SUPREME COURT OF FLORIDA

CASE NO. 88,206

JOHN ROSEMURGY

Petitioner,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF FACTS

Petitioner, JOHN ROSEMURGY, seeks relief from a decision of the Fourth District Court of Appeal which certified this decision to be in conflict with certain other Florida Appellate decisions, especially State Farm v. Licea, 649 So.2d 910 (Fla. 3rd DCA, 1995), is presently pending before this Court under case number 85,200 and, oral arguments have already been had.

The pertinent facts in and the history of this case which led to these proceeding are set forth below.

Petitioner, JOHN ROSEMURGY, owned a home in Florida which was covered by homeowners insurance issued by State Farm Mutual under policy number 79B25459 (R.35). The homeowner's policy issued to Petitioner contained the following 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 a dwelling under Coverage A and other building structures under the Dwelling Extension at replacement costs without regard to the limit of liability, subject to the Loss Settlement provisions un 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 identify within 20 days of receipt of the written demand. The two appraiser 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 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." (R.20)

"Loss Payment", §19 (p.14) provides, in pertinent party, that

> Loss will be payable:
>
> a. 20 days after we receive your proof of loss and reach an 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. (R.21)

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

> "Our request for an appraisal or examination shall not waive any of our rights". (R.26)

The policy does not define what "our rights" are.

On May 25, 1990, while the policy was in full force and effect, the Petitioner suffered a casualty loss. (R.35) The Petitioner sought recovery for said loss from the Respondent who paid a part of the loss, but refused to pay the entire amount claimed. When an attempted resolution of this matter reached an impasse, suit was filed (R.36).

The Respondent sought to have the claim dismissed based on the appraisal clause of its policy and the holding in Preferred Mutual Ins. Co. v. Martinez, 643 So.2d 1101, (Fla. 3rd DCA 1994) (R.3-31). The Petitioner moved to strike the demand for appraisal that, based on

its conduct, Respondent was estopped from asserting its alleged appraisal rights (R.32-33).

On December 21, 1994, the Trial Court granted Respondent's Motion and gave the Petitioner leave to file an Amended Complaint. (R.34) On January 18, 1995, Petitioner filed an Amended Complaint adding a Count which sought a Declaratory Judgment finding that the appraisal clause is void and unenforceable, in part, because its obliges the Petitioner to abandon his right to a judicial remedy. In addition, the Declaratory Judgment Count of the Amended Complaint sought to have the policy provisions declared unenforceable. (R.35-41) The Respondent responded to the Amended Complaint by filing a second Motion to Dismiss, which adopted the arguments in its first presented Motion to Dismiss. No other basis for the dismissal was contained in the second motion. (R.42-43)

On May 4, 1994, the Court entered an Order granting Respondent's Motion to Dismiss relying solely on the holding in Preferred Mutual Ins. Co. (R.44-45) On May 30, 1995, the Petitioner filed a Motion for Re-Hearing based on the holding in State Farm v. Licea, 649 So.2d 910 (Fla. 3rd DCA, 1995). (R.46-51) The Motion for Rehearing was denied and a timely Appeal followed. (R.53)

SUMMARY OF ARGUMENT

The appraisal clause of the Respondent's contract does not provide for the Petitioner to recover his costs if he is successful. Because of this, Petitioner contends that the appraisal clause is void and unenforceable because it conflicts with §627.428. The legislature of this state in its wisdom has decided that, as a matter of public policy, insured's who are involved in a dispute with their insurance company should not be prevented from going forward with a just claim because of his inferior economic position. In passing §627.428 they provided that a successful insured can recover the costs and fees he incurred in prosecuting his claim if he is successful. Given this statute, it seems clear that the provisions of an insurance policy because it is in conflict with its stated purpose should be declared null and void and unenforceable.

If this Court rejects the above argument, Petitioner also contends that as is the case in this matter when the appraisal provisions contains one sided opt-out provisions, the promise to resolve the dispute by arbitration become illusory and should then be declared unenforceable and the parties required to litigate the entire matter. The policy's appraisal clause as set forth above clearly are one sided and unfair. When appraisal becomes a prelude to, rather than an alternative to litigation, at the sole option of the Respondent, it should fall. No public policy is served by requiring the homeowner because the policy says so to abide by the appraisal process with the assurance that it will set the amount of the loss while allowing an insurer like State Farm to hide its rights and sit on them, while awaiting the appraisal outcome before deciding whether or not to be bound by it.

It is respectfully suggested that the Third District decisions in Licea and Preferred Mutual, are correct and that when Licea is affirmed the decision of the 4th District in the instant

case should also be reversed.

ARGUMENT

A. The Appraisal Clause contained within the policy of insurance by Respondent to Petitioner should be declared null and void and unenforceable

The Trial Judge in the instant matter dismissed Petitioner's claim for damages based on the holding of Preferred Mutual Ins. Co. v. Martinez, 643 So.2d 1101, (Fla. 3rd DCA, 1994). In Preferred, the reviewing court reversed the trial court's denial of the insurance company's motion to dismiss because they considered the appraisal clause a pre-condition to the filing of a lawsuit. In doing so, that court specifically held that the prior conduct of Preferred Mutual Insurance Company did not act as a waiver of its right to invoke the appraisal clause (p.1102). However, the Court, recognized that a party, by its inconsistent conduct, can waive its right to demand appraisal. (p.1102) See also, Balboa Inc. Co. v. Mills, 403 So.2d 1149 (Fla. 2nd DCA, 1981). The record that was before the trial judge demonstrates that STATE FARM, had forfeited its right to seek to impose the appraisal clause, or, at the very least, that a factual issue was raised by the pleadings that require that the motion to dismiss be denied.

In order to determine whether a Motion to Dismiss should be granted because the Complaint lacks legal sufficiency, the trial judge is required to look only at the pleadings and grounds asserted in the motion. Flye v. Jette, 106 So.2d 229 (Fla. 1st DCA 1958)

Petitioner's Amended Complaint alleged that Respondent's conduct prior to the suit being filed amount to a waiver (R.39) Defendant's Motion to Dismiss relied solely on the holding in the Preferred Risk matter. (R.42-43)

When ruling upon a Motion to Dismiss, well pleaded allegations of the complaint are taken as true. Fletcher v. Williams, 153 So.2d 759 (Fla. DCA 1963). Petitioner's Amended Complaint clearly raised the factual issue of whether Defendant's conduct amounted to a waiver and that the alleged conduct, standing alone, should allow Plaintiff to proceed with his lawsuit.

There are no dispute of the following:

(1) That STATE FARM was notified of the loss in May of 1990. (R.35)

(2) That from the onset, there was a dispute concerning the amount of Plaintiff's loss. (R.36)

(3) That at no time prior to filing the Motion to Dismiss did the Defendant attempt to invoke the appraisal clause. (R.3-31)

In addition, it should be noted that Respondent originally did not offer appraisal to the Petitioner, instead they offered binding arbitration. This offer was a substantial change in position by the insurer. The arbitration proceedings suggested by Respondent, are governed by the provisions of Florida Statute §682.01 et. seq. and The Insurance Code, Florida Statute §627.01 et. seq. The arbitration procedure has both the due process and procedural safeguards provided by the arbitration code. Cases that interpret the Code hold that if the insured is successful in those proceedings, he is entitled to reimbursement of his attorney's fees incurred in prosecuting the claim if authorized by agreement or statute. State Farm Mutual Ins. Co. v. Anderson, 332 So.2d 623 (Fla. 4th DCA 1976)

The appraisal process of the STATE FARM policy, creates an informal procedure with no safeguards and has no provision for paying the insured's attorney's fees. Putting aside for the moment whether STATE FARM can unilaterally insert this clause into its contract a

requirement that its insured agree to a non-judicial proceeding, the fact that this alternative procedure first suggested by the Respondent had these safeguards clearly demonstrates that Defendant was waiving its right to demand appraisal and was offering the Plaintiff an alternative to the lawsuit. Respondent was not demanding an appraisal misnamed, by them, as binding arbitration. Defendant's conduct as set forth above, clearly constituted a waiver of the right to demand an appraisal. Seville Condominium No.1, Inc. v. Clearwater Dev. Corp., 340 So.2d 1243 (Fla.2nd DCA 1994).

Because the appraisal language of the Respondent's policy that allows them to ignore the obligation that it unilaterally imposes on its insured, to be bound by the result, it is illusory. The appraisal clause allows the respondent to renounce the results of the appraisal, the clause lacks mutuality of obligation and is unenforceable.

As pointed out in Licea and Country Walk cases, the practical effect of these non-waiver clauses 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 then deny all or part of the claim. No corresponding right is granted to the homeowner to disavow, increase, or augment the appraisal determination. The insurer can enforce the appraisal if it is low enough, or reject it if it is not. 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)

As stated in their brief filed with this Honorable Court in the Licea, the insured asserted that, "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 remains 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." The purpose of appraisal is to ensure a swift and cost effective resolution of a dispute, even at the expense of accuracy and procedural safeguards. The essence of appraisal is an agreement to be bound by the factual determination of the fact finder and thus end of the controversy. Bankers & Shippers Insurance Co. v. Gonzalez, 234 So.2d 693, 695 (Fla. 3d DCA 1970). The broad language of the respondent's policy is violative of these goals. Once the speed and efficiency already offered by the appraisal provision is 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 policy imposed denial of the insured's right to a jury trial, his right of access to the courts, his right to be reimbursed for the expenses incurred in proceeding with his claim, and his right to a determination based on competent evidence and correct legal standards becomes meaningless (even if the clause is held not to be in conflict with §627.428) if the appraisal process is not the end of the dispute, but rather a prologue to the

litigation of the matter.

The same appraisal clause should be declared unenforceable because Respondent's contract clearly contains one-sided, open-ended provisions that do not provide a fast efficient manner for resolving disputes and avoiding litigation. Instead, the policy places an expensive road block in the Petitioner's way by preventing him from getting a final resolution of the claim. The process for the possible resolution of the claim is one which was not contemplated by the legislature when it passes §627.428.

This statute is yet another reason why this clause should not be enforced. Not only do these clauses provide an unnecessary procedure for the Plaintiff to follow before he gets paid for his loss, it allows the Respondent to use the appraisal clause as an economic club that neither the binding arbitration proposed by Defendant nor litigation gives them. As stated above, the expense of the Petitioner of the appraisal process is prohibitively more expensive than litigation is he is successful. The appraisal clause requires Plaintiff, without any provision for reimbursement if he is successful, to pay for, in addition to any costs and attorney's fees he incurs, one-half of the appraisal proceeding. Binding arbitration of insurance disputes do not permit this. (Fla.Stat. §627.428) Litigation of insurance disputes does not allow this. (Fla.Stat. §627.428) The stated public policy reason for providing costs and fees to successful insureds in disputes with their insurance company is to encourage prompt resolution of disputes and to put insureds in the same place they would have been if the claim had been paid promptly. Clay v. Prudential Ins. Co. , 617 So.2d 433 (Fla. 4th DCA 1993). It serves to prevent insurance companies from using the superior economic position to thwart justice. Insurance Co. of North American v. Lexow, 602 So.2d 528 (Fla. 1992).

Additional issues have been raised by the insured and by the Florida Trial Lawyers Association in an amicus brief. To the extent they have not specifically addressed in Petitioner's brief, Petitioner respectfully requests that they be adopted as part of Petitioner's claim and be considered in reaching a decision in this matter.

CONCLUSION

For the reasons stated above, the Petitioner requests that the holding of the Fourth District in this matter be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits was mailed this 5th day of July, 1996:

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