The Lawyer’s Role in Appraisal: The Control Conundrum

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THE LAWYER'S ROLE IN APPRAISAL: THE CONTROL CONUNDRUM

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Appraisal has become a tool in the resolution of first party insurance disputes that has surged in popularity among lawyers, especially defense lawyers, recently. However, lawyers are not mentioned in any appraisal provision with which we are familiar. Furthermore, the appraisal process is designed to take place outside the context of litigation.[1] Consequently, the role lawyers should play in that process is often little understood and sometimes, even when it is understood, it is unfortunately ignored. The purpose of this presentation is to explore the role that lawyers may legitimately play in the decision to invoke the appraisal process, the execution of the appraisal, and the utilization of the appraisal award. We believe it is crucial for both the defense and plaintiff's bar to understand these issues to make sure that the appraisal process is effectively serving the practical, tactical, and strategic goals of their respective clients resolving disputes about the amount of loss sustained in a claim. However, before we discuss these issues, we believe it is important to review why appraisal has gained so much popularity over the past few years.

I. Renaissance of a Policy Provision: Where We Are and How We Got Here

Appraisal provisions have been included in insurance policies and enforced courts for over 120 years.[2] Fifty years ago and more insureds and insurers routinely resorted to appraisal to resolve disputes about the amount of damage and cost of repairs. However, even while enforcing the right to appraisal, early judicial views expressed skepticism and hostility towards the process.[3] Moreover, intermediate courts were relatively quick to place impediments in the widespread use of the procedure; finding it was either easily waived[4] or inappropriate due to the existence of causation questions.[5] Perhaps in response to such judicial negativism or perhaps as a strategic decision to gain greater control over the outcome of such disputes (or even perhaps from a justifiable fear of giving up control to a process that was potentially subject to manipulation and abuse), both insureds and insurers abandoned appraisal as a widely utilized mechanism for dispute resolution, notwithstanding the fact that most policies have long conditioned payment upon either an agreement as to the amount of loss or an appraisal award conforming to the policy requirements.

The Texas Supreme Court, for example, adopted common law consumer protections in recognition of the unequal bargaining power between insureds and insurers in the first party

[1] The Texas Supreme Court has pronounced that "appraisals should go forward without preemptive intervention by the courts." *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009).
[2] Most people consider *Scottish Union & National Ins. Co. v. Clancy*, 8 S.W. 630 (Tex. 1888) to be the seminal Texas decision on appraisal.
[3] Thus, in *Scottish Union* the Court describes the agreement to such a term as "injudicious" and its willingness to enforcement of the provision as "constrained." *Id.* at 631.
[4] *Manchester Fire Ins. Co. v. Simmons*, 35 S.W. 722 (Tex. Civ. App. 1896, no writ); *American Fire Ins. Co. v. Stuart,* 38 S.W. 395 (Tex. Civ. App. – 1896, no writ); *Boston Ins. Co. v. Kirby,* 281 S.W. 275 (Tex. App. – Eastland 1926).
[5] *Wells v. American States Pref. Ins. Co.*, 919 S.W.2d 679 (Tex. App. – Dallas 1996, writ den.).

context.[6] Like most stacks, the Texas Legislature enacted statutory protections as well; some of which were interpreted to impose virtual strict liability against insurers for liquidated penalties with no requirement of actual damages merely for being wrong, even if such an error was made in good faith and based upon a reasonable but erroneous assessment of the amount owed.[7] Estimating the cost of repairs is, at best, an inexact science with no precise figure that everyone will necessarily agree is the "right" figure: that is why it is an "estimate." However, being off even one dollar exposed the insurer to penalties, interest, and attorney fees regardless of the reason. Plaintiffs' lawyers began to recognize the leverage such extra-contractual claims provided in their battles with insurers and the defense bar: Plaintiffs could insist that insurers accept their evaluations of the amount of loss or face rapidly escalating extra-contractual penalties and fees. Moreover delay was their friend and the enemy of the insurer. The longer the insurer took to see the righteousness of Plaintiff's counsel's damage model, the greater its exposure to penalties, interest, attorney fees for Plaintiff's counsel, and the privilege of paying its own lawyers to "fight the good fight."

In the meantime, some insurers began to question the usefulness of the traditional litigation model for resolving such disputes. The Hobbesian choice, as they perceived it, was to either accept what they considered a highly inflated estimate of the cost of repair or face years of protracted litigation in which every day that passed simply added to their potential damages and added to their cost of defense at an alarming rate. They began to consider whether some other approach might be found to quickly and efficiently set the amount of damage without incurring risks of enormous penalty, interest, and attorney fee awards while minimizing or even eliminating the costs of defense. It was sometimes smaller insurers, with less to lose overall but probably a larger percentage of their capital at risk by even a single lawsuit gone bad, that were at the forefront of this search for an approach to "even the playing field."[8] A body of case law began to emerge which suggested that an appraisal award, if promptly paid, not only resolved the contractual issues between the parties, but potentially resolved many of the most expensive extra-contractual claims which were at the heart of the economic threat being presented by the Plaintiffs' bar.[9] The landfall of Hurricane Ike and the massive amount of litigation which it spawned throughout Southeast Texas provided a stark choice for smaller insurers: find a response to the threat posed by this litigation or go out of business. A few began to demand appraisal routinely.

The response to this approach by much of the Plaintiff's Bar was generally, negative. They initially refused, almost unanimously, to agree to appraisal and routinely responded to demands for appraisal with claims of waiver or inapplicability because of the existence of coverage or scope of damage issues. However, a few lawyers representing insureds, in other areas of the State, began to recognize that delays in resolving disputes with insurers, while potentially very lucrative, were not particularly satisfying to those insureds who simply wanted to get their homes or autos repaired for a reasonable sum and to be treated fairly in the process. Years of litigation and appeals were

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[6] See e.g. *Arnold v. National County Mutual Ins. Co.,* 725 S.W. 2d 165, 167 (Tex. 1987).

[7] See Art. 21.55 of the Texas Ins. Code now codified at TEX. INS. CODE §542.60 et seq.

[8] See e.g. *In re Slavonic Mutual,* 308 S.W. 3d 556, 562 (Tex. App. – Houston [14th Dist.] 2010); *Franco v. Slavonic Mutual Fire Ins. Assn.*, 154 S.W.3d 777, 787-88 (Tex. Civ. App. – Houston [14th Dist.] 2004).

[9] *Brashears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex. App. – Corpus Christi 2004); *Amine v. Liberty Lloyds of Texas Ins. Co.*, 2007 Tex. App. LEXIS 6280 (Tex. App. – Houston [1st. Dist.] 2007); *Waterhill Cos. Ltd. v. Great American Assurance Company*, 2006 U.S. Dist. LEXIS 15302.

not what such insureds had in mind when they sought a lawyer. Those lawyers began to demand appraisal in first party claims presumably (at least one hopes) in recognition that such a process could be completed more quickly and at much less expense than traditional litigation.[10] They were met with the same sort of rejection by many in the defense bar representing large insurers.[11]

Against this backdrop, several cases began working their way through the trial and appellate courts. In contrast to earlier judicial resistance to appraisal, the modern view adopted by Texas courts towards the appraisal process has undergone a sea change. Today a denial of the right to appraisal has been described by the Texas Supreme Court as not only an abuse of discretion, but preventing a party from developing "proof going to the heart of a party's case." [12] The Texas Supreme Court has pronounced that "appraisals should go forward without preemptive intervention by the courts."[13] The existence of coverage issues has been declared to not be an impediment to appraisal.[14] The right to invoke appraisal even where the insurer contends there is no coverage or there is no damage was specifically reaffirmed in *Johnson* where the Court observed:

> When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong. And when the parties disagree whether there has been any loss at all, nothing prevents the appraisers from finding $0 if that is how much damage they find."[15]

The Texas Supreme Court has also clarified the waiver issue to the point of making it virtually impossible for a party to waive a right to appraisal except in the most egregious of circumstances causing harm to the other party.[16]

At the outset of the Hurricane Ike Docket only a very few insurers sought to compel appraisal, Plaintiffs' counsel universally refused to go to appraisal voluntarily, and the local trial courts routinely found reasons to deny Motions to Compel Appraisal. Judge Miller even entered an Order prohibiting parties from filing Motions to Compel Appraisal without first going to mediation and from opting out of the General Standing Order as part of controlling the residential Hurricane Ike docket in Harris County. However those impediments have been lifted. Since that time, demands for appraisal have skyrocketed. Virtually every insurer and defense attorney consider it to be a primary tool to use in an effort to resolve these cases without being exposed to what they considered to be legally sanctioned demands for extortion. The Plaintiff's bar has stopped refusing to go to appraisal and the fight has shifted instead to the mechanics of appraisal, the effect an appraisal has on a previously filed lawsuit, and the effect of the award. All of these issues affect and are affected by what the lawyers on both sides of the claim do or recommend their clients to do.

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[10] The Texas Supreme Court has explicitly recognized this fact in *In re Universal Underwriters of Texas Ins. Co.,* 345 S.W. 3d 404, 407 (Tex. 2011),

[11] See e.g. *State Farm Lloyds v. Johnson, supra.*

[12] *In re Allstate County Mut.Ins. Co.,* 85 S.W.3d 193, 196 (Tex. 2002).

[13] *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009).

[14] *Id.* at 893-894.

[15] *State Farm Lloyds v. Johnson, supra* at 894.

[16] *In re Universal Underwriters of Texas Ins. Co.,* 345 S.W. 3d 404 (Tex. 2011).

II. The Lawyer's Role in the Decision to Demand Appraisal

One important role a lawyer serves in the appraisal process is to provide advice to the client, be it the insured or insurer, about whether to invoke appraisal. Consequently it is critical to understand when appraisal is available, when it may not be available, and why it should or should not be requested.

In almost all policies, the event which triggers a right to demand appraisal is a disagreement as to the "amount of the loss" or the "actual cash value, amount of loss, or cost of repair," or some similar recitation. While this seems obvious, the disagreement must be objectively demonstrated and not contrived.

One of the earliest appraisal cases in Texas dealt with the issue of when the right to appraisal is triggered.[17] Stuart had a loss to goods in storage and submitted a claim to his insurer American Fire. The insurer sent its adjuster to inspect the loss and he made an inventory of the items that had burned but never made any attempt to reach agreement with the insured as to the amount of the loss. Furthermore, the insured submitted a proof of loss to the insurer which it retained without exception for over 60 days. This timing is important since the policy provided that the claim is payable within 60 days after receipt of an agreed proof of loss or an appraisal award. The insured filed suit and the insurer complained on appeal after an adverse verdict that it was denied a right to appraisal which was a condition precedent to the suit. The Court of Appeals noted that there was no disagreement between the parties as to the value of the loss because the insurer never made any effort to determine the value and come to an agreement.[18]

The disagreement as to the amount of loss must be based upon a good faith attempt on the part of the party invoking appraisal to agree on the amount of the loss. An arbitrary refusal to pay is not enough.[19] In *Barnett* the insurance company's adjuster refused to go with the insured to examine the damaged goods and made no attempt to come to an agreement as to the amount of the loss, although he did make a settlement offer to the insured.[20] As a result, the insurer was not entitled to demand appraisal according to the Court.

While real disagreement is a prerequisite to a demand for appraisal, the mere fact of disagreement is not, in and of itself, a trigger which requires a party to demand appraisal. Instead, the Supreme Court has noted that ongoing negotiations and even an insurer's offer of money do not necessarily indicate a refusal to negotiate further or even a refusal to consider the existence of additional damages. Instead, it is the apparent breakdown in good-faith negotiations, sometimes demonstrated by the filing of a lawsuit, which reflects an impasse between the parties which will trigger a demand for appraisal.[21]

Another issue to be considered is whether appraisal has been waived. Here is a hint: probably not. The Texas Supreme Court recently addressed this issue and reaffirmed its holding over 100 years

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[17] *American Fire Ins. Co. v. Stuart,* 38 S.W. 395 (Tex. Civ. App. 1896).
[18] *Id.* at 396.
[19] *Springfield Fire & Marine Ins. Co. v. Barnett*, 213 S.W. 365 (Tex. App. 1919)
[20] *Id.* at 366.
[21] *Id.*at 408-410.

ago that there is no waiver of a right to appraisal unless there has been either an intentional relinquishment of that right or intentional conduct that is inconsistent with claiming that right.[22] Moreover, mere delay in demanding appraisal is not enough to demonstrate waiver; there must be prejudice as a result of the delay in invoking appraisal, which the Supreme Court has noted would probably never be able to be shown.[23] Nonetheless, the Court has clearly stated that delay in invoking the right to appraisal after an impasse has clearly been reached can be a factor in interpreting a party's intent in determining whether a waiver has occurred.[24] Furthermore, if litigation has been filed, delay in demanding appraisal raises the real prospect of creating prejudice by invoking the judicial process to the other party's detriment.[25] Consequently, practitioners should advise their clients that the decision to invoke appraisal should be made once it is clear that the parties cannot reach a negotiated agreement; however, once a lawsuit has been filed there is no doubt that the parties are at an impasse and a decision on whether to invoke appraisal needs to be made and acted upon promptly.

What about where the insurer has denied the claim in its entirety on the basis either that the damage is not caused by a covered risk or that the claim is not covered because the policy was not in force? If the issue is merely a dispute as to whether the damage was caused by a risk covered under the policy appraisal is available, according to the Supreme Court, to determine the amount of damage. If an indivisible injury has occurred which may have several causes, the appraisers can determine the amount of damage and let the Court decide the cause. If the injury is divisible the appraisers can decide the cost to repair each and let the Court worry about who pays for which.[26] The tougher question is whether appraisal can play a role where the insurer has rejected the claim on the basis that the policy was not even in force. On the one hand, it is hard to imagine an act that more clearly would be inconsistent with the right to demand appraisal than a denial of the existence of the very contractual provision upon which the demand is based. On the other hand, the Texas Supreme Court has stated, "When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong."[27] As support for this pronouncement, the Supreme Court cited to a case going back to 1897 in which it had previously held that a demand for appraisal did not waive an insurer's right to deny coverage based upon a breach of a policy condition.[28] Did the Court mean that an insurer could actually deny a policy was in force and at the same time demand appraisal? On a practical level there is no good reason to disallow appraisal in such a circumstance. After all, the appraisers will not be allowed to decide the coverage question, just the amount of the loss. If the insurer is wrong about coverage then the policy upon which the insured's claim is premised, including the appraisal clause, is in force. Unfortunately, *Johnson* was not a waiver case and the issue was not discussed again in *In re Universal Underwriters.* Consequently we believe the issue remains open and valid arguments can be presented on either side. The careful practitioner should weigh whether the benefits of appraisal outweigh the risks in such a circumstance.

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[22] *In re Universal Underwriters of Texas Ins. Co., supra* at 407.
[23] *Id.* at 412.
[24] *Id.* at 409.
[25] *Id.* at 411.
[26] *State Farm Lloyds v. Johnson,* 290 S.W. 3d 886, 894 (Tex. 2009).
[27] *Id.*
[28] *Am. Cent. Ins. Co. v. Bass,* 38 S.W. 1119, 1119-20 (Tex. 1897).

Finally, the lawyer should give careful consideration to the jurisdiction in which the appraisal will take place, if invoked. Are competent appraisers readily available in the area? If the appraisers are unable to come to an agreement on an umpire who will likely be selecting the umpire? If it is a Judge do you know what criteria will be used by the Court? Is there a list of umpires from which the Court makes its choice? Where did it come from? Does the Court seek or even allow input from the appraisers or the parties? What is the risk that the Court is more closely aligned with one party or another (or with one attorney or another) that its decision might be influenced by such a fact? These are not only valid considerations to discuss with one's client, they may, unfortunately, be critical to the fairness of the outcome and the satisfaction of both parties with the eventual result.

III. The Lawyer's Role in the Appraisal Process

The easy answer to this topic ought to be "None." After all, none of the appraisal clauses with which we are familiar mentions attorneys. The Texas Supreme Court has observed that

> Appraisal is intended to take place before suit is filed; this Court and others have held it is a condition precedent to suit. Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings. [29]

Clearly attorneys are not required in an appraisal. Are they desirable? What risks exist if attorneys attempt to actively participate/manage the appraisal process? What information should attorneys know in advising their clients about the appraisal process?

A. Attorneys Role in Appraiser Selection

Once a decision has been made by either the insurer or the insured to seek an appraisal, most appraisal clauses require each party to select a "competent and disinterested appraiser." There is nothing prohibiting an insured or an insurer from delegating the task of selecting an appraiser to an attorney acting as its agent. However, the attorney to whom that task has been delegated should clearly state that the appointment of the appraiser is being made based upon the authority of the client. Furthermore, there is nothing in the appraisal clause or case law prohibiting an attorney from conferring with or advising a client about whom to appoint. Regardless of whether the attorney actually makes the selection upon authority delegated by the client or simply advises the client concerning the appointment, the attorney must have a good understanding of what qualifies or disqualifies an appraiser. This is also true in considering whether the appointment of the other party's appraiser is a valid selection and evaluating how to respond in the event the other party has selected an appraiser who is not qualified under the policy.

What constitutes a competent appraiser has not been the subject of much debate or litigation. In *Johnson,* the Supreme Court quoted with apparent approval the *amicus* brief of Texas Windstorm Insurance Association, concerning the qualifications of a competent appraiser as follows:

> In actual practice, appraisers and umpires are frequently unqualified to make complex liability determinations under an insurance policy. There is no requirement that they be

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[29] *Johnson, supra* at 894.

> licensed. Umpires are often lawyers or mediators with no particular experience or expertise in property insurance coverage or claims. Appraisers are often contractors who may be familiar with repair costs but are not qualified to make policy interpretations or to determine cause and origin of the damage being claimed. There is no explicit requirement that the appraisers and umpire inspect the property or read the policy, and many do not.[30]

Appraisal clauses typically speak in terms of each party appointing an "appraiser." Consequently, the appointment of a group of people or a company has been held to be improper.[31] An appraiser may not delegate his or her duty to someone else.[32] Thus, it is important that an appraiser be selected who has a basic understanding of the rules of appraisal. However, substitute appraisers have been authorized where an appraiser resigns as long as the appointment is made within a reasonable time.[33]

Based upon the foregoing, it seems apparent there are no particular qualifications as to the competency of an appraiser as long as he/she is able to reach an honest and independent opinion of the amount of loss. The fact that he/she may not be expert in a particular field is of no apparent consequence. An appraiser or umpire need not be an "expert" even where the subject matter is relatively complex or specialized.[34] As a practical matter, however, an appraiser who has extensive experience in or specialized knowledge of the subject of the appraisal will likely have greater credibility with both the other appraiser or, if necessary, with the umpire. In a case involving a structure such as a building or a residence consider using a contractor or a building consultant, or a public adjuster, or an insurance adjuster.

The requirement that appraisers and umpires be "disinterested" has resulted in much more judicial interest. An appraiser who views his/her role as "working for" a particular party as opposed to working for the benefit of both has been held to not be "disinterested." [35] Clearly, an appraiser with a direct financial interest in the outcome of an appraisal is not disinterested either.[36] Consequently, appointing a public adjuster whose compensation is tied to the outcome of the appraisal or a contractor who is going to perform the repairs is likely to be met with a challenge and potentially be a defense to Plaintiff's claim. Similarly, the appointment of an employee of the insurer would likely constitute a waiver of the right to appraisal. However, the existence of a business relationship between the appraiser and one of the parties that is not directly related to the dispute being appraised does not disqualify an appraiser, absent evidence that the appraiser is either employed by the party or the party actually exercised control over the appraiser.[37] Furthermore,

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[30] *Id.* at 890.

[31] *International Service Ins. Co. v. Brodie*, 337 S.W.2d 414, 417 (Tex. Civ. App. – Fort Worth 1960, writ ref'd. n.r.e.).

[32] *Id.*

[33] *Woodward v. Liberty Mutu. Ins. Co.*, C.A. 3:09-CV-0228-G, 2010 US Dist LEXIS 29250 (US Dist. Ct. for the N. Dist of Texas March 26, 2010); *see also Bunting v. State Farm Lloyds*, No. 3-98-CV-2490-BD, 2000 US Dist. LEXIS 2087 (U.S. Dist. Ct. for the N. Dist of Texas, Feb. 14, 2000).

[34] In *US Pecan Trading Co. v. General Ins. Co.,* CA EP-08-CV-347-DB, 2009 US Dist. LEXIS 57730 (U.S. Dist. Ct. for the W. Dist. of Texas, May 29, 2009), a case involving the value of damaged nut crop, the Court chose a mediator as an umpire over candidates proposed by both parties with significant experience in the nut marketplace because he was "unbiased" and "used to hearing evidence."

[35] *New York Underwriters Ins. Co. v. Sproles*, 73 S.W. 2d 857 (Tex. Civ. App. – Galveston 1934)

[36] *Delaware Underwriters v. Brock,* 211 S.W. 779, 780-81 (Tex. 1919); *General Star Indem. Co. v. Creek Hill VIII. Apts.*, 152 S.W.3d 733, 737-38 (Tex. App. – Houston [14th Dist.] 2004).

[37] *Gardner v. State Farm Lloyds*, 76 S.W.3d 140 (Tex. App. – Houston [1st Dist.] 2002).

even where the appraiser has served in a different role, such as an expert consultant on cause and origin for one of the parties in the very claim being appraised, he/she is not necessarily disqualified absent evidence that he/she was under the influence or control of one of the parties, that he/she had some financial interest in the outcome, or that his/her prior role influenced the damage valuation.[38] Even appraisers who are described as "rude," unfavorable to homeowners," or allegedly "biased in favor of insurers" will pass muster.[39]

One thing attorneys must remember is that they are agents of their client, the insured or insurer, respectively. Consequently, an attorney is not a proper selection to be an appraiser on behalf of his/her client because the control exercised by the client over the attorney and the attorney's ethical obligation to zealously represent the interests of his/her client run directly counter to the requirement that the appraiser be "disinterested." Similarly, an employee of the attorney's law firm is probably also disqualified because of the legal duties owed by an employee to his/her employer. This is doubly true for a Plaintiff's lawyer or an employee of the law firm where the case is being handled on a contingency basis.

B. Attorney's Role in Umpire Selection

Most appraisal clauses specify that the appraisers attempt to agree upon a neutral, disinterested "umpire" to assist in resolving disagreements between the appraisers appointed by the parties, and failing an agreement on an umpire, to have the umpire appointed by a District Judge. None of this requires the involvement of an attorney, even the request to have an umpire appointed by a District Judge.

The appraisers are required to attempt to agree to an umpire. An attorney who seeks to influence this process, even minimally, risks having any favorable appraisal award signed by the appraiser appointed by that attorney, or his/her client set aside. Appraisers are supposed to be "independent;" that is they must be free from the control of either the insurer or the insured.[40] If an attorney submits a proposed list of umpires to the appraiser appointed on behalf of his/her client, and those are the only names the appraiser announces he/she will consider, is the appraiser truly free from control by the client? When a lawyer for one party sends a list to the appraiser appointed on behalf of his/her client, that list will be Exhibit 1 in the Motion to Set Aside Appraisal Award.

One procedure which has recently become popular, at least among attorneys in Harris County, is for the lawyer for one party to send a list of proposed umpires to the lawyer for the other party, and the two lawyers reach agreement on the umpire to be appointed by the Court or selected by the appraisers. Such a procedure is certainly not in compliance with the appraisal clause provisions about how the umpire is to be selected. However, if both parties agree to such a procedure, they have essentially amended the policy to provide an alternative procedure for the selection of the umpire. At worst, an attempt to set aside an award agreed to by an umpire selected in such a procedure would probably be met with a strong argument that any problem with the process by which the umpire was selected has been waived by both parties. Consider, however, whether truly independent appraisers or a District Judge is bound by such an agreement. Can they reject the

[38] *Franco v. Slavonic Mutual Fire Ins. Assn.*, 154 S.W.3d 777, 787-88 (Tex. Civ. App. – Houston [14th Dist.] 2004)
[39] *Bunting, supra.*
[40] *Franco, supra* at 787.

"selection" made by the lawyers/parties? What happens if a District Judge decides that he/she does not like lawyers usurping his prerogative and refuses to sign an "Agreed Order" appointing an umpire and selects someone else?

In most counties in Texas the application for appointment of an umpire is a very informal process. The informality is meant to keep the process relatively inexpensive, without the necessity of hiring lawyers. The appraisal clause usually simply states that either party may seek appointment from the Court if an agreement is not reached between the appraisers within a certain time. There are no formal rules or pleadings. No hearing is typically required and often no notice may be provided. Obviously, this presents a great opportunity for mischief and subversion of the process and Courts should guard against appointing an umpire "suggested" by either party, or known to be closely identified with either, without notice and an opportunity to be heard, because the selection may ultimately be challenged on bias or even due process grounds. In partial recognition of the potential for abuse by such an informal system, and to create a system that is facially neutral and minimally burdensome upon the Courts, at least one Texas county has created a more formalized process for the judicial appointment of umpires, requiring all applications to be presented to the Court responsible for ancillary matters and for the Court to appoint an umpire from a specific list of former judges maintained by the District Clerk and in the order the names are maintained.[41]

Lawyers have also sought to influence the appointment of umpires by District Judges in both State Court and Federal Court. Any effort by counsel to suggest potential umpires to the Court immediately raises questions about whether such people are truly neutral. Be honest: why would you recommend someone unless you believed that person would be beneficial to your client? If your opposing counsel recommended someone wouldn't you view that person with suspicion? Do you really believe your proposals are viewed with any less suspicion? Is the legal system best served by allowing lawyers to undermine the perceived neutrality of judicial appointments? Is the appraisal process served well in such a process? As a result, we believe the best approach to be followed by counsel is to refrain from proposing umpires to the Court; and the best approach to be followed by Judges is to automatically exclude any umpire proposed by either party.[42]

C. Attorney's Role in Disqualification of Appraiser or Umpire

The attorney will likely play an important role in deciding whether to seek to disqualify an appraiser appointed by the other party or an umpire agreed to by the appraisers or appointed by the Court, as well as assisting the client in deciding how to respond to claims of disqualification

[41] See *Harris County District Clerk's Procedure* # 331-332/1.04, attached as Appendix B.

[42] Judge Miller, the District Judge presiding over the Harris County Residential Hurricane Ike Docket, has announced just such a policy. Compare the procedure followed by Judge Ellison in at least one case in which he had each side propose a list of three umpires, allowed each party to "strike" one proposed umpire and then he made the selection from the remaining list. Obviously the Court can adopt any process by which it makes its selection, but since this process still results in a selection of an umpire proposed by one party or the other, it is still subject to the suspicion that the umpire is not truly neutral. On the other hand, if the Court truly has no idea who might be a good candidate to consider, inviting the parties to propose names and qualifications, allowing each side to strike the most egregious suggestions posed by the other side, and selecting from the remainder using qualifications that demonstrate each candidate's experience and expertise, has some obvious benefits. What it does not provide however is consideration of the true neutrality of an umpire that is obviously well known by one side but either not known or not liked by the other.

of the appraiser appointed by the client. Once facts become known to a party which draws into question the qualification of an appraiser or umpire, a decision must be made whether to seek disqualification prior to completion of the appraisal or to allow the appraisal to proceed despite knowledge of the disqualification. One might be tempted to hedge one's bets and proceed with the appraisal under the presumption that a bad appraisal award could then be set aside based upon the disqualified appraiser or umpire. This is a doubtful strategy. As noted above, waiver is the intentional relinquishment of a known right. Failure to seek disqualification and to instead proceed with appraisal despite knowledge of facts which would lead to disqualification likely would result in a waiver of any complaint based upon the disqualification.

How does one disqualify an appraiser or an umpire? What happens if an appraiser or umpire is disqualified? The Texas Supreme Court has held that the appointment of an unqualified appraiser by an insurer constitutes a waiver of its right to demand appraisal.[43] Presumably this would also apply to an insured that demanded appraisal and appointed an appraiser that was not qualified. However what about the insured who does not want to go to appraisal in the first place? One possible ramification of an insured appointing an unqualified appraiser might be a dismissal of his/her breach of contract case.[44] An insurer that wrongfully appoints an unqualified appraiser may be in violation of Section 541 of the Insurance Code. What happens if an umpire is disqualified?

The procedure employed to disqualify an appraiser is not specified in the Policy. Obviously one might consider starting by simply sending a letter to the other party or his/her counsel pointing out the basis of the alleged disqualification and requesting the appointment of a substitute. Assuming such a letter is met with rejection and assuming no lawsuit has yet been filed, the next step could be to file a declaratory relief action requesting the Court to declare the appointment to be void. Such a suit could also seek additional relief of either a ruling the insurer has waived appraisal or that the insured has violated the terms and conditions of the policy and therefore, his/her claim for breach of contract must be dismissed. If a lawsuit has already been filed the forum for a Motion to Disqualify is established.

An interesting example of a Motion to Disqualify to the Court was recently considered by Magistrate Judge Froeschner in which the insurer sought to disqualify both the insured's appraiser and the court appointed umpire because of attempts made by the insured's appraiser to "poison" the neutrality of the umpire and his ability to fairly consider the opinions of the insurer's appraiser.[45] In that case, the insurer sought to have the Court remove both the insured's appraiser and the umpire appointed by the Court because of a series of emails from the insured's appraiser to the umpire criticizing the appraiser for the insurer and making a variety of comments which indicated that he was being subjected to pressure from the insured's attorney to get a quick

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[43] *Delaware Underwriters, supra.*

[44] *Heap v. Progresive County Mut. Ins. Co.*, 2001 Tex. App. LEXIS 7390 (Tex. App. – Houston [1st Dist.] 2001); *Boler-Phillips Body Shop, Inc. v. Emplrs. Mut. Cas. Co.*, No. 07-60284, 2007 U.S. App. LEXIS 24917 (5th Cir. Oct. 24, 2007). See also e.g. *Perrotta v. Farmers Ins. Exchange,* 47 S.W. 3d 569 (Tex. App. – Houston [1st Dist.] 2001) in which the Court of Appeals held that the failure of an insured to sign and swear to an Examination Under Oath was fatal to his theft claim under his homeowners policy as a theoretical basis for the position that a refusal to comply with a demand for appraisal may constitute a complete defense to a suit by the insured under the same contract.

[45] *Katy Clock Tower, LLC v. American Economy Insurance Company,* C.A. No. G-11-22; In the U.S. District Court for the Southern District of Texas; Opinion and Order, August 1, 2011 [Document 34].

appraisal result.[46] Magistrate Froeschner's decision to disqualify the umpire (who appears to be innocent of any wrongdoing) but not the insured's appraiser (whose actions seeking to influence the umpire was cited by the Court as the basis for its ruling) seems surprising. However, the indictment made against the insured's appraiser was not so much that he was being controlled by the insured, or that he had some financial interest in the outcome, or even that he was working to benefit only the insured's position. Instead, he was accused of attempting to subvert the neutrality of the umpire. Since an appraisal award requires agreement by two among the appraisers/umpire some degree of persuasion and negotiation is to be anticipated and even necessary. Consequently, nothing the insured's appraiser did could properly be characterized as demonstrating his incompetence or even his failure to be disinterested. Thus, there was no basis to challenge his "qualification" under the appraisal clause. However, the appraiser's comments were nonetheless wrong because they were an attempt, not to persuade the umpire that the position taken by the other appraiser was wrong on the merits, but that the other appraiser was a liar and should not be believed or trusted. As a result, the Court was apparently concerned that any appraisal award signed by the umpire might be subject to challenge on the basis that the umpire was no longer neutral.

D. Attorney's Contact with Appraiser and/or Umpire During Appraisal

Any effort to exercise control or influence the appraiser is inappropriate and may vitiate an appraisal award. Consequently, all contacts between counsel and the appraiser or umpire are likely to be scrutinized closely in any challenge to an appraisal award. This does not mean that all communications are necessarily forbidden. For example, merely contacting the appraiser to ask about the status of the appraisal is unlikely to be construed as an effort to control or influence the appraiser. However, there is no good reason for there to be any communication between counsel and appraiser about what the appraiser's position should be on the merits of the appraisal beyond providing factual information for the use of all of the appraisers and the umpire. Thus, there is nothing wrong with providing photos, estimates, repair bills, and even consultant reports from adjusters and engineers and the like for all the appraisers and the umpire to consider or not as they may decide. However, lawyers have no business commenting on what the appraisers or umpire should do and should refrain from recommending that an appraiser should be guided by or even attach any particular weight to such materials, or anything else. The appraisers and the umpire must be free to ignore any or all of such materials and nothing the lawyer says or does should draw that into question. The point is that it is one thing for lawyers to facilitate the free flow of information to all the appraisers and to the umpire to assist them in identifying areas of possible damage and other evidentiary materials for the decision makers to consider; it is potentially even crucial where repairs have been undertaken before the appraisers have had an opportunity to conduct their own investigation. It is quite another for the lawyer to play any role whatsoever in attempting to influence the decision that is ultimately reached.

The appraisers and the umpire are the masters of their own procedures. For example, they may or may not desire to inspect the property in question. They may or may not invite the parties to submit specific positions on a topic. They may seek specific information from one party or the other for all of them to consider. Sometimes issues may arise which may need the intervention of

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[46] *Id.*, see Document 28 and the attachments thereto.

the Court. For example, if the insured will not make his/her property available for inspection, the Court may need to get involved to order the insured to cooperate with the appraisal. There is nothing which prevents one or more of the appraisers/umpire from asking the Court for assistance. While this does not necessarily require involvement of counsel, since it may involve a more formal judicial hearing, it is likely that appraisers and/or umpire may feel more comfortable in requesting the parties to get involved directly with the Court. In such a circumstance the approach to the Court should be preceded by notice to the other party advising of the issue that has arisen and requesting an agreement. Failure to reach agreement may then serve as the basis for seeking relief from the Court. This could be analogized to referral to the Court for enforcement of subpoenas in the arbitration context, although no corresponding statutory basis exists with respect to appraisals.[47]

The appraisers and the umpire may also decide they need to retain additional experts to evaluate issues affecting the merits of the appraisal such as cause and origin experts, contractors, and engineers. The appraisal clause typically requires each party to pay the costs of his or her own appraiser and to split the costs of the umpire equally. Thus, an expert retained by an individual appraiser would be compensated by the party appointing that appraiser. Does that mean that the party has any say in who is to be appointed? Absolutely not. In fact, any communication between counsel and appraiser that even remotely suggests whom an appraiser should retain or that an appraiser should or should not retain anyone is probably going to be evidence of inappropriate control. The right of the appraiser to retain whomever the appraiser deems appropriate, if anyone, and the obligation of the party that has retained the appraiser to pay for reasonable expenses so incurred should be stated in the engagement letter by which the appraiser is advised of his/her appointment. Similarly, the umpire, or the umpire and both appraisers jointly, may decide to retain such experts. Even though such decisions will have to be paid for by both the insured and insurer jointly, counsel can play no role in making suggestions or attempting to influence the decision of the adjusters and/or umpire about whether to utilize such experts or whom to utilize.

Appraisers and the umpire may or may not decide to have some sort of evidentiary proceeding and may or may not invite the parties to participate in such a proceeding.[48] However, the failure of appraisers and the umpire to allow the insurer and the insured to present evidence after such has been requested has been held to create a fact issue as to whether the appraisers are biased or the policy provisions followed.[49] If the appraisers and umpire have invited the parties to participate in the process, there is nothing to prevent such participation. In other words, if you and your client are invited to the party you should feel free to participate; but if you have not been invited, don't be a party crasher! Frankly, if you are invited to participate as part of the evidence gathering phase of the appraisal, your failure to participate may be construed as a waiver of any complaint that the appraisers/umpire failed to consider some item.

E. Attorney's Role in the Language of the Appraisal Award

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[47] See e.g. Federal Arbitration Act, 9 U.S.C.S. §§ 1-16, or the Texas Arbitration Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-.098.

[48] See e.g. *Laas v. State Farm Mutual Automobile Ins. Co.*, 2000 Tex. App. LEXIS 5332, *4 (Tex. App. – Houston [14th Dist.] 2000, no pet.).

[49] *Security Ins. Co. v. Kelly*, 196 S.W. 874, 876-877 (Tex. Civ. App.-Amarillo 1917, writ ref'd); but see *Orient Ins. Co. v. Harmon,* 177 S.W. 192 (Tex. App. – Dallas 1915, writ ref'd.).

The decision in *Johnson* about the extent to which issues of causation may be decided by appraisers and which may not has sparked a great deal of confusion. Justice Brister distinguished between situations in which different causes are alleged to have caused a single, indivisible injury as opposed to situations in which different damages occur to different portions of the property. The Court pointed to *Wells* as an example of the former, in which the causation issue was entwined with liability, since the foundation damage was caused by settlement, plumbing leaks, or a combination of the two. If the appraisers could determine which of the two caused the loss, as well as the amount necessary to repair it, there was nothing left for a Court to decide on the issue of liability. The Court pointed to *Lundstrom* as an example of the latter, in which the causation issue was entwined with damages, since the appraisers were called upon to limit their analysis to water damage from a specific event which caused identifiable damage to an area and did not consider the more general mold problem for which there was no coverage. While Courts can decide whether mold or water damage are covered, if the Courts also must decide the amount of damage caused by each there would be no damage question left for the appraisers.

Justice Brister then appeared to take a more practical view of the issue and added that causation questions involving separating a loss due to a covered event from its pre-existing condition, such as wear and tear, were appraisable because to hold otherwise would render the appraisal clauses meaningless. He then added:

> Indeed, appraisers must always consider causation, at least as an initial matter. An appraisal is for damages caused by a specific occurrence, not every repair a home might need. When asked to assess hail damage, appraisers look only at damage caused by hail; they do not consider leaky faucets or remodeling the kitchen. When asked to assess damage from a fender bender, they include dents caused by the collision but not by something else. Any appraisal necessarily includes some causation element, because setting the "amount of loss" requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else.[50]

To say that this dichotomy is confusing is an understatement. However, more importantly it has created a dilemma for appraisers and umpires in how to craft their awards to comply with the Court's directive. What do they include in the award? What, if anything do they exclude? How to they differentiate between repairs to items where the damage is potentially a combination of indivisible causes from those whose damage is from a single cause and what do they do where that cause is not from the event in question? Are their decisions binding? This will be discussed in more detail in the next sections, but what role, if any, should lawyers play in assisting appraisers and umpires in sorting through these issues?

The answer on an individualized case basis is probably none. In the context of a single claim, an effort by counsel to steer the appraisers or umpire into using specific language or format may be considered an exercise of improper influence and control. However, appraisers and umpires should be generally knowledgeable about these issues; and lawyers probably do have a valuable role to provide generalized guidance to appraisers and umpires to steer clear of making coverage

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[50] *State Farm Lloyds v. Johnson, supra* 290 S.W.3d at 893

decisions. Providing appraisal award forms to appraisers and umpires for their use generally might be worthwhile but should be approached cautiously. Some counsel simply tell the appraiser they appoint to include every item of damage raised by anyone and let the parties figure out later if it was caused by a covered risk. Others provide a format with two columns or sections: one section estimates the cost to repair damage that everyone agrees is caused by the event in question (the divisible cause mentioned by Justice Brister) and a second section that estimates the cost to repair all of those damages for which there are multiple potential causes (the indivisible injury with multiple causes mentioned by Justice Brister). The insurer can pay the first column and can decide whether to litigate or pay all or a portion of the second. While we see no problem with either approach, we see a potential problem with the attorney dictating to the appraisers which approach should be used.

IV. The Lawyer's Role After the Appraisal Award

Your client has called: *We have an appraisal award, now what?* Above all else, in doing this analysis for yourself, your client, and your profession, be intellectually honest – not outcome determinative. The "best result for my client" is not making the carrier pay everything awarded and then some, paying nothing, or some arbitrary amount "needed" by the insured. The "best result" is the reasonable and necessary cost to actually repair the accidental direct physical loss resulting from an event covered under the policy at issue.

Attorneys may have a role after the appraisal in challenging an award or working to uphold valid awards. That noted however, if the appraisers and umpire do their job correctly as outlined above, there should not be anything left for the lawyers to do.[51]

Appraisers are reporting that the current state of affairs in Harris County and surrounding area, is the umpires are treating appraisal as a modified form of mediation in which they "resolve all doubt: in favor of the policy holders" and "let the lawyers work it out later." The better course of action – more in accord with Texas Law and principles of protecting the insured and carrier – is to treat appraisal as an arbitration. The appraisal panel is assigned the responsibility of making the right decision. Emphasis on right – not compromised.

The parties must be mindful of the Supreme Court of Texas' admonition against converting an insurance policy into a maintenance agreement.[52] An insurance claim is not a remodeling boon or the chance to recover 20 years of premiums. An insurance claim is the vehicle by which the parties to the contract work together to keep their mutual promises to restore the insured to their position immediately prior to the accidental direct physical loss suffered.[53] The parties promised to help the insured recover from accident or tragedy. If you, as insurer, policyholder or lawyer for either seek

[51] This statement is not original to the authors. One South Texas appraiser often advises his partner appraiser and umpire that "if we do our job right, there is nothing left for the lawyers to do."

[52] "These 15 risks are also very common; construing the HO-B policy to cover them all would convert it from an insurance policy into a maintenance agreement." *Fiess v. State Farm Lloyds,* 202 S.W.3d 744 (Tex. 2006).

[53] For example, the Insuring Agreement of many policies states: "Coverage A – Dwelling. We insure for accidental direct, physical loss to the property described in Coverage A, except as provided in SECTION J – LOSSES NOT INSURED." (State Farm Lloyds HO-W form FP 7955 TX). Or, similarly, the Allstate Texas Lloyds HO-A Plus homeowners policy form states: "[w]e insure against physical loss to the property described in Coverage A (Dwelling) and Coverage B (Personal Property) caused by a peril listed below, unless the loss is excluded in Section I exclusions."

more you undermine the mechanism by which recovery is made available to all. And in so doing, damage the integrity of each party in the process, the contract, and the rule of law in America.

What do you want for your client: (a) the right answer, (b) the truth, or (c) the amount owed? It should be immediately apparent that these are not mutually exclusive concepts. They should all be the same figure. And, regardless of the position of the carrier representative or the policyholder, The Noble Lawyer [54] will advise their client that the right answer is timely efficient payment of the full amount owed for damages covered under the policy.

> Too few lawyers, in circumstances that might be somewhat controversial, stand up and say what Nicodemus said in an equally unpopular setting. The noble lawyer understands his positive obligation to stand for due process, especially when it might be unpopular to do so. Rule 3.4 of the ABA Model Rules of Professional Conduct requires fairness in adjudicatory proceedings. This rule binds lawyers not to obstruct another party's access to evidence, not to destroy evidence, not to encourage or allow the falsification of evidence, not to counsel or assist a witness to testify falsely, and not to mention in court or allude to anything unfairly prejudicial or otherwise not material to the case. This rule requires lawyers to be not just zealous advocates for their clients but to be zealous advocates for the system, and it places restrictions on their conduct to make sure that the process in which they play a part is scrupulously fair. [55]

A. Analyze the Award – If, When, What, and How Much Is Owed?

1. What Is the Decision Deadline?

The first question answered should be **when is the payment due?** While not the most fundamental question, it is the deadline by which the decisions discussed below have to be made. Thus, it should be answered first and the client advised as soon as is practicable.

Not surprisingly, the first point of analysis should be the policy. Most do not, but some appraisal clauses contain language setting a contractual payment deadline. For example: we will pay any appraisal award within 30 days of the award. Regardless of the existence of such a commitment in the appraisal clause, the contractual analysis does not end there. Many commercial and personal lines policies contain a version of the payment deadlines found in the Insurance Code Prompt Payment of Claims Act. Check closely, they are not always identical to the statute. Thus, the deadlines in the contract must be identified and noted.

Next, the prudent lawyer will confirm applicable statutory payment deadlines. To do so, it is necessary to check the communications between the parties prior to, and during the appraisal process in order to assess what commitments were made by the carrier. For example, as is commonplace, was a commitment made by the carrier to the insured that "we'll pay any covered damages in the award over and above the deductible and what has been paid to date." Or, is there language to that effect in the appraisal clause itself? If so, the prior commitment, the language of the clause combined with the advent of the award could be considered notice to the insured that

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[54] William J. Chriss, The Noble Lawyer, © 2011, State Bar of Texas, Texas Bar Books.
[55] William J. Chriss, The Noble Lawyer, Page 123-124.

the carrier will pay the covered portions of the award upon issuance, thereby triggering the five business days to pay the claim deadline in Chapter 542 (or the policy version of same).[56]

Again, the analysis does not end here. Did the advent of the issuance of the award create a situation in which the insurer now has 'final proof of loss' of the claim or some part of the claim under the Texas Insurance Code? If so, there is now a 15 business day deadline to accept or reject the claim (i.e. award) or notify the insured additional time to do so is needed, and why.[57]

Query: is the payment of an appraisal award from a claim which arose out of a declared catastrophe subject to the original or the extended deadlines under the Prompt Payment of Claims Act? The authors posit that the answer lies in the date on which the award is issued. If it is within the time frame during which the deadlines were extended – they would apply. If, as in Hurricane Ike claims, the claim tail lasted beyond the expiration of the deadline extension, the original statutory deadlines should control.

At the conclusion of the foregoing analysis you are likely to have one or more competing payment deadlines for a valid award. Obviously, the answer for both carrier and policyholder counsel is to advise the client of each deadline and its source and work together to meet the earliest payment deadline.

The carrier counsel should make sure the earliest deadline is calendared and advise the carrier of the need to meet that deadline. The policyholder counsel should make sure the policyholder understands the deadlines and communicates their expectations to the carrier. The policyholder counsel should also insure their client has provided the carrier everything necessary to constitute final proof of loss under the statute[58] and assist the client in responding to reasonable requests for additional information.

Ultimately, the shortest deadline is the target date by which the carrier should accept, reject, or pay the award.

2. Is the Award Valid?

Once the decision deadline is known, the next question to be answered is **whether the award is valid** and, therefore, can be relied on by both parties to have resolved the disagreement over damages. As noted above, this is a growing area of focus among the insurance bar. And, as

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[56] Chapter 542 Subchapter B. Prompt Payment of Claims §542.057(a) Payment of Claim: "(a) Except as otherwise provided by this section, if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made."

[57] Once an insurer *"receives all items, statements, and forms required by the insurer to secure final proof of loss"* the carrier is required to notify the insured of the acceptance or rejection of the claim within 15 business days. *Tex. Ins. Code C Chapter 542* Subchapter B; Prompt Payment of Claims §*542.056(a).* If the insurer notifies the insured of the need for additional time, the carrier is required to accept or reject the claim within an additional 45 calendar days. *Tex. Ins. Code Chapter 542* Subchapter B. Prompt Payment of Claims 542.056(d).

[58] Note, there is not a definition of "final proof of loss" in Chapter 542 of the insurance code. The authors postulate final proof of loss is the information reasonably necessary to determine coverage, liability, and damages under the policy – or – the coverage under which the check can be written, to whom, and for what amount.

discussed, the question of bias of the appraisers or umpire is more frequently creeping into the debate.

Courts analyzing the question will start with the premise that, in Texas an appraisal award is binding so long as it made pursuant to the provisions of an insurance contract. [59] Thereafter, the analysis will turn to whether the award can be disregarded based on the facts before the court. "Texas courts recognize three situations in which an appraisal award may be disregarded (1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract."[60]

Lack of Authority. "[A]n award which is not made substantially in compliance with the requirements of the policy will not be sustained."[61] An appraiser's acts in excess of the authority conferred upon him by the appraisal agreement is not binding on the parties.[62] In *Fisch,* the umpire issued an award after hearing from only one appraiser. Because the "umpire's power to act was conditioned upon disagreement between the appraisers, the court found the umpire acted without authority, rendering the award invalid.[63] Texas courts have held that umpires act without authority when they decide issues of coverage or liability, and sometimes causation.[64]

For example, Hartford alleged an appraisal award was not in compliance with certain policy exclusions and was, therefore, invalid because it included costs to repair items not "physically damaged by water or steam." The insured argued the exclusion provided for coverage as determined in the appraisal award and the award was, therefore, binding. Judge Kent disagreed finding the evidence showed the final appraisal award resolved questions of both causation and coverage and was, therefore, not binding.[65]

In the post appraisal discovery, the umpire testified that the appraisal award contained amounts to remediate areas of the house that had no physical contact with water. The Parties vigorously disputed whether items not physically damaged by water are covered under the Policy. Judge Kent opined: "[b]y including such amounts, [the umpire] implicitly resolved the dispute in favor of the [insured]. Additionally, the insured's appraiser testified at his deposition that in the course of his appraisal, he determined that there was a causal relationship between the tub leak and the mold. *[internal record citation omitted]* Since an appraiser is not allowed to resolve disputes over causation or coverage, the appraisal was made without proper authority and is therefore, not binding."[66]

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[59] *Wells v. American States Preferred Ins. Co.,* 919 S.W.2d 679, 683 (Tex. App.-Dallas 1996, writ denied); *Barnes v. Western Alliance Ins. Co*., 844 S.W.2d 264, 267 (Tex. App.-Fort Worth 1992, writ dism'd by agr.).
[60] *Wells v. American States Preferred Ins. Co.,* 919 S.W.2d 679, 683 (citing *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist*., 877 S.W.2d 872, 875 (Tex.App.-San Antonio 1994, no writ); *Hennessey v. Vanguard Ins. Co*., 895 S.W.2d 794, 798 (Tex.App.—Amarillo 1995, writ denied)).
[61] *Fisch v. Transcon. Ins. Co.,* 356 S.W.2d 186, 190 (Tex.App.-Houston 1962, writ ref'd).
[62] *Fisch v. Transcon.,* 356 S.W.2d 186, 190.
[63] *Id*. at 190-91.
[64] *See, e.g. Wells,* at 683; but see *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009)("Any appraisal necessarily includes some causation element ....").
[65] *Hartford Lloyd's Ins. Co. v. Yarbrough,* 2006 WL 1469705 (Not Reported in F. Supp.).
[66] *Hartford Lloyd's Ins. Co. v. Yarbrough,* 2006 WL 1469705.

Notably, it has been held that an appraisal award that assesses coverage, or liability is made without authority, since appraisers may only determine the amount of a loss.[67] Conversely, the *Johnson* Court, in reliance in part on *Lundstrom v. USAA,* specifically sanctioned the concept that appraisers may have to consider causation in order to complete their appraisal.[68] Thus, it appears there remains an unresolved quandary: *where appraisers consider, or make a decision on causation which establishes coverage, is the award made without authority?* Furthermore, is the determination of cause (and potentially coverage) actually binding on the parties to the policy contract?

Consider Justice Brister's comparison between a damage with multiple causes which appraisers should not consider (as exemplified by his reference to *Wells*) versus a damage with a single potential cause which appraisers should consider (as exemplified by his reference to *Lundstrom*). If appraisers are allowed to consider coverage in one instance but not the other, has the Supreme Court of Texas held their "consideration" is a decision binding on the parties where appraisers are appraising a damage with a single potential cause?

The authors posit we do not yet know. The answer to the quandary likely lies in the policy itself. Where appraisers "consider" causation in an appraisal on an all-risk policy and exclusions are not triggered (or going to be asserted) their decision may be binding under *Johnson*. However, where the appraisers consider, and even decide, causation in an appraisal in a named peril policy, and the carrier is or will assert an affected exclusion, it may be that Judge Brister's point that the carrier retains the right to contest coverage controls – and that 'causation decision' of the appraisers is not binding.

Fraud. To establish fraud, a party must show: (1) a material misrepresentation, (2) the misrepresentation was false, (3) the misrepresentation was either known to be false when made or was asserted without regard to its truth or falsity, (4) that the misrepresentation was intended to be acted upon, (5) the misrepresentation was relied upon, and (6) the misrepresentation caused injury.[69] In the *JM Walker* case above, the insured also argued the award should be set aside on the ground of fraud. Specifically, Walker asserted the carrier's appraiser fraudulently misrepresented the roof size to the umpire and the umpire relied on that statement in making the appraisal. In his deposition, the umpire testified that he relied on a diagram provided by the carrier's appraiser containing measurements in determining the roof size. The umpire further testified that "[the carrier's appraiser] said that [the insured's appraiser] and he had agreed on those measurements." The court found this insufficient evidence to find fraud in the appraisal award.[70] The court ultimately held there was no evidence the appraiser made a material misrepresentation to the umpire regarding the size of the roof as would have been required to support insured's claim that setting aside the award was warranted under Texas law on grounds of fraud.[71]

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[67] *Wells v. American States,* at 684.

[68] *State Farm Lloyds v. Johnson,* 290 S.W.3d 886 citing "*Lundstrom v. USAA*, 192 S.W. 3d 78 (Tex. App. – Houston [14th Dist.] 2006).

[69] *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.,* 960 S.W.2d 41, 47 (Tex.1998).

[70] *JM Walker LLC v. Acadia Ins. Co.,* 356 Fed. Appx. 744, 747 (5th Cir. 2009).

[71] *JM Walker LLC v. Acadia Ins. Co.,* 356 Fed. Appx. At 747.

Mistake. Mistake has been defined in the appraisal context as "a situation where the appraisers and umpire were laboring under a mistake of fact by which their appraisal award was made to operate in a way they did not intend, such that the award does not speak the intention of the appraisers and umpire, or where the error resulting in the award is so great as to be indicative of gross partiality, undue influence, or corruption."[72] Of note to the current Hurricane Ike docket, an assumption regarding the pre-storm condition of the property was considered by one court a potential for mistake.[73] In *Savan*, the court found that "if the appraisers and umpire in this case were operating under the assumption that [the property] was in better condition prior to the storm than it actually was, the appraisal award could be the result of mistake. Because there is still a genuine issue of material fact regarding whether the appraisers were provided with accurate information about [the property's] condition before the storm, this Court cannot hold on summary judgment that the appraisal award was not the result of accident, fraud, or mistake."[74]

A court may set aside an award on the ground of mistake only "upon a showing that the award does not speak the intention of the appraisers."[75] In *JM Walker*, the Fifth Circuit ruled a difference in the roof measurement used for the award and the larger measurement advocated by the insured was not a mistake on which an award could be overturned because the insured provided no evidence that the award did not speak to the umpire's intent. The court noted that an umpire often must choose between two competing values, and the umpire's decision to go with one appraiser's measurement, rather than the other did not mean his award was premised on a mistake.[76]

If the carrier or its counsel determine it may be necessary to challenge the validity of the award, it becomes necessary to determine: (1) whether to issue payment by the contractual or statutory deadline to forestall breach of contract arguments and prevent the accrual of assorted statutory penalties; (2) advise the insured of the questions regarding the validity of the award and committing to issue payment at the awarded amount once the award can be validated; or (3) issue payment to the registry of the court and seek a declaratory judgment regarding whether the award is valid?

If the payment is issued to the insured, there is little precedent for seeking its return. In the authors' experience, most carriers will not seek refunds of prior payments – whether accidental overpayment or issued subject to a reservation of rights - from policyholders. Thus, issuing a payment the carrier does not believe is validly owed, is likely not the best option for either party.

Where the policyholder questions the validity of the award or the amount of a payment, counsel for the insured can recommend the carrier's payment be accepted or returned. If accepted, the policyholder has waived the right to contest the amount issued.[77] If returned, counsel for the

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[72] *Barnes v. Western Alliance Ins. Co*., 844 S.W.2d 264, 268 (Tex.App. – Fort Worth 1992, writ dism'd by agr.) (quoting district court's Jury Instruction No. 14–C).

[73] *Savan Corp. v. Interstate Fire & Cas. Co.,* 1998 WL 826904 (N.D.Tex.,1998)(Not Reported).

[74] *Savan Corp. v. Interstate Fire & Cas. Co.,* 1998 WL 826904.

[75] *JM Walker v. Acadia,* citing *Providence Wash. Ins. Co. v. Farmers Elevator Co.,* 141 S.W.2d 1024, 1026 (Tex. Civ. App.-Amarillo 1940, no writ).

[76] *JM Walker* at 747.

[77] *See e.g*., *Rolison v. Puckett*, 145 Tex. 366, 198 S.W.2d 74, 78 (1946) ("A waiver is the intentional relinquishment of a known right,—or, ... acts as would warrant inference of the relinquishment of such right."); *In re Slavonic Mut. Fire Ins. Ass'n,* 308 S.W.3d 556, 563 (Tex.App.-Houston [14th Dist.] 2010, no pet.); *In re Universal Underwriters of*

policyholder should explain the rationale for the rejection of the payment and present the desired resolution options for all parties' consideration.

3. Which of the Appraised Damages Are Covered?

For both parties, the next question to answer is **what are the covered damages in the award?** Again, this requires turning first to the policy contract. The question in a property damage claim for example, is which of the awarded damages is the result of accidental direct physical loss? And, which of the awarded damages, if any, fall within an excluded cause of loss? The parties and their counsel often diverge at this point. Experts are retained and much consternation and improper manipulation of the appraisal process and litigation is sometimes attempted.
However, what is a better result for the policyholder? The efficient payment discussed above (at a now contractually agreed amount) or protracted litigation over whether an unsealed shingle is accidental direct physical loss caused by windstorm?[78]

There is value for all parties in obtaining an appraisal award where the damages are individually itemized. Where it is clear, the carrier can readily identify and pay awarded amounts for all covered items. For example, if there is a dispute as to the cause of some, but not all, of the interior water damage at issue, the carrier can easily identify and issue payment for all water damage constituting accidental direct physical loss from an event not excluded. Thus, reserving for further debate the damages not covered. Equally as important, a properly itemized award in this scenario assists the insured to understand, and consider for further debate, the items for which payment was not issued.

An appraisal award, in spite of arguments to the contrary, does not assess causation and does not, by the mere inclusion of a damage in the award, constitute a binding coverage determination. Thus, an award should clearly state its purpose and scope to the following effect:

> We the appraisers and umpire… have appraised and determined and do hereby agree the following are the reasonable and necessary costs to repair the damages at issue in the above referenced claim regardless of cause.

If not immediately apparent from the face of an award form or its accompanying estimate, it may be necessary to interview the appraiser or umpire for clarification of award specifics. A more formal request to the appraisal panel as a whole may also be in order. To avoid the appearance of collusion, influence, or attempting to set up fraud accident or mistake, any communications to the umpire or the panel should be shared with all parties to the appraisal. This too is an area where counsel for both parties can support the integrity of the appraisal process and assist to obtain the early, efficient, and correct answer for their client.

Texas Ins. Co., 345 S.W. 3d 404, 407 (Tex. 2011)(waiver of a contract provision requires intent, either the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right).

[78] As entire papers and lengthy court opinions have been – and no doubt still will be – written on this subject the authors will refrain from engaging in the debate. We merely provide here, a current example of lawyers debating the number of angels that can dance on the head of a pin.

This is not a plea that policyholders just accept appraisal payments as issued. Honorable policyholder counsel will analyze each award, the facts, and the policy and assist the carrier and/or its counsel to issue the correct payment. Honorable adjusters, carriers, and their counsel will do the same. This may, in a claim with complex damages and questions or an unclear award, require both parties question, listen, and work to assist the policyholder to receive the correct payment.

4. How Much Can Be Paid?

After confirmation there is a valid award, the date by which payment is due, and the covered items that were appraised, the final question is exactly **how much can be paid?** Should, for example, the carrier pay all ACV and RCV amounts for covered damages without reserving the RCV holdback until repairs are made? Most policies do not require such a payment until the repairs are completed, items replaced, or costs otherwise incurred. Texas law has not yet held that an appraisal award triggers RCV being owed.[79] Further, while additional living expenses are not owed until incurred (as a general rule) where ALE is going to be incurred as a result of repairs, is this a payment a carrier can issue in conjunction with an appraisal award as a means to resolve the entirety of the claim?

B. Is The Lawyer's Role Preventing or Promoting Litigation?

After the foregoing analysis, the carrier counsel has an additional inquiry to assist their client to make: is it possible, given the individual facts of the claim and appraisal award, for the award to become a platform to resolve the entirety of the claim?

The more significant question in this analysis is whether the carrier should issue payment for all awarded damages, regardless of coverage, and thereby waive the right confirmed in *Johnson* to reserve the causation/coverage question for the trial court:

> [I]n most cases appraisal can be structured in a way that decides the amount of loss without deciding any liability questions. As already noted, when an indivisible injury to property may have several causes, appraisers can assess the amount of damage and leave causation up to the courts. When divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it. When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong.[80]

In that event, should the policyholder elect to pursue litigation, the carrier has narrowed the amount and items in controversy to only items not addressed in the award. Thus, lending support for the position stated herein that counsel should be permitted to assist the appraisal panel in conducting as complete an appraisal 'of all damages at issue between the parties.' The carrier has also positioned itself for filing of an early motion for summary judgment that timely payment of the

[79] The authors are interested in any trial court holdings to this effect and would appreciate copies being sent by email to either or both of them.
[80] *State Farm Lloyds v. Johnson*, 290 S.W.3d at 894.

entire appraisal award establishes there cannot be, as a matter of law, any breach of the policy contract.[81] And, in so doing, likely forestalled any 'bad faith' litigation as well.[82]

Again, where the parties prior to appraisal (individually, through their appraisers, or on advice of counsel) ensure as complete a list as possible of damages/items is appraised, they have combined to create an award which, ultimately, is more strongly positioned to resolve the entirety of the disagreement between the parties. Query: would intentionally holding back a known or claimed damage from the appraisers for later dispute be a sufficient act of fraud or bad faith to undermine the appraisal? Or, as is more likely, would such an act constitute waiver of any consideration of that damage?

Ultimately, where carrier and policyholder elect appraisal, counsel for both should honor the original intent of the contractual provision and work within the contractual relationship to effect the correct contractual payment for all covered damages under the policy. Counsel for the insured is, perhaps, in the best position to effect such an outcome.

C. The Lawyer As Post Award Coverage Counsel

Post appraisal, counsel for both the carrier and the policyholder have a duty to honestly assess coverage for the damages awarded. Texas law is clear – appraisers' decisions or considerations are not binding as to coverage. Advocates to the contrary do a disservice to policyholders and carriers alike by undermining a strong dispute resolution tool which more and more carriers are accepting as an efficient means to resolve a disagreement on the amount of loss and issue the correct payment.

The policy directs the appraisers to decide the "amount of loss," not to construe the policy or decide whether the insurer should pay.[83] "As a general rule, the sole purpose of an appraisal is to determine the amount of damage. As a consequence, an appraisal clause does not permit appraisers to determine whether a loss was, in fact, total. However, the replacement cost of real property may be appraised, that is, estimated or evaluated."[84]

The *Johnson* Court also turned to Couch at note 23 of the opinion:

> In 15 COUCH ON INSURANCE § 213:44 ("An appraiser can make no legal determinations."); Br. of Tex. Windstorm Ins. Ass'n as Amicus Curiae Supporting Pet'rs at 8 ("In actual practice, appraisers and umpires are frequently unqualified to make complex liability determinations under an insurance policy. There is no requirement that they be licensed. Umpires are often lawyers or mediators with no particular experience or expertise in property insurance coverage or claims. Appraisers are often contractors who may be familiar with repair costs but are not qualified to make policy interpretations or to

[81] *Brashears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex. App. – Corpus Christi 2004); *Amine v. Liberty Lloyds of Texas Ins. Co.,* 2007 Tex. App. LEXIS 6280 (Tex. App. – Houston [1st. Dist.] 2007); *Waterhill Cos. Ltd. v. Great American Assurance Company,* 2006 U.S. Dist. LEXIS 15302.

[82] *Brashears v. State Farm Lloyds*, 155 S.W.3d 340; *Amine v. Liberty Lloyds of Texas Ins. Co.*, 2007 Tex. App. LEXIS 6280; *Waterhill Cos. Ltd. v. Great American Assurance Company*, 2006 U.S. Dist. LEXIS 15302.

[83] *State Farm Lloyds v. Johnson,* citing 15 COUCH ON INSURANCE § 210:42

[84] 15 COUCH ON INSURANCE §210:42 as quoted by the Supreme Court of Texas in *State Farm Lloyds v. Johnson,* 290 S.W. 3d at note 22.

> determine cause and origin of the damage being claimed. There is no explicit requirement that the appraisers and umpire inspect the property or read the policy, and many do not.").[85]

As delineated by the *Johnson* Court, appraisers can <u>consider</u> but cannot <u>decide</u> causation:

> [W]hen different causes are alleged for a single injury to property, causation is a liability question for the courts….Appraisers can decide the cost of repairs in this context, but if they can also decide causation there would be no liability questions left for the courts. By contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability…In this context, courts can decide whether water or mold damage is covered, but if they can also decide the amount of damage caused by each, there would be no damage questions left for the appraisers. The same is true when the causation question involves separating loss due to a covered event from a property's pre-existing condition. Wear and tear is excluded in most property policies…because it occurs in every case. If State Farm is correct that appraisers can never allocate damages between covered and excluded perils, then appraisals can never assess hail damage unless a roof is brand new. That would render appraisal clauses largely inoperative, a construction we must avoid. Indeed, appraisers must always consider causation, at least as an initial matter. An appraisal is for damages caused by a specific occurrence, not every repair a home might need. When asked to assess hail damage, appraisers look only at damage caused by hail; they do not consider leaky faucets or remodeling the kitchen... Any appraisal necessarily includes some causation element, because setting the "amount of loss" requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else. This of course does not mean appraisers can rewrite the policy. No matter what the appraisers say, State Farm does not have to pay for repairs due to wear and tear or any other excluded peril because those perils are excluded. But whether the appraisers have gone beyond the damage questions entrusted to them will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award.[86]

Thus, the conclusion for the "Post Appraisal Coverage Counsel" is to confirm the information known about the damages, if any, which remain in dispute and assist carrier and policyholder to assess whether the cause of the remaining disputed damages is accidental direct physical loss, and whether it is otherwise excluded. It is not, as some attempt, to take the position that the award is owed in its entirety and any payment short of the full awarded amount is a breach of contract done in bad faith. It is not, as some have, to sue the carrier on the premise that participation in appraisal when the cause of the appraised damages was in dispute was a fraudulent misrepresentation made in bad faith. After all, the Supreme Court of Texas stated in *Johnson*:

> "When divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it. [*See, e.g., Lundstrom v. United Servs. Auto. Ass'n–CIC*, 192 S.W.3d 78, 87–89 (Tex. App.-Houston [14th Dist.] 2006, pet. denied) (rejecting argument that appraisal is barred "whenever causation factors into the award," and affirming appraisal in which appraisers separated water damage from mold damage).] When an

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[85] *State Farm Lloyds v. Johnson*, 290 S.W. 3d at note 23.
[86] *State Farm Lloyds v. Johnson, at 893.*

> insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong. [*Am. Cent. Ins. Co. v. Bass,* 90 Tex. 380, 38 S.W. 1119, 1119–20 (1897).] And when the parties disagree whether there has been any loss at all, nothing prevents the appraisers from finding "$0" if that is how much damage they find."

V. What Effect Does the Appraisal Award Have on Breach of Contract and Bad Faith Allegations?

Courts have said appraisal does not necessarily resolve Insurance Code and Deceptive Trade Practices Act causes of action if there are legitimate questions remaining. Thus, post appraisal counsel for both parties must accurately assess whether there are further items in dispute between their clients.

Further – courts have held appraisal can still be invoked after denial of a claim based on the damage being excluded. Specifically, the Beaumont Court of Appeals concluded that an insurer's denial of a claim based on causation does not waive the right to invoke appraisal to determine the amount of loss or cost of repair.[87] In *In re Southern Insurance Company,* the insurer denied a homeowner's claim seeking coverage for damage allegedly caused by Hurricane Ike. The insurer denied the claim as caused by long term leakage and not Hurricane Ike as claimed by the insured. After suit was filed, the insurer moved to invoke appraisal and the trial court denied the motion. The insurer then filed a petition for writ of mandamus.

The Beaumont Court of Appeals observed that the policy provides that "no provision of this policy may be waived unless the terms of this policy allow the provision to be waived" and that the "appraisal clause did not allow for the forfeiture of that right." The insured argued that the insurer must agree that the loss is covered before it may "fail to agree" on the amount of the loss. But the court analyzed the recent *State Farm Lloyds v. Johnson* case and concluded that appraisal can go forward and the parties can litigate causation after the amount of loss is determined through appraisal. Accordingly, the court conditionally granted the petition for writ of mandamus instructing the trial court to vacate its order denying the insurer's motion to invoke appraisal and to allow the appraisal to go forward.

Have we as an industry bought into this issue the position of: *If the carrier was wrong, it must be bad faith. NO.* That is not bad faith. The concept of appraisal is that reasonable minds can differ – but they can contractually agree to a fair resolution process. The underlying principal is not a failure to pay a claim when it is reasonably clearly owed. It is inherent in the need for appraisal that the claim is not reasonably clear.

Consider the following award: $1500 for repair of the fence and roof at $750 each. There is an applicable $500 deductible. And, the policy excludes coverage for the fence. The award payment: $250. In this case, the carrier was wrong by $300. The question becomes when the carrier should have known the covered damages, i.e., reasonable costs of repair, were $750 and not $450. In this real case, the insurer offered $5,000. The plaintiff's response was outrage and litigation.

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[87] In *In re Southern Insurance Company,* No. 09-11-00022-CV (Tex.App. – Beaumont 2011).

What, if anything, can the attorneys for the parties do to prevent this result? Should the insured's attorney work to this end? Or, should they set up the carrier for the pure bad faith case secondary to an appraisal?

Argument:

> An appraisal award does not establish a breach. It establishes a dollar amount of damage – nothing more. It does not establish "you should have paid…" It establishes that "as of now, this is the reasonable and necessary cost to repair damage." An overreaching appraisal panel could attempt to establish coverage. But, as the Supreme Court of Texas has said in *Johnson*, that is not a binding decision on the parties. The dollar amount of damages is, however, binding on the parties. Thus, it is ALL the award establishes.
>
> The term of a contract that sets the method for resolution of a dispute establishes a duty to pay an amount under the contract. Not a breach. Once that duty is established, a breach can occur if the established amount is not timely paid. One cannot imply the reverse.

VI. Conclusion

Where attorneys for carriers and policyholders try to manipulate, stretch, or otherwise game the system to our individual single-minded result-oriented goals, we risk losing an underutilized but efficient dispute resolution tool. Appraisal is a tool which can result in payment of all covered damages at a contractually agreed and binding amount in less than 60 days rather than three-plus years of protracted and unnecessary litigation expenses.

For example, the first Hurricane Ike case tried in Orange County resulted in a judgment of "actual damages of $7,833.01 …18% statutory interest of $4,300.27 … and prejudgment interest in the amount of $713.56."[88] After analyzing the post-trial briefing of the parties, the court found the "plaintiff made excessive demands for damages which were unreasonable and in bad faith … and caused unnecessary litigation costs, including attorneys' fees and court costs." The court then awarded $3,133.20 in attorneys' fees representing "40% of the amount recovered."[89] One wonders if those plaintiffs would have preferred receiving the $7,833.01 three years earlier or the nothing they are likely to recover after fees and expenses are paid off the top of their verdict.

All of which was likely less than the costs incurred by the policyholder in achieving the verdict. Similarly, the first Hurricane Ike case tried in Harris County (more than three years after the date of loss) resulted in a verdict of $20,960.41 for violation of the Texas Insurance Code admonition against "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the liability under the insurance policy… had become reasonably clear"[90] and attorneys' fees of $132,900. In spite of the jury finding some amounts owed for interior

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[88] *Joe Ware vs. United Fire Lloyds*, No. D-100048-C in the 260th Judicial District Court of Orange County, Texas; Final Judgment.
[89] *Ware vs. United Fire Lloyds*; Final Judgment.
[90] *Battle v. Cypress Texas Lloyds Et. Al.*; Charge of the Court; Question 5i which was answered "yes" as to the carrier and independent adjusting company Crawford and Company.

($4,113.60) and exterior ($6,846.81) property damage, the entire verdict is at risk of reversal on appeal.

Had each of these cases been allowed to go to appraisal, the insureds might have been paid the jury identified property damage years before their respective jury verdicts. That is not, of course, a guarantee since in each of these cases there were questions of both the costs to repair damages owed and the coverage for some of the damages at issue. Thus, some issues may have been litigated even after an appraisal; but the amount of damage would have been quantified far earlier in the process. The parties and their counsel would have had a much better idea early in the case whether protracted litigation, and its related expense, was worth the delay in resolution and the limited amounts of damage that were actually determined to be at stake.