

NO. A11-1145

State of Minnesota
 In Supreme Court

Auto-Owners Insurance Company,

Appellant,

vs.

Second Chance Investments, LLC,

Respondent.

**BRIEF AND APPENDIX OF AMICUS CURIAE
 MINNESOTA ASSOCIATION FOR JUSTICE**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION

The Minnesota Association for Justice (MAJ) has no interest in the particular dispute between the litigants in this case.¹ The MAJ advocates for public policy and law that enhances consumer rights and protections consistent with principles of fundamental fairness and impartial justice. In other words, the MAJ seeks a “level playing field” in our justice system for non-professional litigants - those without a preferred vendor list of attorneys, engineers, contractors, medical doctors, adjusters, claims professionals, and appraisers, as opposed to insurance companies, who are, in practice, professional defenders of lawsuits. Trial by jury is a fundamental safeguard for the substantive and procedural rights of insureds, who are, generally speaking, non-professional litigants.

In the context of the instant case, the MAJ seeks to preserve a long-standing right of Minnesota insureds, based in common law and statute, that allows insureds to demand a jury determination as to whether a damaged property is “total loss” under Minnesota’s Valued Policy Statute, Minn. Stat. § 65A.01, Subd. 5. The preservation of this right does not prohibit an appraisal panel from determining the actual-cash value (ACV) amount of loss, nor does it prohibit such a panel from concluding that the ACV amount of loss exceeds an insurance policy’s limits, which renders the loss a *de facto* total loss. In fact, an appraisal should be conducted in the event a jury does not conclude that a property is a total loss. For example, in the instant case, Respondent agreed to participate in an appraisal with the understanding that it would preserve its right to a jury determination on the issue of total loss should the ACV amount of loss not exceed policy limits. Appraisal

¹ No party or counsel for a party has authored any part of this brief; no one other than the MAJ and its members have contributed monetarily to the preparation and submission of this brief.

is also appropriate for claims involving additional coverage items such as contents or personal property, additional living expenses or loss of use, debris removal, and damages to landscape items such as trees, plants, and shrubs.

It should be noted however, that appraisal is not arbitration. *Johnson v. Mutual Service Casualty Insurance Co.*, 732 N.W.2d 340, 344-346 (Minn.App. 2007). Further, appraisal not a condition precedent to suit. *See Nathe Bros., Inc. v. American Nat. Fire Ins. Co.*, 615 N.W.2d 341, 347 (Minn. 2000) (holding that strict compliance with all terms of the Standard Fire Insurance Policy is not a condition precedent to suit, nor a complete bar to recovery).

In addition to protection of the traditional right to jury determination of total loss, the MAJ seeks through its participation in this case to preserve the access of Minnesota insureds to redress for bad-faith conduct by insurers, including unreasonable delay and denial of claims, as provided by Minn.Stat. § 604.18 (2008).

The MAJ, as Amicus, respectfully urges this Court to uphold the Minnesota Court of Appeals below, leaving intact the traditional right of Minnesota insureds to a jury determination as to whether a property is deemed a total loss under a valued policy.

DISCUSSION

I. THERE ARE AT LEAST THREE WAYS IN WHICH A PROPERTY MAY BE RENDERED A “TOTAL LOSS.”

Practically speaking, there are at least three ways in which a property may be rendered a “total loss.” The position of the Appellant insurer in this case is perverse in that it seeks, in practice, to exalt only a pathway to “total loss,” thereby ignoring established Minnesota statutory and common law, adopted as a matter of sound public

policy by the Minnesota legislature and its courts.

The first way in which a property may suffer a “total loss” is when the “actual-cash value” (ACV) of the loss to the property exceeds the policy limits (“the ACV method”). “Actual-cash value” is a term only found in the language of the insurance industry. It is not synonymous with the better known term “fair-market value,” which is generally understood to be the “[p]robable price at which a willing buyer will buy from a willing seller when (1) both are unrelated, [and] (2) know the relevant facts”² In the insurance industry, the ACV amount of loss to property is based upon a property’s “replacement-cost value,” which is the actual cost to replace the property at the present time (to its pre-damaged condition), less depreciation, which is a subjective amount based upon property’s age, use, or obsolescence.³ Insurance professionals, however, will admit that determining a value for the ACV amount of loss is not an exact formula, but a “calculated guess,” which is often based upon a computer software program that specifies depreciation dollar amounts without any explanation for the basis.⁴ Notably, the State of Minnesota deems it an unfair practice for an insurance company to reduce or attempt to reduce for depreciation the value of property not adversely affected by age, use, or

² www.businessdictionary.com (2012)

³ Where a valued policy applies, depreciation is irrelevant in the event of a “total loss.” See Minn.Stat. §65A.01, Subd. 5 (2008).

⁴ “The California insurance commissioner investigated State Farm’s use of Xactimate and concluded that the program ‘specifies depreciation dollar amounts but does not document how these figures were determined, resulting in low and unsupported settlement offers.’” Feinman, Jay M., *Delay Deny Defend: Why Insurance Companies Don’t Pay Claims and What You Can Do About It* (2010), p. 133, citing Conduct Examination of State Farm on Northridge Earthquake of January 17, 1994 (California Department of Insurance July 15, 1998).

obsolescence, *see* Minn.Stat. §72A.201, Subd. 5 (2008), and it prohibits depreciation reductions in the event of total loss on buildings. *See* Minn.Stat. §65A.01, Subd. 5 (2008). Practically speaking, if the ACV amount of the loss to the property exceeds the insurance policy's limits for such property, then the property is a total loss. In practice, this is the only method routinely advocated by the insurance industry.

The ACV method of determining a total loss could hypothetically be performed by an insurance company, judge, or a jury, but in practice, ACV determinations of total loss are most commonly determined by appraisal panels. In this case, Respondent agreed to participate in an appraisal of the ACV amount of loss, but preserved its right to a determination of whether the property was a total loss under the reasonable, prudent owner standard as discussed below. In this scenario, which is not uncommon, an appraisal panel typically determines the ACV amount of loss. If the ACV amount of loss exceeds policy limits on the property, the property is a total loss. If the ACV amount of loss falls short of policy limits on the property, Respondent may bring suit to have a jury decide whether the property is a total loss under the reasonable, prudent owner standard. If the jury determines that the property is a total loss, then Minnesota's Valued Policy Statute applies and the policy limits are paid. If the jury determines that the property is not a total loss, then the ACV amount of loss determined by the appraisal panel applies.⁵

Under the ACV method, liability for payment is separate issue. So is the actual cost to replace the property, which is subject to additional policy provisions such as inflation riders, which can allow for additional payments of 120-125% of policy limits,

⁵ If a property is not deemed a total loss by a jury, it is MAJ's position that an appraisal of the loss should still be conducted to determine the ACV amount of loss, with the understanding that an appraisal is not a condition precedent to suit.

and Minn.Stat. § 65A.09, subd. 1 (2008), which prohibits an insurer from knowingly issuing a property insurance policy in excess of the replacement value of the property (see Section III, *infra*).

The second way in which a property may suffer a “total loss” is through judicial determination under the common-law standard, which Respondent refers to as the “reasonable, prudent-owner standard.” Determination of total loss under this standard is, as this Court determined in *Northwestern Mutual Life Insurance Company v. Rochester German Insurance Company*, 88 N.W. 265, 271 (Minn. 1901), a fact question. In *Northwestern Mutual*, this Court observed that:

A building is not a total loss . . . unless it has been so far destroyed . . . that no substantial part or portion of it above ground remains in place capable of being safely utilized in restoring the building to the condition in which it was before the [damage] There can be no total loss of a building so long as the remnant of the structure left standing above ground is reasonably and safely adapted for use . . . ; and whether it is so adapted depends upon the question whether a reasonably prudent owner of the building, uninsured, desiring such a structure as the one in question was before the [damage], would, in proceeding to restore the building, utilize such standing remnant as such basis. If he would then the loss is not total.

In arriving at a determination of what a prudent owner would do under such circumstances, it is proper to consider not only the condition of the walls standing, whether they are suitable, in place, to be used as a part of the reconstruction, but also the relative value of such walls, in place, as compared with the cost of rebuilding. It does not follow that, because some part of the remnants may be utilized, in place, there is not substantial and total destruction and loss It follows that there must remain a substantial part of the building in place, which, with reasonable repairs, can be used in its reconstruction. What such substantial part is is a question of fact depending upon the nature and cost of the structure and the character and condition of the remaining parts, and it [is] proper to submit to the jury . . . all evidence bearing upon that question, including the condition of the building as left . . . and the cost of rebuilding.

88 N.W. 265, 271 (Minn. 1901).

While the *Northwest Mutual* standard is lengthy, and has never been updated by this Court or the legislature, it currently remains the only definition available for an instruction to a jury. See Sample Jury Instruction, AmApp19. In practice, a jury is often confused with such a lengthy instruction, especially when insurance companies offer testimony from structural engineers that opine what *could* be reused and rebuilt as opposed to what *should* be reused and rebuilt. In reality, a policyholder must find a contractor willing and able to perform such repairs and warrant the work to be performed.

However, the existing standard is beneficial in that it removes any need for an expert witness in the field of engineering to determine whether a property could be salvaged and repaired or rebuilt from scratch. This Court could appropriately refine the standard so that the instruction would read: “A property is not a total loss if any remnant standing above the ground exists that can be reasonably and safely adapted for use as determined by a reasonably prudent owner, uninsured, desiring the same structure as before the loss; use of the remnant is cost-effective compared to the to the cost of rebuilding without it; such remnant may be incorporated in the reconstruction of the same structure without first being removed; and a willing and able contractor is available to perform the work.” Such an instruction is shorter and more comprehensible to a jury, who should be tasked with a determination in more practical terms.⁶

⁶ Two additional elements are added to this proposed instruction: First, requiring that the remnant be usable without first being removed prevents the insurer from imposing an unrealistic requirement that the insured remove, salvage and restore basic building elements like bricks and timbers as a part of reconstruction process. Second, the requirement of a willing and able contractor that would actually perform the work is a beneficial practical safeguard. All too often, insurance companies rely on hypothetical

Regardless of whether the reasonable, prudent-owner standard is altered in the foregoing way, jury determination of total loss avoids the perversity of buildings that could be more safely and cost-effectively rebuilt being repaired at greater cost, not all of which may be covered by insurance. Given the current price fluctuation in the housing market, many houses are insured for much more than their cost of rebuilding. This means insurance companies have been over-insuring dwellings and policyholders have been paying more in premium for more insurance coverage than they need. As a result, insurance companies have been proposing repairs for buildings in excess of their cost of reconstruction to avoid having to pay more under Minnesota's Valued Policy Statute. For example, in a recent District of Minnesota case involving State Farm Fire and Casualty Company, a contractor revealed that he was instructed not to consider a property a total loss because it felt the property was overinsured and it did not want to pay its policy limits. See Affidavit of Tom Beier, AmApp01. The Minnesota Valued Policy Statute is intended to prevent this kind of manipulation. See *Nathan v. St. Paul Mut. Ins. Co.*, 243 Minn. 430, 433-434, 68 N.W.2d 385, 388 (1955) ("the purpose of valued policy statutes is twofold: (1) To prevent overinsurance by requiring prior valuation; and (2) to avoid litigation by prescribing definite standards of recovery in case of total loss."). Jury determination of total loss under the reasonable, prudent owner standard helps to ensure that the Valued Policy Statute fulfills its purpose.

software analysis, and the opinions of structural engineers and contractors who know they will not be performing the actual work they estimate. In this circumstance, policyholders may struggle to find an actual contractor willing and able to perform the work as estimated. Often, actual contractors are unwilling to even submit a bid for insurer-proposed repairs because the job is either unsafe or unprofitable, or they just do not want to warrant such repair work.

A third, and often overlooked, way in which a property may suffer a total loss occurs when the proposed scope of repair is required to be in accordance with the minimum code as required by state or local authorities (“the building-code method”). *See* Minn.Stat. 65A.10, subd. 1 (2008). Subdivision 1 of Section 65A.10 of the Minnesota Statutes states:

65A.10 LIMITATION.

Subdivision 1. Buildings. Nothing contained in sections 65A.08 and 65A.09 shall be construed to preclude insurance against the cost, in excess of actual cash value at the time any loss or damage occurs, of actually repairing, rebuilding or replacing the insured property. Subject to any applicable policy limits, where an insurer offers replacement cost insurance: (i) the insurance must cover the cost of replacing, rebuilding, or repairing any loss or damaged property in accordance with the minimum code as required by state or local authorities; and (ii) the insurance coverage may not be conditioned on replacing or rebuilding the damaged property at its original location on the owner's property if the structure must be relocated because of zoning or land use regulations of state or local government. In the case of a partial loss, unless more extensive coverage is otherwise specified in the policy, this coverage applies only to the damaged portion of the property.

In this scenario, insurance companies will often point to an engineering report that supports their proposed scope of repair. Usually, the insurance company’s engineer will be given a limited scope for their evaluation and asked only whether it is possible to reuse some of the existing structure in rebuilding the damaged property. The insurance company’s preferred vendor engineer, however, is not asked to consider whether a reasonable, prudent owner would perform such repairs or whether such a repair is safe or whether any contractor would actually perform the work. The insurance company’s preferred vendor engineer is only asked whether such a repair is possible. Only if the policyholder is sophisticated enough to submit a building permit for the proposed scope of

repairs by an insurance company does this issue arise. Usually, the insurance company settles with a policyholder before any application for a building permit is made, and thus, the policyholder is stuck with an appraisal award that does not consider the minimum code as required by state or local authorities.

II. THE REASONABLE, PRUDENT-OWNER STANDARD FOR DETERMINING WHETHER A PROPERTY IS A TOTAL LOSS IS A FACT QUESTION JUSTLY AND APPROPRIATELY DETERMINED BY A JURY AS OPPOSED TO AN APPRAISAL PANEL.

The reasonable, prudent-owner standard for determining whether a property is a total loss is a factual question most justly and appropriately determined by a jury as opposed to an appraisal panel. As indicated above, there are at least three ways in which a property may suffer a total loss after a fire in Minnesota: 1) when the ACV amount exceeds policy limits; 2) when a reasonable, prudent owner, uninsured, could not and would not reasonably, safely and cost-effectively reuse any of the existing above-ground remnants of the structure in rebuilding the structure, and 3) when the proposed scope of repair is not in accordance with the minimum code levels required by state or local authorities. In the first scenario, where an appraisal panel is the appropriate finder of fact, neither the insurance company, nor the policyholder, would ever dispute the issue of total loss if the actual-cash value exceeds policy limits (in fact, the insurer may be subject to penalties for underinsuring the property per Minn.Stat. § 65A.09, Subd. 1 (2008)). In the third scenario, local building officials, not appraisal panels, have the authority to interpret applicable state or local building ordinances and codes. In the second scenario, where the reasonable, prudent owner standard is applied, a jury, and not an appraisal panel, should

make the determination for several reasons.

A. The Minnesota legislature specifically excluded the issue of “total loss” from determination by appraisal in the Minnesota standard fire insurance policy.

First, the Minnesota legislature specifically excluded the issue of “total loss” from determination by appraisal in the Minnesota standard fire insurance policy, Minn.Stat. §

65A.01:

In case the insured and this company, **except in case of total loss on buildings**, shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. In case either fails to select an appraiser within the time provided, then a presiding judge of the district court of the county wherein the loss occurs may appoint such appraiser for such party upon application of the other party in writing by giving five days' notice thereof in writing to the party failing to appoint. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then a presiding judge of the above mentioned court may appoint such an umpire upon application of party in writing by giving five days' notice thereof in writing to the other party. The appraisers shall then appraise the loss, stating separately actual value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual value and loss. Each appraiser shall be paid by the selecting party, or the party for whom selected, and the expense of the appraisal and umpire shall be paid by the parties equally.

Minn.Stat. §65A.01, Subd. 3 (2012) (emphasis supplied).

The phrase “except in case of total loss on buildings” has a meaning and a purpose. The only dispute that will ever occur between a carrier and an insured as to the issue of total loss will arise, as here, from the carrier’s insistence that the property is not a total loss. Where that dispute arises, appraisal is not available under the clear terms of the

statute.

B. Appraisal panels cannot be relied upon to fairly apply the reasonable, prudent-owner standard.

If an appraisal is demanded by any party, each party must hire and pay for their own appraiser. Some appraisers charge hourly, some a flat fee, depending on the type of loss and extent of their involvement. Per Minnesota statute, an appraiser need only be “a resident of the state, disinterested, and willing to act.” Minn.Stat. 65A.12, Subd. 2 (2012). Appointed appraisers are rarely individuals capable of performing the actual repair work they estimate, and usually lean towards the interests of one party or another – typically, they are *de facto* advocates for whichever party is paying their bill.⁷ Although the “neutral umpire” is typically agreed upon by the appraisers, the appraisal process is held up in the absence of such an agreement until the objecting party commences an action to have a district court judge make the appointment. In practice, most policyholders agree to an umpire selected from a list of “preferred” umpires provided by the insurance company’s appraiser.⁸ The resulting panel tilts towards the insurer, and the economic pressure on insureds to submit to this process is one reason why appraisal cannot be a condition precedent to suit. Appraisers and umpires are also pulled by their desire for repeat

⁷ In Minnesota, appraisers rarely, if ever, exchange their opinions with each other regarding the ACV amount of loss prior to involving the umpire as it is presumed that they will not agree based upon their inherent bias arising from the party paying their fees.

⁸ Very often, this is a list provided by independent adjuster James Stoops, who acts as an appraiser on behalf of insurers in over 100 appraisals per year, including his retention by Appellant in the matter under review. As a practical matter, most insureds will only know what the carrier tells them about the process. See Feinman, Jay M., *Delay Deny Defend: Why Insurance Companies Don’t Pay Claims and What You Can Do About It* (2010), p. 125.

business towards the interests of the insurer, which hires appraisers on a repeated and frequent basis, as opposed to the insured, who typically does not. As professional litigants with access to vast amounts of money and preferred vendors whose businesses depend upon them, insurance companies have an inherent advantage in the appraisal process against *pro se* policyholders who have just experienced a property loss, often for the first time in their lives.⁹ Given the nature of the appraisal process, it is unrealistic to think that the resulting panels will preserve and fairly apply the reasonable, prudent-owner standard in any determination of a total loss.¹⁰

III. THE APPRAISAL PROCESS PRECLUDES REDRESS FOR BAD-FAITH AND UNFAIR CLAIMS HANDLING AND SETTLEMENT PRACTICES BY INSURANCE COMPANIES.

Currently, Minnesota has only two means of regulating claims handling and settlement practices by insurance companies. The first means, regulation under the Unfair Claims Practices Act (Minn.Stat. §§ 72A.20-.201 (2012)), is limited to enforcement actions by the Minnesota Department of Commerce and the Attorney General. *See Morris v. American Family Mut. Ins. Co.*, 386 N.W.2d 233, 238 (1986) (holding that a private person does not have a cause of action for a violation of the Unfair Claims Practices Act). The sole means of regulating the claims handling and settlement practices of insurance

⁹ “Not having a car to drive or a home to live in can put you in a serious financial bind.” Berardinelli, David J., *From Good Hands To Boxing Gloves: The Dark Side of Insurance* (2008), p. 21.

¹⁰ Unlike the no-fault system of arbitration (as distinct from limited-scope appraisal), appraisals do not result in initial determinations that are then reviewable by the courts. No-fault arbitrations are subject to a well-defined statutory and regulatory scheme with oversight by a standing committee. Appraisals in property damage matters have no equivalent safeguards.

companies through enforcement by private parties is Minnesota's First-Party Bad Faith Statute, Minn.Stat. § 604.18 (2012), which provides a cause of action to insureds for bad-faith conduct by insurers. A bad-faith claim, however, is not available to policyholders who submit to the appraisal process.

Establishment of liability under a bad-faith claim in Minnesota requires policyholders to satisfy two elements: 1) the absence of a reasonable basis for denying the benefits of the insurance policy; and 2) that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy. *See* Minn.Stat. § 604.18, Subd. 2(a) (2012). Policyholders are permitted to recover as "taxable costs": (1) either half the proceeds awarded that exceed the insurer's offer made 10 days or more before the start of trial or \$250,000, whichever is less; and (2) reasonable attorney's fees up to \$100,000 attributable to efforts to establish the violation. *See* Minn. Stat. § 604.18, Subd. 3(a) (2012). Under a plain reading of the bad-faith statute, however, the right to the foregoing recovery is lost if the dispute is resolved by appraisal. Specifically, the bad-faith statute states: "An award of taxable costs under this section is not available in any claim that is resolved or confirmed by arbitration or appraisal." *See id.*, Subd. 4(c).

In the case under review, the district court granted Respondent's motion to amend its counterclaim to add a claim for taxable costs per Minn.Stat. § 604.18 ("bad-faith insurance conduct") based upon a prima facie showing that Appellant had no reasonable basis for denying Respondent's claim. However, if the matter under review was limited to an appraisal panel's determination regarding the issue of total loss, Respondent would not

have any redress for Appellant's bad-faith conduct in its claims handling and settlement practices. This consequence, broadly applied to Minnesota policyholders, is contrary to the legislature's intent in enacting § 604.18, which is designed to hold insurance companies accountable for bad-faith claims and settlement practices.

IV. PRESERVING THE POLICYHOLDER'S RIGHT TO A JURY DETERMINATION OF TOTAL LOSS DOES NOT LESSEN THE APPROPRIATE FUNCTION OF APPRAISAL.

As indicated above, the MAJ recognizes the merits of an appraisal to determine the ACV amount of loss, which may include consideration of the cause of loss, e.g. wind, hail, or fire. Preservation of access to jury determination of "total loss" does not interfere with this function. This Court, however, should recognize the limited scope of appraisal, its lack of any formal rules of procedure, evidence, and decorum, and the inherent delay it causes in reaching an award.

First, an appraisal cannot be a condition precedent to suit. This Court recently stated that "appraisal is a process that is generally intended to take place before suit is filed." *Quade v. Secura Insurance*, --- N.W. ---, 2012 WL 2121235, * 9 (Minn. 2012). Unfortunately, this Court's use of the phrase "generally intended" has already been construed by insurance companies as mandatory condition precedent suit. Attorneys for Secura Insurance have already interpreted *Quade* to mean that an appraisal is a condition precedent to suit (even though, in the case in question, Secura refused to participate in appraisal as late as two weeks prior to the limitation to commence suit). See *Memorandum in Support of Defendant's Motion to Dismiss*, dated July 20, 2012, in *Kruse v. SECURA Supreme Ins. Co.*, Civ. No. 12-1576 DWF/SER (D.Minn.).

AmApp04. While the MAJ agrees that appraisal is generally intended to take place before suit is filed, it cannot be a condition precedent to suit for practical purposes.

In practice, the time limitations for a policyholder to bring suit against their insurance company is typically only one or two years, depending upon the type of loss and terms of the policy, e.g., two years for fire; one year for wind or hail. The time limit for suit runs from the date of loss. Loss arising from wind or hail is frequently not discovered or evaluated until much later after the date of loss. Once an insurance claim is made, the loss may not be inspected by the insurance company for several weeks. Once an insurance company inspects the loss, it may not complete its evaluation for several more weeks. If the loss is complex, the insurance company may perform re-inspections with other contractors and even engineers. If causation or coverage issues arise, further evaluations and investigations are often demanded by insurers. In some cases, insurers pursue investigation of loss with law firms that make extensive demands of policyholders, including demands for W2s, tax returns, business records, utility records, cell phone call records, receipts and invoices, and submission to examinations under oath. *See* standard demands of Hanson, Lulic, and Krall, LLC and Meager & Geer. AmApp15-19. Such investigations often take several months with some lasting longer than a year, and demands on policyholders are often disingenuous. *See Martin v. State Farm Fire and Casualty Co.*, 794 F.Supp.2d 1017, 1023 fn. 4 (D. Minn. 2011). While insurers conduct loss investigations, they often refuse to participate in an appraisal. All the while, the suit limitation for policyholders is not tolled. *See Rottier v. German Ins. Co.*, 84 Minn. 116, 120, 86 N.W. 888, 890, (Minn. 1901).

If the time limitation for policyholders to commence suit is not tolled during an insurance company's evaluation or investigation, policyholders have no remedy for preservation of their rights unless they commence suit. Even if both parties agree to participate in an appraisal, an appraisal often cannot be had for several months. By statute, each party has 20 days to select a competent disinterested appraiser and the appraisers have 15 days to select a neutral umpire. *See* Minn.Stat. §65A.01, Subd. 3 (2012). If the statutory deadlines are complied with and an appraisal panel is empanelled, the next step is the coordination of a mutually agreeable date for the appraisal panel, and if a hearing is demanded, a mutually agreeable date for attorneys, contractors, engineers, and any other witnesses deemed necessary. There are no formal rules of procedure, evidence, or decorum for an appraisal hearing, nor is there any time limitation for an appraisal to occur. In practice, a policyholder will often commence suit merely to preserve their rights of recovery under their policy, demand an appraisal shortly thereafter to determine the ACV amount of loss, and if appraisal resolves the issue, the suit is dismissed.

If appraisal becomes a condition precedent to suit, insurers will use this process to run out a policyholder's time limit for suit. For that reason, appraisal cannot become a condition precedent to suit without drastically violating the rights of policyholders.

It is also important to recognize that appraisers cannot decide issues of liability and interpret insurance policies. This Court recognized in *Quade* that interpretation of insurance policies is beyond the scope of appraisal. *See id.* at *10. Another practical and inherent problem with appraisals is the absence of any rules of procedure, evidence, or decorum, and, even more significantly, the typical lack of written findings for any further

review or analysis. Although the appraisal statute states that the appraiser must first “appraise the loss, stating separately actual value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire,” in practice, few, if any, appraisers meet separately to determine what they can agree upon and then submit their differences only to the umpire. The “standard appraisal award form” typically only provides the names of the appraisers, the umpire, and an ACV amount of loss without an itemization of the amount and little, if any, description of the basis for the award. *See sample appraisal award. AmApp22.*

This Court should also be cognizant that appraisal is not arbitration. Unlike a no-fault arbitration, for example, the appraisal process is not governed by lawyers, there are no formal rules of procedure, evidence, or decorum, no established basis for findings, no formal roster of neutrals for appraisers or umpires, and no oversight by any standing committee.

Appropriately understood, appraisal is simply an avenue for determination of the ACV amount of loss. Appraisal is inappropriate to determine not only total loss, but also, without limitation, amount of coverage, whether concurrent causation issues arise, and whether policy exclusions apply.

Seen in this light, preservation of a policyholder’s right to jury determination of total loss does not lessen the appropriate function of appraisal. Appraisal should be incorporated whenever possible to resolve disputes over the ACV amount of loss, but that, in fairness, is the extent of its utility. This Court’s decision in *Quade* should be clarified to recognize this limitation – and certainly, the reasonable, prudent-owner

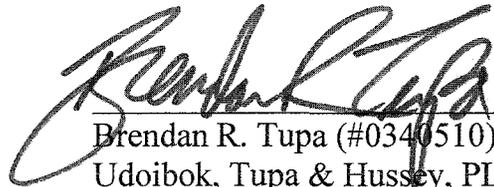
standard for determining a total loss must be left exclusively to a determination by a jury.

CONCLUSION

The traditional common law and statutory right to jury determination of “total loss” under Minnesota’s Valued Policy Statute should be preserved. Preservation of this right is consistent with long standing law and also preserves the access of insureds to redress for bad faith and unfair claims handling practices by insurers. Further, preservation of the right to jury determination of “total loss” does not interfere with appraisal’s appropriate function in determination of the actual-cash value (ACV) amount of loss. Appraisals should be limited to that function and should not, for reasons discussed above, become a condition precedent to suit. As Amicus, the MAJ respectfully urges that the decision of the Minnesota Court of Appeals below be affirmed.

Respectfully submitted,

Dated: August 8, 2012



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