# LET'S MAKE A DEAL: INSURANCE APPRAISAL THE WHO, WHAT, WHEN, WHERE, AND HOW

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**March 30, 2007**

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## I. INTRODUCTION

An appraisal provision is common in most forms of property insurance policies. A party to a typical property insurance policy has a right to demand an appraisal, which is the procedure in which the value of lost or damaged property is determined. The purpose of an appraisal provision is to afford a simple, speedy, inexpensive, and fair method of determining the loss or damage resulting from the happening of a contingency insured against. *See Fire Ass'n of Philadelphia v. Ballard*, 112 S.W.2d 532 (Tex. Civ. App.—Waco 1938, no writ).

An appraisal provision requires that certain disputes between the insurer and insured relating to the policy be submitted to a process called appraisal. A dispute invoking the appraisal process typically arises out of a post-loss disagreement on the value of the property or the amount of the loss and is triggered by a written demand by either party for an appraisal. Appraisal is an alternative to the parties pursuing litigation to determine the value of the post-loss property or the extent of the loss of the property.

Appraisal establishes a procedure for the insurer and insured to follow in order to resolve, by disinterested parties, disputed values of the post-loss property. Appraisal is a contractual remedy, binding on both parties, and is a fair and efficient way to settle many valuation disputes. *See Breshears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex. App.—Corpus Christi 2004, pet. denied); *General Star Indem. Co. v. Spring Creek Village Apartments Phase V, Inc.*, 152 S.W.3d 733 (Tex. App.—Houston [14th Dist.] 2004, no pet.). However, appraisal can only be applied to valuation disputes between the parties, not coverage disputes. When coverage is in dispute, appraisal can be used to address valuation issues even when the coverage dispute leads to litigation.

In this paper, the author will discuss what appraisal entails, including the differences between appraisal and arbitration; how to demand appraisal; when a party waives its right to appraisal; when appraisal is appropriate; and how to attack an appraisal award, including whether the award was (1) unauthorized, (2) the result of fraud, accident, or mistake, or (3) not made in substantial compliance with the requirements of the policy.

## II. WHAT IS APPRAISAL?

Insurance appraisal is a means of alternative dispute resolution and it distinguishable from arbitration. *Hartford Lloyd's Insurance Co. v. Teachworth*, 898 F.2d 1058, 1061 (5th Cir. 1990); *see In Re Allstate Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002). An arbitration agreement may encompass the entire controversy between the parties or it may be limited to a particular factual or legal dispute. *Teachworth*, 898 F.2d at 1061-62. "[A]n appraisal determines only the amount of loss, without resolving issues such as whether the insurer is liable under the policy." *Id*. at 1062. The United States Supreme Court noted the difference between arbitration and appraisal in *Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910), as follows:

> An arbitration implies . . . a dispute, and involves ordinarily a hearing . . . . The right to notice of hearings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute . . . But when . . . the parties had agreed that one should sell and the other should buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute . . . . This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate.

Andrew L. Pickens, *Appraisement: An Old But Effective Form of ADR for Contract Liabilities*, 60 TEX. B.J. 18 (1997) (quoting *Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910)).

Arbitration is a quasi-judicial proceeding that includes formal hearings, notice to parties, and testimony of witnesses. *Teachworth*, 898 F.2d at 1062. Arbitration determines the rights

and liabilities of the parties. *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193 (Tex. 2002). While appraisal is a less formal process than arbitration, appraisal binds the parties to determine the extent of the loss or amount of the loss. *Id*.

Appraisal is not designed to resolve the issue of liability; rather it is only used to determine the amount of liability. Andrew L. Pickens, *Appraisement: An Old But Effective Form of ADR for Contract Liabilities*, 60 TEX. B.J. 18 (1997). Texas courts have recognized appraisal as a means of determining the value of a loss ever since the 19th century opinion *Scottish Union & National Insurance Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888) (holding "here the stipulation … only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts").

Appraisal is designed to effectively and cost efficiently resolve disputes over the amount owed on an insured loss. *See Fire Ass'n of Philadelphia v. Ballard*, 112 S.W.2d 532 (Tex. Civ. App.—Waco 1938, no writ).

"Under Texas law it is clear that an insurance appraisal which only determines the value of a loss is not an arbitration." *Teachworth*, 898 F.2d at 1062 (citing *Standard Fire Insurance Co. v. Fraiman*, 514 S.W.2d 343, 344 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Huntington Corp. v. Inwood Construction Co.*, 348 S.W.2d 442, 444 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.); 7 TEX. JUR.3d Arbitration and Award 1 (1980); 46 TEX. JUR.3d Insurance Contracts and Coverage 466 (1986)).

## III. DEMANDING APPRAISAL

A party must demand appraisal by written request to the other party as required by the insurance policy.[1] A typical appraisal provision in a property policy provides as follows:

> Appraisal. If you and we fail to agree on the actual cash value, amount of loss, or cost of repair or replacement, either can make a written demand for appraisal. Each will then select a competent, independent, appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers will then set the amount of loss, stating separately the actual cash value and loss to each item.
>
> If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these three and filed with us will set the amount of loss. Such award shall be binding on you and us.

### A. Loss Conditions

#### 1. Appraisal for Physical Damage Loss

> If you and we disagree on the amount of the "loss", either may demand an appraisal of the "loss". In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss." If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If we submit to an appraisal, we will still retain our right to deny the claim.
>
> Insurance Services Office, Inc., Business Auto Coverage Form CA 0001 (07/97).

[1] A standard Business Auto Policy appraisal provision provides as follows:

Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally.

The appraisal provision states "the time limits for naming appraisers and umpires, how that it is to be accomplished, who pays, and appointment of an umpire." Mark A. Ticer, *A Primer on Appraisal in Texas or One of the Most Frequently Abused and Misused Provisions in an Insurance Policy*, 2004 Insurance Law Institute 6, *available at* http://www.ticerlawfirm.com/appraisalprimer.jsp. Additionally, insurers may require the parties to complete a memorandum of appraisal which includes information such as: "the property damaged, the date of loss, the cause of the loss, and sometimes an oath for an appraiser to sign." *Id*. However, note that the policy language does not require the parties use a memorandum of appraisal. *See id*.

"A proper memorandum specifies the parameters of an appraisal including the appraiser's duty of only affixing the amount of loss." *Id*. The memorandum may prevent the insured from later accusing the appraiser or umpire of determining causation, liability, and/or coverage. *See id*. Additionally, the memorandum may include language requiring the appraisers and umpires are disinterested, impartial, and competent. *See id*.

## IV. WHO WAIVES APPRAISAL

Several Texas courts have examined whether a party waives its right to an appraisal under an insurance policy. *See In re State Farm Lloyds, Inc.*, 170 S.W.3d 629 (Tex. App.—El Paso 2005, no pet.); *In re Clarendon Insurance Company*, 2004 WL 2984916 (Tex. App.—Fort Worth 2004, mandamus denied) (unpublished opinion); *see also Springfield Fire & Marine Ins. Co. v. Cannon*, 46 S.W. 375 (Tex. Civ. App. 1898, no writ) (holding acceptance of a proof of loss waives appraisal); *Gulf Ins. Co. v. Carroll*, 330 S.W.2d 227, 231 (Tex. Civ. App.—Waco 1959, no writ) (holding retaining a proof of loss for unreasonable time without demanding appraisal waives appraisal); *Northern Assurance Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S.W. 239 (Tex. Civ. App.—1895, no writ) (holding insurer who demands appraisal and fails to participate any further waives the right to appraisal). Waiver is the intentional relinquishment of a known right. *Labrado v. County of El Paso*, 132 S.W.3d 581, 594 (Tex. App.—El Paso 2004, no pet.); *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192, 195 (Tex. App.—San Antonio 1999, pet. denied).

Courts want to enforce appraisal provisions because failing to do so would prohibit the parties from using the contractually agreed upon method of determining the value of the loss. *See In re Allstate County Mutual Insurance Co.*, 85 S.W.3d 193, 195 (Tex. 2002) (noting courts need to enforce appraisal provisions because denying an appraisal may impede an insurer's ability to defend itself in a breach of contract action filed by the insured since the parties agreed as to the method by which to determine whether a breach had occurred).

The court in *In re State Farm Lloyds, Inc.*, 170 S.W.3d 629 (Tex. App.—El Paso 2005, no pet.) examined whether an insurer failed to compensate the insured for personal items damaged in a house fire and for loss of use of the home. A fire damaged Ruby Johnson's home and many of her belongings. *Id*. at 630. After notifying her carrier of the loss, she made a claim for living expenses under the loss of use coverage and claimed damages to personal items which were destroyed in the fire. *Id*. Johnson refused the offer from State Farm and State Farm then invoked the policy's appraisal provision. *Id*. The appraisal provision of the policy stated that "'[n]o action can be brought against [State Farm] unless there has been compliance with the policy provisions.'" *Id*. at 631.

Johnson contested that State Farm had the right to invoke the appraisal provision of the policy based on allegations that:

> State Farm failed to (1) request a sworn proof of loss from Johnson; (2) notify her in writing whether the claim would be paid or had been denied or whether more information was needed; and (3) failed to give its reason for denying the

> claim or its reason for requiring more time to process the claim.

*Id*. at 632-33 (internal citations omitted). Note that Johnson's allegations do not assert that the appraisal provisions are unenforceable or that State Farm failed to comply with the appraisal provisions, rather Johnson asserted State Farm failed to comply with other provisions of the contract. *See id*. at 632.

The El Paso Court of Appeals examined the analysis used in *In re Clarendon Insurance Company*, 2004 WL 2984916 (Tex. App.—Fort Worth 2004, mandamus denied) (unpublished opinion), to determine whether the insurer waived its right to an appraisal. *In re State Farm Lloyds, Inc.*, 170 S.W.3d at 633.

> In *Clarendon*, a homeowner filed a claim under his homeowner's insurance policy for water and mold damage to his home. The insurer enlisted the help of a third-party claims administrator, which in turn, employed the services of an adjustor. Upon learning that the homeowner was a homebuilder, the adjustor agreed to allow him to do his own repairs. The adjustor did not prepare any paperwork affixing the amount of the loss. Instead, the homeowner was to submit invoices for the repair work and the insurer planned to reimburse him monthly. After paying the homeowner more than $260,000 over a four month period, the insurer became concerned about the manner in which the claims were being handled by the third-party administrator. The insurer hired a new third-party claims administrator who retained another firm to examine the validity of the homeowner's claims. The insurer stopped making payments to the homeowner because he would not allow anyone to enter his home to videotape or photograph the repairs. The homeowner had a duty under the contract to provide the insurer with access to the damaged property. The homeowner subsequently made a policy limits settlement demand to the insurer and filed suit five days later. During the discovery period, the insurer sent the homeowner a demand for an appraisal based on a provision in the policy. Because the homeowner opposed the appraisal, the insurer filed a motion to dismiss or abate the suit. The trial court denied the motion and struck the insured's demand for an appraisal. The insurer sought mandamus relief.

*In re State Farm Lloyds, Inc.*, 170 S.W.3d at 633 (citing *In re Clarendon Insurance Company*, 2004 WL 2984916 at *3). The homeowner disputed the insurer's right to invoke an appraisal or was estopped from seeking appraisal because its conduct was not consistent with a demand for appraisal or the insurer breached the contract by failing to remit timely payments. *Id*. (citing *In re Clarendon Insurance Company*, 2004 WL 2984916 at *3). The *Clarendon* court determined the appraisal provision did not provide a deadline for demanding appraisal, thus the insurer did not waive the right to demand appraisal. *In re Clarendon Insurance Company*, 2004 WL 2984916 at *3.

The Fort Worth Court of Appeals in *In re State Farm Lloyds, Inc.*, disagreed and held that the insurer's payment of invoices for four months and its attempts to examine the repairs was not consistent with waiver of the right to appraisal. *In re State Farm Lloyds, Inc.*, 170 S.W.3d at 634 (citing *In re Clarendon Insurance Company*, 2004 WL 2984916 at *3). The Fort Worth Court of Appeals examined the Texas Supreme Court's decision in *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630 (Tex. 1888) regarding whether an insurer waived the proof of loss and appraisal by making a partial adjustment of damage. The Texas Supreme Court examined the waiver issue and stated as follows:

> [i]t is a well-known principle in this class of cases that the acts relied on as constituting a waiver should be such as are reasonably calculated to make the assured believe that a compliance on his part with the stipulations providing the mode of proof of loss, and regulating the appraisement of the damage done, is not

> desired, and that it would be of no effect if observed by him. It cannot be said, in the face of the proof showing that proof of loss was insisted on by the company, and that it was endeavoring to ascertain the amount of damages done by the fire to the goods of the appellee, that this indicated an intention or desire to dispense with the very requirements inserted in the policy for the purpose of enabling the company to arrive at this loss. The facts in this case show that there was no waiver of the stipulations in the policy relating to proof of loss and appraisement of the property. *They show, on the other hand, that appellants, through their agents and adjuster, were endeavoring to ascertain the amount of damage, while the appellee declined to comply with the conditions in the policy, on which alone his right to recover depends.*

*In re State Farm Lloyds, Inc.*, 170 S.W.3d at 634 (citing *Scottish Union*, 18 S.W. at 440-41).

Therefore, the Fort Worth Court of Appeals determined that in order for a party to waive its right to appraisal the party asserting waiver must show the other party intended to relinquish the right to seek appraisal or intended to dispense with the policy provisions allowing a determination regarding the amount of the loss. *Id*. Additionally, it is an abuse of discretion for a trial court to refuse to enforce an appraisal provision where the insurance contract mandates appraisal to resolve the parties' dispute regarding the value of the loss and where the appraisal right has not been waived. *In re Clarendon Insurance Company*, 2004 WL 2984916 at *3. The court determined the record did not show that State Farm intended to dispense with the policy provisions allowing appraisal. *In re State Farm Lloyds, Inc.*, 170 S.W.3d at 635. The court of appeals determined the trial court abused its discretion by refusing the insurer's request to enforce the appraisal provision. *Id*.

## V. WHEN IS APPRAISAL APPROPRIATE?

Parties may be compelled to appraisal where they fail to agree on the amount of loss of a covered claim. *Johnson v. State Farm Lloyds*, 204 S.W.3d 897, 900 (Tex. App.—Dallas 2006, pet. filed) (citing *Standard Fire Ins. v. Fraiman*, 514 S.W.2d 343, 344-46 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ)). Absent agreement between the parties, appraisal is only to be used to determine the amount of loss or the extent of the loss. *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 684 (Tex. App.—Dallas 1996, writ denied). Appraisers do not have the authority to determine questions of causation, liability or coverage. *Id*.

Appraisal is frequently invoked by insurers in roof damage claims. *See* Mark A. Ticer, *A Primer on Appraisal in Texas or One of the Most Frequently Abused and Misused Provisions in an Insurance Policy*, 2004 Insurance Law Institute 5, *available at* http://www.ticerlawfirm.com/appraisalprimer.jsp. For example, a dispute will arise over whether the roof was damaged by hail (a covered peril) or ordinary wear-and-tear (not covered). *Id*. The appraisers and umpires will evaluate the roof in an appraisal and one appraiser may decide that hail caused the damage resulting in a total loss, while the other appraiser will make a finding of no hail damage. *Id*. The umpire then decides for one side or the other. *Id*. "In this example, appraisal is clearly inappropriate because the appraisers and umpire are making a determination regarding causation and ultimately coverage." *Id*. Determinations regarding causation and coverage are inappropriate in an appraisal situation. *Id*.

The intent of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court to determine. *Lundstrom v. United Services Auto. Ass'n-CIC*, 192 S.W.3d 78, 87 (Tex. App.—Houston [14th Dist.] 2006, pet. filed Apr. 27, 2006); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343 (Tex. App.—Corpus Christi 2004, pet. denied); *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777 (Tex. App.—Houston

[14th Dist.] 2004, no pet.); *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227, 253 (Tex. App.—Austin 2002, pet. granted, judgm't vacated. w.r.m. by agr.).

### A. Wells v. American States Preferred Insurance Co.

In *Wells*, an insured made a claim for damage to his house from foundation movement allegedly caused by a plumbing leak. 919 S.W.2d at 681. The insurer invoked an appraisal process under the insurance policy and the parties went through the appraisal process. *Id*. The appraisers and umpire selected under the appraisal provision agreed that the insured's home had over $22,000 damage to the dwelling due to foundation movement, but two of the three appraisers determined that the damage to the dwelling was not caused by the plumbing leak. *Id*. The appraisal award reflected this determination, awarding no damages to the insured for damage to the dwelling related to the plumbing leak but finding that the dwelling sustained over $22,000 in damage due to foundation movement. *Id*. at 683. Thus, the Dallas Court of Appeals determined whether the appraisal provision in the policy "authorized and empowered the appraisers to determine what caused or did not cause the loss claimed." *Id*.

The Dallas Court of Appeals noted that "no reported Texas case has decided the issue of whether the authority of appraisers under the appraisal section of an insurance policy is limited to determination of only the *amount* of loss as distinguished from determining *cause* of loss, and *coverage* and *liability* for the loss." *Id*. at 683-84. The court noted that other jurisdictions follow the rule that:

> [A]ppraisers have no power or authority to determine questions of causation, coverage, or liability, which is consistent with the Texas courts' discussion of the effect of the appraisal award.

*Id*. at 684 (noting that appraisers have no power to determine the cause of the damages and their power is limited to the function of determining the money value of the property damage).[2]

[2] *Munn v. National Fire Ins. Co. of Hartford*, 237 Miss. 641, 115 So.2d 54, 55, 58 (1959) ("The chancellor should have judicially determined what force caused the walls to lean and twist[;] [t]hat was not a question for the appraisers to decide. If that damage was the result of the storm, then the appraisers should have been directed to estimate the value of the loss occasioned by the walls being damaged."); *see also Jefferson Ins. Co. v. Superior Court*, 3 Cal.3d 398, 90 Cal. Rptr. 608, 475 P.2d 880, 883 (1970) (the function of the appraisers is to determine the amount of damage resulting to various items submitted for their consideration, and not to resolve questions of coverage and interpret provisions of the policy, which exceed the scope of their powers); *Appalachian Ins. Co. v. Rivcom Corp.*, 130 Cal.App.3d 818, 182 Cal.Rptr. 11, 16 (Ct. App. 2d Dist. 1982) (the appraisal clause provides the device to be utilized to determine the amount of loss if the parties cannot agree on the amount; once the amount of the loss has been fixed, whether by agreement between insurer and insured or by appraisal procedure, if the insurer refuses to pay such amount, the insured is not without jury trial rights); *Lewis Food Co. v. Fireman's Fund Ins. Co.*, 207 Cal. App.2d 515, 24 Cal. Rptr. 557, 561 (Ct. App. 2d Dist. 1962) (the appraisers' function under the policy is to determine the amount of damage resulting to various items submitted for their consideration; it is certainly not their function to resolve questions of coverage and interpret provisions of the policy); *Oakes v. Franklin Fire Ins. Co.*, 122 Me. 361, 120 A. 53, 54 (1923) (the right of the insured to recover the loss is not submitted to the referees, only the amount of the damages); *Wausau Ins. Co. v. Herbert Halperin Dist. Corp.*, 664 F. Supp. 987, 989 (D. Md. 1987) (where insurer does not factually dispute the consequences of the occurrence, but contests the issue of legal "causation" on the basis that the policy exclusions apply so as to limit the scope of coverage, the issue is one of contract interpretation, and is within the competence of the court, not an appraiser, to resolve); *Hogadone v. Grange Mut. Fire Ins. Co.*, 133 Mich. 339, 94 N.W. 1045, 1047 (1903) (the policy provision relates only to cases of disagreement as to the amount of valuation, in whole or in part, and not whether the claim itself is valid); *Denton v. Farmers' Mut. Fire Ins. Co.*, 120 Mich. 690, 79 N.W. 929, 930 (1899) (the sections of the charter do not give board of auditors the power to pass upon questions of liability, but contemplate a valid loss, and confer upon the auditors only the power to fix the

The court held that the appraisal award in the *Wells* case should be disregarded because it was made without authority. *Id*. at 685. The appraisers and umpire in *Wells* clearly made a determination of causation in their appraisal award by concluding that although the dwelling sustained damage due to foundation movement, the foundation movement was not caused by the plumbing leak. *Id*.

An appraiser's acts in excess of the authority conferred upon him by the appraisal agreement are not binding on the parties. *Id*. (citing *Fisch v. Transcontinental Ins. Co.*, 356 S.W.2d 186, 190 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.)). Additionally, the court noted that appraisers are not arbitrators. *Id*. Appraisers have no power to arbitrate disputes between the property owner and the insurance company, other than to value the property damage. *Id*. (citation omitted). Because appraisers are not authorized to made determinations of causation, the award was not enforceable. *Id*. The court in *Wells* held that appraisers selected under an appraisal provision of an insurance policy may not determine issues of causation, coverage or liability. *Id*. at 683; *see Holt v. State Farm Lloyds*, 1999 WL 261923 (N.D. Tex. 1999); *St. Paul Fire & Marine Ins. Co. v. Wright*, 629 P.2d 1202, 1203 (Nev. 1981).

### B. Lundstrom v. United Services Automobile Association-CIC

In *Lundstrom v. United Services Automobile Association-CIC*, 192 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2006, pet. filed), the insureds' home was damaged by multiple water leaks. The insurer agreed to cover the losses caused by the initial water leak and asked appraisers to determine the amount of that loss. *Id*. at 89. Thus, the appraisers had to determine which damages were caused by the initial water leak and distinguish those damages from damages that occurred later. *Id*. The court concluded the appraisers were not deciding a causation issue, but were deciding an issue concerning the amount of loss. *See id*. The *Lundstrom* court noted that *Wells* stood for the narrow proposition that appraisers exceed their authority when they make legal determinations of what is or is not a covered loss based on their determination of what caused the loss or some portion of it. *Id*.

### C. Johnson v. State Farm Lloyds

In *Johnson v. State Farm Lloyds*, 204 S.W.3d 897, 898 (Tex. App.—Dallas, 2006, pet. filed), an insured brought suit against its insurer that a dispute over the extent of the loss caused by hail damage was a dispute over the amount of the loss and was therefore subject to appraisal. The damage to Johnson's roof occurred during a hail storm and State Farm estimated the repairs were less than Johnson's deductible and therefore declined any payment. *Id*. Johnson argued the entire roof needed replacement and demanded appraisal. State Farm declined appraisal arguing that the extent of the hail damage was a coverage question that could not be determined by appraisal. *Id*.

The court determined whether the extent of loss from hail damage is subject to appraisal under the policy. *Id*. at 900. Johnson argued that "the amount of loss" includes a dispute over the extent of the damage as well as a determination of what it will cost to fix the damage. *Id*. State Farm argued that it does not have to submit to the appraisal process unless the parties first agree on

amount); *St. Paul Fire & Marine Ins. Co. v. Wright*, 97 Nev. 308, 629 P.2d 1202, 1203 (1981) (contrary to arbitration, where the arbitrator is frequently given broad powers, appraisers generally have more limited powers; an appraiser's power generally does not encompass the disposition of the entire controversy between the parties, but extends merely to the resolution of the specific issues of actual cash value and the amount of loss); *In re Delmar Box Co.*, 309 N.Y. 60, 127 N.E.2d 808, 811 (1955) (agreement for appraisal extends merely to the resolution of specific losses of actual cash value and the amount of loss, with all other issues being reserved for determination in a plenary action); *United Boat Serv. Corp. v. Fulton Fire Ins. Co.*, 137 N.Y.S.2d 670, 671 (Sup. Ct. 1955) (where appraisers made a determination of a question of liability, they exceeded the powers conferred upon them, and summary judgment is improper); *Kentner v. Gulf Ins. Co.*, 66 Or. App. 15, 673 P.2d 1354, 1356 (1983) (statutory policy language establishes an appraisal procedure to determine the amount of the insured's loss; the procedure does not apply to the determination of the insurer's responsibility).

causation, coverage, and liability. State Farm contended it was not required to submit to an appraisal in this case because whether the hail damaged only the ridgeline of the roof, as State Farm contended, or the entire roof, as Johnson contended, is a causation, coverage, and liability issue, not an issue concerning the amount of loss. *Id*. at 900-01. State Farm relied on the *Wells* opinion to argue that any decision by an appraiser on the extent of damage is beyond the scope of their authority. *Id*. at 901. However, the court noted that *Wells* only limits the authority of an appraiser to not make a determination of what is and what is not a covered loss based on what caused the loss. *Id*.

The *Johnson* court relied on *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002)[3], that "appraisal merely 'binds the parties to have the extent or amount of the loss determined in a particular way.'" The court went on to state:

> If the parties had to first agree on which specific shingles were damaged and approach every disagreement on extent of damage as a causation, coverage or liability issue, either party could defeat the other party's request for an appraisal by labeling a disagreement as a coverage dispute. Instead, as the process is designed, once it is determined that there is a covered loss and a dispute about the amount of that loss, the appraisal process determines the amount that should be paid because of loss from a covered peril.

*Johnson*, 204 S.W.3d at 901. The *Johnson* court held that if the parties agree there is coverage but disagree on the extent of damage, the dispute concerns the "amount of loss" and that issue is determined in accordance with the appraisal clause." *Id*. Thus, because Johnson and State Farm agreed the covered property sustained property damage from a covered peril, the appraisal provision applied where the parties disputed the extent of the loss. *Id*.

### D. Breshears v. State Farm Lloyds

In *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343 (Tex. App.—Corpus Christi 2004, pet. denied), the Corpus Christi Court of Appeals denied an insured's claim that the insurer was liable for breach of contract when the appraisal award was greater than the initial payment made by the insurer. *Id*. The court determined that where the insurance contract clearly specifies the appraisal process as the remedy for any disagreement regarding the amount of the loss and the insurer satisfies the appraisal award, no breach occurs. *Id*. at 344.

Additionally, the insured argued that State Farm did not comply with Texas Insurance Code art. 21.55. Because of the appraisal process they were not actually paid until after State Farm paid them the difference between the first payment and the appraisal award—after the 60 day statutory limit. *Id*. at 345. The court of appeals disagreed with the insured's position and held that the insurer did not breach its contractual obligations to the insured. *Id*. Rather, the insured was paid by State Farm within the 60 day limit and the fact that the appraisal process was invoked did not alter the fact that State Farm complied with the insurance code reasonable prompt payment provision. *Id*.

## VI. HOW TO ATTACK AN APPRAISAL AWARD

Appraisal awards made pursuant to the provisions of an insurance contract are binding and enforceable. *Providence Lloyds Insurance Co. v. Crystal City Independent School District*, 877 S.W.2d 872, 875 (Tex. App.—San Antonio 1994, no writ) (citing *Scottish Union and Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 71 Tex. 5 (1888); *Barnes v. Western Alliance Ins. Co.*, 844 S.W.2d 264, 267 (Tex. App.—Fort Worth 1992, writ dism'd by agr.)). Every reasonable presumption will be indulged to sustain an appraisal award. *Continental Ins. Co. v. Guerson*, 93 S.W.2d 591, 594 (Tex. Civ. App.—San Antonio 1936, writ dism'd). Texas courts consistently enforce

[3] The Texas Supreme Court held that a trial court's denial of an insurer's motion to invoke appraisal regarding a vehicle's value was error, and that the trial court proceedings did not need to be abated while the appraisal went forward. *In re Allstate*, 85 S.W.3d 193 (Tex. 2002).

appraisal provisions in insurance policies. *See, e.g., Vanguard Underwriters Ins. Co. v. Smith*, 999 S.W.2d 448, 451 (Tex. App.–Fort Worth 1999, no pet.); *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. App.–Dallas 1996, writ denied), cert. denied 519 U.S. 1118 (1997).

### A. Unauthorized Action by Appraiser

In Texas, an appraisal award made pursuant to the terms of an insurance policy is binding and enforceable unless one party proves that the award was (1) unauthorized, (2) the result or fraud, accident, or mistake, or (3) not made in substantial compliance with the requirements of the policy. *Crystal City Independent School District*, 877 S.W.2d at 875-76; *see Scottish Union*, 8 S.W. at 631; *Toonen v. United Services Auto. Ass'n*, 935 S.W.2d 937 (Tex. App.—San Antonio 1996, n.w.h.); *Barnes*, 844 S.W.2d at 267; *Fisch v. Transcontinental Ins. Co.*, 356 S.W.2d 186, 190 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.).

The court in *Crystal City* determined whether there was substantial compliance with the appraisal provisions of the policy and to subsequently uphold the appraisal award. *Crystal City Independent* School *District*, 877 S.W.2d at 876. The Crystal City School District argued that the umpire exercised independent judgment when he should have ascertained to his own best judgment the cash value of the property upon which the two appraisers disagreed. *Id*. The duty of the umpire under the terms of the insurance policy was to ascertain and determine, in the exercise of his own best judgment, the cash value of the items of property about which the appraisers had disagreed, independent of the findings of the appraisers, or either of them. *Id*. at 877. The court determined the umpire did this and both appraisers agreed with his findings and signed the award, which included their agreed findings. *Id*.

The court stated that an umpire is to act where there is a difference between the two appraisers. *Id*. If the three are of one mind, or if any two of them are in accord as to value and loss, the appraisal award is a finality. *Id*. (citing *Dennis v. Standard Fire Ins. Co.*, 90 N.J.Eq. 419, 107 A. 161 (1919)). The *Crystal City* court determined that the umpire did not exceed the authority given to him when he acted independently of the disputed values. *Id*. at 877-78. The umpire's duty, according to the terms of the appraisal provision, was "to ascertain and determine, in the exercise of his own judgment and as the result of his own investigation, the cost values of the disputed items, independent of the findings of the appraisers, or either of them." *Id*. at 878. The court held that both appraisers agreed with the final appraisal award and thus made the award binding on the parties. *Id*.

### B. Appraisal Award the Result of Fraud, Accident, or Mistake

In *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 141 (Tex. App.—Houston [1st Dist.] 2002, no pet.), an insured disputed the independence of an appraiser by asserting a pre-existing relationship existed between the insurer and its appraiser. Under the terms of the policy, State Farm selected Don Boudreaux ("State Farm's Appraiser") of Haag Engineering Company ("Haag") to serve as its appraiser. *Id*. at 142. The Gardners selected Vance Hardie ("the Gardner's Appraiser") of A.J. Vice & Co., Inc. The two appraisers selected Marty Beasley ("Umpire") of All State Roof Inspections as umpire to resolve any differences between the two appraisers' estimates. *Id*. State Farm's Appraiser inspected the Gardners' roof, but did not find hail damage exceeding the amount of the policy deductible. *Id*. The Gardners' Appraiser disagreed, and the dispute was submitted to the Umpire. *Id*. The Umpire agreed with State Farm's Appraiser and found that any damage did not exceed the policy deductible. *Id*.

The Gardners argued that the award was the result of fraud, accident, or mistake and was not made in substantial compliance with the policy. *Id*. (citing *Wells v. Am. States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. App.—Dallas 1996, writ denied); *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 875-76 (Tex. App.—San Antonio 1994, no writ)). The policy stated that each party will "select a competent, independent appraiser." *Id*. at 143. State Farm explained to the Gardners that:

> The qualifications of the appraisers are that they be competent and independent. The appraisers should be competent with respect to identification of damage and independent insofar as the appraisers are unbiased and free of control to arrive at their own evaluation of the loss. In short, the appraiser should have knowledge in identifying damage and act fairly, without bias, and in good faith.

*Id*. The Gardners alleged the appraiser was not independent because there was a pre-existing relationship between State Farm and Haag-the employer of State Farm's Appraiser, Don Boudreaux. *Id*. The Gardners presented evidence that: (1) Haag wrote a training program used by State Farm, about hail damage claims; (2) Haag wrote numerous publications about hailstorm evaluations, and served as a "consultant" for State Farm on those matters; and (3) Haag was paid by various State Farm companies for assignments across the United States over seven years.

The court distinguished *Mays v. Foremost Insurance Co.* from the Gardner's case. 627 S.W.2d 230, 234 (Tex. App.—San Antonio 1981, no writ). In *Mays* the court discussed the quantum of evidence necessary to defeat summary judgment based on the preclusive effect of an appraisal award. *Id*. The insurer and its selected appraiser maintained a continuing business relationship, the insurer directed its appraiser to object to a former umpire upon which the appraisers had previously agreed, and the insurer acted in concert with the new umpire in determining the award. *Id*. Based on that evidence, there were genuine issues of material fact about whether the appraisal procedure was complied with fully, fairly, and without undue influence by the insurer. *Id*. The *Gardner* court held as follows:

> . . . there is no evidence that State Farm directed Boudreaux to reach any conclusions. Nor is there any evidence of foul play by the Umpire. In fact, the Gardners never complained about the Umpire.

*Gardner*, 76 S.W.3d at 144.

The *Gardner* court examined *American Central Insurance Co. v. Terry*, 298 S.W. 658, 662 (Tex. Civ. App.—Texarkana 1927, no writ). The insured in *Terry* argued that the insurance company's appraiser was not impartial because the company had selected him as its appraiser "many times before" and he "had consistently served with partiality and bias in making awards of amount of damage." *Id*. The court held, "Even if true, this fact alone would not necessarily or probably be inconsistent with his impartiality in the present case, in the absence of some act or conduct tending to exhibit his serving the company's interest as a partisan would." *Id*. The insured in *Terry* complained about a pre-existing relationship between the insurance company and the appraiser. *Id*. In contrast, the Gardners complain about a pre-existing relationship between the insurance company and the appraiser's employer. As in *Terry*, the Gardners presented no evidence that the appraiser performed "some act or conduct tending to exhibit his serving the company's interest as a partisan would." *Id*. Therefore, the *Gardner* court held that there was no evidence raising a fact issue whether State Farm's appraiser lacked independence. *Gardner*, 76 S.W.3d at 144.

### C. Independent, Disinterested Appraisers

In *General Star Indemnity Co. v. Spring Creek Village Apartments Phase V, Inc.*, 152 S.W.3d 733 (Tex. App.—Houston [14th Dist.] 2004, no pet.), the court examined whether the appraiser was impartial and whether the umpire exceeded his authority under the policy. The insurance contract between Reliance and Spring Creek contained an appraisal provision, which provided that if the parties disagree on the amount of loss, "each party will select a competent and impartial appraiser." *Id*. at 737. In the appraisal agreement between Spring Creek and its appraiser, the agreement stated that:

> Spring Creek agrees to "compensate City Wide for its time and costs incurred in this process, for an amount not to exceed [five] (5%) percent of the gross settlement amount." Spring Creek further agreed to compensate City Wide

> for additional time and costs as follows: "In the event that the minimum gross settlement amount of the Spring Creek Village Apartments, Phase V., Inc's loss is at least TWO MILLION ($2,000,000.00) DOLLARS, Spring Creek hereby agrees to reimburse City Wide for its additional time and costs and hereby assigns those costs to City Wide, per its final invoice, up to but not in excess of, Six (6%) percent of the gross settlement amount. Additionally, for every million dollars awarded above Two Million Dollars, City Wide will be entitled to reimbursement for its time and costs for appraising that additional amount but not in excess of another one (1%) percent of the gross settlement amount[.]"

*Id*. The court stated that an "appraiser with a financial interest in the outcome of the appraisal is not impartial." *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S.W. 779, 780-81 (1919); *cf. Gardner*, 76 S.W.3d at 143 (in finding appraiser impartial, court noted he did not have a financial interest in the claim); *see also Central Life Ins. Co. v. Aetna Cas. & Surety Co.*, 466 N.W.2d 257, 261-62 (Iowa 1991) ("The appointment of an appraiser with a concealed pecuniary interest in the outcome is a sufficient ground for voiding the award as a matter of law without a showing of prejudice."). The court held that because "Edwards had a financial interest in insuring the appraisal award exceeded $2 million, General Star raised a fact issue with regard to whether Edwards was impartial." *General Star,* 152 S.W.3d at 737.

In *Franco v. Slavonic Mutual Fire Insurance Ass'n*, 154 S.W.3d 777 (Tex. App.—Houston [14th Dist.] 2004, no pet.), an insured sought coverage under a fire and extended coverage insurance policy for damages caused by a plumbing leak in her home. The parties invoked the appraisal provision under the policy. *See id*. at 780. The insurer, prior to appointing its appraiser, contacted the appraiser to examine the premises and determine the cause of damage and the appraiser issued a report regarding his examination of the residence and his findings. *Id*. at 781. Franco alleged the appraisal award should have been set aside because the appraisal was not conducted in substantial compliance with the insurance policy, and even if the appraisal award is valid, the insurer's payment of the appraisal award is not dispositive of the breach of contract action alleged against the insurer. *Id*. at 785.

Franco asserts the appraisal award should be set aside because Garibay was an interested, prejudiced, and biased appraiser, due to his status as an investigating engineer for Southland and the fact that he already had issued a report containing his opinions regarding the scope of appellants' damages and coverage prior to his appointment as appraiser. *Id*. Franco argued that "Garibay had a predetermined opinion as to what the scope of his appraisal would be and was, therefore, bias[ed] against the Franco family." *Id*. at 786. The evidence relied upon by Franco to support the claim of bias consists of (1) Franco's statement in a deposition excerpt that Garibay was an engineer hired by Southland to inspect their home and that he was appointed as an appraiser, and (2) Garibay's affidavit in which he acknowledges being hired by Southland in mid-July 2002 to conduct an examination of appellants' house in order to determine the cause of the damage from a plumbing leak and discusses his observations and conclusions concerning the leak. *Id*.

The court stated that a showing of a pre-existing relationship, without more, does not support a finding of bias. *Id*. at 786-87 (citing *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227, 255 (Tex. App.—Austin 2002, pet. granted, judgm't vacated w.r.m.); *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 143-44 (Tex. App.-Houston [1st Dist.] 2002, no pet.)).

The court determined that the evidence showed that Garibay was hired by Southland "to examine the premises" and "determine the cause of the damage, possibly from a reported sink drain line leak." *Id*. at 787. Garibay was not an employee of Slavonic, and Garibay's report and conclusions regarding the cause of the plumbing leak were his own. *Id*. There was no evidence suggesting that Slavonic influenced or exercised

control over Garibay, that Garibay had a financial interest in Franco's claim, or that Garibay's previous inspection of the premises somehow factored into his damages valuation. *Id*. Additionally, the final appraisal award was entered into by Kubala, Franco's appraiser, and the umpire. *Id*. The court held that the evidence does not raise a fact issue as to Garibay being biased against appellants. *Id*.

## VII. CONCLUSION

Appraisement is an effective means of resolving differences between an insured and the insurer as to the amount or extent of a liability on a contract. Parties using appraisement may avoid both prolonged litigation and the formalities of arbitration, but achieve a final determination of the amount owed under the insurance policy.

A party may demand appraisal by written request to the other party as required by the insurance policy. The request for appraisal must comply with all policy provisions. The policy provision typically includes all relevant deadlines for the request for appraisal and any other requirements. Parties should adhere to the requirements to ensure appraisal can be implemented or face the possibility of waiving their right to invoke the appraisal process. Texas courts have established that the party asserting waiver must show the other party intended to relinquish the right to seek appraisal or intended to dispense with the policy provisions allowing a determination regarding the amount of the loss.

Parties may be compelled to appraisal where they fail to agree on the amount of loss of a covered claim. *Johnson v. State Farm Lloyds*, 204 S.W.3d 897, 900 (Tex. App.—Dallas, 2006, pet. filed). Absent an agreement between the parties, appraisal is only to be used to determine the amount of loss or the extent of the loss. *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 684 (Tex. App.—Dallas 1996, writ denied). Additionally, appraisers do not have the authority to determine questions of causation, liability, or coverage.

Once appraisal has been implemented and the award determined, a party may try and attack the appraisal award. However Texas law is clear, where parties to an insurance contract agree that questions regarding the amount or extent of a loss will be submitted to third persons, whose decision is binding, the third persons' decision is final and cannot be attacked in the courts unless one party proves that the award was (1) unauthorized, (2) the result or fraud, accident, or mistake, or (3) not made in substantial compliance with the requirements of the policy. *Crystal City Independent School District*, 877 S.W.2d at 875-76. Every reasonable presumption will be indulged to sustain an appraisal award, and the burden of proof lies on the party seeking to avoid the award. *Fisch*, 356 S.W.2d at 190.

The purpose of an appraisal provision is to afford a simple, speedy, inexpensive, and fair method of determining the loss or damage resulting from the happening of a contingency insured against. Therefore, parties need to be aware of the litigated issues involving appraisal to prepare and equip themselves for potential areas of conflict or confusion.