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The Insurance Fallout Following Hurricane Andrew: Whether Insurance Companies Are Legally Obligated to Pay for Building Code Upgrades Despite the "Ordinance or Law" Exclusion Contained in Most Homeowners Policies

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The Insurance Fallout Following Hurricane Andrew: Whether Insurance Companies Are Legally Obligated to Pay for Building Code Upgrades Despite the “Ordinance or Law” Exclusion Contained in Most Homeowners Policies

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I. INTRODUCTION

On August 24, 1992, at approximately 4:28 a.m., Hurricane Andrew slammed into South Florida packing winds greater than 160 miles per hour.¹ Damage from the storm was estimated at over 20 billion dollars, making it the largest natural disaster in United States history.² In the wake of the hurricane, insurance companies asserted their rights under the “Ordinance or Law” exclusions found in the insurance contracts of at least three thousand homeowners in south Dade County. To these homeowners, the “Ordinance or Law” exclusion was almost as devastating as Andrew.

Most homeowner insurance policies contain an “Ordinance or

1. THE BIG ONE: HURRICANE ANDREW 12-13 (Roman Lyskowski & Steve Rice eds., 1992).

2. *Id.* at 8.

Law" exclusion that excludes from coverage costs resulting from the "enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure," unless specifically provided for in the policy.³ At first glance, the exclusion appears to be harmless; however, on closer examination, and when applied to a real set of facts, its devastating effect becomes frighteningly apparent.

Although the idea for this Comment arose from the aftermath of Hurricane Andrew, this analysis could easily apply to other situations anywhere in the country. Every home or building owner in the country could be affected by the Ordinance or Law exclusion, which can have a devastating effect on the naive, unwary, or unsuspecting home or building owner.

This Comment examines the Ordinance or Law exclusion as it relates to the repair of homes damaged by Hurricane Andrew. Specifically, this Comment focuses on legal and doctrinal arguments that potentially obligate insurance companies to pay for building code upgrades.⁴ Section II defines the Ordinance or Law exclusion and analyzes reasons espoused by the insurance industry to support its use. Section III discusses problems created by the building code after Hurricane Andrew. Section IV examines the "reasonable expectation" doctrine and presents arguments which suggest that Florida should adopt the doctrine. Section V discusses how insurance companies could be made to pay for code upgrades pursuant to section 211 of the Second Restatement of Contracts. Section VI explains the "efficient proximate cause" rule which Florida has applied in cases of concurrent causation to defeat an insurer's contention that an excluded loss is not covered when combined with a covered loss. Section VII analyzes cases and articles dealing with the "total constructive loss" doctrine as it relates to the "Ordinance or Law" exclusion and suggests that this doctrine, when used in conjunction with Florida's "valued policy" law, renders the exclusion unenforceable.

3. See, e.g., YOUR STATE FARM HOMEOWNERS POLICY, Special Form 3, at 10 (Dec. 1990) (on file with the author). Some policies also contain a provision which provides that the insurer "will not pay for any *increased costs* resulting from enforcement of any ordinance or law regulating the construction, repair or demolition of a building unless specifically provided under this policy." *Id.* at 12 (emphasis added).

4. This contention could also be supported with a *contra proferente* approach (i.e., the provision could be constituted most strongly against the drafter). However, "a result placed not squarely upon inequity, but upon interpretation, seems sure to produce continuing uncertainty in the law of insurance contracts." *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 603 (2d Cir. 1972).

II. THE "ORDINANCE OR LAW" EXCLUSION

A typical Ordinance or Law exclusion clause reads: "We do not cover loss . . . resulting in any manner from . . . Enforcement of any ordinance or law regulating the construction, reconstruction, maintenance, repair or demolition of buildings or other structures."⁵ The insurance industry has articulated several reasons for the exclusion. However, as discussed below, the reasons fail to explain the distinction between costs of complying with the building codes and costs associated with coverage under "Replacement Cost" policies, which are fairly standard in today's market.

Insurance companies most frequently state that the purpose of the exclusion is to prevent an insured from obtaining a "windfall" through the enforcement of a local or state ordinance or law. For example, in *Bradford v. Home Insurance Co.*,⁶ the insured sustained damage to his leaching field.⁷ The cost of replacing the field with material similar to the original would have been \$1,000.⁸ However, a local ordinance required that the insured also install a septic tank at a cost of \$2,300.⁹ The insurer denied coverage for the cost of the tank based on an Ordinance or Law exclusion in the insured's policy and the court upheld the insurer's decision.¹⁰

Another court articulated the purpose of the exclusion as follows:

[T]he insurer is required . . . to indemnify the insured for the cost of repairing or replacing a building which was lost or destroyed by fire with materials of like kind and quality, but it is not required to assume repair or replacement costs which would provide the insured with a more structurally valuable building than the one that was damaged or destroyed. . . . The owners of new buildings which conform with state or local building laws are merely reimbursed for costs which they actually incurred. On the other hand, the owner of buildings which do not conform with such laws are not permitted to recover costs which they never assumed in the first place.¹¹

Such windfalls, however, are inherent in "replacement cost" policies, which obligate insurers to reimburse the insured for the actual cost of repairs and construction without deducting any amount for depreciation.¹² For example, if an insured needed to replace a damaged roof, the

5. ALLSTATE DELUXE PLUS HOMEOWNERS POLICY 6-7 (on file with the author).

6. 384 A.2d 52 (Me. 1978).

7. *Id.* at 53.

8. *Id.*

9. *Id.*

10. *Id.* at 54.

11. *Breshears v. Indiana Lumbermens Mut. Ins. Co.*, 63 Cal. Rptr. 879, 883 (Cal. Ct. App. 1967).

12. "Replacement cost" has been defined as: "The estimated cost to construct, at current

insurer would be liable for the cost of the entire new roof, even if the damaged roof had been 10 years old. This begs the question: why is paying to replace a 10 year old roof with a new roof less objectionable than paying to replace a home built under an old building code with a home that complies with a current building code?

Insurers also justify the exclusion by stating that they must limit their exposure to the risk of having to pay for costs that are uncertain. Moreover, insurer's claim that it is expensive to keep track of, and properly estimate, the impact of building codes. Ironically, uncertainty created the need for insurance in the first place and inspires many homeowners to purchase insurance. The basic purpose of insurance is to pool and distribute the risk of uncertain losses over a large number of people so that an individual will not bear the entire impact of a loss. Who better to evaluate and spread risk than insurance companies?

Because insurance companies have the knowledge and ability to pool and spread risk, and because ordinances and laws, *e.g.*, building codes, are enacted for the health, safety, and welfare of the public, the following questions must be asked: Why is coverage of building code upgrades not automatically included in insurance policies? Why have insurance companies fought so ardently to support the exclusions despite the fact that courts have been ambivalent toward the exclusions? The fact that some individuals may benefit from an increase in the value of their property because of an upgrade required by an ordinance or law is unimportant when weighed against the potentially devastating effect the exclusions can have when they are enforced.

III. HURRICANE ANDREW AND THE CODE UPGRADE PROBLEM

Every state and local government has enacted laws and ordinances to protect the health, safety, and welfare of its citizens. Many of these laws address the construction or repair of buildings and other structures. Local building codes can and do regulate everything from where a building can be built to what kind of nails can be used. South Florida and, more specifically, south Dade County, Florida, has two such codes: the Dade County Code¹³ and the South Florida Building Code.¹⁴

Dade County enacted Chapter 11-C of the Dade County Code (the "Code") to take advantage of the national flood program administered

prices, a building with utility equivalent to the building being appraised, using modern materials and current standards, design, and layout." AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE DICTIONARY OF REAL ESTATE APPRAISAL 256 (1984).

13. DADE COUNTY, FLA., BUILDING CODE § 11C (1987) [(DADE COUNTY BUILDING CODE)].

14. SOUTH FLORIDA, FLA., BUILDING CODE ch. 104 (1988) [(SOUTH FLA. BUILDING CODE)].

by the federal government.¹⁵ Homes which were built prior to the enactment of the Code and were below the flood levels established by the federal program did not have to be immediately in compliance with the Code provisions.¹⁶ However, a home located in a flood area which sustains damage and requires "substantial improvement"¹⁷ must be elevated to the level required under the Code.¹⁸ Moreover, the construction materials and methods used to repair or rebuild the home must minimize flood damage.¹⁹

To remain eligible for the federal flood insurance program, Dade County must continue to comply with the Code and any additional requirements imposed upon the county by the Federal Flood program.²⁰ A violation of the Code could result in a fine of five hundred dollars, imprisonment of not more than sixty days, or both, for each day that such violation continues to exist.²¹ Violations of the Code could also result in "any legal action necessary, such as application to any court for injunctive relief, revocation of any building permit issued[,] or other appropriate means."²² Conceivably, "other appropriate means" could include demolition of a home or structure that was repaired in violation of the Code. The possibility that a demolition order could be issued by a governmental agency significantly effects the current statutory and case law dealing with the Ordinance or Law exclusion.

The South Florida Building Code²³ provides that repairs costing less than fifty percent of the replacement value of the existing building

15. DADE COUNTY BUILDING CODE, *supra* note 14, § 11C-1. The Code was enacted so that the county could obtain flood insurance coverage under the National Flood Insurance Act of 1968. *Id.* As a result of the Code, "the Federal Insurance Administration declared the entire area of Dade County eligible for federally assisted flood insurance, which insurance will mitigate the effects of damages from such natural disasters as hurricanes and severe storms and their attendant flooding." *Id.*

16. *Id.* § 11C-16.

17. "Substantial improvement" means:

any combination of repairs, reconstruction, alteration, or improvements to a structure, taking place during the life of a structure (a fifty-year period), in which the cumulative cost equals or exceeds fifty (50) percent of the market value of the structure. The market value of the structure shall be (1) the appraised value of the structure prior to the start of the initial repair or improvement, or (2) in the case of damage, the value of the structure prior to the damage occurring. "Substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure.

Id. § 11C-2(ff).

18. *Id.* § 11C-5(a)-(b).

19. *Id.* § 11C-3(b)(1)-(2).

20. *Id.* § 11C-1.

21. *Id.* § 11C-15(a).

22. *Id.* § 11C-15(b) (emphasis added).

23. SOUTH FLA. BUILDING CODE, *supra* note 14.

must comply with the current building code.²⁴ However, the entire building does not have to be altered to comply. On the other hand, repairs costing more than fifty percent of the replacement value of the existing building must conform to "all the requirements for a new building or structure *or be entirely demolished*."²⁵

According to several estimates, at least three thousand homeowners in Dade County could not obtain building permits to rebuild homes damaged by Hurricane Andrew because their homes were below federal flood levels.²⁶ In order to rebuild and to comply with federal flood guidelines, these owners must raise the foundation of their home by several feet.²⁷ The cost to raise a two thousand square foot house by several feet could easily exceed thirty thousand dollars.²⁸ In addition, many South Florida residents whose homes were damaged by Andrew must comply with the current South Florida Building Code when rebuilding.²⁹ The latest estimates suggest that the construction costs associated with building upgrades could exceed ninety million dollars.³⁰

Therefore, the legality of the Ordinance or Law exclusion is of significant socio-economic importance to the residents of South Florida and to others around the country who might find themselves similarly situated after a natural disaster. If the exclusion is allowed to stand, its cost will be borne by those who can least afford it: the individual homeowner. Unfortunately, many homeowners will not be able to afford the costs and will be forced to abandon their homes. This could ultimately result in the demolition of the home or structure as a nuisance and would seriously threaten neighborhoods and communities as we know them.

IV. THE "REASONABLE EXPECTATION" DOCTRINE

Insurance companies, relying on the Ordinance or Law exclusion, offer to settle claims for the amount of the actual damage only; they disregard both elevation costs and the fact that the home cannot be rebuilt until it is elevated. Therefore, although claims are paid, insureds do not receive what they thought they would get: a functional home. They find they do not own what they thought they purchased: a policy that would cover the cost of repairing their homes to a functional condi-

24. *Id.* § 104.3(d).

25. *Id.* § 104.3(e) (emphasis added).

26. Don Fine Frock, *Insurance Could Pay to Elevate Houses*, MIAMI HERALD, Nov. 18, 1992, at 1A.

27. *Id.*

28. *Id.* at 11A.

29. SOUTH FLA. BUILDING CODE, *supra* note 15, at § 104.3.

30. Frock, *supra* note 26, at 11A.

tion. It is this expectation that forms the basis of the "reasonable expectation" doctrine.

The reasonable expectation doctrine has been written about extensively.³¹ However, this Comment limits the discussion and analysis of the doctrine to a basic overview of the principals underlying and supporting the doctrine: an illustration of the doctrine applied and a discussion of how and why Florida courts could adopt the doctrine.

A. *Contracts of Adhesion*

Generally, adhesion contracts are "standard form contracts presented on a take-it-or-leave-it basis."³² Unequal bargaining power is inferred in insurance contracts because the insured is universally presented a form contract which allows little, if any, negotiation or choice over the terms or provisions. The Supreme Court of Arizona described the adhesive nature of a typical insurance contract when it stated that an insurance contract:

[i]s not a contract arrived at by negotiation between the parties. The insured is given no choice regarding terms and conditions of coverage which are contained on forms which the insured seldom sees before purchase of the policy, which often are difficult to understand, and which usually are neither read nor expected to be read by either the person who sells the policy or the person who buys it.³³

Recently, a trend developed recognizing that contracts of adhesion are different from "ordinary" contracts and that they should be treated

31. See, e.g., Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 823-24 nn.6-8 (1990) (listing over 40 articles on the reasonable expectation doctrine).

32. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174 (1983). Rakoff described a "contract of adhesion" as follows:

1. The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
2. The form has been drafted by, or on behalf of, one party to the transaction.
3. The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
4. The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
5. After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
6. The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party.
7. The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.

33. *Gordinier v. Aetna Casualty & Sur. Co.*, 742 P.2d 277, 282 (Ariz. 1987) (quoting *Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441, 446 (Ariz. 1982)).

differently.³⁴ In fact, the Second Restatement of Contracts includes a separate section which specifically addresses contracts of adhesion.³⁵ Moreover, at least one commentator believes that "the form terms present in contracts of adhesion ought to be considered presumptively (although not absolutely) unenforceable."³⁶

Because insurance contracts are contracts of adhesion,³⁷ the rules governing insurance contracts warrant special consideration. Contracts of adhesion are treated differently than negotiated contracts and the reasonable expectation doctrine constitutes one attempt by the courts to address that difference by re-leveling the playing field.

B. *Overview of the Doctrine*

The nature of contracting has changed to such an extent that it is no longer practical for a court to rely on many traditional principals of contract law when resolving conflicts between parties. Many of the traditional methods for resolving contract disputes "were formulated at an early time when parties of equal strength negotiated in the historical sequence of offer, acceptance, and reduction to writing."³⁸

Once insurance contracts were identified as contracts of adhesion, decisions in insurance cases initially were difficult to reconcile with then-existing contract law.³⁹ The aphorism used to explain such decisions was simply: "It's an insurance case."⁴⁰ On closer examination, however, it appeared that those decisions were based on similar "currents of principle."⁴¹ They shared a common rationale.

These principles, now recognized as the "reasonable expectation" doctrine, were first identified by Judge Robert E. Keeton in an article written while he was a professor at Harvard University.⁴² Professor Keeton's formulation of the doctrine provided that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though pains-

34. Rakoff, *supra* note 32, at 1174.

35. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). Insurance contracts are unquestionably contracts of adhesion. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966 (1970).

36. Rakoff, *supra* note 32, at 1176.

37. Keeton, *supra* note 35.

38. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 173 (Iowa 1975); *see also* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) ("The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.").

39. *See* Keeton, *supra* note 35.

40. *Id.* at 961.

41. *Id.*

42. Keeton, *supra* note 35.

taking study of the policy provisions would have negated those expectations."⁴³

Insurance policies are typically long and complicated documents that are difficult to read and comprehend. It is recognized that most insureds do not even read their insurance policies.⁴⁴ Consequently, an insured might first learn of an exclusion or limitation on coverage only when he or she suffers a loss and the insurer denies coverage.

Several respected commentators believe not only that insureds do not read their policies, but also that no one should reasonably expect them to.⁴⁵ It is the insured's lack of understanding of the policy terms and the insurer's opportunity to draft policy terms unreasonably favorable to themselves that forms the basis for honoring the "objectively reasonable expectations" of the insured.⁴⁶

The doctrine may also apply where the language in the policy is clear and unambiguous⁴⁷ "even if careful examination of the policy provision would negate [a particular] expectation."⁴⁸ However, some courts use the doctrine only where the policy language is ambiguous. Under the reasonable expectation doctrine, the meaning of a term in an insurance contract is not what the drafter intended it to mean, but what a reasonable person in the position of the insured would have understood

43. *Id.* at 967. Keeton expounded on this principal by stating that:

First, as an ideal this principal incorporates the proposition that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters. Arguably that proposition should be regarded as a corollary of the principle of resolving ambiguities against the insurer. The principle of honoring reasonable expectations should be extended further, protecting the policyholder's expectations as long as they are objectively reasonable from the layman's point of view, in spite of the fact that had he made a painstaking study of the contract, he would have understood the limitation that defeats the expectations at issue.

Id. at 967.

44. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) (The insurer does not expect the insured "to understand or even to read the standard terms.").

45. See 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 559, at 266 (1960) ("He may not even read the policy, the number of its terms and the fineness of its print being such as to discourage him."); 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 906B, at 300 (3rd ed. 1963) ("[W]here the document thus delivered to him is a contract of insurance the majority rule is that the insured is not bound to know its contents.").

46. See Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843, 844 (1960) ("[S]tandardized form contracts are never read by the party who 'adheres' to them. . . . [T]he proponent of the form is free to dictate terms most advantageous to himself.").

47. See Keeton, *supra* note 35, at 968 ("[T]hose expectations should prevail as well when the language of an unusual provision is clearly understandable."). See also *Gordinier v. Aetna Casualty & Sur. Co.*, 742 P.2d 277, 283 (Ariz. 1986); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 176 (Iowa 1975).

48. *Grinnell Mut. Reinsurance Co. v. Wasmuth*, 432 N.W.2d 495 (Minn. Ct. App. 1988).

it to mean.⁴⁹ Therefore, in construing the ambiguity against the insurer and in favor of the insured, some courts look to the "objectively reasonable expectations" of the insured to fashion a remedy.⁵⁰

In *Gordinier v. Aetna Casualty & Surety Co.*,⁵¹ the Supreme Court of Arizona analyzed cases and authorities dealing with the reasonable expectation doctrine and described four situations in which it would not enforce disputed terms in an insurance policy:

1. Where the contract terms, although not ambiguous to the court, cannot be understood by the reasonably intelligent consumer who might check on his or her rights, the court will interpret them in light of the objective, reasonable expectations of the average insured;
2. Where the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage;
3. Where some activity can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured;
4. Where some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe that he has coverage, although such coverage is expressly and unambiguously denied by the policy.⁵²

Courts in thirty-one states and the District of Columbia recognize the reasonable expectation doctrine,⁵³ only three states have rejected it.⁵⁴ One commentator strongly believes that the doctrine will continue to gain support in the remaining jurisdictions.⁵⁵

C. *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*⁵⁶

In *C & J Fertilizer*, the plaintiff purchased two insurance policies to

49. *Macon Light House Revival Ctr., Inc. v. Continental Ins. Co.*, 651 F. Supp. 417, 420 (M.D. Ga. 1987).

50. See, e.g., *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 174-75 (Cal. 1966); *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985); *Gowing v. Great Plains Mut. Ins. Co.*, 483 P.2d 1072, 1075 (Kan. 1971); *Woodson v. Manhattan Life Ins. Co. of N.Y.*, 743 S.W.2d 835, 839 (Ky. 1987).

51. 742 P.2d 277 (Ariz. 1987).

52. *Id.* at 283-84 (citations omitted).

53. BARRY R. OSTRAGER, *INSURANCE COVERAGE DISPUTES* 19 (1993) (Alabama, Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Texas, West Virginia, and Wisconsin). *Id.* at 19-23.

54. *Id.* at 24 (Illinois, Ohio, and Idaho).

55. Henderson, *supra* note 31, at 834.

56. 227 N.W.2d 169 (Iowa 1975). This case illustrates one situation in which the doctrine can apply.

cover loss at his fertilizer plant.⁵⁷ Both policies provided coverage for burglaries but they defined burglary as "the felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry."⁵⁸ Ostensibly, this requirement was intended to guard against "inside jobs."⁵⁹ When the plant was burglarized, the insurers denied coverage because there were no visible marks on the exterior of the building. The insurer maintained this defense despite significant evidence that the burglary was not an inside job.⁶⁰

The court examined cases and treatises which addressed the adhesive nature of modern standardized insurance contracts.⁶¹ The court determined that "[i]t is generally recognized the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it if he does."⁶² The court concluded, therefore, that "the inevitable result of enforcing all provisions of the adhesion contract . . . delivered subsequent to the transaction and containing provisions never assented to, would be an abdication of judicial responsibility."⁶³

The court cited the Second Restatement of Contracts to support its adoption of the reasonable expectation doctrine.⁶⁴ The court agreed with the Restatement's approach that an insured should not be bound by a term in an insurance contract if the insurer had reason to believe⁶⁵ that

57. *Id.* at 171.

58. *Id.* at 171.

59. *Id.* at 172.

60. *Id.* at 171-72. The insurance agent who sold the policy observed the crime scene and expressed surprise that the insurer denied coverage. *Id.* at 171.

61. The court cited several authorities as follows:

"Few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract." . . . 7 Williston on Contracts § 900, pp. 29-30 (3d Ed. 1963). . . . 7 Williston on Contracts § 906B, p. 300 ("But where the document thus delivered to him is a contract of insurance the majority rule is that the insured is not bound to know its contents"); 3 Corbin on Contracts § 559, pp. 265-66 ("One who applies for an insurance policy . . . may not even read the policy, the number of its terms and the fineness of its print being such as to discourage him") 7 Williston on Contracts § 900, pp. 33-34 ("Some courts, recognizing that very few insureds even try to read and understand the policy or application, have declared that the insured is justified in assuming that the policy which is delivered to him has been faithfully prepared by the company to provide the protection against the risk which he had asked for").

Id. at 174-76.

62. *Id.* at 174.

63. *Id.*

64. *Id.* at 176.

65. See RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. f (1981) ("Reason to believe may

the insured would not have assented to that term if it had been brought to the insured's attention.⁶⁶ Consequently, the court refused to enforce the unambiguous policy definition of burglary, stating that that definition "which crept into [the] policy comport[ed] neither with the concept a layman might have of that crime, nor with a legal interpretation."⁶⁷ The court added that the definition of burglary in the policy made the "insurer's obligation to pay turn on the skill of the burglar, not on the event the parties bargained for: a bona-fide third party burglary resulting in loss of plaintiff's chemicals and equipment."⁶⁸ The court concluded that, although the disputed language was unambiguous, the insured had a reasonable expectation that a loss from a burglary would be covered if burglary was not an inside job.⁶⁹

D. The Florida Courts

The reasonable expectation doctrine has received little attention in Florida. With few exceptions,⁷⁰ it does not appear that the doctrine has been fully discussed.⁷¹ However, several courts and judges in Florida have discussed some of the principles that underlie the doctrine.⁷²

be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction.").

66. *Id.* § 211(3).

67. *C & J Fertilizer*, 227 N.W.2d at 177.

68. *Id.*

The court noted that the reasonable expectation doctrine does not always work against the insurer; it can and does work for the insurer in some cases. *Id.* (citing *Central Bearing Co. v. Wolverine Insurance Co.*, 179 N.W.2d 443 (Iowa 1970) (The court in *Central Bearing* reversed the trial courts ruling that the language was ambiguous and stated that "we think the insured as a reasonable person would understand the policy coverage purchased meant the insured was not covered for loss if the 'accident' with concomitant damage to the victim occurred away from the premises and after the operation and sale was complete.")).

69. *Id.* at 176-77.

70. See, e.g., *Florida Farm Bureau Casualty Co. v. Hurtado*, 587 So. 2d 1315, 1320-21 (Fla. 1991); *Shuster v. South Broward Hosp.*, 570 So. 2d 1362, 1366 (Fla. 4th DCA 1990); *Gathings v. West Am. Ins. Co.*, 561 So. 2d 450 (Fla. 5th DCA 1990); *Spengler v. State Farm Fire & Casualty Co.*, 568 So. 2d 1293, 1295 (Fla. 1st DCA 1990).

71. See also *Henderson*, *supra* note 31, at 836 n.73 ("Research has not revealed any case involving the issue that has reached the highest courts of Arkansas, Florida, and Tennessee.") (emphasis added).

72. See, e.g., *National Gypsum Co. v. Travelers Indem. Co.*, 417 So. 2d 254, 256 (Fla. 1982) ("[A]llowing recovery is the more equitable course of action and furthers the reasonable expectations of those who purchase insurance."); *Moncello v. Federal Ins. Co.*, 558 So. 2d 1081, 1083 (Fla. 5th DCA 1990) (Harris, J., dissenting) ("Unambiguous insurance contracts are enforced in accordance with the reasonable expectations of the insured."); *Galinko v. Aetna Casualty and Sur. Co.*, 432 So. 2d 179, 182 (Fla. 1st DCA 1983) ("[A]doption of the modern rule of reasonable expectations promotes the social function of insurance coverage."); *McDaniel v. Lawyers' Title Guar. Fund*, 327 So. 2d 852, 856 (Fla. 2nd DCA 1976) ("One of the reasonable expectations of a policyholder who purchases title insurance is to be protected against defects in his title which

On January 25, 1993, Dade County, Florida filed a complaint for Declaratory Judgment against State Farm and Allstate Insurance companies to determine the legality of the Ordinance or Law exclusion.⁷³ In Florida, an insurance policy must be interpreted to provide coverage whenever possible.⁷⁴ Moreover, in Florida, exclusions are narrowly interpreted against the insurer.⁷⁵ The complaint filed by Dade County presents an opportunity for Florida courts to formally adopt the reasonable expectation doctrine. A decision to adopt the doctrine would have an immediate effect on at least three thousand families whose homes were destroyed by Hurricane Andrew.⁷⁶ It is time for the courts in Florida to recognize the need for intervention. Judicial regulation of insurance contracts as adhesion contracts is appropriate given the lack of statutory and administrative controls and the considerable influence insurers often have over legislative decisions.⁷⁷

The Restatement approach, discussed above, provides a basis upon which Florida courts could base a decision to adopt the doctrine.⁷⁸ At least two other jurisdictions have used section 211 of the Restatement to justify adoption of the doctrine.⁷⁹ In addition, the American Law Institute has recognized and supported the reasonable expectation doctrine.⁸⁰ This support, combined with the fact that a majority of the jurisdictions have now adopted the doctrine, provides significant justification for its adoption in Florida.

Adopting the reasonable expectations doctrine to render the Ordinance or Law exclusion unenforceable would require little effort. For example, in *Hertog v. Milwaukee Mutual Insurance Co.*,⁸¹ the Minnesota Court of Appeals commented that the adoption of the doctrine in that state "afford[ed] Minnesota courts a standard to construe insurance contracts without forced reliance on arbitrary rules 'which do not reflect

appear of record."); *Osepchook v. Gateway Ins. Co.*, 298 So. 2d 169, 172 (Fla. 4th DCA 1974) (Cross, J., dissenting) ("I am impelled to follow to [sic] a higher piper. It has always been my belief that when members of the public purchase policies of insurance, they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. This is what they pay their premium for. They should not be subjected to narrow interpretations which afford no coverage for premium dollars.").

73. The complaint was filed in the 11th Judicial Circuit Court in and for Dade County, Florida, case number 93-01307.

74. *Sanz v. Reserve Ins. Co.*, 172 So. 2d 912, 913 (Fla. 3rd DCA 1965).

75. *Cochran v. State Farm Mut. Auto. Ins. Co.*, 298 So. 2d 173, 174 (Fla. 4th DCA 1974).

76. See *supra* text accompanying note 26.

77. Keeton, *supra* note 35, at 966-67.

78. See *supra* notes 64-67 and accompanying text.

79. *Darner Motor Sales v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (Restatement § 237 has since been renumbered as § 211.).

80. See Henderson, *supra* note 31, at 845 n.110.

81. 415 N.W.2d 370 (Minn. Ct. App. 1987).

real life situations and without having to bend and stretch those rules to do justice in individual cases.' ”⁸²

If Florida courts are concerned that adopting the doctrine might “open the flood gates” of litigation, they could limit the application of the doctrine to situations in which the expectations of the insured are supported by substantial public policy reasons that affect the health, safety and welfare of the public.

Even such a limited application would apply to the victims of Hurricane Andrew. An insured whose home was damaged could reasonably have expected that insurance would cover the cost of elevating and repairing the home as required by local building codes; this expectation, in turn, is supported by substantial public policies (e.g., continued federal funding). Therefore, by adopting the reasonable expectation doctrine, Florida courts could give effect to the objective and reasonable expectations of the insureds, notwithstanding the unambiguous Ordinance or Law exclusion which explicitly negates those expectations.

V. RESTATEMENT (SECOND) OF CONTRACTS § 211

The American Law Institute adopted section 211 of the Restatement to deal with the inherent unfairness of standardized agreements, while at the same time recognizing the need for such agreements. Section 211 provides that:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.⁸³

Pursuant to section 211, a standardized agreement will be enforced whether or not the obligor read or understood the agreement *unless* the obligee “has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term.”⁸⁴ Therefore, when an insurance contract is the subject of a dispute, courts should interpret a particular term according to its plain

82. *Id.* at 373 (quoting *Atwater Creamery Co. v. Western Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985)).

83. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

84. See *infra* note 87 and accompanying text.

meaning unless the insurer had "reason to believe"⁸⁵ that the insured would not have agreed to the term if he or she was aware of the existence of that term in the policy.⁸⁶

Some courts have stated that comment f of section 211 stands for the same principles as those of the reasonable expectation doctrine.⁸⁷ However, the principles of section 211, as expounded in comment f, appear to be more narrow than those of the reasonable expectation doctrine. For example, section 211 requires that the insurer have "reason to believe" that the insured would not have accepted a particular term.⁸⁸ In contrast, the reasonable expectation doctrine, as it is currently understood and applied, does not have such a requirement. As also stated in comment f, however, the proof required to show that the insurer had "reason to believe" could be inferred "from the fact that the term is bizarre or oppressive, from that fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction."⁸⁹

Section 211 may be used alone, or with the reasonable expectation doctrine, to render the Ordinance or Law exclusion unenforceable. Courts should conclude that an insurer had reason to believe that an insured would not have assented to the Ordinance or Law exclusion if the exclusion, and the potential applicability of the fifty percent rule (of which the insurer was undoubtedly aware), had been brought to the attention of the insured. If insurance companies had informed their clients about the exclusion and about the availability of an Ordinance or

85. "Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

86. *Gordinier v. Aetna Casualty & Sur. Co.*, 742 P.2d 277, 283 (Ariz. 1987).

87. *See, e.g., C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 176 (Iowa 1975). The text of comment f provides:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. . . . [A] party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. . . . Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.

RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

88. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

89. *Id.*

Law endorsement,⁹⁰ homeowners could have either purchased extra coverage or have decided not to enter into the agreement.

VI. THE "EFFICIENT PROXIMATE CAUSE" RULE

A. *The Rule*

The efficient proximate cause rule provides that "where there is one cause which sets other causes in motion, there is coverage for the loss if the cause which set others in motion is an included risk under the terms of the policy. This is so even though there might be an excluded risk which also contributed to the loss or damage."⁹¹

Courts that have applied the "efficient proximate cause" rule have held that an Ordinance or Law exclusion is inapplicable where the loss was predominately caused by something other than the application of the ordinance or law.⁹² For example, in *Starczewski v. Unigard Insurance Group*,⁹³ the Washington Court of Appeals used a "Loss Settlement" provision in the contract and the efficient proximate cause rule to defeat the Ordinance or Law exclusion. The "Loss Settlement" provision provided that "losses are settled at actual cash value at the time of loss but not exceeding *the amount necessary to repair or replace the damaged property*."⁹⁴ The court reasoned that "the average person would believe that 'the amount necessary to repair or replace the damaged property' includes the amount necessary to comply with mandatory building codes enacted after the policy was issued."⁹⁵ Accordingly, the court held that the Ordinance or Law exclusion was inapplicable because of the efficient proximate cause rule "since any additional repair costs due to code requirements resulted predominately from the fire, not from the enforcement of any ordinance or law."⁹⁶

Several courts have concentrated solely on the proximate cause of a

90. An endorsement is optional coverage purchased at the election of the insured for an additional premium. The endorsement typically covers costs associated with the application of any "Ordinance or Law" that could effect the insured's property. Some insurance companies offer this additional coverage but fail to properly market it. Beatrice E. Garcia, *Agent Takes Issue with State Farm*, MIAMI HERALD, Sept. 11, 1992, at 81CA.

91. *Farmers Ins. Exch. v. Adams*, 216 Cal. Rpt. 287, 289 (Ct. App. 1985); see also GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 74:711 (rev. ed. 1983) ("[I]n determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.").

92. See, e.g., *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413, 416 (Wash. 1989); *Sabella v. Wisler*, 377 P.2d 889, 896-97 (Cal. 1963) (where concurrent causes combine to produce a loss, the efficient cause is the cause to which the loss is attributed).

93. 810 P.2d 58 (Wash. Ct. App. 1991).

94. *Id.* at 60 (emphasis added).

95. *Id.* at 62.

96. *Id.*

loss and have held that loss associated with an ordinance or law is merely a secondary or consequential loss and therefore recoverable. For example, in *Farmers Union Mutual Insurance Company v. Oakland*,⁹⁷ the Supreme Court of Montana held that an Ordinance or Law exclusion⁹⁸ did not apply to costs associated with removal of asbestos from a building damaged by fire.⁹⁹ The court reasoned that the regulation which required the removal of the asbestos "did not 'cause' or 'result in' 'loss or damage' to the insured property [and that it was] the fire that caused the 'loss or damage' to the insured property."¹⁰⁰

Several courts have recently decided that Ordinance or Law exclusions apply only when loss is solely and directly attributable to the Ordinance or Law. In *Garnett v. Transamerica Insurance Services*,¹⁰¹ the Supreme Court of Idaho held that the exclusion applied only when the loss was caused solely by the ordinance or law.¹⁰² The court reasoned that:

if some safety improvement of a building to which no other loss occurred were required by an ordinance or law, Transamerica would not be liable. However, when the cost of repairing or replacing a building that had been damaged by fire is increased by the requirements of an ordinance or law, Transamerica is not relieved of that cost.¹⁰³

B. *The Florida Courts*

Courts in Florida have recognized and adopted the efficient proximate cause rule. The courts, therefore, could rely on this rule alone to render the Ordinance or Law exclusion inapplicable to the elevation requirement confronted by victims of Hurricane Andrew. In *Hartford Accident & Indemnity Co. v. Phelps*,¹⁰⁴ a leak from an underground water-pipe damaged the plaintiffs home.¹⁰⁵ While the plaintiff was trying to repair the damage, the house settled and caused additional damage.¹⁰⁶ The policy provided coverage for damage caused by leaking

97. 825 P.2d 554 (Mont. 1992).

98. The exclusion provided that coverage did "not apply to loss or damage caused by or resulting from: 1. Enforcement of any ordinance or law, either directly or indirectly, regulating the construction, repair or demolition of buildings or structures." *Id.* at 555.

99. *Id.* at 556-57.

100. *Id.* at 556.

101. 800 P.2d 656 (Idaho 1990).

102. *Id.* at 666.

103. *Id.*

104. 294 So. 2d 362 (Fla. 1st DCA 1974).

105. *Id.* at 363.

106. *Id.*

pipes but excluded damage caused by settling or cracking.¹⁰⁷ The court held that because the leak in the plumbing system was the proximate and efficient cause of the loss, the exclusion regarding settling was inapplicable.¹⁰⁸

In *Wallach v. Rosenberg*,¹⁰⁹ a storm caused the defendant's sea wall to collapse which, in turn, caused a portion of the plaintiff's sea wall to collapse.¹¹⁰ A jury determined that weather and the defendant's failure to properly maintain the wall caused the collapse.¹¹¹ The plaintiff's insurance policy provided coverage for damage caused by the negligent acts of others but contained an exclusion for loss caused by earth movement or water damage.¹¹² The insurer denied coverage, arguing that the proximate cause of the loss was the water pressure caused by the storm and that therefore the loss was not covered under the policy.¹¹³ The insurer also argued that where concurrent causes combine to cause a loss and one of the causes is a loss that is excluded under an insurance policy, the insured should not recover.¹¹⁴ The plaintiff argued that the loss was caused by the defendant's negligence and was therefore covered under the policy.¹¹⁵ Experts on both sides testified that if the defendant had properly maintained his wall, the collapse would not have occurred.¹¹⁶ The court held that an insured may recover even when "the insured risk [is] not . . . the prime or efficient cause of the accident."¹¹⁷ Moreover, the court held that the insured could recover for the total loss even though a contributing cause of the loss was excluded in the policy.¹¹⁸

VII. THE "CONSTRUCTIVE TOTAL LOSS" DOCTRINE

The "constructive total loss" doctrine provides that a loss will be considered a total loss when the requirements of an ordinance or law prevent the insured from rebuilding or repairing the damaged struc-

107. *Id.*

108. *Id.* at 364.

109. 527 So. 2d 1386 (Fla. 3d DCA 1988).

110. *Id.* at 1386.

111. *Id.* at 1387.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* (quoting 11 G. COUCH, COUCH ON INSURANCE 2d § 44:268 (rev. ed. 1982)); see also *State Farm Mut. Auto. Ins. Co. v. Partridge*, 514 P.2d 123, 129 (Cal. 1973).

118. *Wallach*, 527 So. 2d at 1388. *Mattis v. State Farm Fire & Casualty Co.*, 454 N.E.2d 1156, 1160 (Ill. App. Ct. 1983) ("Where a policy expressly insures against loss covered by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause.").

ture.¹¹⁹ Generally, when a governmental agency, acting pursuant to authority or law, prohibits the repair of a partially damaged structure, courts hold an Ordinance or Law exclusion inapplicable because the ordinance or law renders the structure a "constructive total loss."¹²⁰ In such a case, governmental action, in effect, renders the building a total loss even though repairs to the structure may be physically and economically feasible. Moreover, even if the ordinance or law merely renders an insured's property impractical (either physically or economically) to repair, courts should consider the structure a constructive total loss for which the Ordinance or Law exclusion should be inapplicable and unenforceable. This rule *should* apply, particularly when the added cost of repair attributed to the ordinance or law does not result in a windfall to the insured. In other words, and in view of the stated purpose of the exclusion, when the costs associated with an ordinance or law do not directly benefit or increase the value of the insured's property, the exclusion should not apply.¹²¹

For example, as stated above, Hurricane Andrew has left over three thousand homeowners unable to get building permits to rebuild their homes unless they elevate their homes as required under the building codes. The cost of compliance renders impractical the repair of many of these homes. Courts should apply the total constructive loss doctrine and determine that the Ordinance or Law exclusion does not apply in this case. The homeowners will not reap a windfall from such a ruling; rather, they will regain their homes.

A. Overview of the Doctrine

In 1903, the Supreme Court of Massachusetts applied the constructive total loss doctrine in *Hewins v. London Assurance Corp.*¹²² *Hewins* involved a consolidated action against twelve insurance companies. It addressed the issue of whether an insurer's liability included the cost of repairing a building which had been damaged by fire and which was

119. *Stahlberg v. Travelers Indem. Co.*, 568 S.W.2d 79, 84 (Mo. Ct. App. 1978). The history of the constructive total loss doctrine can be traced to maritime law. The doctrine was developed to alleviate the harsh requirement of an "actual total loss" where the cost of repairs would exceed the repaired value of the ship. The doctrine enabled the insured to abandon the vessel as if it were a total loss thereby entitling the insurer to the salvage value rights. *Lenfest v. Coldwell*, 525 F.2d 717, 724 (2d Cir. 1975).

120. See *Feinbloom v. Camden Fire Insurance Association*, 149 A.2d 616, 618 (N.J. Super. Ct. App. Div., 1959); *Stahlberg v. Travelers*, 568 S.W.2d 79, 84 (Mo. Ct. App. 1978); *Stevick v. Northwest*, 281 N.W.2d 60, 62 (N.D. 1979); *Hertog v. Milwaukee Mutual Insurance Co.*, 415 N.W.2d 370, 372 (Minn. Ct. App. 1987).

121. See, e.g., FLA. STAT. § 627.702 (1993).

122. 68 N.E. 62 (Mass. 1903).

subject to specific building laws.¹²³ On the general measure of damages, the court stated:

Ordinarily, the loss or damage by fire is the difference between the value of the building before the fire and the value of what remains after the fire, and that difference is to be regarded as the true loss covered by the policy, unless there be in the policy some language by which some element of that difference is excluded. Where the building is only partially destroyed, and the proper course is to repair . . . it is manifest that in estimating the value of the part remaining the cost of the necessary repairs is a very material matter; and, if the repairs must conform to certain legal requirements, the nature of those requirements is also to be considered.¹²⁴

Thus, according to the court, the language of the insurance policies themselves determine the general measure of damages.¹²⁵ Only one of the policies at issue in the case contained an Ordinance or Law type exclusion.¹²⁶ The court determined that the costs associated with the building laws should be included in the general measure of damages under the policies which did not contain an exclusion.¹²⁷ The court reasoned that:

The building laws were the same at the time of the fire as at the time the policies were issued. The only change in the situation was in the physical condition of the building, and that change was caused wholly by the fire. The building laws simply constituted one of the conditions of the situation. While it is true that by reason of [the] existence [of the building laws,] the loss caused by the ravages of the fire was greater than it otherwise would have been, it is none the less true that the sole operating cause of the change in the building was the fire, and, . . . in the absence of any provision in the policy expressly excluding from the damages the part arising out of that condition, that part is not to be excluded, but is to be regarded as primarily the result of the fire, or as "loss or damage by fire."¹²⁸

The court discussed and adopted the reasoning of the Michigan

123. *Id.* at 62-63.

124. *Id.* at 63.

125. *Id.* The court called this policy the "Pawtucket Policy." It is discussed in further detail below.

126. *Id.* These policies incorporated the "Massachusetts Standard" form which contained a harmless "loss settlement" type provision. This provision provided that:

In the case of any loss or damage, the company . . . shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees as hereinafter provided, or replace the property with other of the same kind and goodness, or it may . . . notify the insured of its intention to rebuild or repair the premises.

Id.

127. *Id.* The court described the defendants position as "untenable." *Id.*

128. *Id.* at 63-64.

Supreme Court in *Brady v. Northwestern Ins. Co.*¹²⁹ The *Brady* court held that "where an ordinance prevent[s] the repair of a building which [has] been practically destroyed by fire, the loss [is] total, although the cost of restoring the building to its original condition would [be] much less than the amount of the insurance."¹³⁰ The court noted that other jurisdictions have qualifiedly¹³¹ adopted the following proposition, which is generally regarded as the constructive total loss doctrine:

[W]here the law prohibits the repair of a building which has been partially destroyed by fire, in the absence of any express provision in the policy to the contrary[,] the loss is not measured by the sum required to restore the building to its condition before the fire, but it is total.¹³²

Thus, in *Hewins*, the plaintiffs were entitled to the costs associated with the building laws because the change in the building was brought about solely as a result of the fire and because the policies did not contain an Ordinance or Law exclusion.¹³³ The court added that the principal is the same regardless of whether the application of the building laws results in a total loss or whether they merely increase the cost of a partial loss.¹³⁴

On the other hand, the court enforced the exclusion included in the Pawtucket policy and determined that the insurer was not liable for the increased costs associated with the building laws.¹³⁵ The court noted two separate provisions in the Pawtucket policy which provided that the insurer's liability "shall in no event exceed what it would cost the insured to repair or replace the same with material of like kind and quality"¹³⁶ and that the insurer would not be liable "beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings."¹³⁷ The court reasoned that:

[S]uch portion of the damage caused by the change in the condition of the building as arises from the existence of the building laws, whether regarded as a condition or a cause, is not to be considered as a loss or damage by fire, but is to be excluded from consideration, and the loss is to be estimated as if there were no building laws affecting the situation.¹³⁸

129. *Brady v. Northwestern Ins. Co.*, 11 Mich. 425 (1863).

130. *Hewins v. London Assur. Corp.*, 68 N.E. at 63.

131. As discussed below, an Ordinance or Law exclusion is generally regarded as unenforceable in states with Valued Policy laws if a municipal authority prevents the repair of a partial loss.

132. *Id.* at 64.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

Several jurisdictions have used the constructive total loss doctrine to limit the applicability of the Ordinance or Law exclusion.¹³⁹ In *Feinbloom v. Camden Fire Insurance Ass'n*,¹⁴⁰ the plaintiff's building, valued at more than the \$18,000.00 for which it was insured, sustained \$12,600.00 worth of damage.¹⁴¹ A local ordinance prevented repair of the building unless the entire building was brought up to code.¹⁴² The policy stated that the insurer would pay the actual cash value "without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair."¹⁴³ The court held that the building was a constructive total loss and ordered it demolished because the remaining portion of the building "could not be 'restored' in a manner which would comply with the ordinances"¹⁴⁴ The court stated that "the general rule is that if 'by reason of public regulations rebuilding is prohibited the loss is total, although some portion of the building remains which might otherwise have been available in rebuilding.'"¹⁴⁵ The court reasoned:

[t]his language does not exclude liability for a constructive total loss It must be noted that the language does not say that the companies shall not be liable for loss caused by the operation of ordinance or law, but merely that no allowance will be made for the increased cost of repairing or reconstructing that loss. In other words, this language does not relate to the definition of a total (or partial) loss, nor to the exclusions from coverage. In short, we must first determine whether the loss was total or partial. If it is partial, the amount for which the company is liable may not be more than the "cost to repair or replace . . . with material of like kind or quality . . . without allowance for any increased cost of repair . . . by reason of any ordinance When we say the loss is total we mean that reconstruction or repair is impossible, and then [the exclusion] does not apply for there is nothing to which to add 'increased cost.'"¹⁴⁶

The court relied upon the "Loss Settlement" language in the policy ("without allowance for any increased cost . . . by reason of any ordinance or law")¹⁴⁷ to render the Ordinance or Law exclusion inapplicable. The court reasoned that where the loss is total, repairs are not

139. See, e.g., *Stahlberg v. Travelers Indem. Co.*, 568 S.W. 2d 79, 84 (Mo. Ct. App. 1978) (listing jurisdictions which follow the constructive total loss rule: Mississippi, Montana, Nebraska, New Hampshire, North Carolina, South Carolina, Texas, and Wisconsin).

140. 149 A.2d 616 (N.J. Super. Ct. App. Div., 1959).

141. *Id.* at 618.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

permitted; therefore, there is nothing to which increased costs may be added.¹⁴⁸ The court noted the distinction between the language which appeared in the "Exceptions" section, which dealt with what was covered, and the language in the "Loss Settlement" section, which related only to "what the company will pay for what is covered."¹⁴⁹ The defendant's reliance on *Hewins v. London Assurance Corp.*, a case which upheld the exclusion, was misplaced because the language in that case was contained in the "exceptions" section and provided that the company would not be liable "for loss occasioned by ordinance or laws"¹⁵⁰

In *Stahlberg v. Travelers Indemnity Co.*,¹⁵¹ the insured's building was partially destroyed by fire. A municipal order was issued for the demolition of the building pursuant to a local ordinance which prohibited its repair.¹⁵² The court stated that under the doctrine of constructive total loss, a building is considered a total loss if it is damaged to the extent that "no substantial remnant remains that a prudent uninsured person would use on rebuilding."¹⁵³ In addition, if municipal authorities prohibit the repair of a damaged structure, the insured is entitled to recover on the basis of a total loss as a matter of law.¹⁵⁴ Therefore, the court held that the insured suffered a total loss by reason of the demolition order.¹⁵⁵ The court reasoned that the local ordinance was not the cause of the loss; rather, it merely recognized that the loss was total.¹⁵⁶

B. Florida's "Valued Policy" Law

Under the valued policy law, a total loss, whether actual or constructive, entitles the policy holder to collect the face amount of the policy. In many cases, a valued policy law is crucial to the issue of whether an insurer is liable for a total-in-law¹⁵⁷ loss.¹⁵⁸ Courts in which valued policy statutes exist have uniformly held that total-in-law losses are cov-

148. *Id.*

149. *Id.* at 619.

150. *Id.*

151. 568 S.W.2d 79 (Mo. Ct. App. 1978).

152. *Id.* at 82. The ordinance provided that non-conforming use buildings that have been damaged by more than sixty percent are not to be restored unless it restored to a conforming use. The court noted that had if the building been in conforming use at the time of the fire, it could have been restored. *Id.* at 82 n.1.

153. *Id.* at 84.

154. *Id.*

155. *Id.* at 84-85.

156. *Id.* at 85.

157. A total-in-law loss results when an ordinance or law contributes to the loss to the extent that it renders the loss total as opposed to a total-in-fact loss that is a total loss caused solely by actual physical damage.

158. In cases where there is no valued policy law, jurisdictions are split. *See, e.g.,* Fidelity &

ered despite an exclusion in the policy to the contrary.¹⁵⁹ Thus, Ordinance or Law exclusions have been held inapplicable when they conflict with a valued policy statute.¹⁶⁰

Florida's valued policy statute provides that:

(1) In the event of the *total loss* of any building [or] structure . . . as to a covered peril . . . 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 property, the insurer's liability, if any, under the policy shall be for the actual amount of such loss.¹⁶¹

The statute, in effect, operates like a liquidated damage clause when the insured's loss is deemed total, thus making it unnecessary for the insured to prove the value of the loss.¹⁶² The statute also prevents overinsurance because it discourages insurance companies from collecting premiums on overvalued property and then contesting the value of the property when it is in their best interests to do so.¹⁶³

In *Hart v. North British & Merchantile Ins. Co.*, the Louisiana Supreme Court held that an agreement to let the loss be adjusted by arbitration is invalid as against the valued policy laws.¹⁶⁴ In *Hart*, the court rejected the insurer's argument that the state insurance commissioner had approved a form to provide additional protection for an additional premium to cover total-in-law losses because the argument violated the purposes of the statute.¹⁶⁵ Presumably, this reasoning would also prevent an insurer from successfully arguing that the insured had declined to purchase the Ordinance or Law endorsement which would have provided coverage for losses.

For example, in *Stevick*,¹⁶⁶ the insured's policy contained a provision that specifically excluded coverage for a loss resulting from a condemnation order.¹⁶⁷ The court held that, under the valued policy law, such an exclusion was unenforceable when the insured suffered a total

Guar. Ins. Corp. v. Mondzelewski, 115 A.2d 697, 699 (Del. 1955); *Hewins v. London Assurance Corp.*, 68 N.E. 62 (Mass. 1903).

159. See, e.g., *Fidelity & Guar. Ins. Corp. v. Mondzelewski*, 115 A.2d 697 (Del. 1955); *Hart v. North British & Merchantile Ins. Co.*, 162 So. 177 (La. 1935).

160. *Id.*

161. FLA. STAT. § 627.702 (1993) (emphasis added).

162. See *Springfield Fire & Marine Ins. Co. v. Boswell*, 167 So. 2d 780, 783-84 (Fla. 1964); *Underwriters Ins. Co. v. Kirkland*, 490 So. 2d 149, 153 (Fla. 1st DCA 1986).

163. *Stevick v. Northwest G. F. Mut. Ins. Co.*, 281 N.W.2d 60, 63 (N.D. 1979).

164. *Hart v. North British & Merchantile Ins. Co.*, 162 So. 177, 181 (La. 1935).

165. *Id.* at 180.

166. 281 N.W.2d 60 (N.D. 1979).

167. *Id.* at 62.

loss, whether the loss was "total in fact" or "total in law."¹⁶⁸ The court reasoned that where the loss is deemed total, any exclusion that attempts to limit the liability of an insurer to less than the face amount of an insurance policy is contrary to the valued policy statute and, therefore, void.¹⁶⁹

C. *Specific Hurricane Related Issues*

1. PHYSICAL CONSIDERATIONS

A homeowner who is required to elevate his or her home must lift the home's foundation as well as the portion of the home that remains undamaged or that can be utilized in rebuilding. As a practical matter, however, there is considerable question whether the elevation process can be completed without injuring the foundation or the remaining portion of the building. Although courts vary in their methods of determining whether a constructive total loss has occurred, the two most widely utilized have been identified as the "Usable Remnant" and "Loss of Identity" rules.¹⁷⁰

The following definitions are helpful:

Loss of Identity: A total loss has been sustained whenever the building has been so injured as to lose its identity and specific character.

Usable Remnant: A total loss has not been sustained so long as a substantial remnant remains which a prudent uninsured person would use in rebuilding.

A total loss has been sustained wherever the building has been so damaged that in effect it has lost its identity as a building, and that even though certain parts which remain may be made use of, if the work which is required must be looked upon as construction rather than repair, the loss must be considered as total.¹⁷¹

Where there is a question as to whether a building can be adequately repaired using the remnants that remain, some courts are quick to find a constructive total loss, refusing to place an insured in the precarious position of bearing the risk of defects manifesting themselves in the future. In *Occhipinti v. Boston Ins. Co.*, there was a possibility that if the building was repaired using the existing walls and foundation, defects could manifest themselves in the future.¹⁷² The court acknowledged the Loss of Identity rule for purposes of a constructive total loss. However, it fashioned a variation which took into account the situation "where there remains standing and in place sufficient parts of the build-

168. *Id.* at 62.

169. *Id.* at 63.

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

171. *Id.*

172. *Id.*

ing and foundations to justify the belief that the owner, if he had no insurance, would probably have used those parts, but that there is nevertheless a fair possibility that defects might later develop."¹⁷³ The court stated the rule that a "constructive total loss has occurred either when the building has been so damaged as to lose its identity, or has been so nearly completely destroyed that a reasonably prudent owner would not care to take the chance of using those parts which remain standing."¹⁷⁴ The court also reasoned that:

an insured owner in such a case is entitled to be made whole and that he is not made whole when there is reasonably remote possibility that at sometime in the future he may be called upon to repair defects resulting from the occurrence of the hazard against which he has purchased insurance. In such a case he has sustained at least a constructive total loss and is entitled to recover for such loss.¹⁷⁵

The same reasoning was adopted in *Reliance Ins. Co. v. Orleans Parish Sch. Bd.*,¹⁷⁶ where the district court applied the Usable Remnant rule to a building damaged over 75% and determined that the remnants left standing after the fire were not usable in the restoration of the building.¹⁷⁷ The court, citing *Occhipinti*, stated that even if an attempt were made to use the remaining 25%, "there would be no guarantee of the structural integrity of the restored building. The [insured] is not required to assume this risk."¹⁷⁸ Consequently, the court held that the building was a total loss.¹⁷⁹

Additionally, in *Sensat v. State Farm Fire and Casualty Co.*,¹⁸⁰ the court adopted and restated the entire holding and reasoning of *Occhipinti* and held that since there was a reasonable possibility that the foundation of the plaintiff's home had sustained heat damage from fire, "the insured should not be forced to assume the risk of such hidden dangers."¹⁸¹

2. ECONOMIC CONSIDERATIONS

To many homeowners affected by the hurricane and the elevation requirement, compliance with an ordinance or law is a financial impossibility. Moreover, irrespective of the ability to pay for the elevation, it may be cheaper, wiser, and more practical to just demolish the home and

173. *Id.*

174. *Id.* at 330.

175. *Id.* at 332-33.

176. 201 F. Supp. 78 (E.D. La. 1962).

177. *Id.* at 80.

178. *Id.*

179. *Id.*

180. 176 So. 2d 804 (La. Ct. App. 1965).

181. *Id.* at 806.

build a new one. In such a case the loss should be considered a total loss.¹⁸²

Where a building or structure is only partially destroyed, courts have considered the cost of repairs, particularly in relation to whether it would be cheaper to repair or to demolish and reconstruct, when determining whether there was a total loss. In *The Phoenix Ins. Co. v. The Port Clinton Fish Co.*,¹⁸³ a fish house and a portion of an attached dock were destroyed by fire. Apparently, the dock was more valuable than the structure. Testimony established that in order to rebuild the dock, the remaining undamaged portion would have to be removed. It was also established that the materials dismantled could be utilized in rebuilding the dock.¹⁸⁴ The court held, however, that because the cost of saving and utilizing the remaining portion of the dock (the dismantled materials) would be greater than the value of those materials, the loss was a total loss.¹⁸⁵

In *Pennsylvania Co. v. Philadelphia Contributorship*,¹⁸⁶ a case which dealt with the increased cost of repairs brought about by an ordinance, the plaintiff's building was partially damaged by fire. A city ordinance, however, required that the width of the building's walls be of a greater thickness.¹⁸⁷ Although compliance costs doubled, the cost of repairing the building, the market value of the building remained the same.¹⁸⁸ The court, in discussing the measure of damages, questioned whether the proper measure would be to calculate the damages as including those repair costs "existing and lawfully imposed at the time when the fire occurred."¹⁸⁹ The court refused to calculate the damages according to what it would cost to repair the building in the same condition as it was before the fire without regard to the requirements of the ordinance.¹⁹⁰ The court reasoned by analogy that material costs would be based on the market price at the time of the fire and not on what those costs were or would have been at the time of signing the insurance con-

182. See *Harvey v. General Guar. Ins. Co.*, 201 So. 2d 689, 691 (La. Ct. App. 1967) (holding that "[e]ven though the building was not totally consumed by fire, it was so damaged as not to be economically repairable").

183. 7 Ohio Cir. Dec. 468, 469 (Cir. Ct. 1897).

184. *Id.* at 471.

185. *Id.* at 473.

186. 51 A. 351 (Pa. 1902).

187. *Id.*

188. *Id.* at 351-52. This fact negates the ostensible purpose put forth by the insurance industry that the purpose of the Ordinance or Law exclusion is to prevent the insured from gaining a windfall. If this is in fact the purpose of the exclusion, then the courts should not enforce the exclusion when it is determined that the insured would not benefit or gain by the application of the ordinance.

189. *Id.* at 352 (emphasis added).

190. *Id.*

tract.¹⁹¹ The court stated that an insurance contract should be interpreted according to the changed conditions when determining the amount of the loss and that "such a principle would not involve the insuring company in any loss greater in extent than that which it undertook to assume when the policy was made."¹⁹²

In *Kinzer v. National Mut. Ins. Co.*,¹⁹³ the insured's building was partially destroyed and the insurer, who had attempted repairs, was prevented from doing so by the city because of a newly-enacted ordinance that required that the building contain fireproof materials.¹⁹⁴ The trial court had determined that it would be cheaper to tear down the building than to attempt to utilize the materials or portions that were not damaged.¹⁹⁵ The Supreme Court of Kansas agreed and stated that:

[N]o matter how great a portion of the building may remain unconsumed, yet if it is so injured that it must be torn down, or that what remains cannot be utilized in reconstructing the building without incurring greater expense than if it were not so utilized, the property must be regarded as [a total loss].¹⁹⁶

3. PRIOR CONDITION: INSURER ASSUMED THE RISK

The insurance companies, most of whom underwrite flood insurance policies and all of whom are familiar with the fifty percent rule, price their policies according to the risk involved. In evaluating the risk, insurance companies consider several factors including the elevation of an insured's home. Consequently, a home that was situated below the required elevation constituted a "substandard condition" of which the insurers were aware, and therefore they assumed the risk of insuring homes that were below the required flood level and subject to the fifty percent rule.

The defective or poor condition of a building that existed prior to a loss and which ultimately contributed to its total loss by the refusal of authorities to allow the building to be rebuilt has been held to be a constructive total loss and a risk assumed by the insurer. In *Monteleone v. Royal Ins. Co. Of Liverpool & London*,¹⁹⁷ a building described as old, frail and unsafe was "injured" by a fire.¹⁹⁸ The city authorities refused to issue a building permit and ordered the building demolished based in

191. *Id.*

192. *Id.*

193. 127 P. 762 (Kan. 1912).

194. *Id.* at 763.

195. *Id.*

196. *Id.* at 764.

197. 18 So. 472 (La. 1895).

198. *Id.* at 472.

part on the damaged portion and the condition of the undamaged portion.¹⁹⁹ The insurer argued that the building could have been repaired and that its liability should be measured by those repairs.²⁰⁰ The court noted the "mass of testimony" regarding the impracticability of such repairs, the efficacy of such repairs if made or attempted, the large expense associated with the repairs, and testimony that even with the proposed repairs the building would still be unsafe.²⁰¹ The court, in discussing the measure of damages, stated:

A total loss may be claimed though the walls of a building stand, and the elements that composed it be not entirely consumed. It is the same, we think, when the insured building cannot be made secure by repairs. Nor will it make any difference, in such cases of constructive total loss, that the condition after the fire is due in part to causes existing before. Such causes are deemed the remote, not the proximate, causes of the loss. The insurer, taking a risk on an old, and in this instance an insecure, building, incurs the obligation to pay for a total loss if the injuries by the fire, combined with the antecedent defects, make repairs impracticable. The value of the old building at the time of the fire is the measure of indemnity promised by the policy."²⁰²

In *Rutherford v. Royal Ins. Co.*,²⁰³ a case which involved a policy that contained an Ordinance or Law exclusion,²⁰⁴ the court followed the reasoning in *Monteleone* regarding prior existing defects, and held the insurer liable for the total loss where the city ordered the demolition of the building after a fire. The court so held, despite the exclusion²⁰⁵ and the insurer's argument that the fire did not cause the loss but merely revealed the defective condition. The court stated:

if, because of the antecedent condition, the fire did cause a total loss, by rendering the building unfit for occupancy and incapable of being repaired, the defendants would be liable as upon a total loss, even though it should appear that, but for the antecedent weakened and

199. *Id.* at 473.

200. *Id.*

201. *Id.*

202. *Id.*

203. 12 F.2d 880 (4th Cir. 1926).

204. *Id.* at 881. The exclusion provided that the insurer will pay "but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality . . . without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law, regulating construction or repair . . ." *Id.*

205. *Id.* at 880-81. The court acknowledged and adopted the rule that where a public authority prevents the repair of a structure, a constructive total loss results. The court dismissed the defendants' contention that the rule did not apply to this case because the "condition which brought about the destruction of the building and prevented its repair was not the result of the fire, but of conditions existing prior thereto." *Id.* at 881.

impaired condition, the fire would not have produced such result.²⁰⁶

In such a case, the court noted, "it makes no difference that the condition after the fire is due in part to causes existing before."²⁰⁷ The court reasoned that "but for the fire, [the building] would have continued to have value as rentable property, and if it was so damaged by the fire that it ceased to have any value whatever, the fire was the proximate cause of the loss, the producing cause, without which it would not have occurred."²⁰⁸

4. THE ORDINANCE OR LAW AS PART OF THE CONTRACT

The Dade County Code and South Florida Building Code were enacted so that Dade County could participate in the national flood program. That program was developed presumably to assist the states in providing for the health, safety, and welfare of its citizens. It is unquestioned that the county has the right and, as some would hold, the obligation to adopt and enact such laws. To allow the insurance companies to exclude compliance with such laws from coverage, would be to allow them to circumvent the purpose and intent of the law. Florida should not allow the insurance companies to engage in private lawmaking about matters of profound public importance. Florida should require that insurance companies write policies that reflect adherence to the laws of the state.

Several courts have stated that the actual ordinance or law is itself a part of the insurance contract. It has been stated that although an insurance policy is a matter of contract, "when parties enter an insurance contract which is surrounded by statutory limitations and requirements, they are presumed to have entered into the contract with reference to the statute, and the statute thus becomes part of the contract."²⁰⁹

Although the language cited by the courts specifically refers to the "parties," the courts have sided with the insureds on public policy grounds by stating that the exclusion contravenes the ordinance or law.²¹⁰

D. *The Florida Courts*

Florida appears to have initially adopted the constructive total loss

206. *Id.*

207. *Id.*

208. *Id.* at 882.

209. *Hertog v. Milwaukee Mut. Ins. Co.*, 415 N.W.2d 370, 372 (Minn. Ct. App. 1987) (citing *Larkin v. Glens Falls Ins. Co.*, 83 N.W. 409, 410 (Minn. 1900)); *see also* *Stahlberg v. Travelers Indem. Co.*, 568 S.W.2d 79, 85 (Mo. Ct. App. 1978); *Lux v. Milwaukee Mechanics' Ins. Co.*, 295 S.W. 847, 850 (Mo. Ct. App. (1927)).

210. *Hertog*, 415 N.W.2d at 373.

doctrine in *Citizens Ins. Co. v. Barnes*,²¹¹ a case that was decided in 1929. In that case, a wood frame building was partially damaged by fire, but a city ordinance prevented its repair because it was damaged to the extent of 50% of what it would cost to build a similar building.²¹² The insurer argued that since the building was only partially damaged, it was liable only for the cost of repairs. The court held, however, that the building was a constructive total loss after adopting the rule that where a building "cannot be repaired, because of a city ordinance . . . a recovery may be had for a total loss."²¹³ In addition, the court adopted the rule that "where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract."²¹⁴ Consequently, the court held that the parties are presumed to know of the ordinance which "directly and materially affect[s] their rights" and that such ordinance "should govern and control in the adjustment and settlement of such loss."²¹⁵

The doctrine's applicability to the Ordinance or Law exclusion was first tested in Florida in *Netherlands Ins. Co. v. Fowler*,²¹⁶ where, pursuant to the exclusion, the insurer would not be liable for "increased costs of repair or construction by reason of any ordinance or law regulating construction or repair."²¹⁷ The plaintiff's building was partially destroyed by fire, but a city ordinance prevented its repair and consequently the city ordered the building demolished.²¹⁸ The insured argued that the fire was the cause of the condition that lead to the demolition of the building and that under the valued policy laws, the insurer was liable for the face amount of the policy.²¹⁹ The insurer argued that it should not be liable for the total loss because the building was only partially damaged and that its total destruction was caused by the operation of the ordinance or law, the coverage of which is specifically excluded in the policy.²²⁰ Furthermore, the insurer argued that the valued policy statute required a "total loss by fire" and that since the plaintiff's building was only "partially destroyed by fire" liability should be limited to the esti-

211. 124 So. 722 (Fla. 1929).

212. *Id.* at 722-23.

213. *Id.* at 723-24.

214. *Id.*

215. *Id.*

216. 181 So. 2d 692 (Fla. 2d DCA 1966).

217. *Id.* at 693.

218. *Id.*

219. *Id.*

220. *Id.*

mated cost of repair.²²¹ The court, although not specifically mentioning a constructive total loss, held that where the city prevents the repair of a building, the loss is deemed a total loss. Under the valued policy law, the insurer was liable for the face amount of the policy.²²²

In *Regency Baptist Temple v. Insurance Co. of N.A.*,²²³ a portion of the insured's roof collapsed due to standing water which had accumulated because of the faulty construction of the roof.²²⁴ Pursuant to a city ordinance, the city refused to issue a permit unless the entire roof was replaced.²²⁵ The court held that under the policy, which contained an Ordinance or Law exclusion,²²⁶ the insurer was not liable for that portion of the roof that did not collapse. Of great significance, however, is the fact that the court noted that the "rule is otherwise when, in the case of [total] loss by fire or lightning, such a provision conflicts with Florida's valued policy law, Section 627.702, *Florida Statutes* (1975)."²²⁷ This statement is significant in that the current valued policy statute eliminated "total loss by fire or lightning" and replaced it with "total loss . . . as to a covered peril."²²⁸ Therefore, it would appear that if the case were decided today, based solely under the current statute, the court might render the roof a total loss under the valued policy statute and require the insurer to pay for the entire replacement of the roof.

The court added, however, that the facts of this case should be distinguished from those cases where the ordinance prevented the repair of the damaged building. In those cases, the court noted, the buildings were deemed a constructive total loss and the insurer was liable for the total amount of the loss.²²⁹

In *Reliance Ins. Co. v. Harris*,²³⁰ the parties were in the process of determining the amount of the insured's loss when the city condemned the building as a safety hazard and demolished it.²³¹ The court adopted the rule in *Regency*, that "a building will be considered a 'constructive total loss,' and the insurer liable for the building's entire value, under circumstances where an ordinance prevents repair."²³² Consequently,

221. *Id.*

222. *Id.*

223. 352 So. 2d 1242 (Fla. 1st DCA 1977).

224. *Id.* at 1243.

225. *Id.*

226. *Id.* The exclusion provided that coverage would be excluded for loss "[o]ccasioned directly or indirectly by enforcement of any local or state ordinance or law regulating the construction, repair or demolition of buildings or structures." *Id.* at 1244.

227. *Id.* at 1244 (emphasis added).

228. FLA. STAT. § 627.702 (1992) (as amended in 1982) (emphasis added).

229. *Regency*, 352 So. 2d at 1244.

230. 503 So. 2d 1321 (Fla. 1st DCA 1987).

231. *Id.* at 1322.

232. *Id.* at 1323.

the court held that the insured suffered a constructive total loss.

VIII. CONCLUSION

The combined effects of Hurricane Andrew and the Ordinance or Law exclusion demand judicial intervention. The courts in Florida should adopt the reasonable expectation doctrine and Restatement section 211, and apply the efficient proximate cause rule and the constructive total loss doctrine to the situation in south Dade County, Florida. These doctrines have gained considerable support and could provide the courts in Florida with sound principles upon which to base their rulings and allow the courts to prevent insurance companies from escaping their obligations to rebuild those homes destroyed by Hurricane Andrew.

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