproved of on other grounds by* Johnson v. Nationwide Mut. Ins. Co., 828 So. 2d 1021 (Fla. 2002).

110. *Id.* at 759.

111. *Id.*

112. *Id.*

113. *Id.* at 761.

114. *Id.* at 759.

multiple causation issues, or because the holding was narrow, the language on liability is mere dicta.[115]

The trial court ruled that Citizens was indeed required under the Valued Policy Law to pay the full policy limits of all claims denied due to the existence of concurrent flood damage: "This Court is duty-bound to follow the decision of the District Court in *Mierzwa* . . . unless this Court finds that the decision in *Mierzwa* was clearly decided erroneously. I believe the *Mierzwa* case was correctly decided."[116] If affirmed on appeal,[117] *Scylla Properties* would present a rule far stricter than *Mierzwa* because the plaintiffs specifically plead that the liability of insurers under the Valued Policy Law begins at "the first scintilla of 'loss' or 'damage.' "[118]

2. Florida Farm Bureau Casualty Insurance Co. v. Cox[119]

Following *Mierzwa*, the First District held in *Cox* that the Valued Policy Law in effect in 2004[120] "forecloses an insurer's challenge to the measure of damages in the event of a total loss."[121] The insureds' property was rendered a total loss by Hurricane Ivan in 2004, damaged by wind as well as by water.[122] The opinion does not state whether there was a separate flood insurer, as was the case in *Mierzwa*. The *Cox* majority undertook a lengthy exercise in statutory construction to find that the literal statutory language of the Valued Policy Law requires windstorm insurers to pay full policy limits for covered property rendered a total loss when wind contributes to the

115. The *Cox* court noted that the Valued Policy Law was not in issue in *Opar*. Fla. Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 835 n.9 (Fla. 1st DCA 2006). Likewise, Judge Polston noted in his dissent that the language from *Opar* was dicta. *Id.* at 841-82 (Polston, J., dissenting).

116. Summary Final Judgment at 4, Scylla Props., LLC v. Citizens Prop. Ins. Corp., No. 05 CA 01 (Fla. 2d Cir. Ct. 2005).

117. The case is currently on appeal to Florida's First District Court of Appeal, Case Number 1D05-3480. As this article went to press, the First District has issued two opinions addressing various procedural issues, but has yet to rule on the merits. Citizens Prop. Ins. Co. v. Scylla Props., LLC, 946 So. 2d 1179 (Fla. 1st DCA 2006); Litvak v. Scylla Props., LLC, 946 So. 2d 1165 (Fla. 1st DCA 2006). In light of the First District's recent holdings in *Florida Farm Bureau Casualty Insurance Co. v. Cox* and *Citizens Property Insurance Co. v. Ueberschaer*, the court will almost certainly affirm *Scylla Properties* as well. See discussion *infra* Part III.D.2-3.

118. Plaintiff's Motion for Summary Judgment Re: Class a at 7, *Scylla Properties v. Citizens Prop. Ins. Co.* (No. 05 CA 01).

119. 943 So. 2d 823 (Fla. 1st DCA 2006).

120. The Florida Legislature amended the Valued Policy Law in 2005 in response to *Mierzwa*. The legislature specifically noted that the amendment would not apply to any claims prior to the law's enactment. The First District in *Cox* was thus bound to apply the law as it stood in 2004. See *infra* Part VI for a detailed discussion of the 2005 amendments and the *Cox* court's treatment of these amendments.

121. *Cox*, 943 So. 2d at 826.

122. *Id*.

loss, regardless of any damage caused by flooding.[123] The case is currently on appeal to the Florida Supreme Court.[124]

3. Citizens Property Insurance Co. v. Ueberschaer

The First District recently decided the case of *Citizens Property Insurance Co. v. Ueberschaer* on the authority of *Mierzwa* and *Cox*.[125] As was the case in *Cox*, Ueberschaer's home was rendered a constructive total loss by Hurricane Ivan. Although Citizens, the windstorm insurer, conceded that some of the damages were caused by windstorm, it also argued that a significant amount of damages were caused by flooding. Judge Lewis, writing for the majority, held that payment of full policy limits under the Valued Policy Law should not be interpreted as payment for flood damages: "Ueberschaer is not making a claim for flood or water damages, [but rather] for windstorm damges and corresponding total loss costs by requesting a fixation of the measure of damages equal to the predetermined amount in the policy."[126]

Ueberschaer is distinct from *Mierzwa* and *Cox* because it involves the liability of Citizens Property Insurance, which was created by the legislature with the express limitation to provide only windstorm coverage.[127] Citizens argued that its enabling legislation prohibited the application of the Valued Policy Law to it, even in light of *Mierzwa* and its progeny. The court held, though, that the Valued Policy Law and the Citizens enabling legislation "address different situations," and thus can both be applied. As noted above, the court considers full policy limits triggered by the Valued Policy Law to be wind damages, rather than flood damages. Judge Thomas, who was on the majority in *Cox*, dissented from the *Ueberschaer* majority's determination that Citizens should be held liable notwithstanding significant flood damages. Noting that the legislature took great pains "to ensure that Citizens would not function as simply another private insurer," Judge Thomas wrote that he did "not believe that the Legislature could more clearly state its intent that Citizens shall not provide flood insurance, and that an applicant or insured cannot depend on Citizens for such coverage." Therefore, he would have held that the Valued Policy Law does not apply to Citizens.

123. *Id.* at 826-27.
124. Fla. Farm Bureau Cas. Ins. Co. v. Cox, 948 So. 2d 758 (Fla. 2007).
125. 956 So. 2d 483 (Fla. 1st DCA 2007).
126. *Id.* at 488
127. *See* FLA. STAT. § 627.351(6).

IV. A "PARADE OF HORRIBLES": TAKING THE *MIERZWA* & *COX* DECISIONS SERIOUSLY

The *Mierzwa* court made a literal interpretation of the Valued Policy Law. All that is needed for the law to take effect is that the structure be insured for a covered peril and that the structure be considered a total loss.[128] As discussed above, the courts applied the law as intended for single peril losses to the dual-peril losses at issue in these cases. The courts dismissed the insurers' arguments that such a reading of the Valued Policy Law would result in insurers being liable for full policy limits when a covered peril is responsible for a minimal amount of the overall damage to the property.[129] A serious reading of the *Mierzwa* and *Cox* decisions, however, allows for no other interpretation of the Valued Policy Law.

While the courts could have justifiably chosen to determine that the statute and the case law were silent on the Valued Policy Law's application to concurrent causation issues—and were therefore inapplicable[130]—the courts instead labored to declare that the statute lacked ambiguity, thereby avoiding the need to traverse the jungle of statutory and insurance contract rules of construction. The *Cox* majority was especially reluctant to go beyond its literal interpretation of the statute:

> If the power the Florida Constitution assigns to the Legislature were ours instead, considerations like ease of actuarial analysis, the economics of the insurance industry, and even our own notions of fairness might well lead us to an interpretation of the 2004 statute not unlike what the statute has required since it was significantly revised in 2005.[131]

The court, relying on principles of judicial restraint, declined to pass judgment on "the merits [of] either . . . version of the statute, matters which are properly for the Legislature . . . ."[132]

Examples such as the following illustrate the absurd results that would flow from a literal application of the Valued Policy Law as interpreted in *Mierzwa* and *Cox*.[133] A home is situated within a floodplain, is valued at $200,000, and is insured for the same amount un-

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128. Mierzwa v. Fla. Windstorm Underwriting Ass'n, 877 So. 2d 774, 775 (Fla. 4th DCA 2004).

129. *See id.* at 778 n.5.

130. Judge Polston, dissenting in *Cox*, criticized the majority for going beyond the intent of the statute as a valued policy law to require an insurer to pay for damages caused by excluded perils. *Cox*, 943 So. 2d at 836-37 (Polston, J., dissenting).

131. *Id.* at 826 (majority opinion).

132. *Id.* at 827.

133. Garraffa, *supra* note 80, at 30, mentions the possibility that "a single shingle . . . blown from the roof" could evoke Valued Policy Law coverage for flood damage. This hypothetical scenario explores that assertion.

der a standard homeowner's policy. The homeowner elects to not purchase flood insurance. A Category One hurricane hits the property. The property experiences sustained winds no greater than eighty miles per hour, damaging only one window and removing several tiles from the roof. The hurricane makes landfall near the property at high tide, however, creating a storm surge that inundates the property with sea water. This results in extensive flood damage to the structure. The wind damage is accurately and in good faith estimated by the homeowner's insurance adjuster to be valued at $5000. The damage caused by the floodwaters, however, is so severe that the structure is condemned pursuant to local building ordinances, resulting in a constructive total loss.

Under the first element of the *Mierzwa* test, a court would examine whether the property had sustained damage due to a covered peril.[134] The property in this example has indeed satisfied this first element because it has sustained $5000 worth of windstorm damage. The second element is whether the structure is deemed to be a total loss.[135] The property in the example has satisfied this element as well, because it has been condemned and was considered a constructive total loss. The *Mierzwa* court explicitly states that the analysis ends here—because the two elements of the Valued Policy Law were met, the insurer is required to pay the full policy limits.[136] Thus, damage to the property caused by the covered peril resulted in only 2.5% of the overall cost of the damage to the property, yet the insurer is made liable for 100% of the face value of the policy.

This interpretation of the Valued Policy Law is contrary to the intent of the law as drafted, as well as the principles of indemnity. Rather than being fair to both insureds and insurers, the law under the *Mierzwa* interpretation will certainly lead to confusion and higher premiums.[137] The effect of exclusionary language in insurance policies has now been nullified because only "a scintilla of damage that could be attributed to a covered [peril]" is required to trigger the Valued Policy Law and recover full policy limits for damage caused by an excluded peril.[138] The Valued Policy Law should not be construed to give windfalls to insureds in the absence of a covered loss.[139]

The majority in *Cox* attempted to dismiss the concerns arising out of this argument. It noted that "[a]t the lower end of the spectrum—

134. *Mierzwa*, 877 So. 2d. at 775.

135. *Id.*

136. *Id.* "If these two facts are true, the [Valued Policy Law] mandates that the carrier is liable to the owner for the face amount of the policy, *no matter what other facts are involved as to the cost of repairs or replacement*." *Id.* (emphasis added).

137. *See* Garaffa, *supra* note 80, at 30.

138. *Id.*

139. Citizens Prop. Ins. Corp. v. Ceballo, 934 So. 2d 536, 538 (Fla. 3d DCA 2006). The *Ceballo* court certified conflict with *Mierzwa*. *Id.*

where a covered peril causes only minor damage," the Florida Statutes require that "damage less than the deductible would not create 'any' liability for the windstorm insurer."[140] While this addresses some of the hyperbole surrounding arguments that the Valued Policy Law applies beginning with the first scintilla of damage, the *Mierzwa* application of the law will still result in insurers being exposed to liability for full policy limits when the covered peril caused only a small percentage of the overall damages.

Judge Polston, dissenting in *Cox*, noted that implicit in the statutory language applying the Valued Policy Law to insurance contracts "for which a premium has been charged and paid"[141] is a benefit of the bargain test.[142] The insureds in these cases have not paid a premium to the homeowners' insurers for flood insurance. Indeed, these policies explicitly exclude flood coverage. The Valued Policy Law should not be construed to require an insurer to cover flood damages when the peril is explicitly excluded from the policy and no premium has been paid for it.[143]

V. SOLUTIONS FOR A JUST TREATMENT OF HURRICANE DAMAGES UNDER THE VALUED POLICY LAW

The majority of states do not have valued policy laws, and most that do limit the law's scope to damage by fire.[144] Thus, in light of the *Mierzwa* case and the continued possibility of active hurricane seasons in the future, should damage caused by hurricanes be excluded from the perils that trigger the Valued Policy Law?

The current controversy over Valued Policy Law claims has illustrated the law's weakness in addressing damages caused by hurricanes. Valued policy laws are intended to reduce litigation by acting as liquidated damages clauses, setting the value of the insured property and the obligations of the insurer before loss occurs.[145] Litigation applying the Valued Policy Law has mushroomed since *Mierzwa*, however, frustrating the law's aim of limiting court battles.[146] By taking hurricane damage out of the domain of the Valued Policy Law, litigation would be focused on the damage caused by each peril, rather than over which peril caused the total loss of the structure.

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140. Fla. Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 834 n.7 (Fla. 1st DCA 2006) (citing FLA. STAT. § 627.701 (2004)).

141. FLA. STAT. § 627.702(1) (2004).

142. *Cox*, 943 So. 2d at 843-44 (Polston, J., dissenting).

143. *Id.*

144. See discussion *supra* Part II.

145. Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. 1st DCA 1964).

146. See discussion *supra* Part III.D concerning litigation that has been filed in response to *Mierzwa*.

Simply scrapping the Valued Policy Law, however, would not comport with the policy of the State of Florida and would be unfair to insureds. The Florida Legislature has recognized the Valued Policy Law's "important role in ensuring that Florida policyholders are able to recover damages in the event their home is destroyed . . . ."[147] The Valued Policy Law is most important in cases of constructive total loss. Absent the law, properties rendered a constructive total loss would not be eligible to receive full policy limits. Rather, the insurer would be likely to provide coverage for the actual costs of the damage and deny coverage for the losses caused by operation of the statute.

This Part will explore various methods for applying the Valued Policy Law to damages caused by hurricane, with the goal of finding a solution that is fair to both insured and insurer while advancing the public policy of Florida. Part V.A will first examine the proximate cause approach put forward by Judge Gross in his *Mierzwa* concurrence. Part V.B will address some of the shortcomings of Judge Gross's approach, suggesting that a true pro rata approach would best allocate damages in the hurricane context.

A. The Mierzwa *Concurrence–A Better Way?*

Judge Gross's concurrence in *Mierzwa* provides a better framework for the fair and justifiable application of the Valued Policy Law to situations such as *Mierzwa*. Judge Gross explicitly disagreed with the majority's holding that requires an insurer with any liability at all on a property that is a total loss to pay out its full policy limits under the Valued Policy Law.[148] He wrote that "[t]he better rule is to require that a covered peril be the proximate cause of the total loss in order to trigger the valued policy law."[149] Under this analysis, a covered peril must pass a "but for" test in order to trigger the valued policy loss. In *Mierzwa*, for example, Judge Gross noted that applying a proximate cause analysis does not change the outcome of the case, "since it is clear that, but for the wind damage the ordinance would not have been brought into play."[150] Judge Gross also recognized the responsibility of the flood insurer in *Mierzwa*, writing that in order to give effect to the exclusion of flood damages from coverage, he

147. FLA. JOINT SELECT COMM. ON HURRICANE INS., FINAL REPORT AND RECOMMENDATIONS 19 (2005), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2312&Session=2005&DocumentType=Reports&FileName=JointCommHurricaneFinalReport.pdf.

148. Mierzwa v. Fla. Windstorm Underwriting Ass'n, 877 So. 2d 774, 781-82 (Fla. 4th DCA 2004) (Gross, J., concurring specially).

149. *Id.* at 782.

150. *Id.*

would have given the windstorm insurer a credit for damages caused by the flooding.[151]

Judge Gross relied on *Mondzelewski v. Fidelity & Guaranty Insurance Corp.*[152] and *Security Insurance Co. v. Rosenberg*[153] in developing his "proximate cause" analysis. In *Rosenberg*, a building damaged in a fire was condemned by local ordinance, rendering it a total loss.[154] At issue was whether the building was in an unsafe condition requiring condemnation before sustaining fire damage.[155] On remand, the trial court was instructed that "if the injuries caused by the fire, combined with the antecedent defects, made the repairs impracticable or illegal, the insurer is liable as for a total loss."[156] On the other hand, "if the condemnation was caused by conditions having no connection with the fire, the insurer is liable only for the part destroyed by the fire."[157] *Mondzelewski* fleshes out this analysis: "the proper approach in a case of this kind is first to determine whether the insured has sustained a total loss proximately resulting from the fire"; if so, "then the valued policy statute controls, regardless of the terms of the policy itself"; however, "if the answer is in the negative, the valued policy statute has no application."[158] These cases reflect Judge Gross's analysis in *Mierzwa* and support his determination of the insurer's liability for its full policy limits. If the wind damage at issue in *Mierzwa* had not been sufficient to render the structure a total loss but for the contribution of the flood damage, then the Valued Policy Law would not have been applicable.[159]

Judge Gross's rule is further supported by Florida case law. In *Netherlands Insurance Co. v. Fowler*,[160] the insured's property was partially damaged by fire but was condemned under local ordinance.[161] The insured argued successfully that the ordinance was triggered by the fire damage, thus the loss should be considered a total one under the Valued Policy Law.[162] Therefore, if the loss caused by the covered peril independently results in a constructive total loss,

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151. *Id.*
152. 105 A.2d 787 (Del. Super. Ct. 1954).
153. 12 S.W.2d 688 (Ky. 1929).
154. *Id.* at 688-89.
155. *Id.* at 691.
156. *Id.*
157. *Id.*
158. Mondzski v. Fid. & Guar. Ins. Corp., 105 A.2d 787, 790 (Del. Super. Ct. 1954).
159. Mierzwa v. Fla. Windstorm Underwriting Ass'n, 877 So. 2d 774, 782 (Fla. 4th DCA 2004) (Gross, J., concurring specially) ("A proximate cause analysis does not change this case, since it is clear that but for the wind damage, the ordinance would not have been brought into play.").
160. 181 So. 2d 692 (Fla. 2d DCA 1966).
161. *Id.* at 693.
162. *Id.*

the Valued Policy Law demands payment of full policy limits.[163] *Fowler* is silent on what would result in the event that the fire alone would not have caused the total loss to the property. The *Cox* majority attempted to reconcile its holding with the *Fowler* case.[164] It argued that the total loss was caused not by the fire, but by the operation of the ordinance.[165] The *Fowler* holding, however, rested upon the logic that the fire damage alone led to the operation of the municipal ordinance, thus rendering the property a total loss.[166] The *Fowler* case held that the Valued Policy Law applies to properties that are a "constructive total loss" because of the operation of the ordinance.[167] Hurricane damage combining covered wind damage with excluded flood damage is distinguishable from the logic behind the constructive total loss principle.

A good example of when the Valued Policy Law and constructive total loss principles are not to be applied is *Regency Baptist Temple v. Insurance Co. of North America*.[168] In that case, the insured's roof was partially damaged by standing water which was caused by the trusses being installed upside-down.[169] After the insurer settled the claim by agreeing to pay for the replacement of the damaged portion of the roof, the municipality where the property was situated refused to issue a construction permit unless the roof was completely replaced.[170] The court held that the insurer was liable only for the costs of the portion of the roof actually damaged, giving effect to an exclusion for losses caused by operation of law or ordinance.[171] The court explicitly stated that the facts in this case did not invoke the principles of constructive total loss or the Valued Policy Law.[172] *Regency Baptist* stands for the principle that the loss to the property needs to be total and caused by the covered peril in order for the Valued Policy Law to apply.[173]

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163. *See id.* This is the justification for Judge Gross's opinion being a concurrence, rather than a dissent, because the ordinance in *Mierzwa* would have been triggered regardless of the flood damage. *See Mierzwa*, 877 So. 2d at 782 (Gross, J., concurring specially).

164. *See* Fla. Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 834-35 (Fla. 1st DCA 2006).

165. *Id.*

166. *See Fowler*, 181 So. 2d at 693.

167. *See id.*

168. 352 So. 2d 1242 (Fla. 1st DCA 1977).

169. *Id.* at 1243.

170. *See id.*

171. *Id.* at 1243-44.

172. *Id.* at 1244.

173. A commentator has argued that *Regency Baptist* would have come out differently under the version of the Valued Policy Law that existed up to 2005 that covered "any peril." The commentator thus posits that the court could have declared the roof a total loss under the Valued Policy Law, requiring the insurer to pay for the cost of repairing the entire roof. *See* Wood, *supra* note 19, at 980. The Valued Policy Law, however, clearly applies only in cases of total loss to an entire *structure*. *See* FLA. STAT. § 627.702 (2005). Thus, the Valued Policy Law is evoked only when the structure actually has to be demolished.

Judge Gross's concurrence thus reduces the harshness of the majority's holding in two key ways. First, his proximate cause analysis requires the covered peril to be primarily responsible for the damage leading to the Valued Policy Law being triggered. Thus, insurers are not liable under the Valued Policy Law beginning from the first scintilla of damage, as noted by Garaffa and pled successfully at trial in *Scylla Properties*.[174] Second, the Gross opinion gives credit for the flood exclusion, preserving the incentive for insureds to obtain separate flood insurance and preventing insureds from using the Valued Policy Law as a way to bootstrap compensation for flood damages without paying premiums for the coverage.

Perhaps the most just application of Judge Gross's rule is in situations where there is no flood insurer. The requirement of a covered peril to be the proximate cause of damage makes the most sense in these situations. Consider a scenario in which a house is covered under a windstorm policy but has no flood insurance. Damage caused by a hurricane renders the home a constructive total loss, with sixty percent of the damage attributable to windstorm and the remainder attributable to flooding. Applying Judge Gross's rule, the insurer is liable for its full policy limits under the Valued Policy Law less the actual cost of the damage caused by flood. This arrangement is fair to both parties: the insurer is able to give effect to exclusions for flooding, while the insured remains protected under the Valued Policy Law in the event the property is rendered a total loss. Most importantly, this arrangement preserves the incentive for a property owner to obtain flood insurance—because the flood exclusion is given effect, the property owner is liable for the shortfall caused by this lack of coverage.

Likewise, Judge Gross's rule is fair in the event that the loss is proximately caused by the excluded peril. In such a situation, the insurer will pay only for the actual damage caused by the covered peril and will have no liability under the Valued Policy Law. Although unfortunate, the insured has assumed the risk of loss due to the excluded peril by not obtaining additional insurance and should not be able to collect when the excluded peril is the dominant cause of the loss. Judge Gross's rule comports with the holding of *Garvey v. State Farm Fire & Casualty Co.*, a seminal case advocating the use of a proximate cause analysis in concurrent causation coverage determinations: "the reasonable expectations of the insurer and the insured in the first-party property loss portion of a homeowner's policy . . . cannot reasonably include an expectation of coverage in property loss

174. *See* Garaffa, *supra* note 80, at 30; Plaintiff's Motion for Summary Judgment Re: Class a at 7, Scylla Properties., LLC v. Citizens Prop. Ins. Corp., No. 05 CA 01 (Fla. 2d Cir. Ct. 2005).

cases in which the efficient proximate cause of the loss is an activity expressly *excluded* under the policy."[175]

B. Pro Rata Allocations of Liability Under the Valued Policy Law

Although a rational and appropriate application of the Valued Policy Law, Judge Gross's concurrence does have one major consequence. His rule requires that the insurer of the peril that is the proximate cause of the total loss be responsible under the Valued Policy Law, yet receive a credit for damages caused by other, excluded forces.[176] Thus, whichever insurer covers the peril that is deemed to be the proximate cause of the loss must bear the full brunt of the Valued Policy Law, paying out its full policy limits less any credit for excluded damages. An additional insurer who covers these excluded damages, however, has no responsibility under the Valued Policy Law and is only required to pay out the actual cost of the damages caused by the peril it covered.

This does not lead to much injustice when the proximate cause is a large percentage of the overall damage. To use an example from the hurricane context, assume that a structure has sustained hurricane damage resulting in a constructive total loss. Seventy percent of the damage can be attributed to the windstorm damage and is considered the proximate cause of the total loss. The remaining thirty percent of the damage is attributed to flooding. The windstorm insurer, under Judge Gross's rule in *Mierzwa*, is liable for its full policy limits less the actual costs of the flood damage. The flood insurer has no responsibilities under this interpretation of the Valued Policy Law and is only liable for the actual damages caused by the flood.

Problems are likely to arise, however, when the two concurrent perils are nearly equally responsible for the damage to property that is rendered a constructive total loss. Assume now that a property valued at $100,000 has sustained hurricane damage. The costs of repairs to the property are calculated to be sixty percent of the overall value of the property, rendering it a constructive total loss. Fifty-one percent of the total damage is attributable to wind, and forty-nine percent is attributable to flood. Under Judge Gross's rule, both windstorm and flood insurers are liable for the actual costs of their respective covered perils. Because wind is deemed the proximate cause of the damage, however, the wind insurer is liable under the Valued Policy Law for full policy limits less the actual costs of repair covered by the flood insurance. The flood insurer is not required to bear any burden

175. 770 P.2d 704, 711 (Cal. 1989).

176. Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774, 782 (Fla. 4th DCA 2004) (Gross, J., concurring specially).

under the Valued Policy Law under Judge Gross's construction and is only responsible for paying the actual costs of flood damages.

TABLE 1
CALCULATION OF VALUES UNDER THE PROXIMATE CAUSE RULE

Value of Property	$100,000
Costs of Damages to Property (60% of total value)	$60,000
Costs of Damages Attributable to Windstorm (51% of $60,000)	$30,600
Costs of Damages Attributable to Flood (49% of $60,000)	$29,400
Liability of Windstorm Insurer Under Valued Policy Law (policy limits of $100,000 less flood damage of $29,400)	$70,600

Table 1 sets forth the liabilities for both windstorm and flood insurers. While this construction of the Valued Policy Law is fair to the insured—giving effect to both the policy underlying the Valued Policy Law and to the windstorm insurer's exclusion of flood damages—it places an unfair burden on the insurer of the proximate cause of damage to meet the Valued Policy Law obligations. Recall that the Valued Policy Law applies to any insurer whose covered peril results in a total loss.[177] Thus, an insurer of a peril that is not the proximate cause of the total loss should still have some liability under the Valued Policy Law.

The trial court in *Mierzwa* ruled that the wind insurer would be liable only for a pro rata portion of the total loss.[178] Pro rata responsibility of all insurers of a total loss would comply with the both the letter of the law as well as the underlying policy considerations of the Valued Policy Law. Under a true pro rata interpretation of the Valued Policy Law, the insurers are still liable for paying for the entire insured value of the lost property as a whole.[179] They are required,

177. FLA. STAT. § 627.702(1) (2005).
178. *Mierzwa*, 877 So. 2d at 777.
179. Judge Polston's interpretation of the Valued Policy Law also points towards pro rata allocation of damages. He noted that the Valued Policy Law sets the value of the property at issue in *Cox* at $65,000. Thus, "this value . . . should be used to determine the

however, to apportion their payments based on the overall percentage of their damages. Table 2 shows how the damages from the example in Table 1 would be allocated under a pro rata system.

TABLE 2
CALCULATION OF VALUES UNDER THE PRO RATA RULE

Liability of Wind Insurer (51% of the constructive total loss to the property caused by windstorm)	$51,000
Liability of Flood Insurer (49% of the constructive loss caused by flood)	$49,000

This interpretation of the Valued Policy Law is fair to the insured, as he is made whole for his loss and is not required to prove the value of his property ex post. Pro rata liability is also the fairest interpretation of the Valued Policy Law for insurers, as it prevents "placing an insured in a position of profit through incurring a loss caused by a risk not contractually assumed by the insurer."[180] All insurers of a given property are subject to the Valued Policy Law, thus the insurer of the proximate cause of damage should not have to bear the entire burden of the Valued Policy Law.

VI. THE FLORIDA LEGISLATURE'S REACTION TO *MIERZWA*

The Florida Legislature reacted swiftly to *Mierzwa* by amending the Valued Policy Law in 2005 to specifically disavow the construction put forward by the Fourth District Court of Appeal. This Part will explain the amendments to the statute and their effects on the application of the Valued Policy Law to hurricane damages.

A. Amending the Valued Policy Law

The Florida Legislature appointed a Joint Committee on Hurricane Insurance in 2005 in response to 2004's active hurricane season.[181] The Committee examined "all aspects of the property insurance market that promote the availability and affordability of coverage" for hurricane damage.[182]

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amount of losses caused by" covered perils. Fla. Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 839-40 (Fla. 1st DCA 2006) (Polston, J., dissenting).

180. Hual & Schofield, *supra* note 23, at 34.

181. FLA. JOINT SELECT COMM. ON HURRICANE INS., *supra* note 147, at 1.

182. *Id.* The committee heard testimony "from the Department of Financial Services (DFS), the Office of Insurance Regulation (OIR), the Office of the Insurance Consumer Advocate, Citizens Property Insurance Corporation, various insurance companies, insurance and agent associations, the Florida Consumer Action Network, and others." *Id.*

The Joint Committee specifically addressed the *Mierzwa* decision in its Final Report. The Committee noted that representatives of the insurance industry testified that the *Mierzwa* decision "will serve to increase the risk of total loss to insurers, reduce the capacity of the private market to write wind insurance policies, and increase the population and loss exposure of" the insurance industry.[183] The Committee recommended that the legislature amend the Valued Policy Law to explicitly state that a property insurer is responsible only for the portion of damage to property caused by the covered peril.[184] Any amendment to the Valued Policy Law, the Committee also recommended, should clarify that an insurer is not liable for damages caused by excluded perils.[185] Such amendment would clarify "that the Fourth DCA opinion in *Mierzwa v. Florida Windstorm Underwriting Association* was incorrect."[186] The Committee also noted the role the Valued Policy Law serves in allowing policyholders to recover after a total loss and urged "careful consideration" to be taken in amending the law.[187]

The legislature followed the recommendations of the Joint Select Committee, amending section 627.702 to reflect its interpretation of the Valued Policy Law.[188] The long title of the Act, in part, states that the amendments are an act "providing legislative intent regarding the requirement that an insurer pay policy limits if there is a total loss of a building; providing nonapplication of certain insurer liability requirements under certain circumstances; [and] limiting an insurer's liability to certain loss covered by a covered peril."[189]

The Act made two key alterations in the text of section 627.702(1). First, it deleted the words "if any" from the phrase "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."[190] The *Mierzwa* court placed a great deal of emphasis on the "if any" language in holding that the Valued Policy Law requires the payment of full policy limits whenever there is a total loss, caused in any way, by a covered peril.[191] Second, the Act amended the law to read that "the insurer's liability under the policy for such total loss, *if caused by a covered peril*, shall be in the amount of money for which such prop-

183. *Id.* at 19.
184. *Id.* at 23.
185. *Id.*
186. *Id.*
187. *Id.* at 19.
188. Act effective June 1, 2005, ch. 2005-111, 2005 Fla. Laws 1063.
189. *Id.* at 1064.
190. *Id.* at 1093 (emphasis added). For the version of the statute before the Act, see FLA. STAT. § 627.702(1) (2004).
191. Mierzwa v. Fla. Windstorm Underwriting Ass'n, 877 So. 2d 774, 775-76 (Fla. 4th DCA 2004).

erty was so insured."[192] Taken together, these alterations serve to eliminate the language the *Mierzwa* court relied upon in mandating that any damage caused by a covered peril triggered the Valued Policy Law when total loss occurred.[193]

The Valued Policy Law was also amended to include a broad statement of legislative intent. It reads:

> The intent of this subsection is not to deprive an insurer of any proper defense under the policy, to create new or additional coverage under the policy, or to require an insurer to pay for a loss caused by a peril other than the covered peril. In furtherance of such legislative intent, when a loss was caused in part by a covered peril and in part by a noncovered peril, paragraph (a) does not apply. In such circumstances, the insurer's liability under this section shall be limited to the amount of the loss caused by the covered peril. However, if the covered perils alone would have caused the total loss, paragraph (a) shall apply. The insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss.[194]

Finally, the legislature added a provision explicitly noting that the amendments to the Valued Policy Law were not to be applied retroactively.[195] The Amendments to the Valued Policy Law took effect June 1, 2005;[196] therefore all claims and litigation arising out of the 2004 Hurricane Season still fall under the former Valued Policy Law.

B. How the 2005 Amendments Change the Interpretation of the Valued Policy Law to Losses Caused by Hurricane

The legislature's amendments to the Valued Policy Law essentially codify the interpretation of the Valued Policy Law put forth in Judge Gross's concurrence in *Mierzwa*. The law as amended now requires courts to determine whether "the covered perils alone would have caused the total loss."[197] The courts are thus required to conduct a proximate cause analysis. If the property would not have been a total loss but for the loss caused by the covered peril, the Valued Policy

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192. FLA. STAT. § 627.702(1) (2005) (emphasis added).

193. See *Mierzwa*, 877 So. 2d at 775-76. The *Mierzwa* court reasoned that "if the insurance carrier has *any* liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy" and emphasized that the Valued Policy Law "statutory text does not require that a covered peril be *the* covered peril causing the entire loss; it need merely be *a* covered peril." *Id.*

194. Act effective June 1, 2005, Ch. 2005-111, 2005 Fla. Laws 1063, 1093.

195. *Id.* ("It is the intent of the Legislature that the amendment to this section shall not be applied retroactively and shall apply only to claims filed after effective date of such amendment.").

196. *Id.* at 1103.

197. FLA. STAT. § 627.702(1)(b) (2005).

law applies.[198] Otherwise, "the insurer's liability . . . shall be limited to the amount of the loss caused by the covered peril."[199] Finally, an insurer is now "never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss."[200] Under this language, a windstorm insurer would likely be eligible for a credit for payments made to the insured under a separate flood policy.[201]

One consequence, though, of the legislature's amendment of the Valued Policy Law is the potential for courts to imply that, by changing the language of the statute, the *Mierzwa* court correctly interpreted the prior version. The courts in *Cox*, *Ueberschaer*, and *Scylla Properties* have done precisely that.[202] When the legislature amends a statute in response to case, it frequently creates a dilemma: does the amendment change the actual law, or does it merely clarify the law to give guidance to the courts in its interpretation? The *Cox* court noted that the 2005 statute was significantly different from the prior version.[203] In light of the significant changes, coupled with the clear intent for the amendment to not apply retroactively, the court held that it was "not at liberty to transmogrify the earlier version of the statute into its inapposite successor, by reading the controlling version of the statute as if it were the later-enacted replacement now on the books."[204] The *Cox* majority rejected that the legislature's amendment should be interpreted as a clarification of the prior statute. The court held that the prohibition on applying the new statute retroactively nullified a rule of interpretation that allowed an amendment to be interpreted as a clarification when promulgated immediately after a controversy surrounding a statute's interpretation.[205] Finally, it declined to view an amendment made twenty-two years after the prior statute was enacted as a clarification.[206] Judge Polston, dissenting in *Cox*, disagreed with the majority's holding that the legislature's amendments to the Valued Policy Law foreclosed the court from finding that the prior version of the law does not mandate

198. *Id.*
199. *Id.*
200. *Id.*
201. *See* Mierzwa v. Fla. Windstorm Underwriting Ass'n, 877 So. 2d 744, 782 (Fla. 4th DCA 2004) (Gross, J., concurring specially).
202. Citizens Prop. Ins. Co. v. Ueberschaer, 956 So. 2d 483 (Fla. 1st DCA 2007); Fla. Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 827 n.1 (Fla. 1st DCA 2006); Summary Final Judgment at 4-5, Scylla Props., LLC v. Citizens Prop. Ins. Co., No. 05 CA 01 (Fla. 2d Cir. 2005).
203. *Cox*, 943 So. 2d at 826 (Fla. 1st DCA 2006).
204. *Id.* at 829.
205. *Id.* at 829-30 (citing Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985)).
206. *Id.* at 831 (citing State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55, 62 (Fla. 1995)).

that an insurer pay full policy limits when damages are caused by an excluded peril.[207] Rather, the new language in the amended version of the statute demonstrates that the prior version of the statute did not address causation issues.[208] Thus, the new language in the amendment is not a clarification, but rather adds language where previously none existed.

The *Mierzwa* case and its progeny are examples of courts applying a law in a situation unforeseen by the original drafters. A statute cannot be expected to anticipate all future directions the law may take; therefore, "[s]ome ambiguity must be expected in statutes. The legislature cannot be expected to foresee every factual situation that may arise, for '[s]tatutes come out of the past and aim at the future.' "[209] The Report of the Joint Select Committee on Hurricane Insurance is particularly important in this determination, stating that amendments to the Valued Policy Law should be made to clarify that the *Mierzwa* decision was "incorrect."[210] The choice of words is significant—if the legislature's intent in amending the statute was to clarify an ambiguity or to fill a gap in the law as it stood, it could have done so. The legislature's unwillingness to make the amendments retroactive likely reflects a desire to avoid a separation of powers conflict rather than an acknowledgement that the law as it stood before the amendment was properly applied in *Mierzwa*.[211]

VII. CONCLUSION: *APRÈS MIERZWA, LE DELUGE*?

The Valued Policy Law will continue to have a large impact on the insurance industry in Florida. Meteorologists believe that the Atlantic Basin is experiencing the "busy" part of the multi-year hurricane cycle;[212] more storms are certain to threaten the Florida coast in the coming years. The financial protection provided against catastrophic storm damage by insurance is essential to the wellbeing of Florida and its citizens. Rulings which impair the insurance industry's ability to predict potential exposures may result in unnecessary higher premiums, a reduced willingness to cover property in Florida, or both. Citizens Property Insurance Company—which was created by

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207. *Id.* at 846 (Polston, J., dissenting).

208. *Id.*

209. Robert M. Rhodes et al., *The Search for Intent: Aids to Statutory Construction in Florida*, 6 FLA. ST. U. L. REV. 383, 387 (1978) (quoting Felix Frankfurter, *Some Reflection on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947)).

210. FLA. JOINT SELECT COMM. ON HURRICANE INS., *supra* note 147, at 23.

211. *See* FLA. CONST. art. II, § 3.

212. *See, e.g.*, Rebecca Mowbray, *New Risk Models May Cost Residents: Insurers Likely to Raise Rates if They're Used*, TIMES-PICAYUNE (New Orleans), Apr. 7, 2006, at 1 (exploring how various insurance companies are adjusting their risk assessments in light of increased hurricane frequency).

the legislature as an insurer of last resort[213]—has now become the second-largest property insurer in Florida.[214] Citizens will now be doubly pressured as a result of *Ueberschaer*: not only will it be burdened by taking on policies which the private insurance market will no longer touch, but Citizens will also suffer the same financial damage under the Valued Policy Law that forced the private insurers to drop policies in Florida in the first place.

Causation issues, however, have long vexed the property insurance industry.[215] Even in the absence of Valued Policy Law concerns, conflict and litigation is likely to continue over the extent that damage to a property was caused by windstorm (a covered peril under most standard homeowners policies), rather than flooding (a peril typically excluded). Perhaps the time has come to eliminate the practice of artificially bifurcating hurricanes into separate "windstorm" and "flood" events.[216] As insurance for hurricane damages is becoming dominated by government entities such as Citizens and the National Flood Insurance Program,[217] it will become increasingly logical to classify hurricanes as discrete and singular events. Alternatively, the insurance system may be better served by moving away from "all risks" coverage to coverage defined strictly in terms of losses.[218] The cost of reduced control in defining risks excluded would be offset by reduced litigation costs.[219]

The Florida Legislature's amendments to the Valued Policy Law are a step in the right direction. By adopting the position of Judge Gross's concurrence, the legislature has acted to address some of the problems hurricanes pose for the insurance industry.[220] *Mierzwa* and *Cox*, though, have exposed insurers in Florida to massive liability resulting from the 2004 Hurricane Season. Because the legislature stepped in, the damage to the insurance system as a whole will be

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213. FLA. JOINT SELECT COMM. ON HURRICANE INS., *supra* note 147, at 9.

214. Randy Diamond, *Home Sweet Underinsured Home*, TAMPA TRIB., Aug. 27, 2005, at 1.

215. *See, e.g.*, State Farm Fire & Cas. Co. v. Bongen, 925 P.2d 1042, 1043 (Alaska 1996) (addressing the effect of a policy exclusion when a loss was caused in part by a covered peril (negligence by a third party) and an excluded peril (mudslide)).

216. *See* Bean v. Prevatt, 935 So. 2d 557, 560 (Fla. 2d DCA 2006) ("[T]here is no standard policy that covers the risk of 'hurricane.' ").

217. Increased frequency of hurricanes, as well as higher population densities and property values in coastal areas, has caused many private insurers to flee the property insurance market in vulnerable areas: "the more recent history of hurricane insurance has been the weakening of a once independent market into one where insurers stay only because they are forced to do so, or because they are not forced to bear the cost alone." Michelle E. Boardman, *Known Unknowns: The Illusion of Terrorism Insurance*, 93 GEO. L.J. 783, 829 (2005). There are currently doubts that "the voluntary insurance market can provide affordable coverage to customers who seek it and still ensure the long-term solvency of firms in the industry." *Id.* at 829-30 (citation omitted).

218. McDowell, *supra* note 76, at 589-90.

219. *Id.* at 590.

220. *See* FLA. JOINT SELECT COMM. ON HURRICANE INS., *supra* note 147, at 23.

limited. As noted in *Cox*, its holding will not cause insureds to "rush out to cancel their flood insurance, counting on windstorm insurers to cover any total loss" thanks to the legislature's amendment.[221] Since the law as interpreted in *Mierzwa* and its progeny will be a mere aberration, rather than the norm, the current insurance system will continue to protect the interests of both insurers and homeowners.

221. Fla. Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 835 (Fla. 1st DCA 2006).