LITIGATING APPRAISAL CLAIMS

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LITIGATING APPRAISAL CLAIMS

I. INTRODUCTION

While Texas has a long history of appraisal in the insurance industry, the changing landscape of Texas insurance law has resulted in more appraisals and more appraisal awards than ever. While the causes of this phenomenon are outside the scope of this paper, we would be remiss if we did not acknowledge the current environment.

For the purposes of this paper, we provide a survey of recent decisions involving appraisal. In the appendix, we include a collection of verdicts in cases involving an appraisal award. While there have been a handful as of the date of this paper, the variety of charges and results suggest that litigating appraisal awards is heavily case-specific as to both the policy language, the award, claim facts, and the requested relief.

II. PAYING THE APPRAISAL AWARD

A. Supreme Court of Texas Holds Insurer's Full and Timely Payment of Appraisal Award Does Not Foreclose Any Possibility of Damages Under Prompt Payment of Claims Act, But Insured Must Still Establish Contractual Liability for Damages

The Supreme Court of Texas held that insurers are liable for damages under Section 542.060 of the Texas Prompt Payment of Claims Act ("TPPCA") only when the insurer (1) accepts liability or is adjudicated liable under the policy, and (2) violated a TPPCA deadline or requirement. In *Barbara Technologies Corporation v. State Farm Lloyds*, No. 17-0640, 2019 WL 2710089, (Tex., June 25, 2019, mem. op.)**,** Barbara Technologies Corporation ("Barbara Tech") contracted with State Farm Lloyds for property insurance covering Barbara Tech's commercial property, including wind and hail coverage. After a wind and hailstorm damaged Barbara Tech's property, it filed a claim with State Farm. State Farm inspected the property and denied Barbara Tech's claim stating that the property sustained $3,153.57 in damages, which was less than Barbara Tech's $5,000 deductible. Consequently, Barbara Tech filed suit against State Farm, alleging violations of the TPPCA, among other claims. In response to the suit, State Farm invoked the appraisal provision under the policy. Approximately seven months later, the appraisers agreed to an appraisal value of $195,345.63, which State Farm paid, less depreciation and the deductible, six days after receipt of the appraisal award.

Barbara Tech accepted the payment but continued with its lawsuit, contending that State Farm still owed damages (18% interest and attorney fees) pursuant to section 542.060 of the Texas Insurance Code because State Farm allegedly violated Section 542.058(a) by failing to pay the claim within sixty days of receiving the information required to secure final proof of Barbara Tech's loss (i.e. over one year earlier when State Farm initially denied the claim). State Farm filed a motion for summary judgment asserting that its timely payment of the appraisal award precluded Barbara Tech from recovering damages pursuant to TPPCA's sixty-day requirement.

The Supreme Court of Texas concluded that a full and timely payment of an appraisal award under the policy precludes an insured from recovering damages under the TPPCA when acceptance or adjudication of liability is absent. In the court's words: "until an insurer is determined to owe the claimant benefits and thus is liable under the policy—either by accepting the claim and notifying the insured that it will pay, or through an adjudication of liability—the insurer is required to pay nothing, is subject to no payment deadline, and is not subject to TPPCA damages for delayed payment." The court further concluded that State Farm's payment based on the appraisal was neither an acknowledgment of liability under the policy nor an award of actual damages. In sum, the Supreme Court of Texas held that "invocation of the contractual appraisal provision to resolve a rejected claim . . . neither subjects an insurer to TPPCA damages nor insulates the insurer from TPPCA damages. An insurer will become liable for TPPCA damages under section 542.060 only if it (1) accepts liability or is adjudicated liable under the policy, and (2) violated a TPPCA deadline or requirement."

Following *Barbara Tech*, in a pair of brief, almost identical per curiam opinions, the Supreme Court of Texas reversed two other appellate courts who had previously granted summary judgment for insurers and who promptly paid appraisal awards. In *Marchbanks v. Liberty Ins. Corp.*, 18-0977, 2020 WL 3393472, (Tex. June 19, 2020) and *Perry v. United Services Auto. Ass'n*, 19-0210, 2020 WL 3393470 (Tex. June 19, 2020) the Texas Supreme Court reaffirmed its commitment to allowing policyholders to pursue claims under Insurance Code Chapter 542 after payment of an appraisal award, even though the payment of the award extinguishes all other claims.

B. Supreme Court of Texas Holds Timely and Full Payment of An Appraisal Award Does Not Relieve Insurer of Liability Under the Prompt Payment of Claims Act Where Insurer Made a Prior Timely and Reasonable Payment on the Claim.

The Supreme Court of Texas considered whether an insurer's prompt payment of the additional amount of loss determined through appraisal, after its initial timely payment based on its own damage estimate, precluded liability for statutory interest and attorney's fees under the Texas Prompt Payment of Claims Act on

the additional amount, and determined that statutory interest may be recovered. But, despite the appraisal award, the insured must first establish: 1) the amount for which the insurer is contractually liable under the policy; 2) the insurer's failure to comply with statutory deadlines; and 3) "statutory damages based on the amount contractually owed less the amounts paid within the statutory deadline."

In *Hinojosa v. State Farm Lloyds*, 2021WL 1080854 (Tex. March 19, 2021), the insured presented a claim for wind and hail damage to the insured residence. After a series of reinspections, State Farm made an otherwise timely payment based on its own evaluation of the damages. Disputing the amount of damage, the insured filed suit and fifteen months later into the lawsuit, State Farm invoked appraisal. The appraisal process determined the amount of loss to be $22,974.75 more than what State Farm initially paid. "Within a week of the appraisers' decision, and about two-and-a-half years after Hinojos submitted his claim, State Farm tendered" the additional amount and moved for summary judgment asserting that payment of the award precluded further liability. Prior to the Supreme Court's *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019), and *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781 (Tex. 2020), decisions, the trial court granted State Farm's motion and the court of appeals affirmed. The Supreme Court granted the homeowners petition for review.

Applying its holdings in *Barbara Technologies Corp. v. State Farm Lloyds* and *Alvarez v. State Farm Lloyds*, the Court rejected State Farm's "reasonable payment" arguments based on dicta in those and related decisions and held that "an insurer's acceptance and partial payment of the claim within the statutory deadline does not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires." And addressing the reasonableness argument further, the Court stated: "Although the statute says nothing about reasonableness, a reasonable payment should roughly correspond to the amount owed on the claim. When it does not, a partial payment mitigates the damage resulting from a chapter 542 violation. Interest accrues only on the unpaid portion of the claim."

Lastly, the Court noted that the decision did not address the insured's affirmative claim for Chapter 542 relief and that in order to prevail, the insured must first establish: 1) the amount for which the insurer is contractually liable under the policy; 2) the insurer's failure to comply with statutory deadlines; and 3) "statutory damages based on the amount contractually owed less the amounts paid within the statutory deadline." Accordingly, the summary judgment in State Farm's favor was reversed, and the case was remanded to the trial court for further proceedings.

C. Payment of Appraisal Award and Interest Results in Summary Judgment Under Chapter 542A

A federal judge in Sherman adopted a magistrate's report and recommendation that an insurer who pays an appraisal award of a weather claim and all interest which may be due under Texas Insurance Code Chapter 542A (a/k/a the Texas Prompt Payment of Claims Act) precludes any remaining claim for 542A interest and attorney fees as a matter of law. *Morakabian v. Allstate Vehicle and Property Ins. Co.*, No. 4:21-CV-100-SDJ, 2023 WL 2712481 (E.D. Tex. Mar. 30, 2023) (slip op.) involved a property claim for storm damage. After the parties disagreed on the value of the claim, the policyholder filed suit, and also demanded appraisal. When appraisal completed, the insurer promptly paid the resulting award and an added amount of $4,699 intended to cover all Chapter 542A interest that could potentially be due. The payment did not include any amount of attorney fees.

The insurer moved for summary judgment on all claims, and the policyholder agreed to nonsuit all claims except the Chapter 542A claim. The policyholder did not argue that the $4,699 was insufficient to cover the statutory interest due, but instead argued more generally that the insurer could not nullify moot his right to litigate the 542A claim and recover attorney fees by pre-emptively paying the interest due and that the statute does not require a "$0" entry within the judgment for purposes of calculating attorney's fees under § 542.007's numerator/denominator calculation.

The court parsed the wording of Chapter 542A, examined several other recent opinions on the matter, and openly disagreed with the 2020 opinion out of Houston, *Martinez v. Allstate Vehicle & Property Insurance Co*., No. 4:19-CV-2975, 2020 WL 6887753 (S.D. Tex. Nov. 20, 2020). The court reasoned that because the claim had been entirely satisfied by payment of the appraisal award, the amount of the remaining claim was $0 and therefore could not support an award of attorney fees. The court relied on *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 134 (Tex. 2019) for this conclusion.

D. Other Courts Hold Payment of Appraisal Award and Interest Does Not Preclude Attorney's Fees Under Chapter 542A

Unlike Morakabian, a court of the Western District of Texas held that an insurer's payment of an appraisal award and interest does not preclude the insured's recovery for attorney's fees under Chapter 542A. In *Modesto Gonzalez v. Allstate Fire and Cas. Ins. Co.*, No. 18-cv-00283-OLG (W.D. Tex. Dec 2, 2019), the court reasoned that although *Barbara Technologies* did not specifically address this issue under Chapter 542A, the Texas Supreme Court did

leave open the possibility that the amount paid following appraisal could serve as "actual damages" for the purposes of determining liability under the Texas Prompt Payment of Claims Act. The court further recognized that the court could enter a declaratory judgment in Plaintiff's favor with respect to the amount owed by the insurer, irrespective of whether all or portions of that amount have been paid. The court noted that Allstate's interpretation of Chapter 542A would mean that "insurer's could systematically avoid liability for [Prompt Payment Claims Act] attorney's fees by (i) first, paying only a small fraction of the alleged claim amount to a claimant, (ii) second, invoking appraisal, and (iii) third, only following appraisal, paying the difference and any interest owed to the claimant."

Also, unlike *Morakabian*, a court of the Southern District of Texas held that an insurer's payment of an appraisal award_and interest does not moot the insured's recovery for attorney's fees under Chapter 542A. *Martinez v. Allstate Veh. & Prop. Ins. Co*., Civ. A. No. 4:19-CV-2975, 2020 WL 6887753 (S.D. Tex. Nov. 20, 2020.) In *Martinez*, the court noted that Allstate appeared to have paid "interest for a tactical reason: to moot [Martinez's] claim and thereby avoid paying her fees." The court held that payment of interest fails to make an insured whole where the insured is forced to hire an attorney and that Allstate's position would force upon the insured a settlement to which the insured did not agree.

E. Paying Appraisal Award and Interest Not Enough to Protect Insurers From Post-Appraisal Litigation In Non-542A Cases

A Houston court of appeals reversed a summary judgment originally granted in favor of an insured after the insurer paid an appraisal award on a residential wind/hail claim. In *Tex. FAIR Plan Ass'n v. Ahmed*, No. 14-20-00585-CV, 2022 WL 3268391 (Tex. App.—Houston [14th Dist.] Aug. 11, 2022, no pet. h.) (slip op.), FAIR Plan initially found the hail damage was below the deductible. Ahmed sued, and FAIR Plan demanded appraisal. The appraisal resulted in the two appraisers issuing an agreed award which was above the deductible. FAIR Plan promptly paid the replacement cost less the deductible, choosing not to enforce the policy's replacement cost conditions.

While this suit was pending, the Supreme Court of Texas decided *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019), holding that payment of an appraisal award after the Texas Insurance Code Chapter 542 payment deadline for the claim has elapsed does not entitle the insurer to summary judgment. When Barbara Technologies was issued, FAIR Plan immediately made a supplemental payment to Ahmed of the Chapter 542 interest plus pre-judgment interest plus $2,500 in "estimated" attorney fees. FAIR Plan then moved for summary judgment on the grounds that it had paid not only the appraisal award itself, but also all amounts that might be considered due under Chapter 542 as interpreted by *Barbara Technologies*.

At the same time, Ahmed filed his own motion for summary judgment, seeking a much larger attorney fee award. The court denied FAIR Plan's motion, conducted a bench trial on attorney fees, and awarded Ahmed a judgment which included the Chapter 542 interest and $96,000 in attorney fees through trial.

On appeal, the appellate court concluded neither side was entitled to judgment, reasoning that Barbara Technologies was based on liability for a claim that is either proven or admitted, and because appraisal does not determine liability, paying an appraisal award is not proof of liability. Therefore, the court reversed the judgment in favor of Ahmed and remanded the case.

When *Barbara Technologies* was issued, many in the industry read it to mean that when paying an appraisal award after initially finding the claim below the deductible, the insurer should also calculate and pay the most generous amount of Chapter 542 interest that might be due to ensure any alleged violation has been fully cured and nothing more could be owed under Chapter 542. Some federal courts have favored that approach, while others have not as cited above (e.g., *Morakabian* and *Martinez*).

As of the date of this paper, *Ahmed* is the only Texas Appellate Court to address the issue of whether timely payment of an appraisal award plus interest precludes any claim for attorney's fees. Although Ahmed was in the context of a non-542A claim (Ahmed's lawsuit and insurance claim arose before the legislature passed Chapter 542A), *Ahmed* cited and favorably adopted and discussed the reasoning in *Martinez v. Allstate Vehicle & Prop. Ins. Co*., 2020 WL 6887753 (S.D. Tex. Nov. 20, 2020) (a 542A case, holding payment of 542 interest did not fully cure a 542 violation).

F. Court Holds Extra-Contractual Remedies Not Precluded by ACV Appraisal Payment Where Insured Seeks Ordinance or Law Coverage Benefits

A court of the Southern District of Texas denied an insurer's motion for summary regarding the insured's claim for code and ordinance coverage benefits following the insurer's actual cash value payment of an appraisal award. *Kabir Marina Grand Hotel, Ltd. v. Landmark Am. Ins. Co.,* No. 2:18-CV-00237, 2022 WL 19517466 (S.D. Tex. January 18, 2022) (D.E. 74)

Kabir Marina Grand Hotel, LTD., sustained damage to its hotel during Hurricane Harvey. Marina Grand compelled appraisal by court order. The appraisal panel awarded an amount for ordinance or

law compliance. Although the policy included an "Ordinance or Law Coverage" endorsement, that endorsement provided the insurer will not pay for code upgrades "[u]nless the repairs or replacement are made as soon as reasonably possible after the loss or damage, *not to exceed two years*." Landmark argued it did not owe any additional benefits because the time period expired, and Marina Grand had not yet made the repairs.

While Marina Grand conceded it had not yet made the repairs, it further claimed that Landmark's refusal to pay *any* policy benefits on which its ability to make any such repairs depended had prevented the hotel from timely conducting the repairs. Marina Grand argued that Landmark is estopped from relying on the contractual limitations period.[1]

The court agreed. Although Landmark correctly pointed out that Texas law does not allow the imposition of equitable remedies to expand the scope or duration of coverage, Marina Grand argued that the "Benefits-Lost Rule" pronounced in *USAA Texas Lloyds Co. v. Menchaca,* 545 S.W.3d 479, 497 (Tex. 2018) entitled Marina Grand to its claim for code and ordinance coverage even if those benefits were now time-barred. The Court denied Landmark's motion and noted that Marina Grand was not seeking coverage for a risk that is not covered or for a time period for which it did not pay a premium. In other words, Marina Grand did not seek to "expand coverage" by equitable means but sought benefits it otherwise would have had but for prejudice resulting from the insurer's conduct. The court cited the Texas Supreme Court's opinion in *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 775 (Tex. 2008), which held "that if an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered."

III. INDEPENDENT INJURY AND APPRAISAL AWARDS

A. Insured Can Pursue Extra-Contractual Claims Despite Insurer's Payment of Appraisal Award Where the Policy Includes a "Unilateral" Appraisal Clause

The Texas Supreme Court reversed and remanded an appellate court's decision to limit an insured's statutory and common law bad-faith claims to those under Texas Prompt Payment of Claims Act (TPPCA), even after appraisal benefits were fully paid by the insurer under a policy with a unilateral appraisal clause. In *TopDog Prop. v. GuideOne Nat,l* Ins. Co., 2020 WL 1898538 (Tex. Apr. 17, 2020), the insured property sustained wind and hail damage. After its first inspection, GuideOne determined that the loss fell below TopDog's $5,000 deductible. TopDog requested a second inspection and GuideOne reached the same conclusion. After GuideOne declined a request for a third inspection, TopDog sought to invoke the policy's appraisal process. GuideOne refused arguing the policy contained a unilateral appraisal clause, GuideOne was the only party that could invoke appraisal and they considered appraisal unnecessary.

TopDog then sued GuideOne asserting claims for breach of contract, common-law and statutory bad faith, and violations of the TPPCA. Eight months later, GuideOne demanded an appraisal, but TopDog declined their demand. GuideOne went to the court and was able to secure an order compelling an appraisal. The appraisal set the amount of loss at $168,808—significantly higher than GuideOne's initial estimates. GuideOne then paid TopDog the value of the appraisal award less the deductible and depreciation. After payment by GuideOne, both parties moved for summary judgment. The trial court denied TopDog's motion and granted GuideOne's, based on GuideOne's payment of the appraisal award. TopDog appealed, but the appellate court held, "(1) TopDog failed to raise a fact issue because GuideOne paid all benefits available under the policy when it paid the appraisal award, and (2) TopDog's bad-faith and TPPCA claims failed because it did not allege an injury independent from the policy benefits and did not demonstrate policy benefits were withheld after the appraisal award was paid. TopDog then petitioned the Texas Supreme Court asking whether the court of appeals' holdings were consistent with recent precedent and whether GuideOne's unilateral appraisal clause ought to change the result.

Prior to issuing an opinion in this case, the Texas Supreme Court decided *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019), holding that payment in accordance with an appraisal clause does not foreclose TPPCA damages, but the payment is "neither an acknowledgement of liability nor a determination of liability under the policy for purposes of TPPCA damages under section 542.060." In *Ortiz v. State Farm Lloyds,* 589 S.W.3d 127, the court held an appraisal payment eliminates an insurer's liability for breach of contract and common-law and statutory bad faith so long as the insured did not suffer an independent injury. TopDog asked the Court to create an exception to Ortiz arguing that

[1] The court would later issue a similar ruling in another case, albeit in a matter that did not involve appraisal. *Landmark Am. Ins. Co. v. Port Royal by Sea Condo. Owners Ass'n, Inc.,* No. 2:19-CV-00006, 2022 WL 3135301, at *5 (S.D. Tex. Aug. 5, 2022). In *Port Royal*, Landmark argued it did not owe recoverable depreciation as a matter of law on a commercial Harvey claim where repairs had not been completed within the two-year contractual limitations period. The court rejected Landmark's argument, citing the same authority as *Kabir Marina*.

"insureds need not establish independent injury to recover for breach of contract and bad faith where an insurer relies on a unilateral appraisal clause to force the insured to file suit, then compels appraisal, and pays the appraisal award." TopDog argued that under these facts "the appraisal award itself constitutes actual damages."

In reversing the court of appeals, the Texas Supreme Court noted that *Ortiz* did not involve a unilateral appraisal clause and that the independent injury argument may be considered by the trial court on remand. Further, and consistent with its holding in *Barbara Technologies*, not allowing TopDog to maintain their TPPCA claim was error. Accordingly, the Court reversed the judgment of the court of appeals and remanded the case to the trial court to further consider TopDog's claims.

The Court's willingness to allow statutory and common law bad faith claims to proceed despite full payment of an appraisal award may be limited to those matters where an insurer has a unilateral right to invoke appraisal and refuses to appraise until after suit is filed. Nevertheless, this case is significant in suggesting that an insurer's refusal to appraise a damage dispute until after suit is filed may support an "independent injury" argument allowing the statutory and common law bad-faith claims, in addition to the TPPCA claims, to proceed. The Court also noted that TopDog is free to brief its argument that unilateral appraisal clauses are illusory and therefore, unenforceable, on remand.

IV. COMPELLING APPRAISAL

A. US District Court Grants Motion to Compel Appraisal Despite Insurer's Position That the Damage Was Not a Covered Loss

On March 16, 2023, the United States District Court for the Southern District of Texas granted the insured's motion to compel appraisal notwithstanding the insurer's position that the damage was not a covered loss. In *Chen v. Amguard Ins. Co*., No 4:22-CV-3673, 2023 WL 2541704 (S.D. Texas—Houston, March 16, 2023, mem. op.), Chen made a claim for roof damage under his insurance policy with AmGuard. After an investigation, AmGuard denied the claim, asserting that the damage was excluded under the policy because it resulted from wear, tear, and deterioration. Consequently, Chen's counsel sent a letter to AmGuard demanding appraisal, which AmGuard rejected on the ground that the issue was a coverage issue and not a price/scope issue. The operative provision in the policy provided: "If you and we fail to agree on the amount of loss, either may demand appraisal of the loss." Chen subsequently sued AmGuard asserting contractual and extra-contractual claims.

The U.S. District Court began its analysis by noting that the language of the appraisal clause made the parties' disagreement "on the amount of loss" a condition precedent that required Chen to show that the parties failed to agree on the amount of loss before appraisal was warranted. The Court concluded that "AmGuard's attempt to avoid appraisal by focusing on the cause of the asserted loss [did] not comport with the Texas Supreme Court's decision" in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009), wherein the Supreme Court concluded that the appraisal process "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." "This is true when—as here—the causation question involves separating loss due to a covered event from a property's pre-existing condition. And even when an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong. Moreover, nothing indicate[d] that coverage [was] so unlikely here that appraisal will never be needed. AmGuard therefore cannot avoid appraisal at this point merely because there might be a causation question that exceeds the scope of appraisal. Appraisal is warranted to determine the amount of loss, even if the ultimate causation and coverage determinations are reserved to the Court post-appraisal."

In sum, the Court concluded that the parties "[had], in fact, disagreed about the 'amount of loss,' notwithstanding AmGuard's position that the damage to Chen's property stem[med] from a non-covered cause." Thus, "because the condition precedent to invoking appraisal had been satisfied, the Court grant[ed] Chen's motion to compel appraisal."

B. Motion To Compel Appraisal Granted Ten Months into Lawsuit - Impasse Not Reached Until After Mediation Failed

The United States District Court for the Eastern District of Texas granted an insured's motion to compel appraisal, which was first invoked ten months after suit was filed and three days after the insurer sought summary judgment. In *Hamorsky v. Allstate Vehicle and Property Ins. Co*., No. 4:19-CV-00084, 2020 WL 1929420 (E.D. Texas, April 21, 2020, mem. op.), Jennifer Hamorsky's home sustained wind and hail damage. Hamorsky presented a claim under her homeowners' insurance policy with Allstate Vehicle and Property Insurance Company ("Allstate"). Allstate investigated the claim and paid Hamorsky $31,614.47 for the loss. However, Hamorsky, relying on an independent contractor, believed she was entitled to $51,043.27.

In January 2019, Hamorsky filed suit against Allstate. In June 2019, the court referred the case to mediation and entered an amended scheduling order, with trial to occur in March 2020. In September 2019, the parties notified the court that mediation resulted in an impasse. In October 2019, Allstate filed a motion

for summary judgment. Three days later, and ten months after suit was filed, Hamorsky invoked appraisal pursuant to the policy. Allstate opposed appraisal and, consequently, Hamorsky filed a motion to compel appraisal.

Under Texas law, since the policy did not include a time frame in which Hamorsky must request an appraisal, she needed to make the request for an appraisal within a reasonable time from the moment of impasse. "An impasse is reached when it becomes apparent to both sides that they disagree as to the damages and any further attempts to negotiate a settlement is futile. A court is not to measure the point of impasse by considering the first sign of disagreement between the parties because both parties must be aware that future negotiations would be futile. An impasse can exist even though the parties are engaged in continuing efforts to resolve their dispute, including mediation."

Allstate argued that the point of impasse occurred on January 8, 2019—the date the lawsuit was filed—and that Hamorsky waived her right to appraisal by "waiting until the end of litigation and the eve of trial to invoke appraisal."

The United States District Court for the Eastern District of Texas disagreed, concluding that the parties reached an impasse on September 10, 2019—the date that mediation failed—and that Hamorsky's approximate one-month delay in invoking appraisal after impasse was not unreasonable, and no waiver was committed. To that end, the U.S. District Court relied on cases concluding five-month and six-month delays from the point of impasse were not per se unreasonable. Further, the court reasoned the there was nothing in the record to evidence that Allstate believed that the parties were at an impasse prior to mediation or that Hamorsky acted in a manner that would constitute waiver prior to mediation. Further, "any argument that Allstate believed that the parties were at an impasse as early as January 8, 2019 was belied by the fact that the parties entered mediation following the filing of [the] suit." Lastly, "the filing of a lawsuit does not necessarily signify an impasse because the filing of a suit merely demonstrates that one party, the plaintiff, has unilaterally concluded that the parties were at an impasse."

In sum, although "appraisal is intended to take place before suit is filed" and "many of the benefits of appraisal are lost if a party is allowed to delay invoking the appraisal," the U.S. District Court granted Hamorsky's motion to compel appraisal, first invoked ten months into the lawsuit, because an impasse had not been reached until that time.

C. US District Court Denies Insured's Motion to Compel Appraisal

The United States District Court for the Southern District of Texas denied an insured's motion to compel appraisal, concluding that the insured did not comply with the conditions precedent under the insurance policy. In *Hall v. State Farm Lloyds*, No. H-21-1769, 2021 WL 5054647 (S.D. Texas, [Houston Division] November 1, 2021, mem. op.), the insured's residence allegedly sustained damage caused by an explosion 1.8 miles away. Before filing suit, the insured invoked the policy's appraisal clause in a letter stating that he was entitled to recover $184,376.59 for the damages to the property, that this estimate was substantially different from State Farm's belief (without identifying any loss amount that State Farm "believed" applied), and that the adjuster did not perform an adequate inspection or was not adequately trained. State Farm denied the insured's request, noting that neither State Farm nor the insured could demand appraisal until there was an itemized disagreement over the loss amount. The insured subsequently filed suit, and again invoked the appraisal process, which State Farm again denied. Finally, the insured filed a motion to compel appraisal.

The court quickly denied the insured's motion based on the policy provisions. That is, the policy included the following conditions to invoking an appraisal: (1) the party seeking appraisal must provide the other party with written, itemized documentation of a specific dispute as to the amount of the loss, identifying separately each item being disputed, and (2) a party may not demand appraisal after that party brings suit or action against the other party relating to the amount of loss.

The court noted that it was unclear why the appraisal process was relevant in the first place, as State Farm and the insured disputed whether the nearby explosion caused any covered damage to the insured's property. "The purpose of an appraisal provision is not to determine the cause of the loss," the Court noted.

This case demonstrates that a court's willingness to compel appraisal may rely on the policy language and any required conditions precedent to a party's right to demand appraisal, such as providing documentation of the parties' disagreement in this case.

D. Court Conditionally Grants Insurer's Petition for Writ of Mandamus to Enforce Right to Appraisal

The Beaumont Court of Appeals of Texas granted Allstate Vehicle and Property Insurance Company's petition for mandamus relief compelling an appraisal of residential storm damage. In *Re Allstate Vehicle & Prop. Ins. Co.*, No. 09-18-00024-CV, 2018 WL 10033794 (Tex. App.—Beaumont Feb. 22, 2018) the Court addressed the insurer's right to enforce the underlying policy's appraisal provision after the insured filed suit. The court found, among other things, that the policy set no time limit to invoke the appraisal clause and Allstate did not waive its right to appraisal.

Accordingly, the court conditionally granted Allstate's petition, confident the trial court would vacate its order denying Allstate's motion to compel and to enforce the appraisal clause.

Allstate insured Pamela Bailey's home when it was damaged by a storm in April 2015. Bailey submitted an estimate for repairs to Allstate totaling $13,776 while Allstate determined the home suffered only $2,766 in damages. After applying Bailey's deductible, Allstate indicated it would pay $766 to Bailey based on its damage calculation. Accordingly, Bailey's attorney wrote Allstate a letter in July 2017 demanding payment of $11,776—the Insured's estimate less Allstate's prior payment and the deductible. Counsel for Bailey further demanded Allstate pay penalties of $3,405 as well as $3,533 in attorney's fees. The letter stated if Allstate wished to invoke the policy's appraisal clause, they were to identify an appraiser within 20 days of receipt of the letter. Forty days following receipt, Allstate responded by declining the demand, however the response was silent on the issue of appraisal.

Bailey filed suit in August 2017 alleging breach of contract, misrepresentation, failure to promptly pay her claim, and breach of the duty of good faith and fair dealing. Allstate answered and then invoked the appraisal clause in November 2017, notifying Bailey's counsel of its chosen appraiser. When Bailey failed to respond, Allstate filed a motion to compel an appraisal. In her response, Bailey asserted that by waiting until after suit was filed, Allstate waived its right to appraisal. Bailey further argued that Allstate's appraisal was an impermissible request to compel specific performance under the policy. The trial court denied Allstate's motion to compel.

In its mandamus action, Allstate alleged the trial court abused its discretion in denying its motion to compel. Allstate further argued Bailey was not prejudiced by a delay in its appraisal request, since Bailey herself could have demanded an appraisal before filing suit. Allstate further argued that the trial court's denial was improper by interfering in its right to defend against Bailey's claims that Allstate breached its policy obligations. Bailey countered that mediation and trial would be more efficient than appraisal. Bailey further asserted that the trial court had basis to deny Allstate's motion based on her incurred attorney fees and expenses in filing suit and that additional fees incurred in appraisal and trial would hinder her ability to make repairs to her home. Bailey claimed Allstate waived its right to appraisal as it failed to invoke the right before engaging in litigation. Finally, Bailey asserted Allstate waived its right to appraisal by failing to allege that Bailey had not submitted her property damage claim to the appraisal process.

The Court noted an appraisal clause binds the parties to have the loss amount determined in a particular way and waiver requires either the intentional relinquishment of a known right or intentional conduct inconsistent with claiming the right. Notwithstanding the demand letter, the Court found that the policy did not place a time limit on invoking the appraisal and the attorney letter cannot unilaterally change Allstate's rights. Accordingly, the trial court did not have discretion to re-write the policy requiring Allstate to invoke the right to appraisal prior to Bailey filing suit. The Court further concluded that the record did not support that Allstate unreasonably delayed or that Bailey was prejudiced by the alleged delays. Specifically, the policy did not contain a time limit on invoking the appraisal clause and Bailey herself could have invoked the clause prior to filing suit. Lastly, the Court rejected Bailey's argument that Allstate failed to file the proper pleading—rejecting the notion that filing a motion to compel arbitration is analogous to attempting to enforce an arbitration award; "a party's right to appraisal may be accompanied by filing a motion to compel appraisal which is the procedure that Allstate followed here." Because Allstate followed the correct procedure and did not waive its right to appraisal, the Court ordered the trial court vacate its order denying Allstate's motion to compel and to enforce the appraisal clause.

E. San Antonio Court Holds Disputes on Overhead & Profit and Tax are Appraisable, Orders Suits Abated Pending Appraisal

In a pair of nearly identical sister cases, the San Antonio court of appeals granted mandamus, ordering the trial court to send two first-party commercial property cases to appraisal and also ordering the suits abated pending the outcome of the appraisal process. *In re Acceptance Indem. Ins. Co*., No. 04-18-00232-CV, --- S.W.3d ---, 2018 WL 4608261 (Sep. 26, 2018) and *In re Acceptance Indem. Ins. Co*., No. 04-18-00232-CV, --- S.W.3d ---, 2018 WL 4610902 (Sep. 26, 2018) were two wind/hail lawsuits brought by owners of several apartment complexes against Acceptance. In both cases, the insureds alleged that the loss estimates prepared by Acceptance failed to include overhead, profit, and sales tax. The insureds signed proofs of loss for the undisputed actual repair costs, but reserved the right to continue seeking the overhead, profit, and sales tax. In response to pre-suit demand letters from the insureds, Acceptance invoked appraisal. The insureds contended appraisal was not appropriate and sued Acceptance. Acceptance moved to compel appraisal and abate both lawsuits, which the trial court denied.

On mandamus, the court of appeals considered several arguments lodged by the insureds in an effort to escape appraisal. First, the insureds argued that Acceptance had waived the right to appraise by undue delay. Applying the standard enunciated by the

Supreme Court of Texas in *In re Universal Underwriters*, 345 S.W.3d 404 (Tex. 2011), the court sought to determine when the parties reached an impasse, whether an unreasonable time had elapsed after impasse, and whether the insureds had been prejudiced by the delay. Observing that an impasse requires more than mere disagreement, but a mutual understanding that neither party will negotiate further, the court found no evidence that impasse had been reached at all, let alone that an unreasonable delay after impasse had occurred. The court held that a pre-suit demand letter cannot be evidence of impasse because its inherent purpose is to encourage settlement, which implies further negotiation.

The insureds also argued that the dispute regarding overhead, profit, and tax is not subject to appraisal because it is not a value dispute on the amount of loss, but a legal dispute over whether they are owed at all. But Acceptance agreed that some amount was due, and the question was how much, thus bringing it squarely within the “amount of loss,” which is precisely what the appraisal clause covers.

Then the insureds argued that Acceptance had breached the policy by not paying overhead, profit, and tax, and because of that breach, they no longer had any duty to comply with any art of the policy. The court disagreed because the only reason it had not yet been paid was the dispute over the amount, which Acceptance had invoked appraisal to resolve.

Finally, the insureds argued the appraisal clause lacks mutuality and is illusory because the carrier expressly retains the right to deny the claim, and therefore any award the carrier does not like will simply result in a denial. Again, the court disagreed, pointing out that both sides can invoke the appraisal clause, and both sides retain the right to dispute coverage after an appraisal award is issued – the carrier by denying the claim, and the insured by filing suit.

V. WAIVER OF THE RIGHT TO APPRAISAL

A. Court Finds No Waiver of Insurer's Right to Appraisal First Invoked Two Months Out from Trial

The San Antonio Court of Appeals found that an insurer had not waived its right to invoke appraisal, despite extensive discovery, a failed mediation and being two months from trial when appraisal was invoked. In *In re American Nat’l Prop. & Cas. Co.*, 2018 WL 3264932 (Tex. App.—San Antonio July 5, 2018), the insured claimed damage to a commercial property arising from a hailstorm. The insurer found the damage was minor and less than the deductible and sent a partial denial letter to the insured. The insured then filed suit in August 2016 alleging breach of contract, breach of the duty of good faith and fair dealing and other extra-contractual causes of action. After discovery was complete and mediation failed in July 2017, the court ordered the parties to be ready for trial in November 2017. The insurer then filed a motion to compel appraisal and abate the lawsuit. The court denied the motion and this mandamus action followed.

The insured presented several arguments in opposition to appraisal including waiver by denying the claim and engaging in conduct inconsistent with that right, and that public policy reasons supporting appraisal due to speed and lower costs, no longer applied. In response, the insurer argued that the nonwaiver clause in the policy requiring a written endorsement to change the policy terms was dispositive of all issues. The court closely examined Texas law addressing waiver and nonwaiver clauses and held "that the inclusion in an insurance contract of a broadly worded nonwaiver clause such as the one in this case is not dispositive, as a matter of law, on the issue of whether the insurer waived any of its rights under the contract." The court then focused its attention on whether the insurer "intentionally engaged in conduct inconsistent with claiming the right to enforce the nonwaiver agreement." And finding that the insured did not point to any evidence in the record of intentional conduct inconsistent with claiming its right to appraisal, the court concluded the trial court erred in denying the insurer's motion to compel appraisal.

Interestingly, the court went further noting that even if it had concluded that the insurer waived the nonwaiver clause and waived its right to seek appraisal due to delay, the insured would still be required to show prejudice as a result. And in response to the insured's argument that the financial impact of the insurer's "litigious conduct exceeds $145,000" (over $100,000 in attorney's fees and over $35,000 in case expenses), the court applied age old "Goose v. Gander" logic. Quoting from the Texas Supreme Court's decision in *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W. 3d 404, 412 (Tex. 2011), the court noted that "it is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal. If a party senses that an impasse has been reached, it can avoid prejudice by demanding an appraisal itself."

In this case, the court observed that the insured chose to initiate litigation rather than pursue appraisal, and they participated in discovery and prepared for mediation and trial, instead of invoking appraisal. Quoting "In *re Cypress Tex. Lloyds*, 419 S.W. 3d 443, 445 (Tex.App.—Beaumont 2012, orig. proceeding) (per curiam) ("When a party knows of its right to request an appraisal and does not make that request, it is difficult to attribute the costs incurred to the opponent."). Accordingly, the court concluded that absent a showing of prejudice by the insured, the trial court erred in denying the motion to compel appraisal.

B. Fort Worth Court of Appeals Finds Waiver of Contractual Right to Appraisal

In a mandamus action the Fort Worth Court of Appeals upheld a trial court finding an insurer had waived its right to appraisal. In *In re Allstate Vehicle & Prop. Ins. Co.*, No. 02-17-00319-CV, 2018 WL 2069185, (Tex. App.— Fort Worth, May 3, 2018) the court found the trial court did not abuse its discretion by finding that the insurer waived its right to invoke its policy's appraisal provision. The insured made two claims for roof damage on two separate dates under her homeowner's policy with Allstate. Allstate did not issue payment on either claim because the covered damage observed did not exceed the policy's deductible. The insured filed suit pursuant to the expedited action provisions of the Texas Rules of Civil Procedure.

The court noted that prior to invoking the appraisal provision set forth in the policy, Allstate had conducted at least six inspections of the insured's roof; had removed the case to federal court—the federal court remanded it to state court three months later; had taken the insured's deposition; had conducted discovery; had agreed to a trial setting; sought and had obtained an order compelling a seventh inspection of the insured's roof in order to prepare for the upcoming jury trial; and had obtained an extension of time to the expert designation deadline in order to designate the new expert conducting the seventh inspection. After the inspection was completed, Allstate made a second offer to settle the case that was rejected by the insured. The day after the rejection of the second settlement offer, Allstate made a written demand for appraisal under the terms of its policy. When the insured refused to participate, Allstate filed a motion to compel appraisal and abate the lawsuit.

The trial court conducted a hearing on Allstate's motion to compel an appraisal and motion to abate. Allstate argued that a point of impasse had been reached when the insured rejected the second settlement offer and that, consequently, Allstate's demand the next day was timely. The insured argued that Allstate had waived its right of appraisal by conduct inconsistent with that right and that she would suffer prejudice from Allstate's attempt to invoke the appraisal clause. At the hearing on Allstate's motion, the trial court noted that the parties had been preparing for trial and the insured had asked for an extension of deadlines to prepare for trial. The trial court found the insurer had waived the right to invoke the appraisal provision and denied the request for the appraisal. This mandamus action followed.

The appellate court began its analysis by noting the standard for mandamus relief is a showing of clear abuse of discretion and no adequate remedy by appeal. The court then found that whether the party's delay in invoking an appraisal clause is reasonable or unreasonable depends on the time between the "point of impasse" in the parties' negotiations concerning the amount of loss and the time the appraisal clause is invoked. The court defined impasse as the point when it becomes apparent to both sides that they disagree as to the damages and that further negotiations are futile. The court also found that other factors or circumstances are pertinent in determining whether a party has waived by conduct, its right to an appraisal and that the party challenging the enforceability of an appraisal clause bears the burden of establishing waiver by conduct of the party and, prejudice. The court found that the point of impasse had been no later than the day the insured rejected the initial settlement offer and reasserted her demand. The insurer failed to demand appraisal for more than three months after that date. Based on the facts and circumstances of the case, the court found it was within the court's discretion to find the insurer delayed and acted inconsistent with the right of appraisal and, therefore, waived that right. The court also found that the policy did not contain a "nonwaiver" clause barring the trial court from finding waiver by conduct. The writ of mandamus was denied, and the stay of the underlying case was lifted.

VI. UMPIRES

A. Trial Court Abused Discretion by Appointing Attorney as Umpire in Homeowners Insurance Appraisal Dispute – Mandamus Conditionally Granted

The Corpus Christi Court of Appeals determined that a trial court's appointment of an attorney to serve as umpire in a property damage dispute, was improper, not in compliance with Policy terms and thus, conditionally granted the insurer's petition for writ of mandamus. In *In re State Farm Lloyds*, 2023 WL 2029148 (Tex.App.—Corpus Christi, February 15, 2023), the insured and State Farm were unable to reach an agreement over the amount of damage to the insured residence caused by a July 25, 2020, hurricane. The insured invoked appraisal under the Policy, but the two appraisers were unable to agree on the amount of loss or on an umpire. So, the insured petitioned the trial court to appoint an umpire. State Farm responded to the request arguing that it was "procedurally improper" and that the umpires recommended by the insured lacked the training and experience required by the Policy. Following a hearing, the trial court appointed Derek Salinas, an attorney to serve as umpire and then rejected State Farm's motion to reconsider. State Farm then filed a petition for writ of mandamus with the Corpus Christi Court of Appeals.

The Court of Appeals carefully analyzed Texas case law on policy appraisals and the policy language at issue in this case which required in part that to qualify as an umpire, they must be either an engineer, architect, an adjuster or public adjuster, or a contractor "with experience and training in the construction,

repair, and estimating of the type of property damage in dispute." And the court found no evidence in the record that Salinas, an attorney, meets the qualifications required by the Policy. State Farm also argued that because a request to appoint an umpire is not a lawsuit and the order is not a final judgment subject to appeal, State Farm lacks a remedy by appeal. After considering the favored status of appraisal and the implications of proceeding with appraisal under these circumstances, the court found that State Farm lacked an adequate remedy by appeal to address the error. Accordingly, the Corpus Christi Court of Appeals conditionally granted the petition for writ of mandamus and directed the trial court to vacate its order appointing Salinas and to appoint a new umpire in compliance with the Policy terms.

B. When Ruling on An Application to Appoint Umpire, Court Finds Causation Exclusion Within Appraisal Clause to Be Void

A court of the Northern District of Texas held that an appraisal clause's "causation exclusion" is void as against public policy. In *Salas Realty LLC v. Transportation Ins. Co.*, 425 F. Supp. 3d 751, 754 (N.D. Tex. 2019), the insurer—Transportation Insurance Company—denied coverage having determined that wear and tear caused the loss. Salas Realty, the insured, filed an application for the appointment of an umpire. The appraisal clause stated, in part:

> This APPRAISAL Condition is not available to the named Insured or the Insurer if there is a dispute as to whether the loss or damage was caused in whole or in part by the covered peril. This APPRAISAL Condition is not available if there is a dispute as to whether or not the loss is covered in whole or in part under this coverage part.

Transportation Insurance Company argued that because it had determined the claim is not covered, the policy's plain language did not permit Salas Realty to make an appraisal demand. The court rejected this argument, holding that an appended condition to an otherwise standard appraisal clause is void as a matter of public policy. The court cited to and discussed *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009), and noted that Johnson determined an appraiser is barred from determining causation when an injury to property is indivisible, citing *Wells v. Am. States Preferred Ins. Co.*, 919 S.W.2d 679, 685–86 (Tex. App. —Dallas 1996, writ denied). But, the court further noted that under Johnson an appraiser is not barred from assessing damage when the damage is divisible. In other words, appraisers "decide the cost to repair each [injury] without deciding who must pay for it." Under *Johnson*, therefore, when covered damages and pre-existing wear and tear occur, the dispute falls into the divisible category, the court held.

The court concluded that although parties are free to contract, the court must read an insurance policy so as to avoid rendering any portion inoperative. The "causation exclusion" as written would render the entire appraisal clause "largely inoperative" because if "appraisers can never allocate damages between covered and excluded perils, then appraisals can never assess [storm] damage unless [the property] is brand new."

VII. MOTION TO ENFORCE APPRAISAL AWARD

A. Insurer Seeks and Wins Mandamus to Protect $0 Appraisal Award

An insurer filed a petition for writ of mandamus after a favorable appraisal award was set aside with no explanation, and the appellate court stepped in to reinstate the award. In *re Auto Club Indem. Co.*, 14-19-00490-CV, 2019 WL 3432144 (Tex. App.—Houston [14th Dist.] July 30, 2019, no pet. h.) (orig. proc.) involved a residential wind/hail dispute. The insurer participated in an appraisal invoked by the insured. The appraisal panel issued an award of $0, documented by 84 photos showing no storm damage was present. The homeowners moved to set aside the award, arguing the appraiser and umpire had improperly gone beyond determining the amount of loss and attempted make coverage decisions. The record contained no evidence that the appraisal award was a result of fraud or was made without authority.

On mandamus, the court of appeals relied directly on *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009), in which the Supreme Court of Texas held that while the scope of appraisal is damages, not liability, an appraisal nevertheless typically involves determining causation at some level. The scope of the appraisal is the damage caused by a specific occurrence, not every repair a home might need, and therefore the appraisal panel must have some latitude to determine what the scope of the loss is. If appraisers and umpires have no discretion to separate storm damage from the pre-existing condition of the roof, then no roof claim can ever be appraised unless the roof is brand new. The court of appeals noted that the mandamus record showed no evidence that the appraisal award was the result of fraud made without authority, and therefore, the trial court's order was an abuse of discretion.

VIII. MOTION TO SET ASIDE

A. Appraisal Umpire Exceeded Authority as To One Category of Damages, But Error Did Not Invalidate Entire Award

The Fifth Circuit ruled that an umpire should not have unilaterally removed a set of repairs from a final

appraisal award but concluded that the remainder of the reward was enforceable, and the insurer was not in breach of the policy because it paid the appraisal award plus the agreed amount for the repairs that the umpire improperly excluded. In *TMM Investments, Ltd. V. Ohio Cas. Ins. Co*., No. 12-40635, 2013 WL .5222625 (5th Cir. Sept. 17, 2013), the insured, a shopping center, had refused the insurer's payment of an appraisal award resulting from a hailstorm claim. After the insurer's appraiser and the umpire agreed on an amount of loss, the umpire while drafting the final award struck an agreed amount for damage to the insured's heating, ventilation, and air conditioning system. The insurer tendered the amount of the award plus the amount of the HVAC system that the umpire removed. The insured took issue with the appraisal process and the ultimate award, rejected the tender, and filed a declaratory judgment action in state court.

The insurer removed to federal court and the Federal District Court for the Eastern District of Texas ruled that the appraisal award should be set aside finding the umpire's removal of the HVAC portion award was improper and also finding the umpire and the insurer's appraiser should not have considered causation and coverage issues. The Fifth Circuit agreed the HVAC portion of the award was improperly deleted, but nevertheless reversed, finding that the error did not taint the remainder of the award. An umpire is not empowered to unilaterally modify an award where there is no disagreement — here, the amount for the HVAC was not in dispute between the appraisers selected by the parties. There was, however, no issue raised by any party concerning the propriety of the remainder of the award. The Fifth Circuit therefore held that the appraisal provision of the contract should be enforced as to the portions of the appraisal award unrelated to the HVAC system.

The Fifth Circuit further held the District Court erred in concluding that causation was outside the purview of the appraisal panel. Relying on the Texas Supreme Court's opinion in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009), the Fifth Circuit stated that "[a]t the very least … appraisal panels are within their rights when they consider whether damage was caused by a particular event or was instead the result of non-covered pre-existing perils like wear and tear." Thus, the Court held the appraisers properly considered the cause of the alleged damages. Because the appraisal award was valid, the insurer's tender of the appraisal amount plus the HVAC amount fulfilled the terms of the contract and the district court's judgment to the contrary was reversed.

B. Amarillo Court Of Appeals Finds No "Mistake of Fact" Underlying Umpire's Appraisal-Decision, Denies Insured's Motion to Vacate Umpire's Award and Appoint a New Umpire

The Amarillo Court of Appeals denied the insured's motion to vacate the umpire's appraisal-decision and appoint a new umpire, holding that a disagreement between the appraisers did not constitute a "mistake of fact" resulting in an unintended award. In *Abdalla v Farmers Insurance Exchange*, No. 07-17-00020-CV, 2018 WL 2220269 (Tex. App.—Amarillo, May 14, 2018, mem. op.), the insured's residence sustained water damage, which was covered under his insurance policy with Farmers Insurance Exchange ("Farmers"). However, the extent of the damage and insurance proceeds payable was disputed and submitted to appraisers in accordance with the policy's terms, and then to an umpire appointed by the trial court. Subsequently, the umpire found that the appraisal made by Farmers' appraiser was the "more sound and well supported appraisal" and designated a certain amount as the actual cash value of the insured's loss, which Farmers tendered. Nevertheless, the insured believed that the umpire's award was a product of "mistake" and he moved the trial court to vacate the award and appoint a new umpire. The insured's allegation of "mistake," though, was simply that there was a disagreement between the appraisers about the extent of water damage and the ultimate award of damages omitted damages that the insured's appraiser thought should have been included.

The court observed that Texas courts have recognized three grounds on which the results of an otherwise binding appraisal may be set aside: when the award (1) fails to comply with the policy, (2) was made without authority, or (3) resulted from fraud, accident, or mistake. "Mistake" applies when the complainant establishes that the appraisers were operating under a mistake of fact which resulted in an unintended award. In the case at hand, the court, noting that a split of opinions between the appraisers was precisely what the umpire was called upon to settle, concluded that the disagreement between the appraisers "fell short of illustrating the umpire operated under a mistake of fact resulting in an unintended award." Accordingly, the court denied the insured's motion to vacate.

C. Amarillo Court of Appeals Sets Aside Award for Mistake as to Policy Coverage

United Fire & Casualty Company (United Fire) appealed from the trial court's summary judgment granted in favor of Gossetts, Inc. (Gossetts). *United Fire & Cas. Co. v. Gossetts, Inc.,* No. 07-18-00204-CV, 2019 WL 2572042, at *2 (Tex. App. —Amarillo June 21, 2019). The suit arose from a dispute regarding payment for loss allegedly caused by a May 2013 hailstorm. The loss encompassed damage to the roof of

a building that Gossetts owned. United Fire questioned whether the storm caused any damage to the roof, but upon reserving that position, it agreed to submit the claim to appraisal in accordance with the terms of the insurance policy. Appraisers were selected, as was an umpire. The latter subsequently issued an appraisal award in the approximate amount of $212,000, to which award Gossetts' appraiser agreed. As this process was occurring, so too was litigation initiated by Gossetts against United Fire pertaining to United Fire's failure to pay the insurance claim. United Fire counterclaimed for a declaratory judgment negating the appraisal due to various purported errors in the appraisal process. The validity of the appraisal award was the subject of the appeal.

According to United Fire, a mistake occurred when the appraisal award incorporated damages to a portion of the roof owned by a third party. The third party was not an insured under the policy. The Court sided with United Fire. In reaching its decision, the court held "… they obviously intended to calculate the cost of repairing or replacing property covered by the policy and owned by the insured….[t]heir calculation exceeded that purpose and intent due to their mistaken inclusion into their calculations the cost of repairing or replacing property that the insured did not own and that fell outside policy coverage."

IX. COVERAGE DEFENSES TO PAYMENT OF THE APPRAISAL AWARD

A. For Want of a Sworn Proof of Loss, A $600,000 Appraisal Award Is Overturned

A federal judge in Wichita Falls granted summary judgment for an insurer after it challenged a large appraisal award. *Great Lakes Insurance SE v. Horton Family Trust, LLC*, No. 7:19-CV-00138-O, 2021 WL 1117171 (N.D. Tex. Mar. 24, 2021) involved a wind/hail claim which the insurer initially denied after finding no damage caused by the claimed weather event. When the policyholder demanded appraisal six months later, the insurer requested a sworn proof of loss, which the policyholder did not return. After obtaining an ex parte umpire appointment, the policyholder's appraiser and the umpire signed an appraisal award of about $600,000. The insurer filed a declaratory judgment action challenging the appraisal award and the original invocation of appraisal.

The court granted the insurer's motion for summary judgment because the policyholder had not submitted a sworn proof loss when the insurer requested it in response to the appraisal demand. The court rejected arguments that the insurer had waived its right to request a sworn proof loss by denying the claim without requesting one, noting multiple courts have held a sworn proof loss is a condition precedent to appraisal. The court also pointed out Texas law does not support the conclusion that denial of a claim waives other rights under the policy, particularly when the policy contains express nonwaiver wording. Because a condition precedent was not satisfied, the court concluded the appraisal award did not comply with the policy terms and was issued without authority. The court granted summary judgment for the insurer, declared the appraisal award void, struck the umpire, and dismissed the policyholder's counterclaims with prejudice.

It is worth noting that the court analyzed this issue in terms of waiver. See id. at *6. However, other Texas courts that have considered an insured or insurer's rights regarding an investigative condition precedent (e.g., proof of loss or an examination under oath) have not viewed the matter in terms of waiver but in terms of whether an insured is obligated to perform a condition precedent once the insurer has concluded its investigation and denied the claim. See, e.g., *In re Cypress Texas Lloyds*, 437 S.W.3d 1, 17 (Tex. App.—Corpus Christi 2011). In *Cypress Texas Lloyds*, the insurer had requested an examination under oath only after it had disposed of the claim and represented that it had concluded its investigation. Without mentioning or addressing waiver, the court held the insured is not obligated to comply with the request for an examination under oath. *Id*. "[B]ased on the plain language of the contract, the insured's duties under the contract exist during the investigation of the claim, and nothing in the contract suggests that these duties continue after disposition of a claim." *Id*.

B. Appellate Court Finds Fact Issue on "Causation and Damages" Based on Appraisal Award – Trial Court's Judgment Reversed and Remanded

In a significant decision, an appellate court in Houston reversed and remanded a trial court's judgment and jury findings based on an appraisal award under an insurance policy, finding that the appraisal award and evidence offered did not conclusively prove "whether and how much alleged loss was caused by a covered peril." In *TWIA v. Dickinson ISD*, 2018 WL 2436924 (Tex.App.— Houston [14th Dist.] May 31, 2018), TWIA invoked the appraisal provision to address the amount of property damage claimed by the District following Hurricane Ike and a $10.8 million damages award was issued. The District then sought partial summary judgments on causation and damages. TWIA opposed the motions asserting that the School District had not conclusively proven that the damages, or any portion of them, were caused by a covered peril under the named-peril policy. The trial court ruled in the District's favor and the only issue submitted to the jury was whether TWIA breached the policy by not paying the appraisal award. The jury answered "yes" and the trial court entered a final judgment against TWIA for $9,602,542.82. This appeal followed.

TWIA challenged the judgment based on four issues, the first of which was determined to be dispositive. In its first issue, TWIA argued that the School District failed to conclusively prove damages caused by a covered peril under the policy; or, that TWIA raised genuine issues of material fact of whether the damages were caused by a named peril under the policy. In its analysis, the court examined arguments asserted by both sides based on the Texas Supreme Court's decision in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009). The court also examined the doctrine of concurrent causes, noting the insured's duty to segregate damages arising from covered and non-covered causes of loss. Here, the policy provided in part, coverage for "direct physical loss to the covered property caused by windstorm" unless excluded. In a detailed analysis of the impact of the appraisal award, the court determined that "[s]tanding alone, the Appraisal Award simply does not provide sufficient evidence from which a court may determine as a matter of law which Appraisal Award damages, if any, were caused by a covered peril." Accordingly, the judgment was reversed and the case remanded for further proceedings.

C. Court of Appeals Rejects Mandamus Request in Appraisal Dispute

A panel for the Court of Appeals in Beaumont denied a petition for mandamus filed by Mountain Valley Indemnity Company ("Mountain Valley") and Prostar Adjusting ("Prostar") contending the trial court abused its discretion by granting the insured's motion to quash depositions on written questions and motion for a protective order. *In re Mountain Valley Indem. Co. and Prostar Adjusting*, No. 09-20-00156-CV, 2020 WL 5666569 (Tex. App.—Beaumont Sept. 24, 2020).

In late 2017, a pipe burst in the attic of the insured's home and caused damage to his residence and personal property. He made a claim with Mountain Valley, who hired Prostar to investigate the claim. For over two years, the parties disagreed over the reasonable value of the damages caused by the water that damaged the insured's home.

The insured invoked the appraisal process in the policy and requested that the trial court appoint an umpire based on such provisions. In March 2020, the umpire issued a ruling appraising the losses at $225,302. The award made clear that it did not account for any applicable deductibles or whether the policy covered the appraised loss.

Soon after, Mountain Valley served discovery requests to the insured and notified him that they intended to take deposition by written questions of nonparties they claimed had knowledge of the repairs, damages, delays, and renovations performed on the insured's home. In response, the insured moved to quash the deposition notices and sought protection from discovery requests seeking information related to the valuation of any losses valued in the appraisal process—arguing that Mountain Valley could no longer dispute the value set by the umpire per the appraisal provision in the policy. In response, Mountain Valley and Prostar argued that there were substantial coverage issues and the discovery was relevant to the affirmative defense they planned to advance in a forthcoming motion to set aside the appraisal award due to fraud, mistake, or accident.

The trial court found Mountain Valley and Prostar did not have the right to challenge the validity of the appraisal award without a pleading raising affirmative defense to avoid the legal effect of the award. Because Mountain Valley and Prostar did not include their answers in the appellate record, the appellate court held it could not tell if the trial court abused its discretion. It therefore denied the petition and remanded the case to the trail court, stating "we are confident the trial court will permit Mountain Valley and Prostar to pursue more discovery on claims raised by the pleadings should they amend their pleadings and raise new defenses before serving [the insured] with more discovery."

D. Court Of Appeals Holds Appraisal Award and Note from Umpire Do Not Establish Policy Exclusion as a Matter of Law

The Fort Worth Court of Appeals held that an insurer had not met its burden on summary judgment to establish the applicability of a cosmetic damage exclusion as a matter of law following appraisal. In *Tippett v. Safeco Ins. Co. of Ind.*, No. 02-19-00152-CV, 2020 WL 827143, at *1 (Tex. App.—Fort Worth 2020, no pet.), Safeco denied a homeowner's claim pursuant to a cosmetic damage exclusion. After Tippett filed suit, Safeco invoked appraisal. The appraisal panel's umpire generated an estimate reflecting amounts listed in the appraisal award, a separate document. The umpire's estimate included a note stating "it is my opinion that hail did not damage the aluminum shake roof in a manner that caused or contributed to any interior leaking…. My opinion is that this hail denting will not cause a loss of the intended water-shedding functionality of the aluminum shakes." The appraisal award did not indicate that the appraisal panel had adopted or incorporated the umpire's note and estimate into the actual four corners of the award.

Although the appraisal panel determined the actual cash value of the loss to be $59,794.89, Safeco prepared a revised estimate totaling $8,693.73 (ACV) and issued payment based on this revised estimate. The trial court granted Safeco's subsequent motion for summary judgment. On appeal, the court reversed, holding that 1) Safeco had not conclusively established that two members of the appraisal panel had adopted the umpire's findings and 2) that even if the panel had

adopted the umpire's findings, those findings constituted a liability determination, which the panel had no authority to make.

X. APPRAISAL MECHANICS

A. Appraisal Process Not Confidential

A trial court in the Northern District of Texas determined that the appraisal process is not confidential. *Reeves v. State Farm Lloyds*, No. 5:21-CV-272-H-BQ, 2022 WL 4454365, at *6 (N.D. Tex. Sept. 23, 2022.) The court further held that the communications surrounding it are discoverable.

Reeves filed a claim with his insurance carrier, State Farm Lloyds (State Farm), concerning storm damage to his home. Reeves invoked the appraisal provision of his homeowner's policy. After reviewing the appraisal award, State Farm declined to pay certain line items, finding they were not covered by Reeves's policy. Reeves filed suit.

State Farm asked the court to (1) protect it from all discovery related to the appraisal process, and (2) exclude testimony regarding the appraisal process because "the appraisal process is confidential under § 154.073 of the Texas Civil Practice and Remedies Code." In other words, State Farm argued the appraisal process is not subject to disclosure because certain alternative dispute resolution procedures may not be used in any judicial or administrative proceeding under Texas Law Reeves opposed the motions.

In denying State Farm's motion, the court held that State Farm had not met its burden for a protective order and that the information related to the appraisal process was relevant to Reeves's claims. The court noted that the appraisal process differs from the mechanisms described in Chapter 154 and concluded that it does not apply to appraisal.

XI. U.S. DISTRICT COURT ALLOWS DISCOVERY OF APPRAISAL DOCUMENTATION AND DEPOSITION OF APPRAISER

On a third-party's motion for protection and to quash a subpoena, a trial court for the Eastern District of Texas allowed discovery into the appraisal process. *Park Bd. Ltd. v. State Auto. Mut. Ins. Co*., No. 4:18-CV-00382, 2019 WL 7067135, at *4 (E.D. Tex. Dec. 23, 2019). The insured had sought discovery from the appraiser and the appraiser sought relief from it.

Plaintiff Park Board Ltd. ("Park Board") purchased an insurance policy (the "Policy") from Defendant State Automobile Mutual Insurance Company ("State Auto") in January 2017 for a commercial building in Collin County. In March and April of 2017, Park Board's property sustained damage from severe wind- and hailstorms. Park Board reported a claim to State Auto immediately. Not satisfied with the result from the adjuster, Park Board initiated appraisal in January 2018. According to Park Board, State Auto denied the request for appraisal in breach of the Policy. In response, Park Board filed suit in April 2018, a year after the storm occurred. The Parties ultimately initiated the appraisal in August 2018.

State Auto's appraiser and the umpire signed and issued their findings in April 2019. State Auto provided Park Board with a check for $49,531.29 shortly after. Due to the deductible and prior payments State Auto had made to Park Board, this payment ensured that the $131,380.95 "actual cash value" award determination was satisfied. State Auto informed Park Board that it would pay the remaining $80,165.16 depreciation amount once repairs were completed. But it also advised that the Policy has a requirement as to the completion of the repairs "2 years from the date of the loss in which to actually complete the repairs in order to collect the balance of the damages"—a date that had passed.

In a prior ruling, the court had dismissed some of the claims against State Auto while allowing others to remain. Of the remaining claims, Park Board argued that it was entitled to discovery as to whether the appraisal award should be set aside. The court agreed and allowed the discovery to proceed.

XII. HOUSTON COURT OF APPEALS UPHOLD SANCTIONS WHERE ATTORNEY ATTEMPTED TO "GAME" THE APPRAISAL PROCESS

A Houston court of appeals upheld sanctions against a policyholder attorney after an appraisal process went off the rails. In *Etienne v. State Farm Lloyds*, No. 14-18-00665-CV, 2019 WL 4266104 (Tex. App.—Houston [14th Dist.] Sept. 10, 2019, no pet. h.) (slip op.), the policyholder invoked appraisal of a claim under her homeowners' policy. After State Farm agreed to the appraisal and both sides appointed their appraisers, Etienne filed suit against State Farm, accusing State Farm of refusing to participate in the appraisal. State Farm answered the lawsuit, filed a motion to appoint an umpire, and set a hearing on the motion.

Twelve hours before the hearing, Etienne non-suited her case, and her counsel did not appear for the hearing. (Meanwhile, outside the context of the original lawsuit and unbeknownst to State Farm, Etienne filed a separate application for appointment of an umpire.) At the hearing, which was already on the court's docket, the court appointed an umpire. The next day, the court signed the nonsuit and dismissed the lawsuit.

Etienne sought to vacate the court's order appointing the umpire, arguing the court lost jurisdiction the moment she filed her nonsuit and could

not appoint an umpire. In response, State Farm sought and won sanctions against Etienne's counsel for signing and filing a pleading which falsely alleged State Farm had refused to participate in appraisal, in violation of Texas Rule of Civil Procedure 13. Etienne appealed both the umpire appointment and the sanctions order.

On appeal, the court pointed out that as a procedural matter, a nonsuit does not immediately deprive the court of jurisdiction if another party has sought affirmative relief. Additionally, the court retained plenary power for 30 days after its own dismissal order and had the power to hear and rule on State Farm's motion to appoint an umpire the morning after Etienne filed her nonsuit. The court summarily rejected Etienne's appeal of the sanctions order because she had not been personally sanctioned – only her attorney had.

XIII. CONCLUSION

The law around appraisals continues to develop as the parties to the awards map out the nuances of this area of insurance law. The authors have collected several verdict forms from recent cases involving an appraisal award. Thank you to the lawyers who provided these and allowed us to include them here.

NO. 1116348

WEN WIRELESS, INC. D/B/A CELL SPOT, KICK BACK WIRELESS	§ § §	IN THE COUNTY CIVIL COURT
V.	§ §	AT LAW NUMBER 4
AMGUARD INSURANCE COMPANY	§	HARRIS COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. Unless otherwise instructed, you may answer a question upon the vote of five or more jurors. If you answer more than one question upon the vote of five or more jurors , the same group of at least five of you must agree upon the answers to each of those questions.

7. These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

8. The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

9. When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

10. Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be a based on a preponderance of the evidence *unless otherwise instructed.* If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence *unless otherwise instructed.*

11. A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

12. If you answer questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of the judgment.

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. To preside during your deliberations;

2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;

3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;

4. To vote on the questions;

5. To write your answers to the questions in the spaces provided; and

6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

10/19/2022

HONORABLE MIRYEA AYALA
PRESIDING JUDGE

FILED
10/20/2022 9:40:17 AM
Teneshia Hudspeth
County Clerk
Harris County, Texas
tgarza

QUESTION NO. 1
BREACH OF CONTRACT

Did AmGuard Insurance Company fail to comply with its agreement with Wen Wireless, Inc., D/B/A Cell Spot, Kick Back Wireless ("Wen Wireless") to insure Wen Wireless' business property?

INSTRUCTIONS

To answer "Yes" to this question, Wen Wireless bears the initial burden to prove by a preponderance of the evidence that coverage exists under the terms of the AmGuard Policy.

If Wen Wireless meets this burden, AmGuard bears the burden to prove by a preponderance of the evidence that the loss or damage at issue (or a portion of the loss or damage at issue) is excluded from coverage under the terms of the AmGuard Policy.

Wen Wireless is not entitled to any damages for any loss that is not covered by the AmGuard Policy.

ANSWER: "Yes" or "No."

ANSWER: ~~[illegible]~~ NO

If you answer "Yes" to Question 1, proceed to answer the remaining questions. If you answer "No" to Question 1, stop and sign your verdict certificate at the close of this document and do not answer any remaining questions.

QUESTION NO. 2
CONDITIONS PRECEDENT

1) Did Wen Wireless fail to cooperate with AmGuard Insurance Company ("AmGuard") in the investigation of its claim?

Answer "Yes" or "No."

Answer: [illegible]

2) Did Wen Wireless fail to prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss when asked to do so by AmGuard?

Answer "Yes" or "No."

Answer: [illegible]

QUESTION NO. 3
CONDITION PRECEDENT

Answer the following questions only if you answered "Yes" to one or more of the questions in Question No. 2. Only answer below for the questions for which you answered "Yes" in Question No. 2.

INSTRUCTIONS

You are instructed that prejudice is defined as "damage or detriment to one's legal rights or claims."

You may answer "Yes" to the questions below if you find that AmGuard has proved by a preponderance of the evidence that the answer should be "Yes."

QUESTIONS

1) Was AmGuard prejudiced by Wen Wireless's failure to cooperate with AmGuard in the investigation of its claim?

Answer "Yes" or "No."

Answer: [illegible]

2) Was AmGuard prejudiced by Wen Wireless's failure to prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss?

Answer "Yes" or "No."

Answer: [illegible]

If you answer "Yes" to any part of Question 2 AND "Yes" to any part of Question 3, stop and sign your verdict certificate at the close of this document and do not answer any remaining questions.

QUESTION NO. 4
CONCEALMENT OR FRAUD

Did Wen Wireless intentionally conceal or misrepresent any material fact or circumstance, make false statements, or commit fraud?

INSTRUCTIONS

You are instructed that the AmGuard Policy states:

> Concealment or Fraud. This policy is void as to you and any other insured if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance, made false statements or committed fraud relating to this insurance, whether before or after a loss.

You are further instructed that fraud occurs when:

a. a party conceals or fails to disclose a material fact within the knowledge of that party,

b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,

c. the party intends to induce the other party to take some action by concealing or failing to disclose the fact, and

d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

Fraud also occurs when:

a. a party makes a material misrepresentation,

b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that it should be acted on by the other party, and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

(answer on the following page.)

Answer “Yes” or “No”.

Answer: ________________

If you answer “Yes” Question 4, stop and sign your verdict certificate at the close of this document and do not answer any remaining questions.

QUESTION NO. 5
BREACH OF CONTRACT – DAMAGES

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Wen Wireless for damages to its business property that was within 100 feet of its building that occurred between July 30, 2017 and July 30, 2018 that was not otherwise paid by AmGuard?

INSTRUCTIONS

Wen Wireless has the burden to prove by a preponderance of the evidence the damages it claims that AmGuard owes. In answering questions about damages, answer each question separately. Do not increase or reduce the amount in your answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Wen Wireless has the burden to prove that the damage to its business personal property was within 100 feet of its building that occurred between July 30, 2017 and July 30, 2018 that was not otherwise paid by AmGuard.

Wen Wireless must prove its damages with reasonable certainty and is not entitled to recover damages that are too remote, too uncertain, or purely conjectural.

Wen Wireless is not entitled to any damages for any loss that is excluded under the AmGuard Policy, regardless of the cause of the excluded event; or other causes of the loss; or whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.

Do not include in your answer any amount Wen Wireless could have avoided through the exercise of reasonable care. AmGuard has the burden to prove by a preponderance of the evidence the amount Wen Wireless could have avoided through the exercise of reasonable care.

Do not include in your answer any damage amounts caused by delay brought about by Wen Wireless.

Consider the following elements of damages, if any, and none other:

Property damage covered by the AmGuard policy.

(answer on next page.)

Answer in dollars and cents, if any.

Answer: $__________

QUESTION NO. 6
GOOD FAITH AND FAIR DEALING

Did AmGuard fail to comply with its duty of good faith and fair dealing to Wen Wireless?

An insurer fails to comply with its duty of good faith and fair dealing by –

> Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear, or
>
> Refusing to pay a claim without conducting a reasonable investigation of the claim.

AmGuard's acts or omissions, if any, must have been a substantial factor in bringing about damages to Wen Wireless that would not have occurred but for the act or omission.

ANSWER: "Yes" or "No."

ANSWER: ___________

If you answered "Yes" to Question 6, then answer the following question. If not, then do not answer the following question.

QUESTION NO. 7
GOOD FAITH AND FAIR DEALING DAMAGES

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Wen Wireless for its damages, if any, that were proximately caused by its failure to comply with its duty of good faith and fair dealing to Wen Wireless that was fraudulent, malicious, intentional, or grossly negligent?

INSTRUCTIONS

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom.

There may be more than one proximate cause of an event.

Extra-contractual damages are recoverable when AmGuard commits an act which is so extreme that it causes an injury which is independent of and unrelated to the claim under the insurance policy.

Do not include in your answer any amount that you find Wen Wireless could have avoided by the exercise of reasonable care.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any

Do not include in your answer any damage amounts caused by delay brought about by Wen Wireless or its representatives.

Wen Wireless must prove its damages with reasonable certainty and is not entitled to recover damages that are too remote, too uncertain, or purely conjectural.

Answer in dollars and cents, if any.

ANSWER: $_________________

If you answered "Yes" to Question 6, then answer the following question. If not, then do not answer the following question.

QUESTION NO. 8
***BONA FIDE* DISPUTE**

Was there a *bona fide* dispute about AmGuard's liability under the terms of its Policy?

INSTRUCTION

A *bona fide* dispute exists if at the time AmGuard delayed or denied Wen Wireless's claim, AmGuard had a reasonable basis for its belief that there was no coverage or some disqualifying provision of the AmGuard Policy had been triggered.

Answer "Yes" or "No"

Answer:_______________

QUESTION NO. 9
PROMPT PAYMENT

1) Did AmGuard fail to pay Wen Wireless' claim within sixty days of receiving all items, statements, and forms AmGuard reasonably requested from Wen Wireless that were necessary to decide whether to accept or reject the claim?

   Answer "Yes" or "No."

   Answer: ________________

If your is answer is "No," do not answer the following question.

2) By what date had AmGuard received all items, statements, and forms it reasonably requested from Wen Wireless that were necessary to decide whether to accept or reject the claim?

INSTRUCTIONS

AmGuard may make additional requests for information "if during the investigation of the claim the additional information requests are necessary." AmGuard's requests for information must be reasonable and necessary to decide whether to accept or reject the claim.

Answer with a date in the blank below.

Answer: ________________

If you answered "No" to Question No. 8, then answer the following question. If not, then do not answer the following question.

QUESTION NO. 10
INSURANCE CODE LIABILITY

Did AmGuard engage in any unfair or deceptive act or practice that caused damages to Wen Wireless?

INSTRUCTIONS

"Unfair or deceptive act or practice" means either of the following:

> Failing to attempt in good faith to bring about a prompt, fair, and equitable settlement of a claim once the insurer's liability becomes reasonably clear; or
>
> Refusing to pay a claim without conducting a reasonable investigation of the claim.

You are instructed that AmGuard did not commit a false, misleading or deceptive act or practice merely because it denies a claim made by Wen Wireless.

You are further instructed that AmGuard has not committed an unfair or deceptive act or practice, if the evidence established that AmGuard reasonably relied on reports of consultants or experts indicating that the claim of Wen Wireless was not covered under the AmGuard Policy, even if AmGuard's liability on the AmGuard Policy is ultimately established in this trial.

It is not a violation if the evidence shows AmGuard was merely incorrect about the factual basis for its denial of the claim, or about the proper construction of the AmGuard Policy.

AmGuard's acts or omissions, if any, must have been a substantial factor in bringing about damages to Wen Wireless that would not have occurred but for the act or omission.

You are instructed that an insurer's liability for payment of a claim is "reasonably clear" when it is no longer fairly debatable. Reasonableness is determined under an objective standard of whether a reasonable insurer under the same or similar circumstances would have accepted, delayed or denied the claim. Reasonableness is based on the facts available to the insurer at the time of the acceptance, denial or delay of the claim.

ANSWER: "Yes" or "No."

ANSWER: ___________

If you answered "Yes" to Question No. 10, then answer the following question. If not, then do not answer the following question.

QUESTION NO. 11
INSURANCE CODE DAMAGES

Did AmGuard engage in any unfair or deceptive act or practice that caused damages to Wen Wireless knowingly?

INSTRUCTIONS

"Knowingly" means actual awareness of the falsity, unfairness, or deceptiveness of the act or practice on which a claim for damages is based. Actual awareness may be inferred if objective manifestations indicate that a person acted with actual awareness.

In answering this question, consider only the conduct that you have found was a producing cause of damages to Wen Wireless.

ANSWER: "Yes" or "No."

ANSWER: ___________

If you answered "Yes" to Question No. 10, then answer the following question. If not, then do not answer the following question.

QUESTION NO. 12
INSURANCE CODE DAMAGES

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Wen Wireless for their damages, if any, that were caused by the unfair or deceptive act or practice of AmGuard because AmGuard's conduct was committed knowingly?

INSTRUCTIONS

Consider the following elements of damages, if any, and none other.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Wen Wireless must prove its damages with reasonable certainty and is not entitled to recover damages that are too remote, too uncertain, or purely conjectural.

Do not include in your answer any amount Wen Wireless could have avoided through the exercise of reasonable care. AmGuard has the burden to prove by a preponderance of the evidence the amount Wen Wireless could have avoided through the exercise of reasonable care. Do not include in your answer any damage amounts caused by delay brought about by Wen Wireless or their representatives.

Answer in dollars and cents for damages, if any:

Answer: $_________________

QUESTION NO. 13
ATTORNEY'S FEES

What is a reasonable fee for the necessary services of Wen Wireless' attorney, stated in dollars and cents?

Answer with an amount for each of the following:

a. For representation in the trial court.

Answer: $__________________

b. For representation through appeal to the court of appeals.

Answer: $__________________

c. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: $__________________

d. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: $__________________

e. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: $__________________

FILED
JUN 23 2022
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN H. WINSTON III,

Plaintiff,

v. **Case No. SA-20-CV-00515-JKP**

STATE FARM LLOYDS,

Defendant.

VERDICT FORM

QUESTION NO. 1

Did State Farm fail to comply with the insurance policy agreement?

State Farm failed to comply with the insurance policy agreement if it failed to pay the fair and reasonable damages, if any, that were caused by the April 13, 2019 hail storm event.

The relevant portions of the insurance policy agreement are as follows:

> **Replacement Cost Loss Settlement – Similar Construction.**
> a. We will pay the cost to repair or replace with similar construction and for the same use on the premises shown in the **Declarations**, the damaged part of the property covered under **SECTION I – COVERAGES, COVERAGE A – DWELLING** ...
>
> **Appraisal.** If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal. Only you or we may demand appraisal. A demand for appraisal must be in writing. You must comply with **SECTION I – CONDITIONS, Your Duties After Loss** before making a demand for appraisal. At least 10 days before demanding appraisal, the party seeking appraisal must provide the other party with written, itemized documentation of a specific dispute

as to the amount of the loss, identifying separately
each item being disputed.
a. Each party will select a competent, disinterested
appraiser and notify the other party of the appraiser's
identity within 20 days of receipt of the written
demand for appraisal.
b. The appraisers will then attempt to set the amount
of the loss of each item in dispute as specified by
each party, and jointly submit to each party a written
report of agreement signed by them. In all instances
the written report of agreement will be itemized and
state separately the actual cash value, replacement
cost, and if applicable, the market value of each
item in dispute.
The written report of agreement will set the amount
of the loss of each item in dispute and will be binding
upon you and us....
g. You and we do not waive any rights by demanding
or submitting to an appraisal, and retain all contractual
rights to determine if coverage applies to each item
in dispute.
h. Appraisal is only available to determine the amount
of the loss of each item in dispute. The appraisers
... have no authority to decide:
(1) any other questions of fact;
(2) questions of law;
(3) questions of coverage;
(4) other contractual issues; or
(5) to conduct appraisal on a class-wide basis.

Answer "Yes" or "No" to Question No. 1 below.

Yes ____✓____

No ____________

If you answered "Yes" to Question No. 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 2

What sum of money, if paid now in cash, would fairly and reasonably compensate Dr. Winston for damages, if any, that resulted from State Farm's failure to comply with the insurance policy agreement.

Only include damages that are fair and reasonable.

Do not include in your answer damages, if any, caused by wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown.

Do not include in your answer any sums State Farm has already paid.

Answer in dollars and cents.

$77,896.71

CAUSE № 096-324346-21

FILED TARRANT COUNTY 2023 JAN 12 PM 4:08 THOMAS A. WILDER DISTRICT CLERK

ALICE LADKIN,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
VS.	§	TARRANT COUNTY, TEXAS
	§	
STATE FARM LLOYDS,	§	
	§	
Defendant.	§	96TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "Yes" or "No" to all questions unless you are told otherwise. A "Yes" answer must be based on a preponderance of the evidence. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence.

   The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

   A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. The answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

DEFINITIONS

As used in this charge, "Plaintiff" means Alice Ladkin.

As used in this charge, "Defendant" means State Farm Lloyds.

JURY QUESTIONS

QUESTION Nº 1:

Do you find that Plaintiff is entitled to benefits under the policy for wind and/or hail damages caused by a storm that occurred on or about May 18, 2019, or June 9, 2019, that Defendant did not pay?

In order to be entitled to benefits under the policy, Plaintiff has the initial burden to prove her home sustained accidental direct physical loss caused by wind and/or hail from a storm that occurred on or about May 18, 2019, or June 9, 2019, that Defendant did not pay.

Answer "Yes" or "No."

ANSWER: YES.

If you answered "Yes" to Question № 1, then answer Question № 2; otherwise, do not answer Question № 2.

QUESTION Nº 2:

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for the replacement cost of the covered losses or damages, if any, which were caused by the hail and/or windstorm which occurred during the policy period?

Consider the following element of damage and none other:

- The reasonable and necessary cost to repair or replace damages caused by the hail or windstorm which occurred during the policy period and not otherwise excluded by the insurance policy.

Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any. Do not include in your answer damages, if any, not caused by wind or hail.

Answer in dollars and cents for damages, if any.

ANSWER: $ 30,000 .

CHARGE OF THE COURT
Cause № 096-324346-21; *Alice Ladkin v. State Farm Lloyds*

QUESTION Nº 3:

By what date had Defendant received all items, statements, and forms it reasonably requested from Plaintiff that were necessary to decide whether to accept or reject the claim?

Answer with a date in the blank below.

ANSWER: July 24, 2019.
[MONTH/DATE/YEAR]

QUESTION Nº 4:

Did Defendant fail to pay the full amount of Plaintiff's claim within sixty (60) days of receiving all items, statements, and forms it reasonably requested from Plaintiff that were necessary to decide whether to accept or reject the claim?

Answer "Yes" or "No."

ANSWER: YES.

QUESTION Nº 5:

Did Defendant or its agents/employees engage in any unfair or deceptive act or practice that caused damages to Plaintiff?

"Unfair or Deceptive Act or Practice" means any of the following:

a) Engaging in false, misleading, and deceptive acts or practices in the business of insurance in this case;

b) Engaging in unfair claim settlement practices;

c) Not attempting in good faith to effectuate a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear;

d) Refusing to pay Plaintiff's claim without conducting a reasonable investigation with respect to the claim; and

e) Failing to provide promptly to a policyholder a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for the denial of a claim or for the offer of a company's settlement.

Answer "Yes" or "No."

ANSWER: YES.

If you answered "Yes" to Question № 5, then answer Question № 6; otherwise, do not answer Question № 6.

QUESTION Nº 6:

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages, if any, that were caused by any unfair or deceptive act or practice (as defined in Question № 5) by Defendant or its agents/employees?

Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any. Do not include in your answer damages, if any, not caused by the unfair or deceptive act or practice (as defined in Question № 5).

Answer in dollars and cents for damages, if any.

ANSWER: $ 10,000 .

If you answered "Yes" to Question № 5, then answer Question № 7; otherwise, do not answer Question № 7.

QUESTION Nº 7:

Did Defendant or its agents/employees knowingly engage in any unfair or deceptive act or practice (as defined in Question № 5)?

"Knowingly" means actual awareness at the time of the conduct of the falsity, deception, or unfairness of the conduct in question. Actual awareness may be inferred where objective manifestations indicate that a person or company acted with actual awareness.

In answering this question, consider only the conduct that you have found was a producing cause of damages to Plaintiff.

"Producing cause" means a cause that was a substantial factor in brining about the damages, if any, and without which the damage would not have occurred. There may be more than one producing cause.

Answer "Yes" or "No."

ANSWER: yES.

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If you answered "Yes" to Question № 7, then answer Question № 8; otherwise, do not answer Question № 8.

QUESTION N° 8:

What sum of money, if any, in addition to actual damages should be awarded to Plaintiff against Defendant because Defendant's conduct was committed knowingly?

Answer in dollars and cents for damages, if any.

ANSWER: $ 5,000 .

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QUESTION Nº 9:

Did Defendant engage in any unconscionable action or course of action that was a producing cause of damages to Plaintiff?

"Producing cause" means a cause that was a substantial factor in brining about the damages, if any, and without which the damage would not have occurred. There may be more than one producing cause.

An "unconscionable action or course of action" (for purposes of Question № 9) is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer "Yes" or "No."

ANSWER: YES.

If you answered "Yes" to Question № 9, then answer Question № 10; otherwise, do not answer Question № 10.

QUESTION Nº 10:

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for her damages that resulted from any unconscionable action or course of action (as defined in Question № 9) by Defendant or its agents/employees?

Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any. Do not include in your answer damages, if any, not caused by the unfair or deceptive act or practice (as defined in Question № 9).

Answer in dollars and cents for damages, if any.

ANSWER: $ 40,000 .

If you answered "Yes" to Question № 9, then answer Question № 11; otherwise, do not answer Question № 11.

QUESTION Nº 11:

Did Defendant or its agents/employees knowingly engage in any unconscionable action or course of action?

"Knowingly" means actual awareness at the time of the conduct of the falsity, deception, or unfairness of the conduct in question. Actual awareness may be inferred where objective manifestations indicate that a person or company acted with actual awareness.

In answering this question, consider only the conduct that you have found was a producing cause of damages to Plaintiff.

Answer "Yes" or "No."

ANSWER: YES.

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If you answered "Yes" to Question № 9 and/or Question № 11, then answer Question № 12; otherwise, do not answer Question № 12.

QUESTION Nº 12:

What sum of money, if any, in addition to actual damages should be awarded as additional damages to Plaintiff against Defendant because Defendant or its agents'/employees' unconscionable action or course of action (as defined in Question № 9) was committed intentionally and/or knowingly?

"Additional damages" means an amount that you may, in your discretion, award as an example to others as a penalty or by way of punishment or as compensation for the inconvenience and expense of litigation, except attorneys' fees and court costs, in addition to any amount that may have been found by you as actual damages.

Factors to consider in awarding additional damages, if any, are —

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of Defendant.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents for damages, if any.

ANSWER: $ 35,000 .

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QUESTION Nº 13:

Did Defendant fail to comply with its duty of good faith and fair dealing to Plaintiff?

An insurer fails to comply with its duty of good faith and fair dealing by —

(1) Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear, or

(2) Refusing to pay a claim without conducting a reasonable investigation of the claim.

Answer "Yes" or "No."

ANSWER: YES.

QUESTION Nº 14:

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for her damages, if any, that were proximately caused by Defendant's failure to comply, if any, with its duty of good faith and fair dealing?

"Proximate cause" means a cause that was a substantial factor in bringing about an event, without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using a degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

ANSWER: $ 35,000 .

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If you answered "Yes" to any of the previous questions, then answer Question № 15; otherwise, do not answer Question № 15.

QUESTION Nº 15:

What is a reasonable fee for the necessary services of Alice Ladkin's attorneys in this case?

Factors to consider in determining a reasonable fee include:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services;
8. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Answer with a dollar amount for each of the following:

a)	For preparation and representation in the trial court	$ 107,000
b)	For representation through appeal to the court of appeals	$ 40,000
c)	For representation at the petition for review stage in the Supreme Court of Texas	$ 15,000
d)	For representation at the merits briefing stage in the Supreme Court of Texas	$ 40,200
e)	For representation through oral argument and the completion of proceedings in the Supreme Court of Texas	$ 20,000

CHARGE OF THE COURT
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1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

1. You may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you may not have a group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.

2. If 10 jurors agree on every answer, those 10 jurors sign the verdict.

   If 11 jurors agree on every answer, those 11 jurors sign the verdict.

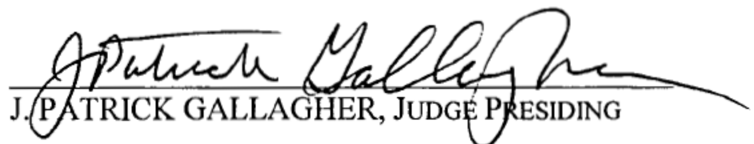
   If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 who agree on every answer will sign the verdict.

Do you understand these instructions? If you do not, please tell me now.

DATE: JAN. 12, 2023

TIME: 8:50 a.m.



J. PATRICK GALLAGHER, JUDGE PRESIDING

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