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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

D & S Realty, Inc., appellee, v.
Markel Insurance Company,
a corporation, appellant.
816 N.W.2d 1

Filed June 22, 2012. Nos. S-11-664, S-11-764.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Contracts.** Performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.
3. ____. A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition.
4. **Property: Valuation: Words and Phrases.** Actual cash value is the value of the property in its depreciated condition.
5. **Insurance: Real Estate: Words and Phrases.** Replacement cost insurance is optional additional coverage that may be purchased to insure against the hazard that the improvements will cost more than the actual cash value and that the insured cannot afford to pay the difference.
6. **Insurance.** A repair/replace condition to replacement cost coverage is neither ambiguous nor unconscionable.
7. **Contracts.** The doctrine of prevention states that where a promisor prevents, hinders, or renders impossible the occurrence of a condition precedent to his or her promise to perform, the promisor is not relieved of the obligation to perform and may not invoke the other party's nonperformance as a defense when sued upon the contract.
8. **Breach of Contract.** Pursuant to the doctrine of prevention, where the impeding act is the denial of liability in breach of the insurer's obligations under a policy with the insured, the breach may excuse the insured's performance of a repair/replace condition even if made because of a "good faith" misunderstanding of the rights and liabilities of the parties.
9. **Contracts.** The law does not require the doing of a useless act.
10. **Judgments: Contracts.** Whether interference by one party to a contract amounts to prevention so as to excuse performance by the other party is a question of fact to be decided under all of the proven facts and circumstances.

11. **Contracts.** The doctrine of prevention does not require proof that the condition would have occurred "but for" the wrongful conduct of the promisor, but requires only that the promisor's conduct contributed materially to the nonoccurrence of the condition.
12. **Insurance.** The respective interests of parties acting in good faith can, in most cases, be adequately protected by excusing the performance of the repair/replace condition only for such time as it appears the insurer will not honor its obligations under the policy.
13. **Insurance: Liability.** If the delay in determining the insurer's liability materially contributed to a situation where the insured can no longer perform the condition after the coverage dispute is resolved, then the condition will be absolutely excused.
14. **Judgments: Testimony: Attorneys at Law.** It is unreasonable to expect counsel to attempt to present testimony in anticipation that a judge's favorable rulings will be reversed.

Appeals from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for a new trial.

Richard J. Gilloon and Heather B. Veik, of Erickson & Sederstrom, P.C., and Tory M. Bishop and Angela Probasco, of Kutak Rock, L.L.P., for appellant.

David A. Blagg, Charles F. Gotch, and James D. Garriott, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

I. NATURE OF CASE

This is an appeal after a retrial on remand in a breach of contract claim by the insured against the insurer. At issue in this appeal is the optional replacement cost coverage that the insured contracted. The question is whether the insurer's general denial of liability excused the insured from complying with a policy condition requiring that the insured actually repair or replace the damaged property before replacement costs will be paid.

II. BACKGROUND

D & S Realty, Inc. (D&S), owned a building known as the North Tower, in Omaha, Nebraska. D&S purchased the

property in 1999 for $1.75 million. At the time, it was approximately 40 years old. At some point prior to the loss in question, the building was appraised at $4 million. The first six floors of the building were for commercial use, and the top floors were residential. Markel Insurance Company (Markel) insured the North Tower through a standard indemnity policy with additional coverage for repair and replacement cost payments in the event of a covered loss.

1. Vacancy

D&S embarked on a plan to renovate the building, floor by floor, in small increments. In order to conduct the renovations, D&S began vacating the areas occupied by its tenants. By November 2002, less than 30 percent of the building was occupied. By January 2003, less than 5 percent of the building was occupied. D&S put on a new roof, started demolition of the second floor, and painted and replaced the carpet on most of the residential floors. Markel was aware of the vacancy and the renovations.

As part of the renovation project, in January 2003, D&S decided to drain all the waterlines, put antifreeze into the system so the pipes would not freeze, and shut down the boiler system. However, without D&S' knowledge, the maintenance engineer turned off the boiler on a Friday night and did not flush the lines or inject antifreeze.

The following day, a D&S employee discovered that pipes throughout the building had burst. Massive amounts of water flooded the building and froze into ice. According to witnesses on behalf of D&S, there was extensive damage on every floor of the building. D&S immediately attempted to mitigate the damage and remove debris. In March 2003, when the weather became warmer, the firelines thawed and burst, and again, significant amounts of water flooded the building. Passersby observed water gushing down three exterior sides of the North Tower like a waterfall.

2. Policy

D&S timely filed a claim with Markel for the losses incurred as a result of the water damage in January and March 2003. The policy with Markel explicitly included water damage.

However, the "Loss Conditions" section of the policy contained a "Vacancy" clause stating that Markel would not pay for water damage if the building had been vacant for more than 60 consecutive days before the loss or damage. The vacancy clause defined a building as "vacant" when 70 percent or more of its square footage was neither rented nor used to conduct customary operations. The clause further stated that "[b]uildings under construction or renovation are not considered vacant." "Construction" and "renovation" were not defined in the policy. A Nebraska endorsement to the policy provided that "[a] breach of warranty or condition will void the policy if such breach exists at the time of loss and contributes to the loss."

In the event of a covered loss under the policy, the standard "loss payment" clause of the policy stated that at Markel's option, it would either (1) pay the value of lost or damaged property, (2) pay the cost of repairing or replacing the lost or damaged property, (3) take all or any part of the property at an agreed or appraised value, or (4) repair, rebuild, or replace the property with other property of like kind and quality. The loss payment clause also stated that Markel would not "pay [the insured] more than [its] financial interest in the Covered Property." A "valuation" clause stated that Markel would determine the value of the loss or damage at actual cash value as of the time of loss or damage, subject to certain exceptions for specified items. The policy provided limited coverage for debris removal.

D&S had purchased optional additional coverage for "replacement cost." Under the terms of the policy, "Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of [the policy's] Coverage Form." The replacement cost clause provided that the insured had the option of making a claim for loss or damage on an actual cash value basis instead of on a replacement cost basis. And it provided that

> [i]n the event [the insured] elect[s] to have loss or damage settled on an actual cash value basis, [the insured] may still make a claim for the additional coverage this Optional Coverage provides if [the insured] notif[ies

> Markel] of [its] intent to do so within 180 days after the loss or damage.

Further provisions of the replacement cost clause stated:

> **d.** [Markel] 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.
>
> **e.** [Markel] will not pay more for loss or damage on a replacement cost basis than the least of **(1), (2)** or **(3)** . . . :
>
> **(1)** The Limit of Insurance applicable to the lost or damaged property;
>
> **(2)** The cost to replace, on the same premises, the lost or damaged property with other property:
>
> **(a)** Of comparable material and quality; and
>
> **(b)** Used for the same purpose; or
>
> **(3)** The amount [the insured] actually spend[s] that is necessary to repair or replace the lost or damaged property.

The policy limit of the insurance policy issued by Markel to D&S was $4.5 million, subject to a deductible of $50,000.

Markel generally denied coverage for the claimed water damage loss. Markel informed D&S that its investigation had revealed the North Tower was more than 70-percent vacant at the time of the loss. Markel told D&S that under the vacancy clause of the policy, Markel does not pay for water damage if the property is vacant. Because Markel generally denied liability under the vacancy clause of the contract, the parties did not discuss cash value versus replacement costs and neither specifically made any election between cash value and replacement cost. Believing Markel's denial of liability was wrongful, D&S brought a breach of contract action against Markel.

3. Lawsuit

In its complaint, D&S sought replacement cost damages. D&S acknowledged that it had not yet repaired or replaced the

damaged property. However, D&S pled that it was Markel's denial of coverage, in breach of its policy obligations, which caused D&S to be unable to repair or replace the property.

In its answer, Markel generally denied D&S' claims. In its affirmative defenses, Markel pled the vacancy clause, but did not plead as a defense D&S' failure to actually repair or replace as a condition to replacement cost coverage.

Thus far, D&S' complaint has resulted in two trials. The first trial occurred in 2008. The first trial principally concerned the parties' dispute over the vacancy clause of the policy. D&S attempted to show that the North Tower was not "vacant" because it was "under construction." Alternatively, D&S attempted to show that Markel had waived the vacancy clause or was estopped from asserting it because Markel was aware of the vacancy and continued to accept premiums with that knowledge. Finally, D&S asserted that Neb. Rev. Stat. § 44-358 (Reissue 2010) was applicable to the vacancy clause. Therefore, in the event D&S had breached the vacancy provision, such vacancy would not preclude recovery under the policy unless it contributed to the loss. D&S also relied on the Nebraska endorsement to the policy, which endorsement mirrored § 44-358.

At the close of D&S' case in the first trial, Markel moved for a directed verdict and raised for the first time the issue of D&S' nonperformance of the repair/replace condition to replacement cost coverage. Markel renewed the motion at the close of all the evidence. Markel also asked the court to find (1) the evidence was undisputed that the North Tower was more than 70-percent vacant for more than 60 days immediately prior to the loss, (2) the building was not under construction or renovation, and (3) Markel had not waived the loss conditions regarding vacancy.

The court found as a matter of law that the building was more than 70-percent vacant, but left the question of whether it was under construction or renovation for the jury. The court found, as a matter of law, that Markel had not waived the vacancy clause and was not estopped from relying on the vacancy clause. The court determined that § 44-358 and the Nebraska endorsement did not apply to the vacancy clause.

But the district court overruled Markel's motion for a directed verdict as to replacement cost damages. The court explained that Markel had failed to raise the issue of the repair/replace condition "in anything up until [its] motion for a directed verdict" and that it was "not going to allow [Markel] to go on with that argument under the policy."

Consistent with its rulings on the motion for a directed verdict, during the instructional conference at the first trial, the court refused D&S' request to instruct the jury on § 44-358. It also refused D&S' request to allow an instruction on waiver or estoppel based on the fact that Markel had accepted premiums after learning the building was vacant.

Consistent with its denial of Markel's motion for a directed verdict, the court denied Markel's request for an instruction that D&S could recover replacement costs for only those items D&S had actually replaced prior to trial. At the instructional conference, D&S argued that pursuant to *Bailey v. Farmers Union Co-op Ins. Co.*,[1] its performance of the repair/replace condition to replacement cost coverage was excused. In *Bailey*, the Nebraska Court of Appeals stated that the condition to actually repair or replace was excused because the insurer's denial of the claim prevented the insured's performance of the condition.[2] D&S argued that Markel's wrongful denial of any liability for the water damage loss likewise prevented its performance of the repairs or replacement of the damaged property. D&S suggested it would be unreasonable to expect an insured to repair or replace when the insurer has told the insured it will not pay regardless. The district court agreed: "I have an issue with making [D&S] go spend millions of dollars . . . and then seek recovery . . . ." The court also noted that Markel had failed to raise the replacement cost condition until its motion for a directed verdict.

The instruction given on damages stated in part:

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[1] *Bailey v. Farmers Union Co-op Ins. Co.*, 1 Neb. App. 408, 498 N.W.2d 591 (1992).

[2] *Id.*

> If you find in favor of [D&S] on its claim for breach of the insurance contract, then you must determine the amount of its damages.
>
> In accordance with the insurance policy, [Markel] is obligated to pay the cost of repairing or replacing the damaged property. [Markel] is only obligated to pay the amount it would cost to repair the covered property with comparable material and quality up [to] the policy limits of $4.5 million and less the deductible of $50,000.00.

The jury returned a verdict for Markel, presumably determining that the North Tower was "vacant" and that Markel was therefore not liable under the policy.

D&S appealed the judgment to our court. Markel did not file a cross-appeal. D&S asserted on appeal that the district court erred in refusing to submit to the jury the issues of § 44-358, waiver, and estoppel. D&S did not contest the jury's implicit finding that the building was not under construction or renovation or the district court's conclusion that the building was more than 70-percent vacant for more than 60 days preceding the loss.

In *D & S Realty v. Markel Ins. Co.*,[3] we affirmed the district court's determinations as to waiver and estoppel, but we reversed the district court's determination on § 44-358. We held that the vacancy clause was a condition subsequent. Thus, under § 44-358, vacancy could not operate to avoid liability under the policy unless the vacancy contributed to the loss. We held that the jury should have been so instructed and that D&S should have been allowed to argue that the contribute-to-the-loss standard applied to preclude Markel from denying liability for the loss. We remanded the cause "for further proceedings limited to the issue of whether D&S' breach of the vacancy condition contributed to the loss."[4] In *D & S Realty*, we did not address whether replacement cost was the proper measure of damages or whether the instruction on damages

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[3] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[4] *Id.* at 590-91, 789 N.W.2d at 19.

was erroneous, presumably because neither D&S nor Markel contested that issue.

On remand, during the pretrial conference, it was discussed that the issues to be tried were whether the breach of the vacancy provision contributed to the loss and, if not, the measure of D&S' damages for Markel's breach of the insurance contract. In accordance with the jury instruction given at the first trial, the court appeared to believe replacement cost was the proper measure of damages. Markel filed a motion in limine asking that the court prevent D&S from offering any evidence of repair or replacement costs and that it prohibit D&S from addressing repair or replacement costs in voir dire, its opening statement, and its closing argument. Markel asserted, similarly to the first trial, that D&S failed to satisfy the repair/replace condition to replacement cost coverage. Indeed, Markel noted that D&S had sold the North Tower at the end of the first trial in December 2008. Markel asserted that in the event it was liable under the policy, the proper measure of damages should instead be the difference in actual cash value of the North Tower immediately before and after the water damage.

The district court took the matter under advisement and did not expressly rule on it at that time. But when Markel renewed the motion in limine at trial and objected to D&S' evidence of replacement costs, the court overruled the objections and received the evidence. D&S' expert was allowed to present a detailed document listing, as of July 25, 2003, a total replacement cost of $2,309,721.97 for the damages incurred in January and March 2003. A revised estimate as of August 29, 2008, which took into account inflation, listed the total replacement cost as $3,138,516.45.

David Abboud, the president of D&S, testified that other than removing certain water-logged items, D&S had not actually conducted the repairs or replacements listed in the document presented by D&S' expert. When asked why, Abboud responded, "Lack of money[,] primarily." Markel did not cross-examine Abboud on that point.

The court granted D&S' motion to preclude Markel from eliciting testimony concerning the sale of the North Tower, on

the ground that it would confuse the issues. Markel made an offer of proof that D&S sold the North Tower for $437,000 after the water incidents.

At the close of D&S' case, Markel moved for a directed verdict on the grounds that (1) the vacancy did contribute to the loss and (2) D&S presented evidence of only replacement costs, which it could not recover because it had not actually repaired or replaced the damaged property. The court overruled the motion.

Markel entered into evidence an estimate by its insurance adjuster stating that the total repair and replacement costs for the damaged property were only $59,208. Markel renewed its motion for a directed verdict at the close of all the evidence, based again on D&S' failure to actually conduct any repairs or replace any damaged items. The motion was overruled.

An instruction on damages virtually identical to the instruction in the first trial was given to the jury over Markel's objection. The jury was instructed that the measure of damages was replacement cost.

The court rejected Markel's proposed instruction on the measure of damages, which read in part as follows:

> [D&S] must . . . prove the amount of its damages, that is, the least of the following amounts as provided in the policy:
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> 1. The limit of insurance applicable to the damaged property;
>
> 2. The cost to replace, on the same premises, the lost or damaged property with other property:
>
> (a) Of comparable material and quality; and
>
> (b) Used for the same purpose; or
>
> 3. The amount [D&S] actually spent that is necessary to repair or replace the damaged property.

On a special verdict form, the jury first found that the vacancy did not contribute to the subject loss. The jury then determined the amount of replacement cost damages to be $784,421.89.

Subsequently, D&S filed a motion to tax costs and fees pursuant to Neb. Rev. Stat. §§ 25-1708 (Cum. Supp. 2010)

and 44-359 (Reissue 2010). On May 19, 2011, Markel filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Markel asserted that the district court erred in failing to sustain its motion for a directed verdict because D&S failed to show it had repaired or replaced any of the damaged property and that furthermore, D&S had failed to offer any evidence of the actual cash value of the North Tower immediately before and immediately after the damage occurred. Thus, according to Markel, D&S had failed to present any evidence of recoverable damages.

Markel also averred that the district court erred in permitting D&S to present evidence of the cost to repair or replace the damage to the North Tower, because D&S did not repair or replace the damaged property. Finally, Markel alleged that the district court erred in failing to instruct the jury that D&S was entitled to the lesser of three items, one of which was "the amount actually spent that is necessary to repair and replace the damaged property," as set forth in Markel's proposed instruction.

On July 1, 2011, the court overruled Markel's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. On August 12, the court entered an order granting attorney fees in the amount of $385,471.50 and costs in the amount of $3,598.49. Markel timely appealed the final judgment.

III. ASSIGNMENTS OF ERROR

Markel assigns that the district court (1) erred in overruling Markel's motions for a directed verdict because D&S did not repair or replace the water-damaged portions of the North Tower; (2) erred in refusing Markel's requested jury instruction on the measure of damages; (3) abused its discretion in overruling Markel's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial; and (4) erred in awarding attorney fees and costs to D&S, because D&S would not have recovered a verdict for damages had the proper jury instructions been given.

IV. STANDARD OF REVIEW

[1] On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[5]

V. ANALYSIS

[2] Markel argues that the district court erred in several rulings below because Markel's duty to pay replacement costs under the policy never became due. Performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.[6] D&S failed to fulfill the repair/replace condition to replacement cost coverage under the policy. And Markel argues that its good faith denial of liability for the water-damage loss should not excuse D&S from performing the repair/replace condition.

Markel argues in the alternative that any theory which might excuse performance based on a good faith denial of coverage would involve specific factual showings which D&S failed to make. Markel acknowledges that under the jury's verdict, D&S would have been entitled to actual cash value. However, Markel argues that D&S failed to prove actual cash value. Therefore, Markel asks that we reverse and that we remand with directions to dismiss the case with prejudice.

D&S, in contrast, argues that Markel's denial of liability for the loss excused the repair/replace condition as a matter of law. D&S alternatively asserts that even if excusal is a matter of fact, there was sufficient uncontroverted evidence that the denial of liability actually prevented D&S' performance of the repair/replace condition.

D&S argues that when the insurer has unequivocally stated it will not reimburse any replacement costs, it is unreasonable to require the insured to procure the money for repairs and incur the financial risk of repairing or replacing the damaged property. D&S argues that it paid for replacement cost coverage and

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[5] See *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012).

[6] 13 Samuel Williston, A Treatise on the Law of Contracts § 39:1 (Richard A. Lord ed., 4th ed. 2000).

that Markel should not be allowed to benefit from its wrongful denial of coverage, which forced D&S to bring the current breach of contract action.

1. *Bailey v. Farmers Union Co-op Ins. Co.*

[3] D&S relies on the Nebraska Court of Appeals' opinion in *Bailey v. Farmers Union Co-op Ins. Co.*[7] for the proposition that denial of coverage excuses performance of repair/replace conditions. In *Bailey*, the Court of Appeals held that the insured was "prevented" from satisfying the repair/replace condition of replacement cost coverage "by [the insurer's] refusal to assure [the insured] that, in addition to the actual cash value figure, the cost of rebuilding her home would be covered up to the policy limit."[8] The Court of Appeals reasoned that "an insured should not be barred from recovery for failure to rebuild within the time constraints of the policy when the conduct of the insurer prevented the insured from rebuilding."[9] The court relied on the general principle of law that "[a] condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition."[10] The trial court had found that the insurer's conduct prevented the insured from rebuilding, and the Court of Appeals said such finding was not clearly wrong.

Markel, however, argues that the facts of *Bailey* are distinguishable from those of the case at bar. The insurer in *Bailey* acted in bad faith in delaying acknowledgment of liability for the accidental loss of the insured's home. While the insurer delayed, the remains of the house were condemned and the insured incurred additional demolition costs and other damages.[11] Markel asserts that while a bad faith denial can excuse performance of the repair/replace condition, a good faith denial should not.

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[7] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

[8] *Id.* at 418, 498 N.W.2d at 598.

[9] *Id.* at 419, 498 N.W.2d at 599.

[10] *Id.* at 418, 498 N.W.2d at 598.

[11] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

Neither our court nor the Court of Appeals has had occasion to consider whether a good faith denial of coverage which is ultimately determined to be in breach of contract excuses performance of a repair/replace condition. And our courts have never been squarely presented with the question of whether the prevention of a repair/replace condition by virtue of the insurer's denial of coverage may be determined as a matter of law or must instead be determined by the trier of fact. In order to answer these questions, we turn first to the nature of replacement cost coverage as an optional rider to standard indemnity policies and the reason for the repair/replace condition.

2. What Is Replacement Cost Coverage?

[4] Standard casualty protection for residential and commercial property insures the property only to the extent of its actual cash value.[12] Actual cash value is the value of the property in its depreciated condition.[13] The purpose of actual cash value coverage is indemnification.[14] It is to make the insured whole, but never to benefit the insured because the loss occurred.[15]

Most standard indemnity policies allow the insurer to choose to pay the lesser of actual cash value or the cost of repairing or replacing the damaged property. Thus, where the cost to repair or replace is greater than the actual cash value, the insured, not the insurer, is responsible for the cash difference necessary to replace the old property with new property.[16]

[5] Replacement cost insurance is optional additional coverage that may be purchased to insure against the hazard

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[12] See Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 Wake Forest L. Rev. 295 (1999).

[13] 3 Allan D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies and Insureds § 11:35 (5th ed. 2010).

[14] See Parker, *supra* note 12.

[15] *Id.*

[16] 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 176:56 (2005). See, also, Annot., 1 A.L.R.5th 817 (1992).

that the improvements will cost more than the actual cash value and that the insured cannot afford to pay the difference.[17] In essence, replacement cost coverage insures against the expected depreciation of the property.[18] Unlike standard indemnity, replacement cost coverage places the insured in a better position than he or she was in before the loss.[19] "Any purported windfall to an insured who purchases replacement cost insurance is precisely what the insured contracted to receive in the event of a loss."[20] Replacement cost coverage is, accordingly, more expensive than standard indemnification coverage.[21]

But because replacement cost coverage places the insured in a better position than before the loss, there is a moral hazard that the insured will intentionally destroy the insured property in order to gain from the loss.[22] For this reason, most replacement cost policies require actual repair or replacement of the damaged property as a condition precedent[23] to recovery under the replacement cost rider.[24] The repair/replace condition generally requires, as it did here, that the repair or replacement occur "as soon as reasonably possible after the loss," or a similar time constraint.

If the insured has contracted for replacement cost coverage, the insured will normally be entitled under the policy to an immediate payment representing the actual cash value of the loss, which can be used as seed money to start the

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[17] See, *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60 (Ind. App. 2009); Parker, *supra* note 12.

[18] Parker, *supra* note 12. See, also, John H. Magee & David L. Bickelhaupt, General Insurance (7th ed. 1964).

[19] Parker, *supra* note 12.

[20] *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17, 911 N.E.2d at 65.

[21] *Id.*

[22] See, e.g., *Ohio Cas. Ins. Co. v. Ramsey*, 439 N.E.2d 1162 (Ind. App. 1982); *Patton v. Mutual of Enumclaw Ins. Co.*, 238 Or. App. 101, 242 P.3d 624 (2010).

[23] See, *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Higgins v. Insurance Co. of N. America*, 256 Or. 151, 469 P.2d 766 (1970).

[24] See 12 Russ & Segalla, *supra* note 16, § 176:60.

repairs.[25] Depending on the policy, the acceptance of this actual-cash-value payment may trigger a more limited time constraint for completion of the repairs, as it does here.[26] If the insured repairs or replaces the property within the time period stated in the policy, the insured will then be entitled to an additional payment for the amount by which the cost of the repair or replacement exceeded the actual cash value payment.[27]

[6] When the insurer has not breached its obligations under the policy, provisions which mandate actual repair or replacement as a condition to recovery of replacement cost damages are almost universally found enforceable.[28] In other words, the repair/replace condition is neither ambiguous nor unconscionable.[29] If the insurer accepts liability for the loss under the standard indemnity portion of the policy, the insured is bound to comply with the repair/replace condition before the insured can recover replacement costs.[30] But that is not the situation here.

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[25] See 3 Windt, *supra* note 13. See, also, e.g., *Ward v. Merrimack Mut. Fire Ins.*, 332 N.J. Super. 515, 753 A.2d 1214 (2000).

[26] See Parker, *supra* note 12.

[27] 3 Windt, *supra* note 13.

[28] *Id.*

[29] See *id.*

[30] See, *Versai Management Corp. v. Clarendon America Ins.*, 597 F.3d 729 (5th Cir. 2010); *Kolls v. Aetna Casualty and Surety Company*, 503 F.2d 569 (8th Cir. 1974); *Bourazak v. North River Insurance Company*, 379 F.2d 530 (7th Cir. 1967); *Huggins v. Hanover Ins. Co.*, 423 So. 2d 147 (Ala. 1982); *Rhodes v. Farmers Ins. Co., Inc.*, 79 Ark. App. 230, 86 S.W.3d 401 (2002); *Higginbotham v. Am. Family Ins. Co.*, 143 Ill. App. 3d 398, 493 N.E.2d 373, 97 Ill. Dec. 710 (1986); *Burchett v. Kansas Mut. Ins. Co.*, 30 Kan. App. 2d 826, 48 P.3d 1290 (2002); *Porter v. Shelter Mut. Ins. Co.*, 242 S.W.3d 385 (Mo. App. 2007); *Nicolaou v. Vermont Mut. Ins. Co.*, 155 N.H. 724, 931 A.2d 1265 (2007); *De Lorenzo v. Bac Agency Inc.*, 256 A.D.2d 906, 681 N.Y.S.2d 846 (1998); *Bratcher v. State Farm Fire & Cas. Co.*, 961 P.2d 828 (Okla. 1998); *Burton v. Republic Ins. Co.*, 845 A.2d 889 (Pa. Super. 2004); *Fitzhugh 25 Partners v. KILN Syndicate KLN*, 261 S.W.3d 861 (Tex. App. 2008); *Saleh v. Farmers Ins. Exchange*, 133 P.3d 428 (Utah 2006); *Hess v. North Pacific Ins. Co.*, 122 Wash. 2d 180, 859 P.2d 586 (1993).

We must determine whether and under what circumstances a wrongful denial of coverage excuses the insured's duty to comply with the repair/replace condition.

3. Doctrine of Prevention

When the insurer, in breach of the insurance contract, denies liability for the insured's loss, most courts conclude that such denial may excuse the insured's duty under the repair/replace condition to replacement cost coverage.[31] While other theories are sometimes relied upon,[32] most courts frame the issue in terms of the doctrine of prevention.[33] Thus, in *Bailey*, the court referred to the insurer's denial of liability as having "prevented" the insured's performance of the repair/replace condition.[34]

[7] The doctrine of prevention states that where a promisor prevents, hinders, or renders impossible the occurrence of a condition precedent to his or her promise to perform, the promisor is not relieved of the obligation to perform and may not invoke the other party's nonperformance as a defense when

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[31] 12 Russ & Segalla, *supra* note 16, §§ 176:59 and 176:60; 3 Windt, *supra* note 13. See *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1. See, also, *Zaitchick v. American Motorists Ins. Co.*, 554 F. Supp. 209 (D.C.N.Y. 1982); *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 81 Cal. Rptr. 3d 72 (2008); *State Farm Fire & Cas. Ins. Co. v. Miceli*, 164 Ill. App. 3d 874, 518 N.E.2d 357, 115 Ill. Dec. 832 (1987); *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001); *Pollock v Fire Ins Exchange*, 167 Mich. App. 415, 423 N.W.2d 234 (1988); *Cornelius v. Badger Mut. Ins. Co.*, 354 N.W.2d 100 (Minn. App. 1984); *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[32] See, *City of Hollister v. Monterey Ins. Co., supra* note 31; *Conrad Brothers v. John Deere Ins. Co., supra* note 31.

[33] See *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1. See, also, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Pollock v Fire Ins Exchange, supra* note 31; *Cornelius v. Badger Mut. Ins. Co., supra* note 31; *Ward v. Merrimack Mut. Fire Ins., supra* note 25; Parker, *supra* note 12; 1 A.L.R.5th, *supra* note 16, § 13[a].

[34] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1, 1 Neb. App. at 418, 498 N.W.2d at 598.

sued upon the contract.[35] "In short, under the doctrine of prevention, where a party to a contract is the cause of the failure of the performance of the obligation due him or her, that party cannot in any way take advantage of that failure."[36]

(a) Doctrine of Prevention Is Not Limited to Bad Faith

[8,9] But, at least where the conduct is in breach of the promisor's obligations under the contract, "prevention" is not necessarily limited to "bad faith" acts.[37] Thus, where the impeding act is the denial of liability in breach of the insurer's obligations under a policy with the insured, the breach may excuse the insured's performance of a repair/replace condition even if made because of a "good faith" misunderstanding of the rights and liabilities of the parties.[38] It has been said that "a party typically 'acts at its peril if that party, insisting on what it mistakenly believes to be its rights, refuses to perform its duty.'"[39] Furthermore, whether the denial was in good or bad faith, it would be "wasteful[] and useless" to require the insured to comply with the repair/replace condition when, by doing so, the insured would not obtain recognition of coverage.[40] The law does not require the doing of a useless act.[41] According

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[35] 13 Williston, *supra* note 6, § 39:3.

[36] *Id.* at 519.

[37] See *id.* Accord Restatement of Contracts § 295 (1932).

[38] See, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Conrad Brothers v. John Deere Ins. Co., supra* note 31; *Ward v. Merrimack Mut. Fire Ins., supra* note 25; Restatement, *supra* note 37; 13 Williston, *supra* note 6, § 39.3. See, also, *Go Travel Toledo, Inc. v. American Airlines*, 96 Fed. Appx. 290 (6th Cir. 2004); 13 Williston, *supra* note 6, § 39:10.

[39] *Conrad Brothers v. John Deere Ins. Co., supra* note 31, 640 N.W.2d at 241 (quoting 2 E. Allan Farnsworth, Farnsworth on Contracts § 8.21 (2d ed. 1998)).

[40] *Conrad Brothers v. John Deere Ins. Co., supra* note 31, 640 N.W.2d at 241.

[41] *Id.* (quoting 13 Williston, *supra* note 6, § 39:37). See, also, e.g., *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009); *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997).

to Williston on Contracts, "the performance of a condition precedent is waived where the other party has unequivocally declared by word or act that performance of the condition will not secure performance of the counterpromise."[42]

Courts have explained that not allowing claims of prevention based on the erroneous denial of coverage would trap the insured "in a no win situation."[43] The insured, in order to recover under the replacement cost coverage he or she purchased, would have to incur the cost of repairs and replacements when there is no guarantee that a future breach of contract action by the insured will be successful. Indeed, *Bailey* and other cases have recognized that it would be very difficult for most insureds to obtain the financing necessary to conduct the repairs or replacements when the insurer has denied liability for the loss.[44] This is equally true whether the denial has been made in good or bad faith.

In *Ward v. Merrimack Mut. Fire Ins.*,[45] the court thus held that the insurer's good faith denial of the insureds' claim could excuse performance of the repair/replace condition. The trial court below had concluded as a matter of law that the insured was entitled only to actual cash value, because the insured did not perform the repair/replace condition. The trial court had found that the doctrine of prevention did not apply to good faith denials of coverage. The Superior Court of New Jersey reversed, specifically rejecting the trial court's view that a good faith denial of coverage rendered the doctrine of prevention inapplicable. The court explained that an insurer's denial of a claim is no less "'wrongful'" because it is made in good faith.[46]

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[42] 13 Williston, *supra* note 6, § 39:39 at 672-73.

[43] *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17, 911 N.E.2d at 65.

[44] See *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1. See, also, *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Smith v Michigan Basic Ins*, 441 Mich. 181, 490 N.W.2d 864 (1992) (superseded by statute as stated in *Salesin v State Farm*, 229 Mich. App. 346, 581 N.W.2d 781 (1998)); *McCahill v Commercial Ins Co*, 179 Mich. App. 761, 446 N.W.2d 579 (1989); *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[45] *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[46] *Id.* at 524, 753 A.2d at 1219.

We agree, and we reject Markel's assertion that a good faith denial of liability cannot excuse D&S' duty to perform the repair/replace condition. We have said in other contexts that if a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused.[47] We have never said the prevention must be in bad faith. And in *Bailey*, while bad faith formed the basis for the insured's separate tort claim, the Court of Appeals never discussed bad faith when it held the insured was excused from performing the repair/replace condition.[48] This was the correct approach. An insurer can prevent the performance of a repair/replace condition without acting in bad faith.

(b) Prevention Is Question of Fact

However, Markel is correct that most courts view prevention as a question of fact under the particular circumstances presented and that the insured has the burden to prove those circumstances.[49] In *Ward*,[50] for example, because the question of prevention was never presented to the jury, the court remanded the matter for the necessary factual determination of whether the insurer's denial actually prevented the insureds from repairing or replacing the property.

In contrast, the court in *Rockford Mut. Ins. Co. v. Pirtle*[51] affirmed the verdict in favor of the insured when the jury had been instructed as follows: "'When one party prevents the other from performing any part of the contract, the other party is excused from the remainder of his duties. The party excused may also recover for any work and any other damages sustained as a direct result of the prevention of performance.'"

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[47] See *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

[48] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

[49] See, *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Ward v. Merrimack Mut. Fire Ins., supra* note 25. But see *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31.

[50] *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[51] *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17, 911 N.E.2d at 66.

There was no determination that the insurer in *Rockford Mut. Ins. Co.* had acted in bad faith. The insurer had offered to "'cash out'" the insurance policy at an amount which would not be enough to repair the insured's damaged building.[52] While the dispute over the value of the claim continued, the insured was unable to keep his tenants in the building and fell behind on his mortgage. When the insurer finally made an actual-cash-value payment with agreement that the insurer would additionally pay for the repairs once conducted, the insured had to use the cash value payment for the mortgage instead of beginning repairs. The court observed that if the condition of actually repairing or replacing the property were not excused under these facts, the replacement cost endorsement paid for by the insured "would be rendered illusory."[53]

[10,11] It is true that some courts have held that the insurer's good faith denial of liability excuses the insured from performing the repair/replace condition as a matter of law.[54] But the greater weight of authority, in accordance with general principles of contract law, is that whether interference by one party to a contract amounts to prevention so as to excuse performance by the other party is a question of fact to be decided under all of the proven facts and circumstances.[55] And the burden to prove those facts is on the party bringing action under the contract.[56] The doctrine of prevention does not require proof that the condition would have occurred "but for" the

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[52] *Id.*

[53] *Id.*

[54] See, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Conrad Brothers v. John Deere Ins. Co., supra* note 31. See, also, *Smith v Michigan Basic Ins, supra* note 44.

[55] See, e.g., 13 Williston, *supra* note 6, § 39:3.

[56] See, *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000); *Chadd v. Midwest Franchise Corp., supra* note 47; 81A C.J.S. *Specific Performance* § 130 (2004). See, also, *Zaitchick v. American Motorists Ins. Co., supra* note 31; *Chambers v. Pingree*, 351 S.C. 442, 570 S.E.2d 528 (S.C. App. 2002); *Paddock v. Mason*, 187 Va. 809, 48 S.E.2d 199 (1948); *O'Brien v. Hunt*, 464 P.2d 306 (Wyo. 1970); 71 Am. Jur. 2d *Specific Performance* § 226 (2001).

wrongful conduct of the promisor, but requires only that the promisor's conduct contributed materially to the nonoccurrence of the condition.[57] However, if the promisee could not or would not have performed the condition, or it would not have happened whatever had been the promisor's conduct, the condition is not excused.[58]

(c) Excusal May Be Only Temporary

Markel is also correct that at least when a good faith denial of liability is the cause of the nonperformance, many courts hold that the duty to perform the condition is merely suspended while the issue of liability is undetermined.[59] These courts reason that it would "not be necessary to excuse the performance of a condition precedent that would still be capable of performance following the resolution of the coverage question."[60] On the other hand, "a coverage dispute may excuse performance by the insured of certain conditions that could no longer be performed even after the coverage dispute is resolved."[61]

In *Smith v Michigan Basic Ins*,[62] the Michigan Supreme Court held that the excusal of the insureds' performance of the repair/replace condition was only temporary. The court distinguished its facts from those in *Pollock v Fire Ins Exchange*,[63]

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[57] See *Moore Bros. Co. v. Brown & Root, Inc., supra* note 56.

[58] *Ward v. Merrimack Mut. Fire Ins., supra* note 25 (citing 5 Samuel Williston, A Treatise on the Law of Contracts § 677 (Walter H.E. Jaeger ed., 3d ed. 1961)).

[59] See, *Dickler v. CIGNA Property and Cas. Co.*, 957 F.2d 1088 (3d Cir. 1992); *Miller v. Farm Bureau Town & Country Ins.*, 6 S.W.3d 432 (Mo. App. 1999); *Todd v. Wayne Co-op. Ins. Co.*, 31 A.D.3d 1026, 819 N.Y.S.2d 179 (2006). See, also, *Conrad Brothers v. John Deere Ins. Co., supra* note 31. But see, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17. See, additionally, Restatement (Second) of Contracts § 245 and comment *a*. (1981).

[60] *Conrad Brothers v. John Deere Ins. Co., supra* note 31, 640 N.W.2d at 240.

[61] *Id.*

[62] *Smith v Michigan Basic Ins, supra* note 44.

[63] *Pollock v Fire Ins Exchange, supra* note 31.

a case involving the bad faith denial of a claim and which the Nebraska Court of Appeals extensively discussed in *Bailey*.[64]

The insurer in *Smith* had, in good faith, denied the insureds' claim after fire destroyed their home, believing that the insureds deliberately set the fire.[65] When it appeared that the home would not be repaired, the city demolished what was left of the structure, and the insureds had not replaced it. Prior to trial, the trial judge had made a special determination as a matter of law that the insureds would be entitled to replacement costs if the jury determined they had not committed fraud. The Michigan Court of Appeals had affirmed the judge's ruling that the insureds could recover the replacement costs without actually having repaired or replaced the home. But the Michigan Supreme Court reversed.

The Michigan Supreme Court agreed that "'a bank would be chary to lend money on the basis of an unlitigated law suit in which the defendant and its vast resources intend to present several defenses to payment.'"[66] Thus, the insureds "could not be expected to repair, rebuild, or replace while this litigation was pending."[67] However, once litigation has determined the insureds are entitled to coverage, the insurer's defense to coverage "no longer stands in the way of lender-assisted financing of repair, rebuilding, or replacement."[68]

Although the insured's house in *Smith* had been demolished by the time the policy dispute was decided, the policy allowed the insured to rebuild in a different location from the site of the loss. Accordingly, the Michigan Supreme Court concluded that the insureds' "interest in obtaining payment of replacement cost can be protected without estopping the insurer from requiring actual repair, rebuilding, or replacement."[69] The court

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[64] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

[65] *Smith v Michigan Basic Ins, supra* note 44.

[66] *Id.* at 190, 490 N.W.2d at 867 (quoting *Zaitchick v. American Motorists Ins. Co., supra* note 31).

[67] *Id.* at 190, 490 N.W.2d at 867.

[68] *Id.* at 190, 490 N.W.2d at 868.

[69] *Id.* at 191, 490 N.W.2d at 868.

remanded with directions that the judgment award the insureds actual cash value and require an additional payment by the insurer when and if the insureds actually repaired, rebuilt, or replaced their home.

In other cases, courts have similarly denied an award of replacement costs, while at the same time expressly allowing the insured additional time to repair or replace the property after the judgment which determined that the insurer was liable under the policy.[70] In other words, those courts found that the insurer's denial of liability excused the repair/replace condition only while the question of liability was undecided. We observe that, in those cases, the facts showed that it was still possible to satisfy the repair/replace condition after the decision was rendered.[71]

[12] There are courts which hold that the good faith denial of liability under the policy absolutely and permanently excuses or waives the insured's obligation to perform the repair/replace condition.[72] But we agree with the reasoning in *Smith*.[73] The respective interests of parties acting in good faith can, in most cases, be adequately protected by excusing the performance of the repair/replace condition only for such time as it appears the insurer will not honor its obligations under the policy. Where the insured can still conduct the repairs/replacements and be reimbursed by the insurer, then the good faith denial of liability should not operate to give the insured a benefit it did not contract for.

[13] Neither, however, should the insurer be permitted to take advantage of the insured's failure to perform a condition precedent under the contract when the insurer has materially contributed to that failure. Thus, we conclude that if the delay in determining the insurer's liability materially contributed to

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[70] *Dickler v. CIGNA Property and Cas. Co., supra* note 59; *Todd v. Wayne Co-op. Ins. Co., supra* note 59. See, also, *Miller v. Farm Bureau Town & Country Ins., supra* note 59.

[71] See *id.*

[72] *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[73] *Smith v Michigan Basic Ins, supra* note 44.

a situation where the insured can no longer perform the condition after the coverage dispute is resolved, then the condition will be absolutely excused.[74]

4. New Trial

In this case, the trier of fact did not determine whether Markel's conduct materially contributed to D&S' failure to repair or replace the property. Instead, the jury was improperly instructed as a matter of law that the measure of damages was replacement costs. Nevertheless, each of the parties in this case wishes to hold the other to its proofs, or lack thereof, on matters neither tried nor determined below.

Markel argues that Abboud's testimony that a "[l]ack of money[,] primarily," caused D&S not to repair or replace the property is insufficient to make even a prima facie case of prevention. D&S disagrees and argues that since Markel did not rebut D&S' evidence, we should determine prevention as a matter of law.

Markel argues that if D&S' evidence of prevention was insufficient, then D&S cannot recover anything at all. Markel points out that D&S presented no evidence of actual cash value—which Markel concedes was recoverable. Markel argues that D&S chose to focus on only one measure of recovery and that it took the risk of being wrong. While Markel made an offer of proof of the sale price of the North Tower after the loss and D&S presented evidence of the original purchase price and an appraisal after the loss, Markel argues that this evidence is inadequate.

We find neither party's arguments on these points persuasive. The district court conducted both trials under the theory that an insurer's erroneous denial of liability excuses performance of the repair/replace condition as a matter of law. From the time of the first trial, the judge stated, "I have an issue with making [D&S] go spend millions of dollars . . . and then seek recovery . . . ." In both the first and second trials, the district court did not give the jury the opportunity to determine

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[74] See *Conrad Brothers v. John Deere Ins. Co.*, *supra* note 31.

actual prevention and it did not give the jury an opportunity to determine actual cash value.

As a result of the district court's rulings, D&S had no reason to believe evidence of actual cash value was relevant or even admissible. Under the terms of the policy, where replacement costs are recoverable, that measure "replaces Actual Cash Value in the Loss Condition, Valuation, of [the policy's] Coverage Form."

Likewise, D&S presented only Abboud's one-line statement about "[l]ack of money" on the matter of proving prevention, because the district court's rulings indicated it believed the good faith denial of coverage absolutely excused the repair/replace condition as a matter of law. As mentioned, such a view is not unprecedented in other jurisdictions, and we had never before determined this issue. Because Markel was similarly unaware that actual prevention was a factual issue at trial, Markel did not question or rebut Abboud's testimony of causation.

[14] A party may rely on a trial court's favorable ruling.[75] It is unreasonable to expect counsel to attempt to present testimony in anticipation that a judge's favorable rulings will be reversed.[76] D&S' presentation of the evidence, or lack thereof, was in reliance on the trial judge's favorable position. The judge conducted the trials on the theory that the only issues to be determined by the jury were whether the vacancy contributed to the loss and, if it did not, the amount of the replacement costs to be granted D&S. D&S and Markel followed suit.

The parties did not litigate the factual questions necessary to the determination of their respective rights and liabilities, and the jury below was not given an opportunity to determine those factual questions. We will not decide for the first time on appeal the factual question of whether D&S was actually prevented from performing the repair/replace condition. That question is for the trier of fact. We make no comment

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[75] *U.S. ex rel. Bostick v. Peters*, 3 F.3d 1023 (7th Cir. 1993).

[76] See *id.*

on whether the record before us could adequately support a finding that Markel prevented D&S from fulfilling the repair/replace condition. Likewise, we do not reach the issue of whether the record is sufficient to demonstrate actual cash value in the event that D&S was not excused from performing the repair/replace condition.

There is no longer any issue that Markel was liable under the policy for the water damage which occurred at the North Tower. The only question remaining is whether Markel must pay D&S actual cash value or replacement costs. In most cases involving good faith denial of coverage, the interests of the parties would be adequately protected by granting a judgment to the insured for actual cash value and, in addition, a declaratory judgment that the insured will be reimbursed for the difference between actual cash value and any repair/replacement costs actually conducted within the time stated in the policy, running from the time of the judgment.

But the North Tower has been sold. And the policy issued by Markel to D&S required that the replacement be "on the same premises." Thus, future repair or replacement by D&S is now impossible. Therefore, if D&S can demonstrate to the trier of fact on remand that Markel's general denial of liability and the resulting litigation materially contributed to this impossibility, D&S may recover replacement costs without ever actually repairing or replacing the damaged property.

If the jury finds that D&S was thus permanently prevented from repairing or replacing the property, then D&S would be entitled to replacement costs in the amount that the jury has already determined—an amount which D&S has not contested in this appeal. If D&S cannot prove that Markel's general denial of liability for the loss materially contributed to its permanent inability to repair or replace the property, then D&S can recover only actual cash value, which may be determined in a new trial on remand.

We find no merit to Markel's assignment of error on costs and attorney fees, since we find no merit to its argument that good faith denial of coverage can never operate to excuse the insured's performance of the repair/replace condition.

VI. CONCLUSION

We reverse the judgment and remand the cause for a new trial on the limited issue of the extent to which Markel's conduct prevented D&S from complying with the repair/replace condition to replacement cost coverage under the policy. Also to be tried on remand is the amount of the actual cash value of the loss in the event D&S is not excused from the condition precedent to replacement cost coverage.

REVERSED AND REMANDED FOR A NEW TRIAL.

MILLER-LERMAN, J., not participating.