SUPREME COURT OF FLORIDA

CASE NO. 85,200

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

ELICER LICEA and HERMIDA LICEA,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS ELICER and HERMIDA LICEA

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STATEMENT OF THE CASE AND FACTS

Respondents agree with State Farm's recitation of the case and facts, with the following exceptions and clarifications:

Policy Provisions

The homeowners' policy issued to the Liceas (attached as an Appendix to Petitioner's Brief) contained four pertinent provisions: a coverage provision, an appraisal clause, a loss payment schedule, and a non-waiver provision.

"Guaranteed Extra Coverage" (p. 7) provides:

> We will settle covered losses to the dwelling under Coverage A and other building structures under the Dwelling Extension at replacement cost without regard to the limit of liability, subject to the Loss Settlement provisions in Section I - CONDITIONS.

"Conditions", §6 (p. 13) contains the appraisal clause:

> Appraisal. If you and we fail to agree on the amount of loss, either one can demand that the amount of the 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 two 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 premised 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 the 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 the 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.

"Loss Payment", §19 (p. 14; A-2) provides, in pertinent part, that

Loss will be payable:

> a. 20 days after we receive your proof of loss and reach agreement with you; or
>
> b. 60 days after we receive your proof of loss and:
>
> (1) there is an entry of a final judgment; or
>
> (2) there is a filing of an appraisal award with us.

"Conditions", §4 (p. 19) provides, in pertinent part:

> "Our request for an appraisal or examination shall not waive any of our rights."

The policy does not define what "our rights" are. Presumably, they include the right to deny the claim, the right to deny coverage, and the right to raise policy defenses after the appraisal is concluded. In the Third District, State Farm stated that the purpose of this provision "is to avoid admitting coverage by requiring arbitration as was held to have occurred in Reserve Ins. Co. v. Pollock, 270 So. 2d 469 (Fla. 3d DCA 1972)." (Appellant's Brief, R 76-105, at pp. 20-21).

State Farm's Recommendation of Appraisal

In August, 1992, Hurricane Andrew severely damaged Appellees' home. Damage to the roof caused leaks, resulting in continuing damage to the interior. State Farm acknowledged that the Licea residence sustained heavy structural damage from Hurricane Andrew, but refused to pay for the roof damage. State Farm recommended appraisal to the Liceas "as an option for settling" the roof claim. (R 18). State Farm requested that the Liceas retain an appraiser, but then unilaterally rejected that appraiser; it provided a list of State Farm-approved appraisers, but unilaterally rejected their appraisals as well. In the

letter to the Liceas rejecting their appraiser, State Farm stated that it "does not intend by this letter to waive any policy defenses." (R 155). Meanwhile, the roof remained unrepaired.

A year and a half after Hurricane Andrew, the Liceas were no closer to receiving their policy benefits than the day the storm ravaged their home.

Course of Proceedings

State Farm commenced this action on February 10, 1994 by filing a "Motion, Pursuant to Florida Statute §682.04, for an Umpire for Arbitration Proceeding". On March 7, 1994, the Liceas answered and counterclaimed for breach of contract, and requested a jury trial (R 121-155). They admitted that the policy contained an appraisal clause, but denied that it was enforceable, because it lacked mutuality of obligation and was illusory, as the policy provided that request for appraisal would not waive any of State Farm's rights, and because State Farm had written to the Liceas that despite the ongoing appraisal process, it was not waiving any policy defenses.

State Farm's Amended Answer and Affirmative Defenses to Counterclaim (R 231-246, Appendix D) raised policy defenses and coverage exclusions, e.g., that the policy excludes insurance for loss consisting of or caused by wear and tear, deterioration, or latent defect (A 14); that the policy excepts from coverage loss caused by design and material defects, inadequate maintenance, failure to protect the property after the loss, etc. and misrepresentation of facts concerning the roof claim; and that the Liceas exaggerated the damage.

On March 15, 1994, State Farm filed a "Motion to Stay Action on Counterclaim", pursuant to Fla. Stat. §682.03(3), arguing that it filed a motion to appoint umpire, that the

Liceas filed a counterclaim, and that the issue of repair or replacement cost should be determined by appraisal. On March 30, 1994, the trial court denied State Farm's Motion to Stay (R 231-246, Appendix B), based on American Reliance Insurance Co. v. The Village Homes of Country Walk, 632 So. 2d 106 (Fla. 3d DCA 1994), rev. denied, 640 So. 2d 1106 (Fla. 1994). State Farm did not appeal the March 30, 1994 Order within thirty days. (R 5-75).

On April 14, 1994, State Farm noticed for hearing on April 27, 1994 its "Motion, Pursuant to Florida Statute §682.04, for an Umpire for Arbitration Proceeding". After hearing argument for the second time concerning the unenforceability of the arbitration provision (R 106-200, tabs 1 and 15), the trial court denied the Motion by Order dated April 27, 1994. State Farm appealed this April 27 order, but not the March 30 order. The Liceas filed a Motion to Dismiss Appeal (R 5-75; 201-204), based on State Farm's failure to appeal the denial of its Motion to Stay Action on Counterclaim within thirty days. The Third District denied the Motion on July 1, 1994. (R 205).

SUMMARY OF ARGUMENT

It takes a natural disaster like Hurricane Andrew to expose otherwise dormant infirmities in a homeowner's insurance policy. While many policies contain "appraisal clauses", some also contain boundlessly-worded and sometimes hidden "non-waiver" or "reservation of rights" qualifiers that effectively give the insurance company the unilateral ability to disavow the appraisal.

Respondents do not quarrel with the general proposition that appraisal clauses are enforceable, and may, when deployed fairly, reduce litigation. However, when appraisal

provisions contain open-ended, amorphous "escape hatches" effectively giving the insurer the sole option to deny or reduce the appraisal by proceeding to litigation, the promise to resolve the dispute by arbitration becomes illusory, and the entire matter should be litigated. This is especially true for property damage claims made under homeowner's policies, where "coverage" and "policy" defenses are bound up in the determination of the amount of the loss.

Even if the escape hatches should now be assigned the narrow interpretation espoused by State Farm, and by the dissent in American Reliance v. Country Walk, i.e., that appraising the amount leaves open coverage questions for judicial determination, such a separation must be clearly expressed to the insured, and agreed to by the insured. The phrases "Our request for an appraisal shall not waive any of our rights", or "we will still retain our right to deny the claim" are declarations that the insurer is not giving any consideration; they do not unambiguously notify the insured that appraisal will not settle the claim, and that the insurer has the option of not paying.

The policies underlying arbitration are thwarted when arbitration becomes a prelude to, rather than an alternative to litigation, especially where the insured is led to believe appraisal is an option to settle the claim. State Farm's policy contains what appears to be an unconditional promise to pay an appraisal award. The appraisal clause itself does not expressly except "coverage" or "policy" defenses, and appraisal was presented to the Liceas as an option to settle the claim. The "non-waiver" provision that State Farm contends allows it to avoid, reduce, or nullify the appraisal determination under the guise of litigating "coverage", "policy", or other defenses, is buried in an inconspicuous paragraph six pages

after the appraisal clause. No public policy is served by permitting -- even encouraging --- an insurer like State Farm to "hide" its rights and sit on them, while the homeowner has been lured into the appraisal process with the assurance that it will "set" the amount of the loss. The public policies that discourage multiplicity of proceedings and encourage efficient, alternative dispute resolution mechanisms are ill-served by having appraisers set the amount of a loss, and then allowing the insurer the sole option to re-visit the issue in a judicial proceeding. These public policies, and the law of mutuality of obligation, necessitate that all issues be resolved at one time in one place.

The Third District's decision does not directly and expressly conflict with the cited decisions of other district courts of appeal, or of this Court, and there is no conflict jurisdiction. None of the district court decisions dealt with the impact or interpretation of "non-waiver" clauses in homeowners' policies in general, or State Farm's policy in particular, and the decisions are factually distinguishable. Nor does this Court's decision in Hanover Fire Insurance Co. v. Lewis, 10 So. 297 (Fla. 1891) conflict with the Third District's decision, as already indicated by this Court in denying the insurer's petition for review, based on asserted conflict, in American Reliance Ins. Co. v. Village Homes of Country Walk, 632 So. 2d 106 (Fla. 3d DCA 1994), rev. denied, 640 So. 2d 1106 (Fla. 1994). Finally, to the extent State Farm's appeal to the district court was untimely or unauthorized, this Court may lack jurisdiction.

The petition for review should be denied, or the decision of the Third District affirmed.

ARGUMENT

I. ARGUMENT ON THE MERITS

A. An insurer's promise to set the amount of a loss through appraisal is illusory when accompanied by a reservation of the right to reject or reduce that amount.

When an insurance company represents that submission to appraisal will settle the claim once and for all, but in the next breath purports to reserve the right to deny the claim, the promise to arbitrate is illusory. State Farm's provision that appraisal "shall not waive any of our rights", and American Reliance's reservation of the right "to deny the claim", announce that the insurer is giving no consideration. Absent consideration, an appraisal clause lacks mutuality of obligation and is unenforceable. It also becomes a tool of oppression to a homeowner after a natural disaster. This is especially so where there is no express language reserving liability, but rather, general all-inclusive language permitting the insurer to deny the claim.

The practical effect of these non-waiver clauses, as correctly construed by the panel in Country Walk[1], is to grant the insurer the unilateral option of rejecting any decision of the appraisers. The "amount" set in the appraisal process is but a starting point for the insurer, which can deny all or part of the claim as not covered or not insured. Nowhere is there available to the homeowner an option to disavow, increase, or augment the appraisal determination. Cf., Roe v. Amica Mutual Ins. Co., 533 So. 2d 279 (Fla. 1988)(option of rejection equally available to both parties, and therefore, there was no lack of mutuality).

[1] As discussed *infra*, these non-waiver clauses do not limited themselves only to coverage issues, as State Farm presupposes.

The insurer can enforce the appraisal if it is low enough, or reject it if it is not. On the other hand, the homeowner cannot enforce the insurer's promise to pay within 60 days, and cannot challenge the appraisal as insufficient, even if the award is clearly contrary to the facts and the law. Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1328 (Fla. 1989).

"It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract". Pan-Am Tobacco v. Department of Corrections, 471 So. 2d 4, 5 (Fla. 1984). An agreement cannot bind one party and not the other. Balter v. Pan American Bank, 383 So. 2d 256, 257 (Fla. 3d DCA 1980); Col. Cty. Sheriff's Off. v. Law Enforcement, 574 So. 2d 234, 237 (Fla. 1st DCA 1991). Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound. Pan-Am Tobacco supra, citing Miami Coca-Cola Bottling Co. v. Orange-Crush Co., 291 F. 102 (D. Fla. 1923), affirmed, 296 F. 693 (5th Cir. 1924). A promise which reserves by its terms to the promisor the privilege of alternative conduct is insufficient as a consideration if any of the reserved alternative courses of conduct would be insufficient if bargained for alone. 11 Fla. Jur 2d Contracts §73, p. 364. Here, the insurer reserves for itself the course of conduct of repudiating the appraisal.

Such an illusory promise cannot constitute consideration for a return promise to arbitrate.[2] Without consideration there is no mutuality of obligation, and without mutuality of obligation, the appraisal provision is unenforceable.

B. Since "coverage defenses" to a claim for damage to a

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[2] Agreements for arbitration contained in a contract are treated as separable parts of the contract, and must have their own consideration or mutual obligation. R.W. Roberts Construction Co. v. St. Johns River, 423 So. 2d 630, 633 (Fla. 5th DCA 1982).

homeowner's residence are intertwined with the "amount of the loss", reservation of coverage issues deprives the appraisal determination of any binding effect.

State Farm argues that appraisal is not futile because it will determine the amount of loss or damage. Even if the broad non-waiver clauses are construed to preserve only coverage defenses[3], it is difficult to see how an appraisal amount will be "binding"[4] on State Farm, if it is free to delay paying it, or reduce or completely nullify it by taking the after-the-fact position that the loss or damage resulted from non-covered causes (e.g., wear and tear, latent defect, or unsound design and construction), or by unleashing whatever "rights" or "defenses" it can think of after the appraisal process is under way. State Farm's "promise" to arbitrate is a classic illusory promise. State Farm will pay the appraisal award only if it chooses to. Rosenberg v. Lawrence, 541 So. 2d 1204, 1206-1207 (Fla. 3d DCA 1988)(parties' agreement to share equally in child's education, except for any unusual or extraordinary expense to which he or she does not consent, rendered "promise" to share illusory).

State Farm's "policy defenses" and "coverage defenses", which it insists cannot be determined by appraisal, are so interrelated with the "amount of the loss", that it makes no

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[3] Respondents submit that the policy terms should be construed to remove impediments to payment of policy benefits. Doubtful language in an insurance contract should be interpreted most strongly against the party who selected that language, Finberg v. Herald Fire Ins., 455 So. 2d 462 (Fla. 3d DCA 1984), and liberally in favor of the insured, so as to effect the dominant purpose of...payment to the insured. 30 Fla. Jur 2d Insurance §406, pp. 351-352, especially when necessary to avoid forfeiture or to limit the effect of limitations upon coverage. Hulse v. Blue Cross/Blue Shield of Florida, Inc., 424 So. 2d 191 (Fla. 5th DCA 1983). Here, bypassing appraisal removes a redundant layer of proceedings and hastens recovery of policy benefits.

[4] Unlike the appraisal clause in Country Walk, in which the appraisal was to be "binding", in State Farm's policy, appraisal would "set" the amount.

sense for appraisal to "set" the amount of the Liceas' loss, and then have State Farm dispute coverage and reduce the award on the ground that the loss resulted from uninsured causes.

A homeowner faced with an inadequate award who believes that the appraisers have not considered portions of the claim has no remedy, while the insurer who believes that the award is too high is free to reduce the amount by further "negotiating" or litigating its coverage defenses. Narrowly construing the "escape hatches" to be reservation of coverage or liability does little to repair the mutuality defect.

Thus, division of amount, coverage, and whatever other "rights" the insurer has is not only impractical, but fraught with the potential for abuse, delay, and confusion.

C. State Farm did not adequately inform the Liceas of its intention to reserve its "rights".

From a homeowner's perspective, determining the "amount of loss" means "how much is the insurer going to pay me". By its inclusion of the non-waiver provision (in an inconspicuous place six pages after the appraisal provision) State Farm converts it to "how much is the insurer going to pay me if it feels like it".

The Liceas' policy contained a promise by State Farm to pay within sixty days of an appraisal award. It did not contain a "clear expression" that such promise was conditioned upon State Farm's unilateral decision whether to litigate coverage, policy defenses, or any of its other unspecified "rights". It was only in its appellate brief to the district court that State Farm first sought to explicate the intent of its non-waiver clause: to avoid admitting coverage by seeking appraisal. Surely, if this were the intent, State Farm could have

expressed it in definite terms.[5] Absent any limiting language, the non-waiver clauses in Country Walk and Licea give the insurer the unfettered discretion to delay, dispute, or deny the appraisal award.

In the absence of a clear expression, a policy of insurance may not give a right in one paragraph and retract it in another. Moore v. Connecticut General Life Ins. Co., 277 So. 2d 839, 842 (Fla. 3d DCA 1973); Tire Kingdom, Inc. v. First Southern Ins. Co., 573 So. 2d 885 (Fla. 3d DCA 1990). Notwithstanding what at first blush seems an unconditional, mutual agreement to resolve the dispute by arbitration, the appraisal clause is actually a promise to pay only if State Farm wants to.

In their policies, both State Farm and American Reliance, instead of precisely defining what and what would not be arbitrated, resorted to catch-all language that only later is revealed to include reservation of the right to deny all elements of the claim, by whatever artifice available, including challenges to the amount of and entitlement to the claim. While both insurers argue it is permissible to arbitrate damages and litigate coverage[6], neither policy expresses this principle or informs the insured of it. Rather, they employ vague, imprecise language that can be molded to fit whatever theory the insurer

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[5] If the intent of the non-waiver provision was to reserve coverage issues or not to admit liability, certainly State Farm could have and should have expressed that intent clearly and succinctly, as was done in Hanover Fire. State Farm should not be able to define and redefine its non-waiver provision, depending upon what is expedient for it in a particular situation at a particular time.

[6] Unlike Hanover Fire Insurance Co. v. Lewis, 10 So. 297 (Fla. 1891), where the clear policy language as well as a subsequent written ratification by the parties clearly delineated the scope of the appraisal, here the insurer unilaterally determined and camouflaged what "defenses" or "rights" it was reserving.

wants to pursue in order to avoid paying the claim. The Liceas thought appraisal was an option to settle the roof claim, not merely a procedure for State Farm to ascertain its maximum exposure. Further, in the State Farm policy, such reservation is repugnant to its promise to pay the arbitration award within 60 days, and renders that promise illusory.

In Country Walk, the homeowners were rightfully loathe to submit their claims to appraisal, where American Reliance could deny the claim, including the arbitrator's determination, at its sole and unilateral discretion. In State Farm's policy, an even broader reservation of rights exists, and was coupled with State Farm's warning that it was not waiving any of its policy defenses. A homeowner trying to rebuild after a natural disaster cannot be expected to understand that the "right to deny" or "non-waiver" clauses allow the insurer to participate in an appraisal, and if it does not like the outcome, seek to whittle away the appraisal award by litigating defenses and coverage. It is therefore not surprising that the Liceas as well, were loathe to submit their dispute to arbitration once they learned State Farm reserved the right to thwart the very purpose of the appraisal; a quick and efficient means of paying for hurricane damages.

Unenforceability of the appraisal provision does not subvert or re-write the contract between the parties, since the loss payment schedule of State Farm's policy expressly contemplates litigation or appraisal, and appraisal is elective rather than mandatory. Since State Farm is adamant that coverage questions are for the court, not the arbitrators, the entire dispute can be, should be, and must be resolved in litigation.

D. The two-tiered procedure espoused by State Farm is contrary to the goals of arbitration.

Appraisal or arbitration is meant to be an alternative to, not a precursor to litigation.

The very essence of arbitration is the agreement to be bound by the factual determination of the arbitrator and thus end the factual controversy. Bankers & Shippers Insurance Co. v. Gonzalez, 234 So. 2d 693, 695 (Fla. 3d DCA 1970). Appraisal or arbitration contemplates limited judicial review to prevent it from becoming merely an added preliminary step to judicial resolution, rather than a true alternative. Complete Interiors, Inc. v. Behan, 558 So. 2d 48, 50 (Fla. 5th DCA 1990). Thus, the broader a non-waiver provision is, the more likely it is to run afoul of these policies.

State Farm's answer to the Liceas' counterclaim illustrates that arbitration will not resolve the dispute, nor will it determine the amount of the loss. Thus, an arbitrator could determine the amount of the loss, and according to State Farm, State Farm could still reduce the award by claiming the Liceas exaggerated the amount of the loss, or by claiming that the damage resulted from wear and tear or defective materials, or a myriad of other "coverage defenses".

Practical considerations also militate against splitting up the resolution of an insurance claim with right to deny or non-waiver clauses. Logically, one cannot expect an appraiser to "set" the loss caused by the hurricane, reserving whether the hurricane caused the loss. Aside from the obvious duplication of effort and inconsistency of adjudications that will result from determining related issues in different forums with different evidentiary standards, such a bifurcation will inevitably tempt a judge or appellate court to go behind the appraisers' decision to try to determine what factors the umpire did or did not take into consideration. However, the courts are powerless to correct obvious mistakes of law or fact due to the limited judicial review of appraisal awards, Schnurmacher, supra. Similarly, the

appraisers will be charged with determining what the amount of the loss is, without knowing what causes are covered, and without any procedures or guidelines to define their role.

One goal of arbitration is to ensure a swift resolution of a dispute, even at the expense of accuracy and procedural safeguards. However, once the speed and efficiency of arbitration are sacrificed so as to preserve an insurer's right to litigate after appraisal, the reason for dispensing with rules of evidence and rules of law vanishes. The homeowner's trade-off of his right to a jury trial, his right of access to the courts, and his right to a determination based on competent evidence and correct legal standards becomes meaningless if he winds up not with a short-cut around litigation, but rather a prologue to it.

Even if a division of issues between arbitration and litigation is permissible, Florida public policy compels the conclusion that all issues should be litigated if any are litigated to avoid piecemeal litigation.[7] This result is in accord with the results reached by the trial courts in the instant case and in Country Walk.

The deluge of "unnecessary litigation" predicted by State Farm (Petitioner's Brief at 17, n. 5) will not come to pass. Insurers with bona fide coverage defenses will be prompted to file declaratory judgment actions; otherwise, they can and should allow appraisal to

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[7] The law seems divergent as to the procedure to be employed if both damages and coverage are disputed. Some cases hold that coverage should be litigated before damages are arbitrated, e.g., State Farm Fire & Cas. v. Glass, 421 So. 2d 759 (Fla. 4th DCA 1982); others indicate that damages should be arbitrated before coverage is litigated. Respondents believe that the better view is that since reserved coverage questions can only be decided by a court, all issues should be determined in litigation. Criterion Ins. Co. v. Amador, 479 So. 2d 300 (Fla. 3d DCA 1985). This serves to avoid multiplicity of suits. Kenilworth Ins. Co. v. Drake, 396 So. 2d 836 (Fla. 2d DCA 1981).

determine the amount of the loss with no reservation or restriction. Insurers can and will tailor their non-waiver clauses to insure mutuality, and to delineate the precise elements of a claim that will be resolved. Insurers who insist on reserving and litigating "defenses", should logically expect to litigate the amount at the same time, especially in casualty losses to private dwellings, where the two issues are so intertwined they should be resolved together anyway.

This will avoid the risk of inconsistent adjudications by an umpire and a judge, and save the expense of an appraisal, which is often prohibitively more expensive than litigation. North American Van Lines v. Collyer, 616 So. 2d 177 (Fla. 5th DCA 1993). To expect an umpire to understand the nuances of the law or its application to the policy is unrealistic; yet, with a charge to determine "the amount of the loss", with no legal or factual constraints, and then have a judge rule on exclusions, defenses, and limitations directly affecting the amount, creates inevitable and unnecessary confusion and conflict. Both parties going in should know that the matter will be fully considered and fully compensated in arbitration -- or in the courts. One proceeding in one forum, with all parties on equal footing, should fully and finally resolve a claim.

II. CONFLICT JURISDICTION DOES NOT EXIST

A. There is no interdistrict conflict.

The cases from the First, Second, Fourth, and Fifth Districts cited by the Third District Court of Appeal in State Farm Fire and Casualty v. Licea, do not conflict with the Third District's decision, or can be harmonized with it. They do not involve the effect of nebulous non-waiver provisions. They involve different facts and different insurance policies.

In order for conflict jurisdiction to exist, the decision below must be in express and direct conflict with the decisions of another district court of appeal, or of this Court on the same question of law. Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994); Times Publishing Co. v. Russell, 615 So 2d 158 (Fla. 1993). Conflict must be obvious and patently reflected in the decisions relied on and must result from an application of law to facts which are in essence on all fours, without any issue as to the question in character of proof. Trustees of International Improvement Fund v. Lobean, 127 So. 2d 98, 101 (Fla. 1961). Where a cause is factually or legally distinguishable from those cited in conflict, the Supreme Court should discharge jurisdiction. Dept. of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1953); Olvera v. State, 641 So. 2d 120 (Fla. 5th DCA 1994).

In Kenilworth Insurance Co. v. Drake, 396 So. 2d 836 (Fla. 2d DCA 1981), an uninsured motorist case, the insured brought a declaratory judgment action seeking a declaration of coverage. The insurance companies objected to maintenance of the lawsuit, claiming that the policy provisions required liability[8] and damages to be arbitrated, not litigated. However, the denial of the insurers' motion to dismiss was affirmed based on a holding that the trial court "can and should adjudicate the entire controversy, so as to avoid multiplicity of suits." 396 So. 2d at 838. The court therefore affirmed a judgment on a jury verdict which decided the issues of damages and liability. Consequently, Kenilworth stands

[8] Analogizing UM cases to hurricane damage cases is complicated by the blurring of "coverage" and "liability", especially when "liability" is usually in the context of a third-party tort-feasor's liability in connection with a suit by an insured against his own uninsured motorist carrier. There is some confusion in the caselaw caused by the use of the terms "liability" and "coverage". State Farm Fire & Casualty v. Glass, 421 So. 2d 759 (Fla. 4th DCA 1982).

for the proposition that if one party seeks to reserve to itself the privilege of litigation, then the underlying policy against successive or repetitive proceedings is advanced by litigating the entire controversy, rather than dividing it up between arbitration and litigation. Therefore, Kenilworth is consistent with, rather than in conflict with, the result below.

Similarly, U.S.F & G. v. Woolard, 523 So. 2d 798 (Fla. 1st DCA 1988) does not conflict with the denial of State Farm's motion to compel appraisal. Woolard *reversed* an order compelling arbitration. There, the issue was whether an alleged tortfeasor qualified as an "uninsured motorist", or if for any reason, the insured could not recover damages from the tortfeasor. These were threshold questions that had to be determined by the court *prior* to arbitration, assuring that the arbitration determination could not be disavowed. The insurer did not attempt to reserve its right to deny or reduce the claim after arbitration; rather, it promptly sought such a determination of coverage issues before arbitration.

Montalvo v. Traveler's Indemnity Co., 643 So. 2d 648 (Fla. 5th DCA 1994) held that the trial court had the discretion to reduce an arbitration award on an uninsured motorist policy, by considering the "other insurance" clause of the policy, but could not, under the facts of the case, reduce the award since the insurer had not joined the "other insurer". Unlike in Montalvo, here there is no issue whether another insurer has to pay part of the Liceas' damages, or the effect of failure to join other parties.[9] Further, Montalvo is of limited value, since North Carolina law was applied to interpret the policy and there is no

[9] Courts generally have no qualms about preventing double recoveries or windfalls upon confirmation of an award when it appears a third party has paid or is obligated to pay all or a portion of the damages, e.g., Bruno v. Travelers Ins. Co., 386 So. 2d 251 (Fla. 3d DCA 1980)(insurer could raise the fact that after the arbitration, the tortfeasor paid the insured in full).

suggestion that the appraisal clauses were similar, or that the policy contained an "escape hatch". Nor was there any discussion of whether the appraisal clause suffered from lack of mutuality or was otherwise unenforceable. Finally, Montalvo was decided after Country Walk, but does not cite to it, let alone suggest any conflict with it.

JJF of Palm Beach, Inc. v. State Farm Fire and Casualty, 634 So. 2d 1089 (Fla. 4th DCA 1994) involved a business interruption claim under a fire policy, where the judge disagreed with the arbitrator's determination of what constituted a reasonable time to repair the premises. The Court held that a trial judge could not review an arbitrator's decision for legal and factual accuracy under the rubric of deciding "coverage". The coverage question reserved for the court is "whether the claim is arguably within the class of claims covered by the policy." 634 So. 2d at 1091. Assuming that State Farm's non-waiver applies only to coverage defenses, by contending that the Liceas' roof damage resulted from causes not covered, e.g., wear and tear or substandard workmanship, State Farm effectively reserves the power to undermine the appraisers' determination under the rubric of litigating coverage -- contrary to the rationale of JJF[10]. Furthermore, it is anybody's guess what precise issues are "reserved for the court", in light of the reservation of State Farm's rights. Once again, there was no discussion of ambiguous non-waiver clauses and their impact upon the appraisal provision. This case does not deal with the question of mutuality or illusory promises.

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[10] As the Third District aptly observed in Country Walk, a dispute over PIP or UM benefits differs from a claim under a casualty policy for hurricane losses. In the former, issues of "coverage" are independent of the amount of the loss, e.g., whether the tortfeasor was an "uninsured motorist" or whether other insurers are required to contribute. In the latter, issues of "coverage" are inextricably bound up with the "amount" of the loss.

Respondents submit that conflict jurisdiction is unavailable to resolve what is essentially an *intradistrict* conflict between panels of the Third District regarding construction and effect of non-waiver clauses in homeowners' policies. The Country Walk majority interpreted it according to its plain terms: a unilateral, unfettered right to deny the result of the appraisal. Dissenting Judge Cope (and presumably, the reluctant panel in Licea) construed the right to deny to mean the insurer has not abandoned coverage defenses by proceeding to arbitrate. 632 So. 2d at 198. To the extent the construction of the non-waiver clauses presents an intradistrict conflict, that disagreement is to be settled by the district court *en banc* pursuant to Fla. R. App. P. 9.331. By denying the panel's request for en banc consideration[11], any such "conflict" has been put to rest by the district court. As explained by the Committee Notes to Rule 9.331 regarding the 1982 amendment, "the new appellate structural scheme requires the district courts of appeal to resolve conflict within their respective districts through the en banc process." None of the purportedly conflicting decisions discuss construction of the non-waiver clauses, and there is no indication that the appraisal or loss payment provisions were similar to those in State Farm's policy. Compare, Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938 (Fla. 1979)(Supreme Court had jurisdiction to review district court decision construing language in insurance contract where such decision conflicted with another district court's decision

[11] The panel decision in State Farm v. Licea recounts that:

> [A] request, addressed to the entire court, was made to set this matter for en banc consideration so that Country Walk could be revisited and possibly receded from. That request was denied.

construing identical language in another insurance contract).

State Farm's request that this Court exercise its discretionary jurisdiction "to reaffirm the validity and enforceability of appraisal clauses" should be declined, as the decision below did not invalidate all appraisal clauses.

B. There is no conflict with Hanover Fire.

Nor is there conflict with Hanover Fire Insurance Co. v Lewis, 10 So. 297 (Fla. 1891). American Reliance sought to invoke this court's jurisdiction based on an asserted conflict with Hanover Fire.[12] (See Petitioner's March 31, 1994 Jurisdictional Brief and Respondent's April 20, 1994 Jurisdictional Brief in American Reliance Ins. Co. v. The Village Homes at Country Walk, et al., Case No. 83,405). This Court denied that Petition. (R 248).

As noted by Country Walk in its Response, the arbitration provisions in the insurance policy and supporting documents at issue in Hanover Fire are wholly distinguishable from the arbitration provision considered by the Third District in American Reliance (as well as in State Farm Fire and Casualty Co. v. Licea, 649 So. 2d 910 (Fla. 3d DCA 1995)). The arbitration provision in Hanover Fire does not provide the insurer with the unilateral right to deny the claim, or resurrect or reassert its "rights." Nor did the insurer in Hanover Fire seek to carve out from the appraisal "policy defenses" or "coverage" issues with sweeping,

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[12] The sole argument in American Reliance's Petition was that:

> The decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decision of this Court in Hanover Fire Ins. Co. v. Lewis, 29 Fla. 209, 10 So. 297 (1891).

ambiguous language. Rather, in Hanover Fire, "both in the policy and in the subsequent submission to the appraisers the liability of the insurers was *expressly excepted* and reserved". 10 So. at 303. Thus, the appraisal provision in the Hanover Fire policy employed specific language that clearly indicated the respective liability of the two insurance companies would not be decided in arbitration, and both the insured and the insurer ratified this understanding with an equally definitive written agreement.[13] Here, State Farm's attempted reservation was unilateral, misleading, unfair, unexpected, and certainly not "expressly excepted". The "non-waiver" or "right to deny" clauses preserve for the insurer a hidden agenda of "defenses" to undo, delay, or reduce an appraisal.

Finally, this Court found in Hanover Fire that mutuality was not lacking based in large part upon the separate written agreement clearly defining the issues that were and were not going to be determined in the appraisal. In contrast, State Farm's reservation of policy defenses was a unilateral pronouncement. Also, there is no indication that the policy in Hanover Fire, or any of the policies in the cases cited by State Farm (pages 11-12) contained an unconditional promise to pay the appraisal, as well as a reservation not to pay it.

C. State Farm's appeal was untimely or unauthorized.

As recited in the Liceas' Motion to Dismiss or Quash Appeal (R 5-75), the trial court's March 30, 1994 order denying State Farm's motion to stay counterclaim was tantamount to a denial of a motion to compel appraisal. See, Balboa Ins. Co. v. W.G. Mills,

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[13] The appraisal was completed as agreed, and the only issue was whether the insurer could introduce the appraisal as evidence of damages in the insured's action to recover policy benefits.

Inc., 403 So. 2d 1149 (Fla. 2d DCA 1981)(motion to dismiss based on contractual right to arbitration is, in substance, also a motion to compel arbitration). This March 30, 1994 order determined State Farm was not entitled to arbitration based on unenforceability. However, State Farm did not appeal this Order within 30 days, and could not resurrect its waived appeal by appealing the April 27, 1994 Order denying its Motion to Appoint Umpire. Hawthorne Industries, Inc. v. Transohio Savings Bank, 573 So. 2d 211 (Fla. 4th DCA 1991)(corporation's motion to vacate an order appointing receiver, which was made 40 days after the appointment order was entered and argued only the merits of the appointment order, was tantamount to an untimely motion for rehearing, and corporation could not obtain more time to file an appeal of the order appointing receiver by making a motion to vacate the appointment order and appealing from its denial).

Alternatively, the 1993 amendment to Rule 9.130(a)(3)(C)(v), concerning appeals of non-final orders, which changed the phrase "whether a party is entitled to arbitration" to "the entitlement of a party to arbitration", can be read so that only an order entitling a party to arbitration is appealable. Alphagraphics Franchising, Inc. v. Stebbins, 617 So. 2d 463, 464, n. 2 (Fla. 4th DCA 1993) (J. Farmer, dissenting). Under this construction[14], this Court lacks jurisdiction since the appealed Order does not entitle State Farm to arbitration.

Under an "equally plausible" interpretation, an order that determines entitlement to arbitration - one way or the other - is appealable. Id.; American Reliance Ins. o. v. The

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[14] As Judge Farmer points out, though this construction places Florida at odds with federal appellate provisions on arbitration orders, two reasons argue in favor of this more restrictive interpretation. First of all, provisions for non-final review should be construed narrowly. Secondly, "if the drafters intended no real change in meaning, then why change the text at all - especially without an explanatory note". 617 So. 2d at 464, n. 2.

Village Homes at Country Walk, 632 So. 2d 106, 107 n. 1 (Fla. 3d DCA 1994), rev. denied, 640 So. 2d 1106 (Fla. 1994). In that event, the March 30, 1994 order was appealable, and State Farm cannot challenge that ruling after 57 days.

CONCLUSION

Based on the foregoing facts and authorities, Respondents respectfully request that this Court decline to exercise its discretionary jurisdiction, discharge jurisdiction, and/or affirm the decision of the Third District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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