

**State of Minnesota**  
**In Court of Appeals**

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AUTO-OWNERS INSURANCE COMPANY,

*Appellant,*

vs.

SECOND CHANCE INVESTMENTS, LLC,

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### I. **USE OF THE APPRAISAL PROVISION IN MINN. STAT. § 65A.01, SUBD. 3 TO DETERMINE A TOTAL LOSS IS CONSISTENT WITH THE VALUED POLICY LAW.**

Minn. Stat. § 65A.01 codifies Minnesota's Standard Fire Insurance Policy, which includes Minnesota's valued policy law. Appellant acknowledges that Minn. Stat. § 65A.01, Subd. 5 is clear, in that when there exists a total loss on buildings the insured is entitled to the policy limits. Appellant further acknowledges that when there exists a total loss, because the insured is entitled to the policy limits, there is no purpose in submitting the loss to appraisal because nothing remains to appraise; the extent of the loss having been determined to be total, and the statute having set the award at policy limits.

Given this framework, there is nothing inconsistent with the valued policy law and implementing the statutory and contractual rights of the parties to submit to appraisal the dispute over whether the loss is total.

Appellant is not suggesting that the appraisal provision may be invoked for determination of the dollar value of the amount of the loss when the loss is in fact total. Appellant agrees that the result is obvious: there is no need to appraise the amount of recovery and the value of the property when that amount, i.e., the dollar amount, is fixed by the policy limits. It is obvious that when a loss is, in fact, total, nothing need be submitted to any tribunal, be it a district court or an appraisal board.

To submit a loss determined to be total to appraisal would be wholly inconsistent with our valued policy law. But the issue here is whether it is inconsistent with our valued policy law to submit to appraisal the question: *has there been a total loss?*

Submitting to appraisal the issue of whether a total loss exists does not undermine the purpose behind our valued policy law in any way, and does not take away any rights of any parties to the contract. Instead, it provides both parties with what the legislature intended, namely, a “plain, speedy, inexpensive and just determination of the extent of the loss.” *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 288 N.W. 723, 725 (Minn. 1939).

**II. WHETHER THERE HAS BEEN A “TOTAL LOSS” IS A QUESTION OF FACT, AND NOT A LIABILITY OR COVERAGE ISSUE.**

Respondent argues that total loss questions are coverage questions, and thus, questions for the courts. Minnesota law has long held that total loss is a question of fact: “Where the line is to be drawn between [a partial and total loss] is, in each particular case, a question of fact.” *Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co. of Rochester, N.Y.*, 88 N.W. 265, 270-71 (Minn. 1901).

Total loss is defined as follows: “...[A] loss is not total, within the meaning of the standard policy law, unless the building insured be so far destroyed by the fire that no substantial part or portion thereof above the foundation remained in place capable of being utilized in restoring the building to the condition in which it was before the fire.” *Poppitz v. German Ins. Co. of*

*Freeport, Ill.*, 88 N.W. 438, 439 (Minn. 1901). As the definition makes clear, a total loss is an analysis of the extent of the loss, i.e., how much has been damaged? Thus, total loss is a factual question with respect to the extent or scope of the loss.

Moreover, the Minnesota Supreme Court has long held that it is the duty of an appraisal board to determine the scope or extent of the loss: “The appraisers must determine many matters *other than the mere value of specific property produced before them for examination and appraisal*. They must determine the quantity of property covered [sic] by the policy and on hand at the time of the fire, the quantity destroyed....” *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N.W. 425, 427 (Minn. 1928) (emphasis added). Thus, because appraisal boards have a duty to determine the scope of the loss, and total loss is a factual question regarding the scope of the loss, it follows that an appraisal board can determine whether a total loss exists.

Total loss disputes are not coverage questions but factual questions with regard to the extent or scope of the loss, and are completely within the jurisdiction and duties of appraisal boards. The determination by an appraisal board of whether a total loss exists does not affect the insured’s right to recover under the policy. It only affects how much the insured will recover. In this case, there is no coverage dispute—the loss is covered. The dispute is how much the insured is entitled to recover, which requires a determination whether the loss is total. In *Quade v. Secura Insurance*, this court made it

clear that "...[i]f the disputed issue is how much...an appraisal is necessary." *Quade v. Secura Insurance*, 792 N.W.2d 478, 480-81 (Minn. App. 2011).

**III. IT IS APPROPRIATE FOR AN APPRAISAL BOARD TO DECIDE DISPUTES OVER WHETHER A LOSS EXISTS.**

Respondent also argues that the individuals making up the appraisal board are not in a position to decide whether the loss is total because the term "total loss" has been defined by courts. At every appraisal there exists a framework by which appraisal boards determine the amount of the loss. This framework often includes the policy of insurance and the law. For example, when appraisers are charged with determining the actual cash value of a loss, the term "actual cash value" has a definition that has to be discerned by the appraisal board. In this case, "actual cash value" happens to be defined in the policy (See Appellant's Brief, Appendix, p. App – 06). In other cases, where not defined, the appraisal board must look to industry standards or the law for guidance. Similarly, in *QBE Insurance Corporation v. Twin Homes of French Ridge Homeowners Association*, this court found no problem with the appraisal board looking to the policy for guidance on how it was to award a loss. See generally, *QBE Insurance Corporation v. Twin Homes of French Ridge Homeowners Association*, 778 N.W.2d 393 (Minn. Ct. App. 2010).

Parties who submit their dispute to appraisal are entitled to a formal hearing. *Redner v. New York Fine Ins. Co.*, 92 Minn. 306, 99 N.W. 886 (Minn. 1904). The definition of total loss has been clear for over a century. Nothing prevents the parties to the dispute from presenting the definition of total loss

to the appraisal board for consideration, just as in the case of “actual cash value.” In addition, Minnesota law has long held that the appraisal board “...is a quasi court, subject to the principles governing common-law arbitration. Such board should sit in a body, and receive evidence offered by the respective parties, submitting the same to the usual tests of cross-examination.... The [appraisal board] must constitute a body of disinterested men, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy.” *Christianson v. Norwich Union Fire Ins. Co.*, 88 N.W. 16, 18 (1901). Each member of the appraisal board in this case has inspected the subject property, and is able to accurately ascertain the facts and the amount of the loss.

Moreover, there are many claims where the existence of a total loss was undisputed. In these situations, representatives from the insurance industry make the determination that the loss is, in fact, total. This must include an assessment as to the extent of the damage based on the legal standard of a total loss. If the insured claims a total loss, the insured, or its representative, must too make a similar assessment. In short, the analysis to which Respondent objects is done routinely by industry experts, such as the individuals comprising the appraisal board in this case.

**IV. THE PLAIN LANGUAGE AND OPERATION OF MINN. STAT. § 65A.01, DOES NOT PROHIBIT AN APPRAISAL BOARD FROM DECIDING DISPUTES OVER WHETHER A TOTAL LOSS EXISTS.**

Respondent argues that allowing appraisal boards to determine whether a total loss exists violates the statutory language of Minn. Stat. § 65A.01. Respondent would incorrectly limit the authority of appraisal boards, pursuant to the appraisal provision, to determine, only, “the actual cash value” of the loss. The appraisal provision in Minn. Stat. § 65A.01 is clear: appraisal boards resolve disputes with respect to actual cash value “*or the amount of the loss.*” Minn. Stat. § 65A.01, Subd. 3 (emphasis added). And as stated above, *Quade v. Secura Insurance* requires that when the dispute is over how much, the dispute goes to appraisal. *Quade* at 480-81.

Respondent also argues that the language “except in case of total loss on buildings” excludes from appraisal disputes over whether a total loss exists. Respondent argues that any other construction is superfluous.

The language “except in case of total loss on buildings” is included to clarify that the insurer cannot challenge the dollar value of the amount of the loss in the event of a total loss. For example, If a building is insured for \$300,000, and there is a total loss, the insurer cannot invoke the appraisal provision because it claims that the current market value of the structure, or the cost to rebuild, is less than \$300,000. The purpose of the language is to prevent the insurer from using the appraisal provision to deprive the insured of its rights and benefits under the valued policy law. But submitting the dispute

over whether there exists a total loss to an appraisal board does no more to abrogate the rights of the insured under the valued policy law than submitting the dispute to a jury. Respondent's argument then boils down to the position that any time an insurer disputes the existence of a total loss, it is an attempt to deprive the insured of its rights under the valued policy law. Such a position is untenable.

Respondent would have this court interpret the words "except in case of total loss on buildings" to mean "except in case of a dispute over whether there exists a total loss on buildings", thereby excluding such disputes from appraisal. An analysis of the same language contained in Minn. Stat. § 65A.01, Subd. 5 illustrates why such an interpretation is incorrect. Subdivision 5 provides as follows:

**Subd. 5. Provision prohibited, total loss; limiting amount to be paid.** No provision shall be attached to or included in such policy limiting the amount to be paid *in case of total loss on buildings* by fire, lightning or other hazard to less than the amount of insurance on the same. Minn. Stat. § 65A.01 Subd. 5 (2004) (emphasis added).

If we substitute the words "in case of a dispute over whether there exists a total loss" for "in case of total loss" then Subdivision 5 becomes a provision that prohibits payment of anything less than policy limits if there is merely a dispute over total loss. Certainly if there is a dispute over total loss, and it is determined not to be a total loss, the insurer is not required to pay policy limits. Therefore, the language "in case of total loss" must mean—can only mean—that the loss has been determined to be a total loss.

**V. AMPLE LEGAL AUTHORITY EXISTS TO SUPPORT THE POSITION THAT APPRAISAL BOARDS CAN DECIDE DISPUTES OVER WHETHER A TOTAL LOSS EXISTS.**

Appellant relies on the *Williamson v. Liverpool & London & Globe Ins. Co.* and the dissent in *Lee v. Hamilton Fire Ins. Co.* in support of its argument that appraisal boards have the authority to determine whether a loss is total. *Gouin v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 259 P. 387 (Wash. 1927) is directly on point and also supports Appellant's argument.

*Gouin* involved fire damage to an insured's home, which was insured under a valued policy, pursuant to a Washington state valued policy law. *Gouin* at 388. The facts are as follows: The insured claimed the loss was total; the insurer claimed it was partial; the dispute, pursuant to the provisions in the policy, was submitted to appraisal; the appraisal returned an award less than that stated on the policy; and the insured sued for, among other causes of action, a vacation of the award stating that the loss was total and appraisal was not an appropriate venue based on Washington's valued policy law. *Id.* at 388-90.

With respect to the claim that the issue of total loss should not have been decided at appraisal, the Washington Supreme Court held as follows:

The next contention is, if we understand the appellant, that because he at all times claimed a total loss, and his evidence tended to show a total loss, there was no room for an appraisal, since the statute in such cases fixes the amount of the insurance as the measure of the loss. But the contention is not tenable. The insurance company was as much entitled to dispute his claim of total loss as it would have been entitled to dispute his claim had he claimed less than a total loss. The company could

therefore plead as a defense to his action the plea it did interpose; namely, that the question as to the amount of the loss had been submitted to a tribunal agreed upon between them to determine the question, and that the tribunal agreed upon had made such an award. In other words, the appellant cannot in this action plead and offer evidence to prove a total loss and thereby deprive the company of its defense that the differences between them have been determined in the manner agreed upon in the contract of insurance.

*Gouin* at 390 (emphasis added).

*Gouin*, *Williamson*, and the dissent in *Lee* are directly on point and squarely address the issue before this court. In addition, Appellant relies on *Quade* and *QBE* which stand for the proposition that appraisal boards make their determinations within the framework of the policy, the law, and industry standards. Appellant also relies on *Minnesota Farmers Mut. Ins. Co. v. Smart* and the *Kavli* case to establish the legislative intent of the appraisal provision, which is remedial in nature and provides a quick and inexpensive way to resolve the dispute.

Respondent attempts to distinguish *Williamson* on the grounds that it is an open policy. First, it is not clear from the *Williamson* opinion that the case involved an open policy. Second, even if it is an open policy the analysis does not change. The only difference between an open policy and a valued policy is in the event of total loss, the damages are predetermined by statute. Respondent fails to explain how this bears on whether an appraisal board can determine *if* a loss is total.

In addition, in support of its argument Respondent cites *Johnson v. Madelia Lake Crystal Mut. Ins. Co.*, 2004 WL 61057 (Minn. App.); *Dri-Kleen, Inc. v. Western Nat'l Mut. Ins. Group*, 2002 WL 1611507; and the *Northwestern* case, as referenced above. In each of these cases the issue of total loss was either decided by the district court or put to a jury for determination. However, none of these cases involved a dispute over whether the issue of total loss should be decided at appraisal or in district court. The parties in these cases did not make the argument to the court that the issue of whether a total loss exists should have been decided at appraisal. Accordingly, the courts in those cases did not address the issue that is now before this court.

Appellant acknowledges that if the parties agree to waive their right to appraisal, the issue of whether a total loss exists shall be decided in district court and by a jury. The cases above reflect this. However, when one party demands appraisal, as is the case here, and the issue does not involve questions with respect to coverage, as is the case here, then that party's statutory and contractual right to appraisal must be upheld.

**VI. APPRAISAL BENEFITS ALL PARTIES TO THE CONTRACT, NO SOUND REASON EXISTS PROHIBITING APPRAISAL BOARDS FROM DECIDING DISPUTES OVER WHETHER A TOTAL LOSS EXISTS AND PUBLIC POLICY REQUIRES THAT APPRAISAL BOARDS DECIDE SUCH ISSUES.**

Appraisal provisions benefit both parties to the insurance contract. As stated above, appraisals provide a plain, speedy, and just determination of the amount of the loss. *Kavli supra*. In addition, appraisal of a total loss does not

prevent an insured from receiving the benefits of the valued policy law if the appraisal board decides the loss is total. As in the *Williamson* case, an appraisal of whether a total loss exists can be awarded in favor of the insured. It is interesting to note, that in *Williamson*, it was the insurer who challenged the appraisal determination of total loss. *Williamson* at 59, 60. In *QBE* as well, it was the insurer who took issue with the appraisal award. *QBE* at 394. Clearly appraisal boards, and the decisions rendered by them, are not designed to benefit only insurance companies.

There is no good reason to prohibit appraisal boards from determining whether a total loss exists. The three-person appraisal panel, carefully selected by both parties, is more than qualified to determine whether or not a building is so far destroyed that no substantial portion of it remains such that it can safely be utilized in its reconstruction.

Public policy also requires that total loss disputes be decided at appraisal, when one party demands the same. For over a century, courts in this state, and elsewhere, have endorsed appraisal as the preferred venue for resolving these types of disputes. The legislature has relieved the courts of deciding such disputes and instead, has put in place a system by which qualified individuals, trained in assessing these types of disputes, can make an expedited, efficient, and just determination of the amount of the loss. There is no reason why this long-standing policy should not apply to disputes over total loss as well.

**CONCLUSION**

An appraisal board's determination of whether a total loss exists is perfectly consistent with Minn. Stat. § 65A.01. No statutory construction argument can be made to prohibit appraisal boards from deciding total loss disputes. Total loss disputes involve questions of fact with respect to how much an insured is entitled to recover. They do not involve questions of whether an insured is, in fact, entitled to recover under the policy. Finally, the public policy that supports the appraisal process supports the notion that appraisal boards can determine whether a total loss exists. For these reasons, the District Court's decision denying Appellant's right to have the dispute decided at appraisal should be reversed.

Respectfully submitted,

**HANSON, LULIC & KRALL, LLC**

September 16, 2011.

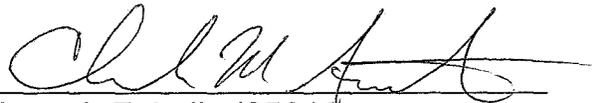
  
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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel of record, pursuant to Rule 132.01, subd. 3(a) of the Rules of Civil Appellate Procedure, hereby certifies that the attached brief has been prepared using Microsoft Word 2003, Arial, with a font size of 13 pt. and a word count of 3,121.

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