IN THE SUPREME COURT OF FLORIDA

Case No. 85,200

On Petition For Discretionary Review
From The Third District Court Of Appeal

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

ELICER and HERMID LICEA,

Respondents.

BRIEF AMICUS CURIAE OF AMERICAN INSURANCE ASSOCIATION

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STATEMENT OF THE CASE AND FACTS

Amicus AMERICAN INSURANCE ASSOCIATION ("AIA") adopts the statement of the case and facts of the Petitioner.

AIA is a national trade organization representing 270 companies which write property and casualty insurance in every state and jurisdiction of the United States. These companies provide twenty-seven percent (27%) of all property and casualty insurance underwritten in the United States. AIA companies are affiliated with 79,000 independent insurance agents nationwide.

The purposes of AIA are to promote the economic, legislative, and public standing of its members and the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and, to serve the public interest through appropriate activities, including the promotion of safety and security of persons and property.

AIA and its members have an acute interest in the resolution of the issue in this case. The appraisal clause at issue (or close variations thereof) have been included in thousands -- if not millions -- of property and casualty insurance contracts over the past century. They have been used in Florida since at least the early 1890s. See Hanover Fire Ins. Co. v. Lewis, 10 So. 297 (Fla. 1891). This Court's decision will affect each of AIA's member companies that conduct business in Florida and its practical and legal ramifications are of substantial interest and importance to AIA's membership.

SUMMARY OF ARGUMENT

Appraisal clauses are a valid means of resolving disputes as to the amount of loss. They have been upheld under Florida's common law since at least the 1890s. For over a century, insurers and insureds nationwide have successfully used the appraisal process and avoided the time and expense associated with judicial resolution of valuation disputes. The appraisal process is a tried and true method of fairly resolving valuation disputes without resort to the judicial system.

Florida has a strong public policy of encouraging the type of dispute resolution the appraisal process provides. Florida has a general, if not overwhelming, preference for the resolution of conflicts through extra-judicial means such as arbitration. In light of the substantial judicial deference to arbitration, appraisal clauses are entitled to an even greater presumption of validity. Because they resolve only one factual aspect of a dispute (i.e., amount of loss) rather than an entire controversy, they pose less potential for overreaching and lack of mutuality.

Finally, Florida's substantial and growing population, its distinctive geography, and its exposure to the risks of natural catastrophes can result in periods when massive numbers of insurance claims are made. The fair and effective resolution of factual disputes pursuant to appraisal clauses in private insurance contracts reduces the potential for such claims to overwhelm the court system. The Third District's reasoning should be rejected and the validity of appraisal clauses reconfirmed by this Court.

ARGUMENT

I. APPRAISAL CLAUSES ARE VALID AND MUTUALLY BENEFICIAL MEANS OF RESOLVING VALUATION DISPUTES

Under well-established and well-founded precedents spanning the last century,[1] the validity of appraisal clauses contained in insurance contracts cannot be seriously disputed. Insurers and insureds nationwide have successfully used the appraisal process for decades and thereby avoided the time and expense associated with judicial resolution of valuation disputes (which are purely factual matters). In this regard, the Third District's Country Walk[2] opinion, upon which the panel below was grudgingly forced to rely, is simply out of step with the history of Florida and American jurisprudence on appraisal clauses.[3]

AIA therefore fully supports the cogent brief that Petitioner has submitted in support of reversal of the Third District's anomalous decisions in Country Walk and this action. Additional public policy reasons also dictate reversal of the Third District's

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[1] This Court has affirmed and reaffirmed the use of appraisal clauses for over a century. See New Amsterdam Cas. Co. v. J. H. Blackshear, Inc., 116 Fla. 289, 156 So. 695 (Fla. 1934); Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297 (Fla. 1891).

[2] American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d DCA 1994).

[3] The decision is also inconsistent with a panel opinion from the Third District which recently held that the "use of appraisal clauses as binding arbitration agreements is . . . well-established." State Farm Fire & Cas. Co. v. Middleton, 648 So. 2d 1200, 1202 (Fla. 3d DCA 1995) (citing Blackshear, supra).

decision and reaffirmation of the validity of the appraisal process as set forth in the policy in question.[4]

A. Appraisal Clauses Reduce Burdens on the Court System

Appraisal clauses have ancient roots in the insurance industry as well as the common law of Florida and other states.[5] In the current environment where alternative dispute mechanisms have become increasingly prevalent, the types of appraisal clauses at issue stand as testaments to the longevity of tried and true

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[4] The appraisal clause at issue states:

> Appraisal. If you and we fail to agree on the amount of loss, either one can demand that the amount of loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

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[5] These roots extend to English common law as this Court recognized in Hanover Fire Ins.. 10 So. 297 at 246 (since 1853 "it has been uniformly held in England and in this country that provisions like this in a policy of insurance for the ascertainment and settlement of the amount of loss or damage by submission to arbitrators are proper, legal and binding on the parties . . .").

methods of fairly resolving valuation disputes without reliance on the judicial system. The Third District's invalidation of such clauses imperils their continued vitality and creates the potential for overwhelming the court system with the additional burden of adjudicating the large number of valuation disputes previously reserved to the private appraisal process.

It is important to recognize that the valuation process under an appraisal clause is wholly separate and independent from the issue of whether coverage exists. Damages and coverage are entirely distinct issues; simply because an insured has incurred damages does not establish coverage for such damages.[6] It is equally clear that an insurer (or an insured) must abide by the amount of damages the appraisers agree upon, provided there is no coverage dispute. The essence of the appraisal clause is an agreement to be bound by the appraisers' factual determination of the amount of damages. But appraisers do not decide coverage issues. Appraisers address only the narrow issue of damages and do not make legal determinations regarding whether coverage exists

[6] For example, an insured who commits arson by burning down his business would incur damages but no coverage would exist.

under a particular policy.[7] A California appellate court made this distinction as follows:

> The function of the appraisers is to determine the amount of damage resulting from various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy.

Jefferson Ins. Co. of N.Y. v. Superior Ct., 3 Cal. 3d 398, 90 Cal. Rptr. 608, 611, 475 P.2d 880, 883 (1970). Coverage disputes are resolved in a judicial forum (or arbitration) while appraisals of disputed losses are not.[8]

In this regard, the use of appraisal clauses provides a mutually beneficial method of resolving valuation disputes without resort to the court system. The primary purpose of an appraisal clause is to provide a relatively swift and informal method by which appraisers -- rather than courts -- determine the amount of a disputed loss where the parties cannot themselves agree on the amount. The appraisal process therefore provides a means of making valuation determinations while saving a great deal of judicial resources. Florida has a strong public policy of encouraging the

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[7] Where appraisers have ventured beyond the limited inquiry of property value or loss and made decisions about, for example, liability, ownership, or fraud, courts have held such activities are outside the appraisers' scope of authority; see St. Paul Fire & Marine Ins. Co. v. Wright, 629 P.2d 1202 (Nev. 1981) (umpire and appraisers exceed their authority in interpreting extent of coverage provisions); Elberon Bathing Co. v. Ambassador, Inc., 389 A.2d 439, 445 (N.J. 1978) ("An appraiser . . . can make no legal determinations.").

[8] An insured or insurer can, under certain circumstances, challenge an appraisal based on fraud or other similar grounds. Weinger v. State Farm Fire & Cas. Co., 620 So. 2d 1298 (Fla. 4th DCA 1993) (umpire chosen pursuant to appraisal clause must be neutral).

type of dispute resolution the appraisal process has provided over the years: There is a "general, even overwhelming, preference in Florida for the resolution of conflicts through any extra-judicial means, especially arbitration, for which the parties have themselves contracted." State Farm Fire & Cas. Co. v. Middleton, 648 So. 2d 1200, 1201-02 (Fla. 3d DCA 1995) (issue of actual loss under appraisal clause must be submitted to appraisers); see Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988) ("Under Florida law, . . . arbitration is a favored means of dispute resolution and courts should indulge every reasonable presumption to uphold proceedings resulting in an award.").

Under the Third District's decision, the practical and laudable benefits of the appraisal process are substantially lost with no corresponding gain to consumers or the insurance industry. Instead, disputes as to loss amounts will simply be shifted to the courts which is precisely the result to be avoided. Midwest Mut. Ins. Co. v. Santiesteban, 287 So. 2d 665, 667 (Fla. 1973) (private dispute resolution favored "to expedite claims and reduce litigation.").

B. The Appraisal Process is Fair and Equitable and Should Be Accorded a Presumption of Validity

Florida's strong policy of favoring extra-judicial methods of dispute resolution extends to arbitration as well as to appraisal clauses.[9] This is because the appraisal process is a mutually fair

[9] Middleton, 648 So. 2d at 1201-02.

and equitable method for determining the amount of a disputed loss and is thereby accorded substantial judicial deference.[10]

Although courts sometimes confuse them, the appraisal process is significantly different from the arbitration process.[11] This confusion has resulted, at least in Country Walk and its progeny, in the unjustifiable conclusion that appraisal clauses are tantamount to binding arbitration and somehow lack mutuality between insurers and insureds.

Arbitration and appraisement, however, differ in material ways. The appraisal process is significantly more informal (though no less professional) than arbitration proceedings, the latter approximating a costly "quasi-judicial" method of dispute

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[10] 6 Appleman Ins. L. & Prac., § 3921 (Validity of Policy Provisions) (1972) ("Generally, policy provisions requiring arbitration or appraisal of a loss are valid and binding on the parties. Such provisions are upheld on grounds of sound public policy, since they tend to fair dealing and the prevention of litigation.") (footnotes omitted); Middleton, 648 So. 2d at 1201-02.

[11] John R. Casolaro, A Primer on Appraisal to Resolve Valuation Disputes, 65 N.Y. St. B.J. 10 (Jan. 1993) (discussion of differences between appraisal and arbitration).

resolution.[12] The Supreme Court of New Jersey discussed these distinctions as follows:

> The purposes of both are the same: to submit disputes to third parties and effect their speedy and efficient resolution without recourse to the courts. To assure minimum judicial intervention, the scope of judicial review of both types of recourse is narrow. The distinctions are significant. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, and judgment may be entered upon the award, whereas an appraisal establishes only the amount of loss and not liability. Arbitration is conducted as a quasi-judicial proceeding, with hearings, notice of hearings, oaths of arbitrators and oaths of witnesses. Appraisers act on their own skill and knowledge, need not be sworn and need hold no formal hearings so long as both sides are given an opportunity to state their positions.

Elberon Bathing Co. v. Ambassador, Inc., 389 A.2d 439, 447 (N.J. 1978) (citations omitted) (emphasis added). Consistent with this explanation, under the typical appraisal clause, two professional appraisers[13] informally -- but in accordance with accepted

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[12] The distinction between a valuation under an appraisal clause and an arbitration was made over a century ago.

> There is scarcely a day in which, in commercial transactions, the valuation of property or estimate of damages is not entrusted to third parties, and no one has yet dreamed of looking upon them as arbitrations, and subjected to all the formalities imposed on them by [arbitration statutes], with the paraphernalia of oaths, witnesses and notices of trial.

Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N.Y.S. 798 (N.Y. Sup., Jun. 21, 1922) (citing Brink v. New Amsterdam Fire Ins. Co., 28 N.Y. Super. Ct. 104, 123 (Super. Ct. of N.Y.C. 1867)).

[13] Appraisers are licensed professional who are regulated by the Florida Real Estate Appraisal Board. §§ 475.610 - .630, Fla. Stat. (1993 & Supp. 1994).

valuation standards[14] -- prepare estimates of the amount of loss. If the two appraisers cannot agree on the amount, they submit their reports to a mutually agreed upon umpire who is competent and impartial. An agreement between any two of three on the amount of loss resolves the dispute.

Under these circumstances, the limits placed on the authority of appraisers (and umpires) lessens the argument that arbitration and appraisement are comparable in terms of exercising dispositive powers.

> Contrary to arbitration, where the arbitrator is frequently given "broad powers, appraisers generally have more limited powers." An appraiser's power generally does not "encompass the disposition of the entire controversy between the parties . . . (but) extends merely to the resolution of the specific issues of actual cash value and the amount of loss."

St. Paul Fire & Marine Ins. Co. v. Wright, 629 P.2d 1202, 1203 (Nev. 1981) (citation omitted).

The fact that appraisers have a lesser degree of authority than arbitrators is important from a public policy perspective. Given the substantial judicial deference to arbitration clauses, appraisal clauses should be entitled to an even greater presumption of validity because they resolve only one aspect of a dispute, i.e., the amount of loss, rather than the entire controversy. As such, they pose less potential for overreaching and lack of mutuality. In addition, it is not in the public interest to

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[14] The Board oversees the registration, licensing and certification standards for real estate appraisers who must comply with the Uniform Standards of Professional Appraisal Practice. Id. §§ 475.612 & .628.

encourage litigation over the very procedures that were designed to resolve disputes without litigation.[15] Every reasonable presumption should therefore be accorded to such clauses.

C. Appraisal Clauses Are Vitally Important in Florida

Among the fifty States, Florida would perhaps be most uniquely impacted if this Court were to adopt the Third District's reasoning. Florida's substantial and growing population, its distinctive geography, and its exposure to the risks of natural catastrophes, including hurricanes, flooding, and wind-storms,[16] create a severe potential for periods during which insurance claims peak at high levels. For example, within a month after Hurricane Andrew swept through South Florida, over 700,000 homeowners filed insurance claims[17] which ultimately resulted in $16.5 billion in

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[15] Elberon Bathing, 389 A.2d at 445.

[16] See Richard Hamann, Post Hurricane Litigation: Private Liability Under Florida Law for Personal Injury, Loss of Life and Property Damages Resulting from Major Coastal Storms, 4 J. Land Use & Envtl. L. 73 (1988).

> Tremendous injury to people and damage to property may result when a hurricane strikes the coast. These storms arise quickly and threaten severe damage to life and property. Florida is particularly threatened, due to its rapidly growing population concentrated along hundreds of miles of vulnerable coastline. In the aftermath of a destructive storm, attempts to assess liability for the damage are likely.

Id. at 118.

[17] Earl C. Gottschalk, Jr., "In Hurricane Andrew's Wake, Settling Insurance Claims May Be Next Disaster," Wall St. J., Sept. 25, 1992, at C1.

losses.[18] Without alternative non-judicial means to expeditiously handle disputes arising from the enormous number of claims in times of such catastrophic loss, Florida courts -- whose dockets are burdened in normal times -- would be inundated with disputed insurance claims that courts are ill-equipped to handle. Court caseloads in Florida are currently at levels that threaten the judicial system's ability to timely resolve litigants' claims without the added burden of such an extraordinary volume of claims.

Yet it is when a catastrophe occurs that prompt processing and payment of insurance claims, including resolution of claims disputes, is of the greatest importance. In the wake of a catastrophe, insureds need prompt responses to their insurance claims to rebuild damaged or destroyed structures. Indeed, the public interest is best served through the prompt resolution of insurance disputes so that damaged properties can be restored. The appraisal process has worked effectively for many years to serve these interests and has done so without imposing a substantial administrative or financial burden on the State's judiciary. This Court should therefore reconfirm what Florida courts uniformly have recognized for decades: that public policy favors appraisal clauses in private insurance contracts and such clauses should be given full effect.

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[18] Review of 1992 Best's Rating Changes and Trends for Property/Casualty Insurers, Best's Review -- Property-Casualty Ins., (Sept. 1, 1993); John H. Snyder, Hurricane Andrew: A Postmordem, Best's Review -- Property-Casualty Ins., (Jan. 1, 1993).

CONCLUSION

Based upon the foregoing, AIA supports the Petitioner in this action and requests that the Third District's opinion be reversed.

Respectfully submitted,

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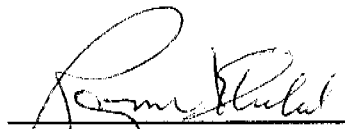

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to: Linwood Anderson, Esq., Law Offices of Charlton Lee Hunter, 150 Southeast Second Avenue, Suite 1200, Miami, Florida 33131, Elizabeth K. Russo, Russo & Talisman, P.A., Suite 2001, Terremark Centre, 2601 South Bayshore Drive, Coconut Grove, Florida 33133, Hal Vogel, Esq., 20801 Biscayne Boulevard, Suite 454, Aventura, Florida, 33180 and Barry Finkel, Esq., Frankel & Finkel, P.A., 404 East Atlantic Boulevard, Pompano Beach, Florida 33060, this 3rd day of April, 1995.

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