

MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670

(800) 637-9176 (262) 673-7850 Fax (262) 673-3766

<http://www.mwl-law.com>

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

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TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

HEALTH INSURANCE SUBROGATION

TRIAL LAWYERS JOIN THE FRAY IN *FORTIS* MADE WHOLE APPEAL

Texas Trial Lawyers Association Files Amicus Brief

By Gary L. Wickert

Last year we reported to you on the National Association of Subrogation Professional's (NASP) Amicus Curiae brief which was filed by Matthiesen, Wickert & Lehrer with the Texas Supreme Court in the case of *Fortis Benefits v. Vanessa Cantu and Ford Motor Co.*, No. 05-0791 (Texas Supreme Court). As you may recall, this case, appealed from the Texas Court of Appeals, involved the application of equitable defenses such as the made whole doctrine to contractual subrogation rights in the health insurance subrogation arena. Cantu filed suit to recover for injuries sustained in a motor vehicle accident on April 12, 1998. Fortis Benefits intervened into the suit, asserting an interest in any recovery by Cantu by virtue of its payment of medical benefits under a health plan issued to Cantu. This private, non-self-insured plan contained subrogation and reimbursement language granting Fortis a right of recovery notwithstanding whether the policyholder was made whole. Cantu settled the suit for \$1.445 million and claimed she was not "made whole". Fortis was not a party to the settlement. The trial court found that Fortis could not recover its \$250,000 subrogation interest because Cantu was not "made whole", and the Court of Appeals, with a strong dissent by one of the justices, affirmed. Fortis appealed the case to the Texas Supreme Court, and asked if NASP would consider filing an Amicus Curiae brief in support of the plan's subrogation rights. Last year, Gary Wickert, who is also licensed in Texas, filed an Amicus Curiae brief on behalf of NASP, setting forth the laws of the rest of the country in this area and urging the Supreme Court to reverse the Court of Appeal's decision and give effect to the clear language in the Fortis health plan. Our Amicus Curiae brief sets forth in detail the law in 28 of 33 states which have addressed this issue, that equitable/legal subrogation is totally different from contractual subrogation, and that the equitable made whole doctrine can and should be overridden by contract terms in a policy of insurance. The intent of the parties to the insurance contract should be given effect. Even major insurance treatises such as *Couch on Insurance* state clearly that the general equitable made whole doctrine should only apply "in the absence of contrary statutory law or valid contractual obligation to the contrary."

Trial lawyers are watching this case carefully because the made whole juggernaut has been one of their faithful tools of subrogation destruction over the last fifty years. In December of 2006, the Texas Trial Lawyers Association filed their own Amicus Curiae brief with the Texas Supreme Court in this case. Filed by a consortium of trial lawyers, the Amicus Curiae brief speciously picks through case law from around the country, urging the Supreme Court to deny Fortis' subrogation claim. In essence, they accuse Fortis of trying to "avoid the made whole rule" by "invoking a provision in its insurance contract 'supposedly' giving it the right to reimburse itself." Imagine that. They conspicuously fail to mention Cantu's efforts to avoid its contractual obligation to repay Fortis by invoking an equitable doctrine that has no application to contractual (conventional) subrogation. The trial lawyers make the following points in their brief:

- Fortis' contractual subrogation rights violate public policy;
- A "first money" subrogation clause does not prevent a double recovery and actually bestows a windfall on the insurer;
- Allowing reimbursement before the insured is made whole would not make health insurance more affordable;
- Allowing an insurer to "grab" the first money from a tort recovery would have "disastrous" and "inhumane" consequences for the injured; and
- The cited language does not clearly provide Fortis with a "right to first monies recovered".

The violins are playing loudly and in unison in this brief. I guess a recovery of \$1.2 million is "inhumane" in the minds of some. What is inhumane is the increasing burden of health insurance on the employing public of the country. Every Christmas, more employees learn that they will have to shoulder a larger and larger portion of their deductibles and co-pays and, in more and more situations, employees are having to shoulder the entire burden of skyrocketing health insurance costs. The stakes in *Fortis Benefits v. Vanessa Cantu and Ford Motor Co.* are huge - transcending any one case or insured. Texas and California remain powerful influences on the higher courts of many states. The decision by the Texas Supreme Court in this case can and will have repercussions extending way beyond the effect it has on the newest millionaire in Texas - Vanessa Cantu.

If you are interested viewing a copy of the Texas Trial Lawyers' Amicus Curiae brief, please click on the button below.

[TEXAS TRIAL LAWYERS' AMICUS CURIAE BRIEF](#)

AUTO SUBROGATION

FIRST-PARTY DIMINUTION IN VALUE CASES IN ALL 50 STATES

By Barry Zalma and Gary L. Wickert

When a car is damaged in an accident and then repaired, the resale value may be less than a comparable car that has not been damaged. In other words, the damage results in a reduction or "diminution" in the resale value of the auto. An insured's claim for this reduction in value may be made against a third party that negligently caused the damage to the insured's auto, or it may arise from a first-party claim against the insured's own physical damage coverage.

In third-party claims for property damage to automobiles as a result of a collision for which a third party was at fault, the measure of damages is traditionally - but not always - the difference between the market value

before and after the collision (“diminution of value”) or the reasonable repair value – whichever is greater. Such third-party diminution claims have generally been found by the courts to be covered by auto insurance since the measure of damage in tort claims (which the insurer promises to pay) is the difference in the value of the property before the loss and the value of the property after the loss. For example, Texas court cases have found that legal liability for third-party damages includes diminution of value. *Ludt v. McCollum*, 762 S.W.2d 575 (Tex. 1988); *Terminix Int’l, Inc. v. Lucci*, 670 S.W.2d 657 (Tex. App. 1984). In New Jersey, however, the measure of damages is the difference between the market value of the vehicle before and after the damage occurred. However, if the vehicle is not substantially damaged and it can be repaired at a cost less than the difference between its market value before and after the damage occurred, the plaintiff’s damages would be limited to the cost of the repairs. *Jones v. Lahn*, 63 A.2d 804 (N.J. 1949). Both cost of repair and diminution in value have traditionally been regarded as acceptable methods of proving the amount of damage to property in third-party cases. In *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289 (Alaska 2001), the Alaska Supreme Court used “diminution of value” as a method of establishing tort damages.

The Restatement of Torts § 928 states as follows:

“Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for: (a) the difference between the value of the chattel before the harm and the value after the harm, or at the plaintiff’s election, the reasonable cost of repairs or restoration where feasible, with due allowance for any difference between the original value and the value after repairs.”

The following states allow recovery for diminution in value of a damaged vehicle in a third-party claim. *Farmers Ins. Co. v. R.B.L. Investment, Inc.*, 675 P.2d 1381 (Ariz. 1983); *Trujillo v. Wilson*, 189 P.2d 147 (Colo. 1948); *Airborne v. Denver Air Center*, 832 P.2d 1086 (Colo. App. 1992); *McHale v. Farm Bureau Mutual*, 409 So.2d 238 (Fla. 1982); *Perma Ad Ideas v. Mayville*, 282 S.E.2d 128 (Ga. 1981); *Trailmobile Division v. Higgs*, 297 N.E.2d 598 (Ill. 1973); *Wiese-GMC v. Wells*, 626 N.E.2d 595 (Ind. 1993); *Halferty v. Hawkeye Dodge*, 158 N.W.2d 750 (Iowa 1968); *Orillac v. Solomon*, 765 So.2d 1185 (La. 2000); *Fred Frederick v. Krause*, 277 A.2d 464 (Md. 1971); *Hubbard v. Albuquerque*, 958 P.2d 111 (N.M. 1998); *Rosenfield v. Choberka*, 529 N.Y.S.2d 455 (N.Y. 1988); *EAM Advertising Agency v. Helies*, 954 P.2d 812 (Or. App. 1998); *Newman v. Brown*, 90 S.E.2d 649 (S.C. 1955); *Averett v. Shircliff*, 237 S.E.2d 92 (Va. 1977). It should be remembered that proof of diminution of value of a vehicle after repairs have been conducted can be difficult to prove and, in some states, the burden is quite high. See *EAM Advertising Agency v. Helies*, 954 P.2d 812 (Or. App. 1998). In some cases it may be necessary to actually sell it in its damaged condition in order to establish its post-crash market value or, at a minimum, engage an expert appraiser to provide a detailed report.

With regard to first-party claims, the ISO contract language (specifically the Limit of Liability condition) arguably appears to cover only the actual cash value (ACV) of the damage or the actual cost to repair the damage. There is nothing in the policy language that appears to contractually cover any reduction in market value, even if the insured were able to prove the amount of reduction in value. On the other hand, the policy clearly allows the insurer to deduct for “betterment” or depreciation, although the burden of proof is on the insurer to demonstrate such depreciation or betterment. In physical damage claims, the policy allows the carrier to deduct for an “improvement” in value (i.e., betterment) due to repairs with newer parts, but will not compensate the insured for a reduction in value due to the same accident.

There is a disparity among the various states regarding recovery of diminution of value in first-party cases. Insurance claims professionals should be aware of when and how the laws of each state deal with diminution of value. The following is a summary of how the first-party issue is treated in all 50 states:

Alabama: In a first-party suit by an insured against his insurance company, the Alabama Court of Appeals refused to allow diminution in value that the insurer was not required to compensate the insured for the

difference in the value of the vehicle before the collision and value of the vehicle after the damage caused by collision had been repaired. In *Pritchett v. State Farm Mutual Automobile Ins. Co.*, 834 So.2d 785 (Ala. Civ. App. 2002), the court said:

“After considering the arguments of the parties, the applicable insurance policy language, relevant Alabama case law, and the authority from other jurisdictions, we conclude that the provisions of the insurance policy at issue in this appeal do not require State Farm to restore an insured’s collision-damaged automobile to its pre-collision value. We agree with the trial court that the most appropriate interpretation of the ‘repair the damaged property or part, or replace the property or part’ provision requires that State Farm return the damaged automobile to substantially the same physical and operating condition as it occupied before the collision that caused the damage but that, under the unambiguous language of the insurance policy, State Farm is not required to restore the automobile’s value. In other words, under the ‘repair or replace’ language of the insurance policy, State Farm is not required to compensate its insured for any possible difference between the value of the insured automobile before the collision and the value of that automobile after the damage caused by the collision has been repaired. We affirm the trial court’s summary judgment in favor of State Farm.”

Alaska: In *Jackovich Revocable Trust v. State, Dep’t of Transportation*, 54 P.3d 294 (Alaska 2002), the Supreme Court used diminution of value in establishing the amount owed in a condemnation proceeding. As of the date of this publication, there were no Alaska cases available that deal with a claim for the loss of value of an automobile after repair by an insurer.

Arizona: Arizona’s Court of Appeals refused to allow recovery on a first-party claim for diminution of value in *Johnson v. State Farm Mutual Automobile Ins. Co.*, 754 P.2d 330 (Ariz. App. 1988), where it stated:

“We agree with the trial court that under the provisions of the insurance contract and the evidence here, plaintiff’s measure of damages is not the difference in the market value of the automobile immediately before and after the collision. The contract of insurance does not so provide. To apply such measure of damages would be arbitrarily reading out of the policy the right of defendant to make repairs or replace the damaged part with materials of like kind and quality.”

Arkansas: In *Daughhetee v. Shipley*, 669 S.W.2d 886 (Ark. 1984), the Arkansas Supreme Court held that:

*“It has long been the rule in Arkansas that the measure of damages for damage to personal property is the difference in the fair market value of the property immediately before and immediately after the occurrence. AMI Civil 2d, 226. The reasonable cost of repairs may be considered in determining this difference. Id. In *Golenternek v. Kurth*, 213 Ark. 643, 212 S.W.2d 14 (1948), we held that, ‘In the absence of other competent proof of market value, we have held that the difference in market value before and after the collision may be established by a showing of the amount paid in good faith for the repairs necessitated by the collision.’ Similarly, in *Beggs v. Stalnaker*, 237 Ark. 281, 372 S.W.2d 600 (1963), we held that where the jury was presented with the best evidence available, there, competent appraisals of the market value of the car before and after the collision, and the car owner’s testimony of what she had paid so far in repairs, then the jury was allowed to consider the cost of those repairs in assessing property damages.”*

See also, the Arkansas Supreme Court’s decision in *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979); *McDaniel v. Linder*, 66 Ark. App. 362, 990 S.W.2d 593 (Ark. App. 1999); and *Minerva Enter., Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (Ark. 1992). In *MFA Ins. Co. v. Citizens Nat’l Bank of Hope*, 545 S.W.2d 70 (Ark.1977), the issue was whether an automobile damaged by fire was repaired

with parts of like kind and quality would restore the automobile to its former condition where the policy provided the limits of liability to the "cost to repair or replace the property or such part thereof with other of like kind and quality, less depreciation." The trial court allowed damages for loss in market value as the automobile would not have the same market value it had prior to the fire even with the repairs. The Arkansas Supreme Court held that if repairs to a fire-damaged vehicle with parts of other like kind and quality would not restore the vehicle to its former market value, the proper measure of damages was the difference in market value before and after.

California: The California Court of Appeals in *Ray v. Farmers Ins. Exchange*, 200 Cal. App.3d 1411, 246 Cal. Rptr. 593 (Cal. App. Dist. 3, 1988) concluded:

"We will not rewrite an otherwise unambiguous limitation of collision coverage to provide for a risk not bargained for. To the extent Ray's automobile was repaired to its pre-accident safe, mechanical, and cosmetic condition, Farmer's obligation under the policy of insurance to repair to 'like kind and quality' was discharged."

Also, in *State Farm Fire & Casualty Co. v. Superior Court of San Diego County*, 215 Cal. App.3d 1435, 264 Cal. Rptr. 269 (1989), the court held:

"Diminution in market value' is not a 'peril' at all; it is a method of measuring damages. As was stated in Geddes: 'The measure of damages is the diminution in the market value of the building ...' (Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., supra, 51 Cal.2d 558, 565...). This language from Geddes was quoted by the Eichler court to support its conclusion that the diminution in the market value of the home was a 'separate and distinct' loss. (citations omitted). [D]amage to other property could be measured by the repair or replacement cost or by the diminution in value to the entire property caused by the presence of the defective product. ...neither diminution in value nor the cost of repair or replacement are active physical forces - they are not the cause of the damage to the structures; they are the measure of the loss or damage. ... diminution of market value is not specifically excluded because it is not a 'cause' of loss; it is the measure of a loss caused by something else."

Recovery for tort damages is therefore limited to the difference between the fair market value of the object before the loss and its value after the loss. Whether that is enough to repair or replace the item of property is irrelevant. Also see, *Moran v. California Dep't of Motor Vehicles*, 139 Cal. App.4th 688, 43 Cal. Rptr.3d 116 (Cal. App. Dist. 4, 2006), where the insured tried to have the state remove a "salvage title" because it diminished the value of the vehicle.

Colorado: In *Hyden v. Farmers Ins. Exchange*, 20 P.3d 1222 (Colo. App. 2000), the Colorado Court of Appeals held:

"When an automobile insurer promises to provide an insured with a vehicle 'of like kind and quality,' the insurer must provide the insured, through repair, replacement, and/or compensation, the means of acquiring a vehicle substantially similar in function and value to that which the insured had prior to his or her accident."

Also see, *Heritage Village Owners Ass'n, Inc. v. Golden Heritage Investors, Ltd.*, 89 P.3d 513 (Colo. App. 2004), where the court allowed for recovery of diminution in value for damage to real property.

Connecticut: With regard to damage to real property, the court has discretion to select either the repair measure which stands in as a proxy for diminution in value caused by damage to property in *Willow Springs Condominium Ass'n, Inc. v. Seventh Brt Dev. Corp.*, 245 Conn. 1, 717 A.2d 77 (Conn. 1998). At the time of this publication, there were no cases available dealing with insurance recovery as differentiated from tort recovery.

Delaware: The Delaware Superior Court (Delaware's highest trial court) in *Delledonne v. State Farm Mutual Ins. Co.*, 621 A.2d 350, 352 (Del. Super. Ct. 1992), denied cross motions for summary judgment finding that "repair or replace ... with like kind and quality" to be ambiguous and susceptible to two or more reasonable interpretations regarding loss in value. The *Delledonne* court determined that the majority of jurisdictions requiring the insurer to pay for diminution in value was the better view. However, that decision was short-lived because in *O'Brien v. Progressive Northern Ins. Co.*, No. 58, 2001 (Del. 2001), the Delaware Supreme Court joined the ranks of states strictly interpreting "repair and replace" language in automobile policies by holding that:

"We conclude that the language 'repair and replace' is not ambiguous and that this language does not contemplate payment for diminution of value."

District of Columbia: In *American Service Center Associates v. Helton*, 867 A.2d 235 (D.C. 2005), the court held:

"When a plaintiff can prove that the value of an injured chattel after repair is less than the chattel's worth before the injury, recovery may be had for both the reasonable cost of repair and the residual diminution in value after repair, provided that the award does not exceed the gross diminution in value. Our conclusion is overwhelmingly supported by decisions in other jurisdictions that have considered the issue, including neighboring Maryland and Virginia, which allow recovery for the cost of repair made plus the residual diminution in value."

This is a tort remedy and does not answer the question of the coverage available under a policy of insurance.

Florida: In *Siegle v. Progressive Consumers Ins. Co.*, 819 So.2d 732 (Fla. 2002), the Florida Supreme Court found that an automobile collision policy which provides that the insurer must repair or replace the damaged vehicle "with other of like kind and quality" does not obligate the insurer "to compensate the insured in money for any diminution in market value after the insurer completes a first-rate repair which returns the vehicle to its pre-accident level of performance, appearance, and function." See also, *Morrison v. Allstate Indemnity Co.*, 1999 WL 817660 (M.D. Fla. 1999).

Georgia: In *State Farm Mutual Automobile Ins. Co. v. Mabry*, 556 S.E.2d 114 (Ga. 2001), the Georgia Supreme Court found that the public policy of the state requires insurers to pay the diminished value as well as the cost of repair of an automobile even if the insured does not make claim for the diminished value. The court held:

"The fact of physical damage resulting from an event covered by the policy can reduce the value of a vehicle, even if repairs return it to pre-loss condition in terms of appearance and function; the policies issued by State Farm obligate it to compensate its policyholders for that loss of value, notwithstanding repairs that return the vehicle to pre-loss condition in terms of appearance and function, if the repairs do not return the vehicle to its pre-loss value; and State Farm is obligated to assess that element of loss along with the elements of physical damage when a policyholder makes a general claim of loss."

In *Hartford Fire Ins. Co. v. Rowland*, 351 S.E.2d 650 (Ga. App.1986), the Georgia Court of Appeals interpreted a policy providing that the insurance company pay for the "cost of repairing the damaged or stolen property with other of like kind or quality." It held that the meaning of repair included "restoration of the vehicle to substantially the same condition and value as existed before the damage occurred." The court determined that the insurance company had the "option to pay for the loss in money, to repair the vehicle, or to replace it with other property of like kind and quality, but the contract requires that no matter

which alternative is chosen, the market value of the property plus (deductible) after payment must equal the market value before the loss."

Hawaii: In *County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Haw. 1982), diminution of value was used to establish value for the purposes of condemnation. Similarly, in *Clog Holdings, N.V. v. Bailey*, 992 P.2d 69 (Haw. 2000) *Opinion Ordered Depublished (April 20, 2000)*, diminution was used as the method of establishing values for loss to real property.

Idaho: In *Boel v. Stewart Title Guaranty Co.*, 43 P.3d 768 (Idaho 2002), the court dealt with the need, in a suit against a title company, to show some diminution in value of the real property.

Illinois: The Illinois Court of Appeals in *Traveler's Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481, (Ill. 2001) found that there was coverage for property damage even though there was no physical injury but there was evidence of a diminution in value. Also see, *Sims v. Allstate Ins. Co.*, 851 N.E.2d 701, (Ill. App. 2006), where the court held:

"To expand the ordinary meaning of 'repair or replace ... with other of like kind and quality' to include an intangible, diminished-value element would be ignoring the policy's language or giving the policy's text a meaning never intended."

Indiana: In *Allgood v. Meridian Security Ins. Co.*, 836 N.E.2d 243 (Ind. 2005), the Indiana Supreme Court reversed a Court of Appeal's decision and held that diminution in value may not be recovered by the insured of an automobile policy. The Supreme Court noted that the policy provided that the insurer may choose to pay either the actual cash value of the vehicle or the amount necessary to repair, not some combination of the two. However, at the same time, the same court found in *Dunn v. Meridian Mutual Ins. Co.*, 836 N.E.2d 249 (Ind. 2005) that an uninsured motorist carrier must pay diminution of value since it stands in the shoes of the uninsured motorist and must pay tort damages.

Iowa: In *Hawkeye Motors v. McDowell*, 541 N.W.2d 914 (1995), the Iowa Court of Appeals held:

"The law in Iowa governing damages to automobiles is well-settled and follows three general standards. Papeheim v. Lovell, 530 N.W.2d 668, 671 (Iowa 1995). They are: (1) When the motor vehicle is totally destroyed or the reasonable cost of repair exceeds the difference in reasonable market value before and after the injury, the measure of damages is the lost market value plus the reasonable value of the use of the vehicle for the time reasonably required to obtain a replacement; (2) When the injury to the motor vehicle can be repaired so that, when repaired, it will be in as good condition as it was in before the injury, and the cost of repair does not exceed the difference in market value of the vehicle before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the vehicle for the time reasonably required to complete its repair; and (3) When the motor vehicle cannot by repair be placed in as good condition as it was in before the injury, then the measure of damages is the difference between its reasonable market value before and after the injury, plus the reasonable value of the use of the vehicle for the time reasonably required to repair or replace it."

In *Conditioned Air Corp. v. Rock Island Etc. Co.*, 114 N.W.2d 304 (Iowa 1962), the Iowa Supreme Court opined about the tort measure of damages, as follows:

"It is not unusual to allow recovery for the reasonable cost of repairing or restoring injured property, especially where the expense of so doing is less than the diminution of value because of the injury. And if the value of the repaired or restored property is less than the value of the property before the injury, such difference in value is also allowed, in addition to the reasonable cost of repair or restoration."

Also, in *K & W Electric, Inc. v. State*, No. 47/04-0643 (Iowa 2006), the Supreme Court used diminution in value as the measure in an inverse condemnation case. Indirectly, the Iowa Supreme Court in *Aetna Casualty & Surety Co. v. Ins. Dep't of Iowa*, 299 N.W.2d 484 (Iowa 1980), implied that an insurer could be responsible for diminution in value. The court held that:

"When the injury to the car can be repaired, so that, when repaired, it will be in as good a condition as it was before the injury, the automobile insurer must pay the reasonable cost of repair plus the reasonable value of the use of the car while being repaired, with ordinary diligence, not exceeding the value of the car before the injury; insurer cannot only pay diminution in value of the car caused by the accident unless and until a repair is actually undertaken."

Kansas: In *Venable v. Import Volkswagen, Inc.*, 519 P.2d 667 (Kan. 1974), the Kansas Supreme Court found that the proper measure of damages in Kansas, where repair fails to restore the property to its former condition and value, is the value of the vehicle immediately before the damage less the value immediately after repairs are made, plus the reasonable cost of the repairs may be applied. According to the decision in *Kansas Power and Light Co. v. Thatcher*, 797 P.2d 162 (Kan. App. 1990), the basic principle of contract damages is to make a party whole by putting it in as good a position as the party would have been had the contract been performed.

More recently, in *Dodson Aviation v. Rollins, Burdick, Hunter*, 807 P.2d 1319 (Kan. App. 1991), the Kansas Court of Appeals held:

"We believe that a reasonable person in the position of Dodson would have understood the limitations in the policy to cover the loss of value according to Venable as a result of hail damage less his deductible. In other words, Dodson's loss is not to be determined by who repaired the plane or the extent of repairs made."

Kentucky: In *General Accident Fire & Life Assurance Corp. v. Judd*, 400 S.W.2d 685 (Ky. 1966), an insurer is required to restore the physical condition but not the value of the damaged automobile which was followed by the Court of Appeals in *Tomes v. Nationwide Ins. Co.*, 825 S.W.2d 284 (Ky. App. 1991).

Louisiana: In *Campbell v. Markel American Ins. Co.*, 822 So.2d 617 (La. App. 2001), the Court of Appeals stated:

"The 'repair or replace' limitation of liability language operates to cap Markel's liability at the cost of providing physical restoration of the cycle and that the policy does not provide coverage for claims for the cycle's diminished value. As such, we agree with the conclusion reached by the Townsend court that the insurer's obligation is satisfied once payment is made for the full and adequate physical repair of a damaged vehicle..."

In *Defraites v. State Farm Mutual Automobile Ins. Co.*, 864 So.2d 254 (La. App. 2004), the Court of Appeals held:

"Louisiana law provides that diminution in value of a vehicle involved in an accident is an element of recoverable damages if sufficiently established. In a case involving damages to an automobile, where the measure of damages is the cost of repair, additional damages for depreciation may be recovered for the diminution of value due to the vehicle's involvement in an accident. However, there must be proof of such diminished value. Davies v. Automotive Casualty Ins., 26, 112 (La. App. 2nd Cir. 1994), 647 So.2d 419. The jurisprudence awarding damages for depreciation involves facts wherein a repaired vehicle decreases in value, despite a quality repair job, solely due to the fact that the vehicle was involved in a collision."

However, the court refused to allow the case to be certified as a class action since each party was required to prove individual damages.

Massachusetts: In *Given v. Commerce Ins. Co.*, 796 N.E.2d 1275 (Mass. 2003), the court applied the appropriate rules of contract interpretation and held:

"We will not torture the plain meaning of the terms 'repair' and 'replace' to encompass 'repair' or 'replace[ment]' of damage caused by stigma, a form of damage that, by definition, defies remedy by way of 'repair' or 'replace[ment]'. There is nothing exotic about the words 'repair or replace' as used in the standard policy - both words, in their ordinary usage, refer to the remedying of tangible, physical damage. See Webster's Third New Int'l Dictionary 1923 (1993) (defining 'repair' as 'to restore by replacing a part or putting together what is torn or broken'); Id. at 1925 (defining 'replace' as 'to place again: restore to a former place, position, or condition'). No 'objectively reasonable insured, reading the relevant policy language' would conclude that these terms include compensation for diminution in market value or for anything else beyond restoration of the vehicle's pre-collision physical condition. Hazen Paper Co. v. United States Fid. & Guar. Co., 407 Mass. 689, 700 (1990)."

The decision was repeated on the same date in *Roth v. Amica Mutual Ins. Co.*, 440 Mass. 1013, 796 N.E.2d 1281 (Mass. 2003) wherein a Massachusetts Superior Court addressed the issue of whether or not an insurance company is required to reimburse the insured for any loss market value due to the perception that an automobile involved in an accident is not worth as much. *Roth v. Amica Mut. Ins. Co.*, No. 98-3551 (Mass. Dist. Ct. Sept. 3, 1999). The relevant policy provision stated that "[i]n any event, we will never pay more than what it would cost to repair or replace the damaged property." The court determined that the policy did not require the insurance company to pay the cost of repairs plus the diminution in market value due to the alleged stigma of the accident.

Maryland: In *Reichs Ford Road Joint Venture v. State Roads Comm'n of the State Hwy. Admin.*, 880 A.2d 307 (Md. 2005), diminution of value was appropriate as a measure of damages in a condemnation case.

Maine: In *Hall v. Acadia Ins. Co.*, 2002 Me. 110 (Me. 2002), the Maine Supreme Judicial Court concluded:

"The term 'repair' is unambiguous and that the insurer's liability for a loss under the policy extends only to the loss that can be repaired as that term is commonly understood. Because diminution in value is a loss that cannot be repaired, an ordinary person would reasonably conclude that a claim for diminished value is not covered by the policy."

Michigan: In *Baranowski v. Strating*, 50 N.W.2d 744 (Mich. App. 1976), the court concluded the measure of damages to real property in a negligence suit where the damage cannot be repaired is the difference between the market value of the property before and after the injury; where the damage can be repaired and the cost of repair is less than the value of the property prior to the injury, cost of repair is the proper measure. The court in *Buckeye Union v. State of Mich.*, 178 N.W.2d 476, 383 Mich. 630 (1970) held:

"A partial destruction or diminution in value is a taking. Mills, Em. Dom. § 30; Pumpelly v. Green Bay Co., (1871), 80 U.S. (13 Wall) 166, 177 (20 L Ed 557); Cushman v. Smith, 34 Me. 247 (1852); Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308 (1874)."

In construing an insurer's obligation for payment of a claim to its insured under a theft provision of automobile insurance policy, the Michigan Court of Appeals held that the proper construction of the policy is that it covers all damage resulting, or which, in the contemplation of the parties, might result, from theft, which would include damages caused by reckless driving or handling of the car and storage of the same, or any use which destroyed its value in whole or in part. *Wetzel v. Cadillac Mutual Ins. Co.*, 169 N.W.2d 128 (Mich. App. 1969). This included the diminution in value of the stolen vehicle.

Minnesota: In *In re the Matter of the Commodore Hotel Fire and Explosion*, 324 N.W.2d 245 (Minn. 1982), the court held that the basic rule in Minnesota is that when a chattel is damaged, not amounting to total destruction in value, the damages include compensation for loss of use. Restatement (Second) of Torts § 928 (1979). Comment (b) to this section states that in addition to damages for diminution in value, the claimant is entitled to loss of use of which the defendant's tort is the legal cause and for tort damages. the diminution in value of the buildings in *Hauenstein v. St. Paul-Mercury Indemnity Co.*, 65 N.W.2d 122 (Minn. 1954) and constituted property damages within the ambit of the insuring agreement.

Mississippi: In *Potomac Ins. Co. v. Wilkinson*, 57 So.2d 158 (Miss. 1952), the court held that if, despite repairs, there remains a loss in actual market value, that deficiency is added to the cost of the repairs. In *Calvert Fire Ins. Co. v. Newman*, 124 So.2d 686 (Miss. 1960), the court held that the measure of loss to an automobile damaged but not destroyed by a collision is the difference between its reasonable market value immediately prior to the collision and its reasonable market value after all reasonable and feasible repairs have been made.

Missouri: In *Lupo v. Shelter Mutual Ins. Co.*, 70 S.W.3d 16 (Mo. App. 2002), the court found an automobile policy to be unambiguous and, according to the policy language, decided that diminished value is not a covered loss and that the insurer's liability was capped at either the actual cash value of the automobile or the cost to repair or replace the damaged automobile itself or with parts or property of like kind and quality. The specific policy language at issue read as follows:

"Part V, 'Limits of Liability'. Under COVERAGES F and G [collision and comprehensive coverage], the limit of our liability for loss will not exceed the actual cash value of the stolen or damaged property, nor what it would then cost to repair or replace it or such part with other of like kind and quality, less depreciation."

Likewise, in *Camden v. State Farm Mutual Automobile Ins. Co.*, 66 S.W. 3d 78 (Mo. App. 2001), the Court of Appeals found that an insurer "may choose to repair the damaged vehicle and where there is no allegation of inadequate repairs, the policy limits Insurer's liability to the cost of said repairs. Therefore, in the case at bar, we find inherent diminished value is not a covered loss in the policy." However, compare that with the Missouri Court of Appeals' decision in *Williams v. Farm Bureau Mut. Ins. Co. of Mo.*, 299 S.W.2d 5870 (Mo. Ct. App. 1957), in which it was held that "If the insurer, permitted to undertake repairs, falls short of substantial restoration of function, appearance and value, the insured, upon proper showing, can recover damages in an amount equal to the difference between the reasonable market value of the insured automobile immediately prior to the upset and its reasonable market value when tendered to plaintiff after repairs."

Montana: In *Safeco Ins. Co. v. Munroe v. Cogswell Agency*, 527 P.2d 64 (Mont. 1974), the Supreme Court concluded that diminution in value is property damage.

Nebraska: In a criminal case, the State failed to provide evidence, such as the cost to repair the vehicle or the diminution of value of the vehicle due to the fire, to convict the defendant in *State v. Arellano*, 262 Neb. 866, 636 N.W.2d 616 (Neb. 2001).

Nevada: As of the date of this publication, no applicable cases were found.

New Hampshire: As of the date of this publication, no applicable cases were found.

New Jersey: In *Titus v. West American Ins. Co.*, 362 A.2d 1236 (N.J. Super. 1976), the court concluded that actual cash value of an automobile loss is established as fair market value. In *Fanfarillo v. East End Motor Co.*, 411 A.2d 1167 (N.J. App. 1980), the court applied the principles set out in *Hintz v. Roberts*, 121 A.711 (N.J. Err. & App. 1923), which held that when the cost to repair a vehicle is proven, but there exists additional proof showing that even with the repair, the vehicle has depreciated, the plaintiff is entitled to

the reasonable cost of repair plus the depreciation, if any. *Premier XXI Claims Mgmt. v. Rigstad*, 885 A.2d 521 (N.J. Super. App. Div. 2005).

New Mexico: In *Davis v. Farmers Ins. Co. of Ariz.*, 142 P.3d 17 (N.M. App. 2006), the Court of Appeals decided to follow the majority trend toward disallowing recovery for the diminished market value under the terms of plaintiff's policy of insurance.

New York: In *Edwards v. Maryland Motor Car Ins. Co.*, 197 N.Y.S. 460 (N.Y. App. Div. 1922), the court held that diminution in value is damage embraced within the clause of the policy insuring the plaintiff against direct loss or damage by the peril of theft. The policy contained language that the insurance company had the option to "repair, rebuild, or replace the property lost or damaged with other of like kind and quality." The court found that "diminution in value is damage embraced within the clause of the policy insuring plaintiff 'against direct loss or damage' by the perils of 'theft, robbery or pilferage.'" The court went on to state that the liability is not severed by making the insurance company liable for actual cost of repairs or replacement. The court notes that this case allowed recovery for diminished value by finding coverage in another section of the insurance policy and not due to any obligation to repair the automobile with like kind and quality. In *Miller v. Sanchez*, 6 Misc.3d 479, 789 N.Y.S.2d 850 (N.Y. City Civ. Ct. 2004), the court accepted the difference in value as the proper measure of tort damages.

North Carolina: In *Parker v. Hensley*, 625 S.E.2d 182 (N.C. App. 2006), a case arguing about an award of attorneys' fees, the court allowed recovery of diminution in the value of the vehicle in question. Some years earlier, the North Carolina Supreme Court found that "*where the insurer elects to repair the damaged automobile and represents, at least tacitly, that it will place the vehicle in the condition that it was in previously, the insured has no choice but to acquiesce, and the original contract of the parties is converted into a new one, under which the insurer is bound to repair the automobile and restore it to its former condition.*" *Pierce v. American Fidelity Fire Ins. Co.*, 83 S.E.2d 493 (N.C. 1954). In this case, the automobile was not properly repaired. The court essentially found that the measure of damages is the fair market value of the car immediately before the collision and the fair market value after the accident.

North Dakota: In *Sullivan v. Pulkrabek*, 611 N.W.2d 162 (N.D. 2000), the North Dakota Supreme Court concluded:

"The measure of damages for injury to property caused by the breach of an obligation not arising from contract is presumed to be the reasonable cost of repairs necessary to restore the property to the condition it was in immediately before the injury was inflicted and the reasonable value of the loss of use pending restoration of the property, unless restoration of the property within a reasonable period of time is impossible or impracticable, in which case the measure of damages is presumed to be the difference between the market value of the property immediately before and immediately after the injury and the reasonable value of the loss of use pending replacement of the property."

Ohio: In *Nationwide Mutual Ins. Co. v. Shah*, 2004 Ohio 1291 (Ohio App. Dist. 5, 2004), the insured was not allowed to recover diminution in value of a damaged automobile under the Nationwide policy. Also see, *Goodman v. Grange Mutual Casualty Co.*, 2002 Ohio 6971 (Ohio App. Dist. 10, 2002). In *Kent v. Cincinnati Ins. Co.*, No. CA2001-04-100 (Ohio App. Dist. 12, 2001), the court found that there was no cause of action for diminished value of an automobile. Also, in *Banks v. Nationwide Mutual Fire Ins. Co.*, No. 99AP-1413 (Ohio App. Dist. 10, 2000), the Ohio Court of Appeals found that given the "*plain and unambiguous language in the contract regarding the type of parts that may be used for repairs, plaintiff did not state a claim for breach of contract when she alleged that Nationwide required the use of, or premised its repair estimates on, non-OEM parts.*"

Oklahoma: In *National Farmers Union Property & Casualty Co. v. Watson*, 298 P.2d 762 (Okla. 1956), the court held that the proper "*measure of recovery, under a policy provision is in no material respect*

different from paragraph 13, supra, as to an automobile that can be repaired, is the cost of putting it in as good condition as it was before the collision.”

Oregon: In *Dunmire Motor Co. v. Oregon Mutual Fire Ins. Co.*, 114 P.2d 1005 (Or. 1941), the Oregon Supreme Court ruled that the insured was entitled to the difference between the pre-loss and post-loss value of the vehicle and the proper repair of the car may not accomplish this result. The court stated that if the insurance policy specifically limits liability of the insurance company to "what it would then cost to repair or replace the automobile, or parts thereof, with other of like kind and quality," a complete restoration of the property has not occurred unless there has been no diminution of value after repair of the automobile.

Pennsylvania: In *Lobozzo v. Adam Eidemiller, Inc.*, 263 A.2d 432 (Pa. 1970), the Supreme Court specifically noted that, with regard to remedial damage to realty, a plaintiff may recover only the cost of repair or restoration without regard to the diminution in value of the property. A Pennsylvania District Court dismissed a class action lawsuit against Allstate for its failure to pay the diminished value of the automobile after a collision. *Munoz v. Allstate Ins. Co.*, No. 9906-2855 (Pa. D. Nov. 15, 1999). The policy language included the statement that the insurer would pay the "cost to repair or replace the property or part with other of like kind and quality." The court stated that it was unaware of any circumstances where an insurance company reimbursed the insured for diminished value. Furthermore, the court held that such payment would not be the norm, and could not form the basis for a reasonable expectation by the public.

Rhode Island: A Rhode Island Superior Court in *Cazabat v. Metropolitan Property & Casualty Ins. Co.*, 2000 WL 1910089 (R.I. Super. Ct. 2000) denied an insurer's summary judgment as to diminution of value in a case involving the following policy language:

"MAXIMUM AMOUNT WE WILL PAY. Our payments will not exceed the lesser of: (a) the actual cash value of the property at the time of loss; or (b) the cost to repair or replace the property with other of like kind and quality. If the loss is only to a part of the property, our responsibility extends to that part only."

The court found that an ambiguity existed as to whether or not "the cost of repair or replace the property with other of like kind and quality" includes damages for the inherent diminished value of an automobile resulting from the vehicle being in an accident. The court held that a dispute existed with respect to the parties' intent, and there existed a genuine issue of material fact that must be resolved by the jury.

South Carolina: In *Schulmeyer v. State Farm Fire & Casualty Co.*, 579 S.E.2d 132 (S.C. 2003), the South Carolina Supreme Court refused to follow the Supreme Court of Georgia and ruled:

"To read value into the repair clause would arbitrarily read out of the policy the insurer's right to determine whether to repair the vehicle or to pay for its loss. Bickel v. Nationwide Mutual Ins. Co., 143 S.E.2d 903 (Va. 1965). The language provision in the present case expressly limits coverage to the lesser of the actual value or the cost of repair. These are alternatives, which do not include an additional obligation to pay for diminished value when the cost of repair is chosen."

In South Carolina, the court would not read into the cost of repair an additional requirement to also pay for diminished value since, to do so, would render the limitation provision meaningless, as the insurer would essentially always pay for the value of the car. In an earlier decision, the South Carolina Supreme Court, interpreting the different policy language, could not find "there has been a complete restoration of the property unless it can be said that there has been no diminution of value after repair of the car." *Campbell v. Calvert Fire Ins. Co.*, 109 S.E.2d 572 (S.C. 1959) In *Campbell*, the court held that:

"It follows from the foregoing that where there is a partial loss and the automobile can be repaired and restored to its former condition and value, the cost of repairs is the measure of liability, less any deductible sum specified in the policy. But if, despite such repairs, there yet remains a loss in actual value, estimated as of the collision date, the insured is entitled to compensation for such deficiency."

The State Farm insurance contract in *Schulmeyer* was more specific in its obligations than was the policy in *Campbell*. The *Campbell* policy provided:

"The limit of the company's liability for loss shall not exceed either:
(1) the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss; or
(2) what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation; or
(3) the applicable limit of liability stated in the declarations."

The *Schulmeyer* policy provided:

"The limit of our liability for loss to property or any part of it is the lower of:
(1) the actual cash value; or
(2) the cost of repair or replacement.
Actual cash value is determined by the market value, age and condition at the time the loss occurred. Any deductible amount that applies is then subtracted."

The State Farm policy in *Schulmeyer* defined the term "cost of repair or replacement" as:

"(1) the cost of repair or replacement agreed upon by you and us;
(2) a competitive bid approved by us; or
(3) an estimate written based upon the prevailing competitive price ... [which] means prices charged by a majority of the repair market in the area where the car is to be repaired ..."

Additionally, the State Farm policy in *Schulmeyer* explicitly reserved the insurer's right to indemnify the insured "for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid."

South Dakota: In *Culhane v. Western Nat'l Mutual Ins. Co.*, 704 N.W.2d 287 (S.D. 2005), the South Dakota Supreme Court followed the majority and refused to allow recovery of diminished value after the full repair of a vehicle and applied the clear language of the insurance policy.

Tennessee: In *Black v. State Farm Mutual Automobile Ins. Co.*, 101 S.W.3d 27 (Tenn. App. 2002), the Tennessee Court of Appeals refused to apply diminution of value in Tennessee automobile policies finding the wording unambiguous and limiting the insured to repairs.

Texas: In *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454 (Tex. App. - Houston [14th Dist.] 2000), the court held:

"Where an insurer has fully, completely, and adequately 'repaired or replaced the property with other of like kind and quality' any reduction in market value of the vehicle due to factors that are not subject to repair or replacement cannot be deemed a component part of the cost of repair or replacement."

Also, in *Smither v. Progressive County Mutual Ins. Co.*, 76 S.W.3d 719 (Tex. App. - Houston [14th Dist.] 2002), the court refused to allow recovery of diminution of value. In *American Manufacturers Mutual Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003), the Texas Supreme Court held that:

“The actual market value of the vehicle before injury may be considerably less than the cost of repairs plus the loss of market value; or the actual market value may be more than the cost of repairs plus the loss of market value.”

The Supreme Court refused to rewrite the insurance contract and held:

“AMM elected to repair the damaged vehicle and Schaefer does not contend that the repairs were faulty, incomplete or inadequate. If he did, then the insurer might be liable for breaching its obligations under the policy's terms. But Schaefer would still only be entitled to the remedies outlined in the policy, which do not include compensation for a fully repaired vehicle's diminished market value. We acknowledge that Schaefer's repaired vehicle may command a smaller sum in the market than a like vehicle that has never been damaged, and that awarding Schaefer diminished value in addition to repair would go further to make him whole. But we may neither rewrite the parties' contract nor add to its language. See Royal Indemnity Co. v. Marshall, 388 S.W.2d 176, 181 (Tex. 1965).”

The Texas Department of Insurance Bulletin B-0027-00 (2000) states:

“The position of the Department is that an insurer is not obligated to pay a first party claimant for diminished value when an automobile is completely repaired to its pre-damage condition. The language of the insurance policy does not require payment for, or refer to, diminished value.”

Utah: The proper measure of damages for injury to personalty not entirely destroyed is the difference between its value immediately before and immediately after injury. *Angerman Co., Inc. v. Edgemon*, 290 P. 169 (Utah 1930). In some instances, proper repair will restore the market value of the property, but the plaintiff can recover, not only the reasonable cost of repairs, but also depreciation in market value, if any, after repair. *Metcalf v. Mellen*, 192 P. 676 (Utah 1920).

Vermont: At time of this publication no applicable cases involving repairs or damages to automobiles have been decided. However, in *American Protection Ins. Co. v. McMahon*, 562 A.2d 462 (Vt. 1989), a homeowner's policy covered the insured for claims brought against them for “property damages”. That term was defined as “physical injury to or destruction of tangible property, including loss of use of this property.” The insured's claim essentially was that the presence of toxic material in the walls of their house constituted “destruction of tangible property.” They claimed to have lost much of the beneficial use of the property - they can no longer live there without injury, and the property's resale value is diminished. The Supreme Court held that the homeowner's policy was required to indemnify the insured for the diminution in value.

Virginia: In *Bickel v. Nationwide Mutual Ins. Co.*, 143 S.E.2d 903 (Va. 1965), the Supreme Court refused to compensate an insured for the loss of his new car warranty because the policy did not make such an agreement and the diminution in value was not recoverable under the policy.

Washington: In *Heaphy v. State Farm Mutual Automobile Ins. Co.*, 72 P.3d 220 (Wash. App. 2003), the Court of Appeals was required to accept “diminished value” as a basis its decision because State Farm admitted it owed diminished value for the purpose of avoiding class action certification and to compel arbitration. The case stands for methods to determine diminished value or full indemnity. Although not an automobile case, the Washington Supreme Court in *Certification From United States Dist. Court for Western Dist. of Wash. v. Aetna Casualty and Surety Co.*, 784 P.2d 507 (Wash. 1990), in the dissent on subjects not involving diminution, added dicta the general rule that:

“Damages for injury to property are measured in terms of the amount necessary to compensate for the injury to the property interest. D. Dobbs 5.1, at 311. Therefore,

damages for injury to property are limited under Washington law to the lesser of diminution in value of the property or the cost to restore or replace the property.”

In *Thompson v. King Feed & Nutrition Service, Inc.*, 105 P.3d 378 (Wash. 2005), the Washington Supreme Court allowed recovery of diminished value of a structure. In so finding the court said:

“The owner is entitled to recover the entire cost of restoring a damaged building to its former condition unless such cost exceeds its diminution in value as the result of the injury, in which event the recovery must be limited to the amount of such diminution. Under this rule the court should receive evidence both as to the cost of restoring the building and as to the amount of its diminished value, and then adopt as the measure of damages the lesser of the two amounts.”

In *Kurtis R. v. Sto Industries, Inc.*, 132 P.3d 115 (Wash. 2006), the Washington Supreme Court recognized that where the damage to real property is permanent, a plaintiff is entitled to recover, not only for the costs of restoration and repair, but also for the property’s diminished value.

Wisconsin: In *Paulson v. Allstate Ins. Co.*, 649 N.W.2d 645 (Wis. App. 2002), the court found that *“plaintiffs in an automobile property damage case are entitled to either the reasonable cost of repairs or the diminution in fair market value of the vehicle, whichever is less. This agreement is in keeping with case law and the standard jury instruction.”*

West Virginia: As early as 1990, the West Virginia Supreme Court, in *Ellis v. King*, 400 S.E.2d 235 (1990), found as a method of determining recoverable damages:

“If the vehicle looked and operated substantially the same after the accident but its market value had been diminished by the fact of being in an accident, then to be adequately compensated, the injured party must receive, in addition to the cost of repairs, the diminution in market value stemming from the injury.”

The West Virginia Supreme Court, however, limited its holding, by stating:

“We caution that trial courts should narrowly construe our holding today. Not all damage to a vehicle would allow the plaintiffs to recover for diminution in value. First of all, there must be actual proof that the value was diminished following repair. Secondly, we require that the damage be structural, something that is integral to the structure of the vehicle. For example, if an automobile is sideswiped and, as a result, the right front panel of the car must be replaced, diminution in value would not be permitted. However, if the frame of a car is damaged and would affect the future use of the vehicle even after repair, then diminution in value is recoverable. Finally, we note that only a vehicle with significant value prior to the accident is subject to recovery. Frankly, a vehicle that is so old or in such poor condition as to have minimal value will not be subject to recovery for loss or diminution in value.” [Emphasis added]

Wyoming: In *Helm v. Board of County Commissioners, Teton County, Wyoming*, 989 P.2d 1273 (Wyo. 1999) the Helms’ complaint charged that the county’s breach of duty resulted in a home with serious defects rendering the home unsafe and virtually uninhabitable. Thus, the diminution of value stems directly from the damage to the property occasioned by the builders’ installation of a defect and/or from the loss of use of the property. This injury falls squarely within the plain language of the insurance policy exclusion. Since the policy did not cover the loss the suit could not be maintained. The Supreme Court also found, in *Miller v. Campbell County*, 901 P.2d 1107 (Wyo. 1995) that the diminution of value was an element of damage in an inverse condemnation case.

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