

Calculating Damages for Business Interruption Losses: Coverage Maximizing Methodologies, Post-Loss Market Conditions

TUESDAY, MARCH 29, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Joseph Critelli, CPA, CFF, CRIS, ERIS, Senior Director, **Imperium Consulting Group**,
New York

Marshall Gilinsky, Shareholder, **Anderson Kill P.C.**, New York

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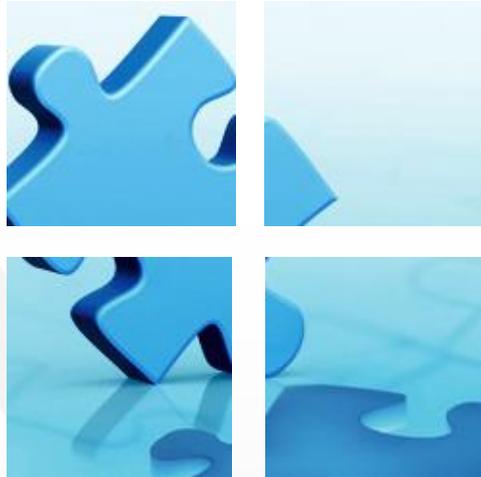
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STRAFFORD WEBINARS

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March 29, 2022
1:00 pm – 2:30 pm

CALCULATING DAMAGES FOR
BUSINESS INTERRUPTION
LOSSES: COVERAGE
MAXIMIZING
METHODOLOGIES, POST-LOSS
MARKET CONDITIONS



Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

SPEAKER:

Marshall Gilinsky is a shareholder in the New York office of Anderson Kill and practices in the firm's Insurance Recovery and Commercial Litigation Departments. Marshall is co-chair of the firm's Sexual Harassment and Abuse Insurance Recovery Group, and a member of the firm's Banking and Lending Group and Hospitality Industry Practice Group.



During his 20-year career representing policyholders, Marshall has recovered hundreds of millions of dollars for his clients, successfully litigating disputed claims under a variety of insurance products, including property and business interruption insurance, commercial general liability (CGL) insurance, errors and omissions (E&O) insurance, directors' and officers' (D&O) insurance and life insurance. Marshall has represented clients on numerous high-stakes, complex insurance claims arising out of prominent losses such as 9/11, Hurricane Katrina, Superstorm Sandy and the "Big Dig" in Boston. He also focuses extensively on assisting clients that own and manage captive insurance companies, especially with respect to resolving coverage disputes between the captive and its reinsurers.

Marshall's success in solving clients' problems stems from his ability to understand their businesses – as well as their insurance programs – in order to maximize the value of the clients' insurance assets. He frequently writes and lectures on a variety of topics of interest to professionals and practitioners in the insurance arena, and is frequently quoted in the press, including appearances in the New York Times, Wall Street Journal, National Law Review, CNN.com and Business Insurance, among others.

Since 2018, Marshall has been selected by his peers for inclusion in The Best Lawyers in America for insurance litigation.

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SPEAKER:



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Mr. Critelli is Senior Director of Imperium Consulting Group. During his extensive career, Mr. Critelli has accumulated thirty years of experience working in various aspects of the Insurance Industry, including policyholders and carriers. He has spent the majority of his career consulting and providing forensic accounting services, damage measurement, and financial investigation support for national and international level clients. His particular insurance expertise includes commercial property claim preparation, business interruption, builder's risk, construction delay & defect, soft costs, cyber-attack claims, expert witness services and other property/casualty insurance matters.

Mr. Critelli has extensive hands-on assistance to policyholder clients with property damage and business interruption claim preparation support following major catastrophic events including, but not limited to, Winter Storm Uri, COVID-19 claims, Hurricane Imelda in 2019, Hurricane Michael and California Wildfires in 2018, Hurricanes Irma and Maria in 2017, Superstorm Sandy in 2012, Hurricane Katrina, Rita and Wilma in 2005, as well as a number of claims resulting from September 11, 2001. He was responsible for managing one of the largest contingent business interruption files recorded. As a result of an incident at a Tier 1 automotive parts supplier, Mr. Critelli assisted in the successful settlement of the claim valued at over \$300,000,000.

AGENDA

- Overview of Property Insurance in General
 - First Party Insurance Policies
 - Basic Coverages
 - Dispute Resolution
- Common Provisions for Business Interruption Claims
 - Basic BI Coverage
 - Common Extensions of Coverage
 - Valuation Provisions
 - Dispute Resolution
- Factors for Calculating Business Interruption Losses
 - The North Star
 - Projecting Revenues
 - Saved Expenses
- Factors of Interest
 - Period of Restoration
 - Make-up
 - Wider Effects of a Catastrophe
 - COVID Considerations
 - Testifying Expert Witnesses – “Reasonable Certainty”



OVERVIEW OF PROPERTY INSURANCE



BUSINESS INTERRUPTION LOSS

“30% of all companies who experience a catastrophic loss will fail within the first 24 months and an additional 29% will fail beyond 24 months.

Source: META Research Report



Source: Facebook.com



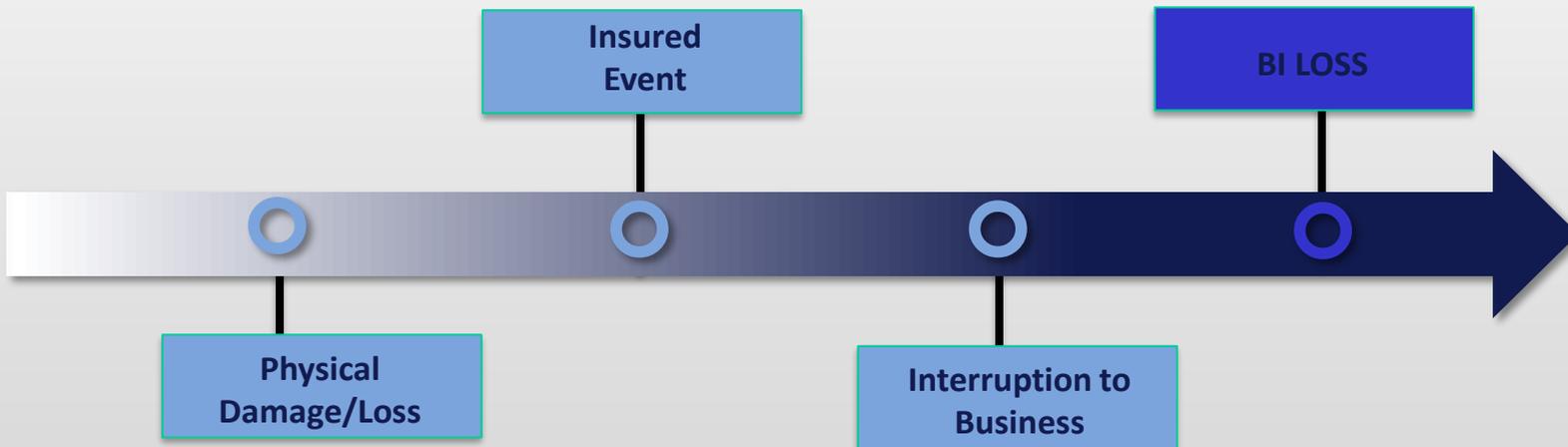
Source: Flickr.com

BUSINESS INTERRUPTION

What is Business Interruption?

We will pay for the actual loss of Business Income you sustain due to the *necessary suspension of your operations*, during the *period of restoration*.

- “Suspension” includes slowdowns.
- Period of Restoration typically is a hypothetical period of time reasonably needed to restore the property itself.
- Most policies include “Extended BI” covering the time needed to restore the business.



BUSINESS INTERRUPTION (CONT'D)

Contingent Business Interruption

Policy words are key:

“A. This policy insures loss resulting from or caused by physical loss or damage insured herein to the following:

1. Property that *directly prevents* a supplier (including suppliers of any tier) of goods and/or services to the Insured from rendering their goods and/or services, or property that *prevents* customers (*including customers of any tier*) of goods and/or services from the Insured from accepting the Insured's goods and/or services.”

BUSINESS INTERRUPTION (CONT'D)

Civil Authority

Policy words are key:

INTERRUPTION BY CIVIL OR MILITARY AUTHORITY

We will pay the actual **business income** loss sustained by you and **extra expense** if an order of civil or military authority limits, restricts or prohibits access to property not insured under this Policy provided that:

- a. Such property sustains direct physical loss or damage by a **covered cause of loss**;
- b. Such property is within the distance from the **covered location** as shown in Item **7.C.** of the Declarations under Interruption by Civil or Military Authority; and
- c. The effect of such order is to partially or totally prohibit access to a **covered location**.

Coverage begins on the effective date and time of such order and ends on the date and time that the **covered location** could be reopened for business, but in no event for more than the number of days shown in Item **7.C.** of the Declarations under Interruption by Civil or Military Authority.

BUSINESS INTERRUPTION (CONT'D)

Attraction (aka “Leader”) Property

Policy words are key:

ATTRACTION PROPERTY

We will pay the actual business income loss sustained by you and extra expense caused by direct physical loss or damage by a covered cause of loss to property of the type insured under this Policy that attracts business to a covered location, provided that such property is within the distance from the covered location as shown in Item 7.C. of the Declarations under Attraction Property (hereinafter, the attraction property).

BI LOSS VALUATION

Valuation Provisions

- “Top Down” provisions
- “Bottom Up” provisions

DISPUTE RESOLUTION

Appraisal

“If the Insured and the Company fail to agree on the amount of loss, each will, on the written demand of either, select a competent and disinterested appraiser . . . ” after:

The appraisers will first select a competent and disinterested umpire. If the appraisers fail to agree upon an umpire within 30 days then, on the request of the Insured or the Company, the umpire will be selected by a judge of a court of record in the jurisdiction in which the appraisal is pending. The appraisers will then appraise the amount of loss, stating separately the Actual Cash Value and replacement cost value as of the date of loss and the amount of loss, for each item of physical loss or damage or if, for **TIME ELEMENT** loss, the amount of loss for each **TIME ELEMENT** coverage of this Policy.

- Only used to resolve disputes over the amount of the loss.
- Legal disputes over coverage and policy interpretation reserved for court.

CALCULATING BI LOSSES

The North Star

“the general purpose of business interruption insurance is to do for the insured during the period of business interruption what the business would have done had no interruption occurred”

New Appleman on Insurance Law § 46.03[3] (2012).



CALCULATING BI LOSSES (CONT'D)

Projecting Revenues

- Industry type determines methodology
 - Manufacturing v. Retail
 - Hospitality v. Gaming
- “But For” Projection of Revenue
- Lost Revenue



Source: Dreamstime.com

CALCULATING BI LOSSES (CONT'D)

Saved Expenses

- What is a discontinuing expense?
- Variable vs. Fixed / Semi-Variable
- Depreciation – Fixed or Variable



PERIOD OF RESTORATION

- “Period of restoration” typically defined to begin on the date of direct physical damage to insured property, and typically ends on the earlier of: (1) the date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) the date when business is resumed at a new permanent location.
- Date when the property “should be repaired” is typically measured by an objective test, and is not dependent on when the insured actually completed repairs.
- Most policies also cover extended period of interruption.

PERIOD OF RESTORATION (CONT'D)

- Complex issues can arise in connection with the interruption to an insured's business caused by a hurricane, which may produce physical damage from both wind *and* flood, one of which might be excluded.
- When covered and excluded causes combine to damage property, the insurer must determine, 1) whether the covered loss caused a suspension of operations; and 2) the theoretical duration of the period of restoration if only the covered property damage needed to be repaired.
- To the extent excluded damage extends the necessary repair time, the loss of business income during that extended repair time may not be covered.

MITIGATION

- Do increased sales at other insured locations offset BI losses?

- Does post-loss business success due to a catastrophe mitigate BI losses during indemnity period?
 - After period of restoration—how does change in market conditions affect BI quantification?

- What if a new competitor enters market during indemnity period?
 - Does EPOI apply to customers that move to competitor?

WIDER EFFECTS OF A CATASTROPHE

- Both policyholders and insurance companies have argued that the wider effects of a catastrophe should be taken into account when calculating a BI loss.
 - Policyholder
 - Hotel
 - Insurance Companies
 - Carpet Store
 - 9/11
- Most courts have held that the BI loss should be calculated as if the entire catastrophe did not occur.

WIDER EFFECTS OF A CATASTROPHE (CONT'D)

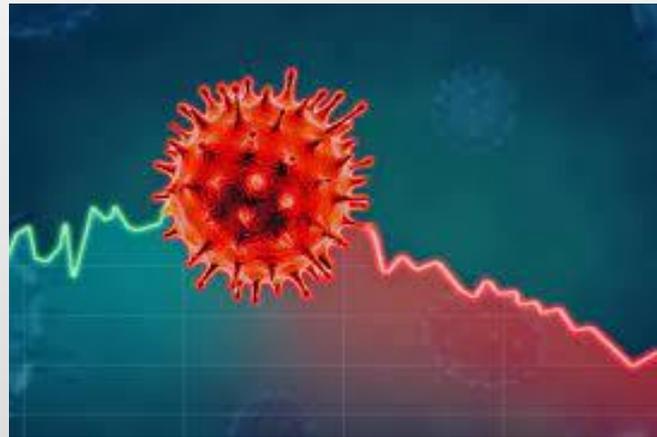
- *Levitz Furniture Corp. v. Houston Casualty Co.*, 1997 U.S. Dist. LEXIS 5883 (E.D. La. 1997): Where policy determined indemnity by comparing pre-loss business experience to experience “had no suspension of business operations” occurred, post-loss “windfall” taken into account in determining business income.
- *Prudential-LMI Insurance Co. v. Colleton Enterprises, Inc.*, 1992 WL 252507 (4th Cir. 1992) – where indemnity clause measured business interruption by experience of business “had no loss occurred,” income caused by the loss itself not taken into account.

WIDER EFFECTS OF A CATASTROPHE (CONT'D)

- ISO forms changed in an attempt to protect insurance companies against policyholders benefiting from wider effects. Excludes loss:
 - “as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located”
- No corresponding standard provision stating that the policyholder cannot benefit from the wider effects.
- So, the issue is still alive.

COVID CONSIDERATIONS

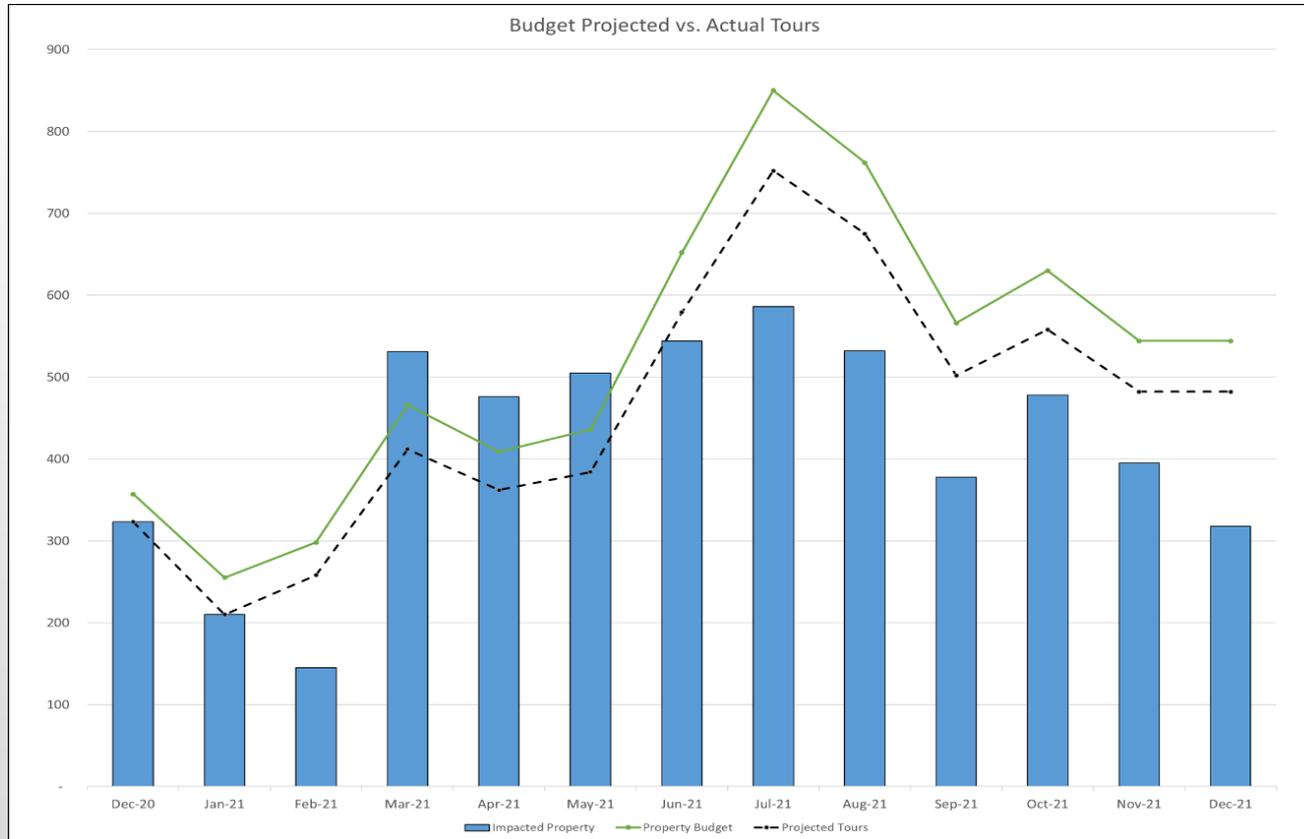
- The pandemic had dramatic effects on many business sectors and the entire economy.
- Projecting revenues using standard methodologies often yields obvious inaccurate results.



Source: Bureau of Labor Statistics

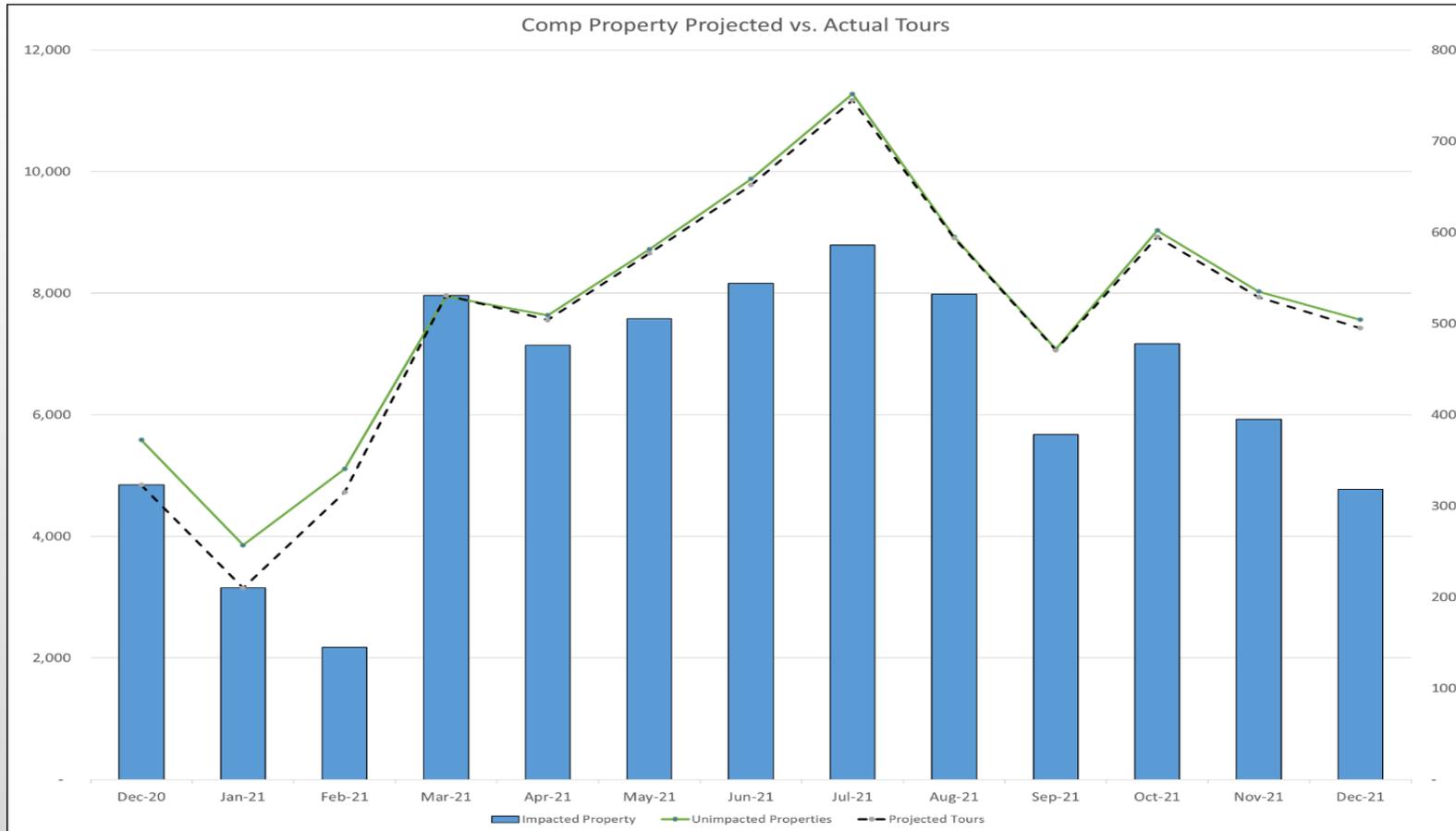
COVID CONSIDERATIONS

The need to pivot your approach



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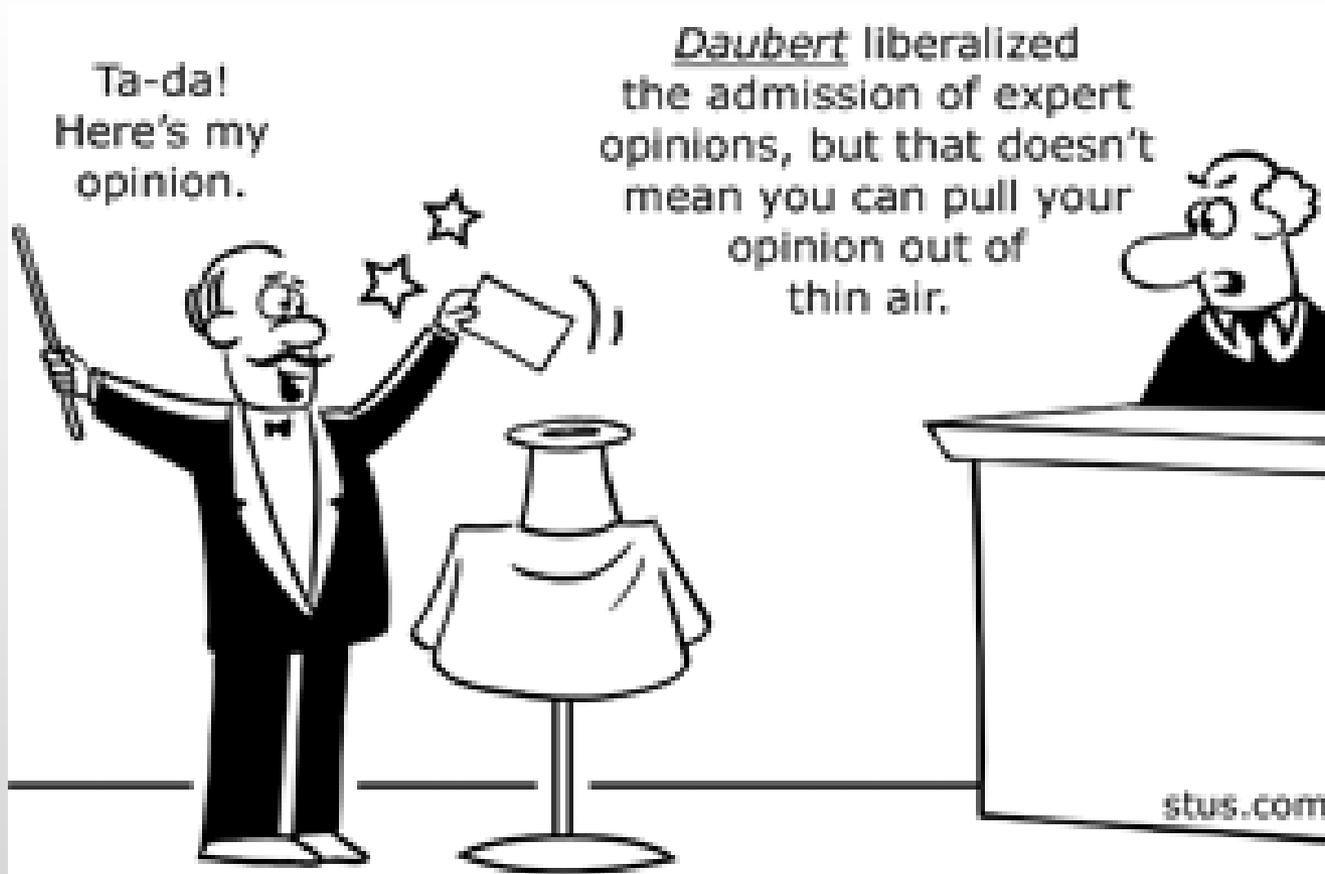
EXPERT TESTIMONY

Admissibility for Expert Testimony



DAUBERT STANDARD

Is your opinion admissible?



EXPERT TESTIMONY

Admissibility for Expert Testimony

- Admissibility generally not an issue in appraisal
- Sometimes there are challenges in court
- “Reasonable certainty” generally the baseline rule

Source: Family Law Magazine

QUESTIONS?



THANK YOU.



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