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 REPLY BRIEF

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INTRODUCTION

While San Marco's brief argues the parties' dispute is only a disagreement over the amount of loss, it fails to address the central question preventing appraisal. Can a court compel the specific performance of appraisal under a contract prior to the court determining coverage and the validity of that contract?

This dispute is not merely whether San Marco inflated the cost of repair. American Coastal asserts that San Marco intentionally misrepresented the true scope of its Hurricane Irma claim and made several material false representations in its claim presentation. To date, American Coastal has found San Marco claimed damage to items that did not exist and sought replacement of items its own experts confirmed were not damaged by Hurricane Irma. Those actions by San Marco violated the policy's Concealment, Misrepresentation or Fraud provision, and voided the policy's Coverage Part containing the policy's appraisal provision.

While the enforceability of the policy is in question, a demand for appraisal is not ripe. Before a court can compel performance

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under the policy, a jury must hear evidence and decide whether San Marco's actions voided the policy's Coverage Part. As the Fourth District found, just as a finding of liability precedes a calculation of damages, so, too, must the court first determine whether the policy's appraisal provision is enforceable before ordering an appraisal.

ARGUMENT

I. APPRAISAL CANNOT BE COMPELLED BECAUSE AMERICAN COASTAL DENIED ALL COVERAGE AND DECLARED THE COVERAGE PART CONTAINING THE APPRAISAL PROVISION VOID.

San Marco argues throughout its brief that the parties' dispute is solely over the amount of loss. It does so because appraisal is only ripe when an insurer admits there is coverage for a loss and the parties only disagree about the amount of loss, i.e. a disagreement over the cost to repair covered damage.

But, San Marco ignores the fact that American Coastal both denied coverage for the loss and declared the Coverage Part containing the appraisal provision (as well as the property damage insuring provisions) void. It also ignores American Coastal's counterclaim seeking the return of all monies paid to San Marco

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before American Coastal discovered the material misrepresentations and false statements.

Regardless of the amount of the actual loss, American Coastal denies it owes *any* payment and argues it is entitled to the return of all monies paid on the claim.

In other words, there is a dispute as to whether there is *any* coverage for the Hurricane Irma loss – a dispute the Court must resolve prior to compelling appraisal.

A. *Johnson*, which held appraisal is not appropriate when an insurer wholly denies there is a covered loss, is applicable here.

San Marco's first argument is that American Coastal, and all of Florida's District Courts of Appeal until *Leeward Bay*, misinterpreted this court's holding in *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021 (Fla. 2002). This Court held in *Johnson* that:

> … 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 that there is a covered loss, the amount of which is disputed.

Johnson, 828 So. 2d at 1022.

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While *Johnson* did not explicitly discuss the timing of appraisal, it clearly held that appraisal is inappropriate when coverage for the cause of loss is wholly denied. This Court went on to note, "the insurers denied there was a covered loss under the respective policies." Accordingly, the issue "was not appraising the amount of a loss which the insurer admitted was covered," but "whether the policies covered the losses for the claims that were made" – a coverage issue "to be judicially determined by the court and [that is] not subject to a determination by appraisers." *Johnson*, 828 So. 2d at 1025-26.

Here, American Coastal wholly denied coverage after it discovered San Marco's multiple violations of the policy's Concealment, Misrepresentation or Fraud provision. And, Florida's courts have found such provisions voiding coverage to be valid and enforceable. *Wong Ken v. State Farm Fire & Case Co.*, 685 So. 2d 1002, 1003 (Fla. 3d DCA 1997); *Svetlanovich v. State Farm Fla. Ins. Co.*, 291 So. 3d 1261, 1264 (Fla. 2d DCA 2020) (a policy provision voiding coverage "if the [insured] made any material misrepresentations or concealed any material facts either before or

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after a loss" is "fully enforceable"); *Anchor Prop. & Cas. Ins. Co. v. Trif*, 322 So. 3d 663, 671 (Fla. 4th DCA 2021) (same).

The fact the Coverage Part is voided shows the false reliance San Marco places in § 627.7015(9)(c). As correctly noted by San Marco, the appraisal provision does not mirror the language in the *mediation* statute, wherein the legislature excluded denied claims from the state's voluntary *mediation* program. San Marco argues American Coastal could achieve its position if only its appraisal provision specifically prohibited enforcement on a denied claim. [br. at 33]. But, such language was not needed in the appraisal provision because the Concealment, Misrepresentation or Fraud provision already contained it. If, "*at any time"*, that provision is breached, the Coverage Part – including the appraisal provision – is *voided*. [R. 79]. Reading the policy as a whole shows the error in this aspect of San Marco's argument.

Thus, we are faced with a coverage question that precludes appraisal – did San Marco intentionally conceal or misrepresent material facts and/or make false statements? American Coastal argues it did when it made a sworn demand for payment on items

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that did not exist and that its own experts confirmed were not damaged. [R. 236-241, 268-278, 387, 428-433]. In doing so, San Marco violated the policy's Concealment, Misrepresentation or Fraud provision and voided the Coverage Part that contained the appraisal provision.

San Marco's further reference to *Midwest Mut. Ins. Co. v. Santiesteban*, 287 So. 2d 665 (Fla. 1974) is also misplaced. There the insurer agreed to arbitration under *one* of its two policies it believed afforded coverage for the insured's claim. *Id.* at 667. However, it disputed coverage on the second policy and, as this Court held, "a challenge of *coverage* is exclusively a *judicial question* and may not be decided by arbitration." *Id.* Similarly, since American Coastal discovered San Marco's material concealments, misrepresentations, and false statements, its position has been that there is no covered loss and the Coverage Part is void. Since coverage is disputed as a whole, San Marco's claim is not ripe for appraisal.

Mentioned in the initial brief, but not discussed by San Marco, is *State Farm Fire & Cas. Co. v. Wingate*, 604 So. 2d 578 (Fla. 4th DCA 1992). *Wingate* preceded *Johnson*, but it is in line with *Johnson*

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and this case. The insurer in *Wingate* denied coverage based on its insured's misrepresentations about its fire claim. When the trial court denied the insurer's motion to stay appraisal, the Fourth reversed. In doing so, it found a coverage denial based on an insured's alleged misrepresentations was an issue "for the court to decide." *Wingate*, 604 So. 2d at 579.

In *Johnson*, appraisal was not appropriate because the insurer questioned whether there was *any* covered loss. Here, too, American Coastal has denied there is *any* covered loss. It is American Coastal's position that San Marco's alleged violation of the Concealment, Misrepresentation or Fraud provision voided the Coverage Part that would have extended coverage for the loss and contains the appraisal provision. In keeping with *Johnson*, appraisal is not appropriate here.

B. Coverage is at issue in both American Coastal's affirmative defense and its counterclaim that there is no coverage for the Hurricane Irma loss and the Coverage Part is Void.

San Marco next attempts to argue that American Coastal has no coverage defense, despite its position that there is no coverage for the Hurricane Irma loss *at all* because the breach of the

Concealment, Misrepresentation or Fraud provision voided coverage. [br. at 11-22]. It then goes through a lengthy analysis to arrive at two basic propositions. First, citing Black's Law Dictionary, San Marco states that insurance coverage is "[i]nclusion of a risk under an insurance policy." [br. at 12, citing *Black's Law Dictionary* 394 (8th ed. 2004]. Next, it cites one of this Court's decisions that held "the exclusion clauses of the policy… restrict and shape the coverage otherwise afforded." [br. at 12, citing *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 881 (Fla. 2007)]. American Coastal agrees with these basic elements of insurance law and policy interpretation. However, San Marco's argument and citations only emphasize American Coastal's point.

The primary question presented is whether San Marco's actions voided coverage. If so, even though damage from Hurricane Irma might have been covered prior to San Marco's actions, it is no longer included as a risk under the policy since the Coverage Part is voided. This coverage question precludes appraisal.

C. Coverage must be determined by a court, regardless of the grounds for the coverage denial.

In an attempt to distinguish the body of case law that prevents appraisal on a claim for which coverage is wholly denied, San Marco argues that a complete challenge to coverage only bars appraisal in certain circumstances. [br. 18 - 22]. San Marco's attempted distinction between coverage denials based on exclusions, coverage forfeitures resulting from a lack of compliance with post-loss conditions, and the voidance of coverage based on a breach of a misrepresentation or fraud provision is perplexing. Further perplexing is San Marco's assertion that its creation of these distinctions harmonizes the conflict certified below. [br. 18]

The Second District repeatedly certified the question of whether appraisal can be compelled on a wholly denied claim. Additionally, the Fourth District recently the acknowledged the conflict. *See*, *Merrick Pres. Condo. Ass'n, Inc. v. Cypress Prop. & Cas. Ins. Co.*, 315 So. 3d 45, 47 (Fla. 4th DCA 2021) ("The districts have not reached a consensus on whether the trial court must resolve coverage issues before compelling appraisal when the insurer denies coverage."). Clearly, the Courts of Appeal see that a conflict was created by *Am.*

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Cap, Assur. Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n, 306 So. 3d 1238, 1242 (Fla. 2d DCA 2020) and its progeny.

Prior to *Leeward Bay*, the courts were uniform that there was no right to appraisal once an insurer denied coverage in its entirety – regardless of the basis for the coverage denial. For example, appraisal was found to be inappropriate where coverage was denied based on excluded causes of loss *and* the insured's lack of compliance with post-loss duties. *Citizens Prop. Ins. Corp. v. Demetrescu*, 137 So. 3d 500 (Fla. 4th DCA 2014). Appraisal was also not allowed when coverage was denied *solely* because the insured failed to comply with post-loss duties – even after the insurer made payment on an initial claim presentation. *Sunshine State Ins. Co. v. Corridori*, 29 So. 3d 129, 130 (Fla. 4th DCA 2010). The Third District found appraisal was the inappropriate remedy when coverage was denied based *solely* on a coverage exclusion, and that the insured should have filed an action challenging the coverage decision. *Corzo v. Am. Superior Ins. Co.*, 847 So. 2d 584 (Fla. 3d DCA 2003).

And, contrary to San Marco's argument otherwise, appraisal has been denied when an insured violated a misrepresentation or

fraud provision. *Wingate*, 604 So. 2d at 579. The *Wingate* Court, prior to *Johnson*, agreed with the insurer that "the first issue is one of coverage, it having voided the policy." *Id.* In doing so, the court cited to *Allstate Ins. Co. v. Banaszak*, 561 So. 2d 465 (Fla. 4th DCA 1990), which held that the preliminary issue of coverage must be decided by a court before the question of damages can be sent to arbitration. *Id.* at 466.

Providing guidance is another pre-*Johnson* case, *Nationwide v. Cooperstock*, 472 So. 2d 547 (Fla. 4th DCA 1985). There, a police officer rear-ended a car, and the insured driver of that car made a claim for uninsured motorist benefits to her insurer. Nationwide brought a declaratory judgment to determine whether the claim was covered and the insured moved to compel arbitration, arguing the liability of the police car driver was a question of fact for the arbitrators. *Id.* at 548. The trial court determined that question of fact must be determined by the arbitrators.

The appellate court reversed and agreed with the insurer that, "the negligence of the officer is a question which the court, not arbitrators, must decide in determining *coverage*." *Id.* In doing so, it

found the "true question being litigated is coverage, notwithstanding the fact that the legal question as to coverage turned on an issue of fact." *Id.*

Here, too, the true question being litigated is coverage (whether the policy, and coverage for the claim, is void), notwithstanding the fact that the legal question as to coverage turns on an issue of fact (whether San Marco intentionally concealed or misrepresented material facts or made false statements about its claim).

D. San Marco ignores the fact that no Court of Appeal allows "dual track" when coverage is *wholly* denied, apart from the *Leeward Bay* progeny.

The initial brief discussed that although *Leeward Bay* asserted it followed the Third District in adopting its "dual track" approach to this issue, it actually charted a new path and departed from the essential requirements of law. Even the Third District does not allow a "dual track" when coverage is denied in its entirety. *Compare*, *Am. Cap, Assur. Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n*, 306 So. 3d 1238, 1242 (Fla. 2d DCA 2020) *with*, *Sunshine State Ins. Co. v. Rawlins*, 34 So. 3d 753, 754 (Fla. 3d DCA 2010) ("If an insurer admits there is a covered loss, the amount of which is disputed, the

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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.").

And, the Second District appears to have changed course after *Leeward Bay* and this case. *Heritage Prop. & Cas. Co. v. Veranda I at Heritage Links Ass'n*, 334 So. 3d 373, 376 (Fla. 2d DCA 2022) ("However, when an insurance company wholly denies a claim, the trial court cannot refer that claim to appraisal."). *Leeward Bay*'s line of cases leading to San Marco is truly the exception to the rule.

To support its argument in favor of a dual-track approach, San Marco incorrectly asserts that American Coastal agrees there is a covered loss. As discussed above and in the initial brief, American Coastal's position is that once it discovered San Marco's alleged breaches of the Concealment, Misrepresentation or Fraud provision, coverage was voided for the Hurricane Irma loss in its entirety.

Because coverage and the validity of the policy are in question, the primary issue is on of coverage and appraisal is inappropriate. *See*, *Castigliano v. O'Connor*, 911 So.2d 145, 148 (Fla. 3d DCA 2005) (holding specific performance under a contract can only be granted

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when the plaintiff is clearly entitled to it); *Palm Lake Partners II, LLC v. C&C Powerline, Inc.*, 38 So. 3d 844 (Fla. 1st DCA 2010) (same).

E. The parties chose to have their dispute resolved by a jury trial in the pleadings.

San Marco also argues that, at best, there are questions of fact intertwined with the coverage question relating to whether the Coverage Provision is enforceable. American Coastal also noted in its initial brief that the issues concerning the amount of loss are inextricably intertwined with the issues of coverage here.

Significantly, San Marco's stated position is that, where there are mixed questions of law and fact or where a question of law is dependent upon a finding of fact, "the factual issue is for the chosen finder of fact to decide." [br. at 14-15]. It also states, "[i]f a jury trial has been demanded, then the finder of fact is a jury." [br. at 15]. Again, this supports American Coastal's position that all elements of this coverage dispute should be determined by a jury.

San Marco's complaint was not framed as an action for specific performance to compel appraisal. Rather, San Marco pleaded a breach of contract, asking for a *jury trial* to resolve this dispute. [R.

115 – 120]. Similarly, American Coastal asked for a *jury trial* to resolve the breach of contract action, as well as its own counter-claim. [R. 471 – 498]. "[I]t is a fundamental rule that the claims and ultimate facts supporting same must be alleged [in the pleadings]." *Gilbert v. Merritt*, 901 So. 2d 334, 336 (Fla. 4th DCA 2005).

The parties chose their finder of fact and method of resolution – a jury trial. Taking San Marco at its word, this matter should be sent to a jury for resolution in its entirety.

II. APPRAISAL IS NOT A "SUPERIOR" METHOD FOR RESOLVING FACT DISPUTES AND WILL PREJUDICE AMERICAN COASTAL'S AFFIRMATIVE DEFENSE AND COUNTERCLAIM.

San Marco's argument that there is no prejudice in proceeding with appraisal [br. 27-30] and that appraisal is "superior" [br. 23 – 26] is based on assumptions, some of which are not fully supported by the language of the policy or the law. The facts of this claim – a coverage denial based on the insured's lack of candor and intentional misrepresentations – highlights the problems in San Marco's position.

American Coastal denied coverage in its entirety because San Marco and its representatives misrepresented and made false statements concerning its claim by demanding payment of 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]. Yet, San Marco believes it is better to have the appraisal panel proceed with blinders on to the fact the insured's claim package includes soffits that never existed and replacement of windows and doors San Marco's own experts testified were not damaged and only need to be cleaned. [R. 274-277, 279-385, 387].

While San Marco argues the appraisal panel will take into account whether its claim is inflated and contains false statements, it also argues that no witnesses will testify and the panel will not consider the credibility of the information presented by the parties. [br. 29]. The appraisers, according to San Marco, will not rely on witness testimony, but their own investigation of the buildings. [br. 29]. To San Marco, there is no benefit to obtaining information from fact witnesses and questioning the experts who prepared each party's

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claim presentation, even several years after the loss and with Hurricane Ian having affected the area.

San Marco also argues that prejudice is removed because "the trial court has the power to compel the appraisers to submit a detailed, line-item appraisal" so the court and the parties can determine how the award was allocated. That argument has two problems.

None of the cases cited by San Marco actually stand for the proposition that a line-item award can be compelled by a trial court. In *First Call 24/7, Inc. v. Citizens Prop. Ins. Corp.*, 333 So. 3d 1180, 1183 (Fla. 1st DCA 2022), the policy contained language requiring a line-item appraisal award. *State Farm Fla. Ins. Co. v. Speed Dry, Inc.*, 292 So. 3d 1260, 1261 (Fla. 5th DCA 2020) (same). American Coastal's policy contains no such language. And, while *Fla. Ins. Guar., Inc. v. Olympus Ass'n, Inc.*, 34 So. 3d 791 (Fla. 4th DCA 2010) noted that a line-item appraisal award assists a court in identifying coverage issues, neither it, nor any of the other cases cited by San Marco, held a court *must* compel its use against a party's objection.

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Indeed, some courts have specifically held appraisers *cannot* be compelled to use a line-item award absent agreement of the parties or policy language requiring it. *See*, *White Surf Condo. Mgmt. Ass'n v. Lexington Ins. Co.*, No. 6:17-cv-1203-Orl-40TBS, 2017 U.S. Dist. LEXIS 222840, at *4 (M.D. Fla. Aug. 10, 2017) (declining to compel a line-item award and noting that, "[w]hile the parties are free to agree to such a procedure, Defendant provides no legal basis to compel it."); *Vista View Apartments, Ltd. v. Chubb Custom Ins. Co.*, No. 08-22772-CIV-KING, 2009 U.S. Dist. LEXIS 139280, at *5 (S.D. Fla. July 6, 2009) (refusing to require a line-item award where the policy does not require one).

Similarly, the Fourth District reversed a trial court's order prohibiting an insured from recording the insurer's adjuster during a property inspection because the policy did not expressly prohibit it. *Gesten v. Am. Strategic Ins. Corp.*, 339 So. 1008, 1011 (Fla. 4th DCA 2022). Based on *Gesten*, *White Surf*, and *Vista View*, one could easily see a court refusing to compel a line item award where the policy did not expressly require it.

Further, San Marco makes no attempt to address the cases cited in the initial brief that discuss the impropriety of not bifurcating actions where the facts relevant to one issue are intermingled with the other issues in the case. *See generally*, *Sall v. Luxenberg*, 313 So. 2d 775, 776 (Fla. 4th DCA 1975); *Valliappan v. Cruz*, 917 So. 2d 257 (Fla. 4th DCA 2005). As *Cooperstock* illustrates, when the true question being litigated is coverage, appraisal is not appropriate - notwithstanding the fact that the legal question of coverage turned on an issue of fact. *Cooperstock*, 472 So. 2d at 548.

Thus, there is the risk of great prejudice in that the appraisal panel could return an award without adequately being able to evaluate potential factual misrepresentations or concealments. That prejudice could then be compounded by the panel issuing a non-itemized lump-sum appraisal award. That undecipherable award based on incomplete information would then bind the parties at trial on the coverage issue and counterclaim. *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.

And, while San Marco extolls the purported efficiency of appraisal, it concedes that a separate trial will still be needed to resolve the issue of coverage and the counterclaim. Even with a line-item award, much of the documentary and testimonial evidence will duplicated the documents submitted in the appraisal process (though, now the parties will finally be able to probe their credibility). To prove its defense and counterclaim, American Coastal will have the right to compare the scope of loss claimed by San Marco prior to suit and in the appraisal with testimony from its own adjusters and experts concerning their evaluations of damages and findings. A jury will then have to duplicate the efforts of the appraisal panel, though with presumably more information, and again evaluate the scope and amount of damage.

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Far from achieving any efficiency by forcing an appraisal of damages and then a trial on whether the policy and appraisal provision was even enforceable, this procedure will only prolong the dispute and increase the time and expense allocated to it.

CONCLUSION

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

Date: June 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail on this 9th day of June, 2023, to:

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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 4,000 words.

/s/ Patrick E. Betar