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IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC21-883

AMERICAN COASTAL INSURANCE
COMPANY,

Petitioner,

v.

SAN MARCO VILLAS CONDOMINIUM
ASSOCIATION, INC.,

Respondent.
_________________________/

RESPONDENT'S ANSWER BRIEF

On Discretionary Review of a Decision of the District Court of Appeal, Second District

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PRELIMINARY STATEMENT

This case is before this Court based on certified conflict by the Second District Court of Appeal.

The Petitioner, American Coastal Insurance Company, will be referred to as the "Insurer."

The Respondent, San Marco Villas Condominium Association, Inc., will be referred to as "San Marco."

The Insurer's Amended Initial Brief on the Merits will be cited as "Amended Initial Brief."

The record will be cited as "R.__."

STATEMENT OF FACTS

The Appellant's Statement of the Case and Facts contains substantial argument by counsel, including innuendo and unnecessary inferences unsupported by the record, as well as stating mere allegations as established facts. Accordingly, it is necessary for the Appellee to restate the facts.

San Marco Condominium Association, Inc. ("San Marco") is the entity responsible for the operation of the San Marco Condominium community located on Marco Island in Collier County, Florida. The community took a direct hit from Hurricane Irma on September 10, 2017 and sustained substantial damage. R. 55.

The condominium buildings were insured by a policy issued by American Coastal Insurance Company (the "Insurer.") R. 60. San Marco made a timely claim to the Insurer for Hurricane Irma damage, and the Insurer opened a claim file. The Insurer accepted coverage, inspected the property to its satisfaction and made a claim payment of $192,629.75, net of applicable deductibles and depreciation. R. 56.

In its Statement of Facts, the Insurer impliedly criticizes San Marco for using a public adjuster. Amended Initial Brief at 9. This criticism is argument that is inappropriate in a Statement of Facts.

The Board of San Marco had a fiduciary duty to hire a public adjuster. The Board was required to ensure that a prompt claim was made to the Insurer, if necessary, in order to preserve insurance benefits for all of San Marco. The Board of San Marco, a group of retirees and part-time residents, were very poorly equipped to make an investigation, determine the damage, and present a claim on their own. Therefore, they also had a fiduciary duty to retain a professional to assist in meeting their fiduciary duty to make a prompt claim.

San Marco disagreed with the Insurer's determination of the amount of the claim and submitted a Statement of Loss of $6,917,023.96. R.246-247. San Marco also demanded appraisal of the loss, *id*, invoking the appraisal clause of the policy that applies whenever the parties "disagree on the value of the property or the amount of loss." R. 101.

The Insurer also improperly criticizes San Marco in its Statement of Facts for originally appointing its public adjuster as its appraiser. Amended Initial Brief at 10-11. What the Insurer omits to mention is that this was done on October 25, 2018. R. 93. Two weeks earlier, the Third District in *Brickell Harbour Condo Ass'n., Inc. v. Hamilton Spec. Ins. Co.*, 256 So.3d 245, 249 (Fla. 3rd DCA 2018) had

approved an insurer's appointment of an employee of the insurer's consultants on the claim as an appraiser. Then, in *State Farm Fla. Ins. Co. v. Sanders*, 327 So.3d 342 (Fla. 3rd DCA 2020) the court specifically endorsed the practice of appointing the insured's public adjuster as the insured's appraiser. Nevertheless, San Marco made this issue moot by voluntarily withdrawing the adjuster as an appraiser on August 17, 2020. R. 554. This was long in advance of this Court's decision earlier this year in *Parrish v. State Farm Fla. Ins. Co.*, ___ So.3d ___, SC21-172, 2023 WL 1830816 (Fla. February 9, 2023) resolving this previously unsettled question of Florida law.

The Insurer conducted extensive further investigation including EUO's and inspection of San Marco's books and records. R. 102, 249-266, 567, 573. This investigation included demanding a sworn proof of loss from San Marco. San Marco complied and submitted a Sworn Proof of Loss in the amount of $7,203,909.25. R. 137.

After an unsuccessful voluntary pre-suit mediation, App.569, 574, San Marco filed suit on June 9, 2020, R. 54, and promptly filed its Motion to Compel Appraisal on July 7, 2020, R. 129. In response to the Complaint, for the first time, the Insurer asserted a fraud defense and denied coverage. R. 552, 545-550. The Insurer

unilaterally determined that San Marco's claim was a fraud, and accordingly unilaterally declared that the policy was void, and thus denied liability under the policy. *Id.* The Insurer opposed the appraisal asserting that its unilateral acts of declaring that the claim was a fraud and declaring the policy void precluded San Marco's contractual rights to appraisal. R. 142, 153. After hearing, the trial court granted San Marco's motion to compel appraisal. R. 554.

The Insurer appealed to the Second District Court of Appeal, which affirmed based on *Am. Cap. Ass. Corp. v. Leeward Bay at Tarpon Bay Condo Ass'n*, 306 So.3d 1238 (Fla. 2d DCA 2020); *Am. Cap. Ass. Corp. v. Cayman I at Tarpon Bay Condo Ass'n,* 313 So.3d 847 (Fla. 2d DCA 2021); and *Villagio at Estero Condo Ass'n v. Am. Cap Ass. Corp.*, Case No. 2020-1414, 2021 WL 1432160 (Fla. 2d DCA April 16, 2021). R. 682. The district court certified conflict with *Citizens Prop. Ins. Corp. v. Demetrescu*, 137 So. 3d 500 (Fla. 4th DCA 2014), *Citizens Prop. Ins. Corp. v. Michigan Condominium Ass'n,* 46 So. 3d 177 (Fla. 4th DCA 2010), and Sunshine *State Ins, Co. v. Corridori*, 28 So. 3d 129 (Fla. 4th DCA 2010). *Id.*

The Insurer filed a Notice to Invoke Discretionary Jurisdiction in this Court, R. 696, where the case was stayed pending decision in

Leeward Bay, R. 712, and later *Weston Ins. Co. v. Riverside Club Condo. Ass'n.* Case No. SC21-567 as raising issues similar to those and other cases. Ultimately, this case became the lead case.

STANDARD OF REVIEW

San Marco disagrees with the Insurer's statement of the standard of review. Whether to refer a matter to appraisal prior to determining liability is a matter of discretion for the trial court, and is reviewed for an abuse of discretion. *American Coastal Ins. Co. v. Villas of Suntree Homeowner's Ass'n, Inc.*, 346 So.3d 126, 130 (Fla. 5th DCA 2022).

SUMMARY OF ARGUMENT

This Court's decision in *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021 (Fla. 2002) permits lower courts to exercise their discretion in insurance claim lawsuits to decide the issues in the order in which they logically present themselves, and in the forum that the parties have chosen. The Insurer and others in the insurance industry have misinterpreted *Johnson* to further an argument that if an insurer raises a defense that it labels as a "coverage" issue, then there is nothing left to appraise and the parties' chosen forum of appraisal is no longer available to quantify the amount of a loss. *Johnson* says nothing of the kind. It merely holds that the chameleonic issue of causation is a legal issue for the court to decide when it raises an issue of law on coverage, and a factual valuation issue that may be referred to appraisal when it involves the amount of loss. *Johnson* is silent on the order in which any issues should be resolved by a trial court. Thus, the Insurer's entire theory of how this case must proceed in the trial court is predicated on a false premise and misunderstanding of *Johnson*.

A misrepresentation or claim exaggeration affirmative defense does not raise a coverage issue. Instead, it raises a question of the

amount of loss. Coverage is determined by the language of the policy stating who may make a claim and what risks or perils are covered. The claim exaggeration affirmative defense raised by the Insurer assumes that coverage exists, and in fact the Insurer conceded coverage in this case. The affirmative defense depends on determining the value of the claim. This is a question that the parties have allocated to the appraisers, and it should be determined before addressing any legal issues.

Appraisal is a judicially preferred method of valuing insurance claims because it avoids the waste of time and resources that results from a battle of the experts before a jury. The Insurer's misreading of *Johnson* deprives the parties and the court of this benefit, because an insurer simply needs to incant the language of fraud and the insured's contractual right to appraisal evaporates.

The Insurer is amply protected in the appraisal process. That protection comes from: choosing its own appraiser; providing that appraiser with all of the information that led the Insurer to make its fraud accusations; the neutrality of the umpire; the appraisers' independent, expert and first-hand inspection of the buildings and components; and requiring a detailed, line-item appraisal. The

Insurer chose to include the right to appraisal in the policy that it wrote, and should not now be heard to complain that appraisal is unfair or inadequate to the task.

All homeowners' insurance policies in Florida have a requirement for mediation if demanded by a party, similar to this policy's requirement for appraisal if demanded by a party. However, the statute grants no right to mediation if the insurer asserts fraud in the claim. This proviso is noticeably absent from the appraisal clause in this policy. Reading the entire policy *in pari materia*, this omission must mean that an assertion of fraud does not affect the right to demand appraisal.

ARGUMENT

I. THIS COURT IN *NATIONWIDE V. JOHNSON* DID NOT REQUIRE THAT AFFIRMATIVE DEFENSES TO PAYMENT UNDER AN INSURANCE POLICY MUST BE DETERMINED BEFORE THE CLAIM CAN BE SENT TO APPRAISAL[1]

Like most insurance policies, the policy in this case contained a clause stating that the benefits of the policy will be voided or forfeited if the insured engages in misrepresentation to the insurer. The Insurer has misinterpreted this Court's decision in *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021 (Fla. 2002) to mean that if an insurer asserts a defense under such a forfeiture clause, no appraisal can be had until the affirmative defense is determined. The Insurer is mistaken.

Johnson did not address the timing of proceedings in trial courts. The issue in *Johnson* was whether causation was a coverage question for the court to decide (i.e. whether the loss was caused by an insured peril) or amount of loss question for appraisers to decide. *Johnson*, 828 So.2d at 1022. *Johnson* simply did not address the relative timing of an appraisal vis-a-vis a court determination of

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[1] The Insurer's points labelled IA and B make virtually the same argument that is addressed under this point I.

coverage, and certainly not in the context of an affirmative defense to liability under the policy based on allegations of misrepresentation.

In *Johnson*, the insurer completely denied coverage based on the scope of the insuring clause of the insurance contract, and the causation issue was whether the damage was caused by a sinkhole (a covered peril) or by normal settling. *Johnson* did not address an affirmative defense to a policy, particularly an affirmative defense that only arises after a loss has been incurred or a claim has been made.

Johnson decided that a causation question related to interpreting whether the loss arose from an insured risk or peril is a question raising a legal issue predicated on the interpretation of the contract of insurance, and thus is more appropriately decided by the court. However, when there has been a loss within the coverage of the policy, but there are factual issues regarding how much of the observed damage was caused by a risk within the insuring language of the policy, the appraisers should decide. For example, a windstorm could damage a roof and require its replacement. However, if the policy excludes dry rot, and the scope of the repair is multiplied by the existence of dry rot, then the appraisers should determine the

amount of the loss that was actually caused by the insured risk or peril.

Johnson does not address or discuss the order in which a trial court should consider and address coverage issues and damages issues. As always, this is left to the trial court's broad discretion in controlling its own docket to bring cases to resolution quickly and efficiently.

A. A Misrepresentation Affirmative Defense Is Not A Coverage Defense

The Insurer's argument depends on classifying its affirmative defense of forfeiture as a "coverage" defense or a voidance of "coverage." That classification of the defense is what leads the Insurer to apply its misreading of *Johnson* and its "wholly denies there is a covered loss" language. This is an example of the material logical fallacy of equivocation - an ambiguity created when a single word is used to describe two different things. https://plato.stanford.edu/entries/fallacies/#CORFAL (last visited April 11, 2023). When describing a misrepresentation allegation as a coverage defense, the insurer is using the term "coverage" in its broadest possible colloquial meaning. For example, a lay person

would say that any denial of insurance benefits is denial of coverage, without considering the reason why insurance benefits were denied.

In the law, "coverage" has a more precise definition as a term of art. *"Black's Law Dictionary"* defines coverage as "[i]nclusion of a risk under an insurance policy" *Black's Law Dictionary* 394 (8th edition 2004). A risk is defined as "[t]he type of loss covered by a policy; a hazard from a specified source." *Id* at 1353." *Ceballo v. Citizens Property Ins. Corp.*, 967 So.2d 811, 813 (Fla. 2007). This is why insurance policies or discussions of insurances policies often refer to "covered perils" or "covered risks." *E.g., id.* at 812, 813.

The covering clauses in an insurance policy state or define the covered persons and the risks or perils that are covered by the policy. Exclusion clauses limit the generality of coverage clauses. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2nd 871, 881 (Fla. 2007) ("[T]he exclusion clauses of the policy… restrict and shape the coverage otherwise afforded," quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 778, 792 (N.J. 1979)). Thus, properly understood, when an insurer "wholly denies that there is a covered loss," *Johnson*, 828 So.2d at 1022, it is saying that the loss is not among the perils covered by the policy. Here, despite the repeated Insurer's claims, it did not deny

that there is a covered loss. Rather, it denied liability for reasons wholly unrelated to the scope of coverage under the policy.

The danger of the Insurer's equivocation is demonstrated by its mistaken reliance on *State Farm Fire & Cas. Co. v. Licea*, 685 So.2d 1285, 1287 (Fla. 1996) for the blanket principle that any argument that an insurer chooses to label broadly as "coverage" is solely a judicial question and not for an appraiser. In *Licea*, there was no "coverage" issue before this Court. Rather, the question was whether a "no waiver of rights" clause rendered the appraisal clause void for lack of mutuality. This Court's citation in *Licea* to *Midwest Mut. Ins. Co. v. Santiesteban*, 287 So.2d 665 (Fla. 1974) on what constitutes a coverage question provides clarity. In *Santiesteban*, the insurer and insured had an appraisal (called arbitration at the time) of a loss from a motorcycle accident under two policies, but the insurer denied coverage under one of the policies. Importantly, this denial was based on the covering language of that policy, listing those persons entitled to insurance benefits under the policy. This illustrates San Marco's point here – a question of "coverage," properly defined, is not a matter that can be submitted to appraisal because it is a legal question committed to judicial resolution and the interpretation of a

contract. *Santiesteban*, 287 So.2d at 667 ("A challenge of *coverage* is exclusively a *judicial question….*")(emphasis original). *See generally, Aetna Cas. & Sur. Co. v. Warren Bros. Co*, 355 So.2d 785, 787 (Fla. 1978) ("[I]nterpretation of [a] contractual provision [is] a question of law to be resolved by the Court, rather than a factual question for jury resolution."); *Peacock Const. Co., Inc. v. Modern Air Cond., Inc.* 353 So.2d 840, 842 (Fla. 1977) (interpretation of a contract is a matter of law for the court, not a jury); *First Call 24/7, Inc. v. Citizens Prop. Ins. Corp.*, 333 So.3d 1180, 1182 (Fla. 1st DCA 2022).

This analysis also reveals a glaring inconsistency in the Insurer's argument in this case. The Insurer has asked in this case for a jury trial on the amount of San Marco's loss. Amended Initial Brief at 19, 20. This is a concession that the amount of loss is a jury question, or a question of fact. It cannot also be a judicial question or a question of law. Therefore, an amount of loss issue cannot be a coverage issue, and a denial based on the amount of the loss is not a denial of coverage.

Even if a particular case presents a mixed question of law and fact, or a question of law that is dependent upon a finding of fact, the

factual issue is for the chosen finder of fact to decide. *E.g., Ocean Concrete, Inc. v. Indian River County, Bd. Of County Comm.*, 241 So.3d 181 (Fla. 4th DCA 2018); *Bone & Treatment Ctrs. of Am. v. HealthTronics Surg. Svs., Inc.*, 114 So.3d 363 (Fla. 3d DCA 2013). If a jury trial has been demanded, then the finder of fact is a jury. If the parties have chosen appraisal to decide a defined factual issue (the amount of loss) then the finder of fact is the appraisal panel.

The fraud or misrepresentation clause in San Marco's policy is neither a covering clause nor an exclusion clause. It does not define the perils or risks that are insured against under the policy or define covered persons. Instead, the fraud or misrepresentation clause presumes the existence of coverage under the policy, but allows an affirmative defense to liability under that coverage in the event that the insurer is able to prove fraud or misrepresentation within the meaning of the policy. Deciding whether or not fraud or misrepresentation occurred is not a coverage question. It is a not a question that turns on what risks are included in or excluded from a policy of insurance or who is covered. In fact and function, the fraud and misrepresentation clause is a forfeiture clause that forfeits coverage that would have otherwise existed, even as to aspects to the

claim untainted by fraud or misrepresentation, if there is fraud either in the application or the claims process. *Anchor Prop. And Cas. Ins. Co. v. Trif*, 322 So.3d 663, 671 (Fla. 4th DCA 2021). The Insurer concedes this. Amended Initial Brief at 19.

The Fourth District Court of Appeal in the conflict cases found that coverage must be determined before appraisal is allowed because consideration of liability proceeds consideration of damages. This order of consideration argument may have some appeal in cases like *Citizens Prop. Ins. Corp. v. Demetrescu*, 137 So.3d 500 (Fla. 4th DCA 2014), where coverage was truly at issue. As noted above, that is not true here. The order of consideration in this case should not be dictated by bromides about the hierarchy of issues in any case. Instead, the issues should be decided in the order in which they logically present themselves. Here, the issue of the amount of loss is a predicate issue to the Insurer's denial of liability under the policy. Determining whether the claim was exaggerated requires a quantification of the loss. Accordingly, the amount of the loss must be determined first. The parties' chosen method for resolving issues of the amount of loss is by appraisal. Any other coverage disputes, or the factual issues of whether any exaggerations were intentional or

material, would remain for consideration by a court or jury. *Licea*, 685 So.2d at 1288; *Liberty Am. Ins. Co. v. Kennedy*, 890 So.2d 539 (Fla. 2d DCA 2005). As *Johnson* makes clear, appraisers simply determine the amount of the loss. The *Leeward* court recognized that trial courts, reacting to the myriad factual patterns presented before them, require the flexibility and authority to order appraisal in insurance cases when doing so, in the discretion of the trial court, will advance the case in an effective and economical way.

The Insurer draws a false distinction between this case and *Sunshine State Ins. Co. v. Rawlins*, 34 So.3d 753, 754 (Fla. 3rd DCA 2010). Amended Initial Brief, page 28. The Insurer notes that the insurer in *Rawlins* conceded coverage, then falsely suggests that it never conceded San Marco suffered any loss within the covering language of the policy. This is false. As the Insurer itself recites in its Statement of Facts, it initially concluded that there was coverage for San Marco's loss and made payments to San Marco. Amended Initial Brief at 9, 10. Thus, the Insurer originally conceded coverage. It was only when after-the-fact allegations about after-the-fact events gave rise to an alleged defense that the Insurer attempted to argue that there had not been any coverage from the outset. Effectively, the

Insurer is asking to take a mulligan on its own original coverage determination. But the Insurer is not entitled to a do-over. The mere fact that the Insurer has sought the return of its prior payments cannot alter history to erase this prior concession of coverage under the language of the policy.

B. Proper Classification Of The Affirmative Defense Resolves The Conflicts.

Properly understanding this distinction harmonizes this case with all of the cases cited as being in conflict. The Second District Court of Appeal in *Leeward Bay* noted conflict with *Demetrescu; Citizens Prop. Ins. Corp. v. Mich. Condo. Ass'n*, 46 So.3d 177 (Fla. 3rd DCA 2010) and *Sunshine State Ins. Co. v. Corridori*, 28 So.3d 129 (Fla. 4th DCA 2010). However, none of these cases dealt with forfeiture clauses or any contract based affirmative defenses to payment under the policy, as is the case here. Rather, the Fourth District addressed the scope of the covering clauses in the pertinent policies, or gave insufficient detail to discern the coverage question involved. For example, in *Demetrescu*, the insurer denied coverage because the loss was attributed to wear and tear, constant seepage, faulty design and maintenance, neglect in preexisting damage, all of which were

expressly excluded causes of loss. *Demetrescu*, 137 So.3d at 501. *Corridori* is mischaracterized as a case where appraisal was denied because of coverage issues, when in fact appraisal was denied in *Corridori* because appraisal was not ripe. The insured in *Corridori* failed to complete a sworn proof of loss or to sit for an examination under oath. Compliance with these post loss obligations is essential to determine whether there even is a disagreement as to the amount of the loss. *Corridori*, 28 So.3d at 130. *See, Heritage Prop. & Cas. Co. v. Williams*, 338 So.3d 1119, 1120 (Fla. 1st DCA 2022) (appraisal is not ripe unless there has been adequate investigation). In *Mich. Condo.*, the opinion does not describe the reason why the insurer denied benefits under the policy. *Mich. Condo*, 46 So.3d at 178.

The other cases that the Insurer cites as conflicting are also distinguishable. The Insurer's reliance on them reveals a combination of misreading and wishful thinking. To the extent that any of these cases are not distinguishable, they rely on the same misreading of *Johnson* and should be disapproved.

In *Gratkowski v. ASI Pref. Ins. Corp.*, 351 So.3d 1216 (Fla. 2d DCA 2022), Amended Initial Brief at 27, n. 3, the insurer found that none of the damage was caused by a covered peril. The insured

demanded appraisal, resulting in an award of zero dollars. The insured brought suit to declare the appraisal invalid. The court concluded that whether the loss was caused by a covered peril was not an amount of loss question, and therefore the appraisal was invalid. This is unrelated to the issues here of whether claim exaggeration allegations are coverage issues or amount of loss issues, or whether that may be appraised before or as part of a final liability determination.

In *American Coastal Ins. Co. v. Hanson's Landing Ass'n, Inc.*, 331 So.3d 199 (Fla. 4th DCA 2021), Amended Initial Brief at 23, the court deemed appraisal premature because there were factual disputes as to whether appraisal was ripe, i.e., whether pre-suit requirements were met. Though the insurer there (the same one as the Insurer here) attempted to get a ruling that an insurer's declaration of fraud automatically avoided appraisal, the court would only go so far as to say that it made the ripeness issue "more pronounced." *Id.* at 203.

In *State Farm Fla. Ins. Co. v. Speed Dry, Inc.*, 292 So.3d 1260 (Fla. 5th DCA 2020), Amended Initial Brief at 26, the insurer was entitled to demand an appraisal to determine the amount of loss (the

extent of damage to a roof and the proper repair), not only because some coverage was admitted. Of course, the Insurer here did admit coverage initially, so the Insurer's argument still fails.

In *Fla. Ins. Guar. Ass'n, v. Santos*, 148 So.3d 837 (Fla. 5th DCA 2014), Amended Initial Brief at 26, the court rejected the insurer's argument that "'method of repair'" is distinct from the "'amount of loss'" and therefore not appraisable, relying on *Fla. Ins. Guar. Corp. v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2004), Amended Initial Brief at 26. 148 So.3d. at 838. Interestingly, the insurer in *Branco* tried but failed at a strategy similar to the one used by the Insurer here, attempting to recast an amount of loss question as a coverage question.

In *Corzo v. Am. Sup. Ins. Co.*, 847 So.2d 584 (Fla. 3d DCA 2003), Amended Initial Brief at 26, appraisal was denied because the loss allegedly from blasting was not a covered risk under the policy language.

The Insurer arrogates to itself a supposed authority to declare a policy void. Amended Initial Brief at 14, 15, 19, 21. An insurer has no such authority. An insurer may only assert or argue that a policy is void based on misrepresentation. It is up to a court and a finder of

fact to make that determination. When the allegation of voidness is predicated upon fraud or misrepresentation resulting in an exaggeration of the claim, a determination of the true amount of the claim is essential in order to determine whether the claim was exaggerated. Even if the numbers don't exactly match the insured's demand, issues of intent and materiality remain to distinguish a fraud claim that will forfeit coverage from a mere difference of opinion. *See, Jose Rivera Soler & Co. v. United Firemen's Ins. Co. of Phila.*, 299 U.S. 45, 50 (1936); *Berkshire Mut. Ins. Co. v. Moffett*, 378 F2d 1007, 1012 (5th Cir. 1967)(applying Florida law); 200 *Leslie Condo. Ass'n v. QBE Ins. Corp.*, 965 F.Supp. 2d 1386,1405 (S.D. Fla. 2013). If the insurer and the insured have agreed in their policy that the question of the amount of loss will be determined by appraisal, the trial court is entirely within its discretion to refer the amount of loss question to appraisal before considering any legal issues of fraud, misrepresentation or forfeiture, etc. to determine whether the policy has been rendered void. The amount of loss as determined by the appraisers is a critical part of determining an insurer's affirmative defense of misrepresentation or exaggeration of the claim.

C. Appraisal Is Judicially Preferred Because It Is Superior For Resolving Fact Issues.

Allowing the trial court discretion to require the parties to appraise the claim first before determining the entire misrepresentation or exaggeration issue promotes judicial efficiency, wise use of the court's and the parties' resources, and preserves the parties' agreed contractual right to appraisal. Appraisal (and its cousin, arbitration) are judicially preferred methods for dispute resolution precisely because they are less expensive and more expeditious than a drawn-out litigation process culminating in a decision by a six-person jury, a panel of lay people in the construction and insurance industry. This time and expense can be saved through appraisal. *Santiesteban*, 287 So.2d at 667; *Cammarata v. State Farm Florida Ins. Co.*, 152 So.3d 606, 614 (Fla. 4th DCA 2014) (*en banc*) (Gerber, J., with three other judges, concurring) ("Arbitration and appraisal are alternative methods of dispute resolution that provide quick and less expensive resolution of conflicts."), quoting *Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So.2d 1047, 1049 (Fla. 5th DCA 2001); *Fla. Ins. Guar. Ass'n., Inc. v. Lustre*, 163 So.3d 624, 631, 632 (Fla. 2nd DCA 2015) (Altenbernd, J., concurring) ("it is my

impression that the appraisers in this context develop expertise and can more rapidly and efficiently evaluate these complex claims than could a jury of inexperienced lay persons."); *People's Trust Ins. Co. v. Lavadie*, 306 So.3d 285, 290, 291 (Fla. 3rd DCA 2020) ("[a]ppraisal clauses…seek an efficient mode of damage and repair assessments, generally by persons with experience in claim adjustment, construction cost estimating, and negotiated claims resolution - in lieu of claims resolutions by judges or juries.")

The Insurer in this case is unabashed that its proposed procedure of having the jury determine whether or not San Marco exaggerated its claim will deny the parties and the court all the cost savings and efficiency of appraisal, and in the process deprive San Marco of its contractual right to appraisal. Amended Initial Brief, pages 19, 20. Even if San Marco prevails and convinces the jury that the claim was not exaggerated, the Insurer still accomplishes its goal - San Marco is still deprived of its contractual right to appraisal. *Id.* For the Insurer, it's "heads I win, tails you lose." By making an allegation of exaggeration of the claim, the Insurer would require a jury to determine the amount of the claim. Even if the jury decides that the claim was not exaggerated, the determination of the amount

of the claim remains a jury question and is not determined by expert appraisers. All that the Insurer has to do to strip San Marco or other insureds of this valuable contractual right is just make an allegation.

Judicial economy and preservation of resources of the parties and the court are served by having the issue of the amount of loss determined in accordance with the parties' agreement – by appraisal. This will have the dual effect both of quantifying San Marco's loss (on a line-by-line basis, if desired) and deciding whether or not San Marco's claim had been exaggerated. If necessary, the trial court could then decide all of the other issues in the case, including, if necessary, convening a jury to try any factual issues. In contrast, the Insurer proposes a wasteful and time-consuming process involving months of factual and expert depositions, further months of motion practice, culminated by an expensive jury trial during which complicated construction, building code and insurance issues will be presented to and decided by a jury with no expertise in any of these matters.

Appraisal of insurance claims is a neutral process. It does not favor either insurers or insureds. Florida cases involving insurance appraisal reveal both insurers and insureds insisting on their right

to appraisal under policies. The only difference between insureds and insurers in the context of appraisal is that, unlike insureds, insurers can never be forced into appraisal. Appraisal can only occur if a unilateral appraisal clause is inserted in an insurance contract by the insurer, or if the parties agree after the fact (with or without a bi-lateral appraisal provision) to go to appraisal. It is the policy that was drafted, offered and sold by the Insurer that compels the Insurer to appraisal.

II. THE INSURER WILL NOT BE PREJUDICED BY COMPLYING WITH THE APPRAISAL PROVISION THAT IT INSERTED INTO THE POLICY[2]

The Insurer attempts to drum up reasons why compelling it to comply with its own policy provisions would be unfair. None of this speculation withstands scrutiny.

As the Insurer concedes, the only thing that appraisal can determine is the amount of the loss. *Johnson*, 828 So.2d at 1025; Amended Initial Brief at 29. The trial court has the power to compel the appraisers to submit a detailed, line-item appraisal that will allow the court and the parties to determine precise amounts that the appraisers awarded for particular aspects of the claim at issue. *See, e.g., First Call 24/7, Inc. v. Citizens Prop. Ins. Corp.*, 333 So.3d 1182 (Fla. 1st DCA 2022); *State Farm Fla. Ins. Co. v. Shotwell*, 336 So.3d 64 (Fla. 3d DCA 2021); *State Farm Fla. Ins Co. v. Gonzalez,* 328 So.3d 369, 373 n.2 (Fla. 2d DCA 2021); *State Farm v. Speed Dry*, 292 So.3d at 1261; *Bryant v. GeoVera Spec. Ins. Co.*, 271 So.3d 10123 (Fla. 4th DCA 2019); *Fla. Ins. Guar., Inc. v. Olympus Ass'n, Inc.*, 34 So.3d 791 (Fla.4th DCA 2010). Doing this will relieve the parties and the court

[2] This point addresses the Insurer's point IC.

of the need to have a courtroom battle of the experts (necessarily preceded by expensive deposition discovery and related motion practice). Instead, the experts will be the "judges" themselves.

The Insurer posits that the appraisers might lack information necessary to determine the amount of the claim which will require the use of subpoenas, presumably directed to third parties. Not only is this nothing but speculation, but it ignores how appraisal panels are assembled. Each party will choose one expert appraiser, and those two appraisers will choose a third expert appraiser, called the "umpire." There is nothing in the appraisal process that prevents the Insurer from communicating any of its concerns about the proper scope of the claim to the appraiser it appoints, including providing the appraiser with whatever documentation prompted the Insurer to make its unilateral declaration of fraud. Likewise, there is nothing in the process preventing that appraiser from communicating that information to San Marco's appraiser or to the umpire. Since the Insurer already believes that it has uncovered sufficient information that it felt justified in making a scandalous accusation of fraud and declaring a forfeiture, no further subpoenas should be needed by the appraisal panel.

The Insurer's argument also ignores one of the most helpful features of the "dual track" model of *Leeward*. The litigation is not dismissed pending appraisal, but proceeds alongside appraisal. The parties may use discovery processes, including subpoenas, subject only to the discretion of the trial court to manage discovery.

The Insurer also expresses an irrational fear that the appraisal panel, including its own appointed appraiser and the neutral umpire, could have the wool pulled over its eyes by a retiree condo board and its public appraiser. But each of the appraisers will be an expert in the areas of construction, damage repair and insurance adjusting. As such, they will be far better qualified than a jury, or even a trial judge, to differentiate what constitutes "junk science" from reliable information and real-life experience. Amended Initial Brief at 31. Similarly, cross-examination of witnesses will be unnecessary simply because witnesses will be unnecessary. Rather than gaining their information filtered through the memories and perceptions of witnesses inside a courtroom, the appraisers will be able to investigate the buildings and the damage for themselves, applying their expertise. The Insurer's statement that "the appraisal is based

solely what the parties choose to produce and the facts they volunteer to the panel," Amended Initial Brief at 32, is simply false.

The Insurer complains that it will not be able to interrogate the appraisers about why they chose to include some items or exclude others. Amended Initial Brief at 32. But they would not be able to interrogate the jury, either. Any such interrogation is not the insurer's protection against fraud. Rather, it is the expertise of the appraisers, its ability to appoint and inform its own appraiser and the neutrality of the umpire that protects the Insurer against fraud. The trial court can order the appraisers to produce a detailed, line-item award that would allow the parties to see the appraisers' process and discern the rationale. If there are any remaining legal issues regarding a claim of exaggeration, they can be addressed based on this record.

There is no concern about duplication of effort between the appraisal panel and the court or jury, as the Insurer apparently imagines based on its citation to cases regarding bifurcated trials. The issue of the amount of loss will be determined once, by the appraisers. All other issues will be determined once, by the trial court and jury. The overlap should be minimal if any occurs at all.

III. <u>THIS COURT SHOULD NOT BE PERSUADED BY A FEDERAL COURT'S MISINTERPRETATION OF FLORIDA PRECEDENT.</u>[3]

The federal court in *Oceania I Condo Ass'n, Inc. v. QBE Ins. Corp.*, Case No. 11-20578-CIV, 23 Fla. L. Weekly Fed. D 9, 2011 WL1984483 (S.D. Fla. May 20, 2011) (the sole case cited by the Insurer on this point) erred to the extent it decided that a unilateral, unproven allegation of fraud was sufficient to defeat the parties' contractual rights to appraisal. Though the federal court purports to rely on *Johnson* to support this untenable position, as demonstrated above, *Johnson* does not stand for this proposition at all.

[3] This point addresses the Insurer's point ID.

IV. **THE POLICY AS WRITTEN ALLOWS AN INSURED TO DEMAND APPRAISAL EVEN IF THE INSURER BELIEVES THERE HAS BEEN A MISREPRESENTATION**[4]

At the oral argument on one of the cases related to this one, *Weston Insurance Company v. Riverside Club Condo Ass'n*, SC21-567, argued June 8, 2022, Justice Polston pointed out that Florida Statutes provide insurers with the exact rule that the Insurer advocates here, but only with respect to the alternative dispute resolution mechanism of mediation, not appraisal. The Insurance Code provides all property insurance insureds and insurers with the right to demand mediation of a "claim." However, in § 627.7015(9)(c), the definition of "claim" specifically excludes any demand in which the insurer believes that the policy holder has made an intentional misrepresentation leading to denial of the entire request for payment. Thus, with respect to mandatory unilateral mediation, an insurer can avoid the mandate to participate by declaring that it believes there was fraud by the insured. This provision of the Insurance Code is incorporated by reference in all property insurance policies in the State of Florida, including the one that the Insurer issued to San

[4] This point was not addressed by the Insurer.

Marco. However, there is no such provision in the Insurance Code for appraisal.

The legislature demonstrated to insurers how to achieve the result it seeks to achieve in this case. An insurer would only need to include language with respect to appraisal that parallels the language in § 627.7015(9)(c) in the policy provision on appraisal. But the Insurer did not do so in this policy. In short, the policy impliedly includes this exclusion language for mediation, but lacks exclusion language for appraisal. This omission by the Insurer should be interpreted to mean that the exclusion from mediation under § 727.7015(9)(c) does not exist for appraisal. *Armstrong v. Edgewater*, 157 So.2d 422 (Fla. 1963); *Rebich v. Burdine's and Lib. Mut. Ins. Co.*, 417 So.2d 284, 285 (Fla. 1st DCA 1982)(courts do not insert words or phrases to supply omission). This is a form of *expression unius est exclusion alterius*. This is especially true because insurance policies are construed strictly against the insurer. *Washington Nat. Ins. Corp. v. Ruderman*, 117 So.3d 941 (Fla. 2013). If the Insurer had desired to include this concept with respect to appraisal as well as with respect to mediation, it should have said so.

The mere fact that the legislature needed to include § 727.7015(9)(c) in the Insurance Code undermines any argument that an allegation of fraud takes a claim completely out of coverage under a policy. If that were true for mandatory appraisal, it would also be true for mandatory mediation, and a mere allegation of fraud would excuse an insurer from mandatory mediation even without § 727.7015(9)(c). That would mean that § 727.7015(9)(c) is superfluous surplusage. The courts should not indulge statutory interpretations that render statutory language surplusage. *American Home Assur. Co. v. Plaza Materials Corp.*, 908 So.2d 360, 366 (Fla. 2005).

The position taken by the Insurer in this case is misbegotten by the Insurer's misreading of *Johnson* and is not supported by the Fourth District cases claimed to be in conflict with the decision below. Appraisal is a fair and neutral process that has been chosen by the parties to decide the amount of the claim. The lower courts correctly ordered the parties to appraisal in compliance with their contract of insurance. This Court should approve this order and disapprove any cases to the extent the rely on the same misreading of *Johnson*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be affirmed.

Dated: April _____, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 27, 2023, the foregoing was electronically filed with the clerk of the court and electronically served on the following counsel of record.

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