SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

PETER JOHNSON and CHRISTINE JOHNSON,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, a foreign corporation,
Respondent.

CASE NO. SC01-91

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

MARIANO R. GONZALEZ AND RENE GONZALEZ,

Respondents.

CASE NO. SC01-321

PETITIONERS, PETER JOHNSON AND CHRISTINE JOHNSON, REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

I.

THE ISSUE OF CAUSATION, UNDER A PROPERTY INSURANCE POLICY, TO DETERMINE IF A LOSS IS AN INSURED OR EXCLUDED LOSS IS A COVERAGE QUESTION FOR THE JUDICIARY AND NOT AN AMOUNT OF LOSS QUESTION FOR AN APPRAISAL PANEL.

In our Initial Brief, we advised the Court of our belief that this case is not complex. We maintained that under the existing law of this state, an insurer must admit that some part of an insured's loss is covered under the policy (i.e., that the insurance company acknowledges it has an obligation to make some payment) before the insurer can compel an insured to have the amount of the loss determined by appraisal. We also explained that unless the insurer admitted responsibility to pay some portion of the insured's claim, that the insurer's position was a denial of coverage for the loss as a whole which presented a question of coverage, the resolution of which was exclusively within the domain of the judiciary. Finally, we analyzed Nationwide's policy, its use of defined terms and its appraisal provision to demonstrate that even if the issue of causation was in a general sense, not an issue of coverage, but one that may permissibly be determined by appraisers, that Nationwide's appraisal provision in particular did not require submission of this issue to the appraisers, nor could it be interpreted so as to effectively rewrite the provision to require appraisal of such issues. In a nutshell, Nationwide's response has been

that this Court's decision in State Farm Fire & Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996) has implicitly overruled the overwhelming amount of Florida authority which is contrary to its position. Moreover, Nationwide asserts that this Court's holding in Licea was ambiguous, such that there is now confusion on behalf of insurance companies like Nationwide who now only seeks a clarification of this Court's intent concerning the proper breadth of appraisal. Finally, Nationwide surveys the law of other jurisdictions in an apparent attempt to demonstrate that there is no agreement among the courts who have decided whether causation is an issue that is properly addressed by the appraisers, or alternatively, to suggest that in those jurisdictions where the appraisers are allowed to consider causation, it does not offend that particular jurisdiction's public policy. The conclusion drawn by Nationwide is that if it is legally acceptable for appraisers to evaluate causation when some portion of the loss is admittedly covered, then the appraisers should likewise be able to properly consider causation to determine that none of the loss is covered, even if that results in finding that there is no coverage for the loss as a whole. Most respectfully, this Court need not resort to Nationwide's convoluted analysis to resolve the more narrow issue presented by the facts of this case, that is, whether an insurer may invoke the appraisal clause of its policy when it has taken the position that an entire loss falls within an exclusion contained within the policy of insurance. Rather, existing Florida law and considerations of public policy of this state appear to dictate that appraisers are to

consider an amount of loss only. Matters that address coverage, including causation, are matters that are solely within the province of the judiciary to determine.

Nationwide begins its argument by asserting that there are three propositions articulated in Licea. The first is that a challenge of coverage is exclusively a judicial question. According to Nationwide, there is no dispute between the parties as to that proposition. Nationwide then states that the second Licea statement appears to mean that a coverage question has been presented when an insurer asserts there is no coverage under a policy for the loss as a whole. Nationwide apparently finds this statement to be ambiguous as it argues that the question for this Court is whether that proposition includes those instances where an insurer asserts that the loss was wholly caused by an excluded peril. Nationwide then asserts that the third proposition in Licea actually answers the question in the negative because this Court interpreted the appraisal clause to require an assessment of whether the requirement for repair or replacement was caused by a covered peril or a cause not covered or otherwise excluded under the policy.

Even if one accepts for sake of argument Nationwide's interpretation of this Court's decision in Licea, Nationwide's resolution of the quandary purportedly created by the decision is analytically flawed in its entirety. To reach its proposed resolution, under its own analysis, Nationwide must first overcome the first two hurdles presented by the plain language of the Licea decision. That is, it must first get

past the universally-accepted principle that coverage issues are to be resolved by the court, and second, that a coverage issue is presented when the insurer denies coverage for the loss as a whole. To avoid what would appear to be a very obvious result under that standard, Nationwide creates a fiction from which it seeks to avoid the first two propositions and asks the court to analyze the third. That fiction is that Nationwide has not denied coverage for the loss as a whole since it has admitted that a sinkhole loss is a covered peril under the policy. Apparently, Nationwide believes that as long as it admits that which it cannot possibly deny (the verbiage of its own contract), it can take the position that there is coverage in the abstract, and then try to convince the appraisers that there is no coverage in reality for the loss as a whole because it falls within an excluded peril. Most respectfully, even the most creative interpretation of this Court's decision in Licea cannot be used to suggest that this Court was addressing theoretical claims, hypothetical coverage positions or speculative losses. Rather, Nationwide's conduct in failing to pay the claim, and further, maintaining that the loss fell wholly within an excluded peril, is undeniably a denial of coverage for the whole claim. Thus, if for no other reason, Nationwide's argument on this point must fail.

Nationwide also misconstrues the second proposition it claims was raised in Licea when it completely ignored the fact that when this Court adopted Judge Cope's dissent, both he and the court were analyzing a "right to deny" sentence which could be triggered once the insured invoked the appraisal process. We believe this

circumstance to be critical because the court's statement, "thus, where there is a demand for an appraisal under the policy, the only `defenses' which remain for the insurer to assert or that there is no coverage under the policy for the loss as a whole or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate," was addressing the responses that an insurer who had not invoked the appraisal provision could make to the insured. Indeed, this Court was construing a provision in State Farm's policy that allowed it to retain its right to later deny coverage if the insured demanded appraisal and State Farm went through the appraisal. In short, if the insured demanded the appraisal, the insurer must comply, but was still protected by virtue of the retained rights provision in its policy which allowed it to go forward to deny coverage in the future. Having the appraisal under those circumstances would merely fix the amount of damages that it would be responsible to pay upon a determination that coverage existed. Presumably, in recognition of these critical facts, this Court couched the insurer's responses in terms of "defenses." Here, however, Nationwide has attempted to invoke the appraisal process without ever having admitted that any part of the loss is covered. Nationwide had not retained its rights to deny coverage, it has denied coverage. Thus, rather than support Nationwide's position, this Court's decision in Licea suggests that the trial court's interpretation was appropriate and the Second District misinterpreted not only the policy, but the decision in Licea as well.

Curiously, while Nationwide has gone to great lengths to discuss its interpretation of the holding of Licea, its brief is conspicuously silent on the point of whether its policy requires appraisal of the cause of loss even if this Court were to determine that such were a proper function for appraisers. The absence of any argument on this point whatsoever by Nationwide certainly suggests that it has, at a minimum, tacitly conceded that the language it chose when writing this insurance policy does not require insureds, such as the Johnsons, to submit the coverage issue of causation to the appraisers. As we explained in our Initial Brief, Nationwide's policy employs a variety of defined terms, not the least of which is the term "covered causes of loss." Had it been Nationwide's intention to confer upon the appraisers the ability to determine whether a loss fell with the term "covered cause of loss," or alternatively, was an excluded one, presumably Nationwide would have said so in clear and unambiguous terms. In its policy, it simply did not do so. Rather, the only issue subject to appraisal under the policy is "the amount of loss," an undefined phrase.

We do not believe that the appraisal provision is susceptible to being read in two reasonable fashions, the first of which would limit appraisal only to the amount of the loss and the second, to allow the appraisers to determine whether a claim was caused by a covered cause of loss. Even if one could make the argument that the appraisal provision is susceptible to two different interpretations in good faith, that

position would necessarily be a concession that the provision was ambiguous, and as such, have to be construed narrowly against the insurer and broadly in favor of the insured. See, e.g., Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135 (Fla. 1998). Thus, Nationwide would still be prohibited from demanding that the determination of whether the loss was a covered cause of loss or an excluded one fell within the appraisal provision.

Finally, there are several issues of Florida public policy rather than that of other jurisdictions that this Court should consider. In its summary of the argument, Nationwide states: "The appraisal clause is a contractual mechanism in the policy of insurance designed and intended to reduce litigation and to speed resolution of disputed claims on an even playing field." (Answer Brief, p. 5) Regardless of its intent, the appraisal process does anything but reduce litigation or speed resolution of the disputed claim. Indeed, when enacting Fla. Stat. § 627.7015 which requires mediation for property claims, the Florida legislature made a specific finding of the need for:

> An informal, non-threatening forum for helping parties who elect this procedure to resolve their claims disputes because most homeowner's insurance policies obligate insureds to participate in a potentially-expensive and time-consuming adversarial appraisal process prior to litigation. The procedure set forth in this section is designed to bring the parties together for a mediated claims settlement conference without any of the trappings or drawbacks of an adversarial process.

§ 627.7015(1).

Not only can Nationwide force the insured into this expensive and time-consuming adversarial process, but its policy requires the insured to pay its own appraiser and to bear the other expenses of the appraisal and umpire equally. (A. 39) Moreover, the Fifth District in Nationwide Prop. & Cas. Ins. v. Bobinski, 776 So.2d 1047 (Fla. 5th DCA 2001) recently ruled that an insured was not entitled to attorneys' fees incurred in the appraisal process if the insurer paid the appraisal award prior to the insured having filed suit.

The findings of the legislature regarding appraisals under homeowner's policies, the policy's standard provision to share expenses and the inability of an insured to obtain attorneys' fees for the appraisal process must be viewed together as a whole when considering the effect this court's decision will have in the future. The appraisal provision in Nationwide's policy is a provision that is commonly found in what we believe to be all approved homeowner's policies delivered for use within the state of Florida. Allowing insurers like Nationwide to resolve their coverage issues through appraisal will allow the insurance industry to shift the expense of their wrongful denials of benefits under such policies to their insureds. Insurers will do so by forcing the insureds into a costly and time-consuming adversarial process in which the companies will be able to deftly utilize their far superior economic resources to the detriment of their insured, whose home and major life investment has been damaged and is in need of repair. Rather than suffer any adverse consequences from such

conduct, an insurer could actually benefit by making the appraisal more complicated and drawn out because the expenses associated with its conduct must, by contract, be equally borne by its insured. Thus, after a loss to his or her home, at a point in time where most insureds are economically and emotionally most vulnerable, they will likewise be the most susceptible to insurance company strong-arm tactics to either accept an unreasonably low settlement offer from their insurance company or face a drawn-out and expensive adversarial process for which there is no corresponding downside for the insurance company.

If this scenario were not bad enough, it must be remembered that in this particular case, and in many cases like it around Florida, the loss was occasioned by a sinkhole. Sinkhole coverage is a statutorily-mandated coverage which is required to be provided in every property policy issued in this state. See, Fla. Stat. § 627.706. In other situations involving statutorily-mandated coverage, this Court has repeatedly stated that insurance companies may not include provisions in their insurance contract which whittle away at that legislatively-mandated coverage. See, e.g., Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971). The public policy which underlies such rulings in the context of uninsured motorist coverage is the same public policy that this Court should consider when reaching its determination of whether an insurance company like Nationwide can refuse coverage for the claim as a whole under its policy, maintain that a determination of its obligation is an issue for its

handpicked appraiser and then force its insured to endure the drawn-out, expensive adversarial process before its appraisers reach its predictable result. This Court should quash the decision of the Second District and determine that as it pertains to excluded or covered losses under a policy, causation is a coverage issue that may only be determined by a court, and further, that Nationwide's policy does not require its insureds to submit such issues to appraisers under the appraisal clause of the policy.

CONCLUSION

As this Court said in Licea, a challenge of coverage is exclusively a judicial question. Here, the Second District overlooked that clear statement of policy and law from this Court when it authorized Nationwide's appraisers to make coverage determinations concerning whether damage was caused by a covered or excluded cause of loss. The decision of the Second District should be quashed with directions on remand to reinstate the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. MAIL to **W. Douglas Berry, Esquire and Anthony J. Russo, Esquire,** 6200 Courtney Campbell Causeway, #1100, Tampa, Florida 33607; **Alan S. Marshall, Esquire,** 36410 U.S. Highway 19 North, Palm Harbor, Florida 34684; **Craig A. LeValley, Esquire,** 7617 Little Road, New Port Richey, Florida 34654; **Linda Spaulding White, Esquire**, Post Office Box 14723, Ft. Lauderdale, Florida 33302; and **Richard A. Warren, Esquire,** 9130 S. Dadeland Blvd., Suite 1209, Miami, Florida 33156-7848, on September 26, 2002.

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George A. Vaka, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioners, Peter Johnson and Christine Johnson's, Reply Brief on the Merits complies with font requirements, and this brief is typed with 14 point New Times Roman.

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