

SPLIT Decisions

The outcome of court cases concerning appraisals varies from state to state for insurers.

by Ronald E. Tigner

Weather catastrophes along the Gulf Coast in 2005 from hurricanes Katrina and Rita, and from Hurricane Ike in 2008, produced a significant number of lawsuits by insureds, alleging a smorgasbord of bad acts by their insurers.

Driving much of this litigation is heavy mass media advertising by lawyers whose tactics have been to attempt to extract cost-of-defense settlements.

These tactics have been met with demands for appraisal by insurers seeking to reduce excessive legal fees. Predictably, insureds opposed appraisal on a number of grounds, primarily waiver.

When their legal arguments failed or were rejected by the courts, they often designated one of their counsel's preselected appraisers, and then moved for the appointment of their own sympathetic umpire, in hopes of obtaining a favorable award and then boot-strapping it into a bad faith claim. They then argued to the judge/jury that impar-

tial appraisers found the amount offered by the insurance company was inadequate and such conduct should be punished.

Given recent weather catastrophes along the East Coast, such as Hurricane Irene in August 2011, these issues and tactics are likely to surface in areas away from the Gulf Coast.

We have identified issues and areas where the courts have developed a consensus and where they continue to struggle with how to address these issues.

Some courts hold that appraisers cannot consider causation, while others decided that they can.

Rejection-of-Waiver Arguments

Most courts have allowed a reasonable time after an impasse has arisen (that is, no chance of further negotiations) before making a demand for appraisal. States such as Texas, Florida, Mississippi, Virginia and New York appear disinclined to find waiver of an insurer's right to appraisal. A Texas intermediate appellate court, in *In re Slavonic Mutual Fire Inc. Co.*, held that a demand for appraisal made six days after the insurer received a demand letter from its insured was timely. However, a Pennsylvania court, in *Kestler v. State Farm Fire and Casualty Co.*, held that a demand for appraisal by an insurer 23 months after an impasse was reached had been waived.

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Key Points

- ▶ **What Happened:** Weather catastrophes have led to the use of appraisals to settle claims.
- ▶ **At Issue:** U.S. and state courts' rulings vary widely when it comes to appraisals.
- ▶ **What Needs to Happen:** The jurisdiction, venue and who will be appointed umpire need to be closely examined before a decision is made to pursue appraisal.

fully argued, in *Indian Chef Inc. v. Fire and Casualty Insurance Company of Connecticut*, that because it had already repaired the damage there was nothing for an appraiser to view; therefore, appraisal was not appropriate. However, this argument was not successful in *In re Certain Underwriters at Lloyd's*.

Courts Stay Lawsuits

To conserve judicial resources, most courts stay legal proceedings until the appraisal process is completed. However, at least one Texas federal court case and one Florida state court case have held that such right to appraisal will not be enforced unless there has been a demand for appraisal prior to the insured filing a lawsuit, although Florida decisions have gone both ways. This issue is currently before the Texas Supreme Court, in *In re Cypress Texas Loyds*.

Given the public policy arguments in favor of nonjudicial resolutions of disputes, such as appraisals and arbitrations, it seems logical that courts would abate potentially expensive litigation until there has been an appraisal award.

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Causation in Appraisal

Some courts hold that appraisers cannot consider causation, while others decided that they can. Some courts have decided that appraisers can consider causation, but that causation can be relitigated with respect to coverage. Texas, in *State Farm Lloyds v. Johnson*, held that appraisers must always consider causation, at least as an initial matter. A U.S. District Court in New York State ruled in *Indian Chef Inc. v. Fire & Casualty Insurance Company of Connecticut* that appraisers can consider causation, but their decision is not definitive.

Delaware, on the other hand, holds that appraisers can decide causation, as decided in *Cigna Insurance Co. v. Didimoi Property Holdings, N.V.* A Florida court decided in *Johnson v. Nationwide Mutual Insurance Co.* that causation is a coverage question when an insurer wholly denies that there is a covered loss; but when the insurer admits there is coverage, it becomes an amount-of-loss issue for the appraisal panel.

By contrast, courts in Tennessee, Maryland and a scattering of other states hold that determining

causation is not properly within the scope of the appraiser's task. *Merrimack Mutual Fire Insurance Co. v. Batts*, a Tennessee ruling, is an example. Mississippi courts are undecided whether appraisers should only consider the covered damage value rather than the amount of the entire loss, as seen in *Pearl River v. RSUI Indemnity*.

Other courts, such as Florida (*Liberty American Insurance Co. v. Kennedy*), Minnesota (*QBE v. Twin Homes*) and Connecticut (*Gordon v. Amica Mutual Insurance Co.*) appear to give appraisers broad latitude in making awards when causation is disputed.

Qualifications of Appraisers

Another contentious area is the impartiality of the other party's appraiser. Somewhat surprisingly, courts have uniformly rejected challenges premised on pre-existing relationships, financial interest in the outcome of the award or the fact that an appraiser is a public adjuster, has worked for insurance companies, is a lawyer or has no construction experience. Historically, courts have held arbitrators to a higher standard than the courts in the area of appraisal,

even in states which make little distinction between arbitration and appraisal.

As a rule of thumb, unless a party has very strong evidence of bias, attacks on appraiser qualifications will likely fail because the courts recognize that each side's appraiser will act as an advocate for the party appointing them. It is up to the umpire to decide who is right and who is wrong.

One exception to this rule may arise in situations where a particular appraiser is appointed again and again. In *Sterling Spinning & Stamping Works Inc. v. Knickerbocker Insurance Co. v. Chicago Fire and Marine*, the court held that an appraiser selected by Chicago Fire 1,792 times as an estimator, and an additional 92 times as an appraiser for the same insurance company between 1922 and 1928, and earning \$250,000, which represented 79% of his total income for that period, was not disinterested. This is an issue one party may wish to challenge an opposing appraiser on, but only once supporting evidence has been developed.

Unfortunately, the few courts that have been faced with the issue were

Appraisal Suggestions

Look Closely at Initial Estimates: A third party should closely analyze estimates to make certain they will withstand close scrutiny before agreeing to binding appraisal.

Select the Right Appraiser: The appraiser should have field-specific experience—in engineering, architecture or construction—as opposed to an insurance adjuster. An impartial umpire is likely to give more credence to a professional than someone associated with the insurance business, such as a public adjuster or another professional named by opposing counsel.

Determine Who Selects the Umpire: The typical appraisal clause provides that if appraisers cannot agree on an umpire, a court in the local jurisdiction will select the umpire. Because attacks on the bias of the other side's appraiser are unlikely to succeed, selection of the umpire will often be outcome-determinative.

Examine Whether Causation Will Be a Critical Issue: If the claim arises in a venue requiring appraisers to determine causation, and such a finding is binding, appraisal might not be a good decision, especially if the claim is pending in an unfavorable venue.

Determine Difficulty in Vacating an Appraisal Award: Most venues impose high standards to overturn an appraisal award.

Decide if Appraisal Will Resolve the Case: Appraisal is not arbitration or mediation. Its scope can be quite limited, and it may not resolve the entire case or necessarily reduce legal fees or result in a quicker resolution.

Consider Filing Motions Contesting the Impartiality and Competence of an Umpire to Preserve the Issue for Appellate Review: Appellate courts often avoid issues by noting that the issue was not preserved for appeal.

reluctant to permit discovery into it. *Schreiber v. Pacific Coast Fire Ins. Co.*, a Maryland decision, is an example.

Attacks on Umpires

Theoretically, the impartiality of an umpire should deserve more judicial scrutiny but recent cases do not support that conclusion. Mere conclusory attacks with minimal evidence were rejected in *Hemingway v. State Farm Fire and Casualty Co.* A Texas state court judge recently rejected an objection to a former judge appointed as an umpire on the basis of receipt of past political contributions from the opposing lawyer.

Enforcing and Modifying Awards

While this area of appraisal law is not fully developed, some trends have been noted.

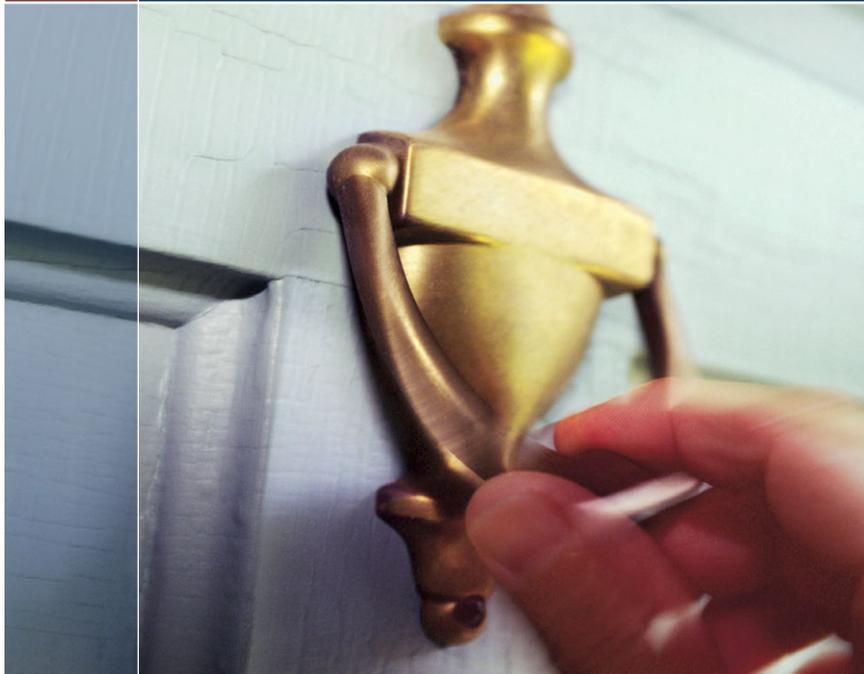
In Florida, an insurer can contest whether such claims are covered under its policy, per a decision in *Florida Insurance v. Olympus*. A Pennsylvania court rejected an attack on an appraisal award because it did not itemize the damages. Whether that decision, *Riley v. The Farmers Fire Insurance Co.*, was based on law or on the fact that only \$8,000 was involved is unknown.

Bad Faith Claims

Bad faith claims usually involve a fact-intensive inquiry with factors such as the length of time between the claim being reported, the claim's magnitude, whether the insurer paid the undisputed portion of the claim, when the demand for appraisal was made and how promptly the insurer paid the appraisal award (see *Royal Marco Point I v. QBE*).

A recent case from the 5th U.S. Circuit Court of Appeals, considering a Texas case, *Blum's Furniture v. Certain Underwriters at Lloyds*, held that when the insured accepts the prompt payment of the appraisal award, the insured is estopped from pursuing additional claims. **BR**

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