Recently the National Hurricane Center released a report that Superstorm Sandy was the deadliest hurricane to hit the northeastern U.S. in 40 years and the second-costliest in the nation’s history, resulting directly in more than 70 deaths from Maryland to New Hampshire. Eighty-seven more deaths were indirectly tied to the storm. The report estimated Sandy caused $50 billion in damage, greater than any U.S. hurricane but Katrina. Many businesses claiming loss or damage are seeking coverage under commercial property insurance policies. This Superstorm Sandy supplement follows our previous special endorsement on Sandy. We provide a brief update on our firm as well.
William N. Erickson

Robins, Kaplan, Miller & Ciresi L.L.P. is pleased to announce that William Erickson, who has been with the firm since 1986, has been named Chair of the firm’s Insurance Litigation Group effective January 1, 2013.

“I’m honored to lead our talented team of insurance lawyers who have decades of experience handling large, complex insurance coverage and recovery claims and are strongly committed to our clients. I look forward to continuing to add depth to our group and working with any partners to guide the practice into the future,” said Mr. Erickson.

Mr. Erickson has handled hundreds of coverage disputes under first and third-party policies for claims arising from fire, explosion, collapse, design defect, environmental impairment, flood and other losses. He has litigated disputes concerning fortuity, reformation, physical damage, insured risk, insured property, exclusions, obligations in case of loss, extra expense, business interruption, sue and labor, limits and deductibles, arson and fraud, and fair claims practices. He also has an active appraisal practice and represents cedants and reinsurers in reinsurance disputes.

Mr. Erickson replaces Bill Stanhope, who for the past 10 years served as head of the insurance practice. “Bill Stanhope’s creativity, leadership and insight will be with us for the foreseeable future as he plans to continue as an active full time partner in the firm, and will be available to lend me a hand when needed,” said Mr. Erickson.

AND MORE...

Jonathan D. Mutch Named Principal

Jonathan Mutch, a member of the Insurance Litigation Group, was advanced to Principal of the firm as of January 1, 2013. Jon has over fifteen years of experience handling large loss coverage matters. Jon’s broad experience includes the World Trade Center property coverage litigation, Y2K suits, business interruption claims involving industrial manufacturers, and multi-million dollar reference proceedings. Jon recently obtained an order of dismissal on a suit limitations issue in CFS Logistics v. Lumbermens Mutual, won summary judgment on a faulty workmanship defense in Tocci v. Commonwealth Insurance, obtained an affirmance of that decision from the Massachusetts Appeals Court, and has resolved product liability and professional negligence claims brought against the testing and engineering affiliate of one of the firm’s largest clients.

Michael V. Silvestro, New Associate

We welcome Michael Silvestro to the Insurance Litigation Group of Robins, Kaplan, Miller & Ciresi L.L.P. Mr. Silvestro has extensive experience advising insurers and reinsurers on various insurance-related matters, including domestic and international first-party coverage issues. He is an experienced litigator, and has represented clients in the courtroom and alternative forums.

Mr. Silvestro is admitted to practice in Massachusetts, New York, and the U.S. District Court, Southern District of New York. He attended Boston College Law School (2008), where he was the Editor of the Boston College Law School Intellectual Property & Technology Forum; he earned a B.A. in Political Science, summa cum laude, Phi Beta Kappa, from Union College in 2005.
CAUSATION AND ANTI-CONCURRENT ISSUES IN CONNECTION WITH SUPERSTORM SANDY

INTRODUCTION AND EXECUTIVE SUMMARY

Superstorm Sandy caused widespread damage across several states in the Northeast. Chief among these are New York and New Jersey, followed by Connecticut. The damage has resulted in claims under policies that are written on a wide variety of forms. Each claim requires careful analysis of the specific policy covering the risk at the time of the loss in order to determine coverage.

This article is not an exercise in analyzing coverage for losses caused by Sandy under any particular policy. Instead, it is our intent to share with the industry the basic insurance law regarding causation and anti-concurrent cause exclusions in New York, New Jersey and Connecticut in order to alert the reader to these nuances.

Many claims have already raised questions concerning the cause of the loss and the application of anti-concurrent causation exclusions. Our research disclosed that the courts in these jurisdictions have developed different approaches to identify the cause of a loss for purposes of determining coverage. Further, law regarding the application of anti-concurrent causation language is not equally developed in all three states. These differences give rise to a host of questions concerning the position that insurance carriers will take regarding the cause of damage and which jurisdiction’s law will apply to Sandy claims. This is especially true in situations where the insured has multiple locations in different states.

The proximate efficient cause of an insurance loss requires a different analysis under the laws of New York, New Jersey, and Connecticut. The New York causation analysis looks to the “proximate, efficient and dominant cause” of the loss. New Jersey courts differ and look to whether the first or last step in the chain of causation resulting in the loss was a covered event. Connecticut courts take a third path, and employ a “train of events” test that looks to the first event in the chain of causation.

Anti-concurrent cause clauses have not been addressed by the highest court of any of the these jurisdictions. Lower court decisions in New York and New Jersey have upheld such exclusions. The courts of Connecticut have not addressed such language, although references to anti-concurrent cause exclusions suggest that Connecticut courts recognize the significance of the language and at least one federal court decision has applied it.
NEW YORK


The term “proximate, efficient, and dominant cause” has not been explicitly defined. New York courts will, however, consider what a reasonable businessperson would conclude to be the cause of the loss in their analyses. *Album Realty*, 607 N.E.2d at 805; see *Wilner v. Allstate Ins. Co.*, 2011 N.Y. Misc. LEXIS 1424. Only this “most direct and obvious cause” will be considered in the application of exclusionary language. *Album Realty*, 607 N.E.2d at 805.

When other excluded events occur closer in time or space to a loss than a covered event, the “question of whether the covered event was sufficiently proximate to the loss to require that the insurer compensate the insured will depend on whether it was the dominant and efficient cause.” *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66, 69 (1st Dept. 1998).

Although the issue has not yet come before New York’s highest court, lower appellate courts have generally enforced anti-concurrent causation provisions. See, e.g., *Cali v. Merrimack Mut. Fire Ins. Co.*, 43 A.D.3d 415, 841 N.Y.S.2d 128 (2d Dep’t 2007) (upholding anti-concurrent causation provision containing language “regardless of any other cause or event contributing concurrently or in any sequence to the loss”).

Insurers should be aware of one federal case of potential significance to Sandy claims. The Southern District of New York has declined to apply the proximate efficient cause analysis with regard to the application of sublimits. *The Hit Factory, Inc. v. Royal Ins. Co. of America*, 2005 U.S. Dist. LEXIS 19050 (S.D.N.Y. Aug. 26, 2005). In *The Hit Factory*, the loss involved water damage resulting from both flood caused by rain and an apparent drain back-up. The insurer made payments exhausting the policy’s flood sublimit, which was less than the amount of the loss, but declined to make additional payments under a separate sublimit for drain back-up as it contended the loss was proximately caused by flood.

The Southern District rejected this position and declined to apply the proximate efficient cause analysis. The court reasoned that because *The Hit Factory* was not a case “where a plaintiff is suing for coverage under a policy for damages caused by two perils, one which is covered under the policy and the other is not, and where the insurance company is denying coverage” the proximate cause analysis should not apply. The court instead held that the terms of the policy created issues of fact as to whether the loss was covered under both sublimits. We anticipate that policyholders seeking to avoid New York’s proximate efficient causation analysis in cases involving sublimits may look to *The Hit Factory* for support.

NEW JERSEY

Courts in New Jersey apply a proximate cause test derived from “Appleman’s rule” on causation, which provides:

Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss…. In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk.
The practical application of Appleman’s rule is that “with regard to sequential causes of loss, [New Jersey] courts have determined that an insured deserves coverage where the included cause of loss is either the first or last step in the chain of causation which leads to the loss.” *Simonetti v. Selective Ins. Co.*, 372 N.J. Super. 421, 431, 859 A.2d 694, 700 (N.J. App. Div. 2004).

Where covered and excluded perils act concurrently to cause a loss, “it is for the factfinder to determine which part of the damage was due to the included loss and for which the insured can recover.” *Id.* One New Jersey court contemplated concurrent causation issues relating to a storm under a named-perils policy and held that the insured bore the burdens to prove: (1) that the excluded peril (i.e. the sea) was not the “sole or substantial cause of the loss;” and (2) what damage was actually caused by the covered peril (i.e. wind). *Newman v. Great Am. Ins. Co.*, 86 N.J. Super. 391, 403, 207 A.2d 167, 175 (N.J. Super. Ct. 1965), citing *Brindley v. Firemen’s Ins. Co. of Newark, N.J.*, 35 N.J. Super. 1, 113 A.2d 53 (N.J. App. Div. 1955).


**CONNECTICUT**

Connecticut takes a sequential approach to the proximate efficient causation analysis. Connecticut courts attribute causation to the “active efficient cause” and have also defined proximate cause to be “an actual cause that is a substantial factor in the resulting harm.” *Frontis v. Milwaukee Ins. Co.*, 156 Conn. 492, 499 (Conn. 1968); see also *Sansone v. Nationwide Mut. Ins. Co.*, 47 Conn. Supp. 35 (Sup. Ct. New Haven 1999).

The Connecticut analysis includes a “train of events test” that looks to the first event in time which sets off a sequence of events resulting in the loss as the “active efficient cause” of the loss. The Connecticut Supreme Court, quoting Couch on Insurance, explained:
In the determination of what caused the loss or damage, the cause or agency which is nearest in time or place to the result is not necessarily to be chosen. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the proximate cause. ... In the determination whether a loss is within an exception in a policy, where there is a concurrence of two causes, the efficient cause—the one that sets the other in motion—is the cause to which the loss is to be attributed, though the other cause may follow it and operate more immediately in producing the disaster.

*Frontis v. Milwaukee Ins. Co.*, 156 Conn. at 499 (citations omitted) (emphasis added).

Put another way, the proximate cause “is not that which is last in time or place, not merely that which was in activity at the consummation of the injury, but that which is the procuring, efficient and dominant cause.” *Id.* at 497-498 (citations omitted).

The Connecticut Supreme Court has not yet had the opportunity to address anti-concurrent causation provisions. There are, however, a few decisions where anti-concurrent causation language is quoted, but not applied due to facts at hand, suggesting that Connecticut courts may not be hostile to the concept. *Cornish Contracting and Real Estate, LLC v. The Travelers Indem. Co.*, 2008 Conn. Super. LEXIS 840 (Sup. Ct. Conn. April 2, 2008) (holding that wind damage to roof would be covered loss subject to provision of exclusions including anti-concurrent causation language but deciding case on late notice grounds); *Dlugokenski v. Hartford Ins. Co. of Illinois*, 2010 Conn. Super. LEXIS 3346 (Sup. Ct. Conn. Dec. 14, 2010) (applying Ordinance or Law exclusion prefaced by anti-concurrent causation language without analysis of the anti-concurrent causation language).

In addition, the U.S. District Court for the District of Connecticut, in explaining Connecticut’s “train of events” test, held that “under an all risk policy where the efficient cause of loss is a covered risk, coverage is not defeated merely because an excluded risk contributed to the loss or constituted the loss (unless the policy expressly excludes such loss regardless of the antecedent cause).” *Farrell and Reinhold v. Royal Ins. Co. of Am.*, 989 F. Supp. 159, 164 (D. Conn. 1997).

CONCLUSION

This basic research is only the beginning of the analysis that must be conducted in determining coverage for any insurance claim. The specific policy language in question must be compared to the facts of the loss and often further legal research must be done to determine if there is additional precedent that would govern your specific situation.

Further, a claim may require the carrier to conduct a choice of law analysis, particularly where the insured’s claim involves locations in multiple jurisdictions. We have encountered policies that contain choice of law provisions as well as choice of jurisdiction provisions. These two concepts should not be confused. A choice of law provision is intended to identify the jurisdiction whose law will apply to specific disputes. A jurisdiction clause may be limited to only an agreement as to the state where any lawsuit will be filed. Simply requiring a lawsuit to be filed in a specific state does not by itself require that the law of that state be applied to determining coverage for the claim.

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Q: What are reference and appraisal?

A: Reference and appraisal are different names for similar, summary methods to determine the amount of loss when no dispute exists regarding coverage. Massachusetts calls its process “reference” and the rest of the country uses the term “appraisal.” Both require that a) there be a disagreement limited to the amount of loss and, b) that the process be initiated before other litigation begins.

Q: How does it work?

A: Usually it begins with a written demand from the insured but, depending on policy language, either party may be able to make the request. Then, three appraisers are selected to hear evidence on the amount of loss and resolve the matter. The parties choose the first two referees and together, those referees select the third who will make up the panel that resolves the claim.

Q: What are some of the benefits of reference and appraisal?

A: As a process that is intended to be summary in nature, done right reference and appraisal offers both insureds and insurers an effective, less expensive forum for resolving disputes about the amount of loss.

Q: What can insurers do to maximize the benefits reference and appraisal offer?

A: Reference and appraisal work best when not treated as an adversarial court proceeding. That means choosing decision makers who know the issue of loss at hand and understand how to measure the loss under the policy in question. When that kind of panel is at work, they can get to a number on the loss quickly.

Q: What trends do you see in reference and appraisal?

A: I see a trend towards a more litigious kind of panel selection from both insurers and insureds. I think it’s a mistake because it often escalates the fight and increases the cost of the disagreement without really changing or reducing the amount of liability.

Q: What advice do you have for insurers when it comes to reference and appraisal?

A: Make sure you choose counsel who knows the individuals who serve as appraisers. Work with someone who wants to pick a panel that can make a good decision—not pick a fight.

Q: What role do you see the process having in the wake of Superstorm Sandy?

A: There will be a number of claims coming out of the storm’s aftermath where the dispute is limited to the amount of loss rather than a question of coverage. Insurers who want an opportunity to challenge the amount the insured demands should not overlook reference and/or appraisal as means to manage their risk.

What Do You Need?

We created the Insurance Academy to meet your professional education needs. We bring our best-of-practice knowledge to you with articles and on-site presentations and seminars. Please contact Bill Erickson at 617.859.2780 to see a list of available presentations or to discuss creating a custom Insurance Academy event for your team.
Property insurers face millions of dollars of utility service interruption claims for losses associated with power outages caused by Superstorm Sandy. Many of these claims will arise in New York and New Jersey. So how does the service interruption claim case law compare – or differ – in New York and New Jersey? It is a tale of two cases.

New York’s and New Jersey’s highest courts have not written decisions interpreting service interruption coverage, but in each state the lower courts did issue decisions interpreting property insurance coverage for power outages during the August 2003 blackout. Both the New York and New Jersey decisions involved extensive spoilage claims by supermarket chains. Despite similar factual premises, the legal approaches of the two states to interpreting service interruption coverage were very different.

In a 2010 decision, *Fruit and Vegetable Supreme v. Hartford Steam Boiler Inspectors & Ins. Co.*, 905 N.Y.S.2d 864, the Supreme Court of Kings County, New York denied a service interruption claim made under an equipment breakdown policy. The court found that there had not been an “accident” causing “physical damage to covered equipment.” The court also held that an exclusion in the service interruption coverage for equipment “tripping offline” applied. In *Fruit and Vegetable Supreme*, the court flatly rejected the insured’s ambiguity arguments, allowing only for the possibility of coverage for power surge damage to the supermarket’s equipment before the general power outage. Of particular note, in *Fruit and Vegetable Supreme* the court showed no interest in diluting the requirement that for service interruption coverage to apply, there must be “physical damage” to equipment.

In a 2009 case, *Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co.*, 968 A. 2d 724, a New Jersey court took a very different approach. *Wakefern* involved an all risk policy and almost identical facts – a large spoilage claim by a supermarket whose power was lost because its utility’s relays tripped, putting the power grid offline during the blackout.

In *Wakefern*, the New Jersey Superior Court Appellate Division found coverage on the theory that the “physical damage” requirement of the policy’s off-premises service interruption coverage was ambiguous. The court reasoned that the electrical grid was arguably “physically damaged” because “the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity.” In other words, the court suggested that the failure of the transmission equipment to operate during the blackout could arguably be equated to “physical damage.”

The *Wakefern* court stretched the service interruption coverage to fit the “reasonable expectations” of the insured, saying that “from the perspective of the millions of customers deprived of electric power for several days, the system certainly suffered physical damage because it was incapable of providing electricity.” The *Wakefern* case in New Jersey is controversial because of its disregard for the commonly accepted meaning of “physical damage.” The *Fruit and Vegetables Supreme* decision in New York represents a more traditional, contract-based view of service interruption coverage.

In these two neighboring states both impacted by Superstorm Sandy, it is a tale of two cases -- two very different cases -- on the same issue.

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Jim Harrington represents businesses and insurers in arbitrations, litigation and trials throughout the United States. He has 25 years of litigation experience including defense of coverage matters in property, liability and life insurance; arson and fraud; subrogation; health care litigation; and liability defense.
This article provides an overview of some issues that you may encounter related to demands for appraisal you may want to make or you may receive on Superstorm Sandy claims, including the timing and procedure for demanding appraisal, the scope of appraisal, and the interplay between appraisal and litigation. We have analyzed these issues under New York, New Jersey, and Connecticut law. Generally, these states are in accord on most issues related to appraisal but we note a few of the differences below.

**Timing and procedure for demanding appraisal**

A typical appraisal provision gives either party the right to demand an appraisal if the parties find that they “disagree on the amount of loss.” See *Hala Cleaners, Inc. v. Sussex Mut. Ins. Co.*, 115 N.J. Super. 11, 13 (Ch.Div. 1971); *Drescher v. Excelsior Ins. Co.*, 188 F. Supp. 158, 159 (D.N.J. 1960) (the insurer has “no right to prevent plaintiffs, the insured, from obtaining the appraisal which they have demanded”). If either side refuses to appoint an appraiser after a proper demand has been made, the court will either compel the refusing party to appoint an appraiser or the court will appoint an umpire. *Drescher v. Excelsior Ins. Co.*, 188 F. Supp. 158, 159 (D.N.J. 1960) (if a party refuses to appoint an appraiser, the court should appoint an umpire and then allow the refusing party to appoint an appraiser to protect its interests); *Hala Cleaners*, 115 N.J. Super. at 13 (if a party refuses to appoint an appraiser, the court should compel the party to appoint one).

While some appraisal provisions state that a party must demand appraisal within a certain period of time, for example within 60 days of the proof of loss, other appraisal provisions do not provide a specific deadline.

New York has embraced a rather loose rule for determining the timing for demanding appraisal if none is listed, which involves a case-specific determination of whether the timing of the demand was “reasonable.” In *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, the court noted that “New York public policy favors an appraisal proceeding over a trial
on damages,” and as such “waiver of the right to an appraisal is not lightly inferred.” 2004 U.S. Dist. LEXIS 25642, *8-9 (S.D.N.Y. Dec. 1, 2004). The court stated that when a policy does not specify a time limit for demanding appraisal, “the court must determine whether the demand was exercised within a reasonable period, depending upon the facts of the case.” *Id.* at *9. In making this determination, courts may look at the following three factors: “(i) whether the appraisal sought is impractical or impossible (that is, whether granting an insurer’s appraisal demand would result in prejudice to the insured party); (ii) whether the parties engaged in good-faith negotiations over valuation of the loss prior to the appraisal demand; and (iii) whether an appraisal is desirable or necessary under the circumstances.” *Id.* at *9-10. In that case, the court granted the insurer’s motion to compel appraisal due to the lack of prejudice to the insured and the general rule favoring appraisal.

In Peck v. Planet Ins. Co., the court held that the insurer’s demand for appraisal thirteen months after the loss and four months into trial was reasonable because the parties “continually were negotiating and working toward an agreement on the amount of loss.” 1994 U.S. Dist. LEXIS 9957, *3 (S.D.N.Y. July 20, 1994). In Amerex Group, Inc. v. Lexington Ins. Co., the appellate court held that it was reasonable for the insurer to demand appraisal nearly four years after the insured submitted its proof of loss and two months after the insured filed a breach of contract suit. 678 F.3d 193, 197-198 (2d Cir. N.Y. 2012). Affirming that “reasonableness” is a case-specific inquiry, the court noted that cutting off the right to demand appraisal when a party files litigation is the minority rule. *Id.* at 201.

On the contrary, under Connecticut law, a party can waive the right to appraisal by initiating litigation on the same issue. Giulietti v. Connecticut Ins. Placement Facility, 534 A.2d 213, 216 (Conn. 1987) (“the trial court properly directed a verdict for the defendant on this count, because the plaintiffs, by proceeding to trial before the jury upon the question of the amount of their loss, the very issue to be determined by appraisers, effectively waived their rights under the appraisal clause.”). In Trojanowski v. Worcester Ins. Co., the court held that a provision providing that an insured must take “action” against the insurer within 12 months of the loss does not apply to appraisal. 1996 Conn. Super. LEXIS 1404, *2-5 (Conn. Super. Ct. May 28, 1996) (allowing the insured to demand appraisal 14 months after the loss).

**Scope of appraisal**

In general, appraisals are limited to disputes over the “amount of loss” or value, whereas determinations of coverage are reserved for the courts. Amerex Group, Inc. v. Lexington Ins. Co., 678 F.3d 193, 204 (2d Cir. N.Y. 2012); Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 411 F.3d 384, 389 (2d Cir. 2005) (applying New York law and holding that appraisal was inappropriate where the insurer contested liability for a windstorm loss). However, the line between “coverage” and “amount of loss” can be difficult to draw and different jurisdictions have come to varied conclusions.

In New York, the rules appear to be rigid. Here, the parties must resolve liability before submitting the issue of value to appraisal. Secord v. Chartis Inc., 2010 U.S. Dist. LEXIS 139852, *26 (S.D.N.Y. Dec. 8, 2010). For example, when an insurer argues that all or some of the alleged damage was the result of excluded wear and tear, the insurer is contesting liability and not merely disagreeing as to the value of the loss. *Id., quoting Kawa, 664 NYS2d 430, 431 (Sup Ct. 1997).* This dispute must be resolved in (or outside of) court before the parties can conduct an appraisal as to the value of the alleged damage. *Id.* Some New York cases have allowed appraisal if the coverage dispute is independent of the valuation issue. Amerex Group, 678 F.3d at 205 (only “[c]overage disputes that are independent of the valuation of damages can stand in abeyance pending the appraisal.”). But, if the insurer denies coverage completely, appraisal would not be allowed.

This appears to be the rule under New Jersey law as well. In Rastelli Bros. v. Netherlands Ins. Co., the court refused to compel appraisal after the insurer denied liability for the insured’s extra expense claim. 68 F.Supp. 2d 448, 449 (D.N.J. 1999). The court noted that the appraisal provision in the policy gave the insurer the right to deny coverage even after an appraisal. The court held that since the issue was not the “amount of loss” but rather the insurer’s “liability for that amount,” the court would not compel appraisal. *Id.*
On the contrary, under Connecticut law, parties may proceed with an appraisal even if the insurer denies coverage. “Connecticut law does not mandate that the parties resolve their legal contentions before an appraisal may occur.” Secord v. Chartis Inc., 2010 U.S. Dist. LEXIS 139852, *26, citing Giulietti v. Connecticut Ins. Placement Facility, 205 Conn. 424 (Conn. 1987). In Giulietti, the insurer argued that it was not obliged to participate in an appraisal because it denied coverage and the appraisal therefore would be useless should it prevail on its liability defenses. Id. at 431. The Connecticut Supreme Court rejected this argument, however, stating that “[i]f the defendant’s proposition were sound, it would provide an effective and simple way to destroy the insured’s right of appraisal.” Id. at 432. The court added that “[a] determination of the amount of the plaintiffs’ loss by appraisers pursuant to the policy would not have precluded a subsequent determination of the liability issues at a trial.” Id.

**Interplay between appraisal and litigation**

Unlike Connecticut, courts in New York and New Jersey are clear that appraisal and arbitration are distinct procedures and that appraisals are not subject to the statutes governing arbitration. See Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 16-18 (N.J. 1978) (holding that the New Jersey Arbitration Act is not applicable to appraisals).

In comparing appraisal and arbitration, the New Jersey Supreme Court has stated:

> The purposes of both are the same: to submit disputes to third parties and effect their speedy and efficient resolution without recourse to the courts. To assure minimum judicial intervention, the scope of judicial review of both types of recourse is narrow. The distinctions are significant. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, and judgment may be entered upon the award, whereas an appraisal establishes only the amount of loss and not liability. Arbitration is conducted as a quasi-judicial proceeding, with hearings, notice of hearings, oaths of arbitrators and oaths of witnesses. Appraisers act on their own skill and knowledge, need not be sworn and need hold no formal hearings so long as both sides are given an opportunity to state their positions.


The Connecticut Supreme Court, on the other hand, has held that an appraisal clause in an insurance contract constitutes an agreement to arbitrate and falls within the ambit of Connecticut’s arbitration statutes. Covenant Ins. Co. v. Banks, 177 Conn. 273, 281 (Conn. 1979). Section 52-408 of the Connecticut General Statutes defines “agreement to arbitrate” as “[a]n agreement in any written contract, or in a separate writing executed by the parties to any written contract, to settle by arbitration any controversy thereafter arising out of such contract, or out of the failure or refusal to perform the whole or any part thereof.” As the Connecticut Supreme Court has noted, “[t]he parties themselves, by the agreement of submission, define the power of the arbitrator.” Bic Pen Corp v. Local No. 134, 183 Conn. 579 (Conn. 1981). Under Connecticut law, parties may agree to the parameters of the appraisal. See Middlesex Mutual Assurance Company v. Komondy, 120 Conn. App. 117, 991 A.2d 587, 589-90 (Conn. App. Ct. 2010) (after a fire destroyed the defendant’s home, the parties directed the appraisers to determine “the actual cash value of the loss caused by the fire.”).