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IN THE

SUPREME COURT OF CALIFORNIA

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU,

Petitioner,

v.

DOUGLAS KIRKWOOD,

Respondent.

After a Decision by the Court of Appeal
First Appellate District, Division Four
Case A128131

PETITION FOR REVIEW

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ISSUES PRESENTED

1. California's standard form fire insurance policy's mandatory appraisal clause contained in Insurance Code section 2071 provides that when an insured and insurer disagree about the actual cash value or amount of loss under a homeowner's policy, upon request of either, the dispute must proceed to appraisal. Section 2071 further provides that no suit shall be maintained in court unless there is compliance with the requirements of the policy. When an insured files a civil action seeking to recover the actual cash value of a loss suffered under a homeowner's policy, may an insured evade the mandatory appraisal clause, as permitted by the Court of Appeal, by contending the dispute is not only with the insurer's "actual cash value" amount but also, as alleged in his declaratory relief claim, with the insurer's *methodology* for calculating "actual cash value"?

2. Code of Civil Procedure section 1280(a) provides that an agreement to conduct an appraisal is an agreement to arbitrate and is governed by Code of Civil Procedure section 1280 et seq. Section 1281.2 generally provides that, on petition by a party to an arbitration agreement, a court shall order arbitration of the controversy if it determines an agreement to arbitrate the controversy exists. When it is undisputed that an appraisal clause exists and the dispute involves the actual cash value of the loss, may an insured evade Code of Civil Procedure section 1281.2's mandatory enforceability of appraisal clauses, as permitted by the Court of Appeal, by contending the dispute is not only with the insurer's "actual cash value" amount but also, as alleged in his declaratory relief claim, with the insurer's *methodology* for calculating "actual cash value"?

3. May an insured avoid mandatory appraisal (Code Civ. Pro. § 1281.2; Ins. Code § 2071) of his dispute over the "actual cash value" of his loss, by contending in a civil action containing a declaratory relief claim that court intervention in the first instance is necessary because the appraisers must apply statutes and regulations governing the meaning and calculation of "actual cash value"?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

The Court of Appeal's Opinion is a clear departure of established California law on the issues presented above. Specifically, the Opinion directly conflicts with the decision in *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.*, 92 Cal.App.4th 886 (2001), which held insureds may not avoid appraisal by challenging the legality or fairness of the insurer's valuation methodology, and this Court's decision in *Jefferson Ins. Co. v. Superior Court*, 3 Cal. 3d 398 (1970), which confirmed the general principle that appraisers are expected to apply the law in valuation disputes in the first instance and that the potential misapplication of the law is subject to judicial review *after* completion of appraisal. It also conflicts with federal cases addressing these same issues under California law.

The Court of Appeal's Opinion severely undercuts the public policy goals intended to be served by the appraisal process by holding: (1) an insured may avoid mandatory appraisal by framing their complaint as one not merely challenging the insurer's "actual cash value" amount, but as one challenging the insurer's methodology for calculating the "actual cash value" amount; and (2) if a statute or regulation is applicable to the "actual cash value" determination, courts must first interpret the statute or regulation before any appraisals may be conducted. It also erects a barrier

to the appraisal process by permitting evasion and/or delay of that process by resort to litigation challenging the legality of the *manner* in which an appraisal is conducted. This Court's review is necessary to correct this misapplication of the law.

The Opinion arises out a dispute between an insurer, California State Automobile Association Inter-Insurance Bureau ("CSAA") and its insured, Douglas Kirkwood ("Kirkwood") over the value of personal property after a fire loss under Kirkwood's homeowners' policy. The insurance policy contained an appraisal clause modeled after Insurance Code section 2071 and which required appraisal of any dispute over the valuation of property covered by the policy upon request of either CSAA or Kirkwood.

Kirkwood sought to litigate the valuation dispute claiming he was entitled to more than CSAA offered and that CSAA employed an improper methodology for valuing his personal property by failing to comply with Insurance Code section 2051(b) when it accounted for physical depreciation. CSAA requested appraisal and Kirkwood declined. In accordance with a long line of California cases including *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co*., 92 Cal.App.4th 886, 893 (2001);. *Enger v. Allstate Insurance Company*, 682 F.Supp.2d 1094 (E.D. Cal. 2009) aff'd mem. 2010 U.S. Lexis 26835 (9th Cir. December 28, 2010); *Goldberg v. State Farm Fire & Cas. Co.*, 2002 WL 768893, *6-8 (C.D. Cal. 2002); *Garner v. State Farm Fire & Cas. Co.*, 2008 WL 2620900, *2-3 (N.D. Cal. 2008), CSAA moved to compel appraisal of the valuation dispute.

In affirming the trial court decision denying CSAA's motion to compel appraisal, the Court of Appeal held that because Kirkwood sought a

declaration challenging CSAA's application of section 2051(b) in arriving at a value for his personal property, a determination appraisers may not make, the mandatory appraisal provision contained in Insurance Code section 2071 and the insurance policy, as well as the mandatory arbitration/appraisal requirement of Code of Civil Procedure 1281.2, did not apply. The Court of Appeal held the trial court should first render a decision on CSAA's interpretation and application of section 2051(b) under the declaratory relief claim before any appraisal may take place.

The Court of Appeal's decision is contrary to every case in California where the courts have been called upon to decide this very question. It is also contrary to the statutory scheme set forth in Insurance Code section 2071, which for over one hundred years has required disputes between an insurer and an insured over the amount of a loss be submitted to an appraisal. *See Appalachian Ins. Co. v. Rivcom Corp.,* 130 Cal. App. 3d 818, 824 (1982). It is further contrary to the statutory scheme set forth in Code of Civil Procedure sections 1280 et seq., and in particular, sections 1285 and 1286, which provide for confirming, vacating or correcting an award.

The Court of Appeal's decision also defeats the primary public policy goals intended to be served by the California Legislature and recognized in California law to put in place an inexpensive and streamlined process to resolve valuation disputes. The decision also ignores the fact that until such time an insured establishes in an appraisal he is entitled to be paid more for his loss, or stated differently, he was underpaid, it is premature to bring a civil action claiming he did not get paid enough. In other words, during the appraisal it may be decided even under Kirkwood's interpretation of section 2051(b), he is not entitled to a higher value and

more money for his loss. If that is the case, there is no harm, injury or justiciable controversy to allow any civil action to proceed as it now will under the Court of Appeal's decision whether or not Kirkwood suffered any injury.

The Court of Appeal's rationale also prevents appraisers from applying a law, rule or regulation where the meaning of such law is being challenged by way of a claim for declaratory relief. As a consequence, any party to an appraisal clause can avoid appraisal by merely including a declaratory relief claim in the civil action complaint. And, the Court of Appeals statement that "Appraisers have no power to interpret the governing statutes" (Opinion, p. 8), will be read as preventing appraisers from interpreting any statute, regulation or rule, which they necessarily must interpret, in conducting an appraisal, to arrive at the correct valuation.

This Court should grant review to resolve the conflict between the Court of Appeal's decision and every other California reported decision addressing similar facts. It is also necessary to address the conflict with federal court decisions addressing this very issue.

Review should also be granted because many insurance property appraisals take place every year and appraisers will need to know whether they may interpret statutes, regulations and rules as they make their valuation determinations or whether the courts must first become involved to interpret those statutes, rules and regulations prior to any valuation taking place.

In summary, this case presents important issues of law have been handled differently not only by state courts in California but federal courts

as well. It is important these legal issues be settled to permit appraisals to continue and uniformity achieved.

STATEMENT OF THE CASE[1]

Factual Background

Kirkwood was insured by CSAA under a homeowner's policy that provides CSAA would pay actual cash value or replacement cost for property damaged in a loss under the policy. The policy also provides if there is a dispute over the amount to be paid, either party may request appraisal and, in accordance with Insurance Code section 2071, the appraisers "shall appraise the loss." Kirkwood alleged in his complaint his home and personal property suffered a total loss as a result of a fire on August 21, 2007. He submitted his claim to CSAA setting forth what he believed was the value of his property, including any deduction he believed was appropriate for physical depreciation.

CSAA valued the property and calculated a different amount for depreciation. Kirkwood disagreed with the amount CSAA calculated and claimed CSAA accounted for "excessive depreciation."

A dispute arose between Kirkwood and CSAA over the value of the damaged personal property because, as Kirkwood contends, CSAA ignored his estimated depreciation and instead used CSAA's depreciation schedule to calculate depreciation of the personal property contained in his claim. Kirkwood alleges CSAA based the amount to settle his personal property

[1] The facts described here are taken chiefly from the Opinion of the Court of Appeal (attached as Exhibit "A"), with limited supplemental citations to the Appellant's Appendix (AA) and the Respondent's Appendix (RA).

claim by deducting "depreciation" based on the age of the item without regard to the physical condition of the lost items which, in his view, violated Insurance Code section 2051(b). (AA ___).

Procedural Background

On June 29, 2009, Kirkwood filed this action, which included individual and class allegations challenging the actual cash value paid by CSAA for the damage to his personal property. (AA ___). His complaint alleged four causes of action: (1) Declaratory Relief; (2) Breach of Contract; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; and (4) Violation of Business and Professions Code section 17200 ("UCL"). The thrust of each cause of action is stated in the "General Factual Allegations" of the complaint, which is incorporated into each cause of action: "CSAA's offer to settle personal property claims for less than the true value of such claims has resulted in damage to Kirkwood and the Class equal to the difference between the true value of the claim and the amount offered or paid by CSAA." (AA___).

After Kirkwood filed suit, CSAA demanded that Kirkwood dismiss his lawsuit and engage in appraisal as mandated by the policy's appraisal clause and "Suits Against Us" provision. (AA__). Kirkwood rejected CSAA's demand for appraisal.

CSAA responded to the complaint by filing a demurrer, motion to strike and motion to compel appraisal. As to the motion to compel appraisal, CSAA argued that Kirkwood's action was based on the dispute over the amount CSAA offered to pay him for the personal property he lost in the fire and that this dispute must be submitted to appraisal under Insurance Code section 2071 and the terms of his CSAA policy. Kirkwood

argued he was not only disputing the amount of CSAA's valuation but also that CSAA's methodology for calculating the amount of the actual cash value of his loss violated Insurance Code section 2051(b). (AA __)

Following oral argument, the trial court sustained the demurrer to the UCL claim with leave to amend, and granted the motion to strike class allegations with leave to amend. With respect to the motion to compel appraisal, the court denied it without prejudice because he felt the court must interpret Insurance Code section 2051(b) first before appraisal. (AA___).

Subsequently, Kirkwood filed his first amended complaint. [AA, Vol. II, pp. 476-493.] The first amended complaint alleged three causes of action on behalf of the putative class: (1) Declaratory Relief, (2) Breach of Contract/Specific Performance; and (3) Violation of the UCL; and two individual causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. (2 AA 476-493)] Like the prior complaint, all causes of action were based on CSAA's failure to pay Kirkwood the amount it should have paid under the policy. (2 AA 480-481.)

After a First Amended Complaint was filed and subsequent rulings made by the trial court on CSAA's demurrer and motion to strike, Kirkwood filed his second amended complaint and realleged his declaratory relief and UCL causes of action on behalf of the putative class. Kirkwood's Second Amended Complaint also contained individual claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Again, each cause of action was based on the contention that CSAA offers "to settle personal property claims for less than the true value

of such claims" which "has resulted in damage to Kirkwood and the Class equal to the difference between the true value of the claim and the amount offered or paid by CSAA." (AA ___).

Prior to filing a response to the second amended complaint, CSAA filed its timely notice of appeal challenging the trial court's denial of the motion to compel appraisal.

Pursuant to the Opinion, the Court of Appeal affirmed the trial court's order denying the motion to compel. CSAA filed a Petition for Rehearing, which was denied by the Court of Appeal.

LEGAL DISCUSSION

I. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE COURT OF APPEAL'S DECISION AND OTHER CALIFORNIA COURT OF APPEAL AND FEDERAL COURT DECISIONS

In California, all fire insurance policies "***shall*** be on the standard form, and, except as provided by this article shall not contain additions thereto." *Ins. Code* § 2070 (emphasis added). The standard form for fire insurance policies is contained in Insurance Code section 2071, which in relevant part, provides:

> In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each ***shall*** select a competent and

> disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. (Emphasis added).

Section 2071 also provides that: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

It has been held that sections 2070 and 2071 "governing fire insurance policies in California establish an 'appraisal' procedure when the insured and the insurer cannot agree on the cash value or the amount of loss." *Michael v. Aetna Life & Cas. Ins. Co.*, 88 Cal. App. 4th 925, 933 (2001). And, "'since its substance was first enacted in 1909, . . . section 2071 has directed that the standard form for fire insurance policies include an appraisal provision to settle disagreements concerning the amount of loss.'" *Kacha v. Allstate Ins. Co.*, 140 Cal. App. 4th 1023, 1031 (2006).

Notwithstanding the fact the policy included sections 2070 and 2071 language, and the dispute involved valuation of Kirkwood's damaged personal property, the Court of Appeal found these statutory provisions did not require appraisal because CSAA's interpretation and application of Insurance Code section 2051(b) was also in issue. According to the Court of Appeal, a court should interpret the statute first before any appraisal takes place.

The Court of Appeal's Opinion conflicts with every published decision addressing this question.

A. The Court of Appeal Opinion Conflicts with *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.*

In *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.*, 92 Cal. App. 4th 886 (2001), the insured alleged certain insurers unfairly, unlawfully, and fraudulently "adjusted, and continued to adjust, or have concluded such claims on the basis of 'replacement cost less depreciation,'" rather than using "fair market value, i.e. what a willing seller would pay a willing buyer" as required by sections 2070 and 2071 and this Court's decision in *Jefferson Insurance Company v. Superior Court*, 3 Cal. 3d 398 (1970). *Community Assisting*, *supra* at 890. The insurers demurred, maintaining the insured's claim was subject to appraisal and the civil action must be dismissed. The trial court agreed with the insurers and sustained the demurrers without leave to amend. *Ibid*.

The central issue on appeal in *Community Assisting*, as it is here, was whether the dispute over the calculation of the amount of the loss and use of a methodology (replacement cost less depreciation) plaintiff argued violated the law was subject to appraisal. In affirming the trial court, the Court of Appeal in *Community Assisting* held "section 2071 requires appraisal for resolution of contested claims." *Id.* at 893.

The Court found the complaint "fails to take into consideration the safeguard of the appraisal process provided by the Legislature within Insurance Code section 2071" and that appraisal is the mandatory remedy for valuation disputes:

> "Thus, notwithstanding how the insurer approaches valuation of the damaged property during

> adjustment of the claim, the Legislature has provided the remedy to which the parties must resort for determination of the amount of the loss."

Id. at 892-93.

The Opinion incorrectly attempts to distinguish *Community Assisting Recovery, Inc.* on two grounds. First, *Community Assisting Recovery, Inc.* was decided before the enactment of Insurance Code section 2051(b) and "there was no statutory direction dictating how the insurer was to measure the actual cash value of an open policy." [Opinion, p. 10.] Second, the court in *Community Assisting Recovery, Inc.* was not asked to consider the availability of declaratory relief "to construe the statute and regulation governing depreciation practices under an open policy." *Id.*

As discussed further below, with respect to the first ground, the Opinion is mistaken in its conclusion that there was no statutory direction dictating how to measure actual cash value when *Community Assisting Recovery, Inc.* was decided. Not only was there statutory direction, but there were regulations and case law that were applied by appraisers in determining actual cash value. In addition, that language to section 2051(b) was added after the decision in *Community Assisting Recovery, Inc.* does not change the rule established by that case – i.e., notwithstanding a challenge to an insurer's actual cash valuation methodology, if actual cash value is in dispute the matter must proceed to appraisal in the first instance.

Further, in terms of the second ground, the Opinion is correct that declaratory relief was not sought in *Community Assisting Recovery, Inc.* However, the fact that declaratory relief was not requested does not change the rule established by that case.

(1) The Opinion Incorrectly States There Was No Statutory Direction Dictating How Insurers Were To Measure Actual Cash Value When *Community Assisting Recovery, Inc.* Was Decided

In 2002, when *Community Assisting Recovery, Inc*. was decided, Insurance Code section 2071 provided (as it does now) that a fire or homeowner's policy must provide coverage "to the extent of the actual cash value of the property at the time of loss but not exceeding the amount which it would cost to repair or replace the property . . . . *Community Assisting Recovery, Inc, supra* at 892.

The predecessor to current Insurance Code section 2051 was also in effect and it provided: "Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire." *See Breshears v. Indiana Lumbermens Mut. Ins. Co.*, 256 Cal. App. 2d 245, 247 (1967).

Contrary to the Opinion's statement that there was no statutory direction for valuation under an open policy, the foregoing provisions did provide direction long before enactment of current section 2051(b) as the court so held in *Breshears*: "we agree with respondents' contention that we must look to the Insurance Code [2071 and former 2051] and not necessarily to the insurance contract in order to determine the extent of the insurance carrier's liability for a fire loss." *Id.* at 249; *see also Community Assisting Recovery, Inc., supra* at 895 ("The Legislature has provided more

than one measure to adjust claims under section 2071, 'actual cash value' being only one.").

(2) *Community Assisting Recovery, Inc.* Applies Notwithstanding The Fact That Declaratory Relief Was Not Requested

The Opinion is correct in stating the complaint in *Community Assisting* did not include a cause of action for declaratory relief. However, the court's holding in *Community Assisting* made clear that it did not matter what methodology was used by the parties or, for purposes of the declaratory relief distinction made in the Opinion, what methodology a court "declared" the parties should be using because "section 2071 requires appraisal for resolution of contested claims. . . ." *Community Assisting Recovery, Inc.*, *supra* at 893.

> "The appraisal term creates an arbitration agreement subject to the statutory contractual arbitration law. . . . As an arbitration award, the appraiser's award may be vacated or confirmed and judgment entered upon it. . . . Thus, *notwithstanding how the insurer approaches valuation of the damaged property during adjustment of the claim, the Legislature has provided the remedy to which the parties must resort for determination of the amount of loss*." (Emphasis added.)

Id.

The *Community Assisting* court's holding confirms the immateriality of the question of whether the parties had an actual controversy as to the

meaning of actual cash value or how value was to be determined under section 2071 – subjects that arguably would have been included in any declaratory relief claim. Indeed, "notwithstanding how the insurer approaches valuation," the appraisal remedy contained in section 2071 was first required. Thus, to suggest in the Opinion that had declaratory relief been requested in *Community Assisting Recovery, Inc.*, there would have been a different result is inconsistent with that court's holding.

B. The Court of Appeal's Opinion Conflicts with *Enger v. Allstate* and Other Federal Court Decisions

As with *Community Assisting Recovery, Inc.*, the Court of Appeal rejected the holdings in three federal court decisions with similar of facts and one of which had *identical* facts, *Enger v. Allstate Insurance Co.*, 682 F. Supp. 2d 1094 (E.D. 2009), aff'd mem. 2010 U.S. Lexis 26835 (9th Cir. December 28, 2010). The net of effect of the Court of Appeal's rejection is that if an action like Kirkwood's is brought in federal court, a motion to compel appraisal will be granted. However, if it is brought in state court, First Appellate District, the motion will be denied. This court should address the lack of uniformity and provide guidance to the federal court on California state law. [insert citation to cases discussing supreme court providing guidance to federal court on state law].

(1) The Conflict with *Enger v. Allstate Insurance Co.*

In *Enger*, just as Kirkwood has done here, the insured filed a putative class action against his insurer for declaratory relief, violation of the UCL, bad faith and breach of contract contending the insurer used an improper methodology (standardized depreciation schedules) to value a

personal property loss. *Id.* at 1096-97. The insurer responded by filing a motion to compel appraisal. Again, like Kirkwood, the insured in *Enger* opposed the motion to compel asserting he was seeking relief because the insurer's methodology and use of depreciation schedules were contrary to Insurance Code section 2051(b) and, therefore, the dispute was about more than value, which made the appraisal clause inapplicable. *Id.*

In conflict with the *Kirkwood* Court of Appeal, the *Enger* court granted the motion to compel and rejected Enger's arguments in opposition. The *Enger* court acknowledged that the action involved the propriety of the insurer's depreciation methods and the meaning of Insurance Code section 2051(b), but this did not change the fact that "at its core" the dispute was about the value of the insured's personal property. *Id.* at 1099. "Although the present case . . . is much more than a simple disagreement over value of Plaintiff's [personal property], this does not change the fact there ***is*** such disagreement . . . . Pursuant to the terms of the contract, [completion of the appraisal process] is a precondition to Plaintiff's filing a lawsuit. . . . Therefore, Plaintiff's claims against Allstate are not ripe for judicial determination." *Id.*

The federal district court ruling in *Enger* was affirmed by the federal Ninth Circuit Court of Appeals in a memorandum decision in which it explained that by reason of mandatory appraisal language of section 2071 as contained in the insurance policy, "it is immaterial that Enger believes the cause of the disagreement concerning the actual cash value is Allstate's alleged use of an improper valuation method. The contract makes no exception where the source of the dispute is the valuation method used: so long as the parties 'fail to agree as to the actual cash value or amount of loss,' the appraisal remedy is triggered at the request of either party." *Enger*

v. Allstate Insurance Company, 2010 U.S. Lexis 26835, *4 (9th Cir. December 28, 2010).

As to allowing the declaratory relief claim to proceed before appraisal, which the *Kirkwood* Court found compelling, the Ninth Circuit further explained:

> "[u]ntil an appraisal is completed, it is impossible to know whether Enger's claim in fact was undervalued, such that her claims for breach of contract, breach of the covenant of good faith and fair dealing, and Cal. Bus. & Prof. Code § 17200 *et seq.*, are viable. Furthermore, because 'full compliance with the policy terms' is a contractual prerequisite to bringing suit, Enger first must submit to the appraisal. Her arguments that compliance with the appraisal provision is excused or that the provision should be disregarded because she seeks declaratory relief are unpersuasive. Accordingly, the judgment of the district court is AFFIRMED."

Id. at *5.

In its Opinion, the Court of Appeal in *Kirkwood* seeks to distinguish *Enger* and other federal court decisions by stating that "these federal cases [including *Enger*] do not address the central reality of the case, namely that the trial court determined Kirkwood properly invoked its declaratory relief powers, thereby justifying its nonprejudicial rejection of CSAA's motion to compel appraisal." [Opinion at 11-12.] However, at the same time, the Opinion earlier acknowledges on page 11, that in *Enger* the plaintiff raised

claims "similar to the instant complaint," including a claim for declaratory relief.

It is without question the same central issue addressed in the Opinion by the Court of Appeal was addressed by both the federal district court and Ninth Circuit in *Enger*, albeit arriving at the opposite result from the Opinion. The Opinion's suggestion that the central reality of the case before it – whether a trial court may deny appraisal pending a ruling by the trial court as to the methodology to be used to determine value – was directly considered by the federal courts in *Enger* and answered in the negative. This conflict leads to the inevitable result that if a case like Kirkwood's is filed in federal court, it will go to appraisal. If in state court, First Appellate District, it will stay in court. This lack of uniformity must be corrected and this Court should provide guidance to the state and federal courts.

(2) The Conflict with *Goldberg v. State Farm and Garner v. State Farm*

In addition to *Enger,* two other federal court decision reached contrary conclusions to that reached by the Court of Appeal and found that notwithstanding a challenge to the valuation methodology and the insurer's interpretation of the law, appraisal was mandatory.

In *Goldberg v. State Farmers Fire & Cas. Co*., 2002 U.S. Lexis 22321 (C.D. Cal. 2002), the insured filed an action challenging State Farm's methodology for calculating actual cash value after an earthquake loss, because State Farm used a replacement cost less depreciation formula rather than the fair market value of the property which the insured

maintained the law required. In reliance on Insurance Code section 2071 as tracked in the State Farm policy and *Community Assisting Recovery, Inc.*, *supra*, the court granted State Farm's motion to compel appraisal because when such a dispute arises "it is to be settled by appraisal." *Id.* at *7. The court also noted that *Community Assisting Recovery, Inc.'s* holding requiring appraisal was "an interpretation of the state law coming from California's highest court to rule" and is binding. *Id.* at 6.

To the same effect, the federal district court in *Garner v. State Farm Automobile Insurance Company*, 2009 U.S. Lexis 116882 (N.D. Cal. 2009), found that even though an appraisal clause may not cover the full extent of the dispute between the insured and insurer, when the ultimate value of damaged property is at the core of the dispute, appraisal is mandatory.

In *Garner*, an insured brought suit to challenge the insurer's method of valuing the total loss of her vehicle. The insured's policy required appraisal if there was disagreement over the amount of the loss. *Id.* at *2. The *Garner* court acknowledged that appraisal would not decide all of the issues raised in the complaint, e.g. the propriety of defendant's valuation methods and whether they violated regulations, but that "the dispute is, at its core, about the value of Plaintiff's automobile." *Id.* at *6-7.

> "Although the present case…, is much more than a simple disagreement over the value of Plaintiff's automobile, this does not change the fact that there *is* such a disagreement. Because that disagreement exists, Defendant had the contractual right to demand an appraisal, and Plaintiff had the contractual obligation to proceed

> with the appraisal process. Pursuant to the terms of the contract, this was a precondition to Plaintiff's filing a lawsuit."

Id. at *7 (italics in original). Like the court in *Goldberg, supra*, the court relied in part on the reasoning of *Community Assisting* to support its holding that a challenge to valuation methods does not exempt the dispute from appraisal to determine the amount of loss.

The Court of Appeal in its Opinion rejected the federal courts' analysis and conclusions in *Goldberg* and *Garner*, finding those courts gave *Community Assisting Recovery, Inc*. an "overly broad interpretation." [Opinion at 11]. It also distinguished those cases because a declaratory relief cause of action was not part of the complaints filed in those actions. This is a distinction without significance because the rule established in these federal cases is that appraisal is required when there is a disagreement over value regardless of whether insurer's valuation methodology is being challenged or its interpretation of law. This is in direct conflict with the Court of Appeal Opinion and this important conflict should be resolved now.

II. REVIEW SHOULD BE GRANTED TO ALLOW APPRAISERS TO PERFORM THEIR ROLE UNDER CALIFORNIA'S STATUTORY SCHEME FOR VALUING INSURANCE PROPERTY LOSSES WITHOUT INITIAL COURT INTERVENTION

In reliance on the rule of law that appraisers are not to construe insurance coverage, determine causation for a loss, or decide whether an

insured engaged in fraud (*see Kacha v. Allstate Ins. Co.*, 140 Cal. App. 4th (2006) and *Safeco Ins. Co. v. Sharma*, 160 Cal. App. 3d 1060 (1984)), the Court of Appeal went too far in declaring that "Appraisers have no power to interpret the insurance contracts *or the governing statutes.*" [Opinion at 8.]

CSAA does not take issue with the statement that appraisers do not make coverage determinations, causation or fraud. But, that is not what is alleged in this case. Rather, this case is about dispute over the value of Kirkwood's damaged property and how CSAA applied Insurance Code section 2051(b) in arriving at that value. It necessarily is about the application of rules for valuation of property as is every appraisal.

Under appraisal clauses in insurance policies, such as the one in Kirkwood's policy that follows Insurance Code section 2071, appraisers are regularly called upon to value property that has been lost or damaged in a variety of contexts. After homeowners' losses, where structures and personal property are damaged, appraisers will determine the value of the damaged items. After automobile losses, where automobiles are lost or damaged, again appraisers will determine the value of the loss. In each circumstance, there are statutes and regulations that govern the valuation process that have been and will continue to be applied by appraisers. To suggest that court intervention is necessary to interpret every applicable statute or regulation before it may be applied or interpreted by an appraiser is not supported by any authority and, if anything, will undermine the purpose of appraisals to efficiently resolve disputes over the value of a loss.

Nothing in the cases relied upon by the Court of Appeal (*Jefferson v. Superior Court*, 3 Cal. 3d 398 (1970), *Safeco Ins. Co, or Kacha*) suggest a

different result. [*See* Opinion at 8, 12.] Indeed, this Court's decision in *Jefferson* suggests just the opposite.

Jefferson involved a challenge to an appraisal award. The insured's hotel suffered a fire loss under an insurance policy that contained the standard Insurance Code section 2071 language. A dispute arose between the insured and insurer over the meaning of "actual cash value." The insured maintained actual cash value meant fair market value. The insurer claimed actual cash value meant replacement cost less depreciation. *Jefferson, supra* at 400.

The appraisers accepted the insurer's interpretation of actual cash value and calculated the appraisal award for the actual cash value based on replacement cost less depreciation. *Id.* at 401. The insurer offered to pay the amount calculated by the appraisers. The insured rejected the offer and petitioned the trial court under Code of Civil Procedure section 1285 to vacate the appraisal award contending that the award should have been based on the fair market value of the property. *Id.* at 401-402. The trial court agreed and vacated the award.

This Court considered two questions arising out the vacation of the appraisal award. First, whether in the context of the case before it, actual cash value means fair market value. The Court answered this question in the affirmative. More important here, was the second question facing the Court: *"Did respondent court act properly in vacating the appraisal award because appraisers based the award on a misconception of the law." Id.* at 403. The Court also answered this question in the affirmative, and their rationale is critical.

After acknowledging appraisers have more limited powers than arbitrators, a point with which CSAA does not disagree, the Court addressed the rule regarding an appraiser's "misconception of the law" – not an appraisers inability to apply or interpret the law as suggested in the Opinion. Specifically, the Court states:

> "Since the evidence shows that the appraisers misinterpreted the meaning of 'actual cash value' and therefore failed to decide the factual issue submitted to them, the insured properly invoked the jurisdiction of respondent court to vacate the award and order a rehearing. (Citations omitted.) As stated in *Meat Cutters Local No. 439 v. Olson Bros., Inc*., . . . 'it is in the determination of whether a decided issue was properly before the arbitrator *or an issue before him was not decided*, that the agreement or order of submission falls under the scrutiny of the court. . . .' (Emphasis in original).'

Id. at 403.

Accordingly, this Court found where an "appraisal award is based upon a misconception of law," this may be shown by extrinsic evidence such as an appraiser's declaration showing what the appraisers considered and that they "exceeded their powers by *making an error of law*." *Id.* at 403 (emphasis added). Tellingly, the Court did not say the appraisers exceeded their powers by applying or interpreting what they understood to be the law, rather justification for vacating the award was the misapplication, misconception or the wrong decision that they made. Importantly, the Court found awards may be vacated where such misconceptions of law take place.

Mistakenly, the Opinion relies upon *Jefferson* for authority that appraisers may not interpret statutory rules, regulations or laws. *Jefferson* does not say this. Rather, it acknowledges appraisers are required to apply, understand and interpret laws and rules in arriving at the valuations. If their interpretation is wrong such that they fail to make the required factual determination (in *Jefferson* this was the failure to determine fair market value), a trial court may vacate the award based on the appraisers' misconception or misapplication of the law – not because the appraisers interpreted and applied the law in the first instance.

Similarly, in *Safeco Ins. Co. v. Sharma* and *Kacha v. Allstate Insurance Company*, those Courts of Appeal did not say appraisers may not apply or interpret statutory rules in determining the value of property. Rather in *Safeco Ins. Co.*, the question addressed by court was whether an appraiser can decide the factual issue of an insured's misrepresentation about the property that was lost and which is the subject of the claim. The court found that in deciding the actual cash value of the lost property, appraisers may not resolve factual disputes regarding the description of the lost property in determining value. *Safeco Ins. Co., supra* 1062-64.

Kacha involved the appraisal panel's determination of whether a loss that was covered by the insurance policy caused the damage. The court found causation was not part of the actual cash value determination. Like *Safeco Ins. Co.*, the appraisers were to accept the property identified by the insured and make an actual cash value determination. Causation was not part of the appraisers decision-making process. *Kacha, supra* at 1033.

The key distinction between *Safeco Ins. Co*. and *Kacha*, and the case before this Court, is that in those cases it was clear the appraisers went

beyond the actual cash value determination in deciding a question of misrepresentation in the one case, and causation in the other. In contrast, here the Opinion is preventing the appraisers from making the very actual cash value determination they are empowered to make in the first instance.

Appraisers, by their very power of determining actual cash value, must apply explicit and implicit rules, statutes and laws that set the parameters for arriving at the actual cash value of property. *See e.g.* Cal. Code Regs., Tit. 10, §§ 2695.8 (standards for determining cash value of total loss under automobile insurance policy), 2695.9 (standards for adjusting claims under residential and commercial property). Necessarily in applying these laws, they must interpret them. That is not only within their power, but a practical necessity and expectation of their job, and neither *Safeco Ins. Co.* or *Kacha* hold differently as the Opinion mistakenly suggests.

In this case, under the Opinion, after the trial court makes its declaratory relief ruling, it will be necessary for the appraisers to read, interpret and apply the trial court's ruling. In other words, the appraisers will be called upon to interpret and apply the rule of law established by the trial court. This is their job. If the appraisers interpret that law in a manner in which one of the parties disagrees, they will have recourse to challenge the appraiser's decision and "misconception of the law" under *Jefferson* and Code of Civil Procedure section 1286.2(a)(4). It is incorrect to suggest appraisers may not interpret statutory rules, regulations or law where necessary to arrive at their valuations. To so hold will disrupt the appraisal process, increase the costs of claims resolution, and foster only more litigation. This presents an important issue of law for California and the need for intervention by this Court is manifest.

CONCLUSION

For the foregoing reasons, the Court should grant the petition to review.

Dated: April 11, 2011

Barger & Wolen

By _____

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