Texas Courts Continue to Address Appraisal Procedures

March 2012 by Lisa Henderson

The importance of the Texas Supreme Court's opinion, *In re Universal Underwriters of Texas Insurance Company*, 345 S.W.3d 404 (Tex. 2011), continues to grow as Texas courts face an onslaught of appraisal cases. *In re Universal Underwriters* involved a petition for writ of mandamus brought by an insurance carrier contending that a trial court had abused its discretion in denying its motion to compel an appraisal and abate a pending lawsuit. The Texas Supreme Court issued an opinion directing the trial court to order appraisal. However, the court found that the trial court's failure to grant the motion to abate the case during appraisal was not subject to mandamus and that the proceedings need not be abated while the appraisal goes forward.

In the subsequent case of *In re Certain Underwriters at Lloyds*, No. 10-11-00263-CV, 2011 WL 4837869 (Tex. App.—Waco Oct. 12, 2011), the Waco Court of Appeals considered a trial court's repeated denial, on the basis of waiver, of the insurance carrier's motion to compel appraisal. In analyzing the appraisal issue, the Court of Appeals initially noted that "[w]hile trial courts have some discretion as to the timing of an appraisal, they have no discretion to ignore a valid appraisal clause entirely." *Id*. at *10 (*citing State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888 (Tex. 2009)). It further noted that "[i]n order to establish waiver...a party must show that an impasse was reached, and that any failure to demand appraisal within a reasonable time [of the impasse] prejudiced the opposing party." *Id*. at *13.

Accordingly, the Court of Appeals first had to determine when the parties reached a point of impasse. Point of impasse is defined as "the point when *both* parties are aware that further negotiations would be futile, or would be of no effect if performed." *Id*. at *14. The insureds argued that impasse occurred in December 2008, after the carrier sent a letter stating that the claim was closed. The court noted, however, that the letter also invited the insureds to submit additional information to support a re-evaluation of the claim and that the insureds failed to respond. The court concluded that, as a result, the parties merely disagreed about the amount of loss in December 2008. The court found that impasse did not clearly occur until the insureds filed suit almost two

years later. As Underwriters invoked its right to appraisal within two weeks of the suit being filed, it did not unreasonably delay in the invocation of its appraisal rights. The court thus directed the trial court to grant Underwriters' motion to compel appraisal.

The issue of abatement of a pending lawsuit was considered in the recent case of *In re Cypress Texas Lloyds*, No. 01-11-00714-CV, 2011 Tex. App. LEXIS 9884 (Tex. App.—Houston [1st Dist.] Dec. 15, 2011). In the case, the insureds contended that Cypress Texas Lloyds (CTL) underpaid and delayed in paying their claim for damage to their home as a result of Hurricane Ike. In its answer, CTL asserted that the insured failed to comply with the policy's condition precedent of submitting to an appraisal. CTL further requested an abatement of the lawsuit until the policy condition was satisfied. The trial court granted CTL's subsequent motion to compel appraisal, but denied its motion to abate the lawsuit. CTL filed a petition for writ of mandamus challenging the trial court's denial.

The CTL policy provides that "[n]o suit or action can be brought unless the policy provisions have been complied with" and an "[a]ppraisal is required as a prerequisite before an insured can file suit related to Section I – Property Coverage." Despite the strong language in the CTL policy, the Court of Appeals held that CTL was not entitled to relief pursuant to the controlling authority of *In re Universal Underwriters*, in which the Texas Supreme Court held that a motion to abate a lawsuit pending appraisal is not subject to mandamus. *Id*. at *10-11. As noted by the Houston Court of Appeals, however, the *In re Universal Underwriters* opinion does not contain any substantial analysis or explanation for the court's conclusion that the denial of a motion to abate is not subject to mandamus. *Id*. at *8. *In re Universal Underwriters* also appears to contradict a prior Texas Supreme Court opinion in which it characterized the right to appraisal as a condition precedent to suit. *See State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 894 (Tex. 2009) (stating that "appraisal is intended to take place before suit is filed" and that "it is a condition precedent to suit"). Accordingly, carriers are likely to continue challenging this aspect of the appraisal process.

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