Appraisals of First-Party Property Damage Insurance Claims

Can Causation Be Examined as Part of the Amount of Loss?

By Ashlyn M. Capote and Jonathan Schapp

When is the cause of damage related to "the amount of loss," making it subject to resolution through appraisal?

A typical first-party property coverage form contains language indicating that in some circumstances where there is a dispute about the insured's loss, appraisal is appropriate. In fact, many states mandate certain language in a first-party property policy by statute via a "Standard Fire Insurance Policy," and the standard policy contains an appraisal provision. For example, in New York the required language states:

> In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand.

N.Y. Ins. Law §3404. Thus, the appraisal clause can only be triggered when the dispute is specifically about "the amount of loss," as opposed to, for example, whether there is coverage under the policy. There is generally no dispute that the appraisal process is inappropriate to make determinations regarding coverage. *See, e.g.*, *Walnut Creek Townhome Ass'n v. Depositors Ins. Co.*, 913 N.W.2d 80, 91 (Iowa 2018), *reh'g denied* (June 19, 2018) ("Coverage questions are for the court.").

However, whether a particular dispute is over "the amount of loss" is often not a simple question. Take, for example, an instance where a homeowner asserts that his or her roof needs to be replaced after a hailstorm. The homeowner's insurer evaluates the roof and determines that there is some evidence of hail damage to some of the shingles on the roof, but not enough to necessitate replacing the entire roof. The insurer takes the position that the damaged shingles can be replaced. The insurer also notes, however, that some of the shingles on the roof are in poor condition as a result of wear and tear, an excluded cause of damage under the policy. Is this a dispute over "the amount of loss"?

Courts have adopted different positions on how to characterize this issue. On the

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one hand, as in nearly all of these disputes, the causation question could be characterized as a dispute over "the amount of loss" because the ultimate questions are how extensive is the roof damage, and how much does the insurer owe? On the other hand, whether some of the roof damage was caused by wear and tear and thus subject to a policy exclusion is generally considered a coverage question, and therefore, it would be inappropriate for appraisal. This article evaluates the conflicting case law concerning the particular issue of whether a question regarding the cause of damage is related to "the amount of loss" that it is subject to resolution through appraisal.

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Causation of Damages as Appropriate Subject for Appraisal

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Many courts have determined that appraisers must make certain causation determinations, as a practical matter, in order to reach a conclusion about the amounts owed by the insurer. For example, an appraiser evaluating hail damage would not consider whether the property had leaky faucets; deciding not to consider leaky faucets is an initial causation assessment necessary to the appraisal. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009). *See also Spring Point Condo. Ass'n v. QBE Ins. Corp.*, No. 17 CV 2065, 2017 WL 8209085, at *3 (N.D. Ill. Dec. 13, 2017) ("[D]etermining the cause of the damage is inherent to the appraiser's duties. For example, if a building has damage before a covered event occurred, the appraiser cannot determine the amount of loss without evaluating what damage was caused by the covered event and which damage was caused, for instance, by previous wear and tear.") (internal citations omitted); *Philadelphia Indem. Ins. Co. v. WE Pebble Point*, 44 F. Supp. 3d 813, 818 (S.D. Ind. 2014) ("We agree with Pebble Point that it would be extraordinarily difficult, if not impossible, for an appraiser to determine the amount of storm damage without addressing the demarcation between 'storm damage' and 'non-storm damage.' To hold otherwise would be to say that an appraisal is never in order unless there is only one conceivable cause of damage—for example, to insist that 'appraisals can never assess hail damage unless a roof is brand new.'"). Thus, these courts have determined that some causation analysis is, at the very least, an implicit part of the appraisal process.

Many courts also note that public policy favors the appraisal process because the purpose is to avoid litigation. Therefore, some conclude that the process should not be so limited as to exclude any issues of causation. *See Quade v. Secura Ins.*, 814 N.W.2d 703 (Minn. 2012); *CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 269 (D. Del. 2000) ("If the Court were to curtail the appraisers authority to include only dollar value assessments without regard for whether the property was damaged as a result of the fire, the Court would be reserving a plethora of detailed damage assessments for judicial review, thereby debunking the purpose of appraisal which is to minimize the need for judicial intervention.").

These courts also emphasize that the purpose of the appraisal process is to avoid litigation and point out that developing issues in the appraisal process helps to do so. *See Quade*, *supra*, quoting *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 362, 288 N.W. 723, 725 (1939) (noting that the purpose of the appraisal provision was to provide "the plain, speedy, inexpensive and just determination of the extent of the loss") (quoting *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 362, 288 N.W. 723, 725 (Minn. 1939)); *Philadelphia Indem. Ins. Co.*, 44 F. Supp. 3d at 819 ("Even if an appraisal under the policy would not resolve this case completely, it could eliminate or substantially narrow the significant issue of loss value, which might also facilitate settlement discussions.") (internal citations omitted); *State Farm Lloyds v. Johnson*, 290 S.W.3d at 895 ("Litigating the scope of appraisal is wasteful and unnecessary if the appraisal itself can settle this controversy."). Thus, some courts appear to be of the opinion that affording appraisers more leeway in the appraisal process is beneficial.

More specifically, a primary justification for finding that appraisers can evaluate causation is that if any dispute about the cause of any damages could preclude appraisal, then parties could use a causation dispute solely to avoid the appraisal process. For example, in *N. Glenn Homeowners Assn. v. State Farm Fire & Cas. Co.*, the court explained that if an appraiser were not able to consider causation, it "would improperly limit the appraisal process to situations where the parties agree on all matters except the final dollar figure." 854 N.W.2d 67, 71 (Iowa Ct. App. 2014). *See also Villas at Winding Ridge v. State Farm Fire & Cas. Ins. Co.*, No. 116CV03301TWPMJD, 2019 WL 1434220, at *8 (S.D. Ind. Mar. 29, 2019), *aff'd sub nom. Villas at Winding Ridge v. State Farm Fire & Cas. Co.*, 942 F.3d 824 (7th Cir. 2019) ("In order for the appraisal to be meaningful at all it must quell questions about the origin of the damage—otherwise parties would litigate those questions

and the appraisal process would serve very little purpose.").

When the Texas Supreme Court considered this particular issue in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 887 (Tex. 2009), the dispute was over damages to the policyholder's home from a hailstorm. The insurer determined that hail had caused about $500 in damages, while the insured claimed that the roof on her home needed to be completely replaced for about $13,000. The insurer asserted that appraisers could not determine causation issues, and it asserted that there was a dispute pertaining to whether certain shingles were damaged by a covered cause of loss. The court explained that appraisal was appropriate because "[i]f the parties must agree on precisely which shingles have been damaged before there can be an appraisal, appraisals would hardly be necessary" and "either party could avoid appraisal by simply picking a few extras." *Id*. at 891.

This issue was further analyzed at length in *CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 269 (D. Del. 2000), where the court came to a similar result:

> Indeed, under the circumstances of this case, the Court cannot reconcile any other approach. Carried to its logical conclusion, Didimoi and GECC's position would be nonsensical. If the appraisers were required to accept the insured's claimed damages regardless of their cause and assign only dollar value assessments of the cost to repair or replace the items of claimed damage, the appraisers could be examining damage entirely unrelated to this case. For example, the insured could claim damage that resulted from an office party months ago and the appraisers would be required to assess a repair or replacement cost for that damage, when clearly such damage was not caused by the fire and would not be remotely relevant to this dispute. The Court cannot conclude that this is the appropriate function of the appraisal process.
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> In this litigation, CIGNA contends that the asbestos and microbial problems were pre-existing conditions excluded from coverage under the policy. Didimoi and GECC contend that such problems as microbial growth resulted from CIGNA's refusal to allow Didimoi to remove the wet materials from the Building. While the Court understands the overlap between these issues and causation which is the root of the dispute in this case, the Court believes that the ultimate question of whether CIGNA is responsible for this damage or whether this damage is excluded under the Policy is a coverage question which requires judicial resolution. Indeed, to the extent that the appraisers' assessment may overlap with a coverage question, the parties certainly may seek the Court's ultimate review. However, the Court believes it would be inappropriate to curtail the appraisal process simply because it might come shoulder-to-shoulder with subsequent legal questions.

How Should Appraisers Approach Appraisal in Causation Disputes?

Several cases provide guidance regarding how appraisers should approach the appraisal process where there are causation disputes. In *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 100 F. Supp. 3d 1099, 1103 (D. Colo. 2015), the court explained that appraisers could make factual findings that would enable a court to resolve legal disputes:

> [T]he appraisals should address the cost of replacing undamaged property to achieve matching. The appraisals should separately calculate and identify disputed costs so that the Court can either include or exclude them once it has determined whether the policy provides coverage for them. Counsel should work collaboratively to ensure that the appraisals provide sufficient detail to enable the Court to do this. Following this course will enable the parties to avoid unnecessary discovery or additional appraisals.

Id. at 1104 (internal citations omitted). Similarly, the court in *State Farm Lloyds v. Johnson*, explained that "appraisers can assess the amount of damage and leave causation up to the courts," and "[w]hen divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it." 290 S.W.3d at 894 (Tex. 2009), *Cf. Sunquest Properties, Inc. v. Nationwide Prop. & Cas. Co.*, No. CIV.A.1:08CV687LTSRH, 2009 WL 1609046, at *3 (S.D. Miss. June 8, 2009) ("If done correctly, appraisal may benefit the ultimate resolution of this action. Once the total amount of the loss is established, then a fact-finding allocation between covered and excluded losses can be made. There would be no need to revisit the amount of the loss, and the only issue to be visited is the extent of the coverage to that amount, i.e., the amount of covered damage and the amount caused by an excluded peril.").

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On that same note, many of these courts also note that if there is a dispute about how specific damages have occurred, that determination can be challenged later. *See Quade*, 814 N.W.2d at 708 ("We conclude that appraisal at this stage of the process must go forward, but the decision of the appraisers will be subject to review by the district court. This process gives force to the appraisal process but reserves to the courts the authority to decide coverage questions."); *Arvat Corp. v. Scottsdale Ins. Co.*, No. 14-22774, 2015 WL 6504587, at *2 (S.D. Fla. Oct. 28, 2015) ("After the appraiser makes a determination as to the amount of loss attributable to each cause, Defendant may still challenge coverage."); *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 100 F. Supp. 3d 1099,

1103 (D. Colo. 2015) ("The parties may still dispute coverage issues after the appraisal process has been completed.").

One state that takes an interesting approach in deciding this issue is Florida. Courts in Florida have developed a well-established rule:

> when the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid. In that circumstance, the appraisers are to inspect the property and sort out how much is to be paid on account of a covered peril.

Gonzalez v. State Farm Fire & Cas. Co., 805 So. 2d 814, 816 (Fla. Dist. Ct. App. 2000), *approved and remanded sub nom. Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002) (internal citations omitted). In other words, the Florida courts have determined that appraisal is only ever appropriate where the carrier acknowledges that there is a covered loss, but appraisal is inappropriate if the carrier has denied the claim.

That being said, even in the jurisdictions where appraisers are not to decide causation, doing so does not necessarily void the entire appraisal decision.

Thus, in *Kendall Lakes Townhomes Developers, Inc. v. Agric. Excess & Surplus Lines Ins. Co.*, the court explained that even though an insured's appraiser had determined that a windstorm resulted in $716,000 in covered damages, while the insurer's appraiser estimated that there was less than $1,000 in covered damage, appraisal was appropriate because the insurer had not denied that there was a covered loss. 916 So. 2d 12, 14 (Fla. Dist. Ct. App. 2005). The carrier had concluded that the property was damaged but that it was caused by an excluded cause of loss under the policy, and the policyholder argued that by acknowledging only $1,000 in covered damages, the carrier had effectively denied the claim completely. The court, however, disagreed, holding as follows:

> Therefore, based on *Johnson*, although there is a large discrepancy between the insured's and insurance carrier's estimate of the loss, because the insurer has not wholly denied that there is a covered loss, causation is "an amount-of-loss question for the appraisal panel," not a coverage question that can only be decided by the trial court.

Id. at 16.

This is also true where an insured submits one claim but there are multiple, distinct items of damage, only some of which are potentially covered. In *People's Tr. Ins. Co. v. Tracey*, 251 So. 3d 931, 932 (Fla. Dist. Ct. App. 2018), the insurer acknowledged coverage for the insured's interior but denied coverage for the insured's roof. The insured asserted that the claim could not be determined by an appraisal because the insurer had denied coverage for the roof; however, the court determined, based on *Johnson*, that the insurer had not "wholly" denied coverage and that appraisal for the single roof claim was appropriate. *See also People's Tr. Ins. Co. v. Garcia*, 263 So. 3d 231 (Fla. Dist. Ct. App. 2019).

Causation of Damages as Outside the Scope of Appraisal

Among states that have analyzed this issue, a minority have determined that the cause of damage is not to be determined during the appraisal process. *See Rogers v. State Farm Fire & Cas. Co.*, 984 So. 2d 382, 392 (Ala. 2007) ("Although the parties agreed as to the causation of the damage to the roof, they were not in agreement as to the cause of the damage to the brick veneer or to the foundation. The determination of the causation of these matters is within the exclusive purview of the courts, not the appraisers."); *N. Carolina Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (noting that the policy specifically stated, "In no event will an appraisal be used for the purpose of interpreting any policy provision, determining causation or determining whether any item or loss is covered under this policy."); *Sunquest Properties, Inc. v. Nationwide Prop. & Cas. Co.*, No. CIV.A.1:08CV687LTSRH, 2009 WL 1609046, at *3 (S.D. Miss. June 8, 2009) ("The only matter appropriate for the appraisal process is the determination of the total loss, without any regard to causation or coverage."); *Kirkwood v. California State Auto. Assn. Inter-Ins. Bureau*, 193 Cal. App. 4th 49, 62, 122 Cal. Rptr. 3d 480, 489 (Cal. App. 2011) ("California courts have consistently held that an appraisal panel exceeds its authority when it does anything beyond deciding the worth of the property in question.").

In one example, *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142 (Tenn. Ct. App. 2001), the appraisers had about a ten-fold difference in amount because they disagreed over whether certain items of damage were caused by a windstorm and tornado and therefore were recoverable under the policy. The court concluded that the appraisers had exceeded their authority by determining the particular cause of damage. *Id.* at 153. Similarly, in *Spearman Indus. Inc. v. St. Paul Fire & Marine Ins. Co.*, 109 F. Supp. 2d 905, 906 (N.D. Ill. 2000), the insured sought coverage for alleged damages to his roof, but the insurer denied coverage because it had determined that the damages were a result of excluded wear and tear. The court concluded that the issue was not appropriate for appraisal because the parties were disputing the cause of the damages rather than the amount of the damages.

Glendale LLC v. Amco Ins. Co. arose over a dispute following the policyholder's restaurant being damaged in a fire. No. 3:11-CV-3-RJC-DCK, 2012 WL 1394746 (W.D.N.C. Apr. 23, 2012). The claim was submitted to appraisal, and the policyholder filed a lawsuit and ultimately asked the court to declare the appraisal award invalid. The parties disagreed about whether certain damaged items were the result of the policyholder's post-fire neglect, and with respect to contents that were damaged during a post-fire break-in. *Id.* at *2 In analyzing the award, the court determined that the appraisers had disregarded certain damages based on the conclusion that those damages resulted from the policyholder's neglect and the post-fire theft, neither of which were covered. The court found that the award was invalid, explaining that the appraisers had made

improper determinations regarding causation and coverage under the policy. *See also Haman, Inc. v. Chubb Custom Ins. Co.*, No. 2:18-CV-01534-KOB, 2019 WL 3573550, at *1 (N.D. Ala. Aug. 6, 2019).

Entire Appraisal Decisions Not Necessarily Void

That being said, even in the jurisdictions where appraisers are not to decide causation, doing so does not necessarily void the entire appraisal decision. In *LeBlanc v. The Travelers Home & Marine Ins. Co.*, the appraisal umpire determined that all of the damage to a home was the result of a tornado and made a determination of damages accordingly. No. CIV-10-00503-HE, 2011 WL 1107126 (W.D. Okla. Mar. 23, 2011). The court determined that an appraisal could only examine the specific amount of damages, rather than what caused those damages, but the amount of the award could be used if the policyholder ultimately succeeded in demonstrating through litigation that the tornado caused all of the damage. *Id.* at 5. *But see Louati v. State Farm Fire & Cas. Co.*, 161 A.D.3d 701, 702, 77 N.Y.S.3d 51 (2018) (determining that appraisal was premature where there was a dispute over the cause of water damage).

Conclusion

As can be seen from the various cases discussed above, courts evaluate whether causation is appropriate for appraisal differently, often with different conclusions. Arguably, there is no "correct" answer, and the inquiry is jurisdiction specific. Of course, the specific policy language necessarily guides any dispute about the appraisal process, so it is important to evaluate the specific policy language at issue. However, it is often the case that courts interpret even the same policy language differently.

Despite the different approaches that courts have taken, the overall trend is that courts are typically more inclined to allow appraisers latitude to determine causation issues. It can therefore be expected that more courts will adopt the already majority view that causation questions are appropriate for appraiser determination. In our experience, property insurers have varying views on the propriety and/or effectiveness of the appraisal process. However, we believe that carriers are best served by taking an overinclusive view of appraisals. While it may be an insurer's opinion that an individual case is inappropriate for appraisal, avoiding litigation whenever possible will lead to more favorable results and less hostile relationships with customers than those that often result from litigation.