

Appraisal: Navigating Procedural and Legal Issues


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Question
(Type your answer in the Questions box)

- Have you had bad experiences with appraisal?
- What are they?



Topics

- Nature Of Appraisal
- The Appraisal Process
- Reoccurring Issues
- The Appraisal Decision



The Nature of Appraisal

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Typical Appraisal Clause in Insurance Policy Conditions

- If we and you disagree on the value of the property or the amount of loss, either may make a written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request the selection be made by a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss.

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Other Appraisal Language


- "If you and we fail to agree on the Actual Cash Value or amount of loss, either party may make written demand for an appraisal. Each party will select **an appraiser** and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a **competent and impartial umpire.**"
- No language the appraisers be "competent and impartial."

Form (H-3) 6500-41937-MN-46

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Statutory Provisions

- Fire Insurance:
- Subd. 2. Appraiser.
“No person shall be a qualified appraiser who is not **disinterested** and willing to act.”



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Statutory Provisions

- Hail Insurance:
- Every policy of insurance against damage by hail issued by any company, however organized, must provide as follows: “...the company and the insured each shall select a **competent appraiser** and notify the other of the appraiser selected within ten days of the demand. The appraisers shall first select **a competent and disinterested** umpire...”

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Recent Cases- Competent Appraisers

- **Business Relationships do NOT Prove Impartiality**
- A past or present business relationship must be substantial enough to make the appraiser biased
- Mere fact of past business relation of one of the parties with an appraiser, including having previously acted as appraiser for that party, does not by itself make the appraiser partial
 - *Mahnke v. Superior Court*, 180 Cal. App. 4th 565, 103 Cal. Rptr.3d 297 (2009).

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Recent Cases – Competent Appraisers

- Appraiser Cannot have Financial Interest in Outcome of Appraisal
- Appraiser is not disinterested where appraiser’s fee includes a percentage of the final appraised value
 - [Harris v. Am. Modern Home Ins. Co., 571 F.Supp.2d 1066 \(E.D. Mo. 2008\)](#)

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When to Appraise a Loss

- Policy Conditions complied with
- Scope of damage, price of damage and/or value of property in dispute for part or all of the loss
- Just need to resolve amount of loss or value to conclude claim
- Insured’s claim is excessive and compromise attempts have failed

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Issues Appropriate for Appraisal - Recent Cases

- Appraisal award does not by itself entitle insured to judgment against insurer...
- Appraisal is used to decide disputes over the value of the loss and not for determining the cause of loss or coverage issues...in some states
- Some courts refuse request to order appraisal until the cause of loss are first determined.

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Issues Appropriate for Appraisal - Recent Cases

- Questions of cause of loss may be properly considered by appraisers if it is necessary to determine the amount of the loss.
 - Quade v. Secura Ins., 814 N.W.2d 703 (Minn. 2012)



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Issues Appropriate for Appraisal - Matching

- In some states, the appraisal panel may appropriately consider whether the insured is required to match the repaired damaged portion of a building with the undamaged portion.
- Cedar Bluff Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co., A13-0124, 2014 WL 7156914 (Minn. Dec. 17, 2014)
 - The Court held the appraisal panel could properly consider the meaning of the policy language requiring replacement of damaged property with "like kind and quality" and affirmed the appraisal award requiring the insurer replace both the undamaged and damaged siding in order for the siding to match.

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Appraisal in the event of a Total Loss

- Disagreement among the Courts as to whether Insured can compel appraisal where there is a total loss.
- Some states say it is appropriate for appraisal
- Interpreting Minnesota's valued policy statute, the Court held could not appraise a total loss because there was no dispute as to the amount of the loss.
 - Auto-Owners Insurance Co. v. Second Chance Investments LLC, 827 N.W.2d 766 (Minn. 2013)

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Demand for Appraisal after Time Limit for Suit

- Disagreement among the Court whether demand for appraisal must be made within time limit for suit or within a “reasonable time” after the parties have failed to agree on the amount of the loss.
- The Court held that an appraisal provision is governed by the two-year limitation on actions or suits to recover under the policy.
 - Johnson v. Mut. Serv. Cas. Ins. Co., 732 N.W.2d 340 (Minn. Ct. App. 2007)
- Appraisal demand must be made within a reasonable time after the parties have reached an impasse as to agreeing on the amount of the loss.
 - Lyon v. Am. Family Mut. Ins. Co., 644 F. Supp. 2d 1071 (N.D. Ill. 2009) supplemented, 08 C 7319, 2009 WL 2421576 (N.D. Ill. Aug. 3, 2009)

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Appraisals Gone Bad

- Roof mismatch- Award based on matching
- Ignoring experts
- Correct past wrongs – Umpire Make Up
- Multi-loss dates damage vs. Date of loss being appraised
- Slanted umpire
- Umpire without subject matter knowledge – Award based on “best presentation” or “split the baby”
- Re-adjusting the loss vs. Items in dispute
- Outside interference in process

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The Appraisal Process


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Question

(Type your answer in the Questions box)


- Do you confirm, in writing, the scope of the appraisal prior to the start of the process?



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Typical Appraisal Process Steps


- Memorandum of Appraisal
 - See Handouts: Example Letter 5
- Panel Set
 - See Handouts: Example Letters 2 – 4
- Loss Appraised
- Award Made – RC and ACV
- Award interfaced with Policy and Claim File
- Any additional covered payment as “undisputed loss less deductible” previously paid
- Deny Claim is Coverage is Lacking



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Poll Question

- Who do you normally select as your appraiser?
 - a) attorney
 - b) adjuster
 - c) expert
 - d) contractor



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Selecting Your Appraiser

- What do you want?
 - Understands subject matter
 - Familiar with the appraisal process
 - Diplomatic debater
 - Can recommend appropriate umpire candidates to other appraiser promptly
 - Qualifies as "impartial"
 - Service bill will be reasonable given the dollar amount involved

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Appraiser Candidate – Pluses and Minuses

- Attorney
- "Expert" such as engineer, CPA, etc
- Contractor
- Retired adjuster
- Independent adjuster
- Retired Judge



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Umpire Selection

- Most critical aspect of the appraisal process
- Need a knowledgeable neutral with some backbone
- Need to present your list of multiple names of qualified umpires to other appraiser before you get the other appraiser's list!!
- Need to make sure the umpire doesn't have positive or negative history with anyone involved
- Needs to be able to physically view the damaged property such as a roof or burned out building
- Let the parties run the process

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Common Appraisal Methods

First Common Method:

- Entire panel together for entire process with or without appearance by parties
- Need each of the parties' documents at some point
 - Claim with support vs. undisputed loss with support
- Inspect loss together, hearing anyone out who wishes to appear and then go elsewhere to deliberate and render award

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Common Appraisal Methods

Second Common Method:

- Parties conduct a hearing with attorneys present in front of Appraisal Panel
- Hearing is recorded by court reporter
- Evidence is submitted and testimony taken
- Panel issues their "ruling" following the hearing and presentation of all evidence and testimony

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Common Appraisal Methods

Third Common Method:

- Appraisers inspect loss on their own
- Appraisers submit their "reports" to umpire and each other
- If they cannot agree, umpire "rules"
 - All or nothing
 - Compromise proposal

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Common Appraisal Methods


- Courts treat appraisals as similar to arbitration but may disagree on the type of hearing required.
- While appraisal is likened to arbitration, an appraisal hearing is conducted in an informal manner and not as a formal arbitration hearing. Therefore, a party may not be entitled to examine witnesses or call other witnesses to testify.
 - *Allstate Ins. Co. v. Suarez*, 786 So. 2d 645 (Fla. Dist. Ct. App. 2001) approved, 833 So. 2d 762 (Fla. 2002)
- Although the appraisal clause does not mention notice to the policyholder, or the opportunity to produce evidence, the policyholder is fundamentally entitled to both.
 - *Casualty Indemnity Exchange v. Yother*, 439 So. 2d 77 (Ala. 1983).

Reoccurring Issues

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Poll Question

- Do you use attorneys to represent you in your appraisals?
 - -yes
 - -no



Various Issues


- Loss of Insurer and Insured control as appraisal progresses
- Last minute new support documents or new claim items
- Insured insists on using their contractor as their appraiser
- Return to original amount of loss position? Effect of Insurer compromises
- Do you have a supportable amount of loss position?



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Various Issues

- Why email or letter support important... Document, Document, Document!
- Emotions effect with appraisal panels
- Low ball or over claim effect with appraisal panels
- Appraiser leaves, are they entitled to a new umpire?



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The Appraisal Decision

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Question
(Type your answer in the Questions box)


- Do you appraisal award forms ask for a lump sum award, or a detailed break down of damages?



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Award Forms


- Key to Appraisal
 - Defines issues
 - Limits questions
- Should be agreed upon in advance
 - May need court intervention



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Award Forms

- Examples of issues
 - Wear tear vs. storm damage
 - Covered vs. non-covered
 - Multiple dates of loss
 - Policy limitations



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Award Forms


- Courts have interpreted the appraisal policy language as “necessitates only an itemization of the damage to the basic component systems . . . so as to insure a modicum of accountability and reliability in the appraisal process.” De Crescenzo v. Capital Mut. Ins. Co., 187 A.D.2d 793 (N.Y. App. Div. 1992).
- If an itemization requirement is not agreed upon by the parties, then a general conclusion or lump sum may suffice. Mich. Fire Repair Contractors' Ass'n v. Pacific Nat'l Fire Ins. Co., 107 N.W.2d 811 (Mich. 1961).

Award Forms

- The phrasing of questions on award forms is important
 - Appraisal panel did not go beyond the scope of appraisal and authority by determining “period of restoration” as defined by the policy where the questions submitted to appraisal included “the reasonable time frame within which the repairs to the building should have been completed.” Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co., 435 S.W.3d 202 (Tenn. Ct. App. 2013).

Pre-Award Interest

- Varies by state whether insured entitled to pre-award interest.
 - Might be considered arbitration
 - Allowed by case law in some states
 - May have special statutes



Standard to Upset Appraisal Award

- **Varies from state to state**
- In Oklahoma, for example, appraisal awards are only binding on the party that invoked the appraisal clause. The invoking party can only avoid the award if can prove fraud, bad faith or mistake. Massey v. Farmers Ins. Groups, 837 P.2d 880 (Okla. 1992).

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Standards to Upset Appraisal Award

- **Fraud, misfeasance or malfeasance**
- **Mistake of Fact**
- **Mistake of Law**



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