

Loss at Separate Buildings Required “Building Specific” Coverage Decision Before Loss Appraisal

In Florida, as in many U.S. jurisdictions, appraisal is not available to resolve coverage disputes. Appraisal may be invoked solely for the limited purpose of determining the amount of loss that is otherwise covered under the policy. Appraisal, therefore, is premature in losses where coverage issues remain. In Florida, a court must first resolve any coverage disputes by dispositive motion or trial before a loss may be appraised. One of the byproducts of these general appraisal principles is that policyholders will attempt to fashion arguments that any loss issues pending at the time of the policyholder’s appraisal demand are solely related to the valuation of damages sustained by the insured property.

The recent *Pernas v. Scottsdale Ins Co.*, 2016 WL 471949, Civil Action No. 1:15-cv-21506 (S.D. Fla., February 8, 2016), is another example of a policyholder’s effort to categorize all remaining loss issues as ones related to the valuation of damages sustained (i.e., the loss amount). In the *Pernas* case, the U.S. District Court for the Southern District of Florida applied Florida law and denied the insured’s motion for summary judgment seeking to compel appraisal of losses sustained at two of her insured buildings. Although the insured argued that the insurer accepted coverage for the loss leaving only the loss amount in dispute, in actuality, the insurer only agreed to provide coverage for a portion of claimed damage at one of the two buildings. The insurer wholly denied coverage for any damage sustained at the second separate building. Under such circumstances, the court held that because it could not resolve the pending coverage issues on motion, the matter was not ripe for appraisal.

The Loss

Scottsdale issued one named-peril policy to the insured, Elena Pernas (the insured), providing coverage for two separate commercial buildings located at 221 and 211 N.W. 7th Avenue, Miami. The policy contained a standard appraisal provision that either party could invoke in the event they disagreed on the property’s value or the loss amount. The provision at issue also provided “If there is an appraisal, we still retain our right to deny the claim.”

The insured filed a claim under the policy alleging that both the 221 and 211 buildings sustained significant water damage caused by accidental water discharge from cracked or broken pipes. Scottsdale assigned the same claim number to both properties. Scottsdale’s investigation determined that the 221 building was damaged, in part, by water damage covered by the policy, but that the 221 building had also sustained damage resulting from excluded causes of loss such as wear and tear; and faulty, inadequate or defective workmanship, repair, construction and/or maintenance. Scottsdale issued a check representing the covered portion of claimed damage.

With respect to the second building, the 211 building, Scottsdale refused to cover any of the damage sustained. First, Scottsdale determined that the loss at the 211 building was caused by wear and tear; and faulty, inadequate or defective workmanship, repair, construction and/or maintenance – all of which are expressly excluded by the policy. Second, the insured failed to comply with her post-loss obligations under the policy to protect the property from further damage and cooperate in the investigation of the claim.



Richard M. Mackowsky

Attorney

rmackowsky@cozen.com
Phone: (215) 665-2064
Fax: (215) 665-2013

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After Scottsdale refused to submit to appraisal, the insured filed an action for non-monetary relief, asking for: (1) a declaratory judgment establishing that the parties' disagreement is ripe for appraisal; (2) an order compelling an appraisal; and (3) a declaratory judgment that the loss suffered at the 211 building was caused by a peril covered under the policy. The insured moved for summary judgment seeking a determination that appraisal was, in fact, appropriate under the circumstances. The district court found that the loss was not yet ripe for appraisal, as there were remaining coverage issues that could not be resolved based on the evidence before the court at the summary judgment stage.

The Insured Argued That Coverage Is A “Loss Specific” Determination in Support of Appraisal

In support of appraisal, the insured argued that because Scottsdale acknowledged coverage for one of the two buildings at issue in the claim – the 221 building – a coverage determination had been made and the entire claim was now ripe for appraisal. According to the insured, the two buildings constituted one property under the policy. As such, if Scottsdale found coverage for a loss to either of the two buildings, that coverage determination applied to the entire loss, including the other building. The insured, therefore, argued that “what remained is simply a dispute over the amount of loss, which should be referred to appraisal. Otherwise, ... a policyholder ... would have to file separate claims for the dwelling, any appurtenant structures or personal property.” *Pernas*, 2016 WL 471949 at * 2. The court characterized the insured's argument as “loss” centric, rather than “property” centric: “For *Pernas*, coverage is not building specific, but loss specific – unless each building is insured under a separate policy.” *Id.*, 2016 WL 471949 at * 2.

The Insurer Argued That Coverage Is A “Building Specific” Determination in Opposition to Appraisal

Scottsdale argued that, though the two separate buildings at issue are insured under the same policy, each property, as its own entity, is potentially subject to unique coverage issues. Thus, because Scottsdale completely denied coverage for the losses to the 211 building, appraisal of the 211 building losses was not available. Rather, appraisal would only be appropriate after resolution of the causation and post-loss obligation issues on which the 211 building coverage denial was based. In its application of Florida law, the court agreed with Scottsdale's reasoning that the two buildings were two separate properties, requiring their own respective coverage determinations:

... the 221 and 211 buildings are listed on separate declarations pages, each subject to a different premium and coverage amount. As such, the two properties are effectively covered by separate insurance contracts, meaning that the amount recoverable for a loss affecting one property must be determined independently of any loss affecting the other. An independent coverage determination for each property is thus required.

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Id., 2016 WL 471949 at *3 (quoting *Florida Ins. Guar. Ass'n v. B. T. of Sunrise Condo. Ass'n, Inc.*, 46 So. 3d 1039, 1042 (Fla. 4th DCA 2010)) (citing *Anderson Mattress Co. v. First State Ins. Co.*, 617 N.E.2d 932 (Ind. App. 5th Dist. 1993)).

The court concluded that it was unable to decide on motion whether coverage was available under the policy for the damage sustained by the 211 building. Accordingly, appraisal was premature, and the court denied the insured's summary judgment motion.

Conclusions

There may be instances where the line is blurred between quantum issues (subject to appraisal) and coverage issues (not subject to appraisal). This, however, was not such an instance. This case is more in line with other cases in which the policyholder attempted to fast track a disputed claim to appraisal and a damages award, in order to avoid known coverage defenses. Had the insured's argument prevailed in this case, an insurer's decision to cover, and pay an undisputed amount toward, any part of a loss could potentially constitute a determination of coverage for the entire loss. This would effectively make the remaining loss ripe for appraisal, regardless of the number of properties or type(s) of loss at issue in the claim. The submission of a loss to appraisal prematurely stands to either: (1) waive coverage defenses with respect to the remaining unpaid and

still disputed portions of the claim; or (2) improperly convert coverage issues into factors for consideration in the appraisal's valuation of the amount of loss. As such, the court properly rejected the insured's efforts to compel appraisal, irrespective of whether the insured's ultimate goal was to resolve the remaining coverage issues in appraisal; or to avoid the remaining coverage defenses altogether.
