Insurance Disputes and the Appraisal Process: *The Good, The Bad ... and Sometimes Ugly Consequences*

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Tornadoes and Thunderstorms

Tornadoes accounted for **37.2%** of **insured losses** from 1994 to 2013 according to Property Claim Services (PCS). Severe thunderstorms (which include tornadoes) are by far, the most costly natural disaster losses in the U.S.

When **$12.3 BILLION** is involved, you can be sure that a LOT of people are going to be getting in line for a cut of the action!
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Is ANYONE ever truly “happy” about an insurance settlement?


Commonly referred to simply as “the 165 lines,” the standard fire insurance policy of the state of New York has served as the foundation for all property insurance policies that cover fire in NY and most other states since its inception in 1943. In New York an insurer cannot write a fire insurance policy that is more restrictive than the 165 lines by law.

Restrictive Covenant of the 165 Lines

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twenty-four months next after inception of the loss.

The Appraisal Clause of the 165 Lines

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Step 1

There has to be an actual DISPUTE on the amount of loss. Generally, most Courts have agreed that the “dispute” must be on damages that are solely related to the event that the claim was initially submitted under.

Where does the “dispute” start?

Most states have statutory requirements that the claim be “settled” within a prescribed period of time. Insurance companies “adjust” the loss by using computerized estimating systems to “estimate” the loss amount and issue payments based on the results.

Highly dependent on the expertise of the person inputting information into the estimating program.
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HAIL CLAIM

Insurance Estimate: $2,797.45
(RCV and Pre-Deductible)

PA Estimate: $107,818.76

Policy Limits: $122,221.00

Step 2

Each side selects a “COMPETENT” and “DISINTERESTED” appraiser.

COMPETENT:
“Duly qualified; answering all requirements; having sufficient ability or authority…”
(Black’s Law Dictionary – 5th Edition)

Building Contractors,
Public Adjusters,
Independent Adjusters, etc.

DISINTERESTED:
“Not concerned, in respect to possible gain or loss, in the result of the pending proceedings or transactions; impartial, not biased or prejudiced.”
(Black’s Law Dictionary – 5th Edition)

Building Contractors - ?
Public Adjusters - ?
Independent Adjusters - ?
Attorneys - XXX

Florida’s Fifth District Court of Appeals:
Florida Ins. Guar. Assn. v Branco,
2014 WL 4648208, 2014Fla.App.LEXIS 14602

“The policy provision, which requires a “disinterested appraiser”, expresses the parties’ clear intention to restrict appraisers to people who are, in fact, disinterested. Given the duty of loyalty owed by an attorney to a client, we conclude that attorneys may not serve as their clients’ arbitrators or appraisers when “disinterested” arbitrators or appraisers are bargained for.”

Step 3

Once appraisers are selected, the Insured and the Carrier are required to step back and stay out of the process. Any ‘direction’ by either can be enough to invalidate the proceedings.
Step 4

The appraisal clause states that the appraisers must select an “Umpire” first.

CRITICAL DECISION

“The appraisers shall first select a competent and dis-interested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located.”

(Race to the Courthouse?)

Step 5

“What does “appraise the loss” really mean?”

“If the appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire.”

Texas Supreme Court: State Farm v. Johnson, 290 S.W. 3d 886 (2009)

“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 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.”

Is determining “causation” a de facto determination of “coverage”?
Conflicting opinions?


FLORIDA – Citizens Prop. Ins. Corp v Denetrucci, 2014 WL 1225124, So. 3d (Fla. 4th DCA. March 26, 2014) – “Causation is a coverage issue and only for the Court’s consideration when the underlying facts include a complete coverage denial by the insurer.”

GEORGIA – Lam v Allstate Indemnity Co., 2014 WL 1228118, S.E. 2d (Ga. App. March 26, 2014) – Carrier accepted that there was covered wind damage to roof but dispute was on how much of the roof was actually damaged. Court concluded that dispute was one of coverage and not appropriate for appraisal.

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Step 6

Establishing the Award

“An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss.”

Step 7

Does “Paying the Award” end it?

TEXAS – Michels v. Safeco Ins. Co of Indiana, No. 1:12-CV-00511-SS (W.D. Tex. March 13, 2013) – After upholding the validity of the appointment and award, the court held timely compliance with the appraisal award defeated all of the insured’s causes of action. The insureds tried to argue that they had not accepted the award and therefore were entitled to continue pursuing their claims, but the court summarily rejected that argument stating: “If an insured could simply avoid the outcome of the appraisal process by refusing to accept payment of the award, appraisals would be meaningless exercises in futility.”

Not so fast there!

OKLAHOMA – Massey v. Farmers Ins. Group, 1992 OK 80, 837 P.2d 880 (Supreme Court of Oklahoma, as Corrected June 22, 1992.) “Because Art. 2, Sect. 19 of the Oklahoma Constitution provides for the right to a jury trial to be and remain inviolate, we likewise conclude that legislative narrowing of the claims process is not effective to deny a party of their right to have all fact issues decided by a jury. … We, therefore, conclude that a court-appointed umpire’s damage appraisal under the statutorily-mandated provision of a fire insurance policy … has no preclusive effect on the party who did not demand the appraisal process.”

The “UGLY” Consequences


Summary:
An appraisal panel’s determination that minor damage (less than 2% of the total area) to the siding on each of 20 buildings required the REPLACEMENT of ALL of the siding on ALL of the buildings because no color match could be made to the remaining pieces.

Compare to Greene v. USAA, 2007 Pa. Super. 344, 336 A.2d 1178 (2007) – Trial Court record – “To utilize Appellants logic would necessitate replacing all siding when one piece of siding is damaged, or an entire door when a door knob is damaged. It defies common sense.”

“UGLY” – Part Deaux

FLORIDA – Cammarata v. State Farm Florida Ins. Co., No. 4D13-185, Florida Dist. Ct of Appeals, 4th District

Summary:
A “Bad Faith” claim MAY proceed “any time the insurer dares to dispute a claim, but then pays the insured just a penny more than the insurer’s initial offer to settle.”
Where do we go now?

- Many Carriers are removing the appraisal clause completely from their policies.
- Re-writing the appraisal clause to be much more instructive and directive.
- Organizations forming with representatives from both sides of the process to outline processes and procedures to follow.

Key Factors

- Try to clarify WHAT is in dispute before invoking appraisal.
- Make sure the appraisers you retain are fully competent and capable to address the specific requirements of your jurisdiction.
- DOCUMENT EVERYTHING!