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APPRAISAL IN THE NEW WORLD ORDER

Property policies, both personal and commercial, typically contain appraisal provisions. Just a few years ago, the law on appraisal seemed relatively settled and uncontestable. Appraisal, when the circumstances were appropriate, was an efficient method to determine the amount of loss under most property policies. It could not be used in every case – if causation, coverage, or liability were at issue, its use was improper. Appraisal was rarely litigated. Between 1888 and 2009, there only were five instances in which the Texas Supreme Court reviewed appraisal. But in 2009, the Texas Supreme Court determined the law on appraisal, although working well, nevertheless needed to be clarified. In *State Farm Lloyds v. Johnson*[1], the Court changed the appraisal landscape. Rather than clarify the use of appraisal in Texas, the *Johnson* decision wreaked havoc on and upset the status quo of a process that seemingly worked well. In the aftermath, the demands for appraisal became automatic which, in turn, has led to an increase in litigation over appraisal, something *Johnson* sought to avoid. This paper will examine the issues, trends, and tactics in appraisal in the post-*Johnson* world.

I. THE HISTORY OF APPRAISAL IN TEXAS

A. Pre-*Johnson*

For well over a century prior to *Johnson,* Texas courts had been rather consistent in their interpretation of appraisal clauses. Appraisal was to be used to provide a simple, speedy, inexpensive, and fair method of determining the amount of loss only.[2] Appraisal is *not* arbitration.[3] If appraisal is properly invoked, carried out, and awarded, the *amount of loss* is binding on the insurer and insured.[4] Appraisal could be waived[5] (or so we thought). Appraisers and umpires were without authority or power in an appraisal to determine "questions of causation, coverage, or liability ...."[6]

Every reasonable presumption will be indulged in favor of an appraisal award.[7] However, an appraisal award may be disregarded in three (3) instances: (1) when the award was made without authority; (2) when the award was the result of fraud, accident or mistake; and (3) when the award was not made in substantial compliance with the terms of the contract.[8]

The status of appraisal appeared predictable and settled until the Texas Supreme Court's decision in *Johnson*, followed two years later by *In re Universal Underwriters.*[9] For a more comprehensive overview and history of appraisal before *Johnson,* see "Why You Should Care About Appraisals" by Mark Ticer and "A Primer on Appraisals in Texas" by Mark Ticer. Both articles can be found at www.ticerlawfirm.com/articles.

B. The *Johnson* Decision

1. The Facts.

In April 2003, Becky Ann Johnson's ("Johnson") house was damaged by hail.[10] State Farm Lloyds ("State Farm") inspected Johnson's property, specifically the roof, and concluded that only the ridgeline of Johnson's roof was damaged by hail, a covered peril, and estimating the loss at $499.50 which was less than Johnson's deductible.[11] Johnson requested a second inspection, but State Farm's conclusion remained the same.[12] Johnson did not accept State Farm's determination and contended that the entire roof needed to be replaced, submitting an estimate for $6,400.[13] Johnson hired a lawyer who demanded appraisal, contending the amount of loss necessarily includes the extent of loss or damage.[14]

The appraisal clause in Johnson's policy provided:

SECTION I -- CONDITIONS

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4. Appraisal. If you and we fail to agree on the *amount of loss,* either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser. Each shall notify

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> the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

State Farm responded that the dispute was about the extent of hail damage which was a coverage issue therefore, appraisal was not proper or appropriate.[15] Johnson filed a declaratory judgment action to compel appraisal.[16] Ultimately, both parties moved for summary judgment on that issue.[17] The trial court granted State Farm's summary judgment motion and Johnson appealed.[18]

2. The Dallas Court of Appeals.

The Dallas Court of Appeals reversed, finding Johnson was entitled to appraisal and framed the issue this way:

> This case involves the determination of whether the meaning of the term "amount of loss" in an appraisal clause of a homeowner's insurance policy includes the *extent* of loss and whether the insured can compel the insurer to appraisal when there is a dispute about the extent of loss.[19]

Johnson argued that the amount of loss includes a dispute over the extent of the damage.[20] In contrast, State Farm argued that no appraisal can be compelled unless the parties agree on causation, coverage, and liability.[21] Specifically, State Farm took the position that because it only acknowledged coverage on the ridgeline and the remainder of the roof was damaged by an excluded cause – wear and tear – the issue was coverage, not the amount of loss.[22] Therefore, State Farm argued the amount of loss does not include the *extent of loss*, because it would necessarily include determining coverage, causation, and/or liability.[23]

In evaluating both parties' arguments, the Dallas Court of Appeals cited *Wells*[24] which it had decided ten (10) years earlier.[25] *Wells* stood for the proposition that appraisers and umpires do *not* determine coverage.[26] But the Court of Appeals in *Johnson* did hold that under *Wells*, appraisers are to determine the "amount of damage" resulting to the property submitted for their consideration.[27]

According to the Dallas Court of Appeals' analysis, the parties in *Wells* agreed "on the extent of the loss and cost of repairs, but disagreed on whether there was a covered loss at all."[28] According to the Dallas Court of Appeals, the appraisers in *Wells* used appraisal to determine if the loss was caused by a covered peril.[29]

In siding with *Johnson*, the Dallas Court's opinion attempted to distinguish *Wells* from *Johnson* by asserting that the parties in *Johnson* agreed there was a covered loss, but disagreed on the extent of the loss and cost of repairs.[30] The Dallas Court additionally cited *Lundstrom v. United Services Automobile Ass'n*[31] as support for the appropriateness of appraisal in *Johnson* by noting the appraisers in *Lundstrom* had to determine which damages were caused by one water leak covered by a homeowner's policy versus damages occurring at another time, which were not covered.[32] The Dallas Court reasoned that both cases stood for the "narrow proposition that appraisers exceed their authority when they make legal determinations of what is or is not a covered loss based on their determination of what caused the loss or some portion of it."[33] According to the Dallas Court, appraisals which involve "making decisions about the extent of damage" are not precluded by *Wells* or *Lundstrom*.[34] The test for whether appraisal is proper is "if the parties agree there is coverage, but disagree on the extent of damage, the dispute concerns the 'amount of loss' and that issue can be determined in accordance with the appraisal clause."[35]

In very simple terms, the court of appeals in *Johnson* held that the amount of loss *includes* the extent of loss. Therefore, applying the rationale of *Johnson*, if there is damage to an automobile caused by hail on a very small part of the car and other parts are allegedly corroded from rust, a noncovered peril, appraisal would be appropriate to decide the extent of the covered loss. Sound confusing? It is. Under this analysis, where there are concurrent causes of loss, one covered and the other not, appraisers can be called upon to determine causation – something previously prohibited by *Wells* and regardless of how the Dallas Court of Appeals chooses to distinguish *Wells*.

A review of the typical appraisal clause substantiates that the term *extent of loss* is not found. Reading or implying this term into an appraisal clause only confuses the appraiser's task and obligations, and makes it unclear for the insurer and insured to decide when appraisal is proper. Including "extent of loss" into appraisal determinations necessarily translates into how much is damaged and *what caused it*, rather than how much does it cost to repair or replace, which is the stated function of appraisal according to a plain reading of a typical appraisal clause.

Under the Dallas Court of Appeals' *Johnson* opinion, once the parties agree there is *some coverage for a loss*, but disagree how much of the loss is actually covered or what part is covered versus uncovered, the extent of loss can

then be decided by appraisers. If it were only that simple. Obviously, the task of the appraisers in such a situation is to decide *how much of a covered loss exists*; logically, this task would entail an appraiser making a decision on causation – whether the damage was caused by hail as opposed to rust – wear and tear – or both hail and rust – concurrent causation, including perhaps what percentage of each. The actual effect in *Johnson* was to permit appraisers in such cases to decide causation leading to coverage and liability determinations, which is contrary to the plain reading of *Wells*. The ultimate consequence of the Dallas Court of Appeals' opinion in *Johnson* is that an appraisal award where extent of damage is decided is binding on the parties even if causation (covered vs. uncovered) is in play. As a result, decisions regarding causation, and ultimately coverage, could now be decided by appraisal – trial by appraisal through the use of appraisers and in the *Johnson* case – trial by roofer.

State Farm sought review in the Texas Supreme Court, contending that, where issues of causation, and ultimately coverage and liability, are presented and need to be decided, then appraisal is not appropriate.[36]

3. The Texas Supreme Court

The Texas Supreme Court accepted State Farm Lloyds' petition for review to decide whether the dispute between Johnson and State Farm fell within the scope of the appraisal clause.[37] Against most appellate odds (considering that acceptance of review usually translates into reversal and contrary to well-settled law on appraisal), the Court affirmed the Dallas Court of Appeals decision.[38] Implying that its affirmance was a pro-consumer decision, the Court wrote: "... we affirm the court of appeals' judgment *in favor of the insured.*"[39] Emphasis added. There were no dissents. The Texas Supreme Court's affirmance of *Johnson* can hardly be termed a pro-policyholder decision. Neither policyholders nor insurers are winners under *Johnson,* only the certainty of satellite litigation and the mucking up of what once was an understandable, simple, and efficient process for some property claims.

The Court at the outset noted it had infrequently written about appraisal.[40] From that fact, the Court then concluded that appraisal was working well and, therefore, should not be limited.[41] (If it was working well, one must ask the question then why change well-settled principles. Like the old adage – "We are here from the government, and we are here to help you" – this decision has only complicated matters instead of simplifying a process that was to be prompt and efficient.)

The Court initiated its opinion by attempting to trace the history of appraisal clauses.[42] The Court recognized that appraisal clauses are enforceable and used to determine *the amount of loss for a covered claim.*[43] But the Court pointed out it had not addressed the scope of appraisal, more particularly the meaning of "amount of loss."[44] The Court acknowledged that appraisal clauses instruct the appraisers to decide the "amount of loss," not policy construction or whether the claim should be paid.[45] Despite these observations, the Court then embarked on a mission of expanding appraisal employing problematic reasoning which has resulted in appraisal being used to decide, at least implicitly, coverage, causation and/or liability.

In evaluating State Farm's appeal, the Court wrote that the Texas courts *have split on the question of whether appraisers can decide causation.*[46] In making this statement, the Court in a footnote cited *one case* allegedly supporting appraisers determining causation and four (4) cases that prohibit it.[47] The Court's footnote was confusing, as it failed to discuss its implicit approval of *Wells* (rejecting the use of appraisers to decide coverage, causation, and/or liability) almost fourteen years earlier when it denied review of the Dallas Court of Appeals' *Wells* decision. *Wells* expressly prohibited an appraiser from deciding causation, as well as coverage and liability.[48] Stating a split of authority existed on whether appraisers can decide causation was misleading at best given other courts heavy reliance on *Wells*.

The Court acknowledged that appraisal clauses instruct the appraisers to decide the "amount of loss," not policy construction or whether the claim should be paid.[45] Despite these observations, the Court then embarked on a mission of expanding appraisal employing problematic reasoning which has resulted in appraisal being used to decide, at least implicitly, coverage, causation and/or liability.

The Court decided that the facts in *Johnson on the record presented to it* did not prove that the dispute was about causation.[49] The Court reasoned that, because State Farm acknowledged some shingles were damaged by hail, a covered peril, the dispute concerned the number of shingles damaged – "A dispute about how many shingles were damaged and needed replacing is surely a question for the appraisers."[50]

To support this conclusion, the Court asserted that the cost of replacing shingles "is a function of both *price* and *number*...."[51] (emphasis in the original). The Court wrote that which shingles need replacing is a dispute for appraisal.[52] To the extent the parties disagree which shingles need replacing, that dispute would fall within the scope of appraisal.[53] (See a problem here?) According to the Court, nothing in the summary judgment record revealed that the shingles were damaged by anything but hail.[54] Because there was no contrary evidence in the record about covered versus uncovered causes (according to the Court), the trial court could not deny appraisal as a matter of law simply because State Farm contended the dispute was about causation.[55] Additionally, the summary judgment record did not show the dispute was *solely* about how much of Johnson's roof

was damaged.[56] *Because* this was a summary judgment proceeding, the trial court erred when it decided the dispute was about causation.[57]

In writing for the Court, Justice Brister wrote, "Even if the parties' dispute involves causation, that does not prove whether it is a question of liability or damages."[58] Reasoning further, the Court determined that causation relates to both liability and damages because it is the connection between them."[59] To justify this contention, the Court referred to the *Texas Pattern Jury Charge* which placed causation in both liability and damage categories.[60] Abstractively, the Court wrote that causation could fall equally into both categories – liability and damages.[61]

To arrive at the conclusion that causation was a proper part of appraisal, the Court cited *Wells* and *Lundstrom*, *Wells* where the appraisers determined damages based on two causes, one covered peril versus another uncovered peril, and *Lundstrom* where appraisers allegedly did the same thing.[62] The Court held that both decisions were correct because courts determine coverage and appraisers decide the amount of damage caused by each peril.[63] According to the Court, this principle is also applicable in evaluating a loss due to a covered event versus a preexisting condition.[64] *To* hold otherwise would mean that appraisers could never evaluate hail damage unless the roof was brand new, making an appraisal clause invalid or meaningless, a construction which the Court must avoid.[65] To property insurance practitioners, the Texas Supreme Court's reasoning was a departure from precedent and signaled that appraisal was proper in almost every first party property damage claim.

The Court further stated that appraisers "must always consider causation, at least as an initial matter. An appraisal is for damages caused by a specific occurrence, not every repair a home might need."[66] Justice Brister then wrote that appraisal necessarily must include some causation because the appraisers have to decide damages where coverage is claimed versus damages to other property caused by something else. This holding has made appraisal a one size fits all solution for first party property claims.

Attempting to provide some comfort, the Court held that State Farm did not have to pay for wear and tear or other excluded perils.[67] If the appraisers go beyond damage questions, then the award may be avoided, but the mere existence of a causation question is not enough.[68] In making this statement, the Court did not distinguish between the application of this statement versus permitting appraisers to determine causation regarding "extent of loss."

The Court went even further and announced that even if appraisal does involve liability questions, it should not be prohibited initially.[69] In making this statement, the Court provided four (4) reasons.[70] First, appraisals that have yet to occur involve conditions precedent and allowing litigation pre-appraisal would encourage more litigation, thereby defeating the purpose of appraisal.[71] Second, appraisals that have yet to occur can be structured to avoid liability questions; even if the insurer denies coverage, there is no harm in an appraiser setting the amount of loss.[72] Third, the lack of precedent on scope of appraisal suggests that appraisal generally resolves such disputes.[73] Fourth, a flawed appraisal can be disregarded.[74] Based on this reasoning, the Court held that appraisal should occur pre-litigation, without involvement of the legal process and without "preemptive intervention by the Courts."[75] These reasons defy the reality of what results from a flawed appraisal.

Johnson's broad language does a disservice to insurers and insureds. Instead of limiting the reasoning in *Johnson* to the facts in the summary judgment record, the Texas Supreme Court went far beyond the facts to permit futile exercises which needlessly complicate and increase the cost of a claim and ultimately litigation. The Court's opinion seems to require the insurer and insured to go to the effort and expense of an appraisal merely because every claim involves a dispute about the amount of loss and there is no real harm in doing so.

State Farm's petition for rehearing was denied. In its *Motion for Rehearing*, State Farm tried to draw the Court's attention to the fact that its decision confused more than helped, created needless and wasted efforts, increased the costs to all parties to an appraisal, complicated litigation, and that its reasoning was tantamount to re-writing the policy. Based on prior decisions and practical application, State Farm's arguments were meritorious, but rehearing was denied.

II. THE UNANSWERED QUESTIONS FROM *JOHNSON*

The Texas Supreme Court decision in *Johnson* left several unanswered questions and raised a host of others. For example, by allowing the appraisal to determine extent of loss or causation, has the Court created a way for an insured to avoid its burden of proof when concurrent causation issues exist? Similarly, can it provide a means for the insurer to avoid its burden of proving the application of an exclusion? What about the competence of the umpire and appraiser? Certainly competence must be a consideration, otherwise the use of the term "competent" in an appraisal clause would be rendered meaningless, a result that the courts reject in interpreting insurance policies, i.e. contracts. In light of the fact that appraisal can determine causation, does the competence requirement mean that the appraiser and umpire must satisfy *Robinson* or *Daubert* criteria? What does impartial in an appraisal clause mean? Surely, the competence and impartiality of appraisers and umpires can be raised but when one should do so remains unclear; much of the reported litigation indicates that it occurs with frequency post-appraisal.

Johnson cast serious doubt on the possibility of litigating appraisal prior to completion of the appraisal. As the Court noted:

> But in every property damage claim, someone must determine the "amount of loss," as that is what the insurer must pay. An appraisal clause binds the parties to have the extent or amount of the loss determined in a particular way. Like any other contractual provision, appraisal clauses should be enforced. There may be a few times when appraisal is so expensive and coverage is so unlikely that it is worth considering beforehand whether an appraisal is truly necessary. But unless the "amount of loss" will never be needed...appraisals should generally go forward without preemptive intervention by the courts.[76]

So, how does a party, prior to appraisal, persuade a court that appraisal is so expensive and coverage so unlikely that appraisal is not necessary or appropriate? Is a party objecting to appraisal, particularly those with limited resources, required to first incur the costs of appraisal before asserting a challenge?

Furthermore, case law demonstrates that undoing the appraisal puts a tremendous burden on the party seeking to set it aside. The unsophisticated and unrepresented insured may become aware of the binding results of an appraisal too late. As State Farm stated in *Johnson* – it forces the losing party to "unring the bell." Because appraisal will be viewed as presumptively a legitimate process, courts will be swayed to enforce the award no matter how the results are obtained or how unjust.

The *Johnson* decision is neither pro-consumer nor pro-insurer. *Johnson* seems contrary to the Supreme Court's willingness to uncomplicate trials and keep litigation costs down. While appraisal may simplify the trial process in theory, the Supreme Court's tinkering with the scope of appraisal in fact does the opposite. The standard to undo an appraisal is hardly simple or easy to satisfy. The parties to appraisal will bear the costs of appraisal for their own appraiser and likely one-half the cost of an umpire. The parties may then need to assume the additional burden and expense of litigating the competence and/or bias of an appraiser or umpire, that appraisers or the umpire exceeded their authority, or that liability and/or coverage was decided. This will undoubtedly require depositions, the hiring of other experts, and of course, attorney's fees, not to mention time which is the enemy of prompt and efficient. The Court has complicated a rather simple process.

Appraisal was not meant to be used in every first party property case. It was designed to be employed in circumstances such as grandmother's antique diamond ring being stolen, an event covered by a typical property policy. There is *no controversy* as to what extent the ring is covered. Appraisal properly framed is that the insured says the ring is worth $5,000 while the insurer argues the value is $1,000. Appraisal would certainly be proper and an efficient means of resolving the issue of damages, the value of grandmother's stolen antique diamond ring. In contrast though, where there are multiple causes of a loss, some covered and others not, an appraisal which includes appraisers and umpires undertaking causation, implicitly or expressly, whether stated in the award or not, when evaluating the amount of loss confuses the parties, the court, what is to be tried, and the binding effect of the award.

With regard to assessing hail damage versus excluded wear and tear, the *Johnson* court said: "If State Farm is correct that appraisers can never allocate damages between covered and excluded perils, then appraisals can never assess hail damage unless a roof is brand new."[77] But the court went on to say that "[t]his of course does not mean that appraisers can rewrite the policy. No matter what the appraisers say, State Farm does not have to pay for repairs due to wear and tear or any other excluded peril because those perils are excluded."[78] These confusing and contradictory statements demonstrate the material challenges caused by the Court's opinion in *Johnson* which do the opposite of providing a prompt and efficient method of determining the amount of loss.

Texas law is clear about the burdens imposed upon the parties where there are covered and uncovered causes of loss. Under Texas law, the insured only is entitled to recover under the policy for covered events, and it bears the burden of segregating the damage attributable solely to the covered peril.[79] A failure to present evidence of damages from a covered peril with some degree of reliability and precision, or to provide a basis upon which to determine the extent of damage caused by the covered peril, is fatal to the insured's claim.[80] Thus, in a hurricane claim involving wind and water damage, it is the insured's burden to segregate the damages caused by wind, and in a hail claim, it is the insured's burden to segregate which of the damages was caused by hail as opposed to wear and tear or some other event. If the appraiser does not segregate the damages, or if the umpire does not require the appraiser for the insured to segregate the damages attributable solely to the covered peril, the insured will be relieved of its burden of satisfying the concurrent causation doctrine. Or, if the umpire simply declines to segregate covered and uncovered damages, or dismisses the issue by claiming that he only took into consideration the covered damages without any real attempt at segregation, the concurrent causation doctrine will have been circumvented under the guise of appraisal.

Equally significant, the issue of competence has not been litigated with any reported decisions. Common sense would seem to indicate that an appraiser may well have to satisfy the *Robinson* criteria to make his findings valid.[81] Causation in property damage claims is not something that necessarily

is within the general experience and common sense of a lay person. A competency argument is especially compelling when concurrent causation issues exist. Given the substantial number of losses involving multiple perils (hail versus wear and tear and wind versus water), the competency of the appraiser cannot be considered insignificant. Invariably, segregation between covered and uncovered perils – satisfaction of the concurrent causation doctrine – requires expertise in damage assessment and repair, something that the Court has remained silent about.

III. WAIVER AND THE EFFECT OF *IN RE UNIVERSAL UNDERWRITERS* ON LITIGATION STRATEGY POST-*JOHNSON*

Some insureds who did not like *Johnson* changed their strategy to avoid appraisal by asserting waiver. The insured's strategy was to file suit, and, in response to the insurer's attempt to invoke appraisal, argue that the insurer had waived its right to invoke appraisal by waiting until after suit was filed. The insured often was successful in maintaining waiver. Even when the insured was unsuccessful, it could often persuade a court that waiver was a fact issue for discovery, sidetracking the litigation on the merits with costly discovery on the waiver issue. This strategy was dealt a near-fatal blow by the Supreme Court of Texas in *In re Universal Underwriters*[82].

The facts in *Universal Underwriters* were not complicated. Universal insured Grubbs Infiniti.[83] Grubbs' buildings suffered hail damage.[84] Universal paid Grubbs $4,081.95 for the loss.[85] Grubbs was dissatisfied with the amount and asked Universal to reevaluate.[86] Universal responded by sending an engineer to reinspect; the engineer found $3,000.00 in damages and Universal paid this amount.[87] Universal sent the $3,000.00 payment with a letter advising Grubbs that the insurer would hold open its file for another fifteen (15) days.[88] Furthermore, Universal reminded Grubbs that it had two years and one day to file suit pursuant to Grubbs' insurance policy with Universal.[89]

Four months after receiving the $3,000.00 payment, Grubbs sued Universal. In response, Universal invoked the appraisal clause.[90] Universal filed a motion to compel appraisal which the trial court denied.[91] Universal then sought mandamus relief in the Court of Appeals, which also was denied.[92] Universal then sought mandamus relief in the Texas Supreme Court. In granting relief to Universal, Chief Justice Jefferson, writing for the Court, began by discussing previous high court decisions on waiver of appraisal, noting that, of three cases addressing the issue, only one of the three decisions found waiver.[93] That one case, *Brock*, dealt with waiver due to an insurer's selection of a biased appraiser in violation of the insurance policy.[94]

Chief Justice Jefferson noted that the eight-month delay between the last payment and Universal's letter to Grubbs, and Universal's demand for appraisal, was not determinative of waiver.[95] According to the Court, decisions involving 39, 58, or 72 day delays before requesting appraisal were not decided on the lengths of delay but "rather on the parties' conduct, as indications of waiver."[96] The Court noted that "waiver requires intent, either the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right."[97] The Court held that time periods alone are not determinative of waiver, only a factor.[98]

The Court announced a new two-part test for determining whether appraisal has been waived. First, any delay for purposes of waiver must be measured from the point of "impasse."[99] "Impasse" is defined as when both sides realize that further negotiations would be futile or have no further effect.[100] Thus, "once the parties have reached an impasse – that is, a neutral understanding that neither will negotiate further – appraisal must be invoked within a reasonable time."[101] Because Universal invoked appraisal one (1) month after Grubbs sued, Universal demanded appraisal within a reasonable time.[102]

The second part of the test announced in *Universal Underwriters* was a prejudice requirement: a party must show that it has been prejudiced to avoid appraisal based on waiver.[103] The Court stated that, "it is difficult to see how prejudice could ever be shown when the policy . . . gives both sides the same opportunity to demand appraisal."[104] The Court announced a prong to the waiver test that it recognized no party could likely satisfy.

To summarize, to establish waiver of the appraisal clause, a party must show an actual impasse existed and an unreasonable period of time passed following the actual impasse. And even if an impasse is shown, the proponent of waiver must demonstrate prejudice, something the Court doubted could ever be shown.

The Beaumont court of appeals recently rejected an insured's argument that *In re Universal Underwriters'* requirement of prejudice was dicta. The insurer in *In re Cypress Texas Lloyds* sought mandamus to compel the trial court to abate the pending lawsuit and order appraisal.[105] After the suit was filed and answered, a considerable amount of time had elapsed.[106] The trial court considered "the lapse of time, the significant procedural and substantive matters developed for litigation" and concluded "it is clear that the parties have incurred significant legal expenses which would, undoubtedly, damage their financial position" and that the waiver employed a "deliberate strategy" to refrain from appraisal.[107] The trial court denied the motion to compel appraisal because the insurer had waived appraisal.[108] The insurer sought mandamus relief.[109] In response to insurer's mandamus plea, the insurer urged that *In re Universal's* requirement that the party resisting appraisal show prejudice was dicta, and the Supreme Court did not intend to set an impossible test for waiver.[110]

Although the court of appeals noted that the "record supports a conclusion that Cypress employed a deliberate strategy to not obtain an appraisal and that the Newmans incurred some costs before Cypress filed a motion to compel," it concluded that it was not free to ignore the Texas Supreme Court's statement of law, regardless of whether it was pivotal to the opinion.[111] In granting the insurer relief, the court of appeals stated that the insured could have avoided the litigation costs by requesting appraisal itself, particularly after the insurer answered the suit and pleaded appraisal as a condition precedent.[112]

The extremism of the Supreme Court's philosophy on appraisal and the imprint of *Universal Underwriters* is recently demonstrated by the Beaumont Court of Appeals' decision of *In Re GuideOne Mutual Insurance Company.*[113] The facts are straightforward: after several years of litigation and two (2) months before the trial setting, GuideOne invoked the appraisal clause.[114] The trial court denied GuideOne's request finding an impasse existed as of December 13, 2007 and appraisal was demanded in May 2012. The Beaumont Court of Appeals nevertheless stated impasse was not evident because the parties mediated in October 2011 and, at the time appraisal was requested, there was no trial date.[115] Thus, an impasse was not established.

Moreover, with regard to the policyholder's prejudice argument, the insured demonstrated over $110,000 in expenses; yet, the appellate court ruled this was not prejudice because the insured did not show such expenses would not have been incurred in the absence of appraisal.[116] Finally, the Court of Appeals held to deprive the insurer of appraisal would preclude the insurer's defense of the policyholder's prompt pay claim.[117]

The Beaumont Court of Appeals granted GuideOne mandamus relief, ordering appraisal but leaving the time and effect of appraisal to the trial court.[118] This decision represents appraisal out of control and directly contradicts the purposes of appraisal – that is a prompt, efficient, and inexpensive method to determine the amount of loss. *In Re GuideOne* turns appraisal upside down to the detriment of insurers and insureds.

IV. LITIGATED APPRAISAL ISSUES

Undoing an appraisal award is at best problematic. Every reasonable presumption will be indulged in favor of an appraisal award.[119] Nevertheless, an appraisal award may be disregarded in three instances: (1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; and/or (3) when the award was not made in substantial compliance with the terms of the contract.[120] In attacking or attempting to set aside the appraisal award, the insured and insurer must tailor their arguments to demonstrate an entitlement to relief.

A. Is Competence of Appraiser/Umpire Required?

As previously discussed, the Texas Supreme Court in *Johnson* held that appraisers must consider causation when assessing damage: "Any appraisal necessarily includes some causation element, because setting the 'amount of loss' requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else."[121] Likewise, the duty of the *umpire* is to "ascertain and determine, in the exercise of his own judgment and as a result of his own investigation, the cost values of the disputed items, independent of the findings of the appraisers, or either of them."[122] It follows, logically, that the umpire - whom the court in *Providence Lloyds* called "a third appraiser" - must consider causation when determining the value of a loss. [123]

When a specific cause issue is not within the general experience and common sense of a lay person, expert testimony is required to establish causation.[124] Even when a theory of causation of property damage is posited by an "experienced engineer," courts have disregarded those causation theories when, under the standards set forth in *Daubert* and *Robinson,* those theories amount to nothing more than "subjective belief and unsupported speculation."[125] Absent special knowledge "as to the very matter on which he proposes to give an opinion," a witness is not qualified to proffer causation testimony.[126] General experience in a specialized field does not qualify a witness as an expert on issues of causation.[127]

The factors in *Daubert* have been extended beyond "scientific" causation to a number of matters involving "technical" and "other specialized" knowledge.[128] The Texas Supreme Court has stated that "[j]ust as not every physician is qualified to testify as an expert in every medical malpractice case, not every mechanical engineer is qualified to testify as an expert in every products liability case."[129] It would seem to follow that the *Robinson/Daubert* factors should be extended to a determination of causation in a property damage claim.

Considering these same principles in a Memorandum Order issued in response to the insured's Motion to Appoint Umpire in *Glenbrook Patiohome Owners Association v. Lexington Ins. Co.*, Judge Lee Rosenthal noted that an umpire "must combine competence in evaluating conflicting disputed evidence with expertise and experience in assuring a fair process."[130] Judge Rosenthal emphasized the importance of the umpire's subject matter expertise and experience, stating that such expertise was as important as fairness of the appraisal process.[131] The dearth of other reported decisions on this requirement suggests this could be a fertile ground to challenge an appraisal award or perhaps a preappraisal attack on the appraisal process.

B. Is Bias/Impartiality of Appraiser and/or Umpire to be Considered?

Texas law has held in *Delaware Underwriters* that appraisers

and umpires be competent and disinterested:

> The purpose of the [appraisal] clause is to secure a fair and impartial tribunal to settle the differences submitted to them. In their selection it is not contemplated that they shall represent either party to the controversy or be a partisan in the cause of either, nor is an appraiser expected to sustain the views or to further the interest of the party who may have named him. And this is true, not only with respect to estimating the amount of the loss, but also with reference to the selection of an umpire. They are to act in a quasi judicial capacity and as a court selected by the parties free from all partiality and bias in favor of either party, so as to do equal justice between them. This tribunal, having been selected to act instead of the court and in place of the court, must, like a court, be impartial and nonpartisan.[132]

Following *Delaware Underwriters*, the court in *Pennsylvania Fire Ins. Co. v. W.T. Waggoner Estate*, stated that the term "disinterested" does not mean simply lack of pecuniary interest, but also "not biased or prejudiced."[133] The court in *W. T. Waggoner* affirmed the judgment of the trial court, in which the appraiser and umpire were found to be biased.[134]

It follows that an appraiser who has a financial interest in an appraisal award is not impartial.[135] In *General Star,* the insurer challenged an appraisal that resulted in an award from the insured's appraiser and umpire.[136] The insured in *General Star* agreed to pay its appraiser a 5% contingency of the gross settlement amount.[137] The Houston Court of Appeals reversed the summary judgment granted to the insured on the binding nature of appraisal because the insured's appraiser had a financial/pecuniary interest in assessing the amount of loss and his impartiality could reasonably be questioned.[138]

In *Holt v. State Farm Lloyds*, the insured challenged the impartiality of State Farm's appraiser - Tim Marshall from Haag Engineering.[139] At issue was whether Marshall, who derived approximately one-quarter of his income from State Farm appraisal work, was impartial.[140] The federal court declined to grant summary judgment on the binding nature of appraisal, finding a fact issue on Marshall's impartiality.[141]

In contrast, courts have rejected impartiality challenges where the appraiser's employer, rather than the appraiser individually, was accused of being partial.[142] And even where the insurer's chosen appraiser who had previously rendered an opinion on the cause of the loss before being selected an appraiser did not invalidate an appraisal award on the basis of bias the appraiser.[143]

In *MLCSV10 v. Stateside Enterprises, Inc. v. Hartford Steam Boiler Inspection and Ins. Co.*,[144] the insureds filed suit against several insurers for breach of contract and various extra-contractual causes of action in connection with claims arising out of Hurricane Ike.[145] Prior to filing suit, the insureds invoked the appraisal clause, but the appraisal award was not issued until after suit was filed.[146] The insurers tendered payment of the appraisal award, and then sought summary judgment in the lawsuit.[147] In response, the insureds argued that there were material fact issues as to whether the award was valid or should be disregarded and set aside because the insurer's appraiser and the umpire "failed to disclose a referral relationship between each other's companies, thereby implicating the impartiality of the tribunal and violating the terms of the policy's appraisal provision."[148] The insureds also contended that the umpire and appraiser's failure to disclose this relationship to the insureds' appraiser created "an appearance of partiality" that provides a sufficient basis under Texas law for disregarding the award.[149]

Citing *Franco v. Slavonic Mut. Fire Ins. Ass'n,*[150] the court noted that "[t]he showing of a pre-existing relationship, without more, does not support a finding of bias."[151] The court found no evidence that the umpire referred clients to the insurer's appraiser, that the insurer influenced or exercised control over the umpire or appraiser during the appraisal, that the umpire or appraiser had a financial interest in the outcome of the appraisal, or that the umpire was more likely to side with the insurer's appraiser than with the insured's appraiser because of the preexisting business relationship between the two companies.[152] On this record, the court found that the insureds could not defeat summary judgment simply by arguing that the umpire and appraiser were biased against them. The court also found no basis for setting aside the award based on a failure to disclose a pre-existing relationship. According to the court, "Texas courts require more than an appraiser's failure to disclose a preexisting business relationship between the appraisers' companies to disregard an appraisal award. Texas courts require "evidence that the [challenged] appraiser performed 'some act or conduct tending to exhibit his serving the [insurer's] interest as a partisan would.' "[153]

To summarize, in order to demonstrate bias the challenging party must attack a specific individual, not an entity, company, or firm. Generalities will not work; the challenging party must identify specific act(s) by the appraiser/umpire that will call into question the appraiser/umpire's impartiality.

C. Selection of the Umpire

1. Were Appraisers at an Impasse?

In Texas, an appraisal award is binding if it is made in compliance with the provisions of an insurance contract.[154] Texas courts have recognized that an appraisal award may be disregarded "when the award was not made in substantial compliance with the terms of the contract."[155]

A typical appraisal provision in a property insurance policy will provide that, "[t]he two appraisers will select an umpire," and "[i]f they cannot agree within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction." In other words, either appraiser can seek appointment of an umpire if they are at an impasse in their selection of a mutually agreeable umpire. Note that the typical language states that either "appraiser" can seek appointment of the umpire. Increasingly, one or the other party, or its lawyer, may seek appointment of the umpire. This begs the question whether or not an application to the court for appointment of an umpire by the insured or the insurer, or by counsel for either, complies with the policy's appraisal provision. Consider the role of the appraiser (and presumably umpires) and the quasi-judicial capacity in which the appraiser serves: "The policy by its terms required that the insured and insurer select competent and disinterested appraisers. They constitute a quasi court and should be free from partiality and bias in favor of either party."[156] The appraiser is not a representative of either party. It stands to reason, therefore, that an application to a court by either the insured or the insurer, or by counsel for either, is not contemplated nor authorized by the policy.

With regard to whether or not the two appraisers are at an impasse, *In re Universal Underwriters* provides guidance as to the meaning of an impasse – "when both sides realize that further negotiations would be futile or have no further effect....the parties have reached...a neutral understanding that neither will negotiate further."[157] If the appraisers have not yet reached the point that both realize that further negotiations will be futile or that there will be no further negotiations, then an attempt to seek court appointment of an umpire arguably does not substantially comply with the policy's appraisal clause. The party resisting appraisal – whether in response to a motion to compel appraisal, in an effort to set aside an order appointing an umpire, or in post-appraisal litigation attacking the appraisal – could argue that the policy's appraisal provision was not complied with when the umpire appointment was sought. When it has been established that the appraisers had not reached an impasse, some parties resisting the umpire appointment have successfully persuaded trial courts to set aside umpire appointments on the basis that the court lacked jurisdiction to enter the order.

Realizing that the umpire appointment may have been premature because of the lack of an impasse, some appraisers have attempted to bait the other appraiser, after the appointment of the umpire, into agreeing that they were never going to agree on the selection of an umpire. Some savvy appraisers appear to recognize, and refuse to fall victim to, the trap. The unwary appraiser, however, may take the bait without understanding the consequences.

2. Do Principles of Fairness and/or Due Process Require Notice when Appointing an Umpire?

Appraisal clauses do not typically specify whether the appraiser seeking appointment of an umpire must give prior notice to the other appraiser and/or allow the other appraiser to have some input into the process, and no reported case law exists in Texas on this issue. Some insurers and policyholders interpret the absence of any such language as an invitation to proceed *ex parte* without any notice to the other side or the opportunity for the other appraiser to have some input with the court prior to its appointment of the umpire. Obviously, principles of fairness and due process would seemingly dictate that there be prior notice. Moreover, to find otherwise would serve to encourage or invite abuse. An appraiser (or worse yet, the party that appointed the appraiser) could feign cooperation and exchange names of proposed umpires, all the while never intending to agree to any proposed umpire from the other appraiser, and then seek to have one of its preferred umpire candidates appointed by the court. By imposing a prior notice requirement and allowing the other appraiser an opportunity to have some input with the court on the umpire appointment, courts would help to preserve the integrity of the process and minimize a basis to challenge the appraisal award.

D. Appraisal/Umpire Exceeded Authority

If the appraiser or umpire attempts to determine liability, whether by making coverage interpretations or determinations about what the insured is entitled to recover or the insurer is obligated to pay under the policy, then the appraiser/umpire may have exceeded his authority and the award should be set aside. While the Supreme Court's *Johnson* decision may have confused the tasks of appraiser and umpire, the Supreme Court's opinion in *Scottish Union* stated:

> If the stipulation [consent to appraisal] was to deny or repudiate the jurisdiction of the courts to determine the rights and liability of the parties arising upon the contract, we would hold, with the weight of authority, such stipulation void. But here the stipulation does not divest the courts of jurisdiction, but only binds the parties to have the extent or amount of the loss determined in a particular way, *leaving the question of liability for such loss to be determined, if necessary, by the courts.*[158]

Scottish Union was subsequently cited favorably by the Dallas Court of Appeals in *Wells*:[159]

> The parties agree that no reported Texas case has decided the issue of whether the authority of appraisers under the appraisal section of an insurance policy is limited to determination of only the *amount* of loss as distinguished from

> determining *cause* of loss, and *coverage* and *liability* for the loss. We conclude, however, that the weight of authority from other jurisdictions discussing the issue follows the rule that appraisers have no power or authority to determine questions of causation, coverage, or liability, which is consistent with the Texas courts' discussion of the effect of the appraisal award.[160]

To recap, in *Wells,* the appraisers were called upon to determine the damages due to foundation movement of a home.[161] The appraisers and umpire arrived at a figure of $22,875.94.[162] However, the insurer's appraiser and umpire determined that the damage related to the plumbing leak was zero.[163] The trial court granted summary judgment in favor of the insurer, denying the Plaintiffs' claim.[164] The plaintiffs appealed and the Dallas Court of Appeals determined that appraisal was limited to determining the "amount of money involved in the controversy" and not to be used to determine liability, causation, or coverage.[165] *Wells* makes it clear that appraisal is improperly used and has no binding effect if causation, coverage, or liability is decided by the appraisers and/or umpire.

Johnson, as previously noted, makes the *Wells* holding unclear. The Texas Supreme Court in *Johnson* explicitly stated that "limiting appraisal to damages and not liability is surely still correct."[166] The Court in *Johnson* specifically noted that the purpose of appraisal is to determine amount of loss, and not "to construe the policy or decide whether the insurer should pay."[167] *Johnson* fully embraced the *Scottish Union* decision when it noted that "the scarcity of suits on the subject suggests the 1888 test is still adequate: the scope of appraisal is damages, not liability."[168] Still, an asterisk needs to be attached to *Wells*, as *Johnson* provides that determining "extent of law" includes coverage – at least in part.

In *MLCSV10*[169], District Judge Lee Rosenthal considered whether there was evidence that the appraisal award was made without authority.[170] There, the insured argued that the appraisal panel exceeded its authority by deciding issues of coverage and causation reserved for the courts.[171] The underlying claim involved commercial property damage resulting from Hurricane Ike and vandalism.[172] As part of its claim, the insured included damaged ductwork, and its appraiser included estimates for replacing the ductwork.[173] The insurer's appraiser and the umpire did not inspect the ductwork because they concluded that neither the hurricane nor vandalism could have damaged it.[174]

Judge Rosenthal concluded that the record evidence supported a finding either that the appraisal award was incomplete because it did not include any inspection of the ductwork, or that the umpire and insurer's appraiser impermissibly found no coverage by finding no covered event caused the ductwork damage.[175] Judge Rosenthal ruled that, to the extent the appraisal award implicitly determined that the ductwork was not covered under the policy, the insured had provided a sufficient basis for setting aside that part of the appraisal award.[176] The court determined that there was no precedent for setting aside the entire award based on a finding that one part of the award implicitly determined a coverage issue.[177]

E. Fraud, Accident or Mistake as a Basis to Avoid an Appraisal Award

As previously noted, an appraisal award may be set aside if it is the result of fraud, accident or mistake. A court may set aside an award on the ground of mistake [or accident] only "upon a showing that the award does not speak the intention of the appraisers."[178] Evidence of dishonesty about the parts of the property that are damaged by the covered event which results in confusion of the appraisers and umpire may be sufficient to establish that the award was the result of accident or mistake.[179] However, a disagreement between experts or appraisers as to the methodology employed in assessing damage is insufficient to establish mistake.[180]

Cases dealing with fraud and misconduct are virtually nonexistent. Only one case seems to deal with fraud and misconduct.[181] Barnes, the insured, made a claim for hail damage to two roofs on buildings he insured with Western Alliance.[182] Following an appraisal where the appraisers could not agree, Barnes' appraiser and the umpire signed an award for $402,978.08.[183] Western Alliance refused to pay the award and Barnes filed suit.[184] The jury found the appraisal award was due to fraud, accident, or mistake.[185] Barnes appealed.[186]

The Fort Worth Court of Appeals found sufficient evidence of fraud to overturn the appraisal award.[187] Specifically, the Court found Barnes had lied about the claim.[188] Barnes admitted that hail did not cause damage to one roof, but rather Barnes put on a new roof before the hail storm, not because of it.[189] Barnes lied to the insurer about whether hail damage occurred and failed to tell the umpire part of his claim was based on fraud.[190] The Court found that more than sufficient evidence existed to avoid the appraisal award based on fraud.[191]

V. DOES EXTRA-CONTRACTUAL LIABILITY EXIST IN THE APPRAISAL CONTEXT?

Texas courts have long held that a completed appraisal, wherein the insurer has paid and the insured has accepted the payment of the amount of the appraisal award, estops the insured from maintaining a breach of contract claim against the insurer unless the insured proves that the award was unauthorized or the result of fraud, accident or mistake.[192]

Two recent decisions from the Southern District of Texas appear to reach inconsistent conclusions with regard to the issue of whether a carrier who initially disputes the extent of

damage, but later pays an appraisal award, can be liable for extra-contractual damages. In *Mag-Dolphus, Inc. v. Ohio Cas. Ins. Co.*[193], Judge Melinda Harmon granted summary judgment for Ohio Casualty Insurance Company, finding that the insureds' invocation of the appraisal provision in the insurance policy and Ohio Casualty's prompt compliance with the provision and award precluded Plaintiffs' claims as a matter of law.[194]

The plaintiffs in *Mag-Dolphus* submitted a claim to Ohio Casualty for damage to an office building in The Woodlands, Texas as a result of Hurricane Ike.[195] Plaintiffs disagreed with Ohio Casualty's estimate of the covered damages and invoked the policy's appraisal provision.[196] The parties each selected appraisers who submitted separate estimates of the amount of covered loss.[197] The two appraisers did not agree on the amount of the loss and submitted the claim to the umpire.[198] Upon issuance of the final appraisal award, Ohio Casualty promptly forwarded payment to the insured for the amount of the award, minus the previous payment made, depreciation and the deductible.[199] Ohio Casualty subsequently sent Plaintiffs a second notice of payment and a check for $52,759.81 for the recoverable depreciation on the repairs to the building.[200] Several months later, Plaintiffs filed a lawsuit asserting claims for breach of contract, common law and statutory breach of the duty of good faith and fair dealing, fraud, and violations of the Texas prompt payment statute.[201]

Judge Harmon granted Ohio Casualty's motion for summary judgment, ruling that Plaintiffs, having accepted timely payment of the binding and enforceable appraisal award, were estopped from maintaining a breach of contract claim against Ohio Casualty.[202] The court also concluded that the absence of a contractual breach likewise precluded Plaintiffs' extra-contractual claims.[203] Finally, the court found that the plaintiffs failed to meet the burden of proof on their fraud claim because they failed to introduce evidence of a material misrepresentation or reliance on such misrepre-sentation.[204]

In contrast, U.S. District Judge Kenneth Hoyt recently denied a similar summary judgment motion filed by Allstate Texas Lloyds in the face of an appraisal award rendered and paid during the pendency of a bad faith lawsuit filed against it.[205] In *Singletary v. Allstate Texas Lloyd's*, a Houston-area homeowner sued Allstate for breach of contract, breach of the duty of good faith and fair dealing, and Insurance Code violations after Allstate allegedly underpaid his Hurricane Ike claim.[206] Allstate estimated the covered damage to be approximately $15,000, while Plaintiff claimed the covered damages exceeded $290,000.[207] After the insured filed suit, Allstate invoked appraisal under the policy. Despite the insured's objection, an appraisal award was entered and timely paid by Allstate.[208] After tendering payment, Allstate moved for summary judgment on the Plaintiff's claims, arguing that its payment of the binding appraisal award prevented the insured from pursuing its breach of contract claim and also precluded the extra-contractual claims.[209]

Plaintiff argued Allstate waived its right to appraisal by failing to timely invoke it after Plaintiff had submitted its repair estimate prior to suit, and challenged the umpire's award due to alleged errors and omissions of damage categories.[210] Judge Hoyt concluded that conflicting evidence presented by both sides created a genuine fact issue concerning, "*inter alia:* (1) whether Allstate waived its right to invoke the appraisal condition contained in the policy; and (2) whether the appraisal award was incomplete and/or the result of mistake, fraud or accident."[211]

Significant distinctions which might, at least in part, explain the difference between the decisions in *Singletary* and *Mag-Dolphus* include the fact that Allstate waited until after suit was filed to pursue appraisal and there was evidence presented by the insured that certain definitive categories of damage were omitted in the appraisal award. These issues seem to open the door to proof of waiver and a flawed appraisal award due to mistake.

VI. CONCLUSION

Appraisal is intended to be an efficient and inexpensive method to determine damages. But when issues of causation, including concurrent causation, and coverage, are at issue, the efficiency, expense, and usefulness of appraisal must be questioned. The Texas Supreme Court's decision in *Johnson* has indicated appraisal should take place without court intervention and let the results be sorted out later even in the face of causation and coverage – i.e., extent of loss requiring an unhappy participant to unring the bell and go through a process that can be both expensive and doomed from the outset. Perhaps the competence and impartiality of appraisers and/or umpires can be open to challenge pre-appraisal. But given the presumption in favor of the results of appraisal, it causes the "loser" of appraisal to have to undo the results. Even waiver is likely not enough to defeat a demand for appraisal. Instead of being a tool for efficiently resolving claims, appraisal in the post-*Johnson* world has resulted in increased litigation between insureds and their insurers.

1 290 S.W.3d 886 (Tex. 2009).

2 Fire Ass'n v. Ballard, 112 S.W.2d 532, 534 (Tex. Civ. App. – Waco 1938, no writ).

3 In Re Allstate Ins. Co., 85 S.W.3d 193, 195 (Tex. 2002).

4 Scottish Union National Ins. Co. v. Clancy, 71 Tex. 5, 8 S.W. 630, 631 (1888).

5 Ins. Service Co. v. Brodie, 337 S.W.2d 414, 415 (Tex. Civ. App. – Fort Worth 1960, writ ref'd n.r.e.).

6 Wells v. American States Preferred Ins. Co., 919 S.W.2d 679, 684 (Tex. App. – Dallas 1996, writ denied).

7 Hennessey v. Vanguard Ins. Co., 895 S.W.2d 794, 798 (Tex. App. – Amarillo 1995, writ denied).

8 Providence Lloyds v. Crystal City Indep. School Dist., 877 S.W.2d 872, 875 (Tex. App. – San Antonio 1994, no writ); *Hennessey*, 895 S.W.2d at 798.

9 In re Universal Underwriters, 345 S.W.3d 404 (Tex. 2011).

10 Johnson v. State Farm Lloyds, 204 S.W.3d 897, 898 (Tex. App. – Dallas 2006, pet. granted).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 898 and 900.

15 *Id.* at 898.

16 *Id.* at 898-899.

17 *Id.*

18 *Id.* at 899.

19 *Id.* at 898-899.

20 *Id.* at 900.

21 *Id.*

22 *Id.* at 901.

23 *Id.*

24 *See Wells*, 919 S.W.2d at 685.

25 *Id.* at 902.

26 *Id.*

27 *Id.* (citing *Wells*, 919 S.W.2d at 685).

28 *Johnson*, 204 S.W.3d at 902.

29 *Id.*

30 *Id.*

31 Lundstrom v. United Services Automobile Ass'n, 192 S.W.3d 78 (Tex. App. – Houston [14th Dist.] 2006, pet. denied).

32 *Johnson*, 204 S.W.2d at 920.

33 *Id.* at 902-903.

34 *Id.*

35 *Id.* at 903.

36 State Farm Lloyds v. Johnson, 290 S.W.3d 886, 887-888 (Tex. 2009).

37 *Id.* at 888.

38 *Id.* at 887.

39 *Id.*

40 *Id.* at 888.

41 *Id.* at 888-889.

42 *Id.*

43 *Id.*

44 *Id.* at 888-889.

45 *Id.* at 889-890.

46 *Id.* at 890-891.

47 *Id.* at 890-891, n. 24.

48 *Wells*, 919 S.W.2d at 684.

49 *Id.* at 891.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 891.

59 *Id.* at 891-892.

60 *Id.* at 892.

61 *Id.*

62 *Id.* at 892.

63 *Id.*

64 *Id.*

65 *Id.* at 892-893.

66 *Id.* at 893.

67 *Id.*

68 *Id.*

69 *Id.* at 894.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 894-895.

74 *Id.* at 895.

75 *Id.* at 894-895.

76 *Johnson*, 290 S.W.3d at 895.

77 *Id.* at 892-893.

78 *Id.* at 893.

79 Allison v. Fire Ins. Exchange, 98 S.W.3d 227, 258 (Tex. App. – Austin 2002, no pet.); State Farm Fire & Cas. Co. v.

Rodriguez, 88 S.W.3d 313, 320-21 (Tex. App. – San Antonio 2002, pet. denied); Wallis v. United Servs. Auto. Ass'n, 2 S.W.3d 300, 302-3 (Tex. App. – San Antonio 1999, pet. denied).

80 *Allison*, 98 S.W.3d at 259; *Wallis*, 2 S.W.3d at 302.

81 See E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995).

82 In re Universal Underwriters, 345 S.W.3d 404 (Tex. 2011).

83 *Id.* at 405.

84 *Id.* at 406.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 407 citing Delaware Underwriters v. Brock, 109 Tex. 425, 211 S.W 779, 780-781 (1919).

94 *Id.*

95 *Universal Underwriters*, 345 S.W.3d at 406-407.

96 *Id.* at 408.

97 *Id.* citing In re General Electric Corp., 203 S.W.3d 314, 316 (Tex. 2006).

98 *Id.*

99 *Id.* at 408.

100 *Id.* at 409.

101 *Id.*

102 *Id.*

103 *Id.* at 411.

104 *Id.* at 412.

105 In re Cypress Texas Lloyds, 2012 WL 1435739 *1 (Tex. App. – Beaumont 2012, orig. proceeding).

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at *2.

113 2013 WL 257371*1 (Tex.App.-Beaumont 2013, orig. proceeding).

114 *Id.*

115 *Id.* at *1-2.

116 *Id.* at *2.

117 *Id.*

118 *Id.* at *3.

119 Hennessey v. Vanguard Ins. Co., 895 S.W.2d 794, 798 (Tex. App. – Amarillo 1995, writ denied).

120 *Id.* at 798; Providence Lloyds v. Crystal City Indep. School Dist., 877 S.W.2d 872, 875 (Tex. App. – San Antonio 1994, no writ); MLCSV10 v. Stateside Enterprises, Inc. v. Hartford Steam Boiler Inspection and Ins. Co., __ F.Supp.2d __, 2012 WL 1098415 (S.D. Tex. 2012).

121 State Farm Lloyds v. Johnson, 290 S.W.3d 886, 893 (Tex. 2009).

122 Providence Lloyds Ins. Co. v. Crystal City Indep. School Dist., 877 S.W.2d at 878.

123 *Id.* at 877.

124 Qualls v. State Farm Lloyds, 226 F.R.D. 551, 558 (N.D. Tex. 2005); *see also*, Mays v. State Farm Lloyds, 98 F. Supp. 2d 785 (N.D. Tex. 2000).

125 State Farm Lloyds v. Mireles, 63 S.W.3d 491, 499 (Tex. App. – San Antonio 2001).

126 Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996).

127 Houghton v. Port Terminal R.R. Ass'n., 999 S.W.2d 39, 47 (Tex. App. – Houston [14th Dist.] 1999, no pet.).

128 Kumho Tire Company v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 1171 (1999).

129 Gammill v. Jack Williams Chevrolet, 972 S.W.2d 713, 719 (Tex. 1998).

130 Glenbrook Patiohome Owners Association v. Lexington Ins. Co., No. H-10-2929,* 2 (S.D. Tex. July 28, 2011).

131 *Id.; see also*, St. Charles Parish Hosp. Dist. #1 v. United Fire and Cas. Co., 2008 U.S. Dist. LEXIS 34421 (E.D. La. 2008) ("Beyond the requirement of impartiality, subject matter expertise and being knowledgeable about the issues in dispute are relevant to the appointment. In this regard, experience in damage analysis, estimating and/or appraisals weighs in on the positive side"); In Re Travelers Indem. Co., 2004 U.S. Dist. LEXIS 30074 (D. Conn. 2004); Karl A. Schulz, *Accurate Outcomes in Appraisal: The Importance of Umpire's Subject Matter Expertise*, 15 Journal of Consumer & Commercial Law 54 (2012).

132 Delaware Underwriters v. Brock, 109 Tex. 425, 211 S.W 779, 780-781 (1919).

133 Pennsylvania Fire Ins. Co. v. W.T. Waggoner Estate, 39 S.W.2d 593, 594-595 (Tex. Comm'n App. 1931, no writ).

134 *Id.* at 596.

135 General Star Indem. Co. v. Spring Creek Village Apt. Phase V, Inc., 152 S.W.3d 733, 737 (Tex. App. – Houston [14th Dist.] 2004, no pet.).

136 *Id.* at 734-737.

137 *Id.* at 737.

138 *Id.*

139 Holt v. State Farm Lloyds, 1999 WL 261923,*1 (N.D. Tex 1999).

140 *Id.* at *4.

141 *Id.*

142 *See* Gardner v. State Farm Lloyds, 76 S.W.3d 140 (Tex. App. – Houston [1st Dist.] 2002, no pet.); *see also* Bunting v. State Farm Lloyds, 2000 WL 191672 (N.D. Tex. 2000).

143 Franco v. Slavonic Mut. Fire Ins. Co., 154 S.W.3d 777, 786-787 (Tex. App. – Houston [14th Dist.] 2004, no pet.).

144 MLCSV10 v. Stateside Enterprises, Inc. v. Hartford Steam Boiler Inspection and Ins. Co., CA. NO. H-10-4186, 866 F.Supp.2d 691, 695 (S.D. Tex. 2012).

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* at 698.

149 *Id.* at 699.

150 *Franco,* 154 S.W.3d at 786.

151 *MLCSV10,* 866 F. Supp 2d at 699.

152 *Id.* at 700

153 *Id.* at 699-700.

154 *Wells,* 919 S.W.2d at 683; Barnes v. Western Alliance Ins. Co., 844 S.W.2d 264, 267 (Tex. App. – Fort Worth 1992, writ dism'd by agr.).

155 *Wells,* 919 S.W.2d at 683 (citing Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist., 877 S.W.2d at 875. "[A] n award which is not made substantially in compliance with the requirements of the policy will not be sustained." Fisch v. Transcon. Ins. Co., 356 S.W.2d 186, 190 (Tex. App. – Houston 1962, no writ).

156 *See* Pennsylvania Fire Ins. Co. v. W.T. Waggoner Estate, 39 S.W.2d at 594. *See also Delaware Underwriters,* 211 S.W. at 780.

157 345 S.W.3d at 409

158 8 S.W. 630 (emphasis added)

159 *Wells,* 919 S.W.2d at 683-84

160 *Id.*

161 *Id.* at 682.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* at 683-684.

166 *State Farm Lloyds v. Johnson,* 290 S.W.3d at 889.

167 *Id.* at 890 .

168 *Id.*

169 *MLCSV10,* 866 F. Supp. 2d at 699-700.

170 *Id.* at 702-703.

171 *Id.* at 703.

172 *Id.* at 695.

173 *Id.* at 705-706.

174 *Id.* at 706-707.

175 *Id.* at 707-708.

176 *Id.* at 707-708.

177 *Id.*

178 *Id.* at 702 citing JM Walker LLC v. Acadia Ins. Co., 356 Fed. Appx. 744, 746 (5th Cir. 2009) (quoting Providence Wash Ins. Co. v. Farmers Elevator Co., 141 S.W.2d 1024, 1026 (Tex. Civ. App. -- Amarillo 1940, no writ)).

179 *See Barnes v. Western Alliance Ins. Co.,* 844 S.W.2d at 270-271.

180 *See MLCSV10,* 2012 WL 1098415 *8; KLM Resources LLC v. Ohio Cas. Ins. Co., 2012 WL 1911801*1 (S.D. Tex. 2012). *See also* Triple S Properties v. St. Paul Surplus Lines Ins. Co., 2010 WL 3911422 *6-8 (N.D. Tex. 2010).

181 *Barnes.*, 844 S.W.2d at 268-269.

182 *Id.* at 266-267.

183 *Id.* at 267.

184 *Id.*

185 *Id.* at 267-268.

186 *Id.*

187 *Id.* at 268-269.

188 *Id.* at 269.

189 *Id.*

190 *Id.*

191 *Id.*

192 Hudgens v. Allstate Texas Lloyds, 2012 WL 2887219 at *8 (S.D. Tex. 2012); Breshears v. State Farm Lloyds, 155 S.W.3d 340, 344 (Tex. App. - Corpus Christi 2004, pet. denied); Blum's Furniture Co. v. Certain Underwriters at Lloyd's London, 2012 WL 181413 *2 (5th Cir. 2012).

193 Mag-Dolphus, Inc. v. Ohio Cas. Ins. Co., 2012 WL 4018001 (S.D. Tex. 2012).

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 Singletary v. Allstate Texas Lloyd's, H-10-CV-03990, 2012 WL 4675314 (S.D. Tex. Sept. 28, 2012) (Hoyt, J.).

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.* at *3.