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***403 APPRAISAL AND THE PROPERTY INSURANCE APPRAISAL CLAUSE--A CRITICAL ANALYSIS: GUIDANCE AND RECOMMENDATIONS FOR ARIZONA**

I. Introduction

It took David Leven, a sixty-four-year-old retiree in North Miami, Florida, and his wife Barbara three years of hard-fought litigation to get a state government-chartered insurance company, Citizens Property Insurance Corp. (“Citizens”), to settle their property claim after Hurricane Wilma sent a tree crashing through their roof in 2005.¹ According to the Levens, what started as a leak led to a collapse of the roof because Citizens--after refusing to have the roof replaced--only paid the Levens enough to have the damaged area patched.² The Levens claimed the collapse resulted in mold and mildew formation, which aggravated Mr. Leven's severe respiratory illness.³ They sent their teenage daughter to live with friends after the hurricane, but the Levens themselves were forced to stay in the home for lack of resources.⁴ Contentious court battles like that between the Levens and Citizens arise because insurers and their insureds are unable to come to an agreement as to the dollar value of an insured loss.

Such litigation, however, may frequently be unnecessary. A standard property insurance policy provision provides for a process designed to efficiently and cost effectively resolve disagreements as to value without resort to formal legal process.⁵ That process is insurance appraisal.⁶ An ***404** insurance appraisal, unlike a judicial proceeding, involves a contractual agreement contained in the policy by which the parties agree to have a third person determine the amount of a loss or value of property.⁷ Rather than encompassing issues of liability, an insurance appraisal merely determines the value of a claim if the parties do not agree to its value.⁸ Ideally, appraisal should prevent long and costly court battles by providing a mechanism to fix damages when liability is not in dispute.⁹ As a direct result of the proliferation of litigated insurance disputes, appraisal clauses have become just as important as policy provisions governing coverage and exclusions.¹⁰ Despite the important implications for both insurer and insured, however, Arizona courts have given insurance appraisal almost no attention.

Part II discusses the basic framework of the insurance appraisal clause and the purpose and policy underlying the insurance appraisal process, illustrating via anecdotal evidence the importance of ensuring the efficacy of those goals. Part III examines the historical distinctions between appraisal and arbitration, and analyzes the conflicting approaches taken in other jurisdictions and in Arizona to the first of two main questions concerning the insurance appraisal process: (1) Should insurance appraisal be viewed as an adversary proceeding similar to arbitration or should different rules apply where the parties' only disagreement concerns dollars and cents?¹¹ Part IV considers the second crucial question in insurance appraisal: (2) Should an umpire, appointed to resolve disputes arising under the appraisal process, possess unique qualifications and, if so, what should those qualifications be?¹²

Part V weighs two alternatives for addressing the problems raised by the lack of clarity in Arizona law concerning these issues: (A) eliminating the distinction between appraisal and arbitration and determining matters of appraisal in a quasi-judicial proceeding resembling arbitration;¹³ or (B) recognizing the important differences between the two processes by codifying

the limited procedural involvement of the courts in the insurance appraisal process relating to appointment of umpires and instituting prophylactic measures to minimize remaining uncertainties in the common law.¹⁴

*405 Rather than muddy the waters with the former approach, which would frustrate the policy goals of appraisal, this Comment suggests that Arizona should take the latter course, because it would better avoid the necessity of resort to courts in the first instance. As a result, Part V.B advocates a three-part approach: (1) augmenting Arizona's property insurance statutes to more closely define the umpire selection and appointment process; (2) statutorily defining appraiser and umpire qualifications;¹⁵ and (3) acting to limit or prevent disputes from arising through improved drafting by insurers¹⁶ and better recordkeeping by insureds.¹⁷

II. Background

A. The Appraisal Clause

A typical appraisal clause in a property insurance policy looks something like:

If [Company] and [Insured] disagree on the value of the property or the amount of the "loss," either may make written demand for an appraisal of the "loss." In this event, each party will select a competent and impartial appraiser. [Insured] and [Company] must notify the other of the appraiser selected within twenty days of the written demand for appraisal. The two appraisers will select an umpire. If the appraisers do not agree on the selection of an umpire within 15 days, they must request selection of an umpire by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of the "loss." If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be the appraised value of the property and the amount of "loss."¹⁸

Such appraisal clauses contain little express detail or direction concerning the nature of the appraisal process, terms or scope of court involvement, or the qualifications of appraisers or umpires selected *406 thereunder.¹⁹ Further, few jurisdictions have codified rules pertaining to the appraisal process in the property insurance context.²⁰ Arizona is no different in this regard. Title 32, chapter 36 of the Arizona Revised Statutes creates a State Board of Appraisal (the "Board").²¹ However, the Board of Appraisal's authority extends only to real estate appraisal and not to insurance appraisal.²² Arizona's property insurance statutes-- sections 20-1501 to -1509 of the Arizona Revised Statutes--provide no guidance concerning the insurance appraisal process.²³

B. Purpose and Policy of Insurance Appraisal

Insurance appraisal has as its chief goal the efficient, inexpensive, and fair resolution of the amount of an insured loss.²⁴ Speed is often cited as the chief advantage of appraisal.²⁵ A quick resolution may be more important to the homeowner than to the insurer, since the former is likely to be dealing with displacement or other inconveniences beyond the fact of a pecuniary loss.²⁶ Nevertheless, speed in resolution and recovery of claims is a primary policy goal of the appraisal process and benefits both insurer and insured.²⁷ Expense is another chief factor in the appraisal process. Because litigation, and to a lesser extent arbitration, are costlier means of resolving a dispute, appraisal provides a method to minimize the expense associated with determining the separate issue of the amount of a loss.²⁸ Finally, appraisal provides both policyholder and insurer an equitable means of resolving dollar-value disputes by submitting the parties' disagreements to industry professionals with more expert knowledge about loss valuation than an arbitrator, judge, or jury might possess.²⁹

The application of these policy goals is best demonstrated by example. While the problem may appear less imperative in the case of a single *407 homeowner haggling with his insurer over the cost of remediation after a loss, what happens when a loss affects an entire neighborhood, town, or region? The Levens are not the only Citizens Property insureds suffering after

appraisals gone wrong. A lawsuit concerning one condominium development in Daytona Beach pits an appraisal estimate from the property owner exceeding \$5 million against claim payments made by Citizens Property totaling \$370,000.³⁰ In fact, the number of suits filed against Citizens Property after the 2004 and 2005 hurricane seasons has reached into the hundreds.³¹

Nor is Citizens Property the only insurer still facing lawsuits after the 2004 hurricane season, when hurricanes Charley, Frances, Jeanne, and Ivan caused a combined total of \$42 billion in damages in Florida alone.³² Four years after Charley swept across the central part of the state, many residents still have unrepaired damage from the storm. Deborah and Clinton Wiley are residents of Arcadia, Florida, where Charley's storm winds reached 103 miles per hour even twenty-five miles inland, and have been living with a hole in their living room ceiling and another in their bedroom since 2004.³³ The Wileys, like many of United Casualty Insurance Company of America's insureds, are socioeconomically disadvantaged, so when United Casualty appraised their damages at what it termed "a fair amount," but what the Wileys claim was in reality a pittance, the Wileys and their neighbors were left with crumbling homes and no money to fix them.³⁴ Many residents reported receiving insurance payments ranging from \$3,500 to \$10,000 for their losses, which was not enough to repair damaged electrical wiring, open holes, sagging roofs and floors, and extensive mold.³⁵ Residents have filed suit to force adequate appraisals, but in the meantime residents are "dodging raindrops indoors."³⁶

***408** These kinds of problems are not limited to Florida. Last year, the Louisiana Attorney General filed suit against several major insurers alleging collusion to manipulate and lowball damage estimates after Hurricane Katrina, which caused roughly 972,000 damage claims in the state.³⁷ The suit targets six insurance companies, including insurance giants Allstate and State Farm, alleging pressure tactics--including doctoring engineering reports and delaying claim payments--to force settlements.³⁸ The suit papers highlight some internal motivations for such tactics, citing an Allstate consultant's report recommending that insurers safeguard profits by "undervaluing claims using the tactics of deny, delay and defend."³⁹

Of course, consumers are not the only victims of fraud in the claims handling and damage appraisal process. Angleton, Texas resident Daniel Hunger pled guilty to insurance fraud in March 2007 as part of a conspiracy that involved purchasing homes, flooding them with water via hose, then letting the water sit for days to encourage mold formation and substantially augment damages.⁴⁰ The court also ordered Hunger to pay restitution of \$1.4 million in addition to his prison sentence.⁴¹ The scheme affected a number of insurance companies, which lost millions of dollars in fraudulent payouts.⁴² In 2006, Orlando-based CPM Construction offered free damage inspections to Indianapolis residents after a massive Good Friday hailstorm that damaged thousands of roofs.⁴³ While conducting their preliminary appraisals, CPM representatives caused further damage to shingles and siding, including bending, abrading and even beating building components with golf balls tied in socks.⁴⁴ Though State Farm was able to ferret out the fraud during its own inspection and appraisal process, it incurred more than \$100,000 in additional costs for specialty forensic exams.⁴⁵ CPM's ***409** President and CEO faces up to eight years in prison for fourteen felony charges in connection with the scam.⁴⁶

While the appraisal process is equally important to the individual homeowner with a single loss, the necessity of an efficient and fair process for resolving disputes is most evident in the case of natural disasters, where large numbers of property owners present simultaneously with cumulatively massive claims. Arizonans, of course, typically have little to worry from widespread flooding, but fire presents a significant threat to residents of this hot, arid desert region. By way of example, the 2002 Rodeo-Chediski and Aspen fires were the second- and fourth-costliest catastrophes in Arizona history, resulting in total property damages of over \$200 million.⁴⁷ The Rodeo-Chediski fire charred 468,000 acres of Arizona high country over the course of three weeks during the summer of 2002 and took 491 structures with it, most of them homes.⁴⁸ The \$102 million in insured losses included homes and personal belongings, vehicles, temporary housing and related costs.⁴⁹ The Aspen fire raced across 85,000 acres of land in the Santa Catalina Mountains in June 2002, leveling 340 structures and carrying a price tag of \$80 million for resulting individual property claims.⁵⁰

All in all, property insurance claims nationwide accounted for direct payments of \$6.7 billion in 2007.⁵¹ Because appraisal is designed to minimize the impact in both time and money of disputes arising during the claims process, the sheer magnitude of this figure makes the importance of clarity in the appraisal process self-evident.

*410 III. Appraisal Distinguished

A. Distinguishing Appraisal and Arbitration

Though the line is frequently blurred between appraisal and arbitration, appraisal is not an adversary proceeding, but rather a process designed to prevent disputes as to the value of a claim from arising in the first instance.⁵² Black's Law Dictionary defines appraisement as “[a]n ADR method used for resolving the amount or extent of liability on a contract when the issue of liability itself is not in dispute,” further noting that, “[u]nlike arbitration, appraisement is not a quasi-judicial proceeding but instead an informal determination of the amount owed on a contract.”⁵³ Arbitrators therefore conduct a quasi-judicial proceeding for the purpose of resolving many issues in dispute between the parties, while an appraiser's duty is to prevent disagreements on the amount of liability at issue under an insurance contract by virtue of conducting the appraisal, and not to settle disputes that already exist.⁵⁴ While the term “dispute” is susceptible of a broad definition, for purposes of this Comment, it refers to a controversy that is the subject of a lawsuit or similar adjudicative proceeding, and does not include mere disagreements between the parties.⁵⁵ An appraisal, though designed to resolve disagreements, is not a “dispute” in this narrow sense.

This distinction between quasi-judicial dispute resolution and appraisal was the key issue in *Parks v. Cleveland Railway Co.*, where the Ohio Supreme Court addressed the legality of procedures to establish passenger rail rates in a contract between the Cleveland Railway Company and the city of East Cleveland.⁵⁶ Despite the fact that the contract called for submission of rate requests to a panel of arbitrators, the court found that resolution of this issue was not in technical terms an arbitration but rather was an appraisement of the reasonable value of a service.⁵⁷ In support of its finding, the court pointed to United States Supreme Court authority for the proposition that the difference between arbitration and appraisal arises from *411 the fact that the former implies a dispute, whereas an appraisal is merely the fixing of value by persons agreed to by the parties.⁵⁸ The court noted that this arrangement was intended to preclude differences in the first instance, rather than to settle existing disputes.⁵⁹

The Ninth Circuit addressed a similar issue more recently in *Portland General Electric Co. v. U.S. Bank Trust National Ass'n (“PGE”)*.⁶⁰ The issue in PGE was whether appraisals should be treated under common law contract principles or under the rules of arbitration.⁶¹ Portland General Electric Co. (“PGE”) entered into contracts with the U.S. Bank Trust (the “Trust”) to lease turbine generators for use at PGE's power plants for twenty-five years, after which the parties agreed to an appraisal process to determine the current market rate for re-lease or purchase.⁶² The Trust, unhappy with the result of the appraisal, sought to have the appraisal award vacated, arguing on appeal after an unfavorable ruling that the district court's confirmation of the appraisal under the Federal Arbitration Act (“FAA”) was reversible error.⁶³ In remanding the case for further proceedings, the Ninth Circuit found that the trial court had improperly applied the FAA to the market rate determination at issue, reasoning that the FAA applies to proceedings quasi-judicial in nature, whereas appraisal is limited to a ministerial determination of value.⁶⁴

B. Appraisal in the Property Insurance Context

1. Distinctions in Other Jurisdictions

Beyond those distinctions set forth above concerning appraisal generally,⁶⁵ a number of courts have expressly addressed the processes' dissimilarity in the property insurance context. In *Hartford Fire Insurance Co. v. Jones*,⁶⁶ the Mississippi Supreme Court addressed the issue of whether a fire loss valuation agreed to by the insured's appraiser and the umpire constituted an arbitration award.⁶⁷ The court noted that both sides had briefed the appeal under the theory that the appraisers' report was an arbitration award issued pursuant to an agreement to arbitrate.⁶⁸ However, the court rejected this suggestion, instead going on to articulate in detail the differences between arbitration and appraisal:

While some of the rules of law that apply to arbitration apply in the same manner to appraisement . . . there is a plain distinction between them. In the proper sense of the term, arbitration presupposes the existence of a dispute or controversy to be tried and determined in a quasi judicial manner, whereas appraisement is an agreed method of ascertaining value or amount of damage, stipulated in advance, generally as a mere auxiliary or incident feature of a contract, with the object of preventing future disputes, rather than of settling present ones The investigation

of arbitrators is in the nature of a judicial inquiry and involves, ordinarily, a hearing and all that is thereby implied. Appraisers, on the other hand . . . are generally expected to act upon their own knowledge and investigation, without notice of hearings, are not required to hear evidence or to receive the statements of the parties, and are allowed a wide discretion as to the mode of procedure and sources of information.⁶⁹

Other jurisdictions are substantially in accord.⁷⁰

2. Ambiguity in Arizona's Common Law

Notwithstanding the distinctions noted above, at least some Arizona courts have compared appraisal clauses to arbitration clauses in insurance *413 contracts.⁷¹ This comparison likely arises from the fact that traditionally little attention has been given to appraisal as a distinct process, despite the clear differences.⁷² In *Home Indemnity Co. v. Bush*,⁷³ for example, Division One of the Arizona Court of Appeals construed an appraisal clause in an automobile policy as an “appraisal and arbitration provision,” despite the lack of any language in the provision characterizing it as one involving arbitration.⁷⁴ But nothing in the Bush court's opinion suggests it (or the parties) even considered whether a distinction between the two processes might exist.

Some twenty years later, in *Meineke v. Twin City Fire Insurance Co.*,⁷⁵ the same appellate court concluded on the basis of a single Maryland case that despite differences between appraisal and arbitration, the processes are analogous.⁷⁶ The court further referred to a 1978 Arizona decision, *Hirt v. Hervey*,⁷⁷ for the proposition that appraisers' decisions are entitled to the equivalent measure of finality given those of arbitrators, and to a 1986 opinion in *Hanson v. Commercial Union Insurance Co.*⁷⁸ to suggest that in view of similarities between appraisal and arbitration proceedings, courts should apply the standard of review applicable in arbitration cases to those concerning appraisal.⁷⁹ The courts' conclusory statements failed, however, to establish precisely how arbitration and appraisal are “analogous,” nor did the *Meineke* court identify or discuss the differences it acknowledged to exist between the processes.⁸⁰

*414 The Arizona Supreme Court has never addressed this issue, but courts that have considered the policy concerns underlying appraisal, including courts interpreting Arizona law, consistently recognize a difference. In *Carbonneau v. American Family Mutual Insurance Co.*,⁸¹ the United States District Court for the District of Arizona considered a motion to compel appraisal filed by the homeowner plaintiffs.⁸² While suggesting as a preliminary matter that appraisal and arbitration are analogous processes, the court went on to identify a critical feature of appraisal that distinguishes it from arbitration—that is, the fact that “appraisers only determine the amount of damage and do not resolve questions of coverage.”⁸³ The court found this issue central to its decision to compel appraisal, because, it reasoned, if insurance companies were permitted to argue that a dispute involved the scope of a claim rather than amount of damages, “insurance companies could avoid appraisal obligations merely by claiming that the dispute concerned coverage.”⁸⁴ In this regard, there is a clear need to formally distinguish appraisal from arbitration, because arbitration employs a much more extensive fact finding exercise than is used in appraisal and, unlike appraisal, employs a quasi-judicial decision making process. Arbitration involves far more than does appraisal; arbitrators hold formal hearings, take evidence, call witnesses, and resolve disputed issues of liability,⁸⁵ whereas appraisal is designed to avoid the necessity for this type of adversary proceeding in the first instance.⁸⁶ Appraisal's sole purpose is to fix the amount of damages where liability is undisputed.⁸⁷

*415 IV. Umpire Qualifications

Umpires in the insurance appraisal process perform a markedly different role than arbitrators, and therefore must possess unique qualifications. Similar to an appraiser, an umpire should be qualified to independently inspect and appraise a loss and to determine which, if either, of the parties' appraisers is correct in his appraisal of the loss. An umpire's qualifications should include, at a minimum, “experience in building inspection, communicating with contractors, engineers and architects, damage appraisal, analysis or estimating.”⁸⁸ This is perhaps the most crucial issue in determining the fairness of the appraisal process, yet Arizona courts have never addressed this issue. However, even jurisdictions that, of experience and necessity, have taken

positions on the issue have often given us only vague answers to the question of what those qualifications must be.⁸⁹ What type of experience is “relevant” in the appraisal context? What are the proper bases for an umpire’s “knowledge and investigation” of the matter appraised?

At least some courts have decided that, in the insurance appraisal context, an individual who has “the requisite special experience in damage analysis[] will be in [the] best position to efficiently umpire the appraisal” process.⁹⁰ In *St. Charles Parish Hospital v. United Fire and Casualty Co.*, a school district plaintiff sought judicial appointment of an umpire after the parties disagreed on the value of plaintiff’s loss.⁹¹ In addressing the appropriateness of the parties’ nominees, the court reasoned that limiting appointments to those familiar with the process of appraising property *416 damage and estimating repairs would promote fairness and efficiency in the process.⁹²

In *Liberty Mutual Fire Insurance Co. v. Hernandez*,⁹³ the insureds contended that a state statute governing appointment of arbitrators, and requiring that they be members of the bar, applied in an appraisal proceeding.⁹⁴ In holding that the statute did not govern the selection of an umpire, because of the difference between the appraisal process and arbitration, the court discussed the requisite qualifications an umpire must possess. It acknowledged that the trial court could appoint an umpire with subject-matter expertise, such as a qualified building contractor, even if that person was not an attorney.⁹⁵ With respect to the issue of appointing a retired judge or other attorney as umpire, the court determined that such an appointment would be permissible if the appointee was independently qualified to address the matter being appraised.⁹⁶

While arbitrators may frequently resolve issues about which they possess limited expertise, umpires must possess qualifications specific to the subject matter, and in the case of property insurance claims, those qualifications should include experience appraising property damage and estimating repairs.⁹⁷ An umpire should be a seasoned contractor or appraiser, and able to perform an independent investigation and meaningfully analyze and evaluate the items of damage about which the parties’ appraisers disagree. A retired judge or other attorney experienced in alternative dispute resolution, while certainly qualified in that field of expertise, does not have the capability to perform this more narrow function of independently appraising damages and estimating repairs.

V. Recommendations

A. Arbitration? Appraisal?

One option for dealing with the ambiguities associated with the appraisal process in Arizona might involve rejecting the distinctions between the two *417 and viewing appraisal as a new type of quasi-judicial proceeding, but one better adapted to the singular purpose of valuing a loss.⁹⁸ An appraisal panel might proceed to reach an award in similar fashion to a panel of arbitrators: taking evidence concerning the loss, including receiving witnesses’ testimony, and collaborating to determine a fair damages award. This approach would appear at first blush to merit some consideration, for several reasons.

First, as previously noted, courts and litigants in some jurisdictions have either explicitly rejected or failed to appreciate the distinctions between the two processes.⁹⁹ The disagreement across jurisdictions, or even within a jurisdiction, concerning whether appraisal and arbitration are analogous creates a host of problems for practitioners and judges, since it may be difficult to ascertain which approach is favored in a particular jurisdiction. Second, courts’ failure to distinguish between appraisal and arbitration is not altogether unsurprising, given their similarity in at least some respects.¹⁰⁰ Third, appraisal and arbitration share the common purpose of efficiently resolving disputes without resort to courts.¹⁰¹

The trouble with this approach is that while appraisal and arbitration may share some common features and goals, the differences between the processes are significant and important. As the *Binkewitz* court noted:

The distinctions are significant. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, and judgment may be entered upon the award, whereas an appraisal establishes only the amount of loss and not liability.¹⁰²

With respect to the doctrinal considerations underlying both methods of dispute resolution, the reason for establishing two separate procedures is equally evident. As noted above, the primary purpose of alternative dispute resolution is to promote efficient and speedy resolution of disagreements.¹⁰³ In the case of an arbitration proceeding, the arbitrators conduct hearings, take evidence, hear witnesses, and proceed in a formal manner to decide the parties' dispute.¹⁰⁴ Appraisers, on the other hand, travel to construction sites, *418 inspect damaged property, assess labor and materials costs to repair property, and value personal property in order to attach a dollar figure to a loss.¹⁰⁵ Just as courts have long been reluctant to overturn appraisal awards or involve themselves in the appraisal process absent disputes concerning umpire appointments,¹⁰⁶ requiring a panel of appraisers/umpires to undertake arbitrator's tasks to determine a loss would be counterproductive to efficiency goals.¹⁰⁷ Thus, dissolving the line between arbitration and appraisal would discourage efficiency. Courts presently have a difficult enough time recognizing the differences in aim and structure between arbitration and appraisal, and modifying the appraisal process to make it look more like arbitration could only make this problem worse.¹⁰⁸

B. A Prophylactic Approach

If expanding the scope of appraisal is not a workable answer to the problem, what other potential solutions exist? As Benjamin Franklin famously remarked, "an ounce of prevention is worth a pound of cure."¹⁰⁹ I suggest a revision to Arizona's statutory provisions governing property insurance, together with protective measures on the part of insurers and *419 consumers, in order to prevent disagreements from arising in the course of appraisal.

1. Statutory Alternatives

Arizona, like many states, has enacted a general statutory scheme governing property insurance, which has no provisions pertaining to appraisal.¹¹⁰ This oversight is particularly problematic for Arizona policyholders given the lack of common law concerning these issues in the jurisdiction. As a result, the terms of their policies determine how appraisal should be conducted and umpires selected. Critics suggest that leaving the contours of the appraisal process to boilerplate contract provisions drafted by insurance companies and inserted into adhesion contracts permits insurers to obtain the greater benefit of the appraisal bargain.¹¹¹ On the other hand, were the state legislature, rather than the insurer, to give clearer shape to the appraisal and umpire selection process, that effort would almost certainly help to minimize any bias currently present in the appraisal process and better effect the public policy goals of appraisal.¹¹² A clear statutory scheme would benefit lawyers as well, as not only courts misperceive the relationship between appraisal and arbitration. In fact, many cases in which courts intuitively apply arbitration principles to appraisal problems are caused by a party's invocation of the protections of arbitration in the first instance.¹¹³

New York long ago took the lead in developing both a statutory procedure for appointment of umpires¹¹⁴ and a comprehensive standard insurance policy.¹¹⁵ Importantly, both the standard policy appraisal clause *420 and the statutory language provide that, at the outset of the appraisal process, the parties' appraisers shall select a "competent and disinterested" umpire.¹¹⁶ This requirement serves two important functions: (1) it ensures that any disagreement over umpire selection or qualifications requiring court intervention will be resolved before the parties conduct their investigation; and (2) it provides a method for determining an umpire's credentials.¹¹⁷

With respect to the first function, the requirement that umpire designation take place at the outset of the appraisal process serves to eliminate duplication of efforts and unnecessary post hoc judicial inquiry regarding the manner of appointment and also serves to enhance the fairness of the appraisal process by ensuring earlier involvement on the part of the umpire in the event of a dispute.¹¹⁸

With respect to the second function, a requirement that the umpire be "competent and disinterested" preserves the element of fairness in the appraisal process. The two elements are related but distinct. Competence implies that the umpire has the relevant expertise to reach a conclusion,¹¹⁹ whereas disinterest requires that the umpire be "free from bias, prejudice or partiality."¹²⁰

While the competence requirement certainly allows for appointment of an umpire with extensive experience in adjusting and appraising loss, the standard merely requires that an umpire be an “adult person possessed of mental capacity.”¹²¹

I propose that Arizona adopt a modification and expansion of the New York statute, requiring insurance policies to reference Arizona's appraisal statute for purposes of determining the qualifications of umpires, or alternatively permitting appointment of an individual who otherwise possesses sufficient qualifications relevant to the matter being appraised. The additional provisions would supplement the standard policy appraisal *421 clause and provide direction concerning the process for appointing an umpire in those situations where the parties or their appraisers cannot agree to an umpire. A section specifying the requisite qualifications for serving as an umpire would simplify the appointing court's task in selecting an umpire.

Specifically, I propose an amendment to title 20, chapter 6, article 7 of the Arizona Revised Statutes relating to property insurance, adding the following sections:

20-1510. Appointment of Umpire; Procedure

(a) Whenever application shall be made for the selection of an umpire pursuant to the provisions relating to appraisals contained in the standard policy identified in section 20-1503, it shall be made to a judge of the superior court of the county in which the lost or damaged property is or was located. The application shall be on five days' notice in writing to the other party. Any such notice in writing, when served by the insured, may be served upon any local agent of the insurer.

(b) The court shall, on proof by affidavit of the failure or neglect of the appraisers to agree upon and select an umpire within the time provided in such policy, and of the service of notice pursuant to subsection (a), appoint a competent and disinterested person to act as such umpire in the ascertainment of the amount of such loss or damage.

20-1511. Umpire Qualifications

An individual selected by a party or appointed pursuant to section 20-1510 to act as an umpire pursuant to the provisions relating to appraisals contained in the standard policy identified in section 20-1503 must be competent within the meaning of this section:

(a) An umpire shall be presumed competent if licensed to perform appraisal in the state of Arizona pursuant to section 32-3611.

(b) An umpire not meeting the requirements of subsection (a) shall be presumed competent only if the party seeking the appointment demonstrates, by a preponderance of the evidence, *422 that the individual is qualified to independently assess structural damage and estimate costs of repair.

Proposed section 20-1510 provides formal direction to the parties concerning the procedures to follow in the event of a disagreement concerning umpire appointment. The five-day notice requirement balances the efficiency and fairness goals of appraisal by providing the non-petitioning party an opportunity to object to the petitioning party's choice of umpire, while providing for a quicker method of determining the appointment than would occur in a normal adversary proceeding.

With respect to proposed section 20-1511, the subsection (a) licensing preference¹²² would further the policy goals of fairness and efficiency in the insurance appraisal process. The Arizona Board of Appraisal promulgates comprehensive educational requirements for licensing real estate appraisers, designed to ensure that licensed real estate appraisers have sufficient foundational knowledge to render accurate opinions concerning property value.¹²³ Additionally, potential licensees must complete a training program under a licensed appraiser and submit the appraisal reports prepared during that training program to the Board for evaluation.¹²⁴ After completion of the education and training requirements, and approval by the Board, candidates must submit to an examination testing their accumulated knowledge and experience.¹²⁵ As these requirements demonstrate, the licensing process ensures that every individual licensed to appraise real estate in Arizona has a sound educational and practical background for their opinions. Construction professionals and estimators qualified pursuant to subsection (b) acquire equivalent guarantees of competency by way of their education and experience in the construction field.¹²⁶

***423** Such an attempt to clarify the appraisal process is not without flaws. While the proposed changes would clearly enhance fairness in the appraisal process, they could potentially frustrate the remaining policy goals underlying appraisal. More stringent qualification requirements might make the process more time consuming, either in the event an insurer or insured elected to scrutinize an opponent's choice of appraiser more carefully for compliance with the statute or if challenges to a selected representative's qualifications required a trip to the courthouse for a judicial determination of suitability to serve. The five-day notice requirement would theoretically help to minimize the delay associated with obtaining that determination, but as a practical matter courts may not be poised to make decisions quite so quickly.¹²⁷ Restricting the world of qualified representatives to those licensed as appraisers or possessing a somewhat narrow class of expertise could also increase the cost of the process.¹²⁸

However, the cost and delay arguments also cut the other way. The present system does not promote the use of individuals meeting a mere competence standard¹²⁹ to referee losses, but rather encourages the use of legal professionals, including specialty litigators and retired judges, as umpires.¹³⁰ The services of such professionals do not come cheap. In fact, hourly rates for professional mediators are frequently multiples of the rates charged by licensed appraisers or professional estimators.¹³¹ Further, such ***424** individuals often do not have relevant experience with construction estimating or property valuation, the particular skills required to appraise an insurance loss. For this reason, their inquiries necessarily require more investigation of the parties' competing appraisals than would be necessary if a "third appraiser" were simply to examine the property and make an independent estimate of the damage, and this additional analysis involves both additional time and cost.

Providing the parties with a process that actually achieves the policy goals underlying insurance appraisal is essential. The Levens lived under a collapsed roof for three years in order to obtain a fair resolution of their claim, and such protracted litigation is far more costly and time consuming to both parties than a properly conducted appraisal.¹³² Arriving at a fair price for a loss is critical as well. The Wileys are still "dodging raindrops" because their post-loss appraisal was conducted unfairly and the amount paid was insufficient to repair the damage to their roof.¹³³ A fair valuation is also critical where the opposing estimates are widely disparate, as occurred in Citizens' dispute with Sunglow Condominiums, where Citizens made claim payments of \$370,000 for damage the condominium association argued totaled over \$5 million.¹³⁴

2. Recommendations for Insurers

As a corollary to drafting better statutory alternatives, insurers can help avoid disputes by doing more at the outset to clarify the scope of policy provisions governing appraisal. Recall the sample appraisal clause in Part II.¹³⁵ While that provision requires the parties' appraisers to be "competent and impartial," there is no such constraint on an umpire selected to resolve valuation disputes; it merely provides that "[t]he two appraisers will select an umpire."¹³⁶ Although language used in an appraisal clause varies by policy, a statement as generic as the foregoing is not uncommon. However, given the availability of the comprehensive New York standard fire policy (adopted by statute as the standard policy in Arizona¹³⁷) and its more specific language as to umpire qualifications, insurers should eliminate nonconforming language from their standard policies. Insurers can further protect the integrity of the appraisal process by modifying policy language ***425** to require that all appraisal inspections be conducted jointly by the insurer's and the insured's appraiser. These amendments would benefit insurers by providing a better opportunity for experts to assess a loss before a judicial fact finder becomes involved.¹³⁸

Clarifying the policy language regarding umpire qualifications would exclude many unqualified contractors from the appraisal process altogether. Further, many instances of fraud in the appraisal process, such as those involving CPM Construction in Indianapolis, occur without the homeowner's knowledge.¹³⁹ But if insurers insist on joint inspections at the outset, otherwise qualified contractors may be less likely to act on unscrupulous impulses in conducting their appraisals, thereby reducing the instance of fraud.

3. Protection for consumers

While insurers may narrow the scope of disputes arising during the appraisal process by drafting their appraisal clauses more carefully, insureds, particularly in the homeowner's insurance context, may be at a bargaining disadvantage as a result.¹⁴⁰ So what is a consumer to do? Although a procedural bias in favor of the insurance company likely cannot be completely eliminated, it can be minimized by enhancing the efficiency of the process. In this regard, insureds may better protect their interests from the danger of unequal bargaining power, ensure a quick and efficient resolution of claims, and even prevent many disagreements from occurring in the first place by conducting periodic inventories and appraisals of their assets.¹⁴¹ Homeowners like the Levens and Wileys could certainly have benefited from a current, pre-loss appraisal. Such an evaluation would have documented the then-existing conditions of their roofs and minimized disagreements with their insurers concerning the extent of the damage *426 attributable to storm damage. Admittedly, few homeowners are likely to commission a formal appraisal every few years, but even a photographic inventory of a home and the condition of its major components (either pre- or immediately post-loss) would be helpful in the event of a catastrophic loss.¹⁴²

Consumers should also take care in selecting their representatives in the appraisal and repair process, because fraudulent behavior on the part of unscrupulous contractors could void a homeowner's policy in some circumstances.¹⁴³ Even if fraud is not an issue, if a contractor does a poor job on the original repair, insurance will not cover the cost of a subsequent repair.¹⁴⁴ The Ohio Department of Insurance warns consumers to be cautious of any contractor that is not licensed, bonded, and registered with the state department of insurance or accredited by the Better Business Bureau; that provides inordinately high estimates compared to other contractors; that requests prepayment or a down payment for services; or that either discourages insurance company involvement or seeks to represent the insured in dealings with the insurer.¹⁴⁵

While these solutions may not provide a comprehensive solution for the unsophisticated consumer, they go a long way toward keeping insurance companies honest and ensuring that homeowners can obtain quick and fair settlements after a loss.¹⁴⁶

VI. Conclusion

Appraisal is a necessary and important right for all parties to a property insurance policy, serving to provide a fair, efficient, and inexpensive means of resolving disputes concerning the amount of an insured loss where coverage and liability are not at issue. Though the differences between appraisal and arbitration are readily apparent and recognized to varying degrees in other jurisdictions, Arizona courts have not specifically addressed the distinction in the property insurance context, nor have they provided litigants guidance in the umpire appointment process beyond exercising their ministerial appointment powers. Yet without clarity in *427 Arizona's law on point, appraisal fails of its fundamental purpose when parties must seek court intervention to settle disputes contractually intended to be resolved outside the adversary system. The financial and human scope of the issue militates in favor of action to remedy the lack of common law guidance and the ambiguities written into vague appraisal clauses. The prophylactic measures proposed herein, consisting of statutory changes to Arizona's property insurance statutes coupled with encouraging insurers and consumers to do more to prevent disputes from arising in the first instance, would fulfill the need for clarity in the appraisal process and further the policy goals underlying appraisal.

Footnotes

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- 1 See Patrick Danner, *Citizens Settles over Storm Suit*, *Miami Herald*, Apr. 26, 2008, at 1C. The suit, filed in 2006, settled “on the eve of trial” in April 2008. *Id.*
- 2 See *id.*
- 3 See *id.*
- 4 See *id.* (noting that the Levens' net monthly disability income amounted to only \$1,300 after payment of medical expenses).
- 5 Johnny C. Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program*, 37 *U. Tol. L. Rev.* 931, 931 (2006).
- 6 The terms “appraisal” and “insurance appraisal” may be used interchangeably herein.
- 7 Parker, *supra* note 5, at 932.
- 8 *Id.* at 933.
- 9 See generally 4 *Am. Jur. 2d Alternative Dispute Resolution* § 3 (2008).
- 10 See Parker, *supra* note 5, at 931.
- 11 See *infra* Part III.
- 12 See *infra* Part IV.
- 13 See *infra* Part V.A.
- 14 See *infra* Part V.B.
- 15 See *infra* Part V.B.1. Arizona's property insurance statutes, [Ariz. Rev. Stat. Ann. sections 20-1501 to -1509](#), make no reference to the umpire appointment process and merely incorporate the terms of the 1943 New York standard fire insurance policy. See [Ariz. Rev. Stat. Ann. § 20-1503](#) (2008). This incorporation will, however, be important to remember when we discuss the recommendations contained in Part V.B.
- 16 See *infra* Part V.B.2.
- 17 See *infra* Part V.B.3.
- 18 See Parker, *supra* note 5, at 931.
- 19 See Timothy P. Law, Esq. & Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 *Conn. Ins. L.J.* 291, 293 (2006-2007).
- 20 See *id.* at 293. But see, e.g., *N.Y. Ins. Law* § 3408 (McKinney 2007).
- 21 See generally [Ariz. Rev. Stat. Ann. §§ 32-3601 to -3656](#) (2008).
- 22 See *id.* § 32-3601(1) (defining appraisal, in the context of that chapter's coverage, as a “statement ... as to the market value of real property”).
- 23 See generally §§ 20-1501 to -1509.
- 24 Law & Starinovich, *supra* note 19, at 308.

- 25 Id. at 304 n.69 (“The only real benefit of an informal appraisal is the reduced cost and a more speedy resolution of the dispute.” (quoting Herbert Dodell, *Using the Appraisal Process to Resolve Insurance Disputes*, L.A. Lawyer, July/Aug. 2002, at 15)).
- 26 Id. at 304-05.
- 27 Id.
- 28 Id. at 305-06.
- 29 Id. at 306-08.
- 30 See Ludmilla Lelis, *Condos Say State Insurer Owes Millions*, Orlando Sentinel, Oct. 8, 2008, at D1.
- 31 Id.; see also Danner, *supra* note 1; Julie Patel, *A Second Blow-- Years After Damage from Hurricanes, 2,000 Households Still Have Unresolved Damage Claims Against State-Run Citizens Property*, S. Fla. Sun-Sentinel, Sept. 19, 2008, at 1A (noting that Citizens Property received 2,422 complaints about its claims handling process after the hurricanes, compared with a substantially smaller number--142 and 218 respectively--logged by Florida's two leading private property insurers).
- 32 See Lelis, *supra* note 30; see also Ron Bartizek, *In Storms' Wake*, Times Leader (Wilkes Barre, PA), Sept. 14, 2008, at 1D (pegging total number of claims for the 2004-2005 hurricane season at more than \$5.5 million, with losses exceeding \$81 billion).
- 33 Anthony McCartney, *'04 Storm Victims Say They Were Ripped Off-- Insurance Firm Cited as Homes Still Damaged*, S. Fla. Sun-Sentinel, May 27, 2008, at 6B.
- 34 See *id.*
- 35 See *id.*
- 36 Id.
- 37 Mark Ballard, *Suit: Insurers Colluded*, Advocate (Baton Rouge, LA), Nov. 8, 2007, at 1A.
- 38 See *id.*
- 39 Id.; see also Rebecca Mowbray, *State Farm Suit Hits Federal Court*, Times-Picayune (New Orleans, LA), June 13, 2007, at 1 (discussing suit alleging that State Farm's internal estimation and appraisal software trims line item property repair costs in order to depress estimates and underpay claims).
- 40 John Tompkins, *Man Gets Prison Time for Insurance Fraud*, Brazosport Facts (Clute, TX), May 17, 2008.
- 41 Id.
- 42 Id.
- 43 Jon Murray, *Firm's Hail Scam May Top \$1.75M*, Prosecutors Say, Indianapolis Star, Sept. 19, 2008, at A01.
- 44 Id.
- 45 Id.
- 46 Id.; see also Steve Wartenberg, *Fair-Weather Claims--Insurers, Homeowners and Contractors Hope Not to Get Taken for a Ride on Repairs*, Columbus Dispatch (Ohio), Sept. 21, 2008, at 1D (noting that fraudulent property insurance claims amount to roughly \$30 billion per year and discussing the potential for fraud on the part of “normally honest people” tempted to extract more than their damages are worth, or on the part of contractors who artificially inflate estimates).
- 47 See Larry Copenhaver, *Aspen Fire Property Claims Hit \$80M*, Tucson Citizen, Oct. 22, 2003, at 4C.

- 48 See Catherine Reagor-Burrough, *Insurers Rank Fire as No. 2 Disaster*, Ariz. Republic, July 16, 2002, at B1.
- 49 Id.
- 50 Copenhaver, *supra* note 47.
- 51 Insurer Services Office, *Insurer Financial Results: 2007*, http://www.iso.com/index.php?option=com_content&task=view&id=3009&Itemid=211,
- 52 See *Parks v. Cleveland Ry. Co.*, 177 N.E. 28, 33 (Ohio 1931).
- 53 Black's Law Dictionary 110 (8th ed. 2004).
- 54 *Parks*, 177 N.E. at 33 (quoting *Sebree v. Bd. of Educ.*, 98 N.E. 931, 935 (Ill. 1912)).
- 55 Cf. Black's Law Dictionary 505 (8th ed. 2004) (defining the term dispute as “[a] conflict or controversy, esp. one that has given rise to a particular lawsuit”).
- 56 See *Parks*, 177 N.E. at 31.
- 57 Id. at 33; cf. *Carbonneau v. Am. Family Mut. Ins. Co.*, No. 06-1853-PHX-DGC, 2006 WL 3257724, at *1 (D. Ariz. Nov. 9, 2006) (finding that, where evidence is unclear whether a coverage dispute or appraisal is implicated under the specific facts of a case, doubts should be resolved in favor of appraisal).
- 58 *Parks*, 177 N.E. at 33 (quoting *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910)).
- 59 Id.
- 60 218 F.3d 1085 (9th Cir. 2000).
- 61 See *id.* at 1086.
- 62 Id. at 1087.
- 63 See *id.* at 1088-89.
- 64 Id. at 1089-90; see also *Budget Rent-A-Car of Washington-Oregon, Inc. v. Todd Inv. Co.*, 603 P.2d 1199, 1201 (Or. Ct. App. 1979) (holding that “appraisers act independently and apply their own skill and knowledge in reaching their conclusions,” but that arbitrators “adjudge matters based only on what is presented to them in the course of adversary proceedings”).
- 65 See *supra* Part III.A.
- 66 108 So. 2d 571 (Miss. 1959).
- 67 See *id.* at 571-72. The parties' dispute did not implicate this distinction, but rather concerned whether the circuit court properly confirmed the “arbitration award.” See *id.*
- 68 Id. at 572.
- 69 Id. (quoting 3 Am. Jur. Arbitration and Award § 3, at 830-31 (1936)).
- 70 See *Prien Properties, LLC v. Allstate Ins. Co.*, No. 07 CV 845, 2008 WL 1733591, at *2 (W.D. La. Apr. 14, 2008) (“[A]ppraisals are not to be confused with arbitration, because appraisers merely determine the cash value and extent of the insured's loss, while the court retains jurisdiction.”); *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762, 765 (Fla. 2002) (“[T]he clause contemplates inspection and valuation by each appraiser individually, not a trial-type hearing.” (quoting *Liberty Mut. Fire Ins. Co. v. Hernandez*, 735 So. 2d 587, 589 (Fla. Dist. Ct. App. 1999))); *Binkewitz v. Allstate Ins. Co.*, 537 A.2d 723, 727 (N.J. Super. Ct. App. Div. 1988) (commenting that “[a]rbitration is conducted as a quasi-judicial proceeding,” while “[a]ppraisers act on their own skill and knowledge”).

- 71 See, e.g., *Ori v. Am. Family Mut. Ins. Co.*, No. CV-2005-697-PHX-ROS, 2005 WL 3079044, at *2 (D. Ariz. Nov. 15, 2005) (“Arizona courts have concluded that ‘appraisal is analogous to arbitration’ and the ‘principles of arbitration law’ should be applied to proceedings involving appraisals.” (quoting *Meineke v. Twin City Fire Ins. Co.*, 892 P.2d 1365, 1369 (Ariz. Ct. App. 1995))); *Palozie v. State Farm Mut. Auto. Ins. Co.*, No. 96-0021-PHX-ROS, 1996 WL 814533, at *2 (D. Ariz. Dec. 2, 1996) (“[T]he Arizona Court of Appeals has determined that an insurance policy appraisal clause is analogous to arbitration and that arbitration law applies to disputes involving such clauses.”). These cases, however, deal with the issue of whether a party may be compelled to submit to appraisal, in the same way they may be compelled to participate in arbitration, and do not address the underlying nature of the appraisal process.
- 72 See *Parker*, supra note 5, at 933 (arguing that the distinctions between the two processes are frequently overlooked owing to arbitration’s “much longer history and checkered past”).
- 73 513 P.2d 145 (Ariz. Ct. App. 1973).
- 74 *Id.* at 148 (emphasis added).
- 75 892 P.2d 1365 (Ariz. Ct. App. 1994).
- 76 *Id.* at 1369 (citing *Aetna Cas. & Sur. Co. v. Ins. Comm’r*, 445 A.2d 14, 20 (Md. 1982)).
- 77 578 P.2d 624, 626 (Ariz. Ct. App. 1978).
- 78 723 P.2d 101 (Ariz. Ct. App. 1986).
- 79 *Meineke*, 892 P.2d at 1369.
- 80 See also *Jasem v. State Farm Fire & Cas. Co.*, No. CV-06-595-PHX-DGC, 2007 WL 1146433 (D. Ariz. Apr. 18, 2007) (applying the FAA to a dispute arising out of appraisal, without stating a basis for its application); *Gahn v. Columbia Cas. Ins. Co.*, No. CV 03-630 TUC DCB, 2006 WL 3390299 (D. Ariz. Nov. 21, 2006); *Ori v. Am. Family Mut. Ins. Co.*, No. CV-2005-697-PHX-ROS, 2005 WL 3079044, at *2 (D. Ariz. Nov. 15, 2005) (applying FAA to appraisal, and finding arbitration principles should apply in appraisal context, solely on the basis that an appraisal clause is a “written provision in ... a contract evidencing a transaction involving commerce”).
- 81 No. 06-1853-PHX-DGC, 2006 WL 3257724 (D. Ariz. Nov. 9, 2006).
- 82 See *id.* at *1.
- 83 *Id.*
- 84 *Id.* at *2; cf. *Law & Starinovich*, supra note 19, at 306 (“Appraisal should not be a sideshow in a coverage litigation, but an alternative dispute resolution process designed to quickly and inexpensively determine the amount of loss when that is the dispute among the parties.”).
- 85 See 4 Am. Jur. 2d Alternative Dispute Resolution § 3 (2007).
- 86 See *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910).
- 87 See, e.g., *Hartford Fire Ins. Co. v. Jones*, 108 So. 2d 571, 572 (Miss. 1959).
- 88 *St. Charles Parish Hosp. Dist. #1 v. United Fire and Cas. Co.*, No. 07-5924, 2008 WL 1884051, at *2 (E.D. La. Apr. 28, 2008).
- 89 See, e.g., *Liberty Mut. Fire Ins. Co. v. Hernandez*, 735 So. 2d 587, 588-89 (Fla. Dist. Ct. App. 1999) (holding that appraisal umpires are expected to act on their own knowledge and investigation, and therefore must possess experience relevant to the subject matter being appraised).
- 90 *St. Charles*, 2008 WL 1884051, at *3; see also *Levine v. Wiss & Co.*, 478 A.2d 397, 400 (N.J. 1984) (“We have recognized the distinction between a person engaged because of special knowledge, technical skill, or expertise to act as an ‘appraiser’ in a dispute, as opposed to one appointed to serve in a quasi-judicial capacity as an ‘arbitrator.’” (citations

omitted)); *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 877 (Tex. App. 1994) (“He [the umpire] is a third appraiser.”); cf. *Cas. Indem. Exch. v. Yother*, 439 So. 2d 77, 80 (Ala. 1983) (“[A]ppraisers are generally expected to act on their own skill and knowledge.” (quoting 5 Am. Jur. 2d Arbitration and Award § 3 (1962))); *Liberty Mut. Fire Ins. Co. v. Hernandez*, 735 So. 2d 587, 588 (Fla. Dist. Ct. App. 1999) (same (quoting *Preferred Ins. Co. v. Richard Parks Trucking Co.*, 158 So. 2d 817, 820 (Fla. Dist. Ct. App. 1963))).

91 See *St. Charles*, 2008 WL 1884051, at *1.

92 *Id.* at *2. The court's grounds for preferring a construction professional as an umpire highlight the reason a mediator or arbitrator is typically inappropriate to serve as an umpire.

93 735 So. 2d 587 (Fla. Dist. Ct. App. 1999).

94 *Id.* at 587.

95 *Id.* at 589.

96 See *id.* (“[T]he trial court is allowed to consider appointing a retired judge or an attorney who has appropriate experience in the subject area which is being appraised.” (emphasis added)).

97 See *St. Charles*, 2008 WL 1884051, at *2; *Hernandez*, 735 So. 2d at 589.

98 See, e.g., *Law & Starinovich*, supra note 19, at 297-98.

99 See supra Part III.B.2.

100 See *Binkewitz v. Allstate Ins. Co.*, 537 A.2d 723, 728 (N.J. Super. Ct. App. Div. 1988) (“[Appraisals] have some of the relevant functional characteristics of quasi-judicial proceedings.”).

101 See *id.* at 727.

102 *Id.* (quoting *Elberon Bathing Co. v. Ambassador Ins. Co.*, 389 A.2d 439, 446 (N.J. 1978)).

103 See supra Part III.A.

104 See *Law & Starinovich*, supra note 19, at 299.

105 Cf. *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 56 F. 378, 379-80 (9th Cir. 1893) (noting that the parties' appraisers inspected the insured's fire-damaged stock, determined the extent of smoke damage, estimated the cost to remedy that damage, and arrived at an opinion as to the amount of the loss); see also *Law & Starinovich*, supra note 19, at 299 (explaining that appraisers act on personal knowledge and investigation to determine the amount of loss, without holding formal hearings); *Parker*, supra note 5, at 932 (same).

106 See, e.g., *Dore v. S. Pac. Co.*, 124 P. 817, 822 (Cal. 1912) (“[A]n award as to value ... [is] binding on the parties, and, in the absence of fraud or mistake, conclusive.”); *Sebree v. Bd. of Educ.*, 98 N.E. 931, 935 (Ill. 1912) (“As long as appraisers act honestly and in good faith ... [t]heir conclusions, in the absence of fraud or mistake, will be binding upon the parties.”); *In re 176 & 178 East Main Street*, 188 N.E. 647, 648 (N.Y. 1934) (finding no jurisdiction in county court to select a new umpire, where the parties' appraisers had already made their selection); *Boll v. United States Fire Ins. Co. of New York*, 20 Pa. D. & C. 511, 512 (Pa. Ct. Com. Pl. 1934) (holding that the court had no authority to appoint an umpire where the parties' appraisers had never met or attempted to select an umpire).

107 See, e.g., *Carbonneau v. Am. Family Mut. Ins. Co.*, No. 06-1853-PHX-DGC, 2006 WL 3257724, at *2 (D. Ariz. Nov. 9, 2006); cf. *Martin v. Vansant*, 168 P. 990 (Wash. 1917) (“[T]here is a plain distinction between an agreement to submit an existing controversy or matter in difference between parties to the determination of disinterested third persons mutually chosen for that purpose, and conditions in contracts of larger scope whereby the parties agree in advance, and before a dispute has arisen to leave to the decision of appraisers or referees the question of value, price, amount of damage, or other incidental particular fact.”).

108 See generally supra Parts III and IV.

- 109 The Electric Ben Franklin, [http:// www.ushistory.org/franklin/quotable/quote67.htm](http://www.ushistory.org/franklin/quotable/quote67.htm) (last visited Feb. 16, 2009).
- 110 See generally Ariz. Rev. Stat. Ann. §§ 20-1501 to -1509 (2008).
- 111 See Law & Starinovich, *supra* note 19, at 306-07.
- 112 See *id.*
- 113 See, e.g., *Smith v. Civil Serv. Employees Ins. Co.*, No. CIV04-02013-PHX MEA, 2005 WL 2620537 (D. Ariz. Oct. 13, 2005). In *Smith*, the action was commenced when the plaintiff insured filed a motion to compel appraisal, citing Arizona Revised Statutes section 12-1502, a statute governing proceedings “to compel or stay arbitration.” § 12-1502 (emphasis added).
- 114 See N.Y. Ins. Law § 3408 (McKinney 2007), which provides, in relevant part:
(b) The court shall, on proof by affidavit of the failure or neglect of the appraisers to agree upon and select an umpire within the time provided in such policy, and of the service of notice pursuant to subsection (a) hereof, forthwith appoint a competent and disinterested person to act as such umpire in the ascertainment of the amount of such loss or damage.
- 115 See N.Y. Ins. Law § 3404 (2007). While termed a “fire” policy, the New York standard policy form is the model for a wide variety of property and casualty policies, which typically insure against additional perils such as wind, flooding, theft, etc., using supplemental endorsements. Arizona follows this example, providing for adoption of the New York standard policy as Arizona’s standard fire insurance policy and permitting coverage for losses other than fire by way of riders or endorsements. See Ariz. Rev. Stat. Ann. §§20-1503, -1507 (2008).
- 116 N.Y. Ins. Law §§ 3404(e), 3408 (McKinney 2007).
- 117 Cf. Parker, *supra* note 5, at 937-45 (discussing appraiser and umpire qualifications and underlying policy considerations).
- 118 See, e.g., *Caledonian Ins. Co. v. Traub*, 35 A. 13 (Md. 1896); *Chandos v. Am. Family Fire Ins. Co.*, 54 N.W. 390 (Wis. 1893). Both *Traub* and *Chandos* involved suits to invalidate appraisal awards where appraisers failed to designate an umpire at the outset of the appraisal process--needless litigation that could have been avoided by a requirement that appraisers first agree on an umpire before proceeding to conduct their appraisal.
- 119 See Law & Starinovich, *supra* note 19, at 318-19; Parker, *supra* note 5, at 939-40.
- 120 Parker, *supra* note 5, at 940 (quoting Black’s Law Dictionary 502 (8th ed. 2004)).
- 121 Parker, *supra* note 5, at 939; see Law & Starinovich, *supra* note 19, at 318 (“Competency requires only that individuals have the knowledge and experience to make an intelligent judgment concerning the amount of loss.”).
- 122 Subsection (a)’s presumption refers to the licensure and certification process for real estate appraisers. See Ariz. Rev. Stat. Ann. § 32-3611 (2008); see also *supra* notes 1-2 and accompanying text (discussing fact that title 32, chapter 36 of the Arizona Revised Statutes currently has no application to insurance appraisal).
- 123 See Arizona Board of Appraisal, Qualifying Education, Approved Schools and Courses (Oct. 16, 2008), available at [http:// www.appraisal.state.az.us/userfiles/file/qualish%2008%2010OCT.pdf](http://www.appraisal.state.az.us/userfiles/file/qualish%2008%2010OCT.pdf).
- 124 See Arizona Board of Appraisal, Experience Log (June 2008), [http:// www.appraisal.state.az.us/userfiles/file/Experience %20Log%C20WEBSITE%C2006% 2008.pdf](http://www.appraisal.state.az.us/userfiles/file/Experience%20Log%C20WEBSITE%C2006%2008.pdf).
- 125 See Arizona Board of Appraisal, [http:// www.appraisal.state.az.us/userfiles/file/Examination%20Information.pdf](http://www.appraisal.state.az.us/userfiles/file/Examination%20Information.pdf) (last visited Feb. 16, 2009); The Appraisal Foundation, National Uniform Licensing and Certification Exams, [http:// www.appraisalfoundation.org/s _appraisal/sec.asp?CID=292&DID=738](http://www.appraisalfoundation.org/s_appraisal/sec.asp?CID=292&DID=738) (last visited Feb. 16, 2009).
- 126 See, e.g., Construction Cost Associates, Experience, <http://cca-abq.com/html/page.htm> (last visited Feb. 16, 2009) (detailing the qualifications of Chief Estimator Shane McGrew, who “completed a Civil Engineering Degree at Arizona State University, Tempe, AZ in 1996 and has over 22 years of commercial, institutional and civil construction project estimating and project management [including] ... US Army Engineer Officer training and extensive military

construction projects ... at the Albuquerque District office, CENTCOM Headquarters, Qatar, 3rd Army Headquarters, Kuwait and the Kirtland Area Office”).

- 127 See, e.g., Lisa Sandford, *Work of the Courts Hampered by Understaffing, Budget Cuts*, New Hampshire B. Ass'n B. News (Nov. 9, 2001), available at <http://www.nhbar.org/publications/archives/display-news-issue.asp?id=360>.
- 128 See, e.g., Parker Schofield, *Current Rates and Conditions*, <http://www.parkerschofield.com/rates.php> (last visited Feb. 16, 2009) (reflecting real estate appraisal rates of \$175 per hour); Construction Cost Associates, *Rates and Costs*, <http://cca-abq.com/html/services.html#hourlyrates> (last visited Feb. 16, 2009) (listing hourly rates for professional cost estimators ranging from \$35 to \$45 per hour).
- 129 See Parker, *supra* note 5 at 939 (“[A]ny adult person possessed of mental capacity is competent to serve as an appraiser.”).
- 130 See, e.g., ARC Mediation, *Experienced Florida Mediators and Arbitrators Helping Parties Throughout Florida*, <http://www.arcmediation.com> (last visited Feb. 16, 2009).
- 131 See, e.g., Leah Pallin-Hill, http://web.archive.org/web/20060513223209/http://www.leahpallinhill.com/mediation_arbitration/index.html (last visited Mar. 31, 2009) (specifying a \$300 hourly rate in 2006 for services provided by Ms. Hill, a former Maricopa County Superior Court judge pro tem); The International Academy of Mediators <http://www.iamed.org/ekolker/> (last visited Mar. 31, 2009) (reflecting the hourly fee of Edward F. Kolker, former Municipal Court Judge and Assistant United States Attorney, as \$300 per hour).
- 132 See Danner, *supra* note 1.
- 133 See McCartney, *supra* note 33.
- 134 See Lelis, *supra* note 30 and accompanying text.
- 135 See *supra* note 18 and accompanying text.
- 136 See Parker, *supra* note 5, at 931.
- 137 See *Ariz. Rev. Stat. Ann.* § 20-1503(A) (2008).
- 138 See Law & Starinovich, *supra* note 19, at 308.
- 139 See Murray, *supra* note 43.
- 140 See Law & Starinovich, *supra* note 19, at 306-07 (noting that insurance policies are contracts of adhesion and most consumers are not aware of having “agreed” to the appraisal process, while insurers are quite aware of both their policy provisions and the nature of appraisal, and that this “disparity of knowledge and familiarity with appraisal may create both a perception and a reality that appraisal favors the insurance company over policyholders” (citation omitted)).
- 141 See, e.g., Bob Aaron, *Document Your Insured Possessions*, Toronto Star, Dec. 15, 2007, at H2; Bob Gardinier, *Taking Stock--Inventories of Possessions Help if You Need to File an Insurance Claim*, The Times Union (Albany, NY), Dec. 2, 2007, at I4; Marshall Loeb, *Protect Your Assets by Taking Inventory Inside Your Home*, S. Fla. Sun-Sentinel, Nov. 19, 2007, at 6E; Joyce Newman, *Fire Season Is a Good Time to Assess Your Valuables*, Reno Gazette-Journal (Reno, NV), June 12, 2008, at 7D.
- 142 See Kevin Lamb, *Advice on Making Storm-Damage Claims and Repair*, JournalNews (Hamilton, OH), Sept. 15, 2008.
- 143 See Wartenberg, *supra* note 46.
- 144 See *id.*
- 145 See *id.*

¹⁴⁶ See Gardinier, *supra* note 141 (“Generally speaking, those who do inventories are paid quicker and get better settlements There will also be fewer disputes that can go back and forth between insurer and insured that can slow up payouts.” (citation omitted)).

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