

NO. A11-1145

State of Minnesota
In Supreme Court

Auto-Owners Insurance Company,

Appellant,

vs.

Second Chance Investments,

Respondent.

**RESPONDENT SECOND CHANCE INVESTMENTS'
BRIEF, ADDENDUM, AND APPENDIX**

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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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LEGAL ISSUE

Minnesota's Standard Fire Insurance Policy prohibits "limiting the amount to be paid in case of total loss *** to less than the amount of insurance on the same." It allows appraisal "except in case of total loss on buildings." This court has remanded "total loss" questions to juries for over 100 years. Nonetheless, Auto-Owners argues that such questions are subject to binding appraisal. Should the district court have ordered appraisal of Second Chance's "total loss" claim?

No. Under Minnesota's Standard Fire Insurance Policy, appraisers lack jurisdiction to decide whether a property has suffered a "total loss."

Apposite Authority: Minn. Stat. § 65A.01 (2011);
Minn. Stat. § 65A.08 (2011);
Oppenheim v. Fireman's Fund Ins. Co.,
119 Minn. 417, 138 N.W. 777 (1912);
North. Mut. Life Ins. Co. v. Rochester German Ins.
Co., 85 Minn. 48, 88 N.W. 265 (1901).

PROCEDURAL HISTORY

On March 12, 2009, Auto-Owners filed a complaint in the district court asking it to compel Second Chance to submit its claim of total loss to appraisal. (RA-03).¹ Second Chance sought to dismiss the complaint initially, then filed an amended answer asserting a counterclaim for breach of contract. (RA-12, 14.)

On November 30, 2010, Auto-Owners filed a motion to compel appraisal. (RA-29.) In response, Second Chance moved for partial summary judgment declaring the Kings Point Road property a total loss. (RA-39.) Second Chance also moved to amend its counterclaim to seek taxable costs for bad faith under Minn. Stat. § 604.18, and prejudgment interest under Minn. Stat. § 60A.0811.

The district denied Auto-Owners' motion to compel appraisal on April 11, 2011. (Add-1.) The court also denied Second Chance's motion for partial summary judgment, but granted its motion to amend its counterclaim to add a claim for taxable costs for bad faith under Minn. Stat. § 604.18. (*Id.*) On May 23, 2011, the district court granted Auto-Owners' request for an order dismissing its complaint for appraisal. (Add-13).

Auto-Owners appealed on June 22, 2011. (Add-16). Second Chance moved to dismiss Auto-Owners' appeal, arguing that the order was not final. The court of appeals denied that motion on August 29, 2011, ruling that the order was appealable as a final

¹ Throughout this brief, Respondent uses the following citation conventions. "(Add-xx)" refers to Appellant's Addendum. "(App-xx)" refers to Appellant's Appendix. "(RAdd-xx)" refers to Respondent's Addendum. "(RA-xx)" refers to Respondent's Appendix.

declaratory judgment. (RA-224). The court of appeals affirmed the district court on March 26, 2012. (RAdd-1).

On April 25, 2012, Auto-Owners petitioned this court for review of that decision. This court granted review on May 30, 2012. (App-4).

STATEMENT OF FACTS

The insured premises and loss

Second Chance Investments owned property at 3406 Kings Point Road in Minnetrista, Minnesota. (See RA-47). On September 26, 2008, Second Chance purchased from Auto-Owners a “Dwelling Insurance Policy,” number 46 570380 00, effective from September 26, 2008 to September 26, 2009. (*Id.*). Consistent with Minnesota’s Standard Fire Insurance Policy, which is a “valued policy law,” the policy’s Minnesota Amendatory Endorsement contained a “Valuation Clause” that promised to pay the full policy limits in the event of a “total loss.” (Add-25).

Auto-Owners appraised the property’s value at \$2,095,000, and stated this amount in the Declarations as the limit of insurance for Coverage A, Dwelling. (Add-18). Auto-Owners also provided a “Coverage C” Personal-Property limit of \$3,000. (*Id.*). Auto-Owners’ \$4,962.81 premium was underwritten based (in part) on these values. (*See id.*). It is not disputed that Second Chance paid its premium.

On November 12, 2008, the Kings Point Road property burned as the result of a fire that was likely caused by a defective air exchanger in the basement. (RA-47; RA-136-137.). The fire spread within the building’s walls, consuming them and causing sections of floor and ceiling to collapse. (RA-135). Floor joists, wall beams, sheet

materials, doors, and windows were consumed, charred, shrunken, warped, delaminated, heat-damaged or smoke-damaged by the blaze, and further damaged by the water used to extinguish it. (RA-47; RA-56-58; RA-135). The state fire marshal noted the need to “frame the area for safety reasons, as second level walls above the utility room did not have any support.” (RA-136). A Wolf commercial-quality cooking range with a value exceeding the personal-property policy limit of \$3,000 was destroyed in the blaze. (See Figure 68, RA-99).

Auto-Owners’ policy included a Minnesota Amendatory Endorsement, which provided that Auto-Owners would pay undisputed amounts within five business days of receiving the insured’s proof of loss:

OUR PAYMENT OF LOSS

We will adjust any loss with **you**, and pay **you** unless another payee is named in the policy. **We** will pay within five business days after **we** receive **your** proof of loss and the amount of loss is finally determined by an agreement between **you** and **us**, a court judgment or an appraisal award.

(Add-25). The Minnesota Amendatory Endorsement also amended Auto-Owners’ appraisal provision to emphasize that that provision did not apply in the event of a “total loss”:

APPRAISAL

If **you** and **we** fail to agree on the **actual cash value** or amount of loss, *except in the case of total loss to the dwelling insured under Coverage A*, either party may make a written demand for appraisal. * * *

The appraisers shall then appraise the loss, stating separately the **actual cash value** and loss to each item. * * *

(*Id.*, Add-23 (italics added)). Finally, the policy's Minnesota Amendatory Endorsement made the deductible inapplicable in the event of a "total loss." (Add-25).

Proofs of loss and evidence of total loss

On January 9, 2009, Second Chance filed a proof of loss with Auto-Owners stating that the property was a "total loss," and that Second Chance therefore sought payment of the policy limits plus the cost of demolition, and lost rent at \$5,000 per month. (RA-124.). On January 12, 2009, Auto-Owners' expert, EFI Global, gave Claims Representative Cheryl Kintop a written report on the loss. (RA-138.).

EFI explained that fire destroys flammable building materials by consuming them and by charring them, which changes their physical properties. (RA-142.). EFI found "considerable char" in the floor joists at Kings Point Road, stating that: "Essentially, the southern three-fourths of the floor joists on the main level of this dwelling were charred by the fire"; "The southern two-thirds or so of the floor joists for the third level (second story) were charred by the fire"; and "The east and south exterior walls in the southeast room on the main level of this dwelling were partially charred by the fire." (RA-143.).

EFI assumed that the roof was constructed of prefabricated wooden I-joists and plywood sheathing," and that the roof was not damaged in the fire, yet its report admitted that the roof's actual framing was "unknown and not seen." (RA-140). EFI also assumed that no damage occurred to stringers/girders, but again noted that these elements were "Unknown and not seen — none of the stringer lines were uncovered due to the fire." (*Id.*). EFI's report to Auto-Owners likewise noted that removing interior walls and

floor joists required extensive temporary framing to shore up each level, from fourth floor and roof assemblies down to first and second level floor joists:

To be able to remove these interior walls and floor joists, it will be required to shore up (shoring frames) the framing of the fourth level floor/roof assemblies of this dwelling. This action will have to be done prior to any demolition of any of these elevated floors and interior walls of this dwelling.

EFI recommends that the walls on each level of this dwelling need to be temporarily braced. That is, all of the exterior walls need to be braced at the elevation of the first and second level floor joists.

(RA-144). The EFI report highlighted the extent of the necessary framing effort, which would have included bracing the basement walls when the earth supporting them was removed, and extended to the upper levels of the structure:

[T]he first level (basement) walls are especially critical because three of the four wall elevations are resisting earth loads and the load is continually present until the earth is removed *off* these walls. Thus the tops of the basement walls need to be braced for this condition or at the elevation of the second level floor assembly.

The top of the second level wall assembly needs to be braced since a hinge exists in the wall framing when the floor joists are removed. Thus, another level of bracing needs to occur at the level of the third level floor framing.

(*Id.*). EFI opined that “All buildings, no matter what condition they are in, are salvageable, and thus this residential structure is salvageable.” (*Id.*). EFI also opined that the shell, exterior walls, roof, and floor assembly were “able to be reused.” (*Id.*). But EFI nonetheless concluded that it would not be “economical” to reuse the building’s remnant, and that the “best option” would be to demolish the building:

Thus, EFI has concluded that the best option would simply be to demolish the entire wooden framing of this dwelling. That is, all of the wooden framing of this dwelling needs to be demolished from the top down. It

appears to EFI that it would not be economical to reuse the exterior shell of this dwelling due to the requirement of shoring up the upper level roof and floor framing and the need to brace exterior walls of this dwelling.

(RA-144-145.).

On January 22, 2009, Lindstrom Cleaning and Construction, d.b.a. Lindstrom Restoration, produced an “Xactimate” report generating materials and labor costs to perform repair work on a home with dimensions comparable to the Kings Point Road property. (RA-151.). Auto-Owners received this report. (*See Id.*).

Lindstrom’s calculation of \$1,654,841.74 expressly excluded any work on the roof, stating that “any roofing repair within the estimate has been left open.” (RA-180.). Lindstrom’s report also excluded fees for a licensed structural engineer, which the insurer’s expert “highly recommend[ed]” should any attempt to rebuild the property be undertaken. (*See RA-151-182; RA-145.*). The Lindstrom estimate was thus incomplete, and it did not approximate the full cost of any sort of “repair” effort that might be undertaken; Auto-Owners has never produced a bid from a contractor willing to attempt to repair the property and warrant the repairs.

On March 9, 2009, Auto-Owners finally responded to Second Chance’s January 9, 2009 proof of loss, stating that Auto-Owners was “returning” the proof of loss because it did not “set out the Actual Cash Value of the damages nor does it provide a written estimate of repair to support your claim.” (RA-150.). The March 9, 2009 letter did not acknowledge Second Chance’s claim that the property was a total loss. (*See id.*). Auto-Owners did not explain how its “written estimate of repair” requirement squared with Minnesota’s Standard Fire Policy, which explicitly states that insureds need not state the

actual cash value in the event of a “total loss.” (*See id.*); compare Minn. Stat. § 65A.01, Subd. 3 (2012). (“In case of any loss under this policy, the insured shall give immediate written notice to this company of any loss, protect the property from further damage, and a statement in writing, signed and sworn to by the insured, shall within 60 days be rendered to the company, setting forth the value of the property insured, *except in case of total loss on buildings the value of said buildings need not be stated * * **.” (emphasis added)). Auto-Owners’ March 9, 2009, letter further stated that any future proof of loss would be “considered an entirely new document and will be accepted or rejected in connection with the matters and items contained therein.” (*Id.*)

On March 20, 2009, Auto-Owners paid Alliance Bank’s mortgage amount of \$1,038,677. (RA-41). On July 27, 2009, Second Chance filed a second proof of loss, again describing the property as a “total loss.” (RA-47-48). Second Chance’s second proof of loss, totaling 80 pages, included: a two-page letter from counsel outlining why the property was considered a “total loss”; a completed “Personal Property Inventory”; a forensic engineering report by Mark Blazevic of Encompass, Inc.; a Draft Field Report for Initial Fire Loss Investigation by Bryan Oakley and Thomas Irmeter of Forensic Building Science, including 101 photos of the loss; a demolition estimate from Veit, Inc.; and a replacement estimate from AAA Exteriors that offered to do the work necessary to tear down and rebuild the property for \$2,127,000, which was more than the policy’s limits. (RA-47-119).

The Encompass Engineering report, included with Second Chance’s July 27, 2009 proof of loss, noted that “joists installed at the first and second floors exhibited severe fire

damage to web members; at numerous locations webs are either severely charred or are completely burnt through.” (RA-56.). Encompass found waviness and sagging in first and second level floor joists, away from significantly charred framing, and concluded that the joists were likely subject to heat migration through the floor diaphragm, which softens the adhesives in oriented strand board and permanently deforms it. (*Id.*). Encompass observed that damage to wall framing affected a central load-bearing wall supporting the first floor, second floor and roof joists. (RA-57). Encompass also noted that a majority of windows in the basement and first floors were significantly damaged from charring and excessive water exposure. (*Id.*). Encompass reported that second floor windows were darkened from smoke and had peeling finishes, and other windows had failed insulated glass seals. (*Id.*). Encompass also found water seeping into the interior through the roof membrane at various locations. (RA-56.). The mineral/fiberboard below the roofing was observed by Encompass to be soft and soggy. (*Id.*). Finally, Encompass cautioned that “The economic feasibility of repairing the structure as compared to that of total replacement should be reviewed prior to onset of any remedial work.” (RA-58.).

Forensic Building Science examined the premises on June 9, June 16, and July 7, 2009 and did water-intrusion analyses. (RA-61-62.). FBS observed cracking and mold growth in some visible areas of the basement’s concrete masonry. (RA-62.). In several locations, foundation blocks tested for moisture with a “Delmhorst meter set,” registered a “wet” reading. (*Id.*). FBS observed that the intersection of the slab floor and the outer foundation was not sealed, which may have allowed the water used to douse the fire to

collect under the slab, where it could displace soil and slab support after numerous freeze-thaw cycles. (RA-63.). FBS further observed damage to the roof, resulting from buckling of the roof joists due to heat from the fire. (*Id.*). Further roof damage observed by FBS included wet sheathing and wet underlayment in the roof. (*Id.*). FBS explained that the roof and floor system was comprised of engineered “I” joists, which bear on the exterior walls and on an interior center bearing wall. (RA-64.). The exterior walls, FBS noted, utilize platform or “California style” construction, where each wall section and floor assembly is built independent of the section above but relies on the completed wall and floor system for diaphragm and shear strength. (*Id.*). Repairing such a system in sections is complicated and costly, requiring a temporary support system the installation and removal of which would double the job’s framing costs:

This type of design, while easier to construct, is more complicated and costly to repair by sections, especially if lower sections are damaged. . . . In effect, to replace a structural component such as the first floor bearing walls, the contractor would have to build a temporary system to keep all structural systems above in place while the 1st floor bearing wall is replaced. After all the structural components are completed, the temporary shoring system would have to be removed. This would come close to doubling the framing costs of starting over.

(*Id.*). The basement walls also were subject to water and heat damage as a result of the fire and the water used to douse it, and FBS opined that rebuilding on the existing block foundation was “not reasonably possible.” (RA-63.).

Claims representative Kintop again “returned” Second Chance’s July 27, 2009 proof of loss on August 13, 2009, once more claiming that it did not comply with the policy provisions because it allegedly failed to “set out the Actual Cash Value of the

damages.” (RA-183). As before, Auto-Owners’ August 13, 2009 letter did not explain how such a requirement squared with Minnesota’s Standard Fire Policy, which explicitly states that insureds need not state the actual cash value in the event of a “total loss.” (*See Id.*); compare Minn. Stat. § 65A.01, Subd. 3 (2012). Auto-Owners’ August 13, 2009 letter also asserted a new requirement — one not contained in its policy — that Second Chance’s “written estimate of repair” had to be “supported by a trade break down of rebuilding for your claim.” (RA-183). Auto-Owners’ August 13, 2009 letter did not acknowledge any of Second Chance’s evidence showing that the property was a “total loss.” (*See id.*).

On September 3, 2009, Auto-Owners sent Second Chance another letter, claiming that Auto-Owners could wait 30 business days before paying the undisputed amount of Second Chance’s claim. (RA-184). The letter did not explain why the payment period was 30 days rather than the 5 days set forth in the policy. (*Compare id. with Add-25*). Auto-Owners’ September 3, 2009 letter acknowledged that Minnesota law required that, if it was “unable” to “accept or deny” Second Chance’s claim, Auto-Owners must advise why. (RA-184). Auto-Owners stated that its reason for non-payment was that it was “awaiting the following items previously requested: Proof of Loss Form.” (*Id.*). The September 3, 2009 letter did not acknowledge Second Chance’s two prior proofs of loss, nor that Second Chance was seeking to recover for a “total loss.” (*See id.*).

On October 8, 2009, Second Chance’s counsel wrote to Auto-Owners to challenge Auto-Owners’ purported “rejections” of Second Chance’s proofs of loss, and its inexcusable delay in failing to *at least* tender the undisputed amount, i.e., the difference

between the Lindstrom report and the amount paid to Alliance Bank, or \$616,697.74. (RA-147). Second Chance demanded that Auto-Owners pay the full amount owed — the policy limits minus the amount paid to Alliance Bank, or \$1,000,500 — within 30 days, noting that if forced to litigate, it would seek extra-contractual damages. (RA-147-149). In response to Second Chance’s demand, Auto-Owners attempted to negotiate a full release in exchange for payment of the undisputed amount minus the deductible:

We are willing to offer damages to your client of repair \$1,654,841.74 plus personal property loss \$3,000.00 plus board up expenses of \$5,484.50 for a total of \$1,657,841.74 minus the \$2,500.00 policy deductible and the amount paid to the mortgage carrier of \$1,038,644.00 leaving a net payable of \$616,697.74

We enclose a Proof of Loss in this amount and again reiterate that a proper proof of loss has not been filed as of this date.

(RA-185). It did not acknowledge that under Minnesota law, the deductible was inapplicable to “total loss.” (*See id.*; Add-25); *see* Minn. Stat. § 65A.01 Subd. 5 (2012).

Second Chance rejected Auto-Owners’ “offer,” and Auto-Owners finally tendered the undisputed amount on October 28, 2009, which was more than eight months after Auto-Owners received the EFI Global and Xactimate reports stating a minimum amount to “repair” and that repair was not economically feasible. (*See* RA-151; RA-43.)

Auto-Owners’ demands for appraisal

On October 29, 2009, Auto-Owners’ counsel wrote to Second Chance to state that Auto-Owners was demanding appraisal. (App-1). Auto-Owners’ counsel did not explain how appraisal was appropriate, given that Second Chance’s claim involved a “total loss.” (*See id.*).

On November 19, 2009, Second Chance disputed whether appraisal was appropriate, but it appointed an appraiser in order to preserve its right to do so. (App-2). Second Chance then incurred expenses and attorneys' fees preparing for the appraisal. (See RA-191-195.). On February 24, 2010, one day before the scheduled appraisal, Auto-Owners shifted positions and advised Second Chance that Auto-Owners would not proceed with the appraisal that Auto-Owners had itself initiated. (RA-190-1911; RA-33). Having already incurred expenses to prepare for the appraisal, Second Chance stated that it intended to proceed as planned. (See RA-191). The appraisers informed the parties **“that the statute is very clear that the appraisal panel has no jurisdiction of the matter if the loss is a total loss.”** (RA-184 (bold in original)).

On the date scheduled for appraisal, February 25, 2010, Auto-Owners' counsel appeared and joined the scheduled site walk-through, but did not participate in the appraisal. (RA-46).

On March 12, 2009, Auto-Owners filed its complaint, asking the district court to compel Second Chance to submit its total loss claim to appraisal, despite the fact that Auto-Owners had walked away from the appraisal that it initiated. (RA-04). Auto-Owners conceded that it had no coverage or liability defenses. (RA-34.). Second Chance filed an amended answer asserting a counterclaim for breach of contract. (RA-14.)

On November 30, 2010, Auto-Owners filed a motion to compel appraisal. (RA-29). In response, Second Chance filed a motion for partial summary judgment declaring the Kings Point Road property a total loss, and a motion to amend its pleading to seek

taxable costs under Minn. Stat. § 604.18, and prejudgment interest under Minn. Stat. § 60A.0811. (RA-39).

On April 11, 2011, the district court issued an order denying Auto-Owners' motion to compel appraisal. (Add-1). The court's order also denied Second Chance's motion for partial summary judgment, but granted its motion to amend its counterclaim to add a claim for taxable costs for bad faith under Minn. Stat. § 604.18.² (*Id.*)

Plaintiffs appealed and the court of appeals ruled for Second Chance, holding that the appropriate forum for determination of total loss by fire is the district court. (RAdd-1).

ARGUMENT

This case presents a statutory-interpretation question, nothing more. Minnesota's Standard Fire Policy mandates appraisal "except in case of total loss on buildings." For the past 100 years, Minnesota courts have applied a "reasonable uninsured property owner" standard to determine when a building is a "total loss," as that phrase is neither statutorily nor contractually defined. And, consistent with the statute's "total loss" exception, courts have instructed *juries* — not panels of appraisers — regarding that "reasonableness" standard.

If the Minnesota Legislature disagreed with this procedure — i.e., if it wished for appraisers to decide "total loss" questions, as Auto-Owners claims — then the legislature

² As the court is likely aware, Minn. Stat. § 604.18 provides that "[a]n award of taxable costs under this section is not available in any claim that is resolved or confirmed by arbitration or appraisal." Minn. Stat. § 604.18, Subd. 3 (c) (2012). This is one reason why Minnesota insurers are suddenly so eager to expand appraisers' authority.

could have amended the Standard Fire Policy to so state. It has not. Rather, the legislature has acquiesced in this court's determination that "total loss" questions should be submitted to *juries*, so that they may apply a "reasonable uninsured property owner" standard to the facts.

This result is consistent with the Standard Fire Policy's plain language, as well as its consumer-protective purpose. It is consistent with caselaw nationally; Auto-Owners has yet to locate a single case anywhere in the country that supports its position that appraisal panels decide "total loss" issues under "valued policy" statutes. Rather, caselaw and commentators conclude that submitting "total loss" issues to appraisers undercuts the consumer-protective purposes of a "valued-policy" statute like Minnesota's Standard Fire Insurance Policy.

And finally, Minnesota's time-tested procedure is the most efficient manner to decide "total loss" issues, given this state's "reasonableness" standard for "total loss." Individual panels of engineers and professional adjusters are not well-suited to decide what a "reasonable uninsured property owner" would do under the circumstances, given that such an assessment may well include questions about whether the property will ever be resold if it has a fire in its history, or whether the smell of smoke can be reduced to a tolerable level. Jurors, on the other hand, are uniquely well-qualified to make such decisions. There is no good reason to disrupt this century-old process now.

Rather, there is every reason to believe that if Minnesota's procedure is disrupted, then insurers will try to do what Auto-Owners is attempting to do here; i.e., to use the appraisal process to pay less than policy limits, even when its own evidence shows that a

loss is a “total loss” within the Minnesota standard. At least part of Auto Owners’ motivation for compelling appraisal may also be to insulate itself from bad-faith liability for its unreasonable delay, and unconscionable negotiation tactics, including withholding an undisputed amount in an attempt to negotiate a disputed claim.

If Auto Owners prevails here, then insurers will be free to mislead appraisal panels about the legal test for “total loss,” and then assert that the panels’ factual determinations about the “amount” of loss are unreviewable, thereby eviscerating 100 years of caselaw articulating the legal standard for “total loss,” and severely undercutting Minnesota’s valued-policy statute.

I. Minnesota’s Standard Fire Insurance policy, Minn. Stat. § 65A.01, Subd. 3, specifically excepts “total loss” issues from appraisal.

Minnesota’s Standard Fire Insurance Policy is dictated by Minn. Stat. Ch. 65A, and it unambiguously requires that insurers pay the full policy limits in the event of a “total loss.” *See generally*, Minn. Stat. § 65A.01 (2010). It is thus a “valued policy” statute. *See, e.g., Curo v. Citizens Fund Mut. Fire Ins. Co.*, 186 Minn. 225, 226, 242 N.W. 713, 713 (1932) (stating Minnesota’s “‘valued policy statute’ * * * first came into our law as a part of L. 1895, P. 392, c. 175, § 25.”).

The Minnesota Standard Fire Insurance Policy allows for appraisals to determine the “actual cash value” of partial losses, or total losses to property other than buildings, but the appraisal clause contains an explicit carve-out for “total loss on buildings”:³

³ Consistent with the statutory requirement, Auto-Owners’s Minnesota Amendatory Endorsement also amended its appraisal provision to unambiguously except “total loss” issues from appraisal:

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. * * * 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. * * *

Minn. Stat. 65A.01, Subd. 3 (2012) (emphasis added). Auto-Owners claims that the above appraisal provision “*mandates* that an appraisal panel determines whether there has been a total loss to a structure upon demand of either party.” (Appellant’s Brief, 6 (emphasis added)). This argument turns the statutory exception on its head, and runs afoul of several well-settled statutory-interpretation rules.

A. Auto-Owners’ interpretation fails to give effect to all of the statute’s provisions.

Auto-Owners’ theory is that the “total loss” exception only applies “when the loss *has been determined* to be total.” (Appellant’s Brief, 6 (emphasis added)). Auto-Owners does not suggest how such a “determination” would magically occur, but in the courts below it argued that the only time the exception would come into play is if the parties

APPRAISAL

If **you** and **we** fail to agree on the **actual cash value** or amount of loss, *except in the case of total loss to the dwelling insured under Coverage A*, either party may make a written demand for appraisal. * * *

The appraisers shall then appraise the loss, stating separately the **actual cash value** and loss to each item. * * *

(*Id.*, Add-23 (italics added)).

agreed that the property was a “total loss.” (See Appellant’s Court of Appeals Brief, 7-8). In other words, Auto-Owners claims that the legislature meant to say that, when the parties fail to agree on the amount of the loss, they go to appraisal unless they nonetheless *agree* that the loss is “total.” It is hard to fathom how such a situation could ever occur.

Auto-Owners’ interpretation thus violates fundamental statutory-interpretation rules. If the parties *agree* that there has been a total loss to a building, then there is no need for an appraisal of “actual value,” or the “amount of loss,” because “actual value” and the “amount of loss” are irrelevant. Under Auto-Owners’ interpretation, the appraisal exception would never have effect; it is completely superfluous. Minnesota law does not condone a statutory interpretation that renders a provision superfluous. *Zurich Am. Ins. Co. v. Bjelland*, 710 N.W.2d 64, 69-70 (Minn. 2006) (“The first presumption we rely on in this case is that we presume that ‘the legislature intends the entire statute to be effective and certain.’”); Minn. Stat. § 645.17 (2) (2012) (in ascertaining legislative intent, courts should presume legislature intends entire statute to be effective and certain).

B. Auto-Owners’ interpretation puts the appraisal provision in conflict with other portions of the statute.

Auto-Owners’ position would also put the appraisal provision in conflict with another portion of the statute. That portion prohibits any “provision” that permits paying less than policy limits when there has been a “total loss.”

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 (2012). If, as Auto-Owners claims, the legislature meant to suggest that the parties could somehow *agree* that a loss to a building is “total,” yet *disagree* about the *amount* of a loss, then the appraisal provision is itself a violation of the statutory scheme.

One need only imagine a hypothetical scenario to understand why this provision cannot tolerate submission of a “total loss” issue to appraisers. Suppose that in a particular case, a court applying Minnesota law would conclude that a particular loss is a “total loss,” but a panel of appraisers awards less than the policy limits based on the appraisers’ own theory about what “total loss” means. Perhaps the court applies Minnesota’s “reasonable uninsured property owner” standard, and the appraisal panel is persuaded to apply Auto-Owners’ “pile of rubble on the ground” standard. The policy’s appraisal provision would then be a “provision” that violated Minn. Stat. § 65A.01, Subd. 5, and would be void under Minn. Stat § 65A.01, Subd. 1 (2012) (“No policy or contract of fire insurance shall be made, issued or delivered by any insurers * * * on any property in this state, unless it shall provide the specified coverage and conform as to all provisions, stipulations, and conditions, with such form of policy * * *.”). Practically speaking, appraisers can never have the last word regarding “total loss.” There must always be a court proceeding to apply the correct legal standard. So Auto-Owners’ interpretation puts the appraisal provision in conflict with the one provision that is essential to a valued-policy law, namely, the prohibition on payment of less than policy limits in the event of “total loss.”

Auto-Owners' argument also puts the statute in conflict with itself insofar as it expressly limits appraisers to deciding *actual value*, but "actual value" has no meaning if there has been a "total loss" under the statute; this is why insureds are relieved of having to state "actual value" in proofs of loss in which they claim "total loss":

In case of any loss under this policy the insured shall give immediate written notice to this company of any loss, protect the property from further damage, and a statement in writing, signed and sworn to by the insured, shall within 60 days be rendered to the company, setting forth the value of the property insured, *except in case of total loss on buildings the value of said buildings need not be stated * * **.

Minn. Stat. § 65A.01, Subd. 3 (2012) (emphasis added). Appraisers cannot assess "actual value" in the event of a "total loss." This is consistent with the appraisers' conclusions in this case. (*See* RA-194 (expressing appraisers' conclusion that they lacked jurisdiction to decide total loss)).

Auto-Owners' interpretation is strained. It cannot be squared with the Standard Fire Policy when read as a whole, and this court should reject it.

C. Auto-Owners' interpretation is anathema to the consumer-protective purpose of a "valued policy" statute like Minnesota's Standard Fire Policy.

Auto-Owners acknowledges that Minn. Stat. § 65A.01 is "remedial in nature," and that the statute must therefore be construed in favor of its remedial purpose. (*See* Appellant's Brief, 11). But then Auto-Owners' turns century-old law on its head because it willfully ignores the purpose of "valued policy" laws. As every court and commentator to weigh on the subject has concluded, appraisal of "total loss" issues is anathema to that purpose.

“Valued policy” laws were designed to eliminate post-claims underwriting:

The so-called ‘valued policy law,’ section 203.21 of the [Wisconsin] Statutes is a legislative expression of the public opinion against the practice by fire insurance companies of writing excessive amounts of coverage, collecting high premiums, and then reducing the amounts of recoveries to a minimum when losses occur.

Winfield V. Alexander, Insurance: The Wisconsin “Valued Policy” Law, 10 Wis. L. Rev. 248, 248 (1934-35) (included in Respondent’s Appendix beginning at RA-208 because article is old and difficult to find). At the time that such statutes were first passed in the late 1800s, they were considered “drastic,” but were “justified by a very exaggerated condition of unfair practice on the part of insurers * * *.” *Id.*; see also *Curo v. Citizens Fund Mut. Fire Ins. Co.*, 186 Minn. 225, 226, 242 N.W. 713, 713 (1932) (stating Minnesota’s “‘valued policy statute’ * * * first came into our law as a part of L. 1895, P. 392, c. 175, § 25.”). It is of course no accident that such laws were passed (and that most of the caselaw developing them was decided) during economic downturns, because that is when insurers tend to reap the greatest windfalls from avoiding payment of “total losses.”⁴

⁴ And, of course, that’s a one-way street. During an economic downturn, when property values are likely to drop, there’s a greater likelihood that properties are overinsured, so that a complete rebuild might be had for less than the policy limits. There’s some risk of a windfall, which insurers naturally want to avoid. But the insured paid the premium based on the higher value, and if a windfall is going to be had, it should fall to the insured. Because, after all, as the Supreme Court noted, the carrier holds the cards insofar as it can avoid that risk by carefully underwriting the policy. *Orient Ins. Co. v. Dags*, 172 U.S. 557, 565-66 (1898) (“Risk then can only come from the failure to observe . . . that care which it might be supposed, without any prompting from the law, underwriters would observe * * *.”).

Wisconsin introduced the “valued policy” to American law in 1874. H. R. Hayden, Hayden’s Annual Cyclopedia of Insurance in the United States 1911-1913 379 (Fire Ins. Ed. 1913). At the time, insurers were enjoying easy profits at insureds’ expense. *See* Spencer L. Kimball, Insurance and Public Policy 240-241 (1960) (RA-251) (“Insistence that the insured should receive no more than indemnity for his loss, whatever premium he may have paid, seemed to legislators to a refusal to bear the burdens of the transaction after receiving its benefits.”). Insurers would over-insure properties, collect high premiums and then force insureds to litigate their claims after a total loss. Christopher T. Conway, Note, As Hurricanes End, The Storms Begin: The Insurance Battle Under State Valued Policy Laws, 24 Ga. St. U. L. Rev. 1043, 1048 (2008) (“VPLs were originally adopted in response to the perception that insurers were profiting by selling insurance policies with inflated face values, and then, after the building suffered a total loss, litigating the actual value of the insured structure.”)

Valued-policy statutes forced insurers to establish the value — and therefore a correlated premium — up front. *Id.* at 1046. This served a twofold purpose: it prevented over-insurance by requiring prior valuation; and it avoided litigation by prescribing definite standards of recovery in case of total loss. *Nathan v. St. Paul Mut. Ins. Co.*, 243 Minn. 430, 433-34, 68 N.W.2d 385, 388 (1955).

The converse is not true, though, because the limits protect the carrier during boom times. So in economic upswings, when properties may be underinsured, the carrier nonetheless never pays *more* than its limits. So its “heads I win, tails you lose” for the carriers. Anything that can help them reduce the number of “total loss” payments is a plus.

Other states took notice. *See* Hayden, *Cyclopedia of Insurance*, 378. Within twenty years, valued-policy bills were sweeping legislatures all over the country — over 160 such bills were considered by state legislatures between 1891 and 1900. *Id.* Although far more were introduced than passed, the momentum propelled such laws onto the books of 24 states by 1913. *Id.* at 379-386. Minnesota was among the earlier jurisdictions to accept the wisdom of the valued-policy statute, in 1895. *See id.* at 382.

Insurers were not happy. They protested to legislators and the courts. *See e.g.*, Kimball, *Insurance and Public Policy*, 242, 243 (“[T]here were abortive attempts at outright repeal [in Wisconsin] in 1875, 1878 and 1881.... When legislative action failed, the companies might withdraw from the state as a sanction against the law.”) Even the U.S. Supreme Court was convinced to weigh in on the valued policy’s constitutionality. *Orient Ins. Co. v. Daggs*, 172 U.S. 557 (1898) (upholding Missouri valued-policy law).

The Court saw no unfair risk to insurers’ rights:

Risk then can only come from the failure to observe . . . that care which it might be supposed, without any prompting from the law, underwriters would observe, and which if observed would make their policies true contracts of assurance, not seemingly so, but really so; not only when premiums are paying, but when loss is to be paid.

Orient Ins. Co., 172 U.S. at 565-66. The Court held that a state legislature had the right to approve such a result, and to achieve it, even if it meant narrowing insurers’ right of contract. *Id.* (“The State surely has the power to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by plaintiff in error.”).

All valued-policy laws have the common goal of fixing the amount of insurance recoverable when an enumerated peril produces a total loss. Conway, *The Insurance Battle Under State Valued Policy Laws*, 24 Ga. St. U. L. Rev. at 1049. By decreasing litigation, these laws serve not just property owners, but the public at large. *Id.*; William R. Vance, *Handbook on the Law of Insurance*, 885 (Buist M. Anderson, ed., 1951) (“The provisions of these statutes are held to be in the interest of the public at large, and not merely for the benefit of the insured.”).

As commentators have repeatedly observed, court determination of “total loss” is the only procedure that is consistent with the statutory scheme as a whole. Alexander, 10 Wis. L. Rev. at 251-53 (RA-201-203); Case Notes, XIV Minn. L. Rev., 301-02 (1930) (“A stipulation to arbitrate contained in such a valued policy, even though made a condition precedent to recovery, is generally considered inoperative in case of total loss.”) (RA-222). This is because otherwise insurers are able take a premium based on an inflated property value, and then try to convince appraisers to award less based on the property’s “depreciation” or that it was “deteriorated.” That’s what insurers were getting away with in the late 1800s when valued-policy statutes were popping up all over the country. *See* Alexander, 10 Wis. L. Rev. at 248; Hayden, *Cyclopedia of Insurance*, 378-86. (RA-240-248)

Appraisal provisions were already commonplace at that time, and, in fact, insurers regularly used them to avoid and delay paying policy limits on claims. *See, e.g., Gasser v. Sun Fire Office*, 42 Minn. 315, 316-17, 44 N.W. 252, 253 (1890) (Construing “open” policy for personal property and noting, “The contention of the plaintiff is that * * * the

arbitration clause, by its terms, cannot apply to cases where personal property covered by the policy is wholly destroyed.”); *Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co. of Rochester, N.Y.*, 85 Minn. 48, 50, 88 N.W. 265, 266 (1901) (“[I]t was claimed by respondent that within the terms of the policy there was a total loss. This appellant denied * * * and demanded a submission of the amount of the loss to appraisers, according to the provisions of the policies. Respondent refused to comply with the demand for arbitration, and brought this action to recover the entire amount covered by the policies.”).

So when states, including Minnesota, began to enact standard fire policies, many of them specifically excepted “total loss” issues from otherwise allowable appraisal provisions. *See, e.g.*, 1923 Minn. Laws 580 (“In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall, as above provided, be ascertained by two competent, disinterested and impartial appraisers * * *.”). In fact, the New York dissenting opinion on which Auto-Owners so heavily relies complains that the majority failed to consider that New York had no similar statutory provision. *Lee v. Hamilton Fire Ins. Co.*, 167 N.E. 426, 427 (N.Y. 1929) (“All those decisions are based upon statutes the operation of which is of course limited to their respective States.”).

And yet, even states like New York that did *not* have such specific statutory provisions nonetheless considered that it was “clear” that “total loss” issues were not appraisable, because any other outcome would undercut the remedial purpose of the valued-policy statute:

It seems clear that the appraisal was to cover only ‘loss or damage’ less than a total loss. If the insured under such a policy claims a total loss and the insurer a partial loss, and the latter insists on an appraisal, the granting of the appraisal by the insured cannot estop him from litigating the question of a total loss. If it be decided that the loss was not total, then the appraisal stands, but if it be decided that the loss was total, then under the valued policy the plaintiff would be entitled to receive the amount of the policy. *Any other construction disregards the fact that the policy is a valued policy and treats it as an open policy.*

Id. at 427 (emphasis added). Commentators in Minnesota noted that appraisal clauses are inconsistent with “valued policy” laws. *Cf.* Case Notes, XIV Minn. L. Rev., 301-02 (1930) (“A stipulation to arbitrate contained in such a valued policy, even though made a condition precedent to recovery, is generally considered inoperative in case of total loss.”) (RA-222). And so have commentators in other jurisdictions:

C. Policy Provisions Inconsistent with the Statute

As previously stated, the provisions of the policy are controlled by section 203.21 where the two are in conflict. This is so even though the policy be statutory and passed subsequent to the valued policy law. There are several such provisions.

* * *

(3) Arbitration

Likewise, provisions for arbitration as to the amount of indemnity and for the appraisal of the property destroyed to determine the amount of loss are void as being in conflict with the statute. *This result is obvious, since the amount of recovery and the value of the property destroyed are fixed at the face value of the policy, and there is no need for arbitration or appraisal.*

Alexander, 10 Wis. L. Rev. at 251-53 (Emphasis added; beginning at RA-201-203). This is at least in part because courts have defined the phrase “total loss” such that it has “acquired a legal significance which, in some cases, seems to vary from the literal

interpretation which would be given by a layman.” Alexander, 10 Wis. L. Rev. at 249. So an appraiser might be persuaded to (for example) follow some test other than Minnesota’s “reasonable uninsured property owner” test, and thereby deprive the insured of his contractual right under the policy and Minnesota law. *See, e.g., Northwestern*, 85 Minn. 48, 50, 88 N.W. 265, 266 (1901) (asking whether prudent insured would restore under circumstances).

So “total loss” questions are coverage issues requiring application of a legal standard to facts. They are therefore precisely the sort of issue that must be decided by a court, or, in this case, by a jury that a court has properly instructed on the law. And this sort of issue can therefore be distinguished from, say, causation, which this court determined did not involve consideration of a legal standard. *See Quade v. Secura*, 814 N.W.2d 703, 707 (Minn. 2012). Although one can imagine contrary arguments, at least the concept of “causation” may have something of a “natural” meaning apart from policy language; juries don’t have to have elaborate instructions to understand the concept in most circumstances. But “total loss” as a concept has “acquired a legal significance which, in some cases, seems to vary from the literal interpretation which would be given by a layman.” Alexander, 10 Wis. L. Rev. at 249. And it is therefore the sort of issue that is not properly subject to appraisal.

D. Auto-Owners' interpretation is not supported by a single case in any jurisdiction; every jurisdiction that has considered whether appraisers decide "total loss" issues under valued-policy statutes has decided that they do not.

Auto-Owners has not hit on some novel, heretofore-never-considered theory here. As its own authority demonstrates, its arguments have been considered and soundly rejected by courts all over the country. In nearly four years of litigation, Auto-Owners has yet to uncover a single case in which a court has held that appraisal panels have jurisdiction to make decisions regarding whether a property has suffered a "total loss" within the meaning of a valued policy. Auto-Owners does not and cannot offer a single case that has accepted its position with respect to a valued-policy statute.

Auto-Owners' lead case is a 1929 New York Appellate Court decision, in which Auto-Owners is actually citing *the dissent*. The majority decision concluded that the insured was not barred from litigating "total loss" in court, even though he had participated in an appraisal. *Lee v. Hamilton Fire Ins. Co.*, 167 N.E. 426, 426-27 (N.Y. 1929) ("It seems clear that the appraisal was to cover only 'loss or damage' less than total loss. If the insured under such a policy claims a total loss and the insurer a partial loss, and the latter insists on an appraisal, the granting of the appraisal by the insured cannot estop him from litigating the question of a total loss."). The court essentially gave the insured a complete *de novo* review:

The award of the appraisers finding a partial loss only and fixing the "sound value" at the time of loss to be less than the agreed value fixed by the policy is not binding on the insured. Upon due proof of total loss, insured may recover for the full agreed value of the property.

Id. at 426. In so holding, the court relied, in part, on Minnesota law. *See id.* (citing *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N.W.252 (1890), which involved “open” policy).

The dissenting justice (O’Brien) advocated the position that Auto-Owners lobbies for here. *Id.* at 235-36 (“Assume also that when property insured under a valued policy is conceded to have been completely destroyed and to have passed out of existence, appraisal may not be enforced. When, however, the parties to an insurance contract disagree respecting the fact whether the damage is partial or loss is total that rule does not apply. In such circumstances an appraisal provision in a policy controls.”). Justice O’Brien then noted that the cases on which the majority relied came from states with specific statutory exceptions, and that New York had none. *See id.* So Justice O’Brien’s dissent is hardly persuasive in a state in which such a statutory exception exists.

Another authority that Auto-Owners claims supports it is an Eighth Circuit decision from 1903, applying Missouri law to an open (i.e., not a valued) policy. *See generally, Williamson v. Liverpool & London & Globe Ins. Co.*, 122 F. 59 (8th Cir. 1903). As the court noted, the policy explicitly authorized appraisers to determine the “actual cash value” of the building at the time of the total loss:

It is further expressly understood and agreed that, in determining the sound value and the loss or damage upon the property hereinbefore mentioned, the said appraisers are to make an estimate of the total cash cost of replacing or repairing the same or the actual cash value thereof at and immediately preceding the time of the fire, and in case of depreciation of the property from use, age, condition, location, or otherwise a proper deduction shall be made therefor.

Id. at 61. *Williamson* does not support Auto-Owners' position here, under Minnesota's valued-policy law.

Finally, Auto-Owners cites a Washington Supreme Court decision from 1927, *Gouin v. Northwestern National Insurance Company of Milwaukee*, 259 P. 387 (Wash. 1927). *Gouin* also involved an "open" policy, not a valued policy:

Each of the policies contained conditions to the effect that the insurance company should not be liable beyond the actual cash value of the property at the time any loss or damage occurred, which loss or damage should be ascertained with proper deductions for depreciation, however caused.

Id. at 387. And the basis for the court's holding was that the insured consented to appraisal, even if he had an argument against it. *Id.* at 390 ("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 and the tribunal agreed upon had made such an award." Emphasis added.) Finally, Auto-Owners fails to acknowledge that, just ten years later, the Washington Supreme Court held that it was against public policy to allow insurers to "contract around" a valued-policy statute by settling with an insured for less than the policy limits, where the loss was clearly "total." *Grandview Inland Fruit Company v. Hartford Fire Insurance Company*, 66 P.2d 827, 834 (Wash. 1937). In so holding, the court distinguished *Gouin* on the grounds that it involved an "open" policy. *Id.* ("Nor do we find *Gouin* * * * of comfort to respondent. The insurance contract in that case provided that the insurer would not be liable beyond the actual cash value of the property destroyed * * *."). *Gouin* does not assist Auto-Owners here.

The on-point caselaw nationally is completely uniform on this subject, as are commentators; every authority that has addressed the issue has concluded that appraisal of “total loss” questions is anathema to valued-policy statutes. Winfield V. Alexander, *Insurance: The Wisconsin “Valued Policy” Law*, 10 Wis. L. Rev. 248, 251-53 (1934-35) (“[P]rovisions for arbitration as to the amount of indemnity and for the appraisal of the property destroyed to determine the amount of loss are void as being in conflict with the statute. *This result is obvious, since the amount of recovery and the value of the property destroyed are fixed at the face value of the policy, and there is no need for arbitration or appraisal.*” (Emphasis added.)); cf. Case Notes, XIV Minn. L. Rev., 300, 301-02 (1930) (“A stipulation to arbitrate contained in such a valued policy, even though made a condition precedent to recovery, is generally considered inoperative in case of total loss.”). Auto-Owners’ position has zero support.

II. Over 100 years ago, this court interpreted the Standard Fire Insurance Policy to require that juries — not appraisal panels — decide “total loss” questions; the Minnesota Legislature has acquiesced in this interpretation.

The definition of “total loss” is a legal question, requiring application of a particular test. In 1901, this court debated the three primary legal tests for “total loss,” and determined that one was “too hot,” one was “too cold,” and one was “just right.” Minnesota’s “reasonableness” rule is the result.

The legal test for “total loss” is relevant in this appeal insofar as Auto-Owners has repeatedly and flagrantly misstated it, and its continued misstatements demonstrate the risks inherent in allowing appraisers to decide “total loss,” because appraisers’ decisions are only as accurate as the legal standards that they apply. If they are misled by one of

the parties, but do not articulate their reasoning in the award, it will be difficult to show that they applied an incorrect standard.

In this court, Auto-Owners again claims (as it has throughout this litigation) that, in Minnesota, a building is only a total loss if it has been “so far destroyed by fire” that “no substantial portion or part thereof above the foundation remained in place.” (See e.g., Appellant’s Brief, 8). Auto-Owners cites two cases for this proposition. Its primary, go-to authority for it is *Poppitz v. German Ins. Co.*, 85 Minn. 118, 118, 88 N.W. 438, 439 (Minn. 1901). *Poppitz* was a five-paragraph companion case to *Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co.*, 85 Minn. 48, 88 N.W. 265 (1901). The *Poppitz* opinion gives a one-sentence explanation of the holding and refers to the *Northwestern* case for the full analysis:

We there held that 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. *The question was very fully and carefully considered, and the rule there laid down is believed to be sound, and must be followed and applied in this case.*

Poppitz, 85 Minn. at 119; 88 N.W. at 439 (emphasis added). The court affirmed a directed verdict without explanation. *Id.* Auto-Owners has seized upon this “holding” as articulating its preferred version of the Minnesota “total loss” rule.

But that’s woefully incomplete, as any careful read of *Northwestern* would reveal. The court in *Northwestern* did not so much as consider (much less adopt) such an unprecedented legal standard:

There is substantial agreement that insurance upon a building is upon the building, and not the materials of which it is composed, and that a total loss within a property insurance policy does not require literal destruction of the materials of which the property was constructed, or, in the case of a building, that no part thereof be left standing.

Couch on Insurance 3d, § 175:65, and n. 43 (West 1998) (citing *Northwestern*). Rather, in *Northwestern*, this court considered cases articulating various legal tests that courts had followed in determining “total loss” questions. *See id.* (describing three primary tests); *see generally*, *Northwestern*, 85 Minn. at 53, 88 N.W. at 267 (“These questions involve a definition of the expression ‘total loss,’ which is under consideration for the first time in this court * * *.”). The court rejected the “absence of value” test — in which a building is a total loss only if the building could be repaired at much less cost than to have it rebuilt — without much discussion. *Northwestern*, 85 Minn. at 58, 88 N.W. at 269; *see also* Couch on Insurance 3d, § 175:65 (West 1998) (describing three primary tests).

The court then conclusively rejected the “identity” test — which asks whether the structure has lost its “identity and specific character” — concluding that it “adds nothing to say that total loss occurs when the identity and specific character of the structure is destroyed.” *Northwestern*, 85 Minn. at 63, 88 N.W. at 270-71; *see also* Couch on Insurance 3d, § 175:65 (West 1998) (describing three primary tests); Couch on Insurance 3d, § 175:70 (West 1998) (describing “loss of identity” test).

This court opted, instead, to follow a “restoration to use” test, which involves an analysis of whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore it to its original

condition, utilize the remnant thereof as such a basis. Couch on Insurance 3d, § 175:74 and n. 80 (West 1998) (citing *Northwestern*).

Importantly, this court was asked to order a new trial because the district court rejected jury instructions that articulated a “restoration to use” standard, *including* (necessarily) a discussion of what a reasonably prudent uninsured owner would do. *See Northwestern*, 85 Minn. at 52, 88 N.W. at 267 (“Appellant also requested the court to give the following instruction: ‘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 (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; 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 fire, would, in proceeding to restore the building, utilize such standing remnant as such basis. If he would, then the loss is not total.’”). This court granted that request, specifically *because* “[t]he requests of appellant fairly presented the law upon the subject and should have been given * * *.”) *Id.* at 63, 88 N.W. at 271. And it specifically stated, not once, but twice in that same paragraph, that it was “proper to consider not only the condition of the walls standing, * * * but also the relative *value* of such walls, in place, *as compared with the cost of rebuilding.*” *Id.* (emphasis added). It finished its analysis of the issue reiterating that “it was proper to submit to the jury in this case all evidence bearing upon that question, including * * * *the cost of rebuilding.*” *Id.* (emphasis added). So the end result in *Northwestern* was that the case was remanded for a jury trial.

Auto Owners claims that the parties didn't dispute whether appraisal was appropriate. But that's not true. The parties in *Northwestern* certainly argued about whether appraisal was the appropriate forum, and the decision was ultimately to remand for a jury trial:

[I]t was claimed by respondent that within the terms of the policy there was a total loss. This appellant denied, claiming the damage did not exceed \$1,400, and demanded a submission of the amount of loss to appraisers, according to the provisions of the policies. Respondent refused to comply with the demand for arbitration, and brought this action to recover the entire amount covered by the policies.

See *Northwestern*, 85 Minn. at 50, 88 N.W. at 266 (emphasis added).

Moreover, this court also explicitly considered whether appraisal was appropriate in *Oppenheim v. Fireman's Fund Ins. Co.*, 119 Minn. 417, 138 N.W.777 (1912). In that case, the insureds prepared proofs of loss showing that the building was a total loss, and the insurer argued that the loss was not total. *Id.* at 418, 138 N.W. at 778. The insurer demanded appraisal and the insured refused. *Id.* The insurer further argued that the insured was required to submit to appraisal. *Id.* at 419, 138 N.W. at 778 ("As a further defense, it was alleged that the loss was not total, but partial only, and that for this reason the reference demanded by it and refused by the plaintiffs was a condition precedent to the right to sue on the policy * * *."). This court discussed the appraisal provision, including its exception for "total loss." *Id.* at 779-781. It concluded its discussion, stating "[t]he question of whether the loss was total or partial should have been submitted to the jury * * *." *Id.* at 780.

In fact, Minnesota's appellate courts have an unbroken history of deciding "total loss" issues in courts, albeit often without much discussion; this is likely because the statutory exception is so clear. *See, e.g., Northwestern*, 85 Minn. 48, 88 N.W. 265 (court decides "total loss" question); *Johnson v. Madelia Lake Crystal Mut. Ins. Co.*, 2004 WL 61057, *4-6 (Minn. App.) (enforcing "total loss" on summary judgment) *rev. denied* (Minn., March 16, 2004) (RA-252); *Dri-Kleen, Inc. v. Western Nat'l Mut. Ins. Group*, 2002 WL 1611507, *2 ([W]hether a total loss has occurred is generally a question of fact for a jury to decide.) (RA-234).

In any event, this court has long since decided that "total loss" issues are for juries, and the legislature has had ample opportunity to reconsider that holding if it chose to. It has not done so, and it is deemed to have therefore acquiesced in this court's interpretation. *See, e.g., Engquist v. Loyas*, 803 N.W.2d 400, 406 (Minn. 2011) ("Because the Legislature has not acted, we assume that the Legislature has acquiesced in our interpretation."); *Bjelland*, 710 N.W.2d at 69-70 ("In ascertaining legislative intent, we also presume that 'when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.'"); Minn. Stat. § 645.17 (4) (2012).

Auto-Owners essentially claims that this court's century-strong precedent is incorrect, and, in fact, that the court's conclusions were never a correct understanding of the law. It asks this court to re-write 100 years of Minnesota law to allow appraisers to make final decisions regarding "total loss." This court should reject Auto-Owners' invitation.

III. Having district courts decide “total loss” issues is the speediest, most cost-effective, and consumer-protective means of deciding such issues, given Minnesota’s “reasonable uninsured property owner” standard for “total loss.”

Given the applicable legal standard, there is no way for appraisers to make final decisions regarding “total loss.” Under this court’s decision in *Quade v. Secura*, 814 N.W.2d 703 (Minn. 2012), appraisers are permitted to decide questions about causation, which this court concluded was necessarily intertwined with their assessments of the amount of loss in a case in which a pre-existing condition reduced the value of the property lost. *Id.* at 706 (“But the line between liability and damage questions is not always clear, so further discussion is warranted. * * * We believe that under the circumstances of this case a determination of the ‘amount of loss’ under the appraisal clause necessarily includes a determination of causation. Coverage questions, such as whether damage is excluded because it was not caused by wind, are legal questions for the court as this case goes forward.”). That is not this case. In this case, the issue that would have to go to appraisers involves consideration of what “reasonable people” do. There is no overlap between that issue and the “amount of loss.”⁵

⁵ With fullest respect to the court, *Quade v. Secura* leaves many open questions to be sorted out in litigation for years to come. First, what is the standard by which district courts are to review appraisers’ awards? What if appraisers merely put down a number on a page? Some policies articulate particular “causation” rules (i.e., by including anti-concurrent-causation clauses in their exclusions); how are the parties to assess whether the appraisers applied the correct legal standard in assessing “causation” in those cases? What about unrepresented insureds? How are they to know what legal standard to articulate, and how are they to recognize when an appraisal panel has overstepped its bounds?

At best, appraisers could decide the cost to repair, and that “fact” could be considered “settled” for purposes of a jury’s analysis of what a reasonable uninsured property owner would do under the circumstances (i.e., assuming that the repair costs were as appraised). But such a process would nullify the statutory exception, and it would be cumbersome, necessarily involving two steps where one would suffice. Finally, it would be potentially tainted by the fact that, in many “total loss” situations, no contractor will bid to “repair,” because they cannot warranty the work. This leaves the parties with only computer estimates of materials and labor costs, which is not considered the best evidence of the cost to repair. *See In re Farmers Ins. Exch. Claims Representatives’ Overtime Pay Litig.*, 336 F.Supp. 2d 1077, 1100 (D. Or. 2004) (finding Xactimate to be a pricing and replacement cost tool that does not assist claims representatives in “deciding whether damage should be repaired or replaced”), *rev’d on other grounds*, 481 F.3d 1119 (9th Cir. 2007) (holding claims representatives are exempt employees under the Fair Labor Standards Act, yet adopting district court’s findings of fact, 481 F.3d at 1125, n.1).

Moreover, Auto-Owners’ “speedy resolution” arguments are belied by the fact that every aspect of its claims-handling resulted in delay. Auto-Owners “rejected” multiple proofs of loss without processing them, attempted to unilaterally alter its policy language to extend its payment deadlines, initiated an appraisal only to bow out at the last second, and then initiated this court action to compel its insured to participate in an appraisal in which the insured was willingly participating (albeit without agreeing to be bound by any award). (*See* RA-21-31). Ultimately, Auto-Owners attempted to negotiate a full release

in exchange for payment of an undisputed amount. (*Id.* at RA-12). These facts were egregious enough that the district court allowed Second Chance to amend its complaint to add bad faith. But such damages may be unavailable if the final decision comes from appraisers. *See* Minn. Stat. § 604.18 Subd. 4(c).

Just a couple months after the loss, Auto-Owners' own expert concluded that "it would not be economical to reuse the exterior shell of this dwelling," and "the best option would simply be to demolish the entire wooden framing of this dwelling." (RA-144-145). And yet years later, Auto-Owners has yet to pay its insured the policy limits. By the time that this court rules, it may well have been four years since this loss occurred. Meanwhile, the insured has had to pay counsel to defend it against these tactics.

Auto-Owners' delay, coupled with its continued misstatements of the legal standard strongly suggest that it is motivated to seek appraisals not because the resolutions will be "speedier," but because appraisers are more likely than courts to accept Auto-Owners' theory about the standard for "total loss." This court should reject Auto-Owners' attempts to avoid the proper legal standard.

CONCLUSION

Auto-Owners' statutory interpretation fails to give effect to the statute's plain language. It ignores this court's longstanding interpretation, in which the legislature has acquiesced. It ignores the consumer-protective purpose of the valued-policy statute by imposing a procedure that is anathema to that purpose. It forces insureds into a two-step process where one step would do, and, by design, the interpretation undercuts newer consumer-protection statutes including Minnesota's Bad-Faith Statute. There is no way

in which Auto-Owners' position could ever benefit insureds. It could only benefit carriers, which will gain a delay and conceivably get two bites at the "total loss" question where they otherwise would have one. This court should reject Auto-Owners' invitation to re-write 100 years of caselaw interpreting an unambiguous statutory provision.

Respectfully submitted,



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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,948 words. This brief was prepared using Microsoft Office Word 2007.

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