

The Appraisal Process

“An Outline for Making Awards
Useful and Final”

Guidelines for Resolving Disputes in First Party Property Insurance Claims

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I. Introduction

Over the past decade, appraisal has become a popular method to settle disputes regarding the value of a loss. Its main perceived advantages over litigation are that it is considered fast, inexpensive, and relatively final. But one of the most widely held criticisms of the process is that appraisals can produce awards which are unpredictable, and of little use to the parties.

The following is intended as an overview, a “how to” manual intended to make the process completely understood and useful to the parties. Whether you are an insurer or policyholder, and regardless of the size or complexity of a matter, the appraisal process should always be approached in the same way. First, the dispute must be clearly and unambiguously communicated to and understood by the appraisers and umpire who will decide the issue. Second, the appraisal should provide for a simple manner in which to report the results, so that the valuation issue(s) are final.

This paper is not intended to refer to the “law” governing appraisal, which is clearly jurisdiction specific. Issues regarding timeliness or enforceability of appraisal, disinterestedness of an appraiser or umpire, procedure for conducting appraisal, reporting or enforceability of an award, etc. should always be reviewed by counsel when appropriate. Regardless of the legal issues, what follows is a clear and logical way to proceed with settling disputes through the appraisal provision of the policy of insurance.

II. The Insurance Contract

Insurance policies usually provide for appraisal as a means to settle disputes regarding loss and value. Generally, the appraisal provision of any insurance policy provides that, in the event the parties fail to agree on the amount of the loss, either party may make a demand to have the amount of loss determined by appraisal. In most cases, insurance policy appraisal provisions provide for the following in the event of a dispute:

- Either party may demand that the loss and value dispute be submitted to appraisal.
- Demands must be made in writing.
- Each party selects its appraiser.

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- The appraisers then agree on a third party to act as an umpire.
- If the appraisers fail to agree on the identity of the umpire, a court having jurisdiction over the matter will select the umpire.
- The appraisers attempt to agree on the amount of loss and value.
- If the appraisers fail to agree, their differences are submitted to the umpire.
- An award in writing is required and is final when at least two parties to the appraisal are signatories.
- The parties pay their own appraiser and share equally in the cost of the umpire.

Little has changed regarding appraisal provisions found in property insurance policies over the years. The following is the appraisal clause found in the Standard NY Fire Insurance Policy, a/k/a the “165 line” policy.¹

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

In recent years, the words “competent” and “disinterested” are rarely found in insurance policy appraisal provisions. In fact, many states recognize that the appraiser selected by each of the parties is likely to be an advocate, and some states even allow an appraiser to be compensated on the basis of a contingent and/or percentage fee.

While insurance policies recognize that appraisal is a means by which an award of “value” can be finalized, there is little or no additional guidance regarding the issues of how and what to appraise. Neither is the method by which the value(s) will be reported to the parties. In fact, there is likely no other practical guidance about how to appraise a disputed loss in the policy of insurance. Thus, it is left to the parties or, in litigated matters a court, to sort these issues out.

¹ Lines 123 through 140.

III. Choosing to Demand Appraisal, Selecting an Appraiser, and Reacting to an Appraisal Demand

Policyholders and insurers who are considering appraisal are well advised to go through the following step-by- step process prior to making a final decision to demand appraisal.

First, since it is generally assumed that if the parties have either reached an impasse, or are reasonably certain that they will be unable to agree on the amount of loss², consideration should always be given to conducting a third party or peer review, prior to demanding appraisal. In non-complex matters, the appraiser being considered by any party should be asked to conduct this review. In larger complex cases, particularly where the appraisal may involve using expert witnesses to present testimony to the appraisal panel, use of a potential expert witness to conduct a peer review is a good first step prior to making a demand. This peer review process, if conducted in an unbiased and objective manner, has the benefit of informing a party of the reasonableness of their position, and often can result in one side or the other becoming motivated to settle the dispute prior to an appraisal demand. On the other hand, this process can also be helpful to confirm a prior position, and validate the decision to demand the appraisal.

Second, once an appraisal demand is considered, selection of the party appraiser must be weighed heavily based on the following criteria:

- Familiarity and competency in the item(s) being appraised.
- Familiarity and competency in navigating his or way through the appraisal process.

² Clearly, the issue of whether an appraisal demand is timely can be a concern in many cases. An impasse may simply be nothing more than one party disagreeing with another party's position. Perhaps the most extreme example of this is found in *S.R. International Business Insurance Company vs. World Trade Center Properties (The consolidated World Trade Center 9/11 Litigation)*. Here, Allianz Global Risks, one of 24 market insurers who bound coverage at the World Trade Center prior to 9/11, made its own demand for appraisal after litigation had already commenced, and after the insured submitted an initial proof of loss, but before the insurers had even completed their calculation of the amount of the loss. The insured opposed Allianz' appraisal demand citing (among other things) that the demand was premature. Subsequently, the Federal District Court Judge found in favor of Allianz and ordered appraisal as both appropriate and timely.

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- Ability to act as appraiser given the likely manner in which the appraisal will be conducted.³

Of the three criteria noted above, perhaps the most important is an appraiser's ability to understand and work effectively through the process. This is probably even more true in today's environment where it is becoming increasingly accepted that a "disinterested" appraiser is permitted to be an advocate for his or her client.

Third, there must be a clear understanding of what is being appraised. Once a decision has been made to invoke appraisal, a clear and unambiguous demand to appraise value, or multiple set of values must be made in such a way that the party receiving the demand fully understands the scope of the appraisal. While this appears obvious, there are countless cases where parties have engaged in an appraisal without properly defining the scope of appraisal. While more will be made of this issue in following sections, setting the correct course for a useful and final result must always be made at the time of demand. Thus, a demand for appraisal should contain⁴:

- A statement that there is a disagreement on the amount of loss.
- The appraisal clause contained in the policy of insurance.
- A concise statement about the value or set of disputed values to be appraised, with reasonable specificity.
- The name of the appraiser (or multiple appraisers depending on the issues being appraised) including all necessary contact information.
- An attached sample proposed appraisal memorandum (also called a protocol).

Example: A policyholder makes claim for a fire to his insured grocery store. The insurer issued a "package" policy covering building, contents, stock and business interruption. The amount of contents and stock loss is agreed, but the building loss (including code upgrades and demolition and debris removal which are sub-limited), is disputed, as is the business interruption loss. The policy valuation for buildings is at Replacement Cost, but in the event not replaced, Actual Cash Value is the measure. In this instance the party making the demand must clearly state that appraisal is being demanded to determine the replacement cost and actual cash value loss to the building,

³ For example – If a matter will involve a contested evidentiary hearing in a virtual trial format, the appraiser must be competent to deal with the various issues which make this appraisal format unique.

⁴ Sample demand and reply letters are attached hereto.

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the amount of code upgrade loss, the amount of demolition and debris removal loss, and the amount of business interruption loss. In so doing, there will be no ambiguity about the valuation issues which are being submitted to the appraisal panel. Making a clear demand will allow the other party to understand without ambiguity what the appraisal will encompass and will increase the likelihood that a written appraisal protocol can be reached without further disputes.

Case Study: In a case several years ago, an insured demanded an appraisal of a disputed loss to a 6 family residential structure. The parties then entered into a “standard” memorandum of appraisal, which provided limited information, including the location, date and type of loss, and identity of the appraisers. The appraisers promptly agreed on an umpire and set about determining the “amount of loss”. They subsequently rendered an award in a timely fashion. After receiving the “replacement cost” award, the insurance company’s adjuster attempted (on his own) to determine the actual cash value, and arrived at his opinion of the “loss payable”. However, the insured did not agree, and filed suit against the carrier. Several years later the court ordered that a “new” appraisal panel⁵ would be formed to determine the replacement cost and actual cash value loss, given the condition of the property as it then existed. Further, the court ordered that the loss would be valued by the panel at the “current” cost, rather than at the date and time of loss. The building, which by now had sat for 4 years in an un-repaired condition had by then deteriorated to the point where it was essentially a total loss. Ultimately, the new panel (the author was one of the new appraisers) issued an award that was almost \$500,000 more than the original appraisal.

It nothing else, the preceding example and case study illustrate the importance of demanding appraisal in such a fashion so as to frame the nature of the disputed items and preserve the record regarding the intention of the party demanding the appraisal.

Reacting to an appraisal demand, regardless of whether you are the policyholder or insurer should always be the same, and include.

1. An acknowledgement of receipt of the demand.
2. A statement regarding whether the appraisal is appropriate forum to settle the dispute(s).
3. A definition of the issues to be appraised (or simply an agreement to the issue(s) as outlined in the appraisal demand).
4. The name of the appraiser – if appraisal is agreed to.
5. An invitation to further communication on a written memorandum or protocol to govern the appraisal process.

⁵ The author was a member of the newly formed appraisal panel.

IV. Finalizing the Appraisal Panel – The Umpire Selection

Determining who will act as an umpire in an appraisal is usually the single most important factor to finalizing any disputed valuation issue. An umpire must be “disinterested” and should almost always be “competent” in the valuation issues being contested. In reality, an unfair award is rarely the result of an appraisal in which the umpire was an “expert” in the valuation issues being determined. In many cases, and because of an increasing sense of distrust between policyholders and insurers, umpires are often appointed by a court having jurisdiction over the appraisal, although this can often result in the umpire having neither any expertise in the appraisal process, nor any competence in the valuation issues being sought.

With respect to the timing of the umpire selection, it is important that this be the first order of business for the appraisers. Although there is a school of thought that suggests the appraisers should first meet to determine their differences prior to selecting an umpire, this is impractical for several reasons. First, the best chance for the appraisers to agree on the identity of the umpire is prior to attempting to reach agreement on the amount of loss. Once they fail to agree on the disputed loss values, there will be little likelihood that they can then agree on the umpire. Second, in large complex cases, it would create a hardship to attempt to bring an umpire “up to speed” after disputes have developed. Third, and perhaps the most compelling reason to select an umpire at the onset of appraisal, is that an experienced and effective umpire can help the appraisers negotiate their way through the process, steering them (and sometimes the parties) toward consensus on issues. This can often have the benefit of expediting the appraisal process, and indeed help to bring finality to claims even when there are coverage disputes. Finally, the umpire can also be used to assist the parties in finalizing the protocol, which will govern the appraisal.

Case Study: In an extremely large and complex matter (excess of \$1.0 Billion) involving building damage, personal property, extra expenses, business interruption, claim preparation costs, etc. the parties were unable to reach agreement on an appraisal protocol. The umpire, a retired federal circuit court judge who had been nominated by the policyholder and accepted by the insurer’s appraiser (the author), was asked to assist in finalizing the protocol. The disputed protocol issues involved such matters as: items to

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be appraised, order of issues to be heard by the panel, timing, discovery, and others. The umpire assisted in finalizing all issues so that the appraisal could then move forward on an orderly basis. In the same case, and near the end of a two year appraisal process, the umpire acted as mediator at the urging of the parties and attempted to bring about resolution of the entire claim.

Umpire Selection in Non-Complex Matters:

Selection of an umpire in non-complex matters may be as simple as a discussion between two appraisers, who present names to one another, then agree on the identity of the umpire. In those cases in which the appraisers have familiarity with one another, or may have actually been members of the same appraisal panel in the past, the selection of an umpire is usually a simple matter.

In most cases, umpire “nominations” should be made by the appraisers to one another immediately after both appraisers’ identities are known and disclosed.⁶ It is a good practice for an appraiser to send a letter to the opposing appraiser nominating two or three potential candidates, with contact information, and an invitation to discuss a potential umpire’s qualifications with him or her.⁷

An umpire, once nominated, has an obligation to the appraisers and the parties to immediately determine whether any conflicts of interest exist, and if so, to disclose those conflicts to the parties. Clearly, failure to do so will clearly provide an unsatisfied party with a simple reason to petition a court to vacate an award based on umpire bias and non-disclosure of a conflict.

Umpire Selection in High Value and Complex Appraisals:

In large complex matters the selection of the umpire can be a costly, time consuming and closely scrutinized endeavor. In general the following guidelines should almost always be followed, which will insure that there can be no claim of mischief in the umpire nomination and selection process:

⁶ Suggested umpire nomination letter attached hereto.

⁷ Of Course, if there is a concern by any party that there should be no ex parte communication with an umpire, then any discussion or interview process should be joint.

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- Parties should unilaterally research umpire candidates to determine competency to serve on the panel.
- No ex parte contact with should be made at any time by a party, an appraiser or counsel involved in the matter, even to request a resume or determine interest or availability.
- The parties should agree to a simultaneous exchange of candidate names.
- The parties should agree on language of a joint introductory letter to be sent by the appraisers to the umpire candidates (the umpire should not know who the nominating appraiser or party is). The letter should include at least the following:
 1. That the nominee is being considered to act as umpire of a disputed insurance claim (name the matter without specific detail).
 2. That the appraisers desire to meet with or have a conference call with the umpire nominee to determine qualifications and fitness.
 3. That the umpire nominee should provide the appraisers with a resume and/or information regarding his or her ability.
 4. That the umpire nominee should review the conflict list and be prepared to report on any potential conflicts during the initial interview.
 5. Dates and potential times for a telephone or in person interview with the appraisers.
- The parties should agree on a comprehensive conflict list to include with the introductory letter.

It can also be useful to limit the number of nominees, and agree that in the event the appraisers can not agree on the umpire, that the sides will jointly petition a court to name the umpire from the party's nominees (or one finalist for each party).

V. Understanding and Reaching Agreement on What is being Appraised

By now it should be clear that understanding what to appraise, and how to go about communicating the issues to the appraisers and umpire who will make the award, is vital in making the process useful. Failure to clearly and unambiguously define the scope of an appraisal can often serve to compound the problem. Therefore, it is absolutely crucial that the scope of appraisal be clearly defined in a written agreement that does not leave what will be awarded, and how it will be awarded to chance. While it is probably true that in non-complex matters, experienced appraisers and umpires can often determine what should be decided in the appraisal process, this is not their role, and to expect them to do so is bad practice.

“Simple” Agreements to Appraise a Loss:

Earlier, the necessity to make an unambiguous demand for appraisal was noted. Here, the discussion of how to construct an agreement to appraise a loss is outlined.

The scope of coverage and appraisal is determined in the first instance by the applicable policy language. Where the policy is silent (and most policies are silent on this issue), the following is a typical, but by no means complete, list of values that can be determined by appraisal:

- Replacement Cost Loss – Scope and Value
- Replacement Cost Loss – Value only – where scope is agreed.
- Limited Replacement Cost Loss – where a single item, or finite set of items needs to be determined.
- Actual Cash Value Loss
- Period of Restoration
- Demolition Cost
- Code Upgrades/Law and Ordinance Loss.
- Extra Expense Loss
- Expediting Expense Loss
- Rental Loss
- Business Interruption Loss

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After a demand for appraisal has been made and both sides have named their appraisers, regardless of whether the umpire has already been chosen, the next logical step is to reduce an “agreement” to appraise a loss to writing. (As previously noted, neither the insurance policy nor case law is likely to provide guidance in this area). A simple “Agreement for Submission to Appraisers” like the one presented below is often used in non-complex matters.⁸

AGREEMENT FOR SUBMISSION TO APPRAISERS

It is hereby agreed, by and between _____
(Insured)

and _____
(Insurance Company)

that a disagreement exists as to the actual cash value, the amount of loss, or the cost or repair or replacement as a result of a _____ loss on _____
(Peril) (Month Day Year)

To the insured item (s): _____

located at _____ and insured by Policy Number _____
(Address of Insured Dwelling)

_____ effective _____ to _____
(Month Day Year) (Month Day Year)

“Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime, and shall also be subject to a civil penalty not to exceed five thousand dollars and the stated value of the claim for each such violation.”

(Insured) _____
(Insurance Company)

Appraisal. If you and we fail to agree on the actual cash value, amount of loss or the cost of repair or replacement, either can make a written demand for appraisal. Each shall select a competent, independent appraiser and notify the other of the appraiser’s identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers shall then set the amount of loss, stating separately the actual cash value and loss to each item. If you or we request that they do so, the appraisers will also set: (a) the full replacement cost of the dwelling; (b) the full replacement cost of any other building upon which loss is claimed; (c) the full cost of repair or replacement of loss to such building, without deduction for depreciation. If the appraisers fail to agree, they will submit their differences to the umpire. An unanimous decision agreed to by any two of these three and filed with us will set the amount of the loss. Such award shall be binding on you and us. Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally.

APPRAISER APPOINTMENTS:

The insured hereby selects _____
(Name) (Phone)

as his competent and independent appraiser. _____
(Address)

The Insurance Company hereby selects _____
(Name) (Phone)

as his competent and independent appraiser. _____
(Address)

DUTIES OF APPRAISERS

- Appraisers shall first select an umpire. If they fail to agree within 15 days, they shall notify both parties so the provisions can be invoked.
- Appraisers shall then appraise the loss, stating separately actual cash value and loss to each item. If requested by insured or company, the appraisers shall also appraise (1) full replacement cost of the dwelling, (b) full replacement cost of any building upon which loss is claimed; and (c) full cost of repair or replacement of loss (without deduction for depreciation).
- If the appraisers fail to agree, they shall submit their differences to the umpire.

DECLARATION OF APPRAISERS

STATE OF _____

COUNTY OF _____

We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the values and loss upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of the same, according to the best of our knowledge, skill and judgment. We are not related to the assured, either as creditors or otherwise, and are not interested in said property or the insurance thereon.

(Appraiser)

(Appraiser)

Subscribed and sworn to before me this _____ day of _____
(Notary Public)

_____ 20 _____

⁸ This agreement is included in the addendum attached hereto.

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SELECTION OF UMPIRE

We, the undersigned, hereby select and appoint _____ to act as umpire to settle matters of difference that shall exist between us, if any, by reason of and in compliance with the foregoing agreement and appointment.

Witness our hands this _____ day of _____, A.D., 20 _____.

(Appraiser)

(Appraiser)

QUALIFICATION OF UMPIRE

STATE OF _____

COUNTY OF _____

I, the undersigned, hereby accept the appointment of umpire, as provided in the foregoing agreement, and solemnly swear that I will act with strict impartiality in all matters of difference that shall be submitted to me in connection with the appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am not related to any of the parties of this agreement, nor interested as a creditor or otherwise in said property or insurance.

(Umpire)

Subscribed and sworn to before me this _____ day of _____, 20 _____.

(Notary Public)

AWARD

Replacement Cost

Actual Cash Value

Dwelling

Appurtenant Structures

Additional Living Expenses

Witness our hands This _____ day of _____, 20 _____.

Appraiser

Appraiser

Umpire

The above sample memorandum of appraisal (also called an appraisal protocol) illustrates that no matter how small or large the dispute, a simple agreement with instructions governing the appraisal is necessary to establish clarity, and to avoid post-appraisal valuation disputes and/or litigation over the meaning of the award.

Complex Appraisal Protocols:

High value, complex matters which require numerous values to be awarded will require a detailed agreement prior to proceeding with the appraisal. In this regard, the parties, whether on their own, with help from the umpire, or as ordered by a court must enter into a written protocol that has the effect of an “order”. For an appraisal protocol to be useful,

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both an understanding of the nature of the dispute(s) regarding loss and value, and clarity about how the values need to be reported by the panel is required. At a minimum, the appraisal protocol for a complex matter must include the following⁹:

1. The names of the parties and the date and type of loss.
2. The scope of the appraisal, clearly listing the valuation(s) which are going to be determined by the process.¹⁰
3. Any legal issues that parties have agreed can be decided by the umpires or a statement that the appraisers and umpire can not decide questions of law or coverage.
4. The identity of the appraisers
5. The identity of the umpire or a description of the procedure for selecting the umpire.
6. Any disputes regarding the protocol are to be resolved by the panel.
7. The manner in which the disputed loss is to be appraised, which may include:
 - a. Timetable and location of appraisal.
 - b. Method of recording appraisal proceedings.
 - c. Discovery issues which may also include subpoena power of the panel
 - d. Use of Experts
 - e. Manner in which the Loss will be Appraised
 - f. Sample Award Form or Instructions on how Award Will be Reported
 - g. Definitions of Terms and Coverage
8. General Items
 - a. Statement regarding no ex parte communication between parties and appraiser
 - b. Statement regarding no ex parte communication between appraisers and umpire
 - c. Confidentiality issues or agreements
 - d. Hold harmless language protecting the appraisers and umpire.
 - e. Other as may be required.

VI. Other Issues to Consider

Clarifying Disputes Regarding Valuation Definitions or Coverage

It should be clear that where there are issues surrounding coverage, sub-limits, division of insurable interest, etc. a detailed protocol setting out the issues is mandatory. This is

⁹ A sample complex appraisal protocol is included in the addendum attached hereto.

¹⁰ In large complex claims where there are multiple insurers with non-concurrent policies, or multiple insureds who have various insurable interests, further itemization of an award may be necessary, and should be clearly articulated in the protocol.

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necessary, because if a single award stating the “amount of loss” results from the appraisal, the award will be of no practical guidance to the parties.

The same may be true in cases where there are disputes regarding coverage on how a particular valuation is to be calculated. In some cases, “definition” or guidance by the court is actually required in order for the panel to determine the amount to be awarded. Because the appraisal panel can not interpret the meaning of the insurance contract or define valuation terms in an award, the appraisal process is often nothing more than a bifurcation of liability and damages disputes.

Coverage or definition disputes can be resolved in three ways:

1. Before the commencement of the appraisal.
2. During the appraisal.
3. Post appraisal.

There is no good guidance that can be offered here about the optimal time to resolve these issues, though it must be stressed that in some cases, the “coverage” or “definition” dispute may not even be identified by the parties prior to appraisal, and thus can not be resolved until after the appraisal has commenced.

In general, disputes that involve valuation methodology must be resolved by a court either before or during appraisal.¹¹ In most cases, these specific issues are likely to surface prior to the appraisal, since they are generally at the heart of the difference which led to the dispute in the first place. Sometimes, however, parties will proceed to appraisal without providing clear and unambiguous instructions to the appraisal panel about the definition of values being sought. For this reason, when it is possible to agree on

¹¹ The only other alternative is to have the panel award values on each of the disputed methods, providing the court with an “a la carte” menu of awards to be applied once coverage is determined. This is not usually practical in large complex cases, since it could create unnecessary hardship and additional unwarranted expense.

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definitions of terms such as “replacement cost”, “actual cash value”, “period of restoration”, “period of indemnity”, (or a myriad of others) parties are urged to do so.

Case Study: Perhaps the best example of the need to clearly define terms for the appraisal panel is found in *Elberon Bathing Co. Inc. v. Ambassador Insurance Company*. Here, there was a disagreement on the amount of loss, and the parties elected to settle the valuation dispute by appraisal. The insured’s appraiser and court appointed umpire awarded replacement cost as the actual cash value loss. The insurer’s appraiser refused to sign the award. The award was ultimately overturned because New Jersey law requires consideration of a broad spectrum of evidence to determine ACV, and the panel’s award was based on a method that did not apply the New Jersey broad evidence rule. This clearly illustrates the problem that even in those cases where clear instructions are given, appropriate definitions or court rulings are required for the panel to properly appraise the loss.

Multiple Appraisals:

Sometimes parties will demand separate appraisals for each finite coverage dispute that may arise in any given loss. For example, it is not uncommon for a disputed claim to involve separate disputes for building, personal property, and business interruption loss.

Surely, the virtue of having each finite dispute determined by separate panels, each with its own competency to award fair and objective values for each disputed area of coverage is easily understood. However, one party or the other may decide that this is not practical. Whether for a perceived tactical advantage or to avoid unnecessary expense, in such a case, the parties can either agree to appraise disputed coverage parts separately, with a dedicated panel for each, or agree to use one umpire and multiple appraisers per party. This allows each party to make their own decision regarding whether to name multiple appraisers.

Case Study: In a very complex matter involving building loss, extra expenses, business interruption, leasehold interest, personal property, and claim preparation expense, the author was one of three appraisers for the insurers. In the same case, the insured named one appraiser, and the parties reached agreement on one umpire to hear all disputed issues

Umpire Expenses:

In certain instances, umpires will incur expenses for a variety of reasons, but usually to seek guidance from a professional who can aid him or her in making an informed

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decision. In some cases, one side or the other will object to the umpire's retention of "help" to decide an issue.

Regardless of any concern or objection, an umpire should not be constrained in his or her ability to render a fair and impartial decision. Since the appraisal process is designed to produce fair and impartial valuation awards, there are cases in which an umpire may not possess direct or "on point" expertise to determine which appraiser's (or party's) position is correct. In these cases, an umpire must be allowed to incur reasonable consulting expenses as he or she sees fit, and the parties must therefore share in the cost.

Failure of Appraisal:

In very rare cases, the appraisers and umpire will be unable to render an award on a disputed loss or item.¹² Usually, this can result when there is a question of fraud, misrepresentation or bad faith in the underlying claim. In such a case, it can be difficult for the panel members to sort out the actual facts and/or circumstances which will lead to a clear, informed and unbiased award. In cases where arson or fraud is alleged, the parties are usually well advised not to demand appraisal or agree to an appraisal demand.

VII. Summary

Although the appraisal process is a useful tool to settle disputes regarding loss and value, it is absolutely necessary to approach the process in a thoughtful manner. In order to avoid confusion, post-appraisal litigation, and the possibility of an award that is incomplete or of little practical use to the parties, both policyholders and insurers are urged to clarify the dispute and reach agreement on the scope of the appraisal process. Use of a clear, concise and complete protocol to appraise any loss is a key element in insuring finality of any claim.

¹² Failure to reach an award is merely the inability to have two members of the appraisal panel sign an award.

About the Author:

Jonathon C. Held is President of J.S. Held, Incorporated, a Roslyn Heights, NY based construction consulting firm with offices in New Jersey, Ohio, Texas, Georgia and The District of Columbia. He is a frequent guest speaker on the appraisal process at many insurance industry conferences and educational seminars, and has extensive experience as both an appraiser for insurers and policyholders. Mr. Held has also frequently acted as both an umpire and sole appraisal panel member (by mutual agreement of the parties). Most recently, he has been an appraisal panel member in the three largest matters ever to be submitted to appraisal: The World Trade Center Dispute; the 7 World Trade Center dispute; and the 130 Liberty Street (Deutsche Bank Building) dispute; each arising from the 9/11 tragedy.

ADDENDUM

- I. Sample Appraisal Demand Letter.
- II. Sample Response to Appraisal Demand Letter
- III. Sample Umpire Nominee Letter in a Simple Matter.
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I. Sample Appraisal Demand Letter

NOTE: THE FOLLOWING IS A SAMPLE DEMAND LETTER FROM AN INSURER TO AN INSURED, DEMANDING APPRAISAL ON A BUILDING LOSS.

Date _____

Re: Insured:
Policy No.:
Date/Occ.:
Location:
Type of Loss:

Dear _____

This is to inform you that we do not agree with you on the replacement cost building loss and actual cash value building loss.

We direct your attention to the following provision for Appraisal in your policy:

RETYPE APPRAISAL CLAUSE HERE.

By this letter and in accord with the foregoing, we hereby demand an appraisal and name NAME AND CONTACT INFORMATION as our appraiser. Please notify us of the name of your appraiser.

Attached is a sample agreement for submission to appraisers. Please review and contact the undersigned with regard to any questions or comments regarding completion of this agreement.

Nothing stated in this letter is intended nor should it be construed to be a waiver of any of the terms or conditions of the policy nor of any rights or defenses available to NAME INSURER specifically reserves all such rights and defenses now apparent or as may become apparent.

Very truly yours,

II. Sample Response to Appraisal Demand Letter

NOTE: THE FOLLOWING IS A SAMPLE RESPONSE LETTER FROM AN INSURER TO AN INSURED, RESPONDING TO AN INSURED'S DEMAND, AND CLARIFYING THE ISSUES BEING APPRAISED.

Date _____

Re: Insured:
Policy No.:
Date of loss:
Location:
Type of Loss:

Dear _____

We are in receipt of your letter demanding appraisal of the above captioned matter. While we understand that there is a general dispute regarding the amount of the loss, your demand to "appraise the loss" is not specific.

While we will agree to name our appraiser, we insist that the items in dispute be clarified prior to proceeding with the appraisal. In that regard, we are enclosing a sample agreement for submission to appraisal, which specifies that the appraisers will state separately the amount of Replacement Cost Loss to the building, and the Actual Cash Value Building Loss.

For Clarity, we direct your attention to the following provision for Appraisal in your policy:

RETYPE APPRAISAL CLAUSE HERE.

By this letter and in accord with the foregoing, we name NAME AND CONTACT INFORMATION as our appraiser.

Nothing stated in this letter is intended nor should it be construed to be a waiver of any of the terms or conditions of the policy nor of any rights or defenses available to NAME INSURER specifically reserves all such rights and defenses now apparent or as may become apparent.

Very truly yours,

III. Sample Umpire Nominee Letter - Simple Matter.

NOTE: THE FOLLOWING IS A SAMPLE LETTER FROM AN INSURER'S APPRAISER TO AN APPRAISER FOR THE POLICYHOLDER, NOMINATING UMPIRE CANDIDATES

Date_____

Re: Insured:
Policy No.:
Date of loss:
Location:
Type of Loss:

Dear _____

As you may be aware, I have been selected by **NAME INSURER HERE** to act as its appraiser pursuant to the terms and conditions of the policy of insurance.

Prior to our proceeding, it will be necessary for us to select a third party to act as umpire. I therefore nominate the following individuals, each of whom has experience acting in this capacity:

NAME UMPIRE NOMINEES HERE (USUALLY 2 OR 3) WITH CONTACT INFORMATION.

Because this appraisal will involve the determination of the Replacement Cost Loss and Actual Cash Value loss to the building, I believe that these individuals possess the necessary qualifications to act in the capacity as umpire. I would suggest that we jointly contact them to discuss their qualifications, conflicts and ability to act in a fair and impartial manner.

Please contact me upon receipt of this letter so that we may further discuss the umpire selection process, move forward with the appraisal process. I look forward to working with you in connection with this matter.

Very truly yours,

IV. Sample Umpire Contact Letter in a Complex Matter

NOTE: THE FOLLOWING SAMPLE INTRODUCTORY LETTER FROM TWO APPRAISERS IN A LARGE COMPLEX MATTER OUTLINES A FICTITIOUS LOSS THAT IS ASSUMED TO BE HIGHLY PUBLICIZED AND COMPLEX. FOR THE PURPOSE OF THIS HYPOTHETICAL, THE MATTER IS ASSUMED TO BE IN LITIGATION.

LETTER IS SENT FROM THE PARTY APPRIASERS NO LETTERHEAD IS USED

Date:

ADDRESSEE

RE: **TITLE OF CASE OR NAME OF LOSS**

Dear Mr. _____

You have been recommended as a candidate who might be willing to serve as the competent and disinterested umpire on a three-person appraisal panel to appraise the amount of the loss resulting from the destruction of the NAME LOSS HERE. This appraisal arises from the captioned litigation currently pending before JUDGE in the NAME COURT. We offer the following submission for your consideration.

By way of background, a dispute exists between the Insurers and Insureds with respect to the amount of the property damage, business personal property and rental value/business interruption loss or losses sustained by the Insureds at the LOCATION AND DATE OF LOSS. The information presented to the appraisal panel may include, among other things, factual evidence adduced during discovery in the action and the reports and testimony of various real estate and construction professionals, economists, accountants, and other experts, who were retained by the Insureds or Insurers. The parties, counsel and various potential witnesses in the appraisal proceeding, as well as parties and counsel in the underlying litigation, are identified in the attached Schedule ("Schedule").

We will serve on the appraisal panel as the appraisers who have been designated by the Insureds and Insurers. By agreement, both of us must participate in any communications with you. As such, please review the enclosures, and respond to both of us in a single writing or e-mail, if at all possible within 10 days of the date of this letter, letting us know whether: (a) you are potentially interested in serving as the umpire, and (b) you have any known conflicts or relationships with any of the parties, witnesses or counsel and if you are aware of any reason that might prevent you from serving as a disinterested and competent umpire if chosen. If 10 days is not sufficient time to respond, or if this submission has reached you while you were out of town, please let us know nevertheless if you are interested and how quickly you anticipate you could respond. The parties will share the costs of your compensation, and would appreciate your advising us of what compensation arrangements you would propose.

The appraisal sessions will be held in a LOCATION STATED HERE. The timeframe and scheduling of these proceedings are subject to a number of variables that we would want to discuss with you. We recognize that you have a busy schedule, and we would welcome your guidance concerning your availability.

To facilitate distribution of information among counsel on both sides, it would be helpful if you could copy your responses to us to the indicated counsel for one of the insureds and one of the insurers, whose name, address and email information follows at the end of this letter.

We very much appreciate your consideration of this important role and we are available to jointly answer any additional questions if you are interested in pursuing this potential opportunity. In the meantime, please keep this submission confidential.

Very truly yours,

NAME: Appraiser for the Insureds
CONTACT INFORMATION HERE

NAME: Appraiser for the Insurers
CONTACT INFORMATION HERE

With a copy to:

INSURED COUNSEL NAME
CONTACT INFORMATION HERE

With a copy to:

INSURER COUNSEL NAME
CONTACT INFORMATION HERE

V. Sample Agreement for Submission to Appraisers in a Simple Case.

AGREEMENT FOR SUBMISSION TO APPRAISERS

It is hereby agreed, by and between _____
(Insured)
and _____
(Insurance Company) that a disagreement exists as to the actual cash value, the
amount of loss, or the cost or repair or replacement as a result of a _____ loss on _____
(Peril) (Month Day Year)
To the insured item (s): _____

located at _____ and insured by Policy Number
(Address of Insured Dwelling)
_____, effective _____ to _____
(Month Day Year) (Month Day Year)

“Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime, and shall also be subject to a civil penalty not to exceed five thousand dollars and the stated value of the claim for each such violation.”

(Insured) (Insurance Company)

Appraisal. If you and we fail to agree on the actual cash value, amount of loss or the cost of repair or replacement, either can make a written demand for appraisal. Each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers shall then set the amount of loss, stating separately the actual cash value and loss to each item. If you or we request that they do so, the appraisers will also act; (a) the full replacement cost of the dwelling; (b) the full replacement cost of any other building upon which loss is claimed; (c) the full cost of repair or replacement of loss to such building, without deduction for depreciation. If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these three and filed with us will set the amount of the loss. Such award shall be binding on you and us. Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally.

APPRAISER APPOINTMENTS:

The insured hereby selects _____
(Name) (Phone)
_____ as his competent and independent appraiser.
(Address)

The Insurance Company hereby selects _____
(Name) (Phone)
_____ as his competent and independent appraiser.
(Address)

DUTIES OF APPRAISERS

1. Appraisers shall first select an umpire. If they fail to agree within 15 days, they shall notify both parties so the provisions can be invoked.
2. Appraisers shall then appraise the loss, stating separately actual cash value and loss to each item. If requested by insured or company, the appraisers shall also appraise (1) full replacement cost of the dwelling; (b) full replacement cost of any building upon which loss is claimed; and (c) full cost of repair or replacement of loss (without deduction for depreciation).
3. If the appraisers fail to agree, they shall submit their differences to the umpire.

DECLARATION OF APPRAISERS

STATE OF _____

COUNTY OF _____

We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisal and estimate of the values and loss upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of he same, according to the best of our knowledge, skill and judgment. We are not related to the assured, either as creditors or otherwise, and are not interested in said property or the insurance thereon.

(Appraiser)

(Appraiser)

Subscribed and sworn to before me this _____ day of _____
_____ 20 ____

(Notary Public)

SELECTION OF UMPIRE

We, the undersigned, hereby select and appoint _____ to act as umpire to settle matters of difference that shall exist between us, if any, by reason of and in compliance with the foregoing agreement and appointment.

Witness our hands this _____ day of _____ A.D., 20 _____.

(Appraiser)

(Appraiser)

QUALIFICATION OF UMPIRE

STATE OF _____

COUNTY OF _____

I, the undersigned, hereby accept the appointment of umpire, as provided in the foregoing agreement, and solemnly swear that I will act with strict impartiality in all matters of difference that shall be submitted to me in connection with the appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am not related to any of the parties of this agreement, nor interested as a creditor or otherwise in said property or insurance.

(Umpire)

Subscribed and sworn to before me this _____ day of _____, 20 ____.

(Notary Public)

AWARD

Replacement Cost

Actual Cash Value

Dwelling

Appurtenant Structures

Additional Living Expenses

Witness our hands This _____ day of _____, 20__.

Appraiser

Appraiser

Umpire

VII. VI. Sample Protocol for a Complex Case

IN THE MATTER OF THE APPRAISAL

Between

[NAME THE INSURED(S) HERE]

And

[NAME THE INSURER(S) HERE]

STIPULATION AND ORDER REGARDING LOSS APPRAISAL PROTOCOL

It is hereby stipulated and agreed by and between **[NAME INSURER(S)]** (Insurers) and **[NAME INSURED]** (Insured) that the following Stipulation and Order (the "Protocol") will govern the appraisal proceedings regarding the amount of the loss sustained by the Insured as a result of a **[TYPE OF LOSS]** which occurred **[DATE OF LOSS BEING APPRAISED]** to property described in the following policy **[OR MULTIPLE POLICIES OF INSURANCE]** of insurance issued by the "Insurer(s)" to the "Insured"

[LIST INSURER(S) AND POLICY NUMBER(S) HERE]

All matters pertaining to this appraisal, which are not expressly addressed in this Protocol, are reserved for determination by the appraisers and, failing agreement of the appraisers, then by any one appraiser and the umpire.

SCOPE OF APPRAISAL

- A. The appraisers and, failing agreement of the appraisers, then any one appraiser and the umpire who agree, shall determine the following:

[NUMBER AND LIST THE ITEM(S) BEING APPRAISED HERE WITH SUFFICIENT SPECIFICITY TO INSURE THAT THE APPRAISAL PANEL WILL DELIVER A UNAMBIGUOUS AWARDS]

- B. Neither the appraisers nor the umpire shall have authority to decide questions of law. In connection with the appraisal proceeding, neither Insurers' appraiser, Insured's appraiser nor the umpire shall attempt to resolve any issue of insurance coverage, policy exclusions, compliance with the policy terms and conditions, or any issue concerning the limits of insurance available under the policy. A court having jurisdiction over this matter shall address all such issues.

II. THE PANEL

- A. The Insurer names ***[NAME, ADDRESS AND PHONE NO.]*** to act as its appraiser.
B. The Insurer names ***[NAME, ADDRESS AND PHONE NO.]*** to act as its appraiser.

- C. The appraisers agree to *[NAME, ADDRESS AND PHONE NO.]* to act as umpire.
 - D. The Parties agree and except without objection or reservation that *[NAME UMPIRE]* is “competent and disinterested” as the term is generally understood in insurance policies providing for appraisal, that he has experience with determining values of the nature presented by the appraisal and has no financial interest in the outcome, and has no disqualifying conflicts of interest.
 - E. To the maximum extent permitted by law no party will assert any claims against *[NAME APPRAISERS AND UMPIRE]*, or their respective firms, seeking to hold them or their firms liable for any act or omission in performance of their duties as umpire or appraiser
- III. **DISCOVERY (THIS SECTION MAY VARY DEPENDING ON THE SITUATION, ALTHOUGH IN COMPLEX OR LITIGATED MATTERS THE FOLLOWING LANGUAGE IS PREFERRED.**

- A. The parties agree that the claims previously submitted prior to this Protocol, together with any reports of experts will be provided to the appraisal panel within 10 days of the execution of this agreement.
- B. Neither the insured, nor the insurer can provide any new opinions of value at any point during the appraisal process.
- C. Any discovery disputes regarding issues to be addressed in the appraisal shall be resolved by the panel.

IV. **DIRECTION BY THE COURT**

- A. Questions of law and coverage issues shall be resolved by motions filed with the court having jurisdiction over this matter.
- B. The appraisers shall meet to identify any questions of law or coverage issues that are in dispute and require resolution by the Court. Failing to agree on which issues should be presented to the Court for direction, the appraisers shall meet with the umpire, and the panel shall determined the most efficient process for addressing such disputed issues and to evaluate the need for direction from the District Court on specific issues. The panel may consider argument of counsel if it believes that argument would be beneficial to its decision regarding submission of issues to the District Court.

V. **APPRAISAL PROCEEDING**

- A. The appraisers shall meet to attempt in good faith to resolve any disputes or differences and to narrow the disputes and differences that must be addressed in the proceedings before the umpire. If they agree, their agreement shall be noted as the result of the appraisal on that issue. By agreement of both appraisers, or at any time either appraiser decides that further discussions between the appraisers concerning their disputes and differences are no longer beneficial, the appraisers, or either appraiser, may demand participation of the umpire.
- B. The appraisers shall keep a complete written record of the disputes and materials submitted to the umpire and shall provide the parties with a copy of such record at the time any dispute is submitted to the umpire.
- C. All communications between the appraisers and the umpire concerning any disputed item shall be recorded in a manner agreed to by the panel. The cost of that recording shall be divided equally between Appraising Insurers and the policyholders.

- D. It shall be for the Panel to decide on the procedures to be used to resolve any item in dispute that the appraisers present to the umpire. The procedures available to the Panel to obtain information and decide an item in dispute shall include, but not be limited to, conducting a contested evidentiary hearing.
- E. If there is a contested evidentiary hearing, it shall be a trial format with live testimony or deposition testimony to the extent it would be permissible under the Federal Rules of Civil Procedure.
1. The Panel is relieved of all judicial formalities and may abstain from following the strict rules of evidence and civil procedure.
 2. The proceeding shall be recorded in a manner agreed to by the parties.
 3. Time Limits may be Set by the Panel
 4. The Policyholder will present their case first, followed by the Insurer(s). Rebuttal if any will be determined by the panel.
 5. Each Party may present an opening statement.
 6. Witness testimony in the event of a contested evidentiary hearing..
 - i. Questioning of each witness shall be as follows:
 - ii. Direct examination.
 - iii. Cross examination.
 - iv. Re-direct examination.
 - v. Party appraiser questions.
 - vi. Opposing party appraiser questions.
 - vii. Umpire questions.
 7. Subpoenas for the attendance of any testifying witness at the proceeding before the umpire shall be issued pursuant to order of the District Court.
 8. Each Party May will be Permitted a Closing Argument.
 9. Phased proceedings before the umpire (**THIS OBVIOUSLY DEPENDS ON THE FACTS OF THE CASE**) **EXAMPLE:**
 - i. Replacement Cost Loss.
 - ii. Period of Restoration
 - iii. Loss Sustained to Personal Property.
 - iv. Business Interruption Loss.
 10. The proceedings before the umpire on each phase will be heard and decided prior to commencement of the subsequent phase. If the panel determines that it

would be advantageous to divide any of the three phases into sub phases, it may do so.

VI. COMMUNICATIONS WITH PARTY APPRAISER AND UMPIRE

- A. Neither the Insurer, the Insured nor their respective counsel shall have any *ex parte* communication with the umpire or with the other party's appraiser. The appraisers shall not have any *ex parte* communications with the umpire. Appraising Insurers and their representatives may communicate *ex parte* with Appraising Insurers' appraiser, and the policyholders and their representatives may communicate *ex parte* with the policyholders' appraiser.

VII. APPRAISAL EXPENSES

- A. One-half of the umpire's compensation shall be paid by the policyholders and one-half paid by the Appraising Insurers.
- C. The policyholders shall pay all the compensation of their appraiser, and the Appraising Insurers shall pay all the compensation of their appraiser.
- C. The expenses of appraisal shall be paid one-half by the policyholders and one-half by the Appraising Insurers.
- D. Each party shall pay its own costs incurred to prepare for or present its case at the proceeding.

VIII. VENUE FOR PROCEEDINGS BEFORE THE UMPIRE

- A. To be determined by the appraisal panel.

IX. DEFINITIONS

- A. Replacement Cost Loss – The cost to replace the Building and/or Contents as it existed at the date and time of loss, assuming material of like kind and quality.
1. Replacement Cost shall include an appropriate allowance for demolition and debris removal
- B. Period of Restoration – Assuming due and diligence and dispatch, the necessary time, beginning from the date of loss to repair or replace the property as it existed prior to the loss.
1. The Period of Restoration does not include the elapsed time between the date of loss and the appraisal. Disputes regarding any issue of delay caused by the acts of the parties, or adjustment of the claim shall be left for adjudication by the District Court.

X. COURT ORDER

- A. The parties shall request that this Protocol be entered as an order of the Court, binding on all parties to the litigation.

SIGNATURES

Date: _____, 20__

By: _____
Policyholder or Authorized Signatory

Date: _____, 20__

By: _____
Insurer Authorized Signatory

Date: _____, 20__

By: _____
Policyholder's Appraiser

Date: _____, 20__

By: _____
Insurer's Appraiser

Date: _____, 20__

By: _____
Umpire

IT IS SO ORDERED:

SIGNED this _____ day of _____, 200__.

JUDGE