In this, the 2015 edition of *Diminution in Value Damages*, the text has been totally rewritten with additional pages. It is the most extensive and detailed coverage of the issue available and explains how to apply diminution in value damages to losses to property.

This book was written to provide sufficient information to those who became interested in the issue since the Georgia Supreme Court decided *State Farm Mutual Automobile Insurance Co. v. Mabry* and includes cases dealing with the use of diminution in value as a method of determining the amount of loss incurred by a plaintiff seeking indemnity for damage to real or personal property.¹

Because confusion has reigned across the United States concerning the proper measure of damages for damage to property that has been repaired, *Diminution in Value Damages—2015* will assist the reader to answer the questions concerning the proper measure of damage in the states and territories of the United States and each federal United States jurisdiction. This book will allow the reader to find the answer in the appropriate jurisdiction when asked, “What is the proper measure of damage?”

- Is it cost of repair?
- Is it the difference between fair market value before and fair market value after it is damaged?
- Is it the cost of repair plus stigma damages?
- Is it the cost of repair plus the difference between fair market value before and fair market value after it is damaged?
- Is it something in the middle?
- Is it none of the above?
- Is it all of the above?

The answers to the questions depend on the jurisdiction where the claim is presented and, when insurance is involved, the wording of the policy.

The subject of diminution of value damages, when applied to insurance claims, caused serious concern to the insurance industry because insurers believed their policies were clear and they were only required to pay to the insured what was promised: the cost of repair using material of like kind and quality. It also caused concern to appraisers, adjusters, lawyers, and every person who was called upon to deal with claims of property damage and the limitations of a policy of insurance.

Insurance policies, by definition, promise to indemnify the person(s) insured against certain specified risks of accidental loss that is either contingent or unknown at the time the policy is acquired. The methodology used to establish the appropriate amount to indemnify the injured party for damage to his or her property seems different in each decision. When called upon to determine which measure of damages is to be used tends to be different from state to state and from US District Court to District Court of Appeals. Determining the amount of indemnity recoverable—whether cost of repair, diminution in value, or some combination of both—also varies from jurisdiction to jurisdiction.

**INSURANCE AND DIMINUTION OF VALUE CLAIMS**

Since insurance was invented in ancient Sumeria, when insurance policies were written on clay tablets, there have been disputes between the insured and the insurer. Since tort law first came into existence before the writing of the Old Testament, there have been disputes between the tortfeasor and the victim as to the extent of the damages recoverable.

Insurers and their insureds continue to struggle with establishing a fair method to properly compensate the person insured for the property lost or damaged as a result of a peril insured against. Insurance, by definition, is a contract where one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event. The key item of dispute is to determine how much is needed to indemnify the person insured.

The concept of indemnity requires that the person indemnified receives sufficient funds to put him or her back in the financial place he or she was in moments before the loss. The US Supreme Court in 1915 said: “Indemnity means an obligation to make good a loss...”

On its face, calculating indemnity seems to be a simple task. As the cases in *Diminution of Value Damages—2015* are reviewed, the reader will understand that the task is not as simple as it seems. After reviewing the cases, you will understand why diminution in value is a concept that has given litigants, insurers, and courts serious concerns and has generated what seems to be a constant deluge of litigation.

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Since few jurisdictions agree completely on the method to properly compute damages or to properly indemnify the persons insured by an insurance policy, courts have considered diminution in value of property damaged and repaired in an accident justified as one method of reaching true indemnity.

Common sense indicates that the measure of damages should be that amount necessary to compensate the injured party for the damages proximately caused by the conduct of the person causing injury or the amount promised by an insurance policy. The proper measure is often difficult to determine and no single measure fits every type of damage. Every possible means of providing complete indemnity can be, and is, considered when dealing with tort damages, contract damages, and the proper amounts of payment required by a contract of insurance.

The courts of the various states and federal jurisdictions do not use identical rules to calculate the proper measure of damages. To understand the issue and to apply the proper remedy requires an understanding of how each state applies, what it believes to be, the proper measure of damages for tort, for contract breaches, and for insurance claims situations. Each court should seek to reach the result of true indemnity. However, the diversity of opinion is the rule rather than the exception.

Automobile insurance policies usually promise to pay the insured, when an automobile is damaged by collision or some other insured cause, the costs to repair the vehicle, or if unrepairable, the actual cash value of the vehicle. Most policies say nothing about the difference in value of a vehicle that is repaired after an accident than its value before the accident. Because the policies are silent and only promise repair or actual cash value, insurers believed it was unnecessary to even mention in the policy the difference in value before the accident and the value after repairs are completed.

No promise was made to pay for more than the actual cash value or the cost of repair, whichever is less. The issue with regard to damage to automobiles and loss in value after repairs were completed was ignored until the 2001 decision of the Georgia Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Mabry* (Mabry). Mabry raised serious concern among insurers because it required payment of sums greater than that for which a premium was collected. It awarded the insured both the cost to repair and the diminution in value of the car after it was repaired.

Insurers believed the *Mabry* decision was a judicial rewriting of the wording of the policy. Lawyers for policyholders found it to be a means of giving true indemnity to their clients as well as an invitation to file multiple, profitable lawsuits against insurers. Mabry’s success in Georgia generated suits across the country seeking recovery for diminution of

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value from insurers and third-party defendants. The attempt to convince other states to follow Georgia had limited success.

Since Mabry, virtually all of the courts finding no coverage for diminution of value have done so because the word “repair” has a plain meaning that does not encompass payment for the diminished market value after the repair is completed. Rather, the plain meaning of “repair” contemplates physical restoration. Many insurers, to avoid argument, now add to their policy’s wording, endorsements or definitions that establish that the insurer does not intend to, nor will it, pay for diminution of value after the automobile is repaired, while others have simply increased premium to cover the additional payments.

When property of any kind is damaged and repaired, the resale value of the property can easily be diminished because of the stigma carried by the repaired vehicle or property. An automobile is likely to suffer this type of diminution in value after it is damaged in an accident and repaired more than other types of property. The resale value of an automobile most likely will be less for one repaired after an accident than that for a comparable automobile that has not been damaged and repaired. This is not true, however, of all types of property. A fifty-year-old house that is damaged by fire and rebuilt, new for old, will usually be more valuable than it was before the fire. To date, no insured has sought to return to the insurer the increase in value since the policy promised to pay the amounts needed to repair replacing new for old.

The fact of the accident and damage in most situations, even if repaired perfectly, results in a reduction—or “diminution”—of the resale value of the automobile. The insured, as a result, claims they have not received what they were promised by the policy, true indemnity. Insurers counter that they never promised to provide a vehicle of the same value after an accident as the value it had before the accident. The insurer only promised to repair the vehicle using material of like kind and quality.

When real property is repaired replacing old material with new, the resale value of the real property is often increased. No court I have been able to find has suggested that the insurer is entitled to a reduction in its payment for repair because the insured profits from the repair of a structure and is not, therefore, truly indemnified because the insurer promised to replace old with new and to even bring an old building up to modern codes at no cost to the person insured.

When the property is insured, the insured’s claim for this reduction in value may be made against a third party that negligently caused the damage to the insured’s automobile, or it may arise from a first-party claim against the insured’s own physical damage coverage. The key to recovery of the diminution in value depends on the particular state where the damage occurs, the wording of the insurance policy involved, mandates by regulation from state insurance departments, statutes enacted by state legislatures, and the holding of the various courts.
Although there appears to be nothing in insurance policy wording that even appears to contractually cover any reduction in market value of an automobile, some courts, such as the Supreme Court of Georgia, require that the insurer pay more than the cost of repair to achieve total indemnification. All policies of insurance, that insure property up to its actual cash value, allow the insurer to deduct for betterment or depreciation. The burden of proof is on the insurer to demonstrate whether deduction of such depreciation or betterment is appropriate to indemnify the insured as a result of the insured casualty.

In physical damage claims, the policy would allow the carrier to deduct for an improvement in value (i.e., betterment) due to repairs with newer parts, but states nothing about compensating the insured for a reduction in value due to the same accident.

Third-party claims (claims against an insured person for damages done to the property of some third person) for diminution of value, on the other hand, 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 on behalf of its insured) is the difference in 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 include diminution of value. However, no single measure of damages can serve in every case to adequately compensate an injured party. For the award of damages to be fair, recognizing that diminution of value is not always an accurate method of providing true indemnity, an award of restoration damages, according to some courts, must be available to compensate a plaintiff fully for damages to property when diminution in value fails to provide an adequate remedy.

The general rule in tort cases where one party causes damage to the property of another is not the cost of repair of the property. Rather, the standard measure is the difference between the value of the property before and after the injury, or the diminution in value. Unless the cost of repairing the injury and restoring the premises to their original condition amounts to less than the diminution in value of the property. Then the cost of repair is the proper measure of damages.

If the cost of restoration will exceed such diminution in value, then the diminution in value of the property is the proper measure. That rule seems to be in flux and most courts seem to be moving toward a more flexible rule where the measure of damages is considered the amount necessary to compensate the injured party for the damages proximately

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caused by the conduct of the person causing injury regardless of the method used to calculate those damages. Some states apply the rules strictly. Some apply the general rule of fairness. Others apply the rule in one way when dealing with tort damages, another way when dealing with contract damages, and a third way when dealing with insurance claims.

The Insurance Services Office (ISO)\(^8\) has issued an endorsement to avoid the diminution of value issue that reads:

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE FOR DAMAGE TO YOUR AUTO EXCLUSION ENDORSEMENT
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With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by the endorsement.

I. Definitions

The following definition is added:

“Diminution in value” means the actual or perceived loss in market or resale value which results from a direct and accidental loss.

II. Part D—Coverage For Damage To Your Auto

The following exclusion is added:

We will not pay for:

- Loss to “your covered auto” or any “non-owned auto” due to “diminution in value.”

This endorsement must be attached to the Change Endorsement when issued after the policy is written.\(^9\)

Other Types of Property Damage

Diminution in value damages are sought from tortfeasors who damage property and from governments who take all or part of a property by eminent domain. *Diminution of Value Damages—2015* also covers those disputes.

**Diminution**

As you read this book, remember that diminution of value is the loss of financial worth of something because of damage. This concept often refers to vehicles, property, or other financial investments. With vehicles, the amount of diminished value depends on whether inherent diminished value or repair-related diminished value was the cause of the loss of value. Inherent diminished value means that there is some problem with the vehicle that was not caused directly by an accident. Repair-related diminished value refers to the loss of value following repairs after an accident.

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\(^8\) ISO provides insurance forms and data to insurance companies throughout the United States; it has authored policy language that insurers can use in all states.

\(^9\) Personal Auto form PP 13 01 12 99.