THE UNCERTAIN SCOPE OF "HURRICANE DAMAGE" UNDER STATE VALUED POLICY LAWS

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By John V. Garaffa [a1]

I. INTRODUCTION

The 2004 and 2005 hurricane seasons in the Gulf Coast region have highlighted a number of issues that go to the heart of things both personal and governmental. The social and psychological devastation wrought by windstorms like Hurricanes Ivan, Katrina, and Rita continue to shape the way the public perceives the region and its public officials. Somewhat less appreciated is the impact that those storms have had upon more prosaic issues like insurance and the value of taxable property that ultimately have broad economic effects on the region as a whole.

Through a combination of private wind and government-subsidized flood insurance, a sharing of risk has encouraged significant development in the Gulf Coast region where mild climate and a more relaxed pace of life already offer significant attractions. Enticed by the promise of increased tax rolls, state governments encouraged this development despite the risks posed by hurricanes, floods, and other natural impediments to growth. The protections afforded by insurance products have permitted development in areas that otherwise would have posed unacceptable risk for the business community. Likewise, affordable homeowners policies have encouraged people to purchase and build homes in coastal, low-lying areas exposed to significant coastal storm risk for what is typically a family's biggest economic investment.

II. THE GULF COAST REGION: A PROFILE OF RISK

A. Demographics and Economics

While storm activity is a fact of life in the Gulf Coast region, a number of factors have converged to increase the risk of coastal storms. The first is the long-term population growth trends. The scope of development over the last twenty-five years has been significant in all Gulf Coast states. [1] In Florida this trend has been the most pronounced. Florida has sixty-one counties classified as coastal. Their population density has risen dramatically on both coasts. On the Atlantic Coast, density rose from 330 persons per square mile in 1980 to 546 persons per square mile in 2000. It is expected to reach 630 persons per square mile in 2008. On the Gulf Coast, historically less developed than the Atlantic Coast, population density has risen from 119 persons per square mile in 1980 to 192 persons per square mile in 2000. It is expected to reach 223 persons per square mile in 2008. [2] Similar trends can be seen in the Gulf Coast states of Alabama, Mississippi, Louisiana, and Texas. The population density in each, while smaller than Florida's, is growing at a rapid pace.[3]

The second factor is an increase in property values. As population density in the Gulf Coast region has increased, the competition for fixed resources such as land and housing has also increased. In 1980, the median price for a new single-family home in the United States was approximately $150,000. In 2004 it had reached approximately $240,000. [4] Property values in coastal communities generally run higher than the national average since the national average includes many areas that are thinly populated and less prosperous than the Gulf Coast. The limits of the federal flood insurance program[5]- the only such insurance available in most places - once exceeded the needs of the average homeowner. Now, the maximum policy limit of $250,000 is barely adequate for the average new home in the Gulf Coast region and is woefully inadequate for higher-priced homes.

The third risk factor is the increased frequency and intensity of coastal storms themselves. Whether one attributes the trend to global warming or merely to an expected cycle of greater storm activity within the Atlantic Basin, experts predict that the frequency and intensity of tropical storms and hurricanes are on the rise. [6] As the statistics discussed above establish, when these additional storms strike, more people are in danger and more property is at risk. To the extent that property is insured, any significant storm has the potential to affect financial markets adversely. To the extent that property is uninsured and simply goes unrepaired, as is occurring in New Orleans in the aftermath of Katrina, the delay in recovery and the increase in sheer human misery will be felt for years to come.

B. Insurance Expectations

For most insured property owners and government officials as well as the attorneys who represent them, there appears to be an expectation that insurance benefits will be (or should be) sufficient to return property to its prestorm condition. Unfortunately, even for professionals, there are common misconceptions about the interplay between insurance contract provisions and the requirements of insurance statutes in this area. Complicating the analysis, coverage for damage incident to hurricanes often involves a combination of commercial windstorm policies and flood policies underwritten under the federal flood insurance program. Given the exclusion for flood common to most windstorm policies, determining the flood component of a loss has proven to be an extremely difficult aspect of the adjustment process. Further, flood policies under the federal flood insurance program are governed by federal statute, rather than developing case law. [7]

First, the federal flood insurance program is limited to those communities determined to be at risk of flooding. [8] That determination is based on historical data and may not encompass some areas that face flooding from powerful storms. Second, federal law limits the availability of coverage to those jurisdictions that have adopted flood control regulations aimed at lessening the potential for damage during expected flood conditions. [9] In some places this means a ban on new construction in designated zones. In others, the program may require that new construction meet minimum elevation requirements. In return for enforcement of these standards, property owners within the designated flood zone qualify for subsidized flood insurance at rates based upon the pooling of risks under the national program. [10]

While the policy limits available under the federal flood insurance program once provided significant protection for homeowners, the steady rise in property values continues to erode the value of the program. The current limit of $250,000 leaves a substantial percentage of properties significantly underinsured for the peril of flood. [11] In an era when prospective homeowners often buy as much house as they can afford, the cost of "required" insurance may be the critical factor determining a purchaser's loan eligibility. While additional flood insurance can be obtained from surplus lines carriers, the heightened risk in coastal areas can result in premiums well above the subsidized rates under the federal flood insurance program. Simply put, while prudence would dictate that homeowners protect their property to its full value by obtaining additional flood insurance, the market rate for such insurance often places it beyond reach.

Over the years, affordable rates for homeowners insurance in coastal counties have been premised, in significant part, on the ability of insurers and their policyholders to shift the risk of catastrophic flood damage on to the subsidized federal flood insurance program. The viability of this strategy is now in doubt because of the financial limits of the federal program. As a result, homeowners and public officials have increasingly begun to "search for" additional flood coverage within the language of existing windstorm policies and through favorable judicial interpretation of state Valued Policy Laws ("VPLs"). While this strategy seemingly seeks a change in the rules in the middle of the game, the pressure to yield to it is great, which is what happened in a 2004 Florida case that will be discussed in more detail later.

III. STATE VALUED POLICY LAWS: GENERAL RATIONALE

VPLs require insurers to pay the face amount of an insurance policy in the event of a total loss, regardless of the actual value of the building at the time of the loss. VPLs were passed in a number of states in the late nineteenth century 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, even though the insured had been charged premiums for the policy limits on the structure. [12] A secondary objective of VPLs was to simplify the adjustment process following a total loss and to facilitate prompt settlement of insurance claims in such cases. As noted in Springfield Fire and Marine Ins. Co. v. Boswell, [13] the value of property is hard to ascertain after total destruction because the usual evidence relied upon for such an assessment no longer exists. By requiring the payment of policy limits upon a total loss, the VPL makes it necessary for the parties to determine the value of the insured property in advance. With the payment in the event of a total loss fixed by law, the insured is encouraged to insure its property to full value and the insurer is encouraged to provide coverage that is limited to that value. [14]

The application of VPLs is triggered by any total loss. This can be the loss of a single home due to fire or the devastation of multiple structures over a wide geographical area by a natural disaster such as a hurricane. When two or more perils combine to

destroy a structure, both perils may be covered under a single policy but that is not always the case. In the case of wind and flood coverage, a commercial insurer will typically underwrite the wind policy and the government will underwrite the federal flood insurance program. The impact of VPLs on losses where different policies and different insurers cover separate perils is discussed below.

IV. THE FLORIDA VALUED POLICY LAW

Florida's VPL was first enacted in 1899. [15] Since then, this statute has undergone a number of legislative revisions. The law currently provides that, in the event of a total loss by a covered peril, the carrier must pay "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." [16] The VPL is part of every real property policy written in Florida. [17] Its principal purpose is to fix the measure of damages in case of a total loss. [18] To accomplish that goal, the statute presumes that the insurer will ascertain the value of the property before it writes the policy. The statute serves to "remove what would otherwise be a very troublesome and difficult issue to resolve either between the parties by negotiation or by the courts in litigation." [19]

Originally, the Florida VPL applied only to total and partial losses caused by fire or lightning. The scope of that liability was clarified in American Insurance Co. v. Robinson. [20] The Florida Supreme Court held that the insurer could not withhold the payment of policy limits for a total loss by fire because the insured dwelling was arguably worth less than its contractually insured value because of termite infestation and dry rot. [21] The insurer claimed that this damage diminished the value of the structure below the value fixed under the policy. The court disagreed, holding that the VPL did not permit depreciation in the face of a covered total loss by fire. [22] In retrospect, perhaps another way to understand Robinson is that the insurer could not limit its payment for the total loss by deducting for damage caused by other, non-covered, perils. In 1969, the Florida Legislature amended the VPL to apply to total losses on account of all covered perils. It is in this context that the Third District Court of Appeal handed down its decision in *Mierzwa* v. Florida Windstorm Underwriting Ass'n. [23]

A. A Close Look at Mierzwa

In *Mierzwa* , the court addressed the application of Florida's VPL in a case involving two carriers insuring the same property for different perils. [24] The homeowner had wind insurance with one carrier and flood insurance with another. The wind insurer's policy contained an anti-concurrent cause clause excluding coverage for any damage other than wind. The dwelling sustained both wind and flood damage. [25] Another factor in this case was a City of Fort Lauderdale ordinance applicable whenever repairs or alterations to an existing building amounted to more than fifty percent of the building's value during any twelve-month period. [26] In such a circumstance, the ordinance required the building to be brought into conformity with current construction and flood management codes. [27] The city determined that the cost to repair the insured's home exceeded half the value of the

building. To comply with the ordinance, the insured's home had to be elevated; a change could not be made without first demolishing it. [28] In short, the city ordinance effectively condemned the insured's home. [29]

The insured argued that Florida's VPL required the wind insurer to pay the face amount of the policy when the building was a total loss even if there were multiple policies on the property and windstorm caused only a fraction of the total damage to the property. [30] The wind insurer argued that it was liable only for the damage attributable to windstorm-its contractually insured peril-not for the face amount of the policy. The trial court found for the insurer. [31] The District Court of Appeal reversed, finding that when a structure is insured and is deemed to be a total loss, the VPL requires the insurer to pay the insured the face amount of the policy as long as the loss was due in part to a covered peril. According to the court, the existence of contributing causes is irrelevant in such a case. [32]

In one respect, the *Mierzwa* decision appears to be consistent with the terms of the VPL. On its face, the statute does not provide for determination of actual damages once the building has been deemed a total loss. [33] Similarly, the statute does not provide for prorating the amounts due for the dwelling under a valued policy when there are multiple policies and one specifically excludes flood, the peril that all in *Mierzwa* agree caused the bulk of the damage necessitating condemnation. [34] However, while *Mierzwa* appears to apply the language of the VPL literally, it ignores the purpose of that statute, which was to compel the payment of policy limits when there is a total loss as the result of a covered peril. As a matter of historical fact, when the Florida VPL was first enacted, the main perils were fire and lightning and coverage was typically combined in a single policy. [35]

To bolster its interpretation of the VPL, the *Mierzwa* court placed substantial and questionable reliance upon Millers' Mutual Insurance Ass'n v. La Pota, [36] a 1967 decision in the Second Circuit Court of Appeal. In La Pota, one covered peril caused the total loss and thus triggered the application of the VPL. Two different insurance companies provided coverage for the same risk of fire that resulted in the total loss. One of the insurers argued for "pro rata liability," thus reducing its coverage below its policy limits. The La Pota court rejected this argument and held that the insurer must pay its policy limits. [37] Quoting Rutherford v. Pearl Assurance Co., [38] it observed:

The New York Rule, which we think reflects the better view and weight of authority is that, barring any agreement to the contrary, a fire insurance policy is a contract to insure against fire loss, and its premium is assumed to represent the fair equivalent of the obligation contracted for by the insurer without knowledge of the existence of collateral remedies. [39]

The ruling in *La Pota* is troublesome from the perspective of indemnity principles. Rather than requiring reimbursement for the loss of the insured property, the *La Pota* decision made the fire a profitable event for the insured. Nevertheless, it can be argued that the decision-requiring payment of limits for a total loss due to fire-met the expectations of both the insurer, who had insured the property for fire, and the insured, who had paid premiums based upon the agreed value accepted by the insurer. However one reads La Pota, these expectations were frustrated in *Mierzwa* . There the insurer was compelled to pay policy limits as a result of a peril expressly excluded from coverage and the insured received proceeds for flood damage even though the windstorm premiums he paid were based upon the exclusion for flood.

As noted above, the *Mierzwa* decision appears to stand for the proposition that when a first-party property insurer has any coverage for any damage resulting from an occurrence, and as a result of that occurrence, the structure is deemed a constructive total loss, the insurer must pay its policy limits. Under the court's ruling, the insurer is liable for policy limits regardless of whether the peril insured against would ever have resulted in condemnation. The property in *Mierzwa* was damaged by a combination of flood and wind, a common occurrence in a hurricane. After Mierzwa, the property owner who suffered a severe loss could now rely on his or her windstorm policy limits to cover contemporaneous flood damage as well. This undoubtedly tempts cost-conscious homeowners to forego flood insurance altogether.

B. *Mierzwa* and Basic Principles of Indemnity in Conflict

One of the most significant concerns about *Mierzwa* is its departure from the basic concept underlying property insurance law: indemnity. The general rule is that damages are compensatory in nature and, as such, they should provide recovery losses actually sustained and nothing more. Damages are generally unrecoverable where the insured has not paid or has otherwise suffered no loss. [40] As the court stated in Bank of Miami Beach v. Newman, [41] "[it] is fundamental that a person is not entitled to recover damages if he has suffered no injury." [42]

Despite the insurance law aversion to windfalls, [43] *Mierzwa* leads to such a result as it compels one insurer to pay policy limits without regard to payment from another insurer. In response to the claim that the insured unjustifiably profits from double payments, the court suggested that the windstorm carrier should have anticipated the possibility of double payment. [44] It also asserted that the windstorm carrier was always liable to pay policy limits in the event of a total loss. [45] Finally, the court brushed aside the reality that the statute could have been read even more literally and applied only when the total loss resulted from a single "covered peril." [46]

V. THE FLORIDA LEGISLATIVE RESPONSE TO *MIERZWA*

Within a month after the *Mierzwa* decision, Florida was struck by four hurricanes, each causing extensive damage due to wind and flooding. Suddenly there were a large number of cases in which windstorm carriers found themselves subject to demands for policy limits. In the vast majority of instances, it was flooding, an excluded risk, that caused the loss. The scope of these losses-thought to have been limited during the underwriting process-threatened the basis for insurance rates in the homeowners market. Without relief, the state faced the prospect of carrier withdrawal from the Florida market or the dramatic repricing of homeowner policies to reflect the risk of flood damage. Either response would have meant an insurance crisis, which in turn would have jeopardized Florida's tourist, banking, and home-building industries.

In response, the Florida legislature amended the VPL in 2005 to provide for proration of damages when a total loss is caused in part by an excluded peril. The basic provision was left in place, but was made subject to the following exception:

> 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. [47]

On its face, this amendment appears to reestablish the expectations of underwriters before *Mierzwa*. When a total loss results 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. However, this provision may promise more than it can deliver. The amendment specifically provides that if the covered peril alone would have caused the total loss, the requirement to pay policy limits under paragraph (a) still applies. Given the process for determining total loss, the windstorm carrier may still find itself paying policy limits when the damage due to wind is less-potentially far less-than half of an insured structure's market value.

Florida's VPL is implicated when the insured structure is deemed to be a "total loss." However, the term "total loss" is not defined by the statute. Instead, the term has been defined in two ways by Florida courts. In cases in which a structure is severely damaged, some Florida courts have applied the "identity test." Under the "identity test," a structure is a total loss if the damage is so severe that it has lost its identity and character as a building, even though a portion of the structure arguably could be utilized for some useful purpose. [48]

Alternatively, a structure may be a "constructive total loss" when it is damaged by a covered peril and, because of the extent of the damage, a state law or local ordinance requires demolition. [49] In cases decided under VPLs in other states, courts have uniformly held that when demolition is legally mandated, the insured may recover as for a total loss. [50] This is the law under the Florida VPL as well.

In the case of a "total loss" under Florida's amended VPL, the carrier will have to litigate whether wind damage alone would have resulted in the "loss of identity." While the amendment will eliminate the payment of policy limits in cases where the wind damage is clearly negligible, the problematic cases will be when only a slab or foundation remains after the storm. Whether wind alone would have caused the structure to lose its identity is a question that will be decided by a jury-a jury drawn from the community struck by the storm. In the case of a "constructive total loss," the answer to the question will be dictated by the laws and ordinances that prompt demolition. These laws and ordinances fall into two categories: (1) the Florida Building Code, [51] and (2) local flood management codes implementing federal requirements. [52] The specifics of the Florida Building Code are beyond the scope of this article. However, as a general proposition, repair obligations under the Code are based upon the degree of structural damage suffered rather than the monetary value of the damage itself. [53] Under its provisions, the distinction between damage caused by flood and damage caused by wind may be easier to quantify than the value-based restrictions imposed by flood management regulations.

Under the federal flood insurance program, when a structure suffers "substantial damage," the structure must be brought into compliance with local flood management regulations. [54] "Substantial damage" is defined as damage whose value exceeds fifty percent of the structure's market value. While it seems axiomatic that two perils cannot simultaneously contribute more than fifty percent of the damage to a structure, in practice this is not always the case. Federal regulations allow local authorities to implement them in ways that are more restrictive than the federal rule. [55] Under most local flood management codes, "substantial damage" is defined as the ratio between the value of the damage and some larger number such as the property's tax-assessed value. Depending on the date of purchase, a property's tax-assessed value can be a small fraction of its market value. Thus, wind damage that is much less than fifty percent of the structure's market value can still result in a requirement to bring the structure into compliance with flood management codes. In such cases, relatively minor wind damage could meet the local fifty percent rule and take the case out of the coverage of the VPL's new exception.

Perhaps in response to objections based upon principles of indemnity, the 2005 amendment to the VPL provides: "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." [56]

With all due respect to the drafters of the amendment, this portion of the statute shifts the infirmities of the federal flood insurance program onto the shoulders of the windstorm carrier. As recent experience has shown, the $250,000 policy limit under the federal flood insurance program is likely to fall short of full compensation for most flood losses in coastal areas. An increase in demand for both building materials and skilled labor often follows a hurricane. Reconstruction costs obviously can spike in such an environment.

In light of the $250,000 policy limit, the bulk of the replacement cost for a total loss to a structure will fall to the wind carrier, as mentioned above. That burden might not be restricted to its policy limits less payment to the insured under the flood policy. Instead, the wind carrier could be forced to pay the cost to replace the structure less the payment to the insured under the flood policy. In effect, Florida's amended VPL could force the wind carrier to shoulder the increased market costs for all damage, including damages attributable to flooding.

VI. APPLICABILITY OF *MIERZWA* TO OTHER GULF COAST JURISDICTIONS

There has been considerable discussion of the *Mierzwa* decision within the insurance industry and, more particularly, whether *Mierzwa* 's reasoning will be adopted by courts in other Gulf Coast jurisdictions. In light of the limitations of the federal flood insurance program and the failure of many homeowners to purchase flood coverage separately, the question is whether VPLs in Mississippi, Louisiana, and Texas will be interpreted to ameliorate the shortfall and fund the reconstruction. [57]

A. Louisiana

Currently, the VPL in Louisiana appears to apply only to fire losses. [58] The Louisiana statute provides in pertinent part:

> Under any fire insurance policy insuring inanimate, immovable property in this state, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs during the term of the policy at such valuation without deduction or offset, unless a different method is to be used in the computation of loss, in which latter case, the policy, and any application therefor, shall set forth in type of equal size, the actual method of such loss computation by the insurer. Coverage may be voided under said contract in the event of criminal fault on the part of the insured or the assigns of the insured. [59]

In Louisiana, the term "fire insurance policy" is a term of art with the required language for such policies set by statute. [60] Insurers may add coverage to standard fire insurance policies by endorsement or by including coverage that differs from the standard fire policy as long as the contractual terms meet or exceed the statutory requirements. [61] Given the language of the statute, however, it is possible to view the term "fire insurance policy" expansively to include any policy that provides the statutory coverage for fire. There is certainly case law supporting this view.

For example, in *Real Asset Management, Inc. v. Lloyd's of London*, [62] the insured bought a building for less than half of the policy limits one month before Hurricane Andrew rendered the building a total loss. For reasons not clear from the opinion, the parties did not dispute the applicability of Louisiana's VPL to the windstorm loss. [63] The insurer merely argued that payment of policy limits would result in a windfall for the property owner. [64] The Fifth Circuit found the purchase price of the property irrelevant to the insurer's payment obligation under the Louisiana VPL. [65] Consistent with rulings involving VPLs in other states, the court held that the insurance contract ultimately set the policy amount due under Louisiana's VPL. [66] In short, in the event of a total loss, the courts have no authority after the fact to change the loss payment rules.

Real Asset Management is also instructive for the standard used to determine "total loss." As previously discussed, the courts in Florida have recognized two types of total loss: (a) damage so severe as to cause the loss of a structure's identity, and (b) damage so severe as to require its condemnation. [67] The cost of the damage is not determinative. In *Real Asset Management*, however, the court found that when the cost to repair the structure exceeds the value of the property, the property is considered a total loss under Louisiana law. [68] As the court observed, "[t]here is substantial evidence to support the district court's finding that the damage caused by the storm and subsequent deterioration was in excess of the policy limits." [69] Thus, under the court's view of Louisiana law, the policy limits agreed to by the parties set both the threshold for the total loss determination and the amount due in the event of a total loss.

It is clear in *Real Asset Management* that the court as well as the parties assumed that the Louisiana VPL applied to the damage resulting from windstorm. Future litigants, however, would be wise to recognize that the Fifth Circuit's characterization of Louisiana's VPL could well be dismissed as dicta. In any event, should the Louisiana courts embrace the rationale of *Mierzwa*, Louisiana insurers have an option that may be unavailable to insurers in Florida. Louisiana's current VPL, effective January 1, 1993, contains language that permits carriers to "write around" the requirement to pay policy limits in the event of a total loss. [70]

Simply put, Louisiana insurers ultimately might be able to evade the *Mierzwa* rationale even if it were to become attractive to the courts in the catastrophic aftermath of an event like Hurricane Katrina. For the time being, no Louisiana state court has embraced *Mierzwa* and, if the assumptions of the court in Real Asset Management are dismissed as dicta, the scope of the Louisiana VPL may be limited to total loss due to fire.

B. Mississippi and Texas

At this juncture, both the Mississippi [71] and the Texas [72] VPLs are limited to total losses due to fire. In that respect, they are similar to the older version of the Florida VPL. Thus, neither VPL appears to be open to the expansive interpretation given to the Florida VPL in *Mierzwa* . It remains to be seen whether Mississippi or Texas will seek to expand their valued policy statutes to include all perils. If they do, the objective may be to create statutes that would permit a *Mierzwa* interpretation. Insurers in those states will then have to decide whether to leave or whether to anticipate *Mierzwa* and to price their homeowners policies to cover the risk of total loss due to flooding. Whatever is done, the political impact in those states in the post-Katrina environment is likely to be significant.

VII. BEYOND EXISTING STATUTES

The final "peril" for insurers and policyholders alike is the developing challenge to existing windstorm policy language. In most cases, the exclusion for flooding includes flooding caused by wind-driven water and tidal surges. Faced with an unprecedented number of uninsured flood losses, politicians and plaintiffs' attorneys in Gulf Coast states have argued that windstorm policies covering "hurricane damage" already include flood damage "caused by" hurricanes. They assert that the very term "windstorm" contemplates coverage for all damage incident to such storms. Exclusions for hurricane-related flooding are portrayed as internally inconsistent with the nature of windstorm coverage, rendering the policy "ambiguous." While those arguments are difficult to reconcile with the history of such policies and the federal flood insurance program, the courts in storm-ravaged states may nonetheless find them compelling.

In a recent Mississippi case, the issue was resolved in favor of the insurer. In *Buente v. Allstate Ins. Co.,* [73] the insureds purchased a homeowners policy with "hurricane coverage." As the result of Hurricane Katrina, they suffered a loss due to both wind and storm surge. Relying on an exclusion in the policy contract, the insurer advised the homeowners that the policy would not cover storm surge damage. The policy provided: "We do not cover loss to the [insured] property consisting of or caused by: 1. Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind." [74]

In response, the homeowners alleged that they asked the insurer's agent about the need to purchase additional flood insurance. The agent advised them that they were required to have hurricane insurance on the residence but did not need optional flood coverage since their home was not in a flood plain. Also according to the homeowners, the agent explained that hurricane coverage would cover any damage caused by a hurricane. [75] The court held that the exclusions found in the policy for water damage and for damages attributable to flooding were valid and enforceable policy provisions. [76] The court further noted that similar policy terms had been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions in Mississippi. [77]

While the finding of nonambiguity is important, the result in Buente is unlikely to curb litigation in such cases. As the court noted, because the provision is an exclusion from coverage and as such is an affirmative defense, the insurer will bear the burden of proof. [78] If the evidence indicates that part of the plaintiffs' losses is attributable to wind and rain and part to storm surge, the apportionment of damages will be a question of fact for the jury under applicable law. [79] Jury sentiments in such cases are likely to favor the homeowner.

Finally, it has been suggested that the *Mierzwa* court left the door ajar for further litigation on at least two recurring issues. The first arises when the insurer's share of the loss is substantially less than half of the total damage. In this vein, recall the observation of the *Mierzwa* court that, "[because of the extent of the damage due to wind,] [w]e thus have no occasion to consider 'the parade of horribles' suggested by FWUA when its covered peril might be responsible for, say, only 1% of the total damage." [80] From this passage, it should not be inferred that the recognition of some equitable exception to the reasoning in *Mierzwa* is imminent or even likely. In fact, this passage is difficult to reconcile with the *Mierzwa* court's clear statement concerning the purpose of Florida's VPL.

The meaning of the VPL is simple and straightforward. There are two essentials in the statute. The first is that the building be "insured by [an] insurer as to a [e.s.] covered peril." § 627.702(1). The second is that the building be a total loss. If these two facts are true, the VPL 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. [81]

The second issue involves the scope and effect of a well-crafted anti-concurrent cause clause. Would such a clause spare the insurer from the application of a VPL? This line of argument again appears to run counter to the *Mierzwa* holding. Not only did the court in *Mierzwa* reject this part of the trial court's order, it specifically found that the Florida VPL overrode such drafting efforts in the total loss context:

On its face, the ACCC [anti-concurrent cause clause] requires only that the liability of FWUA under the VPL be determined without consideration of the flood damage. The ACCC does not say by any words that it overrides the meaning of VPL. Because the policy is thus silent on whether FWUA's liability under the ACCC becomes merely pro rata with other coverage, or whether instead the VPL takes precedence over the ACCC, there is a conflict between the VPL text and the ACCC text. This conflict creates an ambiguity in the policy. We, of course, follow the rule that where two interpretations may fairly be given to an insurance contract, that interpretation which gives the greater indemnity will prevail. [82]

While this language in *Mierzwa* might suggest only a limited rejection of the insurer's argument against coverage, it must be read in conjunction with language elsewhere in the opinion casting doubt on the possibility that skillful contract draftsmanship can trump the rationale of *Mierzwa* . In Florida, at least for the time being, certain relief from the consequences of *Mierzwa* can only come through the legislative process.

VIII. CONCLUSION

Under the reasoning of *Mierzwa*, insurers were faced with the prospect of paying policy limits in the event of a total loss because of a combination of covered and excluded perils. This raised the specter of an insurance crisis as the cost of insurance rose to reflect the heightened liability risk associated with all perils, whether contractually excluded or not. Florida averted this dilemma when its legislature amended the VPL to allow for proration. However, the reasoning underlying the *Mierzwa* decision may be attractive to other Gulf Coast states that see the decision as a way to mitigate or minimize the deficiencies of the federal flood insurance program with its low policy limits and below-market insurance rates.

State lawmakers and policyholders should not expect private insurers to subsidize coastal development at those same rates. Should legislators in Mississippi or Texas seek to extend the scope of existing VPLs or should the courts in Louisiana interpret its VPL as the *Mierzwa* court did, insurance premiums will have to rise to reflect the expanded coverage. The same impact should be expected if state courts consistently find the current exclusions for flooding incident to windstorms to be ambiguous. If private homeowners insurance rates rise to reflect the true cost of windstorm and flood risks, the recessionary impact on the development, banking, and construction industries will be severe. It will be for the legislators in the Gulf Coast states to decide whether to take steps to avoid such a crisis or to react to a crisis once it is upon them.

ENDNOTES

[a1]. John V. Garaffa is a senior associate in the Tampa, Florida, office of Butler Pappas Weihmuller Katz Craig, LLP. The author acknowledges the invaluable contribution of Kathryn K. Jensen, Counsel and Senior Editor, Property Loss Research Bureau. An earlier version of this article was published in the 79:4 Florida Bar Journal (April 2005). Reprinted by permission.

[1]. Kristen M. Crossett, Thomas J. Culliton, Peter C. Wiley, Timothy R. Goodspeed, Population Trends Along the Coastal United States: 1980-2008, Coastal Trends Report Series (Sept. 2004), available at http://www.oceanservice.noaa.gov/programs/mb/pdfs/6_appendices.pdf (last visited June 15, 2006).

[2]. Id.

[3]. In Alabama, population density in the state's eight coastal counties rose from 70 persons per square mile in 1980 to 82 in 2000. Density in Alabama's coastal counties is expected to reach 88 persons per square mile in 2008. Population density in Mississippi's twelve coastal counties rose from 71 persons per square mile in 1980 to 87 in 2000. Density in the state's coastal counties is expected to reach 94 persons per square mile in 2008. In Louisiana, population density in the state's forty-eight coastal parishes rose from 126 persons per square mile in 1980 to 136 in 2000. Density in Louisiana's coastal

parishes is expected to reach 148 persons per square mile in 2008. Finally, in Texas, population density in the state's forty-five coastal counties rose from 119 persons per square mile in 1980 to 170 in 2000. Density in Texas's coastal counties is expected to reach 192 persons per square mile in 2008. Id.

[4]. Steve Sjuggerund, The Real Estate Bubble: What's Really Happening, The Investment U E-Letter, Issue 449 (July 1, 2005), available at http://www.investmentu.com/IUEL/2005/20050701.html (last visited June 15, 2006).

[5]. 42 U.S.C. §§ 4001-4128 (2005).

[6]. See P.J. Webster, et al, Changes in Tropical Cyclone Number, Duration, and Intensity in a Warming Environment, Vol. 39 no. 5742, Science 1844 (Sept. 2005).

[7]. 42 U.S.C. § 4072 (2005).

[8]. 42 U.S.C. § 4002 (2005).

[9]. 42 U.S.C. § 4012(c) (2005).

[10]. 42 U.S.C. § 4001(a)-(b)(2005).

[11]. National Flood Insurance Program: Oversight of Policy Issuance and Claims, Before the Subcomm. on Housing and Community Opportunity, House Committee on Financial Services, 109th Cong. 4-7 (Apr. 14, 2005) (statement of William 0. Jenkins, Jr., Director, Homeland Security and Justice Issues), available at http://www.gao.gov/new.items/d05532t.pdf (last visited June 15, 2006).

[12]. Tom Baker, On the Genealogy of Moral Hazard, 75 Tex. L. Rev. 237, 261 (1996).

[13]. 167 So. 2d 780 (Fla. Dist. Ct. App.1964).

[14]. Id. at 784.

[15]. Fla. Stat. Ann. § 627.702 (West 2005) (historical note accompanying statute).

[16]. Fla. Stat. Ann. § 627.702(1)(a) (West 2005). VPLs can be seen as the counterpart to the standard co-insurance clause. The co-insurance clause requires an insured to bear a percentage of his own loss if he does not purchase coverage up to a certain portion of the value of the property. The clause is intended to protect the insurer against an insured who intentionally underinsures and then tries to get more coverage for his money than he is really entitled to. The VPL, on the other hand, protects the insured against an insurer that permits him to overinsure the property, but then wants to pay less than the policy amount. Either type of coverage provision may, depending upon the circumstances, be seen as a guard against contracts that appear to violate the expectation that the property is insured

to its actual value. See W. Shelby McKenzie and H. Alston Johnson III, Developments in the Law, 1987-1988-A Faculty Symposium: Insurance, 49 La. L. Rev. 349, 365 (1988).

[17]. *Mierzwa v. Florida Windstorm Underwriting Ass'n,* 877 So. 2d 774 (Fla. Dist. Ct. App. 2004); *Regency Baptist Temple v. Ins. Co. of N. Am.,* 352 So. 2d 1242 (Fla. Dist. Ct. App. 1977); *Citizens Ins. Co. v. Barnes,* 124 So. 722 (Fla. 1929).

[18]. Boswell, 167 So. 2d at 780, 783.

[19]. Id. at 784.

[20]. 163 So. 17 (Fla. 1935).

[21]. Id. at 19-20.

[22]. Id.

[23]. 877 So. 2d 774 (Fla. Dist. Ct. App. 2004).

[24]. At the time of the *Mierzwa* decision, Florida's VPL provided in relevant part:

(1) In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(12), located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.
(2) In the case of a partial loss by fire or lightning of any such property, the insurer's liability, if any, under the policy shall be for the actual amount of such loss but shall not exceed the amount of insurance specified in the policy as to such property and such peril. Fla. Stat. Ann. § 627.702 (West 2003).

[25]. *Mierzwa* , 877 So. 2d at 774, 777 n.3.

[26]. Id. at 777 n.3.

[27]. Id. at 776-77 nn. 3-4.

[28]. Id.

[29]. Id. at 775.

[30]. Id. at 777-78.

[31]. Id.

[32]. Id. at 777.

[33]. See note 24, supra.

[34]. Id.

[35]. See generally Alvin L. Arnold, Real Estate Transactions-Structure and Analysis with Forms § 18:92 (2006).

[36]. 197 So. 2d 21 (Fla. Dist. Ct. App. 1967).

[37]. Id. at 22.

[38]. 164 So.2d 213 (Fla. Dist. Ct. App. 1964).

[39]. *La Pota,* 197 So. 2d at 25-26.

[40]. *Jones v. Crawford,* 361 So. 2d 518 (Ala. 1978).

[41]. 163 So. 2d 333 (Fla. Dist. Ct. App. 1964).

[42]. Id.

[43]. One can plausibly argue that the insured who receives payment for a loss excluded under the policy has received a windfall, a result that conflicts with basic principles of indemnity. However, the concept of windfall typically refers to an insured who receives payment in excess of the value of the damaged property, not in excess of what the insured had reason to expect under the terms of the insurance policy.

[44]. *Mierzwa v. Florida Windstorm Underwriting Ass'n,* 877 So. 2d 774, 778-79 (Fla. Dist. Ct. App. 2004).

[45]. Id.

[46]. Id.

[47]. Fla. Stat. Ann. § 627.702(b) (West 2005).

[48]. *LaFayette Fire Ins. Co. v. Camnitz,* 149 So. 653 (Fla. 1933). A number of other federal and state courts have adopted a similar test. *See, e.g., Paterson-Leitch Co. v. Ins. Co. of N. Am.,* 366 F. Supp. 749, 757 (N.D. Ohio 1973); *Group Von Graupen v. Employers Mut. Fire Ins.,* 259 F. Supp. 934, 936 (D.P.R. 1966); *Security Ins. v. Rosenburg,* 12 S.W.2d 688, 690 (Ky. Ct. App.1928); *Meccage v. Spartenburg Ins. Co.,* 477 P.2d 115 (Mont. 1970); *Stahlberg v. Travelers Indem. Co.,* 568 S.W. 2d 79 (Mo. Ct. App. 1978).

[49]. *Reliance Ins. Co. v. Harris,* 503 So. 2d 1321, 1323 (Fla. Dist. Ct. App. 1987). *See also Regency Baptist Temple v. Ins. Co. of N. Am.,* 352 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 1977); *Netherlands Ins. Co. v. Fowler,* 181 So. 2d 692, 693 (Fla. Dist. Ct. App. 1966).

[50]. *See, e.g., Fid. and Guar. Ins. Co. v. Mondzelewski,* 115 A.2d 697 (Del. 1955); *Stablberg,* 568 S.W. 2d at 79; *Maryland Cas. Co. v. Frank,* 452 P. 2d 919 (Nev. 1969); *Gambrell v. Campbellsport Mut. Ins. Co.,* 177 N.W.2d 313 (Wis. 1970).

[51]. 33 Fla. Stat. Ann. § 553.70 (West 2005).

[52]. 42 U.S.C § 4001 (2005).

[53]. 33 Fla. Stat. Ann. § 553.73 (West 2005)(authorized implementation of the 2004 Florida Building Code).

[54]. 42 U.S. Code Ann. §§ 4001-4128 (2005).

[55]. 44 C.F.R. § 60.3 (1997).

[56]. Fla. Stat. Ann. § 627.702(1)(b) (West 2005).

[57]. Alabama does not have a VPL.

[58]. Cf. Vincent J. Vitkowsky, Reinsurance Issues Arising from the 2005 Hurricane Season, infra p. 1005 (observing that a "fire policy" can provide extended coverage, including for hurricanes).

[59]. La. Rev. Stat. Ann. § 22:695 (West 2006).

[60]. La. Rev. Stat. Ann. § 22:691 (West 2006).

[61]. *Grice v. Aetna Cas. & Sur. Co.,* 359 So. 2d 1288 (La.1978).

[62]. 61 F.3d 1223 (5th Cir. 1995).

[63]. Id. at 1227-28.

[64]. Id. at 1228.

[65]. Id. at 1230-31.

[66]. Id. at 1228.

[67]. See notes 45 and 46, supra, and accompanying text.

[68]. *Real Asset Mgmt.,* 61 F.3d at 1229. *See Dumond v. Mobile Ins. Co.,* 309 So.2d 776,

778 (La. Ct. App. 1975); Bennett v. Emmco Ins. Co., 215 So.2d 518 (La. Ct. App. 1968).

[69]. Real Asset Mgmt., 61 F.3d at 1229.

[70]. La. Rev. Stat. Ann. § 22:695 (West 2006).

[71]. Miss. Code Ann. § 83-13-5 (2006) provides:

> No insurance company shall knowingly issue any fire insurance policy upon property within this state for an amount which, together with any existing insurance thereon, exceeds a fair value of the property, nor for a longer term than five years. When buildings and structures are insured against loss by fire and, situated within this state, are totally destroyed by fire, the company shall not be permitted to deny that the buildings or structures insured were worth at the time of the issuance of the policy the full value upon which the insurance is calculated, and the measure of damages shall be the amount for which the buildings and structures were insured. No insurance company or agent thereof shall be permitted to attach a three-quarter value clause to insurance of this kind, and any fire insurance company or agent thereof who violates this section shall be guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred ($200.00) dollars nor more than one thousand ($1,000.00) dollars for each offense.
> (emphasis added)

[72]. Tex. Ins. Code Ann. § 862.053 (2005) provides in relevant part:

> (a) A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy. This subsection does not apply to personal property.
> (b) An insurance company shall incorporate verbatim the provisions of Subsection (a) in each fire insurance policy issued as coverage on real property in this state.
> (emphasis added)

[73]. 422 F. Supp. 2d 690 (S.D.Miss. 2006).

[74]. Id. at 693.

[75]. Id.

[76]. Id. at 696.

[77]. Id. The court cited the following Mississippi cases: *Lunday v. Lititz Mut. Ins. Co.,* 276 So.2d 696 (Miss. 1973); *Lititz Mut. Ins. Co. v. Buckley,* 261 So. 2d 492 (Miss. 1972); *Grace v. Lititz Mut. Ins. Co.,* 257 So.2d 217 (Miss.1972); *Commercial Union Ins. Co. v. Byrne,* 248 So. 2d 777 (Miss. 1971); *Litiz Mut. Ins. Co. v. Boatner,* 254 So.2d 765 (Miss. 1971); *Fireman's Ins. Co. v. Schulte,* 200 So.2d 240 (Miss. 1967).

[78]. *Buente,* 422 F.Supp.2d at 696.

[79]. Id.

[80]. *Mierzwa v. Florida Windstorm Underwriting Ass'n,* 877 So.2d 774, 778 n.5 (Fla. Dist. Ct. App. 2004).

[81]. Id. at 775.

[82]. Id. at 777 (citing *Fid. Guar. Ins. Co. v. Mondzelewski,* 115 A.2d 697, 699 (Del. 1955)).