

***THE WANING WISDOM OF APPRAISAL?
LET'S TALK: THREE REGIONAL PERSPECTIVES***

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PURPOSE AND HISTORY	2
III.	SAMPLE APPRAISAL PROVISIONS	3-5
IV.	APPRAISAL BEGINNINGS	6-18
	A. Invoking the Appraisal Clause	
	B. Appraisal Not Enforced Until After Policy Conditions Were Met	
	C. Most States Recognize the Enforceability of Appraisal Clauses	
	D. Appraisal Demand Not Enforced	
	E. Appraisals After the Inception of Litigation	
	F. Selection of Appraisers/Umpire	
	G. Waiver/Estoppel Concerns	
V.	WHAT IS THE SCOPE OF THE APPRAISAL PROCESS?	19-25
	A. Appraisal is Limited to Issues of “Valuation”.	
	B. Some Courts Recognize that Valuation Issues May Encompass Analysis of Causation.	
	C. Courts Prohibiting Appraisers From Determining Scope of Loss.	
	D. Cases Allowing Appraisers to Determine Scope of Repairs.	
	E. Determination of Replacement Cost and Actual Cash Value by the Appraisal Panel.	
	F. Loss of Use Claims.	
VI.	HOW DOES THE APPRAISAL PROCESS WORK?	26-31
	A. Some States Hold that Appraisal is a Form of Arbitration and Arbitration Statutes Govern the Proceedings.	
	B. Some Jurisdictions Hold that Insurance Appraisals Are Not a Form of Arbitration.	
	C. Are Hearings to be Conducted? Cases Where a Hearing Was Required.	
	D. Cases Where No Hearing Was Required.	
	E. Cases on the Conduct of Proceedings.	
VII.	WHAT SHOULD BE ON THE APPRAISAL AWARD?	32-33
	A. What Constitutes the Itemization of an Award?	
	B. State Laws May Determine Proper Service of the Award.	

VIII.	WHAT IS THE EFFECT OF THE APPRAISAL AWARD?	34-39
	A. Cases Enforcing the Loss Payment Provision.	
	B. At Least One Court Has Distinguished the Amount of Loss From the Insurer’s Liability.	
	C. Several Decisions Discuss the Award of Interest and Costs in Appraisal.	
	D. An Appraisal Award May Not be Set Aside Absent a Strong Showing by the Moving Party.	
	E. Judgments on Appraisal Awards.	
IX.	ADVANTAGES/DISADVANTAGES TO APPRAISAL	40
	A. Advantages to Appraisal.	
	1. Economy	
	2. Expedition Resolution	
	3. Simplicity	
	B. Disadvantages/Criticisms	
	1. Lack of Procedural Safeguards for the Parties such as Rules of Evidence, Notice Requirements, Witness and Document Discovery	
	2. Lack of Control Over the Format of the Award	
	3. Issues with Payment of Award	
	4. Bias/Favoritism	
	5. “Splitting the Baby”	
X.	CONCLUSION	41

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I. INTRODUCTION

Appraisal as conceived within the insurance industry appears to be very different from its modern form. It was a creature of the insurance contract, but the courts in a number of jurisdictions have brought about an evolution of what was a favorable and easily utilized policy tool into a problem-rife forum that calls its use into question. The common approach of “splitting the baby” harkens back to King Solomon, but does not resolve the issues any more efficiently. The courts have continually eroded efficient use of the policy appraisal vehicle to the point that some insurers are contemplating removal of the provision from policies.

Some policyholders resist appraisal because the policy provisions for appraisal require them to bear their own costs. In the traditional litigation context, a policyholder who obtains a judgment against her insurance company can usually recover attorney’s fees and costs - by virtue of statutory law or civil procedure rules. As such, the appraisal process, especially if attorneys are involved, is of no real benefit to many policyholders if they cannot recover their costs and/or attorneys fees from the insurer.

This presentation will focus upon the procedural aspects of the appraisal process, its substance or scope, and also its effect or enforceability. Other peripheral issues such as attorneys’ fees, costs and pre-judgment interest will also be addressed.

II. PURPOSE AND HISTORY

Appraisal has often been described as a mechanism to resolve disputes between the parties to a contract. One specific definition is “[a] valuation or an estimation of value of property by disinterested persons of suitable qualification. The process of ascertaining a value of an asset or liability.” *Black’s Law Dictionary*, 100 (6th ed. 1990). The definition continues with respect to a “[c]ause in [an] insurance policy providing that the insurer has the right to demand an appraisal of the loss or damage.” *Black’s Law Dictionary*, 100 (6th ed. 1990).

Appraisal provisions have been included within insurance contracts for in excess of a century. See *Hanover Fire Ins. Co. v. Lewis*, 10 So. 297 (Fla. 1891); and *Appalachian Ins. Co. v. Rivcom*, 182 Cal.Rptr. 11 (Cal. Ct. App. 1862). (For a discussion of the evolution and application of appraisal clauses see Annotation, *Remedies of Insured Other than Direct Action on Policy Where Fire or Other Property Insurer Refuses to Comply with Policy Provisions for Appointment of Appraisers to Determine Amount of Loss*, 44 ALR 2d 850 (1955)). Even the U.S. Supreme Court has ruled that appraisal clauses have “long been commonly used in fire insurance policies . . . and, when voluntarily placed in the insurance contract, compliance with its provisions has been held to be a condition precedent to action on the policy.” See *Hardware Dealers Mutual Ins. Co. v. Glidden Co.*, 284 U.S. 151, 157 (1931). The same opinion explained that the appraisal process in the context of insurance claims does not violate constitutional protections of either due process or equal protection of the laws. *Id.* at 159. Furthermore, the right to trial by jury is not infringed by the appraisal provision since such a beneficial substitute for the complicated and time-consuming process of common law has been recognized by all courts. See *Appalachian Ins. Co. v. Rivcom Corp.*, 182 Cal.Rptr. 11, 14 (Cal. Ct. App. 1982).

The touted purpose of utilization of the appraisal process is to allow a quick and inexpensive resolution of the value of the loss. However, with courts utilizing “appraisal” and “arbitration” interchangeably, and with the modern trend to expand the scope of the appraisal, the avowed purpose of efficient and less costly resolution seems to be fading away. If utilized in the traditional fashion envisioned by the insurance industry, appraisal proceedings can still expeditiously resolve the claim. However, before invoking it or agreeing to a demand to participate, an insurer must be cognizant of the jurisdiction and its interpretation of the appraisal process.

III. SAMPLE APPRAISAL PROVISIONS

Over the years, a variety of provisions regarding appraisal have been included within insurance contracts. Residential policy samples follow:

Standard Fire Policy 165 Lines

123 Appraisal
124 In case the insured and this company shall fail to agree as to the
125 actual cash value of the amount of loss, then, on the written
126 demand of either, each shall select a competent and disinterested
127 appraiser and notify the other of the appraiser selected within
128 twenty days of such demand. The appraisers shall first select a
129 competent and disinterested umpire; and failing for fifteen days to
130 agree upon such umpire, then, on the request of the insured or this
131 company, such umpire shall be selected by a judge of a court of
132 record in the state in which the property covered is located. The
133 appraisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall submit
135 their differences, only, to the umpire. An award in writing, so
136 itemized, of any two when filed with this company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the expenses
139 of appraisal and umpire shall be paid by the parties
140 equally.

CP 00 10 10 00 (7/00)

B. Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two (2) appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two (2) will be binding. Each party will:

1. Pay its chosen appraiser; and
2. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

(ISO) HO 01 02 (02/95 Ed.)

Mediation or 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 upon by any two will set the amount of loss.

Each party will:

- (1) Pay its own appraisers; and
- (2) Bear the other expenses of the appraiser and umpire equally.
- (3) If however, we demanded the mediation [as provided in the mediation provision in the policy] and either party rejects the mediation results, you are not required to submit to, or participate in, any appraisal of the loss as a precondition to action against us for a failure to pay the loss.

(ISO) CPH FL H3 08 02

E. 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 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 upon by any two will set the amount of loss.

Each party will:

1. Pay its own appraisers; and
2. Bear the other expenses of the appraisal and umpire equally.

A commercial policy example

Retailers Package Policy Commercial Insurance FA-3R84 (1/87)

Appraisal

If we cannot agree with you on the amount of the loss, either of us can demand that the following procedure be used to settle the amount.

1. You or we will request in writing that the dispute be submitted to appraisal within 60 days from the time we receive your proof of loss. Each will then select an appraiser and notify the other of that choice within 20 days of the initial request.

2. The appraisers will select an impartial umpire, if they cannot agree on an umpire within 15 days, either you or we can ask that

an umpire be appointed by a judge of the court of record in the county where the property is located.

3. The appraisers will appraise each item for its value at the time of loss and the amount of loss. If they can't agree, they will submit any differences to the umpire. An agreement in writing by any two of these three will determine the amount of the loss.

4. You will pay your appraiser and we will pay ours. Each will share equally any other costs of the appraisal and the umpire.

5. We will not surrender our rights by any act we take relating to an appraisal.

IV. APPRAISAL BEGINNINGS

A. Invoking the Appraisal Clause

Generally the insurance contract speaks to the methodology of invoking the appraisal clause. Common threads include initiation by either party, within a reasonable period of time. The definition of timeliness is often fact specific. See *Kester v. State Farm Fire and Casualty Company*, 726 F.Supp. 1015 (Ed. PA. 1989).

To avoid problems, demands for appraisal should be in writing in order to demonstrate the timing. The written demand must be sufficiently clear that a person of ordinary intelligence understands what is being requested. *Government Employees Insurance Company v. Harden*, 132 S.E. 2d 513 (Ga. Ct. App. 1963); *Grand Rapids Fire Insurance Company v. Finn*, 54 N.E. 545 (Ohio 1899).

In practice, it appears that many appraisal provisions, in insurance contracts as well as other contracts, are being specifically enforced if requested by either party to the contract. See *Questrom v. Federated Department Stores, Inc.*, 41 F. Supp. 2d 294 (S.D. N.Y. 1999), *American Silk Mills Corp. v. Meinhard-Commercial Corp.*, 315 N.Y.S.2d 144 (App. Div., 1970).

The demand for appraisal usually must be presented within a reasonable period of time. The definition of timeliness is often fact specific. See *Kester v. State Farm Fire & Casualty Co.*, 726 F. Supp. 1015 (E.D. Pa. 1989). One example that evaluated the timeliness issue determined that a delay of eight months from notice of loss to demand for appraisal by the insurer was not unreasonable, absent any showing of prejudice to the policyholder. *Id.* See also, *Monroe Guaranty Ins. Co. v. Backstage, Inc.*, 537 N.E.2d 528 (Ind. Ct. App. 1989); *Spear v. Cal. State Automobile Ass'n*, 831 P.2d 821 (Cal. 1992). See *Meyerman v. Burgess*, 2006 WL 1682627 (Cal.App. 4 Dist. 2006).

To avoid a problem, the demand should be in writing so its timing may be provable. *New Amsterdam Casualty Co. v. J.H. Blackshear, Inc.*, 156 So.2d 170 (Fla. 1934). The party invoking the appraisal clause can easily meet this burden by sending correspondence via certified or registered mail with an additional copy sent through regular mail channels. An express delivery service also establishes the time of the demand, as can a facsimile transmission or email version. The written demand must be sufficiently clear that a person of ordinary intelligence understands what is being requested. See *Government Employees Ins. Co. v. Hardin*, 132 S.E.2d 513 (Ga. Ct. App. 1963); *Grand Rapids Fire Ins. Co. v. Finn*, 54 N.E. 545 (Ohio 1899).

B. Appraisal Not Enforced Until After Policy Conditions Were Met

Once the appraisal process has been properly invoked by either party, the question becomes whether or not policy conditions to participation have been met. Most jurisdictions follow the rule that policy duties enforcement and compliance by an insured are a condition precedent invocation of the appraisal clause. See *Jacobs v. Nationwide Mutual Fire Ins. Co.*, 236 F. 3d 1282 (11th Cir. 2001); *Terra Indus., Inc. v. Commonwealth Ins. Co. of Am.*, 981 F.Supp.581 (N.D. Iowa 1997); *Ohio Farmers Ins. Co. v. Titus*, 92 N.E. 82 (Ohio 1910); *Boston*

Ins. Co. v. A.H. Jacobson Co., 33 N.W.2d 602 (Minn. 1948); *Ins. Co. of N. Am. v. Baker*, 268 P. 585 (Colo. 1928); *Jersey Ins. Co. v. Roddam*, 56 So.2d 631 (Ala. 1952); *Harowitz v. Concordia Fire Ins. Co.*, 168 S.W. 163 (Tenn. 1914); *James v. Insurance Co. of Ill.*, 115 S.W. 478 (Mo. Ct. App. 1909); *Continental Ins. Co. v. Valladingham & Gentry*, 76 S.W. 22 (Ky. Ct. App. 1903). But see *Scottsdale Ins. Co. v. Univ. at 107th Ave., Inc.*, 827So.2d1016 (Fla. 3d DCA 2002)(failure to provide post-loss information before appraisal invoked cured by production of information during lawsuit to compel appraisal). Generally courts find that there must be a sufficient exchange of information to allow formation of a disagreement or difference of opinion prior to appraisal being invoked. The chronological sequence envisioned in the policy wherein the appraisal provision ordinarily follows the post loss duties of an insured supports compliance with the duties prior to the invocation of appraisal.

For a sampling of jurisdictional approaches see below:

Florida:

Chimerakis v. Sentry Ins. Mut. Co., 804 So.2d 476 (Fla. 3rd DCA 2001). During a dispute arising from a supplemental claim for damages, the insured demanded an appraisal pursuant to the appraisal clause in the insurance policy. The insurer failed to designate its appraiser within 20 days and the insured filed suit, refusing to perform any other conditions pursuant to the policy. The Court held that an action to compel appraisal does not accrue until the policy conditions precedent have been performed or waived, and then appraisal is refused.

El Cid Condominium Assoc., Inc. v. Public Service Mutual Ins. Co., 780 So2d 325 (Fla. 3rd DCA 2001). Appellate court refused to review trial court's refusal to grant insured's motion to compel appraisal for not complying with obligations under policy.

Galindo v. Ari Mut. Ins. Co., 203 F. 3d 771 (11th Cir. 2000). Insureds must comply with their post-loss obligations before the appraisal provision can be invoked.

USF&G v. Romay, 744 So.2d 467 (Fla. 3rd DCA 1999). Before being entitled to demand appraisal, an insured must comply with the policy conditions, including the submission of a proof of loss and the submission to a requested examination under oath. See also, *Jacob v. Nationwide Mutual Fire Ins. Co.*, 236 F.3d 1282 (11th Cir. Fla., 2001).

Preferred Mut. Ins. Co. v. Martinez, 643 So.2d 1101 (Fla. 3rd DCA 1994). Appraisal provisions are deemed to be conditions precedent to recovery under insurance policies.

C. *Most States Recognize the Enforceability of Appraisal Clauses.*

California: *Unetco Industries Exch. v. Homestead Ins. Co.*, 57 Cal.App.4th 1459 (1997). Like other forms of arbitration, insurance appraisal is favored means of dispute resolution.

Florida: *Liberty Mutual Fire Ins. Co. v. Buenaventura Lakes Shopping Center, Inc.*, 846 So. 2d 1204 (Fla. 3rd DCA 2003). The record showed that Liberty Mutual had notice of the loss, and that there was a disagreement about the amount of the loss. Therefore, the amount of the loss was properly submitted to the appraisal panel.

Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. 1st District Court of Appeal, 2000). Insurer ordered to appraisal despite denying coverage.

Florida Select Insurance Company v. Keelean, (1999) 727 So.2d 1131. Insurer did not waive right to seek appraisal or arbitration by asserting coverage defense.

Paradise Plaza Condominium Association, Inc. v. The Reinsurance Corporation of New York, 685 So.2d 937 (Fla. Dist. Ct. App. 1996). Insurer did not waive right to demand appraisal following hurricane loss by initially denying claim on basis of suspected fraud, loss being below deductible, and by reserving rights to deny claim after appraisal. This decision reversed the same court's previous decision in the case of *American Reliance Insurance Company v. Village Homes at Country Walk*, 632 So.2d 106 (Fla., 1994).

United Community Ins. Co. v. Lewis, 642 So.2d 59 (Fla. 3rd DCA 1994). Either party has the right to invoke the appraisal clause in the policy and the other party cannot deny the demand for appraisal.

Southern Home Ins. Co. v. Faulkner, 57 Fla. 194 (Fla. 1909). Appraisal is a condition precedent to a right of action on the contract.

Indiana: *Jupiter Aluminum Corporation vs. The Home Insurance Company*, (1999) 52 F.Supp.2d 885. Party who voluntarily submits to appraisal to determine the amount due under an insurance policy is bound by the appraisal award, absent exceptional circumstances.

Michigan: *St. Vincent de Paul v. Mt. Hawley Ins. Co.*, 49 F.Supp2d 1011 (E.D. Mich. 1999). Where policy did not state time limit for demanding appraisal, insurer did not waive right to appraisal absent evidence of prejudice to the insured from delay. Also, insurer who demanded appraisal in summary judgment motion did not nullify appraisal provision by failing to name appraiser with its demand.

New Jersey: *Hala Cleaners v. Sussex Mut. Ins. Co.*, 115 N.J.Super. 11, 277 A.2d 897 (N.J.Ch. 1971). Even allegations of arson would not preclude appraisal from being mandated.

New York: *SR International Business Ins. Co., LTD v. World Trade Center Properties, LLC.*, 2004 U.S.Dist.LEXIS 25642 (S.D.N.Y. 2004). New York courts have long recognized the role of appraisals in resolving disputes between insurers and insureds where the disagreement is over value or amount of loss. On the question of waiver of appraisal provision, where an insurance policy does not specify a time limit for an appraisal demand, the court must determine whether the demand was exercised within a reasonable period, depending on the facts of the case. Elapsed time does not, in itself, make insurer's demand for appraisal unreasonable. However, where delay in demanding appraisal has resulted in removal, destruction, or repair of damaged property, an appraisal is no longer practical.

Pennsylvania: *Monarch, Inc. v. St. Paul Property and Liability Ins. Co.*, 2004 U.S.Dist.LEXIS 14803 (E.D.Pa. 2004). Pennsylvania law requires that appraisal provisions be included in all fire insurance policies. When insurance company admits liability and disputes only the amount of loss, appraisal is the favored method of settling the dispute. Appraisal provisions are revocable, however, and an insurer may not assert the existence of the appraisal clause as a defense to the innocent party's action on the policy if the insurer has failed to comply with the clause.

Kester v. State Farm Fire and Cas. Co., 726 F.Supp. 1015 (E.D. Pa. 1989). Holding an appraisal cannot be demanded unless the insurer admits liability, but nonetheless allowing insurer to invoke appraisal where liability was denied on grounds of fraud in answer to insured's complaint. The court also found that the insurer had not waived its right to appraisal by waiting eight months after it knew of loss before requesting appraisal absent prejudice to insured.

Ice City Inc. v. INA, 456 Pa. 210, 314 A.2d 236 (Pa. 1974). Insurer who prevented appraisal by refusing to name an appraiser could not assert the appraisal provision as a bar to suit brought by insured.

Texas: *Heap v. Progressive County Mutual Ins., Co.*, 2001 WL 1345694, 2001 Tex.App.Lexis 7390 (Tex. App.-Hous. (1 Dist.)). Appraisal was appropriate under a stated value policy on a unique motorcycle because policy paid the lesser of the cost to repair/replace or the stated value.

D. Appraisal Demand Not Enforced.

Florida: *Bankers Sec. Ins. Co. v. Brady*, 765 So.2d 870 (Fla. App. 2000). Insurer could not invoke appraisal where its adjuster had previously agreed orally on amount of loss with insured's adjuster.

Michigan: *Beck v. Michigan Basic Property Insurance Assoc.*, 2003 Mich.App.LEXIS 577 (Mich. Ct. App. 2003). An appraisal clause in a fire policy which provides for a determination by an umpire constitutes a common-law arbitration agreement. Michigan law requires that in the event that the parties cannot agree on the amount of the loss, either party may request an appraisal and that appraisal must occur prior to commencement of a lawsuit.

In order to show that an insured waived the appraisal provision in the insurance contract, it must show that the insurer delayed substantially in requesting appraisal so as to have waived it. In the present case, the evidence indicates that the insurer made several attempts to move forward with appraisal of the insured's property, and the insured presented no evidence that delay was caused by anything other than by his own actions or by the actions of the appraiser he hired. Thus, the insurer did not waive the appraisal provision.

Nebraska: *Rawlings v. AMCO Ins. Co.*, 231 Neb. 874, 438 N.W.2d 769 (Neb.Sup.Ct. 1989). Tornado loss; court ruled that a clause in policy of insurance which purports to bind the parties to a nonjudicial determination of a future dispute concerning the amount of a loss where an insurer has admitted liability is void and unenforceable.

Oregon: *Molodyh v. Truck Ins. Exchange*, 304 Or. 290, 744 P.2d 992 (Ore. 1987). Appraisal is only binding on the demanding party.

Texas: *In re: Terra Nova Ins. Co.*, 992 S.W.2d 741 (Tex.App. 1999). Where insured's suit included a claim on insurance contract and an extracontractual claim (bad faith), to which appraisal provision did not apply, court refused to order immediate appraisal because it was against judicial efficiency.

Virginia: *Hanover Fire Ins. Co., v. Drake*, 170 Va. 257, 196 S.E. 664 (Va.App. 1938). Insured cannot be compelled to submit to appraisal as the appraisal clause is inserted wholly for the protection of the insurer.

Annotation: Time Within Which Demand For Appraisal Of Property Loss Must Be Made Under Insurance Policy Providing For Such Appraisal. 14 A.L.R.3d 674 (1967).

Wisconsin:

Wieting Funeral Home of Chilton, Inc. v. Meridian Mutual Ins. Co., 2004 WI.App. 218; 2004 Wisc.App.LEXIS 816 (Wis.Ct.App. 2004). Appraisal procedure set out in insurance policy contemplates a formal demand for an appraisal, a prescribed methodology for selecting an umpire and resolving any disputes between the parties' experts, and provision for payment of fees and costs. A mere "agreement" by the parties to meet and discuss the differences in experts' findings does not trigger appraisal as contemplated within Wisconsin statute.

E. Appraisals After the Inception of Litigation.

California: *Appalachian Ins. Co. v. Rivcon Corp.*, 130 Cal.App.3d 818, 182 Cal. Rptr. 11 (1982). “Until the amount of the loss is fixed (under the Appraisal Clause) no one is in a position to evaluate the bad faith claim.”

Delaware: *Hanby v. Maryland Cas. Co.*, 265 A.2d 28 (Del.Supr. 1970). Purported 2½ month delay between alleged termination of good-faith negotiations and insurer’s request for appraisal of fire loss did not result, as a matter of law, in waiver of policy right to request appraisal prior to institution of legal proceedings where it was not shown that insurer had negotiated in bad faith.

Florida: *Gonzalez v. State Farm and Casualty Company*, 805 So.2d 814 (Fla. 3d DCA 2000). Insurer did not waive its right to appraisal by denying coverage or answering insured’s lawsuit.

Scottsdale Ins. Co. v. Desalvo, 666 So.2d 944 (Fla. 1st DCA 1995). The appraisal clause can be invoked by either party; however, if invoked by the insurer, the insurer waives any coverage defense. This case is in conflict with *State Farm Fire & Cas. Co. v. Licea*, 685 So.2d 1285 (Fla. 1996), but has not been specifically overturned.

State Farm Fire & Casualty Company v. Middleton, 648 So.2d 1200 (Fla. 1995). A great deal of judicial resources might be saved by a swift and informal decision by the appraisers as to the amount of the loss.

United States Fire Ins. Co. v. Franko, 443 So.2d 170 (Fla. 1st DCA 1983). Court held that insurer’s delay in sending proof of loss form to insureds was unrelated to insurer’s right to arbitration and could not constitute a waiver of that right; insurer’s failure to immediately demand arbitration upon discovery that there was a large disparity between its amount of loss and the insureds’ did not constitute waiver of right to arbitration; and, insurer’s motion to dismiss complaint constituted necessary demand for arbitration.

Indiana: *Monroe Gar. Ins. Co. v. Backstage Inc.*, 537 N.E.2d 528 (Ind.App. 1989). Insurer does not waive its appraisal rights under fire policy, even though good-faith negotiations ceased more than six months before insurer invoked appraisal clause; there was not evidence of prejudice resulting from delay in demanding appraisal.

Hayes v. Allstate Ins. Co., 722 F.2d 1332 (7th Cir. Ind. 1983). Policy language did not preclude insured from bringing an action under the policy even though the insurer had demanded appraisal.

- Iowa** *Terra Indus., Inc. v. Commonwealth Ins. Co. of Am.*, 981 F.Supp. 581 (N.D. Iowa 1997). As a matter of first impression, Iowa appraisal was a preconditioned suit only if demanded prior to trial. No party may demand for appraisal prior to the institution of suit; and, therefore, the appraisal was not a precondition to suit.
- Montana:** *School District No. 1 v. Globe & Republic Ins. Co.*, 146 Mont. 208, 404 P.2d 889 (Mont. 1965). Where prior to initiation of action by insured, there had been no cessation of good-faith negotiations as to amount of loss, insured was not handicapped by insurers' delay in demanding appraisal and loss was difficult to assess, insurers' delay in demanding appraisal until after insured instituted action was not unreasonable and parties must proceed pursuant to that demand.
- New Jersey:** *Rastelli Brothers, Inc. v. Netherlands Insurance Company T/A Peerless Insurance*, 68 F.Supp.2d 440 (1999). Appraisal clause was not an arbitration clause enforceable under the Federal Arbitration Act.
- Washington:** *Kessling v. Western Fire Ins. Co.*, 10 Wash.App. 841, 520 P.2d 622 (Wash.App. 1974). Insurer and insured had been negotiating with respect to fire loss and insofar as record showed that until insured filed suit, both parties welcomed additional communications and negotiations rather than confrontation, insurer's demand for appraisal made in accordance with terms of the policy was timely notwithstanding the fact that it was not made until eight months after the receipt of proof of loss and subsequent to commencement of suit by insured and a court hearing.
- Wisconsin:** *Lynch v. American Family Mut. Ins. Co.*, 163 Wis.2d 1003, 473 N.W.2d 515 (Wis.App. 1991). Absent policy provision to the contrary, insurer may not demand appraisal of loss after commencement of action by insured when insurer has failed to do so prior to lawsuit.
- Illinois:** *Lundy v. Farmers Group, Inc.*, 322 Ill.App.3d 214, 750 N.E.2d 314, (Ill. App. 2001). Insurer who did not demand appraisal until years after loss and ten months after insured's suit had acted so inconsistent with appraisal as to abandon and waive right to demand it.

F. Selection of Appraisers/Umpire

Qualification of appraisers and/or umpires is often guided by the policy provisions regarding appraisal. These provisions generally define the appraiser as competent and disinterested (standard 165 lines); competent and independent (BOP); competent and impartial (ISO) CA 01 28 (05/94 Ed.). Competency is generally defined as an appraiser who has a reasonable basis for reaching an intelligent decision. See generally *American Union Ins. Co. v. Stull Bros. Co.*, 7 A.2d 866 (N.J. Ch. 1939). Competence is generally accepted by all parties, as it appears axiomatic that no one is going to select an incompetent to represent its own interest. Even lawyers have been deemed competent to act as appraisers. See *14 Couch on Insurance 2d*, (Rev. ed.) 50:134. See also, *Glen Falls Ins. Co. of New York v. Garner*, 155 So.533 (Ala. 1934).

Selection of appraisers as well as umpires can jeopardize the appraisal process if not properly conducted. While public policy favors appraisal as a means of resolution of claims without the delay and expense of litigation, it will only continue to do so if all parties to the proceedings act fairly and in accordance with the terms and conditions of the insurance contract.

For a sampling of jurisdictional approaches see below:

U.S. Supreme Court: *Commonwealth Coatings Corp v. Continental Casualty Co.*, 393 U.S. 145 (1968). Referencing arbitrators, the Court held that “Any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even appearance of bias.”

Alabama: *Glen Falls Ins. Co. V. Garner*, 229 Ala. 39, 155 So. 533 (Ala. 1934). Award fixing fire loss not invalidated because one of the appraisers was an attorney and not a contractor or architect, where testimony showed that the appraiser had basis for forming proper judgment and policy did not limit the selection of appraisers to contractors or architects.

California: *Gebbers v. State Farm Fire and Cas. Co.*, 38 Cal.App.4th 1648, 45 Cal.Rptr.2d 725 (1995). Award signed by all appraisers was set aside because appraiser appointed by State Farm was not deemed to be disinterested (same as “impartial”) because he had served as an expert witness for State Farm on one occasion.

Figi v. New Hampshire Ins. Co., 108 Cal.App.3d 772, 166 Cal.Rptr. 774 (1980). Appraisal award was vacated because the umpire was doing a very small amount of business with the insured’s appraiser which gave him the appearance of not being “impartial.”

Johnston v. Security Ins. Co. of Hartford, 6 Cal.App.3d 839, 86 Cal.Rptr. 133 (1970). The fact that neutral umpire had not disclosed his acquaintanceships with insureds’ appointed appraiser and counsel, or his business dealings with insureds’ appraiser was sufficient ground to vacate award in favor of insureds even though no actual fraud or bias was charged.

Falloon v. Caledonian Ins. Co., 161 Cal.App.2d 522, 327 P.2d 18 (1958). Frequency of service as an appraiser may disqualify the appraiser.

Florida:

Preferred Nat'l Ins. Co. v. Miami Springs Golf Villas, Inc., 789 So.2d 1156 (Fla. 3rd DCA 2001). An umpire's neutrality is not tainted by ex-parte communications with either party.

Galvis v. Allstate Ins. Co., 721 So.2d 421 (Fla. 3rd DCA 1998). The Court held that although the appraisal clause of the policy required each party to select a "competent and disinterested appraiser," the contingent-fee appraiser appointed by the insured was nevertheless fully qualified under the present clause.

Rios v. Tri-State Insurance Company, 714 So.2d 547 (Fla. 3rd DCA. 1998). Party-appointed appraiser's direct financial interest in outcome of appraisal through contingency fee arrangement does not disqualify appraiser if appropriate disclosure is made.

The term "independent" in referring to appraisers within the appraisal provision of the insurance policy does not limit an appraiser's ability to be paid on a contingent fee basis.

Weinger v. State Farm Fire & Cas. Co., 620 So.2d 1298 (Fla. 4th DCA 1993). Loss due to Hurricane Andrew; court ruled that court-appointed umpire in an appraisal involving a business interruption loss should have been recused by trial court when insured brought to court's attention that umpire had, and was presently working as an accountant for State Farm and the revenues he had collected from State Farm amounted to a considerable portion of his annual revenue.

Iowa:

Central Life Ins. Co. v. Aetna Cas. And Surety Co., 466 N.W.2d 257 (Iowa 1991). The fact that an appraiser had a contingency fee arrangement and a long ongoing relationship with a party disqualified him as a matter of law.

Michigan:

Linford Lounge Inc. v. Michigan Basic Property Ins. Assoc., 77 Mich.App. 710, 259 N.W.2d 201 (Mich.App. 1977). Insureds' appraiser was not found to be "interested" even though at one time he was the insureds' public adjuster operating on a percentage basis since he had canceled his contingency fee contract.

New York:

Hemingway v. State Farm Fire & Cas. Co., 187 A.D.2d 814, 589 N.Y.S.2d 956 N.Y.Sup.Ct.A.D. 1992). Fire loss; court held that mere allegations of bias were insufficient to overcome presumption of validity of appraisal process, and insured's negotiations of checks received from

the insurer in the amount of the appraisal award constituted full accord and satisfaction of insured's claim.

Sterling Spinning & Stamping Works v. Knickerbocker Ins. Co., 137 Misc. 349, 242 N.Y.S. 201 (App.Div. 1930). A contractor employed approximately 1800 times by insurance companies over the course of several years was found not to be disinterested.

Coon v. National Fire Ins. Co., 126 Misc. 75, 213 N.Y.S. 407, affirmed 218 App.Div. 812, 218 N.Y.S. 722 (1926), affirmed 246 N.Y.S. 594, 159 N.E. 665 (1927). "Disinterested" means not biased or prejudiced, not interested, and not in the employ of either party.

Kaiser v Hamburg-Bremen Fire Ins. Co., 69 N.Y.S. 344, 59 App. Div. 525 (1901), affirmed 172 N.Y. 633, 65 N.E. 1118 (1902). Where an agent representing several insurance companies interested in a fire loss fraudulently represented to insured that the appraiser selected by the agent was not prejudiced, and a company whom the agent did to represent at the time, afterwards signed the appraisal agreement, the award was void as to such company.

New Jersey:

Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515 (N.J. Super. Ct. 2000) 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. Appraisers act on their own skill and knowledge, need not be sworn and need hold no formal hearings so long as both sides are given an opportunity to state their positions.

American Union Ins. Co. v. Stull Brothers Co., 126 N.J. Eq. 64, 7 A.2d 866 (N.J. Ch. 1979). Appraiser selected by the insured not rendered incompetent by the fact that he was not in a profession or occupation of contractor, builder or engineer or in the machinery business.

North Carolina:

Fireman's Fund v. Flint Hosiery Mills Inc., 74 F.2d 533, 10 A.L.R. 556 (C.C.A.4 (N.C.) 1935), cert. Denied 295 U.S. 748. Prior employment as an appraiser by the same party did not make the appraiser interested. The court also found that the umpire did not have to have experience with a particular type of machine damaged in the fire.

Pennsylvania:

Hozlock v. Donegal Companies, 745 A.2d 1261 (Pa.Super 2000). Where policy called only for "competent" appraisers, a contingent fee did not disqualify appraiser absent proof that partiality caused an unjust result.

Tennessee:

Hickerson v. German-American Ins. Co., 96 Tenn. 19, 193, 33 S.W. 1041 (Tenn. 1895). A disinterested appraiser would lack a pecuniary interest in the outcome and would not be biased or prejudiced.

Texas:

General Star Indemnity Co. v. Creek Village Apartments Phase V, Inc., 2004 Tex.App.LEXIS 10629 (Tex.Ct.App. 2004). An appraisal award made under terms of insurance policy is generally binding as to amount of loss, however, award may be disregarded where it is (1) not made in substantial compliance with the policy; (2) the result of fraud, accident, or mistake; or (3) made without authority.

Appraiser with a financial interest in the outcome of an insurance appraisal is not impartial. The question of appraiser's lack of impartiality raises a fact question which should be submitted to jury, and if the jury finds appraiser is impartial, it follows that appraisal award was not in compliance with the insurance policy and is not binding.

As can be seen from the preceding jurisdictional references, the most interesting controversies on selection of appraisers and umpires arise in the context of what is meant by "disinterested", "independent" or "impartial". Any objections to an appraiser on grounds of competence or interest must be made promptly or could be waived. See *Hyland v. Millers National*, 92 F.2d 462 (9th Cir. 1937); *Firemen's Fund Ins. Co. v. Flint Hosiery Mills, Inc.*, 74 F.2d 533 (4th Cir. 1935), *cert. den.* 295 U.S. 748 (1935); *Heller v. Hartz Mountain Industries*, 636 A.2d 599 (N.J. Super. Ct. Law Div. 1993); *Land v. State Farm Mutual Ins. Co.*, 600 A.2d 605 (Pa. Super. Ct. 1991); *Central Life Ins. Co. v. Aetna Cas. & Surety Co.*, 466 N.W.2d 257 (Iowa 1991); *Palmieri v. Ins. Co. of North America*, 413 N.Y.S.2d 461 (App. Div. 1979).

As to the umpire, the appraisers should agree upon the umpire before dealing with the substantive portion of the appraisal. This approach simply expedites the process in the event the appraisers cannot reach agreement on the amount of the loss and require the services of an umpire. See *Twait v. Farmers Mutual Hale Ins.Co.*, 91 N.W.2d 575 (Iowa 1958). The umpire does not become involved in the discussions, however, until after the appraisers fail to reach agreement. If the appraisers cannot reach agreement on an umpire, the courts generally will select one, through the filing of an appropriate request or petition by one of the parties to the insurance contract. In one of the World Trade Center cases, the federal judge threatened to appoint himself as the neutral umpire to whom the dispute was to be submitted if the appraisers could not agree. *Allianz Ins. Co. v. World Trade Center Properties LLC*, 2002 U.S. Dist. LEXIS 15272 (U.S.D.C., S.N.Y., August 19, 2002). Generally, avoidance of the issues involved with "cronyism" through agreement upon an umpire better serves the insurer and the insured. When appointed by the court for an appraisal proceeding, the umpire is generally not required to be a lawyer but any such umpire should have appropriate knowledge and expertise. *Liberty Mutual Fire Ins. Co. v. Hernandez*, 735 So.2d 587 (Fla. Dist. Ct. App. 1999). An umpire also must be competent and impartial. See generally, *Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F. Supp. 2d 1337 (M.D. Fla. 1998); *Weinger v. State Farm Fire & Cas. Co.*, 620 So.2d 1298 (Fla. Dist. Ct. App. 1993); and *Schwartzman v. London & Lancashire Fire Ins. Co.*, 2 S.W.2d 593 (Mo. 1927). See also, *Fiji v. New Hampshire Ins. Co.*, 166 Cal.Rptr. 774 (Ct. App. 1980); *Johnson v. Security Ins. Co. of Hartford*, 86 Cal.Rptr. 133 (Ct. App. 1970).

G. Waiver/Estoppel Concerns

It is important to note that entitlement to appraisal can be waived through action or inaction by the insurance company; therefore, if an insurer is in doubt as to the amount of the loss and wishes to participate in an appraisal, it should be certain to make timely demand in conformance with the provisions of its policy. *Lundy v. Farmers Group, Inc.*, 750 N.E.2d 314 (Ill. App. 2001); *Hobbs v. State Farm Mut. Auto. Ins. Co.*, 2002 Ill. App. LEXIS 166 (March 8, 2002). For example, in the case of *Phillips v. General Accident Ins. Co.*, 685 So.2d 27 (Fla. 3d DCA 1997) a Florida court ruled that a party can waive its right to arbitration (or appraisal) if it takes any action inconsistent with use of such a mechanism to resolve the dispute. An example of such action includes initiation of a lawsuit without previously seeking arbitration or appraisal. *ee Gray Mart, Inc. v. Fireman's Fund Ins. Co.*, 703 So.2d 1170 (Fla. Dist. Ct. App. 1997); *Preferred Mut. Ins. Co. v. Martinez*, 643 So.2d 1101, 1103 (Fla. Dist. Ct. App. 1994); *State Farm Fire & Cas. Co. v. Kaplan*, 596 So.2d 101 (Fla. Dist. Ct. App. 1992); and *Allstate Insurance Co. v. Singletary*, 540 So.2d 938 (Fla. Dist. Ct. App. 1989). See also, *Giuletti v. Conn. Ins. Placement Facility*, 534 A.2d 213 (Conn. 1987). A Court may find that the appraisal provision is, in fact, an arbitration provision; and in light of public policy favoring arbitration, order appraisal even after suit is filed. *Vanguard Underwriters Ins. Co. v. Smith*, 999 S.W.2d 448 (Tex. Ct. App. 1999). Another example of such action includes the insurance company exercising its right to repair a damaged vehicle, thereby rendering it impossible for both the insurance company and insured to comply with the appraisal clause. *Weiss v. Ins. Co. of Pa.*, 497 So.2d 285 (Fla. Dist. Ct. App. 1986).

Other problems with waiver or estoppel involve reservations of rights regarding coverage issues. A majority of jurisdictions still appear to deem a denial of all liability under a policy of insurance as a waiver of the right to appraisal. See *44 Am. Jur. 2d* §1687 (1992); *J. Wise Smith & Assoc., Inc. v. Nationwide Mut. Ins. Co.*, 925 F. Supp. 528 (W.D. Tenn. 1995). In *Spearman Industries, Inc. v. St. Paul Fire & Marine Ins. Co.*, 109 F. Supp. 2d 905 (N.D. Ill. 2000). the policyholder submitted a claim for roof damage. The insurer denied the claim under the exclusion for wear and tear. When the policyholder filed suit, the insurance company sought dismissal on the grounds that appraisal must be completed before coverage is determined. The court disagreed, stating that, "(1) the parties are disputing the cause of the damage and not the value of the damage and (2) the policy does not require an appraisal on the matter of causation." *Id.* at 907. As such, the case was allowed to proceed without an appraisal as to the amount of loss.

In *Gilbert v. Southern Trust Ins. Co.*, 555 S.E.2d 69 (Ga. Ct. App. 2001) a Georgia court held that the insurer had waived strict compliance with the requirement for timely choosing an appraiser. The court found that the insured had not materially breached the policy by refusing to name an appraiser until the eve of the expiration of the contractual suit limitation period, which was six months after the insurer had demanded an appraisal. Correspondence between the attorneys for the insurer and the insured during the six-month period suggested that the company was not strictly relying upon the requirement that the insured name his appraiser within 20 days after receiving the written demand from the insurer.

V. WHAT IS THE SCOPE OF THE APPRAISAL PROCESS?

Jurisdictions vary with respect to what issues may be addressed in the appraisal process. A sampling of the approaches follows:

A. *Appraisal is Limited to Issues of “Valuation.”*

Arizona: *Hanson v. Commercial Union*, 150 Ariz. 283, 723 P.2d 101 (Ariz.App. 1986). Court overturned appraisal award where appraisers exceeded their authority by determining coverage issues such as deductibles and interest on the award.

California: *Kacha v. Allstate Ins. Co.*, 140 Cal.App.4th 1023 (2006). The insured did not waive the scope of the appraisers’ jurisdiction established in California Insurance Code §2071 and *Safeco Ins. Co. v. Sharma*, 160 Cal.App.3d 1060 (1984) by agreeing to an award form that stated, “[The panel has] made the following determination and award of damage, if any, to the structure of the insured’s residence attributable to the fire...” and was entitled to a determination of the amount of damage, without regard to its cause. Thus, the panel, which awarded zero for certain items that were clearly damaged, was found to have exceeded its authority. But see *Knapp v. Allstate Ins. Co.* (9th Cir. 1998) 1998 U.S.App.LEXIS 959 (appraisers did not exceed their authority by appraising the value of damage caused by the Northridge earthquake, leaving out of the award damage they concluded was preexisting).

Appalachian Ins. Co., v. Rivcom Corp., 130 Cal.Ap.3d 818, 182 Cal.Rptr. 11 (1982). The long recognized statutory appraisal procedure did not deprive the insured of jury trial rights except with regard to setting the dollar amount of the loss under the policy. Insured retains the right to pursue its separate civil action, and it could also maintain a separate action should the insurer fail to pay the amount of the loss set by the appraisers.

Jefferson Ins. Co., v. Superior Court, 3 Cal.3 398, 475 P.2d 880 (1970). The court held that the appraisers could not determine actual cash value” meant as this was a legal issue beyond the scope of the appraisal process.

Hughes v. Potomac Ins. Co., 199 Cal.App.2d 239, 18 Cal.Rptr. 650 (1962) (disapproved on other grounds). Severe rain loss left dwelling overhanging a cliff and repair required to supporting land; court held that appraisers could not determine what was or was not part of the “dwelling.”

Lewis Food Co., v. Fireman’s Fund Ins. Co., 207 Cal.App2d 515, 24 Cal.Rptr. 557 (1962). Business interruption loss; the court refused to uphold an appraisal award where the appraisers had had to determine whether all of the insured’s operation at the loss location was insured.

Florida:

Kendall Lakes Townhomes Developers, Inc. v. Agric. Excess & Surplus Lines Ins. Co., 2005 Fla. App. LEXIS 15692 (Fla. 3rd DCA 2005) When the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid. In that circumstance, the appraisers are to inspect the property and sort out how much is to be paid on account of a covered peril. In doing so, they are to exclude payment for a cause not covered, such as normal wear and tear, dry rot, or various other designated, excluded causes. In other words, 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 that there is a covered loss, the amount of which is disputed.

Liberty American Insurance Co. v. Kennedy, 890 So.2d 539 (Fla. 2d DCA 2005). (Florida appellate court stating Eleventh Circuit in *Three Palms Point, Inc.* misinterpreted Florida law.) A challenge of coverage under property insurance policy is exclusively a judicial question. Submission of claim to appraisal does not foreclose an insurer's subsequent challenge on the issue of coverage. If court decides coverage exists, dollar value agreed upon in appraisal process will be binding upon both parties. Coverage questions are outside the scope of appraisal proceedings. Coverage issue may exist even where the insurer has not denied the claim as a whole, and therefore, issue of coverage is not necessarily a matter of all or nothing.

Delisfort v. Progressive Express Insurance Co., 785 So.2d 734 (Fla. Dist. Ct. App. 2001). Insured's dispute over "betterment" deduction taken by auto insurer was not appraisable because the issue was not factual, but was a legal question of insurer's rights under the policy.

Gonzalez v. State Farm and Casualty Company, 805 So.2d 814 (Fla. App. 3 Dist 2000). Appraisers could not determine if loss was caused by blasting (covered) or settling (excluded). The court distinguished this from *Licea* where coverage was acknowledged for some portions of the loss, because in this case, all coverage was denied.

Florida Select Insurance Company v. Keelean, 727 So.2d 1131 (Fla. 2nd DCA 1999). The cost of repair or replacement was an appraisable issue.

Johnson v. Nationwide Mut. Ins. Co. & State Farm Fire & Cas. Co. v. Gonzalez, 828 So.2d 1021 (Fla. 2002). Two separate cases consolidated by the Florida Supreme Court for purposes of determining whether the damage was caused by an event or incident that was covered under the policy. The Second District and Third District Court of Appeal reached differing results. The State Supreme Court held that whether a claim was

covered under an insurance policy was a judicial question, not a question for appraisers.

State Farm Fire & Cas. Co. v. Wingate, 604 So.2d 578 (Fla. 4th DCA 1992). The question of coverage is one to be decided by the Court.

New Amsterdam Cas. Co. v. J.H. Blackshear, Inc., 116 Fla. 289 (Fla. 1934). The purpose of an appraisal is to determine the amount of damages after coverage has been extended by the insurer.

Illinois:

Lundy v. Farmers Group, Inc., 322 Ill.App.3d 214, 750 N.E.2d 314, (Ill.App. 2001). Class action by insureds over substandard automobile parts did not present on appraisable issue because it required interpretation of “like kind and quality.”

Richter v. Western States Ins. Co., 264 Ill.App.3d 230, 636 N.E.2d 1112 (Ill.App. 1964). Fire loss under a commercial policy; court held that appraisers and umpires did not exceed their authority in interpreting policy not to provide coverage for higher cost of replacing inventory destroyed in fire.

Minnesota:

Mork v. Eureka-Security Fire & Marine Ins. Co., 230 Minn. 382, 42 N.W.2d 33 (Minn.Sup. Ct. 1950). Loss due to freezing of pipes; court held that determination of coverage by appraisers appointed by insured and insurer was not final.

New Jersey:

Rastelli Brothers, Inc. v. Netherlands Insurance Company T/A Peerless Insurance, 68 F.Supp.2d 440 (1999). Appraisal cannot decide coverage issues.

Elberon Bathing Co., Inc. v. Ambassador Ins. Co., 77 N.J.1, 389 A.2d 439 (N.J. 1978). Fire loss; court set aside appraisal award based solely on replacement cost without consideration of depreciation that did not measure “actual cash value,” which the policy required appraisers to determine; court determined that “broad evidence rule” was measure of “actual cash value” in New Jersey, that appraisal only determined “amount of loss” and not liability of insurer, and if trial court found liability on the part of insurer, appraisers should be directed to determine actual cash value according to broad evidence rule.

Feinbloom v. Camden Fire Ins. Assoc., 54 N.J. Super. 541, 149 A.2d 616 (N.J. Super. 1959). Fire loss; court ruled that insured was not bound by appraisal award because policy did not contemplate the submission to appraisers of questions of law, and because appraisal did not address question of whether insureds were only limited to actual cash value where they had suffered a total loss.

New York: *Indian Chef, Inc. v. Fire & Cas. Ins. Co. of Conn.*, (2003 U.S. Dist. LEXIS 2199) New York courts recognize the role of appraisals in resolving disputes between an insurer and insured where the disagreement is over the value or amount of loss. The appraisal process, unlike an arbitration, resolves only a valuation question leaving all other issues for resolution at a plenary trial. Appraisers are not empowered to address disputes arising from questions of coverage or liability. A dispute between the parties that goes to coverage under the policy and can only be resolved by analysis and application of the policy is not appropriate for appraisal.

Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 279 F.Supp.2d 235 (S.D.N.Y. 2003). As a general matter under New York law, questions concerning valuation of loss, as opposed to coverage under an insurance policy must be submitted to appraisal.

In re Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (N.Y. 1955). Determination of amount of loss in a fire claim through appraisal is not an arbitration proceeding.

Tennessee: *Merrimack Mutual Fire Ins. Co. v. Batts*, 59 S.W.3d 142 (Tenn. Ct. App. 2001). Appraisal only determines the monetary value of property damage and is not intended to decide other issues such as the cause of the damage or liability.

Texas: *Lundstrom v. United Servs. Auto. Ass'n - CIC*, 2006 Tex. App. LEXIS 605 (Tex. App. 2006) Appraisers exceed their authority when they engage in making the legal determination of what is or is not a covered loss based on their determination of what caused the loss or a portion of it.

Utah: *Miller v. USAA Casualty Ins. Co.*, 44 P.3d 663 (Utah 2002). Appraisers could determine the amount of loss with respect only to damage to covered property and not the insured's extra-contractual claims for bad faith and emotional distress.

B. *Some Courts Recognize That Valuation Issues May Encompass Analysis of Causation.*

Delaware: *AIU Insurance Co. v. Lexes*, 815 A.2d 312 (Del. 2003). Appraisers are authorized to determine the cause of loss in deciding the "amount of loss" but questions about coverage and policy exclusions are legal questions for the courts.

Cigna Ins. Co. v. Didimoi Property Holdings, 110 F.Supp.2d 259 (D.Del. 2000). Appraisers could determine what damages resulted from insured fire because causation was necessarily part of determining the amount of

loss. Causation did not involve construction of policy or coverage questions beyond appraisers' authority.

Florida: *Nationwide Mutual Insurance Company v. Johnson*, 774 So.2d 779 (Fla. Dist. Ct. App. 2000). Agreeing with *Licea* and allowing appraisers to determine causation: sinkhole or earth movement. Coverage could be decided after amount of loss and causation were determined by appraisers.

State Farm Fire & Casualty Company v. Licea, 685 So.2d 1285 (Fla. 1996). In order to determine "amount of loss," appraisal clause also requires determination of cost of repair and whether a covered peril or non-covered peril caused required repair.

Massachusetts: *Fox v. Employers Fire Ins. Co.*, 330 Mass. 283, 113 N.E.2d 63 (Mass. 1953). Appraisal award upheld where appraisers decided that roof damage was caused by lightning versus wind.

Mississippi: *Munn v. National Fire Ins. Co.*, 237 Miss. 641, 115 So.2d 54 (Miss. 1959). The segregation of wind-related damages and pre-existing damage to a structure was not appropriate for the appraisal panel.

Ohio: *Lakewood Manufacturing Co. v. Home Ins. Co.*, 24 Ohio Misc. 244, 422 F.2d 796 (6th Cir. Ohio 1970). Court upheld decision of appraisers as to which part of the business interruption was caused by fire, a covered peril, and which part was caused by subsequent labor activity which was an excluded peril.

C. Courts Prohibiting Appraisers from Determining Scope of Loss.

Massachusetts: *Fox v. Employers Fire Ins. Co.*, 330 Mass. 283, 113 N.E.2d 63 (Mass. 1953). Where insurance policy covered damage caused by lightning, but not by wind, and lightning tore a hole in the insured's roof, and wind tore off the roof, court upheld appraisal award for \$317.00 for the hole only, against the insured's contention that the appraisers should have evaluated all of the damage, leaving the trial court to decide what should be paid to the insured.

Mississippi: *Munn v. National Fire Ins. Co.*, 237 Miss. 641, 115 So.2d 54 (Miss. 1959). Court held that appraisers were permitted to segregate agreed upon damage to the structure between wind-related and pre-existing damage; dissent argued that to preclude appraisers from determining pre-existing damage would emasculate the appraisal clause.

Missouri: *Hawkinson Tread Fire Serv. Co. v. Indiana Lumbermans Mutual Ins. Co.*, 362 Mo. 823, 245 S.W.2d 24 (Mo. 1951). Court ignored demand for appraisal made prior to litigation on the theory that the real issue

separating the parties was not the actual calculation of the insured's removal of its operation to other premises after the loss.

Rhode Island: *Waradzin v. Aetna Cas. & Sur., Co.*, 570 A.2d 649 (R.I. Sup. Ct. 1990). Court upheld confirmation of appraisal award that included prejudgment interest.

D. Cases Allowing Appraisers to Determine Scope of Repairs.

Florida: *Florida Farm Bureau Cas. Ins. Co. v. Sheaffer*, 687 So.2d 1331 (Fla. Dist. Ct. App. 1997). Loss due to Hurricanes Erin and Opal; court ruled, over objection of insureds, that appraisers could determine whether certain ceramic tiles in insureds' roof should be repaired, or whether entire roof should be completely replaced.

Hawaii: *Wailua Associates v. The Aetna Casualty & Surety Company*, 904 F.Supp. 1142 (D.Hawaii 1995). Hurricane Iniki – Coco Palms Resort – Kauai; where it was undisputed that the policy provided coverage for the increased cost of repair/replacement caused by the enforcement of building codes and laws, the court held that the appraisal panel had the discretion to consider codes and regulations.

E. Determination of Replacement Cost and Actual Cash Value by the Appraisal Panel.

California: *Unetco Industries Exch. V. Homestead Ins. Co.*, 57 Cal.App.4th 1459, 67 Cal.Rptr.2d 784 (1997). Earthquake loss; court held that with respect to an earthquake policy that provided that the appraisers should state separately the actual cash value at the time of the loss and the amount of the loss, and where an endorsement substituted the term "replacement cost" for "actual cash value," court held that appraisers could determine the replacement cost of the property as well as the amount of the loss.

Jefferson Ins. Co. of New York v. Superior Court, 3 Cal.3d 398, 475 P.2d 880, 90 Cal.Rptr. 608 (1970). Court held that appraiser could not determine the meaning or formula for calculating actual cash value.

Indiana: *FDL, Inc. v. Cincinnati Ins. Co.*, 135 F.3d 503 (7th Cir. Ind. 1998). Fire loss; court ruled that dispute relating to replacement cost of lost inventory, i.e., cost to replace or market value, could be resolved in the appraisal process.

F. *Loss of Use Claims.*

Florida:

Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 250 F. Supp. 2d 1357 (D. Fla. 2003) Under Florida insurance law, "direct physical loss" includes more than losses that harm the structure of the covered property. It also stands for the proposition that repair costs may include more than costs to repair the structure of a building. This Court observed that loss of use coverage primarily compensates insureds when a covered loss makes the premises uninhabitable or unusable. See, e.g., *Highlands Ins. Co. v. Kravec*, 719 So. 2d 320, 321-22 (Fla. 3d DCA 1998). While loss of use coverage arguably extends to loss of use when the repair of the covered loss makes the premises uninhabitable or unusable, the primary purpose of having such provision is to cover losses when the loss itself makes the premises uninhabitable or unusable.

Highlands Insurance Company v. Kravec, 719 So.2d 320 (Fla. Dist. Ct. App. 1998). Appraisers improperly awarded Additional Living Expense to third-party purchaser of hurricane-damaged property considering purchaser did not own property and could not have incurred ALE during policy period.

As can be seen from the preceding information, it is imperative to know the approach to appraisal within the jurisdiction for the subject claim in order to make informed decisions.

VI. HOW DOES THE APPRAISAL PROCESS WORK?

Different jurisdictions have varying interpretations regarding the process of appraisal. Some examples follow:

A. *Some States Hold that Appraisal is a Form of Arbitration and Arbitration Statutes Govern the Proceedings.*

California: Code of Civ. Proc. § 1280, et seq.

Connecticut: *Covenant Ins. Co. v. Banks*, 413 A.2d 862 (1979). Our definition of arbitration as “the voluntary submission...of an existing or future dispute to a disinterested person or persons for final determination”... is broad enough to include the appraisal clause [required by Connecticut law].

Ohio: *Cousino v. Stewart*, 2005 Ohio 6245, P27 (Ohio Ct. App. 2005) The difference between appraisal and arbitration presents what seems like a moving target. Some courts have concluded that there is no difference or that the difference is immaterial. Others hold that when the only question presented is the amount of the loss, it is an appraisal. It is suggested that the difference is in the formality of the inquiry: an appraisal is conducted by personal examination and observation--an arbitration implicates solicitation of testimony from witnesses. The scope of the inquiry may be determinative: arbitration occurs when the parties intend that the arbitration determine the whole controversy, including ultimate liability. Alternatively, an arbitration may encompass an entire controversy or be tailored to a particular legal or factual dispute. An arbitration award must be final, binding and without qualification. A determination which is not, is not the result of an arbitration. Both appraisal and arbitration are creatures of contract, and may be defined and classified under ordinary contract principles.

Michigan: *Beck v. Michigan Basic Property Insurance Assoc.*, 2003 Mich.App.LEXIS 577 (Mich. Ct. App. 2003). An appraisal clause in a fire policy which provides for a determination by an umpire constitutes a common-law arbitration agreement. Michigan law requires that in the event that the parties cannot agree on the amount of the loss, either party may request an appraisal and that appraisal must occur prior to commencement of a lawsuit.

In order to show that an insured waived the appraisal provision in the insurance contract, it must show that the insurer delayed substantially in requesting appraisal so as to have waived it. In the present case, the evidence indicates that the insurer made several attempts to move forward with appraisal of the insured’s property, and the insured presented no evidence that delay was caused by anything other than by his own actions

or by the actions of the appraiser he hired. Thus, the insurer did not waive the appraisal provision.

B. Some Jurisdictions Hold that Insurance Appraisals are Not a Form of Arbitration.

Florida: *Nationwide Mutual Fire Ins. Co. v. Schweitzer*, 872 So. 2d 278 (Fla. 4th DCA 2004). An appraisal provision for property damage in a homeowner's insurance policy is not an agreement to arbitrate. Therefore, an order granting or denying an appraisal is not appealable as an order involving entitlement to arbitration. *See also Cotton States Mutual Ins. V. D'Alto*, 879 So. 2d 67 (Fla. 1st DCA 2004).

Allstate Ins. Co. v. Martinez, 833 So.2d 761 (Fla. 2002). In a dispute over whether a homeowner's insurance policy appraisal clause required formal arbitration governed by the Florida Arbitration Code, the State's Supreme Court followed their decision in *Suarez*, holding that the appraisal clause in the homeowner's insurance policy provided for informal appraisal proceedings and did not represent an agreement to submit to formal arbitration proceedings.

Allstate Ins. Co. v. Suarez, 833 So.2d 762 (Fla. 2002). An unambiguous appraisal provision allowed for an informal appraisal proceeding and was not a formal arbitration hearing pursuant to Section 682.06, Florida Statutes.

Scottsdale Ins. Co. v. University at 107th Avenue, Inc., 827 So.2d 1016 (Fla. 3rd DCA 2002). The purpose of post-loss obligations was to provide the insurer with an independent means by which to determine the amount of loss, as opposed to relying solely on the representations of the insured.

Illinois: *Austin v. Illinois Farmers Ins. Co.*, 351 Ill.App.3d 931; 815 N.E.2d 435 (Ill.App.Ct. 2004). 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. Where plaintiff's claims are focused upon alleged fraud and breach of the policy terms by the insurance company, these claims present more than a disagreement between parties concerning actual value of claim, and therefore, dispute is not covered by the appraisal clause.

Indiana: *Atlas Construction Co. v. Indiana Ins. Co.* (1974) 160 Ind.App. 33, 309 N.E.2d 810.

Michigan: *Auto-Owners Ins. Co. v. Kwaiser*, (Mich.Ct. App. 1991) 476 N.W.2d 467.

Mississippi: *Munn v. National Fire Ins. Co.*, (Miss. 1959) 115 So.2d 54.

New Jersey: *Elberon Bathing Co. v. Ambassador Ins. Co.*, (1978) 77 N.J. 1, 1, 389 A.2d 439.

Texas: *Wells v. American States Preferred Ins. Co.*, (919 S.W.2d 679 (Tex. Ct. App. 1996).

Utah: *Salt Lake Tribune Publishing Co., LLC v. Management Planning, Inc.* 390 F.3d 684 (Utah 10th Cir. 2004). Federal law supplied the standard for determining whether appraisal was an arbitration within the meaning of the Federal Arbitration Act, and under federal law, the court must determine if the process at issue sufficiently resembles classic arbitration to fall within the Act's purview. Central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling the dispute. Appraisal did not constitute an "arbitration" because appraisal would not necessarily settle the parties' dispute.

Miller v. USAA Casualty Ins. Co., 44 P.3d 663 (Utah 2002)

C. *Are Hearings to be Conducted? Cases Where a Hearing Was Required.*

Colorado: *St. Paul Fire & Marine Ins. Co. v. Walsenburg Land & Dev. Co.*, 86 Colo. 72, 278 P. 602 (Colo. Sup. Ct. 1929) Fire loss to automobiles; court invalidated appraisal of value of cars destroyed by fire where there was no hearing held and insured was not given opportunity to be heard.

Montana: *St. Paul Fire & Marine Ins. Co. v. Tire Clearing House, Inc.*, 58 F.2d 610 (8th Cir. Mo. 1932). Court held that where fire had destroyed or damaged insured automobile tires, tubes and accessories, and the appraisers and umpires had no accurate information of their own, they were under an obligation to the parties to provide an opportunity to produce whatever evidence they possessed that would aid in the determination of the value of the property lost.

New York: *Kaiser v. Hamburg-Bremen Fire Ins. Co.*, 69 N.Y.S. 344 (N.Y. Sup. Ct. 1901). Fire loss; court held that although appraisals have been regarded as informal proceedings where appraisers are not obliged to give the claimant any formal notice or to hear evidence, unless it is clear that the insured waives it, he must have notice or knowledge of the meeting of the appraiser, and an opportunity to draw their attention to the items of his loss, and make representations and explanations to them concerning the nature thereof, and thus insure a consideration of his entire claim.

New Jersey: *Drescher v. Excelsior Ins. Co.*, 188 F. Supp. 158 (D.N.J. 1960). Fire loss; court held that where property was totally destroyed, the appraisers should give notice to the parties of the appraisal proceedings and let them present their respective claims in each other's presence.

Oklahoma: *Aetna Ins. Co. v. Murray*, 66 F.2d 289 (10th Cir. Okla. 1933). Fire loss to business property; court held that appraisers' award was invalid because of their failure to afford the insured an opportunity to present evidence as to the value of the property destroyed.

South Carolina: *Cleveland v. Home Ins. Co.*, 150 S.C. 289, 148 S.E. 49 (1929). Court held that if interested parties requested to be permitted to appear before appraisers and make statements or offer evidence with respect to the loss or damage, a refusal to grant such a request would vitiate any award made by the appraisers.

D. Cases Where No Hearing Was Required.

Florida: *Allstate Ins. Co. v. Martinez*, 790 So.2d 1151 (Fla. 3rd DCA 2001). Appraisal does not require formal hearing process under Arbitration Code.

Allstate Ins. Co. v. Suarez, 786 So.2d 645 (Fla. 3rd DCA 2001). Fundamental nature of appraisal relieves appraisers of requirement to hold a formal hearing pursuant to Arbitration Code.

Georgia: *Pacific National Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d. 765 (Ga. App. 1952). Court ruled that where neither the policy provisions relating to appraisal, nor the agreement of appraisal stipulated that the parties should be afforded an opportunity to be present at the meeting of the appraisers and present evidence or be given notice of the meeting, neither a hearing nor notice thereof need be given the parties.

Iowa: *Vincent v. German Ins. Co.*, 120 Iowa 272, 94 N.W. 458 (1903). Court held that where persons selected as appraisers were experienced contractors and builders and the contract clearly indicated that only an appraisal was contemplated, their failure to hear evidence did not void the award.

Pennsylvania: *Hozlock v. Donegal Companies*, 745 A.2d 1261 (Pa.Super 2000). Where policy did not specifically require a hearing, the appraisers were not required to hold one, and the lack of hearing did not make process unfair.

Utah: *Phoenix Ins. Co. v. Everfresh Food Co.*, 294 F. 51 (8th Cir. Utah 1923). Court held that where the function of experts' evaluation of fire loss was that of appraisers rather than arbitrators and they had before them a complete record of the inventory and market value of the raw materials and goods which were completely destroyed in a fire, and such goods had a recognized market value at the time of the fire, they were under no obligation to afford the insured's general manager an opportunity to present evidence regarding the value of goods and materials lost.

E. Cases on the Conduct of Proceedings.

- California:** Cal. Ins. Code § 2071 has been amended and now sets forth certain parameters for the conduct of an appraisal:
- a. Mandatory nature unclear:** Traditional “Appraisal” provisions are drafted such that the procedure is mandatory once demanded by either side. Under the new §2071, the process is triggered “Where the request [for appraisal] is accepted.” In addition, in the event of a government-declared disaster, appraisal may be requested but shall not be compelled.
 - b. Proceedings are “informal”:** §2071 states that the proceedings are “informal” meaning no formal discovery shall be conducted, including depositions, interrogatories, requests for admission, or other forms of formal civil discovery, and no formal rules of evidence apply, and no court reporter shall be used.
 - c. Award must be itemized:** §2071 provides that the award must be itemized, stating separately the actual cash value and loss to each item.
- Florida:** *Diaz v. American Bankers Ins. Co. of Florida*, 662 So.2d 416 (Fla. 3rd DCA 1995). Insurer’s notification to the insured of its appraiser 21 days after the hearing on the insurer’s motion to compel appraisal was not so inconsistent with the time provided for notification under the policy that its failure to so act constituted a waiver.
- Hawaii:** *Wailua Associates v. The Aetna Casualty & Surety Company*, 904 F.Supp. 1142 (D.Hawaii 1995) Hurricane Iniki – Coco Palms Resort – Kauai; the court held that it was beyond the scope of the court’s powers to issue a declaration as to the procedures the appraisal panel must follow. The parties should attempt to agree to a mutually acceptable set of procedures. If the parties cannot agree, the umpire should determine the procedures, so as to provide both parties a fundamentally fair hearing, including adequate notice and opportunity to present evidence and arguments.
- Indiana:** *Jupiter Aluminum Corporation v. The Home Insurance Company*, (1999) 52 F.Supp.2d 885. Umpire’s separate appraisal of insured’s loss was appropriate method of resolving differences between appraisers.
- Oregon:** *Director v. South Carolina Ins. Co.*, 49 Ore. App. 179, 619 P.2d 649 (Ore. App. 1980). Court ruled that it would not determine the meaning, application or validity of various policy provisions relevant to determining amount of the loss before appraisal, which had been demanded by insurer.

Texas:

Fisch v. Transcontinental Ins. Co., 356 S.W.2d 186 (Tex. App. 1962).
Fire loss; court reversed judgment in favor of insurer where there was no failure to agree between insured's appraiser and insurer's appraiser, and insurer's appraiser and umpire simply came to an agreement on the amount of the insured's loss.

VII. WHAT SHOULD BE ON THE APPRAISAL AWARD?

See the appraisal clause of the policy. The Standard Form Appraisal Clause provides:

The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; ... An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss.

A. What Constitutes the Itemization of an Award?

- Alabama:** *Commercial Union Ins. Co v. Ryals*, (1978 Ala.) 355 So.2d 684. An award will not be invalidated where the policy provided for an itemized determination of the amount of the loss, and the award was not itemized to account for components which constituted the building damage; it was sufficient to itemize the loss according to the various sections of the coverage.
- Kansas:** *Boutross v. Palatine Ins. Co.*, (1917) 100 Kan 574, 164 P 1069. Although the terms of the submission required that the actual cash value of articles be determined, and the damage be placed on each separately, a failure to comply strictly therewith did not render the award void.
- Michigan:** *Arkin Distributing Co., v. American Ins. Co.*, (1978) 85 Mich. App. 359, 271 N.W.2d 430. Appraisal award for fire loss was properly itemized, under fire and other policies not defining “item,” where appraisal panel used same categories as those in policy for setting amount of premium, and where award followed painstaking process of investigation.
- Mississippi:** *Mitchell v. Aetna Casualty & Surety Co.*, (1978) 5th Cir. 579 F.2d 342, citing Couch 2d. In action by insured against insurers to recover for damage done to buildings by hurricanes, in light of fact that face of insurance policies listed each building as a whole as an “item,” requirement that appraisers itemize loss would be construed as calling for statement of actual cash value and loss to each building as a whole rather than to constituent parts of buildings.
- Missouri:** *Phoenix Assur. Co. v. Singer*, (1964) 8th Cir. 331 F.2d 10. Where arbitration award was made upon the form provided by the fire insurer and it complied with the policy provisions and with the arbitration agreement which required separate showing of actual cash value and loss on each item, the word “item” referred to items as listed in the policy and it was not necessary to make a detailed specification of all the minute elements of each item.

Security Printing Co. v. Westchester Fire Ins. Co., (1920) 204 Mo.App. 390, 221 S.W. 430; *Security Printing Co. v. Connecticut Fire Ins. Co.*, (1922) 209 Mo.App. 422, 240 S.W. 263; *Security Printing Co. v. Hartford Fire Ins. Co.*, (1922) Mo. App. 245 S.W. 1089. An award is void where the policy called for an appraisal and estimate of the loss “by items and in detail,” but instead the appraisers merely made an award stating the value of the loss in the aggregate, without reference to items, or even classes, of property destroyed or damaged.

Pennsylvania: *Riley v. Farmers Fire Insurance Company*, 735 A.2d 124 (Pa.Super. 1999). Umpire was not required to provide itemization of snow and ice loss under the policy language which had been modified from the standard form. Statutory language would have required itemization of a fire loss.

Rhode Island: *Campbell v. Union Mut. Fire Ins. Co.*, (1924m RI) 124 A. 469, reh. den. (RI) 125 A. 273. Where policy covers real estate, not personal property, so there is but one item to appraise, award may be for gross sum without itemizing each of the constituent elements of the building.

South Dakota: *Lee v. Farmers Ins. Co.*, (19480 72 S.D. 127, 32 N.W.2d 188). An award which failed to determine the sound value of hay immediately preceding the fire, where the arbitration clause requires that the appraisers shall make an award “stating separately sound value and damage” of the property, is invalid.

B. State Laws May Determine Proper Service of the Award. For Example:

California: Code of Civ. Proc. § 1283.6 Service of Award.

The neutral arbitrator [umpire] shall serve a signed copy of the award on each party to the arbitration [appraisal] personally or by registered or certified mail or as provided in the agreement.

VIII. WHAT IS THE EFFECT OF THE APPRAISAL AWARD?

A. Cases Enforcing the Loss Payment Provision:

Indiana: *Jupiter Aluminum Corp. v. Home Ins. Co.*, 225 F.3d 868 (7th Cir. 2000) (Ind. law). Policy provision stating that appraisal “shall determine” amount of loss is binding absent unfairness or injustice even though provision does not state that appraisal is binding. Fact that appraised amount was less than figures submitted by either party were not unfair.

Carroll v. Statesman Ins. Co., (1986, Ind. App.) 493 N.E.2d 1289, remanded (Ind. 509 N.E.2d 825). Insurer was obligated to make payment on umpire’s appraisal award within 50 days under the terms of the policy, absent a showing of fraud, mistake, misfeasance, or other prejudicial defect.

Texas: *Lundstrom v. United Servs. Auto. Ass’n - CIC*, 2006 Tex. App. LEXIS 605 (Tex. App. 2006) Appraisal awards made under the provisions of an insurance contract are binding and enforceable, and a court will indulge every reasonable presumption to sustain an appraisal award. The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court

B. At Least One Court Has Distinguished the Amount of Loss From the Insurer’s Liability.

Indiana: *Weidman v. Erie Ins. Group*, 745 N.E.2d 292 (Ind. App. 2001) Amount of loss determined by appraisal did not necessarily equal insurer’s liability because insured had to show cost actually incurred for necessary repairs.

C. Several Decisions Discuss the Award of Interest and Costs In Appraisal.

Florida: *Travelers Indem. Ins. Co. v. Meadows MRI, LLP*, 900 So. 2d 676 (Fla. 4 DCA 2005) *Court Held that the goal of the Florida Fee Statute* is to place the insured in the place it would have been if the insurer had reasonably paid the claim without causing the insured to retain counsel and incur obligations for attorney’s fees, taken in conjunction with the rule of law that the insured could have recovered any attorneys’ fees incurred in reaching a settlement of its lawsuit, had a settlement been reached, we see no rationale for not extending Florida Statute to cover an award of attorney’s fees associated with an expensive and drawn out appraisal due to Travelers’ disputed value estimation.

Allstate Ins. Co. v. Blanco, 791 So.2d 515 (Fla. 3rd DCA 2001). Insured was entitled to interest from date of appraisal award or later date as allowed by loss payment provision as opposed to date of loss.

Ajmechet v. United Automobile Ins. Co., 790 So.2d 575 (Fla. 3rd DCA 2001). Court held that Florida Statute entitled insured to attorney's fees incurred in appraisal process demanded by insurer after suit was brought by insured. Court also held that appraisal was not condition precedent to insured's suit.

Aries Ins. Co. v. Hercas Corp., 781 So.2d 429 (Fla. 3rd DCA 2001). Pre-judgment interest was only allowed from the date of the appraisal award, as that was the date on which the damages were liquidated.

Liberty Mutual Ins. Co. v. Alvarez, 785 So.2d 700 (Fla. 3rd DCA. 2001). Insured was not entitled to interest from time of appraisal demand. No interest awarded where insurer paid within time allowed by loss payment provision. Florida statute authorized attorney fees for insured.

Nationwide Property & Casualty Ins. v. Bobinski, 776 So.2d 1047 (Fla. 5th DCA 2001). Insured was not entitled to attorney fees incurred during appraisal process where suit had not been filed prior to payment by the insurer.

Michigan:

R. D. Management Corp. v. Philadelphia Indemnity Ins. Co., 302 F.Supp.2d 728 (E.D.Mich 2004). The Michigan Supreme Court has held that when authority to award interest exists in appraisers and umpires, courts may not set aside an award of interest, nor may courts supplement an award that is silent on the element of interest since it is presumed that arbitrators considered interest as an element of damages and rejected it.

The appraisal language in the policy and Michigan statute does not confer authority to award common-law interest as an element of damages. Rather, the appraisal language defines the method of determining value of damaged property and insured's compensable loss resulting from that damage. There is no provision, however, for awarding an amount to compensate insured for the time value of money pending settlement of claim, thus appraisers had no authority to read in such a provision.

Texas:

Brownlow v. United Servs. Auto. Ass'n, 2005 Tex. App. LEXIS 1987 (Tex. App. 2005) The contract between the Insured and Insurer specified that an appraisal process would be the remedy for any disagreement regarding the amount of loss and that the decision reached by the umpire would set the amount of loss and such an award would be binding. The insurer participated in the appraisal process and tendered the amount awarded by the umpire. The appellate court concluded that because the insurer

complied with the requirements of the contract, it could not be found to be in breach. As such, insured was unable to recover attorney's fees.

D. *An Appraisal Award May Not be Set Aside Absent a Strong Showing by the Moving Party.*

Arkansas: *Globe & Rutgers Fire Ins. Co. v. Horner*, (1924) 166 Ark. 102, 265 S.W. 351. An award made pursuant to arbitration provision of a fire policy will not be set aside unless the result of fraud, mistake, or the tortfeasance or malfeasance of the appraisers.

California: *Edison Textiles, Inc. v. Topa Insurance Co.*, 2004 Cal. App. Unpub. LEXIS 5243 (Cal. Dist. Ct. App. 2004). An appraisal award may be vacated when the appraisers exceed their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. Since the umpire clearly exceeded his powers by deciding factual issue not correctly before him, and the award cannot be corrected without affecting the merits of the decision, the court necessarily abused its discretion in granting petition to confirm the award.

Michael v. Aetna Life & Casualty Ins. Co., 88 Cal.App.4th 925, 106 Cal.Rptr.2d 240 (2001). Award upheld. Insurer's appraiser was statutorily required to disclose any facts which might cause a reasonable person to doubt he could act impartially, but limited prior work for insurer and insurer's business with other members of appraiser's accounting firm lacked continuous or substantial quality that would require disclosure.

Safeco Insurance Co. of America v. Sharma, 160 Cal. App.3d 1060, 207 Cal. Rptr. 104 (1984). Theft of personal property: court reversed confirmation of appraisal award because the appraisers did not accept the insured's description of the items claimed stolen ("set 36 Rajput miniature paintings") and based its award on its own determination of the identity of the property stolen ("36 [unmatched] paintings").

Klubnikin v. California Fair Plan Assoc., (2d Dist., 1978) 84 Cal.App.3d 393, 148 Cal.Rptr. 563. In keeping with express terms of arbitration statute, "appraisers" empowered under fire insurance policy to determine amount payable on policy would be considered as "arbitrators," their confirmed award would be treated as an arbitration, and because insured failed to pursue statutory remedy to vacate or correct award which was then confirmed by Superior Court, independent action on contract by insured seeking damages in excess of award was barred by res judicata effect of confirmed award.

Jefferson Ins. Co. v. Superior Court of Alameda County, (1970) 3 Cal.3d 398, 90 Cal.Rptr. 608, 475 P.2d 880. Where an appraisal award is based

on a misconception of the law, such fact may be proved to the court by intrinsic evidence, including a declaration of one of the appraisers.

Florida: *High Country Arts and Craft Guild v. Hartford Fire Ins. Co.*, 126 F.3d 629 (4th Cir. 1997). Reservation of right to deny coverage despite an appraisal recognizes that insurer can contest coverage in court without eliminating right to set damages through appraisal, and did not alter appraisal's binding effect. See also *State Farm and Cas. Co., v. Licea*, 685 So.2d 1285 (Fla. 1996).

J.J.F. of Palm Beach, Inc. v. State Farm Fire and Cas. Co., 634 So.2d 1089 (Fla. 4th DCA 1994). A court may modify an arbitration award only for an obvious miscalculation or other self-evident mistake, for ruling on a matter not submitted, and for an imperfection in the form, but not the merits of an award.

Georgia: *Southern General Ins. Co. v. Kent*, (1988) 187 GA App. 496, 370 S.E.2d 663. Appraisal process in homeowners policy was binding despite policy provision that suit could be filed after all requirements of policy are complied with, and appraisal award could be attacked only for reason that would void contract, such as fraud by party obtaining award, palpable mistake of law, or decision by chance or lot.

Massachusetts: *Fox v. Employers' Fire Ins. Co.*, (1953) 330 Mass. 283, 113 N.E.2d 63. An award of the referees made after determining whether the damage was caused by lightning or by the windstorm was not valid as in excess of their authority.

Nevada: *St. Paul Fire & Marine Ins. Co. v. Wright*, (1981) 97 Nev. 308, 629 P.2d 1202. In dispute as to whether fire policy covered only reconstruction costs or covered cost of bring building up to code, which was required by city because fire damage exceeded 50 percent of building value, power of appraisers did not extend to disposition of entire controversy but was limited to determination of amount of loss, and appraisers exceeded their powers by addressing themselves to issue of effect of building code, and thus interpreting coverage provisions, in arriving at award.

New York: *Re: 176 & 178 East Main St., The Buffalo Ins. Co. of Buffalo et al., Appellants; Morris Yoscovitz, Respondent*, (1934) 263 NY 197, 188 N.E. 647. An award of appraisers cannot be attacked on the ground of fraud in the selection of the umpire, as shown by affidavits on an application to a county court for the appointment of a disinterested umpire; rather, an appropriate action must be brought to set aside the award.

Texas: *Breshears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex.App. 2004). Appraisal decision is intended to estop one party from contesting the issue

of the value of damages in a suit on insurance contract, not to facilitate that type of liability. Appraisal award is binding and enforceable unless insured proves that the award was unauthorized or the result of fraud, accident or mistake. Every reasonable presumption will be indulged to sustain an appraisal decision.

Franco v. Slavonic Mutual Fire Insurance Assoc., 154 S.W.3d 777 (Tex.Ct.App. 2004). Appraisal awards made pursuant to provisions of an insurance contract are binding and enforceable, and every reasonable presumption will be indulged to sustain the award. The effect of appraisal provision is to estop one party from contesting issue of damages in a suit on the insurance contract, leaving only the question of liability for the court.

General Star Indemnity Co. v. Spring Creek Village Apartments Phase V, Inc., 152 S.W.3d 733 (Tex.Ct.App. 2004). An appraisal award made under terms of insurance policy is generally binding as to amount of loss, however, award may be disregarded where it is (1) not made in substantial compliance with the policy; (2) the result of fraud, accident, or mistake; or (3) made without authority.

Appraiser with a financial interest in the outcome of an insurance appraisal is not impartial. The question of appraiser's lack of impartiality raises a fact question which should be submitted to jury, and if the jury finds appraiser is impartial, it follows that appraisal award was not in compliance with the insurance policy and is not binding

Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist., (1994, Tex App San Antonio) 877 S.W.2d 872. Appraisal awards made by appraisers and umpire pursuant to provisions of insurance contract can be disregarded if award was made without authority, award was made as result of fraud, accident or mistake, or award was not made substantially in compliance with requirements of policy.

E. Judgments on Appraisal Awards.

California: *Rubin v. Western Mutual Ins.*, (1999) 71 Cal.App. 4th 1539, 84 Cal.Rptr. 2d 648. Judgments after appraisal not appealable where there were other causes of action unresolved.

Florida: *Three Palms Pointe, Inc. v. State Farm Fire & Casualty Co.*, 362 F.3d 1317 (11th Cir. 2004). Under Florida law, if an insurer and an insured go to appraisal, the insurer can only dispute coverage for the loss as a whole. Once an appraisal award has been made, the only defenses that remain for an insurer to assert are lack of coverage for entire claim or violation of one of the standard policy conditions (i.e. fraud, lack of notice, failure to

cooperate, etc.). Note: *Three Palms Pointe* was criticized by the 2d District Court of Appeal in *Liberty American Insurance Co. v. Kennedy*, 2005 Fla. App. LEXIS 74 (Fla. 2d DCA 2005)

Pennsylvania:

Hozlock v. Donegal Companies, 745 A.2d 1261 (Pa.Super 2000). Appraisal award will only be set aside where it is clearly shown that fraud, misconduct, corruption or other irregularity caused an unjust, inequitable or unconscionable result.

Riley v. Farmers Fire Insurance Company, 735 A.2d 124 (Pa.Super 1999). Insurer challenging appraisal award must file a petition to vacate or modify the award prior to its confirmation.

IX. ADVANTAGES/DISADVANTAGES TO APPRAISAL

- a. Advantages to Appraisal
 - 1. Economy
 - 2. Expeditious Resolution
 - 3. Simplicity
- b. Disadvantages/Criticisms
 - 1. Lack of Procedural Safeguards for the Parties such as Rules of Evidence, Notice Requirements, Witness and Document Discovery
 - 2. Lack of Control Over the Format of the Award
 - 3. Issues with Payment of Award
 - 4. Bias/Favoritism
 - 5. “Splitting the Baby

X. CONCLUSION

In the first party property insurance arena the well used and familiar tool of appraisal to resolve disputes is no longer a consistent friend. In light of greater opportunity for abuse of the process and also the concomitant uncertainty surrounding appraisal proceedings, some insurers may consider removal of the appraisal clauses from property insurance policies. Of course, if the clause is statutorily required to be included, such a solution would not be allowed. Suffice it to say that insurers who are in jurisdictions utilizing the appraisal clause in the traditional manner should be cognizant that the system is moving toward a more formal arbitration style process, with all its attendant risks and disadvantages. Each claim should be fully investigated and evaluated as to whether utilization of the appraisal process remains a viable means of dispute resolution in the applicable jurisdiction to considering the individual factual setting of the pending claim(s).