ACCEC
American College of Coverage and Extracontractual Counsel

August 2015

Dear Colleagues:

It is has been my privilege to serve as the second President of the American College of Coverage and Extracontractual Counsel. The College fills an important role in our practice area, promoting professionalism and collegiality and adding to the scholarship in our practice area. In that vein, I am very pleased to introduce the survey of the law on property insurance appraisal prepared by our First-Party Property Insurance Law Committee.

This survey, entitled First-Party Property Insurance Appraisal Compendium (1st Ed. 2014), addresses case law in all 50 states and my home jurisdiction, Washington, DC, on this important and sometimes mystifying issue. Given its support of this project, we have also shared the Compendium with the Windstorm Insurance Network, Inc. Appraisal of course can be an important aspect of a property insurance claim, and the law on the issue can vary from jurisdiction to jurisdiction and present intricacies that coverage practitioners need to know. The Committee is committed to updating this Compendium and is already working on that project.

We thank Committee Chair Janet Brown and Committee members Sherilyn (Sheri) Pastor, Wayne Taylor, and Steve Pate for conceiving the idea of a 50-state survey of the law on appraisal; and Janet and Sheri for enlisting members of the Committee to research and write these comprehensive jurisdiction-by-jurisdiction analyses.

We hope that you will find this survey of the law useful in your practice. We are indebted to all Committee members and contributors who have brought this valuable summary of the law to fruition. Thank you for your support during my year as ACCEC President and your membership in this College.

Sincerely yours,

Lorelie S. Masters

Lorelie S. Masters
President, 2014-2015

Enclosure

ACCEC

American College of Coverage and Extracontractual Counsel

First Party Insurance Appraisal Compendium

Prepared by members of the

American College of Coverage and Extra Contractual Counsel

And shared with the

Windstorm Insurance Network, Inc.

First Edition 2014

FIRST PARTY INSURANCE APPRAISAL COMPENDIUM

FIRST EDITION 2014

Prepared by members of the

AMERICAN COLLEGE OF COVERAGE AND EXTRA CONTRACTUAL COUNSEL

and
Shared with the

WINDSTORM INSURANCE NETWORK, INC.

ACCEC
American College of Coverage and Extracontractual Counsel

August 2015

Dear Colleagues:

On behalf of the members of the First-Party Property Insurance Law Committee of the ACCEC, we all hope that you will find the survey entitled First-Party Property Insurance Appraisal Compendium (1st Ed. 2014) useful in your practices. When we began functioning as a committee, our members decided that a survey of the law on insurance appraisal could be a useful publication for our members.

Many volunteers undertook the research. As co-chairs, we want to express our appreciation to each of them. This survey will be updated, hopefully each year. The 2015 research is currently underway. Once we see the results, we will work with the ACCEC Publications Committee to determine the best way to share the updated information either through a supplement or a posting on the ACCEC website.

This project and its results are also shared with the Windstorm Insurance Network. It too is an organization composed of membership from both the policyholder and insurer sides of the issues. It conducts training each year for appraisers and umpires. Many of our contributors are also members of that organization.

If you wish to participate in future editions or serve on our committee, please contact one of us, an ACCEC officer or the executive director.

Thanks again to all those whose contributions of time and effort made this survey a reality.

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AMERICAN COLLEGE OF COVERAGE and EXTRACONTRACTUAL COUNSEL's FIRST-PARTY PROPERTY INSURANCE APPRAISAL COMPENDIUM

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FOREWARD

First Party Insurance Appraisal Compendium

The First Party Insurance Appraisal Compendium (Compendium) covering 50 states and the District of Columbia is a project of the First Party Property Insurance Committee of the American College of Coverage and Extra Contractual Counsel (ACCEC). Its contributors are all members of that organization which is composed of premier attorneys representing either insurers or policyholders throughout the United States. Many of the contributors are also members of the Windstorm Insurance Network (WIND), also an organization including representatives of both insurance industry and policyholders. To learn more about either of these organizations, visit the websites as follows: americancollegecec.org or Windnetwork.com.

All contributors to this Compendium have given permission for sharing of the outlines between the two organizations for the benefit of the membership of each group. Both Boards of Directors have also approved the sharing of the project results between the WIND and the ACCEC constituencies. These Compendium's appraisal outlines were prepared over a period of months, beginning in July 2014. Every effort has been made to ascertain the accuracy of timeliness of the content at publication. Since legislatures may change or modify statutes and court opinions are changed or modified by appellate courts, readers are strongly cautioned against relying on this Compendium as a sole source of legal authority. It is highly recommended that users update the Compendium research for post-publication changes prior to applying the information to a specific situation. Readers should consult with an attorney to review the individual facts and circumstances of the specific claim to which you may wish to apply the content of these legal outlines.

The editors extend their gratitude to all of the contributors who lent their time, experience and expertise to this project. It is the hope of the contributors, ACCEC and WIND that you find the Compendium to be useful in your everyday claims activities.

Editors: Janet L. Brown of Boehm Brown Harwood, P.A. and Sherilyn Pastor of McCarter & English.

2014
INDEX TO ALABAMA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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Baldwin Mut. Ins. Co. v. Adair, 2014 Ala. LEXIS 161 (Ala. Sept. 30, 2014) – the Alabama Supreme Court reversed and remanded a trial court's order finding that the insureds satisfied their post-loss obligations and requiring an insurer to participate in the appraisal process. The insureds, through their legal counsel, sent a letter to their insurer purporting to invoke appraisal and accusing the insurer of bad faith. The insurer sought and obtained a preliminary injunction on the grounds that it was premature to begin appraisal before the insurer had an opportunity to investigate the insureds' claims and to determine whether it had sufficient information on which it could determine whether it disagreed with the claims. After several of the insureds provided some information regarding their claims, the trial court subsequently modified its previous order staying the appraisal process. On appeal, the Alabama Supreme Court noted that the policy required a disagreement between the parties as to the amount the insurer was to pay in order to trigger an appraisal. The court concluded that the trial court erred by ordering the insurer to engage in the appraisal process before the insureds complied with their post-loss obligations to provide requested information and submit to examinations under oath (a condition precedent to the insurer's duty to pay the claim). Because the insurer lacked sufficient information from the insureds to determine whether it had a duty to pay the claim, there was no genuine disagreement and appraisal could not be invoked.

Ex parte Tower Ins. Co. of N.Y., 2013 Ala. LEXIS 91 (Ala. Aug. 23, 2013) – an insurance company, an independent adjusting firm, and an independent adjuster employed by that firm sought a petition for a writ of mandamus directing the trial court to set aside its order appointing an umpire to resolve a dispute between the insurance company and its insured regarding a claim for damage to the roof of the insured's commercial property. The insured had moved the trial court to appoint an umpire pursuant to an appraisal clause in the insurance policy. The insurance company claimed that the dispute was not over the amount of the loss, but rather, whether the loss was a covered loss. Although the Alabama Supreme Court declined to issue an opinion, one justice, in a concurring opinion, reiterated the holding in ***Rogers*** that disputes concerning the scope of insurance coverage should not be determined by appraisers or umpires in proceedings conducted pursuant to an appraisal clause in an insurance policy; instead, appraisals should be used only to establish the amount of loss.

Pa. Lumbermens Mut. Ins. Co. v. Buettner Bros. Lumber Co., 2012 U.S. Dist. LEXIS 66345 (N.D. Ala. May 11, 2012) – in a dispute over the appointment of an umpire to arbitrate a covered loss, the court invoked its inherent supervisory powers, rejected the parties' proffered umpires, and appointed a certified real estate appraiser to serve as umpire. The court, in addressing the criteria used in the umpire selection process, noted that it is a generally accepted insurance principle that an umpire should be impartial, honest, competent, and should not reside an unreasonable distance from the scene of the loss.

St. John's Deliverance Temple v. Adjusters, 2012 U.S. Dist. LEXIS 24575 (S.D. Ala. Feb. 27, 2012) – an Alabama federal magistrate judge recommended that the plaintiff's motion to remand the case be denied, finding that state law does not provide for a cause of action for negligent and/or wanton appraisal of a loss under an insurance contract, despite ***Rogers v. State Farm Fire and Cas. Co***., 984 So. 2d 382 (Ala. 2007), in which the Alabama Supreme Court determined that appraisers acting in the appraisal process pursuant to an insurance contract are bound by certain duties.

Jadick v. Nationwide Property & Casualty Insurance Company, 2011 Ala. Civ. App. LEXIS 357 (Ala. App. Dec. 16, 2011) – among other rulings, the Court of Civil Appeals of Alabama ruled that appraisal is not appropriate unless there is a disagreement over the amount of damages sustained from a covered loss. Fifteen (15) months after fire damage had been repaired and the insurer paid the full amount of those repairs, the insured obtained another estimate of the damage which was higher than the original estimate of the damages to the property and demanded appraisal. The insurer refused, claiming that the insured and insurer did not disagree on the amount of the loss, which is a condition precedent to invoking the appraisal provision. The appeals court found that the trial court properly granted summary judgment to the insurer on the basis that there was no disagreement of the amount of the loss because, at the time that the insurer submitted the repair estimate to the insured, the insured agreed with that estimate, and the insurance policy required the insured to immediately notify the insurer if the insured disagreed with the estimate or if the estimate was not adequate to cover all necessary repairs. The court held that the insured's action in waiting until 15 months after the insurance claim was paid in full and after the damaged property was repaired to seek an appraisal of the damaged property was so prejudicial to the insurer that it amounted to a waiver of the insured's right to an appraisal.

American Western Home Insurance Co. v. Reese, 2011 U.S. Dist. LEXIS 122085 (S.D. Ala. Oct. 20, 2011) – among other rulings, the court granted the insurer's motion for summary judgment, finding that the insured's attempt to invoke the appraisal provision simultaneously with the filing of a supplemental claim for damages resulting from Hurricane Katrina was inappropriate. The court held that the insurer had the right under the insurance policy to investigate the insured's claim before proceeding with the appraisal process. According to the court, the insurer has a right under the policy to require an insured to comply with all post-loss duties for a claim before the appraisal provision is properly invoked.

Scottsdale Ins. Co. v. Prayer Tabernacle Early Church of Jesus Christ No. 1, 2011 U.S. Dist. LEXIS 85371 (S.D. Ala. August 2, 2011) – although ruling that the insured was not entitled to recover on its supplemental claim for damages resulting from Hurricane Ivan and Hurricane Katrina based upon intentional misrepresentation in the claim, the court noted that the insurer was not obligated to participate in the appraisal process demanded at the same time the insured submitted its supplemental claim until it first completed its investigation of the claims. The court noted that the insurer had the right to require the

insured to comply with its post-loss duties for each supplemental claim, including prompt notice of the loss, submission of a proof of loss, and permitting the insurer to examine the insured's books and records.

Caribbean I Owners' Association, Inc. v. Great American Insurance Company of New York, Inc., 619 F. Supp 2d 1178 (S.D. Ala. 2008) – the court ruled that an appraisal provision which is limited to determining "the value at the time of loss and the amount of loss" is not ambiguous and limits the appraisal process to only a determination of the amount of the loss. The provision did not permit the appraisers to decide issues of causation or liability. Because the submission of the insured's claims under the policy to the appraisal process would implicate issues of causation that the appraisers are prohibited from deciding, the court dismissed the insured's action. In reaching this decision, the court found that determinations of causation and liability lie within the sole purview of the courts.

Rogers v. State Farm Fire and Casualty Co., 984 So. 2d 382 (Ala. 2007) – the seminal case in Alabama on the scope of an insurance policy's appraisal provision, the Supreme Court of Alabama ruled that a party claiming that the other had waived the right to submit a damages dispute to appraisal must show that it suffered substantial prejudice from the other party's delayed invocation of the clause. The court ruled that the insurer's delay of two years from the date of loss and more than a year after the insured filed suit before demanding appraisal was not a waiver of the invocation of appraisal because the insured had failed to show substantial prejudice from the insurer's delayed invocation of the provision. The Supreme Court also ruled that the appraisers' duty under the appraisal provision is limited to determining the monetary value of the property damage (e.g., amount of loss), and appraisers are not vested with the authority to decide questions of coverage and liability, which are expressly reserved for decision by the courts.

Turner v. Allstate Insurance Co., 1991 U.S. Dist. LEXIS 16051 (S.D. Ala. October 28, 1991) – the court ruled that the insured was not required to submit his claim to appraisal as a condition precedent to filing suit. The court found that the insurer failed to comply with the insurance policy's provisions by failing to make a written demand for appraisal, which excused the insured from submitting to the process. The court noted that indirect demands to the court after the matter is in litigation are insufficient and untimely to require appraisal. The policy specifically required that a written demand was required in order to trigger an obligation to submit to appraisal.

Southeast Nursing Home, Inc. v. The St. Paul Fire and Marine Insurance Co., 750 F. 2d 1531 (11th Cir. 1985) – the appeals court upheld the trial court's ruling that an insured could not avoid participation in an appraisal process it demanded because the insurer appointed an appraiser who was not impartial. The insured maintained that the insurer waived its right to appraisal (called arbitration in the opinion) because it had selected an

appraiser that was partial to the insurer. Because the insurance policy in this case did not require the parties to select impartial appraisers, even if the insurer had appointed a biased appraiser, such appointment did not operate as a waiver of its right to resolution of the loss through appraisal. The appeals court also ruled that the policy did not require the insurer to pay any amount toward the loss until the appraisal process was concluded. In other words, the court found that the insurer was not required to pay the uncontested amount of the claim until the appraisal process was complete.

Casualty Indemnity Exchange v. Yother., 439 So. 2d 77 (Ala. 1983) – the Supreme Court invalidated an appraisal award because the insured, who twice had asked for the opportunity to present testimony or evidence of the condition and value of his vehicle, was prohibited from doing so. In reaching this finding, the court found that the procedure instituted was an arbitration and not an appraisal, which required that the Alabama statutory requirements be followed. The court found that any other result would violate the insured's fundamental right to notice and an opportunity to be heard where property rights are affected.

Commercial Union Insurance Company v. Ryals, 355 So. 2d 684 (Ala. 1978) – the Supreme Court overruled an objection by the insurer where an appraisal award determined only replacement and repair costs rather than actual cash value, finding that a depreciation allowance would place an additional expense on the insureds that was not contemplated by the parties. The court also ruled that an itemized account of the components of damage which made up the damaged building was unnecessary. The court found that the appraisers properly computed the loss to the building as one item. According to the court, the word "item" as used in the appraisal provision refers to items listed in the policy (e.g., building, personal property, extra expense, etc.) and not to a detailed specification of all minute elements of damage giving rise to the total damages with respect to each item listed on the policy.

Chambers v. Home Insurance Co. of New York, 191 So. 642 (Ala. App. 1939) – the Alabama appeals court ruled that an insurer's prior denial of liability under a policy estopped the insurer from invoking the appraisal provision (referred to as arbitration in the opinion). The appeals court found that the appraisal provision applies only to determine the amount that was due under the policy, and appraisal is not appropriate once the insurer claimed that it was not liable under the policy at all.

Ex Parte Birmingham Fire Insurance Co., 172 So. 99 (Ala. 1937) – in response to an insurer's attempt to have a case transferred to equity court from a court of law because the insured had wrongfully prevented an appraisal award (the term arbitration used in the opinion) from being made, which the court denied, the court ruled that any action brought by the insured would be barred if it is found that the insured wrongfully prevented an

appraisal award or withdrew from the appraisal proceeding and instead filed suit before an appraisal award was secured.

Glens Fall Insurance Co. of New York v. Garner, 155 So. 533 (Ala. 1934) – the Supreme Court of Alabama ruled that an appraisal award will be overturned only under certain circumstances. The court ruled that once a dispute over damage is submitted to appraisal (the term arbitration used in the opinion), an appraisal award is final unless the appraisers are guilty of fraud, partiality, or corruption in making the award.

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2014
INDEX TO ALASKA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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ALASKA

1. Alaska Statutes and Regulations

Certain policies issued in Alaska must contain an appraisal clause: "A motor vehicle or similar policy, a policy providing property coverage, or any other policy providing first party property, casualty, or inland marine coverage, issued or delivered in this state, must include an appraisal clause providing a contractual means to resolve a dispute between the insured and the insurer over the value of a covered first party loss for real property, personal property, business property, or similar risks." Alaska Stat. § 21.96.035. When the insured and insurer disagree "on the amount of a covered first party loss, either may make written demand upon the other to submit the dispute for appraisal." Within ten days of that demand, "the insured and insurer must notify the other of the competent appraiser each has selected," and those two appraisers must "promptly choose a competent and impartial umpire." Within 15 days of choosing the umpire, "unless the time period is extended by the umpire, each appraiser will separately state in writing the amount of the loss." *Id.* If the appraisers agree to an amount in a submitted "written report," then that amount is "binding upon the insured and insurer." *Id.* But if the appraisers disagree, they "will promptly submit their differences to the umpire." *Id.* An agreed upon decision "by one of the appraisers and the umpire will be binding upon the insured and insurer." The umpire will also determine who pays the "expenses and fees, not including counsel or adjuster fees, incurred because of the appraisal." *Id.*

2. Alaska Case Law

***McDonnell v. State Farm Automobile Insurance Co.*, 299 P.3d 715 (Alaska 2013)**
The mandatory appraisal statute does not require an appraisal for personal injuries. The Alaska Legislature's use of the terms "appraisal" and "personal property" in Alaska Statute § 21.96.035 was the subject of dispute in *McDonnell* in which the Alaska Supreme Court held that the statute did not require an arbitration of personal injury claims. *Id.* at 722. The case arose from a car accident in which McDonnell claimed that she and her son incurred back injuries. *Id.* at 718. Her insurer, State Farm, disputed the injuries' cause. *Id.* at 719. Subsequently, McDonnell sought a declaratory judgment, contending that § 21.96.035 required an "'appraisal-arbitration'" process for her disagreement with State Farm about coverage for the personal injuries. *Id.* at 720. She premised this contention on the following: (1) "appraisal" was synonymous with "arbitration," (2) "personal property" was statutorily defined outside of the insurance code as "things in action," and (3) "things in action" has been defined as including personal injury claims. *Id.* at 720. The Alaska Supreme Court disagreed with McDonnell's reading of the statute. It determined that "appraisal" was not synonymous with "arbitration." *Id.* at 721-22. Although it acknowledged that a "narrow and literal interpretation" supported McDonnell's reading of the statute regarding personal injury claims, the court concluded that the statute's context indicates that it does not include such claims. *Id.* at 722. The court reasoned that if Alaska's legislature intended for § 21.96.035 to

include all things in action, such as personal injury claims, then all insurance claims would be subject to a mandatory appraisal, thereby making "superfluous" the "statute's language limiting the appraisal process to 'real property, . . . business property, and other similar risks.'" *Id.* at 721 (quoting Alaska Stat. § 21.96.035).

Credit: Owen Mooney

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2014
INDEX TO ARIZONA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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1. *San Souci Apartments v. Nat'l Surety Corp.*, No. CV-12-2389-PHX-GMS, 2013 WL 428091 (D. Ariz. Feb. 4, 2013) – Under Arizona law, an appraisal clause only allows the parties to use appraisal to resolve disputes over the amount of damages, not questions of coverage. As the cause of the damage was in dispute, the issue was not about the amount of loss, and therefore not within the appraisal provision.

2. *6700 Arrowhead Owners Ass'n v. State Farm Fire and Cas. Co.*, No. CV-12-1677-PHX-DGC, 2012 WL 5868969 (D. Ariz. Nov. 19, 2012) – Appraisal provisions are governed by arbitration principles, so when considering whether to compel arbitration, any doubts over the scope of arbitable issues should be resolved in favor of arbitration. Additionally, Arizona appraisers are only allowed to determine the amount of damage, not the scope of coverage. Applying these principles, the court ordered all the alleged damages should be appraised, but itemized so that the insurer could later challenge liability for any categories that fell outside the scope of the policy.

3. *Harvey Prop. Mgmt. Co. v. Travelers Indem. Co.*, No. 2:12-CV-01536-SLG, 2012 WL 5488898 (D. Ariz. Nov. 6, 2012) – In light of strong Arizona public policy favoring alternative dispute resolution, claim involving dispute over cause of loss may proceed to appraisal with panel ordered to assess actual cash value and replacement cost for the damages the parties agree were cause by a covered cause of loss and the same for those damages which are in dispute.

4. *Herndon v. American Family Home Ins. Co.*, No. CV-08-928-PHX-ROS, 2009 WL 775428 (D. Ariz. March 23, 2009) – Right to appraisal not waived or impossible after foreclosure and destruction of residence. Issues of scope and coverage are not appraisable and remain with the court.

5. *Jasem v. State Farm Fire Ins. and Cas. Co.*, No. CV-06-595-PHX-DGC, 2007 WL 1146433 (D. Ariz. Apr. 18, 2007) – Breach of contract claim does not preempt policy's appraisal provision and appraisal award is confirmable by the court. However, payment of appraisal award and confirmation does not resolve bad faith cause of action and those contract matters not included in the appraisal process.

6. *Gahn v. Columbia Cas. Ins. Co.*, No. CV-03-630-TUC-DCB, 2006 WL 3390299 (D. Ariz. Nov. 21, 2006) – Appraisers' conclusions will not be vacated or modified except where an award demonstrates manifest disregard of law or where the award is irrational; the court may not substitute its judgment for that of the arbitrator where neither the award nor record suggests manifest disregard of law. Defenses based on lack of cooperation do not invalidate appraisal award.

7. *Carbonneau v. American Family Mut. Ins. Co.*, No. 06-1853-PHX-DGC, 2006 WL 3257724 (D. Ariz. Nov. 9, 2006) – Appraisers only determine the amount of damage and do not resolve questions of coverage. However, where the dispute is what repairs are necessary to restore the property to pre-loss condition, appraisal is appropriate.

8. *Ori v. American Family Mut. Ins. Co.*, No. CV-2005-697-PHX-ROS, 2005 WL 3079044 (D. Ariz. Nov. 15, 2005) – Where a difference in estimates stemmed from the parties' disagreement about the repairs necessary to restore the home to its pre-fire state, it is tantamount to a dispute over the amount of loss and is subject to appraisal. The term "amount of loss" includes the amount it would cost to repair what was lost, and since the dispute was about the cost of repairs, it was subject to appraisal.

9. *Smith v. Civil Service Emp. Ins. Co.*, No. CIV04-02013PHX-MEA, 2005 WL 2620537 (D. Ariz. Oct. 13, 2005) – Insured did not waive right to compel appraisal 11 months after suit was filed because the insurer was not prejudiced and there was no showing that the insured acted inconsistently with the remedy it sought.

10. *Palozie v. State Farm Mut. Auto. Ins. Co.*, No. 96-0021-PHX-ROS, 1996 WL 814533 (D. Ariz. Dec. 2, 1996) – Insurer did not waive right to seek appraisal after suit was filed because the parties had attempted appraisal before litigation and the insured was not prejudiced by granting a motion to compel appraisal, as any litigation expenses were of his own making from his decision not to agree to appraisal when the insurance company repeatedly requested it.

11. *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 892 P.2d 1365 (Ct. App. 1994) – Insurer waives its right to compel appraisal when it files an answer to a suit for breach of the contract, and fails to demand enforcement of the appraisal clause as this would indicate a clear repudiation of the right to arbitrate or appraise. Allowing a defendant to invoke the appraisal clause anytime after it filed its answer "would leave the insured in limbo as to which procedure would prevail for settlement of their claim" and would nullify the time and expense-saving benefits of appraisal.

12. *Hanson v. Commercial Union Ins. Co.*, 150 Ariz. 283, 723 P.2d 101 (Ct. App. 1986) – The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration, but it is not their function to resolve questions of coverage and interpret provisions of the policy. As a result, the appraisers had exceeded the scope of the appraisal clause.

13. *Home Indem. Co. v. Bush*, 20 Ariz. App. 355, 513 P.2d 145 (Ct. App. 1973) – As relates to an appraisal provision under an auto policy, the arbitration provision is relevant at the time the insurer and insured are determining the actual amount of the loss, and if they fail to reach some agreement as to the amount of loss, they may submit the issue to appraisal. Where a policy contains a provision allowing the insurer the option to repair, replace or rebuild the damaged item and that option is exercised, the rights and duties of the parties become governed by the new agreement under the policy and the appraisal provision is specifically waived. Failure to properly repair, replace or rebuild within a reasonable time and in a proper manner will then subject the insurer to liability in accordance with the general rules of contract law.

2014
INDEX TO ARKANSAS DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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ARKANSAS

1. National Fire Ins. Co. of Hartford, Conn. v. O'Bryan, 87 S.W. 129 (Ark. 1905)—in fire policy dispute, insurer invoked appraisal clause. Parties selected appraisers and agreements were written up but not signed. Prior to this, however, insured's appraiser had already made an estimate of the loss and was paid for his services. Insurer's appraiser then also estimated the loss, and the appraisers differed only slightly in estimating the value of the loss. When again choosing appraisers after the parties' initial failure to sign the appraisal agreement, the insured sought to again select the same appraiser and the insurer objected. It also appeared that the insured's appraiser was also a contractor who had agreed to build a number of houses for the insured. The question that was eventually presented to the Arkansas Supreme Court was what the phrase "competent and disinterested appraiser" meant within the context of the appraisal clause of a standard fire insurance policy. The Court held first that whether an appraiser is "competent and disinterested" is a fact question for a jury but noted that juries should determine whether appraisers are "sufficiently free of bias and prejudice to be [ ] disinterested . . . ." The Court then held that the insured's appraiser's other business dealings did call into question whether he was free of bias, but that it was up to the jury to decide that issue. The Court also held that the fact that the insured's appraiser's had a pre-existing familiarity with the property "was not a disqualification as an appraiser."

2. National Fire Ins. Co. v. Boon, 88 S.W. 915 (Ark. 1905)—alongside its companion *O'Bryan*, this case assessed the validity of an appraisal. In this fire policy dispute, the insurer invoked appraisal. Both parties selected appraisers and the appraisers selected an umpire. The appraisers disagreed radically in their estimation of the loss. The insurer's appraiser then called in the umpire, who disagreed with the insurer's appraiser *even more radically* than the insured's appraiser disagreed with the insurer's appraiser. The insurer's appraiser then withdrew, and the umpire and the insured's appraiser then made an award in conformity with their higher estimation of the loss. The lower court approved the appraisal award. In addressing the insurer's ensuing appeal, the Arkansas Supreme Court first noted that "[e]very reasonable . . . presumption is in favor of the award should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake or of the misfeasance or malfeasance of the appraisers." Accordingly, the Court upheld the lower court's determination because it was satisfied that the evidence did not show any of these problems with the appraisal process. Finally, the Court also held that the withdrawal of the insurer's appraiser was immaterial on the ground that once the appraisal process begins, it cannot be upset by the withdrawal of an appraiser.

3. Firemen's Ins. Co. of Newark, N.J. v. Davis, 198 S.W. 127 (Ark. 1917)—in fire policy dispute, insured sued carrier to recover on the policy. The insurer defended by arguing that the insured failed to comply with the policy's appraisal clause, which it argued was a condition precedent to bringing suit. The Arkansas Supreme Court disagreed and highlighted a statute that was passed after *O'Bryan* and *Boon* were decided and which states that "[n]o policy of insurance shall contain any condition, provision or agreement which shall directly or indirectly deprive the insured or beneficiary of the right to trial by

jury on any question of fact arising under such policy, and all such provisions, conditions or agreements shall be void." *See* Ark. Code. Ann. § 23-79-203 (present version of statute). The Court held that the "statute in question was enacted to prevent insurance companies from . . . insert[ing] in its policies a clause providing for an appraisal in case of disagreement as to [the] amount [of the loss] and [making it] a condition precedent to the insured's rights of action on the policy." Thus, the Court held that such appraisal clauses are void under Arkansas law.

4. Insurance Co. of N. Am. v. Kempner, 200 S.W. 986 (Ark. 1918)—in this fire policy dispute, the Arkansas Supreme Court highlighted one way in which appraisal may still live on in Arkansas. In *Kempner*, the insured agreed to appraise the value of the loss *after* the loss and in an agreement *separate* from its insurance policy. As the Court explained, "[t]he agreement for appraisement in the present case, treating it, as we must, as entirely disconnected from the void provision in the policies, amounted to no more nor less than a common-law submission to arbitration of a disputed question of fact . . . ." The Court went on to hold that such an agreement is revocable at any time before the award at the will of either party, but that such revocation "must be of equal dignity with the form of the agreement for submission, that is to say, the revocation must be in writing if the agreement to submit was in writing." The insured had revoked its intent to submit the dispute to appraisal prior to any award, and the Court therefore held that the insurer could not compel the policyholder to submit the dispute to an appraisal process.

2014
INDEX TO CALIFORNIA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

Prepared for

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INDEX OF CALIFORNIA DECISIONS

1. Alexander v. Farmers Insurance Company, Inc., 219 Cal. App. 4th 1183 (2013) – Plaintiffs consisted of a putative class of insureds under homeowners policies who suffered partial losses to their homes and personal belongings due to fire in 2009 and 2010. The class alleged that the insurer, Farmers, method of calculating depreciation was illegal under the Insurance Code and related regulations. The court summarized the significant body of existing California law related to appraisals, including that while appraisal hearings are a form of arbitration and are generally subject to rules governing arbitration, appraisers are limited to determining the amount of damage resulting to various items submitted for their consideration. Appraisers cannot, therefore, resolve questions of coverage and interpret provisions of the policy or relevant statutes. The court further recognized that while it may be appropriate for a trial court to require appraisal to proceed before litigation, the court retains the discretion to defer or stay the appraisal in favor of litigation of issues beyond the scope of the appraisers' limited jurisdiction. Returning to the specific facts there, the court held that there were both factual issues appropriate for the appraisers and legal issues within the jurisdiction of the court. The court of appeal further held that the trial court did not err in exercising its discretion in deferring to compel appraisal pending a judicial declaration of the parties' rights and obligations under the policies and statutes.

2. Kirkwood v. California State Auto. Assn. Inter-Insurance Bureau, 193 Cal. App. 4th 49 (2011) – The insured submitted a claim of loss following a fire at his home for damage to his home and personal property. The insurer ("CSAA") provided the insured with a contents inventory which showed that a blanket depreciation schedule was applied (roughly 50-80 percent depreciation was applied). The insured challenged the settlement offer and asserted that CSAA applied "excessive depreciation" and the insured accused CSAA of violating Insurance Code Section 2051. Thereafter the insured brought a putative class action against CSAA for declaratory relief regarding the interpretation of the statute governing the determination of the "actual cash value" of the property at the time of the loss, breach of contract, bad faith, and violation of unfair compensation law. CSAA brought a motion to compel appraisal. The court found in favor of the insured and CSAA appealed. The appellate court affirmed the decision of the lower court and held that the appraisal was properly deferred until the insured obtained a court declaration as to whether CSAA improperly applied blanket depreciation based on the items age without regard to condition. The appellate court specifically found as follows: 1) fire insurance appraisers have no power to interpret the insurance contract or governing statutes; 2) declaratory relief was appropriate to clarify the proper method of calculating depreciation; 3) the trial court was not required to compel appraisal before declaratory judgment; and 4) the insured did not violate the provisions requiring full compliance with the policy before bringing suit.

3. Doan v. State Farm General Ins. Co., 195 Cal.App.4th (2011) – Insured suffered a fire loss which he calculated at $174,000 based on the actual condition of each item at the time of loss. The insurer, State Farm, responded with a settlement offer of $130,000, and refused to explain the basis for the greater amount of depreciation reflected in its calculation. Insured brought a putative class action alleging that State Farm breached its

policies and violated California law in settling claims by employing improper valuation methods that overstate depreciation. The trial court dismissed the action on the pleadings, in pertinent part based on the insured having not demanded an appraisal. On appeal, the court concluded that the appraisal process is not the exclusive remedy for an insured at least when, as there, there were issues in dispute that exceeded the panel's authority. The court further held that a trial court has discretion to defer an appraisal pending a judicial declaration of the parties' rights under the insurance policies and applicable statutes.

4. Pivonka v. Allstate Ins. Co., 2011 WL 6153611 (E.D. Cal., December 12, 2011) – The insureds submitted a claim under a property policy issued by Allstate. The dispute involved what the court characterized as "factual disputes concerning whether Allstate failed to pay the actual cash value of the subject property, and falsely represented that the amount set forth in its settlement was the 'actual cash value.'" Based on the apparent absence of any contractual or statutory interpretation issues exceeding the appraisal panel's jurisdiction, the court distinguished Doan and Kirkwood, compelled appraisal and stayed the litigation.

5. Pavlina v. Safeco Ins. Co. of America, 2012 WL 5412796 (N.D. Cal., November 6, 2012) – Insured filed suit against insurer, Safeco, for breach of contract and bad faith. The insured alleged that the insurer had improperly refused to pay the actual cash value of his Porsche 911 Turbo GT2. The insurer removed the case to district court, and moved to dismiss the action or, in the alternative, compel appraisal under the policy. The district court granted the motion to dismiss, finding that compliance with the appraisal provision was a condition precedent to filing an action in court when, as apparently there, the court perceived no legal disputes concerning the interpretation of the policy or any applicable statutes.

6. Devonwood Condominium Owners Ass'n v. Farmers Ins. Exchange, 162 Cal.App.4th 1498 (2008) – Following a fire loss, the insured demanded arbitration under the policy's appraisal provision. A properly constituted panel issued an "appraisal of insurance claim award" which included two categories of loss. When the insured filed a petition to confirm the arbitration award, the insurer objected on grounds that one of the two categories of loss represented damages not covered under the policy. The trial court confirmed the award, and the insurer appealed. The court of appeal vacated the judgment, reaffirming standing principals of California law that "[t]he function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration[,]" and not "to resolve questions of coverage and interpret provisions of the policy."

7. Kacha v. Allstate Ins. Co., 140 Cal.App.4th 1023 (2006) – The insured filed a claim resulting from damages to his home following the Cedar Fire in San Diego. The insurer, Allstate, valued the cost to clean the home and contents at $25,799.77 dollars. The insured retained a Public Adjuster and submitted a sworn statement claiming $639,688.82 in covered losses. The same month, the insured filed a motion to compel an appraisal arbitration which was granted. The parties proceeded to appraisal and the panel delivered an award for $163,792 in replacement cost value and $155,993 in actual case value. The

award included zero amounts for numerous items. The insured requested the appraisal panel correct the award, arguing the panel exceeded its authority by making coverage determinations reserved for the court. The panel denied the motion and the insured filed a complaint in superior court. The insured petitioned the court to overturn the appraisal award. The court denied the request and the insured appealed. The appellate court reversed and remanded the case, based on the following holdings: 1) the insured did not waive right that jurisdiction of appraisers was limited to assessing value of damaged property; 2) the appraisers made coverage determinations; and 3) the insured did not waive his challenge to award by taking possession of checks from the insurer.

8. Safeco Ins. Co. of America v. Sharma, 160 Cal.App.3d 1060 (1984) – This dispute involved what insured contended was a "set of 36 Rajput miniature paintings, Bundi School, India, late 18th Century" claimed to have been stolen from the insured's home. The insured demanded an appraisal, and the panel valued the lost art at $14,000. Upon a request from the insured, the panel clarified that the valuation reflected that the panel was "not convinced, by a preponderance of the evidence, that the artwork was of 'Rembrandt' quality, ... but rather, that it was of average quality, assuming as we did, Mr. Sharma owned the art at the time of its loss." The court of appeal held that the panel can only consider "questions relating to value, e.g., quality or condition" of property, not questions concerning the identification of the lost or destroyed property. The court went on to state that any dispute about the claimed identity of the property "necessarily" involves an assertion by the insurer that the "insured misrepresented-whether innocently or intentionally-the character of the loss in filing a proof of loss." Since this implicates legal issues related to fraud, "a determination in the insurer's favor would foreclose a court from determining one essential element of fraud in any subsequent litigation."

9. Jefferson Insurance Company of New York v. The Superior Court of Alameda County, 3 Cal.3d 398 (1970) – In connection with liability for an insured loss under the standard form of fire insurance policy set forth in Insurance Code Section 2071 the insurers petitioned for a writ of mandate to compel the superior court to set aside an order vacating an appraisal award. The Supreme Court discharged the alternative writ and denied the petition for a peremptory writ. The court pointed out that the appraisers, who had been appointed on demand of the insurers, had improperly used replacement cost less depreciation in determining the actual cash value of the insured building at the time of the loss. The basis for the appraisers' determination was in accordance with the insurers' contention and resulted in the building being underinsured and permitting the insurers a proportionate reduction of the loss under the policy. The Supreme Court agreed with the superior court and held that the term "actual cash value" as used in Insurance Code Section 2071, is synonymous with "fair market value." Specifically, the court noted that the function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is not their function to resolve questions of coverage and interpret provisions of the policy.

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Colorado Appraisal Cases

Norwich Union Fire Ins. Soc. v. Rayor, 201 P. 50 (Colo. 1921)
The insurance company argued that the appraisal provision created a condition precedent to a right of action by the insured against the company. The Court found that the language in the appraisal provision was not enough to constitute a "demand" for appraisal was a condition precedent to the right of maintaining an action. The Court quoted a New York case in stating: "It is not the duty of a person whose property is insured by a standard policy, such as the one before us, to initiate an appraisal, for the contract makes an appraisal a condition precedent to recovery, only when one has been required by the insurer."

Providence Wash. Ins. Co. v. Gulison, 215 P. 154 (Colo. 1923)
The Court found that because the company's appraiser was not in the meeting in which an agreement was made (consisting of the insured, the insured's hired appraiser, and the appraiser umpire), the award could not be sustained because it was not made in the presence of the company's appraiser (or arbitrator). The Court stated that "an award by two, without notice to the third, made after one meeting of the three without agreement" was invalid.

Ins. Co. of North Am. et al. v. Baker, 268 P. 585 (Colo. 1928)
This case analyzed the effect of a fire policy provision stating, after its appraisal provision, "no suit or action on this policy, for 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, nor unless commenced within twelve months next after the fire." The court found that the appraisal provision required a genuine bona fide dispute, and that the denial of liability provision constituted a "waiver of the right to an appraisement." The court reasoned that "where an insurer denies that the insured has suffered any loss at all, an appraisement would be an idle ceremony."

Wagner v. Phoenix Insurance Company, 348 P.2d 150 (Colo. 1960)
The Court held that by making a "demand for the appointment of appraisers to determine the amount of the loss, the insureds irrevocably exercised their option to determine that question as provided by the appraisal clause of the policy." The Court based this decision on the language of the appraisal provision in the policy. Specifically, the Court noted that for an appraisal provision to be held to be a "condition precedent to a right of action," the provision must have language which is "expressed in the policy, or necessarily implied from its terms." Specifically with respect to the policy provision the court analyzed, it was neither expressed nor necessarily implied from its terms.

Gold v. State Farm Fire & Cas. Co., No. 10-cv-00825-MSK-MJW, 2010 WL 3894141 (D. Colo. Sept. 30, 2010) (also below on DORA Bulletin).
This order addressed challenges of both the insurance company's appraiser and the insured's appraiser. The court found that neither appraiser was impartial as outlined in the Colorado Division of Insurance (DORA) Bulletin No. B-5-26 and CRS § 13-22-212. With respect to the insured's appraiser, the court found he was not impartial because "[part of his] fee [was] contingent upon Plaintiff successfully obtaining replacement values for her loss." The court also found that the insurance company's appraiser had a bias interest in the value of the artwork in question because he owned a company called "Fine Arts Claims Consultants."

5Star Bank v. Am. Fam. Mut. Ins. Co., No. 11-cv-02844, 2012 WL 4378395 (D. Colo. Sept. 25, 2012)

This case analyzed whether a policy's loss and appraisal provisions could be enforced by a loss payee rather than a named insured party. The court found that because the policy defined the "you" in the appraisal provision (the person who had the right to request an appraisal) as the insured, the loss payee could not utilize the provision because they were "missing from the parties that [were] given contractual rights to enforce [the appraisal] provision.

Windsor Ct., LLC v. Am. Family Mut. Ins. Co., No. 11-cv-01904, 2013 WL 799589 (D. Colo. Mar. 5, 2013)

This case discusses an appraisal provision's effect upon a bad faith claim for failure to re-inspect damaged property. The court found that the appraisal provision provided a "fair, cost-effective opportunity to resolve a disputed claim," and because appraisal was available to the insured, the insurer's failure to re-inspect the property was not bad faith.

Colorado Department of Regulatory Agency Bulletins

The Colorado Department of Regulatory Agencies ("DORA") promulgates bulletins regarding insurance standards. In the appraisal context, DORA provides guidelines to insurers for when an insured has invoked his or her rights under an appraisal clause, which apply to all property and casualty insurance companies providing real property coverage. DORA explains that any appraisers selected must be fair and impartial. Specifically in determining fairness and impartiality, an insurance company must consider the financial or personal interest of the appraiser in the outcome of the appraisal and any current or previous relationships with any of the parties to the agreement to appraise or to the appraisal proceeding, including counsel, representatives, witnesses, or other appraisers. The DORA bulletins are not binding, but courts look to them for guidance, as the magistrate judge did in *Gold v. State Farm*, and as is common since courts tend to give great deference to an agency's interpretation of existing law. *E.g.*, *Regular Route Common Carrier Conference v. Pub. Util. Comm'n*, 761 P.2d 737 (Colo. 1988); *Sanchez v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 471 (Colo. Ct. App. 2003).

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***Visselli v. American Fidelity Co.*, 155 Conn. 622 (1967)**

Questions of coverage are conditions that are to be resolved by the judge before ordering appraisal/arbitration, unless parties have contracted otherwise. Court should decide questions relating to coverage at the same time that it is called upon the decide the question of arbitrability. Questions relating to coverage should be adjudicated with the least possible delay, and it is then incumbent upon the court or judge, as the case may be, to either order arbitration or deny it, according to the rights of the parties.

***Kilby v. St. Paul. Ins.*, 29 Conn. Supp. 145 (1970)**

Plaintiff and her insurance company submitted to an arbitrator the question of the amount owed the plaintiff by an uninsured motorist who injured the plaintiff in an accident. Instead of determining the right to recover and the amount of damages owed the plaintiff from the uninsured motorist, the arbitrator awarded the plaintiff $2,350 from the plaintiff's own insurance company. Because the award was clearly not within the submission to the arbitrator, the insurance company had grounds to file a motion to vacate the award, but failed to do so within thirty days, and thus forfeited its right to contest the award on that ground. The Connecticut Supreme Court held that the forfeited argument that the award was beyond the scope of the submission could not later be used as a basis for denying the plaintiff's motion to confirm the award.

***Sullivan v. Liberty-Mutual Ins. Co.*, 174 Conn. 229 (1978)**

The two appraisers selected by the parties were unable to agree on an umpire because they could not agree upon the meaning of the term "actual cash value," which was the amount of the loss to be determined by the umpire. The plaintiffs applied to the trial court to resolve the issue. The court refused to appoint an umpire, reasoning that the definition of actual cash value was for the court to decide; otherwise, the umpire might err as a matter of law in his definition. The Connecticut Supreme Court held that the trial court is required to appoint an umpire if the one of the parties so requests. The umpire's role was to resolve the dispute over the meaning of actual cash value. The mere possibility that the umpire or appraisers might commit error of law or fact, said the Supreme Court, was not a proper ground for the court to deny the request to compel arbitration. In addition, It is not necessary that the appraisers agree on the proper method of establishing actual cash value. The umpire may make his or her own choice of the method to be applied so long as it is recognized by the broad evidence rule and the policy. The appraisers and umpires may make their determinations of actual cash value based on their own experience and judgment, without taking evidence or hearing argument.

***Covenant Ins. Co. v. Banks*, 177 Conn. 273, 280 (1979)**

Insured requested a damage appraisal under the policy and insurer refused to participate in the appraisal process, citing as its reason the contention that the request for appraisal was premature because the company had not completed its investigation or rejected defendant's proofs of loss, and therefore no disagreements yet existed. Despite the defendant's refusal to participate, the insured appointed his own appraiser, and successfully petitioned the Superior Court to name an umpire. The umpire and insured's appraiser then rendered an award. Reviewing the lower court's procedures, the Connecticut Supreme Court held that the proper procedure was found under the arbitration statutes, § 52-410 and § 52-411. The definition of a "written agreement to arbitrate" as "[a]n agreement in any written contract … to settle by arbitration any controversy arising out of such contract, or out of the failure or refusal to perform the whole or any part thereof" was broad enough to include the appraisal clause required by § 38a-307. "It is important as a matter of policy," the Court noted, "to have a device that allows one party to an insurance contract to compel compliance with the policy's appraisal procedure when the other party is reluctant to proceed." Therefore, the procedures for a party confronted by the other's refusal to comply with the appraisal process to follow are the procedures of the arbitration statute.

***Fishman v. Middlesex Mutual Assurance Co.*, 4 Conn. App. 339, (1985), *cert. denied*, 197 Conn. 806, 807 (1985)**

The Connecticut Court of Appeals examined the order of pleadings and the burdens each party bears in a motion to compel arbitration. The issues centered on the relationship between the statute that provides for prompt hearing of a motion to compel arbitration (§ 52-410) and the usual procedure for civil cases in Connecticut. The court noted that some of these motions ordinarily available to civil litigants are not available to defendants in an action to compel arbitration, because the intent of § 52-410 is "to provide a prompt and appropriate procedure for an insured who needs judicial assistance when an insurer unreasonably refuses to proceed with the appraisal procedure specified in the insurance contract." The motion to compel arbitration is "an alternative to an expensive and time-consuming suit on the policy for the amount of the loss." Therefore, in the interests of saving time, some motions ordinarily available to a defendant in a civil case (e.g., a motion to have the plaintiff revise his or her complaint) are not available in response to a motion to compel arbitration. A defendant, may, however, engage in some discovery which is "reasonably necessary to the prompt and fair disposition of the case." The court also noted that the party contesting coverage should file an answer and special defense raising coverage issues when it answers the opposing party's motion for arbitration.

***Giulietti v. Connecticut Ins. Placement Facility*, 205 Conn. 424 (1987)**

Parties may waive the arbitrability issue by proceeding to trial without insisting on the appraisal condition. The Connecticut Supreme Court, while criticizing the defendant's refusal to take part in the arbitration process, nonetheless found that because the plaintiffs proceeded to trial on the issue to be determined by appraisers (the amount of the loss), the plaintiffs had waived their rights under the appraisal clause.

***Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991)**

Appraiser who met with principal to discuss merits of defenses and examine documentary evidence prior to selection may be removed. Qualifications are the ability to fulfill oath to faithfully and fairly hear and examine the matters in controversy and make a just award based on the best of his/her understanding, and must be independent, not be subject to the direction of a party, and not interested in outcome of proceedings. The District Court applied a judicial standard for *ex parte* communications, which it found to have been violated. The court noted that there has grown a common acceptance that party-designated arbitrators are not and cannot be 'neutral' in the sense that a judge or third arbitrator is, but then explained that the fact that party selected arbitrators are not expected to be 'neutral' does not excuse such arbitrators from their obligations to participate in the proceedings in a fair, honest and good faith manner.

***Travelers Ins. Co. v. Scrivani*, Superior Court, Judicial District of Fairfield, 1992 (Spear, J.)**

Award rendered after this time has no legal effect unless parties expressly extend deadline. The rendition of the award within thirty days is a prerequisite for the arbitrators subject matter jurisdiction.

***Corriveau v. Aetna Cas. & Sur. Co.*, Superior Court, judicial District of New Haven, 1992 (Hodgson, J.))**

Scope of appraisal proceedings can include additional living expenses. Thirty day deadline for moving to vacate or modify award is strictly enforced.

***Vandrillo v. Middlesex Mut. Assur. Co.*, Superior Court, Judicial District of Tolland, 1993 (Hammer, J.)**

Failure of umpire to be sworn invalidates award.

***Fairfield Pool & Equip. Co. v. Transcontinental Ins. Co.*, Superior Court, Judicial District of Fairfield, 1993 (Thim, J.)**

Scope of appraisal proceedings can include business interruption. Mistake is not a valid grounds to overturn award. If the arbitrators have acted in good faith, neither party will be will be permitted to avoid the award by showing that they erred in judgment, either respecting the facts, or respecting the law. It is not enough to claim that computation is without basis and could only result from partiality.

***Calandro v. Allstate Ins. Co.*, 1993 WL 358206, Superior Court, Judicial District of New Haven, 1993 (Lager, J.).**

An individual who has worked in the past as an appraiser for either party is <u>not necessarily</u> disqualified. Plaintiff sought to vacate an arbitration award, claiming that the appraiser named by the insurer was not impartial to the insurance company because he regularly performed appraisals for the company. The court rejected the plaintiff's argument, stating that plaintiffs had cited no authority for the proposition that simply because an individual as a result of his or

her employment is connected to a particular aspect of the subject of arbitration, that, in and of itself, indicates that he approached the arbitration proceeding in this case with any preconceived notions or with any inability to be fair or impartial. The court explained that in order to have effective arbitration as a matter of public policy, individuals who have connections with the subject matters of the arbitration or appraisal because they have worked for one side or another must be called upon to participate in the arbitration process. If the Court ruled otherwise, it would be virtually impossible for parties to arbitrate their disputes because it would be virtually impossible to find individuals who work both sides of the fence -- it is just not a practical reality in this world.

***Middlesex Mutual Assurance Co. v. Clinton*, 38 Conn. App. 555 (1995)**

The remedy of compelling appraisal is available to both the insured and insurer. The party seeking to compel appraisal applies to Superior Court for an order to direct the parties to comply with the appraisal clause. The application is filed in the Superior Court for the judicial district in which one of the parties resides, or in the judicial district where the insured property is located. The form of application is dictated by statute. Certain defects in form do not impact court's jurisdiction.

***Allstate Ins. Co. v. Wojciechowski,* Superior Court, Judicial District of New Haven, 1995 (Hodgson, J.)**

Public adjuster initially hired to represent insureds in negotiating with their insurer, who initially had a financial interest in the loss, and who engaged in very adversarial and hostile exchange of letters with claims adjuster cannot be viewed as impartial within the plain meaning of the policy. policy language may be used by court to apply same standard of impartiality for both party appointed appraisers and selected umpire. The court refused to apply a different standard for party appointed arbitrators and the umpire because policy used same standard for both.

***Trojanowski v. Worcester Ins. Co.*, Superior Court, Judicial District of New Haven, 1996 (Sullivan, J.)**

Application to compel appraisal is not a "civil action" and thus may not be within policy provision that limits insureds right to bring "action" against insurer within one year after loss.

***Reyes v. Allstate Ins. Co.*, Superior Court, Judicial District of New Haven, 1996 (Barnett, J.)**

Unrestricted submission allows and even encouraged umpire to compromise competing claims, and court will not allow substitution of evidence, even where umpire would probably have adopted it.

***Steiner v. Middlesex Mutual Assur. Co.*, 44 Conn. App. 415 (1997)**

Appraisers exceeded their powers in rendering an award as to cost of code upgrades by re-evaluating previous award of actual cash value and replacement cost. Key inquiry is comparison of submission and award.

***Mish, Inc. v. American Country Ins. Co.*, 2002 WL 1336067, Superior Court, Judicial District of Hartford, 2002 (Berger, J.)**

Plaintiff sought to strike coverage special defenses in action to compel appraisal. Court concluded that the assertion of these defenses was an impermissible attempt to intertwine a non-existent action on the policy with the statutory arbitration procedure and struck the defenses.

***Metropolitan Property & Casualty Co. v. Exantus*, 2008 WL 4415841, Superior Court, Judicial District of Stamford, 2008 (Nadeau, J.)**

Appraisal award had no legal effect because umpire did not provide parties with written notice of the result within 30 days of decision. The filing of the award was delayed when the umpire refused to sign until he was paid. The umpire's filing was considered late and untimely, and therefore carrier's motion to invalidate the award was granted.

***Savanella v. Kemper Independence Ins. Co. v. Exantus*, 2011 WL 7049491, Superior Court, Judicial District of Litchfield, 2011 (Pickard, J.)**

Court granted motion to strike claim against party appointed appraiser by insureds. Court agreed with adjuster that he owed no duty to the plaintiffs upon which a claim of negligence could be found and refused to find that an independent adjuster owes a duty to the insured on public policy grounds.

***Jansma v. Patron Mutual Ins. Co. of Connecticut*, 126 Conn. App. 855 (2011)**

Insurer's election to proceed with appraisal to determine amount owed for fire damage did not constitute bad faith and was not otherwise unjustified under the circumstances in which the insurer disputed the amount of the repair estimate provided by insureds.

***Travelers Home and Marine Ins. Co. v. Kravitz*, 129 Conn. App. 166 (2011)**

Appearance of impropriety relating to conversation between two appraisers after the appraisals had been completed did not justify judicially created exception to statutory time limit for filing motion to vacate award.

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INDEX TO DELAWARE APPRAISAL DECISIONS THROUGH DECEMBER 2014

2003

AIU Ins. Co. v. Lexes, 815 A.2d 312 (Del. 2003)
Despite the fact that a policy may provide for a binding appraisal, an insurer is entitled to bring an action contesting an appraisal award on the basis that it exceeds policy limits or the scope of coverage without having to show that the appraiser's determination was so extreme as to make the resulting award irrational.

In Delaware, it is a question of law as to whether an appraiser has authority to make an award that exceeds the policy limits or the scope of coverage.

A question about coverage and scope of an arbitrator's authority is not waived when an appraisal clause is contained in a policy.

2000

CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V., 110 F. Supp. 2d 259 (D. Del. 2000)
Where a policy provides that an insurer may pay the cost of replacement of lost or damaged property, it is proper for an appraiser to determine the replacement cost of a building damaged by a fire.

Depending upon the circumstances of the case and the plain language of the policy, when determining the amount of loss under an appraisal clause, it may be proper to determine causation, i.e., whether a particular item was damaged as a result of fire; not simply the amount of money needed to repair or replace claimed damages; the determination of cause was distinct from coverage/exclusion decisions outside appraisers' authority.

In an assessment of insured's lost income claims for business interruption under a property insurance policy, it is proper for an appraiser to consider the amount of time needed to effectuate repairs when conducting an examination of fire damage to an insured's building.

1999

Sherman v. Underwriters at Lloyd's, London, Not Reported in A.2d, 1999 WL 1223759 (Del. 1999)
Plaintiffs sought appointment of an umpire to determine the amount of loss as a result of a fire to their property. Specifically, Plaintiffs sought rental loss; however the umpire did not render a decision regarding rental loss. Defendants' appraiser refused to participate in an appraisal on this issue and argued that the insurance policy did not provide rental loss coverage and that the umpire was not the appropriate party to determine loss of use.

Plaintiffs filed a "Motion for Default Judgment and/or A Direction for the Appointed Umpire to Complete the Scope of the Umpire's Original Appointment, or in the Alternative, Motion for Leave to Amend Complaint" which the Court stated was actually a motion seeking summary judgment on an action for declaratory judgment. Here, the policy was ambiguous and inconsistent as there was a specific section concerning loss of use and no specific contract language directing the insured to ignore the express provision. Also, the definition of "property damage" included "loss of use." The Court ruled that it could not rule as a matter of law that the policy in force at the time of the loss included coverage for loss of use because it did not have before it sufficient facts to determine the "reasonable expectations" of the insureds at the time the contract was formed, and therefore an additional hearing was necessary on this issue.

1991

Northeast Financial Corp. v. Ins. Co. of No. America, 757 F. Supp. 381 (D. Del. 1991)
When invoked, an insurance policy's appraisal clause mandating arbitration precludes a party's ability to seek recourse via the courts if it contains the following language: "agreement in writing by any two of these three will determine the amount of the loss."

A reservation of rights clause contained in an appraisal provision in a business insurance contract (which indicated that the appraisal procedure was intended to fix only the amount of the loss) does not mean that the appraisal did not become binding as the parties were free to litigate other issues in a subsequent judicial proceeding.

In Delaware, although an insurer does not request an appraisal until after an insured files suit, the insurer's conduct does not constitute "bad faith" or "unreasonable delay" for purposes of awarding pre-award interest when the insurer advanced an initial loss payment, conducted extensive settlement discussions with the insured, promptly invoked the policy's appraisal procedures and paid the appraisal award within the time contractually set for payment.

1983

Closser v. Penn Mut. Fire Ins. Co., 457 A.2d 1081 (Del. 1983)
An insurance policy that contains an appraisal provision which states "an award in writing, so itemized *** shall determine the amount of actual cash value and loss" is an alternative form of alternative dispute resolution; such an appraisal provision, if invoked, provides a mandatory form of arbitration, which precludes an insured's ability to proceed to litigation and is relevant to whether an insured's suit is time-barred.

1982

Faulkner v. State Farm Fire and Cas. Co., Not Reported in A.2d, 1982 WL 590791 (Del. Super. 1982); opinion clarified in *Faulkner v. State Farm Fire and Cas. Co.*, 1982 WL 590792 (Del. Super. 1982).
The homeowners' policy contained a provision that no action should be brought until the homeowner complied with a requirement to submit to an examination under oath. The Court, relying on the Superior Court's ruling in *Hanby v. Maryland Casualty Company*, 265 A.2d 28 (Del. Super. 1970), ordered a stay for 90 days in order for the parties to comply with the policy provision.

1977

Steele v. Ariza, 1977 WL 184939 (Del. Super. 1977)
Where Liberty Mutual denied automobile insurance coverage, the insured requested attorney's fees under Title 18, Section 4102, claiming that the definition of "property insurance" under Title 18, Section 904 is such that it included the instant matter. The Court held that pursuant to *Galiotti v. Travelers Indemnity Co.,* Del.Super., 333 A.2d 176 (1975), the insurance policy is a liability insurance policy and not a property insurance policy; therefore 18 Del. Code Section 4102 is not applicable and the insured was not entitled to attorney's fees.

1975

Galiotti v. Travelers Indem. Co., 333 A.2d 176, 179 (Del. Super. 1975)
Where both an insured and insurer allowed a controversy to proceed to litigation and judgment, and neither availed themselves of the arbitration provision in the automobile policy, the insured was not precluded from recovering attorney's fees when the insurer did not bring the provision to the insured's attention or urge that it be followed.

1973

Maryland Casualty Company v. Hanby, 301 A.2d 286 (Del. 1973)
18 Del. Code§ 4102 provides that upon rendering judgment against an insurer upon any policy of property insurance, the court shall allow a plaintiff a reasonable sum as attorney's fees; except, the statute was not designed to benefit an insured who without just cause insists upon suit despite the presence of an arbitration provision in the policy.

Pullman, Inc. v. Phoenix Steel Corp., 304 A.2d 334, 339 (Del. Super. 1973).
Appraisal extends only to a determination of actual cash value, all other issues being reserved for decision by a court.

1970

Hanby v. Maryland Cas. Co., Not Reported in A.2d, 1970 WL 115802 (Del. Super. 1970)
The insured is entitled to recover interest at the legal rate on the amount set by the appraisal on a fire loss, however depending on the case, the Court may consider other factors such as the delay in the appraisal and the cause of the delay.

An appraisal award which is made according to the terms of the contract has the same effect as a judgment, entitling the insured to recover reasonable attorney's fees under Title 18, Section 4102, which allows attorneys fees after judgment is rendered against an insured upon a suit involving a policy of property insurance.

Hanby v. Maryland Cas. Co., 265 A.2d 28 (Del. 1970)
The Delaware Supreme Court affirmed a stay granted by the Superior Court in order to allow the parties to comply with an appraisal provision of the insurance policy. The insurer did not act in bad faith when it invoked the appraisal procedure after the insured filed suit where negotiations continued during a two and one-half-month delay between an alleged termination of good-faith negotiations and insurer's request for appraisal of fire loss, and the insured had the same right to make a demand for appraisal as the insurer. While the insured elected to waive that right and proceed to litigation, the court did not deprive the insurer of its right to appraisal under the policy. The Delaware Supreme Court stated that "[a]ppraisal will determine the amount of loss and the Court then may be called upon to determine what effect should be given to the findings of the appraisers."

If an insurance policy is silent on the time within which a demand for appraisal is to be made before an action is commenced in the event of a dispute over the amount of loss, the demand should be made within a reasonable time.

Generally, the question of waiver is a factual issue to be determined by a jury. However, in the context of a dispute involving a pre-trial motion to stay an action based on a contract right to have the amount of loss determined by an appraisal before legal proceedings are commenced, it is an issue of law.

1966

Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co., 220 A.2d 778 (Del. 1966)
A fire insurance policy contained a standard provision that required payment within sixty days after filing of the proof of loss. The Court held that interest accrues from the date

that the policy delineates as the time when payment is due; however, this general rule may be affected by other factors such as a delay by plaintiff in prosecuting the action.

1955

Fid. & Guar. Ins. Corp. v. Mondzelewski, 49 Del. 395 (1955)
An appraiser's award is not binding on the insured when an actual or constructive loss of insured property is shown, and the appraisal provisions of the policy are overridden by the valued policy statute.

In a situation where the insured claims a total loss, the appraisers' findings are not conclusive, however, are admissible to prove sound value and loss.

An insured which consents to an appraisal does not waive his right to recover for a "total" loss under the valued policy statutes. In order to have a waiver or estoppel, there must appear some conduct of the insured misleading the insurer to its detriment.

1944

National. Bulk Carriers v. U.S., 56 F. Supp. 765 (D. Del. 1944)
While the insurer and the insured are required to appoint an appraiser to appraise the damaged property, the typical condition precedent of making of an appraisal before commencing an action in court may be waived as a result of delay.

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Roumel v. Niagara Fire Ins. Co.,225 A.2d 658, 660(D.C.1967)

Appellants' premises, insured by appellee, was damaged by fire. A proof of loss was timely filed but was rejected. The insurance company demanded appraisal in accordance with the provisions of the policy, and subsequently sent an appraisal agreement to appellants for signature. After altering certain of its terms, appellants returned the agreement. The carrier rejected the altered agreement and refused to proceed with the appraisal. After the time for filing suit under the policy expired, the insured's filed suit for payment of the loss and the court granted summary judgment in behalf of the carrier. On appeal, Appellants contended that the parties entered into an appraisal agreement which constituted a new contract to which the limitations provision of the policy did not apply. They further contended that there were many questions of fact to be determined at trial.. Relying on cases from various jurisdictions, including New York, Missouri, Pennsylvania and Georgia, the Court affirmed. The court found that appraisement is merely a method of ascertaining the amount of loss or damage and does not determine other issues such as liability and coverage. Accordingly, even if an appraisal award was rendered, the insured's right of action was under the policy, the award being merely conclusive proof of the damages . An agreement to enter into an appraisal would not and could not supersede the contract to pay the loss, or the suit limitations provision, since appraisal was merely a means of ascertaining the extent of that loss.

2014
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INDEX OF FLORIDA DECISIONS

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169. Dynamic Public Adjusters, Inc. v. Henry Rodriguez, - So.3d-, 2014 WL 6864000 (Fla. 3d DCA 2014), November 26, 2014 - This suit involved a controversy over who gets the fees resulting from an appraisal award. The appraiser originally worked for the public adjusting firm but left before the appraisal process commenced. The supplemental claim arose from hurricane damages. The original firm had a percentage contract with the association which included a cap. When the individual departed that firm, he was selected as appraiser by the association and acted in that role. His contract also involved percentage compensation with a cap. It specified it was subordinate to the original public adjusting firm's agreement. The court decided that the $400,000 fee belonged entirely to the original public adjusting firm in light of this subordination language in the appraiser's contract with the association.

168. Florida Insurance Guaranty etc. v. Frank Reynolds and Tracey Reynolds, 39 FLW D2195 (Fla. 5th DCA 2014), October 17, 2014 - The 5th DCA found that the insureds had waived their right to appraisal by engaging in significant litigation activities for over a year following an admission of coverage and before moving to compel appraisal. The issue of waiver is reviewed *de novo* by an appellate court when the facts are undisputed. Generally speaking, a waiver of the right to seek appraisal occurs when the parties seeking appraisal actively participate in a lawsuit or engage in conduct inconsistent with the right to appraisal. Here, FIGA acknowledged that there was a covered loss in August 2012. At that time, appraisal became appropriate to determine the dollar amount. Instead, the insureds waited over a year from that admission before demanding appraisal and participated with significant litigation activities. As a result, the appellate court found that the insureds acted inconsistently with and thus waived their rights to appraisal.

Several other decisions have also addressed the waiver of appraisal issue. Waiver was found in the decision of FIGA v. Eduardo Rodriguez and Dora Rodriguez, 39 FLW D2196 and in FIGA v. Gerassimos Maroulis and Irina Dmitrie Va., 39 FLW D2198 (Fla. 5th DCA October 17, 2014). All of the above cases relied upon the insured engaging in significant litigation activities after an insurer had acknowledged coverage. A decision that found that the right to appraisal was not waived is FIGA v. Fernando Santos and Ana Santos, 39 FLW D2196 (Fla. 5th DCA October 17, 2014). There was no waiver found because within three months of FIGA's agreement that there was a sinkhole loss, the insureds demanded appraisal in compliance with the findings of the neutral evaluator. There was no significant discovery in the lawsuit. What discovery took place, did not address amount of loss or method of repair questions.

167. FIGA v. Kenneth Sill and Kathryn Sill, 39 FLW D2197 (Fla. 5th DCA 2014), October 17, 2014 - The 5th DCA found that the right to appraisal was not waived despite

extensive litigation between the parties from December 2011 to July 2013. The basis for this finding was that FIGA acknowledged that Sill suffered a sinkhole loss and agreed to comply with the neutral evaluator's recommendation only on April 15, 2013. Coverage had been previously denied and appraisal was not appropriate in light of the denial. The insureds demanded appraisal less than a month after FIGA determined it would abide by the neutral evaluator's report. No litigation activities were pursued by the insureds in that interim period.

166. The Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc., 39 FLW D2190 (Fla. 2d DCA 2014), October 17, 2014 - The claim for sinkhole damage involved a dispute as to the necessary scope of repair (i.e., grouting v. underpinning). The insurer demanded appraisal, but the insured refused to participate and filed suit. The appraisal clause included the phrase "[i]f there is an appraisal, we will retain our right to deny the claim." The appellate court found that the method of repair was squarely within the province of the appraisal process; and, further, the retained rights wording did not make the clause unenforceable.

165. FIGA v. Branco, 2014 WL 4648208 (Fla. 5th DCA 2014), Sept. 19, 2014 - This decision reviews the parameters of scope of appraisal in a sinkhole claim setting and determines that method of repair qualifies for the appraisal process. It also addresses waiver of appraisal issues. Most importantly, it is a case of first impression in Florida about the ability of an attorney representing the insureds to serve as a "disinterested" appraiser. In light of the policy wording that said appraisers must be both competent and disinterested, the court found that the attorney did not qualify.

164. Cammarata v. State Farm Florida ins. Co., 2014 WL 4327948 (Fla. 4th DCA 2014), Sept. 3, 2014 - The 4th DCA determined that a bad faith claim could be pursued once the insurer's liability for coverage and also the extent of the damages was determined. A finding of breach of the insurance contract was not required. These findings arose from a Hurricane Wilma claim where the damages were determined via the appraisal process.

163. Rodrigo v. State Farm Florida Ins. Co., 2014 WL 4083324 (Fla. 4th DCA 2014), Aug. 20, 2014 - A claim for damages resulting from decomposition of a human body within a condo unit was submitted. St. Farm's adjuster retained a contractor who ultimately executed an appraisal award. The insurer paid the amount of that award, but denied liability for any personal property within the unit. The policyholder did not accept the monies and filed suit alleging that the appraisal was invalid and requesting that the court vacate the award or approve new appraisers and a neutral umpire to "redo" the appraisal. The appraisal issues were not reached by the appellate court as the failure of the insured to submit a requested sworn proof of loss supported the trial court's entry of summary judgment for the insurer.

162. PDQ Coolidge Formad, LLC v. Landmark American Ins. Co., 566 Fed. 845 (11th Circ. (Fla.) 2014), May 19, 2014 - This decision addresses late note of a storm claim. The court found a six-month delay was not "prompt" as a matter of law then discussed the insured's failure to rebut the presumption of prejudice to the insurer created by the late

notice. Prejudice is properly resolved on summary judgment motion when a policyholder fails to present evidence to rebut the presumption.

161. Solano v. State Farm Florida Ins. Co., 2014 WL 1908827 (Fla. 4th DCA 2014), May 14, 2014 - This suit involved a claim for Hurricane Wilma damages and issues with respect to whether or not the insureds complied with their duties under the policy. The trial court entered summary judgment for State Farm finding that the insureds did not satisfy their duties. The 4th DCA reversed and remanded. It found material issues of fact as to whether or not there was sufficient compliance with the cooperation provision to provide adequate information in order to proceed to appraisal to resolve the damages issues.

160. Citizens Prop. Ins. Corp. v. Demetrescu, 137 So.3d 500 (Fla. 4th DCA 2014), Mar. 26, 2014 - The insureds submitted a claim for damages resulting from a roof leak following a series of wind and rain storms. Citizens denied the claim and refused to proceed to appraisal. Suit was filed for breach of contract and to compel appraisal. A number of policy exclusions were excluded as affirmative defenses. A motion to compel was granted by the trial court on the basis that "water leaks are covered under this policy." All of the issues raised in the affirmative defenses related to causation of damages; and, are therefore, subject to resolution via appraisal. The order was reversed and the case remanded for resolution of all the coverage issues before causation of damages was determined in appraisal.

159. 200 Leslie Condo. Ass'n, Inc. v. QBE Insurance Corp., 965 F.Supp.2d 1386 (S.D. Fla. 2013), Aug. 28, 2013 – The insured suffered damages in Hurricane Wilma and sought a declaratory judgment that the amount of its alleged damages must be resolved through the appraisal process. QBE objected to appraisal on the grounds that the insured had not complied with all post-loss obligations. The court noted that before appraisal can be invoked, an insured must comply with the policy's post-loss conditions. Here, it found that the insured breached the proof of loss provision, the inventory of damaged and undamaged property provision, and the examination under oath provision. The court found that the insured did not show that QBE was not prejudiced by its failure to comply with these post-loss conditions. As a result, appraisal was not appropriate.

158. State Farm Ins. Co. v. Ulrich, 120 So.3d 217 (Fla. 4th DCA 2013), Aug. 28, 2013 - an appraisal award under certain circumstances may constitute a favorable resolution permitting pursuant of a bad faith action.

157. Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo Ass'n., Inc., 117 So.3d 1226 (Fla. 3d DCA 2013), July 10, 2013 – The insured demanded appraisal after submitting a supplemental claim from Hurricane Wilma. After the appraisal process was underway, the insured submitted a revised supplemental claim increasing the amount of the claim by over $800,000. After the umpire submitted an appraisal award, Citizens asserted a number of defenses to the enforcement of the award, including the fact that the insured failed to comply with its post-loss obligation. It also argued that the insured's appraiser was effectively a front man for its public adjuster, that the appraisers failed to meet at the conclusion of their respective investigations to discuss and attempt to agree on the

amount of loss, that the appraisal panel exceeded its authority when it determined an amount of loss greater than the amount originally claimed, and that the court failed to consider its coverage defenses to payment of the award. The appellate court pointed out that the appraisal process is an informal process in which the parties agree to resolve the specific issues of actual cash value and the amount of the loss. All other issues are reserved for determination in a plenary action. The court found that, by confirming the appraisal award, the trial court effectively overruled Citizens' objections to entry of judgment. The proper procedure should have been for Citizens' defenses to be addressed by motion for summary judgment or by trial, not by a motion to confirm the appraisal award under the Florida Arbitration Code. It held that the Florida Arbitration Code is not applicable to appraisal awards.

156. Citizens Property Ins. Corp. v. River Manor Condo. Ass'n, Inc., 125 So.3d 846 (Fla. 4th DCA 2013), Apr. 10, 2013 – The insured building was damaged during Hurricane Wilma. The parties went through the appraisal process, which resulted in an award that specified the total loss sustained by each of the three insured buildings. Citizens claimed that certain items contained in the appraisal award should not have been included in the trial court's judgment because: (a) The parties had reached an agreement on the amount of specific items prior to the appraisal; (b) the items were duplicates of other amounts awarded; or (c) the items were the responsibility of the unit owners to insure. The trial court refused to address these issues and granted the insured's motion for summary judgment. The appellate court held that any pre-appraisal agreement that settled the amount owed for certain damages is a defense in the nature of accord and satisfaction and should have been decided by the trial court. As for Citizen's defense that certain items awarded were duplicative, the trial court properly declined the address the matter. Citizens should have sought clarification and/or modification of the award. The court rejected Citizen's final defense that it was entitled to remove amounts from the appraisal award that represent loss to property that the unit owners were required to insure. The dispositive issue was whether the Citizens policy actually covered those items, not whether the unit owners also covered them.

155. Hunt v. State Farm Fla. Ins. Co., 112 So.3d 547 (Fla. 2d DCA 2013), Apr. 5, 2013 - Appraisal award entered in favor of insured was paid timely by insured. Attorney's fees were awarded to insured who then filed a separate suit alleging bad faith. The court found that the appraisal award established the validity of the claim and constituted favorable resolution of the contract issues, thus meeting the condition precedent to pursuit of a bad faith claim.

154. Jossfolk v. United Property & Cas. Ins. Co., 110 So.3d 110 (Fla. 4th DCA 2013), Mar. 20, 2013 – The insured's roof was damaged in Hurricane Wilma. The claim was submitted to appraisal and the appraisal award specified that "ordinance and law" was not appraised. The insurer paid the award. The insured's contractor then applied for a roofing repair permit and learned that the entire roof would need to be brought up to code. The insured then asked the insurer to pay for the entire roof repair under Ordinance and Law coverage. The court held that Ordinance and Law is not recoverable until it is incurred and thus could not have been appraised at the time of the original appraisal

because the insured had not yet applied for a roof repair permit. He had not incurred or become liable for any additional expense until the city had required compliance with current code in order to complete repairs. It was at that point that the insured incurred additional loss, for which he had the right to an appraisal.

153. Sunshine State Ins. Co. v. Davide, 117 So.3d 1142 (Fla. 3d DCA 2013), Feb. 20, 2013 - A claim for wind damages to a Miami home from Hurricane Katrina led to an appraisal award of 11/2/06, the insurer was uncertain from the wording of the award whether or not depreciation has been deducted or not. Sunshine sent several inquiries to the umpire requesting clarification. Receiving no response, it sent a check within the time allowed for payment in the amount of the award less a sum for depreciation which it unilaterally calculated. A subsequent suit for attorney's fees and bad faith was filed by Davide. Counsel for Davide sent a letter to Sunshine's counsel which was from the umpire verifying depreciation had been deducted in the appraisal award. Sunshine immediately paid the amount it previously deducted from the award. The suit continued with respect to the issue for fees versus the allegations of bad faith. The appellate opinion doesn't address the propriety of the depreciation deduction or the failure of the umpire to timely respond to the inquiries by Sunshine.

152. First Protective Ins. Co. v. Schneider Family Partnership, 104 So.3d 1115 (Fla. 2d DCA 2012), Nov. 14, 2012 – FPIC and its insured could not agree on the amount of damage, so FPIC invoked the appraisal provision. Prior to completion of the appraisal process, and after an unsuccessful mediation attempt, the insured filed suit. The insured moved for summary judgment, arguing that under Fla. Stat. § 627.7015(7) and Florida Administrative Code Rule 69J-2.003(10), it was not required to participate in an appraisal because only an insured can choose appraisal after an unsuccessful mediation. The trial court agreed and FPIC filed this appeal. The appellate court reversed, holding that under the version of Fla. Stat. § 627.7015(7) in effect at the time of the contract, the insured was not required to submit to an appraisal before suing the insurer if the *insurer* requested mediation and it was unsuccessful. Here, it was the insured, not FPIC, that requested mediation. With respect to the Florida Administrative Code Rule 69J-2.003(10), that rule states that if an insured chooses not to participate in mediation or if the mediation is unsuccessful, the "insured may choose to proceed under the appraisal process set forth in the insured's insurance policy, by litigation, or by any other dispute resolution procedure available under Florida law." The appellate court held that reliance on such an administrative rule is error in that it improperly modifies and expands § 627.7015 by providing the insured with an option to resolve disputed property claims not envisioned by the statute.

151. Trafalgar at Greenacres, Ltd. v. Zurich American Ins. Co., 100 So.3d 1155 (Fla. 4th DCA 2012), Sept. 5, 2012 – One month after the insured filed suit, the insurer invoked the appraisal provision. The insurer timely paid the appraisal award. Based on its payment of the appraisal award, the insurer moved for summary judgment on the breach of contract claim, which was granted. The insured then amended its complaint to allege bad faith. The insurer argued that a summary judgment award in its favor precluded the insured's ability to pursue a bad faith claim. The court disagreed and found that an

appraisal award constituted a "favorable resolution," which satisfied the necessary prerequisite to filing a bad faith claim in order to survive a motion to dismiss.

150. Jyurovat v. Universal Property and Casualty Ins. Co., 84 So.3d 1238 (Fla. 2d DCA 2012), Apr. 13, 2012 – After the insured and the insurer disagreed over the amount of damages from the insured's fire claim, the insured demanded appraisal. The appraisal process broke down and the insured's appraiser purported to unilaterally terminate the umpire over the objections of the insurer's appraiser. The insured then filed suit against the insurer and sought the appointment of a new umpire. The insurer asserted that the insured failed to complete the appraisal process by improperly terminating the umpire and filing the lawsuit before completing the appraisal. The trial court granted summary judgment to the insurer. The appellate court found that the insured's appraiser lacked authority to fire the umpire. However, it also found that the insured had cooperated in the appraisal process from May 2008 through December 2008. The policy was silent with respect to a breakdown in the appraisal process. The sole basis for the summary judgment was the purported termination of the umpire and the filing of a declaratory judgment action. Whether that constituted a material breach of the policy was a question for resolution by the fact finder. The appellate court reversed the grant of summary judgment and remanded for further proceedings.

149. Summit Towers Condominium Association, Inc. v. QBE Ins. Corp., 2012 WL 1288735 (S.D. Fla. 2012), Apr. 4, 2012 – The insured sued its insurer in October 2010 and had incurred almost $1,000,000 in costs and fees litigating the case by mid-November 2011. Just a few months before trial and after litigating the case for 16 months, the insured sought to stay litigation and require the parties to obtain an appraisal. The insured maintained that it had a contractual right to appraisal and that an appraisal "shall save judicial resources and [the] parties' time and money." The court found that a party that fails to seek appraisal within a reasonable amount of time after the commencement of litigation waives its appraisal right by acting inconsistently with that right. It denied the insured's motion to enforce appraisal and held that the insured acted inconsistently with the right to seek an appraisal.

148. United Property and Casualty Ins. Co. v. Concepcion, 83 So.3d 908 (Fla. 3rd DCA 2012), Feb. 29, 2012 – After the insured filed a supplemental claim in the amount of $122,769.40 for damages from Hurricane Wilma, its public adjuster requested an appraisal. The insured thereafter filed a breach of contract claim against the insurer and a motion to compel appraisal. The insurer argued that appraisal was premature because the insured had not complied with its post-loss obligations, and, as a result, the insurer had not been able to evaluate the claim. The trial court granted the motion to compel appraisal. The appellate court found that the dispute as to whether the insured complied with its post-loss obligations created a fact issue which should have been resolved by the court through an examination of the evidence. It agreed with the insurer that the trial court was required to resolve the disputed question by conducting an evidentiary hearing to determine if the insured had complied with the policy's post-loss requirements. The appellate court reversed the trial court's order compelling appraisal and remanded the case for an evidentiary hearing.

147. First Protective Ins. Co. v. Hess, 81 So.3d 482 (Fla. 1st DCA 2011), Dec. 9, 2011 – The signed appraisal award stated a total amount which represented the value of all of the insured's lost personal property, and this award did not itemize the lost personal property with corresponding values. The appellate court found that a trial court may not look beyond the face of an appraisal award and consider extrinsic evidence in applying policy limitations to an appraisal award; and, given the nature of the appraisal process and the insurer's failure to request clarification of the award, the trial court was prohibited from holding a hearing to determine the basis for the appraisal award.

146. State Farm Florida Ins. Co. v. Gonzalez, 76 So.3d 34 (Fla. 3d DCA 2011), Dec. 7, 2011 – In this case, the signed appraisal award stated an amount of loss for the insured's dwelling and an amount of loss for ordinance and law. The insurer paid the dwelling amount but withheld the ordinance and law portion based on the policy's provision providing that the building ordinance and law coverage is not payable "until the dwelling is actually repaired." The insured filed a petition to confirm appraisal, alleging that the insurer failed to pay the ordinance and law portion of the appraisal award within sixty days as required by the policy's "Loss Payment" provision, and the trial court granted the petition. The appellate court reversed the trial court's decision and remanded the case with instructions to allow the insureds to file a complaint seeking relief. The appellate court stated that the insurer would then be able to answer the complaint and assert any affirmative defenses contesting coverage. This opinion urged the parties to review Florida Ins. Guaranty Ass'n v. Olympus Ass'n, 34 So.3d 791 (Fla. 4th DCA 2010), which the court stated "illustrates the proper procedure when an insurance company fails to pay an appraisal award, and explains that coverage issues are to be determined by the trial court."

145. Gassman v. State Farm Florida Ins. Co., 77 So.3d 210 (Fla. 4th DCA 2011), Nov. 2, 2011 – The court held that the insurer's failure to notify the insured of her right to participate in mediation (as required under section 627.7015, Florida Statutes) following the insured's filing of suit relieved the insured of her obligation to participate in the appraisal process as a precondition to a legal action against the insurer for breach of contract.

144. State Farm Florida Ins. Co. v. Silber, 72 So.3d 286 (Fla. 4th DCA 2011), Oct. 19, 2011 – The appellate court held that the insureds could not move for confirmation of an appraisal award that had already been paid by the insurer; and, additionally, that no cause of action against the insurer existed upon which the trial court could award statutory interest and attorney fees to the insureds.

*143. State Farm Florida Ins. Co. v. Seville Place Condo. Ass'n, 74 So.3d 105 (Fla. 3d DCA 2011) – Superseded State Farm Florida Ins. Co. v. Seville Place Condo. Ass'n, 2009 WL 3271300 (Fla. 3d DCA Oct. 14, 2009). The insured condominium association commenced a breach of contract action against its insurer related to hurricane damages to the insured property. After ordering the parties to appraisal, the trial court confirmed the appraisal award and granted the association's motions to amend the complaint to add statutory and common law bad faith claims and a punitive damages claim. The insurer

petitioned the appellate court for a writ of certiorari to quash the trial court's order allowing the insured to amend its complaint. The appellate court held that the insurer had not demonstrated that irreparable harm had occurred or was certain to follow, as required to grant the insurer's petition, where no discovery pertaining to the bad faith claims had yet been sought or compelled, and where the insurer had not yet responded to the amended complaint.

142. Citizens Property Ins. Corp. v. Admiralty House, Inc., 66 So.3d 342 (Fla. 2d DCA 2011), July 1, 2011 – The court ruled that until post-loss conditions are met and the insurer has a reasonable opportunity to investigate and adjust the claim, there is no "disagreement," for purposes of an appraisal provision in an insurance policy, regarding the value of the property or the amount of loss to be appraised. The court also found that the insured did not waive its right to seek appraisal under the policy, where the insured made a pre-suit demand for appraisal and included in its complaint a declaratory action to determine whether it was entitled to an appraisal.

141. Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So.3d 187 (Fla. 2011), June 30, 2011 – The issue in this case involved whether a 2005 amendment to section 627.7015, Florida Statutes (requiring an insurer to give an insured notice of the availability of mediation prior to an appraisal demand) applied retroactively to a 2004 insurance policy issued. The Florida Supreme Court found that the proper test to use when determining whether a statute may be applied retroactively to a contract of insurance involves the following two inquiries: (1) whether there is clear evidence of legislative intent to apply the statute retroactively and (2) whether retroactive application of the statute would unconstitutionally impair the obligations of the contract. The Court found that the lower courts had improperly failed to examine the 2005 amendment to section 627.7015 under the retroactivity test's first prong. Based on its review of the 2005 amendment's language, structure, purpose, and legislative history, the Court concluded that there was no clear evidence of legislative intent that the 2005 amendment to section 627.7015 was to be applied retroactively. Thus, the Court ultimately found that the 2005 amendment to section 627.7015 could not be applied retroactively to the 2004 policy and that the defendant insurer was not barred from enforcing its right to demand appraisal under the policy, where the carrier did not give any notice to the insured before the demand regarding an option to mediate.

140. Universal Property and Cas. Ins. Co. v. Colosimo, 61 So.3d 1241 (Fla. 3d DCA 2011), May 25, 2011 – The insured homeowners' alleged knowledge of the state mediation process for insurance claims did not obviate the need for the insurer to provide the statutory notice to the insureds, under section 627.7015, Florida Statutes, that the insureds had a right to participate in the mediation program. Thus, the insureds' participation in the contractual loss appraisal process was not a prerequisite to litigation; and, although the insureds voluntarily commenced the appraisal process, they were not bound to participate in the process through its conclusion due to the insurer's failure to provide the statutorily required notice of the state mediation program.

139. Oceania I Condo Ass'n, Inc. v. QBE Ins. Corp., 2011 WL 1984483 (S.D. Fla. May 20, 2011) – The issue addressed in this case was whether the insured had a right to compel appraisal, where the insurer had denied the insured's claim in its entirety on the ground that the policy was void due to the insured's fraud. In ruling on the insured's motion to compel appraisal, the district court found that while the amount of a loss is for the determination of appraisers, the issue of whether a claim is covered by a policy is for judicial determination. Because QBE had "unequivocally" stated that no coverage was available under the policy and that the policy was void, the court found that coverage was at issue (rather than the amount of loss); and, therefore, the court held that the insured was not entitled to appraisal at that stage of the litigation.

138. Green v. Citizens Property Ins. Corp., 59 So.3d 1227 (Fla. 4th DCA 2011), May 11, 2011 – The court ruled that an insured who brought a breach of contract action against his property insurer to seek additional benefits for hurricane damage to his home, and who obtained a final appraisal award entitling him to an additional payment, was not entitled to pre-judgment interest on the amount paid pursuant to the appraisal award because the insurer did not initially deny coverage of the insured's claim, and the insurer paid the appraisal award within 60 days after the award was signed, as required by the insurance contract.

137. Garden-aire Village South Condo. Ass'n, Inc. v. QBE Ins. Corp., 774 F.Supp.2d 1224 (S.D. Fla. 2011), March 31, 2011 – Garden-aire Village South Condominium Association, Inc. filed suit against QBE Insurance Corporation, in connection with claimed property damages resulting from Hurricane Wilma. Count II of the complaint sought a declaratory judgment establishing that Garden-aire was entitled to an appraisal of its hurricane loss. The Court dismissed this count, finding that appraisal was premature where Garden-aire demanded appraisal before providing notice to QBE 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 noted that because the insured sought appraisal via litigation prior to any notice or meaningful exchange with the insurer, QBE was not given the opportunity to even invoke post-loss policy conditions to which it was entitled.

136. Ellie's 50's Diner, Inc. v. Citizens Property Ins. Corp., 54 So.3d 1081 (Fla. 4th DCA 2011), March 2, 2011 – The court found that the property insurer paid its insured's claim for hurricane damage within 30 days after the appraisal award was signed, which was within the time allotted in the policy; and, thus, the insured was not entitled to pre-judgment interest.

135. Citizens Property Ins. Corp. v. Gutierrez, 59 So.3d 177 (Fla. 3d DCA 2011), March 2, 2011 – The appellate court ruled that the trial court was required to conduct an evidentiary hearing concerning the insureds' compliance with the property insurance policy's post-loss conditions before the court could grant the insureds' motion to compel appraisal, where the insurer requested an evidentiary hearing, the insurer asserted that compliance with the policy was a condition precedent to appraisal, and the insureds and

insurer disputed whether the insureds were in compliance with the post-loss policy obligations.

134. Citizens Property Ins. Corp. v. Mango Hill Condo. Ass'n, 54 So.3d 578 (Fla. 3d DCA 2011), Feb. 9, 2011 – The court held that the insured condominium association was not entitled to an appraisal of its claim for hurricane damage unless it could be determined that the property insurance policy's post-loss conditions were met, as required by the policy to determine whether there was disagreement as to the amount of loss to be appraised. The court ruled that an insured must comply with all of the property insurance policy's postloss obligation before the appraisal clause is triggered. The court also ruled that no disagreement or arbitrable issue exists unless some meaningful exchange of information sufficient for each party to arrive at a conclusion has taken place.

133. Citizens Property Ins. Corp. v. Maytin, 51 So.3d 591 (Fla. 3d DCA 2010), Dec. 29, 2010 – The insured brought a breach of contract action against his property insurer and moved to compel an appraisal. The trial court granted the motion to compel, and the insurer appealed. The district court reversed, holding that the insurer was entitled to an evidentiary hearing to determine whether the insured had complied with the post-loss conditions of the policy. The district court provided that such compliance would be required before the insurer could be compelled to participate in an appraisal of the insured's losses.

132. Citizens Property Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc., 48 So.3d 188 (Fla. 3d DCA 2010), Nov. 24, 2010 – The insured condominium association brought an action against its insurer seeking an appraisal of its claim for hurricane damage and other relief. The court held that the insured was not entitled to an appraisal until after it satisfied its obligations to provide the insurer with documents requested by the insurer, and to provide the insurer's consultant with access to the damaged property. The court stated that no disagreement regarding the value of the property or the amount of loss could arise until the insurer had a reasonable opportunity to investigate and adjust the claim.

131. Pineda v. State Farm Florida Ins. Co., 47 So.3d 890 (Fla. 3d DCA 2010), Oct. 27, 2010 – An insurer filed a petition for the selection of an impartial umpire to assist in assessing hurricane damage to a home, and the petition requested that the appraisal award form itemize each area and item of damage and the amount to repair or replace each item, in a line-by-line item estimate. The insureds counterclaimed seeking a declaration that the Circuit Court was not authorized to require an itemized appraisal. The Circuit Court found that the policy did not require a line-by-line appraisal, entered judgment in favor of the insureds, but denied the insureds' request for attorney's fees. Upon appeal, the Third DCA held that the insureds were entitled to an award of attorney's fees for successfully defeating the insurer's request that the trial court direct the umpire to provide an itemized appraisal of hurricane damages.

130. Citizens Property Ins. Corp. v. Michigan Condominium Ass'n, 46 So.3d 177 (Fla. 4th DCA 2010), Oct. 27, 2010 – The Fourth DCA disagreed and certified conflict with the Third DCA's decision in Sunshine State Ins. v. Rawlins, 34 So.3d 753 (Fla. 3d DCA

2010). In Rawlins, the Third DCA recognized a dual-track approach with regard to proceeding to appraisal while preserving the insurer's right to contest coverage. Relying on the Florida Supreme Court case of Engle v. Liggett Group, Inc., 945 So.2d 1246, 1262-63 (Fla. 2006), the Fourth DCA stated that a finding of liability necessarily precedes a determination of damages.

129. Beverly v. State Farm Florida Ins. Co., 50 So.3d 628 (Fla. 2d DCA 2010), Oct. 27, 2010 – The insureds submitted a claim to their insurer for Hurricane Charley-related damages, and they contended that during the initial inspection of their home by the insurer's adjuster, the adjuster told them that several items (such as the barn, shed, fencing, and trailers) were not covered under the policy. Suit was subsequently filed by the insureds six weeks after the loss. Payments by the insurer, appraisal, and further payments by the insurer ensued. The trial court granted the insurer's motion for summary judgment, and the insureds appealed. The Second DCA found that since significant factual issues remained unresolved (i.e., whether or not the insureds were forced to file suit to resolve their claim under the insurance policy), summary judgment was not appropriate and the trial court's ruling was reversed and remanded for further proceedings.

128. Cabana Club Apartments Associates, Ltd. v. Pacific Insurance Company, Ltd., 399 Fed.Appx. 516 (11th Cir. (Fla.) 2010), Oct. 8, 2010 (unpublished opinion) – The insured, Cabana Club Apartments Associates, Ltd. submitted a claim to Pacific Insurance Company, Ltd. after Hurricane Wilma damaged Cabana Club's insured property. The parties agreed that the property damage from the hurricane was a covered loss under the Pacific policy; however, a dispute arose regarding the dollar amount of the damages, and the parties proceeded to appraisal. The ultimate appraisal award included $95,000 for elevator repairs, and Pacific paid the entirety of the claim.

Thereafter, Cabana Club submitted a second claim to Pacific for supplemental monies alleged to be needed to bring its elevators up to code standards, including the cost of securing permits. Pacific denied the supplemental claim, and Cabana Club responded by filing a breach of contract suit against the insurer. The district court found that, based upon a reading of Florida Statute section 399.03(1), permits would not be required to make repairs to the elevators because they were not "new elevators being erected, constructed or installed." For this reason, the district court dismissed Cabana Club's complaint with prejudice. On appeal, the Eleventh Circuit Court found no error and affirmed the judgment of the district court.

127. La Gorce Palace Condo Assoc., Inc. v. QBE Ins. Corp., 733 F.Supp.2d 1332 (S.D. Fla. 2010), Aug. 10, 2010 – A condominium association brought an action against its insurer to recover for damages caused by Hurricane Wilma. Count one of the insured's complaint sought specific performance of the insurance contract's appraisal clause and the insurer moved to dismiss this count (in addition to other counts). The court found that under Florida law, the insured condominium association failed to establish a present right to appraisal under the insurance contract, and thus was not entitled to specific performance of the appraisal clause, where there were no allegations: (1) that the insurer had responded to the insured's newest proof of loss, (2) that there were no coverage

issues that required judicial determination, (3) that the dispute between the parties was simply the difference in the amount of loss, (4) that the insured had no adequate remedy at law, or (5) that justice required appraisal.

126. Citizens Property Insurance Corporation v. Hamilton, 43 So.3d 746 (Fla. 1st DCA 2010), July 7, 2010 – William and Cynthia Hamilton's mobile home was destroyed by Hurricane Ivan. At the time of the loss, the Hamiltons possessed flood insurance with the National Flood Insurance Program ("NFIP") (offering coverage for the peril of flood) as well as homeowner's insurance with Citizens Property Insurance Corporation ("Citizens") (offering coverage for, among other perils, windstorm, but excluding damage caused by flooding). The insureds submitted a claim to NFIP under their flood policy for damage/loss to the mobile home, out buildings, and personal property. NFIP issued the full flood policy limits for the Hamiltons' claim. Thereafter, the insureds submitted a claim to Citizens under their homeowner's policy, and Citizens issued payment for wind-related damages in the amount of $6,370. The insureds then filed suit against Citizens seeking to recover the full policy limits of the homeowner's policy.

At trial, the jury found that wind had caused a total loss of the Hamiltons' mobile home and awarded Citizens's policy limits for the loss of the home; the jury also assigned damage amounts for the insureds' out buildings based on jury instructions that the homeowner's policy provided for payment of losses on the basis of replacement cost. Additionally, the court awarded prejudgment interest on the entire damages award from the date of loss.

On appeal to the First DCA, the appeals court found as follows:

1. The trial court did not abuse its discretion in ruling that Citizens could not reference the dollar amount paid by NFIP to the insureds under the flood policy;
2. There was no apparent prejudice where the trial court allowed the insureds to admit into evidence the county's determination that the mobile home had been substantially damaged for the purpose of proving that wind caused a constructive total loss of the mobile home before flood surge washed away the remains;
3. The trial court did not abuse its discretion in declining Citizens's proposed jury instruction regarding the insured's burden to prove damages caused solely by wind;
4. The trial court did not abuse its discretion in failing to instruct the jury to apply the "total loss recovery" rule;
5. There was reversible error where the trial court instructed the jury to measure damages to the out buildings by replacement cost value; and
6. There was reversible error where the trial court awarded prejudgment interest on the entire damages award, on the basis that valued law policy did not apply to the out buildings, and therefore the calculation of interest for this portion of the insureds' claim should be calculated in accordance with the homeowner's policy.

125. First Home Insurance Company v. Fleurimond, 36 So.3d 172 (Fla. 3d DCA 2010), June 2, 2010 – The insurer adjusted and paid the insured's Hurricane Wilma claim, and the insureds disputed that the amount paid was sufficient to effect repairs. Thereafter, part of the insured's roof collapsed, resulting in interior water damage, and the insureds made a supplemental claim. In the investigation of the supplemental claim, the insureds (husband and wife) appeared for the examination under oath – unrepresented by counsel – but walked out during a break and did not return.

The insureds retained counsel, who contacted the insurer and offered to resume the examination under oath, but the insurer replied that it was too late and refused the offer. After the offer was rejected, the insureds filed suit and moved to compel appraisal. The appellate court granted the insured's motion to compel appraisal, holding that because the insureds' counsel offered to resume the examination under oath *before filing suit*, and that request was denied, the lawsuit was not premature and the appraisal was appropriate.

124. Florida Ins. Guaranty Ass'n, Inc. v. The Olympus Ass'n, Inc., 34 So.3d 791 (Fla. 4th DCA 2010), May 19, 2010 – The Florida Insurance Guaranty Association (FIGA), sought relief from the 4th DCA as a result of the trial court confirming an appraisal award and entering final judgment for Olympus without first determining FIGA's liability as to contested coverage claims. The 4th DCA reversed the order.

Southern Family Insurance Company issued a property insurance policy to Olympus which, during the policy period, sustained building damage in excess of $8 million as a result of Hurricane Wilma. Southern Family went into receivership and that insolvency triggered FIGA's obligation to pay for "covered claims." Olympus's public adjuster demanded appraisal and a valid and binding appraisal award in excess of $7 million dollars was entered. The appraisal award stated that "this award is made without consideration of other terms, conditions, provisions or exclusions of the …policy, which might affect coverage or the amount of the insurer's liability there under." There was a separate sheet listing line-item appraisal amounts, which indicated that almost $4 million was allotted for Waterproofing/Painting. Olympus filed suit for breach of contract and FIGA raised as an affirmative defense, the "Windstorm Exterior Paint and Waterproofing Exclusion." Olympus filed a Motion to Confirm Appraisal Award and Entry of Final Judgment which was granted. FIGA appealed the order contending that the trial court erred in failing to determine FIGA's liability with regard to the contested claim, and entering final judgment for the entire appraisal amount.

The 4th DCA relied on Florida Supreme Court precedent in State Farm Fire & Casualty, Co. v. Licea, 685 So. 2d 1285 (Fla. 1996), and on established case law, to conclude that the submission of a claim to appraisal does not foreclose a challenge that an element of loss is not covered by the policy. As such, the 4th DCA held that the trial court erred by entering final judgment awarding the amount set forth in the appraisal without first determining the issue of coverage liability contested by FIGA in its affirmative defenses. They further concluded that based on legal precedent, FIGA could contest part of the liability without challenging coverage as a whole and noted that the appraisal award itself

in this case, indicated that the amount could change as the award was made without consideration of policy provisions as to coverage.

123. Hill v. State Farm Florida Ins. Co., 35 So.3d 956 (Fla. 2d DCA 2010), May 7, 2010 – Jacqueline Hill made a claim under her homeowner's insurance policy with State Farm Florida Insurance Company after her home was damaged by fire. After State Farm had paid more than $90,000.00 in coverage, Ms. Hill filed suit. Both parties invoked the appraisal process. The appraisers returned a verdict for Ms. Hill in the amount of approximately, $160,000.00 which was $39,967.60 more than the amount State Farm had already paid Ms. Hill. Accordingly, State Farm issued drafts totaling this amount. Days later Ms. Hill filed an amended complaint for breach of contract and a motion to confirm the appraisal award.

The trial court entered a final judgment confirming the appraisers' award totaling $39,967.60, which was already paid by State Farm. The trial court's order reserved jurisdiction to determine Ms. Hill's entitlement to fees and the amount of same. Despite the final judgment confirming the appraisal, the lawsuit for breach of contract remained pending. The lower court entered an order granting summary judgment against Ms. Hill on the breach of contract. It was this order that was appealed to the Second District Court. The issue for the court was whether the final judgment acts as a confession of judgment entitling Ms. Hill to receive attorney's fees.

The Second District noted that the appraisal process is not a process to resolve breach of contract claims or to determine coverage disputes. Rather, the appraisal process is a method of adjusting a claim to determine the amount payable. After the process was completed and Ms. Hill was paid the additional $39,967.60, Ms. Hill never identified in her amended complaint for breach of contract a loss that had been covered in the adjusting process. The court further noted that the law does not provide a mechanism to impose attorney's fees merely because the negotiation process is difficult. Rather, it is when the "claims adjusting process breaks down" and the parties are taking steps to breach the contract that may entitle an insured to attorney's fees under Sec. 627.428. The court questioned whether Ms. Hill's intentions in filing the lawsuit against State Farm was "to force" State Farm to conduct an appraisal or whether the suit was preemptive in nature and intended to obtain attorney's fees for the routine efforts in negotiating a claim. In Goff v. State Farm Florida Ins. Co., 999 So. 2d 684 (Fla. 2d DCA 2008), the Second District held that the insureds were entitled to attorney's fees because the lawsuit "forced" State Farm to request an appraisal and pay significant additional amounts under the policy.

The Second District reversed and remanded the case back to the trial court to determine whether Ms. Hill was required to file the lawsuit to force State Farm to comply with the policy. The court cautioned that if the trial court determined that Ms. Hill is in fact entitled to attorney's fees, then the scope of the remedy envisioned in Goff will have been misconstrued since the appraisal process is not legal work arising from an insurer's denial of coverage or breach of contract. Therefore, fees should be normally limited to the work

associated with filing the lawsuit after the insurer has ceased to negotiate or has breached the contract and the additional legal work necessary to resolve that breach.

122. 767 Building, LLC v. Allstate Ins. Co., 2010 WL 1796564 (S.D. Fla. May 4, 2010) – The insured's motion to compel appraisal on an insurance claim was denied on the basis that the insurer asserted that the losses claimed by the insured were not covered under the policy. The court found that it was required to determine the issue of coverage before the insurance claim could be appraised.

121. Sunshine State Ins. Co. v. Rawlins, 34 So.3d 753 (Fla. 3d DCA 2010), April 21, 2010 – The Third DCA found that the trial court did not abuse its discretion in granting an order to compel appraisal that left consideration of coverage issues for post-appraisal, and the insurer's right to contest coverage as a matter of law was preserved.

120. American Capital Assurance Corp. v. Courtney Meadows Apartment, LLP, 36 So.3d 704 (Fla. 1st DCA 2010), April 7, 2010 – An apartment complex, Courtney Meadows Apartment, LLP, incurred property damage from a hail storm and submitted a claim to its insurer, American Capital Assurance Corp. The insured believed a majority of the complex's damaged roofs required replacement; however, the insurer's final estimate determined that only one roof needed replacing and that the other roofs could be repaired. The insurer then issued a check for the amount reflected in its final estimate and asked the insured to submit a sworn proof of loss for this amount. The correspondence accompanying the check also stated that if a dispute existed concerning the amount of loss, then the insurer might wish to proceed with appraisal. The insured completely rejected the check, refused to provide a sworn proof of loss, and notified the insurer of four additional items of loss that were not included in the insurer's final estimate. The insurer then demanded appraisal, and the insured responded by filing suit for declaratory relief and numerous breaches of contract. The insurer moved to dismiss and/or abate the action and to compel appraisal, arguing that it had properly invoked the appraisal process under the terms of the policy.

The trial court ruled that the appraisal demand was untimely, and, furthermore, that the four items that had not been adjusted by the insurer were subject to appraisal. On appeal to the First DCA, the Court found that (1) the insurer's demand for appraisal was not untimely and (2) appraisal of the four items that had not been previously adjusted by the insurer was premature on the basis that, without adjustment, it was impossible to know whether the parties disputed the amount of loss to warrant appraisal.

119. Hartford Cas. Ins. Co. v. 600 La Peninsula Condominium Association, Inc., 2010 WL 555686 (M.D.Fla. 2010), February 10, 2010 – 600 La Peninsula Condominium Association, Inc. submitted a claim for Hurricane Wilma-related damages to its insurer, Hartford Casualty Insurance Company. Hartford investigated the claim, issued payment to the insured based upon the estimate completed by the insurer's expert, and closed the file. Two and a half years after closure of the claim file, La Peninsula submitted a new estimate to the insurer for approximately $2.5 million in Hurricane Wilma-related damages, demanding appraisal. The new estimate included damage to items not

previously observed or identified and damage for improper repairs. Hartford investigated the claimed damage under a reservation of rights and ultimately issued denial of this later claim. Hartford then filed a Declaratory Action against La Peninsula seeking a declaration as to coverage under the subject policy. The Court ruled under a motion to dismiss standard to find that the matter could plausibly involve a separate claim from the previous covered claim. The Court also found that since Hartford wholly denied this second claim, any request for appraisal was deemed premature until the judicial question of coverage was determined.

118. Sunshine State Insurance Company v. Corridori, 28 So.3d 129 (Fla. 4th DCA 2010), February 3, 2010 – The insureds, Frances and Cheryl Corridori, submitted a claim to their insurer, Sunshine State Insurance Company, for property damage sustained during Hurricane Wilma. Sunshine State issued payment for the claim and the matter was closed. Two years later, the insureds submitted a "supplemental claim" to Sunshine State for damages to their property. In response, the insurer requested that the Corridoris submit a sworn proof of loss within 90 days, and that they sit for examinations under oath. The insureds did not comply with the set deadlines, and a late sworn proof of loss was deemed by the insurer as "incomplete and inaccurate." Sunshine State subsequently denied the claim, arguing that (1) the subject damages were not "supplemental" to the original damages and (2) the insureds had materially breached the contract of insurance by failing to comply with proof of loss requirements. The insureds demanded appraisal.

At trial, without taking any evidence, the court concluded that the subject claim was supplemental to the original claim and that the Corridoris had not materially breached the policy. Accordingly, the trial court ordered the parties to appraise the loss and the insurer appealed.

The Fourth DCA found that a court must resolve all underlying coverage disputes prior to ordering an appraisal. In the present case, where the insurer alleged that the insureds materially breached the contract by failing to comply with certain policy conditions, the Fourth DCA determined that a fact question existed regarding the necessity or sufficiency of compliance. This fact question had to be judicially resolved with competent evidence supporting a determination of coverage before appraisal could take place. Therefore, since the trial court did not take any evidence, the Fourth DCA found that the dispute of fact remained unresolved, and the trial court's order compelling appraisal was thereby reversed.

117. Nationwide Mut. Fire Ins. Co. v. Francisco, Case No. 2:08-CV-277-FtM-36SPC (M.D. Fla.), March 30, 2010 – The insured, John Francisco, and his insurance company, Nationwide Mut. Fire Ins. Co., agreed to appraisal after a dispute arose regarding evaluation of the insured's claimed property damages. Because the parties' appraisers could not agree on the selection of a neutral umpire, Nationwide petitioned the Middle District Court of Florida to appoint an umpire. The insurer also moved the Court to "require the appraisal panel, in making its decision and ultimate award, to delineate between any damages caused by water as opposed to mold (or any other perils)," and Nationwide provided the Court with a proposed appraisal award form. The insured

objected to any delineation of damages. Thereafter, the magistrate judge issued an order appointing the neutral umpire, granting Nationwide's motion to delineate the appraisal award, but denying the insurer's motion to compel the use of the proposed appraisal form.

The appraisal panel ultimately entered an appraisal award without a delineation of damages. Nationwide filed a motion to strike the appraisal award, on the basis that the award was not drafted to comply with the magistrate judge's order requiring a delineation between damages caused by water as opposed to mold or other perils. Mr. Francisco filed a motion to confirm the appraisal award, and Nationwide then deposited the full appraisal amount into the court registry.

In its opinion, the Middle District discussed the Eleventh Circuit Court's ruling in Three Palms Pointe, Inc. v. State Farm Fire and Cas. Co., 362 F.3d 1316 (11th Cir. 2004), in which the Eleventh Circuit interpreted the Florida Supreme Court holding in State Farm Fire & Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996), to find that, in Florida, once an appraisal award has been issued, an insurer may only challenge the lack of coverage of the ***entire*** claim, and ***not only a part*** of the appraisal award. Despite noting negative treatment of this Three Palms ruling by several Florida District Court and Federal District Court cases (in which a number of courts have found that (1) the Eleventh Circuit misinterpreted Licea, and (2) an insurer ***is*** entitled to challenge the coverage as to portions of an appraisal award), the Middle District found that it was still bound by the Eleventh Circuit's opinion in Three Palms. Accordingly, the Court denied Nationwide's motion to strike the appraisal award, on the basis that the insurer could not challenge coverage of only a portion of the award.

Because Mr. Francisco's motion to confirm appraisal was filed after the insurer filed its motion to strike the appraisal award, and before Nationwide paid the appraisal award in full into the Court registry, the Court found that the motion to confirm appraisal was necessary; and, since the insurer had not asserted a lack of coverage defense for the entire claim or for a violation of one of the standard policy conditions (such as fraud, lack of notice, or failure to cooperate), the Court granted the insured's motion to confirm the appraisal award.

116. State Farm Florida Ins. Co. v. Seville Place Condo. Ass'n, Inc., 2009 WL 3271300 (Fla. 3d DCA Oct. 14, 2009) – (This opinion was subsequently withdrawn and superseded on rehearing by State Farm Florida Ins. Co. v. Seville Place Condo. Ass'n, 2011 WL 2905642 (Fla. 3d DCA July 20, 2011).) The Third District Court of Florida evaluated the ripeness of bad faith claims when contractual appraisal provisions had been invoked and coverage had been determined or admitted. The district court upheld the trial court's ruling that (1) the insurer's liability to the association had already been determined; (2) an appraisal, though aggressively attacked by State Farm, had been completed and confirmed by the court; and, therefore (3) the conditions precedent for amendment to add a bad faith claim were met. The Court rejected State Farm's argument that the prosecution of a bad faith claim must be abated until the insurer has been permitted to appeal the liability and appraisal decisions and has exhausted all appellate remedies

relating to those issues. The dissenting opinion in this case contended that the Court's majority ruling was in direct conflict with North Pointe Ins. Co. v. Tomas, 16 So.3d 977 (Fla. 3d DCA 2009), wherein the Third District Court granted certiorari and quashed an order authorizing first-party insureds to prosecute a bad faith claim against their insurer, North Pointe Insurance Company, before judgment, where the company had conceded all defenses to coverage and actually paid the amount of the appraisal award to its insured, leaving only a determination of the amount of pre-judgment interest and entry of judgment.

115. Jin Zhi Star Lt. LLC v. American Zurich Ins. Co., 2009 WL 2899913 (S.D. Fla. 2009), Sept. 9, 2009 – Referencing Grow, 2009 WL 141481 at *3, the Court stated that under Florida Statute 627.428, an insured may recover attorney's fees incurred in reaching a settlement, compelling arbitration or appraisal, or conducting appraisal. Applying this rule to the present case, the Court found that the Plaintiffs were entitled to attorney fees were they were forced to file a declaratory action to compel Defendant's participation in an appraisal process that was contemplated by the insurance contract between the parties.

114. North Pointe Ins. Co. v. Tomas, 16 So.3d 977 (Fla. 3d DCA 2009), Aug. 26, 2009 – Insureds moved to confirm appraisal award against homeowner's insurer. The appeals court affirmed the trial court's ruling that the insurer, which first denied but later admitted coverage and paid the appraisal award, was deemed to have waived the contractual 60-day period for making payment and was responsible for prejudgment interest from the date of the loss.

113. Lewis v. Universal Property and Casualty Ins. Co., 13 So.3d 1079 (Fla. 4th DCA 2009), June 3, 2009, rehearing denied Aug 28, 2009 – Where insureds prevailed in appraisal and filed a motion for attorney fees against their homeowners insurer, the Court held that the insureds were entitled to attorney fees.

112. Sands on the Ocean Condominium Ass'n, Inc. v. QBE Ins. Corp., 2009 WL 790120, S.D. Fla., March 24, 2009 – The Court concluded that confirmation of appraisal was appropriate where insured filed suit to obtain payment of its loss, the Defendant then sought appraisal, and the Defendant did not pay any of the amount awarded by the appraisers until after the Plaintiff filed the motion to confirm appraisal. The Court distinguished the facts of the present case from Federated National Ins. Co. v. Esposito, 937 So.2d 199 (Fla. 4th DCA 2006) (wherein the insured invoked the appraisal process and the insurer paid the appraisal award in full ***before*** the insured sought confirmation of the appraisal award). However, the Court disagreed with Plaintiff that the Court should confirm the appraisal award without addressing issues regarding coverage; in doing so, the Court highlighted that in the present case, the disclaimer expressly included in the appraisal award by the appraisers stated that the award was "made without any consideration of the deductible amount or prior payments issued to the insured or any terms, conditions, provisions or exclusions" of the insurance policy and that "no attempt by the appraisers have been made regarding the interpretation" of the policy. Accordingly, due to this language, the Court determined that the appraisal award did not reflect the amount owed to Plaintiff under the policy.

111. Goff v. State Farm Florida Ins. Co., 999 So.2d 684 (Fla. 2d DCA 2009), Dec. 12, 2008, rehearing denied Feb. 3, 2009 – Insureds whose residence sustained hurricane damage brought action against homeowner's insurer seeking additional benefits. After an appraisal was performed, insurer paid insureds the actual cash value of the damage. The Court held that the insurer could withhold a portion of the contractor profit and overhead as part of the depreciation.

110. QBE Insurance Corp. v. Dome Condominium Association, 577 F.Supp.2d 1256 (S.D. Fla. 2008), Sept. 16, 2008 – In insurer's action to appoint a neutral umpire to resolve a disputed insurance claim, the court held that the insured had the right to bring counterclaims against the insurer without having to complete the appraisal process, where the insurer breached its statutory duty to inform the insured of its right to participate in the mediation program offered under Fla. Stat. § 627.7015, despite the fact that the parties had twice participated in the mediation program without resolution of the dispute.

109. 316, Inc. v. Maryland Cas. Co., 625 F.Supp.2d 1187 (N.D. Fla. 2008), Aug. 21, 2008 – Referencing Florida Statute 624.155(8), the Court stated that the insurer could not be faulted for seeking an appraisal under the terms of the policy in light of the insured's failure to provide any facts on how the insurer could avoid a bad-faith lawsuit other than by paying the policy limits. Therefore, Court held that the insurer did not act in bad faith in demanding an appraisal.

108. Pacific Ins. Co., Ltd. v. New Park Towers Condominium Ass'n, Inc., 2008 WL 187537 (S.D. Fla. Jan. 18, 2008) – In declaratory judgment action initiated by the insurer, insured's motion to dismiss was granted without prejudice with leave to amend, wherein insurer stated that the parties were in disagreement as to the form in which the appraisal award should be issued, with insurer believing that the award should be issued in a line item fashion for each element of damages that may be awarded, including a determination as to the actual cash value, the replacement cost value and code upgrade items. The court held that because appraisal had been invoked and was ongoing, and because it would not be possible to conclude from the insurer's allegations that the appraisal result would definitively yield a result contrary to the insurer's interpretation of the policy, there was no justiciable case or controversy at that point in time.

107. Grow v. First Nat. Ins. Co. of America, 2008 WL 141481 (N.D. Fla. Jan. 11, 2008) – Court granted insurer's motion to dismiss insured's breach of contract suit after a court-appointed umpire had determined the amount of insured's loss and the insurer had promptly paid the appraisal award. The court held that the insurer did not wrongfully withhold payment of the insured's insurance benefits in case where insurer initially accepted coverage and paid a portion of insured's claim, invoked its right to appraisal when the parties could not agree on the amount of the insured's loss, and issued payment to insured within a month of the umpire's determination.

106. Wroe v. Amica Mut. Ins. Co., 991 So.2d 426 (Fla. 5th DCA 2008), Sept. 26, 2008 – With respect to an award determined by an appraisal panel convened pursuant to a policy of

automobile insurance to consider the damages sustained by the insured's vehicle as a result of an accident, the court affirmed the final order of the trial court without prejudice to the insured's right to seek an additional award should further damages be uncovered when the subject vehicle was repaired.

105. Wilson v. Federated National Insurance Co., 969 So.2d 1133 (Fla. 2d DCA 2007), Nov. 14, 2007 – Insurer did not waive right to compel appraisal by filing an answer to insured's lawsuit where insurer demanded appraisal one month after filing its answer and only minimal discovery had been conducted. However, insured was entitled to have the appraisal award confirmed and final judgment entered because insured was compelled to file suit as a result of insurer failing to pay what its own adjuster's determined to be the amount of loss and later failed to pay all amounts due under the appraisal award.

104. Muckenfuss v. Hanover Insurance Co., 2007 WL 1174098 (M.D. Fla. Apr. 18, 2007) – Court held that despite insurer, in its answer and affirmative defenses, rising multiple affirmative defenses, the only defenses that remain after an appraisal award has been made are those that assert a lack of coverage or a violation of one of the standard policy conditions. Court confirmed appraisal award and entered judgment in favor of insured.

103. Rivergate Oakridge, LLC v. Northern Insurance Company of New York, 2007 WL 1141508 (M.D. Fla. Apr. 17, 2007) – Court denied insurer's motion to dismiss based on insurer claiming that appraisal was a precondition to suit based on the fact that insurer never demanded appraisal prior to the insured filing suit and the policy stated that either party may make a written demand for appraisal.

102 Citizens Property Insurance Corp. v. M.A. & F.H. Properties, Inc., 948 So.2d 1017 (Fla. 3d DCA 2007), Feb. 21, 2007 – Appraiser not disqualified on basis of his uncontroverted bias against insurer where insurance policy only provided that appraiser had to be competent. Bias alone not enough to establish lack of competence.

101. Van Dalen v. Safeco Insurance Co., 2007 WL 604950 (M.D. Fla. Feb. 22, 2007) – Insurer's motion to dismiss denied despite insurer's argument that its demand for appraisal was a condition precedent to filing suit where insured was able to show that insurer breached the insurance policy prior to attempting to invoke the appraisal process. The court rejected the insurer's argument that once a dispute as to the amount of loss arose that the insured was under a duty to submit to appraisal prior to filing suit.

100. Progressive Express Insurance Co. v. Weitz, 218 Fed.Appx. 846 (11th Cir. (Fla.) 2007), Feb. 16, 2007 – Judgment of court denying attorney's fees to insured where insured delayed, sidestepped and misdirected the appraisal process and failed to participate in the appraisal in a timely fashion upheld. The court reasoned that despite the insured prevailing in the appraisal, insured was not the prevailing party for purposes of § 627.428 because the insurer always stood ready appraise the loss and pay the appraisal award.

99. Tristar Lodging, Inc. v. Arch Specialty Insurance Co., 215 Fed.Appx. 879 (11th Cir. (Fla.) 2007), Jan. 26, 2007 – Insured not entitled to confirmation of appraisal award and

entry of award of attorney's fees because insured could not show that insurer failed to timely pay claims properly made and substantiated sufficient to warrant insured filing suit. The court based its holding in part on the fact that the insurer, at time suit was filed, had already paid over $1 million to the insured on its building and other claims, insured was in process of adjusting its remaining claims, insurer did not reject any of insured's claims and delays in payments were due to insured's failure to timely provide requested information and supporting document.

98. Porcelli v. OnceBeacon Insurance Co., 2006 WL 3333599 (M.D. Fla. Nov. 16, 2006) – Under the Federal Rules of Civil Procedure, a motion for attorney's fees and costs must be filed within 14 days after entry of judgment following appraisal award.

97. Central Oaks, Inc. v. Maryland Casualty Co., 2006 WL 2864422 (M.D. Fla. Oct. 5, 2006) – Court denied insured's request to order second appraisal despite insured's contention that its appraiser was mistaken as to the scope of the appraisal and as a result of such mistake the appraisal award did not accurately reflect the extent of the insured's loss.

96. The Bullard Building Condominium Assoc. Inc. v. Travelers Property Casualty Co. of America, 2006 WL 2787850 (M.D. Fla. Sept. 26, 2006) – Right to compel appraisal not waived where despite insurer filing answer to insured's lawsuit insurer demanded appraisal within five months of the submission of the claim.

95. Federated National Insurance Company v. Esposito, 937 So.2d 199 (Fla. 4th DCA 2006), Aug. 23, 2006 – The Fourth District Court of Appeal held that it was an error to confirm appraisal award and enter award of attorneys fees where the insurer timely participated in appraisal and paid award without necessity of court intervention.

94. Burnett v. Clarendon Select Insurance Company, 920 So.2d 188 (Fla. 2d DCA 2006), Feb. 10, 2006 – The Second District Court of Appeal held that order compelling appraisal does not meet the requirements of certiorari relief because such was not "an order that determines the entitlement of a party to arbitration" under new line of cases.

93. Kendall Lakes Townhomes Developers, Inc. vs. Agricultural Excess and Surplus Lines Insurance Company n/k/a Great American E&S Insurance Company, 916 So.2d 12 (Fla. 3d DCA 2005), Oct. 5, 2005 – The Third District Court of Appeals held that where the insurer agreed that it was a covered loss but disagreed as to the amount of loss, it was permissible for the Appraisal Panel to Decide what amount of damages was caused by the loss. Note that the trial court required the Umpire to derive the amount of the total loss and further break down the amount of loss by virtue of excluded causes.

92. The Travelers Indemnity Co. of Illinois V. Meadows MR, LLP, 900 So.2d 676 (Fla. 4th DCA 2005), Apr. 13, 2005 – Attorney's fees awarded to insured whether insured had to retain counsel as a result of initial dispute over coverage and lengthy investigation into the claim which was followed by a demand by the insurer for appraisal. Insured's counsel had to file a declaratory judgment action to ensure that the appraisal was governed by the Florida Arbitration Code.

91. Mertiplan Insurance Co. v. Laughlin, 2005 WL 1054027 (M.D. Fla. Apr. 29, 2005) – Appraisal demand denied where insured's breached the insurance policy by failing to perform reasonable repairs and mitigate their damages. Appraisal would not be ordered until insured's complied with their post-loss obligations or are otherwise discharged from any contractual liability to mitigate damages.

90. Liberty American Insurance Company vs. Kennedy, 890 So.2d 539 (Fla. 2d DCA 2005), Jan. 12, 2005 – The Second District Court of Appeal held that a party cannot file a Petition for Writ of Certiorari to review an Order of the Trial Court refusing to delineate the scope of an appraisal. The Appellate Court held that any error of the Trial Court be made the subject of an appeal from any final judgment entered by the Trial Court. However, the Court did conclude that the Federal 11th Circuit Court of Appeals misinterpreted the Florida decision of State Farm Fire and Casualty vs. Licea. The Florida Second District Court of Appeals held that the submission of a claim to appraisal does not foreclose the insurance company's right from challenging an element of loss as not being covered.

89. Agricultural Excess and Surplus Lines Insurance Company a/k/a Great American E&X Insurance Company vs. Kendall Lakes Townhomes Developers, Inc., 884 So.2d 975 (Fla. 3d DCA 2004), Sept. 15, 2004 – Third District Court of Appeal held that where parties go to the Court to appoint an umpire, there is no justification for a party to be able to take the deposition of the opposing party's appraiser.

88. Three Palms Pointe, Inc. v. State Farm Fire & Casualty Company, 362 F.3d 1317 (11th Cir. (Fla.) 2004), March 19, 2004 – Once an appraisal award has been made, the only defenses that remain for the insurer to assert are lack of coverage for the entire claim, or violation of one of the standard policy conditions (fraud, lack of notice, failure to cooperate, etc.), citing Licea. This decision was disagreed with by Liberty American Ins. Co. v. Kennedy, 890 So.2d 539 (Fla. 2d DCA 2005) (which found that the Three Palms Pointe court had misinterpreted the holding of Licea and that Liberty American Ins. Co., in that case, was not precluded from disputing the scope of coverage under its policy and challenging an element of loss that may be awarded by a final judgment in the future).

87. Nationwide Mutual Fire Insurance Company v. Schweitzer, 872 So.2d 278 (Fla. 4th DCA 2004), March 17, 2004 – The Court cited Allstate Ins. Co. v. Suarez, 833 So.2d 762 (Fla. 2002), stating that an appraisal provision is not an agreement to arbitrate. Accordingly, the Court ruled that an order granting or denying appraisal is not appealable as an order involving entitlement to arbitration.

86. Corzo v. American Superior Ins. Co., 847 So.2d 584 (Fla. 3d DCA 2003), June 18, 2003 – Where the insured files a lawsuit and the sole claim for relief was a demand for appraisal and not breach of contract based on the insurance company's denial, the issue of coverage is for the court and not the appraisal panel.

85. Liberty Mut. Fire Ins. Co. v. Buenaventura Lakes Shopping Center, Inc., 846 So.2d 1204 (Fla. 3d DCA 2003), June 4, 2003 – Where the insurer had notice of the loss and there was a disagreement about the amount of the loss, the loss was properly submitted to the appraisal panel pursuant to U.S. Fid. & Guar. Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999).

84. Rosell v. United Automobile Ins., 836 So.2d 1061 (Fla. 3d DCA 2003), Jan. 29, 2003 – A party's appraiser must be a competent and disinterested appraiser.

83. Three Palms Pointe, Inc. v. State Farm Fire and Cas. Co., 250 F.Supp.2d 1357 (M.D. Fla. 2003), March 10, 2003 – Where appraisal is demanded for a collapse loss and the policy does not exclude coverage for costs of personal relocation expenses but does not have a loss of use provision, personal relocation expenses are recoverable and the award should be confirmed.

82. Allstate Ins. Co. v. Suarez, 833 So.2d 762 (Fla. 2002), Dec. 12, 2002 – An appraisal clause in a homeowners' insurance policy was not an agreement to arbitrate and required an informal appraisal proceeding and therefore the formal procedures of the Arbitration Code were inapplicable. Disapproved Hoenstine v. State Farm Fire and Cas. Co., 736 So.2d 761 (Fla. 5th DCA 1999) and Florida Farm Bureau Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).

81. Allstate v. Martinez, 833 So.2d 761 (Fla. 2002), Dec. 12, 2002 – Upheld Allstate Ins. Co. v. Suarez, 833 So.2d 762 (Fla. 2002) regarding rule that an appraisal clause in a homeowners policy is not an agreement to submit to formal arbitration.

80. Johnson v. Nationwide Mut. Ins. Co., 828 So.2d 1021 (Fla. 2002), Sept. 26, 2002 – Coverage issues are to be determined by the court not the appraisal panel. The determination as to whether a property loss was caused by a sinkhole and covered or caused by earth movement and excluded was an issue of coverage for the whole loss and was an issue for judicial determination by a court, not appraisers.

79. The Florida Residential Property & Casualty Joint Underwriters Association v. Navarre, 816 So.2d 828 (Fla. 3d DCA 2002), May 22, 2002 – The court affirmed Paradise Plaza Condo. Ass'n v. The Reinsurance Corp. of New York, 685 So.2d 937 (Fla. 3d DCA 1996), which held court has discretion to determine if the issue of damages should be appraised before the issue of coverage.

78. Allstate Insurance Co. v. Perez, 817 So. 2d 945 (Fla. 3d DCA 2002), May 22, 2002 – A non-final order compelling appraisal was affirmed based on the prior appeal of Perez v. Allstate holding an insured must file sworn proof of loss before the appraisal as being the law of the case even though the law of the district changed with the ruling in United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999) holding that all conditions precedent must be met.

77. Chimerakis v. Sentry Ins. Mut. Co., 804 So.2d 476 (Fla. 3d DCA 2001), Dec. 5, 2001 – Action to compel appraisal does not accrue until the policy conditions have been performed or waived.

76. Ajmechet v. United Automobile Ins. Co., 790 So.2d 575 (Fla. 3d DCA, 2001), July 25, 2001 – Where a suit was filed for failure to pay an automobile claim and the insurer demanded appraisal, the court stated in a footnote the argument asserted by the insurance company that the appraisal process is a condition precedent to filing suit is erroneous based on Paradise Plaza Condominium Ass'n v. Reinsurance Corp., 685 So.2d 937 (Fla. 3d DCA 1996). The court held that the insured was entitled to attorney's fees under Fla. Stat. 627.428 because the payment was effected by the law suit.

75. Allstate Inc. Co. v. Martinez, 790 So.2d 1151 (Fla. 3d DCA 2001), July 11, 2001 – The appellate court upheld the trial courts order for the parties to have an informal appraisal. As a result, the parties attorney's could not appear and no court reporter was present to prepare a record. This decision was based on the trial **court's** decision that the appraisal process is not governed by the Florida Arbitration Code. Prejudgment interest is to be calculated from the termination of the sixty days after the date of the appraisal award, not from the date of the loss.

74. Allstate Ins. Co. v. Blanco, 791 So.2d 515 (Fla. 3d DCA, 2001), July 18, 2001 – Pre-judgment interest is awarded from the date of the appraisal award and not the date of the loss.

73. Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla. 3d DCA, 2001), June 6, 2001 – A party to an insurance contract does not have a absolute right to a formal appraisal and the umpire may chose to conduct the appraisal informally. The Court certified conflict with Hoenstine v. State Farm Fire and Cas. Co., 736 So.2d 761 (Fla. 5th DCA 1999) and Florida Farm Bureau Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).

72. Delisfort v. Progressive Express Ins. Co., 785 So.2d 734 (Fla. 4th DCA. 2001), May 30, 2001 – The right to take a "betterment" deduction under a policy of auto insurance is an issue based upon construction of the policy and is therefore an issue for the courts and not an appraisal. This case was overruled by Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla. 3d DCA, 2001) on the issue of appealability of an order involving entitlement to an appraisal, as recognized by Nationwide Mut. Fire Ins. Co. v. Schweitzer, 872 So.2d 278 (Fla. 4th DCA 2004) and Cotton States Mut. Ins. v. D'Alto, 879 So.2d 67 (Fla. 1st DCA 2004).

71. Liberty Mut. Ins. Co. v. Alvarez, 785 So.2d 700 (Fla. 3d DCA, 2001), May 23, 2001 – When an appraisal is demanded and an award is entered, pre-judgment interest is awarded from the date of the appraisal demand and not the date of the loss.

70. El Cid Condominium Association, Inc. v. Public Service Mutual Ins. Co., 780 So.2d 325 (Fla. 3d DCA 2001), March 28, 2001 – The court relied on the ruling of United States

Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999) and required the insured to comply with all post-loss conditions prior to demanding appraisal.

69. Tobin v. Sunshine State Ins. Co., 777 So.2d 1207 (Fla. 3d DCA 2001), Feb. 21, 2001 – The circuit court affirmed the trial court's order to grant a motion to stay and compel appraisal where the insurance company did not actively participate in the lawsuit or take any action inconsistent with its contractual right to appraisal.

68. The Aries Ins. Co. v. Hercas Corp. d/b/a Giselle Boutique, 781 So. 2d 429 (Fla. 3d DCA 2001), Feb. 14, 2001 – Insureds are only entitled to prejudgment interest from the date of the appraisal award because that is the date the damages were liquidated, not the date of the loss. The court further rejected consideration of whether the insured was entitled to prejudgment interest and appraisal costs based on the insurance companies delay tactics in processing the claim.

67. Nationwide Prop. & Cas. Ins. v. Bobinski, 776 So.2d 1047 (Fla. 5th DCA 2001), Feb. 2, 2001 – Where an insured filed suit for confirmation of the appraisal award, prejudgment interest and a declaration of the right to attorney's fees after payment of the appraisal award, there is no right to attorney's fees under Fl. Stat. 627.428. Suit must be filed prior to payment of the appraisal award or to compel an insurer to appraisal to be entitled to fees.

66. Jacobs v. Nationwide Mut. Ins. Co., 236 F.3d 1282 (C.A.11 (Fla.) 2001), Jan. 4, 2001 – An insured must fulfill all the post-loss obligations under the insurance contract before invoking the right to appraisal under United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999). The district court awarded attorney's fees to the insured as the prevailing party because they obtained a declaratory judgment compelling appraisal. The Court of Appeals vacated this decision until it could be determined if the insureds satisfied the requirements of Romay. Had they met the preconditions to appraisal, it appears the district court would have upheld the award of attorney's fees.

65. Nationwide Mutual Ins. Co. v. Johnson, 774 So.2d 779 (Fla. 2d DCA 2000), Dec. 15, 2000 – This case involved the issue of whether claimed damage was caused by sinkhole or settlement. The court held that causation is an amount of loss issue that is proper for the appraisal panel based on Licea and Keelean, and the court certified conflict with Opar. Review of this decision was granted by the Supreme Court of Florida in Johnson v. Nationwide Mut. Ins. Co., 795 So.2d 605 (Fla. 2001), and the district court's decision was quashed by the higher court in Johnson v. Nationwide Mut. Ins. Co., 828 So.2d 1021 (Fla. 2002).

64. Gonzalez v. State Farm Fire and Cas. Co., 805 So.2d 814 (Fla. 3d DCA 2000), Nov. 8, 2000 – When the insurer is claiming there is no coverage at all, the court following Licea held that whether the claim is covered by the policy is a judicial question and not a question for the appraisers. The court explained that Licea does not hold that appraisers can determine coverage issues, only that when there is a disagreement as to the amount of the loss, the appraisers are to determine the amount of damage caused by a covered peril

and are not to take into consideration damage caused by perils that are excluded, such as normal wear and tear and dry rot.

63. Allstate Insurance Co. v. Cruz, 768 So.2d 1138 (Fla. 3d DCA 2000), Aug. 30, 2000 – On a Motion to Stay Execution on Partial Judgment after an appraisal award for the insured, the court can require the insurer to post a bond or place the amount in the opposing counsel's trust account.

62. Bankers Security Ins. Co. v. Brady, 765 So.2d 870 (Fla. 5th DCA 2000), Aug. 18, 2000 – Where a public adjuster and the insurance adjuster orally agree on a settlement and the insured has to file suit for breach of contract when the insurer does not pay, the insurer cannot then demand appraisal because the adjusters had agreed on a settlement amount and the policy requires the parties to disagree as to the amount of the loss before appraisal is appropriate.

61. Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. 1st DCA 2000), March 1, 2000 – The court substituted this opinion for the previous opinion (#57) and held an insurer must comply with an appraisal provision in an insurance policy for disputes involving the amount of loss even though the insurer asserts that the insured's loss is not covered under the policy when the insured contends the loss is covered in whole or in part and demand appraisal. The only issue to determine in appraisal is the amount of loss and not causation. Disapproved by Johnson v. Nationwide Mut. Ins. Co., 828 So.2d 1021 (Fla. 2002).

60. Galindo v. ARI Mutual Ins. Co.: Suarez v. ARI Mutual Ins. Co.; Ferrer v. U.S.F.&G., 203 F.3d 771 (11th Cir. (Fla.) 2000), Feb. 7, 2000 – The Court held that an insured submitting a supplemental claim on a homeowners insurance policy must permit the insurance company to investigate the additional claim and comply with all post-loss conditions prior to compelling an appraisal according to the holding in United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999).

59. Aguiar v. United States Fidelity & Guaranty Co., 748 So.2d 343 (Fla. 3d DCA 1999), Dec. 8, 1999 – The court relied on United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999) and held plaintiffs must satisfy all policy pre-conditions before proceeding to appraisal.

58. Opar v. Allstate Ins. Co., 1999 WL 1075122 (Fla. 1st DCA 1999), Dec. 1, 1999 – The court held Allstate had to comply with the appraisal provision when demanded by the insured before a determination was made as to whether a uncovered peril or a covered peril actually damaged the property. The court explained that an appraisal includes both a determination as to the cost of repair or replacement and whether or not the requirement for a repair or replacement was caused by a covered peril. This opinion was withdrawn and superseded on clarification by Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. 1st DCA 2000), which was in turn disapproved by Johnson v. Nationwide Mut. Ins. Co., 828 So.2d 1021 (Fla. 2002).

57. Bulnes v. Allstate Ins. Co., 740 So.2d 599 (Fla. 3d DCA 1999), Sept. 22, 1999 – The court relied on the holding in United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999) and held an insured must meet all of a policy's post-loss obligations before the appraisal may be compelled.

56. Claro v. Allstate Ins. Co., 740 So.2d 599 (Fla. 3d DCA 1999), Sept. 22, 1999 – The court relied on the holding in United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999) and held an insured must meet all of a policy's post-loss obligations before the appraisal may be compelled.

55. United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999), Aug. 25, 1999 – The Court receded from the position requiring trial courts to grant appraisals upon the sole condition that the insured file a sworn proof of loss, and it held that the insured must meet all policy post-obligations before the insured may compel appraisal. Additionally, the Court held that if an insurer compelled appraisal before the insureds satisfied their duties after a loss, this would strike the post-loss obligations from the contract.

54. Liberty Mut. Fire Ins. Co. v. Hernandez, 735 So.2d 587 (Fla. 3d DCA 1999), June 30, 1999 – The court ruled that Rule 11.010 of the Florida Arbitration Code (requiring arbitrators to be members of the Florida Bar) does not apply to appraisals, and that the trial court has discretion to appoint a person with appropriate expertise, even if the appointee is not a lawyer.

53. Hoenstine v. State Farm Fire and Cas. Co., 736 So.2d 761 (Fla. 5th DCA 1999), July 2, 1999 – Court held the appraisal clause is an arbitration clause and therefore the arbitration code applies to the proceeding. Disapproved by Allstate Ins. Co. v. Suarez, 833 So.2d 762, wherein the Florida Supreme Court ruled that the formal procedures of the Arbitration Code are inapplicable to an appraisal clause of an insurance agreement, on the basis that an appraisal clause was not an agreement to arbitrate.

52. ARI Mut. Ins. Co. v. Hogen, 734 So.2d 574 (Fla. 3d DCA 1999), June 16, 1999 – This court held the question of whether arbitration had been waived should only be determined by the trial court. This case appears to equate "appraisal" with "arbitration," but see Allstate Ins. Co. v. Suarez, 833 So.2d 762, wherein the Florida Supreme Court ruled that the formal procedures of the Arbitration Code are inapplicable to an appraisal clause of an insurance agreement, on the basis that an appraisal clause was not an agreement to arbitrate.

51. Florida Select Ins. Co. v. Keelean, 727 So.2d 1131 (Fla. 2d DCA 1999), March 17, 1999 – The court held that insurance companies can both demand an appraisal under the policy and asset certain defenses. An arbitratable issue existed where the parties disputed whether the loss was caused by vandalism or normal wear and tear. This case was disapproved by Johnson v. Nationwide Mut. Ins. Co., 828 So.2d 1021 (Fla. 2002), wherein the Florida Supreme Court held that causation is a coverage question for the court when an insurer wholly denies that there is a covered loss, and an amount-of-loss

question for the appraisal panel when an insurer admits a covered loss but the amount is disputed.

50. Harrah v Allstate Ins. Co., 721 So.2d 1266 (Fla. 3d DCA 1999), Jan. 6, 1999 – The appellate court reversed the trial court's order apparently denying appraisal and ordered the appraisal based upon the authority of Martinez v. Allstate Inc. Co., 718 So.2d 368 (Fla. 3d DCA 1998), Llaguno v. ARI Mut. Ins. Co., 719 So.2d 311 (Fla. 3d DCA 1998), and Perez v. Allstate Ins. Co., 709 So.2d 591 (Fla. 3d DCA 1998). Decision receded from by United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999), wherein the Third DCA held that the insureds were required to comply with all post-loss obligations before compelling appraisal under the insurance policies, and that an insurer's compelling of appraisal before the insured satisfied its duties after a loss would strike the insured's post-loss obligations from the contract.

49. Sierra v. Allstate Ins. Co., 725 So.2d 403 (Fla. 3d DCA 1998), Dec. 30, 1998 – An insured who obtains a declaratory judgment compelling appraisal is the prevailing party and is entitled to attorney's fees. Overruled on other issue in U.S. Fid. & Guar. Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999), as recognized by Liberty Mut. Ins. Co. v. Alvarez, 785 So.2d 700 (Fla. 3d DCA 2001).

48. Felipe v. Allstate Ins. Co., 721 So.2d 839 (Fla. 3d DCA 1998), Dec. 30, 1998 – The court quashed an order from the trial court disqualifying an appraiser based on the authority of Galvis v. Allstate Ins. Co., 721 So.2d 421 (Fla. 3d DCA 1998).

47. Galvis v. Allstate Ins. Co., 721 So.2d 421 (Fla. 3d DCA 1998), Nov. 25, 1998 – A contingency-fee appraiser appointed by the insured is fully qualified under the clause "competent and disinterested appraiser" in the policy.

46. Martinez v. Allstate Inc. Co., 718 So.2d 368 (Fla. 3d DCA 1998), Oct. 1, 1998 – The appellate court reversed an order from the trial court apparently denying appraisal and ordered appraisal conditioned upon the insured filing a sworn proof of loss for additional damages.

45. Llaguno v. ARI Mut. Ins. Co., 719 So.2d 311 (Fla. 3d DCA 1998), July 29, 1998 – The Appellate Court reversed a trial court's decision denying an appraisal and ordered an appraisal conditioned upon an insured filing a sworn proof of loss. The decision appears to reject the insurer's argument that it was entitled to documentation supporting the supplemental claims as well as an Examination Under Oath. Decision receded from by United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999).

44. Perez v. Allstate Ins. Co., 709 So.2d 591 (Fla. 3d DCA 1998), Apr. 1, 1998 – The Third District Court of Appeals (Miami) reversed the trial judge's decision denying an appraisal apparently on the basis that the insured failed to comply with the conditions precedent under the policy such as failure to submit a sworn proof of loss, provide documentation, and give an examination under oath. The Third District Court did condition the appraisal

upon the insured filing a sworn proof of loss. Decision receded from by United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999).

43. Pando v. United States Fidelity and Guaranty Co., 1998 WL 708619 (Fla. S.D. June 29, 1998) – A party may waive the right to appraisal by substantially participating in litigation in a manner inconsistent with the right to arbitrate. Examples include filing an answer without asserting a right to arbitration, initiating legal action without seeking arbitration, filing a counterclaim without raising the issue.

42. Rios v. Tri-State Ins. Co., 714 So.2d 547 (Fla. 3d DCA 1998), June 24, 1998 – An appraiser who is appointed on a contingency-fee basis should disclose this type of compensation.

41. Allstate Ins. Co. v. Sierra, 705 So.2d 119 (Fla. 3d DCA 1998), Jan. 21, 1998 – The appellate court upheld the trial court's order to compel appraisal without formal hearing holding that the parties were required, as a matter of law, to go to appraisal-arbitration to determine the amount of the loss. The court based its decision on a finding that there was no dispute as to entering into the agreement to arbitrate, the insurance policy, or that the carrier had not complied with the policy by resisting the insured's application for appraisal. The Court's ruling, that submission of a sworn proof of loss statement is the sole condition that an insured must fulfill prior to invoking its right to appraisal, was subsequently receded from by U.S. Fid. & Guar. Co. v. Romay, 744 So.2d 467 (Fla. 3d DCA 1999) and overruled by Jacobs v. Nationwide Mut. Fire Ins. Co., 236 F.3d 1282 (11th Cir. (Fla.) 2001).

40. Desalvo v. Scottsdale Ins. Co., 705 So.2d 694 (Fla. 1st DCA 1998), Jan. 30, 1998 – The court awarded attorney's fees but held that fee should only be awarded up to the time a statutory offer of settlement is made which may be for the full amount which the insured may be entitled to recover. The court also held that prejudgment interest ran from date of the appraisal award. The basis of the Court's holding is unclear and the case is still pending before the Florida Supreme Court.

39. American Reliance Ins. Co. v. Kiet Investment, Inc., 703 So.2d 1190 (Fla. 3d DCA 1997), Dec. 24, 1997 – Appraisal can be held on the amount of damages but the appraisal process does not effect the court's ability to determine the availability of coverage. There can be no coverage in the event of a fraudulent claim.

38. Gray Mart, Inc. v. Fireman's Fund Ins. Co., 703 So.2d 1170 (Fla. 3d DCA 1997), Dec. 17, 1997 – Court held insurer waived the right to appraisal by actively litigating the cause until its motion for summary judgment was denied on the eve of trial which would prejudice the insured if appraisal was allowed.

37. Commercial Union Ins. v. Swain, 694 So.2d 39 (Fla. 1st DCA 1997), Jan. 22, 1997 – Appraisal clauses do not lack mutuality and are enforceable according to State Farm Fire and Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996).

36. Florida Farm Bureau Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997) Jan. 31, 1997 – The court found that an appraisal provision within an insurance policy was an agreement to arbitrate, and that, therefore, the Florida Arbitration Code applied to the appraisal process. This part of the First District's ruling was disapproved by Allstate Ins. Co. v. Suarez, 833 So.2d 762 (Fla. 2002), wherein the Supreme Court of Florida ruled that the appraisal clause was not an agreement to arbitrate, and that, thus, the formal procedures of the Arbitration Code are inapplicable to an insurance appraisal. The Sheaffer court also ruled that a challenge of coverage is a judicial question; if the appraisal is invoked, it is a condition precedent to bringing suit; and the scope of repairs may be considered by the appraisers.

35. Harco National Ins. Co. v. Robles, 685 So.2d 1288 (Fla. 1996), Dec. 26, 1996 – Appraisal clauses are not void for lack of mutuality. The court quashed the decision of Robles v. Harco, 669 So.2d 1049 (Fla. 3d DCA 1995).

34. Paradise Plaza Condo. Assoc., Inc. v. Reinsurance Corp. of New York, 685 So.2d 937 (Fla. 3d DCA 1996), Dec. 19, 1996 – The court overruled American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So.2d 106 and its offspring. The court found that a reservations of rights to contest coverage does not render an appraisal clause void for lack of mutuality, and that a court has discretion whether the issue of damages should be appraised before the issue of coverage. The court also found that an insurer does not waive its right to deny liability by invoking the appraisal clause.

33. State Farm Fire and Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996), Dec. 19, 1996 – Appraisal clause was not void for lack of mutuality because it contained a reservation of rights clause. Where there is a demand for appraisal, the only defenses which remain for the insurer are that there is no coverage under the policy or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate.

32. Rosemurgy v. State Farm Fire and Cas. Co., 673 So.2d 989 (Fla. 4th DCA 1996), May 29, 1996 – The court aligned itself with Scottsdale Ins. Co. v. Desalvo and certified conflict with State Farm Fire and Cas. Co. Licea, 649 So.2d 910 (Fla. 3d DCA 1995).

31. Robles v. Harco Nat'l Ins. Co., 669 So.2d 1049 (Fla. 3d DCA 1995), Jan. 18, 1995 – The court followed the reasoning set forth in American Reliance Ins. Co. v. Village Homes at Country Walk, et al, 632 So.2d 106 (Fla. 3d DCA 1994) that the insurer's reservation of its right to deny the claim destroys mutuality of obligation, is incompatible with the goals of arbitration, and renders illusory any purported agreement to submit to arbitration. Both this case and Village Homes were subsequently overruled by Paradise Plaza Condo. Assoc., Inc. v. The Reinsurance Corp., 685 So.2d 937 (Fla. 3d DCA 1996).

30. Childs v. State Farm Fire and Cas. Co., 899 F.Supp. 613 (S.D. Fla. 1995), July 25, 1995 – When the insurance policy contains an appraisal provision and appraisal is demanded, the appropriate course is to stay the proceedings in the trial court pending the outcome of the appraisal.

29. Scottsdale Ins. Co. v. Desalvo, 666 So.2d 944 (Fla.1st DCA 1995), Dec. 28, 1995 – An insurer is not deemed to have waived any coverage defense it may have when it participates in an appraisal requested by the insured. When the insurer requests appraisal, the insurer waives its right to deny liability (this latter ruling was disagreed with by Paradise Plaza Condo. Assoc., Inc. v. Reinsurance Corp. of New York, 685 So.2d 937 (Fla. 3d DCA 1996)).

28. Diaz v. American Bankers Ins. Co. of Fla., 662 So.2d 416 (Fla. 3d DCA 1995), Nov. 8, 1995 – A carrier's conduct in not identifying the appraiser selected by the carrier was not inconsistent with the time provided for notification under the policy to constitute a waiver.

27. State Farm Fire and Cas. Co. v. Licea, 649 So.2d 910 (Fla. 3d DCA 1995), Feb. 1, 1995 – The court ruled that by participating in an arbitration to determine the amount of the loss, the insurer is not deprived of the right to later contest the existence of insurance coverage for that loss.

26. State Farm Fire and Cas. Co. v. Middleton, 648 So.2d 1200 (Fla. 3d DCA 1995), Jan. 4, 1995 – Florida law prefers resolution of conflicts through extra-judicial means, especially arbitration. The use of appraisal clauses as binding arbitration agreements is well-established.

25. Preferred Mut. Ins. Co. v. Martinez, 643 So.2d 1101 (Fla. 3d DCA 1994), Aug. 24, 1994 – Appraisal provisions in insurance policies have been treated like arbitration provisions and they are deemed conditions precedent to recovery under the insurance policy.

24. Gables Court Professional Center, Inc. v. Merrimack Mut. Fire Ins. Co., 642 So.2d 74 (Fla. 3d DCA 1994), Aug. 31, 1994 – Followed reasoning set forth in American Reliance Ins. Co. v. Village Homes at Country Walk, et al, 632 So.2d 106 (Fla. 3d DCA 1994) that the insurer's reservation of its right to deny the claim destroys mutuality of obligation, is incompatible with the goals of arbitration, and renders illusory any purported agreement to submit to arbitration. Both this case and Village Homes were subsequently overruled by Paradise Plaza Condo. Assoc., Inc. v. Reinsurance Corp. of New York, 685 So.2d 937 (Fla. 3d DCA 1996).

23. United Community Ins. Co. v. Lewis, 642 So.2d 59 (Fla. 3d DCA 1994), Aug. 24, 1994 – Appraisals are not permissive only, neither party has the right to deny the demand once it is made. Appraisals are mandatory once invoked.

22. J.J.F. of Palm Beach, Inc. v. State Farm Fire and Cas. Co., 634 So.2d 1089 (Fla. 4th DCA 1994), Feb. 23, 1994 – The court ruled that a period of interruption for a business interruption claim was not an issue of coverage but was instead an issue of damage which could be determined by the appraisers and umpire. The court further stated that appraisal awards are valid and generally may be set aside only if made without authority, are the result of fraud, or if other grounds exist which are sufficient to set aside the arbitration award.

21. American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So.2d 106 (Fla. 3d DCA 1994), Feb. 8, 1994 – The court ruled that a contractual reservation of the carrier's right to context coverage renders a provision for arbitration and appraisal of damages void for lack of mutuality. However, this case has since been overruled by Paradise Plaza Condo. Assoc., Inc. v. Reinsurance Corp. of New York, 685 So.2d 937 (Fla. 3d DCA 1996).

20. Weinger v. State Farm Fire & Cas. Co., 620 So.2d 1298 (Fla. 4th DCA 1993), June 23, 1993 – An arbitrator must disclose any dealing that might create an impression of possible bias. An arbitrator's failure to disclose an association that might create an impression of possible bias undermines appearance of propriety and confidence in fairness of proceedings and requires the vacation of an award. The general rule of impartiality should be applied to appraisers selected as well as umpire.

19. State Farm Fire and Cas. Co. v. Albert, 618 So.2d 278 (Fla. 3d DCA 1993), Apr. 13, 1993 – Prejudgment interest and recovery of appraisal fees as costs of the litigation are permissible.

18. State Farm Fire and Cas. Co. v. Wingate, 604 So.2d 578 (Fla. 4th DCA 1992), Sept. 16, 1992 – Issues of coverage are for the court to decide, not the appraisers.

17. Columbia Cas. Co. v. Southern Flapjacks, Inc., 868 F.2d 1217 (11th Cir. (Fla.) 1989), March 28, 1989 – The insured was entitled to prejudgment interest from the time the proceeds became due under the policy – 30 days after the insured filed the proof of loss – and appraisal of the insured loss did not toll the time period in which prejudgment interest was due.

16. Intracoastal Ventures Corp. v. Safeco Ins. Co. Of Am., 540 So.2d 162 (Fla. 4DCA 1989), March 15, 1989 – Parties must agree in writing to submit any controversy between them to arbitration. Overruled on another issue by Allstate Ins. Co. v. Suarez, 833 So.2d 762 (Fla. 2002), as recognized by Nationwide Mut. Fire Ins. Co. v. Schweitzer, 872 So.2d 278 (2004).

15. State Farm Fire and Cas. Co. v. Feminine Fashions, Inc., 509 So.2d 376 (Fla. 3d DCA 1987), June 30, 1987 – Either party can demand appraisal.

14. Reliance Ins. Co. v. Harris, 503 So.2d 1321 (Fla. 1st DCA 1987) – appraisers were allowed to determine the value of a building that had been demolished after the city condemned it as a safety hazard.

13. Weiss v. Insurance Co. Of the State of Pennsylvania, 497 So.2d 285 (Fla. 3d DCA 1986), March 5, 1987 – An insurer cannot authorize repair of an insured vehicle, refuse to pay for the bill and then demand appraisal. The court held that by exercising the right to repair the vehicle, the insurer rendered it impossible to comply with the appraisal clause.

12. U.S. Fire Ins. Co. v. Franko, 443 So.2d 170 (Fla. 1st DCA 1984), Dec. 12, 1983 – Waiver occurs when parties engage in conduct which is inconsistent with the right to appraisal. A failure to immediately demand arbitration after discovering a large disparity between amounts after a settlement offer was made did not constitute a waiver. A written demand is required to trigger an arbitration clause. Once it is invoked, arbitration becomes a condition precedent to suit.

11. Candales v. Allstate Ins. Co., 421 So.2d 42 (Fla. 3d DCA 1982), Oct. 26, 1982 – Where both appraisers and the umpire sign the appraisal award and one of the appraisers later rescinds his assent to the award while the other two support the award, a trial court has no alternative but to confirm the award.

10. Transamerica Ins. Co. v. Weed, 420 So.2d 370 (Fla. 1st DCA 1982) – Taking positions and utilizing procedures inconsistent with arbitration can constitute waiver.

9. Llerena v. Lumbermans Mut. Cas. Co., 379 So.2d 166 (Fla. 3d DCA 1980), Oct. 12, 1982 – When an insurer admits liability in an unagreed amount, the time in which the insurer is required to demand appraisal under the policy begins to run from the time the insurer admits liability. This policy required 60 days.

8. Mitchell v. Aetna Cas. And Sur. Co., 579 F.2d 342 (5th Cir. (Miss.) 1978), Sept. 1, 1978 – An insufficient appraisal award should be remanded back to the appraisers.

7. Charles Taylor Marine, Inc. v. State Farm Fire & Cas. Co., 234 So.2d 400 (Fla. 3d DCA 1970) – Appraisal provision does not apply where there is a dispute as to coverage, only where the amount of the loss is in dispute.

6. Brown v. Glen Falls Ins. Co., 374 F.2d 888 (5th Cir. (Fla.) 1967), Apr. 21, 1970 – A party must have a legal ground for setting aside the decision of an umpire or disputed issues of fact.

5. Preferred Ins. Co. v. Richard Parks Trucking Co., 158 So.2d 817 (Fla. 2d DCA 1963), Dec. 11, 1963 – Where the agreement so contemplates, the results of an appraisal may be just as binding as the award of arbitrators.

4. Bear v. New Jersey Ins. Co., 138 Fla. 298 (Fla. 1939), May 26, 1939 – Admission of liability begins the time in which the insurer is required to demand appraisal under a policy within 60 days.

3. New Amsterdam Cas. Co. v. J.H. Blackshear, Inc., 116 Fla. 289 (Fla. 1934), Apr. 27, 1934 – Appraisal covenants in policies are valid if they are appropriately invoked and are conditions precedent to the filing of suit, once invoked.

2. Southern Home Ins. Co. v. Faulkner, 49 So. 542 (Fla. 1909), May 11, 1909 – Arbitrations are conditions precedent to filing suit where the insurer requires such arbitration and award.

1. Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209 (Fla. 1891), Dec. 7, 1891 – The court ruled that awards must not be one sided; they are void unless something is arbitrated for the Plaintiff's benefit as well as for the Defendant's benefit. The Court also held that whether an insurer is legally liable or obligated to pay a loss is not within the sphere of arbitration; instead, those are questions for the Court to decide.

2014
INDEX TO GEORGIA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

Prepared for

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Lam v. Allstate Indemnity Company, 327 Ga. App. 151, 755 S.E.2d 544 (2014) – although the insurer conceded that there was wind damage to the insured's roof and agreed to pay for it, the parties could not agree upon the extent (as opposed to the amount) of the damage. The court found that this was a coverage dispute, which is not a proper basis for appraisal under an insurance policy.

Bell v. Liberty Mut. Fire Ins. Co., 319 Ga. App. 302, 734 S.E.2d 894 (2012) – the court held that, absent an explicit provision in the standard fire policy to perform the same itemization of the destroyed property as the insured is directed to perform under the standard fire policy, there is no obligation to itemize a list of damage or loss to any specific article of personal property or components of property in an appraisal award.

Colony Ins. Co. v. 9400 Abercorn, LLC, 2012 U.S. Dist. LEXIS 131839 (S.D. Ga. Sept. 12, 2012) – in an order addressing various pending motions, the court, noting Georgia law's presumption in favor of regularity in and propriety of appraisal awards, refused to set aside an appraisal award where the insurer failed to present any evidence that the appraiser, who had previously disclosed a contract identifying a contingent fee interest in the loss, had any undisclosed interest in the appraisal.

Scott v. Allstate Prop. & Cas. Ins. Co., 2010 U.S. Dist. LEXIS 30417 (S.D. Ga. Mar. 29, 2010) – among other rulings, the court granted the insured's motion to compel appraisal on the basis that the dispute over the insured's claim for structural damage to the insured property was essentially one of value and the parties agreed to the appraisal provision provided for in the insurance policy.

Aaron v. Ga. Farm Bureau Mut. Ins. Co., 297 Ga. App. 403, 677 S.E.2d 419 (2009) – the appellate court affirmed the trial court's grant of summary judgment to the insurer on the basis that the insured's claims were barred by the insurance policy's one year suit limitation provision. The appellate court held that the insured in this case failed to request appraisal until well past the one-year time suit limitation period had expired.

Anders v. State Farm Fire & Cas. Co., 296 Ga. App. 663, 675 S.E.2d 490 (2009) – the appellate court affirmed the grant of partial summary judgment to the insurer regarding the scope of the appraisal process because the insured did not argue that the trial court was without authority to issue the order regarding the parameters of the appraisal.

McGowan v. Progressive Preferred Ins. Co., 281 Ga. 169, 637 S.E.2d 27 (2006) – holding that an appraisal clause only provided a method for determining the actual cash value of the insured property where there is a dispute over value and did not provide a

method for determining broader issues such as an insurer's potential liability to an insured for claims made in a lawsuit.

Rebel Tractor Parts, Inc. v. Auto-Owners Ins. Co., 2006 U.S. Dist. LEXIS 86502 (S.D. Ga. Nov. 28, 2006) – the court denied an insurer's motion for summary judgment where there was a jury question about whether the insurer waived the insurance policy's appraisal provision by unreasonably delaying its demand for appraisal, which was made only two days before expiration of the policy's two-year suit limitation period.

Gilbert v. Southern Trust Ins. Co., 252 Ga. App. 109, 555 S.E.2d 69 (2001) – the appellate court reversed the trial court's grant of summary judgment to the insurer, finding that a trier of fact could determine that the insurer had waived strict compliance with the time limit in which to designate an appraiser because the insurer refused to participate in appraisal after the insured named an appraiser nearly six months after the insurer invoked appraisal and named an appraiser, where the insurance policy did not contain any time limit for naming an appraiser. The appellate court also found that there was evidence that the insured could reasonably have believed that there was no longer a need to designate an appraiser, because, under the terms of a replacement cost rider, they had accepted the insurer's offer for the present value of the house and planned to submit an amended proof of loss when they had determined the replacement amount.

Brothers v. Generali U.S. Branch, 1997 U.S. Dist. LEXIS 14158 (N.D. Ga. July 11, 1997) – the court granted the insurer's motion to dismiss the insured's lawsuit for breach of contract because the insured was contractually bound to submit to appraisal to determine the amount of the loss after the insurer invoked the insurance policy's appraisal clause. The court also granted the insurer's motion to appoint an umpire, since the insurance policy provided that either party could request that the court select an umpire.

Eberhardt v. Georgia Farm Bureau Mut. Ins. Co., 223 Ga. App. 478, 477 S.E.2d 907 (1996) – holding that the appraisal clause in the insurance policy was binding and an appraisal award was enforceable on the parties.

Williams v. Southern Gen. Ins. Co., 211 Ga. App. 867, 440 S.E.2d 753 (1994) – the court held that it was a jury issue whether the insurer waived the insurance policy's appraisal clause by invoking the appraisal clause after litigation had commenced and the insured property was destroyed.

Shelter Am. Corp. v. Georgia Farm Bureau Mut. Ins. Co., 209 Ga. App. 258, 433 S.E.2d 140 (1993) – the court found that the insured was not entitled to recover for its

loss under the appraisal clause in the policy because no appraisal was requested within the one-year period before the policy's suit limitation expired.

Southern General Ins. Co. v. Kent, 187 Ga. App. 496, 370 S.E.2d 663 (1988) – holding that an appraisal award is binding on the parties as to the amount of loss unless the award is set aside, and that the trial court should have directed a verdict on the issue of the amount of loss since there was no evidence that the appraisal award was reached through fraud or mistake.

Georgia Farm Bureau Mut. Ins. Co. v. Mikell, 126 Ga. App. 640, 191 S.E.2d 557 (1972) – after recognizing that appraisal proceedings as provided for in an insurance policy will toll the policy's limitations period, the court held that it was a jury question whether the insurer had waived the policy's suit limitation period by leading the insured by its actions to rely on its promise to pay, either express or implied.

Zappa v. Allstate Ins. Co., 118 Ga. App. 235, 162 S.E.2d 911 (1968) – holding that it is well settled that an insurance policy's suit limitation period is tolled by the pendency of an appraisal proceeding.

Cloud v. Georgia Farm Bureau Mut. Ins. Co., 117 Ga. App. 159, 159 S.E.2d 446 (1968) – the court found that the provisions in an insurance policy for appraisal were not a condition precedent to the insured's right of recovery where there was no evidence that either party demanded appraisal.

Brown v. Glen Falls Insurance Co., 374 F.2d 888 (5th Cir. 1967) – the court held that, where an appraisal was conducted within the terms of the insurance policy, there were no legal grounds for setting aside the appraisers' award.

Yates v. Cotton States Mut. Ins. Co., 114 Ga. App. 360, 151 S.E.2d 523 (1966) – the court held that the provision in the insurance policy that no action on the policy would be maintainable unless commenced within 12 months after the loss was a valid limitation of the time within which suit must be brought and barred the insured's action to recover under the policy, which was brought more than 12 months after the loss occurred, after tolling the period of time the appraisal proceeding was pending.

Georgia Farm Bureau Mut. Ins. Co. v. Boney, 113 Ga. App. 459, 148 S.E.2d 457 (1966) – the court held that an insurer was under no duty to proceed with a proposed appraisal where, after the insurer requested the insured appoint an appraiser but before any appraiser was appointed, the insured informed the insurer that he had disposed of the

insured property and the insured declined to inform the insurer as to whom he had sold the property or where it might be found for the purpose of having an appraisal made.

Government Employers Insurance Co. v. Hardin, 108 Ga. App. 230, 132 S.E.2d 513 (1963) – the court held that a proper demand is a condition precedent for appraisal under a policy providing for the adjustment of claims by appraisal.

Western Fire Ins. Co. v. Peeples, 98 Ga. App. 365, 106 S.E.2d 91 (1958) – the court held that an oral agreement submitting the matter to appraisal was enforceable even though it was oral because the insurance policy did not require the acceptance of an appraisal demand to be in writing.

Peeples v. Western Fire Ins. Co., 96 Ga. App. 39, 99 S.E.2d 349 (1957) – the court held that the agreement to invoke the insurance policy's appraisal provision operated to toll the time limit to file suit stipulated in the policy, so that the suit limitation period did not run while the appraisal process was pending.

Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952) – the court held that an insurance policy's provision providing the process for determining the value of the loss was contractually binding and the resulting award could be attacked only for reasons that would void a contract, such as fraud, oppression, irregularity, or unfairness.

Palatine Ins. Co. v. Gilleland, 79 Ga. App. 18, 52 S.E.2d 537 (1949) – the court held that an appraisal award issued by the insured's appraiser and the umpire after the insurer's appraiser failed to appear at the agreed time was sufficient to establish the amount of the loss.

National Union Fire Ins. Co. v. Ozburn, 57 Ga. App. 90, 194 S.E. 756 (1938) – the court held that the time to sue limitation period in the policy is tolled during the time it takes to complete an appraisal when an insurer and an insured agree to an appraisal to determine the amount of a loss.

National Fire Ins. Co. v. Bennett, 36 Ga. App. 586, 137 S.E. 570 (1927) – the court held that, where the appraiser was neither disinterested nor impartial, the trial court properly rejected the appraisal award as evidence because the law, the insurance contract, and the oath taken by the appraisers all contemplated that the appraiser should have been disinterested and impartial.

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2014
INDEX TO HAWAII DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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Supplement to Index of Hawaii Decisions

1. Christiansen v. First Ins. Co. of Hawai'i, Ltd., 967 P.2d 639 (Ct. App. 1998), aff'd in part, rev'd in part sub nom., Christiansen v. First Ins. Co. of Hawai'i, Ltd., 963 P.2d 345 (1998) (reversed as to the application of the doctrine of equitable tolling). The insureds' residential property suffered extensive damage from Hurricane I'niki. The insurer disagreed with the insured that the roof needed to be replaced and offered a sum without that cost included. Following that disagreement, the insureds selected their own appraiser. Before the appraisal process concluded, the insureds filed complaint against the insurer alleging bad faith and breach of contract. The insurer filed a motion to dismiss arguing the bad faith claims were governed by the terms of the insurance policy, and therefore, the claims were barred by the policy's one-year period. The appellate court, in reversing the dismissal order, held that an action for bad faith is one independent of the policy and thus, is not governed by the policy's one-year limitation – an insured can bring a claim for bad faith against the insurer during the appraisal process. An appraisal clause referring to failure to agree on amount of loss clearly implies agreement to arbitrate only the amount of loss, not an action for bad faith. Further, the court noted that a clause in an insurance contract providing for an appraisal process may, under certain circumstances, imply an agreement between the parties to arbitrate; consequently, this appraisal process has the binding effect of a judgment of a court of law and is governed by the rules of arbitration.
2. Wailua Associates v. Aetna Cas. & Sur. Co., 27 F. Supp. 2d 1211 (D. Haw. 1998). Insured filed breach of contract and bad faith suit against property insurer. The District Court ordered the parties to submit to appraisal under the policy's arbitration provisions, and an appraisal award was confirmed. The insured sought partial summary judgment determining that all ACV, repair cost, and cost of compliance figures determined by appraisers were covered under the policy, and the insurer filed a motion to strike and to dismiss. The District Court held that the appraisal process does not shield a property insurer from possible liability for bad faith for unreasonable delay in payment under Hawai'i law, such that the insured might claim unreasonable delay from the time property damage was claimed to the initiation of appraisal, and might claim bad faith based on the insurer's conduct or delay during the appraisal process, and unreasonable delay for the time between the confirmation of the award and payment of "first period" damages under appraisal award.

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INDEX TO IDAHO DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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IDAHO

1. Idaho Case Law

***Dave's Inc. v. Linford,* 153 Idaho 744, 291 P.3d 427 (2012)**
The insureds' home was damaged by a fire and the insureds submitted a claim to State Farm. After receiving a letter from State Farm giving them three options for repairing their home, the insureds chose an option that entailed them hiring their own contractor to make repairs. The contractor sued the insureds for money the contractor claimed was unpaid. The insureds filed a third-party claim against State Farm alleging, among other things, that State Farm failed to fully pay for repairs to the house. Under the State Farm policy the insureds and State Farm agreed to resolve and set the amount of loss by appraisal. A third party was mutually selected to conduct the appraisal. After the appraisal, State Farm sent the insureds a payment for the difference between the appraisal and the amount already paid. The Court held that after paying the appraised amount, State Farm was not required to pay the actual cost to repair. *Id*. at 430.

***Hall v. Farmers Alliance Mutual Ins. Co,* 145 Idaho 313, 179 P.3d (2008)**
The insured sued Farmers to recover for breach of contract and implied covenant of good faith and fair dealing by delaying final payment. The insureds' home was repeatedly rammed into by a semi truck. The Halls had a homeowners policy with Farmers. The Halls received a check from Farmers for $7,633.86, but later made an additional claim for $57,300. Farmers had an independent adjuster re-inspect the home. The adjuster concluded that additional repairs were required, but that the Halls' estimate was excessive. Farmers informed the Halls that their policy required the Halls to participate in an appraisal resolution process because they were in disagreement about the amount of recovery. The appraisal process dictated that each side select an appraiser. The Halls' appraiser submitted a bid for $69,590 and Farmers' appraiser submitted a bid for $64,395.71. The parties disputed the amount of the actual cash value of the damage. The policy required that the two appraisers select an umpire or ask the court to make that selection. This was never done, thus the Court held that no "finding was ever made by the appraisers on the actual cash value." *Id*. at 318 – 319. The Court further held that Farmers' failure to follow its own appraisal process and seek appointment of an umpire precluded it from benefitting from a provision in the policy that limited liability to actual cash value until completion of repairs. *Id.* at 319.

Credit: Andrew Sherwood

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INDEX TO ILLINOIS DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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ILLINOIS

1. Centrust Bank, N.A. v. Montpelier U.S. Insurance Co., 2013 U.S. Dist. LEXIS 62400, 2013 WL 1855838 (N.D. Ill. May 1, 2013). Here, the court considered whether an appraisal clause was "illusory"—and thus unenforceable—because it provided that the insurer could still deny coverage even after the appraisal had been completed. The court concluded that because an appraisal is a "limited" process that is confined to fact-finding about the amount of damage, an insurer's holding in reserve the right to present legal defenses does not render the right to appraisal useless or illusory. In other words, an insurance company is able to retain the right to deny coverage of a claim post appraisal because an appraisal deals with the value of insured property or its sustained damage, as opposed to coverage, which deals with the liability as to that damage.

2. Lyon v. American Family Mut. Ins. Co., 644 F. Supp. 2d 1071 (N.D. Ill. 2009). Contrary to its prior opinion, the court found American Family had gone well beyond the "reasonable time" within which it was required to invoke the appraisal clause of the policy, thus waiving its ability to invoke the appraisal clause. The court, in reviewing the testimony of Lyon's counsel and American Family's adjuster, concluded that the operative date from which the "reasonable time" should be measured was not from when American Family learned that Lyon filed a lawsuit, but rather from October 20, 2008, or within a day or two thereafter, when Lyon's counsel sent an e-mail to American Family's adjuster, stating in part, that Lyon intended to pursue her rights to the fullest. The court reasoned that this since the adjuster forwarded the e-mail directly to American Family; this was the time when it was notified Lyon was ready to file a legal action. Thus, American Family's delay from October 2008 until March 2009 flunked the "reasonable time" standard of when American Family had to call upon the appraisal clause or lose the right to do so. The court held that American Family's failure to do so resulted in its forfeiture of the right to pursue that route, rather than having the parties' rights decided in the instant litigation.

3. FTI Int'l, Inc. v. Cincinnati Ins. Co., 339 Ill. App. 3d 258, 790 N.E.2d 908 (2d Dist. 2003). The court concluded that submitting questions of contract construction were not proper for an appraiser to determine. An appraisal is a relatively limited process whose primary function is to ascertain the value of property or the amount of a loss.

4. Stratford West Homeowner's Ass'n v. Country Mut. Ins. Co., 2003 Ill. App. LEXIS 438 (3d Dist. Apr. 4, 2003). Here, the court considered a specific policy provision to determine if an appraisal was final and binding. The policy stated: "The appraisers will set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed on will be the amount of the loss. If the appraisers fail to agree within a reasonable time, they will submit their differences to the umpire. A written agreement signed by any two (2) of these three (3) will set the amount of loss." The court concluded that if an

underwriter's intention is for an appraisal to be governed by Illinois law and be final and binding, the policy should explicitly state so. Additionally, the court stated that an insured does not waive its right to sue by participating in an appraisal process with the insurer following a disputed claim where the policy does not unambiguously state that the insured is waiving its right to sue.

5. Travis v. Am. Mfrs. Mut. Ins. Co., 335 Ill. App. 3d 1171, 782 N.E.2d 322 (5th Dist. 2002). Generally, an appraisal process provided for in insurance policies is designed to resolve disputes over the amount of the loss. However, if the dispute arguably presents more than a disagreement between the parties concerning the amount of loss, the courts may hold the dispute is not solely covered by the appraisal clause and deny an insurer's motion to compel an appraisal.

6. Hanke v. Am. Int'l S. Ins. Co., 335 Ill. App. 3d 1164, 782 N.E.2d 328 (5th Dist. 2002). An insurer cannot compel a party to participate in an appraisal when other issues are involved in a claim, such as here, when a policy dispute stems from claims of fraud.

7. Hobbs v. State Farm Mut. Auto. Ins. Co., 2002 Ill. App. LEXIS 166, 2002 WL 423466 (Ill. App. Ct. 5th Dist. Mar. 8, 2002). Court held that appraisal clause was enforceable where policy clearly provided for claims to be appraised in event of dispute on amount of loss. The right to appraisal was not waived when State Farm sought to invoke right six days after it was made a party. The court also stated that the allegations of the particular consumer-fraud claim were so intertwined with the breach-of-contract and declaratory judgment claims that the consumer-fraud claim could properly be a subject of an appraisal, especially since the appraisal clause was simple and applicable. The court reasoned that if the appraisers determined that the insurer paid the insured's body shop a sufficient sum of money to repair her car with parts of like kind and quality, she has no consumer-fraud claim as it was alleged. Public policy dictates judicial economy and prefers this "inexpensive alternative."

8. Lundy v. Farmers Group, Inc., 322 Ill. App. 3d 214, 750 N.E.2d 314 (2d Dist. 2001). The Court must address not only whether an appraisal clause exists, but whether the parties' dispute is covered by the appraisal clause. The appraisal process provided for in the policy was designed solely to resolve disputes over the amount of the loss. Farmers argued that the amount of the loss was the threshold issue, but the court determined that the resolution of Lundy's claims required a determination of whether Farmers misrepresented to its policyholders the quality of repair parts that the insurer would pay for under its policies. Therefore, the court concluded that the real contested issue required an interpretation of the policy language, in particular, the phrase "like kind and quality." The court held that this policy issue could not be resolved through the appraisal process designed to determine damages, and thus was not subject to the appraisal clause. As an aside, the court stated that an appraisal clause can be waived, although waiver is

disfavored because public policy prefers conserving judicial resources through arbitration or appraisal.

9. DeGroot v. Farmers Mut. Hail Ins. Co. of Iowa, 267 Ill. App. 3d 723, 643 N.E.2d 875 (3d Dist. 1994). DeGroot filed suit because the carrier underpaid his claim after an appraisal award was entered. Farmers moved to dismiss arguing that the policy's appraisal remedy was binding upon the parties. The trial court denied the motion. On appeal, the court stated that common law placed great importance upon an individual's right to seek redress in court. The court concluded that any waiver of that right must be clear and unambiguous. In other words, an insurer cannot require an insured to accept an appraisers' decision as binding without stating so in the policy. Therefore, in Illinois, any waiver of one's right to seek redress in court must be clear and unambiguous, placing a greater burden on insurance carriers to clearly state within the policy that the appraisal process is binding on the parties and no suit can be brought against the carrier over the amount of loss determined through appraisal. However, policy language merely stating that the amount of loss is binding appears insufficient under Illinois law.

10. Beard v. Mount Carroll Mutual Fire Ins. Co., 203 Ill. App. 3d 724, 561 N.E. 2d 116 (5th Dist. 1990). The Beard court held: (1) That while an appraisal is made more difficult where there has been total destruction of the property, this does not necessarily preclude appraisal because information as to the value of the property prior to the fire may be obtained by the appraisers from sources such as, the property owners, tenants or neighbors, or recent photographs of the property; and (2) An appraisal clause is analogous to an arbitration clause and is enforceable in a court of law in the same manner as an arbitration clause.

11. Schutt v. Allstate Insurance Co., 135 Ill. App. 3d 136, 478 N.E.2d 644 (2d Dist. 1985). An arbitration clause in a policy should be broadly interpreted as it relates to covering a parties dispute.

12. J & K Cement Constr., Inc. v. Montalbano Builders, Inc., 119 Ill. App. 3d 663, 456 N.E.2d 889 (2d Dist. 1983). After it is determined that an appraisal clause exists, the court must next determine if the parties' dispute is covered by the particular clause.

13. Hetherington v. Continental Ins. Co., 311 Ill. App. 577, 37 N.E.2d 366 (Ill. App. Ct. 1941). We recognize the general rule that where an appraisal has been fairly conducted and is within the terms of the reference under which the controversy is submitted, the findings made by the appraisers in the absence of fraud or mistake will be binding upon the parties. (*see also*, Podolsky v. Raskin, 294 Ill. 443, 128 N.E. 534 (1920). It is equally true though that the courts will set aside an award when it clearly appears that there has been fraud, misconduct or palpable or gross error or mistake.

2014
INDEX TO INDIANA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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INDIANA

1. Shifrin v. Liberty Mutual Ins., 991 F. Supp. 2d 1022 (S.D. Ind. 2014). The insurance policy at issue contained an appraisal clause that made no mention of any exception for determining "causation" issues. It provided only that an appraisal may be demanded if there is disagreement on the "value of the property or the amount of loss." The insureds refused to participate in the appraisal process. The federal court stated that Indiana courts had not decided authoritatively whether an appraisal clause could be invoked to determine a coverage dispute. The court, relying on precedent from other jurisdictions, concluded that the insurer was entitled to invoke the appraisal provision despite the fact that issues remained regarding which items of damage were caused by the tornado or the insurer's liability for that damage. The court reasoned that an appraisal can be a useful tool in this context, even where issues of causation mix in with issues of damages. This federal decision runs contrary to Indiana law that holds that issues relating to liability of a loss may not be determined by an appraiser because those issues are reserved for judicial determination. Atlas Constr. Co. v. Indiana Ins. Co., 309 N.E.2d 810, 813 (Ind. App. Ct. 1970) (as cited below).

2. Westfield Nat'l Ins. Co. v. Nakoa, 963 N.E.2d 1126, 2012 Ind. App. LEXIS 125 (Ind. Ct. App. 2012). Nakoa filed "Verified Demand for Appraisal" pursuant to his policy. An appraisal award was entered for replacement cost, as well as $10,200.00 for loss of use ("ale"), if the "court finds coverage for this loss." Nakoa filed for judgment on the award in the full amount, including the $10,200.00. However, Nakoa stated during her examination under oath that she did not incur any additional living expenses due to the loss. Westfield filed a motion to correct errors as to the appraisal award. The court concluded that Westfield waived its ability to assert policy defenses as to replacement cost coverage because the appraisal was completed without Westfield mentioning it was valuing the loss at actual cash value. However, the court did uphold the trial court's granting of Westfield's motion to correct the appraisal award as to the ale amount since the appraisal did not definitively state Nakoa was entitled to the $10,200.00 ale payment, and since Nakoa testified that she did not incur any ale.

3. Angermeier v. Indiana Farmers Mut. Ins. Group, 2010 Ind. App. Unpub. LEXIS 1797 (Ind. Ct. App. Dec. 21, 2010). Court held that Indiana Farmers' refusal to submit to Angermeier's demand for an appraisal was not in bad faith since the insured had not yet submitted a proof of loss. The court agreed with the Indiana Farmers, and stated that without a proof of loss there was nothing to establish a disagreement between the parties as to the damages. Thus, an appraisal was not warranted. The court stated that an insurer's "insistence" on policy compliance was not reflective of a state of mind of "dishonest purpose, moral obliquity, furtive design, or ill will."

4. Huber v. United Farm Family Mut. Ins. Co., 856 N.E.2d 713, 2006 Ind. App. LEXIS 2326 (Ind. Ct. App. 2006). After the trial court appointed an umpire and the umpire made an award, Huber filed suit claiming the umpire was partial. United Farm Family argued that Huber's claim was barred by *res judicata*, and the trial court agreed. The appellate court disagreed, holding that Huber's allegations of fraud and partiality as to the umpire were not precluded. The court stated that while the trial court had appointed the umpire, the trial court did not render judgment as to the umpire's impartiality, whether the appraisal award was appropriate, or the effect of the appraisal. Therefore, since Huber's valid claim of prejudice was not decided by the trial court it was not barred by *res judicata*.

5. Cunningham v. State Farm Insurance Co., 2005 U.S. Dist. LEXIS 36681, 2005 WL 3279365 (N.D. Ind. Dec. 2, 2005). An insurer does not act in bad faith by refusing to submit what it characterized as a coverage dispute to an appraisal. It is noteworthy though that the court did not decide the underlying issue of whether an insurer is correct in denying arbitration where it insists that the preponderance of the damage was "uncovered." The court only determined that this conduct was not the kind of "conscious wrongdoing" necessary to trigger liability under the heightened standard of bad faith. (*see also,* Spencer v. Bridgewater, 757 N.E.2d 208, 212 (Ind. Ct. App. 2001).

6. Weidman v. Erie Ins. Grp., 745 N.E.2d 292, 297-99 (Ind. Ct. App. 2001). The parties submitted to an appraisal to determine the extent of the loss. The award determined replacement cost and actual cash value at $113,510.92. Erie subsequently paid Weidman 80% of the award after learning he would be doing the repairs himself, thus rendering the allotted amount for "contractor's overhead and profit" moot. Weidman filed suit to recover the 20%. The court agreed with Weidman that there was no policy language authorizing Erie to withhold the remaining monies. However, the policy also unambiguously distinguished between amount of loss and liability for that loss. Thus, the court held that Weidman's summary judgment motion was properly denied because he was still required to provide proof with respect to his expenditures which was an issue of fact. The court implicitly stated that in Indiana, unless stated otherwise, an appraisal award determines the amount of loss, not the extent of an insurer's liability for that loss. Erie's withholding was not made in bad faith.

7. Jupiter Aluminum Corp. v. Home Ins. Co., 225 F.3d 868 (7th Cir. 2000). Applying Indiana law, the court held that an insured is bound by the appraisal award if both the insured and the insurer voluntarily submit to an appraisal as provided by the insurance policy, unless the insured can show evidence that the appraisal was "infected with unfairness or injustice." (*see also,* FDL, Inc. v. Cincinnati Ins. Co., 135 F.3d 503 (7th Cir. 1998) holding that the parties were bound to their appraisal).

8. Sketo v. Allstate Ins. Co., 1981 U.S. Dist. LEXIS 13338 (S.D. Ind. July 6, 1981). The policy at issue stated that the ascertainment of the loss "shall be made by the

insured and the Company, or, if they differ, then by appraisers." The court analogized an appraisal provision to Indiana law concerning arbitration clauses in contracts which are considered binding and a condition precedent to suit. Ind. Code § 34-57-2-3(d) (Indiana's codification of the Uniform Arbitration Act). The court held that when a policy provides for appointment of an appraiser in the event that the parties disagree to the loss, and an insurer demands an appraisal, the appraisal is a condition precedent to suit.

9. Monroe Guaranty Ins. Co. v. Backstage, Inc., 537 N.E.2d 528 (Ind. App. Ct. 3d Dist. 1989). Here, the parties disputed the application of the co-insurance penalty, and an appraisal demand was not made until after suit was filed. The court held that the insurer did not waive its right to an appraisal. While the parties never reached agreement on whether the co-insurance penalty clause applied and evidence supported that good-faith negotiation concerning its application ceased, there was no evidence of prejudice resulting from the delay of invoking the appraisal clause. Further, the court noted that the appraisal method provided an effective tool for establishing the building's actual cash value since the operation of the co-insurance penalty hinged on the determination of actual cash value. Thus, in Indiana, the proper inquiry when an appraisal is demanded after a lawsuit is filed centers on the question of whether the demand for appraisal was unreasonably delayed.

10. Hayes v. Allstate Ins. Co., 722 F.2d 1332 (7th Cir. 1983). The Seventh Circuit stated a policy must "expressly provide that no action may be maintained upon it until after the amount of loss is determined by appraisal" for a post-litigation demand for appraisal to be effective. Here, Allstate demanded an appraisal under the policy, but Hayes rejected the demand, instead opting on the policy language giving the court the ability to determine damages. The court held that the policy was ambiguous as to which method of determining damages superseded the other, and thus, the policy failed to support Allstate's request for an appraisal as a condition precedent to filing suit.
However, Monroe Guaranty Ins. Co. v. Backstage, Inc. (cited above in No. 9) rejected the Hayes rule, finding that a post-litigation appraisal demand did not result in waiver if there was no evidence of prejudice resulting from the delay.

11. Integrity Ins. Co. v. Lindsey, 444 N.E.2d 345 (Ind. App. Ct. 1983). The right to appraisal, like any other contract right, may be waived. Waiver may be implied by the acts, omissions or conduct of one of the parties to the contract.

12. Kendrick Memorial Hospital, Inc. v. Totten, 408 N.E.2d 130 (Ind. Ct. App. 1980). Indiana's arbitration statutes do not mandate that arbitration clauses be invariably construed as conditions precedent to suit, and it noted that parties remain free to waive them. However, parties by contract may not specifically maintain that arbitration provisions are irrevocable or that arbitration is a condition precedent to legal action.

13. Sexton v. Meridian Mut. Ins. Co., 166 Ind. App. 529, 337 N.E.2d 527 (Ind. Ct. App. 1975). Sexton forced to file suit after Meridian refused to pay damages and refused to recognize the umpire's award. Sexton's lawsuit sought compensatory and punitive damages. The trial court then granted Meridian's motion for judgment on the evidence as to punitive damages. The appellate court reversed, stating that Meridian's refusal to participate and recognize the umpire's award (including withholding its own appraiser's figures) after the umpire had been chosen according to the policy, and is failure to "promptly" settle Sexton's claim was clearly evidence a jury could have reasonably concluded was bad faith.

14. Atlas Construction Co. v. Indiana Ins. Co., 160 Ind. App. 33, 309 N.E.2d 810 (Ind. Ct. App. 1974). In Indiana, an appraisal is binding unless it can be demonstrated that the appraisal was unfair or unjust. Indiana courts have the discretion to set aside an appraisal award if it is "tainted with fraud, collusion or partiality for appraisers." Thus, appraisers must act without bias, partiality or prejudice in favor of either party.

2014
INDEX TO IOWA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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Supplement Index to Iowa Decisions

1. Terra Industries, Inc. v. Commonwealth Insurance Co. of America, 981 F. Supp. 581 (N.D. Iowa 1997). The court held that an appraisal provision contained in a policy must be complied with prior to filing of a suit if appraisal is demanded by either party prior to suit. However, if no demand for appraisal is made before commencement, suit cannot be barred as premature since appraisal is not then a precondition to suit.

2. N. Glenn Homeowners Assn. v. State Farm Fire & Cas. Co., 13-0859, 2014 WL 3511803 (Iowa App. 2014). Judicial determination of insurance coverage need not be made before an appraisal is conducted. Where insured demanded an appraisal of damage to roof from wind and hail storm, under a policy provision which set forth a strict and limited timeframe during which each party was required to select an appraiser, and which specifically reserved the insurer's right to challenge coverage after the appraisal process was completed, the trial court should've ordered the appraisal process to begin before coverage disputes were resolved. As a part of the appraisal process, appraisers must determine what the amount of "loss" is – often requiring consideration of causation.

3. Adams v. New York Bowery Fire Ins. Co., 51 N.W. 1149 (Iowa 1892). Where the appraisers determination exceeded the scope of their responsibilities by deciding whether certain articles were covered under a policy, the court held that the appraisal award was not binding where all the articles embraced in the schedule of property destroyed were not appraised, but held that some of those articles were not covered

4. Seibert Bros. & Co. v. Germania Fire Ins. Co. of New York City, 106 N.W. 507 (Iowa 1906). Where one of the appraisers withdraws before a determination is reached, an appraisal award is of no effect.

5. Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W. 2d 257 (Iowa 1991). An appraisal award, when reviewed, is supported by every reasonable presumption and will be sustained even if the court disagrees with the result. That award will not be put aside without a showing by the moving party of fraud, mistake, or misfeasance on the part of an appraiser or umpire. In Central Life, the dispute between an insured and an insurer concerned two separate appraisals on the insured's fire loss. While the insurer unsuccessfully refuted the insured's higher appraisal, the court reiterated that the insurer had the right to fairly debate the award. The court set aside the appraisal award after a finding that the appraiser for Central was retained on a contingent fee, based on the amount of the appraisal award. The "hidden pecuniary interest in the outcome" which the court associated with the contingency fee, was found to be sufficient to void the appraisal award.

6. Vincent v. German Ins. Co., 94 N.W. 458 (Iowa 1903). Even though a policy requires arbitration or appraisal of the amount of loss when requested, as a condition precedent to liability, suit may be maintained both to set aside an award and for a recovery on the policy.

2014
INDEX TO KANSAS DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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KANSAS

1. Friday v. Trinity Universal of Kansas, 924 P.2d 1284 (Kan. Ct. App.—1996)—in homeowners' policy dispute, the only issue in dispute was the amount of the loss. After insurer informed insured of its intent to invoke an appraisal provision in the policy, insured sued and told insurer that the appraisal provision was actually an arbitration provision under another name and was therefore unenforceable pursuant to a Kansas statute. The trial court dismissed insured's lawsuit on the basis that the appraisal provision was mandatory. In assessing the case, the Kansas Court of Appeals first noted the difference between arbitration provisions and appraisal provisions, and it held that that arbitration disposes of the entire controversy while appraisal is used only to determine the amount of the loss. The Court continued, holding that where, as in *Friday*, the only issue in dispute is the amount of the loss such that appraisal would dispose of the dispute, the appraisal provision is in actuality an arbitration provision. With this established, the Court then turned to the enforceability of the appraisal/arbitration provision at issue. The insurer argued that the Kansas statute, which renders unenforceable written agreements requiring submission of existing controversies to arbitration, was preempted by the Federal Arbitration Act ("FAA"). The Court, agreeing with the insured's response, held that an exception provided for in the McCarran-Ferguson Act that exempts state laws regarding insurance contracts from FAA preemption applied. The Court therefore held that that the Kansas statute prohibiting arbitration provisions in insurance policies applied and rendered the appraisal/arbitration provision invalid and unenforceable.

2. Friday v. Trinity Universal of Kansas, 939 P.2d 869 (Kan. 1997)—this case affirmed the Kansas Court of Appeals decision discussed above. Vitally, however, the Court held that it did "not see a meaningful distinction between appraisal and arbitration." The Court therefore broadened the lower appellate court's holding such that the Kansas statute invalidating arbitration agreements in insurance contracts also invalidates appraisal provisions in insurance contracts.

2014
INDEX TO KENTUCKY DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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Bachelor Land Holdings, LLC v. Chubb Custom Ins. Co., 2011 U.S. Dist. LEXIS 127875 (W.D. Ky. Nov. 4, 2011) – the court held that a court will generally not substitute its judgment for that of appraisers, and will not interfere with an appraisal award unless there is evidence of fraud, mistake, or malfeasance.

Motorists Mut. Ins. Co. v. Post, 2005 U.S. Dist. LEXIS 24415 (E.D. Ky. Oct. 20, 2005) – the court held that, if appraisal is allowed under the terms of an insurance contract, a court may let the appraiser determine both the cause of loss and the amount of loss; however, the scope of coverage, whether an event is covered under the terms of the policy, is for the court to determine as a matter of law.

National Fire Ins. Co. v. Pinnell, 199 Ky. 624, 76 S.W. 22 (Ky. 1923) – the court held that a demand for appraisal must be made within a reasonable time, and not after the sixty-day time limit for filing the proof of loss.

Continental Ins. Co. v. Vallandingham & Gentry, 116 Ky. 287 (Ky. 1903) – the court held that a refusal to pay the amount demanded is not a disagreement as to the amount of loss entitling the parties to make a demand for appraisal. The court further held that, unless the insurer asks for arbitration or appraisal before filing suit, the failure to appraise is not a defense.

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2014
INDEX TO LOUISIANA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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1. ***Dore v. Shelter Mut. Ins. Co.***, 2013-0545 (La. App. 1 Cir. 11/1/13) – Appraisal provisions are enforceable in Louisiana. They are distinct from arbitration agreements and do not divest courts of jurisdiction. The duty of appraisers is merely to ascertain the extent and value of an insured's loss and not to determine an insurer's liability. Moreover, such awards are subject to the scrutiny of the courts if it appears the appraisers did not perform their duties under the policy, thereby clearly falling within the court's jurisdiction.

2. ***Dufrene v. Certain Interested Underwriters at Lloyd's of London Subscribing to Certificate No. 3051393***, 11-1002 (La. App. 5 Cir. 3/27/12), 91 So.3d 397 – The insured invoked the appraisal provision of the policy to determine the wind damage to its apartment complex resulting from Hurricane Katrina. The trial court granted the insurer's motion to confirm the umpire's award and for entry of judgment in conformity with the umpire's award. On appeal, the insured argued that the trial court erred by interfering with the appraisal process at the urging of the insurer and by failing to disqualify the insurer's appraiser, who was the original adjuster. The Louisiana Fifth Circuit held that the trial court did not abuse its discretion by creating guidelines for appraising the property. The court also held that the insurer's appraiser was qualified to appraise the insured's property, even though the appraiser was the insurer's original adjuster.

3. ***Long v. Am. Sec. Ins. Co.***, 2010-0026 (La. App. 4 Cir. 11/17/10), 52 So.3d 260 – The insured argued that the insurer acted in bad faith by failing to tender payment during the appraisal process. However, the Louisiana Fourth Circuit held that the insurer complied with the appraisal clause by tendering the balance of the policy limits within 30 days of the umpire's appraisal award. The court found no evidence of vexatious, arbitrary, or capricious conduct to support the bad faith claim for not tendering payment during the appraisal process.

4. ***Willwoods Cmty. v. Essex Ins. Co.***, 09-651 (La. App. 5 Cir. 4/13/10), 33 So.3d 1102 – The Louisiana Fifth Circuit imposed penalties on the insurer for failing to tender within 30 days the amount determined by the insurer's appraiser, even though an umpire had been appointed and the appraisal process was ongoing. The court determined that the insurer's refusal to pay the insured's claim was not based on a good faith defense and was clearly arbitrary, capricious, or without probable cause.

5. ***St. Charles Parish Hosp. Service Dist. No. 1 v. United Fire and Cas. Co.***, 681 F.Supp.2d 748 (E.D. La. 2010) – Appraisal clauses are enforceable under Louisiana law. They do not, however, deprive a court of jurisdiction. Although other states prohibit appraisers from determining causation, defendant has cited no Louisiana authority standing for the proposition that appraisers may not make causation determinations. Even if it would be improper for appraisers to make determinations as to causation under Louisiana law, the extent to which the appraisers in this case made such determinations would not render the award a nullity. The plain language of the policy requires the appraisers to determine the "amount of the loss." An appraiser's job is not to determine policy coverage or liability, but causation must be considered in order to determine the scope of the loss that must be measured.

6. ***Dwyer v. Fid. Nat. Prop. & Cas. Ins. Co.***, 565 F.3d 284 (5th Cir. 2009) – The flood insurer moved to compel appraisal five weeks after receiving an estimate for damages from the insured. The U.S. Fifth Circuit held that the insurer had not waived its right to appraisal and that it had raised the issue in a timely fashion.

7. ***Farber v. Am. Nat. Prop. & Cas. Co.***, 2008-821 (La. App. 3 Cir. 12/10/08), 999 So.2d 328 – Plaintiffs' home was damaged during Hurricane Rita. They made a wind claim against their homeowners insurer, which issued a check to the insureds. Plaintiffs demanded additional payment and invoked the appraisal clause of the policy. The insurer apparently did not nominate an appraiser within the time allotted under the policy, and plaintiffs requested that the district court appoint an umpire, which it did. Plaintiffs submitted information from their appraiser to the umpire, a retired Judge, and the umpire signed off on plaintiffs' request. Plaintiffs then filed suit seeking homologation of the umpire's award as well as bad faith penalties, attorney's fees, and costs. The Louisiana Third Circuit affirmed the trial court's grant of summary judgment in favor of plaintiffs.

8. ***White v. State Farm Ins. Co.***, 2007-1341 (La. App. 3 Cir. 5/28/08), 984 So.2d 243 – The insured and her homeowners insurer could not agree on the cost of wind repairs to insured's property after Hurricane Rita. The insured invoked the appraisal provision of the policy and appointed her appraiser but did not receive a response from the insurer. The insured filed a rule to show cause why an umpire should not be appointed, which the insurer opposed by filing exceptions of prematurity and improper use of summary proceedings. The court held that the use of summary proceedings to invoke the appraisal provisions of the insurance contract was appropriate. The court also found that because the only issue that was before the trial court was whether to appoint an umpire and because the insurer provided no evidence why an umpire should not be appointed, the exception of prematurity should be overruled.

9. ***Katz v. Allstate Ins. Co.***, 2004-1133 (La. App. 4 Cir. 2/2/05), 917 So.2d 443 – After a hailstorm, plaintiff's homeowners insurer paid the claims for damage to the carport and automobile, but the two sides could not agree on the claim for roof damage. Plaintiff filed suit more than a year after the date of loss, and the policy provided that suit must be brought within that a year of the inception of damage. The insurer filed an exception of prescription (prescription is Louisiana's functional equivalent of the statute of limitations). In opposition, plaintiff argued that the insurer's actions during the appraisal process led him to believe that he did not need to file suit within a year. The exception was granted, and the Louisiana Fourth Circuit affirmed it on appeal, finding that plaintiff failed to establish that the insurer's statement or actions constituted a waiver of prescription. The insurer's participation in the appraisal process did not constitute a waiver of the benefit of a one year limitation period for bringing suit.

10. ***Sevier v. U.S. Fid. & Guar. Co.***, 497 So.2d 1380 (La. 1986) – The Louisiana Supreme Court held that a contractor's handwritten estimate of repairs for a fire-damaged house provided satisfactory proof of loss under the homeowner's policy. According to the policy, the loss was payable 60 days after the insurer received satisfactory proof of loss. The court held that because the estimate provided adequate proof of loss and because the

insurer received this proof more than 60 days before it made a demand for appraisal, the demand for appraisal was untimely.

11. ***Alexander v. General Accident Fire and Life Assurance Corp., Ltd.***, 268 So.2d 285 (La. App. 2 Cir. 1972) – We find the appraisal clause in this policy, which contains the mandatory word "shall" throughout, violates La. R.S. § 22:629 in that it has the effect of depriving the courts of this State of jurisdiction in an action against an insurer.

12. ***Girard v. Atl. Mut. Ins. Co.***, 198 So.2d 444 (La. 4th Ct. App. 1967) – The insured claimed the limit under a fire insurance policy and gave the insurer timely proof of loss. The insurer rejected the proof of loss and requested an appraisal. The insured argued that a request for an appraisal is null because it is nothing more than a request for arbitration. The Louisiana Fourth Circuit held that the duties of an appraiser are to ascertain the value and extent of the insured's loss and that appraisals do not fall within the class of arbitrations which seek to "oust" the power of the court. The court also held that the insured had prematurely filed suit before complying with the appraisal requirement of the policy.

13. ***Branch v. Springfield Fire & Marine Ins. Co.***, 4 So.2d 806 (La. 1941) – The validity of stipulations in insurance policies providing for arbitration in case there is disagreement as to the amount of the loss has been recognized in this State. But, for the award of the appraisers to be binding, it must clearly appear that they have performed the duties required of them by the policy. In this case, the Louisiana Supreme Court found that the appraisers di not estimate the sound value of the building, and the policy required that this be done. Failure of the appraisers to fix the sound value, where the policy requires it to be fixed, renders the award unenforceable.

14. ***Dawes v. Continental Ins. Co. of City of New York***, 1 F.Supp. 603 (E.D. La. 1932) – The plaintiff must show 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. 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.

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INDEX TO MAINE DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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***Robinson v. Georges Ins. Co.*, 35 Am. Dec. 239 (Me. 1840)**

Topics: Appraisal as condition precedent to suit

Summary: In *Robinson*, the insured brought suit against its carrier to recover damages sustained when the insured's ship became stranded off the coast of Florida. *Id.* at 242. The insurer contended that the lawsuit was premature, citing a policy provision stating that a disagreement as to the amount of loss must be submitted to arbitration. *Id.* The court, however, refused to dismiss the suit, emphasizing that, absent express language rendering compliance with the appraisal provision a condition precedent to suit, such a clause is "insufficient to oust the courts of law or equity of jurisdiction." *Id.* ("[A] clause might be introduced, by which an offer to refer might become essential, provided the stipulations were that no suit at law or in equity should be instituted until an offer of reference had been made and refused. And in such case a nonsuit might become highly proper, if the precedent condition were not complied with…."). Moreover, the court also noted that even if a policy did contain the requisite express language, an insured may still be able to bring suit where "the insurer denied the general right of the assured to recover anything." *Id.*

Relevant Holdings:

(1) An agreement in a policy to ascertain the amount of a loss by arbitration does not, in the absence of a stipulation to that effect, make an award a condition precedent to the right of the assured to maintain an action on the policy.

Trott v. City Ins. Co., 24 F. Cas. 215 (Me. Cir. Ct. 1860)

Topics: Appraisal as condition precedent to suit

Summary: In *Trott*, the insurer disputed whether the insured could properly bring suit without first complying with the following policy provision:

> **In case any difference or dispute shall arise in relation to any loss sustained or alleged to be sustained**, by any person insured under a policy issued by this company, **the same shall be referred to and determined by referees,** to be chosen mutually by the assured and the board of directors; and no holder of a policy shall be entitled to maintain any action thereon against the company until he shall have offered to submit his claim to such reference. In case any suit shall be commenced without such offer of reference having been made, the claim of the party so commencing shall be released and discharged, and the company released from any liability under it.

Id. at 215. The court held that such a provision – requiring that *any* dispute concerning an actual or alleged loss be submitted to arbitration prior to bringing suit – is invalid as it attempts to "oust the courts of law or equity of their jurisdiction." *Id.* at 217. Importantly, however, the court noted that an *appraisal* provision "impos[ing] a condition precedent with respect to the mode of

settling the amount of damage" would be enforceable as the amount of loss does not go to the root of the action. *Id.*

Relevant Holdings:

(1) A provision stating that *any* dispute relating to a loss sustained by the insured must be submitted to arbitration prior to bringing suit us unenforceable as it ousts courts of law and equity of jurisdiction. Where, however, the same provision is limited to disagreements as to the *amount* of loss, the provision is enforceable.

***Stephenson v. Piscataqua Fire & Marine Ins. Co.*, 54 Me. 55 (Me. 1866)**

Topics: Appraisal as condition precedent to suit

Summary: In *Stephenson*, the insured filed suit under a marine policy, seeking to recover damages sustained to the insured's ship and cargo after the ship was run ashore after taking on water. *Id.* at 66, 69. The insurer argued that the lawsuit was premature, as the insured failed first comply with the following policy provision:

> In case any difference or dispute shall arise in relation to any loss sustained or alleged to be sustained, by any person insured under a policy issued by this company, the same shall be referred to and determined by referees to be chosen mutually by the assured and the board of directors, * * * and no holder of a policy shall be entitled to maintain any action thereon against the company until he shall have offered to submit his claim to such reference. In case any suit shall be commenced without such offer of reference having been made, the claim of the party so commencing such suit shall be released and discharged, and the company be exempted from all liability under it

Id. at 69. The court refused to construe the above provision – requiring that all disputes under the policy be submitted to arbitration prior to filing suit – as a condition precedent to an action at law:

> The law and not the contract prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the courts for their remedy, in a given case, than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void

Id. at 70. Moreover, the court distinguished provisions that purport to entirely foreclose the parties' access to courts prior to submitting their dispute to arbitration from an appraisal provision whereby the parties agree that "as a condition precedent to application to the courts, [the parties] shall first have settled the amount to be recovered by an agreed mode." *Id.* Because the policy at issue required that "in case of differences [under the policy] … the whole subject,

including both the right to recover and the amount of damages shall be determined by referees," the clause was void and unenforceable. *Id.*

Relevant Holdings:

(1) While parties may impose, as a condition precedent to application to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law.

***Patterson v. Triumph Ins. Co.*, 64 Me. 500 (Me. 1874)**

Topics: Enforceability of award

Summary: In *Patterson*, the policy at issue insured seven thousand pounds of ice against loss or damage by fire. *Id.* at 500. Less than a month after the policy was issued, the insured's storage facility burned down, and the ice was either melted or so covered with smoke as to be rendered valueless. *Id.* at 501. The parties disagreed as to the amount of loss, and, at trial, the insurer alleged that they orally agreed to refer the dispute to a referee, and that the insurer regarded the referee's decision as an appraisal. *Id.* at 502. Further, the insurer sought a non-suit, arguing that, because the controversy had been submitted to an appraiser, the insured was required to bring suit upon the arbitrator's award, instead of the policy. *Id.* at 501.

The court found that, while there was an appraisal on the amount of the insured's loss pursuant to an agreement by the parties, "there [was] no proof that the parties agreed to be bound by the reference … [and] such proof is necessary to make the award a bar to an action on the original claim when … the submission [to appraisal] is by parol." *Id.* at 504. Because the court found no evidence that the parties agreed to be bound by the appraisal award, the appraisement was not a bar to the insured's action at law. *Id.*

Relevant Holdings:

(1) Where the submission to arbitration (appraisal) is by parol, and the parties do not agree to be bound by the award, the arbitration does not bar an action on the original claim.

***Bangor Sav. Bank v. Niagara Fire Ins. Co.*, 26 A. 991 (Me. 1892)**

Topics: Scope of appraisal; qualifications of appraiser

Summary: In *Bangor*, the insured's hotel, the Bangor House, was damaged by fire. *Id.* at 991. The insurer did not dispute that it was liable under the policy, but instead disputed the amount of damage the insured was entitled to recover and the mode of its adjustment under the following provisions:

> This company shall not be liable beyond the actual cash value of the property at the time, if loss or damage occurs, and the loss or damage shall be ascertained or

> estimated according to such actual cash value. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided….
>
> ***
>
> In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss.
>
> ***
>
> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements

Id. Before any dispute arose regarding the amount of damage, the parties entered into a written agreement in which it was stipulated that two appraisers named, duly selected, one by each party … should 'appraise and estimate at the true cash value the damage by fire to the property." *Id.*

Failing to agree on the amount of damage, the appraisers selected an umpire, and ultimately issued a unanimous report appraising the insured's damage at $6,953.50. *Id.* In rendering a decision, the umpire solicited the opinion of a qualified painter concerning the cost of painting the insured property. *Id.* The insured, dissatisfied with the award, argued that the award was not binding on him because, *inter alia*, the umpire did not act on his own judgment, but rather the judgment of other persons consulted by him without the knowledge of the plaintiff. *Id.* at 992. The court, rejecting the insured's argument, noted that "appraisers may be said to act in the twofold capacity of arbitrators and experts … they not only give effect to opinions based directly on their personal experience and knowledge, but also [may] … refresh his memory and confirm his judgment by an examination of authorities and conference with other experts." *Id.* at 993. Moreover, the court found that the umpire's conduct – "[a]fter making an examination of the premises and certain estimates of his own, ma[king] an inquiry of an experienced and disinterested painter respecting the cost of painting – was a "praise worthy" "careful and conscientious effort to reach a just a correct appraisal." *Id.* at 994. ("Any rule which would prohibit an appraiser from thus qualifying himself to do justice between the parties, so far from being an aid in the ascertainment of truth, would be an essential obstacle to it.").

Relevant Holdings:

(1) An appraiser chosen to determine the loss under a policy of fire insurance may call in the aid of a third person skilled in a special branch embraced in the appraisal, and may give to the estimate of such third person such weight as he sees fit, even to the point of founding his judgment upon that estimate, provided he adopts that as his real judgment.

***Fisher v. Merchants' Ins. Co.*, 50 A. 282 (Me. 1901)**

Topics: Appraisal as condition precedent to suit; enforceability of award

Summary: Following a loss by fire, the insured and the insurer appointed disinterested appraisers pursuant to the following policy provision:

> In case of loss under this policy, and the failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third to be selected by the two so chosen. The award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action, in law or equity, to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months

Id. at 283. The appraisers fixed a time and place for a hearing, gave notice to the parties, heard their respective positions, and ultimately issued an award in writing fixing the amount of damage sustained by the insured. *Id.* Thereafter, the insured filed suit alleging, *inter alia*, that the award was invalid and void by reason of the appraisers' misconduct during and prior to the appraisal hearing. *Id.* The insured did not, however, contend that the failure of the appraisal was through any fault of the insurer. The insurer argued that the appraisal provision was a condition precedent to a suit on the policy, the insured failed to do all in his power to secure complete performance of the condition, and the allegedly failed appraisement was not attributable to the insurer's conduct. *Id.*

The court first noted that an agreement to arbitrate the amount of damages sustained by the insured, as opposed to all controversies that may arise between the parties, are valid and enforceable when the agreement provides "a reasonable and definite method" for choosing the appraisers. *Id.* (citing *Stephenson v. Ins. Co.*, 54 Me. 55 (Me. 1866)). Further, the court affirmed that "when the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action." *Id.* at 284.

Moreover, finding that the appraisal provision at issue was a condition precedent to suit, the court held that "attempted performance of the condition, which has failed, without the fault of [the insurer]" is insufficient to "satisfy the condition of the contract and allow the insured to maintain an action to recover, not the amount determined upon by the arbitrators, but damages, irrespective of their award." *Id.* ("Under such a clause in a policy of insurance, it is the duty of the parties to the contract to act in good faith, and if either act in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith, and is not bound to enter into a new arbitration agreement.").

Additionally, the court held that "[i]f the award of the arbitrators was invalid, as claimed by the [insured], … it was the duty of [the insured] to seek a new determination of the amount of his loss in the manner provided by the contract." *Id.* The court clarified that "[t]he action in such a case is upon the policy, but the damages recoverable are such as have been previously ascertained and determined by the arbitrators, unless the plaintiff shows some sufficient reason why such a determination could not have been obtained." *Id.* "Consequently, there can be no action until performance of the condition or excuse shown for non-performance; and it is not sufficient to show an award which the plaintiff repudiates, and is not willing to be bound by." *Id.*

Relevant Holdings:

(1) A stipulation in a contract providing for the settlement by arbitration of *all* controversies and disputes that might subsequently arise between the parties is invalid, because its effect would be to oust the courts of their jurisdiction.

(2) An appraisal provision requiring submission of disputes concerning the amount of loss incurred by the insured as a condition precedent to an action on the policy are enforceable, as the amount of loss is a preliminary matter and does not apply to the whole question of liability.

(3) Where a policy makes a determination by appraisal of the amount of the loss a condition precedent to any right of action, and the appraisers have made an award, an action can only be maintained to recover the amount determined by the appraisers, or, if their determination and award are invalid, but due to no fault of the insurer, then the insured must allege and prove either that the amount of his loss has been determined by other appraisers chosen in the manner stipulated by the parties, or some sufficient reason why such a determination has become unnecessary or impossible.

***In re Opinion of Justices*, 55 A. 828 (Me. 1903)**

Topics: Constitutionality of mandatory appraisal provisions in standard fire policies

Summary: In *In re Opinion of Justices*, the Supreme Court of Maine assessed the constitutionality of the statutorily mandated inclusion of the following provisions in all fire insurance policies issued on property in Maine:

> In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no persons shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months.

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> No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this state unless commenced within two years from the time the loss occurred

Id. at 828-29. The court found the mandatory appraisal provision constitutional, reasoning that the Constitutional rights of neither the insurance company nor the insured were infringed upon. *Id.* at 829-30. With respect to the Constitutional rights of the insurance companies insuring property in Maine, the court reasoned that "the corporation or incorporated company derives its existence and rights solely from legislative action [and] [t]he Legislature may refuse to grant any corporate rights or powers … [and] may amend, alter, or repeal any corporate charter or corporate right or existence once granted…." *Id.* at 829. Additionally, the court noted that while the Legislature "cannot impair the obligation of a contract once lawfully made by a corporation … it can prohibit the making of a new contracts … by the corporation." *Id.*

With respect to the policyholders' Constitutional rights, the court noted that "[t]he constitutional right of trial by jury is a right, not a duty, and may be waived by the individual. It is waived by him as to the assessment of his damages if he voluntarily enters into a contract like the statutory standard insurance policy wherein it is mutually stipulated that the damages provided for shall be determined by arbitration." *Id.* at 830. Addressing the likely argument that a policyholder's decision to insure its property, and thus enter into the statutory standard insurance policy, is not entirely voluntary, the court reasoned that there is no requirement that the insured purchase a policy from an incorporated insurer required to include the statutory language in its policies. *Id.*

Relevant Holdings:

(1) The legislative mandate that all insurance policies insuring property in Maine contain a specific appraisal provision is constitutional.

***Cassidy v. Royal Exch. Assur. of London*, 59 A. 549 (Me. 1904)**

Topics: Qualifications of appraiser

Summary: Following a fire that destroyed the insured's lumber, the insured and insurer were unable to agree on the amount of loss, submitting the matter to appraisal and duly appointing referees. *Id.* at 550. The referees rendered an award, fixing the amount of the insured's loss at $2,2084. *Id.* The policy contained an "apportionment clause" that operated as follows:

> [I]f there were piles of lumber in two localities, each valued at $1,000, and together insured for $1,000, and one should be consumed by fire, then the amount of insurance due would be $500, as the value of the lumber burned in this locality would be one-half the value of the lumber insured.

Id. Moreover, the policy stated that piles of lumber shall not be regarded as situation in different localities if they are less than 100 feet apart. *Id.*

The insurer contended that the appraisal settled only the value of the lumber included in the submission, and that the question of whether the lumber was situation in different localities, for purposes of the apportionment clause, had not been resolved. *Id.* The insured argued that, by not raising the issue before the referees, the insurer was estopped from raising the argument before the court. *Id.*

The court noted that the insurer inspected the lumber, including its quantity, value and location, yet failed to assert in its submission to appraisal any request that the referees determine the value of the different piles of lumber, or the distance between the piles of lumber, for purposes of enforcing the apportionment clause of the policy. *Id.* Finding that the "apportionment clause" constituted a "proviso" – "a stipulation added to the principal contract, to avoid the defendant's promise by way of defeasance or excuse" – the court held that "the burden of proof was upon the [insurer] … to raise the question of apportionment … [and] should have submitted to the referees a request for a finding of the essential facts upon which to base it." *Id.* at 550-51. Thus, because the insurer failed to request that the referees determine whether the piles of lumber were more than 100 feet away – an issue relevant to the amount of loss incurred by the insured – the award was valid and the insurer was estopped from invoking the apportionment clause as a defense to the enforcement thereof. *Id.* at 552 ("The burden of proof being upon the defendant to establish the facts upon which the apportionment clause would attach, it was its duty, if it desired to establish them, to have done so before the referees, and it is now estopped to require the plaintiff to submit to another reference to obtain them.").

> **Note:** In *Dunton v. Westchester Fire Ins. Co.*, 71 A. 1037, 1040 (Me. 1908), *infra*, the Supreme Judicial Court of Maine rejected the insurer's argument that *Cassidy* permitted the insurer to raise issues concerning the insurer's liability at appraisal, emphasizing that "[t]he matter which was there deemed to be within the jurisdiction of the referees did not go to the cause of action, but to the amount of damages, and the only question of fact for the determination of the referees was whether certain piles of lumber were within 100 feet of each other."

Relevant Holdings:

(1) Where, after a loss on a fire policy, referees were appointed, who found the value of the property destroyed, and the burden was on [the insurer] to establish facts under which the apportionment clause in the policy would attach, and he did not seek to establish such facts before the referees, he was estopped to require plaintiff to submit to another reference for that purpose.

***Young v. Aetna Ins. Co.*, 64 A. 584 (Me. 1906)**

Topics: Qualifications of appraiser

Summary: In *Young*, the insured sought coverage for a total loss to his property used to store nonhazardous merchandise and machinery as a result of a fire. *Id.* at 584. Upon disagreement as to the amount of loss, the parties sought an appraisal under the provisions of the policy and 49 Me. Rev. St. §§ 4, 5. *Id.* In furtherance thereof, the parties selected two referees as follows:

> Each party nominated three men from whom the other party chose one. These two were to choose the third man if they could agree upon one. [If] they [could] not agree the Insurance Commissioner appointed the third man

Id. at 585. The appraiser chosen by the insurer from the three men nominated by the insured was Sawyer of Calais, Maine where the property was located; the referee chosen by the insured from the three men nominated by the insurer was Allen, of Portland, Maine, a city nearly 300 miles from Calias. *Id.* While Sawyer and Allen were attempting to agree on an umpire, Allen wrote Sawyer a letter stating, in relevant part: "I have no doubt whatever but there are just as good men in Calais as in any other part of the state, but inasmuch as the insurance people whom I represent object to local man, I deem it advisable to select a third referee from some other part of the state." *Id.* at 584-85. Sawyer and Allen were unable to agree an umpire, the Insurance Commissioner appointed an umpire on their behalf. *Id.* at 585. Sawyer believed that the insured's loss was $1,700 – the full amount of the policy – while Allen and the umpire determined the loss to be $1,353.06. *Id.* Unable to unanimously agree, Allen and the umpire rendered an award in the amount of $1,353.06. *Id.*

Following the appraisal award, the insured brought an action against the insurer contending, among other things, that Allen was not a "disinterested" referee, and therefore the insured was not bound by the award. *Id.* The court agreed with the insured that the policy and statute required "three disinterested men" to appraise the amount of loss, but noted that none of the appraisers "had any pecuniary interest in the [insurance] company, or in the [insured's] property loss, or in the result of the appraisal, nor was either of them related to [the insured.]" *Id.* The court, however, recognized that "something more than absence of pecuniary interest and relationship is required to constitute disinterestedness" in the appraisal context. *Id.* Thus, the court held that appraisers must "be 'disinterested' not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad, full sense of being competent, impartial, fair, and open minded, substantially indifferent in thought and feeling between the parties, and without bias or partisanship either way." *Id.* at 586.

The court held that Allen was *not* sufficiently disinterested, reasoning that "[w]hen [Sawyer and Allen] undertook to agree upon a man as a third referee, Allen declined to agree upon any man in Calais, though freely admitting there were as good men in Calais as anywhere else in the state." *Id.* Moreover, the court emphasized that Allen's excuse for not wanting to select an umpire from Calais – that "the insurance people whom [he] represent[s] object to a

local man" – was further evidence that Allen "regarded himself as the representative of the [insurance] company." *Id.* Thus, the court held that "[f]rom this circumstance alone, without considering other appearing in the evidence, we think it clear that Mr. Allen was not the disinterested referee required by the statute and the policy, and hence that the award must be adjudged not binding on the [insured], and must be set aside." *Id.*[1]

Relevant Holdings:

(1) Where a referee appointed under a standard fire insurance policy to fix the amount of the loss was not disinterested, the award will be set aside.

(2) Referees selected under the provisions of the Maine standard fire insurance policy, Me. Rev. St. c. 49, §§ 4, 5, to fix the amount of the loss must be disinterested in the full sense of being competent, impartial, and substantially indifferent between the parties

(3) Where a referee appointed under a fire insurance policy and nominated by the insurance company refuses to agree on any man in the vicinity of the property as a third referee, such refusal is unreasonable, and coupled with the explanation that it is because of the objection of the insurance company, shows disqualifying bias.

***Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 72 A. 732 (Me. 1908)**

Topics: Enforceability of award; burden of proof

Summary: In *Rolfe*, the insured's property was destroyed in a fire and the insured sought to recover the loss under his insurance policy. *Id.* at 732. Under the policy, the insurer's liability could not exceed $900 (the policy limits) nor more than two-thirds of the "actual destructible value of the property at the time the loss may happen." *Id.* Failing to agree on the amount of loss, the parties entered into an agreement whereby the insured and insurer each selected a disinterested appraiser, waiving the policy-given right to appoint a third. *Id.* Following a hearing, both referees rendered and signed an award valuing the property damage at $850. *Id.*

The insured subsequently filed suit on the award, alleging that (1) "the sum found and inserted in the award was never agreed upon by the referees as the total amount of the loss to the premises, but [rather] … the part of the total loss which [the insurer] by its policy agreed to pay … representing two-thirds of the total loss or damage by fire" and (2) "the award was signed by accident and mistake by the referees, and does not represent their finding." *Id.* The case was tried in a court of equity, and the jury determined that the $850 award represented the amount to which the insured was entitled – two-thirds of the total loss.

The court first noted that "a jury upon an issue framed in equity is merely advisory, and must be such as shall satisfy the conscience of the court to found a decree upon. Otherwise it

[1] The court also noted that the insurer refused to comply with the insured's request for another appraisal of the amount of loss, seemingly suggesting that the defendant's refusal permitted the insured to bring the matter before the court under *Fisher*, 50 A. at 283, *supra*.

will be set aside." *Id.* at 733. As prelude to its analysis of whether there was sufficient legal evidence to sustain the jury's verdict in favor of the insured, the court emphasized that "[e]very presumption is in favor of the validity of an award, and the burden of proof is upon the party who would impeach it to show the grounds for such impeachment, and the evidence must be clear and convincing." *Id.* The insured presented testimony of the referee it appointed stating that the award reflected the amount to which the insured was entitled, or two-thirds of the entire loss, while the insurer presented testimony from its referee stating that the award was the amount of the total loss, two-thirds of which would be payable to the insured. *Id.* The court found that, in light of the conflicting evidence, the insured failed "to satisfy the court that the evidence … is of such clear and convincing character as to overcome the presumption in favor of the validity of the award and sustain a decree in favor of the [insured]." *Id.* Consequently, the court set aside the verdict and dismissed the insured's complaint seeking to set aside the award. *Id.*

Relevant Holdings:

(1) Every presumption is in favor of the validity of an appraisal award, and the burden of proof is upon the party who would impeach it to show the grounds for such impeachment by clear and convincing evidence.

***Dunton v. Westchester Fire Ins. Co.*, 71 A. 1037 (Me. 1908)**

Topics: Scope of appraisal; estoppel

Summary: In *Dunton*, the insured sustained property damage resulting from a fire and, upon failing to disagree as to the amount of such loss with its insurer, submitted the question of damages to appraisal under the following relevant provision:

> In case of loss under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss and damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss.

Id. at 1038. During the hearing, the insurer attempted to argue and introduce evidence that the insured did not have title to the damaged property at the time of the fire. *Id.* The appraisers ruled that they did not have jurisdiction over the question of the insured's title or insurable interest, only the question of the amount of damage caused by the fire, and excluded the evidence presented by the insurer. *Id.* Upon conclusion of the hearing, the appraisers rendered an award solely with respect to the amount of damage in the amount of $6,630. *Id.*

The insurer argued that the award did not comply with the requirements of the policy and denied its validity on the basis that the appraisers refused to determine the question of the insured's title to the property insured. *Id.* The insured then filed suit seeking to enforce the award, and the court framed the issue before it as follows:

> [W]hether the stipulation in the Maine Standard policy in regard to arbitration authorizes and requires the referees to take jurisdiction of one of the principal questions involved in the plaintiff's right to recover, and determine his title to the property insured, as well as the amount of the damage done to the property, or whether it contemplates only an appraisal by the referees of the value of the property described in the policy and an estimate of the damage done by the fire to that property, leaving the question of the plaintiff's title and the general question of the defendant's liability to be judicially determined in the courts of law.

Id. at 1038-39. Holding that the appraisers did not have authority to determine the insured's title to the insured property, the court emphasized that the issue of the insured's ownership of the property "goes directly and solely to the plaintiff's cause of action and the defendant's liability, and that such matters are invalid as they deprive the courts of their jurisdiction. *Id.* at 1039. ("[A] general stipulation … to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount of damage will not be sanctioned or enforced so as to divest the courts of their established jurisdiction."). The court distinguished provisions requiring "arbitration" of the amount of loss – a "matter[] that do[es] not go to the root of the action" – recognizing that such provisions are valid and may constitute conditions precedent to a suit on the policy if expressly stated. *Id.*

The court further reasoned that most appraisers, including those at issue, are not selected from the legal profession and "[t]he settlement of questions of title to real and personal property [unlike a determination of the amount of loss] often involves the duty of examining a complex state of facts and important and difficult questions of law, a duty which those not educated to the law would be wholly incompetent to form." *Id.* at 1040. As a result, the court held that the appraisers properly refused to determine the insured's title to the property at issue and limited the proceeding to a determination of the amount of damaged incurred. *Id.*

Relevant Holdings:

(1) Though the parties may agree that it shall be a condition precedent to application to the courts that they shall first settle the amount to be recovered by a stipulated mode, they cannot entirely close access to the courts.

(2) A provision in a contract, which withdraws all controversies of the parties relating thereto from the courts, and submits them to arbitration, will not be enforced.

(3) It is competent to stipulate in a fire policy that the submission to arbitration of the amount of damage or any similar matters shall be a condition precedent to a right of

action; such an agreement not depriving the courts of jurisdiction of the general question of liability.

(4) The stipulation in a standard fire policy that, if the parties fail to agree the amount of loss shall be determined by three referees as a condition precedent to any suit on the policy, is not to be construed to authorize the referees to determine the question of the title to the property, but only an appraisal of the property and an estimate of the loss.

***Mowry & Payson v. Hanover Fire Ins. Co.*, 76 A. 875 (Me. 1909)**

Topics: Waiver

Summary: In *Mowry & Payson*, the insured sustained damages to his property in a fire and sought to recover the loss under his policy and, upon failure to reach an agreement with his insurer on the amount of loss incurred, submitted the matter to appraisal under the following policy provision:

> In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

Id. at 876. Moreover, the Maine standard policy was required by law to provide for waiver of the insurer's right to appraisal under the following conditions:

> **If the insurance company shall not, within ten days after a written request to appoint referees** under the provision for arbitration in such policy, **name three men** under such provision, each of whom shall be a resident of this state, and **willing to act as one of such referees**; or if such insurance company shall not, within ten days after receiving the names of three men named by the insured under such provision, make known to the insured its choice of one of them to act as one of such referees, it shall be deemed to have waived the right to an arbitration under such policy and be liable to suit thereunder, as though the same contained no provision for arbitration as to the amount of loss or damage

Id. Within nine days of the insured's request to submit to appraisal, the insurer provided the names of three individuals who resided in Maine and were willing to serve if chosen by the insured. *Id.* The insured selected one Charles Brackett; however, shortly thereafter Brackett informed the insurer that, due to the death of his father and other business, he would be unable to serve as referee. *Id.* The next day, the insurer informed the insured of Brackett's resignation, stating that it would "do whatever is necessary to bring the [appraisal] about at once," and three days later submitted the name of a suggested replacement. *Id.* The insured, however, refused to agree to a replacement for Brackett, and immediately filed suit on the policy.

The insurer argued that the insured was precluded from bringing an action on the policy, as the appraisal provision was a condition precedent to such a suit and remained unfulfilled. *Id.* The insured argued that the insurer failed to comply with the appraisal provision by failing to submit the names of three persons, each of whom was willing to act as one of the referees. *Id.* Thus, according to the insured, the insurance company must "be deemed to have waived the right of an [appraisal] … and be liable to suit thereunder as through the [policy] contained no provision for [appraisal] as to the amount of loss or damage." *Id.*

The court first recognized that appraisal was expressly made a condition precedent to suit, the issue of amount of loss was submitted to appraisal and no award was rendered before the suit was commenced, and that the insurer in good faith responded to the insured's request for appraisal by naming three referees who were, at the time, willing to act as referees. *Id.* at 876. Moreover, the court noted that the resignation of Bracket, the insurer's first referee, was not occasioned through any fault of the insurer, and that, after the resignation, the insurer offered to do whatever was necessary to appoint a replacement – an offer unequivocally rejected by the insured. *Id.* at 877.

The court, however, noted that the issue before it was "not a question of the good faith or actual intentions of the [insurer];" rather, it was one of statutory waiver, which "may be established without proof of an actual intention to relinquish a known right." *Id.* at 878. Thus, because the statute expressly required the insurer to appoint a referee that was willing to act as such at all times within ten days of the insured's request, and was silent as to whether the company would be permitted to appoint another upon the referee's resignation, the court held in favor of the insured. *Id.* ("[The insurer] failed to comply with the imperative terms and absolute conditions of the statute, and must be held legally responsible for the failure of the arbitration, and, according to the language of the statute, 'be deemed to have waived the right to it.'"). The court also based its decision in part, in the notion that if the insurer were permitted to appoint a new referee beyond the 10-day limit prescribed by the statute, "the insured would in some instance be effectually deprived of the choice given him by the statute and find himself reduced to the necessity of accepting for referee the only one who had not declined to serve and the one especially desired by the defendant."). *Id.*

Relevant Holdings:

(1) Under the standard fire policy provision, Me. Rev. St. c. 49, § 4, par. 7, as amended by Laws 1905, c. 158, for arbitration on disagreement as to the amount of loss by three disinterested men, insurer and insured each choosing one out of three persons named by the other, and under the provision that insurer waives arbitration by failing to name within 10 days after request three men willing to act, insurer waives right to appraisal where one of its nominees later declines to serve as a referee, though the insurer acted in good faith. arbitration was waived by insurer where one of its nominees declined to serve on being selected by insured, though insurer acted in good faith.

***Hutchins v. Merrill*, 84 A. 412 (Me. 1912)**

Topics: Appraisers' liability

Summary: *Hutchins* involved an action to recover damages resulting from defendant, Merrill's, negligent "scaling" of certain logs. *Id.* at 413. Pursuant to an agreement between the parties, the logs were to be "scaled by a disinterested sworn surveyor." *Id.* The parties also agreed that Merrill would survey the logs, and that his scale would be final and binding between the parties as the basis for payment under their contract. *Id.* The parties stipulated that Merrill was "an experienced and competent scaler, and there was no allegation or evidence of fraud or collusion on his part in making his scale." *Id.* Nor was there fraud or mathematical mistake that would relief the plaintiff from paying according to Merrill's scale. *Id.* Rather, the plaintiff contended that Merrill "negligently omitted either to count the logs so that he knew the number of them, or to scale a sufficient number to estimate the average contends, but carelessly accepted the count made … and averaged the number of feet per logs from pencil marks found by him upon the logs." *Id.* Merrill admitted that, due to the way the logs were piled, he did not actually count them all, but contended that he counted enough of them to satisfy his judgment that "the tally kept … of the number of pieces hauled .. was correct." *Id.* Merrill also asserted that he scaled enough of the logs to satisfy his judgment as to the average size of all the logs. *Id.*

The court viewed Merrill's role as a surveyor as one of a "quasi arbitrator," and thus held that he was immune from private actions for damages for judgments entered in accordance with his decision. *Id.* at 415, 416. Specifically, the court emphasized that "[i]t is an elementary principle respecting the judicial character and function and a firmly established rule of law that judges and arbitrators enjoy immunity from private actions for damages against them for judgments rendered while acting within their jurisdiction in the due course of the administration of justice."). Thus, as long as an arbitrator or appraiser "honestly performs [his or her obligations], then he [or she] honestly performs … his [or her] duty … and the parties must abide by it." *Id.* at 416 (noting that a contrary rule would be "destructive to the [appraiser's] independence and his power to discharge his duties as an arbitrator properly and efficiently.").

Relevant Holdings:

(1) Arbitrators are immune from private actions for damages for judgments entered within their jurisdiction.

***Nat'l Furniture Co. v. Prussian Nat. Ins. Co.*, 91 A. 785 (Me. 1914)**

Topics: Waiver

Summary: In *Prussian National Insurance Company*, the insured brought an action under the policy for damages resulting from a fire. *Id.* at 785. At trial, the jury rendered an award for the insurer, and the insured moved for a new trial on the basis of the impropriety of the court's refusal to enter the following jury instruction concerning the insurer's waiver of its right to contest liability for its failure to do so at appraisal:

> That the acts of the defendant, after it had all the information it now possesses in regard to the cause of the fire, and had in its possession the proof of loss containing complete schedule of property, together with their value, and all information concerning amount of damaged goods and their value, which it now has, in negotiating with the plaintiff as it did with no mention of disclaiming liability on account of matters contained in special pleadings and appearing before the referees without raising any question as to their liability for whatever the referees might determine the damage to be, were a waiver of its right to come into court later, and defend under the special pleadings filed by defendant.

Id. The court held that the lower court properly refused the jury instruction in its entirety, on the basis that "[c]alling attention to one instance only, the reference [to appraisal] having been agreed upon, no waiver could arise from a failure on the part of the [insurer] to raise the question of its liability before the referees as this matter [wa]s not before them." *Id.*

Relevant Holdings:

(1) An insurance company does not waive its right to raise the issue of its liability before a jury by its failure to do so at appraisal, where the issue to be decided is restricted to the amount of loss incurred by the insured.

***Oakes v. Pine Tree State Mut. Fire Ins. Co.*, 90 A. 707 (Me. 1914)**

Topics: Waiver

Summary: *Oakes* was an action to recover the amount of a fire insurance policy following the destruction by fire of the insured property. *Id.* at 708. Shortly after filing a claim with the insurer, the insurer sent the insured a letter unequivocally denying coverage for the loss. *Id.* When the insured brought suit under the policy, the insurer "moved for a nonsuit on the ground that the insured failed to show any reference to [appraisal] as required by the policy." [2] *Id.* The

[2] The policy contained the following Maine Standard form appraisal provision:

> "In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss." *Oakes*, 90 A. at 708.

insured admitted that no such reference was made, but asserted that the insurer waived the requirement by denying all liability under the policy. *Id.* The trial court found that the denial did not constitute a waiver of insurer's right to appraisal as a condition precedent to the insured filing suit, and the insured appealed.

On appeal, the insurance company argued that, absent express waiver, the only conduct that could result in a waiver by an insurance company was provided for by statute, and included situations in which the insurance company failed to nominate three disinterested appraisers who are citizens of Maine and willing to serve as referees within ten days of the insured's request. *Id.* The court disagreed, noting that the statute, by its terms, did not provide the exclusive means of waiver. *Id.* Moreover, the court recognized that "[a] distinct denial of all liability by the insurance company is equivalent to a declaration that it will not pay if the amount of the loss should be determined," and, as a result, "the law will not require the useless and expensive formality of an arbitration when the insurer, for whose benefit it was provided, has rendered it superfluous." Accordingly, the court held that "an unqualified denial by the insurance company of all liability under the policy renders inoperative a provision therein for an [appraisal] as to the amount of the loss as a condition precedent to a right of action to recover such loss." *Id.*

Relevant Holdings:

(1) An unqualified denial by the insurance company of all liability under the policy renders inoperative a provision therein for an appraisal as to the amount of the loss as a condition precedent to a right of action to recover such loss.

***Bradbury v. Ins. Co. of State of Pa., Philadelphia*, 106 A. 862 (Me. 1919)**

Topics: Waiver

Summary: Following an appraisal of the insured's loss, the insured contested the validity of the award on the basis of the insurer's failure to offer three disinterested referees pursuant to the Maine standard form appraisal provision.[3] As a result, the insured contended that the appraisal was unfair, biased, and prejudicial, and therefore unenforceable. *Id.* The insurer argued that, even if it had appointed three *interested* referees, the insured did not, and could not have, alleged scienter by the insurer as required to invalidate the award. *Id.* at 863.

The court first recognized that under an appraisal provision, "it is the duty of the parties … to act in good faith, and if either acts in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith, and is not bound to enter into a new arbitration." *Id.* (quoting *Fisher*, 284 A. at 50). Thus, the court held that scienter was not required for a cause of action to set aside an appraisal award; rather, all that must be alleged is that the other party failed to act in good faith and was otherwise at fault for the failure of the

[3] For the language of the appraisal clause, *see, e.g., Oakes v. Pine Tree State Mut. Fire Ins. Co.*, 90 A. 707, 708 (Me. 1914), *supra*.

appraisal process. *Id.* Finding that the insured's allegation that the insurer "forgetful of its duty, did not present the names of *disinterested* men" alleged negligence and fault on the part of the insurer, the court held that the insured sufficiently stated a cause of action to set aside the award. *Id.* at 864-65.

Relevant Holdings:

(1) Where arbitration fails by reason of fault of one of the parties, the other party is not bound to enter into a new arbitration agreement.

(2) Where referees selected to ascertain fire loss are not as free from bias, prejudice, sympathy, and partnership as judges and jurors are presumed to be, award is invalid.

(3) In action on fire policy involving validity of referee's award in ascertainment of loss, evidence of the conduct of the referees from the time they are proposed until they have completed their award, including what they say and do, is competent to prove the referees biased and prejudiced.

***Bradbury v. Rhode Island Ins. Co.*, 112 A. 714 (Me. 1921)**

Topics: Waiver

Summary: Following *Bradbury v. Ins. Co. of State of Pa., Philadelphia*, 106 A. 862, 862 (Me. 1919), where the court held that the insured had stated a cause of action to void the appraisal award due to bias, interest and prejudice on the part of one or more appraisers, the court affirmed a jury verdict finding "that the arbitration failed by reason of the defendant's fault in not choosing referees who were free from prejudice or bias, and were not disinterested, and therefore the [insured] was not bound to enter into a new arbitration agreement." *Id.* at 716.

***Oakes v. Franklin Fire Ins. Co.*, 120 A. 53 (Me. 1923)**

Topics: Scope of appraisal; compelling appraisal; procedure in appraisal

Summary: In *Oakes*, upon failing to agree on the amount of the insured's loss, the parties submitted the question to appraisal in accordance with the Maine standard form appraisal provision. *Id.* at 53. During the appraisal, however, the appraisers refused to proceed unless the insured left the property during their examination. *Id.* at 55. Following an award fixing the amount of the insured's loss, the insured, dissatisfied with the award, filed suit under the policy. *Id.* The insurer moved for a nonsuit, arguing that "once a valid award has been made by referees selected in accordance with the provisions of the standard policy authorized by the statutes of this state, except upon the award." *Id.* at 54.

The court first noted that "[t]he right of the insured to recover the loss is not submitted to the referees; only the amount of damages." *Id.* Thus, "[e]ven in the event of a valid award, the right of the insured to recover any amount may have to be determined in court, and, if so, it must

be done by an action upon the policy, in which the plaintiff must show, having established his right to recover, the amount of the loss, which he may do by offering the award of the referees as conclusively determining it." *Id.* As a result, where liability is disputed, the existence of a valid appraisal award as to the amount of damages does not preclude a suit on the issue of the insurer's liability.

Moreover, the court held that an appraisal provision "contemplates something more than a mere appraisement by the referees upon a view and such information as they see fit to obtain, and requires notice to the parties and an opportunity to present evidence and be heard." *Id.* Because the appraisers refused to proceed with the appraisal unless the insured left the building, the court found it clear that appraisers were not impartial and, moreover, that the insured was denied her right to be heard on any matters pertaining to the amount of loss. *Id.* at 54-56. ("[I]f [appraisal] is to result in an award which shall be conclusive on the parties in a court of law, full opportunity to be heard after notice must be granted both parties by referees who are disinterested and impartial.").

Relevant Holdings:

(1) Only the amount of damages, and not the right to recover, is submitted to appraisal.

(2) Where insured is not provided notice of and a chance to be heard during an appraisal proceeding, the insured is entitled to sue on the policy and recover such damages as he or she can prove before a jury.

(3) Although appraisers have a right to determine what kind of evidence they will receive, and are not bound by the strict rules of court procedure, the action of appraisers in arbitrarily refusing to proceed to determine amount of loss caused by fire, unless insured left the building during the examination, was unwarranted, and violated insured's right to be present and be heard, and was prejudicial, and the fact that insured had no evidence to offer was immaterial.

***Hexter v. Equitable Fire & Marine Ins. Co.*, 121 A. 555 (Me. 1923)**

Topics: Enforceability of award

Summary: In *Hexter*, the parties entered into a written appraisal agreement whereby they would submit the issue of the amount of loss to a binding appraisal and appoint appraisers to state "separately sound value immediately preceding the fire, and damage." *Id.* at 555. The appraisal award stated as follows:

> We, the undersigned, having carefully appraised and estimated the damage to the property of Mary J. Hexter in conformity with the foregoing appointment and declaration, hereby report that we have determined the actual damage thereon to be as follows:
>
> On within described automobile, $2,225 (company to pay $2,225 and to have salvage.)

> The sound value of said property at the time last preceding the fire, we find to have been as follows, viz.:
>
> Of within described automobile, $2,325

Id. The insurer refused to pay the award, and the insured filed suit. The insurer argued that the parenthetical clause in the appraisal report "company to pay $2,225, and to have salvage" exceeded the scope of the appraisers' authority – limited to a determination of the amount of damage – rendering the award invalid. *Id.* The court disagreed, holding that "[u]nauthorized and invalid parts of an award are to be treated as mere surplusage, unless such parts affect, to the prejudice of the excepting party, the portions of the award which are authorized and valid." *Id.* Because the unauthorized statement in the report – purportedly stating the legal rights of the parties – had no influence on the appraisers' judgment as to sound value or damage, the statement was held not to invalidate the award. *Id.* at 556.

Relevant Holdings:

(1) Unauthorized and invalid parts of an appraisal award are treated as mere surplusage, unless they affect authorized and valid portions to the objecting party's prejudice.

***Jewett v. Quincy Mut. Fire Ins. Co.*, 132 A. 523, 524 (Me. 1926)**

Topics: Waiver

Summary: In *Jewett*, the insurer sought to set aside a verdict in favor of the insured, on the basis that the insured failed to comply with the following appraisal provision prior to filing suit:

> In case of loss under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing out of three persons to be named by the other, and the third party selected by the two so chosen; the award in writing … shall be a condition precedent to any right of action in law or equity to recover for such loss.

Id. at 524. Although the parties failed to agree on the amount of loss, the matter was not submitted to appraisal. Prior to filing suit, however, the insurer issued a letter stating, in relevant part, that "our adjuster claims that the damage to the barn was done entirely by wind and not lightning. You can see in that case that we should not be called upon to make up any loss that [the insured] may have suffered." *Id.*

The insured asserted that, by denying coverage under the policy, the insurer waived all conditions precedent thereto, including that all disputes regarding the amount of loss be submitted to appraisal. The court agreed and, citing *Oakes*, 90 A. 707 (Me. 1919), held that "an unqualified denial by the insurance company of all liability under the policy renders inoperative a provision therein for an arbitration as to the amount of the loss as a condition precedent to a right of action to recover such loss." *Id.* at 525.

Relevant Holdings:

(1) An insurer's unqualified denial of all liability under its policy renders inoperative a provision requiring arbitration as a condition precedent to filing suit.

***Bryson v. Am. Eagle Fire Ins. Co.*, 168 A. 719 (Me. 1933)**

Topics: Waiver; scope of appraisal

Summary: In *Bryson*, the insured's mill, together with its contents, were destroyed by a fire. *Id.* at 719. The property was insured under two policies, Policy Nos. 5303 and 5304. *Id.* Unable to agree on the amount of loss, the issue was submitted to appraisal in which an award of $4,400 was rendered in favor of the insured on Policy No. 5304, and $8500on Policy No. 5303. *Id.* The insurer admitted liability for the award rendered under Policy No. 5303, but with respect to Policy No. 5404, argued that the insured breached the terms of the Policy's "Piled Lumber Clause" which required the insured to maintain a clear space of one-hundred feet between the lumber insured and standing brush. *Id.* at 720. The insured argued, in part, that the insurer, "by joining in the [appraisal] proceedings and the submission of loss to referees, waived its defense of a breach of the conditions of the policy. *Id.*

The court rejected the insured's contention, holding that "[n]o waiver could arise from a failure on the part of the [insurance] company to raise the question of its liability before the referees. Specifically, the court emphasized "[t]he arbitration clause in th[e] policy simply provides a reasonable method of estimating and ascertaining the amount of the loss, and leaves the general question of liability to be determined by the courts." *Id.* Thus, "[o]nly matters which relate to the amount of damages are in issue before the referees; those going to the cause of action being material and outside their jurisdiction." *Id.*

Relevant Holdings:

(1) Only matters relating to amount of damages are in issue before appraisers to whom claims for losses under standard fire policies are submitted, and matters going to cause of action are outside their jurisdiction.

(2) Failure of insurer to raise question of its liability before referees to whom claim for loss was submitted was not a waiver of the insurer's defense that insured breached the conditions of the policy.

***Harwood v. U. S. Fire Ins. Co.*, 7 A.2d 899 (Me. 1939)**

Topics: Waiver

Summary: In *Harwood*, the insured sought coverage under a policy insuring his property in the following amounts: $400 on the house, $100 on a shed, and $300 on household goods. *Id.* at 900. The insurer alleged there was a disagreement as to the amount of loss and, having failed to submit the issue to appraisal, the insured could not bring suit against the insurer. *Id.* The insured, however, was never informed of any disagreement as to an amount of loss, and instead, was told by the carrier that the loss likely exceeded the policy limits and, moreover, that there was no coverage under the policy for the loss. *Id.*

The court held that the insurer waived its right to appraisal when it denied liability under the policy, reasoning that the insurer's statement to the insured that "in order … to collect this claim [the insured] will have to take action against the Company" amounted to a denial, notwithstanding an admitted loss in excess of the policy limits. *Id.* at 901 (citing *Bryson*, 168 A. 719 (Me. 1933)).

Relevant Holdings:

(1) A fire policyholder is not required to comply with policy provision requiring arbitration of loss when insurer for whose benefit it was provided has rendered it superfluous by denying liability.

(2) Where a fire policyholder suffered a fire loss in excess of insurance coverage, statement by agent for insurance company that policyholder would have to take action against company to collect his claim constituted a "waiver" of policy provision requiring arbitration of amount of loss.

***Lawler v. Hartford Fire Ins. Co.*, 54 A.2d 685 (Me. 1947)**

Topics: Qualifications of appraisers; enforceability of award

Summary: In *Lawler*, the insured sought coverage for his potato storage house that was destroyed in a fire. Unable to agree on the amount of loss, the insured and his carrier, pursuant to the Maine standard form fire policy, appointed three disinterested referees – Bryant, Woodman, and Dunbar. *Id.* Woodman and Dunbar returned an award fixing the insured's total loss at $33,125. The third appraiser, Bryant, refused to sign the award, claiming that Woodman and Dunbar had not given due consideration to the evidence submitted, and that the amounts allowed were inadequate. *Id.* Consequently, the insured refused to accept the award and instead brought suit, alleging that the award was inadequate and not binding upon him because the majority of the appraisers were not disinterested and impartial, and instead exhibited bias in favor of the insurer. *Id.*

At trial, the evidence showed that Woodman lobbied for Dunbar to be appointed as the third appraiser, "refus[ing] [to] even consider other names suggested by [other appraisers]." *Id.* at 687. Moreover, Woodman "refused to give due consideration to the testimony of many witnesses as to the quantity of potatoes in the building before the fire." *Id.* As a result, the court

held that the evidence was sufficient to support the jury's finding that "the majority of the [appraisal] board did not approach the solution of th[e] problem with that open-mindedness to which the parties here involved were entitled." *Id.*

Relevant Holdings:

(1) Where fire insurers and insured did not agree as to amount of losses on building and contents destroyed by fire and the amount was submitted to referees in accordance with provisions of the Maine Standard Fire Insurance Policy, insured was required to prove alleged partiality and bias of majority members of board in order that issue as to amount of loss could properly be submitted to jury.

(2) Where it is alleged that referees to whom question of amount of losses from fire has been submitted in accordance with provisions of the Maine Standard Fire Insurance Policy because the parties did not agree as to amount of the losses were not disinterested and impartial arbitrators, the court should be meticulous in its examination of the facts to determine whether the arbitrators were unbiased, since the statutory method of selection of referees takes from the parties the freedom of choice which the parties would have in an ordinary reference in choosing those who are to determine the question.

(3) Appraisers must be "disinterested" not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad, full sense of being competent, impartial, fair, and open minded, substantially indifferent in thought and feeling between the parties, and without bias or partisanship either way."

(4) Soon after the fire the Defendant met with an adjuster for the Plaintiff, and quoted to him that his "actual value" loss was $30,000 for the structure and $26,500 for the personal property. Not satisfied with these figures, the Plaintiff contested the claim of its insured, and the question of the amount of the Defendant's loss was eventually submitted to appraisal

***Maine Mut. Fire Ins. Co. v. Watson*, 532 A.2d 686 (Me. 1987)**

Topics: Effect of award

Summary: Following a fire resulting in the destruction of the insured's home and its contents, the insured met with an adjuster and averred that his "actual value" loss was $30,000 for the structure and $26,500 for the personal property. *Id.* at 690. Dissatisfied with these figures, the insurance company contested the insured's claim, and the question of the amount of loss was eventually submitted to appraisers pursuant to 24-A M.R.S. § 3002 (1974), requiring that all fire policies insuring property in Maine contain the following appraisal provision:

> 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 that appraiser and the expenses of appraisal and umpire shall be paid by the parties equally.

Id.; Me. Rev. St., tit. 24-A, § 3002. The appraisers determined that the actual value of the insured's total loss was $26,000, consisting of $16,000 for the building, $8,500 for personal property, and $1,500 for debris removal. *Id.* The court held that, pursuant to 240A M.R.S.A. § 3002, the "actual cash value" of the insured's loss was undisputed as of the date of the award, and became due one month thereafter. *Id.* at 690-91.

Relevant Holdings:

(1) Portion of insured's claim representing "actual cash value" was undisputed as of date appraisers determined actual value of insured's loss, and became due one month after arbitrator's decision, and insurer's failure to tender unconditional check within that time entitled insured to award of attorney fees and interest.

***Cnty. Forest Products, Inc. v. Green Mountain Agency, Inc.*, 758 A.2d 59 (Me. 2000)**

Topics: Waiver

Summary: In *County Forest*, the insured sawmill brought suit against its insurers and brokers for breach of contract, breach of fiduciary duties, unfair claims practices, and negligence arising out of the failure to procure increased coverage limits requested by the insured before a fire destroyed the sawmill and pay an appraisal award entered thereafter. *Id.* at 61. As required by 24-A M.R.S. § 3002 (2000), the policy contained the following provision:

> **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.

Id. at 66-67; Me. Rev. St., tit 24-A, § 3002 (2000). Pursuant to this clause, the insurers selected an appraiser, Cricones, and the insured notified the insurers that it had selected Hoffman, an employee of the company hired by the insured to adjust this loss and thus had a financial outcome in the amount recovered. *Id.* at 61. The insurers' attorney then wrote to the insured, acknowledging that Hoffman's employer was not "disinterested" due to "a direct pecuniary interest in the outcome of the appraisal." *Id.* at 67. Nonetheless, the letter stated that "the insurers are willing to accept a representative of the Alex N. Sill company as the assured's appraiser in this matter, in order to facilitate the appraisal process. The insurers' acceptance of [the insured's] nominee shall not be construed as a waiver of any of the terms involved in the policy. *Id.* The two appraisers, Cricones and Hoffman, then selected an umpire. The appraisal process concluded a year later with an award of $1,172,367.57 for the insured. *Id.*

The insurers challenged the appraisal award on the ground that Hoffman, the insured's appraiser, was not disinterested as required by law. *Id.* The parties filed cross-motions for summary judgment and, while there was some evidence that Hoffman may have had an interest in the outcome, the trial court held that the insurers waived their right to contest the impartiality of Hoffman by willingly accepting the insured's nominee while fully aware of the potential impropriety. *Id.*

On appeal, the insurers first argued that the issue of waiver is factual and cannot be determined at the summary judgment stage. *Id.* The court, however, affirmed the lower court's grant of summary judgment in favor of the insured, reasoning that "[a]lthough the [insurers'] letter goes on to say that the acceptance of Hoffman should not be construed as a waiver of the terms of the policy, … [b]y agreeing to proceed with the appraisal process and accepting [the insured's] representative in spite of knowledge of a possible interest … the insurers waived their right to object to the appraisal award on that basis." *Id.*

Relevant Holdings:

(1) An insurance company waives the right to object to an appraisal award the basis of the impartiality of the insured's appraiser by agreeing to proceed with the appraisal process and accepting the insured's representative in spite of knowledge of a possible interest.

(2) Letter by insurers' attorney informing the insured's attorney of a willingness to accept the insured's appraiser despite its interest in the outcome of the appraisal waived the claim that the appraiser was not disinterested, even though the letter also stated that the insurers' acceptance of the insured's nominee was not a waiver of any of the terms of the policy

***Allstate Indemn. Co. v. Jellerson*, 2001 WL 1708835 (Me. Super. Ct. Aug. 29, 2001)**

Topics: Qualifications of appraiser

Summary: *Jellerson* involved a dispute over whether the operator of the body shop selected to perform the repairs on the insured automobile constituted a "qualified appraiser" as required by the policy. *Id.* at *1. Under the policy, the insurer was required to compensate the insured for "the actual cash value of the property or damaged part of the property at the time of loss," and limited the insurer's liability to the "cost to repair or replace the property or part with other of like kind and quality." *Id.* Following the loss, the insurer's adjuster estimated the damage to be $6,335.92, and the insurer issued payment to the insured for that amount. *Id.* The insured then took the vehicle to Mark Cobb of Cobb's Collision Center, who sent the insurer a "Repair Process Deficiency Notice," requesting payment of an additional $10,525.52 to repair the insured's car. *Id.* The insurer issued a supplemental payment of $1,952.46, but would not pay the full amount requested by the insured. *Id* The parties proceeded to appraisal, and the insured informed the insurer that Cobb would serve as her "qualified appraiser" pursuant to the policy. When the insurer objected, the insured refused to designate another appraiser, and the insurer sought a declaration from the court that Cobb was not sufficiently "qualified" under the following policy provision:

> ***Right to Appraisal***
>
> Both you and Allstate have a right to demand an appraisal of the loss. Each will appoint and pay a **qualified appraiser.** Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they will submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

Id. (emphasis added).

In support of its appointment of Cobb, the insured alleged that: "(1) Mr. Cobb does not have any direct or indirect financial interest in the outcome of the appraisal process because the defendant has agreed to pay him according to his estimate; (2) Mr. Cobb has a substantial experience in the collision repair industry; and (3) he is qualified to serve as an appraiser." *Id.* Further, it was undisputed that the insured agreed to pay Cobb according to his estimate regardless of the outcome of the appraisal process, and that Cobb had the training and experience to appraise damage to motor vehicles. *Id.*

Noting that the term "qualified appraiser" was not defined, the court afforded it its average meaning. *Id.* Because "[t]here [was] no dispute … that Cobb has the training and expertise to appraise damage to cars … [and] that he has no financial stake in the outcome of th[e] dispute … [t]here is nothing in th[e] record to support [the insurer's] … argument that Cobb is "partisan, not impartial."[4] *Id.* As a result, the court found that Cobb was a "qualified appraiser" as required by the policy, and granted summary judgment in favor of the insured. *Id.*

[4] The court also noted that the cases cited by the insurer for the proposition that Cobb was not sufficiently "disinterested" – *Lawler*, 143 Me. at 43 and *Young*, 101 Me. at 296 – "addressed terms different from the term [the

Relevant Holdings:

(1) An appraiser is "qualified" in the ordinary sense of the term where he or she has the training and experience to assess the damage at issue and does not have a financial or other stake in the outcome of the appraisal.

***Rankin v. Allstate Ins. Co.*, 336 F.3d 8 (1st Cir. 2003)**

Topics: Qualifications of appraiser

Summary: In *Rankin*, the insureds sought coverage for personal property damaged during a move from California to Maine. *Id.* at 9. Shortly after the insureds discovered the damage, they notified their insurer who hired an adjuster to determine what goods were damaged and their value. *Id.* The insureds provided a detailed list of the many lost or damaged items, including household goods, electronics, artwork and furniture. *Id.* A month later, the insureds' attorney sent the insurer a demand letter, to which the insurer responded that there was no coverage for the lost items, as the policy covered theft and damage to property in transit, but not items that were merely misplaced by the carrier. *Id.* Months later, the insurer sent a worksheet to the insureds giving its appraisal of the damaged items, but making no mention of the stolen items. *Id.* The insureds valued the damage at about $24,000, of which the insurer's share was half. *Id.* The insurer, however, agreed to pay only $6,000 to satisfy what it believed was its share of the damaged goods. *Id.* The next day, the insureds provided an itemized list of their losses (damaged and stolen goods) at $97,583 (which later changed to roughly $107,000). *Id.* Having received no response, the insureds filed suit against the carrier. *Id.* at 9-10.

Shortly after the discovery deadline, but before the date set for trial, the insurer sent a letter invoking the policy's appraisal provision. *Id.* at 10. The insured argued that the insurer could not then invoke the appraisal provision because (1) the insurer itself breached the contract and (2) failed to invoke the appraisal provision in a timely manner. *Id.* at 10.

With respect to the insured's first contention, the court held that due to the circumstances of the case, including the changing nature of the insureds' claims, the insurer's delay, could not amount to a "total" breach which would defeat the arbitration clause, if timely invoked. *Id.* The court further reasoned that while "some violations may be so broad and fundamental that they should prevent the wrongdoer from invoking the arbitration provision … this requires something more than a claim by one side that the other paid some of what was due a bit too slowly and is insisting on arbitration as to the rest under a provision explicitly designed to resolve disputes about value." *Id.*

The court then addressed whether the insurer waived its right to appraisal by failing to timely invoke the applicable policy provision. *Id.* The court began by noting that where an

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insurer] chose for its policy; namely "disagreement about amount of loss shall be determined by 'three disinterested men.'" *Id.*

appraisal provision is alleged to have been waived "by inaction (as opposed to an explicit waiver), the components of waiver of an [appraisal] clause are undue delay and a modicum of prejudice to the other side." *Id*. at 12. In finding that the insurer's delay in invoking appraisal was an "undue delay," the court emphasized that the insured did not invoke appraisal until ten months after there was a clear dispute between the parties concerning the amount of loss and, moreover, failed to do so until the close of discovery and the eve of trial. *Id.*

In support of their contention that they were prejudiced by the insurer's undue delay, the insureds noted that, although appraisers would have had an opportunity to inspect the damaged goods when the disagreed as to amount of loss first arose, the insureds were left with only photographs at the time appraisal was demanded. *Id.* at 13. While the court noted that "[t]he absence of the damaged items themselves does not help the [insureds] very much," the court nonetheless recognized that "there is prejudice inherent in wasted trial preparation when an [appraisal] demand is made … after many months of delay and only six weeks before a long-scheduled trial." *Id.* As a result, the court, emphasizing that the prejudice showing required to find a waiver of an appraisal provision "is tame at best," held that the insurer's undue delay in demanding appraisal sufficiently prejudiced the insured to justify a waiver of the insurer's contractual right to appraisal. *Id.* ("If there were no hint of prejudice, that would be a different matter. But as the case stands, we think that Allstate has forfeited its right to arbitration and that value disputes should be tried in court….").

Relevant Holdings:

(1) In Maine, an appraisal provision has to be invoked in a timely manner or the option is lost.

(2) A determination of whether an appraisal provision is waived due to undue delay is an issue for the judge, which is reviewed for clear error.

(3) The components of waiver of an appraisal clause by inaction are undue delay and a modicum of prejudice to the other side.

(4) By waiting until after discovery had closed and the long-scheduled trial date had almost arrived, insurer "unduly delayed" in invoking appraisal clause and prejudiced the insured, thereby waiving its right to demand appraisal.

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MARYLAND

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***Allegre v. Maryland Ins. Co.*, 6 H. & J. 408 (Md. 1825)**

Topics: Appraisal as condition precedent to suit; waiver of right to appraisal

Summary: *Allegre* involved a claim by the insured for damaged cargo under a policy intended to insure $6,000 worth of cargo aboard the insured's vessel, *Eugene*, on its voyage from *Rio de la Plata* to *Havanna*. Upon returning from the voyage, the cargo was lost and the insured submitted sworn affidavits of the captain and three crew members detailing the particulars of the shipment, cargo, and the voyage, as well as a bill of lading evidencing the cargo's insured value. The carrier denied coverage, contending that the insured failed to provide sufficient proof of loss, including the value of the cargo, based on the following policy provision:

> [I]n case of loss, such loss to be paid in ninety days after proof and adjustment thereof, the amount of the note given for the premium, if unpaid, being first deducted; and it is mutually agreed, that if any dispute shall arise relating to a loss on this policy, it shall be referred to two persons, the one to be chosen by the assured, the other by *The Maryland Insurance Company*; which two persons shall have power to adjust the same; but in case they cannot agree, then those two persons shall choose a third, and any two of them agreeing, their determination shall be obligatory on both parties

Id. at 409. Although the principal issues before the court were (1) whether custom and usage could be used to explain the meaning of the words "proof of loss and adjustment thereof" and (2) whether the insured submitted sufficient proof of loss, the court also addressed whether the carrier, by sending a "plain unequivocal" denial letter to the insured, waived its right to invoke the policy's appraisal provision. Specifically, the court held that the "agreement to arbitrate," while enforceable, (1) could not "oust courts of justice of their jurisdiction" and (2) does not apply where the acts of the insurer make it clear that an amicable adjustment is not practicable:

> The agreement to arbitrate does not oust courts of justice of their jurisdiction. The parties then stand in an attitude not contemplated by them. Their stipulation that the loss is only to be paid in ninety days after proof of loss and adjustment, looks only to the case of an amicable adjustment by themselves. When then by the acts of the defendants that cannot be made, the plaintiff is absolved from the operation of this stipulation, and his right of action immediately accrues.

Id. at 413.

Relevant Holdings:

(1) A policy's agreement to arbitrate cannot oust courts of justice of their jurisdiction.

(2) Where an insurer unequivocally denies coverage, the insured may bring suit without first complying with the policy's appraisal provision.

***Caledonian Ins. Co. of Scotland v. Traub*, 35 A. 13 (Md. 1896)**

Topics: Appraisal as condition precedent to suit; appointment and authority of appraisers and umpire; enforceability of award

Summary: In *Caledonian*, the insured sought coverage for certain goods destroyed in a fire. The principal issue in the case was the effect and legal consequences of the policy's appraisal provision, which stated, in relevant part:

> Said ascertainment or estimate shall be made by the insured and this company, and, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company. * * * In the event of disagreement as to amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss

Id. at 14-15. Following a disagreement as to the amount of loss, the insured and the carrier each selected an appraiser, then, shortly after the appraisal process began, jointly selected an umpire. Shortly thereafter, one of the appraisers withdrew. *Id.* at 15. In his absence, the remaining appraiser and the umpire completed the appraisal and issued an award without the approval of the withdrawn appraiser. *Id.* The court held the award unenforceable on the basis that "th[e] award is not in accordance with the stipulations of the policy, [which] required that the appraisers, **acting together**, should estimate the loss, and, **when they failed to agree**, their differences were to be submitted to the umpire." *Id.* at 15 ("The umpire had no authority to act, except when they differed in their estimates.").

Further, the court noted that "[*i*]*ndependently of the distinct requirement of the policy*, the law would require combined action by the appraisers who were selected by the parties. They occupied the position of arbitrators, and with respect to the duties of arbitrators the law is fully settled … All must be present throughout each and every meeting, equally whether the meeting before hearing the evidence or arguments of the parties or for consultation or determination upon the award." *Id.* (emphasis added) (quotations omitted).

With respect to the appointment of the umpire, the court held that "the fact that the umpire was not chosen until after the appraisement had been begun would not have invalidated the award," reasoning that "[t]he substantial requirement was that he should decide the differences of judgment between the appraisers … [and] [a]lthough the direction as to his

appointment was not strictly followed … the variation did not interfere with any of the duties which he was appointed to perform…."

Finally, the court noted that, in the event of a disagreement as to amount of loss, submission to appraisal is a condition precedent to payment under the policy and a suit by the insured for such payment. *Id.* Moreover, if the insured either refuses to appoint an appraiser, fails to appoint an appraiser in good faith, or if the appraisal otherwise fails through fault of the insured, the insured is precluded from bringing suit on the policy. *Id.* at 15-16 ("If the insured should refuse to perform this duty, he would be disabled to recover in a suit on the policy….").

Relevant Holdings:

(1) A policy's appraisal provision is an enforceable condition precedent to payment or suit under the policy.

(2) Under the policy and common law, the two disinterested appraisers must decide the amount of loss, and only upon disagreement as to that amount does the umpire have authority to render an opinion.

(3) Failure to appoint an umpire prior to the commencement of the appraisal process is not fatal to an appraisal award, so long as the timeliness of his or her appointment does not interfere with his or her ability to render an opinion in the event of a disagreement between the two appraisers.

(4) If an appraisement fails without the fault of the insured, the failure would not be any impediment to their right of recovery, if they could maintain their suit on other grounds.

***Connecticut Fire Ins. Co. of Hartford v. Cohen*, 55 A. 675 (Md. 1903)**

Topics: Compliance w/ appraisal provision; appraisal as condition precedent to suit; appointment of umpire; enforceability of award

Summary: *Cohen* involved a claim under a $2,000 fire insurance policy intended to cover the insured-retailer's merchandise. *Id.* at 675. Following a fire at the insured's store, the insured were unable to agree on the amount of loss, and an appraisal dispute arose involving the following policy language:

> [I]n the event of a loss by fire to the insured goods and a disagreement as to the amount of the loss, it shall be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, the two so chosen to first select an umpire, and the appraisers then to estimate and appraise the loss, and, failing to agree to submit their differences to the umpire, the award in writing of any two to determine the amount of the loss.
>
> ***

> [T]he loss shall not become payable until 60 days after due notice and proof, including an award by appraisers when appraisal has been required…. [N]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire

Id. at 676. Both parties appointed a disinterested appraiser, and the appraiser for the insured provided the names of two qualified umpires while the appraiser for the insurer suggested one. *Id.* After each party rejected the other's suggestions, the appraisers refused to suggest additional names and no further attempts were made to proceed with the appraisement. Having failed to come to a resolution after nearly two months, the insured brought suit on the policy.

The insurer contended that the insured was precluded from bringing suit because an appraisal was required as a condition precedent to any suit on the policy. The insured, in turn, responded by claiming that it was the insurer who had abandoned the appraisal process. The insurer, in turn, placed the blame on the insured, arguing that the insured's appraiser unreasonably disagreed with the insurer's candidates for umpire, and thus was entitled to a verdict. The court, while acknowledging that an appraisal provision is ordinarily a condition precedent to coverage, the failure of such appraisal due to the conduct of the appraisers, and without fault of the insured, will not preclude suit under the policy:

> The cases all agree that, when the policy provides for ascertaining the amount of loss by appraisement, both the insured and the insurer, who have submitted the amount of a loss to appraisement, must act in good faith, and each must do his part to have the appraisement completed; but … the failure of an appraisement through the conduct of the appraisers, without the fault of the insured, [does not] interpose[] any impediment to [the insured's] right to recover on his policy

Id. at 678. Moreover, this proposition holds true irrespective of whether the appraiser at fault was appointed by the insured or the insurer. *Id.*

Relevant Holdings:

(1) The insured may, when the policy provides for an appraisement, be estopped from bringing his suit by his own conduct in reference to the appraisement; but, if the insured's conduct in that connection be free from fault, he is not estopped from suing by the failure of the appraisement from other causes.

(2) The insured does his part toward the success of the appraisement by uniting in good faith in the selection and appointment of the appraisers, and furnishing them all needed facilities and opportunities for the inspection and examination of the insured property and the ascertainment of its value, and then abstaining from all attempts to influence or interfere with them in the discharge of their duty.

***Home Ins. Co. of New York v. M. Schiff's Sons*, 64 A. 63 (Md. 1906)**

Topics: Authority of umpire; compliance with appraisal provision; prejudgment interest

Summary: *M. Schiff's Sons* involved a dispute regarding the enforceability of an appraisal award following a fire at the insured property resulting in damage to insured merchandise. The policy provided, in relevant part, that:

> In the event of a disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage, and, failing to agree, shall submit their differences to the umpire; **and the award in writing of any two shall determine the amount of such loss**

Id. at 64 (emphasis added). Two appraisers, Dingle and Cooley, and an umpire, Straus, were duly appointed by the parties and entered into the following Appraisal Agreement:

> Appraisal Agreement. It is hereby agreed by M. Schiff's Sons, of the first part, and the Home Insurance Company of New York, N. Y., and other insurance companies signing this agreement, each acting for itself and each a party of the second part, they having failed to agree as to the amount of loss and damage by fire, which occurred 15th day of November, 1904, sustained by the parties of the first part herein named, to the property described in the policies of insurance issued to said parties of the first part by the parties of the second part, that John S. Dingle and Charles A. Cooley, together with a third person to be first appointed by them as required by said policies of insurance, **who shall act as umpire on matters of difference only**, shall appraise and estimate the actual cash value of, and the loss and damage by fire to, the property described in said policies as follows: On stock of ready-made clothing, piece goods and tailors' trimmings, and on store furniture and fixtures, contained on the first and second floors and in cellar of the four-story brick building, situate No. 121 North Eutaw street, and on first floor of building No. 123 adjoining and communicating, Baltimore, Md. Building is otherwise occupied for the manufacture of ladies' cloaks and suits. On patterns.

Id (emphasis added). Soon thereafter, the appraisers and umpire traveled to the insured property to assess the value of the damaged property. The appraisers generally agreed on the value of most damaged items, but were unable to agree on the value of certain others. Following the inspection, Dingle (appraiser) went home, while Cooley (appraiser) and Straus (umpire) went to Straus' office where they rendered an award of $10,460.33 in the absence of Dingle.

The insurer contended that the award was conclusive as to the extent of its liability. The court disagreed, but first noted that under the appraisal clause of the policy, the umpire had the authority, in the event of a disagreement between the two arbitrators, to render an enforceable

award with the consent of only one of the two appraisers. *Id.* at 65 ("[Under the policy's appraisal provision], [t]he appraisers are … together to estimate and appraise the loss … and, failing to agree, are to submit their differences to the umpire … [and] the written award of any two shall be final"). Recognizing that the policy's appraisal provision and the parties' subsequent appraisal agreement must be read together, the court found that the appraisal agreement – providing that the umpire "*shall act as umpire on matters of difference only*" – limited the authority of the umpire to situations where the appraisers disagreed. *Id.* at 66. Because "Straus, when he was chosen as umpire by the two appraisers, was thereby … authorized to act upon and decide only the matters on which appraisers failed to agree," the award made by one of the appraisers and the umpire only, and covering matters as to which the appraisers did not differ, did not conform to the parties' appraisal submission and was not binding.

Relevant Holdings:

(1) The authority of the umpire is governed by the agreement(s) between the insured and the carrier.

(2) When an umpire is chosen by the two appraisers (or the insured and the insurer), and is invested with the power and authority only of an "umpire," in the strict sense of that term, the umpire is authorized to act upon and decide only the matters on which the appraisers fail to agree.

(3) Where a policy provides for an appraisal by arbitrators in case of a disagreement as to the amount of loss, the failure of the appraisers to render a proper and legal award, without the fault of the insured, does not affect his right to maintain an action on a policy.

(4) Where a fire policy provides that, when an appraisal has been required, the award of the appraisers must be furnished to the company before the loss becomes payable, an irregular and illegal award by appraisers does not affect the right of the insured to recover interest upon the loss after the time fixed by the policy for payment, in case there is no appraisal.

***Shawnee Fire Ins. Co. of Topeka, Kan., v. Pontfield*, 72 A. 835 (Md. 1909)**

Topics: Compliance w/ appraisal provisions; appraisal as condition precedent to suit

Summary: In *Shawnee*, the insured and its insurer were unable to agree on the amount of loss sustained when the insured's property was damaged by fire, and in accordance with the following provision, submitted their dispute to appraisal:

> In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall each select a competent and disinterested umpire; the appraisers together shall then

> estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expense of the appraisal and umpire. *** No suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Id. at 835. In addition to the policy's appraisal provision, the parties agreed that the appraisers selected by the parties were to "appoint a competent and disinterested umpire, to whom they were to submit 'matters of difference only."

After failing to select an umpire after several months, the insured brought suit against the carrier. *Id.* The insurer averred that suit was not ripe because the appraisal was still pending and an award had not yet been obtained. The insured countered by pointing out that the failure of appraisal was not the insured's fault, and that the insurer abandoned the process before the insured brought suit. The court held that "unless the insured is responsible for the failure of appraisement, he is entitled to recover on his policy," reasoning that the policy is the source of the insured's right to bring suit, and "if the insured in good faith complies with its terms … his right to maintain the action is complete." *Id.* at 836. Specifically, the court reasoned that "[t]he primary obligation of the insurer is to pay the loss, and it is the right of the insured to enforce that obligation. The agreement to submit to appraisement only provides a means of ascertaining the loss. If that means fails without his fault, the rights of the insured under his policy are not by reason thereof forfeited." *Id.* Finding no evidence that the failure of appraisal was attributable to the insured, the court held that the suit against the carrier was properly before the court.

Relevant Holdings:

(1) It is the duty of both parties to a contract of insurance, which provides, in case the insured and insurer cannot agree as to the amount of loss, for the submission of the question of loss to arbitration, to act in good faith, and to make a fair effort to carry out such provision and accomplish its object.

(2) Where the failure to secure an award after submission to arbitration is due to the fault of the insured, the absence of an award is a bar to an action on the policy; but, where it is due to the fault of the insurance company or its appraiser the insured may bring suit on his policy without an award.

(3) If appraisal fails because the arbitrators cannot agree upon an umpire within a reasonable time without insured's fault, he may sue on the policy, even though the appraisement has not been abandoned or waived by the company.

a. Reasoning: Suit was brought four months after the loss, and more than two months after the selection of the appraisers. The insurer's appraiser refused to agree on an umpire and refused to suggest an alternative with knowledge of

the type of goods at issue. The court found the two month delay unreasonable.

***Schreiber v. Pac. Coast Fire Ins. Co.*, 75 A.2d 108 (Md. 1950)**

Topics: Qualifications of appraiser; enforceability of award; standard of review; prejudgment interest

Summary: In *Schreiber*, the insured disputed the value of its property as determined at an appraisal conducted pursuant to the policy's appraisal provision, which stated, in relevant part: "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…." Specifically, the insurer attempted to invoke the policy's co-insurance provision – providing for a reduction in coverage to the extent the property was not insured for its full value – and the insured contested the amount and validity of the appraisal award on several grounds.

First, the insured disputed whether the appraiser appointed by the insurer, who was employed as an appraiser by several other insurance companies, was "disinterested," as required by the policy. The court disagreed, holding that "the mere fact of other employment by insurance companies does not, as a matter of law, disqualify one from selection as 'a disinterested appraiser.'" *Id.* at 110.

Second, the insureds contended that the appraisal was invalid because the appraisers appointed an umpire despite agreeing on the amount of loss. This, too, the court rejected, holding that only because all three ultimately agreed as to the amount of loss did not alter the fact that the two appraisers first disagreed.

The insured also argued that the method by which the appraisers and the umpire arrived at their award – taking the combined average of the three individuals' appraisals – was improper, rendering the award valid. The court again disagreed, noting that if "two … appraisers strike a mean between the opposing claims of the parties and then adopt it as their appraisal, this is not unlawful, though it might be if they had agreed in advance to accept the mean." *Id.* Because "[t]here [was] no evidence that these appraisers agreed to be bound by the result of their computations or otherwise subordinated their judgment to the fall of the dice," the court upheld the validity of the award. *Id.* at 111.

Finally, the insured argued that the appraisers and umpire did not consider the proper evidence of value when determining the "actual cash value" of the damaged property. The court responded by noting that "the evidence of value on which the award was based is not reviewable [by the Court]." *Id.* The court further held that "[i]t is a fundamental principle that where the parties to a dispute decide of their own accord to submit their dispute to arbitration without restriction or condition, the award on the subject matter, in the absence of fraud or mistake, is

binding and conclusive upon the parties." Moreover, the court clarified that "[w]here the award finds facts it is conclusive, where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one was made, could have been corrected in the court below, and can be corrected here. Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be distinctly shown, the parties must abide by the award." *Id.* at 112-13. As such, the award was upheld in its entirety and, because the insured attempted to set aside the appraisal, the insured was not entitled to pre-judgment interest on the amount of the award. *Id.* at 113 ("Since plaintiffs did not accept the appraisal but sought to set it aside, it was not certain that plaintiffs would ultimately recover as much as they would under the appraisal. If the appraisal had been set aside, the question of value would have been open, and the court could not say in advance that the verdicts would be more or less than those based on the appraisal.").

Relevant Holdings:

(1) The mere fact of other employment by insurance companies does not, as a matter of law, disqualify one from selection as "a disinterested appraiser."

(2) If two appraisers and an umpire strike a mean between the opposing claims of the parties and then adopt it as their appraisal, this is not unlawful, though it might be if they had agreed in advance to accept the mean.

(3) The rule restricting and preventing judicial review of errors of fact or of law in an award of arbitrators or appraisers is applicable to an appraisal under the usual appraisal clause in a fire insurance policy.

(4) It is a fundamental principle that where the parties to a dispute decide of their own accord to submit their dispute to arbitration without restriction or condition, the award on the subject matter, in the absence of fraud or mistake, is binding and conclusive upon the parties.

(5) The court will not review the findings of law and fact made by arbitrators, or substitute its judgment for theirs. Arbitrators are expected to frame their award on broad views of justice, which may sometimes deviate from strict rules of law. Their good faith in the discharge of their duties will be presumed, and their award will not be disturbed unless it clearly appears that they were influenced by partiality or corruption.

(6) A mistake which will be sufficient to avoid the award must be one that is plain and palpable, such as an erroneous computation or calculation of the amount, and the like

(7) Where the award finds facts it is conclusive, where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one was made, could have been corrected in the court below, and can be corrected here. Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be distinctly shown, the parties must abide by the award.

(8) An insured is not entitled to pre-judgment interest on an appraisal award where the insured disputes the validity of such award.

***Aetna Cas. & Sur. Co. v. Ins. Com'r*, 445 A.2d 14 (Md. 1982)**

Topics: Distinction between arbitration and appraisal; compelling appraisal; appraisal as condition precedent to suit

Summary: The insured, the Archdiocese of Baltimore, sought coverage for a near total loss to its property due to a fire. The insurer and the insured were unable to agree on the amount of loss, and the insured invoked the policy's appraisal clause, which stated, in relevant part: "*In case the insured and this Company shall fail to agree as to the actual cash value of the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser*." *Id.* at 14 (emphasis supplied). The insurer, however, refused to submit to appraisal, contending that the dispute arose out of issues of coverage. In a declaratory judgment action filed by the insurer, the insurer took the position that an insured could not invoke a policy's mandatory appraisal provision against its insurer. The Court of Appeals of Maryland disagreed, holding that "the appropriate principle to be applied is that ordinarily an insured may compel an insurer to submit to appraisal., reasoning that "[t]he plain language of the appraisal clause, the need to preserve the insured's bargained for benefit, and the legislative policy in favor of enforcement of executory agreements to arbitrate, dictate this result." *Id.*

With respect to the arbitration clause of the policy, the court emphasized that the clause "expressly provides that in the event of a failure to agree on the amount of loss, on the written demand of either the insured or the insurer, each shall select an appraiser." *Id.* at 19 The court found that such "plan and unambiguous" language "mandates that both the insured and the insurer submit to appraisal upon the demand of either, thereby assuring that the insured as well as the insurer has a contractual right to prompt an inexpensive determination of the amount of loss." *Id.* Moreover, the Court reasoned that "[t]hat contractual right, for which the insured bargained and paid premiums, can be preserved only if the insured is enabled to compel the insurer to submit to appraisal." *Id.*

Additionally, the court found that the provisions of the Maryland Uniform Arbitration Act[1] (the "Act") are equally applicable in the appraisal context, and that the court's decision was in accord with the legislative policy inherent in the Act that "executory agreements to submit to [appraisal] be enforced." *Id.* at 20, 21 ("Thus, our holding that ordinarily an insured can compel an insurer to submit to appraisal when the insurer refuses to comply with a mandatory appraisal clause is consonant with Maryland's legislative policy favoring enforcement of executory agreements to arbitrate.").

Relevant Holdings:

[1] Md. Code, Cts. & Jud. Proc. §§ 3-201, et seq.

(1) An appraisal provision providing for appraisal where there is a disagreement as to the amount of loss upon the written demand of either the insured or the insurer allows the insured to compel its insurer to submit to appraisal.

    a. Reasoning: The plain language of the appraisal clause, the need to preserve the insured's bargained for benefit, and the legislative policy in favor of enforcement of executory agreements to arbitrate, dictate this result.

(2) Notwithstanding the distinctions between an appraisal under an insurance policy appraisal clause and arbitration, appraisal is analogous to arbitration, and thus arbitration law applies equally to appraisal clauses in insurance policies.

(3) Under an insurance contract providing that an insured and an insurer shall submit to appraisal when they cannot agree as to the amount of loss, it is the duty of both parties to act in good faith and to make a fair effort to carry out such provision and accomplish its object.

(4) Under an appraisal clause requiring the insured and insurer to submit to appraisal upon disagreement as to the amount of loss, a determination by the appraisers of the amount of the loss is a condition precedent to a suit on the policy by the insured

(5) Where the failure to secure an award after submission to arbitration is due to the fault of the insured the absence of an award is a bar to an action on the policy, but where it is due to the fault of the insurance company or its appraiser the insured may bring suit on his policy without an award.

***Brethren Mut. Ins. Co. v. Filsinger*, 458 A.2d 880 (Md. 1983)**

Topics: Compelling appraisal; enforceability of award; review of award; prejudgment interest

Summary: In *Filsinger*, the insured's property was destroyed by a fire, and the insured sought to recover under two separate policies – a policy issued by Brethren Mutual Insurance Company ("Brethren") providing for payment of "actual cash value" up to $30,000.00 and another issued by Erie Insurance Exchange with policy limits of $35,000.00. The insured submitted a sworn proof of loss alleging an actual cash value loss of $82,240. Brethren, disagreeing with the insured's valuation, invoked the policy's appraisal provision, which stated, in relevant part:

> 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.

Id. at 881-82 (emphasis in original). In addition to the policy's appraisal provision, the insurer asked the insured to execute a form entitled "Agreement for Submission to Appraisers," instructing the appraisers to determine "Sound Value," defined to mean "actual cash value of the property prior to the loss with proper deduction for appreciation." *Id.* at 882. The insured refused to sign, and filed suit against Brethren for its failure to pay the insured's claim, seeking the actual cash value of the property, plus interest. *Id.* The insurer responded by filing a motion to dismiss on the basis that the action was premature in that the appraisal had not yet been completed. *Id.* Prior to the court's ruling on Brethren's motion, appraisers were appointed, and they determined the actual cash value to be $69,000 and the amount of the loss to be $66,000.

Relying on the unexecuted "Agreement for Submission to Appraisers," Brethren attempted to apply a fifteen percent depreciation factor that was not considered by the appraisers. *Id.* The insurer contended that the failure of the appraisers and umpire to make a deduction for depreciation from their findings of replacement value constituted a violation of the terms of the policy and a mistake of law, and that the trial court erred in refusing to review the award based on standards applicable to arbitration provisions.

The court first addressed the insurer's contention that principles applicable to arbitration are inapplicable in the context of appraisal. Citing *Aetna Cas. & Sur. Co. v. Ins. Com'r*, 445 A.2d 14 (Md. 1982) and *Schreiber v. Pac. Coast Fire Ins. Co.*, 75 A.2d 108 (Md. 1950), the court held that provisions applicable to arbitration are equally applicable in the appraisal context. Moreover, the court affirmed that "[e]ven if a mistake of law had been committed by the appraisers, the error would not be susceptible to review by the courts of Maryland" unless "[the appraisers] acted fraudulently, went beyond the scope of the issues, or [] the proceedings lacked procedural fairness." *Id.* at 883-84. Finding that the insurer failed to sustain this burden, the court refused to review the appraisal award.

Next, the court addressed the insurer's argument that the failure of the appraisers and umpire to account for depreciation was in violation of the policy. Holding that it was not, the court emphasized that the policy required the appraisers to state separately actual cash value and loss to each item, but "d[id] not command that depreciation shall be deducted." *Id.* at 884. Moreover, the court rejected the insurer's argument that the unexecuted "Agreement for Submission to Appraisers" which requires depreciation, was intended by the parties to govern the appraisal, noting that the insured never agreed to be bound thereby.

Lastly, the court addressed whether the insured is entitled to pre-judgment interest as of the date of the insurer's denial. The court first noted that, under Maryland law, "[i]f the contractual obligation be unilateral and is to pay a liquidated sum of money at a certain time,

interest is almost universally allowed from the time when its payment was due." *Id.* The court also noted that an award of pre-judgment interest is in the discretion of the jury, or where there is no jury, the trial court, and that the party disputing the award bears the burden of establishing that the award of pre-judgment interest was an abuse of discretion. *Id.* at 885. Rejecting the insurer's argument that, because it proffered a good faith defense it should not be liable for prejudgment interest, the court affirmed the award in favor of the insured. *Id.* ("Regardless of an insurer's good faith denial of coverage, a plaintiff is entitled to recover interest from the date coverage was denied.").

Relevant Holdings:

(1) Even if mistake of law was committed by appraisers in appraising property destroyed by fire, that error would not be susceptible of judicial review unless appraisers acted fraudulently, went beyond scope of issues or proceedings lacked procedural fairness.

(2) Form entitled "Agreement for Submission to Appraisers" which defined sound value as actual cash value of property prior to loss with proper deduction for depreciation was not referred to in fire policy, nor was it ever agreed to by insureds and, therefore, when appraisers determined value of property destroyed by fire, they were not required to deduct depreciation.

(3) Regardless of insurer's good faith denial of coverage, the insured is entitled to recover interest from date coverage was denied, and a trial court's award of such interest will be reviewed only for abuse of discretion.

***Wausau Ins. Co. v. Herbert Halperin Distribution Corp.*, 664 F. Supp. 987 (D. Md. 1987)**

Topics: Scope of appraisal

Summary: In *Herbert Halperin Distribution Corporation*, the insureds discovered that a portion of the roof of an insured building had collapsed. *Id.* at 988 After conducting an inspection, an independent consulting firm concluded that the damage was caused by long-term exposure to water. *Id.* Wausau claimed that it was not liable to the insureds for the entire loss, citing policy exclusions for damage caused by faulty design, construction or operational deterioration and wear and tear. *Id.* Wausau instead offered to pay $56,833.59, which represented its evaluation of the immediate and direct damage from the partial collapse of the roof. *Id.* The insureds rejected Wausau's offer, contending that Wausau is responsible for far more than the $56,833.59 because it is structurally impossible to repair one area of the roof without repairing and replacing the entire roof. *Id.* The insureds then sought to invoke the policy's appraisal provision which stated, in relevant part:

> 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 disinterest 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

Id. at 989 n.1.

Specifically, the insured argued that the parties' dispute fell within the terms of the appraisal provision because it involved "the actual cash value or the amount of loss … [and] the only matters not subject to appraisal are those external to the actual occurrence such as issues of fraud in the insurance application, failure to cooperate, non-compliance with policy modification clauses, lack of ownership of the property, lack of an insurable interest, lack of jurisdiction, the agent's lack of authority to issue the policy and the like." *Id.* at 988. In response, the insurer sought a declaratory judgment that the appraisal provision was inapplicable, arguing that "the only issue subject to appraisal is the monetary valuation of items which the parties agree are covered by the policy." *Id.* The court rejected both arguments, reasoning that "[t]o so read the appraisal clause would be to make the term "the amount of loss" simply redundant to the term 'the actual cash value.'" *Id.*

Ultimately, the court determined that the parties' dispute – concerning whether the insurer was liable to pay only for immediate and direct damage for partial collapse of the insured's roof or for a greater amount – was not subject to appraisal under the policy's appraisal clause. *Id.* The court, however, cited *Aetna Casualty & Surety Co. v. Insurance Commissioner*, *supra*, as an example of what would constitute an "amount of loss" question, noting that "[t]here, one of the primary questions in dispute was whether or not the insured was attempting to recover under the policy not a loss which had been suffered as a result of the occurrence but improvements to the property which had not before existed." *Id.* at 888-89 ("If Wausau was disputing that as a factual matter a larger area than that immediately damaged by the occurrence had to be repaired in order to repair the immediate damage itself, this would constitute an 'amount of loss' question. However, the Insureds have asserted (and Wausau apparently does not contest) that this fact is not in genuine dispute.").

Relevant Holdings:

(1) Dispute between insured and insurer as to whether insurer was liable to pay only for immediate and direct damage from partial collapse of roof or for a much greater amount because it was structurally impossible to repair one area of roof without repairing and replacing entire roof concerned actual cash value or amount of loss

which under pertinent policy clause providing for appraisal of disputes concerning "amount of loss" was not subject to appraisal process.

***Meyer v. State Farm Fire & Cas. Co.*, 582 A.2d 275 (Md. 1990)**

Topics: Appraisal as condition precedent to sui; constitutionality

Summary: In *Meyer*, the insured submitted a claim for fire damage to its home. Following a disagreement as to the amount of that loss, the insurer sought to invoke the policy's appraisal provision, which provided, in relevant part that "[n]o actual shall be brought unless there has been compliance with the policy provisions." *Id.* at 275. The insured filed suit, arguing that the appraisal provisions were invalid as a violation of their Constitutional right to a jury trial under Maryland Constitution Declaration of Rights, article 23. *Id.* Specifically, the insureds argued that although a right to trial may be waived, such waiver must be knowing, voluntary, and intentional, and because the policy was a contract of adhesion and the insureds were unaware that it contained the appraisal provision, there was no effective waiver of their Constitutional right. *Id.* at 276-77.

The trial court granted the insurer's motion to dismiss for the insured's failure to comply with the policy's appraisal provision prior to filing suit, and the insured appealed. The Court of Special Appeals of Maryland framed the question as follows:

> Is the enforcement by the courts of policy provisions which make an appraisal, if invoked by the insurer, a condition precedent to suit by the insured, an unconstitutional deprivation of the right to trial by jury?

The court answered in the negative, emphasizing that (1) appraisal provisions do not remove all jury trial rights, only those regarding the dollar amount of the loss under the policy; (2) the reluctance to find waiver of basic Constitutional rights must be weighed against the equally well-established view that favors and enforces agreements to arbitrate disputes – an election that the law encourages; (3) the fact that a contract is one of adhesion does not mean that either it or any of its terms are invalid or unenforceable unless they are unconscionable; and (4) if the "weaker" party to such "contracts of adhesion" were able to escape the duty to arbitrate on the premise that he was unaware of the arbitration clause .. the viability of this favored method of dispute resolution would be significantly circumscribed." *Id.* at 277-79.

Relevant Holdings:

(1) An appraisal provision of an insurance policy that prohibits insureds from bringing a suit against the insurer without compliance with policy provisions was not unconscionable and did not deprive insureds of right to trial by jury.

(2) Fact that contract is one of adhesion does not mean that either it or any of its terms are invalid or unenforceable, though a fraudulently induced arbitration clause in an insurance contract will not be enforced.

***McNeal v. Aetna Cas. & Sur. Co. of Illinois*, 165 F.3d 19 (4th Cir. 1998)**

Topics: Enforceability of award

Summary: In *McNeal*, a fire damaged a restaurant owned and operated by the insured. *Id.* at 19. The insured submitted a claim to his insurer, Aetna Casualty & Surety Company of Illinois ("Aetna"), who adjusted the claim directly with the owner of the real property, Edgewater Partnership ("Edgewood"), ultimately paying Edgewater $214,861.26. *Id.* Dissatisfied with the manner in which his claim was adjusted, the insured filed suit against Aetna for breach of contract and tortious failure to pay an insurance claim. *Id.* Aetna quickly moved for partial summary judgment, and demanded an appraisal pursuant to the policy's appraisal provision. *Id.*

The district court found, in relevant part, that Aetna's adjustment of the building loss with Edgewater was appropriate, but that McNeal would have the opportunity during the appraisal process to prove that he was entitled to additional payment. *Id.* Following the district court's ruling, the parties attended an appraisal hearing in which the appraisers and umpire unanimously awarded the insured $76,921, consisting of: $5,000 for the building; $69,040 for business and personal property; $300 for exterior signs; and $2,500 for valuable papers. *Id.* Because Aetna agreed to honor the appraisal, the judge entered a conditional order dismissing the case. *Id.* Unhappy with the amount of the appraisal award, however, the insured filed a motion to reopen the case on the basis that the appraisers had "exceeded their powers" by issuing an award that did not conform to the district court's rulings on Aetna's motion for partial summary judgment. The issue before the court was whether the insured established "good cause" to re-open the case based on the alleged deficiencies in the appraisal award.

Finding in favor of Aetna, the court first noted that "Under Maryland law, in the absence of fraud or mistake, an appraisal award under the usual appraisal clause in a fire insurance policy is binding and conclusive on the parties … [because] an award by [appraisers] is the decision of a tribunal which the parties themselves have created, and by whose judgment they have mutually agreed to abide." *Id.* at 20 (quotations and citations omitted). The court then rejected the insured's arguments that the appraisers "exceeded their power" by "incorrectly determin[ing] that [the insured] did not own certain improvements on the premises" notwithstanding the district court's finding to the contrary and by "determining whether [the insured] had the ability to remain in business after the fire" – an issue that, according to the insured, was the province of the district court. In so holding, the court reasoned that the district court merely said that the insured could present evidence of building damage and lost income at appraisal and that the insured did present such evidence. *Id.* ("Thus, [the insured] has not alleged errors which warrant overturning the appraisal award. Accordingly, we hold that [the insured] has failed to produce good cause for reopening the case….").

Relevant Holdings:

(1) "Under Maryland law, in the absence of fraud or mistake, an appraisal award under the usual appraisal clause in a fire insurance policy is binding and conclusive on the parties … [because] an award by [appraisers] is the decision of a tribunal which the parties themselves have created, and by whose judgment they have mutually agreed to abide."

***Hartford Fire Ins. Co. v. Adcor Indus., Inc.*, 158 F. App'x 430 (4th Cir. 2005)**

Topics: Enforceability of award

Summary: In *Adcor Industries, Inc.*, the insured sought coverage for damage to a storage facility that collapsed under the weight of an accumulation of ice and snow. *Id.* at 430-31. The insured and its carrier, however, were unable to agree on the value of the insured's claim for business personal property and the insured demanded an appraisal under the terms of the policy. *Id.* at 431. Each party selected an appraiser, and the appraisers jointly selected an umpire to render a decision in the event the appraisers failed to reach an agreement as to the amount of loss. *Id.* Ultimately, the appraisers could not agree on a mutually acceptable value and submitted the disagreement to the umpire. *Id.* The umpire sided with the insured's appraiser, and together issued an award of $11,217.67 in favor of the insured. Dissatisfied with the amount, the insurer filed a declaratory judgment action seeking to adjust the appraisal award due to alleged "errors of law, erroneous calculations, and improper methodology." *Id.* (internal quotations omitted).

The court held in favor of the insured, emphasizing that "[t]he Maryland Court of Appeals has delineated a narrow set of cases in which courts may set aside appraisal awards:

> When it is sought to set aside an award upon the ground of a mistake committed by arbitrators, it is *not sufficient to show that they came to a conclusion of 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 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 avoid the award must be one that is plain and palpable,* such as an erroneous computation or calculation of the amount, and the like"

Id. (citations omitted). Specifically, the court rejected the insurer's contention that the umpire's final appraisal award "erroneously included sales taxes, used the wrong quote to value certain raw materials, used a replacement-value measure rather than the actual-cash-value measure required by the policy, and erroneously applied [the insured's] appraiser's own methodology to value finished goods … [which] caused the appraisers to reach legal, coverage conclusions which the court can correct if erroneous." *Id.* Moreover, because "the appraisal awards were unreasoned, i.e., they listed only numbers without providing a basis for those figures," the insurer's "proof" which consisted of an affidavit from the accountant who assisted the insurer's appraiser in the preparation of his appraisal, was insufficient. *Id.* ("Because of his lack of direct knowledge, [the accountant's] affidavit amounts to little more than a recitation of [the insurer's]

allegations." *Id.* Accordingly, the court affirmed the district court's grant of summary judgment in favor of the insured.

Relevant Holdings:

(1) An appraisal award may be modified or set aside only "[w]hen it is sought to set aside an award upon the ground of a mistake committed by arbitrators, it is *not sufficient to show that they came to a conclusion of 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 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 avoid the award must be one that is plain and palpable*, such as an erroneous computation or calculation of the amount, and the like."

a. *Citing Schreiber v. Pacific Coast Fire Ins. Co.*, 75 A.2d 108, 112 (Md. 1950); *Aetna Cas. & Sur. Co. v. Insurance Comm'r*, 445 A.2d 14, 20 (Md. 1982), *supra*.

***Rodeheaver v. Hartford Ins. Co. of The Midwest*, 2006 WL 2225294 (D. Md. July 31, 2006)**

Topics: Appraisal as condition precedent to suit; compliance with appraisal provision

Summary: In *Rodeheaver*, the main dwelling of the insured's home and the personal property contained therein were completely destroyed by a fire. *Id.* at *1. A week later, the insurer met with the insured to survey the damage, determining that the home and personal property were a "total loss." *Id.* At the insurer's request, the insured submitted an estimate of the cost to rebuild the home. *Id.* Three months later, the insurer notified the insured that the estimate was defective. *Id.* The insured immediately submitted a revised estimate, and the insurer began making payment under the policy. *Id.* By this time, however, the building season had ended and construction on the insured's new home did not commence for nearly a year, and was completed six months thereafter. *Id.* During the nearly two-year period after the fire, the insured continued to contest the insurer's valuation of the replacement cost of the home and personal belongings, as well as the damages the insured suffered as a result of not being able to occupy her home. *Id.* As a result, the insurer invoked the policy's appraisal provision, which stated, in relevant part:

> Appraisal. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent 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 residence premises is located. The appraisers will separately set the amount of loss. 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 loss.
>
> ***
>
> No action can be brought unless the policy provisions have been complied with and the action is started within three years after the date of loss.

Id. at *1, 3. During the initial 20-day period, the insured responded with two letters but did not name an appraiser. Over the next few months, the insured continued to extend the time period in which the insured could name an appraiser, to no avail. Several months later, the insured wrote a letter to the insurer stating that the insured would not submit to the appraisal process unless the insurer first provided answers to the forty-nine questions included in the letter. *Id.* at *2. The insurer never provided answers, and the insured never named an appraiser. *Id.*

The court held that the insured's claims failed as a matter of law, reasoning that "under an insurance contract providing that an insured and an insurer shall submit to appraisal when they cannot agree as to the amount of loss, it is the duty of both parties to act in good faith and to make a fair effort to carry out such provision and accomplish its object." *Id.* at *3 (citations omitted). Thus, "once [the insurer] invoked the appraisal clause … it was [the insured's] obligation to take part in the process before bringing suit…. [and] her refusal to do so [bars] this claim." *Id.*

Relevant Holdings:

(1) Under an insurance contract providing that an insured and an insurer shall submit to appraisal when they cannot agree as to the amount of loss, it is the duty of both parties to act in good faith and to make a fair effort to carry out such provision and accomplish its object. Moreover, under such an appraisal clause, a determination by the appraisers of the amount of the loss is a condition precedent to a suit on the policy by the insured.

***Liberty Mut. Grp., Inc. v. Wright*, 2012 WL 718857 (D. Md. Mar. 5, 2012)**

Topics: Distinction between arbitration and appraisal; appointing neutral umpire

Summary: *Wright* involved a dispute as to the actual cash value of portions of the insured's home and its contents that incurred water damage due to a leaky pipe. *Id.* at *1. Immediately following the loss, the insured obtained a public adjuster and submitted a claim to the insured, asserting losses to his home's contents of an "actual cash value" of $102,106. The insurer responded by quoting the "actual cash value" of the insured's loss at $22,106. The insured sought to invoke the following appraisal provision of the policy:

> **Appraisal .**If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent

> 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 "residence premises" is located. The appraisers will separately set the amount of loss. 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 loss.

Id. (emphasis in original). Pursuant to this provision, both parties selected an appraiser, but the appraisers were unable to agree on an umpire to value the loss. *Id.* As a result, the insurer filed a "Petition to Appoint Neutral Umpire," requesting that the court select an umpire to aid the parties' appraisers in valuing the loss and submitting the names of four candidates. *Id.* The insured moved to dismiss the petition and filed a counterclaim alleging that the insurer breached the policy by filing the petition. The insurer moved to strike the counterclaim, arguing that it had "never filed a claim, cause of action, or allegations against [the insured], therefore giving [him] no basis to file an Answer or Counterclaim." *Id.*

The court construed the insured's motion to dismiss as one predicated on the court's subject matter jurisdiction. *Id.* at *2-3. In holding that subject matter jurisdiction existed over the dispute, the court first noted that the amount in controversy exceeded the jurisdictional minimum of $75,000. The court determined that the amount in controversy was the *difference* between the insured's request for payment of $102,106 on an "actual cash value basis" and the insurer's "actual cash value" valuation of $22,106, or $80,000. *Id.*

Importantly, however, the court recognized that the insured's "jurisdictional argument … goes beyond the traditional questions involving diversity and amount in controversy … [and instead] challenges whether the petition to appoint an umpire constitutes a 'civil action.'" *Id.* According to the insured, "with very limited exceptions – one of which involves the [Federal Arbitration Act ("FAA")] – a 'civil action' does not commence, and a court is thus without jurisdiction, until a complaint is filed." *Id.* "Maintaining that the FAA does not apply to appraisals, the insured contend[ed] that the court lacks jurisdiction over the petition because [the insurer] never filed a complaint."

The court rejected the insured's argument, recognizing that the FAA is applicable to appraisal provisions, and emphasizing that Federal Rules of Civil Procedure 2 and 3, which provide that the only cognizable "form of action" is "civil action," which does not commence until a complaint has been filed, "do not govern where the FAA sets forth 'other procedures' for a petitioner to follow." *Id.* at *4. The court found that the Sections 5 and 6 of the FAA provided "other procedures" for petitioning for the appointment of an umpire; thus, "if the FAA is applicable to this appraisal provision, the fact that [the insurer] has not filed a complaint in accordance with the Federal Rules will not be fatal to its request." *Id.*

The court recognized that "the umpire's involvement in the appraisal process, on its own, does not constitute arbitration and, therefore, does not trigger application of the FAA," but nonetheless held that the appraisal process as a whole constitutes "arbitration" within the meaning of the FAA. *Id.* at *6 ("When viewed on the whole … the entire appraisal process does constitute 'arbitration.'"). Specifically, the court reasoned that "[t]he parties agreed to select 'competent appraiser[s]' if they could not agree on the amount of loss, and their agreement provides a fixed procedure for those appraisers to follow in setting the amount of loss. Submission of the dispute to the appraisers will ultimately settle that issue, as the appraisers—perhaps through involvement of the umpire—will reach a binding decision through that process." *Id.* Moreover, the court found inconsequential the fact that the appraisal process does not settle the parties' entire controversy or require an official adversary proceeding. *Id.* Finally, the court held that "[b]ecause the appraisal provision, on the whole, does constitute 'arbitration' under the FAA, the FAA is applicable to the petition at issue here … [and] although [the insured] requested appointment of an umpire without first filing a complaint, it has complied with the applicable [Federal Rules]." *Id.*

Relevant Holdings:

(1) The appraisal process conducted pursuant to an insurance policy's appraisal provision is an "arbitration" under the FAA because the parties agree to submit their dispute to and be bound by the decision of a third party. As a result, where the appraisers selected by the parties are unable to agree on a neutral umpire, a party may file a "Petition to Appoint Neutral Umpire" in federal court without the need to file a complaint.

(2) In the appraisal context, the amount in controversy for purposes of diversity jurisdiction is derived from the difference between the appraised values of the parties.

Liberty Mut. Group, Inc. v. Wright, 2012 WL 1446487 (D. Md. April 25, 2012)

Topics: Waiver of right to appraisal

Summary: Following the court's denial of the insured's motion to dismiss the insurer's "Petition for Appointment of Neutral Umpire," the court conducted a hearing on the propriety of the court's appointment of an umpire. *Id.* at *2 Specifically, the insured opposed the insurer's request for appointment of an umpire on two grounds: (1) the insurer waived the right to participate in the appraisal process because it failed to appoint an appraiser within the twenty-day window provided by the policy and (2) the umpire candidates proposed by the insurer are either "not competent" to appraise personal property or are "not impartial." *Id.* at *3.

In assessing the insured's claim of waiver, the court reiterated that the Federal Arbitration Act ("FAA") applied to the appraisal provision at issue. *Id.* Moreover, the court noted that "[u]nder the FAA, 'a party loses its right … to arbitrate if it is 'in default in proceeding with

arbitration.'" (quoting 9 U.S.C. § 3). Recognizing that "the party opposing arbitration bears a heavy burden of proving waiver ... [and] any doubts concerning [arbitrability] should be resolved in favor of arbitration," the court nonetheless recognized that "conduct manifesting an abandonment of [the] arbitration forum [itself] can constitute waiver." (internal quotations and citations omitted). The court held that "to waive arbitration in such situations, a party must (1) know of an existing right to arbitration, (2) act inconsistently with that right, and (3) cause prejudice to the opposing party through these inconsistent acts." *Id.*

The insured argued that the insurer "act[ed] inconsistently with" a known right to arbitration by its "express reject[ion] of his request for appraisal … [and] [failing to] appoint[] an appraisal [until] nearly four months beyond the twenty-day window provided in the policy." *Id.* at *4. The court held that it must "look beyond a party's mere statement refusing arbitration to the facts of the particular case in determining whether waiver actually occurred." *Id.* The court ultimately found that the insured failed to meet the "heavy burden" needed to demonstrate that waiver occurred, emphasizing that the insurer's delay was based in part on the insured's failure to comply with other post-loss conditions, including providing proof of loss and allowing an inspection of the property, and thus was not inconsistent with the right to arbitrate. *Id.* at *5 ("[The insured's] refusal to permit inspection of his property at minimum contributed to, if not caused, virtually the entire delay between his initial request for appraisal and Liberty Mutual's appointment of an appraiser.… Accordingly, he has failed to demonstrate that Liberty Mutual waived the right to arbitration.").

Relevant Holdings:

(1) To waive appraisal, a party must (1) know of an existing right to appraisal, (2) act inconsistently with that right, and (3) cause prejudice to the opposing party through these inconsistent acts.

(2) In determining whether a party has acted inconsistently with a known right to appraisal for purposes of waiver, the court should look beyond a party's mere statement refusing appraisal to the facts of the particular case.

(3) An insurance company's unexplained delay in proceeding to arbitration may constitute an act inconsistent with the right to seek arbitration, but any doubts as to whether the insurer's conduct (or lack thereof) is inconsistent with a known right to arbitrate will be resolved in favor of arbitration.

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Cases	
Ascertainment of Loss by Award of Referees—In General	
Vera v. Mercantile Fire & Marine Ins. Co., 216 Mass 154 (1913)	Insurers' failure to nominate referees after receipt by them of insureds' written statements of loss and note that insured was "ready to proceed under the provisions of the policy," is not a waiver by insurer because a plausible construction of insured's notice was that the insured was ready to attempt to agree as to the amount of the loss. Therefore, judgment was for the insurers on that issue and insurers could thus insist on reference as condition precedent to recover on policy.
Goldberg v. Lynn Mfrs. & Merchants' Mut. Fire Ins. Co., 276 Mass. 213 (1931)	Court affirmed finding that the court did not err in granting a directed verdict to the insurance company because the plaintiff insured failed to provide sufficient evidence that he had given the insurance company notice of his loss.
Goldberg v. Lynn Mfrs. & Merchants' Mut. Fire Ins. Co., 276 Mass. 213 (1931)	Fact that insurance company participated in reference to determine amounts of loss, under this section, does not constitute waiver by company of defense to recovery under policy, based upon failure of insured to furnish notice and sworn proof of loss.
Molea v. Aetna Ins. Co., 326 Mass. 542 (1950)	Where insureds executed inventory and appraisal which was intended as appraisal of items of personal property in premises just before fire, to be used as basis of adjustment and not as proof of loss, appraiser for companies "spot checked" inventory and found it correct, another agent for companies visited premises, and no sworn statement of loss was requested, but one was furnished to each company some months after fire, there was no waiver of reference, and unless waived by parties, it was a condition precedent to recovering upon policies of insurance—parties having failed to agree upon amount of loss—and no waiver or excuse was shown. Court found that a written demand for a reference was never made.
Molea v. Aetna Ins. Co., 326 Mass. 542 (1950)	This section imposes on insured the burden of making written demand on company for reference if parties fail to agree as to the amount of loss.
Fox v. Employers' Fire Ins. Co., 330 Mass. 283 (1953)	Purpose of provision for reference to referees made by this section is to provide summary method of establishing amount of loss, and such clause inserted in standard policy should be given reasonable interpretation to carry out that purpose.
Employers' Liability Assurance Corp.	Where theft policy required, in accordance with this section, that questions relative to value of loss should be referred to referees, insurer is not entitled to maintain proceeding for declaratory relief to determine its liability for

v. Traynor, 354 Mass. 763 (1968)	loss before proceeding to reference because purpose of statute is to obviate very type of proceeding which insurer sought to maintain and to expedite equitable settlement of claims, questions of ultimate liability being determinable following action on reference, pending which insurer's rights relative thereto are protected under § 101E. Here, court granted insured's motion to dismiss.
McDonough v. Hardware Dealers Mut. Fire. Ins. Co., 448 F.2d 870 (1971)	Where insurer wrote fire policy without protest to Massachusetts insurance commissioner for his act in approving form requiring it to contain arbitration clause, and then proceeded to arbitration without complaint, its subsequent claim that arbitration clause was unconstitutional, which even if raised seasonably and in proper form, would impose very heavy burden on insurer, was belated, and court would not consider it.
Piper Café Inc. v. Commercial Union Ins. Cos., 27 Mass. App. 317 (1989), review denied, 405 Mass. 1203 (1989)	Oral agreement about amount of insured loss satisfies language of M.G.L. c. 175 § 99, Twelfth, so as to avoid arbitration as condition precedent to insured's initiation of action against insurer.
Agri-Mark, Inc. v. Ins. Co. of N. America, 1990 US Dist LEXIS 8550 (July 11, 1990)	"The substantive protections afforded insureds under MGL c 175 § 99 are also guaranteed to businesses insured under any form of policy for property insurance." M.G.L. c. 175 § 99B (1986).
FCI Realty Trust v. Aetna Cas. & Surety Co., 906 F. Supp. 30 (1995)	In its motion for summary judgment, the insurer contended the failure of the insured to comply with a condition precedent in the insurance policy requiring the submission of claims to a panel of referees pursuant to the Standard Fire Insurance Form prior to the commencement of any suit on the claim required dismissal of the suit. The court granted the summary judgment motion stating that the contract provision, on its face, barred the action because there had been no reference as required, nor was there any waiver by the insurer.
Hawn v. Cambridge Mut. Fire Ins. Co., 14 Mass. L. Rep. 190 (2001)	The insured claimed that there was no dispute as to the amount of damages and the insurer claimed that the insured failed to submit the issue to a board of referees. The court held that the policy, as drafted, created a condition precedent to reference that was not in M.G.L. c. 175 §99. Instead the policy created an option of reference exercisable by the insured. While the insured said that there was no dispute as to the amount of loss, the insured continued to press for full coverage under the policy. Therefore, by the insured's own tacit admissions, the amount of damages remained in dispute.
M.A.S. Realty	The insurer demanded that the insured submit its claim to a reference

Corp. v. Travelers Cas. & Surety Co. of Ill., 196 F. Supp. 2d (2002)	proceeding as required by M.G.L. c. 175 § 99 *et seq*. The insured also demanded a reference proceeding, and then filed suit. The insured claimed that merely filing a reference proceeding satisfied the statutory requirement. The court stayed the action, holding that a reference proceeding had to be concluded before a suit could be brought. The court held that the insured's claim for a declaratory judgment determining what improvements were required by law did not exceed the scope of the referees' authority. Thus the court required that all claims be submitted to a reference proceeding. The court did not dismiss the action because the insured had agreed to submit to a reference proceeding, but merely disagreed with the insurer's statutory interpretation and the scope of the proceedings.
Degen v. Cmty. Assocs. Underwriters of Am., Inc., 23 Mass. L. Rep. 358 (2007)	Because the reference award was conclusive as to the amount of loss due to the fire, but not as to the insurer's ultimate liability, as the insured wished to litigate the issue of whether the insurer fraudulently overstated its claim so as to vitiate the policy and relieve the insurer of liability, the insureds were not entitled to summary judgment as to liability.
Delta Search Labs, Inc. v. Federal Ins. Co., 31 Mass.L.Rptr. 345 (2013)	Insured held to have waived its right to reference where it waited twenty-three months after the loss to demand reference and nearly two years after the loss to submit a proof of loss. Statute requires that a demand for reference be made at least thirty days prior to the two-year anniversary of a loss. In that suit was commenced, the court determined that allowing reference now would likely delay, not encourage, settlement.
Waiver of Reference by Insurer	
Middlesex Mut. Assurance Co. v. Puerta de la Esperanza, LLC, 2011 WL 1361552 (D. Mass.)	No waiver unless in writing. Appraisal survives a finding of breach of contract. Appraisal clause applies to the entire policy, not just to damages caused by fire.
Santos v. Preferred Mut. Ins. Co., 2014 WL 1921246 (D.Mass.)	Insurer waived reference/appraisal requirement in policy by communicating with insured and failing to indicate that it was contesting the amount of the loss.
Lancaster v. General Accident Ins. Co. of America, 32 Mass. App. Ct. 925 (1992)	The question of waiver is one of fact.

C & W Industries, Inc. v. Sentry Ins. A Mutual Co., 2 Mass. L. Rep. 437 (1994)	The insurance company, by failing to comply with the 10 day statutory time limits of a reference request, waived any right to a reference.
McCord v. Horace Mann Ins. Co., 390 F.3d 138 (2004)	The district court granted the insurer's motion on the grounds that the insured failed to comply with a condition precedent in the policy, inserted under M.G.L. c. 175 § 99, that required the amount of loss to be submitted to a panel of referees. There was no question that the insured failed to request a reference proceeding prior to bringing suit. Therefore, absent waiver, the reference condition precedent, pursuant to M.G.L. c. 175 § 99 and the provisions of the policy barred her from bringing suit. The insured contended that the insurer waived its right to a reference by completely denying any liability under the policy. However, the insurer did more than merely deny liability. The insurer also disputed the amount of the loss and repeatedly called attention in its correspondence with the insured to the existence of the reference condition. The insurer's reliance on the reference condition as an affirmative defense and its allegation in its counterclaims that the parties had never reached an agreement on the amount of loss, also indicated a dispute about the amount of loss.
Selection, Appointment, and Qualification of Referees	
Nadeau v. Insurance Co. of Pennsylvania, 238 Mass. 462 (1921)	Where no third referee is ever chosen and no application is made to commissioner, there can be no recovery.
National Fire Ins. Co. v. Goggin, 267 Mass. 430 (1929)	Third referee was appointed by insurance commissioner because referees selected by insurer and insured were unable to select third referee.
Hyder v. Old Colony Ins. Co., 272 Mass. 232 (1930)	Third referee was selected by insurance commissioner.
Hyder v. Old Colony Ins. Co., 272 Mass. 232 (1930)	Under standard reference to referees clause, as provided for by predecessor of this section, which clause was in substantially same form as that now provided by this section, objection that one of named referees had acted in like capacity within four months could be waived by insured by signing of written waiver, but such waiver might be rendered ineffective if incurred, in signing waiver, relied upon misrepresentation of referee as to his not having acted in similar capacity, and if insured, in relying upon misrepresentation,

	had acted as reasonable man.
Fox v. Employers' Fire. Ins. Co., 330 Mass. 283 (1953)	Under terms of reference to them, referees have limited powers.
Scope of Determination and Award of Referees	
Doherty v. Phoenix Ins. Co., 224 Mass. 310 (1916)	Where the submissions of the amount of loss to referees contain no restrictions or conditions, their decision on all necessary questions of law and findings of fact are final.
F & M Skirt Co. v. Rhode Island Ins. Co., 316 Mass. 314 (1944)	Provision of standard form fire insurance policy that, "In case of loss under this policy and a failure of the parties to agree as to the amount of loss," means that if insured claims loss and insurer disputes it either in whole or in part and basis of dispute has nothing to do with amount of loss or fact of loss and no question of liability is involved, case is proper one for arbitration.
F & M Skirt Co. v. Rhode Island Ins. Co., 316 Mass. 314 (1944)	While it is the duty of referees to determine amount of loss and not to determine questions of liability, such referees, as part of their duty to determine amount of loss, may properly arrive at determination that no loss was sustained.
F & M Skirt Co. v. Rhode Island Ins. Co., 316 Mass. 314 (1944)	Reference provides for arbitration not of question of liability, but only for determination of amount of loss sustained by insured in case parties are unable to agree.
F & M Skirt Co. v. Rhode Island Ins. Co., 316 Mass. 314 (1944)	It is the function of the referee to determine amount of loss suffered, and while referees have no power under such reference, to determine whether loss, if suffered, was covered by the policy, or whether policy had ever taken effect, such referees do have the power to determine that no loss has been sustained.
F & M Skirt Co. v. Rhode Island Ins. Co., 316 Mass. 314 (1944)	Where referees found that no loss or damage was sustained by insured, it was not necessary that they should go through empty ceremony of determining "sound value of the property."
Fox v. Employers' Fire Ins. Co., 330 Mass. 283 (1953)	Where amount of loss or damage is referred to referees under standard form reference clause set forth in this section, while it is not within function of referees to determine questions as to ultimate liability under policy, nevertheless, it is amount of loss or damage under policy which referees are to determine, and where policy covers only loss by lightning and not by windstorm, it is function of referees to determine loss by lightning and not

	loss from all causes, including windstorm.
Fox v. Employers' Fire Ins. Co., 330 Mass. 283 (1953)	Where referees are appointed under standard form reference clause set forth in this section, award of referees, in general, must comply in substance and in form with submission agreement.
Fox v. Employers' Fire Ins. Co., 330 Mass. 283 (1953)	Where, after award by referees appointed under standard form reference clause set forth in this section, insured brings action against insurer, claiming that award is invalid, while action is upon policy and not upon award, the award, if valid, is conclusive evidence as to damage or loss, and where there is no evidence that award is invalid, question of invalidity of award should not be left to jury.
Fox v. Employers' Fire Ins. Co., 330 Mass. 283 (1953)	Powers of referees were limited under terms of reference to them.
Fox v. Employers' Fire Ins. Co., 330 Mass. 283 (1953)	"In order to intelligently determine the amount of loss or damage under a given policy, as an incidental step in their deliberation, 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 as far as ultimate liability goes are wholly tentative and in no sense a decision on the underlying questions." *Id.* 287-288.
Cadillac Auto. Co. v. Engeian, 339 Mass. 26 (1959)	Although general rule is that contract clauses limiting forum within which suit is to be brought are unenforceable, clause Twelfth of this section was referred to in support of proposition that person may waive his right to jury trial and may even agree in advance that arbitration will be final.
Harold J. Warren, Inc. v. Federal Mut. Ins. Co., 386 F.2d 579 (1967)	The sole function of referee is to determine amount of loss and not questions of liability and, hence, insurer who goes to reference under statute is not precluded by findings of referees to damages from subsequently commencing action to have policy declared void on grounds of alleged fraud of insured, because such issue of fraud goes to question of ultimate liability, and therefore was not issue within scope of reference.
Employers' Liability Assurance Corp. v. Traynor, 354 Mass. 763 (1968)	Questions as to ultimate liability of insurer for loss are determinable following action on reference, pending which insurer's rights relative thereto are protected.
Augenstein v. Ins. Co. of North	The introductory phrase of the reference clause, "in case of loss under this policy," does not mean that an insurer by joining in a reference should be

America, 372 Mass. 30 (1977)	taken to concede that there was a loss; the context indicates that the meaning is: in case of claimed loss. The clause has the effect of submitting to binding reference the "amount of the loss" as distinguished from the insurer's ultimate liability. The right to determine the amount of loss carries with it the right to determine that none existed.
Augenstein v. Ins. Co. of North America, 372 Mass. 30 (1977)	Where there is no question about the *construction* of the policy, it would follow that the referees' finding would be conclusive of the loss as well as the amount. The referees are still to find the amount of loss in light of their own interpretation of the terms of the policy, but the question of construction would remain open for reexamination in an action on the policy, if one should eventuate.
Church of Christ in Lexington v. St. Paul Surplus Lines Ins. Co., 22 Mass. App. Ct. 407 (1986)	The referees awarded the policy limits plus interest as provided in the interest payable provision of the standard fire insurance policy (M.G.L. c. 175 § 99A). The insurer paid the policy limits, but refused to pay the interest. The trial court awarded summary judgment in the insured's action to recover the interest, and the insurer appealed. The court affirmed the order that allowed the insured's motion for summary judgment because the insurer was bound by the interest provision, notwithstanding a clause in its policy which was more favorable to the insurer. The court ruled that in view of the language used by the insurer in the policy, the insured was entitled to the benefit of the more generous of the two provisions relating to interest. The Appeals Court affirmed the order of the trial court.
FIC v. Klinck, 1993 U.S. Dist. LEXIS 10254 (July 6, 1993)	Decision on issue of fact and amount of loss incurred by the insured had been "finally decided" in the reference proceedings and were thus binding on the parties. Nevertheless, the issue of whether the insured had fraudulently overvalued the loss was beyond the scope of the reference and thus properly decided by the court.
Dorfman v. Cmty. Ass'n Underwriters of Am., Inc., 15 Mass L Rep 566 (2003)	Where an insurer wished a jury to determine a question of loss and prove that this loss was a sham, but this same issue was resolved by a referee, summary judgment, in the amount of the reference award, had to be granted to the insureds.
Degen v. Cmty. Assocs. Underwriters of Am., Inc., 23 Mass. L. Rep. 358 (2007)	Because the reference award was conclusive as to the amount of loss due to the fire, but not as to the insurer's ultimate liability, as the insured wished to litigate the issue of whether the insured fraudulently overstated its claim so as to vitiate the policy and relieve the insurer of liability, the insureds were not entitled to summary judgment as to liability.
Bertrand v. Merrimack Mut.	A decision of a board of referees is final as to the amount of the loss sustained by the insured. The Supreme Judicial Court previously addressed

Fire Ins. Co., 2010 Mass. App. Div. 85 (Mass. App. Div. 2010)	the effect of a decision of the referees on a subsequent lawsuit in *Fox v. Employers' Fire Ins. Co.*, 330 Mass. 283, 113 N.E.2d 63 (1953) and *Augenstein v. Insurance Co. of N. America*, 372 Mass. 30, 360 N.E.2d 320 (1977). "In the case at bar, the conclusion is inescapable that the referees' award was based on their interpretation of the actual language used in Coverages C and D. There is no indication in the record before us that Merrimack ever contested the fact that the Bertrands incurred this expense. . . . This was not a situation where the amount of the loss had been set and the subsequent trial would determine whether the insurer was liable for that amount. Nor was this a situation where in determining that there was no liability, the referees had only to resolve the ordinary meaning of commonly used words -- for example the difference between lightning and wind (as in *Fox*) or what is a theft (as in *Augenstein*). The interpretations required in this case to determine which coverage applies are far from self-evident. . . . We conclude that in these circumstances, the trial judge was presented with a "question of construction" that he had to resolve unfettered by the decision of the referees. We cannot discern, however, the basis for the judge's allowance of Merrimack's motion for summary judgment. . . . There has never been a real discussion at trial, or on appeal, by either party about the language used in Coverages C and D. In these circumstances, it appears highly probable that summary judgment was granted on the erroneous ground that the reference award was binding. Even though the interpretation of a contract is generally a question of law, any argument as to the interpretation of these provisions is best made in the first instance in the trial court. Accordingly, summary judgment was not appropriate. That being the case, we need not address the other illegalities in the reference procedure alleged by the Bertrands, or their claims under G.L. c. 93A and c. 176D. Accordingly, the summary judgment for the defendant is vacated, and the case is returned to the trial court for trial, or for further proceedings on the defendant's motion for summary judgment."
Audubon Hill S. Condo. Assn. v. Community Assn. of Underwriters, Inc., 82 Mass. App. Ct. 461 (2012)	A claim submitted to reference does not extend to issues of coverage and liability. Distinguished from *Augenstein v. Ins. Co. of North America, infra*, 372 Mass. 30 (1977) on basis that the insurer maintained that the terms of the policy put the loss outside coverage.
Hearing by Reference	
National Fire Ins. Co. v. Goggin,	Referees shall "meet to hear the evidence in the case" means that minds of referees shall be open to truth, and intent upon its ascertainment, and that

267 Mass. 430 (1929)	material evidence when presented shall be received and given due consideration, but they do not imply that legislature intended that referees shall proceed by means of formal judicial proceeding, not that they shall be bound by strict rules of evidence, and that they may proceed by summary methods implied by arbitration.
Ritson v. Atlas Assurance Co., 272 Mass. 73 (1930)	Referees are not required to act in a formal manner according to the procedure in a judicial inquiry, nor are they bound by the strict rules of evidence. Nevertheless, the statute imposes upon them a duty to hold a hearing, which implies that both parties should be present or have the opportunity to be present and offer their evidence.
Rock of Salvation Pentecostal Church, Inc. v. Guideone Ins. Co., 17 Mass L. Rep. 519 (2004)	Summary judgment pursuant to Mass. R. Civ. P. 56 was granted to an insurer in an insured's claim for "code upgrade" coverage arising from a fire on its premises, as the claim was made more than two years after the fire, and accordingly, it was barred by the two year period in the policy as well as the statutory two year period of M.G.L. c. 175 § 99; the suspension of a reference hearing pursuant to M.G.L. c. 175 § 101 was based on an unresolved contents coverage issue and accordingly, there was no extension of the limitations period for the code upgrade coverage therein.
Attendance of Parties at Reference Hearing	
Second Soc. of Universalists v. Royal Ins. Co., 221 Mass. 518 (1915)	Insured contended that the referees' award should be overturned because referees did not give insured written notice of the hearing. The court concluded that this allegation did not go far enough to overturn an award because the insured did not allege that there was no hearing or that insured did not, in fact, have some sort of notice of the hearing.
Clark v. New England Tel. & Tel. Co., 229 Mass. 1 (1917)	Under Massachusetts standard form fire insurance, referees were not required, before enactment of this section, to hear parties before making award.
National Fire Ins. Co. v. Goggin, 267 Mass. 430 (1929)	Hearing by referees should proceed with dispatch, and where a party is notified of hearing in ample time to have representative present, it is the duty of the party to arrange to be represented at hearing if he so desires.
National Fire Ins. Co. v. Goggin, 267 Mass. 430 (1929)	Legislature did not intend to attach all requisites of judicial proceedings to reference hearing, but use of the words "to hear the evidence" and to conduct "hearing" generally would imply at least that both parties should be present even if not always signifying formal procedure with all attributes of judicial inquiry.

Ritson v. Atlas Assurance Co., 272 Mass. 73 (1930)	Hearing by referees may be invalidated by failure of referees to give to one of parties notice sufficient to inform him that hearing was to be held, and that he was being afforded the opportunity to attend hearing and to offer evidence.
Ritson v. Atlas Assurance Co., 272 Mass. 73 (1930)	While it is not essential to validity of hearing held under this section that parties be actually present or in fact offer any evidence, it is essential that parties be given the opportunity to attend and introduce evidence, if they choose.
Reception of Evidence	
Second Soc. of Universalists v. Royal Ins. Co., 221 Mass. 518 (1915)	Referees appointed under provisions of standard form fire insurance policy to determine amount of loss are required to hear evidence relating to loss, which is offered, and refusal by referees to hear such evidence may result in invalidating hearing.
National Fire Ins. Co. v. Goggin, 267 Mass. 430 (1929)	Upon hearing, there is no requirement that referees be learned in law, it being matter of common experience that they are generally laymen selected because of practical knowledge as to subject involved, and fact that referees receive evidence which would not have been competent at trial in court, and which ought not to have been received by referees, does not necessarily invalidate hearing but whether it will have such effect will depend upon nature of evidence received.
Paying the Referees	
Wiggin v. National Fire Ins. Co. of Hartford, 271 Mass. 34 (1930)	Referee was appointed as third referee to determine the amount of loss after a fire. Pursuant to the statute, the referee was to furnish the insurer and insured with a written statement of his claim for compensation and expenses and make the insurer and insured each liable for half the amount. The court found that the referee's costs had been incurred not in determining the amount of the award, but in defending against a bill in equity brought to have the referee removed. The court held that the referee was not entitled to recover and that the insurance commissioner had final authority over the amount of the referee's award. Furthermore, given the referee was a successful litigant in the action seeking his removal, his expenses were deemed fully compensated by the costs awarded in that proceeding.
Reference a Prerequisite to Suit	
L & B Realty, Inc. v. Certuse Adjustment, Inc., 77 Mass. App. Ct.	Where, as here, the insurer and the insured were unable to agree about the amount of the loss, absent waiver (not in issue here), a reference to a panel of three disinterested referees for a decision on that factual question was a condition precedent to "any right of action in law or equity to recover for such loss." Both the Massachusetts courts and the Federal courts applying

1108 (2010)	Massachusetts law have recognized and enforced this reference provision. "Here, it was undisputed that L & B did not request reference proceedings before filing suit. The defendants raised L & B's failure to comply with the condition precedent as an affirmative defense. Summary judgment was properly granted on that basis."
Bertrand v. Merrimack Mut. Fire Ins. Co., 2010 Mass. App. Div. 85 (Mass. App. Div. 2010)	The provision in the standard home insurance policy that the decision of a board of referees is "binding" is of limited effect. Such a decision clearly does not preclude a lawsuit. Indeed, as stated in § 99, the reference procedure is a "condition precedent" to a subsequent lawsuit.
Statute of Limitations for Filing Suit	
L & B Realty, Inc. v. Certuse Adjustment, Inc., 2010 Mass. App. Unpub. LEXIS 792, 3-4 (Mass. App. Ct. July 7, 2010)	Pursuant to G. L. c. 175, § 99, Twelfth, any "suit or action against [the insurer] for the recovery of any claim by virtue of this policy" is subject to a two-year limitations period. As pleaded here, L & B's G. L. c. 93A claim was predicated entirely upon the defendants' breaches of the underlying insurance policy. Though brought under c. 93A, the action arose out of and was dependent upon the contract. Nor was L & B's c. 93A claim "grounded" in G. L. c. 176D, which was not even mentioned in the complaint. Thus, the two-year limitations period of G. L. c. 175, § 99 (incorporated by Merrimack into the policy), applied to L & B's claim. Filed more than two years after the loss, L & B's action was time-barred.
Challenging a Reference Award	
Hanley v. Aetna Ins. Co., 215 Mass. 425 (1913)	Supreme Judicial Court reversed a lower court decision invalidating a reference award because the referees refused to hear a point of evidence offered by the defendant insurer. The court specifically found that it was within the discretion of the referees "to admit evidence or to find the amount of the loss by inspection, or by inspection and information obtained by them in such way as they in their discretion think fit." "We are therefore of the opinion that referees appointed under the Massachusetts standard policy are not bound to receive evidence upon the amount of the loss, but may proceed to determine that fact in any way in which the exercise of an honest discretion they may think wise."
Doherty v. Phoenix Ins. Co., 224 Mass. 310 (1916)	The Supreme Judicial Court upheld a jury instruction providing that an award was not valid if, in the making of the award, there was (1) "fraud," (2) "bias," or (3) "prejudice" on the part of one or more referees, or if (4) there was "misconduct" by someone other than a referee that influenced one or more of the referees in the making of the award. However, a reference award is valid if: "The referees acted honestly and

	with a desire to arrive at a just and correct result. [T]his is to say . . . if the referees were free from bias, prejudice, or fraud in making of the award, and . . . there was no misconduct on the part of [an interested party] that influenced [the referees] in the making of the award."
Mulrey v. Employers Fire Ins. Co., 312 Mass. 609 (1942)	A heavy burden of proof rests with any party seeking to set aside an award. Merely alleging the invalidity of a reference is insufficient to upset an award. There is a strong presumption of validity that attaches to reference awards.
Fox v. Employers' Fire Ins. Co., 330 Mass. 283 (1953)	Where, after award by referees appointed under standard form reference clause set forth in this section, insured brings action against insurer, claiming that award is invalid, while action is upon policy and not upon award, the award, if valid, is conclusive evidence as to damage or loss, and where there is no evidence that award is invalid, question of invalidity of award should not be left to jury.
Augenstein v. Ins. Co. of North America, 372 Mass. 30 (1977)	An award of the referees, duly considered, must be "presumptively valid and dispositive." Grounds for appealing a reference include a mistake of law by referees, including a mistake as to the scope of coverage, the arbitrary refusal to hear relevant proffered evidence, and illegality on the part of the referees. A court must not substitute its judgment for that of the referees or otherwise 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.

2014
INDEX TO MICHIGAN DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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INDEX OF MICHIGAN DECISIONS

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1. Dupree v. Auto-Owners Ins. Co., unpublished opinion of the Court of Appeals, issued July 18, 2013 (Docket No. 310405), No. 310405, 2013 WL3766580 (Mich. Ct. App. July 18, 2013). [1] –The parties disputed whether the insured was required to produce proof of loss regarding the replacement cost of destroyed property after an appraisal panel had issued its award. The insurer argued that it was not required to pay the award because the insurance contract required the insured to submit a proof of loss to the insurer as a precondition to payment of the claim, and the insured had not yet submitted one. The court held that an appraisal award was conclusive and final. The court could not consider the terms of the insurance contract after the appraisal process had concluded and an award had been issued. The award could, at that point, only be overturned as a result of bad faith, fraud, misconduct, or manifest mistake.

2. Evanston Ins. Co. v. Cogswell Prop., 683 F.3d 684 (6th Cir. 2012). – A portion of the insured's commercial property, which amounted to less than four percent of the entire property, was damaged by fire. The policy contained a coinsurance penalty. Under the penalty, the insured was required to carry insurance equaling at least 80 percent of the property's total value. The insured carried only $1 million in coverage, however, and the insurer determined its liability as a percentage of $1 million. During the appraisal process, the umpire used two different valuations to determine the property's actual cash value versus the actual cash loss. The insurer filed a motion to vacate the appraisal award, arguing that the umpire's use of different valuation methods amounted to manifest mistake. The district court agreed; and the insured appealed, claiming that the appraisal provision was subject to the Federal Arbitration Act (FAA). The Sixth Circuit concluded that the appraisal provision was not subject to the FAA. Rather, an appraisal provision is akin to a common law arbitration clause only when determining the appropriate standard of review. Moreover, the appellate court affirmed the order to vacate the appraisal award, holding that the use of different valuation methods ascribed different meanings to the property's actual value versus the actual loss. According to the court, the disparity between

[1] Pursuant to Michigan Court Rule 7.215, a party may cite an unpublished opinion. An unpublished opinion is not binding precedent and the party citing the opinion must provide a copy to the court and to the opposing party. Michigan has its own citation format for unpublished opinions. See Michigan Uniform System of Citations I.A.4.s. In this compendium, the first citation listed for unpublished opinions is in the Michigan citation format, and the second citation listed is in the Blue Book citation format.

the different methods clearly constituted a manifest mistake because it did not result in an accurate estimate of the loss value.

3. White v. State Farm Fire & Casualty Co., 293 Mich. Ct. App. 419, 809 N.W.2d 637 (2011). – After the insureds' house was damaged by fire, they hired an adjuster, Jeffery Moss, to assist with their claim. The insureds signed a contingency fee agreement by which Moss would receive ten percent of the plaintiff's award. After Moss and State Farm could not agree on the amount of loss, Moss demanded an appraisal as provided for under law and the insurance policy. The insureds hired Moss as their appraiser. State Farm did not accept Moss as the insureds' appraiser on the grounds that he was not "independent" as required by statute. State Farm also claimed that the statute governing appraisals, M.C.L.A. § 500.2833, was unconstitutional because it violated its right to due process. On the first issue, the court ruled in favor of the insured, finding that the appraiser was "independent." The court relied on Auto-Owners Insurance v. Allied Adjusters & Appraisers (see below). There, the court defined independent as "not dependent; not subject to control, restriction, modification, or limitation from a given outside source." The court here next turned to Linford Lounge v. Michigan Basic Property Insurance (see below), a decision issued before the change to M.C.L.A. § 500.2833, but one that considered a contingency-fee arrangement. There, the court held that an appraiser may still be disinterested even if he has previously served as an adjuster on a claim. Since the appraiser in Linford Lounge had cancelled his adjuster contract with the insureds prior to accepting an appointment as their appraiser, the Linford Lounge court did not determine whether the appraiser would have still been independent if, as in this case, his adjuster contract was still in effect. The court here looked to other jurisdictions and held that, based on the definition of "independent," Moss was "independent" and could serve as the insureds' appraiser even though his adjuster contract was still in effect. The court also held that M.C.L.A. § 500.2833 was not unconstitutional. State Farm argued that an appraiser serves a quasi-judicial role and it therefore violates State Farm's right to due process to have a biased appraiser. The statute requires an appraiser to be "independent." Auto-Owners held that an appraiser could be biased toward the party that retained it and still be "independent" under the statute. Therefore, according to State Farm, the statute is unconstitutional because it deprived it of an impartial appraisal. In ruling against State Farm, the court reasoned that an appraiser is not akin to a judge or even an umpire. Therefore, the statute does not require impartiality and State Farm was not denied due process

4. Overall Trading, Inc. v. Hastings Mut. Ins. Co., unpublished opinion of the Court of Appeals, issued Jan. 15, 2009 (Docket No. 278859), No. 278859, 2009 WL103169 (Mich. Ct. App. Jan. 15 2009). – Personal property stored in a warehouse and owned by the insured suffered water damage on two separate occasions, January 2005 and February 2005. The insured submitted a single proof of loss for both incidents to Hastings Mutual Insurance Company. The parties went through the appraisal process but could not agree on the loss. Hastings denied the January claim because it disputed whether the damage was covered under the policy, and Hastings denied the February claim because the insured did not separate the February damage from the January damage in its proof of loss. The trial court found that the insurance policy covered both losses. Hastings appealed. With regard to the January claim, the court of appeals found that the trial court should have suspended

the appraisal process to determine whether the policy covered the January claim at the time that the trial court first identified a dispute over coverage. The insured argued that the issue of coverage was for the appraiser to decide. However, the court of appeals held that the issue of coverage is a matter for the courts to decide, not the appraisers. The court's holding reiterated the rule previously established in Auto-Owners Insurance v. Kwaiser (see below) and Agnott v. Chub Group Insurance (see below). The court here went further, holding that "coverage issues can be subject to a court ruling even after an appraisal so long as there was no indication that coverage was conceded or waived by the insurer." The court based that conclusion on a footnote in Agnott, which, in turn, relied on Kwaiser. In Kwaiser, the parties went through the appraisal process and then the insurer asked the trial court to determine whether the insurance policy covered the damage at issue. On appeal, the court remanded the case for the trial court to determine the issue of coverage. The Agnott court—in the footnote referred to here by the Overall Trading court—interpreted the Kaiser court's remand to mean that coverage issues could be subject to a court ruling even after the appraisal process was completed. In Agnott, the insurer did not submit the issue of coverage to the court until after the appraisal process had ended, and the court found that the delay meant that the insurer had waived the issue of coverage. Therefore, the court did not remand the case to the trial court to determine the issue of coverage. In this case, the Overall Trading court adopted the footnote from Agnott as part of its holding, and found that, since there was no indication that the insurer, Hastings, had waived the issue of coverage, as had been the situation in Agnott, the case should be remanded for the trial court to determine whether the January damage fell within the insurance policy. With regard to the February loss, the court of appeals found that whether the appraisal award should be upheld depended upon whether the insurance policy covered the January claim. The appraisal award was based on the total value of the property damage and did not distinguish between the January and February losses. The court reasoned that, if the January claim was not covered by the insurance policy, then the entire appraisal award must be thrown out and recalculated because there was no way to determine which portion of the award to allocate to each loss. If, however, the insurance policy covered the January award, then the entire appraisal must be upheld. Hastings complained that the appraisers did not separate the two losses. The court stated that such an argument constitutes a dispute over damages and the method by which the appraisers calculated them; it is not a dispute over coverage. A court will not overturn an appraisal award unless it was based on bad faith, fraud, misconduct, or manifest mistake. The court of appeals remanded the case for the trial court to determine the issue of coverage, and, if the January claim was not covered by the policy, to separate the appraisal award into the two losses and award the February claim to the insured.

5. Detroit City Dairy, Inc. v. United Nat'l Ins. Co., No. 07-CV-112228, 2007 WL 3333020 (E.D. Mich. Nov. 8, 2007). – Vandals broke into and damaged a warehouse owned by the insured. The insured filed a claim with United National Insurance Company (UNI), but UNI denied all but $6,347.90 of the $1,029,216.26 claim. The insured filed suit against UNI and the court granted summary judgment in favor of the insured on the issue of coverage, holding that the insurance policy covered the damage to the warehouse. The insured then submitted a written request for appraisal to UNI. In response to the request, UNI stated that it was "still considering" the insured's proposal to use the appraisal

process. The insured then filed suit against UNI to compel UNI to abide by the appraisal clause in the policy, which was substantively the same as M.C.L.A. § 500.2833(m). UNI put forth two arguments against appraisal: first, an appraisal must occur prior to the commencement of a lawsuit; and second, the insured waived its right to appraisal. The magistrate judge found in favor of the insured and ordered the parties to engage in the appraisal process. As to UNI's first argument, the court held that an appraisal does not need to occur prior to the commencement of a lawsuit unless a provision in the insurance policy specifies that it must. The court reasoned that § 500.2833(m) and (q) require compliance with the insurance policy before commencing an action; they do not specify the timing of the appraisal. In this case, UNI's policy did not contain a provision that specified that an insured could not commence a lawsuit until after it requested an appraisal. The court therefore found that the fact that the insured requested an appraisal after it had filed suit against UNI did not bar the insured from proceeding with its claim. As to UNI's second argument, the court found that the insured did not waive its right to an appraisal. The court did not discuss its reasoning in detail other than to say that the insured did not violate the terms of the contract, so it did not waive its right to an appraisal. The court did, however, note that Michigan law allows for the possibility that a party could waive its right to an appraisal in the appropriate circumstances, such as where a party refuses to arbitrate for an unreasonable length of time. Since that was not the case here, the insured did not waive its right to arbitrate.

6. Prof'l Team, Inc. v. Safeco Ins. Co. of Am., unpublished opinion per curium of the Court of Appeals, issued April 11, 2006 (Docket No. 259020), No. 259020, 2006 WL932414 (Mich. Ct. App. April 11, 2006). – Fire damaged a motel owned by the insured. After completing the appraisal process, the umpire awarded the insured an amount disputed by Safeco. The parties filed claims to enforce and set aside the award. The insurer claimed that the award should be set aside on the basis that the appraisers did not follow the proper procedure because there was not a full exchange of information and a good faith meeting of the appraisers. The court of appeals upheld the award on several grounds. First, no provision in the statutory appraisal procedure or in the insurance contract at issue expressly required an exchange of information or a meeting of the appraisers. Second, Safeco waited to challenge the appraisal process until after the award was issued. The court stated, "A party may not adopt a 'wait and see' approach and then complain for the first time after the ruling." Third, nothing in the record indicated that the umpire's award was based on a manifest mistake.

7. Agnott v. Chubb Group, Ins. Co., 270 Mich. Ct. App. 465, 717 N.W.2d 341 (2006), *appeal denied*, 477 Mich. 941 (2006). – The insured's house suffered damage twice: first, burst pipes caused water damage to the first floor; and second, land on the side of the house collapsed and subsided downhill toward Lake Michigan. The parties submitted the claim to an appraisal panel, but signed a letter stating that the panel was only to appraise the damage caused by the burst pipes, not the landscape damage. After the panel issued its award, the insurer filed suit to have the award set aside. The insurer claimed that the panel improperly included the land stabilization costs into its award, a cost that was not covered by the insurance policy. The insured presented testimony from the appraisers' depositions during which the appraisers stated that that they only factored into their award the water

damage. The court of appeals held that the insurer waived its right to challenge the award based on coverage issues. The court reasoned that the insurer conceded in its pleadings that there was no coverage dispute, and that a party is bound by its pleadings. In addition, the court held that any dispute as to the extent of coverage must be submitted for a court to determine prior to the appraisal process. Since the insurer did not submit the issue to the trial court prior to the appraisal process, it was deemed to have waived the issue. Under these facts, the appraisers' award could only be reviewed for bad faith, fraud, misconduct, or manifest mistake.

8. Frans v. Harleysville Lake States Ins. Co., 270 Mich. Ct. App. 201, 714 N.W.2d 671 (2006). – Fire damaged the insured's commercial property and the parties began the appraisal process. Before the umpire issued the award, the insured revoked the agreement. The insurer subsequently demanded a binding appraisal. The court held that M.C.L.A. § 500.2833 imposes a mandatory appraisal requirement that cannot be unilaterally revoked. Michigan courts consider appraisal clauses to be common law arbitration agreements, and, under Michigan law, either party may unilaterally terminate the common law agreement at any time prior to the award being issued, regardless of which party initiated the arbitration. However, as the court reasoned, M.C.L.A. § 500.2833 superseded the common law and created a requirement that the parties must submit to an appraisal if either party demands it. Therefore, the insured here could not unilaterally terminate the appraisal process.

9. Trooper Jake, Inc. v. Auto-Owners Ins. Co., unpublished opinion of the Court of Appeals, issued Aug. 11, 2005 (Docket No. 253787), No. 253787, 2005 WL1923120 (Mich. Ct. App. Aug. 11, 2005). – Fire damaged several buildings owned by the insured. The parties went through the appraisal process and the umpire issued an award for the insured. Rather than merely affirming the appraisal award, the trial court augmented the award by awarding interest. The trial court reasoned that the appraisers' authority was limited to determining the amount of the loss, and that they had no authority to add interest. As a result, the court concluded that the discretionary award of interest by the trial court was not a usurpation of the appraisers' exclusive responsibility for determining the amount of the loss. Reversing this decision, the court of appeals ruled that the trial court should not have awarded interest. The court noted that the Michigan courts consider appraisal a form of common-law arbitration, and that under Michigan law, arbitrators have the discretion to award interest. As a result, the court concluded that only the appraiser, not the trial court, has the discretion to award interest.

10. Roehrig v. State Auto Mut. Ins. Co., unpublished opinion of the Court of Appeals, issued July 5, 2005 (Docket No. 252742), No. 252742, 2005 WL1579518 (Mich. Ct. App. July 5, 2005). – The insured's home suffered water damage to the upper level of his house and fire damage to the lower level of his house. The insurer appealed the award issued by the court-appointed umpire on the grounds of manifest mistake. The umpire found that it was more cost effective to tear down and replace the home than to repair it. In issuing his award, the umpire separated the loss into the cost to tear down and replace the water-damaged upper level of the home and the cost to tear down and replace the fire-damaged lower level. The insurer claimed that the umpire had awarded two total losses for the one house, rather than awarding one total loss. The court of appeals disagreed, explaining that

there was no manifest mistake in the umpire's methodology because he treated the loss as two losses on the house: one to the upper level and one to the lower level. The two separate losses combined to result in the one total loss, which was a manifestly sound means of valuing the award. The insurer also claimed that the award should be set aside for misconduct by the umpire. According to the insurer, the umpire did not provide the insurer with copies of certain documents and he held an *ex parte* meeting with the insured's appraiser. The court pointed out that prior case law established that such conduct does not constitute misconduct as there is no statutory requirement for an umpire to furnish documents to both parties or prohibiting an umpire from meeting with one party's appraiser without the other party's appraiser being present. The court of appeals upheld the umpire's award.

11. Mae Prop., LLC v. Home-Owners Ins. Co., unpublished opinion per curium of the Court of Appeals, issued May 5, 2005 (Docket No. 253208), No. 253208, 2005 WL1048738 (Mich. Ct. App. May 5, 2005). – After a fire destroyed its building, the insured made repairs and then requested the replacement cost from the insurer. The parties could not agree on the value—in part because the insured did not have complete receipts for the repairs—and they submitted the claim for appraisal. Home-Owners disagreed with the appraisal award and refused to pay based on the insured's failure to provide supporting receipts. The court held that once the insurer had submitted the claim for an appraisal, it could no longer resist payment based on what the insured could prove. The court reasoned that the appraisal process is a binding alternative to a judicial determination, and accordingly, the court will overturn an umpire's finding only for bad faith, fraud, misconduct, or manifest mistake. Because Home-Owner challenged the appraisal methods, as opposed to asserting any bad faith, fraud, misconduct or manifest mistake, the court would not overturn the award.

12. *Beck v. Mich. Basic Prop. Ins. Ass'n*, unpublished opinion of the Court of Appeals, issued Mar. 6, 2003 (Docket No. 237320), 2003 WL887690 (Mich. Ct. App. Mar. 6, 2003) – The insured's single family dwelling caught fire three times. At the time of the third fire, the amount of damage from the second fire had not yet been determined. The insured testified at a deposition that he did not have receipts for the repairs from the second fire, nor the first, which made it impossible to adjust the claim for the third fire. The insurer, MBPIA, demanded an appraisal and both parties selected appraisers. The MBPIA's appraiser wrote to the insured's appraiser, but the latter did not respond. During this time, MBPIA discovered that the insured's property had been demolished. After three months, the insured's appraiser wrote back saying that he had not been officially retained as an appraiser. After repeated attempts to contact the insured, MBPIA denied the claim and the insured sued. The trial court ruled that the suit was premature because there had been no appraisal of the property; the court of appeals affirmed. The insured claimed that the insurer had a contractual obligation to pay its claim within thirty days, regardless of whether there was an appraisal. The court disagreed and held that an appraisal must occur prior to the commencement of a lawsuit. The appraisal clause is mandatory under Michigan law, and without the appraisal, the suit was premature. The insured also argued that MBPIA had waived its right to appraisal because MBPIA did not notify the insured that the insured's appraiser was unresponsive. The court of appeals held that "in order to show that defendant waived the appraisal provision in the insurance contract, it must show

that defendant delayed substantially in requesting appraisal so as to have waived it." Here, the court of appeals found that the insurer did not waive its right to an appraisal because it had made multiple attempts to get an appraisal and the insured had presented no evidence that the insurer was responsible for the delay.

13. Auto-Owners Ins. Co. v. Allied Adjusters & Appraisers, Inc., 238 Mich. Ct. App. 394, 605 N.W.2d 685 (1999). –Fire damaged the houses of two insureds. Auto-Owners insured both houses. The insureds selected as their appraiser, the owner of Allied, Gary Lappin. Auto-Owners filed an action seeking a declaratory judgment that Lappin could not serve as the insured's appraiser because he was not an "independent appraiser" as required under Michigan Law. Auto-Owners argued that Lappin was not independent because Lappin owned Allied and Allied had performed the initial loss adjustment for the insureds. The court turned to Black's Law Dictionary to construe the meaning of the statute. The court of appeals held that an "independent appraiser" may be biased toward the party who hires him as long as he can base his appraisal on his own independent judgment. In construing "independent appraiser," the court reaffirmed its decision in Linford Lounge (see below), which held that "appraisers are not disqualified from their appointments on the basis of having previously served as adjusters." While the language of the controlling Michigan statute had changed since *Linford*, the definition of "independent appraiser" had not changed. By contrast, the new statute changed the meaning of "umpire" to require a higher standard of independence than that required of an appraiser. Consistent with this statutory requirement, the court held that an umpire "may not favor either party; he must serve only equity, fairness, and justice."

14. Emmons v. Lake States Ins. Co., 193 Mich. Ct. App. 460, 484 N.W.2d 712 (1992). – The insured's home was damaged by fire, and that parties sought an appraisal. Because the umpire had spent thirty years working for the insurance company, the insured argued that the umpire could not be impartial and filed a petition to remove him. The trial court denied the petition and the appraisal went forward. On appeal, the insured again argued that the umpire was not impartial, and also contended that the appraisal was unfair because the umpire (1) had told the insured that he could not bring his attorney to the appraisal meeting, (2) had given the insurer's appraiser certain documents but would not give them to the insured's appraiser, (3) had written down his own loss estimate without identifying the items in dispute, and (4) had refused to allow a court reporter to make a record of the proceedings. The court of appeals found that there was no misconduct. The court held that the appraisal process is a substitute for the judicial determination of an amount in dispute and it constitutes a common law arbitration agreement. As such, the standard of review is lower and an umpire's award will only be set aside for bad faith, fraud, misconduct, or manifest mistake. In this case, there was no misconduct. The insured's attorney did attend the meeting. The insured did not submit proof that the umpire withheld documents from him. Nothing in the statutes required the umpire to identify the disputed amounts in writing; and the insured provided no authority stating that a court reporter must be present at an appraisal meeting. Therefore, the court of appeals found that the trial court did not err in denying the insured's petition to remove the umpire.

15. Auto-Owners Ins. Co. v. Kwaiser, 190 Mich. Ct. App. 482, 476 N.W.2d 467 (1991). – The roof of the insured's mobile home collapsed because of heavy rain. An engineer hired by Auto-Owners determined that the entire roof was rotted and would need to be replaced. The insured, believing that the mobile home was unsafe, did not reenter the mobile home to retrieve the damaged property. As a result of the elapsed time, the personal property developed mold and the insured threw it out before the appraisers examined it. The appraisers estimated the loss for the roof and personal property. After the appraisals, Auto-Owners filed suit claiming that (1) the appraisers did not determine the scope of the policy's coverage before make their estimates; and (2) the appraisers acted beyond the scope of their authority by valuing property that they did not actually see. The court of appeals first held that the scope of an insurance policy's coverage is a matter for the courts, not the appraisers. The court of appeals thus found that the trial court should not have granted summary disposition to the insured without having first determined the extent of the insurance policy. The court of appeals next held that an appraiser does not need to visually inspect the damaged items before he makes his estimate. While the insurance policy in this case stated that the insured must present the damaged items to the appraiser for inspection, the policy did not specify that the appraiser had to inspect the items. The court will not question an appraiser's methods unless they are based on bad faith, fraud, misconduct, or manifest mistake. In their absence, a court will accept the appraiser's award as conclusive. The decision of which particular items of property fall within the general description of the property that an appraiser is to value falls within the appraiser's discretion and is not a matter of the scope of the policy's coverage, which is for the court to decide.

16. Schanz v. New Hampshire Ins. Co., 165 Mich. Ct. App. 395, 418 N.W.2d 478 (1988). – Fire destroyed a building owned by the insureds. The controversy in this case centered on an appraisal that New Hampshire Insurance Company (NHI) had conducted three years prior to the fire when the insured first applied for insurance on the building. NHI had an internal company policy that it would appraise any property valued over $100,000 prior to insuring the property. In accordance with its policy, NHI had sent an appraiser to value the insured's building prior to insuring it. NHI issued the policy to the insured with a policy limit that was based on the appraiser's valuation. It was later discovered that NHI's appraiser had undervalued the property. The damage to the building caused by the fire exceeded the policy limit. NHI offered the policy limit to the insured, but the insured rejected the offer and sued to recover the full cost to rebuild the building. The insured contended that NHI's appraiser had negligently appraised the building three years earlier when NHI originally issued the policy and that, if NHI had appraised the building correctly, the insurance policy limit would have been high enough to cover the damage caused by the fire. NHI argued that it undertook the appraisal of its own accord and did not owe a duty of care to the insured. A jury found for the insured. On appeal, the court affirmed the jury's award. The court held that, while the law does not impose a duty on insurers to inspect the premises of the insured, a jury could have found that NHI owed the insured a duty when it undertook to appraise the building. By undervaluing the building, NHI breached its duty to use reasonable care in determining the replacement coverage cost. The court thus upheld the jury's award of an amount greater than the policy limit.

17. Arkin Distrib. Co. v. Am. Ins. Co., 85 Mich. Ct. App. 359, 271 N.W.2d 430 (1978). – A building owned by Arkin caught fire, damaging the building, inventory, furniture, fixtures, and equipment, and interrupting Arkin's business. Rather than listing the damage associated with each item of property, the court-appointed umpire broke down his appraisal into the following general categories: buildings; contents-stock; contents-furniture; and fixtures, machinery, and equipment. AIC appealed the appraisal, arguing that the umpire was required to list each item that was damaged separately. The insurance policy contained an appraisal clause that used language nearly identical to M.C.L.A. § 500.2833. Both the insurance contract and the statute state that an appraisal award must set the value of "each item." The parties here disputed what the term "item" meant. The court held that it is not necessary for an appraiser to itemize damaged items further than the categories listed here by the umpire. Citing Michigan decisions holding that policies calling for an assessment of damages for "buildings" did not require an itemization of each component of the building, the court concluded that the same rationale applied to other categories of property referenced in a policy. Since the umpire's award specified losses for each of the categories listed in the policy itself, the court concluded that no further specificity was required for a valid award.

18. David v. Nat'l Am. Ins. Co., 78 Mich. Ct. App. 225, 259 N.W.2d 433 (1977). – Fire damaged a building owned by the insured. When the parties could not agree on an umpire, the circuit court appointed one. The insurer disagreed with the umpire's appraisal award and filed a motion to set it aside, arguing that the umpire had erred as a matter of law in the method used to determine the building's value. The court of appeals upheld the umpire's decision, stating that the standard of review of an appraisal is whether the umpire "acted in bad faith, so as to defeat the real purpose of the arbitration." Since the umpire here did not act in bad faith, his appraisal was upheld. The court further held that market value, repair cost, and replacement cost are guides to determine actual cash value for an appraisal, but no particular method must be followed.

19. Linford Lounge, Inc. v. Michigan Basic Property Insurance Association, 77 Mich. Ct. App. 710, 259 N.W.2d 201 (1977). – A fire occurred at the insured's building, which was insured by MBP. The insured hired an insurance adjuster, Harry Kramer, to adjust its claim. Kramer and MBP could not agree on the amount of loss so the insured demanded an appraisal pursuant to the insurance policy. MBP would not agree to the appraisal because the insured hired Kramer as its appraiser. MBP argued that Kramer was not "disinterested" as required by Michigan law because he had conducted the original adjustment. The insured filed suit, and MPB filed a motion for summary judgment to set aside the award on the grounds that Kramer was not "disinterested," which the trial court denied. The court of appeals upheld the trial court's assessment that the appraiser was "fair, impartial and disinterested," relying on a previous case, London v. Melinski (see below), which held that "an appraiser is not necessarily 'interested' if he has previously acted as an appraiser for a party." Just as a person who previously served as an appraiser is not disqualified, a person who computed the loss prior to the appraisal is not necessarily interested. The court held that a party seeking to disqualify an appraiser must make a showing of "prejudicial conduct."

20. Auto-Owners Ins. Co. v. Higby, 69 Mich. Ct. App. 485, 245 N.W.2d 102 (1976). – Higby was injured in an automobile accident while riding as a passenger in a car driven by her daughter. The other driver was uninsured. Auto-Owners Insurance insured the car that Higby rode in; Michigan Mutual insured Higby's daughter. Both policies provided uninsured motorist coverage and both polices had arbitration clauses. Higby filed a demand for arbitration. While the demand was pending, Higby settled with Auto-Owners for $10,000 and Higby released Auto-Owners. The arbitration proceeding was never dismissed and Auto-Owners filed suit against Higby to stay the arbitration proceedings and seeking a declaration that the claims had been settled. While arbitration was proceeding, the statute of limitations on any claim that Higby had against the uninsured motorist was running so she filed suit against the motorist. A jury returned a verdict against Higby. Auto-Owners and Michigan Mutual then filed this action seeking a declaratory judgment on two grounds: first, the suit against the uninsured motorist precluded Higby from filing another lawsuit against the insurance companies based on *res judicata*; and second, the suit against the uninsured motorist constituted a waiver of their right to an appraisal. The court of appeals rejected both of the insurers' arguments. The court first held that *res judicata* did not apply "because two lawsuits [were] not involved here. [The court was] concerned here with the effect of a lawsuit on contractual rights, rather than the effect of one lawsuit on another lawsuit." Rejecting the insurers' second argument that Higby had waived her right to arbitration by filing suit against the uninsured motorist, the court found that the insurance company's delay tactics had forced Higby to file suit to avoid the statute of limitations.

21. Thermo-Plastics R & D, Inc. v. Gen. Accident Fire & Life Ins. Corp., 42 Mich. Ct. App. 418, 202 N.W.2d 703 (1972). – Fire damaged machinery owned by the insured. General Accident paid the insured for the cost of repairing the machinery. The insured also sought money for lost profits caused by a long delay in making the repairs; however, General Accident would not pay the lost profits. The insured sued both the company that repaired the machinery and General Accident to recover the lost profits. A jury returned a verdict against the machine repair company, but the judge withdrew the claim against General Accident because the insured did not comply with the procedures outlined in the insurance policy, which required the insured to submit a proof of loss to General Accident, and, in the event of a dispute, go through the appraisal process prior to filing a lawsuit. The insured had submitted a claim to General Accident for the damaged machinery but did not submit a claim for the lost profits before suing to recover the lost profits. The court of appeals upheld the trial court's decision and found that the insured had no cause of action for the lost profits because it had not submitted this claim for appraisal. The court of appeals held that appraisal is not an "insubstantial procedure[]," it is mandatory under Michigan law, and serves "as a substitute for judicial determination of a dispute concerning the amount of a loss."

22. Mich. Fire Repair Contractors' Ass'n v. Pacific Nat. Fire Ins. Co., 362 Mich. 552, 107 N.W.2d 811 (1961). – When the insureds' house was damaged by fire, the insureds hired a repair contractor, Michigan Fire Repair Contractors, and assigned all of their rights under the insurance policy to the contractor. Michigan Fire Repair demanded an appraisal but the insurer refused. The insurance contract provided that the insurer had the option to repair,

rebuild, or replace the property. After the insurer elected to repair the damage, the insurer hired a contractor to make the repairs. The insurance company's contractor worked on the insureds' house until Michigan Fire Repair sued to enjoin the repairs and force the insurer to go through the appraisal process. The trial court issued a temporary restraining order and ordered the parties to begin the appraisal process. The court of appeals reversed, holding that the appraisal clause in an insurance contract may only be invoked if there is a dispute over the amount of the loss or the quality or the nature, extent, or quality of the repairs. In this case, because the insureds had agreed to allow the insurance company to repair their house, there was no dispute, and thus, no right of appraisal.

23. Manausa v. Saint Paul Fire & Marine Ins. Co., 356 Mich. 629, 97 N.W.2d 708 (1959). – A car ran off the highway and into the insureds' house, causing significant damage. The insureds hired an adjuster to appraise the damage and settle the claim. When the adjuster could not reach an agreement with Saint Paul Fire & Marine Insurance Company, the insureds demanded an appraisal. The insureds did not agree with the amount of the umpire's award and filed suit to have it set aside on the grounds that the umpire committed fraud and mistake. Concluding that the trial court is in a better position to judge the credibility of witnesses, the Michigan Supreme Court upheld the circuit court's finding that there had been no mistake or fraud by the umpire, and affirmed the umpire's award.

24. Campbell v. Mich. Mut. Hail Ins. Co., 240 Mich. 167, 215 N.W. 401 (1927). – A hail storm damaged the insured's crop of peas, and the insured and insurer submitted their dispute to arbitration, rather than for an appraisal. Comparing the role of an arbitrator versus the role of an appraiser, the court observed, "Unless otherwise provided, appraisers can act on their own knowledge and investigation, are not required to have hearings or take evidence or even receive the statements of the parties. As long as they act honestly and in good faith, they have a wide discretion as to their methods of procedure and sources of information."

25. Maki v. Commonwealth Ins. Co. of New York, 232 Mich. 295, 205 N.W. 83 (1925). – Fire damaged merchandise and fixtures located within the insured's business. Commonwealth Insurance Company of New York was one of sixteen insurance companies that insured Maki's business. The insurance companies hired three appraisers to ascertain the loss, but the adjusters and Maki disagreed on the amount. According to Maki, the adjusters told him that they would pay $3,200 and no more. Maki replied that he would sue them, and the adjusters replied, "Go on and sue us. We'll show you up. You won't get one cent more than $3,200." The adjusters then demanded an appraisal pursuant to Michigan law and the terms of the insurance policies. Maki refused to submit the dispute to an appraisal, and instead sued the insurance companies to recover the loss, claiming that Commonwealth had waived its right to an appraisal. The jury returned a verdict in favor of Maki, finding that the insurer had waived its right to an appraisal by inviting the insured to sue. Commonwealth appealed. The Michigan Supreme Court affirmed the jury's verdict, holding that appraisers have authority to bind the insurance companies and to admit or deny liability. When advising the insured that the insurance company would pay no more than $3,200, the court reasoned that the adjusters had unilaterally determined the loss. The court further held that when the adjusters issued their ultimatum, they had waived the insurer's right to an appraisal. Because the insurer had waived its right to an appraisal, the

Michigan Supreme Court further held that the trial court should not have appointed an umpire to ascertain the loss.

26. Schwier v. Atlas Assurance Co., 227 Mich. 104, 198 N.W. 719 (1924). – The insured's car was stolen and the insurer, Atlas Assurance Company, offered a settlement. The insured refused the offer and Atlas demanded an appraisal. The insured refused to participate and instead filed suit. While the case was pending, the insured told Atlas that he was ready to arbitrate, and he hired an appraiser. This time, however, Atlas refused to participate. After Atlas's refusal, the insured proceeded with the lawsuit. A jury found in favor of the insured. Atlas appealed. The court of appeals affirmed the trial court in favor of the insured. Atlas argued that the insured could not file suit because the insurance policy required the parties to go through the appraisal process before filing suit, which the insured had not yet done. The court found that the insured's refusal constituted a waiver of its right to an appraisal. At the point that the insured refused to participate, Atlas had a valid defense against any lawsuit because the insured was required to go through the appraisal process prior to commencing any action in court. The court further found, however, that when the insured hired an appraiser and offered to go through with the process, and Atlas refused, Atlas had waived *its* right to an appraisal. At that point, neither party had a right to an appraisal of the claim, effectively negating the appraisal clause and paving the way for the insured to maintain his legal action.

27. Rott v. Westchester Fire Ins. Co., 218 Mich. 576, 188 N.W. 334 (1922). – An automobile owned by the insured was destroyed when the building in which it was being stored caught fire. Westchester Fire Insurance Company sent the insured to an adjuster hired by Westchester. The adjuster offered the insured $250 for the car on a $450 policy. When the insured objected to the $250, the adjuster said that $250 was as much as he and the insurance company would give the insured, and that, if the insured wanted more money, he would have to sue. The insured subsequently sued the insurance company and the jury returned a verdict for $450 in favor of the insured. The trial court then entered a judgment notwithstanding the verdict in favor of Westchester on the grounds that the insured had not complied with the appraisal requirements in the insurance contract. The court of appeals reversed the trial court, finding that Westchester's adjuster had waived its right to an appraisal. The court reasoned that, based on the evidence, the jury could have found that the insured could reasonably have drawn the inference that he could not recover anything more than $250—even with an appraisal—unless he sued Westchester. The court thus held that the appraisal requirement is a condition precedent to bringing suit, unless the other party waived its right to an appraisal.

28. Innis v. Fireman's Fund Ins. Co., 218 Mich. 253, 187 N.W. 268 (1922). – A fire damaged the insured's basement and assorted household goods. The parties' appraisers agreed on the award, but the insured disagreed with it and sued the insurer. The court conducted a jury trial that resulted in a verdict in favor of the insured, and the trial court entered judgment accordingly. On appeal, however, the Michigan Supreme Court reversed, concluding that the insurance contract bound the insured to the award absent fraud on the part of the appraisers, which the insured had not shown.

29. Baumgarth v. Firemen's Fund Ins. Co. of San Francisco, Cal., 152 Mich. 479, 116 N.W. 449 (1908). – A fire damaged goods owned by the insured, and after a claim was submitted, the parties submitted the claim for an appraisal. The insured and the insurer each chose an appraiser, and the two appraisers chose an umpire. After the umpire fell ill, the insured's appraiser suggested another umpire, but the insurer's appraiser did not agree to the new umpire. The insured's appraiser retained the second umpire anyway and then conducted an *ex parte* appraisal of the damaged goods and then brought suit against the insurer for the claim. The court found that the *ex parte* appraisal violated the terms of the arbitration clause in the insurance contract. Under Michigan law, an insured cannot bring a claim against an insurer until an appraisal is made in accordance with the insurance policy. The court reasoned that the delay caused by the umpire's illness did not relieve the parties of their duty to arbitrate and that the insured should have continued negotiating for a new umpire before filing suit. Where a chosen umpire remains undecided about serving, a party cannot choose another umpire and conduct an *ex parte* appraisal.

30. Nat'l Home Bldg. & Loan Ass'n v. Dwelling-House Ins. Co., 106 Mich. 236, 64 N.W. 21 (1895). – The plaintiff brought an action to recover on an insurance policy prior to either party requesting an appraisal. The defendant argued that an appraisal was a condition precedent to bringing an action. The court held that, while an appraisal is a condition precedent, it is not an absolute condition. The court reasoned that an appraisal is only a required when it has been demanded. In this case, neither the plaintiff nor the defendant had requested an appraisal for the period of eight months after a fire damaged the plaintiff's property. The court found that an eight-month period was a sufficient amount of time after which the plaintiff was warranted in bringing the action.

31. Zimeriski v. Ohio Farmers' Ins. Co., 91 Mich. 600, 52 N.W. 55 (1892). – Fire damaged property owned by plaintiff and insured by Ohio Farmers' Insurance Company (OFIC). The dispute centered on provisions in the insurance policy. The policy stated that a loss would not become payable until sixty days after the insured gave notice and the amount of the loss had been determined. If an appraisal was required, the sixty-day payment period began to run after the appraiser or umpire made his award. The policy included the standard Michigan appraisal clause (see M.C.L.A. § 500.2833), which required an appraisal whenever the parties disputed the amount of loss or when any party requested one. In this case, the insured, a foreigner unable to speak English, hired an attorney to assist with his claim. The attorney gave OFIC notice of the loss five days after the fire and told the insurance agent that the attorney would handle the claim on behalf of the insured. Fifty-seven days after receiving notice of the loss, OIFC served the insured a letter demanding an appraisal. The letter was written in English and left at the insured's home with his infant son. The letter did not name OIFC's appraiser nor give a time and place for the appraisers to meet. The plaintiff argued that this did not constitute sufficient notice of a request for an appraisal. OIFC argued that it requested an appraisal so the plaintiff was required, by the terms of the insurance contract, to go through with the appraisal process prior to bringing suit. The court found that OIFC's letter did not bar the plaintiff from bringing suit to recover the losses to his property. The letter arrived just three days short of the sixty-day notice period. The court reasoned that this did not leave the plaintiff with sufficient time to select an appraiser, notify OIFC, and have an appraisal made prior to the end of the notice

period. Therefore, OIFC's letter was not sufficient notice. The court stated that OIFC's conduct has been held by other courts to constitute a waiver of a demand for appraisal, but it specifically withheld ruling on that issue.

2014
INDEX TO MINNESOTA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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INDEX OF MINNESOTA DECISIONS

NOVEMBER 26, 2014

1. Creekwood Rental Townhomes, LLC v. Kiln Underwriting Ltd., 11 F. Supp. 3d 909 (D. Minn. 2014) – The insured submitted a claim for hail damage to the roofs of several buildings. An appraisal panel determined the amount of loss. The insurer refused to pay the full amount of the loss, however, on the theory that a portion of the loss amount was the result of wear and tear rather than the hail. The court ordered the insurer to pay the full amount of the appraisal. The court held that the appraisal panel's loss determination necessarily included a determination as to the cause of the loss – *i.e.*, that the damage to the roofs was caused by hail rather than by wear and tear. The court further held that the appraisal panel's causation determination was not subject to judicial review because it did not constitute a coverage question and was thus not a question of law.

2. Trout Brook S. Condo. Ass'n v. Harleysville Worcester Ins. Co., 995 F. Supp. 2d 1035 (D. Minn. 2014) – The roofs of the insured's buildings were damaged in a hail storm. The insured attempted to repair the damaged shingles, but discovered that it was impossible to match the color of the existing, undamaged shingles. The insured thus demanded a full roof replacement from the insurer; the insurer refused, on the grounds that its liability had already been fixed by an earlier appraisal. The insured then filed suit, seeking a declaration that that the insurer was required to provide a full roof replacement. The insurer, in turn, argued that the suit was barred by the statute of limitations because the insured had failed to timely challenge the earlier appraisal. Rejecting this argument, the court concluded that the issue of color-matching the roof shingles was never before the appraisal panel. The court further noted that the issue before the court was fundamentally a coverage question – *i.e.*, a question of law that was not subject to the appraisal panel's authority in the first place. Accordingly, because the limitations period had not begun to run until after the insurer's refusal to pay for the cost of the full roof replacement, the court held that suit had been timely filed.

3. Auto-Owners Ins. Co. v. Second Chance Investments, LLC, 827 N.W.2d 766 (Minn. 2013) – After its building suffered extensive fire damage, the insured filed a proof of loss claiming a total loss and seeking the policy limits. The insurer refused to pay the policy limits and instead demanded an appraisal pursuant to Minnesota statute. The insured disputed the insurer's right to an appraisal, and the insurer filed suit. The Supreme Court held that, under the plain language of the Minnesota statute, the statutory appraisal process was inapplicable in cases of "total loss on buildings." *See* Minn. Stat. § 65A.01.

4. Quade v. Secura Ins., 814 N.W.2d 703 (Minn. 2012) – The insured submitted a claim for loss due to storm damage to the roofs of several buildings. The insurer paid a portion of the damages that it determined were caused by the storm, but declined to pay for damages that it determined were a result of deterioration over a period of time (which were excluded under the policy). Instead of seeking an appraisal, the insured filed suit for breach of contract. The insured argued that the appraisal clause did not apply to his claim for damage to the roofs because the parties' dispute was one of liability (whether the damage to the roofs was covered by the policy) rather than of damages (the cost of repairing the roofs). The Supreme Court disagreed and ordered the parties to participate in an appraisal. The Court held that the determination of the "amount of loss" under the policy's appraisal clause required an appraiser to make a determination as to the cause of the loss in addition to a determination as to the amount it would cost to repair that loss. Any determinations as to causation and liability embedded in the appraisal were subject to judicial review, but the parties could not avoid the appraisal simply because it necessarily included some such determinations. Absent exceptions that did not apply here, the court concluded, an appraisal is a condition precedent to filing suit.

5. QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n, 778 N.W.2d 393 (Minn. Ct. App. 2010) – The insured submitted a claim for hail damage to the roofs of several buildings. An appraisal panel determined the loss based on the cost of a total roof replacement. The insurer disagreed with the panel's loss determination and filed suit to vacate the appraisal. The insurer argued that the appraisal panel engaged in an impermissible coverage determination rather than merely calculating the value of the loss. The court disagreed and held that the appraisal panel had not exceeded its authority in deciding the valuation of respondent's loss.

6. Johnson v. Mut. Serv. Cas. Ins. Co., 732 N.W.2d 340 (Minn. Ct. App. 2007) – Two years and three months after her house had suffered fire damage, the insured first demanded an appraisal from the insurer. The insurer refused this request on the grounds that any claim under the policy was barred by the contractual and statutory two-year limitations period. The insured argued, however, that a demand for an appraisal did not constitute a legal action for recovery on the policy. The court agreed with the insurer that the appraisal (as well as the insured's claim) was time-barred. The court held that the statutorily required appraisal provision did not constitute an agreement to arbitrate, and thus the appraisal was governed by the two-year limitation on actions to recover under the policy. The court distinguished this holding from its earlier holding *Vaubel Farms* (*infra*): in *Vaubel Farms* the policy was sufficiently ambiguous that a reasonable insured could have concluded that it contained an agreement to arbitrate; the policy in this case, however, contained no such ambiguity.

7. Vaubel Farms, Inc. v. Shelby Farmers Mut., 679 N.W.2d 407 (Minn. Ct. App. 2004) – The insured filed suit to compel arbitration and appraisal nearly three years after sustaining wind damage to a barn. The insurer argued the "suit" was barred by the two-year limitation on legal actions. The court rejected the insurer's timeliness argument. Specifically, the court found that the use of the terms "arbitration" and "award" in the statutory provision describing an appraisal created ambiguity and a reasonable expectation on the part of an

insured that the provision was an arbitration agreement governed by the Uniform Arbitration Act. Thus, because "suit" does not include arbitration, the insurer could not invoke the two-year limit on the insured's claim for arbitration.

8. Walker v. Republic Underwriters Ins. Co., 574 F. Supp. 686 (D. Minn. 1983) – The court held that an insurance policy providing that all disputes over loss of contents would be submitted to an impartial umpire constitutes a binding contract to substitute a board of appraisal for a court of law.

9. Mork v. Eureka-Security Fire & Marine Ins. Co., 230 Minn. 382, 42 N.W.2d 33 (Minn. 1950) – In a furnace explosion case, the trial court set aside the appraised amount of damages in favor of the actual cost of repairs. The Supreme Court reversed, finding that an appraisal award that was 60.5% of the repair cost was not so grossly inadequate as to compel vacation.

10. Boston Ins. Co. v. A. H. Jacobson Co., 226 Minn. 479, 33 N.W.2d 602 (Minn. 1948) – In a fire damage case, the insurer demanded an appraisal, selected an appraiser, and sought the appointment of an umpire by a district court – all without the insured ever submitting a proof of loss. The insured refused to participate in the appraisement, and, on the insured's motion, the district court eventually vacated its order appointing an umpire. The Supreme Court affirmed, holding that an insurer's right to demand appraisal does not ripen until the insured provides a proof of loss, and any such attempts by the insurer to appoint an appraiser prior to that time are premature and void.

11. Kavli v. Eagle Star Ins. Co., 206 Minn. 360, 288 N.W. 723 (Minn. 1939) – In interpreting a policy provision that allowed a judge to appoint an appraiser in the event that the parties could not agree on one, the Supreme Court held the reason for the parties' failure to agree on an appraiser was immaterial to the provision's execution.

12. Minnesota Farmers Mut. Ins. Co. v. Smart, 204 Minn. 101, 282 N.W. 658 (Minn. 1938) – The Supreme Court held that the insured timely complied with the 15-day deadline to select an appraiser where the insured "designated" an appraiser by "written instrument" on the 15th day. The fact that notice of this selection was mailed to the insurer two days later did not render the selection untimely.

13. Ciresi v. Globe & Rutgers Fire Ins. Co., 187 Minn. 145, 244 N.W.688 (Minn. 1932) – In an auto theft case, the Supreme Court held that the trial court had properly set aside an appraisal amount where the appraisers mistakenly believed they were prevented from including the car's general depreciation in their valuation.

14. Robertson v. Boston Ins. Co., 184 Minn. 470, 239 N.W. 147 (Minn. 1931) – In an auto damages case, the trial court set aside the appraised amount of damages in favor of the actual cost of repairs. The Supreme Court reversed, finding that an appraisal award was not so grossly inadequate as to compel vacation.

15. Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N.W. 792 (Minn. 1930) – In a fire damage case, the Supreme Court vacated an appraised amount of damages because it exceeded the plaintiff's true interest in the insured property. The Court held that the appraisers' valuation was excessive because it included the value of improvements a lessee had made to the damaged property; instead, the valuation should have included only the value of the lessee's right to use the property for the two years that remained on the lease after the date of the fire.

16. Glidden Co. v. Retail Hardware Mut. Fire Ins. Co., 181 Minn. 518, 233 N.W. 310 (Minn. 1930) overruled on other grounds by Park Constr. Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 475 (Minn. 1941) – In a fire damage case, the Supreme Court held that an appraisal provision in an insurance policy was binding on the parties and could not be revoked. In so holding, the court rejected the insurers' contention that Minnesota's arbitration and appraisal statute violated either the state or federal Constitution.

17. Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N.W. 425 (Minn. 1928) – In a fire damage case, the Supreme Court held that the insurer, which had the opportunity to participate in the appraisal process but refused to, was barred from challenging an appraisal board's valuation of the loss. The board's valuation did not, however, bar the insurer from challenging questions of coverage and liability in court.

18. Abramowitz v. Continental Ins. Co., 170 Minn. 215, 212 N.W. 449 (Minn. 1927), overruled on other grounds by Park Constr. Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 475 (Minn. 1941) – The Supreme Court held that the Minnesota statute providing for appraisals allows both the insured and the insurer to demand appraisal. *See* Minn. Stat. § 65A.01. The insured maintains such a right even where the insurer denies liability.

19. Marblestone Co. v. Phoenix Assurance Co., 169 Minn. 1, 210 N.W. 385 (Minn. 1926) – The Supreme Court held that the appraisal award of a three-member panel was valid and binding on the parties where one appraiser and the neutral umpire agreed on the award amount, even though the other appraiser allegedly "failed to act."

20. Continental Ins. Co. v. Titcomb, 7 F.2d 833 (8th Cir. 1925) – The court held that the appraisal award of a three-member panel was valid and binding on the parties where one appraiser and a neutral umpire agreed on the award amount. The issues that had been raised by the third appraiser in the appraisal process could not be re-litigated in court.

21. Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N.W. 560 (Minn. 1923) – In an auto theft case, the Supreme Court held that a trial court could properly set aside an appraisal award as invalid where the insured was not told of the date of the appraisal and had been given no opportunity to present his case to the appraisers.

22. Di Re v. Fire Ass'n of Philadelphia, 156 Minn. 281, 194 N.W.755 (Minn. 1923) – The Supreme Court held that allegations in a complaint that one appraiser made fraudulent representations to another appraiser as to the disinterestedness of an ostensibly neutral

umpire state a claim to vacate the appraisal award sufficient to overcome a motion for judgment on the pleadings.

23. American Cent. Ins. Co. v. District Court, 125 Minn. 374, 147 N.W. 242 (Minn. 1914) – The Supreme Court held that appraisers need not be experts in the business of the loss suffered in order to qualify as competent. In assessing the competency of an appraiser, the burden rests with the challenging party to establish incompetence.

24. Astell v. American Cent. Ins. Co., 114 Minn. 206, 130 N.W. 1002 (Minn. 1911) – The Supreme Court held that the two appraisers selected by the parties may orally agree on the third, neutral appraiser (*i.e.*, that the agreement need not be in writing).

25. Schoenich v. American Ins. Co., 109 Minn. 388, 124 N.W. 5 (Minn. 1910) – In a fire damage case, the Supreme Court held that parties with an interest in an appraisal must be given a reasonable opportunity to present evidence relevant to the case.

26. O'Rourke v. German Ins. Co., 96 Minn. 154, 104 N.W. 900 (Minn. 1905) – In a fire damage case, the Supreme Court held that a party waives its right to an appraisal if it chooses an appraiser who later refuses to act in good faith as an appraiser and the party authorizes or approves of that action.

27. Redner v. New York Fire Ins. Co., 92 Minn. 306, 99 N.W. 886 (Minn. 1904) – In a fire damage case, the Supreme Court held that an insured has a right to appear before an appraisal panel and introduce evidence, and the denial of that right renders an award voidable.

28. Produce Refrigerator Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N.W. 875 (Minn. 1904) – The Supreme Court held that an appraisal award could be vacated where the evidence supported the conclusion that one of the appraisers was not fair-minded and disinterested. The Court further held, however, that an award would not be vacated if the opposing party is fully informed of the appraiser's bias and nevertheless consents to his or her appointment.

29. Williamson v. Liverpool & London & Globe Ins. Co., 122 F. 59 (8th Cir. 1903) – The court held that appraisers who were empowered to estimate and appraise a loss were also empowered to determine whether the loss was total or partial.

30. Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 88 N.W. 16 (Minn. 1901) – In a fire damage case, the Supreme Court held that if one party attacks an appraisal award on the grounds of fraud by the appraisers, the other party has a duty to investigate the validity of the charge in order to determine whether to abide by the award or submit it for re-appraisement. If the party decides to abide by the award, that party is later estopped from demanding another appraisal.

31. Western Assurance Co. v. Decker, 98 F. 381 (8th Cir. 1899) – The court held that where appraisers appointed by the parties were unable to reach a valuation and eventually

abandoned the appraisal process, the insured was not required to appoint additional appraisers and could instead seek redress in the courts.

32. Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N.W. 1005 (Minn. 1899) – Believing it was not bound by an appraisal clause, the insured filed suit to recover on a fire insurance policy. The trial court dismissed the case on the grounds that appraisal was a condition precedent to filing suit, after which the insured sought to enter into an appraisal with the insurer. The insurer refused, however, on the theory that the insured was now barred from seeking any action on the policy. The Supreme Court held that the insured was not barred from filing suit to enforce the policy under these circumstances.

33. Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N.W. 855 (Minn. 1896) – The insured filed suit to vacate an appraisal award on the ground of fraud and misconduct. The insurer insisted on the validity of the appraisal. The trial court vacated the appraisal and entered a new award. The insurer argued on appeal that the trial court had erred in entering a new award and instead should have ordered a second appraisal. The Supreme Court rejected that theory and affirmed the trial court.

34. Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N.W. 932 (Minn. 1892) – In a fire damage case, the Supreme Court held that the specific terms of the appraisal provision in the policy at issue represented a condition precedent to a party's right of action.

35. Schreiber v. German-American Hail Ins. Co., 43 Minn. 367, 45 N.W. 708 (Minn. 1890) – In a crop insurance case, the Supreme Court held that an appraisal was void where the insurer failed to notify the insured of the appointment of the appraisers and of the time scheduled for their appraisal.

36. Gasser v. Sun Fire Office, 42 Minn. 315, 44 N.W. 252 (Minn. 1890), overruled on other grounds by Park Constr. Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 475 (Minn. 1941) - The Supreme Court held that, under the specific terms of the appraisal provision in the policy at issue, an appraisal constituted a prerequisite to the right to institute a suit on the policy.

2014
INDEX TO MISSISSIPPI DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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1. ***Jefferson Davis County Sch. Dist. V. RSUI Indem. Co.***, 2:08-cv-190-KS-MTP, 2009 U.S. Dist. LEXIS 16337 (S.D. Miss. Feb. 11, 2009) – The purpose of an appraisal is not to determine the cause of loss or coverage under an insurance policy. Instead, it is limited to the function of determining the money value of the property at issue.

2. ***Munn v. Nat'l Fire Ins. Co. of Hartford***, 237 Miss. 641, 115 So.2d 54 (1959) – The issue on this appeal to the Mississippi Supreme Court was the scope of an appraiser's role under a windstorm policy, specifically whether the appraiser's job is to determine damage to the property or whether it also includes deciding the cause of that damage. The insured had two fire and storm policies covering his residence, barn, and chicken houses. After a storm caused damage, the insured and his insurers could not agree on the repair cost. Appraisers were appointed to estimate the damage. The insured asked the appraisers to include in their estimates repair of the leaning and twisted walls of his residence, but the appraisers refused to estimate that damage because, in their opinion, the damage to the walls was not caused by the windstorm. The court held that the trial court should have judicially determined what force caused the walls to lean and twist. That was not a question for the appraisers to decide. If that damage was the result of the storm, the appraisers should have been directed to estimate the repair cost for the walls.

3. ***Hartford Fire Ins. Co. v. Jones***, 235 Miss. 37, 108 So.2d 571 (1959) – The insured's trailer was destroyed by fire, and the insured and insurer agreed to appoint appraisers to determine the loss. The insured's appraiser and the umpire agreed on the amount of damages, but the insurer's appraiser did not. The insured filed a motion to confirm the arbitration and award loss under the policy, and the insurer filed a motion to vacate the arbitration award. The Supreme Court of Mississippi held that an appraisal is not an arbitration award but an agreement to determine the value of destroyed property. The court went on to describe the difference between appraisal and arbitration and to call "the whole proceeding before us" "almost a comedy of errors."

4. ***Home Ins. Co. v. Watts***, 229 Miss. 735, 91 So.2d 722 (1957) – Denial of liability after the insured refuses to participate in appraisal does not constitute a waiver of the appraisal process.

5. ***Hartford Fire Ins. Co. v. Conner***, 223 Miss. 799, 79 So.2d 236 (1955) – The insured and his insurer disagreed on the amount of damage to a vehicle damaged by fire. The insurer sent a letter to the insured notifying him of its desire to begin the appraisal process, but the insured never selected an appraiser. Instead, he traded in the damaged vehicle, received a credit of $1,600, purchased a new vehicle, and sued the insurer for $2,269, which he alleged was the actual value of the damaged vehicle at the time of the fire. The Mississippi Supreme Court held that the insured failed to make a reasonable effort to carry out the policy's appraisal agreement and that he was barred from recovering under the policy as a result. The parties to an insurance contract with an appraisal provision must act in good faith and make a fair effort to carry out the agreement.

6. ***Franklin Fire Ins. Co. v. Brewer***, 173 Miss. 317, 159 So. 545 (1935) –The Mississippi Supreme Court stated that appraisal awards do not bar an action on the policies. Instead, they fix the amount of recovery under the policy in the event of a partial loss.

7. ***Providence-Washington Ins. Co. v. Kennington***, 111 Miss. 244, 71 So. 378 (1916) – When the appraisers selected by the insured and the insurer cannot agree on appointing an umpire, the insured may institute an action without offering to submit to a second appraisal.

2014
INDEX TO MISSOURI DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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MISSOURI

1. SSDD, LLC v. Underwriters of Lloyd's London, 2013 U.S. Dist. LEXIS 77467, 2013 WL 2420676 (E.D. Mo. June 3, 2013). The insured incurred damages due to theft/vandalism, fire and hail damage and subsequently submitted three property damage claims. The parties could not reach settlement so the insured file an action to compel an appraisal. Lloyd's filed a separate declaratory action to rescind the policy due to material misrepresentations and omissions in the application for insurance, and to stay the motion to compel appraisal until after decision on the DJ. The court found the stay was appropriate because the primary dispute involved coverage, not the opposed amount of loss. The court stated that it stands to reason that expending time or money on an appraisal when the policy is subject to rescission would be a waste.

2. Underwriters at Lloyd's of London, Syndicate 4242 v. Tarantino Properties, Inc., 2012 WL 3835385 (W.D. Mo. Sept. 4, 2012). Lloyd's sent a consultant to estimate the cost of repair to its insured's property. The consultant estimated damages from the wind and/or hail to be $277,854.98. However, the insured submitted a Proof of Loss claiming $2,967,548.42 in damages. Lloyd's paid the undisputed portion of the claim, and filed a declaratory suit for the remainder of the claimed losses. The insured moved to compel an appraisal. Lloyd's objected claiming the disputed issue related to coverage, not the amount of damages. While the court noted that appraisal is not appropriate for resolving questions of coverage, the appraisal here was appropriate because the central issue was a dispute over the amount of loss, not whether the loss was covered under the policy. The court granted the insured's motion to compel appraisal of the claim since the insurer already acknowledged that some of the property damage was due to those causes.

3. TAMKO Building Products, Inc. v. Factual Mutual Ins. Co., 890 F. Supp. 2d 1129 (E.D. Mo. 2012). Here, the selected appraiser had worked on no less than 26 prior matters for the insurer, deriving as much as four to seven percent of its total annual business from the insurer. Further, the appraiser requested advice from the insurer on the selection of an umpire and sought approval from the insurer as to whether he should agree to the amount of damages calculated by the insured's appraiser. The insured expressed concern about using the insurer's appraiser through the process, but did not file a formal objection letter. The court held that an insured does not waive its right to object to a selected appraiser by failing to file a formal objection letter. The court determined that the appraisal award was void and unenforceable due to the fact that the insurer's appraiser was not a disinterested party.

4. Jablonski v. Barton Mut. Ins. Co., 291 S.W.3d 345 (Mo. Ct. App. 2009). The insurer argued that there were no factual issues in dispute, and that the trial court should have determined as a matter of law that the insured's artwork was "business property" subject to a $2,500.00 limitation. The appellate court

concluded that the trial court did not err in denying the insurer's motions for a directed verdict. The parties presented conflicting evidence as to whether the insured created her artwork for business purposes. Consequently, the facts were disputed as to whether the artwork was subject to the business property limitation. This dispute raised a factual question that could only be resolved by the fact finder, and thus, the issue regarding whether the artwork was business property was properly submitted for jury determination. The trial court properly overruled the insurer's objections to the admission of the policy into evidence. The policy was admissible to prove or disprove facts stated in the verdict director: that there was a policy in effect on personal property covering loss due to fire on the date of the loss. The record was sufficient to support the award of prejudgment interest based on a fixed and readily determinable value of the property loss.

5. Harris v. American Modern Homes Ins. Co., 571 F. Supp. 2d 1066 (E.D. Mo. 2008). An insured's appraisal was found to be void because the insured hired an appraiser and agreed to give the appraiser 15% of the final appraised value. Under Missouri law, an appraiser must not be interested, biased or prejudiced.

6. Beltramo Enterprises II, Inc. v. United Fire & Casualty Ins. Co., 2006 WL 744304 (E.D. Mo. March 23, 2006). The insured incurred property damage from a windstorm and the parties subsequently invoked the appraisal clause of the policy. The insurer claimed that the insured's appraisal was void because the insured's appraiser was not impartial and he did not sign the appraisal award. The court held that the policy didn't require the appraiser to sign the decision. However, since the appraiser was the insured's real estate agent, the court found that he was not a disinterested party. The court ultimately held that the insurer waived its right to object because the insurer was notified of that fact and failed to object until after the appraisal process was completed.

7. Dollard v. Depositors Ins. Co., 96 S.W.3d 885 (Mo. Ct. App. 2002). In a case with disputed property damages, the parties are bound by the determination of damages if the insurer and insured previously agreed on an appraisal method.

8. Clark v. Traders Ins. Co., 951 S.W.2d 750 (Mo. Ct. App. 1997). The parties disagreed over the amount of loss so the insured demanded an appraisal. An appraisal award was determined and the insurer sent four separate checks in payment of the claim. However, the insured sent correspondence to the insurer during the payment process withdrawing the request for appraisal, even though the insured already cashed the checks. The insured instead opted to repair claiming total loss and partial loss. The court ultimately held that the insured's claim for total loss was not defeated by the appraisal, but since the insured endorsed the settlement drafts, which was an accord and satisfaction of the partial loss claim, the insurer was entitled to summary judgment on the insured's partial loss claim.

9. Abercrombie v. Allstate Ins. Co., 891 S.W.2d 838 (Mo. Ct. App. 1995). The court held that in insured's claim for partial fire loss, insurer could not elect to withhold portion of loss, as determined by its appraiser, because Missouri law allows insured to elect to receive cash in amount of loss or to restore property to pre-fire condition. Mo. Rev. Stat. § 379.150. In Missouri, insurer is required to pay amount equal to damages done to the property, or restore property to its pre-fire condition, at the insured's option. Additionally, an insurer cannot withhold payment on personal property based on insured replacing personal property. The court declined to rule on the insured's claim for vexatious refusal to pay and instead remanded to the trial court to determine this issue.

10. Hueser v. Shelter Mut. Ins. Co., 901 S.W.2d 138 (Mo. Ct. App. 1995). Hueser claimed $88,500.00 in damages to his house and contents. Shelter Mutual offered a cash payment of $39,347.00, or if Hueser requested, to repair the dwelling. Hueser then invoked the appraisal provision under his policy. However, Hueser later withdrew his appraisal demand after an umpire was appointed by the court, and requested repair of the damages. Nevertheless, the appraisal process continued and the umpire made an award of $56,377.00, which was paid to Hueser stipulating that acceptance did not foreclosure Hueser's ability to pursue further relief. The court held that Hueser's election to receive damages at the outset was not, as a matter of law, irrevocable. Hueser's election for repair was not impermissible as a matter of law since Hueser had a right to compel Shelter Mutual to repair or replace his house rather than accept the appraisal award.

11. Equity Mut. Ins. Co. v. Campbell, 886 S.W.2d 221 (Mo. Ct. App. 1994). Equity Mutual rejected Campbell's claim of loss, prompting the necessity of an appraisal. An appraisal award was entered and Equity Mutual subsequently argued that summary judgment was improper because the appraisal award raised issues of misconduct and carelessness since each appraiser didn't view all damaged pieces of property. The appellate court concluded that there was no evidence in the record to suggest any fraud or misconduct on the part of the appraisers. Further, under the policy, each appraiser was not required to view each piece of damaged property in calculating amount of loss. The insurer, by its own admission, could point to nothing to support its claim of impartiality. Thus, summary judgment is proper where the record fails to show fraud or other misconduct on the part of appraisers.

12. Yankoff v. Allied Mut. Ins. Co., 289 S.W.2d 471 (Mo. Ct. App. 1956). Here, the insured's automobile was damaged as the result of a collision in which his wife sustained injuries as a passenger. The insured sought a recovery for damage to the automobile, medical expenses incurred in the treatment of his wife's injuries, and for the automobile's storage charges. The insurer obtained an appraisal for the loss. However, the court held that it was not appropriate to instruct the jury that the appraisal was binding. The court determined that the appraisal was a "common-law appraisement" since neither party had actually submitted a written

demand for appraisal as required by the policy. Thus, in Missouri, a written demand for the appointment of an appraiser acts as a condition precedent to suit.

13. Hawkinson Tread Tire Service Co. v. Indiana Lumbermens Mut. Ins. Co., 245 S.W.2d 24 (Mo. 1951). Indiana Lumbermen's issued a policy of fire insurance that covered Hawkinson's building and equipment in its tire retreading business. The policy provided for an indemnity of the insured's "actual loss sustained" and included an appraisal clause. On the day that Hawkinson's lease expired, the building was destroyed by fire. Even though Hawkinson had an option to renew, their plan was to move the business to a new building. Hawkinson moved buildings and was up and running six months after the fire, instead of the estimated ten months it would have taken had Hawkinson stayed at the original building. Nonetheless, the court held that Hawkinson was entitled to damages based on resumption of its business at the original building. The court also held that Hawkinson was entitled to maintain its action against Indiana Lumbermen's, despite the appraisal clause in the policy, since it did not bar the action.

14. Security Printing Co. v. Connecticut Fire Ins. Co., 240 S.W. 263 (Mo. Ct. App. 1922). A provision for a stipulation for an appraisal in an insurance policy is to be regarded as collateral to the contract of insurance, unless by its terms it is made a condition precedent to the right of the insured to sue upon the policy. Thus, in order for the clause to amount to a condition precedent, the stipulation for an appraisal must be clearly made. Here, the policy required arbitration to settle disputed amounts and the parties made a special agreement about how to arbitrate. Thus, the loss was not payable until the amount had been determined by the appraisers. The insurer failed to comply with the agreement and the insured sued on the policy. In Missouri, if the appraisal is deemed invalid without fault of the insured, he or she may bring an action under the policy.

2014
INDEX TO MONTANA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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Supplement Index to Montana Decisions

1. Nelson v. Farmers Union Mut. Ins. Co., 68 P.3d 689 (Mont. 2003). Homeowners' insurer was not required by policy to make payment within 60 days of joint appraisal rejected by insureds as settlement of loss from hail damage. The policy at issue required payment within 60 days of an agreement, final judgment, or filing of appraisal award. The insurer agreed to pay replacement costs after the insureds rejected the appraisal. The court held that requiring compliance with the 60-day time period would trump the insureds' rejection of the joint appraisal and their ultimate receipt much later of payment that included replacement costs.

2. Dunn v. Way, 786 P.2d 649 (Mont. 1990). The insured was involved in a single-vehicle accident, damaging his truck, camping trailer and its contents. The trailer and truck were insured under an automobile policy and the contents of the trailer were insured under a homeowners' policy. During negotiations, the insurer clearly and specifically asked for an appraisal as to the contents of the trailer, covered under the homeowners' policy. The insureds did not comply. The policy contained a specific provision precluding legal action against the insurer until there has been full compliance with all terms of the policy. The court ultimately held that the insureds' failure to respond to insurer's notice that appraisal procedure in automobile policy had been invoked precluded suit against the insurer. Further, the insureds' failure to elect as to whether they wished to replace destroyed items or seek reimbursement on the basis of depreciated costs, as required by homeowners' policy, precluded the suit initiated against insurer. Finally, the court held that the insureds' failure to follow the policy's appraisal procedure, which would likely have made their damages certain, precluded right to interest.

3. Garretson v. Mountain West Farm Bureau Mutual Insurance Co., 761 P. 2d 1288 (Mont. 1988). Where the insureds sued their insurer for bad-faith refusal to settle claim under an automobile policy, summary judgment was proper where appraisal was invoked but the insured did not comply before filing a complaint.

4. Solem v. Connecticut Fire Ins. Co. of Hartford, 109 P. 432 (Mont. 1910). Where the parties to a fire policy agreed to arbitrate the amount of loss, and the appraisers provided an award, the court held that, unless set aside, that award is binding on both parties to the policy. The insured cannot, on one hand, rely on the appraisal award and sue for the amount of that award, and on the other hand rely on loss on goods covered by the submission to appraisal, which it is alleged the appraisers wrongfully refused to appraise

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INDEX TO NEBRASKA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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1. ***Rawlings v. Amco Ins. Co.***, 231 Neb. 874, 438 N.W.2d 769 (1989) – The insureds sued their homeowners insurer to recover for tornado damage to their home. The insurer admitted that the policy covered the loss but argued that the insured did not comply with the policy's appraisal requirement. The lower court granted summary judgment in favor of the insurer, but the Supreme Court of Nebraska reversed, holding that a clause in an insurance policy which binds parties to a non-judicial handling of a future dispute concerning the amount of damages owed when an insurer has admitted liability is void and unenforceable.

2. ***Phoenix Ins. Co. v. Zlotky***, 66 Neb. 584, 92 N.W. 736 (1902) – The Nebraska Supreme Court considered the issue of whether the refusal of the insured to comply with the appraisal clause in the policy should abate this suit. The insurer conceded that if the clause at issue involved arbitration of the whole question of liability, it would be against public policy and void. It argued, however, that a different rule applies when the agreement is for the arbitration of but one question, i.e., the amount of damage. The court declined to adopt the insurer's position, reiterating the holding in *Etherton*. There is no better reason for upholding a contract that in advance ousts the jurisdiction of a court of law from finding the amount of damage than there would be for upholding a contract that in advance ousts the jurisdiction of courts on any other question that might arise, and whenever we say that the jurisdiction of court may be contracted away in advance of any question, we open a leak in the dike of constitutional guaranties which might some day carry all away.

3. ***Schrandt v. Young***, 62 Neb. 254, 86 N.W. 1085 (1901) – Whatever distinction may be made elsewhere between arbitration generally and arbitration as to damages only, it is well settled in this state that a provision in a contract requiring arbitration, whether of all disputes arising under the contract, or only of the amount of loss or damage sustained by the parties thereto, will not be enforced, and that refusal to arbitrate is not available to the parties in an action growing out of the contract.

4. ***German-Am. Ins. Co. v. Etherton***, 25 Neb. 505, 41 N.W. 406 (1889) –The Nebraska Supreme Court found void any provision in an insurance policy which prohibits an insured from suing the insurer without first submitting the dispute to arbitration so that the amount due after loss can be fixed. The effect of such a provision is to oust the courts of their legitimate jurisdiction.

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INDEX TO NEVADA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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INDEX OF NEVADA DECISIONS

AMY SAMBERG
AS OF NOVEMBER 11, 2014

1. Herrera v. Allstate Fire & Cas. Co., No. 2:13-CV-00908-MMD, 2013 WL 6408490 (D. Nev. Dec. 6, 2013) – The court held that an appraisal provision does not amount to a binding arbitration provision that is unenforceable under Nevada law. The insured's vehicle was involved in motor vehicle accident and declared a total loss within the meaning of NRS 487.790. The insurer paid a substantially lower amount than the value that should have been assigned as required by NAC 686.680(1)(b)(1). The Policy contained an appraisal provision that allows either the insurer or the insured to demand a loss appraisal. The insured argued that an appraisal provision was akin to a binding arbitration provision. The court disagreed and found that Policy required full compliance with its terms before commencement of litigation. Because the insurer initiated the appraisal process under the Policy, the insured was contractually required to submit to the appraisal process before bringing suit.

2. Redzepagic v. CSAA Gen. Ins. Co., No. 2:14-CV-929 JCM PAL, 2014 WL 4079643 (D. Nev. Aug. 18, 2014) – The court found that the insured must first submit to the appraisal to determine the actual cash value of his vehicle before he could bring suit because it was clearly required under the policy terms. After the insured's vehicle was damaged by an automobile accident, the insurer conducted an appraisal of the vehicle and sent the insured an offer to settle his total loss claim. The insured accepted the offer, but argued that the insurer was obligated pay the "actual cash value" of the vehicle under the policy. The insured alleged that settlement value was insufficient because the insurer used an improper valuation method, violating NAC 686A.680 and excusing him from compliance with the appraisal provision. The insurer invoked its appraisal rights under the policy and sought dismissal because the claim was barred under the policy's appraisal and "legal action against us" provisions. The court held that if full compliance with policy terms is a contractual prerequisite to bringing suit, the insured must first submit to the appraisal because until an appraisal is completed because it is impossible to know whether the insured's claim is undervalued in breach of the contract.

3. Silverman v. Fireman's Fund Am. Ins. Companies, 96 Nev. 30, 604 P.2d 805 (1980) – Addressing the scope of the Uniform Arbitration Act (repealed in 2003), the Nevada Supreme Court found that the legislature clearly intended for the Act to cover appraisals. The insured's restaurant was bombed and totally destroyed. Dissatisfied with appraisal award for business interruption loss, the insured filed an action for declaratory relief seeking an interpretation of the business interruption clause. The court found that because appraisals are subject to the Uniform Act, the action was barred by failure of the insured to seek to vacate the appraisal award within 90 days as provided by the Act.

4. St. Paul Fire & Marine Ins. Co. v. Wright, 97 Nev. 308, 629 P.2d 1202 (1981) – The court held the umpire and appraisers exceeded their powers when they interpreted coverage provisions to arrive at the award figure. After a fire destroyed portions of the

insured's motel, a dispute arose as to whether the policy covered the total value of the motel, including bringing the building up to code, or whether coverage was limited to construction costs. The appraisers determined the amount of loss and found that coverage was limited to reconstruction costs. The court held an appraiser's power generally does not encompass disposition of entire controversy between insurer and insured but extends merely to resolution of specific issues of actual cash value and amount of loss. The court vacated the award because evidence showed that the umpire and appraisers interpreted coverage provisions to arrive at the award figure, exceeding the scope of their powers.

2014
INDEX TO NEW HAMPSHIRE DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

Prepared for

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New Hampshire

Maravas v. Am. Equitable Assur. Corp. of New York, 136 A. 364 (N.H. 1927)

Salganik v. U.S. Fire Ins. Co., 118 A. 815 (N.H. 1922)

Levi v. Palatine Ins. Co., 78 A. 617 (N.H. 1910)

Franklin v. New Hampshire Fire Ins. Co., 47 A. 91 (N.H. 1900)

Drury v. Amoskeag Fire Ins. Co., 18 A. 1109 (N.H. 1889)

Hall v. Fire Ass'n of Philadelphia, 13 A. 648 (N.H. 1888)

Leach v. Republic Fire Ins. Co., 58 N.H. 245 (N.H. 1878)

N.H. Pub. St., Chapter 170.

N.H. Pub. Laws, Chapter 276

N.H. Rev. Stat. §§ 407:1, et seq.

***Leach v. Republic Fire Ins. Co.*, 58 N.H. 245 (N.H. 1878)**

Topics: Compelling arbitration; enforceability of appraisal provision

Summary: In *Leach*, the Supreme Court of New Hampshire addressed whether a policy provision providing that disagreements as to the amount of loss shall be determined by arbitration, and that no suit shall be maintained until after an award or unless brought within a year after the loss was valid. *Id.* at 246. The court, while noting that "[a] stipulation in a policy of insurance, limiting the time within which a suit may be brought, is valid, and binding on the assured," held that both the arbitration and time limit requirements imposed by the provision were invalid. *Id.* The court reasoned that under such a provision, either party could thwart arbitration or prevent an award within the time limit prescribed by the provision by, for example, refusing to join in the choice of arbitrators or by revocation after choice. *Id.* at 246-47. Thus, the limitation "coupled with a condition requiring arbitration if differences arise on the question of the amount of loss, and that no suit shall be brought until after an award … is an attempt to oust the court of its jurisdiction, and is void." *Id.* at 246-47.

Relevant Holdings:

(1) A stipulation in a policy that differences about the amount of loss shall be determined by arbitration, and that no suit shall be maintained until after an award or unless brought within a year after the loss, is invalid, not only as to the arbitration clause, but as to the time limit also, since by refusing to arbitrate the company could prevent an award, and consequently prevent suit, until after the expiration of the year.

***Hall v. Fire Ass'n of Philadelphia*, 13 A. 648 (N.H. 1888)**

Topics: Enforceability of award

Summary: *Hall* involved an action on a policy issued by Fire Association of Philadelphia to Hall, the insured, and made payable to Woodman, Hall's mortgagee upon a covered loss. *Id.* at 648. After the insured property was destroyed by fire, the insurer, by agreement with Hall, but without the knowledge or consent of Woodman, referred the question of the amount of loss to appraisal. *Id.* At the conclusion of appraisal, an award was issued in an amount less than the mortgage debt due to Woodman. *Id.* The insured contended that Woodman, as mortgagee, was bound by the award, notwithstanding the insurer and insured's failure to obtain Woodman's consent, or even notify Woodman, of the submission to appraisal. *Id.*

The court held that Woodman, not being a party or privy to the appraisal process, was not bound by the award. *Id.* at 649. The court reasoned that "at the moment of the loss, the rights of the parties were fixed … [and] [w]hatever amount was secured by the policy, to the extent of the mortgage debt, was due to Woodman." *Id.* Because the insurer was bound to pay Woodman,

Hall could not release the insurer from its obligation, nor defeat Woodman's rights under the policy. *Id.* ("[The insured] could no more adjust the amount of the loss than he could release it.").

Relevant Holdings:

(1) While a mortgagee to whom a fire policy is made payable may be affected by the acts of the mortgagor prior to the occurrence of a covered loss, at the moment of loss the rights of the parties, including the mortgagee, are fixed, and the mortgagee is not bound by an adjustment or appraisal entered into between the mortgagor and the insurer without the mortgagee's knowledge or consent.

***Drury v. Amoskeag Fire Ins. Co.*, 18 A. 1109 (N.H. 1889)**

Topics: Scope of appraisal

Summary: In *Drury*, the insured its insurer agreed to submit to appraisal the question of the amount of loss suffered by the insured due to a fire on the insured property. *Id.* at 1109. In consideration for this agreement, the insurer agreed to waive all other defenses to the insured's claim. *Id.* At the hearing before the referees, the insurer requested that, in addition to determining the amount of loss, the referees find and report that the insured falsely overstated the cost and value of the damaged goods in his written proof of loss with the intent to defraud the defendant. *Id.* The insurer's motion was denied, and the insurer thereafter sought to be relieved of the agreement to submit solely the issue of amount of loss to the referees. *Id.* Refusing to grant the insurer's request, the court held that the agreement was legitimate, that the award on the amount of loss was properly rendered and, moreover, that the referees had "no authority to find or determine anything but the amount of the plaintiff's actual loss." *Id.* at 1110.

Relevant Holdings:

(1) Appraisers, or "referees," have no authority to render decisions on topics other than those contemplated by the policy's appraisal provisions and/or other agreements entered into between the insurer and the insured.

***Franklin v. New Hampshire Fire Ins. Co.*, 47 A. 91 (N.H. 1900)**

Topics: Appraisal as condition precedent to suit

Summary: *Franklin* involved an action for coverage for goods and clothing damaged in a fire. *Id.* at 91. Following the loss, the insured and its carriers agreed to appoint referees to adjust the loss under the following provision:

> In case difference of opinion shall arise as to the amount of any loss under this policy, other than on buildings totally destroyed, unless the company and the insured shall, within fifteen days after notice of the loss, mutually agree upon referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the supreme court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their award in writing, after proper notice and hearing, shall be final, and binding on the parties.

Id. at 91, 92. Shortly thereafter, the referee appointed by the insured withdrew, refusing to participate further in the appraisal. *Id.* Before appraisal was completed, the insured submitted a notice of refusal to proceed with the appraisal. *Id.* Thereafter, the insurer informed the insured that an award had been rendered and, although the insurer admitted liability to the extent of the award, the insured filed suit against the insurers several weeks later to collect on the policy. *Id.* at 91.

The insurer argued that, because the policy form was approved by the legislature, the appraisal provision was a condition precedent to suit, and, moreover, that an award rendered in appraisal is conclusive as to the damages incurred by the insured. *Id.* at 92. The court disagreed. *Id.* at 92-93. First, the court noted that "it is the well-settled law of this state that either the refusal of the arbitrator to perform the duties necessary to carry out the purpose of the agreement, or the withdrawal from the compact of either part before the award is published, renders the agreement of no effect." *Id.* at 92. Thus, the court held that "[t]he agreement of the parties to submit their differences to arbitration was revoked by the refusal of one of the arbitrators to act, and the notice given the insurers by the insured." *Id.*

Moreover, the court held that the mandatory appraisal provision, as construed by the insurer, was inconsistent with Pub St. c. 170 § 13 [Modern N.H. Rev. Stat. § 407:16], which contemplated an award at trial that differed from that determined by the insurers.[1] *Id.* ("If the only contract made by the insurer was to pay the amount determined by arbitrators, this provision of the statute is meaningless; but if the statute means, as it must, that the amount of loss may be litigated, the [appraisal] clause cannot mean that an award of arbitrators is the only foundation for the suit."). The court further held that "[e]ven if the parties are agreed as to all other questions, dissatisfaction with the insurer's estimate of the loss entitles the insured to sue." *Id.* Thus, "if [the insured] may bring suit, he is not bound to abandon the action because of a stipulation in the policy which conflicts with the statutory provision under which the suit was

[1] If, upon trial, the insured recovers more than the amount determined by the insurers, he shall have judgment and execution immediately therefor, with interest and costs. If he recovers no more than such amount, the court may allow interest thereon, and such costs to either party as may be just; but execution shall not issue against the company within 3 months, unless by special order of court. N.H. Rev. Stat. Ann. § 407:16.

brought." *Id.* ("The statute must prevail over the policy contract, for such was the legislative intent) (citing [N.H. Rev. § 407:21]). As a result, the court found that the insured was entitled to a jury trial upon the question of the amount of loss.

Relevant Holdings:

(1) It is the well-settled law of this state that either the refusal of the arbitrator to perform the duties necessary to carry out the purpose of the agreement, or the withdrawal from the compact of either party before the award is published, renders the agreement of no effect.

(2) An appraisal provision in conflict with the provisions of [N.H. Rev. Stat. §§ 407:1, et seq.] by requiring appraisal prior to a suit on the policy is void and unenforceable.

(3) Policy provision requiring arbitration in the event of a dispute is not a condition precedent to suit because such a provision conflicts with statute permitting suit to be filed by insured if the insured is not satisfied with the adjustment made by the insurer.

Relevant Standard Form Provisions:

(1) N.H. Rev. Stat. §§ 407:22 (2014):

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

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 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 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 2 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.

***Levi v. Palatine Ins. Co.*, 78 A. 617 (N.H. 1910)**

Topics: Appraisal as condition precedent to suit

Summary: *Levi* involved an action under a fire insurance policy for $400 in in personal property damaged by smoke and water. *Id.* at 617. Immediately following the loss, the insured submitted a written list of the goods damaged and, when dissatisfied with the amount of loss determined by

the insurer, refused to accept the insurer's offer and was told by the insurer that she'd have to file suit against the insurer. *Id.* The policy contained the following relevant provision:

> In case difference of opinion shall arise as to the amount of any loss under the policy other than on buildings totally destroyed, unless the company and the insured shall, within 15 days after notice of the loss, mutually agree upon referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the Supreme Court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their award in writing, after proper notice and hearing, shall be final and binding on the parties.
>
> ***
>
> It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable as hereinafter provided

Id. at 617-18. After a trial in which the jury found for the insured, the insurers moved for a nonsuit on the grounds that, *inter alia*, the insured sold or disposed of a material part of the goods claimed to be damaged before the expiration of the time within which the insurers had a right to ask for appraisal. *Id.*

Refusing to grant the insurer's motion, the court recognized that, although the insurer had not waived its right to demand appraisal, "[t]he requirement[] of … appraisal by referees … is not essential to the maintenance of a suit upon the policy." *Id.* at 618 (citing *Franklin v. New Hampshire Fire Ins. Co.*, 47 A. 91 (N.H. 1900)). The court further noted that "[i]f refusal to enter upon or continue an appraisal by referees, when required by the insurer within the time limited, does not defeat the action, an act which indicates the insured's intention not to enter into such submission, or renders the proceeding impossible, cannot have that effect." *Id.* Thus, "[a]s the [insurers] could not have compelled the insured to enter [appraisal], if they had applied for the same within the time limited, the fact … that they were prevented from applying for [appraisers] by the sale of a portion of the goods before the expiration of that time is immaterial." *Id.*

Relevant Holdings:

(1) Under, N.H. Pub. St. c. 170 (1901), appraisal is not a condition precedent to suit.

***Salganik v. U.S. Fire Ins. Co.*, 118 A. 815 (N.H. 1922)**

Topics: Appraisal as condition precedent to suit; enforceability of award

Summary: In *Salganik*, the insured sought coverage under a New Hampshire standard form fire insurance policy. *Id.* at 815. Following the loss, the insured petitioned the court to appoint referees to adjust the loss under the policy's standard appraisal provision, stating:

> In case difference of opinion shall arise as to the amount of any loss under this policy, other than on buildings totally destroyed, unless the company and the insured shall, within fifteen days after notice of the loss, mutually agree upon referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the supreme court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their award in writing, after proper notice and hearing, shall be final, and binding on the parties.

Id. at 818 (citing *Franklin*, 47 A. 91 at 92, and noting that "[t]he same form of policy is now in force as when the above decision was rendered…."). The insurer argued that the insured falsely and fraudulently stated that he had goods in his store at the time of the fire and grossly inflated the value of property actual destroyed. *Id.* at 817. Moreover, the court held that, despite the insurer's contention, which was not at issue before the referees, the appraisal award was fully enforceable against the parties, emphasizing that "[t]he award is the result of a completed [appraisal] between the parties, relating to the loss suffered by the insured, and the parties must be bound by it." *Id.*

Moreover, the court noted that the referee clause in the New Hampshire standard form fire insurance policy does not compel either party to adopt that procedure to adjust a loss, and is thus not a condition precedent to a suit on the policy:

> The referee clause in the New Hampshire standard form of a fire insurance policy provides a method by which the parties may have the amount of loss under a policy determined by referees. But the parties are not compelled to adopt this procedure to adjust a loss. The insured may, if he prefers, bring an action at law to collect his damages under chapter 170 of the Public Statutes. The referee clause is not rendered void by this chapter, but is an additional means for the parties to an insurance policy, if they so desire, to adjust a loss thereunder.

Id. (internal citations omitted). Finally, because the insurer did not object to the appraisal until after the referees filed their report and issued an award, the amount of damages determined therein was binding on the parties thereto. *Id.*

Relevant Holdings:

(1) Because Chapter 170 of the New Hampshire Public Statutes (1901) provides for an action at law by the insured in the event the insured is dissatisfied with the insurer's adjustment of a loss, the appraisal provision in the New Hampshire standard fire insurance policy is not a condition precedent to suit on the policy, but rather an additional means for the parties to adjust a loss.

(2) Where an appraisal reward is rendered upon completion of appraisal between the parties, the parties must be bound by it.

***Maravas v. Am. Equitable Assur. Corp. of New York*, 136 A. 364 (N.H. 1927)**

Topics: Appraisal as condition precedent to coverage; enforceability of award

Summary: *Maravas* involved an action by an insured to recover damages sustained to several barrels of "Feta" cheese when a fire broke out in the insured property and the cellar flooded. *Id.* at 365-66. A few days after the fire, while the insured was attempting to mitigate his damages, the insured failed to follow secure the barrels containing the cheese, resulting in the intrusion of contaminated water. *Id.* at 366. Both parties agreed that the cheese ought to have been repacked at once in new barrels. *Id.*

The New Hampshire standard fire insurance policy at issue contained the following appraisal provision:

> In case difference of opinion shall arise as to the amount of any loss under this policy … unless the company and the insured shall within fifteen days after notice of the loss mutually agree upon referees to adjust the same either party may upon giving written notice to the other apply to a justice of the Supreme Court who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered and their award in writing after proper notice and hearing shall be final and binding on the parties."

Id. at 366. Following a disagreement as to the amount of the insured's loss, the parties agreed to an appraisal, in which the appraisers unanimously determined that "[a]t this present time the cheese is of no value, the condition of which we cannot tell at this time was due to the fire or not." *Id.* The insurer argued that the insured was bound by the appraisal report, particularly in light of the fact that, due to the insured's failure to properly contain the loss, it is impossible to tell whether the damage was actually caused by the fire. *Id.* at 369.

The court, citing *Salganik*, 116 A. at 818, held that the appraisal clause in the New Hampshire standard form fire policy is not a condition precedent to suit, but rather merely provides an alternative method by which the parties may have the amount of loss under a policy determined by the referees." *Id.* ("The parties are not compelled to adopt this procedure, and it is optional with the insured whether he will submit his claim to arbitration or bring an action at law to collect his damages under the fire insurance statute."). Where, however, the parties agree to submit to appraisal, they are bound by a proper award. *Id.*

Moreover, the court held that "[a] submission to [appraisal] … requires a decision by the referees upon all the questions submitted to them, and an award which fails to decide a part of the matters covered by the submission is void." *Id.* Thus, because the appraisers were unable to determine the amount of loss to the insured's cheese due to the fire, the appraisal was void and the parties were entitled to bring an action at law, despite having previously agreed to an appraisal.

Relevant Holdings:

(1) Failure of insurance appraisal, as shown by determination of appraisers that damage to cheese by fire could not be determined, did not prevent recovery by action.

(2) While the New Hampshire standard fire insurance policy appraisal provision is not a condition precedent to coverage, as the insured and insurer have the option to pursue an action at law pursuant to the provisions of New Hampshire Public Laws, Chapter 276 (1926) [formerly New Hampshire Public Statutes, Chapter 170], once the parties agree to submit a dispute concerning the amount of loss to appraisal, they are bound by a proper award rendered therein.

(3) Award of referees as to loss under fire policy is void, unless all questions submitted are covered.

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American Central Ins. Co. v. Landau, 62 N.J. Eq. 73, 49 A.738 (Court of Chancery, 1901)
Appraisal is not an ordinary arbitration, where the parties hear witnesses, and appear by counsel, and act upon sworn evidence only. Appraisers and umpire get their information "in an informal way." 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." If a party appointed appraiser withdraws after a submission has been entered into, that does not annul or avoid the appraisal. Party should have "at once appointed another appraiser to act in his place."

Caledonian Ins. Co. v. North Dutch Reformed Church, 96 N.J. Eq.342 (Court of Chancery, 1924)
The court cannot weigh the experience and competency of an umpire lawfully appointed. "We see no reason for the separation and the itemizing of the damage…as the policy covered both and was not apportioned as between the two. ..An award made as this was made will not be set aside unless there is clear proof of injustice done to the complainant."

Melton Bros. v. Philadelphia Fire & Marine Ins. Co., 104 N.J. Eq. 153, 144 A. 726 (1929)
"Every reasonable intendment and presumption comes to the support of an award in arbitration proceedings." Court does not address directly whether appraisal is a form of arbitration. The umpire is not really an umpire. He is really a third appraiser. Requirement that party appraisers meet and submit only disputed items to umpire does not need to be strictly adhered to. "Substantial compliance with such a provision is all that is required." Itemized award not required. An award "is not invalidated because the appraiser is merely zealous for what he conceives to be the rights of the party who nominated him." Appraiser was still competent and disinterested.

Feinbloom v. Camden Fire Ins. Co., 54 N.J.Super. 541, 149 A.2d 616 (App. Div. 1959)
Appraisal award not binding on policyholder when more than 50% damage triggered code requirements that had the effect of making the loss a constructive total loss. The appraisal was not valid because code requirements involve questions of law and"the policy does not contemplate the submission to the appraisers of questions of law."

Hala Cleaners v. Susex Mutual Ins. Co. 115 N.J. Super. 11 (**Ch. Div. 1971)**
An insured as well as an insurance company can insist that the appraisal procedures be followed. Appraisal can be compelled even if insurer claims a valid defense to coverage. Only the amount of loss can be appraised.

Elberon Bathing Co., Inc. v. Ambassador Ins. Co., 77 N.J. 1 (1978)
Appraisers cannot decide legal issues. Appraisal award vacated because, in appraising actual cash value of a loss, appraisers awarded full cost of replacement without regard to depreciation. Since New Jersey follows broad evidence rule in calculating actual cash value, and since actual cash value is based on principle of indemnity, panel erred by making legal determination of what constitutes actual cash value. Panel also erred by refusing to hear broad range of evidence on what constitutes actual cash value.

Rastelli Brothers, Inc. v. Netherlands Ins. Co., 68 F.Supp.2d 440 (D.N.J., 1999)
Appraisal clause is not an arbitration clause under the Federal Arbitration Act. Appraisal deals exclusively with the method of handling a dispute about the amount of loss. If the amount of loss is not in dispute, an appraisal cannot be compelled.

Ward v. Merrimack Mutual Fire Ins. Co., 332 N.J.Super. 515 (N.J.App. 2000)
The fact that coverage was denied did not necessarily preclude either party from invoking appraisal. Rejects plaintiff's argument that he was deprived of due process under the Fourteenth Amendment because the umpire declined to have

the parties and their counsel participates in fact finding hearings. "[A]appraisal is a proceeding without a presiding officer with authority to control proceedings and punish misconduct, without formal taking of evidence, without oaths, procedural safeguards, discipline or other court-like restraints. ..As such, the appraisal process does not lend itself to the formal introduction of evidence by the parties or the opportunity to submit rebuttal documents or proofs. Appraises…need not be sworn and need hold no formal hearings so long as both sides are given an opportunity to state their positions."

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INDEX TO NEW MEXICO DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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NEW MEXICO

1. Lisanti v. Alamo Title Ins. of Texas, 35 P.3d 989 (N.M. 2001)—this case was a dispute regarding the enforceability of an arbitration provision rather than an appraisal provision. However, given the lack of New Mexico case law on appraisals, much deference should be given to the New Mexico Supreme Court's statement in this case that, "[w]hen a party agrees to a non-judicial forum for dispute resolution, the party should be held to that agreement."

2014
INDEX TO NEW YORK DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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INDEX OF NEW YORK DECISIONS

PILLSBURY WINTHROP SHAW PITTMAN LLP

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William Decotiis
July 2014

1. Pilkenton v. New York Cent. Mut. Fire Ins. Co., 112 A.D.3d 1327 (2013) – The trial court granted the insured's motion to compel the insurer to submit to appraisal, but the Appellate Division reversed. The policy provided for appraisal in the event of a covered loss, and here there was a pending declaratory judgment action in which the parties disputed whether the loss was covered. Appraisal would thus have been premature.

2. Ginsburg v. Charter Oak Fire Ins. Co., 109 A.D.3d 959 (2013) – This was an action to recover damages for breach of a homeowner's insurance contract. The plaintiffs claimed their losses were higher than the amount initially remitted to them by the insurer, and brought suit. While the action was pending, an appraisal award became final and the insurer paid the difference between its initial payment and the award. The Appellate Division affirmed the trial court's finding that the insureds were not entitled to collect interest on the additional amount that the insurer paid to them following the appraisal award, since CLPR §5001 (on which the plaintiffs based their claim for interest) applies only in the event of a breach of contract. Because the insurer, consistent with the policy's Loss Payment provision, paid the award within 60 days of the filing of the appraisal award, there was no breach and no interest could be collected.

3. Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193 (2d Cir. 2012) – The insured suffered losses from the collapse of a storage rack in a warehouse. The primary insurer paid the policy limit, but excess insurers refused to pay the further amount claimed. The insured brought suit, and the excess insurers demanded appraisal. The appraisers determined that damages from the rack collapse were below the amount covered by the primary insurer, and the district court granted summary judgment for the excess insurers. The Second Circuit held: (1) A party does not waive its right to appraisal if its demand for appraisal is reasonable under the circumstances, and reasonableness depends on (a) whether the appraisal sought is impractical or impossible, (b) whether the parties engaged in good-faith negotiations over valuation prior to the appraisal demand, and (c) whether an appraisal is desirable or necessary under the circumstances; (2) causation of losses and the end date of the period of restoration were questions of fact related to valuation, not questions of law, and were thus legitimately decided by the appraisers; and (3) in the context of appraisal, as opposed to litigation or arbitration, an insured does not have a due process right to discovery of materials relating to an insurer's investigation.

4. Woodworth v. Erie Ins. Co., 2006 WL 140708 (W.D.N.Y Jan. 17, 2006); Woodworth v. Erie Ins. Co., 743 F. Supp. 2d 201 (W.D.N.Y 2010); Woodworth v. Erie Ins. Co., 2011 WL 98494 (Jan. 12, 2011) – These three opinions relate to an insured's claim for breach of contract for the insurer's refusal to engage in appraisal of the cost of replacement of the insured's house, which

was destroyed in an explosion. In *Woodworth I*, the court dismissed the claim because actual rebuilding of the house was a condition precedent to the insurer's liability for replacement cost under the policy. Since the insured had not yet rebuilt, he had no claim for replacement cost, and hence the insurer had no duty to engage in appraisal. In *Woodworth II*, the court reversed itself *sua sponte*, agreeing with a recent S.D.N.Y. decision that "although actual replacement is a condition precedent to collecting replacement proceeds, it is not a condition precedent to valuing hypothetical replacement cost." *See SR Intern. Business Ins. Co. Ltd. V. World Trade Center Prop. Ltd.*, 445 F. Supp. 2d 320, 333 (2006). Then, in *Woodworth III*, the court reversed itself yet again, observing that the insurance policies at issue in *SR International* contained provisions that expressly provided that under certain circumstances the insured would be reimbursed for a hypothetical replacement cost. Since no such provision existed in the policy at issue, the court again dismissed the insured's claim of breach of contract for refusing to engage in appraisal.

5. *In re* Merrimack Mut. Fire Ins. Co. v. Seibert, 31 Misc.3d 523 (N.Y. Sup. Ct. 2011) – Pursuant to an appraisal provision, and because their respective appraisers were unable to agree on an umpire, the parties initiated a special proceeding under Insurance Law § 3408 to ask the court to appoint a competent and disinterested umpire. The parties submitted collateral motions in the proceeding, both parties requesting that the court delineate the scope of the umpire's valuation powers, and the insured asking for a declaration that its chosen appraiser was competent and disinterested. The court appointed an umpire, but denied all of these collateral motions as outside the scope of the powers given the court under § 3408.

6. Baron Upholsterers, Inc. v. Penn. Lumbermens Mut. Ins. Co., 2010 WL 1629631 (S.D.N.Y. April 20, 2010) – The insured brought an action against the insurer after the parties had been unable to agree on the valuation of damages for nearly two years. The policy contained a two-year period of limitations for litigating claims, and the insured brought the action in order to prevent forfeiture of its claim. The insurer then demanded appraisal, the insured refused, and the insurer moved for summary judgment because of the insured's failure to comply with the policy's appraisal provision. The insured argued that because of the insurer's "inexcusable delay" in ascertaining the value of the claim, the insurer had waived its right to appraisal, but the court disagreed and granted summary judgment for the insurer. In a very short opinion, the court observed that the insurer had offered a settlement, and that appraisal had not become impossible, citing *Richardson v. Merrimack Mut. Fire Ins. Co.*, 2000 WL 297171 (S.D.N.Y. March 21, 2000) (insurer did not waive right to appraisal by demanding appraisal two days after insured filed suit, where insured brought suit four months after claim's inception, and parties had been in frequent communication during that time). The insurer thus had not waived its right to appraisal, and the insured was required to submit to appraisal before bringing suit.

7. ***Duane Reade*** **Opinions (2003–2010)**

   I. Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 261 F. Supp. 2d 293 (S.D.N.Y April 30, 2003) – Plaintiff insured operated a drug store in the World Trade Center prior to its destruction on September 11, 2001. The plaintiff brought suit seeking, inter alia, declaratory judgments as to the scope of coverage. The defendant insurers moved to dismiss the claims and compel the plaintiff to enter appraisal. The court denied defendant's motion to compel appraisal, since coverage disputes existed that could not

properly be determined through appraisal, and because any appraisal would be premature with matters of coverage yet to be settled.

II. Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 279 F.Supp.2d 235 (S.D.N.Y. 2003) – The insurer motioned to have the appraisers (as opposed to the court or jury) determine the duration of the period of restoration. The court agreed with the insurer that such calculation fell within the appraisers' purview, observing that pursuant to the parties' agreement, and as a general matter under New York law, questions concerning valuation of the loss rather than coverage are proper subjects of appraisal. *Citing Kawa v. Nationwide Mut. Fire Ins. Co.,* 664 N.Y.S.2d 430, 431 (Sup. Ct. 1997); *Zar Realty Management Corp. v. Allianz Ins. Co.,* 2003 WL 1744288, at *4 (S.D.N.Y. Mar. 31, 2003); *Indian Chef, Inc. v. Fire and Cas. Ins. Co.,* 2003 WL 329054, at *3 (S.D.N.Y. Feb. 13, 2003). While the definition of "Restoration Period" was a question of coverage to be determined by the court, the estimation of that period in order to help value the loss was a matter of valuation rather than coverage. The court observed that that real estate, business, and insurance appraisers regularly make such determinations. The court therefore granted the insurer's motion to submit the issue to the appraisal panel.

III. Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384 (2d. Cir. 2005) –

The Second Circuit affirmed the trial court's *Duane Reade II* opinion almost in its entirety, including all holdings relating to appraisal. An additional issue raised on appeal was that the trial court erred in not dismissing the suit under the policy's "no action clause," which provided that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless [the insured] shall have fully complied with all of the requirements of this policy." The court found that this provision was ambiguous: the clause could plausibly be read as precluding suit until the insured satisfied every contractual obligation, but was equally amenable to being read as precluding suit only if the insured had failed to satisfy those obligations that accrued before the suit was filed. Since the insurer did not demand appraisal until four months after the insured filed suit, the court affirmed the trial court's decision to let the case proceed.

IV. Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 600 F.3d 190 (2d. Cir. 2010) – The appraisers valued the insured's loss in the millions of dollars, relying on two provisions in the policy covering, respectively, "Business Interruption" and "Extended Recovery Period." The appraisers also awarded prejudgment interest on the losses. The district court struck down the award as to the extended recovery period, finding the loss was not covered under this provision of the policy, but upheld the award of pre-judgment interest. The Second Circuit upheld the former decision, but adjusted the award so as to preclude pre-judgment interest, finding that under New York law, interest accrues only from the time when the contract is breached. In this case, the payments on the policy were due no later than sixty days after an appraisal award became final; interest could thus only be awarded beginning on the 61st day after appraisal, since this was the day the insurer breached the contract through non-payment.

8. ***SR International* Opinions (2002–2007)**

I. SR International Bus. Ins. Co. Ltd. v. World Trade Ctr. Prop. LLC, 2002 WL 1905968 (S.D.N.Y. Aug. 19, 2002) – The insured owned property interests in the World Trade Center buildings. One of the many insurers involved in this litigation moved to compel the insured to submit to appraisal. The insured objected on the bases that (1) the federal Air Transportation and System Stabilization Act (ATSSA) preempted the contract's appraisal provision, (2) the demand for appraisal was premature because the insured had not yet engaged in good faith negotiations over the value of the loss, and (3) the demand for appraisal came too late because the insured was already engaged in litigation over the loss when it made the demand. The court rejected all of these arguments. The ATSSA could not and did not purport to strip the state-protected contractual rights contained in the insurance policy. Good faith negotiations were not an absolute prerequisite to a demand for appraisal, and in fact in some instances might be duplicitous with appraisal proceedings. And the insurer had preserved its right to an appraisal in its reply to the insured's counterclaim against it, and since then had engaged in good faith efforts to convince other insurers to invoke their rights to appraisal.

The court did find, however, that there was a real risk that "[t]he enforcement of appraisal rights in this case, where only some of the insurers are seeking appraisal, may unfairly multiply the proceedings in which the [insured] are forced to litigate the valuation issue." One possible remedy for this was for the court to substitute itself as the neutral umpire to the dispute should the appraisers be unable to reach an agreement. However, the issue was not yet ripe, and the court reserved the question until such time as the appraisers could not agree on valuation. The court thus granted the insurer's motion to compel participation in the appraisal process.

II. SR International Bus. Ins. Co. Ltd. v. World Trade Ctr. Prop. LLC, 2003 WL 1344882 (S.D.N.Y. Mar. 18, 2003) – After *SR International I*, several other insurers also moved to compel appraisal. The insured opposed the motions on the grounds that the insurers had waived their right to appraisal. The two different policies at issue required any demand for appraisal to be made within a certain amount of time after receiving a proof of loss: either thirty or sixty days, respectively. On January 18, 2002, the insured had submitted to the insurers a document entitled "First Supplement to Preliminary Proof of Loss," which noted it was "Subject to Revision," listed several items as "T.B.D.," and otherwise purported not to "express any opinion as to the Actual Cash Value of the [insured property]." The insured now argued that this document constituted a proof of loss, and that therefore the window of opportunity for demanding appraisal had long since passed.

The court rejected the insured's argument, first observing that "under New York law, waiver of the right to an appraisal is not lightly inferred." The status of the document at issue as a proof of loss was anything but clear: if the insured had intended the document to so function, it could have labeled it as such instead of using the ambiguous title "supplement to preliminary proof of loss," as well as including other equivocal language that suggested the document was not an official proof of loss. Additionally, even after March 2002—when, according to the insured, all rights to appraisal had been forfeited—the parties continued to discuss appraisal, and the insured never suggested the right to appraisal had been forfeit. In fact, as late as June 2002 the insured had argued to the court in *SR International I* that appraisal was premature. It was thus clear that the document at

issue, combined with the insured's conduct, had been insufficient to put the insurers on notice that the clock had begun to run on their rights to demand appraisal, and the court granted the motions to compel appraisal.

III. SR International Bus. Ins. Co. Ltd. v. World Trade Ctr. Prop. LLC, 2004 WL 2979790 (S.D.N.Y. Dec. 1, 2004) – Zurich American Insurance Company was one of the few insurers who did not join in demanding appraisal in *SR International II*. In May 2003, Zurich was granted status as an observer to the appraisal proceedings, with the express condition that the grant of such status would not "prejudice [] the position of any party as to whether the Court should enforce any appraisal provision in any insurance contract." Zurich later moved to be admitted as a participant in the appraisal process, leading to this opinion.

The court granted the motion despite the insured's argument that the motion was untimely. The court observed that where an insurance policy (like Zurich's) does not specify a time limit for an appraisal demand, the court must decide if the demand has been made "within a reasonable period, depending upon the facts of the case." This inquiry turned on three factors: (1) whether the appraisal sought was impractical or impossible; (2) whether the parties engaged in good-faith negotiations over valuation prior to the appraisal demand; and (3) whether an appraisal was desirable or necessary under the circumstances. The court observed that although there was no evidence of any good-faith negotiations between the parties, this single factor was not determinative, and other factors cut in favor of allowing appraisal: appraisal was practical (and in fact, already ongoing), the insured would not be prejudiced by Zurich's delay in demanding appraisal, and appraisal was desirable since it would allow all claims to be valuated in a uniform proceeding rather than having "a separate damages trial solely to determine Zurich's coverage obligations."

IV. SR International Bus. Ins. Co. Ltd. v. World Trade Ctr. Prop. LLC, 445 F. Supp. 2d 320 (S.D.N.Y. July 25, 2006) – In this opinion, the court resolved various coverage issues that had arisen while the appraisal process was ongoing. "Although a court generally reviews disputed questions of law after an appraisal is complete, this timing is not mandatory." Here, the appraisal panel had unanimously requested that the court rule on issues of coverage. The court granted this request in the interest of efficiency, since these issues directly implicated the values the panel was determining under the appraisal stipulation: for instance, the issue of what evidence was appropriate for the appraisers to consider in estimating the "Actual Cash Value" of the World Trade Center.

V. SR International Bus. Ins. Co. Ltd. v. World Trade Ctr. Prop. LLC, 2007 WL 519245 (S.D.N.Y. Feb. 16, 2007) – In previous decisions, the court decided that the insured would be compensated for losses during a hypothetical, rather than actual, period of restoration, and for a hypothetical replacement cost of the World Trade Center as it stood just before it was destroyed. In this opinion, the court granted the insurers' motion to enjoin the insured from presenting to the appraisal panel evidence of "real-world circumstances" that would require the rebuilding of a World Trade Center different than the one in existence before the 9/11 attacks. For instance, evidence of the cost of building a new Center with blast walls, higher ceilings, embassy glass, etc., was not relevant to

hypothetical replacement cost, since these items did not exist in the original structure. However, evidence of market changes in the wake of 9/11 and other such "real-world circumstances" *were* relevant for determining items such as hypothetical lost rent, and thus appropriate evidence for the panel to consider. Also, the materials hypothetically used for reconstruction could be comparable to the original materials rather than exact replacements: e.g., "vinyl instead of asbestos, or different steel to rebuild similarly-sized beams."

9. *In re* U.S. Fid. & Guar. Co., 819 N.Y.S.2d 852 (Sup. Ct. 2006) – The court held that here is no breach of contract where the insurer pays an appraisal award within the time allowed for under the policy, and hence no interest can be awarded under CLNY § 5001, which provides for the recovery of interest on sums awarded for breach of contract.

10. Int'l Office Ctr. Corp. v. Providence Washington Ins. Co., 2005 WL 2258531 (D. Conn. Sept. 16, 2005) – In this District of Connecticut case applying New York law, the plaintiff insured operated an office that was destroyed in the World Trade Center disaster of September 11. The plaintiff sought to recover for business loss and property loss under the policy, and disputes as to the amount of loss arose between the parties. The court held that the policy was a valued policy as to the property, and the fact that it included an appraisal provision did not change this fact. Appraisal clauses in valued policies may still function where the loss is partial rather than total. However, where loss is total, the coverage is fixed at the valued amount. Because the loss was total, a fact not disputed by the parties, the insured was entitled to coverage in that amount.

11. Indian Chef, Inc. v. Fire and Cas. Ins. Co., 2003 WL 239054 (S.D.N.Y. Feb. 13, 2003) – Plaintiff insured's restaurant was damaged as a result of the World Trade Center disaster. Adjusters for the two parties inspected the damaged property, but disagreed as to issues of both valuation and coverage. The insured sent a proof of loss on February 1, 2002 claiming losses in excess of the policy limits. On February 25, the insurer rejected the proof of loss. The insured did not respond in writing, but claimed that its adjuster made numerous phone calls to the insurer over the coming weeks, which were never returned. At this point in time, neither side requested appraisal.

    On May 2, 2002, the insured brought suit under the policy. In late May or early June, the insurer demanded appraisal. Also at some point in late May, the insured regained access to its premises and began clean-up and renovation. It undertook major renovations and reopened for business on June 16. Nonetheless, the insurer continued to demand appraisal, and moved the court to compel appraisal before allowing the lawsuit to go forward.

    The court noted that the insurer had not made clear which of two claimed items of damages it wished to have submitted to appraisal: property damage, or lost business income. If the former, its demand was inappropriate because appraisal was no longer practical: the plaintiff had restored and renovated the property, making such an appraisal impossible. If the latter, appraisal was inappropriate because the parties' dispute was essentially one of coverage: the plaintiff claimed that two provisions of the policy provided it with independent and cumulative coverage, while the defendant claimed the lost business income was covered by only one of the provisions. Because legal questions of coverage were inappropriate subjects of appraisal, and because appraisal of property damage was impossible, the court denied the insurer's motion to compel appraisal.

12. Zar Realty Mgmt. Corp. v. Allianz Ins. Co., 2003 WL 1744288 (S.D.N.Y. Mar. 31, 2003); Zar Realty Mgmt. Corp. v. Allianz Ins. Co., 2003 WL 21787323 (S.D.N.Y. Aug. 1, 2003) – Plaintiff insured owned a building that suffered damage from the 2001 World Trade Center collapse. The insured thereafter submitted several proofs of loss, which the insurer refused to pay because, in some instances, it denied that the policy covered the claimed losses, and in other instances, it considered the claimed losses to be exaggerated.

In *Zar I*, the insured brought suit and the insurer moved to dismiss the claims and compel appraisal. The insured argued that N.Y. CLPR § 7601 (as it existed at the time) expressly prohibited courts from specifically enforcing appraisal provisions in fire insurance policies like the one at issue here. While acknowledging the force of this argument, and the fact that one New York court had accepted it as an accurate statement of the law (*see Fahrenholz v. Security Mutual Ins. Co.*, 291 A.D.2d 876 (2002)), the court found that New York Insurance Law § 3404 compelled a different result. That statute provided that "notwithstanding any other provision of law to the contrary, the provisions of the appraisal clause set out on the . . . standard fire policy . . . shall be binding on all parties to the contract." The court held that because § 3404 had been enacted after § 7601, the legislature evinced a clear intent to give courts discretion to specifically enforce appraisal provisions in fire insurance policies. (Note that as of March 30, 2010, CLPR § 7601 has been amended to expressly allow for judicial enforcement of appraisal provisions in fire insurance policies.)

The court thus held that—at least for those items for which there currently existed a dispute over valuation only—the insured was compelled to comply with the insurer's demand for appraisal. However, certain portions of the controversy centered on the defendant's denial of liability under the policy. The court observed that issues of coverage were not appropriate subjects of appraisal, and that additionally, a denial of coverage excuses the insured from complying with the policy terms, including appraisal provisions. The court thus granted the defendant's motions to dismiss and compel appraisal as to issues of pure valuation, while denying the motions with respect to issues of coverage.

In *Zar II*, the plaintiff insured belatedly asserted an additional $125 million claim for remediation of "dust" that infiltrated the insured building as a result of the World Trade Center collapse. After the insurer conceded that, if valid, such a claim would be covered under the policy, the court ordered the loss to be submitted to appraisal. The insurer then demanded, as its right under the policy, to examine under oath the experts relied upon by the insured in bringing the claim for dust remediation. The insured responded by claiming, inter alia, that "since the claim will be subject to an appraisal—which [the insured claimed was] the functional equivalent of an arbitration—only the appraiser has the 'jurisdiction' to order pre-arbitration discovery." The court rejected this argument, since "the fact that this claim will be subjected to an appraisal process is inconsequential." The court had previously compelled similar examinations in connection with claims that were pending appraisal, and the right to examine the experts was a contractual right under the policy, which the insurer was entitled to regardless of whether the claim proceeded to any form of litigation, arbitration, or appraisal.

13. Fahrenholz v. Security Mut. Ins. Co., 291 A.D.2d 876 (2002) – Plaintiff insured sought a declaration that the insurer was compelled to submit to appraisal. The trial court dismissed the motion, and the Appellate Division affirmed. Insurance Law § 3404, in its then-present form, did

not eliminate the prohibition against seeking specific performance of the appraisal provision in the standard fire insurance policy set forth in CPLR § 7601, which explicitly provided that a valuation or appraisal provision was specifically enforceable, "other than one contained in the standard fire insurance policy." Further legislative action was required to eliminate that prohibition. (Note that such action came in 2010, when § 7601 was amended to make appraisal provisions in fire insurance policies specifically enforceable.)

14. Richardson v. Merrimack Mut. Fire Ins. Co., 2000 WL 297171 (S.D.N.Y. March 21, 2000) – Plaintiff insured suffered damage by fire on April 29, 1998. Though the parties disputed several aspects of the facts, it was undisputed that at least one settlement offer had been tendered by the insurer on August 6, and other evidence showed that the parties had "exchanged many letters, phone calls, and reports pertaining to the fire and Plaintiff's loss." On September 9—just over four months after the fire—the insured brought suit, and two days later the insurer demanded appraisal. The plaintiff refused, and the insurer asserted as an affirmative defense the plaintiff's failure to comply with the policy's appraisal provision. The plaintiff argued that by waiting until after suit was filed to demand appraisal, the insurer had waived its right to appraisal. The court disagreed, finding that it was not unreasonable for the insurer to wait until negotiations completely broke down before demanding appraisal, since the parties had been in frequent contact since the claim's inception, and the demand was made almost immediately upon receiving notice of the suit. Furthermore, appraisal had not become impractical or impossible as was the case in *Chainless Cycle*, and the dispute was purely one of valuation, making appraisal desirable. The court thus granted the defendant's motion for summary judgment because of the plaintiff's failure to comply with the appraisal provision.

15. Caiati of Westchester v. Glens Falls Ins. Co., 264 A.D. 2d 286 (1999) – The court held that interest cannot be collected on an appraisal award until after the amount has become payable under the terms of the contract.

16. Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261 (2d Cir. 1997) – Plaintiff insured brought suit against the insurer to collect for damage to his property. The parties entered appraisal, and the court ultimately appointed an umpire, who proceeded to resolve both coverage and valuation issues. The parties then settled the lawsuit for the amount awarded by the umpire.

    The insured brought suit again several months later, making various claims of fraud and misconduct. The district court dismissed the complaint on grounds res judicata, since the claims could have been raised in the previous litigation. On appeal, the plaintiff argued that because the umpire's award was "never confirmed or entered as a judgment of the state court," the district court erroneously based its finding of res judicata on that award. Affirming this judgment, the Second Circuit held that, although some previous decisions appeared to support this argument, more recent New York cases had found that the "contention that only a judicially confirmed arbitration award may form the basis for the defenses of res judicata and collateral estoppel is without merit."

    Somewhat confusingly, this case seems to conflate the processes of arbitration and appraisal in a way that New York courts are usually careful to avoid. Multiple cases note that an appraisal is *not* an arbitration, and that appraisal panels, including court appointed umpires, should not determine matters of coverage. However, the plaintiff appears not to have raised this argument

either in the trial court or on appeal, and it was perhaps the plaintiff's submission through settlement to the umpire's findings that moved the court to give the appraisal award preclusive effect on further litigation.

17. Kawa v. Nationwide Mut. Fire Ins. Co., 664 N.Y.S.2d 430 (Sup. Ct. 1997) – Plaintiff insured's house was damaged in a windstorm, including damage to the structure's aluminum siding. After the insurer tendered an offer for the cost of repair, the insured asserted that the insurer was required to fully replace the aluminum siding with vinyl siding, and demanded appraisal pursuant to the policy. The insurer refused to submit to appraisal on the grounds that the issue was one of coverage, which cannot be decided through appraisal. The insured brought suit seeking a declaratory judgment that the insurer was required to submit to appraisal

    The court found that the issue was one of coverage and thus not a proper subject of appraisal. The court quoted a Missouri Supreme Court decision that held "[i]t is essential that the legal contentions of the parties be resolved in order to make correct computation in a determination of the actual loss sustained." Whether or not the policy required the insurer to replace the aluminum siding with vinyl was a legal question of coverage to be determined by a court. The court noted that the insured's reference to a Florida decision to the contrary was unpersuasive, especially since appraisal proceedings are more closely equated with arbitration proceedings in Florida, whereas New York clearly delineates the two.

18. Saxena v. New York Prop. Ins. Underwriting Assn., 232 A.D.2d 622 (1996) – The insured and insurer were unable to agree on the value of losses, and the insurer exercised its right under the policy to demand appraisal. The insured waited an entire year before responding to this demand, then later sued to collect under the policy. The court found that the insured had breached the policy and thus lost her right to sue under it. The insured's "contention that she was not required to respond [to the demand for appraisal] because the defendant did not name an impartial appraiser is unsupported by statute or case law. Although the policy did not set a time limit for a response, the plaintiff was required to respond within a reasonable time." Her failure to do so "constituted a material breach of the policy."

    The court further found that even if the insured hadn't breached the policy, she could not sue for her loss because it had occurred more than two years prior to the suit, in violation of the policy's limitations period. The court refused to find that the limitations period was tolled by the demand for appraisal, since (1) there was no evidence of an intent on the part of the insurer to waive its protection under the limitations period, and (2) no evidence the insurer had induced the plaintiff into "sleeping on her rights under the insurance contract." The plaintiff's unreasonable delay in responding to the demand further cut against tolling the limitations period. "Evidence of communications or settlement negotiations . . . either before or after expiration of a limitations period contained in a policy is not, without more, sufficient to prove waiver or estoppel."

19. Peck v. Planet Ins. Co., 1994 WL 381544 (S.D.N.Y July 21, 1994) – The insured suffered severe fire damage to her home. Nine months later, after ongoing and unsuccessful negotiations over the value of the loss, she brought suit against the insurer to recover under the policy. The insurer did not dispute liability. Four months after the suit began, the insurer demanded appraisal, and the insured refused on the grounds that the demand was untimely. The court found that while a demand for appraisal must be made within a reasonable period of time, dependent on the

circumstances, the demand here was reasonable since the parties had been "continually negotiating and working toward an agreement on the amount of loss." Because the policy made compliance with all policy terms a condition precedent to bringing suit, the court dismissed the case.

20. Hemingway v. State Farm Fire & Cas. Co., 187 A.D.2d 814 (1992) – The insured suffered extensive damage to his home by fire. The parties submitted to appraisal, an award was set, and checks for the amount of the award were tendered by the insurer and accepted by the insured. The insured then brought suit to collect the policy limits, claiming that the appraisal umpire had not been disinterested. The Appellate Division affirmed judgment for the defendant, finding that (1) the plaintiff's conclusory allegations as to the umpire's impartiality were insufficient to create a triable issue of fact, and (2) acceptance of the checks after submission to binding appraisal constituted "knowing acknowledgement of the disposal of [the insured's] claim," despite the defendant's failure to include formal language to this effect on the checks.

21. De Crescenzo v. Capital Mut. Ins. Co., 187 A.D.2d 793 (1992) – Plaintiff insured brought suit seeking to set aside an appraisal award which had been made in a lump sum, without itemization. The fire insurance policy at issue provided that the appraisers were to "determine the amount of the 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 court found that while this did not "necessitate[] valuation of every nail and brick in the house," a reasonable interpretation of the policy required "itemization of the damage to the basic component systems (e.g., electrical, plumbing, heating, structural, carpentry, painting, refinishing) so as to insure a modicum of accountability and reliability in the appraisal process." Since no such itemization had been provided, the Court set aside the award.

22. Glicksman v. N. River Ins. Co., 86 A.D. 2d 760 (1982) – The insured was a tenant in possession of real property who suffered property damage and loss of rent due to fire. His policy with the insurer contained a standard appraisal provision. After failing to agree on the value of the plaintiff's losses, the parties executed a "memorandum of understanding" by which they agreed to submit two limited questions for appraisal by the methods specified in the appraisal provision: the actual cash value of the building, and the length of time reasonably required to rebuild the building after the loss. However, rather than addressing these items separately, the umpire simply placed the total amount of damages at approximately $49,000. The court held that the insured was not necessarily bound by this determination, since the umpire "did not make the factual findings that [the insured] agreed to be bound by." The burden was on the insurer to show that the memorandum of understanding "constituted a complete submission by the parties to the appraisal process binding [the parties] to the umpire's decision," and the insurer had not carried this burden.

23. Allstate Ins. Co. v. Kleveno, 81 A.D.2d 648 (1981) – The insurer appealed from the trial court's denial of its motion to set aside an appraisal award. The policy provided for payment of the lesser of the actual cash value of the house at the time of destruction or the cost of replacement. When the parties' appraisers did not agree on value, the umpire placed the value at $90,000. Although the umpire agreed with the insurer's appraiser that the house (which was 100 years old) was actually only worth $45,000, he found that there were no houses in the area available for that amount, and hence awarded the amount it would cost the insured to replace the home.

The Appellate Division set aside the award on two grounds. First, neither of the two appraisers ever concurred in the award of $90,000, while the policy required written agreement of at least two of the three members of the appraisal panel. Second, the umpire had acted beyond the scope of his power by awarding replacement value over and above the acknowledged actual cash value of the house.

24. Schiller v. Cosmopolitan Mut. Cas. Co., 20 Misc.2d 206 (1959) – Plaintiff insured was injured in an automobile accident and the parties submitted the valuation of his injuries to appraisal. Pursuant to the policy, when the two appraisers appointed by the parties failed to agree on a neutral umpire, the parties had the court appoint an umpire. After a favorable award at appraisal, the insured "moved in the proceeding which resulted in the appointment by the court of the . . . umpire" for an order confirming the award and for specific enforcement. The court dismissed the motion, rejecting plaintiff's argument that the appraisal clause equated to an agreement to submit all aspects of the claim to arbitration, and holding that the plaintiff's remedy was to institute a plenary action to recover the amount of damages fixed by the appraisers.

25. *In re* Ross v. Hardware Mut. Cas. Co., 13 Misc.2d 739 (N.Y. Sup. Ct. 1958) – Under an uninsured automobile policy, a provision for appraisal of the insured's injuries was not an agreement to submit all aspects of a disputed claim for arbitration. The question of whether the automobile causing the injuries was an "uninsured automobile" was a question of coverage and not an appropriate subject of appraisal.

26. Karasch v. Empire Ins. Co., 13 Misc. 2d 395 (N.Y. Sup. Ct. 1958) – Plaintiff insured was injured in an car accident, and the insurer disagreed about the amount of damages claimed. The insured demanded appraisal, and the insurer did not respond for 24 days, at which point the insured filed suit. The court held that, although the policy made compliance with the appraisal provision a condition precedent to filing suit, where an insured proceeds diligently and in good faith but the insurance company fails or refuses to do so, so as to defeat the real object of the appraisal clause, then the insured may file suit despite not having completed appraisal. The court further held that whether the 24-day delay constituted a refusal to comply with the insured's demand or an action in bad faith was a question of fact to be resolved at trial.

27. Gansevoort Holding Corp v. Palatine Ins. Co., 11 Misc. 2d 518 (N.Y. Sup. Ct. 1957) – The respective appraisers for the insurer and insured could not agree on the value of fire damage to insured's building. An umpire was nominated, later announced he had come to a decision on valuation, and asked for the parties to submit their respective shares of payment, which they did. The umpire then announced the appraisal award and the insurer's appraiser concurred, at which point the insured's appraiser withdrew from the appraisal, alleging undue influence of the insurer's appraiser on the umpire.

28. Happy Hank Auction Co., Inc. v. Am. Eagle Fire Ins. Co., 1 N.Y.2d 534 (1956) – The insured demanded appraisal but the insurers refused to comply, alleging fraud on the part of the insured. The court held that, although an *insured* waives its right of action under a policy if it does not comply with a demand for appraisal, the courts are without power to compel an insurer to comply with such a demand. (overturned by statute in 2010, *see* CLPR § 7601)

29. *In re* Delmar Box Co., 309 N.Y. 60 (1955) – The insured suffered losses from fire and demanded appraisal, but the insurer refused to submit. The insured sought specific enforcement of the appraisal provision, but the court found that the Civil Practice Act, which provided for specific enforcement of arbitration agreements, did not extend to the appraisal provisions, since appraisals are not arbitrations. (note that the Civil Practice Act has since been revised to make agreements for appraisal or valuation specifically enforceable. *See* N.Y. CPLR § 7601).

30. United Boat Serv. Corp. v. Fulton Fire Ins. Co., 137 N.Y.S.2d 670 (Sup. Ct. 1955) – Plaintiff insured brought suit despite an appraisal award, and the defendant insurer moved for summary judgment against itself for the amount of the award. The plaintiff argued that the appraisers had exceeded the scope of their power by determining a question of liability. The court held that "[w]hile a complaint will not ordinarily be sustained in disregard of an appraisal award, it will survive upon proof of an equitable defense to such an award." Thus, the plaintiff's claim created a triable issue and the motion for summary judgment was denied.

31. Gervant v. New England Fire Ins. Co., 306 N.Y. 393 (1954) – Plaintiff insured suffered partial damage to her insured building, the parties went through appraisal, and the insured brought suit to have the award set aside. The Appellate Division set aside the award because the insurer's appraiser and the umpire refused to receive and consider evidence pertinent to the Actual Cash Value (ACV) of the building, and the Court of Appeals affirmed. The evidence showed that the umpire and insurer's appraiser fixed a "replacement value" of $25,000 based solely on the cubic footage of the premises, and then applied 40 percent depreciation to arrive at an ACV of $15,000. The insured's appraiser, on the other hand, considered various factors, including the original cost of the premises and repairs less depreciation, the rental income, and the market value of the premises. The insured and her appraiser prevailed upon the umpire and insurer's appraiser to consider such factors, but were completely ignored.

    The Court of Appeals noted that in a previous decision it had ruled that under a New York standard fire insurance policy, ACV cannot be determined simply by calculating replacement cost less depreciation. Though the defendant argued that an appraisal award may only be set aside for fraud or misconduct, the court held an award could also be set aside based on "the failure of the company's appraiser to hear and receive evidence as to factors other than reproduction cost less depreciation." "[A]n umpire and one appraiser are not free to disregard, arbitrarily, pertinent evidence presented by the other appraiser, and [] a flat refusal on their part to hear such evidence is condemned by authorities in this State as legal misconduct for which the award will be set aside.

    In light of this holding, the defendant argued that the proper remedy was for the parties to be relegated to a new appraisal, but the court disagreed. "[A]fter an appraisal proceeding has terminated in an award and the award has been set aside, without any fault on the part of the insured, he need not submit to any further appraisement but may sue on the policy."

32. Lazaroff v. Nw. Nat. Ins. Co., 121 N.Y.S.2d 122 (Sup. Ct. 1952) – Plaintiff insured's building suffered damage by fire. The policy provided for payment of the Actual Cash Value (ACV) of the premises. In submitting the loss for appraisal, the parties stipulated that ACV should be determined in a certain way. When the appraisers settled on an award that was dissatisfactory to the insured, he brought suit to have it set aside.The court noted that although the appraisal did

not "accord with recognized judicial criteria" for ascertaining the cash value of property, the parties had stipulated to a set of criteria for the appraisers to use and were bound by their agreement absent a showing of fraud, which was not present. However, the court found that where the appraisal submission "provide[d] for the ascertainment of the cash value of the property 'with proper deductions for depreciation[']but d[id] not provide for deductions for depreciation as to the 'cost to repair or replace,' it was improper for the appraisers to deduct 20 percent in depreciation from the cost of replacement materials.

33. Syracuse Sav. Bank v. Yorkshire Ins. Co., 301 N.Y. 403 (1950) – Under a standard mortgagee clause in a fire insurance policy (providing that the interest of the mortgagee "shall not be invalidated by any act or neglect of the mortgagor or owner"), the mortgagee has the right to participate in appraisal proceedings and is not bound by an appraisal reached between insurer and mortgagor without the mortgagee's participation. The court also found, on a peripheral issue, that the mortgagor was estopped from seeking to void the appraisal award by claiming that his own chosen appraiser was not competent.

34. Andrews v. Empire Coop. Fire Ins. Co., 276 A.D. 447 (1950) – A building owned by the plaintiffs was partially destroyed by fire. The parties submitted the loss to appraisal, and after the two appraisers had submitted their reports, but before the umpire had acted, the insured brought suit to collect $9,000, claiming the appraisers had "agreed" on this number in writing as required by the policy to make the award final.

The policy insured the plaintiff for the lesser of actual cash value or replacement cost for "all direct loss by fire." Both of the appraisers' reports estimated the actual cash value of the entire property at $11,806, and contained a statement reading: "Fire loss—$9,000." The trial court found this to be conclusive evidence of a meeting of the minds, and granted summary judgment for the plaintiff, but the Appellate Division reversed. There was a triable issue of fact as to whether the appraisers had ever actually agreed that the $9,000 figure represented "all direct loss by fire" as that term was used in the policy. Other language in the report of the insurer's appraiser—discounted by the trial court— listed "amount due" as $4,500 or $3,935.34, and the appraiser's affidavit stated that he had never agreed with his counterpart's estimate. This, the court found, raised a dispute as to whether there had been actual agreement, and summary judgment had therefore been improvidently granted.

35. Mehl v. Patriotic Ins. Co., 72 N.Y.S.2d 447 (Sup. Ct. 1947) – Plaintiff insured suffered loss by fire, and the parties entered appraisal. The appraisal panel did not reach a final award until 362 days after the inception of the claim, and on that same day the insured filed suit. One clause in the policy required actions under the policy to be brought within one year of the policy, but another provided that an appraisal award did not become payable until sixty days after the award was made. The court dismissed the suit as premature, citing several cases for the proposition that an insured could bring suit notwithstanding the expiration of a period of limitations where ongoing appraisal and a required waiting period caused a delay in his ability to bring suit.

On a separate issue, the insurer claimed the appraisal was void because the umpire had acted beyond the scope of his power by independently determining value for items the two appraisers had never disagreed upon. The court rejected this argument, since for each of the items, the umpire's award had been lower than the suggested award of the insured's appraiser, and the

insurers argument seemed to rest on the premise that its own appraiser had appraised the loss at a value greater than what the plaintiff was claiming—"an absurd conclusion."

36. Buchholz v. United States Fire Ins. Co., 293 N.Y. 82 (1944); Buchholz v. United States Fire Ins. Co., 269 A.D. 49 (1945) – There was a loss by fire, and the policy provided that in the event of a loss of goods that had been sold but not delivered, the value of the goods would be fixed at their selling price. After the parties had signed a written agreement to enter appraisal, an assignee of the insured brought suit to recover the policy limit (*Buchholz I*), claiming that prior to the fire his lost goods had been sold for a price in excess of the policy's value, and thus there was no need for appraisal.

    The trial court dismissed the complaint, and the Appellate Division and Court of Appeals affirmed. "There was a dispute as to whether the property had been sold by the insured. Consequently the defendant insurer was justified in insisting that the value of the property be fixed by the appraisers prior to litigation of the issues, including the dispute as to whether there had been a sale."

    In *Buchholz II*, the plaintiff again brought suit after having complied with appraisal. The court held that the judgment in *Buchholz I* was "conclusive on the existing facts," it did not bar a subsequent suit brought after the plaintiff tendered performance of the requirement for appraisal.

37. Mizrahi v. Nat. Ben Franklin Fire Ins. Co., 37 N.Y.S. 2d 698 (N.Y. City Ct. 1942) – Plaintiff insured suffered loss by fire and the parties submitted the loss to appraisal. The appraisers and umpire unanimously agreed to fix the damages at a certain sum, and once the award was final the insured quickly brought suit to enforce the award against the insurers. The insurers moved for summary judgment, asserting as affirmative defenses that (1) the plaintiff's appraiser was not competent and disinterested; (2) the suit was premature; and (3) the award was improper in form and thus invalid.

    Finding for the defendants, the court first noted that whether an appraiser is competent and disinterested is to be decided at trial if there exists a triable issue of fact as to that matter, and thus was not a proper subject of a defense motion for summary judgment. However, the plaintiff's claim was premature because the policy provided the insurers sixty days after an appraisal's completion in which to pay the award. Additionally, the court noted that the appraisal clause of the policy provided "[t]he appraisers shall then appraise the loss and damage *stating separately sound value and loss or damage to each item*." (emphasis added). Here, the appraisers had simply agreed on the total amount of loss, without itemization. "The conclusion follows that the award is improper in form, ineffectual because lacking in vital particulars and, hence, invalid." The fact that the appraiser selected by the defendants concurred in the award did not disturb this result, since "the appraiser is in no sense, for the purpose of an appraisal, the agent of the party . . . nominating him."

38. Jacobs v. N. Riv. Ins. Co., 283 N.Y.S. 901 (Sup. Ct. App. Term 1935) – This two-sentence opinion holds that the one year statute of limitations on a fire insurance policy did not begin to run until the appraisal award was filed with the insurer.

39. Sterling Spinning & Stamping Works v. Knickerbocker Ins. Co., 137 Misc. 349 (Manhattan Mun. Ct. 1930) – Plaintiff insured objected to the appointment of the insurer's nominated appraiser on the grounds that he was not disinterested. The nominee had been employed by insurance companies frequently throughout the past seven years, had represented them in appraisal over ninety times, and had derived the great majority of his income from them. The court held that, even without a showing that the company had fraudulently misrepresented the nominee's qualifications (as had happened in several analogous cases), these facts alone were enough to establish that the nominee was not disinterested.

40. Lee v. Hamilton Fire Ins. Co., 251 N.Y. 230 (1929) – The plaintiff insured had a "valued" policy on his truck—that is, a policy that definitely fixed the liability of the insurer in the event of total loss of the insured property—for $5,720. The truck caught fire, the insurer disputed the insured's claim of total loss, and the parties submitted to appraisal pursuant to a standard appraisal clause in the contract. The appraisers fixed the value of the truck at $3,700 and the loss and damage at $2,700. The insured brought suit for the full value of the policy, and the trial court found that the loss to the truck was total and that the insured was liable for the full value of the truck as stated in the policy: $5,720.

    The insurer argued that the appraisal decision was binding, and that in any case the right to recovery for total loss had been waived by entering into appraisal. Finding for the plaintiff, the Court of Appeals rejected both of these arguments. The court found that "[a]n appraisal clause does not permit appraisers to determine whether a loss was in fact total, as an appraisal is to determine the amount of damage only." The clause of the appraisal provision which provided that "[i]n the event of loss or damage under this policy, this Company shall be liable only for the actual cost of repairing or, if necessary, replacing the parts damaged or destroyed," had to be read to refer only to something less than a total loss, since the policy, being a "valued" one, required *more* than the cost of repair or replacement in the event of a total loss. Therefore, "[i]f the insured under such a [valued] policy claims a total loss and the insurer a partial loss, and the latter insists on an appraisal, the granting of the appraisal by the insured cannot estop him from litigating the question of a total loss."

41. Ferrari v. Nw. Natl. Ins. Co., 224 A.D. 690 (1928) – The insurer's demand for an examination did not waive its right to appraisal where a provision of the policy stated that no action taken by the insurer related to appraisal or examination would waive any of the insurer's rights under the policy.

42. Littrell v. Allemannia Fire Ins. Co., 222 A.D. 302 (1928) – The plaintiff insured refused to submit to appraisal, arguing that the appraisal provision contained in its policy did not apply to a complete loss, as opposed to a partial loss. The court disagreed, holding that the word "loss" implied the complete destruction of property while "damage" implied a partial loss, and dismissing the insured's complaint for failure to comply with appraisal.

43. Coon v. Nat'l Fire. Ins. Co., 213 N.Y.S. 407 (Sup. Ct. 1925) – Plaintiff insured suffered loss by fire to several insured buildings, and the parties submitted to appraisal. The insurer nominated an appraiser who it said was a contractor and builder in Syracuse. In reality, the nominee was a professional appraiser who had conducted over five-hundred appraisals on behalf of fire insurance companies over a ten year period, and had been duly compensated. The insurer

accepted this nominee, who proceeded to dominate the appraisal proceedings and solicit an award far below the damage actually sustained by the insured. The trial court set aside the award, finding that the insurer's appraiser was not disinterested, as required by the policy, and that regardless of the misrepresentations, his name should not have been submitted as a nominee because of his inherent bias in favor of the insurance company and his pecuniary interest in the outcome.

44. *In re* Amer. Ins. Co., 208 A.D. 168 (1924) – The Appellate Division reversed the trial court's order that the insured submit to binding arbitration pursuant to the appraisal clause of the parties' policy. The trial court erroneously found that, because the appraisal decision was binding on the parties, it amounted to an arbitration. The appellate court found that the appraisal clause was meant only to substitute for a judicial determination of the value of damages and not to be binding on any issue of law.

45. Ugovitch v. Ohio Farmers' Ins. Co., 180 A.D. 905 (1917) – In this very short opinion, the appellate division held that where the status of appraisers as "competent and disinterested" was "doubtful," the trial court had the equitable power to halt appraisal proceedings until the eligibility of the "so-called appraisers" could be passed upon by the jury.

46. Davis Mfg. Co. v. Stuyvesant Ins. Co. 160 A.D. 64 (1914)– The plaintiff insured successfully had an appraisal award set aside based on the jury's finding that the insurer's appraiser had failed to comply with the policy's appraisal provision. That provision required that upon appointment "the appraisers together shall then estimate and appraise the loss." However, it appeared from the record that the insurer's appraiser had considered it "beneath his dignity to consult with" the insured's appraiser, and had gone about his appraisal in an arbitrary fashion, dismissing the advice of persons who had more carefully estimated the loss. The court found that "the evidence does disclose that there was never any such effort at a fair and impartial appraisal as the . . . policy contemplates," and affirmed the jury's determination that the appraisal provision had not been complied with and the award was not binding.

47. Gross Co. v. Westchester Fire Ins. Co., 151 N.Y.S. 945 (N.Y. City Ct. 1914) – The plaintiff insured suffered loss by fire. He submitted a proof of loss, but the insurer disputed the value of the loss, and the parties submitted to appraisal. After an award was made in an amount significantly lower than the amount claimed in the proof of loss, the insurer refused to pay the award. It claimed that the appraiser's award proved that fraud on the part of the insured, since the goods had a fixed value and nothing short of fraud could explain the discrepancy between the award and the amount claimed in the proof of loss. The court rejected this argument and upheld the award, finding that the discrepancy, which a witness for the plaintiff had testified was the result of accounting errors, was not enough to show fraud.

48. Cohen v. Atlas Assur. Co., 163 A.D. 381 (1914) – As a result of fire, plaintiff insured suffered "smoke damage" to his stock of cigars which made them smell and taste of lesser quality than they previously had. The loss was submitted to appraisal, the appraisers disagreed as to the amount of loss (calculated as the percentage of devaluation of the cigars), and an umpire was called in. After sampling numerous cigars from several different lots, the umpire agreed with the insurer's appraiser and the two set the damage at 35 percent of the previous sale value of the goods. At trial, the plaintiff presented expert testimony that the loss was 85 percent of value,

since the fact that they cigars could not be affixed with the brand they typically carried made them practically worthless. The trial court found that the appraisal award was not made in good faith and set it aside.

The Appellate Division reversed, finding that the amount of devaluation from the change in smell and flavor was purely a matter of opinion, and that the umpire had undertook sufficient actions to show a good-faith effort at appraisal. The insured further argued that the award should be set aside on the basis of fraud since the insurer's appraiser had acted as an appraiser "half a dozen" times before, once for an insured and five times for insurers. But the court found that this, without more, was not enough to show that the appraiser was not disinterested, and found for the insurer.

49. J.E. Davis Mfg. Co. v. Firemen's Fund Ins. Co., 210 F. 653 (N.D.N.Y. 1914) – Plaintiff insured brought suit to set aside an appraisal award. The facts showed that the insurer's appraiser had relied in large part on an unsworn document prepared by an agent of the insurer, which grossly underestimated the actual losses. The insurer's appraiser also had ignored sworn statements and other important evidence. Furthermore, the umpire and the insurer's appraiser, though agreeing to an award, had not considered all of the same evidence. The court held that in an appraisal proceeding, there must be a "fair effort to ascertain the truth, and a consideration of all available information, and a deliberate judgment of those making the award." Such was lacking in this case, and the totality of the circumstances suggested that the true intent of the appraiser and umpire had been to effectuate an award grossly below what was actually warranted. The award was therefore set aside.

50. Langser v. German Alliance Ins. Co., 67 Misc. 411 (N.Y. App. Term 1910) – Plaintiff insured suffered loss by fire. The terms of the policy provided that the loss was payable within sixty days after the proof of loss was filed, or in the case of appraisal, sixty days after the completion of the appraisal. The insurer inspected the damaged premises within a week of the fire, but disputed the amount of damages. On the fifty-fifth day after the proof of loss was filed, the insurer demanded appraisal. The insured refused to submit to appraisal and instead brought suit.

After a full trial, the trial court directed a verdict for the insurer, instructing the plaintiff to submit to appraisal. The Supreme Court, Appellate Term reversed, noting that "while it might be said that, under the [terms of the policy], the insurer may wait fifty-nine days before demanding appraisal . . . [t]he truer construction would seem to be that the insurer 'has a reasonable period, depending upon the facts of the particular case,' to demand appraisal." *Quoting Chainless Cycle Mfg. Co. v. Sec. Ins. Co.*, 169 N.Y. 304, 310 (1901). The court held that whether a demand takes place within a "reasonable" time is a question for the court, and that the insurer's delay in this case was "palpably unreasonable" as a matter of law and its right to appraisal had thus been waived. The court further noted that "it was [] a question for the jury whether the demand for an appraisal was made in good faith; because, if not, that would either be a circumstance bearing on the alleged waiver, or it would in itself absolve the plaintiff from his obligation to enter appraisal."

51. Mayer v. Phoenix Assurance Co., 124 A.D. 241 (1908) – Plaintiff insured brought suit against two insurers to have an appraisal award set aside as fraudulent and judgment entered for the amount of his loss. The insurers moved to dismiss the complaint on the grounds that (1) the two

companies were improperly joined as defendants, and (2) the suit in equity to set aside the award was improperly joined with the suit at law to collect damages under the policy. The Appellate Division rejected these arguments. The companies' interests had been joined in a single appraiser, so they were properly joined for the purposes of having the appraisal award set aside. Also, "[w]here an appraisal in behalf of several insurance companies is fraudulently had, one company innocent of the fraud is not protected by it, because the award is for the benefit of all and is vitiated by the fraud of one." As to the second grounds for dismissal, the court found that actions to set aside an award, and then, if successful, collect under the policy, had been "uniformly sustained."

52. Williams v. German Ins. Co., 90 A.D. 413 (1904) – The insured suffered damage by fire to his property on October 9, 1900. The policy contained three provisions pertinent to the case: one providing for an appraisal process on request of either party; one providing that any "suit or action" on a claim must be brought within one year of the loss; and a third providing that a loss "shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss . . . including an award by appraisers when appraisal is required."

In August 1901 the insured and insurer agreed to submit the loss to appraisal. In September 1901 the appraisers still had not met, and the insured requested a stipulation that the time allowed for bringing an action under the policy be extended until thirty days after completion of the appraisal. The insurer responded that the policy protected the insured's right to bring an action sixty days after the appraisal process's completion, so that no such stipulation was needed. The appraisers met on October 7, 1901, and agreed to choose an umpire at a later date. The next day the insured brought suit under the policy.

At trial, the jury found that the insurer had waived its right to appraisal, but the Appellate Division overturned. There was no evidence of bad faith or any attempt on the part of the insurer to defeat the object of the policy. Furthermore, the apparently conflicting terms of the contract indicated that the parties intended the period of limitations to apply only if good faith efforts at appraisal did not run past that period. And even if this wasn't so, by assuring the plaintiff that the policy protected his interests in bringing suit, the insurer became estopped from enforcing the period of limitations in this context. The insured was thus unjustified in abandoning participation in the appraisal and could not bring suit under the policy before complying with the provision for appraisal.

53. New York Mut. Sav. & Loan Ass'n v. Manchester Fire Assurance Co., 94 A.D. 104 (1904) – The plaintiff insured's home was destroyed by fire, and the parties entered appraisal. The plaintiff's appraiser claimed the home was worth the amount of the policy and was totally destroyed. There were meetings between the two appraisers in which the insured's appraiser shared his estimate, but the insurer's appraiser did not disclose his estimate to his counterpart. The insurer's appraiser then met with the umpire, without notice to the insured's appraiser, and submitted his estimate, with which the umpire agreed, and the two executed the award.

The trial court set aside the appraisal award, and the Appellate Division affirmed. The policy contemplated that the two appraisers would cooperate, and only "their differences" would be submitted to the umpire. Here, the insured's appraiser had failed to give notice to his counterpart either of his own estimate or of his meeting with the umpire. This substantially prejudiced the

insured and violated the appraisal process required by the policy. The difference between the appraisal award and the actual value of the property—$1,032 and $1300, respectively—was of sufficient proportion to justify setting aside the award based on this impropriety, and the insured was allowed to maintain an action to collect under the policy.

54. Eisenberg v. Suyvesant Ins. Co., 87 N.Y.S. 463 (App. Div. 1904) – Plaintiff insured sought to have an appraisal award set aside on the grounds that his chosen appraiser had resigned. The court held that since the appraiser had not resigned until several days after the award was made, the award was binding.

55. Bellinger v. German Ins. Co. of Freeport, 95 A.D. 262 (1904) –The policy provided that an appraisal award was payable sixty days after it was filed. After appraisal, the plaintiff brought a suit in equity—before the sixty days had elapsed—to have the appraisal set aside. The challenge to the award failed, but because the sixty days had now passed, the court allowed the plaintiff to amend his complaint and entered judgment for the amount of the appraisal award. The Appellate Division reversed, holding that where the equitable grounds for challenging an award fail, the legal claim must be dismissed if it was filed before the award became payable.

56. Townsend v. Greenwich Ins. Co., 86 A.D. 323 (1903) – The plaintiff sought to have an appraisal award set aside on the grounds that the parties had orally agreed to limit the appraisers' duties in a manner which they had exceeded. Dismissing the action, he court held that, in the absence of fraud or mistake, parole evidence was incompetent to vary a written submission to appraisal. The court also observed that appraisers under a standard fire insurance policy are not arbitrators, and that therefore, the fact that plaintiffs were not notified of the meetings of the appraisers did not affect the validity of their findings.

57. Schmitt Bros. v. Boston Ins. Co., 82 A.D. 234 (1903) – The plaintiff suffered loss to his insured colonial furniture, and the parties submitted the loss to appraisal. The two appraisers and the umpire met to examined the damaged goods, but because it was December and very cold, "they were unable to make a practical examination," and adjourned. At some point later, the insurer's appraiser met with the umpire outside of the presence of the insured's appraiser, and agreed on an award without ever having made a proper examination of the damaged goods or taken into consideration the other appraiser's estimate. The trial court set the award aside, and the Appellate Division affirmed, finding that the award was invalid because (1) the insured, or his appraiser, were not given proper notice of the umpire's intent to settle the award through meeting with the insurer's appraiser, and (2) the award was made in gross, without examination of each individual damaged item, as was required by the policy.

58. Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 A.D. 525 (1901) – The plaintiff insured suffered fire damage to a building that was insured by the defendant as well as three other insurers. A man named Locke, who represented all of the insurers except for the defendant insurer, demanded appraisal pursuant to a standard appraisal clause calling for "two competent and disinterested appraisers." Locke represented to the plaintiff that his selected appraiser was not a professional appraiser for insurance companies and had never before acted as an appraiser for any of the four insurers, when in reality his "principal business for the past four or five years had been representing insurance companies in appraising their losses." Locke further knew that his selected appraiser had previously acted as appraiser for at least three of the insurers involved, for

one of them as many as fifty times. The two appraisers conducted a cursory examination of the damaged premises that lasted two-and-a-half hours, before agreeing to an award that was "grossly inadequate" to compensate for the loss sustained.

The plaintiff argued that the appraisal award should be set aside because of Locke's fraudulent misrepresentations regarding his chosen appraiser, and the court agreed, quoting language that is frequently cited in explaining the meaning of "a competent and disinterested appraiser" and good grounds for setting aside an appraisal award because of misrepresentations:

> While . . . each party nominates someone who may be supposed friendly to the side nominating him, yet he should at the same time be disinterested, or, in other words, fair and unprejudiced. The duties of these appraisers are to give a just and fair award, one which shall honestly and fairly represent the real loss actually sustained by reason of the fire; and it is not the duty of either appraiser to see how far he can depart from that purpose and still obtain the consent or agreement of his associate, or in case of his refusal, then of the umpire. It is proper and to be expected that all the facts which may be favorable to the party nominating him shall be brought out by the appraiser, so that due weight may be given to them, but the appraiser is in no sense for the purpose of an appraisal the agent of the party appointing or nominating him, and he remains at all times under the duty to be fair and unprejudiced, or in the language of the policy, disinterested. When a false statement is made in regard to the attitude of a proposed appraiser for the purpose of inducing consent to his appointment, which is in that way obtained, and where concealment is practiced in regard to his real attitude to the company nominating him, and when in fact he is not disinterested, good ground is shown for setting aside an appraisal which is grossly below the actual loss sustained, although it has been concurred in and agreed to by the appraiser nominated by the insured.

Quoting Bradshaw v. Agric. Ins. Co.,137 N.Y. 137 (1893). The *Kaiser* court elaborated that, in its view, where a party was fraudulently induced into agreeing to an appraisal award he should be able to set that award aside regardless of whether, as the Court of Appeals had described, the award was "grossly below the actual loss sustained." The court also held that, although the defendant insurer had not been represented by Locke, it was nonetheless enjoined from enforcing an appraisal award that was void because of fraud.

59. Chainless Cycle Mfg. Co. v. Sec. Ins. Co., 169 N.Y. 304 (1901) – Plaintiff insured suffered loss by fire on August 19. The parties failed to agree on the value of the loss, but despite several requests by the insured that the loss be submitted for appraisal, the insurer refused to submit to appraisal, saying it preferred to negotiate on the claimed amount. The plaintiff gave the insurer notice that on a certain date it would sell the damaged property, which was rapidly succumbing to rust and losing value, and demanded that the insurer either adjust the loss or submit to appraisal before that date. The insurer ignored these demands until several days after the plaintiff sold the insured property, at which point the insurer demanded appraisal.

The court found that the insurer had waived its right to appraisal. That right "must be exercised within a reasonable period, depending upon the facts of the particular case." Here, the insurer

could not put off the insured's demands for appraisal until such time as appraisal became impossible, and then demand appraisal as a condition precedent to collecting under the policy. The defendant had ample time to demand appraisal and sufficient notice that appraisal would soon become impossible, and could not wield its right to appraisal as a "weapon of attack" to make collection under the policy impossible.

60. Yentes v. Firemen's Ins. Co., 36 Misc. 850 (N.Y. City Ct. 1901) – Where the insurer acted in bad faith in delaying the appraisal process, insured was allowed to bring suit notwithstanding the incompletion of appraisal.

61. Lyons v. St. Paul Fire & Marine Ins. Co., 36 Misc. 866 (N.Y. City Ct. 1901) – Insured suffered loss by fire, and entered into an agreement with three insurers fixing the loss at $450 with the liability divided equally between the three insurers. One of the insurers refused to honor the agreement, instead waiting several days and then demanding appraisal after the damaged goods had already been disposed of and the damages could not possibly be appraised. The court found that the settlement agreement was binding and constituted a waiver of the insurer's right to appraisal.

62. Bear v. Atlanta Home Ins. Co., 34 Misc. 613 (N.Y. Sup. Ct. 1901) – The fire insurance policy required the insured to give immediate notice to the insurer of any loss sustained. The insured did not give notice for over a month after sustaining a loss, but the insurer nonetheless retained the proof of loss, and six weeks later requested to submit the loss to appraisal. The court held that under these circumstances, where the insured incurred expense in complying with the request for appraisal, the insurer had waived its right to immediate notification under the policy.

63. Silver v. Western Assur. Co. 164 N.Y. 381 (1900) – The plaintiff insured appealed from a judgment dismissing his complaint for failure to comply with appraisal. The insured argued that because the insurer had acted in bad faith to obstruct the appraisal process, he was excused from the requirement of submitting to appraisal before bringing suit. Finding for the insurer, the court noted that, in fact, the evidence suggested that the defendant had been the only one making good faith efforts at furthering appraisal: "[I]t is difficult to discover the logic of the contention that the assured and his appraiser could sit still from the time of making the agreement until the commencement of the action, and then deprive the other party, whose appraiser and attorney did take some action towards carrying out the agreement, of the benefit of the agreement on the ground that its object had not been made effective by an appraisement."

64. Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co., 159 N.Y. 418 (1899) – Plaintiff insured suffered damage by fire to insured buildings. Prior to the fire, the property had been foreclosed upon and sold, and the policy provided that it would be void in the event of foreclosure or sale of the insured property with the knowledge of the insured. Sometime after appraisal had been demanded and commenced, the insurers learned of the foreclosure, and thus knew that the policy had become void prior to the loss. The insurers nevertheless allowed the appraisal process to proceed, and only after an award issued and a proof of loss was submitted did they assert that the policy was void. The insured claimed that this delay constituted a waiver of the forfeiture, but the court disagreed, holding that to prove waiver a party must show by a preponderance of the evidence that there has been some affirmative act or demand made under the policy. In this case, "the plaintiff has in no way been misled by any act or statement of the

defendant. It has done nothing under the policy, has exercised no right by virtue of it, nor has it required the plaintiff to perform any act which it was required by the policy to perform. The most that can be said as to the continuance of the appraisal is that the defendant did nothing, and whatever was done by the plaintiff was voluntary." The court thus affirmed judgment for the insurer.Yendel v. Western Assurance Co., 47 N.Y.S. 141 (Sup. Ct. App. Term 1897) – Pursuant to an appraisal clause, the insured and insurer appointed appraisers to valuate the insured's loss. The appraisers agreed to meet at the office of the insurer's appraiser at 10:30 on a certain day. They failed to meet at that time, and a few days later the insured brought suit under the policy. The court held that (1) because the evidence tended to show that the plaintiff's appraiser had been at fault for failing to meet as had been agreed upon, the plaintiff was enjoined from suing under the policy until such time as he had complied with the demand for appraisal, (2) the insurer had not waived the defense of failure to comply with the appraisal provision by pleading the alternative defense of fraud on the part of the insured, although these affirmative defenses may have been inconsistent with one another, and (3) where there is a dispute as to whether there was a total loss, appraisal remains proper.

Upon bringing suit, the insured's claim for damages over and above the amount found by the umpire was dismissed. The court held that an appraisal award "is entitled to every reasonable intendment and presumption of validity" as long as the appraiser and umpire comply with the terms of the submission. Where such compliance exists, there must be "clear and strong proof [of] fraud, bad faith or misconduct" to nullify the award. Furthermore, the insurer had submitted payment to the umpire with full knowledge of the alleged undue influence, which cut against allowing the insured to nullify the award after not receiving the result it wanted.

However, the court granted the insured's motion to invalidate the umpire's award of rental fees. The umpire had tacked on the award of rental fees as an afterthought, and the two appraisers had never made initial estimates of these losses as the policy's appraisal provision required. The insured was thus allowed to continue with an action to collect his lost rental fees.

Additionally, the court also struck down defendant's period of limitations defense, since "the insured was prevented from maintaining an action on the policy while the appraisal proceeding was pending and for some period thereafter."

65. McManus v. W. Assur. Co., 43 A.D. 550 (1898) – The insured informed the insurer that she objected to the appraiser appointed by the insurer on the grounds that he was not disinterested, since on numerous occasions he had acted as an appraiser for this and other insurers. The insurer made no response for 21 days, at which point the insured brought suit. The Appellate Division held that the issue of whether this delay constituted a waiver of the insurer's right to appraisal was a question of fact for the jury.

66. Austen v. Niagara Fire Ins. Co., 16 A.D. 86 (1897) – The policy at issue in this case had a one-year period of limitations on bringing suit after loss, as well as a provision stipulating that loss would not become payable until sixty days after an appraisal when appraisal was required. The appraisal was not completed until a few days after a full year had passed, and the insured then waited approximately ninety days more before bringing suit to collect the award. The trial court dismissed the claim on the grounds that the period of limitations barred the suit, because the plaintiff had been at fault for the long delay in completing appraisal.

The Appellate Division reversed, finding that "[t]he appraisers and umpire, when appointed, became the agents of both parties, and for their action both parties were equally responsible." The defendant argued that plaintiff's counsel had delayed the appraisal by attempting to force a certain construction of the appraisal provision on the appraisers, and that the refusal of one or more of the appraisers to "act under this erroneous construction" resulted in the delay and a forfeiture by the plaintiff. The court disagreed, holding that the appraisers were free to disregard the attorney's opinion and continue with their work on their own accord, so that fault could not be laid at the feet of the plaintiff in this instance.

67. Strome v. London Assur. Corp., 20 A.D. 571 (1897) – Plaintiff insured brought suit to set aside an appraisal and recover the true value of his loss. The Appellate Division held that, although an appraisal award cannot be set aside for mere inadequacy, here there was evidence that the umpire had flatly refused to consider the estimate and opinions of the insured's appraiser. This was a clear violation of the umpire's duty under the policy, which contemplated that he would act after considering the opinions and estimates of both sides. The court therefore affirmed the trial court's decision to set aside the award.

68. Lawrence v. Niagara Fire Ins. Co., 2 A.D. 267 (1896) – The insured's property suffered damage by fire, and the policy provided that loss would not become payable "until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss . . . including an award by appraiser when appraisal has been required." The administrator of the insured's estate submitted a proof of loss to the insurer "in the form prescribed by [the insurer's] agent," and the agent subsequently sent several messages to the administrator, first saying that the forms were not "legally verified," second that the verification had no "venire," then, four weeks later, that rather than "venire" he had meant to use the word "venue." At no point did the insurer claim the proof to be insufficient or suggest that an appraisal would be required. When the insurer failed to pay the claim after more than sixty days had passed, the administrator brought suit. The insurer then claimed that appraisal was a condition precedent to bringing suit, that the phrase "when appraisal has been required" meant when the policy required appraisal, and that the policy always required appraisal. The court rejected this argument, finding that the plain meaning of the phrase was "when required by either party," and that the insurer had not demanded appraisal or objected to the proof of loss despite ample opportunity to do so. The court thus affirmed judgment for the estate.

69. Kiernan v. Dutchess Cty. Mut. Ins. Co., 150 N.Y. 190 (1896) – Plaintiff insured suffered loss by fire to various items of property on his farm. His policy provided separate policy limits for various items of his property, including his barn, house, furniture, horses, cattle, etc. A provision of the policy provided that the "entire policy" would be void if any of the personal property thereby insured was or became "incumbered by a chattel mortgage." The policy also included a standard appraisal clause, along with a provision providing that the insurer would not "be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal."

The insured promptly reported his loss to the insurer and in the same interview revealed the existence of a chattel mortgage on his cattle. The insurer did not mention the forfeiture provision of the policy but instead sent its agent to examine the loss. When the parties failed to agree on an amount to settle the matter, and before any proof of loss had been submitted, the agent convinced

the insured to submit to appraisal. At this time, the agent made several misrepresentations about the qualifications of its nominated appraiser, claiming him to be a resident of Kingston and "an impartial and disinterested person," when in fact he lived in Syracuse, was a personal friend of the agent, and had worked for insurers as an adjuster and appraiser for twenty years. The insured's appraiser, on the other hand, was inexperienced, and allowed himself to be dominated by his counterpart. The result was an appraisal award far below the actual amount of damage.

The insurer's agent created a proof of loss for the amount of the award, but the insured refused to execute it. He instead drafted his own proof of loss, stating the value of each lost item—including the cattle—and submitted it to the agent. The agent rejected the proof on the grounds that it was not based on the appraisal award. The insured responded by resending the proof of loss, alleging that the appraisal award was the product of fraud and thus void, and demanding a fair and honest appraisal of the loss. The insurer did not respond for several months, until eventually the insured brought suit.

At trial the insurer argued that the entire policy was void because of the mortgage on the cattle, or that alternatively, the appraisal was binding. The Court of Appeals rejected both of these arguments. First, the court found that because the policy stated separate policy limits for each insured item, the contract was severable, and thus, to the extent the mortgage worked a forfeiture, it only did so as to the mortgaged property itself, not the entire policy. However, the court found the insurer had waived the forfeiture despite the policy's provision that no "act or proceeding" relating to appraisal would be deemed to waive any of the insurer's rights. The court noted that a waiver had been effected by several of the insurer's actions that were *not* related to appraisal, including: failing to inform the insured of the forfeiture within a reasonable time of learning of it; including the purportedly forfeited item in a proof of loss drafted by the insurer to be executed by the insured; and rejecting a proof of loss drafted by the insured that included the cattle as a claimed item without predicating the rejection in part on the alleged forfeiture. In the court's opinion, such acts "reasonably justif[ied] the conclusion that . . . [the insurer] intended to abandon or not to insist upon the particular defense afterward relied upon."

As to the validity of the appraisal, the fraudulent statements of the insurer's agent regarding the qualifications of its chosen appraiser, combined with a resulting appraisal award that was "grossly below the actual loss sustained," made the appraisal award void and not binding on the insured despite his chosen appraiser's having consented to it. The court thus affirmed judgment for the plaintiff.

70. Lang v. Eagle Fire Co., 12 A.D. 39 (1896) – The insurance policy issued by the defendant insurer insured various fixtures and goods contained in the basement and first floor of the insured's building. A fire occurred destroying the insured goods and partially damaging the property. The loss was submitted to appraisal, but the appraisers made an award only as to the damaged property, stating that it was impossible for them to conduct an appraisal on property that had passed completely out of existence. The insurer then refused to pay any sum beyond the amount awarded by the appraisers for partial damage to the property, insisting that the award was conclusive on the entire claim. The insured brought suit, and the court held that the insured was bound to pay for the items which had been totally destroyed, since the appraisers' decision to not value the property, right or wrong, could not prejudice the insured's rights under the policy.

The court further observed that the appraisal provision was not in fact applicable where the property at issue has passed out of existence.

71. Meyerson v. Hartford Fire Ins. Co., 17 Misc. 121 (App Div. 1896) – After a loss by fire and agreement to enter appraisal, the insurer rejected each of three persons the insured nominated as appraiser, on the grounds that they were not disinterested. Plaintiff then brought suit. Overruling the insurer's motion to dismiss for failure to comply with the appraisal provision, the court submitted to the jury the question of whether any of the three persons nominated by the insured was competent and disinterested. The jury found that at least one of them was. On appeal, the insurer argued that the jury should have been instructed that the nominees were per se not disinterested if they were found to have previously worked as adjusters or been business associates with the insured's adjuster. The Appellate Division rejected this argument, finding that there was a presumption of disinterest and honesty, and past work as an adjuster or business association with the plaintiff's adjuster did not, as a matter of law, render the nominees biased or interested.

72. Fleming v. Phoenix Assur. Co of London, 75 Hun 530 (Sup. Ct. 1894) – Plaintiff insured brought suit to collect under a fire insurance policy, despite the existence of an appraisal award and without any attempt to set it aside. The court held that the appraisal was conclusive on both parties, and dismissed the claim.

73. Bradshaw v. Agric. Ins. Co., 137 N.Y. 137 (1893) – The plaintiff (the insured's successor in interest) brought suit to set aside an appraisal award on the grounds that it was fraudulently obtained. The evidence showed that the insurer had, by false representations, obtained consent to both an appraiser and an umpire who were biased in its favor. The result was an award far below the actual amount of the loss. The Court of Appeals affirmed a decision setting aside the appraisal award and entering judgment for the plaintiff in the actual amount of the loss. "When a false statement is made in regard to the attitude of a proposed appraiser for the purpose of inducing consent to his appointment, which is in that way obtained, and where concealment is practiced in regard to his real attitude to the company nominating him, and when in fact he is not disinterested, good ground is shown for setting aside an appraisal which is grossly below the actual loss sustained, although it has been concurred in and agreed to by the appraiser nominated by the insured."

74. Bishop v. Agric. Ins. Co., 130 N.Y. 488 (1892) – Plaintiff insured suffered loss by fire. Upon meeting to discuss the loss, the insurer's agent requested appraisal and assured the plaintiff that he need not submit a proof of loss since coverage was conceded and appraisal would dispose of issues of valuation. The parties appointed appraisers, but the appraisers were unable to agree on an umpire: the insurer's appraiser nominated only persons who had been "frequently employed by insurers as appraisers and umpires," and he refused to accept any of the persons nominated by the insured's appraiser. The insured thereafter informed its agent not to participate in the appraisal, and eventually submitted a proof of loss, which the insurer rejected since a provision of the policy required a proof of loss to be submitted within sixty days of the loss—a timeframe that had long since elapsed.

The insured then brought suit. The insurer asserted as defenses that the insured had failed to comply with the provisions of the policy requiring participation in appraisal and requiring

submission of a proof of loss within sixty days of the claim's inception. At trial, the jury found that the insurer had refused to agree upon a "disinterested umpire," and thus could not assert failure to comply with the appraisal provision as an affirmative defense. The trial court also held that the insurer had waived the sixty-day statute of limitations for submission of a proof of loss, since its agent had given the insured multiple assurances that he did not have to file a proof of loss. The Court of Appeals affirmed both of these holdings.

75. Robertson v. New Hampshire Ins. Co., 16 N.Y.S. 842 (Sup'r Ct. 1891) – Plaintiff insured suffered loss by fire, and the record showed that the insurer's agent took part in the adjustment of the loss with the representatives of other companies, examined the books, and determined the amount of loss, and the damage to the property saved, and practically agreed on the discount which should be made on the stock of goods. The court held that, under these circumstances, the question whether defendant waived its right to appraisal was properly submitted to the jury, and there was evidence to support the jury's finding of waiver.

76. Enright v. Montauk Fire Ins. Co., 15 N.Y.S. 893 (1891) – The plaintiff insured challenged an appraisal on the grounds that (1) the umpire had not participated, and (2) the appraisers had not itemized the damaged property as required in an endorsement "upon the submission agreement, or appended to it." Somewhat cryptically, the court held that, where the appraisers agreed, the appraisal agreement did not require participation of the umpire. The court also found that the endorsement was non-binding because it did not appear that it "formed any part of the submission agreement" and "was not signed by anybody." As the appraisal otherwise appeared to be fair and honest, the award was upheld.

77. Hamilton v. Home Ins. Co., 137 U.S. 370 (1890) – A policy of fire insurance provided for an appraisal of each article damaged or destroyed by fire, which appraisal was to be submitted as part of the proofs of loss, and that, in case differences arose as to any loss or damage after the proof had been received, the matter was to be submitted to arbitrators, whose award in writing would be binding on the parties as to the amount of the loss. The court held that, though the initial "appraisal," to accompany the proofs of loss, was made a condition precedent to collecting under the policy, the policy did not contain any provision that made the "arbitration" award a condition precedent to suit. Thus, the refusal of the insured to submit to an award of arbitrators could not be pleaded as an absolute bar to an action on the policy. Instead, the insurer's remedy was to plead a separate action for breach of the policy's arbitration provision.

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INDEX TO NORTH CAROLINA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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Otto Indus. N. Am. v. Phoenix Ins. Co., 2013 U.S. Dist. LEXIS 69640 (W.D.N.C. May 14, 2013) – the court denied an insurance company's motion to compel appraisal and stay a lawsuit, finding that the action was distinguishable from a recent decision of the North Carolina Court of Appeals, ***Patel v. Scottsdale Ins. Co.***, 728 S.E.2d 394 (N.C. App. 2012), because it involved disputed legal questions of policy interpretation and scope of coverage, as well as allegations of bad faith, that could not be resolved by appraisal. The insurer relied heavily on ***Patel*** to support its contention that appraisal is a condition precedent to suit.

Owners Ins. Co. v. Southern Pines Hotel Operations LLC, 2013 U.S. Dist. LEXIS 19897, 12-14 (M.D.N.C. Feb. 14, 2013) – the court denied an insurance company's motion for a preliminary injunction to enjoin the appraisal process because the e-mails between the insured's representative and the insurance company included references to business personal property loss and business income loss, suggesting that the insured was seeking an appraisal of business loss and that the insurance company had assented to an appraisal of business loss.

Patel v. Scottsdale Ins. Co., 728 S.E.2d 394 (N.C. App. 2012) – the court held that, based on the policy language, initiation of, participation, and completion of the appraisal process is a condition precedent to the commencement of litigation, even though there had been no appraisal demand before suit was filed.

Glendale LLC v. Amco Ins. Co., 2012 U.S. Dist. LEXIS 98758 (W.D.N.C. July 17, 2012) – among other rulings, the court held that the fact that the two appraisers had represented opposing parties in another insurance claim did not create a conflict of interest. The court noted that the North Carolina courts have yet to articulate any affirmative duty owed by appraisers to disclose their prior dealings with other appraisers.

Glendale LLC v. AMCO Ins. Co., 2012 U.S. Dist. LEXIS 56335 (W.D.N.C. Apr. 23, 2012) – the court, granting summary judgment in part, held that the appraisal award's valuation of the building damage was invalid due to the appraisers' improper consideration of causation and coverage issues into the contents valuation relating to two post-fire thefts at plaintiff's restaurant. The court found that the appraisers were not the proper parties to determine what building damage was caused directly by the fire and what damage resulted from the post-fire thefts.

N.C. Farm Bureau Mut. Ins. Co. v. Sadler, 365 N.C. 179 (N.C. 2011) – the North Carolina Supreme Court held that the policy's appraisal process was limited to a determination of the amount of loss and was not intended to interpret the amount of coverage or resolve a coverage dispute. Based on this reasoning, the court found that the plain language of the policy provided that, while the appraisal process assessed the value

of the loss at issue, the insurer retained the right to determine in the first instance what portion of that loss was covered by the policy. The court further found that the insured was not obligated to pay the full amount of an appraisal award, which could be reduced or denied by policy exclusions and limitations.

Hailey v. Auto-Owners Ins. Co., 181 N.C. App. 677, 640 S.E.2d 849 (2007) – the court held that "the unsupported opinion of the insured that the insurer's payment was insufficient does not rise to the level of a disagreement necessary to invoke appraisal." The court reasoned that the insured's disagreement with the amount proffered by the insurer was unilateral as the insured failed to communicate to the insurer any amount of loss greater than the amount already paid.

Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362 (2002) – the court held that the fact that there was an *ex parte* meeting between the umpire and the insured's appraiser was not proof of fraud because one of the appraisers had to agree with the umpire for an award to issue. The court further found that the fact that the insured's appraisal award included items that were not damaged by the hurricane was a mistake by the appraisers that was not a basis to overturn the award.

Gilbert v. N.C. Farm Bureau Mut. Ins. Cos., 155 N.C. App. 400 (2002) – the court found that the trial court erred by awarding plaintiffs the replacement cost value established by an appraisal award rather than the actual cash value for hurricane damages covered by their homeowners insurance policy without requiring plaintiffs to rebuild or repair as set forth in the loss settlement provisions of the pertinent insurance policy. In arriving at its decision, the court noted that the appraisal procedure is outlined in the policy and there is no language indicating that it is a remedy exclusive of other provisions in the policy.

N.C. Farm Bureau Mut. Ins. Co. v. Harrell, 148 N.C. App. 183, 557 S.E.2d 580 (2001), disc. review denied, 356 N.C. 165, 568 S.E.2d 606 (2002) – the court upheld an umpire's appraisal award that awarded the insured money for damage to the farm equipment as well as the equipment itself. The court noted that if the contractual appraisal provisions of an insurance policy were followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances. The court held that the insurance policy provisions indicated that the umpire followed the correct procedures for a disputed claim. The court concluded that the umpire's reasoning was logical and that mistakes by appraisers, like those made by arbitrators, are insufficient "to invalidate an award fairly and honestly made."

PHC, Inc. v. N.C. Farm Bureau Mutual Ins. Co., 129 N.C. App. 801, 501 S.E.2d 701 (1998) – the court recognized that appraisal provisions are analogous to arbitrations, in

that they provide a "mechanism whereby the parties can rapidly and inexpensively determine the amount of property loss without resorting to court process."

High Country Arts & Craft Guild v. Hartford Fire Ins. Co., 126 F.3d 629 (4th Cir. 1997) (applying North Carolina Law) – the court held that parties are not bound by an appraiser's determinations of causation and coverage issues.

Enzor v. North Carolina Farm Bureau Mut. Ins. Co., 123 N.C. App. 544 (1996) – the court noted that an appraisal is "analogous to an arbitration proceeding," in that "in arbitration 'errors of law or fact . . . are insufficient to invalidate an award fairly and honestly made.'" However, the court held that the policy's appraisal procedure was not followed, as only the umpire signed the report. In invalidating the appraisal award, the court found that the policy appraisal procedure clearly required that at least one other appraiser concur in the award and concluded that the umpire's signature alone failed to demonstrate compliance with the policy's appraisal procedure.

Bentley v. North Carolina Ins. Guaranty Ass'n, 107 N.C. App. 1 (N.C. App. 1992) – the court, in upholding an appraisal award, held that an appraisal clause in an insurance contract is not against public policy, and it will be upheld by a court, in so far as it provides for the submission to arbitration of the amount of loss or damage sustained by the insured.

McMillan v. State Farm Fire and Casualty Co., 93 N.C. App. 748 379 S.E.2d 88 (N.C. App. 1989) – holding that, if the policy's appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances.

Young v. New York Underwriters Ins. Co., 207 N.C. 188, 176 S.E. 271 (N.C. 1934) – the court held that an interested appraiser is one who is partial, unfair, arbitrary and dominated by bias and prejudice for or against the parties or the property in controversy, or has some pecuniary interest in the result of the appraisal. The court further held that the State of North Carolina considers the parties contractually bound by the results of an appraisal process.

Grimes v. Home Ins. Co. of N.Y., 217 N.C. 259, 7 S.E.2d 557 (N.C. 1940) – the court held that where plaintiff had neither notice nor opportunity to argue his position before the appraisers, the appraisal was invalid.

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Minot Town & County v. Fireman's Fund Ins. Co., 1998 ND 215, 587 N.W.2d 189 – Court held that North Dakota's Arbitration Act was inapplicable to an insured's attempt to appeal arbitration decision reached by two appointed appraisers and an umpire under the terms of the insurance contract. Because appraisal proceeding only established the amount of the loss, and not any issues relating to liability, the Arbitration Act was inapplicable to the contractual remedy provided in the Contract of Insurance.

Erickson v. Farmers Union Mut. Ins. Co., 311 N.W.2d 579, 1981 N.D. Lexis 400 – Supreme Court of North Dakota affirmed the trial court's finding that an insurer had to pay the appraisal amount determined by an umpire. On appeal, the insurer had argued that the appraisal was not binding, but the Court noted that the insurer's agreement to appraisal was tantamount to an acknowledgement of coverage and that the amount of loss was the only issue left to be determined under appraisal. The appellate court agreed with the trial court that the findings of the umpire were conclusive because there was nothing left to be determined but the amount of damages.

Siegel v. Insurance Co. of N. America, 56 ND 841, 219 N.W. 467 (1928) – The Supreme Court of North Dakota reversed an appraisal award entered by a trial court against an insurer because, from the record, it did not appear that the insured's appraiser and the umpire agreed upon every item entered into the award. The Court concluded that the failure of the umpire and the insured's appraiser to agree upon the sound value of the damage to the property vitiated the award and necessitated a reversal of the judgment for lack of competent proof of loss and damage.

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INDEX OF OHIO DECISIONS

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1. Graham v. German Am. Ins. Co., 75 Ohio St. 374, 79 N.E. 930 (Ohio 1907) – The Supreme Court of Ohio decided three separate appeals, each addressing whether a contractual appraisal provision constitutes a condition precedent to filing suit when the parties disagree regarding the loss amount. The Graham decision resolved conflicting Ohio decisions on this issue. Based on the plain language of the policy, the court held that obtaining an appraisal is a condition precedent to filing suit. Before bringing an action and recovering under the policy, the party filing the action must show compliance with the contractual requirements, or provide a legal excuse for not complying.

2. Fire Ass'n of Philadelphia v. Appel, 76 Ohio St. 1, 80 N.E. 952 (Ohio 1907) – The decedent-insured's property was destroyed by fire. After the insured gave notice of the loss to the insurer, the parties disagreed about the amount of the loss and agreed to an appraisal. However, the insurer's appraiser refused to participate. The insured requested that the insurer select another appraiser. The insurer refused, demanding an entirely new appraisal. Subsequently, the insured died, and the estate's administrator filed an action against the insurer to recover the loss amount. The trial court entered judgment for the estate, concluding that the insurer's refusal made it impossible for the insured to obtain an appraisal, which effectively absolved the insured from compliance. The appellate court agreed. The Supreme Court of Ohio affirmed the lower courts' judgments, concluding that the contract did not require the insured to perform two appraisals. The court held that the administrator established a sufficient legal excuse for not complying with the appraisal provision based on the insurer's refusal to complete the appraisal.

3. Royal Ins. Co. v. Ries, 80 Ohio St. 272, 88 N.E. 638 (Ohio 1909) – The insured's storage building was destroyed by fire. The insured and the insurer were unable to agree on the loss amount, and the insurer demanded an appraisal under the policy. At the time of the fire, the insured also had concurrent insurance. The policy at issue expressly reduced the insurer's liability by the amount payable under another policy. Accordingly, the appraisers reduced the award pursuant to these terms. The insured filed an action seeking to invalidate the award, alleging misconduct by the appraisers. The trial court entered judgment in favor of the insured and the appellate court affirmed. The Supreme Court of Ohio disagreed, however, and held that the insured did not meet the evidentiary burden for invalidating an award. Rather, the insured's allegations of misconduct merely raised the

suspicion of bias but did not establish misconduct. Moreover, the legal question of whether an appraisal is void or voidable depends on the sufficiency of the allegations in the complaint. Therefore, without proof of misconduct, the insured's allegations only rendered the appraisal voidable, rather than void, which required that the insured attach a cause of action to invalidate the award.

4. Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St. 161, 92 N.E. 82 (Ohio 1910) – The insured's barn and certain personal property were destroyed by fire. The insured filed a claim, but the insurer denied coverage because the property was encumbered by a mortgage, in violation of the policy's terms. The insured sued the insurer for payment on the policy, alleging that he had complied with all the conditions precedent required before filing suit. Specifically, the insured argued that by denying coverage, the insurer never disputed the property's value. Thus, obtaining an appraisal was impossible. In its answer, the insurer generally denied the insured's allegations that he complied with all the conditions. The trial court rejected the insurer's motion for directed verdict on the question of compliance, and the appellate court affirmed the jury's verdict for the insured. The Supreme Court of Ohio affirmed the lower courts' judgments, holding that the insurer's general denial failed to raise the issue of compliance. The court concluded that to trigger the plaintiff's burden to show compliance, the insurer needed to specifically deny the plaintiff's performance of all the conditions and specifically plead the appraisal provision in the answer.

5. Commercial Union Assur. Co. v. Weinberger, 34 Ohio Cir. Dec. 223 (Cir. Ct. Ohio 1912) – The insured hired a third-party adjuster to submit his loss claim to the insurer. A disagreement arose between the adjuster and the insurer. The adjuster submitted the loss claim but did not appraise the property. Unaware of the disagreement, the insured filed suit against the insurer, admitting that no appraisal was conducted. The trial court entered judgment for the insured. The appellate court reversed, concluding that the insured did not meet the burden to comply with the appraisal provision. The record established that a disagreement had occurred between the insured's adjuster and the insurer. According to the court, the burden to comply was triggered, and the agent's failure to comply with the appraisal provision did not absolve the insured from compliance.

6. Weil v. Connecticut Fire Ins. Co., 27 Ohio C.D. 263 (Ohio Ct. App. 1914) – The insured sued the insurer seeking to recover for fire damages. The complaint alleged that the insured complied with all the conditions precedent in the policy. In its answer, the insurer generally denied the insured's allegations of compliance. The trial court granted the insurer's motion for directed verdict on the grounds that the evidence at trial did not establish full compliance. The insured's testimony demonstrated that he merely mentioned selecting an appraiser to the local insurance adjuster. The record did not, however, establish that the adjuster affirmatively responded to the insured's statement. The court noted that, because there was no duty to speak, proof of the adjuster's silence did not constitute waiver of the appraisal provision. Hence, proof of the insurer's silence was not a legal excuse for failing to comply with the appraisal provision.

7. Fireman Ins. Co. v. Barnardi, 14 Ohio Law Abs., 1933 WL 1416 (Ohio Ct. App. 1933) – After the property was destroyed by fire, the insured provided notice of the loss to the local

agent, rather than the insurer. The insured demanded an appraisal and also named an appraiser. The insurer failed to complete the appraisal and refused to pay the loss amount on the grounds that the insured failed to provide notice. The issue was whether the insurer could bring an action on the policy, despite not satisfying the condition precedent of obtaining an appraisal and award. The appellate court affirmed the trial court's judgment for the insured, holding that the insured sufficiently complied with the provision. Without the power to compel the insurer to complete an appraisal, the insured did all she could to obtain an appraisal. The court held that if the insurer refuses to complete the appraisal, the insured's only recourse is filing an action on the policy.

8. Saba v. Homeland Ins. Co., 159 Ohio St. 237, 112 N.E.2d 592 (Ohio 1954) – The insured's property suffered fire damages. Unable to agree on the loss amount, the insurer ignored the insured's demand for an appraisal but filed a motion to appoint an umpire under the policy. The insurer argued that it had the unilateral right to revoke the appraisal requirement. The probate court granted the insured's motion and appointed an umpire—before the parties appointed the two appraisers. The issue on appeal was whether the probate court had jurisdiction to appoint an umpire before the appraisers were selected. The appellate court affirmed the trial court's judgment. The Supreme Court of Ohio reversed the lower courts' decisions, however, ruling that the policy's plain language required an appraisal on the demand of either party. By refusing to select an appraiser, the insurer refused to comply with the policy's requirements. Therefore, the insured was authorized to file a motion to appoint an umpire, and the probate court had jurisdiction to hear the motion.

9. Rademaker v. Atlas Assur. Co., 98 Ohio App. 15, 120 N.E.2d 592 (Ohio Ct. App. 1954) – The insured's garage was destroyed by fire. The parties disagreed regarding the loss amount and agreed to complete an appraisal. The insured rejected the appraisers' award and filed an action on the policy for full payment. The insurer subsequently filed a motion to confirm the appraisers' award without first filing an action with the court—a remedy available under the state's arbitration statute. The trial court granted the motion to confirm, but the appellate court reversed the order. According to the appellate court, contractual appraisal provisions are not subject to the arbitration statute. Nothing in the arbitration statute addressed contractual appraisal provisions. Further, the standard appraisal provision only concerned the disputed loss amount, not the question of liability. Because the policy did not grant either party the right to seek a judicial order to enforce the appraisers' award, the appellate court concluded that the trial court lacked jurisdiction to hear the motion.

10. Madison v. Caledonian-American Ins. Co., 36 Ohio Law Abs. 172, 43 N.E. 2d 245 (Ohio Ct. App. 1940) – The insured's residential property was destroyed by fire. The insured gave verbal notice of the loss to the insurer's local agent, and the agent relayed the notice to the insurer. A disagreement occurred regarding the loss amount, and the insurer filed an action on the policy. The complaint generally alleged that the insured fully complied with the policy's conditions. The complaint also alleged that the insurer waived the appraisal provision by both denying coverage and continuing negotiations past the 60-day period for paying the loss. In its answer, the insurer generally denied the insured's allegations of full compliance. At trial, the jury returned a verdict in favor of the insured, and the insurer appealed. The appellate court reversed, ruling that the trial court erred by instructing the

jury that the insurer's acts constituted waiver. Moreover, the appellate court rejected the insured's interpretation of Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St. 161, 92 N.E. 82 (Ohio 1910). Instead, the court interpreted Titus as applying only where the complaint alleges that no disagreement occurred regarding the loss amount. Because the record established that a disagreement occurred, the Madison court held that the insured's burden to comply, or provide a legal excuse, was triggered.

11. Edwards v. TransAmerica Ins. Grp., No. 86AP-176, 1986 WL 9619 (Ohio Ct. App. Sept. 2, 1986) (unpublished) – The insured's home was destroyed by fire. The parties disagreed over the loss amount, and the insured sued to recover on the policy. The insurer filed an appraisal demand with the court after suit was filed. The trial court stayed the proceeding until the appraisal was completed. Once the appraisal was completed, the court granted the insurer's motion for summary judgment and dismissed the suit. The insured appealed, arguing that the trial court erred by interpreting the appraisal provision as mandatory, and thus by staying the proceedings. The appellate court agreed and reversed the trial court's order. Based on the policy's plain language, the insured could recover payment in three ways: through agreement, by obtaining a final judgment, or by obtaining an appraisal award. Nothing in the policy established obtaining an appraisal as the primary method for settling a disputed claim. Because the insured could recover through a final judgment, the insured was expressly permitted to file an action without first obtaining an appraisal.

12. Nationwide Roofing & Sheet Metal, Inc. v. Cincinnati Ins. Co., No. CA 12383, 1991 WL 76764 (Ohio Ct. App. May 9, 1991) (unpublished) – The insured sued the insurer for breach of contract. The trial court dismissed the suit as premature based on the policy's loss payment provision. Under the loss payment provision, payment became due 60 days after the insurer received proofs of loss, and after the loss was determined either by agreement or by an appraisal award filed with the insurer. The appellate court reversed, citing two statements of law. First, the appraisal provision was not a condition precedent to determining the question of liability. Instead, the appraisal provision could be asserted by the insurer only as a defense to the question of liability. To assert the defense, however, the insurer must plead the insured's noncompliance in its responsive pleading, rather than in a motion to dismiss. Because the appraisal and the loss payment provisions were intended to be construed together, the insurer could not assert the defense of noncompliance because neither party invoked an appraisal.

13. Phifer-Edwards, Inc. v. Hartford Fire Ins. Co., No. 65536, 1994 WL 236225 (Ohio Ct. App. May 26, 1994) (unpublished) – The insured's commercial property was damaged by fire. The parties disagreed regarding the loss amount, and the insurer demanded an appraisal. While the appraisal was being completed, the insured sued the insurer to recover on the policy. The insurer filed a series of motions including motions for appraisal and for summary judgment on the grounds that the insured failed to comply with the appraisal provision. The trial court denied the motion for summary judgment and the insurer filed a motion for reconsideration and a notice of appeal. The issue before the appellate court was whether the insurer appealed from a final order. Citing the state arbitration statute, the insurer argued the denial of the motion for appraisal was a final order because it was an order granting or denying a stay of the proceedings. The appellate court dismissed the

appeal, however, concluding that the order denying the motion for appraisal was not final. The appraisal only decided one discreet issue in the case. Because other issues remained disputed, the trial court lacked jurisdiction to decide the merits of the case.

14. Humphrey v. Scottish Lion Ins. Co., No. 94-T-5099, 1996 WL 200567 (Ohio Ct. App. March 15, 1996) (unpublished) – A policy that was issued by two insurers covered the insured's semi-tractor, which was damaged in a traffic accident. The insured attempted to invoke the appraisal provision, but the parties failed to agree on an umpire. The insured filed an action against the insurer to recover on the policy. The complaint alleged that by failing to agree on an umpire, the insurers did not comply with the policy's appraisal provision. The insurers filed a motion for summary judgment, arguing that the insured had agreed to dismiss the action once the umpire's award was paid, and that they offered to pay the umpire's award. The trial court granted the motion for summary judgment, finding that the parties had previously reached a settlement. The insured appealed on the grounds that the trial court erred when it dismissed the case based on the alleged settlement. The appellate court reversed the order granting summary judgment, concluding that the record established a material, factual dispute regarding the terms of the alleged settlement.

15. Smith v. Shelby Ins. Grp., No. 96-T-5547, 1997 WL 799512 (Ohio Ct. App. Dec. 26, 1997) – The insured's vehicle was damaged by fire. The parties disagreed regarding the loss amount, and the insured invoked the policy's appraisal provision. After six years of various settlement offers, the insured sued the insurer to recover on the policy. The insurer filed a motion for summary judgment, arguing that the insured failed to comply with the appraisal process. The trial court dismissed the motion and ordered the parties to complete an appraisal. The trial court confirmed the umpire's award and entered judgment for the insured. The insured appealed the judgment entry, arguing the umpire's awarded was invalid because it did not include an amount for the car's wheels, tires, radio, or antenna. The court of appeals affirmed the trial court's order. The appellate court stated that the standard of review of an appraisal award is extremely limited. Absent evidence of fraud, mistake or misfeasance, an order confirming an appraisal will not be vacated. The court held that the umpire did not engage in misconduct by excluding the vehicle items from the appraisal because there was insufficient evidence to assess the value of each item.

16. Cousino v. Stewart, No. F-05-011, 2005 WL 3120245 (Ohio Ct. App. Nov. 23, 2005) (unpublished) – The insured's home was severely damaged by fire. The insurer did not take any action on the loss for several months, and the insured sued, alleging bad faith. While the bad faith suit was pending, the parties agreed to complete an appraisal pursuant to the homeowner's policy. Unable to agree on an umpire, the appraisers petitioned the trial court to appoint an umpire, who subsequently issued an award favoring the insured. The trial court denied the insurer's motion to replace the umpire and confirmed the appraisal award. The insurer appealed. At issue before the appellate court was whether the proceeding was an appraisal or an arbitration, and whether the trial court erred by not removing the umpire. First, the court deemed the proceeding an arbitration because it was intended to be binding, and the scope of the appraisal was a determination of coverage, which included fact-finding. Second, the appellate court affirmed the order denying the motion to replace because the standard for setting aside an award is "evident partiality or

corruption," rather than the mere "appearance of bias." Because the phrase "evident partiality" connotes more than a mere suspicion or appearance of partiality, the insurer failed to meet its burden.

17. Hull v. Motorists Ins. Grp., No. 25643, 2011 WL 2040958 (Ohio Ct. App. May 25, 2011) (unpublished) – The insured's business premises suffered damages from wind and hail. The parties disagreed regarding the value of the damaged property. After invoking the policy's appraisal provision, the insured petitioned the trial court to appoint an umpire pursuant to the contract. Additionally, the insured requested that the court direct the appraisers to use a "detailed, line item appraisal award form." The trial court appointed an umpire and ordered the appraisers not to determine causation. The insurer appealed the trial court order. The court of appeals reversed on the grounds that the trial court's causation instruction exceeded its authority. The court of appeals determined that, while the parties agreed to petition the court to appoint an umpire, the insured's request to limit the appraisal method was beyond the parties' agreement. Because the parties did not agree that the court could restrict the appraisal method, the trial court lacked authority to define the appraisal method under the insurance policy.

18. Stuckman v. Westfield Ins. Co., 968 N.E.2d 1012 (Ohio Ct. App. 2011) – The insureds' residence was damaged by fire. The parties disagreed regarding the loss amount, and invoked the appraisal provision. The trial court modified the appraisal award, expressly deducting amounts previously paid by the insurer to the insureds. The insureds filed a motion for reconsideration, arguing that the trial court's deductions were inappropriate without evidence in the record to support these deductions. The trial court denied the motion and the insureds appealed. The appellate court reversed and remanded the judgment. Citing the limited review that courts apply to appraisal awards, the appellate court held that the trial court erred when it modified the appraisal award absent evidence of the appraisers' fraud, mistake or misfeasance. But see Stuckman v. Westfield Ins. Co., No. 3-11-18, 2012 WL 777073 (Ohio Ct. App. March 12, 2012) (concluding that, procedurally, the trial court should have deducted the insurer's previous payments after it held a hearing, in which the insurer submitted evidence of its previous payments).

19. TransCapital Bank v. Merchants Mut. Ins. Co., No. 3:11 CV 1176, 2013 WL 322156 (N.D. Ohio Jan. 28, 2013) (unpublished) – The insured's hotel suffered damages from vandalism and theft. The parties disagreed regarding the loss amount and invoked the policy's appraisal provision. The umpire agreed with the insurer's appraisal, which excluded the insured's claim for business personal property. The insured filed motions to modify and/or vacate the award, alleging bias by the umpire. The issue before the district court was whether the umpire exceeded his authority by excluding the business personal property from the appraisal award. Citing Smith v. Shelby Ins. Grp., No. 96-T-5547, 1997 WL 799512 (Ohio Ct. App. Dec. 26, 1997), the district court found that there was insufficient proof that the personal property was lost due to the vandalism and theft in question. The court held that there was no mistake or misfeasance based on evidence that the umpire agreed with the insurer's appraisal, rather than the insured's appraisal. Therefore, the umpire did not exceed his authority by excluding the business personal property from the appraisal award.

2014
INDEX TO OKLAHOMA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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OKLAHOMA

1. Massey v. Farmers Ins. Group, 837 P.2d 880 (Okla. 1992)—In fire damage dispute, carrier invoked a contractual loss-appraisal process and the parties appointed independent appraisers. The claim still did not settle, and the policyholder sued. The state court appointed an umpire who made an award that was awaiting state court approval when the policyholder dismissed his state court action without prejudice. Left undecided were: (1) the policyholder's motion to reconsider the appointment of an umpire; and (2) the carrier's offer to allow judgment on the umpire's award. The policyholder then refiled in federal court, seeking both determination of the loss amount *and* punitive damages for bad-faith failure to settle. A jury trial ended in a verdict heavily in the policyholder's favor, to the tune of more than $4,000,000.00. On appeal, the 10th Circuit certified a question to the Oklahoma Supreme Court, namely, whether the court-appointed umpire's damage appraisal had a preclusive effect such that the amount of the loss could not be relitigated. The Oklahoma Supreme Court determined that the judicially unconfirmed umpire's award had no preclusive effect because, without a final order determining the amount of the loss or approving the umpire's loss award, "the [policyholder's] recovery amount was never fully and fairly litigated and the umpire's unsanctioned award [therefore] lack[ed] the attributes critical for application of issue preclusion." Interestingly, the Court also addressed a constitutional challenge to the appraisal process. The challenge was that, because the appraisal provision was statutorily-mandated for fire loss policies such as the one here, it denies the parties the right to a jury trial on the amount of the loss. In light of this challenge, the Court held that the appraisal process is only binding as against the party that invokes it but is non-binding upon the party compelled to participate due to the other party's demand.

2. Trinity Baptist Church v. GuideOne Elite Ins. Co., 654 F.Supp.2d 1316 (W.D. Okla. 2009)—In tornado loss dispute, carrier invoked appraisal. The appraisal process produced a memorandum listing costs for certain "code items." These code items were accompanied by two columns of comments and numbers. Carrier agreed that the items for which a value appeared in the left-hand column were covered by the "Ordinance or Law" extension of coverage if such does were enforced and expenses were incurred. With one exception, the carrier claimed that the items for which a value appeared in the right-hand column were not covered. Primarily at issue were the costs of parking lots and landscaping, with the carrier claiming such items were not "covered property." Also at issue were certain other costs that carrier contended were incurred as a result of the voluntary decisions of the policyholder. The policyholder moved for summary judgment seeking a determination of coverage for the disputed items and claimed that carrier's arguments regarding coverage were foreclosed by the appraisal process because the appraisers agreed that all of the listed "code items" were required to comply with applicable ordinances and laws. The court disagreed. The court then clarified that *Massey* stands for the propositions that "appraisal provisions permit appraiser or umpires to determine one issue, to wit, the amount of damage to the property," but that "appraisal awards generally cannot determine the cause of a loss and do not discharge a cause of action on the policy." The court therefore ruled that the appraisal decided the amount of loss attributable to different items and addressed coverage separately.

3. London v. Trinity Companies, Trinity Universal Ins. Co. of Kansa, Inc., 877 P.2d 620 (1994)—In homeowners' policy fire damage dispute, carrier immediately issued a $1,000 check to policyholders to cover interim living expenses after receiving notice of the loss. The policyholder than hired a professional adjuster, who acknowledged receipt of the check and requested an additional $1,000, which was paid approximately one month later. A week after that, the adjuster submitted a proof of loss statement in the amount of $64,375. Two weeks later, the carrier advised the adjuster of the need to document the additional living expense claim in order to obtain the same. Two weeks after that, the carrier paid $16,250 for the contents of the dwelling lost in the fire. A day later, the carrier informed the adjuster that it was rejecting the proof of loss due to a disagreement over the amount of the loss to the house. Policyholder demanded appraisal, and the umpire eventually signed an award of $20,577.74, which was then paid by the carrier. The carrier then paid about $3,000 more in living expense claims. All told, the carrier paid $41,000. Policyholder later sued for bad faith, but the trial court granted the carrier's motion for summary judgment. On appeal, policyholder claimed that there was a fact issue on carrier's bad faith because carrier: (1) unreasonably withheld additional living expense payments for six months in order "to oppress the [policyholders] and take advantage of their stress and poverty"; (2) requested that its appraiser pay close attention to its adjuster's estimate and only sent its adjuster's low estimate, not an earlier, higher, one. In response, carrier highlighted the fact that carrier's agent had advised policyholder's adjuster of the need to document additional living expense claims for same to be payable. Policyholders admitted they did not properly document their claims, but argued that the carrier should have explained the policy provisions better. The appellate court rejected the policyholders' first argument, agreeing with the trial court that the complexity of handling loss claims "does not mean that the insurer must pay whatever the insured requests or demands or risk paying punitive damages through a claim of bad faith." As to the second argument, the appellate court held that there was no evidence tending to support even an inference of bad faith because: (1) the carrier's requests to its appraiser to pay attention to its in-house adjuster's estimate was advisory, not mandatory; (2) the law imposed no obligation on carriers to send appraiser any estimates, much less low ones; and (3) the policyholders' appraiser and the neutral umpire both signed the appraisal.

4. LeBlanc v. The Travelers Home and Marine Ins. Co., No. CIV-10-00503-HE, 2011 WL 1107126 (W.D. Okla. March 23, 2011)--In homeowners' policy tornado damage dispute, carrier invoked appraisal process and umpire ultimately concluded that the applicable loss was $1,614,052. The appraisal process did not resolve the dispute, which included disputes about the scope, nature, and result of the appraisal process. The dispute landed in federal district court, where the court first addressed the policyholder's argument that the carrier lacked standing to object to the umpire's award because carrier invoked the appraisal process, citing *Massey*. The court rejected policyholder's argument, reading *Massey* narrowly as only prohibiting (1) the party invoking the appraisal from (2) challenging the appraisal award (3) in the *absence* of fraud, bad faith, or mistake. Put another way, the non-invoking party is not bound at all by an appraisal award and may relitigate the issue of the value of property that is a loss, and the invoking party is

ordinarily bound by the appraisal award but can still challenge the award on the basis of fraud, bad faith, or mistake. The court then turned to the meat of the dispute, which turned on whether the appraisal umpire exceeded the scope of his authority as an umpire. The carrier argued that the pleadings show the umpire made determinations of both coverage and causation, which it argued was prohibited under Oklahoma law. The policyholder argued, relying on persuasive authority from other states, that appraisal umpires may make what are, at least in part, causation determinations. The court noted that *Massey* was the closest case it found from Oklahoma courts in addressing the issue, though *Massey* did not directly address it. The court then found that the umpire did *not* make a coverage determination because coverage, strictly-speaking, was not at issue. That is, there was no dispute about what the policy meant—there was only a dispute about whether the tornado caused the damage or some other cause, such as a pre-existing structural deformity, did. The court ruled that Oklahoma courts would likely find it improper for an appraisal umpire to make causation determinations. The court accordingly ruled that the policyholder could rely on the appraisal amount only to the extent it proved the cost of repairing the house to its pre-tornado state, but that the "issue of causation—whether the damages ultimately established were due to the tornado or to some other arguably excluded condition or reason—remains for resolution by the court in ordinary course."

5. Fidelity-Phenix Fire Ins. Co. of New York v. Penick, 401 P.2d 514 (Okla. 1965)—in fire policy dispute, carrier invoked appraisal while also reserving the right to litigate liability. The policyholder brought suit to determine liability and coverage and won at trial. Carrier appealed, arguing in part that policyholder had no standing to sue until after the appraisal process was completed. The Oklahoma Supreme Court disagreed and held that "the appraisal clause does not constitute a condition precedent for maintaining a suit or action . . . if the insurer in his demand for an appraisal [] reserves the right to litigate the question of liability."

6. Hester v. Certain Underwriters of Lloyd's, No. CIV-12-57-SPS, 2013 WL 817304 (E.D. Okla. March 5, 2013)—in personal property policy dispute, carrier's response to policyholder's claim was that it was "investigating [policyholder's] Loss and insurance claim under a full reservation of rights under the Policy and applicable law" and estimated the loss at $32,500. Then, though stating its expectation that the policyholder would "likely be in agreement with the adjustment of [the] Loss," the carrier invoked the appraisal clause which stated in part that "[i]f there is an appraisal, [carrier] will still retain [its] right to deny the claim." Policyholder disputed the value of the loss and appointed his own appraiser, who estimated the loss at $441,000. The parties discussed choosing an appraisal umpire but policyholder filed suit. Carrier moved to compel appraisal and stay the suit. The district court found that the terms of the appraisal clause governed whether the carrier had unequivocally accepted coverage or had instead reserved its right to challenge liability. Because the appraisal clause reserved the carrier's right to deny the claim, the court, following *Fidelity-Phenix*, rejected carrier's motion to compel appraisal or stay the proceedings and instead continued handling the lawsuit like it would any other.

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INDEX TO OREGON DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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OREGON

1. Oregon Statutes and Regulations

ORS 742.232 (previously ORS 743.648) – Under Oregon law, a standard fire insurance policy must contain the following appraisal provision:

> 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 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 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 the appraiser and the expenses of appraisal and umpire shall be paid by the parties equally.

2. Oregon Case Law

***Paton v. American Family Mut. Ins. Co.*, 256 Or.App. 607, 302 P.3d 1204 (2013)**

Insured was injured in an automobile accident caused by an uninsured motorist. Shortly before the two year anniversary of the accident, the insurer sent a letter to the insured's attorney stating, in part, that it "hereby consents to submit this case to binding arbitration." The insured eventually filed a UIM claim against the insurer, who moved for summary judgment on statute of limitations grounds. The question for the court was whether the insured or the insurer had formally instituted arbitration proceedings, which tolled the statute of limitations. The court held that defendant had "formally instituted" arbitration with its letter because it expressly communicated to the insured that the initiating party was beginning the process of arbitrating the dispute. A party's express "consent" to arbitrate suffices to "formally institute" arbitration proceedings under the UIM statutes, so long as the consent is not made explicitly contingent on the occurrence of any future event.

***Foltz v. State Farm Mut. Auto. Ins. Co.*, 326 Or. 294, 952 P.2d 1012 (1998)**

A District of Oregon court certified questions to the Oregon Supreme Court on questions of law regarding a dispute between the amount of PIP benefits due after an automobile accident. First, the Oregon Supreme Court held that ORS 742.520(6), in combination with ORS 742.522, required the parties to arbitrate disputes over the

amount of PIP benefits. Second, before a plaintiff can file suit for an alleged "wrongful scheme" of denying PIP benefits, the plaintiff must first establish that PIP benefits were due to her, which requires arbitration. Third, despite the mandatory nature of the arbitration, the result of the arbitration is not binding on the plaintiff because it would violate her constitutional right to a trial.

***Kramm v. Mid-Century Ins. Co.*, 153 Or.App. 325, 956 P.2d 1036 (1998)**

Under the holding of *Foltz*, *supra*, an insured, who brings an action arising out of nonpayment of PIP benefits without first arbitrating that dispute, need not dismiss the lawsuit until the dispute is arbitrated. While the PIP dispute must be arbitrated before it can be *tried*, the insured is not precluded from filing a court action before the PIP arbitration occurs. If an action is filed, it is subject to abatement, not dismissal.

***Carrier v. Hicks*, 316 Or 341, 352, 851 P2d 581 (1993)**

The question for the court was whether an insured was bound by an arbitration award that was issued from the arbitration provision in the UIM statutes. Under the UIM statutes, the insured and insurer can "elect by mutual agreement" to settle disputes by arbitration. Because arbitration under the UIM statutes is not mandatory, a participant is not deprived of a jury trial; he has voluntarily agreed to forego a jury trial. Thus, the arbitration award was binding on the consenting party.

***Molodyh v. Truck Insurance Exchange*, 304 Or 290, 298, 744 P2d 992 (1987)**

Plaintiff owned property which was damaged by fire and was insured by defendant. The parties went through the appraisal process, and the umpire awarded the plaintiff damages. Plaintiff filed suit, arguing that a jury must determine the amount of loss to his property. Plaintiff argued that the appraisal was a condition precedent to an action on the policy, but its results were non-binding, while the insurer argued the decision was binding. The court found that appraisal provision is permissive and appraisal is not a condition precedent to filing suit under an insurance policy. Because the statute provides for appraisal "on the written demand" of either party, the appraisal process is permissive and therefore litigation may be commenced without invocation of the appraisal process. Once one party demands an appraisal, the process becomes mandatory for the other party, and to that extent, the appraisal process becomes a condition precedent to sustaining a claim in court. However, the result of the appraisal is not binding as to the non-demanding party, as such a result would offend the right to a jury trial and thus be unconstitutional.

Credit: Drew Passmore

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PENNSYLVANIA DECISIONS

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1. *Mitchell v. Safeco Ins. Co. of Ill.*, No. 14-625, 2014 WL 1789104 (E.D. Pa. May 6, 2014) – The insureds sued their insurer for breach of contract and bad faith for failure to pay what was allegedly due to them under their insurance policy as a result of fire damage to their home. The insureds then moved to set aside an appraisal award on the ground that during the course of the appraisal process, their appointed appraiser suffered some form of mental breakdown, which rendered him incompetent to adequately advocate on their behalf. The court noted an appraisal award may only be set aside where it is clearly established 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, or where the appraisers have exceeded their authority. The court found that because the insured failed to present any evidence of the alleged mental breakdown, and there was no basis for overturning the award.

2. *Mirachi v. Seneca Specialty Ins. Co.*, No. 13-2129, 2014 WL 1673748 (3d Cir. Apr. 29, 2014) – The insured suffered fire and business-related loss. The insurer's expert estimated the damages at $331,777.42, whereas the insured's expert estimated the damages at $692,160. After the insurer paid the undisputed portion of the claim, the parties entered into an appraisal process, where the insurer's independent appraiser estimated damages at $449,550 and the umpire ultimately concluded the damages totaled $618,338.07. Thereafter, the insurer paid the balance of the determined damages up to the policy limit of $600,000. The insured sued, alleging the insurer had delayed payment in bad faith. The court rejected the claim, holding that the fact that subsequent estimates assigned a higher value was not clear and convincing evidence that the insurer had acted in bad faith either in arriving at its initial estimate or in standing by the estimate until the appraisal process concluded.

3. *Williamson v. Chubb Indem. Ins. Co.*, No. 11-cv-6476, 2013 WL 6692570 (E.D. Pa. Dec. 19, 2013) – The insureds suffered damage to their home. Contrary to its standard practice of using an estimating program called Symbility, the insurer retained an independent contractor, who used an estimating program called Xactimate, to estimate the loss. The insurer paid the claim based on the Xactimate estimate. The insureds then engaged a public adjuster to request the insurer rewrite its estimate using Symbility, noting the units costs in Xactimate were consistently less than those in Symbility. The parties engaged in the appraisal process and the claim was valued at $203,450.11, or $6,094.73 more than the Xactimate estimate. The insured sued for bad faith and the insurer moved to dismiss. The court denied the motion, holding the insurer's alleged departure from its standard practice, which generated a lower estimate, could prove a dishonest purpose and self-interest that are the hallmarks of bad faith; this was particularly so, according to the court, where it was also alleged that the insurer knew the unreasonableness of its action in departing from its standard practice and was subsequently put on notice of the difference in the estimating programs but refusing to rewrite its estimate.

4. *Keystone Asset Management, Inc. v. West American Ins. Co.*, No. 10-cv-02088, 2010 WL 4159249 (E.D. Pa. Oct. 22, 2010) – The basement of the building where the insured's office was located was flooded, forcing the insured to relocate its servers and employees. The insurer paid for the insured's moving and relocation expenses but denied a subsequent claim for lost business income, taking the position that it was not covered because the insured did not suffer a necessary suspension of its operations or an actual loss of business income. The insured sued and demanded the court order the insurer to appoint an appraiser in accordance with the appraisal clause of the policy. The court declined to do so, explaining that under Pennsylvania law, an appraisal clause can only be invoked when the insurer admits liability and the sole issue is a dispute over the valuation of the loss. Here, because the insurer disputed coverage, the appraisal provision was not triggered.

5. *Maiden Creek T.V. & Appliance, Inc. v. General Cas. Ins. Co.*, No. 05-667, 2008 WL 351906 (E.D. Pa. Feb. 8, 2008) – The insured suffered fire damage to its business. After the insurer acknowledged liability and paid the undisputed portion of the claim, litigation as to the disputed portion of the claim ensued but was stayed pending completion of the appraisal process. The insured then sought review of the appraisal award for loss of stock materials, inclusion in the award of compensation for inventory preparation cost and valuable papers and records, and adjustment of the award to correct an agreed-upon mathematical error. The court acknowledged its scope of review of appraisal awards, like that of arbitration awards, is severely limited, but found the award with respect to loss of stock materials, which had already been agreed upon by the parties and paid by the insurer, was outside the authority of the appraisers. With respect to adjustment of the award to include compensation for preparation cost and valuable papers and records, the court found the insured failed to make a clear showing that it was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable, or unconscionable award, which would justify modification of the award. The court granted the petition to correct the agreed-upon mathematical error.

6. *Celebrations Caterers, Inc. v. The Netherlands Ins. Co.*, No. 06-1341, 2008 WL 282203 (E.D. Pa. Jan. 1, 2008) – After the insured suffered a fire loss, the parties went through the appraisal process. Several months after the appraisal award was paid, the insured submitted proof of claim for loss of rent in the amount of $41,801, which had not been incurred but would be incurred when repairs actually took place. The court found that the insurer was not yet liable for payment pursuant to the appraisal award because it was only obligated to pay for actual loss. Once the repairs were made or scheduled, the insurer would be liable for payment.

7. *Riley v. Farmers Fire Ins. Co.*, 735 A.2d 124 (Pa. Super 1999) – The insured suffered property damage due to snow and ice. The parties agreed the loss was covered but could not agree on the actual amount of loss suffered. The matter was submitted to appraisal and the umpire circulated a proposed award. The insurer requested itemization of the award but the umpire did not provide any itemization, and the award was signed and confirmed by the court without it. The insurer then filed a motion to show cause why the court should not vacate/amend the judgment entered on the appraisal award based on the umpire's refusal to itemize the damages. The court found that there was no language in the policy's appraisal

provision that required the umpire to itemize damages, and as such, it declined to vacate the judgment.

8. *Hodges v. Pennsylvania Millers Mut. Ins. Co.*, 673 A.2d 973 (Pa. Super. 1996) – The insureds' home was damaged by a wind storm and the insureds and insurer failed to agree on the amount of loss. In a letter regarding the disputed value of the claim, the insurer's adjuster noted that the insurer intended to strictly enforce the one-year period for filing suit related to the loss. The insureds, thereafter, filed suit. Nearly a year after the insureds filed suit and nearly two years after the date of loss, the insurer demanded appraisal. The court found that, even though the appraisal provision contained no time limit, such a demand must nonetheless be brought within a reasonable time. The court reasoned this request for appraisal was untimely and prejudicial to the insureds given the insurer's threat to strictly enforce the one-year suit limitation provision, which forced the insureds to prepare and prosecute their action.

2014
INDEX TO RHODE ISLAND DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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***Grady v Home Fire & Marine Ins. Co.*, 27 R.I. 435 (1906)**

When a policy provides for arbitration of the amount of the loss as a condition precedent to insured's right of action on the policy, a failed attempt without fault or misconduct of either party does not constitute compliance with the condition and thus, in the absence of waiver, does not entitle insured to sue on the policy without compliance with insurer's demand for further arbitration.

***Messler v. Williamsburg City Fire Ins. Co*., 42 R.I. 460 (1920)**

Insured sued on the policy that required appointment by each party of a competent and disinterested appraiser and for the appraisers to agree upon a competent and disinterested umpire. Insured introduced a letter at trial, which he wrote to the insurer, stating the insurer's appraiser was not competent and disinterested, and both insured and insurer's appraisers were unable to agree on an umpire, and that said failure to agree was the fault of the insurer and its appraiser. The court held the defendant insurance company was entitled to an instruction that the jury must find defendant's appraiser was competent, disinterested and duly qualified as otherwise jury might conclude competency and disinterestedness were at issue.

***Campbell v Union Mut. Fire Ins. Co., et al*., 125 A. 273 (1924)**

Where submission for an appraisal of sound value and loss, upon property insured and covered by fire insurance policies, and based on agreement of the parties in lieu of the provisions of the policy, the insured is bound by the appraisal made under such agreement.

***Gregory, et al. v. Pawtucket Mut. Fire Ins. Co., et al*., 58 R.I. 434 (1937)**

In cases where the property is practically totally destroyed, and appraisers were not acquainted with the construction or condition thereof prior to the fire, a hearing should be held at which sworn testimony is presented, though the hearing need not be conducted in accordance with rules of procedure and evidence which prevail in court. Failure to conduct hearing justifies vacating and annulling the award.

***Rhode Island Joint Reinsurance Association v. White Holding Company*, 1981 WL 386510 (R.I. Super. 1981)**

Admission or finding of liability is a prerequisite to an appraisal and plaintiff was not required to submit to an appraisal until liability determined.

***Waradzin v. Aetna Casualty and Surety Company*, 570 A.2d 649 (R.I. Super. 1990)**

Policy's "appraisal" procedure requiring two appraisers and an umpire is an "arbitration" and it is within an arbitrator's authority to award prejudgment interest.

***Imperial Casualty and Indemnity Co. v. Bellini, et al*., 888 A.2d 957 (R.I. 2005)**

Demand for deductible payment, and payment thereof, constitutes a waiver of right to deny coverage under an insurance contract.

***National Refrigeration, Inc., et al, v Travelers Indemnity Company of North America, et al.*, 947 A.2d 906 (R.I. 2008)**

Summary judgment is proper where plaintiff initiates petition for arbitration years after the time expressly provided for in the insurance contract. The court held that the petition for arbitration is a legal action subject to the policy's two-year limitations clause and insurer's agreement to further investigate the claim does not estop it from raising the limitations issue.

***Hahn v. Allstate Insurance Co*., 15 A.3d 1026 (R.I. 2011)**

When the insurer refuses to submit to the appraisal process in favor of litigation, the insurer must specify with particularity to the policyholder the alleged ambiguity in the policy and articulate why the issue is one of coverage for the loss rather than the amount of the loss. The insured is entitled to timely and adequate notice; vague allegations of pre-existing damage not sufficient to put insured on notice.

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Coker v. Fireman's Fund Ins. Co., 2011 U.S. Dist. LEXIS 126329 (D.S.C. Oct. 31, 2011), *reconsideration denied in part by* ***Coker v. Fireman's Fund Ins. Co.***, 2012 U.S. Dist. LEXIS 9793 (D.S.C., Jan. 27, 2012) – the court concluded that the insurer's right to invoke the appraisal process was waived in the six months between the time a bad faith action was filed and when the demand for an appraisal first was made. The court noted that both sides were well aware that the appraisal process was available and appropriate, however, did not invoke the appraisal process either before or within a short period after the bad faith action was filed.

Hendricks v. American Fire & Casualty Co., 247 S.C. 479 (S.C. 1966) – the court held that appraisal clauses usually provide that the parties may demand appraisal if they cannot agree on the amount of loss. The court further held that the appraisal award was valid despite the insurer's failure to notify the insured of the appraisal meetings and whether the appraisal process was complete because the policy did not require that notice of the appraisal meetings be given to the insured.

Miller v. British America Assurance Co., 238 S.C. 94, 102-103 (S.C. 1961) – the court upheld an insurance policy appraisal provision within an arbitration clause as valid and enforceable where the insurer, as an affirmative defense, alleged that the insureds had failed to file a proof of loss and that it would exercise its rights to have an appraiser evaluate the loss under the policy's arbitration clause.

Harwell v. Home Mut. Fire Ins. Co., 228 S.C. 594 (S.C. 1956) – the court found that because the policy expressly prohibited the insured from bringing an action until after the amount of loss was submitted to arbitration or appraisal, compliance with the provision was a condition precedent to the right of the insured to maintain the action, unless arbitration or appraisal is waived by the insurer, or there is a legal excuse for noncompliance.

L. D. Jennings Co. v. North River Ins. Co., 175 S.C. 407 (S.C. 1935) – the court upheld an appraisal award, finding that there was no evidence that the appraiser named by the insured had any interest in the property, that he acted unfairly or impartially in the matter, or that he was influenced by any improper motive in the performance of his duty as an appraiser. The court further ruled that the evidence showed that the umpire substantially performed the duties required of him by the parties' agreement. The court also noted that the purpose of an appraisal is to obtain, if possible, a fair and satisfactory adjustment of the claim of the insured.

Cleveland v. Home Ins. Co., 150 S.C. 289, 148 S.E. 49 (1929) – the court held that if any of the interested parties requested to be allowed to appear before appraisers and offer

evidence or testimony with respect to the loss or damage, a refusal to grant such a request would invalidate any award made by the appraisers.

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Batiz v. Fire Ins. Exch., 2011 SD 35, 800 N.W.2d 726 – The Court determined that the insured's legal challenge to an amount awarded by umpire after the parties' appraisers could not agree on an amount of the loss was premature; while the appraisal provision of the policy required the appraisers to set the amount of the loss, the policy clearly provided that the insured was not entitled to payment of that amount of loss, unless that amount is actually needed and spent to repair or replace the damaged property. Insured had not yet completed repairs or replaced the damaged property. The Court noted that the insured's challenge to the insurer's appraiser's credibility is generally not appropriate for summary judgment, and because the issue of the insured's loss was premature, the challenge to the appraiser's credibility would only be considered if the insured repaired or replaced the damaged property and the matter was returned to the trial court.

Lee v. Farmers Ins. Co., 72 SD 127, 32 N.W.2d 188 (1948) – The Court reversed the determination made by the insurer's appraiser and the umpire concerning the value of damage to burnt hay. The language of the arbitration clause in dispute was one which required the appraisers to make an award "stating separately sound value and damage" of the property. Property damage under South Dakota law is ascertained by determining first, the sound value of the hay immediately preceding the fire, and second, the value of the hay after the fire. The award made by the umpire in the case failed to appraise the sound value of the insured hay before the fire as required by the clause of the policy and the award of the appraiser was, therefore, invalid.

Mason v. Fire Ass'n, 23 SD 431, 122 N.W. 423 (1909) – The Supreme Court of South Dakota affirmed reversal by trial court of appraisal relating to a stock of grain and flour and other milling products that were damaged. The basis for the affirmance of the reversal of the appraisal was a finding by the Court that the appraisal had not been conducted in an impartial fashion. The Court held that appraisers, including the umpire, constitute a quasi court, governed by rules applicable to common law arbitrators, and should constitute a body of a disinterested man, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy, without regard to the manner in which the duty has been devolved upon them. Such appraisers are bound, in the execution of their trust, to look to the true merits of the matter submitted to their judgment. The appraisers and umpire are alike the agents of both parties, and not of one party alone, and are bound to exercise a high degree of judicial impartiality. The findings below were that the appraiser, who had been employed by numerous other insurance companies, was biased and failed to consider the full range of evidence presented.

Schouweiler v. Merchants Mut. Ins. Ass'n, 11 SD 401, 78 N.W. 356 (1899) – Court holding that insurer's failure to abide by appraisal provision in policy constituted waiver of the insurer's reliance upon the provision when the insured subsequently brought suit to determine the amount of the property loss. It was undisputed that the insured had sent a letter formally demanding appraisal and the insurer had made no reply to the communication, but had instead agreed to an informal arbitration which failed. The South Dakota Supreme Court affirmed the judgment of

the trial court in favor of the insured because the insurer had waived its right to have the loss ascertained by appraisement.

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Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co., No. M2012-00915, 2013 Tenn. App. LEXIS 759, (Tenn. App. Nov. 21, 2013) – under the insurance policy, an appraisal panel was authorized to make a binding determination of the amount of loss, and the parties expressly agreed to submit to the appraisal panel the issue of the actual business income loss incurred and the reasonable time frame necessary for repairs. The court held that the appraisal panel did not exceed its authority in determining the period of restoration to calculate the actual business income loss incurred. The court also found that the appraisal panel's finding that the reasonable time frame necessary for repairs was six months from the date construction begins did not equate to a finding that the period of restoration applied in calculating lost business income was six months from the fire, thereby limiting the insured's recovery to a six-month period.

J. Wise Smith and Associates, Inc. v. Nationwide Mut. Ins. Co., 925 F. Supp. 528 (W.D. Tenn. 2003) – the court held that the insurer's delay in demanding appraisal of a loss constituted a waiver of the right to insist on appraisal because the insured was prejudiced by the expenses incurred in litigating its rights under the policy. The court, however, noted that consistent with public policy in favor of arbitration or appraisal as a way to save judicial resources, there is a generally recognized presumption against waiver.

Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142 (Tenn. App. 2001) – the court held that appraisal is distinguishable from arbitration, which is a formal proceeding. The court explained that, unlike arbitration, appraisal typically involves the appraisers conducting an investigation and basing their decisions on their own knowledge. The court further held that the purpose of appraisal is to value the property loss only, and not to resolve disputes over liability and causation issues.

J. Wise Smith & Assocs. v. Nationwide Mut. Ins., 925 F. Supp. 528 (W.D. Tenn. 1995) – the court held that the insurer waived its right to invoke appraisal because it was aware of the appraisal provision and could have sought to invoke the appraisal process long before it did so as to avoid unnecessary delay and expense for both parties. The insurer demanded that the insured comply with appraisal nearly eight months after the insured filed suit against the insurer.

Bard's Apparel Mfg., Inc. v. Bituminous Fire & Marine Ins. Co., 849 F.2d 245 (6th Cir. 1988) (applying Tennessee law) – the court held that the insurer waived its contractual right to appraisal by waiting an unreasonable length of time to the prejudice of the insured before demanding appraisal. The insurer demanded appraisal only after the insured notified the insurer of its intention to file suit and after the insured had disposed of the machinery that would have been the subject of appraisal.

Case v. Hanover Fire Ins. Co., 50 Tenn. App. 72, 359 S.W.2d 831 (1962) – the court held that, in the absence of an objection on the grounds of partiality, there is a presumption that the appointment of an appraiser was made in compliance with the terms of the policy.

Agricultural Ins. Co. v. Holter, 201 Tenn. 345, 299 S.W.2d 15 (1957) – the court held that the general rule is that the appointment of an umpire does not involve the judicial function. The court further held that an insured's failure to give an insurer notice of an application with a court for appointment of an umpire to complete an appraisal is not fraud.

Franklin v. Firemen's Ins. Co., 4 Tenn. App. 688 (1927) – the court held that parties are entitled to meet with appraisers when the appraisers are unacquainted with the property, and the validity of the award depends on the parties' input.

Harowitz v. Concordia Fire Ins. Co., 129 Tenn. 691 (1914) – the court held that appraisal provisions are valid and provide a speedy and reasonable method of estimating and ascertaining the sound value and damage, and appraisal provisions may be made a condition precedent to the filing of a lawsuit under a policy. The court further found that a disinterested appraiser is one who lacks a pecuniary interest in the outcome of the appraisal and is not biased or prejudiced.

Home Ins. Co. v. Hancock, 106 Tenn. 513, 62 S.W. 145 (1901) – the court held that appraisal clauses may be waived by an insurance company's absolute denial of liability.

Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S.W. 787 (1901) – the court held that the object of appraisal in cases of casualty insurance is to quantify the monetary value of a property loss. The court further held that no real disagreement warranting appraisal exists when the policy in question is a valued policy.

Hickerson & Co. v. Ins. Cos., 96 Tenn. 193, 33 S.W. 1041 (1896) – the court held that an appraisal provision in an insurance policy is valid. The court further held that appraisal clauses in insurance contracts can be waived by a delay in demanding appraisal, causing prejudice to the opposing party. The court also found that an insurer cannot demand appraisal of the amount of the loss, while at the same time it denies all liability under its policy, and that a demand for appraisal by the insurer is a waiver of other defenses going to the question of liability.

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INDEX TO TEXAS DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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TEXAS

1. Michels v. Safeco Insurance Co. of Indiana, 544 Fed. Appx. 535 (5th Cir. 2013)—Insured's home was damaged by smoke from a wildfire. Insured filed a claim with insurer. Insurer assigned an appraiser to investigate the damage to the home, and he found no visible damage. Regardless, insurer paid $12,005.19 for general cleaning and attic insulation replacement. Insured invoked policy's appraisal provision, but the party's appraisers were unable to agree on an umpire, so insurer filed suit requesting that the court assign an umpire in accordance with the policy. After an umpire was chosen and he made the appraisal award, the insured moved to set aside the appraisal award. The district court denied the motion. On appeal, the Fifth Circuit reaffirmed the proposition that under Texas law, "appraisal is an enforceable, contractually agreed upon method of determining the amount of loss." The burden of proof is on the party seeking to avoid the award. However, any award that is made in substantial compliance with the policy is presumptively valid. Mild discrepancies found in the appraisal process or in the appraisal award will not invalidate the award. On the other hand, when the award is not in compliance with the requirements of the policy the otherwise binding appraisal may be disregarded. Finding no such problems with the award, the Fifth Circuit affirmed.

2. In re Public Service Mutual Insurance Co., No. 03-13-00003-CV, 2013 WL 692441 (Tex. App.—Austin Feb. 21, 2013, no pet.)—In this homeowners' policy dispute, insured filed a claim for roof damage but withdrew the claim prior to inspection. Despite the withdrawal, insurer sent an adjuster to inspect the damage. Insurer's adjuster estimated the loss at $1,000.23. The insured also retained an adjuster who found the value of loss to be much greater due to damage that required replacing the entire roof. The insured filed suit contending that both parties disputed both the policy coverage for the claim and the amount of loss. Insurer subsequently filed a motion to compel an appraisal as well as to abate litigation, invoking the policy's appraisal provision. The trial court granted insurer's motion and insured appealed. The Austin Court of Appeals first noted Texas courts' preference for enforcing appraisal provisions absent illegality or waiver. The Court then rejected the insured's argument that a dispute over coverage made the appraisal provision unenforceable. Next, the Court noted that the process of appraisal inherently involves causation for coverage purposes because an appraisal must determine the amount of damage caused by one particular event versus pre-existing damage. Further, the Court noted that under Texas law, parties cannot avoid appraisal merely because there could be a question that exceeds the scope of the appraisal. The Court then turned to the insured's waiver claims and noted that "to establish waiver, the party challenging appraisal must show that (1) the parties reached an impasse—'a mutual understanding that neither will negotiate further,' and (2) any failure to demand appraisal within a reasonable time prejudiced the opposing party." Because the parties were still negotiating, the Court rejected both the insured's waiver-by-futility argument and the insured's waiver-by delay argument, holding that a six-month delay was not unreasonable and that the insured suffered no prejudice by the delay. Lastly, the Court summarily rejected the insured's various contract law unenforceability arguments.

3. In re Texas Windstorm Insurance Association, No. 14-13-00632-CV, 2013 WL 4806996 (Tex. App.—Houston [14th Dist.] Sept. 10, 2013, no pet.)—In this windstorm policy dispute, the insured made a claim, and, after investigating, the insurer advised the insured that the cost to repair the property did not exceed the policy's deductible Insured's own inspector, however, found additional damage that such that he believed that the amount of the loss exceeded the deductible. Insurer refused to pay, and the insured threatened suit. Insurer then demanded appraisal and moved to compel it in court. Insured sought to avoid appraisal and argued that appraisal was not warranted because the dispute focused on coverage rather than the amount of loss. Further, insured argued that insurer waived its right to appraisal because it only demanded appraisal after it was notified of the insured's intent to sue. The trial court granted insurer's motion. On appeal, the Fourteenth District Court of Appeals first discussed the insured's waiver argument, finding that waiver based on the length of delay, prior to demanding an appraisal, is determined "from the point of impasse." "For impasse, both parties must be aware not merely that there is a disagreement, but also that further negotiations would be futile." Because insurer only waited seven days after receiving the insured's notice of intent to file suit, the Court held that there was not a sufficient delay to support a finding of waiver. Insured also argued that the appraisal provision could not be asserted since there were coverage issues. The Court disagreed and opined that the appraisal provision could not be disregarded simply because coverage and causation issues exist.

4. MLCSV10 v. Stateside Enterprises, Inc., 866 F. Supp. 2d 691, 694 (S.D. Tex. 2012)—In commercial property policy dispute, insured (and a related party to which some of the insured's claims were assigned, both parties being referred to here as the "insured) was dissatisfied with insurer's estimate of damage and invoked the policy's appraisal provision. The parties then appointed appraisers and the appraisers selected an umpire. After receiving the umpire's appraisal recommendation, insured's appraiser refused to sign the appraisal agreement because he disagreed with the fact that the umpire had not submitted any reports or documentation to support his findings. Insurer paid the insured the amount determined by the umpire. Insurer sought to enforce the appraisal award and thereby dismiss parallel bad faith litigation. Insured argued that the award was invalid because the appraiser failed to disclose a referral relationship between himself and the umpire, thereby implicating impartiality and violating the terms of the policy's appraisal provision. The district court found that "showing of a pre-existing relations, without more, does not support a finding of bias." The court continued, ruling that more is required than the appraiser's mere failure to disclose a preexisting business relationship between the appraiser and a party in order to disregard an appraisal award. There must instead be 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 also noted that an appraiser's loss valuation is not considered unsound simply because another appraiser submits supporting documentation and the challenged appraiser does not. The court therefore rejected insured's challenge to the award based on the supposed partiality of the appraiser. However, the court did find that the appraisal award was not complete in that it did not include a full valuation of one part of the loss, so the court could not dismiss the claims against insurer on the basis of payment of the appraisal award amount.

5. State Farm Lloyds v. Johnson, 290 S.W.3d 886 (Tex. 2009)—In this homeowners' policy dispute, insured demanded an appraisal of the amount of damage to her roof caused by hail after the parties' adjusters disagreed on whether her whole roof needed to be replaced or not. The appraisal clause provided for appraisal if there was a dispute regarding "the amount of loss." Insurer refused to participate in the appraisal process, arguing that the dispute was not about the amount of loss but was about causation, and insured filed suit to compel appraisal. The trial court agreed with insurer, but the Dallas Court of Appeals reversed, holding that appraisal was required. Insured appealed to the Texas Supreme Court, where the issue was whether the dispute fell within the scope of the appraisal clause. The Texas Supreme Court held that the trial court could not conclude as a matter of law that the central issue in dispute was causation. The Court noted that "appraisers must always consider causation, at least as an initial matter." The Court held that insurer could not avoid an appraisal simply because there might be causation issues. The Court held further that even if the appraisal addresses liability questions and not just questions concerning amount of loss, it does not mean that the appraisal should be prohibited as an initial matter. The Court held that appraisals should take place before the suit, and in most cases can be structured in a way that decides the amount of loss without also deciding the liability questions. The Court also noted that appraisal provisions, unless expensive and unreasonable, should be enforced and that appraisals should go forward without any intervention by the courts. The Court therefore affirmed the Dallas Court of Appeals' ruling and ordered the parties to appraisal.

6. In re Allstate County Mutual Insurance Co., 85 S.W.3d 193 (Tex. 2002)—In this personal automobile policy dispute, insurers determined that covered vehicles were total losses. Insureds then brought suit, alleging that insurers fraudulently generated low values for the vehicles' worth. Insureds theory was that insurers systematically undervalued the cost of the cars knowing that insureds would not challenge the violations due to the costly appraisal process. Insurers sought to compel appraisal but the trial court rejected the attempt, ruling that the appraisal provision was really an arbitration provision that was unenforceable on public policy grounds. The insurers sought mandamus review and the Texas Supreme Court granted the writ. The Court held that the trial court had found in error that an appraisal provision was an arbitration agreement and unenforceable. More controversially, the Court held that granting mandamus was proper because the value of the loss—the thing to be established by appraisal—was at the heart of the breach of contract claim which was in turn at the heart of the insureds' claims. The Court continued by noting that "the failure to order the appraisals will vitiate or severely compromise the defendants' defenses to" the breach of contract claim. The Court accordingly held that the insurers would have inadequate remedies on appeal and that mandamus was the proper remedy. The Court also held that although trial courts have no discretion to deny an appraisal, courts *do* have the discretion as to the timing of the appraisal such that appraisal could occur without staying the litigation.

7. Allison v. Fire Insurance Exchange, 98 S.W.3d 227 (Tex. App.—Austin 2002, pet. granted, judgment vacated w.r.m.)—In this complicated mold damage homeowners' policy dispute, one of the issues was whether the trial court properly disregarded an

appraisal award for being the result of fraud, accident, or mistake, or because the appraiser was not "competent and independent." The Austin Court of Appeals, after rejecting the sufficiency of the evidence for finding that the appraisal award was the result of fraud, accident, or mistake turned to analyzing the competence and independence of the appraiser. The insured presented evidence that: (1) the appraiser's company had performed twenty to twenty-five percent of its work for the insurer; (2) eighty percent of the appraiser's company's work was on behalf of insurance companies; (3) the appraiser himself had performed four or five appraisals for the insurer involved in the dispute; and (4) the appraiser had worked with the insurer's attorney ten times in the recent past. In addressing the insured's claim, the Court first noted that "[t]he showing of a pre-existing relationship, without more, does not support a finding of lack of independence. The Court then held that the insured had failed to present sufficient evidence of a lack of independence because: (1) the appraiser had never been an employee of insurer; (2) insurer instructed appraiser to determine costs on his own, not from figures provided by insurer; and (3) there was no evidence contradicting the assumption that the appraiser exercised independent judgment. The insured also argued that the appraiser was incompetent because he had no experience with mold or mold remediation. The Court rejected this contention, noting that the appraiser had a degree in civil engineering, was a registered professional engineer, had thirty-three years of experience in structural engineering, built hundreds of houses, and retained mold experts to assist him with the remediation expert.

8. Wells v. Am. States Preferred Ins. Co., 919 S.W.2d 679, 681 (Tex. App.—Dallas 1996, writ denied)—In this homeowners' policy dispute, an appraiser was selected pursuant to an appraisal provision in the policy. The appraisal award included conclusions regarding causation. When the insured filed suit and the insurer moved for summary and declaratory judgment, the trial court granted the motion on the ground that the dispute had been decided via the appraisal process, which had concluded that a certain loss was not caused by a covered cause. On appeal, the Dallas Court of Appeals held that causation is not a proper matter for an appraiser to determine. Instead, the "function of the appraisers is to determine the amount of damage resulting to the property submitted for their consideration." The Court therefore reversed the summary judgment below and remanded for trial on the merits. While the holding in this case could be read broadly to prevent appraisal when issues of causation are involved, such a reading would now have no bearing due to the holding in *State Farm Lloyds v. Johnson*, supra.

9. Standard Fire Insurance Co. v. Fraiman, 588 S.W.2d 681, 683 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)—In this first-party property policy dispute, insured demanded appraisal after insurer refused to pay the amount of insured's claim for fire damage. Insurer refused to submit to appraisal and insured brought suit. The trial court ordered an appraisal and insurer paid the amount of the appraisal award. Insured then sued again to recover lost rentals, interest, and damages for breach of the appraisal provision and won at trial. Insurer argued on appeal that telephone and travel expenses awarded by the jury were unrecoverable consequential damages for the refusal to appraise. The Fourteenth Court of Appeals first likened appraisal provisions to arbitration provisions and held that a cause of action lies for damages caused by a breach

of an appraisal provision. The Court then held that consequential damages are recoverable for such a breach.

10. Scottish Union & National Insurance Co. v. Clancy, 8 S.W. 630 (Tex. 1888)—This case was the progenitor of all Texas case law on appraisal provisions in insurance policies because it affirmed the enforceability of the same. In it, the Texas Supreme Court set in stone the bedrock proposition that appraisal provisions are enforceable for determining the amount of a loss absent fraud, accident, or mistake.

2014
INDEX TO UTAH DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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INDEX OF UTAH DECISIONS

1. Hong Sling v. National Assur. Co. of Ireland, 7 Utah 441 (1891) – The insured suffered a loss due to a fire. The policy contained an appraisal provision and an appraisal assessed damages at $117.95, but a jury returned a verdict for plaintiff of $793.59 damages and $60.80 interest. The issue was whether the plaintiff's right of recovery was limited by the appraisal award. The insurer's instructed the appraiser to limit the inventory and damage that was being appraised. The Utah Supreme Court found that the basis for the appraisal was too narrow and that the policy covered any loss of property or damage to it by reason of the fire. The court held that the plaintiff's damages were not limited by the appraisal award and insured was entitled to the amount awarded by the jury.

2. Stephens v. Union Assur. Soc., 16 Utah 22, 50 P. 626, 627-28 (1897) – Insurer's appraiser only appraised property damaged but not consumed by fire and insurer ultimately denied the entire claim. The Court found that the amount of the appraisal was too narrow and unjust and that this was the insurer's fault. The amount entered by the trial court was not limited to the appraisal amount.

3. Hiramatsu v. Maryland Ins. Co., 73 Utah 303, 273 P. 963, 967 (1928) – Court found that insurer could not assert that action was premature due to failure to conduct appraisal where the parties had entered into an agreement for the repair and replacement of the broken parts of the car without either party requesting appraisal and jury charge that insurer had waived the right to have the damages or cost of the repairs fixed by appraisers was proper.

4. Barnhart v. Civil Service Emp. Ins. Co., 16 Utah 2d 223, 398 P.2d 873 (1965) – The arbitration provision of "uninsured motorist" clause of a policy did not fall within arbitration statute providing that parties may agree in writing to arbitration of controversies existing between them at the time of agreement to submit, nor could it be regarded as merely an agreement for appraisal, since the provision relates to future controversies which may arise after a contract is entered into. (The Utah Arbitration Act was later amended to include the arbitration of future disputes.)

5. Miller v. USAA Cas. Ins. Co., 44 P.3d 663 (2002) – Court held that (1) the Arbitration Act does not directly apply to appraisal; (2) the appraisal clause did not apply to extra-contractual claims; and (3) order compelling appraisal and dismissing insureds' claims, including extra-contractual claims, was not a final judgment on the merits for *res judicata* purposes.

6. Tucker v. State Farm Mut. Auto. Ins. Co., 2002 UT 54, 53 P.3d 947, 952 (2002) – Insured argued that the 3-year statute of limitations was tolled by insurer's agreement to consider additional information regarding claim after partial denial. The Court found that the insurer's willingness to consider additional information did not constitute an agreement to toll the statute pending appraisal or arbitration pursuant to Utah Code Ann. § 31A-21-313(5)(2001) ("The period of limitation is tolled during the period in which the

parties conduct an appraisal or arbitration procedure ... as agreed to by the parties.") and affirmed the trial court's decision that the insured's suit was time-barred.

7. Powell v. Cannon, 2008 UT 19, 179 P.3d 79 (2008) – Although there are significant differences between arbitration and appraisal, the main difference is that after meeting the homeowner's insurance requirements under its appraisal provision all of the insureds' remaining claims are viable, and cognizable and appraisal did not end the controversy.

8. Stone Flood and Fire Restoration, Inc. v. Safeco Ins. Co. of America, 268 P.3d 170 (2011) – Court held that the district court erroneously calculated the time that had elapsed under the limitations period. The district court started the tolling on July 11, 2003, the date of the court's appraisal order. This was error. The tolling period began February 3, 2003, when Safeco sent a written demand to insured expressing its intent to invoke an appraisal of the loss under the policy.

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INDEX TO VERMONT DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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8 V.S.A. § 3961. Valuation of Property – Whenever a fire insurance company shall write a policy covering a building in this state and shall attach thereto the so-called co-insurance clause, or any similar clause requiring the insured to carry insurance in amount equal to any percentage of the value of such building, the insured may ask for a valuation of such building insured, which valuation may be agreed upon in writing by the insuring company and the insured, and shall be the valuation of the property insured for the purpose of fixing the liability of the company during the life of the policy.

8 V.S.A. § 3962. Application to Commissioner – In case the insuring company and the insured do not agree on the valuation, as provided in section 3961 of this title, the insured may file with the commissioner a request for valuation, which shall contain a complete description of the building showing location, the name of the company, and the agent, if any, through whom the insurance is placed and the date of the policy.

8 V.S.A. § 3963. Time and Place for Making Valuation – Upon the receipt of such a request, the commissioner shall appoint a time and place for making such valuation which shall be not later than 15 days thereafter, unless an earlier date is agreed upon by the parties interested, and he or she shall give proper notice to all concerned.

8 V.S.A. § 3964. Appointment of Appraisers to Determine Valuation – The owner of a building and the insurance company or agent shall each file with the commissioner a list of not less than three disinterested persons competent to act as appraisers of the building described in the notice. The commissioner shall select one person from each of the lists so submitted who shall together act as appraisers of the property, and in case these two cannot agree, he or she shall select a third competent and disinterested person who shall act as third appraiser only as to matters regarding which the two appraisers first appointed cannot agree.

8 V.S.A. § 3965. Appraisers' Award and Expenses – An award in writing of any two appraisers, when filed with the commissioner, shall determine the sound value of the building. Each of the two appraisers first appointed shall be paid by the party nominating him or her and the third appraiser shall be paid by the parties equally.

8 V.S.A. § 3966. Duration of Valuation Fixed – The value of any building fixed as provided in sections 3964 and 3965 of this title shall be considered the true value of the building during the terms for which any fire insurance policy is issued to cover thereon, if issued within three years from the date of such award, and such value shall continue as the basis of valuation for the purpose of ascertaining the amount of insurance required under a co-insurance clause until a new valuation has been made on an application by the insured or by the company, or agent placing the insurance thereon, provided that a new valuation shall not be required oftener than once in three years.

8 V.S.A. § 3967. Effect on Rate – The rate charged for a fire insurance policy covering abuilding valued in accordance with the provisions of section 3964 of this title shall not be increased above the rate fixed for the same form of policy, containing or having attached thereto a co-insurance clause, where no request has been made to have the value of the property fixed.

8 V.S.A. § 3968. Penalty for Violation – If an insurance company violates a provision of sections 3961-3967 of this title or if the commissioner is satisfied, after a hearing, that a company declines or refuses to write insurance on any building because of the requirement that the value of such building shall be agreed upon as provided in section 3964 of this title, the commissioner shall suspend its authority to do business in this state for such period, not exceeding one year, as he or she may deem advisable.

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INDEX TO VIRGINIA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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Metro. Apts. at Camp Spring, LLC v. Nat'l Sur. Corp., 2014 U.S. Dist. LEXIS 98213 (E.D. Va. May 29, 2014) – in determining whether the insured waived the right to demand appraisal, the court noted that Virginia law provides a procedure that allows parties to submit disagreements over a loss amount to appraisal,"a form of arbitration," for a binding determination of the amount of loss. The court further noted that either party may demand appraisal unless that right has been waived. The non-moving party must prove waiver by showing actual prejudice, caused by delay and substantial litigation activity. The court found that neither the insured's participation in mediation nor the filing of the lawsuit and limited discovery conducted was sufficient to meet the burden of showing sufficient actual prejudice to constitute waiver. Therefore, the court found that the insured had not waived its contractual and statutory right to compel appraisal and that the insurer should submit to the appraisal process. (No objections to the magistrate judge's proposed findings of fact and recommendation were filed during the fourteen day period as required by Fed. R. Civ. P. 72(b)(2), and therefore, the district court adopted the above findings and recommendations of the magistrate judge in full and without modification).

Coates v. Erie Ins. Exch., 79 Va. Cir. 440 (2009) – the court addressed the meaning of "amount of loss" in Va. Code Ann. § 8.2-2105, which requires that all insurance policies include an appraisal provision which requires that either party, upon written demand, submit a dispute concerning the amount of loss to the appraisal process. The court held that "amount of loss" means, at the very least, more than assigning an itemized cash value to each item of lost property. What must be replaced in order to adequately repair damage is not a coverage question, but a question on the extent of loss.

HHC Assocs. v. Assurance Co. of Am., 256 F. Supp. 2d 505 (E.D. Va. 2003) – the court held that appraisal is triggered only when parties disagree as to the amount of loss, not the existence of coverage. The court noted that other courts interpreting appraisal provisions in insurance contracts have consistently held that issues relating to whether coverage was properly denied are legal questions reserved exclusively for a court.

Bilicki v. Windsor-Mount Joy Mut. Ins. Co., 954 F. Supp. 129 (E.D. Va. 1996) – among other issues, the court held that, under Va. Code Ann. § 38.2-2105, all insurance companies are required to include a suit limitation provision in their policies. The court further held that a petition for appointment of an umpire is not a type of action that tolls a suit limitation provision, and therefore, an umpire's ruling is not a condition precedent to filing suit.

Eden Corporation v. Utica Mutual Insurance Company, 350 F. Supp. 637 (W.D. Va. 1972) – the court upheld Va. Code Ann. §38.2-2105 concerning standard provisions, conditions, stipulations and agreements for fire insurance policies, finding that such provisions do not unconstitutionally deprive an insured from a jury determination

regarding damages. The court noted that, if an insurer fails to submit the loss to appraisal, and the insured is free from fault, then the insured is absolved from compliance with the appraisal provision.

Hanover Fire Ins. Co. v. Drake, 170 Va. 257 (1938) – the court held that a clause in a policy providing for arbitration or appraisement of loss or damage as a condition precedent to suit by the policyholder to recover is inserted for the protection of the insurer, and as a general rule, may be expressly waived or impliedly waived from the acts, omissions, or conduct of the insurer or its authorized agents. The court found that the insurer waived its right to appraisal because the insurer's appraiser failed to participate in the appraisal process.

North British & Mercantile Ins. Co. v. Robinett & Green, 112 Va. 754 (1911) – the court held that appraisal provisions contained within insurance policies were similar to arbitration clauses, and are usually valid. The court further held that the fire policy gave the insurer the right to demand appraisal at any time within 60 days after the proof of loss was submitted.

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INDEX TO WASHINGTON DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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WASHINGTON

1. Washington Statutes and Regulations

An insurer's violation of any subsection of WAC 284–30–330 establishes a breach of the duty of good faith, and may also be an unfair or deceptive act or practice for purposes of proving a violation of the Washington Consumer Protection Act (CPA). *Anderson v. State Farm Mutual Ins. Co.*, 101 Wash. App. 323, 330, 333, 2 P.3d 1029 (2000). To prove a claim under the CPA for a violation of a subsection of WAC 284-30-330, the insured must prove that the insurer acted unreasonably. *Id.* at 335. The following appraisal-related provisions are enumerated under WAC 284-30-330 as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance specifically applicable to the settlement of claims:

> (7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings
>
> * * *
>
> (17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.
>
> * * *
>
> (18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

To prove a claim under the CPA, an insured must not only show the insurer committed one of the above, an unfair or deceptive act or practice, but must also show that the act caused injury to the party in its business or property. *Id.* at 330. If an insured prevails under the CPA it is entitled to treble damages up to $25,000, costs, and attorney fees. RCW 19.86.090.

In 2007, Washington enacted the Insurance Fair Conduct Act (IFCA). IFCA provides a cause of action for an insured who is unreasonably denied a claim for coverage or payment of a benefit. RCW 48.30.015(1). If an insurer has unreasonably denied a claim for coverage or payment of a benefit or has violated specifically enumerated WAC provisions—including WAC 284–30–330—a court may award unlimited treble damages, costs, and attorney fees. RCW 48.30.015(2). Because IFCA was enacted recently, the Washington Supreme Court and state appellate courts have not been

afforded the opportunity to provide much guidance on its application. Federal courts construing Washington law have uniformly held that a violation of the enumerated WAC provisions by themselves do not constitute an IFCA violation. Yet, it is currently undecided whether offering an insured an amount substantially less than the amount awarded in appraisal constitutes an IFCA violation.

2. Washington Case Law

***Garoutte v. Am. Fam. Mut. Ins. Co.*, 2013 WL 3819923 (W.D. Wash. 2013)**
The insured's home was severely damaged by a fire. The insured's insurance policy provided coverage for additional living expenses (ALE) for the shortest time to repair or replace the home. The insurer initially offered $38,285.70 as full payment for the value of the damaged structure. The insured disagreed and invoked the policy's appraisal provision. The appraisal panel unanimously agreed that the value of the structure was $127,689.04. The insurer paid the appraiser panel's award 57 days after the award was entered. The insured filed a breach of contract and bad faith action, including a claim under IFCA, after receiving the appraisal award. The insurer cutoff ALE after the insured commenced litigation. The insured moved for summary judgment arguing: (1) the award was not paid promptly; (2) the insurer unreasonably cutoff ALE; and (3) that the insurer unreasonably forced the insured to submit to litigation under WAC 284-30-330(7) by making an unreasonably low offer as to the value of the damaged structure. The federal court construing Washington law found: (1) the issue of whether the insured was promptly paid was factual and, thus, inappropriate for summary judgment; (2) the insurer unreasonably cutoff ALE; and (3) the insurer's initial offer was unreasonably low. Notably, the court found that the insurer had violated IFCA because it cutoff ALE—an unreasonable denial of a benefit—**and** violated WAC 284-30-330(7), therefore the insured could recover treble damages. The court did not find that the insurer's unreasonable offer, in itself, was an unreasonable denial of benefits under IFCA.

***Morella v. Safeco Ins. Co. of Illinois*, 2013 WL 1562032 (W.D.Wash., 2013)**
Morella does not directly involve an insurance policy's appraisal provisions but is probative on the issue of whether an insured can pursue an IFCA action where an insurer offers an unreasonably low amount to settle a claim. In *Morella*, a federal court construing Washington law found that the insurer offered an unreasonably low settlement value prior to arbitrating the claim in violation of WAC 284-30-330(7). The court further found that an unreasonable offer to settle a claim is an unreasonable denial of benefits under IFCA. Although not precedent, policyholders will likely use *Morella* to argue an insurer that violates WAC 284-30-330(7) by offering an unreasonably low settlement prior to the insured electing appraisal has committed an unreasonable denial of benefits under IFCA.

***Lloyd v. Allstate Ins. Co.*, 167 Wash.App. 490, 275 P.3d 323 (2012)**
The insured submitted a claim after his car was totaled in an accident. The insurer initially offered $5,105 for the value of the car. The insured denied the offer and claimed that the automobile was worth more due to its complete maintenance records.

The insurer then offered $6,645.63. Subsequently, the insured invoked the insurance policy's appraisal provision. The insurer's appraiser valued the car at $6,815.16. The insurer offered the appraised value but subtracted the deductible under the policy. The insured sued claiming that the insurer's initial offer was in bad faith forcing the insured to invoke appraisal and that the insurer had wrongly subtracted the deductible from the appraised value. The court found that the mere difference in the amount offered did not show evidence of bad faith where evidence established both offers were reasonable. Moreover, the court found that the insurer correctly subtracted the deductible from the appraisal award.

***Lasha v. Farmers Ins. Co. of Washingto*n, 2004 WL 119880 (Wash.App. Div. 3, 2004)**

The insured submitted a claim for replacement of the entirety of its roof. The insurer denied coverage concluding the majority of the damage was caused by excluded deterioration of the roof's substrate and the remaining damage was less than the deductible. The insured demanded appraisal. The insurer denied appraisal concluding that the appraisal process does not apply to damage that is excluded from coverage. On summary judgment, the trial court dismissed the insured's claim. On appeal, the insured argued that the insurer's summary judgment should have been stayed until appraisal was completed. The court found that appraisal only applies to the amount in question and is immaterial as to causation and, thus, where no coverage exists, appraisal is inapplicable.

***American Manufacturers Mut. Ins. Co. v. Osborn*, 104 Wash.App. 686, 17 P.3d 1229 (2001)**

After the insured suffered a fire loss, the insurer obtained a bid for $20,895.30 to repair the insured's home. At appraisal, the insured was awarded $63,548.56 in replacement cost value of the home and $49,320.90 in actual cash value of the home. At appraisal, the insurer also offered $31,223.91 actual cash value and $36,384.66 replacement costs value for the insured's personal property. The appraiser awarded the insurer $47,310.99 actual cash value and $69,411.68 replacement cost value. The insured sued alleging, in part, the discrepancy between the insurer's offer and the appraisal established that she was forced to submit to appraisal in bad faith. The insured further argued that the governing administrative provision, WAC 284-30-330, does not contain a reasonableness requirement and, therefore, reasonableness of the insurer's actions is not a defense. The court found that the reasonableness requirement under WAC 284-30-330 was implied. Moreover, the court found that the discrepancy between the insurer's offer and the appraisal does not establish bad faith. The court must instead consider the circumstances and reasoning underlying the offer and, therefore, evidence of the disparity between the offer and appraisal alone is insufficient to support an allegation of bad faith.

***Berg v. Liberty Nat. Fire Ins. Co.*, WL 188758 (Wash.App. Div. 2, 1997)**

The parties submitted to appraisal after a fire damaged the insured's restaurant. The appraiser awarded the insured $630,000. Pursuant to the policy's terms, the insurer deducted a co-insurance penalty because the restaurant was underinsured. The

insured appealed, arguing that the insurance penalty should have been considered by the appraiser and the insurer could not deduct the penalty from the appraiser's award. The court rejected the insured's argument finding the appraiser determined the amount of the loss but did not resolve the legal question issue of what portion of the loss was covered under the policy and, as result, the insurer's deduction was appropriate.

***Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wash.App. 245, 928 P.2d 1127 (1996)**

The insured submitted a claim after their home was damaged by a fire. The parties participated in an appraisal in which the appraiser found the actual cash value of the insured's home was $32,000 and the replacement value of the home, including the costs of complying with building code requirements, was $85,000. The insured made no repairs to the home but demanded the full replacement value. The insurer paid the actual cash value of the home relying on the policy's loss settlement provision which stated that the insurer would pay no more than the actual cash value of the home until repair or replacement was complete. The insured argued that the insurer waived its right to rely on this provision by invoking the policy's appraisal provision. The court disagreed finding that the insurer did not waive its right to invoke the loss settlement provision. In so doing, the court upheld language in the appraisal award reserving the right of the court to determine the amount owed under the policy at a later proceeding. Further, the insurer's letter demanding arbitration specifically reserved all rights and defenses under the policy. Therefore, no intentional waiver was intended.

***Bainter v. United Pac. Ins. Co.*, 50 Wash. App. 242, 748 P.2d 260, *review denied*, 110 Wash.2d 1027 (1988)**

The insured submitted a claim after a large tree damaged their home. The parties submitted to appraisal after they were unable to agree on the amount of loss. Pursuant to the policy's terms, the parties each appointed an appraiser. After it became apparent the parties' appraisers were unable to agree on the amount of loss, the court appointed an umpire. The insurer's appraiser and the umpire agreed on the amount of loss which became the appraisal award. Unhappy with the result, the insured sought court intervention alleging the award was grossly disproportionate to the damage sustained and also that the umpire was unfair, bias, and lacked impartiality. The court permitted the insured to depose the appraisers. After considering evidence on the issue, the court confirmed the appraisal award. The insured appealed arguing it had a right to a jury to determine whether the appraisal award was fair and honest. The court found that a jury may be appropriate where there is evidence supporting the appraiser was biased, prejudice, or unfair. Absent such evidence, the trial court properly confirmed the appraisal. Notably, the court affirmed prior Washington case law that held an appraisal award is conclusively the amount of loss, which should not be disturbed by a court.

***Keesling v. Western Fire Ins. Co. of Fort Scott, Kansas*, 10 Wash. App. 841, 520 P.2d 622 (1974)**

A fire destroyed the insured's home. After eight months of negotiating the loss, the

insured filed a lawsuit. The insurer then invoked the policy's appraisal provisions. The trial court dismissed the lawsuit finding it had no jurisdiction over the value of the loss because the appraisal provisions had been invoked. The appellate court found that: (1) a demand for appraisal does not deprive the court of jurisdiction and (2) a demand for appraisal must occur within a reasonable amount of time. A determination of a reasonable amount of time will be made a on a fact-specific basis. In so doing, the courts will weigh two principal factors: the prejudice resulting from the delay and the date good faith negotiations break down regarding a loss. In *Keesling*, the court found eight months was not an unreasonable amount of time to wait prior to invoking appraisal.

***Gouin v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 145 Wash. 199, 259 P. 387 (1927)**

A fire damaged the insured's home. The insurer invoked the appraisal provisions of the policy after the parties failed to agree to the value of the loss. The insurer tended the award unanimously made by the appraiser panel. The insured refused tender of the award. The insured then filed a lawsuit. The appellate court upheld the appraisal panel's award as the amount of damages owed to the insured. In so doing, the court held that the provision allowing the insured's and insurer's appraisers to elect a third independent appraiser was enforceable, the insured's and insurer's appraisers could elect a third independent appraiser prior to any disagreement between them, the third independent appraiser does not need to be approved by the insured, the appraisal panel is not required to take evidence on the loss, and the insured was not prejudiced by the appraisal panel's failure to provide notice of the time and place of appraisement where the insured was present during appraisement.

***McLaughlin v. Orient Ins. Co.*, 138 Wash. 82, 244 P. 254 (1926)**

The insured's home was damaged by fire. The parties invoked the appraisal provisions of the policy after being unable to agree on the value of the loss. After the insured's and insurer's appraisers were unable to agree, an umpire was selected. The umpire provided the insured an award of $550. The insured filed a lawsuit alleging the umpire's award was result of bias and prejudice. At trial, the jury found in favor of the insured. On appeal, the insurer argued that whether insurer's appraiser and the umpire's award was result of bias and prejudice was a legal issue reserved for the court. The court disagreed holding whether an insurance appraiser's award and umpire's award was the result of bias or prejudice is properly decided by a jury.

***Goldstein v. National Fire Ins. Co. of Hartford, Conn.*, 106 Wash. 346, 180 P. 409 (1919)**

After a fire damaged the insured's building, the insurer sent a builder and architect to provide an estimate of damage to the building. The insured believed the building to be a total loss. The insurer invoked the policy's appraisal provisions after the parties were unable to agree on whether the property was a total loss. The insured refused to participate in the appraisal. On appeal, the court found: (1) an appraiser could determine whether the loss was partial or total; (2) the policy provisions calling for appraisal of property prior to commencement of litigation comply with public policy;

and (3) an insurer does not waive its right to appraisal by sending its agents to estimate the amount of loss.

***Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 P. 436 (1896)**
After a fire damaged the insured's laundry machinery, the insured filed a lawsuit because the parties could not agree to the settlement value of the claim. On appeal, the insurer argued that the loss had to be set by appraisement as a condition precedent prior to lawsuit. The court disagreed finding that if an insurer does not request appraisement, failure to obtain an appraisal does not preclude a lawsuit by the insured.

Credit: Brendan Hanrahan

2014
INDEX TO WEST VIRGINIA DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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West Virginia

Moore v. Allstate Ins. Co.,2013 W. Va. LEXIS 747(W. Va.June 24, 2013)-
This case involved a fire loss where the carrier sought appraisal of the disputed loss, the insured failed to respond to the appraisal demand, and subsequently demolished the premises without advising Allstate and constructed a modular home on the premises because they believed that ALE benefits were about to run out. Thereafter, the insureds filed a complaint alleging breach of contract, bad faith, and unfair trade practice act violations. At trial the judge gave the following instruction:

> "The Court instructs the jury that if you find that either party failed to engage in the appraisal process pursuant to the terms of the insurance policy, then you may find that party breached the insurance contract."

The insured appealed a verdict for the carrier; the Court of Appeals found the instruction with respect to appraisal, and spoliation was proper and affirmed.

Estate of Davis by Casey v. Farmers Mut. Ins. Co.,207 W. Va. 400, 404-405(W. Va.2000)-
Decedent's home was destroyed by fire. Appellant accepted a settlement of $ 34,933 from appellee. Appellant subsequently filed suit, alleging that appellee intentionally misrepresented the method by which actual cash value was to be determined in total loss claims. The court reversed summary judgment in behalf of the carrier, holding that it could not rely on its appraiser's determination that the house had a value of $ 28,155, but had the burden of establishing that the actual cash value of the property had been diminished by physical depreciation between the date the policy was issued and the date of the fire. The Court found that the carrier bears the burden of inspecting the policyholder's property before issuing a policy, and that the value of the policy should reflect the actual pre-loss value of the property. The court also held that the "agreement as to value as of the date of the policy . . . is an agreement with respect to the value of the property insured which will carry through the life of the contract[.] If there is a total loss the insurer must pay the value of the property introduce substantial proof to show that some intervening factor (besides time or cosmetic wear and tear) reduced the value of the property below the pre-loss agreed value of the property.

Wolford v. Landmark Am. Ins. Co.,196 W. Va. 528, 534(W. Va.1996)
Claim for the theft of mining equipment which was being held for auction. The equipment was allegedly stolen before it could be auctioned off. The insured filed a $ 360,750 claim The carrier selected and employed an appraiser who placed an approximate value of $ 70,000 upon all of the appellant's mining equipment. After various deductions, Landmark offered the appellant $ 35,500 to settle the claim. An appraisal submitted by the insured valued the mining equipment at approximately $ 267,000. The appellant instituted an action in the circuit court against Landmark, which resulted in a summary judgment for the carrier. The insured appealed on the basis of the insurance policy provisions regarding (1) dishonest acts, (2) misrepresentation and (3) the appraisal process claiming there were genuine issues of fact as to each of those provisions and that, accordingly, summary judgment should not have been entered. The insurer

contended that rather than agreeing to the appointment of an umpire, when the parties appraisers disagreed as to value, the insured began attacking the credibility of the insurer's appraiser. The Court found that either side could have sought judicial appointment of an umpire and accordingly, there were issues of fact which precluded summary judgment, concerning compliance with the appraisal process.

Smithson v. United States Fid. & Guar. Co.,186 W. Va. 195, 198-199(W. Va.1991)- In this bad faith action, the parties agreed to appraisal, and the award exceeded the policy limit. After payment of the limit the insured sued for bad faith including attorney fees and consequential damage. A directed verdict was entered for the insured because he had substantially prevailed in the appraisal. The jury rendered a verdict of $ 95,833, and the trial court awarded the plaintiff attorney's fees equal to one-third of this amount. On appeal, the insurer argued that the trial court erred in failing to disqualify the insured's attorney, in not finding that the appraisal procedure under the policy barred the action, and other points of error relating to the damage award. The court affirmed finding that an action was not barred by an appraisal of the loss, as opposed to an arbitration proceeding. The court also held that that the insurer was foreclosed from asserting that the insured failed to mitigate his damages, but concluded that the evidence was insufficient to support the jury's award for economic losses, and remanded on the issue of damages.

Mutual Improvement Co. v. Merchants' & Business Men's Mut. Fire Ins. Co.,112 W. Va. 291, 294-295(W. Va.1932)-
A fire began in a building next to the owner's building. The owner's building was damaged as well as a party wall between the buildings. Appraisers were appointed who made an award for the damage to the two buildings and to the party wall. The insurance company accepted the appraisal, but the owner refused to abide by the appraisal and sued on the policy. The circuit court sustained a demurrer to a special plea to the award. On appeal, the court found no uncertainty in the award. The appraisers ascertained the damages and were not required or expected to settle controversies of law. The appraisers were not required to pass upon the extent of the owner's portion of the party wall. The circuit court erred in holding that the award was void on its face. The insurance company had offered to pay the award of loss for the entire party wall. Thus, the legal question of ownership of the party wall was not in issue. The Court announced that because the law favors arbitrations, "every reasonable intendment will be indulged in support of them".

Crouch v. Franklin Nat'l Ins. Co.,104 W. Va. 605, 606(W. Va.1927)-
If an adjuster makes up a proof of loss from the data furnished him by the insured, or his agent, which includes an itemized list of the goods saved from the fire, with the value of each item, and makes no demand that they be appraised, he thereby waives the provision in the policy relating to their appraisement.

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INDEX TO WISCONSIN DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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INDEX OF WISCONSIN DECISIONS

NOVEMBER 26, 2014

1. Gronik v. Balthasar, 2014 WL 2739333 (E.D. Wis. June 17, 2014) – This is the second of two district court decisions addressing appraisal issues in this action. *See* Gronik v. Balthasar, 2013 WL 5376025 (E.D. Wis. Sept. 24, 2013). The insured had submitted three claims to Chubb Indemnity Insurance Company for damage caused by storms and other defects. When the insured and Chubb failed to agree on the amount of the loss, Chubb asked for an appraisal as allowed under the insurance policy, and the insured filed suit. The insured and Chubb each selected an appraiser. When the parties could not come to an agreement on the third appraiser, the court subsequently appointed a third appraiser for them. The appraisers issued an award of $1,709,352.19. The insured challenged the award on two grounds, alleging: (1) the appraisers did not understand their task and (2) the court-appointed appraiser was biased. The court rejected both arguments. As to the first holding, the court noted that, under Wisconsin law, its scope of review was limited, and that the award could "be set aside only upon the showing of fraud, bad faith, a material mistake, or a lack of understanding or completion of the contractually assigned task." The court held that mistakes made by the appraisers were not grounds for invalidating the award, because it was not the court's responsibility "to determine whether the third-party expert accurately valued each individual item." The court further concluded that the appraisers properly understood that their task was to assess the cost of repairing the damage, despite the fact that their notes indicated that they discussed the issue of causation. As to the second holding, the court rejected the insured's contention that the appointed appraiser was biased merely because he had prepared an affidavit, at Chubb's request, describing the work he had performed on the appraisal. The court expressed skepticism that such a communication was improper, and in any event, concluded the conduct was irrelevant to the validity of the appraisal because the affidavit had been prepared after the appraisal had been completed. The court also denied the insured's request to reopen discovery to depose the court-appointed appraiser about the challenged *ex parte* communications because the insured had failed to present a *prima facie* showing that any such improper *ex parte* communications had occurred. It is noteworthy that the insured's challenge to the purported bias of this court-appointed appraiser was the second such challenge that the insured had asserted in this action, though based on different facts. *See* Gronik v. Balthasar, 2013 WL 5376025 (E.D. Wis. Sept. 24, 2013).

2. Gronik v. Balthasar, 2013 WL 5376025 (E.D. Wis. Sept. 24, 2013) – The insured had submitted three claims to Chubb Indemnity Insurance Company for damage caused by storms and other defects. Unable to agree on the amount of the loss and coverage issues, Chubb requested an appraisal and the insured filed suit. After the court ordered the insured to participate in the appraisal process—which the court described as "similar to an arbitration" but less formal and with the goal of "resolv[ing] valuation disputes"—as defined in the policy, the parties were unable to agree on a third appraiser. In February of 2012, the court appointed, without objection from the parties, an experienced civil engineer to serve as a third appraiser. However, the insured refused to participate in the appraisal process because the court-appointed appraiser had previously worked for a company that had provided services to Chubb. Relying on Wis. Stat. § 788.10(1)(b), the court applied an "evident partiality" standard, requiring proof that 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 court rejected the bias challenge because the appraiser had retired from the company years earlier, Chubb had never been a major client of the company, the appraiser had no control over the company's operations, and the appraiser's retirement benefits were limited to payments due under a stock redemption plan. Accordingly, the parties were required to proceed with the appraisal process. This same dispute resulted in a second federal district court decision rejecting a bias challenge on other grounds, as well as a challenge to the validity of the three appraisers' award. *See* Gronik v. Balthasar, 2014 WL 2739333 (E.D. Wis. June 17, 2014).

3. Winter v. Seneca, 2012 WI App 1, 808 N.W.2d 175 (Wis. Ct. App. Nov. 29, 2011) (unpublished) – The insured filed claims with Seneca, Sigel Mutual Insurance Company after their home was destroyed by fire. Seneca invoked the appraisal provision and three appraisers were selected. However, the appraisal process was delayed because one of the appraisers was on vacation; in the meantime, the parties attempted but failed to resolve the dispute informally. The insured ultimately filed suit alleging breach of contract and bad faith, and the lawsuit was stayed while the appraisal process was being completed. The process was "long and complex," and it appeared that the "appraisers did more than simply establish values" by inserting themselves into the adjustment process. After a bench trial, the trial court found that Seneca had breached the insurance agreement but was not liable for bad faith. On appeal, the appellate court affirmed the trial court. First, the appellate court concluded that an insurance company may be guided by third party-advice, including an appraiser, when evaluating a claim, despite the fact that the duty of good faith is nondelegable. Second, the appellate court found that the trial court's analysis was "well-reasoned and thorough," including its consideration of Seneca's invocation of the appraisal provision and the "extremely lengthy and complex" process that resulted. Finally, the court identified three flaws in the insured's bad faith as a matter of law claim: (1) the insured had forfeited the claim because he did not raise it with "sufficient prominence to appraise the circuit court of it;" (2) a failure to select an independent appraiser may be a breach of the agreement, but "it does not follow that Seneca is guilty of bad faith" because breach of contract and bad faith are separate claims; and (3) "equitable reservations" counseled against it because similar questions about the independence of the insured's appraiser existed.

4. Viebrock v. Wisconsin Mut. Ins. Co., 2010 WI App 135, 790 N.W.2d 542 (Wis. Ct. App. Aug. 3, 2010) (unpublished) – The insured filed a claim with Wisconsin Mutual after a fire had damaged his rental property. After two years of negotiation over the amount of the loss and the choice of contractors to hire to perform the repair work, the insured filed suit alleging breach of contract and bad faith. After the trial court had ruled that the suit was timely and the appellate court denied leave to appeal, the parties stipulated to determining the amount of the loss under the appraisal process specified in the insurance policy. The appraisers awarded the insured $308,051, and the circuit court entered judgment accordingly. Wisconsin Mutual appealed, asserting that the suit had not been filed within the statutory limitations period. As a preliminary matter, the appellate court concluded that Wisconsin Mutual had not waived its right to appeal by stipulating to the appraisal process. However, the appellate court concluded that the suit had not been timely filed, remanding the case to the trial court for entry of judgment in favor of Wisconsin Mutual. Pivotal to this decision was the appellate court's conclusion that the pre-suit exchange of cost estimates between the insured and Wisconsin Mutual was not the equivalent of participating in the contractual appraisal process. As a result, the court concluded that these pre-suit communications did not meet the statutory requirements for the tolling of the limitations period set forth in Wis. Stat. § 631.83(5) ("The period of limitation is tolled 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.").

5. Farmers Auto. Ins. Ass'n v. Union Pacific Ry. Co., 2009 WI 73, 768 N.W.2d 596 (Wis. Sup. Ct. July 10, 2009) – The insured filed suit after his home burned down in a grass fire. While his suit was pending in the circuit court, the insured agreed to Farmers' request to resolve the disagreement over the replacement cost under the policy's appraisal clause. After the parties had selected their appraisers, the insured advised Farmers that he would only continue with the appraisal process if it was non-binding. Farmers refused to proceed on that basis, and the parties presented the issue to the court for resolution. Although the appraisal clause did not expressly state that the appraisal was binding, both the circuit court and the intermediate appellate court ruled in Farmers' favor. On appeal, the Wisconsin Supreme Court affirmed the lower courts' decisions. First, the Court concluded that the appraisal process was binding, despite the absence of an express provision in the appraisal clause on this point. Because the appraisal clause provided that "the amount agreed upon by any two appraisers 'will set the amount of loss,'" the Court concluded that this language plainly and unambiguously called for a binding determination. Second, the Court rejected the insured's contention that prior case law precluded enforcement of an appraisal clause after one of the party's had filed suit, noting that the decision relied upon by the insured "did not hold that invocation of a binding appraisal clause is *per se* precluded after one party files suit." Thus, the Court rejected the insured's argument that the prior case law gave him the ability to "refuse Farmer's demand to participate in the Policy's appraisal process" because the insured had filed suit. Further, because the parties had agreed in writing to participate in the appraisal process specified in the policy and no mutual mistake of fact existed, the Court concluded that the circuit court "had ample reason to bind [the insured] to his word." Third, concluding that appraisal determinations are "presumptively valid," "should not be lightly set aside," will only be overturned "upon the showing of fraud, bad faith, a material mistake, or a lack of understanding or completion of the

contractually assigned task," and are "usually . . . limited to the face of the award," the Wisconsin Supreme Court rejected the insured's substantive challenge to the award. Rejecting the insured's contention that communications between the appraisers demonstrated flaws in the process, the Court concluded that "the face of the award demonstrates that the appraisers understood and accomplished their contractual task." The Court observed that the communications "appear[ed] to be the normal back-and-forth between appraisers in an effort to ascertain the true replacement value." Relying on the limited basis for judicial challenges to an appraisal, the Court concluded that assertions that the award was too high or too low were "of no event" without "credible evidence on the face of the award of fraud, bad faith, material mistake, or a failure to understand the contractually assigned task." Finally, the Court rejected the insured's challenge to the trial court's denial of his request to conduct discovery into the appraisal process to determine whether the appraisers had misunderstood their task. The Court concluded that the trial judge had not abused his discretion in denying discovery into the appraisal process where the lower court had examined the relevant facts, had applied the proper standard, and had reached a conclusion that a reasonable judge could reach.

6. Farmers Auto. Ins. Ass'n v. Union Pacific R. Co., 2008 WI App 116, 756 N.W.2d 461 (Wis. Ct. App. May 6, 2008) – When the insured and Farmers could not agree on the replacement cost of the insured's home destroyed in a grass fire, the insured filed suit. Nearly a year after filing suit, the insured agreed to Farmers' request to resolve their disagreement over the replacement cost under the policy's appraisal clause. The insured later changed his mind, refusing to continue with the appraisal process unless it was non-binding. The Wisconsin Court of Appeals affirmed the circuit court's determination that the insured was bound by his initial agreement and any mistake of law could not be a basis for unwinding that agreement. The intermediate court also rejected the insured's argument that he was entitled to discovery into the conduct of the appraisers to determine if they misunderstood their task or made unspecified assumptions because the "communications reflect[ed] a normal deliberative process." Relying primarily on the standards for vacating arbitration awards set forth in Section 788.10 of the Wisconsin Arbitration Act and the decision in Dechant v. Globe & Rutgers Fire Ins. Co., 217 N.W. 322 (Wis. Jan. 10, 1928), the Wisconsin Court of Appeals concluded that the insured had made no showing that there was any reason to inquire into the appraisers' deliberations. Similarly, the court rejected the insured's demand that the appraisal award be modified or set aside, reasoning that the circuit court's confirmation of the appraisal was consistent with the "great leeway" the courts must afford to decisions rendered by Wisconsin appraisers and arbitrators.

7. Kottke v. Commercial Truck Claims Management, 2007 WI App 110, 730 N.W.2d (Wis. Ct. App. Feb. 20, 2007) – Among the nine purported errors asserted in its appeal, the insurer argued that the circuit court had erred in excluding any reference to the appraisal process in the policy and in denying its request to refer the matter to the appraisal process after the insured filed suit. The Wisconsin Court of Appeals rejected both arguments. First, the court concluded that the appraisal clause in the policy did not require appraisal, but merely afforded the parties the option to participate in the appraisal process. The operative language in the policy stated: "'on the request of the Insured or Insurers' an umpire would be appointed by the court." Although the parties initially embraced the

appraisal process, the parties abandoned this voluntary participation when they could not agree upon the umpire and neither asked the court to appoint one. Second, the court of appeals rejected the insurer's contention that the circuit court's refusal to compel participation in the appraisal process was subject to *de novo* review, because the insurer had pointed to no authority to support the *de novo* standard.

8. Murphy ex rel. Schulz v. Cincinnati Ins. Co., 2007 WI App 34, 728 N.W.2d 374 (Wis. Ct. App. Jan. 23, 2007) – The insured's home had been damaged in a storm and subsequently was infested with mold, forcing the family to move out while repairs languished. The home was eventually razed, and the insured filed suit alleging breach of contract and bad faith. Cincinnati demanded an appraisal pursuant to the terms of the policy. The appraisers set the total amount of loss and damage at $214,049.49. The circuit court confirmed the award and ordered Cincinnati to pay the difference between the amount the appraisers had determined and the amount that Cincinnati had paid previously paid to the insured. Although the total amount that had been paid by the insurer was less than the $214,049.49 appraisers' award, the insurer had actually paid more for the living expenses component of the claim than had been determined by the appraisers. Accordingly, the trial court had given the insurer credit for this overpayment when approving the final award figure. On appeal, the insured argued that Cincinnati's voluntary overpayment of the living expenses should not offset the underpayment of dwelling and personal property losses. The Wisconsin Court of Appeals affirmed the circuit court's analysis, concluding that it would be inequitable not to offset the amounts: "[N]ot to allow the offset would result in a windfall to the [insured] and constitute unjust enrichment."

9. Weiting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co., 2004 WI App 218, 690 N.W.2d 442 (Wis. Ct. App. Oct. 13, 2004) – The insured's funeral home sustained damage during a storm. Meridian paid a portion of the claim, but the parties were unable to agree on whether damages to the roof were the result of the storm or "wear and tear," despite efforts to resolve the dispute spanning more than a year. Although the loss had occurred in May of 2000, the insured did not file suit until April of 2003. Affirming the circuit court's dismissal of the action on limitations grounds, the Wisconsin Court of Appeals rejected the insured's contention that the limitations period had been tolled during the parties' pre-suit efforts to resolve their dispute. Because neither party had invoked the policy's appraisal procedure, the court concluded that the time spent in the parties informal efforts to negotiate a resolution did not satisfy the tolling provisions of Wis. Stat. § 631.83(5) ("The period of limitation is tolled 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.").

10. Franz v. Little Black Mutual Ins. Co., 582 N.W.2d 504 (Wis. Ct. App. May 27, 1998) (unpublished) – After vandals had damaged the insured's rooming house, he submitted a claim to Little Black. The policy called for a two-appraiser process for property damage claims. When the appraisers selected by the parties arrived at different valuations of the damage, the parties submitted the conflicting appraisals to an umpire for resolution. The umpire chose the Little Black appraiser's valuation. The trial court rejected the insured's efforts to overturn the umpire's decision on summary judgment, and the Wisconsin Court

of Appeals affirmed. First, the appellate court umpire's ruling "implicitly adopted and incorporated" the damage sum of Little Black's appraiser. Second, while the umpire had "inadvertently overlooked the co-signing formality," the court held that such an oversight was not material to the validity of the ruling, as "technical defects by umpires on unessential matters" must be ignored. Third, the court rejected the insured's appeal of the circuit court's refusal to permit an amendment of the pleadings to challenge the substantive aspects of the umpire's decision, holding that such an amendment would have been futile because the insured could not establish the "fraud, mistake, or perversity by the umpire" required to overturn the umpire's decision.

11. Mosch v. Alpha Property & Cas. Ins. Co., 495 N.W.2d 103 (Wis. Ct. App. Oct. 27, 1992) (unpublished) – After the insured's home had been damaged in a fire, the insured claimed that the home was a total loss and demanded the policy limits. Two of the three appraisers, including the neutral appraiser, had placed the cost of repair and replacement below the policy limits. Alpha thus refused to pay the policy limits. In a separate proceeding, the municipality issued a raze order for the building. Following the raze order, Alpha tendered payment of the policy limits. The circuit court granted summary judgment in Alpha's favor. The insured argued on appeal that there were disputes of material fact whether Alpha violated its contractual and good faith duties by refusing to pay the policy limits before the raze order. The Wisconsin Court of Appeals affirmed the lower court because the two appraisers' conclusion that the cost was less than the policy limits provided a "legitimate, good faith reason" to conclude that the building was not wholly destroyed. The lower court thus did not err in granting summary judgment for Alpha on the insured's claims for breach of contract and bad faith for failing to pay the policy limits until after the raze order.

12. Lynch v. American Family Mut. Ins. Co., 473 N.W.2d 515 (Wis. Ct. App. July 2, 1991) – The insured and American Family were unable to agree on the cost of replacing damaged caused by burst water pipes in the insured's home. After American Family tendered a check for $14,589, the insured filed a complaint with the Officer of the Commissioner of Insurance. American Family sent a letter highlighting the appraisal provision of the policy, stating that "[i]f you which to follow this course of action, please contact our office with the name, address and phone number of your appraiser." The insured then filed suit. American Family filed a motion to stay the lawsuit, arguing that the appraisal process was a condition precedent to suit. The circuit court granted that motion. On appeal, the Wisconsin Court of Appeals held that, absent a policy provision to the contrary, an insurance company may not demand an appraisal of a loss after the commencement of an action by the insured on that loss when the insurance company had failed to demand the appraisal prior to the lawsuit. Recognizing that the terms "appraisal" and "arbitration" are sometimes used interchangeably, the court noted that there is a distinction between appraisal and arbitrations in Wisconsin. Absent policy language expressly providing otherwise, the court held, participation in the appraisal process is not a precondition to filing a lawsuit unless the appraisal rights under the policy were expressly invoked by the insurer prior to the insured's filing suit. Because no such provision appeared in the subject policy, the court ruled that the action should not have been stayed by the lower court.

13. Olson v. Milwaukee Mut. Ins. Co., 468 N.W.2d 249 (Wis. Ct. App. Mar. 26, 1991) (unpublished) – The insured's home had been damaged by a fire. After several months of negotiations regarding the amount of the covered loss and an offer of $51,469 by Milwaukee Mutual, the insured invoked the appraisal clause of the insurance policy. After the appraisers had valued the loss at $60,000, the insurer promptly paid this amount to the insured. The insured nonetheless filed suit for breach of contract and bad faith, arguing (among other things) that Milwaukee Mutual failed to the pay the "undisputed" portion—the $51,469 offer—of his claim before the completion of the appraisal process. The appellate court concluded that the insurer's compliance with its obligations under the policy and its payment of the award established through appraisal precluded liability in contract or tort.

14. Alioto's Restaurant, Inc. v. Insurance Co. of North America, 425 N.W.2d 39 (Wis. Ct. App. Apr. 22, 1988) – The insured's automobile had been damaged in an accident. The insured insisted that the vehicle was a total loss, while INA maintained that the vehicle could be repaired. INA invoked the appraisal clause, each side chose an appraiser, and the appraisers selected an umpire. The insured, however, did not agree to be bound by the umpire's decision. After the umpire issued a decision setting the cost of repairs at $10,706.69, INA offered to pay this amount to the insured. Instead, disputing the amount that had been fixed by the appraisers, the insured filed suit alleging breach of contract and bad faith. The circuit court granted summary judgment in INA's favor. On appeal, the insured argued that the award was not conclusive for two reasons: (1) the appraisal process did not permit the appraisers to determine if the automobile was a total loss as a matter of law and (2) there were material questions of fact as to whether the umpire had acted impartially, had failed to appreciate his task, and had made a material mistake. The appellate court rejected the insured's arguments. First, the appellate court found that the appraisal provision was clear, unambiguous, and binding. Second, relying on Dechant v. Globe & Rutgers Fire Ins. Co., 217 N.W. 322 (Wis. Jan. 10, 1928), the appellate court held that the appraisal award was conclusive regardless of whether the insured could demonstrate that the appraisers were wrong and the vehicle was totally destroyed. Even if "the damage was clearly 'total'" and the appraisers' determination "significantly less than the plaintiff's actual loss," the appraisal award should be sustained. Third, the court found that the insured had not presented any evidence creating a genuine issue of fact concerning any of the three challenges—impartiality, a failure to appreciate the task, and material mistake—that had been asserted by the insured and rejected by the trial court.

15. Simonz v. Johnson, 287 N.W.2d 854 (Wis. Ct. App. Nov. 12, 1979) (unpublished) – A fire damaged a building owned by the insured's estate on August 15, 1970. The estate's personal representative filed a sworn proof of loss with Ohio Casualty on May 7, 1971. Ohio Casualty denied coverage and invoked the contract terms for appointing appraisers to determine the amount of loss. Each party chose an appraiser, but the city razed the building before the appraisers had completed their assessment. On November 24, 1971, the appraisers issued a decision stating that an appraisal was impossible due to the demolition of the building. Ohio Casualty closed the file, advising the insured in two separate letters that the expiration of the limitations period precluded any recovery on the claim. Thirteen months later, on January 15, 1973, the estate's personal representative filed suit. The

circuit court dismissed the action as untimely, and the Wisconsin Court of Appeals affirmed the circuit court's decision. The appellate court concluded that the one-year statute of limitation had begun to run on the date of the fire, and that the limitations period had been tolled upon Ohio Casualty's invocation of the appraisal clause on May 18, 1971. However, the tolling of the limitations period ceased on November 24, 1971, after the appraisers had issued their decision.

16. Quinn v. New York Fire Ins. Co., 126 N.W.2d 211 (Wis. Feb. 7, 1964) – After a fire had damaged the insured's building, the insured and New York Fire were unable to reach an agreement on the amount of the loss. The parties selected appraisers and an umpire pursuant to the policy. The insured's appraiser and the umpire issued an award that found the total loss to be $31,027. The insured file suit to confirm the appraisal award, and the circuit court ruled in favor of the insured on summary judgment. On appeal, the Wisconsin Supreme Court held that New York Fire was estopped from asserting defenses based on certain policy provisions because it had inspected the damage, negotiated for settlement, made an offer of settlement, and submitted to an appraisal under the policy without objection. However, the Court reversed the lower court's grant of summary judgment. Acknowledging that "[t]he cases cited by the trial court do set forth general rules as to the dignity and conclusiveness to be accorded awards," the Wisconsin Supreme Court nonetheless found that the appraisal award should have been vacated because it failed to comply with the contractual requirement of issuing a separate finding as to the actual cash value of the items lost. Because the award lacked this necessary finding, it was deficient on its face.

17. Fischer v. Harmony Town Ins. Co., 24 N.W.2d 887 (Wis. Nov. 26, 1946) – The insured's barn was damaged in a fire on May 12, 1944. After an extended period of negotiations, the insured filed suit and the jury returned a verdict in his favor. On appeal, the Wisconsin Supreme Court affirmed the judgment of the lower court, concluding, among other things, that Harmony had waived the policy provision requiring that a suit or action on the policy be filed within a year of the fire because its acts had induced the insured to delay filing suit. In addition to the time spent during the parties' negotiations, the Court noted that Harmony had requested that the insured sign a letter invoking the appraisal provision of the policy on April 6, 1945. Although the parties then appointed their appraisers, no umpire was selected and no appraisal was completed. Although the appraisal had not moved forward, the Court noted that the appraisers were never formally discharged. The Court concluded that by invoking and initiating the appraisal process, the insurer had induced the insured's delay in filing suit, thereby tolling the limitations period.

18. Eck v. Netherlands Ins. Co., 234 N.W. 718 (Wis. Feb. 10, 1931) – The insured contended that a fire had totally destroyed his insured building on March 6, 1928. Netherlands contended that the building was not a total loss, relying upon an appraisal made under the terms of the policy assessing damages at $2,491.50. Netherlands further contended that the insured was bound by the results of the appraisal. Upon the filing of suit, the trial court agreed with the insured, concluding that the building was a total loss and that the appraisal proceedings were irregular, improperly pursued, and void. Affirming this decision on alternative grounds, the Wisconsin Supreme Court found that it was "not necessary to

consider the sufficiency or validity of the proceedings for an appraisal." Rather, the court examined whether there was evidence in the record to sustain the trial court's conclusion that there had been a total loss within the meaning of Wis. Stat. § 203.21. Based on the testimony and other evidence offered at trial, the Wisconsin Supreme Court concluded that there was sufficient evidence to support the trial court's findings that the fire destroyed the identity of the building and thus, that the loss was total.

19. Cady Land Co. v. Philadelphia Fire & Marine Ins. Co., 218 N.W. 814 (Wis. Apr. 3, 1928) – The parties were unable to agree on the amount of the loss caused by a fire on December 31, 1926. The insurance companies demanded an appraisal under their policies, and each appointed an appraiser. The two appraisers met on April 2, but they were unable to agree on an umpire. At 12:01am on April 11, a judge at the Green Bay municipal court appointed an umpire at the insured's request. Just before noon on the same day, a Milwaukee County circuit court judge appointed an umpire at the request of the insurance companies. Neither party gave prior notice. On April 14, the Milwaukee-appointed umpire, the insured's appraiser, and the insurance companies' appraiser met, but the insured's appraiser refused to act. The Milwaukee-appointed umpire and the insurance companies' appraiser then issued an award. On April 19, the Green Bay municipal judge appointed the same umpire with a provision that the insurance companies should be notified of their opportunity to present objections on April 22. The insurance companies failed to appear and the judge reappointed the same umpire. On May 14, the Green Bay-appointed umpire and insured's appraiser issued an award for $20,082 when the insurance companies' appraiser did not appear for a meeting. The Wisconsin Supreme Court concluded that the Green Bay appointment was valid over the Milwaukee appointment. As a threshold matter, the court noted that the insurance policy was silent as to notice. If prior notice was not required, then the Green Bay appointment on April 11 would be valid because it preceded the Milwaukee appointment in time. On the other hand, if prior notice was required, then both of the appointments on April 11 were invalid. In this scenario, it would be the Green Bay appointment of the same umpire on April 22 that would be valid. Thus, the court concluded that whether or not notice of the application and appointment was required, the result would be the same. The court also disregarded the insurance companies' alternative arguments that the early hour of the April 11 Green Bay appointment exhausted the ministerial power of the judge and that the insured's appraiser should be disqualified for failing to cooperate with the Milwaukee-appointed umpire. Finally, the court found that the issue as to fraud or mistake by the appraisers was not properly raised by the insurance companies.

20. Dechant v. Globe & Rutgers Fire Ins. Co., 217 N.W. 322 (Wis. Jan. 10, 1928) – The insured's car was destroyed by fire on May 21, 1924. The automobile insurance policy called for an appraisal if the parties differed in their estimate of the cost to repair or replace the vehicle. Globe's appraiser and the umpire signed an award of $350, which the insured's appraiser refused to sign. The insured filed suit and a jury found the value and damage to be $750. The trial court found that the appraisal was a valid and binding award and that the award fixed the amount of damages. The trial court directed judgment dismissing the complaint. On review, the Wisconsin Supreme Court found that even a substantial difference between an appraisal award and the actual loss determined by the

jury was not sufficient to set aside an award "in the absence of the slightest evidence of fraud or want of good faith on the part of the appraisers." Although the car was totally destroyed and the appraiser's award was significantly less than the actual loss, the court concluded that the appraisal provision and the results of the process were binding. Furthermore, the court recognized that appraisals should not be set aside lightly without a showing of a substantial failure by the appraisers to appreciate the matter and questions before them or a showing of the misuse of an arbitration agreement.

21. Montgomery v. American Cent. Ins. Co. of St Louis, 84 N.W. 175 (Wis. Nov. 16, 1900) – Two buildings owned by the insured were damaged in a fire. Because the insurance companies and the insured were unable to agree on the amount of loss, one of the insurance companies invoked the appraisal clause of the insurance policies. The parties signed agreements providing that the results of the appraisal would be "binding and conclusive." After the appraisal award had been issued, the insured challenged the amount that had been determined by filing six different actions. After consolidation, a jury returned a verdict with amounts of loss higher than the awards. On appeal, the Wisconsin Supreme Court concluded that the appraiser awards were binding and conclusive. While the insurance policies provided that the awards were only "prima facie evidence of the amount of such loss," the agreements signed by the parties modified the policies to make the awards binding. Absent fraud or mistake, the insured was presumed to know the contents of those agreements. The Court also concluded that there was no state policy that precluded the parties from agreeing to a binding settlement or appraisal of the amount of loss outside of the court system.

22. Chapman v. Rockford Ins. Co., 62 N.W. 422 (Wis. Mar. 5, 1895) – The insured had insurance policies with seven different insurance companies for his stock of goods, which were destroyed in a fire. Each policy contained a clause that in the event of a disagreement as to the amount of loss, appraisers appointed by the parties and an umpire selected by the appraisers would determine the amount of loss. The policies further provided that the loss would not become due and payable until sixty days after an award by the appraisers. The insurance companies invoked the clause and the parties selected their appraisers. The appraiser appointed by the insurance companies, who was from Chicago, met with the insured's appraisers in Fond du Lac County but he refused to agree to an umpire until he spoke with the insurance companies. He then left Fond du Lac County and never returned. The insured's appraiser suggested a number of umpires over the next several weeks, all of whom were rejected without significant explanation. On appeal from a judgment in favor of the insured, the Wisconsin Supreme Court found the appraisal clause in the policy to be valid. It also found that payment on the loss by the insurance companies was contingent upon an appraisal award, distinguishing it from other cases in which the policies did not provide that an appraisal award was a condition. However, the Court affirmed the judgments in favor of the insured because it found that the insurance companies had acted in bad faith in several respects. First, the appraisers made no attempt to agree on an award because the insurance companies' appraiser refused to agree on an umpire. Second, the evidence demonstrated that there was no disagreement on the value of the goods. Third, the insurance companies "arbitrarily and capriciously demand[ed] an appraisal, simply to suspend a claim for a loss, and select[ed] an appraiser who . . . perversely refus[ed] to

concur in the appointment of an umpire unless he reside[d] in Chicago, or is the kind of man the insurers want[ed]." Because of the "perverse conduct and want of good faith of the insurance companies," the Court concluded that the insured was absolved of his obligation to obtain an appraisal award before the loss would be payable.

23. Chandos v. American Fire Ins. Co., 54 N.W. 390 (Wis. Jan. 31, 1893) – A fire damaged the insured's mill and other property. The insurance policy with American Fire provided that the loss would be payable to a mortgagee "as her mortgage interest may appear," and permitted the insured or American Fire to request an appraisal to resolve any disagreement on the amount of the loss. When the insured and American Fire could not agree on the amount of loss, American Fire invoked the appraisal clause. The insured and American Fire entered into an agreement to appoint four appraisers to value the amount of loss of the two categories of property. The appraisers issued two awards, which the circuit court invalidated. The Wisconsin Supreme Court reversed the circuit court's judgment, concluding that the appraisal awards were valid and binding. First, the Court found that the challenged omission of items from the appraisals was the fault of the insured, who had provided the schedule of items to the appraisers. Second, the Court concluded that the insured, and not the mortgagee, had the authority to enter into the agreement to resolve the disagreement over the amount of loss through the appraisal process, because the policy provided that the policy was payable to the mortgagee "as her mortgage interest may appear." Thus, the fact that the mortgagee had no notice of the agreement between the insured and American Family and did not participate in the appraisal process was not fatal. Third, the Court concluded that it was not clear whether the appraisers had failed to select an umpire before appraising the loss as required by the policy, as their report and award were silent on the issue. Even if they failed to do so, the Court concluded, the parties had waived the error when they failed to object. Finally, the Court found that the insured had failed to provide any evidence to support the assertion that the appraisers were not impartial.

24. Vangindertaelen v. Phenix Ins. Co. of Brooklyn, 51 N.W. 1122 (Wis. Apr. 12, 1892) – The insured's personal property was damaged in a fire. The policy stated that in the event of a disagreement regarding the amount of loss, the disagreement should be submitted to arbitrators to determine a binding and conclusive amount of loss. The policy also stated that no suit or action was sustainable until after the appraisers issued an award fixing the amount of loss. The insured submitted a claim to Phenix, which refused to pay on a number of grounds. The insured filed suit and the court entered judgment in the insured's favor for $857.54. The Wisconsin Supreme Court affirmed the judgment. Among other rulings, the Court rejected Phenix's argument that the judgment should be reversed because no appraisal award had been issued before the insured had filed suit. The Court held that the facts demonstrated that there was no disagreement on the amount of loss because Phenix "silently acquiesced in the claim made for three months before the commencement of the action." If Phenix disagreed with the amount of loss, it should have made its disagreement known. The Court refused to allow the clause to be used "as an instrument for alluring the unwary into a trap from which there could be no escape." According to the Court, "the provision making such award a condition precedent to the commencement of a suit upon the policy presupposes such failure to agree, and consequent arbitration."

25. Bailey v. Aetna Ins. Co., 46 N.W. 440 (Wis. Sept. 23, 1890) – Aetna insured a homestead damaged in a fire. The insurance policy included a clause providing that no suit on the policy could be brought until arbitrators had issued an award of damages. According to the complaint, Aetna denied all liability on the policy. Although it had denied any responsibility under the policy, Aetna took the position that the insured was nonetheless required to go through the formality of an appraisal, insisting that "such an award was essential, and constituted a condition precedent to the right to bring action on the policy." Affirming the lower court's rejection of this argument, the Wisconsin Supreme Court held that the issuance of an award was a condition precedent to filing suit only when the parties disagreed on the amount of loss; the clause did not apply when the company denied all liability.

26. Canfield v. Watertown Fire Ins. Co., 13 N.W. 252 (Wis. Sept. 9, 1882) – A fire destroyed the insured's personal property. The policy provided that any disagreement regarding the amount of loss "shall be referred to two disinterested and competent men, each party select one, (and in the case of disagreement they to select a third), who shall ascertain, estimate, and appraise the loss or damage, and their award in writing shall be binding . . ." At trial, Watertown Fire provided evidence that the appraisers had issued an award and that it had paid that amount to the insured. The insured maintained that the appraisal award had been procured by misrepresentation and fraud because the insured had not allowed to present evidence to the appraisers and had been barred from the room where the appraisers met. The insured also maintained that the award was based on mistakes of fact and law because it did not include all of the destroyed property. The trial court excluded the testimony about the alleged fraud and judgment for Watertown Fire was entered. The Wisconsin Supreme Court reversed and remanded the case for a new trial. First, it concluded that the policy did not provide "that an award shall precede the right to sue upon the policy." Without such language, "the law is well settled that an agreement to ascertain the amount of a loss by arbitration is not a condition precedent, a waiver or performance of which, or any offer to perform, must be shown by the plaintiff." Second, the court found that the insured could argue that the award was invalid in an action at law and need not resort to an equitable action. Finally, the Court concluded that the trial court had erred in excluding the insured's evidence that the appraisal award was invalid based on fraud and mistakes of fact.

27. Phoenix Ins. Co. v. Badger, 10 N.W. 504 (Wis. Nov. 3, 1881) – Phoenix appealed a judgment in favor of the insured, arguing that the appraisal clause in the insurance policy made an appraisal award a condition precedent to any action on the policy. The Wisconsin Supreme Court affirmed the lower court's judgment, concluding that the clause did not preclude the action because there was no evidence of a disagreement about the amount of loss and because neither party had requested the appointment of appraisers. Because both of these events were conditions precedent to the appointment of the appraisers, and neither the insured nor the insurer had invoked their appraisal rights, Phoenix was "estopped from taking advantage of the fact that there ha[d] not been an award."

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INDEX TO WYOMING DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

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and
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Wyoming

Automobile Ins. Co. v. Lloyd, 40 Wyo. 44, 46(Wyo.1929)

This was an action to recover on a fire insurance policy. The carrier demanded appraisal due to a dispute over the loss, and the insured appointed an appraiser, sought Court appointment of an umpire, and when the carrier's appraiser left town, conducted the appraisal with the umpire, allegedly without notice to the carriers appraiser. The carrier took the position that the insured's actions voided the policy, The insured brought suit for recovery of loss, after the carrier refused to pay the claim. After a verdict was for the insured, but for less than the appraisal amount, the e insurer appealed the court's refusal to instruct, that if its appraiser had no notice of the meeting of appraisers, the appraisement was void, and an the policy was voided.

The Supreme Court of Wyoming announced several rules related to appraisal: The general rule is that matters of appraisal in actions for loss under fire insurance policies are questions for the jury. 26 C. J. 552. …Where one of the parties to an appraisal acts in bad faith, it absolves the other party. Ins. Co. v. Bishop, 39 N.E. 1102. Where insurer refuses to admit liability, the insured may bring suit on the policy without prior arbitration. 26 C. J. 431. Delay in admitting or accepting an appraisal, prejudicial to the opposing party waives the right of appraisal. 26 C. J. 430, 544 also. All parties are entitled to notice of the time and place of appraisal. 26 C. J. 422. An appraisal by one appraiser and an umpire, is not vitiated by failure of the other appraiser to attend when properly notified. Society v. Ins. Co., 109 N.E. 384. In as much as the jury apparently ignored the appraisal and made its own determination of damages, the judgment was affirmed, and the insurer's argument that the actions of the insured with respect to the appraisal justified voiding the policy was rejected.

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