

STATE OF MINNESOTA

COURT OF APPEALS

A-06-1478

Margaret Johnson,

Appellant,

vs.

Mutual Service Casualty Insurance
Company,*Respondent.*

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. RESPONDENT'S POLICY LANGUAGE DOES NOT UNAMBIGUOUSLY PLACE A TIME LIMIT ON AN INSURED'S DEMAND FOR APPRAISAL

Respondent argues that under the terms of commercial insurance policy BCP-2-2024866 (the "Policy"), an insured must demand appraisal within two years of the "direct physical loss or damage." See Appellant's Brief, p. 5. This assertion should be rejected, as the policy language is ambiguous and confusing. Further, Respondent's interpretation of the meaning of the word "action" in the language of their policy is contrary to the meaning imposed by Minnesota case law.

Respondent's policy does not prohibit a demand for appraisal after the two year statute of limitations has lapsed. Defendant's fire insurance policy covering Plaintiff's property contains a provision for "Appraisal." It provides,

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 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....

Policy, R.A. 17. Nothing in the "Loss Conditions" section makes any reference to a time limit requirement for demanding appraisal.

Defendant points to the sentence under the heading "E. Loss Conditions" that states, "[t]he following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions" as its rationale for arguing that the statute of limitations applies to an insured's

demand for appraisal. Defendant points to the portion of the “Commercial Property Conditions” section, Subdivision D “Legal Action Against Us” as the prohibition for participating in appraisal over two years after the fire loss. Policy, R.A. 39. Under the Heading, “Legal Action Against Us,” the Policy states, “No one may bring a legal *action* against us under this Coverage Part unless: 1. There has been full compliance with all of the terms of this Coverage Part; and 2. The *action* is brought within 2 years after the date on which the direct physical loss or damage occurred.” Policy, R.A. 39. Respondent’s argument that the sentence in the policy that makes the Commercial Property Conditions apply “in addition” to the Appraisal provision prevents Appellant from demanding appraisal after the statute of limitations has run is flawed for several reasons.

Respondent’s Policy is silent as to a time limit during which an insured can demand appraisal. Respondent’s attempt to link the statute of limitations prescribed in their policy to a demand for appraisal relies on an ambiguous wording in the policy. It is well-established law that ambiguities in an insurance policy are resolved in favor of the insured. Progressive Specialty Ins. Co. v. Widness ex rel. Widness, 635 N.W.2d 516 (Minn.App. 2002); Brookdale Pontiac-GMC v. Federated Ins., 630 N.W.2d 5 (Minn. App. 2001); Youngquist v. Cincinnati Ins. Co., 625 N.W.2d 178 (Minn.App. 2001); Vierkant by Johnson v. AMCO Ins. Co., 543 N.W.2d 117 (Minn.App. 1996). An insurance policy is ambiguous if language is reasonably subject to more than one interpretation, in which case the court should extend coverage rather than allow it to be restricted by ambiguous or confusing language, and any reasonable doubt as to meaning of the language of the policy is resolved in favor of the insured. Brault v. Acceptance Indem. Ins. Co., 538 N.W.2d 144 (Minn.App. 1995); See Also Steele v. Great West Cas. Co., 540 N.W.2d 886 (Minn.App. 1995).

The language of Respondent’s policy indicates that the “Loss Conditions” provision requiring

appraisal is “in addition” to the “Commercial Property Conditions” which require legal *action* to be brought within two years after the fire loss. A plain interpretation of this sentence implies that the insured must demand appraisal if there is a disagreement over the amount of the loss, but if she wishes to bring a legal *action*, then she must bring her legal *action* within two years after the loss.

Respondent interprets this sentence in the policy to mean that an insured must demand appraisal within two years of the loss. Had Respondent wished to require an insured to demand appraisal within two years of the loss, it should have worded its policy clearly and unambiguously. The supposed two-year limitation is not mentioned anywhere in the appraisal provision of the insurance policy or in the appraisal provision of Minn.Stat. § 65A.01, Subd. 2a (2004). The Respondent could have easily added a time limit to the appraisal provision of their policy by adding a simple sentence stating that an appraisal must be demanded within two years of the loss. However, Respondent added no such provision.

Instead, Respondent relies on the “Commercial Property Conditions” portion of their policy for the two-year limitation. While the Commercial Property Conditions section of their policy mentions a two year limitation, it does not mention the word “appraisal.” R.A. 39. It simply mentions that a legal action must be brought within two years after the date of the loss. R.A. 39. However, nowhere in the policy does the Respondent define what constitutes “a legal action.” Because the Respondent’s policy does not define a “legal action,” we must turn to how Minnesota case law defines the words. In Har-Mar, Incorporated v. Thorsen & Thorshov, Inc., the Minnesota Supreme Court found that the common-law definition of the term ‘action’ restricted it to “the prosecution in a court of justice of some demand or

assertion of right by one person against another.” Har-Mar, Incorporated v. Thorsen & Thorshov, Inc., 300 Minn. 149, 152, 218 N.W.2d 751, 754 (Minn. 1974), citing Muirhead v. Johnson, 232 Minn. 408, 42 N.W.2d 318 (Minn. 1951). The Court in Har Mar determined that the word “action” was intended to be confined to judicial proceedings. 218 N.W.2d 751, 754. Because appraisal is not a judicial proceeding in a court of justice, the word “action” does not apply to appraisal. Thus, there is no provision in Respondent’s policy prescribing a time limit within which to demand appraisal.

Finally, the Commercial Property Conditions portion of the Policy is a completely different section of the Policy than the Building and Personal Property Coverage Form, which is the portion of the policy which describes appraisal. Even in the way that Respondent has ordered the portions of the policy, the appraisal portion of the policy is twenty-two (22) pages from the Commercial Property Conditions portion of the policy describing the two-year limitation on legal actions. At minimum, the policy is confusing and not laid out in such a way that an insured would knowingly apply the two year limitation of the Commercial Property Conditions to the appraisal provision of the Building and Personal Property Coverage Form 22 pages away. Where, as here, the policy language is ambiguous and subject to multiple reasonable interpretations, the language must be resolved in favor of the insured, the Plaintiff.

Nothing in the Respondent or the Minnesota Statute’s appraisal provisions mentions a two-year time limit; nothing in the Commercial Property Conditions portion of the policy that discusses a two-year limitation on legal actions mentions appraisal or defines a legal action; the portions of the policy governing appraisal and the two-year time limitation on legal actions are two completely

separate portions of the policy. The applicability of the two year time limitation on legal actions to appraisal is ambiguous at best and should be resolved in favor of the insured by allowing the right to appraisal.

II. APPRAISAL IS AKIN TO AN ARBITRATION UNDER MINNESOTA LAW, AS WELL AS THE LAW OF OTHER JURISDICTIONS

As stated in Appellant's Brief, the words appraisal and arbitration are used interchangeably when discussing the procedure through which to resolve disputes over the amount of a fire loss. See Glidden Co. v. Retail Hardware Mut. Fire Ins. Co. of Minnesota, 233 N.W. 310 (Minn. 1930); Kavli v. Eagle Star Ins. Co., 206 Minn. 360, 288 N.W. 723 (Minn. 1939); Itasca Paper Co. V. Niagra Fire Ins. Co., 175 Minn. 73, 220 N.W. 425 (Minn. 1928).

Of particular note in the instant case, Minnesota Courts have repeatedly used the term "arbitration" when describing appraisal in cases involving one party attempting to compel another's participation in appraisal to determine the amount of a fire loss. See Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N.W. 1005 (Minn. 1899); Milwaukee Insurance Company v. Kogen, 240 F.2d 613 (8th Cir. 1957); Boston Insurance Co. V. A.H. Jacobson Co., 226 Minn. 479, 33 N.W.2d 602 (Minn. 1948); Minnesota Farmers Mut. Ins. Co. V. Smart, 204 Minn. 101, 282 N.W. 658 (Minn. 1938); Itasca Paper Co. V. Niagra Fire Ins. Co., 220 N.W. 425 (relying on arbitration law to determine that a denial of liability does not deprive an insured of their right to appraisal).

Despite Minnesota Courts repeatedly using the words arbitration and appraisal

interchangeably to describe the procedure for determining the amount of damage in a fire loss matter, Respondent relies on North Dakota law for the proposition that an appraisal is not an arbitration. See Respondent's Brief, p. 16-17. In Minot Town & Country v. Fireman's Fund Ins. Co., the North Dakota Court found that an appraisal was not an arbitration because the appraisal could not resolve questions of liability. 587 N.W.2d 189 (N.D. 1998). However, the Minot case also states that "the substance of what occurred and not the name given to the proceeding should control..." Id. at 191. Therefore, one should examine the substance of what defines an arbitration. Black's Law Dictionary defines "arbitration" as "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard." Black's Law Dictionary 70 (Abridged 6th ed, West 1991). It further defines an "arbitration clause" as "[a] clause inserted in a contract providing for compulsory arbitration in case of dispute as to rights or liabilities under such contract;...The purpose of such clause is to avoid having to litigate disputes that might arise." Id. Minnesota law defines an agreement to arbitrate as "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties..." Minn. Stat. §572.08 (2005). Neither Minnesota law nor Black's Law Dictionary requires resolution of liability disputes in an arbitration decision. In fact, the Minnesota statute allows for an arbitration to involve "any existing controversy" or "controversy thereafter arising." Id.

Connecticut, Hawaii, Florida, and Maryland have all found that the Uniform

Arbitration Act applies to fire loss appraisal provisions that are nearly identical to the one in Minnesota and the instant case. In Covenant Insurance Company v. Banks, the Court found that the appraisal clause in the fire insurance policy constituted a ‘written agreement to arbitrate’ within the meaning of Connecticut’s Uniform Arbitration Act statutes. 177 Conn. 273, 413 A.2d 862 (Conn. 1979). The Court relied on the language of Connecticut’s Uniform Arbitration Act, which defined a ‘written agreement to arbitrate’ as “an agreement in any written contract...to settle by arbitration any controversy thereafter arising out of such contract...” Id. at 279. It should be noted that this language is almost identical to that in Minn. Stat. §572.08 (2005). In Covenant Insurance, the Court found that the “connotation of ‘controversy’ is more than sufficient to encompass the dispute over the amount of a fire loss that triggers the appraisal procedure in the insurance contract...” 177 Conn. 280.

In Wailua Associates v. Aetna Casualty and Surety Company, the Court found that “if an agreement provides that disputes will be submitted to an appraisal panel and that the panel’s decision is to be ‘final, conclusive, and binding,” it was an agreement to arbitrate. 904 F.Supp. 1142 (D. Hawaii 1995). The Court agreed that the Hawaii appraisal provision was an agreement to arbitrate even though the Hawaii appraisal provision, like the Minnesota provision, does not allow for liability disputes to be decided at appraisal. Id.

Even after a lengthy discussion regarding the differences between an “ordinary” agreement for arbitration and an agreement for appraisal, the Court found that “notwithstanding the distinctions between an appraisal under and insurance policy appraisal

clause and arbitration, appraisal is analogous to arbitration.” Aetna Casualty & Surety Company v. Insurance Commissioner, 293 Md. 409, 445 A.2d 14 (Md. 1982). The Court acknowledged applying arbitration law to appraisal clauses in insurance policies and acknowledged that “appraisal” fit within Maryland’s Uniform Arbitration Agreement definition of “agreement to arbitrate.” Id. As in Connecticut, the language defining an agreement to arbitrate in Maryland is nearly identical to that in Minnesota. Maryland’s definition is “[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future....” Md. §3-206(a). Finally, multiple courts in Florida have held that appraisal provisions are arbitration provisions. Preferred Mutual Insurance Company v. Martinez, 643 So.2d 1101, 19 Fla. L. Weekly D1795 (Fla. 3^d DCA 1994); American Reliance Ins. Co. v. Village Homes at country Walk, 632 So.2d 106 (Fla. 3^d DCA 1994); Intracoastal Ventures Corp v. Safeco Ins. Co. of Am., 540 So.2d 162 (Fla. 4th DCA 1989); U.S. Fire Ins. Co v. Franko, 443 So.2d 170 (Fla. 1st DCA 1983).

As has been noted by multiple other jurisdictions with nearly identical language in their appraisal provisions and definitions of agreements to arbitrate, an appraisal fits within the definition of an agreement to arbitrate. Therefore, arbitration laws should apply to appraisal provisions.

As was detailed in Appellant’s Brief, if the Court should determine that the appraisal provision of the Policy fits within the definition of an arbitration, then Appellant’s demand

for appraisal was timely; the Uniform Arbitration Act should apply; and Appellant's motion to compel appraisal should have been granted.

CONCLUSION

Neither the Respondent's policy nor Minn. Stat. §572.08 (2005) clearly define a time limit for an insured's demand for appraisal. The ambiguity in these policies should not operate to eliminate the rights of the insured. The ambiguity must be resolved in favor of the insured, allowing her to demand appraisal without any poorly defined and confusing limits. Further, the appraisal provision of the Policy and of Minn. Stat. §572.08 describes a procedure well within the confines of an agreement to arbitrate. Applying arbitration law to appraisal allows the insured to enforce the appraisal agreement under the Uniform Arbitration Act. Here, because the Appellant's demand for appraisal was timely and arbitration law should apply, the Respondent should be compelled to attend an appraisal.

Respectfully Submitted,

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