

**Petition for Writ of Mandamus Conditionally Granted and Memorandum Opinion  
filed September 23, 2010.**



In The

**Fourteenth Court of Appeals**

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NO. 14-10-00709-CV

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**IN RE CONTINENTAL CASUALTY COMPANY, Relator**

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**ORIGINAL PROCEEDING  
WRIT OF MANDAMUS**

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**MEMORANDUM OPINION**

On July 29, 2010, relator Continental Casualty Company filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. §22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. In the petition, relator seeks a writ of mandamus ordering the respondent, the Honorable Thomas R. Culver, presiding judge of the 240th District Court of Fort Bend County, to abate the underlying case and enforce the appraisal clause in the insurance contract between Continental Casualty and its insured, the real party in interest, Zoya Enterprises, Ltd.. We conditionally grant the writ.

**I. BACKGROUND**

Continental issued a commercial property insurance policy to Zoya covering several pieces of commercial property, which Zoya alleges were damaged by Hurricane Ike on September 13, 2008. The policy requires the insured to provide notice to Continental when a loss occurs by providing a sworn proof of loss. If the parties disagree

as to the amount of the loss, either party may demand an appraisal as provided in the policy's appraisal clause, which reads as follows:

If we and you disagree on 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 and notify the other of the appraiser selected within 20 days of such demand. The two appraisers select an umpire. If they cannot agree within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction: Each appraiser will state the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to 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,

- a. You will still retain your right to bring a legal action against us, subject to the provisions of the Legal Action Against Us Commercial Property Condition; and
- b. We will still retain our right to deny the claim.

## **II. ANALYSIS**

### **A. The Appraisal Process**

Almost all insurance policies contain provisions specifying appraisal as a means of resolving disputes regarding the “amount of loss” for a covered claim. *See State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888 (Tex. 2009). As in this case, appraisal provisions generally provide that either the insured or the insurer may demand an appraisal pursuant to the terms of the policy. *See In re Allstate Cty. Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002) (orig. proceeding). Where an insurance contract mandates appraisal to resolve the parties’ dispute regarding the value of a loss, and the appraisal

provision has not been waived, a trial court abuses its discretion and misapplies the law by refusing to enforce the appraisal provision. *Scottish Union & Nat'l Ins. Co. v. Clancy*, 83 Tex. 113, 18 S.W. 439, 440 (1892). More recently, the supreme court has expressed a strong policy in favor of enforcing appraisal clauses in insurance contracts. *See State Farm Lloyds*, 290 S.W.3d at 891–93 (holding that insurer is bound by appraisal clause to have amount of loss determined, even when dispute also involves questions of causation).

The Texas Insurance Code mandates prompt payment of claims. *See* Tex. Ins. Code Ann. §§ 542.051–.061 (Vernon 2009). An insurer is required to acknowledge receipt of a claim, begin an investigation, and request documentation from its insured within 15 days of notification of the claim. Tex. Ins. Code Ann. § 542.055(a) (Vernon 2009). The insurer is to notify the claimant in writing of the acceptance or rejection of the claim within 15 days after it receives the required documentation for proof of loss. *Id.* § 542.056(a). If the insurer notifies the claimant it requires more time, the acceptance or rejection must be made within 45 days of the notice. *Id.* § 542.056(d). Section 542.057 provides that a claim must be paid within five business days after notice that the claim, or a part of the claim, will be paid. Tex. Ins. Code Ann. § 542.057(a) (Vernon 2009). An insurer's failure to comply with the statutorily prescribed timeframes will subject the insurer to damages, including interest on the amount of the claim and attorney's fees. *See* Tex. Ins. Code. Ann. §§ 542.058(a), 542.060 (Vernon 2009).

## **B. The Claim**

Shortly after Hurricane Ike struck, Zoya reported damage to 14 locations insured by Continental. In November or December of 2008, Continental tendered payment on claims submitted for most of those locations. With regard to the locations on which Continental did not tender payment, it was understood that the parties agreed with regard

to the amount of loss. Five months later, on May 1, 2009, Zoya's counsel sent a letter to Continental informing Continental that it had been retained to represent Zoya and was investigating the damages to the 14 locations caused by Hurricane Ike. The letter requested that Continental provide a payment log indicating all payments made and to whom they were made. Zoya further requested documentation relating to the claims including all investigative reports regarding the claims.

On June 10, 2009, Continental's attorney responded to the May 1 letter stating that Continental had inspected the damage incurred as a result of Hurricane Ike and listed co-insurance valuations relating to five of the locations claimed to have been damaged. Continental stated that those locations were not properly valued or insured at the time of the loss. The letter contained a statement of reservation of rights in which Continental stated its investigation of the claim was subject to a complete reservation of all rights in the policy, and that Continental did not "intend to waive, and expressly reserves, any and all rights or defenses that may be available to it under the terms and conditions of the policy, the common law, or any applicable statute."

Another five months passed, and on November 4, 2009, Zoya filed an original petition in which it alleged that Continental improperly adjusted and mishandled Zoya's damages claims on the original 14 locations plus an additional eight locations. Continental answered the suit and began inspecting the locations to ascertain whether additional payments were necessary. The inspections occurred on December 8-10, 2009 and January 14-15, 2010. Continental communicated its evaluation of the amount of loss associated with Zoya's Hurricane Ike losses on Friday, February 19, 2010. On that day, Zoya's attorney sent an email to Continental's attorney rejecting Continental's estimate of the amount of loss, and informing Continental that it would seek the earliest possible trial date. On February 24, 2010, Continental invoked its right to appraisal, stating that,

“[b]ased on your February 19, 2010 email that I received, it is apparent that the parties disagree on the ‘amount of loss’ associated with the above-referenced claims.”

Also on February 24, 2010, Zoya filed a motion for expedited trial setting. Continental, on March 5, 2010, filed a motion to compel appraisal and to stay proceedings pending appraisal. Associate Judge Pedro Ruiz initially heard the motion to compel appraisal and denied it. Continental appealed the ruling to the respondent district court judge who affirmed Judge Ruiz’s decision. Zoya argued at the hearing before the respondent that Continental was using appraisal oppressively and had waived the appraisal clause by failing to invoke it until months after suit was filed. Continental then filed this mandamus proceeding.

### **C. Mandamus Review**

Mandamus relief is available if the trial court abuses its discretion, either in resolving factual issues or in determining legal principles, when there is no other adequate remedy by law. *See Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex.1992). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze or apply the law correctly. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005).

The refusal to enforce a contract according to its terms constitutes an abuse of discretion that may be subject to mandamus relief. *See, e.g., In re Prudential*, 148 S.W.3d 124, 135 (Tex. 2004) (jury waiver clause); *In re Slavonic*, 308 S.W.3d 556, 562 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (appraisal clause). The Texas Supreme Court has held that a trial court’s failure to enforce an appraisal clause is an error of law constituting an abuse of discretion that cannot be remedied by appeal. *Allstate*, 85 S.W.3d at 195–96.

#### **D. Abuse of Discretion**

Continental argues it is entitled to mandamus relief compelling appraisal because the trial court abused its discretion in finding that Continental waived the appraisal clause in its contract.

In general, parties may waive contractual rights. *See Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex.2008) (finding no waiver of arbitration). Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *In re General Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006) (orig. proceeding). Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. *Jernigan v. Langley*, 111 S.W.3d 153, 156–57 (Tex.2003); *see also Van I.S.D. v. McCarty*, 165 S.W.3d 351, 353 (Tex. 2005) (“While waiver may sometimes be established by conduct, that conduct must be unequivocally inconsistent with claiming a known right.”). Waiver is ordinarily a question of fact, but when the facts are admitted or clearly established, it becomes a question of law. *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996).

The date of disagreement, or impasse, is the point of reference to determine whether a demand for an appraisal is made within a reasonable time. *Slavonic*, 308 S.W.3d at 562. In *Slavonic*, this court determined that the date of impasse was the date the insured sent a demand letter to the insurance company stating they did not accept the insurance company's valuation of their claim. *Id.* The insurance company demanded appraisal six days later, which this court held did not waive the right to appraisal. *Id.* at 563.

In this case, Zoya alleges the parties reached an impasse in late 2008, when Continental initially did not pay their claims on some of the original 14 locations for

which Zoya claimed damage. Continental argues that in late 2008 it was operating under the impression that Zoya was satisfied with the claims paid and, if the parties had a dispute, it was as to coverage, not amount of loss. Zoya argues that Continental was put on notice as to an impasse in May, 2009, when Zoya's counsel sent a letter to Continental informing Continental of their representation of Zoya. The letter, however, does not put Continental on notice that there is a dispute as to the amount of loss. Zoya finally argues that the last possible date of impasse was November 4, 2009, when it filed suit. Both parties agree that the suit filed in November 2009 was the first notice Continental received of the eight additional locations that were added to Zoya's claim. The record further reflects that the date of the suit is the date on which Continental was first put on notice that there was a dispute as to the amount of loss. Continental presented evidence, which Zoya did not dispute, that it began inspecting all the locations included in Zoya's suit and did not conclude its investigation until January 2010.

On February 19, 2010, Continental communicated its findings based on its investigation. Zoya rejected those findings, at which time, an impasse was reached. Continental demanded appraisal five days later.

The test for waiver of the right to appraisal is set forth in *Scottish Union*, in which the supreme court held:

To constitute waiver, the acts relied on must be such as are reasonably calculated to induce the assured to believe that a compliance by him with the terms and requirements of the policy is not desired, or would be of no effect if performed. The acts relied on must amount to a denial of liability, or a refusal to pay the loss.

71 Tex. at 10, 8 S.W. at 632. Applying this established test, we conclude there is no evidence in this record constituting waiver of the right to appraisal. As in *Scottish Union*, there is no evidence that Continental denied liability or that it would refuse to pay the

amount of loss that would be determined by appraisal. *See id.* We find no evidence of the requisite intent necessary to establish waiver. *See Jernigan*, 111 S.W.3d at 156. We conclude that the trial court abused its discretion in finding Continental waived its right to enforce the appraisal clause. *See Slavonic*, 308 S.W.3d at 563; *In re Security Nat'l Ins. Co.*, 14-10-00009-CV; 2010 WL 1609247 (Tex. App.—Houston [14th Dist.] April 22, 2010, orig. proceeding) (memo. op.).

### **E. Remedy**

The insurance policy in this case specifically provides that all requirements precedent to coverage must be met before suit is filed. Therefore, appraisal is a condition precedent to suit. *See State Farm Lloyds*, 290 S.W.3d at 894. An insurer's remedy to enforce a condition precedent in its policy is abatement of the case. *Slavonic*, 308 S.W.3d at 564; *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725, 735 (Tex. App.—Houston [14th Dist.] 2003, no pet.). As in *Slavonic*, in addition to the appraisal provision, the policy contained a provision requiring compliance with the policy before a lawsuit could be brought. In that case, this court held that because appraisal is a condition precedent to suit, abatement of the trial proceedings is appropriate. *Slavonic*, 308 S.W.3d at 564. The same holds true for this case. Therefore, we conclude that the trial court abused its discretion by denying Continental's motion to compel appraisal and stay the trial proceedings.

### **III. CONCLUSION**

We conditionally grant the petition for a writ of mandamus. We are confident that the respondent will stay trial proceedings, vacate its order denying Continental's request



for appraisal and grant Continental's motion to compel appraisal. The writ will issue only if the respondent fails to act in accordance with this opinion.

/s/ John S. Anderson  
Justice

Panel consists of Justices Anderson, Frost, and Seymore.