

THOUGHT LEADERSHIP

News

SAN ANTONIO COURT HOLDS DISPUTES ON OVERHEAD & PROFIT AND TAX ARE APPRAISABLE, ORDERS SUITS ABATED

Newsbrief

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In a pair of nearly identical sister cases, the San Antonio court of appeals granted mandamus, ordering the trial court to send two first-party commercial property cases to appraisal and also ordering the suits abated pending the outcome of the appraisal process. *In re Acceptance Indem. Ins. Co.*, No. 04-18-00232-CV, — S.W.3d —, 2018 WL 4608261 (Sep. 26, 2018) and *In re Acceptance Indem. Ins. Co.*, No. 04-18-00232-CV, — S.W.3d —, 2018 WL 4610902 (Sep. 26, 2018) were two wind/hail lawsuits brought by owners of several apartment complexes against Acceptance. In both cases, the insureds alleged that the loss estimates prepared by Acceptance failed to include overhead, profit, and sales tax. The insureds signed proofs of loss for the undisputed actual repair costs, but reserved the right to continue seeking the overhead, profit, and sales tax. In response to pre-suit demand letters from the insureds, Acceptance invoked appraisal. The insureds contended appraisal was not appropriate and sued Acceptance. Acceptance moved to compel appraisal and abate both lawsuits, which the trial court denied.

On mandamus, the court of appeals considered several arguments lodged by the insureds in an effort to escape appraisal. First, the insureds argued that Acceptance had waived the right to appraise by undue delay. Applying the standard enunciated by the Supreme Court of Texas in *In re Universal Underwriters*, 345 S.W.3d 404 (Tex. 2011), the court sought to determine when the parties reached an impasse, whether an unreasonable time had elapsed after impasse, and whether the insureds had been prejudiced by the delay. Observing that an impasse requires more than mere disagreement, but a mutual understanding that neither party will negotiate further, the court found no evidence that impasse had been reached at all, let alone that an unreasonable delay after impasse had occurred. The court held that a pre-suit demand letter cannot be evidence of impasse because its inherent purpose is to encourage settlement, which implies further negotiation.

The insureds also argued that the dispute regarding overhead, profit, and tax is not subject to appraisal because it is not a value dispute on the amount of loss, but a legal dispute over whether they are owed at all. But Acceptance agreed that some amount was due, and the question was how much, thus bringing it squarely within the “amount of loss,” which is precisely what the appraisal clause covers.

Then the insureds argued that Acceptance had breached the policy by not paying overhead, profit, and tax, and because of that breach, they no longer had any duty to comply with any art of the policy. The court disagreed

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because the only reason it had not yet been paid was the dispute over the amount, which Acceptance had invoked appraisal to resolve.

Finally, the insureds argued the appraisal clause lacks mutuality and is illusory because the carrier expressly retains the right to deny the claim, and therefore any award the carrier does not like will simply result in a denial. Again, the court disagreed, pointing out that both sides can invoke the appraisal clause, and both sides retain the right to dispute coverage after an appraisal award is issued – the carrier by denying the claim, and the insured by filing suit.

Editor's Note: While the court's ruling upholding the insurer's right to appraisal is consistent with a well-established body of law enforcing the appraisal clause in most circumstances, the court went further and also ordered the trial court to abate the suits pending the outcome of the appraisal process. This ruling is quite surprising in light of ample Texas precedent holding that abatement is not necessary during appraisal and is at the trial court's discretion. In *In re Universal Underwriters*, the Supreme Court of Texas expressly stated, "...the trial court's failure to grant the motion to abate is not subject to mandamus, and the proceedings need not be abated while the appraisal goes forward."