2016 INDEX TO TEXAS DECISIONS ON APPRAISAL PROVISIONS IN INSURANCE POLICIES

Prepared for

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and
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TEXAS

1. In re GuideOne National Insurance Company, No. 07-15-00281-CV, 2015 WL 5766496 (Tex. App.—Amarillo Sept. 29, 2015, no pet. h.)—in commercial property dispute, carrier initially denied hail claim in March of 2014. Policyholder asked for appraisal, and carrier declined, arguing that the right to appraisal was unilateral and that it was uninterested in the same. Policyholder sued in August of 2014. In April of 2015, carrier invoked appraisal process. Policyholder opposed appraisal by that time and argued that the carrier waived appraisal by conduct and that the unilateral appraisal provision was unenforceable. Carrier argued that the non-waiver provision in the policy, which provided that the "policy's terms can be amended or waived only by endorsement issued by [carrier] and made a part of [the] policy" controlled and that the unilateral provision was enforceable like any other contractual provision. Trial court agreed, and Amarillo Court of Appeals affirmed. The Court noted that the policyholder did not cite any cases "where the Texas Supreme Court or any intermediate appellate court [had] held an appraisal clause that can only be instituted by the insurance company to be against public policy." The Court, "therefore, decline[d] the invitation to so find." The Court also rejected policyholder's argument that, notwithstanding the non-waiver provision, the carrier waived appraisal by conduct. The Court reasoned that "the parties chose the language when the decision to enter into the insurance contract was made, and [the Court] cannot change that language at this late date."

2. In re Guideone National Insurance Company, No. 05-15-00981-CV, 2015 WL 5050233 (Tex. App.—Dallas Aug. 27, 2015, pet. filed)—in commercial property dispute, carrier paid for fire loss but denied wind and hail portion of claim in July 2014. In September 2014, policyholder sued. Trial court ordered parties to mediation. In April 2015, one week after mediation failing to resolve the dispute, carrier first sought appraisal. Trial court denied carrier's motion. Dallas Court of Appeals affirmed, reasoning that the carrier's delay forced the policyholder "to incur the costs of hiring experts to assess and value its damages for litigation purposes, thereby reducing or eliminating entirely the efficiencies appraisal is intended to provide." In contrast to the Amarillo GuideOne case discussed above, there was no non-waiver provision in the policy-at-issue.

3. Michels v. Safeco Insurance Co. of Indiana, 544 Fed. Appx. 535 (5th Cir. 2013)—Insured's home was damaged by smoke from a wildfire. Insured filed a claim with insurer. Insurer assigned an appraiser to investigate the damage to the home, and he found no visible damage. Regardless, insurer paid $12,005.19 for general cleaning and attic insulation replacement. Insured invoked policy's appraisal provision, but the party's appraisers were unable to agree on an umpire, so insurer filed suit requesting that the court assign an umpire in accordance with the policy. After an umpire was chosen and he made the appraisal award, the insured moved to set aside the appraisal award. The district court denied the motion. On appeal, the Fifth Circuit reaffirmed the proposition that under Texas law, "appraisal is an enforceable, contractually agreed upon method of determining the amount of loss." The burden of proof is on the party seeking to avoid the award. However, any award that is made in substantial compliance with the policy is

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presumptively valid. Mild discrepancies found in the appraisal process or in the appraisal award will not invalidate the award. On the other hand, when the award is not in compliance with the requirements of the policy the otherwise binding appraisal may be disregarded. Finding no such problems with the award, the Fifth Circuit affirmed.

4. In re Public Service Mutual Insurance Co., No. 03-13-00003-CV, 2013 WL 692441 (Tex. App.—Austin Feb. 21, 2013, no pet.)—In this homeowners' policy dispute, insured filed a claim for roof damage but withdrew the claim prior to inspection. Despite the withdrawal, insurer sent an adjuster to inspect the damage. Insurer's adjuster estimated the loss at $1,000.23. The insured also retained an adjuster who found the value of loss to be much greater due to damage that required replacing the entire roof. The insured filed suit contending that both parties disputed both the policy coverage for the claim and the amount of loss. Insurer subsequently filed a motion to compel an appraisal as well as to abate litigation, invoking the policy's appraisal provision. The trial court granted insurer's motion and insured appealed. The Austin Court of Appeals first noted Texas courts' preference for enforcing appraisal provisions absent illegality or waiver. The Court then rejected the insured's argument that a dispute over coverage made the appraisal provision unenforceable. Next, the Court noted that the process of appraisal inherently involves causation for coverage purposes because an appraisal must determine the amount of damage caused by one particular event versus pre-existing damage. Further, the Court noted that under Texas law, parties cannot avoid appraisal merely because there could be a question that exceeds the scope of the appraisal. The Court then turned to the insured's waiver claims and noted that "to establish waiver, the party challenging appraisal must show that (1) the parties reached an impasse—'a mutual understanding that neither will negotiate further,' and (2) any failure to demand appraisal within a reasonable time prejudiced the opposing party." Because the parties were still negotiating, the Court rejected both the insured's waiver-by-futility argument and the insured's waiver-by delay argument, holding that a six-month delay was not unreasonable and that the insured suffered no prejudice by the delay. Lastly, the Court summarily rejected the insured's various contract law unenforceability arguments.

5. In re Texas Windstorm Insurance Association, No. 14-13-00632-CV, 2013 WL 4806996 (Tex. App.—Houston [14th Dist.] Sept. 10, 2013, no pet.)—In this windstorm policy dispute, the insured made a claim, and, after investigating, the insurer advised the insured that the cost to repair the property did not exceed the policy's deductible Insured's own inspector, however, found additional damage that such that he believed that the amount of the loss exceeded the deductible. Insurer refused to pay, and the insured threatened suit. Insurer then demanded appraisal and moved to compel it in court. Insured sought to avoid appraisal and argued that appraisal was not warranted because the dispute focused on coverage rather than the amount of loss. Further, insured argued that insurer waived its right to appraisal because it only demanded appraisal after it was notified of the insured's intent to sue. The trial court granted insurer's motion. On appeal, the Fourteenth District Court of Appeals first discussed the insured's waiver argument, finding that waiver based on the length of delay, prior to demanding an appraisal, is determined "from the point of impasse." "For impasse, both parties must be aware not merely that there is a disagreement, but also that further negotiations would be futile."

Because insurer only waited seven days after receiving the insured's notice of intent to file suit, the Court held that there was not a sufficient delay to support a finding of waiver. Insured also argued that the appraisal provision could not be asserted since there were coverage issues. The Court disagreed and opined that the appraisal provision could not be disregarded simply because coverage and causation issues exist.

6. MLCSV10 v. Stateside Enterprises, Inc., 866 F. Supp. 2d 691, 694 (S.D. Tex. 2012)—In commercial property policy dispute, insured (and a related party to which some of the insured's claims were assigned, both parties being referred to here as the "insured) was dissatisfied with insurer's estimate of damage and invoked the policy's appraisal provision. The parties then appointed appraisers and the appraisers selected an umpire. After receiving the umpire's appraisal recommendation, insured's appraiser refused to sign the appraisal agreement because he disagreed with the fact that the umpire had not submitted any reports or documentation to support his findings. Insurer paid the insured the amount determined by the umpire. Insurer sought to enforce the appraisal award and thereby dismiss parallel bad faith litigation. Insured argued that the award was invalid because the appraiser failed to disclose a referral relationship between himself and the umpire, thereby implicating impartiality and violating the terms of the policy's appraisal provision. The district court found that "showing of a pre-existing relations, without more, does not support a finding of bias." The court continued, ruling that more is required than the appraiser's mere failure to disclose a preexisting business relationship between the appraiser and a party in order to disregard an appraisal award. There must instead be evidence that the challenged appraiser performed "some act or conduct tending to exhibit his serving the insurer's interest as a partisan would." The court also noted that an appraiser's loss valuation is not considered unsound simply because another appraiser submits supporting documentation and the challenged appraiser does not. The court therefore rejected insured's challenge to the award based on the supposed partiality of the appraiser. However, the court did find that the appraisal award was not complete in that it did not include a full valuation of one part of the loss, so the court could not dismiss the claims against insurer on the basis of payment of the appraisal award amount.

7. State Farm Lloyds v. Johnson, 290 S.W.3d 886 (Tex. 2009)—In this homeowners' policy dispute, insured demanded an appraisal of the amount of damage to her roof caused by hail after the parties' adjusters disagreed on whether her whole roof needed to be replaced or not. The appraisal clause provided for appraisal if there was a dispute regarding "the amount of loss." Insurer refused to participate in the appraisal process, arguing that the dispute was not about the amount of loss but was about causation, and insured filed suit to compel appraisal. The trial court agreed with insurer, but the Dallas Court of Appeals reversed, holding that appraisal was required. Insured appealed to the Texas Supreme Court, where the issue was whether the dispute fell within the scope of the appraisal clause. The Texas Supreme Court held that the trial court could not conclude as a matter of law that the central issue in dispute was causation. The Court noted that "appraisers must always consider causation, at least as an initial matter." The Court held that insurer could not avoid an appraisal simply because there might be causation issues. The Court held further that even if the appraisal addresses liability questions and not just questions concerning amount of loss, it does not mean that the appraisal should be prohibited as an

initial matter. The Court held that appraisals should take place before the suit, and in most cases can be structured in a way that decides the amount of loss without also deciding the liability questions. The Court also noted that appraisal provisions, unless expensive and unreasonable, should be enforced and that appraisals should go forward without any intervention by the courts. The Court therefore affirmed the Dallas Court of Appeals' ruling and ordered the parties to appraisal.

8. In re Allstate County Mutual Insurance Co., 85 S.W.3d 193 (Tex. 2002)—In this personal automobile policy dispute, insurers determined that covered vehicles were total losses. Insureds then brought suit, alleging that insurers fraudulently generated low values for the vehicles' worth. Insureds theory was that insurers systematically undervalued the cost of the cars knowing that insureds would not challenge the violations due to the costly appraisal process. Insurers sought to compel appraisal but the trial court rejected the attempt, ruling that the appraisal provision was really an arbitration provision that was unenforceable on public policy grounds. The insurers sought mandamus review and the Texas Supreme Court granted the writ. The Court held that the trial court had found in error that an appraisal provision was an arbitration agreement and unenforceable. More controversially, the Court held that granting mandamus was proper because the value of the loss—the thing to be established by appraisal—was at the heart of the breach of contract claim which was in turn at the heart of the insureds' claims. The Court continued by noting that "the failure to order the appraisals will vitiate or severely compromise the defendants' defenses to" the breach of contract claim. The Court accordingly held that the insurers would have inadequate remedies on appeal and that mandamus was the proper remedy. The Court also held that although trial courts have no discretion to deny an appraisal, courts *do* have the discretion as to the timing of the appraisal such that appraisal could occur without staying the litigation.

9. Allison v. Fire Insurance Exchange, 98 S.W.3d 227 (Tex. App.—Austin 2002, pet. granted, judgment vacated w.r.m.)—In this complicated mold damage homeowners' policy dispute, one of the issues was whether the trial court properly disregarded an appraisal award for being the result of fraud, accident, or mistake, or because the appraiser was not "competent and independent." The Austin Court of Appeals, after rejecting the sufficiency of the evidence for finding that the appraisal award was the result of fraud, accident, or mistake turned to analyzing the competence and independence of the appraiser. The insured presented evidence that: (1) the appraiser's company had performed twenty to twenty-five percent of its work for the insurer; (2) eighty percent of the appraiser's company's work was on behalf of insurance companies; (3) the appraiser himself had performed four or five appraisals for the insurer involved in the dispute; and (4) the appraiser had worked with the insurer's attorney ten times in the recent past. In addressing the insured's claim, the Court first noted that "[t]he showing of a pre-existing relationship, without more, does not support a finding of lack of independence. The Court then held that the insured had failed to present sufficient evidence of a lack of independence because: (1) the appraiser had never been an employee of insurer; (2) insurer instructed appraiser to determine costs on his own, not from figures provided by insurer; and (3) there was no evidence contradicting the assumption that the appraiser exercised independent judgment. The insured also argued

that the appraiser was incompetent because he had no experience with mold or mold remediation. The Court rejected this contention, noting that the appraiser had a degree in civil engineering, was a registered professional engineer, had thirty-three years of experience in structural engineering, built hundreds of houses, and retained mold experts to assist him with the remediation expert.

10. Wells v. Am. States Preferred Ins. Co., 919 S.W.2d 679, 681 (Tex. App.—Dallas 1996, writ denied)—In this homeowners' policy dispute, an appraiser was selected pursuant to an appraisal provision in the policy. The appraisal award included conclusions regarding causation. When the insured filed suit and the insurer moved for summary and declaratory judgment, the trial court granted the motion on the ground that the dispute had been decided via the appraisal process, which had concluded that a certain loss was not caused by a covered cause. On appeal, the Dallas Court of Appeals held that causation is not a proper matter for an appraiser to determine. Instead, the "function of the appraisers is to determine the amount of damage resulting to the property submitted for their consideration." The Court therefore reversed the summary judgment below and remanded for trial on the merits. While the holding in this case could be read broadly to prevent appraisal when issues of causation are involved, such a reading would now have no bearing due to the holding in *State Farm Lloyds v. Johnson*, supra.

11. Standard Fire Insurance Co. v. Fraiman, 588 S.W.2d 681, 683 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)—In this first-party property policy dispute, insured demanded appraisal after insurer refused to pay the amount of insured's claim for fire damage. Insurer refused to submit to appraisal and insured brought suit. The trial court ordered an appraisal and insurer paid the amount of the appraisal award. Insured then sued again to recover lost rentals, interest, and damages for breach of the appraisal provision and won at trial. Insurer argued on appeal that telephone and travel expenses awarded by the jury were unrecoverable consequential damages for the refusal to appraise. The Fourteenth Court of Appeals first likened appraisal provisions to arbitration provisions and held that a cause of action lies for damages caused by a breach of an appraisal provision. The Court then held that consequential damages are recoverable for such a breach.

12. Scottish Union & National Insurance Co. v. Clancy, 8 S.W. 630 (Tex. 1888)—This case was the progenitor of all Texas case law on appraisal provisions in insurance policies because it affirmed the enforceability of the same. In it, the Texas Supreme Court set in stone the bedrock proposition that appraisal provisions are enforceable for determining the amount of a loss absent fraud, accident, or mistake.