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APPRAISALS OF LOSS AND DAMAGE UNDER INSURANCE POLICIES‡

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7. Irrevocable Appraisal Provisions—Frustration and Displacement— The Plethora of "Waivers".

Even though the appraisal provision is adequately drafted to qualify for irrevocability and even though the insurer has duly demanded appraisal and has duly pleaded same, the provision is frustrated and displaced in many different instances. Most of these instances are designated as "waivers."

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‡This article is the second part and a continuation of the original article written by these authors and appearing in 11 *Miami L.Q.* 1-53 (1956). A third and concluding part will appear in a subsequent issue.

These "waivers" are imputed and synthetic affairs derived from one or more items of conduct attributed to the insurer.¹⁰⁴ A "waiver" by the insurer of the rights to appraisal is the insured's excuse for non-compliance on his part with the provision.¹⁰⁵

The insured's claim to waiver by the insurer generally is heard and determined in the insured's action to collect on the policy. The issue of "waiver" or no "waiver" is heard and determined along with the amount of the loss and damage. Generally there is no separate or preliminary trial of the issue of "waiver" of the appraisal provision.¹⁰⁶ At the conclusion of the trial, if there is any competent evidence tending to show what the court will hold is "waiver," the jury will resolve whether or not it was in fact committed. If it finds "waiver," it also will return a verdict upon the amount of the loss and damage. And so is the provision first put to trial by jury as to whether or not it has been waived.¹⁰⁷ It is further frustrated for, on an hypothesis as it were, that the insured's claim of "waiver" will prove out to be true, the question as to the amount of loss and damage also is heard and sent to the jury. If the jury finds that "waiver" was committed, the appraisal provision is thereby displaced; the jury also returns its verdict upon the dollar amount of the loss and damage.

In view of the variety of "waivers" ruled against the insurer in the American cases, the irrevocability of irrevocable appraisal provisions in insurance policies has come to be the exception.¹⁰⁸ The insurer generally has lost on the issue of "waiver" and only rarely does it any longer invoke the provision against an action brought by the insured to collect on the policy. It will settle or litigate.

104. Reference already has been made to the judicial practice of favoring the insured with "interpretations" of the terms and provisions of the policy, especially those, like the appraisal provision, having post-loss application. *Supra* 11 *MIAMI L.Q.* 42 (1956).

In most instances of "waiver" the words and actions are committed after loss and before the commencement of the insured's action to collect. They are committed by the adjuster or other representative (such as an appointee as appraiser) brought into the case by the insurer.

Neither the anti-waiver provisions of the policy nor a separate, post-loss, non-waiver agreement is controlling with respect to the consequences of the course of conduct of these representatives. See *Bankers Fire & Marine Ins. Co. v. Draper*, 242 Ala. 6001, 7 So.2d 299 (1942); *Great American Ins. Co. v. Scott*, 89 Colo. 99, 299 Pac. 1051 (1931); *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 65 Atl. 134 (1906) (also discussing the kinship of these waivers and estoppels). See also, *Oakes v. Pine Tree State Ins. Co.*, 112 Me. 52, 90 Atl. 707 (1914).

105. These matters of waiver may be advanced by the insured under general allegations of performance on his part—the matters need not be pleaded specially. *Great American Ins. Co. v. Scott*, *supra* note 104; *Simmons v. Home Ins. Co.*, 235 Ill. App. 344 (1925); *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S.W. 207 (1893).

106. See, e.g., the course of events at trial as reported in *Chainless Cycle Mfg. Co. v. Security Ins. Co.*, 169 N.Y. 334, 62 N.E. 392 (1901); compare, *Alamo Casualty Co. v. Trafton*, 231 S.W.2d 474 (Tex. Civ. App. 1950); *Home Ins. Co. v. Turner*, —Miss.—, 91 So.2d 722 (1957).

107. See, e.g., *Chainless Cycle Mfg. Co. v. Security Ins. Co.*, *supra* note 106; *Lamson Consol. Store Serv. Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N.E. 943 (1898).

108. See, e.g., Foster's Study of the Missouri cases in his article, *Arbitration and Appraisals In the Missouri Courts*, 1954 *WASH. U.L.Q.* 49, 60, 62 (1954).

The making of the "waiver" in these cases has been an implementation of the judicial crusade to prevent the insurance contract from being made (by the insurer) "a trap for the unwary" (i. e., the insured).

The predominant thought in this connection appears to be that the "entrapment" of the insured is best prevented by displacing the appraisal provision. Alternatives have been considered only rarely. Quite clearly in various cases the alleged "entrapment" might as readily have been obviated otherwise.¹⁰⁹ This crusade antedates the standard policy and appraisal provision. It has continued unabated with respect to the provision in the standard contract as written by the legislature.

The judicial climate for the appraisal provision in these cases is quite at odds with that in the cases in which the courts first extricated the appraisal provision from the common law restriction against contracts which might oust the courts of their jurisdiction and ruled that the provision, when properly drafted, is irrevocable by action.

Waivers as ruled with respect to these appraisal provisions in insurance policies have very few companions in cases making "waiver" of provisions for appraisal in other commercial contracts or of provisions for valuations and price fixing as used in various commercial contracts, or of architect and engineer clauses in construction contracts, which have been held irrevocable by action. Arbitration provisions in commercial contracts and collective bargaining agreements which qualify under modern arbitration statutes making them irrevocable and enforceable also have escaped the judicial pursuit of "waiver" and the collateral litigation by which the irrevocable appraisal provision in insurance policies has been frustrated and generally displaced.¹¹⁰

While the cases developing the various grounds to defeat the plea of the appraisal provision and the litigation involved in determining their existence have rendered the provision in insurance contracts quite useless, it does not follow that it should be relegated to such futility. The decisions ruling on these issues and finding "waiver" or other grounds to defeat the provision cannot be said to confirm the superiority of litigation over appraisal to determine the amount of loss and damage when the parties disagree about it. One may conclude that appraisal probably would have been, in most cases, more expeditious and less expensive than litigating the matter. There have been expressions of judicial judgment to this effect. The Court of Appeals of Kentucky once commented upon the matter as follows:

109. Consult and compare, for example, *Tilley v. Connecticut Fire Ins. Co.*, 860 Va. 811, 11 S.E. 120 (1890) *re* reasons for the waiver charged against the insurer for waiting too long in claiming arbitration and the views on the same point in *Bratley v. Brotherhood of American Yeoman*, 159 Minn. 14, 198 N.W. 128 (1924).

110. Consult *In re Pahlberg Petition* 131 Fed. 968 (2d Cir. 1942); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942); *In re Utility Oil Corp.*, 69 F.2d 524 (2d Cir. 1934); *Matter of Lipman (Houser Shellac Co.)*, 289 N.Y. 76, 43 N.E.2d 817 (1943).

The arbitration clause in insurance policies issued upon personal property, if lived up to in the spirit that justifies their encouragement by law, is a serviceable method of settling the question of loss or damage. *While the facts are yet fresh, and the damaged articles are to be seen, it is reasonable to suppose that impartial men, familiar with the character and value of such goods in that community, can, by personal inspection, and by the use of their judgments and experience, more nearly come to a true valuation than any number of men not on the scene, inexperienced in every probability in the business of valuing such articles, trying to get at the values upon the testimony often of biased or incompetent or careless witnesses.*¹¹¹ (Italics supplied.)

At all events, it seems that if insurance companies are to be allowed, or *required* (as is true under standard policy legislation), to include the provision in their policies, it should be capable of more useful function than it now serves.

As previously indicated, in the course of the litigation in the cases involving "waiver," the courts frequently have emphasized that the appraisal provision is a one-sided affair designed for the benefit of the insurer. It is a one-sided affair in the sense that in most jurisdictions only the insurer can enforce it in any respect. The insurer can enforce it (absent "waiver") in the particular of staying or abating the insured's law suit pending the appraisal.

The insured has no remedy of enforcement; in most jurisdictions the insurer has no other remedy of enforcement. The insurer is free to invoke the provision (absent "waiver") or to forego it and stand trial on the amount of the loss and damage. Such was the situation after the provision was first ruled irrevocable and when the provision was written into the standard policy by the legislature. This still is the situation with respect to the provision under most standard policy legislation.

If more effective remedies of enforcement were to be accorded the parties, the courts might well abate their crusade to displace the provision and, instead, facilitate its enforcement. Remedies, *for both parties alike*, might well be organized along the lines of those provided in the more modern arbitration statutes making arbitration provisions which qualify thereunder irrevocable and enforceable. Remedial legislation will be necessary for it is doubtful indeed that the courts will grant such remedies unaided by statute. In this connection it may be noticed that the New York arbitration statute originally enacted in 1920 was subsequently amended to cover

111. *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 76 S.W. 22 (1903). Illustrative of the court's comments upon the ineptness of trial by jury to determine the amount of loss and damage, or the speculations in verdicts or trial court findings, or the bias, incompetence or carelessness of witnesses or some combination thereof, see *Abramowitz v. Continental Ins. Co.*, 170 Minn. 215, 212 N.W. 449 (1927); *Schwartzman v. Fire Ins. Co.*, 318 Mo. 1089, 2 S.W.2d 593 (1927); *Gilders v. Underwriters*, 91 Co. App. 231, 85 S.E.2d 499 (1954).

these appraisal provisions. Experience with this legislation and with other legislation whereby other enforcement remedies have been afforded in connection with these provisions, is reviewed in a later section.¹¹²

The following review of the cases dealing with "waiver" or other grounds to defeat the provision now under consideration probably would not be merited if it were only to verify the near uselessness of the appraisal provision in insurance policies as it has been wrought in the courts. It is deemed worthy, however, to scrutinize at least a variety of these grounds to indicate not only the expediency of remedial legislation to the end of making the provision more useful to both parties but also to indicate the existing backlog of "waivers" which any such legislation might inherit unless it were adequately disowned.

Same—Insured's Claim of "Total Loss."

Whenever the insured claims "total loss" the appraisal provision becomes frustrated or displaced by litigation upon the merits of that claim. Unless the insurer admits "total loss" the issue will go to trial, generally before the jury, upon proper instructions by the court as to the legal constituency of "total loss".¹¹³ The trial and determination of this claim will be had in the insured's action to collect on the policy. In the course of such litigation the efficacy of the appraisal provision has been tested and resolved in two general classes of cases—namely, those in which no valued-policy statute or stipulation was involved, and those in which such statute or stipulation was involved.

Given a "total loss" general questions upon the applicability of the appraisal provision have been posed from time to time as follows: What use can appraisal serve if there is total loss? What difference can there be over the *amount* of the loss if there is "total loss"?¹¹⁴

112. Also the British experience—in the meantime, reference should be made to *In the Matter of Selmar Box Co.*, 309 N.Y. 60, 127 N.E.2d 808 (1955).

113. See, e.g., *Oppenheimer v. Fireman's Fund Ins. Co.*, 119 Minn. 417, 138 N.W. 777 (1912).

114. These questions are discussed in *Stout v. Phoenix Assur. Co.*, 65 N.J. Eq. 566, 56 Atl. 691 (1904); *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S.E. 120 (1890). Consult also *Reilley v. Agricultural Ins. Co.*, 311 Ill. App. 562 (1941).

When the appraisal provision covered "damage to property not totally destroyed", as did some early appraisal provisions, it appears to have been easy to conclude that "total loss" was not covered. *Williams v. Hartford Ins. Co.*, 54 Cal. 442 (1880).

Two early New York cases also concluded that a provision covering the "amount of sound value and of damage" did not cover "total loss." Said the court in *Rosenwald v. Phenix Ins. Co.*, 50 Hum. 172 (N.Y. Sup. Ct. Gen. T. 1888):

It is quite clear that this provision can have no possible relation to a thing which has no existence; absolute destruction having distinguished the loss. If there had been any design to require arbitration where a total loss occurs, it is fair to presume that with the vigilance which marks the contracts made by the insurance companies it would have been set out in the policy.

See also, *Long v. Eagle Fire Co.*, 12 App. Div. 39, 42 N.Y.Supp. 539 (4th Dep't 1896). Compare *Littrell v. Allemania Fire Ins. Co.*, 222 App. Div. 302, 226 N.Y.Supp. 243 (3rd Dep't 1928).

Decisions involving the more modern appraisal provisions are nearly in accord that they are applicable to "total loss" as well as partial. In these cases no valued-policy stipulation or statute was involved.

In the New York case of *Littrell v. Allemannia Fire Ins. Co.*¹¹⁵ the court put the matter as follows:

The policy in the present case was issued October 19, 1925, pursuant to Section 121 of the Insurance Law (added by Laws 1917, c. 440, and amended by Laws 1922, c. 268, and Laws 1923, c. 438) providing for a standard form of policy.

That statute specifically makes the appraisal provisions in the standard policy apply to 'lost or damaged property,' and requires the appraisers or appraiser and umpire to ascertain the 'amount of said loss or damage' in respect to the property. We think the words 'loss' and 'damage' were designedly used to indicate a distinction in respect to property entirely or partially destroyed. The policy in this case carries out the intent of the statute and makes the same distinction between 'loss' and 'damage.' The word 'loss' implies that the property is no longer in existence, whereas the word 'damage' implies that it still exists although in damaged form No good reason exists why there should be a distinction in respect to property totally or partially destroyed. The appraisers can make the appropriate estimates in one case as well as in the other, and we think such is the intent of the statute and the policy issued pursuant thereto.¹¹⁶

Under valued-policy statutes the appraisal provision has been held inapplicable to "total loss". In the event of "total loss" the insurer is bound like a debtor to pay the value stated in the policy; that figure is, by the statute, the amount to be paid whether the dollar amount of the loss is more or less. Accordingly, appraisal can serve no useful purpose.

115. 222 App. Div. 302, 226 N.Y.Supp. 243 (3rd Dep't 1928). The court looked askance at the two earlier New York cases cited above, *supra* note 114.

116. *Accord*:

U.S. Williamson v. Liverpool Ins. Co., 122 Fed. 59 (8 Cir. 1903) (award of amount as for total loss authorized under appraisal provision).

Iowa. Adams v. New York Bowery Ins. Co., 5 Iowa 6, 51 N.W. 1149 (1892) (submission and award under the provision must cover "all loss or damage to the property insured, whether total or partial").

La. Hart v. Springfield Fire & Marine Ins. Co., 136 La. 114, 66 So. 558 (1914).

Mich. Chippewa Lumber Co. v. Phoenix Ins. Co., 80 Mich. 116, 44 N.W. 1055 (1890).

Minn. Gasser v. Sun Fire Office, 42 Minn. 315, 44 N.W. 252 (1890); but see, *Oppenheimer v. Fireman's Fund Ins. Co.*, 119 Minn. 417, 138 N.W. 777 (1912).

Miss. See *Scottish Union & National Ins. Co. v. Skaggs*, 114 Miss. 618, 75 So. 437 (1917).

N.J. Stout v. Phoenix Assur. Co., 65 N.J. Eq. 566, 56 Atl. 691 (1904) (award of an amount for total loss authorized under appraisal provision).

Said the Court:

The form of the clause seems to be broad enough to include an appraisement for all loss, for its language is that, in the event of disagreement as to the amount of loss (clearly all the loss), the same shall be ascertained by two competent and disinterested appraisers.

Nor can the appraisal provision be invoked pending determination of the issue whether the loss was "total" or only "partial" to defeat the trial of that issue.

The Court of Appeals of Kentucky stated the prevailing view on this matter:

Counsel [for the insurer] insists that until the extent of the damage or loss was ascertained it could not be known whether the loss was total, or partial only; that if it was but partial, then the arbitration feature of the contract clearly, and under all the authorities, applied. That the parties might have submitted the question of the extent of damage or loss to arbitrators in the case, we do not doubt. Their award, though, in our opinion, could have been used as a basis of the settlement only in event the loss was partial. If it was total, no matter what may have been the value of the building (in the absence of fraud mentioned in the statute), the liability of the insurer was fixed at the sum named in the face of the policy; and the agreement to submit that question to arbitration, being without consideration, and being contrary to the policy of the law as embodied in Section 700, Ky. St. [the valued-policy statute] was not binding on the insured. The only one who took any risk by refusing the arbitration was the insured, for if the loss turned out to be only partial, then, without a fulfillment of the condition precedent (and it not being waived) appellee could have recovered nothing. Appellee [the insured] took the burden and the risk of maintaining that the loss was total.¹¹⁷

The insured can maintain his action as for total loss although the parties already have actually engaged in an appraisal under the appraisal provision and although an award has been returned as for a partial loss and for a sum less than the amount stated in the policy. No such

117. *Hartford Fire Ins. Co. v. Bourbon County Court*, 115 Ky. 109, 72 S.W. 739 (1903); see also *Royal Ins. Co. v. Ward*, 252 Ky. 687, 68 S.W.2d 9 (1934).

Accord:

La. Hart v. North British and Mercantile Ins. Co., 182 La. 551, 162 So. 177 (1935).
Minn. Cohage v. Union Ins. Co., 82 Minn. 426, 85 N.W. 212 (1901); see also, *Oppenheimer v. Fireman's Fund Ins. Co.*, 119 Minn. 417, 138 N.W. 777 (1912).

Mo. Stevens v. Norwich Union Fire Ins. Co., 120 Mo. App. 88, 96 S.W. 684 (1906); *O'Keefe v. Liverpool Ins. Co.*, 140 Mo. 558, 41 S.W. 922 (1897); *Jacobs v. North British and Mercantile Ins. Co.*, 61 Mo. App. 572 (1895).

Ohio. Queens Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N.E. 1072 (1890).

Okla. Springfield Fire & Marine Ins. Co. v. Homewood, 32 Okla. 521, 122 Pac. 196 (1912).

Texas. Republic Ins. Co. v. Hale, 69 S.W.2d 482 (Tex. Civ. App. 1934); *Export Ins. Co. v. Axe*, 36 S.W.2d 572 (Tex. Civ. App. 1931); *Aff'd Export Ins. Co. v. Axe*, 58 S.W.2d 39 (Comm. of App. 1933); *American Cent. Ins. Co. v. Terry*, 15 S.W.2d 81 (Tex. Civ. App. 1929); *Aff'd 26 S.W.2d 162* (Comm. of App. 1930); *National Fire Ins. Co. v. House* 298 S.W. 658 (Tex. Civ. App. 1917).

W. Va. Nicholas v. Granite State Fire Ins. Co., 125 W.Va. 349, 24 S.E.2d 280 (1942).

And certainly the courts on appeal will not review the evidence with disfavor for the plaintiff's case. "Because the verdict of the jury [of total loss] was in plaintiff's favor, it is proper that the evidence be reviewed in the light most favorable to plaintiff's theory of the case." *Nicholas v. Granite State Fire Ins. Co.*, *supra*. See further, *United State Fire Ins. Co. v. Boswell*, 82 S.W.2d 176 (Tex. Civ. App. 1935); *Eck v. Netherlands Ins. Co.*, 203 Wis. 515, 234 N.W. 718 (1931).

course of conduct constitutes a waiver of the rights of the insured to collect according to the valued-policy statute.

Said the Supreme Court of Wisconsin in such a case:¹¹⁸

The parties submitted the question of the amount of loss on the buildings to arbitrators, pursuant to a stipulation contained in the policy, and the arbitrators awarded the same at a sum which would make the liability of the company \$682 less than it would be if the policy is enforced under the statute. It is claimed that the submission is a waiver of the benefits of the statute, and that the defendant's liability is limited by the award. This proposition was negatived by this court in *Thompson v. Insurance Co.* [45 Wis. 389]¹¹⁹

If the insured shall have guessed wrong, it being finally adjudged on the evidence that the loss was only partial, then appraisal there must be as indicated in the above opinion of the Court of Appeals of Kentucky—unless, of course, the insurer shall have "waived" its rights to it.¹²⁰ If there shall have been an earlier appraisal and award, the award will fix the amount of the insured's recovery in such case, there being no cause otherwise to set it aside.¹²¹

Same—Insurer's "Denial of Liability"—Refusal to Pay Anything.

There is near consensus among the decisions that when the insurer denies liability on the policy it thereby "waives" its rights under the appraisal provision.¹²²

In some of the reported cases it is not clear when the denial took place; in a few it is clear that it was first made in the insurer's answer to the insured's action to collect on the policy; in the others it is apparent, or readily inferred, that it was made after loss and before commencement of the in-

118. *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, 41 N.W. 443 (1889). *Accord*, *Eck v. Netherlands Ins. Co.*, 203 Wis. 515, 234 N.W. 718 (1931).

119. *Accord*:

Del. Mondzelewski v. Fidelity and Guaranty Ins. Corp., 48 Del. 441, 105 A.2d 787 (1954).

Ky. Merchant's Ins. Co. v. Stephens, 59 S.W. 511 (Ky. 1900); and see *Hartford Fire Ins. Co. v. Bourbon County Court*, 115 Ky. 109, 72 S.W. 739 (1903).

Miss. Yorkshire Ins. Co. v. Brewer, 175 Miss. 538, 166 So. 361 (1936); See *Franklin Fire Ins. Co. v. Brewer*, 173 Miss. 317, 159 So. 545 (1935).

Mo. Baker v. Phoenix Assur. Co., 57 Mo. App. 559 (1894); *Prather v. Connecticut Fire Ins. Co.*, 188 Mo. App. 653, 176 S.W. 527 (1915). *Compare Harmon v. Stuyvesant Ins. Co.*, 170 Mo. App. 309, 156 S.W. 87 (1913).

Neb. German Ins. Co. v. Eddy, 36 Neb. 461, 54 S.W. 856 (1893).

N.Y. See Lee v. Hamilton Fire Ins. Co., 130 Misc. 165, 223 N.Y.Supp. 441 (Sup. Ct. 1927) (valued policy by the terms of policy; not by statute.); *aff'd.*, by 4 to 3 decision, 251 N.Y. 230, 167 N.E. 426 (1929); Note 14 MINN. L. REV. 301 (1929-30).

Texas. United States Fire Ins. Co. v. Boswell, 82 S.W. 2d 176 (Tex. Civ. App. 1935).

W. Va. Hinkle v. North River Ins. Co., 70 W. Va. 681, 75 S.E. 54 (1912).

120. *Goldstein v. National Fire Ins. Co.*, 106 Wash. 346, 180 Pac. 409 (1919).

121. *Mondzelewski v. Fidelity and Guaranty Ins. Corp.*, 48 Del. 441, 105 A.2d 787 (1954); *Yorkshire Ins. Co. v. Brewer*, 175 Miss. 538, 166 So. 361 (1936); *Gouin v. Northwestern Nat'l Ins. Co.*, 145 Wash. 199, 259 Pac. 387 (1927).

122. The cases are collected and summarized in an Annotation, 3 A.L.R. 2d 407-416.

sured's action. In some cases it has appeared both before the action and in the insurer's answer.¹²³

While the term "denial of liability" is most frequently used in these cases, the "waiver" is likewise applied to the insurer's refusal to pay. Waiver drawn from the insurer's "denial of liability" is as readily derived from any other set of words or action by the insurer indicating to the insured its refusal to pay anything on the policy.¹²⁴ It is not of any substantial significance in fixing the waiver in either case that the insurer did not give any reason for its denial or refusal.¹²⁵

And so, when the adjuster or other representative covering the case for the insurer reports to the insured: "You will not get a cent,"¹²⁶ or "You burned the property and we will not pay you until we pay you at the end of the Supreme Court,"¹²⁷ or "No, I ain't going to pay you any money till you go into court and fight us—go ahead and sue,"¹²⁸ or "You go to a lawyer and give him the case to sue because the company refused absolutely to pay,"¹²⁹ or "The company would not pay and if you want

123. Rarely has the matter been resolved on the pleadings. It has happened, however. See *Bailey v. Actna Ins. Co.*, 77 Wis. 336, 46 N.W. 440 (1890) (adjudication made on insurer's demurrer to insured's complaint to collect on policy; demurrer denied).

124. It seems clear that when there is uncertainty as to what was meant by insurer's words or actions, the insured's interpretation will count most in determining whether or not the insurer denied liability. Apparently the insured is a competent witness on the point; and generally the jury will make the final decision on the basis of the insured's understanding. See *In re Insurance Co. v. Baker*, 84 Colo. 53, 268 Pac. 585 (1928); *Rott v. Westchester Fire Ins. Co.*, 218 Mich. 576, 188 N.W. 334 (1922); *Seigle & Son v. Badger Lumber Co.*, 106 Mo. App. 110, 80 S.W. 4 (1904); *Lamson Consol. Store Serv. Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N.E. 943 (1898). *Consult*, *City of Fall River v. Aetna Ins. Co.*, 219 Mass. 454, 107 N.E. 367 (1914).

When there is conflicting testimony as to what the insurer's representative reported to the insured but the insured's version makes for denial of liability or refusal to pay, the jury is likely to accept his version. It is certain that such a verdict will be sustained. This is true even when the insurer's representative testifies in rebuttal of the insured's version of what he (the representative) said and did. See *Springfield Fire & Marine Ins. Co. v. Shapoff*, 179 Ky. 804, 201 S.W. 116 (1918); *Rott v. Westchester Fire Ins. Co.*, *supra*; *Hamberg v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 335, 71 N.W. 388 (1897); *Rimmer v. Aachen & Munich Fire Ins. Co.*, 82 Atl. 1060 (R.I. 1912).

125. When preliminary investigations and discussions over the loss are shown to have come to a stop, evidence indicating that the insurer gave the insured the "silent treatment" re settlement of his claim is competent and sufficient evidence of waiver; a verdict of waiver is certain to be sustained. *Lamson Consol. Store Serv. Co. v. Prudential Fire Ins. Co.*, *supra* note 124; *Ball v. Royal Ins. Co.*, 129 Mo. App. 34, 107 S.W. 1097 (1908). See also *Phoenix Ins. Co. v. Stokes*, 149 Ill. 319, 36 N.E. 408 (1893) (insurer's advices to the insured about settlement being couched in equivocal expressions (as to the "integrity of the loss") plus procrastination in closing the case, constituted waiver for want of "bona fide" disclosure by insurer of its grounds of defense against the policy).

126. *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 65 Atl. 134 (1906); *Seigle v. Badger Lumber Co.*, 106 Mo. App. 110, 80 S.W. 4 (1904); *Johnstone v. Home Ins. Co.*, 34 S.W.2d 1029 (1931); *Lang v. Eagle Fire Co.*, 12 App. Div. 39, 42 N.Y.Supp. 539 (4th Dep't 1896); *Connecticut Fire Ins. Co. v. Hilbrant*, 73 S.W. 558 (Tex. Civ. App. 1903).

127. *Glens Falls Ins. Co. v. Hite*, 83 Ill. App. 549 (1899).

128. *Hamberg v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 335, 71 N.W. 388 (1897).

129. *Cheshansky v. Merchants' Fire Ins. Co.*, 102 N.J.L. 414, 131 Atl. 910 (1926).

the money you will have to sue for it,"¹³⁰ or "The company would not do a damn thing,"¹³¹ or reports of like tenor,¹³² the insurer is as deep into "waiver" of its rights under the appraisal provision as if the representative had reported its "denial of liability" with or without adding explanation of why.

In some of the cases involving the make-up for this waiver the post-loss negotiations and communications between the parties have lent themselves to alternative versions as follows: Was the insurer's denial of liability or refusal to pay an unqualified refusal to pay anything, or was it, instead, limited to being a refusal to pay the amount which the insured claimed but in a tenor of willingness to work out with the insured the fair amount of the loss? Action of the latter version is permissible under the appraisal provision. Any substantial evidence on behalf of the insured, however, indicates the first version is sufficient to take the issue of "waiver" to the jury.¹³³ Any substantial evidence on behalf of the insured that the parties' failure to agree on the amount, accrued with, or through, an offer by the insurer of a certain sum on a take-it-or-go-without basis, or on a take-it-or-go-and-sue basis is sure to spell the "waiver" now under consideration.¹³⁴

The identification and evaluation of the insurer's denial of liability or refusal to pay as being "waiver" also become involved when the insurer assigns a reason for its refusal. It may refuse to pay anything or it may offer to pay only a limited amount for one or more declared reasons. Thus, in an Alabama case the insurer refused to pay any amount because,

130. *Harwood v. United State Fire Ins. Co.*, 136 Me. 233, 7 A.2d 899 (1939); *Evens v. Farmers' Reliance Co.*, 110 N.J.L. 159, 164 Atl. 258 (1933).

131. *Callahan v. London Ins. Co.*, 98 Misc. 589, 163 N.Y.Supp. 322 (1st Dep't 1917).

132. See *Harwood v. United States Fire Ins. Co.*, 136 Me. 223, 7 A. 2d 899 (1930); *Jewett v. Quincy Mut. Fire Ins. Co.*, 125 Me. 234, 132 Atl. 523 (1926); *Maki v. Commonwealth Ins. Co.*, 232 Mich. 295, 205 N.W. 83 (1925); *Concordia Fire Ins. Co. v. Barkett*, 110 Okla. 177, 236 Pac. 890 (1925); *Connecticut Fire Ins. Co. v. Hilbrant*, 73 S.W. 558 (Tex. Civ. App. 1903).

133. *Lamson Consol. Store Serv. Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N.E. 943 (1898); *Rott v. Westchester Fire Ins. Co.*, 218 Mich. 576, 188 N.W. 334 (1922). Compare *Pollina v. State Mut. Rodded Fire Ins. Co.*, 249 Mich. 121, 227 N.W. 765 (1929); *Hartford Fire Ins. Co. v. Conner*, 223 Miss. 799, 79 So.2d 236 (1955). See also *Rimmer v. Aachen & Munich Fire Ins. Co.*, 82 Atl. 1060 (R.I. 1912).

134. *Rott v. Westchester Fire Ins. Co.*, 218 Mich. 576, 188 N.W. 334 (1922); *Maki v. Commonwealth Ins. Co.*, 232 Mich. 295, 205 N.W. 83 (1925); *Cullen v. Insurance Co.*, 126 Mo. App. 412, 104 S.W. 117 (1907); *Concordia Fire Ins. Co. v. Barkett*, 110 Okla. 177, 236 Pac. 890. See also *Shook v. Retail Hardware Mut. Fire Ins. Co.*, 154 Mo. App. 394, 134 S.W. 589 (1911). See further, *Dantel v. Pennsylvania Ins. Co.*, 65 Mo. App. 44 (offer of settlement once made was later withdrawn).

That the posing of these alternative versions invites refinements in distinguishing between a take-it-or-go-without offer working the waiver and "an attempt in good faith to agree with the plaintiff" on the amount of loss with no "arbitrary refusal to try to agree", see *James v. Insurance Co.*, 135 Mo. App. 247, 115 S.W. 478 (1909).

Compare with the foregoing cases the following in which the denial or refusal to pay above a certain amount was deemed ineffective as waiver; *Chambers v. Home Insurance Co.*, 241 Ala. 20, 1 So.2d 15 (1941); *Pollina v. State Mut. Rodded Fire Ins. Co.*, 249 Mich. 121, 227 N.W. 765 (1929); *Hartford Fire Ins. Co. v. Conner*, 79 So.2d 236 (Miss. 1955).

according to its claim, nothing was due the insured after paying his mortgagee. The court ruled that this was not a waiver. Said the Court:

"Such denial [as constitutes waiver] must in general be upon the basis of the invalidity of the contract, its want of coverage, or forfeiture on account of a breach of some stipulation or warranty in the policy."¹³⁵

On the other hand, the Maine and Missouri courts ruled that when the insurer denied all liability or refused to pay anything on the ground, as it claimed, that the loss occurred from a cause not covered by the policy, there was an "unqualified denial" and waiver.¹³⁶ Thus, in the Missouri case, the insurer claimed that cattle covered against lightning were not killed by lightning. Said the Missouri Court of Appeals:

If this "was not a denial of all liability under its contract, it would be hard to conceive what would amount to such a denial, unless we accept defendant's idea that it must be a denial of the validity of the contract itself. But no such meaning was ever attached to the language before, according to our understanding, and we do not think it can be found in the books—*reductio ad absurdum*."^{136a}

The latter view also has prevailed in cases wherein the insurer denied liability to pay for part of the property for which the insured had made claim on the ground that the policy did not cover that property.¹³⁷

Several different explanations have been advanced by the courts in support of the "waivers" now under consideration. Some have been more popular than others; some have been contradicted. These explanations may be sorted into classes about as follows: (1) Those which declare that the denial or refusal renders the appraisal *futile*; (2) those which indicate that there is fatal *inconsistency* between the demand for appraisal and the denial of liability; and (3) those which indicate that the insurer, by denying liability thereby *repudiates its obligation to make "bona fide" effort to agree with the insured and settle the amount of loss*.

There also is the view, not dependent upon "waiver", that *the appraisal provision does not cover issues raised by the denial of liability*;

135. *Chambers v. Home Ins. Co.*, 241 Ala. 20, 1 So.2d 15 (1941). But see, *contra*, *Moore v. Sun. Ins. Office*, 100 Minn. 374, 111 N.W. 260 (1907). Compare *Bankers Fire & Marine Ins. Co. v. Draper*, 242 Ala. 601, 7 So.2d 299 (1942).

136. *Jewett v. Quincy Mut. Fire Ins. Co.*, 125 Me. 234, 132 Atl. 523 (1926); *White v. Farmers' Mut. Fire Ins. Co.*, 97 Mo. App. 590, 71 S.W. 707 (1903). Consult also, *Insurance Co. v. Baker*, 84 Colo. 53, 268 Pac. 585 (1928) (insurer claimed insured had *no loss* in any amount); *Mechanics Ins. Co. v. Hodge*, 149 Ill. 298, 37 N.E. 51 (1894); *Harowitz v. Concordia Fire Ins. Co.*, 129 Tenn. 691, 168 S.W. 163 (1914) (claim that the damage resulted from water and not covered by fire policy).

136a. *White v. Farmers' Mut. Fire Ins. Co.*, 97 Mo. App. 590, 597-8, 71 S.W. 707, 709 (1903).

137. *Ovavez v. Patrons' Mut. Fire Ins. Co.*, 233 Mich. 305, 206 N.W. 503 (1925). Compare *Pollina State Mut. Rodded Fire Ins. Co.*, 249 Mich. 121, 227 N.W. 765 (1929). To like effect, *Westfield Cigar Co. v. Insurance Co.*, 169 Mass. 382, 47 N.E. 1026 (1897). See also, *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 175 Minn. 73, 220 N.W. 425 (1928).

that it can be pleaded only against the trial of issues as to the amount of loss or damage.

(1) *The futility.* The futility of appraisal in these cases is voiced as follows: Upon the insurer's denial or refusal "there is nothing left to arbitrate"; that appraisal in such cases would be "an idle and useless ceremony"; and, in similar vein, "no difference of opinion touching the amount of loss could arise where all liability was denied."¹³⁸ Explanations of this tenor appear to be the most prevalent. They do not seem persuasive. This is true because, in the first place, the issues raised by the insurer's defenses against the policy generally are distinct and separate from any issue as to the amount of loss and damage or its determination pursuant to the terms of the policy.¹³⁹ Generally these issues look only to a declaratory adjudication of liability or nonliability regardless of any amount. In the second place, only if the insurer wins on its defense against the policy does consideration of the amount of the loss and damage pass from the parties' concern. If the insurer loses (and the recorded cases indicate that this is likely) the amount of loss and damage will come up for determination either by the jury in the same action, or by appraisal.¹⁴⁰ In these instances appraisal may not be relegated to the role of an idle or useless ceremony. Accordingly, at best, this explanation must rest upon the hypothesis that the insurer will win on its defense against the policy. But the explanation has not been restricted to the instances in which the insurer wins. If it were, it would be a rather vain thing to talk about—and even more so to advance as support for the waiver as ruled in the cases now under consideration.

(2) *The inconsistency.* Some of the opinions indicate that denial of liability and plea of the appraisal provision are, in some general way,

138. *Cal.* Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23 Pac. 769 (1890).

Colo. Insurance Co. v. Baker, 84 Colo. 53, 268 Pac. 585 (1928).

Ill. Retail Merchants Ass'n Mut. Fire Ins. Co. v. Cox, 138 Ill. App. 14 (1907).

La. Baillie v. Western Assur. Co., 49 La. Ann. 658, 21 So. 736 (1897).

Maine. Harwood v. United States Fire Ins. Co., 136 Me. 223, 7 A.2d 899 (1939);

Oakes v. Pine Tree State Mut. Fire Ins. Co., 112 Me. 52, 90 Alt. 707 (1914) ("the law will not require the useless and expensive formality of an arbitration when the insurer, for whose benefit it was provided, has rendered it superfluous").

Minn. Page v. Rolling Stone Fire Ins. Co., 166 Minn. 74, 207 N.W. 24 (1926); *Cash v. Concordia Fire Ins. Co.*, 111 Minn. 162, 126 N.W. 524 (1910).

Miss. Mississippi Fire Ins. Co. v. Dixon, 133 Miss. 570, 98 So. 101 (1923), *but compare*, *Hartford Fire Ins. Co. v. Conner*, 223 Miss. 799, 79 So.2d 236 (1955).

Tenn. Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S.W. 1041 (1896).

139. Even if the insurer were to deny liability on the single ground of no loss—this is suggested by *Wainer v. Milford Mutual Fire Ins. Co.*, 153 Mass. 335, 26 N.E. 877 (1891), or on the grounds of no loss beyond a given sum, the determination of such issue would not necessarily resolve what is the total amount of the loss and damage figured according to the terms of the policy.

140. It is clear that the insured is not precluded by its "waiver" (its denial of liability or refusal to pay anything) from putting in issue the amount of loss and damage. *Maimes v. Automobile Ins. Co.*, 112 Misc. 656, 183 N.Y.Supp. 690 (Sup. Ct. 1920); *Gratz v. Insurance Co.*, 282 Pa. 224, 127 Atl. 620 (1925).

exclusive and inconsistent. In some cases the inconsistency appears to be derived from an assumption made at the time of ruling out the plea that the insurer's defense against the policy is good.¹⁴¹ It is difficult to make inconsistency out of this situation.

The inconsistency also has been based upon the view that "the insurer must admit liability to pay something before it can insist upon the insured's going through with what would be otherwise an idle and useless ceremony."¹⁴² It is doubted that there is any American decision ruling the precise point that the insurer must make such positive admission in order to qualify its demand for arbitration or its plea of the provision; and there is at least one case holding that such admission is not so required.¹⁴³ Allied with this general thesis are the observations that the insurer's demand for appraisal is a waiver of its defenses against the policy; that such demand is "a concession of its liability for some amount." The Supreme Court of Tennessee put the matter as follows:

"In many courts it has been held that such demand for appraisal is a *waiver of other defenses upon the part of the insurer*, notwithstanding the policy may provide that the award shall be binding only as to the amount of loss, and shall not decide the liability of the company under the policy. Upon reason it would seem that this result should follow, as it would only be a farce to adjust the amount of loss, when the company denied liability for any amount. *In such case the company has nothing to arbitrate and the amount of damages is a matter to be determined only after the preliminary questions of liability have been conceded or adjudged.*" (Italics supplied).

Taking this statement at its face value, it seems clear that there well may be something to arbitrate, namely, the amount of the loss and damage—"after the preliminary questions of liability have been conceded or adjudged." (Italics supplied to question what the Court could mean by these words in light of the first part of the opinion that the demand for appraisal is a *waiver of other defenses*).¹⁴⁴

This general idea of *inconsistency* between the demand and the denial also has been voiced in the vernacular of pleading problems. May the

141. See, e.g., the opinion in *Glens Falls Ins. Co. v. Hite*, 83 Ill. App. 549 (1899).

142. *Lang v. Eagle Fire Co.*, 12 App. Div. 39, 42 N.Y. Supp. 539 (4th Dep't 1896).

This idea that the insurer must admit liability for some amount before it can invoke the appraisal provision is voiced in comparatively few other opinions. See *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. 478 (1875); *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S.W. 1041 (1896); *Kahn v. Traders Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059 (1893).

143. *Western Assur. Co. v. Hall Bros.*, 120 Ala. 547, 24 So. 936 (1898). See also *Bryson v. American Eagle Fire Co.*, 132 Me. 172, 168 Atl. 715 (1933). Perhaps *New Amsterdam Cas. Co. v. Blackshear, Inc.*, 116 Fla. 289, 156 So. 695 (1934) should be understood as ruling the precise point that the positive admission must be made—there is quite clear language to that effect in the majority opinion.

144. *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S.W. 1041 (1896).

pleading of the two matters by the insurer involve fatally inconsistent defenses? The Supreme Court of Montana once advanced an answer in the affirmative saying that "insisting that arbitration should have been had to ascertain the amount of loss carries with it the implication that a contract of insurance existed; that defendant was liable in some amount; that merely an erroneous valuation of the property destroyed was made by the plaintiff; and that defendant would have cooperated in seeking an agreement as to the amount of loss, and concurred in such arbitration, if necessary. These implications are in direct antagonism to the main ground of defense set up, namely, that the alleged policy of insurance was not in force."¹⁴⁵

The Supreme Court of Ohio advanced a contrary opinion as to this "direct antagonism"—at least in its broad statement as set out in the foregoing Montana opinion. That Court observed as follows:

"A denial of ultimate liability is not necessarily a denial of the amount of the loss, and in many cases—perhaps in most cases—there is nothing inconsistent in demanding a compliance with the conditions agreed upon for ascertaining the amount of loss or damage, and at the same time insisting that there are legal defenses to any liability whatever The insurers have not deluded the insured into a failure to comply with the arbitration clause. On the contrary they have persistently kept it before the insured, and demanded compliance with it. Under our Code of Civil Procedure a defendant may set forth in his answer as many grounds of defense, counterclaim, or set-off as he may have, provided that they are so far consistent that they can be verified by oath without swearing falsely There is no inconsistency nor any implied falsehood in the insurer swearing that he believes that the insured set his store on fire, or that he violated the conditions of the policy as to the storage of kerosene, and at the same time and in the same answer swearing that the insured neglected or refused to arbitrate as to the amount of his loss, when the parties to the contract differed on that point."¹⁴⁶

This idea that the demand by the insurer for appraisal is a concession on its part of liability for some amount appears to have only limited sponsorship in the opinions. See *Harowitz v. Fire Ins. Co.*, 129 Tenn. 691, 168 S.W. 163 (1914) (expressly relying on the *Hickerson* case, *supra*; also *Gulf Compress Co. v. Insurance Co.*, 129 Tenn. 586, 167 S.W. 859 (1914); *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138, 66 N.W. 278 (1896) — quoted with approval in *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N.W. 125 (1896). In Nebraska these appraisal provisions have been held revocable at all events (i.e., regardless of "waiver") as attempts to "oust the courts of their jurisdiction."

See also *Mississippi Fire Ins. Co. v. Dixon*, 133 Miss. 570, 98 So. 101 (1923), but compare *Hartford Fire Ins. Co. v. Conner*, 223 Miss. 799, 79 So.2d 236 (1955).

145. *Savage v. Phoenix Ins. Co.*, 12 Mont. 458, 31 Pac. 66 (1892).

146. *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 55 N.E. 805 (1900). Consult also, *Pollina v. State Mut. Rodded Fire Ins. Co.*, 249 Mich. 121, 227 N.W. 765 (1929).

The general concept of *inconsistency* between the demand and the denial also is discarded by some authorities when the insurer's denial of liability occurs for the first time in its answer in the action brought by the insured to collect on the policy; it does not "waive" the insurer's rights under the appraisal provision, nor, it seems, prejudice its prior demand for appraisal.¹⁴⁷

It also has been held that when the parties had gone first to appraisal and award and then the insurer lost on its defense of no liability, the award fixed the amount of the insured's recovery. In so deciding the Supreme Court of Texas supported its ruling as follows:

"The policy in question, as outlined in the statement of the court of civil appeals, does not expressly provide that, in the event an appraisal is demanded, it shall be equivalent to an admission of liability, or that, if the liability be contested, the appraisal shall go for naught. On the contrary, it provides first that 'the loss shall be ascertained by appraisal,' without expressing any exception whatever, and then specially stipulates that 'any proceeding relative to the appraisal should not waive any of the conditions of the policy.' From the latter provision we think it is to be inferred that the parties contemplated that there might be an appraisal binding upon the parties, and at the same time a denial of liability on the ground of a breach of one or more of the conditions of the contract. There being no stipulation to the effect that the appraisal should be of no force in the event the company should contest its liability in a suit for the loss, the provision as to the appraisal was not waived by the terms of the policy; and since the appraisal did not in any manner embarrass the insured in prosecuting their suit to recover on the policy, and since whatever labor and expense which attended the appraisal could have been incurred if there was no contest of the right to recover, we think there was no waiver of the condition as to appraisal. *The amount of the loss being determined, there was one issue less to be tried, and to that extent the prosecution of the suit was less burdensome upon the plaintiffs by reason of the appraisal.*"¹⁴⁸ (Italics supplied).

(3) The insurer's denial or refusal to pay as a *repudiation of its obligation to make "bona fide" effort to agree with the insured and settle the amount of loss.* This idea appears to be embraced in the above quoted

147. Hartford Fire Ins. Co. v. Conner, 223 Miss. 799, 70 So.2d 236 (1955); Home Ins. Co. v. Turner Watts, ___Miss___, 91 So.2d 722 (1957); Murphy v. Mercantile Co., 61 Mo. App. 323 (1895); Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S.W. 757 (1904). But see Kahn v. Traders Ins. Co., 4 Wyo. 419, 34 Pac. 1059 (1893).

148. American Central Ins. Co. v. Bass, 90 Tex. 380, 38 S.W. 1119 (1897). Compare Pellicano v. Hartford Fire Ins. Co., 211 Minn. 314, 1 N.W.2d 354 (1941). Consult further, Pioneer Mfg. Co. v. Phoenix Ins. Co., 106 N.C. 28, 10 S.E. 1057 (1890) (denial by insurer after insured had refused insurer's request to arbitrate the amount of loss; held, no waiver).

opinion of the Montana Court, urging the "direct antagonism" between the implications of the insurer's demand for appraisal and its denial of liability. As quoted above, the demand for appraisal implies, among other things, "that defendant would have cooperated in seeking an agreement as to the amount of loss, and [have] concurred in such arbitration, if any."¹⁴⁹ The Supreme Court of Connecticut once put the matter somewhat more positively and glossed the insurer's denial with some sin as follows:

"The defendant, by its refusal to recognize any obligation, at once came under the condemnation of the law for not acting in good faith in carrying out the provisions of the policy to secure an adjustment, and justified a suit against it."¹⁵⁰

It is difficult indeed to find any basis for posing the unconditional and absolute implications of the demand for appraisal indicated by the Montana Court, or for imputing, even to a fire insurance corporation, a fault or want of "good faith" for putting a claimant, even the insured, to suit to validate his claim in the courts. It may be emphasized in this connection that the appraisal provision relates to differences over the amount of loss and damage. While the amount to be paid is always a significant concern of both parties in case of loss, the insurer may well believe that on the facts in the given case, as it sees them, the insured has breached important conditions or warranties on his part, or that he burned the property for the insurance money, or that he was intentionally deceiving in inducing the coverage so as to have no just or valid claim on the policy. Denial of liability on the policy on any such grounds raises issues outside the purport of the appraisal provision. By the same token it is difficult to give the denial any such effect in such instances as to bring down the "condemnation of the law for not acting in good faith" upon the insurer.

Concerning the view that the appraisal provision *does not cover issues raised by the denial or refusal to pay*: This explanation alone is given in the recent case of *Home Ins. Co. v. Scott* by the Circuit Court of Appeals, to defeat the plea of the provision.¹⁵¹ Said the Court:

149. To like effect see *Bass v. Farmers Mut. Protective Fire Ins. Co.*, 21 Cal. App. 2d 21, 68 P.2d 302 (1937); *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 76 N.E. 977 (1906).

150. *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 65 Atl. 134 (1906).

Like notion was once voiced by Lord Haldane, L.C., in the House of Lords. He declared that the insurer by making defense against the policy (for alleged fraud and arson by the insured) committed a "repudiation"; that it went "to the substance of the whole contract"; and that it abrogated the whole policy contract, including the appraisal provision therein. So, the provision could not be pleaded against the action. *Jureidini v. National British Ins. Co.*, 1915 A.C. 499, 1915 D. Ann. Cas. 327 (1915). But see this case further, *infra*, note 155.

151. 46 F.2d 10, (6th Cir. 1930). The case was reversed on grounds not involving this matter in 284 U.S. 177 (1931).

"The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not the amount of loss. The question to be arbitrated was therefore never reached, and defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained."¹⁵²

This explanation for ruling out the insurer's plea of the appraisal provision in these cases seems more substantial than the others. It is readily verified by the terms fixing the coverage of the provision. Except in rare instances¹⁵³ the provision was limited in the earlier policies, and is limited in the current standard policy forms, to differences over the amount of loss and damage. This limited coverage has been recognized and emphasized especially in the cases ruling its irrevocability.¹⁵⁴ Its limited coverage and its tie-in with a clause to the effect that the award "shall not decide the liability of the company" and with a "no action" clause to the effect that, in event of difference over the amount of loss and damage, no action shall lie to prove and collect any amount on the policy except that determined by appraisal and award, constituted the basis upon which the British and American courts first extricated the provision from the common law tradition of revocability.

The plea of the provision in the cases now under consideration would disregard the foregoing conditions upon which irrevocability is based. It misconceives the scope of the provision. It would use the provision to stay or abate the insured's action in which the issues as raised in the insurer's answer do not involve the determination of the parties' difference over the amount of loss and damage and do involve a determination as to its liability on the policy regardless of any amount of loss or damage.

152. *Accord*: *Robinson v. National Fraternal League*, 81 Conn. 707, 71 Atl. 1096 (1909); *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N.W. 504 (1881); *Bailey v. Aetna Ins. Co.*, 77 Wis. 336, 46 N.W. 440 (1890).

Similarly, the award covers only the amount of loss and damage — not the issue of liability. *Stockton Works v. Glens Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633 (1893); *Hogadone v. Grange Mut. Fire Ins. Co.*, 133 Mich. 339, 94 N.W. 1045 (1903). *Itasca Paper Co. v. Niagara Falls Ins. Co.*, 175 Minn. 73, 220 N.W. 425 (1928); *Salganik v. United States Fire Ins. Co.*, 80 N.H. 450, 118 Atl. 815 (1922).

It also has been held that an action to collect the amount of an award is necessarily and properly based on the policy (and its validity) and the award — not upon the award alone. *British American Assur. Co. v. Darragh*, 128 Fed. 890 (5th Cir. 1904); *Stockton Works v. Glens Falls Ins. Co.* *supra*; *Soars v. Home Ins. Co.* 140 Mass 345, 5 N.E. 149 (1885). See also, the Minnesota cases cited, *infra*, note 157.

153. See *Jackson v. State Mut. Rodded Fire Ins. Co.*, 217 Mich. 301, 186 N.W. 514 (1922); also cases cited, *supra*, notes 104 and 105.

154. It also is made apparent when the provision is compared with the arbitration provisions in current usage. The latter generally embrace "any dispute" arising out of or in connection with the container contract.

In the light of these considerations it is surprising to find that the foregoing explanation in *Home Ins. Co. v. Scott* has not been used more widely in ruling against the insurer's plea in the cases at hand.¹⁵⁵

One further consideration arises in this connection. In ruling out the plea of the provision in these cases the courts generally have pronounced the denial or refusal by the insurer as constituting, as of the time it was uttered, a "waiver" of the insurer's rights under the provision. Of course, whether the plea is defeated on the ground stated in the *Home Ins. Co.* case, or on the ground of "waiver," the result is the same. But the rationale of ruling out the plea is of more importance. If the insurer were to include among its pleas a plea of the provision so framed as to claim appraisal conditionally, then in the event that the insurer's defense against the policy failed, the plea should prevail. The rationale of the *Home Ins. Co.* case would permit this more readily than the "waiver" view. It seems that such a plea of the provision should be sustained.¹⁵⁶

It is interesting to note that when the parties, insured and insurer alike, are accorded remedy for positive enforcement of the appraisal pro-

155. In the light of this conclusion there seems to be no worthy basis to sustain the plea even though the denial or refusal is first voiced in the insurer's answer to the insured's action. The cases relying upon this timing of the denial to sustain the plea are cited, *supra*, note 147.

As pointed out above, *supra* note 150, the House of Lords, through Lord Haldane, L.C., once identified the insurer's defense against the policy (fraud and arson by the plaintiff) as a "repudiation" of the policy, including the appraisal provision therein. Accordingly, it sustained the lower court's denial of the insurer's plea of the appraisal provision (covering as it did differences over the amount of loss and damage). The insurer pleaded it along with the above defenses in bar of the insured's action. It was Lord Haldane's opinion that the insurer's plea of arson and fraud by the insured constituted "a repudiation on the part of the respondents [insurers] of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. [Lord Haldane knew at this time, and had reported the fact, that the jury had found against the insurer on these defenses]. But one of the benefits is the right to go to arbitration, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the Courts; and accordingly that is one of the things which the appellants [insurers] have, according to the respondents [insured], forfeited with every other benefit under the contract.

"Now, my Lords, speaking for myself, when there is a *repudiation which goes to the substance of the whole contract* I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced." (Italics supplied to question what the words might mean) *Jureidini v. National British Ins. Co.*, 1915 A.C. 499, 1915 D. Ann. Cas. 327 (1915).

It seems difficult to imagine a more fanciful indulgence in semantics in order to deny the effect of the plea of the arbitration provision to defeat the insured's action to gain the favorable verdict which it did.

It will be noted that at least two of the Lords were not taken by Lord Haldane's exploitation of "repudiation". They concurred in denying the plea of the provision only on the ground that the appraisal provision, limited as it was to differences over loss and damage, did not cover the issues raised; that accordingly the provision could not be pleaded in bar of the insured's action.

Twenty-seven years later the House of Lords found it proper finally to discard both the make-up and the effect of the "repudiation" as accomplished by Lord Haldane. *Heyman v. Darwins Ltd.*, 1942 A.C. 356 (1942).

156. It is interesting in this connection to note the observations of Lord Dnedin in *Jureidini v. National British Ins. Co.* *supra*, note 155. While concurring in the foregoing determination of Lord Haldane in denying the insurer's plea of the appraisal provision, he also added this: "Personally I should rather like to reserve my opinion

vision, the insured has been allowed to use that remedy and gain an appraisal and an award of the amount of loss and damage notwithstanding denial of liability by the insurer. The Supreme Court of Minnesota so held under the appraisal provision in the standard policy of that state. It also indicated that, under like circumstances, the insurer would be accorded the remedy.¹⁵⁷

Same—Whether or Not the Insurer Did Its Part In Arranging For the Appraisal.

Once appraisal has been duly demanded the insurer must do its part in making the necessary arrangements for the appraisal.

The important first step in bringing on the appraisal is that of setting up the appraisal board. Under the more prevalent appraisal provision this is to be accomplished by each party selecting an appraiser and the two appraisers appointing an umpire.

If the insurer defaults with respect to these matters so that the appraisal is not accomplished, generally its rights under the appraisal provision are thereby "waived," and its plea of the provision fails. As in case of other "waivers," the insurer's default is the insured's excuse for maintaining his action to collect on the policy without appraisal.

It is frequently indicated in the opinions of the courts that it is the common duty of the two parties to accomplish these arrangements. In most of the pertinent cases, however, judicial inquiry has centered upon the course of conduct of the insurer more than upon that of the insured. In these cases the courts have determined the make-up of the insurer's general obligation with respect to these matters and prescribed the rules of trial procedure for determining the validity of a claim of "waiver" against the insurer in the given case.

As in other cases under review relating to waiver of the insurer's rights under the appraisal provision, only rarely has the determination been made "as a matter of law" either on the pleadings,¹⁵⁸ or otherwise.¹⁵⁹ Generally

as to what would have been the effect if the respondents [insurers], instead of pleading as they did, had pled this way: 'We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not', and had gone on to say, 'but in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration.' I should like to reserve my opinion on whether they might have said so with effect."

157. *Abramowitz v. Continental Ins. Co.*, 170 Minn. 215, 212 N.W. 449 (1927); *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 175 Minn. 73, 220 N.W. 425 (1928); *Orient Ins. Co. v. Shillet Co.*, 28 F.2d 968 (8th Cir. 1928). Compare the Minnesota cases cited, *supra*, note 138. Also, *Saba v. Homeland Ins. Co.*, 159 Ohio St. 237, 112 N.E.2d 1 (1953).

158. Of course the issue may be so presented and determined. See, e.g., *Western Assur. Co. v. Hall Bros.*, 143 Ala. 853, 38 So. 853 (1905) (decision on insured's demurrer to insurer's plea); *Provident Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N.E. 26 (1907) (decision on insurer's demurrer to insured's complaint; and on insurer's demurrer to insured's reply); *Vernon Ins. Co. v. Maitlen*, 158 Ind. 393, 63 N.E. 755 (1902) (decision on insurer's demurrer to insured's complaint).

159. Exceptional process is available under the Minnesota standard policy legislation to challenge and have adjudicated the qualifications of a nominee for appraiser or

the insured sues to collect on the policy; the insurer pleads non-compliance with the appraisal provision; and the insured, in his case, as upon reply, brings forward evidence of the insurer's conduct by way of excuse for no appraisal or award. This issue is tried along with the merits of the insured's claim to collect and the amount thereof. Generally the case is tried before a jury; the necessary constituency of waiver is determined by the court; whether or not the insurer did make a waiver in the given case is determined by the jury. Verdict of waiver against the insurer overcomes the plea of the provision and permits the insured to take judgment, if the validity of his claim is established, and for the amount of loss as determined by the jury.

The appellate courts review the adequacy of the evidence to go to the jury on the issue of "waiver" and the adequacy thereof to sustain a verdict. Generally the courts have ruled in favor of the adequacy for both purposes.¹⁶⁰ And so, as in other cases of claim to "waiver" by the insured, the appraisal provision is first put to trial by jury as to whether or not it has been "waived." It is further displaced for, on the assumption, as it were, that insured's claim to waiver will prove true, the amount of loss and damage also is sent to the jury.¹⁶¹

The general obligation of the insurer with respect to these preliminary arrangements has been written in broad and comprehensive terms. It must be diligent in its own performance of the appraisal provision which it has invoked by its plea. It is duty-bound to act in good faith to bring about the appraisal—and to bring it about promptly. Its refusal or neglect to do so is competent and sufficient evidence of "waiver." Its failure to act promptly and its unexplained delay permit "adverse inferences" of its

umpire. *American Central Ins. Co. v. District Court*, 125 Minn. 374, 147 N.W. 242 (1914); see also *Mowry & Payson v. Hanover Fire Ins. Co.*, 106 Me. 308, 76 Atl. 875 (1909) reported *infra*, note 186, 187.

160. Accordingly it is hazardous for a trial court to direct a verdict for the insurer on this issue or to direct a judgment for the insurer notwithstanding verdict. See *e.g.*, *Hall Bros. v. Western Assur. Co.*, 133 Ala. 637, 32 So. 257 (1901); *O'Rourke v. German Ins. Co.*, 96 Minn. 154, 104 N.W. 900 (1905); *Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 N.Y. 362, 4 N.E. 745 (1886). See also, *Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N.W. 650 (1915) (case tried to the court without jury; trial court found waiver; order of the court denying insurer's motion for judgment on the pleadings sustained on appeal. "We find" said the Court, "no sufficient reason for disapproving that conclusion"; this, although the Court also considered it "reasonably clear from the evidence that the jury might have found a verdict for the defendant [insurer].")

Compare *Western Assur. Co. v. Hall Bros.*, 120 Ala. 547, 24 So. 936 (1898); *Silver v. Western Assur. Co.*, 164 N.Y. 381, 58 N.E. 284 (1900); *Williams v. German Ins. Co.*, 90 App. Div. 413, 86 N.Y. Supp. 98 (4th Dep't 1904); *American Central Ins. Co. v. Terry*, 298 S.W. 658 (Tex. Civ. App. 1927). These cases are among the comparatively few American cases ruling the evidence insufficient to sustain a verdict of waiver against insurer. See also *Westenhaver v. German-American Ins. Co.*, 113 Iowa 726, 84 N.W. 717 (1900) (the court declaring that the "scintilla doctrine" has been abolished).

161. See, *e.g.*, cases cited *infra* note 170 and *Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N.W. 650 (1915).

purpose to squeeze the insured in his adversity or to pressure a compromise settlement.

The general admonition of the New York Court of Appeals in *Uhrig v. Williamsburg City Fire Ins. Co.*,¹⁶² in 1886, has been widely approved by other courts. Earle J. addressed the opinion of the Court toward "each party" as follows:

Under the arbitration clause, it was the duty of each party to act in good faith to accomplish the appraisal in the way provided in the policy, and if either party acted in bad faith so as to defeat the real object of the clause, it absolved the other party from compliance therewith; and if either party refused to go on with the arbitration, or to complete it, or to procure the appointment of an umpire so that there could be an agreement upon an appraisal, the other party was absolved. A claimant under such a policy cannot be tied up forever without his fault and against his will by an ineffectual arbitration.¹⁶³

In *Powers Dry Goods Co. v. Imperial Ins. Co.*¹⁶⁴ decided in 1892, the Supreme Court of Minnesota advanced a like view, relying upon the *Uhrig* opinion. It particularized a little more, however, the requirements of prompt action and cooperation with the insured, as follows:

One of the reasons for the insertion of provisions of this kind in policies of insurance is to provide a means for the speedy settlement and adjustment of the loss; and, as such a provision can only be carried into effect by the concurrent action of both parties, neither can, rightfully, refuse to act with reasonable promptness, when the other demands that such action be taken. Neither can rightfully postpone his concurrent action for the purpose of forcing the other to a settlement. If one in bad faith prevents or postpones unreasonably the carrying into effect of this stipulated method of adjusting the rights of the parties, by refusing to participate where his participation is necessary, he ought not to be heard to plead, in defense of an action to recover upon the contract, that the stipulated mode of adjustment has not been pursued.¹⁶⁵

162. 101 N.Y. 362, 4 N.E. 745 (1886). Compare *Silver v. Western Assur. Co.*, 164 N.Y. 381, 58 N.E. 284 (1900).

163. See to like effect, *Provident Wash. Ins. Co. v. Wolf*, 168 Ind. 690, 80 N.E. 26 (1907) and cases reviewed therein. Consult further, *Shapiro v. Mutual Fire Ins. Co.*, 219 Mich. 581, 189 N.W. 202 (1922).

164. 48 Minn. 380, 51 N.W. 123 (1892).

165. While, as indicated above in the text, these opinions and others pose a common obligation of the two parties to bring on the appraisal, they are, in truth generally being addressed to the insurer. The insurer is not trying to collect on the policy; it is never the "claimant," who may not "be tied up forever." The insured is not in any position to use delaying tactics with respect to the appraisal to force the insurer to a settlement. If the insured defaults in his obligations for the appraisal, he does not collect; the plea of the appraisal provision stands.

Only rarely has the insured been judged for his bona fide efforts in these matters and found wanting. It has happened, however. See *Silver v. Western Assur. Co.*, 164 N.Y. 381, 58 N.E. 284 (1900); *Reilly v. Agricultural Ins. Co.*, 311 Ill. App. 562, 37 N.E.2d 352 (1911); also *Hyland v. Millers Nat. Ins. Co.*, 91 F.2d 755 (9th Cir. 1937).

The foregoing admonition in the *Uhrig* case is made more meaningful by reference to the evidence in the case and the role given the jury under the precise ruling of the Court. Apparently the trial court dismissed the insured's complaint after trial and entered judgment for the insurer. This was reversed.

The loss occurred on July 30, 1882. The insured gave notice of loss to the insurer on the following day. On August 2, 1882, the insurer demanded arbitration of the amount of loss and the insured agreed. Thereupon the insured appointed one De Andreau and the insurer, one Magnus, as arbitrators. It is inferred that no umpire was appointed. The two appraisers failed to agree upon the amount of the loss.

The Court reported upon the further evidence in the case as follows:

The defendant gave evidence tending to show that it subsequently made plaintiff an offer to appoint a new arbitrator in the place of Magnus, and also that Magnus offered to unite with De Andreau in selecting an umpire, but that the plaintiff and De Andreau refused. The plaintiff, as a witness in his own behalf, gave evidence tending to show that, after the arbitrators failed to agree, he requested the defendant to appoint another arbitrator, and that he asked Magnus to agree with De Andreau in appointing an umpire, and they did not accede to his requests.

After voicing the requirements of the situation as set out in the admonition quoted above, the Court concluded:

(1) The evidence *tended to show* that the defendant failed and refused to go on with the arbitration [This evidence, so far as the report of the case shows, consisted of the above testimony of the insured which contradicted that of the insurer as quoted above]. (2) There was *some evidence tending to show, and from which a jury might have inferred*, that the defendant was not acting in good faith to procure a speedy appraisal, and was interposing this clause in the policy for the purpose of forcing a compromise from the plaintiff. [This evidence is not reported].¹⁶⁶

In affirming the reversal of the trial court, the Court said: "Upon all the evidence, it was a question of fact for the jury to determine whether there was any breach of this clause [the appraisal provision] in the policy on the part of the plaintiff and

166. The Court also noted that sometime during the period following the loss the damaged property and debris had been removed from the insured's premises "partly under the orders of the city authorities," wherefore, "an appraisal" said the Court, "had become to a large extent impractical." The Court seems to have made nothing of the point beyond reporting it. It is not clear how this fact would be material on the issue of waiver unless it was used to suggest that the appraisal may have become more difficult, thereby aggravating the insurer's alleged default in furthering the appraisal. Quite clearly the appraisal had not been rendered impossible; certainly the amount of loss and damage could be determined as readily by appraisers as by jury trial. And it seems clear that no such aggravation is necessary to the insured's case for waiver.

the case should thus have been submitted to them."¹⁶⁷ (Italics supplied)

Under this ruling the jury becomes the final judge as to what was the truth in the foregoing conflicting testimony. And when the jury is persuaded by the insured's testimony that the insurer refused to cooperate with insured to overcome the impasse which overtook the two appraisers, or when the jury is persuaded by insured's evidence that the insurer has not acted in good faith to procure an early appraisal, the insurer's rights under the appraisal provision are thereby foreclosed. Persuasion of the jury is readily accomplished in both situations on little evidence.

Given the foregoing widely accepted statements by the New York and Minnesota courts of the general scope and content of the responsibilities of the parties with respect to the pre-appraisal arrangements and the role of the jury, it remains to point out their application to various situations arising in the course of such arrangements.

The appraisal provisions involved in the cases under review generally have not contained any time schedules for carrying out any of the steps involved in these arrangements. Moreover, those provisions have generally prescribed no formalities or special procedures for any of these steps. Exceptions are noted below.

Selection of appraisers—time limitations—procedures. While the appraisal provisions covered by the more common standard policy legislation carry some time schedule bearing upon the parties' nomination and appointment of appraisers, those time schedules have become involved only rarely in the adjudicated cases. And most of the appraisal provisions under which waiver has been resolved did not carry such limitation, or it was not brought into the case.

Although no time schedule for the nomination and appointment of appraisers is prescribed, it seems clear that the general requirement of prompt action leading to an early appraisal as advanced by the New York and Minnesota courts gives the insurer only "a reasonable time" within which to select a qualified person as appraiser. It is, of course, within the insurer's control to take such action. It seems that this reasonable-time limitation should start with the date appraisal was duly demanded. It also seems clear that the question whether or not the time which has been allowed to elapse with no such action by the insurer is an unreasonable delay is for the jury to determine from the evidence

167. While the insurer's waiver is offered by the insured as excuse or justification for non-compliance with the appraisal provision, it will be noted that the excuse involved in these cases is only for non-compliance with the appraisal provision. And so, if a burden of proof to establish the excuse is to be allocated to the insured, the foregoing cases teach how light is that burden. See also *Molea v. Aetna Ins. Co.*, 326 Mass. 542, 95 N.E.2d 749 (1950).

in the particular case.¹⁶⁸ When the insured presses the insurer for quick action in this matter, and the insurer disregards the request, quite clearly such "silent treatment" for a relatively short period of time becomes competent evidence of waiver.¹⁶⁹

If one duly appointed as appraiser dies, resigns or otherwise fails to act, it seems clear that the appointing party is called upon (regardless of any demand of the other party) to appoint a qualified substitute promptly in order to satisfy his obligations under the appraisal provision.¹⁷⁰ It seems equally clear that he is entitled to a reasonable time in which to select the substitute before he can be counted in default under the provision.

When the insured objects to the person designated by the insurer as appraiser or the insurer objects to the one designated by the insured, a reasonable time is allowable for the parties to resolve the objection. When the insurer responds with reasonable promptness to persuade away the objection and with an offer to substitute another if the persuasion fails, it is not apparent why the insurer should be chargeable with dereliction under its foregoing general obligation to cooperate in the accomplishment of an early appraisal. If the insurer objects to the insured's selection, it likewise seems clear that a reasonable time is allowable to press its objection and demand that the insured make another appointment.¹⁷¹ Selection of a substitute is fully within the control of each party; and reasonable confidence of the parties in the persons to serve as appraisers is likely to facilitate the appraisal.

If the impasse over the appointment of appraisers continues beyond a reasonable time either by reason of the insured's insistence on his appointment notwithstanding insurer's objection, or by reason of the insurer's persistence in its appointment notwithstanding the insured's objection, the insured has no other recourse under most of the appraisal provisions than to bring suit to collect on the policy.¹⁷² Upon the insurer's plea

168. Consult *Provident Wash. Ins. Co. v. Wolf*, 168 Ind. 690, 80 N.E. 26, (1907); *National Fire Ins. Co. v. Pinnell*, 199 Ky. 624, 251 S.W. 651 (1923).

It also may be inferred from the foregoing Indiana case that the provision in the policy to the effect that the loss shall not become payable until sixty days after proof of loss, or subsequent events if they transpire, does not permit the insurer to use up that period as matter of right before taking the required steps to arrange the appraisal.

169. See *Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213, 59 N.E. 12 (1900); *Aaberg v. Minnesota Comm. Men's Ass'n.*, 152 Minn. 478, 189 N.W. 434 (1922); *Schonweller v. Merchants' Mut. Ins. Co.*, 11 S.D. 401, 78 N.W. 356 (1899).

170. See, *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. 936 (1898); *Provident Wash. Ins. Co. v. Wolf*, 168 Ind. 690, 80 N.E. 26 (1907); *Fire Ass'n. of Phila. v. Appel*, 76 Ohio St. 1, 80 N.E. 952 (1907); *Harrison v. Hartford Fire Ins. Co.*, 80 N.W. 309 (Iowa 1899); *Compare Mowry v. Hanover Fire Ins. Co.*, 106 Me. 308, 76 Atl. 875 (1909); reported *infra*, note 186, 187.

171. See cases cited *supra*, note 170; compare *Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 128 Minn. 292, 152 N.W. 650 (1915).

172. Compare the procedure available under the Minnesota standard policy regulation. *American Central Ins. Co. v. District Court*, 125 Minn. 374, 147 N.W. 242 (1914).

of non-compliance with the appraisal provision the validity of the challenged appointment will come in issue. That issue, under the usual appraisal provision, will involve a determination of whether or not the appointee was "competent and disinterested." Generally the jury will return the answer under proper instructions of the trial court as to the legal constituency of this qualification requirement.¹⁷³

It seems clear that neither party may claim any credit as for bona fide effort in selecting appraisers if he nominates a person as appraiser knowing him to be disqualified unless and until the other party approves the nominee knowing of the disqualification.¹⁷⁴ When such nominee is approved by the other party without knowledge of the disqualification, it also seems clear that the appointing party remains in default under the appraisal provision and when the insurer has made the appointment it should be sufficient evidence of waiver.¹⁷⁵

Suppose that a party has, in good faith, appointed one whom he believes to be a competent and disinterested person as appraiser, but the appointee undertakes his office demonstrating what appears to be bias and partisan aid for the party appointing him. It seems clear that the appointing party will disregard a challenge by the other party of the appointment at his peril of the jury finding the challenge valid and of being held in default under the appraisal provision—a waiver by the insurer.¹⁷⁶

But suppose in such case both appointees are challenged; that both have proved themselves disqualified in the course of the appraisal or the

173. See *Hall Bros. v. Western Assur. Co.*, 133 Ala. 637, 32 So. 257 (1901); *National Fire Ins. Co. v. O'Bryan*, 75 Ark. 198, 87 S.W. 129 (1905); *Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N.W. 650 (1915); *Delaware Underwriters Fire Ins. Co. v. Brock*, 109 Tex. 425, 211 S.W. 779 (1911).

174. *Hyland v. Millers Nat'l Ins. Co.*, 91 F.2d 735 (9th Cir. 1937); *Hall Bros. v. Western Assur. Co.*, 133 Ala. 637, 32 So. 257 (1901); *Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N.W. 650 (1915). See also *Bradbury v. Rhode Island Ins. Co.*, 120 Me. 1, 112 Atl. 714 (1921); *Bradbury v. Ins. Co.*, 118 Me. 191, 106 Atl. 862 (1919); *Kaiser v. Hamburg-Bremen Fire Ins. Co.*, 59 App. Div. 525, 69 N.Y.S. 344 (1901).

175. See cases *supra*, note 174. Compare what seems to have been an indulgent overlooking of the questionable qualifications of the insured's appointee in *Westenhaver v. German-American Ins. Co.*, 113 Iowa 726, 84 N.W. 717 (1900).

It also seems clear that the appointment by either party of one as appraiser with an understanding (express or tacit) that he will serve the interest of the party appointing him during the appraisal is a default under the appraisal provision and when made by the insurer is sufficient evidence of waiver. Of course, generally, evidence of any such understanding will not appear until the appointee demonstrates his dereliction in the course of his office. Such demonstration alone may be sufficient to require his displacement and to work default or waiver if the appointing party fails or neglects to remove him. On the other hand, proof of the initial understanding when available, will make sure the appointing party's own "fault" in the matter and preclude any disclaimer by him of responsibility for the misconduct of the appointee. Consult *Hyland v. Millers Nat'l Ins. Co.*, 91 F.2d 755 (9th Cir. 1937); *Hall Bros. v. Western Assur. Co.*, 133 Ala., 637, 32 So. 257 (1907); *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 76 S.W. 22 (1903); *Pretzfelder & Co. v. Merchants' Ins. Co.*, 116 N.C. 491, 21 S.E. 302 (1895).

176. See cases cited *supra*, note 175.

preliminary arrangements. It has been held that such finding as against the insurer's appointee is competent and sufficient evidence of waiver of the appraisal provision by the insurer, regardless of the contemporary finding against the insured's appointee. The Court of Appeals of Kentucky explained such a ruling as follows:

"But if a person for whose benefit a clause in a contract is inserted would have the advantage of it, he must bring himself within its terms, and will not be excused because the other party had likewise failed. Unless the insurer asks for the arbitration or appraisal before suit brought, the failure to appraise is not a defense And when the insurer demands the appraisal, it must in good faith nominate a competent, disinterested person as appraiser, before it can defend upon the ground that the insured has failed to keep that part of his contract."¹⁷⁷

Modern standard policy legislation indicates a purpose to supplement the general obligation declared by the courts that the insurer act promptly and cooperate to bring on an early appraisal by fixing time schedules for appointing the appraisers. While there is some variation in these schedules, they indicate a common purpose to aid the insured to work waiver against the insurer if it does not comply.

The appraisal provision in the New York standard policy form fixes a time schedule for appointing appraisers as follows: When the parties fail to agree upon the amount of loss or damage, "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.*"¹⁷⁸ (Italics supplied).

Maine and Massachusetts have not only time schedules for appointing appraisers but also special procedures therefor as indicated below.

Minnesota has an over-all time limitation for demanding appraisal as follows: "Unless *within fifteen days after a statement of such loss* has been rendered to the company, either party, the assured or the company, shall have *notified* the other in writing that such party demands an appraisal, such right to an appraisal shall be waived."¹⁷⁹ (Italics supplied) With reference to the selection of appraisers the Minnesota statute provides for the insured and the company each selecting one *within fifteen*

177. *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 76 S.W. 22 (1903). *Accord*, *Delaware Underwriters Fire Ins. Co. v. Brock*, 109 Tex. 425, 211 S.W. 779 (1911). Consult also *Fowble v. Phoenix Ins. Co.*, 106 Mo App. 527, 81 S.W. 485 (1909).

178. While its context is not entirely clear, it is inferred that "the written demand" refers to a written demand to *select appraisers* (rather than any demand for appraisal) and that the *selection* and *notification* are due within twenty days of that demand. Compare the variations in the pertinent terms of the Maine and Massachusetts legislation reported later in the text.

179. MINN. STAT. § 65.01 (1953).

days after a statement of loss has been rendered to the company, and in case either party fails to select an appraiser *within* such time, the other appraiser and the umpire selected as provided in the statute, may act as a board of appraisers.¹⁸⁰

The text of the appraisal provision in the Massachusetts standard policy as written in the current standard policy does not prescribe a time or procedure for appointing appraisers.¹⁸¹ Apparently, however, earlier legislation is still alive which provides as follows: If the parties fail to agree upon the amount of loss, "the company shall, *within ten days after receiving a written demand from the insured for the reference of the amount of loss to three referees as provided in such policy, submit in writing the names and addresses of three persons to the insured,*¹⁸² who shall, *within ten days after receiving such names, notify the company in writing of his choice of one of the said persons to act as one of said referees.*" With respect to correlative action of the insured, the statute reads: "The insured shall submit in writing the names and addresses of three persons to the company, which shall, *within ten days after receiving such names, notify the insured in writing of its choice of one of said persons to act as one of said referees.*"¹⁸³

The statute further provides that "every person nominated" as a referee shall be "*willing to act as referee.*"¹⁸⁴

Maine has similar legislation providing as follows: Upon failure of the parties to agree "if the insurance company shall not, within 10 days after a *written request to appoint referees . . . name 3 men* under such provision, each of whom shall be a resident of this state *and willing to act as one of such referees*; or if such insurance company shall not, within 10 days *after receiving the names of 3 men* named by the insured under such provision, make known to the insured its choice of one of

180. MINN. STAT. § 65.01 (1953).

These time limitations have been considered in the following Minnesota cases involving some aspect of the enforcement remedies provided by the Minnesota statute. *Boston Ins. Co. v. Jacobson Co.*, 226 Minn. 479, 33 N.W.2d 602 (1948); *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 288 N.W. 723 (1939); *Minnesota Farmers Mut. Ins. Co. v. Smart*, 204 Minn. 101, 282 N.W. 658 (1938). They are reviewed *infra*, § 8, "Enforcement of Appraisal Provisions."

181. MASS. ANN. LAWS, c. 175, § 99 (1954).

182. While this text says that the company shall submit its names of referees "within ten days *after receiving a written demand for the reference,*" (see also *Molea v. Aetna Ins. Co.*, 326 Mass. 542, 95 N.E. 2d 749 (1950) (the Supreme Court of Massachusetts has said this: "It is only in case of the failure of the parties to agree as to the amount of the loss, and *within ten days after a written request to appoint referees* under the provision for arbitration in the policy, that the insurance company is required by the statute to name three men under such provision." (Italics supplied.) *Vera v. Mercantile Fire & Marine Ins. Co.*, 216 Mass. 154, 103 N.E. 292 (1913).

183. MASS. ANN. LAWS, c. 175, § 100 (1954). The Company or its agent who "wilfully refuses to comply" with the provisions of this return (§ 100) "shall be punished by a fine of not less than one hundred nor more than five hundred dollars."

184. MASS. ANN. LAWS, c. 175, § 100B (1954).

them to act as one of such referees, it shall be deemed to have waived the right to an arbitration under such policy and be liable to suit thereunder, as though the same contained no provision for arbitration as to the amount of loss or damage."¹⁸⁵

It is thought likely that the courts will hold such time limitations and procedural provisions for appointing appraisers "mandatory" and not "directory" as against the insurer, to the end that almost any non-compliance by the insurer will work "waiver" of its rights under the appraisal provision.

A ruling by a majority of the Supreme Court of Maine in *Mowry v. Hanover Fire Ins. Co.*,¹⁸⁶ in 1909, in administering its statute quoted above is suggestive in this connection. It involved the requirement that the insurance company shall name 3 men who are "willing to act as one of such referees" from whom the insured may choose one, and the provision that if the company fails to comply "it shall be deemed to have waived the right to an arbitration."

The insurer duly named three persons within the required ten day period; each was a resident of the state, and each, before his nomination, had stated to the insurer that he was willing to serve if chosen by the insured. The insured thereafter chose one of the three, a Mr. Brackett. Three days later Brackett informed the insurer that on account of his father's death and the demands of his regular business he could not serve. "The next day," as reported in the opinion, "the defendant informed the plaintiff by letter of Mr. Brackett's inability to serve stating that it would 'do whatever is necessary to bring the reference about at once,' and three days later submitted the name of another person in place of Mr. Brackett." The insured refused to make another choice claiming that the insurer could not submit a substitute and brought suit to collect on the policy. Held that, under the foregoing statute, the insurer had "waived" its right to appraisal. The Court indicated that it would hold likewise if Brackett had died or had otherwise become incapable of serving as a referee.¹⁸⁷

185. REV. STATS., c. 60, §§ 105, 108.

Concerning how dubious of merit is this process under the Massachusetts and Maine statute for selecting appraisers, see *Young v. Aetna Insurance Co.*, 101 Me. 294, 64 Atl. 584 (1906); *Christianson v. Norwich Union Fire Ins. Co.*, 84 Minn. 526, 88 N.W. 16 (1901).

186. 106 Me. 308, 76 Atl. 875 (1909).

187. The Court was not persuaded by the insurer's argument that this would be an unreasonable construction of the statute because the construction would "make the company guarantee that the persons named by it for referees should not only be willing to serve when named, but that they shall remain alive and able and willing to serve during the entire limit of two years within which the action may be commenced."

Nor could the Court regard the foregoing provision of the statute as being merely "directory"; it must be construed as "imperative and controlling."

The Court felt that the statute required the insurer to name those who were willing to act not only when nominated but also when chosen by the insured; that

Reference also will be made to the attitude of the California courts toward certain pertinent provisions in former standard policy legislation of that state which accorded the insured express authority to escape appraisal in situations indicated therein. According to the statute the insured could disregard the appraisal provision and sue to collect on his policy "*if for any reason not attributable to the insured, or to the appraiser appointed by him,*" appraisal was not "*had and completed*" within ninety days after his preliminary proofs of loss to the insurer. It is clear enough that in administering this statutory provision the California courts were

it gave the insurer no right to submit a substitute for the one declining to serve or to name three new ones—at least not after the ten-day period had expired.

And while the insurer's good faith was not questioned in this case, the waiver was said to be derived from the very text of the statute. The insurer, according to the Court, "failed to comply with the imperative terms and absolute conditions of the statute, and must be held legally responsible for the failure of the arbitration and according to the language of the statute 'be deemed to have waived the right to it.' It is not a question of the good faith or actual intentions of the defendant. It is not an intentional waiver, but a statutory waiver that deprives the defendant of the right to arbitration."

While the statute did not cover the contingency under consideration, the Court speculated upon what might happen in other cases (not like this one) if the insurer were to be allowed to nominate either a successor for Brackett, or a new panel of three. "By selecting Mr. Brackett as referee in this case," the Court argued, "the plaintiff thereby distinctly preferred him to the other two and by implication necessarily rejected the other two. It would be an injustice to compel the plaintiff to accept one of those men after Mr. Brackett declined to serve, and if the opportunity were given the defendant to designate a new man in place of Mr. Brackett, the plaintiff would be practically forced to accept any name which the defendant might deem it advantageous to present."

"Again if the Court should assume to establish a rule that would authorize the men named by the defendant for referees to refuse to serve after the expiration of ten days, and still permit the defendant to retain the benefit of the arbitration clause irrespective of the limitation of time now prescribed by the statute it is evident that through the adroit management of a zealous insurance agent, the insured would in some instances be effectually deprived of the choice given him by the statute and find himself reduced to the necessity of accepting for referee the only one who had not declined to serve and the one especially desired by the defendant." (Italics supplied to question the plausibility of these speculations as to the destitute position of the insured in the situations posed, if they were to happen.)

None of these what-might-happen situations was in issue in this case: Were they to come about, judgment of their consequences upon the appraisal provision could then be made. They can hardly serve as substantial support for the absolutism of "waiver" which the majority ruled on this case. (Three justices, including the Chief Justice, dissented.)

The Court relied upon the decision of the Supreme Court of Massachusetts in *Mc Dowell v. Aetna Ins. Co.*, 164 Mass. 444, 41 N.E. 665 (1895) applying the Massachusetts statute then having like provision for waiver.

In that case, however, the insurers had paid no attention to the insured's request to appoint referees for a period extending beyond the ten-day period.

There is considerable irony in the history of the case for the insured if he were seeking quick settlement of his claim. The fire occurred June 4, 1907; insured made proof of loss July 25, 1907; insured requested reference on September 9, 1907; insured rejected insurer's offer of a substitute for Brackett on October 30, 1907, and started suit on the policy on that date. The case came to the Supreme Court on exceptions to a ruling of the trial court on an agreed statement of facts involving a ruling on the question of waiver. The trial court ruled that the insurer had not waived its rights to arbitration. The issue was decided by the Supreme Court December 20, 1909. When the insured may have obtained a judgment for his loss does not appear. Total elapsed time, July 4, 1907-December 20, 1909; time elapsed in connection with the appraisal September 9, 1907-October 30, 1907; time elapsed in the litigation as reported, October 30, 1907-December 20, 1909.

reluctant indeed to attribute default to the insured. Instead, they would be solicitous to conclude in the given case that failure of the appraisal was for a reason "*not attributable to the insured, or to the appraiser appointed by him.*"¹⁸⁸

In *Hyland v. Millers Nat. Ins. Co.*,¹⁸⁹ however, a majority, but only a majority, of the Circuit Court of Appeals for the Ninth Circuit did sustain the finding and decision of the District Court, sitting in equity, which attributed default to the insured under the foregoing California provision. The Court below had sustained the insurers' contention that the insured had appointed one as appraiser who was not "disinterested," and who was in secret collusion with the insured to cheat the insurers. There was substantial evidence that, before the fire, the insured's appointee had been bought and paid for by the insured in a clandestine course of commercial bribery; also that both of them understood that as the insured's appraiser he would serve the insured in his plans to cheat and defraud the insurers in the settlement of this loss. On such evidence it was clear that the insured was so wanting in "clean hands" as to be disqualified to claim escape from appraisal as contemplated by the above provision of the statute.

Appointment of umpire—time limitations—procedures. Most of the appraisal provisions involved in the waiver cases now under consideration have prescribed that the two appraisers selected by the parties should appoint an umpire. Various time schedules and procedures for appointing the umpire have been included in standard policy legislation. They have not been in issue in many cases; they are reviewed below.

Frequently the appraisers fail to agree upon an umpire and return no award. Along the line, sometime after the appraisers have been selected, but before they have agreed upon an umpire, the insured has started suit to collect on the policy. He has relied upon circumstances attending the failure of the appraisers up to the time of his suit to appoint an umpire to excuse himself from further regard for the appraisal provision.

Absent controlling time schedules and special procedures, the courts have been called upon to determine how the general obligation of the insurer to cooperate in accomplishing an early appraisal should be applied.

One of the initial problems arising in this connection has been whether or not the parties should be chargeable with the conduct of their respective appointees in their failure to appoint an umpire, and if so, under what circumstances?

This problem is derived from the widely accepted view that once the appraisers are appointed, each shall, by virtue of his office, forego any role

188. See *Koyer v. Detroit Fire & Marine Ins. Co.*, 9 Cal. 2d 336, 70 P.2d 927 (1937). This case is reviewed *infra*, note 192.

189. 91 F.2d 735 (9th Cir. 1937); *petition for rehearing denied*, 92 F.2d 462 (9th Cir. 1937).

of "agent" or "partisan" for the party appointing him; each is to perform his duties without partiality for the party appointing him, and this duty attends each of them in this very first step of completing the appraisal board. The Supreme Court of Alabama put the matter as follows:

"In their selection [by the parties of the two appraisers] it is not contemplated that they [the appraisers] shall represent either party to the controversy or be a partisan in the cause of either, nor is an appraiser expected to sustain the views or to further the interest of the party who may have named him. *And this is true, not only with respect to estimating the amount of loss, but also with reference to the selection of an umpire.*"¹⁹⁰ (Italics supplied.)

In line with this view, dictation by the insurer to the appraiser appointed by it as to whom he shall agree upon as umpire is competent and sufficient evidence to work "waiver" of the appraisal provision. Thus, in the Minnesota case of *Powers Dry Goods Co. vs. Imperial Fire Ins. Co.*¹⁹¹ It was shown that the insurer had directed the appraiser whom it had appointed to insist upon either A or B as umpire and to refuse all others. The appraiser appointed by insured suggested persons other than A or B; the insurer's appointee refused all of them. The insured's appointee accepted A, but A declined to serve. Thereupon the insurer instructed its appointee to take only B as umpire. On the next day, however, the insurer's appointee resigned. The insurer then appointed B as appraiser, but the insured thereupon cut off further consideration of an appraisal and brought suit to collect. It was held that these matters, having been found by the jury, constituted "waiver" by the insurer.

The Court set down the following mandate concerning the behavior of the parties toward the appraisers in connection with their selection of the umpire:

"It may be conceded that defendant might state to the arbitrator whom it had appointed any specific *fact* showing the unfitness of any person whose selection as an umpire might be contemplated; for instance, that such person was a member of the plaintiff corporation. But it had no right to assert its mere will, preference, or disapproval, to control the *choice*, in which by the terms and spirit of the contract, neither of the parties was to have a voice. The agreement contemplated that the two arbitrators alone should select the umpire in the exercise of their judgment

190. *Hall Bros. v. Western Assur. Co.*, 133 Ala. 637, 32 So. 257 (1901). To like effect see *Read v. State Ins. Co.*, 103 Iowa 307, 72 N.W. 665 (1897); *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 76 S.W. 22 (1903); *Connecticut Fire Ins. Co. v. Cohen*, 97 Md. 294, 55 Atl. 675 (1903); *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527, 81 S.W. 485 (1904).

191. 48 Minn. 380, 51 N.W. 123 (1892). To like effect see *Township of Munro v. Insurance Co.*, 237 Mich. 646, 213 N.W. 161 (1927); *Govin v. Northwestern Nat. Ins. Co.*, 145 Wash. 199, 259 Pac. 387 (1927).

and discretion, uncontrolled by the interested parties. It was of the very essence of the agreement that the latter should not choose or reject or assert their preference or objections. If the defendant, by expressing to the arbitrator whom it had chosen its disapproval of the selection of particular persons,—as, by saying that such persons would not act impartially,—led him to defer to its will, or so influenced him that by reason of such interference he did not agree with his fellow arbitrator in the selection of an umpire when otherwise he would have done so, the failure of the proposed arbitration is attributable to the fault of the defendant, and the plaintiff had the right to pursue its legal remedy by action."¹⁹² (Italics by the Court)

In short, the appraisers, once they are appointed, bear independent authority and responsibility to choose a qualified person as umpire; and neither party may control or unduly influence them in so doing.

Accordingly, the initial problem as to whether or not the parties may be chargeable with the conduct of their respective appointees who default for an unreasonable time to choose a qualified person as an umpire comes to this: Assuming that the party does not overreach his privileges with respect to the choice of the umpire by seeking unduly to hinder or influence the appraisers in making their choice, is such party, notwithstanding, chargeable with such conduct of its appointee as will put it (insured or insurer as the case may be) in default under the general obligation to bring on an early appraisal? In almost all of the cases this question has been raised with respect to the insurer and its appointee rather than with respect to the insured and his appointee.

192. It seems clear that less explicit, less commanding and more subtle action on behalf of the insurer to influence its appointee in the choice of the umpire should be held equally fatal to its plea of the appraisal provision. Neither party (insurer or insured) can justify such *ex parte* tampering with the process of completing the appraisal board. To seek by such means to determine the appointment of two of the three members of the board is an endeavor not only to circumvent the terms of the appraisal provision but also to gain what they party must believe is some significant advantage in the appraisal. Such endeavor by either party—whether it succeeds or not—seems reasonably chargeable to such party as a deliberate default in the general obligation of that party to be diligent and bona fide to accomplish an early, fair, and impartial appraisal.

In the following cases there were instances of such *ex parte* endeavors by insured or insurer to influence the appointment of the umpire. It seems clear that the evidence of these endeavors alone should be held to constitute irretrievable default of the party under the appraisal provision. See *Hyland v. Millers Nat. Ins. Co.*, 91 F.2d 735 (9th Cir. 1937); *rehearing denied*, 92 F.2d 462 (9th Cir. 1937); *Headley v. Aetna Ins. Co.*, 202 Ala. 384, 80 So. 466 (1918); *Hall Bros. v. Western Assur. Co.*, 133 Ala. 637, 32 So 257 (1902); *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 76 S.W. 22 (1903); *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13 (1896); *Provident-Washington Ins. Co. v. Kennington*, 111 Miss. 244, 71 So. 378 (1916).

Consult further what appears to have been extraordinary indulgence in behalf of the insured by overlooking such misconduct on his part to his advantage. *Westerhaver v. German-American Ins. Co.*, 113 Iowa 726, 84 N.W. 717 (1900); also *Koyer v. Detroit Fire and Marine Ins. Co.*, 9 Cal. 2d 336, 70 P.2d 927 (1937).

In *Niagara Fire Ins. Co. v. Bishop*,¹⁰³ decided in 1894, the Supreme Court of Illinois handed down one of the first express rulings on this question. Counsel for the insurer emphasized the foregoing established precept that one who is appointed appraiser shall not act as agent or partisan for the appointing party. Therefore, it was argued, the insurer could not be held responsible for any conduct of its appointee which may have contributed to the stalemate in selecting an umpire.

The Court rejected this argument as follows:

"We are inclined to agree with the counsel for appellant (insurer) in the contention that a person nominated as an arbitrator ought not to consider himself as the agent for the person on whose behalf he is nominated But, while it is true that an arbitrator or appraiser is not to be regarded as the agent of the party appointing him, simply by reason of the fact of his appointment, *yet an arbitrator or appraiser may act in such a partial manner, and so manifestly in the interest of the party appointing him, that it may become a question of fact to be submitted to the jury, or to be determined by the court sitting without a jury, whether he conducts himself as an agent to such an extent that the party appointing him shall be held responsible for his acts. If an insurance company selects a man for appraiser, who, instead of acting as such, conducts himself in the interest of the company, and as an agent for the company, the company will be held responsible for such conduct on his part as inures to the benefit of the company. If the evidence proves that he prevents an agreement, or the appointment of an umpire, by methods which show him to be the agent of the company, his acts will be regarded as those of his principal.*"¹⁰⁴ (Italics supplied)

By this rationale, the insurer's appointee may, by his unilateral action in dereliction of his office, make himself the "agent" or "partisan" of the insurer and thereby impute to the insurer enough responsibility for his actions and delays to work a "waiver." The legal make-up of the "waiver" in these cases has consisted chiefly of varying items of evidence on the conduct of the insurer's appointee in the selection of the umpire which the court would add up to being "arbitrary," "unfair," or as unduly pro-

193. 154 Ill. 9, 39 N.E. 1102 (1894). See also *Slepski v. German Fire Ins. Co.*, 141 Ill. App. 614 (1908); *Kavli v. Eagles Star Ins. Co.*, 206 Minn. 360, 288 N.W. 723 (1939).

194. See further, *Read v. State Fire Ins. Co.*, 103 Iowa 307, 72 N.W. 665 (1897); *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527, 81 S.W. 485 (1904); *Corp. v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S.W. 757 (1904); *Hickerson v. Insurance Co.*, 96 Tenn. 193, 33 S.W. 1041 (1895). Compare *Bishop v. Agricultural Ins. Co.*, 130 N.Y. 488, 29 N. E. 844 (1892) with *Silver v. Western Assur. Co.*, 164 N.Y. 381, 58 N.E. 284 (1900).

crastinating under the insurer's general obligation to accomplish an early appraisal.¹⁹⁵

Under this agency rationale the scope of the trial on the issue of waiver, the attention of the trial court in its instructions and the verdict of the jury are centered upon the course of conduct of *the insurer's appointee and whether or not it shall count against the insurer as "waiver."* In some of these cases it appears that the insurer or its agent had knowledge of what the respective appointees were doing and seeking to do about the appointment of an umpire, but that they took no steps, or indeed refused to take any steps, to substitute another as an appraiser. It is doubted, however, that the "agency" under consideration is intended to be dependent upon evidence of knowledge or authorization by the insurer.¹⁹⁶

The foregoing agency doctrine has been disowned, at least formally, in more jurisdictions than appear to espouse it. The Supreme Court of Maryland, in *Connecticut Fire Ins. Co. v. Cohen*¹⁹⁷ was among the first, if not the first, of the courts expressly to reject it.

"It is fundamental," said the Court, "to the conception of such an appraisal, which is in effect an arbitration, that the person selected to make it should be free from the control or direction of the respective parties whose interests have been confided to them and should act independently and upon their own judgment. It being thus the duty of the parties to the submission to abstain from all interference with the appraisers

195. Insistence by the appraiser upon the appointment of one who is *not* "disinterested" seems to be clearly within these categories of proscribed conduct. See *Hyland v. Millers Nat. Ins. Co.*, 91 F.2d. 35 (9th Cir. 1937), *rehearing denied*, 92 F.2d 462 (9th Cir. 1937); *Bishop v. Agricultural Ins. Co.*, 130 N.Y. 488, 29 N.E. 844 (1892).

196. The Supreme Court of Minnesota once indicated that some authorization from the party may be required. It did so in *O'Rourke v. German Ins. Co.*, 96 Minn. 154, 104 N.W. 900 (1905). After reviewing evidence of the conduct of the insurer's appointee in refusing to agree upon anyone for umpire except one of two persons whom he named, and concluding that his conduct was arbitrary and unfair, the Court covered the question of authorization by observing that "*if his [the appraiser's] action was authorized or approved, directly or indirectly, by the defendant, it would constitute a waiver of its rights to have the loss adjusted by referees. What the effect would be upon the rights of the parties if the insurer should affirmatively show that the refusal of its referee to act was without its knowledge or consent we need not determine.*"

"But if the defendant did not so authorize or approve such action on the part of its referee, yet if, upon being advised thereof, it refused to agree to the selection of other referees, it would thereby waive its rights to an appraisal of the loss." (Italics supplied).

On a later appeal in this case the Court declared that "no direct evidence of authorization or ratification is required," 99 Minn. 293, 109 N.W. 401 (1906). The Court cited a substantial number of cases as being in accord, including the *Niagara Fire Ins. Co. v. Bishop*, *supra* note 193.

It seems clear enough from the report of *Niagara Fire Ins. Co. v. Bishop*, *supra* note 193, as decided by the Supreme Court of Illinois, that insurer's appointee took and expressed a solicitous and partisan interest in behalf of the insurer. But it does not appear to have been of concern to the Court in making the "agency" which it did, whether or not the insurer had authorized, approved or had knowledge of the conduct of its appointee with respect to the selection of the umpire.

197. 97 Md. 294, 55 Atl. 675 (1903). The Court expressly relied upon parts of its opinion in the earlier case of *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13 (1896).

it would be manifestly unjust, when they have observed such abstinence, to hold them responsible for the negligence or misconduct of the appraisers. *In order to defeat the rights of a party to a submission to an appraisal by reason of the conduct of the appraiser the evidence should connect the party himself with that conduct.*" (Italics supplied).^{197a}

By taking this position the court redirected the inquiry in such cases. It redirected the inquiry from search for fault of the insurer, or of its appointee, for the impasse of the appraisers in choosing an umpire, to the more negative inquiry, namely, the insured's freedom from fault therefor. Default of insured's appointee as appraiser is not to be counted unless it is made to appear that the insured himself induced or abetted it.

The Court reaffirmed its foregoing views in *Shawnee Ins. Co. v. Pontfield*.¹⁹⁸ In this case, the insurer sought to bring fault home to the insured himself for the failure of the appraisal by claiming that he broke up the pending endeavor of the appraisers to select an umpire by bringing his action to collect on the policy.

On this point the Court took the position that the inquiry should first be centered upon whether or not there was "*any evidence in the case tending to show that before the suit was brought the submission to appraisal had failed.*" If the jury should find that the appraisers came to the impasse in choosing an umpire before the action was instituted, and after they had had "a fair opportunity, and a reasonable time in which to make the appraisal," and this "without any fault of the insured," the insured can sue.¹⁹⁹

197a. *Connecticut Fire Ins. Co. v. Cohen*, 97 Md. 294, 300-1, 55 Atl. 675, 677 (1903).

198. 110 Md. 353, 72 Atl. 835 (1909).

199. The foregoing views of the Maryland Court both in narrowing the question of the insurer's waiver (insured's excuse) to that of fault or not fault of the insured himself and in disclaiming the agency rationale appear to be accepted in the following cases:

U.S. *Norwich Union Fire Ins. Co. v. Cohn*, 68 F.2d 42 (10th Cir. 1933) (appraisal broke down *after* umpire had been appointed; appraisal started; adjournment; umpire resigned); *Western Assur. Co. v. Decker*, 98 Fed. 381 (8th Cir. 1899).

Ala. *Maryland Cas. Co. v. Mansfield*, 225 Ala. 449, 143 So. 465 (1932) (decision on demurrer to insurer's plea); *Headley v. Aetna Ins. Co.*, 202 Ala. 384, 80 So. 466 (1918). *Ga.* See *Globe & Rutgers Fire Ins. Co. v. Jewell Co.*, 36 Ga. App. 538, 137 S.E. 286 (1927).

Kan. See *Cowles v. Connecticut Fire Ins. Co.* 113 Kan. 532, 215 Pac. 308 (1923); *Jerrils v. German American Ins. Co.*, 82 Kan. 320, 108 Pac. 114 (1910).

Ill. *Lancashire Ins. Co. v. Lyon*, 124 Ill. App. 491 (1906); *compare* *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 39 N.E. 1102 (1894).

Ind. See *Vernon Ins. Co. v. Maitlin*, 158 Ind. 393, 63 N.E. 755 (1902).

Miss. *Provident-Washington Ins. Co. v. Kennington*, 111 Miss. 244, 71 So. 378 (1916).

Mo. See *Security Printing Co. v. Connecticut Fire Ins. Co.*, 209 Mo. App. 422, 240 S.W. 263 (1922); *Sharp v. Niagara Fire Ins. Co.*, 164 Mo. App. 475, 147 S.W. 154 (1912); but see *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527, 81 S.W. 485 (1904); *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S.W. 757 (1904).

N. C. See *Pretzfelder v. Merchants' Ins. Co.*, 123 N.C. 16, 31 S.E. 470 (1898). The question submitted to the jury—and approved on appeal—was this: "Was the failure of the appraisers to make an award caused by the plaintiffs or any of them?" (Italics

It is concluded that under these views as advanced by the Maryland Court, the making of waiver against the insurer is somewhat easier for the insured than under the view directing inquiry to the fault of the insurer, or of its appointee as its agent.²⁰⁰

Under the Maryland view the issue of waiver (excuse of insured) is narrowed to three questions about as follows: (1) Is there "any evidence tending to show that before suit was brought the submission to appraisal had failed"? (2) Did the appraisers have "fair opportunity and a reasonable time" in which to choose an umpire before the insured withdrew from appraisal and started his action? (3) Did the insured induce the failure of the appraisers to choose an umpire? *Whether or not the insurer or its appraiser were at fault for the impasse accruing between the appraisers and whether or not insurer's appointee is its agent is not important to this instance of "waiver"; and the course of conduct of the insured's appointee becomes important only when it is connected to the insured; the inquiry centers upon the question of fault of the insured himself and this generally requires evidence of his inducement of his appointee's default.*

The Maryland Court also indicated that it might be inclined to rule out any agency as between the insurer and its appointee as appraiser as much as between insured and his appointee. On the other hand, it regarded the lot of the insured and of the insurer as being different in these cases. (What might be the results of ruling out the agency of the insurer's appointee are not apparent). Said the Court in the *Cohen* case:

"It is in our judgment sufficient to maintain the right of the insured to sue in such cases, to find that the failure of the appraisal was without fault on his part, and it is unnecessary for that purpose to ascertain that

supplied). Said the Court: "When this cause was here on the former appeal it was held that, if the appraisal fell through by no fault of the plaintiff, he is relegated to his right of action." *Compare Braddy v. New York Bowery Fire Ins. Co.*, 115 N.C. 354, 20 S.E. 477 (1894).

R. I. See *Messler v. Williamsburgh City Fire Ins. Co.*, 94 Atl. 875 (R.I. 1915). *Tenn.* See *St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S.W. 1186 (1914); *compare Hickerson v. Insurance Cos.* 96 Tenn. 193, 33 S.W. 1041 (1895). *W. Va.* *Hanover Fire Ins. Co. v. Drake*, 170 W. Va. 257, 196 S.E. 664 (1938). It is indicated in the Kansas case of *Cowles v. Connecticut Fire Ins. Co.* *infra* note 202 that "the burden" is on the insured "to prove that before bringing the action she appointed or caused to be appointed an appraiser in good faith, and that an appraisal failed without fault on her part; and further that if she did not show good faith and freedom from fault in this respect, the verdict must be for defendants." (Italics supplied). It is doubted that this "burden" with respect to the matters italicized is more than formal unless and until there is substantial evidence from the insurer connecting the insured himself with the conduct of the appraiser appointed by him. See the earlier Kansas case, *Jerrils v. German American Ins. Co.*, *supra*.

200. When the scope of inquiry is directed to the fault of the insurer as imputed to it from the fault of its appointee, a comparative judgment involving the relative fault of the two appraisers may seem plausible. See, e.g., *Carp v. Queen Ins. Co.* 104 Mo. App. 502, 79 S.W. 757 (1904); *American Central Ins. Co. v. Terry*, 298 S.W. 658 (Tex. Civ. App. 1927). Consult further, *Vernon Ins. Co. v. Maitlen*, 158 Ind. 393, 63 N.E. 755 (1902). More generally, however, the conduct of the insured's appraiser is not put to such judgment in making up the fault of the insurer. See, e.g., *Bishop v. Agricultural Ins. Co.*, 130 N.Y. 488, 29 N.E. 844 (1892).

the insurer was the cause of the failure. The title of the insured to maintain his suit rests upon his policy and not upon the conduct of the insurer in relation to the appraisal. He may, when the policy provides for an appraisal, be estopped from bringing his suit by his own conduct in reference to the appraisal, but if his conduct in that connection be free from fault he is not estopped from suing by the failure of the appraisal from other causes." (Italics supplied)^{200a}

In the *Shawnee Ins. Co. case supra*, the Court expressed the opinion that if "no award is obtained by reason of the fault of the appraiser selected by the insurer, the insured has a right to sue, *not because the appraiser so in fault is the agent of the insurer, but because the means provided by the contract of ascertaining the loss failed without any fault on the part of the insured.*"^{200b}

While the fact-situations making up the failure of the appraisers to agree upon an umpire vary in the cases, there is one situation that recurrently has led to the impasse. It has occurred in a substantial group of cases and has been resolved under both of the foregoing general views of the courts—*i.e.* under the inquiry as to the fault-of-the-insurer-through-its-appraiser and under the no-fault-of-the-insured-himself inquiry. Thus, the appraisers have come to a more or less definitive deadlock by the time the insured starts suit. The insured's appointee insists upon a person as umpire who resides at or near the place of the fire (some one "living in the vicinage," or at the "locality of the fire") while the insurer's appointee insists upon a person living at a distance from the fire or who is a non-resident of the state.²⁰¹ This point of difference is constant; there is, however, a variety of attending circumstances. But those circumstances, tend to conform to a general pattern or outline about as follows: Insurer's appointee nominates several persons for umpire who reside at a substantial distance from the locale of the fire; they may or may not be non-residents of the state. Insured's appointee nominates persons residing at or near the place of the loss. Sometimes the respective appraisers refuse the other's nominations expressly on the ground that they come from too far away or are too local, as the case may be; sometimes their reasons, as reported to each other, are less explicit. Almost never is the challenge based upon any ground of disqualification stated in the appraisal provision. Varying degrees of abruptness and obstinacy on the part of both appointees appear in the different cases; overtures from one to the other to get on with the appointment appear in some of them. In some cases the situation appears to be still fluid while in others the impasse appears to be more definitive and final when the insured commences his suit to collect on the policy.

200a. *Connecticut Fire Ins. Co. v. Cohen*, 97 Md. 294, 303-4, 55 Atl. 675, 678 (1903).

200b. *Shawnee Ins. Co. v. Pontfield*, 110 Md. 353, 361, 72 Atl. 835, 836 (1909).

201. That appraisal provisions under some standard policy legislation prescribe that the appraisal board shall be composed of residents.

The decisions are nearly uniform with respect to this point of disagreement of the appraisers (and regardless of the foregoing variations of the attending circumstances) and hold (1) that insistence by the insured's appointee upon a local person is justified and (2) that the action of the insurer's appointee in refusing to join in the appointment of such person is "arbitrary" and "unreasonable." Accordingly, an unreasonable time having been used up in this bickering, the insurer's plea of the appraisal provision fails.²⁰²

The insured seems to have somewhat the better argument in these cases. If the nominee for umpire is otherwise "competent and disinterested" it is not clear why it is important to the insurer (or to its appointee) that the umpire come from a distance or that he not be a local man. Generally he will engage in the appraisal at the place of the fire and it is not clear what his distant residence can legitimately contribute to his immunity from "local influence," or in fortifying his competence and disinterestedness in the course of the appraisal.²⁰³

In supporting the insured's side of this question it also is deemed worthy of note that, by the terms of the appraisal provision, the insured

202. *Ala.* *Headley v. Aetna Ins. Co.*, 202 Ala. 384, 80 So. 466 (1918).
Ill. *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 39 N.E. 1102 (1894).
Iowa. *Consult Westenhaver v. German-American Ins. Co.*, 113 Iowa 726, 84 N.W. 717 (1900); *Harrison v. Hartford Fire Ins. Co.*, 112 Iowa 77, 83 N.W. 820 (1900).
Kan. *Cowles v. Connecticut Fire Ins. Co.*, 113 Kan. 532, 215 Pac. 308 (1923).
Maine. See *Young v. Aetna Ins. Co.*, 101 Me. 294, 64 Atl. 584 (1906).
Md. *Shawnee Ins. Co. v. Pontfield*, 110 Md. 353, 72 Atl. 835 (1909).
Mich. *Township of Munroe v. Insurance Co.*, 237 Mich. 646, 213 N.W. 161 (1927); *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 61 N.W. 67 (1894). But see *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10, 97 N.W. 57 (1903). In the *Kersey* case the Court summarized the situation as follows: "The evidence shows this, and only this; that defendant's arbitrator declined to accept as umpire any of the dozen or fifteen business men of Reed City suggested by plaintiff's arbitrator, and that most of the persons proposed by him lived out of town, and were for that reason rejected by plaintiff's arbitrator, and that an umpire willing to act was never selected. *There was no evidence that the men proposed as umpire by defendant's arbitrator were not fair and competent men; nor was there any evidence that there was not a valid, bona fide objection to those proposed by plaintiff's arbitrator.* We cannot, therefore, hold defendant responsible for the failure to select an umpire." (italics supplied) Consult further, *Baumgarten v. Firemen's Fund Ins. Co.*, 152 Mich. 479, 116 N.W. 449 (1908).

It must be recognized that the foregoing language in the *Kersey* case in italics is new and strange doctrine in these cases involving the pursuit of waiver of the appraisal provision; and this approach cuts across that of the Court in the *Brock* case. The *Brock* case, although widely cited with approval by other courts, was not mentioned in this case.

Mo. *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S.W. 207 (1892); *Mason v. Fidelity Phoenix Ins. Co.* 258 S.W. 759 (Mo. App. 1924); *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527, 81 S.W. 485 (1904); see also, *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S.W. 757 (1904).
N. C. *Braddy v. New York Bowery Fire Ins. Co.*, 115 N.C. 354, 20 S.E. 427 (1894).
Tenn. *Hickerson & Co. v. Insurance Cos.*, 96 Tenn. 193, 33 S.W. 1041 (1895).
Texas. *New York Underwriters' Ins. Co. v. Sproles*, 73 S.W. 2d 857 (Tex. Civ. App., 1934) (policy concerning wind damage).

Wis. *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N.W. 422 (1895).

203. On the other hand the suggestion that one from the home folk "would naturally be best qualified to pass upon the question of values" as made in *Brock v. Dwelling House Ins. Co.*, *supra* note 202, seems quite doubtful.

shares equally with the insurer the expenses of the umpire. The greater the distance to be covered by the umpire, the greater, of course, will be his expenses. It also seems probable that, with a local umpire, there may be greater facility in convening the appraisal board for the appraisal.

It is pointed out above that modern standard policy legislation indicates a purpose to expedite the completion of the appraisal board by fixing time schedules for the selection of appraisers. If the time schedules are not met, the insured may sue to collect on the policy. There is no corresponding time limitation for appointing an umpire. But there is provision for a somewhat more affirmative enforcement of the appraisal provision to meet the situation when the appraisers fail to choose an umpire. It may be invoked after a stated length of time following such failure by the appraisers. Either party may apply, under some statutes to a judge, and under others, to the Insurance Commissioner, to appoint an umpire when the appraisers fail to do so.²⁰⁴

Under the New York standard policy legislation the appraisers, having been duly selected, "shall first select a competent and disinterested umpire," and, upon their "failing for fifteen days to agree upon such umpire," either party may apply to a judge of a court of record to make the appointment.²⁰⁵

Maine and Massachusetts²⁰⁶ provide that if the two referees selected by the parties in the manner prescribed by the statute shall fail to agree upon and select a third referee^{206a} within ten days from *their appointment*²⁰⁷ then *either of the parties*^{207a} may apply to the Insurance Commissioner to appoint such third referee.

Under the Minnesota legislation the two appraisers chosen by the parties "shall first select" a qualified person as umpire, "provided, that *if after five days* the two appraisers cannot agree on such an umpire," then either party may apply in writing on five days notice thereof to the judge of a designated court to make the appointment.²⁰⁸

In the foregoing cases making "waiver" against the insurer out of failure of the appraisers to choose an umpire by the time suit is started

204. Concerning various questions relating to the use of these procedures to enforce these appraisal provisions by appointment of the umpire, see *infra* § 8, "Enforcement of Appraisal Provisions."

205. N.Y. INS. LAW § 168 (1949).

206. MAINE REV. STATS. ANN. c. 60, § 108 (1954); MASS. GEN. LAWS, c. 175, § 100 (1932).

206a. Maine adds "willing to act in said capacity," and Massachusetts provides in a separate section that "Every person nominated, specified or appointed" shall be "willing to act as referee." *id.* § 100B.

207. Massachusetts dates the ten days "from the choice of the second referee." MASS. ANN. LAWS, c. 175, § 100 (1932).

207a. Massachusetts provides that "*either of the said referees* [selected by the parties] or *parties*" may apply to the Commissioner to appoint the third referee. (*Italics added*).

208. MINN. STAT. § 65.01 (1953). When the *five days* begins to run is not very clear.

by the insured to collect on the policy, no consideration appears to have been given to the above statutory provisions enabling either party to gain the appointment of an umpire in a summary manner. It seems doubtful, however, that the courts will allow the availability of this remedy to burden the make-up of the waiver. By the text of these statutes resort to the remedy is permissive, not mandatory. Unless the insurer duly invokes the remedy, it seems reasonable to expect that the courts will allow the insured to sue to collect on his policy and excuse himself from the appraisal provision without first pursuing or attempting to follow this further remedy looking to an appraisal in lieu of litigation.

Miscellaneous defaults in furthering early appraisal—"waiver" by the insurer. The general obligation of the insurer under the appraisal provision to do its part in accomplishing an early appraisal has been applied in a variety of situations beyond those involving the establishment and maintenance of the appraisal board. While the cases involving these situations are fewer in number than those relating to the organization of the board, the likelihood of the situations occurring is deemed sufficient to justify mention of at least some of them.

Thus, on occasion, the parties have informally agreed upon appraisal, but they have fallen into disagreement over the terms of a proposed formal submission agreement.²⁰⁹ Even though it was found that "both parties were acting in good faith" in presenting and standing upon their opposing claims as to what the submission should provide, it has been held that the reasonable time limitation for bringing on the appraisal will expire notwithstanding, and thereby work "waiver" against the insurer. The insurer may not indulge in such disagreement indefinitely.²¹⁰

It also is clear that insistence by the insurer for too long upon a submission agreement relating to the appraisal which does not conform in its terms to those of the appraisal provision is competent and sufficient evidence of "waiver." Neither party may require more or less in the submission agreement than is provided in the appraisal provision.²¹¹

209. It seems clear that no submission agreement is necessary. *Pennsylvania Lumbermans Mut. Fire Ins. Co. v. Barfield*, 138 F.2d 365 (3rd Cir. 1943). Consult further, *Buchholz v. U.S. Fire Ins. Co.*, 265 App. Div. 467, 39 N.Y.S.2d 663 (1st Dep't 1943) *aff'd*, 293 N.Y. 82, 56 N.E.2d 43 (1944).

210. *National Fire Ins. Co. v. Pinnell*, 199 Ky. 624, 251 S.W. 651 (1923). See also, *Dee & Sons v. Key City Fire Ins. Co.*, 104 Iowa 167, 73 N.W. 594 (1897) (insured claimed that insurance covered items of property not listed in policy; insured denied liability for any items not so listed); *Walker v. Ins. Co.*, 51 Kan. 725, 33 Pac. 597 (1893); *Fidelity Phenix Fire Ins. Co. v. Henry*, 248 Ky. 818, 60 S.W.2d 111 (1933).

211. See *Dee & Sons v. Key City Fire Ins. Co.* *supra* note 210; *Walker v. Insurance Co.*, *supra* note 210. Nor may the insured validly claim such non-conforming submission; insurer's refusal of such claim held, no waiver. *Pennsylvania Lumbermens Mut. Ins. Co. v. Barfield*, 138 F.2d 365 (5th Cir. 1943).

There is, moreover, some judicial opinion indicating that when the parties agree upon a submission which does not conform to the terms of the appraisal provision and the appraisal or award thereunder fails, the insurer may not thereafter claim appraisal pursuant to the appraisal provision. *Davis v. Atlas Assur. Co.*, 16 Wash. 232,

In another case the making and revocation by the insurer of appointments of a succession of persons as appraiser appeared along with some indication of purpose by the insurer thereby to play fast and loose with the appraisal and pressure a settlement. Such evidence was held competent and sufficient to establish insurer's default under the appraisal provision.²¹²

Another situation may be summarized as follows: Due progress has been made in setting up the appraisal board pursuant to the appraisal provision and the time and place for starting the appraisal agreed upon. But the insurer's appointee as appraiser fails to appear. The insured, his appointee and the umpire appear at the time and place as agreed. Insured is incurring expenses on account of his appointee and of the umpire. No explanation for the absence of the insurer's appointee is forthcoming. Quite clearly such situation can soon be counted as sufficient evidence of default and waiver by the insurer. In a case of this sort the Supreme Court of Indiana declared as follows:

"When the agreement to submit to appraisal was executed by the parties, and appellant [the insurer] learned that the appraiser selected by it could not be present at the time fixed to commence the appraisal, it was the duty of appellant, within a reasonable time, to select another appraiser who would proceed without unnecessary delay, to the performance of his duties. The right of appellant to have an appraisal under the agreement therefor was not indefinite as to time, but such appraisal must be completed within a reasonable time, and what was such reasonable time depends upon the facts of the case, and was a question for the jury to determine."²¹³

*Same—If a First Appraisal Fails, Does the Appraisal Provision Survive—
Are the Parties To Try Again?*

The topic question presupposes not only failure of the parties to agree upon the amount of loss and damage but also that they have taken some steps to bring on an appraisal. Most of the cases in which the question has been answered are of a common pattern. Thus, each party duly appoints a qualified person as appraiser. The appraisal comes to

47 Pac. 436 (1896); Compare *Davis v. Imperial Ins. Co.*, 16 Wash. 241, 47 Pac. 439 (1896). In *Adams v. New York Bowery Fire Ins. Co.*, 85 Iowa 6, 51 N.W. 1149 (1892), the Court observed as follows: "By entering into an agreement of submission not in accord with the provisions of the policy, and standing on the validity of an award made under such submission, defendant [insurer] must be held to have waived the right (if he had any), to insist that an award must be made in accordance with the terms of the policy before suit could be commenced thereon." (The submission in the Adams case restricted the appraisal to items not wholly destroyed. The award was limited accordingly. An appraisal and award under the terms of the appraisal provision would not have been so restricted). Compare *Vincent v. German Ins. Co.*, 120 Iowa 272, 94 N.W. 458 (1903).

212. *Talbert v. Northwestern Nat. Ins. Co.*, 167 La. 608, 120 So. 24 (1929).

213. *Providence-Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N.E. 26, (1907). See also, *Harrison v. Hartford Fire Ins. Co.*, ___ Iowa ___, 80 N.W. 309 (1899); *Harrison v. German-American Ins. Co.*, 67 Fed. 577 (S.D. Iowa 1895).

naught by reason of an impasse developing thereafter within the appraisal board so that no award is rendered, or the appraisal goes to award, but is ruled invalid. When the appraisal fails in either of these situations, does the appraisal provision survive and require the parties to try again?

This question arises for decision whether, as under the more prevalent view, the insurer must first duly demand appraisal to make the provision effective, or, as under the more limited view, the insured must take the initiative and offer appraisal.²¹⁴

It also will be noted that this general question does not come before the courts in any direct proceeding between its parties to enforce a further appraisal. Generally no such remedy is available to enforce the appraisal provision.²¹⁵ Instead, it is presented for judicial consideration in the action brought by the insured to collect on the policy. It is presented under somewhat different circumstances when the appraisal proves abortive before award from those obtaining when the appraisal has gone to award. In the latter situation the determination of the invalidity of the award and allied matters become involved in the action as well as the consideration and disposition of the question at hand. These additional considerations are cited below.

A majority of the decisions passing on the question have ruled with respect to both situations that the appraisal provision does not survive the first failure so as to require any further attempt at an appraisal and award.²¹⁶

In arriving at this majority view some of the courts have pointed out that the text of the appraisal provision does not stipulate for any second attempt.²¹⁷ It neither requires nor excuses one; it is silent on the point. Also, the query has been voiced as to what-might-be-the-end-of-it-all if the provision were held to require a second attempt; if the second were to fail, might a third be required, and so on indefinitely, or *ad infinitum*?²¹⁸

When the first attempt fails before award. When the first endeavor ends in an impasse before any award is rendered the question at hand

214. See *supra* § 6, *Irrevocable Appraisal Provisions—How Invoked*, 11 MIAMI L.Q. 35.

215. See *infra*, § 8, "Enforcement of Appraisal Provisions."

216. Cases on the general question are collected and reviewed in an Annotation, 94 A.L.R. 494.

217. See, for example, *Headley v. Aetna Ins. Co.*, 202 Ala. 384, 80 So. 466 (1918).

The Supreme Court of Mississippi observed on the point as follows: "The policy does not contain an express provision for an appraisement in the event the appraisers first selected fail to agree; and this provision of the policy being one of the many printed provisions prepared by the insurance company and for its benefit, should not be enlarged or extended by any construction of this court." *Provident-Washington Ins. Co. v. Kennington*, 111 Miss. 244, 71 So. 378 (1916).

218. *Norwich Union Fire Ins. Co. v. Cohen*, 68 Fed. 42 (10th Cir. 1933); *Provident-Washington Ins. Co. v. Kennington*, 111 Miss. 244, 71 So. 378 (1916). Consult also *Fire Ass'n Phila. v. Appel*, 76 Ohio St. 1, 80 N. E. 952 (1907).

No case has been observed in which more than the first failure and second attempt were involved.

is resolved, as indicated above, in the insured's action to collect on the policy. The insurer will have pleaded the appraisal provision. The insured will rely upon the impasse which intervened to excuse his further compliance with the appraisal provision.

The parties will have progressed to the extent that each party has appointed a qualified person as appraiser. The two appraisers may have tried and failed to agree upon an award; they may have tried and failed to choose an umpire; they may have agreed upon an umpire but he may have refused to act, or he may have accepted and then resigned before any award was reached; or the appraisers and umpire may have started on their appraisal work, have adjourned before it was completed, and have tried without success to reconvene and complete the appraisal. At some point along the line the insured will have cut short further participation by his appointee and have commenced his action to collect on the policy.

It is noticeable that in most of these cases the courts have been disposed, in stating their rulings, to allocate "the fault" for the failure to one, or both, of the parties, or to acquit both. The identity of "the fault" is not always clear.

The instances of potential fault of the respective parties in these cases appear to be as follows: (1) The insured withdraws from the appraisal and brings his action prematurely; he still owes time and effort under the appraisal provision.²¹⁹ (2) The insurer defaults under its near absolute responsibility to bring on an early appraisal and award as advanced in *Uhrig v. Williamsburg City Fire Ins. Co.* reviewed above p. 343. (3) The party dictates to the appraisers, or one of them, who should be, or should not be, the umpire, thereby contributing to or bringing about the impasse over his selection; or the party may otherwise induce the given stalemate of the appraisers in their proceedings.²²⁰

It remains to note that in most of the cases concerned with the general question at hand the rulings have been predicated upon the declared conclusion that both parties were *without* "fault" for the failure of the first appraisal. This predication for these rulings appears to rest upon a record in each case which is negative of substantial evidence of the foregoing instances of fault on the part of either party, or upon the disposition of the court in the given case so to characterize the record in order to

219. See *Silver v. Western Assur. Co.*, 164 N.Y. 381, 58 N.E. 284 (1900); *Williams v. German Ins. Co.*, 90 App. Div. 413, 86 N.Y.S. 98 (4th Dep't 1904). Compare *Shawnee Ins. Co. v. Pontfield*, 110 Md. 353, 72 Atl. 835 (1909).

220. See *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13 (1896); *Reilly v. Agricultural Ins. Co.*, 311 Ill. App. 562, 37 N.E.2d 352 (1941).

"rescue" the insured from the appraisal provision and the postponement of his action to collect on the policy.²²¹

It remains to observe further that the allocation of "the fault" in these cases appears to be of little consequence provided the net conclusion is that the *insured is not at fault*. If "the fault" is not his, it is not important whether or not it is that of the insurer. Rare indeed are the cases in which the insured has been determined by judgment or verdict to be at fault for the failure of the first appraisal. This is not surprising since such adjudication, if followed to its bitter end, could be made to mean that the insured cannot gain further appraisal, nor can he maintain any action to collect any loss on his policy.²²²

The Supreme Court of California seems to be alone in the view that when both appraisers share "the fault," the appraiser for the insured is *not* so at fault but that the insured may sue without appraisal.²²³

The insured being "without fault" for the failure of the first appraisal, the general question at hand may be broken down as follows: Shall the insured be allowed to maintain his action to collect on the policy without first offering to start over on another appraisal, or without requesting the insurer to join with him in so doing? Shall he be allowed to maintain his action if the insurer shall have offered and requested that they start over, but the insured shall have refused?

The view of the majority of the courts in the cases appears to be as follows: Once the insured has duly selected a qualified person as appraiser, and he, in turn, has undertaken to serve as such and to bring on the appraisal and the proceedings come to an impasse without fault of the insured, the insured may cancel his further participation in the appraisal and commence his action without any offer or request that the parties start over by appointing new appraisers or otherwise. Nor is he required to respond to the insurer's request that they do so.

Thus, in one of the earliest American cases on this question, *Western Assur. Co. v. Decker*,²²⁴ it is reported that the two appraisers were unable to agree upon an award or upon an umpire and that they "finally abandoned all effort to agree on either." Neither party offered to appoint or requested

221. See, for example, *Koger v. Detroit Fire & Marine Ins. Co.*, 9 Cal.2d 336, 70 P.2d 927 (1937); *Westenhaver v. German-American Ins. Co.*, 113 Iowa 726, 82 N.W. 717 (1900). Compare, *Reilley v. Agricultural Ins. Co.*, 311 Ill. App. 562, 37 N.E.2d 352 (1941); *American Central Ins. Co. v. Terry*, 298 S.W. 258 (Tex. Cir. App. 1927).

222. See *Reilley v. Agricultural Ins. Co.*, *supra* note 221.

223. *Koger v. Detroit Fire & Marine Ins. Co.*, 9 Cal.2d 336, 70 P.2d 927 (1937) (certain provisions of the standard policy legislation then in effect were considered in deriving this quite abstruse consequence). See further, *Westenhaver v. German-American Ins. Co.*, 113 Iowa 726, 82 N.W. 717 (1900) wherein like judicial labors were diverted to the insured's cause. Compare *American Central Ins. Co. v. Terry*, 298 S.W. 658 (Tex. Civ. App. 1927).

224. 98 Fed. 381 (8th Cir. 1899).

the other to appoint, a substitute appraiser. The insured thereafter sued to collect on the policy. The insurer, in support of its plea of the appraisal provision, urged that the insured should have proposed a new selection of appraisers and that, "not having done so, and not having appointed an arbitrator the second time, he cannot maintain this action." Ruling against the insurer the Court said:

"The terms of the policy are satisfied when the insured, acting in good faith, appoints an appraiser. If the appraisal falls through by disagreement of the appraisers without any fault of the insured, he has discharged his covenant, and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed."

And with specific reference to the point that the insured had made no offer to participate in the selection of new appraisers the Court continued:

"Even if a second appointment of arbitrators was required by the terms of the policy, there is nothing in the policy, as contended by the defendant in error, which imposes on the insured the obligation to be the first to propose another selection of arbitrators and appoint a second arbitrator."²²⁵

225. The Court took this position in the face of a dissenting opinion by Sanborn, J. The dissent made the point that the appraisal provision was unconditional in its terms, that is, it was not the more common one wherein appraisal is provided upon written request by either party. Being thus an unconditional condition precedent, it was urged that the insured must "show that he has done everything on his part that could be done" to obtain an appraisal and award. By reason of this requirement Sanborn, J., observed as follows:

"In my opinion, the mere appointment of an appraiser who could not or would not agree with his associate upon an umpire, and whose disagreement necessarily prevented the appraisal and award, fell far short of a compliance with this rule. The insured might have revoked his appointment, and have appointed another appraiser. He might have caused his appraiser to propose a number of unexceptionable men as umpires, and to request the appraiser of the company to choose from them. He might have caused his appraiser to request his associates to propose such men, and permit him to choose. He might have requested the insurer to agree with him upon other appraisers. These are but the ordinary means to choose an umpire which would occur at once to every one who really sought to secure a choice, and I am unable to believe that, without resorting to any of them, or taking any action to procure the appraisal other than the appointment of an inactive appraiser, the insured has done all that he could do to bring about the appraisal and award."

In accord with the majority of the Court in the *Decker* case:

U.S. See *Spring Garden Ins. Co. v. Amusement Syndicate Co.*, 178 Fed. 519 (8th Cir. 1910).

Ala. *Headley v. Aetna Ins. Co.*, 202 Ala. 384, 80 So. 466 (1918) (policy covering tornado and cyclone loss).

Ill. *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 39 N.E. 1102 (1894).

Miss. *Provident-Washington Ins. Co. v. Kennington*, 111 Miss. 244, 71 So. 378 (1916).

Consult also *Uhrig v. Williamsburg City Fire Ins. Co.*, 101 N.Y. 362, 4 N.E. 475 (1886) (the two appraisers failed to agree upon an umpire; there was evidence that insured requested insurer to appoint another appraiser or have its appointee agree with insurer's appointee upon an umpire and that insurer refused. The Court appears to have considered this refusal as a "refusal or neglect to go on with the first arbitration," and therefore the insurer's subsequent request for appraisal was misconceived. By its refusal the insurer put itself at fault for the failure. And: "The plaintiff having once consented to arbitrate, if the arbitration failed and came to an end, from the fault of the defendant, the arbitration clause could not stand in the way of this action.")

In *Norwich Union Fire Ins. Co. v. Cohen*²²⁶ the appraisal had progressed further than in the foregoing *Decker* case as follows: Each party had named an appraiser: the appraisers had agreed upon an umpire; the board commenced the appraisal; before the appraisal was completed an adjournment was had by general consent, but apparently to no stated date. Efforts of the three to reconvene had proved abortive and the umpire resigned. It is further reported that after this situation had developed the appraiser appointed by the insurer "wrote several letters to the appraiser for the insured in an effort to fix a date, to which there were no replies in writing, although there is testimony that the insured's appraiser called the companies' appraiser on the telephone several times concerning the matter." Shortly thereafter, as is further reported, adjusters for the companies wrote plaintiff demanding that a new appraisal agreement be entered into, and new appraisers appointed. The insured did not reply but started his suit shortly thereafter. The Court affirmed the trial court's instruction to the jury that upon the demand by the insurer it became the duty of the insured to name an appraiser "*and if she [the insured] in good faith names an appraiser and the appraisal fails without her fault she is not required to propose the selection of other appraisers, nor is she required to name another appraiser even at the request of the defendant but may resort to the courts to have her damages assessed.*" (Italics supplied).²²⁷

226. 68 F.2d 42 (10th Cir. 1933).

227. *Accord*:

Kan. Cowles v. Connecticut Fire Ins. Co., 113 Kan. 532, 215 Pac. 308 (1923); *Jerrills v. German American Ins. Co.*, 82 Kan. 320, 108 Pac. 114 (1910) (after the impasse insurer had offered to appoint a substitute appraiser and suggested that insured do likewise. Insured did not respond).

N.C. Pretzfelder v. Merchants' Ins. Co., 116 N.C. 491, 21 S.E. 302 (1895) (after the impasse insured proposed to insurer that the parties appoint new appraisers; insurer refused unless insurer's original appointee be retained; insured refused; thereafter insurer proposed appointment of new appraisers; insured refused).

Texas. Bankers' & Shippers' Ins. Co. v. Sharber Grocery Co., 297 S.W. 474 (Tex. Civ. App. 1927) (after the impasse insurer offered to appoint substitute appraiser and requested insured to do likewise; insured refused).

Pa. Chavin v. Superior Fire Ins. Co., 283 Pa. 397, 129 Atl. 326 (1925); *Fritz v. British American Ins. Co.*, 208 Pa. 268, 57 Atl. 573 (1904) (It is not clear that the question whether or not there must be a second try at an appraisal is significant in Pennsylvania in view of the apparent rulings in that state that such appraisal provisions are revocable from the beginning. See *infra* 11 MIAMI L.Q. 31).

Va. Hanover Fire Ins. Co. v. Drake, 170 Va. 257, 196 S.E. 664 (1916).

A Georgia case indicates that the foregoing majority view obtains in case an impasse over the choice of an umpire, unless the insurer makes "a further demand" for appraisal. *Globe & Rutgers Fire Ins. Co. v. Jewell-Loudermilk Co.*, 36 Ga. App. 538, 137 S.E. 286 (1927). Consult also, *Messler v. Williamsburgh City Fire Ins. Co.*, 42 R.I. 460, 108 Atl. 832 (1920).

The position of the Supreme Court of Connecticut on the general question at hand is left in doubt in *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 65 Atl. 134 (1906).

*The minority view—Davenport v. Long Island Ins. Co.*²²⁸ The minority decisions ruling that the appraisal provision survives the failure of an appraisal before award rendered appear to stem from the *Davenport* case. It was decided in 1882 by the then Court of Common Pleas for the City and County of New York. The appraisal provision became effective upon the written request of either party. The Court expressed its view that the guiding rule with respect to the question at hand requires the insured to “show that he has done everything on his part which could be done” to carry out the appraisal provision.²²⁹ Looking to the evidence in the case, it concluded that “neither the plaintiff nor the defendant were in any way responsible” for the failure of the two appraisers to agree upon the third.²³⁰ Upon this conclusion as to the evidence and in furtherance of the foregoing guiding rule the Court held that it was the insured’s duty “at least to propose to the defendants that they should each select new appraisers” before bringing his action to collect on the policy. Accordingly, the insurer’s plea of the appraisal provision prevailed.²³¹

228. 10 Daly 535 (N.Y. 1882). The case has been cited to the Court of Appeals to sustain the insurer’s claim to resubmission after an award had been held invalid. The Court denied the claim but did not mention the *Davenport* case. See *Ethel Gervant v. New England Fire Ins. Co.*, 306 N.Y. 393, 118 N.E.2d 574 (1954).

229. The Court referred to the ruling of the United States Supreme Court in *United States v. Robeson*, 34 U.S. (9 Pet.) 319 (1835) for this true rule, as did Sanborn, J., dissenting in the *Decker* case, *supra* note 225.

230. It is clear enough that the Court meant by this conclusion that there was no evidence that either party sought by any undue means to influence the appraisers, or either of them, in the choice of an umpire.

231. *Accord*:

Ind. Vernon Ins. Co. v. Maitlin, 158 Ind. 393, 63 N.E. 755 (1902). The appraisal provision contained no clause that appraisal be upon the request, or written request, of either party. The Court concluded from the evidence that: “The appraisers seem to have been equally unreasonable in their views concerning the proper qualifications of an umpire. Those views proved to be irreconcilable. It cannot be said that one of the parties [appraisers?] more than the other, was responsible for the failure to agree upon an umpire. We cannot attribute bad faith or perversity to either. We must ascribe their failure to agree, rather, to the peculiarities of the two appraisers. Other appraisers, if chosen, may easily decide the amount of loss, or, in case of a difference of opinion on this point, may promptly select an umpire.”

The bone-of-contention between the appraisers in this case was whether the person to be chosen as umpire should be a local or a non-local person. Courts in other jurisdictions have ruled that action of the insurer’s appointee in insisting upon a non-local person, like in this case, is arbitrary and unreasonable and that action of insured’s appointee in insisting upon a local person, like in this case, is reasonable. Accordingly they have ruled, quite as a matter of law, that the insured can maintain his action.

Iowa. Westenhaver v. German-American Ins. Co., 113 Iowa 726, 82 N.W. 717 (1900). Whether or not the appraisal provision was conditional upon a request, or written request, of either party, does not appear in the report of the case.

The case is most remarkable for its judicial gloss of the insured’s iniquities in connection with the appraisal. Apparently the Court so indulged the insured in order to derive, notwithstanding the failure, “an honest and earnest attempt” of the appraisers to agree upon an umpire and thereby recognize the insured as free from fault and thereby qualify the insured to claim a second attempt. Having so exculpated the insured the Court recited what it considered to be the established rule, namely, that “it was plaintiff’s duty, when the appraisers first selected failed to agree *through no fault of*

When the first appraisal ends in an award, but is held invalid. A majority of the decisions covering the situation wherein the appraisal goes to an award but is held invalid are in accord with the foregoing majority view covering the situation wherein the appraisal fails before award. If the appraisal and award fall without fault of the insured he can, by the majority view, maintain his action to collect on the policy without further regard for the appraisal provision. Thus, the New York Court of Appeals, in holding invalid an appraisal and award because the appraisers refused to consider certain matters of evidence relating to the valuation of the property and loss, ruled out the requirement of any resubmission as follows:

"However, after an appraisal proceeding was terminated and the award has been set aside, without any fault of the insured, he need not submit to any further appraisal but may sue on the policy."²³²

either of the parties, to select a new appraiser, in order that the amount of their recovery should be fixed." (Italics supplied).

It seems clear from the Court's report of the case that the insured selected a person as appraiser who would serve the insured and do his bidding throughout the appraisal. That appraiser's nominations for umpire were obviously designed to gain an umpire who would go along with him on any difference accruing between the two appraisers; he proved to be the puppet of the insured during the negotiations over the umpire and lent himself to the insured's ex parte dictation as to whom he should agree upon as umpire. Concerning these facts the Court uttered the following extraordinary conclusion: "These facts are mentioned *not for the purpose of showing fraud or bad faith, but as evincing a purpose on the part of plaintiffs to derive every advantage possible in the arbitration.*" (Italics supplied).

The two appraisers, according to the Court, after spending "some days in an effort to agree, mutually came to the conclusion that they could not agree, and so informed the parties." The insurer thereupon selected a new appraiser and demanded that the insured select another and proceed with the appraisal. The insured refused and immediately brought his action. Compare *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13 (1896).

Quite clearly a comparable course of conduct on the part of the insurer and/or, its appointee, would have worked the loss of its rights under the provision. See *Read v. State Ins. Co.*, 103 Iowa 307, 72 N.W. 665 (1897).

232. *Ethel Gervant v. New England Fire Ins. Co.*, 306 N.Y. 393, 118 N.E.2d 574 (1954).

Accord:

U.S. Aetna Ins. Co. v. Hefferlin, 260 Fed. 695 (9th Cir. 1919), (award invalid because appraisers overlooked items of property which should have been appraised).

Ky. Globe & Rutgers Ins. Co. v. Johnson, 127 S.W. 765 (Ky. 1910) (award invalid because appraisers did not separately find and state sound value and damage.)

Md. Home Ins. Co. v. Shiff's Sons, 103 Md. 648, 64 Atl. 63 (1906) (majority award by insurer's appraiser and umpire ruled invalid under the particular submission).

Mo. Security Printing Co. v. Connecticut Fire Ins. Co., 209 Mo. App. 422, 240 S.W. 263 (1922) (award invalid because appraisers did not separately find and note in sufficient detail sound value and damage). Compare, *Griebel v. Niagara Fire Ins. Co.*, 28 S.W.2d 411 (Mo. 1930).

N.D. Siegal v. Insurance Co., 56 N.D. 841, 219 N.W. 467 (1928). (majority award by insured's appraiser and umpire ruled invalid for the two had not actually agreed either upon amount of inventory or the amount of loss and damage).

Tenn. St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S.W. 1186 (1914) (bill in equity by insurer to vacate award; cross bill to enforce award or collect on policies. Award vacated apparently because of no separate statement of sound value and damage and judgment for insured for amount of loss on insured's cross bill.)

It is apparent that the instances of potential "fault" of the insured, or of the insurer, in this situation and for the purpose at hand are likely to be different from those attending a failure of the appraisal before award. They are likely to involve the misconduct of the party either in clandestinely appointing a partisan appraiser who serves the purpose, or in inducing, or contributing to, such misconduct within the appraisal board as constitutes sufficient cause to set aside the award. Rarely has the insured been adjudged at fault in these cases.²³³

The minority view, as voiced in the foregoing cases ruling the survival of the appraisal provision when the appraisal fails *before award*, undergoes a degree of refinement into technicality in some of the cases passing upon the situation now under consideration. That refinement or limitation upon the general minority view leaves the rule about as follows: The insured is bound to a resubmission when the appraisal and award are held invalid, if, *but only if, the insurer disowns the award when the insured objects thereto*. Otherwise stated, if the insurer defends the award, rather than disclaiming it in deference to the insured's claim of invalidity, and it is ruled invalid, no resubmission need be offered or undertaken by the insured.

Cases interposing this requirement upon the insurer to qualify its claim to another appraisal after the award is ruled invalid stem from the Minnesota case of *Levine v. Lancashire Ins. Co.*²³⁴ decided in 1896. The insured sued to vacate the award and collect on the policy. The award was set aside for partisanship on the part of the appraiser appointed by the insurer and his domination of an inept umpire. The insured's appointee did not join in the award. The misdoings of the insurer's appointee were not charged to the insurer so as to make them a "fault" on its part.

In denying the claim to resubmission by the insurer, the Court first observed generally upon the survival of the appraisal provision as follows:

"The law also, undoubtedly, is that under such a provision if an award is set aside for misconduct of the arbitrators, *not participated in or caused by the insurer, the agreement for an appraisal still remains in force, and a new appraisal, unless it had become impossible, would still be a condition precedent to a right of action on the policy unless waived.*" (Italics supplied.)

The Court then turned to the making of waiver against the insurer for defending, and not disclaiming, the award. It continued that, even though the award failed without fault of the insurer, "*yet its conduct after*

233. It did happen in *Reilly v. Agricultural Ins. Co.*, 311 Ill. App. 562, 37 N.E.2d 352 (1941).

234. 66 Minn. 138, 68 N.W. 855 (1896). To like effect, *Dufresne v. Marine Ins. Co.*, 157 Minn. 390, 196 N.W. 560 (1923) (policy covering theft of automobile).

plaintiffs rejected the award clearly constituted a waiver of the right to a new appraisal. Not only did it never ask for or even suggest a new appraisal, but in its communications with plaintiffs it expressly insisted on the award already made, and notified them that any claim under the policy must be made on that basis, and no other. It took the same position in its answer."^{234a}

In short, the insurer must choose either to stand on the award and try to sustain it against the insured's attack, or to disclaim it in deference to the insured's challenge and claim, if it desires one, a resubmission. Its claim to resubmission is made thus conditional; the insured's obligation to resubmit is thus qualified.

In a subsequent case²³⁵ the Court vouched for the *Levine* case as laying down a sound principle and elaborated upon its being applicable alike to insurer and to insured. By this principle, "if an award is attacked upon the ground of fraud or misconduct of the referees, and one party to the controversy notifies the other of that fact, demanding a reappraisal on account of such misconduct, it then becomes the duty of the other party to investigate the validity of the charges, and determine whether or not it will abide by the award or submit to a reappraisal; and, if it shall determine to abide by the award and refuse to submit to a reappraisal, such party is thereby estopped from thereafter demanding another appraisal, in case the charges shall prove to be sustained. The purpose of the provisions in the standard policy with reference to arbitration is to secure a speedy determination of the controversy, and to hold that the party insisting upon the validity of an award might litigate that question, and not be bound by the result of the action, would be to create an interminable method by which the controversy could be submitted again and again."

The Court also made explicit denial that the foregoing principle was partial to the insured; it declared that "the conclusion we have arrived at does not result in a discrimination against the insurance companies, for the same principle would apply to the actions of the insured in case the

234a. *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 149, 68 N.W. 855, 860 (1896).

235. *Christianson v. Norwich Union Fire Ins. Co.*, 84 Minn. 526, 88 N.W. 16 (1901) (In its answer to the insured's action to set aside the award and collect on the policy, the insurer defended the award, but it also pleaded in its answer that if the award should be held invalid, then there should be a resubmission).

In accord with the foregoing Minnesota decisions are the following:

Mass. See *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N.E. 384 (1915).

Mo. *Coffin v. German Fire Ins. Co.*, 142 Mo. App. 295, 126 S.W. 253 (1910).

Okla. *Aetna Ins. Co. v. Jester*, 37 Okla. 413, 132 Pac. 130 (1913).

Texas. *American Ins. Co. v. Bell*, 33 Tex. Civ. App. 11, 75 S.W. 319 (1903); *Security Ins. Co. v. Kelly*, 196 S.W. 874 (Tex. Cit. App. 1917).

Wash. See *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436 (1896).

insurer should attack the award for the same purpose." It is difficult to verify the principle in this light.²³⁶

There is some authority sustaining the minority view with respect to the question at hand which does not interpose the technicality that the insurer disclaim the award as required in the *Levine case*. Thus, in *Fisher v. Merchants Ins. Co.*,²³⁷ the Supreme Court of Maine took the general position that an ineffectual attempt to comply with the appraisal provision is not a compliance therewith, and the insured must make a second attempt. The insured sued to collect on the policy, and in his amended complaint set forth an appraisal and an award therein which he claimed was invalid for misconduct of the referees making it. Insurer requested an instruction to the jury that if the failure of the award was without fault of the insurer, the insured was required to take steps to have a new reference and in absence of evidence that he did so, the action could not be maintained. It ruled that the insurer was entitled to the instruction as requested. Said the Court:

"The action in such a case is upon the policy, but the damages recoverable are such as have been previously ascertained and determined by the arbitrators, unless the plaintiff shows some sufficient reason why such a determination could not have been obtained. *Consequently there can be no action until performance of the condition or excuse shown for nonperformance. And it is not sufficient to show an award which the plaintiff repudiates and is not willing to be bound by.*"

"The action can only be maintained to recover the amount determined upon by the arbitrators, or, if their determination and award were invalid, then the plaintiff must allege and prove, either that the amount of the plaintiff's loss has been determined by other arbitrators chosen in the manner stipulated by the parties, or some sufficient reason why such a determination has become unnecessary or impossible." (Italics supplied)²³⁸

It may be pointed out that these cases dealing with the claim to resubmission after failure of the appraisal and award have also involved a

236. If the insurer challenges the award (either by an action to set it aside, or in defense to an action by the insured to enforce it) and the insurer prevails over the insured's defense of it, it seems very difficult to believe that the principle is to be honored as against the insured. This is true because it is doubted that the insured will or should be held disqualified to offer resubmission and thereby be disabled from maintaining any action to collect on the policy. To honor the principle as against the insured would, it seems, work his loss of all claim on the policy, whereas, to honor it as against the insurer works its loss only of its claim to insured's offer of resubmission when it (the insurer) fails in its support of the award.

237. 95 Me. 486, 50 Atl. 282 (1901).
Accord, see *Headley v. Commercial Standard Ins. Co.*, 17 La. App. 25, 134 So. 305 (1931).

238. *Grady v. Fire & Marine Ins. Co.*, 27 R.I. 435, 63 Atl. 173 (1906). See also *Riddell v. Rochester German Ins. Co.*, 36 R.I. 240, 89 Atl. 833 (1914); *Early v. Providence Wash. Ins. Co.*, 31 R.I. 225, 76 Atl. 753 (1910).

question of civil procedure which does not arise when the appraisal falls before award. The insured seeks to get rid of the award and to collect on the policy. Can this be done in a single action? The near consensus of the decisions is that the two objectives may be accomplished in one action. Thus, in the foregoing *Levine* case the insured set forth in the complaint that an appraisal had been had and award rendered but that the award should be set aside because of the misconduct of the insurer's appointee as appraiser and of the umpire who had rendered the award. The Court identified the action as one "to set aside the award and to recover on the policy." Said the Court further: "There can be no doubt but that all this relief may be granted in the same action." It is in connection with the second part of the action that the survival of the appraisal provision is tested.²³⁹

239. See further, *St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S.W. 1186 (1914) (Insurer sued to vacate award; insured filed cross-bill in alternative to enforce award, or, if award invalid, to collect on policy. Insurer successful on its bill; insured allowed to collect on cross bill); *Vincent v. German Ins. Co.*, 120 Iowa 272, 94 N.W. 458 (1903); *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436 (1896).

Compare *Early v. Providence Washington Ins. Co.*, *supra* note 238 (Insured cannot, in action "at law" to collect on policy, impeach the award because of alleged misconduct of appraisers by excluding certain items of property from their computation of the loss and incompetency of the appraisal board). See *contra* that the "action at law" is not misconceived in such cases, *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N.E. 384 (1915); also *Sullivan v. Travelers' Ins. Co.*, 169 N.Y. 213, 63 N.E. 146 (1901); *Wilbisky v. German Alliance Ins. Co.*, 90 Misc. 335, 152 N.Y.S. 1048 (1st Dep't 1915).