

SUMMER LAW UPDATE:

REFERENCE IN MASSACHUSETTS

The Speedy and Cost Effective Solution to Value-Centered Disputes

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WHEN TO USE REFERENCE

- Reference resolves disputes regarding the extent of loss and amount of damage under a property insurance policy. Reference does *not* represent a viable solution to questions of liability such as the existence or extent of coverage. In technical terms, Reference therefore resolves questions of value, not coverage.
- For decades, Sloane and Walsh, LLP has successfully and efficiently assisted parties with commercial and residential References and Appraisals throughout New England. We have assisted parties at the initial Reference demand stage, as well as during pre-hearing investigations, hearings, and post-hearing proceedings. In addition, our attorneys have served as referees or umpires on numerous occasions.

WHY PURSUE REFERENCE?

- Reference affords an expedient, expeditious, and efficient solution to value based disputes that benefits both policyholders and insurance companies. Rather than expending unnecessary resources and enduring the countless delays associated with traditional litigation, Reference provides a fair, amicable, and equitable route to resolution.

“[I]n most jurisdictions, it is one of the only provisions that affords protection to the interests of the insured in equal measure to those afforded the insurer.” Jonathan J. Wilkofsky, *The Law and Procedure of Insurance Appraisal 1*, (2d. Ed. 2009).

IMPORTANT CONSIDERATIONS CONCERNING REFERENCE

- ***Reference as Condition Precedent to Litigation:***

According to Mass. Gen. Laws ch. 175, § 99, “[i]n case of . . . a failure of the parties to agree as to the amount of loss,” reference, unless waived, shall be a “condition precedent” to any right of action to recover for such loss. McCord v. Horace Mann Ins. Co. 390 F.3d 138, 142-43 (1st Cir. 2004).

- ***Waiver:***

The contractual right to Reference may be waived. The issue of waiver is fact specific and determined on a case by case basis. Generally, an insurer’s complete denial of

liability under the policy, without more, constitutes waiver of the Reference provision. See Goodman v. Quaker City Fire & Marine Ins. Co., 241 F.2d 432, 435 (1st Cir. 1957) (holding that insurer’s letter denying any liability constituted a waiver of any right to require arbitration); McCord v. Horace Mann Ins. Co., 390 F.3d 138, 143 (1st Cir. 2004) (No waiver where insurer “specifically disputed public adjuster’s amount of loss and called attention to reference condition, and further asserted condition as affirmative defense to insured’s suit”). The burden of proving that an insurer or an insured has waived its right to reference, as a condition precedent to any cause of action to recover for a loss under a policy of insurance, rests with the party asserting waiver. Molea v. Aetna Ins. Co. of Hartford, Conn., 326 Mass. 542, 547 (1950).

- ***Statute of Limitations:***

Commencement of a Reference is subject to the two-year statute of limitations set forth in Mass. Gen. Laws Ch. 175, § 99, which is NOT tolled simply by a demand for reference. J & T Enterprises, Inc. v. Liberty Mut. Ins. Co., 384 Mass. 586 (Mass. 1981); Merrimack v. Wilson, 66 Mass. App. Ct. 1102 (2006).

For decades Sloane and Walsh has handled Reference and Appraisal proceedings throughout New England. Our attorneys are well versed in the substantive and procedural law concerning Reference/Appraisal proceedings. Our experience and expertise allows us to make valuable input throughout the process from the selection of referees/appraisers to the enforcement or appeal of an award.



THE POLICY

Property insurance policies generally include “Appraisal” or “Reference” clauses that define the procedure for settling disagreements over the amount of loss. For example, the Standard HO 03 homeowner’s policy contains the following “Appraisal” provision:

Appraisal

If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within the 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the “residence premises” is located. The appraisers will separately set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

Each party will:

1. Pay its own appraiser; and
2. Bear the other expenses of the Appraisal and umpire equally.

HO 00 03 10 00 Insurance Services (1999).

MASSACHUSETTS’ STATUTORY LAW

Mass. Gen. Laws ch. 175, § 100 *et seq.* sets forth the procedure for Reference under a standard fire insurance policy in Mass. Gen. Laws ch. 175, § 100 *et seq.* The statute provides, in relevant part, as follows:

If a claim is presented under any policy of fire insurance issued on property or interests in the commonwealth in the standard form set forth in the preceding section, and if the parties fail to agree as to the amount of loss, the company shall, within ten days after receiving a written demand from the insured for the reference of the amount of loss to three referees as provided in such policy, submit in writing the names and addresses of three persons to the insured, who shall, within ten days after receiving such names, notify the company in writing of his choice of one of the said persons to act as one of said referees.

The insured shall submit in writing the names and addresses of three persons to the company, which shall, within ten days after receiving such names, notify the insured in writing of its choice of one of said persons to act as one of said referees.

If, at the expiration of ten days from the choice of the second referee, the two referees chosen as hereinbefore provided, shall not have agreed upon and selected a person to act as the third referee, then either of the said referees or parties may make written application on oath to the commissioner in such form as he may prescribe, for the appointment of the third referee and the commissioner shall, after such summary inquiry or hearing, if any, as he may deem expedient, appoint a person to serve as the third referee and shall notify such person and the parties in writing of such appointment.

ADDITIONAL CONSIDERATIONS:

- In MA, when policy provisions conflict with the statute, the statute controls the Reference proceeding.
- Narrowing the scope of the issues in dispute can help lower costs.
- Always consider which referees are reliable, fair, and respected in the community.
- Most policies of insurance allow for an examination under oath which typically benefits both the insurer and insured.
- A court may vacate an appraisal award where the appraiser acted without authority or contravened the terms of the contract. Sun Microsystems, Inc. v. Elec. Services, Inc., CIVASUCV2005-2841BLS, 2009 WL 987336 (Mass. Super. Apr. 13, 2009)

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