PERSPECTIVES

The Assault on Indemnity: Why Now Is the Time to Replace Actual Cash Value Language in Insurance Policies

Our perspectives feature the viewpoints of our subject matter experts on current topics and emerging trends.

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INTRODUCTION

Indemnification of the policyholder is a core principle of the property insurance industry. A similar principle holds that the policyholder shall be "made whole" but not put in a better position than it was prior to the loss. These basic principles led to the property insurance industry's near universal use of the valuation provision known as Actual Cash Value (ACV).

Over time, disputes involving ACV led to legal interpretations which varied by jurisdiction, resulting in no one rule or law that governed how ACV was to be determined. In recent years, attacks on the valuation methods used in certain states have led to judicially or legislatively mandated ACV calculations going well beyond the concept of indemnity and, often, resulting in loss calculations that do much more than make an insured "whole." In these jurisdictions, betterment—not indemnity and "made-whole"—has become the basic coverage grant guaranteed to a policyholder, not by the express terms of the policy but by law and statute.

Because of these developments there are now certain limitations on determining how to calculate ACV that are so restrictive we must question whether the ACV valuation language should be eliminated from insurance policies altogether. We must ask whether there is a better way to return property insurance policies to their original intent of indemnifying the insured for the actual loss sustained.

This paper discusses the issue in detail and offers practical recommendations for an industry currently mired in costly legal battles, the outcomes of which can result in ACV calculations which are fundamentally inconsistent with the basic principle of indemnity.

THE HISTORICAL BACKDROP

Early first-party property insurance policies used ACV as the basis for valuation of insured property and losses. ACV is terminology unique to insurance, and the language is almost never referred to in real estate or other forms of valuation.

In the past 50 years, ACV policies have been largely replaced by Replacement Cost Value (RCV) policies that allow for betterment in the event that property is repaired or replaced, and such policies have become the standard property insurance product sold in the United States. In these RCV policies, an insured is paid the cost of the installation of new materials without any deduction for age, wear, tear, or deterioration inherent in the damaged building components at the time of loss.

The insurance industry's recognition that RCV policies provide "new for old" replacement of damaged property led to a common policy provision requiring that the policyholder must repair or replace damaged or destroyed property (usually within a specified time period) to qualify for the coverage. If not, the valuation of the loss is calculated at the historical ACV measure. In most cases, the basic obligation of the insurer who has an RCV policy is to calculate the cost to repair or replace damaged property and make payment of the ACV amount as undisputed prior to making a final payment after the damaged property is actually repaired or replaced. Typically, insurance policies will contain language that will limit final payment to the calculated and agreed replacement cost loss, or the amount that a policyholder actually spends making replacement, whichever is less.

There are three methods used to calculate ACV, which vary widely by state:

1. **Replacement cost minus a deduction for depreciation** – although replacement cost and depreciation are not always defined in a policy.
2. **Market value** – in which the difference between the pre- and post-loss market value are used to calculate the amount of loss.
3. **The Broad Evidence Rule** – in which any fact or circumstance can be considered in arriving at ACV.

Of the three methods, the replacement cost minus depreciation method is by far the most widely used. In applying this method, the RCV loss is first determined, and an adjustment is made based on the pre-loss deterioration of a damaged or destroyed building component. Because most losses do not involve complete destruction of insured property, this method is usually applicable whether the loss

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is in a replacement cost minus depreciation, market value, or broad evidence state. This is because the diminution in value of a building component is typically synonymous with the pre-loss cost to make the component "as new."

For example, when a house damaged by wind has rotted windows which required replacement prior to a loss, the insurer calculates ACV by applying depreciation to the cost to replace the windows, which is the amount to make the windows "as new" prior to the loss.[1] In doing so, the insurer calculates the amount to put the insured back in the same position they were immediately prior to the loss—no better, no worse.

In the opinion of the author, the most equitable rule for determining ACV is the market value rule, which is the minority rule in the United States and was the standard by which ACV losses were calculated in California until recently. This rule assumes that "loss" is measured as an economic concept in which the insured's financial loss, resulting from a peril covered by insurance, is the amount by which the property's market value was diminished by the damage.

The broad evidence rule, which is the majority rule by judicial application in the U.S. traces its roots to the 1928 New York Court of Appeals decision in McAnarney vs. Newark Fire Insurance Company[2]. In that decision, McAnarney was the owner of a beer brewery that was destroyed by fire. The fire occurred during the National Prohibition Act, making malt production illegal. McAnarney made a claim to repair the property under their ACV policy. Newark took the position that since a brewery was a special purpose property that existed solely for the purpose of producing a product banned by the U.S. government, that the property had little or no value. The court ultimately rejected each party's methods of valuation, stating that multiple factors must be considered in determining the amount of loss.

In McAnarney, the court held as follows:

> *"Where insured buildings have been destroyed, the trier of fact may, and should, call to its aid, in order to effectuate complete indemnity, every fact and circumstance which would logically tend to the formation of a correct estimate of the loss. It may consider original cost and cost of reproduction; the opinions upon value given by qualified witnesses; the declarations against interest which may have been made by the assured; the gainful uses to which the buildings might have been put; as well as any other fact reasonably tending to throw light on the subject."*

Market value and broad evidence applications allow an insurer to take economic factors into account when ACV is not easily calculated by quantifying the extent of deterioration of building components in order to determine the amount necessary to effectuate indemnity. For example, in the late 1970s and early 1980s, urban blight in major cities in America resulted in the market value of existing structures being a small fraction of their replacement costs. It was not uncommon for a building with a $1 million replacement value to have a $100,000 market value, including the land and building.[3] In those cases, determining the ACV loss by calculation of replacement cost minus depreciation, in which depreciation was limited solely to deterioration, typically resulted in an ACV measure that was many times greater than the economic loss suffered by the policyholder. This created a moral hazard to the extent that a policyholder can recover more than the actual economic loss without making repairs.

To summarize, if ACV is appropriately defined as "an amount of money that effectuates indemnity," then the market value method is the most equitable way to determine ACV, as it bases the calculation solely on the economic loss sustained by the policyholder.[4]

[1] "As new" is calculated as a sum that will provide the same utility and life span that the building component had when it was originally installed.
[2] McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928)
[3] This situation still exists in many areas today.
[4] It is the author's opinion that the appropriate application of the broad evidence rule requires the fact finder to determine the amount to indemnify a policyholder. Thus, the broad evidence rule and market value rule should result in identical amounts in almost all cases.

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THE EARLY ASSAULT ON INDEMNITY: STEWART DICKLER, BEECH TREE RUN VS. CIGNA

In the early 1990s the author was retained as a litigation expert in a matter regarding a June 1988 fire at a school building over 50 years in age in Wantagh, Long Island, New York. The school was situated in a residential neighborhood that had been substantially vacant for almost a decade prior to Wantagh entering into an agreement, before the fire occurred, to sell the school, and the property on which it sat, to developer Stewart Dickler. The cost of repairing the fire damage exceeded $3 million; however, Cigna determined it did not result in a compensable ACV loss under Wantagh's policy for several reasons, including the fact that Wantagh (the named insured) had no economic basis for pursuing a claim for a building it had deemed to have no value. After the fire, but prior to closing, Dickler negotiated for and obtained an assignment of Wantagh's rights under the policy while in contract to purchase the land and building. The following facts were known to Cigna at the time it determined that the ACV loss was zero:

1. Wantagh had previously determined that the existing school had no use value to the district and was not the highest and best use of the property.
2. Prior to the fire, Wantagh considered eliminating the property coverage for this location.
3. Prior to the fire, Wantagh studied adaptive re-use of the school and concluded it should be sold to a developer who would build houses on the site.
4. Prior to the fire, Dickler had planned to sub-divide the property, demolish the school, and build houses on the site, and was in the process of going through local government approvals prior to closing.
5. The demolition cost post-loss was the same or less than Dickler was going to incur to remove the building in its entirety had there been no loss.
6. No adjustment of the purchase price was negotiated post-loss.

Ultimately, Dickler brought suit against Cigna. At trial, the author testified that under the broad evidence rule in New York, it was clear that consideration of all evidence that would lead an expert to "indemnity" resulted in an ACV loss calculation of zero. Not only was there no diminution in the pre- and post-loss market value of the property, but any payment at all would result in an economic windfall to Dickler (or, for that matter, the named insured, Wantagh). However, rather than use the traditional ACV language typically found in most New York policies (which, at that time, rarely defined the term ACV), the Cigna policy defined ACV as "replacement cost minus depreciation."

At trial, the federal court awarded replacement cost without a deduction for depreciation. Cigna appealed. Ultimately, the Third Circuit Court of Appeals ruled that because Cigna chose to define depreciation in its policy, it was prohibited from calculating the loss using the broad evidence rule. At trial, the author also testified that depreciation is defined simply as "a loss in value from any cause," which is the commonly recognized and legal definition in cases involving valuation of real property. Despite this, the appeals court found that in the insurance industry, the common meaning of "depreciation" includes physical deterioration only, and thus Cigna was prohibited from calculating the loss under the New York broad evidence rule.

It is worthwhile to review the court's reasoning, in part:[5]

> *"We next must determine how to calculate actual cash value. Insurance contracts often fail to define actual cash value, leaving that task to the courts. Courts confronting such contracts have defined the term actual cash value in essentially three ways: 1) as fair market value; 2) as replacement cost less depreciation, and 3) according to the broad evidence rule. The broad evidence rule allows the factfinder to take into account all pertinent evidence on the subject of value including, the cost of restoration or replacement of the building less depreciation;*

[5] Dickler v. CIGNA Property and Cas. Co., 957 F.2d 1088 (1992)

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the age of the property; the economic value of the property; the condition in which the property is maintained; the income derived from the building's use; the property's location; the degree of obsolescence, both structural and functional; the profit likely to accrue on the property; the material of which the building is composed; the market value; the opinions regarding value given by qualified witnesses; the potential gainful uses to which the building might have been or may be put; the building's value for purposes of rental; and any other facts disclosed by the evidence which may possibly throw light on the actual value of the building at the time of loss, including the property's salvage value, if any. Insuring Real Property § 24.04(2) at 2430 (Stephen A. Cozen, ed., 1989).

In McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928), a case that involved malt production factories that could no longer be used for their intended purpose because of the National Prohibition Act, the New York Court of Appeals interpreted the undefined term actual cash value in New York's standard fire insurance policy. The Court rejected both market value and replacement cost less depreciation as appropriate definitions of actual cash value and instead adopted the broad evidence rule. CIGNA argues that, because New York law applies to our case, McAnarney requires us to define actual cash value in accordance with the broad evidence rule. Indeed, CIGNA's expert witness on the subject of the building's value initially reached his conclusion regarding the building's lack of actual cash value by employing the broad evidence rule, which allowed him to take into account his belief that the building's existence precluded more profitable uses of the land on which the building stood.

However, we cannot ignore the language of the contract in this case, which defined actual cash value as replacement cost less depreciation. New York courts only apply the broad evidence rule when the insurance contract, like New York's standard fire policy, does not itself define actual cash value. When the parties to an insurance contract agree to define actual cash value as replacement cost less depreciation, the broad evidence rule does not apply."[6]

Ultimately, because Dickler put on no evidence of depreciation at trial, the appeals court gave Dickler the option of accepting the amount of depreciation testified to by the author or conducting a second trial to determine physical depreciation. The author then testified as an expert at a second trial in which Cigna prevailed in its calculation as to the amount of physical depreciation (deterioration). The ultimate payment exceeded $1 million.[7]

THE NOTION THAT ACV CLAUSES ARE NOT ALWAYS INTENDED TO INDEMNIFY: S.R. INTL. VS. WORLD TRADE CENTER PROPERTIES – THE DESTRUCTION OF THE WORLD TRADE CENTER ON SEPT. 11, 2001

Prior to the destruction of the World Trade Center (WTC) in 2001, the owner of the property, The Port Authority of NY and NJ, requested proposals to enter into a long-term net lease agreement to operate the WTC site. The WTC site included two 110-story towers, two low-rise structures, the largest retail mall in Manhattan, and subgrade areas

[6] It should be noted that the court also opined that in the business of insuring property, depreciation is commonly referred to mean "physical" depreciation only, ignoring the broadly accepted definition that depreciation is a "loss in value from any cause."
[7] Ultimately, Dickler purported to assign its rights to collect the RCV to a not-for-profit private school, as a "charitable donation." However, Cigna was successful in having a court rule that these rights could not be assigned.

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beneath the towers (the "Bathtub"). Bids were received from numerous real estate operators. After an initial announcement of an award of the lease to a New York real estate entity (Vornado), the parties failed to consummate a deal in the first quarter of 2001. Soon thereafter, New York City developer Larry Silverstein (and partners) entered into an agreement to net lease the property for a reported value of $3.2 billion. Only a matter of weeks prior to the September 11, 2001, terrorist attack, the Silverstein parties (World Trade Center Properties) were in negotiations for the placement of property insurance.

On September 11, 2001, the insured WTC property was destroyed in a terrorist attack. However, at that time the final insurance policy had not been fully negotiated and issued. Although almost two dozen insurers had issued binders in which they agreed to participate in the insurance program, the final policy language was never agreed to. Soon after 9/11, WTC Properties advised the interested market of insurers that the two aircraft strikes constituted two separate occurrences, thus entitling them to two times the stated $3.2 billion policy limit. Although this matter was litigated for several years resulting in the majority of the market liable for only one occurrence,[8] some carriers were found liable for two occurrences. Ultimately, because experts for the insurers opined that neither the RCV nor ACV losses exhausted two times the policy limit, the questions of value still had to be determined. As a result, the valuation disputes were submitted to an appraisal panel for determination.[9]

Prior to 9/11, Travelers Insurance Company ("Travelers") agreed to participate in the property insurance and was negotiating with their broker, (Willis) to have their policy form adopted by both the market of insurers and the insured. In fact, Travelers formally issued their policy form to WTC Properties several days after 9/11, informing WTC Properties that its form would govern Travelers's obligations in connection with the claim.

The Travelers form contained the following ACV definition:

> *"Actual Cash Value means the cost to repair, rebuild or replace the lost or damaged property, at the time and place of the loss, with other property of comparable size, material and quality, less allowance for physical deterioration, depreciation, obsolescence and depletion."*

As part of the determination of value undertaken in both the litigation and appraisal, the insurers formulated opinions based on the above definition that led to the conclusion that the economic loss sustained by WTC Properties was equivalent to the contributory market value of the buildings that were destroyed on 9/11 to the total market value of the property.[10]

During the appraisal process, the parties asked the court to interpret the Travelers ACV language in order to inform the appraisal panel of the appropriate method of calculating the ACV loss. A review of the court's discussion of ACV is useful:[11]

> *"First, the Insurers' argument takes a reading of depreciation appropriate to the McAnarney Court's specific analysis of what to do when an insurance policy contains no definition of actual cash value, and imposes it on the Travelers form, which does contain such a definition, even though the reading in the one context is unquestionably inconsistent with the reading in the other. New York's standard fire insurance clause in force at the time of McAnarney insured property owners to the extent of actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage. After setting forth the broad evidence rule as described above, the Court commented that the word (depreciation) means, by derivation and common usage, a fall in value (reduction of worth). It is incorrect to view this statement*

[8] Prior to 9/11, WTC Properties' insurance broker, Willis, was negotiating to have their custom manuscript "Wilprop" form adopted by the market. This form was determined by the court to have occurrence language that limited the "Wilprop" insurers to a single occurrence. A trial ultimately determined which insurers had bound coverage to the "Wilprop" form.
[9] The author was initially a valuation expert on RCV and ACV for the interested insurers and, ultimately, became the party appointed appraiser in the "appraisal" of the loss demanded by one insurer (Allianz). Because the policyholder rejected the appraisal demand, a legal battle ensued regarding whether an appraisal was appropriate. Ultimately, the court ruled in Allianz's favor and the "2 Occurrence" insurers participated in the appraisal with the insured.
[10] The $3.2 billion transaction value of the 99-year lease was determined to be the market value. After subtracting the remaining land, the market value of the destroyed building was significantly less than the transaction value. No debris removal expenses were incurred by the insured as part of the clearing of the site, the cost of which was borne by the government. The author was deposed as an expert in the litigation, prior to appraisal.
[11] SR Intern. Business Ins. Co. Ltd. v. World Trade Center..., 445 F.Supp.2d 320...

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about the general meaning of the term as suggesting that depreciation cannot refer to a fall in value attributable to a particular cause, and still stay true to its derivation and common usage; the statement quoted from McAnarney certainly did not imply that the mere appearance of the term depreciation in a policy requires a fact-finder to consider any piece of evidence relevant to a fall in value, no matter what other language appears in the policy.

McAnarney's discussion of depreciation appears after the Court had already determined that the broad evidence rule applied, and thus it is appropriate, when dealing with a case controlled by McAnarney, to treat the term as expansively as that rule allows. The Insurers' motion asks this court to do precisely the reverse. The Insurers ask for a determination that the broad evidence rule applies based on an expansive reading a priori of depreciation so as to compel application of the broad evidence rule. That is, the Insurers ask the court to use a definition of depreciation that assumes the applicability of the broad evidence rule in order to determine that the broad evidence rule applies. An argument that starts out by assuming the desired result is something less than compelling."

The court then addressed the principle of Indemnity, as follows:

"The Insurers suggest also that the concept of indemnity compels an interpretation of the Travelers form consistent with the broad evidence rule[…]The Insurers are certainly correct that Indemnity is the basis and foundation of all insurance law[…]and that the purpose of indemnity is to repay the owner[...]such sum of money as will, as nearly as possible, place such owner[...] financially in the identical position in reference to the building destroyed,[…] However, that broad concept, to the extent applicable here, does not compel a finding that the language in the Travelers form embodies the broad evidence rule.
In aid of complete indemnity, the broad evidence rule lets the fact finder consider all the one hundred and one[...]things that go to fix the value of any property[...]However, the most common and obvious criticism of this approach is the lack of certainty or predictability that use of the rule entails[…] The Insurers would have this court read the Travelers form, which calls for a four-factor deduction from replacement cost, as a direction to account for the one hundred and one factors that bear upon a property's value. The broadly phrased theoretical principles of property insurance law do not require that all insurance contracts be read to provide complete indemnity, assuming such a goal is attainable; nor do they override contractual language that foregoes the unbounded fact-finding of the broad evidence rule in favor of a more predictable method of determining ACV."

The matter settled during the appraisal process before the appraisal panel determined the extent to which depreciation, obsolescence, and depletion reduced the replacement cost. Notably, it was the author's opinion that the resulting calculation would have naturally led the appraisal panel to a determination of economic loss (market value of the destroyed structures without consideration for the land value).

Although the court found that not all ACV definitions are synonymous with "indemnity," the Travelers policy at least provided a formula by which true indemnity might have been the result.

THE CURRENT ASSAULT: DEPRECIATION OF LABOR

In recent years, an issue has arisen regarding whether an insurer can properly depreciate labor when calculating ACV. Class actions have been filed in various states on the basis that insurers improperly included labor in determining depreciation and the resulting ACV measure. The courts

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have come down on both sides of the issue. The debate tends to involve whether the courts find the policy language to be unambiguous and/or whether they believe an insured would reasonably understand that labor is among the categories of components subject to depreciation. As such, a court is most likely to allow depreciation of labor if insurance policies specifically allow for it. To avoid further litigation on this issue, some insurers have amended their policies to specifically state that depreciation may be applied to the estimated cost of labor among other items.[12]

While deprecation of the entire RCV of property—both materials and labor—arguably makes sense in the context of an indemnification policy, not all courts have allowed labor to be depreciated. In finding against insurers, some courts have held the terms "actual cash value" or "depreciation" to be ambiguous.

Despite the decisions by courts disallowing depreciation of labor, a simple example regarding the diminution of market value of a roof on two properties can be used to explain why depreciation of labor is necessary under the principle of indemnity:

Example Scenario Facts

- A home buyer finds two equally desirable properties of similar age, size, condition, and desirability.
- The two homes are in the same overall condition, and if all were equal, would have similar if not identical value. One of the homes requires the installation of a new roof while the other home recently had the roof replaced.

Valuation Differential

- The values of the two properties under the scenario above would have a market value differential equivalent to the replacement cost of the roof. Such replacement would include the roofing material, the labor to remove the old roof and reinstall the new roof, and any other costs including the overhead and profit of the contractor who performs the work.

While the preceding example is easily understood when the concept of real estate values is at issue, legal challenges and court interpretations have often resulted in decisions that blur the lines between the simple meaning of indemnity and the calculation of ACV. It is undeniable that the failure to depreciate labor in an insurance claim will result in leaving an insured in a position that is better than the cost to make the roof "as new" prior to the loss. If the insured had the property on the market prior to a wind loss, he or she would simply replace the damaged roof, sell the property for a higher price, and be in a better economic position to the extent that an insurer had paid for the new roof. Of course, while replacement cost contracts of insurance contemplate this form of betterment, insurers never intended that ACV calculations could put an insured in a better economic position than they were in prior to a loss.

The 8th Circuit Court of Appeals, in a depreciation of labor case, explained the indemnity issue succinctly:[13]

> *"The basic premise of traditional property insurance is the concept of indemnity. The insured who suffers a covered loss is entitled to receive full, but not more than full, value for the loss suffered, to be made whole but not be put in a better position than before the loss."*

While the preceding example presumes the roof is totally worn out, calculations of ACV typically consider the effective age or remaining useful life of a building component, then deduct the cost to make a building component "as new" at the time of loss. For example, assume carpeting in a home has an expected useful life of ten years. At the time of loss, the carpet is five years old and exhibits signs that it will be totally worn out within five years. Therefore, both the effective age and remaining useful life would indicate that the value of the carpet has deteriorated by 50%. Clearly if the diminution of market value of a property were being considered, the 50% rate would be applied to the new cost of the carpet (including material, labor, and other costs) to arrive at the contributory value of the property.

Why, then, should the principle of indemnity vary from the simple principles and practices used to determine

[12] See also Defining Indemnity in the Context of Actual Cash Value Calculations – 2nd Edition. Jonathon C. Held and Heidi H. Raschke - 2020
[13] In re: State Farm Fire & Cas. Co., 872 F.3d 567,573 (8th Cir. 2017)

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market value?

The loss in market value due to any peril is clearly and unequivocally the economic loss sustained by the property owner. Interestingly, the Internal Revenue Service, in its interpretation of the United States Tax Code understands and recognizes the concept of economic loss. In the event of an uninsured casualty loss, a U.S. taxpayer is subject to the following IRS guidelines:[14]

> *"If your property is personal-use property or isn't completely destroyed, the amount of your casualty loss is the lesser of:*
>
> - *The adjusted basis of your property, or*
> - *The decrease in fair market value of your property as a result of the casualty"*

From a taxation perspective, the "lesser of" language caps the deduction at the adjusted basis, as the IRS recognizes the economic loss cannot be more than a property owner's basis at the time of loss. Clearly the IRS bases its interpretation of the tax deduction for an uninsured loss on the simple principle of indemnity, and no special instructions are given with respect to whether labor is depreciable in a calculation of the reduction in fair market value.

Perhaps the most glaring example of how the principle of indemnity has been abandoned is a study of ACV as it pertains to California. For many years, California followed the market value rule. This changed first for partial losses and more recently for total losses to an ACV rule that bears no relationship to the concept of economic loss and indemnity. In order to illustrate how far California has departed from the principle of indemnity, below is an example of how ACV is calculated in a loss where 25% overall depreciation is applied in California (which does not allow depreciation of labor) as compared to a state like New York (which applies the broad evidence rule):

CALIFORNIA			
	RCV	DEPR.	ACV
Material	$ 2,000	25%	$ 1,500
Labor	$ 3,000	0	$ 3,000
	$ 5,000		$ 4,500
Markup - 20%	$ 1,000		$ 900
Total	$ 6,000		$5,400

NEW YORK			
	RCV	DEPR.	ACV
Material	$ 2,000	25%	$ 1,500
Labor	$ 3,000	25%	$ 2,250
	$ 5,000		$ 3,750
Markup - 20%	$ 1,000		$ 750
Total	$ 6,000		$ 4,500

As shown above, the ACV calculation in California leads to an increased measure.

CONCLUSION

Historically, insurers have devised two basic valuation provisions to protect policyholders from the risk of loss. The historical basic grant of coverage, ACV, was always intended to be an indemnity-based valuation method. The replacement cost valuation provision was devised to allow the insured to replace old with new, leaving an insured in an improved condition.

The states have never devised a uniform valuation method to be applied for all losses regardless of jurisdiction, and in their attempts to clarify the principle of indemnity, insurers have sought to clarify ACV in their policies. In so doing, the insurers have arguably provided a basis for policyholders to challenge the principle of indemnity inherent in the intended meaning of ACV.

This has led to broad attacks on the basic principle of indemnity. Class action lawsuits are the current vehicle being used to increase ACV measures from their original historical intent. These lawsuits have led to conflicting

[14] https://www.irs.gov/taxtopics/tc515

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decisions and even more uncertainty. This, in turn, raises the question of whether there is a better approach to achieving indemnity.

One approach would be for insurers to eliminate the ACV language in policies and replace it with a carefully worded "indemnity" provision based on economic loss in value, which would leave no doubt as to the intent to make a policyholder whole, but not more than whole, as the basic coverage grant.

Alternatively, perhaps insurers can more descriptively define ACV, leaving no question as to what is and is not to be included in its determination. This would include a definition that removes all doubt that the basic obligation of an insurer is, as was appropriately stated by the McAnarney court almost 100 years ago, to effectuate complete indemnity. This would restore this basic property insurance principle to its original intent.

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