

A10-714

STATE OF MINNESOTA
IN COURT OF APPEALS

David and Melynda Quade,

Appellants,

v.

Secura Insurance,

Respondent.

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. SECURA'S LIABILITY TO PAY FOR THE ADMITTED DAMAGE IS AN ISSUE TO BE RESOLVED BY THE COURT, NOT BY APPRAISERS

A. The Parties Do Not Dispute That The Roofs Are Damaged And That Liability Issues Must Be Resolved By Courts.

Based on their briefs, the parties agree on several important matters. First, they agree on the key legal issue -- that under Minnesota law, whether an insurer is liable for a loss is a question solely for a court to resolve, not appraisers. *See Johnson v. Mut. Service Cas. Ins. Co.*, 732 N.W.2d 340, 346 (Minn. Ct. App. 2007) *rev. denied* (Minn. 2007) ("It is well settled that appraisal does not determine liability under a policy. Liability depends on a judicial determination.").

The parties also agree upon a key factual issue -- that the roofs of the three farm structures are, in fact, damaged. Secura's Brief acknowledges the presence of damage. (Resp. Brf. at 3, 5-6.) Moreover, Secura never contests the evidence in the record about the damage to the roofs, such as evidence showing the purlins were lifted off the roof joists (A. App. 45), evidence showing that the metal roof lifted and tore through its fasteners (A. App. 43), or evidence showing that the underlying roof supports were fractured by outside forces (A. App. 46.) Secura admits that this damage exists.

B. The Dispute In This Case Concerns Secura's Liability.

What is in dispute is Secura's liability for the admitted damage. Secura contends that it has no liability for the damage to the roofs because the damage allegedly falls within an exclusion in the policy for inadequate "maintenance." *See* Resp. Brf. at 5-6 (contending "that the roofs had not been damaged by the storm but rather were leaking

due to inadequate maintenance”). The “maintenance” exclusion in the policy is the only basis upon which Secura denied the claim. Its denial letter states only that “Your farm policy excludes ‘loss to property caused by . . . maintenance’. . . . I am sorry, but we are unable to honor your claim for damage to the roof of the buildings.” (A. App. 57.) Its liability defense, based on this exclusion, is reiterated in its Answer to the Complaint. (A. App. 18.) It is difficult to imagine a clearer case of an insurer contesting its own liability for a loss.

C. Liability Determinations Are Suited For Courts, Not Appraisers.

Secura argues that resolving its liability is an appropriate issue for appraisers. That is not correct. Determining Secura’s liability requires resolving a number of legal determinations that are best suited for the court, not appraisers.

Resolving the liability dispute in this case will require an analysis of the provisions of the policy, including the maintenance exclusion. Any time an insurer’s liability depends on the application of a policy exclusion to the facts, the decisionmaker not only has to interpret the language used in the exclusion, but also must navigate the shifting burdens of proof which are part of the liability determination under an insurance policy. “In an action to determine coverage, the initial burden of proof is on the insured to establish a prima facie case of coverage.” *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995). Establishing a prima facie case of the insured’s liability includes “causation” -- i.e., establishing that the loss was caused by a covered event. *Id.* at 312. “[O]nce the insured has established a prima facie case of coverage it is entitled to go to the jury.” *Id.* at 313 (quotation omitted).

The burden of proof then shifts. “If the policy contains an exclusion clause, the burden then shifts to the insurer to prove the applicability of the exclusion as an affirmative defense.” *SCSC Corp.*, 536 N.W.2d at 313. Moreover, if the exclusion contains an exception, the burden of proof then shifts back to the insured to establish the applicability of the exception to the exclusion. *Id.* at 314.

If the damage is brought about by two or more causes, the insurer’s burden of proof is to show that an excluded cause was “overriding,” i.e., “that an overriding cause, not covered under the provisions of the policy, caused the alleged damages . . .” *Id.* at 314. Establishing an overriding cause is “an affirmative defense available to the insurer, rather than a prima facie requirement for the insured.” *Id.* at 314 (citing *Henning Nelson Constr. Co. v. Fireman’s Fund Amer. Life Ins. Co.*, 383 N.W.2d 645, 653 (Minn. 1986)). It is the insurer’s burden “to show that an excluded cause was the overriding cause of the damages even if other covered causes contributed.” *Id.* Thus, if both defective maintenance and a storm contributed to the damage in this case, Secura would have to prove that the inadequate maintenance was the overriding cause of the loss.

In addition to navigating the shifting burdens of proof to establish an insurer’s liability under its policy, the decisionmaker also has to apply rules of construction to policy language, including the rule that “exclusions are narrowly interpreted against the insurer.” *SCSC Corp.*, 536 N.W.2d at 314 (citing *Bob Useldinger & Sons, Inc. v. Hangsleven*, 505 N.W.2d 323, 327 (Minn. 1993)). Also, disputes concerning an insurer’s liability are subject to public policy considerations. “Minnesota embraces a strong policy of extending coverage rather than allowing confusing or ambiguous language to restrict

coverage.” *Safeco Ins. Co. v. Lindberg*, 380 N.W.2d 219, 221 (Minn. Ct. App. 1986) *aff’d*, 394 N.W.2d 146 (Minn. 1986).

Finally, the decisionmaker’s task may be further complicated by an “ensuing loss” clause in the policy’s exclusions. An “ensuing loss clause . . . brings within coverage a loss from a covered peril that follows as a consequence of an excluded peril.” *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 301 (Minn. Ct. App. 1997). “An ensuing loss is covered even if an excluded peril is a ‘but for’ cause of the loss.” *Id.* Secura’s policy contains an ensuing loss provision. The maintenance exclusion applies to “loss to property caused by . . . faulty, inadequate or defective . . . maintenance . . .” but the exclusion also states that “any *ensuing loss* to property which would otherwise be covered by the policy . . . is covered.” (A. App. 112) (emphasis added).

The complexity of determining an insurer’s liability justifies the rule that courts, not appraisers, must make liability determinations. Applying shifting burdens of proof, applying the proper construction of insurance policy language, determining if an excluded cause is the “overriding cause” of the loss or just one of several proximate causes, determining if the loss is an “ensuing loss” which follows an excluded peril, and applying public policy in favor of coverage are all matters that courts are equipped to address, not appraisers. Appraisers are expected to have knowledge about what something is worth or how much it would cost to repair it. They are not expected to engage in the complex analysis that goes into determining an insurer’s liability. These are all issues that are properly resolved by courts, as a long line of cases in Minnesota have held. The requirement that liability determinations be resolved by courts, not

appraisers, cannot be so easily sidestepped, as Secura is attempting to do here, simply by characterizing the liability dispute as one about the “amount” of covered loss.¹

D. Having Chosen to Deny All Liability, Secura Must Now Accept the Consequences of its Choice.

It is true that appraisals can be very useful processes that can streamline the resolution of disputes about the amount of a *conceded* liability. However, the insurer must concede liability for the loss. If the insurer does not concede its liability, an appraisal accomplishes nothing.

Notably, *all* of the cases relied upon by Secura in its brief agree that an appraisal can take place only after the insurer has admitted its own liability for the loss. Most of the cases cited by Secura involve express liability concessions by the insurers. For example, in *Sampson v. Horace Mann Ins. Co.*, 2003 WL 22234692 (Minn. Ct. App. 2003) the court noted that “both sides agree that damage occurred to the siding of Appellant’s home as a result of the hail storm, and that the Appellant has suffered a loss under the terms of the policy.” (R. App. 49.) The court noted that “there is no dispute as to liability.” *Id.* The only dispute was how much it would cost to repair the admitted storm damage. *See also QBE Ins. Co. v. French Ridge Homeowner’s Assoc.*, 778

¹ The substantive dispute between the parties is Secura’s liability under its insurance policy for the admitted damage to the roofs. Secura attempts to elevate form over substance by simply recharacterizing the dispute concerning liability as a dispute about the “amount” of “covered” loss, which Secura contends is subject to appraisal. As Appellants pointed out in their opening brief, any liability dispute could be recharacterized as a dispute about the “amount” of “covered” loss in this same fashion. However, characterizations do not change the fundamental nature of the dispute, which in this case is a dispute about liability.

N.W.2d 393, 399 (Minn. Ct. App. 2010) (“in this case, the insurer has conceded that causation exists for purposes of coverage . . .”); *Cigna Ins. Co. v. Didimoi Property Holdings*, 110 F. Supp. 2d 259, 263 (D. Del. 2000) (“Cigna does not contest that the policy covers fire and that a fire damaged the building.”); *Kendall Lakes Townhomes v. Agricultural Excess and Surplus Lines Ins. Co.*, 916 So. 2d 12, 16 (Fla. Ct. App. 2005) (“because the insurer has not wholly denied there is a covered loss, causation is ‘an amount-of-loss question for the appraisal panel,’ not a coverage question that can only be decided by the trial court”). In the two case cited by Secura where the insurer did *not* concede liability, the courts held that an appraisal was improper. *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021 (Fla. 2002) (“the issue . . . was not appraising the amount of a loss which the insurer admitted was covered” and therefore the “coverage issues were to be judicially determined by the court and were not subject to determination by appraisers”); *Gonzalez v. State Farm Fire and Cas. Co.*, 805 So.2d 814, 816 (Fla. Ct. App. 2000) (“Since State Farm's position is that this entire loss falls within a policy exclusion, this defense is a judicial question and not a question for the appraisers.”).

Here, Secura most decidedly has *not* conceded liability.² In the face of graphic evidence that the roofs were damaged by wind (A. App. 43-53), Secura took the untenable position that the roofs were completely spared from any damage by the storm,

² Secura incorrectly claims that it has both “admitted liability and the existence of a covered loss,” but is only “in disagreement with the insured as to the amount of loss.” (Resp. Brf. at 10.) However, it *denied* the claim based on an *exclusion* in the policy (A. App. 57) and has contended that it owes nothing for the roof damage. It is difficult to see where this alleged admission of liability or concession about the existence of a covered loss occurred.

and that the sole cause of the damage on the roofs was lack of adequate maintenance, an excluded cause.³ (A. App. 57.) Had it conceded that it was liable for the loss, even for a small portion, Secura may have been able to take advantage of the appraisal process to determine the amount of the loss. However, having chosen to deny all liability, Secura has no right to insist upon an appraisal. It has made its own bed and now must lie in it.

II. APPELLANTS DID NOT WAIVE THEIR RIGHT TO CHALLENGE THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT "WITH PREJUDICE."

Even if a bona fide dispute existed in this case about the "amount of loss" rather than a dispute over liability, it was improper for the district court to dismiss the Complaint. Additional issues, including all of Secura's liability defenses, remain to be resolved. Secura has not surrendered any of its affirmative defenses and apparently will continue to contest its liability even if an appraisal takes place. The district court's order even noted the need for further proceedings. The dismissal was improper.

Moreover, it was particularly inappropriate to dismiss the Complaint "with prejudice." Secura now argues that Appellants waived, i.e., intentionally chose to relinquish, their objection to a dismissal "with prejudice" by failing to raise the issue in the district court. However, in its motion in the district court, Secura never asked the

³ Secura argues that Appellants are improperly "parsing their claim on a building by building basis" in arguing that Secura has denied liability for the damage to the three roofs. However, it was Secura that treated the damage to the roofs of the three structures differently -- denying liability for the roof damage because of the maintenance exclusion. Secura did not claim that its liability for damage to other structures was negated by a policy exclusion. It admitted liability and paid for damage elsewhere, but denied liability for damage to the roofs.

court to dismiss the Complaint “with prejudice.” See R. App. 1 (moving to simply “dismiss” the Complaint, not dismiss “with prejudice”); R. App. 12 (same). The district court decided, *sua sponte*, to dismiss the case “with prejudice.” The failure to object to something that was not part of Secura’s motion and which was ruled upon *sua sponte* by the district court in its order is not a waiver.⁴

III. INSURANCE APPRAISALS ARE NOT SUBJECT TO THE UNIFORM ARBITRATION ACT.

The issue of whether the Uniform Arbitration Act (“UAA”) governs judicial review of a determination by appraisers as to the “amount of loss” is a peripheral issue in this case. If the judgment is reversed, and issue of Secura’s liability remanded back to the district court for resolution, then it will be unnecessary to resolve the issue of what procedures govern the review of an award by appraisers. Nevertheless, it may be appropriate for this Court to clarify this issue, since it appears to be the subject of conflicting language in decisions from this Court. Compare *Johnson v. Mut. Service Cas. Ins. Co.*, 732 N.W.2d 340, 346 (Minn. Ct. App. 2007) *rev. denied* (Minn. 2007) with *QBE Ins. Co. v. French Ridge Homeowner’s Assoc.*, 778 N.W.2d 393, 398 (Minn. Ct. App. 2010).

The Eighth Circuit Court of Appeals, applying Minnesota law, has put the issue this way:

⁴ In any event, the Court always has the option of reviewing an issue regardless of whether it was fully presented below. See *Putz v. Putz*, 645 N.W.2d 343 (Minn. 2002) (“This court has the authority to take any action ‘as the interest of justice may require.’”); *Richter v. Progressive Preferred Ins. Co.*, No. A09-1621 (Minn. Ct. App. June 8, 2010)(“Thiele is not an ‘ironclad rule’”).

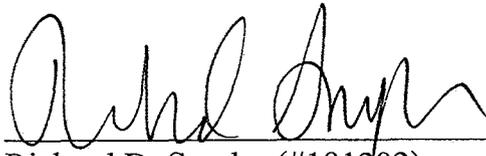
In general, where parties to a contract, before a dispute and in order to avoid one, provide for a method of ascertaining the value of something related to their dealings, the provision is one for an appraisal and not for an arbitration.

Sanitary Farm Dairies v. Gammel, 195 F.2d 106, 113 (8th Cir. 1952) (cited with approval in *Augustine v. Arizant, Inc.*, 735 N.W.2d 740, 745 (Minn. Ct. App. 2007) *reversed on other grounds*, 751 N.W.2d 95 (Minn. 2008)). “Under Minnesota law . . . the result of an appraisal which parties have thus contracted to have made is just as conclusive upon them as would be an arbitration award . . . if they have expressly stipulated that it shall be so conclusive, or if the intention to be so bound is fairly inferable from the language which they have used. 195 F.2d 113 (citing *Nelson v. Charles Betcher Lumber Co.*, 88 Minn. 517, 93 N.W. 661, 662 (1903)). Under the common law, parties to a binding appraisal process typically have very limited grounds on which to challenge an award, usually limited to “fraud or corruption, or partiality or malfeasance.” *Id.* It is unnecessary to use the judicial review procedures outlined in the UAA. It is also confusing and inadvisable to say that appraisals will be governed by the review procedures in the UAA. Arbitrators typically resolve all issues between the parties and the award can be entered as a final judgment, whereas that is not the case with the much narrower valuation issues presented in appraisals. Review of appraisals should continue to be governed by the common law standards.

CONCLUSION

The judgment should be reversed and remanded to the district court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard D. Snyder", written over a horizontal line.

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