HURRICANE CONFERENCE

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Section 627.4025(2), Fla. Stat. (Hurricane Coverage, Defined)

(2) As used in policies providing residential coverage:

(a) "Hurricane coverage" is coverage for loss or damage caused by the peril of windstorm during a hurricane. The term includes ensuing damage to the interior of a building, or to property inside a building, caused by rain, snow, sleet, hail, sand, or dust if the direct force of the windstorm first damages the building, causing an opening through which rain, snow, sleet, hail, sand, or dust enters and causes damage.

(b) "Windstorm" for purposes of paragraph (a) means wind, wind gusts, hail, rain, tornadoes, or cyclones caused by or resulting from a hurricane which results in direct physical loss or damage to property.

(c) "Hurricane" for purposes of paragraphs (a) and (b) means a storm system that has been declared to be a hurricane by the National Hurricane Center of the National Weather Service. The duration of the hurricane includes the time period, in Florida:

1. Beginning at the time a hurricane watch or hurricane warning is issued for any part of Florida by the National Hurricane Center of the National Weather Service;

2. Continuing for the time period during which the hurricane conditions exist anywhere in Florida; and

3. Ending 72 hours following the termination of the last hurricane watch or hurricane warning issued for any part of Florida by the National Hurricane Center of the National Weather Service.

Section 627.70132, Fla. Stat. (Notice of Windstorm or Hurricane Claim)

A claim, supplemental claim, or reopened claim under an insurance policy that provides property insurance, as defined in s. 624.604, for loss or damage caused by the peril of windstorm or hurricane is barred unless notice of the claim, supplemental claim, or reopened claim was given to the insurer in accordance with the terms of the policy within 3 years after the hurricane first made landfall or the windstorm caused the covered damage. For purposes of this section, the term "supplemental claim" or "reopened claim" means any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim. This section does not affect any applicable limitation on civil actions provided in s. 95.11 for claims, supplemental claims, or reopened claims timely filed under this section.

Preliminary Issues (Sebo)

Sometimes a loss is caused by both covered and non-covered losses, such as construction defects and hurricane, or even within a single apparent cause of loss, like hurricane windstorm and hurricane storm surge (flood water).

Sebo v. American Home Assurance Co., Inc.*, 208 So. 3d 694 (Fla. 2016)**. The homeowner's loss was caused by a combination of construction defect, design defects, and Hurricane Wilma. The 2nd District had referenced, but dismissed, the dependent/independent nature of the combined perils, and determined the CCD simply did not apply to multiple peril, first party insurance claims. The Florida Supreme Court held that when *dependent* perils combine to cause a loss, the efficient proximate cause doctrine ("EPC") applies: "The EPC provides that where there is a concurrence of different perils, the efficient cause—the one that set the other in motion—is the cause to which the loss is attributable." If the EPC is covered, the loss is covered. When *independent* perils combine to cause a loss, the concurrent cause doctrine ("CCD") applies: "We conclude that when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine. The CCD provides that coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause."

EPC

***Fire Ass'n of Phila. v. Evansville Brewing Ass'n*, 73 Fla. 904, 910-11, 75 So. 196 198-99 (1917)**. "While the insurer is not liable for a loss caused by an explosion which was not produced by a preceding fire, yet if the explosion is caused by fire during its progress in the building, the fire is the proximate cause of the loss, the explosion being a mere incident of the fire, and the insurer is liable. Where an explosion is an incident to a fire already in progress, the burning of the building is a 'direct loss or damage by fire,' within the meaning of the policy. If the explosion is not caused by a pre-existing fire, the insurer is liable 'for the damage by fire only,' if any, after the explosion."

***Hartford Accident and Indemnity Co. v. Phelps*, 294 So. 2d 362, 364 (Fla. 1st DCA 1974)**. " '[T]he efficient cause – *the one that sets the others in motion* – 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.' " Quoting Couch on Insurance. In *Hartford v. Phelps*, water leaked from the plumbing system under the house. When the water was pumped from beneath the house, the house settled. Water leaks from the plumbing system were covered under the insurance policy, yet there were specific exclusions for "water below the surface of the ground" and collapse. *Id.* at 363. The court held that because the leak from the plumbing system (covered) was the proximate cause of the water below the surface of the ground (excluded) and settling (excluded), the entire claim was covered under the EPC. *Id.* Coverage was required, and the exclusion did not apply, because the covered loss (plumbing leak) set the excluded losses (water below the surface of the ground and settlement) in motion.

7 Couch on Insurance §101.55. "The efficient proximate cause rule permits recovery under the insurance policy for a loss caused by a combination of a covered risk and an excluded risk only if the covered risk was the efficient proximate cause of the loss. The efficient proximate

cause of the loss is the one that sets the other causes in motion that, in an unbroken sequence, produced the result for which recovery is sought."

CCD

Sebo v. American Home Assurance Co., Inc., supra. "Also not in dispute is that the rainwater and hurricane winds combined with the defective construction to cause the damage to Sebo's property. As in *Partridge*, there is no reasonable way to distinguish the proximate cause of Sebo's property loss—the rain and construction defects acted in concert to create the destruction of Sebo's home. As such, it would not be feasible to apply the EPC doctrine because no efficient cause can be determined. As stated in *Wallach*, "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." *Wallach*, 527 So. 2d at 1388. Furthermore, we disagree with the Second District's statement that the CCD nullifies all exclusionary language and note that AHAC explicitly wrote other sections of Sebo's policy to avoid applying the CCD. Because AHAC did not explicitly avoid applying the CCD, we find that the plain language of the policy does not preclude recovery in this case."

Wallach v. Rosenberg*, 527 So. 2d 1386, 1387-88 (Fla. 3rd DCA 1988)**. "The appellants' second contention is that where concurrent causes join to produce a loss and one of the causes is a risk excluded under the policy, then no coverage is available to the insured. We reject that theory and adopt what we think is a better view—that the jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where "the insured risk [is] not ... the prime or efficient cause of the accident." 11 G. Couch, *Couch on Insurance 2d* § 44:268 (rev. ed. 1982). Where weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage. There is no contention here that the policy contains a provision which specifically excludes coverage where a covered and an excluded cause combine to produce a loss." Citations and footnote omitted.

***Hrynkiw v. Allstate Floridian Ins. Co.*, 844 So. 2d 739, 745 (Fla. 5th DCA 2003)**. "Under Florida law, the issue of multiple causes in cases involving coverage disputes is usually decided by application of the concurrent cause doctrine. This doctrine, which permits coverage when the injury is caused by multiple causes and one of the causes is an insured risk, only applies when the causes are not related and dependent, but rather involve separate and distinct risks."

***Paulucci v. Liberty Mut. Fire Ins. Co*., 190 F.Supp.2d 1312, 1319 (M.D. Fla. 2002)**: In comparing and contrasting the concurring cause and efficient proximate cause doctrines: "[W]here an excluded earthquake and covered fire were independent such as where loss is caused by an unrelated simultaneous earthquake and lightning strike, the efficient proximate cause doctrine would be inapplicable. In this scenario, the concurring causation doctrine would apply and mandate coverage regardless of which peril was covered and which peril excluded."

***W. Am. Ins. Co. v. Chateau La Mer II Homeowners Ass'n*, 622 So.2d 1105, 1108 (Fla. 1st DCA 1993)** Pursuant to the subject insurance policy and Florida law, coverage existed for

damage to balconies which resulted from both a covered cause (hidden decay) and an excluded cause (faulty design).

7 Couch on Ins. § 101:47. "Unless there is an express policy provision to the contrary, the requirement that the peril insured against be the proximate cause of the loss does not require that it be the sole cause of the loss. Coverage will exist under circumstances involving loss resulting from multiple contributing causes despite the fact that one of the causes is expressly excluded unless the excluded risk is the substantial or predominant cause of the loss." Ffootnotes omitted.

***Warth v. State Farm Fire & Cas. Co.*, 695 So. 2d 906, 908 (Fla. 2nd DCA 1997)**: Without noting the CCD, finding reversal and new trial was required where the verdict form was confusing and misleading. The sinkhole case's verdict form listed cracking as a policy exclusion without identifying the cause of loss. The jury instruction clarified that for State Farm to prevail, it must prove that something other than sinkhole activity caused the cracking, but the verdict form itself did not contain this clarification. The verdict form gave undue prominence to the cause of cracking identified in the exclusions, even though some of the cracking could have been caused by an insured cause (like sinkhole).

ACCC – The "Anti Concurring Cause" Clause

In order to avoid the coverage consequences of the CCD, insurers abrogate the doctrine by inserting an ACCC. Typical ACCC language provides, under "Exclusions":

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Following the exclusionary language is an extensive list of causes of loss which are not covered It is also apparent from the language of the ACCC that the ACCC is intended to exclude not only concurrent causes, but also efficient proximate causes ("or in any sequence to the loss").

In *Paulucci*, above, the court reviewed applicable case law and came to the conclusion "[U]nder Florida law, parties can contract around the concurrent cause doctrine through an express anti-concurrent cause provision." *Paulucci* at 1320. The court also referenced the fact that courts applying Florida law (and the law of other states) have repeatedly upheld the validity of policy provisions which exclude coverage where a loss results from a combination of covered and non-covered causes. *Id*.

In *Paulucci*, the insurer argued the insured's building collapsed in part because of wet and dry rot and wear and tear, excluded causes under the ACCC, and therefore no coverage was available. The insured argued the ACCC was a violation of public policy and against Florida law, and argued the building collapsed due to excessive rain pooling on the roof during Tropical Storm (formerly Hurricane) Gordon. After deciding the ACCC clause was valid in Florida, and recognizing the exclusion would completely bar the insured's claim, the court determined the evidence was conflicting as to the prior condition of the structure before the collapse and as to the severity of the storm:

> [I]n evaluating whether the anti-concurrent cause provision provides a defense in the instant case, there must be a factual determination as to whether the loss was caused by an excluded cause. Ultimately, summary judgment is not warranted for either party on this affirmative defense because questions of fact remain as to the storm's impact on the garage and as to the extent to which the structural condition of the garage was less than ideal.

Paulucci at 1318.

***Citizens Property Ins. Corp. v. Manning*, 966 So. 2d 486 (Fla. 1st DCA 2007)**. In *Manning*, the trial court determined the valued policy law required Citizens to pay its policy limits for losses sustained during Hurricane Ivan (on the authority of *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774 (Fla. 4th DCA 2004), superseded by statute, § 627.702(1)(b), Fla. Stat. (2005), as recognized in *Fla. Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815, 821 (Fla. 2007)). The First District Court of Appeal reversed the trial court award on the authority of *Fla. Farm Bureau Cas. Ins. Co. v. Cox*. The Mannings asserted a tipsy coachman argument, suggesting that Citizens did not meet its burden to prove that any damage was attributed to an excluded cause. The 1st DCA initially noted: "The record left no doubt that wind contributed to the total loss of the Mannings' home, but was unclear as to what damage the wind alone caused" and directly referenced the policy's ACCC. In direct response to the tipsy coachmen argument, the 1st DCA held:

> Because the record does not establish that wind alone caused damage that exceeded the deductible, however, the Mannings' "tipsy coachman" argument must fail. The record does contain an uncontroverted engineer's affidavit to the effect that wind, wind-driven rain, and storm surge combined to destroy the Mannings' home (and other evidence values the house at considerably more than the sum of the face amount of Citizens' policy and the flood insurance proceeds), but the record is devoid of evidence establishing the amount of damage caused solely by wind. The Mannings never even alleged that the amount of damage attributable to wind alone exceeded the policy deductible. Since the record does not establish this threshold fact, it is not clear that the Mannings are entitled to recover anything or that the burden to prove an exclusion will ever shift to Citizens.

Id. at 488, footnote omitted.

***Citizens Property Ins. Corp. v. Hamilton*, 43 So. 3d 746 (Fla. 1st DCA 2010)**. The Hamiltons' mobile home was destroyed by Hurricane Ivan. The Hamiltons had a National Flood Insurance Program (NFIP) policy which insured the residence and contents against flood loss. The Hamiltons also had a policy with Citizens which covered the residence, its contents, and outbuildings against certain named perils, including windstorm. The Citizens policy excluded coverage for losses caused by water damage, such as damage resulting from flood, waves, tidal water, and overflow. The Citizens also contained an ACCC which stated loss caused directly or indirectly by an excluded peril "is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."

When Hurricane Ivan hit, storm surge and waves washed away the mobile home, as well as a rabbit hutch and garage. The Hamiltons made a flood claim, asserting total loss as a result of flood, not wind. Hamiltons' NFIP adjuster recommended payment of policy limits for the full value of the home and contents, and NFIP paid its limits (totaling $94,700.00). The Hamiltons also made a claim against Citizens for total loss caused by windstorm. Citizens' adjuster concluded that only tree damage to the roof of the garage had been caused by wind, and Citizens paid $6,370 under its policy. The Hamiltons filed suit to recover full policy limits.

The parties trial experts offered differing opinions as to the cause of loss. The Hamilton's expert testified the majority of the damage was caused by high winds, and the storm surge just washed away the house. Citizens' expert testified the mobile home would not have sustained significant wind damage—that by the time with winds reached an angle to impact the home directly, the storm surge was already 2.6 feet above the mobile home's floor, and it only took a depth of about a foot to float the home off its foundation.

The jury determined the wind caused total loss of the home, and also damaged the garage and rabbit hutch. On appeal, among other things, Citizens claimed the trial court erred on not giving its proposed ACCC jury instruction that specifically gave the insureds the burden to prove damages caused solely by wind. The 1st DCA found the jury was adequately instructed, in part because the trial court instructed the jury that the Hamiltons shouldered the burden to prove what losses were sustained as a result of wind.[1]

Valuation and Setoffs from Multiple Policies

***Citizens Property Ins. Corp. v. Hamilton*, 43 So. 3d 746 (Fla. 1st DCA 2010)**. A primary allegation of error on appeal in *Hamilton* centered on whether the jury was allowed to know the amount of the flood claim settlement. Citizens was allowed to reference the flood coverage, flood damage, and flood loss claim, but not the dollar amount of the flood claim. In response, Hamilton argued the amount of the flood claim was not only irrelevant, but such information was barred by the collateral source rule.

The 1st DCA initially noted that it applied the collateral source rule both to tort and contract cases, then found the dollar amount of the flood recovery was properly excluded:

> As applied, the common law collateral source rule militates against evidence of the dollar amount of flood insurance payments, disbursed by an entity wholly independent of appellant, under a plainly distinct contractual obligation, and paid for entirely by premiums remitted by the Hamiltons. Accordingly, we find no abuse of discretion in the ruling on this matter. In reaching this conclusion, we do not minimize appellant's interest in presenting evidence to rebut the Hamiltons' claim that wind caused the total loss of the home. Generally, however, "there ... will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance-type benefits." Here, the trial court blocked appellant only from admitting the dollar amount of flood insurance payments and estimates, leaving Citizens free to

[1] Recall the Citizens policy was a "named peril" policy. "The Citizens policy insured the home, its contents, and other on-site properties against loss caused by certain named perils, including windstorm."

> reference the existence of the Hamiltons' flood insurance policy, the Hamiltons' submission of a flood claim, and the flood carrier's resulting adjustment of that claim, as well as the physical damage caused by flood. One of the flood adjusters specifically testified concerning preparation of an estimate for repair or replacement of the dwelling. Also Citizens had wide latitude to attempt proof through expert testimony that the loss came about entirely from flood.

Hamilton at 751-52, citation omitted.

***Citizens Property Ins. Corp. v. Ashe*, 50 So. 3d 645 (Fla. 1st DCA 2011)**. The first DCA revisited the collateral source wind/flood issue in another loss arising out of Hurricane Ivan. In *Ashe*, the insured received $225,200.00 in proceeds from a flood insurance policy. In the windstorm litigation against Citizens, Ashe successfully moved *in limine* to exclude all evidence of flood insurance coverage and payment. On appeal, Citizens argued the trial court erred in granting Ashe's motion and excluding evidence of Ashe's demand for flood insurance payments, and the payment of $225,200.00 in flood policy benefits. The 1st DCA agreed it was error to keep information about the claim out, but that it was proper to exclude evidence of the amount of flood insurance proceeds.

ROOF CLAIMS FOR OLDER ROOFS

Section 627.70132, Fla. Stat.

> Notice of windstorm or hurricane claim.—A claim, supplemental claim, or reopened claim under an insurance policy that provides property insurance, as defined in s. 624.604, for loss or damage caused by the peril of windstorm or hurricane is barred unless notice of the claim, supplemental claim, or reopened claim was given to the insurer in accordance with the terms of the policy within 3 years after the hurricane first made landfall or the windstorm caused the covered damage. For purposes of this section, the term "supplemental claim" or "reopened claim" means any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim. This section does not affect any applicable limitation on civil actions provided in s. 95.11 for claims, supplemental claims, or reopened claims timely filed under this section.

Replacement Cost

Section 627.7011(1), Fla. Stat., provides that insurers must offer replacement cost policies or endorsements.

> **Section 627.7011(3)(a), Fla. Stat.**:
>
> In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:
>
> (a) For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred.

Insurance policies may contain endorsements or policy language which mirrors the statute. In *Siegel v. Tower Hill Signature Ins. Co.*, ___ So. 3d ___, 2017 WL 3722502 (Fla. 3rd DCA Aug. 30, 2017), the court cited a policy endorsement containing the following language:

> We will initially pay at least the "actual cash value" of the insured loss, less any applicable deductible. We shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred.

Seigel at *3.

The prior version of Section 627.7011(3)(a), Fla. Stat., (before 2011), carried no such actual cash value limitation, and simply required the insurer to "pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured repairs the dwelling or property."

Note: Check to ensure the policy has not been changed to account for the statutory amendment. If the policy language includes the language that the insurer will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, subject to limitations on the amount paid, without incorporating the more restrictive statutory language, actual cash value limitation in the statute should not apply. *Green v. Life & Health of America*, 704 So. 2d 1386 1390-91 (Fla. 1998) ("It is well settled that, as a general rule, 'parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract.' ***Therefore, within reason, parties are free to contract even though either side may get what turns out to be a 'bad bargain.'" Citations omitted.); *Carguillo v. State Farm Mut. Auto. Ins. Co.*, 529 So. 2d 276, 278 (Fla. 1988) ("[A]n insurer may provide more coverage than is statutorily required…."); *Kingsway Amico Ins. Co v. Ocean Health, Inc*., 63 So. 3d 63, 68 (Fla. 4th DCA 2011) ("An insurance company is not precluded from offering greater coverage than that required by statute."); *State Farm Florida Ins. Co. v. Nichols*, 21 So. 3d 904 (Fla. 5th DCA 2009) (when the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control.); *Wright v. Auto–Owners Ins. Co.*, 739 So.2d 180 (Fla. 2d DCA 1999) (policy provision requiring payment in accordance with the PIP statute should not be construed to limit coverage to the minimum amount authorized by the PIP statute). *See, e.g.*, *GSG Holding, Inc. v. QBE Specialty Ins. Co*., No.: 1:15-cv-23385, 2016 WL 8793342 (S.D. Fla. Jun. 27, 2016), where the insurer paid actual cash value, holding back depreciation until repairs were made, consistent with the limitations afforded in the statute. However, the policy had no such limitation, and required payment of replacement cost (less deductible). When the insurer moved for summary judgment, the federal court stated its intention to enter summary judgment for the insured, instead.

Matching Materials

Section 626.9744(2), Fla. Stat.:

> When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

Florida Building Code "25% Rule"

Florida Building Code, Section 611.1.1:

> Not more than 25 percent of the total roof area or roof section of any existing building or structure shall be repaired, replaced, or recovered in any 12 month period unless the entire roofing system or roof section conforms to the requirements of this code.

HOW TO DEAL WITH LONG TERM DAMAGE

Section 627.70132, Fla. Stat.

> Notice of windstorm or hurricane claim.—A claim, supplemental claim, or reopened claim under an insurance policy that provides property insurance, as defined in s. 624.604, for loss or damage caused by the peril of windstorm or hurricane is barred unless notice of the claim, supplemental claim, or reopened claim was given to the insurer in accordance with the terms of the policy within 3 years after the hurricane first made landfall or the windstorm caused the covered damage. For purposes of this section, the term "supplemental claim" or "reopened claim" means any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim. This section does not affect any applicable limitation on civil actions provided in s. 95.11 for claims, supplemental claims, or reopened claims timely filed under this section.

Notice

Some policies require the insured to give "prompt notice" or "immediate notice" after a loss. "Prompt" or "immediate" notice does not mean instantaneous notice, but means with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case.

"Notice is necessary when there has been an occurrence that should lead a reasonable and prudent man to believe that a claim for damages would arise." *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3d DCA 1981).

***Laquer v. Citizens Prop. Ins. Co.*, 167 So. 3d 470 (Fla. 3rd DCA 2015)**. The policy required the insured to give "prompt notice" of any claim. Hurricane Wilma struck in October, 2005, and more than three years later, on May 19, 2009, the insured notified the insurer of hurricane related damage. The insurer argued a delay of more than three years was not prompt notice as a matter of law. The 3rd DCA disagreed, and said whether notice was "prompt" was an issue of fact. The court recognized:

> "Prompt" is undefined in the policy. It is well settled, however, that "prompt" and other comparable phrases, like "immediate" and "as soon as practicable," do not require instantaneous notice. *Cont'l Cas. Co. v. Shoffstall*, 198 So. 2d 654, 656 (Fla. 2d DCA 1967). Instead, Florida courts have interpreted these phrases to mean that notice should be provided "with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case." *Yacht Club on the Intracoastal Condo. Ass'n, Inc. v. Lexington Ins. Co.*, No. 13-12486, 599 Fed. Appx. 875, 2015 U.S. App. LEXIS 293, 2015 WL 106862, at *3 (11th Cir. Jan. 8, 2015) (citation omitted).

Laquer at 474.

***LoBello v. State Farm Florida Ins. Co*., 152 So. 2d 595 (Fla. 2nd DCA 2014)**. Sinkhole case requiring policyholder to "give immediate notice to us or our agent" after a loss. The insured noticed cracking in 2004, but did not make a sinkhole claim until 2008. State Farm moved for summary judgment, arguing: "Because the cracking first manifested itself in the LoBellos' residence in 2004 and they did not make a claim until 2008, counsel concluded that State Farm was entitled to a summary final judgment based on its defense of untimely notice." *LoBello* at 598. The trial court granted State Farm's motion. The 2nd DCA reversed, noting "immediate notice" meant "as soon as practicable" and was dependent upon the facts and circumstances of each case:

> In this case, the policy condition called for "immediate notice" of a "loss to which this insurance may apply." Such a provision will be read as meaning "as soon as practicable" and "call[s] for notice to be given with reasonable dispatch and within a reasonable time in view of all the facts and circumstances of each particular case." *Collura*, 163 So. 2d at 792. "All of the Florida cases bearing upon the question of the requirement of notice being given to the insurer seem to be uniform in the proposition that what is a reasonable time depends upon the surrounding circumstances and is ordinarily a question of fact for the jury." *Renuart–Bailey–Cheely Lumber & Supply Co. v. Phoenix of Hartford Ins. Co*., 474 F.2d 555, 557 (5th Cir.1972) (*citing Hartford Accident & Indem. Co. v. Mills*, 171 So. 2d 190 (Fla. 1st DCA 1965)); *see generally* Steven Plitt et al., *Chapter 190. Time Requirements–Introduction & General Principles; Standards & Measure of Compliance*, in 13 *Couch on Insurance*, § 190:30 (3d ed. 2013) (discussing notice provisions in insurance policies and stating that "an 'immediate notice' provision merely imposes a reasonable requirement").

LoBello at 599-600.

However, sometimes "late" is simply late as a matter of law. The key is a when there has been an occurrence that would lead a reasonable and prudent man to believe that a claim for damages would arise, *Waldrep*.

***Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3d DCA 1981)**. In *Waldrep*, the policyholder lent his aircraft to an acquaintance on November 23, 1978, for a one day trip to the Bahamas. The aircraft did not return, and a few days later, Waldrep located the aircraft and notified the Coast Guard and Bahamian authorities. By December 2, 1978, the authorities had inspected the aircraft, found the remains of the acquaintance, and "found that the aircraft had been damages by both a bullet hole in the right wing flap and by the saturation of [the dead acquanitance's] body fluids throughout the cockpit." On January 16, 1979, Waldrep flew over the aircraft and found it stripped, with the motor, fuel tank, and wheels removed, and with holes in the wings. On January 18, 1979—56 days after the aircraft went missing—Waldrep notified his insurer, Ideal, of the loss.

Waldrep's policy required him to give notice of loss "as soon as practicable to the Company or any of its authorized agents…." The 3rd DCA found the notice was untimely as a matter of law.

> In the present case, the record reveals no reasonable interpretation of the evidence which will support a finding that the notice of loss was given as soon as practicable. It should be borne in mind that the insured could not wait until the full extent of the damage to the aircraft was apparent, because the policy covered any "occurrence" resulting in injury to the aircraft. Notice is necessary when there has been an occurrence that should lead a reasonable and prudent man to believe that a claim for damages would arise.
>
> The decision of whether a policy's notice provisions have been complied with in a particular case must be evaluated on the facts of that case. No fact in this case justified a delay from late November, when Waldrep discovered the aircraft on the ground and U.S. Customs and Bahamian authorities reported the pilot dead in the cockpit, until the following January 15, when notice was given. Even if the reasonable reporting date is extended until early December, when Waldrep knew that the downed aircraft was on a remote island with the pilot murdered, with a wing damaged by gunfire and with the interior damaged by the saturation of human body fluids, the delay to mid-January cannot be justified.

Waldrep at 785-86, citations omitted.

Kroener v. Fla. Ins. Guar. Ass'n, 63 So. 3d 914 (Fla. 4th DCA 2011). In *Kroener*, the subject residence sustained interior and exterior property damage from Hurricane Wilma on October 24, 2005. The residence was unoccupied at the time, but the owners were aware of some damage. The owners never notified their insurer of the hurricane damage or made a claim. The Kroener's subsequently purchased the house, and sometime after the purchase, discovered a roof leak which was attributed to Hurricane Wilma. The prior owners assigned their insurance proceeds to the Kroeners. The prior owner's insurer had become insolvent, FIGA was successor in interest, and the Kroeners filed a claim against FIGA for the hurricane damages.

FIGA denied the claim, litigation ensued, and FIGA filed a motion for summary judgment asserting, *inter alia*, that a two year delay in reporting the claim violated the timely notice requirements. The trial court granted FIGA's motion and entered judgment for FIGA. The 4th DCA affirmed the summary judgment, noting:

> Although the trial court entered final summary judgment for FIGA under several theories, we agree with the trial court's ruling that, as a matter of law, notice to the insurer of a claim of loss more than two years and two months after the loss occurred was *not* prompt notice; the untimely reporting of the loss violated the insurance policy and was sufficient to bar the claim.

Kroener at 916, alteration in original.

***Yacht Club on the Intracoastal Condo. Ass'n., Inc. v. Lexington Ins. Co.*, 599 Fed.Appx. 875 (11th Cir. Jan. 8, 2015)**. *Yacht Club*'s unpublished federal opinion offers a comprehensive analysis of Florida law regarding late notice. *Yacht Club* arose out of a Hurricane Wilma claim (October 24, 2005). The Condo's Board knew of obvious damage from Wilma, but believed the cost to repair would not exceed the policy's deductible. In March, 2005,

the Board imposed a special assessment that exceeded the deductible, however, to pay for Hurricane Wilma damage. In 2006, the Board received a report which indicated roof damage due to Wilma. In late 2009, the Board retained a public adjuster, who attributed significant damage to Wilma and informed the Board it should make a claim under the Lexington insurance policy. On July 27, 2010, four years and seven months after Wilma, the Condo sent formal notice of its loss to Lexington, and ultimately filed suit in October, 2010.

The Lexington policy required "prompt notice of the loss or damage." Lexington moved for summary judgment, and the district court granted it, in part on a finding that the Condo's notice was not "prompt" as a matter of law. The 11th Circuit engaged in a lengthy and thorough analysis of "prompt notice":

> [U]nder Florida law, "prompt," "as soon as practicable," "immediate," or comparable phrases have been interpreted to mean that notice should be given "with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case." "Notice is necessary when there has been an occurrence that should lead a reasonable and prudent man to believe that a claim for damages would arise." "While the question as to what is a reasonable time, depending as it does upon the surrounding circumstances, is ordinarily for decision by the trier of facts, yet when facts are undisputed and different inferences cannot reasonably be drawn therefrom, the question is for the court."
>
> To be clear, there is no "bright-line" rule under Florida law setting forth a particular period of time beyond which notice cannot be considered "prompt." Rather, as would be expected given a standard that depends on facts and circumstances, Florida courts have found that notice several years after an occurrence is "prompt" in some cases, but not others. In *LoBello,* for example, new homeowners moved into property in 2002 and noticed cracking in 2004, but they attributed the problem to normal settling of the home. It was not until four years later when a friend recommended the homeowners consult with a public adjuster that they learned the cracking was caused by a sinkhole and filed a claim with their insurer. The court found that whether notice was "prompt" under these circumstances was a question for the jury. *See* 152 So.3d at 602.
>
> On the other hand, Florida courts have interpreted "prompt" differently when damage is caused by a known event, such as a hurricane, or when the insured was on-site when readily apparent problems developed. For example, in *1500 Coral Towers Condominium Association, Inc. v. Citizens Property Insurance Corporation,* 112 So.3d 541 (Fla. 3d DCA 2013), Coral Towers admitted that it had some knowledge of damage to the complex within a month after Hurricane Wilma, and that some repairs were made to the roof; however, no insurance claim was made until five years later on June 29, 2010. Under these circumstances, the court found there was "no factual dispute that Coral Towers failed to give timely notice of the loss." *Id.* at 543….
>
> We find as a matter of law that The Yacht Club's notice to Lexington was untimely. Mr. Capodanno clearly testified that immediately after the fact, the

> Board knew the structures had sustained damage from Hurricane Wilma. The Board even set aside a $150,000 special assessment to address this damage. These facts alone are sufficient to "lead a reasonable and prudent man to believe that a claim for damages would arise."

Yacht Club at 879-880, citations omitted.

The inquiry does not end with whether notice timely. Under Florida law, the "question of whether an insured's untimely reporting of loss is sufficient to result in the denial of recovery under the policy implicates a two-step analysis." *LoBello v. State Farm Fla. Ins. Co.*, 152 So. 3d 595, 599 (Fla. 2d DCA 2014). A determination that the notice was timely concludes the analysis. However, if the notice was untimely, then the analysis proceeds to the second step—whether the insurer is prejudiced by the late notice. In the absence of prejudice, coverage will lie.

Prejudice

***Bankers Insurance Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985)** (Condition precedent requiring notice of claim "can be avoided by a party alleging and showing that the insurance carrier was not prejudiced by noncompliance with the condition.");

***H.S. Equities, Inc. v. Hartford Acc. Indem. Co.*, 334 So. 2d 573, 574 (Fla. 1976)** ("Notice is not an absolute defense to performance of an insurance contract, but rather, if the insured can demonstrate the insurer was not prejudiced by late Notice, then the insurer will be liable under the contract.");

***Tiedtke v. Fidelity & Cas. Co. of New York*, 222 So. 2d 206, 209 (Fla. 1969)** ("[T]he proper interpretation of the effect of prejudice" in cases of noncompliance with condition precedent is "if the insurer has not been prejudiced thereby, then the insurer will not be relieved of liability….");

***Nationwide Mut. Fire Ins. Co. v. Beville*, 825 So. 2d 999, 1004 (Fla. 4th DCA 2002)** ("Unless the carrier was prejudiced by the insured's violation of the notice provision, the carrier could not avoid its duty to provide coverage for the expenses.");

***Independent Fire Ins. Co. v. NCNB Nat. Bank of Fla.*, 517 So. 2d 59, 64 (Fla. 1st DCA 1987)** ("It is well established in Florida decisions that, in general, when an insurer is entitled to receive notice as a condition precedent to maintaining an action on a claim, a violation of that provision will not operate to defeat coverage absent **substantial** prejudice to the insurer.")(emphasis added);

***Robinson v. Auto Owner's Ins. Co.*, 718 So. 2d 1283, 1284 (Fla. 2nd DCA 1998)** (Insured's violation of notice provision gives rise to rebuttable presumption that insurer has been prejudiced, presumption rebutted by demonstration that insurer was not prejudiced.);

***National Gypsum Co. v. Travelers Indemn. Co.*, 417 So. 2d 254, 256 (Fla. 1982)** ("When notice of a possible claim is not given to an insurance company, prejudice is presumed, but recovery is not precluded if the insured can demonstrate lack of actual prejudice.");

***Gonzalez v. USF&G Co.*, 441 So. 2d 681 (Fla. 3rd DCA 1983)** ("While a presumption of prejudice follows a finding of unreasonable notice, that presumption may be overcome by competent evidence.") (citation omitted);

***Holinda v. Title and Trust Co. of Fla.*, 438 So. 2d 56, 57 (Fla. 5th DCA 1983)** ("There are cases involving insurance claims which hold that while the failure of the insured to give timely notice of loss in contravention of the policy may constitute a legal basis for the denial of policy benefits, the insured may recover if he can show that the late notice did not prejudice the insurer.");

***Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3rd DCA 1981)** ("[T]he failure of an insured to give notice of loss to his insurer in accordance with the provisions of the policy creates a presumption of prejudice to the insurer. In such instance, the insured may recover only upon a showing that the late notice did not cause prejudice.") (citation omitted);

***Allstate Ins. Co. v. Korschun*, 350 So. 2d 1081, 1082 (Fla. 3rd DCA 1977)** ("While prejudice to the insurer is presumed in the case of non-compliance with such a notice requirement, the insurer will not automatically be relieved of liability simply by showing that notice was not given within the time provided for in the policy if the insured can demonstrate that the insurer has not thereby been prejudiced.").

"Substantial Prejudice"

***Bankers Insurance Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985)**. "In a breach of cooperation clause case… the insurer must show a material failure to cooperate which **substantially prejudiced** the insurer."

***Ramos v. Nw. Mut. Ins. Co.*, 336 So. 2d 71, 75 (Fla. 1976)**. "Only that failure which constitutes a material breach and substantially prejudices the rights of the insurer in defense of the cause will release the insurer of its obligation to pay. The question of whether the failure to cooperate is so substantially prejudicial as to release the insurance company of its obligation is ordinarily a question of fact, but under some circumstances, particularly where the facts are admitted, it may well be a question of law."

***Am. Fire & Cas. Co. v. Vliet*, 148 Fla. 568, 571, 4 So. 2d 862, 863 (1941)**. "The rule is that to constitute the breach of such a policy the lack of cooperation must be material and the insurance company must show that it was substantially prejudiced in the particular case by the failure to cooperate."

***State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1075, n.7 (Fla. 2014)**. "[I]f a cooperation clause has been breached, the insurer must show a material failure to cooperate which substantially prejudiced the insurer. [*Macias*] at 1217–18. Further, the Court held that a 'failure to cooperate is a condition subsequent and it is proper to place the burden of showing prejudice on the insurer.'" *Id.* at 1218.

***Axis Surplus Ins. Co. v. Carribean Beach Club Assoc., Inc.*, 164 So. 2d 684, 689 (Fla. 2nd DCA 2014)**. "To avoid liability through forfeiture, Axis must demonstrate that it was substantially prejudiced by Caribbean's noncompliance with the two-year clause. *See Ramos v. Nw. Mut. Ins. Co.*, 336 So.2d 71, 75 (Fla.1976). 'Only that failure which constitutes a material breach and substantially prejudices the rights of the insurer in defense of the cause will release the insurer of its obligation to pay.' *Id.* As noted earlier, our record is devoid of any prejudice suffered by Axis."

***Independent Fire Ins. Co. v. NCNB Nat'l Bank of Fla*., 517 So. 2d 59, 64 (Fla. 1st DCA 1987)**. "It is well established in Florida decisions that, in general, when an insurer is entitled to receive notice as a condition precedent to maintaining an action on a claim, a violation of that provision will not operate to defeat coverage absent substantial prejudice to the insurer."

***Am. Fire & Cas. Co. v. Collura*, 163 So. 2d 784, 794 (Fla. 2nd DCA 1964)**. "As we view it, the rule in Florida is that an insurance company, in order to avoid liability under its policy on the ground that the insured violated the cooperation clause, *must show that the lack of cooperation was material and that it was substantially prejudiced in the particular case by such lack of cooperation.*" Alteration (italics) in original.

SLAYTON ISSUES

or

When must the policyholder object to an insurer's inadequate estimate before filing suit?

***Slayton v. Universal Prop. & Cas. Ins. Co.*, 103 So. 3d 934 (Fla. 5th DCA 2012).** Slayton suffered a loss to her home, and Universal estimated that the total cost of repair would be $28,915.87. Slayton, however, submitted an estimate prepared by a public adjuster for $61,638.00. Universal tendered a check for its total estimate less the $1,000.00 deductible, in the amount of $27,915.87. Importantly:

> Universal notified Slayton in writing that "the amount of $27,915.87 does not necessarily constitute a full and final settlement of your claim for damages associated with your claimed loss" and that Slayton could "submit supplemental claims for any damages discovered in the covered reconstruction and repair of the above mentioned property."

Id. at 936. Slayton tendered the check, did not submit any supplemental claims to Universal (but *had* previously submitted the public adjuster's estimate for $61,638.00), and filed suit for breach of contract. The case proceeded to trial, and at the conclusion of Slayton's case, Universal moved for directed verdict. Universal argued:

> [T]hat its decision to pay the amount of its estimate (less the deductible) and then consider supplemental claims for additional damages discovered during or arising from the repairs was consistent with the terms of its insurance policy.

The 5th DCA agreed:

> That argument had merit. The insurance provision cited above unambiguously limited Universal's liability for the replacement or repair costs to the lesser of the policy limits, the replacement costs for like construction and use, or the necessary amounts actually spent to repair or replace.

Id. On appeal, Slayton argued policy provision violated Section 627.7011, Fla. Stat. (2009), which (prior to the 2011 amendment) required payment of replacement cost value without regard to whether or not the insured made repairs. The 5th DCA determined Slayton did not preserve that argument, and did not address it. Notably, the 5th DCA also determined: "Our decision does not preclude Slayton from submitting supplemental claims to Universal."

Several cases have been decided on appeal since *Slayton*, which distinguish its holding.

***Siegel v. Tower Hill Signature Ins. Co.*, ___ So. 3d ___, 2017 WL 3722502 (Fla. 3rd DCA Aug. 30, 2017)**. The Siegels suffered loss to their home, and Tower Hill's independent adjuster inspected the loss. The Siegels submitted their public adjuster's estimate in the amount of $30,716.23 ($33,216.23 minus a $2,500 deductible). Tower Hill sent a payment letter asserting the settlement was $4,304.75 ($6,804.75 estimate by Tower Hill's independent adjustor, minus the deductible). Like *Slayton*, Tower Hill's letter advised the Siegels that the

amount did not necessarily constitute full and final settlement of their claim, and invited the Siegels to submit supplemental claims for any damages discovered in the covered reconstruction and repair of the above mentioned property. The Siegels filed suit against Tower Hill for breach of contract, alleging that the $4,304.75 payment was inadequate.

Tower Hill moved for (and was granted) summary judgment. Tower Hill—relying on *Slayton*—argued it fully complied with the policy because the initial payment was based on the estimate prepared by its independent adjuster, and its loss settlement language was identical to *Slayton*. The 3rd DCA reversed. In distinguishing *Slayton*, the 3rd DCA recognized an endorsement to the Siegels' policy required Tower Hill to "initially pay at least the 'actual cash value' of the insured loss, less any applicable deductible," which mirrored the current language of Section 627.7011(3)(a), Fla. Stat. The 3rd DCA drew attention to the fact the statutory argument in *Slayton* was not preserved and the 5th had "explicitly declined to address" the statutory argument, and determined that were it not for the endorsement the Siegels' loss settlement language (and the language in *Slayton*) would violate the initial payment requirement of Section 627.7011(3)(a). When Tower Hill argued that it complied with the initial payment requirement because it paid *more* than the policy required, saying it paid replacement cost value ("RCV") instead of actual cost value ("ACV"), the 3rd DCA responded:

> We reject this argument because even if Tower Hill did pay the replacement cost based on its estimate, this amount would still be lower than the Siegels' actual cash value estimate, and consequently, a genuine issue of fact would still exist as to actual cash value. We find no support in *Slayton*—or any other authority Tower Hill cites5—for the proposition that the insurer is able to unilaterally determine, as a matter of law, actual cash value or replacement cost value.

Id. at *4.

Lastly, Tower Hill argued that the lawsuit was premature because it "had not yet issued a complete and final initial payment." The 3rd DCA rejected this argument as well, noting Tower Hill had the Siegels' estimate, and although it issued payment and invited supplemental claims, the supplemental claim was conditioned on whether the Siegels initiated repairs in excess of the replacement cost value that Tower Hill had unilaterally determined to apply.

***Francis v. Tower Hill Prime Ins. Co*., 2017 WL 2960690 (Fla. 3rd DCA July 12, 2017)**. Francis had roof leaks which caused interior rainwater damage. Tower Hill paid the policyholder, pursuant to an estimate computed by its Tower Hill's own appraiser, for the interior repairs, less the policy's deductible and depreciation. Tower Hill told Francis the amounts were based on ACV, and that she could make a claim for the depreciation after providing documentation the repairs were completed, and that she could submit supplemental claims for damage that was revealed as repairs were made. Francis used the proceeds to repair her roof instead of her interior. Francis then sued Tower Hill for breach of contract, claiming Tower Hill's ACV payment undervalued her interior damage claim. Tower Hill successfully moved for summary judgment, and argued Francis was not entitled to further compensation because she received payment for ACV of her interior loss, and because she did not use the proceeds to repair the interior damage.

The 3rd DCA reversed. After documenting that Francis's estimated proofs of loss totaled over $139,000.00 after deductible, and Tower Hill's appraiser's estimate was merely $15,000.00 after deductible, the court held: "It follows that the widely-divergent estimates of covered repair costs created a genuine issue of material fact precluding summary judgment regarding the roof leak claims." The 3rd DCA also rejected Tower Hill's argument that the case was governed by *Slayton*, noting Francis preserved her argument that Tower Hill violated Section 627.7011, Fla. Stat.

***Milhomme v. Tower Hill Signature Ins. Co.*, ___ So. 3d ___, 2017 WL 4158850 (Fla. 3rd DCA Sept. 20, 2017)**. Tower Hill investigated the Milhommes' claim, did not dispute loss, computed ACV and RCV, and issued a check for RCV, less the deductible. Tower Hill's transmittal letter informed the Milhommes it could consider supplemental claims for damages discovered in during repair. However, Tower Hill's gross estimate was about $20,000.00 less than the Milhommes' independent adjuster's estimate, which showed a clear disagreement in the ACV and scope of the work involved. Tower Hill refused to readjust the claim or pay anything further, and the Milhommes filed suit.

Tower Hill successfully moved for summary judgment, relying on *Slayton*, arguing that *Slayton* stood for the proposition that no breach occurs if the insurer pays the pays the amount its own adjuster computes to be due on the claim and also allows for "supplemental" claim submission (limited to additional damages which are discovered during the course of the reconstruction and repair).

The 3rd DCA reversed, noting that the amount computed by the Milhommes' independent adjuster was not a supplemental claim or for damages discovered during the course of repair, and there was a dispute in the amount owed. The 3rd DCA distinguished *Slayton* and refused to apply it for the reasons provided in *Siegel v Tower Hill Signature*, *supra*; *Francis v. Tower Hill Prime*, *supra*.

***Escobar v. Tower Hill Signature Ins. Co*., ___ So. 3d ___, 2017 WL 4399096 (Fla. 3rd DCA Oct. 4, 2017)** (Trial court's summary judgment in favor of insurer reversed upon confession of error by Tower Hill, and upon determining genuine issues of material fact existed as to the amount of the ACV of the insured loss, citing to Section 627.7011(3)(a), Fla. Stat. (2016); *Siegel v Tower Hill Signature*, *supra*; *Francis v. Tower Hill Prime*, *supra*.)

***Vazquez v. Southern Fidelity Prop. & Cas., Inc.*, ___ So. 3d ___, Case No.: 3D16-915 (Fla. 3rd DCA Oct. 11, 2017)**. Southern Fidelity paid its estimate of ACV, $773.37, and said it would issue no further payments unless repairs were made in excess of that amount. The homeowners' public adjuster estimated ACV at over $30,000.00. The homeowners sued. Southern Fidelity moved for summary judgment, arguing it had satisfied its policy and 627.7011(3) by paying ACV. In opposition, the homeowners filed the affidavit and estimate of their adjuster. Trial court entered summary judgment for insurer. The 3rd DCA reversed, recognizing: "Section 627.7011(3) requires payment of actual cash value – not merely the insurance company's estimate of actual cash value. Where, as here, there is a genuine issue of material fact as to the amount of actual cash value, the insurance company has sent the homeowners a letter indicating it does not intend to make any additional payments unless and until repairs are made, and the homeowners have brought an action challenging whether the

insurance company paid actual cash value as required by the policy and statute, summary judgment may not be granted in favor of the insurance company." Cites *Siegel*, *Francis*, and *Milhomme* (however, did not mention *Slayton*)

Federal Cases:

***Girard v. American Security Ins. Co.*, No.: 16-cv-61335, 2016 WL 4264054 (S. D. Fla. Aug. 12, 2016)**. In Girard, an action for breach of contract and declaratory judgment, the insurer successfully moved to dismiss the count containing the dec action. Girard argued a separate claim for declaratory relief was required, because *Slayton* prevented him from bringing a breach of contract action against his insurer for the underpayment of his claim. The Court found Girard's reliance on *Slayton* was misplaced because *Slayton* did not discuss whether an insured may assert a breach of contract action predicated on alleged insufficient coverage for a resulting loss or whether the insurer underpaid a portion of the claim, and dismissal of the dec action was appropriate because it was duplicative of the breach of contract claim.

> Indeed, Defendant argues that Plaintiff's breach of contract claim may provide full and adequate relief with respect to Defendant's alleged failure to fully indemnify Plaintiff for the "resulting" loss portion of the claim. Specifically, Defendant asserts that "[t]he court's finding in *Slayton* does not eradicate an insured's right to dispute the designated valuations for the repairs with a loss" and that Plaintiff has failed to demonstrate "how or why the proper valuation of Plaintiff's resulting damage cannot be resolved through the surviving claim."

Id. at *4.

***GSG Holding, Inc. v. QBE Specialty Ins. Co*., No.: 1:15-cv-23385, 2016 WL 8793342 (S.D. Fla. Jun. 27, 2016)**. GSG, a dissolved corporation, sustained a plumbing leak, and submitted a claim to QBE for the loss. QBE investigated, and determined the replacement cost value was $16,144.08 and, after accounting for the deductible and refundable depreciation, issued payment for actual cash value totaling $13,043.20. GSG obtained two estimates, in the amount of $79,405.48 and $78,342.16. GSG filed suit for breach of contract, and at the close of discovery, QBE filed a motion for summary judgment alleging, among other things, it did not breach the policy. Specifically, QBE argued under the policy language and *Slayton*, it did not have to tender any additional payment to GSG after tendering actual cash value. QBE argued that because GSG didn't repair the property QBE's responsibility to make additional payments was not triggered.

The federal court not only disagreed that QBE was entitled to summary judgment, it believed that GSG was entitled to summary judgment, and stated its intention to enter partial summary judgment in GSG's favor. The court noted that it was undisputed QBE tendered actual cash value and, despite the language of the statute, there was nothing in the replacement cost policy which entitled QBE to do so. The court distinguished *Slayton* on the grounds that the *Slayton* insurer paid its estimated replacement cost, and QBE paid its estimated actual cash value.