Don't Appraise Me Bro?: Navigating The How's And Why's Of The Appraisal Condition

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INTRODUCTION

Almost all insurance policies providing property coverage include an appraisal condition. The typical appraisal condition bares some resemblance to the following:

If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written request from the other. 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 court having jurisdiction. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

Each party will:

1. Pay its own appraiser; and

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2. Bear the other expenses of the appraisal and umpire equally.

Appraisal conditions can and do vary between policies and insurers, so, as with any other insurance coverage issue, it is important to pay special attention to the policy at issue. However, in general, all appraisal conditions include the same basic elements shown by the example: (1) prefatory language describing the type of dispute to which the condition applies; (2) enabling language giving both parties the right to demand appraisal; (3) language concerning the selection of appraisers and umpires; (4) language providing instruction as to how the appraisal is to proceed and conclude; and (5) language concerning expenses.

The inclusion of an appraisal condition in a policy generally inures to the benefit of the insurer and insured by providing a non-judicial method to resolve what is the most common dispute between insurers and insureds, the valuation of the property damaged. While this statement is conceptually simple, the practicalities of requesting and completing appraisal present unique problems that must be considered by insurers and insureds even before a party demands appraisal.

Among those unique problems is the restriction on the use of mandatory arbitration to resolve insurance coverage disputes. Thus, care should be taken to ensure that the dispute in which appraisal is demanded actually relates to the value of the damage instead of any issue concerning whether the policy provides coverage for that damage. Moreover, where issues of coverage and valuation are intertwined, the party requesting appraisal must be prepared to show that appraisal will not resolve any coverage issues. Beyond that consideration, a party contemplating appraisal should have a clear understanding of how its request for appraisal will fit in its larger claims resolution strategy and should pay particular attention to the specific requirements of the arbitration condition contained in the policy at issue.

While these considerations may seem obvious to an experienced insurance professional, they may not be as obvious to an insured or certain other parties that may become involved in the claims process. Additionally, care should be taken to ensure that the conduct of the appraisal process by both parties involves competent and qualified appraisers and, if necessary, umpires and that the appraisal award complies with the requirements of the policy’s appraisal condition and any applicable law. Further, if a property claim results in litigation, parties should understand the effect a request for appraisal or the existence of an appraisal award may have on litigation and, if necessary, how to set aside or invalidate an appraisal or request or obtain appraisal during the course of litigation.

This article discusses these issues as well as related topics concerning the purpose and effect of appraisal. Further, this article considers how recent changes in case law affect parties’ rights and duties before, during, and after appraisal.
I. APPRAISAL v. ARBITRATION

A. Arbitration in Insurance Policies

Generally viewed, Arbitration is quicker, cheaper, and is commonly included in commercial contracts. Arbitration provides an avenue for parties to promptly dissolve a dispute, generally with arbitrators who have expertise or at least familiarity with the subject matter of the dispute. This alternative dispute resolution is desirable for companies as it can provide greater predictability and efficiency than litigation. Further, arbitration can be confidential and offers finality, as arbitration decisions generally are not appealable. A number of states, however, have restricted binding arbitration clauses in insurance contracts, either by the state laws governing arbitration or as part of the state’s insurance statutes.

The Federal Arbitration Act (FAA) makes arbitration clauses in contracts involving interstate commerce “valid, irrevocable and enforceable save upon such grounds as exist at low or in equity for the revocation of any contract,” and thus preempts any state law that requires a judicial forum for claims. The McCarran-Ferguson Act, however, limits federal pre-emption of state insurance regulations. The McCarran-Ferguson Act is the delegation of authority from Congress to the states with respect to the regulation and taxation of the business of insurance. It has been affirmed in the Gramm Leach Bliley Act and in the Dodd Frank Act. Specifically, the Act states that, “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . .” Applying McCarran-Ferguson, state laws restricting the arbitration of insurance disputes supersede the mandatory arbitration provisions of the FAA. Thus, while the FAA would prohibit a state’s restriction on arbitration provisions in insurance policies, the McCarran-Ferguson generally exempts the FAA from state insurance regulations. Thus, narrowly drafted restrictions on arbitration generally do not run afoul of the FAA.

The rationale behind statutes restricting arbitration clauses in insurance policies stems from the fact that insurance contracts are in large part contracts of adhesion.

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10 Id.
11 IOWA CODE § 679A.1(2)(a) (refusing to enforce arbitration clauses on contracts of
such, most courts have routinely construed insurance policies against the insurance company and in favor of coverage. Moreover, the insurer’s obligation to pay a covered claim creates a very different relationship than that found in most commercial or consumer contracts, as the policyholder cannot obtain a different policy if an insurer delays or denies coverage and full payment. Further, all states require insurers to adjust claims with their policyholders’ best interests in mind. Placing mandatory arbitration clauses in insurance policies could restructure this crucial aspect of the insurer-insured relationship. As opposed to prohibiting arbitration clauses, some states have recognized the nature of the insured-insurer relationship and prohibited arbitration clauses where the insured is an individual\(^\text{12}\), or have only permitted them when the insurance is between insurance companies, such as reinsurance\(^\text{13}\).

\section*{B. Appraisal as a Means of Alternative Dispute Resolution}

While state restrictions may prohibit insurance policies from containing arbitration clauses, appraisal provisions are uniformly included in most property insurance policies.

The purpose of the appraisal condition is to provide an impartial party to answer what is often the crux of an insured/insurer dispute—the value of the loss or the value of the property\(^\text{14}\). It permits that question to be answered in an expeditious and inexpensive way and relieves the already bogged down courts from answering a very narrow question. The insured, however, does lose some of the “benefit” of having a matter heard in court—namely that the policy is construed against the drafter in favor of coverage.

Appraisal provisions are an efficient and inexpensive method to determine the value of a loss and thus resolve any dispute the parties may have on subject, without costly and drawn out litigation. Because appraisal conditions resolve a dispute without resorting to traditional litigation, they are often viewed as means of alternative dispute resolution (“ADR”). However, appraisal provisions have distinct differences from arbitration provisions. Appraisal solves a very narrow dispute—the value of the loss; does not offer any contract interpretation; is not a judicial proceeding and does not resolve whether the insurer is liable for the loss. Conversely, arbitration can involve the entire controversy between the insurer and insured, including contract interpretation and adhesion;

\(^{12}\) MD CODE ANN., (CTS. & JUD. PROC.) § 3-206.1 (2019) (any provision in an insurance contract with a consumer that requires arbitration is void and unenforceable”)

\(^{13}\) OKLA. STAT. tit. 12 § 1855(D) (2017) (“The Uniform Arbitration Act shall not apply to collective bargaining agreements and contracts which reference insurance, except for those contracts between insurance companies”)

liability. Additionally, appraisals are informal proceedings that lack all of the hallmarks of arbitration, including notice requirements and the opportunity to be heard.\footnote{4 AM. JUR. 2D Alternative Dispute Resolution §3 (2010); Austin v. Ill. Farmers Ins. Co., 815 N.E.2d 435,441 (Ill.App.Ct. 2004) (An appraisal clause is analogous to an arbitration clause and is enforceable in a court of law in the same manner as an arbitration clause.)

\footnote{Friday v. Trinity Universal of Kan., 939 P.2d 869, 871 (Kan. 1997); Giulietti v. Connecticut Ins. Placement Facility, 534 A.2d 213, 217 (Conn. 1987); see also Covenant Ins. Co. v. Banks, 177 Conn. 273, 279-80 (1979) (minimizing any distinction between appraisal and arbitration and holding that state arbitration statutes apply to appraisal proceedings).}

Despite the notable differences, courts have determined that appraisal is a form of arbitration\footnote{McGowan v. Progressive Preferred Insurance Co., 274 Ga. App. 483, 618 S.E.2d 139 (2005), rev’d, 281 Ga. 169, 637 S.E.2d 27 (2006).}, or wrestled with whether certain appraisal conditions are in fact tantamount to arbitration. For instance, in \textit{McGowan v. Progressive Preferred Insurance}, a Georgia court had to determine if the appraisal clause at issue was tantamount to an arbitration clause. In doing so it explained that expanding the scope of the appraisal clause beyond the issue of value is tantamount to converting the appraisal clause into an arbitration clause, and arbitration clauses are impermissible in contracts between insurers and insureds.\footnote{Cal. Code of Civ. Proc. § 1280, et seq. (2018)}

\section*{C. Interplay Between Appraisal and Arbitration Statutes}

Some states hold that appraisal is a form of arbitration and arbitration statutes thus govern the proceedings.\footnote{Cousino v. Stewart, 2005 Ohio 6245, p12 (Ohio Ct. App. 2005). (“Considering all the documents together with the appraisal clause in the insurance contract we must conclude that this proceeding was an arbitration. The use of an "umpire" tracks the language of the arbitration statute. The proceeding was intended to be binding. The scope of the appraisal was beyond only setting values, but also implicated a determination of what is covered by the policy. Although the procedure employed was not a formal hearing, it was agreed upon by the parties and included fact-finding observations and interviews.”)} Similarly, some courts have concluded the proceeding itself can resemble arbitration so closely that it is in fact arbitration, triggering application of the states arbitration statute.\footnote{Cal. Ins. Code § 2071;C.G.S.A. § 38a-307;L.C.A.§ 515.109. LSA-R.S. § 22:1311.M.R.S.A. § 3002.M.C.L.A. § 500.2833;M.S.A. § 65A.01;N.H. Rev. Stat. § 407:22.;N.J.S.A. § 17:36-5.20. McKinney's Ins. Law§ 3404.N.C.G.S.A. § 58-44-16. 36 Okla. St. Ann. § 4803. 40 P.S. § 636.} Several states, such as Louisiana, California, New York and Virginia have opted for statutes which mandate appraisal provisions as part of insurance policies\footnote{Cal. Code of Civ. Proc. § 1280, et seq. (2018)}, Whereas other states specify that an appraisal provision must appear in certain specific types of policies, such as auto policies\footnote{Cal. Code of Civ. Proc. § 1280, et seq. (2018)}:
II. WHEN TO INVOKE APPRAISAL

The appraisal process offers benefits for both policyholders and insurance companies. Appraisal can simplify a dispute by providing certainty about the amount at issue. This potentially reduces litigation costs and creates more negotiation opportunities. Conversely, both parties face some similar risks when invoking appraisal. As discussed in Section III.D, infra, appraisal will not resolve coverage issues in a case. If there has been a complete denial of coverage, there will be other, more weighty issues that must first be resolved before a policyholder can expect a payment. And, as noted, even though the umpire’s decision is final, this has not prevented insurers and policyholders alike from seeking to set aside findings.

A The Insurer’s Perspective

There is a perception that appraisal is elected more often by insurers, in part because it is perceived to be more favorable for insurance companies. Indeed, insurance companies do have certain advantages in the appraisal process. Insurance companies are in the business of evaluating losses; they have adjusters on staff and experience navigating the claim and appraisal process. To that end, insurance companies also typically have worked with more appraisers than the average policyholder (who likely has never worked with a public adjuster, let alone engaged in the appraisal process). The appraisal process also helps limit an insurance company’s exposure to a policyholder’s claim for attorneys’ fees, which in some jurisdictions, like Florida, can be awarded in litigation following an improper denial of coverage.

However, the appraisal process can also impose burdens on the insurer. Once appraisal is elected, the parties need to operate quickly to hire appraisers and an umpire and collect their respective findings. When an insurance company is dealing with a large-scale loss and hundreds or thousands of contemporaneous claims, these time restrictions and additional costs can add up and create logistical issues.

Overall, though, the appraisal process tends to be a useful tool for insurance companies seeking clarity (and finality) on an amount at issue in a claim.

21 AS§ 21.96.035; M.G.L.A. 175 § 191A; N.C.G.S.A. § 20-279.21; AS§ 21.96.035; O.R.S. 742.232. (requiring appraisal provisions in property insurance polices)
22 See “Understanding the Appraisal Process” Insurance Litigation Group (Dec. 18, 2017)
23 That said, a policyholder may still wish to invoke appraisal while the coverage issues are being resolved to minimize time and energy spent on determining the amount at issue should the coverage issue be resolved favorably for the policyholder.
24 See Section IV.D, infra.
B. The Policyholder’s Perspective

Appraisal can be a new and unfamiliar process for a policyholder, particularly homeowners. Finding an appraiser to assist on a claim following a significant loss can be difficult and confusing. Additionally, the appraisal process does not resolve all open issues (like coverage) which may be at issue in a claim dispute. A policyholder may not want to increase costs by hiring an attorney, an adjuster, and an appraiser immediately following a loss.25

However, there are benefits to the policyholder that make appraisal an attractive solution. For one, documenting the claim can be a time-consuming, detail-oriented, and emotionally challenging process. Using an experienced adjuster can help alleviate a significant part of this burden. Additionally, electing the appraisal option in a policy can bring a reluctant insurance company to the table. If a policyholder feels like the claim process has stalled, this option will jumpstart evaluation of claims, even if it is just about the quantum at issue. And, typically, appraisal can resolve a dispute quicker (and cheaper) than litigation, especially if the only issue is the amount of the claim.26

C. Special Issues Policyholders Should Consider When Using Public Adjusters

Whether documenting a claim or formally engaging in the appraisal process, there are special issues a policyholder must keep in mind when hiring a public adjuster.

While insurance companies will assign an adjuster to handle the claim, a policyholder also has a right to an adjuster. These are typically called “public adjusters.” “A public adjuster is hired by and works for the person filing the claim to help with the filing, negotiation, and settlement of the claim.”27 Like many professionals, being a public adjuster is governed by the rules of the jurisdictions he is licensed in and in the jurisdictions where he operates. A public adjuster can be used to inspect the site, prepare an inventory of all lost or damaged property, calculate a dollar value for the losses, review the policy provisions, hire contractors to make repairs, inspect the repairs as they

26 However, appraisal “can take just as long and be just as expensive and formal as litigation without resolving all disputed issues.” United Policyholders, “Policyholders Can Win in Appraisal,” What’s UP (Summer 2016) at 2. Accordingly, a policyholder should be wary of electing appraisal for a large, complicated loss if the only reason they are doing so is to attempt to resolve the matter quickly.
27 NC Department of Insurance, A Consumer’s Guide to Public Adjusters at 1
are performed, and handle claim paperwork.\textsuperscript{28} It is not uncommon for a public adjuster to work hand-in-hand with forensic accountants, risk managers, lawyers, and contractors following a major loss and during the claim period.

In most states, public adjusters must be licensed in to conduct business. Many states offer “reciprocity” of licensing, allowing an “out-of-state” adjuster to practice in a state other than the one in which they are licensed. However, reciprocity, that is, the mutual agreement between states that an adjuster holding a license in his or her home state can successfully apply for a license in another state without taking that state’s exam or courses, is not a certainty and should not be taken as a given.\textsuperscript{29} Some states, like North Carolina, still require the public adjuster to be licensed in the state of North Carolina.\textsuperscript{30} Other states, like California, Hawaii, and New York, will not offer any kind of reciprocal agreement.\textsuperscript{31} Other states, like Oklahoma, Florida, and Delaware will not offer a license to adjusters from a home state which does not offer reciprocity (like California, Hawaii, and New York).\textsuperscript{32}

While it may be difficult in the immediate aftermath of a loss to verify these details, it is important that the policyholder protect himself from further losses (including scams and shoddy work) by only working with public adjusters permitted to work in the state of the loss. Therefore, before hiring any public adjuster, a policyholder should ask for the adjuster’s state(s) of licensure and license number. The policyholder also should ensure that the public adjuster has a malpractice policy in place. A policyholder can also call the Better Business Bureau or state department of insurance to verify that the public adjuster is qualified.\textsuperscript{33} Additionally, a policyholder also should consider asking for references to understand from past clients how responsive and/or successful the prior relationships were.\textsuperscript{34}

As with selecting an appraiser, policyholders should seek input on public adjusters from their attorneys or others working on the team. Not only can the policyholder’s team

\textsuperscript{28} Id.
\textsuperscript{29} See Adjuster Pro Reciprocity Map “Reciprocity: The Truth About Adjuster Licensing Agreements between States” (Dec. 7, 2017).
\textsuperscript{30} NC Department of Insurance, A Consumer’s Guide to Public Adjusters at 1.
\textsuperscript{31} See Adjuster Pro Reciprocity Map “Reciprocity: The Truth About Adjuster Licensing Agreements between States” (Dec. 7, 2017).
\textsuperscript{32} Id.
\textsuperscript{33} Adjusters International, “Interested in Hiring a Public Adjuster? Tips on How to find the Right Fit for your Claim” (July 29, 2014); NC Department of Insurance, A Consumer’s Guide to Public Adjusters at 1.
\textsuperscript{34} Adjusters International, “Interested in Hiring a Public Adjuster? Tips on How to find the Right Fit for your Claim” (July 29, 2014)
provide input on the selection to avoid scams, but the team can also help select someone with experience handling the relevant property damage issues. For instance, a public adjuster who has experience evaluating homeowner losses following a flood may not have the same experience as a public adjuster evaluating factory losses following a wildfire (Although there are public adjusters who do have this wide range of expertise).

Before formally retaining any public adjuster (or lawyer!), the policyholder should review the contract. In some states, there are requirements about what must be stated in the contract. This may include a requirement to include a description of services to be provided, the license number, attestation that the public adjuster is bonded pursuant to state law, and a clear recitation of what the public adjuster’s fee and/or compensation will be for the services provided. Policyholders should also review whether there is a right to cancel the contract, and if so, what the penalties may be for doing so.

It is also important that policyholders understand the fee structure offered by the public adjuster before retaining him or her. “The public adjuster charges a fee for his or her services, often a percentage of the final settlement amount.” How much a public adjuster can recover may be capped by state statutes, but a policyholder should know that these fees are negotiable. There also may be time restrictions on when a public adjuster may recover. For instance, in North Carolina, if the insurance company “offers to pay the full amount of [the policyholder’s] policy limits within 72 hours after the date on which [the policyholder] reported [the] loss to the company, then the public adjuster cannot receive a commission based on a percentage of the total settlement amount. Instead, he/she may charge a reasonable fee based on his/her time and expenses.”

The policyholder should keep in mind that the public adjuster he or she hires likely cannot be the appraiser if appraisal is elected. A policyholder has a right to use a public adjuster in any claim, but when appraisal is elected, the two appraisers are supposed to be independent and disinterested. That said, the policyholder’s selected appraiser can work with and/or review the work product of the policyholder’s public adjuster when reaching his determination.

35 See, e.g., 2006 National Association of Insurance Commissioners, Public Adjuster Licensing Model Act, Section 15.
36 NC Department of Insurance, A Consumer’s Guide to Public Adjusters at 2
37 Id. at 1
38 For instance, in North Carolina, if the fee is a result of a natural disaster, the public adjuster’s recovery is capped at 10 percent. NC Department of Insurance, A Consumer’s Guide to Public Adjusters at 2
39 Amy Bach of United Policyholders, “Making the Best Choice When Hiring a Public Adjuster”
Finally, even the most wary policyholder may encounter problems with his or her public adjuster. If unable to resolve the dispute informally, the policyholder should consider reaching out to the public adjuster’s trade association in the state. “If there is no public adjuster trade association, [the policyholder can] contact the National Association of Public Insurance Adjusters (NAPIA) and seek their help resolving the dispute. If that doesn’t help, [the policyholder can] file a complaint with [the] state regulator.”41 The types of claims that can be brought against a public adjuster will vary based on the issues, but may include claims under the Unfair Insurance Practices Act or Trade Practices Act, breach of the duty of good faith and fair dealing, unauthorized practice of law, breach of contract, breach of fiduciary duty, fraud, misrepresentation, conversion.

III. APPRAISAL PROCEDURES

A. Selection and Requirements for Appraisers

Inherent in the appraisal provision are the rights of parties to choose their appointed appraisers. While discretionary in some respects, most insurance contracts require that an appraiser be competent, impartial, and independent.42 The independent and impartial requirements may present contentious issues when a party has some business or personal relationship with their appointed appraiser. These issues require courts to evaluate the personal and business dealings of the parties to determine whether the scope of the business and personal connections inhibit the appraiser’s ability to render a fair and impartial appraisal.

In many jurisdictions, an appraiser becomes interested or biased when he is frequently or habitually employed by a party and, thus, financially interested in that party, or by otherwise having some direct financial interest in the outcome of the claim.43 However, a pre-existing relationship with a party—without more—typically does not support a finding of bias.44

In Allstate Indemnity Company v. Gaworski, the Missouri Court of Appeals recently took the opportunity to revisit this “well-settled, although scarce and somewhat outdated” law regarding the impartiality of an appraiser. Allstate argued that the Gaworski’s appointed appraiser had a disqualifying financial interest due to his ongoing relationship with the company to which the Gaworskis had assigned their interest in any claim against Allstate. The court rejected this argument because the record failed to show any employment or financial relationship between the assignee and its appraiser. The appraiser had no contract to furnish future appraisal work for the assignee, and he was not the sole appraiser receiving all of the assignee’s appraisal work. Thus, while there was evidence the assignee hired the appraiser for previous jobs, that evidence was insufficient to constitute a “frequent or habitual employment rising to the level of a disqualifying basis.”

Additionally, courts have struggled with whether the payment of an appraiser on a contingency fee basis disqualifies an appraiser as de facto interested in the appraisal proceedings. Generally speaking, contingency fee arrangements are unfavorable and are often times used as a basis for vacating awards. For example, the Iowa Supreme Court in Central Life Insurance Co. v. Aetna Casualty & Surety Co. reasoned that contingency fee arrangements constitute per se pecuniary interests in the appraisal proceedings, thus undermining the literal meaning of the word “disinterested.” Even still, however, courts must still consider the practical realities inherent in the party-appointed appraisal process when evaluating whether a contingency fee arrangement constitutes a direct financial interest in the award.

Harris v. American Modern Home Insurance Co. presents a more recent analysis displaying the inherent tension between the “disinterested” requirement and contingency fee-based compensation. This case also considers the “practical realities” of the business relationship between the insured and his appointed appraiser. In Harris, the insured and his appraiser entered into a contract that promised the appraiser 15% of the final appraisal value of the property at issue. In exchange, the appraiser agreed to perform an

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46 Id.
47 Id.
48 Id.
49 Id.
52 Grabbert, 590 A.2d at 92-93.
appraisal of the property and act as the insured’s “attorney-in-fact.” Evaluating these facts together, the court held that the appraiser was not disinterested as required by Missouri law and the terms of the policy. However, some jurisdictions will tolerate contingency fee arrangements so long as the appraisal provision in question does not specifically require a “disinterested” appraiser. For example, in *Hozlock v. Donegal Companies/Donegal Mutual Insurance Co.*, the court drew a hard distinction between policy language requiring mere “competent” appraisers as opposed to “disinterested” appraisers. In acknowledging that there is often some amount of bias in the party-appointed appraisal process, the court reasoned that an appraiser paid on a contingency fee basis will not necessarily be any more biased towards his appointer than one paid on a flat fee basis. Thus, in the absence of some contractual language specifically requiring impartiality, a contingency fee arrangement between a party and his appointed appraiser will not render an award invalid.

As these cases and others demonstrate, there are no fixed standards for selecting an appraiser. These inquiries tend to be particularly fact-sensitive and require evaluating the circumstances in totality. Thus, it is beneficial to reference the standard typically applied in the jurisdiction of interest in order to adequately apply these principles.

### B. Selection and Requirements for Umpires

Insurance contract provisions typically provide that the appraisers will exercise their impartial discretion to select an unprejudiced, honest, and competent umpire. However, issues may arise if the appraisers are unable to reasonably agree upon an umpire. If the appraisers cannot agree on an umpire, many appraisal provisions and some statutes indicate that the appraisers may request an umpire be selected by a judge of a court having jurisdiction. Questions often arise when the parties take such a narrow issue to a judge.

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54 *Id.*
55 *Id.* at 1079.
57 *Hozlock*, 745 A.2d at 1265.
58 *Id.*
60 See *Jacobseon v. Fireman’s Fund Ins. Co.*, 111 F.3d 261, 263 (2d Cir. 1997) (representing typical appraisal provision cited in most insurance policies).
In going to court for such a narrow issue, courts will often heavily focus on the contractual language and nature of the appraisal clause. For example, in Agricultural Insurance Co. v. Holter, the Tennessee Supreme Court was called upon to interpret an appraisal clause containing a standard provision for selecting an umpire:

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.61

When the parties failed to agree upon an umpire, the insured—without notice to the insurer—appeared through their attorney and made an oral application to a judge for the appointment of an umpire.62 The insurer raised several arguments in response, including that the order appointing the umpire was void as a mere summary order failing to recite the necessary jurisdictional facts and that the appointment was made without notice to the company.63 Focusing exclusively on the policy language, the court recognized that the appointment of an umpire was not a court proceeding, but “simply a proceeding according to the provisions of the contract between the parties.”64 Distinguishing between a specification of “judge” in the policy language as opposed to a “court,” the court held that it was not necessary for the request to be made in the form of a motion or in open court—“under this language the request could have been made and acted upon by a Judge of a Court of record while he was on vacation and while Court was not in session.”65 In further holding that the insurance company was not entitled to notice of the insured’s request for the appointment of an umpire, the court honored the language of the contract and thus held that it was inappropriate to create a notice requirement that was not stipulated to and agreed upon by the parties in the contract.66

Given the courts’ heavy reliance on the specific language contained in the statute or policy, however, questions regarding the judicial interpretation of the language and how it governs the appraisers’ actions sometimes precede requests for a court-appointed umpire. For example, in Sullivan v. Liberty Mutual Fire Insurance Co., the insured applied to the trial court to appoint an umpire after the appraisers failed to agree upon an umpire because of a disagreement about the meaning of “actual cash value” in the insurance contract.67 The insurer objected to the application, arguing that, unless the statutory and contractual meaning of actual cash value was first defined by a court, the

62 Id.
63 Id. at 17.
64 Id.
65 Id.
66 Id. at 18.
appraisers would be required to make an unauthorized legal judgement. The court disagreed finding that the purpose of such an appraisal provision was to resolve these sorts of disagreements. “The mere possibility that the umpire or appraisers might commit errors of law or fact was not a proper ground for the court to deny the plaintiffs’ application.” Thus, the court held that the insured was entitled to have his loss determined by the appraisal procedure required by statute and the terms of the insurance policy.

C. Award Procedures

Consistent with the procedural mechanisms for appointing appraisers and umpires, appraisers and umpires are also strictly bound to the contractual language of an appraisal condition when delineating the award. The typical appraisal condition will require the appraisers to specifically itemize the damages being valued in the appraisal process, as this ensures the appraisal produces an unambiguous award that provides finality to the claim. This itemization allows the appraisers to more easily distinguish between covered damage and non-covered damage and more readily apply the policy terms. However, if the appraisers disagree on the valuations, they submit their differences to the umpire. As most policies require a majority concurrence of the appraisal panel, only two of the three actors need to agree on the amount for the appraisal award to become final.

These procedures were recently illustrated by *Cantu v. Southern Insurance Co.*, in which the insured claimed the appraisal award was invalid because it did not substantially comply with the strict requirements of the policy. More specifically, the insured argued, *inter alia*, that the appraisal was not an “itemized decision” within the meaning of the policy because the award stated amounts for whole classes of loss without identifying the cost of any item affected by the loss. The award listed as “items” the coverages under the policy and stated a replacement cost, depreciation and actual cash value less the

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68 *Id.*
69 *Id.* at 386.
70 *Id.*
74 *Id* at *7.
75 In this case, the “items,” or coverages under the policy, included “dwelling,” “personal property,” “additional living expense,” and damage from testing.
amount of loss for each item. On this record, the court held that the appraisal award—which listed separate loss values for each category of coverage rather than a single lump sum for the total loss—substantially complied with the appraisal clause provision that an “itemized decision” be agreed to by two of the three participants in the appraisal process.

Comparatively, Herll v. Auto-Owners Insurance Company demonstrates a recent finding of ambiguity in an appraisal award. In that case, the award listed “Loss Replacement Cost” and “Loss Actual Cash Value” for two items: (1) “Dwelling—All but front & right window related to loss,” and (2) “Dwelling—front & right window related loss an additional.” Under the second item, the panel wrote, “We question the # of losses here.” In the spaces designated for the listing of total amounts in each loss category, the panel simply stated “see above” without entering any total amount. “Above” seemingly referred to the two listed items, the amounts attributable to each item for replacement cost and actual cash value, and the commentary that the panel members “question the # of losses here.” Thus, it was unclear whether the panel meant to award the sum of the two amounts that were listed but not totaled, because “see above” could have also referred the reader to the panel’s statement that it questions the number of losses. Accordingly, the court found that the appraisal award was detrimentally ambiguous because it was “reasonably susceptible of more than one interpretation.”

D. Binding Nature of Appraisers Actions and Appraisal Award

Appraisal awards made pursuant to the terms of a policy are typically binding only as to the amount of the loss. While an appraisal clause determines the amount of loss, a

76 Id.
77 Id. (citing Providence Lloyds Ins. Co. v. Crystal Indep. Sch. Dist., 877 S.W.2d 872, 875 (Tex. App.—San Antonio 1994).
78 Id.; cf. Richardson v. Allstate Texas Lloyd’s, No. 05-06-00100, 2007 WL 1990387 2007, at *1 (Tex. Ct. App.—Dallas, July 11, 2007) (court concluded appraisal award was not itemized because it was “merely…a lump sum award written next to the phrase ‘to be determined by the hygienist’” and did not “categorize[] the contents of the home in a manner customary in the insurance industry”).
80 Id.
81 Id.
82 Id. (quoting Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997).
separate determination of liability and other associated claims is necessary. For a party wishing to dispute coverage for part of an award, the only defenses that remain for a party to assert are lack of coverage for the entire claim as a whole—nothing less.

This limitation of the appraisal award to determining loss values and the award’s binding nature were recently explored by the Colorado Court of Appeals. Following the completion of the appraisal process, the insured in Andres Trucking Company v. United Fire and Casualty Company appealed the trial court’s grant of summary judgment to the insurer on its statutory breach of contract and bad faith claims. The insured, Andrews Trucking, further challenged the binding nature of the loss valuation. Regarding Andres Trucking’s statutory claims, the court on appeal determined that the appraisal process did not conclusively resolve whether the insurer had breached the policy or unreasonably delayed payment of benefits. Expounding that an appraisal award, by itself, does not entitle either the insured or the insurer to judgment in its favor, the court held that judgment does not follow directly from an appraisal because, unlike arbitration, the function of an appraisal award is not to determine the merits of any claim.

Andrews Trucking further attempted to argue that the appraisal process did not result in a binding loss valuation because it was inconsistent with the policy requirements and the umpire’s valuation was mathematically flawed. The court rejected these arguments, finding that the appraisal process was procedurally consistent with the policy and thus produced a binding loss amount. Andres Trucking failed to carry its burden to establish a “manifest mistake” in the appraisal proceedings, and there was thus no reason to invalidate the umpire’s decision.

at 785.

84 Andres Trucking Co. v. United Fire and Cas. Co., No. 17CA1672, 2018 WL 4496407, at *3; (Colo. App. Sept. 20, 2018); Southern General Ins. Co., 370 S.E.2d at 665; Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 362 F.3d 1317, 1319-20 (11th Cir. 2004) (court finding that if an insurer and an insured go to appraisal, insurer can only dispute coverage for the “loss as a whole.”).

85 State Farm Fire & Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996).


87 Id. at *5.

88 Id. at *3.


90 Id. at *6.

91 Id. at *7.

92 Id.
E. **Effect of Appraisal Award**

Generally, the applicable limitations period is tolled during the pendency of the appraisal proceedings, irrespective of whether an insurance agreement provides for a contractual limitations period or the nominal statute of limitations applies. Some states provide for a tolling of any limitations period via statute. In other jurisdictions, however, case law supports the proposition that participation in appraisal proceedings to determine the amount of a loss will toll any applicable period of limitations for the time it takes to complete the appraisal. This tolling is based upon the rationale that “both parties have agreed to proceed with an appraisal that will bind them as to the amount of the loss if they proceed to trial on liability (or if they settle).” The appraisal must be demanded within the limitations period, however.

IV. **LITIGATION AND ENFORCEMENT PROCEDURES**

When the rubber hits the road in a dispute over the value of a claim, either the insurer or the insured can invoke a policy’s appraisal provision. But what happens when either the insurer or insured refuses to comply with the appraisal provision and proceed with the appraisal, or if there is a refusal to comply with the appraisal award? What options are available to challenge an appraisal award? This section addresses the myriad idiosyncrasies of enforcing – or conversely challenging – appraisal provisions.

A. **The Enforceability of Appraisal Clauses Generally**

Like arbitration clauses, appraisal clauses are favored under the law and are generally enforceable, absent illegality or waiver. As the U.S. District Court for the

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93 See W.S.A. § 631.83(5); Wieting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co., 690 Wis.2d 274, 291 (Wis. Ct. App. 2004) (“Agreement” as envisioned by statute tolling limitations period for action on insurance policy, if the parties otherwise agreement to an appraisal procedure, requires something more than to meet and discuss a dispute”); U.C.A. § 31A-21-313(5); Tucker v. State Farm Mut. Auto Ins. Co., 53 P.3d 947, 952 (Utah 2002) (insurer’s mere willingness to consider additional information after paying part of a claim was not an agreement to toll the limitations period during appraisal or arbitration).


97 State Farm Lloyds v. Johnson, 290 S.W.3d 886, 888 (Tex. 2009); see also Garcia v. State Farm Lloyds, 514 S.W.3d 257, 265 (Tex. Ct. App. 2016) (“An appraisal award made pursuant to an insurance policy is binding and enforceable unless the insured proves that the
Eastern District of Pennsylvania has observed, “[a]ppraisal clauses in insurance contracts are enforceable and recognized . . . as favored alternative dispute resolution mechanisms.” Because of this favored status, courts have held that “every reasonable presumption will be indulged to sustain an appraisal award, [and] the burden of proof is on the party seeking to avoid the award.” A failure to comply with the appraisal clause can be grounds for dismissal of an action, as courts have interpreted the condition as a “condition precedent” to a suit on the policy by the insured. “If a defendant’s demand for an appraisal is valid, a plaintiff is contractually bound to exhaust the appraisal process before bringing suit on her claim.”

B. Compelling Appraisal

Where one party to the insurance contract invokes the appraisal clause, but the other party refuses to comply, the aggrieved party’s remedy is to move to compel appraisal. Where a timely demand for appraisal has been made, a court has “the inherent power to enforce recourse to the appraisal procedures before litigation may continue on amount-of-loss questions.” When presented with motions to compel appraisal, courts have declined efforts to treat the appraisal provision as just another

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100 Aetna Cas. & Sur. Co. v. Insurance Comm’r, 293 Md. 409, 415 (Md. Ct. App. 1982); Phila. Indemn. Ins. Co. v. WE Pebble Point, 44 F. Supp. 3d 813, 819-20 (S.D. Ind. 2014) (“The majority of states appear to treat the satisfaction of a party’s demand for appraisal, where such a right is provided in the contract, as a condition precedent to suit on the policy.”); Hartford Fire Ins. Co. v. Conner, 223 Miss. 799, 806, 79 So.2d 236 (1955) (insured must comply with demand for appraisal or there can be no recovery under the policy).
102 Aetna Cas. & Sur. Co., 293 Md. 409 at 415-24 (“We are persuaded under the appraisal clause here, the appropriate principle to be applied is that ordinarily an insured may compel an insurer to submit to appraisal.”); Saba v. Homeland Ins. Co. of Am., 159 Ohio St. 237, 238 (1953); United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467, 469 (Fla. Ct. App. 1999) (“When a party refuses to arbitrate a dispute in accordance with the policy’s arbitration clause, the other party may bring an action to compel arbitration.”)
provision of the policy for which the remedy is a breach of contract action, noting the lack of an ability to compel appraisal would render an appraisal condition meaningless.\footnote{Aetna Cas. & Sur. Co., 293 Md. at 415; Ice City, Inc. v. Ins. Co. of N. Am., 456 Pa. 210, 220, 314 A.2d 236 (1974) (“Our Court may not deny an insured the right to enforce this benefit, paid for by premiums, any more than we could deny an insurance carrier its right to receive the premiums. The legislatively-mandated appraisal clause, an early recognition of what currently is known as consumerism, may not be discarded by the insurer. This Court cannot agree that the insurer may unilaterally free itself from its statutorily-imposed and contractually-required appraisal obligations.”); Saba, 159 Ohio St. at 238.}

1. **Are the Circumstances Ripe for Appraisal?**

In determining whether to compel appraisal under an insurance policy, a court must make a preliminary determination as to whether the demand for appraisal is ripe.\footnote{Citizens Prop. Ins. Corp. v. Admiralty House, Inc., 66 So. 3d 342 (Fla. App. 2011) (reversing order compelling appraisal because circuit court below failed to make preliminary determination as to whether the insured’s demand for appraisal was ripe).} First and foremost, there must be an actual “disagreement” between the insurer and insured as to the amount of the loss before an appraisal provision can be invoked.\footnote{Romay, 744 So. 2d at 469-70 (appraisal inappropriate because, fundamentally, there must be a dispute as to the dollar amount of the loss to trigger appraisal); Baldwin Mut. Ins. Co. v. Adair, 181 So. 3d 1033, 1045 (Ala. 2014).} Language common to appraisal clauses begins with the phrase, “If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss . . . .” As a Florida appellate court observed, this language means the disagreement must be real and not imaginary:

[The disagreement necessary to trigger an appraisal cannot be unilateral. As expressly indicated in the parties’ agreement, the failure to agree must be between the “you” and the “we.” In other words, by the terms of the contract, it was contemplated that the parties would engage in some meaningful exchange of information to arrive at a conclusion before a disagreement could exist.\footnote{Romay, 744 So. 2d at 469-70.}]

Part and parcel with the disagreement requirement is the insured’s obligation to first comply with the policy conditions before appraisal can be invoked, as there can be no valid “disagreement” as to the amount of the loss if the insurer has not had an opportunity to gather documents, investigate the loss, and formulate its opinion as to the value of the loss.\footnote{See, e.g., Darmer v. State Farm Fire & Cas. Co., No. 0:17-CV-04309-JRT-KMM, 2018 U.S. Dist. LEXIS 114526, at *13-*14 (D. Minn. 2018) (noting “policy clearly contemplates submitting a proof of loss, submit to an examination under...”)} Failure to supply upon demand a proof of loss,\footnote{Romay, 744 So. 2d at 469-70.} submit to an examination under...
provide the insurer with financial documents, supply inventories of damaged and undamaged property, or provide documentation demonstrating why the insurer’s loss calculation was incorrect. Many states, however, the insurer must actually sustain prejudice for a insured’s breach of a condition precedent to be sufficient grounds to avoid the invoking of the appraisal clause.

2. Have Either the Insured of Insurer Waived the Right to Compel Appraisal?

The appraisal clause, however, can be waived by either the insurer or the insured, which can present a defense to a motion to compel appraisal. Courts have noted that “a party to a contract may waive its right to enforce an arbitration agreement by its conduct.” Given the favored nature of appraisal clauses, there is a “strong presumption that a claim by the insured for an amount of loss be accompanied by supporting documentation, which allows the insurer to evaluate the validity of that claim and to determine the amount of loss” prior to invoking appraisal clause; Citizens Prop. Ins. Corp. v. Galeria Villas Condo Ass’n, 48 So. 3d 188, 191 (Fla. Ct. App. 2010) (“Until these [postloss] conditions are met and the insurer has a reasonable opportunity to investigate and adjust the claim, there is ‘no disagreement’ (for purposes of the appraisal provision in the policy) regarding the value of the property or amount of loss.”); Baldwin, 181 So. 3d at 1046 (“In other words, the insured must satisfy his or her post-loss obligations so that the insurer can know whether it does or does not agree with the insured’s claim as to the amount of loss at issue.”)

109 Romay, 744 So.2d at 469.
110 Jacobs v. Nationwide Mut. Fire Ins. Co., No. 97-1485-CIV, 2002 U.S. Dist. LEXIS 28464, at *20 (S.D. Fla.) (finding plaintiffs’ request for an appraisal to be premature where they had not fully complied with request to submit to examination under oath); Baldwin, 181 So. 3d at 1044-45 (failure to provide documentation and submit to examination under oath).
111 Id. at *18-*19.
112 200 Leslie Condominium Assn. v. QBE Ins. Corp., 965 F.Supp.2d 1386, 1400 (S.D.Fla.2013) (insured failed to provide insurer “with complete inventories of the damaged and undamaged property, including quantities, costs, values and amount of loss claim, as required by the [] policy”).
113 Hailey v. Auto-Owners Ins. Co., 181 N.C.App. 677, 686, 640 S.E.2d 849 (2007) (appraisal premature because plaintiff did not provide defendant with any documentation that the damage to any of plaintiff's properties was greater than the amount already paid by defendant).
114 Id. at 1401 (A condition precedent “can be avoided by a party alleging and showing that the insurance carrier was not prejudiced by noncompliance with the condition.”) (quoting Soronson v. State Farm Fla. Ins. Co., 96 So. 3d 949, 952 (Fla. Ct. App. 2012)).
against finding that a party has waived its right to appraisal” and courts have noted that “the burden to prove waiver is [a] heavy one.”

i. Unreasonable Delay in Seeking Appraisal

A frequent basis for claiming a waiver of the appraisal clause is a delay in invoking the appraisal. Generally, where the policy does not provide a time for requesting an appraisal, the request must be made within a reasonable time. An unreasonable delay in seeking appraisal may result in waiver of the appraisal condition.

Courts have struggled with defining what constitutes an “unreasonable delay” such as to waive the appraisal provision. Two approaches have been followed. The first is a bright line approach setting a time certain for appraisal to be invoked. For example, the Arizona Court of Appeals in Meineke v. Twin City Fire Ins. Co. tied the deadline to the policy’s one-year suit limitations period, noting that this period “serves to reveal the parties’ intent concerning the period within which the appraisal may be requested.” The court noted that after one year, the other party’s rights are prejudiced, as “[t]he failure of one party to demand arbitration within one year would prejudice the other party’s right to file a timely lawsuit.”

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118 See, e.g., Sanchez v. Prop. & Cas. Ins. Co. of Hartford, 2010 U.S. Dist. LEXIS 6295, *23 (S.D. Tex.) (insurer’s failure to invoke appraisal clause until nearly one year after insured filed claim and insurer completed its investigation and adjusting process waived appraisal provision, as insurer failed to produce evidence that its delay in requesting appraisal was due to a good faith attempt to ascertain the amount of damages).

119 See, e.g., Meineke, 181 Ariz. at 583 (applying one-year suit limitation period as guidepost for when a demand for appraisal is deemed untimely); School Dist. No. 1, 404 P.2d at 893 (same);

120 Meineke, 181 Ariz. at 583.

121 Id.
The second is a balancing approach whereby courts look at the delay in light of all of the facts and circumstances of the claim. Courts note that the circumstances to be considered include, “(1) the time between the breakdown of good faith negotiations concerning the amount of the loss suffered by the insured and the appraisal demand; and (2) whether there would be any prejudice to the other party resulting from the delay in demanding an appraisal.” The lack of prejudice provides a frequent basis for turning back a claim of waiver. “If the insured has suffered no prejudice due to delay, it makes little sense to prohibit appraisal when it can provide a more efficient and cost-effective alternative to litigation.”

Another challenge faced by courts is measuring the amount of time of the delay. When does the time begin running at which point an insurer or insured is put on notice that they must invoke the appraisal clause, if at all? Most courts have measured the time of delay from the point at which the parties reach an “impasse” as to the amount of the loss. A mere disagreement as to the estimate of damages is irrelevant to the analysis of whether there is an impasse, “since mere disagreement does not in itself signal an unwillingness to negotiate further.” Instead, there must be a “mutual understanding that neither will negotiate further” at which point the appraisal must be invoked within a reasonable time. A failure to communicate to the other party that there is an impasse, can prevent the deadline for commencing an appraisal from running.

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122 See, e.g., Terra Indus., Inc. v. Commonwealth Ins. Co. of Am., 981 F. Supp. 581, 602 (N.D. Iowa 1997) (“In deciding whether a demand for appraisal was made within a reasonable time, and consequently has not been waived even if suit was filed before the demand was made, courts have considered the timeliness of the demand in light of the circumstances as they existed at the time the demand was made.”); In re Universal Underwriters of Tex. Ins. Co., 546 S.W.3d 404, 408 (Tex. 2010) (noting that courts must examine the circumstances and the parties’ conduct, as it is “not merely a measure of the amount of time involved in seeking appraisal”).

123 Terra Indus., Inc., 981 F. Supp. at 602.


125 In re Universal Underwriters, 547 S.W.3d at 408 (whether delay is unreasonable is measured from the point of the impasse); see also Sanchez, 2010 U.S. Dist. LEXIS 6296 at *13-*14 (same); Keelsing v. W. Fire Ins. Co., 10 Wn. App. 841, 847 (Wn. Ct. App. 1974) (“The timeliness of a demand for an appraisal in each case depends upon the circumstances as they existed at the time the demand was made.”)

126 In re Universal Underwriters, 547 S.W.3d at 410.

127 Id.

ii. Acts Inconsistent With Appraisal

Acts inconsistent with appraisal by either an insured or insurer can result in the waiver of appraisal and bar enforcement of the appraisal clause. Proceeding to litigation without adequately asserting and preserving the right to appraisal can lead to a waiver.\(^{129}\) In *Transamerica Ins. Co. v. Weed*, a Florida Court of Appeals held that an insurer’s decision to proceed with litigation, failure to invoke the appraisal condition, and subsequent activities in court proceedings, including engaging in discovery, agreeing to set the case for trial, and participating in suit for four months prior to moving to compel appraisal, all led to a waiver of the right to compel such a remedy.\(^{130}\) But invoking the appraisal clause after the commencement of litigation will not always result in waiver of the insurance clause, particularly where the party seeking appraisal has preserved the right to seek appraisal, the grounds for appraisal arise post-litigation, and/or no prejudice would be sustained by the other party.\(^{131}\)

C. Enforcing a Valid Appraisal Award

Where the parties proceed with an appraisal, but the insured nevertheless pursues a breach of contract action in court for the loss, the appraisal operates as an absolute defense to the action. Timely payment of a binding and enforceable appraisal award estops the insured from maintaining a breach of contract claim against the insurer.\(^{132}\) As

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LEXIS 14556 (S.D. Tex. 2011) (insurer did not waive appraisal because there was no evidence that insured communicated to insurer an impasse over value of the loss amount under the policy prior to suit).


\(^{130}\) *Transamerica*, 420 So. 2d at 372.

\(^{131}\) *Rogers v. State Farm Fire & Cas. Co.*, 984 So. 2d 382, 388 ( Ala. 2007) (no waiver where insurer invoked appraisal clause after commencement of litigation, as insureds were not prejudiced by appraisal post-litigation, as the insureds had also asserted a claim for bad faith and would have been required to incur litigation expenses anyways); *Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342, 344-45 (Fla. Ct. App. 2011) (though insured litigated case for ten months, this was not inconsistent with appraisal remedy because insured made pre-suit demand for appraisal and pleaded a claim for declaratory judgment to determine its right to an appraisal; *Florida Ins. Guar. Assn. v. Branco*, 148 So.3d 488, 494 (Fla. Ct. App. 2014) (post litigation demand for appraisal is appropriate where facts justifying appraisal arose after litigation commenced).

\(^{132}\) *Gabriel v. Allstate Tex. Lloyds*, 2013 U.S. Dist. LEXIS 186032, *12 (S.D. Tex. 2013); see also Andres Trucking Co.*, 2018 WL 4496407 at *52 (“We are certainly in no position to
one court has explained, “the reason an insured is estopped from maintaining a breach of contract claim against the insurer after receiving full payment of the appraisal award is that the very object of the binding appraisal process is to avoid litigation on the issue of damages and not to facilitate liability.”133 For example, under Texas law, a party is estopped from pursuing a breach of contract claim if the defending demonstrates: “(1) the existence and enforceability of an appraisal award, (2) the timely payment of the award by the insurer, and acceptance of the appraisal award by the insured.”134

D. When an Appraisal Award Can Be Set Aside

Courts will make every reasonable presumption in favor of the validity of the appraisal, which renders most challenges unsuccessful. 135 However, a party seeking to avoid an appraisal award can seek relief in court to set aside the award due to waiver, illegality, or some other valid cause.136 For instance, under Texas law, an appraisal award will be upheld unless at least one of three circumstances are present: “(1) the award was made without authority; (2) the award was the result of fraud, accident, or mistake; or (3) the award was not made in substantial compliance with the terms of the contract.”137 Courts have set aside awards due to a concealed pecuniary interest in the outcome of the litigation, as “arbitrators or appraisers who may be selected to adjust a loss should be disinterested, and not represent the parties selecting them.”138 Also, appraisal awards have been vacated due to the failure of the appraisers to comply with the policy’s

second-guess the mathematical process adopted by an umpire whose competence and impartiality were never challenged. That is why we require that parties, after having selected their own judges . . . be bound by the result.” (internal quotations and citations omitted).


136 State Farm Lloyds v. Johnson, 290 S.W.3d 866, 888 (Tex. 2009) (appraisal clauses are generally enforceable, absent illegality or waiver); Garcia v. State Farm Lloyds, 514 S.W.3d at 265 (“An appraisal award made pursuant to an insurance policy is binding and enforceable unless the insured proves that the award should be set aside.”)

137 TMM Invs., Ltd. v. Ohio Cas. Ins. Co., 730 F.3d 466, 472 (5th Cir. 2013); see also Andres Trucking Co., 2018 COA 144 (Col. Ct. App. 2018) (appraisal award may be disregarded only if award was made without authority or was made as a result of fraud, accident, or mistake).

138 Central Life Ins. Co. v. Aetna Cas. & Surety Co., 466 N.W.2d 257, 261-62 (Iowa 1991) (sustaining motion for partial summary judgment to vacate the appraisal award by insurer where it was revealed that the appraiser’s fee was based on a percentage of the settled loss).
procedures for the appraisal and errors in calculating the award, or where an appraiser or umpire was appointed improperly. Moreover, courts also consider whether the appraisal panel acted outside the scope of its authority or in a way that was not in substantial compliance with the terms of the policy, though this may not necessarily mean that the entire award will be invalidated. The burden of proof is typically on the party seeking to avoid the award.

Consider Zurich American Insurance Company v. Omni Health Solution, LLC, which arose after Omni, the insured, invoked the appraisal condition. After the two party-appointed appraisers and original umpire agreed to an award for the structural damage to the insured property, the original umpire (who had previously been an independent adjuster) joined a firm that performed work for Zurich. Thereafter, Zurich’s appraiser and the original umpire agreed to an award amount for Omni’s business interruption claim. The original umpire then resigned at Omni’s request and a new umpire was appointed by trial court. The trial court further ruled that the appraisal awards made by the original umpire were not binding because there was a question regarding the umpire’s impartiality.

On appeal, the court found that the structural damage award was binding on both parties, notwithstanding any alleged bias of the original umpire, because it was agreed upon by both appraisers in addition to the original umpire in accordance with the plain language of the insurance policy. However, the court found that the original umpire’s impartiality was grounds for setting aside the business interruption award because it was based on an estimate prepared by Zurich’s appraiser and, unlike the structural damage award, was only agreed to by Zurich’s appraiser and the original umpire. Moreover, the business interruption award was issued after the original umpire began working for a

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139 St. Charles Parish Hosp. Serv. Dist. No. 1 v. United Fire & Cas. Co., 681 F. Supp. 2d 748, 764-64 (E.D. La. 2010) (setting aside appraisal and remanding matter to appraisal panel due to panel’s erroneous awarding of interest, failure to list damages and property value in accordance with the policy language, and double counting of damages).
140 Covenant Ins. Co. v. Banks, 177 Conn. 273, 281 (1979) (invalidating appraisal award where umpire was improperly appointed).
141 See TMM Investments, Ltd. v. Ohio Cas. Ins. Co., 730 F.3d at 472.
142 See Garcia, 514 S.W.3d at 265.
143 See Zurich American Ins. Co. v. Omni Health Solutions, Inc., 774 S.E.2d 782.
144 Id. at 783.
145 Id.
146 Id.
147 Id.
148 Id. at 784.
149 Id.
company that performed work for Zurich.\textsuperscript{150} Thus, the business interruption award was not binding.

**CONCLUSION**

The rights and duties of insurers and insureds relating to appraisal present unique challenges for each party. Mastering those challenges and understanding the purpose and scope of the appraisal condition as well as the procedures attendant with requesting and completing appraisal can provide insurers and insureds alike with a powerful tool to quickly resolve claims where there is a disagreement as to the amount of damages. However, misuse of the appraisal condition can be an equally powerful hindrance to the resolution of a claim, potentially resulting in a waste of time and resources from failing to follow the proper procedures or even litigation. Thus, any practitioner that handles first party property claims should be familiar with the appraisal condition and know how and why to demand appraisal when appropriate.

\textsuperscript{150} *Id.* at 785.