

11th Circuit Requires Repair for RCV Benefits

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In September 2010, the Eleventh Circuit issued its decision in *Buckley Towers Condominium, Inc. v. QBE Insurance Corp.*, 2010 WL 3551609 (11th Cir. Sept. 14, 2010). The decision upholds policy provisions requiring insureds to first make repairs to property before claiming replacement cost coverage or law and ordinance coverage. The insured, a pair of condominium towers, were covered by a property insurance policy that said that the insurer "will not pay on a replacement cost basis for any loss or damage (1) Until the lost or damaged property is actually repaired or replaced; and (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage." The insurance contract did not provide for advance payments for repairs. The insured submitted a proof of loss, claiming Actual Cost Value (ACV) and Replacement Cost Value (RCV) damages. The insurer construed it as a premature claim for RCV damages and did not respond. The insured sued, conceding that the policy required it to make repairs before claiming RCV damages, which it had not done. The trial court nonetheless ruled that the insurer had "prevented" the insured from performing its obligations under the policy. The jury found for the insured. The Eleventh Circuit reversed in part, concluding that Florida's "prevention of performance" doctrine did not apply in this case. The court reaffirmed that the doctrine cannot be used to rewrite an unambiguous insurance contract, and does not apply where an insurer is simply following the plain terms of the contract and is not imposing obstacles outside of the contract. *Buckley Towers* strongly affirms a property insurer's right to insist that the insured follow the plain terms of an insurance contract for which the insured freely negotiated. Under Florida law as applied by the Eleventh Circuit, insureds who agree to make repairs before seeking RCV payments will not be excused from that obligation simply because the repairs may be inconvenient or expensive.

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