IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-883

AMERICAN COASTAL INSURANCE COMPANY,

Petitioner, L.T. CASE NO: 6D23-0009

vs.

SAN MARCO VILLAS CONDOMINIUM ASSOCIATION, INC.,

Respondent. /

ON REVIEW OF AN OPINION OF THE SIXTH DISTRICT CERTIFYING CONFLICT WITH THE FOURTH DISTRICT

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This Court accepted jurisdiction to review a decision in a matter originally pending in the Second District certifying conflict with decisions from the Fourth District. *See* Fla. R. App. P. 9.030(a)(2)(A)(vi). The Second District has since transferred the matter to the Sixth District, following its creation. While the Sixth District has not opined on the issue presented since its creation, there remains a conflict between the Second and Fourth Districts.

This is a property insurance claim where the insured claimed over $8 Million in alleged Hurricane Irma damage. After investigating the claim, the insurer concluded its insured had made material false statements and misrepresentations about its claim, including claiming damage to items that did not exist and that were not damaged. The insurer then denied coverage for the loss and voided the Coverage Part, based on the policy's Concealment, Misrepresentation or Fraud provision.

The insured sued claiming a breach of contract and the insurer filed a counterclaim seeking to recover the monies paid on the claim prior to the coverage denial. The insurer also raised the policy's

Concealment, Misrepresentation or Fraud provision as an affirmative defense, claiming the Insured's violation of that provision voided the Coverage Part and, therefore, that appraisal was barred.

The trial court granted the insured's motion to compel appraisal on the amount of covered loss from Hurricane Irma. On appeal to the Second District, the insurer argued that appraisal was inappropriate when an insurer has declared the policy void and denied all coverage for the loss and, in such a case, the primary issue is one of coverage for the court. The Second District affirmed, however, stating it was bound by three of its recent cases. Those cases held that, even when an insurer denies coverage exists for a loss, a trial court has discretion to determine the order in which the legal issues of coverage or the amount of damages (through appraisal) are established.

The affirmance also certified conflict with three opinions from the Fourth District which concluded that, just as a finding of liability precedes a calculation of damages, so, too, must the court first determine whether the policy affords coverage for the claim before ordering an appraisal of those (potentially) covered damages.

This appeal presents the following issue:

Whether, after an insurer has denied coverage and declared the Coverage Part void, it is appropriate to compel appraisal of the amount of damages for a claimed loss before coverage is first established by a court for that claim.

I. Facts relevant to the appeal.

American Coastal Insurance Company ("American Coastal") insured San Marco Villas Condominium Association's ("San Marco") 23 condominium buildings against certain risks, including hurricane. [R. 55, 60-128][1]. The insurance policy included an appraisal provision, common to many policies. When the parties disagree over the amount of loss, the provision gives them the option to have appraisers determine that loss amount within the policy's coverage grant. [R. 101]. The policy also contains a second commonplace provision for Concealment, Misrepresentation or Fraud. If that provision is breached, the Coverage Part that contains

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[1] "R. __" refers to the page number of the record on appeal. All cites are to the appendix filed in the District Court of Appeal below.

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the appraisal provision becomes void and there is no coverage for the claimed loss. [R. 79].

Almost within a week of Hurricane Irma, San Marco had already been approached by and retained a public adjusting firm, Keys Claims Consultants, Inc. ("Keys"). [R. 242-245]. San Marco retained Keys to assist with its presentation of the insurance claim, including its retention of engineers, contractors, glazing consultants, and property management oversight. [R. 198, 237-245].

Shortly after Keys was retained, it advised American Coastal that San Marco suffered some damage from Hurricane Irma. American Coastal initially inspected loss and, by February 27, 2018, it had created a $356,208.82 repair estimate. [R. 237]. Based on its inspections, American Coastal confirmed that some buildings sustained damage above the policy's deductibles. [R. 236-237].

Each building insured under the policy has a separate deductible equal to 5% of that building's insured value. [R. 118-119]. Since American Coastal only found damage to some buildings, the applicable deductibles for the affected buildings amounted to $129,861.65. Payment was sent to San Marco on February 27, 2018

for $192,629.75, which represented American Coastal's $356,208.82 repair estimate, less the applicable deductibles and $33,717.42 in recoverable depreciation. [R. 237].

On October 25, 2019, over a year after the storm and eight months after American Coastal paid the claim, Keys presented a supplemental claim stating, "the insured feels the damages grossly exceed the amount estimated by your previous adjusting team." [R. 246]. With the letter was a "claim package" consisting of a statement of loss that claimed a net $6,917,023.96 in damage to San Marco's property, estimates for each of the buildings, and consulting reports. [R. 246-247, 546].

Also within this newly disclosed supplemental claim, Keys demanded appraisal of the loss for the first time and named a principal of Keys – George Keys – as the insured's appraiser. [R. 246].

The policy contains an appraisal provision as a potential means to resolve a dispute over the amount of a covered loss when the parties "disagree on the value of the property or the amount of loss." [R. 101]. American Coastal responded that the demand for appraisal in October 2019 was premature since American Coastal had not yet

had the opportunity to evaluate the newly presented multi-million dollar claim and American Coastal's adjusters, engineers, roofers, and contractors had not yet evaluated the supplemental claim. [R. 248].

American Coastal also objected to Mr. Keys being the appraiser since the policy requires a "competent and impartial appraiser" and Mr. Keys' company was to be compensated on a contingency basis – thus giving Mr. Keys a direct financial interest in the outcome of the appraisal and making him partial [R. 101, 242-245, 264-265].

Further, to investigate the newly presented estimate and reports from San Marco, American Coastal invoked its right to take Examinations Under Oath ("EUO"s) of the insured's representatives and to have the insured present its claim via a Sworn Statement in Proof of Loss ("Proof of Loss"). [R. 102, 249-266]. Given the substantial difference in what was being claimed and what American Coastal had observed up to that point, American Coastal also invoked its right to inspect the insured's of books and records. [R. 102, 249-266]. Among the documents requested were the insured's maintenance records and historical documents so American Coastal

could better understand the health of the buildings before and after the storm. [R. 249-266]. American Coastal was trying to find the basis for the seven-figure claim, confirm whether there actually was a dispute over the amount of loss, and, if so, narrow the scope of any dispute prior to proceeding with appraisal.

American Coastal began to discover disconcerting facts as the evaluation progressed. San Marco's claim sought replacement of all of its windows and sliding glass doors based on a report by GCI Consultants, Inc. ("GCI"). The GCI report, however, showed not all windows and sliding glass doors were damaged by the storm. [R. 279-385]. Indeed, when GCI's representative was examined under oath, he noted that certain windows and doors ("fenestrations") only required a "service and clean" – not replacement. [R. 387]. GCI's report confirmed that, even in the opinion of San Marco's experts, not all fenestrations were storm damaged.

Further, San Marco sought replacement of the roofs on all 23 buildings because of Hurricane Irma. San Marco's representative stated in his sworn examination that the demand for full roof replacement is based on a report from Roof Leak Detection Company

("RLDC"). [R. 268-278]. RLDC's methodology states it would "walk each slope of the roofing system" as part of its condition assessment. [R. 428]. Despite its claimed methodology, RLDC only inspected 8 of the 23 roofs. [R. 430]. It then determined from the 8 roofs that all of the 15 roofs it did not inspect also needed replacement. [R. 430-433].

Even more concerning, San Marco's claim package included replacement of damaged soffits on five buildings – buildings B, C, D, H, and I – despite the fact that those buildings did not have soffits installed at the time of the storm. [R. 274-277]. Although the representative from San Marco testified otherwise, American Coastal noted that the soffits for those five buildings were included in the claim package. [R. 549].

Unsurprisingly, American Coastal's consultants could not find wind damage anywhere near the amount being claimed by San Marco. [R. 392-427]. American Coastal explained that fact in its letter denying coverage for the loss. [R. 236-241].

San Marco ultimately presented a supplemental claim for $8,165,527.15, less the policy's $961,617.90 aggregate deductible for all buildings, which amounted to a $7,203,909.25 payment demand.

[R. 137]. Not only could American Coastal's engineers, consultants, and contractors not find evidence of Hurricane Irma damage anywhere near $7,203,909.25 claimed, the adjustment had shown that San Marco and its representatives had inflated its claim with undamaged items, items that were never inspected, and items that did not exist at the time of the storm. [R. 236-241, 268-278, 387, 428-433].

Among the provisions in the insurance policy, there is a provision that voids the policy's Coverage Part for a claim if an insured intentionally misrepresents or conceals a material fact concerning that claim. [R. 79]. Accordingly, American Coastal sent a June 23, 2020 letter advising the insured that the Coverage Part was void and coverage for the claim was denied in its entirety based on the insured's violation of the policy's Concealment, Misrepresentation or Fraud provision. [R. 236-241].

After American Coastal denied coverage for the claim in its entirety and the declared the policy void, San Marco filed its Motion to Compel Appraisal on July 7, 2020. [R. 129]. By that point, San Marco had filed its lawsuit alleging a breach of contract. [54-59]. In

turn, American Coastal raised the Concealment, Misrepresentation or Fraud provision as an affirmative defense, claimed the Insured's violation of that provision voided the Coverage Part and, therefore, that appraisal was barred. American Coastal also filed a counterclaim seeking to recover the monies paid on the claim prior to the discovery of the misrepresentations and coverage denial. [R. 142-160].

The policy provides appraisal as a means of setting the amount of covered loss when the parties disagree as to the amount of a covered loss. [R. 101]. However, once the policy's Concealment, Misrepresentation or Fraud provision has been violated, the Coverage Part that contains the appraisal provision is void. [R. 79]. Thus, there was no longer a right to appraisal under the policy.

San Marco's Motion to Compel Appraisal essentially argued that the circuit court should look past the fact coverage was denied as a whole and that the policy was voided. [R. 129-140]. Instead, San Marco argued – and the lower courts agreed – that the parties should proceed to appraise the cost to repair the loss before resolving the fundamental question of whether the policy and the appraisal

provision were void and there was even coverage for the loss. [R. 554]. Despite disputes over whether there was coverage for the loss and the policy was void, the circuit court compelled appraisal over American Coastal's objection. [R. 554].

American Coastal appealed the order to the Second District. *See* Fla. R. App. P. 9.130(a)(3)(C)(iv). After oral argument, the Second District issued a brief citation opinion, stating it was bound by a prior panel's recent opinion in *Am. Cap. Assur. Co. v. Leeward Bay at Tarpon Bay Condo. Ass'n*, 306 So. 3d 1238 (Fla. 2d DCA 2020) and its progeny. In that case, the Second District affirmed an order compelling appraisal despite the insurer's denial of all coverage, concluding "the gravamen of [the insurer's] defense was amount of loss, not coverage." *Id.* at 1239. In doing so, the Second District acknowledged, "district courts have yet to reach a consensus regarding the order in which the trial court should resolve appraisal and coverage issues." *Id.* at 1242.

American Coastal invoked this Court's discretionary jurisdiction. This Court stayed the matter pending resolution of *Leeward Bay*, for which this Court already accepted jurisdiction. *See*

Am. Cap. Assur. Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n, Case No. SC20-1766. When the insurer in *Leeward Bay* went into receivership, the lead case became *Weston Insurance Company v. Riverside Club Condominium Association*, Case No. SC21-567. After that insurer, too, went into receivership, this case was reactivated, jurisdiction was accepted, and a briefing schedule was set.

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STANDARD OF REVIEW

With regard to an order compelling appraisal, the court reviews factual findings under a competent, substantial evidence standard and the application of the law to the facts found is reviewed *de novo*. Where a trial court makes no findings of fact or law, as is the case here, the standard of review is *de novo*. *Fla. Ins. Guar. Ass'n v. Lustre*, 163 So.3d 624, 627-628 (Fla. 2d DCA 2015); *see also Fla. Ins. Guar. Ass'n v. Castilla*, 19 So. 3d 703, 704 (Fla. 4th DCA 2009).

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SUMMARY OF THE ARGUMENT

When coverage for a claim is denied its entirety and the policy's appraisal provision is voided under the Concealment, Misrepresentation or Fraud provision, appraisal is inappropriate. Before the parties appraise a covered loss, appraisal must be ripe and there must be a covered loss to appraise. An insured's violation of the policy's Concealment, Misrepresentation or Fraud provision forfeits coverage for an otherwise covered loss and renders the Coverage Part containing the appraisal provision void.

American Coastal wholly denied coverage for San Marco's Hurricane Irma claim and declared the Coverage Part void after it discovered violations of the policy's Concealment, Misrepresentation or Fraud provision. San Marco then filed a breach of contract action and demanded a jury trial to establish its damages. American Coastal answered that there is no coverage and made a counterclaim to recover the amounts it had paid prior to discovering San Marco's misrepresentations, concealments, and false statements.

A jury will hear the evidence and decide whether San Marco misrepresented or concealed facts, or made false statements, thereby

breaching the policy. If it decides San Marco breached the policy, then American Coastal's coverage decision is affirmed, there is no appraisable issue, and the jury will decide the damages to which American Coastal is entitled (the return of prior indemnity payments). If it decides San Marco did not misrepresent or conceal a material fact or make a false statement, then the jury will decide the amount of damages to which San Marco is entitled and set the amount of loss in that same verdict. In other words, a jury trial will decide both coverage and the amount of the loss.

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ARGUMENT

I. ONCE AMERICAN COASTAL DENIED COVERAGE AS A WHOLE AND DECLARED THE COVERAGE PART VOID, THERE WAS NO APPRAISABLE ISSUE.

Where coverage for a claim has been denied in its entirety, there is no appraisable issue present and a party cannot be compelled to participate in an appraisal. *Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814 (Fla. 3d DCA 2000), *aff'd.* at 828 So. 2d 1021; *State Farm Fire & Cas. Co. v. Wingate*, 604 So.2d 578 (4th DCA 1992).

The policy provides that the "Coverage Part is void… if [insureds], at any time, intentionally conceal or misrepresent a material fact concerning… the Covered Property… or a claim under this Coverage Part." [R. 101]. American Coastal's defense and counterclaim assert that it denied coverage and voided the Coverage Part for the loss because San Marco materially misrepresented its claim. Those misrepresentations led to a claim for greater than $8 million dollars, prior to application of deductibles.

Provisions such as the one found in American Coastal's policy have routinely been upheld. *See Wong Ken v. State Farm Fire & Cas. Co.*, 685 So. 2d 1002, 1003 (Fla. 3d DCA 1997) ("[T]he clause which

voids coverage if the insured makes an intentional misrepresentation 'after a loss'-that is, as here, in making a claim-is valid and enforceable."); *Am. Reliance Ins. Co. v. Kiet Invs., Inc.*, 703 So. 2d 1190 (Fla. 3d DCA 1997) (holding that clauses voiding coverage for intentional misrepresentations and fraud in claims process are valid and enforceable); *Schneer v. Allstate Indem. Co.*, 767 So. 2d 485, 489 (Fla. 3d DCA 2000) (holding that an insureds' fraudulent misrepresentations as to their contents claim voided their homeowner's policy in its entirety and thus voided the dwelling coverage); *Valdez v. Consolidated Prop. & Cas.*, 762 So. 2d 1034 (Fla. 3d DCA 2000) (affirming final judgment voiding insured's insurance policy where insurance policy contained a valid provision voiding the policy upon intentional concealment or misrepresentation by the insured).

Over twenty years ago, the Fourth District upheld a similar provision, denying a request for appraisal after an insurer voided coverage based on material misrepresentations. In the 1992 *Wingate* decision, the Fourth District reversed an order compelling appraisal

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where, after investigating the claim, coverage was denied based on misrepresentations. *Wingate*, 604 So. 2d at 579.

A. This Court has long held that determining whether a policy covers a loss is judicial question.

Seventeen years ago, and after *Wingate*, this Court confirmed that a "challenge of coverage is exclusively a judicial question" and not one for an appraisal panel. *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285, 1287 (Fla. 1996). The *Licea* case led to the decision that both parties have cited favorably below, *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002).

The primary holding in *Johnson* appears straightforward:

> [C]ausation 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 that there is covered loss, the amount of which is disputed.

Licea, 685 So. 2d at 1022.

Yet, both the Second and Fourth Districts have cited to it at various times to support their conflicting positions. *Comp., Am. Coastal Ins. Co. v. Hanson's Landing Ass'n, Inc.*, 331 So. 3d 199, 202 (Fla. 4th DCA 2021) ("Consistent with *Johnson*, we have held that the trial

court must resolve all underlying coverage disputes prior to ordering an appraisal.") *with*, *Leeward Bay*, 306 So. 3d at 1241 (Fla. 2d DCA 2020) ("*Johnson* did not hold that the trial court had to resolve coverage issues *before* compelling appraisal. Rather, it held that appraisers may not determine what caused the damage 'when an insurer wholly denies that there is a covered loss' because causation is exclusively a judicial question.").

Like this case, *Johnson* involved conflicting decisions – though the conflict there was between the Second and Third Districts. *See Nationwide Mut. Ins. Co. v. Johnson*, 774 So. 2d 779 (Fla. 2d DCA 2000); *Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814 (Fla. 3d DCA 2000). In both cases, the insurers denied all coverage. *Johnson*, 828 So. 2d at 1025. In *Johnson*, the Second District ordered appraisal, holding that the appraisal panel could decide certain coverage issues. *Nationwide*, 774 So. 2d at 780-81. In *Gonzalez*, the Third DCA reversed a judgment confirming the appraisers' conclusion that the policy did not cover the loss: "[w]hether the claim is covered by the policy is a judicial question, not a question for the appraisers." *Gonzalez*, 805 So. 2d at 817.

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This Court quashed the Second District's opinion in *Johnson* and approved the reasoning of the Third District in *Gonzalez*, noting that the issue in these cases was not about "appraising the amount of a loss which the insurer admitted was covered," but "[r]ather . . . one of whether the policies covered the losses for the claims that were made." 828 So. 2d at 1025-26. Coverage issues must "be judicially determined by the court and [a]re not subject to a determination by appraisers." *Id.* at 1025; *see also Gonzalez*, 805 So. 2d at 816 ("Since State Farm's position is that this entire loss falls within a policy exclusion, this defense is a judicial question and not a question for the appraisers.").

Though different exclusions were applied when denying coverage in *Johnson*, *Gonzalez*, and here, the universal message is the same – once coverage was denied based on the invocation of a policy exclusion, coverage became the primary question and the cases were to be resolved by a judge and jury rather than an appraisal panel.

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B. The decision below deviates from well-established law since *Johnson*.

Every District Court of Appeal to address the issue since *Johnson* had been uniform in that there was no right to appraisal once coverage as a whole has been called into question. *See*, *Corzo v. Am. Sup. Ins. Co.*, 847 So. 2d 584 (Fla. 3d DCA 2003) (the request for appraisal was premature absent a determination that coverage exists under the policy."); *Sunshine State Ins. Co. v. Corridori*, 28 So. 3d 129, 131 (Fla. 4th DCA 2010) ("[T]he trial court must resolve all underlying coverage disputes prior to ordering an appraisal . . . ."); *State Farm Fla. Ins. Co. v. Speed Dry, Inc.*, 292 So. 3d 1260 (Fla. 5th DCA 2020) (compelling appraisal, but only because the insurer "did not wholly deny coverage for storm damages"); *Fla. Ins. Guar. Ass'n v. Santos*, 148 So. 3d 837, 839 (Fla. 5th DCA 2014) ("Appraisal [is] not appropriate until coverage [is] conceded or determined." (citing *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 494 (Fla. 5th DCA 2014)). It was not until the Second District issued *Leeward Bay* in 2020 that there was any deviation among the Courts on the issue – and it is *Leeward Bay* upon which the Second District relied here.

While *Leeward Bay* asserted it followed the Third District in adopting its "dual track" approach to this issue, it actually charted a new path[2]. *Leeward Bay*, 306 So. 3d at 1242. *Leeward Bay* created an exception to the post-*Johnson* rule holding that, if coverage is completely disclaimed for a loss because of gross inflation and misrepresentation, it can still proceed to appraisal[3].

The Third District had never applied a "dual track" approach where coverage for a claim was denied in its entirety. For example,

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[2] One other case may be *Paradise Plaza Condo. Ass'n v. Reinsurance Corp.*, 685 So. 2d 937, 941 (Fla. 3d DCA 1996) (*en banc*). But that case preceded this Court's decision in *Johnson*. The Third DCA later followed *Johnson* in *Corzo* without mentioning *Paradise Plaza*. *Corzo*, 847 So. 2d at 585 ("The trial court's ruling in substance means that the request for appraisal was premature absent a determination that coverage exists under the insurance policy.").

[3] Even within the Second District, *Leeward Bay* and its progeny seem to be uncomfortable exceptions to the rule. At the end of last year, the Second District found there was no right to an appraisal because the insurer disputed coverage as a whole, as American Coastal did here. *See*, *Gratkowski v. ASI Preferred Ins. Corp.*, 351 So. 3d 1216, 1220 (Fla. 4th DCA 2022) ("ASI determined the entire loss was not covered, so there was no amount of loss to be determined by the appraisal panel.").

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in the case upon which the *Leeward Bay* Court relied, the insurer admitted there was coverage for the loss, but only disputed the amount of loss. *Sunshine State Ins. Co. v. Rawlins*, 34 So. 3d 753, 754 (Fla. 3d DCA 2010) ("In the case before us, the insurer twice admitted there was a loss.").

Rawlins stated that, under *Johnson*, "[i]f an insurer admits there is a covered loss, the amount of which is disputed, the amount of loss question is for an appraisal panel. If an insurer denies there is a covered loss, the issue of coverage is one for the trial court." *Id.*; *People's Trust Ins. Co. v. Garcia*, 263 So. 3d 231, 236 (Fla. 3d DCA 2019) (compelling appraisal because the insurer had not wholly denied coverage, while preserving the insurer's non-causation defenses).

Following that rule, the Fourth District also holds that appraisal can be compelled where the insurer concedes some coverage. *People's Tr. Ins. Co. v. Tracey*, 251 So. 3d 931, 944 (Fla. 4th DCA 2018). As does the Fifth District. *State Farm Fla. Ins. Co. v. Speed Dry, Inc.*, 292 So. 3d 1260, 1262 (Fla. 5th DCA 2020) ("Because State Farm did not wholly deny coverage for storm damage to the

[insureds'] roof, it was entitled to compel appraisal pursuant to the terms of the insurance policy.").

In the pre *Leeward Bay* cases that apply a dual-track approach, the insurer conceded some coverage. The dispute concerned coverage for specific items within the overall claim or the cost of repairs. In that event, appraising the loss first may provide some benefit: the appraisal panel may not award damages for those disputed items; or may render such a small award that litigating coverage no longer makes sense. But such logic does not apply when an insurer denies *all* coverage. In that case, the amount awarded will not matter. The insurer will contest any award because it denied coverage.

C. Setting the amount of loss through appraisal would prejudice American Coastal's misrepresentation affirmative defense as well as its counterclaim.

Appraisal has a very limited function. It resolves "a disagreement on the *amount* of loss" when "the insurer admits that there *is* a covered loss." *Johnson*, 828 So.2d at 1025. But, American Coastal has not merely alleged San Marco inflated the cost to repair the damaged portions of its building.

American Coastal denied coverage in its entirety because San Marco and its representatives had also inflated its claim by including undamaged items, items that were never inspected, and items that did not exist at the time of the storm. [R. 236-241, 268-278, 387, 428-433]. Thus, this is not a simple dispute over the cost of repair or causation, but whether undamaged, uninspected, and non-existent items were intentionally included in the claim. This goes well-beyond the purview of the appraisers, who are only meant to provide a cost of repair.

Indeed, because of how appraisal works, to appraise the loss before establishing whether the policy is void will only result in two labor intensive procedures to ascertain the true amount of loss suffered from Hurricane Irma.

In the coverage action, American Coastal has several procedural and evidentiary tools available that are not allowed in an appraisal under the policy.

First, American Coastal has the ability to subpoena third parties for documentation and testimony. This will allow American Coastal to obtain documentation that could show the insured sought

estimates prior to the storm for "damages" now claimed because of the storm. It would also allow American Coastal to obtain documents from unit owners and tenants that show the health of the building prior to the storm. Additionally, it gives American Coastal the right to examine or cross-examine witnesses presented by San Marco, as well as third-party witnesses to clarify discrepancies between what is being claimed and what American Coastal found during the claim phase.

The ability to cross-examine witnesses is especially important where issues of concealment, misrepresentation or fraud are raised. While in litigation the trier of fact has the benefit of experts being vetted under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), there is no such safeguard in appraisal. The amounts presented to the appraisal panel can be based on "junk science," causing the appraisal award to be inherently faulty. The insured could then claim *res judicata* or estoppel from examining the basis of the appraisal award in the subsequent coverage trial, since the appraisers set the amount of loss.

In essence, an insured can hide its misrepresentations and concealments with regard to the scope and amount of loss behind the shield of an appraisal award. If these issues were left to the jury in the coverage action from the beginning, however, the fraudulent foundation could be shown to a jury through cross-examination or excluded under *Daubert*.

The subpoena power is not available in the policy's appraisal process. Instead, the panel must rely on documents the parties volunteer. If the panel believes an appraiser or consultant from either side is being less than truthful, it has no power to take that witness's testimony under oath. Nor can the panel compel a party to testify or produce records. Thus, the appraisal is based solely on what the parties choose to produce and the facts they volunteer to the panel.

The award issued will not state why some items were included and others not, nor will it provide commentary on any concerns with representations made to the appraisal panel. Thus, even if one or more of the appraisers believed certain items were grossly misrepresented, that misrepresentation might still be baked into the

award as the panel gives-and-takes toward a final determination.

Some guidance can be found with regard to Fla. R. Civ. P. 1.270(b), which gives trial courts the discretion to bifurcate trials. Even there, when facts relevant to one issue are intermingled with other issues, it is preferred to not bifurcate the issues. *See generally*, *Sall v. Luxenberg*, 313 So. 2d 775, 776 (Fla. 4th DCA 1975) ("The granting of separate trials is discretionary and, in particular, in the instant case where the issues of tender, consideration, fraud and misrepresentation are so intermingled and entwined it cannot be said that the trial court abused its discretion in denying separate trials on the issues raised by the pleadings."); *Valliappan v. Cruz*, 917 So. 2d 257 (Fla. 4th DCA 2005) (holding it was proper to not bifurcate a trial where the facts to one issue were relevant to and intermingled with other issues in the case). This illustrates American Coastal's point that issues of fact concerning misrepresentations should not be tried separately from issues of damages because the facts are so inextricably intertwined.

Adding to American Coastal's prejudice, some courts have implied that the appraisal panel's calculation of that amount—no

matter how inflated—binds the insurer at trial. *See, e.g.*, *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n*, 125 So. 3d 846, 854 (Fla. 4th DCA 2013) (rejecting the insurer's assertion that there was duplication in the appraisal award because the amount of loss was an issue "solely within the province of the appraisers"); *Fla. Select Ins. Co. v. Kealean*, 727 So. 2d 1131, 1133 (Fla. 2d DCA 1999) ("If, after the appraisers determine the amount of the loss, the court finds that the loss is covered, the insurer is bound to pay the amount the appraisers awarded."), *disapproved on other grounds by Johnson*, 828 So. 2d at 1026.

Even if the trial court were able to scratch below the surface of the appraisal award, it would not make sense to appraise the loss first. If the award can be challenged at a later coverage trial, it would not be worth the paper it is written on. The parties would have to duplicate the time and effort already spent on the appraisal to take it apart and reveal the alleged misrepresentations and false statements upon which the appraisal award was based. This one of the reasons why appraisal in inappropriate on a claim denied in its entirety due to alleged misrepresentations, false statements, and concealments.

D. Appraisal should not be compelled until a court determines whether the policy has been voided.

As discussed briefly above, if San Marco violated the policy's Concealment, Misrepresentation or Fraud provision, the policy's Coverage Part for the claim "is void." [R. 79]. The Coverage Part that grants coverage for the potential loss to property is the Condominium Association Coverage Form. [R. 93]. That same form contains the policy's appraisal provision. [R. 101]. Thus, if American Coastal is correct and San Marco's actions did breach that policy provision, the Coverage Part in which the appraisal clause is found is void and unenforceable. This is another reason appraisal should not be compelled.

Supporting this position is *Oceania I Condo. Ass'n, Inc. v. QBE Ins. Corp.*, Case No. 11-20578-CIV, 23 Fla. L. Weekly Fed. D9 (S.D. Fla. May 20, 2011). The insurer in *Oceania* denied a Hurricane Irma claim as a whole because, among other things, the policyholder had not complied with its post-loss obligations and had submitted an inflated claim. *Id.* at 3-4. It also declared the policy void due to the insured's violation of its post-loss obligations. *Id.* *5. The federal

trial court denied the policyholder's motion to compel appraisal explaining that, "because [the insurer] has declared the policy void, there is no covered claim and therefore the parties cannot disagree over the amount of any covered claim. Consequently, appraisal is not appropriate." *Id.* at 5. Again, that decision rested on *Johnson*. *Id.* at *5.

Because American Coastal denied coverage in its entirety and declared the policy void, there would be no right compel appraisal under that policy until a court determines the policy is not void[4].

CONCLUSION

For the reasons stated, this Court should reverse the opinion of the Second District and remand for trial.

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[4] A party who seeks specific performance under a contract must first establish it is clearly entitled to the remedy sought. *Castigliano v. O'Connor*, 911 So.2d 145, 148 (Fla. 3d DCA 2005).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(b). It is written in Bookman Old Style 14-point and does not exceed 13,000 words.

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