

IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC01-91, SC01-321 (consolidated)

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

MARIANO R. GONZALEZ and RENE GONZALEZ,

Respondents.

**ON CERTIFICATION OF CONFLICT FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

REPLY BRIEF OF PETITIONER

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ARGUMENT

ISSUE

THE CAUSE OF A LOSS IS A FACTUAL ISSUE TO BE DETERMINED BY APPRAISERS UNDER A POLICY CLAUSE PROVIDING FOR APPRAISAL OF THE “AMOUNT OF LOSS.”

Respondents frequently refer to the rule stated in *Midwest Mutual Insurance Company v. Santiesteban*, 287 So. 2d 665, 667 (Fla. 1973), that “a challenge of coverage is exclusively a judicial question and may not be decided by arbitration.” This principle was reaffirmed by *Licea*, which then went on to state that the cause of a loss is a matter for appraisal. This principle is not an issue in this case; the question is how to define a “challenge of coverage” or “coverage defense.” None of the cases cited by Respondents are helpful.

Respondents cite the statement in *Hanover Fire Insurance Company v. Lewis*, 10 So. 297 (1891), that “liability of the insurers was expressly excepted and reserved from the consideration of said arbitrators. The naked question submitted to them was: What is the amount of the damage here?” This statement is an accurate representation of the facts in *Hanover* – the dispute was over the cost to replace the building, not the cause of the loss. Furthermore, the phrase “amount of the damage” is not, any more than the term “amount of loss,” necessarily restricted

to the costs of repair or replacement, as Respondents seem to assume. Indeed, as argued in the Initial Brief, *Hanover* shows that the cause of a loss is not a coverage question. According to *Hanover*, a coverage question (which is beyond the “sphere of inquiry” of the appraisers) asks whether the insurer is “legally liable,” and the answer to that question depends upon “other independent circumstances and conditions growing out of the contract between the parties.” *Id.* at 303. The cause of a loss is clearly not such an issue.

Respondents also cite the statement in *New Amsterdam Casualty Company v. Blackshear*, 156 So. 695 (Fla. 1934), that “the object of the appraisal clause is merely to fix the amount of recoverable damage” *Blackshear* did not involve the cause of a loss, and does not state the reason for the insurer’s denial of coverage. *Blackshear* held that an insurer may not demand appraisal of the amount of a loss if it also denies coverage because an appraisal might therefore be speculative. *Blackshear* was followed in *Scottsdale Insurance Co. v. Desalvo*, 666 So. 2d 944, 947 (Fla. 1st DCA 1995) (also cited by Respondents), which held “that an insurer may not demand an appraisal while at the same time denying coverage; but that, rather, the language [in the reservation of rights clause] is intended merely to ensure that an insurer is not deemed to have waived any coverage defense it might have when it participates in an appraisal requested by the insured.”

Scottsdale and *Blackshear* are not pertinent to this case because they deal with the insurer's right to demand appraisal when it also asserts a coverage defense, not with the scope of an appraisal of the "amount of loss." The holding of these cases was also implicitly disapproved by this court in *Licea*, which recognizes that an insurer may assert coverage defenses even when it has demanded appraisal. These cases have accordingly either been rejected or distinguished by post-*Licea* cases. See *Nationwide Mutual Insurance Co. v. Johnson*, 774 So. 2d 779, 781 (Fla. 2d DCA 2000) (distinguishing *Blackshear* because it did not involve a reservation of rights provision); *Florida Select Insurance Company v. Keelean*, 727 So. 2d 1131 (Fla. 2nd DCA 1999) (rejecting *Scottsdale*); *Paradise Plaza Condominium Association, Inc. v. Reinsurance Corporation of New York*, 685 So. 2d 937 (Fla. 3d DCA 1996) (rejecting *Scottsdale* and distinguishing *Blackshear* because it did not involve a reservation of rights provision).

Respondents refer to State Farm's briefs in *Licea* (copies of which are included in Respondents' appendix) to argue that State Farm is taking an inconsistent position. "In *Licea*, State Farm argued that appraisal is only binding on the parties as to the amount of the loss and loss valuation. Coverage issues and general questions of the insurer's liability, State Farm asserted, are for the courts." Answer Brief at 21. State Farm stands by these statements. "Amount of the loss"

encompasses more than mere “loss valuation.” “Coverage issues” are indeed for the courts – the issue in this case is whether the cause of a loss *is* a coverage issue. State Farm did not take a position on this question in *Licea* since, as the briefs show, the cause of the loss was not an issue. In fact, State Farm made a similar argument, pointing out that Florida law “has approved the concept of parties using such alternative dispute resolution mechanisms to dispose of as many issues as they can, reserving to the courts just those issues which may *only* be resolved by the courts.” Respondents’ appendix 7 at 9.

Respondents claim that the plain meaning of “amount of loss” limits appraisal to computing the cost of making repairs. *See* Answer Brief at 24. But the briefs included in Respondents’ appendix show that the issue in *Licea* was not the cost of repair or replacement. The issue was whether the policy required the insurer to repair or to totally replace the roof, not the actual cost of doing either. *See* Respondents’ appendix 7 at 1, 8. This issue is identical to that in *Florida Farm Bureau Casualty Insurance Co. v. Sheaffer*, 687 So. 2d 1331 (Fla. 1st DCA 1997). *Sheaffer* rejected the insureds’ argument that appraisal was limited to “how much it would cost to replace the roof.” The court held that the issue of repair or replacement was an “amount of loss” question even though computation of costs was not involved. The court relied on the distinction between amount of loss issues

and coverage questions drawn by *J.J.F. of Palm Beach, Inc. v. State Farm Fire and Casualty Co.*, 634 So. 2d 1089 (Fla. 4th DCA 1994), including its statement that “whether the claimant is actually entitled under the facts of the case to be paid on a claim and, if so, the precise amount to which the claimant is entitled, is a question reserved for the arbitrator.”

That the “amount of loss” phrase cannot be so neatly applied is also demonstrated by the recent decision of the Fourth District in *Delisfort v. Progressive Express Insurance Co.*, No. 4D00-2491, 26 Fla. L. Weekly D1397 (Fla. 4th DCA May 30, 2001). The Fourth District held that whether the insurer was entitled to take deductions based on its construction of policy language was not an issue for appraisal, even though it was clearly a dispute only as to the “amount of the loss.” The court reasoned that the issue was not an issue of fact but was rather a legal issue based upon a construction of the policy language. This decision supports State Farm’s argument that the scope of appraisal should be delineated by the respective functions of appraisers and courts, and that issues involving interpretation of policy are clearly legal matters for the court to decide.

Respondents mistakenly describe State Farm’s homeowners policy as an “all risks” policy. State Farm’s policy covers the dwelling only for “accidental direct physical loss” except as provided in the “Losses Not Insured” section; it does not

cover “all” risks of loss. True all-risk policies create “a special type of coverage extending to risks not usually covered under other insurance, and recovery . . . will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud” 13A Couch on Insurance 2d, § 48.141 (1982).

Respondents argue that submitting the cause of a loss to appraisers will require the appraisers to consider legal issues regarding the appropriate burden of proof – issues that appraisers are not competent to address. *See* Answer brief at 26. But “[a]rbitrators are not constrained by formal rules of evidence or procedure.” *Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995). If arbitrators are not bound by burdens of proof, then appraisers are much less so, since appraisers proceed *ex parte* and are not required to hear evidence at all. *See Preferred Insurance Co. v. Richard Parks Trucking Co.*, 158 So. 2d 817, 820 (Fla. 2d DCA 1963).

Respondents misstate State Farm’s argument to mean that all factual issues, even those relating to coverage defenses such as breach of conditions subsequent, are for the appraisers. *See* Answer brief at 26. To the contrary, all issues (legal and factual) relating to coverage defenses (such as fraud by the insured or lack of an insurable interest) are for the court or the jury, as are all issues regarding the interpretation of the contract between the parties. The appraisers can properly

decide only two factual questions – the cost of repair and replacement and the cause of the loss. The cause of a loss is, as *Licea* notes, “necessarily” a matter for the appraisers because the “amount” of a loss is restricted, in the context of an insurance policy, to losses compensable under the policy, and because appraisers can make that determination based upon examination of the property and upon their expertise.

As Respondents note, courts from other jurisdictions are divided on this question. The court that matters, however, is this Court, and in *Licea* this Court decided the question contrary to Respondents’ position. The decision in *Licea* logically follows from other Florida decisions, such as *J.J.F.* and *Sheaffer*, holding that whether the loss is compensable under the policy, based on the facts surrounding the loss, is a matter for the appraisers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to all persons on the attached service list on this _____ day of June, 2001.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font (Times New Roman 14 point) and spacing requirements of Fla. R. App. P. 9.210(a)(2).

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