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AS HURRICANES END, LEGAL STORMS BEGIN: THE INSURANCE BATTLE UNDER STATE VALUED POLICY LAWS

INTRODUCTION

“Nothing was left of John Hadden’s \$600,000 beachfront house when he returned to Bay St. Louis, Miss., three days after Hurricane Katrina hit.”¹ Hadden did not lose hope because he insured his home for more than \$700,000.² However, months after his home was destroyed he received a letter from the insurer denying him any benefit whatsoever because his insurance policy excluded water damage.³ Thousands of families face the same crisis: Their insurance companies refuse to pay for hurricane damage.⁴

This and similar situations impacted residents all along the Gulf Coast after hurricanes “bent billboard signs, damaged trees, ripped roofs off buildings and scattered debris.”⁵ Since 1995, the Gulf Coast has seen a rise in deadly storms.⁶ In fact, the hurricanes of 2005 resulted in more deaths and destruction than during the previous ten years combined.⁷

As the catastrophic hurricanes of 2004–2005 become a memory, a new storm began to rage in courtrooms all along the Gulf Coast as insurance companies rejected claims and homeowners filed suit.⁸ Because of major hurricanes, questions of coverage under standard homeowners’ insurance policies are becoming more prevalent.⁹ The major issue is how Valued Policy Laws (VPLs) apply when multiple

1. Joseph Contreras, *The Check’s in the Mail*, NEWSWEEK, May 29, 2006, at 36.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Ivan’s Stormy Trek Floods Southeast*, CNN.COM, Sept. 16, 2004, <http://www.cnn.com/2004/WEATHER/09/16/hurricane.ivan/index.html>.

6. Peter Whoriskey, *The Gathering Winds*, WASH. POST, Nov. 27, 2005, at A1 (referring to hurricanes Opal (1995), Fran (1996), Floyd (1999), Iris (2001), the quartet of Charley, Frances, Ivan and Jeanne in 2004, and the 2005 storms of Katrina and Rita).

7. *Id.*

8. See generally Contreras, *supra* note 1, at 36.

9. See Nora Lockwood Tooher, *Deluge of Litigation Expected Over Hurricane Flood Insurance*, LAW. WKLY. USA, Oct. 10, 2005, available at 2005 WLNR 24503987.

perils work together to destroy a home.¹⁰ Throughout the Gulf Coast region, homeowners are suing insurance companies with hopes of recovering on their hurricane policies.¹¹ The Attorney General of Mississippi filed suit against insurance providers supplying seventy percent of Mississippi homeowners' insurance coverage, alleging that "insurance coverage provisions that attempt to exclude damage caused by water are unenforceable."¹² In Louisiana, the supreme court accepted a case on the state's valued policy law,¹³ while the Florida Supreme Court recently ruled that Florida's VPL only applies when a covered peril causes a total loss, overruling a lower court decision that applied Florida's VPL when any covered peril causes any damage whatsoever.¹⁴ In Alabama, the legislature has not passed a VPL, and in Texas, the VPL only applies to fire.¹⁵ As storms damage or destroy homes and claims overwhelm insurance companies, the application of VPLs to hurricane damage is brought to the forefront of public interest all along the Gulf Coast.¹⁶ With the devastation inflicted by Hurricane Katrina, "The focus of much debate . . . is how much of the damage can be characterized as damage covered by windstorm insurance rather than by either nonexistent or fairly limited, flood insurance."¹⁷

This Note analyzes the application of VPLs in light of the recent hurricanes along the Gulf Coast and encourages state legislatures to

10. See generally Tina Garmon, *Evaluating Valued Policy Law After Katrina*, 5 NO. 4 INS. COVERAGE L. BULL. 1 (2006).

11. Julie Triedman, *Water Torture: The Stakes are High as Katrina-Related Insurance Suits Move Toward Trial*, 28 AM. L. 86, 86 (2006), available at 10/2006 AM. LAW 86 (Westlaw).

12. Rhonda D. Orin, *Wind vs Water: Battle Royale Over Hurricane Claims*, 53 RISK MGMT. 5 (2006), available at 2006 WLNR 8639068; Adam Scales, *How Will Homeowners Insurance Litigation After Hurricane Katrina Play Out?*, FINDLAW, Sep. 19, 2005, http://writ.news.findlaw.com/commentary/20050919_scales.html (discussing the complaint filed by the Mississippi Attorney General against multiple insurance companies).

13. Rebecca Mowbray, *Valued Policy Case Appealed; La. Supreme Court Gets Insurance Issue*, TIMES-PICAYUNE, Dec. 11, 2007, at Money 1, available at 2007 WLNR 24445349.

14. See Fla. Farm Bureau Cas. Ins. Co. v. Cox, 967 So. 2d 815 (Fla. 2007).

15. See James A. Knox Jr., *Causation, The Flood Exclusion, and Katrina*, 41 TORT TRIAL & INS. PRAC. L.J. 901, 920 (2006); TEX. INS. CODE ANN. § 862.053 (Vernon 2006).

16. See Contreras, *supra* note 1, at 36.

17. Daniel B. Rubock, *U.S. CMBS: Hurricane Katrina Shows Limitations of Current Flood Insurance Practices*, MOODY'S INVESTORS SERV., Sept. 30, 2005, available at <http://dirt.umkc.edu/CMBSKatrina.pdf>.

take action to protect homeowners from debilitating loss.¹⁸ Part I defines a VPL, explains the purpose of a VPL, and defines “total loss.”¹⁹ Part II examines VPLs in light of public policy arguments both favoring the insurer as well as those in favor of the insured homeowner.²⁰ Part III looks at the public policy underlying homeowners insurance.²¹ Part IV discusses strategies for circumventing VPLs.²² Part V looks at how courts apply VPLs to a total loss in situations involving both single and multiple perils.²³ Part VI examines how courts interpret ambiguity in both VPLs and insurance policies.²⁴ Part VII gives an example of a recent legislative response to the judicial interpretation of a VPL.²⁵ Finally, this Note concludes by challenging state legislatures, in anticipation of future devastating hurricanes, to revise their VPLs in order to protect homeowners from devastating financial loss.²⁶

I. BACKGROUND

In 1874, Wisconsin enacted the first Valued Policy Law (VPL) and since then, twenty states have adopted some form of a traditional VPL.²⁷ A “valued policy” is defined as “one in which the value of

18. See discussion *infra* Conclusion.

19. See discussion *infra* Part I.

20. See discussion *infra* Part II.

21. See discussion *infra* Part III.

22. See discussion *infra* Part IV.

23. See discussion *infra* Part V.

24. See discussion *infra* Part VI.

25. See discussion *infra* Part VII.

26. See discussion *infra* Conclusion.

27. States enacting Valued Policy Laws include: Arkansas, ARK. CODE ANN. § 23-88-101 (1999); California, CAL. INS. CODE § 2054 (West 2005); Florida, FLA. STAT. ANN. § 627.702 (West 2005); Georgia, O.C.G.A. § 33-32-5 (1977); Kansas, KAN. STAT. ANN. § 40-905 (2005); Louisiana, LA. REV. STAT. ANN. § 22:695 (1995); Minnesota, MINN. STAT. § 65A.01 (2004); Mississippi, MISS. CODE ANN. § 83-13-5 (1936); Missouri, MO. REV. STAT. § 379.140 (1939); Montana, MONT. CODE ANN. § 33-24-102 (1981); Nebraska, NEB. REV. STAT. § 44-501.02 (1989); New Hampshire, N.H. REV. STAT. ANN. § 407:11 (1960); North Dakota, N.D. CENT. CODE § 26.1-39-05 (1997); Ohio, OHIO REV. CODE ANN. § 3929.25 (West 1992); South Carolina, S.C. CODE ANN. § 38-75-20 (1987); South Dakota, S.D. CODIFIED LAWS § 58-10-10 (1999); Tennessee, TENN. CODE ANN. § 56-7-801 (West 1932); Texas, TEX. INS. CODE ANN. § 862.053 (Vernon 2003); West Virginia, W. VA. CODE ANN. § 33-17-9 (West 2005); Wisconsin, WIS. STAT. ANN. § 632.05(2) (West 2004).

property insured is agreed upon by the parties so that in the case of a total loss, it is not necessary to prove the actual value to recover under the policy.”²⁸ VPLs apply when a covered peril, such as fire, wind, or flood, destroys insured property.²⁹ Along the Gulf Coast, Florida, Louisiana, Mississippi, and Texas have VPLs while Alabama does not.³⁰ Texas’s and Mississippi’s VPLs apply only to fire insurance, while the VPLs in Florida and Louisiana apply to any peril.³¹ Courts have historically held VPLs constitutional.³²

A. *What is a Valued Policy Law?*

A Valued Policy Law conclusively establishes the value of the insured property in the event of a total loss.³³ It applies when a covered peril destroys insured property.³⁴ The statutory language of VPLs range from covering only fire to covering *any* covered peril, which may include wind or flood.³⁵ VPLs may also exclude certain perils; for example, the Arkansas VPL specifically applies to insurance policies aside from flood and earthquake policies.³⁶ A VPL may be voided by fraudulent or criminal conduct on the part of the insured homeowner such as setting fire to one’s own home.³⁷

28. 44 AM. JUR. 2D *Insurance* § 1500 (2003).

29. *See id.*; FLA. STAT. ANN. § 627.702 (West 2005); LA. REV. STAT. ANN. § 22:667 (1995)

30. *See* FLA. STAT. ANN. § 627.702 (2005) (VPL enacted); LA. REV. STAT. ANN. § 22:695 (1995) (same); MISS. CODE ANN. § 83-13-5 (1936) (same); TEX. INS. CODE ANN. § 862.053 (Vernon 2003) (same); Knox, *supra* note 15, at 920 (stating that “Louisiana, Mississippi and Alabama do not have valued policy statutes applicable to windstorm losses,” then discussing Louisiana’s and Mississippi’s VPL but mentioning nothing of Alabama, drawing the inference that Alabama does not have a VPL).

31. *See* FLA. STAT. ANN. § 627.702 (West 2005); LA. REV. STAT. ANN. § 22:667 (1995); MISS. CODE ANN. § 83-13-5 (1936); TEX. INS. CODE ANN. § 862.053 (Vernon 2003).

32. *Orient Ins. Co. of Hartford, Conn. v. Dags, 172 U.S. 557, 557 (1899)* (holding the Missouri VPL constitutional).

33. 44 AM. JUR. 2D *Insurance* § 1500 (2003).

34. *See id.*

35. *Compare* FLA. STAT. ANN. § 627.702(1)(a) (West 2005) (applying Florida’s valued policy law to “any insurer as to a covered peril”), *with* LA. REV. STAT. ANN. § 22:695 (1995) (applying Louisiana’s valued policy law only to “any fire insurance policy insuring inanimate, immovable property”), *and* MISS. CODE ANN. § 83-13-5 (1936) (applying Mississippi’s valued policy law only to “loss by fire”).

36. ARK. CODE ANN. § 23-88-101 (1999).

37. FLA. STAT. ANN. § 627.702(1)(a) (West 2005); *see also* O.C.G.A. § 33-32-5 (1977) (providing that a VPL is inapplicable if there is fraudulent or criminal fault on the part of the insured or one acting on his or her behalf); LA. REV. STAT. ANN. § 22:695(A) (1995) (providing that “[c]overage may be

A VPL applies to real property, but does not generally apply to personal property.³⁸ Yet some states, such as Louisiana, have separate VPLs applying only to personal property.³⁹ Unlike Louisiana's VPL for immovable property, which only applies to fire insurance policies, Louisiana's VPL for movable personal property applies to damage "from whatever cause."⁴⁰

Under a VPL, in the event of a "total loss," the insurer is required to pay the insured homeowner the entire amount of the policy.⁴¹ VPLs are "regarded as part of the policy of insurance, and the amount written in the policy as liquidated damages agreed upon by the parties."⁴² However, some VPLs distinguish between covered and non-covered perils.⁴³ The Florida legislature amended Florida's VPL in 2005 to explicitly define how it applies when a home is destroyed by a combination of a covered peril and a non-covered peril.⁴⁴ Florida's amended VPL does not apply when a covered and non-covered peril act together to cause a loss.⁴⁵ This results in prorated damages rather than a total payout when a home is destroyed in part by an excluded peril.⁴⁶

voided . . . in the event of criminal fault on the part of the insured or the assigns of the insured"); Herbert J. Baumann, Jr., *Applications & Complications: Recovery under the Valued Policy Law*, 19 BRIEF 45, 47 (1990) (concluding that several factors play a part in determining the existence of fraudulent or criminal fault and explaining that these factors include fraudulent conduct in the application for insurance used by insurance companies to contest the validity of the insurance contract, and, where arson is suspected, overvaluation of the insured property is used as evidence of motive).

38. *Foremost Ins. Co. v. Lowery*, 617 F. Supp. 521, 524 (S.D. Miss. 1985) (finding that the Mississippi VPL did not cover personal property, such as the contents of a building that was destroyed by fire); 44 AM. JUR. 2D *Insurance* § 1500 (2003).

39. See LA. REV. STAT. ANN. § 22:667 (1985).

40. Compare LA. REV. STAT. ANN. § 22:695(A) (1995), with LA. REV. STAT. ANN. § 22:667(A) (1985).

41. See Baumann, *supra* note 37, at 45.

42. *Hart v. N. British & Mercantile Ins. Co.*, 162 So. 177, 181 (La. 1935). But see *Scottsdale Ins. Co. v. Wasserman*, No. CIV.A. 97-1803, 1997 WL 722940, at *3 (E.D. La. Nov. 17, 1997) (finding the VPL inapplicable where the insurance policy provides that it is an actual cash value basis policy).

43. See discussion *supra* Part I.A.

44. Compare FLA. STAT. ANN. § 627.702(1) (West 2002) (Florida's old VPL), with FLA. STAT. ANN. § 627.702(1)(b) (West 2005) (Florida's new VPL).

45. FLA. STAT. ANN. § 627.702(1)(b) (West 2005).

46. John V. Garaffa, *The Uncertain Scope of "Hurricane Damage" Under State Valued Policy Laws*, 41 TORT TRIAL & INS. PRAC. L.J. 943, 952 (2006).

B. Purpose of a Valued Policy Law

VPLs were originally adopted “in response to the perception that insurers were profiting by selling insurance policies with inflated face values, and then, after the building suffered a total loss, litigating the actual value of the insured structure.”⁴⁷ Thus, the rationale behind VPLs is to prevent overinsurance by requiring prior valuation and to avoid litigation by stipulating specific standards when a home is deemed a total loss.⁴⁸

1. To Prevent Overinsurance by Requiring Prior Valuation

VPLs prevent overinsurance by requiring insurance companies to set the value of insured property at the time the insured homeowner purchases the policy.⁴⁹ VPLs “prohibit insurers from writing excessive insurance coverage on property to collect a higher premium.”⁵⁰ Further, by requiring insurers to determine the property value at the outset, VPLs also cause insurers to actually examine the property to be certain of the correct insurance value.⁵¹

2. To Avoid Litigation by Prescribing Definite Standards of Recovery in Case of Total Loss

Historically, a VPL’s “principal object and purpose is to fix the measure of damages in case of loss total, or partial,”⁵² thus invalidating insurance clauses which limit the amount of loss.⁵³ VPLs achieve this objective by requiring the insurance company to determine the insurable value of the insured property at the time that

47. *Id.* at 946.

48. *See id.* at 946-47; Baumann, *supra* note 37, at 45.

49. Nathan v. Saint Paul Mut. Ins. Co., 68 N.W.2d 385, 388 (Minn. 1955).

50. Robert Groelle, *Florida’s Valued Policy Law: An Insurer’s Obligation for Additional Coverages After Mierzwa v. FWUA*, 24 NO. 1 TRIAL ADVOC. Q. 19, 19 (2005).

51. Baumann, *supra* note 37, at 45.

52. Hartford Fire Ins. Co. v. Redding, 37 So. 62, 65 (Fla. 1904) (one of the earliest cases defining the purpose of a VPL).

53. Dinneen v. Am. Ins. Co. of City of Newark, 152 N.W. 307, 309 (Neb. 1915).

the policy is drafted, and to insert that value into the policy.⁵⁴ “[A]ll valued policy laws maintain the common goal of fixing the amount of insurance recoverable when an enumerated peril results in a total loss.”⁵⁵ Consequently, states created VPLs to decrease litigation over remuneration in total loss situations.⁵⁶ This also protects insured homeowners whose home is a total loss from having to prove the value of their property.⁵⁷ Consequently, less litigation results because the VPL “operates as a liquidated damages clause when the insured suffers a total loss” by eliminating the need for the insured to prove the monetary value of the damage to their property.⁵⁸

C. *What is a “Total Loss?”*

The issue of whether a total loss occurred is critical under a VPL analysis because without a total loss the VPL does not apply and the homeowner must prove the home’s actual value at the time of loss.⁵⁹ Courts apply various tests to decide whether a damaged building is indeed a “total loss.”⁶⁰ Courts typically use one of three different methods in determining whether a building is a “total loss:” (1) the “identity” test, (2) the “restoration” test, and (3) whether a building is a constructive “total loss.”⁶¹

1. *The “Identity” Test*

The “identity” test examines whether a building’s identity or specific character was destroyed by the covered peril.⁶² The

54. *Hartford Fire Ins. Co.*, 37 So. at 65.

55. Baumann, *supra* note 37, at 45.

56. *Nathan v. Saint Paul Mut. Ins. Co.*, 68 N.W.2d 385, 388 (Minn. 1955).

57. 44 AM. JUR. 2D *Insurance* § 1500 (2003) (citing *St. Paul Reinsurance Co. v. Irons*, 45 S.W.3d 366, 369 (Ark. 2001)); *see also* *Springfield Fire and Marine Ins. Co. v. Boswell*, 167 So. 2d. 780, 784 (Fla. Dist. Ct. App. 1964) (“[A]n important object of the [VPL] is also to simplify and facilitate prompt settlement of insurance claims when a total loss occurs.”).

58. Groelle, *supra* note 50, at 19.

59. Knox, *supra* note 15, at 920.

60. *See* Garmon, *supra* note 10, at 2.

61. John V. Garaffa, *Florida’s “Valued Policy” Law – The Eye of the Storm*, 79 FLA. B.J. 8, April 2005 at 11.

62. *Sec. Ins. Co. v. Rosenberg*, 12 S.W.2d 688, 690 (Ky. Ct. App. 1928).

Louisiana Court of Appeals succinctly defined the “identity” test as “the rule that a total loss has been sustained wherever the building has been so damaged that in effect it has lost its identity as a building.”⁶³ The identity of a home can be lost although part of the building remains and could be used for some purpose.⁶⁴

2. *The “Restoration” Test*

“Under the restoration test, a structure is a total loss if a reasonably prudent owner would not use the remains of the structure after the loss as a basis for restoring the building to its pre-loss condition.”⁶⁵ This test is applied when a building is so destroyed that a reasonable uninsured owner would not use any of the remaining structure to rebuild.⁶⁶ Further, when a covered peril damages a building to the extent that its components are worthless or unsatisfactory for purposes of rebuilding the insured structure, the building is deemed a total loss under the insurance policy.⁶⁷

3. *Constructive Total Loss*

A constructive total loss occurs when a building is “only partially destroyed [but] could not be repaired or restored on account of the building laws or regulations in force at the time of the [loss].”⁶⁸ Insurance policy provisions excluding liability due to city ordinances are written out of the insurance contract by virtue of the VPL.⁶⁹ Further, where a constructive total loss occurs, policy conditions limiting loss are void.⁷⁰ This results in the VPL superseding

63. *Occhipinti v. Boston Ins. Co.*, 72 So. 2d 326, 329 (La. Ct. App. 1954).

64. *Baumann*, *supra* note 37, at 46.

65. *Garaffa*, *supra* note 61, at 10; *Baumann*, *supra* note 37, at 46.

66. *Fidelity & Guar. Ins. Corp. v. Mondzelewski*, 115 A.2d 697, 699 (Del. 1955).

67. *Rosenberg*, 12 S.W.2d at 690.

68. *Id.*; see also *Hart v. N. British & Mercantile Ins. Co.*, 162 So. 177, 179–80 (La. 1935) (finding constructive total loss when seventy-five percent of a building was destroyed by fire).

69. *Scanlan v. Home Ins. Co.*, 79 S.W.2d 186, 189 (Tex. Civ. App. 1935) (citing *Palatine Ins. Co. v. Nunn*, 55 So. 44, 45 (Miss. 1911)).

70. *Dinneen v. Am. Ins. Co. of City of Newark*, 152 N.W. 307, 309 (Neb. 1915).

insurance policy exclusions for local building ordinances.⁷¹ Therefore, “[i]f 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.”⁷²

However, “simply because an ordinance or law may require repairs to undamaged portions of the building or structure, this does not render the loss a constructive total loss as long as the ordinance or law does not prevent repairs.”⁷³ In *Regency Baptist Temple v. Insurance Co. of North America*, a portion of the insured homeowner’s roof collapsed under standing water because of faulty roof installation where the trusses were installed upside down.⁷⁴ “[T]he parties reached a settlement on replacing the collapsed portion of the roof.”⁷⁵ However, the city would not issue a building permit unless the whole roof was replaced.⁷⁶ The trial court held that “the amount payable was ‘the replacement cost of the property damaged or destroyed at the time of loss.’”⁷⁷ The appellate court would not require the insurer to replace the undamaged sections of the roof to comply with code regulations.⁷⁸ The court found no constructive total loss where the ordinance did not prevent repair but “merely increased the cost of repair.”⁷⁹

4. *Applying Multiple Methods to Determine a Total Loss*

Courts do not limit themselves to a single method in determining whether a “total loss” occurred.⁸⁰ For example, the Delaware

71. See generally *id.*; *Palatine Ins. Co. v. Nunn*, 55 So. 44, 45 (Miss. 1911); *New Orleans Real Estate & Mortgage & Sec. Co. v. Teutonia Ins. Co.*, 54 So. 466, 473–74 (La. 1911).

72. Baumann, *supra* note 37, at 46.

73. See Garaffa, *supra* note 61, at 12.

74. 352 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1977).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1244.

80. See generally *Fidelity and Guar. Ins. Corp. v. Mondzelewski*, 115 A.2d 697, 699–700 (Del. 1955).

Supreme Court found Delaware's VPL applicable both when a loss is total in fact and in law.⁸¹ A loss is total in fact, as with the "restoration" test, when a building is so damaged that no prudent person would rebuild.⁸² A loss is total in law, as a constructive total loss, when "the insured is prevented by law from making repairs."⁸³ The court found that the VPL applied whether the loss was in fact or in law.⁸⁴ As a result, the determination of whether a total loss occurred is critical because without a total loss, the VPL does not apply and the homeowner must prove both the home's actual value at the time of loss and the amount of damage done by the covered peril.⁸⁵

II. PUBLIC POLICY ARGUMENTS COVERING VALUED POLICY LAWS

The public policy used by a court in evaluating a VPL will determine whether the court rules in favor of the insurance company or the insured homeowner.⁸⁶

A. Valued Policy Laws Protect Insured Homeowners from Devastating Loss and Exploitation

A VPL is a valuable asset to an insured homeowner if the home is destroyed because a VPL may protect the homeowner from overly complex insurance policies, devastating financial loss, and lengthy litigation.⁸⁷

81. *Id.* at 699.

82. *Id.*

83. *Id.*

84. *Id.* at 700; *see also id.* at 699 (stating that under Delaware's VPL, "[w]henver any policy of insurance shall be issued to insure any real property in this State against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed without criminal fault on the part of the insured, . . . the amount of the insurance stated 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").

85. Knox, *supra* note 15, at 920.

86. *See* discussion *infra* Part II.A-B.

87. *See* discussion *infra* Part II.A.1-3.

1. Complexity of Insurance Policies and Lack of Bargaining Power

An insurance policy “is one of the most complicated contracts the average person will ever sign.”⁸⁸ Considering this complexity, that the insured policyholders do not negotiate the terms of the policy and seldom bother to read the cryptic policy language comes as no shock.⁸⁹ As this complexity results in few homeowners reading or understanding their policies, many are unaware of policy exclusions such as anti-concurrent or *pro rata* liability clauses.⁹⁰ Further, courts treat insurance policies as special contracts due to the complexity of the contracts and the lack of bargaining power held by the policyholder.⁹¹

States need to provide clear VPLs to protect homeowners from devastating loss due to misunderstanding of complex insurance policies.⁹² Although courts attempt to protect homeowners by construing contracts to provide coverage and by honoring the reasonable expectations of policyholders, insurance companies find creative ways to avoid coverage.⁹³ A VPL serves to “simplify and facilitate prompt settlement of insurance claims when a total loss occurs.”⁹⁴ Therefore, courts should strongly construe VPLs in favor of insured homeowners in order to protect policyholders from complex terminology that negates the insureds’ claims.⁹⁵

2. Devastating Financial Loss

The destruction caused by hurricanes can financially cripple homeowners when their insurance companies refuse to honor

88. Scales, *supra* note 12.

89. *Id.*

90. Mitchell F. Crusto, *The Katrina Fund; Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329, 335 (2006); *see discussion infra* Part IV.

91. *Id.* at 367.

92. *See* Scales, *supra* note 12 (discussing the complexity of insurance policies).

93. *Id.*; Orin, *supra* note 12 (“By parsing hurricanes into the smallest possible parts, insurers can find grounds for denying coverage.”).

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

95. *See* Scales, *supra* note 12 (examining the zeal with which judges apply the doctrine of construing insurance policies to provide coverage and the doctrine of honoring the reasonable expectation of the policyholder).

homeowners' policies.⁹⁶ In Mississippi, after a hurricane destroyed a homeowner's \$140,000 home and the homeowner paid a \$2,000 deductible, the insurer paid only \$525.52, claiming the destruction was caused in part by storm surge.⁹⁷ The homeowner claimed tornados generated by the hurricane were the cause, but the insurer refused to pay.⁹⁸

Determining the value of severely damaged or destroyed property is hard because there is little if any evidence remaining for valuation.⁹⁹ Insurance companies are unwilling to cover most water-related damage because "flood insurance is not commercially viable."¹⁰⁰ However, in 2005, even with the destruction of both Hurricanes Katrina and Rita, insurance companies still made a profit.¹⁰¹ In the same year that hurricanes caused policyholders to file insurance claims totaling \$38.1 billion, the insurance industry raked in \$44.8 billion in profits.¹⁰² Therefore, the insurers' argument that the application of VPLs to multiple peril losses would cripple the insurance industry does not hold water.¹⁰³

3. *Lengthy Litigation*

As hurricanes often cause destruction from numerous sources, including wind and water, trying to prove which element caused what damage could take years to litigate while the insured individual

96. See Contreras, *supra* note 1.

97. *Id.*

98. *Id.*

99. *Springfield Fire*, 167 So. 2d. at 784.

100. Crusto, *supra* note 90, at 334.

101. Contreras, *supra* note 1.

102. J. ROBERT HUNTER, CONSUMER FEDERATION OF AMERICA, PROPERTY/CASUALTY INSURANCE IN 2008: OVERPRICED INSURANCE AND UNDERPAID CLAIMS RESULT IN UNJUSTIFIED PROFITS, PADDED RESERVES, AND EXCESSIVE CAPITALIZATION 6 (Jan. 2008), http://www.consumerfed.org/pdfs/2008Insurance_White_Paper.pdf; see also Press Release, I.S.O. Properties, Preliminary Estimates Puts Insured Losses From Hurricane Katrina at \$34.4 Billion: I.S.O. Property Claim Services (Oct. 4, 2005), *available at* http://www.iso.com/press_releases/2005/10_04_05.html (breaking down the amount of insured property damage in the Southeast from Hurricane Katrina).

103. Toohar, *supra* note 9.

carries the burden of proof and resultant costs.¹⁰⁴ Homeowners do not have the financial resources or the time to engage in such litigation.¹⁰⁵ VPLs should apply to any covered peril even when multiple perils destroy a home because it may take several years from when a hurricane hits to the conclusion of a claim, resulting in devastating financial loss to the insured homeowner.¹⁰⁶

B. Valued Policy Laws do not Protect Insurance Companies from Uninsured Loss

VPLs act to avoid litigation by stipulating when a home is a total loss.¹⁰⁷ This may result in an insurance company being liable for double indemnity or compensating for a non-covered peril.¹⁰⁸

1. Danger of Double Indemnity

If VPLs apply to any policy on a single property, they may give rise to the danger that a property owner could purchase multiple full-value policies on a single piece of property in the hopes that the property would be destroyed, also creating the temptation to “help the odds.”¹⁰⁹ The *Mierzwa* court “suggests that double payment to the insured is somehow not unjust because the insurer was always liable to pay policy limits under the [VPL].”¹¹⁰ This reasoning leads to a windfall for the insured.¹¹¹ The VPL should not apply when multiple insurers provide coverage for the same property, but for different perils, which could damage the insured property during a single storm or other disastrous event.¹¹² Insurers will argue that the danger of a decision like that of *Mierzwa* lies in its potential “to

104. Crusto, *supra* note 90, at 368.

105. *Id.* at 369.

106. *Id.*

107. See discussion *supra* Part I.B.

108. See discussion *supra* Part II.B.1; discussion *supra* Part II.B.2.

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

110. Garaffa, *supra* note 61, at 18.

111. *Id.*

112. *Id.* at 19.

convert policies covering specific perils into all-risk policies, even though the insurer did not collect premiums for certain risks.”¹¹³

2. Full Payout for Partial Damage by the Covered Peril

Courts interpret VPLs to apply when a combination of a covered peril and a non-covered peril destroy a home, resulting in one insurance policy being responsible for the entire cost of the home.¹¹⁴ VPLs can lead to unfair results where “proof of any wind loss would mean that the insurer must pay the entire loss, even if some or most of the loss was caused by flood or other excluded risk.”¹¹⁵ This type of application could open the door to overwhelming demands for insurance policy payouts.¹¹⁶ In spite of insurers’ arguments for excluding non-covered perils from VPL application, the insurance industry would continue to prosper even if courts upheld VPLs in cases resulting from hurricane damage.¹¹⁷

III. PUBLIC POLICY UNDERLYING HOMEOWNERS INSURANCE

Different states utilize distinct public policies to explain the purpose of homeowners insurance; some see an insurance policy as a contract to insure loss, while others see the policy as a contract for indemnity.¹¹⁸ In *Springfield Fire*, both the buyer and seller of a home purchased fire insurance on the home.¹¹⁹ Shortly thereafter, fire

113. Garmon, *supra* note 10.

114. See generally Garaffa, *supra* note 61, at 13–15.

115. Knox, *supra* note 15, at 921.

116. Groelle, *supra* note 50, at 22.

117. See Contreras, *supra* note 1 (estimating the total insurance claims filed by policyholders due to hurricane Katrina to be \$38.1 billion and the total profits for the insurance industry in 2005 to be \$44.8 billion); HUNTER *supra* note 102 (reporting record net income for property/casualty insurers over the past four years: \$65.0 billion for 2007, \$67.6 billion for 2006, \$48.8 billion for 2005, and \$40.5 billion in 2004).

118. See generally *Springfield Fire & Marine Ins. Co. v. Boswell*, 167 So. 2d 780, 782 (Fla. Dist. Ct. App. 1964) (differentiating between the New York rule, which defines homeowners insurance as a contract to insure against loss, and the Wisconsin rule, which define homeowners insurance as a contract of indemnity).

119. *Id.* at 781.

destroyed the insured premises.¹²⁰ The defendant insurance company argued that based on the sale, the plaintiff seller “had no loss the defendant [was] obligated to indemnify.”¹²¹ The court, examining the public policy behind homeowners insurance, differentiated between the New York rule and the Wisconsin rule.¹²²

The New York rule regards an insurance policy as a contract to insure against loss, whereas the Wisconsin rule considers an insurance contract as a contract of indemnity.¹²³ The court distinguished between two different applications of the New York rule.¹²⁴ Under the “face value rule,” “the insured may recover the full value of his policy, even though the value of his actual interest is less than the amount of the insurance.”¹²⁵ However, under the “insurable interest value rule” the insured may recover only the “value of his interest at the time of loss not exceeding the amount of coverage provided by the policy.”¹²⁶ In applying the New York rule, the court found that where insured property is a total loss, the insured interest may be recovered if it is not greater than the face value of the policy.¹²⁷ If the Wisconsin rule applied, then the insured would get nothing because he lost nothing due to the sale of the property prior to the fire.¹²⁸

Lawyers and legal scholars disagree on the basic principles behind property insurance law.¹²⁹ A court’s view of the purpose behind insurance, whether it is a contract to insure against loss or a contract

120. *Id.*

121. *Id.*

122. *See id.*

123. *Id.* at 782 (regarding policy as a contract to insure against a loss); *Springfield Fire*, 167 So. 2d at 782 (regarding policy as a contract for indemnification).

124. *Id.*

125. *Id.* at 782–83.

126. *Springfield Fire*, 167 So. 2d at 783.

127. *Id.* at 782.

128. BLACK’S LAW DICTIONARY 342 (2d pocket ed. 2001) (defining indemnity as “[a] duty to make good any loss, damage, or liability incurred by another”).

129. Compare Garaffa, *supra* note 61, at 13 (arguing that indemnity underlies property insurance law), with Crusto, *supra* note 90, at 334 (discussing insurance as “a form of contract between the insurer (insurance company) and the insured (the homeowner)”).

of indemnity, greatly affects the outcome of a case.¹³⁰ In *Millers' Mutual Insurance Ass'n of Illinois v. La Pota*, the plaintiff held two insurance policies on the same home.¹³¹ After fire destroyed the home, the defendant insurer denied full liability based on a *pro rata* liability clause in the insurance policy.¹³² The court rejected the insurer argument based on Florida's public policy for insurance.¹³³ The court reasoned that Florida's alignment with the New York rule negates a *pro rata* liability clause, favoring instead a VPL based on the theory of calculated risk.¹³⁴

IV. STRATEGIES FOR CIRCUMVENTING VALUED POLICY LAWS

Insurance companies often attempt to alter the scope of coverage under a policy by limiting liability through clauses that apply when multiple perils destroy a home.¹³⁵ Insurers utilize two primary methods: anti-concurrent cause clauses and *pro rata* liability clauses.¹³⁶

1. *Anti-Concurrent Cause Clauses*

Often insurance companies include Anti-Concurrent Cause Clauses (ACCCs) in their insurance policies.¹³⁷ A typical ACCC provision states, "[w]e will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or

130. See *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774, 775 (Fla. Dist. Ct. App. 2004) (applying the New York rule in a hurricane case to find the insurance company liable when a covered peril contributed to a total loss).

131. *Millers' Mut. Ins. Ass'n of Illinois v. La Pota*, 197 So. 2d 21, 22 (Fla. Dist. Ct. App. 1967).

132. *Id.*

133. *Id.* at 25.

134. *Id.* at 25–26.

135. See Orin, *supra* note 12; *La Pota*, 197 So. 2d at 22 (analyzing insurer's use of a *pro rata* liability clause in attempting to limit liability under Florida's VPL).

136. See discussion *infra* Part IV.A-B.

137. David J. Rosenberg, Kenneth M. Portner, & Matthew Stool, *Insurance Industry Woes in the Aftermath of Hurricanes Katrina & Rita*, 73 DEF. COUNS. J. 141, 152 (2006).

in any sequence to the loss.”¹³⁸ This clause “excludes loss caused directly or indirectly by an excluded cause regardless of any other cause that concurrently or in any sequence contributes to the loss.”¹³⁹ In Florida, a court found that if there is any conflict between the text of the VPL and the text of the ACCC, the VPL prevails.¹⁴⁰ However, other state courts along the Gulf Coast have yet to address ACCCs when applied to hurricane damage.¹⁴¹

2. *Pro Rata Liability Clauses*

Pro rata liability clauses are often included in insurance policies though VPLs invalidate *pro rata* clauses as they run contrary to the purpose behind the law.¹⁴² A *pro rata* liability clause computes the proportionality of an insurance policy to the entire amount of insurance on a property.¹⁴³ For example, in *Millers’ Mutual Insurance Ass’n of Illinois v. La Pota*, the homeowner had two policies: one with the defendant insurer for \$5,000 and another for \$6,500.¹⁴⁴ The homeowner sought \$5,000 in damages for the total destruction of her home.¹⁴⁵ The defendant insurer, under the *pro rata* liability clause, claimed that its liability was limited to 43% of the loss because the \$5,000 policy was 43% of the total insurance on the home.¹⁴⁶ However, the court found the rationale behind the VPL is “to fix the measure of damages in case of loss total and . . . require the insurer to ascertain the insurable value at the time of writing the policy.”¹⁴⁷ Therefore, when a homeowner obtains two insurance

138. Orin, *supra* note 12, at 5.

139. Knox, *supra* note 15, at 923.

140. *Mierzwa*, 877 So. 2d at 777–78.

141. Knox, *supra* note 15, at 923–24.

142. *Cf. La Pota*, 197 So. 2d at 22.

143. *Id.* See also BLACK’S LAW DICTIONARY 565 (2d pocket ed. 2001) (defining *pro rata* as “[p]roportionality; according to an exact rate, measure, or interest”).

144. *La Pota*, 197 So. 2d at 22.

145. *Id.*

146. *Id.* at 22 n.1.

147. *Id.* at 24.

policies on a single piece of property and the covered peril destroys the property, each insurer is liable for the face value of the policy.¹⁴⁸

V. HOW COURTS APPLY VALUE POLICY LAWS TO A “TOTAL LOSS”

Courts apply VPLs differently based on the amount of insurance policies and the number of perils that combine to create a total loss.¹⁴⁹

A. Application of VPLs When a Single Peril Results in a Total Loss

Multiple states have applied their VPL where one property has more than one insurance policy and/or insurance policy holder. The Arkansas Supreme Court found that its VPL applies when both the buyer and seller of a home held insurance policies on the property.¹⁵⁰ Moreover, the Arkansas Supreme Court held that an insured with a one-eleventh interest in a property was entitled to the face value of his insurance policy.¹⁵¹ In Florida, when multiple policies are held against a single property, “[t]he aggregate liability is the total of the various values specified and for which an appropriate premium has been paid.”¹⁵² In Louisiana, a court enforced multiple policies on a single home because the policies did not explicitly state a method for valuation other than the value of the policy.¹⁵³

148. See generally *id.*

149. Compare *id.* at 22 (applying the VPL where a single peril destroyed a home covered by multiple insurance policies), with *Mierzwa v. Florida Windstorm Underwriting Ass’n*, 877 So. 2d 774, 775-76 (Fla. Dist. Ct. App. 2004) (applying the VPL where multiple perils—wind and water—destroyed a home covered by both a wind policy and a flood policy), and *Chauvin v. State Farm Fire and Cas. Co.*, 450 F. Supp. 2d 660, 669 (E.D. La. 2006) (rejecting homeowner’s argument that the VPL should apply to a home destroyed by multiple perils—wind and flood—when the insured was only covered by a wind insurance policy), *aff’d*, 495 F.3d 232 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1075 (2008).

150. See *Hensley v. Farm Bureau Mut. Ins. Co. of Arkansas*, 420 S.W.2d 76, 81 (Ark. 1967).

151. See generally *Tedford v. Sec. State Fire Ins. Co.*, 278 S.W.2d 89 (Ark. 1955).

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

153. *Bonnette v. Foremost Ins. Co.*, 493 So. 2d 874, 875 (La. Ct. App. 1986) (requiring valid exceptions to VPL insurance must be “set out in prominent size of type in its policy and the insurance application so that in case of loss, it would value the insured item according to a different standard than the value assigned in the policy”).

Insurers can limit recovery under multiple insurance policies by including a clause prohibiting other insurance.¹⁵⁴ In *Hensley v. Farm Bureau*, both the buyer and seller of a home held insurance on the property, fire destroyed the home, and the lower court denied recovery.¹⁵⁵ The insurance policy at issue contained a clause providing that “other insurance may be prohibited or the amount of the insurance may be limited by endorsement attached hereto.”¹⁵⁶ The supreme court reversed the lower court’s ruling, in part, because the clause did not contain an endorsement prohibiting other insurance.¹⁵⁷ Therefore, in spite of the clause prohibiting other insurance, the VPL was not limited and the homeowner recovered the full amount of the policy.¹⁵⁸

B. Application of VPLs When Multiple Perils Result in a Total Loss

In many hurricane cases, both water and wind cause damage to a home resulting in a total loss.¹⁵⁹ When multiple perils orchestrate a total loss, either the concurrent causation doctrine or the proximate cause doctrine is applied.¹⁶⁰ Concurrent causation is when the two separate perils, acting at the same time, result in a loss where neither peril could have produced the loss independently.¹⁶¹ Concurrent causation applies when two or more independent perils produce a loss.¹⁶² Proximate cause applies when dependant perils produce a loss in which “one peril instigates or sets in motion the other.”¹⁶³

154. *Hensley*, 420 S.W.2d at 80.

155. *Id.* at 77.

156. *Id.* at 78.

157. *Id.*

158. *Id.* at 80–81.

159. See Orin, *supra* note 12, at 1–2.

160. See generally Knox, *supra* note 15, at 918–23.

161. *Id.* at 921.

162. Rosenberg, *supra* note 139, at 150.

163. Knox, *supra* note 15, at 921.

Determining whether the concurrent cause doctrine or the efficient proximate cause doctrine applies is a purely factual analysis.¹⁶⁴ The efficient proximate cause doctrine applies when causes are dependant, whereas the concurrent cause doctrine applies when causes are independent.¹⁶⁵ For example, “causes are independent when they are unrelated such as . . . a windstorm and wood rot.”¹⁶⁶ However, “causes are dependant when one peril instigates or sets in motion another, such as an earthquake which breaks a gas main that starts a fire.”¹⁶⁷ Courts must decide if a state’s VPL requires the insurance company to pay policy limits when the covered peril only does partial damage and the home is a total loss.¹⁶⁸

C. Application of VPLs When an Insurance Policy Covers Each Contributing Peril

In some instances, a homeowner has both wind and flood insurance policies from separate insurers.¹⁶⁹ In Florida, an appellate court applied Florida’s VPL to a scenario involving multiple insurance policies and multiple perils.¹⁷⁰ In *Mierzwa v. Florida Windstorm Underwriting Ass’n*, Hurricane Irene damaged an insured’s home through a combination of wind and flood: 57% of the damage was caused by wind and 43% caused by flood.¹⁷¹ The local authorities condemned the building because the repair costs exceeded 50% of the property value.¹⁷² The homeowner insured the property with both a flood policy and a wind policy through different

164. See generally *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1319 (M.D. Fla. 2002) (analyzing the difference between the concurrent cause doctrine and the efficient proximate cause doctrine).

165. *Id.*

166. *Id.*

167. *Id.*

168. See generally *Orin*, *supra* note 12.

169. *Garaffa*, *supra* note 61, at 6 (discussing *Mierzwa v. FWUA* where “[t]he homeowner had wind insurance with one carrier and flood insurance with another”).

170. *Mierzwa v. Florida Windstorm Underwriting Ass’n*, 877 So. 2d 774, 775 (Fla. Dist. Ct. App. 2004).

171. *Id.* at 775–76.

172. *Id.* at 776, n.3.

insurance companies.¹⁷³ The flood insurance company paid the insured policy limits.¹⁷⁴ However, the wind insurance company failed to pay, arguing that its policy excluded flood damage.¹⁷⁵ The wind insurance policy contained an anti-concurrent cause clause that excluded any coverage for flood damage.¹⁷⁶ The trial court found the wind insurer liable only for the wind damage.¹⁷⁷ However, the court of appeals reversed, finding that if an insurance company “has any liability at all, even a fractional share of the total damage, under the VPL it is liable for the face amount.”¹⁷⁸

The majority rule stated, “if the insurance carrier has *any* liability at all to the insured for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy.”¹⁷⁹ Judge Gross, in a concurring opinion, disagreed, endorsing a rule requiring “that a covered peril be the proximate cause of the total loss in order to trigger the valued policy law.”¹⁸⁰ He reasoned that the outcome would be the same under a proximate cause analysis “since it is clear that but for the wind damage, the ordinance would not have been brought into play.”¹⁸¹ In spite of Judge Gross’s endorsement of a proximate cause analysis, the concurrent cause doctrine is the standard applied in Florida.¹⁸²

Although, the Florida Supreme Court later rejected the proposition that the VPL applies where “the insurance carrier has *any* liability at all to the owner for the building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy,” *Mierzwa* is instructive as to the reasoning that takes place in a case involving multiple perils covered by separate insurance policies.¹⁸³

173. *Id.* at 776.

174. *Id.*

175. *Id.*

176. *Mierzwa*, 877 So. 2d at 777.

177. *Id.*

178. *Id.* at 778.

179. *Id.* at 775–76 (emphasis in original).

180. *Id.* at 782.

181. *Id.*

182. *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1319 (M.D. Fla. 2002).

183. *Fla. Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815, 821 (Fla. 2007) (rejecting the rule).

The Florida Supreme Court's holding does not apply where a covered peril results in a constructive total loss, as was the case in *Mierzwa*, thus the result in *Mierzwa* remains unchanged.¹⁸⁴

D. Application of VPLs When an Insurance Policy Covers Only One Contributing Peril

In the wake of Hurricane Katrina, with storms destroying homes insured only for wind, the issue of concurrent causation is paramount.¹⁸⁵ In many cases, multiple perils cause a total loss for homeowners having coverage for only a single peril.¹⁸⁶ In Louisiana, homeowners filed a class action after Hurricanes Katrina and Rita destroyed their homes through a combination of wind and flood.¹⁸⁷ In *Chavin v. State Farm*, Louisiana homeowners claimed the hurricanes caused such damage that their homes were a total loss.¹⁸⁸ The homeowners' policies covered wind and rain damage but excluded flood damage.¹⁸⁹ The issue was "whether the VPL mandates that an insurer pay the full value of the . . . policy in the event that a total loss by any cause occurs simultaneously with a covered loss, however small."¹⁹⁰ The plaintiffs argued they were entitled to the face values of their policies based on the "partial loss caused by the covered perils of wind and/or rain."¹⁹¹ The district court rejected the plaintiffs' argument and found that the Louisiana VPL did not apply to the damage caused by hurricanes Katrina and/or Rita because flooding, an excluded peril, did the majority of the damage.¹⁹² Furthermore, the court disputed the plaintiffs' claims because the

184. *Id.* at 821 n.6.

185. Peter Geier, *Dissecting a Disaster: Courts Weigh Whether Wind or Water From Hurricane Katrina Caused Damage*, 81 MIAMI DAILY BUS. REV. 14, 14 (2006) (discussing Katrina-related insurance litigation).

186. See Orin, *supra* note 12, at 2 (analyzing the issue of wind damage verses water damage in the aftermath of Hurricanes Katrina and Rita).

187. *Chavin v. State Farm Fire and Cas. Co.*, 450 F. Supp. 2d 660, 661–62 (E.D. La. 2006).

188. *Id.* at 661.

189. *Id.* at 662.

190. *Id.* at 665.

191. *Id.*

192. *Id.* at 669.

plaintiffs' proposed interpretation would lead to "absurd consequences," including full recovery for a total loss under a wind insurance policy if a home lost a few shingles but at the same time was completely flooded.¹⁹³ In holding that Louisiana's VPL "does not apply when a total loss is not caused by a covered peril," the court reasoned that "the VPL was designed to fix valuations of losses and was not intended to expand coverage to excluded perils."¹⁹⁴ Therefore, under a proximate cause analysis, when an excluded peril acts with a covered peril to cause a total loss, the VPL does not apply.¹⁹⁵

VI. INTERPRETING AMBIGUITIES FOUND IN VPLS AND INSURANCE POLICIES

A court's interpretation of ambiguity found both in a VPL and in an insurance policy plays a fundamental role in how the court applies the VPL to a homeowner's insurance policy in the case of a total loss.¹⁹⁶ The process for interpreting both a statute and an insurance policy is similar. "When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in a statute"; or policy.¹⁹⁷ If the statute is clear and unambiguous, its meaning must be gleaned from the actual language without speculation of the legislature's intent or other rules of construction.¹⁹⁸ Similarly, if the insurance policy's language is plain and unambiguous, it should be interpreted to give effect to the policy's intent.¹⁹⁹

However, if a court finds ambiguity, the methods for interpretation differ between statutes and insurance policies. If statutory ambiguity

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

194. *Id.* at 669.

195. *Id.* at 669.

196. *Id.* at 666 (finding that statutory language is ambiguous leads to rejection of VPL application when multiple perils cause a total loss to a property covered only by wind insurance).

197. *Childers v. Cape Canaveral Hosp., Inc.*, 898 So. 2d 973, 975 (Fla. Dist. Ct. App. 2005); *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785 (Fla. 2004).

198. *Id.* at 975; *see, e.g., Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992).

199. *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785 (Fla. 2004).

exists, the court must follow the rules of statutory construction.²⁰⁰ In these situations, courts should construe a statute to achieve a reasonable conclusion, protect legislative intent, and prevent absurd results, regardless of the literal interpretation of the legislation.²⁰¹ An insurance policy's language is thought to be ambiguous if the language "is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage."²⁰² Courts have decided in cases of ambiguity that an insurance policy must be liberally construed in favor of the insured in order to protect his reason for obtaining insurance coverage which is protection of his home when disaster strikes.²⁰³ Furthermore, "ambiguous terms, conditions or provisions in a contract of insurance are to be fairly construed in favor of the insured."²⁰⁴

When an exclusionary provision within an insurance policy is ambiguous or otherwise susceptible to more than one meaning it must be construed in favor of the insured, because the insurer writes the policy.²⁰⁵ However, this rule applies only when "genuine inconsistency, uncertainty, or ambiguity in meaning remains," after employing the ordinary rule of construction.²⁰⁶

An example of judicial interpretation of statutory language is found in *Florida Farm Bureau Casualty Insurance Company v. Cox*, where the Florida Supreme Court overruled and vacated the appellate

200. *Childers*, 898 So. 2d at 975.

201. *Id.*

202. *Travelers Indemnity*, 889 So. 2d at 785 (quoting *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003)).

203. *Inter-Ocean Cas. Co. v. Hunt*, 189 So. 240, 242 (Fla. 1939); *see also* *Travelers Indem. Co.*, 889 So. 2d at 785-86 ("When language in an insurance policy is ambiguous, a court will resolve the ambiguity in favor of the insured by adopting the reasonable interpretation of the policy's language that provides coverage as opposed to the reasonable interpretation that would limit coverage."); *New York Life Ins. Co. v. Kincaid*, 186 So. 675, 677 (Fla. 1939) ("It is a well recognized rule of construction and interpretation of contracts for insurance that the contract or policy must be liberally construed in favor of the insured so as not to defeat . . . his claim to the indemnity which . . . was his purpose and intention to obtain.").

204. *Hunt*, 189 So. at 242.

205. *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986).

206. *Id.* (citing *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 639 So. 2d 938, 942 (Fla. 1979)).

court's interpretation of the Florida VPL.²⁰⁷ In this case, the plaintiffs' home was totally destroyed by Hurricane Ivan.²⁰⁸ As a result, they made a policy limits demand of \$65,000 which was denied by the insurance company who claimed that wind, the covered peril, only caused \$11,583.93 of damage.²⁰⁹ The statutory language at issue stated:

In the event of the total loss of any building . . . insured by any insurer as to a covered peril . . . the insured'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.²¹⁰

In analyzing the statute, the appeals court found two essential ingredients for full recovery: first, "the building [must] be 'insured by [an] insurer as to a covered peril,'" and second, "the building [must] be a total loss."²¹¹ However, the supreme court disagreed, finding the plain language of the statute to mean that "an insurer is liable for a loss by a peril covered under the policy for which a premium has been paid."²¹² The court found that "the VPL was intended *only* to set the valuation of the insured property."²¹³ Prior to this case, the Florida Legislature amended the statute so that when a non-covered peril does partial damage, the VPL does not apply.²¹⁴ The *Florida Farm Bureau* decision essentially "adopt[ed] limitations in the new law for damages that occurred before it was passed."²¹⁵ Consequently, "homeowners today must collect separate loss

207. Florida Farm Bureau Cas. Ins. Co. v. Cox, 967 So. 2d 815, 821 (Fla. 2007) (interpreting the language of FLA. STAT. ANN. § 627.702 (2003)).

208. *Id.* at 817.

209. *Id.*

210. FLA. STAT. ANN. § 627.702(1) (2002).

211. Florida Farm Bureau Cas. Ins. Co., 967 So. 2d at 818 (Fla. 2007).

212. *Id.* at 820.

213. *Id.* (emphasis added).

214. See FLA. STAT. ANN. § 627.702(1)(b) (2005).

215. Beatrice E. Garcia, *Ruling May Curb Property Insurer Liability: Two Florida High Court Rulings Allowing Insurers to Pay Only Actual Losses Could Affect Homeowners Battling Their Insurance Companies for Wind and Flood*, MIAMI HERALD, Sept. 21, 2007, at C1.

payments from wind and flood insurers who do not always agree on their shares of the damage.”²¹⁶ Homeowners whose homes were destroyed by hurricanes must prove how much damage was done by wind versus how much damage was done by water—a difficult task when little more than a foundation has survived.²¹⁷

VII. LEGISLATIVE RESPONSE TO JUDICIAL INTERPRETATION OF VALUED POLICY LAWS

In response to criticism of the *Mierzwa* decision, the Florida Legislature amended its VPL so that when a home is destroyed in part by a covered peril and in part by a non-covered peril, the insurer’s liability is limited to the amount caused by the covered peril.²¹⁸ The Florida Legislature acted to clear up ambiguity found when courts interpret their VPL in light of concurrent causation with both a covered and non-covered peril.²¹⁹ The Florida Legislature left the basic provision in place, but added a clause to its VPL that states:

The intent of this subsection is not to deprive an insurer of any proper defense 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, [the VPL] 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, [the VPL] shall apply.²²⁰

The amended statute allows for pro rated damages when an excluded peril contributes to a total loss.²²¹ Now, “[w]hen a total loss results

216. Paige St. John, *Court Backs Insurers*, FLA. TODAY, Sept. 21, 2007, at 1A.

217. *Id.*

218. Garmon, *supra* note 10, at 2; see generally discussion *supra* Part II.B.2.

219. See FLA. STAT. ANN. § 627.702 (2005) (amended in 2005).

220. FLA. STAT. ANN. § 627.702(1)(b) (2005).

221. Garaffa, *supra* note 46, at 952.

from a combination of wind and flood, the insurer who has excluded flood coverage should only be required to pay for damage caused by wind.”²²² However, if a covered peril does over 50% of the damage and a statute or ordinance is in place that requires demolition, the VPL applies.²²³ This clause will lead to increased litigation where a storm totally demolishes a home because the insurer will want to prove that the covered peril did not do the majority of the damage.²²⁴ Therefore, if the amended statute was applied in *Mierzwa*, the wind insurer still would have paid the policy limits because the home was a constructive total loss with over 50% of the damage caused by wind.²²⁵ However, this amendment may lead to increased litigation as insurers dispute the percentage of damage caused by a covered peril, thus detracting from the underlying policy behind the VPL of reducing litigation.²²⁶

Despite “the intent of the [l]egislature that the amendment to [the VPL] shall not be applied retroactively and shall apply only to claims filed after the effective date of such amendment,”²²⁷ the Florida Supreme Court chose to retroactively apply this amendment by interpreting the old VPL to mean that “an insurer is liable for a loss by a peril covered under the policy for which a premium has been paid.”²²⁸

CONCLUSION

The vital issue is whether courts and legislatures will allow insurance companies to avoid paying homeowners for a total loss in the face of multiple perils. VPLs can protect homeowners from catastrophic losses inflicted by major storms and hurricanes.²²⁹ A

222. *Id.*

223. *Id.* at 953.

224. *Id.*

225. *Id.* at 954; *see also* discussion *supra* Part VI.

226. *See* discussion *supra* Part I.B.2.

227. FLA. STAT. ANN. § 627.702(1)(c) (2005).

228. Fla. Farm Bureau Cas. Ins. Co. v. Cox, 967 So. 2d 815, 820 (Fla. 2007).

229. *See Mierzwa v. Florida Windstorm Underwriting Ass'n.*, 877 So. 2d 774 (Fla. Dist. Ct. App. 2004) (awarding homeowner policy limits on both wind and flood insurance).

strong VPL can protect homeowners, such as John Hadden, from denied coverage after the devastation caused by a hurricane.²³⁰ VPLs protect homeowners by preventing overinsurance (by requiring prior valuation) and avoiding litigation (by prescribing definite standards of recovery in a case of total loss).²³¹ Although insurers try to circumvent VPLs through both anti-concurrent cause clauses and *pro rata* clauses, courts interpret VPLs to trump both.²³² Furthermore, courts protect homeowners by construing ambiguous insurance policies in favor of the insured.²³³

When multiple policies exist for a single peril, which results in a total loss, courts interpret VPLs to allow any property owner with any percentage interest to collect on their policy.²³⁴ The Arkansas Supreme Court states it well: “[I]n [a] case of a total loss of the property insured under a valued policy statute, the valuation in the policy is conclusive upon the parties.”²³⁵ VPLs apply even when multiple covered perils work simultaneously to destroy a home.²³⁶ However, in the wake of Hurricane Katrina, the issue of wind verses water, a covered peril verses a non-covered peril, is vital to the survival of homeowners along the Gulf Coast.²³⁷ A court in Louisiana found “the VPL was designed to fix valuations of losses and was not intended to expand coverage to excluded perils.”²³⁸

However, this results in fundamental unfairness because when policyholders buy insurance policies that cover hurricanes, they think that if a hurricane roars through their area and leaves physical and economic devastation in its wake, all of the resulting damages from that hurricane will be covered.²³⁹ Homeowners suffer from both a

230. See generally Contreras, *supra* note 1; discussion *supra* Introduction.

231. See discussion *supra* Part I.B.1; discussion *supra* Part I.B.2.

232. See discussion *supra* Part IV.A; discussion *supra* Part IV.B.

233. See discussion *supra* Part VI.

234. See discussion *supra* Part V.A.

235. *Tedford v. Sec. State Fire Ins. Co.*, 278 S.W.2d 89, 92 (Ark. 1955).

236. See discussion *supra* Part V.C.

237. See generally Orin, *supra* note 12; discussion *supra* Part V.D.

238. *Chauvin v. State Farm Fire and Cas. Co.*, 450 F. Supp. 2d 660, 669 (E.D. La. 2006), *aff'd*, 495 F.3d 232 (5th Cir 2007), *cert. denied*, 128 S.Ct. 1075 (2008).

239. See generally Orin, *supra* note 12.

lack of bargaining power and a lack of capacity to comprehend insurance policies.²⁴⁰ VPLs provide courts and legislatures the opportunity to protect homeowners from both catastrophic financial loss and lengthy litigation.²⁴¹

Insurance companies argue that applying a VPL to any covered peril would result in a windfall for the insured through double indemnity and policy limits for partial damage by a covered peril.²⁴² However, even with four hurricanes in Florida in 2004, “the Property/Casualty insurers set a record profit at \$40.5 billion in net income.”²⁴³ In 2005, one of the most catastrophic years for hurricanes including Katrina and Wilma,²⁴⁴ the property insurance industry racked up \$48.8 billion in profits.²⁴⁵ In fact, the past four years are the most profitable years in the property insurance industry’s history.²⁴⁶ This leads to the conclusion that the insurance industry would continue to prosper even if courts uphold VPLs in cases resulting from hurricane damage. Therefore, both courts and legislatures should act to protect helpless homeowners from catastrophic loss at the hands of both hurricanes and insurance companies by amending state VPLs to explicitly apply to damage by multiple perils.

Courts and legislatures can protect homeowners in a number of ways, including but not limited to, shifting the burden of proof for causation from the homeowner to the insurer, resulting in a rebuttable presumption that the covered peril caused the damage; employing a proximate cause analysis, so if the covered and non-covered perils are dependant, then the insurance company is liable; or requiring an

240. See discussion *supra* Part II.A.1.

241. See discussion *supra* Part II.A.2; discussion *supra* Part II.A.3.

242. See discussion *supra* Part II.B.1; discussion *supra* Part II.B.2.

243. *Statement of J. Robert Hunter Before the Select Committee on Property Insurance Accountability of the Florida Senate*, CONSUMER FED’N OF AM., at 5 (Jan. 2008), available at http://www.consumerfed.org/pdfs/Hunter-Remarks_to_FL_SenSelectCtte.pdf.

244. Whoriskey, *supra* note 6 (stating that “2005 racked up more storm deaths and destruction than the previous 10 years—combined”).

245. Hunter, *supra* note 245, at 5–6.

246. *Id.* (stating that the net income in 2004, 2005, and 2006 was \$40.5 billion, \$48.8 billion, and \$67.6 billion, respectively, and estimating the net income for 2007 at \$65.0 billion).

insurance company to pay policy limits if a covered peril causes any damage and a home is a total loss. Otherwise, helpless homeowners will continue to be taken advantage of by insurance companies through lengthy litigation and complex insurance policies.

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