

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

PETER JOHNSON and
CHRISTINE JOHNSON,

CASE NUMBER: SC01-91

Petitioners,

v.

NATIONWIDE MUTUAL
INSURANCE COMPANY,
a foreign corporation,

Respondent.

**RESPONDENT, NATIONWIDE MUTUAL INSURANCE COMPANY'S
ANSWER BRIEF ON THE MERITS**

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CERTIFICATE OF TYPE SIZE & STYLE

Respondent certifies that the type, size, and style utilized in this Brief is 14 point Times New Roman, which is 10 characters per inch.

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PRELIMINARY STATEMENT

Respondent Nationwide Mutual Insurance Company (“Nationwide”) was the defendant and Appellant below and will be referred to as “Respondent” or “Nationwide” in this brief. Petitioners were the plaintiffs and Appellees below and will be referred to as “Petitioners” or “the Johnsons” in this brief. Items in the appendix prepared by Petitioner will be referred to as “App.” followed by the appropriate number assigned by Petitioner in parentheses (*e.g.*, App. 3).

STATEMENT OF THE CASE AND FACTS

Nationwide issued the Johnsons a policy of property insurance covering residential property located in Pasco County which the Johnsons own and rent to others. As required by section 627.706(1) Florida Statute, the policy includes coverage for physical damage due to sinkhole. (App. 53; “Florida Changes” addendum to policy, paragraph C). It also includes a limitation on the extent of indemnity in the event of a sinkhole loss.¹

The Johnsons reported damage to the property to Nationwide, and Nationwide commissioned an investigation. This investigation was conducted by a geotechnical engineer who concluded the damage was not caused by sinkhole as that term is defined by Florida Statute. The Johnsons disagreed with that conclusion and instituted this lawsuit. (App. 56-60).

In response to the lawsuit, Nationwide sought to invoke its right to appraisal of the amount of loss as provided for in the policy. (Apps. 62,67). The Johnsons resisted Nationwide’s Motion to Stay the lower court proceedings while appraisal

¹“Sinkhole collapse” means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or similar rock formations. This cause of loss does not include: (1) the cost of filling sinkholes; or (2) sinking or collapse of land into man-made underground cavities. *Id.*

proceeded. Following a hearing (App. 67), the trial court agreed with the Johnsons.

The trial judge specifically concluded, in relevant part:

I honestly believe the appraisal clause in there is just that; not an arbitration clause, although it comes under the arbitration rules, but it has cause to be invoked when there is a disagreement as to the amount of loss.

I think you are entitled to have that done by the appraisal, but I don't think the appraisal process is an appropriate place for determining if it's covered – whether it's a covered loss or not.

We will determine here in Court any questions of coverage and whether it is a covered loss and so forth.

Then we will send back to the appraisal process the issue of the amount of the loss....

(App. 91-92).

On December 1, 1999, the lower court entered the non-final order under review in the district court. (App. 94). The trial court ruled that “[t]he Court exercises its discretion to have questions of coverage regarding whether the damage to the Plaintiffs [sic] home is a covered loss to be determined by the Court.” (App. 94). Jurisdiction was proper in the district court under Fla. R. App. Pro. 9.130(a)(3)(v) which permits interlocutory review of orders regarding an appraisal provision in a policy of property

insurance because it is in the nature of an arbitration provision. *Florida Select Ins. Co. v. Keelean*, 727 So. 2d 1131 (Fla. 2d DCA 1999).

The District Court reversed, certifying conflict with *Opar v. Allstate Ins. Co.*, 751 So. 2d 758 (Fla. 1st DCA 2000), *pet. rev. den.*, 767 So. 2d 459 (Fla. 2000)(Anstead, J., dissenting). This appeal followed.

SUMMARY OF ARGUMENT

The question presented is whether, under a policy of property insurance, the determination of the cause of damage is a “coverage question” for resolution in court, or an “amount-of-loss question” for resolution by the appraisal panel.

Nationwide’s position.

The appraisal clause is a contractual mechanism in the policy of insurance designed and intended to reduce litigation and to speed resolution of disputed claims on an even playing field. A surge in the use of this process, primarily by insureds, and formalization of the process by the courts, have created opportunities for disputes to arise regarding the operation of the appraisal process. Nationwide needs to know the answer to the question presented by this case, *i.e.*, whether causation is a coverage defense for court adjudication, or an “amount of loss” question for the appraisers, in order to conduct its business.

It appears to Nationwide that *State Farm Fire & Casualty Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996) and *Keelean, supra*, require causation to be determined in appraisal. If this is incorrect, Nationwide will adjust its practices accordingly, but Nationwide needs, and prays for, explicit direction from this Court on the issue. Nationwide is not advocating any change in the law in this case, but seeks only to ascertain the status of the law so that it may conform its conduct to that law.

ARGUMENT

A conflict exists among the District Courts of Appeal as to whether causation is a “coverage question” reserved for the courts, or an “amount of loss question” suitable for appraisal, and as to the meaning of this Court’s holding in *State Farm Fire & Casualty Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996).

This Court, in *Licea*, made three important pronouncements: First, this Court stated “a challenge of coverage is exclusively a judicial question.” *Id.* at 1287.

Second, this Court stated:

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.* [Emphasis supplied.]

Id. at 1288. Third, immediately following this language, this Court stated:

We interpret the appraisal clause to require an assessment of the amount of the 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. [Emphasis supplied.]

Id. There is no dispute between the parties, or among the courts of this state, as to the first statement: everyone agrees a challenge of “coverage” is exclusively a judicial question. The question is the meaning of the second and third statements.

The second statement appears to mean that a coverage question has been presented when the insurer asserts there is no coverage under the policy for the loss as a whole. The question for the Court is whether this second statement includes those instances where the insurer asserts the loss was wholly caused by an excluded peril. The Johnsons answer in the affirmative. “Moreover, this court indicated that when an insurer denies coverage for the loss as a whole, a coverage issue is presented.” Petitioners’ Initial Brief at 11. The decisions of Third and First District Courts of Appeal in the *Gonzalez v. State Farm Fire & Casualty Company*, No. 3D00-185, 2000 Fla. App. LEXIS 14610 (Fla. 3d DCA November 8, 2000) and *Opar, supra* cases, respectively, support or tend to support the Johnsons’ position.

Nationwide believes the third statement in *Licea, supra*, answers this question in the negative: “We interpret the appraisal clause to require an assessment of. . . whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered. . . or various other designated, excluded causes.” If this Court did not mean to say here that *appraisers determine causation*, then it is not clear what *Licea* means. Nationwide understands this language from

Licea to mean that the determination of whether the loss, *in whole or in part*, was caused by a covered or excluded peril, is a question for the appraisers. This same presumption underlies the Second District cases of *Keelean* and *Nationwide Mutual Insurance Company v. Johnson*, No. 2D00-287, 2000 Fla. App. LEXIS 16321 (Fla. 2d DCA December 15, 2000).

The issue for this Court is which reading of *Licea*, if either, is correct.

1. *A conflict exists between or among Keelean, Johnson, Opar and Gonzalez.*

Keelean

In *Keelean*, the insurance company agreed that the peril of vandalism was covered, but disputed that vandalism was the cause of the insured's loss. The carrier concluded that the damage was simple wear and tear, a cause of loss excluded under the policy. The Second District ruled the issue of causation, *i.e.*, covered vandalism or excluded "wear and tear," would be determined in appraisal. The Second District cited to the third statement of *Licea* set out above, which appears to be directly on-point, as the basis of its ruling that an appraisable issue had been presented, *i.e.*, whether the loss was wholly caused by covered vandalism or excluded wear and tear.

Johnson

In *Johnson*, the dispute between the parties is whether the damage was wholly caused by the covered peril of "sinkhole" or the excluded peril of "earth movement."

The Second District Court of Appeal, relying on *Licea*, and *Keelean*, ruled that the question of causation was for appraisal, and was not a coverage issue for judicial determination.

Opar

It is no surprise *Johnson*'s argument is based on the case of *Opar*, *supra*. The dispute between the insurer and insured in *Opar* was whether the damage was caused by the covered peril of "wind" or the excluded peril of "flood," and whether this issue should be resolved in appraisal or in court. The First District hewed to that part of *Licea* holding "a challenge of coverage is exclusively a judicial question," but rejected that part of *Licea* holding appraisal includes a determination of causation by covered or excluded perils. *Opar* cannot be easily squared with *Licea*. Merely to say that a challenge of coverage is exclusively a judicial question begs the critical question of whether a challenge of causation is a coverage question.

Nationwide agrees that the *Johnson* and *Opar* decisions are in conflict. Both cases involve assertions by the insurer that the loss was wholly caused by an excluded peril. Both cases involve a dispute as to whether the causation question was a coverage question that must be resolved in court, or an "amount-of-loss" question that must be resolved in appraisal. The First District, citing to *Licea*, held the question to

be one of coverage, the Second District, citing to *Licea*, held the question to be one for appraisal.

Gonzalez

The dispute between the insurer and insured in *Gonzalez* is whether the damage to the residence was caused by the covered peril of blasting damage or by the excluded peril of “settlement.” The matter proceeded to appraisal concluding with a zero award, signifying the appraisers found the damage was caused by an excluded cause of loss. The award was confirmed in the trial court but the Third District reversed, citing to *Licea*, concluding that State Farm’s defense to *Gonzalez* was that there is no coverage under the policy for the loss as a whole and therefore the question (improperly) presented to the appraisers was one of coverage. Implicit in *Gonzalez* is the assumption that causation is a coverage issue, an assumption that conflicts with the assumption in *Licea* that it is not. Like *Johnson* and *Opar*, *Gonzalez* involves an assertion by the insurer, or finding by the appraisers, that the loss was wholly caused by an excluded peril.

- 2. The question for resolution is whether an insurer asserts there “is no coverage under the policy for the loss as a whole” when it asserts the loss was wholly caused by an excluded peril.***

There is a perceived difference between an insurer’s acknowledgment that some, but not all, of the loss was caused by a covered peril, on the one hand, and the

insurer's assertion that none of the loss was caused by a covered peril, on the other. The Johnsons apparently agree the former situation allows the appraisers to segregate the damage into two categories, one "covered" and the other "excluded." The Johnsons argue the latter situation, however, is a question not appropriate for appraisal. The language in *Licea* lends itself to this distinction. When this Court said that the only defenses that remain for the insurer to assert are that there is no coverage for the loss *as a whole*, it left room for a party to argue that an assertion that the loss was wholly caused by an excluded peril is not appraisable, because it is tantamount to asserting there is no coverage for the loss as a whole.

But in practical terms, there is no real distinction between appraisers acting to determine that some portion of the loss was caused by an excluded peril, (which activity appears to be acceptable to the Johnsons and permitted by *Licea*), and the appraisers acting to determine that the entire loss was caused by an excluded peril (which the Johnsons say is prohibited). After all, the same issue, causation, is being decided by the appraisers in both cases. "Coverage," if coverage includes causation, would be decided in both cases. Why is it acceptable in one case but not another? Is a ruling by the appraisers that only \$1 of damage was caused by a covered peril, and that \$100,000 was caused by an excluded peril, any different, legally or

realistically, from a decision that none of the damage was caused by a covered peril?² To say that the appraisers may consider causation in the former instance (where some but not all damage is caused by a covered peril) but not in the latter (where all damage is caused by an excluded peril) is arbitrary, without logic and ultimately unworkable.

To Nationwide, *Licea* can be read to mean that “causation” is never a coverage issue. The second statement in *Licea*, (“the only defenses which remain are that there is no coverage as a whole. . .”) refers to circumstances where causation by a covered peril may be admitted, but still the insurer is not required to pay a loss because of other contractual defenses. For example, the property damaged may not be “covered property,” the claimant may have no insurable interest in the property, the policy may have lapsed or been cancelled. In all these cases, the carrier is asserting “that there is no coverage under the policy for the loss as a whole,” and so the issue is one of “coverage” and is for the courts to determine, even though causation by a covered peril is admitted.

²As far as the law of Massachusetts is concerned, the answer is “no.” The appraisers’ duty to determine the amount of loss allows them to determine that there is no loss. *Fox v. The Employer’s Fire Insurance Co.*, 113 N.E.2d 63 (Mass. 1953).

3. *There is no clear precedent in Florida jurisprudence to answer this question.*

Several Florida cases have addressed issues related to the one presented on this appeal, many have been cited by the Johnsons in their initial brief. However, none are controlling on the issue presented.

New Amsterdam Cas. Co. v. J.H. Blackshear, Inc., 156 So. 2d 695 (Fla. 1934) stated that the object of the appraisal clause is “merely to fix the amount of recoverable damage. . . .” *Id.* This Court stated that “unless liability under the policy for some recoverable amount is affirmatively admitted by the insurer when appraisal is demanded, a refusal of the insured to submit to an appraisal would not be unjustified. . . .” *Id.* The opinion does not disclose whether the insurer contested the cause of loss as being excluded, or contested some fundamental contractual right to recover *ab initio*, *e.g.*, the property is not “covered property,” etc.

Here, Nationwide admits that some recoverable amount is available if the cause of the damage is a sinkhole. The Johnsons’ position is that unless the carrier acknowledges it owes something, appraisal cannot be compelled, and they cite to the line of *Blackshear, supra*, as authority for this proposition. Petitioner’s Brief at 13. But *Blackshear* does not say that the insurer must admit causation by a covered peril and waive all its coverage (*i.e.*, both “cooperation” and “contract”) defenses, before

a court will enforce the insurer's demand for appraisal. This is not to say this position is without support in Florida jurisprudence.

In the First District a carrier waives its coverage defenses when it demands appraisal. *See Scottsdale Ins. Co. v. DeSalvo*, 666 So. 2d 944, 946 (Fla. 1st DCA 1995) (“an insurer may not demand an appraisal while at the same time denying coverage”). The rule is different in other districts. *See, e.g., Keelean*, (rejecting *DeSalvo* and its proposition that company cannot both demand an appraisal under the policy and assert coverage defenses). *Keelean* aligned itself with *Paradise Plaza Condominium Ass’n v. Reinsurance Corp. of New York*, 685 So. 2d 937 (Fla. 3d DCA 1996), which had rejected *DeSalvo* and certified conflict with *DeSalvo*. To the extent *Blackshear* holds that a carrier must admit causation by a covered peril before a court can enforce an insurer’s petition to compel appraisal, the case would conflict with and be overruled by, *Licea, supra*, and would conflict with *Keelean* and *Paradise Plaza, supra*.

Paradise Plaza provides that an insurer may contest coverage in a court action, thus denying all liability for the loss as a whole, while participating in an appraisal. This result plainly contradicts the holding of *Blackshear* that appraisal is not required if the insurer denies liability for the loss.

Midwest Mut. Ins. Co. v. Santiesteban, 287 So. 2d 665 (Fla. 1973) involved the question whether an insurance company which had admitted coverage under one policy, but denied coverage under another, waived its position on the second policy by agreeing to arbitrate a question under the first policy. When the *Santiesteban* court stated “a challenge of coverage is exclusively a judicial question. . . .,” it meant that the arbitrator's improper adjudication of issues under the second policy could not affect a legal question as to the insured status of a claimant under the second policy. Causation as a coverage or appraisal issue was not addressed in *Santiesteban*.

In *Florida Farm Bureau Cas. Ins. Co. v. Sheaffer*, 687 So. 2d 1331 (Fla. 1st DCA 1997) the court had to decide if the following question was one for the appraisal panel or for the court to decide: whether the insured's entire roof must be replaced or could be repaired by replacing only the damaged sections. The insured sought judicial determination of the question, calling it a coverage issue. *Sheaffer* does not involve a question of causation and so is of limited value in resolving the question presented in this appeal. However, the court's reasoning is useful to note. The insurance company argued the matter should be resolved in appraisal. The insurer's argument was characterized by the court as follows:

Because it concedes the insurance policy covers the damage to the Sheaffers' home and it would be bound by the appraisers' determination that replacement of the

entire roof was required, there is no coverage dispute between the parties, but simply a dispute regarding the amount of loss.

Id. The court held that the dispute between the parties did not involve a question of “coverage,” but concerned only the amount of loss, and so was appropriate for appraisal.

The *Sheaffer* court cited to *J.J.F. of Palm Beach, Inc. v. State Farm Fire & Cas. Co.*, 634 So. 2d 1089 (Fla. 4th DCA 1994). *J.J.F.* attempts to identify what constitutes a “coverage” question. The Fourth District Court of Appeal defined the term “coverage question” to be “whether the claim is arguably within the class of claims covered by the policy. . . .”

If this passage means that a coverage question is one where a loss is caused by a peril that the insurer agrees is covered, but disputes that the facts show that covered peril caused the loss, then *J.J.F.* would be consistent with *Licea* and *Keelean*. If this passage means that a dispute as to whether a loss was caused by a covered or excluded peril is a coverage question (as in *Opar*), Nationwide believes the case would have been overruled by *Licea*, and that it would contradict *Keelean*. Certainly this latter interpretation is consistent with *Opar* and supports the Petitioners in this case.

J.J.F. also states:

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. . . the extent of the claim does not constitute a coverage question.

Nationwide acknowledges that the insureds have made claim for sinkhole damages, bringing the **claim** within the policy coverage. To Nationwide, determining the amount of **covered loss** owed on the claim is dependent on the resolution of disputed issues of fact and the application of policy language to those facts. The disputed issue of fact is whether the covered peril of “sinkhole,” or the excluded peril of “settlement,” is the actual cause of loss. Thus, the question appears to be one for resolution in appraisal under *J.J.F.*

The case of *Montalvo v. Travelers Indemnity Co.*, 643 So. 2d 648 (Fla. 5th DCA 1994) addressed whether coverage is exclusively a judicial question. *Montalvo* involved the effect of an “other insurance” clause and whether, under the terms of its policy and North Carolina law, the carrier was obligated to pay only one-half of the insured's damages. *Montalvo* held this issue was one for the trial court, and not the arbitration panel, to resolve. The issue of causation was not at issue in *Montalvo*.

State Farm Fire & Cas. Co. v. Wingate, 604 So. 2d 578 (Fla. 4th DCA 1992) involved a denial of a fire claim on the basis of fraud. Fraud is not a causation issue,

but rather is a coverage issue under the explicit terms of *Licea and Paradise Plaza Condominium Ass'n v. Reinsurance Corp. of New York*, 685 So. 2d 937 (Fla. 3d DCA 1996). *Wingate*, therefore, does not address whether a causation issue is a coverage issue.

Atencio v. U.S. Security Ins. Co., 676 So. 2d 489 (Fla. 3d DCA 1986) regarded the “monumental” question of whether the carrier had a duty to pay the \$200 limit or, instead, \$10 per day, for loss of use of a damaged auto. The court declared this was a coverage question for the court and not an “amount of loss” question for the arbitrators. The case dealt with the extent of an entitlement under the policy, a legal question presenting a policy interpretation issue. No causation question was involved.

Nationwide Ins. Co. v. Cooperstock, 472 So. 2d 547 (4th DCA 1985) involved the question of negligence of various parties to an auto accident. The liability of various parties involved in the accident determined Nationwide’s duties under an uninsured motorist policy. Nationwide instituted a declaratory judgment action asking the court to determine the question of the parties’ culpability.

The insured resisted resolution of this issue in court, instead seeking arbitration of the issue. The court ruled that a question of negligence is one of coverage. It is not clear that a question of negligence in a UM case, with a presumably different arbitration clause, is equivalent to a question of causation of property loss with an appraisal

clause. To the extent they are equivalent, this Court in *Licea* would appear to have overruled, *sub silentio*, the Fourth District Court of Appeal's decision in *Cooperstock*.

Aetna Casualty and Surety Co. v. Goldman, 346 So. 2d 111 (Fla. 3d DCA 1977) involved a true arbitration agreement in a UM policy. The opinion is not clear as to whether the causation of personal injuries or the construction of the policy was determined to be an issue for court adjudication. And like *Goldman*, *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279 (Fla. 1988) involved a true arbitration clause found in a UM policy, and did not explicitly address causation issues.

4. *Florida's District Courts of Appeal have equated appraisal with arbitration, which contributes to the confusion.*

The issue of appraisal-as-arbitration is relevant to this case in the following way: Arbitration is a substitute for a lawsuit and resolves all issues between parties. Appraisal is a limited proceeding restricted to resolution only of the amount of loss issue. The more appraisal is seen as arbitration, the wider the scope of the appraisal clause, including, presumably, the causation issue. The less appraisal is seen as arbitration, the narrower the scope of the appraisal clause. Jurisdictions which hold appraisal is not the same as arbitration typically do not extend to appraisers the power to determine causation. *See, e.g., Kawa v. Nationwide Mutual Fire Insurance*

Company, 664 N.Y.S.2d 430 (N.Y. Sup. Ct. 1997)(“[A]rbitration, a more formal proceeding, ordinarily encompasses the disposition of the entire controversy while appraisal extends merely to the specific issues of cash value and the amount of loss. . . .”)citing to *Delmar Box Co. v. Aetna Ins. Co.*, 127 N.E. 2d 808 (C.A.N.Y. 1955)(Appraisal is not arbitration) and *St. Paul Fire & Marine Insurance Company v. Wright*, 629 P.2d 1202, 1203 (Nev. 1981)(“An appraiser’s power generally does not ‘encompass the disposition of the entire controversy between the parties. . . [but] extends merely to the resolution of the specific issues of actual cash value and the amount of the loss.”) Many Florida cases have construed appraisal provisions as arbitration clauses. *See, e.g., Preferred Mutual Ins. Co. v. Martinez*, 643 So. 2d 1101 (Fla. 3d DCA 1994)(citing similar cases therein); *Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, supra*; *Hoensline v. State Farm Fire & Cas. Ins. Co.*, 736 So. 2d 761 (Fla. 5th DCA 1999).

Other Florida courts have drawn distinctions between the limited agreement to appraise the amount of the loss and general agreements to submit to arbitration. *See, e.g., Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297 (Fla. 1891); *Columbia Casualty Co. v. Southern Flapjacks, Inc.*, 868 F.2d 1217, 1223 (11th Cir. 1989), citing *Preferred Ins. Co. v. Richard Parks Trucking Co.*, 158 So. 2d 817 (Fla. 2d DCA 1963); *see also, Opar v. Allstate Ins. Co., supra*.

The distinction between appraisal and arbitration was described by the Eleventh Circuit Court of Appeal in *Southern Flapjacks* as follows:

Although the courts loosely interchange the terms “appraisal” and “arbitration,” Florida law expressly distinguishes between a limited agreement to appraise the amount of the loss and a general agreement to submit to arbitration. *Preferred Ins. Co. v. Richard Parks Trucking Co.*, 158 So. 2d 817 (Fla. 2d DCA 1963); *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297 (Fla. 1891). The Florida Arbitration Code applies only to arbitration agreements, not to appraisals. *Lewis*, 10 So. at 302. A provision for arbitrating a disputed amount constitutes an appraisal agreement, rather than an arbitration agreement. *Preferred Ins. Co.*, 158 So. 2d at 819-21; *Lewis*, 10 So. at 302. 31 FLA. JUR. 2D, *Insurance* at 891 (1981).

Southern Flapjacks, Inc., 868 F.2d at 1223.

Although the terms are used interchangeably, as pointed out by the *Southern Flapjacks* court, there *are* substantive differences between an agreement to arbitrate and the appraisal clause at issue in this case. Unlike arbitration awards, appraisal awards are binding as to the amount of loss pursuant to the terms and conditions of the policy and require no judicial confirmation. The loss payment provision of the policy is a promise that payment will be made within 30 days after the appraisal award is filed with Nationwide. Failure of the insurer to pay the appraisal award can result in a breach of contract action.

The *Sheaffer* decision, upon which *Hoerstine* relies, equates an appraisal with statutory arbitration for the limited purposes of 1) finding jurisdiction to review a lower court order compelling compliance with an appraisal provision in the policy, and 2) setting forth procedural guidelines as to how an appraisal proceeding will be conducted (*i.e.*, under the procedures established by the Florida Arbitration Code). In *Sheaffer*, the insured did not invoke appraisal and, once the insurer had invoked appraisal, the insured refused to submit to appraisal before proceeding to sue its insurer. The insurer moved to dismiss plaintiff's complaint for failure to submit to the appraisal as a precondition to an action on the policy. The trial court denied the insurer's motion to dismiss and the insurer attempted to appeal relying on the provisions of Fla. R. App. P. 9.130(a)(3)(C)(d) which grants the district courts of appeal jurisdiction to review non-final orders that determine the entitlement of a party to arbitration.

As the court remarked,

[H]ere we have jurisdiction to review the order on appeal only if we determine that the appraisal provision in the Sheaffers' insurance policy entitles the insurer to arbitration of a dispute between the parties. Because, for the reasons discussed below, we conclude that the

appraisal provision constitutes an agreement to arbitrate, we have jurisdiction.

Id. at 1333. Thus, as the *Sheaffer* court readily acknowledged, without equating appraisal with arbitration, the court did not have jurisdiction to correct the trial court's erroneous refusal to require the insured to comply with the conditions precedent in the policy.

The *Sheaffer* court went on in *dicta* to indicate that the provisions of the Florida Arbitration Code governed the way an appraisal should be conducted. This was adopted as the rule of the case in *Hoestine*. Establishing a procedure for the conduct of an appraisal, however, does not alter the fundamental character of appraisal and turn it into something it is not. And the existence of cases that flatly hold appraisal is arbitration, apparently for all purposes, provides opportunities for contention over the scope of appraisal.

5. *The precedent of other jurisdictions presents a choice for this Court.*

Nine other jurisdictions, to Nationwide's knowledge, have addressed the question of whether causation is a coverage issue. The results and reasoning differ from jurisdiction to jurisdiction. Nationwide sets out the cases in chronological order, as the development in the law on this question is best demonstrated in this manner.

Denton v. Farmers' Mutual Fire Insurance Co., 79 N.W. 929 (Mich. 1899).

Over 100 years ago, the power of the appraisers to determine whether the loss was caused by a fire set by the insured was challenged. The court recognized this finding to be beyond the mandate of the panel, stating that “the provisions contemplate a valid loss, and confer upon the auditors only the power to fix the amount. . . .” *Id.*

F. & M. Skirt Co., Inc. v. Rhode Island Insurance Co., 55 N.E.2d 461 (Mass. 1944). The insured skirt factory was damaged by fire. The standard form fire insurance policy contained an appraisal clause. The parties failed to agree on the amount of loss and the matter was referred to appraisal. After a hearing, a majority of the referees (the term for appraisers) found that no loss or damage was sustained by the insured as a result of the fire and therefore they awarded no sum to the insured. (This result mirrors that of *Gonzalez*.)

The insured sued the carrier, arguing the amount of loss, and not the fact of loss, was the sole matter for determination by the referees and that the award (or lack of one) was a determination of the fact of loss. The court agreed that the appraisal clause allowed for determination of the amount of loss only, and not for the question of “liability.” The insured argued that by submitting the matter to arbitration, the carrier was estopped to deny that a loss was sustained, and that it could be heard only

on the amount of loss, and that an award that determined no loss was sustained was not within the scope of appraisal.

The Massachusetts Supreme Court rejected this reasoning, stating that “the right to determine ‘the amount of loss’ carries with it by necessary implication the right to determine that none existed.” The court went on to state:

[W]e 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 461. At least in Massachusetts, an appraisable question exists even when the insurer disputes the claim “in whole” was caused by an excluded peril. This position is directly contrary to the position taken by Petitioners, and apparently by the First and Third Districts in *Opar* and *Gonzalez*, respectively.

Fox v. The Employers’ Fire Insurance Co., 113 N.E.2d 63 (Mass. 1953). The dispute between the insurer and insured was whether the loss was caused by covered lightning or excluded windstorm. The court held the appraisers did not err by determining the amount of covered damage, *i.e.*, that caused by lightning alone, and that they did not err by refraining from determining the total amount of damage from the “entire havoc of the storm,” *i.e.*, loss caused by both covered and excluded perils.

Id. at 67.

Mork v. Eureka-Security Fire & Marine Insurance Co., 42 N.W.2d 33 (Minn. 1950). The insured's house was damaged by an explosion of an oil burning furnace. The matter was put to appraisal and the appraiser panel, there called the "board," who determined the dollar amount of the damages and found that the loss was not covered by the policy. The award was challenged in a lawsuit by the insured on the grounds that the arbitrators had improperly attempted to construe the policy. The court stated that the board's finding on coverage was "not within their province and mere surplusage. The finding of appraisers on the question of coverage would not be final." *Id.* at 35.

Munn v. Nat'l Fire Insurance Co., 115 So. 2d 54 (Miss. 1959). The question determined in *Munn* was the extent of the appraisers' power under a windstorm insurance policy to ascertain not only the amount of loss but also the cause of the damage. The Mississippi Supreme Court determined that the appraisers had no power to determine the cause of damage. The appraisers' power, said the court, was limited to determining the money value of the property which may be damaged by the storm.

A windstorm had damaged the residence of the insured who made a claim for structural damage (among other items, a wall pushed askew by the storm). The appraisers determined the leaning of the wall was not caused by the windstorm and so they did not include in their award any damage to the wall. Citing to the *Mork* case,

supra, and with great attention to the fact that appraisal under a property insurance policy is not the same as arbitration, the court stated the appraisers had no power to determine whether wind caused the walls to lean, as causation is an issue reserved to the courts. *Id.* at 65.

Augenstein v. Insurance Co. of North America, 360 N.E.2d 320 (Mass. 1977).

The question presented was whether a loss of jewelry had occurred or not. The insured invoked appraisal and the appraisers determined that a loss did occur. The insurer rejected the finding and refused to pay. The insured sued the carrier and took the position at trial that the appraisal award was presumptively conclusive as to the loss and the amount of loss. The insurer took the position that although the award could fix the amount of the loss, if there was any, the question whether there had been a loss or not remained for trial. *Id.* at 321.

Apparently, the jury did not believe the insured and it gave the insurance company the verdict. A judgment was entered for the carrier. On appeal, the judgment was reversed and judgment for the insured was ordered. The appellate court held the panel's determination as to the cause of loss was binding. The appraisers' ruling would not be disturbed where the insurer did not contend that the referees had misconceived the meaning of the term "theft" or that the appraisers had made some mistake as to coverage. *Id.* at 324.

Auto-Owners Insurance Co. v. Kwaiser, 476 N.W.2d 467 (Mich. App. 1991). The insured's roof collapsed because of heavy rain. The insurance company's engineer determined the roof was rotted because of long-term trapped moisture. The disagreement between the parties was submitted to appraisal as provided in the policy. The insurer apparently argued the loss was caused by neglect of the insured and by wear and tear, excluded causes of loss. The appraisal panel apparently did not segregate between the covered "collapse" or excluded "wear and tear and neglect" damages, instead entering an award for all damages.

The insurer challenged the appraisal award in a lawsuit, asserting the appraisers did not consider the exclusion in the policy. The trial judge refused to consider the causation question, and instead simply affirmed the entire appraisal award. On appeal, the trial court's decision was reversed. The appellate court reversed the decision and remanded the matter to the trial court for determination of the policy's coverage of the loss. *Id.* at 469.

Wausau Insurance Co. v. Helperin, 664 F. Supp. 987 (D. Md. 1987). A portion of the insured's building collapsed. An independent consulting firm concluded the framing members and plywood at the collapsed areas were rotten and decayed by fungus and mold due to long-term exposure to water. Wausau offered to pay some of the insured's claim, but denied liability for that part which it determined

was caused by faulty design, construction or operational deterioration and wear and tear, all excluded perils.

The insured sought recovery of all claimed damages, because it was impossible to repair one area of the roof without repairing the entire roof. The insured sought to invoke appraisal but a dispute developed over the scope of the appraisal. Wausau responded with a lawsuit. The insureds contended the only matters not subject to appraisal were those external to the actual occurrence of such as issues of fraud in the application, failure to cooperate, non-compliance with policy modification clauses, lack of ownership, lack of insurable interest, etc. Wausau, on the other hand, contended the only issue subject to appraisal was the monetary valuation of items which the parties agreed were covered by the policy.

The court disagreed with Wausau. The court concluded that the insurer was raising coverage issues for the court when it contested “causation.” The district court concluded:

[T]he issue is one of contract interpretation which is within the competence of the Court, not an appraisal, to resolve. Of course, to the extent that issues of design and construction relating to ‘the amount of loss’ are ultimately presented, these will be properly referable to the appraisal process.

F.C.I. Realty Trust v. Aetna Casualty & Surety Co., 906 F. Supp. 30 (D. Mass. 1995). In this case, the insured claimed an underground pipe broke and the water leak washed out the earth beneath the plaintiff's structure thereby damaging the building. Aetna concluded the leak did little damage to the property, and that inadequate construction and other excluded perils were the true cause of the damage.

The insured sued Aetna. Aetna sought summary judgment, arguing the appraisal provision was a condition precedent to the suit. In response, the insured stated that causation of the damage, a matter not within the competence of the appraisal panel, was required to resolve the dispute, and so appraisal was not a proper basis for summary judgment. The district court disagreed, citing to *Augenstein*, *supra*:

The Supreme Judicial Court has held that referees must 'find the amount of loss in light of their own interpretations of the terms of the policy,' although the 'question of construction would remain open for reexamination in an action of the policy, if one should eventuate.' [Citation omitted.] If the referees reach questions of ultimate liability, those issues can be relitigated; but that eventuality does not excuse the contractual requirement that there be a reference [appraisal] before there be a lawsuit.

Id. at 33.

Wells v. American States Preferred Insurance Co., 919 S.W.2d 679 (Texas App. 1996). The issue here, as in *F.C.I.*, *supra*, regarded appraisal of damages to a property caused by washout of subterranean soil by a water leak. The question presented to the appellate court was whether the appraisers were authorized and empowered to determine the cause of the loss. The appraisers had determined the damage to the dwelling was due to foundation movement in the amount of \$22,875.94. *Id.* at 681. But the covered damage to the dwelling was zero. *Id.* The *Wells* court then embarked on a lengthy discussion of whether causation was an “amount of loss question” for appraisal or a coverage question for the court. The court identified the holdings of many other jurisdictions, including all the cases cited above. The Texas court concluded that “questions of what caused or did not cause the loss are questions to be decided by the court.”

Kawa v. Nationwide Mutual Fire Insurance Co., 664 N.Y.S.2d 430 (N.Y. Sup. Ct. 1997). The residence was damaged by windstorm, including damage to the aluminum siding. The insured claimed that the carrier was required to replace all the aluminum siding with new vinyl siding, and the insurer contended it owed only to repair the wind damaged siding. The insured sought to submit the matter to appraisal, but the carrier disagreed, maintaining there was a legal dispute presented, not merely a question as to the value of the loss sustained.

The fundamental question presented was whether the dispute was a coverage question or a question as to the amount of loss. The court noted that the appraisal clause “only applies to a case with a disagreement as to the amount of loss or damage, and not where the insurer denies liability and is not merely disagreeing as to the value of the loss.” *Id.* at 431. The carrier argued the damage to the siding was due to wear and tear, and not the result of windstorm. The court agreed with the insured that the dispute went to coverage and that such an issue could only be resolved by the court.

The court refused to order appraisal of the question and, in the process, distinguished and refused to follow *Sheaffer*. The New York court noted that the jurisprudence of New York distinguished between formal arbitration, a quasi-judicial proceeding which resolved all issues between the parties, from appraisal, which addressed only the amount of loss, while Florida law did not.

Holt v. State Farm Lloyds, No. 3:98-CV-1076-R, 1999 U.S. Dist. LEXIS 6257 (N.D. Tex. April 22, 1999). The insured made a claim for damage to his building for hail damage. The matter was submitted to appraisal and the panel determined that there was no evidence of hail damage. The court stated that this finding of the panel is an expression of damage causation which is beyond the authority of the panel and outside the scope of the appraisal process. *Id.* at *9. The court relied upon *Wells*, *supra*.

Spearman Industries, Inc. v. St. Paul Fire & Marine Insurance Co., 109 F. Supp. 2d 905 (N.D. Ill. 2000). The insured made claim for roof damages which St. Paul asserted were caused by wear and tear, not covered by the policy. St. Paul sought to submit the matter to appraisal and the insured sued. The court noted that the dispute went to the causation of damage, and not the amount of property lost or value of the property. The court therefore agreed with the insured's contention that the policy does not require an appraisal of the matter of causation. Accordingly, the court denied St. Paul's motion for judgment on that issue.

CIGNA Insurance Co. v. Didimoi Property Holdings, N.V., 110 F. Supp. 2d 259 (D. Del. 2000). *Didimoi* runs contrary to the gist of most of the cases set out above because it holds that causation is a matter for the appraisal panel.

A fire damaged a large commercial building. Fire-fighting efforts spread asbestos throughout the building, greatly enlarging the amount of damages. CIGNA did not contest the policy covered fire and that a fire damaged the building, but did contest the extent of the damage from the fire. CIGNA and the insured agreed to appraise the claim but sharply disputed the scope of appraisal. The insured sought a judgment that the phrase "amount of loss" must be construed narrowly to require the appraisers to determine the amount of money necessary to repair or replace the

damages claimed, without determining the cause of damages or the amount of “covered loss.” *Id.* at 262.

CIGNA wanted the appraisers to determine the amount of fire damage. The court squarely addressed the question whether determining the “amount of loss” includes a determination of the cause of the loss. *Didimoi* expressly held that the term “amount of loss” is not ambiguous and that:

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 based its conclusion on the plain meaning of the terms “amount of loss” and “loss” and referred to dictionary definitions. “The plain and common meanings of the terms ‘amount of loss’ and ‘loss’ in the insurance context includes a causation element.” *Id.* at 265.

Didimoi distinguished between the two concepts “amount of loss” and “coverage.” The court noted that the meaning of the term “coverage” is narrow and includes such questions as who is insured, what type of risk is insured against and whether the insurance contract exists. These defenses are what Nationwide here calls “contract defenses,” and it is these defenses that Nationwide believes is referenced in the phrase in *Licea* as to an insurer’s assertion that there is “no coverage as a whole.”

Didimoi addressed the *Wells*, *Kawa*, *Kwaiser* and *Sheaffer* cases, discussed *supra*. *Didimoi* concluded that the holding of *Sheaffer* was that “causation questions were appropriately determined in the appraisal process.” Whether this statement reflects the Delaware court’s unique understanding of *Sheaffer*, or accurately states the holding of that case, is not clear.

The Delaware district court concluded that to the extent the appraisers’ assessment of causation might overlap with coverage questions, the parties were free to seek the court’s ultimate review:

However, the Court believes it would be inappropriate to curtail the appraisal process simply because it might come shoulder-to-shoulder with subsequent legal questions. . . . The Court concludes that under the circumstances of this case, the appraisal process should include a determination of whether the claimed damage was caused by the fire.

Id. at 269.

The jurisdictions that have addressed the issue of resolution of causation issues in appraisal have resolved it in various ways. Texas and Mississippi hold that all cause of loss questions are determined by the courts, and never by the appraisers. In those jurisdictions, appraisers apparently determine the amount of loss of any item declared by the insured as being damaged. Whether or not the cause of the damage is a

covered or excluded peril is then adjudicated in the courts. This appears to be the position of *Gonzalez* and *Opar* and, according to the Petitioners, *Licea* as well.

Delaware and Massachusetts allow causation to be considered by the appraisers, whose decision on the subject is binding so long as no issue of coverage is decided. Insofar as the appraisers' decisions on causation touch on coverage issues, the decisions are not binding. Rather, any coverage decisions made by the appraisers in the course of doing their work may be challenged in subsequent litigation.

Johnson, Keelean, and, to the understanding of the Second District and Nationwide, *Licea*, hold that cause of loss questions are determined by the appraisers, and not by the courts.

The current status of the law in Florida on this point is unstable, contradictory and untenable. The statement in *Licea*, that:

[W]e interpret the appraisal clause to require an assessment of the amount of loss. This necessarily includes determinations as to . . . whether or not the [loss] was caused by a covered peril or a cause not covered. . . .

and

We interpret the appraisal clause to require an assessment of the amount of the 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. [Emphasis supplied.]

and what they mean and how they operate together is the prime source of confusion and conflict between the parties and among the District Courts of Appeal. Nationwide, among others, understands this language to mean that causation is a matter for determination by the appraisers. If Nationwide is incorrect, then Nationwide will adjust its practices accordingly. However, Nationwide needs, and prays for, explicit guidance on this specific question.

CONCLUSION

A conflict exists between *Johnson* and *Opar*. The conflict is due to the failure of *Opar* to follow *Licea*. Therefore, the First District Court of Appeal's decision in *Opar* should be overruled and the Second District Court of Appeal's decision in *Johnson* affirmed.

Respectfully submitted,

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