THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2021 TERM

JUNE SESSION

2021-0068

Dylan O’Malley-Joyce and Eileen Nash

v.

Travelers Home and Marine Insurance Company

BRIEF OF APPELLEE TRAVELERS HOME AND MARINE INSURANCE COMPANY

Doreen F. Connor, #421
Primmer Piper Eggleston
& Cramer, PC
900 Elm Street
PO Box 3600
Manchester, NH 03105
603-626-3300
dconnor@primmer.com

Doreen F. Connor will represent the Appellee at oral argument, if this Court requires argument.

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407:22 New Form Adopted. – The Standard Fire Policy (with permission to substitute for the word, company, a more accurate descriptive term for the type of insurer) shall be in the following form:

Standard Fire Insurance Policy for New Hampshire

No. Type of Company
Renewal of Number

Space for Company Name, Insignia and Location

Insured's Name and Mailing Address
Space for
Producer's
Name and
Mailing
Address
....
Inception (Mo. Day Yr.) Expiration (Mo. Day Yr.) Years

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.
Insurance is provided against only those perils and for only those coverages indicated below by a premium charge and against other perils and for other coverages only when endorsed hereon or added hereto.
Space for policy amounts, rates, premium, description and location of property covered.
Subject to Form No(s). attached hereto.

Insert form number(s) and edition date(s)
Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to:
Insert name(s) of mortgagee(s) and mailing address(es)
Agency at
Countersignature Date. ....Agent

If any conditions of this form are construed to be more liberal than any other policy conditions relating to the perils of fire, lightning or removal, the conditions of this form shall apply.
In consideration of the provisions and stipulations herein or added hereto and of the premium above specified, this Company, for the term of years specified above from inception date shown above at 12:01 AM (Midnight, Standard Time) to expiration date shown above at 12:01 AM (Midnight, Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure the insured named above and legal representatives, 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 with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all direct loss by fire, lightning and by removal from premises endangered by the perils insured against in this policy, except as hereinafter provided, to the property described herein while located or contained as described in this policy, or pro rata for 5 days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.
Assignment of this policy shall not be valid except with the written consent of this Company.
This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

Concealment, fraud.

Coverage under this policy shall be void for the insured who, whether before or after a loss, has intentionally concealed or misrepresented any material fact or circumstance; engaged in fraudulent conduct; or made false statements relating to this insurance.

Notice requirements.

In the event that a company or filing or rating organization eliminates or reduces coverages, conditions or definitions in its policies issued under this section other than at the request of a policyholder, the company must attach to the policy a printed notice in each such policy explaining clearly what coverages, conditions or definitions have been eliminated or reduced. If explanations of such reduced or eliminated coverages are not contained in the printed notice attached to its policies, then such coverages, conditions or definitions shall remain in full force and effect without such reductions or eliminations. The requirements of this section shall apply only to such policies renewed or endorsed with the same company.

Uninsurable and excepted property.

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included.

This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) terrorism; (i) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (j) neglect of the insured to use all reasonable means to save and

preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (k) nor shall this Company be liable for loss by theft.

Other insurance.

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance.

Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured; or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 60 consecutive days; or (c) as a result of explosion or riot, unless fire ensues, and in that event for loss by fire only.

Other perils or subjects.

Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions.

The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions.

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy.

This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a 5 days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations.

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a 10 days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within 60 days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability.

This Company shall not be liable for a greater proportion of any loss than the amount hereby

insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs.

The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.

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 demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any 2 when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options.

It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required.

Abandonment.

There can be no abandonment to this Company of any property.

When loss payable.

The amount of loss for which this Company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made

either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit.

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

Subrogation.

This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

RSA 491:8-a..14

491:8-a Motions for Summary Judgment. –

I. A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment, may, at any time after the defendant has appeared, move for summary judgment in his favor upon all or any part thereof. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move for a summary judgment in his favor as to all or any part thereof.

II. Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits. Copies of all motions and affidavits shall, upon filing, be furnished to opposing counsel or to the opposing party, if the opposing party is not represented by counsel.

III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

IV. If affidavits are not filed by the party opposing the summary judgment within 30 days, judgment shall be entered on the next judgment day in accordance with the facts. When a motion for summary judgment is made and supported as provided in this section, the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.

V. If it appears to the court at any time that any of the affidavits presented pursuant to this section are presented in bad faith or solely for the purpose of delay, the court shall

forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be found guilty of contempt.

Administrative Rule Ins. 1002.09 11,13,16,26

Ins 1002.09 Value of Total Losses – Other than Motor Vehicle. When the insured's or claimant's property has been determined to be a total loss, and there is no dispute concerning liability or coverage, and the provisions of RSA 407:11 do not apply, insurers attempting to establish the value of the property shall:

(a) Value the property in the community where the total loss property is located;

(b) Be prohibited from using arbitrary methods to establish the value of the property that do not take into consideration the specific characteristics of the property, however, this shall not preclude the insurer from making an offer of settlement on property based upon the fair market value of like kind and quality property wherever situated.

(c) Consider as an element of damages additional costs incurred in purchasing and shipping the property.

(d) Comply with Ins 1002.18 for every total loss settlement made or offered by the insurer to replace lost or damaged jewelry, watches, precious, or semi-precious stones, under applicable property insurance.

Administrative Rule Ins. 1002.16 .... *passim*

Ins 1002.16 Willing and Able Contractors and Repairers; Other Than Motor Vehicle.

(a) Every settlement offer that is based upon an appraisal conducted on behalf of the insurer relative to property and liability insurance shall:

(1) Include a written statement that, if the claimant or insured cannot find a contractor or repairer to do the repair or replace the damage property for the price quoted, then the insured or claimant may request that the insurer supply the insured or claimant with the name and address of any known recognized, competent and conveniently located contractor or repairer who is willing and able to repair or replace the damaged property with other property of like kind and quality within a reasonable time for the price quoted in the appraisal or as otherwise provided for in the insurance policy;

(2) If the insurer provides the insured or claimant with the name of a contractor or repairer as set forth in (a)(1) above, the insurer shall also provide a written disclosure that any contractor or repairer may be used at the discretion of the insured or claimant; and

(3) If the insurer is unable to provide the name of a contractor or repairer upon request, then any fair and reasonable cost incurred to repair or replace the damage as set forth in the appraisal, in excess of the insurer's appraisal price, shall be at the expense of the insurer. If the insurer has provided the insured or claimant with the name of a contractor or repairer who is willing and able to repair or replace the damaged property with other property of like kind and quality within a reasonable time for the price quoted in the appraisal

and the insured or claimant uses another contactor or repairer, then any cost in excess of the insurer's appraisal prices shall not be at the expense of the insurer.

(b) The insured or claimant shall be entitled to the usual and customary guarantees as to materials and workmanship relative to the property that is being repaired or replaced.

(c) In processing any claim for damage to a home, dwelling, or other property, the insurer shall not require as a condition to the payment of such claims that repairs be made by a particular contractor or repairer.

(d) Any settlement made based upon an agreement negotiated by an adjuster on behalf of the insurer with a contractor or repairer shall include a provision for coverage of hidden damage that is determined to be connected with the claim in question.

(e) For all claims, insurers and their adjusters, whether hired under contract or employed, shall not make any coercive, threatening, or intimidating statements at any time, orally or in writing, to an insured or claimant for the purpose of influencing the insured’s or claimant's choice of a particular contractor or repairer.

(f) In addition to the above requirements, every settlement made or offered by the insurer to repair or replace damaged jewelry, watches, precious, or semi-precious stones, under applicable property insurance, shall comply with the provisions of Ins 1002.18.

STATEMENT OF CASE AND FACTS

This appeal arises out of the Grafton County Superior Court's (Hon. Peter Bornstein) summary judgment order in favor of Travelers Home and Marine Insurance Company ("Travelers"). Travelers moved for summary judgment because the plaintiffs' damage claims were either not covered under the Policy or encompassed within those damages previously paid by Travelers in response to binding appraisal. The Court granted Travelers' Motion "for the reasons set forth in the Motion and supporting Memorandum of Law." (Appendix, hereinafter "App." 108).

Travelers filed its Motion for Summary Judgment on November 3, 2020. The plaintiffs requested a 60 day extension to secure successor counsel to respond to the Motion. Travelers consented and the Court granted the extension from December 3, 2020 to February 3, 2021. Despite the 60 day extension of time, the plaintiffs did not file a summary judgment objection. On February 5, 2021, the Court granted Travelers' Motion for Summary Judgment. The plaintiffs did not file a Motion for Reconsideration. Instead, the plaintiffs filed a Notice of Appeal with this Court on February 25, 2021.

In their appeal, the plaintiffs argue the Trial Court erred in granting Travelers summary judgment because Travelers' appraisal language is not binding. (Appeal Issue I). The plaintiffs did not raise this issue before the Trial Court. The plaintiffs also failed to include this challenge in their Complaint. (App. 96-106).

The plaintiffs' alternative arguments on appeal assert the Trial Court erred when granting summary judgment because Travelers failed to establish it had complied with Administrative Rule 1002.16 (d), 1002.16(a)(1) and 1002.09. (Appeal Issue II-IV). The plaintiffs did not raise any of these alleged rule violations before the Trial Court. Additionally, the plaintiffs' Complaint includes no reference to Administrative Rules 1002.16(d) and 1002.09. (App. 96-106).

The plaintiffs' alleged damages arose out of two separate water losses to their home in November of 2017 and January of 2018. (App. 97-98). When the parties were

unable to reach an agreement on the cost and scope of the water repairs, Travelers invoked appraisal. (App. 93). The Travelers policy language includes appraisal as one of three ways in which damages may be determined. (App. 36). The pertinent loss payment language reads as follows:

6. **Loss Payment**. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

a. Reach an agreement with you;

b. There is an entry of a final judgment;

c. There is a filing of an appraisal award with us. (App. 36).

The plaintiffs and Travelers each selected an appraiser. Those two appraisers reviewed each parties' documentation of the scope and cost of the water repairs and concluded the cost to repair the plaintiffs' first water loss totaled $123,996.16 (ACV value of $97,107.74) and the cost to repair the second totaled $16,079.62 (ACV of $11,551.73). (Summary Judgement Exhibit C, Addendum (hereinafter "Add." 49). As noted in the Undisputed Statement of Facts, Travelers paid that appraisal award. (App. 119, ¶19). When the plaintiffs filed suit against Travelers they alleged that, "Travelers has refused to pay the total actual cash value of the claims." (App. 101, Complaint, ¶33). The plaintiffs further alleged that there were ongoing disputes as to the value of the claim and a balance owed to the plaintiffs. (App. 101, Complaint, ¶34).

In their suit, the plaintiffs sought the following damages:

1. Lost wages, lost income - $355,187.00
2. Increase in policy premiums due to second claim - $7,020.00
3. Difference between amounts paid for repairs and actual costs - $15,012.00
4. Missed items not paid for outside of repair costs - $4,495.00
5. Mortgage costs increases - $14,891.32
6. Inflation - $5667.64
7. Damaged property (driveway, landscaping) - $78,391.66

(App. 115, Undisputed Statement of Material Fact ¶29). Travelers contested any obligation to pay damages for lost wages; increased premiums, mortgage costs, inflation

and driveway repairs because these damages do not fall within the policy definition of covered "property damages" flowing from the plaintiffs' interior water damage claims.[1] (Add. 39-41). Travelers' Motion contested the plaintiffs' request for additional repair costs and missed repairs as these damages should have been adjudicated in the binding appraisal process. (Add. 35-39).

The plaintiffs' appeal does not challenge the Trial Court's ruling that their damage claims for lost wages; increased premiums, mortgage costs, inflation and driveway repairs are not covered "property damages" flowing from their covered interior water claims. (NOA). The plaintiffs only challenge whether they can recover $15,012 and $4,495 in additional repair costs not awarded in appraisal. (NOA; App. 115).

SUMMARY OF ARGUMENT

The plaintiffs have not preserved the arguments they assert on appeal. Three of the four arguments they raise were not pled in their underlying Complaint as required by N.H. Superior Court Rule 8. Moreover, none of the plaintiffs' appeal arguments were raised before the Trial Court thereby precluding that Court from addressing their merits and/or creating a record for appeal. This Court should not address the plaintiffs' arguments on the merits, as the issues they raise have not been preserved.

If this Court addresses the merits of the arguments raised on appeal, the alleged Administrative Rule violations do not apply. Administrative Rule 1002.16(a) and (d) apply to settlement offers not damages resolved in appraisal. Administrative Rule 1002.09 applies to "total loss" claims and the plaintiffs' home did not incur a "total loss."

The plaintiffs' assertion that the final appraisal award is not enforceable because the policy's appraisal clause does not include the word "binding" ignores the policy's loss payment language, which equates an appraisal award with a final judgment. (App. 36). The Travelers' policy states it will pay a loss based upon "the filing of an appraisal

[1] Plaintiffs' Appendix is missing pages 5-18 of the Travelers' Memorandum of Law in support of Summary Judgment. The entire Memorandum along with Exhibit C is attached as an Addendum. The plaintiffs' Appendix includes Exhibit A (the policy) and B (the demand for appraisal).

award" and a decision by any two appraisers "will set the amount of loss". (App. 36). Travelers' policy appraisal language follows that mandated by the New Hampshire Legislature in the Standard Fire Policy. Pursuant to RSA 407:22, all fire policies issued in New Hampshire must allow appraisal. It provides: "An award in writing, so itemized, of any 2 when filed with this Company shall determine the amount of actual cash value and loss." N.H. Rev. Stat. Ann. § 407:22.

STANDARD OF REVIEW

Pursuant to RSA 491:8-a, any party opposing summary judgment, "has the burden of contradicting the proponent's affidavits; otherwise the facts stated in them will be deemed admitted for the purpose of the motion. RSA 491:8-a (Supp.1975); *Community Oil Co. v. Welch,* 105 N.H. 320, 199 A.2d 107 (1964)*." Arsenault v. Willis,* 117 N.H. 980, 983, (1977). The plaintiffs did not oppose Travelers' Motion and they did not contest the supporting Statement of Facts. Accordingly, those facts were deemed admitted for the proceedings before the Trial Court and for this appeal.

On appeal, the plaintiffs confirm they "do not contest the facts." (Brief, p. 4). Instead, they allege four legal arguments, none of which were presented below and three of which were not included in their Complaint. Although errors of law adjudicated by the Trial Court are subject to de novo review that review does not apply to arguments that were not raised and not preserved. *New Hampshire Department of Corrections v. Butland*, 147 N.H. 676, 679 (2002); *Snow v. American Morgan Horse Assoc*., 141 N.H. 467, 472 (1996).

ARGUMENT

I. THIS COURT SHOULD NOT ADDRESS THE PLAINTIFFS' APPEAL ARGUMENTS AS THEY WERE NOT RAISED IN THE COMPLAINT AND THEY WERE NOT PRESENTED TO THE TRIAL COURT.

It is well-settled law that this Court "will not consider issues raised on appeal that were not presented in the lower court." *Daboul v. Town of Hampton*, 124 N.H. 307, 309 (1983)(citing *Carburs, Inc. v. A&S Office Concepts, Inc.*, 122 N.H. 421, 423 (1982)). The plaintiffs failed to provide the Trial Court with an opportunity to address the arguments they now raise on the merits and they failed to provide a record for appellate review. *Id*. The burden is on the appealing party to demonstrate that the issues on appeal were raised before the trial court. *Bean v. Red Oak Prop. Mgmt*., 151 N.H. 248, 250 (2004). In essence, the plaintiffs have accused the Trial Court of committing an error of law for its failure to anticipate unknown and unidentified issues plaintiffs have raised for the first time on appeal. Allowing the plaintiffs to seek reversal of the Trial Court based on arguments not presented below precludes this Court from receiving a proper record from which to decide the issues and has the adverse effect of encouraging repeat piecemeal appeals.

Because the plaintiffs did not ask the Trial Court to interpret, as a matter of first impression, whether the language used by Travelers in its policy to describe the binding nature of loss adjustment by appraisal is enforceable, the lower court received no evidence about the policy language drafting history. It likewise received no testimony about the parties' discussions and/or communications about the finality of the appraisal process. Travelers was precluded from introducing any evidence to rebut the arguments the plaintiffs now raise, as they were never advanced. Allowing the plaintiffs to assert these arguments for the first time on appeal when Travelers is precluded from supplementing the record with additional evidence is unduly prejudicial.

Although New Hampshire is a notice pleading state, the plaintiffs' initial complaint must still "state the general character of the action and put both the court and counsel on notice of the nature of the controversy." *Pike Industries v. Hiltz Const*r. 143

N.H. 1, 4 (1998). In this case, the plaintiffs' complaint did not allege the appraisal process language was unenforceable nor did it allege that Travelers violated Administrative Rules 1002.16(d) or 1002.09 as required by Superior Court Rule 8. The plaintiffs' attempt to amend their complaint on appeal should be rejected by this Court.

In *Donald Toy v. City of Rochester*, 172 N.H. 443 (2019) the defendant challenged the underlying verdict because the plaintiff's complaint did not allege the imposition of restrictive covenants violated the conditions of sale. This Court observed that it "is well settled that a defendant is entitled to be informed of the theory on which the plaintiff is proceeding and the redress that the plaintiff claims as a result of the defendant's actions. *Porter v. City of Manchester*, 151 N.H. 30, 43, 849 A.2d 103 (2004)." *Donald Toy,* 172 N.H. at 448. This Court found no surprise as the claim had been advanced in the parties summary judgment pleadings. The Court also found the defendant had not timely objected to the evidence. Based upon the record, this Court concluded it saw "no unfairness in the trial court's consideration of the [plaintiff's] arguments and evidence submitted at trial. *Cf. Morancy v. Morancy*, 134 N.H. 493, 497-98, 593 A.2d 1158 (1991)." *Donald Toy,* 172 N.H. at 448.

Unlike the setting in *Donald Toy*, no party raised any arguments addressing appeal issues I, II, and IV until appeal.[2] The plaintiffs' late assertion of new theories of liability should be excluded just as the defendant's late assertion of an undisclosed defense was precluded in *Welch v. Gonic Realty Trust Co.*, 128 N.H. 532 (1986). In that case, the defendant argued at trial, for the first time the plaintiff should not recover because he was trespassing at the time of his injuries. This Court concluded it was reversible error to allow the defendant to assert an undisclosed defense that was not in its answer or pretrial statement. Similarly, here, the plaintiffs' complaint did not allege that the underlying appraisal award should be overturned because it was not binding. The plaintiffs' complaint also failed to reference Administrative Rule 1002.16(d) or 1002.09. The only Administrative Rule referenced in the Plaintiffs' lengthy complaint is 1002.16(a)(1).

[2] Plaintiffs' complaint alleged a violation of Administrative Rule 1002.16 (a)(1), however no evidence addressing that alleged rule violation was presented to the Trial Court. (Appeal Issue III).

Travelers had no notice of appeal issues I, II and IV, as they were not contained in the plaintiffs' Complaint. Thus, in addition to these theories not being a subject of briefing in the court below, neither Travelers nor the Trial Court had reason to anticipate them.

As such the plaintiffs' appeal should be dismissed and/or the summary judgment in favor of Travelers be affirmed because the plaintiffs' have failed to preserve any of the issues it raises for the first time on appeal.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS THE POLICY'S APPRAISAL LANGUAGE, THAT A DECISION BY ANY TWO APPRAISERS "WILL SET THE AMOUNT OF LOSS," IS BINDING AND ENFORCEABLE.

If this Court should decline to dismiss based on a lack of preservation of the issues, the Court should affirm summary judgment on the merits because the policy language is unambiguous, binding, and enforceable.

The plaintiffs ask this Court to reverse the Trial Court's summary judgment order enforcing the parties' underlying appraisal award because they maintain Travelers' appraisal language does not expressly state the award is "binding." Instead, the Travelers language states that an appraisal decision agreed to by any two, "will set the amount of loss." This appraisal language immediately follows the policy language that confirms **Loss Payment** will be made by one of three ways including:

a. Reach[ing] an agreement with you;
b. There is an entry of a final judgment;
c. There is a filing of an appraisal award with us. (App. 36).

The plaintiffs' challenge to the finality of an appraisal award ignores the policy's Loss Payment language, which expressly identifies an appraisal award as equivalent to a final judgment and one of three ways a covered loss is adjudicated. The suggestion that appraisal is informative but not binding would eliminate the very basis for invoking appraisal as an informal, less expensive and more expedient process by which to adjudicate a covered loss without court intervention. The absence of the word "binding" in the appraisal clause does not make the appraisal clause language tentative or

ambiguous. In fact, the language in the Travelers' policy, which confirms that a decision by any two appraisers "will set the amount of loss," is similar to the language endorsed and required by the N.H. Legislature for every fire loss policy issued in New Hampshire. See RSA 407:22.

Pursuant to RSA 407:22, every fire policy issued in New Hampshire must contain the option of appraisal. The statutorily mandated appraisal language does not state that a decision of any two will be "binding." Instead, the statutory language in RSA 407:22, much like Travelers' language, states, "[a]n award in writing, so itemized, of any 2 when filed with this Company *shall determine the amount of actual cash value and loss*." N.H. Rev. Stat. Ann. § 407:22 (emphasis added). The plain language used by the Legislature to characterize binding appraisal entirely rebuts the plaintiffs' position as a matter of law.

Beyond the fact that New Hampshire law already supports the binding enforceability of a decision of two appraisers that "sets" or "determines" the amount of an insured loss, (See RSA 407:22), none of the foreign case law cited by the plaintiffs supports a contrary view. For example, in *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142 (Ct. App. Tenn. 2001) a Tennessee Court of Appeals invalidated an appraisal award because it did not comply with state law, not because of the alleged non-binding policy language. Under Tennessee law, a written agreement to submit a matter to arbitration requires the signature of both parties. Tennessee Statute 29-5-302 (a). The insured, however, did not sign the appraisal clause in Merrimack's policy or the policy application and the Court concluded that pursuant to Tennessee's statutory law, neither party could require the other to submit to binding arbitration without such signature. The Court of Appeals decision in *Batt*s is not persuasive because New Hampshire has no comparable statute requiring a written agreement signed by the parties before appraisal can be invoked.

The Tennessee Batts Court also found that the appraisers had exceeded their authority. Specifically, the Merrimack homeowner's policy allowed the appraisers to determine the "amount of the loss," but did not authorize the appraisers to determine coverage including whether any particular loss or damage was caused by a covered peril.

The Court noted responsibility for resolving disputes over coverage rests with the Court, not the appraisers. Accordingly, the Court concluded the appraisers had erroneously decided coverage issues when they determined the cause of various damages. In this case, the plaintiffs do not assert the appraisers improperly decided coverage issues in appraisal, and instead dispute solely the amount of loss set by the panel.

The Wisconsin Supreme Court decision cited by the plaintiffs does not support their appeal because that Court enforced appraisal language similar to Travelers. *Farmers Automobile Ins. Assoc. v. Union Pacific Railway Co.*, 768 N.W.2d 596 (WI 2009). The appraisal clause in that case stated:

> The appraisers will separately set the amount of 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 an umpire. *A decision agreed to be any two will set the amount of loss.*

768 N.W.2d at 605 (emphasis added). In *Farmers*, the insured filed suit prior to the invocation of appraisal. The Wisconsin Supreme Court dismissed the suit without a ruling to allow the appraisal process to proceed.

The insured then "sent a letter to Farmers indicating that he would only continue the appraisal process if it was not conducted pursuant to the Policy, and was simply considered part of the mediation process and non-binding." *Farmers Auto. Ins.,* 768 N.W.2d at 601. The insured confirmed his understanding that appraisal policy language, similar to Travelers, was binding. The carrier refused to modify its policy terms to substitute mediation for binding appraisal and asked the Court to enforce the appraisal agreement. The Court granted the carrier's motion and the appraisal panel set the value. The insured then moved to vacate and/or modify the binding award.

On appeal, the insured argued the appraisal process was not binding, but the Court concluded the insured was "simply wrong" in his assertion. The Court stated, "[t]he text of the [policy] provision clearly provides for an appraisal process that may be invoked by either party and, 'will set the amount of loss upon its completion." 768 N.W.2d at 604-605. Thus, the Wisconsin Supreme Court expressly rejected the very

arguments raised by the plaintiffs in this appeal. As the Wisconsin Supreme Court noted, appraisals "deserve a more deferential review because the appraisal process is a fair and efficient tool for resolving disputes. . . . Appraisals also promote finality, are time and cost-efficient and place a difficult factual question – the replacement value of an item – into the hands of those best equipped to answer that question. As a form of alternative dispute resolution, the appraisal process is favored and encouraged." 768 N.W.2d at 607. The Wisconsin Supreme Court's decision favors this Court's affirmance of the summary judgment order in Travelers' favor.

The plaintiffs in this case seem to base their argument solely on the dissent in that case; notwithstanding the dissenting opinion, Wisconsin embraces the notion that such appraisal language firmly establishes that arbitration *is* binding. Thus, in an unpublished decision, the Wisconsin Court of Appeals in *Esser v. Hawkeye-Sec. Ins. Co.*, 2018 WL 2422652, 917 N.W.2d 233 (Ct. App. WI 2018), later enforced the finality of appraisal language similar to that contained in the Travelers' policy relying in part on *Farmers Automobile Ins. Assoc. v. Union Pacific Railway Co.*, 768 N.W.2d 596 (WI 2009). There the policy language stated, "appraisers will separately set 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.*" *Esser v. Hawkeye-Sec. Ins. Co.,* 917 N.W.2d 233 *4 (Ct. App. WI 2018)(emphasis added).

In *Esser*, the insured received a $2.7 million appraisal award. Post-award the insured argued they should be allowed to return to appraisal for items not included in the first proceeding. *Id.* The Court rejected the insured's argument, noting in part the policy's loss payment language, which like the Travelers' policy, equates the issuance of an appraisal award with a final judgment that concludes all matters between the parties. *Id*. at *6. This Court should likewise find the Travelers' appraisal language is enforceable, it is binding and it is a final resolution of any damage claims the insureds could have litigated in relation to their water claims. (App. 103, *6).

The plaintiffs' brief next represents that the Federal District Court for the District of Maine "entered a similar order" to that issued by a Louisiana court with respect to the

non-binding authority of appraisal. Notably, Louisiana provides the only case cited by the plaintiffs in which a court refused to enforce appraisal language similar to that contained in the Travelers policy. For reasons more fully stated below, the plaintiffs misconstrue the significance of that case. Regardless, contrary to the plaintiffs' representation, the Maine District Court did not invalidate the appraisal language before it in *Musto v. Liberty Ins. Co.*, 2020 WL 7212989 (D. Me. 2020). Instead, the Musto Court noted that it was premature to decide the issues raised by the plaintiffs in response to a 12(c) Motion for Judgment on the Pleadings. At best, the Court noted there were disputed issues regarding the appraisal process, including the legitimacy of the award due to non-compliance with the policy and the independence of the appraisers. The Court concluded the case was in an "embryonic state" and that the defendant would be free to renew its arguments that the appraisal award was binding in a Motion for Summary Judgment at a later date. The District Court's decision in *Musto* did not address whether the appraisal language was binding and does not support the plaintiffs' allegation that the Travelers' appraisal language is ambiguous and unenforceable.

As noted, the only support cited by the plaintiffs that remotely suggests that an appraisal award may be non-binding is in dicta in an unreported decision issued by a Federal Court for the District of Louisiana. *Lewis v. Republic Fire & Cas. Ins. Co.*, 2016 WL 112732 (W.D. LA. 2016). The Western District Court's decision was not based on a finding that the appraisal language was non-binding but rather because no umpire had been selected to resolve the appraisers' differences. Further, the case is factually distinguishable from the one before this Court.

In *Lewis*, the insured claimed damages following a fire loss. The carrier investigated and issued a payment; however, the insured invoked appraisal. Two appraisers reviewed the loss and executed an appraisal award following which the carrier issued a supplemental payment. Post-appraisal, while doing repairs the insured's contractor discovered "hidden damage and missing items" totaling $39,006.49; the

estimate was submitted to the insured's appraiser who then signed off. The carrier refused, however, to consider another supplemental payment and the insured filed suit.

The Western District Court concluded that in order to affirm the appraisal award and dismiss the plaintiff's breach of contract and bad faith claims, it would have to "conclude the appraisal award amount and that the process has been completed; the appraisal award is binding; and the plaintiff's dwelling damages under the policy are limited to the amount contained in the appraisal award." 2016 WL 112732 ¶ 5. The Court concluded it could not grant the insurer's request because it lacked the authority to do so and it could not conclude the appraisal process had been completed. Particularly, the Court found that the two appraisers did not agree to the amount of the loss and, notwithstanding the policy language providing that appraisal differences be submitted to an umpire that was not done. Additionally, the policy did not provide that the court could set the amount loss rather, that was something to be done by appraisal – a process that had not been completed.

Unlike *Lewis*, the plaintiffs here did not submit a supplemental post-appraisal demand for hidden damages. Although they describe "missing" damage items as hidden in their brief, (15-17) in the Complaint the plaintiffs allege their damages totaling $4,495 were "missed items not paid for outside of repair costs" as opposed to post-appraisal hidden damages. (App. 96-106). In contrast to the damages in *Lewis*, all the damages claimed by the plaintiffs here were, or could have been, submitted to appraisal. For instance, the plaintiffs asserted that beginning in mid-December 2017 and during negotiations, <u>prior to appraisal</u>, they "noticed that there were significant aspects of the reconstruction missing from the insurance offers they were receiving. These were pointed out to the adjustor." (App. 98-99, ¶ 20). The plaintiffs claim they had to point these items out to multiple adjustors on multiple occasions. (App. 99, ¶ 21). The plaintiffs claim the items missing from the Travelers' estimate caused a wide "disparity between what the insurance company would agree to pay, and the actual cost of doing the work…." (App. 99, ¶ 24). The plaintiffs claim they "continued to point out issues and items that were missing from the Travelers estimates." (App.100-101, ¶ 27, 33). All of

the plaintiffs' allegations of missed damages pre-date appraisal. (App. 96-106). The plaintiffs' Complaint contains no assertion of "hidden" post appraisal damages, rendering the *Lewis* decision entirely inapplicable to this case. *Id.*

The clear trend in case law it to uphold appraisal clauses such as that involved in this case as binding. For instance, in *Jupiter Aluminum Corp. v. Home Ins. Co*., 225 F.3d 868 (7th Cir. 2000) the Seventh Circuit Court of Appeals rejected an insured's challenge that Home's appraisal language was not binding. Home's policy language, like Travelers', stated, "the appraisers shall then appraise the loss, stating separately actual cash value, and loss to each item, and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company *shall determine the amount of actual cash value and loss." Jupiter Aluminum Corp. v. Home Ins. Co.,* 225 F.3d 868, 875 (7th Cir. 2000)(emphasis added). The Seventh Circuit found the absence of the word "binding" in the appraisal clause did not render the award unenforceable. Instead, "the strongest indication in Jupiter's policy that the appraisal would be binding can be found in the statement that the appraisal award "shall determine" the amount of the loss." *Jupiter Aluminum Corp.* 225 F.3d at 875.

Similarly, the Supreme Court of Texas enforced appraisal language that stated "[t]he 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." *State Farm Lloyds v. Johnson,* 290 S.W.3d 886, 888 (Tex. 2009). The Court found that in every property damage claim, "someone must determine the 'amount of loss,' as that is what the insurer must pay. An appraisal clause 'binds the parties to have the extent or amount of the loss determined in a particular way.' Like any other contractual provision, appraisal clauses should be enforced." *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009).

This Court should enforce the binding nature of the parties' appraisal award as it is the equivalent of a final judgment and/or settlement among the parties. *See generally* 15 Couch on Insurance Section 213"12 (2020); 2 Ins. Claims & Disputes Section 9:33 (6th ed.).

III. **NEW HAMPSHIRE ADMINISTRATIVE RULE INS. 1002.16(d), WHICH REQUIRES A PROVISION FOR HIDDEN DAMAGES IN ALL SETTLMENT OFFERS, DOES NOT APPLY TO THE PARTIES' APPRAISAL AWARD**

This Court should not review the plaintiffs' arguments with regard to New Hampshire Administrative Rule Ins. 1002.16(d) as the alleged rule violation was not raised in the Trial Court and was not raised in the plaintiffs' Complaint. For the first time on appeal, the plaintiffs argue this Court should reverse summary judgment that concluded the plaintiffs' damages were either not covered under the policy and/or encompassed within the binding appraisal award, because of alleged Insurance Department Rule violations. If the plaintiffs believed such rule violations had occurred, which Travelers disputes, it should have raised them during the course of appraisal or in their complaint as opposed to on appeal.

If this Court addresses the alleged Rule violation on its merits notwithstanding plaintiffs' failure to preserve the issue for appeal, the Court should reject the plaintiffs' contention because the Rule simply does not apply. The Rule requires "a provision for coverage of hidden damage" that post-dates "any settlement made based upon an agreement negotiated by an adjuster on behalf of the insurer with a contractor or repairer." 1002.16(d). Travelers did not reach a settlement with the plaintiffs so there is no requirement that it include a provision to allow for the payment of potential hidden damages. The parties were unable to reach an agreement on the cost of repairs and thus submitted the question to appraisal.

Additionally, contrary to the representations by appellate counsel, the plaintiffs did not assert a "hidden damage" claim in their Complaint. Rather, as noted, plaintiffs claim that during the adjustment process in December 2017, Travelers missed "significant

aspects of the reconstruction" in their estimates. The plaintiffs identified these omissions to the adjuster. (App. 99, ¶ 20). The plaintiffs claimed their home had many custom features that "Travelers failed and/or refused to take into consideration during their review process." (App. 99, ¶ 22). For instance, the insured alleged she had to point out the measurement of her cabinets, as they were not standard to ensure appropriate pricing. (App 99, ¶ 23). This course of conduct, according to the plaintiffs, resulted in a disparity between what Travelers was willing to pay and the actual cost of doing the work. (App. 99, ¶ 24). After receiving Travelers' estimates the "plaintiffs continued to point out issues and items that were missing from the Travelers estimates." (App. 100, ¶ 27). The plaintiffs asserted, "*Travelers has refused to pay the total actual value of the claims, even after the Plaintiffs demonstrated missed items and inaccurate costs in the Travelers estimates*." (App. 101, ¶ 33)(emphasis added). Finally, they claimed, "Travelers engaged in unfair settlement practices when it continuously left items off its estimates after receiving supporting evidence from the Plaintiff/Insureds…" (App. 103, ¶ 49).

The plaintiffs' Complaint confirms they seek repair costs identified during the claims process, which Travelers refused to pay. These missed repair costs were not described as "hidden" in their Complaint and to re-characterize them on appeal as such is inappropriate. Absent an allegation in their Complaint for "hidden" damages the plaintiffs' reliance on Insurance Rule 1002.16(d) and the cases cited in argument II of plaintiffs' brief are misplaced. Because a violation of Rule 1002.16(d) is wholly unsupported by the facts in the record, the plaintiffs' argument must fail.

IV. NEW HAMPSHIRE ADMINISTRATIVE RULE INS. 1002.16(a)(1), WHICH REQUIRES INSURERS TO BASE ALL SETTLEMENT OFFERS ON ESTIMATES FROM CONVENIENTLY LOCATED CONTRACTORS, DOES NOT APPLY TO THE PARTIES' APPRAISAL AWARD.

The plaintiffs did allege that Travelers' recommended contractors were not conveniently located or known in the area and this might be construed as raising a violation of Ins. Rule 1002.16(a)(1) in plaintiffs' Complaint. (App. 100, ¶28).

Significantly, however, the plaintiffs did not raise this alleged Rule violation with the Trial Court and thus it is not preserved for appeal.

Even if this Court were to determine that the issue was somehow preserved, which Travelers denies, summary judgment should still be affirmed. As noted previously, Rule 1002.16 applies to "every settlement offer" made by the insurer. Ins. R. 1002.16(a). Although Travelers' attempted to resolve this loss prior to appraisal, the plaintiffs refused its offers and the claims were not resolved until the February 2019 appraisal award. (App. 119). If the plaintiffs disputed the ability of the contractors retained by Travelers to perform the repairs, their recourse was to present estimates from their own alternative local contractors in appraisal.

Because the plaintiffs failed to contest the appraisal process and instead simply dispute the amount of the award, this Court should presume the appraisal panel acted in accordance with all applicable Insurance Regulations, including any obligation that repairs be made by a competent and conveniently located contractor for the dollar award rendered. *Bean v. Red Oak Mgt. Inc.*, 151 N.H. 248 (2004)(appellate court would assume that evidence supported the trial court when the moving party failed to provide a record for appeal.). Again, because the plaintiffs never raised this issue in the Trial Court below, this Court should affirm the Trial Court's decision because the undisputed record does not establish a violation.

V. NEW HAMPSHIRE ADMINISTRATIVE RULE INS. 1002.09 DOES NOT APPLY BECAUSE THE PLAINTIFFS DID NOT INCUR A TOTAL LOSS.

Also for the first time on appeal, the plaintiffs claim that Travelers violated Insurance Rule 1002.09(b). (Issue IV). This alleged rule violation is not contained within the plaintiffs' Complaint. Nor did the plaintiffs raise this argument in response to Travelers' Motion for Summary Judgment and thus it is not preserved for appeal. *Daboul v. Town of Hampton*, 124 N.H. 307, 309 (1983)(citing *Carburs, Inc. v. A&S Office Concepts, Inc.*, 122 N.H. 421, 423 (1982)).

If this Court were to review this argument on its merits, affirmation of summary judgment is appropriate because the rule simply does not apply. The Rule's preface itself confirms that it applies when the insureds property has been "determined to be a total loss." The plaintiffs' Complaint does not allege a total loss; rather, the pleadings allege water loss damage that partially impacted their home. *Cf. Nicolaou v. Vermont Mut. Ins. Co.*, 155 N.H. 724 (2007)(general discussion of total loss policy provision).

CONCLUSION

The Trial Court's decision should be affirmed on appeal. The plaintiffs' appeal arguments were not set forth in their Complaint or in response to Travelers' Motion for Summary Judgment. The plaintiffs should not be allowed to raise legal and factual challenges to the appraisal process for the first time on appeal.

The entirety of the record on appeal consists of the Travelers' evidence and argument in support of summary judgment in its favor. There being no contrary evidentiary record establishing either an issue of disputed fact or law, summary judgment should be affirmed on its merits.

Respectfully submitted,

Travelers Home and Marine Ins. Co.
By its attorneys,
Primmer Piper Eggleston & Cramer PC

Date: 6/9/2021

By: /s/ Doreen F. Connor

Doreen F. Connor, #421
P.O. Box 3600
Manchester, NH 03105
(603) 626-3300
dconnor@primmer.com

REQUEST FOR ORAL ARGUMENT

Given the plaintiffs' failure to preserve any of the issues they raise on appeal oral argument is unnecessary. The Trial Court's Summary Judgment Order should be affirmed on the Briefs without oral argument.

/s/ Doreen F. Connor
Doreen F. Connor, #421

CERTIFCATION OF WORD LIMIT

I hereby certify that the total words in this Brief do not exceed the maximum of 9,500 words.

/s/ Doreen F. Connor
Doreen F. Connor, #421

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was this day served via electronic submission through the Court's electronic filing system upon R. James Steiner, Esquire.

/s/ Doreen F. Connor
Doreen F. Connor, #421

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THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. SUPERIOR COURT

Dylan O'Malley-Joyce and Eileen Nash

v.

Travelers Home and Marine Insurance Company

215-2019-CV-00494

MEMORANDUM OF LAW IN SUPPORT OF TRAVELERS HOME AND MARINE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Travelers Home and Marine Insurance Company ("Travelers") is entitled to summary judgment on Dylan O'Malley-Joyce and Eileen Nash's ("Plaintiffs'") breach of contract/bad faith/statutory violations claim and their declaratory judgment claim arising from water damage at the premises located at 141 Ellsworth Hill Road, Campton, New Hampshire (the "Property"). Plaintiffs' breach of contract claim is improper as Plaintiffs participated in an appraisal pursuant to the terms of Travelers Policy No. 9969987606331 (the "Policy") with respect to the water damage at the Property. That appraisal precludes Plaintiffs from seeking additional damages through a breach of contract claim. Plaintiffs similarly cannot maintain a bad faith claim against Travelers as their claimed damages are either barred by the appraisal or not covered under the Policy. Plaintiffs have no cause of action against Travelers for alleged violations of the New Hampshire Unfair Insurance Practices Act (the "Act") as the New Hampshire Insurance Commissioner (the "Insurance Commissioner") has not found that Travelers violated the Act, a prerequisite for such a claim. Plaintiffs' declaratory judgment claim also cannot succeed as such a claim is improper in a case where coverage is not in dispute. In further support hereof, Travelers submits the following.

BACKGROUND

I. The Policy.

On January 2, 2017, Travelers issued the Policy, a homeowners policy, to plaintiff Dylan O'Malley-Joyce. *See* Complaint, ¶ 4; *see also* Policy, attached to the statement of material facts as Exhibit A, p. 68.[1] The Policy is effective January 15, 2017 to January 15, 2018. Policy, p. 82. The Policy provides that "[t]he Residence premises is located at 141 ELLSWORTH HILL RD, CAMPTON NH 03223-4113." *Id.* The Policy defines "Residence premises" as

> a. The one family dwelling where you reside; or
>
> b. The two, three or four family dwelling where you reside in at least one of the family units;
>
> and which is shown as the "residence premises" in the Declarations.
>
> "Residence premises" also includes other structures and grounds at that location.

Id., p. 90. "Coverage A – Dwelling" of the Policy's Property Coverages provides, in pertinent part:

> 1. We cover:
>
> a. The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling; and
>
> b. Materials and supplies located on or next to the "residence premises" used to construct, alter or repair the dwelling or other structures on the "residence premises".

Id. "Coverage B – Other Structures" of the Policy's Property Coverages provides, in pertinent part:

> 1. We cover other structures on the "residence premises" set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.

[1] The page numbers for the Policy are from the Bates numbers beginning OMALLEYJOYCE.

Id. The Policy states that "[w]e insure against risk of **direct physical loss to property** described in Coverages A and B." *Id.*, p. 97 (emphasis added).

In its "Appraisal" provision, the Policy states:

> 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 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 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 difference to the umpire. A decision agreed to by any two will set the amount of loss.

Id., p. 103. With respect to "Inflation Coverage," the Policy provides:

> We may adjust the limits of liability for Coverages A, B, C and D at the beginning of each successive policy term to reflect increases in the cost of insured property. The amount of such increase will be based on the data provided by the appraisal company shown in the Declarations. Payment of the required premium when due for the successive policy term will be sufficient to indicate your acceptance of the adjusted limits.
>
> We will also adjust the limits of liability at the time of a loss by the same percentage pro rated from the effective date of the policy period or the effective date of change if you have requested a change to the limit of liability for Coverage A during the policy period.

Id., p. 96. The Policy also states that Travelers "may elect not to renew this policy." *Id.*, p. 111.

II. Water Damage At The Property.

On November 27, 2017, the damage to the Property was reported to Travelers due to a water leak that occurred when an ice maker line parted (the "November Water Damage"). *See* Complaint, ¶ 10. The November Water Damage resulted in a claim against the Policy. *See id.*, ¶¶ 10-11. In early January 2018, a frozen pipe in the Property's master loft caused a second water

leak at the Property, resulting in damage (the "January Water Damage"). *See id.*, ¶ 15. The January Water Damage resulted in a second claim against the Policy. *See id.*, ¶ 16. The claims resulting from the November Water Damage and the January Water Damage occurred during the Policy's policy period. *See id.*, ¶ 17.

Travelers has not denied coverage for the claims arising from the November Water Damage or the January Water Damage. *See id.*, ¶ 33. Despite this reality, Plaintiffs and Travelers had a number of disagreements regarding the cost and scope of the repairs to the Property after the November Water Damage and the January Water Damage. *See id.*, ¶¶ 19-27. Pursuant to the Policy's "Appraisal" provision, Travelers made a written demand to initiate the appraisal process. *See* November 19, 2018 Appraisal Demand Letter, attached to the statement of material facts as Exhibit B. Plaintiffs and Travelers then engaged in the appraisal process with respect to the value of the loss resulting from the November Water Damage and the January Water Damage. *See* Complaint, ¶ 32. After the appraisal, Travelers paid an appraisal award. *See* Answer, ¶ 32; *see also* February 22, 2019 Appraisal Award, attached to the statement of material facts as Exhibit C.

III. The Allegations In The Complaint.

On November 19, 2019, Plaintiffs filed the Complaint initiating this action. *See generally* Complaint. In the Complaint, Plaintiffs allege that "Travelers has refused to pay the total actual value of the claims" arising from the November Water Damage or the January Water Damage. *See id.*, ¶ 33. Plaintiffs further claim that "[t]here are ongoing disputes as to the value of the claim and the balance owed to the Plaintiffs." *Id.*, ¶ 34.

Plaintiffs assert two counts: one for "breach of contract, bad faith, statutory violations" and a second declaratory judgment claim. *See id.*, ¶¶ 36-61. With respect to their first claim, Plaintiffs state:

> The actions of the Defendant Travelers in failing to properly adjust the Plaintiffs' claim, to pay the claim as a single claim, and to provide contractors who could properly perform the work required on the Plaintiffs' property constitute breaches of the parties' contract of insurance, and of the underlying obligation of good faith and fair dealing and has handled the claim to the detriment of the Plaintiff and to its own benefit.

Id., ¶ 57. With respect to their declaratory judgment claim, Plaintiffs state:

> The Defendant has not denied coverage under the policy, but, has undervalued the loss, has recommended inappropriate contractors, has manipulated the loss so as to be able to deny renewal of the Plaintiffs' policy, and has failed to comply with the Policy of Insurance thereby limiting the Defendant Travelers' liability to the Plaintiff.

Id., ¶ 60. Plaintiffs also allege violations of N.H. Rev. Stat. Ann. § 417 by Travelers with respect to Plaintiffs' claims related to the November Water Damage and the January Water Damage. *See id.*, ¶¶ 49-52.

IV. Plaintiffs' Alleged Damages.

In their automatic disclosures, Plaintiffs claim lost wages, increased premiums for homeowners' insurance, the difference between the amount paid for repairs to the Property and the actual costs for those repairs, alleged missed items not included as part of the costs to repair the Property, mortgage cost increases, inflation, and damages that allegedly occurred during the repair of the Property after the November Water Damage and the January Water Damage. *See* Cover Letter to Plaintiffs' Automatic Disclosures, attached to the statement of material facts as Exhibit D, p. 1-2. According to Plaintiffs' Damages Summary, Plaintiffs claim the following damages:

1. Lost wages / Lost income $355,187.00
2. Increase in policy premiums due to "second claim" $7,020.00
3. Difference between amount paid for repairs and actual costs $15,012.00
4. Missed items not paid for outside of repair costs $4,495.00
5. Mortgage cost increases $14,891.32

6. Inflation $5,667.64
7. Damaged property (driveway, landscaping) $78,391.66.

Plaintiffs' Damages Summary attached to Plaintiffs' Automatic Disclosures, which is attached to the statement of material facts as Exhibit E.

LEGAL STANDARD

Summary judgment is an appropriate means of avoiding the time and expense of trial, *High Country Assocs. v. New Hampshire Ins. Co.*, 139 N.H. 39, 41 (1994), and it should be granted where "there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law." *Guilfoy v. United Servs. Auto. Ass'n*, 153 N.H. 461, 462 (2006); *see* N.H. Rev. Stat. Ann. § 491:8-a. Insurance coverage disputes are routinely resolved by summary judgment as the "interpretation of insurance policy language is a question of law for this court to decide." *Godbout v. Lloyd's Ins. Syndicates*, 150 N.H. 103, 105 (2003). New Hampshire courts "construe the language of an insurance policy as would a reasonable person in the position of the insured based on a more than casual reading of the policy as a whole," giving "the language its natural and ordinary meaning" unless it is "reasonably susceptible to more than one interpretation." *Miller v. Amica Mut. Ins. Co.*, 156 N.H. 117, 119-20 (2007).

ARGUMENT

I. Plaintiffs' Breach Of Contract Claim Cannot Succeed As Plaintiffs Participated In A Binding Appraisal Process That Set The Amount Of Loss Resulting From The November Water Damage And The January Water Damage.

After the November Water Damage and the January Water Damage, Plaintiffs had a number of disagreements with Travelers regarding the cost and scope of the repairs to the Property. *See* Complaint, ¶¶ 19-27. Pursuant to the Policy's "Appraisal" provision, Plaintiffs and Travelers engaged in the appraisal process to determine the value of the loss resulting from the November

Water Damage and the January Water Damage. *See id.*, ¶ 32. After the appraisal, Travelers paid the appraisal award. *See* Answer, ¶ 32; *see also* Appraisal Award.

The Policy's "Appraisal" provision states, in pertinent part, that "[i]f you and we fail to agree on the amount of loss, either may demand appraisal of the loss." Policy, p. 103. It further provides that "[a] decision agreed to by any two [of the appraisers and/or umpire] **will set the amount of loss.**" *Id.* (emphasis added). As this language makes clear, the Policy's appraisal process is intended to be conclusive regarding the amount of a loss. Plaintiffs cannot avoid the appraisal award, nor seek additional damages by now alleging a breach of contract.

It is well-settled that as a general matter, an appraisal award is the result of a contractual method of ascertaining the amount of loss under a property insurance policy, and it is binding on the parties as to the amount of loss unless the award is set aside. See *Bell v. Liberty Mut. Fire Ins. Co.*, 319 Ga. App. 302, 734 S.E.2d 894 (2012); *Villas at Winding Ridge v. State Farm Fire and Cas. Co.*, 942 F.3d 824 (7th Cir. 2019)(under Indiana law, insurance appraisal awards are binding absent exceptional circumstances, which means manifest injustice, fraud, collusion, misfeasance, or unfairness, particularly when the parties voluntarily submit to an appraisal under the policy). Further, contractually specified appraisal awards are presumed accurate. See *St. Charles Par. Hosp. Serv. Dist. No. 1 v. United Fire & Cas. Co.*, 681 F. Supp. 2d 748, 754 (E.D. La. 2010). "The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court." *TMM Invs., Ltd. v. Ohio Cas. Ins. Co.*, 730 F.3d 466, 472 (5th Cir. 2013) (citation omitted).

An appraisal award is akin to an arbitration award. Like with an arbitration, Travelers made a written demand to initiate the appraisal process. Plaintiffs and Travelers then selected competent and disinterested parties to appraise the amount of the loss. These appraisers then

independently determined the value of Plaintiffs' loss and issued the Appraisal Award based on that determination. *See* Appraisal Award. Had the appraisers been unable to agree on the value of the loss, they would have presented evidence to a competent and disinterested umpire who would then have determined the value of Plaintiffs' loss.

Although New Hampshire courts have not directly addressed the issue, numerous courts have recognized that an appraisal is a form of arbitration and that an appraisal award should therefore be afforded the finality accorded to an arbitration award. *See, e.g., Penn Cent. Corp. v. Consol. Rail Corp.*, 56 N.Y.2d 120, 130 (1982) (ruling that "a dissatisfied party who participated in the selection of an independent appraiser has no greater right to challenge the appraiser's valuations than he would have to attack an award rendered by an arbitrator") (internal quotations omitted); *Loyalty Dev. Co. v. Wholesale Motors, Inc.*, 61 Haw. 483, 487-88 (1980) (concluding that "the determination of market value of the demised premises made by the appraisers or a majority of them had the binding effect of a judgment of a court of law and that the function of the panel of appraisers herein was the function of a board of arbitration"); *Washington Automotive Co. v. 1828 L Street Assocs.*, 906 A.2d 869, 875 (D.C. Ct. App. 2006) (explaining that "appraisal agreements are treated like arbitration agreements in that they are accorded deference comparable to that which is given to decisions by arbitrators") (internal quotation omitted); *Cambridge Street Metal Co. v. Corrao*, 30 Mass. App. Ct. 150, 155 (1991) ("In the absence of fraud, neither errors of fact nor errors of law are sufficient to set aside the award of an arbitrator. .... Substantially the same rule applies to the award of an appraiser."); *Safeco Ins. Co. v. Sharma*, 160 Cal. App. 3d 1060, 1063 (1984) ("In view of the similarity between arbitration and appraisal enforcement proceedings... we apply to the appraisal proceeding at issue herein the general standard of review applicable to arbitration. Accordingly, every presumption favors the arbitrator's award.") (internal

quotations omitted); *Hirt v. Hervey*, 118 Ariz. 543, 546 (Az. Ct. App. 1978) (noting that a "review of cases from other jurisdictions reflects that the overwhelming weight of authority supports the view that decisions of an appraiser or other financial expert acting in the role of an appraiser are entitled to the same degree of finality accorded decisions of arbitrators").

Although New Hampshire has not directly addressed this question, the Supreme Court has ruled that where "[b]oth parties submitted the question of damages to the determination of the referees… they must be bound by the finding of the referees relating thereto." *Salganik v. U.S. Fire Ins. Co.*, 118 A. 815, 818 (N.H. 1922). Further, New Hampshire law explicitly recognizes that:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or an agreement in writing to submit to arbitration any controversy existing at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

N.H. Rev. Stat. Ann. § 542:1. Considering New Hampshire's general policy favoring alternative dispute resolution, this Court should afford the Appraisal Award the same deference it would an arbitration award. *See Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 121 N.H. 344, 348 (1981) (noting with respect to alternative dispute resolution that "courts value the saving of scarce and valuable legal and judicial time and talent that results from this method of settling controversies").

As Plaintiffs are bound by the Appraisal Award, they cannot now seek additional damages related to the November Water Damage or the January Water Damage through a breach of contract claim. As the Policy provides, "[a] decision agreed to by any two [of the appraisers and/or umpire] **will set the amount of loss**." Policy, p. 103 (emphasis added). As the Appraisal Award reflects, Plaintiffs' and Travelers' appraisers agreed to an amount of loss. *See* Appraisal Award. This

amount is conclusive regarding the amount of Plaintiffs' loss and binding with respect to Plaintiffs. Accordingly, Plaintiffs' breach of contract claim must fail.

II. Plaintiffs' Claimed Damages Are Either Barred By The Appraisal Award Or Not Covered Under The Policy.

In addition to not stating a viable breach of contract claim, Plaintiffs also seek damages that are not covered by the Policy's Property Coverage. In their automatic disclosures, Plaintiffs claim lost wages, increased premiums for homeowners' insurance, the difference between the amount paid for repairs to the Property and the actual costs for those repairs, alleged missed items not included as part of the costs to repair the Property, mortgage cost increases, inflation, and damages that allegedly occurred during the repair of the Property after the November Water Damage and the January Water Damage. *See* Cover Letter to Plaintiffs' Automatic Disclosures, p. 1-2. The Policy provides that "[w]e insure against risk of **direct physical loss to property** described in Coverages A and B." Policy, p. 97 (emphasis added). The relevant property is 141 Ellsworth Hill Road, Campton, New Hampshire. *Id.*, p. 82.

The Policy's Property Coverage does not entitle Plaintiffs to lost wages because those damages are not part of the direct physical loss to the Property. Nothing in the Policy's Property Coverage states, nor even suggests that an insured could be entitled to lost wages as a result of a first-party property damage claim. "Coverage A – Dwelling" of the Policy's Property Coverages provides that Travelers will cover the dwelling on the Property and various supplies. *See id.*, p. 90. "Coverage B – Other Structures" of the Policy's Property Coverages provides that Travelers will cover other structures on the Property. *See id.* No provision indicates that Plaintiffs could be entitled to recover lost wages.

Plaintiffs' damages claim related to increased premiums for homeowners' insurance also fails. As Plaintiffs admit, the November Water Damage and the January Water Damage occurred

during the Policy's policy period. *See* Complaint, ¶ 17. Allegedly, as a result of these claims, Plaintiffs now pay a higher premium for homeowners insurance than they paid Travelers for the Policy. Travelers, however, had no obligation to continue insuring the Property or to guarantee that the cost of Plaintiffs' homeowners coverage would remain the same. The Policy provides that Travelers "may elect not to renew this policy." Policy, p. 111. Its decision not to continue insuring the Property is consistent with this provision, and Plaintiffs cannot recover any increased amount of their homeowners' premiums from Travelers.

As explained above, the Appraisal Award is binding on Plaintiffs, which prevents them from recovering the difference between the amount paid for repairs to the Property and the actual costs for those repairs and/or alleged missed items not included as part of the costs to repair the Property. The appraisers set the amount of Plaintiffs' loss consistent with the process detailed in the Policy. *See* Policy, p. 103; *see also* Appraisal Award. Plaintiffs cannot seek additional damages for repairs after the November Water Damage and the January Water Damage.

Plaintiffs' claim for damages resulting from "mortgage cost increases" is also not covered by the Policy. Travelers is not obligated to ensure that Plaintiffs' mortgage payments remain the same, and nothing in the Policy's Property Coverage suggests that such damages could be compensable.

With respect to their claim for damages related to inflation, Plaintiffs appear to have misinterpreted the Policy's "Inflation" provision. In pertinent part, the Policy provides:

> We may adjust the limits of liability for Coverages A, B, C and D at the beginning of each successive policy term to reflect increases in the cost of insured property. The amount of such increase will be based on the data provided by the appraisal company shown in the Declarations. Payment of the required premium when due for the successive policy term will be sufficient to indicate your acceptance of the adjusted limits.

> We will also adjust the limits of liability at the time of a loss by the same percentage pro rated from the effective date of the policy period or the effective date of change if you have requested a change to the limit of liability for Coverage A during the policy period.

Policy, p. 96. This language authorizes Travelers to adjust the Policy's limits of liability at certain times to reflect inflation. It does not entitle Plaintiffs to any additional damages, nor increase the amount of Plaintiffs' loss.

Plaintiffs' final category of claimed damages, which arise from the repair of the Property after the November Water Damage and the January Water Damage, are also not covered under the Policy. *See* Cover Letter to Plaintiffs' Automatic Disclosures, p. 2. According to Plaintiffs, "[t]hese damages are estimates for repairs caused during or necessitated by the construction" after the November Water Damage and the January Water Damage. *Id.* Plaintiffs claim that the Property's driveway and landscaping were damaged. *See* Plaintiffs' Damages Summary attached to Plaintiffs' Automatic Disclosures. Travelers, however, did not perform the repairs on the Property after the November Water Damage and the January Water Damage. If Plaintiffs allege that the Property was damaged by contractors working on the Property, their claims related to that damage would be against those contractors. Plaintiffs cannot maintain a claim against Travelers for damages caused a third party when Travelers was not responsible for, nor involved in causing those damages.

As each category of Plaintiffs' claimed damages is either barred by the Appraisal Award or not covered under the Policy, Plaintiffs' breach of contract claim cannot succeed. *See Direct Capital Corp. v. Am. Tank Co.*, 2017 WL 7411007, at *2 (D.N.H. Oct. 26, 2017) (explaining that "the necessary elements of a breach of contract claim are: (1) A valid contract; (2) material breach of its terms; and (3) **resultant damages to the party having the right to complain that the**

contract has been broken." (emphasis added) (internal quotations omitted)). Travelers is therefore entitled to summary judgment on Plaintiffs' breach of contract claim.

III. Plaintiffs Cannot Maintain A Bad Faith Claim As Travelers Has Not Denied Them Any Amount That They Are Entitled To Under The Policy.

Confusingly, Plaintiffs' first count is subtitled "Breach of Contract, Bad Faith, Statutory Violations." Complaint, p. 6. Regardless of whether the count is treated as a breach of contract or bad faith claim, it fails. In New Hampshire, a claim for bad faith against an insurer arises "[w]here [the insurer's] failure to make prompt payment under the policy is to coerce the insured into accepting less than full performance of the insurer's contractual obligations... ." *Lawton v. Great Sw. Fire Ins. Co.*, 118 N.H. 607, 612 (1978). To state a bad faith claim, "**[t]he insured must, of course, prove that the insurer's failure or delay in payment was a breach of contract.** Not every delay or refusal to settle or pay a claim under the policy will constitute a breach of the contract." *Id.* (emphasis added).

Like Plaintiffs' breach of contract claim, their bad faith claim cannot succeed because Travelers did not breach any provision of the Policy. Consistent with the Policy's "Appraisal" provision, Travelers participated in the appraisal process to resolve any disputes regarding the value of the loss caused by the November Water Damage and the January Water Damage. *See* Policy, p. 103. After the appraisal, Travelers paid the appraisal award. *See* Answer, ¶ 32; *see also* Appraisal Award. This award is binding on Plaintiffs, and they cannot seek additional damages related to the November Water Damage and/or the January Water Damage through a bad faith claim. *See Boulevard Assocs. v. Seltzer P'ship*, 445 Pa. Super. 10, 19 (1995) ("Appraisal, like arbitration, is subject to limited judicial review. In both instances the law favors non-judicial dispute resolution that the parties have agreed to."). As the Complaint makes clear, Plaintiffs assert that the value of their claim related to the November Water Damage and the January Water

Damage is in dispute. *See* Complaint, ¶¶ 33-34. That amount has been established by the Appraisal Award.

As Travelers has not breached the terms of the Policy, Plaintiffs' bad faith claim cannot succeed. "The underlying factor in determining whether there has been a bad-faith breach of contract is whether the terms of the insurance policy cover" the particular services or damages at issue. *Jarvis v. Prudential Ins. Co. of Am.*, 122 N.H. 648, 653 (1982). Only if the particular services or damages are covered could an insurer's denial of those benefits constitute bad faith. *See id.* As explained above, Plaintiffs' claimed damages are either barred by the Appraisal Award or not covered under the Policy. Travelers has not denied Plaintiffs any amount that they could be entitled to, and, therefore, Plaintiffs' bad faith claim must fail.

IV. Plaintiffs' Statutory Violations Claim Fails As A Matter Of Law Because The Insurance Commissioner Has Not Issued An Adverse Finding Against Travelers.

Plaintiffs' claim for "statutory violations" by Travelers also cannot succeed. This cause of action purports to allege violations of the Act, N.H. Rev. Stat. Ann. § 417, *et seq.*, by Travelers with respect to the handling of Plaintiffs' claims related to the November Water Damage and the January Water Damage. *See* Complaint, ¶¶ 49-52. The purpose of the Unfair Insurance Trade Practices Act "is to regulate trade practices in the business of insurance... by defining or providing for the determination of all such practices which constitute in this state unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." N.H. Rev. Stat. Ann. § 417:1. Plaintiffs cannot maintain a direct cause of action against Travelers for any alleged unfair insurance practice absent a finding by the Insurance Commissioner that Travelers violated the Act. In pertinent part, the Act provides:

> When a supplier, in any action or proceeding brought by the insurance commissioner, has been found to be in violation of this chapter or has been ordered to cease and desist, and said finding or

> order has become final, any consumer claiming to be adversely affected by the act or practice giving rise to such finding or order may bring suit against said supplier to recover any damages or loss suffered because of such action or practice.

N.H. Rev. Stat. Ann. § 417:19. As the Insurance Commissioner has not made such a determination with respect to Travelers, Plaintiffs' unfair insurance practices claim fails as a matter of law. *See, e.g.*, *U.S. Bank, N.A. v. Foremost Ins. Co.*, 2017 WL 2592420, at *3 (D.N.H. June 14, 2017) ("[A] finding by the insurance commissioner that a supplier has violated chapter 417 is a prerequisite to bringing a private action."); *Lacaillade v. Loignon Champ-Carr, Inc.*, 2010 WL 2902251, at *4 (D.N.H. July 22, 2010) ("Under chapter 417, a consumer may bring a private action against an insurer, but only after the insurance commissioner has determined that the practice in question violates the statute."); *Shaheen v. Preferred Mut. Ins. Co.*, 668 F. Supp. 716, 718 (D.N.H. 1987) ("RSA 417 does not presently provide for a direct civil action for a violation of any of the unfair insurance trade practices listed therein. Rather, aggrieved parties must first seek administrative relief from the insurance commissioner, and a finding of a violation of the statute by the commissioner is required prior to the institution of a civil action for damages.").

As courts interpreting New Hampshire law have repeatedly confirmed that an adverse finding by the Insurance Commissioner is a prerequisite to an unfair practices claim, Plaintiffs cannot maintain a claim for "statutory violations" against Travelers because the Insurance Commissioner has not determined that Travelers violated the Act with respect to its handling of Plaintiffs' claims.

V. Plaintiffs' Declaratory Judgment Claim Cannot Succeed As Travelers Has Not Denied Coverage For Plaintiffs' Claims Arising From The November Water Damage And The January Water Damage.

Plaintiffs have also asserted a declaratory judgment claim pursuant to N.H. Rev. Stat. Ann. § 491:22. *See* Complaint, ¶ 60. As Plaintiffs admit, however, Travelers "has not denied coverage under the policy." *Id.* This admission is fatal to Plaintiffs' declaratory judgment claim.

As Plaintiffs acknowledge, this dispute involves "the value of the claim and the balance owed to the Plaintiffs." *Id.*, ¶ 34. Through their declaratory judgment claim, Plaintiffs request "a declaration of the respective rights and interests of the parties" with respect to the Policy. *Id.*, ¶ 61. This relief is the same as the relief that Plaintiffs seek to recover through their breach of contract claim. In both claims, Plaintiffs seek to recover an additional amount under the Policy for their alleged losses arising from the November Water Damage and the January Water Damage. *See id.*, ¶ 53. Where a declaratory judgment claim seeks identical relief to a breach of contract claim, the declaratory judgment claim cannot survive. *See Coyle v. Battles*, 147 N.H. 98, 100 (2001) (upholding the dismissal of a declaratory judgment action where the "factual issues were identical to those in the breach of contract action" and where the declaratory judgment action "provided no additional remedy to the plaintiffs.").

To the extent that Plaintiffs seek to challenge the Appraisal Award through their declaratory judgment claim, Plaintiffs also cannot succeed. N.H. Rev. Stat. Ann. § 542:8 provides the exclusive mechanism through which a party can challenge an arbitration award. *See* N.H. Rev. Stat. Ann. § 542:8. This mechanism does not include filing a declaratory judgment action, nor does N.H. Rev. Stat. Ann. § 491:22, the declaratory judgment statute, indicate that it is a proper authority under which to challenge an appraisal award. *See* N.H. Rev. Stat. Ann. § 491:22 ("Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties. . . ."). The

issue in this matter is not a dispute as to coverage under Travelers' policy, but rather concerns the amount of Plaintiffs' loss.

A declaratory judgment claim is also improper because it shifts the burden of proof to Travelers and entitles Plaintiffs to attorneys' fees, neither of which is available in a breach of contract action or when challenging an appraisal award. Under N.H. Rev. Stat. Ann. § 542:8, as in most cases, the plaintiffs bear the burden of proof and attorneys' fees are not recoverable. *See* N.H. Rev. Stat. Ann. § 542:8. The declaratory judgment statute creates exceptions to these general rules, but those exceptions are inapplicable here as coverage under the Policy is not in dispute. *See* Complaint, ¶ 60. As coverage under the Policy is not in dispute, Plaintiffs cannot maintain their declaratory judgment claim.

CONCLUSION

As Plaintiffs cannot maintain any of the claims alleged in their Complaint, Travelers is entitled to summary judgment.

Respectfully submitted,

Travelers Home and Marine
Insurance Company

By Its Attorneys,

Primmer Piper Eggleston & Cramer PC

Dated: November 3, 2020

By: /s/ Doreen F. Connor
Doreen F. Connor, #421
PO Box 3600
Manchester, NH 03105
(603) 626-3600
dconnor@primmer.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was this day forwarded to Plaintiffs through the Court's Electronic Filing System.

/s/ Doreen F. Connor
Doreen F. Connor

Exhibit C

Appraisal Award

We the undersigned, pursuant to the within appointment, do herby certify that we have truly and conscientiously performed the duties assigned to us, agreeably to the foregoing stipulations, and have appraised and determined and do hereby award as the actual cash value of said property on the 27th day of Nov., 20 17 and the amount of loss thereto by water on that day the following sums.

ACTUAL CASH VALUE / TOTAL AMOUNT OF LOSS

1ST ITEM Bldg. loss 1 ACV: $ 97,107.74 TOTAL LOSS: $ 123,996.16

2nd ITEM Bldg. loss 2 ACV: $ 11,551.73 TOTAL LOSS: $ 16,079.62

Umpire's Signature __________ Date __________

Appraiser's Signature [signature] Date 2-22-19

Appraiser's Signature [signature] Date 22 FEB 19

Notary: State of __________ County of __________

On this _____ day of _____ 20 _____

Notary's Signature __________ Date Commission Expires __________