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A PRIMER FOR HANDLING HOMEOWNER'S INSURANCE CLAIMS IN FLORIDA

This paper is intended to serve as a guide for the general practitioner representing a policyholder claiming benefits under a homeowner's policy of insurance. As most homeowner's insurance policies issued today are standardized across the industry, the principles outlined herein will generally apply no matter which particular insurer issued the policy. However, as the specific policy language may vary from insurer to insurer, I strongly urge the practitioner to carefully read the language of the particular policy with which you are dealing.

BASIC COVERAGE ISSUES

The first step in analyzing any homeowner's insurance policy is determining what property is covered, who is an insured and what perils are insured against. Covered property typically includes the dwelling on the residence premises, including structures attached to the dwelling. (Usually the location specifically described on the declaration page). Coverage is also typically provided for other structures on the residence premises set apart from the dwelling by a clear space such as a guest house, tool shed, etc.

Types of Property Covered

Coverage is generally provided for personal property owned or used by the insured anywhere in the world. The following items of personal property are typically excluded from coverage: animals, birds or fish; motor vehicles or all other motorized land conveyances (however, motorized golf carts and their equipment are usually covered);

aircraft and parts; property of roomers, boarders, tenants or other residents not related to an insured; property in an apartment regularly rented or held for rental to others; business data, including electronic data and computer disks; and credit cards or fund transfer cards. Most policies have special limits of liability which limit the amount of loss to be paid, in the aggregate, for certain specified items of personal property which typically includes money, gold and silver; securities and letters of credit; watercraft; loss by theft of jewelry, watches, precious stones, fur, silverware, goldware, firearms; and motorized golf carts.

Loss of Use Coverage

Most policies also include coverage for loss of use, including additional living expenses (ALE). This coverage indemnifies an insured for the necessary increase in living expenses so the insured's household can maintain its normal standard of living, if a covered loss to the dwelling makes that part of the residence premises not fit to live in. Generally, payment is made for the shortest time required to repair or replace the damage or, if the insured permanently relocates, the shortest time required for the insured's household to settle elsewhere. In either case, most policies have a maximum benefit period of twelve (12) months. Most loss of use provisions also provides indemnity for the loss of rental income when the dwelling becomes uninhabitable. This coverage pays for the fair rental value of that part of the residence premises rented to others or held for rental ?less? any expenses that are no longer incurred while the premises are not fit to live in, if a covered loss to the dwelling makes that part of the residence premises rented to others or held for rental, not fit to live in.

Additional and Extended Coverage

Most policies provide additional or extended coverages, sometimes at an increased premium, for the following when associated with a covered property loss: debris removal; reasonable repairs taken to prevent further damage to the property; damage to trees, shrubs and other plants; fire department service charges; credit card, fund transfer, forgery and counterfeit money; fines or assessments levied by a property owner's association as a result of direct loss to the property; collapse; lock replacement; refrigerated products; land; glass or safety glazing material; landlord's furnishings; and increased building costs as a result of ordinance or law.

Who Is Insured

The practitioner next needs to determine who is an insured under the policy. Policies generally include as insureds the named insured(s) listed on the declaration page; residents of the named insured's household who are relatives or other persons under the age of 21 and in the care of any person named above. In analyzing whether an individual is a resident of the insured's household, the court will look at the totality of the circumstances, including the intent of the particular individual. General Guaranty Ins. Co. v. Broxsie, 239 So. 2d 595, 597 (Fla. 1st DCA 1970) and Taylor v. USAA, 684 So. 2d 890 (Fla. 5th DCA 1996). A student away from home at school can still qualify as a resident of his parent's household. Seitlin & Co. v. Felix Ins. Co., 650 So. 2d 624 (Fla. 3rd DCA 1994). Similarly, one who is away in military service can still be a resident of his/her primary physical residence. Taylor, supra.

What Perils Are Insured

Finally, a determination must be made as to what specific perils are insured against. With respect to the dwelling, certain homeowner's forms provide coverage for all

direct physical loss to property unless specifically excluded, while other forms specifically set forth the “Perils Insured Against.” Regardless of the policy form, most policies will not cover loss resulting from the following events:

- a. Pressure or weight of water damaging a fence, pavement, patio, swimming pool, foundation, bulkhead or dock. See Wallach v. Rosenberg, 527 So.2d1386 (Fla. 3d DCA 1988) (noting that a jury question existed as to whether pressure, in part, caused collapse of sea wall.)
- b. Theft in and to a dwelling under construction of materials and supplies used in construction. See Diaz v. Florida Insurance Guaranty Association, 650 So.2d 675 (Fla. 3d DCA 1995).
- c. Vandalism and malicious mischief, if a dwelling has been vacant for more than thirty (30) consecutive days before a loss.
- d. Constant or repeated seepage or leakage of water over a period of weeks, months, or years from within a plumbing, heating or air-conditioning system. Please note that the purpose of this exception is to preclude coverage for a slow leak which goes on unabated for a significant period of time. Coverage is not precluded for sudden water loss causing damage from a plumbing, heating, air-conditioning or household appliance.
- e. Ordinary wear and tear and deterioration are not covered under the policy. Nor is there coverage for damage caused by a latent defect or mechanical defect. Therefore, damage caused by, or attributable to, a failure to maintain or preserve the dwelling will not be a covered peril under the policy.
- f. Settling, shrinking, bulging, or expansion, including resulting cracking of pavements, foundation walls, floors, roofs or ceilings are not covered. As a result, general settling and/or cracking to a home unrelated to an outside force will not be covered. See Gutman v. American Motorists Insurance Company, 410 So.2d 1001 (Fla. 3d DCA 1982) (settlement cracks in 45 year old home not covered under homeowner's policy).
- g. Smog, rust or other corrosion, mold, wet or dry rot.
- h. Birds, vermin, rodents or insects.

Personal Property – Covered Perils

With respect to personal property, the standard homeowner's policy typically lists those events which constitute covered perils. The enumerated perils covered by the standard form include:

- a. Fire/lightening;
- b. Windstorm or hail. It should be noted that rain damage will only be covered if the direct force of the wind creates an opening in the structure through which the rain enters. See New Hampshire Insurance Company v. Carter, 359 So.2d 52 (Fla. 1st DCA 1978). The policy does not provide coverage for damages which result solely due to a leaky roof. Stufflebean v. Fireman 's Fund Insurance Company, 710 S.W.2d 931 (Mo. App. W.D. 1986).
- c. Explosion;
- d. Riot or civil commotion;
- e. Vehicles;
- f. Vandalism or malicious mischief. Coverage for vandalism applies even though the damage may have occurred in the course of an uncovered event, i.e., a burglary. See Allstate Insurance Company v. Coin-O-Mat Inc., 202 So.2d 598 (Fla. 1st DCA 1967) Damage by a wild animal, however, will in all likelihood not constitute vandalism. See Montgomery v. United Services Automobile Association, 886 P.2d 981 (N.M. Ct. App. 1994) (noting that a bobcat lacked the intent necessary to commit an act of vandalism) Id. at 981.
- g. Theft is generally covered, as is attempted theft and loss of property. However, theft is not covered if committed by or at the direction of an insured. Further, no theft is covered if it occurs to a dwelling under construction. A theft may include items lost in an unlawful repossession, even if performed in good faith. St. Paul Fire & Marine Insurance Company v. Pensacola Diagnostic Center and Breast Clinic, 505 So.2d 513 (Fla. 1st DCA 1987). Property of a student, who is an insured, is covered while at a residence away from home if the insured has been at said residence at any time during the forty-five (45) days immediately before the loss.

- h. Accidental Discharge or Overflow of Water - discharge of water from a plumbing, heating, air-conditioning system, automatic sprinkler or household appliance is covered. The discharge must originate on the residence premises. The term household appliance means a device that performs a task in or around the home. It does not include items such as a waterbed. See West American Insurance Company v. Lowrie, 600 So.2d 34 (Fla. 3rd DCA 1992). Further, a discharge of water resulting from a backup or discharge occurring off premises is not covered. Hallsted v. Blue Mountain Convalescence Center, 595 P.2d 514 (Wash. Ct. App. 1979) (sewer backup causing damage is not a covered event).

Policy Exclusions

Most policies also have a list of exclusions that operate to preclude coverage to both the dwelling and personal property losses, and if such exclusion applies, the policy will afford no coverage regardless of the item or property involved. Most policies carry an exclusion for damage caused by earth movement, which is usually defined as loss caused by the earth sinking, rising, or shifting. However, the Florida Supreme Court has recently held that, in the absence of specific policy language to the contrary, this exclusion applies only where the earth movement results from natural events as opposed to man-made events such as road blasting. Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082 (Fla. 2005). An exception to this exclusion applies where the policy has a sinkhole collapse endorsement. Zimmer v. Aetna Insurance Company. 383 So.2d 992 (Fla. 5th DCA 1980).

An exclusion typically exists for ordinance or law coverage, which means damage or expense caused by the enforcement of any ordinance or law regulating the construction, repair or demolition of a building.¹ See State Farm Fire & Casualty Co. v.

¹ Most property insurers will provide ordinance and law coverage by way of a policy endorsement for an additional premium.

Metropolitan Dade County, 639 So. 2d 63 (Fla. 3d DCA 1994) (improvements to homes damaged by Hurricane Andrew to bring them into compliance with code is not covered). Damage from flood or rising surface waters is typically excluded. This includes water which backs up from a sewer or drain. However, direct loss caused by fire, explosion, or theft resulting from water damage is covered. A loss resulting from war or nuclear hazard is also typically the subject of an exclusion.

No property coverage is provided for any loss arising from an intentional act committed by or at the direction of an insured. Further, there is no coverage for damage resulting from an insured's neglect after a covered loss. An insured is required to use all available reasonable means to protect and preserve property following a loss. Failure to do so will preclude any coverage for loss or deterioration, which occurs after the insured event. McCorkle v. Valley Forge Ins. Co., 665 S.W. 2d 898 (Ark. Ct. App. 1984).

THE INSURED'S POST-LOSS DUTIES

In addition to establishing that a particular loss is covered, most policies contain a laundry list of post-loss duties an insured must comply with or potentially risk a forfeiture of coverage. These duties include giving the insurer and/or its agent prompt notice of the loss; notifying the police in case of loss by theft; protecting the property from further loss; preparing an inventory of damaged personal property showing its quantity, description and actual cash value; and submitting a signed, sworn proof of loss. As often as the insurer reasonably requires, the insured will also be required to show damaged property; provide records and documents requested and permit copies to be made; and submit to an

Examination Under Oath (“EUO)” while not in the presence of any other insured. An insured’s refusal to comply with a demand for a EUO can be considered a material breach of the contract which will preclude an insured from recovery under the policy. Goldman v. State Farm Fire General Insurance Company, 660 So. 2d 300 (Fla. 4th DCA 1995) and Stringer v. Fireman’s Fund Insurance Co., 622 So. 2d 145 (Fla. 3rd DCA 1993). It is important to note that a policy provision requiring an EUO is a condition precedent to suit rather than a “cooperation clause.” Thus, an insurer need not show prejudice to validly deny a claim based on an insured’s failure to submit to a EUO. Goldman, supra. Even an offer to submit to a deposition following the filing of suit will not excuse the failure to attend a EUO. Goldman, supra.

LOSS SETTLEMENT

Most standard homeowner’s policies give an insurer the option to settle covered property losses by either paying the insured the actual cash value (ACV); replacing or paying the insured the cost to replace the property with property of like kind, quality, age and condition; or paying the insured the cost to repair or restore the property to the condition it was in just before the loss.

Replacement Cost Coverage

An insured can purchase, for an extra premium, a rider or endorsement for replacement cost coverage. Replacement cost is typically defined as the cost, at the time of loss, of a new item identical to the one damaged, destroyed or stolen. Replacement cost insurance is designed to cover the difference between what property is actually worth (ACV) and what it would cost to rebuild or repair that property. It is insurance on the property’s depreciation. Most replacement cost endorsements provide, and courts that

have interpreted such endorsements have held, that an insurance company's liability for replacement cost does not arise until the repair or replacement has been actually made.

State Farm Fire & Casualty Co. v. Patrick, 647 So. 2d 983 (Fla. 3rd DCA 1994).

Additionally, most policies impose a time limit, usually 180 days after the date of the loss, for the insured to replace the property and make a claim for the replacement cost. The practitioner must be aware, however, that Florida Statute §627.7011 was amended in 2005 and now requires that the insurer pay full replacement cost coverage up front, regardless of whether the insured actually replaces the property. Therefore, if your claim arises after July 1, 2005, the effective date of the amended statute, an insured is entitled to full replacement cost coverage upon the loss of property.

An insurer loses its option of repairing as opposed to replacing damaged property where a statute, rule or regulation requires that the insured replace damaged property. Northbrook Property & Casualty Ins. Co., v. R & J Crane Service, Inc., 765 So. 2d 836 (Fla. 4th DCA 2000) ("Because we conclude that the insurance contract must be interpreted in light of existing statutes and regulations surrounding its subject, we hold that where the OSHA regulations preclude repair of the property, the insurer is obligated to replace, rather than repair the damaged crane.") Also, where the insurer elects to repair the damaged property rather than pay its value, and where the insurer selects the repair contractor, the insurer can be held liable for any consequential damages resulting from the contractor's negligence or any unreasonable delay in making the repairs. Travelers Indemnity Co. v. Parkman, 300 So. 2d 284 (Fla. 4th DCA 1974) and Coleman v. American Bankers Ins. Co. of Florida, 228 So. 2d 410 (Fla. 3rd DCA 1969).

APPRAISAL

For the purported purpose of avoiding protracted and expensive litigation arising from property claims, insurers insert appraisal provisions in most standard homeowner's policies. However, as will be discussed in further detail below, these provisions are often times used by insurers to gain both an unfair economical and tactical advantage over its insured during the claims process. With the exception of minor variations in the terminology employed, most appraisal provisions take the following form:

"If you and we do not agree on the **amount of the loss**, either party can demand that the amount of the loss be determined by appraisal. If either makes a written demand for appraisal, each will select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand.

The two appraisers will then select a competent, impartial umpire. If the two appraisers are not able to agree upon the umpire within 15 days, 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 will then set the amount of loss. If they submit a written report of any agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree within a reasonable time, they will submit their differences to the umpire. Written agreement signed by any two of these three will set the amount of the loss. The party selecting that appraiser will pay each appraiser. Other expenses of the appraisal and the compensation of the umpire will be equally paid by you and us."

Recently, there have been many reported appellate decisions regarding the procedural and substantive aspects of the appraisal process. As reflected in the above appraisal clause, either the insured or the insurer can demand that the amount of the loss be determined by appraisal, where a disagreement as to the amount of the loss exists. However, before submitting to the appraisal process, the practitioner must first determine

whether appraisal is appropriate, whether it has been prematurely demanded and whether the insurer has waived its contractual appraisal rights.

Appropriateness of Appraisal

In determining whether appraisal is an appropriate method of dispute resolution, the practitioner must be mindful that Florida courts have consistently held that appraisal is appropriate only to determine the amount of the loss, while questions of coverage are for the courts. See USF & G v. Romy, 744 So. 2d 467 (Fla. 3rd DCA 1999) (“Arbitrable issues involved with appraisal, by their nature, are narrowly restricted to the resolution of specific issues of actual cash value and the amount of the loss”). Compare with Johnson v. Nationwide Mutual Ins. Co. 828 So. 2d 1021 (Fla. 2003) (Causation is a coverage question for the court when an insurer wholly denies that there is a covered loss and an amount of loss question for the appraisal panel when an insurer admits a covered loss, but the amount is disputed.)

Appraisal is appropriate only if there exists an actual disagreement as to the amount of the loss. In other words, the disagreement necessary to trigger appraisal cannot be unilateral. Romy, supra. Do not permit an insurer to invoke the appraisal clause if the insurer has not independently determined the amount of the claimed loss. (“In other words, by the terms of the contract, it was contemplated that the parties would engage in some meaningful exchange of information sufficient for each party to arrive at a conclusion before a disagreement could exist”). Romy, supra. A corollary to this rule is that an insured must comply with the policy’s post-loss duties prior to attempting to compel appraisal. Romy, supra. (“The nature of the post-loss obligations are merely to provide the insurer with an independent means by which to determine the amount of the loss, as opposed to

relying solely on the representations of the insured.") See also Scottsdale v. University at 107th Avenue, Inc., 827 So. 2d 1016 (Fla. 3rd DCA 2002).

Finally, be aware of policies that contain language that gives the carrier the right to continue to deny a claim post-appraisal. This language often takes the following form: "If we submit to an appraisal, we still retain our right to deny the claim." The Florida Supreme Court in State Farm Fire and Casualty Co. v. Licea, 785 So. 2d 1285 (Fla. 1996); held that such a clause was not void for lack of mutuality of obligation, but only to the extent that the clause is interpreted as referring to the insurer's right to dispute coverage as a whole and issues of whether there has been a violation of the usual policy conditions of fraud, lack of notice and failure to cooperate.

Department of Insurance Mediation

Even where appraisal is appropriate to resolve a dispute as to the amount of the loss, make sure the insurer has offered the insured his/her statutory right to participate in a Department of Insurance sponsored mediation prior to appraisal. See §627.7015, Fla. Stat. The Florida Legislature, when it enacted §627.7015, recognized that appraisal is not always the quick, inexpensive means of dispute resolution that insurers portray it to be and when it stated:

- (1) "There is a particular need for an informal, non-threatening forum for helping parties who elect this procedure to resolve their claims disputes because most homeowner's insurance policies obligate insureds to participate in a potentially expensive and time-consuming adversarial appraisal process prior to litigation... This section is available with respect to claims under personal lines policies for all claimants and insurers prior to commencing the appraisal process, or commencing litigation... This section does not apply to commercial coverages, to private passenger motor vehicle insurance coverages, or disputes relating to liability coverages in policies of property insurance."

Subsection (2) of the statute mandatorily requires that the insurer notify all first-party claimants of their right to participate in the mediation program under this section, at the time a first-party claim is filed.

Implied Waiver of Appraisal Right

The statute was amended in 2005 to provide that an insurer who fails to comply with the statute by notifying a first-party claimant of their right to statutory mediation, waives their contractual right to demand appraisal to determine the amount of the loss.

An insurer may also waive its right to appraisal where it takes action inconsistent with the use of appraisal to resolve the dispute. Gray Mart, Inc. v. Fireman's Fund Ins. Co., 703 So. 2d 1170 (Fla. 3rd DCA 1997); U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983) and Finn v. Prudential-Bache Securities, Inc., 523 So. 2d 617 Fla. 4th DCA 1988). Florida courts recognize that a party's contractual right to appraisal may be waived by actively participating in a lawsuit. Gray Mart, supra. Filing an answer without asserting the right to appraisal, initiating a legal action without seeking appraisal and counterclaiming without raising the issue of appraisal will act as a waiver. Phillips v. General Accident Ins. Co. of America, 685 So. 2d 27 (Fla. 3rd DCA 1996); Transamerica Ins. Co. v. Weed, 420 So. 2d 370 (Fla 1st DCA 1982). However, the Court held in Phillips, supra, that an insured did not waive the right to arbitration by serving discovery limited in scope and for the only purpose of obtaining information relevant to the trial court's determination of whether the right to arbitration was present. Until recently, a conflict existed in the District Courts of Appeal as to whether a showing of prejudice is indispensable to a finding of waiver of the right to arbitration or appraisal. The Florida

Supreme Court resolved this conflict in Raymond James Financial Services, Inc. v. Saldukas, 896 So.2d 707 (Fla. 2005) when it held that an effective waiver of the right to appraisal does not require proof of prejudice. It must be noted, however, that a mere delay in the assertion of one's right to arbitrate does not constitute waiver unless the delay has given the party seeking appraisal an undue advantage or has resulted in prejudice to another. Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Melamed, 453 So.2d 858 (Fla. 4th DCA 1984). Similarly, an insurer's failure to immediately demand arbitration upon discovering that there is a large disparity between the insurer's appraisal and the insured's appraisal did not constitute a waiver of the right to appraisal. U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983). Finally, an insurer does not waive its right to appraisal by failing to request appraisal prior to a homeowner filing suit to collect benefits under the policy. Gonzalez v. State Farm Fire and Casualty Co., 805 So. 2d 814 (Fla. 3d DCA 2000).

Appraisal Procedures

If and when it is determined that appraisal is appropriate to resolve a given dispute, the practitioner must be familiar with the procedural rules that govern appraisal, including the selection of the appraisers and umpire. The starting point for this task is to reference the particular policy language involved. Most policies provide that both the insured and the insurer each appoint a competent, independent appraiser. The two appraisers then select a competent, impartial umpire. If the two appraisers are not able to agree upon an umpire, either side can petition a court in the state where the residence premises is located to select an umpire. I suggest that you do not, under any circumstances, accept the “neutral” umpire recommended by the insurer or its appraiser. Invariably, this purported “neutral” umpire is a person or firm who has previously been appointed as the insurer’s appraiser on other claims. Instead, I recommend that the Court be petitioned to appoint a neutral umpire such as a mediator or a retired judge.

Qualifications of Appraisers

The qualifications for each party’s selected appraiser are minimal. According to the policy language, they must be competent and independent. An appraiser does not need to be a lawyer, but can be a non-lawyer with expertise appropriate to the issues at hand. Liberty Mutual Fire Ins. Co. v. Hernandez, 735 So. 2d 587 (Fla. 3rd DCA 1999). With respect to the policy requirement that an appraiser be independent, one court has defined this as an outside appraiser, unaffiliated with the parties and one where the appointing party does not have an ownership interest in the firm designated to do the appraisal. Rios v. Tri-State Ins. Co., 714 So. 2d 547 (Fla. 3rd DCA 1998). The Rios court also held that a direct or indirect financial interest in the outcome of the appraisal does not require the

disqualification of an appointed appraiser. Thus, an appraiser paid by a contingent fee percentage of the award was deemed to be an “independent appraiser” within the meaning of an appraisal clause. See also Galvis v. Allstate Ins. Co., 721 So. 2d 421 (Fla. 3rd DCA 1998).

Applicability of Arbitration Code

Until recently, a conflict existed among the District Courts of Appeal as to whether appraisal clauses in homeowners’ insurance policies are considered agreements to arbitrate and are governed by the Florida Arbitration Code. The conflict was resolved by the Florida Supreme Court in Allstate Ins. Co. v. Suarez, 833 So. 2d 762 (Fla. 3rd DCA 2002), wherein the Court held that such clause contemplates an informal process which is not governed by the Florida Arbitration Code.

Court Proceedings

Once the appraisal is concluded, make sure that the appraisal award is in writing and signed by two of the three members of the appraisal panel. Pursuant to Florida Statute §682.12, upon application of a party to the appraisal, the court shall confirm an award, unless a party makes a timely application to vacate, modify or correct the award pursuant to §682.13 or §682.14, Florida Statutes. Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when: (a) there is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (b) the arbitrators or umpires have awarded upon a matter not submitted to them or him and the award may be corrected without effecting the merits of the decision upon the issues submitted; and (c) the award is imperfect as a matter of form, not effecting the merits of the controversy.

Pursuant to §682.13, Fla. Stat., upon application of a party, the court shall vacate an award when: (a) the award was procured by corruption, fraud or other undue means; (b) there is evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party; (c) the arbitrators or umpire in the course of his jurisdiction exceeded their powers; (d) the arbitrators or the umpire refused to postpone the hearing upon sufficient cause being shown therefore or refuse to hear evidence material to the controversy or otherwise so conducted the hearing, as to prejudice substantially the right of a party; and (e) there is no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under §682.03 and unless the party participated in the arbitration hearing without raising the objection. Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Section 682.15 Fla. Stat.

ATTORNEYS' FEES, COSTS AND PREJUDGMENT INTEREST

Florida courts have consistently held that an insured, as a prevailing party, can recover attorneys' fees incurred during arbitration or appraisal proceedings pursuant to §627.428 and/or §682.11, Florida Statutes. Insurance Company of North America v. Acousti Engineering Company of Florida, 579 So. 2d 77 (Fla. 1991); Fewox v. McMerit Construction Co., 556 So. 2d 419 (Fla. 2nd DCA 1989); and Scottsdale Insurance Company v. DeSalvo, 748 So.2d 941 (Fla. 1999); See also a case handled by the undersigned, Travelers Indemnity Insurance Company of Illinois v. Meadows MRI, LLP, 900 So. 2d 676 (Fla. 4th DCA 2005). Compare with Nationwide Property & Casualty Insurance Co. v. Bobinski, 776 So. 2d 1047 (Fla. 5th DCA 2001) wherein an insured was

denied an award of attorneys' fees where the insured first filed suit after the appraisal award had been rendered. The Court also determined that suit was filed solely to obtain attorneys' fees under the statute. Please note that the arbitrators or appraisers are prohibited from determining an award of attorneys' fees, unless the parties confer jurisdiction on the arbitration/appraisal panel to decide entitlement to attorneys' fees and assess the amount of the fee. Acousti Engineering, supra.

Generally, the prevailing party to an appraisal proceeding is entitled to recover their appraisal fees as costs of the proceeding. State Farm Fire and Casualty Co. v. Albert, 618 So. 2d 278 (Fla. 3rd DCA 1993) and American Indemnity Co. v. Coneau, 419 So. 2d 670 (Fla. 5th DCA 1982). However, if the policy specifically addresses this issue, the policy language will control. Aries Ins. Co. v. Hercas Corp., 781 So. 2d 429 (Fla. 3rd DCA 2001).

The insured is entitled to recover prejudgment interest from the date of the appraisal award. DeSalvo v. Scottsdale Insurance Company, 705 So. 2d 694 (Fla 1st DCA 1998) ("Appraisal of insured property loss created liquidated damages entitling insured to prejudgment interest from the date of the award.")

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