CHAPTER II

CIRCUMSTANCES WARRANTING APPRAISAL

A] DISAGREEMENT NECESSARY

Once the claim has been presented by the insured or the insured's public adjuster, the carrier will have a reasonable chance to respond, investigate and take a position with respect to coverage and damages. It is only then that it will begin to appear if there is sufficient disagreement about the amount of loss or value to warrant an appraisal. Of course, the carrier is entitled to a reasonable time to review the insured's claim and respond with either an offer of settlement or an explanation as to why the carrier believes the amount payable is less then the insured's claim.

For the dispute to be ripe for an appraisal, there must be a disagreement between the parties as to the amount of the loss or the value of the insured property. Typically, the representatives for both parties

should already have ascertained an opinion of the amount of the loss and discussed those opinions, and upon their failure to reach an agreement and conclude the claim, there is a disagreement ripe to be resolved by the appraisal process.

However, it has been held that where the appraiser for the insurance carrier has refused to proceed (in this case due to a perceived fee dispute with the umpire) it was held to be proper to conclude that the stonewalling appraiser's evaluation of the loss was $0.00 and the "differences" between the appraisers would therefore be the entire amount of loss.[75]

Where the insured claims a loss and the insurer disputes it, either in whole or in part, and the basis of the dispute involves the amount of loss and no question of liability is involved, the claim is ripe and a proper one for appraisal.[76]

However, a North Carolina court declined to enjoin appraisal where an insurer believed an insured had prematurely sought appraisal as to both structural and business losses sustained. As to the structural loss, the subject policy allowed the insurer to challenge the scope of appraisal after an award had been rendered and thus coverage disputes

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[75] Everett Cash Mut. Ins. Co. v. Krawitz, 430 Pa. Super. 25, 633 A.2d 215 (1993).
[76] *Couch on Insurance* §50:157 (2d rev. ed. 1982).

could be resolved in the course of litigation. In finding that the appraisal process for business losses had not been commenced prematurely it concluded that the insurer had not adequately shown "irreparable harm" or "that the balance of equities tip[ped] in favor of granting the injunctive relief" sought. In so finding, the court stated that emails regarding itemization and other paperwork suggested that the insurer assented to an appraisal that encompassed business losses "at least implicitly, agreed that all conditions precedent to appraisal were met and that the process should move forward."[77]

A failure to agree as to the amount of loss or actual cash value is essential in order to render the appraisal a condition precedent to litigation.[78]

There must be an honest attempt made by the insured and insurer to meet on the question of loss and damage before the appraisal should take place. The initial disagreement between the parties without some effort to resolve that disagreement is

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[77] Owners Ins. Co. v. Southern Pines Hotel Operations LLC, 2013 WL 595924 (M.D.N.C. 2013).

[78] Harrison v. Hartford Fire Ins. Co., 59 F. 732 (C.C.S.D. Iowa 1984); Hanover Fire Ins. Co. v. Harper, 77 Ill. App. 453 (4th Dist. 1898); Maimes v. Automobile Ins. Co., 112 Misc. 656, 183 N.Y.S. 690 (Sup. Ct. 1920), *aff'd*, 196 A.D. 21, 187 N.Y.S. 943 (4th Dept. 1921); Phoenix Ins. Co. v. Badger, 53 Wis. 283, 10 N.W. 504 (1881).

generally not sufficient to make the case ripe for appraisal.[79]

In cases where the insurance carrier asserts the position that the insured sustained no loss whatsoever, the appraisal clause may nevertheless be operative and appropriate.[80]

A case with a different perspective arose with respect to the World Trade Center attack of September 11, 2001. Several different insurance carriers had each issued separate policies sharing portions of the risk of loss and in favor of World Trade Center Properties, LLC. A single insurance company, Allianz, demanded an appraisal after litigation had already ensued between the parties. One of the insured's grounds for rejecting the demand for appraisal was the fact that it was premature. The basis of this assertion was that the parties had been engaged in a dispute over various issues of liability and had not yet engaged in any meaningful dialogue regarding the issues of loss and damage. A detailed four volume presentation was prepared by the insured and tendered to the carriers which reflected a claim in the amount of $6.5 Billion. The extent of the disagreement was contained in one line of a letter prepared by the carriers' counsel

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[79] Continental Ins. Co. v. Vallandingham & Gentry, 116 Ky. 287, 76 S.W. 22 (1903).
[80] Fitzgerald Bottling Works of Amsterdam v. Continental Ins. Co., 275 A.D. 453, 90 N.Y. S.2d 430 (3d Dept. 1949).

which summarized their view of the loss as being less than $2 Billion.

In a decision strange in a number of respects, Judge Martin of the United States District Court for the Southern District of New York stated the following:

> "There is nothing in the language of the appraisal provision that suggests an insurer must hire experts to evaluate the loss and then engage in good faith negotiations with the insured over the amount of the loss before it may invoke the appraisal process. Indeed, the appraisal provision itself suggests that it is the appraisers appointed by the parties who are to engage in the good faith effort to resolve the dispute before it is submitted to an umpire. It makes no sense to suggest that the parties must bear the expense of hiring experts to evaluate a loss before they obtain the services of "an impartial appraiser."[81]

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[81] S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC., 2002 WL 1905968 (S.D.N.Y. 2002).

This determination by Judge Martin appears contrary to the very language of the policy and significant precedent around the country holding to the contrary. In fact, in the particular appraisal provision quoted by the court, the policy states "in case the insured and this company shall fail to agree as to the amount of the loss or damage to the property insured ...". This language, in the context of the duties and obligations on the part of the insurer to execute the terms of the contract in good faith, makes the court's conclusion questionable.

It can be succinctly stated that the insured has an obligation to present its claim, the insurer a duty to investigate it in good faith and respond. If at this juncture it appears there is a disagreement as to loss or value, the matter is ripe for appraisal.

A Washington court addressed the meaning of "Proof of Loss" as utilized in an insurance policy's appraisal provision where the policy did not define the provision and a dispute arose as to its interpretation. It has been held in Washington that "'the concept of 'proof' for purposes of an insurance claim means 'sufficient notice to allow insurers to evaluate their rights and liabilities and to investigate claims.'" It also looked to the Washington Administrative Code for guidance,

which indicates that a Proof of Loss statement may be insufficient to enable coverage decisions "given that it allows an insurer to object to the sufficiency of the 'Proof of Loss' form statement and request additional time to investigate." The court deemed the insurer's objections to the sufficiency of the insured's Proof of Loss form to be reasonable since the form didn't detail the loss and the insurer had expressed its desire for more information.[82]

However, it was held in both EDM Office Services, Inc. v. Hartford Lloyds Ins. Co. and Dike v. Valley Forge Ins. Co.[83] that the insurer's compliance with the insurance policy's "Claims Handling" provisions, requiring it to conduct a reasonable investigation of the insured's claim, was not a condition precedent to invoking the appraisal process. Both courts explained that the policy's appraisal clause did not use conditional language nor was there any policy provision demonstrating that the parties intended that the insurer fully comply with the claims handling provisions prior to beginning appraisal.

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[82] Trident Seafoods Corp. v. Commonwealth Ins.Co., 2010 WL 3894111 (W.D.Wash. 2010), citing Van Nov v. State Farm Mut. Auto. Ins. Co., 98 Wash.App. 487, 494, 983 P.2d 1129 (Wash. Ct. App. 1999).

[83] 20111 WL 2619069 (S.D. Tex. 2011).

B] APPRAISAL WHERE THERE ARE QUESTIONS OF LIABILITY OR COVERAGE

Generally (and subject to a policy provision that provides otherwise), the appraisal clause in the Standard Fire Policy has no application to a claim where the insurer denies all liability. It typically applies only where there is a disagreement as to the amount of loss or damage.[84]

In Georgia, for instance, a dispute as to extent of damage was deemed to involve coverage and thus did not warrant an invocation of appraisal. There, an insurer had determined only four of an insured's roof tiles had been damaged by wind while the insured contended that replacement of all shingles was required and covered under the policy. However, both parties' estimates for replacement cost of the shingles were consistent. In finding the appraisal provision inapplicable, the court cited a Supreme Court of Georgia holding that, "an appraisal clause can only resolve a disputed issue of value. It cannot be invoked to resolve broader issues of

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[84] Maimes v. The Automobile Ins. Co. of Hartford, 112 Misc. 656, 183 N.Y.S.690 (Sup. Ct. 1920), *aff'd,* 196 A.D. 21, 187 N.Y.S. 943 (4th Dept. 1921); See also American Family Mut. Ins. Co. v. Dixon, 450 S.W.3d 831 (Mo. Ct. App. 2014) ("Missouri law is clear that whether the appraisal provision of an insurance policy applies depends upon whether the dispute between the insurer and insured is properly characterized as a coverage dispute or a disagreement over the amount of loss.").

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liability. To invoke an appraisal clause to eliminate…issues of liability…would be impermissible, as it would expand the scope of the appraisal clause beyond the issue of value. It would be tantamount to converting the appraisal clause into an arbitration clause, which is the type of clause that would be invoked to address broader issues. Arbitration clauses, however, are impermissible in contracts between insurers and insureds."[85]

However, in some states, as for example, under Michigan law, regardless of whether liability issues exist, the appraisal proceedings must go forward to determine the issue of damages only. The justification for allowing the appraisal to go forward is based on the fact that appraisal does not pass on any question of liability, it is not arbitration and it is simply determinative of the question of the amount of damages suffered.[86] The logic underlying this approach is that the consumer is entitled by contract to a resolution of the issue of loss and value so that if he may ultimately prevail in litigation on the issues of coverage raised by the carrier or even on a subsequent appeal of a negative determination, the insured should nevertheless have the right to this efficient resolution of these issues in a timely manner. To

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[85] Lam v. Allstate Ind. Co., 2014 Ga. App. LEXIS 225 (2014).

[86] Denton v. Farmer's Mut. Fire Ins. Co., 120 Mich. 690, 79 N.W. 929 (1899).

wait until after a final judicial determination of issues of coverage in order to conduct the appraisal would almost guarantee that relevant evidence, witnesses and information would be less available. The Michigan law attempts to give life to the intent of the appraisal provision by mandating compliance with the provision on a timely basis.

The practical logic of compelling an appraisal to proceed even when issues of liability have been raised is explained in the case of Masonic Temple Assoc. v. Michigan Fire and Marine Ins. Co.[87] The Supreme Court of Michigan affirmed a trial court's decision to permit an appraisal proceeding to go forward despite the carrier's denial of liability, stating: "The Judge also expressed his opinion that if there was an appraisal the parties might adjust their differences and end the litigation."[88]

As was discerned by Judge Mukasey in a matter arising out of the World Trade Center disaster:

"[A] court generally reviews disputed questions of law after an appraisal is complete [but] this timing is not mandatory."[89]

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[87] Masonic Temple Ass'n of Grand Rapids v. Michigan Fire & Marine Ins. Co., 323 Mich. 662, 36 N.W.2d 317 (1949).
[88] Id. at 673.
[89] Duane Reade Inc. v. St. Paul Fire & Marine Ins., 411 F.3rd 384, 389 (2d Cir. 2005).

In Florida, the court properly allowed appraisal of an insured's damages and a determination of coverage "to go forward on a dual track basis." It relied upon controlling precedent in asserting that "it is the law in our district that the order in which the issues of damages and coverage are to be determined by arbitration and the court is left to the discretion of the trial court…we [have] recognized that putting the issue of coverage first before arbitration in every case might have adverse effects on the expeditious, out of court disposition of litigation, which is the reason arbitration is a favored remedy…[i]t also saves 'judicial resources which might otherwise be required in resolving the factual and legal issues involved in the [coverage issue] by a relatively swift and informal decision by the appraisers as to the amount of the loss.'"[90]

Florida has also addressed the ability to challenge an aspect of coverage without contesting coverage as a whole. In stating the trial court should have first made a liability determination, the Fourth District Court of Appeals held that part of the liability may be contested "without challenging coverage as a whole." Such was especially true under these circumstances where "the appraisal award

[90] Sunshine State Ins. Co. v. Rawlins, 34 So.3d 753 (Fla. 3d DCA 2010).

itself indicated the amount could change as the award was made without consideration of the policy's provision of coverage." It cited prior holdings allowing an insurer to contest coverage and liability as to one element of an appraisal award and that it was "not reasonable to order an insurer to pay for all elements set forth by an appraisal award if the insurer raises an issue of coverage as to only one element and not the whole claim." It declared "the issue of coverage is not necessarily a matter of all or nothing" and reversed and remanded for determination of liability and the amount of payment to which the insured was entitled.[91]

In Texas, appraisal was not automatically precluded where a disagreement pertained to both coverage and amount of loss. It was decided that the lower court had abused its discretion when it denied an insurer's motion to compel appraisal, affirming that under those circumstances, the policy's appraisal provision could not be avoided "simply because coverage or causation issues about whether the storm caused the roof damage may overlap with issues about the amount of the loss and repair costs." The court deemed causation always a matter of consideration in

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[91] Florida Ins. Guar. Ass'n. Inc. v. The Olympus Ass'n, Inc., 34 So.3d 791, 35 Fla. L. Weekly D1117 (Fla. 2d DCA 2010).

appraisal; appraisers must allocate damages rendered by covered and excluded perils and determine damages from a particular occurrence.[92] This reflects the modern pervasive view on the issue.

Generally, appraisal is not available where the claim has been denied in totality. In a Florida case where an insured sought to compel appraisal, the court determined that the insured was not entitled to appraisal "because coverage for the claim ha[d] been denied in its entirety." There, the court deemed appraisal inappropriate where the insurer had declared the policy void, there was no covered claim and thus no disagreement over the amount of any covered claim. The court stated that, "under Florida law, 'when the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid'...[h]owever, whether the claim is covered by the policy is a question for judicial determination. Thus, when the claim has been denied in its entirety based on lack of coverage, appraisal is not appropriate."[93]

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[92] In re Texas Windstorm Ins. Ass'n, 2013 WL 4806996 (Tex. App.-Houston [14th Dist] 2013.

[93] Oceana I Condo Ass'n, Inc., v. QBE Ins. Corp., 2011 WL 1984483 (S.D. Fla. 2011).

Interestingly, in the Province of Ontario, Canada, the Ontario Insurance Act requires the insurer to proceed to appraisal without excuse. This is accomplished by including language in the Standard Fire Policy of the Province of Ontario which states that the appraisal must proceed when demanded, whether "the right to recover on the contract is disputed or not, and independently of all other questions."[94] The import of this provision is that it prevents any argument by either the insured or the insurer which attempts to avoid having the amount of loss and damage determined by appraisal once appraisal has been demanded.

Some courts have determined that even where allegations of arson exist, an appraisal may still be appropriate.[95]

The responsibility of establishing coverage is imposed on the insured. In Alabama, it was held that an insurer was within its right to investigate a claim before proceeding with appraisal and that an insured "bears the burden of establishing coverage by demonstrating that a claim falls within the insurance policy." There, the court found the insurer was entitled to judgment since the

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[94] Insurance Act, R.S.O., CH I-8, §148 (2)(11) (2003) (Ontario, Can.).
[95] Hala Cleaners v. Sussex Mut. Ins. Co., 115 N.J. Super 11, 277 A.2d 897 (Ch. Div. 1971), *distinguished by,* Rastelli, 68 F. Supp.2d 440 (D.N.J. 1999).

insured had not identified any provision in the policy that required an insurer to name its appraiser before finishing an investigation of the claim.[96]

In Florida, it has been held that until a judicial determination has been made concerning the insureds' fulfillment of their post-loss obligations including any contractual duty to mitigate damages, appraisal was premature.[97]

Though coverage was an issue, where the insurer made a settlement offer prior to the insured bringing suit which the insured rejected as being insufficient, the carrier will not be deemed to have "denied liability" for the insured's claim. In this situation, the claim would likely still be ripe for appraisal.[98]

In Florida, a court found that appraisal of issues relating to ordinance and law could not be properly demanded where none had yet been incurred. In that case, following an appraisal award which stated that "Ordinance and Law" was "not appraised", an insured had requested its insurer pay for the entirety of roof repairs under Ordinance and Law coverage.

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[96] Scottsdale Ins. Co. v. Prayer Tabernacle Early Church of Jesus Christ, 2011 WL 3320544 (S.D. Ala 2011).

[97] Meritplan Ins. Co. v. Laughlin, 2005 WL 1054027 (M.D. Fla. 2005).

[98] Richardson v. Merrimack Mut. Fire Ins. Co., 2000 WL 297171 (S.D.N.Y. 2000).

The court held that Ordinance and Law was not recoverable until it was incurred per policy terms and in this instance, could not have been initially appraised.[99]

This decision recognizes the reality that claims for expense due to ordinance and law are not payable until incurred. However, the decision more appropriately should have allowed a determination of the loss due to ordinance and law, if such was possible without the repair work actually being concluded with payment for the portion of the award for ordinance and law being withheld until actually incurred.

This situation is analogous to the appraisal of replacement cost benefits prior to work being performed where the insurer pays only the actual cash value until the work is actually performed when payment of the holdback becomes ripe. Claims are commonly settled in this manner and this approach allows for the insured to anticipate their ultimate recovery and plan accordingly. If appraisal of the costs due to ordinance and law are not possible because, due to hidden damages or impossibility of determining what ordinances and laws might apply prior to filing of plans,

[99] Jossfolk v. United Prop. & Cas. Ins. Co., 110 So.3d 110, 111 (Fla. 4th DCA 2013).

appraisal of this portion of the claim must await such determination.

However, appraisal was not appropriate where the insurer declared the insurance policy void, and thus, the parties could not disagree over the amount of any covered claim as there was no covered claim.[100]

[100] Oceana I Condo Ass'n., Inc. v. QBE Ins. Corp., 2011 WL 1984483 (S.D.Fla 2011).

C] COST, TIME AND OTHER CONSIDERATIONS

1. Cost

The most profound benefit favoring the appraisal process is the savings of money and resources for both of the parties to the process as well as an already overburdened judicial system. It is this savings which should be among the primary considerations in deciding to assert the benefit of the appraisal process. It is almost always the rule that the appraisal process will resolve the issues of the amount of loss, damages and value less expensively than full blown litigation.

The legal fees and expenses associated with the appraisal process are likely to be significantly less than those associated with litigation on the issue of damages alone. Furthermore, there is the added benefit of finality, as the figure arrived at by the appraisers is significantly less likely to be successfully challenged on appeal. The opportunity for a successful challenge of an appraisal award is much more limited in most jurisdictions, avoiding the possibility of appellate fees and costs as well.

The Standard Fire Policy, as well as most insurance policies today, generally provide that each appraiser shall be paid by the party

selecting him or her and the expenses of the appraisal and the umpire shall be paid by the parties equally.[101]

For example, in Florida the terms of an insurance policy have been found to govern with respect to appraisal related costs such as umpire and appraiser fees. In one matter, the court deemed umpire and appraiser fees unrecoverable under circumstances where a policy contained "clear and unambiguous" direction that each party would pay for its chosen appraiser and bear expenses equally. It did not accept the insured's argument that such fees would be covered under Florida's Civil Remedy Statute, Florida Statute 624.155(8) "for the recovery of damages 'which are a reasonably foreseeable result of a specified violation of this section…'" as there was no legal authority for recovery under this provision.[102] A similar result was seen where the carrier sought recovery of its appraisal expenses, and the court denied an insurer's motion for appraisal costs. There, the court found no basis to disregard that policy

[101] Virginia, however, provides in lines 144 through 147 of its Standard Fire Policy that "[I]f the written demand is made by this Company, then the insured shall be reimbursed by this Company for the reasonable cost of the insured's appraiser and the insured's portion of the cost of the umpire." Va. Code Ann. §38.2-2105.

[102] 316, Inc. v. Maryland Cas. Co. , 625 F. Supp. 2d 1187 (2009).

provision, providing for each party bearing the appraisal expenses equally.[103]

No one participating in the process should be misled into thinking that appraisal is an inexpensive process. While it generally is far less expensive then the alternative of litigation, it can be costly as well. It is therefore not appropriate in some small claims where the cost of the process (the party's appraiser and half of the umpire's cost) will approach the value of the claim. Nevertheless, if the parties cannot agree and a builder's meeting has proven unproductive, appraisal is the most cost efficient method of resolution.

Many jurisdictions do not provide for the recovery of attorneys' fees nor sums above and beyond the contractual claim. Particularly in these jurisdictions, appraisal could be a far more efficient and user-friendly process for the determination of the amount of loss and value than litigation.

2. Time Considerations

A review of lines 123 through 140 of the New York Standard Fire Policy, reflect a significantly expedited schedule for

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[103] Aries Ins. Co. v. Hercas Corp., 781 So.2d 429 (Fla.3d DCA 2001).

conducting the appraisal from beginning to end. The clear intent of the framers of the provision was to provide for an expedited and efficient process for resolving the issues of value and the amount of loss. In most cases, the existence of these contractually mandated time constraints encourage a quick and orderly process by which either party may compel the other to respond within a short period of time to launch the process and bring it to a speedy conclusion.

Once a disagreement has arisen between the parties concerning an appraisable issue, the appraisal process tends to be the most time efficient and user-friendly process available to the parties to resolve these issues.

Even in jurisdictions which mandate the speedy litigation of matters such as these, litigation tends to be significantly more time consuming and often stretches from months to years before a successful resolution is achieved. Even then, verdicts and determinations can be appealed and the process sometimes seems endless.

Thus, with regard to the timeliness of the result, appraisal is by far the most advantageous method to use in obtaining a quick resolution of appraisable issues.

The Standard Fire Policy provides that once appraisal is demanded, each party shall have 20 days to nominate its appraiser. It is then provided that the parties shall have 15 days to agree upon an umpire and then mandates the involvement of a court of record in the state to appoint an umpire should the parties fail to agree. Most states have an efficient process by which this can be accomplished in short order and in far less time then full blown litigation of all of the issues presented by the claim.

Assuming both parties are acting in good faith, it should be possible to bring an appraisal to a conclusion within a period of 60 days from the date of the demand. However, one can imagine many opportunities for delay.

3. Other Considerations

Other advantages may also be available through the use of the appraisal process.

Experienced appraisers may be more likely to recognize the effects of market conditions in a particular locality with regard to the cost and availability of materials, construction methods, zoning and building codes, etc. and thus may be more sensitive to issues likely to make for a more appropriate and fair result.

An additional benefit to the insurance carrier in pursuing an appraisal in those states that recognize a cause of action for an insurance company's bad faith, is that engagement in the appraisal process itself may be evidence of the company's good faith in confronting the problem of loss and value determination.

In Florida, however, an appraisal award in favor of an insured satisfies the necessary prerequisite for maintaining a bad faith action against an insurer. Florida requires that an insured's first-party cause of action for claim benefits against their insurer be resolved favorably before bad faith may be raised. Only a favorable "resolution of some kind" must occur, inclusive of not only an award of damages by a trial or arbitration but pursuant to appraisal as well.

Two cases demonstrate the potential impact the appraisal process may have in the context of a bad faith case which resulted from an insurance carrier's unwillingness to pay the full value of the claim. In Fraley v. Allstate[104] and Guebara v. Allstate[105] it was determined that where there is a genuine dispute including the reasonable reliance on experts, the

[104] 81 Cal. App. 4th 1282, 97 Cal. Rptr. 2d 386 (2000).
[105] 237 F.3d 997 (9th Cir. 2001).

insurance carrier has not committed bad faith as a matter of law, however, where there are other grounds for an assertion of bad faith such as the carrier's failure to do a thorough investigation or where it is alleged they acted in a dilatory manner, the "genuine dispute" theory may not save the carrier.

On the other hand, where an appraisal award was almost three times the insurer's initial payout, courts have upheld an insured's claim for breach of implied covenant of good faith and fair dealing.[106]

In Carden v. Allstate Ins. Co.,[107] it was held that the appraisal award, which was approximately $600,000 more than what the insurer initially offered, established the basis for consequential damages pursuant to Bi-Economy.[108] The court determined that because the insurer breached its duty to investigate, bargain and settle the insured's claim in good faith, consequential damages for breach of contract may be recovered not limited by the amount specific in the insurance policy.

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[106] *See* Blakely v. USAA Cas. Ins. Co., 633 F.3d 944 (10th Cir. 2011), 78 Fed.R. Serv.3d 845 (10th Cir. 2011).

[107] 30 Misc.3d 479, 912 N.Y.S.2d 867, 2010 N.Y. Slip Op. 20495 (Sup. Ct. West. Cty. 2010).

[108] Bi-Economy Market, Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 886 N.E.2d 127 (2008).

Furthermore, the informality associated in most jurisdictions with the appraisal process may have many advantages over the much more technical and legalistic aspects of proof of damages that occurs under the supervision of the watchful eye of a judge. Juries may be unable to cope with complex factual issues, which often require expert opinion.

An additional benefit of using the appraisal process, particularly where there are extreme differences between the parties in the evaluation of loss and damage, is that it may avoid the assertion of a fraud or gross exaggeration affirmative defense. These defenses are commonly asserted by the insurer in response to a law suit brought by an insured where the principle issue is loss and value. If the issue survives for consideration by a jury there is always a risk of disaster for the insured.

4. Bankruptcy

Generally, a bankruptcy court is without discretion to decline to stay bankruptcy proceedings in favor of appraisal and they certainly have the authority to grant such a stay.[109]

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[109] In re U.S. Lines, 197 F.3d 631 (2d Cir. 1999); In re Crysen/Montenay Energy Co., 26 F.3d 160 (2d Cir. 2000); S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC,2002 WL 1905968 (S.D.N.Y. 2002).

5. Multiple Policies

Where multiple policies exist covering the risk on the same property, and where only one insurer among several demand appraisal, the possibility of different results in parallel proceedings militates against the right of the lone carrier to have the damage issue resolved in accordance with the terms of the insurance policy.

Though the existence of multiple insurers is but one consideration, where full enforcement of the appraisal clause may unfairly multiply the proceedings in which the parties are forced to both litigate and appraise on the same or similar issues, a court may properly deny the appraisal or hold it in abeyance. [110]

One potential though unusual remedy is for the court to substitute itself as the neutral to whom the dispute is submitted as to matters in which the appraisers cannot agree.[111]

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[110] S.R. Bus. Intern. Bus. Ins. Co. Id.; Penn Central Corp.. v. Consolidated Rail Corp., 56 N.Y.2d 120, 436 N.E.2d 512 (1982).

[111] S.R. Bus. Intern. Bus. Ins. Co., Id.: Clark v. Kraftco Corp., 323 F. Supp. 358 (S.D.N.Y. 1971).

D] IN ACTIONS AGAINST AGENTS AND BROKERS

In an action against a broker or agent brought due to some failure of coverage alleged to be the fault of the broker or agent, it is generally said that the broker or agent stands in the shoes of the insurance carrier with respect to the rights, obligations and responsibilities of the insurance carrier.

Thus, with respect to determining damages, the insured's demand to have the issues of loss and value resolved through appraisal should be equally as enforceable as against the broker or agent standing in the shoes of the insurance carrier as it would have been against the carrier directly in the absence of the coverage failure that gave rise to the action against the broker or agent. Thus, an aggrieved insured who lost the benefit of coverage for an otherwise covered claim due to the malfeasance of a broker or agent can properly and efficiently resolve the issue of loss and damage with an appropriate demand for appraisal pursuant to the underlying insurance policy and in so doing, avoid having to litigate those issues unnecessarily where the underlying policy either contained or was subject to an appraisal clause.

E] IN ACTIONS INVOLVING THIRD-PARTIES

Where an insured brought suit against his insurer as well as several allegedly negligent contractors upon a demand for appraisal by the first-party insurer, the court granted its demand but stayed the appraisal until a resolution of the third-party claims could be achieved, as the court (quoting the California Arbitration Statute) was concerned about the possibility of conflicting rulings between the appraisal and the related civil action.[112]

In such a situation, care must be taken to analyze the different measures for valuing the loss with the first-party claim's valuation subject to policy terms (i.e. replacement value might apply), whereas third-party claims against the tortfeasor(s) are subject, generally, to a depreciated value or actual cash value.

[112] Roberson v. Allstate Ins. Co., 2008 WL 1838426 (Cal. Ct. App. 2008) (unpublished opinion).