Buffalo Law Review

Volume 4 | Number 1 Article 46

10-1-1954

Insurance—Duty of Appraisers

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Duty of Appraisers

Conduct of appraisers in determining the fire loss of insured premises was unanimously condemned by the Court of Appeals in *Gervant v. New England Fire Ins. Co.*[24] The policy contained the usual provision for appointment of an appraiser by the insured and the insurer respectively, and the selection by them of an impartial umpire. It appeared that the umpire and the appraiser selected by the insurer disregarded evidence presented by claimant's appraiser as to market value, rental income and original cost of the premises, and confined their valuation to replacement cost less depreciation, and insurable value.

The court found that the intentional exclusion of relevant factors constituted legal misconduct, and affirmed vacation of the award.

"Actual cash value" of premises under a standard fire insurance policy in New York can be determined only by receiving all pertinent evidence, and such factors as were offered in the instant case may not be excluded.[25] It follows, therefore, that refusal to hear such evidence is legal misconduct warranting reversal.[26]

Mere inadequacy of the award, however, does not justify annulling it,[27] although gross inadequacy may have a bearing as evidence of misconduct.[28] Indeed, the court may not examine the merits of the appraisers' decision, except under statutory authorization.[29] Nor is departure from formal technicalities, without a showing of attendant injury, sufficient to nullify an award.[30]

Insurance appraisals are far less formal than arbitration proceedings at common law or under the statute, but the general rules as to duties of appraisers nevertheless apply to both,[31] at least as to the duty of an umpire to examine and consider the evidence and appraisals of both appraisers. Perfunctory, hasty

24. 306 N.Y. 393, 118 N.E. 2d 574 (1954).
25. *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176, 159 N.E. 902 (1928).
26. *Strome v. London Assur. Corp.*, 20 App. Div. 571, 47 N. Y. Supp. 481, *aff'd*, 162 N.Y. 627, 57 N.E. 1125 (1900); *Van Cortlandt v. Underhill*, 17 Johns. 405 (1819); *Halstead v. Seaman*, 82 N. Y. 27 (1880); In re *Rosenberg*, 180 Misc. 500, 41 N. Y. S. 2d 14 (Sup. Ct. 1943).
27. *Masury v. Whiton*, 111 N.Y. 679, 18 N.E. 638 (1888).
28. See, 7 COUCH, *op. cit., supra* note 15, § 1620.
29. See, C. P. A. § 1462; and, In re *Rosenberg, supra* note 26.
30. *Gerli & Co. v. Oscar Heineman Corp.*, 258 N.Y. 484, 180 N.E. 243 (1932).
31. *Fleming v. Phoenix Assurance Co.*, 75 Hun. 530 (1894); *De Groot v. Fulton Fire Ins. Co.*, 4 Robt. 504 (1867); *Bradshaw v. Agricultural Ins. Co.*, 137 N.Y. 137, 32 N.E. 1055 (1893).

performance may also result in reversal, for the right to have appraisers receive all pertinent evidence offered is fundamental.[32]

The instant case also held that the insured need not submit to a new appraisal, for the defect in the award was due to no fault of claimant, and in the absence of a showing of claimant's bad faith, he may maintain a suit on the policy.[33]

Unearned Premiums

In *Bohlinger v. Zanger*,[34] the court encountered a problem created by the statutory liquidation of an insurer while unearned premiums were in the hands of a broker. The decision centered on the definition of the broker's status when he accepts premium payments from the insured; it was held that in so acting, the broker is agent for the insured[35] and therefore need not remit the unearned premiums to the appointed liquidator to await formal distribution among the creditors, but may return them directly to the insured.

The majority relied on the accepted practice among brokers to refund unearned premiums to the insured upon cancellation of the policy, where the broker has not yet made his remittance to the insurer. The court could see no need for different treatment where cancellation prior to the broker's remittance is accomplished by a statutory liquidation of the insurer.

But the dissent pointed out that such a practice is largely irrelevant, for it is essentially the product of bookkeeping convenience, and in the normal order of things, entails no legal implications. But, it was argued, the situation is radically altered when the cancellation results from insolvency of the insurer, for the rights of other creditors must now be determined.

It is clear that for purposes of "placing risks or taking out insurance" the broker acts as agent for the insured.[36] But it does not follow inexorably that he remains the agent of the insured for purposes of accepting premium payments. Decisional law has been uniform in treating the broker as agent for the insurer

32. *Strome v. London Assur. Corp., supra* note 26; *De Groot v. Fulton Fire Ins. Co., supra* note 31. For a general discussion of the powers and duties of appraisers, see 7 COUCH, *op. cit., supra* note 15, § 1576-1580.

33. *Aetna Ins. Co. v. Hefferlin*, 260 Fed. 695 (9th Cir. 1919).

34. 306 N.Y. 228, 117 N.E. 2d 338 (1954).

35. INSURANCE LAW §§ 111, 121, 125. The latter section provides that an insurance broker is "responsible in a fiduciary capacity for all funds received or collected." The court found that in view of the statutory and common law principle that the broker, when acting for the insured, is deemed the agent of the insured, § 125 must be construed as creating a *dual* agency status: as trustee for the insured to return unearned premiums, and as agent for the insurer to remit the earned portion.

36. INSURANCE LAW § 111.