
NOTES

INHERENT DIMINISHED VALUE IN MOTOR VEHICLE TORTS

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ABSTRACT

Motor vehicles lose value after accidents, even when they subsequently are competently and completely repaired. Previously damaged vehicles have a stigma surrounding them stemming from a fear that repairs cannot restore a vehicle to its exact pre-accident condition. The loss in value caused by this phenomenon is called inherent diminished value (“IDV”). Despite widespread expert recognition of IDV, many vehicle owners are not compensated for this loss in value when they recover damages in an insurance settlement or a tort judgment. Even if a vehicle owner knows to request IDV damages, she will face substantial obstacles: her jurisdiction may limit tort recovery to repair costs only, her insurer may argue that IDV does not exist, or her burden of proof may require a costly expert opinion to establish even minor diminution in value.

This Note argues that IDV is a real and inevitable consequence of motor vehicle collisions for which plaintiffs must be compensated by defendants and their insurers to be made whole. This Note starts with an exploration of the tort and insurance concepts underlying diminished value claims before surveying the different ways in which the fifty states fashion their measures of damages to include or exclude IDV. This Note then queries what problems must be addressed by an IDV doctrine that compensates but does not overcompensate plaintiffs and provides judicial and legislative suggestions enacting such a system.

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INTRODUCTION

Suppose you go to a used car dealership.¹ The dealer shows you two cars. They are identical as far as you can tell—each of them has the same make, model, year, mileage, paint, frame, and engine. They also have the same price tag. The dealer tells you, “The car on the left was in a huge crash last year, but don’t worry—the repair shop down the road fixed it up just fine.” Would you rather buy the car on the left or the car on the right?

Or suppose a reckless driver crashed into your three-year-old, \$15,000 car and mangled its passenger side.² The driver’s insurance admits fault and graciously offers to pay for a rental vehicle on top of full repair costs. When you get the repaired car back, you still feel nervous about its structural integrity and decide to trade it in for a new car. The dealer tells you, “I’ll give you \$12,000 for your trade-in. It would be worth more, but with its accident history this is all I can offer you.” Looking back, did the tortfeasor’s insurance properly compensate you for the damage done?

Even if a car has been competently and completely repaired after an accident, most consumers would rather buy a car that has never been in an accident.³ Many consumers will only buy a vehicle with an accident history at a discount—CARFAX claims that the average vehicle with severe damage in its past sold for

¹ This is a common occurrence—Americans purchase an estimated 39.4 million used vehicles every year, as many as 40% of which have been in an accident or sustained damage. See Ben Ellencweig, Sam Ezratty, Dan Fleming & Itai Miller, *Used Cars, New Platforms: Accelerating Sales in a Digitally Disrupted Market*, MCKINSEY & CO.: AUTOMOTIVE & ASSEMBLY INSIGHTS (June 6, 2019), <https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/used-cars-new-platforms-accelerating-sales-in-a-digitally-disrupted-market> [<https://perma.cc/U2GA-DTKK>] (contrasting number of used cars sold—39.4 million—with number of new cars sold—17.3 million—in year 2018); CARFAX, *CARFAX Accident Data Helps Car Buyers Shop Smarter*, CISION PR NEWSWIRE (Jan. 28, 2020, 8:00 AM), <https://www.prnewswire.com/news-releases/carfax-accident-data-helps-car-buyers-shop-smarter-300994391.html> [<https://perma.cc/Y6KZ-2MQD>] (estimating 40% of vehicles on road, or 110 million cars, have sustained damage).

² This is also a common occurrence—the federal government counted 12,145,837 vehicles involved in crashes in 2019, the vast majority of them being passenger cars and light trucks. Nat’l Highway Traffic Safety Admin., *Traffic Safety Facts Annual Report Tables*, U.S. DEP’T OF TRANSP., <https://cdan.nhtsa.gov/tsftables/tsfar.htm> (navigate to folder “Chapter 3: Vehicles,” then subfolder “Vehicles: All Vehicles,” then Table 36 “Vehicles Involved in Crashes, by Vehicle Type and Crash Severity,” and then choose “2019” from dropdown menu) (last updated June 24, 2022).

³ See, e.g., *Allgood v. Meridian Sec. Ins. Co.*, 807 N.E.2d 131, 138 (Ind. Ct. App. 2004) (“[A] vehicle that has been involved in a collision is considered to have less value than a vehicle identical in all respects except that it has not been involved in such a collision.”), *overruled on other grounds by Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243 (Ind. 2005); *Ellis v. King*, 400 S.E.2d 235, 237 (W. Va. 1990) (“Once structural damage occurs, often no amount of repair can return the vehicle to its condition prior to the accident and consequently, to the value it had prior to the injury.”).

\$1,700 less than a comparable vehicle without damage.⁴ This drop in value comes from two considerations. First, a buyer of a damaged car may not want to assume the risk that the vehicle's repair wasn't performed competently and extensively.⁵ Second, a buyer may believe that no repair, even the best repair available, could completely restore a vehicle to its pre-accident condition.⁶ Whatever the reason, many courts have taken judicial notice of the fact that vehicles inevitably and irreversibly lose value even after repaired to their pre-accident conditions.⁷ This phenomenon goes by many names, but this Note will refer to it as inherent diminished value ("IDV").⁸

The question of whether to account for IDV in awarding damages to plaintiffs divides state courts due to several confounding factors.⁹ Does requiring a defendant to pay for plaintiff's repair costs as well as IDV provide a windfall to the plaintiff? What evidence may be used to establish a vehicle's pre-accident value and its post-accident, post-repair value? Should IDV be awarded even if such stigma only exists in the minds of consumers without any remaining physical damage to the vehicle? These questions and others have generated a

⁴ Patrick Olsen, *Don't Let Accident Reports Steer You Away from a Used Car*, CARFAX (Feb. 23, 2021), <https://www.carfax.com/blog/buying-a-used-car-that-has-been-in-an-accident> [https://perma.cc/CBG7-8TWN]. *But see infra* Section I.D (questioning objectivity of CARFAX data).

⁵ See Doug Demuro, *Should You Buy a Car That's Been in an Accident?*, AUTOTRADER (June 30, 2019, 8:00 PM), <https://www.autotrader.com/car-tips/should-you-buy-a-car-thats-been-in-an-accident-210714> [https://perma.cc/WKD5-7LRW] (suggesting warning signs indicating previously damaged vehicle's poor repair).

⁶ See Doug Demuro, *Buying A Car: Why Should You Care if a Car Was in an Accident and Repaired?*, AUTOTRADER (June 30, 2019, 4:00 PM), <https://www.autotrader.com/car-shopping/buying-car-why-should-you-care-if-car-was-accident-and-repaired-258359> [https://perma.cc/DX9K-2DVP] (asserting "main reason" to avoid previously damaged vehicles is risk of damage that can "cause problems long after the car has been repaired"). For a fuller exploration of why buyers may devalue cars with accident histories, see *infra* notes 72-75 and accompanying text.

⁷ See, e.g., *Martins v. Vt. Mut. Ins. Co.*, 411 F. Supp. 3d 166, 167 (D. Mass. 2019) (considering without evidence "the fact that a vehicle involved in an accident typically has a lower market value, even after repairs have been made, due to a stigma attaching to such vehicles" (emphasis added)); *Shield Glob. Partners-G1, LLC v. Forster*, 141 N.E.3d 1269, 1272 (Ind. Ct. App. 2020) ("Automobiles that have been involved in accidents, even if they have been successfully and fully repaired, usually have a diminished value.").

⁸ IDV is also sometimes referred to as diminution in value, diminished value, residual diminished value, and stigma damage. In the interest of precision, this Note more clearly defines its terms below. See *infra* notes 55-71 and accompanying text.

⁹ This Note primarily concerns doctrines of tort damages that govern actions against a negligent driver or her insurer. For analysis of diminished value in first-party contractual claims against insurers arising from collision insurance policies, see generally Katy M. Young, *Georgia is a Peach for Insured's Right to Diminished Value*, 43 U.S.F. L. REV. 417 (2009); and Thomas O. Farrish, "Diminished Value" in *Automobile Insurance: The Controversy and Its Lessons*, 12 CONN. INS. L.J. 39 (2005).

constellation of diminished value doctrines across the country,¹⁰ some of which, this Note argues, fail to adequately compensate plaintiffs for their losses.

For clarity's sake, this Note assumes a scenario with stylized but often true elements: Defendant (or first-party insured) negligently and accidentally crashes her vehicle into Plaintiff's (or claimant's) vehicle, causing a simple, two-car collision.¹¹ Defendant was unambiguously at fault, and admits as much to Plaintiff. Plaintiff takes her now-damaged car to a reputable auto body shop, which restores Plaintiff's vehicle substantially to its pre-accident physical condition with high-quality parts and labor.¹² Plaintiff either sues Defendant or files a third-party claim against Defendant's insurer demanding compensation for her out-of-pocket repair costs—the cost of her rental car while repairs were performed and the IDV of her vehicle. This Note concerns Plaintiff's ability to recover IDV damages in this scenario.

This Note argues that IDV is a real and inevitable consequence of motor vehicle collisions for which plaintiffs must be automatically compensated by defendants and their insurers in order to be made whole. This Note proceeds as follows. Part I defines IDV and other related concepts, and then explores their origins and importance. Part I also surveys the different ways in which jurisdictions fashion their measures of damages to include or exclude diminished value. Part II queries what problems must be addressed by a new IDV doctrine that compensates, but does not overcompensate, plaintiffs. Part III provides judicial and legislative suggestions for jurisdictions that have not yet decided this legal question.

I. HOW PLAINTIFFS RECOVER DIMINISHED VALUE TODAY

A. *Principles of Tort Damages*

A tort victim may seek compensatory, nominal, and punitive damages.¹³ Compensatory damages—those that “give compensation, indemnity or restitution for harms”¹⁴—in motor vehicle accidents can be broadly split into damages for harm to the person and damages for harm to property. Harm to the person encompasses compensation for economic harms (e.g., loss of earning capacity and payment of medical expenses) and noneconomic harms (e.g.,

¹⁰ See *infra* Section I.F (providing state-by-state survey concerning approach in terms of claimant friendliness).

¹¹ While a car accident is the most common cause for repairs and diminished value, any tortious conduct, negligent or otherwise, that causes damage could give rise to a diminished value claim. See, e.g., *Willett v. State*, 826 P.2d 1142, 1143 (Alaska 1992) (considering diminished value caused by criminal mischief).

¹² To the extent that Plaintiff's vehicle is in a worse physical condition after repairs, Plaintiff would be able to recover damages for her repair-related diminished value. See *infra* notes 56-58 and accompanying text.

¹³ RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1979).

¹⁴ *Id.*

bodily harm and emotional distress).¹⁵ Much scholarship and practical guidance has examined compensatory damages for these personal harms.¹⁶ Harm to chattel property generally encompasses harm to the condition and value of the property, as well as the plaintiff's loss of use of the property during the time between the accident and successful repairs.¹⁷ Compensatory damages for loss of use is another fascinating element of motor vehicle collision litigation, but they are outside of the narrow legal question examined in this Note.¹⁸ The focus of this Note is determining the proper measure of damages to compensate a plaintiff for the economic damage done directly to her motor vehicle as a result of the collision.

The goal of compensatory damages is to make the plaintiff whole again—that is, to restore the plaintiff to the same position (no better and no worse) that she was in before the tort, or to make it as if the tort had never occurred.¹⁹ In the case of a motor vehicle accident, being made whole may require either physical restoration—returning the plaintiff's vehicle to its exact pre-accident condition so that the plaintiff can continue driving as though no tort had occurred—or economic restoration—returning the net value of plaintiff's assets and liabilities to the same level as just before the accident.²⁰ One difficulty of determining a proper measure of damages in motor vehicle collisions comes from the intersection of these two restorative goals.

Compensatory damages may only be recovered for a harm when the extent of the harm, and the amount of adequate compensation, is reasonably certain.²¹ A tort claimant is permitted to recover for all of her past, present, and prospective harms caused by the tort.²² However, to the extent that damages are exceedingly

¹⁵ *Id.* § 924 (enumerating personal damages tort victims may pursue).

¹⁶ See 1 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 1:7 (3d ed. 2021); L.C. Di Stasi, Jr., Annotation, *Necessity and Sufficiency, in Personal Injury or Death Action, of Evidence as to Reasonableness of Amount Charged or Paid for Accrued Medical, Nursing, or Hospital Expenses*, 12 A.L.R. 3d 1347, 1356-84 (1967).

¹⁷ RESTATEMENT (SECOND) OF TORTS § 928 (enumerating property damages tort victims may pursue).

¹⁸ For further reading on recovery for loss of use, see C.C. Marvel, Annotation, *Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed*, 18 A.L.R. 3d 497, 508-23 (1968), and see generally Jeremy Walter, *When Legal Fiction Met Common Sense: How the Court in Morrison v. Campbell Said What Everyone Was Thinking*, 66 BAYLOR L. REV. 812 (2014).

¹⁹ See, e.g., *Am. Serv. Ctr. Assocs. v. Helton*, 867 A.2d 235, 242 (D.C. 2005) (“The ultimate test of the fitness of a damage award is its capacity to advance the goal of tort damages, which is ‘to make the injured party whole again.’” (quoting *Bell v. Westinghouse Elec. Corp.*, 507 A.2d 548, 555 (D.C. 1986))).

²⁰ See *Dunmire Motor Co. v. Or. Mut. Fire Ins. Co.*, 114 P.2d 1005, 1009 (Or. 1941) (comparing insurance recovery for “restoration of the property to its condition prior to the injury” with complete economic restoration).

²¹ RESTATEMENT (SECOND) OF TORTS § 912 (setting out certainty requirement for recovery).

²² *Id.* § 910.

unlikely, or the magnitude of them is unascertainable, the plaintiff may not recover.²³ Further, once a judgment is issued against a defendant for a tort, a plaintiff may not sue a second time, even if a harm that was previously too uncertain later comes to pass.²⁴

B. *Stigma Damages*

The cases and scholarship that address stigma damages offer insights into how to approach the arguments surrounding IDV. Stigma damages refer broadly to permanent losses caused by a temporary harm, even after that harm has been fully remediated.²⁵ For example, consider a railcar maintenance facility that used harmful chemicals in its operations.²⁶ Those chemicals leaked into an adjacent property's soil and groundwater.²⁷ Even after remediation efforts reduced the quantity of chemicals in the soil and groundwater to acceptable levels, landowners found that buyers were afraid (whether rationally or irrationally) to purchase the formerly contaminated property, lowering its price.²⁸ In the complicated litigation that ensued, the Third Circuit Court of Appeals permitted the plaintiffs to recover the lowered value of their property as stigma damages. Even though, "in a perfectly functioning market, fully repaired property will return to its former value,"²⁹ the court recognized that "the market sometimes fails"³⁰ and awarded stigma damages as compensation for this market imperfection. Such a real property stigma damages case can even arise where the property is simply close to a contaminated environmental site, irrespective of whether the property suffered any physical damage at all.³¹

²³ See *id.* § 912 (discussing burden and standard of proof).

²⁴ See *Res Judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit.").

²⁵ *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁶ This happened at the Paoli Rail Yard in Chester County, Pennsylvania, which contaminated nearby property with polychlorinated biphenyls ("PCBs"). *Paoli Railyard Paoli, PA Cleanup Activities*, U.S. ENV'T PROT. AGENCY: SUPERFUND <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0301447> [<https://perma.cc/HYX6-RRT7>] (last visited Sept. 15, 2022) (providing public with information about environmental fallout and subsequent mitigation efforts).

²⁷ *Id.*

²⁸ *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 795 (3d Cir. 1994) (discussing claims for stigma-based damage to property value).

²⁹ *Id.* at 797.

³⁰ *Id.*

³¹ See Alex Geisinger, *Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications*, 76 NEB. L. REV. 452, 457-71 (1997) (surveying jurisprudence of such "proximity stigma" cases).

Professor Alex Geisinger generously refers to the jurisprudence on such real property stigma damages as “confused.”³² He traces this confusion to “the variety of legal claims asserted as a basis for stigma recovery;”³³ the particularities of the common law of nuisance,³⁴ a field which preeminent scholars have called a “‘wilderness’ of law” and a “legal garbage can;”³⁵ and courts’ proclivities to bend ordinarily applicable damages rules in order to reach the best policy outcome.³⁶ As such, a quick look at other stigma damages cases will not resolve the question of IDV. Nonetheless, the existing work is helpful in conceptualizing stigma as a “psycho-social phenomenon”³⁷ caused by a complicated mix of markers and factors that can result in stigma damages that are “much higher or smaller than the amount of risk determined by experts to accompany any [physical damage] event.”³⁸ The scholarship and case law of stigma damages indicate the importance of “acknowledging the reality that public perception does influence property value,”³⁹ even after a full abatement of the temporary harm and adjusting damages awards accordingly.

C. *Diminished Value 101*

Diminution in value is a broad term that encompasses a range of factors, each of which may be treated differently by different state tort systems. Juries must consider a vehicle’s pre-accident value, immediate post-accident value, current value, and repair costs in determining the extent of an award for gross diminished value, repair-related diminished value, insurance-related diminished value, residual diminished value, or IDV.

First, juries must look to the car’s pre-accident value—the fair market value of the vehicle immediately before the accident occurred if the seller and buyer wanted, but did not need, to reach an agreement—to set the baseline for

³² *Id.* at 455.

³³ *Id.*

³⁴ *Id.* at 472.

³⁵ Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENV’T AFF. L. REV. 89, 90 (1998) (quoting 16 H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS iii (3d ed. 1893); William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942)).

³⁶ Geisinger, *supra* note 31, at 473 (reflecting on courts reading terms like “permanent damage” broadly in order to encompass damages beyond cost of repair).

³⁷ *Id.* at 475.

³⁸ *Id.* at 482.

³⁹ Jennifer L. Young, *Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty*, 52 S.C. L. REV. 409, 422 (2001).

damages.⁴⁰ Because used vehicles almost always depreciate over time,⁴¹ a car's pre-accident value cannot be established with a mere reference to the car's original purchase price. Instead, pre-accident value may be established by testimony of the vehicle's owner⁴² or by reference to industry guides for used car sales.⁴³ The pre-accident value of the vehicle is the starting point of diminished value analysis, and compensatory property damage awards (sans loss-of-use damages) usually may not exceed a vehicle's pre-accident value.⁴⁴

Second, juries consider the car's immediate post-accident value. The post-accident value is the fair market value of the vehicle immediately after it was damaged by the defendant's tortious conduct.⁴⁵ For a mildly scratched vehicle, post-accident value may be very close to pre-accident value because many future buyers could overlook or easily repair such damage.⁴⁶ On the other hand, there may be little active market for a crumpled car awaiting a tow on the side of the road. In the most violent collisions, a vehicle's post-accident value may be no more than the value of its parts as scrap metal.⁴⁷

Third, juries consider the car's current value, defined as the car's post-accident, post-repair value. This is the fair market value of the vehicle after it

⁴⁰ See, e.g., *Shield Glob. Partners-G1, LLC v. Forster*, 141 N.E.3d 1269, 1272 (Ind. Ct. App. 2020) (discussing property's pre-accident value as crucial part of diminished value analysis).

⁴¹ See I.R.C. § 167 (contemplating depreciation of tangible assets); Bader Alshamary & Ovidiu Calin, *Pricing a Stochastic Car Value Depreciation Deal*, 3 APPLIED STOCHASTIC MODELS BUS. & INDUS. 509 (2014) (discussing proper mathematical model to account for vehicle depreciation).

⁴² See *Merchs. Motor Freight, Inc. v. Downing*, 227 F.2d 247, 249-50 (8th Cir. 1955) (upholding damages award where owner testified as to reasonable market value of vehicle, although admission of offer received by owner was deemed harmless error).

⁴³ See *Shield Glob.*, 141 N.E.3d at 1270 (establishing pre-accident value by an appraisal according to National Automobile Dealers Association Used Car Guide).

⁴⁴ See, e.g., *Myers v. Thornton*, 480 S.E.2d 334, 335 (Ga. Ct. App. 1997) (stating well-established limitation on damages that "any recovery may not exceed the market value of the car before the damage with interest").

⁴⁵ See, e.g., *Wiese-GMC, Inc. v. Wells*, 626 N.E.2d 595, 600 (Ind. Ct. App. 1993) (remanding damages award because "trial court's findings are insufficient on the question of [plaintiff's] damages because they fail to determine the van's post-accident fair market value").

⁴⁶ See *Ellis v. King*, 400 S.E.2d 235, 238 (W. Va. 1990) (questioning whether any diminished value would be recoverable at all after minor, nonstructural damage).

⁴⁷ In such a situation, the cost of repairs usually exceeds the vehicle's pre-accident value; this is called a "total loss." See 46 C.J.S. *Insurance* § 1737 (2022) (setting total loss damages to pre-accident value plus interest, minus salvage or scrap value). After a total loss, the plaintiff/insured may recover the vehicle's pre-accident value, while the insurance company takes salvage title to the vehicle. This solution is viewed as more economical than attempting futile repairs. See *id.*

has been in an accident and been repaired.⁴⁸ This figure is the core of IDV analysis. As with pre-accident value, current value can be ascertained by actual sales,⁴⁹ expert appraisals,⁵⁰ or reference to industry guides⁵¹ like the Kelley Blue Book.⁵²

Finally, juries consider the reasonable cost of repairs to the vehicle, which may be proven with estimates or receipts from auto repair shops.⁵³ While the cost of repairs may require less speculation than a car's entire value, plaintiffs and defendants still often disagree on the extent of the repairs necessary, the necessity of using original equipment manufacturer parts (as opposed to aftermarket) and the appropriate amount of labor required for repairs.⁵⁴

This Note now addresses the many different measures of damages that fall under the broad umbrella of diminished value. Most diminished value damages involve the addition or subtraction of some combination of repair costs and pre-accident, post-accident, and post-repair value.⁵⁵

Sometimes, even high-quality repairs are unable to cure a very noticeable physical defect of the vehicle.⁵⁶ In these cases, courts generally award damages that account for the resulting lost value.⁵⁷ This Note does not generally address

⁴⁸ See *Brennen v. Aston*, 2003 OK 91, ¶ 2, 84 P.3d 99, 100 (affirming jury verdict for \$1,750 in diminution damages based on post-repair value \$3,500 less than pre-accident value).

⁴⁹ See *Farmers Ins. Co. of Ariz. v. R.B.L. Inv. Co.*, 675 P.2d 1381, 1382 (Ariz. Ct. App. 1983) (establishing post-repair value by owner's post-collision, post-repair sale of car for \$13,500).

⁵⁰ See *Brennen*, 84 P.3d at 100 (affirming use of expert testimony to establish post-repair value).

⁵¹ See *Shield Glob. Partners-G1, LLC v. Forster*, 141 N.E.3d 1269, 1270 (Ind. Ct. App. 2020) (establishing current value by an appraisal according to National Automobile Dealers Association Used Car Guide).

⁵² *About Us*, KELLEY BLUE BOOK, <https://www.kbb.com/company/about-us/> [<https://perma.cc/VUA7-N4WF>] (last visited Sept. 15, 2022) (describing Kelley Blue Book's role in helping consumers price used cars).

⁵³ See, e.g., *Farmers Ins. Co.*, 675 P.2d at 1382 (affirming cost of repairs damages calculated by amount spent to fix vehicle after collision).

⁵⁴ See, e.g., *Dado v. Jeeninga*, 743 N.E.2d 291, 295 (Ind. Ct. App. 2001) (affirming trial court's finding that repair costs were appropriate and did not represent windfall to plaintiff).

⁵⁵ See, e.g., Judicial Council of California Civil Jury Instructions CACI No. 3903J (2021) ("[T]he damages are (1) the difference between [the vehicle's] value immediately before the harm and its lesser value immediately after the repairs have been made; plus (2) the reasonable cost of making repairs.").

⁵⁶ See, e.g., *Giles v. Eagle Ins. Co.*, 43 Mass. (2 Met.) 140, 140 (1840) (considering boat that sustained bend in its frame from storm even after repairs); see also *Copelan v. Infinity Ins. Co.*, 359 F. Supp. 3d 926, 929 (C.D. Cal. 2019) (distinguishing between repair-related costs and stigma damages like IDV).

⁵⁷ See *Giles*, 43 Mass. (2 Met.) at 146 (providing additional compensatory damages for residual diminished value); *Nichols v. Cimbura*, No. A15-0861, 2016 WL 456952, at *2

repair-related diminished value, which is diminished value due to the collision and incomplete or futile repairs.⁵⁸

A vehicle might also retain a serious defect after an accident because of an insurer's refusal to pay an auto repair shop to fix a specific problem with the vehicle.⁵⁹ Such diminished value is called insurance-related diminished value⁶⁰ in the auto industry and is easily remedied in court in a third-party insurance context where a plaintiff can prove such continuing damage.⁶¹

Gross diminished value ("Gross DV"),⁶² also referred to as pre-repair diminished value,⁶³ is the difference between pre-accident value and immediate post-accident value.⁶⁴ When a jurisdiction defines the relevant measure of damages as "the difference between the value of the vehicle immediately before the damage occurred and the value after the damage occurred,"⁶⁵ it refers directly to Gross DV.

Residual diminished value ("Residual DV") is the difference between pre-accident value and current value.⁶⁶ The diminished value is "residual" because it remains even after repairs.⁶⁷ In a jurisdiction that sets the measure of damages as "the cost of the repair, together with *the difference in value of the repaired property and its value before injury*," the italicized portion represents Residual DV.⁶⁸ Residual DV can be caused either by an identifiable physical problem

(Minn. Ct. App. Feb. 8, 2016) ("If the repairs have not fully restored the property, 'the owner is entitled to the remaining diminution in value . . .'" (quoting *Rinkel v. Lee's Plumbing & Heating Co.*, 99 N.W.2d 779, 783 (Minn. 1959))).

⁵⁸ See, e.g., *Defraites v. State Farm Mut. Auto. Ins. Co.*, 10-78, p. 11 (La. App. 5 Cir. 6/29/10); 44 So. 3d 762, 769 (distinguishing between repair-related and non-repair-related damages); *Nichols*, 2016 WL 456952, at *1 (discussing expert testimony establishing absence of repair-related diminution and reporting stigma-related diminution).

⁵⁹ Charlie Barone, *Diminished Value: Fact or Fiction?*, BODYSHOP BUS., July 2010, at 22 (discussing history of company providing estimates for repair-related and insurance-related diminished value).

⁶⁰ *Id.*

⁶¹ See *Superior Pontiac Co. v. Queen Ins. Co. of Am.*, 434 S.W.2d 340, 342 (Tex. 1968) (permitting recovery against insurance company beyond repair costs where poor repairs did not restore automobile to its pre-accident physical condition).

⁶² See *Am. Serv. Ctr. Assocs. v. Helton*, 867 A.2d 235, 242 (D.C. 2005) (referring to "gross diminution in value").

⁶³ *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1282 (10th Cir. 2005) (affirming jury's finding that damage to home value was equal to cost of performing repairs that insurer declined to cover).

⁶⁴ Gross DV = (pre-accident value) – (immediate post-accident value).

⁶⁵ ARK. CODE ANN. § 27-53-401 (1987).

⁶⁶ Residual DV = (pre-accident value) – (current value).

⁶⁷ See, e.g., *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App. 3d 523, 2007-Ohio-3739, 875 N.E.2d 993, at ¶ 14 (differentiating between residual value and gross diminution in value).

⁶⁸ *Broadie v. Randall*, 216 P. 1103, 1104 (Kan. 1923) (emphasis added).

with the vehicle (whether repairable or not)⁶⁹ or by a fear or stigma attached to the car even in the absence of some identifiable physical problem. The latter type of Residual DV is called “inherent” because the decreased value automatically accrues at the time of the accident; the damage is inherent in the fact that the accident occurred.⁷⁰ Assuming, as this Note does, that repairs were as complete and competent as possible so that no identifiable physical problem remains,⁷¹ any residual loss in value would therefore be IDV. Where repairs were proper and complete, IDV equals pre-accident value minus current value.

One reason why a driver may not want a vehicle that has been in an accident is the long-lasting damage that a collision can cause. For example, “[i]f a vehicle’s crumple zones have already crumpled, it’s difficult to put them back together again exactly as they were when the car left the factory—and that means it might not be as safe in a future accident.”⁷² Additionally, a driver of a damaged car must assume the risk that the repair was performed imperfectly; even a top-notch auto shop can fail to notice a bent, broken, or damaged part that could fail more quickly in the future.⁷³ These factors do more than just drive down the resale price of a vehicle—they potentially make the vehicle less safe for the current owner to drive.⁷⁴ For this reason, even if some IDV damages are attributable primarily to irrational market stigmas, tort plaintiffs whose cars are repaired may still suffer and internalize physical harms that they would not have had to internalize had the tortious conduct never occurred. Finally, IDV can have a self-perpetuating feedback effect: if the secondhand buyer of a vehicle reasonably believes that a thirdhand buyer will devalue the vehicle because of a stigma, then the secondhand buyer would want to pay less for the vehicle even if she did not personally “buy in” to the other rationales of IDV.⁷⁵

⁶⁹ In such a case where repairs still left an identifiable physical problem with the vehicle, the plaintiff could seek repair-related diminished value. *See supra* notes 55-61 and accompanying text.

⁷⁰ *See Given v. Com. Ins. Co.*, 796 N.E.2d 1275, 1276 (Mass. 2003) (describing IDV as occurring “despite the fact that the vehicle has been restored to its precollision physical condition”). To the extent that major accidents cause greater IDV than minor accidents, the loss in value can be said to inhere in *the specific accident*, not merely in the fact that any accident occurred. *See, e.g., Olsen, supra* note 4 (measuring different diminished value results for major and minor accidents).

⁷¹ *See supra* notes 11-12 and accompanying text.

⁷² Demuro, *supra* note 6.

⁷³ Barone, *supra* note 59, at 26 (discussing tools like paint film thickness inspectors that can reveal hidden damage not initially realized by a repair shop).

⁷⁴ *See* Demuro, *supra* note 6.

⁷⁵ *See* Demuro, *supra* note 5 (“If you buy a car knowing it was in an accident, it’s likely the next buyer will easily find out the same thing. So while you’re paying less up-front for your vehicle, remember you probably won’t get as much when you go to sell it . . .”).

D. *The Collision History Industry*

A savvy (if not shady) owner of a vehicle that previously suffered collision damage could try to avoid the impact of IDV by selling her car without informing the buyer of its collision history. Such a buyer, unaffected by any stigma surrounding collided-with cars, would likely pay a higher price than she would if the accident were reported.⁷⁶ Sellers are disincentivized from doing so by more than just statutes and common law forbidding this behavior.⁷⁷ A seller trying to pass off a damaged car as undamaged must stymie not just the seller, but the entire collision history industry.⁷⁸

Services like CARFAX and AutoCheck purport to keep billions of records on used cars that detail each vehicle's collision and repair history, alongside other data like mileage.⁷⁹ For a modest fee, a buyer can obtain a report for almost any car based on its vehicle identification number and discover if it was previously in a collision.⁸⁰ Additionally, services like WreckCheck offer reviews and appraisals to help buyers uncover any repair-related, insurance-related, or IDV-related history of their desired vehicles.⁸¹ On the other side of the deal, groups like Kelley Blue Book and the National Automobile Dealers Association publish guides and maintain websites with up-to-the-month sales figures based on make, model, year, and condition to help wholesale dealers structure their transactions.⁸² All of these sources purport to know the "true value" of a vehicle

⁷⁶ See *supra* note 4 and accompanying text (explaining how car buyers can save money by investigating damages on vehicles using CARFAX Vehicle History Reports).

⁷⁷ See, e.g., MASS. GEN. LAWS ch. 140, § 58 (2020) (requiring car dealers to obtain bond used to pay consumer if consumer is damaged by "dealer's unfair and deceptive acts or practices, misrepresentations," etc.); RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981) (making contracts voidable if entered into because of fraudulent or material misrepresentations and omissions).

⁷⁸ See Barone, *supra* note 59, at 33 (warning of increased acceptance of idea of diminished value due to certain interested industry actors).

⁷⁹ CARFAX Vehicle History Data Sources, CARFAX, <https://www.carfax.com/company/vhr-data-sources> [<https://perma.cc/RFT9-8ZUK>] (last visited Sept. 15, 2022) (advertising "more than 26 billion records"); Vehicle History Data Solutions, EXPERIAN, <https://www.experian.com/automotive/vehicle-history-services> [<https://perma.cc/KC2W-7GNK>] (last visited Sept. 15, 2022) ("We analyze millions of data points from public and private sources, auction data, open recall and diverse accident sources, many exclusive to Experian.").

⁸⁰ See *Order CARFAX Reports*, CARFAX, <https://secure.carfax.com/creditCard.cfx> [<https://perma.cc/G9NN-KUX8>] (last visited Sept. 15, 2022) (offering one, three, or six vehicle history reports for forty to one hundred dollars).

⁸¹ See *How WreckCheck.com Works*, WRECKCHECK, <https://www.wreckcheck.com/#how-it-works> [<https://perma.cc/MV4V-62CR>] (last visited Sept. 15, 2022) (providing simple text and video explanations of WreckCheck's diminished value services).

⁸² See *NADAguides vs Kelley Blue Book Values*, J.D. POWER, <https://www.nadaguides.com/vs-kelleybluebook> [<https://perma.cc/KP56-9MWM>] (last

in a way that a layperson could not, and they must convince buyers that the diminished value of the buyer's vehicle is substantial enough to justify paying for one of their offered services.⁸³ This has led some in the auto industry to suggest that the growth of the collision history industry has accelerated the increasing magnitude of diminished value damages and buyer stigmas against vehicles with collision histories.⁸⁴

E. *The Role of Insurance*

People whose cars are damaged after accidents tend to go to insurance companies rather than court.⁸⁵ The tortfeasor and claimant's insurance policies determine the amount recoverable from an insurance claim.⁸⁶ Where the claimant was herself responsible for the accident, or where her coverage arises from optional collision or comprehensive insurance policies, her damages depend on the language of the insurance contract and her insurer may not be obligated to make the victim whole through the payment of diminished value damages.⁸⁷ Whether the insurer must, as a matter of contract language or public policy, reimburse first-party insureds for diminished value is outside the scope of this Note.⁸⁸

visited Sept. 15, 2022) (comparing and contrasting NADA Guides and Kelley Blue Book Values' consumer and business offerings).

⁸³ Demand for used car valuation services is especially high in times of fluctuating prices, such as during the rise in used vehicle prices caused by chip shortages for new vehicles as a result of the COVID-19 pandemic. See Jeanne Whalen, *The Used-Car Market Gets Fast and Furious*, WASH. POST, Nov. 7, 2021, at G1 (discussing effect of chip shortage on used cars and people who buy them).

⁸⁴ See Kevin Mehok, *Changing Perceptions*, AUTO. BODY REPAIR NEWS, Nov. 2011, at 47, 48 (accusing services like CARFAX of "mudd[y]ing the waters" by releasing vague vehicle history reports that force body shops to confront consumer conceptions about diminished value).

⁸⁵ *Car Accident Settlement Process and Timeline*, FINDLAW, <https://www.findlaw.com/injury/car-accidents/car-accident-settlement-process-and-timeline.html> [<https://perma.cc/N6DD-UVJM>] (last updated Dec. 1, 2021) ("The vast majority of car accident cases are resolved through settlement negotiations between the injured party and an insurance company.").

⁸⁶ See Farrish, *supra* note 9, at 45 (remarking that these policies "are almost invariably contracts of adhesion," except for rare exceptions such as where "the terms of the policy are dictated by government regulation").

⁸⁷ See, e.g., AUTO. INSURERS BUREAU, MASSACHUSETTS AUTOMOBILE INSURANCE POLICY 16-17 (2016 ed.) ("We will not pay for any decrease in value claimed to result from the loss. The most we will pay will be either the actual cash value of the auto or the cost to repair the auto, whichever is less.").

⁸⁸ For analysis of diminished value in first-party contractual claims against insurers arising from collision insurance policies, see Young, *supra* note 9, at 421-34; and Farrish, *supra* note 9, at 47-59.

Where the tortfeasor was at fault for property damage, the tortfeasor's compulsory liability insurer is usually obligated to pay however much money is recoverable against the defendant in court.⁸⁹ Therefore, the focus of this Note—the proper measure of damages for property damaged in motor vehicle collisions—applies with equal strength to actions in tort; claims against a tortfeasor's liability insurer; subrogated claims by the claimant's insurer against the tortfeasor's liability insurer; and, in many jurisdictions, uninsured or underinsured motorist insurance claims.⁹⁰

The vocabulary of insurance law is useful in discussing the limits and perils of recovery for diminution in value. The principle of indemnity states that “an insurance policy should not confer a benefit greater in value than the loss suffered by the insured.”⁹¹ Just as judges in tort worry about providing windfall gains to plaintiffs, insurers argue against any proposed rule that would put a claimant in a better position than where she was before the accident.⁹² If an insured could be better off through an insurance settlement, she would be perversely incentivized to cause or fail to prevent damage to her property.⁹³ The resultant risk that an insured would intentionally suffer losses in order to maximize her profit is called a moral hazard.⁹⁴ If the principle of indemnity were not followed, and an award of diminished value damages exceeded the value of the insured's loss, then the insured would face a moral hazard where she is better off crashing her car than trading it in at a dealership.

F. *Surveying the Diminished Value Landscape*

This Section surveys the laws of all fifty states and the District of Columbia and categorizes their diminished value doctrines from least claimant-friendly to most claimant-friendly. This analysis will demonstrate the breadth of diminished value regimes currently active in the United States.⁹⁵ This landscape is

⁸⁹ See, e.g., AUTO. INSURERS BUREAU, *supra* note 87, at 10-13 (“The amount we will pay is the amount the owner of the property is legally entitled to collect through a court judgment or settlement for the damaged property.”).

⁹⁰ See *Campbell v. Markel Am. Ins. Co.*, 2000-1448, p. 6-8 (La. App. 1 Cir. 9/21/2001); 822 So. 2d 617, 621-23 (distinguishing between first-party claims sounding in contract and third-party claims sounding in tort).

⁹¹ *Indemnity Principle*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁹² See, e.g., *Braum v. Kinderdine*, 2015-Ohio-696, 27 N.E.3d 602, at ¶ 33 (rejecting defendant's contention that recovery of IDV would result in windfall to plaintiff).

⁹³ See Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1523 (1999) (“Casualty insurance exceeding losses, of course, creates perverse incentives to cause accidents rather than avoid them.”).

⁹⁴ *Hazard*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁹⁵ Instrumental as a starting point in this fifty-state survey was *Diminution in Value Cases in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C., <https://www.mwl-law.com/wp-content/uploads/2018/02/DIMINUTION-IN-VALUE-IN-ALL-50-STATES.pdf> [<https://perma.cc/5KN3-CBG6>] (last updated Mar. 16, 2022). I used the cases referenced in

constantly changing and updating, and the lines between some categories are thin.⁹⁶ Nonetheless, this survey reveals six unique frameworks for awarding diminished value damages.

Sixteen states do not have a clear leading case or statute purporting to set rules for the recovery of diminution in value for harm to chattels.⁹⁷ While some of these jurisdictions have cases hinting at a possible acceptance of diminished value claims,⁹⁸ a claimant in these states could not easily assert to an insurer that the insurer is responsible for paying her diminished value damages.

Two jurisdictions explicitly cap recovery for injury to property at the reasonable cost of repairs necessary to restore the property to its pre-accident condition.⁹⁹ This represents a rejection of IDV, as it assumes that physical repair costs sufficiently remedy the plaintiff and make her whole.¹⁰⁰ In New York, “the [inherent] diminution in resale value is not to be taken into account if the repairs will place the car in the same condition it was [in] before the accident.”¹⁰¹ One exception exists for rare or collector cars that “appreciate[] in value from the time of [their] purchase,” in which case a Gross DV measure of damages applies.¹⁰² North Dakota’s statute sets the measure of damages as “the

this report to generate a list of West Headnotes to search within each state and the District of Columbia, including 115k113, Injuries to Personal Property. Search terms used within jurisdictions to find further cases included “diminished value” and “diminution in value” within a paragraph of “car” or “vehicle.” Resulting cases were scanned for references to precedents that may go beyond motor vehicles. The bulk of this search was conducted between November 2020 and March 2021. Additionally, email messages with state insurance commissioners solidified my understanding of the most important precedent in some jurisdictions. *See, e.g., infra* notes 146, 152, 224. This Note is the first source that specifically divides the states into the categories of diminished value doctrines used in this Section.

⁹⁶ There is significant disagreement and speculation as to which states cover diminished value. *See, e.g., What Is Diminished Value?*, INS. INFO. INST., <https://www.iii.org/article/what-is-diminished-value> [<https://perma.cc/3HJ8-K8Z7>] (last visited Sept. 15, 2022) (claiming that “all states except Michigan” recognize third-party IDV).

⁹⁷ These states are Alabama, Alaska, Delaware, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, South Dakota, and Wyoming.

⁹⁸ *See, e.g.,* EAM Advert. Agency, Inc. v. Helies, 954 P.2d 812, 814 (Or. App. 1998) (rejecting claim for IDV where plaintiff offered insufficient evidence of current value, but conditioning its rejection “[o]n this record” without explicitly closing the door on future IDV claims).

⁹⁹ Because these jurisdictions deviate significantly from other states by explicitly barring diminished value recovery, this Note examines their cases inline. This Note discusses individual state rules and cases in the footnotes for the remaining jurisdictions.

¹⁰⁰ *See* Johnson v. Scholz, 93 N.Y.S.2d 334, 336 (App. Div. 1949) (explicitly commanding that “the diminution in resale value is not to be taken into account”).

¹⁰¹ *Johnson*, 93 N.Y.S.2d at 336.

¹⁰² *Franklin Corp. v. Prahl*, 932 N.Y.S.2d 610, 615 (App. Div. 2011) (finding that owner of car that appreciated in value before it was damaged in an accident was not limited to lesser

reasonable cost of repairs necessary to restore the property to the condition it was in immediately before the injury was inflicted,”¹⁰³ and the state’s court rejected the IDV claim of a plaintiff who had already received repair costs from the defendant.¹⁰⁴ These are the only states with laws explicitly rejecting recovery for any type of diminished value where repairs can restore the physical condition of the vehicle.

Six states employ a theoretically elegant measure of damages applicable to every instance of property damage: “[T]he difference between the value of the vehicle immediately before the damage occurred and the value after the damage occurred.”¹⁰⁵ In other words, these states apply a Gross DV measure of damages. However, these jurisdictions do not provide plaintiffs with an easy way to prove Gross DV, and inherent diminution in value might not be valid evidence toward Gross DV.¹⁰⁶ These states are: Arkansas,¹⁰⁷ Connecticut,¹⁰⁸ Colorado,¹⁰⁹ Iowa,¹¹⁰ North Carolina,¹¹¹ and Tennessee.¹¹²

cost of repair or diminution in car’s value and was instead entitled to elect diminution in car’s value).

¹⁰³ N.D. CENT. CODE § 32-03-09.1 (2022).

¹⁰⁴ *Sullivan v. Pulkrabek*, 2000 ND 107, ¶ 13, 611 N.W.2d 162, 164 (“Because [plaintiff] has already chosen to receive the cost of repair over the diminution in value, he has received the full measure of damages under § 32-03-09.1.”).

¹⁰⁵ *Crooms v. Capps*, 274 S.W.3d 364, 365 (Ark. Ct. App. 2008) (quoting ARK. CODE ANN. § 27-53-401 (1994)).

¹⁰⁶ *GEICO v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 WL 1966022, at *44 (Tenn. Ct. App. June 29, 2007) (requiring proof of Gross DV and stating that “post-repair decrease in value, unrelated to the pre-accident value” is “not recognized under Tennessee’s measure of damages”).

¹⁰⁷ *Crooms*, 274 S.W.3d at 366-67 (adopting Gross DV).

¹⁰⁸ *Damico v. Dalton*, 469 A.2d 795, 796 (Conn. App. Ct. 1984) (“[T]he measure of damages to the defendant’s automobile was the difference between its value immediately prior to the collision and its value immediately after.”).

¹⁰⁹ *Trujillo v. Wilson*, 189 P.2d 147, 150 (Colo. 1948) (en banc) (“[T]he measure of damage is the difference between [the vehicle’s] value immediately before its damage and immediately thereafter . . .”).

¹¹⁰ *Long v. McAllister*, 319 N.W.2d 256, 261 (Iowa 1982) (“[T]he measure of damages is the difference between [the vehicle’s] reasonable market value before and after the injury . . .”).

¹¹¹ *U.S. Fidelity & Guaranty Co. v. P. & F. Motor Express, Inc.*, 18 S.E.2d 116, 117 (N.C. 1942) (“The correct and safe rule is the difference between the value of the machine before and after its injury, and in estimating this difference it is proper for the jury to consider the cost and expenses of repairs.” (quoting *Farrell v. Universal Garage Co.*, 102 S.E. 617, 619 (N.C. 1920))).

¹¹² *GEICO v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 WL 1966022, at *42 (Tenn. Ct. App. June 29, 2007) (permitting recovery for Gross DV based on proof of pre-accident value and current value, but only if repairs cannot or did not “substantially restore the property to its pre-accident value, function, and appearance;” and not accepting evidence of inherent, as opposed to gross, diminished value).

Four states still maintain a default and primary measure of tort damages of Gross DV; however, unlike the above states, these jurisdictions accept repair costs and Residual DV as evidence of Gross DV.¹¹³ This has the result of making Gross DV easier to prove where the plaintiff does not or cannot produce evidence of the vehicle's immediate post-accident value. These states are: Indiana,¹¹⁴ Texas,¹¹⁵ Utah,¹¹⁶ and Vermont.¹¹⁷

Eight jurisdictions permit plaintiffs to recover the lesser value of (1) Gross DV or (2) the cost of reasonable repairs plus Residual DV. This measure of damages permits plaintiffs to prove adequate compensatory damages in multiple ways, while also allowing defendants to attempt to cap damages by proving that the unused damages measure is less than the plaintiff's preferred measure.¹¹⁸

¹¹³ See *Kinney v. Cloutier*, 211 A.2d 246, 248 (Vt. 1965) (accepting repair costs and current value as evidence in determining Gross DV, which is the ultimate measure of damages).

¹¹⁴ *Shield Glob. Partners-G1, LLC v. Forster*, 141 N.E.3d 1269, 1271 (Ind. Ct. App. 2020) (using a "fundamental measure of damages" of Gross DV that can be proved "by a combination of evidence of the cost of repair and evidence of the fair market value before the causative event and the fair market value after repair" (quoting *Wiese-GMC, Inc. v. Wells*, 626 N.E.2d 595, 599 (Ind. Ct. App. 1993))).

¹¹⁵ *Jones v. Wallingsford*, 921 S.W.2d 463, 464 (Tex. App. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 928 (AM. LAW. INST. 1991)) (permitting recovery "for either the diminution of the market value or the cost of repair to the damaged vehicle"); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995) (indicating support for diminution in value plus cost of repairs as evidence of appropriate damages, and as not duplicative, "if the diminution is calculated based on a comparison of the original value of the property and the value *after repairs are made*").

¹¹⁶ *Hill v. Varner*, 290 P.2d 448, 449 (Utah 1955) (stating that "the proper measure of damages . . . is the difference between its value immediately before and immediately after injury" but immediately clarifying "the plaintiff can recover, not only the reasonable cost of repairs, but also depreciation in market value, if any, after repair").

¹¹⁷ *Kinney*, 211 A.2d at 248 (setting the measure of damages at "the difference between the market value of the automobile immediately before the accident and its market value immediately afterward" while providing that "evidence is admissible as to the reasonable cost of repairs made necessary thereby, and as to the value of the automobile as repaired" (quoting *Purington v. Newton*, 49 A.2d 98, 100 (Vt. 1946))).

¹¹⁸ See *Conrad v. Shrout*, No. 2017-CA-000862, 2018 WL 3814610, at *1 (Ky. Ct. App. Aug. 10, 2018) (reversing a district court award of repair costs plus IDV after defendant proved a lesser Gross DV).

These jurisdictions are: the District of Columbia,¹¹⁹ Kentucky,¹²⁰ Maryland,¹²¹ Mississippi,¹²² Ohio,¹²³ New Jersey,¹²⁴ New Mexico,¹²⁵ and Washington.¹²⁶

Twelve jurisdictions embrace repair costs plus Residual DV as *the* proper measure of damages, without any significant reference to Gross DV as the “standard” measure of damages. These states therefore explicitly accept Residual DV without concerning themselves with Gross DV.¹²⁷ These states are:

¹¹⁹ *Am. Serv. Ctr. Assocs. v. Helton*, 867 A.2d 235, 243 (D.C. 2005) (“We therefore hold that when a plaintiff can prove that the value of an injured chattel after repair is less than the chattel’s worth before the injury, recovery may be had for both the reasonable cost of repair and the residual diminution in value after repair, provided that the award does not exceed the gross diminution in value.”).

¹²⁰ *Conrad*, 2018 WL 3814610, at *2 (“The costs of repair, plus an award for the residual diminution in value to the vehicle, cannot exceed the gross diminution in value.”).

¹²¹ *Fred Frederick Motors, Inc. v. Krause*, 277 A.2d 464, 467 (Md. 1971) (“[I]f the plaintiff can prove that after repairs his vehicle has a diminished market value from being injured, then he can recover in addition to the cost of repairs the diminution in market value, provided the two together do not exceed the diminution in value prior to the repairs.”).

¹²² *Ishee v. Dukes Ford Co.*, 380 So. 2d 760, 761 (Miss. 1980) (“Cost of repair may be recovered, as well as the remaining diminution in pre-tort value after the proposed repairs, but in no event may cost of repair be recovered to the extent it exceeds the total diminution in pre-tort value in the case of one holding personalty for sale rather than for personal use.”). No Mississippi case directly addresses vehicles held for personal use.

¹²³ *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App. 3d 523, 2007-Ohio-3739, 875 N.E.2d 993, at ¶ 19 (“[T]he plaintiff may recover the residual diminution in value in addition to the cost of repair, provided that the plaintiff may not recover damages in excess of the difference between the market value of the automobile immediately before and immediately after the injury.”).

¹²⁴ *Fanfarillo v. E. End Motor Co.*, 411 A.2d 1167, 1169 (N.J. Super. Ct. App. Div. 1980) (“The cost of repair and the depreciated value of the vehicle is an appropriate measure of damages so long as the sum does not exceed the decline in market value, and does not exceed the pre-accident market value of the vehicle.” (citations omitted)).

¹²⁵ *Hubbard v. Albuquerque Truck Ctr., Ltd.*, 958 P.2d 111, 117 (N.M. Ct. App. 1998) (“The great majority of states rely on the same measure we have described above: repair costs plus depreciation or reduction in market value, whichever is less.”).

¹²⁶ Washington Pattern Jury Instructions—Civil WPI 30.10 (2019) (setting measure of damages as lesser of Gross DV or repair costs “plus the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired”).

¹²⁷ *See Brennen v. Aston*, 2003 OK 91, ¶ 12, 84 P.3d 99, 102 (“[T]he cost of repairs made plus the diminution in value of the property will ordinarily be the proper measure of damages.”).

Arizona,¹²⁸ California,¹²⁹ Florida,¹³⁰ Illinois,¹³¹ Louisiana,¹³² Massachusetts,¹³³ Missouri,¹³⁴ Oklahoma,¹³⁵ South Carolina,¹³⁶ Virginia,¹³⁷ Wisconsin,¹³⁸ and West Virginia.¹³⁹

¹²⁸ *Farmers Ins. Co. of Arizona v. R.B.L. Inv. Co.*, 675 P.2d 1381, 1383 (Ariz. Ct. App. 1983) (finding that appropriate measure of damages “may include the cost of repair and proven residual diminution in fair market value”).

¹²⁹ Judicial Council of California Civil Jury Instructions CACI No. 3903J (2021) (“[T]he damages are (1) the difference between [the vehicle’s] value immediately before the harm and its lesser value immediately after the repairs have been made; plus (2) the reasonable cost of making repairs.”).

¹³⁰ *McHale v. Farm Bureau Mut. Ins. Co.*, 409 So. 2d 238, 239 (Fla. Dist. Ct. App. 1982) (“[D]amages are not limited to the cost of repairs actually made where plaintiff shows that the repairs did not put the property in as good a condition as it was before the injury. In such cases, the cost of the repairs made plus the diminution in value will ordinarily be the proper measure of damages . . .”).

¹³¹ *Trailmobile Div. of Pullman, Inc. v. Higgs*, 297 N.E.2d 598, 600 (Ill. App. Ct. 1973) (“If the property is worth less after it is repaired than its value before the injury, the measure of damages is the difference in the market value before the injury and in its repaired condition in addition to the reasonable cost of repairs.”).

¹³² LA. STAT. ANN. § 9:2800.17 (2010) (explicitly permitting recovery of diminished value in motor vehicle collisions even where the vehicle is repaired “to its preloss condition”); *see also* *Smith v. Midland Risk Ins. Co.*, 29793-CA, p. 5 (La. App. 2 Cir. 9/24/97); 699 So. 2d 1192, 1196 (“In a case involving damages to an automobile, where the measure of damages is the cost of repair, additional damages for depreciation may be recovered for the diminution of value due to the vehicle’s involvement in an accident. There must be proof of such diminished value.”).

¹³³ *McGilloway v. Safety Ins. Co.*, 174 N.E.3d 1191, 1197 (Mass. 2021) (“[I]f a third-party claimant’s vehicle suffers IDV even after it is fully repaired, then . . . the insurer may be liable to the claimant for IDV damages so that he or she may be ‘made whole’ once again.”).

¹³⁴ *Rook v. John F. Oliver Trucking Co.*, 556 S.W.2d 200, 202 (Mo. Ct. App. 1977) (approving diminished value reward because “it would not constitute a double recovery for such a person to recover both for the cost of repairing the car and for the difference between the market values of the car before the collision and after the repairs”).

¹³⁵ *Brennen v. Aston*, 2003 OK 91, ¶ 12, 84 P.3d 99, 102 (“[T]he cost of repairs made plus the diminution in value of the property will ordinarily be the proper measure of damages.”).

¹³⁶ *Coleman v. Levkoff*, 122 S.E. 875, 876 (S.C. 1924) (“If as a result of the repairs the property is not restored to a condition in which its market value is equal to the market value before the injury, then the measure of damages is the difference in the market value of the property immediately before the injury and its market value immediately thereafter, in its condition of partial restoration, together with the reasonable cost of the repairs made . . .”).

¹³⁷ *Averett v. Shircliff*, 237 S.E.2d 92, 96 (Va. 1977) (adopting bifurcated rule that usual measure of damages is “the difference between the market value of the car immediately before and immediately after the accident,” but if repairs can restore condition of vehicle then “the measure of damage is the reasonable cost of repairs, with reasonable allowance for depreciation”).

Finally, three jurisdictions allow the plaintiff to choose to recover either (1) Gross DV or (2) the cost of reasonable repairs plus IDV, with no requirement to pick the lesser measure of damages. This system aligns fully with the Restatement (Second) of Torts § 928,¹⁴⁰ which allows for the recovery of “the difference between the value of the chattel before the harm and the value after the harm or, at [the plaintiff’s] election in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs.”¹⁴¹ These states are: Georgia,¹⁴² Kansas,¹⁴³ and Pennsylvania.¹⁴⁴

Importantly, while many states recognize some form of diminished value as a valid element of tort damages, no state has adopted a system that automatically pays for diminished value without requiring proof from the plaintiff of such damages.¹⁴⁵ In this sense, one could say that no state “accepts” or “fully recognizes” IDV.¹⁴⁶ To the contrary, though, most states have measures of damages that permit IDV to be baked into the final sum. If a plaintiff can prove with sufficient evidence (such as an expert appraisal) that her fully repaired vehicle’s current value is less than its pre-accident value, she can recover that

¹³⁸ *Hellenbrand v. Hilliard*, 2004 WI App 151, ¶ 25, 275 Wis. 2d 741, 687 N.W.2d 37 (“[W]hen a plaintiff proves that repairs to personal property have not restored the property to its pre-injury value, and the plaintiff demonstrates that he or she has been or will be harmed by such loss in value, the plaintiff is entitled to damages for the proven lost value.”).

¹³⁹ *Ellis v. King*, 400 S.E.2d 235, 237, 238-39 (W. Va. 1990) (recognizing that “often no amount of repair can return [a] vehicle to its condition prior to the accident” and awarding residual diminished value on top of repair costs, but requiring before such recovery (1) proof of residual diminished value, (2) damage “that is integral to the structure of the vehicle,” and (3) “a vehicle with significant value prior to the accident” in order to sustain such recovery).

¹⁴⁰ RESTATEMENT (SECOND) OF TORTS § 928 (AM. LAW INST. 1979) (enumerating property damages tort victims may pursue).

¹⁴¹ *Id.*

¹⁴² *Myers v. Thornton*, 480 S.E.2d 334, 334-35 (Ga. Ct. App. 1997) (recognizing “two ways to prove damages to a motor vehicle caused by a collision,” one being Gross DV and the other being repair costs “plus the value of any permanent impairment in the value of the vehicle”).

¹⁴³ *Broadie v. Randall*, 216 P. 1103, 1104 (Kan. 1923) (“In cases where the repair of an injury did not restore the property to its original condition and value . . . the cost of the repair, together with the difference in value of the repaired property and its value before injury, might in some cases be a fair measure of the loss sustained.”).

¹⁴⁴ *Holt v. Pariser*, 54 A.2d 89, 91 (Pa. Super. Ct. 1947) (explicitly adopting Restatement rule as “fair distillation of our cases”).

¹⁴⁵ See *supra* notes 97-144 and accompanying text.

¹⁴⁶ See E-mail from Robert Baron, Assoc. Comm’r for Prop. & Cas., Maryland Ins. Admin., to author (Apr. 12, 2021 02:28 EST) (on file with author) (acknowledging Maryland’s recognition of diminished value in general but stating that “Maryland does not recognize ‘inherent’ diminished value” because “the burden is on the claimant to prove both liability and the amount of damages,” either of which might not be provable in a given individual case).

sum in at least twenty-seven of the thirty-five jurisdictions that have considered the issue.¹⁴⁷ This is because most states care only about the *amount* of the diminution in value, rather than *why* the diminution occurred—as long as the evidence is good, the measure of damages does not care whether the diminution is due to faulty repairs or market stigma.¹⁴⁸ In this sense, while not every jurisdiction makes it *easy* to demonstrate that a market stigma has tangibly reduced the value plaintiff would recover from selling her vehicle, many jurisdictions that have considered the question would at least entertain a plaintiff's claim of IDV.

II. QUESTIONS FOR JURISDICTIONS SETTING DIMINISHED VALUE DOCTRINES

These varying doctrines demonstrate that there is disagreement among jurisdictions as to whether IDV must be paid at all, and disagreement as to whether IDV is its own measure of damages or simply proof going toward Gross DV. While a majority of states do permit plaintiffs to recover their economic loss caused by the collision, the states which have not yet crystallized their Gross DV doctrines have many paths to choose in selecting specifics.

A. *Should IDV Be Recoverable?*

Given courts' general willingness to take judicial notice of the existence and truth of IDV in many cases,¹⁴⁹ the availability of at least some recovery for IDV may not seem controversial. From a policy perspective, the question of recoverability asks, "should the plaintiff or the defendant bear the liability for the discrepancy between what the property is actually worth and the value the market has attributed to the property?"¹⁵⁰ If one accepts the principal that tort damages "should be set sufficiently high to ensure that a tortfeasor fully internalizes all the costs that her conduct imposes on a victim,"¹⁵¹ then it follows naturally that IDV should be recoverable. However, defendants have proposed several reasons why, even in the absence of explicit statutory direction, insurers and defendants should never be forced to pay beyond the cost of repairs.

¹⁴⁷ This count of twenty-six includes the states listed *supra* notes 113-44 and accompanying text.

¹⁴⁸ *But see* Ellis v. King, 400 S.E.2d 235, 238-39 (W. Va. 1990) (caring about nature of the diminution at least to extent of requiring structural damage as prerequisite to recovering Residual DV).

¹⁴⁹ *See supra* notes 3, 7 and accompanying text.

¹⁵⁰ Young, *supra* note 39, at 424 (noting that courts must decide "whether to protect the tortfeasor from liability for damages based on public perceptions, or whether to compensate the innocent landowner for his property's diminution in value").

¹⁵¹ Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 266 (1999) (posing this formulation as how damages should be calibrated to achieve "optimal deterrence").

First, opponents of IDV recovery claim that the existence of IDV damage is too uncertain to permit recovery.¹⁵² This theory points out that the supposed loss in economic value would only be realized through resale of the vehicle and is merely hypothetical until that point.¹⁵³ Suppose a thrifty or sentimental car owner planned to drive her car until it was completely depreciated, with no thoughts of reselling her vehicle. For this hypothetical owner, her IDV would never be realized, and a cash payment for IDV would represent a windfall.¹⁵⁴ The principle of indemnity would therefore prohibit the payment of IDV damages, or else a moral hazard would supposedly arise where this driver would be perversely incentivized to get her car into accidents. Even more abstractly, some argue that IDV does not actually inhere in the damaged chattel but is an intangible stigma whose costs are unrecoverable.¹⁵⁵

Second, opponents of IDV recovery attack the uncertainty of the *extent* of IDV.¹⁵⁶ If the extent of an injury is not sufficiently certain, it cannot sustain a recovery.¹⁵⁷ The hit to an individual car's value because of its accident history depends as much on the buyer's desires, the seller's sales pitch, and the availability of services like CARFAX as much as (or more than) it does on the damage caused by the tortfeasor.¹⁵⁸ If the current value of the car is too difficult to pin down, then IDV cannot be determined with sufficient mathematical certainty.

Third, opponents of IDV recovery argue that, if anything, quality repairs *raise* the value of a vehicle, rather than reducing it.¹⁵⁹ This argument points out that

¹⁵² See *Winrow v. Marriott Corp.*, 553 A.2d 59, 61 (N.J. Super. Ct. App. Div. 1989) (echoing defendant's concern that losses for diminution in value remain uncertain so long as plaintiff retains possession of property); E-mail from Anthony Caporale, Couns., State of Connecticut Ins. Dep't, to author (Apr. 13, 2021, 12:08 EST) (on file with author) (explaining that Connecticut Insurance Department rejected IDV "as hypothetical and speculative").

¹⁵³ See *Farrish*, *supra* note 9, at 70 (noting cases where "one cannot tell right away whether the owner will ever truly realize a loss of resale value").

¹⁵⁴ See *id.* (discussing objections "that such a resolution would violate the principle of indemnity by granting a windfall to the person who keeps her car long after the accident").

¹⁵⁵ See *Given v. Com. Ins. Co.*, 796 N.E.2d 1275, 1278-79 (Mass. 2003) (rejecting such intangible stigmas as types of repairable damages eligible for recovery).

¹⁵⁶ *GEICO v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 WL 1966022, at *41 (Tenn. Ct. App. June 29, 2007) (attacking lack of evidence presented by plaintiff to definitively determine extent of Gross DV, even where other numbers like repair costs were reasonably certain).

¹⁵⁷ See *supra* note 21 and accompanying text.

¹⁵⁸ See *What Is the Fair Market Range?*, KELLEY BLUE BOOK, <https://www.kbb.com/company/faq/new-cars/#q3> [<https://perma.cc/ZPP8-A865>] (last visited Sept. 15, 2022) (discussing Fair Market Range of Kelley Blue Book's valuation reflecting variability in sale price for like or even identical vehicles).

¹⁵⁹ See, e.g., *O'Connor v. Schwartz*, 229 N.W.2d 511, 513 (Minn. 1975) (finding that repairing engine so that it was "mechanically as good as new" caused vehicle's market value

an aging part damaged in an accident may be replaced with a new, original equipment manufacturer part such that the car gets an upgrade when compared to its pre-accident condition.¹⁶⁰ If an insurer pays for such high-quality repairs, the vehicle owner should have no grounds to claim any diminished value, as a perfectly rational buyer would pay the owner a *higher* price for the vehicle after the accident and repairs.¹⁶¹

B. *How Should IDV Be Measured?*

The calculability problem spills over from affecting *whether* IDV should be awarded into *how* it should be awarded. Jurisdictions must determine what measure of damages to use, how to measure the damage, and what standards of proof to apply.

Simply stating that compensatory damages (be they measured with diminution in value, repair costs, or both) ought to be just enough to restore the claimant to the same position she was in before the accident does not provide enough detail because of disagreement as to what position of the claimant should be considered. Consider a claimant who is the owner of a beige 2014 Toyota Camry with 65,000 miles, no material damage, and a present value of \$8,000. In the repair-cost-only states (North Dakota and New York) which prioritize the *physical condition* of the car,¹⁶² the claimant's interest is perceived as a beige 2014 Toyota Camry with 65,000 miles and no material damage. Contrarily, in the Gross-DV-only states (Arkansas, Connecticut, Colorado, Iowa, North Carolina, and Tennessee) which prioritize the *value* of the car as the proper measure of the claimant's pre-accident position,¹⁶³ the claimant's interest is conceptualized as an economic asset with a present value of \$8,000. By focusing only on repair costs or diminished value, these states essentially prescribe an interest onto the claimant, resulting in mismatches for a North Dakota driver who was planning to sell her car the day before the accident, or an Arkansas driver who planned to drive her car until it was worthless. An approach that makes sure that both hypothetical drivers can get back to their preferred position,

to increase after repair and deducting this increase from plaintiff's repair costs); Russell Thrall III, *Inherent DV—"Inherently Stupid,"* AUTOMO. BODY REPAIR NEWS, Feb. 2002, at 6 ("In many cases, the fact that panels have been realigned and refinished could easily increase the value of the vehicle for the owner—particularly if the vehicle was poorly maintained prior to the accident.").

¹⁶⁰ *O'Connor*, 229 N.W.2d at 513 (describing engine as "mechanically as good as new").

¹⁶¹ *See id.* (contrasting value of eight-year-old engine with value of "good as new" engine).

¹⁶² *See, e.g., Johnson v. Scholz*, 93 N.Y.S.2d 334, 336 (N.Y. App. Div. 1949) (viewing cost of repairs as complete measure of recovery where "repairs will place the car in the same [physical] condition it was before the accident").

¹⁶³ *See, e.g., Long v. McAllister*, 319 N.W.2d 256, 261 (Iowa 1982) (discussing plaintiff's interest in vehicle in strictly economic terms).

though, risks overcompensating the driver and creating a principle of indemnity problem.¹⁶⁴

Once a jurisdiction decides what measure of damages to use, its courts then must successfully *measure* the damage. Unfortunately, every major variable in damage calculation is hard to find and open to interpretation.¹⁶⁵ Unless the car just happened to get appraised right before its accident, an appraiser coming in during litigation must appraise the hypothetical pre-accident vehicle without actually getting to see it.¹⁶⁶ For jurisdictions interested in Gross DV, the vehicle's post-accident, pre-repair value is nightmarish to determine, as there tends not to be an expansive, Kelley-Blue-Book-surveyed consumer market for seriously damaged, unrepaired vehicles.¹⁶⁷ Assuming the insurance negotiations or litigation take place significantly after the accident, the post-accident, pre-repair vehicle is also an imaginary one at which an appraiser must make educated guesses.¹⁶⁸ The vehicle's current value is easiest to ascertain, although proving it still requires an expert's opinion as to how much the fair market value would be affected by stigma.¹⁶⁹ In all of these situations, the parties must fight over to which market a claimant would resort.¹⁷⁰ That is, should a court measure the money that a claimant would receive when selling her car to an auction house, a used car dealership, or to an individual consumer?¹⁷¹

As if the cost to the plaintiff of receiving a pre-accident valuation and a post-accident valuation were not enough, the plaintiff might then have to incur legal fees negotiating with the insurer, or worse, going to court.¹⁷² In states with

¹⁶⁴ See *supra* notes 91-94 and accompanying text.

¹⁶⁵ See *supra* notes 40-54 and accompanying text (discussing vehicle valuation).

¹⁶⁶ See, e.g., *Crooms v. Capps*, 274 S.W.3d 364, 366 (Ark. Ct. App. 2008) (requiring inexact guesswork based on owner's testimony as to purchase price and receiving "about \$2500" after collision and repairs in order to reach a reasonable estimate figure for Gross DV).

¹⁶⁷ See *id.*

¹⁶⁸ See *Johnson v. Scholz*, 93 N.Y.S.2d 334, 335-36 (App. Div. 1949) (contrasting plaintiff's expert estimate for Gross DV with defendant's expert estimate, which varied by over 150%).

¹⁶⁹ See *Shield Glob. Partners-G1, LLC v. Forster*, 141 N.E.3d 1269, 1270 (Ind. Ct. App. 2020) (refusing to consider testimony of plaintiff's expert where expert "did not inspect the vehicle, review photos of the vehicle, or in any way assess the actual condition of the vehicle as a result of the accident").

¹⁷⁰ See RESTATEMENT (SECOND) OF TORTS § 911 cmt. d (AM. LAW INST. 1979) (discussing access to wholesale and retail markets and their different selling prices).

¹⁷¹ See, e.g., *Am. Serv. Ctr. Assocs. v. Helton*, 867 A.2d 235, 244 n.13 (D.C. 2005) (observing conflict between parties as to whether retail or wholesale market should be used to establish diminished value).

¹⁷² Various sources project the cost of expert valuations at \$200-500 per diminished value opinion. See, e.g., *Diminished Value Appraisal ReportReports*, DVCHECK, <https://dvcheck.com/> [<https://perma.cc/4CM4-H3X4>] (last visited Sept. 15, 2022) ("We charge a one-time, flat fee up front, typically \$300 for most claims.").

demanding IDV proof requirements, the cost of hiring an expert to testify as to IDV may be greater than the IDV itself.¹⁷³

On the other hand, if proof were made too easy, perverse appraisal incentives could arise. Suppose a \$15,000 car is in an accident. It takes \$3,000 to repair the vehicle substantially to its pre-accident condition. The driver, needing an appraisal to win IDV damages, goes to a used car dealership which offers appraisal services. The dealership values the car in its current state at only \$5,000, but it tells the driver not to worry about the low value, because the tortfeasor's insurer will cover every cent of that \$10,000 Residual DV. The dealership then buys the used car from the driver and sells the car at a much higher price than the value at which the dealership appraised it.¹⁷⁴ This scenario demonstrates why a plaintiff-friendly IDV regime ought to be careful about its standards of proof and its willingness to accept all stigma damages without question. Alternatively, a court's readiness to accept a less perversely incentivized valuation (such as an off-the-page value from CARFAX or the Kelley Blue Book) would still give outsized legal effect to interested and unregulated industry sources.¹⁷⁵

C. *How Do Insurance Settlements Limit IDV Recovery?*

Insurers have multiple tools available to limit a claimant's IDV recovery. In almost every jurisdiction, an insurer is under no obligation to provide compensation for a loss not actually claimed by the claimant.¹⁷⁶ This means that if a claimant with no awareness of the IDV harm she suffered simply submitted her repair costs to the tortfeasor's insurer, the insurer would be allowed to settle the claim for repair costs only. In these situations, an insurer may have no duty to initiate a settlement, even where liability for the IDV harms is reasonably clear.¹⁷⁷

Even if a claimant knows about IDV, she may still be held at bay. An insurer's duty to settle in good faith with third parties (counterbalanced by its duty of loyalty to its first-party insureds) varies from state to state.¹⁷⁸ In states where the

¹⁷³ See, e.g., *Fanfarillo v. E. End Motor Co.*, 411 A.2d 1167, 1169 (N.J. Super. Ct. App. Div. 1980) (concerning IDV claim of only \$400).

¹⁷⁴ See *Farrish*, *supra* note 9, at 72 ("[T]he dealer's bias is obvious; if she can help increase the insured's diminished value recovery, she increases the amount of money her customer can put into her next car purchase.").

¹⁷⁵ See *Mehok*, *supra* note 84, at 48 (pointing out already growing role of such companies).

¹⁷⁶ See, e.g., MASSACHUSETTS AUTOMOBILE INSURANCE POLICY, *supra* note 87, at 34 (disclaiming any requirement to pay if insured does not notify insurer of claim or loss).

¹⁷⁷ See *Reid v. Mercury Ins. Co.*, 162 Cal. Rptr. 3d 894, 904-05 (Cal. Ct. App. 2013) (rejecting any affirmative duty of insurer under California unfair claims settlement practices laws to settle with a third-party simply because liability is reasonably clear).

¹⁷⁸ Compare *Estate of Robichaux v. Jackson Nat'l Life Ins. Co.*, 821 F. Supp. 429, 431 (E.D. La. 1993) (construing what is now LA. STAT. ANN. § 22:1973's affirmative duties to

courts and legislatures have yet to affirmatively decide the recoverability of IDV, an insurer could counter a claimant's well-proven IDV claim outside of court by arguing that the state *might* not require insurers to pay out IDV damages.¹⁷⁹ In that case, most state unfair claims settlement practices laws would not find anything wrong with the insurer's refusal to pay IDV damages in settlement.¹⁸⁰ The high rate of settlement and the arduous path to the courtroom mean that very few IDV claimants get to the courtroom,¹⁸¹ further postponing the possibility that a state court would mandate the payment of IDV damages.

III. ENSURING ADEQUATE COMPENSATORY DAMAGES FOR MOTOR VEHICLE PLAINTIFFS: A SOLUTION

An adequate solution to the problem of IDV, then, must accomplish a lot. It must convincingly explain why diminished value is not too uncertain in its existence or its extent to be recoverable. It then must provide a measure of damages that prevents the claimant's internalization of harms while not contravening the principle of indemnity. It must then practically lower the cost of proving those damages so that the costs of proof do not exceed the value of the recovery, without creating perverse incentives. Finally, the system must function effectively not only in the courtroom, but in insurance settlements.

A. *Why IDV Should Be Recoverable*

IDV is not so uncertain as to be unrecoverable under tort principles. Thomas O. Farrish argues that, while a court might never know whether a claimant plans to sell her car after an accident, the windfall concerns are overblown, as such a violation of the principle of indemnity "is certainly no greater than other

apply to both first- and third-party claimants), *with* *Watson v. Farmers Ins. Co.*, 23 F. Supp. 3d 1342, 1347 (N.D. Okla. 2014) ("[U]nder Oklahoma law, an insurer has no duty to deal fairly and in good faith with a third party."), and *O.K. Lumber Co. v. Providence Wash. Ins. Co.*, 759 P.2d 523, 526 (Alaska 1988) (rejecting insurer's duty to third-party claimants, as "[a]n insurer could hardly have a fiduciary relationship both with the insured and a claimant because the interests of the two are often conflicting").

¹⁷⁹ See *Calandro v. Sedgwick Claims Mgmt. Servs., Inc.*, 919 F.3d 26, 34 (1st Cir. 2019) (finding no duty to settle where recoverability of element of underlying claim "is subject to good-faith disagreement"); Brief of Defendant/Appellee at 41-42, *Martins v. Vt. Mut. Ins. Co.*, No. 19-1878 (1st Cir. Feb. 20, 2020) (citing *Calandro* to argue that genuine dispute as to legal recoverability of diminished value in Massachusetts defeats plaintiff's claim of bad faith against insurer for failure to pay diminished value).

¹⁸⁰ See *Calandro*, 919 F.3d at 34 ("An insurer who has investigated a claim and has a good-faith basis for concluding that liability is not reasonably clear does not violate [Massachusetts's claims settlement practices law] either by delaying a settlement offer or for withholding one altogether.").

¹⁸¹ See *supra* note 85 and accompanying text.

violations”¹⁸² in insurance and tort law.¹⁸³ Deeming a diminished value loss to have occurred at the moment of physical damage, rather than waiting for a realization, is a legal fiction no more harmful than insurance’s “replacement cost” property coverage or tort law’s collateral source rule.¹⁸⁴ If it is difficult to ascertain the exact nature of the harm the moment that it occurs, the question is whether the law should err on the side of overcompensating or undercompensating innocent tort claimants, to the detriment or benefit of negligent tortfeasors and their insurers.¹⁸⁵ Given the high likelihood that a car will eventually be traded in or resold,¹⁸⁶ the risk of a windfall is too remote a reason to deny an IDV claim that is actually fairly likely to be realized.

Even in states that are unwilling to provide any recovery beyond repair costs for temporary or abatable damage to property, stigma damages precedent may provide a path to recovering IDV.¹⁸⁷ Courts could find “permanent damage” either in the fact that even high-quality repairs may leave a vehicle more accident prone in the future, or in the economic reality that reputational damage is still permanent enough to affect the “condition” of the vehicle, broadly construed, and support IDV.¹⁸⁸ Both of these tools have been employed in the stigma

¹⁸² Farrish, *supra* note 9, at 70.

¹⁸³ For example, courts are willing to compensate for lost future wages even when many aspects of the judgment, including the plaintiff’s continuing future employment, are uncertain. *See, e.g.,* Finnie v. Vallee, 620 So. 2d 897, 901 (La. Ct. App. 1993) (“The very nature of lost earning capacity makes it impossible to measure the loss with any kind of mathematical certainty.”); McIver v. Gloria, 169 S.W.2d 710, 712 (Tex. 1943) (“In a personal injury suit the amount which the plaintiff might have earned in the future is always uncertain, and must be left largely to the sound judgment and discretion of the jury.”).

¹⁸⁴ *See* Brandon R. Keel, *Profiting Under the Veil of Compensation: Wills v. Foster and the Application of the Collateral Source Rule to Medicare and Medicaid*, 58 DEPAUL L. REV. 789, 794 (2009) (“Other courts and authorities, however, simply take the position that it is better to side with the injured party and allow the plaintiff to receive a windfall than to reduce the defendant’s liability.”).

¹⁸⁵ *See supra* note 150 and accompanying text.

¹⁸⁶ *See* MELINDA ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET 17 (2019), <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/q1-2019-safm-final-v2.pdf> [<https://perma.cc/K9VK-NSYX>] (finding “all time record highs” of consumers choosing used vehicles across all risk tiers and indicating that more vehicles are traded in or resold every year than are purchased new).

¹⁸⁷ *See* Geisinger, *supra* note 31, at 473 (discussing flexibility courts have used to award stigma damages).

¹⁸⁸ These measures would be necessary in states where current case law only provides for repair cost recovery if repairs can restore the property to its prior “condition.” *See* Martins v. Vt. Mut. Ins. Co., 411 F. Supp. 3d 166, 171 (D. Mass. 2019) (citing *Belkus v. City of Brockton*, 184 N.E. 812 (Mass. 1933)), *abrogated by* *McGilloway v. Safety Ins. Co.*, 174 N.E.3d 1191 (Mass. 2021).

damages context to help courts “read the term ‘permanent damage’ broadly to encompass all damages beyond cost of repair.”¹⁸⁹

As to the argument that repairs might make a vehicle *more* valuable in contravention of diminished value,¹⁹⁰ any such increase in value could be easily set off against the negative diminished value.¹⁹¹ Even if there are (exceedingly rare) cases where the repairs paid for by a defendant or insurer raise the value of the vehicle more than a market stigma decreases its value, such rarities are a poor reason to throw out the entire recoverability of IDV.¹⁹²

IDV should be recoverable because consumers do not want to purchase vehicles with accident histories, try as defendants might to convince courts that such attitudes are irrational.¹⁹³ To tell a plaintiff today whose car is \$5,000 less valuable than it was a week ago that she has been completely compensated because her car was repaired is at best an insincere litigation strategy. Considering the large proportion of American households for which a car is one of its most substantial economic assets,¹⁹⁴ the economic resale value of vehicles cannot be ignored. Minimal risks aside, for compensatory damages to truly make the plaintiff whole, any damages paid must contain IDV.

B. *Toward a Sensible Valuation System for IDV*

While compensatory damages are not meant to cater to every claimant’s idiosyncrasies, they are intended to adequately restore the claimant to her pre-accident position.¹⁹⁵ A claimant’s interest in her car is a combination of her

¹⁸⁹ Geisinger, *supra* note 31, at 473; see *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 91-92 (Ind. Ct. App. 1995) (finding PCB pollution of land caused “permanent” injury and rejecting the usual rules for the temporary-permanent distinction as “ill-suited for determining damages in the context of environmental contamination”).

¹⁹⁰ See *supra* notes 159-61 and accompanying text.

¹⁹¹ See *Anderson v. Am. Fam. Ins. Co.*, 350 F. Supp. 3d 1295, 1301 (M.D. Ga. 2018) (awarding diminished value even where repairs to house may have increased house value were it not for stigma).

¹⁹² Indeed, some courts have explicitly interpreted the Restatement rule’s “due allowance for any difference between the original value and the value after repairs” to account for both positive *and* negative differences. RESTATEMENT (SECOND) OF TORTS § 928 (AM. LAW INST. 1979); see *Oliver v. Henry*, 260 P.3d 314, 318 n.3 (Ariz. Ct. App. 2011) (“Due allowance is made for increase in value of the chattel as a result of new materials used.”).

¹⁹³ See *Barone*, *supra* note 59, at 34 (“Whether or not you believe a customer’s car is worth less than it was prior to being damaged, the concept of DV has taken hold in the public and will continue to do so as time progresses.”).

¹⁹⁴ Adam Carasso & Signe-Mary McKernan, *Asset Holdings and Liabilities*, in *ASSET BUILDING AND LOW-INCOME FAMILIES* 33, 58 (Signe-Mary McKernan & Michael Sherraden eds., 2008) (comparing typical bottom-quintile family’s average car value (\$4,500) to the total median assets for all bottom-quintile families (\$17,000)).

¹⁹⁵ See Colin Read, *The Marginal Agent and Judicial Intervention in the Marketplace*, 30 CONN. L. REV. 647, 648 (1998) (characterizing courts as “determin[ing] compensatory damages based on averages rather than idiosyncratic valuations”).

economic interest in the car (thinking of the car as an asset that she can sell one day) and her utility interest in the car (thinking of the car as something that she can use to get to work tomorrow).¹⁹⁶ To fully restore the claimant to her pre-accident position, both economic and utility interests must be restored. The provision of repair costs would fully restore the claimant's utility interest in the car—assuming the repairs were complete and perfect, then the repairs would allow claimant to continue to drive, commute, and benefit from her car as a physical asset.¹⁹⁷ The provision of Gross DV would fully restore the claimant's economic interest in the car—a correctly sized check for Gross DV would leave the claimant's total assets equal to what they were prior to the accident.¹⁹⁸

Therefore, repair costs plus Gross DV compensates the claimant enough, regardless of whether she views her vehicle as a predominantly physical and usable asset or as an economic asset. The issue, then, is to determine to what extent those two awards are duplicative and intersect. If the duplicative awards are removed from the sum of the two awards, then the claimant does not receive any windfall. The ideal recovery could therefore be calculated as

$$\text{Ideal Recovery} = RC + GDV - (RC \cap GDV),^{199}$$

where *RC* refers to repair costs, and *GDV* refers to gross diminished value. Recall that Gross DV is the difference between pre-accident value and immediate post-accident value.²⁰⁰ Designating these quantities *PreAV* and *PostAV* respectively, we get

$$\text{Ideal Recovery} = RC + (PreAV - PostAV) - (RC \cap GDV).$$

What is a vehicle's immediate post-accident value—how much would a rational buyer pay for the vehicle right after it was in an accident? One recognized way to value a damaged asset is to deduct the cost of repairs from

¹⁹⁶ See *Dunmire Motor Co. v. Or. Mut. Fire Ins. Co.*, 114 P.2d 1005, 1009 (Or. 1941) (comparing insurance recovery for “restoration of the property to its condition prior to the injury” with complete economic restoration).

¹⁹⁷ See *Oliver v. Henry*, 260 P.3d 314, 315 (Ariz. Ct. App. 2011) (finding repair costs to provide complete recovery in part because plaintiff “continued to use and drive [the vehicle] exactly as he had since he bought it”).

¹⁹⁸ See *Trujillo v. Wilson*, 189 P.2d 147, 150 (Colo. 1948) (ignoring factual dispute about whether vehicle was wrecked or usable and focusing explicitly on economic recovery).

¹⁹⁹ The \cap symbol is a mathematical symbol for the intersection, or overlap, between two variables. While unorthodox to use for variables instead of sets, it is still illustrative. The formula shows the need to compensate for use loss (by repairing the car) and economic loss (by providing Gross DV) without giving duplicative windfall rewards (the intersection or overlap of the two).

²⁰⁰ See *supra* Section I.C, notes 62-65 and accompanying text.

the purchase price that a buyer would otherwise pay.²⁰¹ Additionally, the informed and rational buyer would know that the vehicle, after its repairs, would suffer from Residual DV (comprising of diminished value caused both by physical problems that could not be repaired as well as of stigma-based IDV).²⁰² Therefore, buyers are encouraged on the same principle to deduct the cost of IDV from the purchase price.²⁰³ In other words, if the vehicle's pre-accident value was used as a starting point for negotiations, a rational buyer and seller using the above valuation postulates would arrive at a sale price of:

$$PostAV = PreAV - RC - IDV.$$

Substituting the formula for *PostAV* into the above formula for ideal recovery creates the following result, which can then be simplified:

$$Ideal\ Recovery = RC + (PreAV - (PreAV - RC - IDV)) - (RC \cap GDV),$$

$$Ideal\ Recovery = RC + (PreAV - PreAV + RC + IDV) - (RC \cap GDV),$$

$$Ideal\ Recovery = RC + (RC + IDV) - (RC \cap GDV).$$

Compare this formula to the first formula stated above: the $(RC + IDV)$ figure has simply replaced GDV in the first formula. In other words, in an efficient market, repair costs plus IDV is equal to (or will be very close to) Gross DV. This logically aligns with the many states that permit repair costs plus IDV as

²⁰¹ See PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 15:15 (2020) (citing *Gray v. State*, 615 S.E.2d 834 (Ga. Ct. App. 2005)) (“Valuation may start with the cost price of the item but then must account for the condition of the item and discount accordingly.”); Elizabeth Weintraub, *Tips for Buying a House That Needs Work*, BALANCE (Jan. 7, 2022), <https://www.thebalance.com/buying-a-house-that-needs-work-1798264> [<https://perma.cc/E8DN-3LQX>] (formulating appropriate asking price for “fixer-upper” home by taking value of comparable home in good condition and “then reduc[ing] by an estimate for repairs”). The buyer might also deduct a modest additional sum to compensate for the inconvenience of having to perform or secure the repairs herself.

²⁰² Even if the individual buyer did not have a stigma against damaged cars, the buyer might reasonably believe that she would be able to sell the vehicle for less money down the line, reducing its value. See *supra* note 75 and accompanying text. The buyer might also believe that the existence of such a stigma in other potential purchasers would drive down the current demand for the seller's vehicle and allow her to pay a lower price, whether or not she personally cared about the collision history.

²⁰³ See, e.g., *The Used Car You Want Has Been in an Accident—Now What?*, CARFAX CANADA, <https://www.carfax.ca/resource-centre/articles/the-used-car-you-want-has-been-in-an-accident-now-what> [<https://perma.cc/QZA4-64L2>] (last visited Sept. 15, 2022) (encouraging potential buyers to “get a better deal” on vehicles with collision histories by using diminished value “as leverage in your price negotiations”).

appropriate proof of Gross DV.²⁰⁴ The only step left to take is to determine the intersection of RC and GDV. As is now visible by replacing GDV with (RC + IDV), both RC and GDV contain RC as parts of themselves. Therefore, the intersection (or duplicative awards) of the two is equal to RC:

$$\text{Ideal Recovery} = RC + (RC + IDV) - RC,$$

$$\text{Ideal Recovery} = RC + IDV.$$

In conclusion, if the goal of recovery in motor vehicle accidents is to fully restore the claimant's economic and utility interests without providing any duplicative (windfall) awards, then the ideal measure of compensatory damages recovery is the sum of reasonable repair costs plus any remaining IDV. Taking all of the above assumptions as true, this value is approximately the same as Gross DV. In other words, the jurisdictions that offer a choice between recovery for Gross DV and recovery for repair costs plus an allowance for IDV may not be offering a choice at all—the two statements are two sides of the same coin.²⁰⁵

If the two values are the same, then whichever one is more practicable and ascertainable ought to be used. Given the difficulty of determining immediate post-accident value (and therefore difficulty of determining Gross DV)²⁰⁶ as compared to the relative ease of presenting receipts to prove the cost of repairs, this Note posits that the repair costs plus IDV route provides more data to work with and more elegant solutions.²⁰⁷

C. *Measuring the Damage*

Now that a measure of compensatory damages has been set, how can the parties and courts actually *measure* those damages? The reasonable cost of repairs is a straightforward, albeit occasionally litigious, determination.²⁰⁸ The trickier part is determining the exact extent of Residual DV. Recall that Residual DV is equal to the difference between a vehicle's value in its pre-accident state minus its value in its post-accident, post-repair state.²⁰⁹ Professional appraisers would balk at attempts to derive a simple formula that could determine both

²⁰⁴ See *supra* notes 113-17 and accompanying text.

²⁰⁵ In this sense, most jurisdictions that have considered the issue have formulated an appropriate measure of damages except for those that limit recovery to repair costs only. See *supra* notes 99-104 and accompanying text. However, for ease of proof, a system explicitly adopting Residual DV ought to be used.

²⁰⁶ See *supra* note 167 and accompanying text.

²⁰⁷ See *GEICO v. Bloodworth*, No. M2003-02986-COAR10CV, 2007 WL 1966022, at *44 (Tenn. Ct. App. June 29, 2007) (rejecting plaintiff's damages where plaintiff could prove repair costs and IDV but could not provide evidence as to Gross DV).

²⁰⁸ See *supra* notes 53-54 and accompanying text.

²⁰⁹ See *supra* notes 66-67 and accompanying text.

values.²¹⁰ However, if one of the goals of this doctrine is to cut down on the costs of experts, then such an exercise is worthwhile. The purpose of this Section is to propose one suggestion for a quick-and-dirty way to expedite the judicial and insurance process of determining damages in the interest of expedience and efficiency.

This was the task that the Georgia Insurance Commissioner's Office faced when negotiating a settlement in *State Farm Mut. Auto. Ins. Co. v. Mabry*.²¹¹ With thousands of class action plaintiffs all seeking damages in first-party insurance claims for IDV, appraisals would be unruly and expensive.²¹² The settlement eventually arrived at a formula, called the 17c formula.²¹³ To determine the IDV that should be paid on top of the repair costs, the parties calculated each vehicle's base value in the NADA guide based on its make, model, year, and mileage.²¹⁴ Next, the parties divided that value by ten.²¹⁵ They multiplied *that* value by a "damage severity modifier"²¹⁶ (e.g., 0.75 for major damage and 0.25 for minor damage) and a mileage modifier (e.g., 0.9 for 10,000 miles, 0.4 for 60,000 miles).²¹⁷ The resulting value was used as the IDV compensation.²¹⁸ While the numbers used in the 17c formula were arbitrary,²¹⁹ the formula accurately identifies the most important variables for getting IDV right in the aggregate—the vehicle's starting value, the severity of its damage, and the extent to which the car's previous depreciation would reduce the proportional impact of an accident history discount. Therefore, a legislature could undertake the same approach as the *Mabry* settlement after engaging in a more thorough study to uncover less arbitrary numbers to use. If the insurance

²¹⁰ See Barone, *supra* note 59, at 24 (expressing particular contempt for "percentage basis" diminished vehicle appraisers who might make appraisals without ever examining specific vehicle in question).

²¹¹ 556 S.E.2d 114 (Ga. 2001).

²¹² *Id.* at 124 (affirming trial court's command that State Farm "develop an appropriate methodology" for making IDV payments en masse).

²¹³ *Tiller v. State Farm Mut. Auto. Ins. Co.*, 549 F. App'x 849, 852 (11th Cir. 2013) (citing *Mabry*, 556 S.E.2d at 124) (elucidating history of 17c formula, including its development by State Farm, its approval by superior court for use in *Mabry* class action settlement, and its continuing life after *Mabry* as insurance company tool for reaching diminished value estimates).

²¹⁴ See Class Action Complaint & Demand for Jury Trial at 7-9, *Tiller v. State Farm Mut. Ins. Co.*, No. 12-cv-3432, 2013 WL 451309 (N.D. Ga. 2013) (walking through steps of 17C formula).

²¹⁵ *Id.* at 8.

²¹⁶ *Id.* at 8-9.

²¹⁷ *Id.* at 9.

²¹⁸ *Id.*

²¹⁹ Considering the arbitrary numbers and the formula's growing prevalence beyond the *Mabry* settlement, the Georgia Insurance and Safety Fire Commissioner issued a directive stating explicitly that Georgia does not endorse the 17c formula as *the definitive* measure of IDV. Directive 08-P&C-2 (Ga. Dep't of Ins. & Safety Fire Comm. Dec. 1, 2008).

industry objected to the legislature's numbers, its members would be free to uncover their own data to propose more rational numbers to try to convince the legislature to change its weights:

Insurance companies possess millions of bits of data about repair costs and sales prices of wrecked vehicles. They estimate repair costs on millions of vehicles each year, and they sell tens of thousands of wrecks each year as part of their salvage recovery process. If there is a link to be discovered between particular repair types and value losses—say, a discovery that frame damage decreases the car's value by a factor of X, but paint damage decreases it only by a factor of Y—the insurance industry is uniquely positioned to discover it.²²⁰

If a state legislature or insurance commission were to announce a formula (such as a more refined version of the 17c formula) by which insurance companies should calculate the value of IDV claims, then the most subjective elements of determining IDV would vanish, save for a determination of just how severe the property damage was.²²¹ What the parties would lose in the fine-tooth negotiations would be made up for by the lowered transaction costs of not having to hire rival appraisers.²²² An IDV fiat from the state (or at the very least a requirement of auto insurers to notify third-party claimants of the existence of IDV) could also protect vehicle owners who do not know about the existence of IDV, and it would put insurers on notice for unfair claims settlement practices laws.²²³ Any such change would have to come from the state legislature, except in the states where regulatory insurance commissions already have statutory authority to regulate diminished value.²²⁴

²²⁰ Farrish, *supra* note 9, at 73.

²²¹ The property damage's severity could be objectivized by inferring the damage's severity from a repair estimate, but such a system would erroneously conclude that an expensive (but high-quality) repair would result in *more* diminished value than a cheap (but low-quality) repair. *See id.* at 72.

²²² *See supra* notes 173-74 and accompanying text.

²²³ *See supra* Section II.C.

²²⁴ In deference to the principle that administrative agencies may not exceed their legislatively granted authority, see *City of Arlington v. F.C.C.*, 569 U.S. 290 (2013), which frames the central question of administrative action as “whether the agency has stayed within the bounds of its statutory authority.” *Id.* at 297 (emphasis removed). Several state insurance commissions contacted for this Note explained that they would need statutory authority before acting on diminished value. *See, e.g.*, E-mail from James McGuffin, Assistant Director of Automobile Theft Authority & Public Information Division, Arizona Department of Insurance and Financial Institutions to author (Apr. 9, 2021, 6:22 EST) (on file with author) (“Without commenting on the merits of inherent diminished value or whether it is appropriate, in Arizona, the Director of the Department of Insurance and Financial Institutions does not have statutory authority to implement what [this Note] proposes.”).

CONCLUSION

A vehicle that suffers material damage in a collision will sell for less money as a result of that collision. The vehicle's owner should not be forced to internalize that cost. Therefore, tort and insurance law must provide the vehicle owner with compensatory damages for that IDV. A system that explicitly provides for repair costs plus Residual DV is conceptually elegant, is more practicable than a Gross DV system, properly compensates owners for their economic and utility interests in their assets and does not provide duplicative recovery or windfalls. While IDV is somewhat speculative, a recognition that most vehicles are eventually sold, and the adoption of a simple damage formula would keep inefficient transaction costs at a minimum without providing perverse incentives to interested appraisers. States that have not yet addressed the issue of diminished value should adopt systems that incorporate these principles; states that reject diminished value or provide only for Gross DV should consider more appropriate and easily proven measures of damages. IDV is neither new nor uncommon, and it is time to streamline its doctrine.