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THE APPRAISAL PROCESS
'An Update…'
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EDITORIAL

This is the third iteration of this article. The first version was released in 1996 as public adjusters were initiating the Appraisal process as a means to resolve disputes on property losses. At that time, the insurance and legal communities were also beginning to awaken to how they might invoke this rarely used alternate dispute mechanism built into the contract of insurance.

The insurance market in Canada has been rapidly evolving in the past five years. There are direct writers of property insurance who have now moved into the top 10 underwriters. This reflects some changes in the sales distribution channels within the market. With some of these changes has come a huge push by all insurers to improve their customer service. Part of the solution has been a dedication to providing real-time service 24 hours a day, 365 days of the year.

Many insurers view their claims service as a differentiator in the market. To drive improvements, they have implemented customer surveys and are genuinely seeking methods to improve claim processes to meet the high expectations of their customers.

The vast majority of policyholders are satisfied with the settlement of their property claims. But some claims get derailed for a variety of reasons. The appraisal feature of the policy provides a terrific mechanism to resolve disputed matters with a quick, cost-effective solution. So, this appears to be a very appropriate moment in time to update the current landscape on this alternate dispute method.

INTRODUCTION

It was 2 a.m. The night was cold and miserable when a small electrical fire broke out within a large hotel complex in a rural Ontario town. The fire department was still pouring water on the building as the media pushed out news of the fire. The damage exceeded $2 million. Within minutes of the news getting out, public adjusting firms from the United States and Canada were on the phone trying to establish contact with the building owner. All this activity was underway before the building owner had initiated a phone call to his insurance company to report a claim.

By 11 a.m. that morning, sales representatives from the public adjusting firms arrived on the site. They quickly found the owner, who was talking to the fire chief. They took turns speaking privately with the owner. They explained their roles in a polished, professional fashion. They presented brochures that included testimonials from happy, satisfied clients who felt they had made the right choice in hiring a public adjuster to represent to their best interests with the insurance company loss adjuster. They also provided copies of newspaper clippings highlighting some situations where people had been treated badly by insurers.

At noon, the independent adjuster hired by the owner's insurance company arrived on scene. He found the owner to be anxious, upset and confused. Within minutes the owner asked the adjuster when he could expect an advance payment. The adjuster tried to explain that he had just arrived and he needed to orchestrate a site investigation to determine the cause of the fire. He tried to explain the process he would follow to begin handling the claim, but the owner seemed to be getting more upset by each comment he was making.

Eventually, the hotel owner excused himself from talking to the independent adjuster and phoned his lawyer. He learned that his lawyer had no experience in how to deal with a fire claim. The owner decided that he needed to protect his investment in the hotel. He made the decision to call one of the public adjusting firms. He needed help!

This initial phone call led to a meeting later that afternoon where the hotel owner negotiated his deal with the public adjuster. He agreed to pay 5 percent of the gross amount paid on the building loss; 10 percent of the contents claim and 15 percent of the business interruption loss. The Agreement signed by the insured gave a direction to have his insurer add the public adjusting firm as a "loss payee" on all settlement cheques issued.

As soon as the engagement contract was signed, the public adjuster emailed a letter to the insurance company and the independent adjuster. A demand was made for blank proof of loss forms…*and*…an immediate advance payment. References were made by the public adjuster on the insurer's obligation to act in good faith.

Within 24-hours of being engaged, the public adjuster's brought in a construction estimator who was a full-time employee of their firm. This estimator pegged the building repairs at $900,000. A second employee of the public adjusting company worked on a parallel path to catalogue the damaged contents of the hotel. This estimator concluded that everything was destroyed. A contents claim of $500,000 was determined. The last damage item was the business interruption claim. These were early days so the public

adjuster advanced his best estimate on this part of the loss. This early work of the public adjuster led to the filing of a proof of loss with the insurer that totaled more than $1.7 million.

The insurer's loss adjuster was also taking steps to determine the amount of loss. He engaged a structural engineer, chemist and several experienced general contractors to work up with him in determining a scope of damage and arrange for competitive pricing. The hotel owner and his public adjuster were invited to be part of this process, but they refused to participate. The insurer's process led to estimated building repairs of $600,000 and $100,000 for the contents loss.

Without even considering the business interruption loss, both sides were already $700,000 apart on the direct property damage claim. As documents were exchanged by both sides it was obvious there were huge gaps between both sides and firm positions were now taking place. No steps had been taken to initiate repairs. The insurance company was aware of its obligation to act in good faith. They worked through the building and content claims and used their own numbers to determine what they felt was an appropriate actual cash value. The company immediately issued a cheque and sent the funds to the hotel owner with a lengthy letter that spelled out the terms of the Replacement Cost Endorsement on this policy, and waited for the policyholder's next step.

The insurer did not have to wait too long. A letter arrived from the public adjuster announcing that the hotel owner had elected to resolve the damage issues by invoking the Insurance Act of Ontario, R.S.O. 1990, c. 1.8, s. 128, and going to Appraisal. This aligns with Statutory Condition #11 of an Ontario property policy.

What happens now?

GOALS OF THIS ARTICLE

The goals of this article are to:

1. Demonstrate how the Appraisal process works.
2. Provide suggestions to insurers on how to prepare their files so they are effective in advocating their position in the Appraisal process.
3. Outline interaction that currently exists between insurers and public adjusters. Part of this interaction has been crafted from legal decisions and this article will highlight key judgments that influence this very important ADR process.

The article is written in the context of how the Appraisal process operates in the Province of Ontario. Other Provinces, particularly British Columbia, have variances to the process and the readers should consult their specific policy wordings.

Section 128, THE INSURANCE ACT of ONTARIO, R.S.O. 1990

Under the Statutory Conditions of every property policy issued, both the insured and the insurance company have the right to elect appraisal when there is a disagreement as to:

1. The value of the property insured.
2. The value of the property saved.
3. The amount of the loss.

To trigger the process, a proof of loss must have already been filed. A letter (notice) by either the policyholder or the insurer is all that is required to start the 'Appraisal process. In this letter, the party making the demand would formally identify who will be acting as the appraiser in this process. The other party then has seven clear working days to appoint its chosen appraiser.

Once both appraisers are appointed, the Act requires that within an additional 15 days both sides must agree on a choice of an umpire.

A judge can appoint an appraiser or an umpire, as the case may be. In a situation in which an insurer triggers this mechanism and the policyholder refuses to participate in the process, the insurer can petition the court to appoint an appraiser.

THE SELECTION PROCESS

1. *Choosing an Appraiser*

The *insured* can choose whomever he or she wishes to act as appraiser. Some policyholders have acted on their own behalf. Others have elected to use a relative, contractor, public adjuster or lawyer.

The *insurer* can also choose anyone it desires as an appraiser.

When choosing an appraiser, an insurer should consider:

- Whether the appraiser has the knowledge, experience and skill to deal with the issues in dispute. How many cases has the appraiser handled and what issues has he or she dealt with? Does the appraiser have any references? What umpires have heard his or her cases in the past? Has the appraiser ever acted as an umpire or instructor? Has he or she taken any training courses, including classes on mediation or arbitration?
- Does the appraiser have strong advocacy skills? A subject matter expert in a certain discipline, such as a contractor or engineer, does not necessarily make them the best choice if he or she cannot argue a position well before an umpire.
- The issues that need to be resolved. An example is an argument relating to the actual cash value (ACV) of a building loss. The insurer might believe that a market value approach would be best and may consider hiring a real estate appraiser to argue that point of view. But can this appraiser articulate the case law relating to this approach? Where might other arguments come into play relating to policy endorsements or exclusions?
- The appraiser for the policyholder. Determining his or her competencies will allow the insurer to match strength with strength. The insurer does not want to be outmatched on this front.
- Which side triggered the appraisal process? Has the other side elected this process to remove or maneuver the insurer's adjuster off the file? If this is the case, perhaps a new face in the process will resolve matters without going to the umpire. Never discount the potential impact a personality dispute might have in determining the amount of the loss.
- Your appraiser's knowledge of other issues that can come up during the appraisal session. Those issues include::
    - Statutory conditions.
    - Proofs of loss.
    - Pre-judgment interest.
    - G.S.T. / H.S.T.
    - Sales tax.
    - Actual cash value.
    - Prescription periods.
    - Current case law.

When you consider the number of contractual and legal issues that can arise in the appraisal session, it makes sense to utilize an appraiser who has extensive knowledge of as many of the points listed above as possible. If the other appraiser is a lawyer or public adjuster, keep in mind his or her abilities to argue on all these points.

The wrong choice of appraiser can obviously impact the outcome of the process. For example, in situations in which a general contractor was selected as appraiser for the

insurer, the contractor did a fine job arguing scope and pricing. However, when the debate turned to issues of replacement cost and ACV, the contractor was not able to effectively argue the point of view of the insurer.

Bear in mind that once either party elects appraisal, they lose the right to opt out and must comply with the process. If they fail to do so, then a judge will appoint an appraiser and, if necessary, an umpire.

2. Choosing an Umpire

If both appraisers reach an impasse in their efforts to resolve issues in dispute, they need to agree on a choice of an umpire. Generally, each side proposes several names and eventually they agree on one. If they fail to agree on anyone, then the matter is referred to a motion court judge, who hears evidence from each party and makes a decision on appointing an umpire.

Choosing the right umpire to orchestrate a resolution is critical. Points to consider include:

- The umpire should have experience in handling the appraisal process.
- The umpire should be someone who has knowledge, skill and experience with respect to the issues for resolution.
- The individual should be impartial and unbiased. If the umpire has any potential conflicts of interest, they should be declared up front. Both appraisers should be making an informed decision on their choice of umpire.
- The umpire should be up-to-date with respect to current case law.
- The umpire must be very clear on his or her role. The umpire is not conducting an arbitration nor hearing evidence in the fashion of a courtroom setting. The umpire must stay clear of orchestrating decisions that are more properly decided in a court of law. The umpire is present to bring his own experience and knowledge to bear on the issues in dispute.
- At the end of the process, the umpire should strive to ensure that both sides felt they were treated fairly in the process and had appropriate opportunity to present their cases and argue their points of view.

If the selection of an umpire goes to a motion court judge, both sides make written submissions to the court. The judge hears arguments and then makes a decision. An example of this type of decision can be found in Trudeau vs. Royal Insurance Company (Ont. Court-General Division) P. Hurley, March 3, 1999:

> "*The applicant's concern is to avoid an umpire whose apparent affiliation or relationships to the other side would raise an apprehension of bias. Yet, it proposes 2 candidates who, it would appear from reading between the lines of the correspondence, could not be said to have acted for one of the parties. The failure to agree on what, by experience, appear to be capable candidates because of the fear or reasonable apprehension of bias leaves the Court with the option of appointing Mr. Gibson, whom, according to the evidence as being an umpire on many occasions involving appraisal issues. Mr. Gibson will therefore be named umpire…..costs to the respondent's payable forthwith all fixed at $500."*

Further guidance on the selection of an umpire can also be found in:

1. McPeak v. Herald Insurance Co., Alberta QB, 1991, A.J. No. 222.

2. 265 Commercial Street Ltd. v. ING Insurance Co. et al, Nova Scotia Supreme Court, Justice F. Edwards, Dec. 14, 2009.

3. Matti v. Wawanesa Mutual Insurance Company, Queen's Bench, Alberta, Justice W.P. Sullivan, May 14, 2009

Several themes sound in these decisions:

- Is there the potential for bias on the part of the umpire? Some umpires have worked in the insurance industry for years. The test is whether a reasonable apprehension of bias or partiality exists. Much like the process in qualifying an expert in court, each individual stands on his or her own merits in this regard.
- Does the umpire have the right level of experience to deal with the specific issues at hand?

3. Costs

Once the Appraisal mechanism is triggered, the policyholder and insurer are required to pay 100 percent of their own appraisers' costs. In addition, each side is required to pay 50 percent of the umpire's costs.

It is important that everyone understands early in the process the requirements for contributing to costs. Lawyers should also note that once this mechanism is triggered and they continue to act as appraisers for their clients, their costs to do so are born by their clients.

HOW DOES 'APPRAISAL WORK?

Appraisal starts with a request from either side to embark in the process. A simple letter triggers it. The letter usually includes the identity of one appraiser along with a demand to have the other side's appraiser identified within seven days.

A proof of loss form must be filed before an Appraisal process can be triggered. There have been arguments from insurers that a valid proof of loss must exist before the process begins. Their viewpoint is that all of the requirements of Statutory Condition #6 *(Requirements of an Insured Following a Loss)* must be met before a proof of loss can be deemed valid. When faced with what they feel might be non-compliance an insurer might consider formally voicing their reservations and reserving their rights to move forward into appraisal. Then, they can involve the umpire to resolve issues regarding compliance with statutory conditions including the production of documents.

Once appraisers have been elected, they move forward with the full authority of the respective principals to agree on the amount of loss in accordance with the terms of the Insurance Act.

In the first meeting of both appraisers, they identify issues in dispute. An effort should be made by the appraisers to try to resolve these issues. Each appraiser brings the authority to bind their principals to a settlement. There can be a degree of negotiating during this

phase of the process. Some discussions may be held without prejudice so that if issues are not resolved, the appraisers can go back to square one in front of the umpire.

If the two appraisers cannot come to full agreement on some issues, then the next step is involving an umpire. At this point, the umpire would ensure that there has been an appropriate exchange of information and, if not, establish timelines for that to happen.

Each umpire tends to have his or her own style in dealing with an 'Appraisal meeting. No formal rules of conduct exist, but legal cases have supplied some guidelines (that will be referenced later in this article)

Many umpires will begin the process by requesting that each appraiser submit a document brief that could include:

- A narrative setting out the issues in dispute and the appraiser's opinions.
- Insurance policy details. Underwriting file if applicable.
- Repair estimates, drawings or opinions.
- Analytical charts comparing pricing.
- Proofs of loss / payment list.
- Photographs / videotape.
- Engineering reports, if applicable.
- Key correspondence, if applicable.
- Any expert reports or opinions to support a point of view.
- Relevant case law, articles or other material that might support a point of view.

The appraisers should make an effort to agree beforehand on the submission of common documents to avoid duplications that might lead to an increase in costs. Some briefs are quite extensive, so the appraisers should make their submission easy to read and understand.

The submissions should be made in <u>duplicate</u> to the umpire. To even the playing field, the umpire will ensure that each side gets the other's brief once both are in his hands. In addition, any requests of the umpire should be made in writing, with a copy sent to the opposing site. No one should communicate one-on-one with the umpire; to eliminate surprises, both appraisers and the umpire should be dealing with the same information flow.

Disputes over the amount of loss might require the umpire to consider requests that one might not see in other ADR mechanisms, including:

- Completing a site inspection.
- Attending a storage warehouse to inspect equipment, fixtures or other building contents.

In advance of the Appraisal session, appraisers should consider whether or not they wish to bring witnesses to the session. By consent of the umpire, others can be allowed into the session to provide information <u>not</u> evidence. This has included:

- A contractor to discuss his scope of damage or clarify pricing issues.
- An engineer to elaborate on a report or to clarify a specific point.

- The original loss adjuster, who might assist the insurer's appraiser in presenting a myriad of documents.
- A lawyer representing the policyholder who wishes to be present to assist in the choice of appraiser.
- The policyholder to provide information on the claim that has been submitted. On these occasions, the policyholder has been allowed to speak and the umpire addressed questions on specific points, but the policyholder has not been subject to cross-examination. Allowing the policyholder to have his or her "day in court" can help manage a successful outcome for this process.

The umpire must strictly control who is allowed into the session and what input they have into the process. The only people with official status in this process are the two appraisers and the umpire. Each appraiser should feel comfortable that the process is being handled in a fair and even-handed fashion.

At the start of a session, the umpire will usually review how the session will be conducted. These opening remarks set out the ground rules for others that might be present as witnesses.

After opening remarks, many umpires take a mediation approach to resolving the issues. Both sides are given appropriate, uninterrupted time to present their arguments. The umpire will then control a debate between both appraisers. For those familiar with mediation procedures, this is an interest-based approach. As the discussion unwinds, most umpires will then gradually move to a rights-based approach, in which the umpire will provide an opinion on the issues. The umpire's opinions may stimulate further discussion to see if some common ground can be developed with everyone or with one of the two appraisers.

The umpire must ensure that the process stays within the limits of his or her authority and does not drift into are that should properly be addressed by a court of law. For example, an appraiser for the insured might ask the umpire to agree that some goods were destroyed in a fire. The appraiser for the insurer argues that the goods were not in the premises destroyed. An umpire can drive the process to reach a conclusion as to the value of the loss, but cannot conclude whether the property was on the site when the fire happened. Any such conclusion has to be left to a court of law.

Usually, an Appraisal session is concluded in one meeting. Sometimes, more than one meeting is required, and the umpire also can adjourn the session while an appraiser develops and submits further documentation.

Most Appraisals cover many separate issues in dispute. The umpire might choose to try and settle the issues one-by-one. As each item is debated, there may be some situations where:

- Both appraisers and the umpire reach an agreement.
- The appraiser for the insurer and the umpire agree.
- The appraiser for the policyholder and the umpire agree.

When two out of three parties agree on an issue, it is deemed to be resolved. The Award Document can reflect either individual items or, by consent, the parties can use the issues they have resolved to arrive at a macro settlement number whereby at least two of the three agree on the figures. There is some flexibility in how this is completed.

LEGAL CASE REVIEW

The Insurance Act of each province has similar wordings with respect to their Statutory Conditions. Interpretation of that wording has been subject of a number of legal cases across Canada that impact and define the process. This includes answers to a number of frequently asked questions:

1. What is the intent of Appraisal? It is to encourage settlement and to expedite litigation by providing the trial judge with valuations based on the expertise of appraiser(s) and/or umpire.

   (Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co. et al, Sask. Ct. of Appeal, June 28, 1990 …and… O'Brien et al v. Lloyds et al, Alberta Queen's Bench, Dec. 23, 1991); .

2. Does a proof of loss have to be filed before Appraisal can be triggered? Yes! Arguments have also been raised as to whether an incomplete proof of loss can still trigger the process. The case cited below speaks to the proof of loss being complete, but the reality is this entire area is a gray zone that the umpire can deal with prior to the Appraisal session. Remember that the goal of the process is to provide a quick and efficient outcome.

   (LeBlanc v. The Co-Operators, 1993, Ont. District Court.)

3. Can either side elect Appraisal if there are policy coverage issues at play? Yes! This extends to situations in which the insurer claims the insurance policy is void. Interpretation of coverage and policy term is for a trier of fact and not the Appraisal venue. This should not delay the process of determining the amount of loss.

   (David v. Canadian Northern Shield, 1994, British Columbia Supreme Court, I.L.R. 1-306…and…Viam Construction Ltd. v. Zurich Insurance Company, British Columbia Ct. of Appeal, 1984, 6 C.C.L.I.)

4. When a party elects to go through the Appraisal process, does the normal limitation period that might exist on the policy change? The simple answer is no". Most property policies contain a one-year limitation period on fire losses. Someone electing Appraisal or perhaps filing a proof of loss at the last minute does not extend the prescription date. An insurer may consider granting an extension so that parties involved do not incur unnecessary legal costs, but any waiver or extension should be clearly communicated between both parties.

Two of the cases noted below suggest that if a case flows into appraisal an argument can be raised that the limitation period is suspended. Insurer must be absolutely clear with their policyholders or their representatives on their intention—are they relying on the prescription period or not. A clear critical path letter initiated early in the process can spell this out so there is no ambiguity.

(Feist v. Gore Mutual Insurance Company, Ont. Ct.-Gen. Div., Jan. 10, 1991…and…Sadema Lumber Products Limited v. Hanover Insurance Company, Ontario Supreme Court, 1-1381, April 27, 1981. and Terraco Industries v. The Sovereign General Insurance Company, Queen's Bench / Alberta March 1, 2006.

5. What happens if one party does not agree to participate in the process? In these situations, the party initiating the process would apply to the court for the appointment of an appraiser to act for the other side. If the two appraisers could not reach a mutual agreement on the choice of umpires, a judge would appoint an umpire.

   (Trentmar Holdings Ltd. Et al v. St. Paul Fire and Marine Company, Ontario Supreme Court, 1984. This is an interesting case. The policyholder's court-appointed appraiser refused to show up for the Appraisal session with the umpire. This appraiser felt he had no instructions about the claim, so he was not prepared to participate. The Appraisal went ahead, and when the umpire and appraiser for the insurer reached consensus on damage issues, they executed an award document since two out of three parties involved agreed on the issues. So, in spite of the lack of cooperation by one appraiser, this matter concluded in a way that precluded further costs of litigation on damage issues.

6. Can an umpire hear evidence in an Appraisal session? Generally speaking, no. As mentioned earlier in this article, the umpire can allow certain people into the room to provide information or assist in clarifying a point, but usually there is no testimony under oath. An exception took place in the case of Royal Insurance Company of Canada v. Brown (unreported) April 28, 1985, B.C. County Court. In that case, the court determined that the appraisers could hear testimony under oath and receive evidence by way of sworn affidavits.

7. Can a public adjuster's fees to a policyholder form part of the insured's claim? This will depend on the policy wording if the claim is being made via a professional fee's endorsement. Many insurance contracts do allow for certain fees to be paid, but they exclude public adjuster fees. An interesting case to review (it is currently being appealed) is 854965 Ontario Ltd. v Dominion of Canada General Insurance Company, Ontario Superior Court, J. Kennedy, March 17, 2003.

8. Does the allegation of fraud abort the ability of either side to embark on the Appraisal process? No! If an election is made, the matter must go forward, but keeping strictly in mind what the process allows to be decided. Many insurers who are involved with a possible fraud defense on a file resist Appraisal, as this ADR mechanism may confuse strategy on the file. This creates interesting dynamics for the umpire, but there is no choice but to go the Appraisal route if

the process is triggered.

(Arlington Investments v. Commonwealth Insurance Company, 1985, B.C. Court of Appeal, I.L.R.,1-1901….and…Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co. et al, Sask. Ct. of Appeal, June 28, 1990.

9. Can restrictions be placed on the umpire as to what methods might be used to determine the amount of loss? For example, on an ACV argument can the umpire be instructed on what method (i.e. market value; RC less depreciation; income approach) to be used to arrive at the amount of loss? No!

(Greer v. Co-Operators, Ont. Superior Ct. of Justice, J. Shawghnessy, Aug. 12,1999. In this decision the judge said:

"There is no clause in the insurance contract which must be interpreted by this court. I am satisfied that qualified appraisers are quite capable of making that determination or in the event of a dispute an umpire chosen by the appraisers can properly determine the matter. There is no question of law for this court to decide and there is no need to provide directions."

(Barrett et al Vs. Elite Insurance Company, B.C. Court of Appeal, March 27, 1987 and Sehdev v. State Farm, Ont. Court of Appeal, Feb. 20, 1991. Both of these cases affirmed the umpire's ability to choose the path to determine the amount of loss.

7. Does the Appraisal process provide the umpire with authority to direct an insurer to take salvage? No! This is not something the appraisal section of the Act provides the power to determine.

(I.C.B.C. v. Dawd Holdings Ltd., B.C.S.C., Nov. 15,1988)

8. Does an umpire have to declare any previous dealings or relationships with either party to the appraisal process? Yes! If, for example, the umpire is a loss adjuster, he or she should be declaring any past dealings with the insurer who is a party to the process.

(Peak v. Herald Insurance Company, 48 C.C.L.I., 210, 1991)

9. Is the finding of the process binding on everyone? Yes! Any result of the process can be subject to judicial review, but the courts have consistently held that in the absence of fraud, collusion or bias, the decision will stand.

Parslow v. Pilot Insurance Co., Ont. Ct. (Gen. Div.), Feb. 5, 1999 is a case where two appraisers resolved the ACV on a building and contents without using an umpire. A lawyer for the policyholder challenged the result. A judicial review of the decision was demanded. A panel of three Ontario Court justices concluded:

"*Wrongdoing by the appraisers has not been alleged or proved. We can see no reason to go behind the appraisal. The application is dismissed with costs…."*

Pfeil v. Simcoe & Erie Insurance Co., Sask. Ct. of Appeal, 1986 also affirmed that an umpire's award was binding and could not be set aside except for fraud, collusion or bias.

PUBLIC ADJUSTERS

In the past 20 years, there has been a dramatic increase in the number of public adjusters who are now licensed to do business in Canada. Who are they?

Each province has licensing requirements relating to public adjusters that are similar to these required of independent adjusters. They must be licensed to act for a policyholder in the settlement of a claim.

Public adjusters are professional, well-trained loss adjusters. They are also very well-organized with strong marketing and sales professionals who solicit business after a loss.

When public adjusters are engaged by a policyholder, this can change the dynamics of loss handling for insurers. Some things insurers should keep in mind:

- In this day of 24/7 service, the insurer should respond to a first notice of loss by immediately sending an adjuster to the scene of an event.
- The insurer's adjuster should go to every such scene with the view that a public adjusting firm will be in contact with the policyholder. With that thought in mind, the loss adjuster should take a proactive role in explaining the potential contact, role and compensation of public adjusters to the policyholder. Policyholders should understand that they are responsible for paying a public adjuster's fee out of their policy proceeds. Such discussions should be fair and even-handed on the part of an insurer's adjuster; at no time should he or she make derogatory remarks about public adjusters.
- Loss adjusters should keep good notes of discussions between themselves and the public adjuster.
- Public adjusters are required to be licensed. Request that the public adjuster confirm his or her license.-.
- If a public adjusting firm is retained by the insured, request a copy of the engagement contract.
- Take note of any directions signed by your policyholder to add the public adjusting firm as a payee to the settlement funds. If the insured party gives you this direction, you must follow it when issuing funds.
- Do a detailed scope of building and content loss. Most arguments in Appraisal are won or lost on the scope of damage as opposed to pricing issues.
- Be prepared to prove your point of view with letters of opinion from appropriate experts. You bear the costs of obtaining these opinions. Similarly, the public

adjuster bears the cost for his or her experts. In any appraisal session where you have an expert report and there is none forthcoming on the other side you can certainly argue the best evidence rule in pulling the umpire's opinion in your direction.

- Solicit written opinions from contractors or experts on areas of depreciation repair issues, etc. Do not be caught up in situations where you are the one expressing opinions.
- Put everything you are doing in writing to the public adjuster and consider sending copies of all correspondence to the policyholder. While it is true the public adjuster is representing the insured, bear in mind that public adjusters are not lawyers. You have every right to communicate with your policyholder. If the insured advises you not to communicate with the public adjuster, though, you must comply with this request.
- The prescription period on the loss should be clearly spelled out. And, you should outline the intention of the insurer to rely upon it or perhaps alter it to allow the process to unfold without a Statement of Claim being issued.
- Ensure that the insured or his or her representative is authorizing payments that reduce the policy limits. As an example, the insurer's adjuster might authorize major dry-cleaning of clothing following a loss. The policyholder may not have authorized the cleaning or understood that a major bill that will reduce policy limits has been incurred.
- All concerns on mitigation and efforts to reduce further loss or damage should be made in writing.
- Insist on strict compliance with Statutory Condition #6 and proof of loss requirements. It is a common practice of public adjusters to ignore listing the date and location of the original purchase of contents. They simply work up what they call sound value and leave it to the insurer to figure out what this means. Insurers have every right to insist on a reasonable effort to comply with Statutory Condition #6.
- Do not get caught in moving salvage off-site without thinking through the consequences. Remember there is **no** abandonment of salvage to the insurer pursuant to Statutory Condition #10.
- It is unprofessional and inappropriate to direct anger against the insured and/or public adjuster simply because the policyholder has chosen to exercise his or her right of choice. There are many valid reasons why a public adjusting firm might be engaged. This could include ill health, lack of time or a negative previous loss experience. Deal with policyholders in the same manner you would had they not exercised their right of choice.
- Make advance payments where appropriate, following typical practices. Resist the temptation to play hardball with the policyholder. You never know how much good will you sow at the outset of the claim that will help you in later negotiations.

- Be fair and reasonable at all times. Try to resist setting up a high-low game.
- Use reputable and experienced general contractors to price repairs. Umpires are quite familiar with the reputation of firms in the marketplace and will be influenced by the quality of vendors.

It is important on every property claim that the insurer's loss adjuster performs consistent, quality work on every loss. The involvement of a public adjusting firm should have no impact on the decision-making process. As always, act in good faith on any file.

SITUATIONS FOR USE OF APPRAISAL

The Appraisal process has achieved its goals in many situations, including the following examples:

- A truck ran into the plate glass window of an upscale ladies fashion store. Shattered glass was thrown everywhere. Is all of the stock a total loss?
- One year after a fire loss, the policyholder was still complaining that his home smelled like smoke. The appraisers did not agree on issues. An umpire conducted several site visits and reached agreement to engage a neutral expert to inspect the home. Further testing validated the smoke issue and led to significant increases in the original settlement offers.
- Water damaged 15 Persian rugs. What was value of loss? The two appraisers were $50,000 apart.
- After a major commercial fire, arson was alleged against the named insured. The insurer denied the claim, but the policyholder demanded Appraisal. Both parties agreed that a business interruption claim would be part of the process. This led to a decision to resolve the amount of loss based on agreed scenarios. By doing this, if the matter were litigated, the trial judge would then be able to use the scenarios as a basis for determining the actual damages. This would save time and money at trial.
- In a commercial fire claim, arguments were raised not only on direct damage but also on coinsurance issues. By agreement, the process determined the coinsurance penalty.
- An insurer repaired aluminum siding on house, but the insured felt that the entire home should be re-sided instead. What should be the outcome?
- After a theft from their home, the policyholders represented themselves. An agreement was reached on the replacement cost and ACV of the content loss.

CONCLUSIONS

The Appraisal process has been around for many years, but the process has been under-utilized until the past 12 months, when insurers were awakening to how they might utilize this tool as a method to quickly and effectively reach decisions on matters in dispute with policyholders. The legal profession has now seen that decisions made in this process are full and final in the absence of being able to prove fraud, collusion or bias.

In recent years, British Columbia has passed amendments to its Insurance Act to deal with Appraisals. It is compulsory that all property damage claims go to appraisal, including claims for business interruption and loss of rent. Furthermore, an insurer must now give the insured notice within 21 days of the insured's rights to appraisal where the insurer and insured disagree as to the value of the property insured, the value of the property saved or the amount of the loss. Whether other provinces go this route, time will tell.

I hope this article serves its intended purpose to update readers on the use of the Appraisal process. I also hope it provides appropriate suggestions on how insurers should interact with public adjusting firms.

We work in a fast-changing, complex society that is becoming more knowledgeable and demanding. Adjusters need to constantly improve their communication skills and find ways to resolve issues in dispute as quickly as possible.

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