231 Cal.App.4th 1131
Court of Appeal,
First District, Division 1, California.

STEPHENS & STEPHENS XII, LLC, Plaintiff and Appellant,
v.
FIREMAN'S FUND INSURANCE CO., et al., Defendants and Respondents.

A135938; A136740 | Filed 11/24/2014 | As Modified on Denial of Rehearing 12/17/2014 | Certified for Partial Publication. *

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part DISCUSSION, A.2., B., C.

**Synopsis**

**Background:** Insured owner of commercial building brought action against property insurer, alleging breach of contract and breach of the covenant of good faith and fair dealing after insurer disputed that damage to property, which had been burglarized and stripped of copper, took place during three day period between when property damage coverage became effective and when damage was discovered. After jury awarded building owner the full cost of repairing property and awarded lost business income, the Superior Court, San Francisco County, No. CGC–10–502891, Curtis E.A. Karnow, J., granted judgment notwithstanding the verdict (JNOV) and conditionally granted insurer's motion for new trial, and building owner appealed.

**Holdings:** The Court of Appeal, Humes, P.J., held that:

[1] as a matter of first impression, insurer's delay in resolving and denying claim excused owner from policy requirement that the damage be repaired "as soon as reasonably possible after the loss or damage" in order to recover replacement value;

[2] building owner's failure to complete repairs to damaged building, which was a condition precedent to its right to receive replacement cost, did not preclude it from obtaining judgment that it was entitled to reimbursement of replacement cost conditioned upon satisfaction of the condition precedent;

[3] evidence was sufficient to support finding that coverage dispute hindered or prevented building owner from repairing the property;

[4] insurer did not waive right to insist on compliance with repair requirement prior to paying cost of repair as measure of damages;

[5] insurer's failure to advise building owner of policy's requirement that building owner actually complete repairs prior to payment of replacement cost did not estop insurer from refusing to pay replacement cost absent any evidence that any nondisclosure was the cause of its failure either to make a claim for actual cost value or to make the required repairs; and

[6] denial of coverage was not a repudiation of the policy.

Reversed in part, vacated in part, and remanded.

West Headnotes (18)

**[1] Contracts**

Performance prevented by other party or third person

95 Contracts
95V Performance or Breach
95k303 Excuses for Nonperformance or Defects
95k303(4) Performance prevented by other party or third person

Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.

Cases that cite this headnote

**[2] Contracts**

Performance prevented by other party or third person

95 Contracts
95V Performance or Breach
95k303 Excuses for Nonperformance or Defects

95k303(4) Performance prevented by other party or third person

Although it is implicit in the doctrine of prevention that the condition has not occurred, it is not necessary to show that it would have occurred but for the lack of cooperation but rather it is only required that the breach have contributed materially to the non-occurrence; nevertheless, if it can be shown that the condition would not have occurred regardless of the lack of cooperation, the failure of performance did not contribute materially to its non-occurrence and the doctrine does not apply.

Cases that cite this headnote

**[3]** **Insurance**

Repair or Replacement

**Insurance**

Denial or Disclaimer of Liability on Policy

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2184 Repair or Replacement
217k2185 In general
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3110 Denial or Disclaimer of Liability on Policy
217k3110(1) In general

When an insurer's decision to decline coverage materially hinders an insured from repairing damaged property, procedural obstacles to obtaining the replacement-cost value should be excused; if coverage is ultimately resolved in favor of the insured, the insured should remain eligible to receive replacement cost, but only so long as the insured complies with other applicable policy terms, such as a repair requirement.

Cases that cite this headnote

**[4]** **Insurance**

Repair or Replacement

**Insurance**

Failure, delay, or inadequacy

**Insurance**

Judgment

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2184 Repair or Replacement
217k2185 In general
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3110 Denial or Disclaimer of Liability on Policy
217k3110(2) Failure, delay, or inadequacy
217 Insurance
217XXXI Civil Practice and Procedure
217k3581 Judgment
217k3582 In general

Property insurer's delay in resolving and denying insured commercial building owner's damage claim materially hindered owner's ability to plan for the property such that, pursuant to the prevention doctrine, the delay excused building owner from complying with policy requirement that the damage be repaired "as soon as reasonably possible after the loss or damage" in order to obtain replacement cost damages rather than depreciation in value, and building owner was entitled to a conditional judgment awarding replacement cost consistent with policy's repair requirement in the event owner completed repairs after final judgment.

Cases that cite this headnote

**[5]** **Insurance**

Estoppel of or Waiver by Insureds

217 Insurance
217XIII Contracts and Policies
217XIII(E) Estoppel and Waiver
217k1799 Estoppel of or Waiver by Insureds

217k1800 In general

Insured commercial building owner waived any recovery of actual cost value in breach of contract action against property insurer arising out of unrepaired damage to building when its attorney unequivocally informed the court "No, we are not asking for actual cash value."

Cases that cite this headnote

**[6] Appeal and Error**

Matters occurring after judgment

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k837 Matters or Evidence Considered in Determining Question
30k837(9) Matters occurring after judgment

As a reviewing court, the Court of Appeal must generally disregard matters occurring after the entry of the appealed judgment.

Cases that cite this headnote

**[7] Contracts**

What are conditions precedent in general

95 Contracts
95II Construction and Operation
95II(E) Conditions
95k221 Conditions Precedent in General
95k221(2) What are conditions precedent in general

A "condition precedent" is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.

Cases that cite this headnote

**[8] Insurance**

Repair or Replacement

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2184 Repair or Replacement
217k2185 In general

Commercial building owner's failure to complete repairs to damaged building, which was a condition precedent under property insurance policy to its right to receive replacement cost, did not preclude building owner from obtaining judgment that it was entitled to reimbursement of replacement cost conditioned upon satisfaction of the condition precedent; repair was not a condition precedent to insurer's liability under the policy, but rather insurer's duty to reimburse building owner arose as soon as a claim was filed, at which point insurer was liable to pay actual cost value, and repair was a condition precedent only for the additional obligation to pay the difference between actual cost value and replacement cost.

Cases that cite this headnote

**[9] Contracts**

Necessity of performance

95 Contracts
95V Performance or Breach
95k278 Performance of Conditions
95k278(1) Necessity of performance

Generally, a party's failure to perform a condition precedent will preclude an action for breach of contract.

Cases that cite this headnote

**[10] Insurance**

Weight and sufficiency

**Insurance**

Weight and sufficiency

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2201 Weight and sufficiency
217 Insurance

217XXVI Estoppel and Waiver of Insurer's Defenses
217k3126 Evidence
217k3131 Weight and sufficiency

Evidence in commercial building owner's breach of contract action against property insurer was sufficient to support finding that coverage dispute hindered or prevented building owner from repairing the property, as required to satisfy the prevention doctrine and excuse building owner's failure to repair the property prior to obtaining judgment it was entitled to full cost of repair; while there was significant evidence that building owner had debated whether to repair, subdivide, or demolish the property, there was also significant evidence that insurer's refusal to commit to coverage made it difficult for building owner to know what to do with the property, and there was testimony that building owner had essentially exhausted its capital in maintaining the property and needed a coverage commitment from insurer to proceed.

Cases that cite this headnote

**[11] Insurance**

In general; delay

**Insurance**

Particular conduct

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3187 Insurer's Waiver or Estoppel
217k3191 Implied Waiver or Estoppel
217k3191(8) Failure to Object or to State Grounds of Objection
217k3191(9) In general; delay
217 Insurance
217XXXI Civil Practice and Procedure
217k3561 Contractual Time Limitations
217k3565 Estoppel and Waiver
217k3565(3) Particular conduct

An intention to waive a limitations provision is not evinced by the failure to raise that point in a letter denying an insurance claim.

Cases that cite this headnote

**[12] Insurance**

Express waiver

**Insurance**

Failure, delay, or inadequacy

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3085 Express waiver
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3110 Denial or Disclaimer of Liability on Policy
217k3110(2) Failure, delay, or inadequacy

Commercial property insurer's failure to insist on compliance with policy's actual repair requirement in various communications with insured owner of damaged building did not waive right to insist on compliance with repair requirement prior to paying replacement cost, rather than actual cash value, as measure of damages; there was no express waiver, insurer's failure to calculate and pay the claim on the basis of actual cost value, as required by its standard procedure, was due to building owner's failure to make a claim for actual cost value, and insurer's act in obtaining estimates on the basis of replacement cost did not establish an express intent to abandon its rights under the repair requirement.

Cases that cite this headnote

**[13] Estoppel**

Essential elements

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.15 Essential elements

A valid claim of equitable estoppel consists of the following elements: (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts (3) to a party ignorant, actually and permissibly, of the truth (4) with the intention, actual or virtual, that the ignorant party act on it, and (5) that party was induced to act on it.

Cases that cite this headnote

**[14]** **Estoppel**

Silence

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k95 Silence

The equitable estoppel requirement of a representation or concealment is not strictly enforced; mere silence may qualify if, under the circumstances, the party to be estopped was under a duty to speak to avoid a misunderstanding.

Cases that cite this headnote

**[15]** **Estoppel**

Reliance on adverse party

**Estoppel**

Acts done or omitted, and change of position

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k55 Reliance on adverse party
156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k56 Acts done or omitted, and change of position

Equitable estoppel requires that the conduct of the party to be estopped induced action on the part of the complaining party; such causation is essential to estoppel.

Cases that cite this headnote

**[16]** **Insurance**

Claims Process and Settlement

**Insurance**

Implied Waiver or Estoppel

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3106 In general
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3187 Insurer's Waiver or Estoppel
217k3191 Implied Waiver or Estoppel
217k3191(1) In general

Commercial property insurer's failure to advise insured building owner of policy's requirement that building owner actually complete repairs prior to payment of replacement cost, rather than actual cash value based on depreciated value of property, did not estop insurer from refusing to pay replacement cost absent any evidence that any nondisclosure was the cause of its failure either to make a claim for actual cost value or to make the required repairs; building owner was a sophisticated professional owner of real estate, policy's language was clear and unambiguous, and building owner was advised by an insurance broker in its dealings with insurer.

Cases that cite this headnote

**[17]** **Insurance**

Anticipatory breach

217 Insurance
217XIII Contracts and Policies
217XIII(N) Cancellation or Revocation by Insurer
217k1937 Remedies for Wrongful Cancellation
217k1940 Anticipatory breach

Commercial property insurer's denial of coverage to building owner, coming after the occurrence of the damage for which indemnity was sought, was not a repudiation of the

policy but instead was an ordinary breach by nonperformance.

Cases that cite this headnote

**[18] Contracts**

Acts constituting renunciation and liabilities therefor

95 Contracts
95V Performance or Breach
95k313 Renunciation
95k313(2) Acts constituting renunciation and liabilities therefor

Repudiation of a contract, also known as anticipatory breach, occurs when a party announces an intention not to perform prior to the time due for performance.

*See* 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 780 et seq.

Cases that cite this headnote

***686** San Francisco County Superior Court, Honorable Curtis E.A. Karnow, Trial Judge. (Super. Ct. No. CGC–10–502891)

**Attorneys and Law Firms**

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**Opinion**

Humes, P.J.

Fireman's Fund Insurance Co. issued an insurance policy covering loss from property damage, including rent, on a building owned by plaintiff Stephens & Stephens XII, LLC (Stephens XII). Three days after the policy became effective, Stephens XII discovered the property had sustained serious damage from burglars who stripped it of all electrical and other conductive materials. Stephens XII sought reimbursement for the damage from Fireman's Fund, but Fireman's Fund delayed resolving the claim. Stephens XII then brought this suit.

***687** The policy provided two different measures for reimbursing covered damages. Stephens XII could recover either the full cost of repairing the damages, so long the repairs were actually made, or the depreciated value of the damaged property. As of the date of trial, Stephens XII had not repaired the damage. The jury nevertheless awarded Stephens XII the full cost of repairing it. In addition, the jury awarded Stephens XII lost business income on a theory not authorized by the policy, but it declined to award lost rent, which was authorized by the policy. The trial court granted Fireman's Fund judgment notwithstanding the verdict (JNOV), finding that neither of the awards was permitted under the policy.

We reverse. Although we agree with the trial court that Stephens XII is not entitled to an immediate award for the costs of repairing the damage, we conclude that it is entitled to a conditional judgment awarding these costs if the repairs are actually made. We also uphold the award for lost business income because it is properly construed as an award for compensable lost rent. Finally, we conclude that there are insufficient grounds to proceed with a new trial.

## BACKGROUND

Stephens XII filed this suit against Fireman's Fund, American Insurance Company, and Factory Mutual Insurance Company, [1] alleging causes of action for breach of contract and breach of the covenant of good faith and fair dealing. The operative complaint alleged that Stephens XII purchased a liability insurance policy from Fireman's Fund for a commercial property in January 2007. Property-damage coverage was later added and became effective on June 28. On July 1, Stephens XII discovered that burglars had caused more than $2 million in damage to the property. Stephens XII notified Fireman's Fund of the property damage, but the insurance company failed to pay for it.

1 Stephens XII's claims against Factory Mutual were settled and are not involved in this appeal. American is a Fireman's Fund subsidiary, and we will refer to them jointly as "Fireman's Fund" because any distinction between them is immaterial for purposes of this appeal.

**A. Fireman's Fund's Liability.**

Fireman's Fund was found liable to Stephens XII on both causes of action after a jury trial. The factual findings underlying its liability are not challenged in this appeal, but we review them briefly to provide context for the appellate claims.

Stephens XII is a limited liability company formed for the purpose of buying and operating the property, a very large industrial warehouse located in Richmond, California. Stephens XII, in turn, is managed by D.R. Stephens & Company, a "property management company" that manages some 40 real properties. [2] When Stephens XII purchased the property in 2005, it was being used as a distribution center by a tenant, Navistar International Transportation Corporation (Navistar).

[2] The precise legal relationship between Stephens XII and Stephens & Co. is not clear from the testimony at trial. It appears that Stephens & Co. organized the purchase of the property by a group of investors, who presumably became the members of Stephens XII, the entity owning the property. Donald Stephens, the founder of Stephens & Co., was among the investors in Stephens XII and was involved in management decisions concerning the property.

In January 2007, Stephens & Company, Stephens XII, and more than 30 other, presumably related, entities became insured under a Fireman's Fund commercial insurance policy. Stephens XII, however, did not arrange for property-damage coverage ***688** on the property because Navistar already carried it. After Navistar vacated the property on May 31, 2007, Stephens XII realized it needed property-damage coverage and, through its insurance broker, contacted Fireman's Fund to secure it. The coverage was added, and it became effective on June 28.

The property was burglarized sometime after June 8, when the property was inspected and found sound. Burglary hardly begins to describe the nature of the crime. Virtually all conductive material was stripped from the building and taken away. An electrician who examined the damage said "[t]he copper theft was the most complete job I've ever seen." There was water damage throughout; walls were damaged; fire-protection equipment was rendered inoperable; and virtually all electrical components had been taken away. The estimated cost of repair exceeded $1 million. The theft appears to have stopped on or about July 1, after a police officer on routine patrol spotted a door ajar, investigated, and detained two men who said they were collecting metal inside the building.

Within days of discovering the damage, Stephens notified Fireman's Fund. Although Fireman's Fund eventually paid Stephens XII for emergency repairs, it neither accepted nor denied coverage for the loss. From virtually the beginning of its investigation, Fireman's Fund was concerned that the damage was too extensive to have occurred in the brief period of the policy's coverage. Fireman's Fund ultimately denied coverage, but not until February 2012—nearly five years after the incident and barely a month before trial—on grounds that Stephens XII had concealed and misrepresented material information during the insurance investigation.

Trial began the next month. In a special verdict, the jury concluded all of the damage occurred while the policy was in effect, rejected Fireman's Fund's defenses of concealment and misrepresentation, and found for Stephens XII on its claims for breach of contract and breach of the covenant of good faith and fair dealing.

**B. The Damages.**

The issues raised on appeal all relate to the jury's award of damages. Under the breach of contract claim, the jury awarded $2,100,293 for the "Replacement Cost" of the damage to the property and $2,135,936 in lost "Business Income." Under the claim for breach of the covenant of good faith and fair dealing, the jury denied damages for costs of repair and lost profits, but it awarded $436,896 in what was characterized as "lost rents." As we will describe further below, the trial court concluded that the terms of the policy did not support the jury's awards, and it entered JNOV for Fireman's Fund.

**1. Replacement or Repair Cost.**

Under the heading "**Valuation**," the policy provides two alternative means for determining the amount Fireman's Fund is required to pay for property damage. Fireman's Fund must initially value the damages according to their "Replacement Cost," meaning the expenditure required to replace the damaged property with "new property of comparable material and quality." Significantly, however, Fireman's Fund is not required to pay replacement cost "until the lost or damaged property is actually repaired or replaced and unless the repairs or replacement are made as soon as reasonably possible after

the loss or damage." We shall refer to this provision requiring the repairs to be made before full replacement cost is to be paid as the policy's repair requirement. When Fireman's Fund's obligation to pay full replacement cost is triggered, Fireman's Fund is only required to pay "[t]he ***689** amount [the insured] actually spend[s] that is necessary to repair or replace the lost or damaged property." [3]

3 The full text of the relevant section of the policy is as follows:

"**K. Valuation**

"1. Replacement Cost

"If a loss occurs:

"a. We will determine the **value** of the lost or damaged property at Replacement Cost as of the time of the loss or damage, except as provided below. Replacement cost means the cost to replace with new property of comparable material and quality and used for the same purpose without deduction for depreciation.

"b. You may make a claim for loss or damage covered by this insurance on an Actual Cash Value basis instead of a Replacement Cost Basis. In the event you elect to have loss or damage settled on an Actual Cash Value basis, you may still make a claim for the additional coverage which Replacement Cost provides if you notify us of your intent to do so within 180 days after the loss or damage.

"c. We will not pay on a Replacement Cost basis for any loss or damage until the lost or damaged property is actually repaired or replaced and unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

"d. We will not pay more for loss or damage on a Replacement Cost basis, including loss caused by the enforcement of an ordinance or law, than the least of the following:

"(1) The Limit of Insurance applicable to the lost or damaged property;

"(2) The cost to replace the lost or damaged property with other new property of comparable material and quality and used for the same purpose; or

"(3) The amount you actually spend that is necessary to repair or replace the lost or damaged property.

"e. You may voluntarily elect to rebuild on another site provided it does not increase the amount of loss or damage which we would otherwise pay to rebuild at your current site. But we will not pay for the cost of the land."

As an alternative to seeking replacement cost, the insured may claim "Actual Cash Value," which is defined as the actual, depreciated value of the damaged property. [4] As the policy acknowledges, the actual cash value might be "significantly less" than the replacement value. If an insured makes a claim for actual cash value, it may still repair the damage and claim the additional amount necessary to equal the replacement cost, so long as the insured notifies Fireman's Fund of its "intent to [make a claim for the additional costs] within 180 days after the loss or damage."

4 An endorsement to the policy defines actual cash value as "the amount it would cost to repair or replace Covered Property, at the time of loss or damage, with material of like kind and quality, subject to a deduction for deterioration, depreciation and obsolescence."

These provisions are apparently common in property-damage insurance policies. They were explained succinctly in *D & S Realty v. Markel Ins. Co.* (2012) 284 Neb. 1, 816 N.W.2d 1 (*D & S Realty* ), and we quote at length from that decision. "Standard casualty protection for residential and commercial property insures the property only to the extent of its actual cash value. Actual cash value is the value of the property in its depreciated condition. The purpose of actual cash value coverage is indemnification. It is to make the insured whole, but never to benefit the insured because the loss occurred.

"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.

***690** "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. In essence, replacement cost coverage insures against the expected depreciation of the property. Unlike standard indemnity, replacement cost coverage places the insured in a better position than he or she was in before the loss. '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.' Replacement cost coverage is, accordingly, more expensive than standard indemnification coverage.

"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. For this reason, most replacement cost policies require actual repair or replacement of the damaged property as a condition precedent to recovery under the replacement cost rider. The repair/replace condition generally requires ... 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 repairs. Depending on the policy, the acceptance of this actual-cash-value payment may trigger a more limited time constraint for completion of the repairs.... 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." (*D & S Realty, supra,* 816 N.W.2d at pp. 14–16, fns. omitted.)

According to a company adjuster who testified at the trial here, Fireman's Fund handles property-damage claims consistent with the process described in *D & S Realty, supra,* 816 N.W.2d 1. "On a typical basis, the way the losses are handled is that you would ... reach an agreed scope and cost of repairs, and from that amount you would basically take away what's called depreciation.... And [Fireman's Fund] would issue the actual cash value ... payment up front. From the time that that payment is issued, the insured has 180 days to basically show that they have completed or near completion of the actual repairs, and then they can come back and receive up to the amount of held back depreciation."

That is not what happened here. During the three years between the burglary and the initiation of this lawsuit, the parties engaged in an extended series of ultimately fruitless discussions about reimbursement for the damage. During the course of the discussions, it appears never to have been suggested by either party that Stephens XII seek an actual cost value payment, thereby providing it the "seed money" to start repairs. (*D & S Realty, supra,* 816 N.W.2d at p. 16.) As a Stephens XII witness involved in the negotiations acknowledged, Stephens XII sought the replacement cost of the damage, even though it had taken no steps to make the repairs. Fireman's Fund, in turn, never accepted coverage for the loss. At the time of trial, few repairs had been made, beyond the emergency ones for which Stephens XII had been reimbursed by Fireman's Fund.

At trial, Stephens XII presented no evidence of the actual cash value of the damaged property and expressly disclaimed ***691** any intent to seek recovery under this measure.[5] As a result, no provision was made for actual cost value damages in the special verdict form. Rather, Stephens XII sought exclusively replacement cost damages, taking the position that it was excused from complying with the repair requirement as a result of Fireman's Fund's denial of coverage.

5 During the jury instructions conference, the trial court confirmed with Stephens XII's counsel, "it's my understanding that the plaintiff's right now firmly on the record without any equivocation that they are not asking for actual cash value in this case." Counsel responded, "No, we are not asking for actual cash value."

In the special verdict, the jury found that Fireman's Fund "fail[ed] to make payments required by the policy, which prevented Stephens [XII] from repairing the damage to the Property." Although it found that Stephens XII had not repaired the property, it also determined that Stephens XII had performed its material duties under the policy. The jury valued the replacement cost at $2,100,293.

Fireman's Fund moved for JNOV, contending Stephens XII was not entitled to replacement cost as a matter of law because Stephens XII had not satisfied the precondition of the repair requirement. Stephens XII argued that the jury had concluded Fireman's Fund's failure to pay the actual cost value prevented and excused Stephens XII from the repair requirement.

The trial court granted the motion. It found that Stephens XII was required to complete the repairs before it was entitled to receive replacement cost. It also found that Stephens XII's claim that it was excused from the repair requirement was unsupported by the language of the policy. As the court reasoned, Stephens XII was permitted to claim either actual cost value or replacement value, and Fireman's Fund's obligation to pay did not arise until a claim was made. The court held that although Stephens XII "plainly sought insurance proceeds from [Fireman's Fund]," it never made a claim for actual cost value prior to trial and disclaimed the recovery of actual cost value at trial. The court declined to find that the payment of actual cost value was a condition

precedent to Stephens XII's obligation to repair in order to receive replacement cost, noting the right to replacement cost is independent of the right to actual cost value under the policy, and the "availability of these independent avenues to compensation counters the interpretation that proceeding down one of those avenues is a condition to the steps involved in prosecuting the other avenue."

**2. Lost Business Income.**

An endorsement to the policy provided, "[Fireman's Fund] will pay for the actual loss of **Business Income and Rental Value** which you sustain due to the necessary suspension of **operations** during the **period of restoration**. The suspension must be caused by direct physical loss or damage at the **premises**, ... caused by or resulting from a **covered cause of loss**." For purposes of the provision, "**Operations**" was defined as "your business activities occurring at the described premises and the tenantability of the described premises." "**Rental Value**" was defined as "[t]he total anticipated rental income from tenant occupancy of the premises ... as furnished and equipped by you."

Stephens XII provided evidence of two types of damages under this provision and asked the jury to award one or the other, but not both. First, Stephens XII sought, as lost business income, lost profits from a deal to sell the property in March 2008 that fell through. An expert witness for Stephens XII testified that the damages ***692** associated with this failed real property sale amounted to over $10 million. Alternatively, Stephens XII sought the equivalent of nearly five years' rent for the property, which had remained vacant between the time of the burglary and the trial. The damages expert assumed the property would have been rented on a "triple net" basis at a rental value of $.30 per square foot per month, beginning December 1, 2007. [6] Based on 242,720 square feet, the total lost rent to the time of trial was $3,589,110. During cross-examination, the expert acknowledged that the rent proposal on which he based his estimate actually provided for monthly rent of $.20 per square foot when calculated on a triple net basis. Although the expert assumed that the property could have been repaired and rented within six months, Stephens XII's attorney suggested to the jury that it would be "reasonable" for it to find that it would have taken a full year to rent the property, given the time needed for repair and marketing.

6 Under a triple net lease, a common commercial arrangement, "the renter pays all operating expenses and the owner gets a net check."

The special verdict form included a series of questions relating to both lost business income and lost rent. The jury found that Stephens XII had suffered lost business income under the policy and awarded $2,135,936. In a section of the special verdict form labeled, "COVERED LOSS OF RENTAL VALUE," the jury appears initially to have found that Stephens XII suffered "an actual loss of 'Rental Value' " but scratched out its "yes" response to this finding and changed it to "no." It accordingly awarded no damages for loss of rental value under the breach of contract claim. The jury also awarded bad faith damages of $436,896, which it inserted in a blank labeled "lost rents."

In its JNOV motion, Fireman's Fund argued that income lost from the failed real estate sale did not constitute lost "business income" under the policy as a matter of law. Stephens XII countered by arguing that the award of business income should be interpreted as lost rents. It pointed out that the $2,135,936 awarded by the jury was exactly equal to 44 months of rent, calculated on the basis of $.20 per square foot. An award of 44 months of rent would assume the property was rented from July 2008, one year after the damage occurred, as urged by Stephens XII's attorney, through March 2012, the month of trial. Stephens XII suggested that the jury viewed the lost rents to be lost business income because the company was in the business of renting property, and two company employees had equated lost rents and lost business income during their testimony.

In granting JNOV, the trial court concluded Stephens XII could not have suffered lost business income because it did not conduct any business at the property, as required by the policy. The court found the verdict to be "unambiguous" in not awarding lost rents, and it rejected Stephens XII's theory that the jury conflated business income and lost rents. In addition, the court overturned the jury's award of bad faith damages because no compensatory damages had been properly awarded.

**C. The New Trial Motion.**

When it filed its motion for JNOV, Fireman's Fund also filed a motion for a new trial, arguing not only that the jury's award of damages was erroneous as a matter of law but also that its factual findings were against the weight of the evidence. The trial court initially denied the motion as moot in light of its

grant of JNOV. At the request of Fireman's Fund, the court reconsidered and granted a new ***693** trial in a subsequent order ruling, "The motion for a new trial is granted, to be effective only if my ruling on the motion JNOV is vacated or reversed [on appeal]. [Citation.] Specifically, for the reasons stated in my [written decision granting JNOV], I find that there was an insufficiency of the evidence to support the award of damages, that the decision was against the law, and the verdict was against the weight of the evidence."

At oral argument on Stephens XII's postverdict motion to amend the complaint, Stephens XII's counsel sought clarification of the scope of the court's order on the motion for a new trial. Counsel noted that the court's reasons for granting the motion "deal with the complaint only, and not cross-complaint, and I just want to make sure that the new trial is granted only with respect to those issues." [7] The court responded, "when I say we're going to have a new trial, we would have to ... give Fireman's Fund the opportunity to again try to have a new trial on all of those legal and factual issues [of the cross-complaint].... So we would, in fact, be retrying all of those issues. We would just start from the top." In a written order, entered the same day, the court reaffirmed this ruling, noting, "if there is to be a new trial then, depending on the direction from the Court of Appeal, all the issues including all affirmative defenses would be retried."

7 The existence of a cross-complaint is news to this court, since neither party included such a document in its appendix. It is unclear what claims were alleged in the cross-complaint, although Stephens XII's counsel spoke of a "qui tam action."

Finally, in September 2012, the trial court entered an order amending the judgment nunc pro tunc to award certain costs of suit to Fireman's Fund and denying costs to Stephens XII.

Stephens XII initially appealed the trial court's orders granting JNOV and a new trial, and the judgment entered on those orders. It later filed a second notice of appeal addressed to the court's amendment of the judgment to award costs. The appeals were consolidated by our order of May 21, 2013.

## DISCUSSION

### A. The JNOV on the Breach of Contract Cause Cannot Be Sustained.

" ' "The trial court's power to grant a motion for JNOV is the same as its power to grant a directed verdict. [Citation.] The court must accept as true the evidence supporting the jury's verdict, disregarding all conflicting evidence and indulging in every legitimate inference that may be drawn in support of the judgment. The court may grant the motion only if there is no substantial evidence to support the verdict. [Citations.] On appeal from the denial of a motion for JNOV, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citation.]" ' " (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1237, 166 Cal.Rptr.3d 676.) Where, however, the trial court's grant of JNOV is based on an issue of law—here, the interpretation of an insurance policy—our review is de novo. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138, 76 Cal.Rptr.3d 585; *Cardio Diagnostic Imaging, Inc. v. Farmers Ins. Exchange* (2012) 212 Cal.App.4th 69, 73, 150 Cal.Rptr.3d 798 [interpretation of insurance policy is an issue of law].)

We conclude that the trial court's grant of JNOV cannot be sustained under these standards. As we shall explain, although Stephens XII is not entitled to an immediate award for the costs of repairing the damage, it is entitled to a conditional judgment ***694** awarding these costs if the repairs are actually made. And, as we shall further explain, the jury's award for lost business income is properly construed as an award for lost rent.

#### 1. Stephens XII Is Entitled to a Conditional Judgment Awarding It Replacement Cost if It Repairs the Damaged Property.

The trial court properly interpreted the policy's terms, and Stephens XII does not seriously contend otherwise. Under these terms, Stephens XII could claim either actual cost value or replacement cost, but it was entitled to receive replacement cost only if it actually repaired the damage. As the court observed in granting JNOV, there was no dispute that Stephens XII did not repair the property and was ineligible to receive replacement cost under the literal terms of the policy. While the parties dispute whether the court properly interpreted the policy as requiring an affirmative claim for actual cost value reimbursement, Stephens XII disclaimed any intent to recover actual cost value at trial and presented no evidence of this measure of damages.

Instead of arguing that the trial court misinterpreted the policy's terms, Stephens XII instead argues that it was excused from complying with the repair requirement under

various doctrines. We therefore turn to consider these arguments.

**a. Prevention.**

**[1]** **[2]** Stephens XII first argues that it was excused from complying with the repair requirement because it was prevented from repairing the damage by Fireman's Fund's failure to accept coverage. As the doctrine of prevention was articulated in *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1417, 231 Cal.Rptr. 351, " 'Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.' [Citation.]" quoting the Restatement (Second) of Contracts, section 245. " 'Although it is implicit in the rule that the condition has not occurred, it is not necessary to show that it would have occurred but for the lack of cooperation. It is only required that the breach have contributed materially to the non-occurrence. Nevertheless, if it can be shown that the condition would not have occurred regardless of the lack of cooperation, the failure of performance did not contribute materially to its non-occurrence and the rule does not apply.' " (*Ibid.*) More recently, *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 81 Cal.Rptr.3d 72 (*City of Hollister*) reached a similar result through application of the doctrine of estoppel. (*Id.* at pp. 491–492, 81 Cal.Rptr.3d 72.)

No reported California case has addressed the application of the prevention doctrine in the context of the type of repair requirement at issue here, but several decisions from other jurisdictions have. Courts have largely, but not uniformly, excused the insured from repairing damaged property when the insurer failed to pay on the claim or hindered or prevented the repair. (See *Pollock v. Fire Ins. Exchange* (1988) 167 Mich.App. 415, 423 N.W.2d 234, 236–237, *Bailey v. Farmers Union Co–op. Ins. Co.* (1992) 1 Neb.App. 408, 498 N.W.2d 591, 598–599, *Ward v. Merrimack Mut. Fire Ins. Co.* (App.Div.2000) 332 N.J.Super. 515, 753 A.2d 1214, 1219–1221, and *Rockford Mut. Ins. Co. v. Pirtle* (Ind.App.2009) 911 N.E.2d 60, 66–67.)[8] On the other hand, Florida courts ***695** have not excused the insured from repairing damaged property under similar circumstances.[9]

8 In addition, *Conrad Brothers v. John Deere Ins. Co.* (Iowa 2001) 640 N.W.2d 231 (*Conrad Brothers*) discussed prevention doctrine but ultimately reached the same result under the doctrine of repudiation. (*Id.* at p. 242.)

9 We mention cases cited by the parties. Additional cases are discussed in *Conrad Brothers, supra,* 640 N.W.2d at page 240, and *Ward, supra,* 753 A.2d at page 1218.

Two decisions, *D & S Realty, supra,* 816 N.W.2d at pages 16–17 and *Smith v. Michigan Basic Property Ins. Assn.* (1992) 441 Mich. 181, 490 N.W.2d 864, 868 (*Smith*), found a middle ground. Both concluded that an insurer's failure to pay on a claim or other hindrance excused the policy's *procedural* requirements, such as time restrictions, but did not entirely excuse the insured from its underlying obligation to repair the property. They held that the insured was entitled to a judgment requiring the insurer to pay actual cost value immediately and to pay replacement costs conditionally on the insured's completion of repairs promptly from the date of the judgment. (*Smith,* at p. 866,.) In effect, the courts granted specific performance of the insurance policy, requiring the insurer to make good on its contractual obligation to pay full replacement cost only upon the insured's satisfaction of the condition precedent of repairing the property.

The rationale for this approach was explained in *D & S Realty,* partly by referring to the decision in *Smith, supra,* 490 N.W.2d 1: "In [*Smith*], the Michigan Supreme Court held that the excusal of the insureds' performance of the repair/replace condition was only temporary. [¶] ... [¶] 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. 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.... [¶] The ... Supreme Court [pointed out] that [in such a situation] ' "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." ' Thus, the insureds 'could not be expected to repair, rebuild, or replace while this litigation was pending.' " 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.' [¶] 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.' The court 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. [¶] ... [¶] 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. But we agree with the reasoning in *Smith*. 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." (*D & S Realty, supra,* 816 N.W.2d at pp. 16–18, fns. omitted.)

**[3]** ***696** We are persuaded by this reasoning and adopt it. When an insurer's decision to decline coverage materially hinders an insured from repairing damaged property, procedural obstacles to obtaining the replacement-cost value should be excused. If coverage is ultimately resolved in favor of the insured, the insured should remain eligible to receive replacement cost, but only so long as the insured complies with other applicable policy terms, such as a repair requirement. In other words, a coverage dispute should not give the insured a benefit under the policy it never had in the absence of the dispute—such as the right to receive replacement cost without actually repairing the damage. [10]

10 We recognize that both *D & S Realty, supra,* 816 N.W.2d 1 and *Smith, supra,* 490 N.W.2d 864 limited their holdings to coverage disputes conducted in good faith, while Fireman's Fund was found to have acted in bad faith. The finding of bad faith subjected Fireman's Fund to tort remedies, including punitive damages (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073, 56 Cal.Rptr.3d 312), but Stephens XII has provided us with no California authority for depriving an insurance company of its contractual rights under the policy because it failed promptly to pay a property-damage claim in an amount calculated under a measure disclaimed by the insured.

**[4]** **[5]** **[6]** Here, Fireman's Fund's delayed resolution and denial of the claim materially hindered Stephens XII's ability to plan for the property. As a result, Stephens XII should be excused from the requirement that the damage be repaired "as soon as reasonably possible after the loss or damage." Had Stephens XII sought damages based on actual cost value and proved them at trial, it would have been entitled to an immediate award of such damages. When Stephens expressly disclaimed recovery of actual cost value damages, it waived an award based on this measure. In any event, such an award would lack an evidentiary basis because no evidence of actual cost value damages was presented at trial. [11] Stephens XII nonetheless remains entitled to a judgment awarding replacement cost consistent with the repair requirement if it actually completes the repairs "as soon as reasonably possible" after the judgment becomes final. [12]

11 In this connection, Stephens XII contends the trial court erred in denying its oral request, made during argument on Fireman's Fund's motion for a directed verdict, to reopen the evidence to permit proof of actual cost value. We find no abuse of discretion by the trial court in denying the request. (See *Estate of Young* (2008) 160 Cal.App.4th 62, 91, 72 Cal.Rptr.3d 520 [trial courts have broad discretion in ruling on motion to reopen].) Stephens XII presumably knew that proof of actual cost value would be required if the company expected to recover it. The failure to submit such proof appears to have been a tactical decision, rather than an oversight. In any event, Stephens XII subsequently waived any recovery of actual cost value when its attorney unequivocally informed the court, "No, we are not asking for actual cash value."

12 We asked the parties for supplemental briefing on the propriety of a conditional judgment. In the supplemental briefing, both parties argue that such a judgment would be improper because Stephens XII recently sold the property. We disagree. Fireman's Fund's potential liability in the event of any such sale was not litigated below and, as a reviewing court, we must generally disregard matters occurring after the entry of the appealed judgment. (*Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 882, 67 Cal.Rptr.3d 675.) Nor would any such sale moot the issues before us as Fireman's Fund contends. Regardless of any sale, the validity of the JNOV and the form of judgment remain live issues between the parties, and entry of a conditional judgment in favor of Stephens XII may affect other relief available to the parties, such as costs.

**[7]** **[8]** Fireman's Fund argues that Stephens XII is not entitled to an award of ***697** replacement cost because completion of the repairs is a condition precedent to the right to receive them. [13] We are persuaded our decision properly addresses this concern. Stephens XII's failure to satisfy the condition precedent precluded its immediate recovery of replacement cost, but it does not follow that

the failure deprived Stephens XII of the right to litigate about replacement cost—that is, to prove its entitlement to reimbursement of replacement cost conditioned upon satisfaction of the condition precedent.

13 " '[A] "condition precedent" is "either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." ' " (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1009, 146 Cal.Rptr.3d 90.)

**[9]** We recognize that "[g]enerally, a party's failure to perform a condition precedent will preclude an action for breach of contract." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1192, 169 Cal.Rptr.3d 475.) But here, Stephens XII's repair of the property is not a condition precedent to Fireman's Fund's liability under the policy. Instead, Fireman's Fund's duty to reimburse Stephens XII arose as soon as a claim was filed. At that point, Fireman's Fund was liable to pay actual cost value. Repairing the damaged property was a condition precedent only for the additional obligation to pay the difference between actual cost value and replacement cost.

**[10]** Fireman's Fund argues that Stephens XII failed to prove the coverage dispute hindered or prevented it from repairing the property. The jury found otherwise, and that finding was supported by substantial evidence. While there was significant evidence that Stephens XII had debated whether to repair, subdivide, or demolish the property, there was also significant evidence that Fireman's Fund's refusal to commit to coverage made it difficult for Stephens XII to know what to do with the property. Donald Stephens testified that the company had essentially exhausted its capital in maintaining the property and needed a coverage commitment from Fireman's Fund to proceed. We are satisfied that the uncertainty created by Fireman's Fund's failure to accept coverage sufficiently hindered Stephens XII's ability to repair the property to satisfy the prevention doctrine. [14]

14 We also find no basis for Fireman's Fund's claim that Stephens XII waived its argument by not presenting evidence or seeking appropriate jury instructions. The general issue of Stephens XII's entitlement to replacement cost had been an issue throughout the litigation, both sides presented evidence and examined witnesses with the issue in mind, and a special verdict question related to the issue.

The judgment must accommodate an additional limitation on Stephens XII's ability to recover replacement cost. Stephens XII submitted proof of *likely* replacement cost and received a monetary award of those costs from the jury. The policy, however, limits Fireman's Fund's obligation to "[t]he amount [the insured] *actually spend*[*s*] that is necessary to repair or replace the lost or damaged property." (Italics added.) Just as we find no basis for excusing Stephens XII's obligation to repair, we find no basis for awarding Stephens XII a specific amount of replacement cost before it makes the actual repairs. Instead, Stephens XII is entitled to a judgment declaring its right to receive reimbursement for repair costs, if and when the repairs have actually been performed in a timely manner, and in an amount equal to Stephens XII's actual expenditures for them.

**b. Waiver.**

**[11]** Stephens XII also argues that Fireman's Fund waived its right to insist ***698** on compliance with the repair requirement because it failed to "assert" such an insistence in various communications with Stephens XII. We are not persuaded. In the insurance context, "[c]ase law is clear that ' "[w]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' [Citations.] The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [¶] ... California courts have applied the general rule that waiver requires the insurer to intentionally relinquish its right to deny coverage and that a denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31, 44 Cal.Rptr.2d 370, 900 P.2d 619) "Whether a waiver has occurred depends solely on the intention of the waiving party. [Citation.] An intention to waive a limitations provision is not evinced by the failure to raise that point in a letter denying a claim." (*Velasquez v. Truck Ins. Exchange* (1991) 1 Cal.App.4th 712, 722, 5 Cal.Rptr.2d 1.)

**[12]** Here, there is no evidence, much less evidence that is clear and convincing, that Fireman's Fund intentionally relinquished its right to insist on compliance with the repair requirement. Stephens XII cites no express waiver

by Fireman's Fund, and the various instances of omission cited by Stephens XII do not establish an intentional relinquishment of rights. Stephens XII points out, for example, that Fireman's Fund did not calculate and pay the claim on the basis of actual cost value, as required by its standard procedure. But this action can be explained by Stephens XII's failure to make a claim for actual cost value. Similarly, while Fireman's Fund obtained estimates on the basis of replacement cost, there is no reason to infer that by doing so it intended to abandon its rights under the repair requirement. Stephens XII provides no persuasive evidence of an intent by Fireman's Fund to excuse compliance with the repair requirement. [15]

15 The primary decision cited by Stephens XII in support of its argument, *Prudential–LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 274 Cal.Rptr. 387, 798 P.2d 1230, merely recognizes that an insurer may waive the statute of limitations. (*Id.* at pp. 689–690, 274 Cal.Rptr. 387, 798 P.2d 1230.) Beyond recognizing the general principle of waiver, the decision is of little persuasive force here since it did not attempt to apply the principle to the circumstances before the court. (*Id.* at p. 690, 274 Cal.Rptr. 387, 798 P.2d 1230.)

**c. Estoppel.**

Stephens XII also contends Fireman's Fund should be prevented from relying on the repair requirement under the doctrine of estoppel because it failed to advise Stephens XII of the requirement. Again, we disagree.

**[13]** **[14]** **[15]** " 'A valid claim of equitable estoppel consists of the following elements: (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it.' " (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1013, 136 Cal.Rptr.3d 315.) The requirement of a representation or concealment is not strictly enforced; mere silence may qualify if, under the circumstances, the party to be estopped ***699** was under a duty to speak to avoid a misunderstanding. (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268, 84 Cal.Rptr.2d 552.) Other, more general formulations have been proposed (see *City of Hollister, supra,* 165 Cal.App.4th at p. 488, 81 Cal.Rptr.3d 72), but all formulations require that the conduct of the party to be estopped induced action on the part of the complaining party. "Such causation is essential to estoppel." (*Id.*, at p. 487, 81 Cal.Rptr.3d 72.)

**[16]** Stephens XII argues that Fireman's Fund should be estopped from denying coverage because it failed to discuss or disclose the policy provisions. But Stephens XII points to no evidence suggesting that any nondisclosure was the cause of its failure either to make a claim for actual cost value or to make the required repairs. We have no reason to infer that Stephens XII was uninformed about its options under the policy. It is a sophisticated professional owner of real estate; the policy's language is clear and unambiguous; and the company was advised by an insurance broker in its dealings with Fireman's Fund. In short, substantial evidence was not presented demonstrating that Stephens XII was unaware of the repair requirement due to any nondisclosure on the part of Fireman's Fund. [16]

16 Indeed, Fireman's Fund at trial sought to prove that Stephens XII understood and appreciated the policy provisions but was precluded from doing so by Stephens XII's objection. Fireman's Fund attempted to introduce evidence of similar insurance claims filed by Stephens & Co. entities under the policy that would have demonstrated the company's awareness of the actual cash value option. Stephens XII moved to exclude the evidence, arguing the other insurance claims were irrelevant. The trial court granted the motion, concluding Stephens XII's "state of mind" was not relevant to the disputed material issues.

**d. Prejudice.**

Stephens XII cites cases holding that an insurer may not assert defenses based on an insured's breach of a policy condition unless the insurer was substantially prejudiced. (*Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 305, 32 Cal.Rptr. 827, 384 P.2d 155.) The doctrine is ordinarily applied to "procedural" provisions, such as timely notice requirements, rather than substantive provisions, like a repair obligation. (E.g., *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 763, 15 Cal.Rptr.2d 815.) It is inapplicable here for two reasons. First, by failing to pay for repairs or make a claim for actual cost value, Stephens XII did not breach the terms of the policy; it simply failed to satisfy a condition precedent (the repair requirement) to Fireman's Fund's obligation to pay replacement cost. Second, there would be no way to know until after the payment was

made whether Fireman's Fund would be prejudiced by being required to pay replacement cost before the damages were actually repaired. If Stephens XII made the repairs, there would have been no prejudice; but if Stephens XII simply pocketed the money or used it to subdivide or demolish the property, as testimony suggested it might, Fireman's Fund would have been prejudiced by having to pay replacement cost when only actual cost value was required. Accordingly, we cannot say Fireman's Fund was not prejudiced by Stephens XII's conduct.

**e. Repudiation.**

**[17]** **[18]** Stephens XII's final argument is that Fireman's Fund's denial of coverage should be treated as a repudiation of the policy. But this argument misapplies the doctrine of repudiation. Repudiation of a contract, also known as "anticipatory breach," occurs when a party announces ***700** an intention not to perform prior to the time due for performance. (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137–138, 123 Cal.Rptr. 641, 539 P.2d 425; Rest. 2d of Contracts, § 253, com. (a), p. 286.) Fireman's Fund's denial of coverage, coming after the occurrence of the damage for which indemnity was sought, was not a repudiation but instead an ordinary breach by nonperformance.

**2. The Jury's Award for Lost Business Income Is Properly Construed as a Compensable Award for Lost Rent.** **

** See footnote *, *ante*.

**B.–C.** **

**DISPOSITION**

The trial court's order granting judgment notwithstanding the verdict and judgment is reversed, and its orders granting a new trial and awarding costs of suit to Fireman's Fund are vacated. The matter is remanded to the trial court for further proceedings consistent with this decision. The parties shall bear their own costs on appeal.

We concur:

Dondero, J.

Banke, J.

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