

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-321

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

MARIANO R. GONZALEZ and RENE GONZALEZ,

Respondents.

**ON CERTIFICATION OF CONFLICT FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

This is a petition for review of a decision of the Third District Court of Appeal based on certified conflict with the decision of another district in a case involving a homeowners' insurance claim. The insureds claimed that cracks in certain tiles and walls of their home were caused by blasting in a neighboring area. The insurer denied coverage based on its determination that the cracks resulted from wear and tear, settlement or cracking of the foundation, or defects in workmanship – all excluded from coverage under the policy. The insureds sued, and the insurer invoked the policy's appraisal clause, providing for appraisal of "the amount of loss." The trial court compelled appraisal, but the Third District reversed, holding that, because the insurer denied the entire claim, the issue of what caused the loss was a coverage defense for the court, not an "amount of loss" issue appropriate for appraisal. The court later certified conflict with the decision of the Second District in *Nationwide Mutual Insurance Co. v. Johnson*, 774 So. 2d 779 (Fla. 2d DCA 2000).

In *State Farm Fire and Casualty Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996), this Court held that appraisal "necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered such as normal wear and tear,

dry rot, or various other designated, excluded causes." The issue in this case is whether a determination that the entire loss resulted from a cause not covered is a matter for the appraisers, as *Licea* seems to suggest and as the Second District has held, or a question for the court, as the Third District held.

STATEMENT OF THE FACTS

Mariano and Rene Gonzalez made a claim against State Farm under their homeowner's insurance policy, asserting that blasting activities in the area of their residence in Miramar, Florida caused cracks in the tiles and walls of their home. R. 3, para. 4; R. 38, para. 2. In response to this claim, State Farm advised the insureds in a letter dated December 8, 1997 that it was denying coverage because it had determined through its own investigation that the damage was due to wear and tear, settlement or cracking of the foundation, walls, floors, roofs or ceilings, or defects in design, workmanship, construction, or materials. R. 40. State Farm cited an engineer's report for its conclusions.

As per the engineer's report, the cracking to your residence is consistent with routine activity in buildings of that type and construction, and has not been caused by blasting vibrations.

The floor tile cracking is a reflection of cracking in the foundation slab below. The foundation slab cracking is due to minor differential settlement caused by instability in the supporting soils. The exterior stucco cracking

shows that the home has been experiencing minor settlement, which is not unusual for this type of construction. The absence of damage to elevated components of the building that will be more vulnerable to ground vibrations indicate that no damaging vibrations have affected this property.

R. 41. State Farm also advised the insureds that the appraisal provision of the policy applied and quoted that provision, which is found in paragraph 6 of Section I – Conditions (page 12 of the policy):

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, independent appraiser. Each shall notify 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.

R. 41, 19.

The insureds filed suit against State Farm in April, 1998, alleging that the damage was caused by a covered loss (blasting activities) and that State Farm had breached the homeowners policy by failing to pay benefits due under the policy. R. 1-2. State Farm alleged as affirmative defenses that the insureds failed to give timely notice of the loss, that the loss was not caused by a covered peril or was excluded by certain policy conditions,¹ and that appraisal was required under the policy. R. 32-34. State Farm included in its answer a motion to compel appraisal, alleging that State Farm did not pay the claim based on its belief that the damage was not caused by a covered peril. State Farm asserted that this issue was appropriate for appraisal under the holding of *State Farm Fire and Casualty Company v. Licea*, 685 So. 2d 1285 (Fla. 1996), that appraisal under a property insurance policy “necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered such as normal wear and tear, dry rot, or various other designated, excluded causes.” R. 34-35.

¹ State Farm specifically referred to paragraphs 1.c. (the pressure of water on a foundation), 2.b. (earth movement) and 3.b. (defects in planning, design, workmanship and materials) of Section I - Losses Not Insured. R. 16-18, 33-34.

The insureds filed the affidavit of Mariano Gonzalez in opposition to the motion to compel appraisal. Mr. Gonzalez attached State Farm's letter of December 8, 1997 and averred that he was never notified prior to filing suit of any desire on the part of State Farm to submit the claim to appraisal. R. 38-42. The court granted State Farm's motion to compel appraisal in an order dated June 26, 1998. *See App. A to Appellants' initial brief below.*

The insureds moved for reconsideration of this order, arguing that the appraisers could not determine the cause of the loss since that was a challenge to coverage – an exclusively judicial question. R. 43-45. Mariano Gonzalez filed another affidavit, to which he attached the inspection report provided to State Farm finding that the cracks were not caused by blasting vibrations but rather by cracking in the foundation caused by settlement. R. 43-56. The court denied this motion, noting that the appraisers “should give an opinion as to causation and damages.” R. 57.

State Farm's appraiser and the umpire agreed to an award of “\$0.00.” R. 60. On State Farm's motion to confirm this award, Mariano Gonzalez argued that the award reflected the conclusion of the appraisers that the damage was not caused by blasting activities but rather by a non-covered cause, and that this issue was a judicial question rather than a matter for arbitration. *See App. C to Appellants'*

initial brief below. The court, citing *Licea*, decided that the issue was proper for appraisal and confirmed the award. *See id.*, R. 61. Final judgment was accordingly entered in favor of State Farm. R. 63.

On appeal, the Third District reversed. *Gonzalez v. State Farm Fire and Casualty Co.*, No. 3D00-185, 25 Fla. L. Weekly D2614 (Fla. 3d DCA Nov. 8, 2000). The court construed *Licea*'s direction that the appraisers determine whether a loss under a homeowner's policy "was caused by a covered peril or a cause not covered" to mean that the cause of the loss is a matter for the appraisers only when the insurer admits that some part of the loss is covered, relying on the *Licea* court's previous statement that "where there is a demand for an appraisal under the policy, the only 'defenses' which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole" The Third District relied upon *Opar v. Allstate Insurance Company*, 751 So. 2d 758 (Fla. 1st DCA 2000), which held that, despite *Licea*, the cause of a loss is a coverage question for the court rather than an issue for the appraisers.

State Farm moved for certification of conflict with the decision of the Second District in *Florida Select Insurance Company v. Keelean*, 727 So. 2d 1131 (Fla. 2nd DCA 1999), where the insurer declined to pay the entire claim based on its belief that the damage had been caused by normal wear and tear, not vandalism as claimed

by the insured. Applying *Licea*, the court held that the cause of the loss was an issue for the appraisers. State Farm filed a supplemental motion for certification based on the Second District's subsequent decision in *Nationwide Mutual Insurance Co. v. Johnson*, 774 So. 2d 779 (Fla. 2d DCA 2000), where the court interpreted *Licea* to mean that "causation is an issue for appraisal" even in a case where the insurer denied coverage for the loss as a whole on the ground that the loss was caused by earth movement (an excluded cause) rather than by a sinkhole. The Third District denied the motion to certify conflict with *Keelean*, but granted the supplemental motion and certified conflict with *Nationwide*.

SUMMARY OF THE ARGUMENT

In order to preserve mutuality of obligation in appraisal clauses, this Court in *Licea* separated appraisable issues from coverage questions. In doing so, the court clearly stated that the cause of a loss was an issue for the appraisers. *Opar* and *Gonzalez*, however, refuse to allow appraisers to determine the cause of a loss, at least in cases where the insurer asserts that no part of the loss was caused by a covered peril. These decisions share a common misconception – they equate a “coverage defense” with “no coverage.”

“Coverage defenses” have been defined by the case law to include only those issues that would preclude the applicability of the policy based on circumstances other than those giving rise to the loss. Coverage defenses involve matters extraneous to the factual merit of the claim, such as violation by the insured of conditions subsequent (such as fraud, failure to cooperate, notice, and proof of loss) or other matters not connected with the actual loss (such as lack of an insurable interest, whether the loss occurred during the policy period, or whether the claimant was an insured). “Coverage questions” involve interpretation of the insurance contract by the court.

A disclaimer of liability based on a complete lack of coverage for the loss sustained is not a “coverage defense.” There is no justification for distinguishing

appraisable issues from coverage questions based solely on whether the insurer denies part of the claim or the whole claim, and it will cause absurd results. The distinction should rather be based on the subject matter of the issue rather than the context in which the claim arises.

The proper test is whether the issue is within the appropriate “sphere of inquiry” of the appraisers as opposed to that of the courts. This “sphere of inquiry” may be defined based upon a pragmatic distinction between the functions of appraisers and courts. The cause of a loss is an issue properly allocated to the appraisers (as *Licea* dictates) because it involves only the facts of the loss (which can be gathered from the expert appraiser’s examination of the damaged structure) as opposed to circumstances arising out of the contractual relationship between the parties. Requiring judicial resolution of the factual question of what caused the loss would thwart the parties’ agreement to resolve the “amount of loss” issue through the expeditious, out of court appraisal process.

ARGUMENT

ISSUE

THE CAUSE OF A LOSS IS A FACTUAL ISSUE TO BE DETERMINED BY APPRAISERS UNDER A POLICY CLAUSE PROVIDING FOR APPRAISAL OF THE “AMOUNT OF LOSS.”

The issue in *State Farm Fire and Casualty Company v. Licea*, 685 So. 2d 1285 (Fla. 1996), was whether a provision in a homeowners policy that required the parties to submit a dispute over the “amount of loss” to appraisal was void for want of mutuality of obligation. The insureds argued that another clause in the policy providing that the insurer’s request for appraisal “shall not waive” any of its rights meant that the insurer would not be bound by the appraisal, although the insureds would be. *Id.* at 1286. The court solved this problem by separating the types of issues raised by a claim for property damage into two subsets: “coverage defenses” and “amount of loss” issues. Since both the insurer and the insured are equally bound by the “amount of loss” determined by the appraisers, the fact that the insurer might not have to pay the award based on a “coverage defense” does not destroy mutuality *as to the discrete issue* submitted to the appraisers. The court adopted the interpretation proffered by Judge Cope in his dissent in *American Reliance Insurance Co. v. Village Homes at Country Walk*, 632 So. 2d 106 (Fla.

3d DCA 1994). Citing *Roe v. Amica Mutual Insurance Co.*, 533 So. 2d 279 (Fla. 1988), Judge Cope noted that parties may select certain issues and not others to submit to arbitration, and will only be bound as to those issues submitted. *Id.* at 109. “The purpose of the ‘right to deny’ sentence is to state, quite simply, that if the insured requests an appraisal and the insurer proceeds with the appraisal process, the insurer has not thereby abandoned any coverage defenses which may be available to it.” *Id.* at 108.

Having drawn a line between appraisable issues and “coverage defenses,” *Licea* provides guidance on which issues fall on which side of the line.

Thus, where there is a demand for an appraisal under the policy, the only "defenses" which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate. We interpret the appraisal clause to require an assessment of the amount of a loss. This necessarily includes determinations as to the cost of repair or replacement *and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered, such as normal wear and tear, dry rot, or various other designated, excluded causes.*

Id. at 1288 (emphasis supplied).

Despite this Court's clear statement that the "amount of loss" to be determined by the appraisers includes a determination of whether or not the loss was caused by a covered peril or a cause not covered, the Third District in this case, and the First District in *Opar v. Allstate Insurance Company*, 751 So. 2d 758 (Fla. 1st DCA 2000), refuse to allow appraisers to determine the cause of a loss, at least in cases where the insurer asserts that no part of the loss was caused by a covered peril.

These decisions share a common misconception – they equate a "coverage defense" with "no coverage." Since a determination that the loss was not caused by a covered peril will result in no coverage for the insured (in the sense that the insured will not be paid for the loss), the cause of loss must therefore (reason these courts) be a "coverage defense" beyond the scope of appraisal. To the contrary, a factual determination that may absolve the insurer of any duty to pay is not necessarily a "coverage defense." Inherent in the "amount of loss" calculation is the possibility that the amount of loss will be \$0 (if it was not caused by a covered peril). Conversely, a "coverage defense" may, in some situations, reduce rather than eliminate the insurer's duty to pay (as in the application of a deductible or a limitation of the payment to the extent of the insured's insurable interest).

The proper analysis of the scope of appraisal was suggested in the early case of *Hanover Fire Insurance Company v. Lewis*, 10 So. 297 (Fla. 1891), which was cited in both Judge Cope’s dissent in *American Reliance* and in *Licea*. The test is whether the issue is within the appropriate “sphere of inquiry” of the appraisers as opposed to that of the courts, not whether the resolution of the issue may result in no payment to the insured. This “sphere of inquiry” may be defined based upon a pragmatic distinction between the functions of appraisers and courts. Under this analysis, the cause of a loss is an issue properly allocated to the appraisers (as *Licea* dictates) because it involves only the facts of the loss (which can be gathered from an expert’s examination of the damaged structure) as opposed to circumstances arising out of the contractual relationship between the parties.

A. Standard of review.

Where the trial court does not decide any issue of fact or exercise judicial discretion in ruling on a motion to compel arbitration, but rather construes the contract and determines the legal effect of the provision for arbitration, its decision is reviewed under the *de novo* standard. See *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999).

There is, however, a presumption in favor of appraisal. “Public policy favors arbitration as an efficient means of settling disputes, because it avoids the delays and

expenses of litigation. A court must compel arbitration where an arbitration agreement and an arbitrable issue exist, and the right to arbitrate has not been waived.” *Gale Group, Inc. v. Westinghouse Elec. Corp.*, 683 So. 2d 661, 663 (Fla. 5th DCA 1996) (citation omitted). In Florida, arbitration is a favored means of dispute resolution and courts should indulge every reasonable presumption to uphold proceedings resulting in an award. *See Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 281 (Fla. 1988). Some Florida courts have held that appraisal is akin to arbitration, *see Liberty Mutual Fire Insurance Company v. Hernandez*, 735 So. 2d 587 (Fla. 3d DCA 1999), while others have held that it is a form of arbitration, *see Florida Farm Bureau Casualty Insurance Co. v. Sheaffer*, 687 So. 2d 1331 (Fla. 1st DCA 1997).

B. The cause of a loss is a matter within the “sphere of inquiry” of the appraisers.

Licea’s conclusion that the assessment of the amount of a loss “necessarily includes” a determination as to “whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered” is supported by case law and by a practical assessment of the differences between the functions of appraisers and of courts.

The proper focus is, first of all, upon the nature of the issue rather than upon the context of the claim. In *Hanover Fire Insurance Co. v. Lewis*, this court distinguished coverage questions from appraisable issues as follows:

Both in the policy and in the subsequent submission to the appraisers the liability of the insurers was expressly excepted and reserved from the consideration of said arbitrators. The naked question submitted to them was: What is the amount of the damage here? Whether the insurers were legally liable, or obligated to pay that loss, was not submitted to them, and did not enter into their sphere of inquiry, nor into their award, and depended upon the settlement of divers other independent circumstances and conditions growing out of the contract between the parties.

10 So. at 303. Although *Hanover* did not involve a cause of loss issue, this quotation suggests that the line between judicial and appraisable issues should be drawn based upon whether the issue falls within the “sphere of inquiry” of the appraisers, and not upon whether the insurer admits that some part of the loss is covered.

Hanover also sketches a rough picture of that “sphere of inquiry.” There are fundamentally two sets of “circumstances and conditions” involved in a property insurance claim: those circumstances relating to the facts of the loss, and those circumstances relating to the relationship and duties of the parties as established by the policy. According to *Hanover*, “amount of damage” issues differ from

coverage questions because coverage questions involve the resolution of “other independent circumstances and conditions *growing out of the contract* between the parties.” 10 So. at 303 (emphasis added). The sphere of inquiry of the appraisers, then, comprises matters that can be determined from examination of the facts of the loss, and that do not require an interpretation of the contract (a legal question) or facts that are beyond the limited expertise of the appraisers.

This distinction recognizes pragmatic differences between the functions of appraisers and courts. As the Second District noted in *Preferred Insurance Co. v. Richard Parks Trucking Co.*, 158 So. 2d 817 (Fla. 2d DCA 1963), the matters referred to appraisers involve only “some ministerial duty or some matter involving only the ascertainment of facts, requiring neither hearing nor exercise of judicial discretion.” *Id.* at 820 (quoting 5 Am.Jur.2d, *Arbitration and Award*, § 3).

Appraisers are required to be skilled in the area of appraisal, and are usually contractors or other persons with experience in construction. In *Hanover*, for instance, the appraisers were professional builders. Because of their expertise, “appraisers are generally expected to act on their own skill and knowledge; they may reach individual conclusions and are required to meet only for the purpose of ironing out differences in the conclusions reached[.]” *Preferred Insurance Co. v. Richard Parks Trucking Co.*, 158 So. 2d at 820 (quoting 5 Am.Jur.2d, *Arbitration*

and Award, § 3). By examination of the loss, and examination of the loss alone, an expert builder or engineer can determine two things: the cost to repair the damage and the cause of the loss.

Courts, on the other hand, specialize in applying the law to the facts. Courts do not usually find facts in isolation but rather only as needed to apply the relevant legal principles to the dispute. Requiring judicial resolution (by in most cases a jury) of the factual question of what caused the loss – a question that an appraiser can determine at the same time the appraiser examines the loss to determine the cost of repair or replacement – would thwart the parties’ agreement to resolve the “amount of loss” issue through the “expeditious, out of court disposition of litigation, which is the very reason that arbitration is such a favored remedy.” *Paradise Plaza Condominium Ass’n, Inc. v. Reinsurance Corp. of New York*, 685 So. 2d 937, 941 (Fla. 3d DCA 1996). *See also* 15 *Couch on Insurance 3d*, § 209:8 (1999) (“appraisal is designed to be consistent with the public policy of discouraging litigation). As this case illustrates, what caused the damage to a structure is as much a matter within the expertise of professional builders or engineers as the amount required to repair the loss, and may better be resolved by them rather than by inexperienced lay people (a judge or jury).

Two other cases recognize and apply this distinction between the factual merit of a claim based upon the facts of the loss and “other independent circumstances and conditions growing out of the contract between the parties.” *J.J.F. of Palm Beach, Inc. v. State Farm Fire and Casualty Co.*, 634 So. 2d 1089 (Fla. 4th DCA 1994), holds that the calculus employed by an arbitrator to determine the compensable period of interruption of a business is not a “coverage question” because it is “dependent on the resolution of disputed issues of fact and the application of policy language to those facts[.]” *Id.* at 1090. “Under the policy provision in this case, *whether the claimant is actually entitled under the facts of the case to be paid on a claim* and, if so, the precise amount to which the claimant is entitled, is a question reserved for the arbitrator.” *Id.* at 1091 (emphasis added). *J.J.F.* relied on a case involving arbitration under an uninsured motorist policy, an area where courts have consistently held that whether the insured is entitled to payment based on the *facts of the loss* is a question for the arbitrators. *See Stack v. State Farm Mut. Auto. Ins. Co.*, 507 So. 2d 617 (Fla. 3d DCA 1987) (since insured’s right to recover depended on factual question of whether fellow employee was grossly negligent, issue was not a coverage question); *Hartford Acc. and Indem. Co. v. Classie*, 396 So. 2d 1204 (Fla. 3d DCA 1981) (“Arbitrators may determine whether the facts of the case disclose a ‘right or basis for recovery under the coverage provided for in

the policy’, that is, the factual merit of the claim.”); *Ebens v. State Farm Mut. Auto. Ins. Co.*, 278 So. 2d 674, 675 (Fla. 3d DCA 1973) (“issues of fact bearing on the right of recovery, are subject to determination in the arbitration.”).

Most recently, the Second District in *Nationwide Mutual Insurance Co. v. Johnson*, 774 So. 2d 779 (Fla. 2d DCA 2000), correctly applied *Licea* (as it had in its earlier decision in *Florida Select Insurance Co. v. Keelean*, 727 So. 2d 1131 (Fla. 2d DCA 1999)) in a case where the insurer denied that any payment was due on the claim because the loss was not caused by a covered peril, holding that the cause of the loss (sinkhole or earth movement) “is an amount of loss issue for the appraisal panel.” *Id.* at 781. Echoing *Hanover*’s “sphere of inquiry” analysis, the Second District reasoned that because the cause of a loss is a “factual determination” or a “factual issue,” it is “an inquiry for the appraisal panel.” *Ibid.*

Contrary to these cases, and to *Licea*, the First District in *Opar* and the Third District in *Gonzalez* hold that the cause of a loss is not a matter for appraisal. *Opar* suggests that causation is by its nature a coverage question. *Gonzalez* reasons that the cause of a loss is a coverage question when the insurer contends that no part of the loss is compensable, but is a matter for the appraisers when the insurer admits that some part of the loss is compensable. These courts misconceive the meaning of the term “coverage defense.”

C. The cause of a loss is not a “coverage defense.”

In *Opar v. Allstate Insurance Company*, 751 So. 2d 758 (Fla. 1st DCA 2000), the insurer denied coverage for the entire loss on the ground that the loss was caused by storm surge (not covered) rather than windstorm (covered). The insurer refused to comply with the insureds’ demand for appraisal under a provision similar to that in State Farm’s policy.² The trial court refused to compel appraisal, reasoning that there could be no “amount of loss” issue until it was first decided that the loss was “covered.” *Id.* at 759. The First District reversed, holding that the insurer must submit to appraisal of the amount of the loss even before a determination was made regarding whether the loss was caused by a covered peril. *Id.* at 760. But the court went on to reject the insureds’ argument that, under *Licea*, the appraisers should address both the amount of the loss and its cause. Although noting the clearly contrary language in *Licea*, the court reasoned:

Although this language could arguably support the Opars' position that the appraisals may determine the cause of the damage, the *Licea* court also reiterated the

² *Opar* shows that this issue is not one of the insurance industry against the consumer. The appraisal clause benefits insureds because it provides a cheap and expeditious alternative to litigation, an arena where the financial resources of insurance companies may be a factor. In addition, appraisal may provide the only feasible alternative for resolving disputes over smaller claims, where the costs of litigation would not be economically justified.

long-established rule that "[a] challenge of coverage is exclusively a judicial question" Moreover, we note that agreements to arbitrate are only binding as to the issues submitted to arbitration. Here, the insurance policy provides that the only issue to be resolved by the appraisal process is the amount of loss. If the trial court determines, when the case is fully tried on its merits, that the damage was caused by a covered peril, windstorm, then Allstate will be bound immediately by the amount ascertained by appraisal.

Id. at 761 (citations omitted).

According to *Opar*, the cause of a loss is always a coverage question for the court rather than an amount of loss issue for the appraisers. This conception obviously makes *Licea's* statement that coverage questions are exclusively judicial irreconcilable with its directive that appraisers "necessarily" consider the cause of a loss. *Opar* glosses over this contradiction.

"Coverage questions" or "coverage defenses" have been defined by the case law to include only those issues that would preclude the applicability of the policy based on circumstances other than those giving rise to the loss, such as whether the claimant is an insured, *see Midwest Mutual Ins. Co. v. Santiesteban*, 287 So. 2d 665 (Fla. 1973), whether the policy is void due to the actions of the insured, *see State Farm Fire & Cas. Co. v. Wingate*, 604 So. 2d 578 (Fla. 4th DCA 1992), or whether the claim is within the general class of claims covered by the policy, *see*

Florida Farm Bureau Casualty Insurance Co. v. Sheaffer, 687 So. 2d 1331 (Fla. 1st DCA 1997). As the court in *J.J.F. of Palm Beach* explains,

Where the amount owed on a claim, arguably within the policy coverage, is dependent on the resolution of disputed issues of fact and the application of policy language to those facts, as here, the extent of the claim does not constitute a "coverage" question.

In other words, the coverage question reserved for the court is merely whether the claim is arguably within the class of claims covered by the policy and, therefore, the arbitration provision. Under the policy provision in this case, *whether the claimant is actually entitled under the facts of the case to be paid on a claim* and, if so, the precise amount to which the claimant is entitled, is a question reserved for the arbitrator.

634 So. 2d at 1090-91 (emphasis added). *See also Sheaffer*, 687 So. 2d at 1334 (citing *J.J.F.*'s explanation of the difference between coverage questions and factual issues with approval in concluding that a dispute over whether the insurer was obligated to replace the entire roof rather than replace the damaged tiles with non-conforming but functional tiles fell within the scope of the "amount of loss" language of a similar appraisal clause).

In *CIGNA Insurance Co. v. Didimoi Property Holdings, N.V.*, 110 F.Supp.2d 259 (D. Del. 2000), the court reached the same conclusion as did this

Court in *Licea* – the cause of the loss is a factual issue for the appraisers and not a coverage defense.

Didimoi and GECC also contend that an interpretation of "amount of loss" and "loss" which includes causation would render CIGNA's reservation of rights in the appraisal clause meaningless. The Court disagrees with Didimoi and GECC and believes that Didimoi and GECC's argument confuses two concepts: amount of loss and coverage. The meaning of the term "coverage" is "narrow and precise." 15 *Couch on Insurance* §§ 212:12. Coverage is "the assumption of the risk of occurrence of the event insured against before its occurrence." *Id.* Coverage issues include such questions as who is insured, what type of risk is insured against, and whether an insurance contract exists. *Id.*

Id. at 265.

Thus, contrary to *Opar*, an insurer's refusal to pay a claim because the facts of the loss indicate that the loss is not within the list of losses insured by the policy is not a "coverage question" within the exclusive purview of the courts. Rather, coverage defenses involve matters extraneous to the factual merit of the claim, such as violation by the insured of conditions subsequent (such as fraud, failure to cooperate, notice, and proof of loss) or other matters not connected with the actual loss (such as lack of an insurable interest, whether the loss occurred during the policy period, or whether the claimant was an insured).

D. *Opar* and *Gonzalez* wrongly equate a “coverage defense” with “no coverage.”

Opar also reasons that “the insurance policy provides that the only issue to be resolved by the appraisal process is the amount of loss.” 751 So. 2d at 761. Apparently, the court believed that there can be no “amount of loss” issue where the insurer denies that it owes anything. But other authorities and courts have concluded that, since the “amount” may be set at zero, the appraisers may determine that there was no loss, i.e., that the loss was not caused by a covered peril. “The phrase ‘loss or damage arising under the policy,’ as used in an arbitration clause, admits to the possibility that no damages will be found owing under the policy [because no “insured loss” occurred].” 15 *Couch on Insurance* 3d, § 212:9 (1999).

In *F&M Skirt Co., Inc. v. Rhode Island Ins. Co.*, 55 N.E.2d 461 (Mass. 1944), for instance, the policy provided for appraisal if the parties failed to agree “as to the amount of loss.” The appraisers determined that there was no “loss” because the chemical changes in the insured’s dresses were not caused by smoke from the fire, but by some other cause. See *Fox v. Employers’ Fire Ins. Co.*, 113 N.E.2d 63, 66 (Mass. 1953) (describing facts of the case that do not appear in the published opinion). The court rejected the insured’s argument that, since the “amount of loss”

language implied that some loss had been sustained, the appraisers could not determine that no covered loss occurred.

Obviously, the referees would not have the right under such a reference to determine whether a loss, if sustained, was covered by the policy or whether the policy had ever taken effect; in other words, to decide questions pertaining to liability. *But the right to determine the “amount of loss” carries with it by necessary implication the right to determine that none existed.* It is true that the clause in the policy under consideration uses the expression “In case of loss under this policy and a failure of the parties to agree as to the amount of loss . . .” in defining the class of disputes that might be referred to referees. But we think this means that if the insured claims a loss and the insurer disputes it *either in whole or in part* and the basis of the dispute has to do with the amount of loss *or the fact of loss* and no question of liability is involved, the case is a proper one for arbitration.

Id. at 462 (emphasis added). This quotation makes two important points: the cause of a loss is “necessarily” an amount of loss issue because it involves the facts of the loss rather than the extraneous circumstances that comprise “coverage defenses” (as argued above); and that causation remains an “amount of loss” issue even when it is contended that no part of the loss was caused by a covered peril. *See also Fox v. Employers’ Fire Ins. Co.*, 113 N.E.2d at 66 (“In order to determine the amount of loss or damage under a given policy, the referees must reach their own conclusions as to what they think that loss or damage is.”); *F.C.I. Realty Trust v.*

Aetna Casualty & Surety Co., 906 F.Supp. 30 (D. Mass. 1995) (deciding that question of whether loss was caused by leak or by inadequate construction was for appraisers under clause identical to that in this case).

Opar might also be construed as reasoning that the “amount of loss” does not by definition encompass the cause of a loss. This reasoning was rejected in *CIGNA Insurance Co. v. Didimoi Property Holdings, N.V.*, where the court decided that the meaning of the phrase “amount of loss” in an appraisal clause is not ambiguous and is susceptible to only one reasonable interpretation: “Specifically, the Court concludes that in the insurance context, an appraiser's assessment of the ‘amount of loss’ necessarily includes a determination of the cause of the loss, as well as the amount it would cost to repair that which was lost.” *Id.* at 264.

The Court's conclusion in this regard is consistent with the plain meaning of the terms "amount of loss" and "loss" in the insurance context. For example, Black's Law Dictionary defines the term "amount of loss" as "the diminution, destruction, or defeat of the value of, or of the charge upon, the insured subject to the assured, *by the direct consequence of the operation of the risk insured against*, according to its value in the policy, or in contribution for loss, so far as its value is covered by the insurance." *Black's Law Dictionary, supra* at 83 (emphasis added). Thus, the definition provided by Black's expressly includes a causation element.

Although Webster's Dictionary does not define the phrase "amount of loss," Webster's definition of the word "loss" is consistent with the definition of "amount

of loss" in Black's. In the context of insurance, Webster's Dictionary defines "loss" as "the amount of an insured's financial detriment by death or damage *that the insurer becomes liable for.*" *Webster's Collegiate Dictionary* 706 (9th ed. 1988) (emphasis added). As a general matter, without regard to specific legal exceptions created in a policy, an insurer is only liable for damage caused by the risk insured against. Thus, in the Court's view, the Webster's definition of "loss" for purposes of insurance expressly contemplates causation

110 F.Supp.2d at 264-65.

Like *Opar*, *Gonzalez* distinguishes appraisable issues from coverage defenses based on whether the insured stands to receive some payment on the claim. But instead of relying on the "amount of loss" language of the appraisal clause, *Gonzalez* relies upon this Court's statement in *Licea* that "where there is a demand for an appraisal under the policy, the only 'defenses' which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate." According to the Third District, the phrase "no coverage under the policy for the loss as a whole" means that an issue is a "coverage defense" when the insurer says that "there is no coverage for the claim whatsoever," but the same issue is for the appraisers when "the insurer admits that there is a covered loss" but disputes the amount claimed by the insured. 25 Fla. L.

Weekly at D2615. Thus, whether a particular loss was caused by a covered peril or not is an issue for appraisal when the insurer admits that some payment is due to the insured on the claim, but not where the insurer denies that anything is owed.

Gonzalez misinterprets *Licea*'s "loss as a whole" language because it separates it from its subject – the "defenses" that remain for the insurer to assert. The *Licea* court placed quotation marks around the word "defenses" because it was referring back to its previous quotation from Judge Cope's dissent in *American Reliance Insurance Company v. Village Homes at Country Walk*, in which he stated that, when the insurer proceeds with appraisal, "the insurer has not thereby abandoned any *coverage defenses* which may be available to it." 685 So. 2d at 1287 (emphasis added). The *Licea* court therefore meant that the denial of coverage for the "loss as a whole" is a judicial question only when it is based on a *coverage defense*.

Gonzalez strains to reach this interpretation due to a fundamental misconception that makes it logically impossible to give effect to *Licea*'s directive; the court fails to recognize that a "coverage defense" does not arise every time an insurer declines to pay anything on a claim, even though one could technically say that such a claim is therefore not "covered."

In the context of liability insurance policies, this Court has held that the term “coverage defense” as used in section 627.426, Florida Statutes, “means a defense to coverage that otherwise exists.” *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998, 1000 (Fla. 1989). This Court held that a denial of coverage based on the insurer’s contention that coverage for the loss was entirely excluded by a policy exclusion was not a “coverage defense.” “We do not construe the term to include a disclaimer of liability based on a complete lack of coverage for the loss sustained.” *Ibid.* As the court in *Country Manors Association v. Master Antenna Systems, Inc.*, 534 So. 2d 1187, 1195 (Fla. 4th DCA 1988), stated: “An insurer does not assert a 'coverage defense' where there was no coverage in the first place.” The court therefore held that whether the incident occurred during the policy period was not a coverage defense, and that whether the policy was void due to misrepresentations in the application was. *See also Nationwide Mut. Fire Ins. Co. v. Keen*, 658 So. 2d 1101 (Fla. 4th DCA 1995) (whether boat engine had horsepower required for coverage was not a “coverage defense”). In this case, State Farm claims that there is a complete lack of coverage because the loss falls within one of the “Losses Not Insured” as defined in Section I of the policy. This defense, as in *AIU*, is one of “no coverage” rather than a “coverage defense.”

AIU clearly refutes the idea that a complete denial of a claim is equivalent to a “coverage defense.” Coverage defenses do not in all cases entirely defeat the insured’s claim, as in the case of the application of a deductible (treated as a coverage question in *Paradise Plaza*), or the limitation of the payment to the amount of the insured’s insurable interest. Nor, as *Gonzalez* notes, do “cause of loss” issues necessarily implicate the entire claim – such an issue may arise as to only part of the loss claimed.

Thus, there is no justification for distinguishing appraisable issues from coverage questions based solely on whether the insurer denies part of the claim or the whole claim. “Coverage defenses” are, as explained above, distinguished by their subject matter – matters not connected with the actual loss or the factual merit of the claim. *Gonzalez* thus errs in distinguishing appraisable issues from judicial questions based on the context in which the claim arises, rather than by looking at the subject matter of the issue itself. As a result, according to the Third District, the cause of a loss is a matter for appraisal when the insurer agrees that it owes some payment for the loss, but the same issue is a matter for the court when the insurer denies that it owes anything. This distinction makes no logical sense. Why should the same issue be for the appraisers in one situation and for the court in another?

Should not this question be resolved by the nature of the issue rather than its context?

This distinction will also yield inconsistent results. Take, for instance, the facts of *F.C.I. Realty Trust v. Aetna Casualty & Surety Co.*, 906 F.Supp. 30 (D. Mass. 1995). The insured claimed that an external water leak caused damage to the structure of a building by washing out the gravel underneath the interior concrete floor slabs. The insurer denied that any damage to the structure was caused by the leak, blaming the damage on non-covered causes such as inadequate construction, improper soil compaction, and cyclical changes in temperature. *Id.* at 34. However, the insurer agreed to cover the cost of excavating the underground pipe and of returning the property to its condition prior to the excavation. According to *Gonzalez*, the cause of the damage to the structure would be appraisable because the insurer agreed to pay something. But if the loss were caused by an above-ground pipe, and the insurer therefore denied any payment, the Third District would hold that the cause of the damage to the structure must be litigated. Although the issue in either situation is identical, the insured would be entitled to appraisal in the first case, but would be required to litigate the second based solely on a fortuitous circumstance that has no bearing on the real dispute.

Bizarre results would also arise under the “Losses Not Insured” section of the policy. R. 16-17. That section lists several non-covered perils, but provides insurance for any “resulting loss” to the dwelling from these perils. In this case, State Farm declined to pay because of its belief that the damage was due to the non-covered perils of wear and tear (para. 1.g.) or settlement or cracking of the foundation, walls, floors, roofs or ceilings (para. 1.1.), among other excluded causes. If similar cracks appeared in the walls of the home of the Gonzalezes’ neighbors, but in addition rainwater entered through the cracks and caused interior damage, State Farm would pay for repairing the interior damage as a “resulting loss” even though it maintained that the cracks were caused by non-covered perils. Again, based on this fortuitous circumstance, the Third District would hold that the Gonzalezes’ neighbors are entitled to appraise the cause of the cracks while the Gonzalezes would have to hire an attorney and litigate the identical issue in court.

The distinction between appraisable and judicial issues based upon whether the insurer agrees to pay some part of the claim or not thus is contrary to logic, case law, and common sense.

E. Conclusion.

Nationwide is rightly decided because it analyzes whether an issue is appraisable based upon the subject matter of the issue rather than the context of the

claim. It properly delineates the “sphere of inquiry” of the appraisers as those determinations that emanate from the facts of the loss, as opposed to issues growing out of the contractual relationship between the parties. *Opar* and *Gonzalez* are wrong because they misconceive the term “coverage defense” to include any reason cited by the insurer in denying that any payment is due on a claim, without consideration of the subject matter of the issue. This misconception leads these courts to either ignore (as in *Opar*) or to avoid by strained interpretation (as in *Gonzalez*) this Court’s clear statement in *Licea* that the assessment of the amount of a loss “necessarily includes” a determination by the appraisers as to “whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered.”

CONCLUSION

Petitioner, State Farm Fire and Casualty Company, requests that this court quash the decision of the Third District in this case and remand this matter with instructions to affirm the judgment of the trial court.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font (Times New Roman 14 point) and spacing requirements of Fla. R. App. P. 9.210(a)(2).

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