

State of Minnesota
In Supreme Court

AUTO-OWNERS INSURANCE COMPANY,
Appellant,

vs.

SECOND CHANCE INVESTMENTS, LLC,
Respondent.

APPELLANT'S REPLY BRIEF

<p>HANSON, LULIC & KRALL, LLC Joseph F. Lulic (#65018) Melinda J. Grundhauser (#0386724) 608 Second Avenue South 700 Northstar East Minneapolis, Minnesota 55402 (612) 333-2530</p>	<p>UDOIBOK, TUPA & HUSSEY, PLLP Brendan R. Tupa (#0340510) The Grain Exchange, Suite 310 M 400 South Fourth Street Minneapolis, Minnesota 55415 (612) 808-6032</p>
---	--

and

Attorneys for Appellant

<p>MONROE MOXNESS BERG, P.A. Michael R. Moline (#0225496) 8000 Norman Center Dr., Ste. 1000 Minneapolis, Minnesota 55437 (952) 885-5999</p>	<p>SCOTT WILSON (#163191) 301 Fourth Avenue South Suite 5010 Minneapolis, Minnesota 55415 (651) 353-3184</p>
---	--

*Attorneys for Amicus Curiae,
Minnesota Association for Justice*

And

JANSEN & PALMER, LLC
Jenneane Jansen (#0236792)
Kris E. Palmer (#240138)
4746 Elliot Avenue South
Minneapolis, Minnesota 55402
(612) 823-9088

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER APPRAISAL IS THE APPROPRIATE FORUM TO DECIDE WHETHER A TOTAL LOSS HAS OCCURRED.....	1
II. AUTO-OWNERS' INTERPRETATION OF THE APPRAISAL PROVISION DOES NOT CONTRAVENE THE MINNESOTA VALUED POLICY LAW.....	2
III. THE APPRAISAL PROVISIONS OF THE MINNESOTA STANDARD FIRE INSURANCE POLICY AND THE PARTIES' INSURANCE CONTRACT FORECLOSE APPRAISAL ONLY WHEN A TOTAL LOSS DETERMINATION HAS ALREADY BEEN MADE.....	5
IV. CASE LAW SUPPORTS THE RULE THAT AN APPRAISAL PANEL MAY DETERMINE WHETHER A TOTAL LOSS HAS OCCURRED UNDER VALUED POLICY LAWS.....	7
CONCLUSION	8
CERTIFICATE OF COMPLIANCE.....	9

TABLE OF AUTHORITIES

Cases

<i>Dri-Kleen, Inc. v. Western National Mutual Insurance Group</i> , 2002 WL 1611507 (Minn. App.) (unpublished)	5
<i>Gouin v. Northwestern Nat. Ins. Co. of Milwaukee Wis.</i> , 259 P. 387 (Wash. 1927)	7
<i>Grandview Inland Fruit Company v. Hartford Fire Insurance Company</i> , 66 P.2d 827 (Wash. 1937)	7, 8
<i>In re S.M.</i> , 812 N.W.2d 826 (Minn. 2012)	6
<i>Itasca Paper Co. v. Niagra Fire Ins. Co.</i> , 175 Minn. 73, 220 N.W. 425 (1928)	2
<i>Johnson v. Madelia Lake Crystal Mut. Ins. Co.</i> , 2004 WL 61057 (Minn. App.) (unpublished)	5
<i>Kavli v. Eagle Star Ins. Co.</i> , 206 Minn. 360, 288 N.W. 723 (1939)	3, 4
<i>Nathan v. St. Paul Mut. Ins. Co.</i> , 243 Minn. 430, 68 N.W.2d 385 (1955)	3
<i>Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co.</i> , 85 Minn. 48, 88 N.W. 265 (Minn. 1901)	3, 5
<i>Oppenheim v. Firemen's Fund Ins. Co.</i> , 119 Minn. 417, 138 N.W. 777 (1912)	5
<i>Quade v. Secura Ins.</i> , 814 N.W.2d 703 (Minn. 2012)	2, 3, 6, 7

Statutes

Minn. Stat. § 65A.01, subd. 3	4, 6
Minn. Stat. § 65A.08, subd. 2(a)	4
Minn. Stat. § 604.18, subd. 4(c)	3
Minn. Stat. § 645.16	6

ARGUMENT

I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER APPRAISAL IS THE APPROPRIATE FORUM TO DECIDE WHETHER A TOTAL LOSS HAS OCCURRED.

The only issue before this Court is whether the parties to a fire insurance contract have a statutory and contractual right to have an appraisal panel decide whether a total loss has occurred. Respondent devotes several pages of its brief in the attempt to convince the Court that this case involves a total loss and therefore appraisal is inappropriate to determine the amount of loss.

As demonstrated by the proceedings below, the parties dispute whether this case involves a total loss. The trial court denied Respondent's motion for partial summary judgment, which sought a declaration that the property was a total loss. The trial court held that "there are simply too many factual inquiries that need to be made in order to adequately consider and apply the total loss standard" to determine the issue as a matter of law. (*Add-10.*) The determination of whether a total loss has occurred in this case is a question of fact.

Respondent argues that the total loss issue cannot be subject to appraisal because it is a coverage question to be determined by applying the common law definition of total loss. See Respondent's Brief, p. 27. This argument lacks any support and has no basis in the law.

This Court recently affirmed that “questions of law or fact, which are involved as mere incidents to a determination of the amount of loss or damage’ are appropriate to resolve in an appraisal in order to ascertain the ‘amount of the loss.’” *Quade v. Secura Ins.*, 814 N.W.2d 703, 707 (Minn. 2012) (citing *Itasca Paper Co. v. Niagra Fire Ins. Co.*, 175 Minn. 73, 79, 220 N.W. 425, 427 (1928)). No court has ever held that the issue of whether a total loss has occurred presents a coverage or liability question.

II. AUTO-OWNERS’ INTERPRETATION OF THE APPRAISAL PROVISION DOES NOT CONTRAVENE THE MINNESOTA VALUED POLICY LAW.

Respondent and Amicus Curiae identify the Valued Policy Law as a determining factor in deciding the issue presented to the Court. However, reference to the Valued Policy Law is nothing more than a distraction. Auto-Owners’ interpretation of the appraisal provision does not undermine the Valued Policy Law. Although the Valued Policy Law fixes the insurer’s liability at the policy limits in case of a total loss, the insured must first prove that a loss is total. This is true regardless of whether an appraisal panel or a jury determines the issue.

Respondent claims that the application of the Valued Policy Law to total losses dictates that a jury must decide whether a loss is total or partial. There is no sound justification to support this claim.¹ The fact that the Valued Policy

¹ One purported justification for the rule that appraisal cannot decide the issue of total loss is that insureds will be unable to bring an action for bad faith

Law is triggered when a loss is determined to be total does not and should not affect who decides this issue. It is undisputed that appraisal panels may determine the amount of damage and loss for claims involving partial losses, and the difference between a total and partial loss is only one of degree. See *Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co.*, 85 Minn. 48, 62, 88 N.W. 265, 270-71 (Minn. 1901) (noting that “[w]here the line is to be drawn between [a partial and total loss] is, in each particular case, a question of fact”). Far more complicated issues than whether a loss is total are routinely resolved by appraisal.

The purpose of the Minnesota Valued Policy Law is to prevent over-insurance by requiring prior valuation and to avoid litigation by prescribing definite standards of recovery when a loss is total. *Nathan v. St. Paul Mut. Ins. Co.*, 243 Minn. 430, 433-34, 68 N.W.2d 385, 388 (1955). As this Court recently affirmed, the purpose of the appraisal provision is “to provide ‘the plain, speedy, inexpensive and just determination of the extent of the loss.’” *Quade*, 814 N.W.2d at 707 (quoting *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 364, 288 N.W. 723, 725 (1939)). The Valued Policy Law and the appraisal provision are unrelated except for claims in which a total loss determination has already been made. Nowhere does the Valued Policy Law dictate which issues are decided by an appraisal panel and which issues are

against insurers. See Amicus Curiae Brief, p. 13-14. However, the legislature has already decided that bad faith actions are unavailable for claims resolved by appraisal. See Minn. Stat. § 604.18, subd. 4(c).

decided by a jury. The Valued Policy Law does not take effect until a loss has been determined to be total. Likewise, the prohibition against appraisal does not take effect until a loss has been determined to be total. *Compare* Minn. Stat. § 65A.08, subd. 2(a) (“ . . . the insurer shall pay the whole amount mentioned in the policy or renewal upon which it receives a premium, **in case of total loss . . .**”) (emphasis supplied) *with* Minn. Stat. § 65A.01, subd. 3 (“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 . . .”) (emphasis supplied).

According to *Amicus Curiae*, “the actual cash value method” to determine total loss should be decided by appraisal and the “reasonable, prudent-owner standard” to determine total loss should be decided by a jury. See *Amicus Curiae* Brief, p. 3, 5, 9-10. If a jury first determines that a loss is not total, the parties proceed to appraisal to determine the amount of the loss. *Id.* at p. 4, fn. 5. This position stands in stark contrast to long-standing case law holding that appraisal provides a plain, speedy and inexpensive determination regarding the extent of the loss. *Kavli*, 206 Minn. at 364, 288 N.W. at 725.

No Minnesota court has ever held that an appraisal panel lacks the authority to determine whether a total loss has occurred. The cases Respondent cites for the proposition that the district court is the appropriate

forum to determine whether a total loss occurred simply reflect the reality that insurers and insureds have chosen to litigate this issue rather than seek to compel appraisal of the issue. These cases do not expressly address the issue of whether an appraisal panel lacks the authority to determine whether a total loss occurred. See *Oppenheim v. Firemen's Fund Ins. Co.*, 119 Minn. 417, 421-22, 425, 138 N.W. 777, 779, 781 (1912) (reversing a directed verdict on the total loss issue and ordering a new trial); *Northwestern*, 85 Minn. at 62-63, 88 N.W. at 270-71 (holding that the total loss issue is a question of fact and ordering a new trial because the jury instructions did not follow the correct total-loss standard); *Johnson v. Madelia Lake Crystal Mut. Ins. Co.*, 2004 WL 61057, *4 (Minn. App.) (unpublished) *rev. denied* (Minn. March 16, 2004) (reproduced at RA-228-232) (noting that the record supports the district court's determination that the collapse resulted in a complete loss under the policy); *Dri-Kleen, Inc. v. Western National Mutual Insurance Group*, 2002 WL 1611507, *2 (Minn. App.) (unpublished) (reproduced at RA-233-238) (affirming the district court's denial of summary judgment and noting that whether a total loss occurred is generally a question of fact).

III. THE APPRAISAL PROVISIONS OF THE MINNESOTA STANDARD FIRE INSURANCE POLICY AND THE PARTIES' INSURANCE CONTRACT FORECLOSE APPRAISAL ONLY WHEN A TOTAL LOSS DETERMINATION HAS ALREADY BEEN MADE.

Auto-Owners agrees with Respondent that this case requires only that the Court determine the meaning of the plain language of the appraisal

provision in the Minnesota standard fire insurance policy. See Respondent's Brief, p. 14 ("This case presents a statutory-interpretation question, nothing more"). The plain language of the provision mandates that appraisal is available to determine the "amount of loss" upon demand by either party except "in case of" total loss. Minn. Stat. § 65A.01, subd. 3; See also Relevant Policy Provisions at Add-23-25.

Respondent argues that appraisal is unavailable to determine whether a loss is total. The adoption of Respondent's interpretation would render inoperative the words "in case of" and "amount of loss" in the appraisal provision. Such an interpretation violates the rules of statutory construction. *In re S.M.*, 812 N.W.2d 826, 829 (Minn. 2012) (*quoting* Minn. Stat. § 645.16) (noting that "[e]very law shall be construed, if possible, to give effect to all its provisions").

We submit that the phrase "amount of loss" is so broad that it includes every factual determination that bears upon what the insured is entitled to recover under the policy. *Quade*, 814 N.W.2d at 706-07 (noting that appraisers "must determine . . . the quantity destroyed" and that "'amount of loss' necessarily includes a determination of the cause of the loss, and the amount it would cost to repair that loss"). Only coverage questions are excluded from final determination by appraisal. *Id.* at 707-09. An appraisal panel is authorized to make a binding award determining whether a total loss has occurred because the issue does not present a coverage question.

IV. CASE LAW SUPPORTS THE RULE THAT AN APPRAISAL PANEL MAY DETERMINE WHETHER A TOTAL LOSS HAS OCCURRED UNDER VALUED POLICY LAWS.

Respondent claims there is no authority supporting the position that an appraisal panel may determine whether a total loss has occurred under valued policy laws.

However, the Washington Supreme Court firmly rejected the idea that an appraisal panel may not decide whether a loss is total under its valued policy law. In *Gouin v. Northwestern Nat. Ins. Co. of Milwaukee Wis.*, 259-P. 387, 389-90 (Wash. 1927), the insured sought to set aside an appraisal award due to the operation of the valued policy law:

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.

Id. at 390 (emphasis supplied). This language reveals that *Gouin* must have involved a valued policy law. Because there is nothing in the appraisal provision of the Minnesota standard fire insurance policy or the parties' insurance contract that prohibits an appraisal panel from determining whether a total loss has occurred, the same result should be reached in this case.

Respondent's reliance on *Grandview Inland Fruit Company v. Hartford Fire Insurance Company*, 66 P.2d 827 (Wash. 1937) to cast doubt upon the validity of *Gouin* is misplaced and irrelevant to the issue before the Court.

Grandview did not involve an appraisal proceeding and simply held that where a total loss is established, the insured's settlement with the insurer for less than the face value of the policy does not preclude recovery for the unpaid deficiency. *Id.* at 833 (noting that the valued policy "is not waived by the appellant in its agreement with the respondent to accept less than the face of the policy").

CONCLUSION

The plain language of the appraisal provision of the Minnesota standard fire insurance policy, as well as the appraisal panel's broad authority to decide factual disputes regarding the extent and scope of the loss, compel the conclusion that appraisal is the appropriate forum to determine whether a total loss has occurred. Appellant respectfully requests that the decision of the Court of Appeals be reversed because there is no sound justification for the rule that an appraisal panel may not make a final and just determination of whether a total loss has occurred.

August 21, 2012.

HANSON, LULIC & KRALL, LLC



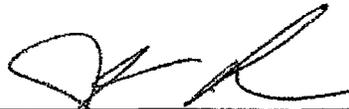
Joseph F. Lulic (65018)
Melinda J. Grundhauser (386724)
700 Northstar East
608 Second Avenue South
Suite 700
Minneapolis, MN 55402
Tel: (612) 333-2530
Fax: (612) 392-3675
Attorneys for Appellant

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 2010, Arial, with a font size of 13 pt. and a word count of 1,915.

HANSON, LULIC & KRALL, LLC

August 21, 2012.



Joseph F. Lulic (65018)
Melinda J. Grundhauser (386724)
700 Northstar East
608 Second Avenue South
Suite 700
Minneapolis, MN 55402
Tel: (612) 333-2530
Fax: (612) 392-3675
Attorneys for Appellant