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The appraisal clause, time to end the games and resolve claims.

By: David Princeton

A note of appreciation:

It is with great sincerity that I express my gratitude to the many industry professionals for the incredible resources, conversations, and support that they provided during the writing of this paper. Their willingness to share expertise, insights, and experiences was invaluable in helping me to gain a deeper understanding of the complex world of the insurance appraisal clause.

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Introduction:

Appraisal has played an important role in shaping the insurance industry. It has been used as a means of resolving value disputes between policyholders and insurers for hundreds of years. Appraisal is a contractual dispute resolution process that determines the cost of repair or replacement using professional appraisers. The information these professionals provide is critical in helping insurance companies and policyholders accurately assess and compensate claims to resolve valuation disputes.

In recent years, the appraisal process has evolved into a gamified system being manipulated by insurance companies and policyholder advocates. Appraisal is a creature of contract, and an insurance policy is a contract of adhesion. Absent state regulations providing for consumer protections, the games will continue and both will suffer the expense. If left unchecked, appraisal could be removed entirely from insurance policies, leaving the insurance company and consumers on a path towards our crowded court systems.

It is time to end the games and resolve claims. This paper explores the history of appraisal, the current games being played by both sides, and suggests two solutions. The solutions are model state legislation and a model appraisal process that could be incorporated by agreement by the parties in the quasi-judicial resolution of valuation disputes.

History:

One of the earliest recorded instances of an appraisal process can be traced back to the 16th century.ⁱ A special court was convened to appraise property losses following a fire that spread across London in September of 1666. The disputes were between landlords and tenants as tenants were required to repair and rebuild the buildings. *Id.* The court appointed a panel of appraisers to resolve the disputes between the parties. Out of this event, property fire insurance companies started to form. *Id.*

America's first standard insurance policy came from Massachusetts in 1873.ⁱⁱ An appraisal clause appeared in the "Massachusetts Standard Policy" referring disputes to disinterested men called referees.

In case any difference of opinion shall arise as to the rights of the parties under this policy, the subject thereof shall be referred to three disinterested men, the company and the insured each choosing one out of five persons to be named by the other, and the third being selected by

the two so chosen, and the decision of the majority of said referees shall be final and binding on the parties.ⁱⁱⁱ

The use of appraisal in property insurance expanded as states across America adopted the 1918 “New York Standard Fire Policy” which replaced the old policy of 1886.^{iv} The appraisal clause provided instructions about the process including what was subject to appraisal and how disputes between the appraisers were resolved.

Appraisal. In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or this Company, such umpire shall be selected by a judge or a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.^v

The formation of the Insurance Services Office, Inc. in 1971 further standardized many insurance companies’ appraisal clauses. Whether the insurance policy covers commercial or residential property. Most modern-day appraisal clauses appear in the Loss Conditions section of the policy requiring strict performance.

Appraisal. If [Company] or [Policyholder] 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 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 amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, [Company] will still retain our right to deny the claim.^{vi}

Variations of the appraisal clause can exist from one insurance company to another and across the various coverage forms. These variations, to the extent they do not infringe on state laws,

tend to provide additional constraints on the policyholder or confer additional powers to the insurance company. A seemingly rare exception to the variations is the appraisal clauses that confer benefits to the policyholder if certain conditions are met.

Appraisal. If you and we fail to agree on the actual cash value or amount of loss, either party may make a written demand that the amount of the loss be set by appraisal. Each party will select a competent and impartial appraiser and notify the other of the appraiser's identity within 20 days after the written demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire.

The appraisers shall then appraise the loss, stating separately the actual cash value and loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the actual cash value or amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the actual cash value or amount of loss. However, the amount of the award shall be subject to all applicable provisions of the policy, including Section I -- Property Protection Conditions 2. c. (4) and 2. c. (5).

Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally, *except we will pay your appraiser's fee and the umpire's fee, if the following conditions exist:*

- a. You demanded the appraisal; and*
- b. The full amount of loss, as set by your appraiser, is agreed to by our appraiser or by the umpire.^{vii}*

Appraisal and arbitration are similar in that they both involve the resolution of disputes with some key differences. Key differences include the disputes scope that is subject to resolution, the formalities of the process, and the strength of the binding result.

Appraisal and arbitration encompass different scopes of a dispute. Appraisal is used to resolve disputes over the value of insured property and the cost of repair or replacement. Depending on the applicable common law, related issues such as causation, damage attribution, or what is subject to the opinion of the appraisers could be outside the scope of the appraisal. Conversely, arbitration can be used to resolve a wide range of disputes. This includes disputes about coverage and causation. A modern trend in commercial insurance policies is to include arbitration clauses. Notably, arbitration prevents the development of common law as decisions are seldom public and never precedent.

The formality of the dispute resolution process is different. Appraisal clauses traditionally specify only a few obligations. The process is optional, when the clause says either party *may* demand appraisal and not a condition precedent to litigation. The process can allow for 20 days to name an appraiser. Some clauses direct the appraisers to name an umpire within 15 days while others do not. In most cases, once the appraisers are named and an umpire selected, the clause provides little direction.

On the other hand, arbitration and the arbitrability of the issues must be clearly defined. In arbitration clauses a specific set of rules is commonly referred to such as the American Arbitration Association, JAMS, or others. These rules provide more structure to the parties and the decision maker. Arbitration also has the support of the Federal Arbitration Act of 1925 and the precedent affirming the legal systems validation of parties privately resolving disputes.

The binding strength of a decision is different between appraisal and arbitration. In appraisal, the determination of the appraisers or umpire plus one appraiser is typically binding on both the insurance company and the policyholder but still may not result in a payment. The insurance company typically reserves the right to apply coverage to the appraisal award or deny coverage all together.

Interference with the opinion of the appraiser can also occur. When either the insurance company or the policyholder direct the opinion of the appraiser it corrupts the competence and impartiality of the appraiser. In arbitration, the decision of the arbitrator is binding on the parties and more likely to be enforced by a court. The strength of an arbitration decision comes from the Federal Arbitration Act of 1925. Only a few exceptions can result in an arbitration award from being vacated by a court:

- 1) A challenge whether the parties ever agreed to arbitrate.
- 2) Show the other party was involved in some type of conduct involving corruption, fraud, or undue means that impacted the arbitration award.
- 3) Prove the arbitrator was evidently partial and thus a fair and impartial arbitrator did not decide the award.
- 4) Establish the arbitrator committed some type of administrative misconduct in conducting the arbitration.
- 5) Prove the arbitrator misused their power and thereby exceeded their authority.^{viii}

Jurisdictions vary in their determinations whether appraisal is or is not an arbitration.^{ix} The ones that see appraisal as separate and distinct from arbitration tend to find that appraisal is limited to disputes of valuation.^x Those same courts tend to see arbitration as a substitution for

proceeding in a court of law.^{xi} While other courts have applied a state's statutory arbitration sections to the appraisal process.^{xii} Even state legislators have adopted laws which subject the appraisal process to specific statutes within a state's arbitration laws.^{xiii}

Appraisal is born from contract, subject to the common law, and state laws. This places insurance companies in the position to modify the contract, shape rules through pursuing specific facts in court, and lobby legislators for changes. A policyholder or their advocates are disadvantaged unless they can scrutinize the provisions of an insurance policy, fund litigation to shape the common law, or garner legislative support. Appraisal is often described as the "wild west" of dispute resolution. Almost anything goes in appraisal, which gives rise to the gamified appraisal process.

The Gamified Appraisal Process:

Time and money are socially constructed concepts interwoven in any decision-making process. They are fundamental themes in any dispute. It should be no surprise these themes are deeply entrenched in disputes arising from invoking the appraisal clause. In this section, the games are categorized into themes of time and money.

Time.

Timelines are in the insurance contract. First party property policies can have timelines specified for seeking replacement cost or actual cash value benefits (180 days), a private statute of limitations (12 or 24 months), submission of a proof of loss (30, 60, 90 days), and some others.

Time element coverages also factor into the ability of policyholders to sustain their business income, pay employees, or protect their family's standard of living. Time element coverage can be limited to the actual loss sustained over 12 months, a specified dollar amount, or sometimes they can be unlimited by time or money based instead on the actual reconstruction of the residence. Endorsements or other terms can extend or shorten the benefit period depending on decisions to return to the same property or if the business closes.

Time often favors insurance companies and harms policyholders. Simply, the longer an insurance company can hold onto a dollar the more profit it could make. The longer a policyholder is deprived of a dollar they are owed the more harm can occur from the deprivation. Most states provide regulations requiring insurance companies to pay claims in a timely manner. Most insurance companies will issue payment for the amounts not in dispute. These undisputed funds

or liquidated damages payments can impact the rights of policyholders depending on the applicable law.

The time added in an appraisal process could be years. Complex issues can take time. Following the 9/11 attack on the world trade center, valuation disputes about rental income, business income, cost to rebuild, and more were resolved through the appraisal clause, and it took years.^{xiv} The complexity of the issues dictated the time.

In other instances, time is added because of the games being played by both sides. The games that add time include how appraisal is invoked, whether a party chooses to participate in the appraisal, and the conduct of the appraisers once appointed.

1. Invoking Appraisal.

The necessary elements for invoking appraisal are contained in the clause. An analysis of the Insurance Service Office, Inc appraisal clause from the 2011 CP 00 10 10 12 Building and Personal Property Coverage Form above finds the following elements:

- 1) If we or you disagree on the value of
 - i. the property; or
 - ii. the amount of the loss
- 2) make a written demand for an appraisal of the loss.

The first element requires that “we” or “you” disagree. Importantly, “we” and “you” are defined terms in the insurance policy. “We” typically refers to the insurance company providing the insurance. “You” typically refers to only the first Named Insured or any other person or organization qualifying as a Named Insured. The distinction between an insured under the policy verse the Named Insured is important. While an insured may have the ability to collect benefits, only the named insured has the full rights, duties, obligations, and benefits under the policy.

The next element is that a disagreement of the value must exist. The value of the property or the value of the loss must be in dispute. The details of what is in dispute matter. Jurisdictions can limit what is subject to the appraisal process. For example, a can of soda could reasonably cost between \$0.50 to \$4.00 for the same can of soda. The lower price could be typical of a vending machine at a local grocery store while the \$4.00 price could be from a vending machine at an amusement park. It’s the same product, just a different price. Importantly, the business decision that goes into what the supplier charges is seldom considered in the claim process. This price difference could be all that an appraisal is allowed to address. Not the scope of whether the soda

was damaged or not. The issue of damage being outside of the scope of appraisal in some jurisdictions.

The last element is making a written demand. Invoking appraisal requires strict compliance. The appraisal clause is a condition of the policy. The words one uses to invoke appraisal must be precise. A request for appraisal is not a demand for appraisal. A disagreement about a coverage provision being applicable is not a value dispute. It is necessary to address each element to have a proper notice of appraisal.

II. Participation in the appraisal.

Invoking appraisal does not always result in prompt participation by the parties. An analysis of the Insurance Service Office, Inc appraisal clause from the 2011 CP 00 10 10 12 Building and Personal Property Coverage Form above finds the following element:

Each party will select a:

- i. competent; and
 - ii. impartial
- appraiser.

Delays occur because the parties immediately take positions. The insurance company and policyholder advocates response to appraisal will seek to establish positions because the clause and the laws do not foreclose the option. Often these positions result in the need for legal guidance. These positions can involve conditioning their participation, challenging competence, and challenging impartiality.

A common tactic by both sides involves conditioning participation in appraisal by seeking agreement on the scope of what can be appraised. Insurance company advocates typically look to narrow what is subject to appraisal. For example, only the price of a previously identified scope of damage. Another example could involve using prior opinions of engineers, building consultants, or adjusters to limit what an appraiser can consider.

Policyholder advocates typically look to expand what is subject to appraisal. For example, seeking to establish prior assessments set the floor of an acceptable resolution—meaning the price can only go up. Sadly, attempting to place conditions on participation never seem to amount to anything more than a dispute about an agreement to agree. These positions often lack consideration to become a binding contract between the parties.

Competence to assess the damaged property is required. Insurance policies cover a wide range of property types like vehicles, homes, commercial buildings, industrial facilities, infrastructure, income, and more. The competence of an appraiser can be defined by the common law and just recently by statute.^{xv} For those serving as appraisers the inclusion of a curriculum vitae can support that the individual possess a competence to assess the property in dispute. Insurance company and policyholder advocates will both seek to disqualify the others appraiser on grounds of competence. It seems counter intuitive that an opposition would look to disqualify their opponents chosen appraiser because of a deficiency in the appraisers ability to form a proper assessment of the damaged property, but it happens. When it happens—time is added.

Impartiality to assess the damaged property is required. Challenges to the impartiality of the chosen appraiser are far more common. Unlike objections to competence, impartiality challenges tend to be interpreted as correlations between the appraiser and the party retaining them. These challenges have sought to remove appraisers on the basis of sources of income, past dealings, retention rates, and social media as evidence of bias against the other side.

Another interpretation of an impartial appraiser is someone without a financial interest in the outcome of their opinion. This inquiry has focused on the compensation of the appraiser being an hourly rate and not contingent on a result. Insurance company appraisers commonly charge an hourly rate. Some policyholder appraisers apply an hourly rate to equal about 2% of their opinion on the valuation. These policyholder appraisers seemingly could fail to meet this interpretation of being impartial.

III. Conduct of the appraisers.

Even amicable conduct by the parties does not mean the appraiser's conduct will be. An analysis of the Insurance Service Office, Inc appraisal clause from the 2011 CP 00 10 10 12 Building and Personal Property Coverage Form above finds the following elements:

- 1) The two appraisers will select an umpire.
 - i. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction.
- 2) The appraisers will state separately the value of the property and amount of loss.
 - i. If they fail to agree, they will submit their differences to the umpire.

Delays occur because of the conduct of the appraisers. The conduct exhibited on the selection of the umpire can create delays in several ways. One way involves the appraisers agreeing on an

umpire but never notifying the umpire. Another way is not selecting an umpire at the start of appraisal process. Instead, they wait until after they have reached a disagreement. Yet another way involves seeking the court to appoint an umpire and then a lawyer picks a court with jurisdiction—but not necessarily the most geographically located one. Some policies specify a timeline to appoint the umpire (15 days) and others do not.

Delays occur because of the conduct of the appraisers in stating separately the value of the property and amount of the loss. Some appraisers use a lumpsum approach to quantifying the amount of the loss. Other appraisers will itemize the amount of the loss. Some will use quotes from trade professionals and others will use popular software products. Nowhere in the clause does it require the appraiser to inspect the property, perform a joint inspection, or establish how the value of the property and amount of the loss is to be displayed.

Delays result from the unprofessional conduct of the appraisers. Appraisers unprofessional conduct include a failure to communicate promptly, to be available, complete their work timely, and resorting to disrespectful name calling. Examples of the unprofessional conduct of appraisers is a topic on the various social media platforms.

Time is lost because of the games being played by both sides. Ending the games around how appraisal is invoked, whether a party chooses to participate in the appraisal, and the conduct of the appraisers will result in a more efficient resolution of the disputed property value and loss. All this time spent on creating positions distracts from resolving the disputed value of the claim.

Money.

Money is at risk in the appraisal. The parties are surrendering their ability to negotiate a resolution to be bound by the decision of the appraisal panel. This presents a risk to both sides as the value of the claim could decrease, increase, or remain flat. All at the cost of time and money.

An analysis of the Insurance Service Office, Inc appraisal clause from the 2011 CP 00 10 10 12 Building and Personal Property Coverage Form above finds the following elements:

- 1) A decision agreed to by any two will be binding.
- 2) Each party will:
 - i. Pay its chosen appraiser; and
 - ii. Bear the other expenses of the appraisal and umpire equally.

The only assessment that matters in appraisal is the one agreed to by the appraisal panel. The prior estimates completed by either side serve as the reason for the valuation dispute. Prior

evidence such as estimates, photos, video, professional reports, and the like could all be used by the appraisal panel to form their opinions. One challenge that results is if one party refuses to share the evidence. Insurance company advocates often claim that evidence gathered during the claim is a protected work product. This serves as reason to deny sharing the information with the policyholder. Policyholder advocates have an inverse problem. They often lack additional evidence or the evidence they have could support a lower value. These challenges result in wasting money.

Payment for a party's chosen appraiser can be influenced by factors. The insurance company decisions on loss adjustment expenses can sometimes result in an offer to compromise once appraisal is invoked. Other times the expense is viewed as necessary to defend against falling prey to those trying to game the system. Insurance companies will sometimes involve an attorney at an additional loss adjustment expense.

Policyholders and their advocates face a similar challenge, but it tends to be one of affordability. If a policyholder lacks the financial resources to pay the cost of the appraiser they may have to enlist the help of a public adjuster or attorney willing to front the expense. In calculating the risks of appraisal, the fees involved with the party's appraiser are a cost outside of most insurance policies. These factors influence the decision of the policyholder to invoke appraisal.

The expenses of the appraisal and the umpire are shared equally. Seemingly straightforward until someone questions the need for an expense of the appraisal or refuses to sign a retention agreement with a selected umpire. This element of the appraisal clause brings with it an implied cooperation between the parties and an obligation to pay.

Assume the appraisers agree they need an engineer or an architect to perform an assessment. Do they need the consent of the parties before incurring the expense? What about something more trivial like sending in a material sample to a lab for analysis for \$35.00. It would seem that the individual contracts between the party and their appraiser may more appropriately address these other appraisal expenses.

The umpire expense is seemingly straight forward to the extent that both sides pay—but nothing describes how the umpire secures their interests in being paid? The umpires may never be needed but must be selected per the terms of the clause. If an umpire accepts the assignment and is not called upon, should they be paid for being available? Does the umpire have the authority to address all disputes between the appraisers or merely the difference in the value of

the property? Should an umpire serve as a referee of sorts? What about ex parte communications between an appraiser and the umpire—is that fair? Does the umpire have a responsibility to oversee the appraisal process to move the matter forward to a conclusion? The answers to these and many more questions add to the money it takes to conduct the appraisal.

Solutions

It is time to end the games and resolve claims. In this section solutions are proposed to address the games being played by both parties. The solutions focus on model regulation and a model appraisal process because the most fundamental interest of the parties must be the full payment of all the benefits owed under the insurance policy. Regulators see to it that insurance companies and policyholders receive the full benefit of the bargain. This shared interest of all three stakeholders serves as the foundation for the solutions proposed.

Regulation

MODEL LEGISLATION FOR APPRAISAL OF PROPERTY INSURANCE CLAIMS^{xvi}

SECTION 1. SHORT TITLE

This Act shall be cited as the "Model Legislation for Appraisal of Property Insurance Claims."

SECTION 2. PURPOSE

The purpose of this Act is to provide a fair and efficient process for the appraisal of property insurance claims in the state of [STATE].

SECTION 3. DEFINITIONS

For the purposes of this Act, the following terms shall have the following meanings:

- (a) "Appraisal" means the pre-litigation process of dispute resolution for determining the scope of loss or damage to insured property and the cost of repair or replacement of the loss or damage property.
- (b) "Appraiser" means a person who is qualified to determine the value of insured property and the cost of repair or replacement of the property and is disinterested in the result.
- (c) "Insured" means the policyholder or another beneficiary of the insurance provided by the policy or either of their legal representatives.
- (d) "Insurer" means the company or entity issuing the insurance policy or their legal representatives.
- (e) "Umpire" means a person who is qualified to determine the value of insured property and the cost of repair or replacement of the property, is disinterested in the result, and serves as the decider of all disputes between the Appraisers.
- (f) "Professional Service Provider" means a person who is licensed to provide engineering, architectural, trade, surveying, planning, or other state licensed professions relating to the improvement of property.

SECTION 4. APPRAISAL PROCESS

- (a) If the Insured and Insurer disagree on an amount of benefits owed under a property insurance policy either party may serve upon the other the Demand to Commence Appraisal.

- (b) Upon receipt of the Demand to Commence Appraisal, the recipient shall appoint an appraiser and provide notice of the appointment to the issuer. In no event shall either party have more than 20 calendar days following the date of receipt to appoint an appraiser. Failure of a party to name an appraiser in the time allowed shall result in a resolution of the dispute at the last offer made by the non-defaulting party stated in the Demand to Commence Appraisal.
- (c) The appointed Appraisers shall agree on a third Appraiser to serve as the Umpire in 15 calendar days following the date of appointment of the second Appraiser. If the appraisers are unable to agree on the selection of an umpire, either party may request that the selection be made by a court having jurisdiction in the closest geographic proximity to the Insured.
- (d) The Umpire shall be responsible for coordinating the actions of the Appraisers.
- (e) No Ex Parte communications between an Appraiser, the Umpire, or Professional Service Providers. Appraisers are encouraged to communicate directly to each other.
- (f) The Appraisers shall promptly determine the amount of loss or damage to the insured property and the cost of repair or replacement of the property in no more than 60 calendar days. An extension of not more than 90 days can be granted upon petition by an Appraiser to the Umpire. The opposing Appraiser may submit a motion against the granting of a requested extension. The Umpire's decision to grant the extension shall be based on the information provided and shall be well reasoned and provided in writing to the parties.
- (g) The umpire shall decide based on the evidence presented by the appraisers on all matters that remain in dispute between the Appraisers within 20 calendar days. .
- (h) The determination of the appraisers or umpire shall be binding on the Insurer and the Insured.
- (i) The Appraisal process is limited to valuation disputes arising from the reported cause of loss on the reported date of loss.
- (j) The application of the insurance policy to the valuation in dispute is outside of the Appraisal process.
- (k) Payments resulting from the issuance of the Appraisal award shall occur in not more than 30 calendar days.

SECTION 5. TOLLING OF LIMITATIONS

- (a) Tolling of period of limitation to bring an action. The period of limitation is tolled during the period in which the parties conduct an appraisal procedure such periods are tolled as prescribed by the insurance policy or by law or agreed to by the parties. The tolling expires on the 30th calendar day following the rendering of the Appraisal Award.
- (b) Statutory interest resulting from the under payment of an amount owed under the policy continues to accrue until the amount owed has been paid.
- (c) The filing of an action before a Demand to Commence Appraisal is received forecloses the ability of either party to unilaterally invoke appraisal. Instead, Parties may mutually agree to proceed with Appraisal.
- (d) An Insureds reasonable hourly legal fees incurred to aid or assist in the Appraisal process shall be reimbursed to the insured in the event an award is 25% greater than the Insurers last offer stated on the Demand to Commence Appraisal.
- (e) An Insurer is entitled to repayment of the difference between their last offer stated on the Demand to Commence Appraisal and the Appraisal award in the event the award is at least 25% less than their last offer. In no event is an Insurer able to collect attorney fees.
- (f) The parties have 30 days following rendering of the Appraisal Award to file any issues of law arising in connection with the Appraisal process.

- (g) Additional Living Expense payments shall continue without eroding limits or time periods stated in the policy from the time Appraisal is commenced until the issuance of the Appraisal Award. These limits will be applicable upon the 31st calendar following the issuance of the Appraisal Award.

SECTION 6. QUALIFICATIONS OF APPRAISER OR UMPIRE

- (a) Competency of an Appraiser or Umpire is determined by the expert witness standard of the court having jurisdiction.
- (b) Impartiality of an Appraiser or Umpire means they must:
- i. be disinterested in the result of the Appraisal process.
 - ii. only charge a reasonable hourly rate for the time served on the Appraisal panel.
 - iii. In the two years prior to their engagement cannot have been an employee of either the Insured or Insurer or served either as an adjuster.
 - iv. disclose any circumstances likely to raise justifiable doubt as to the ability of an Appraiser or Umpire to be impartial. This includes and is not limited to:
 - a. bias against a party
 - b. personal interest in the result
 - c. past or present relationship with the parties or their legal representatives.

SECTION 7. COSTS

The costs of the appraisal process, beyond those of the Appraiser retained by each party, including the fees of the Umpire and Professional Service Providers, shall be borne equally by the Insurer and the Insured. The parties are severally liable for the fees. The Umpire and Professional Service Providers shall have the ability to place a lien against any property interest of the defaulting party.

SECTION 8. DEMAND TO COMMENCE APPRAISAL

The following form shall be completed by the party invoking appraisal and shall be delivered upon the recipient in a manner than confirms delivery.

Whereas <Insurance Company> issued a policy of insurance for certain covered property under policy number _____ to <First Named Insured> with an effective date from <date> to <date>.

Whereas <Insured> claims to be owed benefits for an otherwise covered cause of loss or damage to covered property from a reported date of loss of <date> being addressed under claim number _____.

Whereas the <Insurance Company> and the <insured> dispute the amount of benefits owed.

Whereas the <insurance company> last offer of the total benefits was \$_____.

Whereas the <Insureds> last offer of the total benefits was \$_____.

Here comes now <party> demanding an appraisal of the valuation of the loss or damage.

<Name of Appraiser> has been appointed as our Appraiser and can be reached at
Phone: _____ Email: _____ Address: _____

Notice is hereby provided that the <party> shall appoint an appraiser and provide notice of their appointment. In no event shall this notice arrive than 20 calendar days following the date of receipt of this Demand to Commence Appraisal. Failure to name an appraiser in the time allowed shall result in a resolution of the dispute at the last offer of \$_____stated above.

SECTION 8. ENFORCEMENT

This Act shall be enforced by the [STATE INSURANCE COMMISSIONER] or their designee.

SECTION 9. SEVERABILITY

If any provision of this Act is found to be invalid or unenforceable, the remaining provisions shall remain in full force and effect.

SECTION 10. EFFECTIVE DATE

This Act shall take effect [DATE].

Model Appraisal Process

The appraisal clause does not foreclose the ability of the parties, appraisers, or the umpire from reaching an agreement on how to proceed with the appraisal. Additionally, most appraisal clauses do not provide a path forward. Absent statutes or the common law providing direction to the appraisal panel they are left to their devices. The purpose of this memorandum of understanding is to establish a process the appraisal panel can proceed with rendering an award.

MEMORANDUM OF UNDERSTANDING: APPRAISAL PROTOCOL^{xvii}

To facilitate the efficient and prompt resolution of the valuation dispute through the appraisal process, _____ (“Insured”) and _____ Insurance Company (“Insurer”) (collectively “Parties”) agree that the following Appraisal Protocol (“Protocol”) will guide the appraisal proceedings as described in greater detail below.

Insurer issued to Insured policy number _____ (“Policy”), with effective dates of coverage from _____, 20__ to _____, 20__, providing coverage for certain identified property subject to the terms, conditions, limitations, and exclusions set forth in the Policy.

Insured has submitted a claim to Insurer for loss or damage to covered property at the following specific location(s) which is alleged to have resulted from an otherwise covered cause of loss occurring on or about _____, 20__ (“Claim”):

Location(s) _____

This Protocol supplements the appraisal clause as set forth in the Policy and establishes guidelines for the orderly and timely completion of the appraisal process. In consideration of receiving a timely resolution of the valuation dispute the parties agree as follows:

All scheduling and administrative matters pertaining to this appraisal that are not expressly addressed in the Policy or this Protocol or both are reserved for determination by the appraisers and, failing agreement of the appraisers, then by agreement of any one appraiser and the umpire. Nothing contained in this Protocol shall alter or amend the terms of the Policy or applicable law (whether established by statute, regulation, local code, or common law).

The appraisal panel collectively, or the umpire individually, shall not communicate with the Parties or their legal representatives to seek their input, direction or clarification on any issues related to valuation of loss or damage. The appraisal panel shall communicate collectively with the Parties and their legal representatives on all written communications that arise during the appraisal process including but not limited to, the interpretation or application of this Protocol, any other issues that may facilitate the timely and proper completion of the appraisal process, access to the property, or documentation already in possession of the Parties. Any such communications shall be by email, with subsequent conference calls permissible as agreed by the umpire and the Parties. The umpire shall have no ex parte communications with the Parties, their legal representatives, or an individual appraiser. Nothing herein precludes the appraisers from communicating with their respective clients or legal representatives independently.

II. SCOPE OF APPRAISAL

A. The Parties agree that an agreement by the appraisers or any one appraiser and the umpire, shall be binding and be the final determination of the valuation of the loss or damage with respect to the Location(s) listed above subject to these additional considerations:

1. An itemization of the Replacement Cost (as defined by the policy) of any loss or damage at the Location(s) that resulted from the claimed Loss;
2. An itemization of the Actual Cash Value (as defined by the policy) of any loss or damage the Location that resulted from the claimed Loss.
3. If any upgrades are necessary to a structure because of a Building Code Upgrade (as defined below).
4. The amount of any reasonable and necessary architectural, engineering, consulting, or supervisory fees related to the repair or replacement of any property damaged by the claimed loss.

B. Except for the issues specifically identified above, which the Parties expressly agree are to be conclusively determined by the appraisal panel, neither the appraisers nor the umpire shall resolve any issue(s) of liability, insurance coverage, Policy exclusions, deductibles, or compliance (by either Party) with the Policy's terms and conditions.

C. Both Parties expressly reserve the right to object to or challenge an appraisal award (in whole or in part) as allowed by applicable law and the terms of the Policy.

III. THE PANEL

A. Insurer has named _____ to act as its competent, impartial, and disinterested appraiser.

B. Insured has named _____ to act as its competent, impartial, and disinterested appraiser.

C. The appraisers agreed on _____ as the competent, impartial, and disinterested umpire. In the event an umpire has not yet been appointed in 15 calendar days of the execution of this document, the Parties shall seek court-appointment of an umpire jointly and cooperatively. Neither the Parties nor their respective appraisers shall attempt to seek court-appointment of an umpire unilaterally or without written notice to all Parties.

III. APPRAISAL PROCEEDING

A. To the extent not addressed in this Protocol, the appraisers and umpire (the "Panel") shall decide on the procedures to be used to fairly and promptly complete the appraisal process consistent with the Policy and this Protocol.

B. The umpire may utilize an appraisal award form provided by one of the appraisers or their own award form, either of which must be consistent with this Protocol. The appraisal award form must identify and contain responses for each of the specific issues set forth in Section II. A. above.

C. The umpire will issue a proposed final appraisal award. If neither appraiser agrees to the umpire's proposed final award, the umpire may discuss jointly with the appraisers to discover if a final award to which two members of the panel would agree.

D. The Panel will use its best efforts to complete the appraisal process and issue a final appraisal award ("Award") within 90 calendar days of the umpire's appointment. If the appraisal is not completed by this date, the umpire shall report to the Parties an anticipated completion date not to exceed 45 additional calendar days.

IV. APPRAISAL EXPENSES

A. One-half of the umpire's compensation for the appraisal shall be paid by Insurer, and one-half of the umpire's compensation shall be paid by Insured.

B. Insurer shall pay all the compensation of its appraiser, and Insured shall pay all the compensation of its appraiser.

C. Any other jointly-approved expenses of the appraisal shall be paid one-half by Insurer and one-half by Insured.

D. Except as stated in paragraphs "IV.A" and "IV.C" above, each party shall bear its own fees, expenses, and all other costs arising from or incurred in connection with the appraisal proceeding.

V. DATES/VENUE FOR LOCATION INSPECTIONS AND PANEL MEETINGS

A. The umpire shall coordinate with the appraisers and develop a schedule for the completion of the appraisal process within the allowed 90 calendar days. The umpire is responsible to coordinate access to the property subject to appraisal. The umpire shall schedule meetings of the Parties, appraisers, and joint resources as necessary to ensure the timely completion of the appraisal.

VI. DEFINITIONS **[TO BE REVISED AS PER ANY POLICY LANGUAGE]**

A. Actual Cash Value means the cost to repair, rebuild, or replace the lost or damaged property at the time and place of the loss with other property of comparable size, material, and quality, less allowance for physical deterioration, depreciation, obsolescence, and depletion.

B. Replacement Cost means the cost to repair, rebuild, or replace at the same site the lost, damaged, or destroyed property with other property of comparable size, material and quality; or the actual amount incurred by the insured that is necessary to repair, rebuild or replace the lost, damaged or destroyed property; or the limit of insurance applicable to the lost, damaged or destroyed property.

C. Building Code Upgrade means:

1. The loss to the undamaged portion of property at the Location(s) caused by the enforcement of any ordinance or law that:

- (a) Requires the demolition of part(s) of property at the Location(s) not damaged by the Claimed Loss;
 - (b) Regulates the construction or repair of buildings at the Location(s), or establishes zoning or land use requirements at the Location(s); and
 - (c) Was in force at the time of the Claim;
2. The cost to demolish and clear the Location(s) of undamaged parts of the building(s) at the Location(s) caused by the enforcement of building, zoning, or land use ordinance or law; or
 3. The increased cost to repair, rebuild, or construct property at the Location(s) caused by the enforcement of building, zoning, land use, or any other ordinance or law.

VIII. PAYMENT OF AWARD AND MISCELLANEOUS TERMS

- A. Any payment of the Award issued by the Panel shall be governed by applicable law and the terms of the Policy, or as otherwise specifically agreed by the Parties.
- B. Nothing contained in this Protocol shall alter, limit, supplement, or expand the Parties' claims or defenses except to the extent expressly provided by the terms of this Protocol.
- C. The Award shall be inclusive of the total amount of loss to property at the Location(s) resulting from the Claim, prior to offset for any deductibles, prior payments, or other reductions as provided by the Policy and applicable law, and shall be subject to all the terms, conditions, limitations, and exclusions set forth in the Policy.

ⁱ James Read, HOW THE GREAT FIRE OF LONDON CREATED INSURANCE MUSEUM OF LONDON (2016), <https://www.museumoflondon.org.uk/discover/how-great-fire-london-created-insurance> (last visited Mar 26, 2023).

ⁱⁱ The Standard Fire Policy, The Rough Notes Co, 1930 Joseph G. Wood. P. 5

ⁱⁱⁱ House 277, Commonwealth of Massachusetts, April 4, 1873, Geo G. Crocker Chairman, An Act to Amend, "Differences to be submitted to referees" page 5, lines 118 to 125.

^{iv} The Standard Fire Policy, The Rough Notes Co, 1930 Joseph G. Wood. P. 5

^v Id.

^{vi} Insurance Services Office, Inc., 2011 CP 00 10 10 12 Building and Personal Property Coverage Form. Section E. Loss Conditions. 2. Appraisal.

^{vii} See, Integrity Property & Casualty Insurance Company Homeowners Special Form HO-3 Policy INTH03. (07-2008. (*emphasis added*).

^{viii} Ralph Anzivino, Vacating Awards Under the Wisconsin Arbitration Act and Federal Arbitration Act, 98, Marquette L.R.1633 (2015) (discussing the five ways arbitration awards are vacated).

^{ix} Jonathan J. Wilkofsky, Esq., The Law and Procedure of Insurance Appraisal, p.23-40., 3rd ed. 2016.

^x Id at p.45-64.

^{xi} Id

^{xii} Id

^{xiii} Id

^{xiv} Randall W. Wulff, Appraising the 9/11 Damages to the World Trade Center, 62-3, Dispute Resolution Journal (Aug-Oct 2007).

^{xv} H.B. 604, 2023 Leg., (La. 2023).

^{xvi} With elements adapted from Steven J. Badger, Zelle Appraisal Legislation Language, Zelle Law Firm, Dallas, Tx. And Jonathan J. Wilkofsky, Esq., The Law and Procedure of Insurance Appraisal, index., 3rd ed. 2016.

^{xvii} With elements from Steven J. Badger, Zelle Appraisal Protocol, Zelle Law Firm, Dallas, Tx. And And Jonathan J. Wilkofsky, Esq., The Law and Procedure of Insurance Appraisal, index., 3rd ed. 2016.