W00A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,598

HARCO NATIONAL INSURANCE CO.,

Petitioner,

vs.

FRANCISCO ROBLES,

Respondent.

DISCRETIONARY PROCEEDINGS TO REVIEW
A DECISION OF THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

LEO BUENO, ATTORNEY, P.A.
Post Office Box 440545
Miami, Florida 33144-0545
(305) 267-8884

CARLOS LIDSKY, P.A.
145 E. 49th Street
Hialeah, Florida 33013
(305) 822-2100

DIANE H. TUTT, P.A.
7900 Peters Road, Suite B-100
Plantation, Florida 33324
(954) 475-9933

Co-Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,598

HARCO NATIONAL INSURANCE CO.,

Petitioner,

vs.

FRANCISCO ROBLES,

Respondent.
_____/

INTRODUCTION

This brief is filed on behalf of respondent, FRANCISCO ROBLES, in support of the decision of the Third District Court of Appeal.

In this brief, Petitioner will be referred to as "Harco" and Respondent will be referred to as "Robles."

References to the Record on Appeal will be designated "R." followed by the page numbers.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts set forth in Harco's brief is substantially accurate. Robles would merely add the following:

Robles moved for partial summary judgment in the trial court, asserting that the policy's loss payable clause required Harco to pay, at a minimum, the outstanding balance Robles owed to Capital Bank, which financed Robles' purchase of the subject truck. (R. 79-81, 82-86).

The Court is advised that Robles, who was appellant in the district court, raised several issues in his appeal that were not addressed by the district court in its opinion. These issues include the argument Robles made in his summary judgment motion to the effect that, by the terms of the policy, Harco was required to pay the balance owed to Capital Bank. It was not necessary for the district court to consider such issues, since it ruled in Robles' favor on the lack of mutuality issue.

SUMMARY OF THE ARGUMENT

Robles has no quarrel with the general principles argued in Harco's brief. However, the district court's decision did not reject the general validity of appraisal clauses. The district court merely construed a specific clause in the appraisal provision in this insurance contract and determined that the clause rendered the appraisal provision invalid for lack of mutuality. Harco reserved the right to deny the claim. Because the clause does not specify what grounds Harco could use to deny the claim, it could deny it for any reason, including, for example: the appraisal award is too high, the appraisal was not based on proper proof of amount of loss, the claim was untimely, etc. It is the broad nature of the clause at issue in this case which makes the appraisal proceeding an illusory remedy, lacking in mutuality.

Where a contract, or part of a contract, is not mutually enforceable, the contract (or part thereof) is void for lack of mutuality. That is the case here.

ARGUMENT

WHERE AN APPRAISAL CLAUSE IN AN INSURANCE POLICY UNILATERALLY GIVES THE INSURER THE RIGHT TO DENY THE CLAIM AFTER THE APPRAISAL PROCESS, THE APPRAISAL PROVISION IS INVALID DUE TO LACK OF MUTUALITY.

Harco's primary argument, repeatedly made throughout its brief, is to the effect that appraisal and arbitration clauses in contracts are a favored means of dispute resolution and that such clauses have long been held valid. Harco cites many cases in its brief which so hold. Robles has no quarrel with these general principles, and agrees that the cases Harco cites are supportive of such principles.

The fallacy in Harco's argument, however, is that the Third District has not held that appraisal clauses in general are invalid. The court has simply construed the specific appraisal clauses before it in the present case, and in American Reliance Insurance Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d DCA 1994) and State Farm Fire and Casualty Co. v. Licea, 649 So. 2d 910 (Fla. 3d DCA 1995).

The objectionable language in the appraisal clauses in the present case and in American Reliance is nearly identical.[1] But the language in the appraisal clauses in this case and in American Reliance is not like any of the appraisal clauses in the

[1] In the present case, the clause is: "If we submit to an appraisal, we will still retain our right to deny the claim." The clause in American Reliance is "If there is an appraisal, we will still retain our right to deny the claim." 632 So. 2d at 107.

cases cited in Harco's brief.[2]

The appraisal clause in Hamilton v. Liverpool, London and Globe Insurance Co., 136 U.S. 242 (1890), provided that the appraisal "shall not decide the liability of this company." Id. at 243. The appraisal clause in Hamilton v. Home Insurance Co., 137 U.S. 370 (1890), provided that the appraisal "shall not decide the liability of the company under this policy." Id. at 371. And the appraisal clause in Hanover Fire Ins. Co. v. Lewis, 10 So. 297, 23 Fla. 209 (1891), provided that the appraisal "shall not decide the liability of the companies, respectively, under this policy." Id. at 301. Thus, the language present in the policies involved in those cases clearly identified the specific issue that was not being decided by the appraisal; i.e., the liability of the insurance companies. The companies were thus free to challenge their liability, i.e., coverage, in the judicial forum, although they were not free to challenge the amount of the loss which was established by the appraisal.

The language present in this case is substantially different. Harco did not simply reserve the right to litigate liability (coverage). Harco reserved the right to deny the claim. Because the clause does not specify what grounds Harco could use to deny the claim, it could deny the claim for any reason, including, for example: the appraisal award is too high, the

---

[2] Harco has cited Scottsdale Ins. Co. v. DeSalvo, 21 F.L.W. D129 (Fla. 1st DCA, Dec. 28, 1995), as supplemental authority. The language in the appraisal clause in that case is very similar to the clause at issue in the present case.

appraisal was not based on proper proof of amount of loss, the claim was untimely, etc. It is the broad nature of the clause at issue in this case (and in American Reliance) which makes the appraisal proceeding an illusory remedy, lacking in mutuality. Harco may avoid the appraisal award simply by denying the claim (for any reason), whereas Robles is not given any reciprocal right to avoid the appraisal award.

One of the cases on which Harco relies, Roe v. Amica Mutual Insurance Co., 533 So. 2d 279 (Fla. 1988), is actually supportive of Robles' position. In that case, this Court upheld an arbitration provision which permitted either party to reject an arbitration award and demand a jury trial if the award exceeded $10,000. Applicable to the issue presented in this case is the following language from Roe v. Amica, 533 So. 2d at 281:

> Finally, we find no public policy which would be adversely affected by validating the challenged provision. Roe's characterization of that provision as an "escape clause" which Amica unilaterally can exercise unfairly represents the parties' agreement. The option of rejection is equally available to both parties. (emphasis added).

Unlike the policy language in Roe v. Amica, the language here is one-sided. Harco may deny the claim and thus avoid the appraisal result, but Robles has no similar right.

The decision below, along with American Reliance and Gables Court Professional Centre, Inc. v. Merrimack Mutual Fire Insurance Co., 642 So. 2d 74 (Fla. 3d DCA 1994), which followed American Reliance, are based on an elementary principle of contract

law: where a contract, or part of a contract,[3] is not mutually enforceable, the contract (or part thereof) is void for lack of mutuality. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4, 5 (Fla. 1984); IDEVCO, Inc. v. Hobaugh, 571 So. 2d 488 (Fla. 2d DCA 1990); City National Bank of Miami v. Citibank, N.A., 373 So. 2d 703 (Fla. 3d DCA 1979). An agreement is not valid if it binds one party but not the other. Columbia County Sheriff's Office v. Florida Department of Revenue, 574 So. 2d 234 (Fla. 1st DCA 1991); Balter v. Pan American Bank of Hialeah, 383 So. 2d 256, 257 (Fla. 3d DCA 1980).

As stated by this Court in Pan-Am Tobacco, supra:

> 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.

471 So. 2d at 5, citing Miami Coca-Cola Bottling Co. v. Orange-Crush Co., 291 F. 102 (D. Fla. 1923), affirmed, 296 F. 693 (5th Cir. 1924).

Parties to a contract can agree to have different kinds of remedies by each, but both parties must have genuine, not illusory obligations. Ocean Dunes of Hutchinson Island Development Corp. v. Colangelo, 463 So. 2d 437 (Fla. 4th DCA 1985).

The obligation of Harco concerning the appraisal process is merely illusory, since Harco has left open its right to deny the

---

[3] 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 Water Management District, 423 So. 2d 630, 633 (Fla. 5th DCA 1982).

claim, without specifying that it can only deny the claim for coverage reasons.

The analysis of the Third District in the present case as well as in American Reliance, is sound. While Harco wants this Court to accept the reasoning of Judge Cope[4] in his dissent in American Reliance, a comparison of the majority versus dissenting opinions in American Reliance reveals that the majority considered the plain language of the clause:

> Here, however, the insurer's reservation of its right to deny the claim destroys mutuality of obligation, is incompatible with the goals of arbitration, and renders illusory any purported agreement to submit to binding arbitration. [632 So. 2d at 107-108].

The dissent, on the other hand, went beyond the plain language of the clause and suggested a "reasonable" interpretation. The subject language in the present case is nearly identical to the language in the American Reliance case.

The language here is not doubtful, uncertain or ambiguous. Therefore, it does not need to be construed beyond its plain language. See Moore v. Connecticut General Life Insurance Co., 277 So. 2d 839 (Fla. 3d DCA 1973). If construction of the language is needed, the rule of construction is that the language should be construed most strongly against the party who selected

---

[4] Three judges of the Third District (Barkdull, Levy and Cope) feel that Harco's position in this case is the correct one. See American Reliance and State Farm v. Licea, supra. However, at least four other Third District judges (Jorgenson, Hubbart, Baskin, Green) feel that Robles position is the correct one. See American Reliance, Gables Court, State Farm v. Licea and the present case.

it. Finberg v. Herald Fire Insurance, 455 So. 2d 462 (Fla. 3d DCA 1984). Moreover, 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, supra at 842; Tire Kingdom, Inc. v. First Southern Insurance Co., 573 So. 2d 885 (Fla. 3d DCA 1990).

In summary, the clause at issue here in not like the clauses in other cases in which the courts have approved the appraisal or arbitration process. The clause here is overly broad and, on its face, gives Harco the right to avoid the appraisal award. This clause is contrary to the beneficial and litigation-saving purpose of an appraisal clause. Whereas appraisal and arbitration clauses, in general, are valid and enforceable, the clause at issue here renders the appraisal provision in this policy illusory and lacking in mutuality, and therefore the district court was correct in determining that the appraisal provision was invalid.

CONCLUSION

Based on the foregoing arguments and authorities, the decision of the Third District Court of Appeal should be approved.

Should this Court determine that the district court opinion should be quashed, it is respectfully requested that this Court remand the case to the district court with express instructions to consider Robles' other appellate points that were raised in his appeal to the district court, but not addressed by that court.[5]

LEO BUENO, ATTORNEY, P.A.
Post Office Box 440545
Miami, Florida 33144-0545
(305) 267-8884

CARLOS LIDSKY, P.A.
145 E. 49th Street
Hialeah, Florida 33013
(305) 822-2100

DIANE H. TUTT, P.A.
7900 Peters Road, Suite B-100
Plantation, Florida 33324
(954) 475-9933

Co-Counsel for Respondent

By Diane H Tutt
DIANE H. TUTT
Fla. Bar No. 329371

[5] Although this Court has the authority to entertain issues ancillary to the conflict issue presented in this case, Trushin v. State, 425 So. 2d 1126 (Fla. 1982), Robles has not asked this Court to consider his other appellate issues. This is due to the fact that he is the respondent, not the petitioner, as well as the fact that the district court did not address the other issues.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was served by mail this 14th day of March, 1996 on SHELLEY H. LEINICKE, ESQUIRE, Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., 5th Floor, Barnett Bank Plaza, One East Broward Boulevard, Fort Lauderdale, Florida 33301, CARLOS LIDSKY, ESQUIRE, 145 E. 49th Street, Hialeah, Florida 33013, LEO BUENO, ESQUIRE, P. O. Box 440545, Miami, Florida 33144-0545 and MANUEL R. MORALES, ESQUIRE, Biscayne Building, Suite 711, 19 West Flagler Street, Miami, Florida 33130.

DIANE H. TUTT, P.A.
Co-Counsel for Respondent

By Diane H. Tutt
DIANE H. TUTT
7900 Peters Road, Suite B-100
Plantation, Florida 33324
(305) 475-9933
Fla. Bar No. 329371