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State of Minnesota
In Court of Appeals

Margaret Johnson,

Appellant,

vs.

Mutual Service Casualty Insurance Company,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

I. Whether the District Court properly granted summary judgment to Respondent given that the fire insurance policy's two-year limitation provision barred Appellant's untimely damage claim for breach of contract.

The District Court granted summary judgment because the fire insurance policy's statutorily-mandated two-year limitation provision expressly applied to bar Appellant's breach of contract claim; Appellant did not commence her action for damages until August 30, 2005, more than six months after the two-year limitation period had expired.

Apposite Authority:

Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683 (Minn. 1997)

Minn. Stat. § 65A.01, subd. 3 (2004)

II. Whether the District Court properly denied Appellant's belated motion to compel appraisal when Appellant's Complaint only sought breach of contract damages and did not reference the appraisal provision of the fire insurance policy.

The District Court denied Appellant's motion to compel appraisal because Appellant's Complaint sought only damages and neither mentioned the word "appraisal" nor referred to the fire insurance policy's appraisal provision; Appellant's motion to compel appraisal is time-barred because the policy's two-year limitation provision applies to the appraisal provision.

Apposite Authority:

Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 300 Minn. 149, 218 N.W.2d 751 (1974).

Minn. Stat. § 541.05, subd. 1(1) (2004)

Minot Town & Country v. Fireman's Fund Ins. Co., 587 N.W.2d 189 (N.D. 1998)

STATEMENT OF THE CASE

This appeal arises out of Appellant Margaret Johnson's ("Johnson") failure to timely sue Respondent Mutual Service Casualty Insurance Company ("MSI"). MSI issued a fire insurance policy for Johnson's commercial property. Following a fire, MSI investigated the claim and made payment to Johnson for the loss. Johnson later claimed additional damages, which MSI disputed. Johnson failed to bring suit within the policy's express and statutorily mandated two-year limitation period.

Eight months after Johnson sued MSI for damages for an alleged breach of contract, MSI moved for summary judgment. R.A.50. It was only after MSI moved for summary judgment that Johnson moved to stay the proceedings and to compel MSI to participate in an appraisal. R.A.51. The Honorable Edward J. Cleary, Ramsey County District Court, granted summary judgment to MSI and denied Johnson's motions. A.184. Judge Cleary concluded that Johnson's action was time-barred under the fire insurance policy's two-year limitation period, as well as the limitation period found in the Minnesota standard fire insurance policy, Minn. Stat. § 65A.01. The Court concluded that Johnson's motion to compel appraisal failed because the Complaint only sought damages for breach of contract, not an appraisal or other declaratory relief.

Johnson appeals the summary judgment granted to MSI that dismissed Johnson's damage claim for breach of the fire insurance policy and appeals the denial of her motion to compel an appraisal.

STATEMENT OF FACTS

This matter arises out of a February 18, 2003 fire that damaged the building and contents of Johnson's property, known as the Rice Street Gym, located in St. Paul (the "Property"). A.1-2, 127 at ¶ 1,3. Under the terms of commercial insurance policy BCP-2-2024866 (the "Policy"), MSI agreed to insure the Property for damage resulting from fire in exchange for an annual premium of $613.54. *See generally* R.A.1-49.[1] Once notified of the fire, MSI immediately inspected the fire damage, completed an estimate of the damage, and reached an agreement with a restoration contractor pursuant to the estimate to make the necessary repairs, which totaled $79,430.02. A.56. Johnson later discovered more alleged damages and undertook repairs without notifying MSI. A.14, 124. In her Complaint, Johnson asserted a claim for damages totaling $51,569.98, which represents the difference between what MSI had paid under the Policy, $79,430.02, and the amount for which the Property was insured, $131,000. A.53-54, 127-28 at ¶ 4. The Policy, however, only insured the Property for the actual cash value of the loss. A.56; R.A.10.

[1] In her filings with the District Court, Johnson attached to various affidavits an MSI fire insurance policy that did not list the policy period. The MSI fire insurance policy contained in Johnson's Appellant Brief and Appendix has a policy period of November 24, 2000 to November 24, 2001. A.58. Although the policy in Johnson's appendix does not govern the February 2003 fire loss, the relevant provisions are identical to those within the actual fire insurance policy at issue. MSI will refer to the Policy (policy period November 24, 2002 to November 24, 2003) throughout its Brief and Appendix because this is the relevant fire insurance policy and it is the policy that MSI provided to the District Court.

The Policy contains a limitation provision, which states under the heading "D. Legal Action Against Us," that:

> [n]o one may bring a legal action against [MSI] 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.

R.A.39 at Commercial Property Conditions, Section D. In the District Court, Johnson admitted that her "cause of action for trial on the merits of her fire loss case are [sic] governed by the two-year fire loss statute of limitations." A.174. Although the fire, "the direct physical loss or damage," occurred in February 2003, Johnson did not serve MSI with a Summons and Complaint until August 30, 2005, more than thirty months after the fire. *See* A.126-29. In opposing MSI's summary judgment motion, Johnson "acknowledge[d] that she did not initiate her lawsuit until the two-year fire loss statute of limitations passed." A.174.

The Policy also includes an appraisal demand provision under the Loss Conditions. It states in relevant part that:

> if [MSI] and [Johnson] disagree on the value of the [P]roperty 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.

R.A.17 at Building and Personal Property Coverage Form, Section E. The Policy states that the Loss Conditions, which include the appraisal demand provision, "apply in addition to the . . . Commercial Property Conditions." *Id.* Further, the Policy states that the Commercial Property Conditions are "subject to" the Loss Conditions. R.A.39. In other words, the Policy's two-year limitation period also applies to the appraisal demand provision, and any appraisal demand must be made within two years of the "direct physical loss or damage."

On May 12, 2005, nearly three months after the Policy's two-year statute of limitations period expired, Johnson for the first time demanded that "an appraisal panel review this matter" and nominated Bob Patient to the putative appraisal panel. A.122. MSI responded and declined Johnson's demand because Johnson did not give MSI an opportunity to inspect the new claims of damage. A.124. MSI stated that based upon "the invoices [Johnson] provided it appears that repairs to the [Property] have been completed including repairs that were additional [to] the scope of damage from [the February 18, 2003 fire]." *Id.* MSI stated further that it was:

> not notified of or given the opportunity to inspect any additional claim for damage, as required by the [P]olicy, prior to the completion of the repairs. As a result any evidence of a possible claim for additional damage has been effectively destroyed and the process of dispute resolution by appraisal has been prejudiced by the completion of those repairs.

Id. at 124-25; *see also* A.56 (MSI noting earlier to Johnson that "it appears that the estimate and invoices [Johnson] submitted reflect work that is beyond the

scope of damages from [the February 18, 2003 fire] and do not take into consideration the [P]olicy coverage"). Some months later, Johnson again demanded an appraisal, A.123, but MSI also declined this demand. A.4-5. Johnson finally brought suit in late August 2005, seeking damages for MSI's alleged breach of contract. A.126-29.

Some eight months later, and just one day after MSI moved for summary judgment, Johnson asserted that she would apply to the District Court for relief if MSI failed to choose an appraiser within five days. R.A.50; A.135. MSI responded and noted that it had:

> never received any demand for an appraisal . . . until it received your firm's letter dated May 12, 2005. This was approximately three months after the two-year statute of limitations expired on February 18, 2005 . . . . Thus, [Johnson] has no right to an appraisal given the expiration of the applicable statute of limitations period.

A.136. MSI also stated that Johnson had breached the Policy conditions through her failure to "provide MSI with notice and an opportunity to inspect the additional claimed damage [to the Property] . . . before the additional repairs were made" and that "there was no existing damage for an independent appraiser to appraise or inspect, when [Johnson] first demanded an appraisal in May of 2005." *Id.* (original emphasis). Given the pending summary judgment motion, MSI indicated that it would "provisionally appoint" one of two individuals as its appraiser if the District Court denied MSI's motion. *Id.*

Johnson argues that her "initiation of a lawsuit was in an attempt to have a judge assigned and eventually bring a motion to compel Appraisal." Appellant's

Brief at vi; A.173. The facts belie Johnson's assertion. As Judge Cleary correctly found, Johnson's Complaint only sought damages for alleged breaches of the Policy and Section 65A.01. A.188. It neither mentioned the word "appraisal" nor referred to the Policy's appraisal demand provision. *See* A.126-29. Perhaps most telling is that, although a judge was assigned to Johnson's suit on December 28, 2005, Johnson did not bring a motion to compel an appraisal until May 11, 2006, a month after MSI served its summary judgment motion and over nine months after Johnson brought this lawsuit. R.A.51-53; A.129.

STANDARD OF REVIEW

In an appeal from summary judgment, this Court must determine "'(1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.'" *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W.2d 731, 734 (Minn. Ct. App. 2006) (quoting *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990)). Both of these issues are reviewed *de novo*. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). The construction and meaning of an insurance policy presents questions of law and is, therefore, reviewed *de novo*.

LEGAL ARGUMENT

I. The District Court properly granted summary judgment because the policy's statutorily-mandated two-year limitation provision expressly and unambiguously barred Johnson's claim for breach of contract damages; Johnson did not commence her action until August 30, 2005, more than six months after the two-year limitation period had expired.

Black letter principles of contract law "govern" the construction and interpretation of insurance policies and "insurance policies are interpreted to give effect to the intent of the parties." *Nathe Bros., Inc. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000). As with other contracts, "[p]arties to insurance contracts . . . are free to contract as they see fit, and the extent of liability of an insurer is governed by the contract they enter into." *Bobich v. Oja*, 258 Minn. 287, 104 N.W.2d 19, 24 (1960); *see also Am. Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983) Neither party disputes that the Policy was enforceable and legally binding. *See* A.127 at ¶ 3 (Johnson's Complaint admitting that "the [P]olicy was in full force and effect" in February 2003). "When insurance policy language is clear and unambiguous, 'the language used must be given its usual and accepted meaning.'" *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 325 (Minn. 2004) (quoting *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998)). Of great relevance here, "a statutorily required provision in an insurance policy will not necessarily be construed against the insurer." *Nathe Bros.*; 615 N.W.2d at 344; *see also Laidlaw v. Commercial Ins. Co. of Newark*, 255 N.W.2d 807, 811 (Minn.

1977) (observing that "[t]he usual rule of construction most favorable to the insured does not apply to a provision required by statute").

The Policy is governed by Minnesota Statutes Section 65A.01 (2004), which is known as the Minnesota standard fire insurance policy. The conformity clause of Section 65A.01 states that:

> [n]o policy or contract of fire insurance shall be made, issued or delivered by any insurer . . . on any property in this state, unless it shall provide the specified coverage and conform as to all provisions, stipulations, and conditions, with such form of policy . . . . Any policy or contract otherwise subject to the provisions of [Section 65A.01] . . . which includes either on an unspecified basis as to coverage or for a single premium, coverage against the peril of fire and coverage against other perils may be issued without incorporating the exact language of the Minnesota standard fire insurance policy, provided: Such policy or contract shall, with respect to the peril of fire, afford the insured all the rights and benefits of the Minnesota standard fire insurance policy and such additional benefits as the policy provides.

Minn. Stat. § 65A.01, subd. 1 (2004). Use of the statutory form contained within Section 65A.01 "is mandatory, and its provisions may not be omitted . . . or waived." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 690 (Minn. 1997). Section 65A.01 lists several provisions that must be included in all fire insurance policies issued for Minnesota property, including a mandatory limitation provision which states that "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy have been complied with and unless commenced within two years after inception of the loss." Minn. Stat. § 65A.01, subd. 3.

Pursuant to the express provisions of Section 65A.01, a two-year limitation provision was incorporated into the Policy and states, under the heading "D. Legal Action Against Us," that:

> [n]o one may bring a legal action against [MSI] 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.

R.A.39 at Commercial Property Conditions, Section D.

A statute of limitations, like the one expressly included within the Policy, "is one of repose," the "general purpose" of which "is to 'prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy.'" *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 275 N.W. 694, 697 (1937) (internal citation omitted); *see also Dalton v. Dow Chem. Co.*, 280 Minn. 147, 158 N.W.2d 580, 584 n. 2 (1968) (stating the purposes of statutes of limitation "are the repose of the defendant and the fair and effective administration of justice"). Further, statutes of limitation are based upon the notion "that if one person has a claim against another . . . it would be inequitable for him to assert such claim after an unreasonable lapse of time, during which such other has been permitted to rest in the belief that no such claim existed.'" *Bachertz*, 275 N.W. at 697 (internal citation omitted). When, as here, "an insurance clause requires *suit* to be brought within a certain period,

failure to bring *suit* within that period bars suit if the limitation clause does not conflict with a specific statute and is not unreasonable in length." *L & H Transp., Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 226 (Minn. 1987) (original emphasis). The Policy's limitation provision does not conflict with Section 65A.01 because it is nearly identically worded to, and seeks to accomplish the same purpose and effect of, Section 65A.01. The Policy's limitation provision requires suit to be brought within the same two-year period of time as that mandated by Section 65A.01. Further, the limitation provision is explicitly made applicable to its appraisal demand provision, which states that "[the appraisal demand provision] appl[ies] in addition to the . . . Commercial Property Conditions." R.A.17, Building and Personal Property Coverage Form, Section E.

Section 65A.01 and the Policy expressly and unambiguously required Johnson to commence suit against MSI no later than February 18, 2005, a period of two years after the fire. It is undisputed that Johnson failed to commence her action against MSI in a timely manner because she did not serve her Summons and Complaint upon MSI until August 30, 2005, more than six months after the Policy's two-year limitation period had expired. *See* A.174 (stating "[Johnson] acknowledges that she did not initiate her lawsuit until the two-year fire loss statute of limitations had passed" and "[Johnson's] cause of action for trial on the merits of her fire loss case are governed by the two-year fire loss statute of limitations"). It is also undisputed that Johnson did not demand an appraisal until May 12, 2005; nearly three months after the Policy's limitation period had

expired. The District Court was correct in concluding, therefore, that the express and unambiguous terms of the Policy's two-year limitation period barred Johnson's claim for breach of contract damages and her demand for appraisal.

II. The District Court properly denied Johnson's motion to compel appraisal because her complaint sought only breach of contract damages under the policy and neither mentioned the word "appraisal" nor referred to the policy's appraisal provision; Johnson's motion to compel appraisal is time-barred because the policy's two-year limitation provision was expressly made applicable to the appraisal provision.

On appeal Johnson makes the incredible assertion that this Court should ignore the claim for contract damages expressly pled in her Complaint, which she admits is subject to and barred by the Policy's two-year limitation provision. Johnson claims the District Court erred in taking her Complaint on its face, and that it should have deemed her Complaint as one seeking equitable relief. Appellant's Brief at 4-5. The District Court did not err.

On appeal Johnson continues to attempt to transform the Policy's appraisal demand provision into an agreement to arbitrate, all in a mistaken effort to establish that the Policy's two-year limitation provision does not apply to a demand for an appraisal.[2] The express terms of the Policy and appraisal

[2] Johnson cited several cases for the proposition that appraisal and arbitration are used "interchangeably" by the courts and that her appraisal demand was, somehow, "akin to a demand for arbitration[.]" Appellant's Brief at 6-7. None of the cases Johnson cited, however, are apposite to this matter. For example, Johnson cites *Glidden Co. v. Retail Hardware Mut. Fire Ins. Co.*, 181 Minn. 518, 233 N.W. 310 (1930); however, *Glidden* has long since been overruled and is distinguishable from this case because neither party sought to compel an appraisal. Rather, the defendants asserted that the compulsory appraisal

demand provision, however, make clear that there is not an agreement to arbitrate. Johnson's motion to compel appraisal is barred by her failure to demand appraisal or bring suit within two years of the February 2003 fire.

Although Minnesota Rule of Civil Procedure 8.01 provides that pleadings are "liberally construed," pleadings must still "'give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based.'" *Kelly v. Ellefson*, 712 N.W.2d 759, 767 (Minn. 2006) (internal citation omitted); *see also Hutton v. Bosiger*, 366 N.W.2d 358, 361 (Minn. Ct. App. 1985) (observing that pleadings should be "liberally construed"). Johnson admits that her Complaint "may not have been a model pleading." Appellant's Brief at 5-6. This admission is bolstered by the Complaint failing to mention the word "appraisal" or otherwise referring to the Policy's appraisal demand provision. Instead the Complaint only sought the exclusive remedy of breach of contract damages. Despite this, Johnson asserts that her Complaint somehow "was sufficient to put [MSI] on notice" of an

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provision contained within the fire insurance policy violated the Minnesota State Constitution. *Glidden*, 233 N.W. at 310. In *Kavli v. Eagle Star Ins. Co.*, the parties agreed to participate in an appraisal, but the respective parties' appraisers failed to appoint an umpire to the appraisal panel. 206 Minn. 360, 288 N.W. 723, 724-25 (1939). *Itasca Paper Co. v. Niagra Fire Ins. Co.* is also distinguishable from this case because the issue was whether a party was bound by an appraisal panel's finding when he failed to appear at the appraisal proceeding. 175 Minn. 73, 220 N.W. 425, 425 (1928). The *Itasca* Court also concluded that an appraisal panel did not have the authority to determine liability for loss and that the trial court did not, therefore, err by allowing the defendant to litigate liability at trial. *Id.* at 428. The facts and issues of these cases have no bearing upon Johnson's failure to bring suit against MSI within two years of the fire loss.

appraisal demand because the Complaint mentioned the fire and "laid out the dispute [between Johnson and MSI] over the value of the damage to the [P]roperty." Appellant's Brief at 5-6; *compare* A.145 (asserting that "[Johnson's] motion to compel appraisal is an action to enforce a contract provision"), *with* Appellant's Brief at 6 (asserting that Johnson's demand for appraisal was "a form of equitable relief"). Further, Johnson claims that the Complaint's boilerplate wherefore clause, which sought "other and further relieve [sic] as the court deems just and equitable," also somehow transformed her claim for contract damages into an equitable demand for appraisal. Appellant's Brief at 6; *see also* A.128.

Johnson's attempt to transform her claim for damages into an appraisal demand is a desperate attempt to avoid the express and admitted consequence of her failure to commence this action within two years of the February 2003 fire. Johnson's appraisal demand is barred by the Policy because her Complaint, which was served more than six months after the Policy's two-year limitation period had expired, expressly and exclusively sought breach of contract damages under the Policy and Section 65A.01. A.128-29 at ¶¶ 4, 7; *see also* A.188 (concluding that Johnson's Complaint "only seeks damages, never mentions the word 'appraisal,' and does not refer to the appraisal section of the [P]olicy nor seek relief other than damages"); R.A.17 at Building and Personal Property Coverage Form, Section E (expressly making the Policy's two-year limitation provision applicable to the appraisal demand provision by stating that

"[the appraisal demand provision] appl[ies] in addition to the . . . Commercial Property Conditions"). She was represented by counsel no later than October 2004, A.53, within the two-year limitations period. This Court should reject Johnson's attempt to avoid the consequence of her failure to bring suit before February 18, 2005.

Johnson claims that *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 300 Minn. 149, 218 N.W.2d 751 (1974), aids her. It does not. Notably, *Har-Mar* concerned a fee dispute and did not address a fire loss or a dispute over the Minnesota standard fire insurance policy. Johnson argues that *Har-Mar* stands for the proposition that Section 541.05's six-year statute of limitation applies in this matter and that the limitation period did not begin to run until MSI denied her demand for appraisal. Appellant's Brief at 7-10. The District Court correctly saw this argument as a red herring as it is contrary to the express provisions of Section 541.05. The six-year limitation period only applies "[u]pon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed." Minn. Stat. § 541.05, subd. 1(1) (2004) (emphasis added). Section 541.05's six-year limitation period is inapplicable because the contract in this matter, the Policy, "expressly prescribe[s]" that its governing limitation period is two years, the period that the Minnesota standard fire insurance policy requires, not six years. Further, the Policy's two-year limitation provision is expressly made applicable to the appraisal demand provision. R.A.17, Building and Personal Property Coverage Form, Section E.

Har-Mar is also distinguishable because it dealt with an arbitration demand brought pursuant to a contract's arbitration provision, which was enforceable "'under the prevailing arbitration law'" and stated that the "'[t]he decisions of the arbitrators shall be a condition precedent to the right of any legal action.'" *Har-Mar*, 218 N.W.2d at 753. Unlike the contract in *Har-Mar*, however, the Policy does not contain a mechanism for arbitration, is not an agreement to arbitrate, and is not made enforceable under "prevailing arbitration law," such as the Minnesota Uniform Arbitration Act or the American Arbitration Association. The appraisal provision is just that, an appraisal provision, not an agreement to arbitrate. *See Cloquet Educ. Ass'n v. Indep. Sch. Dist. No. 94*, 344 N.W.2d 416, 418 (Minn. 1984) (stating that if "no agreement to arbitrate exists, either in fact or because the controversy sought to be arbitrated is not within the scope of the arbitration clause of the contract, the court may interfere and protect a party from being compelled to arbitrate"); *State v. Berthiaume*, 259 N.W.2d 904, 909 (Minn. 1977) (stating that whether parties have agreed to participate in arbitration "is to be determined by ascertaining the intention of the parties from the language of the arbitration agreement itself").

That the appraisal provision is not an agreement to arbitrate is further illustrated because its only function is to ascertain the amount of fire loss and does not give the appraisers authority to determine liability for a fire loss. *See Minot Town & Country v. Fireman's Fund Ins. Co.*, 587 N.W.2d 189, 190-91 (N.D. 1998) (determining that a policy provision identical to the Policy's appraisal

demand provision was an appraisal agreement, not an agreement to arbitrate, and that "the parties entered into an insurance contract unambiguously calling for an appraisal"); *see also Itasca Paper Co.*, 175 Minn. 73, 220 N.W. at 427 (appraisers under a fire policy have no authority to determine liability); 21 Williston on Contracts § 57:8 (4th ed.) (observing that "[t]he procedure most often confused with arbitration is appraisal," that "an appraisal . . . is generally a mere auxiliary feature of a contract . . ., the purpose of which is not to adjudicate a controversy but to avoid one," and that "an appraisal [is used] to establish only the amount of loss, and not liability for the loss").

Even more significantly, *Har-Mar* observed that the contract before it was made subject to "prevailing arbitration law" but the Uniform Arbitration Act did not, however, specify the period of time within which arbitration must be demanded. The Court concluded, therefore, that this "gap" "must be filled by agreement of the parties." *Har-Mar*, 218 N.W.2d at 756-57. Unlike the contract in *Har-Mar*, the Policy contains no "gap" because Johnson and MSI expressly agreed that the two-year limitation period applies. R.A.17 at Building and Personal Property Coverage Form, Section E. As well, the standard fire policy requires any suit or action, whether seeking legal or equitable relief, to be brought within two years. *See* Minn. Stat. § 65A.01, subd. 3.

Further distinguishing this case from *Har-Mar* is that Johnson, unlike the appellant in *Har-Mar*, never moved to compel arbitration under the Minnesota Uniform Arbitration Act, Minn. Stat. §§ 572.08-572.30. *Har-Mar*, 218 N.W.2d at

752. Instead, Johnson only brought a claim for breach of contract damages and later made an untimely demand for appraisal. Johnson's motion to compel an appraisal was not brought pursuant to – and never even mentioned – Minn. Stat. § 572.09, which authorizes a motion to compel arbitration. Johnson did not believe that an appraisal provision was the same as an agreement to arbitrate. Even if Johnson had moved to compel arbitration, she has failed to show that an agreement to arbitrate existed. *See Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn. Ct. App. 1993) (observing that "[w]hen considering a motion to compel arbitration, the court's inquiry is limited to (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement").

Finally, the effect of *Har-Mar* on this case is doubtful. *Har-Mar* construed the meaning of the term "action" in Minn. Stat. § 645.45(2), which was enacted in 1941, and the Court held that because its application was not retroactive it did not control Minn. Stat. § 541.05's six-year statute of limitations period, which was enacted in 1927. *Har-Mar*, 218 N.W.2d at 754; *see also Gerber v. Gerber*, 714 N.W.2d 702, 704 n. 3 (Minn. 2006) (noting that "[b]ecause the statute of limitations at issue in *Har-Mar* existed well before 1941, [the Minnesota Supreme Court] noted that the definitional statute was persuasive, not controlling. Similarly, it is not controlling here because [the statute at issue] existed well before 1941"). *Har-Mar* is not controlling authority in this case because the Minnesota standard fire insurance policy, which contains a clear two-year

limitation period, was enacted in 1895. *See* Act of Apr. 25, 1895, ch. 175, § 53, 1895 Minn. Laws 420.

Under the requisite and express terms of Section 65A.01 and the Policy, Johnson's admitted failure to commence her claim within two years of the fire barred her lawsuit. Any rights that Johnson may have had under the Policy were extinguished by her failure to take appropriate and timely action. The District Court did not err in granting summary judgment to MSI.

CONCLUSION

The Court should affirm the District Court's grant of summary judgment in favor of MSI because Johnson did not commence her claim for breach of contract damages until August 30, 2005, more than six months after the Policy's two-year limitation provision had expired. The District Court's denial of Johnson's motion to compel an appraisal should also be affirmed because Johnson did not demand appraisal until May 12, 2005, three months after the applicable two-year limitation provision expired.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).