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Raising the Appraisal

Clause in Policy Not Waived Absent Showing of Prejudice

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The Texas Supreme Court ruled on May 6 that an insurance company did not waive its right to compel an appraisal even though the insurer waited until after it was sued to bring up the issue with the trial court.

Appraisal clauses are common in insurance policies and provide a means to resolve disputes between insurers and insureds over the amount of losses in a covered claim short of litigation.

The case, *In Re Universal Underwriters of Texas Insurance Co.*, has been closely watched by insurance companies and policyholders alike for a variety of reasons. Appraisal clauses appear in most property insurance policies written in Texas, and have become a particular issue in coverage disputes related to disasters such as hurricanes.

The appeal drew eight amicus briefs and amicus letters from insurers and insureds. The insurance company amici feared they may be exposed to future protracted litigation if the Supreme Court ruled that Universal waived its right to compel an appraisal by not invoking the right earlier. And the insured amici worried their rights to sue insurers over unpaid claims would be hampered if the high court found that Universal did not waive its right to compel appraisal.

According to the high court's opinion, the background in the case is as follows:



**Don Martinson represents
Universal Underwriters of
Texas Insurance Co.**

Grubbs Infiniti, a car dealership, suffered hail damage to buildings on its property. Grubbs filed a claim with its insurer, Universal, and a claims representative inspected the property. Universal subsequently paid Grubbs \$4,081.95 for the damage. Grubbs asked Universal to reinspect the property, contending that the claim had not been properly investigated or fully paid. Universal sent an engineer to reinspect the property and issued a \$3,000 supplemental payment to Grubbs.

Universal also informed Grubbs in a letter, "If you would like to have your roof expert discuss the findings with [the engineer] please advise and we will put the two parties in touch with one another." Universal wrote that if Grubbs disagreed with its decision, Grubbs had 24 months and one day from the date of the loss to bring legal action contesting Universal's decision.

Four months later, Grubbs sued Universal in a Tarrant County district court alleging breach of contract and breach of the duty of good faith and fair dealing, among other things. In response, Universal invoked the policy's appraisal clause, which provides, "IF YOU or WE can't agree on the value of the property or the amount of YOUR property LOSS, either of us can demand in writing, an appraisal within 20 days of such demand. Then, each will select a competent and disinterested appraiser who will, in turn, select a competent and disinterested umpire. . . . The appraisal shall be then made at a reasonable time and place. Each appraiser will state his appraisal of the value or loss. If they can't agree, they will submit their differences to the umpire. The value of the property or amount of the LOSS will be determined by a written agreement of any two of them. Such an agreement is binding."

Universal moved to compel an appraisal and to abate the case in the trial court. Grubbs alleged that Uni-

versal waived its right to appraisal by not invoking it sooner. The trial court denied the motion, and Universal filed a petition for writ of mandamus, which the intermediate court of appeals denied. Universal then brought the mandamus action to the Texas Supreme Court.

Rare Ruling

Writing for the high court, Chief Justice Wallace Jefferson noted that appraisal clauses can provide a less expensive, more efficient alternative to litigation; appraisal clauses have been used in Texas for more than a century; and the Supreme Court has only addressed waiver of appraisal clauses three times, only once finding that waiver of an appraisal clause actually occurred. Justice Debra Lehrmann did not participate in the opinion.

Jefferson wrote that Universal had invoked the appraisal clause "within a reasonable time after the parties reached an impasse. . . ."

"Even if Universal had waited to request appraisal, mere delay is not enough to find waiver; a party must show that it has been prejudiced," Jefferson wrote. Grubbs did not attempt to show prejudice in the case, Jefferson wrote.

Jefferson pointed out that both parties in the case had the same opportunity to demand appraisal. "If a party senses that impasse has been reached, it can avoid prejudice by demanding an appraisal itself. This could short-circuit potential litigation and should be pursued before resorting to the courts."

The high court granted the writ of mandamus and directed the trial court to grant Universal's motion to compel appraisal. However, a footnote in the opinion noted that the trial court's failure to grant the motion to abate is not subject to mandamus and the proceedings in the suit need not be abated while the appraisal goes forward.

Don Martinson, a partner in Dallas' Fanning Harper Martinson Brandt & Kutchin who represents Universal, is pleased with what he believes is an important decision.

"It's important, because it reinforces some prior opinions from the Supreme Court, in which they have stated that they favor nonjudicial means for resolving disputes if agreed to by contract. They've taken that position with regard to arbitration agreements in contracts, and they are now taking that same position in appraisal agreements in insurance contracts," Martinson says.

"The reason the court took our case, I think, was because of their desire to get the word out that they favor a non-judicial resolution of appraisal contracts in general," he says. "And because they do, they took that case, and they are going to apply very strict tests to any argument that a party has waived their contractual rights."

Scott Keller, a Dallas solo who represents Grubbs, is disappointed in the decision. "I felt like the court had an opportunity to discuss the interplay between the statutory duties, the common-law duties and the contractual duties and that the opinion doesn't give much guidance concerning that," Keller says. "For the first time the court has required that there be a showing of prejudice with respect to the waiver of the appraisal clause."

Keller notes that appraisals will now become "another hoop that the insured has to jump through in order to be paid under what is due to them under the policy." 