

Appraisals: The Process and Protection from Contractual and Extra-Contractual Claims

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Overview

Appraisal Process

 Effect of Appraisal on Contractual and Extra-Contractual Claims



- Appraisal clauses uniformly included in most property insurance policies
- Used to resolve disputes regarding amount of loss for a covered claim
- Often carried out without attorneys
- More deferential review because process is fair & efficient tool



Mandatory when properly demanded

Binding on parties when properly executed



- Similar to arbitration because:
 - (I) binding; and
 - (2) deciding parties are impartial, independent, and free from bias
- But unlike arbitration, appraisal is
 - (I) informal; and
 - (2) limited in scope



Scope of appraisal:

- Amount of loss only
- Causation is not generally proper issue for appraisal.
- But appraisers may have to decide which damages were caused by a specific occurrence.

State Farm Lloyds v. Johnson, 290 S.W.3d 886

Typical Appraisal Clause

- If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed by any two will be binding. Each party will:
- (a) Pay its chosen appraiser; and
- (b) Bear the other expenses of the appraisal and umpire equally.
- If there is an appraisal, we still retain our right to deny the claim.



Elements

- Written demand for appraisal
 - either party
 - abatement not required
- Selection of appraiser
- Appraisers select umpire, or court appoints
- Appraisers separately determine amount of loss
- Submit differences to umpire
- Decision agreed to by any 2 is binding



•Timeliness— not usually specified in clause, but must be within "reasonable time"

Courts have concluded that I year into litigation and 4 years after loss is timely

• Failure to participate after invoking

Overturning Award

Three ways:

- (I) Appraisal made without authority
 - -E.g., umpire signing award where appraisers did not disagree on amount; outside scope
- (2) Award was the result of fraud, accident, or mistake
 - -E.g., insured lies about damage
- (3) Award not in substantial compliance with policy terms
 - -E.g., lack of written demand, nonpayment of appraisers/umpire



Contractual and Extra-Contractual Claims

Contractual—Breach of Contract

- Extra-contractual—
 - common law bad faith
 - statutory bad faith(Unfair Claims Settlement Practices Act)
 - Prompt Payment of Claims Act



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Contractual Claims

Garcia v. State Farm Lloyds (Tex.Civ.App.—San Antonio 2016)

FACTS:

- Insured made claim for storm damage
- •State Farm investigated and determined damage did not exceed deductible (\$902 loss, \$1760 deductible)
- Insured sued for breach of contract, bad faith, prompt payment, and DTPA



- •Parties proceeded with appraisal and award issued.
- State Farm tendered payment right away
- Court lifted Abatement and State farm moved for Summary Judgment
- Insured rejected payment of award and moved to set aside Award
- Trial court ruled for State Farm, insured appealed.



COURT'S ANALYSIS:

Contractual claim

- HELD: where award is valid and carrier timely tenders the full amount, breach of contract claim is estopped.
- Strong public policy to prevent an insured from taking advantage of the appraisal process and then suing
- Particularly where the allegedly breached contract provides for appraisal

•No disagreement that State Farm tendered timely and in full. Insured's only way to beat estoppel was to overturn award.

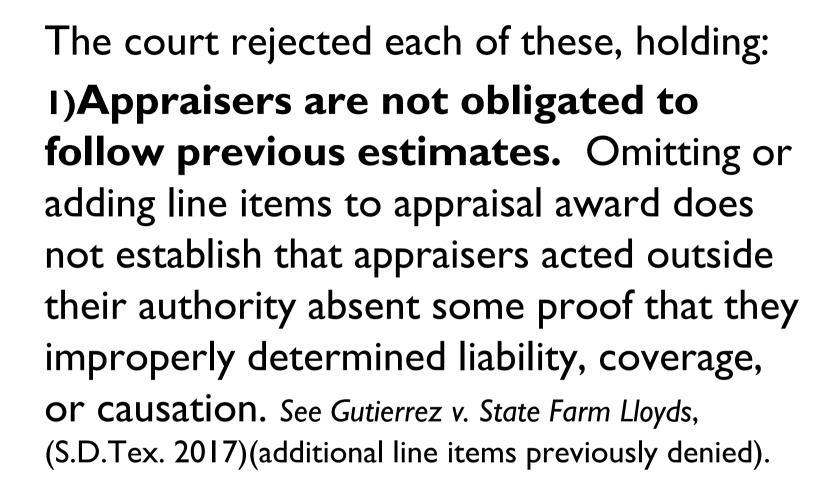
Insured argued award was invalid because:

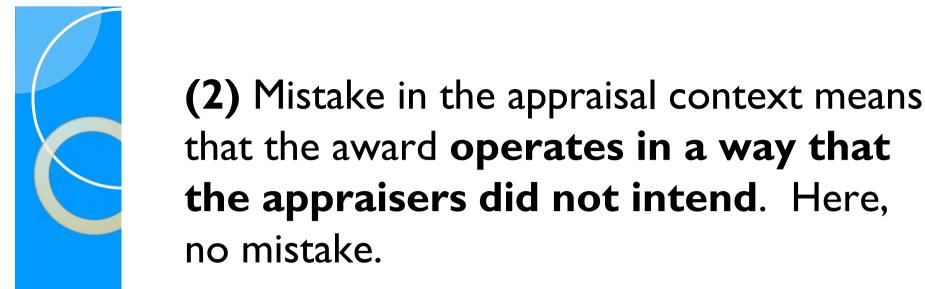
(I) The award was without authority because it excluded items contained in carrier's previous estimate (in other words, that appraiser must have determined coverage as to these items);



(2) Award was due to mistake; and

(3) The insured rejected State Farm's tender.





(3) Insured's rejection of carrier's tender does not invalidate the award. If award is valid, and carrier tenders timely and in full, breach of contract is estopped.

Contractual Claims: Summary

- A carrier can protect its estoppel defense by ensuring that appraisal is properly invoked, carried out, and paid. Mind time requirements. Pay promptly and in full.
- Appraisal only protects carrier from breach of contract claim for underpayment/nonpayment on the disputed claim—NOT for breach of another contractual provision.

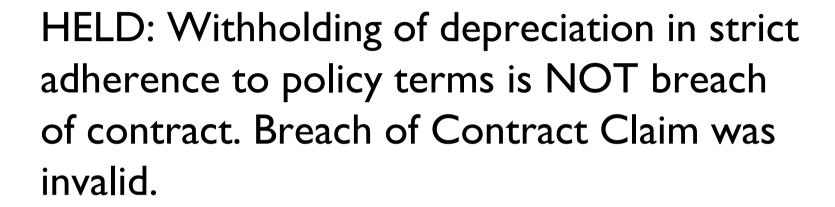


Gutierrez v. State Farm Lloyds (S.D.Tex. 2016)

- Policy included recoverable depreciation if repairs made within 180 days of date of loss.
- State Farm initially paid storm damage claim along with recoverable depreciation.



- •Insured filed suit two years later and invoked appraisal.
- •State Farm promptly paid award minus depreciation (more than 180 days from DOL)
- •Insured argued for breach of contract because after time for dispute and appraisal process had passed, it was well past the 180 day limit and would be deprived of the depreciation payment.





Extra-Contractual Claims

If the insured cannot bring a breach of contract claim, what happens to the related extra-contractual claims?

Is invoking the appraisal provision a get out of jail free card for the insurance company?



USAA Lloyds Company v. Menchaca (Tex. 2018)

FACTS: Hurricane Ike Claim

Claimed damage to home

USAA found little storm damage and made no

payment

Insured sued for contractual and extra-

contractual damages

Jury found no breach of contract but violation

of Ins. Code and awarded policy

benefits(insured's repair estimate)

HOLDING:

Insured can recover policy benefits as measure of damages for violation of Ins. Code if entitled to policy benefits and violation caused loss of benefits.

In reaching decision, Court addressed when recovery of benefits and other damages is generally available for statutory violation. It set forth 5 rules:

- I. An insured cannot recover policy benefits for a statutory violation if not entitled to policy benefits
- 2. Insured can recover policy benefits for a statutory violation if entitled to policy benefits and violation caused loss of benefits

- Insured can recover policy benefits even if not entitled to benefits if statutory violation caused loss of benefit entitlement.

 (misrepresentation regarding coverage)
- 4. Insured can recover damages other than policy benefits if statutory violation causes independent injury.

(must not flow from loss of policy benefits) (would be rare and Court has yet to see one)

5. No recovery unless insured can establish a right to the benefits or independent injury



APPRAISAL AND BAD FAITH

Ortiz v. State Farm Lloyds (Tex. 2019)

FACTS: Wind and Hail damage to home

Insured sued for breach of contract and

violation of Ins. Code

State Farm invoked appraisal and timely

paid appraisal award

Trial court grants State Farm Summary

Judgment

Insured appeals



HOLDING: Texas Supreme Court affirms

Summary Judgment in favor of State

Farm on Ins. Code

Insured received all benefits due under policy and failed to prove independent injury and therefore no

recovery.

In essence, no extra-contractual recovery without independent injury if appraisal paid timely



Mainali Corp. v. Covington Specialty Ins. Co. (5th Cir 2017)

FACTS: Fire damage claim to gas station

Covington pays claim based on

independent estimate

Parties invoke appraisal process

Appraisal award paid timely

Trial Court grants Covington Summary

Judgment on all claims including

Prompt Payment



Although appraisal payment made after Prompt Payment time limit expired, no valid claim.

Looks at prior law and concluded that no Texas court has imposed Prompt Payment liability under these circumstances.

Later case law seems to establish a "reasonableness" defense if the original payment was reasonable. Payments I/3 and I/6th of appraisal award were reasonable as matter of law.



FACTS: Business property suffered hail damage

Carrier found under deductible damage

Insured sues including TPPCA

Appraisal invoked and award paid

Summary judgment granted State Farm

on TPPCA



Supreme Court reverses and

remands

Rejects argument that appraisal

exempt from TPPCA(no language in

statute)

Appraisal requests does not restart

60 day time period

Applies if policy provides

coverage(insured entitled to benefits)

No discussion regarding reasonableness

Hinojos v. State Farm Lloyds (El Paso 2019, rev. granted)

FACTS: Residence Hail Storm Damage

Under deductible damage

Paid minimal payment after

re-inspection

Appraisal invoked and award paid

Sued for TPPCA

Trial Court granted State Farm summary judgment



HOLDING:

Court affirms summary judgment Reasonable payment of initial amount is defense to Prompt Payment

Supreme Court reverses decision on March 19, 2021 and rejects "reasonableness" defense



Common law bad faith, DTPA, and statutory bad faith claims fail where the underlying breach of contract claim fails UNLESS the insured can show independent injury.

Prompt Payment —not precluded. Carrier still faces potential exposure for penalty interest and attorney fees.



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