

Litigating Appraisal in Texas:

Navigating Uncharted Waters

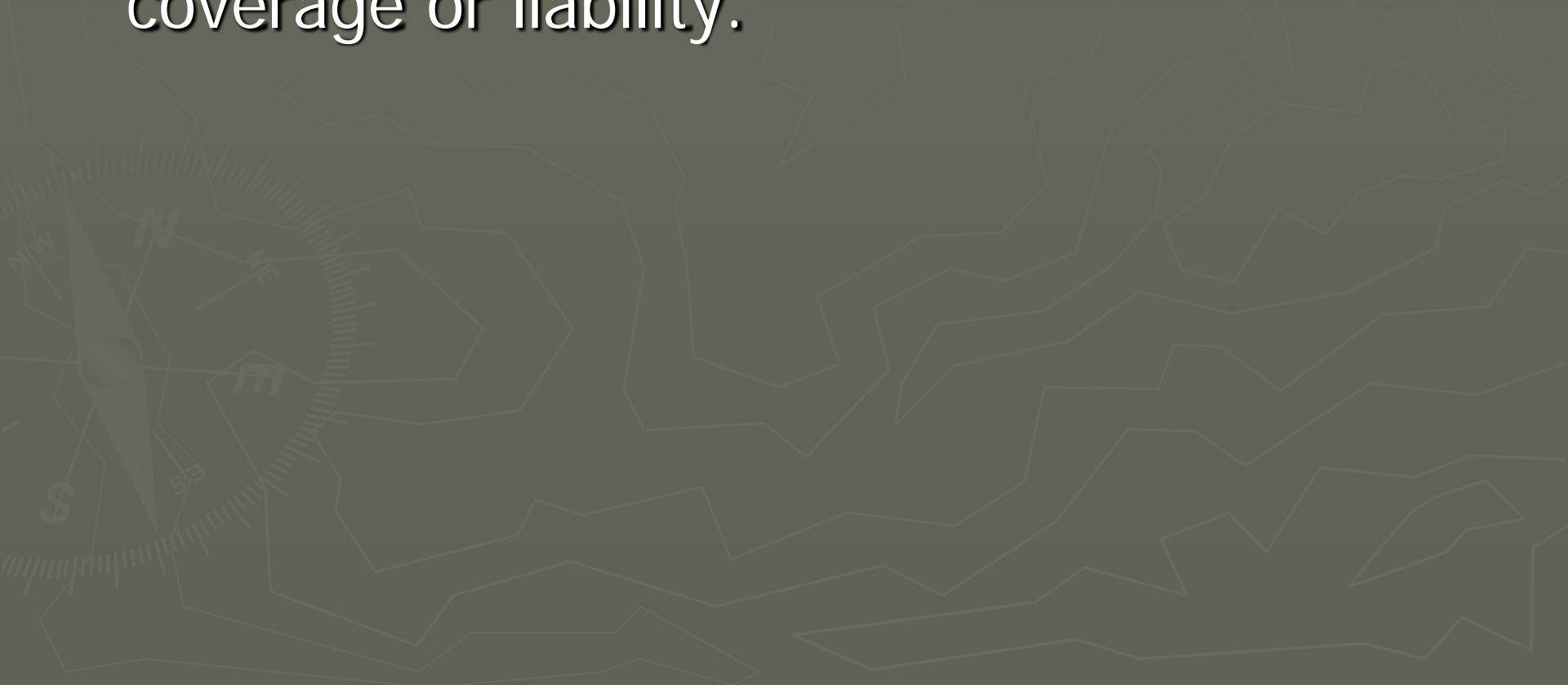


History of Appraisal

- ▶ Appraisal rarely litigated.
- ▶ Appraisal intended to be used to provide a simple, speedy and inexpensive method to determine amount of loss only.
- ▶ Appraisal could be waived (or so we thought).

History of Appraisal

- ▶ Appraisers and Umpires were without authority to decide questions of causation, coverage or liability.



History of Appraisal



Waiver of Appraisal

- ▶ In re Universal Underwriters of Texas Insurance Company
- ▶ Decided by Texas Supreme Court on May 6, 2011.

In re Universal

- ▶ Grubbs Infiniti car dealership suffered hail damage to buildings.
- ▶ Carrier paid \$7,081.95 for damage and invited any additional information.
- ▶ Four months later, Grubbs sued.
- ▶ Universal moved to compel appraisal.

In re Universal

- ▶ Grubbs argued waiver.
- ▶ Texas Supreme Court set out two part test.
 - ▶ 1. Unreasonable delay measured from point of impasse, and
 - ▶ 2. Prejudice must be shown.

In re Universal

- ▶ Delay measured from point of impasse.
- ▶ The date of impasse is the point of reference to determine whether a demand for appraisal is made within a reasonable time.
- ▶ Must examine circumstances and parties' conduct.

In re Universal

- ▶ The relevant question is the amount of time that has passed since the breakdown of good faith negotiations.
- ▶ Both parties must be aware that further negotiations would be futile.
- ▶ No waiver if one party genuinely believes negotiations to be ongoing.

In re Universal

- ▶ Prejudice from the delay in requesting appraisal must be shown.
- ▶ Example of where a party has incurred unnecessary expenses as result of the delay.

In re Universal

- ▶ Court shuts the door.
- ▶ "It is difficult to see how prejudice could ever be shown when the policy... gives both sides the same opportunity to demand appraisal".

Is Waiver Dead?

- ▶ In re GuideOne Mutual Insurance Company.
- ▶ Decided by Beaumont Court of Appeals on January 24, 2013.
- ▶ First Baptist Church of Silsbee claimed damage from Hurricane Rita.
- ▶ GuideOne answered the lawsuit in December of 2007.

Is Waiver Dead?

- ▶ Case was litigated almost four years and mediated in October of 2011.
- ▶ GuideOne waited to request appraisal in May of 2012 just two months before trial.
- ▶ No waiver.

Is Waiver Dead?

- ▶ Policy placed no time limit on making a written demand for appraisal.
- ▶ Policy provided that in event of appraisal, the insured retained right to sue and insurer retained right to deny the claim.
- ▶ Policy provided no waiver of policy terms except by endorsement.

Is Waiver Dead?

- ▶ Insured claimed prejudice since it had incurred over \$100,000 in fees in working the case.
- ▶ Court found expenses would have been incurred regardless.
- ▶ It was an abuse of discretion to deny the appraisal.

Is Waiver Dead?

- ▶ Practical Application.
- ▶ If you wish to avoid appraisal, do not give any indication that you are willing to negotiate further.
- ▶ An indication that an impasse was not reached will likely preclude a waiver finding.

Scope of Appraisal

- ▶ State Farm Lloyds v. Johnson.
- ▶ Decided by Texas Supreme Court on July 3, 2009.



State Farm Lloyds v. Johnson

- ▶ Johnson's house was damaged by hail and claimed entire roof needed to be replaced at cost of \$6,400.
- ▶ State Farm inspected the roof and concluded only ridgeline of roof was damaged by hail. Any other damage was not from a covered peril.

State Farm Lloyds v. Johnson

- ▶ Johnson then demanded appraisal.
- ▶ State Farm argued that appraisal not appropriate since the cause of the damage was in dispute and causation is reserved for the courts to decide.
- ▶ The trial court denied appraisal.
- ▶ Dallas Court of Appeals reversed.

State Farm Lloyds v. Johnson

- ▶ In a surprising decision, the Texas Supreme Court ruled that appraisal was required.
- ▶ Reiterated that limiting appraisal to damages and not liability was still correct.
- ▶ This principle was validated by scarcity of cases over past 100 years.

State Farm Lloyds v. Johnson

- ▶ "Causation relates to both liability and damages because it is the connection between the two".
- ▶ "In the abstract, it is hard to say whether causation is more a question of liability or damages".

State Farm Lloyds v. Johnson

- ▶ "When different causes are alleged for a single injury to property, causation is a liability question for the courts".
- ▶ "By contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability".

State Farm Lloyds v. Johnson

- ▶ Court stated that a party could not avoid appraisal because there might be a causation question that exceeds the scope of appraisal.

State Farm Lloyds v. Johnson

- "Whether the appraisers have gone beyond the damage questions entrusted to them will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award.

State Farm Lloyds v. Johnson

- Court then proceeds to make its prior comments irrelevant in the context of whether appraisal should proceed.
- "When divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it. When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong".

State Farm Lloyds v. Johnson

- ▶ "Finally, even if an appraisal award is flawed, that can be easily remedied by disregarding it later".
- ▶ "If an appraisal is not an honest assessment of necessary repairs, that can be proved at trial and the award set aside".

Application of Johnson

- ▶ Effect of Johnson has been to result in the compelling of appraisal in almost every case.
- ▶ In re Public Service Mutual Insurance Company
- ▶ Decided by Austin Court of Appeals on February 21, 2013.

In re Public Service

- ▶ Involved damage to a motel roof from windstorm
- ▶ Insured claimed new roof was required.
- ▶ Insurer valued claim at \$1,000.23.
- ▶ Insured files suit on March 30, 2012.
- ▶ Trial set for October 22, 2012.
- ▶ Insurer moves for appraisal on September 19, 2012.

In re Public Service

- ▶ No waiver.
- ▶ Three months before appraisal requested, the parties were discussing attending mediation – therefore no impasse.
- ▶ No prejudice.
- ▶ Both parties had the opportunity to request appraisal.

In re Public Service

- ▶ Causation – Insured argued the dispute was over causation since it claimed damage was caused by storm within policy period while insurer claimed damage was caused by storm which pre-dated policy period.

In re Public Service

- ▶ Insured argued Johnson language:
- ▶ “When different causes are alleged for a single injury to property, causation is a liability question for the courts”.
- ▶ Yes, but.....

In re Public Service

- ▶ Court noted Johnson language encouraging enforcement of appraisal and that involvement of liability questions does not prohibit appraisal.
- ▶ May not disregard appraisal simply because causation issues exist concerning which storm caused the property damage.
- ▶ Left unanswered was the question of what happens after the appraisal.

Abatement

- ▶ At least we can save costs by abating the case during appraisal – maybe.
- ▶ In re Universal Underwriters
- ▶ Trial court refused to abate the case pending appraisal.
- ▶ Texas Supreme Court stated that failure to abate is not subject to mandamus.

Abatement

- ▶ In re Cypress Texas Lloyds decided by Houston 1st District Court of Appeals.
- ▶ Policy stated appraisal was a prerequisite prior to filing suit which insured ignored.
- ▶ Appellate Court held that abatement was within discretion of trial court and decision not subject to mandamus.

Mandamus of Order Compelling Appraisal

- ▶ Courts have made clear that you can mandamus a trial court's decision denying appraisal.
- ▶ The party seeking appraisal has no adequate remedy by appeal since the denial impacts the insurer's right to defend a breach of contract claim.

Mandamus of Order Compelling Appraisal

- ▶ So we can mandamus an order compelling appraisal, right?
- ▶ Wrong.
- ▶ In re Universal Underwriters
- ▶ Texas Farmers Insurance Company v. Minjarez

Mandamus of Order Compelling Appraisal

- ▶ Texas Supreme Court has held that it is not necessary to establish that a loss was a covered loss before proceeding to appraisal.
- ▶ Therefore there is no substantial difference of opinion regarding a controlling question of law between the appellate courts.