

## Invoking ‘Our Option’ and Preferred Contractor Network Endorsements

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Increasing abuses in the claims process have caused insurance companies to rethink the traditional model of sending out cash to pay claims. Far too often, that cash is used for purposes other than fixing damage, with a significant portion of claim payments being siphoned off by third parties injecting themselves into the claim process for their own financial gain.

Invoking the “Our Option” provision in existing policies and use of preferred contractor network endorsements in future policies ensures that property insurance serves its intended purpose—repairing damaged property.

Preferred contractor network programs provide a better approach to achieving this intended purpose. Programs that ensure damage is repaired not only eliminate many of the common claim abuses but also ensure that claim payments are used to fix damage and for no other purpose.

### **Our Option**

Under the traditional model, property insurance companies generally pay claims by providing the policyholder with money that they may—or may not—use to effectuate repairs. The insurance companies first estimate the value of the claim and make an “actual cash value” (ACV) payment, which represents the depreciated value of the damaged property. If the policy provides “replacement cost coverage” (RCV), once the work is completed and the cost of repairs actually incurred, the insurance company then pays the balance of the claim.

Obviously, under this model a considerable amount of money is put directly into the hands of policyholders. Predictably, sometimes policyholders decide to use this money for other purposes, leaving the damaged property unrepaired. This model also often leads to various third parties, including contractors, supplementers, appraisers, public adjusters, lawyers, and others—all injecting themselves into the claims process hoping to put a portion of that money into their own pockets. In the end, this often leads to increased claim measures and, unfortunately, results in the policyholder not having sufficient funds to complete necessary repairs.

An alternative model to compensate policyholders for their covered damage has also always been included in property insurance policies. This is the “Our Option” provision. This provision quite simply gives the insurance company the right to hire a contractor and fix the covered damage themselves.

Historically, however, insurance companies have been reluctant to invoke this right because of the risks that come with actually stepping in and completing the work.

This reluctance is diminishing. Given the dramatic increase over the past decade in abuses by third parties trying to profit from the claims process, insurance companies are realizing that it is easier and less expensive to complete repairs under the “Our Option” policy provision. Moreover, more

insurance companies are including preferred contractor network endorsements in their policies, which require policyholders to have the damage repaired by a selected contractor network.

When properly structured, these programs can provide the proverbial “win win win” for the insurance company, the contractor, and the insured.

### **The Historical “Our Option” Policy Provision**

An “Our Option” provision is language in a policy that allows an insurance company to exercise its option to repair the damage, instead of issuing payment for the covered loss.

A typical “Our Option” provision states that in the event of loss or damage covered by the policy, at its option, the insurance company will either: (1) pay the value of lost or damaged property; (2) pay the cost of repairing or replacing the lost or damaged property; (3) take all or any part of the property at an agreed or appraised value; or **(4) repair, rebuild or replace the property with other property of like kind and quality.**

Other simple stand-alone provisions provide that at the insurer’s option, it may choose to repair or replace any portion of the damaged property.

Under either provision, the insurance company clearly has the right to advise the insured that it will not be making a monetary payment on the claim and will instead send out a contractor to repair the damage.

Although most property insurance policies have always contained “Our Option” provisions, insurance companies have historically been hesitant to invoke their right to repair because of potential liability concerns.

In *Vainberg v. Avatar Property & Casualty Insurance Company*, Florida’s Fourth District Court of Appeal explained that “under Florida law, when the insurer makes its election to repair, that election is binding upon the insured and creates a new contract under which the insurer is bound to perform repairs within a reasonable time.” This is known as a “Drew Contract” based on *Drew v. Mobile USA Insurance Company*, another case decided by the same court. Notably, in *Vainberg*, the court pointed out that “where the option to repair has been invoked, the insured and the insurer would become parties to a separate repair contract wherein the insurer is obligated to perform repairs which will adequately return the insured property to its pre-loss condition.”

Ultimately, if an insurer invokes its right to repair, but the repairs are not adequately performed, the insured may be entitled to damages caused by the faulty repairs. Insurance companies have understandably been reluctant to undertake this additional risk.

But things are changing. Over the past two decades there has been a significant increase in third-party involvement in the catastrophe claims process. There is now an entire industry of storm chasing contractors attempting to “win the storm” in every claim. There are supplementing companies who are nothing more than professional Xactimate writers juicing up estimates after the work has been completed and taking a percentage of the claim increase. Use of the appraisal process has grown dramatically, with some appraisers viewing their role as to “win” disputed claims for the insured or even the contractor doing the work.

There is also an ever-increasing number of public adjusters, many of which have no experience and sign up every claim they can get their hands on without regard to the existence of damage or coverage. Finally, of course, there are policyholder attorneys, some of whom take any claim referred to them, regardless of merit, and pocket a 45% contingency fee. All of these interlopers in the claims process have greatly increased abuse and outright fraud in property damage claims. As a result, insurance companies are now asking with increased frequency: “Would it just be easier for us to send our hammers rather than dollars?”

Invoking the “Our Option” provision solves all of the problems created by these third parties. It also, however, can create a different problem. Under the traditional “Our Option” policy provision, the insurance company is undertaking repairs itself, arguably putting the insurance company in the contractor role. This has led insurance companies to look for an alternative approach that avoids this potential exposure, such as a preferred contractor network endorsement.

### **The Emerging Use of Preferred Contractor Network Endorsements**

A preferred contractor network endorsement is a policy form agreed to by the insured at policy inception providing that the insured agrees to participate in a preferred contractor network. With such an endorsement, the decision to have damage repaired by the network is being made by the insured and not the insurance company.

These endorsements have typically been voluntary, allowing the insured the option whether to participate in the network or retain its own contractor. Often the insured is incentivized to participate in the network with benefits, including a reduced deductible, upgraded construction components, or a top-tier warranty. Some policies also restrict coverage to ACV unless the insured participated in the network.

Recently, there has been a move towards policy endorsements in which the insured selects an endorsement at the time the policy is purchased requiring participation in a preferred contractor network. Under such a mandatory endorsement, the insured agrees that in the event of a loss within the scope of the network, the insured must have its damage repaired through the preferred contractor network program. Often the insured is incentivized to include the endorsement as part of the policy with a discount in policy premium.

Courts have held that endorsements mandating participation in such networks are fully enforceable when agreed to by the insured at policy inception. (See, e.g., *People’s Trust Insurance Company v. Hernandez*, 400 So. 3d 744 (Fla. 3d DCA 2024)). If the insured refuses to comply with this policy requirement, the insured breaches the policy, and there is no coverage.

The advantages to the insurance company of a mandatory endorsement are obvious. After every storm, insureds are inundated with door-knocking contractors and public adjusters trying to sign up the job. These door knockers will advise the insured not to trust the insurance company and never agree to participate in a voluntary preferred contractor network. Obviously, their motivation is to get the job for themselves. Fearmongering about the purported perils of preferred contractor networks is a common tactic.

But imagine if participation by the insured in a preferred contractor network is mandatory under the policy purchased by the insured. In that situation, the contractor or public adjuster knows that

there is no upside to signing up the insured. The contractor cannot get the job. The public adjuster cannot earn a commission (or if it does, the insured will have to pay it out of pocket). With no financial upside, the door-knocking contractor or public adjuster will simply move on.

Insurance companies have realized that mandatory preferred contractor network endorsements provide a mechanism to remove all of the individuals who are trying to profit from the claims process because there is simply no cash for them to put into their own pockets. Eliminating these individuals brings an end to inflated estimates, use of contingency fee supplementing companies, invocation of appraisal just to squeeze a few more dollars out of the claim, and litigation.

### **Invoking “Our Option” and Preferred Contractor Network Endorsements**

It is important that insurance companies provide prompt notice to the insured of either their intent to invoke the “Our Option” provision or to remind the insured that it has agreed to participate in a preferred contractor network program. Raising the provision in the first claim communication to the insured can help to set the insured’s expectations and avoid a situation in which the insured enters into a contract with an out-of-network contractor and is unable to fulfill its obligations under that contract.

The insurer can then proceed with adjusting the claim as it would any other, confirming the scope of covered damage. At that point, the remaining process is very simple. The insurer would then notify its preferred contractor network program provider of the claim. The program provider would then arrange to have an estimate prepared consistent with the insurer’s scope of damage. A contractor would then be selected to perform the work consistent with the scope and estimate. The contractor would in turn contact the insured and confirm a date to complete the work. The contractor would also collect the insured’s deductible, with the balance of the cost being paid directly by the insurer to the network program provider (who obviously then pays the contractor). The work would then be completed. Again, no disputes over pricing. No arguments over required supplements. No appraisal demands. No litigation.

### **What Can Go Wrong?**

While there may be occasional hiccups with this arrangement, the frequency of such problems are likely to be far, far less than the disputes that typically arise in a large percentage of claims using the ordinary claim process. The risk of insurer liability for faulty repairs can be mitigated by requiring the preferred contractor network program providers to purchase liability insurance covering the work being performed, including providing indemnity to the insurance company. Essentially, all potential exposures are assumed by the program provider.

### **Ensuring Program Success**

It is a given that any preferred contractor network program must be fair to all three involved parties. The contractor must be paid a fair price for completing the work. The insurance company must know that it is paying a fair price for the work. And the insured must receive properly installed code- and manufacturer-compliant repairs.

This fairness is not hard to accomplish. There is no shortage of contractors willing to work for Xactimate pricing, especially when there is no salesman involved taking half the profit. Use of

Xactimate pricing ensures that the contractor is paid enough to properly complete the work, and the insurance company knows it is paying a fair price. For these reasons, use of Xactimate pricing achieves the necessary objectives of protecting the interests of the contractor, the insurer, and the insured.

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