2006

Understanding the Insurance Policy Appraisal Clause: A Four-Step Program

Johnny Parker

UNDERSTANDING THE INSURANCE POLICY APPRAISAL CLAUSE: A FOUR-STEP PROGRAM

*Johnny C. Parker**

APPRAISAL provisions are uniformly included in most forms of property insurance policies. These provisions require that certain disputes between the parties to the policy be submitted to a process known as appraisal.[1] Typically, the process is triggered by a post-loss disagreement on the value of the property or the amount of the loss, and a written demand by either party for an appraisal. Although the language used varies, a typical appraisal provisions provides:

> **Appraisal**
> If we and you disagree on the value of the property or the amount of the "loss," either may make written demand for an appraisal of the "loss." In this event, each party will select a competent and impartial appraiser. You and we must notify the other of the appraiser selected within twenty days of the written demand for appraisal. The two appraisers will select an umpire. If the appraisers do not agree on the selection of an umpire within 15 days, they must request selection of an umpire by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of the "loss." If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be the appraised value of the property or amount of "loss." If you make a written demand for an appraisal of the "loss," each party will:
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> a. Pay its chosen appraiser; and
> b. Bear the other expenses of the appraisal and umpire equally.

Appraisal clauses, as a consequence of the proliferation of insurance litigation, have become as important as coverage and exclusion provisions. The appraisal process is a means of alternative dispute resolution. It is designed to effectively and cost efficiently resolve disputes over the amount owed on an insured loss by avoiding the substantive and procedural nuances typically associated with the legal process, and the finality associated with other forms of alternative dispute

* Professor of Law, University of Tulsa College of Law; B.A., 1982, University of Mississippi; J.D., 1984, University of Mississippi College of Law; LL.M., 1986, Columbia University College of Law.

1. *See, e.g.*, Herbert Dodell, *Using the Appraisal Process to Resolve Insurance Disputes*, 25 L.A. LAW. 15, 15 (2002).

resolution mechanisms such as arbitration. Therefore, insureds must be aware of the theoretical and practical differences between appraisement and arbitration. This article is intended to provide an insurance novice with a basic understanding of how appraisal clauses operate. With this objective in mind, this article attempts to explain the practical and theoretical distinctions between arbitration and appraisal. Thereafter, it examines the language commonly used in appraisal provisions and how that language has been construed by the courts.

I. STEP 1: APPRAISAL V. ARBITRATION

The difference between appraisal[2] and arbitration has been explained as:

> Appraisement, in particular, is perhaps most often confused with arbitration. While some of the rules of law that apply to arbitration apply in the same manner to appraisement, and the terms have at times been used interchangeably, there is a plain distinction between them. In the proper sense of the term, arbitration presupposes the existence of a dispute or controversy to be tried and determined in a quasi judicial manner, whereas appraisement is an agreed method of ascertaining value or amount of damage, stipulated in advance, generally as a mere auxiliary or incident feature of a contract, with the object of preventing future disputes, rather than of settling present ones. Liability is not fixed by means of an appraisement; there is only a finding of value, price, or amount of loss or damage. The investigation of arbitrators is in the nature of a judicial inquiry and involves, ordinarily, a hearing and all that is thereby implied. Appraisers, on the other hand, where it is not otherwise provided by the agreement, are generally expected to act upon their own knowledge and investigation, without notice of hearings, are not required to hear evidence or to receive statements of the parties, and are allowed a wide discretion as to the mode of procedure and source of information.[3]

Appraisement is narrower in scope than arbitration; which can encompass the entire controversy between the parties.[4] Furthermore, it is not designed to answer questions of contract interpretation.[5]

There are two major differences between appraisement and arbitration. First, unlike arbitration, appraisement is not a quasi-judicial proceeding. Instead, the parties only contract for a third person to determine the value of the property or amount of the "loss"—a contract term—according to the method provided in the policy.[6] Second, an appraisement is not a means of resolving the issue of liability

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2. It should be noted that the terms appraisal and appraisement are used interchangeably throughout this article.

3. Hartford Fire Ins. Co. v. Jones, 108 So.2d 571, 572 (Miss. 1959). *See also* Atlas Constr. Co. v. Indiana Ins. Co., 309 N.E.2d 810, 813 (Ind. Ct. App. 1974); FTI Int'l, Inc. v. Cincinnati Ins. Co., 790 N.E.2d 908, 910 (Ill. App. Ct. 2003).

4. *Hartford Fire Ins. Co.*, 108 So. 2d at 572.

5. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003) (arbitrators, in the informal context of arbitration, are generally empowered to decide the same type of questions courts regularly decide); *FTI Int'l,* 790 N.E.2d at 910.

6. *Hartford Fire Ins. Co.*, 108 So. 2d at 572.

under an insurance policy.[7] Rather, it only determines the amount of an acknowledged liability which has not been agreed upon by the parties.[8]

These universally recognized distinctions between arbitration and appraisal, however, are often overlooked because arbitration has a much longer history and checkered past. Every state and the federal government has enacted an arbitration act.[9] Arbitration statutes were enacted to enforce valid arbitration agreements by compelling participation in the arbitration process.[10] Historically, the courts disfavored arbitration agreements because they could potentially deprive the judiciary of jurisdiction over the entire controversy.[11] The statutes also placed arbitration provisions on the same footing as other contracts.[12] While

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7. *Id.*

8. *Id.*

9. ALA. CODE §§ 6-6-1 to 6-6-16 (2005); ALASKA STAT. §§ 09.43.010 to 09.43.180 (2005); ARIZ. REV. STAT. ANN. § 12-133 (2004); ARK. CODE ANN. §§ 16-108-201 to 16-108-223 (2004); CAL. CIV. PRO. CODE §§ 1280 to 1294.2 (West 2004); COLO. REV. STAT. §§ 13-22-201 to 13-22-230 (2004); CONN. GEN. STAT. §§ 52-408 to 52-424 (2006); 18 DEL. CODE ANN. tit. 18, § 331; D.C. CODE §§ 16-4301 to 16-4319 (2005); FLA. STAT. ANN. §§ 682.01 to 682.22 (2005); GA. CODE ANN. §§ 9-9-1 to 9-9-18 (2004); HAW. REV. STAT. §§ 658A-1 to 658A-25 (2005); IDAHO CODE ANN. §§ 7-901 to 7-922 (2004); 710 ILL. COMP. STAT. 5/15/22 (2005); IND. CODE §§ 34-57-2-1 to 34-57-2-22 (2004); IOWA CODE §§ 679A.1 to 679A.19 (2004); KAN. STAT. ANN. §§ 5-401 to 5-422 (2005); KY. REV. STAT. ANN. §§ 417.045 to 417.050 (2004); LA. REV. STAT. ANN.§§ 9:4201 to 9:4217 (2004); ME. REV. STAT. ANN. tit. 14, §§ 5927 to 5949 (2004); MD. CODE ANN. CTS. & JUD. PROC. §§ 3-201 to 3-234 (2004); MASS. GEN. LAWS ch. 251, §§ 1 to 19 (2005); MICH. COMP. LAWS §§ 600.5001 to 600.5035 (2005); MINN. STAT. §§ 572.08 to 572.30 (2004); MISS. CODE ANN. §§ 11-15-1 to 11-15-37 (2004); MO. REV. STAT. §§ 435.350 to 435.470 (2004); MONT. CODE ANN. §§ 27-5-106 to 27-5-324 (2004); NEB. REV. STAT. §§ 25-2602.01 to 25-2622 (2004); NEV. REV. STAT. §§ 38.206 to 38.248 (2004); N.H. REV. STAT. ANN. 542:1 to 542:11 ((2004); N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (West 2005); N.M. STAT. §§ 44-7A-1 to 44-7A-32 (2005); N.Y. C.P.L.R. §§ 7501 to 7514 (McKinney 2005); N.C. GEN. STAT. §§ 1-569.1 to 1-569.31 (2005); N.D. CENT. CODE §§ 32-29.3-01 to 32-29.3-29 (2005); OHIO REV. CODE ANN. 2711.01 to 2711.24 (Westlaw 2005); 15 OKLA. STAT. tit. 15, §§ 801 to 818 (2004); OR. REV. STAT §§ 36.600 to 36.740 (2003); 42 PA. CONS. STAT. ANN. §§ 7301 to 7362 (West 2004); R.I. GEN. LAWS §§ 10-3-1 to 10-3-21 (2004); S.C. CODE ANN. §§ 15-48-10 to 15-48-240 (2004); S.D. CODIFIED LAWS §§ 21-25A-1 to 21-25A-38 (2003); TENN. CODE ANN. §§ 29-5-101 to 29-5-320 (2004); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001 to 171.098 (Vernon 2004); UTAH CODE ANN. §§ 78-31a-101 to 78-31a-131 (2005); VT. STAT. ANN. tit. 12, §§ 5651 to 5681 (2004); VA. CODE ANN. §§ 8.01-581.01 to 8.01-581.016 (2004); WASH. REV. CODE §§ 7.04.010 to 7.04.220 (2005); W. VA. CODE §§ 55-10-1 to 55-10-8 (2005); WIS. STAT. §§ 788.01 to 788.18 (2004); WYO. STAT. ANN. §§ 1-36-101 to 1-36-119 (2004). *See also* Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000).

10. *See, e.g.*, Lynn v. Gen. Elec. Co., 2005 U.S. Dist. LEXIS 5108, at *10 (D. Kan. 2005).

11. *See, e.g.*, Headley v. Aetna Ins. Co., 80 So. 466, 468 (Ala. 1918); Harwell v. Home Mut. Fire Ins. Co., 91 S.E.2d 273, 274-75 (S.C. 1956); Cont'l Ins. Co. v. Vallandingham & Gentry, 76 S.W. 22, 24 (Ky. Ct. App. 1903); Baldwin v. Fraternal Accident Ass'n of America, 46 N.Y.S. 1016, 1019 (N.Y. Sup. Ct. 1897); Stevens v. Norwich Union Fire Ins. Co., 96 S.W. 684, 689-90 (Mo. Ct. App. 1906); Firemen's Ins. Co. v. Davis, 198 S.W. 127, 127-28 (Ark. 1917). *See also* LA. REV. STAT. ANN. § 22:629 (2004) ("No insurance contract delivered or issued for delivery in this state . . . shall contain any condition, stipulation, or agreement . . . depriving the courts of this state of jurisdiction of actions against the insurer.").

12. Strict enforcement of arbitration agreements has been reaffirmed by the United States Supreme Court in several contemporary decisions. *See generally* Green Tree Fin. Corp. v.

arbitration laws reinforced the validity and enforceability of arbitration as a means of alternative dispute resolution, judicial review of arbitration awards remains extremely limited.[13]

Therefore, whether an appraisal provision constitutes an agreement to arbitrate is important for a number of substantive and procedural reasons. Resolution of this issue establishes both the basis of the court's jurisdiction over the case on appeal and the procedures which govern the resolution of the dispute. For example, in *Hartford Lloyd's Insurance Co. v. Teachworth,* the Fifth Circuit was called upon to resolve the issue of whether an appraisal conducted pursuant to the provision of a Texas multi-peril insurance policy constituted an arbitration agreement within the coverage of the Federal Arbitration Act.[14]

The appraisal provision in *Teachworth* was almost identical to that set out above. Because the parties could not agree on the extent of the damage, Teachworth invoked the appraisal provision.[15] The respective appraisers could not agree on an umpire, therefore, a Galveston County Judge appointed one. After conducting their investigations, the appraisers failed to agree on the amount of the insured's loss. Pursuant to the policy, the appraisers submitted their differences to the umpire. The umpire agreed with the insured's appraiser and the two of them rendered a written appraisal award in the amount of $3,770,043.[16]

Hartford promptly filed a declaratory judgment action, alleging that the appraisal award was invalid because the insured's appraiser had not acted impartially and because the insured "had acted fraudulently during the appraisal process."[17] The district court bifurcated the case and ordered that the validity of the award be tried separately from the rest of the case.[18] Originally, the district court ruled that the issue of the validity of the award would be tried by a jury.[19] However, the court reconsidered and reversed this ruling, sua sponte, on the basis that the appraisal award was an arbitration award subject to the Federal Arbitration Act (FAA).[20]

Accordingly, the district court decided that the appraisal award must be reviewed under sections 10 and 11 of the FAA, which circumscribes a court's

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Randolph, 531 U.S. 79 (2000); E. Assocs. Coal Corp. v. United Mine Workers of America, 531 U.S. 57 (2000).

13. *See, e.g.*, Wailu Assocs. v. Aetna Cas. & Sur. Co., 904 F. Supp. 1142, 1149 (D. Haw. 1995); Montelepre v. Waring Architects, 787 So.2d 1127, 1130 (La. Ct. App. 2001); Bohlmann v. Printz, 96 P.3d 1155, 1157 (Nev. 2004); Herrendeen v. Daimler Chrysler Corp., No. L-00-1268, 2001 Ohio App. LEXIS 1500 (Ohio Ct. App. 2001); Desjarlais v. USAA Ins. Co., 818 A.2d 645, 647 (R.I. 2003); Haddon v. Shaheen & Co., 499 S.E.2d 693, 696 (Ga. Ct. App. 1998).

14. 898 F.2d 1058 (5th Cir. 1990). For a case involving the same issue in the context of a state arbitration act, see Allstate Ins. Co. v. Suarez, 833 So. 2d 762 (Fla. 2002).

15. *Teachworth*, 898 F.2d at 1059.

16. *Id.*

17. *Id.*

18. *Id.* at 1059-60.

19. *Id.* at 1060.

20. *Id.*

authority to vacate or modify an arbitration award.[21] The court also concluded that sections 10 and 11 did not afford Hartford the opportunity for a jury trial on the issue of the validity of the award. Consequently, this issue had to be tried to the bench. After a four-day evidentiary hearing, the district court concluded that none of the grounds for vacating or modifying an arbitration award enumerated in sections 10 and 11 existed in the case and affirmed the award.[22]

According to the appellate court, the dispositive issue was whether the appraisal provision was an agreement to arbitrate governed by the FAA.[23] Ultimately, the court concluded that the issue was a question of federal law.[24] Nevertheless, because the FAA failed to define arbitration, state law, if not inconsistent with federal law, could be used to determine whether an appraisal constituted arbitration.[25] Relying on Texas law, the Fifth Circuit concluded that the insurance appraisal provision was not an arbitration agreement.[26] Therefore, the district court erred in reviewing the appraisal award under the FAA.[27] According to the court, the misapplication of the FAA harmed Hartford in three ways.

> First, Hartford was denied a jury trial on the validity of the award. Under Texas law, it appears that the validity of an appraisal award may be tried to a jury. Second, by reviewing the appraisal award under the FAA the district court applied the wrong standards in assessing the validity of the award. Under the FAA, an award can be modified or vacated only if one of the circumstances enumerated in section 10 or 11 exists. Texas law has its own specific standard for vacating appraisal awards. Third, the court's review of the appraisal under FAA standards led it to make certain factual findings that defeated Hartford's policy coverages defenses.[28]

Teachworth illustrates two very basic propositions in the context of whether a provision is one of arbitration or appraisal. First, it demonstrates the difficulty that courts and legal practitioners experience in distinguishing these types of provisions. Second, it provides a view of the legal consequences of getting it wrong. As demonstrated by the case, the procedure and substantive rules applicable to arbitration are much stricter than those applicable to appraisal. Consequently, as evidenced by *Teachworth*, the ability to distinguish arbitration

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21. Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058, 1060 (5th Cir. 1990).

22. *Id.*

23. *Id.* at 1059.

24. *See id.* at 1062.

25. *Id. See also* Volt Info. Servs., Inc. v. Bd. of Trustees, 489 U.S. 468, 475-76 (1989); Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987); Recold v. Monfort of Colo., Inc., 893 F.2d 195, 197 n.6 (8th Cir. 1990); Wailu Assocs. v. Aetna Cas. & Sur. Co., 904 F. Supp. 1142, 1147 (D. Haw. 1995).

26. *Teachworth*, 898 F.2d at 1062.

27. *Id.* at 1063-64.

28. *Id.* (citations omitted).

from an appraisal provision will effect the outcome of the case and quite possibly deprive one of the parties of due process of law.

An appraisal also differs from arbitration in that it is an informal proceeding.[29] Appraisers act on their own skill and knowledge and are not obligated to give rivals notice or an opportunity to be heard.[30] In addition, an appraiser's authority is limited to determining the value of the property or amount of the loss and does not extend to other issues.[31]

Courts have developed a number of approaches for distinguishing arbitration from appraisal provisions. For example, the informal/formal appraisal versus arbitration dichotomy supports the view that where the clause provides for formal appraisals process the provision is tantamount to an agreement to arbitrate.[32] Another approach treats appraisal agreements limited to resolving the value of the property or the loss to an appraisal panel as an agreement to arbitrate.[33] Connecticut decisional law has rejected the common law distinctions between the two processes and concluded that the term arbitration is broad enough to encompass appraisal provisions contained in insurance policies.[34] Approximately eight states statutorily provide that arbitration does not apply to insurance contracts.[35] Several of these jurisdictions except from this rule insurance

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29. Ne. Fin. Corp. v. Ins. Co. of N. Am., 757 F. Supp. 381, 383-84 (D. Del. 1991); FTI Int'l, Inc. v. Cincinnati Ins. Co., 790 N.E.2d 908, 910 (Ill. App. Ct. 2003); Allstate Ins. Co. v. Suarez, 833 So. 2d 762, 763 (Fla. 2002); Rademaker v. Atlas Assurance Co., 120 N.E.2d 592, 594 (Ohio Ct. App. 1954).

Pursuant to California Insurance Code § 2071, an appraisal proceeding is informal unless the parties mutually agreed to the contrary. "Informal" means that no formal discovery can be conducted, including depositions, interrogatories, requests for admissions, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used in the proceeding. CAL. INS. CODE § 2971 (West 2006). *See also* CAL. INS. CODE § 10082.3 (West 2006).

30. *See, e.g.*, FTI Int'l, Inc. v. Cincinnati Ins. Co., 790 N.E.2d 908, 910 (Ill. Ct. App. 2003); City of Omaha v. Omaha Water Co., 218 U.S. 180, 194 (1910); Harmon v. Schwartz, 242 A.2d 490, 492 (Md. 1968).

31. *See, e.g.*, City of Omaha v. Omaha Water Co., 218 U.S. 180, 194 (1910); Se. Nursing Home v. St. Paul Fire & Marine Ins. Co., 750 F.2d 1531, 1537 (11th Cir. 1985); Marceron v. Chevy Chase Servs., 258 F.2d 155, 158 (D.C. Cir. 1958); Kelly v. United States, 19 Cl. Ct. 155, 163 (1989); Standard Fire Ins. Co. v. Fraiman, 514 S.W.2d 343, 345 (Tex. Civ. App. 1974); *Rademaker*, 120 N.E.2d at 595.

32. *See* Allstate Ins. Co. v. Suarez, 833 So. 2d 762, 764 (Fla. 2002); Christiansen v. First Ins. Co. of Haw., 967 P.2d 639, 649 (Haw. Ct. App. 1998).

33. Wailu Associates v. Aetna Cas. & Sur. Co., 904 F. Supp. 1142, 1148 (D. Haw. 1995); Leeward Bus. Co. v. City & County of Honolulu, 564 P.2d 445, 448 (Haw. 1977); Aetna Cas. & Sur. Co. v. Ins. Comm'r, 445 A.2d 14, 20 (Md. 1982). *See also* DEL. CODE ANN. tit. 18, § 331 (2005) (disputes relating to the amount owed under homeowner's insurance required to be arbitrated); DUNNELL MINNESOTA DIGEST: RIGHTS AND LIABILITIES OF PARTIES UNDER POLICY § 10.02 (4th ed. 1998).

34. Covenant Ins. Co. v. Banks, 413 A.2d 862, 866 (Conn. 1979).

35. *See* ARK. CODE ANN. § 16-108-201(2) (2005); GA. CODE ANN. § 9-9-2(c)(3) (2004); KAN. STAT. ANN. § 5-401(c) (2005); KY. REV. STAT. ANN. § 417.050(2) (West 2004); MO. REV, STAT. § 435.350 (2004); NEB. REV. STAT. § 25-2602.01(F)(4) (2004); OKLA. STAT. tit. 15, § 802(A) (2005); S.C. CODE ANN. § 15-48-10(b)(4) (2004); S.D. CODIFIED LAWS § 21-25A-3 (2003). *See*

contracts between insurance companies.[36] Kansas decisional law regards appraisal as a form of arbitration which, statutorily, does not apply to contracts of insurance.[37] However, the majority rule is that whether the procedures required to be followed are those of appraisal or arbitration is to be determined from the intent of the parties or from the character of the questions and issues resolved, or both.[38]

II. STEP 2: SELECTION OF AN APPRAISER

> An agreement of appraisal is a contract. Appraisers who make an award under such an agreement are presumed to have acted in accordance with the law and the terms of the contract, and the burden of proof is on those who attack their award to establish to the contrary by convincing evidence. Every reasonable intendment and presumption is in favor of the award, and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers.[39]

The appraisal provision establishes the rights, obligations and liabilities of the parties in the event of a dispute.[40] Chief among the rights of the parties is the right to specify the credentials of party-appointed appraisers. Most insurance contracts restrict the choice to a *competent and impartial appraiser.*[41] This right of nomination is also variously described as the right to choose a *competent and independent* or *competent and disinterested* appraiser.[42] It is of no consequence that an appraisal provision provides that *each party will select* a competent and impartial appraiser.[43] The naming of an individual to serve as an appraiser is not

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also Eberhardt v. Ga. Farm Bureau Mut. Ins. Co., 477 S.E.2d 907, 908 (Ga. Ct. App. 1996); Girard v. Atl. Mut. Ins. Co., 198 So. 2d 444, 447 (La. Ct. App. 1967).

36. *See, e.g.*, GA. CODE ANN. § 9-9-2(c)(3) (2004); KAN. STAT. ANN. § 5-401(c) (2005); KY. REV. STAT. ANN. § 417.050(2) (2004); OKLA. STAT. tit. 15, § 802(A) (2005); S.D. CODIFIED LAWS § 21-25A-3 (2003).

37. Friday v. Trinity Universal of Kan., 939 P.2d 869, 871 (Kan. 1997).

38. Cas. Indem. Exch. v. Yother, 439 So. 2d 77, 79 (Ala. 1983); Preferred Ins. Co. v. Richard Parks Trucking Auth., 158 So. 2d 817, 820 (Fla. Dist. Ct. App. 1963); Harmon v. Schwartz, 242 A.2d 490, 493 (Md. 1968); Vesledahl Farms, Inc. v. Rain & Hail Ins. Serv., No. C2-96-1049, 1996 Minn. App. LEXIS 1424, at *6 (Minn. Ct. App. Dec. 17, 1996); Lakewood Twp. Mun. Utils. Auth. v. S. Lakewood Water Co., 324 A.2d 78, 83 (N.J. Super. Ct. App. Div. 1976); Minot Town & Country v. Fireman Fund Ins. Co., 587 N.W.2d 189, 190-91 (N.D. 1998) (where only issue to be resolved is the amount of the loss provision is one for appraisement).

39. Niagara Fire Ins. Co. v. Boon, 88 S.W. 915, 916 (Ark. 1905) (quoting Barnard v. Lancashire, 101 F. 36, 37 (8th Cir. 1900)). *Accord* Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 260 (Iowa 1991); Gen. Star Indem. Co. v. Spring Creek Vill. Apartments Phase V, 152 S.W.3d 733, 737 (Tex. App. 2004).

40. *See id.*

41. *See generally* Rios v. Tri-State Ins. Co., 714 So. 2d 547, 548 (Fla. Dist. Ct. App. 1998) (involving an arbitration agreement that mandated a "competent, impartial umpire").

42. *See generally* Maryland Cas. Co. v. Legg, 247 So. 2d 812, 813 (Miss. 1971) (using "competent and disinterested appraiser" language).

43. FDL, Inc. v. Cincinnati Ins. Co., 135 F.3d 503, 504 (7th Cir. 1998).

a selection until the other has agreed to accept him.[44] Because the purpose of an appraisal is to secure a fair and impartial tribunal to settle the dispute regarding value, it is not contemplated that an appraiser will represent either party to the controversy, be partisan in the cause of either, sustain the views or further the interest of the party who named her.[45] While the appraiser is not the agent of the party who selected her, simply by reason of her appointment, it is proper for her to bring out all the facts which may be favorable to the nominating party.[46] Consequently, in the absence of fraud or other misconduct, an award is not invalid merely because the respective appraisers zealously maintained a position favorable to the party who nominated them.[47]

Appraisers are presumed qualified.[48] An appraiser's qualifications are important in two instances. First, her qualifications, whether expressed as *competent and impartial*, *competent and independent*, or *competent and disinterested,* extends to the selection of the umpire.[49] Second, it extends to determining the amount of the loss or value of the property.[50] Where one party consciously nominates an unqualified (i.e., interested, partial, or non-independent) appraiser, who is accepted by the other party without knowledge, the appraisal award can be set aside.[51] However, where the non-nominating party is aware that the appraiser's credentials are questionable but does not object to her appointment, the right to subsequently object is waived.[52] Typically, the issue of an appraiser's qualifications arises in the context of a motion to disqualify the appraiser or in a proceeding to set aside the appraisal award.[53] Whether an appraiser is *competent and impartial*, *competent and independent*, or *competent and disinterested* is a question of fact for the jury.[54]

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44. Hall & Brother v. W. Assurance Co., 32 So. 257, 257 (Ala. 1901).

45. *Id.*; *Central Life*, 466 N.W.2d at 260-61.

46. Nat'l Fire Ins. Co. v. O'Bryan, 87 S.W. 129, 130 (Ark. 1905). *See also* Headley v. Aetna Ins. Co., 80 So. 466, 469 (Ala. 1918); *Central Life*, 466 N.W.2d at 261.

47. *See* Gansevoort Holding Corp. v. Palatine Ins. Co., 170 N.Y.S.2d 171, 174 (N.Y. Sup. Ct. 1957); Melton Bros. v. Phila. Fire & Marine Ins. Co., 144 A. 726, 730 (N.J. 1929); Ambient Group, Inc. v. Cont'l Ins. Co., 1994 U.S. Dist. LEXIS 8442, at *9 (D.V.I. 1994); R.E. Jones & Co. v. N. Assurance Co., 207 S.W. 459, 462 (Ky. 1919).

48. *Hall,* 32 So. at 258; *Central Life*, 466 N.W.2d at 261; Hozlock v. Donegal Co., 745 A.2d 1261, 1265-66 (Pa. Super. Ct. 2000).

49. *Hall,* 32 So. at 257-58.

50. *Id.*

51. *Id.* at 258-59. *See also* Bradshaw v. Agric. Ins. Co., 32 N.E. 1055, 1058 (N.Y. 1893) (non-nominating party may subsequently object to the appointment of an unqualified appraiser where the nominating party misrepresented the credentials of the appraiser in order to get the non-nominating party to accept him).

52. *See* W. Assurance Co. v. Hall Bros., 38 So. 853, 854 (Ala. 1904).

53. *See id.*

54. Hall & Brother v. W. Assurance Co., 32 So. 257, 258 (Ala. 1901); Nat'l Fire Ins. Co. v. O'Bryan, 87 S.W. 129, 130 (Ark. 1905); Pa. Fire Ins. Co. v. W.T. Wagner Estate, 41 S.W.2d 340, 343 (Tex. App. 1929); Abdella v. Lumber Mut. Fire Ins. Co., 256 N.Y.S.2d 391, 392 (N.Y. App. Div. 1965).

The process of determining the meaning of words used in an insurance contract has been delegated to the courts as a matter of law.[55] Because insurance policies are adhesion contracts and the insurer assumes a duty to define any limitations in clear and explicit language, courts typically construe insurance contracts from the perspective of an ordinary person.[56] So, when words in a policy are not defined they are given their plain, ordinary, common meaning.[57] Insurance policies universally fail to define the words describing the party appraiser's credentials (i.e., what is meant by *competent and impartial, competent and independent* or *competent and disinterested*). Consequently, dictionaries are a good source of the common meanings of these terms.

A. Competent

The requirement that a party appraiser be both *competent and disinterested* provides for distinct and not interchangeable credentials.[58] An appraiser may be competent by virtue of having extensive experience with either adjusting or appraising losses for insurance companies.[59] This same experience, however, can operate to disqualify her on the basis of being interested, partial, or not independent.[60] The term competent is defined in *Merriam-Webster's Collegiate Dictionary* as "having requisite or adequate ability or qualities."[61] In the context of the insurance appraisal clause, the word has been construed to mean "capable of rendering a fair judgment."[62] Pursuant to this construction, any adult person possessed of mental capacity is *competent* to serve as an appraiser.[63]

In *Hozlock v. Donegal Mutual Insurance Co.*,[64] the Superior Court of Pennsylvania distinguished the requirement of *competent* from that of *disinterested.* The appraisal provision in *Hozlock* merely required the appointment of a *competent* appraiser.[65] Specifically, the issue in *Hozlock* was whether a contingency fee arrangement between a party and a party-appointed

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55. Grinnell Mut. Reinsurance v. Jungling, 654 N.W.2d 530, 536 (Iowa 2002).

56. Mansion Hill Condo Ass'n v. Am. Family Mut. Ins. Co., 62 S.W.3d 633 (Mo. Ct. App. 2001). *See also* Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

57. *See, e.g.*, *Jungling*, 654 N.W.2d at 536; *Mansion Hill Condo*, 62 S.W.3d at 638; Hanneman v. Cont'l W. Ins. Co., 575 N.W.2d 445, 451 (N.D. 1998); Kaplan v. Nw. Mut. Life Ins. Co., 65 P.3d 16, 23 (Wash. Ct. App. 2003).

58. *See* Meyerson v. Hartford Fire Ins. Co., 39 N.Y.S. 329, 331 (N.Y. App. Term 1896); Hozlock v. Donegal Cos., 745 A.2d 1261, 1264 (Pa. Super. Ct. 2000).

59. *Meyerson*, 39 N.Y.S. at 329.

60. Hill & Bruton v. Star Ins. Co. of Am., 157 S.E. 599, 603 (N.C. 1931).

61. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 234 (10th ed. 2002).

62. *Hozlock*, 745 A.2d at 1264.

63. *See* Glens Fall Ins. Co. of New York v. Garner, 155 So. 533, 535 (Ala. 1934) (attorney competent to serve as appraiser); *Meyerson*, 39 N.Y.S. at 331 (former insurance adjuster competent to serve as appraiser and is not per se interest).

64. 745 A.2d at 1264.

65. *Id.* at 1262.

appraiser disqualified the appraiser as per se incompetent.[66] The court concluded that given the practical reality that appraisers will have at least some bias towards the appointing party, an appraiser who is paid under a contingency fee contract will not necessarily be any more biased than one paid a flat fee.[67] According to the court:

> [I]n the absence of contractual language specifically requiring impartiality, the existence of such an arrangement between an insured and his appointed appraiser does not, in and of itself, render the appraiser unfit. Simply proving that an appraiser is partial is not the same as proving that he is incompetent. Appellant would have needed to prove that whatever partiality existed actually clouded the appraiser's good judgment and caused an unjust result. . . . We express no opinion as to whether the inclusion of the word "disinterested" would have made any difference in this case. Our holding is only that use of the word "competent" in this context does not necessarily imply that the party-appointed appraisers must be neutral.[68]

Courts, as illustrated by *Hozlock*, generally apply a pure plain meaning of the word "approach" to ascertaining the meaning of the term "competent." Courts have developed a more detailed analysis for determining the meaning of the phrase "disinterested and impartial."

B. Disinterested and Impartial

The requirement that the appraiser be *disinterested* has garnered much more judicial attention than that of the *competent* appraiser requirement. The term is defined in *Black's Law Dictionary* to mean "free from bias, prejudice or partiality, not having a pecuniary interest."[69] Courts, in the context of insurance law, have focused on the lack of pecuniary interest aspect of the definition to determine whether an appraiser is disinterested and impartial.[70] In this context, the appraiser is required to be free from bias, partiality, and prejudice towards either party. Thus, by virtue of both the dictionary definition and judicial construction *disinterested* and *impartial*[71] are equivalent terms.

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66. *Id.* at 1263.

67. *Id.* at 1265.

68. *Id.* at 1265-66. *See also* Gen. Star Indem. Co. v. Spring Creek Vill. Apartments Phase V, 152 S.W.3d 733, 738 (Tex. App. 2004) (contingency fee arrangement between a party and its appraiser raises a question of fact where the policy language calls for the appointment of a competent and impartial appraiser).

69. BLACK'S LAW DICTIONARY 502 (8th ed. 2004).

70. *See, e.g.*, Coon v. Nat'l Fire Ins. Co., 213 N.Y.S. 407, 410-11 (N.Y. Sup. Ct. 1925); Hall & Brother v. W. Assurance Co., 32 So. 257, 258 (Ala. 1901); Mason v. Fire Ass'n of Phila., 122 N.W. 423, 427 (S.D. 1909); *Gen. Star Indem,* 152 S.W.3d at 737; Hill & Bruton v. Star Ins. Co. of America, 157 S.E. 599, 602 (N.C. 1931); Meyerson v. Hartford Fire Ins. Co., 39 N.Y.S. 329 (N.Y. App. Term 1896); Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 261 (Iowa 1991).

71. *Black's Law Dictionary* defines impartial as unbiased; disinterested. BLACK'S LAW DICTIONARY, *supra* note 69, at 767.

There is no fixed standard for determining whether an appraiser is disqualified or an award may be set aside because the appraiser was interested. The issue is especially fact sensitive and must be resolved on a case-by-case basis. Furthermore, the authorities suggest that an interest, in order to disqualify an appraiser or justify setting aside an award, "must be direct, definite and capable of demonstration."[72] In essence, mere partiality does not render an appraiser incapable of fair judgment.[73]

In *Coon v. National Fire Insurance Co.*, the court determined whether a professional appraiser who had performed 556 appraisals and 205 estimates for insurance companies over a period of 10 years was disinterested.[74] The court concluded that it was apparent that the insurance company's appraiser was not *disinterested.*[75] Rather, he was a professional appraiser working for and retained hundreds of times by insurance companies and their agents to look after their interest.[76] While *competent,* as a result of his experience, the sentiment of past service and hope that it would continue made him an advocate rather than a *disinterested* appraiser.[77]

In *Hill & Bruton v. Star Insurance Co. of America*, the North Carolina Supreme Court examined the issue of whether an appraiser who had worked for insurance companies for nearly six years was disqualified to serve because he was not sufficiently *disinterested.*[78] Rather than adopting a per se disqualification rule as did the *Coon* court, the North Carolina court concluded that previous experience qualified the appraiser as *competent* and did not conclusively disqualify him because of interest.[79] According to the court, evidence that he had worked for and been compensated by insurance companies for such an extensive period constituted evidence for the jury to examine the question of his qualifications.[80]

Appraisal provisions uniformly provide that each party pay its chosen appraiser and bear the other expenses of the appraisal and umpire equally. The

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72. Giddens v. Bd. of Educ., 75 N.E.2d 286, 291 (Ill. 1947).

73. *See, e.g.*, Donegal Ins. Co. v. Longo, 610 A.2d 466, 469 (Pa. Super. Ct. 1992) (an attorney-client relationship extends beyond mere partiality and requires disqualification).

74. 213 N.Y.S. 407, 409-10 (N.Y. Sup. Ct. 1925). *See also* Sterling Spinning & Stamping Works, Inc. v. Knickerbocker Ins. Co, 242 N.Y.S. 201, 202 (1930); Nat'l Fire Ins. Co. v. Bennett, 137 S.E. 570, 571 (Ga. Ct. App. 1927); Mason v. Fire Ass'n of Phila., 122 N.W. 423, 425 (S.D. 1909).

75. *Coon*, 213 N.Y.S. at 411.

76. *Id.*

77. *Id.*

78. 157 S.E. 599, 601-02 (N.C. 1931).

79. *Id.* at 602.

80. *Id.* at 603. *See also* Nat'l Fire Ins. Co. v. O'Bryan, 87 S.W. 129, 131 (Ark. 1905) (fact that appraiser had been hired by insured to adjust loss prior to appointment as appraiser did not alone automatically disqualify him); Scheiber v. Pac. Coast Fire Ins. Co., 75 A.2d 108, 110 (Md. 1950) (mere fact of other employment by insurance company does not as a matter of law disqualify one from selection as a disinterested appraiser); Brethren Mut. Ins. Co. v. Filsinger, 458 A.2d 880, 883-84 (Md. 1983); Linford Lounge, Inc. v. Mich. Basic Prop. Ins. Ass'n, 259 N.W.2d 201, 203 (Mich. Ct. App. 1977) (mere fact of previous employment does not automatically disqualify).

manner in which appraisers are compensated has been fertile soil for the issue of whether an appraiser is *disinterested* or *impartial.* Specifically, the question is whether payment of an appraiser on a contingency fee basis constitutes an interest that disqualifies an appraiser or justifies setting aside the award.

In *Central Life Insurance Co. v. Aetna Casualty & Surety Co.*, Aetna argued that "Central's agreement to pay it's appraiser a contingent fee based on a percentage of the amount of loss recovered cause[d] the appraiser to be interested" and mandated setting aside the appraisal award.[81] The court, relying on the literal meaning of the word *disinterested,* concluded that the salary arrangement constituted a pecuniary interest in the outcome of the dispute.[82] Consequently, Central's appraiser was not *disinterested.*[83]

The same issue confronted the Supreme Court of Rhode Island in *Aetna Casualty & Surety Co. v. Grabbert.*[84] In *Grabbert*, the trial court found that the existence of a contingency fee arrangement between the insured and its selected appraiser constituted a financial interest and undermined confidence in the arbitration system.[85] Despite agreeing with the trial court in principle, the court relied on the public policy in favor of the finality of arbitration awards and concluded that the award was binding.[86] As observed by the court:

> In applying this principle to this case, however, despite our belief that the party-appointed arbitrator's contingent fee gave him a direct financial interest in the award that was absolutely improper, we nevertheless believe that Aetna has failed to demonstrate the required causal nexus between the party-appointed arbitrator's improper conduct and the award that was ultimately decided upon. For that reason, we reverse the trial court's judgment that vacated the award.[87]

The Rhode Island Supreme Court's approach to the problem in *Grabbert* takes into consideration certain practical realities inherent in the party-appointed appraisal process. First, "the most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose. Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results."[88] Second, "[t]he reason the parties contract for the choice of their own arbitrator is to ensure that each party will have [its] 'side' represented on the arbitration panel by a sympathetic member."[89] "The parties would not consider the appointment of an arbitrator a valued right to be bargained for and litigated over if they contemplated no more than the

81. 466 N.W.2d 257, 260 (Iowa 1991).
82. *Id.* at 261.
83. *Id.*
84. 590 A.2d 88 (R.I. 1991).
85. *Id.* at 92.
86. *Id.*
87. *Id.*
88. Int'l Produce Inc. v. A/S Rosshavet, 638 F.2d 548, 552 (2d Cir. 1981).
89. *Grabbert*, 590 A.2d at 93.

appointment of a neutral arbitrator."[90] In light of the practical realities, the court concluded that it was duty bound "to determine whether the party-appointed arbitrator's conduct was proper under the [circumstances] . . . and . . . whether any improper conduct affected the award ultimately decided upon."[91] Thus, while contingency fees arrangements are undesirable, they in and of themselves, do not form the basis for vacating an award.

C. Independent

The requirement that an appraiser be independent has been evaluated by courts from a statutory and common law perspective. In *Auto-Owners Insurance Co. v. Allied Adjusters & Appraisers, Inc.*, the Michigan Court of Appeals, in the context of a statutory appraisal dispute, was called upon to determine whether an appraiser who was the sole shareholder of the company and who adjusted the loss was disqualified to subsequently serve as appraiser for the insured.[92] The Michigan statute provided that "if the insurer and insured cannot agree on the value of the loss, a written demand may be made that the amount of the loss is to be set by an appraisal."[93] Specifically, the statute required that "when a written demand is made, the insured and the insurer each choose a 'competent, independent appraiser....' Together the appraisers choose a 'competent, impartial umpire.'"[94] Because the statute failed to define the word *independent*, the court looked to the dictionary definition of the term.[95] Therein, *Black's Law Dictionary* defined the term as "not dependent; not subject to control; restriction, modification, or limitation from a given outside source."[96] Accordingly, an independent appraiser "may be biased toward the party who hires and pays him, as long as he retains the ability to base his recommendation on his own judgment."[97] Consequently, an appraiser is not disqualified for lack of independence on the basis of having previously served as an adjuster for the nominating party.

In *Rios v. Tri State Insurance Co.*, the Florida Court of Appeals was called on "to interpret the term 'independent appraiser' as used in an insurance policy."[98] The court, applying a common law analysis, utilizing the dictionary definition, "conclude[d] that this language call[ed] for the appointment of an outside appraiser, unaffiliated with the parties."[99] According to the court, the phrase independent appraiser meant "that a party cannot appoint himself, herself, or itself .... If a firm is designated to do the appraisal, it must be unaffiliated with

90. 590 A.2d 88 at 93.
91. *Id.*
92. 605 N.W.2d 685, 687 (Mich. Ct. App. 1999).
93. *Id.* at 687 (citing MICH. COMP. LAWS SERV. § 500.2833(1)(m) (LexisNexis 2006)).
94. *Id.* at 688 (citing MICH. COMP. LAWS SERV. § 500.2833(1)(m) (LexisNexis 2006)).
95. *Id.* at 689.
96. *Id.* (citing BLACK'S LAW DICTIONARY 770 (6th ed. 1990)).
97. *Id.* at 689.
98. *Id.* at 549.
99. *Id.*

the appointing party, that is, it cannot be a firm in which the appointing party has an ownership interest."[100]

This construction does not disqualify an appraiser whose pay is based on a contingency fee basis.[101] The distinction between the requirement that an appraiser be competent, or disinterested and impartial or independent can be drawn along relational lines. The focal point of the former qualification—competent—is the personal quality of the appraiser as an individual. The focal point of the latter qualifications—disinterested and impartial or independent—is the personal relationship between the appraiser and either party. Thus, where the issue is whether an appraiser is disinterested and impartial or independent we look to the personal and business dealings of the parties to determine whether prior dealings would impede the ability of the appraiser to be fair.

D. Conclusion

In order to trigger the appraisal process, the parties must be unable to agree on the value of the property or the amount of the "loss."[102] Thereafter, a written demand for appraisal must be made.[103] The written demand for appraisement, though not required to, should include a request for the appointment of an appraiser as described in the policy (i.e., *competent and disinterested*, *competent and impartial* or *competent and independent*).[104] A statement to the effect that the appraiser being appointed should be free of undue influences and not have prior relationships or expected future relationships with any party who will be involved in this appraisal process strengthens the expectation of good faith in the selection process.

Appraisers must satisfy the credential requirements set out in the insurance contract. Public policy favors the resolution of disputes by appraisement because it assists in judicial economy.[105] Therefore, every presumption is cast in favor of the validity of the resulting award.[106] "While all the courts and text-writers seem to agree on this general [principle], there is much division of opinion respecting the circumstances" that will justify a court in either disqualifying an appraiser or setting aside an appraisal award.[107] "A large number of courts follow the rule that where the amount of the loss ... [has been] submitted to arbitrators or appraisers [the issue should], in the absence of fraud or misconduct," be determined by the award itself.[108]

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100. *Id.*

101. *Id.* at 549-50.

102. *See, e.g., id.* at 548 n.2.

103. *See, e.g.*, Bilicki v. Windsor-Mount Joy Mut. Ins. Co., 954 F. Supp. 129, 132 (E.D. Va. 1996).

104. *Id.*

105. Lee v. Providence Wash. Ins. Co., 266 P. 640, 643 (Mont. 1928).

106. *Id.*

107. *Id.* at 643.

108. *Id.*

The appointment of an appraiser with a concealed or misrepresented interest in the outcome of the appraisal constitutes grounds for voiding the award as a matter of law.[109] Consequently, in the absence of concealment or misrepresentation, the better rule is that the determination of whether an appraiser is *disinterested, impartial or independent* should not be based solely on the basis of her prior experience, compensation structure, or employment relationship with the nominating party—any of which might qualify the appraiser as *competent*.

The infirmity created by the requirement that the appraiser be *competent and disinterested, competent and impartial*, or *competent and independent* can be avoided by the appraiser or the party nominating her fully disclosing any interest or experience which might reflect negatively on the process. Consequently, "[t]he act of disclosure operates as a cure rather than an excuse for intervention by the courts."[110] Thus, in the absence of misconduct[111] during the appraisement process, full information and honest disclosure will not serve as a basis for disqualification of an appraiser or the setting aside of an award because the integrity of the process is preserved.[112] "After all, it would seem that an adequate test is, were the proceedings honestly and fairly conducted?"[113]

Once the distinction between arbitration and appraisal is understood and the qualifications of the appraiser satisfied, the next hurdle to understanding appraisement is grasping the source and extent of the authority and power of an appraiser.

III. STEP 3: THE POWER AND AUTHORITY OF APPRAISERS

> The two appraisers will select an umpire. If the appraisers do not agree on the selection of an umpire within 15 days, they must request selection of an umpire by a judge of a court having jurisdiction. The appraisers *will state separately the value of the property and the amount of the "loss." If they fail to agree, they will submit*

109. *See, e.g.*, Bradshaw v. Agric. Ins. Co., 32 N.E. 1055, 1058 (N.Y. 1893); Coon v. Nat'l Fire Ins. Co., 213 N.Y.S. 407, 410 (N.Y. Sup. Ct. 1925).

110. Perez v. Mid-Century Ins. Co., 934 P.2d 731, 734 (Wash. Ct. App. 1997).

111. The word "misconduct" as employed in the first statement of the rule "is comprehensive enough to include 'misfeasance' and 'malfeasance.'" *Lee*, 266 P. at 643. As variously defined, misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner. Malfeasance is the unjust performance of some act which the party had no right, or which he had contracted not, to do. Misfeasance is the wrongful or injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner, while malfeasance is doing an act which is positively unlawful or wrongful. *Id.*

112. *See* Rios v. Tri-State Ins. Co., 714 So. 2d 547, 553 (Fla. Ct. App. 1998); Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88, 94 (R.I. 1991).

113. *Lee*, 266 P. at 643.

their differences to the umpire. A decision agreed to by any two will be the appraised value of the property or amount of "loss."[114]

The power and authority of an appraiser are dependent on the terms of the insurance policy.[115] Therefore, appraisers cannot exercise authority over or resolve any matter not included therein.[116] Appraisers are bound by the law of the policy and must also carry out their charge (i.e., (1) determine the value of the property; (2) determine the amount of the loss; and (3) state each separately) in accordance with the terms and conditions of the policy.[117]

An appraiser's authority is generally limited by the language of the provision to determine the *value of the property and the amount of the "loss."*[118] Courts have construed this language as a limitation on an appraiser's authority which precludes her from resolving issues of law such as those pertaining to coverage, liability, causation, and exclusions.[119]

Judicial review of an appraisal award is generally limited in scope to fraud, corruption or misconduct that caused an unjust result.[120] However, courts may also review an appraisal award on the basis of the scope of the appraiser's authority and whether she has exceeded it.[121]

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114. This represents a typical appraisal provision cited in most insurance policies. *See, e.g.*, Jacobseon v. Fireman's Fund Ins. Co., 111 F.3d 261, 263 (2d Cir. 1997).

115. Fairfield Pool & Equip. v. Transcon. Ins. Co., No. CV92 293277S, 1993 Conn. Super. LEXIS 2, at *3 (Conn. Super. Ct. 1993); Hanson v. Commercial Union Ins. Co., 723 P.2d 101, 103-04 (Ariz. Ct. App. 1986); R.D. Mgmt. Co. v. Phila. Indem. Ins. Co., 302 F. Supp. 2d 728, 734 (E.D. Mich. 2004); Riley v. Farmer's Fire Ins. Co., 735 A.2d 124, 128 (Pa. Super. Ct. 1999); Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142, 152 (Tenn. Ct. App. 2001); Richter v. Western State Ins. Co., 636 N.E.2d 1112, 1113 (Ill. Ct. App. 1994); Fisch v. Transcon. Ins. Co., 356 S.W.2d 186, 190 (Tex. Ct. App. 1962).

116. *See supra* note 115.

117. *See* Pac. Nat'l Fire Ins. Co. v. Beavers, 73 S.E.2d 765, 770 (Ga. Ct. App. 1952).

118. Cincinnati Ins. Co., Building and Personal Property Coverage Form, sec. D Loss Conditions, at 22 (on file with author).

119. *See* St. Paul Fire & Marine Ins. Co. v. Wright, 629 P.2d 1202, 1203 (Nev. 1981); Hanson v. Commercial Union Ins. Co., 723 P.2d 101, 104 (Ariz. Ct. App. 1986); Holt v. State Farm Lloyds, No. CA 3:98-CV-1076-R, 1999 U.S. Dist. LEXIS 6257, at *9 (N.D. Tex. Apr. 21, 1999); Munn v. Nat'l Fire Ins. Co., 115 So. 2d 54, 54 (Miss. 1959); Auto-Owners Ins. Co. v. Kwaiser, 476 N.W.2d 467, 468-69 (Mich. Ct. App. 1991); Feinbloom v. Camden Fire Ins. Co., 149 A.2d 616, 620 (N.J. Super. Ct. App. Div. 1959); Jefferson Ins. Co. v. Superior Court of Alameda, 475 P.2d 880, 883 (Cal. 1970); Opar v. Allstate Ins. Co., 751 So. 2d 758, 759 (Fla. Ct. App. 2000). *But see* AIU Ins. Co. v. Lexes, 815 A.2d 312, 314 (Del. 2003) (appraiser may determine "the cause of a loss in deciding the 'amount of loss' ... but questions about coverage and policy exclusions are legal questions for the court" to resolve); CIGNA Ins. Co. v. Didimoi Prop. Holdings, 110 F. Supp. 2d 259, 265 (D. Del. 2000); Richter v. Western State Ins. Co., 636 N.E.2d 1112, 1113 (Ill. Ct. App. 1994) (in the absence of an expressed limitation parties intended that all matters in dispute will be decided by appraisers).

120. Boulevard Associates. v. Seltzer P'ship, 664 A.2d 983, 987 (Pa. Super. Ct. 1995).

121. *See supra* note 115. *See, e.g.*, Holt v. State Farm Lloyds, No. CA 3:98-CV-1076-R, 1999 U.S. Dist. LEXIS 6257, at *10 (N.D. Tex. Apr. 21, 1999); Mitchell v. Aetna Cas. & Sur. Co., 579 F.2d 342 (5th Cir. 1978).

The umpire is constrained by the same rules of authority as the appraisers.[122] Accordingly, it is only where the appraisers *fail to agree that they will submit their differences to the umpire.*[123] This language does not require that the appraisers concur in summoning the umpire to settle their differences. Rather, whenever an disagreement arises between them and such disagreement comes to the attention of the umpire then the latter becomes qualified to act.[124] Where an umpire purports to act in the absence of differences between the appraisers, the award is invalid.[125]

A. In Accordance with the Terms and Conditions of the Policy

An appraiser must determine the *value of the property and the amount of the "loss"* and separately state each in accordance with the terms and conditions of the policy.[126] Consequently, the policy must be carefully read to ensure that any provisions providing for the methodology by which these determinations are to be made are followed. For example, in an appraisal of *value of the property and the amount of the "loss"* arising out of a replacement cost policy, the replacement cost provisions must be consulted as a matter of course.[127]

The pertinent issue, however, arises out of the inability of the parties to agree on the *value of the property and the amount of the "loss."* Therefore, due to the fact that the word "loss" appears in quotations—which designates it as a word defined in the policy—the definition section of the policy must be consulted. Typically, the word is defined to mean "accidental loss or damage."[128]

B Value of the Property

The requirement that the appraiser determine the value of the property is reinforced in the **Valuation** provision of the policy. Such a provision is commonly found in the **Loss Conditions** section of the policy. In the model policy that provision provides:

> SECTION D. LOSS CONDITIONS
> 7. Valuation
>
> We will determine the value of Covered Property in the event of "loss" as follows:

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122. Glickman v. North River Ins. Co., 448 N.Y.S.2d 77, 78 (N.Y. App. Div. 1982).

123. *Id.* at 78.

124. *See* Melton Bros., Inc. v. Newark Fire Ins. Co., 139 A. 399, 400 (N.J. Chan. Ct. 1927).

125. *See* Fisch v. Transcon. Ins. Co., 356 S.W.2d 186, 189-90 (Tex. Ct. App. 1962).

126. Cincinnati Ins. Co. Form, *supra* note 118, at 22.

127. For a detailed discussion of replacement cost coverage, see Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 WAKE FOREST L. REV. 295 (1999).

128. All insurance provisions referred to herein were taken from the Cincinnati Insurance Policy endorsed for the State of North Carolina.

a. At "Actual Cash Value" as of the time of "loss", except as provided in **b.**, **c.**, **d.**, **e.**, and **f.** below.

The above provision is amended by the **Replacement Cost** provision to provide:

SECTION F. OPTIONAL COVERAGES
3. REPLACEMENT COST

Replacement Cost (without deduction for depreciation) replaces "Actual Cash Value" in **SECTION D. LOSS CONDITIONS, 7. Valuation, Part a.** of this Coverage Form.

Interestingly, this provision contemplates that the appraiser will determine only the value of covered property and not the amount of the "loss" on a replacement cost basis.

While the model policy does provide a methodology for determining the *value of the property*, it fails to provide a basis for determining the *amount of the "loss."* Nevertheless, an appraiser in performing this obligation is to be guided by the definition of the term *"loss"* as provided in the policy. The definition provided in the policy contains no limiting or qualifying terms. This is significant because assessment of the *amount of the "loss,"* by either appraiser, on the basis of "covered cause of loss," "covered loss," "loss caused," or "direct physical loss" suggests that the appraiser may have exceeded its authority under the policy.

This implication arises out of the fact that the above quoted phrases are commonly used in the coverage section of the policy. For example, the model policy provides:

SECTION A. COVERAGE

We will pay for direct physical "loss" to Covered Property at the "premises" described in the Declaration caused by or resulting from any Covered Cause of Loss.

3. Covered Causes of Loss

a. Risks of Direct Physical Loss

Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the "loss" is

(1) Excluded in **3.b., Exclusions**; or
(2) Limited in **3.c., Limitations**;

That follow.

Because the above illustrative assessment bases are traceable to the COVERAGE section of the policy, determination of the *amount of the "loss"* involved

resolution of coverage issues—questions of law—relegated exclusively to the court.[129]

C. *Legal Standards and Mistakes of Law*

Appraisal awards are most often made by individuals who are not learned in law or schooled in the judicial process. Consequently, the question whether appraisers are duty bound to use prevailing legal standards as a part of their methodology for determining the *value of the property and the amount of the "loss"* frequently arises.[130] As has been variously stated, courts are committed to the sanctity of appraisal awards.[131] Nevertheless, some courts have expressed a willingness to ignore the presumption of validity on a very limited basis. For example, in *Lee v. Providence Washington Insurance Co.*, the Montana Supreme Court took an intermediate position and adopted the view that not every mistake of law will warrant the setting aside of an appraisal award.[132] According to the court, only where the mistake of law is so gross and palpable as to evidence misconduct or undue partiality on the part of the appraisers should a court interfere with the award.[133]

In *Brethren Mutual Insurance Co. v. Filsinger*, the Maryland Court of Appeals took the position that it was without authority to review the finding of law or facts of an appraiser.[134] Therefore, the award is enforceable and cannot be reviewed, even if erroneous, unless the appraiser acted fraudulently, went beyond the scope of the issues, or the proceedings lacked procedural fairness.[135] As the court noted:

> "An honest mistake of judgment in the conclusion of the arbitrators which does not exceed the bounds of the submission is not, as a general rule, ground of impeachment of the award, whether the alleged mistake is one of fact or of law, or of both. * * * Such error are among the contingencies which parties assume when they select such tribunals."[136]

The view articulated by the court in *Brethren Mutual* is not as extreme as it seems to appears at first glance because the court relied on both the holding and the rationale of *Schreiber v. Pacific Coast Fire Insurance Co.*[137] Significantly, in *Schreiber*, the Maryland Supreme Court was asked "to set aside [the] award for

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129. *See supra* note 119.

130. *See* McIntosh v. Hartford Fire Ins. Co., 78 P.2d 82, 84 (Mont. 1938).

131. *See, e.g.*, Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 260 (Iowa 1991).

132. 266 P. 640, 644 (Mont. 1928).

133. *Id.* at 643.

134. 458 A.2d 880, 883 (Md. Ct. Spec. App. 1983) (citing Schreiber v. Pac. Coast Fire Ins. Co., 75 A.2d 108, 111-12 (Md. 1950)).

135. *Id.*

136. *Id.* at 884 (quoting *Schreiber*, 75 A.2d at 112).

137. 75 A.2d 108 (Md. 1950).

an alleged error of law [because the] appraisers and umpire had erroneously held 'actual cash value' to be equivalent to cost of reproduction less depreciation."[138] While the court agreed that this was an error of law, the evidence of value was still not a reviewable issue.[139] Nevertheless, the *Schreiber* court recognized that:

> When it is sought to set aside an award, upon the ground of a mistake committed by arbitrators, it is not sufficient to show that they came to a conclusion of fact erroneously, however clearly it may be demonstrated that the inference drawn by them was wrong. It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case, so that upon their own theory, a mistake was made which has caused the result to be somewhat different from that which they had reached by their reason and judgment. . . . A mistake which will be sufficient to avoid the award must be one that is plain and palpable, such as an erroneous computation or calculation of the amount, and the like.[140]

When examined in this light, the Maryland rule is strikingly similar, if not identical, to that articulated by the Montana Court in *Lee*.

A somewhat different approach to the problem of whether appraisers are obligated to apply legal standards and the effect of mistakes of law was applied by the New York Court of Appeals in *Gervant v. New England Fire Insurance Co.*[141] Therein, the court was called upon to determine whether an appraiser's and umpire's refusal to hear and consider evidence on the law of determining actual cash value could be the basis for setting aside their award.[142] Confronted with the rule restricting judicial review to errors of fact and law, the court concluded that appraisers "are not free to disregard, arbitrarily, pertinent evidence presented by the other appraiser."[143] According to the court, a refusal to hear such evidence constituted legal misconduct which justified setting the award aside.[144] However, it is unclear whether *Gervant* stands for the proposition that an appraiser's application of the wrong legal standard per se supports the setting aside of an appraiser's award or merely that application of an improper legal standard in addition to other questionable circumstances can constitute misconduct—a universally recognized basis for setting aside an award.[145]

The issue of whether an appraisal award can be vacated because it was based on a misconception of law was put before the Supreme Court of California in *Jefferson Insurance Co. of New York v. Superior Court of Alameda County*.[146] In *Jefferson*, the appraisers determined the actual cash value of the insured's

138. *Id.* at 108.
139. *Id.* at 111-13.
140. *Id.* at 112.
141. 118 N.E.2d 574 (N.Y. Ct. App. 1954).
142. *Id.* at 575.
143. *Id.* at 577.
144. *Id.*
145. *See id.*
146. 475 P.2d 880 (Cal. 1970).

building on a replacement cost less depreciation basis.[147] Moreover, they refused to consider other relevant factors tending to show the fair market value of the property despite the fact that such evidence was made available to them.[148] The court avoided answering the specific issue of whether a misapplication of legal standards was sufficient to vacate an appraisal award by reformulating the issue as whether the appraisers had exceeded their authority under the policy. As the court observed:

> Where an appraisal award is based upon a misconception of the law, this fact may be proved to the court by extrinsic evidence . . . . The declaration of an appraiser is properly received to show what the appraisers considered the issue to be, for the purpose of determining whether they exceeded their powers by making an error of law.[149]

As in *Gervant*, the California Supreme Court avoided the penultimate issue and merely categorized the appraiser's conduct as a kind that has been universally recognized as supporting judicial review.

Both *Gervant* and *Jefferson* evidence judicial reluctance to stray from the traditional legal philosophy accorded to the appraisement process. Pursuant to this philosophy, the matter of the reviewability of an appraisal award must be approached from a narrow perspective. According to this perspective, it is not in the public interest to encourage litigation over procedures designed to resolve disputes without litigation. Thus, every reasonable presumption supports the validity of such awards.

Despite the conservative philosophy with which courts have historically approached disputes over the validity of appraisal awards in general, the Supreme Court of New Jersey in *Elberon Bathing Co. v. Ambassador Insurance Co.*,[150] took the bull by the horns, at least with respect to the question of whether an appraiser's failure to apply the appropriate legal standard constitutes a distinct basis for vacating an award. The *Elberon* court concluded that misapplication of an inappropriate legal standard constituted legal misconduct which in and of itself justifies vacating the award.[151]

Whether *Elberon* really evidences a new philosophy is questionable for two reasons. First, the court—like those in *Gervant* and *Jefferson*—classified the conduct as one universally accepted basis for vacating an appraisal award—that is, legal misconduct. Second, the footnote appended by the court to its ultimate conclusion, makes the holding of the case circumspect. As provided in the note:

> In some cases a refusal to consider relevant evidence, while improper, might not in itself be cause to set aside an award if the result reached appeared reasonable. Here,

147. *Id.* at 882.
148. *Id.*
149. *Id.* at 883.
150. 389 A.2d 439 (N.J. 1978).
151. *Id.* at 445-46.

> however, exclusion of depreciation while applying replacement cost new prevents the result from being reasonable.[152]

Thus, another factor—reasonableness—is to be considered in determining whether the award is based on an improper basis or constitute legal misconduct. The former—improper basis—does not per se justify vacating the award, while the latter—legal misconduct—will.

IV. STEP 4: APPRAISAL AS A CONDITION PRECEDENT TO A LAWSUIT

The parties are free to contract that an appraiser's decision is a condition precedent to a right of action on the contract. The condition may be either expressed or implied from the terms of the policy.[153] A mere policy provision that the amount to be paid in case of disagreement shall be submitted to appraisal does not preclude the insured from asserting an action.[154] In order for the provision to operate as an express condition precedent it must also provide language to the effect that no action shall be maintained until afterwards or after full compliance by the insureds of all the requirements.[155]

If implied, the condition "must be so plain that a contrary intention cannot be supposed."[156] Thus, the court may, in construing the policy as a whole, ascertain the intentions of the parties to imply appraisal as a condition precedent to a lawsuit.[157] In the context of determining whether the condition should be implied, it has been observed that:

> In determining whether arbitration is a condition precedent, "the governing principle," as stated by an able commentator on arbitration, "seems to be that, if there is an absolute covenant to pay, and a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant, but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover."[158]

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152. *Id.* at 446 n.6.

153. *See, e.g.*, Hamilton v. Liverpool, London & Globe Ins. Co., 136 U.S. 242, 256 (1890); Hamilton v. Home Ins. Co., 137 U.S. 370, 385 (1890); George Dee & Sons Co. v. Key City Fire Ins. Co., 73 N.W. 594, 594 (Iowa 1897); Manchester Fire Assurance Co. v. Koerner, 40 N.E. 1110, 1111 (Ind. Ct. App. 1895); Harwell v. Home Mut. Fire Ins. Co., 91 S.E.2d 273, 275 (S.C. 1956); Graham v. German Am. Ins. Co., 79 N.E. 930, 934 (Ohio 1907).

154. *Graham*, 79 N.E. at 932.

155. *See* Palatine Ins. Co. v. Morton-Scott-Robertson Co., 61 S.W. 787, 790-91 (Tenn. 1901); Big Vein Pocahontas v. Browning, 120 S.E. 247, 251 (Va. 1923).

156. *Browning*, 120 S.E. at 251; *Palatine Ins. Co.*, 61 S.W. at 790-91.

157. *Browning*, 120 S.E. at 251; *Palatine Ins. Co.*, 61 S.W. at 790-91.

158. *Browning*, 120 S.E. at 251 (quoting CORPUS JURIS ¶ 71C ("Arbitration and Award")).

Where appraisement is a condition precedent to a lawsuit, an action on the policy may not be asserted unless the condition is waived or in some way legally dispensed.[159]

Pursuant to the language of the model policy, "*either may make written demand for an appraisal*," appraisement is an option for both parties. Neither party is required to invoke it, but either may do so.[160] Consequently, the insured is not required to seek appraisement of a dispute arising over the amount of the loss claimed before filing suit against the company where no demand for appraisement has been made.[161] Until there has been a written demand for appraisement neither is compelled to arbitrate.[162] Therefore, if neither party has demanded appraisement before the filing of a lawsuit, the filing party is not prohibited from proceeding with the litigation because of the appraisal provision. However, if the demand precedes the filing of the suit, the option is exercised, and the parties are bound by the provision of the policy.[163]

In assessing whether the appraisal provision constitutes a condition precedent to a lawsuit, other provisions of the policy—especially the CONDITIONS clause—are relevant for two reasons. First, in determining whether appraisal is an implied condition precedent to a lawsuit, the court must draw the implication from the policy as a whole.[164] Second, a reading of the appraisal clause, in combination with other conditions in the policy, may create an ambiguity which must be construed in favor of the non-drafting party.[165] For example, in *Hayes v. Allstate Insurance Co.*,[166] the policy provided:

> Condition 7: Our Payment of Loss
> We will settle any covered loss with you. We will pay you unless another payee is named in the policy. We will pay within 60 days after the amount of loss is finally determined. This amount may be determined by an agreement, between you and us, a court judgment, or an appraisal award.
>
> Condition 8: Appraisal
> If you and we fail to agree on the amount of the loss, either may make written demand for an appraisal. Each will select a competent and disinterested appraiser

159. Fire Ass'n of Phila. v. Appel, 80 N.E. 952, 954 (Ohio 1907).

160. McClary v. Cincinnati Ins. Co., No. 84AP-223, 1985 Ohio App. LEXIS 6641, at *9 (Ohio Ct. App. May 16, 1985).

161. *Id.*

162. *Id.* ("To insist that no action could be maintained until after the amount of loss had been ascertained by appraisement would render meaningless the optional language of the appraisement provision.").

163. *Id.* at *13.

164. Federated Guar. Life Ins. Co. v. Dunn, 439 So. 2d 1283, 1285 (Ala. Civ. App. 1983).

165. Bergholm v. Peoria Life Ins. Co., 284 U.S. 489, 492 (1932). For a detailed discussion of the sources of, and analytical standards for, assessing ambiguities in insurance contracts see Johnny Parker, *The Wacky World of Collision and Comprehensive Coverages: Intentional Injuries and Illegal Activities Exclusions*, 79 NEB. L. REV. 75, 101-13 (2000).

166. 722 F.2d 1332 (7th Cir 1983).

> and notify the other of the appraiser's identity within 20 days after the demand is received. . . .[167]

Despite the fact that the lawsuit was filed prior to the demand for appraisal by the insurance company, the trial court construed the two conditions as meaning that "although the parties are free at the outset to pursue any remedy provided in Condition 7, once a demand for the appraisal procedures has been made by either party, those procedures become a mandatory condition precedent to bringing a lawsuit."[168] Thereafter, the trial court stayed the lawsuit and ordered the parties to proceed under the appraisal procedures of Condition 8.[169]

On appeal, the Seventh Circuit considered the fact that the policy did not expressly provide that no action may be maintained on the policy until after the amount of the loss was determined by appraisal.[170] Consequently, the court reasoned that Condition 8 merely provided the procedures by which an appraisal was to be made, but was silent on whether appraisal must precede a lawsuit on the policy.[171] The court also noted that the policy provisions read together did not imply that the right of action was conditioned on the completion of an appraisal.[172] In reversing the trial court and ruling in favor of the insured, the court primarily relied on the fact that Conditions 7 and 8 were inconsistent in that the former provision expressly provided that "this amount may be determined by an agreement, between you and us, *a court judgment*, or an appraisal award."[173] Therefore, the court concluded that the inconsistent policy provisions created an ambiguity to be construed against the interpretation advanced by the drafter.[174]

A. Condition Precedent Waived—Conduct Attributable to the Parties

Both parties are bound by the obligation to exercise good faith and fair dealing in the context of an appraisal.[175] Therefore, it is not permissible for either the insurer or the insured to engage in any tactics designed to defeat the appraisal process of its ultimate objectives.[176] If the insurer should engage in conduct which robs the appraisal of its ultimate purpose then the condition precedent is waived.[177] A waiver need not be in expressed terms;[178] it may be implied from the acts, omissions or conduct of the insurer.[179]

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167. *Id.* at 1334 (emphasis omitted).
168. *Id.*
169. *Id.*
170. *Id.* at 1335.
171. *Id.*
172. *Id.*
173. *Id.* at 1333-36.
174. *Id.* at 1335.
175. Fisher v. Merchants' Ins. Co., 50 A. 282, 284 (Me. 1901).
176. *See, e.g.*, Carp v. Queen Ins. Co. of N. Am., 79 S.W. 757, 760 (Mo. Ct. App. 1904).
177. *Id.*
178. Bielski v. Wolverine Ins. Co., 150 N.W.2d 788, 790 (Mich. 1967).
179. *Id.*

The conduct of an appraiser may, under certain circumstances, be attributed to the person who appointed her.[180] Thus, the conduct of an insurer's adjuster and appraiser in refusing to concur in the appointment of any umpire (not of the insurer's choosing) for the sole purposes of either delaying the appraisal or to secure an unjust result was deemed a breach of good faith attributable to the insurer which constituted a waiver of the condition.[181] Likewise, where the failure or refusal to submit to appraisal is due to the fault of or attributable to the insured, the absence of an award operates as a bar to an action on the policy.[182] Thus, the failure or refusal of the insured, without cause, to submit to or allow the appraisal to begin or continue in accordance with the policy is a valid defense to an action on the policy.[183] Whether the conduct of an appraiser is attributable to the party that nominated her is a question of fact.[184]

Neither party may engage in conduct designed to unreasonably postpone, delay, or prevent appraisal.[185] Neither may either engage in such conduct for the purpose of forcing the other to settle.[186] Typically, in order for a waiver of the condition to occur the aggrieved party must demonstrate that it has been prejudiced by the other's misconduct and that it has acted with reasonable diligence.[187] However, proof of prejudice is not a universal requirement.[188]

A recurring question to which there seemed to be no definitive answer is whether a denial of liability by the insurer constitutes a waiver of the condition precedent. One position is that a denial of ultimate liability prior to both the filing of a lawsuit and the demand for appraisal does not constitute a waiver unless the denial was made under circumstances, or is accompanied by conduct, suggesting that the appraisal would be an empty gesture.[189] Another position provides that a denial of liability amounts to a waiver of the condition precedent of an appraisal if it persisted until after the lawsuit is filed.[190]

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180. *Carp*, 79 S.W. at 760.

181. *See* Chapman v. Rockford Ins. Co., 62 N.W. 422, 426 (Wis. 1895).

182. McCollough v. Owners Mut. Ins. Co., 8 So. 2d 404, 409 (Ala. 1942).

183. *See id.*; Hartford Fire Ins. Co. v. Conner, 79 So. 2d 236, 240 (Miss. 1955).

184. *Carp*, 79 S.W. at 761.

185. *See generally* Powers Dry Goods Co. v. Imperial Fire Ins. Co., 51 N.W. 123, 124-25 (Minn. 1892).

186. *Id.* at 124.

187. *See Chapman*, 62 N.W. at 426; Martinez v. Fin. Pac. Ins. Co., No. F038930, 2003 Cal. App. Unpub. LEXIS 675, at *12 (Jan. 22, 2003).

188. *See Martinez*, 2003 Cal. App. Unpub. LEXIS 675, at *13.

189. *See* Fire Ass'n of Phila. v. Agresta, 154 N.E. 723 (Ohio 1926); McClary v. Cincinnati Ins. Co., No. 84AP-223, 1985 Ohio App. LEXIS 6641, at *5-6 (Ohio Ct. App. May 16, 1985). *Compare* Ohio Farmers' Ins. Co. v. Vogel, 76 N.E. 977, 978 (Ind. 1906) (when a party denies liability the performance of conditions precedent waived).

190. *See* Carp v. Queens Ins. Co. of N. Am., 79 S.W. 757, 760 (Mo. Ct. App. 1904); Am. S. Ins. Co. v. Daniel, 198 So. 2d 850, 853 (Fla. Dist. Ct. App. 1967); McNall v. Farmers Ins. Group, 392 N.E.2d 520, 523 (Ind. Ct. App. 1979) ("denial of liability under an insurance policy is a waiver of the right to demand performance of conditions precedent"); Integrity Ins. Co. v. Lindsey, 444 N.E.2d 345, 347 (Ind. Ct. App. 1983) (requirement of an appraisal can be waived); Concordia Fire Ins. Co. v. Barkett, 236 P. 890, 891 (Okla. 1925); Glen Falls Ins. Co. v. Hite, 83 Ill. App. 549, 553 (Ill. App. Ct. 1898); Hartford Fire Ins. Co. v. Conner, 79 So. 2d 236, 240 (Miss. 1955) ("The denial

It was once common for insurance appraisal clauses to expressly provide that "[t]he company shall not be held to have waived any of its rights by any act relating to appraisal."[191] Provisions of this nature rendered the issue of whether denial of liability constituted a waiver moot. This type of reservation of rights provision appears in contemporary insurance policies less frequently than it did a decade ago.[192] This fact is significant because an insurance policy is a contract of adhesion affected with public policy. Thus, the drafter of the policy is burdened with the responsibility of clearly defining the rights, liabilities, and obligations of the parties. Where the rights, liabilities, and obligations are capable of being clearly defined and the drafter fails to do so, the failure is construed against the drafter.[193] Consequently, the failure to include a reservation of rights clause, which was once a common provision, counsels in favor of resolving the disputed issue in favor of the insured.

B. Conduct of the Appraisers Not Attributable to the Parties

There is a difference of opinion regarding the issue whether a party must demand or submit to another appraisal where there is a failure to secure an award that is not due to the fault of either party. One view is that if the appraisal is not complete or the award set aside on the basis of misconduct not attributable to either party, the agreement for appraisement remains in force and a new appraisement is a condition precedent to a right of action on the policy unless waived.[194] The second and seemingly majority view provides that where there is a failure to secure an appraisal award in accordance with the terms of the policy which is not attributable to either party, the insured is not required to submit to another appraisal but may bring an action on the policy.[195] The rationale underlying the latter view is that a claimant should not be tied up forever without his fault and against his will by a failed appraisement.[196] However, an honest, but futile attempt by the appraisers to perform their duties should not dispense with the need for a second appraisal unless it caused a wholly unreasonable delay.[197]

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of liability which dispenses with the necessity of an appraisal must occur ... before answering in a suit on the policy.").

191. The appraisal provision of the model policy originally included a clause that provided: "If there is an appraisal, we still retain the right to deny the claim." Cincinnati Insurance Co. Form, *supra* note 118, at 22. This clause was delete from the policy by the 2003 endorsement. Cincinnati Insurance Co., Endorsement: North Carolina Changes, sec. E Appraisal, at 1-2 (on file with author).

192. *See, e.g.*, Jupiter Aluminum Corp. v. Home Ins. Co., 225 F.3d 868, 872 (7th Cir. 2000); Global Fire Protection Co. v. Federal Ins. Co., 684 F. Supp. 591, 592 (N.D. Ill. 1986).

193. For a detailed discussion of the sources of and analytical standards for assessing ambiguities in insurance contracts, see PARKER, *supra* note 165, at 101-13.

194. *See* Fisher v. Merchants' Ins. Co., 50 A. 282, 283-84 (Me. 1901).

195. *See* Security Printing Co. v. Conn. Fire Ins. Co., 240 S.W. 263, 269 (Mo. Ct. App. 1922).

196. *See id.*

197. *Carp*, 79 S.W. at 761.

V. SUMMARY

More than one hundred years of judicial and legislative scrutiny has shaped appraisement into an almost perfect method of alternative dispute resolution. Over the past twenty-five years it has stepped out of the shadow caste by arbitration and taken on a life of its own. In the context of insurance, it has become the methodology of choice for resolving disputes over value of property and the amount of an insured loss.

One might, given the fact that much of the seminal decisional law regarding appraisement is quiet old, conclude that the law on the subject is much more predictable and uniform than it really is. The reality is, however, that early common law courts, motivated by the fact-sensitive nature of appraisal disputes relied on juries to assist them in identifying and shaping the doctrinal contours and boundaries of appraisement. Because each dispute seemed factually unique, the exceptions outnumbered the rules and the law of appraisement appeared as a patchwork quilt of many colors.

Contemporary common law courts, especially in the context of insurance disputes are as wedded to the principle of freedom of contract and doctrinal philosophy as their earlier counterpart. However, contemporary courts, because of the importance of insurance in modern society, are burdened with the additional task of interpreting private insurance contracts in a manner which reflects society's interest in the subject matter thereof. Thus, as a result of the influence of public policy in the context of insurance disputes, a number of tools of contract interpretation—ambiguity, honoring the reasonable expectation of the insured, unconscionability—have developed. Contemporary courts have only recently begun to apply the doctrine of ambiguity to appraisal disputes; consequently, the future of appraisal clause interpretation stands on the precipice of a new frontier.