THE LAW AND PROCEDURE OF INSURANCE APPRAISAL

by

Jonathan J. Wilkofsky, Esq.

Third Edition

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Dedicated To My Extraordinarily Supportive Family, Friends And Colleagues And To Those Professionals Who Have Dedicated Themselves to Making the Appraisal Process Work

Preface to the Third Edition

It has been fifteen years since I began writing this book, and twelve years since the first edition. In that time, the resolution of claims through the contractual appraisal provision has grown exponentially. It has become one of the most common methods of first-party claim resolution. With its ever expanding use has come extraordinary challenges. The stakeholders in the insurance market, including claims' adjusters and executives, claims' counsel, litigators and the judiciary have been very inconsistent across the country in the successful administration of insurance appraisals. My observation has been that the reasons for this fall into two basic categories: ignorance and greed. For those suffering from a lack of exposure as I was back in the early 1990s, it is hoped that with resources like this book, and many of the fine continuing education programs offered by groups such as The Windstorm Conference, The First Party Claims Conference, The National Association of Public Insurance Adjusters and The New York Public Adjusters Association, the ignorance will slowly be reduced. The problem of greed is another story. I have personally observed counsel from both the consumer side and the industry side castigate and denigrate the process for no other apparent reason than the negative impact the appraisal process has had on the amount of fees they are able to earn at the expense of their clients. To those so engaged, shame on you. As counsel we have a fiduciary duty to find the most effective and most efficient strategy to maximize our clients' rights. It seems to me, those so engaged regularly breach that duty.

As legislatures, the courts and regulators gain more insight into the process, the clear trend is to enforce the appraisal provision and avoid litigation unless there exist legitimate legal or coverage issues, since the insurers place the language in the policy (in many states, having been statutorily required to do so), it is long past due to allow the process to flourish by supporting it and encouraging the growth of an effective, well trained cast of independent appraisers and neutrals. The training and certification program created by the Windstorm Conference, largely in Gulf states, is a terrific example of this. Both sides of the industry banded together to make this work. In coming years, I hope this effort becomes national. I am currently working to bring it to the northeast where the need is critical.

Additionally it is noteworthy that some executives in the insurance industry do not allow their personnel to utilize continuing education opportunities in mixed company...

that is with professionals from the other side. This is very worrisome and counterproductive. It suggests as well that for some companies, continuing education is more an opportunity for indoctrination, then training. In my experience, the most dynamic classes are those attended by professionals from both sides where a free exchange and debate of ideas and practices can occur.

There are many people and organizations to thank for their assistance with the Third Edition. My assistant, Sandy Dozis, who has been at my professional side for twenty-one years has been indispensable. This work would not have been possible without her. She has been an integral part of every page. Once again, Lawrence Victory who has been a senior law clerk at my firm for more than a decade has done an exhaustive study working to locate literally every decision written on appraisal and put it in my hands for consideration. That includes thousands of cases. New to the Third Edition are contributions from two extremely capable and committed attorneys who have assisted with research, writing and digesting. Casey Spellman, Esq. an associate with the firm has been extraordinarily committed to the excellence and timeliness of this project. She's a terrific attorney and talented writer and editor and her contribution over the last year was huge. My daughter, Yael Wilkofsky, Esq. worked on this project for about six months before being named as a senior law clerk to a New York State Supreme Court Justice. It was so rewarding and exciting to work with her on this project. She's an extraordinary woman and legal talent and will likely be wearing judicial robes herself one day.

To my partners and staff who have supported me in this project from its beginning so many years ago, without their patience and understanding this book would not have been possible. I also honor them for their commitment over more than 25 years to the ideals mentioned above...where the interests of the client are paramount and take precedence over the pecuniary interests of the firm. It has been a challenging and successful experiment and would not have been possible if we were not in accord.

Finally, I hear regularly from practitioners from all over the country who share their appraisal problems, experiences and ideas. I am humbled and appreciative by the dedication and hard work and caring I witness every day.

Please stay in touch. Work on the Fourth Edition begins soon.

Preface to the Second Edition

Since 2003 and the publication of the first edition, the use of appraisal has exploded around the country.

With its ever-expanding use, a growing array of issues has developed as well. As jurisdictions around the country develop a body of precedent to guide the parties to the policy through the process, too much time and money is being expended litigating these issues thwarting a process designed for litigation avoidance.

Several trends can be observed generally in the decisions issued by courts called upon to resolve these issues. Courts generally have favored the appraisal process as an efficient and fair method of issue resolution as long as the basic policy requirements are adhered to, the members of the appraisal team act within their authority and there is no fraud. At the same time, the judiciary has generally acted swiftly to prevent the court's authority to resolve coverage issues from being usurped by the appraisal team and to prevent abuse of the process on unwary consumers.

The passage of time has also been highlighted by a growing roster of qualified and professional appraisers and neutrals who are well-suited to their assigned tasks and complete them with speed and efficiency to the benefit of all parties. Unfortunately, there are too many examples of appraisals being handled by individuals who have no idea of the rules of the road, the process or the limitations and responsibilities that exist in appraisal. It is often the litigation resulting from these secondary disasters that I've cited to help avoid a recurrence of these problems. Practitioners are well advised to learn from the mistakes of others to better serve the interests of the parties.

This Second Edition would not be possible without the dedication and endless assistance from Sandy Dozis who has supported me and this project since its beginning. My gratitude is really beyond words.

Lawrence Victory has been an extraordinary help in tracking down the hundreds of judicial decisions which have been written and upon which I base much of my analysis.

I've derived great satisfaction from the anecdotes reported to me of claims resolved satisfactorily with the assistance of the book. I hope the Second Edition continues in that tradition.

I welcome input on problems and issues that may develop in the future.

Preface

My first contact with the Standard Fire Policy's appraisal provision was in 1981 when, as a law clerk, I was directed by my mentor, Frank Weg, to read and understand the "165 Lines" of fine print that made up the Standard Fire Policy. That conversation so many years ago is memorable for two outstanding reasons. First, my mentor failed to mention that to fully understand those "165 Lines" would take an entire legal career and, secondly, his final comment to me that day which, in substance was, "when you come to the appraisal portion of the Standard Fire Policy don't bother, as it will never come up." In fact, for the first 10 years of my legal career I never dealt with or discussed the concept of appraisal.

That changed in 1991 when the New York legislature, in an effort to overturn a disastrous decision by the New York Court of Appeals in the case of <u>Happy Hank Auction Co. v. American Eagle Fire Insurance Co.</u>, 1 N.Y.2d 534, 136 N.E.2d 842 (1956) which stood for the proposition that insureds could not obtain specific performance of this provision. As insurance companies rarely had a motivation to utilize this generally consumer-friendly provision, appraisal was substantially unheard of for many years in New York.

Once the provision was brought to life by the change in law, appraisal became commonplace in the New York insurance market. Disputes developed in the interpretation and the practical use of the provision. There was very little precedent to rely on for guidance as to the process and procedure to be utilized.

As these issues more regularly crossed my desk I found myself in urgent need of a resource to assist me in understanding the scope and breadth of the appraisal provision and the practical rules of the road which might guide the appraisers and the umpire, as well as the parties, in their interactions with each other while bringing a particular claim to a speedy conclusion.

In doing my research I was called upon to find precedent from all over the United States as we attempted to develop a body of case law that would make for a meaningful and efficient process but one which was not subject to abuse or inappropriate use.

Due to the absence of available material, a number of organizations requested that I offer a presentation with respect to the law and procedure of insurance appraisal in light of those recent developments. It was the outline for these presentations which formed the basic skeleton for this book, supplemented by the research accumulated over these many years that I present in what I hope is a user-friendly form to assist insureds, insurance counsel, company and public adjusters, appraisers, neutrals and judges in obtaining the most beneficial use of this important policy provision.

My goal was to be as accurate, balanced and complete as possible. While that was the goal, I look forward to hearing from readers wherever I may have fallen short. I welcome any contribution of case law, statutes or perspectives I may have missed. We expect to issue pocket supplements every 6 to 12 months to keep readers updated on these developments. All submissions would be appreciated.

The subject of appraisal is in flux in a number of states and courts are reconsidering its scope and the rules of engagement on a regular basis as appraisal becomes a more common approach to the settlement of contested property losses.

It is my hope that readers will find this book to be a valuable resource in making a determination as to whether appraisal is an appropriate remedy in a particular claim and in guiding you throughout the appraisal process as to the applicable laws and procedures that may apply to your particular claim in your particular jurisdiction.

Readers are cautioned that the law and practice of insurance appraisal varies from state to state and from time to time and it is always wise and appropriate to seek local counsel in the jurisdiction in which the claim is pending should any issues arise. This book is not intended to offer legal advice or to replace the valuable assistance of counsel. Additionally, I offer a Forms Appendix, but caution against the use of any form without careful consideration to local laws and custom as well as specific policy provisions which may govern the process in a particular claim. No form should be used blindly or verbatim as it may invite claims for malpractice.

Comments, questions, suggestions or information with respect to developments on the law and procedure of appraisal may be sent to me care of the publisher, or at my law office at 299 Broadway, 17th Floor, New York, N.Y. 10007.

It is my sincerest hope that as a result of the publication of this book, both parties to the insurance contract can obtain a more satisfactory conclusion to a disputed property claim. It has been my intention to present a balanced and broad survey of the current state of the law in an effort to benefit both insured and insurer who each have much to gain from a satisfactory appraisal experience.

Finally, the book contains one line of inconsequential frivolity. To those readers who may stumble upon it, my only defense is to say, I couldn't help myself.

Acknowledgments

The publication of The Law and Procedure of Insurance Appraisal is an accomplishment many years in the making. It is the product of the hard work, cooperation and dedication of many people over many years.

Initially, without the guidance, love and encouragement of my Mom, Bess, and my Dad, Judge Benjamin Wilkofsky, who instilled in me a sense of principles and values as well as a commitment to education, I would have been unable to reach a point in my career where I was able to undertake a project such as this. My father also instilled in me a sense of the power of the law and an appreciation of the legal process which has helped to guide me to this very day.

In addition to my parents, this project would not have been possible without the love and encouragement of my wife and partner of 38 years, Nama Taub and my extraordinary daughters, Yael and Shira. Drafts of this book were a constant companion on family outings, vacations and shopping trips and they were all incredibly supportive throughout this long process.

The pile of discarded drafts of this book

measures almost 9 feet in height. This edition would certainly not have been possible without the tireless dedication of my friend and assistant, Sandy Dozis, whose thoughtful input, encouragement and wisdom regularly find their way into the pages of this book. Throughout this marathon she has always been in lock step with me as we battled daily to bring this project to a successful conclusion. This work would not have been possible without her.

Readers are cautioned that this book does not offer legal advice or counsel. Care must be taken to verify the current state of the law in the local jurisdiction of the claim involved as well as the specific policy provisions and facts presented. There is no substitute for well informed advice and counsel. This book is a resource to educate on the process, but the process is ever-changing and it is wise to use this book in conjunction with knowledgeable counsel.

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CHAPTER I

AN INTRODUCTION TO THE APPRAISAL PROCESS

A] AUTHOR'S PERSPECTIVE

One of the most important and balanced provisions found in the Standard Fire Insurance Policy and most other property insurance policies today is the Appraisal Clause.

In fact, in most jurisdictions, it is one of the only provisions that afford protection to the interests of the insured in equal measure to those afforded the insurer. It has long been a valuable tool to all parties to the insurance contract in most states around the country.

One of the great challenges in the relationship between insured and insurer has long been finding an efficient and timely method of resolving the differences between the parties with respect to quantifying value and loss covered by the policy.

In the absence of a binding appraisal

provision, the consumer must either accept the insurance company's figures or retain counsel and proceed to litigation. Insureds would be forced to resort to the legal system to have these differences resolved. The litigation process is often expensive and time-consuming, with insureds paying in legal fees, the very benefit they were fighting to recover from the insurance company. An insurance carrier seeking to reduce claim payments could use this knowledge to leverage insureds to accept less in payment of claims than the insured might otherwise be entitled, due to the absence of quick, efficient and user-friendly alternatives.

In my legal practice representing victims of disasters, introducing my clients to this cold reality is something I've never gotten used to. These stark realities often prevents the insured from ever being made whole.

From the insurer's perspective, an insurance carrier might benefit from the ability to bring a difficult, expensive and contentious adjustment to a satisfactory conclusion, without incurring extensive legal fees and accusations of bad faith.

Among the primary benefits favoring the appraisal process is the savings of time and money for the parties to the insurance contract as well as the courts. States have long recognized that litigation avoidance results in many efficiencies and monetary savings for the parties involved as well as for an overburdened judicial system.[1]

The clear intent of the appraisal provision is to avoid undue formalities, delays, expense and the vexation of litigation.[2]

The usefulness of the appraisal provision depends upon whether the law of the state where the property is located permits either the insured or the insurer to compel the other to submit to appraisal and whether the award is binding. It will also depend on the scope of the issues subject to appraisal in the particular state where the property is located.

Its usefulness in the state of New York, for example, has been enhanced by the New York State Legislature on a number of occasions. In 1990 it amended the Insurance Law so as to permit an insured to require an insurer to proceed to appraisal on an expeditious basis in order to fairly and equitably determine the amount of loss and value.

Prior to 1990, appraisals were quite rare in

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[1] Standard Form., Cal. Ins. Code §2071 (West 2003).

[2] Ginsberg v. Coating Products, Inc., 152 Conn. 592, 210 A.2d 667 (1965).

the state of New York as consumers could not compel insurance companies to proceed to appraisal[3] and insurers apparently determined it was not in their interest to utilize the process. For this reason, little historical guidance was available from New York State courts on the interpretation of the provision and the practical issues which arise from the time a formal demand for appraisal is served to the moment the check arrives.

In the decades since, the New York legislature has facilitated the enhanced use of appraisal by passing legislation which made it easier for insureds to compel the process by creating a quick and efficient "special proceeding" to enforce its usage when appraisal is wrongfully denied.[4] This legislation was drafted by the author and signed by Gov. David Paterson on March 30, 2010. The legislature acted again (this time unanimously) in adopting legislation (drafted by the author and signed by Governor Andrew Cuomo in November, 2014) which clarified that issues of scope of loss are appraisable.[5] These changes and the legislature intent they reflect have allowed use of appraisal to flourish as a method for claims resolution.

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[3] Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 1 N.Y.2d 534, 136 N.E.2d 842, (1956).

[4] Bill # 2088A.

[5] Bill # 9346A.

Other states have a longer history of enforcing the appraisal process and a larger body of interpretive case law has resulted.[6] Generally, appraisal is widely supported and encouraged by the judiciary as an informal, efficient, fair and equitable process to resolve the issue of "how much" in first-party insurance claims.

As a consequence of the proliferation of insurance litigation, the appraisal clause has become as important as coverage and exclusionary provisions.[7]

This book represents an effort to accumulate the available precedent from around the country with an emphasis, wherever necessary, on distinctions between jurisdictions. It was organized in a manner that permits the members of the appraisal team as well as insurers, insureds, attorneys, adjusters and claims personnel who have a stake in the process, to understand it better, navigate it more efficiently and produce a valid award. The treatise was also designed to inform when an award may not be valid or some problem may have infected the process so as to undermine an award.

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[6] *See, e.g.*, Taylor v. Farm Bureau Mut. Ins. Co., 2008 WL 4525496(Iowa App. 2008); Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 260 (Iowa 1991).

[7] The University of Toledo Law Review, 37 U. Tol. L. Rev. 931.

B] HISTORY

Lines 123 through 140 of the New York Standard Fire Policy state the following:

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each

> appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

In the many states that have adopted the Standard Fire Policy (also known as the New York Standard Fire Policy and less formally as the "165 Lines"), this language sets forth the minimum standards enjoyed by the policyholder.[8] In these states, the carrier may amend the statutory language but may not diminish the rights of the insured as granted by the Standard Fire Policy.[9]

For example, the Standard Fire Policy has been mandated by statute in New York for many years. It was originally enacted in 1853, and its present form has been in use since 1943.

It has been held that the appraisal portion of the standard fire policy applies even if the peril causing the loss is something other than fire.[10]

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[8] *e.g.,* Standard Form, Conn. Gen. Stat. §38a-307 (2003); Standard Policy Provisions, N.Y. Ins. Law §3404(e) (McKinney 2003); Standard Policy Provisions, 40 Pa. Cons. Stat. §636 (2003) (statute originally enacted on May 17, 1921); Insurance Act. R.S.O. 1990 Condition 11, §143 (Ontario, Can); Standard Provisions, Conditions, Stipulations and Agreements for such Policies, Va. Code Ann §38.2-2105 (Michie 2002); Michigan Statute M.C.L. 500.2833(1) requires all fire insurance policies issued in the state to include an appraisal provision requiring that the parties proceed to appraisal upon written demand of either.

[9] Lane v. Security Mut Ins. Co., 96 N.Y.2d 1, 747 N.E.2d 1270 (2001).

[10] Zar Realty Management Corp. v. Allianz Ins. Co., 2003 WL 1744288 (SDNY).

Further, the appraisal provision has been held not to be ambiguous and many jurisdictions have used very similar provisions. "Appraisal" is a common term used in an insurance contract, with *Black's Law Dictionary* defining "appraisal clause" as "[a]n insurance-policy provision allowing either the insurer or the insured to demand an independent estimation of a claimed loss."[11]

The strength and effectiveness of the appraisal provision has been inconsistent from state to state and year to year.

In fact, it has been held that where a commercial policy covered locations in several states and the insurance policy failed to make clear how or where state-specific endorsements applied, where one endorsement required the insured to submit to binding appraisal without its consent while another, following the laws of the state of Kansas, allowed binding appraisal only if both parties agreed to it, the policy was deemed ambiguous in this regard and the court applied the interpretation favorable to the insured.[12]

For a time in New York, an insured's ability

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[11] Stuckman v. Westfield Ins. Co., 2011 WL 1944266 (Ohio Ct. App. 2011).

[12] Security Storage Properties, Inc. v. Safeco Inc of America, 2010 W.L. 1936127 (D.Kan. 2010).

to compel the insurer to appraise a loss and to have judgment entered upon an award wavered.[13] In 1949 the Appellate Division, Third Department held that an appraisal under a fire insurance policy was in the same nature of any arbitration agreement and could be enforced by the courts.[14]

New York State, as with all states, has a strong public policy in favor of arbitration. In fact, courts are statutorily pre-empted from deciding cases that fall within the scope of a valid arbitration clause.

However, in 1954, in a decidedly anti-consumer decision, the New York Court of Appeals in Happy Hank Auction Co. v. American Eagle Fire Ins. Co.,[15] held that despite the mandatory language of the Standard Fire Policy, the New York courts had no power to require an insurer to take part in an appraisal demanded by an insured. This had the effect of making the appraisal clause almost irrelevant in the processing of insurance claims within the state. Few claims went to appraisal after this decision and New York became one

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[13] Max Gwertzman, *A Legal Analysis of the Appraisal Agreement* (4th Ed., Roberts Publ. Corp. 1972).

[14] Fitzgerald Bottling Works of Amsterdam v. Continental Ins. Co., 275 A.D. 453, 90 N.Y.2d 430 (3d Dept. 1949), *overruled in part by,* In re Delmar Box Co., 285 A.D. 398, 137 N.Y.S.2d 491 (3d Dept. 1955), *aff'd,* 309 N.Y. 60, 127 N.E.2d 808 (1955) (appraisal clause in an insurance policy does not constitute enforceable agreement to arbitrate.

[15] 1 N.Y.2d 534, 136 N.E.2d 842 (1956).

of the few states in the nation to leave its consumers unprotected in this manner. Litigation became the only alternative to resolve disputes as to the amount of loss and damage. In countless cases, consumers accepted less than they merited under the policy due to the anticipated delay and expense involved in litigation. Others incurred extensive legal fees litigating the value of loss and damage, often negating any hard won monetary victory.

In 1990, the New York legislature appeared to have restored to the insured the power to compel compliance with the appraisal clause, originally taken away by the Court of Appeals in the Happy Hank[16] decision. This was accomplished by the legislature's enactment of an amendment to §3404 of the New York State Insurance Law. The amendment provided that the appraisal provision shall be binding on all parties.

It states:

> § 3404(g). Notwithstanding any other provision of law to the contrary, the provisions of the appraisal clause set out on the second page of the standard fire

[16] Id.

> policy and the provisions of section three thousand four hundred eight of this chapter, including determination as to the amount of loss or damage rendered thereunder, shall be binding on all parties to the contract of fire insurance evidenced by the policy.[17]

The great majority of states reject the Happy Hank line of cases.[18] In fact, in Standard Fire Insurance Company v. Fraiman,[19] the Texas Court of Appeals, while discussing other similarly minded decisions stated:

> To the extent that Happy Hank Auction Co. v. American Eagle Fire Ins. Co.[20] holds that the insurer may raise as a defense the failure of the insured to submit to an appraisal, but the insured may not coerce the insurer to appraisal but he may file suit on the policy, we reject that line of reasoning. The insured has the right to rely on the plain language of this policy providing for appraisal upon the written

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[17] N. Y. Ins. §3404(g).

[18] 15 *Couch on Insurance* §209:3 (3d ed. 2003).

[19] 514 S.W. 2d 343 (Tex. App.-Houston [14th Dist.] 1974).

[20] Happy Hank, *supra*.

demand of either party, which language may have formed in his own mind a part of the consideration for the premiums he paid for.[21]

In New York, the legislature's amendment of the insurance law was prompted by the fact that the Standard Fire Policy in New York, which has long required the inclusion of the appraisal clause, had been interpreted in a manner that rendered it all but obsolete. As a practical matter, insurers had been given the option of declining appraisal while the insured was required to go to appraisal if such action was requested by the insurer or would risk claim denial based upon his or her failure to cooperate. This interpretation effectively negated the practical significance of the appraisal clause while placing the insurance consumer at a distinct disadvantage in coming to an agreed settlement with their insurer.[22]

Such a demand does not negate jurisdiction of the courts and leaves the general question of liability to be judicially determined. It simply provides a reasonable method of estimating and ascertaining the amount of the loss and value of the property damaged and

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[21] 15 *Couch on Insurance* §209:3 (2d. ed. 2003).

[22] Memorandum to Bill No. 2585 N.Y.S. Legislature, 1989, Sponsors Senator Joseph Bruno and Assemblyman Howard Lasher.

insured.

This provision of the policy clearly and unequivocally manifests the intent and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or value of the property insured shall, at the request of either party, be submitted to the appraisal process. The appraisal is to be by an umpire and two appraisers to be chosen as therein provided, whose award shall be conclusive as to the amount of such a loss and value only but shall not determine the question of liability of the company.[23]

In Connecticut it has been held that where an appraisal provision exists within a policy of insurance, the Connecticut courts are empowered to direct compliance with its provisions.[24]

The same rule exists in the state of Texas.[25]

In the state of Pennsylvania, the law

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[23] Max Gwertzman, *A Legal Analysis of the Appraisal Agreement*, *pp*. 5-6 (4th ed., Roberts Publ. Corp., 1972); N.Y. Ins. Law §3404.

[24] Steiner v. Middlesex Mut. Assur. Co., 44 Conn. App. 415, 689 A.2d 1154 (1997); Ginsberg v. Coating Products, Inc., 152 Conn. 592, 596, 210 A.2d 667, 669 (1965).

[25] *See* James v. Prop. & Cas. Ins. Co. of Hartford, 2011 WL 4067880 (S.D. Tex. 2011) (An appraisal clause which granted insured and insurer the right to "demand an appraisal of the loss" was enforceable…"Appraisal clauses such as this one...have been upheld in Texas for more than one hundred years.").

requires that the appraisal provision be included in all fire insurance policies.[26]

Some states currently have reduced the importance and effectiveness of the appraisal provision by making it voluntary, thus precluding any successful attempt at enforcement by litigation. These states, such as Arkansas, California, Nebraska, Oklahoma, Oregon, Puerto Rico, South Dakota and West Virginia have left their insureds substantially unprotected by requiring the insured to retain counsel and litigate the issues of actual cash value and the amount of loss. This will have the ultimate effect of making it more likely that insureds would be forced to accept less in payment than they might otherwise have been entitled with a more efficient and less expensive enforcement mechanism.

However, where a policy in Florida provided that either party "may" demand appraisal in the event of a disagreement as to amount of loss, a court reversed a lower court judgment and clarified that this term did not connote that the appraisal was permissive. It remanded for an order finding arbitration mandatory once invoked by either party, asserting "a full reading of the clause makes

[26] 40 P.S. § 636; *See also*, Monarch Inc. v. St. Paul Property & Liability Ins. Co., 2004 WL 1717618 (E.D. Pa. 2004).

clear that neither party has the right to deny that demand once it is made." This was particularly applicable under these circumstances, where the insurer's demand for the process was timely and it had not acted inconsistently with the right to pursue appraisal throughout the proceedings.[27]

Puerto Rico has taken the appraisal provision out of its Standard Fire Policy completely, thus depriving its insurance consumers of any appraisal rights whatsoever.

Without a binding appraisal provision, an aggrieved insured can either accept the carrier's best offer or litigate. By undermining this important process, as for example by permitting the insured to challenge the carrier's position on the issue of the amount of loss, only if the insurer agrees to be challenged, these states will ultimately experience increased litigation as well as customer dissatisfaction.

Formerly, the state of California required that every policy issued in the state mandate that the parties submit to appraisal when demanded by either party. However, California Senate Bill 658 (introduced in 2001) which was passed by the legislature, now limits

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[27] United Community Ins. Co. v. Lewis, 642 So.2d 59 (Fla.3d DCA 1994).

the insured's right to compel appraisal to only cases involving catastrophic loss, such as earthquakes.

In most situations in California, appraisal has been made voluntary by inclusion of the language, "where the request is accepted..." in the statutorily mandated appraisal clause.

Virginia mandates participation in the appraisal process upon demand,[28] however a separate section of the insurance code prohibits the carrier from including a policy provision which deprives the insured access to the courts in seeking redress for breaches of the insurance contract. Therefore, in the state of Virginia, at least, it would appear that either the insured or insurer may compel appraisal, but the insured alone maintains the right to litigate should that be appropriate under the circumstances.[29]

In Louisiana it has been held that the policy language which states in pertinent part that "either party *may* make written demand for an appraisal of the loss" utilizes permissive

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[28] Standard Provisions, Conditions, Stipulations and Agreements for such Policies, Va. Code Ann. §38.2-2105 (Michie 2002).

[29] Provisions Limiting Jurisdiction, or requiring construction of contracts by Law of Other States, Prohibited, Va. Code Ann. §38.2-312 (Michie 2002). "No insurance contract delivered or issued for delivery in this commonwealth...or which are performed in this commonwealth shall contain any condition, stipulation or agreement depriving the courts of this commonwealth of jurisdiction in actions against the insurer."

language that permits but does not require that the parties engage in the appraisal process. Thus, the claimant was not bound to participate in the process.[30]

In the state of Massachusetts, a statutory reference procedure is utilized whereby both the insurer and insured submit three names to the other side, whereupon the other party selects one of those three to serve as an appraiser. The process is compulsory upon demand.[31]

In fact, in Massachusetts, where the insurer had specifically rejected the public adjuster's calculation of the loss, and the parties failed to agree on the amount of loss, appraisal was a condition precedent to bringing an action against the insurer even where the insurer denied liability for the fire on the ground that the insured or someone at her direction had intentionally set the fire.[32]

In Oklahoma, the party who demands the benefit is bound by the appraisal while the non-requesting party is not bound.[33] The premise for this approach is that the statute which mandates the inclusion of the appraisal

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[30] Smith v. Employers Mut. Cas. Co., 2006 WL 3533126 (W.D. La. 2006).

[31] Referees; Selections, Mass. Gen. Laws Ch. 175, §100 (2003).

[32] McCord v. Horris Mann Ins. Co., 390 F.3d 138 (1st Cir. Mass. 2004).

[33] Massey v. Farmers Ins. Group, 837 P.2d 880, 1992 Okla. 80 (Okla. 1997).

provision in the policy[34] violates the Oklahoma constitution which requires the right to a jury trial to be inviolate.[35] In Oklahoma, it is only the unwary and unsophisticated insured who will make use of the appraisal provision where he can only lose.

With respect to claims arising out of the September 11, 2001 terrorist attack on the World Trade Center, it had been held that acts of Congress limiting liability of various entities and industries and which conferred exclusive jurisdiction on the United States District Court, Southern District of New York, with respect to resolution of related disputes, were not intended to deprive the parties to an insurance contract of their contractual right to appraisal. Thus, those claims are appraisable pursuant to the laws of the state of New York.[36]

Even in states that recognize the appraisal provision as a condition precedent to suit, this will only be so where there has been an actual demand for appraisal. In the case of Duane Reade, Inc. v. St. Paul Fire and Marine Ins,[37] the court disagreed with the carrier's argument that an appraisal was required

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[34] Standard Policy Provisions, Okla. Stat. tit. 36 §4803(g) (2003).
[35] Oklahoma Const. Art. 2 §819.
[36] S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC , 2002 WL 1905968 (S.D.N.Y. 2002).
[37] 411 F.2d 384 (2nd Circ. 2005).

before suit could be brought based on the plain language of the policy's appraisal clause which stated that neither party was required to submit to an appraisal until a written demand for appraisal had been issued. In this matter, the Second Circuit Court of Appeals sitting in New York and ruling on a matter arising out of the destruction of the World Trade Towers found the "no-suit" provision of the policy to be ambiguous with respect to the appraisal provision. The court concluded that while the clause may plausibly be read as precluding suit until an insured satisfies every contractual obligation as the carrier asserted, it is equally amenable to being read as precluding suit only if the insured failed to satisfy those obligations which have accrued before suit is filed. Thus, the court concluded that appraisal is not a condition precedent to suit if it had not been demanded.

In Iowa, a district court's decision to order appraisal was upheld when appraisal was found to be a condition precedent to any further action to resolve the matter. The court held that where appraisal has been demanded, the court may consider coverage issues before appraisal is complete and that other judicial determinations are properly postponed until such time. Where appraisal is demanded, under a policy with terms governed by Iowa Code §515.138(6), "completion of the appraisal process is a precondition to a suit by either party." However, if an appraisal demand is not made before litigation is commenced, a lawsuit "cannot be barred as premature, because appraisal is not then a precondition to suit." [38]

[38] North Glenn Homeowners Ass'n v.State Farm Fire and Cas .Co., No. 13-0859 (Court of Appeals, July 16, 2014).

C] APPRAISAL AS DISTINCT FROM ARBITRATION

Although numerous courts around the country have taken guidance from cases and statutes relating to arbitration, insurance appraisal is actually distinct from an arbitration.[39] A number of basic distinctions have long prevailed between an appraisement under the Standard Fire Policy and an arbitration. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which judgment may be entered after judicial confirmation of the arbitration award. In contrast, an agreement for appraisal extends merely to the resolution of the specific issues of value and the amount of loss, with all other issues being reserved for a determination in a plenary action.[40]

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[39] United States Fire Ins. Co. v. Franko, 443 So.2d 170 (Fla. 1st DCA1983); New Amsterdam Cas. Co. v. J.H. Blackshear, Inc., 116 Fla. 289, 156 So. 695 (1934); Preferred Mut. Ins. Co. v. Martinez, 643 So.2d 1100 (Fla. Dist. Ct. App. 3d Dist. 1994); Intracoastal Ventures Corp. v. Safeco Ins. Co., 540 So.2d 162 (Fla. Dist. Ct. App. 4th Dist. 1989); Childs v. State Farm Fire & Cas. Co., 899 F. Supp. 613 (S.D. Fla. 1995), *aff'd,* 158 F.3d 588 (11th Cir. 1998) (Appraisal provision in insurance policy construed to be an arbitration provision.); Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla. Dist. Ct. App.3d Dist. 2001), *aff'd,* 833 So.2d 762 (Fla. 2002) (*over ruling* Hoenstine v. State Farm Fire & Cas. Co., 736 So.2d 761 (Fla. 5th DCA. 1999) and Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997)); *See also*, Allstate Ins. Co. v. Martinez, 833 So.2d 761, 27 Fla. L. Weekly S1043 (Fla. 2002); Quade v. Secura Ins., 792 N.W.2d 478 (Minn Ct. App. 2011), .Alexander v. Farmers Ins. Co., Inc., 219 Cal.App.4th 1183, 162 Cal Rptr.3d 455 (Cal. App. 2 Dist. 2013), citing Doan v. State Farm. General Ins. Co., 195 Cal.App.4th at 1092-99, 125 Cal.Rptr.3d 793 (2011); Certain Underwriters at Lloyd's of London v. Bart Enterprises, Int'l Ltd., 2013 WL 2252914 (Cal. App. 2013).

[40] In re Delmar Box Co., 309 N.Y. 60, 127 N.E. 2d 808 (1955).

Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Michigan, Minnesota, Mississippi, Texas and Wisconsin among others, have also used the rules and procedures relating to arbitration in the context of insurance appraisals.[41]

Michigan however, has recognized an insurer's right to appraisal despite an insured's common law right to unilaterally revoke an arbitration clause. It has been stated that the principle of unilateral revocation of arbitration had to succumb to the statute requiring fire insurance policies to contain a provision entitling either party to make a demand for

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[41] Steiner v. Middlesex Mut. Assur. Co., 44 Conn.App. 415, 689 A.2d 1154 (1997); Middlesex Mut. Assur. Co. v. Clinton, 38 Conn. App. 555, 662 A.2d 1319 (1985); Covenant Ins. Co. v. Banks, 177 Conn. 273, 413 A.2d 862 (1979); Closser v. Penn Mut. Fire Ins. Co., 457 A.2d 1081 (Del. 1983); Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 389 A.2d 439 (1978); Atlas Const. Co. v. Indiana Ins. Co., 160 Ind. App. 33, 309 N.E.2d 810 (2d Dist. 1974); Auto-Owners Ins. Co. v. Kwaiser, 190 Mich. App. 482, 476 N.W.2d 467 (1991); Acme Roll Forming Co. v. Home Ins. Co., 100 F.Supp.2d 567, 569 (E.D. Mich. 2000), *aff'd in part, reversed in part on other grounds,* 31 Fed. App. 866 (6th Cir. 2002) (full-text opinion unpublished) (Where the court states "The law in Michigan is clear that appraisal constitutes a common-law arbitration agreement."); Davis v. National Am. Ins. Co., 78 Mich. App. 225, 259 N.W.2d 433 (1977); Meineke v. Twin City Fire Ins. Co., 181 Az. 576, 892 P.2d 1365 (Ariz. App. Div. 1 1995); Harvey Prop. Mgmt. Co. v. Travelers Ind. Co., 2012 WL 5488898 (D Ariz.) 6700 Arrowhead Owners Ass'n v. State Farm Fire and Cas Co., 2012 WL 5868969 (D. Ariz. 2012); Munn v. Nat'l Fire Ins. Co. of Hartford, 237 Miss. 641, 115 So.2d 54 (1959); Wells v. American States Preferred Ins. Co., 919 S.W.2d 679 (Tex. App. Dallas 1996); Beard v. Mount Carroll Mut. Fire Ins. Co., 203 Ill. App. 3d 724, 561 N.E.2d 116 (5th Dist. 1990); Friday v. Trinity Universal, 262 Kan. 347, 939 P.2d 869 (1997); Garden-Aire Village South Condo Ass'n, Inc., 2013 WL864570 (S.D. Fla); U.S. Fid. & Guar. Co. v. Romay, 744 So.2d 467, 469 (Fla.3d DCA 1999); Galindo v. ARI Mut. Ins. Co., 203 F.3d 771,776 (11th Dir. 2000); QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n., 778 N.W.2d 393, 398 (Minn.Ct. App. 2010). (In Minnesota, appraisal decisions are subject to Minn. Stat. §572.08-.30 (2008) {renumbered to 572B.01 et. Seq}, The Arbitration Statute.).

appraisal. Allowing one party to unilaterally revoke the appraisal clause and terminate the appraisal process would directly conflict with the statute.[42]

However, the United States Court of Appeals for the Sixth Circuit has stated in a case arising in Michigan that a commercial property policy's appraisal provision in which the insurer retained its right to deny a claim in event of an appraisal, did not provide for binding "arbitration" within the meaning of the Federal Arbitration Act as defined by federal or Michigan law and did not mandate that a "hearing type" appraisal process was required.[43]

As seen in some of the cases cited above, at times it seems courts have confused arbitration with appraisal with somewhat unpredictable consequences.[44]

Those jurisdictions that tend to treat insurance appraisal as arbitration often permit a broader array of issues that may be resolved

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[42] Frans v. Harleysville Lake States Ins. Co., 270 Mich. App. 201, 714 N.W.2d 671 (Mich. App. 2006).

[43] Evanston Ins. Co. v. Cogswell Properties, LLC, 683 F.3d 684 (6th Cir, 2012); 9 U.S.C.A. §1 *et seq*.

[44] Richard C. Bennett, *Appraisal, Insuring Real Property* §3001 (3)(a) (Matthew Bender); *See also,* Suarez, 786 So.2d 645 (Fla. Dist. Ct. App. 3d Dist. 2001), *aff'd,* 833 So.2d 762 (Fla. 2002) ; *See also*, Allstate Ins. Co. v. Martinez, 833 So.2d 761, 27 Fla. L. Weekly S1043 (Fla. 2002).

through the appraisal process. For example, in Florida Farm Bureau Cas. Ins. Co. v. Scheaffer[45] the principle issue involved whether the insured was entitled to replacement of their entire roof when concededly, only a few roof tiles were damaged and required replacement but matching tiles could not be located. The insured claimed this to be a coverage issue and thus not subject to the appraisal provision. After carefully reviewing the distinctions between appraisal and arbitration, the First District Court of Appeals nevertheless found the appraisal clause constituted an agreement to arbitrate and held it was subject to the Florida Arbitration Code.

Indeed, in December, 2002 the Supreme Court of Florida specifically disapproved of the holding in Sheaffer in bringing Florida into line with the majority of states. The Supreme Court stated the following:

> "We disapprove of the decisions in Sheaffer[46] and Hoenstine,[47] because the appraisal clauses in those cases were substantially similar to the one in the present

[45] Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997) (amended by Allstate v. Suarez, 786 So.2d 645 (Fla. Dist. Ct. App. 3d Dist. 2001), *aff'd,* 833 So.2d 762 (Fla. 2002) (appraisal clause is not an agreement to arbitrate)).
[46] Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).
[47] Hoenstine v. State Farm Fire & Cas. Co., 736 So.2d 761 (Fla. 5th DCA 1999)

case, and a plain reading of those clauses reveals that formal arbitration was not contemplated or agreed upon by the parties. In Sheaffer, the First District went beyond the plain meaning of the appraisal clause when it considered that the appraisers would have to 'exercise...quasi-judicial authority' to resolve the dispute.[48]

"The issue to be resolved is whether an unambiguous provision for appraisal may be construed as an agreement to arbitrate the underlying dispute. As we stated in Siegle v. Progressive Consumers Ins. Co., 819 So.2d 732 (Fla. 2002) 'when an insurance contract is not ambiguous, it must be given affect as written.' *See*, State Farm Fire & Cas Co. v. Oliverias, 441 S.2d 175, 178 (Fla. 4th DCA 1983)."

Neither the trial court nor the Third District in Suarez found the appraisal clause in the homeowner's policy to be ambiguous, nor do we find any

[48] Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla.3d DCA 2001), *aff'd,* 833 So.2d 762 (2002).

> ambiguity in the clause. It is clear from a plain reading of the clause that an informal appraisal proceeding, *not* a formal arbitration hearing pursuant to §682.06 Florida Statutes (1999) was intended and agreed upon by the parties in agreeing to the appraisal provisions of the policy. *See*, Liberty Mut.l Fire Ins. Co. v. Hernandez, 735 S.2d 587, 589 (Fla. Dist. Ct. App. 3rd Dist. 1999) ("[T]heclause contemplates inspection and valuation by each appraiser individually, not a trial-type hearing.")"[49]

More recently, Florida's Third District Court of Appeals found the state's Arbitration Code not to be a source of guidance when it considered an insured's petition to confirm an appraisal award where there was no statute authorizing such a petition.[50]

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[49] Suarez, 786 So.2d 645 (Fla. Dist. Ct. App.3d Dist. 2001), *aff'd,* 833 So.2d 762 (2002);; *See also*, Allstate Ins. Co. v. Martinez, 833 So.2d 761, 27 Fla. L. Weekly S1043 (Fla. 2002); *see also* 200 Leslie Condominium Ass'n, Inc. v. QBE Ins. Corp., 2011 WL 2470344 (S.D.Fla.); *see also* United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla.3d DCA 1999); *see also* Gray Mart, Inc. v. Fireman's Fund Ins. Co.,, 703 So.2d 1170 (Fla.3d DCA 1997); Fla. Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997); State Farm Fire & Cas. Co. v. Middleton, 648 So.2d 1200 (Fla.3d DCA 1995); Intracoastal Ventures Corp. v. Safeco Ins. Co. of Am., 540 So.2d 162 (Fla. 4th DCA 1989); Phillips v. General Acc. Ins. Co. of Am., 685 So.2d 27 (Fla.3d DCA 1996); Preferred Ins. Co. v. Richard Parks Trucking Co., 158 So.2d 817 (Fla.2d DCA 1963).

[50] State Farm Florida Ins. Co. v. Gonzalez, 76 So.3d 34 (Fla.3d DCA 2011).

Numerous jurisdictions have recognized the traditional distinctions between arbitration and appraisal. These states have generally included Alabama, Arizona, California, Georgia, Indiana, Iowa, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Tennessee, Utah, West Virginia, Wisconsin and others.[51]

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[51] *See*, Rastelli Bros. v. Netherlands Ins. Co., 68 F. Supp.2d 440 (D.N.J. 1999); Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 389 A.2d 439 (1978); Casper v. Allstate Ins. Co., Unrecorded decision, Md .Ct. of Special Appeals # 1583, June 28, 2000 (recognizing the party's right to proceed by informal appraisal without the procedural requisites mandated by the Maryland Uniform Arbitration Act, 3-213, *et seq;* In re Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955); Rademaker v. Atlas Assur. Co., 98 Ohio App. 15, 120 N.E.2d 592 (8th Dist. 1954); Minot Town & Country v. Fireman's Fund Ins. Co., 1998 N.D. 215, 587 N.W.2d 189 (1998); Hartford Fire Ins. Co. v. Jones, 235 Miss. 37, 108 So.2d 571 (1959); PHC, Inc. v. North Carolina Farm Bureau Mut. Ins. Co., 129 N.C. App. 801, 501 S.E.2d 701 (1998) (holding that the Uniform Arbitration Act did not apply to appraisal under insurance policy, explaining that "the appraisal provisions of the insurance policy merely provide a mechanism whereby the parties can rapidly and inexpensively determine the amount of property loss without resorting to court process"); Eberhardt, et al v. Georgia Farm Bureau Mut. Ins. Co., 223 Ga. App. 478, 477 S.E.2d 907 (1996) (holding that appraisal clauses are valid, binding and enforceable, but stating that the Georgia Arbitration Code does not apply to insurance contracts); Smithson v. United States Fid.& Guar. Co., 186 W. Va. 195, 411 S.E. 2d 850 (1991); Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142 (Tenn. Ct. App. 2001) (The court recognized that appraisal is a narrower form of relief than arbitration and is limited to the effort to quantify the monetary value of a property loss, not to decide questions of liability); and Standard Fire Ins. Co. v. Fraiman, 514 S.W. 2d 343 (Tex. App.-Houston [14th Dist] 1974); Appalachian Ins. Co. v. Rivcom Corp., 130 Cal. App.3d 818, 182 Cal. Rptr. 11 (2d Dist. 1982); Jefferson Ins. Co. of New York v. Superior Court of Alameda County, 3 Cal.3d 398, 475 P.2d 880, 90 Cal.Rptr. 608 (1970); Miller v. U.S.A.A. Cas. Ins. Co., 44 P.3d 663 (2002); Lyon v. Hartford Ace & Indem. Co., 25 Utah 2d 311, 480 P.2d 739 (1971), *overruled on other grounds by,* Beek v. Farmer's Ins. Exch., 701 P.2d 795 (Utah 1985), *overruled as stated in,* Gagon v. State Farm Mut. Auto Ins. Co., 746 P.2d 1194 (Utah Ct. App. 1987), *overruled as stated in,* Camphill v. State Farm Mut. Auto Ins. Co., 840 P.2d 130 (Utah Ct. App. 1992); Hanson v. Commercial Union Ins. Co., 150 Ariz. 283, 723 P.2d 101 (Ct. App. Div. 1 1986); Lynch v. American Family Mut. Ins. Co., 163 Wis.2d 1003, 473 N.W.2d 515 (Ct. App. 1991); Casualty Indem. Exchange v. Yother, 439 So. 2d 77, 79-80 (Ala. 1983); Hartford Lloyds Ins. Co. v. Teachworth, 898 F.2d 1058, 1061-62 (5th Cir.1990); Unetco Ind. Exchange v. Homestead Ins. Co., 57 Cal App. 4th 1459, 67 Cal Rptr.2d 784 (Ct. App. 1997); Robinson v. Lumberman's Mut. Cas. Co., 110 Pa. Super. 396, 168 A. 321 (Pa. 1933) (the appraisal provision provided for in the Standard Fire Policy was not an "arbitration" and the appraisal merely operated as conclusive

For example, the Utah Supreme Court in Miller v. U.S.A.A. Cas. Ins. Co.,[52] distinguished insurance appraisals from arbitration, stating:

> "Although appraisal may be used as another form of alternative dispute resolution, it is not arbitration. Appraisal, in a general sense is defined as the "determination of what constitutes a fair price; valuation; estimate of worth."[53]

An appraisal is an informal, independent investigation conducted by individuals who "base their decisions on their own knowledge."[54] An appraisal is generally

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evidence of damages); Frans v. Harleysville Lake States Ins. Co., 270 Mich.App. 201, 714 N.W.2d 671 (Mich.App. 2006) (parties had the right to the benefit of appraisal despite their common law right to unilaterally revoke an arbitration clause at any time before the announcement of the award as allowing one party to unilaterally revoke the appraisal clause would directly conflict with the statute. M.C.L.A. §500.2833(1)(m); Terra Industries, Inc. v. Commonwealth Ins. Co. of Am., 981 F. Supp. 581, 607 (N.D. Iowa 1997) (determining appraisal provision required on ascertainment of the amount of loss, not legal question of coverage); Taylor v. Farm Bureau Mut. Ins. Co., 2008 WL 4525496 (Iowa App.) (finding Iowa Code Chapter 579A.1(2)(a) which invalidates an agreement to arbitrate in a contract of adhesion is inapplicable to appraisal.); Stuckman v. Westfield Ins. Co., 2011 WL 1944266 (Ohio Ct. App.) (holding that there was nothing in the record to indicate that the provision at issue was anything other than an appraisal as Ohio law is clear than an appraisal condition in an insurance policy is not subject to the arbitration statutes.); Kirkwood v. California State Auto. Assn Inter-Ins. Bureau, 193 Cal .App. 49, 122 Cal. Rptr.3d 480 (Ct. App. 2011; CNS Corp. v. Global Aerospace, 2010 WL2978063 (E.D.Mo.) (As the dispute in an appraisal centers on the cost to repair, it does not resolve all issues and thus does not violate the Missouri prohibition against arbitration provisions in insurance contracts).

[52] Miller, 44 P.3d 663 (2002).

[53] *Black's Law Dictionary* 97 (7th Ed. 1999).

[54] Teachworth, 898 F.2d 1058.

conducted "without hearing or judicial inquiry."[55]

In addition, unlike arbitration, "appraisal ordinarily settles only a subsidiary or incidental matter rather than the main controversy as does an arbitration award."[56]

In Miller[57] it was stated that an appraiser's power generally does not encompass the disposition of the entire controversy between the parties...[but] extends merely to the resolution of the specific issues of actual cash value and the amount of loss.[58]

The Miller court went on to distinguish arbitration by describing it as:

> "[A] method of dispute resolution involving one or more neutral parties...whose decision is binding."[59]

Specifically, an arbitration is a "broad, quasi-judicial proceeding, complete with

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55 6 C.J.S. Arbitration §3 (1975).

56 Id.; St. Paul Fire & Marine Ins. Co. v. Wright, 97 Nev. 308, 310, 629 P.2d 1202, 1203 (1981).

57 Miller, 44 P.3d 663.

58 In re Delmar Box Co., 309 N.Y. 60; *See also*, Miller v. U.S.A.A. Cas. Ins. Co., 44 P.3d 663 (quoting, In re Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955)).

59 *Black's Law Dictionary* 100 (7th Ed. 1999); *See also*; Reed v. Davis County School District, 892 P.2d 1063, 1065 (Ut. Ct. App. 1995); 6 C.J.S. Arbitration §1 (1975).

formal hearings, notice to parties and testimony of witnesses."[60]

Louisiana has explained the distinction by stating that appraisers' responsibilities "are merely to ascertain the cash value and the extent of the insured's loss and are proper and legal and do not fall into that class of arbitrations which undertake to oust the courts of their jurisdiction". It has been recognized that "[i]n theory, arbitration is a substitute for a proceeding in court, and should not be confused with what takes place where parties refer to selected persons some ministerial duty or some matter involving only the ascertainment of facts, requiring no hearing nor the exercise of judicial discretion upon the question in dispute."[61]

Some states like Maryland, while not imposing their formal arbitration rules and procedures on the appraisal process, often use the terms appraisal and arbitration interchangeably. While the terms are used interchangeably and the two processes share a body of procedural law, these states nevertheless recognize the distinction between the two while making available the statutory enforcement mechanisms necessary to give

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[60] Teachworth, 898 F.2d 1058.

[61] Girard v. Atlantic Mut. Ins. Co., 198 So.2d 444 (4th Cir. 1967), citing Housing Authority of New Orleans v. Henry Ericsson Co., 197 La. 732 (La. 1941).

life to the appraisal provision.[62]

The Maryland Court of Appeals properly articulated the distinctions between the two methods of issue resolution.

The Court stated:

> A number of basic distinctions have long prevailed between an appraisement under the standard fire policy and a statutory arbitration. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, upon which judgment may be entered after judicial confirmation of the arbitration award, while the agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action. Appraisal proceedings are, moreover, attended by a larger measure of informality, and appraisers are 'not bound to the

[62] Aetna Cas. & Sur. Co. v. Insurance Com'r, 293 Md. 409, 422, 445 A.2d 14 (1982); Meyer v. State Farm Fire & Cas. Co., 85 Md. App. 83, 85, 582 A.2d 275, 275-276 (1990); Brethren Mut. Ins. Co. v. Filsinger, 54 Md. App. 357, 362-63, 458 A.2d 880, 883-84 (1983).

strict judicial investigation of an arbitration.' Arbitrators are required to take a formal oath and may act only upon proof adduced at a hearing of which due notice has been given to each of the parties. They may not predicate their award upon evidence garnered through an *ex parte* investigation of their own, at least unless so authorized by the parties. Appraisers, on the other hand, are not required to take an oath. They are likewise 'not obliged to give the claimant any formal notice or to hear evidence;' and they may apparently proceed by *ex parte* investigation, so long as the parties are given the opportunity to make statements and explanations to the appraisers with regard to the matters in issue.

Furthermore, in an arbitration, all of the arbitrators, if there be more than one, 'must meet together and hear all the allegations and proofs of the parties.' The standard appraisal clause, in contrast, specifically recites that the umpire is not to participate in the appraisal in all cases, but is only to pass on

> such differences as there may be between the appraisers designated by the respective parties. In addition, the vacator of an arbitration award invariably results in a new arbitration whereas after an appraisal award has been set aside without fault on the part of the insured, he is not required to submit to any further appraisement but is free to litigate the issues in an action at law on the policy.[63]

In California, while the terms arbitrator and appraiser are at times used interchangeably, the courts have historically recognized the distinctions between arbitration and appraisal. It is said that in California, though the appraisal is governed by the general rules of arbitration, an appraiser has far greater flexibility then an arbitrator in evaluating a matter in appraisal.[64]

The wide applicability in California of arbitration's guidelines to appraisal is not

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[63] Aetna Cas. & Sur. Co. v. Ins. Com'r, 293 Md. at 422, *Quoting,* In Re Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808, 811 (1955).

[64] Unetco Ind. Exchange v. Homestead Ins. Co., 57 Cal. App. 4th 1459, 67 Cal. Rptr.2d 784 (2d Dist. 1997); Devonwood Condominium Owners Ass'n v. Farmers Ins. Exchange, 162 Cal. App.4th 1498, 77 Cal. Rptr.3d 88 (2008) (recognizing a confirmed award of appraisers and umpire under an insurance policy is treated as a confirmed arbitration award which has the same effect as a judgment in a civil action but recognizing appraisers generally have more limited powers that arbitrators).

without exception. In one appraisal-related matter, the court considered the provisions in Section 1281.9 of California's Arbitration Act requiring proposed arbitrators to disclose any potential grounds for disqualification to opposing parties. It examined them against the state's Insurance Code § 2071 requiring parties to engage in an informal appraisal proceeding, where each chooses a competent and disinterested appraiser (or alternatively, the court) who may then choose a competent and disinterested umpire. Though disclosure and disqualification requirements are "standard components" of arbitration, § 2071's specifications warrant different treatment of party-selected appraisers; the requirement to select a competent and disinterested appraiser "in effect constitutes a contractual agreement between the parties to select neutral appraisers." In light of this and in the absence of other statutory authority, the court did not observe "an automatic and unlimited right of disqualification" for appraisers' disclosures.[65]

The United States Court of Appeals for the 5th Circuit has articulated the differences between appraisals and arbitrations as follows:

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[65] Mahnke v. Superior Court, 180 Cal. App.4th 565, 103 Cal. Rptr.3d 197 (Ct. App. 2009).

> Insurance appraisals are generally distinguished from arbitrations. While both procedures aim to submit a dispute to a third party for speedy and efficient resolution without recourse to the courts, there are significant differences between them. For example, an arbitration agreement may encompass the entire controversy between the parties or may be tailored to particular legal or factual disputes. In contrast, an appraisal determines only the amount of loss without resolving issues such as whether the insurer is liable under the policy. Additionally, an arbitration is a quasi-judicial proceeding, complete with formal hearings, notice to parties, and testimony of witnesses. Appraisals are informal. Appraisers typically conduct independent investigations and base their decisions on their own knowledge, without holding formal hearings.[66]

A Florida court similarly clarified the difference in the realms of appraisal and

[66] Teachworth, 898 F.2d at 1061-62.

arbitration in finding that the trial court erred in applying the Florida Arbitration Code to confirm an appraisal award, ultimately reversing on the basis that the trial court improperly overruled an insurer's objections and defenses to a judgment. It declared that arbitration "ordinarily encompasses the disposition of the entire controversy between the parties…[but] appraisal extends merely to the resolution of the specific issues of actual cash value and 'amount of loss'"; that appraisal is an informal process which does not require that appraisers be sworn; that appraisers "act on their own skill and knowledge" related to the appraisal; that appraisers are not required to provide formal notice of their actions to parties or counsel or hear evidence; appraisers may conduct ex parte investigation if done in good faith; and other issues not assigned to appraisal are determined in a "plenary action." The court contrasted appraisal with arbitrations, which it characterized as "quasi-judicial proceedings...impressed with the same procedural safeguards" of judicial proceedings.[67]

As will be seen throughout this text, many courts have utilized the arbitration process and

[67] Citizens Prop. Ins. Corp. v. Mango Hill #6 Condominium Ass'n. Inc., 117 So.3d 1226, 1227 and 1230 (2013).

the law which has been constructed around that process to draw analogies in resolving disputes that have arisen during appraisal.

For example, it has been held in the state of Ohio that the appraisal clause in a homeowner's insurance policy constituted an "arbitration" for the purposes of judicial review and the enforcement of the award.[68]

Serious consequences have occurred where courts have equated arbitration and appraisal, however. For example, in Philip Vandrilla v. Middlesex Mut. Assur. Co.,[69] the Superior Court of Connecticut concluded that since appraisal is the equivalent of arbitration under Connecticut law, the failure of the umpire, if not the appraisers as well, to be sworn as required by §52-414(d) of the Connecticut General Statutes, requires the appraisal award to be invalidated. This interpretation would not appear to do justice to the intent of the appraisal clause.

Connecticut courts have acknowledged that "a person can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which he has agreed to do so."

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[68] Cousino v. Stewart, 2005 WL 3120245 (Ohio App. 6th Dist. 2005).

[69] 1994 WL 668756 (Conn. Super. Ct. 1994); *See also*, Reinke v. Greenwich Hospital Assoc., 175 Conn. 24, 29, 392 A.2d 966, 968 (1978).

The issue of whether the parties to a contract have agreed to appraisal is controlled by their intention. In the Jacob v. Seaboard[70] case, the Superior Court of Connecticut found that the intent of the parties as expressed in their contract was for an appraisal without the attendant formalities called for by the arbitration statute. Nevertheless, the court concluded that the informal valuation proceeding held was a statutory arbitration proceeding for the purposes of enforcement under the laws of Connecticut.

Some states, like California, have specifically made certain aspects of its statutory law as to arbitration applicable to insurance appraisals. For example, California Code of Civil Procedure § 1281.9 requires the umpire to disclose prior relationships with the parties within 10 days of their proposed nomination. In Jefferson Ins. Co. of New York v. Superior Court of Alameda County,[71] the California Supreme Court determined that enforcement procedures respecting arbitration

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[70] Jacob v. Seaboard, Inc., et al, 1991 WL 2238765 (Conn. Super. Ct. 1991); and Jacob v. Seaboard, Inc., etal.,1991 WL 162314 (Conn. Super Ct. 1991); *See also*, A. Dubreiul & Sons, Inc. v. Libson, 215 Conn 604, 608-09, 577 A.2d 709, 712 (1990).

[71] 3 Cal.3d 398, 402, 475 P.2d 880, 90 Cal. Rptr. 608 (1970); *See also, e.g*., Order to Arbitrate Controversy; Petition; Determination of Court, Cal. Civ. Proc. §1282.2(g) (2003)(which provides that "if a neutral arbitrator intends to base an award upon information not obtained at the hearing, he shall disclose the information to all parties to the arbitration").

were specifically made applicable to insurance appraisals.

There, the trial court was found to have the discretion as to whether to stay appraisal. In an action involving a disagreement over the nature of a dispute and the applicability of Appraisal, it was held that "just as it has 'the power to sever arbitrable claims from inarbitrable ones and to stay either the arbitration or the judicial proceedings pending the outcome of the other.'"[72]

In Arizona, it has been determined that "appraisal clauses should be interpreted using arbitration principles, based on the determination that appraisal is analogous to arbitration. Since public policy favors arbitration, it also favors liberally construing a policy's appraisal clause and resolving any doubts in favor of the appraisal process."[73]

In Pennsylvania, for purposes of enforceability, there is no distinction between arbitration and appraisal.[74]

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[72] Alexander v. Farmers Ins. Co., Inc., 219 Cal.App.4th 1183, 162 Cal Rptr.3d 455, citing Doan v. State Farm General Ins. Co., 195 Cal.App.4th at 1092-99, 125 Cal.Rptr.3d 793 (2011).

[73] Harvey Prop. Mgmt. Co. v. Travelers Ind. Co., 2012 WL 5488898 (D Ariz.2012); U.S. Insulation Inc. v. Hilro Const. Co., Inc., 146 Ariz. 250, 705, P.2d. 490, 498 (Ariz. App. Ct. 1985).

[74] Ice City, Inc. v. Ins. Co. of North America, 456 Pa. 210, 314 A.2d 236 (1974).

The policy form commonly known as the London Arbitration Clause or the Bermuda Arbitration Clause, for example, is more encompassing then the standard appraisal provision and replaces both appraisal and litigation against the carrier. The policy language in these situations contemplate a true arbitration in that the clause commonly covers all disputes or controversies arising out of or relating to the policy, its breach, termination or invalidity and mandates a resolution of all such disputes by a panel of arbitrators.

CHAPTER II

CIRCUMSTANCES WARRANTING APPRAISAL

A] DISAGREEMENT NECESSARY

Once the claim has been presented by the insured or the insured's public adjuster, the carrier will have a reasonable chance to respond, investigate and take a position with respect to coverage and damages. It is only then that it will begin to appear if there is sufficient disagreement about the amount of loss or value to warrant an appraisal. Of course, the carrier is entitled to a reasonable time to review the insured's claim and respond with either an offer of settlement or an explanation as to why the carrier believes the amount payable is less then the insured's claim.

For the dispute to be ripe for an appraisal, there must be a disagreement between the parties as to the amount of the loss or the value of the insured property. Typically, the representatives for both parties should already have ascertained an opinion of the amount of the loss and discussed those opinions, and upon their failure to reach an agreement and conclude the claim, there is a disagreement ripe to be resolved by the appraisal process.

However, it has been held that where the appraiser for the insurance carrier has refused to proceed (in this case due to a perceived fee dispute with the umpire) it was held to be proper to conclude that the stonewalling appraiser's evaluation of the loss was $0.00 and the "differences" between the appraisers would therefore be the entire amount of loss.[75]

Where the insured claims a loss and the insurer disputes it, either in whole or in part, and the basis of the dispute involves the amount of loss and no question of liability is involved, the claim is ripe and a proper one for appraisal.[76]

However, a North Carolina court declined to enjoin appraisal where an insurer believed an insured had prematurely sought appraisal as to both structural and business losses sustained. As to the structural loss, the subject policy allowed the insurer to challenge the scope of appraisal after an award had been rendered and thus coverage disputes

[75] Everett Cash Mut. Ins. Co. v. Krawitz, 430 Pa. Super. 25, 633 A.2d 215 (1993).
[76] *Couch on Insurance* §50:157 (2d rev. ed. 1982).

could be resolved in the course of litigation. In finding that the appraisal process for business losses had not been commenced prematurely it concluded that the insurer had not adequately shown "irreparable harm" or "that the balance of equities tip[ped] in favor of granting the injunctive relief" sought. In so finding, the court stated that emails regarding itemization and other paperwork suggested that the insurer assented to an appraisal that encompassed business losses "at least implicitly, agreed that all conditions precedent to appraisal were met and that the process should move forward."[77]

A failure to agree as to the amount of loss or actual cash value is essential in order to render the appraisal a condition precedent to litigation.[78]

There must be an honest attempt made by the insured and insurer to meet on the question of loss and damage before the appraisal should take place. The initial disagreement between the parties without some effort to resolve that disagreement is

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[77] Owners Ins. Co. v. Southern Pines Hotel Operations LLC, 2013 WL 595924 (M.D.N.C. 2013).

[78] Harrison v. Hartford Fire Ins. Co., 59 F. 732 (C.C.S.D. Iowa 1984); Hanover Fire Ins. Co. v. Harper, 77 Ill. App. 453 (4th Dist. 1898); Maimes v. Automobile Ins. Co., 112 Misc. 656, 183 N.Y.S. 690 (Sup. Ct. 1920), *aff'd*, 196 A.D. 21, 187 N.Y.S. 943 (4th Dept. 1921); Phoenix Ins. Co. v. Badger, 53 Wis. 283, 10 N.W. 504 (1881).

generally not sufficient to make the case ripe for appraisal.[79]

In cases where the insurance carrier asserts the position that the insured sustained no loss whatsoever, the appraisal clause may nevertheless be operative and appropriate.[80]

A case with a different perspective arose with respect to the World Trade Center attack of September 11, 2001. Several different insurance carriers had each issued separate policies sharing portions of the risk of loss and in favor of World Trade Center Properties, LLC. A single insurance company, Allianz, demanded an appraisal after litigation had already ensued between the parties. One of the insured's grounds for rejecting the demand for appraisal was the fact that it was premature. The basis of this assertion was that the parties had been engaged in a dispute over various issues of liability and had not yet engaged in any meaningful dialogue regarding the issues of loss and damage. A detailed four volume presentation was prepared by the insured and tendered to the carriers which reflected a claim in the amount of $6.5 Billion. The extent of the disagreement was contained in one line of a letter prepared by the carriers' counsel

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[79] Continental Ins. Co. v. Vallandingham & Gentry, 116 Ky. 287, 76 S.W. 22 (1903).
[80] Fitzgerald Bottling Works of Amsterdam v. Continental Ins. Co., 275 A.D. 453, 90 N.Y. S.2d 430 (3d Dept. 1949).

which summarized their view of the loss as being less than $2 Billion.

In a decision strange in a number of respects, Judge Martin of the United States District Court for the Southern District of New York stated the following:

> "There is nothing in the language of the appraisal provision that suggests an insurer must hire experts to evaluate the loss and then engage in good faith negotiations with the insured over the amount of the loss before it may invoke the appraisal process. Indeed, the appraisal provision itself suggests that it is the appraisers appointed by the parties who are to engage in the good faith effort to resolve the dispute before it is submitted to an umpire. It makes no sense to suggest that the parties must bear the expense of hiring experts to evaluate a loss before they obtain the services of "an impartial appraiser."[81]

[81] S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC., 2002 WL 1905968 (S.D.N.Y. 2002).

This determination by Judge Martin appears contrary to the very language of the policy and significant precedent around the country holding to the contrary. In fact, in the particular appraisal provision quoted by the court, the policy states "in case the insured and this company shall fail to agree as to the amount of the loss or damage to the property insured ...". This language, in the context of the duties and obligations on the part of the insurer to execute the terms of the contract in good faith, makes the court's conclusion questionable.

It can be succinctly stated that the insured has an obligation to present its claim, the insurer a duty to investigate it in good faith and respond. If at this juncture it appears there is a disagreement as to loss or value, the matter is ripe for appraisal.

A Washington court addressed the meaning of "Proof of Loss" as utilized in an insurance policy's appraisal provision where the policy did not define the provision and a dispute arose as to its interpretation. It has been held in Washington that "'the concept of 'proof' for purposes of an insurance claim means 'sufficient notice to allow insurers to evaluate their rights and liabilities and to investigate claims.'" It also looked to the Washington Administrative Code for guidance, which indicates that a Proof of Loss statement may be insufficient to enable coverage decisions "given that it allows an insurer to object to the sufficiency of the 'Proof of Loss' form statement and request additional time to investigate." The court deemed the insurer's objections to the sufficiency of the insured's Proof of Loss form to be reasonable since the form didn't detail the loss and the insurer had expressed its desire for more information.[82]

However, it was held in both EDM Office Services, Inc. v. Hartford Lloyds Ins. Co. and Dike v. Valley Forge Ins. Co.[83] that the insurer's compliance with the insurance policy's "Claims Handling" provisions, requiring it to conduct a reasonable investigation of the insured's claim, was not a condition precedent to invoking the appraisal process. Both courts explained that the policy's appraisal clause did not use conditional language nor was there any policy provision demonstrating that the parties intended that the insurer fully comply with the claims handling provisions prior to beginning appraisal.

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[82] Trident Seafoods Corp. v. Commonwealth Ins.Co., 2010 WL 3894111 (W.D.Wash. 2010), citing Van Nov v. State Farm Mut. Auto. Ins. Co., 98 Wash.App. 487, 494, 983 P.2d 1129 (Wash. Ct. App. 1999).

[83] 20111 WL 2619069 (S.D. Tex. 2011).

B] APPRAISAL WHERE THERE ARE QUESTIONS OF LIABILITY OR COVERAGE

Generally (and subject to a policy provision that provides otherwise), the appraisal clause in the Standard Fire Policy has no application to a claim where the insurer denies all liability. It typically applies only where there is a disagreement as to the amount of loss or damage.[84]

In Georgia, for instance, a dispute as to extent of damage was deemed to involve coverage and thus did not warrant an invocation of appraisal. There, an insurer had determined only four of an insured's roof tiles had been damaged by wind while the insured contended that replacement of all shingles was required and covered under the policy. However, both parties' estimates for replacement cost of the shingles were consistent. In finding the appraisal provision inapplicable, the court cited a Supreme Court of Georgia holding that, "an appraisal clause can only resolve a disputed issue of value. It cannot be invoked to resolve broader issues of

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[84] Maimes v. The Automobile Ins. Co. of Hartford, 112 Misc. 656, 183 N.Y.S.690 (Sup. Ct. 1920), *aff'd,* 196 A.D. 21, 187 N.Y.S. 943 (4th Dept. 1921); See also American Family Mut. Ins. Co. v. Dixon, 450 S.W.3d 831 (Mo. Ct. App. 2014) ("Missouri law is clear that whether the appraisal provision of an insurance policy applies depends upon whether the dispute between the insurer and insured is properly characterized as a coverage dispute or a disagreement over the amount of loss.").

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liability. To invoke an appraisal clause to eliminate...issues of liability...would be impermissible, as it would expand the scope of the appraisal clause beyond the issue of value. It would be tantamount to converting the appraisal clause into an arbitration clause, which is the type of clause that would be invoked to address broader issues. Arbitration clauses, however, are impermissible in contracts between insurers and insureds."[85]

However, in some states, as for example, under Michigan law, regardless of whether liability issues exist, the appraisal proceedings must go forward to determine the issue of damages only. The justification for allowing the appraisal to go forward is based on the fact that appraisal does not pass on any question of liability, it is not arbitration and it is simply determinative of the question of the amount of damages suffered.[86] The logic underlying this approach is that the consumer is entitled by contract to a resolution of the issue of loss and value so that if he may ultimately prevail in litigation on the issues of coverage raised by the carrier or even on a subsequent appeal of a negative determination, the insured should nevertheless have the right to this efficient resolution of these issues in a timely manner. To

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[85] Lam v. Allstate Ind. Co., 2014 Ga. App. LEXIS 225 (2014).

[86] Denton v. Farmer's Mut. Fire Ins. Co., 120 Mich. 690, 79 N.W. 929 (1899).

wait until after a final judicial determination of issues of coverage in order to conduct the appraisal would almost guarantee that relevant evidence, witnesses and information would be less available. The Michigan law attempts to give life to the intent of the appraisal provision by mandating compliance with the provision on a timely basis.

The practical logic of compelling an appraisal to proceed even when issues of liability have been raised is explained in the case of Masonic Temple Assoc. v. Michigan Fire and Marine Ins. Co.[87] The Supreme Court of Michigan affirmed a trial court's decision to permit an appraisal proceeding to go forward despite the carrier's denial of liability, stating: "The Judge also expressed his opinion that if there was an appraisal the parties might adjust their differences and end the litigation."[88]

As was discerned by Judge Mukasey in a matter arising out of the World Trade Center disaster:

"[A] court generally reviews disputed questions of law after an appraisal is complete [but] this timing is not mandatory."[89]

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[87] Masonic Temple Ass'n of Grand Rapids v. Michigan Fire & Marine Ins. Co., 323 Mich. 662, 36 N.W.2d 317 (1949).
[88] Id. at 673.
[89] Duane Reade Inc. v. St. Paul Fire & Marine Ins., 411 F.3rd 384, 389 (2d Cir. 2005).

In Florida, the court properly allowed appraisal of an insured's damages and a determination of coverage "to go forward on a dual track basis." It relied upon controlling precedent in asserting that "it is the law in our district that the order in which the issues of damages and coverage are to be determined by arbitration and the court is left to the discretion of the trial court…we [have] recognized that putting the issue of coverage first before arbitration in every case might have adverse effects on the expeditious, out of court disposition of litigation, which is the reason arbitration is a favored remedy…[i]t also saves 'judicial resources which might otherwise be required in resolving the factual and legal issues involved in the [coverage issue] by a relatively swift and informal decision by the appraisers as to the amount of the loss.'"[90]

Florida has also addressed the ability to challenge an aspect of coverage without contesting coverage as a whole. In stating the trial court should have first made a liability determination, the Fourth District Court of Appeals held that part of the liability may be contested "without challenging coverage as a whole." Such was especially true under these circumstances where "the appraisal award

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[90] Sunshine State Ins. Co. v. Rawlins, 34 So.3d 753 (Fla. 3d DCA 2010).

itself indicated the amount could change as the award was made without consideration of the policy's provision of coverage." It cited prior holdings allowing an insurer to contest coverage and liability as to one element of an appraisal award and that it was "not reasonable to order an insurer to pay for all elements set forth by an appraisal award if the insurer raises an issue of coverage as to only one element and not the whole claim." It declared "the issue of coverage is not necessarily a matter of all or nothing" and reversed and remanded for determination of liability and the amount of payment to which the insured was entitled.[91]

In Texas, appraisal was not automatically precluded where a disagreement pertained to both coverage and amount of loss. It was decided that the lower court had abused its discretion when it denied an insurer's motion to compel appraisal, affirming that under those circumstances, the policy's appraisal provision could not be avoided "simply because coverage or causation issues about whether the storm caused the roof damage may overlap with issues about the amount of the loss and repair costs." The court deemed causation always a matter of consideration in

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[91] Florida Ins. Guar. Ass'n. Inc. v. The Olympus Ass'n, Inc., 34 So.3d 791, 35 Fla. L. Weekly D1117 (Fla. 2d DCA 2010).

appraisal; appraisers must allocate damages rendered by covered and excluded perils and determine damages from a particular occurrence.[92] This reflects the modern pervasive view on the issue.

Generally, appraisal is not available where the claim has been denied in totality. In a Florida case where an insured sought to compel appraisal, the court determined that the insured was not entitled to appraisal "because coverage for the claim ha[d] been denied in its entirety." There, the court deemed appraisal inappropriate where the insurer had declared the policy void, there was no covered claim and thus no disagreement over the amount of any covered claim. The court stated that, "under Florida law, 'when the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid'...[h]owever, whether the claim is covered by the policy is a question for judicial determination. Thus, when the claim has been denied in its entirety based on lack of coverage, appraisal is not appropriate."[93]

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[92] In re Texas Windstorm Ins. Ass'n, 2013 WL 4806996 (Tex. App.-Houston [14th Dist] 2013.

[93] Oceana I Condo Ass'n, Inc., v. QBE Ins. Corp., 2011 WL 1984483 (S.D. Fla. 2011).

Interestingly, in the Province of Ontario, Canada, the Ontario Insurance Act requires the insurer to proceed to appraisal without excuse. This is accomplished by including language in the Standard Fire Policy of the Province of Ontario which states that the appraisal must proceed when demanded, whether "the right to recover on the contract is disputed or not, and independently of all other questions."[94] The import of this provision is that it prevents any argument by either the insured or the insurer which attempts to avoid having the amount of loss and damage determined by appraisal once appraisal has been demanded.

Some courts have determined that even where allegations of arson exist, an appraisal may still be appropriate.[95]

The responsibility of establishing coverage is imposed on the insured. In Alabama, it was held that an insurer was within its right to investigate a claim before proceeding with appraisal and that an insured "bears the burden of establishing coverage by demonstrating that a claim falls within the insurance policy." There, the court found the insurer was entitled to judgment since the

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[94] Insurance Act, R.S.O., CH I-8, §148 (2)(11) (2003) (Ontario, Can.).
[95] Hala Cleaners v. Sussex Mut. Ins. Co., 115 N.J. Super 11, 277 A.2d 897 (Ch. Div. 1971), *distinguished by,* Rastelli, 68 F. Supp.2d 440 (D.N.J. 1999).

insured had not identified any provision in the policy that required an insurer to name its appraiser before finishing an investigation of the claim.[96]

In Florida, it has been held that until a judicial determination has been made concerning the insureds' fulfillment of their post-loss obligations including any contractual duty to mitigate damages, appraisal was premature.[97]

Though coverage was an issue, where the insurer made a settlement offer prior to the insured bringing suit which the insured rejected as being insufficient, the carrier will not be deemed to have "denied liability" for the insured's claim. In this situation, the claim would likely still be ripe for appraisal.[98]

In Florida, a court found that appraisal of issues relating to ordinance and law could not be properly demanded where none had yet been incurred. In that case, following an appraisal award which stated that "Ordinance and Law" was "not appraised", an insured had requested its insurer pay for the entirety of roof repairs under Ordinance and Law coverage.

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[96] Scottsdale Ins. Co. v. Prayer Tabernacle Early Church of Jesus Christ, 2011 WL 3320544 (S.D. Ala 2011).

[97] Meritplan Ins. Co. v. Laughlin, 2005 WL 1054027 (M.D. Fla. 2005).

[98] Richardson v. Merrimack Mut. Fire Ins. Co., 2000 WL 297171 (S.D.N.Y. 2000).

The court held that Ordinance and Law was not recoverable until it was incurred per policy terms and in this instance, could not have been initially appraised.[99]

This decision recognizes the reality that claims for expense due to ordinance and law are not payable until incurred. However, the decision more appropriately should have allowed a determination of the loss due to ordinance and law, if such was possible without the repair work actually being concluded with payment for the portion of the award for ordinance and law being withheld until actually incurred.

This situation is analogous to the appraisal of replacement cost benefits prior to work being performed where the insurer pays only the actual cash value until the work is actually performed when payment of the holdback becomes ripe. Claims are commonly settled in this manner and this approach allows for the insured to anticipate their ultimate recovery and plan accordingly. If appraisal of the costs due to ordinance and law are not possible because, due to hidden damages or impossibility of determining what ordinances and laws might apply prior to filing of plans,

[99] Jossfolk v. United Prop. & Cas. Ins. Co., 110 So.3d 110, 111 (Fla. 4th DCA 2013).

appraisal of this portion of the claim must await such determination.

However, appraisal was not appropriate where the insurer declared the insurance policy void, and thus, the parties could not disagree over the amount of any covered claim as there was no covered claim.[100]

[100] Oceana I Condo Ass'n., Inc. v. QBE Ins. Corp., 2011 WL 1984483 (S.D.Fla 2011).

C] COST, TIME AND OTHER CONSIDERATIONS

1. Cost

The most profound benefit favoring the appraisal process is the savings of money and resources for both of the parties to the process as well as an already overburdened judicial system. It is this savings which should be among the primary considerations in deciding to assert the benefit of the appraisal process. It is almost always the rule that the appraisal process will resolve the issues of the amount of loss, damages and value less expensively than full blown litigation.

The legal fees and expenses associated with the appraisal process are likely to be significantly less than those associated with litigation on the issue of damages alone. Furthermore, there is the added benefit of finality, as the figure arrived at by the appraisers is significantly less likely to be successfully challenged on appeal. The opportunity for a successful challenge of an appraisal award is much more limited in most jurisdictions, avoiding the possibility of appellate fees and costs as well.

The Standard Fire Policy, as well as most insurance policies today, generally provide that each appraiser shall be paid by the party selecting him or her and the expenses of the appraisal and the umpire shall be paid by the parties equally.[101]

For example, in Florida the terms of an insurance policy have been found to govern with respect to appraisal related costs such as umpire and appraiser fees. In one matter, the court deemed umpire and appraiser fees unrecoverable under circumstances where a policy contained "clear and unambiguous" direction that each party would pay for its chosen appraiser and bear expenses equally. It did not accept the insured's argument that such fees would be covered under Florida's Civil Remedy Statute, Florida Statute 624.155(8) "for the recovery of damages 'which are a reasonably foreseeable result of a specified violation of this section…'" as there was no legal authority for recovery under this provision.[102] A similar result was seen where the carrier sought recovery of its appraisal expenses, and the court denied an insurer's motion for appraisal costs. There, the court found no basis to disregard that policy

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[101] Virginia, however, provides in lines 144 through 147 of its Standard Fire Policy that "[I]f the written demand is made by this Company, then the insured shall be reimbursed by this Company for the reasonable cost of the insured's appraiser and the insured's portion of the cost of the umpire." Va. Code Ann. §38.2-2105.

[102] 316, Inc. v. Maryland Cas. Co. , 625 F. Supp. 2d 1187 (2009).

provision, providing for each party bearing the appraisal expenses equally.[103]

No one participating in the process should be misled into thinking that appraisal is an inexpensive process. While it generally is far less expensive then the alternative of litigation, it can be costly as well. It is therefore not appropriate in some small claims where the cost of the process (the party's appraiser and half of the umpire's cost) will approach the value of the claim. Nevertheless, if the parties cannot agree and a builder's meeting has proven unproductive, appraisal is the most cost efficient method of resolution.

Many jurisdictions do not provide for the recovery of attorneys' fees nor sums above and beyond the contractual claim. Particularly in these jurisdictions, appraisal could be a far more efficient and user-friendly process for the determination of the amount of loss and value than litigation.

2. Time Considerations

A review of lines 123 through 140 of the New York Standard Fire Policy, reflect a significantly expedited schedule for

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[103] Aries Ins. Co. v. Hercas Corp., 781 So.2d 429 (Fla.3d DCA 2001).

conducting the appraisal from beginning to end. The clear intent of the framers of the provision was to provide for an expedited and efficient process for resolving the issues of value and the amount of loss. In most cases, the existence of these contractually mandated time constraints encourage a quick and orderly process by which either party may compel the other to respond within a short period of time to launch the process and bring it to a speedy conclusion.

Once a disagreement has arisen between the parties concerning an appraisable issue, the appraisal process tends to be the most time efficient and user-friendly process available to the parties to resolve these issues.

Even in jurisdictions which mandate the speedy litigation of matters such as these, litigation tends to be significantly more time consuming and often stretches from months to years before a successful resolution is achieved. Even then, verdicts and determinations can be appealed and the process sometimes seems endless.

Thus, with regard to the timeliness of the result, appraisal is by far the most advantageous method to use in obtaining a quick resolution of appraisable issues.

The Standard Fire Policy provides that once appraisal is demanded, each party shall have 20 days to nominate its appraiser. It is then provided that the parties shall have 15 days to agree upon an umpire and then mandates the involvement of a court of record in the state to appoint an umpire should the parties fail to agree. Most states have an efficient process by which this can be accomplished in short order and in far less time then full blown litigation of all of the issues presented by the claim.

Assuming both parties are acting in good faith, it should be possible to bring an appraisal to a conclusion within a period of 60 days from the date of the demand. However, one can imagine many opportunities for delay.

3. Other Considerations

Other advantages may also be available through the use of the appraisal process.

Experienced appraisers may be more likely to recognize the effects of market conditions in a particular locality with regard to the cost and availability of materials, construction methods, zoning and building codes, etc. and thus may be more sensitive to issues likely to make for a more appropriate and fair result.

An additional benefit to the insurance carrier in pursuing an appraisal in those states that recognize a cause of action for an insurance company's bad faith, is that engagement in the appraisal process itself may be evidence of the company's good faith in confronting the problem of loss and value determination.

In Florida, however, an appraisal award in favor of an insured satisfies the necessary prerequisite for maintaining a bad faith action against an insurer. Florida requires that an insured's first-party cause of action for claim benefits against their insurer be resolved favorably before bad faith may be raised. Only a favorable "resolution of some kind" must occur, inclusive of not only an award of damages by a trial or arbitration but pursuant to appraisal as well.

Two cases demonstrate the potential impact the appraisal process may have in the context of a bad faith case which resulted from an insurance carrier's unwillingness to pay the full value of the claim. In Fraley v. Allstate[104] and Guebara v. Allstate[105] it was determined that where there is a genuine dispute including the reasonable reliance on experts, the

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[104] 81 Cal. App. 4th 1282, 97 Cal. Rptr. 2d 386 (2000).

[105] 237 F.3d 997 (9th Cir. 2001).

insurance carrier has not committed bad faith as a matter of law, however, where there are other grounds for an assertion of bad faith such as the carrier's failure to do a thorough investigation or where it is alleged they acted in a dilatory manner, the "genuine dispute" theory may not save the carrier.

On the other hand, where an appraisal award was almost three times the insurer's initial payout, courts have upheld an insured's claim for breach of implied covenant of good faith and fair dealing.[106]

In Carden v. Allstate Ins. Co.,[107] it was held that the appraisal award, which was approximately $600,000 more than what the insurer initially offered, established the basis for consequential damages pursuant to Bi-Economy.[108] The court determined that because the insurer breached its duty to investigate, bargain and settle the insured's claim in good faith, consequential damages for breach of contract may be recovered not limited by the amount specific in the insurance policy.

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[106] *See* Blakely v. USAA Cas. Ins. Co., 633 F.3d 944 (10th Cir. 2011), 78 Fed.R. Serv.3d 845 (10th Cir. 2011).

[107] 30 Misc.3d 479, 912 N.Y.S.2d 867, 2010 N.Y. Slip Op. 20495 (Sup. Ct. West. Cty. 2010).

[108] Bi-Economy Market, Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 886 N.E.2d 127 (2008).

Furthermore, the informality associated in most jurisdictions with the appraisal process may have many advantages over the much more technical and legalistic aspects of proof of damages that occurs under the supervision of the watchful eye of a judge. Juries may be unable to cope with complex factual issues, which often require expert opinion.

An additional benefit of using the appraisal process, particularly where there are extreme differences between the parties in the evaluation of loss and damage, is that it may avoid the assertion of a fraud or gross exaggeration affirmative defense. These defenses are commonly asserted by the insurer in response to a law suit brought by an insured where the principle issue is loss and value. If the issue survives for consideration by a jury there is always a risk of disaster for the insured.

4. Bankruptcy

Generally, a bankruptcy court is without discretion to decline to stay bankruptcy proceedings in favor of appraisal and they certainly have the authority to grant such a stay.[109]

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[109] In re U.S. Lines, 197 F.3d 631 (2d Cir. 1999); In re Crysen/Montenay Energy Co., 26 F.3d 160 (2d Cir. 2000); S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC,2002 WL 1905968 (S.D.N.Y. 2002).

5. Multiple Policies

Where multiple policies exist covering the risk on the same property, and where only one insurer among several demand appraisal, the possibility of different results in parallel proceedings militates against the right of the lone carrier to have the damage issue resolved in accordance with the terms of the insurance policy.

Though the existence of multiple insurers is but one consideration, where full enforcement of the appraisal clause may unfairly multiply the proceedings in which the parties are forced to both litigate and appraise on the same or similar issues, a court may properly deny the appraisal or hold it in abeyance. [110]

One potential though unusual remedy is for the court to substitute itself as the neutral to whom the dispute is submitted as to matters in which the appraisers cannot agree.[111]

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[110] S.R. Bus. Intern. Bus. Ins. Co. Id.; Penn Central Corp.. v. Consolidated Rail Corp., 56 N.Y.2d 120, 436 N.E.2d 512 (1982).
[111] S.R. Bus. Intern. Bus. Ins. Co., Id.: Clark v. Kraftco Corp., 323 F. Supp. 358 (S.D.N.Y. 1971).

D] IN ACTIONS AGAINST AGENTS AND BROKERS

In an action against a broker or agent brought due to some failure of coverage alleged to be the fault of the broker or agent, it is generally said that the broker or agent stands in the shoes of the insurance carrier with respect to the rights, obligations and responsibilities of the insurance carrier.

Thus, with respect to determining damages, the insured's demand to have the issues of loss and value resolved through appraisal should be equally as enforceable as against the broker or agent standing in the shoes of the insurance carrier as it would have been against the carrier directly in the absence of the coverage failure that gave rise to the action against the broker or agent. Thus, an aggrieved insured who lost the benefit of coverage for an otherwise covered claim due to the malfeasance of a broker or agent can properly and efficiently resolve the issue of loss and damage with an appropriate demand for appraisal pursuant to the underlying insurance policy and in so doing, avoid having to litigate those issues unnecessarily where the underlying policy either contained or was subject to an appraisal clause.

E] IN ACTIONS INVOLVING THIRD-PARTIES

Where an insured brought suit against his insurer as well as several allegedly negligent contractors upon a demand for appraisal by the first-party insurer, the court granted its demand but stayed the appraisal until a resolution of the third-party claims could be achieved, as the court (quoting the California Arbitration Statute) was concerned about the possibility of conflicting rulings between the appraisal and the related civil action.[112]

In such a situation, care must be taken to analyze the different measures for valuing the loss with the first-party claim's valuation subject to policy terms (i.e. replacement value might apply), whereas third-party claims against the tortfeasor(s) are subject, generally, to a depreciated value or actual cash value.

[112] Roberson v. Allstate Ins. Co., 2008 WL 1838426 (Cal. Ct. App. 2008) (unpublished opinion).

CHAPTER III

SCOPE OF THE ISSUES COVERED BY THE APPRAISAL CLAUSE

A] APPRAISERS MAY NOT EXCEED THEIR COMMISSIONS

Most insurance policies and statutes which contain the appraisal clause leave much to the imagination and discretion of the parties and their appraisers with regard to appraisal procedure. However, what is usually crystal clear is that the mission of those engaged in the process is to determine the actual cash value (or such other value as the policy may provide) and the amount of loss.

It is generally sacrosanct that the values to be appraised are as to each item of loss claimed by the insured, in a proof of loss, even if the insurer disputes causation of and/or coverage for some of those items. Questions as to whether the insurer is ultimately liable for all or part of the loss must be resolved later by the court.[113]

It is the insured who states the items claimed, and swears to it in a proof of loss. It is this presentation which forms the claim itself and which logically and legally is to be what is appraised. The insistence by some carriers that a less inclusive list be the basis of the appraisal is without basis, so long as the item(s) are in dispute as to amount of loss or value.

The parties should agree in advance on the issues to be determined and the relative amount of detail to be contained in the award in order to give life to the appraisal provision. It is most appropriate to do this in an appraisal agreement signed by the parties.

The appraisers may not exceed the authority granted to them in the appraisal agreement.[114] The appraisal team has no authority to reopen or revisit areas of claim already agreed to or paid by the carrier. The process only pertains "(i)n case the insured and this company shall fail to agree."[115] It is not

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[113] Mapleton Processing, Inc. v. Society Ins. Co., 2015 WL 3467190 (N.D. Iowa 2013).
[114] Safeco Ins. Co. v. Sharma, 160 Cal. App. 3d 1060, 207 Cal. Rptr. 104 (Ct. App. 1984); Edison Textiles, Inc. v. Topa Ins. Co., 2004 WL 1203072 (Cal. App. 2nd Dist. 2004).
[115] Lines 1-2 of the Standard Fire Policy.

within the scope of the appraisers' authority to award less than an undisputed amount previously paid or agreed to by the parties. As to such amounts previously paid, the parties did not "disagree on the amount of loss" and the appraisers thus exceeded their authority. The court granted the insured's petition for an upward modification of the award in such amount.[116]

However, when the appraisers discharge their duty and then exceed their commission, the excess exercise of authority may not destroy what was well done within the submission.[117] An unauthorized portion of an award that does not effect or prejudice the excepting party, should not invalidate the authorized portion of the award. For example, if an umpire who is appointed in accordance with a clause in a standard insurance policy considers the validity of the insured's title to covered property in his or her decision, the unauthorized or invalid parts of an award can be treated as mere surplusage, unless the opposing party is prejudiced.[118]

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[116] Maiden Creek T.V. & Appliance, Inc. v. General Cas. Ins. Co., 2008 WL 351906 (E.D. Pa. 2008).

[117] Nichols v. Rensselaer Ins. Co., 22 WEND 125 (N.Y. Sup. Ct. 1839); Soars v. Home Ins. Co., 140 Mass. 343, 5 N.E.149 (1885).

[118] Hexter v. Equitable F& M. Ins. Co., 123 Me. 77, 121 A. 555 (1923).

This will not prevent the parties from appraising aspects of the loss beyond an undisputed amount previously paid. In a situation where an undisputed amount has been paid, the appraisers may still appraise the value or loss beyond the undisputed payment, but are without authority to review payments or allowances already made unless they were made with a specific written reservation of rights at the time of payment.

An award for lost rents is invalid, for example, where the premises was vacant at the time of loss and the policy language makes clear that rent coverage only applies when the premises are occupied. [119]

It has been held that an appraisal award is subject to judicial review where the complaint alleged that the appraisers exceeded the scope of the appraisal by including items in their calculation that: (1) were excluded from coverage; (2) exceeded the maximum amount of coverage; or (3) were expenses allocated to the insured under the appraisal clause. Furthermore, as the complaint did not dispute the appraiser's valuations or their methodology, and dealt only with the appraisers' authority to make their

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[119] DeCrescenzo v. Capital Mut. Co., 187 A.D.2d 793, 589 N.Y.S.2d 669 (3d Dept. 1992).

award, the complaint states a claim for relief and should not have been dismissed.[120]

In one Massachusetts matter where an insured attempted to vacate an award because an appraiser had exceeded his authority by determining insurance coverage in the course of appraisal, the court set forth its standards governing an appraiser's authority. In addressing the scope of an insurance appraiser's authority for the first time in Massachusetts, the court first established that it was "empowered" to review the decision of the appraiser which had been adopted in the umpire's issuance of the award. It analogized an appraiser's role to that of an arbitrator in stating it "must be limited by and derived from the plain language of the parties' agreement…[t]herefore, an appraiser, like an arbitrator, exceeds his authority by awarding relief beyond the scope of the parties' agreement or beyond that to which the parties otherwise agreed to be bound."[121]

The decision placed the burden of proof in establishing that an appraiser had exceeded its authority on the party attempting to vacate the award.[122]

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[120] AIU Ins. Co. v. Lexes, 815 A.2d 312 (Del.Supr. 2003).

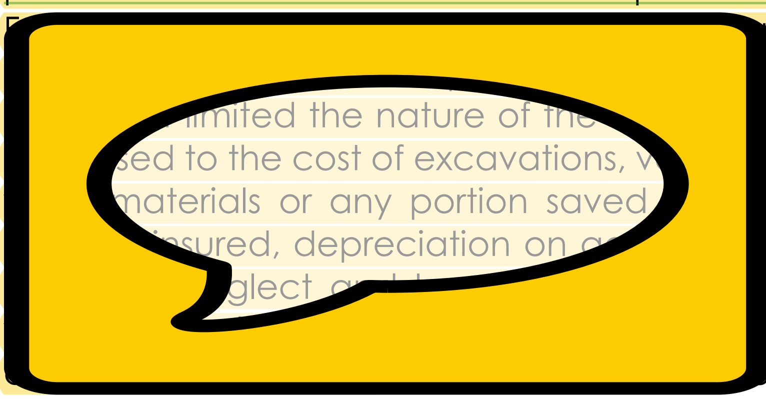
[121] Sun Microsystems, Inc. v. Electronic Services, Inc., 2009 WL 987336 (Mass Super 2009).

[122] Id.

It has been held that appraisers exceeded their authority by resolving such issues as the number and amount of deductibles where this was in dispute or by including an award for interest.[123]

It has been held that an appraisal panel was authorized to direct payment for personal relocation expenses upon their finding that those expenses were the "necessary and direct result" of the covered portion of the loss.[124]

Inappropriate attempts to limit the scope of the appraisal process may be just as problematic and also undermine the process.



unduly limit the scope of the appraisal process or to mandate the form of the award in some manner different than required by the policy

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[123] Hanson v. Commercial Union Ins. Co., 150 Ariz. 283, 723 P.2d 101 (Ct. App. Div. 1 1986).

[124] Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 250 F.Supp.2d 1357, 16 Fla.L. Weekly Fed.D. 231 (M.D. Fla. 2003), *aff'd*, 362 F.3d 1317, 17 Fla. L. Weekly Fed C. 315 (11th Cir Fla. 2004).

[125] Summerfield v. North British & Mercantile Ins. Co., 62 F. 249 (C.C.W.D. Va. 1894).

may waive the right of appraisal as a condition precedent.(See Chapter IV [A] for more on the issue of waiver of appraisal.)

In any event, where issues are raised by the parties in an effort to limit and/or expand the issues to be determined in the appraisal, such a judicial determination is beyond the scope of an application to appoint an umpire. Requests for such clarification as part of such a limited action were properly denied.[126]

It is within the authority of the appraisal team to determine that total roof replacement was more appropriate than mere repair of the damaged shingles.

In Louisiana, it was held that the total destruction of movable property did not render a policy's appraisal option either impossible or unnecessary. In that case, an insured's argument that there was nothing to appraise under the subject policy because the automobile at issue was wholly destroyed was deemed "not tenable". The court substantiated its position by asserting that no state statute imposed liability upon an insurer for movable property's full value where total destruction occurs.[127]

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[126] In the Matter of Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523, 917 N.Y.S.2d 839, 2011 N.Y. Slip Op. 21060 (Monroe Cty. 2011).
[127] Hart v. Springfield Fire & Marine Ins. Co., 66 So.558 (La. 1914).

The Michigan Court of Appeals has held that where the carrier did not properly exercise its right to repair (as by not providing written notice within 30 days of the filing of a proof of loss), a repair unsatisfactory to the insured was insufficient. Without a right to repair, the carrier is bound by its own express language and is bound to pay the "scheduled value contained in the fine art floater and appraisal was deemed inappropriate as there is no dispute regarding the scheduled item's value.[128]

A court in Pennsylvania clarified the applicability of appraisal to issues of scope and extent of loss. While a dispute involving coverage would not warrant appraisal, one surrounding the extent of damage or cause of a portion of the damage pertains to the amount of loss and thus *is* appropriate for appraisal. It was held that disputes involving scope of repairs and causation assessments would not render such a disagreement a coverage dispute.[129] Indeed, this is the modern view as will be detailed below.

Should a question arise about the authority of an appraiser to act, the testimony of the appraiser himself may be offered to

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[128] Shemesh v. Citizens Ins. Co. of America, 2012 WL 6720588 (Mich. Ct. App. 2012).
[129] Currie v. State Farm Fire and Cas. Co., 2014 WL 4081051 (E.D. Pa.), citing Ice City, Inc. v. Ins. Co. of North America, 314 A.2d 236 (1974).

establish his authority to act on behalf of the party that appointed him.[130]

Where there is a dispute as to the existence of coverage, the burden of proof to show coverage generally remains with the party seeking to compel appraisal.[131] Query whether the result should be different in the event of an all-risk policy where coverage is assumed and the insurer has the burden of establishing an exclusion or limitation.

Where there was an issue of what items were in the house at the time of the loss, it is appropriate to appraise the claim as presented and allow the insurer to litigate the issue later if it chooses.

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[130] Isaac v. Donegal & Conoy Mut. Fire Ins. Co., 301 Pa. 351, 152 A. 95 (1930).
[131] Fishman v. Middlesex Mut. Ins. Co., 4 Conn. App. 339, 494 A.2d 606 (1985).

B] APPRAISAL OF "LOSS AND VALUE" TO PROPERTY AS WELL AS ECONOMIC LOSS AND OTHER CLAIMS

An appraisal may determine both the amount and extent of partial damage and the cost to remediate it, as well as whether there has been a total loss. The value of damaged property is also appraisable. As will be seen, however, these are not universal truths.

Other varieties of loss and damage in addition to property damage are subject to the appraisal provision. For example, business interruption claims, extra expense, lost rents, additional living expenses and other economic losses are also appraisable.[132]

For example, under New York law, calculation of the restoration period during which the insured's business income losses can be attributed to a covered event is a factual question about damages, albeit sometimes a complex and contentious one, appropriately addressed by appraisal. However, an appraiser may not resolve coverage disputes or legal questions regarding the interpretation of the policy.[133]

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[132] Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193 (L.A.2 (N.Y.) 2012); Lakewood Mfg. Co. v. Home Ins. Co., 422 F.2d 796, 24 Ohio Misc. 244 (6th Cir. 1970).
[133] Id. at 205-206.

Indeed, in Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.,[134] a claim related to the attack on the World Trade Center, the court held that under New York law, the question of the length of the restoration period of a business interruption claim was a question of valuation for appraisers though the definition of the restoration period was to be settled by the court as a legal issue. In this claim which involved the destruction of the insured's store located on the concourse of the World Trade Center, the court was confronted with the insured's claim for business interruption carried forward for the actual amount of time required to restore operations at an identical store to the previous level against an assertion by the carrier that the claim should be limited to the time required to restore the level of business of the entire Duane Reade chain. Finding the carrier's position to be "manifestly unreasonable" the court determined the definition of the period of restoration as the length of time required for the insured to resume "functionally equivalent operations at the same location" and delegated the determination of the number of months and years to the appraisers.

Where the appraisal award stated both that the insured was entitled to loss of use

[134] 279 F.Supp.2d 235 (S.D.N.Y. 2003).

coverage and that entitlement to the amount depended upon whether the court found the loss to be covered, the insured was not necessarily entitled to the amount of the award. One decision found no abuse of discretion by a trial court which subtracted an amount awarded for "loss of use" from an original appraisal judgment based on "the plain and unambiguous language of the policy, as well as the uncontradicted evidence that [the insured] did not incur any additional living expenses as a result of the fire."[135]

Care should be taken in selecting appropriate appraisers who have expertise in the type of claim at issue. On behalf of the insured, an experienced and qualified public adjuster or forensic accountant may be appropriate for economic claims.

The appraisal clause applies to first-party disputes over the value of loss to tangible property, but not to "causes in action" such as personal injury claims.[136]

In Florida, even where the insurer denies the claim in full and asserts defenses to coverage like failure to cooperate or to comply with conditions precedent, a cause of

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[135] Westfield Nat. Ins. Co. v. Nakoa, 963 N.E.2d 1126 (Ind. Ct. App. 2012).

[136] McDonnell v. State Farm Mut. Auto Ins. Co., 299 P.3d 715 (Alaska 2013) .

action to compel appraisal is not subject to dismissal prior to an evaluation of those defenses, as compelling appraisal may become appropriate should the defenses not be sustained. Dismissal of an appraisal claim is not compulsory even where a claim is fully denied.[137]

[137] Cypress Chase Condo Ass'n "A" v. QBE Ins .Co., 2013 WL 1191413 (S.D. Fla. 2013); State Farm Fire & Cas Co. v Wingate, 604 So.2d 578, 579 (Fla. 4th DCA 1992) (staying appraisal to allow resolution of coverage issues).

C] VALUED POLICIES AND A TOTAL LOSS

Some jurisdictions have considered the applicability of the appraisal provision where the parties have agreed within the policy as to the value of the property insured. Generally, such a policy does not allow for appraisal once there is a total loss.

The New York Court of Appeals discussed the issue of a total loss under the agreed value form of policy in the seminal case of Lee v. Hamilton Fire Ins. Co.[138] In Lee, New York's highest court stated that under these circumstances, the appraisal covers only loss or damage less than a total loss. According to the court, if the insured under such a policy claims a total loss and the insurer asserts a partial loss, and the latter insists on an appraisal, the granting of an appraisal by the insured cannot estop him from litigating the question of whether he suffered a total loss. If it is decided by the court that the loss is not total, then the appraisal stands, but should the court conclude that the loss was total, then, under the valued policy, the insured would be entitled to receive the amount of the policy. Any other construction would emasculate the

[138] 251 N.Y. 230, 167 N.E. 426 (1929).

valuation portion of the policy and disregard the fact that the policy is a valued policy.[139]

A Minnesota court has asserted there is no need for appraisal in the event of a total loss since the amount of loss is predetermined. It explained that the language found within both the pertinent state statute and a policy's appraisal provision stating "except in the case of total loss" was meant to prevent parties from claiming an amount higher or lower than a policy's limits where a total loss occurs.

Total loss, while not defined by the statute or policy, has been described at common law: "A building is not a total loss…unless it has been so far destroyed by the fire that no substantial part or portion of it above ground remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire…There can be no total loss of a building so long as the remnant of the structure left standing above ground is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of the building, uninsured, desiring such a structure as

[139] Id.

the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as a basis. If he would, then the loss is not total."[140]

In Minnesota, the determination of whether a total loss has been sustained is beyond the scope of appraisal. In a case which applied the aforementioned "total-loss prudent-person" standard, total loss was distinguished from the factual dispute submitted to appraisal. Although Minnesota had not previously considered whether an appraisal or court was a more appropriate forum for such a determination, it adhered to the prevailing rule that "the sole purpose of an appraisal is to determine the amount of damage…[a]s a consequence, an appraisal clause does not permit appraisers to determine whether a loss was, in fact, total." The court was found to be the most appropriate forum for a determination of total loss, as the statutory appraisal procedure and appraisers' authority were inconsistent with the common law guidelines, and a total loss requires "interpretation and application of common-law and legal standards that are broader than

[140] Auto-Owners Ins. Co. v. Second Chance Investments, LLC, 812 N.W.2d 194 (Minn. Ct. App. 2012).

loss valuation."[141]

If the policy is **not** a valued form and there is no question but that a total loss occurred, the appraiser can typically determine what the value of the total loss actually is.[142]

It should be noted that while some courts do not authorize appraisers to determine whether a loss is total, an appraisal agreement may be so drawn as to cover the question whether or not there was a total destruction.[143]

A Florida case has illuminated the distinction between a total loss and a constructive total loss. In an action by an insured against an insurer involving wind damage, a District Court of Appeal found that the lower court was correct in allowing a jury to decide which type of loss a mobile home had suffered. This particular matter did not address appraisal, but clarified the distinction between these losses. It applied the identity test in stating, "a building is considered an actual total loss…if it 'has lost its identity and specific

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[141] Id., citing 15 Lee R. Russell & Thomas F. Segalla, *Couch on Insurance* 3d. §210:42 (2005).

[142] Littrell v. Allemannia Fire Ins. Co. of Pittsburgh, Pa., 222 A.D. 302, 226 N.Y.S.343 (3d Dept. 1928), *modified on other grounds,* 224 A.D. 523, 231 N.Y.S. 520 (3d Dept. 1928) *rev'd on other grounds,* 250 N.Y. 628, 166 N.E. 350 (1929).

[143] Yendel v. Western Assur. Co., 21 Misc. 348, 47 N.Y.S.141 (App. Term 1897).

character as a building, and becomes so far disintegrated, it cannot be possibly designated as a building, although some part of it may remain standing.'" However, "'[A] building is considered a constructive total loss when the building, although still standing, is damaged to the extent that ordinances or regulations in effect prohibit or prevent the building's repair, such that the building has to be demolished.'"

Further, the county's substantial damage determination, which required demolition of the property to comply with regulations, was relevant to a determination of constructive total loss.[144]

It has long been recognized that where a policy is a valued policy as to merchandise sold and not delivered, appraisal is not appropriate in the event of a total loss.[145]

In California, where a total loss had occurred, it is for the court to determine whether the policy at issue is either "open or valued" should that issue reasonably be raised.

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[144] Citizens Prop. Ins, Corp. v. Hamilton, 43 So.3d 746 (Fla. 1st DCA 2010).

[145] Buchholz v. US Fire Ins. Co., 293 N.Y. 82, 56 N.E.2d 43 (1944); Lite v. Fireman's Ins. Co. of Newark, N.J., 119 A.D. 410, 104 N.Y.S. 434 (1st Dept. 1907); Buffalo Elevating v. Prussian Nat. Ins. Co., 64 A.D. 182, 71 N.Y.S. 918 (4th Dept. 1901); Harris v. Eagle Ins. Co., 5 Johns 368 (N.Y. Sup. Ct. 1901); Lang v. Eagle Fire Co., 12 A.D. 39, 42 N.Y.S. 539 (4th Dept. 1896); Baldwin v. Fraternal Acc. Ass'n of America, 21 Misc. 124, 46 N.Y.S. 1016 (1897); Knickerbocker Ins. Co. of New York v. Tinguaro Sugar Co., 16 F.2d 128 (2d Cir. 1926); Young v. Allstate Ins. Co., 351 Ill. App.3d 151, 812 N.E. 2d 741 (App. Ct. of Ill. 1st Dist, 6th Div. 2004).

An open policy is one in which the value of the subject matter is not agreed upon but is left to be ascertained in case of loss." (Cal. Ins. Code §411) "A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum. (Ins. Code §412)[146]

In Missouri, it has been held that the state's "valued policy statute" only applied to fire claims and has no applicability to losses caused by risks other than fire.[147]

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[146] Certain Underwriters at Lloyd's of London v. Bart Enterprises, Int'l Ltd., 2013 WL 2252914 (Cal. App. 2013).

[147] Garvin v. Acuity, 2012 WL 5197223 (W.D. Mo. 2012); Mo. Rev. Stat.§379.140

D] ISSUES OF SCOPE OR EXTENT OF LOSS, CAUSATION AND COVERAGE

1. Scope or Extent of Loss

The appraisal team is generally limited to a determination of the value and the amount of the loss to each item of damage sustained by the insured.

A frequent issue that regularly causes frustration and antagonism in the determination of value and the amount of loss is whether the scope of loss is something that may be appraised under the Standard Fire Policy.

For example, it is universally accepted that the cost of replacing wooden beams which have been charred by fire would be subject to an appraisal. However, the question of how many beams would require replacement, it has been argued, is not subject to appraisal, as a possible coverage issue.

In practice, perhaps the most commonly occurring issue might, for example, be in a fire claim where the issue of how many beams or joists need be replaced and how many merely repaired or deodorized. Similar issues arise in almost every claim and become the focus of the appraisers' attention. A number of insurance companies have asserted that this is "an issue of scope" and not subject to appraisal. Logically this is at odds with the Standard Fire Policy and tends to thwart the fundamental purpose of the appraisal provision.

The Standard Fire Policy, in the first sentence of its appraisal clause, states that appraisal is appropriate "in case the insured and this company shall fail to agree as to the actual cash value or the amount of loss..."[148] Objective analysis of the unambiguous terminology of the policy must lead one to conclude that in determining the amount of loss, one must draw conclusions as to the extent of damage to the property which is the subject of the appraisal and the amount, extent, and cost of remediation or replacement in order to fulfill the carrier's responsibility under the policy.

Certainly at its extreme, an overly strict interpretation would tend to frustrate the clear intent of the appraisal provision which is to provide an efficient mechanism to determine the value of loss and damage.

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[148] *See e.g.*, N.Y. Ins. Law §3404.

Historically, there had been a tendency by the courts to treat issues relating to scope of loss as a coverage issue and deprive the parties of the right to appraise that aspect of a disagreement. [149]

In late 2014, historic legislation was signed into law by Governor Andrew Cuomo which clarified that issues of scope of loss (or "extent of loss or damage" as stated in the legislation) are appraisable in the state of New York. This legislation was the culmination of ten years of effort within the legislature and on behalf of consumers to encourage the use of appraisal to resolve all of the issues that comprise the question of the "amount of loss". The author drafted the legislation which passed both houses of the legislature unanimously. The relevant language reads:

> "An appraisal shall determine the actual cash value, the replacement cost, the extent of the loss or damage and the amount of the loss or damage which shall be determined as specified in the policy and shall proceed pursuant to the terms of the applicable appraisal clause of the insurance

[149] Kawa v. Nationwide Mut. Ins. Co., 664 N.Y.S.2d 430, 174 Misc.2d 407, 1997 N.Y. Slip Op. 97580 (1997).

> policy and not as an arbitration. Notwithstanding the provisions of this subsection, an appraisal shall not determine whether the policy actually provides coverage for any portion of the claimed loss or damage."[150]

As of 2015, the existence of issues of scope of loss or minor issues of causation within a covered loss afford no excuse for avoiding appraisal in New York.

A Minnesota court affirmed an award for replacement of all siding panels of a property where matching was required by the applicable policy. The policy there required the replacement of "damaged property with other property…[o]f comparable material and quality." The Court determined that this required a reasonable (not identical) color match between damaged and undamaged material, a standard correctly applied by the appraisal panel. Because the policy also required compensation for direct physical loss or damage to covered property as a result of a covered loss, when combined with the inability to replace damaged panels with siding of comparable material and quality

[150] N.Y. Ins. Law §3408, amended L. 2014. C451 §1, eff. Nov. 21, 2014.

resulting in a color mismatch, the insured was entitled to the replacement of all of its siding panels. There, it was ultimately held that "an appraisal panel can appropriately resolve questions of law when determining the amount of loss [but] [t]his authority is...subject to judicial review." The Court found that the appraisal panel had applied the correct legal standard on the basis of that the plain meaning of the phrase indicated material suitable for matching. However, the Court limited its opinion to the facts before it, observing that each storm-related property damage claim was unique.[151]

In Wisconsin, it was necessary for the Court to distinguish its role from that of an appraiser where it was asked to determine the cost of repair and replacement. The Court affirmed that the cost of repair was a decision properly before the appraisers. It illuminated the purpose of the appraisal process, to determine the total loss claimed – meaning that appraisers should assess each item of damage claimed in proof of loss statements, determine the damaged portions of the property and the cost of repair, and finally issue an award itemizing damages and cost of

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[151] Cedar Bluff Townhome Condo Ass'n v. American Family Mut. Ins. Co., 857 N.W. 290 (Minn. 2014).

repair. The Court emphasized that in the case before it, only then might it be necessary for it to resolve the replacement cost for the insureds' home. It further clarified that appraisers should not consider causation for items of damage; such a determination should be made by the court along with whether the damage was covered under the policy.[152]

However, a partially covered loss is more likely appraisable than a complete denial.

In a recent Missouri case in which parties agreed that there was a covered loss but disagreed as to the amount of loss covered, the Court ultimately found the dispute resolvable by appraisal, stating it could not allow the insurer to "circumvent the appraisal provision the parties contracted for by casting the dispute in this light." As the policy unambiguously provided coverage for the perils at issue, the Court observed a dispute over extent of loss caused by such perils is appraisable.[153]

Another example is found in the case of Safeco Ins. Co. v. Sharma,[154] in which the court reversed a prior confirmation of an appraisal

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[152] Gronik v. Balthasar, 2013 WL 5376025 (E.D. Wis. 2013).
[153] Underwriters at Lloyd's of London, Syndicate 4242 v. Tarantino Properties, Inc., 2012 WL 3835385 (W.D. Mo., 2012).
[154] 160 Cal. App.3d 1060, 207 Cal. Rptr.104 (Ct. App. 1984).

award where the insured had claimed theft of a matched set of 36 paintings. The appraisal determined that the stolen paintings were not a matched set and thus of lesser value. In rejecting the award, the court stated, "[I]n no authority is it suggested that an appraisal panel is empowered to determine whether an insured lost what he claimed to have lost or something different." Thus, though the issue of whether the insured's property was what is was claimed to be impacted on its value, it was held to be beyond the scope of the appraisal provision.

An example of an appropriate and efficient approach in Safeco would have had the appraisers render two conclusions; the first assuming a matched set, the second assuming a non-matched set, leaving it for a subsequent court to enforce the appropriate award.

In an appraisal involving a hotel destroyed by fire while under construction and insured under a builder's risk policy the cost of reconstruction and coinsurance were the prime issues. During appraisal, issues arose concerning what constituted covered property for purposes of calculating the amount of insurance required for coinsurance purposes. For example, questions of whether the cost of parking lots, personal property, site work and other items should be included for coinsurance purposes.

The appraisal team elected to create an award format that valued all items in dispute and calculated two awards; one which included all disputed items and the other which excluded values of the disputed items giving the parties the opportunity to litigate the definition of covered property while having the undisputed portion of the award paid immediately. If the insured prevailed in litigation it would be easy for the court to determine the amount of the additional award.[155]

An appropriate and reasonable approach to issues of this nature would be for the appraisal team to render conclusions of loss and value based upon each of the party's submissions and leave it for a court to make coverage determinations and confirm these parts of the award as appropriate.

For example, the issue of what items were in the home was appraisable, subject to judicial review after the award.[156]

In Texas it has been held that an appraisal should go forward as a preliminary matter because "allowing litigation about the

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[155] See Appraisal Award Form, Section IX, Form 5, page 698 for this award form.

[156] Dorpfield V. Preferred Mut. Ins. Co., Index # 11-386682 (Sup. Ct. Orleans Co. NY, 2011).

scope of appraisal before the appraisal takes place would mark a dramatic change in Texas insurance practices and surely encourage much more of the same."[157]

A Washington insured was entitled to the amount awarded by appraisal for loss of use of his property where his policy provided for such coverage. There, the insurer contested the amount established by appraisal, on the grounds that the amount owed was dependent on a future determination of the scope of applicable coverage. It asserted that the award's own language reflected the inability to resolve coverage issues and believed the insured sought to "equate the appraisal award to the existence of insurance coverage." The Court found that the insurer had presented no basis for challenging the award's fairness, deeming the award conclusive.[158]

A California superior court has deemed it an error to compel appraisers to assign loss values to items without regard to whether they had actually sustained damage. It clarified that while compelling appraisal in light of a dispute over scope of loss in itself would not be

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[157] State Farm Lloyds v. Johnson, 290 S.W.3d 886 at 894 (Tex. 2009).
[158] Kochendorfer v. Metropolitan Prop. & Cas. Ins. Co., 2012 WL 1204714 (W.D.Wash. 2012).

precluded, the fact that a lower court had compelled appraisers to assign values to items that may not have been damaged or ever existed, simply because the insured claimed they were damaged, prevented their compliance with Insurance Code § 2071 requiring appraisal of an insured's actual loss. The lower court decision had misconstrued precedent to suggest that an appraisal panel is compelled to assign a loss value to anything that is submitted to it for consideration by an insured regardless of an item's state of damage or existence. The determinations of whether an item exists or is damaged are "fundamental" to valuation of a loss.

However, the court asserted that "a trial court does not necessarily err in compelling appraisal of disputed items when the disputes turn on issues such as coverage, causation, or policy interpretation. Those legal issues can be resolved in subsequent litigation, although it may be appropriate in certain cases to stay an appraisal pending resolution of the disputed issues. However, when the disputes turn on the condition or quality of damaged or destroyed items-and it is possible for the panel to assess an item's condition or quality without simply having to rely on the insured's representation-it is error to compel the appraisal panel to assign values to items that inspection reveals were not damaged or did not ever exist." It also clarified that an appraiser's authority is exceeded when nothing is awarded for damaged items based on coverage determinations; however, it is not exceeded when nothing is awarded for undamaged or nonexistent items whose nature and existence is readily ascertainable, nor is authority exceeded by determining and labeling different amounts of loss where the amounts differ due to stated assumptions about the property's condition before the loss.[159]

However, a court determined that appraisers did not exceed their scope of authority in carrying out their duties to value a loss, despite the insurer's assertion that the panel had assigned values to items that did not exist or were not damaged because the insured's representative included them within the scope of loss presented to the panel. A review of the record indicated that the panel had not simply "rubber stamp[ed] the estimate" as claimed by the insurer. The court's review of the award did not support the determination that the panel had failed to make factual determinations necessary to value the loss, and decided that if the insurer believed coverage did not extend to certain items included in the scope of loss, it could

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[159] Lee v. California Cap. Ins, Co., Alameda County Superior Court No. RG11571734 (2015).

pursue legal options available to it outside of appraisal.[160]

Citing Safeco Ins. Co. v. Sharma, *supra*, it was held that asking the appraisal panel to determine the length of time for which plaintiff's business was interrupted would be akin to asking the panel "to determine whether an insured lost what he claimed to have lost or something different.[161]

A similar result was reached in the case of Edison Textiles, Inc. v. Topa Ins. Co.[162] where the court recognized the distinction between deciding the value of an item which is the thrust of the appraisal process and deciding the type of item taken. This court was additionally troubled by the umpire's determination of issues of credibility and the burden of proof regarding the extent of the insured's claimed loss.

Similarly, it has been held that where, for example, the parties disagreed as to the length of time for which the policy covered business interruption, or whether or not a particular employee was an "important employee" as

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160 Fidelity Nat. Ins. Co. v. Yolanda Owens, Alameda County Superior Court No. RG11589323)(6/18/15).

161 Turnstone Consulting Corp. v. United States Fidelity and Guaranty Co., 2007 WL 1430037 (N.D. Cal. 2007).

162 2004 WL 1203072 (Cal. App. 2nd Dist. 2004).

defined in the policy, or where the differences as to the amount of loss were all "incidental to the actual underlying legal controversy between the parties as to the meaning of the insurance contract and its application to the facts", appraisal was inappropriate.[163]

This approach was refined in the case of Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co.,[164] where prior to September 11, 2001, the plaintiff operated a drug store in the World Trade Center in downtown Manhattan. When the towers and store were destroyed, plaintiff sought coverage for "business interruption losses" under an insurance policy issued by defendant. The prime dispute between the parties was whether the plaintiff had a right under the policy to recover business interruption losses for the entire period until the World Trade Center was rebuilt or whether plaintiff's recovery was limited to those suffered within 21 months following the terrorist attacks. The District Court determined that appraisal would be premature where there were unresolved claims for declaratory judgment regarding the scope of coverage and related issues.

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[163] Hawkinson Thread Tire Service Co. v. Indiana Lumbermen's Mut. Ins. Co., 362 Mo. 823, 830, 245 S.W.2d 24, 28 (1951).

[164] 261 F.Supp.2d 293 (S.D.N.Y. 2003).

This view was taken to an extreme when a trial court asserted authority to determine the period of restoration, applying this period to the appraiser's determination of monthly loss.

Typically, the court should help to define ambiguous policy terms and determine issues of policy interpretation and leave it for the appraisers to quantify the loss.[165]

In a case in which there are issues of both coverage and of loss valuation, most courts will stay that part of the litigation that involves loss valuation. However, that part of the litigation that involves coverage issues should continue pending the appraisal.[166]

A simplified statement of the rule is that issues of coverage are to be decided by the courts, the dollar value of the loss being resolved by appraisal, with the result binding on the parties. In State Farm Fire & Cas. Co. v. Licea,[167] the Florida Supreme Court stated as follows:

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[165] Meridian Ins. Co. v. Cha Cha, Inc., 868 N.E.2d 922, 2007 WL 1747968 (Ind. App. 2007).

[166] *See* Glenbrook Patiohome Owners Ass'n. v. Lexington Ins. Co., 2011 WL 666517 (S.D.Tex. 2011).

[167] 685 So.2d 1285 (Fla., 1996); *See also,* Harco National Ins. Co. v. Robles, 685 So.2d 1288 (Fla. 1996).

Thus, where there is a demand for an appraisal under the policy, the only defenses which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate. We interpret the appraisal clause to require an assessment of the amount of the loss. This necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for repair or replacement was caused by a covered peril or a cause not covered such as normal wear and tear, dry rot, or various other designated, excluded causes. For the reasons discussed, we hold that the appraisal clause at issue is not void for lack of mutuality of obligation simply because of a retained rights clause [the right of the carrier was reserved to deny the claim after the appraisal], where we interpret the clause as retaining only the right to dispute the issue of coverage as to the whole loss, or whether the policy conditions have been violated as specified above.[168]

The scope of appraisal in Florida was further examined in a recent matter in which a condominium association sought confirmation of an appraisal award in the face of an insurer's argument that damages were improperly awarded for excluded property and that certain amounts should have been deducted upon consideration of its defenses.[169]

The court discussed the differences in the roles of an appraiser and court involved in the appraisal process and clearly outlined the duties of each. It stated that "appraisers determine the amount of loss, which includes calculating the cost of repair or replacement of property damaged, and ascertaining how much of the damage was caused by a covered peril as opposed to things such as "'normal wear and tear, dry rot, or various other designated, excluded causes.". [170] Further, it clarified that "the court decides whether the policy provides coverage for the peril which inflicted the damage, and for the particular

[168] Licea, Id.

[169] Citizens Prop. Ins Corp. v. River Manor Condominium Ass'n, Inc., 125 So.3d 846 (Fla 4th DCA 2013).

[170] *citing* Johnson v. Nationwide Mut. Ins. Co., 828 So.2d 1021, 1025 (Fla. 2002) and State Farm Fire and Cas. Co. v. Licea, 685 So.2d 1285, 1288 (Fla., 1996).

property at issue; in other words, all coverage matters."

More recently the Eleventh Circuit Court of Appeals stated that Florida law is clear that "if an insurer and an insured go to appraisal, the insurer can only dispute 'coverage for the loss as a whole." Causation is a coverage question for the court when the insurer wholly denies that there is a covered loss. However, it is more likely to be an appraisable "amount of loss" question for the appraisal panel when the insurer admits that there is a covered loss, the amount of which is disputed.[171]

In Pennsylvania, the Federal District Court has stated that disputes as to "scope of loss" and "extent of loss" are appraisable. The Court confirmed that those are defined as "an estimation of the dollar value of the loss and a judgment of what repairs are necessary to recoup from the loss."[172]

In keeping with the Eleventh Circuit, the Supreme Court of Rhode Island has held that unless the insurer denies coverage for the

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[171] Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 250 F.Supp.2d 1357, 16 Fla.L. Weekly Fed.D. 231 (M.D. Fla. 2003), *aff'd*, 362 F.3d 1317, 17 Fla. L. Weekly Fed C. 315 (11th Cir Fla. 2004); Muckenfuss v. The Hanover Ins. Co., 2007 WL 1174098 (M.D. Fla. 2007).

[172] Correnti v. Merchants Preferred Ins. Co., 2013 WL 373273 (E.D. Pa.); Sydney v. Pacific Indem Co., 2012 WL 3135529 (E.D. Pa. 2012); Williamson v. Chubb Ind. Ins. Co., 2012 WL 760838 (E.D. Pa. 2012).

claimed loss, and as long as the dispute is limited to the amount or extent of the loss, the parties are required to submit to the statutory appraisal process. In Hahn v. Allstate Ins. Co., the insured brought suit seeking an injunction to compel the insurer to submit to appraisal. In affirming the trial court's issuance of the injunction, the supreme court held that although the insurer argued that scope-of-coverage issues existed which were not appropriate for appraisal, the insurer's vague allegations of pre-existing damage were insufficient to put the insured on notice and were not a genuine attempt to litigate such issues.[173] The insured was entitled to timely and adequate notice of the specifics of the dispute in order to contest the insurer's denial of coverage.

The word "loss" in a property insurance policy clause means "the injury or damage caused by the accident for which the insurer may, under the provisions of the policy, be liable.[174]

In New York, an insured's motion for the appointment of an umpire to conclude an appraisal of both loss and damage to an insured's property was granted where the

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[173] *See* Hahn v. Allstate Ins. Co., 15 A.3d 1026 (R.I. 2011).
[174] 44 Am. Jur.2d Insurance §1327 (2002); Miller v. USAA Cas. Ins. Co., 44 P.3d 663 (Utah 2002).

parties' "Agreement for Submission to Appraisers" used both terms. There, the court found that use of the terms "loss" and "damage" served to represent "patently two separate matters", evidenced particularly by language in the first paragraph stating "the parties hereto have disagreed on the amount of the loss of or damage to the following properties…" The Court found the agreement was reasonably read and even expected to provide for one person to address both issues. The Court reasoned that "[i]n a sense, the two different issues are necessarily conjoined, and an appraisal which determines first, how badly the building was damaged and, second, how much that damage will cost to fix, reasoning, "how is the money value of the damage to be determined until and unless the extent of the damage is determined?"[175]

In one Virginia matter which examined the term "amount of loss" where causation was undisputed but controversy surrounded the extent of replacement and type of repairs required, the Court deemed the disagreement to pertain to extent or amount of loss. It found that appraisal was an appropriate means of resolution, as "the question of what must be replaced in order to adequately repair the

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[175] Kirkpatrick v. Harleysville N.Y. Cas. Co., RJI 32-01-0317 (2008)(unreported decision).

damage caused by the admittedly covered event…is not a question of coverage." Because the term "amount of loss" was not defined by the subject policy nor the Virginia Code or any Virginia court, the Court looked to other jurisdictions having similar appraisal statutes for guidance as to how it should be construed. The Court relied upon two decisions in particular; first, a Texas Supreme Court decision which found appraisal appropriate for resolving which portions of a roof were damaged as well as whether undamaged portions also required replacement to fix the damage sustained. Second, it found a Florida decision instructive in which appraisal was appropriate where coverage was similarly found to be undisputed and the only outstanding issue was "the scope of the required repair or replacement and the amount of the loss."[176]

A Florida court considered scope of loss in characterizing a dispute over necessary repairs to revolve around amount of loss as opposed to a dispute of coverage. It stated, "[n]otably, in evaluating the amount of loss, an appraiser is necessarily tasked with determining both the *extent* of covered damage and the *amount* to be paid for repairs. Thus, a question

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[176] Coates v. Erie Ins. Exchange, 2009 WL 7416039 (Va. Cir. Ct., 2009), citing State Farm Lloyds v. Johnson, 290 S.W.3d 886 (Tex.2009) and Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).

of what repairs are needed to restore a piece of covered property is a question relating to the amount of "loss" and not coverage."[177]

An Arizona court determined a dispute was properly resolvable by Appraisal where the parties disagreed over the amount of loss and the extent of an insurer's liability rather than the meaning of the insurance policy itself.[178]

2. Issues of Causation

Courts have disagreed as to whether the "amount of loss" includes a determination of the "cause of loss." Some jurisdictions have regularly held that appraisers may not consider causation while most other jurisdictions have permitted it, and still other courts have been somewhat ambiguous.[179]

In Ohio, courts have decided the issue on a case by case basis as directed by the appraisal language in the policy. In Hull v. Motorists Ins. Group, the Ohio Court of Appeals reversed a decision made by the trial court which ordered the appraisal panel not to make

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177 Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc., 2014 WL 7404045 (Fla. 2d DCA 2014).

178 Harvey Prop. Mgmt . Co. Inc. v. Travelers Indem. Co., 2012 WL 5488898 (D. Ariz. 2012).

179 Cigna Ins. Co. v. Didimoi Prop. Holding, N.V., 110 F. Supp.2d 259, 265-69 (D. Del. 2000).

any determination as to causation issues when deciding the amount of loss. The Court of Appeals found that under the policy, the parties only agreed to allow the court to select an umpire, but they did not agree to restrict the means by which the appraisers and umpire would determine the value of the insured's property or the amount of loss. Thus, the Court of Appeals did not weigh in on whether appraisers and umpires may consider causation when determining the amount of loss to a structure; it found only that the trial court's causation instruction was "outside the scope of its authority under the parties' contract."[180]

In California it was held that an appraisal panel's consideration of factors of causation as evidenced by allowances for $0.00 for obviously damaged items was an unacceptable coverage determination exceeding the authority of the panel.[181] Such a determination of issues of causation was held inappropriate despite the inclusion of language in an appraisal agreement that read:

[180] Hull v. Motorists Ins. Group, 2011 WL 2040958 (Ohio Ct. App. 2011).

[181] Kacha v. Allstate Ins. Co., 140 Cal. App.4th 1023, 45 Cal. Rptr.3d 92, 2006 WL 1515827 (2006).

> "We, the undersigned, ... in accordance with our appointment as appraisers and/or umpire without bias or personal interest, have observed the subject property and have examined the evidence submitted to us and, in accordance with our appointments, have made the following determination and award of damage, **if any**, to the insured's residence attributable to the fire...".

The inclusion of the words "if any" was held to refer to the degree of damage if any, and not to a covered cause, if any. By making a determination of a non-covered cause of loss to various items, the panel's award was vacated.

In North Carolina, it was held that where an appraisal award purported to determine that wind had caused a loss, factual issues existed as to the causes of damage and coverage under the policy. It was held that "'when, as here, the facts and circumstances surrounding a claim - especially causation - remain in dispute,' the finder of fact must 'determine whether the ultimate cause of the claimed damages falls within the scope of the policy's exclusionary provisions, as defined by the trial court.'" Under these circumstances, factual disputes remained as to which damages were directly caused by wind and which of those related damages may have stemmed from another direct cause, and to coverage under the policy. In North Carolina, appraisal "is limited to a determination of the amount of loss and is not intended to interpret the amount of coverage or resolve a coverage dispute" as an appraisal award may be affected by policy exclusions.[182]

Another North Carolina decision concluded that an appraisal award was invalid where appraisers had inappropriately distinguished what they believed was damage caused directly by fire from that caused by the insured's "post-fire neglect". The Court observed that appraisers are authorized "to assign a value to the damage done by a given event. One cannot measure a loss without determining a starting point…what is not appropriate for an appraiser to decide is how much of the deterioration resulted from a covered cause and how much came from an uncovered cause." North Carolina is among the more conservative states in dealing with causation in this manner.[183]

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[182] North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Sadler, 711 S.E.2d 114 (N.C. 2011), citing Markham v. Nationwide Mut. Fire Ins. Co., 125 N.C. App. 443, 453, 481 S.E.2d 349, 355, *disc. rev. denied*, 346 N.C. 281, 487 S.E2d 551 (1997).
[183] Glendale LLC v. Amco Ins. Co., 2012 WL 1394746 (W.D.N.C., 2012).

Some recent Florida decisions appeared to extend the scope of the appraisal process to allow the award to consider causation.[184]

Florida courts had seen previous conflict on this point. In 2000, Opar v. Allstate Ins. Co.,[185] the First District Court of Appeals concluded that coverage issues were not to be addressed during the appraisal process. The Third District Court of Appeals in Florida has also held that causation was not a proper issue for appraisal. In Gonzalez v. State Farm,[186] the carrier had claimed that the entire loss fell within a policy exclusion and the court determined that such a defense is a legal question to be resolved through litigation and not a question of amount of loss to be determined by appraisers. Interestingly, the Third District, in concluding that the appraisers

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[184] Nationwide Mut. Ins. Co. v. Johnson, 828 So.2d 1021 (Fla. 2002); Gonzalez v. State Farm Ins. Co., 805 So.2d 814 (Fla. Dist. Ct. App. 3d Dist. 2000), *quashed in part and approved in part*, 828 So.2d 1021 (Fla. 2002); Florida Select Ins. Co. v. Keelean, 727 So.2d 1131 (Fla.2d DCA 1999); *But see,* Allstate Ins. Co. v. Suarez, 786 So. 2d 645, *aff'd*, 833 So.2d 645 (Fla. 2002); *See also*, Allstate Ins. Co. v. Martinez, 833 So.2d 761, 27 Fla. L. Weekly S1043 (Fla. 2002); Kendall Lakes Town Homes Developers, Inc. v. Agricultural Excess and Surplus Lines Ins. Co., 916 So.2d 12, 2005 WL 2447887, 30 Fla L. Weekly D2349 (Fla. App.3d Dist. 2005), (where some of the loss is covered, causation is an "amount of loss" question for appraisal panel and not a coverage question to be decided by the trial court. The carrier had agreed that there was some covered loss but disagreed as to the amount of loss. Note that the award was overturned and the matter remanded with an instruction that the appraisal process be repeated before a new umpire, as the trial court had previously limited the umpire's authority and the umpire failed to follow the court's instructions.).

[185] Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. Dist. Ct. App. 1st Dist. 2000).

[186] Gonzalez, 805 So.2d 814; *See also*, Delisfort v. Progressive-Express Ins. Co., 785 So.2d 734 (Fla. Dist. Ct. App. 4th Dist. 2001).

impermissibly decided whether the entire claim was within the coverage of the insurance policy, quoted the same State Farm v. Licea[187] case that the Second District Court of Appeals cited in Johnson in drawing the opposite conclusion.

The Florida Supreme Court's decision in Nationwide Mutual Ins. Co. v. Johnson,[188] however, issued in 2002, seems to have clarified a significant body of Florida jurisprudence which had expanded the scope of appraisal to include a determination of causation.

In Johnson, the intermediate appellate court was confronted by a coverage issue where the consumer claimed his loss was caused by sinkhole, a covered peril, whereas the carrier contended the cause was earth movement, an excluded one. In determining that this issue was a proper one for appraisal, the court stated:

> "The issue presented here is whether causation is a coverage question for the court or an amount of loss question for the appraisal panel. Based on State Farm Fire &

[187] 685 So.2d 1285 (Fla. 1996).
[188] 828 So. 2nd 1021 (Fla. 2002).

> Cas. Co. v. Licea[189] and Florida Select Ins. Co. v. Keelean,[190] we hold that causation is an amount of loss issue for the appraisal panel."

In its Suarez[191] decision, decided in late 2002, the Supreme Court of Florida attempted to resolve these conflicting decisions in handing down its decision in a joint appeal of both Johnson v. Nationwide Mutual Ins. Co.[192] as well as State Farm Fire & Cas. Co. v. Gonzalez.[193] In resolving the conflict, the Supreme Court of Florida adopted the analysis of Judge Kope in the Gonzalez case. Judge Kope stated:

> "Very simply, the Licea court was saying that when the insurer admits there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid. In that circumstance, the appraisers are to inspect the property and sort out how much is to be paid on

[189] 685 So.2d 1285 (Fla. 1996).

[190] 727 So. 2d 1131 (Fla.2d DCA 1999).

[191] Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla. Dist. Ct. App.3d Dist. 2001), *aff'd,* 833 So.2d 762 (Fla. 2002); *See also*, Allstate Ins. Co. v. Martinez, 833 So.2d 761, 27 Fla. L. Weekly S1043 (Fla. 2002).

[192] 828 So.2d 1021.

[193] 805 So.2d 1021.

account of a covered peril. In doing so, they are to exclude payment for 'a cause not covered such as normal wear and tear, dry rot or various other designated excluded causes.'

Thus, in the Licea situation, if the homeowner's insurance policy provides coverage for windstorm damage to the roof but does not provide coverage for dry rot, the appraisers are to inspect the roof, arrive at a fair value for the windstorm damage while excluding payment for the repairs required for pre-existing dry rot.

In the present case (unlike Licea) State Farm says that there is no coverage for the claim whatsoever, while the homeowners say that the claim falls within an applicable coverage. Whether the claim is covered by the policy is a judicial question, not a question for the appraisers."[194]

[194] Gonzalez, 805 So.2d 816-817 (citations omitted) *quashed in part and approved in part*, 828 So.2d 1021 (2002).

In reversing the Johnson decision and affirming the Gonzalez decision, the Florida Supreme Court has adopted a logical and practical resolution of this issue. This resolution would appear to bring Florida within the mainstream of states on this issue.

In the years since Johnson, courts have attempted to confront the varied circumstances that arise. For example, where the insurer acknowledged coverage and paid the claim, but then the insured attempted to reopen the claim several years later which was denied by the insurer, as the entire remaining claim was denied, the court found appraisal inappropriate, stating the carrier "has asserted that the losses now claimed by plaintiffs were not covered under the policies."[195]

The continuing challenge in dealing with this issue will be that inevitably, in fulfilling their duties as appraisers in determining value and the amount of loss, it is inherent in the appraisers' task to make an initial determination as to the cause of damage.

In Colorado, the issue was confronted for the first time in 2011. While acknowledging that other jurisdictions disagree on the question of whether the appraisers' powers include

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[195] 767 Building LLC v. Allstate Ins. Co., 2010 WL 1796564 (S.D. Fla. 2010).

identifying the cause of particular damage when ascertaining the loss the insured has sustained, the Elbart County District Court, relying in part on Florida's Johnson v. Nationwide Mutl Ins. Co., 828 So.2d 1021 (Fla 2001), Delaware's Cigna Ins. Co. v. Didimois Prop. Holding N.V., 110 F.Supp.2d 259 (D.Del. 2000) and Maryland's Wausau Ins. Co. v. Herbert Halporin Dist. Corp., 664 F. Supp.987 (D. Md. 1987) determined that the plain meaning of the policy phrase "amount of loss" necessarily includes a determination of the cause of loss as well as the cost to repair that which was lost. Finding such definition consistent with that found in *Blacks Law Dictionary* and the word "loss" as found in *Webster's Dictionary*, detailed its rationale as follows:

> "If... the court limits the appraisers to simply make dollar value determinations without regard for whether property was damaged by a covered peril, it could be reserving a plethora of detailed damage assessments for judicial review thereby debunking the purpose of appraisal which is to minimize the need for judicial intervention...Moreover the court believes that its approach to the appraisal process may foster the

> parties' resolution of certain issues without legal intervention, thereby promoting the purpose of appraisal... For the appraisal may assist the parties in narrowing and identifying the disputed issues thereby encouraging the partes to attempt a resolution of those matters before seeking judicial intervention."[196]

A more recent Colorado decision has affirmed these principles. There, causation was challenged in a claim which raised a question as to whether damage sustained had been caused by one storm as opposed to a previous one, demonstrating that "as a matter of common usage, one determines the amount of loss with reference to a particular cause." The Court cited the purpose of the appraisal provision as in Rooftop Roofing, holding that to preclude causation from appraisers' consideration would "significantly undermine" its objective. Third, the Court relied upon Colorado public policy in "caution[ing] against an overly restrictive reading" of the provision. Finally, it acknowledged that any determination made by the appraisers as to damage caused by the storm in question

[196] (*quoting* Aqua Ins. Co., *supra* p.249), Rooftop Roofing Inc. v. Fire Ins. Exchange, 2010 CV 243 Dist. Court, Elbert Co., Co. (2011).

would have no bearing on coverage matters, and that such issues may still be disputed by the parties following the conclusion of appraisal.[197]

In Illinois, it has been held that determining the cause of damage is inherent to the appraisers' duties.[198]

In considering this issue, care must be taken to avoid frustrating the clear intent of the appraisal provision by an aggressive assertion of causation as an issue when it is plain that the principal issue between the parties is the amount and value of the loss.

In Iowa as well, the scope of appraisal was found to include issues of causation (but not coverage). In a case where insureds submitted a claim under their policy for hail damage sustained to their roof and two years later, for additional damage suffered from a second storm, a dispute surrounded causation of damage claimed to be a result of the second storm and whether such damage was covered by the policy or excluded by prior compensation. In evaluating this matter, the court asserted that a provision for appraisal of a loss, whether under the terms of an insurance

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[197] Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 2015 U.S. Dist. LEXIS 48854.
[198] Spearman Ind. Inc. v. St. Paul Fire & Marine Ins. Co., 109 F. Supp.2d 905 (N.D. Ill 2002).

policy or pursuant to an independent agreement between parties, are valid and binding. The court acknowledged that the issue of an appraiser's authority to determine causation or issues of coverage had not previously been fully considered in Iowa. Ultimately, it held that an appraiser must determine the amount of loss as part of appraisal process, an undertaking "which often requires consideration of causation." Absent the ability to consider causation, an "integral part of the definition of loss," an appraiser would be unable to take part in its assigned functions. The court determined that this would constitute an improper limit of the appraisal process to circumstances where only the monetary amount of a loss was a disputed matter.[199]

Indeed, a Federal District Judge sitting in the Northern District of Iowa, in attempting to predict how the Iowa Supreme Court would rule on the appraisability of claims raising causation and coverage issues, stated:

> "...[T]he outcome I predict would be adopted in Iowa, is that a dispute over coverage or causation does not eviscerate an

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[199] North Glenn Homeowners Ass'n v. State Farm Fire and Cas. Co., 854 N.W. 2d 67 (Iowa Ct. App. 2014).

> insurance policy's appraisal clause. Instead, upon either party's written demand, a dispute over the amount of loss is subject to the contractual appraisal process despite questions as to coverage or causation. Once appointed, the appraisers must determine the amount of the loss without regard to causation, disputes or defenses to coverage. Basically, this means "valuing each item of loss claimed by the insured, in a sworn proof of loss, even if the insurer disputes causation of and/or coverage for some or all of these items. Questions as to wether the insurer is liable for all or part of the loss must be resolved by the court, not by the appraisers."[200]

Where a challenge based on the improper consideration of causation in an appraisal award was raised by one insurer, a Louisiana decision clarified that causation determinations will not necessarily nullify appraisal awards in that jurisdiction. The Court acknowledged that while causation determinations may be improper in rendering an appraisal award in Louisiana, an award

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[200] Mapleton Processing, Inc. v. Society Ins. Co., 2013 WL 3467190 (N.D. Iowa 2013).

may still stand as any such determinations can be challenged and thus are not binding on either party or the Court. There, an appraiser had argued that issues of causation must be assessed in order to evaluate the "amount of the loss" under the plain language of the policy, recognizing that his work as an appraiser was not to decide coverage or liability matters. Finding no contrary state authority, the Court ultimately held the extent to which the appraiser incorporated causation into the appraisal process alone did not form sufficient grounds for vacating the award.[201]

In a minority of jurisdictions, the rule that causation and other coverage issues are not proper for appraisal is commonly held.[202] However, where coverage for a portion of the loss is accepted, there is a logic and efficiency to allowing the appraisers to determine that

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[201] St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (E.D. La. 2010).

[202] Munn v. National Fire Ins. Co. of Hartford, 237 Miss. 641, 646, 115 So.2d 54, 56 (1959) (holding appraisers did not have authority to decide liability and coverage questions because "nowhere in the standard fire policy is any power vested in or conferred upon the appraisers to determine the cause of loss..."); St. Paul Fire & Marine Ins. Co. v. Wright, 97 Nev. 308, 629 P.2d 1202 (1981); Elberon Bathing Co., Inc. v. Ambassador Ins. Co., Inc., 77 N.J. 1, 389 A.2d 439 (1978); Minot Town & Country v. Fireman's Fund Ins. Co., 1998 N.D. 215, 587 N.W. 2d 189 (1998); Kentner v. Gulf Ins. Co., 66 Or. App. 15, 673 P.2d 1354 (1983), *aff'd and remanded,* 297 Or. 470, 686 P.2d 339 (1984), *modified at reh'g,* 298 Or. 69, 689 P.2d 955 (1984), *superceded by statute on other grounds*, Concealment, Fraud, Representations by Insured, Or. Rev. Stat.§742.208(3)(2001); Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142 (Tenn. Ct. App. 2001); Wells v. American States Preferred Ins. Co., 919 S.W.2d 679 (Tex. App. Dallas 1996); Auto-Owners Ins. Co. v. Kwaiser, 190 Mich. App. 482, 476 N.W.2d 467 (1991); H4C Associates. v. Assur. Co. of America, 256 F.Supp.2d 505 (ED Va. 2003).

portion of the loss which is covered. This nuance represents the majority view currently.

For example, in LeBlanc v. Travelers Home and Marine Ins. Co., the District Court sitting in the Western District of Oklahoma held that although the umpire's decision touched on issues of coverage, his analysis was appropriate. The court explained that as there was no dispute that tornado damage was a covered peril under the homeowner's policy, it was not appropriate for the umpire to determine what damage was caused by the tornado and what damage was caused by some other peril. While the court noted that "[u]nder a typical appraisal clause, the only issue to be determined by the appraiser is the amount of the loss...The problem...is that drawing lines between 'coverage,' 'causation' and 'amount of loss' is not always clear cut in actual practice."[203]

In Texas, appraisers acted within their authority "to the extent [they] merely distinguished damage caused by pre-existing conditions from damage caused by [a] storm"

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[203] LeBlanc v. Travelers Home and Marine Ins. Co., 2011 WL 1107126 (W.D.Okla.2011); *See also* Knop v. The Travelers Home and Marine Ins. Co., unpublished decision, 2:10-cv-05506-JCJ (E.D. Pa. 2010) (Court granted a motion to compel appraisal and stay litigation and directed compliance with an appraisal provision, "find[ing] that the decisions interpreting 'amount of loss' as having an embedded causation element…persuasive and…on point.".

in a case where the court considered the aspect of causation in an appraisal determination. It referenced a state supreme court holding that matters of damage were determinable by appraisal and that liability questions should be resolved by the court, but which also stated that the distinction between liability and damage will not necessarily be clear and that causation relates to both issues.

The court further clarified that should causation be determinable by appraisal then there would be no liability questions before the courts; "[b]y contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability"…and "'[a]ny appraisal necessarily includes some causation element, because settling the 'amount of loss' requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else.'"[204]

A Texas court stated: "[W]hen an indivisible injury to property may have several causes, appraisers can assess the amount of damage and leave causation up to the courts. When divisible losses are involved, appraisers

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[204] TMM Investments, Ltd. v. Ohio Cas. Ins. Co., 730 F.3d 466 (5th Cir. 2013), citing State Farm Lloyds v. Johnson, 290 S.W.3d 886, 892-93 (Tex.2009).

can decide the cost to repair each without deciding who must pay for it…[w]hen an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong."[205]

In Massachusetts, policy coverage issues have been held properly determinable by the Court as a matter of law. In one matter, it was held that an appraiser had properly considered whether certain equipment was part of a covered loss under an insurance policy, but the Court was not bound by the appraiser's interpretation of policy exclusions. There, the insured had contended that an appraiser exceeded his authority by determining coverage issues as part of his appraisal, including a decision that coverage was governed by Form 0180 and an interpretation of policy exclusions. The Court found an insured's claim was subject to appraisal but an insurer's liability in terms of coverage was to be considered after the appraisal. In that action the insured argued that the appraiser had acted outside his authority "by making a threshold determination" pertaining to coverage under the parties' insurance contract. The policy's

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[205] In re Southern Ins. Co., 2011 WL 846205 (Tex. App. 2011), citing State Farm Lloyds v. Johnson, 290 S.W.3d 886 (Tex. 2009) and Scottish Union & Nat. Ins. Co. v. Clancey, 8 S.W. 630, 631 (1888); Amtrust Ins. Co. of Kansas Inc. v. Starship League City, L.P., et al, 2012 WL 2996489 (E.D. Tex. 2012).

language additionally implied that an appraiser must necessarily consider covered losses under the policy in order to carry out its obligations.[206]

An appraisal provision could not be circumvented in Texas where a disagreement surrounded the matters of both coverage and amount of loss. In that case, the overlap of coverage and causation issues with those related to amount of loss and repair cost did not preclude the appraisal provision's applicability. The Court confirmed that with respect to appraisal, causation was always a consideration as appraisers must allocate damage caused by covered and excluded perils in the determination of damages caused by an occurrence.[207]

It was held appropriate to compel the insurer to submit to appraisal where the dispute between the parties had to do with the extent of hail damage. The insurer argued that *any* decisions by appraisers on the extent of damage would be beyond the scope of their authority because their decisions necessarily will involve decisions about causation,

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206 Sun Microsystems, Inc. v. Electronic Services, Inc., 2009 WL 987336 (Mass. Super 2009).

207 In re Texas Windstorm Ins. Ass'n, 2013 WL 4806996 (Tex. App.-Houston [14th Dist.] 2013)

coverage and liability. The Court stated clearly the most logical and appropriate resolution to this common misconception about appraisal:

> "If the parties had to first agree on which specific shingles were damaged and approach every disagreement on extent of damage as a causation, coverage or liability issue, either party could defeat the other party's request for an appraisal by labeling a disagreement as a coverage dispute. Instead, as the process is designed, once it is determined that there is a covered loss and a dispute exists about the amount of that loss, the appraisal process determines the amount that should be paid because of loss from a covered peril."[208]

This Court's approach represents a fundamentally fair and reasonable interpretation of the appraisal provision and gives life to the process.

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[208] Johnson v. State Farm Lloyds, 204 S.W.3d 897 (Tex. App-Dallas, 2006); *See also*, Carbonneau v. American Family Ins. Co., 2006 WL 325724 (D. Ariz. 2006) ("Were such doubts not resolved in favor of appraisal, insurance companies could avoid appraisal obligations merely by claiming that the dispute concerned coverage.").

As stated above, the 2014 change in New York law which clarifies that issues of "extent of loss" are appraisable, establishes that issues of causation as to specific items within an otherwise covered claim would be appraisable as part of the determination of "the amount of loss and damage".[209]

While the cases generally hold that questions of liability are reserved for review in court, when the insurer alleges fraud in the submission of the claim, it should not be assumed that the liability issue must be decided prior to appraisal. In fact, in Dock Resins Corp. v. Sorema N.A. Reinsurance Co.,[210] the court pointed out that while Elberon[211], held that under a fire appraisal the question of liability is preserved for a reviewing court, nothing in the opinion supports the insured's assertion that when the insurer alleges fraud in the submission of the claim, the liability issue must be decided prior to appraisal.

In 201 N. Wells LLC v. Fidelity and Guaranty Ins. Co.,[212] the court was confronted with a situation where the insured had suffered an extensive water damage and the principal

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[209] N.Y. Ins. Law §3804, amended L.2014. C 451 §1. Eff. Nov. 21, 2014.

[210] Unpublished opinion, Index No. Civ. 01-3975 U.S.D.C. D.NJ., 2003.

[211] Elberon Bathing Co., Inc. v. Ambassador Ins. Co., 77 N.J. 1, 389 A.2d 439 (1978).

[212] C.V.03855 (N.D. Ill. Feb. 2, 2001), *as amended,* (Feb. 7, 2001) (Minute Order).

dispute was over what portion of the loss was caused by water damage and what portion of the loss, if any, was caused by the insured's failure to dry out the building, leading to mold and asbestos problems. In commenting that the appraisal provision is used to determine the amount of damages, and not coverage, the court nevertheless found the appraisal provision applicable to this situation. The court noted that the insurance company could not direct its appraiser to ignore certain types of damage to the building because it had already decided that it was not liable for the specific type of damage. The court went on to state:

> "[S]uch behavior would also render an appraisal (and therefore appraisal provisions) largely useless if a court subsequently decides that liability does exist for the type of damage the insurer excluded from the appraisal process."

The District Court concluded that an appraiser's proper duty is to evaluate the amount of damage to covered property after which the insurance company can attempt to apply any alleged mitigating factors, leaving it to the parties to litigate these issues when and if they arise. The court analogized this situation to a situation where a building has pre-existing damage and the appraiser cannot determine the amount of loss without evaluating what damage was caused by the covered event and which damage was caused, for instance, by previous wear and tear. The court required the appraisers to evaluate not only the amount of damage to the building, but also to determine the amount of loss caused by water damage, asbestos, mold and fungi. This will avoid the necessity of litigating these damage issues should the court subsequently decide that coverage existed for some of these categories.

A similar result was seen in Cigna Ins. Co. v. Didimoi Prop. Holdings, N.V.[213] where the court determined that the appraisers were authorized to determine the amount of money necessary to repair or replace the damage as well as the amount of "covered" loss. The court stated: "[A]n appraiser's assessment of the 'amount of loss' necessarily includes the determination of the cause of the loss as well as the amount it would cost to repair that which was lost."[214]

In order to maintain the efficiency of the process as intended by the policy and to avoid the necessity of litigating these issues, the parties may wish to consider clarifying the

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[213] 110 F. Supp.2d 259, 265-69 (D. Del. 2000).
[214] Id. at 264.

powers of the umpire and appraisers by a written agreement signed by the parties authorizing the appraisal team to make such determinations.[215] This grant of authority by the parties to the umpire may be beyond the scope of an insurance appraisal. If the parties should agree to make such an additional grant of authority, the matter becomes, in essence, an arbitration.

If the parties are unable to agree on whether to resolve these issues through appraisal, disputes of this nature may be determined by a court of competent jurisdiction on a motion for declaratory or summary judgment, sometimes avoiding the necessity of expensive and time consuming discovery and a trial.

The difficulty is that in many claims, the line between permissible policy interpretations and those deemed beyond the scope of appraisal is often a blurry one.

Indeed, it is hypocritical to assert this type of limitation on the appropriate scope of the appraisal process as a coverage or "legal" issue, when in most every appraisal, the

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[215] Visselli v. American Fidelity Co., 155 Conn. 622, 237 A.2d 561 (1967), *over-ruled by statute on other grounds,* Uninsured and Under-Insured Motorist Coverage, Conn. Gen Stat. §38a-336 (2003); Connecticut Union of Tel. Workers v. Southern New England Tel. Co., 148 Conn. 192, 169 A.2d 626 (1961).

appraisers and the umpire are left to define the phrase "actual cash value." Many policies do not offer a definition or other guidance as to its meaning. At best, the participants are left to draw upon legal interpretations to assist them in drawing conclusions; at worst, they muddle through based on past experience and negotiation. Couldn't it be said then, that in each and every appraisal that takes place under these circumstances, that the participants are resolving issues of law and coverage in order to reach their conclusion? To the contrary, the proper resolution of this issue is to give life to the intent of the drafters of the Standard Fire Policy and allow for a broad degree of discretion on the part of the appraisers and the umpire in making their good faith effort at doing justice to the policy of insurance.

It is not unusual during the appraisal process for issues to arise that present mixed questions of coverage and damage which will require the appraisers to make quantitative decisions as to causation. For example, appraisers have been upheld where they determined which part of a business interruption loss had been caused by a covered peril on the one hand and which was caused by a labor dispute which was excluded.[216]

Appraisers have similarly been sustained when determining what damage was caused by lightning as opposed to wind in a claim where coverage was affected by the outcome.[217]

In Texas, it has been stated that an appraisal award that assesses causation, coverage or liability is made without authority. In this case, the issue arose as to allowances for mold remediation in areas not directly affected by water and the parties vigorously disputed whether items not physically damaged by water are covered by the policy.[218]

In a matter litigated in a New York Federal Court determining Connecticut law, it has been held that appraisers will be able to determine an amount of loss only after the covered losses are separated from those losses which are not covered. It was held that in the state of Connecticut directing the parties to proceed with an appraisal prior to the determination of the contours of insurer liability would be premature. Moreover, an insured

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[216] Lakewood Mfg. Co., Inc. v. Home Ins. Co., 422 F.2d 796, 24 Ohio Misc. 244 (6th Cir. 1970).
[217] Fox v. Employer's Fire Ins. Co., 330 Mass. 283, 113 N.E.2d 63 (1953).
[218] Hartford Lloyds Ins. Co. v. Yarbrough, 2006 WL 1469705 (S.D. Tex. 2006).

must file a proof of loss and await a determination of the amount of loss even prior to commencement of appraisal. Thus, an insured cannot initiate an action against an insurer prior to the insurer ascertaining at least an initial amount of loss or denying the claim in its entirety.[219]

The issue of what caused or did not cause a loss so as to trigger coverage under an insurance policy often is a question to be decided by a court and are not appropriate for appraisal.[220]

In Arizona, which seems to favor the minority view, a hail claim presented a situation where the issue was whether a "significant portion" of plaintiff's roof claim is covered under the policy as questions of causation were raised. This was held to not be a dispute about the amount of loss that all parties agreed were covered and was beyond the scope of appraisal.[221]

Specifically, in a North Carolina Supreme Court case, the court explained that the insurance policy both provides for and constrains the appraisal process and that the

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[219] Secord v. Chartis Inc., 2011 WL 814743 (S.D.N.Y.).

[220] Kawa v. Nationwide Mut. Ins. Co., 664 N.Y.S.2d 430, 174 Misc.2d 407, 1997 N.Y. Slip Op. 97580 (1997).

[221] San Souci Apts. v. National Surety Corp., 2013 WL 428091 (D. Ariz).

"process cannot exceed the scope of the contractual provisions authorizing it."[222] The court elaborated that while it is the job of the appraisal process to assess the value of the loss, the insurer "retains the right to determine in the first instance what portion of that loss is covered by the policy."[223] Thus, on an insured's motion for summary judgment, there existed issues of fact as to: (1) the causation of the damages; and (2) what part of the damages, if any, are limited to a specific maximum amount under the policy. Causation issues in North Carolina, therefore, must be resolved by a court before the loss covered by the policy can be determined.

In a case of first impression, the Alabama Supreme Court concluded that a trial court which had directed issues of causation to be resolved by appraisal was in error. It determined that the issue of whether the loss was caused by settlement or a tornado was for the lower court to determine.[224]

However, in Ohio, the Court of Appeals has found that an action to appoint an umpire is not the appropriate vehicle to challenge

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[222] North Carolina Farm Bureau Mut. Ins. Co., Inc.,711 S.E.2d 114, 117 (2011).
[223] Id.
[224] Rogers v. State Farm Fire & Cas. Co., 984 22d 382 (Ala. 2007); *See also*, Laird v CMI Lloyds, 261 S.W.3d 322 (Tex. Ct. App. 2008).

causation. In Hull v. Motorists Ins. Group, the court found because the parties had only agreed in the insurance policy to let the court select an umpire, and not to instruct the appraisers on causation issues, such instruction went beyond the scope of the court's authority under the contract. As the contract did not call for the court to limit the way in which the appraisers and umpire determine the value of the insured's property and the amount of loss he suffered, no instruction on causation could be given.[225]

Some courts have drawn a very fine line with respect to whether appraisers may resolve the issue of causation. The Federal District Court of Maryland for example was confronted with a roof collapse where the carrier asserted a portion of the loss was due to rotted and decayed framing members from long term exposure to water. Nevertheless, the insurance carrier offered a substantial sum in satisfaction of the insured's claim based on its evaluation of the value of the immediate and direct damage resulting from the collapse of the roof. In these circumstances, the court rejected the insurance company's assertion that appraisal was limited only to the monetary valuation of areas of damage that the parties agreed were covered by the policy. The court stated: "[T]o

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[225] *See* Hull v. Motorists Ins. Group, 2011 WL 2040958 (Ohio Ct. App. 2011).

so read the appraisal clause would make the term ‘amount of loss’ simply redundant to the term ‘actual cash value’."[226] The court nevertheless concluded that the appraisal provision did not apply to these facts. The court reasoned that the appraisal provision would apply only if the insurance company had disputed the factual issue of whether a larger area than that immediately damaged by collapse had to be repaired in order to restore the damage. The court determined instead, that the insurance company had contested the legal causation of the collapse on the grounds that certain policy exclusions applied to limit the scope of coverage. The court concluded as follows:

> "This issue is one of contract interpretation which is within the competence of the court, not an appraiser, to resolve. Of course, to the extent that issues of design and construction relating ‘to the amount of loss’ are ultimately presented, these will be properly referable to the appraisal process."[227]

Similar results have been seen for example in Illinois, where the Northern District

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[226] Wausau Ins. Co. v. Herbert Halporin Dist. Corp., 664 F.Supp. 987 (D. Md. 1987).
[227] Id. at 989.

Court held that causation is a matter for the courts, not an appraiser.[228]

The Texas Court of Appeals has held that "[A]ppraisers have no power to determine the cause of damages; their power is limited to the function of determining the money value of the property damage."[229] In Wells v. American States Preferred Ins. Co., the Texas court stated that "the weight of authority from other jurisdictions discussing the issue follows the rule that appraisers have no power or authority to determine questions of causation, coverage or liability." However, a detailed review of this chapter leads to a different conclusion on these issues, even back in 2008.[230]

In the state of Minnesota, the Court of Appeals was confronted with a claim for hail damage which was said to have caused dents in the home's siding whereas the insurer claimed the hail merely caused marks on the siding, but no dents. In concluding that the matter was appropriate for appraisal, the Court stated that the insurer's claim that this factual

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228 Spearman Ind. Inc. v. St. Paul Fire & Marine Ins. Co., 109 F. Supp.2d 905 (N.D. Ill. 2000).

229 Wells v. American States Preferred Ins. Co., 919 S.W.2d 679 (Tex. App.-Dallas 1996); *See also,* Holt v. State Farm Lloyds, 1999 WL 261923 (N.D. Tex. 1999) (appraisers may only determine the amount of loss and may not determine issues of causation, coverage, or liability for damages).

230 Wells, Id., *See also*, Salinas v. State Farm Lloyds, 267 Fed. Appx 381, 2008 WL 552498 (5th Cir. 2008) appraisal panel was limited to determination of amount of loss not questions concerning cause, liability or questions of coverage).

dispute is outside the scope of appraisal is unpersuasive. In the Court's view, the dispute centered around the "amount of the loss to the siding" and also "the cost to repair or replace the siding." This is precisely the type of factual dispute the policy's appraisal process is designed for. Thus the dispute falls within the scope of the appraisal process contained in the insurance policy. The Court directed the appraisal team to determine the cost to put the siding back in the same condition it was before the hailstorm–whether it is dented or marked.[231]

However, where there was found to be an issue of fact as to whether the damage occurred before or during the policy period, a motion to compel an appraisal was denied.[232]

The Supreme Court of Minnesota undertook the issue of whether causation is appraisable. In concluding that an appraiser's duty to determine the "amount of loss" requires appraisers to determine causation. It stated:

> "The parties' disagreement concerning the scope of the appraisal process focuses on the

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[231] Sampson v. Horace Mann Ins. Co., 2003 WL 22234692 (Minn. App. 2003).

[232] Natureview Vista Townhome Ass'n. v. Phoenix Ins. Co., 2011 WL 221616 (D.Minn. 2011)

meaning of the phrase "amount of loss." After reading the appraisal clause in the context of the insurance policy as a whole, we conclude that the phrase "amount of loss" is not ambiguous, because it is susceptible to only one reasonable interpretation. Specifically, in the insurance context, an appraiser's assessment of the "amount of loss" necessarily includes determination of the cause of the loss, and the amount it would cost to repair that loss. With respect to insurance, "loss" is defined as "[t]he amount of financial detriment caused by ...an insured property's damage, for which the insurer becomes liable." *Blacks Law Dictionary* 1030 (9th ed. 2009). *Merriam-Webster's Collegiate Dictionary* defines "loss" in the insurance context as "the amount of an insured's financial detriment by debt or damage that the insurer becomes liable for." *Merriam-Webster's Collegiate Dictionary 687* (10th ed. 2001). These definitions state that as a general matter the term "loss" refers to damages for which the insurer is responsible. Thus, the

> dictionary definitions of "loss" for purposes of insurance expressly contemplate an element of causation. By extension, an appraiser's duty to determine the "amount of loss" requires the appraiser to determine causation."[233]

A similar result was obtained in Texas where it was stated that once it is determined that there is a covered loss, the appraisal process determines the amount of loss that resulted from a covered peril. A dispute over the extent of damage to a roof from hail is a dispute concerning the amount of loss and is appraisable. Extent of loss is an appraisable issue. [234]

In Arizona, the Federal District Court found the policy provision to be "not without ambiguity". Given the state's strong policy of construing policies in favor of the insured, where the dispute concerns issues of causation on specific portions of an otherwise covered event, "the disagreement focuses on the extent of the insurer's liability, not over the

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[233] Quade v. Secura Ins., 814 N.W.2d 703 (Minn. 2012).

[234] Johnson v. State Farm Lloyds, 204 S.W.3d 897 (Tex. App-Dallas, 2006); In re Allstate County Mut. Ins. Co., 85 S.W.3d 193, 195 (Tex. 2002); *See also*, Carbonneau v. American Family Ins. Co., 2006 WL 325724 (D. Ariz. 2006) (holding extent of loss is not a coverage issue.

meaning of the policy itself," and is appraisable despite such causation issues.[235]

In Alabama, it has been held that as a matter of law, the term "amount of loss" is not ambiguous as to whether it encompasses liability, coverage and causation issues, it does not.[236]

This conclusion is appropriate as long as it would not tend to emasculate and frustrate the intent of the policy pursuant to standard rules of contract construction. An interpretation which has such an effect is not supportable.[237]

3. Issues of Coverage

Today, nearly all jurisdictions allow or require the parties to an insurance contract to provide for a reasonable method of estimating and ascertaining actual cash value and the amount of the loss. However, the appraisal provision in the insurance contract does not contemplate the determination of liability. The determination of liability is entirely within the

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[235] Harvey Property Mgt. Co., Inc. v. Travelers Indem. Co., 2012 WL 5488898 (D.Ariz. 2012).

[236] Caribbean I Owners Ass'n., Inc. v. Great American Ins. Co. of New York, 2008 WL 687381 (S.D. Ala. 2008); In re Cullman Bowling Center, LLC v. Tower Ins. Co of New York, 2013 WL 4489961 (Ala. 2013); White v. State Farm Fire and Cas. Co., 984 So.2d 382 (La. Ct. App. 2007).

[237] Commissioner of State Ins. Fund v. Ins. Co. of North America, 80 N.Y.2d 992, 607 N.E.2d 795 (1992).

jurisdiction of the courts. The courts have generally held that appraisers are limited to determining the amount of the loss sustained by the insured, and are without power to determine potential defenses to coverage.[238] Accordingly, the appraisal may not consider whether an insured's claim is fraudulent.[239] Generally, the appraiser may not consider questions of law.[240] For example, the questions of whether damage caused by smoke and particulate matter were covered by an insurance policy and whether replacement costs qualified as "Extra Expenses" in a contract were matters of contract law and thus resolvable by a court, "Coverage does not refer exclusively to the underlying event that is the cause of Defendant's losses. Rather…coverage also refers to those categories of losses which fall within the meaning of the insurance policy and for which the Plaintiff is hence liable."[241]

An Ontario court which observed no need for its own interpretation of an insurance policy provision also found that appraisers required no direction by the court before the

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238 United Boat Service Corp. v. Fulton Fire Ins. Co., 137 N.Y.S.2d 670 (Sup. Ct. 1955); In re Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955).

239 Kearney v. Washtenau Mut. Fire Ins. Co., 126 Mich. 246, 85 N.W. 733 (1901); Hartford Ins. Co. v. Miller, 2006 WL2844124 (E.D. Mich. 2006).

240 Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 A.1037 (1908): Relentless, LLC v. Basin Marine, Inc., 2011 WL 2682691 (C.D. Cal.2011).

241 Hartford Fire Ins. Co. v. Computer Data Source, Inc., Case 3:09-cv-01400-AET-LHG.

appraisal process could be undertaken. The Court was "satisfied that qualified appraisers [were] quite capable of making that determination or in the event of a dispute an umpire chosen by the appraisers can properly determine the matter." The policy provision at issue mandated that the insurer pay the actual cash value of the loss from the date of loss to the applicable limit or coverage.[242]

Courts in some states have strictly enforced the above mentioned rule. For example, a Nevada court held that the umpire who considers whether the subject fire policy covered reconstruction costs alone or also the additional cost of bringing the subject motel into compliance with the local building code, had exceeded his authority. The court found that the umpire and appraisers clearly interpreted coverage provisions to arrive at the award figure and in so doing, exercised discretionary judgment not allowed them under the Standard Fire Policy's appraisal clause.[243]

In a case where an insured sought coverage for lost business income, a New York court evaluated the distinction between coverage and damages and concluded that

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[242] Greer v. Co-operators General Ins. Co., (1999) O.J. No. 3118 (2000) I.I.R. 1-3785, 90 A.C.W.S. (3d) 479, 1999 CarswellOnt 2570.
[243] St. Paul Fire & Marine Ins. Co. v. Wright, 97 Nev. 308, 629 P.2d 1202 (1981).

an appraisal panel focused only on extent of damage in forming its award and did not make any determination as to coverage. There, circumstances required that appraisers calculate an insured's business losses to generate its award. The Court recognized that although legal considerations as to coverage existed at the time of appraisal and that the appraisers had "made a complex decision among several competing factual theories, it did not adjudicate the law." Its decision referenced three legal principles in finding that they were not violated by the appraisers' valuation: "First, an appraiser may not resolve coverage disputes or legal questions regarding the interpretation of the policy. Second, the calculation of the restoration period, unless subject to legal challenges, is a factual question about damages - albeit sometimes a complex and contentious one - appropriately addressed by an appraisal. And third, the presence of a coverage dispute does not preclude an appraisal demand. Only a coverage dispute that precedes the valuation of damages will prevent such a demand." [244]

An appraisal award which factored in a co-insurance penalty in the calculation of the award was not upheld where there was an

[244] Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193 (L.A.2 (N.Y.) 2012).

issue of what operations were insured under the policy's business interruption coverage.[245]

Similarly, in a claim arising out of the September 11, 2001 on the World Trade Center, the umpire correctly concluded that the issue of co-insurance was one of coverage and thus outside his purview. Upon the carrier's refusal to pay the award, an action ensured and upon the insurer's motion for summary judgment, the disputed issue of valuation was resolved with the matter then referred back to the appraisal team to fashion an award consistent with the court's interpretation of the co-insurance clause. A distinction is necessary between situations where, as here, the disagreement between the parties was the applicability or interpretation of the co-insurance clause from cases where the issue was merely one of valuation to determine the amount of co-insurance applicable, which would properly be within the purview of the appraisal team.[246]

With respect to co-insurance, the Court of Appeals of Michigan has stated that the co-insurance provision is not merely a factor to be used in determining the amount of the loss. Instead, the co-insurance provision was said to

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[245] Lewis Food Co. v. Fireman's Fund Ins. Co., 207 Cal. App.2d 515, 24 Cal. Rptr. 557 (2d Dist. 1962).

[246] New York Career Institute v. Hanover Ins. Co., 6 Misc.3d 734, 791 N.Y.S.2d 338 (2005).

be a limitation on the carrier's obligation to pay once the loss is determined. Accordingly, because the application of the co-insurance provision was not a matter subject to the appraisal process, at least in Michigan, the insurer was held not to be obligated to raise the issue during the appraisal and may properly assert it thereafter subject to judicial review.[247] This is inconsistent with common practice. It is also inconsistent with the appraisal provision which authorizes the appraisal team to resolve issues of value.

As a co-insurance calculation requires a determination of value which is within the purview of the appraisal team, prudence and best practices suggest including such a determination within the appraisal agreement. Such determinations have been successfully achieved and are generally accepted as appropriate absent legal or coverage issues which may arise in the unusual case.

Where the appraisers are uncertain as to the scope of their authority and a disagreement exists with respect to this issue, a determination of the scope of the appraisal clause is a question of law for determination by

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[247] Professional Team, Inc. v. Safeco Ins. Co. of America, 2006 WL 9322414 (Mich. App. 2006).

a court of competent jurisdiction as it is a matter of contract interpretation.[248]

Questions relating to the interpretation of written contracts involve legal rather than factual issues.[249] Insurance policies are contracts and thus, issues of scope of coverage present questions of law for a court to decide.[250]

For example, if the parties fail to agree on the definition of "actual cash value" it is appropriate to seek guidance from the court.[251]

A New York court deemed parties' requests that the Court limit or define an umpire's assessment of damages to be beyond the scope of the parties' application for selection of an umpire following a disagreement as to umpire selection. While the insurer under those circumstances sought to limit the appraisal determination to actual cash value of damages, the insured believed the umpire should act without limitations and the

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[248] Miller v. USAA Cas. Ins. Co., 44 P.3d 663 (Utah 2002).
[249] Brandt v. Bib Enterprises, Ltd., 986 S.W.2d. 586 (Tenn. Ct. App. 1998); Rapp Const. Co., Inc. v. Jay Realty Co., Inc., 809 S.W.2d. 490 (Tenn. Ct. App. 1991).
[250] Pyle v. Carpenter, 118 Tenn. 288, 99 S.W. 360 (1907); Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Holt, 32 Tenn. App. 559, 223 S.W.2d 206 (1949); Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142 (Tenn. Ct. App. 2001).
[251] S.R. Intern. Business Ins. Co., Ltd. v. World Trade Center Properties LLC, 445 F.Supp.2d 320 (S.D.N.Y. 2006).

determination should encompass the value of the loss, actual cash value, repair and replacement costs and incidental issues. However, the Court held that "[p]ursuant to the policy terms, a decision agreed by any two, consisting of the appraisers and the umpire, sets the amount of the loss. The amount of loss shall be determined according to the policy terms and applicable provisions of the Insurance Law by the appointed umpire." [252]

The question whether a manufacturer's property insurance policy required the insurer to pay the amount necessary to repair or replace the destroyed equipment or its sales price was held to be outside the scope of appraisal as such a determination was a question of contract interpretation.[253]

In California, when such a disagreement arose, the matter was brought before the lower court which referred the issue back to the appraisers, finding a reference for litigation was premature. On appeal, the lower court was found to have erred in referring the determination of the scope of the appraisal to the panel. The appellate court held that in doing so, the District Court improperly

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[252] In the Matter of Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523, 917 N.Y.S.2d 839, 2011 N.Y. Slip Op. 21060 (Monroe Cty. 2011).
[253] FTI Intern., Inc. v. Cincinnati Ins. Co., 339 Ill. App.3d 258, 790 N.E.2d 908, 274 Ill. Dec. 135 (Ill. App. 2 Dist, 2003).

abdicated its duty to interpret the appraisal clause and determine the scope of the appraisal.[254] Thus in California, it is not essential to await the outcome of an appraisal where the parties are in disagreement as to the scope and either party may apparently seek guidance from the local court.

In Pennsylvania, it has been held that where the amount of loss to items for which coverage had been admitted was substantially less then the amount of loss to items where coverage is disputed, appraisal is inappropriate, as it would result in a bifurcated damage determination and is a waste of judicial economy.[255]

A Florida decision has deemed the question of coverage to include whether post-loss policy conditions had been complied with. In a dispute over whether a policy's appraisal provision was applicable, it was held that a party's request for appraisal was premature until a determination of coverage was made. In that case, where an insurer denied coverage of a claim completely, the court observed "a judicial question that cannot be determined by

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[254] Id.; Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n. as Trustee for Trust No. 1, 218 F.3d 1085, 1090 (9th Cir. 2000); Lundy v. Farmer's Group, Inc., 322 Ill. App.3d 214, 750 N.E.2d 314 (2d Dist. 2001).

[255] Banks v. Allstate Ins. Co., 1993 WL 40113 (E.D. Pa. 1993).

an appraiser and must first be determined by the trial court."[256]

Interestingly, while Florida law has established appraisal's inapplicability to matters of coverage, it has also acknowledged that "the issue of coverage is not necessarily a matter of all or nothing" and its prior decision in State Farm Fire & Casualty v. Licea[257] did not address the situation where scope of coverage is in dispute. Thus, in one matter, it was held that an insurer was not precluded from disputing scope of coverage and asserting a challenge to an element of loss as not having coverage pursuant to the subject policy. This Court clarified that "only if a court determines that coverage exists for that element of loss will the amount of appraisal for that element…be binding on [the insurer]."[258]

Where the parties' dispute is essentially a difference regarding coverage, a request for appraisal should be denied.[259]

Courts have made a distinction between deciding the value of an item and deciding

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[256] Hartford Cas. Ins. Co. v. 600 La Peninsula Condo. Ass'n, Inc., 2010 WL 555686 (M.D. Fla., 2010).
[257] 685 So.2d 1285 (Fla., 1996).
[258] Liberty American Ins. Co. v. Kennedy, 890 So.2d 539 (2005).
[259] Indian Chef, Inc. v. Fire & Cas. Ins. Co. of Connecticut, 2003 WL 329054 (S.D.N.Y. 2003); Kawa v. Nationwide Mut. Ins. Co., 664 N.Y.S.2d 430, 431, 174 Misc.2d 407, 1997 N.Y. Slip Op. 97580 (1997).

the type of the item that was damaged. For example, in Edison Textiles, Inc. v. Topa Ins. Co.,[260] the California Court of Appeals found fault with an umpire who exceeded his powers by improperly looking into what nature or type of property comprised the loss inventory. The insured also established that the umpire had improperly looked into the insured's credibility as well as whether the insured had carried its burden of proof with regard to proving what inventory was actually lost. Rather than assessing the value of the damaged property, the umpire exceeded his powers by making a factual determination as to what part of the inventory was residual fabric/trim and what part was bulk fabric. This was held to be impermissible.

The insurance policy's appraisal clause is devoid of any authority to determine coverage, deductibles, credits or off-sets of any kind. Additionally, there is no authority to award interest, attorneys' fees or other professional fees (unless coverage is specifically provided therefore).[261]

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[260] 2004 WL 1203072 (Cal. App. 2nd Dist. 2004).

[261] Hanson v. Commercial Union Ins. Co., 150 Ariz. 283, 723 P.2d 101 (Ariz. App. Div 1 1986); Jefferson Ins. Co. of New York v. Superior Court of Alemeda County, 3 Cal.3d 398, 475 P.2d 880, 90 Cal. Rptr. 608 (1970); Commonwealth Ins. Co. v. Solomon, 32 Del. 98, 119 A. 850 (1923); Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. Dist. Ct. App. 1st Dist. 2000); St. Paul Fire & Marine Ins. Co. v. Wright, 97 Nev. 308, 629 P.2d 1201 (1981); Elberon Bathing Co., Inc. v. Ambassador Ins. Co., 77 N.J. 1, 389 A.2d 439 (1978); Minot Town & Country v. Fireman's Fund Ins. Co., 1998 N.D. 215, 587 N.W.2d 189, 190 (1998); Kentner v. Gulf Ins .Co., 66 Or. App. 15, 673 P.2d 1354 (1983), *aff'd and remanded,* 297

It has been held that an award for loss under an Extended Recovery Period provision of business interruption coverage exceeded the authority of the appraisal team where the insured was not entitled to claim under such coverage until after the "repair, replacement, or rebuilding of such part of the property as has been damaged is actually replaced", and at the time of the award the property had not been replaced.[262]

This problem may be avoided by issuance of an award that distinguishes between monies then due and additional monies that would be due upon compliance with certain conditions like actual replacement. This approach seems most efficient and fair without overstepping the authority of the appraisal team.

In the state of Florida where a statute requires the court to award attorneys' fees upon the rendition of a judgment against the

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Or. 470, 686 P.2d 339 (1984), *modified at reh'g,* 298 Or. 69, 689 P.2d 955 (1984), *superceded by statute on other grounds*, Concealment, Fraud, Representations by Insured, Or. Rev. Stat.§742.208(3)(2001); Wells v. American States Preferred Ins. Co., 919 S.W.2d 679 (Tex. App.-Dallas 1996); Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142 (Tenn. Ct. App. 2001); Trooper Jake, Inc. v. Auto-Owner's Ins. Co., 2005 WL 1923120 (Mich. App. 2005)(where appraisal award is paid timely, an award of pre-award interest is inappropriate.); See Pfister v. State Farm Fire & Cas. Co., 2011 WL 3651349 (W.D.Pa.2011) (citing *Black's Law Dictionary* (9th ed. 2009)("[A]ppraisal is the act of determining 'what constitutes a fair price'...and is not appropriate where, as here, the scope of coverage is in dispute.").

[262] Duane Reade Inc. v. St. Paul Fire and Marine Ins. Co., 503 F.Supp.2d 699 (S.D.N.Y. 2007).

insurer, an appraisal award issued after the insurer demanded appraisal during pending litigation acted as a confession of judgment in the insured's suit requiring the court to award attorneys' fees.[263]

It is well-settled that an insured is not entitled to attorney's fees pursuant to the Florida statute if the insured initiates litigation when the insurer complies with the terms of the alternative dispute resolution provided for in the insurance contract. This is so the insurer will not be faulted for complying with the terms of its insurance contract by participating in the appraisal process and paying in a timely manner.[264]

However, attorneys' fees are not recoverable under the Florida statute where the trial court's appointment of an umpire was the sole basis of the litigation. Nevertheless, the insured was entitled to recover court costs.[265]

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[263] Jerkins v. USF & G Specialty Ins. Co., 982 So.2d 33 (Fla. App. 5 Dist., 2008); F.S.A. §627.428(1); *See also*, Tooles v. Safeco Ins. Co. of America, 2007 WL 45749 (M.D. Fla.2007); *See also*, Tri-Star Lodging, Inc. v. Arch Specialty Ins. Co., 434 F.Supp.2d 1286 (M.D. Fla. 2006); Holder v. State Farm Ins. Co., 944 So.2d 521, 33 Fla. L. Weekly D2694 (Fla. 3d DCA 2008); ; *see also* Kopp v. Meritplan Ins. Co., 2011 WL 397951 (M.D.Fla. 2011).

[264] Chateaubleau Villas Condo Ass'n., Inc., v. Mt. Hawley Ins. Co., 2010 WL 4923112 (S.D.Fla.).

[265] Peraza v. Citizens Prop. Ins. Corp., 973 So.2d 490, 32 Fla. L. Weekly D2766 (Fla. 3d DCA 2007); F.S.A. §627.428(1).

Attorneys' fees were not recoverable under the Florida Statute where the insurer was at all times ready to pay the appraisal amount but the insured failed to participate in the process in a timely fashion.[266]

However, where an award of attorneys' fees was rendered in favor of insureds but their insurer had been replaced by the Florida Insurance Guaranty Association (FIGA) as a party due to insolvency, FIGA was not responsible for payment of this fee under the *Florida Insurance Guaranty Association Act*. The Court determined that the fee award was not a covered claim under §627.428 of Florida law, which provides in part that: "Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had." The Court clarified that the provision serves as

[266] Progressive Express Ins. Co. v. Weitz, 218 Fed. Appx. 846, 2007 WL 496785 (C.A. 11 Fla.).

a penalty for the wrongful refusal to pay benefits. Further, the Act provides that a covered claim must "'arise out of' the insurance policy and be 'within the coverage of' the insurance policy. In the instant action, the damages resulting from the insurer's breach of contract arose out of the insurance policy but were not within its coverage. It deemed §627.428 an implicit part of an insurance policy, but noted "this does not mean that the insured's claim against the insurer for fees and costs is part of the policy's coverage.'"[267]

It has been held that appraisal may not be possible where the damage at issue involved the cost of code upgrades incurred upon the actual repair or replacement of the subject property where actual repair or replacement had not yet occurred and may actually have been impossible. It was determined that a question of fact existed as to whether appraisal was appropriate under these circumstances.[268]

In the state of Washington, it has been held that a determination of whether work was required to bring the property up to code is not

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[267] Florida Ins. Guar. Ass'n, v. Petty, 44 So.3d 1191, 35 Fla. L. Weekly D2149 (Fla. 2d DCA 2010); Fla. Stat. 627.428 and Fla. Stat. 631.50-70 .

[268] Mish, Inc. v. American County Ins. Co., 2003 WL 22905161 (Conn. Super. 2003).

a coverage determination. Therefore, it was held that by deciding such an issue, the appraisal panel did not exceed its authority, and thus, the award was not unfair.[269]

Similarly, where the parties' disagreement was over necessary repairs and methods of repair, those issues did not constitute disputes about coverage.[270]

Where the insured sought a determination of whether a total loss has occurred under the policy where the property cannot be restored to the special subjective needs of the homeowners or only, as the carrier argues that the policy requires merely that the property be restored to pre-loss condition, without reference to the particularized medical needs of the insureds, that this constituted a coverage issue and was not subject to resolution by appraisal.[271]

It has been held that the appraisal process is not relevant to the issue of whether a policy reimbursed for permit fees mandated by the county.[272]

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[269] Progressive Express Ins. Co. v. Weitz, 218 Fed. Appx. 846, 2007 WL 496785 (C.A.11 Fla).

[270] Williamson v. Chubb Ind. Ins. Co., 2012 U.S. Dist. LEXIS 31648 (E.D. Pa. 2012) (insureds were required to comply with an appraisal provision.).

[271] Gordon v. Amica Mut. Ins. Co., 2005 WL 123851 (D. Conn, 2005).

[272] Clinard v. Allstate Floridian Ind. Co. and Allstate Floridian Ins. Co., 2008 WL 879316 (M.D.Fla. 2008).

Issues relating to coverage must be litigated, stipulated, or arbitrated. They should be adjudicated with the least possible delay and it is incumbent upon the court to either order appraisal or deny it according to the rights of the parties, but to do so as expeditiously as possible to accomplish the ends of the appraisal provision.[273]

It has been held that when one party to an insurance contract fails to perform its end of the contract, that party is bound to make good all damages that result naturally from the breach. The non-breaching party must be put in as good condition pecuniarily as he would have been by the performance of the contract.

In Massachusetts, where the standard form of policy requires a reference procedure in the event the parties fail to agree to the amount of loss, the three referees to whom the matter is referred are generally empowered only to determine loss or damage to covered property but may not determine loss or damage to property claimed not to be covered.[274] Again, a more efficient approach would be to segregate items subject to

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[273] Visselli v. American Fidelity Co., 155 Conn. 622, 237 A.2d 561 (1967), *over-ruled by statute on other grounds,* Uninsured and Under-Insured Motorist Coverage, Conn. Gen Stat. § 38a-336 (2003).
[274] Fox v. Employer's Fire Ins. Co., 330 Mass. 283, 113 N.E.2d 63 (1953).

coverage issues in a separate portion of the award so that upon issuance of the bifurcated award, an undisputed payment could be made while the parties litigate those items subject to the dispute but with value and loss already determined in the event the insured prevails.

Another Massachusetts court has expounded upon the scope of determination by this mandatory disinterested board of referees. It asserted the board was not to determine matters of coverage and fault in a decision where it held that the binding nature of such a determination "clearly [did] not preclude a lawsuit" and that the process is actually a condition precedent to suit. Rather, the Court cited a prior holding, stating "[i]n order intelligently to determine the amount of loss or damage under a given policy, as an incidental step in their deliberations, the referees must reach their own conclusions as to what they think that loss or damage is. Such conclusions must necessarily be affected by what they think the coverage is. Their views so far as ultimate liability goes are wholly tentative and in no sense a decision on that underlying question." In that case, a board of referees' award was not binding on insureds' subsequent action against their insurer for coverage under their policy.[275]

In Massachusetts, policy coverage issues have been held properly determinable by the Court as a matter of law. In one matter, it was held that an appraiser had properly considered whether certain equipment was part of a covered loss under an insurance policy, but the Court was not bound by the appraiser's interpretation of policy exclusions. The Court found an insured's claim was subject to Appraisal but an insurer's liability in terms of coverage was to be considered after the appraisal. In that action the insured argued that the appraiser had acted outside his authority "by making a threshold determination" pertaining to coverage under the parties' insurance contract.[276]

However, it has been held that appraisal is mandatory where there is a disagreement as to the amount of the loss even where the insurer denies any liability for the loss on the ground that the insured had intentionally set the fire.[277]

While legal issues between the parties are

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275 Bertrand v. Merrimack Mut. Fire Ins. Co., 2010 WL 2102994 (Mass. App. Div.), *citing* Fox v. Employers' Fire Ins. Co., 330 Mass. 283, 113 N.E.2d 63 (1953).

276 Sun Microsystems, Inc. v. Electronic Services, Inc., 2009 WL 987336 (Mass Super 2009).

277 McCord v. Horris Mann Ins. Co., 390 F.3d 138 (1st Circ. Mass. 2004).

generally not for appraisers to decide, appraisers do have a responsibility "to make factual conclusions to enable the Court to do so." Such detailed determinations include cost of replacement of undamaged property for the purpose of matching and calculation of disputed costs for the Court's inclusion or exclusion depending on its coverage decision. It has been held in Colorado that "[f]ollowing this course will enable the parties to avoid unnecessary discovery or additional appraisals."[278]

[278] Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 2015 U.S. Dist. LEXIS 48854.

E] ISSUES OF BAD FAITH

Though an appraisal is generally final and conclusive on the issues of the amount of loss and value, issues such as bad faith, to the extent they are provable, would survive the appraisal process and might properly be brought in a subsequent suit after both parties completed the appraisal.[279]

Where the dispute between parties pertained to amount of loss, a Pennsylvania court held that insureds could not yet pursue a bad faith claim against their insurer since the dispute did not constitute a denial of the claim. The insureds' action, which would require them to allege that the insurer knew or recklessly disregarded its lack of a reasonable basis for its claim denial, was premature prior to the appraisal process taking place. The Court stayed the claim until appraisal was completed.[280]

Indeed, it has been held that where the insured contends that the insurer is engaged in a fraudulent scheme to undervalue claim payments by the use of inferior materials, in which the appraisal process constitutes an

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[279] Buchholz v. U.S. Fire Ins. Co., 269 A.D. 49, 53 N.Y.S.2d 608, 610 (1st Dept. 1945).
[280] Williamson v. Chubb Ind. Ins. Co., 2012 U.S. Dist. LEXIS 31648 (E.D. Pa. 2012).

CHAPTER V

TIMING ISSUES

A] WHEN APPRAISAL SHOULD BE DEMANDED

For a demand for appraisal to be timely, there must actually be some disagreement between the insured and the insurer as to the amount of loss or value. There must have been an honest attempt made by the parties to meet on the question of damage before the appraisal clause can be invoked.[441]

A demand for an appraisal must be made in good faith, within a reasonable time, in plain and simple terms, and in compliance

[441] Harrison v. Hartford Fire Ins. Co., 59 F.732 (C.C.S.D. Iowa 1894); Hanover Fire Ins. Co. v. Harper, 77 Ill. App. 453 (4th Dist. 1898); Maimes v. Automobile Ins. Co. of Hartford, Conn., 112 Misc. 656, 183 N.Y.S. 690 (Sup. Ct. 1920), *aff'd,* 196 A.D. 921, 187 N.Y.S. 943 (4th Dept. 1921); Phoenix Ins. Co. v. Badger, 53 Wis. 283, 10 N.E. 504 (1881); Ciapanna v. Lincoln Fire Ins. Co., 153 Or. 395, 56 P.2d 1113 (1936); 15 *Couch on Insurance*, §210:77 (3d ed. 2003).

with the terms of the policy.[442] The right to demand appraisal is not indefinite as to time, but must be exercised within a reasonable period, depending upon the facts of the particular case.[443] Certainly, where the policy is silent as to the time for invoking the right to appraisal, the law will require that the demand be made within a reasonable time.[444] In determining whether a demand for an appraisal has been presented within a reasonable period of time, the definition of timeliness is often fact specific.[445]

Under New York law, determining the timeliness of an appraisal demand involves consideration of three factors, none of which are dispositive. They include: 1) whether the appraisal sought is impractical and impossible in that the appraisal demand would result in prejudice to the opposing party, 2) whether the party engaged in good-faith negotiations over valuation of loss prior to the appraisal demand,

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442 Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N.E. 545 (1899), *overruled in part on other grounds by,* Graham v. German Am. Ins. Co., 75 Ohio St. 374, 79 N.E. 930 (1907).

443 Chainless Cycle Mfg. Co. v. Security Ins. Co. of New Haven, 169 N.Y. 304, 62 N.E. 392 (1901); Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d193 (L.A.2 (N.Y.) 2012)

444 Tran d/b/a Imperial Shopping Center v. American Economy Ins. Co., 2010 W.L. 2680616 (S.D. Tex. 2010).

445 Kester v. State Farm Fire and Cas. Co., 726 F.Supp. 1015, 1019 (E.D.Pa. 1989); *See generally*, A.L. Frechette and A.M. Swarthart, Annotation, *Time Within Which Demand for Appraisal of Property Loss Must be Made Under Insurance Policy Providing for Such Appraisal*, 14 A.L.R.3d 674 (1967); Hamilton v. Phoenix Ins. Co., 61 F. 379 (6th Cir. 1894) (what constitutes a reasonable time depends upon all the surrounding circumstances).

and 3) whether appraisal is desirable or necessary under the circumstances.[446]

In essence, "[t]his means that the existence of a real difference in fact, arising out of an honest effort to agree between the insured and the insurer, is necessary to render operative a provision in a policy for arbitration of differences. Furthermore, there must be an actual and honest effort to reach an agreement between the parties, as it is only then that the clause for arbitration becomes operative, the remedies being successive. For example, a mere arbitrary refusal to pay the amount demanded, and the offer of a less amount, without any attempt upon the part of the insurer to ascertain and estimate the amount of loss and damage, do not constitute such a disagreement as is contemplated."[447]

In Texas, it has been determined that "the proper point of reference for determining whether an insurer waived the right to invoke appraisal by delay is the point at which the insurer knew the appraisal clause could be invoked because of a disagreement over the amount of damages, that is, the point of impasse with the insured."[448]

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446 Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193 ((L.A.2 (N.Y.) 2012).
447 14 *Couch on Insurance* 2d §50:56 (1982).
448 Sheridan v. American Bankers Ins. Co., 2011 WL 1542819 (S.D.Tex. 2011).

449 In re Universal Und. of Texas Ins. Co., 345 S.W. 3d 404 (Tex., 2011), citing Terra Ind. Inc. v. Commonwealth Ins. Co. of America, 981 F.Supp. 581 (N.D.Iowa 1997); 29 U.S.C. 151 and Beverly Farm

Case Study

The point of impasse was not yet reached and thus appraisal was invoked within a reasonable time where an insurer waited approximately one month beyond the date the insured began litigation before seeking appraisal. The Court in that case held that while unreasonable delay was a factor to be considered in determining waiver, reasonableness needed to be measured from the point of impasse – requiring "an examination of the circumstances and the parties' conduct, not merely a measure of the amount of time involved in seeking appraisal." It clarified that impasse was not synonymous with a disagreement as to the amount of loss or an insurer's monetary offer to cover damages, and was not triggered by ongoing negotiations. Circumstances weighed by the Court in contemplating waiver include "(1) the time between the breakdown of good faith negotiations concerning the amount of loss suffered by the insured and the appraisal demand; and (2) whether there would be any prejudice to the other party resulting from the delay in demanding the appraisal." Essentially, appraisal must be invoked within a reasonable time after impasse occurs. In the present action, the insurer invoked appraisal within a reasonable time post impasse, as the policy did not indicate a deadline for making the request, the insurer had not denied liability, and the insured had not indicated a refusal to further discuss the matter.[449]

The same Court also emphasized the importance of establishing prejudice in addition to mere delay in showing waiver of the right to appraisal. It stated that prejudice may arise in a variety of ways which cause legal or financial harm to a party, but absent prejudice, appraisal should not be prohibited where it could pose an efficient and cost-effective means of resolution. In that particular case, the insured did not attempt to show prejudice and the court did not explicitly require it, a failure it attributed to "the paucity of cases" in which the waiver of appraisal was addressed rather than its inapplicability. The Court also reasoned the difficulty of showing prejudice under the circumstances since the policy provided both the insured and insurer with an opportunity to invoke appraisal.[450]

In another Texas matter, waiver of the right to invoke appraisal was not established where circumstances did not amount to prejudice. Where the option to pursue appraisal was provided by the policy, the Court reasoned that insureds opposing an

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[449] In re Universal Und. of Texas Ins. Co., 345 S.W.3d 404 (Tex., 2011), citing Terra Ind. Inc. v. Commonwealth Ins. Co. of America, 981 F.Supp. 581 (N.D.Iowa 1997); 29 U.S.C. 151 and Beverly Farm Foundation v.. NLRB, 144 F.3d 1048, 1052 (7th Cir. 1998).

[450] In re Universal Und. of Texas Ins. Co., 345 S.W.3d 404 (Tex., 2011).

insurer's invocation of appraisal could have avoided costs incurred by requesting appraisal themselves and that there was no evidence that the insurer would have resisted such a request. The Court conditionally granted a writ of mandamus with instructions that the lower court enforce the policy's appraisal provision, stating, "[w]here the insurance policy provides for an appraisal process, compliance is excused only if the party resisting the appraisal can show prejudice…When a party knows of its right to request an appraisal and does not make that request, it is difficult to attribute the costs incurred to the opponent."[451]

A case which further explored the matter of impasse found that an insurer had not waived its right to seek appraisal where there was not a "sufficiently lengthy delay" in its appraisal demand seven days after receiving the insured's notice of intent to sue. The Court declared that impasse had not yet been reached, as the record did not reflect that the insurer knew further negotiations would be futile until it received the notice of suit from the insured. It asserted that "if one party genuinely believes negotiations to be ongoing, it cannot have intended to relinquish its right to appraisal

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[451] In re Cypress Texas Lloyds, 419 S.W.3d 443 (Tex.App. 2012).

Kester v. State Farm Fire and Cas. Co., 726 F. Supp. 1015 (E.D. Pa. 1989)

U.S. District Court for the Eastern District of Pennsylvania - 726 F. Supp. 1015 (E.D. Pa. 1989)
December 11, 1989

Patricia KESTER
v.
STATE FARM FIRE AND CASUALTY COMPANY.
Civ. A. No. 88-9844.
United States District Court, E.D. Pennsylvania.

December 11, 1989.
*1016 Roger J. Harrington, Philadelphia, Pa., for plaintiff.

Bonnie Sue Donahey Stein, Morrisville, Pa., for defendant.

OPINION AND ORDER
VAN ANTWERPEN, District Judge.

This diversity matter comes before the court upon the defendant's motion for summary judgment. Oral argument on this motion was heard by the court on October 27, 1989. For the reasons expressed below, we believe that the defendant's motion should be granted, subject to the condition stated herein.

Before embarking upon a discussion of the relevant law, it is first necessary to provide a brief chronology of events in the instant case. On or about February 11, 1988, the plaintiff's dwelling allegedly sustained windstorm damage. At the time of this incident, homeowner's insurance policy # XX-XX-XXXX-X was in effect between the plaintiff and the defendant. The defendant first received notice of the alleged loss on July 19, 1988, when it received a letter from Eastern Public Adjusters ("Eastern") who represented the plaintiff. Eastern had evaluated the plaintiff's claim at $12,782.96 and submitted an estimate for that amount to the attention of Robert Evans, the claims adjuster assigned to handle this case for the defendant. Mr. Evans prepared an estimate for the defendant, after an inspection of the plaintiff's property. That estimate came to $1,878.64.

On September 6, 1988, the defendant wrote a letter to the plaintiff, questioning whether or not the defendant was obligated for the loss because of the plaintiff's delay in providing written notice of the loss to the company. On or about November 22, 1988, Mr. Evans sent a letter to the plaintiff's agent concerning the defendant's estimate. On November 30, 1988, the plaintiff filed suit in the Philadelphia County Court of Common Pleas. The defendant answered the complaint and also removed the case to Federal court on the grounds of diversity jurisdiction. On or about December 1, 1988, the defendant received a sworn proof of loss on behalf of the plaintiff. On March 23, 1989, the defendant, through its counsel, made a written demand upon the plaintiff for appraisal under the terms of the insurance policy. By letter, dated April 4, 1989, the defendant notified the plaintiff's counsel that it was appointing Michael Potter of Maryland as its appraiser. The plaintiff has not designated an appraiser.

Paragraph 6 of the homeowner's policy issued by the defendant reads in pertinent part:

Appraisal. If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire....
Paragraph 6 also states: "If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss."

Paragraph 8 of the policy further provides: "*Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions. The action *1017 must be started within one year after the date of loss or damage."*

Fed.R.Civ.P. 56(c) instructs a court to enter summary judgment when the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This rule provides the court with a useful tool when the critical facts are undisputed, facilitating the resolution of a pending controversy without the expense and delay of conducting a trial made unnecessary by the absence of factual dispute. Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982); Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir.1976), cert. denied, 429 U.S. 1038, 97 S. Ct. 732, 50 L. Ed. 2d 748 (1977).

Summary judgment is inappropriate, however, where the evidence before the court reveals a genuine factual disagreement requiring submission to a jury. An issue is "genuine" only if the evidence is such that a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. 106 S. Ct. at 2511. However, if the evidence is merely "colorable" or is "not significantly probative," summary judgment may be granted. Id.

In a summary judgment action, the moving party bears the initial burden of identifying for the court those portions of the record which it believes demonstrate the absence of a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Following such a showing in a case where the non-moving party is the plaintiff and therefore bears the burden of proof, it must by affidavits or by the depositions and admissions on file "make a showing sufficient to establish the existence of [every] element essential to that party's case." Id. 106 S.Ct. at 2552-53; Anderson, 106 S. Ct. at 2514; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Fed.R.Civ.P. 56(e). In making its ruling on a summary judgment motion, the court must view all inferences in a light most favorable to the non-moving party, United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); Continental Ins. Co. v. Bodie, 682 F.2d 436, 438 (3d Cir.1982), must resolve all doubts against the moving party, Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.1985), cert. denied, 474 U.S. 1010, 106 S. Ct. 537, 88 L. Ed. 2d 467 (1985), and must take as true all allegations of the non-moving party that conflict with those of the movant, Anderson, 106 S. Ct. at 2513.

With these standards in mind, we now turn our attention to the motion before us. The central issue in the instant case is this: does the existence of the policy's appraisal clause preclude the plaintiff from bringing this court action? We do not find the parties to be in disagreement with the facts which we have set forth above. We, therefore, consider the disposition of the instant case to turn upon the application of the relevant law to these facts.

In order to invoke the appraisal provision of a policy, the insurer must admit liability and there must be a dispute only as to the amount of the loss. Ice City, Inc. v. Insurance Company of North America, 456 Pa. 210, 314 A.2d 236, 240 (1974). Also, "if appraisal is not requested, or the request is fruitless, or appraisal proceedings are inclusive or abandoned by the parties' joint consent or liability is denied, then the appraisal provision in the contract may not bar the insured from bringing an action for relief in the courts." Id. 314 A.2d at 239 (footnotes omitted) (emphasis supplied). In none of its communications with the plaintiff did the defendant expressly deny liability for the claim and the defendant explicitly admitted liability in open court at the hearing on this motion held on October 27, 1989.

The plaintiff argues, however, that the defendant definitively denied liability when it answered her complaint. While it is true that the answer filed by the defendant in response to the plaintiff's complaint *1018 denied liability on fraud and other grounds, there is authority to suggest that such response does not constitute a denial. Authorities cited in 3 A.L.R.3d 383, 416 (1949) hold that an insurer's denial of liability, which is raised for the first time in an answer to a complaint, does not amount to a waiver of the condition precedent. In Kahnweiler v. Phoenix Insurance Co., 57 F. 562 (D.Kan.1893), rev'd on other grounds, 67 F. 483 (8th Cir.1895), the court stated:

[T]he plaintiffs insist that the provision in the policy for arbitration has been waived by the company, and is inoperative; that the company could not invoke that provision to abate or defeat the plaintiffs' suit, because it made no demand for arbitration, and because it denies its liability in toto. This denial of liability in toto appears for the first time in the answer of the defendant in this suit. Up to that time the company had offered to pay its proportion of what it claimed was the actual loss of the insured, but there was an irreconcilable difference between the parties as

to the amount of that loss, thus bringing the case within the provisions of the arbitration clause of the policy. Inasmuch as the arbitration should precede any suit, at no time during the period for arbitration did the company deny its liability for the loss. That the company has set up in one count of its answer a denial of any liability does not affect the case. It might waive any objection to the cause of the fire, and offer to settle, to avoid litigation; but this would not effect [sic] its right, when sued, to set up in its answer any legal defense it had to the action....
In Carp v. Queen Insurance Co., 104 Mo.App. 502, 79 S.W. 757 (1904), the court also considered whether the denial of liability in an answer to the complaint constituted such denial of liability as would preclude resort to appraisement. The Carp court concluded that it did not, stating:

"The denial of liability which dispenses with the necessity of an appraisal must occur, except under special circumstances, before answering in a suit on the policy; for a suit will not lie without previous appraisal, when the company has not denied liability or otherwise waived the condition." Id. 79 S.W. at 760.

In the instant case, the defendant did not deny liability before filing its answer to the plaintiff's complaint.

The plaintiff raises, but does not brief, an argument that, under Pennsylvania law, as expressed in Judge v. Celina Mutual Insurance Company, 303 Pa.Super. 221, 449 A.2d 658, 661 (1982),

"an affirmative defense not properly pleaded is waived."

The plaintiff is here referring to the appraisal clause in the policy. The plaintiff has not explained why a Pennsylvania Rule of Civil Procedure (Pa.R.C.P. 1030) should be applicable to the instant case in Federal court. Under the Federal Rules of Civil Procedure, Rule 8(c) deals with "Affirmative Defenses". That rule reads, in pertinent part: "In pleading to a preceding pleading, a party shall set forth affirmatively ... arbitration and award...." It is true that the answer filed by the defendant does not raise the appraisal clause among its affirmative defenses. Kahnweiler, 67 F. 483 (8th Cir. 1895), was, in fact, reversed by the appellate court because of the failure to raise the existence of an arbitration clause in the answer to the complaint. Karno-Smith Co. v. School District of City of Scranton, 44 F. Supp. 860 (M.D.Pa.1942), addressed the propriety of the raising of the existence of an arbitration clause in a motion to dismiss. Said the court in Karno-Smith:

It should ... be noted that rule 8(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 734c, requires certain defenses to be set forth affirmatively. Among these defenses which must be affirmatively pleaded are arbitration and award, ... Thus ... these grounds are not properly before the court on defendant's motion to dismiss....
Id. at 862.

The court in Karno-Smith denied the motion to dismiss and directed that an answer to the complaint be filed within twenty days from notice of its order.

In the instant case, we have no motion to dismiss before us, but we do have a motion for summary judgment which raises the issue of the appraisal clause as a bar to the *1019 litigation of the amount of the plaintiff's loss. Fed.R.Civ.P. 15(a) stipulates the conditions and the timetable under which a party may amend its pleading. It reads in part pertinent to the instant case:

"Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208 (3d Cir.1984), the Third Circuit has spoken of certain considerations which must be taken into account before an actual motion to amend may be granted. That court has said:

Delay alone, however, is an insufficient ground upon which to deny a motion to amend. Cornell and Co., Inc. v. Occupational Safety and Health Review Commission, 573 F.2d 820 (3d Cir.1978). Rather, the touchstone is whether the non-moving party will be prejudiced if the amendment is allowed. Id. at 823. ...
Id. at 1212.

We are mindful that there is not now before us a motion to amend the defendant's answer. We believe, however, that the words of the Third Circuit are equally applicable to the situation here. The Pennsylvania Supreme Court has stated: "It is beyond cavil that settlement of disputes by arbitration or appraisal is the approved public policy of this Commonwealth. [Citations omitted]." Ice City, 314 A.2d at 241

We can conceive of no prejudice to the plaintiff in allowing the defendant to file an amended answer raising the affirmative defense of the appraisal clause. The plaintiff will be in no worse position after such amendment as she has been before it. Moreover, amendment would serve to honor Pennsylvania's public policy in favor of arbitration of disputes.[1]

We shall next proceed to dispose of the plaintiff's remaining arguments in the instant opinion. The plaintiff also argues that the defendant waived its right to appraisal by waiting until March 23, 1989 before requesting it.

The policy in the instant case makes no provision for a time when appraisal must be requested. However, in Lefkowitz v. Hummel Furniture Co., 385 Pa. 244, 122 A.2d 802, 804 (1956), the Pennsylvania Supreme Court stated: "[W]here no time for performance is provided in the written instrument the law implies that it shall be done within a reasonable time...."

In the instant case, eight months elapsed between the insurer's first awareness of the plaintiff's loss (July 19, 1988) and its request for appraisal (March 23, 1989). We must now decide whether eight months constituted a "reasonable time."

Neither the parties' research nor our own has uncovered Pennsylvania case law regarding the issue of timeliness of a demand for appraisal. Other jurisdictions, however, have considered the matter and have concluded that "[t]he timeliness of a demand for an appraisal in each case depends upon the circumstances as they existed at the time the demand was made. Annot., 14 A.L.R.3d 674 (1967)." Keesling v. Western Fire Insurance Company of Fort Scott, Kansas, 10 Wash. App. 841, 520 P.2d 622, 626 (1974). See also Hanby v. Maryland Casualty Co., 265 A.2d 28, 30 (Del.1970); School District No. 1 v. Globe & Republic Insurance Co., 146 Mont. 208, 404 P.2d 889, 893 (1965). Also, the "circumstances" which have proven to be most *1020 decisive are two: prejudice resulting from the delay and the breakdown of good-faith negotiations concerning the amount of the loss suffered by the insured. Keesling, 520 P.2d at 628; School District No. 1, 404 P.2d at 893.

In the instant case, the only "prejudice" which the plaintiff alleges seems related to the continued existence of her court action or related to the contractually mandated resort to appraisal in the event of the parties' disagreement over the amount of the loss. The plaintiff claims loss of a judicial forum in which to prove coverage, liability, replacement cost and interest, loss of a date certain for arbitration, expense in appointing an appraiser and umpire, and delay in resolution, apparently on the grounds that the defendant has appointed an appraiser from Maryland. We believe that none of these claims amounts to the sort of prejudice that would preclude giving free rein to the policy's appraisal clause. The plaintiff has also claimed prejudice in the expenditure of attorney's fees. However, as the court in Keesling, 520 P.2d at 628 opined:

While authority can be found for the proposition that institution of suit by the insured serves to cut off the insurer's right to demand appraisal (Littrell v. Allemania Fire Ins. Co., 250 N.Y. 628, 166 N.E. 350; Davis v. Imperial Ins. Co., 16 Wash. 241, 47 P. 439 (1896)), we think that the better view is that the inconvenience of bringing suit is just one circumstance to be considered in determining whether a delay in demanding appraisal was unreasonable, that is, whether the inconvenience suffered was sufficient to justify a refusal to proceed under the appraisal provision of the policy. Stephens v. Union Assur. Soc., 16 Utah 22, 50 P. 626 (1897).
We do not believe that the plaintiff's institution of suit and consequent expenditure of attorney's fees warrants the conclusion that the appraisal clause must be considered waived in the instant case.

Nor can we say that there was a break-down of good-faith negotiations prior to the initiation of this action. The defendant was not even aware of the plaintiff's loss until five months after it had occurred. From July, 1988 until late November, 1988, there was a good-faith dispute over the timeliness of the plaintiff's claim and over the amount of the loss sustained. At the end of November, 1988, the tenor of the parties' relationship changed, when the parties became adversaries in the suit filed by the plaintiff on November 30, 1988. We, therefore, believe that the plaintiff has not met this part of the circumstances "test", either.[2]

*1021 As we have explained above, we believe that the defendant is entitled to an award of summary judgment in its favor, subject to the defendant's immediate filing of an amended complaint raising the affirmative defense of the existence of an appraisal clause in the policy.

An appropriate order follows.

ORDER

AND NOW, this 11th day of December, 1989, upon consideration of the defendant's Motion for Summary Judgment and of the plaintiff's response thereto, it is hereby ORDERED that defendant is granted leave to file an amended answer and further, said motion for summary judgment is GRANTED effective December 21, 1989, when judgment shall be deemed entered, subject to the defendant's filing an amended answer properly pleading the defense of the existence of the appraisal clause in the policy before said effective date of summary judgment.

NOTES

[1] The granting of summary judgment, subject to the defendants' filing of an amended complaint raising the affirmative defense of statute of limitations, was the course chosen by the court in Echols v. Strickland, 92 F.R.D. 75 (S.D.Tex. 1981). The Echols court stated:

Because this case is still in the pre-trial stage and because the Defendants would therefore generally be permitted to avail themselves of the liberal amendment provisions of Rule 15 by filing amended answers with proper invocation of the defense, the better view is that the defense has not been waived. Greenwald v. Cunard Steam-Ship Company, 162 F. Supp. 250 (S.D.N.Y.1958); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil § 1278, p. 344 (1969); see United Transportation Union v. Florida East Coast Railway, 586 F.2d 520, 527 (5th Cir.1978). Accordingly, the Court will proceed to consider the defense on its merits.

Id. at 77.

We are also aware of the liberal amendment provisions of Fed.R.Civ.P. 15 and that is why we, too, have chosen to follow this course.

[2] The plaintiff argues that the defendant's "full and complete log sheets are essential to a determination of timeliness". The defendant has produced, pursuant to a discovery request made by the plaintiff, numerous log entries made for the plaintiff's claim. It has refused to furnish, however, certain log entries, maintaining that they are non-discoverable because made after the commencement of the instant litigation. The plaintiff would have us deny this motion for summary judgment because it is not in possession of log notes made after the commencement of suit. In support of her argument, the plaintiff cites us to a slip opinion by Magistrate Naythons,

Regalbuto v. Republic Insurance Co., No. 88-3430, slip op., 1988 WL 90421 (E.D.Pa. August 25, 1988). In Regalbuto, however, there stood before the court a motion to compel log sheets made prior to suit and prior to an appraisal demand. Since the log sheets in the instant case were made after the start of litigation, we fail to see the relevance of Regalbuto. Also, the plaintiff evidently made no motion to compel the production of the log sheets made after the commencement of litigation. The plaintiff may not now complain that she is not in possession of "full and complete log sheets".

The plaintiff also argues that the defendant's denial, of the existence of a statement given by plaintiff, followed by its subsequent explanation that it had taken a recorded statement by the plaintiff on September 27, 1988, but that no "statement" existed because the recording device had failed to function, entitles it to an "adverse inference" against the defendant "on any relevant fact." We do not agree. The plaintiff's own definition of "statement" is as follows: "a written statement signed or unsigned or a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it contemporaneously recorded." (Emphasis supplied). Since the defendant had no "written statement" from the plaintiff and since there was no recorded statement or transcription thereof, we believe that the defendant was correct when it denied the existence of the plaintiff's statement.

unless it expressly waives that right." [452]

Neither party can use the right to demand appraisal so as to take undue advantage of the other, but both must act in good faith.[453]

It has been stated that the disagreement necessary to trigger appraisal cannot be unilateral in that the clause contemplates some meaningful exchange of information sufficient for each party to arrive at a conclusion before a disagreement can exist.[454]

The timeliness in which the insurer is required to demand appraisal under the terms of the policy begins to run from the time the insurer admits liability."[455] As to an excess insurer's appraisal demand made some 5 years after the loss, it was held that whether such delay was reasonable depended upon the specific facts of the case.[456]

In Florida, appraisal was deemed to be

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[452] In re Texas Windstorm Ins. Ass'n, 2013 WL 4806996 (Tex. App.-Houston [14th Dist] 2013).

[453] Uhrig v. Williamsburgh City Fire Ins. Co., 101 N.Y. 362, 4 N.E. 745 (1886); Bishop v. Agricultural Ins. Co., 130 N.Y. 488, 29 N.E. 844 (1882).

[454] Hailey v. Auto-owners Ins. Co., 181 N.C. App. 677, 640 S.E.2d 849 (2007); *see also* 200 Leslie Condo. Assn., Inc. v. QBE Ins. Corp., 2011 WL 2470344 (S.D.Fla.).

[455] American Capital Assur. Corp. v. Courtney Meadows Apartment, L.L.P., 36 So.3d 704, 35 Fla L. Weekly D802 (Fla. App. 1 Dist., 2010).

[456] Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193 ((L.A.2 (N.Y.) 2012).

premature where a disagreement by the parties was lacking as to the amount of loss and there was an absence of opportunity for an insurer to invoke post-loss conditions. The court asserted that such a disagreement could not be unilateral. It stated that "by the terms of the contract, it was contemplated that the parties would engage in some meaningful exchange of information sufficient for each party to arrive at a conclusion before a disagreement could exist." It defined disagreement as "the existence of a real difference in fact, arising out of an honest effort to agree between the insured and the insurer…necessary to render operative a provision in a policy for arbitration of differences. Furthermore, there must be an actual and honest effort to reach an agreement between the parties, as it is only then that the clause for arbitration becomes operative, the remedies being successive.[457]

Consistently, where a factual dispute existed as to whether an insured had complied with post-loss obligations, a Florida court recently stated that, "Before a Circuit Court can compel appraisal under an insurance policy, it must make a preliminary determination as to whether the demand for

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[457] Garden-Aire Village South Condo. Ass'n. v. QBE Ins. Corp., 774 F.Supp.2d 1224 (2011); See also, Cypress Chase Condominium Ass'n "A" v. QBE Ins. Co., 2011 WL 1544860 (S.D. Fla. 2011) .

appraisal is ripe. 'Until these [post-loss] conditions are met and the insurer has a reasonable opportunity to investigate and adjust the claim, there is no 'disagreement'...regarding the value of the property or the amount of loss' to be appraised". It held that, "[o]nce the trial court determines that a demand for appraisal is ripe, the court has the discretion to control the order in which an appraisal and coverage determinations proceed."[458]

A Texas court could not impose an additional condition precedent to appraisal on either party where one was not found in the policy, reasoning that the terms of the subject insurance policy must be applied as written. There, an insured sought to have an insurer's request for appraisal denied on the grounds that the insurer had not fulfilled its obligation to adequately investigate the insured's claims as a condition precedent to demanding appraisal and had failed to demonstrate to the court what was and was not disputed. The Court observed nothing in the policy to supply such a requirement and that "to make performance specifically conditional, a term such as 'if', 'provided that', 'on condition that', or some similar phrase of conditional language

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[458] Citizens Prop. Ins. Corp. v. Admiralty House, Inc., 66 So.3d 342 (2011).

must normally be included." [459]

Many courts have been guided by the reasonableness of the timing of the demand under the circumstances of the case and whether the insured has been prejudiced as a result of the passage of time.[460] These cases have often required an appraisal to go forward even after the commencement of litigation, where the insured has not been put to substantial expense, or forced to confront significant delay in the claims process. An additional factor considered was that an insignificant amount of time had passed between the conclusion of good faith negotiations and the commencement of suit.[461]

In Butler v. Property and Casualty Ins. Co. of Hartford, the court found that the insurer did not first have to prove that it conducted an adequate investigation as a condition precedent to invoking appraisal.[462] As there was nothing in the insurance policy that required that kind of exercise as a condition precedent to appraisal, the court determined

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[459] Butler v. Prop. and Cas. Ins. Co. of Hartford, 2011 WL 2174965(S.D. Tex. 2011), citing Criswell v. European Crossroads Shopping Center, Ltd., 792 S.W.2d 945, 948 (Tex. 1990).

[460] School District Number 1 v. Globe and Republic Ins. Co., 146 Mont. 208, 404 P.2d 889 (1965); Kester v. State Farm Fire and Cas. Co.,, 726 F.Supp. 1015 (E.D. Pa. 1989); Monroe Guar. Ins. Co. v. Backstage, Inc., 537 N.E.2d 528 (Ind. App. 3d Dist. 1989); Hanby v. Maryland Cas. Co., 265 A.2d 28 (Del. 1970).

[461] Terra Ind., Inc. v. Commonwealth Ins. Co. of America, 981 F.Supp. 581 (N.D. Iowa 1997).

[462] 2011 WL 2174965 (S.D.Tex.).

that appraisal could be invoked at any time after disagreement about the amount of loss occurred.

The court in the Texas case, EDM Office Services, Inc. v. Hartford Lloyds Ins. Co.,[463] held that the insurer did not waive its right to invoke appraisal even if it did not comply with the "Claims Handling" provisions of the policy as compliance with such provisions is not a condition precedent to commencing the appraisal process. The court found no waiver because the appraisal provision did not use conditional language and the insured did not identify any provision showing that the parties intended the insurer full comply with the "Claims Handling" provisions before seeking appraisal.

This issue was dealt with similarly in Dike v. Valley Forge Ins. Co.[464] In that case, the insured argued that Valley Forge could not demand appraisal because it failed to conduct a reasonable investigation of his claims, which the insured asserted was a condition precedent to invoking appraisal. The court determined that, even assuming the insurer failed to comply with the "Claims Handling" provisions of the insurance policy, it would not

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[463] 2011 WL 2619069 (S.D.Tex. 2011).

[464] Dike v. Valley Forge Ins. Co.,797 F.Supp.2d 177, 2011 WL 2517270 (S.D.Tex. 2011).

prevent the insurer from seeking appraisal as "compliance with the "Claims Handling" provisions...[is] not a condition precedent to exercising appraisal rights."

Where an appraisal has not become impossible or impracticable due to the passage of time, it has been held that even where the insurer had waited 13 months after the loss and 4 months after the litigation was commenced to demand an appraisal, that the demand was still reasonable under the circumstances. This is particularly so where there is no claim that the insurer thwarted the possibility of having an earlier appraisal performed.[465]

An insurer in Florida was deemed to have promptly invoked its right to appraisal pursuant to the policy when it filed a motion to compel appraisal after the parties had neither extensively litigated nor engaged in extensive discovery. Florida law provides that "the right to an appraisal may be waived if a party maintains a position inconsistent with the appraisal remedy." In the instant action, the Court conceded that while the appraisal process could have been invoked by the insurer earlier in the dispute, such an action was not required by the appraisal clause prior

[465] Peck v. Planet Ins. Co., 1994 WL 381544 (S.D.N.Y. 1994).

to suit or even at any particular time. Thus, the insurer's conduct was not inconsistent with appraisal to the extent of demonstrating waiver of the right.[466]

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Contrary circumstances were illustrated in Florida, where the Court examined waiver of the right to appraisal in the context of a time delay in exercising this right. In that case, plaintiff sought to stay litigation and require the parties to proceed to an appraisal after having "actively and vigorously litigated" an action and incurred steep fees and costs in doing so. The court found it to be unexplained why plaintiff had not filed a petition to compel appraisal earlier in the case. In citing the rule that "a party that fails to seek appraisal within a reasonable time after the commencement of litigation waives its appraisal right by acting inconsistently with that right," the court in this matter was "hard pressed to imagine a situation where a party acts more inconsistently with the right to seek an appraisal."[467]

Where the insurance policy does not

[466] The Bullard Bldg. Condo Ass'n, Inc. v. Travelers Property. Cas. Co. of America, 2006 WL 2787850 (M.D. Fla. 2006).

[467] Summit Towers Condominium Ass'n, Inc. v. QBE Ins. Corp., 2012 WL 1288735 at *1 (S.D. Fla. 2012); See also, ARI Mut. Ins. Co. v. Hogen, 734 So.2d 574 (Fla.3d DCA 1999)(a trial court erred by granting an insured's motion to compel appraisal, where it was "apparent that [the insured] aggressively litigated this cause below and that such action over a nine-month period prejudiced the insurance company by resulting legal fees and costs that could have otherwise been avoided had [the insured] elected appraisal initially.").

specify a time limit for an appraisal demand, the court must determine whether a demand was exercised within a reasonable period of time depending upon the particular facts of the case. In S.R. International Business Ins. Co., Ltd. v. World Trade Center Properties, LLC,[468] it was stated that, though New York courts, unlike others, do not appear to have explicitly cited particular factors as "decisive" in determining the reasonableness of the demand, the following three factors are usually relevant: (i) whether the appraisal sought is impractical or impossible (that is, whether granting an insurer's appraisal demand would result in prejudice to the insured party); (ii) whether the party engaged in good-faith negotiations over valuation of the loss prior to the appraisal demand; and (iii) whether an appraisal is desirable or necessary under the circumstances.[469]

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In Mississippi, an insured's request for appraisal made almost five years after a loss was untimely and could not "circumvent the running of the statute of limitations." In a case where a Mississippi court examined the timeliness of the appraisal process where

[468] 2004 WL 2979790 (S.D.N.Y. 2004).

[469] *See* Peck, 1994 WL 381544 (S.D.N.Y. 1994); Kester v. State Farm Fire & Cas. Co., 726 F.Supp. 1015, 1019-20 (E.D. Pa. 1989) ("[T]he circumstances which have proven to be most decisive are two; prejudice resulting from the delay and the breakdown of good-faith negotiations concerning the amount of the loss suffered by the insured." (citations omitted)).

appraisal, a condition precedent to filing a lawsuit in the state, was not demanded until after the time to bring suit had passed, general contract principles were relied upon. Although the appraisal provision was silent as to the time in which a request must be brought, the Court noted that "where no time is specified for performance of a contractual obligation, the courts will require that the obligation be performed within a 'reasonable' time." It further cited the law of Washington state to aid in its consideration of reasonableness: "'[w]hether a demand for appraisal has been made within a reasonable time depends upon the circumstances of the case…[including the two main factors of] prejudice resulting from the delay, and the breakdown of good-faith negotiations concerning the amount of loss.'" Finally, the court considered the objective of an insurance policy's appraisal provision. It held that the provision "provides a contractual avenue in which the parties to an insurance contract can resolve their differences short of litigation…[it] was not intended to extend, and does not extend, the time an insured could bring suit over such claims. Indeed, any such provision would be unenforceable, as Mississippi law prevents any attempts to lengthen or shorten a statute of limitations by contract."[470]

In one New York matter, the Court considered the timeliness of an insurer's demand for appraisal made after litigation had commenced. Its analysis was based upon whether the delay in making the demand was reasonable in light of the state's longstanding rule, that even where there is no policy-mandated time limit the right to seek appraisal "'is not indefinite as to time, but must be exercised within a reasonable period.'" The Court stated the determination of reasonableness must be made depending on particular facts of a case. The state of New York does not readily infer waiver of the right to demand appraisal and has acknowledged the favorability of such a means of resolution. In evaluating the circumstances before it, the Court did an analysis of the aforementioned three factors. It ultimately concluded the insurer's appraisal demand was timely and the insurer did not waive its right to seek appraisal. The Court observed no resulting prejudice to the non-demanding party because of the delay, clarifying that the first factor must be considered when the demand is made and without the benefit of further knowledge of

[470] Greater Trueway Apostolic Church v. Church Mut. Ins. Co., 2012 WL 1143947 (S.D. Miss., 2012), citing Keesling v. Western Fire Ins. Co. of Fort Scott Kan., 520 P.2d 622 (Wash. Ct. App. 1974).

how the appraisal would play out. The fact that the insurer had made a settlement offer while mediation was ongoing and prior to litigation indicated continuing negotiations at the time the action was commenced by the insured, satisfying the second factor. Finally, in finding the third factor was met the Court explained this inquiry to include factors such as "whether the appraisal is likely to facilitate a speedier resolution of the dispute than would occur in the District Court proceeding," "the expected expertise of an appraisal panel in making its valuation determinations" and "the complexity of the valuation."[471]

In a Texas case it was held that the trial court abused its discretion in striking a demand for appraisal where the carrier failed to demand appraisal until litigation had incepted.[472] In this matter, the carrier had made numerous payments in consideration of the claim over a period of months but terminated its claims administrator and demanded the right to reinspect with a new claims administrator. The insured resisted these efforts whereupon the insured made a policy limits settlement demand to the carrier. Five days later, the insured filed suit against the carrier whereupon during discovery, the carrier

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[471] Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193 (L.A.2 (N.Y.) 2012), citing Chainless Cycle Mfg. Co. v. Sec. Ins. Co., 169 N.Y. 304, 310, 62 N.E. 392 (1901).

[472] In re Clarendon Ins. Co., 2004 WL 2984916 (Tex. App.-Ft. Worth 2004).

served a demand for appraisal upon the insured. On these facts, the Texas court held that the carrier had not waived its right for compliance with policy provisions such as the proof of loss requirement, the right to reinspect and the right to appraisal and reversed the trial court sending the matter to appraisal.

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Texas courts have also held that although the appraisal clause may be permissive in nature, the underlying action must still be abated pending the outcome of the appraisal process. In Butler, the court found that abatement of the entire case pending appraisal was appropriate in the interest of the efficient and inexpensive administration of justice. The court commented that the insured will have suffered no prejudice by abating the proceeding if she prevailed in the appraisal process, as her claims will still remain intact.[473]

In a Texas case, the Court found it proper for a trial court to refuse to abate litigation proceedings while the appraisal process goes forward. In In re Cypress Texas Lloyds,[474] Cypress petitioned the Court of Appeals to compel the trial judge to abate the underlying proceedings until an appraisal to determine

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[473] See Butler v. Prop. and Cas. Ins. Co. of Hartford, 2011 WL 2174965 (S.D.Tex. 2011).

[474] 2011 WL 2650724 (Tex.App.-Houston [14 Dist.] 2011); In re Universal Und. of Texas Ins. Co., 2011 WL 1713278, * 7 b. 5 (Tex., 2011); In re Liberty Mut. Group, Inc., 2011 WL 2149482 (Tex.App.-Houston [14 Dist.] 2011).

the amount of the covered loss had been completed. In denying the requested relief, the court held that under Texas law, litigation proceedings need not be abated while the appraisal goes forward.

The Texas Court of Appeals has confirmed that "while trial courts have some discretion as to the timing of an appraisal, they have no discretion to ignore a valid appraisal clause entirely." While the time period may be instructive in interpreting the parties' intentions, it alone is not the standard by which courts determine the reasonableness of delay.[475]

Case Study

However, in a Wisconsin case, the court stated that "[A]n insurance company may not demand an appraisal of loss after the commencement of an action by the insured when the insurance company failed to demand the appraisal prior to the lawsuit even though it had the opportunity to do so,"[476] though even this court recognized that other courts have disagreed with this conclusion.[477]

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[475] In re Guideone Mut. Ins. Co., 2013 WL 257371 (Tex.App.-Beaumont 2013).

[476] Lynch v. American Family Mut. Ins. Co., 163 Wis.2d 1003, 1008, 473 N.W.2d 515, 517 (1991).

[477] Id., citing Hanby v. Maryland Cas. Co., 265 A.2d 28 (Del. 1970) (affirming the trial court's decision to stay proceedings until completion of the appraisal process); School District, 146 Mont. 208 (appraisal may be demanded after suit was commenced as long as demand was made within a reasonable time); United States Fire Ins. Co. v. Franko, 443 So.2d 170, 171-72 (Fla. 1st DCA1983) (plaintiff's failure to submit to the appraisal process demanded after the complaint was filed warranted dismissal of the lawsuit).

Case Study

In Maine, the United States Court of Appeals, First Circuit, stated that while a mechanical rule embracing all possible cases is not possible or appropriate, it is sufficient to state that by waiting until after discovery had been completed and the long-scheduled trial date had almost arrived, that the carrier did unduly delay invoking the appraisal clause. The required elements which must be established in order to prove a waiver of the right to demand appraisal are the components of undue delay plus a modicum of prejudice to the other side.[478]

Case Study

In Alabama, the court declared a policy void and determined no coverage existed where the insured had made intentional, material misrepresentations in asserting a claim for hurricane damage. This was in light of policy language that voided coverage if the insured "intentionally conceal[ed] or misrepresent[ed] a material fact concerning the claim". Ultimately, the court determined that the insurer was within its right to perform this investigation of the claim before pursuing appraisal, and granted the insurer a declaratory judgment stating that the issued policy was void and coverage nonexistent.[479]

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[478] Rankin v. Allstate Ins. Co., 336 F.3d 8 (1st Circ. Conn. 2003).

[479] Scottsdale Ins. Co. v. Prayer Tabernacle Early Church of Jesus Christ, 2011 WL 3320544 (S.D. Ala. 2011).

A demand for appraisal was deemed untimely and thus a provision was rendered unenforceable in a decision in which requirements for timeliness were explored in Louisiana. The court asserted that a "critical factor" in evaluating timeliness is when a dispute surrounding an amount of loss arose, and noted that where there was no contractual guidance as to when appraisal must be invoked, then it must be done within a reasonable time following the dispute. The Court looked to other state decisions to further define this reasonableness requirement, and confirmed that the timing of the demand should be consistent with the subject policy's Loss Payment Provision. In this particular case, an insurer's request was held untimely because it had not provided insureds with notice of its intent to request appraisal within 30 days from when the proof of loss was submitted as required.[480]

In Louisiana, an insurer's demand for appraisal and request for a stay of litigation made just weeks before trial was determined to be unreasonable and untimely.[481]

In Georgia, specific performance of an appraisal provision was not warranted where

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[480] Triple K, Inc. v. Century Surety Co., 2010 WL 3418237 (E.D.La. 2010).
[481] Dwyer v. Fidelity Nat.l Prop. Ins. Co., 2007 WL 1063266 (E.D. La. 2007).

more than a year had passed from the date of loss. Although the provision did not contain a time limit, under those circumstances the Court found that a policy term barring an action against an insurer unless it was brought within one year from the date of loss, prohibited an insured's suit for damages and appraisal enforcement.[482]

However, appraisal demanded within two months of the onset of litigation was considered "timely". [483]

Case Study

In Alabama, the court found prejudicial delay in seeking an appraisal where an insured received compensation for a loss from its insurance company and subsequently requested appraisal upon determination of additional damage. There, the insured waited until 15 months after the claim was paid and damaged property had been fully repaired to seek appraisal of the damaged property. The court deemed the issue to be "not whether any disagreement exists but whether a disagreement was manifested so as to warrant invocation of the appraisal clause of the insurance policy, or in the alternative, whether [the insured's] waiting until after the repairs had been made and after the claim had been

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[482] Aaron v. Georgia Farm Bureau Mut. Ins. Co., 297 Ga. App.403, 677 S.E.2d 419 (Ga. App. 2009).

[483] Newman v. Lexington Ins. Co., 2007 WL 1063578 (E.D. La. 2007).

paid in full to express any discontent whatsoever with the amount of the loss assessed by [the insurer] constituted a waiver of his right to seek an appraisal of the damage." The court found that such a delay was so prejudicial to the insurer that it constituted the insured's waiver of its right to appraisal.[484] One would reasonably wonder if the result would be different in the absence of such prejudice.

Prejudicial delay was further found where insureds failed to provide timely notice to their insurer of a supplemental claim in Alabama. Under those circumstances, insureds submitted their supplemental claim several years after payment from their insurer had been received and admitted that relevant damage had been repaired more than two years prior. There, it was not sufficiently demonstrated that their supplemental claim was within the confines of coverage.[485]

An insurer's nine-day delay in invoking appraisal following a dispute was deemed reasonable by a court in Louisiana, where the applicable appraisal provision contained no specified deadline. However, the Court clarified that in the absence of such a

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[484] Jadick v. Nationwide Prop. and Ins. Co., 2011 Ala. Civ. App. LEXIS 357 (Ala. App. 2011).
[485] Id.

deadline, appraisal must still be invoked within a reasonable time after a dispute arises.[486]

In a claim arising out of the World Trade Center attack, it was held that appraisal may no longer be practical where a delay in demanding the appraisal has resulted in the removal, destruction or repair of the damaged property. Plaintiff had sought recovery for property damage and loss of business income in the aftermath of the September 11, 2001 disaster. After litigation had commenced, the carrier contended it was entitled to appraisal under the policy. Citing Chainless Cycle Mfg. Co. v. Security Ins. Co.[487] and Peck v. Planet Ins. Co.[488] for the proposition that under New York law, the right of appraisal must be exercised within a reasonable period.[489]

However, in another case arising out of the World Trade Center attack, it was held that where multiple carriers insured the same risk, and an appraisal incepted between the insured and certain insurers, that an additional insurer that had resisted the appraisal while coverage issues were being resolved by the court, had not waived participation by virtue of

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[486] Beasley v. GeoVera Specialty Ins. Co., 2013 WL 3187289 (E.D. La. 2013).

[487] Chainless Cycle Mfg. Co., 169 N.Y. 304.

[488] Peck v. Planet, 1994 WL 381544 (S.D.N.Y. 1994).

[489] Indian Chef, Inc. v. Fire & Cas. Ins. Co. of Connecticut., 2003 WL 329054 (S.D.N.Y. 2003).

its delay despite the absence of ongoing negotiations where there was no showing made of prejudice, impossibility or impracticality arising from the demand. This was particularly so, where the carrier conceded its willingness to participate in the appraisal on the same terms of the other appraising insurers and be subject to the same policy form.[490]

A Florida court found that an insurer did not invoke its right to appraisal in a timely manner where parties, through their adjusters, agreed on the amount of loss. There, the appraisal provision in the subject policy allowed the parties to agree on such an issue and was applicable only if the parties (or their adjusters) disputed the amount of loss. In that case the parties' adjusters had mutually agreed on this point, rendering the demand for appraisal too late.[491]

The demand for appraisal is not a weapon of attack, but of defense, and accordingly, in order to use it, a party must give reasonable notice of the intention to demand appraisal. The failure to give reasonable and timely notice is evidence of a waiver,

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[490] S.R. International Business Ins. Co., Ltd. v. World Trade Center Properties, LLC, 2004 WL 2979790 (S.D.N.Y. 2004).

[491] Bankers Security Ins. Co. v. Brady, 765 So.2d 870 (Fla.5th DCA 2000).

depending on the circumstances of the particular claim. This is especially true where the insured detrimentally relied on the insurer's failure to demand appraisal.[492]

Where the company waited until after the expiration of 60 days from the filing of a proof of loss, it was held to have waived the right to appraisal.[493]

The parties do not have an absolute right to wait until the last moment during the 60 day period before the loss becomes payable under the policy, only then to demand the appraisal, but the demand must be made in a reasonable time, depending on the facts of the case.[494]

Although an Ontario decision recognized the existence of a "reasonable limitation" on the right to appraisal as provided by statutory condition 11 of The Insurance Act allowing for appraisal, it refused to define this limitation under other statutory terms requiring that the loss be payable within 60 days of completion of the proof of loss unless otherwise provided in

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[492] Chainless Cycle Mfg. Co., 169 N.Y. 304.
[493] Winchester v. North British Ins. Co. of London and Edinburgh, 160 Cal. 1, 116 P. 63 (1911); Bear v. New Jersey Ins. Co., 138 Fla. 298, 189 So. 252 (1939); School District, 146 Mont 208; Nguyen v. St. Paul Travelers Ins. Co., 2007 WL 1672504 (E.D. La. 2007) (insurer's failure to demand appraisal within 60 days of receipt of satisfactory proof of loss rendered demand untimely).
[494] Langsner v. German Alliance Ins. Co., 67 Misc. 411, 123 N.Y.S. 144 (1910).

the policy (statutory condition 12). It clarified that appraisal was not a condition precedent to commencing that action. The Court reasoned that "[w]hile it is clear that statutory condition 11 limits the time **before** which an appraisal can be sought, it does not...impose a limitation **beyond** which an appraisal can be sought. Had such a limitation been intended, it could easily have been specified." Further, the condition's terms showed a legislative intent that a loss determination be resolved by appraisal before recovery on the contract could take place.[495]

In a large and complex claim, the presentation of a proof of loss denoted as "preliminary" was held not to trigger the obligation to demand appraisal within the time provided for payment of claims under the terms of the policy.[496]

Where the carrier has reason to believe that additional evidence of damage will be presented subsequent to the presentment of a preliminary proof of loss, such a filing appears not to start the clock running for a demand for appraisal.

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[495] Sadema Lumber Products Ltd. v. Hanover Ins. Co., (1981) O.J. No. 228, (1981) I.L.R. 279, (1981) I.L.R.1-1381, 8 A.C.W.S. (2d) 300, 1981 CarswellOnt 672 ; *The Insurance Act*; R.S.O. 1970, c. 224, s. 102 and s.122.

[496] S.R. International Bus. Ins. Co. Ltd. v. World Trade Center Properties, LLC, 2004 WL 2979790 (S.D.N.Y. 2004).

What constitutes a reasonable time to demand appraisal depends on all the surrounding circumstances and where the circumstances are complex, thirty days was held not to be a reasonable time for the insurers to review the insured's claim and determine whether an appraisal was appropriate, particularly where the proof presented was identified as "preliminary."[497]

In Kentucky, the court construed a pro se litigant's response to an insurer's motion to dismiss as a motion to compel appraisal, as the court noted that liberal construction is afforded pro se litigants.[498]

It has been held that although the policy does not state that the appraisal process may be invoked only after the insured has submitted proofs of loss, it does provide that a party may demand appraisal if the parties fail to agree on the amount of loss. This implies that the insured was required to fulfill their post-loss duties and make a good faith attempt to come to an agreement on the amount of loss before invoking the clause. This necessarily means that the parties would engage in some meaningful exchange of information sufficient

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[497] S.R. International Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC, 2004 WL 2979790 (S.D.N.Y. 2004).
[498] *See* Bruckner v. Sentinel Ins. Co., Ltd., 2011 WL 589911 (E.D.Ky. 2011).

for each party to arrive at a conclusion before a disagreement could exist.[499]

However, if the carrier had waived the proof of loss requirement, a superfluous proof filed after the commencement of litigation does not reinstate the insurer's right to demand appraisal.[500]

Ask class what this means

The disagreement necessary to trigger appraisal cannot be unilateral in that the clause contemplates some meaningful exchange of information sufficient for each party to arrive at a conclusion before a disagreement can exist.[501]

Case Study

This issue was highlighted in a Florida case in which the insured demanded an appraisal before providing notice to the insurer that it disagreed with the insurer's position on the amount of loss, and thus, before there was the requisite disagreement between the parties. The court held that the insured's appraisal request was premature as the insurer was not given the opportunity to invoke the post-loss conditions in the policies, much less assert disagreement with the insured. As the court determined that the insured was attempting to

[499] Tavilla v. Employer Mut. Cas. Ins. Co., 2008 WL 2154800 (Ariz. App. Div.1 2008).
[500] Williams v. Southern General Ins. Co., 440 S.E.2d 753 (Ga. Ct. App. 1994).
[501] Hailey v. Auto-owners Ins. Co., 181 N.C. App. 677, 640 S.E.2d 849 (2007).

unilaterally create a disagreement, the insured could not yet compel appraisal.[502]

It should be noted that where there had been a continuation of good faith negotiations as to the amount of loss, and where the insured was not handicapped by the insurer's delay in demanding appraisal, the insurer's delay until after the insured had instituted suit was not unreasonable and the parties were forced to proceed to appraisal, particularly where the loss was more than usually difficult to assess.[503]

Case Study

A Federal District Court sitting in the Northern District of Iowa has held that as the appraisal clause lacks a specific time for the demand to be made, contract interpretation requires a demand to be made within a "reasonable time. In Terra Industries, Inc.,"[504] the court was confronted with the occurrence of a catastrophic explosion at the insured's fertilizer plant which caused an unprecedented amount of damage. After more than two years of investigation and discussion concerning quantification of the damage, the insured commenced litigation, followed six days later by the submission of a final proof of loss. Several months later, during

502 Garden-Aire Village South Condo Ass'n Inc. v. QBE Ins. Corp., 774 F.Supp.2d 1224 (S.D.Fla. 2011).
503 School District No. 1 of Silver Bow County, 146 Mont. 208 (1965).
504 981 F.Supp. 581 (N.D. Iowa 1997).

motion practice, the insurer demanded appraisal. In concluding that the insurer had waived its right to demand an appraisal, the court relied on the language of the appraisal provision itself in concluding that the carrier's actions were unreasonable. The insurance policy under consideration, as most insurance policies, requires an appraisal demand to be made when "the insured and the company shall fail to agree as to the actual cash value of the amount of loss." While the clause lacks a specific time constraint requiring the demand be made within a particular amount of time, rules of construction require that such a demand be made within "a reasonable period of time".[505]

The question of what constitutes a

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[505] Id. at 597; *See also*, Middlesex Mut. Assur. Co. v. Clinton, 38 Conn. App. 555, 569, 662 A.2d 1319, 1327 (1995) (insurer waived its right to appraisal because of an unjustifiable delay in demanding it.); Meineke v. Twin City Fire Ins. Co., 181 Az. 576, 892 P.2d 1365 (Ariz.App.Div. 1 1995) (court investigated whether the carrier had waived appraisal by an "unreasonable delay" before making such demand); Preferred Mut. Ins. Co. v. Martinez, 643 So.2d 1101, 1102-03 (Fla. Dist. Ct. App. 1st Dist. 1994) (court considered whether the insurer unreasonably delayed making a demand for appraisal and thus waived the benefit of the provision when insurer failed to demand appraisal during lengthy negotiations prior to trial); Monroe Guar. Ins. Co. v. Backstage, Inc., 537 N.E.2d 528, 529 (Ind. Ct. App. 3d Dist. 1989) (suit had been commenced six weeks before the appraisal demand and the court considered whether the demand was made within a "reasonable time."); Keesling v. Western Fire Ins. Co. of Fort Scott, Kansas, 10 Wash. App. 841, 847-48, 520 P.2d 622, 626-27 (1974) (the court considered whether appraisal demand made after the action was commenced was made within a "reasonable" period of time); Hanby v. Maryland Cas. Co., 265 A.2d 28 (Del. 1970); School District # 1 of Silver Bow County v. Globe Republic Ins. of America, 146 Mont. 208, 214, 404 P.2d 889, 893 (1965) (carrier's demand must be made within a reasonable time after disagreement has arisen as to the amount of loss or is deemed waived.); Bard's Apparel Mfg. Inc. v. Bituminous Fire & Marine Ins. Co., 849 F.2d 245 (6th Cir. 1988) (applying Tennessee law, found that carrier who waited to demand an appraisal until after the insured gave notice of intent to file suit had waived its right to appraisal).

reasonable time depends on all the surrounding circumstances. Whether or not the parties have demanded appraisal within a reasonable time is ordinarily a question to be determined by a jury which would take into consideration the specific circumstances of each case.

Appraisal becomes ripe and the time period of interest begins when the desirability or necessity of the appraisal became apparent to the party demanding it. The measure of this reasonable period of time generally should not be carried beyond the period of 60 days after the receipt of the proof of loss.[506]

With policies that contain such a 60 day clause, demands for appraisal made after the proofs of loss have been retained more than 3 weeks without objection, have been deemed to be too late.[507] Similarly, it has been held that a demand made 59 days after proofs had been furnished[508] in one matter, and five months after the proofs had been received in another matter had been too late.[509] However, it was held that a delay of 7 days after termination of negotiations to settle the loss was not an unreasonable delay in making an

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[506] Springfield Fire and Marine Ins. Co. v. Hays, 57 Okla. 266, 156 P. 673 (1916).

[507] Lion Fire Ins. Co. v. Heath, 29 Tex. Civ. App. 203, 68 S.W. 305 (1902).

[508] Fireman's Fund Ins. Co. v. Caye, 146 Ky. L. Rptr. 810 (1893).

[509] American Central Ins. Co. v. Heath, 29 Tex. Civ. App. 445, 69 S.W. 235 (1902).

appraisal demand.[510]

Reliance upon the policy's 60 day deadline for payment in response to a proof of loss has been rejected by some courts in establishing a time within which an appraisal must be demanded in favor of a test of reasonableness.[511]

It is not sufficient that the demand for appraisal was mailed within the specified time, but it must also be received by the insured within that period.[512]

In Scottsdale Ins. Co. v. University at 107th Avenue, Inc.,[513] the University suffered hurricane damage and filed a claim. The carrier then inspected and denied the University's claim because the carrier's independent adjuster estimated the damages to be well below the University's claim. When the insured demanded an appraisal, Scottsdale argued that the University had failed to provide the post-loss information required by the insurance policy and that referring the matter to appraisal was premature. The court concluded that the "nature of the insured's

[510] Hamilton's Executors v. Fireman's Ins. Co., 4 Ohio Dec. 407, 11 Ohio Dec. Reprint 784 (Sup. Ct. 1896).
[511] Terra Ind. Inc. v. Commonwealth Ins. Co. of America, 981 F.Supp. 581 (N.D. Iowa 1997).
[512] Winchester, 160 Cal. 1.
[513] 827 So.2d 1016 (Fla. 3d DCA 2002).

post-loss obligation is merely to provide the insurer with an independent means by which to determine the amount of loss as opposed to relying solely on the representations of the insured."[514] Under these circumstances the insurers claim that it did not have sufficient information from which to assess the claim was rejected and the demand for appraisal was held not to be premature.

However, other jurisdictions require the insured to comply with all post loss duties before the insurer must submit to appraisal. In Scottsdale Ins. Co. v. Prayer Tabernacle Early Church of Jesus Christ Number 1,[515] an Alabama court held that Scottsdale did not breach its contractual obligations under the policy when it failed to name its appraiser in response to an insured's demand for appraisal. The court held that nothing in the policy required Scottsdale to name an appraiser before it completed its investigation of the insured's claim. Under the policy, Scottsdale had the right to require the insured to comply with all of its post loss duties before Scottsdale was required to submit to the appraisal process.

[514] Id., quoting United States Fid. and Guar. Co. v. Romay, 744 So.2d 467, 471 N. 4 (Fla. 3d DCA 1999).
[515] 2011 WL 3320544 (S.D.Ala.2011)

In Florida, it was held that an insured was not entitled to an appraisal of its claim for hurricane damage until after it satisfied its obligations to provide the insurer with various documents and to provided the insurer's loss consultant with access to the damaged property.[516] The court determined that the insurer must be given a reasonable opportunity to investigate and adjust the claim before any disagreement regarding the value of the property or the amount of loss could arise. Appraisal is only warranted when there is a real difference in fact, arising out of an actual and honest effort to reach an agreement between the insured and the insurer.[517]

Additionally, it has been held that where a fire policy required a demand for appraisal to be made by the insurer within 90 days after submission of a proof of loss, a notice mailed within 90 days but received on the 91st day was too late.[518]

A Florida insurer had substantially complied with an appraisal provision requiring identification of an appraiser within 20 days of the date an appraisal demand was received

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[516] Citizens Property Ins. Corp. v. Galeria Villas Condominium Ass'n Inc., 48 So.3d 188 (Fla.3d DCA 2010).
[517] *Id.*
[518] Covey v. National Union Fire Ins. Co. of Pittsburgh, 31 Cal. App. 579, 161 P. 35 (3d Dist. 1915).

by the other party. The insured contended that the insurer should have notified him within 20 days of filing its initial motion to compel appraisal or when the hearing was held on this motion, and believed the insurer had identified its appraiser one day late. However, the court did not find the carrier's conduct to be "so inconsistent with the time provided for notification under the policy that its failure to so act constituted a waiver." Further, the insurer had the right to wait for a court to issue a written order.[519]

The prevailing New York view states that an appraisal must be demanded within a reasonable time and that it is usually too late to demand an appraisal after the time for the payment of loss following submission of proofs has expired.[520]

It has been held that "elapsed time" does not in itself make a demand unreasonable under the circumstances, and appraisal may even be demanded after litigation has commenced if the circumstances make it appropriate.[521]

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[519] Diaz v. Am. Bankers Ins. Co. of Florida, 662 So.2d 416 (Fla.3d DCA 1995).
[520] Max Gwertzman, *A Legal Analysis of the Appraisal Agreement*, Roberts Publishing Corp., 4th ed. 1972.
[521] Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N.Y. 304, 62 N.E. 392 (1901); Peck v. Planet Ins. Co., 1994 WL 381544 (S.D.N.Y. 1994).

The carrier would be deemed to have waived its right to an appraisal where it delayed demanding an appraisal until after a portion of the damaged property had been sold, making the appraisal impossible.[522]

Little judicial support can be found for the proposition that the filing of a lawsuit necessarily cuts off recourse to the appraisal process,[523] though several cases have stated a contrary position.[524]

It has been held that the insurer had waived the appraisal provision when it first requested appraisal 23 months after receiving notice of plaintiff's loss. In Hodges v. Pennsylvania Miller's Mut. Ins. Co.,[525] the court considered the circumstances of the case including the fact that a trial date had actually been set and concluded that the insurer's request was untimely and did not bar plaintiff's claim in litigation.

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522 Chainless Cycle, Id.

523 Terra Ind. Inc., 981 F.Supp. 581; Clinton, 38 Conn. App. 555; Meineke, 181 Az. 576; Martinez, 643 So.2d 1101, 1102-03; Backstage, Inc., 537 N.E.2d 528, 529; Keesling, 10 Wash. App. 841, 847-48 (Wash. Ct. App. 1974); Hanby, 265 A.2d 28; School District, 146 Mont. 208, 214; Bard's Apparel, 849 F.2d 245.

524 Littrell v. Allemania Fire Ins. Co. of Pittsburgh, Pa., 222 A.D. 302, 226 N.Y.S.343 (3d Dept. 1928), *modified on other grounds,* 224 A.D. 523, 231 N.Y.S. 520 (3d Dept. 1928) *rev'd on other grounds,* 250 N.Y. 628, 166 N.E. 350 (1929); Davis v. Imperial Ins. Co., 16 Wash. 241, 47 P. 439 (1896); Hayes v. Allstate Ins. Co., 722 F.2d 1332, 1335 (7th Cir. 1983); *But see*, Backstage, Inc., 537 N.E.2d 528.

525 449 Pa. Super. 341, 673 A.2d 973, 975 (1996).

In Michigan, it has been held that appraisal was appropriate and no accord and satisfaction had occurred where an insurer, in allegedly attempting to settle a business income claim, did not write "final payment" on the check to the insured or provide an accompanying letter indicating the check was a final payment or settlement of the business income claim. Thus, because there was no proof that the matter had in fact been settled, the insurer had no defense to the insured's motion for an order to compel appraisal.[526]

[526] King v. Hartford Cas. Ins. Co., 2010 WL 5390135 (E.D.Mich., 2010).

B] RESPONDING TO THE DEMAND FOR APPRAISAL

Once appraisal is demanded, the party upon whom the appraisal demand has been served generally has 20 days within which to respond by appointing an appraiser.

Where the policy or statute does not set a time limit for a response, a response is required within a reasonable time.[527] The failure to respond within a reasonable period of time is a material breach of the policy.[528] In Saxena v. New York Property Insurance Und. Ass'n.[529] for example, one year was held to be too long to wait before responding to a demand for appraisal.

SABA!

Where a party to the policy fails to respond to a demand within 20 days, it has been held that the demanding party may proceed to court for the appointment of an umpire whereupon an agreement between the umpire and the single appraiser would properly resolve the loss.[530]

In Smith v. Civil Service Employee's Ins.

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[527] Saxena v. New York Property Ins. Und. Ass'n., 232 A.D.2d 622, 648 N.Y.S.2d 689 (2d Dept. 1996).

[528] Id.; Chainless Cycle, 169 N.Y. 304.

[529] Id.

[530] Saba v. Homeland Ins. Co. of America, 159 Ohio St. 237, 112 N.E.2d 1 (1953).

No. 33217
Supreme Court of Ohio

Saba v. Homeland Ins. Co. of America

159 Ohio St. 237 (Ohio 1953) · 112 N.E.2d 1
Decided Apr 22, 1953

WEYGANDT, C.J.

Each of the four policies contains the following provisions:

"Appraisal. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in
239 writing, so itemized, of any two when filed with this company shall determine *239 the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally. * * *

"Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

The parties were unable to agree on the amount of the loss. Acting under the appraisal clause, the plaintiff made a written demand on the defendants for an appraisal, and he notified them of the appraiser he had selected. The defendants ignored the notice. After waiting the stipulated period of twenty days, the plaintiff asked the defendants the name of the appraiser they had chosen. They informed the plaintiff that they had selected none and would take no such action. The plaintiff then waited the further required period of fifteen days before filing his motion for the appointment of an umpire by the Court of Probate. After the umpire was appointed, he and the plaintiff's appraiser duly made an award. Subsequently an action thereon was instituted in the Court of Common Pleas and later removed to the federal trial court.

The defendants in the instant case contend that the appraisal provisions are *binding* on the *plaintiff* insured but *not* on *themselves* as insurers. They urge that the provisions are revocable by themselves but not by the plaintiff insured.

The above quoted language of the policies is in part that "in case the insured and this company shall fail to agree as to the actual cash value or the amount of the loss, then, on the written demand of *either, each shall*
240 select a competent and disinterested appraiser and notify the other of the appraiser selected within *240 twenty days of such demand." (Italics supplied.) This provision is not an involved one, the words are simple, and the

meaning is clear. Appraisers are to be selected on the demand of *either* party. In none of the policies is there the slightest intimation that the selection is to be made on the demand of the insurer and not on the demand of the insured. If this were the import of the provision, there could be no excuse for the use of the word "either."

This view is sustained by the succeeding word "each." There is no suggestion that the insured alone shall select an appraiser on demand. As indicated by Ballentine's Law Dictionary, the obvious meaning of the word "each" is "every one of the two or more comprising the whole."

Nor is there doubt about the use of the next succeeding word "shall." It clearly is employed in its ordinary mandatory sense. Furthermore, there is nothing in the context to warrant an inference that the word is used in a mandatory sense as to the insured alone and not as to the insurer. The provisions are not revocable by either.

Hence, unless these words are held to signify the exact opposite of their obvious meaning, the appraisers must be selected when demanded by the insured or by the insurer.

Many decisions are cited in the briefs for the purpose of assisting in the interpretation of these appraisal provisions. However, it is not necessary to interpret language that is simple and unambiguous. The rule with reference to such appraisal provisions is summarized as follows in 45 Corpus Juris Secundum, 1353, Section 1110:

"Their purpose is to provide a plain, speedy, inexpensive and just determination of the extent of the loss, and
241 insured has the right to have the amount of *241 the loss settled as provided in the arbitration clause of his policy even though insurer denies liability or refuses to participate in the arbitration. The clause does not require the parties to do anything but appoint their appraisers, notify them and hand them the policy."

In the case of *Fire Association of Philadelphia* v. *Agresta*, 115 Ohio St. 426, 154 N.E. 723, a different question was involved but the policy contained provisions similar to those in the present policies. In the discussion in the opinion, it was observed that the provisions were applicable alike to both the insurer and the insured.

The defendants insist further that if they refuse to select an appraiser, the plaintiff has no recourse except to file suits on his policies.

This is equivalent to telling the plaintiff that, although he paid a premium for policies containing the advantage of the appraisal provisions, he in fact received nothing therefor, and that the sole result of the insertion of the appraisal provisions in the policies was that the defendants gave themselves the advantageous right to compel the plaintiff to select an appraiser before he could sue on the policies. Hence, under this theory the appraisal provisions were a detriment instead of a benefit to the plaintiff, inasmuch as even without the appraisal provisions he, of course, had the right to sue. The plaintiff was led to believe that he was purchasing policies giving him the right to an appraisal and a prompt settlement of his loss so he would have the insurance money with which to reconstruct his building without the expense and delay incident to litigation. Obviously this is a valuable right which he should not be denied. The failure and refusal of the defendants to select an appraiser as
242 required by the provisions of the policies *242 constituted a failure to agree on an umpire just as effectively as if they had selected an appraiser and instructed him not to agree on an umpire. Under these circumstances the plaintiff was authorized to request the court to select such umpire.

That this view of the policy provisions is consistent with the legislative policy of this state is demonstrated by the provisions of Section 12148-1 *et seq.*, General Code, to the effect that such arbitration provisions in a written contract "shall be valid, irrevocable and enforceable." Section 12148-4, General Code, reads as follows:

"If, in the agreement, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or an umpire, or in filling a vacancy, then upon the application of either party to the controversy the Court of Common Pleas in and for the county in which the arbitration is to be held shall, within fifteen (15) days after such application is made, designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and, unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator."

It is a further contention of the defendants that the appraisal provisions are separate and not a part of the insurance policies. A study of the policies discloses no basis whatsoever for this view. The appraisal provisions
243 are an integral part of the body of each policy precisely the same as every other paragraph. *243 Were there doubt as to this, the elementary rule of construction would require that the ambiguity be resolved in favor of the plaintiff and against the defendants, since the language is that of the defendant insurers.

Like the lower courts, this court can discover no reason for holding the plaintiff to the agreement but excusing the defendants from their obligations under the plain, inescapable language they themselves chose to use when they sold the policies to the plaintiff. The Court of Probate was not in error in appointing an umpire to serve in conformity with the provisions of the policies.

Judgment affirmed.

MIDDLETON, TAFT, ZIMMERMAN and STEWART, JJ., concur.

MATTHIAS and HART, JJ., dissent.

MATTHIAS, J., dissenting.

The insurers, desiring that the amount of the loss in question be determined by a jury in an action on the policies, refused to appoint an appraiser or participate in an appraisal. The only question of law presented is the consequence of such negative action of the insurers.

In the situation disclosed, was the order of the Probate Court appointing an umpire valid, and are the insurers precluded by the appraisal and award made by the appraiser selected by the insured and the umpire appointed by the Probate Court?

It is the contention of the insurers that the insured's demand for an appraisal does not make such proceeding mandatory and thus deprive the insurers of the option of having the amount of the fire loss determined by a jury in an action on the policies.

244 The provision of the policies, giving rise to the controversy, *244 is contained in the so-called standard form policy long used throughout the United States, but diligence of counsel has failed to disclose a decision of any court of last resort of the question clearly presented in the instant case.

Notwithstanding the mandatory language employed, which is emphasized in the majority opinion, the fact must be recognized that, although it is expressely provided that no suit on the policies may be sustained unless all requirements thereof shall have been complied with, such condition is applicable only to the insured, and there is no express provision authorizing an action based on the appraisal and award as made herein, such proceeding being predicated upon the refusal of the insurers to participate in such appraisal.

With the exception of a Minnesota Supreme Court decision, applying a specific statutory provision of that state which prescribes the procedure to be followed, we find no authority contrary to the principle, generally adopted and applied, that the waiver of the appraisal provision of a policy by the insurer, whether resulting from inaction or by express refusal to participate in such appraisement, should be accorded no effect or consequence other than the authorization of immediate suit on the policy by the insured.

The judgment should be reversed.

HART, J., dissenting.

I dissent because, in my opinion, the remedy afforded to the plaintiff by the Probate Court and now finally approved by the majority opinion in this court is not legally available to him.

"At common law the authority of an arbitrator is, in its nature, revocable, and the general rule is that a naked
245 executory agreement, not under authority of *245 statute or rule of court, to submit *to arbitration* existing or prospective matters of difference is revocable by express act of either party or by implication of law at any time before the submission is consummated by a valid award." (Italics supplied.) 3 American Jurisprudence, 891, Section 59; 29 American Jurisprudence, 926, Section 1240; 45 Corpus Juris Secundum, 1375, Section 1131; *Lewis, Admr.*, v. *Brotherhood Accident Co.*, 194 Mass. 1, 79 N.E. 802, 17 L.R.A. (N.S.), 714; *State, Knaus, Pros.*, v. *Jenkins*, 40 N.J. Law, 288, 29 Am. Rep., 237; *Williams* v. *Branning Mfg. Co.*, 153 N.C. 7, 68 S.E. 902, 31 L.R.A. (N.S.), 679, 138 Am. St. Rep., 637; annotations, 42 A.L.R., 732, and 69 A.L.R., 817.

Again, it is stated as follows in 29 American Jurisprudence, 926, Section 1240:

"In accordance with general principles applicable to all contracts, it is the rule that a provision in an insurance policy *that all disputes arising under the policy shall be submitted to arbitrators*, or a provision similar in substance and effect, is not binding." (Italics supplied.) *Lewis, Admr.*, v. *Brotherhood Accident Co., supra; Niagara Fire Ins. Co.* v. *Bishop*, 154 Ill. 9, 39 N.E. 1102, 45 Am. St. Rep., 105; annotation, 47 L.R.A. (N.S.), 354.

The position of the courts is that, although a contract to arbitrate is valid, it is not binding and irrevocable so long as it remains executory and has not been carried through to an award or decision. *First Ecclesiastical Society* v. *Besse*, 98 Conn. 616, 119 A. 903; *Martin* v. *Vansant*, 99 Wn. 106, 168 P. 990, Ann. Cas., 1918D, 1147.

The reason for this rule is that courts of law refuse to enforce any contract which tends to oust the jurisdiction
246 of the court. "On the other hand, the view prevailing in nearly all jurisdictions is that a *246 stipulation not ousting the jurisdiction of the courts, but *leaving the general question of liability for a loss to be judicially determined*, and simply providing a reasonable method of estimating and ascertaining *the amount of the loss, is valid*." (Italics supplied.) 29 American Jurisprudence, 926, Section 1240; *Royal Ins. Co.* v. *Ries*, 80 Ohio St. 272, 283 to 289, 88 N.E. 638; *Hamilton* v. *Liverpool, London Globe Ins. Co.*, 136 U.S. 242, 34 L. Ed., 419, 10 S. Ct., 945; *Norwich Union Fire Ins. Soc.* v. *Cohn*, 68 F.2d 42, 94 A.L.R., 494, certiorari denied, 291 U.S. 665, 78 L. Ed., 1056, 54 S. Ct., 440; *Niagara Fire Ins. Co.* v. *Bishop, supra; Second Society of Universalists* v. *Royal Ins. Co.*, 221 Mass. 518, 109 N.E. 384, Ann. Cas., 1917E, 491; *Chapman* v. *Rockford Ins. Co.*, 89 Wis. 572, 62 N.W. 422, 28 L.R.A., 405.

In 45 Corpus Juris Secundum, 1352, Section 1110, it is likewise stated:

"Although a general arbitration clause requiring submission to arbitrators of the liability of the insurer is invalid, a clause requiring submission of disagreement as to amount of loss is valid, such clause being construed as requiring appraisal of the amount of loss, but not determination of other matters, as a condition precedent to recovery."

The provisions in the policies in the instant case do not call for the determination of the liabilities of the parties to the contracts, but only for the determination of a single question of fact — the amount of the loss sustained. The provisions, therefore, are an appraisal clause and not an arbitration clause, and this difference is significant in the determination of the rights of the parties as to the remedy which they may pursue upon the breach of the agreement by any party to appraise the loss. 29 American Jurisprudence, 935, Section 1252. Where the amount
247 of loss is involved, *247 an appraisal is involved. *Second Society of Universalists* v. *Royal Ins. Co., supra; Omaha Water Co.* v. *City of Omaha*, 162 F., 225; *Sebree* v. *Board of Edn.*, 254 Ill. 438, 98 N.E. 931.

In 47 L.R.A. (N.S.), 382, the rule supported by many authorities is stated as follows:

"All agreements to submit to the judgment and decision of third persons, as prerequisites to litigations, questions that relate merely to prices, values, sums recoverable, amounts of losses or damages payable, quantities, or quality — all of which come under the category of auxiliary, collateral and incidental issues — are considered not to oust the courts of their jurisdiction, and when not waived or abrogated, are respected and enforced judicially as valid and effectual." See *Royal Ins. Co.* v. *Ries, supra; Myers* v. *Jenkins, Admr.*, 63 Ohio St. 101 to 120, 57 N.E. 1089, 81 Am. St. Rep., 613.

The issue involved in this proceeding, as I see it, is mainly one of procedure. Assuming that the contracts to appoint appraisers to determine the amount of loss under the insurance contracts, as distinguished from a contract to arbitrate the controversy, are valid and binding, what are the remedies of the insured in case the insurers breach their contracts by refusing to appoint an appraiser? May the insured, in the absence of a controlling statute, have specific performance of the contracts? Does he have an action for damages for the breach, or does he have the remedy sought to be enforced in this action?

Clearly, a court will not compel specific performance of a contract to submit a matter to arbitration or to an appraisal. In the early case of *Conner* v. *Drake*, 1 Ohio St. 166, 168, wherein there was a failure of one of the
248 parties to a contract for arbitration to appoint an arbitrator, this court held that "a court *248 of equity will not force the specific performance of an agreement to refer any matter in controversy between adverse parties to arbitrators. Nor will they compel arbitrators to make an award."

On the other hand, damages for a breach of contract to appraise is an appropriate remedy. The capacity to breach a contract exists whenever the circumstances are such that courts will not decree specific performance, but the right to do so depends upon some justification recognized in the law. 12 American Jurisprudence, 961, Section 385.

At common law, the revocation of, or the failure or refusal to perform, a valid arbitration agreement by a party thereto ordinarily leaves the opposite party the sole remedy of an action for a breach of the agreement to arbitrate, wherein he may recover whatever actual loss he may prove, just as he could do for the breach of any other contract. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 68 L. Ed., 582, 44 S. Ct., 274; *Hamilton* v. *Home Ins. Co.*, 137 U.S. 370, 34 L. Ed., 708, 11 S. Ct., 133; *Atkieselskabet Korn-Og* v. *Rederiaktiebolaget Atlanten*, 250 F., 935, Ann. Cas. 1918E, 491, affirmed, *The Atlanten*, 252 U.S. 313, 64 L. Ed., 586, 40 S. Ct., 332; *Read* v. *State Ins. Co.*, 103 Iowa 307, 72 N.W. 665, 64 Am. St. Rep., 180; *Hartford Fire Ins. Co.* v. *Hon*, 66 Neb. 555, 92 N.W. 746, 103 Am. St. Rep., 725, 60 L.R.A., 436; *Goerke Kirch Co.* v. *Goerke Kirch Holding*

Co., 118 N.J. Eq. 1, 176 A. 902; *Haggart* v. *Morgan*, 5 N.Y., 422, 55 Am. Dec., 350; *Grady* v. *Home Fire Marine Ins. Co.*, 27 R.I. 435, 63 A. 173; *Martin* v. *Vansant, supra; Kinney* v. *Balt. Ohio Emp. Rel. Assn.*, 35 W. Va. 385, 14 S.E. 8, 15 L.R.A., 142; *Kahn* v. *Traders Ins. Co.*, 4 Wyo. 419, 34 P. 1059, 62 Am. St. Rep., 47;
249 *Wynne* v. *Greenleaf-Johnson Lumber Co.*, 179 N.C. 320, 102 S.E. 403, 8 A.L.R., 1081, annotations, *249 15 L.R.A., 142; 47 L.R.A. (N.S.), 408, 409, 447. Damages may be recovered for such breach. See *Union Ins. Co.* v. *Central Trust Co.*, 157 N.Y. 633, 52 N.E. 671, 44 L.R.A., 227; annotation, 47 L.R.A. (N.S.), 409, 410.

A party wrongfully revoking an agreement for submission to an appraisal renders himself liable to the other party in an action for damages. *Dolman* v. *Board of County Commrs.*, 116 Kan. 201, 206, 226 P. 240; *Goerke Kirch Co.* v. *Goerke Kirch Holding Co., supra.* A party is entitled to such damages as he may directly and proximately suffer as a consequence of such a breach. *Bullock* v. *Mason*, 194 Ala. 663, 69 So. 882. He is entitled at least to nominal damages. *Atkieselskabet Korn-Og* v. *Rederiaktiebolaget Atlanten, supra; Electrical Research Products, Inc.*, v. *Vitaphone Corp.*, 20 Del. Ch. 417, 171 A. 738. Doubtless, such damages for breach of contract to appraise, aside from the right to sue on the policy, would be measured by the cost or additional expense, if any, incurred in establishing the issue of loss under the policy in an action at law (See *Union Ins. Co.* v. *Central Trust Co., supra;* annotation, 47 L.R.A. [N.S.], 409, 410) and any expense of appraisal, prior to revocation.

In the instant case, does the insured have any other remedy. In my opinion, there is no warrant for the procedure adopted in this case. A court, upon which a private contract bestows authority to appoint an appraiser or umpire for the parties in case of their inability to agree on some question of fact concerning their contractual relationship, acts purely as an agent of the parties. The person designated in the insurance contracts here involved to appoint an umpire might well have been a county officer, a banker, a lawyer, or any other private
250 individual, who in such instance would have been clothed with exactly the same *250 power and authority as the court in the instant case. In the absence of statute, the court in the exercise of such function has no jurisdiction to perform any act other than that specifically authorized and set out in the contract. It can not render judgments or decrees affecting the rights of the parties. The utmost that the Probate Court could do in the instant case was to "select" an umpire *under and in accordance with the terms of the contract*, whereupon the authority of appointment ceased. Apparently, the Probate Court in the instant case, appreciating that its contractual authority to represent the parties to the insurance policies in appointing an umpire had been curtailed and thwarted by the failure of the insurers to name an appraiser, conceived the idea that since it was a court it could judicially expand the scope of its authority to make the appointment. Otherwise, there was no occasion, as a substitute for its authority to "select" an umpire at "the request" of the parties, for the court to take judicial jurisdiction of a motion to appoint, issue summons on the motion directed to the parties defendant, hear the motion and make the appointment of the umpire by a court order duly journalized. There was no necessity, occasion or authority for the court to issue a summons upon the motion for such appointment and to undertake to exercise judicial jurisdiction in naming an umpire outside the terms of the contracts. The rights of the parties beyond the mere appointment of an umpire, when authorized, were wholly within the authority of a court of general jurisdiction.

Under the terms of the contracts there was no authority whatever for the appointment of an umpire until each party had appointed his or its appraiser. These two were first charged with the appointment of the umpire. Only
251 after they had failed to make an *251 appointment did the designated agent have the power to do so. The failure of the insurers to appoint their appraiser resulted in the breach of the contracts, but the designated agent was without authority to appoint an umpire until such appraiser was first appointed. Where failure of appraisers appointed by the parties to agree is the occasion for the appointment of an umpire, the court or other party

designated to appoint such umpire is not authorized to do so because of the insurer's failure to appoint. In other words, the insurer's failure to appoint an appraiser will not warrant a court in appointing an umpire to act solely with the appraiser appointed by the insured. (*National Fire Ins. Co.* v. *Shuman*, 44 Ga. App. 819, 163 S.E. 306, and 50 Ga. App. 846, 178 S.E. 758.) This situation or possibility was apparently overlooked in the preparation of the contracts but because of the omission the appraisal clause became ineffective and inoperative. Neither the insured nor the designated agent could rewrite the contracts.

In Ohio, as well as in many other states, there exists an arbitration act or arbitration code which gives some court of general jurisdiction authority to require compulsory performance of a *pure arbitration agreement as distinguished from an appraisal.* In this state, a written contract *to arbitrate*, with certain exceptions, may be enforced by compulsory orders of *the Common Pleas Court* having jurisdiction over a party failing to perform the agreement, and such court *may require him* to appoint his appraiser in accordance with the procedure provided in the contract, if so provided, or otherwise if not so provided, and the court may then confirm, modify, or vacate the award of the arbitrators when made, and enter judgment thereon. See Sections 12148-1 to 12148-16, inclusive, General Code. Although there is a similar statute in at least one state relating to
252 "appraisals" (see *Glidden Co.* v. *Retail Hardware* *252 *Mut. Fire Ins. Co.*, 181 Minn. 518, 233 N.W. 310, 77 A.L.R., 616, affirmed, 284 U.S. 151, 76 L. Ed., 214, 52 S. Ct., 68), there is no such statute in Ohio, and in my opinion this arbitration act can have no application here. The writer of this dissent has made search of the authorities on this subject and is unable to find any case in which the procedure adopted in this case, namely, the appointment of an umpire before the two appraisers were appointed, has been attempted or remotely followed.

Even if the arbitration statute is invoked as to the basis for action, the court in this case failed to proceed in accordance therewith. Section 12148-4, General Code, provides that, if for any reason there is a lapse in the naming of an *arbitrator or an umpire*, or in filling a vacancy, then upon the application of either party to the controversy, the *Court of Common Pleas* of the county in which the arbitration is to be held shall, within 15 days after such application, appoint an arbitrator or umpire. Although I am of the opinion that this statute has no application to the instant case, nevertheless no attempt was made in appointing the umpire to proceed under it.

The judgment of the Court of Appeals should be reversed and the action dismissed.

Co.,[531] when faced with the carrier's refusal to appoint an appraiser in response to a demand for appraisal, the Court issued an order giving the carrier 10 days to select and employ an appraiser and to notify the court and the insured of the name and contact information and upon a failure to abide by the directive, the court indicated a willingness to consider a request for the court to appoint an appraiser and for an imposition of sanctions upon the insurer.

If the responding party is of a mind to either contest coverage and argue that the loss is not covered under the policy, or contest whether the dispute is subject to the appraisal process, these issues should be asserted forthwith. Some states require those special defenses to be asserted in a timely manner, such as when the party answers a motion to compel the appraisal.

For example, Connecticut requires this be done within 5 days of the receipt of a complaint seeking to compel the appraisal.[532]

Under the laws of the Province of Ontario, the responding party has 7 days to appoint an appraiser after being served with a written

[531] 2005 WL 2620537 (D. Ariz. 2005).
[532] Fishman v. Middlesex Mut. Assur. Co., 4 Conn. App. 339, 494 A.2d 606 (1985).

notice to do so.[533] The focus of the appraisal statute in the Province of Ontario is on speed, as each provision of the Insurance Act enhances expediency in the appraisal process. Within 30 days of the appraisal option being exercised, the claim should either be resolved or be in the hands of the umpire pending resolution.

The overriding considerations should be speed and good communication. If for example, additional time is necessary to locate an appropriate appraiser, an effort should be made to communicate the need for additional time to the demanding party with a request for an extension of time to respond. On the other hand, reasonable requests for extensions of time should be reasonably reviewed and granted when appropriate as the process is intended to be a cooperative one.

Once acknowledging that the appraisal process is appropriate in a particular claim, any unnecessary delay thwarts the intent of the provision and does a disservice to both of the parties to the process.

Timing has also been addressed with respect to challenging an appraiser. In Florida, it has been held that the matter of an

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[533] Ins. Act R.S.O. 1990 Ch. I-8 §128 (1990) (Ontario, Can.).

appraiser's incompetence must be raised promptly once the grounds for disqualification are discovered. In a case where an insured learned early on of such incompetence but did not seek the appraiser's disqualification in its complaint nor did the insured address the issue by motion approximately two years later, the Court declined to award attorney's fees to the insured on this issue. The Court also discussed the procedure for raising an appraiser's incompetence: a written demand for replacement of the insurer must be made, and if declined, a complaint must be filed in circuit court seeking the appraiser's removal.[534]

Case Study

However, over-aggressiveness can also lead to pretty unfortunate results. In a Texas case, the insured waited only 8 days before commencing an action to appoint an umpire. The court, accepting the representations made, appointed the umpire and an award was subsequently rendered. The matter was then removed to federal court and a motion was made to set aside the appraisal award and discharge the umpire due to the fact that the state court was without authority to appoint an umpire inasmuch as the 15 day period for consultation and umpire appointment by the appraisers had not yet run. By failing to wait

[534] Travelers of Florida v. Stormont, 43 So.3d 941 (Fla. 3d DCA 2010).

the 15 days referenced in the policy ("if they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge...") the claim's resolution was delayed at least 6 months pending the federal court's decision after which the parties presumably would have to start from scratch. This court saw the 15 day policy language as jurisdictional and concluded that in the absence of jurisdiction to appoint the umpire, the subsequent award had to be vacated. While this decision seems extreme, practitioners need to wait the 15 days prior to seeking judicial assistance with respect to umpire appointment.[535]

[535] Friedrichs v. Geovera Specialty Ins. Co., 2013 WL 674021 (S.D. Tex. 2013)

C] THE ORDER OF PRIORITY BETWEEN APPRAISAL AND LITIGATION

Where the amount of loss to items for which coverage has been admitted is substantial in relation to the total amount of the claim, the parties should be compelled to proceed to appraisal prior to the onset of litigation in order that the parties may recognize the scope of their disagreement prior to litigation. Furthermore, once an award is rendered on those matters not subject to a coverage dispute, the insured may collect this undisputed amount without the need to litigate for it. However, logic dictates that this not be the case where the amount of loss admittedly subject to appraisal is *de minimis* in relation to the balance of the claim as neither party should be compelled to incur the expense of appraisal where the majority of the claim will nevertheless be subject to litigation as a result of a coverage issue.

An additional rational for compelling appraisal under the aforementioned circumstances is the practical reality that upon conclusion of litigation, often years after the loss, the damaged property may no longer be available for inspection by the appraisal team or the condition of such damaged property may have substantially changed in the interim prejudicing one or both parties in their presentation of proof during the eventual appraisal.[536]

Where the outcome of the appraisal may have a significant bearing on the outcome of a coverage issue, it has been held that the coverage issue is thus not yet ripe for adjudication. In this situation, the appraisal should proceed to a conclusion as the coverage issue has not "matured enough to warrant judicial intervention." In Vine Street Ltd. Partnership v. QBE International Ins. Ltd.,[537] the parties disagreed as to the sub-limit of coverage for soft costs. The court determined that the appraisal should proceed and that the legal issue was not ripe until the value of the loss is known and the court need not make a determination as to the applicability of the sub-limit until such time.

Consistently, where a factual dispute existed as to whether an insured had complied with post-loss obligations, a Florida court stated that, "Before a circuit court can compel appraisal under an insurance policy, it must make a preliminary determination as to whether the demand for appraisal is ripe. 'Until these [post-loss] conditions are met and the

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[536] *"Before or After: The Interplay of Litigation and Appraisal*, *The Brief*, Winter 2004 ed. by Lon A. Berk, Christopher Poverman and Erik M. Figlio.

[537] 2004 WL 2526420 (Minn. 2004).

insurer has a reasonable opportunity to investigate and adjust the claim, there is no 'disagreement'...regarding the value of the property or the amount of loss' to be appraised". It held that, "[o]nce the trial court determines that a demand for appraisal is ripe, the court has the discretion to control the order in which an appraisal and coverage determinations proceed."[538]

Mandamus relief may be available where there is an abuse of discretion by the trial court "either in resolving factual issues or in determining legal principles, when there is no other adequate remedy at law." In Texas, "[t]he refusal to enforce a contract according to its terms constitutes an abuse of discretion that may be subject to mandamus relief". More specifically, Texas supreme court precedent provides that "failure to enforce an appraisal clause is an error of law constituting an abuse of discretion that cannot be remedied by appeal." A case which considered such relief did so where it ultimately observed an abuse of discretion by a trial court which had deemed appraisal waived, in the absence of evidence of the requisite intent to establish waiver.[539]

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538 Citizens Prop. Ins. Corp. v. Admiralty House, Inc., 66 So.3d 342 (2011).

539 In re Continental Cas.Co., 2010 WL 3703664 (Tex.App-Houston [14th Dist] 2010).

The Texas Court of Appeals has held that while mandamus relief is appropriate to enforce an appraisal clause in a policy because "denying an appraisal would vitiate the insurer's right to defend its breach of contract claim," mandamus relief is not appropriate regarding the grant or denial of a motion to abate the litigation proceedings.[540] This is because in Texas, litigation proceedings need not be abated while appraisal moves forward.[541]

A Texas court denied an insurer's petition in a decision where it examined mandamus relief in the context of appraisal issues, setting forth several established principles. While differentiating the circumstances before it from those directly applicable to this rule since enforcement of appraisal was not at issue in the instant case, it asserted a state supreme court holding that "mandamus relief is appropriate to enforce an appraisal clause because denying an appraisal would vitiate the insurer's right to defend its breach of contract claim." A more recent supreme court decision held that "mandamus will not lie regarding the grant or denial of a motion to abate" and with respect to insurance appraisal, "failure to grant [a] motion to abate

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[540] In re Liberty Mut. Group, Inc., 2011 WL 2149482 (Tex. App.-Houston [14 Dist.] 2011).

[541] *See* In re Universal Und. of Texas Ins. Co., 2011 WL 1713278 (Tex.2011).

is not subject to mandamus, and the proceedings need not be abated while appraisal goes forward."[542]

In the state of Florida, it is within the trial court's discretion to determine the order in which property insurance coverage and loss issues are considered. However, the court must first make a determination as to whether an arbitrable issue exists. Therefore, before arbitration or appraisal under a policy can be compelled, the party seeking appraisal must demonstrate that a disagreement or arbitrable issue exists.[543]

In Florida, a covenant for appraisal within an insurance policy to determine an amount of loss has been deemed binding. In a case where the subject policy provided that "the sum for which the insurer is liable shall not become payable until 60 days after an award by such arbitrators has been received by the insurer, when an appraisal has been required, or that no suit upon the policy shall be sustainable until after full compliance by the insured with all of such requirements," then

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[542] In re Liberty Mut. Group Inc., 2011 WL 2149482, citing In re Allstate Cnty. Mut. Ins. Co., 85 S.W.3d 193, 196 (Tex. 2002) and In re Universal Und. of Texas Ins. Co., 2011 WL 1713278 at *7 n.5 (Tex., 2011).

[543] *See* Citizens Prop. Ins. Corp. v. Mango Hill Condominium Ass'n 12, Inc., 54 So.3d 578, 36 Fla L. Weekly D298 (Fla. 3d DCA 2011).

arbitration and award are conditions precedent to an insured's right to pursue an action on the policy. In that case, an insurer promptly demanded appraisal pursuant to the policy but the request was declined by the insureds without reason. Thus, conditions precedent were not met in order for insureds' right to maintain an action under the policy.[544]

In Massachusetts, both state and federal courts applying state law require a reference to a three-person panel of disinterested referees to evaluate the amount of loss, a factual question, in the event of a disagreement between parties. Under circumstances where an insured did not request such proceedings before commencing an action, a court deemed compliance with this reference provision "a condition precedent to 'any right of action in law or equity to recover for such loss.'" In that case, summary judgment was properly awarded by the lower court based on this affirmative defense as raised by the adjuster and insurer.[545]

This ruling is consistent with that of another Florida case which provided additional explanation where coverage was contested and insureds sought to compel

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[544] Southern Home Ins, Co. v. Faulkner, 49 So.2d 542 (Fla. 1909).
[545] L & B Realty, Inc. v. Certuse Adjustment, Inc., 929 N.E.2d 358 (Mass. App. Ct. 1988), citing G.L. c. 175, §99, Twelfth, amended by St. 1985,c. 137, § 2.

appraisal. The Court relied upon a state supreme court holding in stating, "once the court establishes that the losses are covered by a policy, then those losses may be appraised." It stated that the trial court "must resolve all underlying coverage disputes prior to ordering an appraisal," and reversed and remanded because the trial court there had not resolved any factual dispute as to the insured's compliance with policy terms.[546]

In Florida, where the insured started suit prematurely, the notice requirement advising the insured of the right to mediation pursuant to Fla. Stat. §627.7015(I) does not apply (as it describes mediation as a viable option before an insured resorts to litigation), the insured cannot rely on the statute to avoid appraisal where her premature filing of the lawsuit rendered the statute inapplicable.[547]

In Pennsylvania, where the insured elected to sue when the carrier denied the claim, there is no prohibition against the recovery of damages in the litigation without satisfying the policy's appraisal clause.[548]

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[546] Sunshine State Ins. Co. v. Corridori, 28 So.3d 129, 35 Fla. L. Weekly D289 (Fla. 4th DCA 2010).
[547] American Integrity Ins. Co. v. Gainey, 100 So.3d 720, 37 Fla. L. Weekly D 2297 (Fla.2d DCA 2012).
[548] James F. Campenella Const. Co. v. Great Am. Ins. Co. of N.Y., 2010 WL 2076089 (E.D. Pa.).

Indeed, in Pennsylvania the insured may not be denied his right ... "to sue for damages."[549]

An insured was judged to have been fully warranted in resorting to the Court "in view of [an insurer's] neglect to actively avail itself of [the insured's] offer of an appraisement, and of the dilatory tactics it was pursuing in the adjustment of his loss." There, an insured's suggestion of appraisal was actually accepted by his insurer but subsequently, "no serious effort" to cooperate with the request was made. To the contrary, the insurer's practice was to engage in delay by making and withdrawing a series of appraiser appointments, until finally the insured sold the property at issue when he believed obtaining an appraisal would be impossible. The insurer insisted upon appraisal after it was sold and then repaired by the purchaser.[550]

Where the insurer has denied a claim in its entirety on the ground that it is not covered by the insurance policy, the issue is one for the court and should generally be determined prior to the onset of appraisal. The appraisal sought by the insureds after denial of the claim was the wrong remedy and was premature absent

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549 Ice City Inc. v. Ins. Co. of North America, 456 Pa 210, 314 A.2d 236 (Pa.1974); Id.

550 Talbert v. Northwestern Nat. Ins. Co., 120 So. 24 (1929).

a determination that coverage existed. It was held that the insureds remained free to file suit on the policy and at that time reassert their claim to appraisal.[551]

In North Carolina, the necessity of pursuing appraisal prior to commencing litigation was influenced by pertinent language within the insurance policy. Where policy language which is fairly common in the market, specifically provided that an insurer was not obligated to make a payment to its insured until the parties had agreed to an amount of loss or appraisal was complete, completion of the appraisal process was deemed a condition precedent to litigation. Because the insured did not complete appraisal before filing an action against the insurer, he could not commence an action at that point. The Court held that the lower court should have stayed proceedings following the insured's complaint and ordered them to participate in appraisal rather than dismissing the insured's claim for failure to comply with appraisal requirements.[552]

A Pennsylvania court found that

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[551] Corzo v. American Superior Ins. Co., 847 So.2d 584, 28 Fla. L. Weekly D 1432 (Fla. App. 3 Dist. 2003); Landmark American Ins. Co. v. Hacienda Village Homeowners Ass'n, Inc., 2008 WL 4371325 (M.D.Fla. 2008).

[552] Patel v. Scottsdale Ins. Co., 728 S.E.2d 394 (N.C. Ct. App. 2012).

appraisal was not triggered where an insurer had not admitted that the insured suffered a covered loss under the policy. The dispute involved policy coverage rather than loss calculation. Pennsylvania law sets forth that an appraisal provision "can only be invoked when the insurer admits liability and the sole issue is a dispute over the valuation of the loss." In making this assertion, the Court nonetheless recognized the state's preference for appraisal: "Appraisal clauses in insurance contracts are enforceable and recognized under Pennsylvania law as favored alternative dispute resolution mechanisms."[553]

The Federal District Court sitting in the Eastern District of Pennsylvania has stated that where an insured fails to comply with an appraisal clause they may not seek resolution through litigation and such an action was dismissed for failure to state a valid claim upon which relief could be granted.[554]

In Missouri, the Court stayed appraisal where it found the dispute was primarily concerned with coverage rather than amount of loss. The Court reasoned that an absence of coverage would result in denial of a claim and time and money spent on appraisal would be

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553 Keystone Asset Mgmt., Inc. v. West American Ins. Co., 2010 WL 4159249 (E.D. Pa. 2010).

554 Sydney v. Pacific Ind. Co., 2012 WL 3135529 (E.D. Pa. 2012).

wasteful. Alternatively, if neither was the case but exclusions applied to certain aspects of coverage, appraisal would be limited in scope. The Court stated that if appraisal took place prior to a coverage determination, modification of the appraisal award or additional appraisal may be warranted, resulting in financial hardship for both parties involved. The Court found further support for staying appraisal until a coverage determination was complete in that no damage would be suffered by the petitioner for appraisal and that judicial economy would be served by the stay.[555]

In California, where disagreement surrounded the nature of a dispute and thus appraisal's applicability under the circumstances, it was concluded that the decision of whether to stay appraisal fell within the trial court's discretion. The Court relied upon a precedential matter in which appraisal was deferred until after contractual and statutory interpretation issues not determinable by appraisers were settled by the trial court. It supported its decision by equating the rules applicable to arbitration to those applicable to insurance appraisal; a court could defer appraisal where appropriate, "just as it has 'the power to sever arbitrable claims from

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[555] SSDD, LLC v. Underwriters at Lloyd's, London, 2013 WL 2420676 (E.D. Mo. 2013).

inarbitrable ones and to stay either the arbitration or the judicial proceedings pending the outcome of the other.'" The Appellate Court further addressed abuse of discretion, finding none where the trial court deferred appraisal until the parties' rights under the policy and statutes were determined.[556]

A California case was stayed pending the conclusion of appraisal where factual disputes existed as to whether an insurer had failed to pay the actual cash value of property and misrepresented that its settlement reflected the actual cash value. There, insureds had raised an issue as to the calculation method to determine depreciation on its property claims and the insurer's concealment of the standard used. In spite of the insured's contention that statutory and regulatory questions must be clarified prior to appraisal, a California court found that they had not presented facts and circumstances implicating such a controversy that needed to be decided by appraisal. The Court stated, "'[t]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience

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[556] Alexander v. Farmers Ins.Co., Inc., 219 Cal.App.4th 1183, 162 Cal Rptr.3d 455, citing Kirkwood v. California State Auto. Ass'n Inter-Ins. Bureau, 193 Cal.App. 49 at 58-60, 122 Cal.Rptr.3d 480 (Cal. App. 2011) and Doan v. State Farm. Gen. Ins. Co., 195 Cal.App.4th at 1092-99, 125 Cal.Rptr.3d 793 (2011).

concerning the functions and extent of federal judicial power'…'[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'"[557]

In Colorado, a stay of litigation pending appraisal was also deemed appropriate on the basis that appraisal would resolve "key issues that are in dispute," having the potential to limit the need for discovery and costs to both parties. For example, if the storm at issue in that instance did not cause damage to the insured's property, then no coverage issue would result and there would be no need for the case to continue; in contrast, if it did cause the damage claimed, appraisal would resolve the extent of damage.[558]

In North Carolina, an insurer's motion to stay an action and compel appraisal was denied where a disagreement had arisen as to the order of appraisal and litigation. The Court

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[557] Pivonka v. Allstate Ins. Co., 2011 WL 6153611 (E.D.Cal. 2011), citing Public Serv. Comm'n of Utah v. Wycoff Co. Inc., 344 U.S. 237, 243, 73 S.Ct. 236, 97 L.Ed. 291 (1952) and Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941).

[558] Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 2015 U.S. Dist. LEXIS 48854.

determined North Carolina law requires that an appraiser's authority "is limited to the valuation of loss, and does not include deciding legal questions of policy interpretation or scope of coverage." While the insurer argued that appraisal was a condition precedent to the initiation of a lawsuit against it, the insured insisted that issues of coverage and bad faith by the insurer were not resolvable by appraisal and must be dealt with prior to the appraisal process. The court distinguished the instant facts from a Court of Appeals precedent which stood for the proposition that appraisal is a condition precedent to filing suit. In contrast to the circumstances in that matter, the present issues clearly pertained to coverage under state law. They included the number of occurrences, coverage existence and scope for equipment breakdowns, and the appropriateness of repair or replacement coverage and alleged bad faith conduct.[559]

However, where litigation was commenced as a direct result of an insurer's failure to proceed with appraisal, the question of whether completion of the appraisal process was a condition precedent to suit was deemed a question of fact.[560]

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[559] Otto Industries North America, Inc. v. The Phoenix Ins. Co., 2013 WL 2124163 (W.D.N.C. 2013).

[560] Gilbert v. Southern Trust Ins, Co., 555 S.E.2d 69 (Ga. Ct. App. 2001).

In Washington, it has been clarified that the stay of an action for the purpose of appraisal must not preclude parties from filing motions related to appraisal. In that case, proper valuation computations related to the appraisal process were in dispute. The court's holding was supported by the insurer's contention that the parties should not be ordered to participate in appraisal without resolving related disputes first.[561]

Where the insured was pursuing both appraisal and litigation of issues of bad faith, it was held that bifurcation was inappropriate as it would be inconvenient and would only serve to further delay litigation.[562]

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[561] Trident Seafoods Corp. v. Commonwealth Ins. Co., 2010 WL 3894111 (W.D.Wash. 2010).
[562] 1550 Brickell Associates v. Q.B.E. Ins. Corp., 2010 WL 4683889 (S.D.Fla. 2010).

D] TIMING OF THE AWARD

Interestingly, the Standard Fire Policy as well as most insurance policies fail to set forth any particular time reference with respect to the issuance of an award. This being the case, rules of contract construction would require the appraisal team to be held to a reasonableness standard, requiring the issuance of their award within a reasonable period of time from the beginning of the process.

It is clear from a careful reading of the appraisal provision that the drafters had as their primary objective, a speedy conclusion to the appraisal.

For this reason, the absence of a contractual time constraint should be viewed as an effort to give the participants flexibility and discretion in carrying out their appointed duties, not as a license for unnecessary delay or dilatory conduct.

It is fundamental to a successful conclusion to the appraisal that the award be rendered within a reasonable period of time and as soon as possible under the circumstances.

The parties to the appraisal may wish to consider including a proposed schedule for the conduct of the appraisal within the appraisal agreement so as to encourage responsible conduct. However, care should be taken in setting the deadlines, as the process often tends to be more protracted than anticipated even with the exercise of diligence. Allowances should be made for scheduling difficulties, inclement weather, the unavailability of witnesses and participants and other practical problems that make the scheduling of activities complicated.

While most policies do not define time constraints for the issuance of an award, some states have mandated time periods, the violation of which can have dire consequences to the appraisal.

In fact, in Connecticut, for example, it has been held that an award rendered after 30 days of the "completion of the hearing" has no legal effect unless the parties expressly extend the deadline.[563] Though it has been held that this deadline is strictly enforced[564] there is no recorded decision specifically applying this particular statute to an insurance appraisal or defining precisely what constitutes the completion of the hearing as contemplated by the statute.

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563 Time Within Which Award Shall be Rendered; Notice, Conn. Gen. Stat. §52-416 (2003).
564 Fagnani v. Integrity Finance Corp., 53 Del. 193, 167 A.2d 67 (Sup. Ct. 1960); Marsala v. Bath Corp. Of America, 157 Conn. 362, 254 A.2d 469 (1969).

E] WHEN THE LOSS IS PAYABLE

Pursuant to the Standard Fire Policy, a loss is payable no later than 60 days after receipt of proof and ascertainment of amount, by agreement or award.[565] This provision measures the timely payment of the loss from either the insured's filing of a proof of loss after the ascertainment of the amount of that loss, either by written agreement between the insurer and the insured or when such an agreement cannot be reached, by an award growing out of the appraisal process. The provision thus recognizes a period of time within which reasonable differences between the parties to the insurance contract may be resolved by methods prescribed in the contract itself.[566]

The 60 day provision is not absolute. Adjustment and payment must proceed without unnecessary delay based upon the facts of the case. Payment should be made as soon as possible after the award is rendered.[567]

Some states regulate the period within which payment must be made after an appraisal award. For example, New York Insurance Regulation §216.6 (f) states in part

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565 Lines 150-156 of the Standard Fire Policy; *See e.g.*, N.Y. Ins. Law §3404.

566 FC&S Bulletins, The National Underwriter Co., Misc. Property, April 1995.

567 Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 N.E. 26 (1907).

that:

> "Every insurer shall pay any amount finally agreed upon in settlement of all or part of any claim not later than five business days from the receipt of such agreement by the insurer, or from the date of the performance by the claimant of any condition set by such agreement, whichever is later, except as provided in §331 of the Insurance Law as respects liens by tax districts on fire insurance proceeds."

In the state of Michigan the former statute MCL §500.2831, repealed in 1990, allowed an insurer to withhold payment until the completion of appraisal without penalty. However the new replacement statute offers no such protection. On the subject of appraisal, MCL §500.2833 (1)(m) addresses the procedure for appraisal but omits discussion of guidelines for when the loss is payable. Where the parties employ the appraisal process, the appraisal award triggers the 30-day payment mandate contained in MCL §500.2836(2). As a result, an award paid after such date was subject to an addition for statutory penalty interest.[568]

Local statutes and regulations should be consulted as many jurisdictions have adopted similar provisions mandating a more expeditious payment then might be required by the insurance policy.

It has been held that for the 60-day time period to apply, there must be a valid appraisal and where the insureds rejected the joint appraisal, it was clear that the loss payment provision of the policy which mandated payment "60 days after we receive your proofs of loss and; a)reach an agreement with you; b) there is an entry of a final judgment; or c) there is a filing of an appraisal award with us", has not been triggered such that the 60 day provision became operable.[569]

In jurisdictions that analogize appraisal with arbitration, it has been held that a party seeking to avoid paying on the award must challenge the appraisal award and adhere to the requirements of local statutes mandating time limits within which such a challenge must be filed. For example, in Connecticut it has been held that where there were procedural

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[568] Griswald Properties, L.L.C. v. Lexington Ins. Co., 275 Mich. App.543, 740 N.W.2d 659 (2007) *rev'd by panel, aff'd in part, rev'd and remanded in part*, 276 Mich. App. 551, 741 N.W.2d 549 (2007).

[569] Nelson v. Farmer's Union Mut. Ins. Co., 315 Mont. 268, 68 P.3d 689 (Mont. 2003).

issues concerning the adequacy of the appraisal proceeding, objections should have been raised within 30 days of the award pursuant to §52-420 of the Connecticut General Statutes.[570]

Where the insurer ignored an appraisal award and paid only the amount it considered due under the policy, an award of a penalty of twice the actual damage is appropriate.[571]

The terms of an insurance policy determine the date from which the coverage payment is due as well as when interest is due on the amounts payable. Thus, if an insurance policy provided that an insurer was required to make payment within thirty days after the filing of an appraisal award, then as long as the policy language is complied with, the insured is not entitled to pre-judgment interest from the date its property was damaged.[572]

The District Court of Appeal of Florida clarified the issue in its decision Jugo v.

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[570] Corriveau, et al v. Aetna Cas. & Sur. Co., 1996 WL 156109 (Conn. Super. Ct. 1996) (It has been held that this deadline is strictly enforced); Vail v. American Way Homes, 181Conn. 449, 435 A.2d 982 (1980); Kilby v. St. Paul Ins. Co., 29 Conn. Supp. 22, 269 A.2d 295 (1970).

[571] Farber v. American National Prop. & Cas. Co., 2008 WL 5159207 (La. App. 3 Cir.).

[572] *See* Ellie's 50's Diner, Inc. v. Citizens Prop. Ins. Corp., 54 So.3d 1081, 36 Fla. L. Weekly D 449 (Fla.. 4th DCA 2011) ; *see also* Citizens Prop. Ins. Corp. v. Mallett, 7 So.3d 552 (Fla. 1st DCA 2009); Lumbermens Mut. Cas. Co. v. Percefull, 653 So.2d 389 (Fla.1995); Sunshine State Ins. Co. v. Davide, 15 So.3d 749 (Fla.3d DCA 2009); Allstate Ins. Co. v. Blanco, 791 So.2d 515, 26 Fla. L. Weekly D1737 (Fla.3d DCA 2001).

American Security Ins. Co.[573] In Jugo, the insured was paid $47,000 toward the amount of loss but more was requested by the insured. After appraisal, the insured was awarded an additional $71,000 and the insured moved for pre-judgment interest from the date of loss. The court denied the insured's request and explained when pre-judgment interest from the date of loss would be appropriate. In cases where the insurer denied coverage for all or any part of the insured's initial claim, an insured would be entitled to pre-judgment interest from the date of the loss. In cases where the insurer admits coverage but disputes the amount of the covered loss, however, the insured is not entitled to pre-judgment interest from the date of the loss, absent some contract provision to the contrary.

In Louisiana, it has been held that an insurer's failure to pay amounts purportedly undisputed during the appraisal process was not arbitrary or capricious.[574]

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[573] 56 So.3d 94 (Fla.3d DCA 2011).

[574] Long v. American Security Ins. Co., 52 So.3d 260, 2010-0026 (La.Ct. App. 1995).

F] TIME TO BRING SUIT

Most property insurance policies contain a suit limitations provision which limits the amount of time an insured has to commence litigation against the carrier should that become necessary. In most states, this issue is also regulated by statute or regulation which mandate a minimum amount of time within which the insured has to bring suit. Typically, this provision is contained in the amendatory endorsement mandated in most states. It is not unusual for the insured to have as little as one year[575] to commence litigation, although many states permit two years.[576] Other states permit a one year period but toll it from the date of notice of claim until claim denial.[577] Florida permits 5 years.

As the road toward the final adjustment or appraisal award can be a long and winding one, the insured and his representatives should always be mindful of this deadline, taking care to diary the date significantly in advance of the deadline in order to either get a formal

575 Records, Ariz. Rev. Stat. §20-153 (2003); Standard Fire Policy, Idaho Code §41-201 (2002); Standard Fire Policy, Ill. Comp. Stat. Ann. 215 5/397 (West 2003); Standard Fire Policy Required; Exceptions, Me. Rev. Stat. Ann. Tit. 24-A §3002 (West 2003); Fire Policy; Standard Form, Mass. Gen. Laws Ann. Ch. 175, §99 (West 2003); Punishment for Issuing Fire Policies Contrary to Law, N.C. Gen. Stat. §58-43-35 (2003); Penalty for Issuing Other than Standard Fire Policies, 40 Pa. Cons. Stat. §637 (2000).

576 *See e.g.*, N.Y. Ins. Law §3404.

577 Furnishing Proofs of Loss, N.J. Stat. Ann. 17:36-6 (West 2003).

written extension from someone in authority at the carrier or to take steps to toll the running of the limitation period by filing suit, filing a summons or by taking whatever procedural step is necessary in the local jurisdiction to preserve the right to sue.

The parties should never presume that merely because negotiations are under way or the appraisal process is moving forward that the time within which to bring suit has somehow been tolled or is irrelevant. Obviously this would not pertain to those jurisdictions where time to bring suit is measured from the date of the denial of the claim. However, in other jurisdictions, care should still be taken, despite being in the midst of the appraisal process, to preserve the right to bring suit.

For example, a Washington court did not find a reasonable excuse for delay for purposes of filing an action where an insurer stopped appraisal pending the production of documents in litigation. The court determined that appraisal could have continued without the documents sought by the insurer and "no reasonable juror could conclude that [the insurer]'s actions prevented [the insureds] from timely filing suit or lured [the insured] into reasonably believing that an additional amount would be paid."[578]

In Ontario, promissory estoppel was held to preclude compliance with an otherwise required limitations period where the court observed "an express admission of liability and a clearly implied promise not to rely on the limitation period." That case considered a statutory condition which required that any action against the insurer for recovery under the contract be barred unless brought within one year following the loss. There, a Statement of Claim was not issued until over a year after the damage. However, letters existed to substantiate the admission of liability and the implication that the insurer was not intending to rely on the limitations period.[579]

At least one jurisdiction, Wisconsin, provides for statutory relief. W.S. Stat. §631.83(5) tolls the statute of limitations "during the period in which the parties conducted an appraisal or arbitration procedure prescribed by the insurance policy or by law or agreed to by the parties." Care should be taken, however, as an informal effort of obtaining and comparing cost estimates has not been

[578] Reed v. Allstate Ins. Co., 2012 WL 527422 (W.D. Wash. 2012).

[579] Feist v. Gore Mut. Ins. Co., (1991) O.J. No. 67, 25 A.C.W.S. (3d) 86, 1991 CarswellOnt 1044.

equated with actual appraisal.[580]

In other states, the limitations period is tolled during the time it takes to complete the appraisal.[581]

Where a Georgia insurance policy incorporated a 12-month limitation for commencement of an action, the court stated that it was "well-settled that the policy period of limitation is tolled by the pendency of an appraisal proceeding." Although that matter in particular did not involve a question of appraisal, the court found the issue pertinent, where circumstances involved the application of the limitations term to an insurer's election to make repairs following a fire. There, the court deemed the policy limitation tolled and the action not barred by the 12-month limitation.[582]

An insured's action to compel appraisal in Florida was found to be within the statute of limitations in light of the rule in Romay that

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580 Weiting Funeral Home of Chilton v. Meridan Mut. Ins. Co., 277 Wis 2d.274, 690 N.W. 2d 442, 2004 WI App. 218 (Wis. Ct. App. 2002) (informal discussions not envisioned as covered); Viebrock v. Wisconsin Mut. Ins. Co., 329 Wis.2d 709, 200 WL 3001519 (Wis. App. 2010) .

581 See, e.g. Southern General Ins. Co. v. Kent, 187 Ga. App. 496, 499, 370 S.E.2d 663 (1988); Nat. Union Fire Ins. Co. v. Ozburn, 57 Ga.App. 90, 92, 194 S.E. 756 (Ga. Ct. App. 1937).

582 Zappa v. Allstate Ins. Co., 162 S.E.2d 911 (Ga. Ct. App. 1968).

appraisal could not be compelled until conditions precedent to appraisal had been performed by the insured. In finding the action timely, the court recognized that "an action to compel appraisal does not accrue until the policy conditions precedent have been performed or waived, and appraisal is then refused." There, it stated the statute could only have begun to run when the insured offered to perform conditions precedent and such performance was refused by the insurer, both of which had occurred consistently with the action taken by the insured.[583]

In a perfect world it would not be necessary to discuss the suit provision of the policy, as one of the fundamentals of the appraisal process is litigation avoidance. However, in the very imperfect world of insurance, preserving the right to bring suit is a strategic imperative in order to motivate both parties to see the appraisal process through to a conclusion in a fair and reasonable manner. Litigation may be necessary in order to compel appraisal where it has been improperly avoided, or to enforce an award where payment has not been made against it, to appoint an umpire or disqualify an appraiser

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[583] Chimerakis v. Sentry Ins. Mut. Co., 804 So.2d 476, Fla. L. Weekly D 2843 (Fla. 3d DCA 2001), citing United States Fid. & Guar. Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999).

for good cause shown. If the right to sue has been dissipated, what recourse would the insured have upon the insurer denying coverage after its receipt of an unfavorable award?

Nevertheless, for those caught unwary or unprepared and where the time to bring suit has passed, courts should be loathe to reap a forfeiture on the insured on a technical failure to toll the running of the suit provision. However, should simple equity and fairness not be sufficient to save the insured, and it often is not, the insured's salvation may be found in their ability to bring suit on the appraisal agreement or award itself should the carrier refuse to proceed to a conclusion of the appraisal or to pay the award upon its issuance.

The appraisal agreement, hopefully in writing, is binding as a contract in its own right. This would, in theory, be subject to the statutory period for bringing suit for breach of contract in the local jurisdiction without regard to the policy time period as the suit is not premised on breach of the policy, but on the appraisal agreement.

Ongoing discussions between the insured and its insurer did not serve to toll the running of the statute of limitations even in a state that tolls the running of the statute where an appraisal agreement is entered into where the parties efforts never ripened into an actual agreement.[584]

In the state of California it has been held that the Doctrine of Equitable Tolling did not operate to suspend the statute of limitations during an appraisal proceeding where the insured had numerous opportunities to conclude that the carrier had breached the contract of insurance and that circumstances did not show an "unjust technical forfeiture" nor was an absence of prejudice established.[585]

In those states which have either a statutory mechanism for enforcement of insurance appraisal awards or which equate appraisal with arbitration and provide for statutory enforcement through an arbitration mechanism, the statutes themselves would provide the statutory cause of action.[586] Theoretically, such a statutory cause of action would not be subject to the contractual period of limitations found in the policy.

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584 Wieting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co., 277 Wis.2d 274, 690 N.W.2d 442 (Ct. of App., 2004); *See* W.S.A. 631.83 (5).

585 Bostonian v. California Fair Plan Ass'n, 2003 WL 22009361 (Cal. App.2d Dist, 2003).

586 See Dupree v. Auto-Owners Ins. Co., 2013 WL 3766580 (Mich. Ct. App. 2013) (in Michigan, the statutory time period in which to challenge an arbitration, and thus an appraisal, is six years; MCL §500.2833(1)(m).

In Vaubel Farms, Inc. v. Shelby Farmer's Mut. Ins. Co.,[587] it was held that a contractual two-year period of limitation for the insured to file suit contained within a property policy was inapplicable to an appraisal/arbitration sought by the insured approximately three years after the loss stating that arbitration was not a "suit". The court explained that such a statutory proceeding is summarily reviewable and enforceable by statute rather than by suit on the award. The court determined that because the insured's enforcement of the award was not subject to the two-year period of limitations, his demand was subject solely to the general 6-year statute of limitations.

However, the Vaubel holding was limited in 2007 when the Court of Appeals in Minnesota distinguished a policy which refers to "appraisal" and not arbitration and in which the carrier retains the right to deny a claim after the award.[588]

In Utah, tolling of the statute of limitations for purposes of a lawsuit has been examined in the context of Utah Code Ann. 1953 §31A-21-313(5), a statute which provides that the limitations term is "'tolled during the period in which the parties conduct an appraisal or

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[587] 679 N.W.2d 407 (Minn. App. 2004).

[588] Johnson v. Mutual Service Cas. Ins. Co., 732 N.W.2d 340 (Ct. of App. Minn. 2007).

arbitration...procedure prescribed by the insurance policy.'" In that case, the court held that the date that a party had made a written demand for appraisal of the loss constituted the event which triggered appraisal pursuant to the policy and thus the beginning of the tolling period. It declined to accept the interpretation of the statute under which the tolling period would begin when appraisal was conducted.[589]

Prudence and diligence would dictate dealing with this issue ahead of time, either with a formal extension or by including a tolling provision within an appraisal agreement to avoid any ambiguity or conflict.[590]

It has been held that where a fire policy provides that no action shall be commenced more than a certain number of months after the fire and also that no action shall be brought until 60 days after an award by appraisers, the provisions are to be construed as meaning that in the event of appraisal, the time to sue is extended until 60 days after an award. However absent any reason for the extension growing out of the appraisal, the action must be brought within the statutorily prescribed time or the policy, whichever is

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[589] Stone Flood and Fire Restoration, Inc. v. Safeco Ins. Co. of America, 268 P.3d 170, 699 Utah Adv. Rep. 72, 2011 Ut. 83 (Utah 2011).

[590] See Appendix A, Form I[A].

greater.[591]

It has been held that an insured's action seeking to enforce the appraisal provision (as distinct from an appraisal agreement) was a "legal action" under the policy, such that it was subject to the policy's limitations clause requiring suit be brought "within 2 years after the date on which the direct physical loss or damage occurred."[592]

In Wisconsin, a statute tolling the limitations period while the parties are conducting an appraisal prescribed by an insurance policy or by law and agreed to by the parties protects the insured under these circumstances.[593]

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591 Williams v. German Ins. Co., 90 A.D. 413, 86 N.Y.S. 98 (4th Dept. 1904).

592 National Refrigeration, Inc. v. Travelers Ind. Co., of America, 947 A.2d 906 (Sup. Ct., R.I. 2008); Marjam Supply Co., Inc. v. Hartford Steam Boiler Inspecting and Ins. Co., 2012 WL 2477963 (Conn. Super. Ct. 2012) (12 month policy provision prevented action to compel arbitration/appraisal in Connecticut); Musleh v. State Farm Fire and Cas. Co., 2012 WL 5493588 (E.D. Mich. 2012) (carrier does not owe insured any coverage because the insured's breach of contract claim is time -barred. Therefore, the insurer was entitled to a grant of summary judgment on the insured's claim to a statutory appraisal.).

593 W.S.A. 631.83(5).

G] COMPETING DEMANDS

Policy conditions such as the requirements to file proofs of loss, testify at an examination under oath and other aspects of policy mandated cooperation are independent of the insured's right to demand an appraisal, such that each party to the contract has an obligation to comply with the reasonable requests of his or her counterpart while still enforcing their own demands. For example, an insured may not resist a carrier's reasonable demand to file a proof of loss or testify at an examination under oath in an attempt to enforce a demand for an appraisal.[594] The U.S. District Court sitting in the Southern District of Florida, for example, determined that where an insurer required a proof of loss and an examination under oath in order to assist in determining loss and value, the insured was not able to obtain an appraisal until complying with those provisions of the cooperation clause. Upon a simple analysis, it would appear that this had the effect of treating the insured's compliance as a condition precedent to the appraisal process.

In truth, each of these policy provisions are actually concurrent conditions in that each

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[594] Pando v. United States Fidelity and Guar. Co., 1998 WL 708619 (S.D. Fla. 1998), *aff'd,* 198 F.3d 262 (6th Cir. 1999).

must be complied with in conformity with the contract or statute and each process should proceed as contractually agreed once their invocation is ripe under the terms of the policy.

An enlightened interpretation of the court's ruling in Pando v. United States Fidelity & Guar. Co., is that there was not yet a ripe disagreement, making the claim unready for appraisal. The decision does not stand for the proposition that the filing of a proof and appearance at an examination under oath are true conditions precedent.

Courts have been fairly uniform in holding the insured to be in compliance with the cooperation clause prior to enforcing the appraisal provision, particularly when demands are related to a full ascertainment by the carrier of the amount of loss and actual cash value.[595] It is logical to conclude that a

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[595] *See*, Jacobs v. Nationwide Mut. Fire Ins. Co., 236 F. 3d 1282 (11th Cir. 2001); Galindo v. ARI Mut. Ins. Co., 203 F.3d 771 (11th Cir. 2000); Ferrer v. Fid. & Guar. Ins. Co., 10 F. Supp.2d 1324 (S.D. Fla. 1998); United States Fid. & Guar. Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999). *See also*; Terra Ind., Inc. v. Commonwealth Ins. Co. of Am., 981 F.Supp. 581 (N.D. Iowa 1997); Ohio Farmer's Ins. Co. v. Titus, 82 Ohio St. 161, 92 N.E. 82 (1910); Boston Ins. Co. v. A.H. Jacobson Co., 226 Minn. 479, 33 N.W.2d 602 (1948); Insurance Co. of N. A. v. Baker, 84 Colo. 53, 268 P. 585 (1928); Jersey Ins. Co. v. Roddam, 256 Ala. 634, 56 So.2d 631 (1952); Harowitz v. Concordia Fire Ins. Co., 129 Tenn. 691, 168 S.W.163 (1914); James v. Ins. Co. of Ill, 135 Mo. App. 247, 115 S.W. 478 (1909); Continental Ins. Co. v. Valladingham & Gentry, 116 Ky. 287, 76 S.W. 22 (1903); Citizens Prop. Ins. Corp. v. Admiralty House, Inc., 2011 WL 2586344 (Fla. 2d, DCA 2011): *But see,* Prudential-LMI Ins. Co. v. Promenade Condo. Ass'n, No. 98-1603 (S.D. Fla. 1998) (ruling contrary to Ferrer, 10 F. Supp.2d at 1324 so as to remain consistent with Allstate Ins. Co. v. Sierra, 705 So.2d 119 (Fla.3d DCA 1998)) and Sanchez v. Harbor Specialty Ins. Co., No. 98-1365 (S.D. Fla 1999).

reasonable understanding of the claim is a prerequisite for a true disagreement to exist.

It has been held that a question of fact for a jury exists where the insured refused a request for supplemental examinations under oath claiming the request, made after the insured's demand for appraisal, was not reasonable in light of the fact that they had provided the carrier with all information they had regarding their claim. The matter was remanded for a trial on the issue. Should a jury find the request for an examination was reasonable, the insured's claim will be dismissed.[596]

Under Florida law, before appraisal can be invoked generally the insured must comply with the policy's post-loss conditions because such compliance enables the insurer to investigate the insured's claims in order to reach a ripe disagreement.[597] The burden of showing prejudice suffered by the insurer due to the insured's failure to comply with a

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[596] Brethren Mut. Ins. Co. v. Thomas, 2006 WL 2376248 (M.D. Pa. 2006).

[597] 200 Leslie Condo Assn Inc. v. QBE Ins. Co., 2013 WL 4714207 (S.D. Fla. 2013) (Insured altered a proof of loss form unreasonably and without justification by striking language stating that "no articles are mentioned herein or in the annexed schedules but such as were destroyed or damaged at the time of said loss and produced a current Board President who did not adequately prepare for an examination under oath and could not respond to the insurer's inquiries."); See also, Biscayne Cove Condominium Ass'n. v. QBE Ins. Co., 971 F. Supp.2d. 1121, 2013 WL4711161 (S.D. Fla. 2013)

condition subsequent is on the insurer.[598]

In Florida, a court found issues of material fact existed as to whether an insured had materially breached policy conditions when his appraiser terminated an umpire. Under those circumstances, the insured's appraiser did so following continuous delays by the umpire in rendering a decision, an action for which the court found a lack of authority and observed other lawful alternatives. In evaluating this matter, the court held that "an insured's refusal to comply with a pre-suit condition may be a willful and material breach of an insurance contract that precludes recovery as a matter of law...however, if the insured cooperates to some degree or explains his failure to comply, whether the insured materially breached the policy remains a question for the fact finder". [599] The court continued that in the absence of such willful disregard by an insured, "'courts have either stayed the action or dismissed the suit without prejudice in order to allow belated compliance.'"[600] Here, the court found that the

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[598] 200 Leslie Condo Assn Inc. Id. at p. 17

[599] Jyurovat v. Universal Prop. & Cas. Ins. Co, , 84 So.3d 1238, 1239 (Fla.2d DCA 2012); *See also*, Oriole Gardens Condominiums, III v. Independence Cas. and Surety Co., 2012 WL 718803 (S.D.Fla. 2012)where an insured's post-loss obligations to submit to an examination under oath, produce and disclose relevant documentation, and give prompt notice of a loss were deemed conditions precedent to an action against an insurer. There, a question of fact was found as to each, based on a degree of compliance by the insured as to the first two, and the insurer's failure to meet its burden as to the third.

[600] Id., citing El-Ad Enclave at Miramar Condo Ass'n v. Mt. Hawley Ins. Co., 752 F.Supp.2d 1282, 1287 (S.D. Fla. 2010).

insured had cooperated in the appraisal process but determined that questions of material fact existed surrounding the umpire's termination and the filing of a declaratory judgment action as material breaches of the policy.

However, an insured was not barred from seeking an order to compel appraisal where he had complied with a provision in his insurance policy which mandated that he submit to an examination under oath (EUO) upon the insurer's request. There, the insurer argued that the insured did not comply with policy conditions because he left his examination under oath during a break; however, the insured testified that during the examination, "he had been berated and yelled at, and subjected to two examinations, one in English and the other in Creole" and his counsel had offered resumption of the examination which the insurer refused.

The court observed its prior holding that "'the insured must meet all of the policy's post-loss obligations before appraisal may be compelled'…[t]his includes the obligation to submit to an EUO" and '[t]he failure to submit to an examination under oath is a material breach of the policy which will relieve the insurer of its liability to pay.'" Here, the offer to resume the EUO was given before the action was filed, and the District Court agreed with the trial court that the action was not premature and appraisal could be compelled.[601]

Similarly, in Florida, it has been held that a property insurer may be entitled to an evidentiary hearing to determine whether the insured complied with the post-loss conditions of the insurance policy before the insurer could be compelled to participate in appraisal of the insured's loss.[602]

In Louisiana, where the insured failed to respond to a demand for an examination under oath but after retaining counsel, offered full cooperation and requested rescheduling the EUO and a joint inspection of the damage, it was held summary dismissal of the case would have been a "draconian measure".[603]

The United States Court of Appeals for the Seventh Circuit has declared that an insurer was not bound by the results of an appraisal from which it withdrew after the insured-restaurant owner materially breached the policy by refusing to submit to an examination under oath prior to the award being

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[601] First Home Ins. Co. v. Fleurimond, 36 So.3d 172 (Fla. 3d DCA, 2010)

[602] *See* Citizens Prop. Ins. Corp. v. Maytin, 51 So.3d 591, 36 Fla. L. Weekly D 484 (Fla 3d DCA 2011); Citizens Prop. Ins. Corp. v. Gutierrez, 59 S. 3d 177 (2011).

[603] Hayes v. Southern Fidelity Ins. Co., 2013 WL 4012745 (E.D .La. 2013).

determined and the appraisal completed.[604]

Neither party should be forced to proceed to appraisal until sufficient information has been exchanged so as to believe there has been a true disagreement under the terms of the policy. As stated, at times this will require the insured to comply with policy provisions in presenting and swearing to his claim. At other times, this may involve the insurer sharing its damage estimates with the insured so as to make the process meaningful and determine not only that a true disagreement exists, but the extent of that disagreement.

Query whether an interview or a recorded statement taken from the insured by the carrier's appraiser would be appropriate. Written questions bearing on the issues of loss and value may be appropriate under a given set of circumstances in order to make the appraisal process meaningful.

Note that the New York State Legislature amended the insurance law by adding §3407-a which now requires the insurer to share with the consumer its building damage estimates upon demand.[605] The author drafted and

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[604] Employers Mut. Cas. Co. v. Skoutaris, 453 F.3d 915 C.A.7 (Ind. 2006).

[605] Property/Casualty Insurance Contract and Policy Standard Provisions, N. Y. Ins. Law §3407-a (McKinney 2003).

lobbied for the passage of this legislation which was adopted effective March, 2002. It requires every insurance policy issued in the state of New York to contain a provision requiring the production of building damage estimates prepared on behalf of the carrier upon demand by the insured or its representatives.

In other jurisdictions, this information is routinely shared and where it is not yet the custom and practice to share the carrier's estimates of damage with the insured, it should be.

The insurance carrier's estimates of loss, value and damage are prepared in the ordinary course of the insurer's business and should be shared upon request to help the parties identify areas of agreement, disagreement, as well as misunderstandings and omissions.[606]

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[606] Mold Maintenance Corp. v. General Acc. Fire & Life Assur. Corp., 56 A.D.2d 134, 392 N.Y.S.2d 104 (4th Dept. 1977); Millen Ind. v. American Mut. Liability Ins. Co., 37 A.D.2d 817, 324 N.Y.S.2d 930 (1st Dept. 1971); Welch v. Globe Ind. Co., 25 A.D.2d 70, 267 N.Y.S.2d 48 (3d Dept. 1966); Dikun v. N. Y. Central R.R., 58 Misc.2d 439, 295 N.Y.S.2d 830 (Sup. Ct. 1968), *aff'd. by,* 31A.D.2d 719, 297 N.Y.S.2d 711 (4th Dept. 1968); Kandel v. Tocher, 22 A.D.2d 513, 256 N.Y.S.2d 898 (1st Dept. 1965); Carp's Delicatessen v. Allcity Ins. Co., 83 A.D.2d 504 (1st Dept. 1981); Chemical Bank v. National Union Fire Ins. Co. of Pittsburgh, 70 A.D.2d 837, 418 N.Y.S.2d 23 (1st Dept. 1979).

H] COMPLIANCE WITH POST-LOSS POLICY PROVISIONS

In Florida, the timing of appraisal has also been examined in the context of compliance with post-loss conditions.[607] There, a District Court of Appeals reversed an order granting an insured's motion to compel an appraisal and remanded a matter for an evidentiary hearing in finding an issue of fact as to whether an insured had complied with all post-loss obligations. The insurer contended that the insured failed to provide it with requested records and documents, respond to material inquiries during his examination under oath, or provide a sworn statement in his proof of loss, and the insured countered by asserting that he did supply sufficient information and comply with necessary post-loss obligations. The court held that "in order to make a preliminary determination that there is a disagreement between the insurer and the insured regarding the amount of loss, the trial court must be satisfied of the insured's compliance with the policy's post-loss conditions. Where the insurer reasonably disputes such compliance and raises a question as to the sufficiency of the insured's compliance with post-loss obligations, a question of fact is created that must be resolved by the trial court before compelling

[607] United Prop. and Cas. Ins. Co. v. Concepcion, 83 So.3d 908 (Fla. 3d DCA 2012).

appraisal."[608] In Concepcion, the court found there to exist a fact issue which must be resolved through examination of the evidence in an evidentiary hearing.[609] However, under these circumstances the trial court never reviewed any such evidence, and in support of this holding the court noted that the argument of counsel does not constitute evidence.

The importance of compliance with post-loss conditions was further recognized in the state. Where a condominium association failed to comply with post-loss conditions before the appraisal process took place, including those pertaining to proof of loss, inventory of property and examination under oath, the court declined to compel an insurer to submit to appraisal because the insured failed to show that the insurer was not prejudiced by its failure to comply with such conditions. The court held that post-loss conditions in the policy must be complied with before invoking appraisal.[610] . This "'enables [insurers] to investigate the insureds' claims and to disagree with the loss amount before the appraisal term becomes effective.'"[611] If an insured could compel

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608 Id.

609 Id. at 909-910.

610 200 Leslie Condo Ass'n, Inc. v. QBE Ins. Corp., 965 F.Supp. 1386 (S.D. Fla. 2013); (*citing* Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 777 (11th Cir.2000) and U.S. Fid. & Guar. Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999)).

611 Id. at 1400, *citing* Galindo at 777.

appraisal prior to compliance with post-loss obligations, the insurer would be "at a considerable disadvantage entering the appraisal process."[612] The court clarified the rules surrounding prejudice in Florida; the law presumes prejudice to the insurer and places the burden of showing its absence on the party seeking to avoid the condition; "by contrast, in cases involving an insured's failure to comply with a condition subsequent, 'it is proper to place the burden of showing prejudice on the insurer.'"[613] The court additionally refused to grant the insured a post-trial opportunity to comply with conditions, finding no supportive basis or legal authority for doing so.

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[612] Id., *citing* Romay, 744 So.2d at 471 (Fla. 3d DCA 1999)
[613] Id. at 1401, *citing* Bankers Ins. Co. v. Macias, 475 So.2d 1216, 10 Fla. L. Weekly 424 (1985).

I] MOVING TO SET ASIDE THE AWARD

Individual states treat this issue differently and the local laws must be identified and complied with.

In those states that equate appraisal with arbitration, care must be taken in commencing any effort to set aside an appraisal award expeditiously and certainly within the statutory time period provided for challenging an arbitration award.[614] For example, in Connecticut, where courts have traditionally equated appraisal and arbitration in certain respects, it was held that where procedural objections to the appraisal process are raised, they must be asserted in a timely fashion pursuant to §§52-418 and 420 of the Connecticut General Statutes. It has been determined that such challenges were required to be raised within 30 days of the award.

This issue was addressed in the case of Travelers Home and Marine Ins. Co. v. Kravitz in which the appellate court of Connecticut affirmed a decision by the trial court denying the insurer's motion to vacate the appraisal award as untimely. In pointing to §52-420(b),

[614] Corriveau, et al v. Aetna Cas. & Sur. Co., 1996 WL156109 (Conn. Super. Ct. 1996); *See also*, Town of East Hartford v. East Hartford Municipal Employee's Union, Inc., 206 Conn. 643, 539 A.2d 125 (1988).

the court held that because the insurer's motion to vacate the appraisal award was not filed within 30 days after it received notice of the award, the trial court lacked subject matter jurisdiction over the motion.[615]

In Kravitz, the insurer argued that the appearance of impropriety, relating to a conversation between two of the three appraisers after the appraisal had been completed, should compel the court to make an exception under the arbitration statute. The court disagreed, however, and found that despite the appearance of potential impropriety, a judicially-created exception to the 30-day time limit under §52-420(b) was not justified.[616]

As legal authority in Michigan has designated appraisal as "'effectively an arbitration'", the statutory limitation within which to challenge to arbitration (and thus, an appraisal) is six years. MCL 500.2833(1)(m).[617]

In Utah, for example, a party may move to modify an appraisal award within 20 days after the panel issued its award.[618]

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615 *See* Travelers Home and Marine Ins. Co. v. Kravitz, 129 Conn.App. 166 (2011).
616 Id.
617 Dupree v. Auto-Owners Ins. Co., 2013 WL 3766580 (Mich.Ct. App. 2013).
618 Miller v. U.S.A.A. Cas. Ins. Co., 44 P.3d 663 (2002); *See* Modification of Award by Court, Utah Code Ann. §78-31a-15 (2002).

In states which do not mandate a time limit directly, practitioners should nevertheless proceed expeditiously after the receipt of the award and a reasonableness standard would apply. Certainly, an effort should be made to commence an action to set aside the award within the time frame provided by policy or statute for payment of the award, whichever is shorter.

As appraisal is intended to be a quick and efficient process with a short time line contractually mandated, any unreasonable delay in moving to set aside the award may result in a denial of the motion, based upon the legal concept of laches. The equitable doctrine of laches is defined as:

> "[U]nreasonable delay or negligence in pursing a right or claim - almost always an equitable one - in a way that prejudices the party against whom relief is sought. The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is

sought."[619]

It has been stated that a party may not adopt a "wait and see" approach and then complain for the first time after the award is issued.[620]

It has been held that the insured's negotiation of the insurer's checks following an appraisal award, constituted a full accord and satisfaction of the insured's claim under the fire policy, despite the fact that no formal language to that affect was contained on the checks.[621] While this rule is not universal, care should be taken in considering the consequences of such an act in the local jurisdiction.

However, an insured was determined not to have waived his right to challenge the award when he took possession of two checks from the insurer, did not cash them and made timely application to the panel to reconsider the award and to the court to vacate the award. Such a waiver only results from a clear and unmistakable acquiescence in the judgment and unconditional acceptance of

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[619] *Black's Law Dictionary* (7th Ed. 1999).

[620] Professional Team, Inc. v. Safeco Ins. Co. of America, 2006 WL 9322414 (Mich. App. 2006).

[621] Hemingway v. State Farm Fire & Cas. Co., 187 A.D.2d 814, 589 N.Y.S.2d 956 (3d Dept. 1992).

the fruits thereof.[622]

Additionally, it has been held that in attempting to set aside an appraisal award after a final judgment enforcing said award has been entered, mandamus relief is not the appropriate method.[623] A writ of mandamus will not be issued as the party has the ability to appeal the judgment as his adequate remedy at law.

In Florida, the court did not properly address the insurer's defense that certain items were duplicative, deciding that "an alleged mistake of that nature raises an issue directly related to the 'amount of loss' sustained," was a matter within the scope of an appraiser's authority to evaluate and was thus entitled to respect.[624]

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[622] Kacha v. Allstate Ins. Co., 140 Cal. App.4th 1023, 45 Cal. Rptr.3d 92, 2006 WL 1515827 (2006).

[623] *See* In re Security Nat.l Ins Co.., 2011 WL 332712 (Tex.App.-Houston [14 Dist.] 2011).

[624] Citizens Prop. Ins. Corp. v. River Manor Condominium Ass'n, Inc., 125 So.3d 846 (Fla 4th DCA 2013).

CHAPTER VI

THE MECHANICS OF DEMANDING AN APPRAISAL

A] THE DEMAND

Pursuant to the insurance contract, the appraisal demand must be in writing. Any verbal demand for appraisement is deemed to be merged into a subsequent written demand.[625] The demand must be clear and unambiguous, such that a person of ordinary intelligence would fairly understand that an appraisal is being requested.[626] Any ambiguity will be construed most strongly against the party making the demand.[627]

As the timing of the demand may one

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[625] Citizens Ins. Co. v. Herpolsheimer, 77 Neb. 232, 109 N.W. 160 (1906).

[626] Government Employees Ins. Co. v. Hardin, 108 Ga. App. 230, 132 S. E.2d 513 (1963), *aff'd*, 219 Ga. 474, 133 S.E.2d 873 (1963); Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N.E. 545 (1899), *overruled in part on other grounds by*, Graham v. German Am. Ins. Co., 75 Ohio St. 374, 79 N.E. 930 (1907).

[627] Grand Rapids, Id.

day be in issue, an additional benefit of putting the demand in writing is to establish the date and substance of the demand.[628]

Although the general rule mandates that the demand be in writing, if an oral offer to appraise is made and accepted, it becomes just as effective as though the original offer had been in writing.[629]

The demand for appraisal could nominate an appraiser. If it does it should include the appraiser's address, phone number, fax number and email address.

A careful reading of the Standard Fire Policy discloses that both parties have 20 days from the date of demand to nominate their appraiser. The demanding party should weigh the strategic benefit of nominating the appraiser within the demand itself or consider waiting the 20 days in order to have the possible opportunity of learning the identity of the adverse party's appraiser prior to nominating their own. The simultaneous exchange of appraiser information also prevents the other side from seeking some perceived advantage based upon the identity of the appraiser. This should be contrasted with

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[628] New Amsterdam Cas. Co. v. J.H. Blackshear, Inc., 116 Fla. 289, 156 So. 695 (1934).

[629] Western Fire Ins. Co. v. People, 98 Ga. App. 365, 106 S.E.2d 91 (1958).

the possible benefits that might be achieved by identifying the appraiser within the demand itself. Samples of both demands are contained within the Forms Appendix.

The demand may not appoint more than one appraiser. If a party demands an appraisal of the loss, and in its demand appoints more than one appraiser, the demand will be deemed to be not in accordance with the policy provision that each party should appoint "a competent and disinterested appraiser."[630]

Nevertheless, in an unusually complex claim or a claim with divergent aspects like building damage and lost earnings, there is nothing to prevent the parties, should they agree, from stipulating to more than one appraiser should the parties decide that appraisers with expertise in various aspects of the claim would be more appropriate and efficient in resolving the particular loss. In this event, each appraiser would confer with his or her counterpart and work to resolve only that aspect of the claim with the umpire. While there may be benefits to this approach, it can only be by agreement between the parties as the relative resources of the parties could become a factor and be the subject of abuse.

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[630] International Service Ins. Co. v. Brodie, 337 S.W.2d 444 (Tex. Civ. App.- Fort Worth 1960).

It is the duty of the party desiring an appraisal to make a demand therefore.[631] A disagreement as to the amount of a loss does not require or necessitate a demand from either party for appraisal.[632]

In Georgia, it was held that an insurer's letter to an insured notifying the insured of its right to appraisal if the insurer's settlement offer was unsatisfactory and that it was agreeable to appraisal did *not* constitute an appraisal demand. Thus, compliance with the subject policy's appraisal provision was deemed not a condition precedent to an insured's action on the policy. The court clarified that a demand is only made where an insurer "names and selects an appraiser and in writing communicates the selection to the insured, at the same time demands in writing that the insured name an appraiser, and the insured fails to comply with such demand, and refuses and fails to name an appraiser as provided in the policy."[633]

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[631] American Ins. Co. of Newark, New Jersey v. Rodenhouse, 36 Okla. 211, 128 P. 502 (1912).

[632] Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323 (1895).

[633] GEICO v. Hardin,, 132 S. E.2d 513, *aff'd*, 219 Ga. 474, 133 S.E.2d 873 (1963) (Ga. Ct. App. 1963), citing National Fire Ins. Co. v. Lam, 34 Ga.App. 246 (Ga. Ct. App. 1925).

B] THE APPRAISAL AGREEMENT

1. Agreement to Appraise

In order to avoid misunderstanding and clarify terms and procedure, it is often advisable, particularly in complex appraisals, for the parties to enter into a written agreement.[634] Through such an agreement, the parties may clarify the procedures to be utilized by the appraisers, the issues to be determined and the definition of pertinent terms. Such a written agreement should be signed by the parties as well as each of their respective appraisers in order to be enforceable, as the appraiser is not an agent of either the insured or the insurer with authority to sign on their behalf.[635]

It has been held that because the appraisal clause is contractual, the parties to the contract may design any reasonable method for selection of appraisers and umpire. Any method agreed to by the parties to the policy will often be followed and enforced as long as there is no overreaching or impropriety.[636]

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[634] See Appendix A, Forms, Section I.
[635] Stephen A. Cozen, *Insuring Real Property* §30.01(1) Matthew Bender, 1989.
[636] Connecticut Union Tel. Wkrs. v. Southern New England Tel. Co., 148 Conn 192, 169 A.2d 646 (1961).

The parties should consider providing a sample format for the ultimate appraisal award that will be acceptable to both parties in order to avoid confusion or disagreement later on. This will assist the two appraisers in formulating their conclusions and it will assist the umpire in dealing with the differences that remain, as well.

With respect to the process and procedure to be utilized during the appraisal and which should be subject to an appraisal agreement, these must be negotiated and agreed to between the parties. One party should not insist upon specific procedures to be utilized over the reasonable objection of his or her counterpart. The Brethren case stands for the principle that procedures not addressed in either the policy or a separate agreement cannot unilaterally be enforced by one party.[637]

Interestingly, it was held that whether the parties had reached a pre-appraisal agreement was a decision for the court, despite that it was not an issue of coverage. The court reversed and remanded for the entry of a judgment in the amount of the appraisal award depending upon whether the parties reached a binding pre-appraisal agreement

[637] Brethren Mut. Ins. Co. v. Filsinger, 54 Md. App. 357, 458 A.2d 880 (1983).

stipulating an amount owed.[638]

In Louisiana, provisions within an insurance policy requiring an insured to submit an amount of loss for damaged property to private appraisal and mandating that appraisers make a determination of sound value of the property, were considered valid although they "work[ed] no divestiture of a court's jurisdiction." The court held that the estimation would not be binding should the umpire and appraisers fail to ascertain the actual cash value and loss and that the appraisal would be "subject to scrutiny by the court."[639]

It has been held that where the parties failed to agree in advance to any particular questions which the appraisal was to resolve, and because the submission did not require the panel to refer to any specific claims of the parties, an award which merely stated that one party owed the other a certain amount was sustainable as the award conformed to the submission.[640] The lesson to be learned from cases like Brethren and Malecki, is that the greater degree of specificity which is included in the appraisal agreement, the greater the

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638 Citizens Prop. Ins. Co. v. River Manor Condominium Ass'n, Inc.,125 So.3d 846 (Fla 4th DCA 2013).
639 Girard v. Atlantic Mut. Ins. Co., 198 So.2d 444 (4th Cir. 1967).
640 Malecki v. Burnham, 181 Conn. 211, 435 A.2d 13 (1980).

likelihood for sufficient specificity in the award to satisfy both policy, statute, as well as the parties.

The appraisal agreement should provide for interest in the rare situation where this would be appropriate. Interest availability and the point from which interest should be calculated are discussed more fully in Chapter X [C].

A provision providing for interest if payment of the appraisal award is not made within the time required by policy, statute, or regulation would certainly seem to be appropriate.[641]

If an insurance company enters into an appraisal agreement which is materially different in its terms from that provided in the policy, the carrier waives the right to demand a new appraisal pursuant to terms of the policy.[642] For example, a provision in a fire policy that the appraisers of a loss shall state in their award the original value of the property as well as the damage thereto, is waived by a submission to an appraisal agreement which

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[641] Standards for Prompt, Fair and Equitable Settlements, 11 N.Y.C.R.R. § 216.6(f) (2002) (provides that the insurer shall pay any agreed upon settlement within 5 days of receipt of the agreement or award by the insurer). The New York Standard Fire Policy provides (at lines 150-156) that "a loss is payable no later than 60 days after receipt of proof and ascertainment of amount, by agreement or award."

[642] Davis v. Atlas Assur. Co., 16 Wash. 232, 47 P. 436 (1896).

only requires a finding of the damage.[643]

The appraisal agreement should provide for a tolling of any contractual or statutory time limitation to bring suit.

The existence of hidden damage is often first ascertained upon efforts at demolition and reconstruction. Often this occurs after the conclusion of the appraisal process. For this reason, the appraisal agreement may provide for an opportunity to reopen the appraisal process where such damage was not reasonably ascertainable by the parties prior to or during the appraisal itself.

The parties should consider including a provision authorizing the appraisers to determine issues such as whether the loss is total,[644] or the applicability and amount of co-insurance penalties, depreciation, length of time for reconstruction, or deductible. Be wary, however, as these issues may exceed the scope of the appraisal process in some states. Chapter III discusses this topic in greater depth. Nevertheless, a properly executed and balanced appraisal agreement is much more likely to be enforced upon subsequent judicial

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[643] Remington Paper Co. v. London Assur. Corp. of England, 12 A.D. 218, 43 N.Y.S. 431 (4th Dept. 1896); Questrom v. Federated Dept. Stores, Inc., 41 F. Supp.2d 294 (S.D.N.Y. 1999); American Silk Mills Corp. v. Meinhard-Commercial Corp., 35 A.D.2d 197, 315 N.Y.S.2d 144 (1st Dept. 1970).
[644] Yendel v. Western Assur. Co., 47 N.Y.S. 141, 21 Misc. 348 (1897).

review as an expression of the intent of the parties, even where the process stipulated may arguably deviate from the policy.

2. The Agreement to Select an Umpire

A separate written agreement could and should be entered into between the respective appraisers when selecting the umpire. This document can be executed by the appraisers alone as, pursuant to the policy, it is the appraisers that select the umpire.

If the parties agree, the document can set forth a proposed schedule and protocol for the balance of the appraisal process subject to the concurrence of the umpire, including dates for the filing of briefs and supporting documents as well as responsive briefs, visits to view the damaged property, meetings to discuss the evidence and arrive at conclusions. The parties may be as specific and detailed as they choose with the goal being issue avoidance and reduction of contentiousness once the process actually begins.

The document should supplement the appraisal agreement and should not be inconsistent with either that document, the policy of insurance or controlling statutes or regulations. Possible samples are contained in Appendix A.

There are two schools of thought as to when the umpire should be selected. It has been stated that the appraisers should discuss and agree on the identity of the umpire before discussing the merits of the issues raised by the appraisal. The advocates of this approach point out that the Standard Fire Policy requires it, stating in relevant part, (lines 128 and 129) "[T]he appraisers shall first select a competent and disinterested umpire..." immediately after providing for the appointment of the appraisers. Additionally, the argument goes that the umpire should be agreed upon immediately in order to avoid confrontation and contention which might arise in that selection process after initial hostility or disagreement between the appraisers.[645]

The other school of thought is that if upon initial review it appears the appraisers might be able to resolve the loss without the need for the umpire, there is little logic in taking the time and incurring the expense and the potential for disagreement in selecting and appointing the umpire.

From a practical standpoint, perhaps the best approach would have the appraisers engage in an initial consultation with each other to review the claim presentation and the

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[645] *See,* In the Matter of Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523, 917 N.Y.S.2d 839, 2011 N.Y. Slip Op. 21060 (Monroe Cty. 2011).

response of the carrier in an effort to see whether a reasonable, but quick resolution is possible without the appointment or the intervention of the umpire. Absent quick concurrence between the appraisers that this is feasible, the parties should proceed as directed by the policy with the selection and appointment of the umpire.

The agreement selecting the umpire should provide for the amount and method for payment of the umpire's compensation. Each appraiser should discuss fee issues with the hiring party so as to obtain their authority for the fees quoted. After all, while the appraiser selects the umpire, the insured and the insurer pay the bills.

While it is the appraisers who select the umpire, there is no authority for them doing so in isolation without input from the party that hired them.

C] REMEDIES IF APPRAISAL IS WRONGFULLY REFUSED

In most states, insurance policy provisions providing for appraisal "are valid, enforceable and irrevocable, save upon such grounds as exist in law or equity for the revocation of any other type of contract."[646]

The Texas Supreme Court has affirmed the enforceability of appraisal clauses in property insurance policies stating:

> "However injudicious it may be for the parties to bind themselves by such agreement, it seems to be well settled that, having done so, they cannot disregard it...In the absence of fraud, accident or mistake, the parties having agreed that the amount of loss shall be determined in a particular way, we are constrained to hold that such stipulation is valid."[647]

In most jurisdictions, a decree of specific performance may be obtained to require its

[646] Mendelson v. Shrager, 432 Pa. 383, 248 A.2d 234 (1968); Ice City, Inc. v. Ins. Co. of North America, 456 Pa. 210, 314 A.2d 236 (1974).
[647] State Farm Lloyds v. Johnson, 290 S.W.3d 886, 888 (Tex. 2009); Tran d/b/a Imperial Shopping Center v. American Economy Ins. Co., 2010 W.L. 2680616 (S.D. Tex. 2010).

enforcement.[648] courts have premised their enforcement on three points. Firstly, specific performance of this provision is consistent with the plain language of the appraisal clause which establishes that submission to appraisal is mandatory when demanded by either the insured or the insurer. Secondly, it is consistent with the principle that an insured is entitled to receive the benefit of the bargain for which he paid premiums, including the ability to resolve a disagreement as to loss and value, without the expense and delay of litigation. Thirdly, the right to obtain specific performance of the appraisal provision is consistent with the judicial economy that results from avoiding the needless and wasteful litigation of the issues of loss and value.

As discussed in Chapter I, since 1990 when the New York Legislature adopted Insurance Law §3408, it was believed that New York insurance consumers enjoyed the right to seek specific performance in the event the insurer wrongfully refused to proceed to appraisal.

While the Appellate Division, Fourth

[648] See, for example, New York Ins. Law §3404(8) and Ins. Law § 3408(c) and CPLR §7601, all as amended in 2010; Zar Realty Mgmt, Corp. v. Allianz Ins. Co., 2003 WL 1744288 (S.D.N.Y. 2003); Ice City, Id.; Hala Cleaners, Inc. v. Sussex Mut. Ins. Co., 115 N.J. Super.11, 277 A.2d 897 (Ch. Div 1971); Saba v. Homeland Ins. Co. of America, 159 Ohio St. 237, 112 N.E. 2d 1 (1953); Drescher v. Excelsior Ins. Co. of N.Y., 188 F. Supp. 158 (D.N.J.1960).

Department of the New York State Supreme Court in Fahrenholz v. Security Mut. Ins. Co.,[649] originally placed this in some question, certainly the more enlightened view and the view of other courts in the state of New York was that the consumer does in fact enjoy a right to specific performance.[650] Farhenholz was overruled by the legislature in 2010. That legislation was drafted by the author.

In Fahrenholz,[651] the court concluded that the legislature failed to make its intentions clear in drafting §3408 of the New York State Insurance Law in that the statute recognizes the mutuality of obligation to go to appraisal without specifically making the relief of specific performance available. The rationale provided by the court is inconsistent with the clear intent of the parties to the contract to proceed to appraisal upon demand and without any undue delay. The court's interpretation of the legislature's intent was flawed, as the court's interpretation would tend to render the legislature's 1990 action meaningless in that the end result would not be one of mutuality of obligation but one of mutuality of the right of refusal. This is contrary to the very language of

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649 Farenholz v. Security Mut. Ins. Co., 291 A.D.2d 876, 738 N.Y.S.2d 623 (4th Dept. 2002).

650 Zar Realty Management Corp. v. Allianz Ins. Co., 2003 WL 1744288 (S.D.N.Y. 2003)

651 Id.

§3404(g).[652] Indeed, it is difficult to imagine any other purpose for the legislature to have enacted this provision except to provide for rights of mutual enforcement.[653]

According to the New York State Department of Financial Services:

> "The appraisal clause provisions of the standard fire insurance policy in New York contain no limitation on an insured's or an insurer's right to obtain an appraisal with respect to the amount of any component of the actual cash value or the amount of loss in the event there is a disagreement as to actual cash value or the amount of loss. Therefore, an insured or insurer can obtain an appraisal with respect to the amount of any of the components of actual cash value or amount of loss anytime where

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[652] Fire Ins Contracts; Standard Policy Provisions; Possible Violation, N.Y. Ins. Law §3404(g) (2003) "[T]he provisions of the appraisal clause...including determination as to the amount of loss or damage rendered thereunder, shall be binding on all parties to the contract of fire insurance evidenced by the policy."

[653] Album Realty Corp. v. American Home Assur. Co., 176 A.D.2d 513, Vol. 206, NYLJ #77, October 18, 1991 at 22 (one of the first decisions interpreting §3404(g) after its enactment determined that the legislature's intent in enacting the amendment was for the explicit purpose of overruling Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 1 N.Y.2d 534, 136 N.E.2d 842 (1956).

there has been a disagreement."[654]

Citing Fahrenholz, the United States District Court for the Western District of New York recently held that in the state of New York an insured did not have the right to specific performance of the appraisal provision due to the absence of clarity of the intent of the legislature concluding it would be better to allow any inconsistency between CPLR §7601 and Insurance Law §3404(g) to be addressed by the New York Legislature.[655]

Legislation was enacted in 2010 by the New York State Legislature to clarify that the right to specific performance exists. The bill was signed by Governor David Paterson on March 30, 2010.[656]

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[654] New York Insurance Department, General Counsel Opinion 3-6-2001; *See also*, Zar Realty, 2003 WL 1744288 (S.D.N.Y. 2003).

[655] Woodworth v. Erie Ins. Co., 2006 WL 140708 (W.D.N.Y. 2006).

[656] The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section1. Subsection (g) of section 3404 of the insurance law, as added by Chapter 27 of the laws of 1990, is amended to read as follows:

(g) Notwithstanding any other provision of law to the contrary, the provisions of the appraisal clause set out on the second page of the standard fire policy and the provisions of section three thousand four hundred eight of this article, including determinations as to the amount of loss or damage rendered thereunder, shall be binding on all parties to the contract of insurance evidenced by the policy and may be enforced by either the insurer or the insured by application made pursuant to subsection (c) of section three thousand four hundred eight of this article.

§ 2. Section 3408 of the insurance law is amended by adding a new subsection (c) to read as follows:

(c) In the event of a covered loss, whenever an insured or insurer fails to proceed with an appraisal upon demand of the other, either party may apply to the court in the manner provided in subsection (a) of this section for an order directing the other to comply with such

Generally speaking, the majority view is that the appraisal provision can be specifically enforced. The Texas Court of Appeals, citing precedent in Ohio, New Jersey and Pennsylvania, concluded that the "insured has a right to rely on the plain language of his policy providing for appraisal on the written demand of either party."[657] Similarly, Florida's First District Court of Appeals has accepted this enlightened view and has concluded that once an insured demands the benefit of the appraisal provision, the insurance company must respond and participate.[658]

In Maryland, it has been held that an insured may compel an insurer to submit to

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demand. If an appraisal is so ordered, it shall be limited to a determination of actual cash value and/or replacement cost, or the amount of loss which shall be determined as specified in the policy and shall proceed pursuant to the terms of the applicable appraisal clause of the insurance policy and not as an arbitration.

§ 3. Section 7601 of the civil practice law and rules is amended to read as follows:

§ 7601. Special proceeding to enforce agreement that issue or controversy be determined by a person named or to be selected. A special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected. The court may enforce such an agreement as if it were an arbitration agreement, in which case the proceeding shall be conducted as if brought under article seventy-five of this chapter. Where there is a defense which would require dismissal of an action for breach of the agreement, the proceeding shall be dismissed. Provided, however, that this section shall not apply to any agreement contained in the standard fire insurance policy of the state with the exception of an action to enforce the appraisal clause pursuant to section three thousand four hundred eight of the insurance law which shall not be enforced as an arbitration agreement.

§ 4. This act shall take effect immediately.

657 Standard Fire Ins. Co. v. Fraiman, 514 S.W.2d 243 (Tex. App.-Houston [14th Dist]. 1974).

658 Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. Dist. Ct. App. 1st Dist. 2000); *But see*, Nationwide Mut. Ins. Co. v. Johnson, 828 So.2d 1021 (Fla. 2002).

appraisal.[659]

In Florida, the court reversed an order compelling appraisal where it found the lower court should have conducted an evidentiary hearing on an insured's compliance with post-loss conditions in the policy. Those circumstances involved a dispute surrounding whether insureds had provided their insurer with documentation and information related to a claim, a condition the insurer argued was precedent to appraisal. In reversing and remanding for a hearing, the court relied upon a previous holding that "'[W]here the insured cooperates to some degree or provides an explanation for its noncompliance, a fact question is presented regarding the necessity or sufficiency of compliance…Whether [insured's] compliance with the policy terms was necessary or sufficient is a dispute of fact.'"[660]

Compliance with post-loss conditions has also been examined in relation to the court's discretion to determine the order of consideration of coverage and loss issues. There, the court's discretion was acknowledged in this arena once a demand

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[659] Aetna Cas. & Sur. Co. v. Insurance Com'r, 293 Md. 409, 445 A.2d 14 (1982); Meyer v. State Farm Fire & Cas. Co., 85 Md. App. 83, 582 A.2d 275 (1990); Brethren Mut. Ins. Co. v. Filsinger, 54 Md. App. 357, 458 A.2d 880 (1983).

[660] Citizens Prop. Ins. Corp. v, Gutierrez, 59 So. 3d 177 (2011).

for appraisal is determined to be ripe. However, such discretion does not "override" a determination of whether there is an arbitrable issue of fact present, which does not exist unless "'some meaningful exchange of information sufficient for each party to arrive at a conclusion'" has occurred.[661]

An argument that an appraisal clause lacked mutuality of obligation and was thus unenforceable has been rejected in Florida. That case was remanded to the trial court with directions to compel appraisal where an insurer invoked the appraisal provision within the subject policy as to the estimated loss to the building but the insured had refused to hire an appraiser.[662]

Similarly, the Supreme Court of Rhode Island held that an insurer could be compelled to conduct appraisal through the issuance of an injunction. In Hahn v. Allstate Ins. Co., the insured sought an injunction requiring the insurer to submit to appraisal. The insurer had refused to begin the appraisal process because it argued that there were scope of coverage issues which had to be determined through litigation. The court found that an

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[661] Citizens Prop. Ins. Corp. v. Mango Hill Condominium Ass'n 12 Inc., 54 So.3d 578, 36 Fla L. Weekly D298 (Fla. 3d DCA 2011)

[662] Commercial Union Ins. Co. v. Swain, 694 So.2d 39 (Fla.1st DCA1997).

injunction to require the insurer to conduct appraisal, rather than litigation to determine which losses were covered under the policy, was the appropriate remedy as there was no dispute that the policy covered direct loss caused by fire.

In the District of Columbia, where the insureds sought declarations that the insurer was obligated to conduct an appraisal of loss following a fire and that insureds were entitled to replacement costs, a declaratory judgment was not the appropriate remedy.[663] The court determined that the insureds' claims were just components of their breach of contract claim, and thus, would be more appropriately resolved through the breach of contract claim. In its explanation, the court stated that declaratory relief would only promote piecemeal litigation.

One court found that specific performance was not available, holding that the party who breaches the agreement to participate in the appraisal process may be liable to the demanding party for actual damages incurred by their refusal, such as attorneys' fees and other costs of litigation, as well as interest.[664] This would seem to be the

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[663] Gibson v. Liberty Mut. Group, Inc., 2011 WL 1518196 (D.D.C. 2011).

[664] Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148 (4th Cir. 1993).

minimum protection to which a consumer should be entitled, as without it, there is nothing to discourage a wilful refusal to participate.

In Pennsylvania, it has been held that when an insured is prevented from submitting the controversy to appraisement by the insurance carrier's refusal to name an appraiser, then the insured may choose between seeking enforcement of the appraisal clause or suing for damages.[665]

An additional remedy either the insured or the insurer has upon their counterpart's refusal to participate by the appointment of an appraiser is to proceed to court to have an umpire appointed. It has been held that upon the failure of a party to appoint an appraiser, that party has waived their right to participate and the appraisal may nevertheless proceed to a conclusion with an award being made by the remaining appraiser and the umpire.[666]

Furthermore, it has been held that where the insurance carrier's appraiser did nothing to advance the settlement of the claim, in this case because of a fee dispute with the umpire, it was permissible for the appraiser for the

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[665] Ice City, Inc. v. Ins. Co.of North America, 456 Pa. 210, 314 A.2d 236 (1974).

[666] Saba v. The Homeland Ins. Co. of America, 159 Ohio 237, 112 N.E. 2d 1 (1953); Everett Cash Mut. Ins. Co. v. Krawitz, 430 Pa. Super. 25, 633 A.2d 215 (1993); Drescher v. Excelsior Ins. Co. of N.Y., 188 F. Supp. 158, 159 (D.N.J.1960).

insured and the umpire to resolve the issue of the amount of loss. This is so despite the "one-sided" nature of the process as the insurer brought this situation upon itself through its own derelict behavior in failing to insure that its appraiser went forward with the process as required.[667]

The Saba and Drescher approach which provided the option of the unilateral appointment of an umpire has been criticized in that although the contract language gives a court the power to appoint an umpire under these circumstances, a more appropriate approach might be to direct the defaulting party to name an appraiser. This would permit the process to go forward. With this approach, it is only upon those two appraisers' inability to appoint an umpire that the court would again become involved.[668] It is noteworthy that the court in Hala found the majority's comments from Saba "convincing" but nevertheless settled on a somewhat less aggressive approach.

In Smith v. Civil Service Employee's Ins. Co.,[669] when confronted with the insurer's failure to appoint an appraiser, the court

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[667] Everett Cash Mut. Ins. Co. v. Krawitz, 430 Pa. Super. 25, 633 A.2d 215 (1993).
[668] Hala Cleaners, Inc. v. Sussex Mut. Ins. Co., 115 N.J. Super 11, 277 A.2d 897 (Ch. Div. 1971).
[669] 2005 WL 2620537 (D. Ariz. 2005).

ordered that an appraiser be selected and employed within 10 days and upon the carrier's failure to so appoint within that time frame, the court reserved the right to impose sanctions and unilaterally appoint an appraiser.

In Arizona, the court recognized the availability of choice on the part of the insured to either sue to compel specific performance of the appraisal provision,[670]or to proceed with the appraisal and produce an award, thus giving life to the appraisal provision contained in the policy.[671]

In Texas, it was held that a court abuses its discretion when it denies enforcement of a valid appraisal clause.[672] If the party resisting the appraisal process has failed to establish waiver, then the appraisal clause is enforceable.

In Louisiana, it has been held that the use of summary proceedings by an insured is appropriate to invoke the appraisal provision, pursuant to which the insured filed papers requiring the insurer to show cause as to why an umpire should not be appointed. The claim

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670 Id., citing Ice City , 456 Pa.210.
671 Everett Cash Mut. Ins. Co. v. Krawitz, 430 Pa. Super. 5, 633 A.2d 215 (1993).
672 *See* In Re Ranchers & Farmers Mut. Ins. Co., 2011 WL 1631820 (Tex.App.-Beaumont 2011).

of prematurity was not valid to challenge such an action as the policy language clearly evinced an intent to avoid litigation at this stage of the proceeding and the cause of action had accrued to the point where it was ripe for judicial intervention.[673]

Florida has outlined the requirements for enforcement by specific performance. There, it was held that the right to specific performance required a pleading of facts showing "(1) [one] is clearly entitled to this remedy; (2) there is no adequate remedy at law; and (3) justice requires it." The first prong (1) "requires litigants seeking the remedy to establish the legal requirements of entitlement to the right 'by clear, definite and certain proof,'" which is more stringent than a preponderance of the evidence. In this matter, the court found that the complaint failed to state a claim, as the aforementioned requirements were not met. It stated facts were not pled to show "a present right to appraisal under the insurance contract, or no adequate remedy at law if appraisal is not ordered, or that justice presently requires the appraisal."[674]

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[673] White v. State Farm Ins. Co., 984 So.2d 243 (La. Ct. App. 3 Cir. 2008).

[674] La Gorce Palace Condo Ass'n, Inc. v. QBE Ins. Corp., 733 F.Supp.2d 1332 (S.D. Fla. 2010).

Despite the logic and efficiency of the proper use of appraisal, some states have left their insureds without any protection whatsoever by making the appraisal provision voluntary. Arkansas, California, Kansas, Nebraska, Oregon, Puerto Rico, South Dakota, Virginia, and West Virginia have all changed their laws regarding the appraisal process by amending the language in each jurisdiction's amendatory endorsement.

For example, Arkansas' law prohibits any policy from containing a binding appraisal clause and an appraisal will take place only if both the insured and the carrier agree voluntarily to have the loss appraised.[675]

Virginia has a history of disregarding the consumer's rights in this regard. In Hanover Fire Ins. Co. v. Drake,[676] it was wrongly held that the appraisal clause is "inserted wholly for the protection of the insurer," in determining that the insurer cannot be compelled to submit to an appraisal.

California has instituted the following language:

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[675] Trial by Jury, Ark Code Ann §23-79-203 (2002); Agreement to Arbitrate, Ark Code Ann. §§16-108-201 (1987); *See also,* Ark. Ins. Dept. Bulletin 19-89, July 21, 1989.

[676] Hanover Fire Ins. Co. v. Drake, 170 Va. 257, 196 S.E. 664 (1938).

> "Where the request is accepted, the appraisers shall first select a competent and disinterested umpire, and failing for 15 days to agree upon the umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property is located. Appraisal proceedings are informal unless the insured and this company mutually agree otherwise."[677] (emphasis added)

Thus, in California, in all but catastrophic cases, the appraisal provision has now become voluntary and therefore of much less value to the consumer.

In Oklahoma, the party that requests appraisal is bound by the appraisal result, but the party who does not request appraisal is not bound.[678] The net effect of this rule is that appraisal has fallen into disuse. Knowledgeable or well advised insureds will not utilize it as only unsophisticated consumers will use a process in which they can lose but cannot win. However, the party that requests appraisal, while bound

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[677] Standard Form, Cal. Ins. Code §2071 (2003).

[678] *See* Massey v. Farmers Ins. Group, 837 P.2d 880, 1992 Okla. 80 (Okla. 1997); *see also* Trinity Baptist Church v. GuideOne Elite Ins. Co., 2009 WL 2972502 (W.D.Okla.2009).

by the appraisal result, can still object to the appraisal award if that party can establish one of the recognized grounds for setting aside an award - fraud, bad faith, or mistake.[679]

In LeBlanc v. Travelers Home and Marine Ins. Co., the court explained that the party invoking appraisal can also challenge the award on the basis that the umpire addressed issues beyond those as to which the appraisal process was invoked by determining issues of coverage and causation.

Oregon's approach has the same interesting wrinkle in that an appraisal is only binding on the demanding party.[680]

Property insurance consumers in Puerto Rico have been left totally unprotected when their Standard Fire Policy was amended to remove the appraisal provision completely.

These jurisdictions inexcusably have left their consumers substantially unprotected in case of a disagreement as to value or the amount of loss and encourage unnecessary and expensive litigation.

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679 *See* LeBlanc v. Travelers Home & Marine Ins. Co., 2011 WL 1107126 (W.D.Okla. 2011).

680 Molodyh v. Trucks Ins. Exhange, 744 P.2d 1942 (Or. 1987).

The legislatures and insurance regulators in these states who have facilitated the undermining of the appraisal process have truly done a disservice to their ultimate constituents, the insurance consumer and the insurance industry.

Some states have determined that it is contrary to public policy to make an appraisal demand mandatory as against the insureds as it deprives the courts of their jurisdiction over consumer-related contractual disputes.[681]

However, generally it has been held that such a clause is not unconscionable even where the insured was not aware of it at the time the policy was applied for.[682]

Courts have been known to punish insurance companies who, acting in bad faith, unreasonably delay or disrupt the appraisal process. For example, in Willow Inn, Inc. v Public Service Mut. Ins. Co., [683] the United States District Court sitting in the Eastern District of Pennsylvania was confronted with a claim where a properly demanded appraisal was

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[681] Rawling v. Amco Ins. Co., 438 N.W.2d 769 (Neb. 1989).

[682] In re Farmers and Ranchers Mut. Ins. Co., 2008 WL 2133116 (Tex. App.-San Antonio, 2008).

[683] The Willow Inn, Inc. v. Public Service Mut. Ins. Co., 2002 WL 922144 (E.D.Pa. 2002), *aff'd*, 66 Fed. Appx. 398 (3d Cir. 2003), *on remand to*, 2003 WL 21321370 (E.D. Pa. 2003).

delayed for eight months when the carrier resisted the appraisal demand, citing insufficient documentation of a dispute. Public Service Mutual persisted in its refusal to proceed despite repeated demands that the process begin. After finding that the insured and the insured's public adjuster had been diligent and cooperative in seeking the appraisal as well as during the process itself, and further finding that the insurer offered no credible basis for its substantial delay in commencing the appraisal process, the court awarded the insured its expenses for complying with its demand for submission of a proof of loss and awarded punitive damages pursuant to 42 Pa. Cons. Stat. § 8371 in the amount of $150,000. plus attorneys' fees and costs.

By this ruling, the district court recognized the overwhelming public policy in favor of resolving the issues of value and loss without judicial intervention while at the same time, encouraging good faith and fair dealings in the administration of insurance claims.

It has been held that where an insured had improperly refused a demand for appraisal, and subsequently had their litigation complaint dismissed as a result thereof, a subsequent demand for appraisal is not permitted by the policy.[684]

A lower court's non-final order which denied an insurer's motion to compel appraisal did not meet the requirements for review on appeal in a jurisdiction that limits appellate review from a non-final order particularly where the trial court's decision that the motion to compel appraisal was not yet ripe for consideration was not a departure from an essential requirement of law and the order did not result in irreparable injury since the appraisal could still be ordered in the future.[685]

It has been held that an order compelling appraisal under the provisions of a homeowner's insurance policy is a non-final order and as such, not appealable. In Burnett v. Clarendon Select Ins. Co.,[686] it was held that the insured's assertion that the insurer had waived the benefit of appraisal had to await completion of the appraisal and the entry of a final order by the circuit court prior to a ripening of the right to appeal. This represented a change in the traditional rule in

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[684] Littrell v. Allemannia Fire Ins. Co. of Pittsburgh, Pa., 222 A.D. 302, 226 N.Y.S.343 (3d Dept. 1928), *modified on other grounds,* 224 A.D. 523, 231 N.Y.S. 520 (3d Dept. 1928) *rev'd on other grounds,* 250 N.Y. 628, 166 N.E. 350 (1929).

[685] Cotton States Mut. Ins. Co. v. D'Alto, 879 So.2d 67, 29 Fla. L. Weekly D1751, 29 Fla. L. Weekly D2026 (Fla. App. 1 Dist. 2004).

[686] 920 So.2d 188, 31 Fla L. Weekly D459 (Fla. App. 2d Dist. 2006).

the state of Florida where historically, appraisal was equated with arbitration and had previously treated orders determining a party's right to appraisal as appealable, non-final orders. Recent decisions in Florida such as Allstate Ins. Co. v. Suarez,[687] have overruled this historic rationale.

The state of Florida has also established that an order granting or denying an appraisal is not appealable as it does not constitute a final order. The Fourth District Court of Appeals of Florida, has stated that inasmuch as the appraisal provision was not an "arbitration agreement" for purposes of fitting within the exception to the rule which authorizes appeals from non-final orders involving the entitlement of a party to arbitration.[688]

At least within the Second Circuit, the federal courts have upheld removal petitions filed in actions to compel appraisal which result in a transfer of the action from state court to federal court in matters where the insurer and insured are from different states. Such an action constitutes a "civil action" within the meaning of the removal § 28 U.S.C. §1441(a).[689]

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[687] 833 So.2d 762, 27 Fla L. Weekly S1028 (Fla. 2002).

[688] Nationwide Mutual Fire Ins. Co. v. Schweitzer, 872 S.2d 278 (Fla. App. 4 Dist. 2004).

[689] Southern Air, Inc. v. Chartis Aerospace Adjustment Services, Inc.., 2012 WL 162369 (D.Conn 2012.); Lummus Co. v. Commonwealth Oil Refining Co., 195 F. Supp. 47 (S.D.N.Y. 1961); Davenport v. Proctor & Gamble Mfg. Co., 241 F.2d 511 (2d Cir. 1957);

D] FAILURE OF APPRAISAL

From time to time, instead of leading to a fair and efficient result, the appraisal process deteriorates and fails, becoming an additional frustrating step in a seemingly endless process. Thankfully, experience tells us that this occurs in a relative minority of cases, though few appraisals are without their complications, aggravations and frustrations.

The need for the parties to demonstrate a commitment to the appraisal process and for a successful and fair conclusion cannot be overstated.

Despite the sometimes overwhelming challenges confronted by insurance professionals in adjusting or appraising large and complex property losses, these professionals must do everything reasonably possible to avoid a failure of the appraisal process.

Where an appraisal award has been set aside without any fault on the part of the insured, he or she is not required to submit to any further appraisal, but is free to litigate the issues in an action at law on the policy. The

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Maxon's Restoration Inc. v. Newman, 292 F. Supp.2d 477 (S.D.N.Y. 2003).

carrier is deemed to have waived its right to the appraisal process.[690]

If the appraisal fails due to the fault of the insurer, then the insured can sue on the policy without seeking or submitting to a further attempt at appraisal.

Actually, each party has a duty to act in good faith in carrying out the appraisal. If either party is guilty of acting in bad faith, the other party may be absolved from compliance with the condition.

If the failure of the appraisal is due to the fault of the appraisers and not the fault of either the insurer or the insured then the prevailing view is that one attempt at appraisal satisfies the condition precedent.[691]

However, there is a minority view that failure of an attempted appraisal through no fault of either party does not satisfy the policy's condition precedent.[692]

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[690] In re Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955).

[691] Hamilton v. Liverpool, L & G Ins. Co., 136 U.S. 242, 10 S. Ct. 945, 34 L.Ed. 419 (1890); Williams v. German Ins. Co., 90 App. Div. 413, 86 N.Y.S. 98 (4th Dept. 1904); Parris v. Hamberg-Bremen Fire Ins. Co., 204 Mass 90, 90 N.E. 420 (1910); Phoenix Ins. Co. of Brooklyn v. Carnahan, 63 Ohio St. 258, 58 N.E. 805 (1900).

[692] Westenhaver Bros. v. German-American Ins. Co., 113 Iowa 726, 84 N.W. 717 (1900); Grady v. Home F & M Ins. Co., 27 R.I. 435, 63 A. 173 (1906).

Where the carrier's appraiser failed to proceed with the process as a result of a perceived fee dispute with the umpire, the insured had as one of his options the right to complete the appraisal in the absence of participation by the carrier's selected appraiser.[693]

Fault on the part of the carrier's appraiser will often be attributed to the carrier. For example, in Green v. International Ins. Co.[694] the court considered the relationship between the appraiser and the party hiring him. The insurer's appraiser persisted in nominating umpire candidates who currently or formerly had dealings with the insurance company. In addition to the resulting delay, the appraiser also adjourned numerous meetings at the last minute and often without explanation. The court found sufficient facts to raise an inference that the appraiser was acting as agent for the carrier in delaying the proceeding at its behest.

This is so despite the fact that the appraiser is not the agent of the party appointing him.[695] Thus, where the appraiser arbitrarily and unfairly refused to act with the

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[693] Everett Cash Mut. Ins. Co. v. Krawitz, 430 Pa. Super. 5, 633 A.2d 215 (1993).
[694] Green v. International Ins. Co., 238 Ill. App.3d 929, 605 N.E.2d 1125 (2d Dist. 1992).
[695] Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N.W. 650 (1915).

other appraiser, the party appointing such appraiser is held responsible.[696]

The parties have an obligation to give life to the intent of the appraisal provision by acting reasonably and fairly and must make a good faith effort at conducting the process in a reasonable manner. The Green[697] case demonstrates that the parties themselves will be held accountable for inappropriate conduct on the part of their duly nominated appraiser.

Where appraisal fails through the fault of neither of the principals, the prevailing view is that the insured can institute suit without regard to the appraisal provision.[698] Indeed, it has been held that where the carrier agreed to proceed to appraisal based on an informal presentation of the claim, the carrier was held to be estopped from relying on the insured's failure to file the claim within the time

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[696] Id.; O'Rouke v. German Ins .Co., 99 Minn. 293, 109 N.W.401 (1906); Harrison v. Hartford Fire Ins. Co., 112 Iowa 77, 83 N.W. 820 (1900); Brock v. Dwelling-House Ins. Co., 102 Mich. 583, 61 N.W. 67 (1894); Bishop v. Agricultural Ins. Co., 130 N.Y. 488, 29 N.E. 844 (1892); Uhrig v. Williamsburgh City Fire Ins. Co., 101 N.Y. 362, 4 N.E.745 (1886); Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S.W. 1041 (1896); Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N.W. 422 (1895); Davis v. Atlas Assur. Co., 16 Wash. 232, 47 P. 885 (1986).

[697] Green, *supra*.

[698] Western Assur. Co. of Toronto, Canada v. Decker, 98 F. 381 (8th Cir. 1899).

prescribed by the policy.[699] In Bernhard,[700] the court determined that the carrier's adjuster had lulled the insured into a false sense of security by agreeing to proceed based on an informal presentation and induced him to refrain from doing that which was required of him under the contract.

Where an insurer improperly refuses a demand for appraisal, the insured may generally deem the contract breached and then commence suit.

The failure of appraisal by virtue of the carrier's abandonment of an action to appoint an umpire resulting in the action's dismissal for want of prosecution certainly raises a question of fact as to the carrier's breach of contract.[701]

Where the failure of the appraisal is definitely due to the fault of the insured and the appraisal is a condition precedent to an action on the insurance policy, the absence of an award may be a bar to an action on the policy.[702]

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[699] Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 A.134 (1906).

[700] *See also*, Roe v. Jerome, 18 Conn. 138 (1846) ; Main v. Brown, 56 Conn. 345, 115 A. 743 (1887); Norwalk Gaslight & Co. v. Borough of Norwalk, 63 Conn. 495, 28 A. 32 (1893); New York Life Ins. Co. v. Eggleston, 96 U.S. 572, 6 Otto. 572, 24 L.Ed. 841 (1878); Butterworth v. Western Assur. Co., 132 Mass. 489 (1882).

[701] Proteet v. Farmers Group, Inc., 2007 WL 4371359 (Tex. App.-Fort Worth 2007).

[702] Hamilton v. Liverpool & London & Globe Ins. Co., 136 U.S. 242 , 10 S. Ct. 945, 34 L.Ed. 419 (1890); Williams v. German Ins. Co., 90 A.D. 413, 86 N.Y.S. 98 (4th Dept. 1904); Parris v. Hamburg-Breman Fire Ins. Co., 204 Mass. 90, 90 N.E. 420 (1910); Boler-Phillips

In Michigan, it has been held that upon the insured's disregard of the carrier's demand for appraisal, the insured's subsequent lawsuit was appropriately dismissed.[703]

However, it has been stated that in the state of Mississippi, there is no precedent to support the argument that an insured's failure to comply with an appraisal provision renders the underlying insurance policy void.[704]

In Connecticut, where the appraisal process failed despite a fair attempt on the part of both the parties and the appraisers and without the fault of any of them, the insured is absolved from compliance with the appraisal provision and may sue. In Berhard,[705] the parties disagreed as to the amount of loss and joined in a submission pursuant to the appraisal provision. No award was ever made. This result was due to the disagreements between the appraisers, without fault of the parties. Notwithstanding the policy requirement that the parties proceed to appraisal upon

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Body Shop, Inc. v. Employers Mut. Cas. Co., 251 Fed. Appx. 912, 2007 WL 3144030 (C.A.5)) Miss. 2007) (where insured's compliance with appraisal demanded by insurer was a condition precedent to suit and insured's non-compliance warranted dismissal.; Phoenix Ins. Co. of Brooklyn v. Carnahan, 63 Ohio St. 258, 58 N.E. 805 (1900); Max Gwertzman, *A Legal Analysis of the Appraisal Agreement*, Roberts Publishing Corp., 4th Ed. 1972.

[703] Beck v. Michigan Basic Property Ins. Ass'n, 2003 WL 887690 (Mich. App. 2003).

[704] Greenbrook, Inc. v. State Farm Fire and Cas. Co., 54 Fed. Appx. 592 (CA 5 C Miss. 2002).

[705] Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 A.134 (1906).

demand, the insured was permitted to file suit. Upon a review of the existing legal authority, the Supreme Court of Connecticut stated the following:

> All the authorities agree that, notwithstanding such stipulations in a policy, an award where a submission is required is not a necessary prerequisite to the maintenance of an action. The duty of a party is to act in good faith and make a fair effort to carry out the provisions and accomplish their object. Failure on the plaintiff's part to perform this duty will bar an action; a like failure on the defendant's part will absolve the insured from compliance and justify suit without an award. So far the authorities[706] are, we believe, agreed where the absence of an award is due to the fault of neither party, the cases are not in full accord as to the rights of an insured. Decisions can be found

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[706] Uhrig, 101 N.Y. 362; Bishop, 130 N.Y. 488; Hood v. Hartschorn, 100 Mass. 117, 101 N.E.362 (1868); Connecticut Fire Ins .Co. of Hartford v. Cohen, 97 Md. 294, 55 A. 675 (1903); Fischer v. Merchant's Ins Co., 95 Me. 486, 50 A. 282 (1901); Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N.W. 422 (1895); Brock v. Dwelling-House Ins. Co., 102 Mich. 583, 61 N.W. 67 (1894); McCullough v. Phoenix Ins. Co. of Hartford, 113 Mo. 606, 21 S.W. 207 (1893); Adams v. South British & Nat'l. Fire & Marine Ins. Co., 70 Cal. 198, 11 P. 62 (1886).

which hold that, in such a situation, no action can be maintained.[707] This unsatisfactory position has, however, been very generally repudiated, and it has been held that either upon the failure of the arbitrators to return an award the insured need go no further and may sue, or that the right to sue arises only upon his failure to secure an award after he has taken all reasonable and proper steps to accomplish that result, whether through an original submission or others. The reason underlying these cases is the reasonable one that a claimant under a policy ought not to be tied up forever without his fault and against his will by an ineffectual arbitration. The only difference between the two positions assumed in them is one merely as to what shall be deemed a fair effort to secure the award.[708] The plaintiffs' conduct satisfies the most exacting of these requirements, since the record

[707] Carroll v .Girard Fire Ins. Co., 72 Cal. 299, 13 P. 863 (1887).

[708] Uhrig, 101 N.Y. 362; United States v. Robeson, 34 U.S. 319, 9 Pet. 319, 9 L. Ed. 142 (1835); Phippen v. Stickney, 44 Mass. 384, 3 Metcalf 384 (1841); Fischer, 95 ME 486; Westenhaver v. German-American Ins. Co., 113 Iowa 726, 84 N.W. 717 (1900); Vernon Ins. & Trust Co. v. Maitlen, 158 Ind. 393, 63 N.E. 755 (1902); Cohen, 97 Md. 294; Pretzfelder v. Merchant's Ins. Co., 123 N.C. 164, 31 S. E. 470 (1898).

> discloses that he was in correspondence with the defendant suggesting either means of breaking the deadlock between the appraisers, bringing about an award or compromise agreement down to within a few days of the time when its repudiation of liability put an end to any further duty on his part in that regard. The defendant, by its refusal to recognize any obligation at once came under the condemnation of not acting in good faith in carrying out the provisions of the policy to secure an adjustment and justified a suit against them. By the same act, the plaintiff was also excused from proceeding to do a vain thing.[709]

In New York, where the insured enters into an appraisal agreement with the insurance company in accord with the policy, the insured is not bound to enter into a second agreement upon the failure of the first effort at appraisal. In this event, the New York Court of Appeals

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[709] Royal Ins. Co. v. Martin, 192 U.S. 149, 48 L.Ed. 385, 24 S. Ct. 247 (1904); O'Brien v. Ohio Ins. Co., 52 Mich. 131, 17 N.W. 726 (1883); Lebanon Mut. Ins. Co. v. Erb, 112 Pa. 149, 4 A. 8 (1886); Campbell v. American Fire Ins. Co., 73 Wis. 100, 40 N.W. 661 (1888); German Fire Ins. Co. v. Gueck, 130 Ill. 345, 23 N.E. 112 (1889); Boyd v. Cedar Rapids, Ins. Co., 70 Iowa 325, 30 N.W. 585 (1886); Siegler v. Phoenix Ins. Co. 107 Mo. App. 456, 81 S.W. 637 (1904); Niagra Ins. Co. v. Lee, 73 Tex. 641, 11 S.W. 1024 (1889).

has held that the insured has discharged his entire duty under the appraisal provision and is not bound to enter into a new agreement.[710]

It has been held that when an appraiser refuses to carry out his duties and states that he is no longer qualified to act and refuses to act further as an appraiser, the remedy is for the party that appointed him to quickly appoint another appraiser.[711]

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[710] Uhrig, 101 N.Y. 362, 4 N.E. 745 (1886).
[711] In re 176 & 178 East Main Street, Amsterdam, New York, 263 N.Y. 197, 188 N.E. 647 (1934).

CHAPTER VII

THE APPRAISERS

A] QUALIFICATIONS

"Competency," a common policy prerequisite for any appraiser, has been defined in this context as an appraiser who has a reasonable basis for reaching an intelligent decision.[712] The competence of the appraiser is generally not an issue or subject of challenge as it is patent that a party to the policy will endeavor not to select an incompetent to represent his interests. To the extent that a party hires one not "competent," that party will bear the consequences when the opinions and arguments of the appraiser are weighted.

Different formulations of policy language present a common theme with minor twists.

[712] American Union Ins. Co. v. Stull Bros. Co., 126 N.J. Eq. 64, 7 A.2d 866 (1939).

Some formulations contain the word "competent" as found in many HO 3 homeowner forms. Other formulations include "competent and disinterested," "competent and impartial," as well as "competent and independent."

While it is generally accepted that the appraiser appointed must be competent and disinterested,[713] an appraiser in other losses, [714] or an appraiser who has been a public adjuster,[715] or an appraiser who has been employed by the same carrier to appraise prior losses have all been held to be qualified.[716] As long as there is no evidence that the appraiser's actions are performed in a dishonest manner or with a lack of integrity or where he or she has acted improperly in making an award, or has an interest in the result, the appraiser generally will be deemed competent.[717]

Appraisers need not be experts as to the type of property being evaluated but must only

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713 N.Y. Ins. Law §3404 (Lines 123-140 of the Standard Fire Policy); 44 Am. Jur.2d Insurance §1688 (1982).

714 Continental Ins. Co. v. Vallandingham & Gentry, 116 Ky. 287, 76 S.W. 22 (1903); Stemmer v. Scottish Ins. Co., 33 Or. 65, 53 P. 498 (1898); Van Winkle v. Continental Fire Ins. Co., 55 W. Va. 286, 47 S.E. 82 (1904).

715 Meyerson v. Hartford Fire Ins. Co., 16 Misc. 286, 38 N.Y.S.112 (1896), *aff'd,* 17 Misc.121, 39 N.Y.S. 329 (1896).

716 Remington Paper Co. v. London Assur. Corp. of England, 12 A.D. 218, 43 N.Y.S 431 (4th Dept. 1896).

717 Levin v. Northwestern Nat'l. Ins. Co., 185 F. 981 (D.C.N.D. 1911).

show a reasonable level of intelligence. It has been held that an appraiser need not be an expert in handling the kinds of property insured.[718]

The same court additionally did not find an appraiser's lack of training and unfamiliarity with state procedures and law to be indicative of bad faith. There, the adjuster was based out of state and had over 20 years of experience in the field, though had no specific training pertinent to Oklahoma. The adjuster's absence of knowledge as to various legal concepts at his deposition "[struck] the court as proving little or nothing as to the fitness of [the adjuster], a non-lawyer, to perform the claims handling tasks assigned to him" and no aspect of state law which unique to the state and relevant to the case was raised.[719]

The Michigan Court of Appeals offered a concise and accurate explanation of what is required of the appraiser when it comes to independence.

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[718] 6 Appleman, Insurance Law & Practice §3927 at 551 (1972); American Union Ins. Co. v. Stull Bros. Co., 126 N.J. Eq. 64, 7 A.2d 866 (1939) (case involved a public adjuster serving as appraiser of building and machinery damage who was neither builder nor machinery expert, held competent); Gear v. Webster, 258 Cal. App.2d 57, 65 Cal. Rptr. 255 (5th Dist. 1968).

[719] LeBlanc v. The Travelers Home & Marine Ins. Co., 2011 WL 2748616 (W.D. Okla 2011).

"The definition of 'independent' is "[not] dependent; not subject to control, restriction, modification, or limitation from a given outside source." Blacks Law Dictionary (6th ed.) The definition of "impartial" is "[f]avoring neither; disinterested; treating all alike; unbiased; equitable, fair and just." *Id.* The implication is that the independent appraiser may be biased toward the party who hires and pays him, as long as he retains the ability to base his recommendation on his own judgment. The umpire, in contrast, may not favor either party; he must serve only equity, fairness and justice.

Because "independent appraisers" may feel biased toward the party who hired them, this construction leaves intact the rule that appraisers are not disqualified from their appointments on the basis of having previously served as adjusters..."[720]

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[720] Auto-Owners Ins. Co. v. Allied Adjustors & Appraisers, 238 Mich. App. 394, 605 N.W.2d 685 (Mich Ct. App. 1999); *See also*, Hartford Ins. Co. v. Miller, 2006 WL 2844124 (E.D. Mich. 2006).

Michigan's current statutory provision on this issue requires that a "competent, independent appraiser" be chosen upon a written demand, and that appraisers then select a "competent, impartial umpire." The court has recently identified the legislature's intent in enacting this language, which prior to 1990 required that both appraisers and umpires adhere to the same standard of "competent and disinterested." In the court's view, the amended language reflects the legislature's expectation of a higher standard of fairness required by an umpire than by an appraiser.[721] This view is largely universal.

With respect to policy mandated competence, parties are free to specify the credentials of party-appointed appraisers. (Subject, of course, to the Standard Fire Insurance Policy in states where it applies.) Competent is not synonymous with neutrality or independence. An appraiser appointed by an insured who had experience in more than 1800 appraisals and has been published in the field of appraisals was found to be competent despite being involved in his own personal lawsuit against the carrier in which he had the same counsel as the insured, worked on a contingency fee basis and had demonstrated animosity against the carrier. It was held that

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[721] Auto-Owners Ins. Co. v. Allied Adjustors & Appraisers, 238 Mich. App. 394, 605 N.W.2d 685 (Mich Ct. App. 1999) citing MCL 500.2833(l)(m).

the appraiser was competent by virtue of his vast experience and was not required to be neutral or unbiased.[722]

In that case, where the insurer's complaint actually centered around the appraiser's neutrality or independence, the court found the appraiser to be competent to render an appraisal as the term is ordinarily used. The language in the instant appraisal provision provided only that a "competent" appraiser be selected by the parties without defining the term further. Absent a definition within the policy, the court adhered to the presumption that absent a contractual definition it "must presume that this word was intended to be used in its plain and ordinary way as can be ascertained by reference to a dictionary." Dictionary definitions included "properly or sufficiently qualified or capable," "adequate for the purpose", "legally qualified or fit to perform an act", among many others. The court ultimately held that the appraiser's "unquestionable prior experience and/or expertise" rendered him competent as consistent with these definitions.[723]

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[722] Citizens Prop. Ins. Corp. v. M.A. & F. H. Prop., Ltd., 948 So.2d 1017, 32 Fla. L. Weekly D537 (Fla. App. 3 Dist. 2007).

[723] Citizens Prop. Ins. Corp. v. M.A. & F.H. Prop,, Ltd., 948 So.2d 1017, 32 Fla. L. Weekly D537 (Fla. 3d DCA, 2007).

Attorneys have been deemed competent to act as appraisers, though they can not act as attorney for the party hiring them.[724]

In California, lawyers, non-lawyers or those with special expertise in a particular field have all been held competent as appraisers.[725]

The prevailing view as enumerated in Produce Refrigerating Co. v. Norwich Union Fire Ins. Co.,[726] is that an appraiser chosen by the insurer did not meet the fair and disinterested standard where there was evidence that the appraiser received a considerable sum each year from the insurer for his appraisal service. When an appraiser chosen by the insurer is a professional appraiser for insurers for a considerable amount of time and derives a substantial amount of his income from insurers, he is not deemed a fair and impartial appraiser.[727]

One California court criticized an overly rigorous standard. There, an insured's appraiser disclosed that he lacked a financial interest

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[724] Glens Falls Ins. Co. of N.Y. v. Garner, 229 Ala. 39, 155 So. 533 (1934); Couch on Insurance, §15:134 (2d rev. ed. 1982).

[725] Gear v. Webster, 258 Cal. App.2d 57, 63 (1968) (real estate agents and brokers are held competent as appraisers).

[726] 91 Minn. 210, 97 N.W. 875 (1904).

[727] Mason v. Fire Assoc. of Philadelphia, 23 S.D. 431, 122 N.W. 423 (1909).

and had no prior dealings with the parties, but was working at the time as an expert for a different client of the law firm representing the insureds. The court cited a United States Supreme Court holding that impartial arbitrators are required to disclose dealings which may "'create an impression of possible bias'", an objective test. It cited a frequent cause of such bias to be a present or past business relationship between an arbitrator and a party, witness or counsel. The court noted that the relationship must be a substantial one; it deemed the compensation for services as relevant to one's ability to serve impartially but not determinative in the instant case, since any party-selected appraiser must be paid by the retaining party. In short, "[i]mposing overly rigorous standards on party-selected appraisers in informal proceedings…would be both short-sighted and naïve about the realities of modern litigation practices."[728]

It has been held that if the insured knows or has reason to know that the appraiser selected by the insurance company is not disinterested but fails to assert a challenge,

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[728] Mahnke v. Superior Court, 180 Cal. App.4th 565, 103 Cal. Rptr.3d 197 (Ct. App. 2009), citing Commonwealth Coatings Corp. v. Continental Cas. Co. 393 U.S. 145, 149, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968).

there are no grounds for a subsequent complaint by the insured.[729]

Where an insurer made representations, false at the time, that the insurer's chosen appraiser was not a professional appraiser and had never appraised for the insurer involved, the appraiser was not unbiased, unprejudiced and disinterested within the meaning of the policy.[730]

The carrier's appraiser may not be employed by the insurance company. The courts have defined employment narrowly. An appraiser who draws a salary from an insurance company is deemed employed by that company, but an appraiser paid on a per diem basis was not deemed employed by said company.[731]

In Missouri, an insurer's appraiser was not disinterested as a matter of law where his conduct demonstrated bias and included, among other behavior, seeking advice from the insurer as to an umpire appointment, allowing the insurer to edit his draft proposal for appraisal, and prior business dealings with the

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[729] Bradshaw v. Agricultural Ins. Co., 42 N.Y. St. Rptr. 79, 16 N.Y.S 639 (1891), *aff'd,* 137 N.Y. 137, 32 N.E. 1055 (1891).
[730] Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 A.D. 525, 69 N.Y.S. 344 (4th Dept. 1901) *aff'd*, 172 N.Y. 663, 65 N.E. 1118 (1902); Bradshaw, Id.
[731] Equitable Fire & Marine Ins. Co. of Providence, R.I. v. Stieffens, 154 Va. 281, 153 S.E. 731 (1980).

insurer which provided an indirect financial stake in the appraisal's outcome. In Missouri, where a policy allows an amount of loss to be determined through the process of appraisal, individuals selected to act as the appraisers or umpire "must not be interested, biased or prejudiced." The standard of fairness and impartiality is strictly applied, and Missouri courts have declared awards to be void and unenforceable where interested appraisers have been involved in formulating an award. The Missouri Supreme Court has said "The fairness and impartiality of an appraiser should be, like that of a juror, not only above reproach, but above suspicion." The court supplied examples of circumstances where bias may be implicated, such as frequent or habitual employment for a party as an appraiser, conduct which clearly communicates acting in their interest, or any financial interest.[732]

A Georgia court correctly rejected an award where the absence of impartiality on the part of an insurer's appraiser was shown by uncontradicted evidence. The appraiser in question had been employed by the insurer for several weeks prior to the meeting of the appraisers, received payment of ten dollars a

[732] Tamko Bldg. Products, Inc. v. Factory Mut. Ins. Co., 890 F.Supp.2d 1129 (E.D. Mo. 2012), citing Orr v. Farmer's Mut. Hail Ins. Co. of Missouri, 356 Mo. 372, 201 S.W.2d 952, 957 (1947).

day for his services, and even swore, "After they employed me as adjuster, paying me $10 a day, I came up here investigating this loss and had them name me as appraiser." The requirement that an appraiser be impartial and disinterested was found to be substantiated in law, the insurance contract and the oath taken by the appraisers.[733]

Because of the obvious bias, employees of one of the parties or agents or sub-agents of the insurer are disqualified from acting as appraisers.[734]

A professional appraiser employed over a thousand times by insurance companies has been held not to be a disinterested person. Where an appraiser has acted for the insurance company for a significant period of time and has received a significant amount of compensation, he is no longer deemed disinterested.[735]

While a single prior experience working for either party as an appraiser will not, in and of itself, disqualify the appraiser, an extensive history of working for or with one company over

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[733] National Fire Ins. Co. of Hartford v. Bennett, 137 S.E. 570 (Ga. Ct. App. 1927).
[734] *Couch on Insurance* §50:142 (2d rev. ed. 1982).
[735] Coon v. National Fire Ins. Co. of Hartford, 126 Misc. 75, 213 N.Y.S 407 (1925), *aff'd,* 213 A.D. 812, 218 N.Y.S. 722 (4th Dept. 1926), *aff'd,* 246 N.Y. 594, 159 N.E. 635 (1927); Sterling Spinning & Stamping Works v. Knickerbocker Ins. Co. of N.Y., 137 Misc. 349, 242 N.Y.S. 201 (1930).

a period of years will often disqualify the appraiser.[736]

However, it has been held that an appraiser selected by an insurer was not shown to be biased against the insureds even though the adjuster had hired him as an engineer to inspect the house and determine the damage from a plumbing leak. The appraiser was not an employee of the insurer and nothing indicated that the insurer influenced or exercised control over him particularly where, as here, the insureds' appraiser and the umpire entered the final award. The mere showing of a pre-existing relationship, without more, does not support a finding a bias of an insurer's appraiser.[737]

In determining whether to disqualify one of the appraisers, it is not necessary to establish actual fraud or bias on the part of the appraiser. Rather, it has been held sufficient to establish merely an impression of possible bias.[738]

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[736] 44 Am. Jur.2d Insurance §1689 (1982); Couch on Insurance §50:139-140 (2d rev. ed. 1982).

[737] Franco v. Slavonic Mut. Fire Ins. Assoc., 154 S.W.3d 777 (Tex. Ct.-Houston 14th Dist. 2004).

[738] Commonwealth Coating Co. v. Continental Cas. Corp., 393 U.S. 145, 89 S.Ct. 337, 21 L. Ed.2d 301 (1968); Johnston v. Security Ins. Co., 6 Cal. App.3d 839, 86 Cal. Rptr. 133 (2d Dist. 1970); Ceriale v. Amco Ins. Co., 48 Cal. App. 4th 500, 55 Cal. Rptr.2d 685 (1996).

Appraisers may not be subject to the direction of either of the parties.[739] Appraisers are not agents of the party appointing them. It is for this reason they cannot be found guilty of the illegal practice of law. If the appraisers were subject to the direction of the party who appointed them, the entire appraisal proceeding would be a useless ceremony.[740]

One court declined to invalidate an award despite the fact that the umpire and insurer's appraiser met without the insured's appraiser in order to sign the award. The insured admitted that its appraiser had submitted its position to the other two and the umpire had testified that he "fully considered all submissions" before rendering the award. The communication was not deemed sufficient to invalidate the award, as the insured was given both notice and an opportunity to be heard by both and did not show fraudulent intent.[741]

Obviously, an insured may never act as their own appraiser under any circumstances. Any award made under these circumstances must be vacated.

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[739] Shawnee Fire Ins. Co. v. Pontfield, 110 Md.358, 72 A.835 (1909); Fritz v. British America Assur.Co., 208 Pa. 268, 57 A. 573 (1904); 6 Appleman, Insurance Law & Practice, §3927 at 547 (1972).

[740] Norwich Union Fire Ins. Soc. Ltd. v. Cohen, 68 F.2d 42 (10th Cir. 1933); Hyland v. Millers Nat. Ins. Co., 58 F.2d 1003 (N.D. Cal. 1932), *aff'd,* 91 F.2nd 735 (9th Cir. 1937).

[741] Glendale LLC v. Amco Ins. Co., 2012 WL 2917920 (W.D.N.C., 2012).

Courts around the country have had varied views on the independence and qualifications of an appraiser who is working on a contingency fee basis.[742]

In California, though the arbitration statutes differentiate between a party appraiser and the neutral appraiser, the courts have stated that they are held to the same "competent and disinterested" standard.[743] The insurance company's duty of good faith and fair dealing in its claims practices with the insured, coupled with the obligations of appraisers generally, require that all of the appraisers in the appraisal process be disinterested.[744]

The Michigan Court of Appeals has held that an appraiser is not necessarily interested because he was once under contract with the party who hired him to appraise the loss. The fact that he has previously made a calculation of the loss also does not automatically disqualify him in the absence of a showing of

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742 Michelle L. Lehmann, *Setting Aside Arbitration Awards On The Grounds of Interest or Bias of Arbitrators-Insurance Appraisals or Arbitrations*, 62 ALR 5th 675 (1998); Linford Lounge, Inc. v. Michigan Basic Property Ins. Ass'n., 77 Mich. App. 710, 259 N.W.2d 201 (1977); Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257 (Iowa 1991); Galvis v. Allstate Ins. Co., 721 So.2d 421 (Fla. Dist. Ct. App. 3d Dist. 1998); Rios v. Tri-State Ins. Co., 714 So.2d 547 (Fla. 3d DCA 1998); *contra*: Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88 (R.I. 1991).

743 Gebers v. State Farm General Ins. Co., 38 Cal. App. 4th 1648, 45 Cal. Rptr. 2d 725 (1st Dist. 1995).

744 Id.

prejudicial conduct.[745]

In White v. State Farm Fire & Casualty Co.,[746] State Farm challenged the insured's decision to hire his public adjuster as his appraiser since the insured and the adjuster was under contract which assigned to the adjuster's firm, ten percent of the total payment on the insured's claim. State Farm argued that the adjuster had a pecuniary interest in the appraisal's outcome and was not "independent" as required under the statute.

In making its determination, the Michigan court turned to cases from other jurisdictions. In Florida, courts have held that an appraiser may be independent while working under a contingency-fee contract with the party who hired him as long as the other party is made aware of said agreement.[747]

Similarly, the White court held that "a contingency-fee agreement does not prohibit an appraiser from being 'independent' under MCL 500.2833" but that the opposing party must be made aware of such an agreement. Because the insured's adjuster was capable of exercising his own judgment regarding the

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745 Linford Lounge, 259 N.W.2d 201.
746 2011 WL 3208150 (Mich.App. 2011).
747 *See* Rios v. Tri-State Ins. Co., 714 So.2d 547 (Fla 3d DCA 1998).

value of the loss, he should not be disqualified to serve as the insured's appraiser under the "competent [and] independent" standard set forth in the statute just because the appraiser and the party who hired him were under contract.

However, in 30-40 East Main Street Bayshore, Inc., et al v. Republic Franklin Ins. Co. and Utica Mut. Ins. Co.[748] it was held that an insurer's appraiser who performed the initial inspection and submitted an estimate to the carrier at its request was disqualified from acting as appraiser as being not "disinterested" as required by the policy and CPLR §3404 (Standard Fire Policy).

A disqualifying interest can be small, but it has been held that the interest must be direct, definite and certain in order to disqualify the appointed appraiser.[749]

It has been held that where both parties complained that the appraiser selected by the other party was not disinterested but the parties nevertheless agreed to proceed with knowledge of the facts, the parties could not later complain after the award that the other

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[748] 2007 N.Y. Supp. Op. 30400(6).

[749] McCabe v. State Farm Mut. Automobile Ins. Co., 36 F. Supp.2d 666 (E.D.Pa. 1989); Couch on Insurance §50:136-137 (2nd rev. ed. 1982); National Fire Ins. Co. v. O'Bryan, 74 Ark. 198, 87 S.W. 129 (1904).

party's appraiser was not disinterested.[750]

An appraiser who has had previous business relations with the insured is not deemed ineligible.[751] Logic would suggest that the insured's selection of an appraiser is more likely to survive a challenge than the insurer's selection when the challenge is based upon a prior relationship between the appraiser and the party who hired him or her. This is generally so because an insured may typically have had prior dealings with an adjuster, appraiser, or builder on an isolated prior claim or two, whereas the insurer, being in the business of adjusting losses, may have hired its nominated appraiser on literally hundreds of prior claims. Where the appraiser derives a substantial amount of his or her income from the nominating insurer, such an interest would destroy the independent nature of the relationship between an insurer and its appraiser.

In Texas, in a case where an appraiser for insureds held a preexisting business relationship with them, the appraiser was found to have lacked independence. The court designated the circumstances before it "unique" in that

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[750] In re 176 & 178 East Main Street, Amsterdam, New York, 263 N.Y. 197, 188 N.E. 647 (1934).

[751] Meyerson v. Hartford Fire Ins. Co., 16 Misc. 286, 38 N.Y.S.112 (Civ. Ct. 1896), *aff'd,* 17 Misc. 121, 39 N.Y.S. 329 (App. Div. 1st Dept. 1896).

the appraiser had been hired as an inspector prior to his appointment and became an advocate for the insured rather than a mere inspector. Texas law has established that "a pre-existing relationship, without more, does not support a finding of bias" and requires "'evidence that the [challenged] appraiser performed 'some act or conduct tending to exhibit his serving the [insurer's] interest as a partisan would.''" The court held that alone, the appraiser's pre-existing relationship or the fact that he was used as an expert to inspect the property before appraisal were not sufficient grounds to set aside the award. However, it observed a fact issue warranting a trial as as to whether his conduct demonstrated that he was an unbiased and impartial appraiser as required by the subject policy.[752]

In Louisiana, where a challenge is asserted by a party to the use of a particular appraiser, evidence must establish that such appraiser's "honesty or integrity is suspect." Further, the trial court established guidelines to ensure an appraisal process was "fair, impartial and efficient" after it became concerned that

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[752] Amtrust Ins. Co. of Kansas, Inc. v. Starship League City, L.P., 2013 WL 1222329 (E.D. Tex. 2012), citing Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 786 (Tex.App.-Houston 2004) and Gardner v. State Farm Lloyds, 76 S.W.3d 140, 143 (Tex.App.-Houston [1st Dist.] 2002).

the umpire in the matter was "overwhelmed" by pertinent documents and communications.[753]

In a Colorado dispute over the value of insured artwork where neither the insured's nor the insurer's appraisers were sufficiently impartial, the selection of new appraisers was required pursuant to standards established by the state Division of Insurance Bulletin and the Uniform Arbitration Act for appraisal and disclosure of interest. In that case, the insured's appraiser was deemed not impartial due to a contingency agreement for recovering his fee, while the insurer's appraiser had previously been hired by the insurer to appraise the insured's property.[754]

The State of Colorado Division of Insurance has issued a Bulletin entitled "Insurance Requirements Related to Disputed Claims Subject to Appraisal." The purpose was to clarify the consumer's rights when an insured has invoked their rights related to appraisal.

It states in relevant part:

"It has come to the Division's

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753 Dufrene v. Certain Interested Und. at Lloyds of London, 91 So.3d 397 (La. App. 5 2013).

754 Gold v. State Farm Fire & Cas. Co , 2010 WL 3894141 (D. Colo., 2010).

attention that insurers may not be selecting "fair and impartial" appraisers. Furthermore, disputed claims subject to appraisal are being delayed and insurers are not communicating in a fair and consistent manner causing significant harm to the Colorado consumer.

The position of the Division is that an insurer must comply with its own policy language when selecting an appraiser and/or umpire under the appraisal clause. For purposes of requiring impartiality of appraisers and umpires, the Division will follow the Uniform Arbitration Act, §13-22-201 *et seq.*, and in particular, §13-22-211(2), which sets forth the standard for impartiality of an arbitrator as: "An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator if the agreement requires the arbitrator to be neutral." This same standard will apply to appraisers and umpires, and to ensure compliance with this standard the Division requires the following:

1. The appraiser and umpire must disclose to all parties, any other appraiser, and any other umpire, as well as any known facts that a reasonable person would consider likely to affect the impartiality of the appraiser including:

(a) A financial or personal interest in the outcome of the appraisal; and
(b) A current or previous relationship with any of the parties to the agreement to appraiser or the appraisal proceeding, their counsel or representatives, a witness, or another appraiser or the umpire.

2. The appraiser shall have a continuing obligation to disclose to all parties to the agreement to appraise, the appraisal proceeding and to any other appraisers and the umpire, any facts that the appraiser learns after accepting appointment that a reasonable

> person should consider likely to affect the impartiality of the appraiser.
>
> In accordance with §12-33 212(3), C.R.S. if a party timely objects to the appointment or continued services of a selected appraiser the objection may be a ground under §13-22-223(1)(b), C.R.S. for vacating an award.
>
> 3. The insurer must not have *ex parte* communications with the appraiser, the umpire and the insurer shall include the insured or the insured's representative.
>
> 4. Upon reaching an agreed upon value (either through the selected appraiser or an umpire) the insurer shall comply with the clean claim standards found in Colorado Regulation 5-1-14.[755]

In Virginia, each appraiser and umpire shall take an oath confirming that he is not employed by the insured, the insurer or any other insurer and that he will faithfully discharge

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[755] Colorado Department of Regulatory Agencies, Division of Insurance, Bulletin No. B-5.26 "Insurer Requirements Related to Disputed Claims Subject to Appraisal."

his duties.[756]

The Federal District Court sitting in the Eastern District of Virginia stated that under Virginia law, the level of disinterest of a selected appraiser pertains only to the partiality of that appraiser for or against the specific parties to the dispute. Further, employees of either the insured or insurer may not be appraisers because they do not satisfy the disinterested requirement. However, an independent contractor who is retained almost exclusively by insurers was disinterested within the meaning of the Virginia statute.[757]

Appraisers can and should advocate on behalf of the party who appointed them, but must maintain a sufficiently independent mind so as to bring the matter to a conclusion by a reasonable exercise of judgment under the circumstances.

Courts have found that as long as the appraiser makes his own determinations regarding the loss and calculates his own recommended settlement amount, the fact that the appraiser is being paid a contingency fee as the insured's public adjuster is

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[756] Appraisers and Umpire to be Citizens of Virginia; Oath to be Taken, Va. Code Ann. §38.2-2122 (Michie 2002).

[757] Tiger Fibers, LLC v. Aspen Specialty Ins. Co., 2008 WL 3849367 (E.D. Va. 2008); Va. Code Ann § 38.2-2105, 38.2-2122.

immaterial.

The concept of an independent advocate is well described in the case of Dennis v. Standard Fire Ins. Co.,[758] where the court stated as follows:

> It was hardly to be expected that the appraisers would agree in all matters. They were partisans within bounds, but were nevertheless unbiased and unprejudiced and disinterested within the meaning of the contract of insurance. Their attitude was that approved of by Vice Chancellor Pitney in American Central Ins. Co. v. Landau, 62 N.J. Eq. 93, 49 A. 745 where he said that – 'the appraiser chosen by each party is supposed and expected, in a restricted sense, to represent the party appointing him, and within reasonable limits see to it that no legitimate consideration favorable to the party so appointing him is overlooked by the other appraiser.'

It is the existence of this independence that prevents an appraiser from being considered an agent of the party that

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[758] 90 N.J. Eq. 419, 107 A. 161 (1919).

nominated him.[759]

In Texas, it has been held that the qualifications required of the appraiser are that they be competent and independent. "The appraisers should be competent with respect to identification of damage and independent insofar as appraisers are unbiased and free of control to arrive at their own evaluation of the loss. In short, the appraisers should have knowledge in identifying damage and act fairly, without bias, and in good faith."[760]

In Gardner, the court went on to state:

> The insured in Terry argued that the insurance company's appraiser was not impartial because the company had selected him as its appraiser "many times before" and he "consistently served with partiality and bias in making awards of amount of damage.
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> The court held:
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> ...[E]ven if true, this fact alone would not necessarily or probably be inconsistent with his impartiality

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[759] Remington Paper Co. v. London Assur. Corp., 12 A.D. 218, 43 N.Y.S. 431 (4th Dept. 1896).
[760] Gardner v. State Farm Lloyds, 76 S.W.3d 140 (Tex. App.-Houston [1st Dist.] 2002).

> in the present case, in the absence of some act or conduct tending to exhibit his serving the company's interests as a partisan would.[761]

The Gardner case certainly suggests the outer limit of permissible partiality and even then there is patent inconsistency within the court's reasoning by permitting this appraisal to stand, once the court assumes that the carrier's appraiser "had consistently served with partiality and bias in making awards" on behalf of the nominating insurer. The court found this record of partiality to be inconsistent with the allegation that the appraiser was being "partisan," when logically it would appear otherwise.

Objections to an appraiser on the basis of his competence or interest should be made promptly or may be considered to have been waived.[762]

It has been stated that in making a determination of whether to disqualify an appraiser, the issue to be determined is

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[761] Gardner, 76 S.W.3d at 144, *citing,* American Central Ins. Co. v. Terry, 298 S.W. 658, 662 (Tex. Civ. App.-Texarkana 1927).

[762] Hyland v. Millers Nat. Ins. Co., 91 F.2d 735 (9th Cir. 1937); Fireman's Fund Ins. Co. v. Flint Hosiery Mills, Inc., 74 F.2d 533 (4th Cir.1935); Heller v. Hartz Mountain Ind., 270 N.J. Super 143, 636 A.2d 599 (1993); Land v. State Farm Mut. Ins. Co., 410 Pa. Super 579, 600 A.2d 605 (1991); Central Life Ins. Co. v. Aetna Cas. and Sur. Co., 466 N.W.2d 257 (Iowa 1991); Palmieri v. Ins. Co. of N. A., 67 A.D.2d 96, 413 N.Y.S.2d 461 (2nd Dept. 1979); *Couch on Insurance* §50:136 (2d rev. ed. 1982).

whether a reasonable person would, based upon the appraiser's history and past actions, objectively entertain doubts about that appraiser's neutrality.[763]

Attorneys should take precaution to clarify to the party hiring them as appraiser that their relationship is not "attorney-client" in the technical sense. That is, there are distinct differences between the duties owed by the attorney to her client, as against the appraiser who enjoys an element of independence and cannot satisfy the demanding fiduciary obligations of the attorney to their client. In most jurisdictions, the attorney-client privilege does not apply within the relationship between the appraiser and the hiring party even where the appraiser is an attorney.

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[763] Banwait v. Hernandez, 205 Cal. App.3d 823, 252 Cal. Rptr. 647 (3d Dist. 1988).

B] DISINTERESTED BUT PERMISSIBLY PREDISPOSED

1. Generally

Appraisers do not violate their commitment of impartiality by acting as advocates for their respective selecting party.[764] Appraisers need not be totally impartial, as is required by the umpire or a jurist in a court of law.

Traditional appraisal law did not allow the adjuster for either of the parties to serve as an appraiser. However, modern decisions have held that an appraiser can permissibly be predisposed toward the position of the party that appointed him or her, as long as the appraiser acts fairly and reveals his or her interests in the result.[765] Modern courts generally hold that the intent of the appraisal procedure is not to provide appraisers who possess the total impartiality that is required in a court of law. However, the appraisers must act fairly and be free from suspicion of unknown interest.[766]

One case interpreting the issue of partiality is Commonwealth Coatings v.

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764 Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257 (Iowa 1991).
765 Id.
766 Id.

Continental Cas. Corp.[767] The United States Supreme Court, in interpreting the Federal Arbitration Act with respect to the term "partiality" held that an interest would be found to exist if the relationship between the arbitrator and one of the parties is of such a nature as to give clear grounds for a suspicion of the proceedings and, render it unlikely that the proceedings constituted the fair and impartial tribunal to which the other party is entitled.[768]

Similarly, a Wisconsin court denied a motion by insureds to disqualify a court-appointed appraiser on the grounds of bias where it observed no evident partiality. Though appraisals in Wisconsin are generally governed by the common law, the court in this instance looked to the state's arbitration code for guidance as it deemed an independent appraiser's role similar to an arbitrator's. An arbitration award may be set aside where evident partiality exists, in other words "when it 'is clear, plain, and apparent' that partiality is so likely that a reasonable person would take action to stop the arbitration of a dispute." The insureds believed the appraiser was biased in favor of the insurer because he had worked for

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[767] 393 U.S. 145, 89 S. Ct. 337, 21 L.Ed.2d 301 (1968).

[768] Johnston v. Security Ins. Co., 6 Cal. App.3d. 839, 86 Cal. Rprt. 133 (5th Dist.1970); Michael v. Aetna Ins. Co., 88 Cal. App.4 925, 106 Cal Rptr.2 240 (Cal. App. 2 Dist. 2001).

a company which had worked for the insurer and continued to receive payment pursuant to a stock redemption plan. However, no partiality was found since the appraiser had stopped working for the company years prior, the insurer had never been one of its major clients and the appraiser had no control over the company's operations.[769]

An appraiser's preconceived opinion will not of itself disqualify him because the courts have considered his knowledge and experience resulted in the appraiser being better qualified to ascertain the true value as long as he is free from bias and prejudice.[770]

In Auto-Owners Ins. Co. v. Allied Adjusters & Appraisers, Inc.,[771] the court found that an "independent appraiser may be biased toward the party who hires and pays him, as long as he retains the ability to base his recommendation on his own judgment."

Even where an insured has established that the carrier exercised undue influence over its own appraiser, it has been held he would still have failed to establish partiality or corruption

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[769] Gronik v. Balthasar, 2013 WL 5376025 (E.D. Wis.2013), citing Wis. Stat. 788.10(1)(b) and quoting Borst v. Allstate Ins. Co., 291 Wis.2d 361, 717 N.W.2d 42 (Wis. 2006).
[770] Produce Refrigerating Co. v. Norwich Union Fire Ins. Co., 91 Minn. 210, 97 N.W. 875 (1904).
[771] 238 Mich.App 394 (1999).

unless he also showed that the umpire was incompetent or had an interest in the matter.[772]

In California, Insurance Code §2071 requires a party-selected appraiser to be "disinterested." It has been held that the failure by a party-selected appraiser to make a disclosure required by the Insurance Law constitutes "corruption" within the meaning of the Code of Civil Procedure (§1286.2) and justifies the vacation of an appraisal award if that party timely requests such relief. A party-selected appraiser therefore must disclose any facts that might cause a reasonable person to doubt that the appraiser would be impartial. This standard is objective, and does not require actual bias. A prior or continuing business relationship or business dealings between an appraiser and a party or a person affiliated with a party ordinarily must be disclosed if the appraiser had a substantial pecuniary interest in the relationship.[773]

2. Public Adjusters

It has been held that a public adjuster

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[772] Fireman's Fund Ins. Co. v. Flint Hosiery Mills, 74 F.2d 573 (4th Cir. 1935); Casper v. Allstate Ins. Co., unreported decision of the Maryland Court of Special Appeals # 1583, June 28, 2000.

[773] DaimlerChrysler Services of North America LLC v. Zurich American Ins. Co., 2005 WL 1208961 (Cal. App. 2 Dist. 2005); Michael v. Aetna Ins. Co., 88 Cal. App.4 925, 106 Cal Rptr.2 240 (Cal. App. 2 Dist. 2001).

may serve as an appraiser even on the same claim in which he or she worked in the capacity of public adjuster. This includes the situation where a public adjuster submits a building damage estimator's report as the basis of the insured's claim or a situation where the claim was premised on the loss calculations of the adjuster himself while under contract with the insured. Of course, even in the jurisdictions which permit this situation, the adjuster must usually renounce any contingent fee interest. Judicial approval is more likely where the claim under review is the first business relationship between the insured and appraiser and additionally where there is no evidence of prejudicial misconduct.

However, where a public adjuster had written numerous acrimonious and fruitless correspondence with the carrier's claims representative, and where he was working on a contingency basis, it had been held that the appraiser-adjuster was not an impartial appraiser within the terms of the policy.[774]

The fact that an appraiser appointed by the insured has previously made a computation of the loss does not automatically disqualify the appraiser, absent a showing of

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[774] Allstate Ins. Co. v. Wojciechowski, 1995 WL 283893 (Conn. Super Ct. 1995); *See also*, Chardonnay Village Condominium Ass'n, Inc. v. James River Ins. Co., 2008 WL 3285908 (E.D. La. 2008).

prejudicial misconduct.[775]

As a matter of law in the state of New York, simply because the individual appointed by the insured as his appraiser served as the insured's public adjuster, the public adjuster is not deemed incompetent or biased.[776]

In Florida, it has been held that even when the appraiser was hired as the insured's public adjuster on a percentage fee basis, he could resign his adjustment contract and still qualify as a "disinterested" appraiser on the same loss.[777]

It has been held that an appraiser paid by a contingency fee percentage of the award is still an "independent appraiser" within the meaning of the appraisal clause requiring the insured and insurer to select independent appraisers. In Rios v. Tri-State Ins. Co.,[778] it was held that an appraiser paid by a contingency percentage of the insurance award should disclose his interest in the outcome. Furthermore, it was held that a direct financial

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[775] 44 Am. Jur.2d Insurance §1689 (2002); Linford Lounge, Inc. v. Michigan Basic Property Ins. Ass'n., 77 Mich. App. 710, 259 N.W.2d 201 (1977) (The public adjuster's contract to adjust the loss was canceled before he was appointed as plaintiff's appraiser).

[776] Meyerson v. Hartford Fire Ins. Co., 16 Misc. 286, 38 N.Y. S. 112 (1896), *aff'd,* 17 Misc. 121, 39 N.Y.S. 329 (1896).

[777] Linford Lounge, 77 Mich. App. 710; Figi v. New Hampshire Ins. Co., 108 Cal. App.3d 772, 166 Cal. Rptr. 774 (1980).

[778] 714 So.2d 547 (Fla. 3d DCA 1998).

interest in the outcome of the appraisal would not necessarily require disqualification of the party's duly appointed appraiser. The rationale of this decision is premised upon the fact that the phrase "independent appraiser" is not defined in the insurance policy drafted by the insurer and is thus subject to the insured's reasonable understanding of the term. The court points out that the dictionary definition of "independent" includes "not subject to control, restriction, modification or limitation from a given outside source."[779] The court further pointed out that though the appraisal clause requires each appraiser to be paid by the party selecting that appraiser, it does not limit or direct the type of compensation which may be paid. As the insurance policy must be read favorably to the insured when any ambiguity is discerned, the insured's appointment should prevail.[780]

Indeed, in Pennsylvania, it has been held that the existence of a contingency fee under certain circumstances will not disqualify an appraiser from serving.[781]

The Michigan Court of Appeals has considered the issue of an appraiser's

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779 *Black's Law Dictionary* 770 (6th Ed. 1990).

780 Rios, *supra*; *See also,* Birkshire Life Ins. Co. v. Adelberg, 698 So.2d 828, 830 (Fla. 1997).

781 Hozlock v. Donegal Mut. Ins. Co., 2000 Pa. Super. 25 ,745 A.2d 1261(2000).

independence where insureds nominated their adjuster, already obligated to receive a percentage of the total claim pursuant to a contract, to also serve as their appraiser. The court relied upon a Florida decision in ultimately concluding that a contingency fee agreement would not prohibit the adjuster from being independent under state statute. It reasoned that the adjuster was "'not subject to control, restriction, modification, or limitation by anyone'" nor was he an employee or "under any other legal duty to [the insureds] with the exception of the public adjusting contract. As such, he is capable of exercising his own judgment regarding the value of the loss in this proceeding and should not be disqualified to serve as [the insureds'] appraiser in this dispute under the 'competent and independent' standard set forth in MCL 500.2833(l)(m)."[782]

However, in the state of New Jersey, it has been held that a public adjuster working on a contingency fee basis had a direct financial interest which disqualified him from service as appraiser.[783]

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[782] White v. State Farm Fire and Cas. Co., 953 So.2d 340 (Ala. 2008), citing MCL §500.2833(1)(m); Rios v. Tri-State Ins. Co., 714 So.2d 547 (Fla.3d DCA 1998); Auto-Owners Ins. Co. v. Allied Adjustors & Appraisers, 238 Mich. App. 394, 605 N.W.2d 685 (Mich Ct. App. 1999) and *Black's Law Dictionary* (6th Ed. 1990).

[783] Commercial Door & Hardware v. Hanover Ins. Co., 2008 WL 302341 (N.J. Super .A.D. 2008).

It has also been held that even if a public adjuster is or recently was a partner of the plaintiff's agent, as a matter of law that does not render him incompetent or biased under a provision of a fire policy which requires the appointment of a disinterested appraiser.[784]

An appraiser appointed by the insured was deemed disinterested and hence was not subject to disqualification where he had submitted an estimate of loss while previously under contract with the insured as a public adjuster. The circumstances were that the estimate was the first business relationship between the insured and the appraiser and no evidence of prejudicial misconduct was otherwise produced by the insurer.[785]

In Iowa and Texas courts have held that where a public adjuster was working on a contingency basis, an award produced by him as appraiser should be vacated on the basis of a lack of impartiality.[786]

For example, in Texas it has been held that where the appraiser's contingent percentage increases if the award exceeded

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[784] Meyerson, 38 N.Y.S 112.

[785] Linford Lounge, 77 Mich. App. 710.

[786] Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257 (Iowa 1991); General Star Indem. Co. v. Spring Creek Village Apts. Phase IV, Inc., 152 S.W.3d 733 (Tex. App.-Houston [14th Dist.] 2004).

a certain pre-set amount, the appraiser had a sufficient financial interest in insuring that the appraisal award exceeded that amount and a fact issue was created as to the appraiser's impartiality.[787]

In Indiana, where a public adjuster was hired to be the insured's appraiser at a rate of "$250 per hour with the maximum fee not to exceed 10% of the claim payments," the agreement gave the appraiser a "vested interest and that determination is not even a close call."[788] A similar result has been seen in Louisiana.[789]

California has examined this issue in the context of a public adjuster's alleged unauthorized practice of law in representing an insured at an appraisal proceeding. The court there discerned no authority to support the contention that an award must be vacated on the grounds that a public adjuster represented an insured at an arbitration proceeding rather than an attorney, thereby engaging in the unlawful practice of law. The court clarified that a public adjuster may "act on behalf of or aid in any manner, an insured" in adjusting a

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787 General Star Indem. Co. v. Spring Creek Village Apts. Phase IV, Inc., Id.

788 Shree Hari Hotels, LLC v. Society Ins., 2013 WL 4777212 (S.D. Ind. 2013).

789 Chardonnay Village Condominium Ass'n, Inc. v. James River Ins. Co., 2008 WL 3285908 (E.D. La. 2008).

claim, although may not practice law without a license to do so. It found an Arizona authority non-persuasive which characterized such behavior as the unlawful practice of law because it did not apply to California law nor did it establish that an award must be vacated where an adjuster acts as an attorney. The court went further and stated that even if this adjuster had engaged in conduct considered as unlawful practice of law, it failed to see any unfair advantage in the appraisal proceeding as a result or effect on the legitimacy of the award. It stated that the insurer could not honestly claim its interests were prejudiced by this behavior when it was represented by a licensed attorney at the same proceeding.[790]

3. Building Damage Estimators

Where an appraiser derives the greatest part of his or her income and livelihood from acting on behalf of insurance companies to quantify losses, the court will often hold that he or she was not a disinterested appraiser.[791]

In Arkansas, the fact that a person selected by the insured to appraise the loss had previously made an estimate of the loss at

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[790] Fidelity Nat. Ins. Co. v. Yolanda Owens, Alameda County Superior Court No. RG11589323)(6/18/15).

[791] Sterling Spinning & Stamping Works v. Knickerbocker Ins. Co. of N.Y., 137 Misc. 349, 242 N.Y.S. 201 (Mun. Ct. 1930).

the request of the insured is a fact to be considered on the issue of his competency and whether he is sufficiently disinterested to act as an appraiser, but does not of itself disqualify him to act in that capacity.[792]

Where the insurance carrier's appraiser conducted himself in the interests of the insurer to such a degree that he might be regarded as an agent of the insurer, he will be deemed such and his misconduct will be imputed to the insurer.[793]

Where a prior relationship exists with one of the parties to the appraisal, the appraiser is not necessarily incompetent to participate, but it is his duty to disclose the facts that might create an impression of bias. The parties should not be required to engage in discovery on the issue and it is the appraiser's duty and obligation to reveal those facts voluntarily.[794]

Some states have amended their statutes to require a detailed disclosure by the appraiser. For example, in California, the Code of Civil Procedure §1281.9 requires that within 10 days of notice of the proposed nomination, the proposed neutral and both appraisers must

792 National Fire Ins. Co. v. O'Bryan, 74 Ark. 198, 87 S.W. 129 (1904).
793 Slepski v. German Fire Ins. Co. of Peoria, 141 Ill. App. 614 (1st Dist. 1908).
794 Kaiser Foundation Hospitals, Inc. v. Superior Court, 19 Cal. App. 4th 513, 517, 23 Cal. Rptr.2d 431, 433 (2d Dist. 1993).

disclose all of the following for the proceeding five years:

> [T]he names of the parties to all prior or pending cases to which he was acting as an appraiser or umpire; any prior attorney-client relationship between any of the parties; any significant professional or personal relationship between the neutral, the appraisers, and any of the parties or the spouses of the parties."

C] FEES

Appraisers have traditionally been hired by written agreement on an hourly basis, plus expenses. As discussed in Chapter VII [C], contingent fees are generally discouraged but have been approved in a number of cases.

Pursuant to the Standard Fire Policy, generally, "[E]ach appraiser shall be paid by the party selecting him and the expenses of the appraisal...shall be paid by the parties equally."[795]

Hourly rates vary from place to place and can accumulate in complex and time consuming appraisals. Good practice dictates periodic billing and often involves the payment of an initial advance to cover at least a portion of the anticipated fee where this is financially possible.

It is also permissible for an insured to authorize an appraiser to have a separate check cut to the appraiser from the settlement proceeds in satisfaction of fees where the insured was unable to fund the appraisal costs

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[795] *See e.g.,* N.Y. Ins. §3404, Lines 137-140; Virginia, for example provides in its Standard Fire Policy that "[I]f the written demand is made by this Company, then the insured shall be reimbursed by this Company for the reasonable cost of the insured's appraiser and the insured's portion of the cost of the umpire." Standard Provisions, Conditions, Stipulations and Agreements for such Policies, Va. Code Annot. §38.2-2105 (Michie 2002) (Lines 144-47).

from his or her pocket due to financial constraints.

Where the appraiser is to be paid out of the proceeds of the claim, it would be appropriate for the appraiser to be named on a separate check and, in the event of an interpleader action to determine the proper payees of an appraisal award, the appraiser should properly be paid directly from the interpleader fund.

To the extent significant expenses can be anticipated under the circumstances of the particular appraisal, these should be discussed and provided for in writing at the time of the appraiser's hiring or immediately thereafter. Expenses can include the cost of travel and in complex claims, experts such as accountants, inventory counters, mold remediation experts, engineers, architects, market value appraisers, salvors, building damage estimators, attorneys, and the cost of laboratory analysis of samples (in cases of suspected mold, smoke damage or asbestos, for example).

While most appraisals will be conducted successfully without any expert assistance, expert involvement should be considered, particularly in claims where the insured was not represented by a public adjuster. One of the distinct advantages of the involvement of a public adjuster on behalf of the insured is the assistance they provide with respect to claim preparation and presentation.

To the extent an insured is in difficult financial straits and may be unable to fund the cost of appraisal, an advance payment from the insurer representing the amount not in dispute should be sought to help finance the undertaking. Indeed, it is often wise to request payment by the insurer of any undisputed amounts, or those amounts which represent the portion of the insured's claim which the carrier agrees is due and owing prior to the onset of the appraisal.

It is always advisable to confirm the appraiser's hiring by a written agreement setting forth at the minimum, the names of the parties, a provision as to the payment of fees and expenses, and a statement of the appraiser's authority, designating him or her to act as appraiser on behalf of the party nominating them.

As stated earlier, it has been held that a contingency fee arrangement with an appraiser might under certain circumstances be acceptable. In Hozlock v. Donegal Mut. Ins.

Co.,[796] it was held that the mere existence of a contingency fee agreement between a party and his or her appointed appraiser does not render the appraiser unfit *per se*, when the policy's appraisal clause requires only that the appointed appraisers be "competent." Unless the policy provision specifically requires the appraisers to be completely neutral, a contingency fee payment scheme does not disqualify the appraiser. Without a specific clause, and without the appraiser having an independent fiduciary duty, the appointment would likely not be vacated.

Similarly, in White v. State Farm Fire & Casualty Co.,[797] the Michigan Court of Appeals held that "a contingency-fee agreement does not prohibit an appraiser from being 'independent' under MCL 500.2833" but that the opposing party must be made aware of such an agreement. Because the insured's adjuster was not the insured's employee or under any legal duty to the insured with the exception of the public-adjusting contract, he could be capable of exercising his own judgment regarding the value of the loss.

A similar result was reached in the state of

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[796] 2000 Pa. Super. 25, 745 A.2d 1261(2000); *See also,* Rios v. Tri-State Ins. Co., 714 So.2d 547 (Fla. 3d DCA 1998); Central Life Ins. v. Aetna Cas.& Sur. Co., 468 N.W.2d 257 (Iowa 1991); White v. State Farm Fire & Cas. Co., 2011 WL 3208140 (Mich.App 2011).

[797] 2011 WL 3208150 (Mich.App 2011.)

Florida where an appraiser was considered competent despite working on a contingency basis.[798]

In Georgia, it has been held that where the Declaration of Appraisers concluded the "appraisers are impartial, independent and competent" and where the insured's appraiser had disclosed a percentage fee interest in the claim, the insurer could not later void the award based upon a claim of partiality.[799]

However, where the policy required a "competent and impartial appraiser," a fee agreement which quoted an hourly rate but also included an alternative percentage of recovery formula which increases as the money recovered from the insurer increases disqualified the appraiser. In this Louisiana matter growing out of Hurricane Katrina, it was held that such a contract impermissibly renders the appraiser a partial and interested party.[800] A similar result was seen in Indiana where an award was set aside.[801]

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[798] Citizens Prop. Ins. Corp. v. M.A. & F.M. Prop., Ltd., 948 So.2d 1017, 32 Fla. L. Weekly D537 (Fla. App. 3 Dist. 2007); Galvis v. Allstate Ins. Co., 721 So.2d 421 (Fla. Dist. Ct. App. 3d Dist. 1998); Rios v. Tri-State Ins. Co., 714 So.2d 547 (Fla. 3d DCA 1998).

[799] Colony Ins. Co. v. 9400 Abercorn, LLC, 2012 WL 3985088 (S.D.Ga. 2012).

[800] Chardonnay Village Condominium Ass'n, Inc. v. James River Ins. Co., 2008 WL 3285908 (E.D. La. 2008).

[801] Shree Hari Hotels, LLC V. Society Ins., 2013 WL 4777212 (S.D. Ind. 2013).

For a further discussion of the appropriateness of certain types of fee arrangements, see the discussion under "Public Adjusters" at page 404.

For a sample form of a written agreement between an appraiser and insured or insurer, see the forms contained in Appendix A.

D] REPLACEMENT OF AN APPRAISER

An insured had not waived the right to object to the selection of an appraiser and was not estopped from doing so, despite the fact that it did not file a formal objection until 8 months after the appraiser in question had been appointed. Under those circumstances, the insured's counsel had expressed concerns about the insurer's appraiser to the insurer, and the insured had even sent a letter to this effect in connection with a different appraisal with the insurer. Further, the insured had sought discovery as to the relationship between the appraiser and insurer on multiple occasions. The court found the circumstances did not show the insured had "'clearly and unequivocally' relinquished its 'known right' to object to [the appraiser's] appointment" and that failure to formally object did not "forever preclude" a challenge to the appointment given the efforts to investigate the bias and the insurer's role in concealing the information.[802]

[802] Tamko Bldg. Products, Inc. v. Factory Mut .lns Co., 890 F.Supp.2d 1129 (E.D. Mo. 2012).

E] LIABILITY OF THE APPRAISER

In the rare case when an appraisal fails, it is not unheard of for one of the parties to consider holding one of the participants responsible. Generally, appraisers enjoy the same immunity as arbitrators.[803] Arbitral immunity, like judicial immunity, promotes fearless and independent decision making and for this reason, courts have been reluctant, absent evidence of fraud or deceit, to hold those involved in this process liable for their "judicial" actions and in many cases in which their misconduct in arriving at decisions has been alleged, courts have cloaked appraisers and arbitrators with immunity.[804]

A disinterested appraiser had immunity from suit over his role as an appraiser in a fire insurance appraisal proceeding. California law recognizes such a benefit because the role he or she executes is analogous to that of a judge.[805]

In Alabama, the court found no valid cause of action for negligence, wantonness or

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[803] Coopers and Lybrand v. Superior Court, 212 Cal. App.3d 524, 260 Cal. Rptr. 713 (2d Dist. 1989).

[804] Baar v. Tigerman, 140 Cal. App.3d 979, 189 Cal. Rptr. 426 (2d Dist. 1983) (note that this case was superceded by statute, Ca. Civ. Pro. §1280.1, which itself appears to have been repealed effectively Jan. 1, 1997).

[805] Lambert v. Carneghi, 158 Cal. App.4th 1120, 70 Cal. Rptr.3d 626 (Cal. App.1 Dist. 2008).

civil conspiracy by an insured against an insurer's appraiser following the issuance of an appraisal award. The court found that Alabama law "clearly imposes a duty on adjusters who are acting pursuant to an appraisal provision, who have been appointed to act as appraisers, and not merely adjusters." However, here there was no duty by an insurer's adjuster to an insured; any duty owed would have been to the insurer to appraise the loss on its behalf. As to an adjuster, the Alabama Supreme Court has "consistently failed to recognize a cause of action for the negligent handling of insurance claims, and…[does] not recognize a cause of action for the alleged wanton handling of insurance claims."[806]

In Connecticut, it has been held that an independent insurance adjuster does not owe a duty of care to an insured but rather only to the insurance company which hired them to adjust or investigate the claim of one of its insureds. The court relied upon a previous decision, which clarified "'[t]his is partly based on the public policy ground that if the adjuster also owed a duty of care to the insured, it would thrust the adjuster in to what could be

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[806] St. John's Deliverance Temple v. Frontier Adjusters, 2012 W.L. 629056 (S.D. Ala. 2012).

an irreconcilable conflict between such a duty and the adjuster's contractual duty to follow the instructions of its client, the insurer." Interestingly, while the appellate court had not yet addressed an appraiser's liability to third parties, it had been decided that such liability may be applicable to builders, contractors, architects, engineers and attorneys without privity of contract. [807]

[807] Savanella v. Kemper Independence Ins. Co., 2011 WL 7049491 (Conn. Super. Ct. 2011), citing Grossman v. Homesite Ins. Co., 2009 WL 5357978 (Conn. Super. Ct. 2009).

F] EXPENSES FOR CONSULTANTS HIRED BY THE APPRAISER

Where an appraiser hired a certified public accountant to perform work in connection with an appraisal on behalf of an insured, upon the appraiser's failure to pay, an action by the accountant was commenced claiming *quantum meruit*. The court held that the action was properly maintained against the appraiser, based on a variety of reasons: that the accountant had been hired by the appraiser, was asked to sign a confidentiality agreement and a consulting and non-disclosure agreement with the appraiser, had discussed an hourly rate of compensation with the appraiser, his work had been managed by the appraiser throughout the appraisal, and worksheets had been prepared for the appraiser detailing work performed and amounts due. Additional elements of the *quantum meruit* claim, that he had provided "valuable services" which were "accepted, used and enjoyed, were not disputed. The decision pointed out that the accountant acknowledged that insurance proceeds payable in the matter were to be the source of compensation for the appraisal team but was also aware of the agreement between the appraiser and insured regarding payment of appraisal costs.[808]

The lesson for the practitioner is that clarity is critical as to the method and source of payment for consultants or experts hired by the appraiser and should be confirmed in writing.

808 Fulgham v. Fisher, 349 S.W.3d 153 (2011).

CHAPTER VIII

THE UMPIRE

A] THE UMPIRE'S QUALIFICATIONS, DUTIES AND SCOPE OF AUTHORITY

1. Qualifications

The Standard Fire Policy's appraisal clause states in relevant part:

> "The appraisers shall first select a competent and disinterested umpire;"

Thus, appraisers must appoint an umpire who is competent and disinterested.

Other qualifications have been stated and reviewed in assessing the appropriateness of a particular selection. For example, in selecting an umpire, the appraisers should not hire an individual who lives outside a reasonable distance from the loss location, regardless of whether said umpire is disinterested or not, as long as there are competent parties that can be found nearby.[809]

The umpire appointed under the appraisal provision of a policy is required to possess judicial qualifications of fairness to both parties, so that he or she may render a faithful, honest and disinterested opinion.[810] Stated another way, it has been said that the umpire must be competent and impartial.[811]

Many courts have likened an umpire in an insurance appraisal to an arbitrator in an arbitration. Umpires have the obligation to be unbiased and further, to disclose any dealings that might create an impression of possible bias. Left intact, such an impression would undermine the appearance of propriety and confidence in the fairness of the

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809 Fowbele v. Phoenix Ins. Co., 106 Mo. App. 527, 81 S.W. 485 (1904).

810 Mizrahi v. National Ben Franklin Fire Ins. Co., 37 N.Y.S.2d 698 (City Ct. 1942) (quoting American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N.Y. 398, 148 N.E. 562 (1925)).

811 Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros, 1 F.Supp.2d 1337 (M.D. Fla. 1998); Schwartzman v. London & Lancashire Fire Ins. Co., Ltd of Liverpool, England, 318 Mo. 1089, 2 S.W.2d 593 (1927); Figi v. New Hampshire Ins. Co., 108 Cal. App.3d 772, 166 Cal. Rptr.774 (4th Dist. 1980); 6 Appleman, *Insurance Law & Practice* §3928 (1972).

proceedings.[812]

Logic dictates a more exacting standard for umpires then for appraisers.[813]

In Weinger v. State Farm,[814] the umpire had worked regularly on behalf of the insurer and had been retained by State Farm on other matters during the course of the prior year. As the appearance of impartiality is paramount, the failure to disclose a potential source of conflict alone has been held to require a court to vacate an appraisal award.[815]

It may be unnecessary to show actual bias once it is demonstrated that there is a failure to disclose information that reasonably should have been disclosed.

In discussing just such a situation, the California Court of Appeals stated this is so because, "[T]he failure to disclose such matters,

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[812] Weinger v. State Farm Fire & Cas Co., 620 So.2d 1298 (Fla.4th DCA 1993); Commonwealth Castings Corp. v. Continental Cas. Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968); International Ins. Co. v. Schrager, 593 So.2d 1196 (Fla. 4th DCA1992); Middlesex Mut. v Levine, 675 F.2d 1997; National Arbitrators; Disclosure of Information; Disqualification; Waiver, Cal. Civ. Proc. §1281.9 (2003) (California Code of Civil Procedure §1281.9 requires a neutral appraiser to disclose the details of his relationships with the parties and appraisers for a period of five years within 10 days of his proposed nomination).

[813] Auto-Owners Ins. Co. v. Allied Adjustors & Appraisers, 238 Mich. App. 394, 605 N.W.2d 685 (Mich Ct. App. 1999), citing MCL § 500.2833(l)(m).

[814] 620 So.2d 1298 (Fla. Dist. Ct. App. 4th Dist. 1993).

[815] Michael v. Aetna Ins. Co., 88 Cal. App.4 925, 106 Cal. Rptr.2 240 (Cal. App. 2 Dist. 2001).

even if no actual bias is present, represents a kind of 'corruption' by creating the appearance that the appraiser or arbitrator is concealing something important and relevant to his or her impartial participation in the appraisal or arbitration procedure."[816]

A California umpire was not found to be "corrupt" however after submitting a declaration in support of one party's petition to confirm an appraisal award, which neither made him an advocate for that party nor cast any doubt on the impartiality of the award. The insurer's reliance on a rule of evidence precluding an arbitrator from "be[ing] competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction therewith" the arbitration, did not indicate that submission of an inadmissible declaration by the umpire was evidence of corruption.[817]

In the states that impose their statutory arbitration machinery on insurance appraisals, the umpire or neutral may well have duties of disclosure with respect to prior relationships with

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816 Id. at 248.

817 Fidelity Nat. Ins. Co. v. Yolanda Owens, Alameda County Superior Court No. RG11589323)(6/18/15).

the parties. For example, pursuant to California Code of Civil Procedures §1281.9, within 10 days of the proposed nomination of the neutral, he or she must disclose information such as the names of the parties to all prior or pending cases where the neutral was acting as a party appraiser or neutral, as well as other personal relationships that the neutral may have had with either party. While this may appear burdensome, it tends to discourage inappropriate appointments.

An individual who had been nominated to be an appraiser by another insurance company liable for the same loss is not suitable to act as an umpire as to the same event.[818]

An accountant who had worked for the insurer and derived income ranging from $8000 to $61,000 annually over a number of years was deemed not to be impartial and though he was court appointed, the award he participated in was vacated.[819]

Solicitation by the umpire to do the actual repair work during appraisal is sufficient to destroy the umpire's impartiality and any subsequent award should be vacated.

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818 Braddy v. New York Bowery Fire Ins. Co., 115 N.C. 354, 20 S.E. 477 (1894).
819 Weinger v. State Farm Fire & Cas Co., 620 So.2d 1298 (Fla. Dist. Ct. App. 4th Dist. 1993).

A North Carolina court examined whether a "pre-existing relationship" between an umpire and an insurer's appraiser would create an impermissible conflict of interest. There, the insurer asserted an appraiser's affirmative duty to disclose prior dealings with another party's appraiser. Contacts called into question included representation of opposing parties in another insurance matter (deemed "hardly the type of 'pre-existing relationship' that would lead to the inference of a conflict of interest"), as well as the appraiser's request that the umpire in this case create plans and elevations based on photographs in an unrelated claim which arose several years prior and for which no information as to his compensation was presented. The court observed no evidence that the umpire's neutrality was affected.[820]

Florida has observed an absence of authority where an umpire engaged in continuous delay in rendering an appraisal award. In that matter, the insured's appraiser had terminated the umpire for such behavior, an issue which ultimately led the court to evaluate whether this constituted a material breach of policy conditions and compliance with necessary pre-suit conditions.[821]

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[820] Glendale LLC v. Amco Ins.Co., 2012 WL 2917920 (W.D.N.C., 2012).

[821] Jyurovat v. Universal Prop. & Cas. Ins. Co., 84 So.3d 1238, 1239 (Fla.2d DCA 2012).

The Michael[822] court stated that a substantial prior or continuing business relationship with a party or with a party's representative, even if the business activity does not occur during a pending appraisal or arbitration, is enough to disqualify the umpire.[823]

Where the umpire is acquainted with one of the appraisers, the umpire should disclose that fact to the other party.[824]

In Alberta, Canada, a duty of impartiality has also been conferred upon an umpire in one matter where repeated failure to disclose a prior relationship with insureds contributed to an impermissible "apprehension of bias." The court opined that the standard by which to measure impartiality involved the existence of this reasonable apprehension, and thus the question: "would a reasonable person, well-informed and viewing the circumstances in this case, objectively have a reasonable apprehension that [the umpire] may not act in an impartial manner?" In that case, although the umpire was questioned about his prior knowledge and business dealings with the parties, he replied that none existed - concealing the fact that he had been involved

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[822] Michael, 88 Cal. App.4th 925.

[823] Id. at 249.

[824] 44 Am. Jur.2d. Insurance §1689.

in several real estate transactions involving the insured. Section 204 of the Insurance Act provides in part that each party to an appraisal equally bear the cost of appraisal and umpire, a requirement the court deemed "fundamental to impartiality;" moreover, the court found it inconceivable that it would not require an umpire it appointed in absence of an agreement by the parties to be impartial.[825]

An Alabama court delineated its umpire selection criteria when it addressed the parties' umpire proposals where the pertinent policy did not outline any criteria defining the umpire selection process. The court was petitioned to appoint a neutral individual to fill this role. In undertaking this responsibility, the court relied upon general insurance principles in finding that "an umpire selected to arbitrate a loss should be disinterested, unprejudiced, honest and competent," and "impartial..and should not live an unreasonable distance from the scene of the loss."[826]

One possible remedy if an umpire appears to violate the prohibitions against the umpire being interested is to move for a hearing to set the award aside on the basis of

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[825] McPeak v. Herald Ins. Co., (1991) 115 A.R.83, I.L.R. 1-2774,1991 CarswellAlta 400; *Insurance Act*, R.S.A. 1980, c. I-5, s. 204 s. 235, statutory condition 11.

[826] Pennsylvania Lumbermens Mut. Ins. Co. v. Buettner Bros. Lumber Co., 2012 WL 1748028 (N.D. Ala. 2012).

fraud.[827]

In small communities, it may be necessary for the parties to go outside the local community to find a qualified, impartial and unbiased umpire. However, generally it is preferable for an appraiser to nominate an umpire who lives in the vicinity where the loss occurred. Without good cause, it is inappropriate to refuse to agree to anyone residing in the locality, who might otherwise be qualified.[828]

The State of Colorado Division of Insurance has issued a Bulletin defining the standards for impartiality of Umpires.[829]

2. The Umpire's Duties and Responsibilities

The appraisal process may proceed in the manner thought best by the umpire or upon stipulation of the parties. However, where the policy specifically provides for a definite

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[827] In re 176 & 178 East Main Street, Amsterdam, New York, 263 N.Y. 197, 188 N.E. 647 (1934); Bradshaw v. Agricultural Ins. Co., 137 N.Y. 137, 32 N.E. 1055 (1893).

[828] Hartford Fire Ins. Co. v. Asher, 30 Ky. L. Rptr. 1053, 100 S.W. 233 (1907); Niagra Fire Ins. Co. v. Bishop, 49 Ill. App. 388 (2d Dist. 1893), *aff'd,* 154 Ill. 9, 39 N.E. 1102 (1894); Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S.W. 1041 (1896); Brock v. Dwelling-House Ins. Co., 102 Mich. 583, 61 N.W. 67 (1894); Young v. Aetna Ins. Co., 101 Me. 294, 64 A. 584 (1906).

[829] Colorado Department of Regulatory Agencies, Division of Insurance, Bulletin No. B-5.26 "Insurer Requirements Related to Disputed Claims Subject to Appraisal."

methodology, the parties must abide by it. Failure to follow the procedure set out by the policy or statute provides grounds for setting aside the award.[830]

For example, an award will be set aside where the record contains no evidence the appraisers first failed to agree on what they could and submitted only disagreements to the umpire as required by the policy.[831]

In some jurisdictions, the award generated may be vacated as invalid if the umpire does not set forth the methodology used at arriving at a value of the insured's loss. Therefore, in this jurisdiction the umpire should generally reflect in detail the value of the goods destroyed rather than in gross.[832]

Note that in those jurisdictions that equate arbitration and appraisal, it has been held that the technical formalities of an arbitration must be observed, with the invalidation of an appraisal award being the result of the failure to follow statutory procedure. For example, in Connecticut, it

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830 St. Paul Fire & Marine Ins. Co. v. The Tire Clearing House, 58 F.2d 610 (8th Cir. 1932); Aetna Ins. Co. v. Murray, 66 F.2d. 289 (10th Cir. 1933).

831 Richardson v. Allstate Texas Lloyds, 2007 WL 1996387 (Tex. App.-Dallas 2007); Fisch v. Transcon Ins. Co., 356 S.W.2d 186, 189-190 (Tex. Civ. App.-Houston, 1962, writ ref'd n.r.e.).

832 Coffin v. German Fire Ins.Co., 142 Mo. App. 295, 126 S.W.253 (1910).

has been held that the failure of the umpire and the appraisers to be sworn is sufficient to invalidate an award.[833] The California Code of Civil Procedure requires the umpire to disclose his prior affiliations and relationships with the parties for a period of five years prior to his nomination.[834]

By equating arbitration and appraisal, these jurisdictions fail to give life to the true intent of the policy, as well as the legislative intent behind the Standard Fire Policy. This is accomplished by giving the appraisal clause an overly technical and formal reading when what was intended was a relatively simple and user-friendly process for determination of loss and value. A review of the Vandrilla court's decision portrays the intellectual struggle in trying to accommodate the contractual process of appraisal with the strict statutory requirements of formal arbitration.[835]

It is generally held that in determining the loss under a Standard Fire Policy the appraisal team may proceed in such a manner as they think proper and are not bound by the strict rules of judicial investigation.[836] An appraisal proceeding is not an ordinary arbitration. It has

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[833] Vandrilla v. Middlesex Mut. Assur. Co., 1994 WL 668756 (Conn. Super. Ct. 1994).
[834] Cal. Civ. Proc. §1281.9.
[835] Vandrilla, *supra*; Hartford Lloyds Ins. Co. v. Teachworth, 898 F.2d 1058 (5th Cir. 1990).
[836] American Steel Co. v. German American Fire Ins. Co., 187 F.730 (3d Cir. 1911).

been said an appraisal is strictly an ascertainment, in a particular manner, of the amount of the loss, made by two or three parties as the case may be in which they act on their own judgment with such information as they may obtain in an informal way and in which the appraiser chosen by each party is supposed and expected in a restricted sense to represent the party appointing him and within reasonable limits to see to it that no legitimate consideration favorable to the party so appointing him is overlooked by the other appraiser.[837] The umpire should not only be competent, but fair and unprejudiced as between the parties to the award.

It was the duty of each party's appraiser to consult together and if they do not agree, to call on the umpire, whose function it is to deliberate with them. It is improper to consider evidence or information not submitted to the others.[838]

Except in a few states like Connecticut and Massachusetts, formal hearings, witnesses, cross examination, etc. are not the required or usual practice in appraisals. Appraisers are not bound to the strict judicial investigation of an arbitration, except in those states that have

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[837] American Central Ins. Co. v. Landau, 62 N.J. Eq. 73, 49 A.738 (Ch. 1907).
[838] Id.

mandated otherwise by statute.[839]

In the more formalistic state of Connecticut for example, an undisclosed ex-parte conversation between a representative of the carrier and the umpire prior to the appraisal was deemed sufficient to constitute actual misconduct and the award was set aside pursuant to §52-418(a)(3) of the Connecticut General Statutes.[840]

While the umpire should receive all of the submissions, materials and evidence that the appraisers had the opportunity to review, the parties should remain focused on the fact that it is only the differences between the appraisers that the umpire should rule on under most policies in most jurisdictions. In those situations where such language is contained within the policy, it represents a material limitation on the umpire's authority. The umpire has no authority to opine in those areas of agreement between the appraisers.

In an Ohio claim, although the umpire's methods may have deviated from the procedures the insurer was accustomed to, the umpire was well qualified, the umpire's

[839] For example, Massachusetts has adopted a more formalistic procedure for carrying out the appraisal called a Reference Proceeding. Referees; Selections, Mass. Gen. Laws Ch. 175 §100 (1977).

[840] Gordon v. Amica Mut. Ins. Co., 2004 WL 2943244 (Conn. Super 2004).

methods were within industry standards and the umpire's placement of his dog in the insured's fenced yard while the property was inspected did not demonstrate an improper personal relationship.[841] In attempting to set aside an appraisal award, it was held that the insurer failed to demonstrate "evident partiality or corruption" as required to set aside an award.

It has been said that the appraisal process is an *ex parte* investigation during which the appraiser will come into contact with information that may or may not simultaneously be seen by the other appraisers and umpire. If the two appraisers cannot agree on a value then a third is appointed and the value agreed upon by two of the three is determinative.[842]

It has been held that an umpire's neutrality was not tainted by *ex parte* communications with counsel for the insured as, unlike in an arbitration procedure, appraisals are generally less formal. Thus, where the umpire independently attempted to resolve differences in the appraisals offered by both sides, the court found no impropriety in the umpire requesting the parties' respective positions to aid him in resolving these

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[841] Cousino v. Stewart, 2005 WL 3120245 (Ohio App. 6th Dist. 2005).
[842] John R. Casolaro, *A Primer on Appraisal to Resolve Valuation Disputes-Part I*, 65 N.Y. St. B.J. 10 (1993).

differences.[843]

An award by appraisers will be sustained unless it clearly appears that it was the result of fraud, mistake or accident or if, in fact, is was made by participants who were incompetent, interested, partial or negligent.[844]

The language of the Standard Fire Policy describes the relationship between the appraisers and umpire where it states that the appraisers, once failing to agree, "[S]hall submit their differences only to the umpire. An award in writing...of any two...shall determine the amount of actual cash value and loss." It has been held that on the basis of this language, the umpire was not an arbitrator who was given sole authority to make a determination. He was to act only in concert and in conjunction with one or both of the other appraisers.[845]

An umpire and one of two appraisers may not arbitrarily disregard pertinent evidence presented by the other appraiser.[846]

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[843] Preferred National Ins. Co. v. Miami Springs Golf Villas, Inc., 787 So.2d 1156, 2001 Fla. App. 9161 (3rd Dist. 2001); Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla. Dist. Ct. App. 3d Dist. 2001), *aff'd,* 833 So.2d 762 (Fla. 2002); Liberty Mutual Fire Ins. Co. v. Hernandez, 735 So.2d 587 (Fla 3d DCA 1999); Preferred Ins. Co. v. Richard Parks Trucking Co., 158 So.2d 817 (Fla. 2d DCA 1963); Harleysville Mut. Ins. Co. v. Narron, 155 N.C.App. 362, 574 S.E.2d 490 (N.C. App. 2002).

[844] Home Ins. Co. v. Walter, 230 S.W. 723 (Tex. Civ. App.-Dallas 1921).

[845] FC&S Bulletins, The National Underwriter Co., Misc. Property, April 1995.

[846] Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 118 N.E.2d 574 (1954).

An award would not be set aside because the umpire and appraisers acted jointly but where the umpire did not confer with the insured's appraiser, the appraisement was held to be ineffective.[847]

The appraisers may hire an umpire prior to disagreeing on the value of a loss, but the umpire may not participate until such a disagreement occurs.[848]

Where an appraisal award is concluded by adding the amounts allowed by each appraiser and the umpire and dividing by three, this method will not be upheld where it is used in accordance with a previous agreement between the appraisers.[849] Where the appraisers and umpire agree to an award arrived at by dividing the aggregate of the amounts of their individual estimates by the number of appraisers, in disregard of their individual judgment, the award or appraisal was held to be invalid.[850]

The obligation of the umpire to act in concert and in conjunction with one or both of

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[847] Headley v. Commercial Standard Ins. Co. of Dallas Texas, 17 La. App. 25, 134 So. 305 (1931).

[848] Enright v. Montauk Fire Ins. Co., 15 N.Y.S. 893 (Sup. Ct. 1891), *aff'd*, 142 N.Y. 667, 37 N.E. 570 (1894).

[849] Schreiber v. Pacific Coast Fire Ins. Co., 195 Md. 639, 75 A.2d 108 (1950).

[850] Round v. Bellows, 21 Mass. 179 (1826); Schreiber, 195 Md. 639.

the appraisers was illustrated by the New York supreme court in its decision setting aside an umpire's determination that included an award in the amount of $90,000. The umpire arrived at this number after being confronted with a $45,000 written appraisal by the insurance carrier's representative and a $220,000 written appraisal submitted by the insured's appraiser. A lower court had initially allowed the umpire's award to stand finding the umpire's "common sense approach" to be appropriate when the umpire selected a figure between the two appraisals he was presented with. In overturning the lower court's decision, the court cited the policy language which prescribes the relationship of appraisers and umpire: "The appraisers, failing to agree, shall submit their differences, only, to the umpire. An award in writing...of any two...shall determine the amount of actual cash value and loss." The court concluded that based on this language, the umpire was not an arbitrator given sole authority to make such a determination and was to act only in concert and conjunction with the other appraisers.[851]

It has been held that a sitting jurist may not directly participate in the appraisal process except with respect to award enforcement

[851] Allstate v. Kleveno, 81 A.D.2d 648, 438 N.Y.S.2d 384 (2d Dept. 1981).

proceedings.[852] The two statutory schemes of litigation and alternative dispute resolution are mutually exclusive and independent of each other. Attempts at creating a hybrid or mutation of the two will generally not be countenanced by a reviewing court.[853]

However, under somewhat unusual circumstances, a federal district judge considered assuming the role of umpire with respect to an appraisal being conducted pursuant to the Standard Fire Policy.[854]

3. The Umpire's Scope of Authority

The functions of the appraisers and umpire in the appraisal process are defined to a limited degree in the policy. Actions by the umpire or appraisers which exceed the scope of the policy or the appraisal agreement may result in an award being set aside. The problem is the simple appraisal paragraph leaves a lot to the parties' imaginations.

In addition to guidance directly from the policy, the umpire should also look at the

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852 Wages v. Smith Barney Harris Upham & Co., 188 Ariz. 525, 937 P.2d 715 (1997); Dodd v. Ford, 153 Cal. App.3d 426, 200 Cal. Rptr. 256 (4th Dist. 1984).

853 Dodd, Id.

854 S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC , 2002 WL 1905968 (S.D.N.Y. 2002) (where the District Court considered appointing himself as the neutral in an appraisal being conducted with respect to the September 11, 2001 attack on the World Trade Center).

appraisal agreement and submission signed by the parties and appraisers and which resulted in the umpire's hiring. The parties should have set forth the issues to be determined and the requisite specificity that the parties have agreed to require with respect to the ultimate award.

The powers and authority to be asserted by the umpire are also determined by the submission of the appraisers or the appraisal agreement which gave rise to the appraisal. In addition, the insurance contract which exists between the parties, as well as any relevant law, regulation or judicial precedent which controls in the jurisdiction where the property is located,[855] may impact on the power and authority of the umpire. Examples would be policy definitions of such terms as actual cash value, co-insurance and the extent of covered property and the policy's settlement provision.

An Ontario court which considered the approach used by an umpire in making his appraisal valuation determined that "the terms of the insurance policy govern the use that can be made of the umpire's determination of what the loss is." There, the umpire had relied upon the replacement cost of the property as

[855] 44 Am. Jur. 2d Insurance §1691 (2002); Town of Trumbull v. Trumbull Police Local 1745, Connecticut Counsel of Police Unions, 1 Conn. App. 207, 470 A.2d 1219 (1984).

stipulated in the policy. The court reasoned that the umpire was correct in his statement that "Whether or not the insured replaces is irrelevant for the purpose of determining the 'loss', such determination being on a replacement cost basis. This of itself does not make the insurer liable for that amount because the insurer limits its liability by the various alternatives set forth in the section." The court could not determine how useful the umpire's determination would be, but stated that even if it turned out to have little use in settling the matter only the expense of a hearing before the umpire would be incurred.[856]

With respect to the Standard Fire Policy, it offers little guidance with respect to the authority granted to the umpire. Once making provisions for the selection of the umpire, it requires merely that the appraisers to submit their "differences only, to the umpire."

It is critically important for the umpire to educate him or herself with respect to the provisions of the policy regulating the determination of actual cash value (or other value insured by the policy) as well as the amount of loss. The umpire should also be

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[856] Sehdev v. State Farm Fire & Cas. Co., 47 O.A.C. 223, 25 A.C.W.S. (3d) 940, 1991 CarswellOnt 868.

familiar with local precedent, insurance regulations and laws which pertain to those definitions of value as well as the insurance appraisal process itself. Particular care must be taken in situations where the umpire has no prior experience with insurance appraisals and may be tempted to rely upon past experience with arbitration, mediation, other types of appraisals such as real estate or market value appraisals, or litigation, all of which have little bearing on the process and procedures of the insurance appraisal.

As the "neutral" in the appraisal process, it may fall upon the umpire to resolve issues of procedure as well as practical issues such as scheduling, the location of meetings, hearings and the order of presentation of evidence and information. While an effort should be made to resolve these issues by consensus and acclamation, as a practical and logical matter, the umpire should have ultimate authority to make reasonable judgments on these matters in order to insure that the purpose of the parties' participation in appraisal is fulfilled fairly.

A British Columbia court, however, declined to confer authority to determine the disposition of salvage where the umpire's action in question had been discussed by appraisers but no agreement or authorization by the parties existed, nor was there statutory authority. In that case, the court concluded that an umpire had exceeded the scope of his authority in assessing a stock loss and directing that the disposition of salvage go to an insurer. The court referenced the Insurance Act, s. 200, stat. cond. 11, which authorized appraisers only to determine value of the insured property, value of saved property and amount of the loss.[857]

The general guideline in performing this mission should be an overriding focus on doing justice to the claim submitted, in a fair and expeditious manner, giving due consideration to all of the arguments.

As discussed in Chapter I, certain jurisdictions, particularly those which equate arbitration and appraisal, impose statutory authority upon the umpire. In these states, umpires have available all of the powers granted arbitrators in carrying out their appointed mission. These powers include subpoena power,[858] the scheduling and conduct of hearings,[859]and the right to

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[857] British Columbia Ins. Corp. v. Dawd Holdings Ltd., (1989) 35 C.C.L.I. 193, I.L.R. 1-2391, 12 A.C.W.S. (3d) 380, 1988 CarswellBC 400; *Insurance Act*, R.S.B.C. 1979, c. 200, s. 11 and 15 Sechion 220.
[858] Subpoenas and deposition, Conn. Gen. Stat. §52-412 (a)(b) (2003).
[859] Hearing; time and place, adjournments, Conn. Gen. Stat. §52-413 (2003); Additional arbitrator; Rehearing; Oath, Conn. Gen. Stat. §52-414 (2003).

administer oaths to witnesses.[860]

An umpire has the authority to make findings of fact such as identifying the items on an inventory that were actually lost or damaged. In the case of such findings, they are conclusive.[861] This view is not universal.

An arbitrator enjoys a level of arbitral immunity, like judicial immunity, is said to promote fearless and independent decision making. Courts have refused to hold judges liable for their judicial actions and, in cases in which misconduct in arriving at decisions has been alleged, have also clothed arbitrators with immunity.[862]

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[860] Conn. Gen. Stat. §52-414(e).

[861] Schreiber v. Pacific Coast Fire Ins. Co., 195 Md. 639, 75 A.2d 108 (1950).

[862] Baar v. Tigerman, 140 Cal. App.3rd 979, 211 Cal. Rptr. 426 (1983).

B] FEES

Pursuant to the Standard Fire Policy, generally "[E]ach appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."[863]

However, this rule is not universal. Virginia, for example provides in its Standard Fire Policy that "[I]f the written demand is made by this Company, then the insured shall be reimbursed by this Company for the reasonable cost of the insured's appraiser and the insured's portion of the cost of the umpire." [864]

While the splitting of the umpire's fee is overwhelmingly the rule, the amount of the fee should certainly be discussed in advance of hiring and be confirmed in writing, signed by the parties to the appraisal, as well as the umpire so as to avoid any misunderstanding.

Though appraisal is generally a less expensive proposition than its more contentious alternative of litigation, it can still be expensive.

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[863] *e.g.,* Standard Form, Conn. Gen. Stat. §38a-307 (2003); Standard Policy Provisions, N.Y. Ins. Law §3404(e) (McKinney 2003); Standard Policy Provisions, 40 Pa. Cons. Stat. §636 (2003) (statute originally enacted on May 17, 1921); Insurance Act. R.S.O. 1990 Condition 11, §143 (Ontario, Can); Standard Provisions, Conditions, Stipulations and Agreements for such Policies, Va. Code Ann §38.2-2105 (Michie 2002).

[864] Standard Provisions and Agreements for such Policies, Va. Code Annot. §38.2-2105 (lines 144-147) (Michie 2002).

Umpire's fees are generally hourly and can range typically from $150 to as high as $400, $500 or $600 per hour. Some jurisdictions have ready-made pools of independent umpires or arbitrators who may be called upon on a given claim to render assistance. In other jurisdictions, umpires are often culled from lists of insurance company and consumer claim estimators who are participating in the insurance claims process generally.

Good success can be achieved by utilizing the rosters of one of the private companies who are engaged in alternative dispute resolution (A.D.R.) and make available retired judges to act as the neutral. These candidates often have judicial temperament and experience in issue determination and do not have the troublesome ties to the insurance claims industry which may become problematic.

As complex appraisals can be long winded, the process can become expensive and the parties should agree to make provision for periodic payments to the umpire where appropriate.

Contingent fees for the umpire are obviously unacceptable.

Where a party refuses to pay his fair share for the work of the umpire, the attorney who petitioned the court for his appointment cannot be required to pay on behalf of his client where the attorney's petition for the appointment of the umpire was a strategic effort taken on behalf of his client.[865]

[865] Dorsey v. Nationwide Ins. Co., 345 Pa. Super. 254, 498 A.2d 387 (1985).

C] WRITTEN AGREEMENT WITH THE UMPIRE

It is often advisable for the parties to appoint the umpire by way of a written agreement which sets forth clearly and unambiguously the issues to be determined pursuant to the appraisal provision, as well as the fees and expenses of the umpire.

The parties and their appraisers have discretion to make the agreement hiring the umpire as simple or as extensive as they choose within their reasonable judgment. For example, it could provide for a chronology of the proceedings, setting forth the anticipated timing of each step in carrying out the process. It can set forth the time within which the team must render its final decision after the proceedings are concluded. At a minimum, it should reference the appraisal agreement between the parties which should be made an exhibit thereto.

As with the appraisal agreement itself, the agreement hiring the umpire should be executed by the parties as well as the appraisers, as the appraisers do not act as agents of the party hiring them and thus may not have the technical legal authority to bind the party that retained them with respect to commitments made to the umpire.

A sample form of agreement hiring the umpire is contained in Appendix A.

It has been held that where a party to an appraisal agreement agrees in writing on the appointment of a certain umpire, that party will be estopped from challenging the selection of the umpire based on a claim of lack of authority where the individual making the designation is the corporate treasurer of the insured and acted in the absence of the president of the company who was away at the time of the loss.[866]

[866] Remington Paper Co. v. The London Assur. Corp. of England, 12 A.D. 218, 43 N.Y.S. 431 (4th Dept. 1896).

D] COURT APPOINTMENT OF THE UMPIRE

The Standard Fire Policy states the following with respect to the appointment of the umpire:

> "The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree to such an umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located."[867]

In order to accommodate the appraisal provision's mandatory court involvement once the appraisers fail to reach agreement on the selection of an umpire, most states provide a statutory method for appointing an umpire.

For example, §3408 of the New York Insurance Law governs the procedure for the selection of an umpire upon the failure of the parties to agree:

> "(a) Whenever application shall be made for the selection of an umpire pursuant to the provisions

[867] *See e.g.*, N.Y. Ins. Law 3404 (Lines 128-32).

> relating to appraisals contained in the standard fire insurance policy of the State of New York it shall be made to a justice of the Supreme Court residing in the county or to a county judge of the county in which the lost or damaged property is or was located. The application shall be on five (5) days notice in writing to the other party. Any such notice in writing, when served by the insured, may be served upon any local agent of the insurer.
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> (b) The Court shall, on proof by affidavit of the failure or neglect of the appraisers to agree upon and select an umpire within the time provided in such policy, and of the service of notice pursuant to subsection (a) hereof, forthwith appoint a competent and disinterested person to act as such umpire in the ascertainment of the amount of such loss or damage."[868]

What constitutes a "court of record" may vary from jurisdiction to jurisdiction. Texas for example, requires that the appointing judge

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[868] *See,* In the Matter of Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523, 917 N.Y.S.2d 839, 2011 N.Y. Slip Op. 21060 (Monroe Cty. 2011).

be a judge of a district court of a judicial district where the loss occurred, thereby preventing county court judges as well as other members of the judiciary from making such an appointment.[869]

In a rare and extremely complex claim involving multiple policies and extensive damage, a court of competent jurisdiction may consider substituting itself as the neutral.[870] Historically, this appears to be a very unusual event. In S.R. International Business Ins. Co. Ltd. v. World Trade Center Properties and Allianz Ins. Co.,[871] a federal district court was confronted with managing the insurance claims arising out of the World Trade Center attack of September 11, 2001. The property at risk was vast, its destruction total and the policies numerous. Many of the carriers who shared the risk had either issued incomplete policies or had failed to deliver their policy at the time of the loss. Confronted with an appraisal demand by one of the carriers, the district court, in recognizing the binding effect of the appraisal clause, considered naming himself as the neutral. No other examples of this can be found.

Note that a technical lack of authority on

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[869] Texas Standard Fire Policy (Lines 109-110).
[870] S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties LLC, 2002 WL 1905968 (S.D.N.Y. 2002).
[871] Id.

the part of a justice to appoint a referee will generally not upset the award if the parties failed to timely object.[872]

It has been held that the order of a federal district court appointing an umpire is not an appealable final order pursuant to 28 U.S.C. §1291. A final decision is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.[873] In Camden Fire Ins. Assoc. v. KML Sales, Inc., it was stated that the final appealable decision which ended the litigation on its merits was the decision to grant the insurance carrier specific performance on the insurance contract and send the dispute to appraisal. That decision was the final decision and was in fact appealed and upheld. If the carrier is unhappy with the outcome of the appraisal process, it could institute a separate proceeding in the district court to vacate the award on the basis of the umpire's alleged bias.

However, in an action to appoint an umpire, the court may not also define the appraisers' and umpire's role under the insurance policy, unless agreed to by the parties. In an Ohio case, the Court of Appeals

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[872] Salganic v. U.S. Fire Ins. Co., 80 N.H. 450, 118 A. 815 (1922).
[873] 99 Fla. Appx. 367, 2004 WL 1147055 (Ca 3. Pa.)(3d Circuit Court of Appeals 2004); Catlin v. U.S, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (U.S. 1945).

reversed a decision made by the trial court directing the appraisers and umpire not to make any determination as to causation of the damage to the insured's property. In reversing, the court held that because the insured did not request a declaratory judgment and only requested that the court select an umpire, an act agreed to by the parties in the contract, the trial court lacked authority to impose specific conditions on the way in which the appraisers would complete their task.[874]

Similarly, in New York it has been held that an action to appoint an umpire is not the proper forum to determine the extent of the issues sto be considered in appraisal and is beyond the scope of an application to appoint an umpire.[875]

Where an action to compel appointment of an umpire is brought by special proceeding pursuant to statute (i.e. Ins. Law § 3408), "there is no basis for the court to issue a declaratory judgment regarding competency of [any] appraiser."[876]

It is important to note that an action to appoint an umpire does not confer jurisdiction

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[874] *See* Hull v. Motorists Ins. Group, 2011 WL 2040958 (Ohio Ct. App. 2011).
[875] In the Matter of Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523, 917 N.Y.S.2d 839, 2011 N.Y. Slip Op. 21060 (Monroe Cty. 2011).
[876] Id.

on the court to limit the scope of appraisal. In New York, the Court declined a request by parties to limit or define an umpire's damage assessment in terms of value of the loss, actual cash value, repair and replacement costs and other issues. It asserted that an appraisal decision pursuant to policy terms determined the amount of loss and "[t]he amount of loss shall be determined according to the policy terms and applicable provisions of the Insurance Law by the appointed umpire." [877]

[877] In the Matter of Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523, 917 N.Y.S.2d 839, 2011 N.Y. Slip Op. 21060 (Monroe Cty. 2011).

E] WHEN TO APPOINT THE UMPIRE

There is a dichotomy in thinking regarding when an umpire should be appointed.

It has been stated that the appraisers should discuss and agree on the identity of the umpire before discussing the merits of the issues raised by the appraisal. The advocates of this approach point out that the Standard Fire Policy requires it, stating in relevant part, (lines 128 and 129) "[T]he appraisers shall first select a competent and disinterested umpire." This is contained in the passage immediately after the provision providing for the appointment of the appraisers. Additionally, an argument has been made that the umpire should be agreed upon immediately in order to avoid confrontation and contention in that selection process which might arise once a disagreement on the merits occurs.

While the umpire may often be selected immediately upon the appointment of the appraisers and their arrival on the scene, the umpire generally does not become directly involved in discussions until the appraisers have failed to reach an agreement between themselves. Involvement of the umpire in formal substantive discussions is generally not appropriate until a reasonable effort has been made on the part of the appraisers to reach an agreement. This is so unless, by their various positions, and in the exercise of their reasonable and independent judgment, it is clear that the appraisers will not be able to agree and that further efforts would be fruitless absent the involvement of the umpire.

It may also be appropriate to appoint an umpire when one party has failed to respond to the demand for an appraisal. There is case support for the proposition that the appraisal may nevertheless proceed; even upon a party's failure to appoint an appraiser, with the matter being determined by the single appraiser and the umpire. The other party is deemed to have waived its right to participate.[878]

The most common procedure is for the appraisers to select an umpire before they actually reach disagreement on a particular issue.[879] The umpire then awaits a disagreement to materialize between the appraisers and then assists in resolving that disagreement.

After an umpire is appointed, the appraisers still have power to act without the umpire if a disagreement does not exist

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[878] Saba v. The Homeland Ins. Co. of America, 159 Ohio 237, 112 N.E.2d 1 (1953).
[879] Atlas Const. Co., Inc. v. Indiana Ins. Co., Inc., 160 Ind. App. 33, 309 N.E. 810 (2d Dist. 1974).

between the appraisers at the time of the umpire's hiring. The fact that the umpire was chosen before a disagreement does not deprive the appraisers of their power to act without him.[880] For example, if an appraisal agreement provides that two persons are named as appraisers with a third to be appointed by them, it has been held that the position of such third person was that of an umpire, who should act only when the appraisers differed.

The predominant approach is to appoint the umpire after the appraisers have initially conferred, agreed to any portion of the claim and identified the nature and extent of the disagreements.

This approach may be more efficient if it appears to the appraisers that there may be a realistic possibility of resolving the claim without the intercession of an umpire.

Unless the policy provides otherwise, there must be a disagreement between the appraisers before an umpire may participate. In fact, an umpire's signature on the award has been held to be ineffective if it occurred prior

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880 Enright v. Montauk Fire Ins. Co., 15 N.Y.S. 893, (Sup. Ct. 1891), *aff'd,* 142 N.Y. 667, 37 N.E. 570 (1894).

to any disagreement by the appraisers.[881] Additionally, the fact that the umpire did not participate in the appraisal from the beginning, but only after the appraisers disagreed, did not negatively effect the validity of the award.[882]

Additionally, once the appraisers have refined their understanding of areas of disagreement it may better enable them to select an appropriate umpire. For example, in the homeowner's policy context, if they can resolve issues of personal property, a builder may be a more appropriate choice for umpire.

As it is in both parties' interest to expedite repair and re-occupancy of the damaged premises, it may be appropriate to encourage an immediate appointment of the umpire to allow for an immediate inspection of the damaged premises so both demolition and the appraisal may proceed simultaneously. It would also facilitate the discovery of hidden damage when there is still time to consider it in the appraisal.

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[881] Fisch v. Transcon Ins. Co., 356 S.W.2d 186 (Tex. Civ. App.-Houston 1962, writ ref'd n.r.e.); Collings Carriage Co. v. German American Ins. Co., 86 N.J. Eq. 53, 97 A. 726 (1916).

[882] Home Ins. Co. v. Walter, 230 S.W. 723 (Tex. Civ. App.-Dallas 1921).

CHAPTER IX

THE APPRAISAL

Pages

A] GENERALLY

As very little specific guidance is offered by most insurance policies with respect to how the appraisal should actually proceed once the principals are in place, the methodology utilized has been developed in practice and by trial and error. One of the basic tenets of the appraisal process, is the ability of the appraisers and the umpire to exercise discretion under the circumstances of the particular claim in an effort to do justice to the parties under the terms of the policy. It is generally accepted that the participants may proceed in such a manner that they think proper and are not bound by the strict rules of judicial inquiry and issue resolution.[883]

The court in American Central Ins. Co. v. Landau,[884] described the process of appraisal very plainly and succinctly in an often quoted excerpt from its decision.

The court stated:

> The proceeding here is not an ordinary arbitration where the parties hear witnesses and appear by counsel and act upon sworn evidence only; but it is strictly an appraisal and ascertainment in a particular manner of the amount of the loss, made by two or three parties, as the case may be, in which they act on their own judgment, and with such information as they may obtain in an informal way, and in which the appraiser chosen by each party is supposed and expected, in a restricted sense, to represent the party appointing him and within reasonable limits to see to it that no

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[883] American Steel Co. v. German-American Fire Ins. Co., 187 F.730 (3d Cir. 1911); *See also*, Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 A. 356 (1988); Townsend v. Greenwich Ins. Co., 86 A.D. 323, 83 N.Y.S. 909 (2d Dept. 1903), *aff'd,* 178 N.Y. 634, 71 N.E. 1140 (1904).

[884] 62 N.J. Eq. 73, 49 A. 738 (1901).

legitimate consideration favorable to the party so appointing him is overlooked by the other appraiser.

Max J. Gwertzman, a respected litigator on behalf of insurers and author of "A Legal Analysis of the Appraisal Agreement"[885] quoted a Federal Court decision which further delineates the duties of the umpire and appraisers.

He quotes the following:

> (1) It is true that such proceeding by appraisers and an umpire does not demand the formalities of a trial in a court of law or equity, but it does demand a fair effort to ascertain the truth and the consideration of available evidence and information, and the deliberate judgment of the ones making the award, after due consideration and deliberation.
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> (2) I take it that the appraiser, as well as the umpire should be not only competent, but fair and unprejudiced as between the parties to the award, and a

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[885] Max Gwertzman, *The Insurance Advocate,* 4th Printing, Roberts Publishing Corp. 1972.

> determination of whose interests are confided to them. In the language of the policy of insurance, the appraiser is to be "disinterested" and this means "fair and unprejudiced."
>
> (3) And it was the duty of these appraisers to consult together and, if they do not agree, to call in the umpire whose function it was to deliberate with them. It was improper for one or two to consider evidence or information not submitted to the other, or the others.[886]

In some states, the process can be either as formal or informal as the parties may agree. In this context, informal appraisals are generally faster and less expensive then a formal process which might include the use of a court reporter and the formal taking of evidence and testimony. However, California has codified this rule to the extent of limiting appraisals to informal affairs without discovery, court reporters, and the formal taking of evidence unless the parties agree otherwise.

On one hand the California legislature

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[886] Phoenix Ins. Co. v. Everfresh Food Co., 294 F. 51 (1923).

added language that makes the process more efficient defining the meaning of "informal," precluding formal discovery like depositions, interrogatories, requests for admissions as well as formal rules of evidence and a court reporter.

On the other hand in the event of a government declared disaster, either party may request appraisal but it cannot be compelled.[887]

Generally, the methodology to be used at arriving at an award is for the appraisal panel to determine. Courts will properly decline to exercise discretion to micro-manage an appraisal or conclude that no case or controversy exists sufficient to warrant declaratory relief unless the issues raised prior to the award suggest a denial of due process or breach of the policy.[888]

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[887] Cal. Ins. Code § 10082.3, Loss Requirements, Appraisals and Adjusters.

[888] Federal Ins. Co. v. Newby, 2013 WL 1285140 (N.D. Cal. 2013) (Disagreement was only whether the appraisers should consider the full cost to remodel while deducting unrelated work or, as the insured's appraiser urged, a comparison of unit costs by type of material and labor. The court stated: "Nothing in the record suggest the appraisal panel would be unable or unwilling to resolve the issues presented...if [the insured] were to present them to the panel.

B] CONSULTATION NECESSARY

Consultation between the appraisers is necessary for an award to be considered valid. However, the appraisers are not required to observe or inspect the property at the same time.[889]

The umpire and one appraiser may not ignore the second appraiser and make an award between them. This rule applies even if all three parties met on several occasions and failed to agree.[890] It is the duty of the appraisers, if they cannot agree, to call in the umpire. It is improper for one or two of them to consider evidence not submitted to the others.[891] The courts have held that two participants acting together without regard to the third, privately collecting information and examining witnesses, renders an award invalid.[892]

Each party must be permitted to present its views to the appraisal team.[893] Where each party had the same opportunity to see the damaged property and the umpire considered each side's submission, a claim of misfeasance

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[889] Kent & Purdy Paint Co. v. Aetna Ins. Co., 165 Mo. App. 30, 146 S.W.78 (1912).

[890] Providence Washington Ins. Co. v. Gulinson, 73 Colo. 282, 215 P.154 (1923).

[891] J.E. Davis Mfg. Co. v. Fireman's Fund Ins. Co., 210 F. 653 (N.D.N.Y. 1914).

[892] Christianson v. Norwich Union Fire Ins. Society, 84 Minn. 526, 88 N.W. 16 (1901).

[893] In re Delmar Box Co., 309 N.Y 60, 127 N.E.2d 808 (1955).

was rejected where the insured claimed its appraiser "did not have any input except for a 30 minute call with the umpire."[894]

The insured is not bound by an award made by the company's appraiser and the umpire, without notice to the insured's appraiser or the insured.[895] In the case of Zoni v. Importers and Exporters Ins. Co. of New York,[896] the court held that an award reached by the umpire and one appraiser without conference with the other appraiser was invalid because it amounted to a deprivation of any representation in the appraisal proceedings. It should be noted that an insurance policy may declare that an award signed by the umpire and only one of the appraisers is valid although made in the absence of the other appraiser. Such provisions have been held to be valid,[897] but are permissible only if the process has been consistent with the requirements of the statutory Standard Fire Policy in the local jurisdiction as to the necessary consultation.

The above stated rule does not mean that all parties to the appraisal must act in concert at all times. The courts generally allow

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[894] Transcapital Bank v. Merchants Mut. Ins. Co., 2013 WL 322156 (N.D. Ohio 2013).

[895] Schmitt Bros. v. Boston Ins. Co., 82 A.D. 234, 81 N.Y.S.767 (1903).

[896] 338 Pa. 165, 12 A.2d 575 (1940).

[897] German Ins. Co. v. Hazard Bank, 126 Ky. 730, 104 S.W.725 (1907).

the appraisers to act privately, so long as no conclusions are drawn until the parties meet. For example, it has been held that where two of the appraisers privately ascertain prices and discuss the amount of the award but did not come to a conclusion until the final meeting, when all three were together, the award was held to be valid. Similarly, the fact that an appraiser appointed by the insured immediately went to work to determine the value of the articles destroyed, did not render the appraiser ineligible.[898]

It has been stated that absent fraud or conniving actions, an umpire's *ex parte* communications with an insured's appraiser did not constitute an impeaching circumstance requiring the appraisal award to be overturned.[899]

One court declined to invalidate an award despite the fact that the umpire and appraiser met without the insured's appraiser in order to sign the award. The insured admitted that its appraiser had submitted its position to the other two and the umpire had testified that he "fully considered all submissions" before rendering the award. The limited

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898 Hurst v. Hope, 152 Va. 405, 147 S.E. 222 (1929).

899 Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362, 574 S.E.2d 490 (N.C. App. 2002).

communication was not deemed sufficient to invalidate the award, as the insured was given both notice and an opportunity to be heard by both and did not show fraudulent intent.[900]

While some older decisions had left it unclear as to whether an umpire may properly have ex *parte* communications with either party during the appraisal in an effort to clarify a party's position or for the umpire to obtain information, more recent cases generally hold that an umpire did not lose his neutrality by conducting an ex *parte* communication with representatives of the insured where the purpose was to clarify the insured's position with respect to the claim. However, while this appears to be the majority view, it is not universal and prudence would suggest that the umpire endeavor to avoid ex *parte* communications without obtaining the consent of the other party. This would tend to avoid an appearance of impropriety and potential challenge to the umpire's neutrality.[901]

In California, it has been held that private dealings between the appraisers selected by the parties while the appraisal procedure is pending may be grounds for vacating an appraisal award. The burden was said to be

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[900] Glendale LLC v. Amco Ins. Co., 2012 WL 2917920 (W.D.N.C. 2012).

[901] Hartford Lloyds Ins. Co. v. Teachworth, 898 F.2d 1058 (5th Cir. 1990); Columbia Cas. Co. v. Southern Flapjacks, Inc., 868 F.2d 1217 (11th Cir. 1989).

on the appraisers to show the significance of the business conducted and that the parties' interests were not prejudiced.[902]

Appraisers without knowledge of essential facts must give the parties an opportunity to produce available evidence. A failure in this respect may result in an award made in disregard of some relevant fact and in ignorance of others. Such a circumstance has been held to justify the setting aside of an appraisal award.[903]

In order to avoid such a result, the insured is entitled to timely and adequate notice of the specifics of the dispute by the insurer so that the insured can contest a denial of coverage prior to appraisal.[904]

An appraiser's denial of an insured's request to be heard regarding the value of stock before the loss constituted conduct sufficient to invalidate the award. [905]

Conversely, an award of the insured's appraiser and the umpire was determined to be valid, where the appraisers disagreed as to

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[902] Figi v. New Hampshire Ins. Co., 108 Cal. App.3d 772, 166 Cal. Rptr. 774 (1980).
[903] St. Paul Fire & Marine Ins. Co. v. The Tire Clearing House, Inc., etc., 58 F.2d 610 (8th Cir. 1932).
[904] *See* Hahn v. Allstate Ins. Co., 15 A.3d 1026 (R.I. 2011).
[905] Aetna Ins. Co. v. Murray, 66 F.2d 289 (10th Cir. 1933).

whether the insurer's appraiser made his position known.[906]

Even in cases of total loss and regardless of whether any property remains to be inspected, the parties have the right to appraisal including the presentation of evidence by witnesses as to their knowledge of the value of what was destroyed as well as other documentary and photographic evidence. Anything else that might be available which tends to establish the condition and value of the property both pre and post loss should be considered in bringing the appraisal process to a proper conclusion.[907]

In case of total destruction, where the property is unavailable for inspection, the appraisers should give notice to the parties and let each in the other's presence, present their respective evidence and positions.[908]

As ever greater amounts of information is stored and shared digitally, the use of these efficient methods may obviate the need for meetings and inspections. As long as each appraiser has an opportunity to share their

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[906] Twait v. Farmer's Mut. Hail Ins. Co. of Iowa, 249 Iowa 1239, 91 N.W.2d 575 (1958).

[907] Drescher v. Excelsior Ins. Co. of N.Y., 188 F. Supp. 158 (D.N.J. 1960); Stout v. Phoenix Assur. Co. of London, 65 N.J. Eq. 566, 56 A. 691 (1904).

[908] Drescher, 188 F.Supp at 159; Standard Provisions, N.J. Stat. Ann. 17:36-5.20 (West 2003); Carlston v. St. Paul Fire & Marine Ins. Co., 37 Mont. 118, 94 P. 756 (1908); Franklin v. Fireman's Fund Ins. Co., 4 Tenn. App. 688 (1927).

views and be exposed to competing ideas, the appraisal team is free to determine how the required consultation shall take place.

C] DETERMINING VALUE

1. Actual Cash Value: The Broad Evidence Rule and Other Formulations

The focus of the appraisal provision as contained in the Standard Fire Policy is a determination of actual cash value (ACV) and the amount of loss. However, many policies fail to define what the term actual cash value means and some jurisdictions have taken to defining the term through regulation, legislation or by judicial decision.

There has been much litigation with regard to the evidence to be considered in determining the actual cash value of the property insured under a first-party fire insurance policy. The New York Court of Appeals has held that in determining actual cash value, the finder of fact should consider all factors which may bear on the issue. Under the so-called Broad Evidence Rule, the parties should not limit the appraisers' receipt of evidence to replacement cost less depreciation only, in determining the actual cash value of the damaged property.[909] In McAnarney v. Newark Fire Ins. Co., the insurer had agreed "to insure to the extent of the actual cash value." The insurance company

[909] 247 N.Y. 176, 159 N.E.902 (1920).

argued that the only evidence to be considered should be replacement cost less depreciation. The Court of Appeals disagreed with the insurer and held that those charged with the responsibility of determining actual cash value should consider "every fact and circumstance which would logically tend to the formation of a correct estimate of the loss. It may consider actual costs and costs of reproduction; the opinions upon value given by qualified witnesses; the declarations against interest which may have been made by the insured; the gainful uses to which the buildings might have been put; as well as any other facts tending to throw light upon the subject." The court noted that this approach "requires the fact-finder to consider all evidence an expert would consider relevant to an evaluation, and particularly both fair market value and replacement cost less depreciation." [910]

In Michigan, it was held that an insurer acted pursuant to the subject insurance policy and state law when it used the Broad Evidence Rule to calculate the actual cash value of the insured's building following a loss. The Sixth Circuit and state of Michigan require the application of this rule. Further, "'Michigan courts recognize that no set method of valuation is necessary within the appraisal

[910] Id. at 183-84.

context…Market value, replacement value, and other means of valuation are merely guides, rather than shackles compelling strict adherence.'" Precedent has confirmed that the application of the Broad Evidence Rule is required when actual cash value is not defined within an insurance contract. After the court observed compliance with the Broad Evidence Rule, the insured was precluded from contesting the valuation through Appraisal as it had waived this right by commencing litigation.[911]

It is important to note however, that the Broad Evidence Rule was formulated by the Court of Appeals as a default rule when the policy contains no definition of actual cash value. Thus, analysis of the appropriate definition of value should begin in the policy of insurance.[912]

In a later case, the New York Court of Appeals reaffirmed its decision in McAnarney by holding that appraisers may not limit their receipt of evidence to reproduction cost less depreciation cost.[913] According to the court,

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[911] Commodity Resources, Inc. v. Certain Underwriters at Lloyd's, London, 2013 WL 3716385 (E.D.Mich. 2013), *citing* Commodity Res. Inc. v. Certain Underwriters at Lloyd's, London, 2013 WL 607772 (E.D. Mich. 2013) and Evanston Ins. Co. v. Cogswell Properties, LLC, 683 F.3d 684 (6th Cir. 2012).

[912] S.R. Intern. Business Ins. Co., Ltd. v. World Trade Center Properties LLC, 445 F.Supp.2d 320 (S.D.N.Y. 2006).

[913] Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 118 N.E.2d 574 (1954).

the umpire and company appraiser may not arbitrarily refuse to consider evidence of the variety of facts which may enter into the determination of actual cash value, despite the fact that evidence of such factors was presented to them by the plaintiff's appraiser.[914] The right of a party to have appraisers receive all pertinent evidence offered is a fundamental procedural right to which the insured is entitled and any conduct to the contrary by the company appraiser or umpire may invalidate an award.[915]

As the Broad Evidence method of ascertaining actual cash value has been adopted in most jurisdictions,[916] it makes an excellent guideline for appraisers in making a determination of actual cash value, except in those states where another method is mandated. Practitioners are cautioned to consider the issue as the definition of actual cash value as the proper method of calculating it does vary from state to state and the use of the correct approach is fundamentally important to a proper outcome.

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[914] Id.
[915] Strome v. London Assur. Corp., 20 A.D. 571, 47 N.Y.S.481 (2d Dept. 1897), *aff'd*, 162 N.Y. 627, 57 N.E. 1125 (1900); Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 A.D. 525, 69 N.Y.S. 344 (1901), *aff'd*, 172 N.Y. 663, 55 N.E. 118 (1902).
[916] Evanston Ins. Co. v. Cogswell Properties, LLC, 730 F.Supp.2d 248 (W.D. Mich. 2010)

In Pennsylvania it has been held that appraisers acted within the scope of their authority in determining actual cash value when they considered the actual use the property could be put to in the future. The court stated that appraisers have to make a variety of decisions in the course of setting a value for the property. One of these permissible decisions was the recognition that the subject property possessed a benefit under the pertinent zoning ordinances and that the existence of this benefit was relevant to a determination of valuation.[917]

The Connecticut Supreme Court has accepted three methods for determining actual cash value. The first is based upon the market value of the property at the time of the loss. The court stated that this method is useful where "[T]he property is of such nature that its market value can readily be determined." The second method is based upon replacement or reproduction cost. The court said that this measure "[I]s merely a limitation on the insurer's liability and not a substantive measure of damages which the insured can invoke." The third method which the court has recognized is the "Broad Evidence Rule." By this standard, the appraisal should consider "any evidence logically tending to the formation of a correct

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[917] Boulevard Assoc. v. Seltzer P'ship, 445 Pa. Super. 10, 664 A.2d 983 (Pa. Super. 1995).

estimate of the value of the destroyed or damaged property."[918]

In California, it has been held that appraisal is appropriate to determine actual cash value even when the issue turns on whether the proper valuation method was used.[919]

The umpire may make his own election as to the method to be utilized so long as it is consistent with the Broad Evidence Rule and the insurance policy.[920]

In Michigan, it was held to be error for the appraisal team to utilize different valuation methods on the same claim; market value for the value of the property and replacement value minus depreciation to calculate the ACV of the loss. Calling this a "manifest mistake and an error of law requiring vacation of the award" the court determined that "the broad evidence rule provides no basis for the appraisers to employ one valuation method to determine the ACV of the property and another to determine the ACV of the loss.

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918 B & D Molded Products, Inc. v. Travelers Cas. & Sur. Co., 2000 WL 1406860 (Conn. Super. Ct. 2000); Vogt v. Rhode Island Joint Reinsurance Ass'n, 1999 WL 1062207 (R.I. Super. Ct. 1999); Sayed v. Ohio Fair Plan Underwriting Ass'n, 1982 WL 6703 (Ohio Ct. App. 6th Dist. 1982); Sullivan v. Liberty Mut. Fire Ins. Co., 174 Conn. 229, 384 A.2d 384 (1978); Davis v. National American Ins. Co., 78 Mich. App. 225, 259 N.W.2d 433 (1977).

919 Enger v. Allstate Ins. Co., 407 Fed. Appx. 191, 2010 WL 5423566 (9th Cir., 2010).

920 Sullivan, Id.

While empowered to define ACV as they may choose, they must give the term a consistent meaning.[921]

The court further found that the meaning of ACV under the policy is ambiguous.[922]

In the state of California, the supreme court in Jefferson Ins. Co. of New York v. Superior Court of Alameda County,[923] held that the term "actual cash value" as used in §2071 of the California Code does not mean replacement cost less depreciation, but instead is synonymous with "fair market value." Where appraisers do not follow the accepted definition of the valuation provision of the policy, the appraisal award is subject to being vacated.[924]

Further, in California, it has been held that resort to declaratory relief was appropriate to obtain judicial clarification of the proper method's compliance with the statute setting out such methodology.[925]

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[921] Evanston Ins. Co. v. Cogswell Properties, LLC, 730 F.Supp.2d 248 (W.D. Mich. 2010).

[922] Id. at 753.

[923] 3 Cal.3d 398, 475 P.2d 880, 90 Cal. Rptr. 608 (1970).

[924] Cheeks v. California Fair Plan, 2004 WL 2095622 (Cal. App. 2 Dist. 2004); *See* Cal. Ins. Code §2071.

[925] Kirkwood v. California State Auto Ass'n Inter-Insurance Bar, 193 Cal. App. 49, 122 Cal. Rptr. 38,480 (Cal. App. 2011); Cal.C.C. §1060; Cal. Ins. Code §2051.

In Louisiana, it has been held that actual cash value is determined by calculating the cost of duplicating the damaged property with new materials of like kind and quality, less allowance for physical deterioration and depreciation.[926] In The Perfect Co. v. Essex Ins. Co.,[927] the District Court quoted approvingly from *Black's Law Dictionary*, "Actual Cash Value is defined as the replacement cost less depreciation." Black's Law Dictionary, (7th ed. 1999).

The actual cash value should consider the cost of the item in the insured's community or include the shipping costs of getting it there if its not available at the value determined in that community.[928]

Appraisers are generally expected to act on their own skill and knowledge. It has been held that they may reach individual conclusions and are required to meet only for the purpose of ironing out differences in the conclusions they reached. In most states, they are not obliged to give their rival any formal notice or to hear evidence but may proceed by ex *parte* investigation so long as the parties are given an opportunity to make statements

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[926] Bradley v. Allstate Ins. Co., 606 F.3d 215,227 (5th Cir 2010).

[927] 2010 W.L. 2835899 (E.D.La 2010).

[928] *See for example*, De La Torre v. Allstate Ins. Co., 2011 WL 831426 (C.D.Cal.2011).

and explanations with regard to matters in issue.[929]

The award should be based on the appraiser's submissions, in combination with the umpire's own judgment.

In some jurisdictions, the umpire may utilize an expert to advise him as to the amount of the loss so long as the appraisers are on notice and the award is founded on the sole judgment of the umpire. [930]

In New Jersey, the Broad Evidence Rule requires the appraiser to consider every fact and circumstance which would logically tend to the formation of a correct estimate of the insured loss so as to effectuate complete indemnity.[931] A refusal of the appraisers to consider factors such as the actual cost to the insured of effecting repairs, the actual extent of repairs made, the age of the building, depreciation, the use to which the building had been put and the condition prior to the fire, in determining the actual cash value of a partial fire constituted legal misconduct and

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[929] Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).

[930] German Ins. Co. v. Hazard Bank, 126 Ky. 730, 104 S.W. 725 (1907).

[931] Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515, 753 A.2d 1214 (2000); Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 389 A.2d 439 (1978) (*quoting* McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 179, 159 N.E. 902, 905 (1928)).

justified vacating an appraisal award.[932] Criteria such as fair market value and replacement cost less depreciation do not bind the fact finder, but instead become guidelines along with other relevant evidence the parties may present in cases of both total and partial loss in the state of New Jersey.[933]

Where actual cash value is defined by the policy as replacement cost less a deduction that reflects depreciation, age, condition and obsolescence, obsolescence refers only to functional obsolescence and did not consider economic obsolescence. To suggest otherwise would equate actual cash value and market value which is impermissible.[934]

Actual cash value includes contractor's overhead and profit even when the insured elects to make needed repairs personally, where the cost to repair or replace would typically require a general contractor.[935]

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[932] Ward, Id.; *See also,* Vacation of award; Rehearing, N.J. Stat. Ann. 2A: 24-8c (West 2003).

[933] Elberon, *supra*; Insured, perils insured against; amount of insurance; assignment; N.J. Stat. Ann. 17:36-5.19 (West 2003).

[934] Whitehouse Condominium Group LLC v. Cincinnati Ins. Co., 2013 WL 3895851 (Mich. Ct. App. 2011).

[935] Mazzocki v. State Farm Fire & Cas. Corp., 1 A.D.3d 9, 766 N.Y.S.2d 719, 2003 N.Y. Slip Op. 17945 (2003); Gilderman v. State Farm Ins. Co., 437 Pa. Super. 217, 226, 649 A.2d 941, 945 (1944), *appeal den'd* 541 Pa. 626, 661 A.2d 874 (1995); Bond v. American Family Mut. Ins. Co., 2008 WL 477873 (D. Ariz. 2008); Tritschler v. Allstate Ins. Co., 213 Ariz. 505, 144 P.3d 519 (Ariz. App. Div. 2, 2006)

Indicia of such claims are those that involve use of multiple trades in performing claim-related demolition, repair and construction.

Once being exposed to all of the evidence of value which the parties have presented, however, it falls to the appraisers and umpire to exercise their independent judgment and make a determination as to the relative weight to be afforded each aspect of the evidence in drawing a conclusion.

A South Dakota appraisal provision which required appraisers to determine the amount of loss has been found unambiguous where a policy's loss settlement terms contained the phrase "actual cash value." The court declined to explore the meaning of amount of loss or actual cash value under the policy, reasoning that "'ambiguity in an insurance policy is determined with reference to the policy as a whole and the plain meaning and effect of its words.'" There, the policy was unambiguous in expressing the parties' rights and obligations thereunder: if property was not repaired or replaced the insurer may pay its actual cash value, and if it was, the insurer had the option to pay for the amount actually needed and spent to do so.[936]

[936] Batiz v. Fire Ins. Exchange, 800 N.W.2d 726 (S.D.2011), citing National Sun Indust. Inc. v. South Dakota Farm Bureau Ins. Co., 596 N.W.2d 45, 1999 S.D. 63 (S.D. 1999)

It has been held that in determining actual cash value it refers to the value of the property at the time of destruction.[937]

Once it appears that these judgments have been made in good faith, they should not be disturbed absent evidence of misconduct (as discussed in greater detail in Chapter X[D].

2. Replacement Value Policies

When the Standard Fire Policy was first created decades ago, insurance policies generally were true indemnity contracts in that they calculated the insured's recovery based upon such considerations as the age, condition, usefulness, original cost, cost to replace, market value etc. However, modern "Replacement Value" policies, purchased for a higher premium, offer benefits far beyond mere indemnity in that they compensate the insured upon the occurrence of a covered peril in a manner that actually places the insured in a better position then they had been prior to the loss. This is accomplished with what are known as replacement value, replacement cost, or guaranteed replacement value endorsements which amend the actual cash value" standard of loss calculation.

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[937] Northern National Bank v. North Star Mut. Ins. Co., 2012 WL 4052835 (Minn. App. 2012)

While policy provisions differ, they can generally be understood as follows:

A replacement value policy generally provides for the recovery of the replacement cost of the property damaged, lost or destroyed with items or material of like kind and quality without regard to the age or condition of the property lost or destroyed.[938] These policies often provide for the initial payment of actual cash value until such time as the insured actually makes replacement, whereupon the carrier pays the difference.

In most states, it is the custom to "hold back" an amount representing the depreciated value of the claim until replacement occurs.

Guaranteed replacement cost policies are very similar in practice except that, under appropriate circumstances, they provide for payment of replacement value above and beyond the stated policy limit such that the property will be repaired or replaced regardless of cost but generally subject to certain conditions.

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[938] Subject to policy limits. Specific policy terms should be consulted as conditions and exceptions are common.

Some deluxe and premier policies also waive the holdback and pay the replacement value upon the adjustment of the loss.

It is crucial for the appraisers and umpire to fully comprehend and implement the value provisions of the specific policy purchased by the insured. In the modern insurance marketplace, policy language varies significantly from carrier to carrier and will define the rights of the parties, subject to statute.

A New York court deemed parties' requests that the court limit or define an umpire's assessment of damages to be beyond the scope of the parties' application for selection of an umpire following a disagreement as to umpire selection. While the insurer under those circumstances sought to limit the appraisal determination to actual cash value of damages, the insured believed the umpire should act without limitations and the determination should encompass the value of the loss, Actual cash value, repair and replacement costs and incidental issues. However, the court held that "[p]ursuant to the policy terms, a decision agreed by any two, consisting of the appraisers and the umpire, sets the amount of the loss. The amount of loss shall be determined according to the policy terms and applicable provisions of the Insurance Law by the appointed umpire."[939]

It is patent that where the term Actual Cash Value is amended by another valuation, the value to be appraised should be that defined by the policy purchased by the consumer from the insurer and the appraisal provision should be read in such a manner that value determinations are consistent with the actual terms of the policy in existence between the parties.

Where the partes are not careful to specify in an appraisal agreement the precise formulation of the desired award, (i.e. allowances for both actual cash value and replacement cost), they may be disappointed with a less precise formulation. For example, in Arizona, where the appraisal agreement listed "actual cash value" and replacement cost" as steps in the appraisal process, an award which states a single amount "based upon replacement cost and actual cash value calculations", the court denied the insured's motion to reconvene the panel to enter a new award and rejected the insured's claims that the award was unintelligible and did not respond to the issues submitted for appraisal. The court found that neither the policy nor the

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[939] In the Matter of Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523, 917 N.Y.S.2d 839, 2011 N.Y. Slip Op. 21060 (Monroe Cty. 2011).

appraisal agreement requires the appraisers to separate the award into "ACV and replacement value." The decision does not quote the policy and it would seem most policies do provide such guidance.[940]

Some jurisdictions have excused compliance with the aforementioned condition precedent of actual replacement, where the insurance company failed to timely pay the claim or mandated an insured to commence proceedings in order to recover under the policy. In these cases, compliance with a provision requiring the insured to repair or replace the building in order to recover replacement cost is excused if the facts demonstrate that the insurer caused the non-performance.[941] However, if the insured could not or would not have performed the conditions regardless of the insurer's conduct,

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[940] T & B McDowell, LLC v. Peerless Ind. Ins. Co., 2013 WL 2287087 (D.Ariz. 2013)

[941] Ward v. Merrimack, 332 N.J. Super 515; Zaitchick v. American Motorists Ins. Co., 554 F. Supp. 209, 217 (S.D.N.Y. 1982), *aff'd,* 742 F.2d 1441 (2d Cir. 1983): Pollock v. Fire Ins. Exchange, 167 Mich. App. 415, 423 N.W.2d 234 (1988); Bailey v. Farmer's Union Co-op Ins. Co .of Nebraska, 1 Neb. App. 408, 498 N.W.2d 591, 598 (1992) (where insurer's refusal to pay the actual cash value of a structure was waived under the rule that "a condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition."); McCahill v. Commercial Union Ins. Co., 179 Mich. App. 761, 775, 446 N.W.2d 579, 585 (1989); State Farm Fire & Cas. Ins. Co. v. Miceli, 164 Ill. App.3d. 874, 518 N.E.2d 357 (1987); *See also*, Randy R. Koenders, Annotation, *Construction and Effect of Property Insurance Provision Permitting Recovery of Replacement Cost of Property*, 1 ALR 5th 817, 855 (1992); Partner, *Replacement and Cost Coverage: A Legal Primer*, 34 Wake Forest Law Review 295, 321 Note 201 (1999).

the condition has been held not to be excused.[942]

In Louisiana, it has been held that where the policy required repairs to be complete and the cost of repairs to be in excess of the ACV paid on the claim in order for the RCV to be recoverable, it was held where repairs had not been completed, the claim for the holdback was not yet ripe.[943]

In Indiana, an insurer could not raise the defense that the insured failed to comply with conditions precedent for replacement cost of her property. There, the insurer allowed appraisal to proceed without mentioning the reason for the difference between its estimate and the insured's: that it had valued the loss at actual cash value while the insured did so at replacement cost value. It "permitted [the insured] to incur the personal expense of the appraisal process and the further delay it caused to her receiving any payment under the policy. Such expense and delay represented tangible prejudice to [the insured] caused by [the insurer]'s silence regarding its alleged policy defenses." The insurer's misconduct arose from both its notice that the

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942 Ward, Id.; Zaitchick, Id. ; Maine Mut. Fire Ins. Co. v. Watson, 532 A.2d 686, 688 (Me. 1987).

943 Cedar Plantation Condo Ass'n v. Modern Select Ins. Co., 2012 WL 5364235 (M.D. La. 2012).

insured sought replacement cost coverage and failure to assert its position that the insured failed to give timely notice of intent to seek this coverage or wasn't entitled to it because she had not actually completed the replacement of her home.[944]

Under the plain language of the insurance policy, the fact that the property was not repaired or replaced does not preclude the matter from being submitted to appraisal.[945] The insurer was not liable for the difference between the actual cash value and replacement cost until the insured actually replaced the property.[946]

This issue was dealt with in Woodworth v. Erie Insurance Co., where the insurer argued that it had no obligation to engage in appraisal concerning replacement cost unless and until the insureds actually rebuilt, which they had not yet done. In its analysis, the court mistakenly suggested that because provisions of the appraisal clause are binding on all parties under N.Y. Insurance Law §3404, then the law could not intend for appraisals to provide advisory or hypothetical calculations of replacement cost.[947] This is an incorrect

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[944] Westfield Nat. Ins. Co. v. Nakoa, 963 N.E.2d 1126 (Ind. Ct. App. 2012).

[945] Mish, Inc. v. American County Ins. Co., 2003 WL 22905161 (Conn. Super. 2003).

[946] Casey v. Hastings Mut. Ins. Co., 2006 WL 1688082 (Mich. App. 2006).

[947] Woodworth v. Erie Ins. Co., 2011 WL 98494 (W.D.N.Y. 2011)

interpretation of both the Insurance Law and N.Y. case law. As previously explained above, the appraisal amount concerning replacement cost is most definitely binding on all parties. However, it is only binding as to amount and is only payable to the insured once the property is actually repaired or replaced. Appraisers routinely appraise replacement value but only actual cash value gets paid until the property is repaired.

D] OUTSIDE EXPERTS

As there is no provision within the Standard Fire Policy or most other policies for the hiring of outside experts by either the appraisers or the umpire, the practice should only be utilized with the consent of both parties.

One can certainly imagine many situations in complex claims where the parties would benefit from the contribution of experts such as accountants, mold and remediation professionals, architects, engineers, builders, real estate appraisers, and others.

The issue of whether to retain an expert or experts and the terms and conditions of the retention are matters which would benefit from discussion between the parties and should be specified in the appraisal agreement between them.

Certainly each party should be free to adduce such proof and evidence as he or she may deem appropriate in best presenting that party's position. However, taken to its extreme, this practice can become abusive and unfair as the relative resources of the parties may be quite different with the insurer able to afford an array of experts while the insured may be of limited means particularly after suffering a severe casualty loss.

The appraisal process should not be allowed to deteriorate into a barometer of the parties' relative wealth.

Similarly, the umpire should refrain from hiring or consulting outside experts without the consent of both parties. Initially, as the parties will have to bear the cost of the expert(s), they should be the ultimate arbiters of what that expense will include. Additionally, the umpire is brought into the process to make an independent judgment and help in resolving the differences between the parties' appraisers. As there is no contractual contemplation of the umpire's reliance upon experts, this practice should not be forced on either party.

To the extent the parties approve of the hiring of an outside expert or consultant to lend assistance to the umpire in drawing his conclusions, the umpire must be mindful of avoiding the retention of experts who are beholden to one party or the other or whose judgment may be affected by the prospect of future business with one of the parties, past dealings or other considerations.

Situations may occur where a building damage appraiser is brought in as a consultant by the umpire who may hope to win future appraisal business from the insurance carrier, or perhaps, where a building contractor is retained to render an opinion for the umpire who may have aspirations of actually obtaining the reconstruction job and making the repairs at the conclusion of appraisal. Either circumstance would destroy their independence and disqualify them.

While experts retained by the appraisers may properly advocate on behalf of the party that hired them, experts retained by the umpire should bring to the table the same level of impartiality and neutrality as required by the umpire. Therefore, information regarding past dealings with the parties, the prospect of future business, and other related issues should be disclosed and discussed prior to the retention of the expert by the umpire himself.

E] NOTICE, ADJOURNMENTS AND CANCELLATIONS

Notice of any appraisal, hearing or meeting should be given to the parties as a matter of good practice. However, there is a divergence of opinion as to whether formal notice of such hearing or meeting is mandatory. Several cases have held that appraisers must give notice to the parties of their meeting.[948] However, other courts have come to the opposite conclusion.[949]

In more formalistic states such as Florida or Connecticut, absent emergency, adjournment of the appraisal hearing may be made only upon reasonable notification to all parties and only a reasonable number of times.

It has been held where an appraiser refused to attend a meeting based on his assertion that the insurance company's appraiser was biased, the award that the insurance company's appraiser made alone was valid. Generally, the reviewing court will look to see whether or not both appraisers had

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948 Aetna Ins. Co. v. Hefferlin, 260 F. 695 (9th Cir. 1919); Drescher v. Excelsior Ins. Co. of N.Y., 188 F. Supp. 158 (D.N.J. 1960).

949 Pacific Nat. Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952); In re Falloon, 161 Cal. App.2d 522, 327 P.2d 18 (1958); *See also*, D.E. Ytreberg, Annotation, *Insurance: Necessity and Sufficiency of Notice of and Hearings in Proceedings Before Appraisers and Arbitrators Appointed to Determine the Amount of Loss*, 25 ALR 3d 680 (2003).

notice of a proposed meeting. Although one elects not to appear, such non-appearance may not invalidate an award subsequently made.[950]

If one appraiser resigns, withdraws or refuses to act further, the umpire may complete the proceeding and make a valid award or seek immediate appointment of a replacement, if this can be accomplished without undue delay or prejudice.

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950 In re Falloon, Id.

F] HEARINGS AND INSPECTIONS

The procedure to be followed for an appraisal hearing is not outlined by most insurance contracts. Generally, if either party to an appraisal seeks an opportunity to present evidence, the request is normally honored. A request to present evidence at a certain time and place allows the appraisal to move forward expeditiously.

In almost all states, there is no requirement that a formal "hearing" actually take place and in fact, an appraisal award can properly be made without the parties being given an opportunity to appear at a specific place and time to present their respective positions. Massachusetts and Connecticut are noteworthy exceptions.

As most policies generally do not offer guidance as to the procedures to be used during the appraisal, the umpire and appraisers enjoy significant discretion in determining how the appraisal shall proceed. It is patent that in order to do justice to the intent of the appraisal provision, a procedure should be agreed upon that allows for the sharing of information as well as ideas and opinions in an expeditious and efficient manner. An expeditious effort is made so that agreements and disagreements can be clarified and issues refined for presentation to an umpire should a disagreement remain after their consultation.

Once the umpire enters the discussion as a result of the failure of the appraisers to agree, the umpire is free to suggest a process and procedure for the resolution of the balance of the appraisal as long as it is not at odds with the Standard Fire Policy, or the terms of the contract between the parties.

In order to avoid confusion and disagreement as well as subsequent challenge, it is often appropriate for the parties to execute an appraisal agreement setting forth the rules, definitions and procedures to be followed in the particular claim. It is appropriate for this agreement to set forth the matters to be determined by the appraisers. These should include the level of specificity to be required in the award. The parties should resolve whether a breakdown by type of coverage (i.e. building, personal property, etc.) or by trade shall be sufficient or whether the actual cash value or the amount of loss as to each board and nail will have to be stated. Further, the appraisers should consider providing for a determination of the amount of time to restore the damaged property if this element would be appropriate to a calculation of the economic loss.[951]

With the advent and wide-spread use of replacement cost policies, the parties should agree to a determination of a proper calculation of depreciation if the policy makes this a factor in the calculation of a holdback until the damage is repaired.

In any event, the goal of the process should mirror the terms of the policy insofar as they relate to definitions and determinations of value and loss.

The procedures to be followed may be as formal or informal as the parties may agree so long as they do not abrogate the contract of insurance.[952]

However, as discussed more fully in Chapter I[C] some jurisdictions equate appraisal with arbitration and mandate statutorily the specific procedures to be followed before, during and after an appraisal hearing. In these jurisdictions, great care must be taken in educating both the appraisers and the umpire with respect to the mandated

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[951] Such as economic claims, claims for lost rent, additional living expenses, business interruption or extra expense.
[952] *See*, 6 Appleman Insurance Law and Practice §3931 (1972).

procedures for a valid and binding appraisal to take place.

Even some of these jurisdictions have begun to recognize the unambiguous principle of the appraisal clause and have concluded that the formal procedures of the local arbitration code were inapplicable.[953]

It may be advisable for each of the appraisers to present the umpire with a detailed, but concise and understandable tabbed and indexed presentation including expert reports, laboratory results, photographs, diagrams, inventories, building estimates, etc. in order to present the parties' positions in their best light and in their most understandable format.

In more formalistic jurisdictions, it is customary for appraisals to be conducted in adherence with procedural requirements more akin to arbitrations. It is not unusual in these states for formal hearings to take place with testimony and documentary evidence received and a stenographic record created. In fact, some jurisdictions require that

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[953] Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla. Dist. Ct. App. 3d Dist. 2001), *aff'd,* 833 So.2d 762 (Fla. 2002) (*overruling*, Hoenstine v. State Farm Fire & Cas. Co., 736 So.2d 761 (Fla. 5th DCA 1999); and Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).

appraisers hear evidence as a matter of course during all appraisal proceedings.[954]

An example of this is illustrated by California Code of Civil Procedure § 1282.2(g) which provides in relevant part, "[I]f a neutral arbitrator intends to base an award upon information not obtained at the hearing, he shall disclose the information to all parties to the arbitration...".

The clear intent of this provision is to give the parties an opportunity to confront contrary information and rebut it if possible.

However, early California common law held differently. The California Supreme Court had stated that arbitrators may educate themselves by "consulting price lists, examining materials, and receiving cost estimates," on an *ex parte* basis, determining that it is entirely proper for appraisers to obtain such information from disinterested persons expert with respect to such information.[955]

California has amended its appraisal provision to impose a much less formal approach then had been in previous practice.

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[954] *See e.g.*, Schoenich v. American Ins. Co., 109 Mn. 388, 124 N.W. 5 (1910); Mason v. Fire Assoc. of Philadelphia, 23 S.D. 431, 122 N.W. 423 (1909).
[955] Sapp v. Barenfeld, 34 Cal.2d 515, 521, 212 P.2d 233, 238 (1950).

The relevant portion of the newly adopted standard form states the following:

> "Appraisal proceedings are informal unless the insured and this company mutually agree otherwise. For purposes of this section, informal means that no formal discovery shall be conducted, including depositions, interrogatories, requests for admissions, or other forms of formal civil discovery; no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings. In the event of a government-declared disaster, as defined in the Government Code, appraisal may be requested by either the insured or this company but shall not be compelled."

Except in those states that view insurance appraisals like arbitrations, appraisal meetings are not quasi-judicial proceedings and can be conducted without the formalities of a formal arbitration. In the majority of jurisdictions, the viability of an appraisal award will turn on whether all sides had an opportunity to be heard and share information.

Additionally, the process could and should include site inspections where possible, the review of building damage estimates, appraisals, engineering reports, and other information relevant to a determination of loss, damage and value. [956]

In the state of Massachusetts, statute requires a reference procedure whereby referees determine the amount of loss and actual cash value by holding a "hearing," impliedly requiring an opportunity for both parties to be present and offer evidence.[957]

A very good practice is exemplified by the process used in the Province of Ontario. The procedure is for each appraiser to prepare a brief which includes all documentation supporting the appraiser's position. Two copies of the brief are provided to the umpire which he then shares with the other appraiser so that each has a copy of the other's brief. Thereafter, a meeting is conducted where the appraisers can bring witnesses or experts to assist in their presentation. If expert testimony is anticipated, it is customary for the appraiser's counterpart to be advised in advance so that

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[956] D.E. Ytreberg, Annotation, *Insurance: Necessity and Sufficiency of Notice of and Hearings in Proceedings Before Appraisers and Arbitrators Appointed to Determine the Amount of Loss*, 25 ALR 3d. 680 (2003).

[957] Referees; Meetings, Mass. Gen. Laws Ch. 175 §101 (2003); Ritson v. Atlas Assur. Co., 272 Mass 73, 171 N.E. 448 (1930).

he may do likewise. The appraisal process is informal though premised on full disclosure and an opportunity to be heard.

If the property to be appraised, whether real or personal, has been lost or destroyed so as to make personal observation impossible, the parties should discuss alternative means of verifying the amount of loss and value under the specific circumstances of the claim. Indeed, by the very nature of the business of insurance, the unavailability of the property to be appraised is all too common and with respect to some claims, is all but inevitable. Nevertheless, the parties to the contract are entitled to have these issues appraised and a fair and equitable result achieved in order to do justice to the contract between the parties.

Photographs, videotapes, building department records and plans, and computerized inventory records or records of purchases and sales as well as the calculation of a book-to-physical reconciliation of the insured's inventory may all be utilized to assist in verifying an out-of-sight claim. Indeed, the parties to the appraisal should be free to present whatever probative methods and means of calculating the loss that are available as long as they are not inconsistent with the terms of the policy or local statutes.

Logic and reason would dictate that the absence of a hearing should only result in a successful challenge to an award where a hearing would have been beneficial in the first place. In Aetna Ins. Co. v. Murray,[958] the court concluded that an appraisal hearing was not necessary where the appraisers had from their own knowledge and experience, the information necessary to determine the issues before them. This was found to be distinct from the situation where appraisers might be required to do fact finding in coming to a conclusion, such as where the property insured had been lost or damaged to the point where it is out-of-sight and unavailable and the appraisers require evidence of the property's age, condition, size and description.

Courts have been reluctant to impose their will or judgment retrospectively on the appraisal process and overturn an appraisal award based on the procedure utilized as long as the result was obtained honestly and in good faith.[959]

It has been held that an opportunity to introduce evidence of value is essential where the appraisers are unacquainted with the insured property or are selected to estimate a

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[958] 66 F.2d 289 (10th Cir. 1933).
[959] Mitchell v. Aetna Cas. & Sur. Co., 579 F.2d 342 (5th Cir. 1978); Atlas Const. Co., Inc. v. Indiana Ins. Co. Inc., 160 Ind. App. 33, 309 N.E. 2d 810 (1974).

loss arising from the total destruction of the property. But where experts had been sent to estimate the value of an insured building before its destruction or after it had been only partially destroyed and sufficient portions of it remained to disclose the size, general character of the architecture and quality of material used, a hearing was not deemed essential.[960]

[960] Carlston v. St. Paul Fire & Marine Ins. Co., 37 Mont. 118, 94 P. 756 (1908); St. Paul Fire & Marine Ins. Co. v. The Tire Clearing House, 58 F.2d 610, (8th Cir. 1932); Franklin v. Fireman's Fund Ins. Co., 4 Tenn. App. 688 (Tenn. Ct. App. 1927) (old wood house with exceptionally fine details was totally destroyed and hearing was necessary to acquaint the appraisers with the quality of construction).

CHAPTER X

THE APPRAISAL AWARD

A] THE APPRAISAL AWARD GENERALLY

Pursuant to the Standard Fire Policy, "An award in writing, so itemized, by any two when filed with this company shall determine the amount of actual cash value and loss."

Obviously, an award which fails to meet any of the few delineated requirements is subject to challenge. The award must be in writing and sufficiently clear so that a reasonable person could comprehend its conclusion. The award must be signed by at least two of the three members of the appraisal team. It must be sufficiently itemized so as to satisfy the requirements of the policy and any applicable statutes.

The award should be responsive to the original submission or appraisal agreement and care should be taken that its scope does not exceed the submission.

Upon the execution of the award as required, the original should be filed with the company forthwith with copies immediately transmitted to the parties.

Upon receipt, the carrier should immediately pay upon the award, taking care not to delay beyond the shortest period provided for in the policy, by regulation or statute.[961]

Consideration must be given to situations where hidden damage is first disclosed after the rendering of the appraisal award. If such damage was not known to the parties during the course of negotiations and appraisal, and where such hidden damage was not reasonably discoverable under the circumstances, nor contemplated by the parties, one could reasonably imagine the need to reopen the appraisal process in order to do justice to the claim, particularly where neither party would be prejudiced by this procedure. For example, where demolition of damaged property awaited the conclusion of the appraisal process, and in the midst of that

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[961] *See, e.g.*,Standards for Prompt, Fair and Equitable Settlements 11 N.Y.C.R.R. 216.6(f) (2002) (which provides for payment within five days of receiving the appraisal award in the state of New York).

demolition, damage within walls, floors, ceilings, cocklofts or other hidden areas is discovered and then immediately made available for the carrier and its representatives to inspect and document, it would be difficult to imagine why the appraisal could not be reopened if the parties were unable to agree on the amount of damage. The appraisers and the umpire could then reexamine the newly discovered covered damage and render an additional award thereon.

It has been held that where the policy limited the insured's recovery to "the amount actually spent that is necessary to repair or replace the damage property," the carrier was entitled to await the presentation of proof of the necessary expenditures prior to having to pay the full amount of the appraisal award. As the court pointed out, the appraisal provision establishes the value of the property and the amount of loss, but read in conjunction with the Loss Conditions provisions of the policy, the insureds were required to submit proof of the amount expended to replace the damaged roof in order to come within compliance with the policy.[962] Sample awards are included in Appendix A.

[962] Geary v. CNA Ins. Co., 2003 WL 21920902 (E.D. La. 2003).

B] FORM AND SUBSTANCE OF THE AWARD

As stated in the appraisal provision, the award must be in writing, itemized, and signed by any two among the umpire and two appraisers. The two required signatures are either both appraisers or one appraiser and the umpire. If an umpire and only one appraiser sign the award, due to the second appraiser's disagreement, the award is still valid and sufficient to bind an insurer and insured who had agreed to an appraisal, so long as the insured's appraiser and the insurer's appraiser had submitted their differences to the umpire and had an opportunity to have their views considered.

However, if the appraisers do not follow a prescribed method, the award may still be considered valid if the appraisers unanimously agreed on the deviation from the general procedure.[963]

As stated by the Fourth District Court of Appeals in Florida, the benefit of itemization is that "when an appraiser uses a line-item appraisal form, a court can readily identify any coverage issues that arise during the course of

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[963] Phoenix Assur. Co. of New York v. Singer, 221 F. Supp. 890 (E.D. Mo. 1963), *aff'd,* 331 F.2d 10 (8th Circ. 1964); Mitchell v. Aetna Cas. & Sur. Co., 579 F. 2d 342 (5th Cir. 1978); Atlas Const. Co. v. Indiana Ins. Co., 160 Ind. App. 33, 309 N.E.2d 810 (2d Dist.1974); Campbell v. Union Mut. Fire Ins. Co., 124 A. 469 (R.I. 1924).

appraisal and resolve these without having to try to decipher what value the appraisers assigned for a particular type of damage."[964]

Similarly, in Arizona, it has been observed that an itemized appraisal award preserves the carrier's option to litigate coverage issues after the issuance of an award which they are generally entitled to do. Such a solution shows proper deference to the case law allowing appraisal; while preserving the parties' rights to dispute actual coverage issues as well.[965]

The lack of detailed itemization has been held to invalidate an award.[966] If there is non-compliance with an itemization provision wherein one of the parties can show that there was prejudice or injustice, then the award will be vacated.

An appraisal award is expected to set forth basic explanations and adjustments,[967] including the necessary facts, figures and calculation to account for any adjustments.

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[964] Florida Ins. Guarantee Ass'n Inc. v. Olympus Ass'n Inc., 34 So.2d 791, 35 Fla. L. Weekly D1117 (Fla. 4d DCA 2010).

[965] 6700 Arrowhead Owners Ass'n v. State Farm Fire & Cas Co., 2012 WL 5868969 (D. Ariz. 2012).

[966] Mound City Roofing Tile Co. v. Springfield Fire and Marine Ins.Co., 281 Mo. App. 395, 277 S.W.349 (1925).

[967] John P. Burke Apts., Inc. v. Swan, 137 A.D.2d 321, 325, 528 N.Y.S.2d 718, 720 (3d Dept. 1988); Northville Ind. Corp. v. Board of Assessors of Town of Riverhead, 143 A.D.2d 135, 136-37, 531 N.Y.S.2d 592, 593 (2d Dept.1988).

However, the award generally need not contain an explanation of the means by which the umpire reached the award.[968]

Interestingly, in Georgia, the form of an award was found to be proper where an umpire did not include an itemized list of damage to specific articles of personal property or components of an insured's home. There, the policy in effect did not require such itemization and the court was further unconvinced that the Standard Fire Policy imposed such a requirement. The court found that absent an explicit provision in the Standard Fire Policy directing itemization, there was no need to impose an obligation in the matter before it that was not specifically contracted for. The insured's argument that failure to itemize resulted in irregularity, palpable mistake of law or fraud by the umpire was not accepted by the court.[969]

Moreover, where an insured contended that because the final award rendered did not "match the level of specificity" in its appraiser's submission to the panel, it did not comply with North Carolina General Statutes § 58-44-16(f)(14). This section provides: "The appraisers shall then appraise the loss, stating separately

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[968] Steiner v. Middlesex Mut. Assur. Co., 44 Conn. App. 415, 689 A.2d 1154 (1997).

[969] Bell v. Liberty Mutual Fire Ins Co., 319 Ga. App. 302, 734 S.E.2d 894 (Ga. App. 2012).

actual cash value and loss to each item; and, failing to agree, shall submit only their differences to the umpire. An award in writing, so itemized, of any two when filed with this insurer shall determine the amount of actual cash value and loss." Under those circumstances, the award listed separately both the replacement cost and actual cash value of repairs to the building, contents and perishable goods, which the court found to be sufficient itemization.[970]

Where the carrier failed to follow its own appraisal process and where such dereliction was responsible for the confusion over the actual cash value of the damage, the carrier was estopped from relying on the policy provision that requires payment of actual cash value until the property is rebuilt. In Hall v. Farmers Alliance Mut. Ins. Co.,[971] the insurer failed to ensure that there was a determination of actual cash value as well as replacement value and was thus partially to blame for the participants' ignorance regarding actual cash value.

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[970] Glendale LLC v. Amco Ins. Co., 2012 WL 1394746 (W.D.N.C. 2012).
[971] 145 Idaho 313, 179 P.3d 276 (2007).

A lump-sum award is generally improper.[972]

The appraisal award becomes effective only after meeting the above-mentioned criteria and upon its being filed with the insurance company. Upon the filing of the award, the appraisers have acted to the full extent of their authority.

Where the insurance policy and submission agreement requires appraisers to ascertain "the sound value of goods," meaning the value before the fire, the appraisers' failure to ascertain sound value invalidates the award.[973]

With respect to the term "sound value," the sound value of anything is its worth, its actual cash value in an undamaged condition. Thus, it was held that an item's sound value was the value of the insured property in the condition in which it was immediately before the loss and is not synonymous with replacement value in that it represents the depreciated value of the item

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[972] Glenn Houle Co. v. State of New York, 73 A.D.2d 794, 795, 423 N.Y.S.2d 714, 715 (4th Dept. 1979); Matter of Acquisition of Real Property by County of Duchess, 186 A.D.2d 891, 892, 588 N.Y.S.2d 936, 937 (3d Dept. 1983) (*citing* Glenn Houle, 73 A.D.2d 794).

[973] Aetna Ins. Co. v. Murray, 66 F.2d 289 (10th Cir. 1933); Azar v. Eureka-Security Fire & Marine Ins. Co., 4 F.Supp. 574 (S.D. Tex. 1933).

as it stood before the loss when it was "sound" and undamaged.[974]

The degree of itemization required is an important issue. The New York view as well as the majority view nationally, is that the lack of required itemization invalidates the award. As an award with insufficient itemization or which gives the value and loss in a lump sum, without itemization, will sometimes be set aside,[975] the difficult issue then becomes what type and level of detail will suffice.

It has been held that an appraisal award would not be invalidated because of the appraisers' failure to itemize unless prejudice or injustice was shown.[976]

In states that have not adopted the Standard Fire Policy, the policy may not have language requiring itemization. In those states the court lacks authority to require itemization.

Where policy language differs from the Standard Fire Policy (i.e. New York Insurance Law § 3404) and expressly mandates itemization with requirements that the appraisers state "separately" and "in detail"

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[974] Patriotic Order Sons of America Hall Ass'n. v. Hartford Fire Ins. Co., 305 Pa. 107, 157 A. 259 (1931).

[975] Mizrahi v. National Ben Franklin Ins Co., 37 N.Y.S.2d 698 (Civ. Ct. 1942).

[976] Mitchell v. Aetna Cas. & Sur. Co., 579 F.2d. 342 (5th Cir. 1978).

the actual cash value of "each item," an award that is stated as a lump sum is invalid.[977] Note that an insured (but not the carrier) might successfully challenge any additional burdens being placed upon the appraisal team beyond that required by the Standard Fire Policy as adopted in the local jurisdiction.[978] As in many states, insurers are not permitted to market a policy less favorable to the insured than that found in the Standard Fire Policy.[979]

In reciting a requirement for itemization, this is not to say that the requirement contemplates valuation of "every nail and brick." It has been stated with respect to the extent of detail required, as follows:

> "[A] reasonable interpretation of the policy language necessitates only an itemization of the damage to the basic component systems (e.g., electrical, plumbing, heating, structure, carpentry, painting, refinishing) so as to insure a modicum of accountability and

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977 DeCrescenzo v. Capital Mut. Ins. Co., 187 A.D.2d 793, 589 N.Y.S.2d 669 (3d Dept. 1992).

978 Standard Form, Conn. Gen. Stat. 38a-307 (2003); Anti-arson application, N.Y. Ins. Law 3403(e) (McKinney 2003); Insurance Act. R.S.O. Condition 11, §143 (1990) (Ontario, Can.).

979 Lane v. Security Mut. Ins. Co., 96 N.Y.2d 1, 747 N.E.2d 12 (2001) (Some courts have limited the application of this case to insurance policies containing coverage for fire, *e,g,,* Slayco v. Security Mut. Ins. Co., 98 N.Y.2d 289, 774 N.E.2d 208 (2002)).

reliability in the appraisal process."[980]

Other states have resolved the issue of the degree of itemization and specificity necessary by requiring the award to be segregated by category of coverage in order to be deemed adequate.[981]

There is a minority view that construes the phrase "sound value and loss or damage to each item" to mean actual cash value and loss to the "building" as an item, as distinct, for example, from personal property or lost earnings claims, rather than to each item that comprises the building.

The court in Commercial Union Ins. Co. v. Ryals,[982] held that it was proper for the appraisers to compute the loss to the building as one item and that an itemized count of the components which made up the damaged building was unnecessary. Thus, the word "item" as used in the appraisal clause was deemed to refer to the property as scheduled on the policy rather than the individual elements of each coverage. However, as

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[980] DeCrescenzo, *supra*.

[981] Mitchell v. Aetna Cas. & Sur. Co., *supra*; Commercial Union Ins. Co. v Ryals, 355 So.2d 684 (Ala.1978).

[982] Commercial Union Ins. Co. v. Ryals, Id.

stated above, this currently seems to be a minority view.

In DeCrescenzo v. Capital Mut. Ins. Co.,[983] the New York Appellate Division held that where a policy provides that "[T]he appraisers are to determine the amount of damage stating separately, in detail: the cost to repair or replace, actual cash value of, and amount of loss to each building item and item of personal property," the language, notably the requirement that the value of "each building item" be stated "in detail," does not suggest aggregate valuation but rather merely contemplates an itemization of building components. The court continued:

> [E]ven if, as defendant contends, the phrase "each building item" is to be construed as a whole building and not its component parts (an interpretation of dubious validity as it appears to render the terms "each" and "item" superfluous), the policy language nonetheless requires that the actual cash value of the building be stated "in detail." A lump-sum figure cannot, in any sense of the word, be said to be detailed (c.f.,

[983] DeCrescenzo, 187 A.D.2d 730.

> 14 Couch Ins.2d §50:226 at 314-316; 6 *Appleman Insurance Law & Practice*, §3945, at 609-610) Accordingly, because of the policy language here, unlike the standard form fire policy (i.e. New York Insurance Law §3404), expressly mandates itemization, the Supreme Court's reliance on Gansevoort Holding Corp. v. Palatine Ins. Co. (11 Misc.2d 518, *aff'd,* 7 A.D.2d 720, *lv. denied*, 6 N.Y.S.2d 705) for the proposition that cash and sound value can be stated in gross without apportionment among the constituent elements of the building (*supra* at 522), was misplaced.[984]

Where the policy required calculation of loss and damage by "items and in detail," an appraisement which merely states the "total value of the property in the basement" and the total damage to such property does not conform to the appraisal provision and the amount of loss fixed by this process was not binding on the insured.[985]

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[984] DeCrescenzo, 187 A.D.2d 794.
[985] Security Printing Co. v. Westchester Fire Ins. Co. of New York City, 204 Mo. App. 390, 221 S.W. 430 (Mo. Ct. App. 1920).

However, where the policy requires the award to "[S]tate separately for each item the amount of loss and damage," the award was nevertheless upheld where it contained a statement signed by the umpire and appraiser that "they had appraised and determined the actual cash value of each item of said property on the 15th day of December, 1925 and the actual direct loss and damage thereto on that day." The court found that such an award should not be overturned in the absence of prejudice or injustice to the complaining party.[986]

A Florida District Court of Appeals affirmed a finding by the lower court that a line by line, itemized appraisal of hurricane damage was not required, under circumstances where the policy itself did not require it. In that case, the court merely recommended that the parties agree to an itemized award upon the insurer's agreement to pay the additional fee to generate such an award. The insurer declined this proposal and made a timely payment of the award, and attorney's fees were issued to the insured for defeating the insurer's request to order the

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[986] Caledonian Ins. Co. v. North Dutch Reformed Church, 96 N.J. Eq. 342, 124 A.703 (1924); McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N.W. 97 (1920); Innis v. Fireman's Fund Ins. Co., 218 Mich. 253, 187 N.W. 268 (1922); Melton Bros. v. Philadelphia Fire & Marine Ins. Co., 104 N.J. Eq. 153, 144 A. 726. (1929).

umpire in the matter to issue a line by line estimate.[987]

However, where the insurance company enters into an appraisal agreement with terms significantly different than the policy, the carrier will be deemed to have waived the terms of the policy.[988]

The majority view in a few states appears to be that an award which does not separately state the value of the property insured, as well as the amount of the damages, is void.[989]

In Pennsylvania, by statute, all commonwealth fire insurance policies must include an appraisal provision requiring appraisers to itemize the value and loss or damage to an insured's items.[990]

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987 Pineda v. State Farm Florida Ins. Co., 47 So.3d 890 (Fla. 3d DCA 2010).

988 Davis v. Atlas Assur. Co., 16 Wash. 232, 47 P. 436 (1896).

989 Azar v. Eureka-Security Fire & Marine Ins. Co., 4 F.Supp.574 (S.D. Tex. 1933); Branch v. Springfield Fire & Marine Ins. Co., 198 La. 720, 4 So.2d 806 (1941) (where appraisers fail to determine sound value as required by the policy, their failure cannot be regarded as harmless); Blaetz v. National Fire Ins. Co. of Hartford, 293 S.W. 504 (Mo. Ct. App. 1927); Lee v. Farmer's Ins. Co. of Minnehaha County, 72 S.D. 127, 32 N.W.2d 188 (1948); Continental Ins. Co. v. Garrett, 125 F. 589 (6th Cir. 1903); Reliance Ins. Co. v. Bowen, 54 S.W.2d 597 (Tex. Civ. App.-Amarillo 1932); Quinn v. N.Y. Fire Ins. Co., 22 Wis.2d 495, 126 N.W.2d 211 (1964) (policy required determination of actual cash value).

990 Fire Insurance Contract, Standard Policy Provisions, Permissible Variations, 40 Pa. Cons. Stat. §636 (2003); Riley v. The Farmer's Fire Ins. Co., 1999 Pa. Super. 179, 735 A.2d 124 (1999); Patriotic Order Sons of America Hall Ass'n. v. Hartford Fire Ins. Co., 305 Pa. 107, 111, 157 A. 259, 260 (1931).

In Texas, it has been held that an award on a contents claim which failed to include the requisite itemized list was not in substantial compliance with the policy provision. In a claim for damage to all household contents caused by raw sewage it was stated as to the lump sum award:

> "We agree that in a situation like this, in which raw sewage may have contaminated the entire contents of a home, it would not be necessary to list and separately appraise, for example, every item of clothing and kitchen utensil in the home. Nevertheless, we reject Allstate's contention that the appraisers were entirely relieved of their obligation to make an itemized list that at least categorized the contents of the home in a manner customary to the insurance industry."[991]

It has been held proper to invalidate an award where the appraisers failed to include all property covered by the submission agreement.[992]

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[991] Richardson v. Allstate Texas Lloyds, 2007 WL 1996387 (Tex. App.-Dallas 2007).

[992] Aetna Ins. Co. v. Murray, 66 F.2d 289 (10th Circ. 1933).

The award should generally contain an allowance for debris removal and/or demolition costs if such are covered costs under the policy. Many policies provide additional coverage for such costs in excess of the policy limits. The policy should be consulted for the extent of the coverage. Unfortunately, too frequently the appraisal agreement or the panel focuses exclusively on costs and calculations of repair and replacement and fail to consider these additional coverages in the award. After the issuance of the award the omission is realized and it leads to needless contentiousness. Thus, these expenses and other "Additional Coverages," if any, should be considered and included in the award.[993]

So-called "quotient" awards are arrived at when each of the appraisers and/or the umpire render an opinion with each of the opinions then totaled and divided to determine, in essence, the average. This method of issue resolution is inappropriate and has been held to be invalid.[994]

An umpire in an insurance appraisal pursuant to the policy is not required to

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[993] Hartford Ins. Co. v. Miller, 2006 WL 2844124 (E.D. Mich. 2006).

[994] Atlas Const. Co., Inc. v. Indiana Ins. Co. Inc., 160 Ind. App. 33 (2d Dist. 1974); *See,* V. Woerner, Annotation, *Quotation Arbitration Award or Appraisal*, 20 ALR 2d 958 (1952).

articulate the reasons for his or her award. However, when they choose to do so, the explanation accompanying the award becomes part of the award for purposes of judicial review.[995]

Other than providing a copy of the award, appraisers may properly refuse to provide anything further concerning their activities as an appraiser. Explanations for the award or the documents that result from their appraisal process are generally not discoverable because the deliberations that constitute the appraisal process are sacrosanct.[996]

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[995] North Carolina Farm Bureau Mut. Ins. Co. v. Floyd Harrell, 148 N.C. App.183, 557 S.E.2d 580 (2001); Howell v. Wilson, 136 N.C. App. 827, 526 S.E.2d 194 (2000).
[996] Arco Alaska, Inc. v. Superior Court, 168 Cal. App.3d 139, 214 Cal. Rptr. 51 (4th Dist. 1985).

C] RECOVERY OF INTEREST UPON THE AWARD

Generally speaking, interest upon a loss payable under an insurance policy is not recoverable before the payment of the principal is due pursuant to the insurance policy, regulation or statute. Based upon the unambiguous terms of the "loss payment" provision of the subject insurance policy, the Appellate Division, Second Department of the Supreme Court of the State of New York has held that since the carrier was not obligated to pay the disputed amount of the plaintiff's loss until thirty days after the appraisal award was made, interest would not be recoverable before payment of the principal was due pursuant to the policy.[997]

Implicit in this ruling is the fact that interest may be recoverable should the carrier choose to delay its payment of the disputed amount until after the period required for payment under the policy or by regulation or statute .

In fact, many states including New York, have adopted insurance laws or regulations

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[997] Caiati of Westchester, Inc. v. Glens Falls Ins. Co., 265 A.D.2d 286, 696 N.Y.S.2d 474 (2d Dept. 1999); *See also*, Trooper Jake, Inc. v. Auto-Owner's Ins. Co., 2005 WL 1923120 (Mich. App. 2005).

which establish a shorter period for payment than that provided for in the policy.[998]

Similarly, in New York, insureds were not entitled to interest on an amount received from their insurer following a favorable appraisal award, where they were timely paid by the insurer within 60 days of the award's filing pursuant to the terms of their insurance policy. In rendering this decision the court stated the general rule, that "'[i]nterest upon a loss payable under a fire insurance policy is not recoverable before the payment of principal is due pursuant to the policy.'"[999]

Only in a situation where the carrier failed to pay timely, would interest be recoverable.[1000]

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[998] *i.e.*, Standards for prompt, fair and equitable settlements, 11 N.Y.C.R.R. 216.6(f) (2002)(requires payment within 5 days of the carrier's receipt of the award).

[999] Ginsburg v. Charter Oak Fire Ins. Co., 971 N.Y.S.2d 573 (2[nd] Dept.2013), citing Farmland Market Corp. v. North River Ins. Co., 105 A.D.2d 602, 603, 481 N.Y.S.2d 80, (1[st] Dept. 1984), *affd*, 64 N.Y.2d 1114, 490 N.Y.S.2d 187, 479 N.E.2d 823 (1985).

[1000] Koven v. Allstate Ins. Co., 2004 WL 1053099 (Cal. App. 2 Dist. 2004) (pre-judgment interest is not recoverable upon an appraisal award prior to the period for payment upon such an award has expired); Capizzi v. Security Mut. Ins. Co., 254 A.D.2d 783, 677 N.Y.S.2d 838 (4[th] Dept. 1998); Farmland Market Corp. v. North River Ins. Co., 105 A.D.2d 602, 481 N.Y.S.2d 80 (1[st] Dept. 1984), *aff'd* 64 N.Y.2d 1114, 490 N.Y.S.2d 187, 479 N.E.2d 283 (1985); Battignol Const. Co. v. Allstate Ins. Co., 22 A.D.2d 689, 253 N.Y.S.2d 172 (2d Dept. 1964), *order aff'd,* 17 N.Y.2d 476, 214 N.E.2d 162 (1965)' Manitou Village Chalet Townhomes v. Harleysville Ins. Co., 2013 WL 1881056 (D. Minn) (The plain meaning of Minn. Stat §60A.0811, is that an insurer is not obligated to pay pre-judgment interest unless it is shown it breached the policy. The parties' inability to agree which resulted in an appraisal award does not constitute a failure to fulfill a contractual duty. Jenkins v. State Farm Fire & Cas Co., 2012 WL 6681882 (Ohio Ct. App. 2012) (Where Ohio insurer's obligation under the policy did not become "due and payable" until an appraisal award was filed and where it issued payment against the award within 8 days of the award, there was no entitlement to interest.).

It has been stated that in an action on a fire policy, the insured is entitled to recover interest from the time the insurance company repudiated liability and put an end to the proscribed process of adjustment.[1001]

If for example, the insureds must sue to compel payment of the appraisal award, interest should logically be recoverable once the court sustains the award, upon a showing that the policy provision mandating payment of the appraisal award has been breached.[1002]

Some jurisdictions have held that pre-judgment interest was not recoverable if the insurance company was ready to tender an award set by the appraiser and their refusal to pay more was not frivolous or in bad faith.[1003]

However, on rare occasions, it has been held that appraisers do possess the power to award pre-judgment interest under a policy appraisal clause.[1004]

[1001] Bernhard v. Rochester German Ins .Co., 79 Conn. 388, 65 A. 134 (1906).
[1002] Rubin v. Williams, 245 A.D.2d 181, 666 N.Y.S.2d 184 (1st Dept. 1997); Catalogue Service of Westchester v. Ins. Co. North America, 74 A.D.2d 837, 425 N.Y.S.2d 635 (2d Dept. 1988); Cohen v. New York Property Ins. Und. Ass'n., 65 A.D.2d 71, 410 N.Y.S.2d 597 (1st Dept. 1978).
[1003] Mitchell v. Aetna Cas. & Sur. Co., 579 F.2d 342 (5th Cir. 1978).
[1004] Waradzin v. Aetna Cas. Ins. Co., 570 A.2d 649 (R.I.1990).

Most courts dealing with the issue have held that pre-award interest is not recoverable under the general rule, if the insurer made disbursement corresponding to the terms of the appraisal award within the time contractually set for payment.[1005] A Florida court has held that an insured is entitled to pre-judgment interest from 30 days after it files a proof of loss.[1006] A Delaware court has held that interest may be awarded commencing 60 days after a proof of loss had been waived by the insurer and ending on the date of the insurer's draft payable to the insured for the exact amount of the appraisal award.[1007]

In Louisiana, it was deemed improper for an appraisal panel to include interest in an appraisal award because the award was still susceptible to challenges based on coverage and causation and thus was "not intended to be the type of final determination of damages upon which a court would add interest." If interest on a loss may be awarded, such a determination should be made by the court as part of the adjudication process rather than appraisers. The court looked to the law of other jurisdictions in arriving at its final conclusion,

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[1005] Northeast Fin. Corp. v. Ins. Co. of North America, 757 F.Supp. 381 (D. Del. 1991); Trooper Jake, Inc. v. Auto-Owner's Ins. Co., 2005 WL 1923120 (Mich. App. 2005); In the Matter of the Application to Compel Appraisal between USF & G and Friedman, 11 Misc.3d 1088(A), 819 N.Y.S.2d 852, 2006 WL 1094557 (2006).

[1006] Columbia Cas. Co. v. Southern Flapjacks, Inc., 868 F.2d 1217 (11th Cir. 1989).

[1007] Maryland Cas. Co. v. Hanby, 301 A.2d 286 (Del. Super. Ct. 1973).

finding authority to be mixed across various states and "no obvious majority rule…to guide this dispute." Among those which did allow an award of pre-judgment interest, many did so because they likened appraisal to arbitration in which the practice is permissible. The court differentiated Louisiana from these jurisdictions based on its strong preference for distinguishing the two means of claim resolution. It cited a state supreme court holding in observing, "'[i]n theory, arbitration is a substitute for a proceeding in court, and should not be confused with what takes place where parties refer to selected persons some ministerial duty or some matter involving only the ascertainment of facts, requiring no hearing nor the exercise of judicial discretion upon the question in dispute.'"[1008]

Additionally, where certain issues of coverage have been preserved for later litigation and the appraisal proceeded to a determination of loss and damage subject to a subsequent litigation on those coverage issues, the issuance of a binding appraisal award may be construed as an appropriate starting point for calculation of interest after the subsequent litigation is concluded.

[1008] St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (E.D. La. 2010), citing Housing Authority of New Orleans v. Henry Ericsson Co., 197 La. 732 (La. 1941).

In Florida, an award of pre-judgment interest was found to be proper dating from the time of an appraisal award, because it marked the point at which damages were liquidated.[1009]

In Florida, the awarding of pre-judgment interest following the rendition of an appraisal award should be calculated according to the applicable loss payment provision in the insurance policy at issue. In the jurisdictions that follow this rule, interest begins to run from the time of the wrongful deprivation of the proceeds.[1010] Florida law has permitted recovery of pre-judgment interest to the party subjected to a wrongful deprivation measured from the date of loss.[1011]

This has been called the "loss theory," and the interest award is unaffected by either the merit of a defense or the certainty of the loss amount. One Florida court has clarified that pursuant to this theory, "the finder of fact merely quantifies the damage and determines a party's liability for such damages. Regardless of the date on which [it] decides these issues, Florida law entitles such individual to pre-judgment interest from the date of loss…as a

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[1009] Aries Ins. Co. v. Hercas Corp., 781 So.2d 429 (Fla.3d DCA 3001).

[1010] Southern Flapjacks, Inc., *supra*.

[1011] Biscayne Supermarket, Inc. v. The Travelers Ins. Co., 485 So.2d 861 (Fla. 3e DCA 1986).

result, the crucial inquiry involves the determination of the date of loss." That case noted that dispute resolution through appraisal did not alter the date for awarding interest. The court held that an insurer's invocation of the appraisal process did not alter its obligation to pay an insured within 30 days after the insured had filed a proof of loss, as the policy did not condition payment upon appraisal or limit the period in which to request it.[1012]

In Florida, a court concluded that confirmation of an arbitration award and an award of pre-judgment interest calculated from the date of loss were properly granted where a policy contained a contractual 60-day period to make payment. There, the insurer argued that the award should not have been confirmed as the 60-day term had expired and that pre-judgment interest should be calculated from the payment date. Because the insurer initially denied the insureds' claim, it had waived the policy provision allowing deferred payment and owed pre-judgment interest from the date of loss, despite having eventually submitted to appraisal and paid the award. The court cited a previous holding, "The general rule is that interest on a loss payable under an insurance policy is recoverable from

[1012] Columbia Cas. Co. v. Southern Flapjacks, Inc., 868 F.2d 1217 (11th Cir. 1989).

the date payment is due pursuant to the provisions of that policy..[there is] an exception to that rule where the insurer denies coverage and later admits coverage or coverage is later determined through litigation. Once the insurer denies coverage, it is deemed to have waived the policy provision for deferred payment and, should it pay, becomes responsible for pre-judgment interest from the date of loss." Further, "'[i]f the insurer denies liability, interest begins to run from the date of the loss, even where the policy provides for payment at a later date.'"[1013]

A Florida court recently affirmed this principle where it found an insured was not entitled to pre-judgment interest on an insurer's payment of an appraisal award within 60 days of the award's filing. In finding no entitlement to pre-judgment interest, the District of Appeals relied on its recent holding that, "'[i]t is the terms of a contract for insurance which determine that date from which the coverage payment is due, as well as when interest is due on the amounts payable.'" The insurer had "timely paid the claim pursuant to the appraisal process after first having paid the insured an amount less than what was awarded…inasmuch as [the insurer] satisfied

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[1013] North Pointe Ins. Co. v. Tomas, 16 So.3d 977 (Fla 3d DCA 2009); Jugo v. American Sec. Ins. Co., 56 So.3d 94, 36 Fla.L. Weekly D481 (Fla. 3d DCA 2011).

the appraisal award within sixty days of the filing of the award, as required by the terms of the insurance contract, [the insured] was not entitled to pre-judgment interest."[1014]

A request by Florida insureds for pre-judgment interest on the amount of an appraisal award dating from a loss through to the time of payment was denied due to a failure to show excusable neglect for untimeliness for delay in making the application in federal court. Case law in the jurisdiction provides that pre-judgment interest is a discretionary award, "'given in response to considerations of fairness…denied when its exaction would be inequitable.'" It would be governed by Fed.R.Civ.P. 59(e), which states that a motion to alter or amend a judgment must be filed within 10 days after its entry. The court clarified that even if Florida procedural law was applied, the insureds' request would still be untimely as Florida Rule of Civil Procedure § 1.530(b) provides that motions for rehearings or amendment of judgments must be filed within ten days from the date a judgment is filed.[1015]

1014 Green v. Citizens Prop. Ins.Corp., 59 So.3d 1227 (Fla. 4th DCA 2011); see, Ellie's 50's Diner, Inc. v. Citizens Prop. Corp., 54 So.3d 1081, 36 Fla.L. Weekly D 449 (Fla. 4th DCA 2011); Sands on the Ocean Condominium Ass'n. v. QBE Ins. Corp., 2012 WL 6217497 (S.D. Fla. 2012).

1015 Porcelli v. Onebeacon Ins. Co., 2006 WL 3333599 (M.D. Fla., 2006), citing Perdue Farms Inc. v. Hook, 777 So.2d 1047 (Fla. 2nd DCA 2001).

In Liberty Mutual Ins. Co. v. Alvarez,[1016] the court, after quoting the Loss Payment provision of the policy which mandates payment "60 days after we receive your proof of loss and...there is a filing of an appraisal award with us," enforced the policy language and reversed the lower court, eliminating pre-judgment interest.

Similarly, an insurer did not breach its insurance contract where it made a timely payment to insureds pursuant to a Loss Payment provision in the policy obligating the insurer to these very requirements following an appraisal award. The court addressed interest in the context of this provision; insureds were not entitled to interest on the difference between the appraisal award and amount that had been paid by the insurer as "'[i]nterest upon a loss payable under a fire insurance policy is not recoverable before the payment of principal is due pursuant to the policy.'"[1017]

Under Missouri law, pre-judgment interest on unpaid insurance benefits generally runs from the time the amount became due and payable under the policy. While the actual dollar amount of the payment was not

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[1016] Liberty Mut. Ins. Co. v. Alvarez, 785 So.2d 700 (Fla.3d DCA 2001).

[1017] Ginsburg v. Charter Oak Fire Ins. Co., 109 A.D.3d 959, 971 N.Y.S.2d 573 (2d Dept. 2013), citing Farmland Market. Corp. v. North Riv. Ins. Co., 105 A.D.2d 602-03 (1st Dept. 1984), *aff'd* 64 N.Y.2d 1114, 490 N.Y.S.2d 187, 479 N.E.2d 283 (1985).

determined until the umpire rendered his finding, it cannot be said that the amount owed to the insured was not ascertainable. The fact that the insurer disputed the amount owed does not make the claim unliquidated. The insured was therefore entitled to pre-judgment interest measured from the date payment was first demanded.[1018]

In some states, statutes provide that interest shall be paid on a money judgment in any civil action from the date of the filing of the complaint and that this provision controls the award of interest on an insurance policy even though the policy provided that the loss was payable 60 days after the appraisal award.[1019]

In Michigan, statutory penalty interest may be added on to an award not paid within 30 days of the award. The appraisal award triggers the 30-day payment deadline contained in MCL 500.2836 (2).[1020]

In Mississippi, monies due become liquidated on the date of an appraisal award

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[1018] BBMB, Inc. v. Pennsylvania Lumberman's Mut. Ins. Co., 2012 WL 2848675 (E.D. Mo.2012)

[1019] Linford Lounge, Inc. v. Michigan Basic Property Ins. Ass'n., 77 Mich. App. 710, 259 N.W.2d 201 (1977); R.D. Management Corp. v. Philadelphia Ind. Ins. Co., 302 F. Supp.2d 728 (E.D. Mich 2004).

[1020] Griswald Properties, L.L.C. v. Lexington Ins. Co., 275 Mich. App. 543, 740 N.W.2d 659 (2007) *rev'd by panel, aff'd in part, rev'd and remanded in part*, 276 Mich. App. 551, 741 N.W.2d 549 (2007).

and the insured is thus entitled to pre and post judgment interest at the statutory rate where the court's intervention was necessary to enforce the award. Mississippi statutes permit recovery of interest as compensation for the retention of money overdue.[1021]

[1021] Children's Imagination Station v. Prime Ins. Syndicate, Inc., 2008 WL 724049 (S.D. Miss. 2008)

D] THE BINDING NATURE OF THE APPRAISAL AWARD-SETTING IT ASIDE

An award made in appraisal is supported by a reasonable presumption and will be upheld even though it differs from what a court may have done. The conclusions of the appraisers are binding upon the parties so long as there is no fraud or mistake.

This presumptive validity is not rebutted by ascribing sinister motives to the umpire.[1022] The appraisers' findings should not be vacated unless they were made without authority or were the result of fraud, mistake or the misfeasance or malfeasance of the appraisers.[1023]

It has been said that the principles of *res judicata* prevent either party from revisiting the validity of the appraisers' award, as well as the final computations or underlying methodologies of the appraisers.[1024]

The North Carolina Court of Appeals stated that it is well settled in that state that

[1022] Hemingway v. State Farm Fire and Cas. Co., 187 A.D.2d 814, 589 N.Y.S.2d 956 (3d Dept. 1992).
[1023] Phoenix Ins. Co. v. Everfresh Food Co., 294 F. 51 (8th Cir. 1923).
[1024] Magaldi v. Safeco Ins. Co. of America, 2010 WL 2542011 (S.D. Fla. 2010); Dadeland Depot Inc. v. St. Paul Fire & Marine Ins. Co., 483 F.3d 1265 (11th Cir. 2007); Wailua Associates v. Aetna Cas & Surety Co., 27 F. Supp.2nd 1211 (D. Hawaii 1998).

where "contractual appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress or other impeaching circumstances."[1025]

The appraisal award is presumptively valid and binding upon the parties though if one of the parties may show that some term or condition of the policy appraisal clause is in contravention of statute it might be possible to set is aside.[1026]

Indeed, even where a contractor who had repaired the claimed damage and sued the homeowner for amounts allegedly due for repairs made due to a fire, where the amount paid to the contractor had resulted from an appraisal award, the insurer was held to have not breached the policy by limiting its payment to the appraisal amount rather than a later determined actual cost of repairs, stating: "the amount of loss under the policy and the amount the insureds were required to pay their

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[1025] Gilbert v. North Carolina Farm Bureau Mut. Ins. Cos., 155 N.C. App. 400, 574 S.E.2d 115 (2002); Enzor v. North Carolina Farm Bureau Mut. Ins. Co., 123 N.C. App. 544, 545-46, 473 S.E.2d 638, 639 (N.C. App. 1996).

[1026] Lundstrom v. United Services Auto. Ass'n-CIC, 192 S.W.3d 78 (Tex. App.-Houston 2006); Lakewood Mfg. Co., Inc. v. Home Ins. Co., 422 F.2d. 796, 24 Ohio Misc. 244 (6th Cir. 1970); Nichols v. Ohio Farmers Ins. Co., 237 F.Supp. 904 (N.D. Cal. 1965); Keesling v. Western Fire Ins. Co. of Fort Scott, Kansas, 10 Wash. App. 841 (Wash Ct. App. 1974); Town of Trumbull v. Trumbull Police Local 1745, Connecticut Counsel of Police Unions, 1 Conn. App. 207, 470 A.2d 1219 (1984); Milford Emp. Ass'n. v. City of Milford, 179 Conn. 678, 427 A.2d 859 (1980); St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (E.D. La. 2010).

contractor could be two separate sums.[1027]

In the absence of bad faith, fraud, misconduct or mistake, a Michigan award was conclusive as to an amount of loss and even superseded replacement cost provisions within an insurance policy requiring that the insured submit proof of actual loss as a precondition to the insurer's payment. The court rejected the insurer's argument that since the policy conditioned its obligation to pay on the insured's producing a proof of loss, it was not yet obligated to pay. Thus, the insured did not have to submit proof of loss and the insurer was obligated to make payment pursuant to the award.[1028]

It has been held that if the appraisal award is within the terms of the submission and contains the honest decision of the appraisers after a full and fair hearing of the parties, the court should not set it aside for error, either of law or fact.[1029] Absent substantial evidence of fraud or improper conduct on the part of a party in procuring the appointment of the appraisers or misconduct upon their part in making the award, the award should stand as

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[1027] Dave's Inc. v. Linford, 153 Idaho 744, 291 P.3d 427 (Idaho 2012).

[1028] Dupree v. Auto-Owners Ins. Co., 2013 WL 3766580 (Mich.Ct. App. 2013).

[1029] Levin v. Northwestern Nat'l Ins. Co. of Milwaukee, 185 F. 981 (N.D. Iowa 1911); North Carolina Farm Bureau Mut. Ins. Co. v. Harrell, 148 N.C. App. 183, 557 S.E.2d 580 (2001).

the umpire was the individual chosen by the parties to decide the matter submitted, finally and without appeal.[1030]

Further, a presumption of fairness has been found to exist as to appraisal awards. A Georgia court has determined such an award to be binding on parties who have contracted to allow for such an award unless the award is set aside. The court found there to exist a "presumption in favor of the regularity and fairness of appraisement awards" and that while one may be voided in the same way as a contract, "where there is no evidence of fraud, oppression, irregularity or unfairness, other than on the disputed issue of value, and no other circumstances tending to raise the issue, a verdict in the amount of the award is demanded."[1031]

Every reasonable intendment is in favor of an appraisal award made pursuant to the terms of an insurance policy and an award will be sustained even though it does not conform to what would have been the judgment of the reviewing court. The appraisal process in the insurance context is not subject to a strict standard of review. Judicial review is limited to instances of bad faith, fraud, misconduct or

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1030 Levin, Id. at 982.

1031 Bell v. Liberty Mutual Fire Ins. Co., 319 Ga. App. 302, 734 S.E.2d 894 (Ga. App. 2012).

manifest mistake.[1032]

In one decision in Louisiana, where an Appraisal award was challenged on multiple grounds, the court addressed how such awards are construed. The court stated, "Insurance policy provisions allowing for appraisal are strictly construed, and contractually specified appraisal awards are presumed accurate." The challenging party must bear the burden of showing that the award should not be confirmed.[1033]

To set aside an award in Louisiana, it must be shown "either that the appraisement was conducted in an improper manner, or that the award was the result of fraud or of gross error amounting to fraud." Further, "mere inadequacy of the amount of the award or a mistake of judgment on the part of the appraisers in arriving at the sum to be allowed would not be sufficient to authorize a court of equity to interfere unless the inadequacy is so great as to indicate corruption or bias on the part of the appraisers." Where an insured sought to set an award aside and concrete

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[1032] Emmons v. Lake States Ins. Co., 193 Mich. App. 460, 466, 484 N.W.2d 712, 715 (1992), (*citing*, Auto-Owners Ins. Co. v. Kwaiser, 190 Mich App. 482, 476 N.W.2d 467 (1991)).

[1033] St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (E.D. La. 2010), citing Branch v. Springfield Fire & Marine Ins. Co., 198 La. 720 (1941).

evidence was not offered as to the value of the property at issue (which consisted of several trucks), the court reasoned that the award was likely not grossly inadequate or even inadequate at all given the older, secondhand nature of the trucks and their "exceedingly small" cash value at the time of loss.[1034]

In Texas, an appraisal provision is not deemed unconscionable where an insured had contended that it unfairly required her to give up her day in court and pay appraisal costs, was cost prohibitive and contradicted her rights under the Texas Insurance Code.[1035]

In the state of Texas, appraisal awards made pursuant to the provisions of an insurance contract are binding and enforceable and every reasonable presumption will be indulged to sustain the appraisal award. An otherwise binding insurance appraisal may be disregarded only when the award was made without authority, it was made as a result of fraud, accident or mistake or the award was not in compliance

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[1034] Dawes v. Continental Ins. Co. of City of N.Y., 1 F.Supp. 603 (D.C. La. 1932).

[1035] James v. Prop. and Cas. Ins. Co. of Hartford, 2011 WL 4067880 (S.D. Tex. 2011), citing Bay Colony, Ltd. v. Trendmaker, Inc., 121 F.3d 998, 1005 (5th Cir. 1997).

with the requirements of the policy.[1036]

Texas law establishes that an appraisal award may be set aside based upon mistake or accident "only 'upon a showing that the award does not speak the intention of the appraisers.'" Invalidation on the grounds of fraud requires proof of: "(1) a material misrepresentation; (2) that was false; (3) and was either known to be false when made or was asserted without knowledge of its truth; (4) intended to be acted upon; (5) relied upon; (6) and causing injury." In one case where an insurer believed the umpire was misled in arriving at his finding due to material misrepresentations by the insureds' appraiser in failing to disclose a preexisting relationship and the existence of a "fundamental disagreement" as to what the award represented, were insufficient to raise an issue of fact as to whether the award was a product of mistake, accident or fraud.[1037]

Under well established Texas law, mistake in the appraisal context has a narrowly defined meaning: an actionable "mistake" is one which caused an award to operate in a way the

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[1036] St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (2010), citing Branch v. Springfield Fire & Marine Ins. Co., 198 La. 720 (1941).
[1037] Amtrust Ins. Co. of Kansas, Inc. v. Starship League City, L.P., 2013 WL 1222329 (E.D. Tex.), citing JM Walker LLC v. Acadia Ins. Co., 356 F.App'x 744, 746-47 (5th Cir. 2009).

appraisers did not intend.[1038]

In evaluating an insurer's motion to set aside an appraisal award, one Texas court which affirmed this principle elaborated on the standard for treatment of appraisal awards within the state. Texas law places the burden of proof upon the party opposing appraisal. It asserted that an award may be disregarded in the state under three circumstances, however: where an award was made without authority; it resulted from fraud, accident or mistake; or did not comply with policy requirements.[1039]

Where an umpire in Texas exceeded his authority by striking a portion of an appraisal award, a court evaluated whether the "valid" and "otherwise unobjectionable" portion of the award should remain standing. There, the umpire had excluded certain damages from the award rendered where there was no dispute among both parties' appraisers as to how much damage was sustained. The court acknowledged that although Texas courts had never addressed this issue, other case law indicated that "minor mistakes that do not taint the entire award should not frustrate the parties' intent to be bound by the appraisal

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[1038] KLM Resources, LLC v. Ohio Cas. Ins. Co., 2012 WL 1911801 (S.D. Tex. 2012).

[1039] Amtrust, *supra,* citing JM Walker LLC v. Acadia Ins. Co., 356 F.App'x 744, 746 (5th Cir. 2009) and Lundstrom v. United Services. Auto. Ass'n-CIC, 192 S.W.3d 78, 87 (Tex. App.-Houston 2006).

provision of their contract." It also relied upon a federal district court case interpreting state law where grounds existed to set aside a portion of an appraisal award but there was "no basis for setting aside the entire award or any other part of it."[1040]

Where the insured failed to wait 15 days after the appointment of the appraisers before moving in state court for the appointment of an umpire, an award rendered by the umpire so appointed was vacated when a federal district court in Texas concluded the state court had been without authority to appoint an umpire thus rendering the umpire without authority to render the award.[1041]

An award is generally not set aside for reason of a mere mistake unless the mistake itself appears on the face of the award. The New York Court of Appeals has held that such an award may be set aside for a "palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures." The party who seeks to set aside an award upon such a mistake must show from the award itself that, but for the mistake, the award would have been different. The court went on to say that "[T]he merit of an award, however unjust or

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[1040] TMM Investments, Ltd. v. Ohio Cas. Ins. Co., 730 F.3d 466 (5th Cir. 2013), citing MLCSV10 v. Stateside Ent. Inc., 866 F.Supp.2d 691,707-08 (S.D.Tex. 2012).
[1041] Friedrichs v. Geovera Specialty Ins. Co., 2013 WL 674021 (S.D. Tex. 2013).

unreasonable it may be, cannot be reinvestigated, for otherwise the award, instead of being the end of litigation, would simply be a useless step in its progress."[1042]

In light of a policy provision mandating that an appraisal determination was to be binding, an appraisal award in Florida was deemed final and a request for a second appraisal due to appraiser mistake was denied. There, the insured alleged that its appraiser misunderstood which damage issues were to be appraised, a mistake it believed warranted a second appraisal. The court ultimately found that the insured failed to state a claim in making this request; its amended complaint demonstrated that an appraisal took place and through their contract "the parties expressly agreed that their appraisers' determinations would be binding."[1043]

Where a court in Florida declined to address an insurer's defense that certain items contained within an appraisal award were duplicative, it determined this issue was of the nature that raises an issue directly related to the 'amount of loss' sustained. As such, the matter was within the appraiser's authority to

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[1042] Perkins v. Giles, 50 N.Y.228 (1872); Masury v. Whiton, 111 N.Y. 679, 18 N.E. 638 (1889); Remington Paper Co. v. London Assur. Co. of England, 12 A.D. 218, 43 N.Y.S. 431 (4th Dept. 1896).
[1043] Central Oaks, Inc. v. Maryland Cas. Co., 2006 WL 2864422 (M.D. Fla. 2006).

evaluate.[1044]

In Maryland, the Court of Appeals has delineated a narrow set of cases in which courts may set aside an appraisal award. When the basis is an alleged mistake committed by the appraisers, it is not sufficient to show that they came to a conclusion of fact erroneously. It must be shown that by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case, so that upon their own theory, a mistake was made which has caused the result to be somewhat different from that which they had reached by their reason and judgment. A mistake which will be sufficient to void the award must be one that is plain and palpable such as an erroneous computation or calculation of the amount due.[1045]

On the other hand, a clerical error by appraisers in listing "alternative living expenses" instead of "additional living expenses" for costs of a homeowner's family living away from the house during mold remediation was obviously held not to be the type of mistake which would

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[1044] Citizens Prop. Ins. Corp. v. River Manor Condominium Ass'n Inc.,125 So.3d 846 (Fla 4th DCA 2013).

[1045] Hartford Fire Ins. Co. v. Adcor Ind. Inc., 158 Fed. Appx. 430, 205 WL 3419986 (C.A. 4 (Md.) 2005); Schreiber v. Pacific Coast Fire Ins. Co., 195 Md. 639, 75 A.2d 108 (1950).

warrant setting aside the appraisal award.[1046]

Grounds for setting aside an appraisal award were considered in Louisiana. There, the court presumed an appraisal award to be correct stating that "a court should not disrupt an appraisal award simply because reasonable minds could differ as to the amount awarded or the methods employed." However, it clarified that notwithstanding this principle, it was not required that a court confirm an award with a clear mistake of fact. In the action where this issue was raised, the insurer claimed an award should be set aside due to the presence of errors including a discrepancy between an estimate and supporting documentation, the inclusion of an award for extra expense and the double counting of certain items within the award. The court found clear error to exist only in the duplication caused by the double counting of items; this calculation was deemed unable to stand. In finding that the discrepancy between an estimate and documentation was insufficient to overturn the award, the court cited its standard of evaluation: "'every reasonable intendment and presumption is in favor of an award of appraisers selected to determine the

[1046] Allison v. Fire Ins. Exchange, 98 S.W.3d 227 (Tex. App.- Austin 2002) The Texas Court of Appeals overturned a jury finding that an appraisal award as the result of "mistake" where the error was a mere clerical mistake that did not affect the intention of the appraisers.

value of property lost.'"[1047]

In Oklahoma, negligent mistakes in making an appraisal determination may not support an action for bad faith under state law. Courts in the state have held both that "[i]t takes something more than mere mistake to constitute bad faith" and "[i]nsurers are free to make legitimate business decisions (and mistakes) regarding payment, as long as they act reasonably and deal fairly and in good faith with their insureds." However, it found a "justiciable issue as to bad faith" was created in one case where the cumulative effect of various mistakes made by an adjuster precluded summary judgment, dismissing a bad faith claim. In that case, mistakes which totaled $60,000, a number which would ordinarily suggest more than ordinary negligence, were not an obvious indicator of misconduct since an expensive home and complex adjustment process were involved. The court acknowledged that "[c]onsidered individually, each of the mistakes appear to be nothing more than negligent mistakes which…are not a basis for a bad faith claim under Oklahoma law." Further, "giving [the insured] the benefit of the uncertainty in

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[1047] St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (E.D. La. 2010).

Oklahoma law as to where the line is drawn between simple negligence and something more," the court observed a question of fact as to bad faith.[1048]

Speculative inferences and conclusory assertions by the insurer's accountant who assisted the insurer's appraiser were insufficient to raise a triable issue of fact as to alleged mistakes where he could claim no direct knowledge or insight into the deliberations or methodology of the umpire or the insured's appraiser.[1049]

As the good faith of the umpire is presumed, to overturn an award, the challenging party must clearly demonstrate partiality, corruption or patent mistake.[1050]

In the case of, In re Appraisal of Loss and Damage to Building Known As 176-178 East Main Street, Amsterdam, New York,[1051] the insurance company's appraiser directed the owner's appraiser to sign a blank form and subsequently filled in the name of an umpire without the homeowner's appraiser's consent or knowledge and the umpire subsequently

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[1048] LeBlanc v. The Travelers Home & Marine Ins. Co., 2011 WL 2748616 (W.D. Okla 2011), citing Bailey v. Farmers Ins. Co., Inc., 137 P.3d 1260 (Okla. Civ. App. 2006).
[1049] Id.
[1050] Casper v. Allstate Ins. Co., Unrecorded decision, Md. Ct. of Special Appeals # 1583, June 28, 2000.
[1051] 263 N.Y.197, 188 N.E. 647 (1934).

arrived at a value within one percent of the insurer's appraiser's valuation. The New York Court of Appeals held that an issue of fraud relating to an appraiser's selection of an umpire for determination of loss under a fire policy cannot be tried on conflicting affidavits, but an action should be brought to set aside the award.[1052] The court may not appoint a new umpire because it does not have jurisdiction while the award is still standing. Accordingly, a proper cause of action to bring is one to set aside the award, not to appoint a new umpire.

Where the carrier failed to pay an award alleging it had uncovered evidence tending to show the insured committed fraud in his submission of invoices in support of his additional living expense claim, the court was concerned as to what point in time the alleged fraud was first discovered as well as with any subsequent investigation and evaluation of the fraud.[1053]

An appraiser's award can be vacated if the appraiser was incompetent, interested, partial or negligent.[1054] The court will not go into the technicalities of the appraisal if the appraisers can show they were qualified and

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1052 New York Ins. Law §3404 (formerly Ins. Law 121).
1053 O'Brian v. American Family Ins. Group., 2006 WL 1541077 (D.Ariz. 2006).
1054 Home Ins. Co. v. Walter, 230 S.W. 723 (Tex. Civ. App.- Dallas 1921).

able to arrive at an accurate valuation of damages.[1055]

Under Indiana law, an appraisal is binding unless it can be shown that the appraisal is infected with unfairness or injustice.[1056]

One example is where an appraiser's fee arrangement impermissibly gave the appraiser a "vested interest" and the award was set aside.[1057]

Similarly, in Washington, the provisions of a fire insurance policy requiring appraisal are held to be valid and enforceable with the award generally considered conclusive as to the amount of loss. However, where the fairness of the appraisal process is questioned by the insured, through allegations of bias, prejudice, or lack of disinterestedness on the part of either an appraiser or the umpire, there may be factual issues for jury determination as to the enforceability of such an award.[1058]

In Connecticut, four grounds exist for

[1055] Caledonian Ins. Co. v. North Dutch Reformed Church, 95 N.J. Eq. 496, 123 A. 242, *aff'd,* 96 N.J. Eq. 342, 124 A. 703 (1924).

[1056] Jupiter Aluminum Corp. v. Home Ins. Co., 225 F.3d 868 (7th Cir. 2000).

[1057] Shree Hari Hotels, LLC v. Society Ins., 2013 WL 4777212 (S.D. Ind. 2013).

[1058] *See* Brooks Family Partnership v. Granite State Ins. Co., 2010 WL 4857539 (W.D.Wash.); *see also* Bainter v. United Pacific Ins. Co., 50 Wash.App. 242, 748 P.2d 260 (Wash. App.. 1988).

vacating an appraisal award. These include situations where the award was procured by corruption or fraud. With respect to an assertion that an award is the result of corruption or fraud, the standard of proof is "evident partiality" which is a lower standard than actual proof of the existence of the conduct.[1059] However, it requires more than a mere "appearance of bias."[1060] Connecticut will also permit a challenge to an appraisal award where the umpire is guilty of conduct such as refusing to postpone hearings or meetings for good cause or refusing to hear pertinent and material evidence thus prejudicing one of the parties. In this case, the party challenging the award has the burden of proof that as a result of such malfeasance, they were deprived of a full and fair hearing. This is a greater level of proof then a mere showing of the existence of an error of law.[1061] Additionally, evidence of unauthorized and impermissible *ex parte* communications with a party or the *ex parte* receipt of evidence of a material fact without notice to the other party as well as the acceptance of gifts during the proceedings all rise to the level of misconduct

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[1059] Local 530 AFSCME, Counsel 15 v. City of New Haven, 9 Conn. App. 260, 518 A.2d 941 (1986).
[1060] Vincent Builders, Inc. v. American Application Systems, Inc., 16 Conn. App. 486, 547 A.2d 1381 (1988).
[1061] O & G /O'Connell Joint Venture v. Chase Family Ltd. Partnership No.3, 203 Conn. 133, 523 A.2d 1271 (1987).

sufficient to set aside an award.[1062] Finally, the award may be set aside in the state of Connecticut where the umpire has exceeded his powers as reflected in the policy and by statute. A party will prevail if he successfully establishes that the award goes beyond the submission made to the umpire.[1063]

An appraisal award may not be enforced where the policy allows the insurer to void the contract upon proof the insured made material misrepresentations in reporting their claim.[1064]

Pursuant to California Code of Civil Procedure § 1286.2, an appraisal award can only be vacated upon proof of one of the following grounds. The award can be vacated if a party can show that it was obtained through a) corruption, fraud or undue means; b) there is corruption on the part of any of the appraisers; c) the rights of the party were substantially prejudiced by the misconduct of the umpire; d) the award exceeded the appraisers' authority; e) refusals to postpone proceedings or hear evidence material to the

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[1062] Id. at 145-47.

[1063] Steiner v. Middlesex Mut. Assur. Co., 44 Conn. App. 415, 689 A.2d 1154 (1997); Kilby v. St. Paul Ins. Co., 29 Conn. Super. 22, 269 A.2d 295 (1970); Malecki v. Burnham, 181 Conn. 211, 213, 435 A.2d 13, 14 (1980).

[1064] Exantus v. Metropolitan Prop. & Cas. Ins. Co., 582 F. Supp.2d. 239 (U.S.D.C. Conn. 2008).

controversy or by other conduct contrary to law; f) where the umpire was subject to disqualification but failed to disqualify himself despite receipt of the appropriate demand therefore.[1065]

Further, under the California Arbitration Act, a party may petition the court to confirm, correct or vacate an appraisal award pursuant to the standard fire policy and the court must confirm the award unless it corrects and confirms as corrected, vacates the award or dismisses the proceeding.[1066]

In Mississippi, an appraisal award may be set aside where it is so grossly inadequate as to amount to a fraud in effect although fraud is not charged, or where the appraisers were without authority or where there is a mistake of fact or to prevent injustice.[1067]

In the state of Georgia, an appraisal award agreed to by two of the appraisers is binding upon the parties absent fraud, mistake or overreaching by wrongfully determining

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[1065] Lee v. California Capital Ins. Co., Alameda County Superior Court No. RG11571734 (2015) and (CS-241); Fidelity Nat. Ins. Co. v. Yolanda Owens, Alameda County Superior Court No. RG11589323)

[1066] Cal. C.C.P. §1285, 1286; Kirkwood v. California State Auto Ass'n Inter-Ins. Bureau, 193 Cal. App. 49, 122 Cal. Rptr. 38,480 (Cal. App. 2011).

[1067] Children's Imagination Station v. Prime Insurance Syndicate, Inc., 2008 WL 724049 (S.D. Miss. 2008); Munn v. Nat'l Fire Ins. Co. of Hartford, 237 Miss. 641, 115 So.2d 54 (1959).

questions of liability.[1068]

A Georgia award has also been held valid where an appraisal by one appraiser and an umpire sufficiently established the amount of loss. In that matter, the insurer's appraiser knew of the umpire's appointment and requested a postponement of the meeting, then declined to appear at a later agreed upon time, resulting in an award by the remaining appraiser and the umpire. Given that the agreement provided "the award of said appraisers and umpire (if the umpire be called upon to act), or any two of them, made in writing, in accordance with this agreement, shall determine the amount of said loss and damage, as provided by the policy, or policies of said company or companies," the court found that it had not been error to direct a jury to find this amount to be the amount of loss sustained by the insured.[1069]

A Kentucky court similarly asserted the standard in that jurisdiction for setting aside an appraisal award in a case where it found an appraiser did not exceed the scope of his authority. In Kentucky, "'[g]enerally, a court will not interfere with an appraisal award but, to the contrary, will indulge in every reasonable

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[1068] McGowan v. Progressive Preferred Ins. Co., 274 Ga. App. 483, 618 S.E.2d 139 (2005).

[1069] Palatine Ins. Co. v. Gilleland, 52 S.E.2d 537 (Ga. Ct. App. 1949).

presumption to sustain it in the absence of fraud, mistake or malfeasance. A court will not substitute its judgment for that of the appraisers or set aside an award for inadequacy or excessiveness unless it is so palpably wrong as to indicate corruption or bias on the part of the appraisers."' In clarifying this standard, the court cited a prior holding that parties were bound to an appraisal determination where there was no evidence of fraud, malfeasance or mistake; and in this instance, it was not a mistake for appraisers to determine the replacement value and actual cash value of an insured building.[1070]

However, an award was vacated in a Kentucky action in which the court was concerned that an umpire's award was not rendered in the manner provided by the insurance policy. The policy at issue mandated that appraisers prepare and compare written reports, with matters of disagreement to then be submitted to the umpire. Under those circumstances, however, the appraisers' comparison never took place despite one appraiser's claimed multiple attempts to contact the other appraiser. The court found the procedure flawed, "[r]egardless…of what may or may not have been gained by

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[1070] Bachelor Land Holdings, LLC v. Chubb Custom Ins. Co., 2011 WL 5389197 (W.D. Ky. 2011), citing Lakewood Mfg. Co. v. Home Ins. Co. of N. Y., 422 F.2d 796, 24 Ohio Misc. 244 (6th Cir. 1970).

following the procedure."[1071]

In Pennsylvania, it has been held that judicial review of an appraisal award is limited to allegations of fraud, misconduct, corruption or other irregularity causing an unjust result.[1072] In addition, it was held that judicial review may also examine the appraisers' scope of authority and whether they have exceeded it.[1073]

Along similar lines, in Wisconsin, an appraisal award is "presumptively valid" and "set aside 'only upon the showing of fraud, bad faith, a material mistake, or lack of understanding or completion of the contractually assigned task.'"[1074]

Furthermore, in Pennsylvania, "the scope of review of an appraisal award is limited to whether a party was denied a hearing or 'fraud, misconduct, corruption, or similar irregularity le[d] to an unjust, inequitable, or unconscionable award."[1075] For an appraisal

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1071 Kentucky Farm Bureau Mut. Ins. Co. v. Gilmore, Civil Case No. 08-CI-517.

1072 Boulevard Assoc. v. Seltzer P'ship, 445 Pa. Super. 10, 664 A.2d 983 (Pa. Super.1995).

1073 Id. at 987; Riley v. The Farmer's Fire Ins. Co., 1999 Pa. Super. 179, 735 A.2d 124 (1999).

1074 Gronik v. Balthasar, 2013 WL 5376025 (E.D. Wis. 2013).

1075 Pinchot v. Chubb Ind. Ins. Co., 2011 WL 865077 (E.D.Pa., 2011) citing Runewicz v. Keystone Ins. Co., 476 Pa. 456, 383 A2d 189 (Pa. 1978); *see also* Wingate Constr. Co. v. Schweizer Dipple, Inc., 419 Pa. 74 (Pa. 1965); Andrew v. CUNA Brokerage Serv., Inc., 976 A.2d 496 (Pa. Super. Ct.2009); Boulevard Assoc. v. Seltzer P'ship, 445 PA. Super. 10, 664 A.2d 983 (Pa. Super. Ct.1995); Gwin Eng'rs, Inc. v. Cricket Club Estates Dev. Group, 555 A.2d 1328, 1329 (Pa. Super. Ct.1989).

award to be reviewable, the movant bears the burden of establishing such corruption "by clear, precise and convincing evidence."[1076]

The Michigan Court of Appeals has recognized the binding nature of appraisal awards in making the following finding and quoting from a Michigan precedent dating back to 1887. The court stated:

> "We are guided by the long-standing principles applicable to the appraisal process, including that it is considered 'a substitute for judicial determination' and 'a simple and inexpensive method for the prompt adjustment and settlement of claims.'" See Thermo-Plastics R & D, Inc. v General Accident Fire & Life Assur. Corp. Ltd., 42 Mich. App. 418, 422, 202 N.W. 2d 703 (1972). And, 'there are great objections to any general interference by courts with awards. They are made by a tribunal of the parties' own selection who are, usually at least, expected to act on their own view of law and

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[1076] Nationwide Mut. Ins. Co. v. Barbera, 277 A.2d 821, 823 (Pa.1971); McKenna v. Sosso, 745 A.2d 1, 4 (Pa. Super. Ct.1999), *appeal denied*, 759 A.2d 924 (Pa.2000); Chervenak, Keane & Co., Inc. (CKC Associates) v. Hotel Rittenhouse Assoc., Inc., 328 Pa. Super.357, 477 A.2d 482, 485 (Pa. Super. Ct.1984).

> testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice which may sometimes deviate from the strict rules of law. It is not expected that after resorting to such private tribunals either party may repudiate their actions and fall back on the courts. And equity, on whatever pretext it may intervene in such cases, does so upon the reason that the tribunal has not really acted within the lines of the duties laid upon it, and has not in fact carried out the agreement under which it has obtained authority to proceed.' <u>Davis v. National American Ins. Co.</u>, 78 Mich. App. 225, 234-235, 259 N.W.2d 433 (1977), quoting <u>Port Huron & Northwestern R C v. Callanan</u>, 61 Mich. 22, 26, 34 N.W. 678(1887)."

In this matter, the court was confronted with two appraisal awards, the first for a water damage sustained to the upper floor of plaintiff's house in January of 1999 and the second, was for fire damage to the lower floor of plaintiff's house in July of 2000. While plaintiff did not claim that the house was a total loss from the water damage, apparently because the damage from both incidents was not promptly repaired, the house required extensive mold remediation by the time of the appraisal process such that demolition was a more economical option. The umpire issued an award finding that there were two losses, one to the upper level and one to the lower level, that combined to cause a total loss. The court determined that judicial review of the appraisal award is limited to instances of bad faith, fraud, misconduct, or manifest mistake none of which appeared in this case.[1077]

In Florida, a District Court of Appeals has also discussed the limitations of an appraisal award in the context of judicial review, holding that a trial court was not permitted to consider extrinsic evidence in applying policy limitations to an appraisal award after the appraisal process had taken place.[1078] There, a trial court would not reduce an award by applying policy limitations pertaining to personal property, because doing so would require consideration of extrinsic evidence from appraisers "and such is not contemplated by the policy nor

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1077 Roehrig v. State Auto Mut. Ins. Co., 2005 WL 1579518 (Mich. App. 2005), *appeal den'd* 474 Mich 1102, 711 N.W.2d 379 (2006); Auto-Owners Ins. Co. v. Kwaiser, 190 Mich. App. 482, 486, 476 N.W.2d 467 (1991).

1078 First Protective Ins. Co. v. Hess, 81 So.3d 482 (Fla.1st DCA 2011).

permitted by Florida law."[1079] The court reviewed the proper duties when reviewing an appraisal decision; while coverage matters are reserved to the courts, disagreements arising regarding the amount of loss are attributed to appraisers to determine. Here, an attempt by the court to apply policy limitations would have required it to "[determine] value of the loss for each category without direct guidance from the appraisal panel...this [was] prohibited as appraisers are charged with determining the value of the lost property."[1080]

In New Jersey, it has been held not to be in the public interest to encourage litigation over procedures which were designed to resolve disputes without litigation and thus, every reasonable intendment and presumption supports an insurance appraisal award.[1081]

The Court of Appeals of Texas has held that an appraisal award made pursuant to the provisions of an insurance contract may be set aside only when it was: (1) made without authority; (2) the result of fraud, accident or mistake; or (3) not made in substantial compliance with the terms of the contract.[1082]

1079 Id.
1080 Id.
1081 Elberon Bathing Co., Inc. v. Ambassador Ins. Co., 77 N.J. 1; *See also*, Standard Provisions, N.J. Stat. Ann. §17:36-5.20 (West 2003).
1082 Allison v. Fire Ins. Exchange, 98 S.W.3d 227, (Tex.App.-Austin 2002).

Two of these factors have been further explored in a case where neither was satisfied. As to the first, the court asserted that action outside an appraiser's authority as given by the appraisal agreement is not binding, and illustrated the point by citing precedent in which an umpire had rendered an award after hearing from one appraiser but had power to act only upon a disagreement between appraisers. The court elaborated that an umpire's decision of coverage, liability or causation matters present additional circumstances under which authority is absent. In that action, the insured's appraiser and umpire did not act outside the scope of their authority by quantifying the actual cash value of a property using replacement cost less depreciation, which the court observed was "an appropriate way to quantify fair market value and ACV."[1083]

It has also been stated that an award not "substantially in compliance with the requirements of the policy not be sustained." Courts are to determine the intent of the parties as represented in policy language and give effect to its terms, and a decision as to ambiguity is a question of law properly before the court. While behavior alleged by the

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[1083] Triple S Properties Inc. v. St. Paul Surplus Lines Ins. Co., 2010 WL 3911422 (N.D.Tex. 2010), citing Fisch v. Transcon. Ins. Co., 356 S.W.2d 186 (Tex.App.-Houston 1962, writ ref'd).

insurer, which included "improperly inject[ing] improper facts and issues that, as a matter of law, fatally corrupt the appraisal process," was outside of the authority of the appraisers and umpire, the Court found neither the appraisers nor the umpire based their decision on any of these issues. In this case, the award was permissible where "the umpire…received two appraisals on the issue of valuation and then, as he was empowered to do under the policy, produced his own award valuing the property. There is no evidence that the award discusses, touches upon, or references liability, coverage or causation."[1084]

To the contrary, the state of Illinois has held that appraisal awards did not constitute a final and binding resolution of the dispute over the amount of loss so as to foreclose an insured's right to sue absent clear, unambiguous language in the policy indicating that the insured had waived his right to file suit by submitting to the appraisal process. In Stratford West Homeowner's Ass'n. v. Country Mut. Ins. Co.,[1085] it was held that a determination by the umpire regarding the amount of loss to an insured's condominium due to hail damage after the appraisers had failed to agree was not a final and binding

[1084] Id.
[1085] 338 Ill. App.3d 288, 788 N.E.2d 342, 273 Ill. Dec. 33 (2003).

resolution of the dispute over the amount of loss as the policy failed to specifically and unambiguously establish that the insured had given up the right to litigate. In citing the court's earlier decision in DeGroot v. Farmer's Mut. Hail Ins. Co. of Iowa,[1086] the court confirmed the generally binding nature of appraisal and arbitration awards as a means of resolving disputes but pointed out that non-binding arbitration also existed in the state of Illinois as a means of resolving disputes. Therefore, in the absence of a clear contractual waiver of the insured's right to litigate, a dissatisfied insured may bring suit despite the existence of an appraisal award.

In Minnesota, where the statutory arbitration rules apply, absent a clear showing that appraisers were unfaithful to their obligations, the courts will assume that the appraisers did not exceed their authority.[1087]

In order to vacate an award in Minnesota, the moving party must demonstrate there was misconduct by an appraiser prejudicing the rights of a party to the proceeding; refusal of a postponement upon showing sufficient cause for one; refusal to

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[1086] 267 Ill. App.3d 723, 643 N.E.2d 875, 205 Ill. Dec. 584 (1994).

[1087] Hilltop Const. Inc. v. Lou Park Apartments, 324 N.W.2d 236, 239 (Minn. 1982); QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n., 778 N.W.2d 393, 398 (Minn. Ct. App. 2010).

consider evidence material to the controversy, or otherwise conducted the hearing contrary to §572B.15, so as to prejudice substantially the rights of the challenging party; or, that an appraiser exceeded the appraiser's powers.[1088]

The moving party bears the burden of proving that the appraisal panel exceeded its powers.[1089]

The insufficiency of an award is not reason enough to set aside the award. Generally, there must be bias, interest or prejudice on the part of one of the appraisers or the umpire.[1090] On the other hand, an award which is grossly inadequate indicates the possible presence of either fraud, bad faith or bias on the part of an appraiser and may result in the award being vacated.[1091] This might occur where the difference or inadequacy is so great that it appears from such difference alone that circumstances warrant such a conclusion.

It should be noted that a quotient verdict, which occurs when a compromise is

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[1088] Interlachen Property Oowners Ass'n. Inc. v. American Family Mut. Ins. Co., 27-CV-11-12855 (4th Dist. Minn. 12/12/12) (award set aside as insured was not permitted to offer testimony from contractors.).

[1089] National Indem. Co. v. Farm Bar. Mut. Ins. Co., 348 N.W.2d 748, 750, (Minn 1984).

[1090] Levin v. Northwestern Nat. Ins. Co., 195 F. 981 (N.D. Iowa 1911); Strome v. London Assur. Co., 162 N.Y. 627, 57 N.E. 1125 (1900).

[1091] Robertson v. Boston Ins. Co., 184 Minn. 470, 239 N.W. 147 (1931).

reached between the appraisers and the umpire simply by awarding the average between the dollar amount each has arrived at, is generally subject to challenge.[1092]

An award may be set aside if the appraisers are guilty of partiality or misconduct substantially affecting the result.[1093]

A Louisiana court has addressed the matter of *ex parte* communications and partiality in considering a challenge by an insurer to the appraisers' performance of their duties and ultimately concluded no evidence of impartiality existed. There, the insurer contended partiality had been demonstrated because the umpire and an appraiser had agreed on calculations, the final award exceeded that appraiser's estimate and further that the two had failed to include the insurer's appraiser in discussions to finalize the award. The court stated: "the challenging party must produce evidence 'that the appraiser's honesty or integrity is suspect'…[t]his evidence must 'transcend the interest of a prior business relationship.'" It found that none of the grounds raised by the insurer in its challenge illustrated partiality. First, the court asserted that "mere agreement between [an appraiser and

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[1092] Lakewood Mfg. Co. v. Home Assur. Co of N.Y., 422 F.2d 796, 24 Ohio Misc. 244 (6th Cir. 1970).

[1093] J.E. Davis Mfg. Co. v. Fireman's Fund Ins. Co., 210 F. 653 (N.D. N.Y. 1914).

umpire] is hardly misconduct; in fact, it is the entire purpose of the umpire's involvement in the process." Second, it determined that neither the policy language nor legal authority precluded an umpire from reliance on the figures of one appraiser over another, and the umpire was not directed under the policy to conduct a de novo review of damages. It additionally deemed failure to include an appraiser in final discussions permissible under the circumstances, where the appraiser had adequate opportunity to participate in the appraisal process, was encouraged to submit materials, had no further influential materials to submit and would not consent in any event to the calculations discussed. The decision distinguished the circumstances there with another more problematic scenario, such as where an appraiser is actually excluded from discussions.[1094]

If appraisers refuse to hear evidence pertinent and material to the matter in controversy such refusal is misconduct which will result in voiding an award.[1095] Generally, where a party's conduct affects the decision improperly, the other party may have the right

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[1094] St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (E.D. La. 2010), citing Carriage Court Condominium Owners Ass'n v. State Farm Fire and Cas. Co., 2009 WL 1565937 (E.D. La. 2009) and Prien Props., LLC v. Allstate Ins. Co., 2008 WL 1733591 (W.D. La. 2008)

[1095] Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 118 N.E. 2d 574 (1954).

to have the award vacated.

The death of an insured who had previously agreed to appraisal does not revoke the appraisal agreement. The date of the award should not be determinative. [1096] Estate laws will differ from state to state and should be consulted where this situation arises.

The resignation of one appraiser after the award was signed and delivered was held to be ineffective to invalidate the award.[1097]

The party attacking the impartiality or viability of an appraisal award has the burden of proof.[1098]

In those jurisdictions that tend to equate arbitration with appraisal, under certain circumstances, it has been held that the failure to follow statutory formalities may be waived, giving force and effect to an informal proceeding. A subsequent claim to set it aside for failure to follow statutory formalities was rejected.[1099]

[1096] Citizens Ins. Co. v. Coit, 12 Ind. App. 161, 39 N.E.766 (1895).

[1097] Eisenberg v. Styvesant Ins. Co., 87 N.Y.S. 463 (Sup. Ct. 1904).

[1098] Lundstrom v. United Services Auto. Ass'n-CIC, 192 S.W.3d 78 (Tex. App.-Houston 2006); Southern General Ins. Co. v. Kent, 187 Ga. App. 496, 370 S.E.2d 663 (1988).

[1099] Jacob v. Seaboard, Inc., et al, 1991 WL 2238765 (Conn. Super. Ct. 1991) and Jacob v. Seaboard, Inc., et al, 1991 WL 162314 (Conn Super Ct. 1991).

Where a party to the process was able to demonstrate that a mistake of law was made, some awards have been overturned.[1100]

Where the appraisers and umpire failed to deduct depreciation from their determination of replacement value, allegedly in contravention of policy terms, it has been held that such "mistakes" do not fall into the narrow category of errors in order to challenge the appraisal award.[1101]

Where the carrier moved to set aside the appraisal award, claiming that it erroneously included sales tax, used the wrong price to value certain raw materials, used a replacement value measure rather than actual cash value measure as required by the policy, and erroneously applied the insured's appraiser's own methodology to value finished goods, the carrier's proof of these allegations was held insufficient where it relied upon an affidavit from its forensic accountant who assisted the carrier's appraiser in preparation of his appraisal. The court reasoned that since the appraisal award listed only numbers without providing a basis for the figures, and the accountant was not a party to the

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[1100] Elberon Bathing Co., Inc. v. Ambassador Ins. Co., 77 N.J. 1, 389 A.2d 439 (1978); Jefferson Ins. Co. of New York v. Superior Court of Alameda County, 3 Cal.3d 398, 475 P.2d 880, 90 Cal. Rptr. 608 (1970); St. Paul Fire & Marine Ins. Co. v. Wright, 97 Nev. 308, 629 P.2d 1202 (1981).

[1101] Schreiber v. Pacific Coast Fire Ins. Co., 195 Md. 639, 648, 75 A.2d 108, 112 (1950).

deliberations of the umpire or the insured's appraiser, the accountant can claim no special insight into how the umpire calculated the award or the methodology applied. Because of this lack of direct knowledge, the affidavit was said to be insufficient to support a setting aside of the appraisal award as they involved speculative inferences and conclusory assertions.[1102]

As to mistake, the rule in Michigan is that relief may be granted where "the mistake or error relied on is clear and the correct result which should have been reached but for the mistake or error can be easily ascertained."[1103]

The North Carolina Court of Appeals in North Carolina Farm Bureau Mut. Ins. Co. v. Floyd Harrell,[1104] has stated that if the contractual appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress or other impeaching circumstances. In this case, the umpire determined that the loss exceeded the policy limits, and after awarding those limits determined that the salvage belonged to the

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1102 Hartford Fire Ins. Co. v. Adcor Ind., Inc., 158 Fed. Appx. 430, 205 WL 3419986 (C.A. 4 (Md.) 2005); Schreiber v. Pacific Coast Fire Ins. Co., 195 Md. 639, 75 A.2d 108 (1950).

1103 Professional Team, Inc. v. Safeco Ins. Co of America, 2006 WL 9322414 (Mich. App. 2006).

1104 North Carolina Farm Bureau Mut. Ins. Co. v. Harrell, 148 N.C. App. 183, 557 S.E.2d 580 (2001).

insured. Without stating that the umpire had exceeded his authority, the court confirmed that a simple mistake is not sufficient to set aside an award as this would open the door for a challenge of almost every appraisal award. The court stated that an appraisal award is not subject to being vacated because of an erroneous decision of a matter submitted to appraisal which was fairly and honestly made.[1105]

It is noteworthy that in some states like North Carolina, appeals are not permitted from a non-final or interlocutory decision and it has been determined that a decision enforcing or setting aside an appraisal award is a non-final interlocutory order which does not dispose of the entire case and is thus not appealable. Nevertheless, an interlocutory order may be immediately appealed in North Carolina where a substantial right would otherwise be lost. This exception may apply in some appraisal situations.[1106]

In Maryland, it has been held that the court should not review the findings of law and fact made by appraisers and substitute their

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1105 Id. at 189; *See also*, Enzor v. North Carolina Farm Bureau Mut. Ins. Co., 123 N.C. App. 544, 545-46, 473 S.E.2d 638, 639 (1996).

1106 Schuchart v. Auto-Owners Ins. Co., 164 N.C. App. 411, 595 S.E.2d 816 (2004); Turner v. Norfolk S. Corp., 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000); N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(2001).

judgment for that of the appraisers. Appraisers are expected to frame their awards on broad views of justice which sometimes deviate from the strict rules of law.[1107]

The participants to an appraisal are given great deference as the parties themselves have made an economic choice in advance of a resolution to settle their differences by appraisal rather than litigation. In exchange for avoiding costly and protracted litigation, the parties have agreed to a speedy and inexpensive but generally final and unalterable process.[1108]

Parties who choose appraisal thus must live with honest and relatively minor mistakes in exchange for the savings they otherwise accrue by selecting such a tribunal. The mistakes that will void an award are said to be in a very limited class. "[I]t is not sufficient to show that appraisers came to a conclusion or fact erroneously, however clearly it may be demonstrated that the inference drawn by them was wrong. It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they

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[1107] Schreiber v. Pacific Coast Fire Ins. Co., 195 Md. 639, 646-47, 75 A.2d 108, 111-12 (1950) (The Schreiber court, as other courts in Maryland, have used the terms "arbitrator" and "appraiser" interchangeably although the umpire in Schreiber was hired pursuant to an insurance appraisal.); Continental Mill & Feed Co. v. Doughnut Corp. of America, 186 Md. 669, 674, 48 A.2d 447, 449 (1946).

[1108] Schreiber, 195 Md. at 647.

intended to apply to the decision of the case, so that upon their own theory a mistake was made which has caused the result to be somewhat different from that which they reached by their reason and judgment."[1109]

A mistake that is sufficient to avoid the award must be "plain and comparable, such as an erroneous computation or calculation of the amount."[1110] An appraiser's mistakes of fact generally go uncorrected on review. Where an appraisal award is the result of erroneous findings of law, a court may correct such mistakes but where the law and facts are mixed, the award is generally conclusive.[1111]

In Michigan, it was held that an award which reflects a manifest mistake on the face of the award such as the use of two distinct definitions of ACV, market value as to the ACV of the property and replacement cost as to the ACV of the damage must be set aside.[1112]

Indeed, even an award which was premised upon an incorrect mathematical calculation has been sustained.[1113] However, where the parties agree the award contains a

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[1109] Id., at 648.

[1110] Id.

[1111] Id.; United States v. Farragut, 89 U.S. 406, 22 Wall 406, 22 L.Ed. 879 (1874).

[1112] Evanston Ins. Co. v. Cogswell Properties, LLC, 730 F.Supp.2d 248 (W.D. Mich. 2010).

[1113] Davis v. National American Ins. Co., 78 Mich. App. 225, 259 N.W.2d 433 (1977).

mathematical error, the court granted an upward modification.[1114]

The standards articulated in Schreiber are practically universal and establish that the party attacking the validity of an appraisal award bears the burden of proof that such appraisal was tainted by fraud, irregularity or mistake.[1115]

A fire loss appraiser's fraud, misconduct, carelessness, or partiality, resulting in an award grossly below the actual loss sustained, generally justifies setting aside the award.[1116]

It has been stated that only upon a showing of "clear convincing evidence of fraud, gross mistake, appraisers' misconduct or failure to perform duties," will an appraiser's award determining loss under a fire policy be set aside.[1117]

The appraisal award will be set aside upon the appraiser's failure to find sound value as required by the appraisal clause, when combined with the great inadequacy of the award, the undisputed evidence of the

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1114 Maiden Creek T.V. & Appliance, Inc. v. General Cas. Ins. Co., 2008 WL 351906 (E.D. Pa. 2008).

1115 Aetna Ins. Co. v. Murray, 66 F.2d 289, 290 (C.C.A. 10 (Okla) 1933).

1116 St.Paul Fire Marine Ins. Co. v. The Tire Clearing House, 58 F.2d 610 (8th Cir. 1932).

1117 Murray, *supra.*

partisan and partial attitude of the appraisers, together with the fact that much of the damage was not seen and taken on faith without adequate investigation. Under these circumstances, it was held to be appropriate for the court to make the ultimate determination thus depriving the appraisal of its binding effect.[1118]

There exists a presumption in favor of the regularity and fairness of appraisal awards and it is and should be difficult to set them aside. While an award may be attacked for any reason that would void a contract, as well as for fraud, palpable mistake of law or deciding any matter by chance or luck, absent such evidence, the award should be sustained.[1119]

In Azar v. Eureka-Security Fire & Marine Ins. Co.,[1120] it was held that an award may be set aside if the appraisers are guilty of partiality or misconduct substantially affecting the award. It is interesting to note how the court viewed the conduct of the various parties and how it impacted on the result. The court ultimately struck the award and stated as follows:

[1118] Azar v. Eureka-Security Fire & Marine Ins. Co., 4 F. Supp. 574 (S.D. Tex. 1933).

[1119] Southern General Ins. Co. v. Kent, 187 Ga. App. 496, 497, 370 S.E.2d 663, 664 (1988); Pacific Nat. Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

[1120] Azar, *supra.*

The evidence overwhelms here that the appraiser for the insurers, looking upon himself as a champion, frankly and openly proceeding with his part in the appraisement with the purpose of protecting and advancing their interests, and in a manner calculated to do so, regarding the appraiser for the plaintiff as the opposing champion for his side. Resourceful, skillful, and energetic, in diligence and preparedness, he overwhelmed the other appraiser, who, though as complete, was by no means as effective a partisan. In fact, plaintiff's appraiser, while stubbornly insisting on a total loss, was so unenergetic and unhelpful in combating the specific contention of the insurer's man-at-arms, that the umpire was forced to climb into the lift himself and fend a little for the plaintiff's side to keep the insurer's champion from sweeping the field. This resulted in imposing on the umpire for a brief space the great burden of preparation and consideration which it was not contemplated in the agreement he should have to undertake. It resulted also in raising

> the figures which the appraiser for the insurer had come prepared to maintain from something over $5,000 to $8,000 finally arrived at. It did not result, however, in bringing about an appraisement of the kind intended in which each appraiser, proceeding in a disinterested and impartial way, would undertake to arrive at a fair and impartial result, submitting to the umpire for decision, the points of difference upon which they could not agree, nor did it result in a just award.[1121]

As discussed more fully in Chapter I (C), in those states that equate appraisal with arbitration, care must be taken in commencing any effort to set aside an appraisal award within the statutory time period provided for challenging an arbitration award.[1122] For example, in Connecticut, a state that has traditionally equated appraisal and arbitration, it was held that where procedural objections to

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[1121] Azar, 4 F. Supp. 574; *See also*, J.E. Davis Mfg. Co. v. Fireman's Fund Ins. Co., 210 F. 653 (N.D.N.Y. 1914); Lawler v. Hartford Fire Ins. Co., 143 Me. 40, 54 A.2d 685 (1947); Corder v. Michigan Mut. Hail Ins. Co., 279 Mich. 697, 273 N.W. 320 (1937); Jones v. Orient Ins. Co., 184 Mo. App. 402, 171 S.W. 28 (1914); Orr v. Farmer's Mut. Hail Ins. Co. of Mo., 356 Mo. 372, 201 S.W.2d 952 (Mo. 1947) (process dominated by insurer's arbitrator); Fass v. Liverpool, London & Globe Fire Ins. Co., 105 S.C. 364, 89 S.E. 1040 (1916).

[1122] Corriveau v. Aetna Cas. & Sur. Co., 1992 WL 310638 (Conn. Super. Ct. 1992), *aff'd,* 33 Conn. App. 921, 635 A.2d 887 (1994); *See also*, Town of East Hartford v. East Hartford Mun. Employee's Union, Inc, 206 Conn. 643, 649, 539 A.2d 125, 129 (1988).

the appraisal process are raised, they must be asserted in timely fashion pursuant to the Connecticut General Statutes, § 52-418 and 420. In this case, the court determined that a challenge to the award was required to be raised within 30 days of the award.

Additionally, in states such as Connecticut, an appraisal award may be set aside for failure to follow other formalities required by arbitration statutes, as for example the failure of the umpire and appraisers to be sworn.[1123]

It has been said that an appraisal award has been vacated where the umpire failed to disclose that he had worked as an accountant for the appraiser chosen by the insurance company on five prior losses, none of which involved the same carrier.[1124]

An irregularity such this will justify setting aside an appraisal award and does not refer to the result of the appraisal, but to the process employed in reaching that result.[1125]

In the state of Texas, an appraisal award made pursuant to the provisions of an

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1123 Vandrilla v. Middlesex Mut. Assur. Co., 1994 WL 668756 (Conn. Super. Ct. 1994).

1124 Figi v. New Hampshire Ins. Co., 108 Cal. App.3d 772, 166 Cal. Rptr. 774 (1980).

1125 Press v. Maryland Cas. Co., 227 Pa. Super. 537, 324 A.2d 403 (1974).

insurance contract is binding and enforceable.[1126] Texas courts generally recognize only three categories of situations in which an appraisal award may be disregarded. The first is when the award was made without authority. The second category is when the award was the result of fraud, accident, or mistake and the last is when the award was not made in substantial compliance with the terms of the contract.[1127]

In Colorado, however, appraisers' intent in agreeing upon an award is not dispositive. It has been held that an award and appraisers' intent in determining it "cannot be examined in a vacuum…[and] must be examined in light of all facts and claims." There, two appraisers had arrived at an actual cash value for an insured's loss, and the insurer deducted the amount it had already paid the insured for his personal property claim and paid him the remainder. While the insured contended that he was owed the full amount awarded, the fact that the

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[1126] Wells v. American States Preferred Ins. Co., 919 S.W.2d 678, 683 (Tex. App.-Dallas 1996); Barnes v. Western Alliance Ins. Co., 844 S.W.2d 264 (Tex. App.- Fort Worth, 1992);Breshears v. State Farm Lloyds, 155 S.W.3d 340 (Tex. App.-Corpus Christi, 2004);

[1127] Allison v. Fire Ins. Exchange, 98 S.W.3d 227, (Tex. App.-Austin 2002); Gardner v. State Farm Lloyds, 76 S.W.3d 140 (Tex. App.- Houston [1st Dist.] 2002); Wells, 919 S.W.2d 678; Providence Lloyds Ins. Co. v. Crystal City Independent School Dist., 877 S.W.2d 872, 875-76 (Tex. App.-San Antonio 1994); Breshears v. State Farm Lloyds, Id.; Franco v. Slavonic Mut. Fire Ins. Assoc., 154 S.W.3d 777 (Tex. Ct.-Houston [14th Dist.] 2004); Richardson v. Allstate Texas Lloyds, 2007 WL 1990387 (Tex. App-Dallas 2007); Amine v. Liberty Lloyds of Texas Ins. Co., 2007 WL 2264477 (Tex. App-Houston 1 Dist. 2007).

appraisers did not intend the subtraction did not "ineluctably establish that [the insured] is entitled to that sum if indeed [the insurer] overpaid [the insured]."[1128]

Some states permit a motion to modify or correct an appraisal award under certain precisely stated circumstances. By statute in the state of Connecticut, for example,[1129] a motion to modify an appraisal award may be maintained upon proof of one of three defects. It may be modified where there had been evident material miscalculation of figures or evident material mistake in a description of any person, thing or property referred to in the award. Secondly, if the umpire has awarded upon a matter not within the submission unless it is a matter not affecting the merits of the award and, finally, the award may be modified if it is imperfect as to a matter of form which does not affect the merits of the controversy between the parties. In these situations, the purpose of the modification is to "promote justice between the parties."[1130]

In Louisiana, errors contained within an appraisal award and which render it unenforceable may be correctable by the appraisers and do not necessarily demand that

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[1128] Rabin v. Fidelity Nat. Property. & Cas. Ins. Co., 863 F. Supp.2d 1107 (D. Colo. 2012).
[1129] Modification or Correction Award. Conn. Gen. Stat. §52-419 (2003).
[1130] Id.

the award simply be ignored. In a case where a court identified multiple errors in one award, it deemed a remand to the appraisers to be "'the most reasonable approach.'" The court there relied upon Mississippi law in asserting the "'general rule that the appraisers, rather than the trial judge or jury, should correct errors [in an appraisal award] that the judge or jury may find to exist. This approach would be inappropriate *only when* an appraisal is vacated for fraud or another reason casting doubt on the basic competency of the appraisers.'"[1131]

Consistent standards have been reflected in Canada as well. There, an award was deemed binding where a decision by appraisers arose from the insurance contract, and there were no allegations of fraud, bias, lack of impartiality nor invalidity of the decision. The court recognized that "the function of the appraisers is to arrive at a decision on the basis of their own skill, knowledge and expertise...The decision of a valuer is binding on the parties and cannot be set aside or remitted except for fraud, collusion, bias or disqualification by way of interest or lack of impartiality." Thus, the insured could not ignore the finding and initiate

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[1131] St. Charles Parish Hospital Service Dist. No. 1 v. United Fire and Cas. Co., 681 F.Supp.2d 748 (E.D. La. 2010), citing Mitchell v. Aetna Cas. and Surety Co., 579 F.2d 342 (5th Cir. 1978).

an action in contract.[1132]

A decision that confirmed this principle added that it is "elementary that the same result will follow where the umpire does something which the empowering statute under which he is purporting to act does not empower him to do." There, the appraisers and umpire were not empowered to make a disposition of an entire controversy as a court would ordinarily do or determine issues other than the value of the property and amount of loss. It asserted that "disputed legal issues," including those related to value, were not within the scope of the appraisers' or umpire's authority.[1133]

In sum, appraisal awards enjoy presumptive validity and absent significant evidence of fraud, the exercise of excess authority, violation of policy or statute, generally both the insurer and the insured should assume that an appraisal award will not be vacated. The courts should exercise great restraint in asserting their power to vacate or set aside an appraisal award. To permit anything but limited judicial review defeats the

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[1132] Pfeil v. Simcoe & Erie General Ins. Co., 1986 CarswellSask 188 (1986).

[1133] Shinkaruk Enterprises Ltd. v. Commonwealth Ins. Co., 85 Sask. R. 54, 71 D.L.R. (4th) 681 [1990] I.L. R. 1-2648 (C.A.); *The Saskatchewan Insurance Act*, R.S.S. 1978, c. s.108 s. 128.

well settled purpose and public policy which favors appraisal.[1134]

[1134] Riley v. The Farmer's Fire Ins. Co., 1999 Pa. Super. 179, 735 A.2d 124 (1999); Boulevard Assoc. v. The Seltzer P'ship, 445 Pa. Super. 10, 664 A.2d 983 (Pa. Super.1995).

E] ENFORCING THE AWARD

Appraisal awards often may be enforced using the statutes available for enforcement of arbitration awards.[1135]

In states like California and Connecticut[1136] that have equated the process of appraisal with arbitration to some degree, the enforcement procedures relevant to arbitration awards have been made applicable to appraisal awards as well. In California, the supreme court ruled in Jefferson Ins. Co. of New York v. Superior Court of Alameda County,[1137] that section 1280 of the Code of Civil Procedure which contains the enforcement machinery with respect to arbitrations are made applicable to insurance appraisals.

In an action to enforce an appraisal award, an appraiser who acted on behalf of the insurer attempted to prove by his testimony his authority from the company to execute the original appraisal award. It was held that the

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[1135] Covenant Ins. Co. v. Banks, 177 Conn. 273, 280, 413 A.2d 862, 865-66 (1979); Reyes v. Allstate Ins. Co., 1996 WL 157306 (Conn. Super Ct. 1996); *See, e.g.*, Devonwood Condominium Owners Ass'n v. Farmers Ins. Exchange, 162 Cal. App.4th 1498, 77 Cal. Rptr.3d 88 (2008); Louise Gardens of Encino Homeowners Ass'n, Inc. v. Truck Ins. Exchange, Inc., 82 Cal. App. 4th 648, 661, 98 Cal. Rptr.2d 378, 2000 Daily Journal D.A.R. 8209 (Cal. App.2 Dist. 2000).

[1136] Agreements to Arbitrate. Conn. Gen. Stat. §52-408 (2003).

[1137] 3 Cal.3d 398, 475P.2d 880, 90 Cal. Rptr. 608 (1970).

authority of an appraiser can always be proven by the testimony of the appraiser himself as he is always a competent witness on this matter.[1138]

An appraisal award was confirmed where an insured moved for confirmation within 60 days of the date the award was rendered)("Pursuant to 42 P.A. C.SA. § 7342(b), a court 'shall' confirm an appraisal award and 'enter a judgment or decree in conformity with the order' upon 'application of a party made more than 30 days after' the award was rendered. Confirmation of the award may be challenged only upon a "clear show[ing] that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award."[1139]

In California, once the award has been rendered, the parties have three options. They may seek to confirm the award by filing a petition in the Superior Court, ultimately resulting in a judgment which can be enforced as any other judgment.[1140] Secondly, the parties have 100 days in which to attempt to have the

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[1138] Isaac v. Donegal & Conoy Mut. Fire Ins. Co., 301 Pa. 351, 152 A. 95 (1930); Curran v. National Life Ins. Co. of U.S., 251 Pa. 420, 435, 96 A. 1041, 1046 (1916).

[1139] See Williamson v. Chubb Ind. Ins. Co., 2013 WL 3009911 (E.D.Pa. 2013).

[1140] Award, etc. Cal. Bus. & Prof. Code § 6203(d)(5) (West 2003) (By statute, the parties have four years to move to confirm).

appraisal award corrected or vacated. It has been held that an appraisal award can be corrected only where there is an obvious mathematical error. Errors of fact or law, even when obvious, do not provide a basis to correct or vacate the award.

In Florida it was held improper for the trial court to enter judgment on a breach of contract claim against the Florida Insurance Guarantee Association (FIGA) pursuant to an appraisal of the loss with adjudicating FIGA's affirmative defenses contesting coverage of particular elements of the loss under the policy issued by the insolvent insurer.[1141]

In Texas, it has been held that an insured's motion seeking to enforce an appraisal award did not entitle the insured to a judgment for the amount of an appraisal award where the insured offered in support only the signed award but failed to attach the insurance policy and failed to allege that admissible evidence conclusively proved all the essential evidence of a breach of contract claim or that there were no genuine issues of material fact or that the insured was entitled to judgment as a matter of law, since such an award determines only the amounts of loss but

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[1141] Florida Ins. Guar. Ass'n. Inc. v. Olympus Ass'n, Inc., 34 So.2d 791, 35 Fla. L. Weekly D1117 (Fla.4d DCA. 2010) (The award was made without consideration of the policy's coverage provisions).

not other issues including the insurer's liability under the policy.[1142]

Similarly, in the state of Washington, where the carrier pointed out the insured's failure to demonstrate that the unpaid damage was caused by the covered peril of lightning when the insured sought to enforce the award, the appellate court stated:

> "As appealing parties, [the insureds] had the burden of presenting a record sufficient to allow for a review of the dismissal of the insureds' breach of contract claim."[1143]

In Louisiana, when confronted with an insurer's argument that the appraisal provision violated Louisiana statute La.R.S. 22:868 by divesting the district court of jurisdiction over the insured's claim, the court disagreed, concluding that the appraisal provision is judicially enforceable in Louisiana.[1144]

In federal court, whether an issue is arbitrable under the Federal Arbitration Act is a

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[1142] Security National Ins. Co. v. Waloon Investment Co., 384 S.W.3d 901 (Tex.App.-Houston [14th Dist] 2012).

[1143] Allan and Marshall v. State Farm Fire & Cas Co., unpublished opinion, No. 67507-9-1 Div. One. (Court of Appeals, WA,(2012)).

[1144] Dore v. Shelter Mut. Ins. Co., 2013 WL 5915141 (La. App. 1st Cir. 2013).

substantive federal issue.[1145] However, state law, not federal substantive law, govern whether an appraisal clause in a property insurance policy was an arbitration clause enforceable under the Federal Arbitration Act.[1146] In Rastelli Bros. Inc. v. Netherlands Ins. Co.,[1147] the court determined that as New Jersey recognizes a great distinction between arbitration and appraisal under an insurance policy, and as New Jersey law applies, the appraisal clause was not an arbitration enforceable under the Federal Arbitration Act. In dismissing the insured's action which sought an order directing the insurer to proceed with appraisal, the district court, in essence, found no federal jurisdiction in order to entertain the issue.

The lesson here is that the party or practitioner seeking to enforce an appraisal provision by judicial intervention should bring the action in state court unless another independent basis exists for federal jurisdiction, such as diversity of citizenship.

As to claims arising from the attack on the World Trade Center of September 11, 2001,

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[1145] Maritime Transaction & Commerce defined, 9 U.S.C. 1 (2003); Rastelli Bros., Inc. v. Netherlands Ins. Co., 68 F. Supp.2d 440 (D.N.J. 1999).

[1146] Rastelli Bros. Inc., Id.; Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058 (5th Cir. 1990) (appraisal award was not arbitration award subject to the Federal Arbitration Act.).

[1147] Rastelli Bros. Inc., Id.

it has been determined that these claims are appraisable in that they do not fall under the restrictions and limitations imposed by the Aviation and Security Act, §201(B)(2) (amending the Act §408 (A)) which was enacted after the World Trade Center attack to extend limitations on liability of the airlines and eventually to persons with a property interest in the World Trade Center. It has been held that there is nothing in the legislation or its history to suggest that Congress in any way intended to affect the rights and obligations between those having an interest in the World Trade Center complex and their insurers.[1148] Further, it was held that when Congress conferred jurisdiction on the United States District Court as to all actions relating to the events of September 11, 2001, it did not intend to deprive the victims of their contractual rights to appraisal.[1149]

In Florida, the court was forced to reconcile the statute [Fla. Stat. §627.70131(5)(a)] which set time parameters for payment of interest on an insurer's payment of a claim, with the terms of an insurance contract between the parties which it was asserted, dictated these details. The statute

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1148 S.R. Intern. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC, 2002 WL 1905968 (S.D.N.Y. 2002).

1149 Id.; *See also*, Hudson News Co. v. Federal Ins. Co., 258 F. Supp.2d 382 (D.N.J. 2003) (holding the U.S. District Court did not have exclusive jurisdiction over claims arising as a result of terrorist-related aircraft crashes and removed the matter to state court).

includes language that it cannot be nullified or otherwise altered by policy language. The court found the last sentence of the statute to be dispositive.[1150]

Florida Statute §627.70131(5)(a) provides in part: "Within 90 days after an insurer receives notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment. Any payment of an initial or supplemental claim or portion of such claim made 90 days after the insurer receives notice of the claim, or made more than 15 days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, whichever is later, bears interest at a rate set forth in §55.03."

[1150] Id.

F] RECOVERY OF ATTORNEYS' FEES

In Florida, where the insured filed suit to confirm an appraisal award before the payment of the claim and obtained a final judgment confirming the award, the court may award attorneys' fees to the insured. In Travelers Indem. Ins. Co. of Ill. v. Meadows MRI, LLC,[1151] the court stated that where an expensive and drawn out appraisal was due to a property insurer's disputed value estimation, the insured was entitled to recover attorneys' fees under a Florida statute requiring the court to award attorneys' fees under such circumstances. § 627.428(1) of the Florida statutes provides:

> "Upon the rendition of a judgment ... by any of the courts of this state against an insurer and in favor of any named ... insured ... under a policy ... executed by the insurer, the trial court, or in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured ... a reasonable sum as fees or compensation for the insured's ... attorney prosecuting

[1151] 900 So.2d 676, 30 Fla. L. Weekly D 962 (Fla. 4th DCA 2005).

the suit in which the recovery is had."

The purpose of the statute was to discourage the contesting of valid claims by insurance companies and to reimburse successful insureds for their attorneys' fees when they are compelled to defend or sue to enforce their insurance contracts.

However, trial level courts have been cautioned to consider whether the insured's action was filed to force the insurer to conduct an appraisal or merely as a preemptive lawsuit intended to obtain attorneys' fees. Except under the most extraordinary circumstances attorneys' fees for bringing a lawsuit to force an insurer to request an appraisal should not be recoverable by the insured; instead the fees should normally be limited to the work associated with filing a lawsuit after the insurer has ceased to negotiate or has breached the contract.[1152]

It has been clarified that an insured may recover such fees even where the insurer has invoked appraisal and there has not been a final judgment. In one Florida matter, a legitimate purpose was served by a lawsuit

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[1152] Hill v. Sate Farm Florida Ins. Co., 35 So.3d 956 (Fla. 2d DCA 2010).

which had motivated an insurer to pay an appraisal award and additional living expenses where before suit the insurer had not been moving forward with the appraisal process.[1153]

A previous Florida holding has expounded upon the principle of recovery of attorneys' fees by setting forth several foundational rules, in a case where attorneys' fees were not warranted following a disagreement over an amount of loss and a subsequent appraisal. The court began its analysis by establishing that, "'Under Florida law, each party generally bears its own attorneys' fees unless a contract or statute provides otherwise'" and cited §627.428, Florida Statutes as applicable. The holding acknowledged that the statute must be strictly construed, but stated that should a dispute fall within its scope, an insurer must pay attorneys' fees regardless of whether it acted in good faith once the insurer loses. The court addressed the statute's legislative purpose; to encourage dispute resolution without judicial intervention, to deter insurers from denying valid claims, and to reimburse insureds who are "compelled" to file an action to recover under their policies. A prerequisite for recovery of such fees is a judgment rendered in favor of an insured, which may consist of a claim

[1153] Barreto v. United Services Auto Ass'n, 82 So.3d 159 (Fla.4th DCA 2012).

settlement or payment of appraisal award in Florida. However, it clarified that fees were inapplicable where an insurer compensates an insured pursuant to an appraisal award before an action is filed, did not wrongfully withhold benefits, or if it timely participated in appraisal and made payment of the award absent court involvement. Attorneys' fees were improper where there had been no judgment entered and no motion brought to confirm the appraisal award and the court found no evidence that the insurer was not willing to pay the award.[1154]

Likewise, attorneys' fees were deemed appropriate in Florida where insureds successfully defeated their insurer's request that a trial court direct an umpire to issue an itemized appraisal award for hurricane damage sustained to their home. The court stated, "an insured is entitled to attorneys' fees under §627.428, Florida Statutes, where it was reasonably necessary for the insured to litigate in court in connection with an appraisal under an insurance policy." It quoted the Fourth District: "whether suit is filed before or after the invocation of the appraisal process is not determinative of the insured's right to fees; rather, the right to fees turns upon whether the filing of the suit served a legitimate purpose."

[1154] Grow v. First Nat'l. Ins. Co. of America, 2008 WL 141481 (N.D.Fla. 2008).

However, attorneys' fees are not to be awarded where parties must file an action seeking the court's appointment of an umpire following a disagreement on this issue. Under these circumstances, the insureds "reasonably responded" to their insurer's request for an itemized appraisal, "attained a benefit by the trial court's ruling," and received payment from the insurer of an appraisal award rendered in their favor. Thus, the District Court reversed the lower court's finding that attorneys' fees were not called for and remanded on this point.[1155]

Conversely, the court reversed summary judgment and a related award of attorneys' fees upon finding genuine issues of material fact existed as to whether it was necessary for insureds to file suit against their insurer to resolve their claim. In that case, the court evaluated the issue of attorney's fees where an insurer paid an insured under a policy after an action was filed. Case law established that "an insurer's post-suit payment of additional policy proceeds entitles the insured to §627.428 attorney's fees where the insurer 'wrongfully caus[ed] its insured to resort to litigation in order to resolve a conflict with its insurer when

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[1155] Pineda v. State Farm Florida Ins. Co., 47 So.3d 890 (Fla. 3d DCA 2010); See Ajmechet v. United Auto. Ins. Co., 790 So.2d 575, 26 Fla L. Weekly D1816 (2001) (reversing a denial of a Florida insured's motion for attorney's fees, where an insurer paid an award following a determination of an amount of loss through appraisal. The insured was entitled to attorney's fees under §627.428, Florida Statutes "[b]ecause the payment was obviously effected by the lawsuit.").

it was within the company's power to resolve it.'" It also clarified that "the law does not provide any general mechanism to impose attorneys' fees against one party or the other merely because the negotiation process is difficult. It is only when the claims adjusting process breaks down and the parties are no longer working to resolve the claim within the contract, but are actually taking steps that breach the contract, where the insured may be entitled to an award of fees under §627.428." Under these circumstances, "significant factual issues" remained surrounding the denial of coverage, compliance with policy conditions and thus insureds were not entitled to attorneys' fees.[1156]

A Florida judgment awarding attorney's fees was thus reversed where there was "no doubt that [the insured] filed suit solely in order to obtain attorney's fees under its theory that arbitration is the equivalent of filing suit and obtaining judgment…[a] stance necessary in order to attempt to qualify for entitlement to fees under §627.428(1), Florida Statutes…" There, no suit was filed prior to payment of the appraisal award by the insurer. While the court acknowledged that attorney's fees have been awarded to compel an insurer to engage in Appraisal or under circumstances where a

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[1156] Beverly v. State Farm Florida Ins. Co., 50 So.3d 628 (Fla.2d DCA 2011).

lawsuit has been filed prior to payment of an award, it observed that no decision had addressed an insured's right to recover attorney's fees when the award was fully paid prior to suit. Neither circumstance was found to apply, nor did a third in which attorney's fees may be awarded for litigating entitlement to them. The court confirmed that §627.428(1) allowed recovery of attorney's fees only "upon the rendition of a final judgment against an insurer in favor of an insured," and, finding no final judgment occurred, attorney's fees were not appropriate.[1157]

In Florida, a court granted insureds an award of reasonable attorneys' fees upon a finding that, "an insured may recover attorney's fees incurred in reaching a settlement, compelling arbitration or appraisal, or conducting an appraisal" under Florida Statutes, § 627.428. Such fees were warranted where, as here, insureds "were forced to file a declaratory action to compel [the insurer's] participation in an appraisal process that was contemplated by the insurance contract between the parties" and a final judgment was rendered. It concluded the entry of judgment triggered the statute's applicability.[1158]

[1157] Nationwide Prop. & Cas. Ins v. Bobinski, 776 So.2d 1047 (Fla. 5th DCA 2001).

[1158] Jin Zhi Star Lt. LLC v. American Zurich Ins. Co., 2009 WL 2899913 (S.D. Fla., 2009); See also Travelers of Florida v. Stormont, 43 So.3d 941 (Fla. 3d DCA 2010).

However, care must be taken by the court to make clear its intent that an order be deemed a "final judgment." In State Farm Florida Ins. Co. v. Hill[1159] the insured brought a breach of contract action alleging the carrier's failure to pay all proceeds due. The matter proceeded to appraisal and an award was rendered. The Circuit Court granted the insured's motion to confirm the award and entered "final judgment" on the award. Subsequently, the Circuit Court awarded summary judgment to the insurer. The District Court asked the Circuit Court to review the finality of the judgment by the Circuit Court whereupon it concluded that the earlier order was a "final judgment" and voided the award of summary judgment to the carrier. Upon appeal, the District Court reversed, holding the order did not contain language of finality disposing of the breach of contract action and, together with the nature of the discussion between the parties and the trial court, indicated the order was not intended as a final judgment in the case.

Where an action for breach of contract remained after a final judgment had confirmed a previously paid appraisal, a Florida court evaluated whether that final judgment entitled the insured to attorneys' fees. It identified

[1159] 2008 WL 5191746, 33 Fla. L. Weekly D 2828, (Fla. 2d DCA 2008) controversy over whether the suit was filed to force the insurer to conduct an appraisal, or if it was "merely a preemptive lawsuit intended to obtain attorneys' fees for the usual efforts in negotiating an insurance claim." The court quoted precedent stating that "[the insureds] were entitled to an award of attorneys' fees because the lawsuit 'forced' [the insurer] to request an appraisal and to pay significant additional amounts." In the instant matter, it clarified its vision for this prior ruling: "the fees we envisioned…were the fees necessary to force [the insurer] back to the negotiations table to resolve the dispute within the terms of the insurance contract. The appraisal process, for example, is not legal work arising from an insurance company's denial of coverage or breach of contract; it is simply work done within the terms of the contract to resolve the claim. Thus, except under the most extraordinary of circumstances, we do not envision fees for such work to be recoverable…instead, the fees should normally be limited to the work associated with filing the lawsuit after the insurance carrier has ceased to negotiate or has breached the contract and the additional legal work necessary and reasonable to resolve the breach of contract."[1160]

Confirmation of an appraisal award was

[1160] Hill v. State Farm Florida Ins. Co., 35 So.3d 956 (Fla. 2d DCA 2010).

deemed appropriate in Florida, however, where plaintiff was forced to file an action to be compensated for its damages and the insurer sought appraisal once the action was started. The insurer also did not pay the insured any amount rendered by appraisal until the insured filed a motion to confirm the award. The court could not confirm the award, however, without discussing coverage and the applicable deductible, and stated that defenses available to the insurer extended beyond "lack of coverage for the entire claim or violation of one of the standard policy conditions."[1161]

However, in Florida it has been held that an appraisal award may not be confirmed where it was already paid in full prior to an insured's motion to confirm. Under those circumstances, in evaluating whether confirmation of the award was proper and in the face of the insurer's argument that the insured had taken such an action to create claims for statutory interest and attorney's fees, the court examined the goal of the appraisal process: "to resolve disputes without litigation." The court found no basis to confirm an award where, as here, the insurer invoked appraisal pursuant to the policy, asserted no dispute over coverage, the parties' agreement on an

[1161]Sands on the Ocean Condominium Ass'n, Inc., v. QBE Ins. Corp., 2009 WL 790120 (S.D. Fla., 2012)..

umpire without court intervention and the insurer's payment of the appraisal award within days of the umpire's decision.[1162]

Similarly, a Florida court reversed an order confirming an appraisal award where an insurer timely engaged in appraisal and made payment of the award when the issue of attorneys' fees was raised. The court found confirmation unnecessary in light of the intent and purpose of appraisal where the insurer had complied with the terms of alternative dispute resolution pursuant to the subject policy, given "the laudable goal of the appraisal process – to resolve disputes without litigation – and the potential to evade that goal by resort to the court system." It further found that affirming the confirmation order and making a future award of attorneys' fees possible contradicted the intent behind those fees to "plainly place the insured or beneficiary in the place she would have been if the carrier had reasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees."[1163]

In a federal diversity case, the contractual right to submit a factual dispute to

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[1162] State Farm Florida Ins. Co. v. Silber, 72 So.3d 286 (Fla. 4th DCA 2011).
[1163] Federated National Ins. Co. v. Esposito, 937 So.2d 199 (Fla. 4th DCA, 2006), citing Travelers Ind. Ins. Co. of Illinois v. Meadows MRI, LLP, 900 So.2d 676, 30 Fla. L. Weekly D 962 (Fla. App. 4 Dist. 2005).

an appraisal is one that the federal courts are required to enforce if such a right is enforceable under the state law where the federal court is sitting.[1164]

One Florida decision actually held that insureds were entitled to receive attorneys' fees after prevailing in appraisal but without having obtained a judgment against their insurer. It cited §627.428, Florida Statutes, and the court illuminated the statute's purpose as to place the insured where it would have been "if the carrier had reasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees." The law in Florida provides that where an insurer invokes its right to appraisal after an insured commences an action against it and "as a consequence…the insured recovers substantial additional sums," then attorneys' fees may be appropriate. Alternatively, where cases have addressed attorneys' fees in connection with an action filed after an insurer invokes its right to appraisal, decisions have indicated that "whether suit is filed before or after the invocation of the appraisal process is not determinative of the insured's right to fees; rather, the right to fees turns upon whether the filing of the suit served a legitimate purpose." Here, the insureds were entitled to recover

[1164] Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938); Cedant Corp. v. Forbes, 70 F. Supp.2d 339, 344-45 (S.D.N.Y. 1999).

attorneys' fees because circumstances did not show that they had "raced to the courthouse or…filed suit simply for the purpose of securing a fee award."[1165]

In Florida, when the insurer became insolvent, The Florida Insurance Guarantee Association was obligated to pay an appraisal award as it was rendered pursuant to the policy but was not obligated to pay on award for attorneys' fees which arose by operation of law.[1166]

1165 Lewis v. Universal Prop. & Cas. Ins. Co., 13 So.3d 1079 (Fla 4th DCA 2009).

1166 Petty v. Florida Ins. Guar. Ass'n., 80 So.3d 313, 27 Fla. L. Weekly 834 (Fla. 2012).

CHAPTER XI

MORTGAGEES AND LOSS PAYEES

A] WHEN THE AWARD IS BINDING UPON A MORTGAGEE

The rights of a mortgagee under a property insurance policy are fixed by a clause attached to the policy generally known as the "Standard Mortgage Clause." It generally states that as to the interest of the mortgagee, such interest shall not be invalidated by any act or neglect of the mortgagor or owner of the described property.

The mortgage clause also entitles the mortgagee to receive or control the proceeds of the contract to the extent of its interest, subject to statute. Many states, including New York, allow the insured to apply the proceeds to the reconstruction as long as they were not in default of the mortgage agreement on the date of loss and gave the mortgagee written notice of the loss in a timely manner.[1167]

Where the owner and insurer of a particular parcel proceeded to resolve the loss by resorting to the appraisal provision, the resulting award is generally not binding upon the mortgagee who had no notice of and did not participate in the appraisal process.[1168] To rule otherwise would result in at least a portion of the interest of the mortgagee being invalidated by an act of the owner in violation of the mortgage clause. As between the mortgagee and the insurance company, the language of the mortgage clause must be permitted to operate and thus no act of the owner can deprive the mortgagee of the protection which the policy afforded it, to the full value of the property insured for its benefit. Though the mortgagee may have entitlement to the proceeds after such an appraisal award, its rights to proceed further are not foreclosed as a result of such an award.[1169]

This result is appropriate as the Mortgagee Clause in the Standard Fire Policy

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[1167] *See, e.g.*, Construction of Clauses and Covenants in Mortgages and Bonds or Notes, New York Real Property Law §254 (McKinney 2003).

[1168] Syracuse Savings Bank v. Yorkshire Ins. Co., Ltd., 301 N.Y. 403; 94 N.E.2d 73 (1950); Bergman v. Commercial Assur. Co., 92 Ky. 494, 18 S.W. 122 (1892); Hathaway v. Orient Ins. Co., 134 N.Y. 409, 32 N.E. 40 (1892); McDowell v. St. Paul Fire & Marine Ins. Co., 207 N.Y. 482, 101 N.E. 457 (1913).

[1169] Beaver Falls Building & Loan Ass'n v. Allemania Fire Ins. Co., 305 Pa. 290, 157 A. 616 (1931); Syracuse Savings Bank, *supra*.

creates independent insurance of the mortgagee's interest just as if it had received a separate policy from the insurance company but without any repugnant or inconsistent conditions imposed upon the owner and free from invalidation by the latter's "act or neglect."[1170] Other jurisdictions have followed this view.[1171]

It has also been held that the mortgagee is not bound by the owner's proof of loss nor any admission made by the owner concerning the value of the property or the amount of damage in any proceeding by the mortgagee against the insurer.[1172]

The view that the mortgagee's rights may not be compromised by the actions of the insured or the insurer is not universally accepted, however. For example, in Judge Desmond's dissent in Syracuse Savings Bank[1173] he points out that none of the cases cited by the majority are authority for a finding that the mortgagee, despite the policy language, has some separate right to conduct or control the appraisal. He points out that the rule is only

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[1170] Syracuse, Id.; *See e.g.,* McDowell, 207 N.Y. 482; Savarese v. Ohio Farmer's Ins. Co., 260 N.Y.45, 182 N.E. 665 (1932); Hastings v. Westchester Fire Ins.Co., 73 N.Y. 141(1878).

[1171] Dragon v. Automobile Ins. Co., 265 Mass 400, 164 N.E. 383 (1929); *See also*, Hardy v. Lancashire Ins. Co., 156 Mass 210, 30 N.E. 1021 (1892).

[1172] Browning v. Home Ins. Co., 71 N.Y.508 (1877); Hathaway, 134 N.Y. 409.

[1173] Syracuse, 301 N.Y. at 415.

that they cannot be affected by any admissions or declarations made by the owner of the property.[1174] Judge Desmond goes on to point out that the language of the appraisal clause which contemplates an owner-appointed appraiser and an insurer-appointed appraiser, cannot be stretched to let in a third appraiser, as the presence of a third appraiser would destroy the policy's "plainly pictured scheme of appraisal" and he finds that no reason has been shown why such a stretching should be attempted. He concluded by stating that all the mortgagee is entitled to is the amount of the loss determined as per the policy, which according to his logic, contemplates an appraisal between the insured and insurer alone.[1175] While contained in the dissenting opinion, the logic and reasoning is unassailable.

States that have not ruled on this issue might consider adopting this approach should it be advocated.

In Erie Brewing Co. v. Ohio Farmer's Ins. Co.,[1176] the court held that the mortgagee need not have notice of or participate in the appraisal process in order for an award to be valid.

[1174] Hathaway, 134 N.Y. at 4133.
[1175] Syracuse, 301 N.Y. at 416.
[1176] 81 Ohio St. 1, 89 N.E. 1065 (Ohio 1909).

A mortgagee in Louisiana has been bound by an appraisal award despite the fact that it was not a party to an appraisal. In that case, the subject policy contained a loss payable clause providing that "subject to all the provisions, exclusions, conditions and warranties contained in this policy, loss, if any, payable as interest may appear, to the assured and [the mortgagee]." There, the mortgagee claimed he was not bound because he played no part in the appraisal, was not notified that one was to be made and was given no opportunity to appoint an appraiser. In holding that the mortgagee was indeed bound by the award, the court referred to several pertinent cases, including one which held that "the relation between the insurer and the insured was not changed or affected by the loss payable clause in favor of a mortgagee creditor." In another case the court regarded as "directly on point," it was held that policy conditions "clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons" and "[s]uch a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of loss, is unquestionably valid, according to the uniform current authority in England and in this country."[1177]

[1177] Officer v. American Eagle Fire Ins. Co., 143 So. 500 (La.1932), citing Monroe Bldg. & Loan Ass'n v. Liverpool & L. & G. Ins. Co., 50 La. Ann. 1243 (La. 1898), approved in Hardy v. Commercial Standard Ins. Co., 172 La. 500 (La. 1931), and Hamilton v. Liverpool & L. & G. Ins. Co., 136 U.S. 242.

B] RIGHTS OF THE MORTGAGEE TO DEMAND AN APPRAISAL

There is authority for the principle that a mortgagee under the Standard Mortgage Clause has an independent right to demand an appraisal under a fire policy.[1178] That right may be exercised either in conjunction with the insured or independent of him.

Should the mortgagee choose to exercise this right, it would be well advised to give prompt notice of such demand to both the insured as well as the carrier.

Where potential coverage issues or policy violations make the prospect of a quick payment to the insured doubtful, the mortgagee should consider the appraisal process as an efficient means of resolving the actual cash value (or other measure of value) and amounts of loss once a dispute arises between the parties.

It is unclear whether the mortgagee could demand appraisal upon a disagreement between the insured and the carrier in which the mortgagee played no role. Judge Desmond's dissent in Syracuse Savings Bank[1179]

[1178] Rubinstein v. Cosmopolitan Mut. Ins. Co., 61 A.D.3d 1029, 403 N.Y.S.2d 96 (2d Dept. 1978).
[1179] Syracuse, 301 N.Y. at 416.

notwithstanding, judicial precedent fails to disclose a reason why this would not be possible.

C] BORROWER AS THIRD-PARTY BENEFICIARY

It has been held that a borrower under a mortgage is an intended third-party beneficiary of a fire and windstorm policy between the mortgage company and the insurer. The policy often recognizes the class of persons known as "borrowers" and provides for coverage in excess of the mortgage company's interest and for loss of personal property and additionally provides for payment directly to the borrower. As a result of these provisions, it was determined that the borrower had rights relating to demanding and contesting a loss appraisal under such a policy.[1180]

[1180] Hickman v. Safeco Ins. Co. of America and Guarantee Residential Lending, Inc., 695 N.W.2d 365 (Minn. 2005); see also, Alvarado v. Lexington Ins. Co., 389 S.W.3d 544 (Tex. App.-Houston [1st Dist. 2012).

D] RIGHTS OF A LOSS PAYEE

Obviously, mere loss payees, as distinct from an actual mortgagee, have no rights with respect to notice or participation in the appraisal process as generally, they have no independent rights under the policy, unless otherwise stated.

The United States District Court sitting in Colorado was confronted with a demand by a loss payee for the court to enforce the appraisal provision for its benefit. It held "...[u]nder Colorado law... that the clear and unambiguous language of the Appraisal provision does not include Loss Payees..." The Loss Payable provision which grants loss payees their right to payment does not grant Loss Payees an independent right to contest the amount of a loss payment and the Loss Payee "cannot enforce the policy's Appraisal provision."[1181]

Such an assignee could exercise the right to demand appraisal in seeking to vindicate their claim.

It is noteworthy that the contractor/assignee likely could not act as an appraiser in such a claim as they have

[1181] 5 Star Bank v. American Family Mut. Ins. Co., 2012 WL 4378395 (D. Colo.2012).

become the real party in interest. They would thus be disqualified.

E] RIGHTS OF ASSIGNEES

It is not unusual or impermissible for an insured who has made repair to assign his or her claim to the contractor who did the work, and who has not been fully paid, owing to the fact that the insurer has paid less than the amount billed by the contractor. Most policies prohibit assignments of policy rights before a loss but do not preclude them once a loss has occurred. In such a situation, the contractor/assignee merely steps into the shoes of the insured to the extent of the assignment.[1182]

Such an assignee could exercise the right to demand appraisal in seeking to vindicate their claim.

It is noteworthy that the contractor/assignee likely could not act as an appraiser in such a claim as they have become the real party in interest. They would thus be disqualified.

[1182] Rooftop Roofing Inc. v. Fire Ins. Exchange, 2010 CV 243 Dist. Court, Elbert Co., Co. (2011).

CHAPTER XII

APPRAISAL UNDER THE STANDARD FLOOD INSURANCE POLICY

A] THE PROVISION

There are three forms of Standard Flood Insurance policies (SFIP) offered by the Federal Emergency Management Agency (FEMA) which administers the National Flood Insurance Program (NFIP). Each form, the Dwelling Form, the General Property Form and the Residential Condominium Building Association Policy (RCBAP) contains an appraisal clause as part of its General Conditions.[1183]

[1183] The policy forms are promulgated and found at 44 C.F.R. §61, Appendixes A(1), A(2) and A(3), respectively.

The Clause is found in Section VII (P) in the Dwelling and General Property Forms and Section VIII (P) in the RCBAP. The text of the Appraisal Provision states the following:

> If you and we fail to agree on the actual cash value or, if applicable, replacement cost of your damaged property to settle upon the amount of loss, then either may demand an Appraisal of loss. In this event, you and we will each choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the State where the covered property is located. The appraisers will separately state the actual cash value, the replacement cost, and the amount of loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by

any two will set the amount of actual cash value and loss.

Each party will:

1. Pay its own appraiser; and

2. Bear the other expenses of the Appraisal and umpire equally.

While the clause reads much like the appraisal clause found in homeowner and commercial non-flood policies in use around the country, when the flood appraisal clause may be used and the necessary conditions for invoking it are substantially different and tend to be more restrictive then in the private insurance market.

Specifically, in the New York Standard Fire Policy, the nature of the disagreement to be appraised is the "actual cash value or the amount of loss..." while in the Standard Flood Insurance Policy it is "the actual cash value, or, if applicable, replacement cost of your damaged property to settle upon the amount of loss..."[1184]

[1184] Lines 125-126 of the New York Standard Policy Provisions, NY Ins. Law §3404(e) (McKinney 2003).

The difference in language is important for two reasons. First, the language makes clear the intention of Congress to limit appraisal to issues of actual cash value or replacement value as components of the amount of loss, while the New York Standard Fire Policy version allows appraisal of all components constituting the amount of loss such as scope of loss issues and minor issues of causation within an otherwise covered loss.

The second point of significance of this dichotomy of language is it highlights beyond doubt why issues of scope of loss and causation are appraisable based upon the language used in the regular market.

The terms of the NFIP policy generally and the appraisal provision specifically are subject to the principle of strict construction with exclusive jurisdiction vested in federal district courts to resolve claim denials, whether complete or partial. This distinction in the law tends to make appraisal available in a reduced percentage of claims than in homeowner and commercial policy claims.[1185]

[1185] Flaharty v. Allstate Ins. Co., 2010 WL 148226 (N.D. Fla. 2010)

B] APPRAISABLE ISSUES UNDER THE NFIP POLICY

Congress expressly limited the application of the appraisal clause to matters where coverage is not at issue and the only dispute remaining between the parties is the quantum of the loss.[1186] Where the insured requests compensation for items that the insurer asserts are not covered by the SFIP, the dispute is "outside the ambit of the appraisal clause."[1187]

The appraisal clause in the NFIP flood policy is interpreted much more conservatively than similar clauses in the non-flood market. In the flood context, the appraisal clause can be invoked only to resolve disagreements between the parties regarding the actual cash value or, if applicable, replacement cost of the damaged property. [1188]

Appraisal has been deemed unavailable upon a disagreement over "the threshold issues of coverage and causation," in a case where

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[1186] Apple v. Allstate Ins. Co., 2010 WL 2509887 (M.D. Fla 2010).

[1187] De la Cruz v. Bankers Ins. Co. , 237 F. Supp.2d 1370 (S.D. Fla. 2002); see also *Apple*, Id. at 3; See Talley v. Texas Farmers Ins. Co., 2010 WL 3630940 (S.D. Tex., 2010) (A request by insureds to compel Appraisal was not supported by the Appraisal clause where the insurer's adjuster had determined that some of the damage to structure and contents asserted was not caused by flood waters. Further, damage purporting to support a supplemental claim which had not previously been listed or presented during the claim process was not covered or was located above the flood line.).

[1188] Flaharty v. Allstate Ins. Co., 2010 WL 148226 (N.D. Fla.); Apple, *supra* at 2, De la Cruz, Id. at 1323 the court clarified that it may be invoked when there is an agreement as to what items are covered but not as to the items' value or cost. There, appraisal was not applicable because the case concerned the question of whether the property was damaged by wind or flood or damaged at all, rather than whether the amount paid by the insurer constituted the damaged property's actual cash value or replacement cost.[1189]

In fact, "Congress has expressly limited the application of the appraisal clause to matters where coverage is not at issue and the only dispute remaining between [the parties] is the quantum of the loss." In a case involving disputes not only as to extent of damage and the necessity of repair or replacement, but also as to whether certain items were covered at all, the appraisal clause was not implicated because the case did not relate exclusively to the actual cash or replacement value of the loss.[1190]

After Superstorm Sandy struck the northeast in October, 2012, FEMA issued a bulletin dated May 15, 2013 to provide guidance regarding when the appraisal clause

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[1189] Flaharty, Id.

[1190] Sam v. National Lloyd's Ins. Co., 2011 WL 4860009 (S.D.Tex. 2011), citing Apple v. Allstate Ins. Co., 2010 WL 2509887 (M.D. Fla. 2010).

may be invoked and detailing the necessary conditions in order to invoke it.

Generally, FEMA has had these rules in place in its Adjuster Claims Manual for many years.[1191]

As interpreted by FEMA, the appraisal clause is one of the last resorts available for attempting to resolve a claim (initiating a lawsuit being the last resort). FEMA encourages the insured and the insurer to exhaust all other avenues available to determine the fair price for an agreed-to scope of loss. This typically includes submission of all estimates, actual receipts (if repair or replacement has already occurred), photos, and a written narrative that may support the claimed pricing of the agreed-to scope of loss.[1192]

According to FEMA's stated practices, for the appraisal clause to be properly invoked, the following conditions must be met prior to the parties use of the process.[1193]

1191 See pp. V-33 (Dwelling Form Commentary), V-71 (General Property Form Commentary, and V-107 (RCBAP Commentary) in the Adjuster Claims Manual.

1192 See, FEMA Bulletin W-13029 dated May 15, 2013, "Proper Invocation and Usage of the Appraisal Clause Provisions in the Standard Flood Insurance Policy".

1193 See, FEMA Bulletin W-13029 dated May 15, 2013, "Proper Invocation and Usage of the Appraisal Clause Provisions in the Standard Flood Insurance Policy.".

The named insured and the insurer of the SFIP must agree to the scope of loss and damages. This means that there must a list of damaged items (the scope) that both parties agree were damaged by the flood event and covered by the SFIP. If the insured and insurer cannot agree on the scope of loss, then the appraisal provision cannot be invoked. This means that a claim cannot be partially resolved by the appraisal process and partially resolved by other means (such as an appeal to FEMA or through litigation). Appraisal can only be used when it will result in complete resolution of the entire claim.

Issues regarding what items in the insured home and what parts of the structure had been damaged by flooding are beyond the scope of the NFIP appraisal clause. Only issues of the valuation of undisputedly damaged items or the severity of damage to undisputedly damaged items is within its purview.[1194]

In Sam et al v. National Lloyds Ins. Co.,[1195] the issue of whether the NFIP policy covers the cost of a "Commercial Superintendent" on site for 3 months of commercial restoration was addressed. The District Court in the Southern

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1194 National Flood Ins. Act of 1968, §1341, 42 U.S.C.A. §4072; De la Cruz, *supra* at 1374.

1195 2011 WL 4860009 (S.D. Tex. 2011).

District of Texas stated in this Hurricane Ike claim "[T]he dispute is whether this expense is covered, not whether $39,000 is a reasonable cost for the Superintendent."

Similarly, issues of causation are not subject to appraisal. For example, in Flaharty v. Allstate Ins. Co., *supra*, the issue presented was whether appraisal was appropriate on an NFIP policy for a claim arising out of Hurricane Ivan where the dispute was over what damage was covered by the flood policy, what damage by the wind policy and what damage, if any, was covered by neither. The court held that this threshold question, which commonly arises on hurricane claims, is simply not subject to a resolution under the Article VII (P) appraisal clause.

The insured must have submitted a timely and complete proof of loss with supporting documentation for the items which the insured is seeking in appraisal.[1196]

Appraisal is available only when the dispute between the parties involves the price to be paid for an SFIP-covered flood-damaged item. No other dispute of any type (e.g., coverage, scope, or causation) can be submitted to appraisal. If any issue other than

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[1196] FEMA Bulletin W-13029, *supra*.

pricing is attempted to be resolved through use of the appraisal process, then the appraisal provision has not properly been invoked and the appraisal process is not valid.

C] TIMING ISSUES

1. Time to Invoke Appraisal

Appraisal can be invoked once a timely proof of loss has been filed by the insured and the insurer's response establishes the existence of only appraisable disagreements.

2. In Relation to Litigation and a FEMA Appeal

As appraisal is a means of litigation avoidance, FEMA encourages insureds to invoke the provision prior to filing a lawsuit. However, nothing prohibits the appraisal provision from being invoked after a lawsuit has been filed if, and only if, it would result in a resolution of all claims of the insured and a dismissal of the lawsuit.[1197]

In fact, it has been held to be an error for the district court to have refused to direct an appraisal to proceed where it had been demanded by the flood insurer only shortly before trial where the insureds had failed to make clear until shortly before trial that they sought only to challenge the costs estimated by the adjuster. In this unusual case, the trial

[1197] See, FEMA Bulletin W-13029 dated Mary 15, 2013, "Proper Invocation and Usage of the Appraisal Clause Provisions in the Standard Flood Insurance Policy.".

had already occurred when the Circuit Appellate Court directed appraisal. The court determined that the appropriate remedy was to enforce non-binding appraisal so it vacated the judgment after the completed trial and sent the claim to non-binding appraisal.[1198]

If any issue has been the subject of a FEMA appeal, that issue is no longer eligible to be appraised. (FEMA Claims Handbook)

3. Time To Pay On An Award

Amounts payable under a successful appraisal award should be paid within the 60 days allowed by Section VII (m) of the SFIP. The parties may agree on a longer period. If the matter was in litigation when appraisal was demanded, the award should be paid in the same manner as is typical in this situation which is typically upon the discontinuance of the litigation and appeals, if any.[1199]

4. Time to Deny Appraisal

FEMA has cautioned that insurers and claims handlers must pay close attention to the time deadlines to appoint an appraiser. If the

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[1198] Dwyer v. Fid. Nat'l Prop.and Cas. Ins. Co., 565 F.3d. 284, (5th Cir 2009).

[1199] See FEMA Bulletin W-13029 dated May 15, 2013 "Proper Invocation and Usage of the Appraisal Clause Provisions in the Standard Flood Insurance Policy."

insured makes an inappropriate demand for appraisal, a denial letter "should be sent as soon as practicable explaining why the provision cannot be invoked, and citing any SFIP terms that might apply."[1200]

According to FEMA, "not responding to the appraisal demand at all is not a good practice."[1201]

[1200] See, FEMA Bulletin W-13029 dated Mary 15, 2013, "Proper Invocation and Usage of the Appraisal Clause Provisions in the Standard Flood Insurance Policy."
[1201] See, FEMA Bulletin W-13029 dated Mary 15, 2013, "Proper Invocation and Usage of the Appraisal Clause Provisions in the Standard Flood Insurance Policy."

D] QUALIFICATIONS OF THE APPRAISERS AND THE UMPIRE

The FEMA policy states that once invoked, the appraisers selected "by you and we" must be "competent and impartial." Though the policy is silent as to the umpire's qualifications, FEMA's stated standards are as follows:

> "The appraisers and umpire selected for the Appraisal Process must be competent and impartial. This means that the individuals nominated to serve as appraisers by the parties, and the umpire to be selected by the Appraisers, cannot be in a position to profit from a higher claim(s) payment made to the insured. For example, if the insured has hired a public adjuster or attorney whose fee is based upon the insured securing a higher claims payment, no one employed, affiliated with, or related to the public adjuster or attorney could serve as the Appraiser or the umpire. The same rule applies to the insurer; no one employed, affiliated with or related to the adjuster or owner of the adjusting company who could

receive a higher fee based upon the insured receiving a greater payment could serve as the Appraiser or umpire. The Appraisal process would not be valid if the Appraiser and/or umpire were not competent and impartial."

E] THE PROOF OF LOSS

In the flood policy context, the "Requirements in Case of Loss" portion of the SFIP states: "In case of a flood to insured property, *you must*: [w]ithin 60 days after the loss, send us a proof of loss..." 44 CFR Pt. 61, App. A(1) (emphasis added). A proof of loss is mandated as a requirement for disbursing funds from the public treasury.[1202]

If an insured submitted a proof of loss for a dollar amount of damages and the insurer paid that amount in full, the appraisal clause cannot be invoked because there is no dispute between the insured and insurer as to the scope of loss or pricing.

It has been held that the doctrine of repudiation can apply to an SFIP. NFIP's refusal to provide building damage coverage amounts to a repudiation and the failure to file a proof of loss was not dispositive of the claim.[1203]

This same logic has been held applicable where NFIP's refusal to go to appraisal created

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[1202] Gowland v. Aetna, 143 F.3d 951, 955 (5th Cir 1998).
[1203] Studio Farms Ltd., v. Standard Fire Ins. Co., 369 F.3d 376 (4th Cir 2004).

a possible repudiation of the contract excusing the filing of a supplemental proof of loss.[1204]

The Federal Circuit Court for the First Circuit reversed an order compelling parties to proceed to appraisal where it found recovery completely barred under the policy due to an insured's failure to comply with certain terms of the Standard Flood Insurance Policy. There, the court found it unnecessary to proceed to an evaluation of the parties' dispute over whether the SFIP's appraisal clause could be invoked as the insured had not filed a timely and proper proof of loss. In the event of a dispute as to an amount of flood damages or coverage, "the SFIP allows policyholders to appeal to FEMA from any denial of their claims or to contest it in federal court…However, to invoke either procedure for review of the denial of a flood insurance claim, a policyholder must have first filed a timely and compliant proof of loss." Strict compliance with the SFIP is required pursuant to the Constitution; the court found that "it would 'usurp Congress's executive power to appropriate money were [federal courts] to award an unauthorized money claim based on a theory of substantial compliance' with the SFIP's proof-of-loss requirement." Despite that an adjuster's estimate had been submitted with timely and compliant proof of loss forms as

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[1204] Jakubowski v. FEMA, 2013 WL 1284389 (D.N.J.2013).

to undisputed amounts, this was insufficient because the insured had not signed and sworn to the amount provided by the estimate as he was required to do.[1205]

[1205] DeCosta v. Allstate Ins. Co., 730 F.3d 76 (1st Cir. 2013), citing Flick v. Liberty Mutual Fire Ins. Co., 205 F.3d 386 (9th Cir. 2000),

F] NON-BINDING ON THE INSURED

One distinguishing element of appraisal under a FEMA flood policy is the fact that it is not binding on the insured, whereas, as a general proposition in other policy contexts other than flood, appraisal is binding.

FEMA regulations permit a claimant who is dissatisfied with the appraisal award to sue.

44 C.F.R. §62.22(a) states:

> "[U]pon the refusal of the claimant to accept the amount allowed upon any claim after appraisal pursuant to policy provisions, the claimant may... institute an action on such claim against the insurer..."[1206]

[1206] See for example, Dwyer v. Fid. Nat'l Prop. and Cas. Ins. Co., 565 F.3rd 284 (5th Cir. 2009).

APPENDIX A
FORMS

INDEX TO FORMS

SECTION I

APPRAISAL DEMAND

FORM - 1

(Letter Form)
(To be sent by email and Certified Mail/Return Receipt Requested)

Re:

This will acknowledge your recent offer of $___ with respect to building damage, $_____ with respect to the contents/personal property loss and $ ______ with respect to additional living expenses which was reported to me in our conversation/correspondence of [date].

Your offer is respectfully rejected as it fails to reflect the actual loss sustained. As a result of the foregoing, it is clear there is now a disagreement between us as to the amount of loss, actual cash value and replacement value.

Accordingly, the insured hereby demands the benefit of the appraisal provision and hereby nominates [Name of Appraiser] of [Name of Company], whose phone number is __________and fax number is ___________.

Please select your appraiser within 20 days pursuant to the policy of insurance.

Additionally, the insured hereby demands, pursuant to the policy and applicable law/regulation that you tender the undisputed amount as reflected by your above offer.

We demand payment of said sum within _____ days consistent with the policy, regulation, and/or insurance law.

Very truly yours,

____

cc: To the appraiser appointed

SECTION I

APPRAISAL DEMAND

FORM - 2

(Letter Form)
(To be sent Certified Mail/Return Receipt Requested and by Fax)

Re: [Date of Loss]
[Loss Location]

Dear

It is apparent that [The Insured] and [The Insurer] disagree as to the amount of loss and damage to the property insured by the ______ Insurance Company as a result of the [peril insured against] loss which occurred at the insured location on [date of loss]. Accordingly, pursuant to Section ________ of policy number ___________, the insured hereby makes written demand for an appraisal of the loss.

The insured requests that [Insurance Company] select a competent and disinterested appraiser by the ___ day of ____, 20___ and [The Insured] shall also select a competent and disinterested appraiser by that date.

We look forward to being advised as to the insurer's designated appraiser no later than the appointed date.

We hereby request and demand that the insurer make an immediate payment in the amount of $ _____ representing the undisputed amount of the loss as reflected by your last offer to the insured on [date].

If you have any questions, please contact me immediately. Waiving none and reserving all of the insured's rights, we remain,

Very truly yours,

____

SECTION I

APPRAISAL DEMAND

FORM - 3

(Letter Form)
(To Be Sent Certified Mail/Return Receipt Requested and by email)

Re: [Date of loss]
[Loss location]

Dear

This letter is to advise you that the [Insurance Company] disagrees with your determination of the value of your loss to your [building, personal property] as reflected in the proof(s) of loss filed on [date]. In order to resolve this dispute concerning the value of the loss, the [Insurance Company] hereby invokes its right to have the loss appraised pursuant to the terms and conditions of the policy. The appraisal provision of the policy provides as follows:

[QUOTE THE APPLICABLE POLICY
APPRAISAL PROVISION]

The [Insurance Company] hereby designates _________ of _____________, whose phone number is ____________ and whose fax number is ____________ A statement of ____'s qualifications is enclosed.

Pursuant to the terms of the appraisal provision, please notify the undersigned within 20 days from the receipt of this letter as to the identity of the appraiser who you have selected.

A check for the undisputed amount owed will be delivered to you under separate cover.

If you have any questions regarding the foregoing, please do not hesitate to contact me.

Very truly yours,

____

cc: Insurance Company Appraiser Appointed

SECTION II

APPRAISAL AGREEMENT

FORM 1

It is hereby agreed by and between [insured], and [insurance company] that whereas the parties to this agreement have failed to agree on the amount of loss or damage to the [real, personal][1207] property of the insured situated at [insured location], which sustained damage as a result of a [covered peril] on or about the ___ day of _____, 20__, under policy number _____________, and they hereby submit their differences to appraisal based upon the following agreement:

1. The policy of insurance involved in this matter provides coverage for damage to [real, personal] up to a limit of liability of $_________ for the property at the location insured.

2. The policy contains the following provisions which are pertinent to these appraisal proceedings:

[Recite the "How We Settle a Loss" provision of the policy including the valuation provision, i.e...replacement value, actual cash value,

[1207] If there is a disagreement as to economic claims such as additional living expense or business interruption, add language including these as well.

agreed value, etc., including whatever definitions may be contained within the policy or local regulation or by statute.]

[Recite the applicable Appraisal Provision as contained in the policy or as required by the local Standard Fire Policy.]

3. Pursuant to the above-quoted Appraisal Clause, the insureds have selected:

Name ______________________
Address ______________________

Telephone ______________________
Fax ______________________
Email ______________________

as appraiser; and the insurer has selected;

Name ______________________
Address ______________________

Telephone ______________________
Fax ______________________
Email ______________________

as its appraiser.

4. The appraisers shall execute the "Declaration of Appraisers" attached hereto as Exhibit "A" before undertaking their duties as

appraisers in this matter. The appraisers shall first select an impartial umpire. If the appraisers are able to agree upon the selection of an umpire within the fifteen (15) day period provided by the policy and this agreement, the appraisers shall execute the "Selection of Umpire Form" attached hereto as Exhibit "B." If the appraisers cannot agree upon an umpire with fifteen (15) days from the date of this agreement, either party may petition the ____ Court, _____ County, for the appointment of a competent and disinterested umpire. Once an umpire is selected by the appraisers or appointed by a court of competent jurisdiction as hereinbefore described, the umpire shall execute the "Qualification of Umpire" form attached hereto as Exhibit "C".

The appraisers will then inspect the aforesaid property insured under the policy. The appraisers shall further receive and consider written estimates of value and loss submitted by the parties and convene a hearing in this matter prior to the inspection of the property to afford both the insured and the insurer through their representatives, a full and complete opportunity to submit such evidence and make such arguments as each shall reasonably request. The receipt of such evidence is proper for the determination to be made by the appraisers pursuant to this agreement.

The appraisers shall estimate and appraise separately the loss or damage, actual cash value, and replacement cost [or other measure of value per the policy] to the insured property alleged to have been damaged as a result of the ___ day of _____, 20___ incident.

If the appraisers are unable to agree upon the loss or damage, actual cash value and replacement cost [or other measure of value per the policy] of the property insured under the policy and lost or damaged as a result of the aforesaid incident, within twenty (20) days of appointment of an impartial umpire, the appraisers shall submit their differences only to the umpire.

The umpire's authority shall extend only to the resolution of the disputes as to the particular items upon which the appraisers are unable to agree.

An award shall be rendered within 20 days of the submission to the umpire. The Award in writing, inclusive of the initial agreement of the appraisers and the subsequent agreement of the umpire and one appraiser, signed by any two of the three shall determine the matters hereby submitted for appraisal.

When the appraisers or the umpire and at least one appraiser are able to agree upon the issues of value and loss submitted to them, they shall execute the "Award" form attached as Exhibit "D" and submit to each party or their designated representative a true and correct copy of such Award within three (3) days of execution.

Each appraiser shall be paid by the party selecting him, and the expenses of the appraisal and the services of the umpire shall be paid by the parties equally.

The parties to this agreement reserve the right to apply to ______Court, _______County, during these Appraisal proceedings and for a thirty (30) day period after receipt of a written Award as hereinbefore described in order to determine any issues of law arising in connection with the Appraisal proceedings.

It is further understood by the parties to this agreement that the policy's suit provision as well as any statutory limitation on the time within which the insured has to bring suit under the insurance policy is tolled during the course of this appraisal process and for a period of up until 30 days after the delivery of an Award to the parties.

Upon receipt of a duly executed appraisal Award as described above, the insurer agrees to make payment thereon within five business days.

It is further agreed that should payment on the Award not be made within the time prescribed, interest shall be payable on such Award for such period of time after such payment was due pursuant to this agreement at the statutory rate for judgments.

If upon commencement of demolition and reconstruction hidden damage is discovered which was not reasonably within the contemplation of the parties prior to or during the appraisal process, upon demand of either party, the appraisers and umpire shall be afforded the opportunity to reinspect the newly discovered damage and upon agreement of the umpire, the appraisal shall be reopened for the purpose of making a further award under the terms of the policy and this agreement.

______________________	____________
Insured	Date
______________________	____________
Appraiser for Insured	Date
______________________	____________
Insurance Company	Date
______________________	____________
Appraiser for Ins. Co.	Date

SECTION II

APPRAISAL AGREEMENT

FORM 2

IT IS HEREBY AGREED BY AND BETWEEN [insured] and [Insurance Company], that whereas the parties hereto have disagreed as to the amount of loss or actual cash value* of the following property: [Describe the property insured] which is alleged to have suffered loss or damage by [the insured peril], on the ___ day of ____ 20__.

NOW, WHEREAS the policy in existence between the parties provides as follows:

[Quote the policy's Appraisal Provision or that of the Standard Fire Agreement, (whichever is appropriate)].

WHEREAS a disagreement has now arisen between the parties to this policy as to the actual cash value* or the amount of loss to the covered property;

The insured selected _______________as (his/her/its) appraiser and the insurer having selected ______________ as its appraiser, said appraisers shall together first select an umpire, and shall then estimate and appraise, the loss of and to said property, stating in writing the actual cash value* of the insured property and the amount of loss, at the time of the loss, and, failing to agree, the appraisers shall submit their differences only to the umpire. An Award executed by any two, in writing, shall determine the matters as hereby submitted for appraisal.

Subscribed and dated this __ day of _____20__
.

_____________________ _____________________
Insurer Insured

* or other insured value as provided in the policy.

SECTION III

AGREEMENT AND AUTHORIZATION NOMINATING THE APPRAISER

FORM 1

Re: Loss of [Date of Loss]
At: [Property Insured]

The undersigned hereby retains the services of _________ to act as my appraiser in an Appraisal to be conducted with my insurance company as a result of my [peril] loss of ______20__, and to conduct an appraisal of replacement value*, loss and damage to the above-captioned property loss per the conditions of the subject policy and will determine the following claims:

1. Building - a survey of value, loss and damage, including betterments and improvements. This will include replacement cost, actual cash value*, demolition and debris removal, contractor's overhead and profit as well as applicable sales tax and set forth such information in accord with the relevant insurance policy provision.

2. Contents/Personal Property - a survey of replacement value, loss and damage. This will be based upon the inventory presented and

will not require a physical inventory to be taken by you.

3. Additional Living Expenses - a survey of loss based upon the information supplied to you, to establish the necessary additional living expenses in accordance with the insurance policy.

4. You will be supplied with all available evidence including photographs, damage estimates, inventories, and other materials which bear on the issue of value, loss and damage. You agree to review these materials and to use them as you deem fit in order to complete the appraisal.

5. In acting as appraiser, the undersigned appraiser agrees, if necessary, to consult with your attorney regarding the steps to be taken pursuant to the requirements of the insurance policy as well as other duties placed upon the parties in connection with the appraisal clause, and other provisions of the insurance policy.

6. Outside Experts - It shall be the appraisers responsibility to provide experts as needed, as well as laboratory testing services, etc., only when and if required. Charges, if any would be my obligation as the insured. Any such expert retention should be discussed and approved by me.

7. It is expressly understood and accepted that you, the insured, shall bear one-half of the umpire's cost, as well as one-half of other reasonable costs and expenses related to the work and services of the umpire. The other half shall be payable by the insurance carrier.

8. Appraiser's Compensation - For the services rendered by you as appraiser, the undersigned unconditionally agrees to pay and assigns a fee in the amount to be calculated at $___________ per hour for work performed measured portal to portal. In addition, I agree to reimburse reasonable expenses incurred by the appraiser in performing his appraisal duties. Any expense in excess of $100.00 shall be subject to my prior approval of the insured. Fees and expenses shall be reimbursable within 14 days of billing by the appraiser. To the extent there exists any balance due the appraiser upon the issuance of the Award, it is the responsibility of and agreement of the insured to make certain that the appraiser is fully paid within 3 days of the clearance of the insurance proceeds check.

If for any reason the proceeds are uncollectible to the insured, the insured personally guarantees the payment of the appraiser's fees and expenses.

Sworn to before me this
______day of ______ 20___

_______________________   ___________________
Notary Public   APPRAISER

Sworn to before me this
______day of ______ 20___

_______________________   ___________________
Notary Public   INSURED

* or other value as defined by the policy or statute.

SECTION IV

DECLARATION OF APPRAISERS

FORM 1

We, the undersigned, do solemnly swear that we will act in accordance with policy provisions and with due speed and dispatch in making an appraisement and estimate of the replacement cost and actual cash value* of the loss and damage [add all aspects of claimed damage which are the subject of appraisal, i.e., ALE, demolition and debris removal, etc.] upon the insured property mentioned, in accordance with the appointment, and that we will make a true, just and conscientious Award, according to the best of our knowledge, skill and judgment. We are not related to the insured or insurer, either as employees or otherwise, and we have no interest in the said property or the insurance thereon.

Sworn to before me this
______day of ______ 20___

________________________ ___________________
Notary Public APPRAISER

Sworn to before me this
______day of ______ 20___

________________________ ___________________
Notary Public APPRAISER

* for other such value as stated in the policy

SECTION V

APPRAISER'S LETTER NOMINATING AN UMPIRE

FORM 1

(Letter Form)

Re:

Dear :

Please be advised that I have been nominated as appraiser on behalf of the above insured. In accordance with the provisions of the policy and statute, we are initially to attempt to select a competent and disinterested umpire. Accordingly, I hereby submit the following names for your consideration:

1. ___________________________

2. ___________________________

3. ___________________________

All of the above individuals have had experience acting as an umpire on disputed property insurance matters and are experienced in appraisal proceedings. Their curriculum vitae are annexed for your consideration.

Should any of the above be agreeable to you, please confirm such at your earliest convenience. In the event that none of the aforementioned umpires meet with your approval, kindly submit a list of names for my review that would be acceptable to you.

Should we be unable to agree on an umpire within 15 days, under the terms of the policy, I will advise counsel for the insured to petition the court for the appointment of a competent and disinterested umpire.

Kindly contact the undersigned upon receipt in order to arrange for a mutually convenient appointment to commence our discussions in this matter. We are mandated to act expeditiously in this matter and to bring it to a timely conclusion based on the contract between the parties.

I am looking forward to hearing from you forthwith.

Very truly yours,

____

cc: Insured

SECTION VI

SELECTION OF THE UMPIRE

FORM 1

We, the undersigned appraisers, hereby select and appoint [Umpire] to act as Umpire to settle matters of difference that shall exist between us, if any, by reason of and in compliance with the foregoing Agreement and Appointment.

The appointment of the umpire is hereby made with the agreement and understanding by the parties to this matter that the obligation of the fee to be paid to the Umpire plus all other reasonable expenses incurred by the Umpire shall be shared equally by the insurer and the insured, and said fees shall be paid promptly upon receipt of billing.

Witness our hands this____ day of ______, 20____.

____
APPRAISER

____
APPRAISER

SECTION VII

QUALIFICATION OF THE UMPIRE

FORM 1

I, the undersigned, hereby accept the appointment as umpire, as provided in the foregoing Agreement and solemnly swear that I will act with strict impartiality in all matters of difference that shall be submitted to me in connection with this Appointment, and I shall make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am not related to any of the parties to this Agreement, nor interested as a creditor or otherwise in said property or the insurance thereon, nor have I had prior dealings with either of the parties or their representatives.

____
UMPIRE

Sworn to before me this
____day of ______ 20___.

____
Notary Public

SECTION VIII

APPOINTING THE UMPIRE

AFFIRMATION AND AFFIDAVIT IN SUPPORT OF MOTION FOR THE APPOINTMENT OF AN UMPIRE AND PROPOSED ORDER

FORM 1

________COURT OF THE STATE OF ___________

COUNTY OF ________________________________

--X
In the Matter of the Claim of Index No.:

[Name of Insured]
against the [Insurance Company] Affirmation
pursuant to [policy number]
--X

____________, an attorney duly admitted to practice before the Courts of this State, herein alleges the following upon information and belief:

1. I am a member of the firm of _________attorneys for the insurer, the _________________ Insurance Company, and as such I am fully familiar with the facts and circumstances surrounding this claim.

2. This Affirmation is submitted in support of the insurer's application for the appointment of an umpire to resolve this insurance appraisal pursuant to section ________ of the Insurance Law of the State of _______________ and the insurance policy issued by insurer to the insureds.

3. The insurer, [Insurance Company] issued a homeowner's policy of insurance to the insureds [name of insured(s)] bearing policy number _____
for the insured's home and contents located at [location of loss].

4. On or about [date of loss] said dwelling insured under the policy was damaged by [the peril insured against].

5. Efforts to settle the claim between the insurer and the insureds were to no avail, and it appears that there is a disagreement with respect to the replacement value, actual cash value and the amount of loss.

6. The policy of insurance upon which this claim is made contains the following appraisal provision:

[quote policy appraisal provision]

7. Having been unable to reach agreement on the claim, the insureds made a formal demand upon the insurer to submit the dispute to appraisal pursuant to Insurance Law section _________ and the policy. The insureds nominated as their appraiser [name of appraiser for insured] (See Exhibit "A" annexed hereto). [annex the Appraiser's appointment]

8. In response to said demand, the insurer nominated [name of insurance company appraiser]. (See Exhibit "B" annexed hereto) [annex the Appraiser's appointment].

9. An impasse has arisen in that the two appraisers have been unable to agree on the selection of an umpire to assist in resolving the appraisal dispute. As set forth in the annexed Affidavit of [the moving party's appraiser], the insurer's designated appraiser, the two sides have been unable to resolve their difference with respect to the extent of the damage suffered.

10. The two appraisers have been unable to agree on the selection of an umpire.

11. It was this inability to agree on an umpire that is the basis for the instant application, which, upon information and belief will not be opposed by the insureds.

12. Based on the foregoing, and pursuant to the policy and Insurance Law section______, the insurer respectfully requests that this Court forthwith appoint a competent and disinterested person, to act as umpire in the ascertainment of the amount of loss, damage and actual cash value* in order to complete the appraisal process and resolve this claim pursuant to the terms of the policy.

13. Pursuant to the policy, the cost of the umpire and his reasonable expenses shall be shared equally by the parties.

14. As appraisal is intended by the legislature and the parties to be an expedited process, it is respectfully requested that the Court's nomination be made as soon as possible.

15. No previous application has been made for any of the relief requested herein.

WHEREFORE, the parties request that this Court grant the instant application pursuant to the contract between the parties and section ________ of the Insurance Law and appoint a competent and disinterested person to act as umpire and for such other and further relief as this Court may deem just and proper.

Dated: [City, State]
[Date]

____
(SIGNATURE OF ATTORNEY)

*or other value as provided for in the policy

SECTION VIII

MOTION TO COMPEL UMPIRE

FORM 2 - AFFIDAVIT

____COURT OF THE STATE OF _____
COUNTY OF ____________________

--x

In the Matter of the Claim of	Index No.:
[Name of Insured]	
against the [Insurance Company]	Affidavit
pursuant to [policy number]	

--x

State of)
County of)

[Appraiser's Name], being duly sworn, deposes and says:

1. I am employed by ________________, located at ________________.

2. I have extensive experience in estimating damage caused by perils such as that suffered by the insured in this matter.

3. On or about the ___ day of ___, 20__, I was retained by the above-mentioned insurer to act as its appraiser on a [peril insured

against] loss at a premises located at [location of loss].

4. The Appraiser for the insureds, [Name of Insured's Appraiser] and I have reached an impasse in our efforts to reach an agreement on the instant claim.

5. Additionally, the appraiser nominated by the insured and I have been unable to agree on the selection of a competent and disinterested umpire to assist in resolving our differences.

6. Each of us identified umpires as reflected on the correspondence annexed as Exhibits "A" and "B".

7. The insured's appraiser was notified of this impasse by my letter dated [_______]. (See Exhibit "C" annexed hereto).

8. Based on the foregoing, it is respectfully requested that this honorable court appoint a competent disinterested person in order to assist in the resolution of this claim by the appraisal process pursuant to the subject policy.

____
[Insurer's Appraiser]

Sworn to before me this
this__ day of ______, 20__.

____

Notary Public

SECTION VIII

MOTION TO COMPEL UMPIRE

FORM 3 - ORDER

_______COURT OF THE STATE OF _________
COUNTY OF ___________________________

---X Index No.:

In the Matter of the Claim of
[Name of Insured] **ORDER**
against the [Insurance Company]
pursuant to [policy number]
---X

This matter, having come on for a hearing, and the Court having reviewed the Affirmation and Affidavit submitted by the moving party as well as the Affirmation submitted by the respondent;

Therefore,

IT IS ORDERED THAT

[The Court Appointed Umpire] whose address is ______, whose phone number is ____ and whose fax number is ____ be and is hereby appointed to act as a neutral umpire with respect to the claims submitted by the insured to its insurer, as to the [type of loss] which occurred on the ___ day of ______, 20___ in accordance with the insurance policy in existence between the parties as well as 4section __________of the State of __________ Insurance Law.

IT IS FURTHER ORDERED THAT

The fees to be charged by the court appointed umpire in the amount of $ ________ per hour as well as reasonable expenses incurred shall be shared equally by the parties to this matter and paid within 14 days of the presentation of an invoice for services rendered.

IT IS FURTHER ORDERED THAT

The court retains jurisdiction over this matter in the event legal issues may arise during the pendency of the appraisal.

SO ORDERED:

____
Judge

SECTION VIII

FORM 4

NOTICE OF PETITION TO APPOINT UMPIRE IN THE STATE OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

---------------------------------------x Index No.:

Petitioner,

NOTICE OF PETITION

-against-

Respondent.

---------------------------------------x

PLEASE TAKE NOTICE that upon the annexed Petition on behalf of PETITIONER, upon the annexed Affirmation of ATTORNEY, dated DATE, the annexed Affidavit of EXPERT and upon all the exhibits annexed hereto, an application will be made at an I.A.S Part of the Supreme Court, County of COUNTY, located at ADDRESS on the ___ day of ____, 20___ at TIME o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order appointing an Umpire, pursuant to N.Y. Insurance Law §§ 3404 and 3408, and the Appraisal provision of the policy of insurance between the above captioned parties.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, are required to be served upon the undersigned no later than seven (7) days prior to the return date of this petition, since this notice is served at least twelve days before such time.

Dated: New York, New York
Date

Yours, etc.

By: ______________________________
Attorneys for Petitioner

SECTION VIII

FORM 5

PETITION TO APPOINT AND UMPIRE IN THE STATE OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF
--x Index No.

Petitioner,

PETITION

-against-

Respondent.
--x

The Petition of PETITIONER, respectfully shows to the Court:

1. That your Petitioner is the owner of a property located in the County of COUNTY, State of New York and insured under ________ INSURANCE COMPANY, policy number ____.

2. That ______ INSURANCE COMPANY is an insurance carrier licensed to issue policies of insurance in the State of New York, and is the issuer of the aforementioned policy. A copy of the aforementioned policy is annexed hereto as Exhibit "1".

3. Petitioner suffered a TYPE OF LOSS due to a CAUSE OF LOSS at the subject premises, ADDRESS OF DAMAGED PROPERTY.

4. As provided for in the Appraisal Clause of the aforementioned insurance policy and under New York Insurance Law §3404, your petitioner and ______INSURANCE COMPANY both appointed appraisers to determine the amount of your petitioners' loss.

5. The parties herein have been unable to agree on the appointment of any one specific umpire, despite attempts to do so and more than 15 days have past since the effort to select an umpire began.

6. The assistance of the Court is required to facilitate the selection of said umpire.

7. New York Insurance Law § 3408 and the Appraisal clause of the aforementioned insurance policy provide for the appointment of a competent, disinterested person to act as an umpire in the ascertainment of the amount of an insured's loss, when an agreement cannot be reached by the parties' appraisers.

8. No previous application has been made for the relief sought herein.

WHEREFORE, your petitioner prays that this Court forthwith designate and appoint a competent and disinterested third person to act as an umpire in the ascertainment of the amount of your petitioners' damage.

Date: New York, New York
Date

By: ___________________________

Attorneys for Petitioners

SECTION VIII

FORM 6

AFFIRMATION IN SUPPORT OF PETITION TO APPOINT UMPIRE IN THE STATE OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF
--x Index No.

Petitioner,

AFFIRMATION

-against-

Respondent.
--x

NAME OF ATTORNEY, an attorney duly admitted to practice before the Courts of this State, hereby affirms the truth of the following, under penalty of perjury and pursuant to section 2106 of the CPLR:

1. I am a member of NAME OF FIRM, attorneys for Petitioner in the aforementioned action and as such am fully familiar with the facts and circumstances concerning this matter.

2. I submit this Affirmation seeking the appointment of an Umpire pursuant to NY

Insurance Law §§ 3404 and 3408 and the Appraisal provision of the policy of insurance issued by Respondent ________ INSURANCE COMPANY (hereinafter "Respondent") to the Petitioner, NAME OF PETITIONER, (hereinafter "PETITIONER").

3. On or about DATE OF LOSS, Petitioner suffered a loss due to an TYPE OF LOSS on the aforesaid date.

4. The loss is covered by an insurance policy, number ______ , issued to Petitioner by Respondent. At the time of the loss, said policy was in full force and effect.

5. Petitioners gave timely notice of the loss to the Respondent whereupon Respondent instituted an investigation and negotiations ensued. A disagreement as to the amount of loss became apparent and the parties were unable to resolve it.

6. In the event of a disagreement, Insurance Law §3404, provides a method for resolution. It states:

> "Appraisal. In case the insured and his company shall fail to agree as to the actual cash value or the amount of loss, then on the written demand of either, each shall select

competent and disinterested appraiser and notify the other of the appraisers elected within twenty days of such demand. The appraiser shall first elect a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then on the request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located."

7. A demand for Appraisal was sent by Petitioners to Respondent which was acknowledged by Respondent on DATE. (see Exhibit "2" annexed hereto).

8. On DATE AND NAME OF APPRAISER was nominated as appraiser for Petitioner. On or about DATE Respondent then selected ________________ as its appraiser (See Exhibit "3" annexed hereto).

9. New York Insurance Law §3408(b) states:

"The court shall, on proof by affidavit of the failure or neglect of the appraisers to agree upon and select an umpire within the time

> provided within such policy . . . forthwith appoint a competent and disinterested person to act as such umpire in ascertainment of the amount of such loss or damage."

10. Thereafter and heretofore, both sides exchanged letters in an attempt to agree on an umpire without success. (See Exhibit "4" annexed hereto).

11. Pursuant to their rights under the applicable New York Insurance Law, the instant insurance policy and under the foregoing authorities, Petitioners request that this Court forthwith appoint a competent and disinterested umpire in the instant matter.

WHEREFORE, affirmant respectfully requests that the Court appoint a competent, disinterested person as Umpire to act together with the appraisers selected by the parties in order to determine the amount of loss sustained by Petitioners.

Date: New York, New York
Date

____

ATTORNEY

SECTION VIII

FORM 7

AFFIDAVIT IN SUPPORT OF PETITION TO APPOINT AN UMPIRE IN THE STATE OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF
--x Index No.

Petitioner,

AFFIDAVIT

-against-

Respondent.
--x
STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

NAME OF APPRAISER, affirms, and says:

I am the duly appointed appraiser for the Petitioner and as such, I am fully familiar with certain facts and circumstances concerned herein.

1. This affidavit is submitted in support of the appointment of an Umpire pursuant to NY Insurance Law §§ 3404 and 3408 and the

Appraisal provision of the policy of insurance issued by Respondent to the Petitioner.

2. On or about DATE I was appointed as the appraiser for Petitioner regarding a business interruption claim due to a loss.

3. In order to settle Petitioner's claim I was in contact with Respondent's appraiser.

4. We have attempted to come to an agreement upon an umpire, but have been unable to reach agreement.

5. Reaching an ascertainment of the appropriate measure of the claims involved, business interruption, extra expense, and cleaning, will necessarily require the umpire to be able to review the policy of insurance, its endorsements, and the interplay among them, and consider the positions and proof submitted by the parties.

6. It is my firmly held belief that an attorney, retired judge, or arbitrator would be best qualified to act as umpire, in contrast to another accountant. Although claims by their nature require consideration of dollars and cents, I believe that the dispute between Petitioner and Respondent are not related to accounting principles and the like.

Dated:

Sworn to before me this
day of , 20

NOTARY PUBLIC

SECTION IX

APPRAISAL AWARD

FORM 1

We, the undersigned, pursuant to our appointment as appraisers and umpire in the appraisal of the loss to the property belonging to [the insured], located at ________arising out of the damage caused by the [peril] loss on the ____ day of _________, 20____,

WE DO HEREBY CERTIFY that we have truly and conscientiously performed the duties assigned to us in this Appraisal involving the _______Insurance Company's policy of insurance issued to [name of insured], the insured.

WE DO HEREBY CERTIFY that we have heard and seen all of the evidence offered by both the insured and the insurer and have appraised and determined the actual cash value, replacement value and amount of loss as follows;*

1. Fair and reasonable cost to repair or replace [type of peril] damage to the following building items or areas:*

(a) ______________________

(b) ______________________

(c) ______________________

(d) ______________________

TOTAL ____________________

2. Reasonable Depreciation allowance per the policy* ________%
(Line 1 multiplied by Line 2 percentage) $___________

3. Actual Cash Value of the Building loss (line 1 minus line 2)* $___________

4. Allowable percentage for Contractor's overhead (Percentage of Line 1) $___________

5. Allowable percentage for Contractor's profit (Percentage of Line 1) $___________

6. Sales Tax as applicable $ ___________

7. Actual Cash Value of loss, Including overhead and profit and sales tax (Line 4 plus Line 5 plus Line 6 plus Line 7) Payable Now* $ ___________

8. Fair and Reasonable Cost to Repair or Replace the damage to the personal property using material of like kind and quality per the policy of insurance* $_____________

9. Reasonable Depreciation Allowance
per the policy _______%*
(Line 8 multiplied by
Line 9 percentage)* $____________

10. Actual Cash Value of the loss
(Line 8 minus Line 9) $____________
Payable now

11. Deductible $ ____________
(if appropriate)

12. Holdback on Building per
the policy* (Line 2) $ ____________

13. Holdback on Contents per
the policy (Line 9) $ ____________

The replacement cost holdback (Lines 10 and 11) will be paid per policy terms.

WE DO HEREBY AWARD the foregoing sums as our Appraisal Award.

The Appraisal Award is payable within__ days of the carrier's receipt of this Award pursuant to policy, statute, or regulation whichever is shortest.

Witness my hand this ___day of __ 20____.

____
APPRAISER

Witness my hand this ___day of ____ 20____.

____

APPRAISER

Witness my hand this ___day of ____ 20____.

____

UMPIRE

[Two out of three signatures validates the Award.]

*or such other value as defined by the policy

SECTION IX

APPRAISAL AWARD

FORM 2

This is to certify that we, the undersigned, pursuant to our appointment as appraisers and umpire, have met in accordance with policy provisions, carefully examined the damaged property and/or evidence thereof and have determined the following values and loss:

Replacement   Actual Cash Value

Loss and Damage

1) Building ___________ ___________ ___________

2) Contents___________ ___________
$ per   # of

3) Additional Living month x months $______
Expenses

The award shall be payable within ____ days pursuant to policy, statute or regulation, whichever is shortest.

This Award, determined and executed this _____ day of _________, 20__.

_____________________   ___________
Umpire   Date

Appraiser Date

Appraiser Date

[Two out of three signatures validate the award]

SECTION IX

APPRAISAL AWARD

FORM 3

State of _______________
County of _____________

We, the undersigned, have carefully examined the damaged property in accordance with our previous appointment and have determined the loss and damage to be $ __ at replacement value* with a holdback of $__ and an actual cash value payable now in the amount of $___.

____
Appraiser

Sworn to before me this
____ day of ______, 20__.

____
Notary Public

____
Appraiser

Sworn to before me this
____ day of ______, 20__.

____
Notary Public

____

Umpire

Sworn to before me this
____ day of ______, 20__.

____

Notary Public

[Signatures of any two validates the award.]

*or such other value as defined by the policy. Includes allowances for all aspects of covered loss including, i.e., demolition and debris removal and other additional coverages pursuant to the policy.

SECTION IX

APPRAISAL AWARD

FORM 4

This is to certify that we, the undersigned, pursuant to our appointment as appraisers and umpire, have met in accordance with policy provisions and determined the following values* and loss for the property located at [loss location] damaged as a result of a [covered peril] which occurred on the __ day of _______, 20__.

1) Building	Value	Loss
Replacement of Dwelling	$	$
Architectural Fees		
Lawn, Trees & Shrubs		
Carpeting		
Window Treatment		
Wallpaper		
Floor Tile		
Patio & Walkways		
Excavation & Basements Repairs or Replacements		
Guard Service		
Temporary Repairs		
Demolition and Debris Removal-Building		
Contractor's overhead (10%)		
Contractor's profit (10%)		
Sales Tax		

Total $ $

2) * Additional Living Expense $ $
*Subject to reduction by prior payment of $___
____

This allowance includes the period from date of occurrence to the ______ day of _____, 20___, subject to further consideration by the panel in the event of unforeseen construction or other delay entitling the insured to additional payment pursuant to the policy.

3) Contents $ $

4) Debris Removal Contents $ $

The Appraisal Panel has determined that the dwelling required total demolition.

Payment upon this award shall be issued within ____ days of the facsimile transmission of this award to the parties, pursuant to policy, statute or regulation, whichever is shortest.

This Award, determined and executed this ___ day of _____, 20___ , at _____________.

____
UMPIRE

____
APPRAISER

APPRAISER

[Signatures of any two validates the award.]

SECTION IX

APPRAISAL AWARD

FORM 5

[For use where there are coverage issues as to extent of covered property–in the context of a builder's risk claim for damage to a building with a co-insurance issue.]

We, the undersigned, pursuant to our appointment as appraisers and umpire, have met in accordance with the policy provisions in order to appraise the (fire, water, etc.) damage that occurred on or about (date of loss), located at (address).

We hereby certify that we have heard and reviewed all of the evidence presented both oral and written by both the insured, (name of insured) and the insurer, (name of insurance company), and have appraised and determined the Replacement Cost of the structure as built on (date of loss). We have also determined the total estimated completed value of the covered property pursuant to the policy.

A. Replacement Cost of the structure as built on (date of loss) $

B. Total Estimated Completed Value of the Covered Property $

SCHEDULE B

	ITEM	COST
1.	Architect	
2.	Drafting/Consulting	
3.	Contractor's Fee	
4.	Dumpster	
5.	Excavating, Footings & Foundation	
6.	Footings Foundation & Stone	
7.	Concrete & Stone	
8.	Lumber Package	
9.	Truss Package	
10.	Framing Contractor	
11.	Stucco & Stone	
12.	Stair & Railings	
13.	Canopy	
14.	Roofing	
15.	Gutter	
16.	Insulation/Fire Safing	
17.	Doors & Windows	
18.	Electronic Locks	
19.	Drywall Hanging & Finish	
20.	Popcorn Ceilings	
21.	Suspended Ceiling	
22.	Tile Work/Granite	
23.	Lobby Millwork	
24.	Lobby Solid Surfaces	
25.	Labor Carpet/Vinyl	
26.	Elevator	
27.	Heating & Cooling	

28. Plumbing
29. Hot Water System
30. HVAC
31. Plumbing Fixtures
32. Electrical
33. Electrical Fixtures
34. Phone System/T.V. Cable
35. Fire Alarm
36. Building Permit
37. Sliding Doors
38. Temp. Utilities
39. Vehicle Costs
    (construction equipment)
40. Insurance
41. Construction Supervision
42. Wall/Roof Sheathing
43. Exterior Facia- Wood
44. Metal Facia
45. Vinyl Soffits
46. Prime, Paint & Stain
47. Fire Extinguishers,
    Handicap rail
48. Interior Signage
    Material, Labor

Total Estimated Completed) $
Value of Covered Property)

Sitework subject to coverage issues

49. Paving work, including
    material, labor & processed
    stone

50. Concrete, underground piping and site work
51. Curbs
52. Labor for Excavating & landscaping
53. Landscaping Material
54. Storm covers, hydrant work other materials & testing
55. Fire Hydrant

Furniture, Fixtures and Equipment Subject to Coverage Issues

ITEM	COST
56. Furniture & Fixtures	
57. Motel/Office Supplies	
58. Washer/Dryer	
Subtotal # 49-58	$
Total Estimated Completed) Value with Disputed Sitework) Included)	$

SCHEDULE C - COINSURANCE PENALTY CALCULATION

I. With items subject to coverage issues excluded

Amount of Ins. X Replacement Cost =
Amount Required

Subtotal Award Payable $
Debris Removal $
Total Award Payable Now $

(subject to credit for prior payments)

(payable within _______ days of the Award pursuant to the Loss Payment provision of the policy.)

II. With items subject to coverage issues included - includes amount payable now and amount subject to resolution of coverage issues.

Amount of Ins. x Replacement Cost = $
Amount Required

Subtotal Award Payable $
Debris Removal $
Total Award Payable $
(with disputed sitework and
furniture and fixtures included)

(subject to a credit for prior payments)

(payable within __ days of the Award pursuant to the Loss Payment provision of the policy, or statute ore regulation, whichever is shorter.)

WITNESS MY HAND THIS __ DAY OF _____, 20__.

____
Appraiser

WITNESS MY HAND THIS __ DAY OF _____, 20__.

____
Appraiser

WITNESS MY HAND THIS __ DAY OF ____, 20 __.

____
Umpire

[Signatures of any two validates the award.]

SECTION X

JURY INSTRUCTION - TRIAL UPON THE INSURER'S REFUSAL TO SUBMIT TO APPRAISAL

FORM - 1

I charge you that under the terms of the insurance policy in evidence in this matter, if there is a dispute as to the amount of loss or actual cash value* then either party can demand an appraisal to determine the amount of such value and loss, by serving a notice in writing on the opposite party. If, upon your consideration of all of the evidence in this matter, you believe from the evidence, that there was a dispute between the parties as to the amount of loss or actual cash value* and that a notice in writing was served upon the insurer or someone authorized to act for the insurer, demanding such appraisal, in accordance with the provisions of the insurance policy, you may find that the insurer wrongfully failed to submit to appraisal in breach of the subject insurance policy. If however you determine after reviewing the evidence that either such a demand was not made or that there did not exist a dispute between the parties as to the amount of loss or actual cash value,* then I charge you that you may find there has been no such breach of contract.[1208]

If you decide that the insurer breached the policy of insurance, you must then decide the amount, in dollars, based upon all of the evidence in this trial, that represents the actual and consequential damage suffered by the insured as a direct result of such breach.[1209]

In addition to actual damages, the plaintiff is seeking consequential damages. Consequential damages are not recoverable in an action to recover for breach of contract unless the plaintiff has proven that such damages were foreseeable and within the contemplation of the parties at the time the contract was made.

In determining the contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered as well as what liability the defendant fairly may be supposed to have assumed consciously or to have warranted the plaintiff reasonably to suppose

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1208 Levy v. Scottish Union & National Ins. Co., 58 W. Va. 546, 52 S.E. 449 (1905); Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N.E. 804 (1888), *aff'd*, 127 Ill. 246, 20 N.E. 18 (1889).

1209 The Willow Inn, Inc. v. Public Service Mut. Ins. Co., 2002 WL 922144 (E.D. Pa. 2002), *aff'd*, 66 Fed. Appx. 398 (3d Cir. 2003), *on remand to*, 2003 WL 21321370 (E.D. Pa. 2003); Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York, 10 N.Y.3d 187, 886 N.E.2d 127 (2008).

that it assumed when the contract was made.[1210]

*or other value as insured by the policy

[1210] Bi-Economy, *supra*; Kenford Co., Inc. v. Erie, 73 N.Y.2d 312, 540 N.Y. Supp.2d 1, 537 N.E.2d 176 (1989), quoting Holmes in Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 23 S. Ct. 754 (1903).

SECTION X

JURY INSTRUCTIONS - TRIAL UPON THE INSURED'S REFUSAL TO SUBMIT TO APPRAISAL

FORM - 2

I charge you that in the event of a dispute between the parties to this matter as to the amount of loss or actual cash value* then either party upon its written demand may compel the other to proceed through an appraisal process by serving notice in writing upon the opposite party. I further charge you that the appraisal provision reads as follows:

[Quote policy appraisal provision]

If after considering all of the evidence admitted in this matter, you conclude that there existed a dispute as to the amount of loss or actual cash value* and if you further conclude that a proper demand was made by the insurer in this matter to the insured to proceed to the appraisal process, and if you further find that the insured refused to proceed to appraisal without sufficient cause, I charge you that you may then conclude that the insured breached the policy of insurance in this matter and the insured may not now recover and your verdict must be for the insurance company.[1211]

* or other value as insured under the policy

[1211] Levy v. Scottish Union & National Ins. Co., 52 S.E. 449, 58 W.Va. 546 (1905); Birmingham Fire Ins. Co. v. Pulver, 18 N.E.804, 126 Ill. 329 (1888)

SECTION XI

COMPLAINT SEEKING TO SET ASIDE AN APPRAISAL AWARD

FORM - 1

SUPREME COURT OF THE STATE OF ______
COUNTY OF __________________________
---x

Index No.:

Plaintiff,

-against-

Complaint

Defendant.
---x

Plaintiff, by his attorneys, as and for his complaint, alleges the following upon information and belief:

1. At all times hereinafter mentioned, plaintiff, was and is a natural person over the age of eighteen (18) years and is a resident of the County of _____ ,City of _____, and State of ________.

2. At all times relevant to this action, defendant,(insurance company), was and is domiciled in the state of _______ , and licensed to issue property insurance policies in the state of__________ .

3. On or about (date policy issued), defendant (insurance company) made and issued insurance policy number (policy number), whereby it did insure the dwelling and personal property, located at (loss location) (hereinafter the "SUBJECT PREMISES") against all risks of loss subject to certain exclusions and limitations including (type of loss) damage.

4. At all relevant times herein mentioned, Plaintiff(s), had an ownership interest in the dwelling and personal property located at the subject premises.

5. On or about (date of loss), the above mentioned policy was in full force and effect.

6. On or about (date of loss), the subject premises sustained damage resulting in extensive loss to the dwelling and personal property therein.

7. As a result thereof, plaintiff has sustained an unreimbursed loss in the amount of at least (open amount of claim) ($_______) Dollars.

8. No part of said personal property claim has been paid, although duly demanded.

AS AND FOR THE FIRST CAUSE OF ACTION

9. The subject policy of insurance contains the following clause relating to the insured's right of appraisal (the "Appraisal Clause"):

APPRAISAL

QUOTE FULL APPRAISAL CLAUSE FROM POLICY [OR FROM THE STANDARD FIRE POLICY, WHICHEVER IS MORE BENEFICIAL TO THE INSURED, IF APPROPRIATE].

10. Following the submission of plaintiff's claim, the plaintiff and defendant failed to agree on the amount of the loss and damage to personal property.

11. On or about (date of demand of appraisal), the plaintiff made a demand for Appraisal pursuant to the policy, and appointed (name of appraiser designated) as appraiser.

12. On or about (date carrier appointed appraiser), (Name of Insurance Company) appointed (Name of appraiser designated).

13. On or about (date umpire retained), (Name of Umpire) was retained to act as

umpire for the appraisal with the consent of both parties.

14. Said Appraisal proceeded and on or about ____, 20__ , an award was rendered and executed by the Umpire and Appraiser for the insurance company, a copy of which is annexed as Exhibit "A".

15. On or about _____, 20__, the Umpire and defendant's appraiser signed an appraisal award for the value of the personal property loss, (the "Award"), which appeared as follows: [This sample alleges lack of itemization as the basis for challenge. The recognized grounds for successful challenge are discussed in Chapter X[D]. The facts underlying the challenge should be alleged in separate allegations and with specificity.]

16. The Award violates the above quoted Appraisal Clause of the policy by failing to separately state the value of each item and amount of loss, as required.

17. The lump sum award also violates the Standard Fire Policy, in which the Legislature sets forth the minimum standard policy language all insureds are entitled to, pursuant to Insurance Law _____, which states as follows: "An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value

and loss." (NOTE - language from New York Insurance Law §3404).

18. The Award dated ____, should be vacated.

AS AND FOR THE SECOND CAUSE OF ACTION

[Insert additional cause of action for breach of contract.]

WHEREFORE, Plaintiff demands judgment against defendant on the First Cause of Action vacating the award dated _________; and on the Second Cause of Action a judgement in the sum of at least $___________ Dollars, plus attorneys' fees, together with interest thereon from (date of award), and the costs and disbursements of this action and such other and further relief as to this Court deems just and proper.

APPENDIX B

TABLE OF CASES

Cases.

APPENDIX C

TABLE OF STATUTES

Statutes.

APPENDIX D

TABLE OF OTHER AUTHORITIES

Other Authorities.

APPENDIX E

THE CODE OF ETHICS FOR UMPIRES IN INSURANCE APPRAISALS[1212]

The Code of Ethics for Umpires in Insurance Appraisals was prepared in 2004 by the Umpire Directory Committee of Windstorm Insurance Network, Inc. And approved by the Officers and Board of Directors at its meeting on August 3, 2004. Pursuant to the Bylaws of the organization, the Code was adopted by the members at the Annual Business Meeting in February 2005 at the annual Windstorm Insurance Conference.

PREAMBLE:

The use of the appraisal to resolve insurance disputes has grown extensively. Persons who act as Umpires therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by Umpires have arisen. Nevertheless, this Code

[1212] Re-printed with the permission of the Windstorm Insurance Network, revised September 2007 sets forth general accepted standards of ethical conduct for the guidance of Umpires, in the hope of contributing to the maintenance of high standards and continued confidence in the process of Appraisal.

Although most proceedings are Appraised pursuant to an insurance contract and voluntary agreement of the parties, certain disputes are submitted to Appraisal by the Court. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, the person in called "umpire."

Umpires, like judges, have the power to decide cases. However, unlike full-time judges, Umpires are usually engaged in other occupations before, during, and after the time that they serve as Umpires. Often, Umpires are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding the pending issues. This Code recognizes these fundamental differences between Umpires and judges.

NOTE ON CONSTRUCTION:

Various aspects of the conduct of umpires, including some matters covered by this Code, may also be governed by agreements of the parties described in any Memorandum of Appraisal, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any umpire to act in a manner inconsistent with the umpire's fundamental duty to preserve the integrity and fairness of the Appraisal process.

Canons I through VIII of this Code apply to all Umpires participating in the Appraisal process.

CANON I. AN UMPIRE SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE APPRAISAL PROCESS.

A. An Umpire has a responsibility not only to the parties but also to the process of appraisal itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an Umpire should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding.

B. One should accept appointment as an umpire only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the appraisers;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the appraisal in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting an appointment and while serving as an Umpire, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as Umpires should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the appraisal by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an Umpire where the parties have consented to the umpire's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Umpires should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an Umpire's authority is derived from the agreement of the parties, an Umpire should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the appraisal or refers to rules to be followed, it is the obligation of the Umpire to comply with such procedures or rules. An Umpire has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the umpire's judgment, would be inconsistent with this Code.

F. An Umpire should conduct the appraisal process so as to advance the fair and efficient resolution of the matters submitted for decision.

An umpire should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the appraisal process.

G. The ethical obligations of an Umpire begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an Umpire and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an Umpire has accepted an appointment, the umpire should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an Umpire is to be compensated for his or her services, the Umpire may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An Umpire who withdraws prior to the completion of the appraisal, whether upon the Umpire's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the appraisal, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective Umpire is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Umpires may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the appraisal. Umpires do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the Appraisal, but an Umpire may not have prejudged any of the specific factual determinations to be addressed during the Appraisal.

During an appraisal, the Umpire may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the appraisal. These activities are integral parts of an Appraisal. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the Appraisal or the umpire's management of the proceeding.

CANON II. AN UMPIRE SHOULD DISCLOSE ANY INTEREST OR RELATION-SHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.

A) Persons who are requested to serve as Umpires should, before accepting, disclose:

(1) any known direct or indirect financial or personal interest in the outcome of the appraisal;

(2) any known existing or past financial, business, professional or personal relationships

which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective Umpires should disclose any such relationships which they personally have with any party or its lawyer, with any appraiser on the panel, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating umpire disclosures.

B. Persons who are requested to accept appointment as Umpire should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the appraisal, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution or by law.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an umpire, that person may properly serve.

G. If an Umpire is requested by all parties to withdraw, the Umpire must do so. If an Umpire is requested to withdraw by less than all of the parties because of alleged partiality, the Umpire should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or Appraisal rules agreed to by the parties, or applicable law establishes procedures for determining, challenges to Umpires, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the Umpire, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective Umpire with any provision of this Code would require disclosure of confidential or privileged information, the prospective Umpire should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON 111. AN UMPIRE SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If a Memorandum of Appraisal establishes the manner or content of communications between the Umpire and the Appraisers, the umpire should follow those procedures, notwithstanding any contrary provision of paragraphs B and C.

B. An Umpire or prospective Umpire should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective Umpire is being considered, the prospective Umpire:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective Umpire may receive information from a party or its counsel disclosing the general nature of the dispute, but should not permit them to discuss the merits of the case.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an Umpire communicates in writing with one Appraiser, the Umpire should at the same time send a copy of the communication to other Appraisers.

CANON IV. AN UMPIRE SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An Umpire should conduct the proceedings in an even-handed manner. The Umpire should be patient and courteous to the parties, their representatives, and the witnesses; and, he or she would always encourage similar conduct by all participants.

B. The Umpire should allow each Appraiser a fair opportunity to present its evidence and arguments.

C. When the Umpire determines that more information than has been presented by the parties is required to decide the case, it is not improper for the Umpire to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

D. Upon the request of either or both Appraisers the umpire should personally inspect any available damaged property.

E. Although it is not improper for an Umpire to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an Umpire should not exert pressure on any party to settle or to utilize other dispute resolution processes. An Umpire should not be present or otherwise participate in settlement discussions or act as a mediator, unless requested to do so by all parties.

CANON V. AN UMPIRE SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. The Umpire should, after careful deliberation, decide all issues submitted for determination. An umpire should decide no other issues.

B. An Umpire should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An Umpire should not delegate the duty to decide to any other person.

D. In the event that both appraisers agree upon a settlement of issues in dispute and request the umpire to embody that agreement in an award, the umpire may do so.

CANON VI. AN UMPIRE SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

A. An Umpire is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the Appraisal process to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The Umpire should keep confidential all matters relating to the Appraisal process and decision. An Umpire may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision.

C. It is not proper at any time for an Umpire to inform anyone of any decision in advance of the time it is given to all parties. It is not proper for the Umpire to inform anyone about the substance of the deliberations of the Appraisers. After an appraisal award has been made, it is not proper for an umpire to assist in proceedings to enforce or challenge the award.

CANON VII. AN UMPIRE SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

A. Umpires who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the Umpire finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established.

(2) Umpires should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

(3) Umpires should not withhold any deicison or award pending payment by any or either party for the services of the umpire.

CANNON VIII. AN UMPIRE MAY ENGAGE IN ADVERTISING OR PROMOTION OF UMPIRE SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an Umpire must be accurate and unlikely to mislead. Any statements about the quality of the Umpire's work or the success of the Umpire's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an Umpire from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of umpire services conforming to such standards or from responding to inquiries concerning the umpire's availability, qualifications, experience, or fee arrangements.

Please note that the Code of Ethics for Umpires in Insurance Appraisals is a living document. It is submitted to the organization for approval and can be modified or amended at future meetings.

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