DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Address: City and County Building 1437 Bannock Street Denver, CO 80202	
Plaintiffs: CATHY COCHRAN and STEVE COCHRAN **vs.** **Defendant**: AUTO-OWNERS INSURANCE COMPANY	**COURT USE ONLY** Case No. **11CV8434** Courtroom: **203**

ORDER ON SCOPE OF APPRAISAL

The Court has reviewed the portions of the depositions of Messrs. Hoag and Burns tendered by Plaintiff's counsel at the October 4, 2012 hearing and the Defendant's prolix Response filed on October 11, 2012. In light of the Court's disposition of this issue, Plaintiff's Motion to File a Sur-Response or to Strike is denied as **moot**.

The issue pending is the scope of the appraisal which is to be conducted per the Court's October 4, 2012 Order (Appraisal) in conformance with the Auto-Owners (AO) homeowner's policy issued to Plaintiffs.

Plaintiffs argue that the Appraisal should include all items of property damage claimed, including:

- all roofs, especially the flat roof

- green house, gutters, skylights, curbs

- water intrusion resulting from hail damage

- interior damage in the pool house

- mold resulting from the water intrusion and necessary mold remediation

(Plaintiff's Response in Opposition, at 11). AO, however, contends that damage to the flat roof of the Cochrans' pool house and other related interior damage (a) was not caused by hail, (b) falls within one or more exclusions of the AO homeowner's policy[1] for which AO has denied coverage and (c) therefore, these items should not be considered by the parties' appointed appraisers and umpire. AO argues that only the following items should be considered in the Appraisal, which AO *concedes* were damaged by hail: "The appraisal process should proceed on only those areas of the property that Auto-Owners determined were damaged by hail, specifically, the main roof of Plaintiffs' house, the roof of their garage, the fiberglass panels on their greenhouse, the gutters, and the curbs on the sides of the skylights on the roof of the pool house." (AO's Response, at 19)

For the reasons set forth below, the Court concludes that **all** items of property damage claimed by the Cochrans in connection with this case – including the pool room roof, the pool room and interior damage – shall be included within the Appraisal.

II. Facts

The parties acknowledge that the homeowner's policy contains the provision:

[1] The exclusions argued by AO include wear and tear, faulty repairs of the roof before May 2011 and/or the insureds' alleged failure to properly maintain the roof.

APPRAISAL

If you and we fail to agree on the **actual cash value** or amount of loss covered by this policy, either party may make written demand for an appraisal. Each party will select an appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days, **you** or **we** can ask a judge of a court of record in the state where the **described premises** is located to select an umpire.

The appraisers shall then appraise the loss, stating separately the **actual cash value** and loss to each item. If the appraisers submit a written report of an agreement to **us**, the amount agreed upon shall be the **actual cash value** or amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the **actual cash value** or amount of loss.

Each party will pay the appraiser it chooses, and equally pay the umpire and all other expenses of the appraisal.

(Policy, at 11).

The policy defines "**actual cash value**" as:

1. **Actual cash value** means the cost to replace damaged property with new property of similar quality and features reduced by the amount of **depreciation** applicable to the damaged property immediately prior to the loss.

(*Id.*, at 1) However, the term "**amount of loss**" is not defined. (*Id.,* at 1-2). The parties dispute whether the term "**amount of loss**" refers solely to the value of those items of claimed property damage which the insurer concedes are covered under the policy (AO's position), or whether it also gives the appraisers and umpire the ability to determine causation, whether particular disputed items of property damage were damaged by hail or resulting water damage or were caused by unrelated factors (Plaintiffs' position).

III. Analysis

A. Interpretation of Insurance Policies

The interpretation of an insurance policy is governed by contract law principles and is a question of law for the court. *Farmers Ins. Exch. v. Anderson,* 260 P.3d 68, 71 (Colo. App. 2010). Like any other contract, a court's obligation is to "give effect to the intent of the parties. Whenever possible this intent should be ascertained from the plain language of the policy alone." *Id.*, at 72 (internal citation omitted).

Unless the insurance policy demonstrates a contrary intent, words used in the policy must be given their plain and ordinary meaning. Additionally, policy provisions should be read as a whole, rather than in isolation. The court may not rewrite, add, or delete provisions to extend or restrict coverage. *McGowwan v. State Farm Fire and Cas. Co.,* 100 P.3d 521, 523 (Colo. App. 2004).

It is the court's duty "to examine the contract as a whole, and the determination of whether an ambiguity exists is a question of law for the court." *State Farm Mut. Auto. Ins. Co. v. Mendiola,* 865 P.3d 909, 912 (Colo. App. 1993). A mere disagreement between the parties concerning the interpretation of a policy does not create an ambiguity. *Cary v. United of Omaha Life Ins. Co.,* 108 P.3d 228, 290 (Colo. 2005).

B. Application

Applying these principles to the appraisal section of AO homeowner's policy, the policy describes valuation disputes which may arise between an insured and AO as: (1) the "**actual cash value**" of the loss or the (2) "**amount of loss**." It is clear that the terms are not intended to be interpreted and should not be interpreted as being synonymous. The policy refers to them in the disjunctive ("[i]f you and we fail to agree on the **actual cash value** *or* "**amount of loss**" covered by this policy . . . ."). An interpretation which rendered the terms synonymous would change the '*or*' into an '*and*' in the sentence describing the appraisal process. Moreover, it would be unreasonable and nonsensical to conclude that the policy defined "**actual cash value**" but also used a different term – "**amount of loss**" – to mean the same thing.

The Court concludes that in using the terms "**actual cash value**" and "**amount of loss**," the policy envisions two different categories of valuation

disputes. Although undefined in the policy, the term "**amount of loss**" must mean something different than merely how much it will cost to replace damaged property. The Court thus rejects AO's assertion that "**amount of loss**" is merely the valuation of property which *both* AO and the insured agree was damaged by a hail storm. If that interpretation was followed, it would render the term "**amount of loss**" into useless surplusage.

The interpretation of the term "**amount of loss**" is, however, far from clear from the case law. *See Rogers v. State Farm Fire and Cas. Co.*, 984 So. 2d 382, 389 (Ala. 2007)(citing *Wausau Ins. Co. v. Herbert Halperin Distribution Corp.,* 664 F.Supp. 987, 988 (D.Md. 1987)).

The Court finds persuasive the reasoning of *CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.,* 110 F. Supp. 2d 259 (D. Del. 2000) in analyzing this question. In *Didimoi*, a building already undergoing asbestos abatement was rendered non-habitable by a fire. The applicable policy had an appraisal clause which was essentially identical[2] to AO's in this case. The insurer and insureds disputed whether the appraisal process should simply be a valuation of the damaged property without determining "the cause of the damages claimed or the amount of the 'covered' loss," *id.*, at 262, or whether "the extent of the fire damage is a question concerning the amount of loss, and therefore, the extent of the fire damage is appropriately determined in the appraisal process." *Id.*

The *Didimoi* court carefully analyzed the competing claims and concluded that the policy language was not ambiguous:

> the Court concludes that the phrase "amount of loss" is not ambiguous, because it is susceptible to only one reasonable interpretation in this context. Specifically, the Court concludes that in the insurance context, an appraiser's assessment of the "amount of loss" necessarily includes a determination of the cause

[2] "If we [CIGNA] and you disagree on the value of the property or the amount of loss either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will: A. Pay its chosen appraiser; and B. Bear the other expenses of the appraisal and umpire equally. If there is an appraisal, we will still retain our right to deny the claim." *Didimoi*, 110 F.Supp.2d at 262.

> of the loss, as well as the amount it would cost to repair that which was lost. The Court's conclusion in this regard is consistent with the plain meaning of the terms "amount of loss" and "loss" in the insurance context.
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> [The insureds] also contend that an interpretation of "amount of loss" and "loss" which includes causation would render [the insurer's] reservation of rights in the appraisal clause meaningless. The Court disagrees with [the insureds] and believes that [their] argument confuses two concepts: amount of loss and coverage. The meaning of the term "coverage" is "narrow and precise." 15 *Couch on Insurance* § 212:12. Coverage is "the assumption of the risk of occurrence of the event insured against before its occurrence." *Id.* Coverage issues include such questions as who is insured, what type of risk is insured against, and whether an insurance contract exists. *Id.* [The insurer's] reservation of rights is not meaningless, because [the insurer], as well as the insured, may still dispute coverage issues after an appraisal has been conducted. However, as [the insurer] recognizes. . ., it may not contest the decision on amount of loss reached by the umpire and at least one of the appraisers as a result of the appraisal process. Accordingly, the Court's interpretation of "loss" and "amount of loss" does not render [the insurer's] reservation of rights meaningless.

Id., at 264-65.

After considering case law in other jurisdictions, the *Didimoi* court concluded:

> . . .under the circumstances of this case, including the plain language of the policy, a determination of amount of loss under the appraisal clause includes a determination of causation. Coverage questions, such as whether damage is excluded for reasons beyond fire damage, are legal questions for the Court as this case progresses. However, the Court believes that whether a particular item was damaged as a result of fire or firefighting efforts is appropriately reserved for the appraisal process.
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> Indeed, under the circumstances of this case, the Court cannot reconcile any other approach. Carried to its logical conclusion, [the insureds'] position would be nonsensical. If the appraisers were required to accept the insured's claimed damages regardless of

> their cause and assign only dollar value assessments of the cost to repair or replace the items of claimed damage, the appraisers could be examining damage entirely unrelated to this case. For example, the insured could claim damage that resulted from an office party months ago and the appraisers would be required to assess a repair or replacement cost for that damage, when clearly such damage was not caused by the fire and would not be remotely relevant to this dispute. The Court cannot conclude that this is the appropriate function of the appraisal process.
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> The Court understands that the damages in this case are not as clear as the Court's above illustration. For example, a major issue in this case concerns damage to the Building by asbestos and microbial agents. . . .The smoke, soot and firefighting water distributed the asbestos throughout the Building. In addition, the air handling equipment remained on during much of the time the fire burned causing further disbursement of the asbestos fibers. After the fire, the wet materials were not promptly removed from the Building causing the growth of mold, mildew and other microbial agents. In this litigation, [insurer] contends that the asbestos and microbial problems were pre-existing conditions excluded from coverage under the policy. [The insureds] contend that such problems as microbial growth resulted from [the insurer's] refusal to allow [it] to remove the wet materials from the Building. While the Court understands the overlap between these issues and causation which is the root of the dispute in this case, the Court believes that the ultimate question of whether [the insurer] is responsible for this damage or whether this damage is excluded under the Policy is a coverage question which requires judicial resolution. Indeed, to the extent that the appraisers' assessment may overlap with a coverage question, the parties certainly may seek the Court's ultimate review. However, the Court believes it would be inappropriate to curtail the appraisal process simply because it might come shoulder-to-shoulder with subsequent legal questions.

Id., at 268-69.

The Court agrees. AO concedes that *some* damage to the roof of the Cochrans' pool house may have occurred as a result of hail and water; AO admits that ". . .some small amount of water may at some time have entered [the pool room] through the worn out skylight curbs and the hail penetrations . . . . " (AO's Reply, at 7) Because AO acknowledges that there was damage to the Cochrans' main residence from hail and may have been "some small amount of water" damage into the pool room, the determination of what

damages were caused by hail – versus other unrelated or pre-existing conditions such as by the pool room roof being worn out and beyond its life expectancy or prior repairs undertaken by the Cochrans – are within the scope of the "**amount of loss**" to be determined in the Appraisal. Borrowing from the example in *Didimoi*, if the Cochrans claim that the pool roof was damaged from hail but it was actually damaged by a roof-top dance contest held years before, then the appraisers/umpire will be able to ascertain this from the evidence and exclude it from the determination. AO conflates coverage with "**amount of loss**." Quite simply, because AO concedes the existence of coverage, in general, – *i.e.,* hail damage (a covered peril) to the Cochrans' house (an insured premise) – the issues of what particular damage(s), if any, exist on the pool room roof and pool room are properly considered as part of the "**amount of loss**" and should, therefore, be part of the Appraisal.

This was the same conclusion reached in *Johnson v. State Farm Lloyds*, 204 S.W.3d 897, 898 (Tex. App. 2006) *aff'd*, 290 S.W.3d 886 (Tex. 2009). In that case, the insured's roof was damaged by hail. The homeowner's policy had an appraisal clause substantially similar to AO's here.[3] The insurer conceded there was some damage to the insured's roof but, like AO here, contended that the appraisal was inappropriate because there were issues of coverage: "State Farm argues that it does not have to submit to the appraisal process unless the parties first agree on causation, coverage, and liability. It contends it is not required to submit to an appraisal in this case because whether the hail damaged only the ridgeline of the roof, as State Farm contends, or the entire roof, as Johnson contends, is a causation, coverage, and liability issue not an issue concerning the amount of loss." *Id.*, at 900-01. The Texas court distinguished an earlier decision and determined that an appraisal was appropriate, including the issue of causation:

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[3] "If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us." *Johnson,* 204 S.W.3d at 900.

> *If the parties had to first agree on which specific shingles were damaged and approach every disagreement on extent of damage as a causation, coverage or liability issue, either party could defeat the other party's request for an appraisal by labeling a disagreement as a coverage dispute*. Instead, as the process is designed, once it is determined that there is a covered loss and a dispute about the amount of that loss, the appraisal process determines the amount that should be paid because of loss from a covered peril.
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> We conclude that if the parties agree there is coverage but disagree on the extent of damage, the dispute concerns the "amount of loss" and that issue is determined in accordance with the appraisal clause. Because the parties here agree that covered property sustained damage from a covered peril but fail to agree on the amount of loss, the appraisal clause applies. Under these circumstances, Johnson was entitled to appraisal.

Id. at 903 (emphasis added).

AO's position regarding the Appraisal here essentially asks the Court to embrace the 'shingle by shingle' approach rejected in *Johnson*, which the Court declines to do. AO acknowledges there was a covered loss at the Cochrans' residence. Whether that loss includes the roof of the pool room and/or the interior or contents of the pool room is a determination of the "**amount of loss**" which AO agreed to submit to the appraisal process. This is the interpretation which makes sense of the policy language, makes sense of the policy's distinction between "**actual cash value**" and "**amount of loss**," and is consistent with the better reasoned case law.

Accordingly, the Court determines that the Appraisal shall include all items of damage claimed by the Cochrans, including damages to the roof of the pool room, the pool room and any contents.

Dated this 22nd day of October, 2012.

BY THE COURT:

Edward D. Bronfin
District Court Judge

cc: all counsel