



# PERSPECTIVES

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## Appraisal Guidelines for Useful Results

3<sup>rd</sup> Edition

Our perspectives feature the viewpoints of our subject matter experts on current topics and emerging trends.

## INTRODUCTION

“Appraisal” is a procedure typically mandated by state law or outlined in an insurance policy. Appraisal is a dispute resolution procedure intended to provide insurers and policyholders with a method to award the measurement of loss. The process is limited to disputed damages in first party insurance claims, including but not limited to real property, personal property, and/or time element damages. Appraisal is also a procedure used in other types of first party insurance, such as automotive, as a method to determine the cost to repair or replace motor vehicles.

The sole intent and purpose of appraisal is to measure and award damages sustained from a loss. The appraisal is typically conducted by a competent and disinterested three-person panel—one member chosen by the policyholder, another chosen by the insurer(s), and a neutral umpire chosen either by the appraisers or a court having jurisdiction over the matter. In some instances, the appraisers can determine and award damages without the input from or naming of an umpire, but this is increasingly rare. In even rarer instances parties, by mutual agreement, can dispense with the naming of appraisers and can agree on a single expert who determines the amount of damage.

Appraisal does not always bring finality to a claim; in some instances the appraisal will precede determinations of coverage. In these cases, appraisal is often used as a method to inform the parties of the value of their respective positions in a coverage dispute. When used in this manner, the results of appraisal either set the damages in advance of a coverage determination or, more commonly, will provide the parties with values used to mediate coverage disputes.

The perceived advantages of appraisal, as opposed to litigation, are expedience, lower cost, and finality. However, the appraisal process is often criticized because of unpredictable awards that are not helpful in settling a disputed claim and, in some cases, because it can lead to further protracted litigation.

The purpose of this document is to provide interested parties with guidelines to produce useful and

unambiguous awards regarding the amount (or amounts) of loss. Regardless of the size or complexity of a disputed claim, the appraisal process should always be approached in a thoughtful manner. It is imperative that the disputed valuation(s) of loss be clearly and unambiguously communicated to, and understood by, the appraisers and umpire (the appraisal panel) who will decide the issue. It is equally imperative that the appraisal award be reported in such a manner as to finalize valuation dispute(s).

Laws or statutes governing appraisal may vary by jurisdiction and are not addressed herein. Issues regarding timeliness or enforceability of appraisal, disinterestedness of an appraiser or umpire, procedure for conducting the appraisal, or reporting or enforceability of an award, etc., should be reviewed by counsel when appropriate. The intent of this paper is to provide parties to the appraisal process with an outline of issues to consider.

The intent of the process is to produce useful results, which will finalize disputes regarding the value of a loss.

## THE APPRAISAL CLAUSE

Appraisal clauses have existed in property insurance policies for almost a century and are mostly unchanged over time.<sup>1</sup> The 1943 Standard NY Fire Insurance Policy contains the following appraisal provision:

*“In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in*

<sup>1</sup> Some insurers have recently introduced new expanded appraisal clauses and/or appraisal endorsements to insurance policies in order to clarify both the intent and process of appraisal, and to prevent abuse.

*writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.”*

The intent of the appraisal provision is to provide a formal procedure to award the measurement of damages from a loss. In general, appraisal provisions provide for the following:

- Either party may demand that the loss and value dispute be submitted to appraisal.
- Demands must be made in writing.
- Each party selects its appraiser.
- The appraisers then agree on a third party to act as an umpire.
- If the appraisers fail to agree on the umpire, a court having jurisdiction over the matter will select the umpire.
- The appraisers attempt to agree on the amount of loss and value.
- If the appraisers fail to agree, their differences are submitted to the umpire.
- An award in writing is required and considered final when at least two parties to the appraisal are signatories.
- The parties pay their own appraiser fees and share equally in the cost of the umpire and any other costs of the appraisal.

While insurance policy appraisal clauses present a procedure to award the measurement of a loss, policies typically contain little or no additional guidance regarding how and what to appraise. Further, they do not include instructions by which the disputed value(s) will be reported to the parties. There is typically no other practical guidance about how to appraise a disputed loss in the policy of insurance. Thus, it is left to the parties, or, in litigated matters, a court, to sort out these issues.

## THE OBJECTIVE OF APPRAISAL

Because appraisal provides a method to award damages in a disputed insurance claim, it naturally follows that

the scope of the appraisal should be confined to the specific items of claim which were disputed and led to the appraisal demand. While this is generally understood and accepted, the process has been increasingly abused to the extent that the scope of the claim may be expanded in the appraisal process.

Appraisals can sometimes include awards for categories of claim which were never articulated, investigated, and adjusted prior to an appraisal demand. Consider, for example, a disputed building loss, wherein one party demands appraisal, and the subsequent award includes amounts of loss for building, personal property, and business interruption. This is an improper use of appraisal, because the insurer is prejudiced by an inability to investigate and measure the newly articulated claims in a typical manner. New claim categories submitted for the first time in the appraisal process cannot be considered “disputed,” since they were not articulated prior to appraisal. For this reason, parties agreeing to appraise disputed claims should limit the process solely to the claim categories presented and investigated during the claim adjustment.

The first step in any appraisal is to determine the scope of what is being appraised. Because the appraisers and umpire cannot determine coverage, valuation methods and other items which, when disputed, will require litigation to sort out, it is incumbent on the parties to identify not only the disputed values being sought, but also any other issues that might affect the outcome of appraisal. It is then recommended that the parties (or a court having jurisdiction over the appraisal) document the scope of appraisal in either an agreement or an order, which can eliminate any ambiguity in the specific valuation disputes being appraised.

Certain issues typically require clarification in order for the appraiser and umpire to return an unambiguous award. At a minimum an appraisal agreement or order should include:

1. The date and type of loss (i.e., fire, windstorm, etc.).
2. The date of valuation—typically, the date of loss.
3. A finite list of the unique disputed values that require itemization; for example, replacement cost loss to building, actual cash value (ACV) loss, law and ordinance loss, time element loss, etc.

4. If there are contested coverage issues, sub-limits, or other disputes requiring itemization, these should be separately awarded to avoid ambiguity in the award.
5. Where appropriate, a statement of limiting factors or legal requirements that may affect valuation. For example, if a building loss requires an actual ACV award, and the venue has limitations regarding the method of evaluating ACV, it is typically necessary to outline these issues in the written agreement/protocol.<sup>2</sup>
6. It is recommended that an award include the amount of loss by category, without regard for deductibles or prior payments.

The parties should also be aware of local regulations that may affect the appraisal. For example, some states have residency or other requirements which may limit who may participate as an appraiser or umpire.

## APPRAISAL DEMANDS AND REPLIES

Prior to demanding appraisal, parties are cautioned to determine if an impasse has been reached and whether appraisal is an appropriate method to finalize the dispute(s). It is good practice for both parties to review their respective positions prior to either making or replying to a demand.

Since it is generally assumed that if the parties have either reached an impasse or are reasonably certain that they will be unable to agree on the amount of loss, consideration should be given to conducting a third-party review prior to demanding appraisal. In non-complex matters, the appraiser being considered by any party is likely to conduct this review. In larger, complex cases, particularly where the appraisal may eventually involve using expert witnesses to present testimony to the appraisal panel, use of an expert witness to conduct a review is a good first step prior to making a demand. This review process, if conducted in an unbiased and objective manner, has the benefit of informing a party of the reasonableness of their

position, and can often result in settlement of disputed items (or an entire claim) prior to an appraisal demand. On the other hand, this process can also be helpful in confirming a prior position and validating the decision to demand the appraisal.<sup>3</sup>

At a minimum an appraisal demand should include at least the following:

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

Replies to appraisal demands should include the following:

1. An acknowledgment of receipt of the demand.
2. A statement regarding whether the appraisal is an appropriate forum to settle the dispute(s).
3. A definition of the issues to be appraised (or simply an agreement to the issue(s) as outlined in the appraisal demand).
4. The name of the appraiser, if appraisal is agreed to.
5. If not included in the demand, a sample proposed appraisal agreement (protocol).
6. If included in the initial appraisal demand, a marked up or signed agreement to appraise the loss.

Where applicable, the parties are also well advised to reach agreements on finite claim items and to limit appraisal solely to the areas of differences. For example, imagine that a policyholder makes a claim for a fire at an insured grocery store. The insurer issues a policy [covering building, contents, stock, and business interruption. The contents and stock loss are agreed, but the building loss (including code upgrades, demolition, and debris removal which are sub-limited) is disputed. Likewise, there is a dispute over the business interruption loss. The policy valuation for buildings is at replacement cost, but in the event not

<sup>2</sup> In those instances, in which disputes regarding coverage or method of valuation that are not decided pre appraisal, it is recommended that the appraisal include valuations for all disputed valuation methods.

<sup>3</sup> In numerous instances the author, acting as an appraiser, has assisted a client in bringing about settlement of issues and/or entire claim disputes at the onset of appraisal. In certain instances, these disputes have exceeded \$100 Million.

replaced, ACV is the measure. In this instance, the party making the demand must clearly state that appraisal is being demanded to determine the disputed claims only, excluding the contents and stock loss. The appraisal should be limited to the replacement cost and ACV loss to the building, the amount of code upgrade loss, the amount of demolition and debris removal loss, and the amount of business interruption loss. In so doing, there will be no ambiguity about the valuation issues which are being submitted to the appraisal panel. Making a clear demand will allow the opposing party to understand the scope of the appraisal without ambiguity, which will increase the likelihood of executing a written appraisal agreement.

In many instances, and depending on the jurisdiction, the timeliness of an appraisal demand can be brought into question. Perhaps the best example of this is *S.R. International Business Insurance Company vs. World Trade Center Properties (the World Trade Center 9/11 Litigation)*.<sup>4</sup> In this matter, Allianz Global Risks, one of almost two dozen market insurers who bound coverage at the World Trade Center prior to 9/11, made a demand for appraisal after litigation had already commenced and after the insured submitted an initial proof of loss, but before the insurers had completed their calculation of the amount of the loss. Prior to 9/11, although an agreement between the parties regarding policy language had not been finalized, Allianz was the only insurer who issued a policy, which, among other things, included an appraisal clause. The insured opposed Allianz's demand citing (among other things) that appraisal was premature because although the matter was already in litigation regarding coverage issues, no negotiations between the parties regarding the issues of replacement cost loss, actual cash value loss, or rental income loss had taken place, and, therefore, it was unclear whether a dispute even existed. Subsequently, the Federal District Court found in favor of Allianz and ordered the appraisal as both appropriate and timely.<sup>5</sup> It is noted, however, that the issue of timeliness of demand or reply can vary by jurisdiction.

Setting aside the timeliness of demand issue, a failure of the parties to specify the required loss measurements being sought in appraisal can result in flawed awards

that require post appraisal negotiation or even litigation, which is avoidable in many cases. For example, in a New Jersey case in the 1990s, an insured demanded an appraisal of a disputed fire loss to a six-family residential structure. The parties then entered into memorandum of appraisal, which provided limited information, except for the location, date, and type of loss, and the identity of the appraisers. The appraisers promptly agreed on an umpire and determined the "amount of loss" in a timely fashion. After receiving the "replacement cost" award, the insurance company's adjuster unilaterally attempted to determine the ACV to determine the undisputed loss. However, the insured did not agree with the valuation and filed suit against the carrier. Several years later, the court ordered a second appraisal<sup>6</sup> to determine the replacement cost and ACV loss, given the condition of the property as it then existed. Further, the court ordered that the loss would be valued by the panel at the "current" cost rather than at the date and time of loss. The building, which had sat for four years in an un-repaired condition, had by then deteriorated to the point it was essentially a total loss. Ultimately, the new panel issued an award that was almost \$500,000 more than the original appraisal. This simple example illustrates that an unambiguous appraisal agreement will provide the parties with the necessary disputed measurement(s) of the categories of loss needed to finalize the claim. This would have eliminated the need to have two appraisals over the course of several years, at far greater expense to the parties, resulting in higher indemnity costs to the insurer.

## SELECTING APPRAISERS

The party-appointed appraiser should ideally be reasonably expert in the loss determination(s) that are the subject of appraisal.

Once an appraisal demand is considered, selection of the party appraiser should be weighed heavily based on the following criteria:

- Familiarity and competency in the evaluation of the disputed loss(es) being appraised.

<sup>4</sup> The author was named as the party appointed appraiser for those insurers that participate in the appraisal process.

<sup>5</sup> In his decision, the district court judge rejected the policyholders argument that that demand was premature because the insurers had not finalized their damage measurement. The opinion noted that the parties were highly sophisticated, and that Allianz clearly understood that the damages were disputed.

<sup>6</sup> The author was named an appraiser in the second appraisal.

- Familiarity and competency in navigating the appraisal process.
- Ability to act as appraiser given the likely manner in which the appraisal will be conducted.

Of the three criteria noted above, perhaps the most important is an appraiser's ability to understand and effectively navigate the process. In many instances an experienced appraiser who conducts a review of the disputed items can highlight areas that will require specificity or definition in an appraisal agreement. In these instances, this can help avoid post appraisal disputes or litigation.

In some instances, the discreet items requiring valuation in appraisal can result in having separate appraisal "panels" or appraisers. In large, complex matters, the issues can be so varied that having separate appraisers to determine the discreet valuation elements of a loss is well advised. For example, a large international bank's U.S. headquarters was destroyed on 9/11. The disputes involved claims in excess of \$1.0 billion, which included, among other things:

- Whether a high-rise office tower was a total loss.
- Complex claims involving extra expenses caused by the inability to utilize the insured real estate for a protracted period.
- Complex trading losses during a finite post 9/11 period.

In this case, the insured named a lawyer as their appraiser, but the insurers chose to name a building damages expert, a trading expert, and a real estate lawyer as separate appraisal panel members to "appraise" these varied and complex claim disputes. A retired federal district court judge was named as a single umpire, and appraisal proceeded successfully over the course of more than two years, awarding damages on a rolling basis, and ultimately helped the parties successfully mediate and conclude all remaining claims without protracted litigation.<sup>7</sup>

## SELECTING THE UMPIRE

A qualified umpire can help ensure a smooth and efficient process and a timely and fair result. Umpires must be disinterested and disclose any potential conflicts.<sup>8</sup> Ideally, the umpire should be competent in the valuation issues being contested. Having a subject matter expert umpire will rarely result in an unfair award.

Acrimony between policyholders and insurers prior to appraisal can often result in an inability to mutually agree on an umpire. Thus, having to petition a court to name an umpire is not uncommon in many jurisdictions. However, this can often result in the appointment of an umpire having neither any expertise in the appraisal process nor any competence in the valuation disputes being decided by the panel. If the appraisers cannot reach agreement on the umpire, it is imperative that the parties jointly petition a court to name the umpire. Cases in which one party or the other unilaterally and without notice seeking to have an umpire named can result in contested awards and post appraisal litigation.

It is appropriate for the umpire to be named as soon as practical after appraisal commences. Waiting to determine if the appraisers disagree on the valuations to be awarded prior to naming an umpire is not good practice and can be impractical for several reasons. Typically, the best opportunity for the appraisers to agree on the umpire is at the onset of appraisal. Once appraisers have disagreements on disputed loss values, there may be little likelihood that they will agree on an umpire.

In large, complex cases, deferring the umpire selection can also result in a delay or additional expense in completing the appraisal.

Perhaps the most compelling reason to select an umpire at the onset of appraisal is that an experienced and effective umpire can help the appraisers negotiate the process, steering them (and sometimes the parties) toward consensus on process and other issues.

<sup>7</sup> The author was named as one of the three appraisers for the insurers.

<sup>8</sup> If conflicts exist, they must be disclosed and waived by all parties. It is appropriate for the parties to enter into an agreement whereby the conflict alone cannot give rise to a post appraisal action to overturn the award. The author has been selected and agreed to by parties as an umpire after disclosing potential conflicts. The appraisals resulted in awards being finalized without post appraisal disputes.

This can sometimes have the benefit of expediting the appraisal process and can help to bring finality to claims even when there are coverage disputes.<sup>9</sup>

In non-complex matters selecting the umpire can be as simple as a discussion between two appraisers who present names to one another.<sup>10</sup> In cases where the appraisers have familiarity with one another or have previously participated in the same appraisal panel, the selection of an umpire is often not disputed.

The following is recommended for the umpire selection process:

- Umpire nominations should be made by the appraisers to one another within a reasonable time after the appraisers have been appointed.
- The parties or their counsel are typically not advised to participate in the umpire selection process.
- It is good practice for an appraiser to nominate more than one candidate for umpire.
- Contact information and an invitation to discuss a potential umpire's qualifications with umpire nominees is considered good practice.
- An umpire, once nominated, has an obligation to the appraisers and the parties to immediately determine whether any conflicts of interest exist and, if so, to disclose those conflicts to the parties. Failure to do so will provide an unsatisfied party with a simple reason to move to vacate an award based on umpire bias and non-disclosure of a conflict.<sup>11</sup>

In large, complex matters, the selection of the umpire can be a time-consuming and closely scrutinized endeavor. In general, the following guidelines for selecting the umpire should be considered:

- Parties should research umpire candidates to determine their competency to serve on the panel.
- Communication with umpire candidates should be limited to the appraisers.
- No ex parte communication should be permitted with any umpire candidate.
- The parties should agree to a simultaneous exchange of candidate names through their appraisers.

- The parties should agree on the language of a joint introductory letter to be sent by the appraisers to the umpire candidates.
- The nominating party should not be disclosed to the umpire candidate. An introductory letter should include at least the following:
  - That the nominee is being considered to act as umpire of a disputed insurance claim (name the matter without specific detail).
  - That the appraisers desire to meet jointly with the umpire nominee to determine qualifications and willingness to serve.
  - That the umpire nominee should provide the appraisers with requested information to help determine competency.
  - That the umpire nominee should review the conflict list and be prepared to report on any potential conflicts during the initial interview.
  - Proposed dates and times for an interview with the appraisers.<sup>12</sup>

## APPRAISAL AGREEMENTS

The importance of making unambiguous appraisal demands has been noted herein. The following is a brief discussion of how to construct an agreement to appraise disputed items of loss.

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

- Replacement cost loss—scope and value.
- Replacement cost loss—value only, where scope is agreed.
- Limited replacement cost loss—where a single item or finite set of items needs to be determined.<sup>13</sup>
- Actual cash value loss.
- Period of restoration.
- Demolition/debris removal cost.
- Code upgrades/law and ordinance loss.

<sup>9</sup> Where expanded appraisal clauses or endorsements are found in policies, they may require a written agreement as a precedent to commencing appraisal.

<sup>10</sup> The author has been successful in selecting umpires in high value complex matters without a highly formalized process.

<sup>11</sup> Several states, like have a history of courts overturning appraisal awards for unreported conflicts of interest by either an umpire or an appraiser.

<sup>12</sup> It can also be useful to limit the number of nominees and agree that in the event the appraisers cannot agree on the umpire, the sides will jointly petition a court to name the umpire from the party's nominees (or one finalist for each party). In the experience of the author, this can often lead to the selection of an effective umpire.

<sup>13</sup> A sample agreement for submission to appraisers is included in the appendix.

- Extra expense loss.
- Expediting expense loss.
- Rental loss.
- Business interruption loss.
- Building replacement cost and/or ACV (often to calculate a deductible or determine a co-insurance calculation).

After a demand for appraisal has been made, it is recommended that the parties enter into a written agreement to appraise the loss. This can happen either after a demand or, in some instances, after the parties have named their appraisers, regardless of whether the umpire has already been chosen. If there is any ambiguity in the scope of the appraisal, it is essential to reach an agreement, in writing, on what disputed values will need to be awarded by the appraisal panel, in addition to other issues which are pertinent to the appraisal. As previously noted, neither the insurance policy nor case law is likely to provide guidance in this area.

High value, complex matters that require numerous values to be awarded will typically require a detailed agreement prior to proceeding with the appraisal. In these cases, the parties, whether on their own, with help from the umpire, or as ordered by a court, should enter a written protocol that has the effect of an “order.” For an appraisal protocol to be useful, an understanding of the nature of the dispute(s) regarding loss and value, as well as clarity about how the values need to be reported by the panel, is required. At minimum, the appraisal protocol for a complex matter must include the following<sup>14</sup>:

- The names of the parties and the date and type of loss.
- The scope of the appraisal, clearly listing the valuation(s) which are going to be determined by the process.
- A list of the legal issues that parties have agreed on which the umpires can decide or a statement that the appraisers and umpire cannot decide questions of law or coverage.
- The identity of the appraisers.
- The identity of the umpire or a description of the procedure for selecting the umpire.
- A statement that any disputes regarding the protocol are to be resolved by the panel.

- The manner in which the disputed loss is to be appraised, which may include:
  - Timetable and location of appraisal.
  - Method of recording the appraisal proceedings.
  - Discovery issues which may also include subpoena power of the panel.
  - Use of experts.
  - The manner in which the loss will be appraised.
  - Sample award form or instructions on how award will be reported.
  - Definitions of terms and coverage.
- General items:
  - A statement regarding no *ex parte* communication between the parties and umpire.
  - A statement regarding no *ex parte* communication between the appraisers and umpire.
  - Confidentiality issues or agreements.
  - Hold harmless and/or defense indemnity agreement protecting the appraisers and umpire.
  - Other as may be required.

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

## CLARIFYING DISPUTES REGARDING VALUATION DEFINITIONS OR COVERAGE

It should be clear that where there are issues surrounding coverage, sub-limits, division of insurable interest, etc., a detailed protocol setting out the agreement to appraise is advisable. It is imperative that the parties seek to avoid unnecessary post appraisal litigation over an award that is either ambiguous or does not provide enough detail to finalize the claim. Having an award which is of no practical guidance to the parties and cannot be used as a mechanism to finalize a claim is an improper use of the appraisal process.

The same is often true in cases where there are disputes regarding how to calculate a particular valuation.

<sup>14</sup> A sample appraisal protocol in a large, complex case is included in the appendix.

For this reason, including definitions (if agreed) in the appraisal agreement can be helpful to the panel. When the parties cannot agree on disputed methodology and coverage, guidance by a court may be required in order for the panel to determine the amount to be awarded. Because the appraisal panel cannot interpret the meaning of the insurance contract or define valuation terms in an award, the appraisal process essentially bifurcates the damages and liability disputes in those cases where coverage or valuation methods are also disputed.

Coverage or definition disputes can only be resolved in three ways:

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

There is no practical guidance here regarding the optimal time to resolve these issues, though it must be stressed that in some cases, the coverage or definition disputes may not be identified prior to the appraisal and thus cannot be resolved until after the appraisal has commenced.

In general, disputes that involve valuation methodology (when identified) should be resolved by a court either before or during appraisal. In most cases, these specific issues are likely to surface prior to the appraisal since they are generally at the core of the difference which led to the dispute. Unfortunately, parties will sometimes proceed to appraisal without providing clear and unambiguous instructions to the appraisal panel about the definition of values being sought.

If these disputes are not decided pre- or during appraisal, the only other alternative is to have the panel award values on each of the disputed methods, which will have the benefit of providing the parties with an “a la carte” menu of awards to be applied once coverage is determined. In large, complex cases, this may be impractical, since it could create unnecessary expense and delay.

The following is a brief list of the most common definition disputes which cannot be decided by an appraisal panel:

- **Replacement cost**—It is not uncommon for the parties to dispute the definition of replacement

cost, particularly as it relates to the valuation date of an award. Sometimes a policyholder or their appraiser will consider the date of the award as the date of valuation. An insurer is likely to define replacement cost as being valued at the date and time of loss. When disputes of this nature arise, they must be settled by a court. If this matter is not decided prior to appraisal, the parties can ask the appraisal panel to provide two separate valuations so that the matter can be finalized once a court decides the legal issue.

- **Actual cash value**—Disputes regarding the method of calculating actual cash value, which is jurisdiction-specific, are not uncommon in appraisal. Setting aside the issue of whether the loss is in a state that follows the broad evidence rule, the market value rule, the replacement cost minus depreciation rule, or, in those states that disallow depreciation of labor, there can also be disputes about whether policy definitions of actual cash value change the jurisdiction-specific law.
- **Period of restoration and period of indemnity**—It is not uncommon for a policyholder’s appraiser to claim that the period of restoration and period of indemnity should include the elapsed time between the date of loss and when/if the property is rebuilt after the appraisal amounts are awarded. Conversely, insurers might take the position that the period begins on the date of loss and ends when the physical damages have been repaired/replaced, assuming the exercise of due diligence and dispatch. Unless these issues are agreed as part of an appraisal protocol, it is the author’s experience that the appraisers first award the length of time it will take to make physical damage repairs without a specified construction commencement date, then award a monthly business interruption or rental value award for the disputed periods. In such cases, the award should note that the parties dispute the method of valuation but are providing enough detail for the matter to be concluded once the legal/policy interpretations are finalized.

To illustrate the complexities associated with valuation definitions, during the appraisal of the World Trade Center 9/11 claim, disputes arose regarding how ACV and period of restoration would be calculated. Given that the appraisal was underway, it became necessary for

the parties to seek guidance from the federal district court, who then decided these issues during the appraisal so that the appraisers and umpire had a clear understanding of criteria they could use to award these disputed categories of loss.

Perhaps the best example of the need to clearly define terms for the appraisal panel is found in *Elberon Bathing Co., Inc. v. Ambassador Insurance Company*. Here, there was a disagreement on the amount of loss, and the parties elected to settle the valuation dispute by appraisal. The insured's appraiser and court-appointed umpire awarded replacement cost, although the required measure of loss was ACV. The insurer's appraiser refused to sign the award. The award was ultimately overturned because New Jersey follows the broad evidence rule to determine ACV, and the panel's award was based on a different method. This clearly illustrates that even in those cases where there is no ambiguity regarding the scope of the appraisal, appropriate definitions or court rulings may be required for the panel to properly appraise a loss.

## UMPIRE USE OF EXPERTS AND EXPENSES

In certain instances, umpires will incur expenses for a variety of reasons, but usually to seek guidance from an independent professional who can assist them in making an informed decision. In some cases, one side or the other will object to the umpire's retention expenses to decide a disputed issue. It is the author's opinion that regardless of any concern or objection, an umpire should not be constrained in their attempt to render a fair and impartial decision. Since the appraisal process is designed to produce fair and impartial awards regarding the amount of loss, there are cases in which an umpire may not possess direct or "on point" expertise to determine which appraiser's (or party's) position is correct. In these cases, an umpire should be permitted to incur reasonable consulting expenses, and the parties must, therefore, share in the cost.

For example, the author was selected as an umpire in a valuation dispute over a total loss fire to an antique log home. At the time of the appraisal the home had already

been reconstructed with a similar, but larger home. During the rebuild, the local municipality mandated a series of costly zoning requirements and upgrades that were included in the claim and, in the opinion of the appraiser for the policyholder, should have been included in the award. Enforcement of local laws and ordinances (code upgrades) was agreed by the parties as a matter to be decided by the appraisal panel. The appraiser for the insurer argued that no code upgrades would have been required if the home had been reconstructed exactly as it existed prior to the total loss fire. To determine the appropriate valuation, the author first sought to determine if the home could have been replaced "as is" then retained an expert to determine what code upgrades would have been required if the property had been replaced as closely as possible to the existing home that was destroyed. The expert's fees were shared equally by the parties as it was understood that this information was necessary for the umpire to render an impartial award, and the parties were satisfied with the result post appraisal.

## FAILURE OF APPRAISAL

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

## SUMMARY

Although the appraisal process is a useful tool to settle disputes regarding loss and value, it is absolutely necessary to approach the process in a thoughtful manner. In order to avoid confusion, post-appraisal litigation, and awards that are either incomplete or of little practical use to the parties, both policyholders and insurers are urged to clarify disputes and agree on the scope of the appraisal process. The use of clear, concise, and complete agreements to appraise any loss is a key element in ensuring the finality of any claim.

## MORE ABOUT THE AUTHOR

[Jonathon C. Held](#) is the Chief Executive Officer of J.S. Held, LLC, a consulting company with more than 1,500 professionals on five continents. During his tenure of more than 45 years with the company, Mr. Held has been responsible for the growth of the firm from two employees to a multi-disciplinary consulting firm with global reach. Mr. Held has acted as a consultant and expert on numerous high value, high profile cases during his career, including many of the highest valued property claims in history. He has handled assignments in all 50 U.S. states, in more than 20 countries, and on five continents. He has been an expert witness and dispute resolution panelist on numerous matters throughout the United States. Mr. Held has also authored many published papers and spoken at numerous educational conferences including (among others) the PLRB, LEA, ABA, the Wind Network conference, the Lloyds Market Association, and the Property Insurance Coverage Group Conference at Lloyds.

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# ADDENDUM

- I. SAMPLE APPRAISAL DEMAND LETTER .....12
- II. SAMPLE RESPONSE TO APPRAISAL DEMAND LETTER .....13
- III. SAMPLE UMPIRE NOMINEE LETTER IN A SIMPLE MATTER .....14
- IV. SAMPLE UMPIRE INTRODUCTORY LETTER FOR COMPLEX MATTERS .....15
- V. SAMPLE AGREEMENT FOR SUBMISSION TO APPRAISERS IN A SIMPLE CASE.....17
- VI. SAMPLE PROTOCOL FOR A COMPLEX CASE .....20

## SAMPLE APPRAISAL DEMAND LETTER

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

**Date:** \_\_\_\_\_

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

**Dear:** \_\_\_\_\_

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

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

**INSERT APPRAISAL CLAUSE FROM THE APPLICABLE INSURANCE POLICY HERE.**

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

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

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

Very truly yours,

## SAMPLE RESPONSE TO APPRAISAL DEMAND LETTER

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

**Date:** \_\_\_\_\_

**Re: Insured:**

Policy No.:

Date of loss:

Location:

Type of Loss:

**Dear:** \_\_\_\_\_

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

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

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

**INSERT APPRAISAL CLAUSE FROM THE APPLICABLE INSURANCE POLICY HERE.**

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

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

Very truly yours,

## SAMPLE UMPIRE NOMINEE LETTER IN A SIMPLE MATTER

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

**Date:** \_\_\_\_\_

**Re:** Insured:

Policy No.:

Date of loss:

Location:

Type of Loss:

**Dear:** \_\_\_\_\_

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

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

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

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

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

Very truly yours,

## SAMPLE UMPIRE INTRODUCTORY LETTER FOR COMPLEX MATTERS

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

LETTER IS SENT FROM THE PARTY APPRAISERS NO LETTERHEAD IS USED.

Date: \_\_\_\_\_

ADDRESSEE

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

Dear: \_\_\_\_\_

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

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

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

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

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

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

Very truly yours,

---

NAME: Appraiser for the Insureds  
CONTACT INFORMATION HERE

With a copy to:

INSURED COUNSEL NAME  
CONTACT INFORMATION HERE

---

NAME: Appraiser for the Insureds  
CONTACT INFORMATION HERE

With a copy to:

INSURED COUNSEL NAME  
CONTACT INFORMATION HERE

# SAMPLE AGREEMENT FOR SUBMISSION TO APPRAISERS IN A SIMPLE CASE

## AGREEMENT FOR SUBMISSION TO APPRAISERS

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

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

\_\_\_\_\_  
 (Insured) \_\_\_\_\_ (Insurance Company)

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

### APPRAISER APPOINTMENTS:

The insured hereby selects \_\_\_\_\_  
 \_\_\_\_\_ (Name) \_\_\_\_\_ (Phone)

\_\_\_\_\_ as his competent and independent appraiser. \_\_\_\_\_ (Address)

The Insurance Company hereby selects \_\_\_\_\_  
 \_\_\_\_\_ (Name) \_\_\_\_\_ (Phone)

\_\_\_\_\_ as his competent and independent appraiser. \_\_\_\_\_ (Address)

DUTIES OF APPRAISERS

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

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

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

\_\_\_\_\_  
(Appraiser)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
(Appraiser)

\_\_\_\_\_

\_\_\_\_\_  
(Notary Public)

SELECTION OF UMPIRE

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

Witness our hands this \_\_\_\_\_ day of \_\_\_\_\_ A.D., 20 \_\_\_\_\_.

\_\_\_\_\_  
(Appraiser)

\_\_\_\_\_  
(Appraiser)

QUALIFICATION OF UMPIRE

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

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

Subscribed and sworn to before me this \_\_\_\_\_ day of

\_\_\_\_\_

\_\_\_\_\_  
(Umpire)

\_\_\_\_\_  
(Notary Public)

**AWARD**

**ITEMIZED AWARDED VALUES SHOULD BE LISTED HERE.**

Witness our hands this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_.

\_\_\_\_\_  
(Appraiser)

\_\_\_\_\_  
(Appraiser)

\_\_\_\_\_  
(Umpire)

## SAMPLE PROTOCOL FOR A COMPLEX CASE

### IN THE MATTER OF THE APPRAISAL

Between

[NAME THE INSURED(S) HERE]

And

[NAME THE INSURER(S) HERE]

### STIPULATION AND ORDER REGARDING LOSS APPRAISAL PROTOCOL

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

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

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

#### I. SCOPE OF APPRAISAL

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

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

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

#### II. THE PANEL

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

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

C. The appraisers agree to [NAME, ADDRESS, AND PHONE NO.] to act as umpire.

D. The Parties agree and accept without objection or reservation that [NAME UMPIRE] is “competent and disinterested” as the term is generally understood in insurance policies providing for appraisal, that he or she has experience with determining values of the nature presented by the appraisal and has no financial interest in the outcome and has no disqualifying conflicts of interest.

E. To the maximum extent permitted by law, no party will assert any claims against **[NAME APPRAISERS AND UMPIRE]**, or their respective firms, seeking to hold them or their firms liable for any act or omission in the performance of their duties as umpire or appraiser

III. **DISCOVERY (THIS SECTION MAY VARY DEPENDING ON THE SITUATION, ALTHOUGH IN COMPLEX OR LITIGATED MATTERS, THE FOLLOWING LANGUAGE IS PREFERRED.)**

A. The parties agree that the claims previously submitted prior to this Protocol, together with any reports of experts, will be provided to the appraisal panel within 10 days of the execution of this agreement.

B. Neither the insured nor the insurer can provide any new opinions of value at any point during the appraisal process.

C. Any discovery disputes regarding issues to be addressed in the appraisal shall be resolved by the panel.

IV. **DIRECTION BY THE COURT**

A. Questions of law and coverage issues shall be resolved by motions filed with the Court having jurisdiction over this matter.

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

V. **APPRAISAL PROCEEDING**

A. The appraisers shall meet to attempt in good faith to resolve any disputes or differences and to narrow the disputes and differences that must be addressed in the proceedings before the umpire. If they agree, their agreement shall be noted as the result of the appraisal on that issue. By agreement of both appraisers, or at any time either appraiser decides that further discussions between the appraisers concerning their disputes and differences are no longer beneficial, the appraisers, or either appraiser, may demand participation of the umpire.

B. The appraisers shall keep a complete written record of the disputes and materials submitted to the umpire and shall provide the parties with a copy of such record at the time any dispute is submitted to the umpire.

C. All communications between the appraisers and the umpire concerning any disputed item shall be recorded in a manner agreed to by the panel. The cost of that recording shall be divided equally between Appraising Insurers and the policyholders.

D. It shall be for the Panel to decide on the procedures to be used to resolve any item in dispute that the appraisers present to the umpire. The procedures available to the Panel to obtain information and decide an item in dispute shall include, but not be limited to, conducting a contested evidentiary hearing.

E. If there is a contested evidentiary hearing, it shall be a trial format with live testimony or deposition testimony to the extent it would be permissible under the Federal Rules of Civil Procedure.

1. The panel is relieved of all judicial formalities and may abstain from following the strict rules of evidence and civil procedure.
2. The proceeding shall be recorded in a manner agreed to by the parties.
3. Time limits may be set by the panel.
4. The policyholder will present their case first, followed by the Insurer(s). Rebuttal, if any, will be determined by the panel.
5. Each party may present an opening statement.
6. Witness testimony in the event of a contested evidentiary hearing.

Questioning of each witness shall be as follows:

- i. Direct examination.
  - ii. Cross-examination.
  - iii. Re-direct examination.
  - iv. Party appraiser questions.
  - v. Opposing party appraiser questions.
  - vi. Umpire questions.
7. Subpoenas for the attendance of any testifying witness at the proceeding before the umpire shall be issued pursuant to order of the District Court.
  8. Each party may be permitted a closing argument.
  9. Phased proceedings before the umpire **(THIS OBVIOUSLY DEPENDS ON THE FACTS OF THE CASE)** EXAMPLE:
    - i. Replacement Cost Loss.
    - ii. Period of Restoration.
    - iii. Loss Sustained to Personal Property.
    - iv. Business Interruption Loss.
  10. The proceedings before the umpire on each phase will be heard and decided prior to the commencement of the subsequent phase. If the panel determines that it would be advantageous to divide any of the three phases into subphases, it may do so.

## VI. COMMUNICATIONS WITH PARTY APPRAISER AND UMPIRE

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

## VII. APPRAISAL EXPENSES

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

## VIII. VENUE FOR PROCEEDINGS BEFORE THE UMPIRE

- A. To be determined by the appraisal panel.

## IX. DEFINITIONS

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

## X. COURT ORDER

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

**SIGNATURES**

Date: \_\_\_\_\_, 20

By: \_\_\_\_\_  
Policyholder or Authorized Signatory

Date: \_\_\_\_\_, 20

By: \_\_\_\_\_  
Insurer Authorized Signatory

Date: \_\_\_\_\_, 20

By: \_\_\_\_\_  
Policyholders' Appraiser

Date: \_\_\_\_\_, 20

By: \_\_\_\_\_  
Insurers' Appraiser

Date: \_\_\_\_\_, 20

By: \_\_\_\_\_  
Umpire

IT IS SO ORDERED:

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

This publication is for educational and general information purposes only. It may contain errors and is provided as is. It is not intended as specific advice, legal, or otherwise. Opinions and views are not necessarily those of J.S. Held or its affiliates and it should not be presumed that J.S. Held subscribes to any particular method, interpretation, or analysis merely because it appears in this publication. We disclaim any representation and/or warranty regarding the accuracy, timeliness, quality, or applicability of any of the contents. You should not act, or fail to act, in reliance on this publication and we disclaim all liability in respect to such actions or failure to act. We assume no responsibility for information contained in this publication and disclaim all liability and damages in respect to such information. This publication is not a substitute for competent legal advice. The content herein may be updated or otherwise modified without notice.

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