INSURANCE: THE WISCONSIN "VALUED" POLICY" LAW[1]

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A. INTRODUCTION

The so-called "valued policy law," section 203.21 of the Statutes, is a legislative expression of the public opinion against the practice by fire insurance companies of writing excessive amounts of coverage, collecting high premiums, and then reducing the amounts of recoveries to a minimum when losses occur. It provides that:

> Whenever any policy insures real property and the property is wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the policy shall be taken conclusively to be the value of the property when insured and the amount of loss when destroyed.

It is applicable only in instances of total loss to realty by fire where property is insured and its effect in most cases is to change many of the principles of contract law. A statute of such drastic effect can only be justified by a very exaggerated condition of unfair practice on the part of insurers, and whether or not this feeling is reasonable is not within the scope of this paper.

The two conflicting interests are clear cut and diametrically opposite. The one is the interest of the insured in securing adequate return for the premiums paid; the other is the interest of the insurer in not having to pay more than the actual amount of the loss sustained. From a purely theoretical view, the latter is more sound because the fundamental basis of insurance is indemnity for loss. This phrase is limited by its own terms to the actual amount of loss as the measure of recovery. The fire insurance policy under the valued policy law ceases to be a contract of indemnity and becomes one of endowment upon a certain contingency, namely, total loss by fire. It is therefore obvious that a strong public policy is the basis of the statute, and how this is reflected in the decisions of the Wisconsin Supreme Court will be seen in the following discussion of decided cases.

In a case[2] decided shortly after the first enactment of the valued policy statute, the basic principle of construction that has been fol-

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[1] Wis. Stat. (1933) §203.21 (total loss measured by amount written in policy).

[2] Reilly v. Franklin Ins. Co., 43 Wis. 449 (1877).

lowed since was set out in the statement that as the statute was based on public policy, the provisions of the insurance contract were abrogated if inconsistent with the rights of the insured under the statute.[3] This construction makes the provisions of the statute an integral part of the contract as though written into the policy. The literal meaning of the language of the statute is given full force, and wherever there has been a total loss of realty by fire without criminal fault, the value of the property at the time of destruction is the face value of the policy; this is also the amount of the loss and the measure of the damages. This principle seems to have been adhered to without substantial change during the subsequent decisions dealing with the construction of the statute.

In *Thompson v. St. Louis Ins. Co.*,[4] in overruling a demurrer to the complaint, the court held it was not necessary to aver the amount of the actual loss, inasmuch as the face of the policy was the true amount of loss upon averments of a total loss. In *Seyk v. Millers' Nat. Ins. Co.*,[5] the statute was held to apply to all fire contracts written on realty in the state regardless of where the contract was made.

Also, where there is more than one policy in force on the same realty at the time of the fire, the total of the amounts in each policy is the recovery to which the insured is entitled.[6]

B. Total Loss

As the valued policy law applies only where there has been a total loss, it is essential to examine the holdings of the court in defining this term. Under the decisions, "total loss" or "wholly destroyed" mean the same and have acquired a legal significance which, in some cases, seems to vary from the literal interpretation which would be given by a layman. In *Lindner v. St. Paul F. & M. Ins. Co.*,[7] the court quotes *Seyk v. Millers' Nat. Ins. Co.*,[7a] in defining total loss as follows: "A building is wholly destroyed by fire so that the loss is total if its identity as a building is destroyed, although some of the materials remain in a more or less damaged condition." Also in *Harriman v. Queen Ins. Co.*,[8] besides finding generally that the building

[3] Reference is to White v. Conn. Mutual Life Ins. Co., reported in (1877) 5 Cent. L. J., 486 (U.S.C.C. W.D. Mo.), for the principle stated.

[4] 43 Wis. 459 (1877).

[5] 74 Wis. 67, 41 N.W. 534 (1889).

[6] Oshkosh G. & L. Co. v. Germania Ins. Co., 71 Wis. 454, 37 N.W. 819 (1888); Stephenson v. Agricultural Ins. Co., 116 Wis. 277, 93 N.W. 19 (1903).

[7] Lindner v. St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N.W. 1125 (1896).

[7a] *Supra* note 5.

[8] 49 Wis. 71, 5 N.W. 12 (1880).

was wholly destroyed by fire, the jury found specifically that no portion of the brick walls remaining after the fire could be used in rebuilding it; that the foundation so remaining was not sufficient to support a building of the weight and dimensions of the one burned; that the expense of removing the debris of the old building would at least equal the value of all materials left; and that such materials were worth less than the cost of getting them out of the wreck of the building. It was held that this constituted total destruction within the meaning of the statute. In *St. Clara Female Academy v. N. W. Nat. Ins. Co.*,[9] the court said:

> Total loss under the statute does not mean that the material of which the building is composed shall be annihilated or reduced to a shapeless mass; that when the identity of the structure as a building is destroyed, so that its specific character as such no longer remains and there is nothing left but the cellar walls and a dilapidated foundation, the loss is total within the meaning of the statute.

In the recent decision of *Eck v. Netherlands Ins. Co.*,[10] the definition of total loss seems to have been broadened, and there is a suggestion that an even further expansion might be made. The roof of the building was destroyed, the sides thoroughly burned, most of the studs, rafters, and joists were burned away; the flooring on the second floor was burned, but could be walked upon. It was estimated on the basis of usable material that about fifteen per cent of the building remained. The outline and appearance of the building could be determined by photographs taken after the fire. It was held that the trial court was justified in finding that it had lost its identity as a building. The court says that there was evidence that a prudent owner would not utilize the remnants in rebuilding, but as a matter of fact the owner had been denied a permit to rebuild because of a city ordinance. In referring to this last fact, the court says that it is not necessary to decide whether the insured might have recovered the full face of the policy on the grounds of constructive total loss due to refusal of the city to allow rebuilding the same building.

This indicates that the court has considered the possibility of holding that an insured may recover the full face value of his policy where a city demolition ordinance prevents the rebuilding of a partially destroyed structure. If this should be held to be the law it would be a violation of underwriting principles, as this type of risk is underwritten in the form of demolition insurance, an additional

[9] 98 Wis. 257, 73 N.W. 767 (1898).
[10] 203 Wis. 515, 234 N.W. 718 (1931).

premium for which has been sanctioned by the Wisconsin Insurance Commissioner. Furthermore, the Wisconsin statutory policy form provides for indemnity to the extent of the actual cash value of the property destroyed, but "without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair. . . ."[11]

C. Policy Provisions Inconsistent with the Statute

As previously stated,[11a] the provisions of the policy are controlled by section 203.21 where the two are in conflict. This is so even though the policy be statutory and passed subsequent to the valued policy law.[12] There are several such provisions.

(1) *Actual cash value limitation*

For example, the policy provides[13] that the amount of recovery to which the insured is entitled shall not exceed the actual cash value of the property destroyed. To give effect to such a limitation would of course completely nullify the valued policy statute, as its primary purpose is to prevent insurers from reducing the amount of recovery below the amount of insurance written when the property insured has been totally destroyed.[14]

(2) *Pro rata liability*

Another clause[15] designed to have a similar effect is one providing for pro rating the loss proportionately among all the insurers covering the risk. The effect of this clause where the valued policy law does not apply, where there has been less than a total loss on realty, or where the subject of insurance is personalty, is clearly stated in *Stephenson v. Agricultural Ins. Co.*[15a] In such cases, where there are concurrent policies covering the same risk, and when the amount

[11] Wis. Stat. (1933) §203.01 (insuring clause on face of policy).

[11a] *Supra* note 3.

[12] Fox v. Milwaukee Mechanics Ins. Co., 210 Wis. 213, 246 N.W. 511 (1933).

[13] Wis. Stat. (1933) §203.01: "In consideration of the stipulation herein named and of ..... dollars premium does insure ..... and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage. . . ."

[14] Thompson v. Citizens Ins. Co., 45 Wis. 388 (1878).

[15] Wis. Stat. (1933) §203.01, lines 101-105: "*Pro rata liability.* This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not."

[15a] *Supra* note 6.

of indemnity has been determined, the amount each insurer pays is determined by the proportion that its policy bears to the total amount of insurance in force. To illustrate, company *A* has $5,000 at risk, company *B* has $2,500 and company *C* $2,500; the loss is $5,000. *A* indemnifies the insured to the amount of $2,500. *B* and *C* each pay $1,250.

However, the above rule was expanded in *Sherman v. Madison Mut. Ins. Co.*,[16] where the situation was somewhat complicated by nonconcurrent provisions in three contracts with three different insurers. Two of the policies had provisions which limited the liability. The third had no limiting provision and the insurer was compelled to make up the balance of the loss in spite of the fact that this was considerably more than its *pro rata* share. The court felt that since the insured had paid a premium on an amount of insurance which was greater than his loss, and since the defendant company had not protected itself by limiting clauses, it should pay the difference between the amount recovered from the first two insurers and the amount of loss. The result is closely analogous to that reached under the present Minnesota statute, discussed below.

In *Fitzimmons v. City F. Ins. Co.*,[17] the insured had recovered the full amount of the loss from less than all of the companies on the risk. This was held to be no defense in an action against the defendant who had not paid. It was held that the *pro rata* share of the defendant was a debt and the insured was entitled to payment. The defendant could not get contributions from the other insurers, though the companies that had overpaid could recover from the insured.[18]

(3) *Arbitration*

Likewise, provisions[19] for arbitration as to the amount of indemnity and for the appraisal of the property destroyed to determine the

[16] 39 Wis. 104 (1875).

[17] 18 Wis. 246 (1864).

[18] *Contra*: Home Ins. Co. v. Baltimore Warehouse, 93 U.S. 527, 23 Sup. Ct. 868 (1876); Williamsburg City F. Ins. Co. v. Gwinn, 88 Ga. 65, 13 S.E. 837 (1891).

[19] Wis. Stat. (1933) §203.01, lines 159-175: "*Appraisal.* In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, and within ten days after such demand, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or this Company, such umpire shall be selected by a judge of the circuit court of the county in which the property was at time of fire. The appraisers shall then appraise the loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

amount of loss are void as being in conflict with the statute.[20] This result is obvious, since the amount of recovery and the value of the property destroyed are fixed by the statute at the face value of the policy, and there is no need for arbitration or appraisal. A submission to arbitration is not held to be a waiver of the rights of the insured under the statute.[21]

(4) *Option to rebuild*[21a]

Section 203.01, lines 176-182,[22] gives the insurer the right to rebuild the damaged or destroyed property. By allowing the company to rebuild a building that has been totally destroyed by fire, the effect of the valued policy law is defeated, as the exercise of the option obviously limits the liability of the insurer to the actual cash value of the property destroyed in the literal sense. The Wisconsin Supreme Court has sustained the right of the company to exercise this option, which seems to be contrary to the majority view.[23]

The outstanding case is *Temple v. Niagara F. Ins. Co.*[24] in which the court, through Mr. Justice Cassoday, reiterates the principles of the valued policy law, which control the provisions of the contract, and then proceeds to stress the point that the standard fire policy is

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[20] Thompson v. St. Louis Ins. Co., *supra* note 4, Seyk v. Millers' Nat. Ins. Co., *supra* note 5, Eck v. Netherlands Ins. Co., *supra* note 10.

[21] Seyk v. Millers' Nat. Ins. Co., *supra* note 5.

[21a] The practice of the companies in the operation of the option to rebuild clause is the center of much controversy between the insurers and the Insurance Commissioner at the present time. The companies have taken the position that they may exercise the option to rebuild and then concede their right to do the rebuilding in consideration of the insured's waiver of his rights under the valued policy law, the result being a cash settlement of the loss in cases where the insured does not wish the property rebuilt. The Commissioner insists that this cannot be done and that the only alternative open to the companies is either to rebuild or pay the full amount of the insurance in force under the valued policy law. These two views will be presented to the 1935 Legislature for the purpose of being enacted into law.

[22] "*Company's options.* It shall be optional with this Company to take all or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; . ." See also *supra* note 13.

[23] See Vance, Insurance (2nd ed. 1930) 771, as to the majority view. A practical argument in support of the Wisconsin rule appears in State Bank of Chilton v. Citizens' Mut. Fire Ins. Co., 252 N.W. 164, 166 (Wis. 1934) where the court refers to the option to rebuild as intended primarily to "prevent intentioned overvaluation of the insured property and the recovery of such overvaluation under the valued policy law." But this presupposes that the valued policy law antedates the option to rebuild, and is not the ground on which the court had earlier supported the coexistence of both provisions as not in conflict.

[24] 109 Wis. 372, 85 N.W. 361 (1901).

statutory. "It is the only contract that parties had within their power to make," says the court, "under the Wisconsin statutes, and must therefore be construed in connection with other statutes." The decision quotes the provision on the face of the statutory policy limiting the companies' liability to the actual cash value,[24a] and also the provision for rebuilding at the option of the insurer, and concludes that these provisions are not in conflict with the valued policy law. The language of the opinion is unequivocal and unambiguous, and the facts make the issue as clear as could be desired inasmuch as the building was totally destroyed. The insured claimed his rights under the valued policy law; the insurers claimed theirs under the standard policy, and proceeded to rebuild the building in conflict with the insured's wishes. The court reversed the circuit court and said that a verdict should have been directed for the defendant insurance companies.

Temple v. Niagara F. Ins. Co. is still controlling as far as the insurer's right to exercise the option to rebuild is concerned. The decision may be rationalized on the ground that the option does not conflict with the valued policy law. The language, however, goes much further, and is contrary to many holdings in Wisconsin both before and after this decision, in suggesting that the provisions of the statutory policy are to be given the same effect as any statute, regardless of conflict. In all other situations litigated to date, where the contract provisions are found to conflict with the valued policy law, the former is always controlled by the latter. This is true even though the standard policy was re-enacted with some slight changes in 1933; the rule that the last legislation prevails over former enactments has been held not to apply.[25]

(5) *Fraud clause*

The question of the effect of the fraud clause,[26] set up by the insurer as a defense where the valued policy law is applicable, has not been satisfactorily settled as to many of the possible situations in which it might be invoked. It would seem, however, that where the

[24a] *Supra* note 13.

[25] Fox v. Milwaukee Mechanics Ins. Co., *supra* note 11.

[26] Wis. Stat. (1933) §203.01, lines 1-9: *"Fraud, misrepresentation, etc.* This entire policy shall be void if the insured has with intent to deceive concealed or misrepresented any material fact or circumstances concerning this insurance of the subject thereof; or if the matter misrepresented increased the risk or contributed to any loss; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

company can prove such fraud as would constitute a good defense in the absence of the valued policy law, that the statute should not prevail. In the situations which existed in *Worachek v. New Denmark Mut. Ins. Co.*,[27] and *Oshkosh Packing and Provision Company v. Mercantile Ins. Co.*,[28] the insured fraudulently overvalued the property destroyed. In both these cases the policy in suit covered real estate and personal property, and an overstatement of values after the loss was made as to each. The court stated that if there were no fraudulent overvaluation as respects the personalty—to which the valued policy law did not apply—then the jury could not consider the question of fraud on the part of the insured as to the realty. In other words, false swearing as to the value of realty which has been totally destroyed cannot be shown by the defendant company, because the value of the property was fixed by the face value of the policy at the time of loss, and this became the amount of liquidated damages to which the insured was entitled; therefore, no fraudulent overvaluation subsequent to the loss could affect the liability of the company for the whole amount of its coverage. In both of these cases, however, the policies were held to be indivisible, and as there was a fraudulent attempt on the part of the insured to recover more than the actual value of the personal property, the fraud vitiated the entire contract; hence, the company was relieved from paying the losses on either the personalty or the realty.

Though these cases seem not to have been overruled, it might logically be argued that a policy covering both personalty and realty is divisible, and that the fraud should void only the coverage on the personalty. The contrary argument and the one on which the cases are based is that where both the realty and the personalty are at the same location and subject to the same hazard, a fraud avoiding liability for any part of the loss should also be applicable to the entire risk. The *Worachek* case is distinguished from *Rockford Ins. Co. v. Williams*[29] on the ground that in the latter the risks were in different locations, hence the avoidance as to one did not affect the others. This seems to be a sound distinction. It would seem that where the fraudulent overvaluation is the inducement by which the insurer assumes the risk in the first instance, it should be allowed as a good defense. But considering *Dogge v. N. W. Nat. Ins. Co.*,[30] where evaluating $2,000 worth of property at $5,000 was held not

[27] 102 Wis. 88, 78 N.W. 411 (1899).
[28] 31 Fed. 200 (U.S.C.C.E.D. Wis., 1887).
[29] 56 Ill. App. 388 (1899).
[30] 49 Wis. 501 (1880).

in itself conclusive proof of fraud, and in view of the general rule that overvaluation must injure the company, also the tendency of juries and courts to interpret evidence in favor of the insured and against the insurer, there may be some question as to the effectiveness of the fraud and false swearing clause in the policy as a defense by the insurer.

D. "Other Insurance" Clause

"Other or double insurance exists where two or more policies of insurance are effected upon or cover the same interests in the same or part of the same property against the same risk, and either in the name of or for the benefit of the same person."[31] The standard fire policy now in general use outside of Wisconsin and prescribed by the Wisconsin Statutes for most types of fire insurers prior to 1929, provides that:

> Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; . . .[31a]

Fully to understand the present state of the law upon this point, it is necessary to understand the policy provision as construed by decisions prior to the enactment of section 203.11.[32]

This clause in the policy which, for convenience, is called the "other insurance" clause, seems to have been given considerable force in allowing companies to avoid liability under standard fire contracts in spite of the valued policy statute.

In *Struebing v. American Ins. Co.*,[33] a leading case, the court held that the procuring of additional insurance without the written consent of the company attached, rendered the policy void during the time that such other insurance was in existence. In *Filipkowski v. Springfield F. and M. Ins. Co.*,[34] the *Struebing* case is cited as representative of the law, and the opinion contains an ample discussion of the problem. After deciding that section 203.11[34a] did not apply to the policy in suit, the court decided the case on the basis of the law applicable where permission for other insurance has not been given in

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[31] 5 Couch, Insurance §1039.
[31a] Wis. Stat. (1931) §203.01, lines 32-37.
[32] Wis. Laws 1929, c. 456, Wis. Stat. (1931) §203.215. See note 34a, *infra*.
[33] 197 Wis. 487, 222 N.W. 831 (1929).
[34] 206 Wis. 39, 238 N.W. 828 (1931).
[34a] Wis. Stat. (1931) §203.215, renumbered by Wis. Laws 1933, c. 487 §92.

writing. On the factual setup, the issue becomes very clear. The insurer had reduced the amount of insurance on the property when the insured moved away, taking some of the personalty with him. The policy covered both realty and personalty. Upon his return, the defendant company refused to take additional liability on the risk, but the agent offered to write additional insurance in another company. Insured refused and took other insurance without notifying the defendant. The court adhered strictly to the rule that the "other insurance" clause avoided the insurance and denied recovery. In its opinion, the court says:

> To hold the defendant estopped to claim the invalidity of the insurance policy by reason of the procuring of the additional insurance, under the circumstances of this case, would be tantamount to saying that an insurance company must always pay the loss no matter what the terms of the insurance contract, even though those terms be prescribed by legislative enactment.

This language is interesting in view of some decisions in which the court seems to have done just that. Also, it exemplifies the attitude of those who advocate the operation of the valued policy law in its extreme form.

E. Effect of Other Policies on Same Risk

Section 203.11, Wisconsin Statutes (1933), provides:

> Whenever a condition is included in any fire insurance policy issued in this state that unless provided by agreement in writing added thereto the insuring company shall not be liable for loss or damage occurring while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by such policy, such other or additional insurance, whether with or without knowledge of the insuring company, shall nevertheless not operate to relieve the insuring company from liability for loss or damage occurring while the insured shall have such other contract of insurance, whether valid or not. *Subject to all other terms and conditions of its policy*, each insuring company shall be liable for its *proportionate share* of any such loss or damage, but in no event shall the insured be entitled to recover from any or all of such insuring companies a sum greater than his *actual loss or damage*.[34b]

There is still considerable uncertainty as to the effect of this section, as there has been no case yet decided in which it has been applied. The only two cases at the time of the present writing in which the parties sought to invoke this section were the *Filipkowski* case and

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[34b] See note 34a, *supra*. (Italics mine.)

Ciokewicz v. Lynn Mut. F. Ins. Co.,[35] and it was held that it did not apply to the policies in suit. However, there is language in the *Ciokewicz* case which is helpful in consideration of this section. Although there are several points involved which are not wthin the present discussion, a brief statement of the case is desirable. The insured had a fire insurance policy of $1,900 on his barn, in defendant company. An agent of another company induced him to drop this policy after an assessment had been made, and rewrote the coverage in another company for the amount of $1,300. The insured delivered the defendant's policy to the said agent to be cancelled. He failed to do so and the policy remained on his desk until after the loss, though the insured did not learn of this until after loss when he returned the policy himself, stating that he was cancelling it and would not pay the assessment. The second insurer paid $1300. The trial court dismissed the suit, but the supreme court reversed the decision and held the defendant liable for the full amount of the policy, $1900, under the valued policy law. The decision is legally sound and based on the fact that at the time of loss the policy had not been cancelled, despite the fact that the insured thought it had been. The other points decided are also well reasoned and based on authority, including the holding that section 203.11 is not applicable, as the defendant's policy did not contain the "other insurance" clause.

In view of the lack of decisive holdings, the following discussion is based on the language of the court in the *Ciokewicz* case and on an analysis of the problem on principle.

Section 203.11 was passed in 1929 and appeared in the 1929 and 1931 Statutes immediately after section 203.21, as section 203.215, until revised in 1933, when it appeared as section 203.11.[35a] A revisor's note indicates that it is a repeal of the "other insurance" clause, although this clause appears in the statutory standard form policy of 1931. The same view is taken by the Commissioner of Insurance.

It is questionable whether section 203.11 was intended solely as a repeal of the "other insurance" clause. It would seem that, had the legislature intended this, it would have been simpler and more logical merely to have erased this clause from the statutory contract, as it did in 1933, instead of adding another section to the insurance statutes with wording that was subject to another interpretation. This view seems to be supported by the language in the *Ciokewicz* case

[35] 212 Wis. 44, 248 N.W. 778 (1933).
[35a] See notes 31a and 34a, *supra*.

where the court says that section 203.11 applies only when the fire insurance contract contains an "other insurance" clause. The section was held not to apply in this case because the policy in suit was written by a mutual company not required to use the statutory form of contract and the policy in suit did not prohibit other insurance. The inference seems to be, therefore, that the legislature intended to modify the valued policy law section 203.21, which it immediately followed, to the extent that where there was additional insurance affected without consent of the insurer, though the policy should not be absolutely void, the insurer nevertheless should be relieved of the operation of the valued policy law and be allowed to prorate its liability with the other insurers to the extent of the actual amount of the loss. This view is supported by a comparison of the language of the two sections. Section 203.11 reads: ". . . but in no event shall the insured be entitled to recover from any or all of such insuring companies a sum greater than his *actual loss or damage,*" while section 203.21 reads: ". . . the amount of the policy shall be taken conclusively to be the *value of the property* when insured and the amount of loss when destroyed." "Actual loss or damage" would seem to be indicative of an intention to avoid the phraseology of the valued policy law as well as its legal implications.

The wording of section 203.11, which reads: "Subject to all other terms and conditions of its policy, each insuring company shall be liable for its proportionate share of any loss or damage," indicates the same purpose. The face of the policy limits the recovery to the actual cash value of the property destroyed, and provides for prorating among concurrent policies as already discussed. The statute, in addition to reiterating the policy limitations by reference, specifically sets out the *pro rata* provision and an actual loss or damage limitation. This, it would seem, supports the view expressed by the court in the *Ciokewicz* case, when it said: "Most insurers protect themselves in a situation of that kind by including in their policies a provision that the insurer shall not be liable for loss or damage occurring while the insured shall have any other contract of insurance, etc., in which event section 203.215 appears to be applicable."

The words, "whenever a condition is included in any fire insurance policy issued in this state that unless provided by agreement in writing added thereto, the insurance company shall not be liable for loss or damage occurring while the insured shall have any other contract of insurance," indicate, it would seem, that it was intended that the clause should remain effective at the option of the contracting

parties, and it was only when this clause was included in the policy that the insurer could apply the section and be entitled to *pro rata* distribution of the loss with other insurers. In other words, the valued policy provision should not apply where this clause was attached.

A glance at the entire situation may assist in the discussion at this point. Briefly, the valued policy law was enacted to prevent insurance companies from overinsuring a piece of property, collecting the premiums, and then cutting down the recovery to the actual cash value of the property destroyed. This was obviously a just end whenever a single company overinsured a risk, with knowledge, or ability to know the fact, that the property was being overinsured. However, under the judicial construction of the statute the situation was permitted in which a property owner could effect a number of policies with a number of insurers much in excess of the actual property value and recover the amount of each policy upon suffering a total loss.

The insuring companies were protected by "the option to rebuild" clause, the "other insurance" clause, and in certain cases, the fraud clause. The possibilities of these defenses have already been discussed. In the second situation where the company avoided the policies because of the additional insurance, an injustice was worked upon the insured. He had carried adequate insurance, paid the premiums, and because he was not aware of the existence of the clause forbidding additional insurance, he was left without coverage.

It is submitted, therefore, that section 203.11 was enacted to eliminate this injustice to the insured. In so doing, however, the legislature, although willing to give the innocent insured the fair measure of protection, was not willing to make insurers the victim of unscrupulous property owners, intentionally overvaluing their property, but intended that in both cases the insurer should be allowed to prorate and be released from the drastic operation of the valued policy law in the situations where it has no opportunity to protect itself. There seems to be no practical method by which a company can determine the amount of insurance on a risk when it assumes coverage or when the insured takes out additional insurance in other companies, except by getting information from the insured.

Another view of the effect of the section is that it was intended to apply only where the loss was less than total. This is, of course, tenable and logical under the precise wording of both section 203.21 and 203.11. Also, it may be argued that the term "actual loss or dam-

age" may be given the meaning it has acquired under the valued policy law, *i.e.*, the face value of the policy. But when the statutes are examined in perspective, it would seem to be a stronger case for the previously advanced construction, namely, that section 203.11, when first enacted and placed in position following the valued policy law as section 203.215, was intended to modify section 203.21 to the extent above described, and that the clause in the policy prohibiting other insurance was not repealed by this section, but was repealed by the 1933 Legislature when it reenacted the revised standard form policy.

The point of this discussion is graphically illustrated by the situation in the *Ciokewicz* case, where, if there had been an "other insurance" clause, so that the section would have applied, an equitable result would have been reached for both insured and insurer. The insured, it will be remembered, recovered more than the value of his property on two policies, one of which he had thought was cancelled. The conclusion from this case is, therefore, that if the policy contains an "other insurance" clause, the insurer can invoke section 203.11 to prevent the valued policy law from imposing full liability on all companies involved for the entire amount of insurance written and limit the recovery to the actual amount of loss sustained. However, inasmuch as the "other insurance" clause is no longer a part of the standard policy, it will be necessary for the insurer to endorse the clause on the policies to avail itself of the benefits of section 203.11. Whether the courts will permit this in view of the fact that the clause has been eliminated from the standard contract, or whether they will hold that under the wording of section 203.11 there is implied power so to endorse a policy, is purely speculative and can be finally answered only by the Wisconsin Supreme Court.

In the opinion of the Attorney General of Wisconsin in 1932,[80] the argument construing section 203.11 as not affecting the valued policy law is well presented. The position there taken is that the intention was merely to have the section apply where the loss was less than total. The fallacy in the argument is that the situation against which insurers are most interested in protecting themselves is entirely ignored, *i.e.*, where a property owner, with the intention of selling his property to insurance companies at more than their sound values, takes out policies in various companies without notifying present carriers of the additional insurance.

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[80] 21 Ops. Att'y Gen. Wis. 634 (1932).

The opinion states that the object of the valued policy law is to require insurers to appraise the value of property insured before accepting the risk. It is immaterial how accurately a building may be appraised or how conservatively it is underwritten if the insured can at his will take out additional insurance with other companies without the knowledge of the other insurers.

The opinion also states: "There is nothing to indicate that the legislature intended that the valued policy law should be abrogated when more than one policy is issued." It would seem that the words, "whenever a condition is included," would indicate that that is exactly what the legislature intended.

The cases cited in the opinion in support of the position are not in point, inasmuch as none of them were decided in the light of section 203.11 or any statute of similar wording. Cases decided prior to the enactment of this section amply support the view stated as previously discussed in this paper. As there are no decisions in which the Wisconsin Supreme Court has construed the section in a case where it applied, any statements of the court in relation to the statute are purely *dicta*, but keeping this in mind, the language of the *Ciokewicz* case is strongly contrary to this opinion.

F. Conclusion

In conclusion it may be stated that the law of Wisconsin is clear in instances where real property covered by fire insurance is totally destroyed insofar as the plain application of the valued policy law is concerned. The amount of insurance written becomes, upon the happening of the total destruction, the value of the property destroyed, the amount of the loss sustained, and the liquidated damages to which the insured is entitled. The one exception which has been decided by the court, occurs where the company elects to exercise the option to rebuild. A second possible exception depends upon the court's interpretation of section 203.11.

It is quite obvious that there are several problems unsolved and also that there is at least one situation in which much fraud may be accomplished by unscrupulous property owners. It would seem that to accomplish the result intended when the valued policy law was enacted, and to eliminate overinsurance and incendiary fires, it is necessary that some legislative changes be made.

A brief consideration of the type of legislation which would cope with this problem is appropriate. Several suggestions have been considered to eliminate the condition brought about by our present statute

and its application. It is the opinion of Commissioner of Insurance H. J. Mortenson that the option to rebuild should be abrogated by statute. It is argued that by this method the companies would be compelled to adopt effective means of preventing overinsurance. It is not clear just what means could be adopted, but presumably the only possible method would be a central recording office which would notify all other companies already insuring a risk as soon as more insurance was written. This, of course, would also necessitate the setting up of an appraisal system of some description.

A second method considered is that the amount of indemnity recoverable under the valued policy law should be limited to a given percentage of the value of the property destroyed in excess of the actual value. This would protect the insurers from paying excessive amounts for destroyed property as they do in some cases under the present rule, but would not eliminate, it would seem, the evil of overinsurance and collection of excess premiums.

The plan which it seems to the writer offers the soundest solution to the problem and which will bring about the greatest equity to both companies and property owners is the Minnesota statute. This is found in section 3516, Minnesota Statutes (1927), entitled "Whole Amount Collectible," and provides that:

> Every company insuring any building or other structure against loss or damage by fire, lightning or other hazard, by the issue of a policy or renewal of one therefore, or otherwise, shall cause such structure to be previously examined, a full description thereof to be made, and its insurable value to be fixed, all by the insurer or his agent, and the amount thereof to be stated in the policy. In the absence of any change increasing the risk, without the consent of the insurer, of which the burden of proof shall be upon it, and in the absence of intentional fraud on the part of the insured, the whole amount mentioned in the policy or renewal upon which the insurer receives a premium, shall be paid in case of total loss, and in case of partial loss, the full amount thereof. If there are two or more policies upon the property, each shall contribute to the payment of the whole or partial loss in proportion to the amount specified. . . .
>
> Section 3517. INSURANCE IN EXCESS OF VALUE. No company shall knowingly issue any policy upon property in this state for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor a longer term than five years. Any company wilfully insuring property for more than its real value shall forfeit to the state, for the benefit of the school fund, double the premium collected on such policy.[37]

[37] The balance of the section which has been omitted provides for co-insurance contracts. This is taken care of very satisfactorily by Wis. Stat. (1933) §203.22. Attention is called to the fact that by the use of the co-insurance clause, an insurer may avoid the application of the valued policy law. However, it has not been considered in this paper, as the fundamental purpose of co-insurance is to increase the amount of coverage whereas the problems involved in a consideration of the valued policy law arise from the fact of overinsurance.

In *Bankers Joint Stock Land Bank v. St. Paul F. & M. Ins. Co.*,[38] the court makes a very clear application of the statute in the following situation. Defendant company had written a policy for $400, and stated the insurable value as $600. The Connecticut Company had a second policy on the same risk in the amount of $800 and the insurable value fixed at $1,000. The loss was total. The court said:

> Under our statutes, in the event of total loss, there can never be contribution by insurance companies unless the total insurance on the property exceeds the insurable value.
>
> Appellant's liability must be fixed from the insurable value stated in its policy, *i.e.*, $600. The total insurance on the building was $1,200, of which appellant had $400, and the Connecticut Company $800. Appellant's *pro rata* share would be 1/12, or $200, and the Connecticut Company's share would be $400. The prorating extends only to the extent of the concurrence of the two policies up to the insurable value as stated in the smaller policy. This would be to the extent of $600. The additional insurable value of $400, required to equal the $1,000 insurable value stated in the Connecticut Company policy, would have no concurrent insurance and would have to be paid in full by that company and this would require its full liquidation of its policy. This fact results from the Connecticut Company fixing the insurable value at $1,000 in its policy. . . . Certainly the appellant's contract cannot be enlarged, extended or modified without its consent. It must follow that the insurable value as fixed in the second policy cannot control or have any bearing in determining the rights of the appellant. It, of course, has the right to insist that insofar as it is concerned a total loss cannot exceed $600 which, as to it, is the insurable value.[39]

This statute seems to do directly what the Wisconsin statute, section 203.21, attempts to do by indirection. It specifically makes it illegal to overinsure property and puts a direct penalty on the company for so doing. It protects the first company assuming the risk when the insured takes out additional insurance in another company without informing or securing the consent of the first company. It places the burden of investigating as to existing insurance upon the second company and puts upon it the penalty of non-contribution for the excess insurance written if it fails to investigate. The insured is protected in that if a company deliberately sets a high insurable value in order to write excessive amounts of insurance to get high premiums it must pay in full in case of total loss. It penalizes companies which intentionally overinsure and penalizes policy holders who intentionally try to defraud insurers.

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[38] 158 Minn. 363, 197 N.W. 749 (1924).
[39] *Ibid.* at 367-8, 197 N.W. at 750.

Another feature of the statute worthy of note is that it does not limit the operation of the valued policy law to fire risks, but includes "loss by fire, lightning or other hazard." It would seem that if a valued policy law were desirable with respect to insurance on real property, there is no logical reason for limiting it to fire only when fire is but one of the many hazards to which the property is subjected.