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TEXAS INSURANCE LAW NEWSBRIEF

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COURT FINDS NO WAIVER OF INSURER'S RIGHT TO APPRAISAL FIRST INVOKED TWO MONTHS OUT FROM TRIAL

Last Thursday, the San Antonio Court of Appeals found that an insurer had not waived its right to invoke appraisal, despite extensive discovery, a failed mediation and being two months from trial when appraisal was invoked. In *In re American National Property and Casualty Company*, 2018 WL 3264932 (Tex. App. - San Antonio July 5, 2018), the insured claimed damage to a commercial property arising from a hail storm. The insurer found the damage was minor and less than the deductible and sent a partial denial letter to the insured. The insured then filed suit in August 2016 alleging breach of contract, breach of the duty of good faith and fair dealing and other extra-contractual causes of action. After discovery was complete and mediation failed in July 2017, the court ordered the parties to be ready for trial in November 2017. The insurer then filed a motion to compel appraisal and abate the lawsuit. The court denied the motion and this mandamus action followed.

The insured presented several arguments in opposition to appraisal including waiver by denying the claim and engaging in conduct inconsistent with that right, and that public policy reasons supporting appraisal due to speed and lower costs, no longer applied. In response, the insurer argued that the nonwaiver clause in the policy requiring a written endorsement to change the policy terms was dispositive of all issues. The court closely examined Texas law addressing waiver and nonwaiver clauses and held "that the inclusion in an insurance contract of a broadly -worded nonwaiver clause such as the one in this case is not dispositive, as a matter of law, on the issue of whether the insurer waived any of its rights under the contract." The court then focused its attention on whether the insurer "intentionally engaged in conduct inconsistent with claiming the right to enforce the nonwaiver agreement." And finding that the insured did not point to any evidence in the record of intentional conduct inconsistent with claiming its right to appraisal, the court concluded the trial court erred in denying the insurer's motion to compel appraisal.

Interestingly, the court went further noting that even if it had concluded that the insurer waived the nonwaiver clause and, waived its right to seek appraisal due to delay, the insured would still be required to show prejudice as a result. And in response to the insured's argument that the financial impact of the insurer's "litigious conduct exceeds $145,000" (over $100,000 in attorney's fees and over $35,000 in case expenses), the court applied age old "Goose v. Gander" logic. Quoting from the Texas Supreme Court's decision in *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W. 3d 404, 412 (Tex. 2011), the court noted that "it is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal. If a party senses that an impasse has been reached, it can avoid prejudice by demanding an appraisal itself."

In this case, the court observed that the insured chose to initiate litigation rather than pursue appraisal, and they participated in discovery and prepared for mediation and trial, instead of invoking appraisal. Quoting "*In re cypress Tex. Lloyds*, 419 S.W. 3d 443, 445 (Tex.App. - Beaumont 2012, orig. proceeding) (per curiam) ("When a party knows of its right to request an appraisal and does not make that request, it is difficult to attribute the costs incurred to the opponent."). Accordingly, the court concluded that absent a showing of prejudice by the insured, the trial court erred in denying the motion to compel appraisal.