

## Hurricane Harvey or Irma Insurance Dispute? How About Appraisal—The Top 10 Items to Consider When Invoking Appraisal

By: Keith Langley

When property damage occurs, the right thing to do, the fair thing to do, is to determine the value of damage and resolve the claim. It is precisely for this reason that policies include an appraisal provision. People who know property, property damage, and have significant experience in evaluating and valuing property damage can literally separate the wheat from the chaff, get to the heart of the matter, and arrive at the proper resolution. Of course, each of us is the hero of her own story and it is all in whose ox is being



gored—the art of advocacy cannot be separated from the appraisal process. Therefore, the insurance company and the insured each have an appraiser advocate, with the ultimate decision resting with the umpire. If this process is properly followed, fair results can be obtained, almost always much more quickly and efficiently than the judicial process.

When Hurricane Ike hit Galveston/Houston in 2008, including sustained winds of 110 miles an hour, substantial property damage resulted. One example was a midrise commercial office tower. After many attempts of the insurance company to do the right thing, the insured filed the lawsuit. After removal of that lawsuit, appraisal was triggered by the insurer. Multiple protest ensued, but the appraisal process moved forward and extremely difficult valuation issues were properly, effectively, and efficiently dealt with by the appraisal panel. That process led to full resolution and settlement at appropriate numbers.

Complex issues regarding coverage are presented in situations with high winds and high water. At times damages are partly covered and partly excluded. With all of that, comes the issue of evaluating the covered damages.

### The top 10 list of considerations include:

1. Who can trigger the appraisal? Either the insured or the insurer.
2. When must appraisal be triggered? As more time passes after the claim is filed, the more likely it is that a party will allege that the appraisal right has been waived. Nevertheless, this should not be a precluding factor because the Texas Supreme Court has held that a party seeking to avoid an appraisal demand must show prejudice—which is hard to do considering that either party can trigger appraisal (which would avoid prejudice). *In re Universal Underwriters of Texas Ins. Co.*, 345 S.W.3d 404, 412 (Tex. 2011).

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- Benjamin Franklin



3. Are there causation issues? There may be arguments as to whether appraisal is appropriate due to potential causation disputes. This should also not be a precluding factor because the Texas Supreme has held that "[a]ny 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." *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009).



4. Who should be selected as an appraiser? Appraisers should be impartial. Therefore, there may be arguments that a selected appraiser does not satisfy this requirement. *Del. Underwriters v. Brock*, 109 Tex. 425, 211 S.W. 779, 781 (1919).
5. Who selects the umpire? The appraisers.
6. What if the appraisers can't agree on an umpire? The Court will select one.
7. What if the insured has filed suit and seeks damages under the Texas Prompt Payment of Claims Act? An insurer's full and timely payment of an appraisal award will preclude the insured from recovering prompt payment penalties. *Garcia v. Lloyds*, 514 S.W.3d 257 (Tex. App—San. Antonio 2016).
8. Can an appraisal award be overturned? Yes, but it is unlikely. "Every reasonable presumption will be indulged to sustain an appraisal award, and the burden of proof lies on the party seeking to avoid the award." *TMM Investments, LTD. v. Ohio Cas. Ins. Co.*, 730 F.3dc 466, 472 (5th Cir. 2013). "An appraisal award will be upheld unless at least one of three circumstances exists: (1) the award was made without authority; (2) the award was the result of fraud, accident, or mistake; or (3) the award was not made in substantial compliance with the terms of the contract." *Id.*
9. Should I consider an appraisal protocol? Yes!
10. What is an appraisal protocol? An appraisal protocol is an additional agreement between the insurer and insured that contains instructions and other items that will clarify various appraisal issues and reduce the possibility of post-appraisal disputes. For example, an appraisal protocol may include language which requires that all communications between the appraisers and umpire be recorded so that the parties may have clarity into how the appraisers and umpire reached a resolution.

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