

CASE NO. A11-1145

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**State of Minnesota
In Court of Appeals**

AUTO-OWNERS INSURANCE COMPANY,

Appellant,

vs.

SECOND CHANCE INVESTMENTS, LLC,

Respondent.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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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).

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ISSUE PRESENTED

Does a party to a fire insurance policy have a statutory and contractual right to have a dispute regarding whether a claim involves a total loss decided by an appraisal panel.

It is Appellant's position that since the determination of total loss is a factual determination regarding the nature, extent and amount of the loss, a party to the contract has the right to have the matter determined by appraisal. The determination of total loss does not involve a coverage or liability issue.

However, the district court ruled that the determination of total loss must be made by a finder of fact in district court. Appellant appeals from that ruling and judgment entered following the ruling.

Apposite Cases:

Quade v. Secura Ins., 792 N.W.2d 478 (2011)

Williamson v. Liverpool & London & Globe Ins. Co., 122 F. 59
(1903)

Lee v. Hamilton Fire Ins. Co., 251 N.Y. 230 (1929)

Statutes:

Minn. Stat. §65.01, subd. 3

STATEMENT OF THE CASE

Auto-Owners commenced an action in district court to compel Respondent to submit all issues regarding the amount of the loss to the appraisal panel which would include the disputed claim that the structure was a total loss.

The Appellant moved the trial court for an order compelling Respondent to submit all issues regarding the amount of the loss, including the issue of the claimed total loss, to the appraisal panel for determination.

The trial court denied the motion of Appellant and entered judgment in favor of Respondent dismissing Appellant's Complaint.

Appellant appeals from the judgment of the trial court and the order denying the right to have the issue decided by the appraisal panel.

STATEMENT OF THE FACTS

The facts of this case are very simple and straight-forward. Respondent sustained a fire loss in November of 2008. The loss was covered by the policy of insurance issued by Auto-Owners, and payment was made for the undisputed amount. There was never any denial of coverage nor any issue relative to coverage. The liability to pay proceeds under the policy for the fair and reasonable cost to repair the premises is not in dispute.

The only dispute in this claim is what the fair and reasonable amount of the loss is and whether the loss is a total loss as claimed by Respondent.

When it became clear that Respondent and Appellant could not agree on the amount of the loss, Appellant demanded appraisal pursuant to the terms and conditions of the policy. (App-43). Respondent agreed to appraisal but did not agree to have the issue of whether the building had sustained a total loss submitted to an appraisal panel. (App-44). Respondent's claim is that that issue should be decided in the district courts.

SCOPE OF REVIEW

Appellant seeks review of the trial court's order denying its motion to compel the Respondent to submit the issue of whether the building sustained a total loss to appraisal.

STANDARD OF REVIEW

Interpretation of the insurance policy and application of the facts are questions of law subject to *de novo* review. *QBE Insurance Corp. v. Twin Homes of French Ridge Homeowners Assn.*, 778 N.W.2d. 393, 397 (Minn. App. 2010) ; *Quade v. Secura Ins.*, 792 N.W.2d 478 (2011).

ARGUMENT

It is undisputed that the Respondent's dwelling was damaged by fire and that the damage claimed is covered under the policy of insurance issued by Appellant Auto-Owners Insurance Company. There is no denial of coverage nor is there any question of liability under the policy. The sole dispute in this claim is what was the amount of loss sustained by the Respondent as a result of the fire.

Both the policy of insurance issued by Auto-Owners (full policy at App-1 and relevant portions of policy at Add-15) and the standard fire policy at Minn. Stat. § 65A.01, subd. 3 (Add-18) contain virtually the identical appraisal clause which, in pertinent part, states as follows:

In case the insured and this company, except in case of total loss on buildings, should fail to agree as to the actual cash value or the amount of the loss, then on written demand of either, each shall select a competent disinterested appraiser

The rest of the provisions provide for procedures selecting umpires and arriving at an award.

The trial court ruled that the district court had jurisdiction over the issue of whether there is a total loss and relied on cases where the issue of total loss was submitted to a jury. (Add-1).

We believe the trial court erroneously relied upon case law which merely stands for the proposition that in a situation where neither party to the

contract invokes the appraisal clause of the policy and the issue is submitted to district court, the issue of total loss is a fact question for the jury.

Appellant agrees that, in this claim as in almost all claims, whether there is a total loss is a fact issue. It is not a question of law. It is a fact issue regarding the amount of the loss which, according to the terms and conditions of the policy and the statute, must be decided by an appraisal panel if either party demands appraisal. If one party demands appraisal, it is not an option for the other party to refuse to submit to an appraisal. The statute and the policy language is quite clear in that, upon written demand of either party, the issue of the amount of the loss shall be submitted to appraisal.

It is undisputed that the sole disagreement in this matter is the amount of the loss. Whether the loss is total or partial is a question of fact and one that bears on the amount of the loss.

The dispute in this case stems from the language in the appraisal clause that states, "*except in case of total loss on buildings.*" The words "*in case of*" are synonymous with the words "*in the event of.*" BLACK'S LAW DICTIONARY 685 (5th ed. 1981). If there is an undisputed total loss, the insurer's liability is fixed and determined by the amount of insurance written on the building, or what is commonly referred to as the policy limits. Minn. Stat. § 65A.01, subd. 5. Minnesota is a valued policy state, and Appellant does not dispute that its responsibility is to pay the policy limit in the event of

total loss. But whether the event of total loss has occurred is a dispute in this claim.

Neither the policy nor the statute contains language that prohibits an appraisal panel from determining whether or not there is a total loss. The words “*in case of total loss*” are not synonymous with “if an insured claims a total loss,” nor “if there is a dispute regarding total loss.” The fact of the total loss has to be undisputed before appraisal is prohibited.

The goal of all statutory construction is to effectuate the intent of the legislature. *Premier Bank v. Becker Development, LLC*, 785 N.W.2d 753, 759 (Minn. 2010) *citing* Minn. Stat. § 645.16 (1941).

The purpose of the appraisal provision in an insurance contract is to provide a plain, speedy, inexpensive and just determination of the extent of the loss. *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 288 N.W 723, 725 (Minn. 1939). Other jurisdictions have favored appraisal clauses in insurance policies for similar reasons. “[An appraisal] provision is justified in the expectation that it will provide a plain, inexpensive and speedy determination of the extent of the loss. *Keesling v. Western Fire Insurance Company of Fort Scott, Kansas*, 520 P.2d 622, 625 (Wash. Ct. App. 1974) (citing *Kavli*). “[Appraisal] is ‘an expeditious and inexpensive method of dispute resolution.’” *Meineke v. Twin City Fire Insurance Company*, 892 P2d 1365, 1369 (Ariz. 1994) (citing *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1243-44 (App. 1984). “Although [appraisal] agreements may call

for less formal proceedings than arbitrations, ‘both provide a contractual method for settling questions in a less complicated and expensive manner than through court adjudication.’” *Beard v. Mount Carroll Mutual Fire Insurance Company*, 561 N.E.2d 116, 118 (Ill. App. Ct. 1990) (citing *Bailey v. Timpone*, 389 N.E.2d 1193, 1196 (Ill. 1979). “It is not in the public interest to encourage litigation over procedures which were designed to resolve disputes without litigation.” *Elberon v. Bathing Co., Inc. v. Ambassador Insurance Co.*, 389 A.2d 439, 445 (N.J. 1978).

Courts in Minnesota and throughout the country have determined that the legislative intent and purpose of the appraisal provision is to provide a plain, speedy, inexpensive and just determination of the extent of the loss.

Minn. Stat. § 65A.01, subd. 3 is a statute that is remedial in nature. *Minnesota Farmers Mut. Ins. Co. v. Smart*, 282 N.W.2d 658 (1938). Remedial statutes are generally entitled to liberal construction in favor of the remedy the statutes provide. *S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228 (2010). As a general rule of law, the statutes which are remedial in nature are entitled to liberal construction in favor of the remedy provided by law. *Blankholm v. Fearing*, 222 Minn. 51, 54, 22 N.W.2d 853, 855 (1946).

The appraisal provision of the statute must be liberally construed to give effect to the intent of the legislature so as to provide the intended remedy of appraisal to either party to the insurance contract. The intent of the appraisal provision is to provide a plain, speedy, inexpensive and just determination of

the extent of the loss. The remedy is an appraisal proceeding rather than a district court trial.

Recent decisions of this Court have determined that valuation issues are to be decided by the appraisal panel and coverage/liability issues under the policy are to be decided by the district courts. *QBE Insurance Corp. v. Twin Homes of French Ridge Homeowners Assn.*, 778 N.W.2d. 393, 397 (Minn. App. 2010); *Quade v. Secura Ins.*, 792 N.W.2d 478 (2011).

As this Court ruled in *Quade, supra*:

Whether an appraisal is necessary pursuant to the policy depends on how we characterize the disputed issue and the phrase “amount of loss” in the appraisal clause. If the disputed issue is how much . . . an appraisal is necessary But if the issue is whether the claimed damage is covered by the policy, which also may include a causation question, then the legal issues of coverage and liability must be submitted to the district court.

Quade at 480-81.

This claim involves the disputed question of how much. It is a question of how much damage, the extent of the damage, the scope of the damage, and whether or not the loss is total or partial; and if the loss is partial, how much are the repair costs. In other words, what is the amount of the loss. There is no dispute regarding coverage or liability involved in this claim.

We have found two cases that deal squarely with the issue at hand. The first case is *Williamson v. Liverpool & London & Globe Ins. Co.*, 122 F. 59 (1903). In this case, the Eighth Circuit Court of Appeals reversed the trial

court's ruling that the appraisal panel did not have authority to determine whether or not the loss was total. The court stated as follows:

But the policy grants the power and determines the extent of the authority of the appraisers. It provides that in the event of disagreement as to the amount of the loss the appraisers shall estimate and appraise the loss. If the insured claimed that the loss was total, and the insurer insisted that it was but 90 percent of the value of the property insured, there would be a disagreement between them as to the amount of the loss. If appraisers were then appointed, it would be their duty to estimate and apprise the loss. If the appraisers were of the opinion that the loss was 100 per cent, it would be their duty to so find and award There is no limitation of the authority of the appraisers to a determination of 50 per cent, or 90 per cent, or 99 per cent, or any other part of the loss. The policy authorizes them to determine the entire loss

Williamson at 61.

In addition, the court stated as follows:

Our conclusion is that an insurance policy which authorizes the appraisers, in case of a disagreement as to the amount of loss, to estimate and appraise the loss, empowers them to determine whether or not the loss is total, as well as to determine what the amount of the loss is in case they find it to be partial. *Adams v. Bowery Fire Ins. Co.*, 85 Iowa 11, 51 N.W. 1149.

Id. at 62.

The other case we found dealing squarely with the issue is a 1929 New York Court of Appeals case, *Lee v. Hamilton Fire Ins. Co.*, 251 N.Y. 230 (1929).

The New York Court of Appeals ruled that the appraisal clause is inoperative when there is a total loss. However, it was a four-to-three

decision with a dissenting opinion, in which Chief Justice Cardozo joined, which stated as follows:

Assume that the policy is a valued one and that, in the event of total loss, the full value as therein stated is recoverable. Assume also that when property insured under a valued policy is conceded to have been completely destroyed and to have passed out of existence, appraisal may not be enforced When, however, the parties to an insurance contract disagree respecting the fact whether damage is partial or loss is total that rule does not apply. In such circumstances an appraisal provision in a policy controls. If a total loss is concluded by the appraisers, the amount payable is the sum at which the property is valued in the policy; if a partial damage is decided, then the amount is 'the actual cost of repairing or, if necessary, replacing the parts damaged or destroyed.'

Lee at 235-36.

We respectfully submit that the reasoning of the above dissent in *Lee, supra*, and the holding of our Eighth Circuit in *Williamson, supra*, is sound and should be adopted by this Court. The reasoning as cited above is consistent with the conclusions of the Minnesota cases that state that if it is a question of how much, appraisal is appropriate and required if demanded by either party. It is also consistent with numerous cases around the country that hold that appraisal should be favored as an expeditious, fair, just and inexpensive alternative to litigation for both the insured and the insurer.

There is no good reason to deny either party to an insurance contract the right to the appraisal process merely because the dispute also involves whether the loss is total or partial. The appraisal process is inexpensive and expeditious when compared to a district court jury trial. Appraisal proceedings

involve disputes that can range from the tens of thousands of dollars to the hundreds of thousands of dollars, or greater. There is no good reason to compel parties to submit those types of claims to an appraisal proceeding and then deny the right to appraisal when there is a dispute regarding whether the loss is total or partial. The policy language prevents either party from compelling an appraisal proceeding when the loss is conceded to be total. It does not prevent the issue of whether the loss is total or partial from being decided by the appraisal panel.

CONCLUSION

The decision of the district court should be reversed. The determination of total loss is a function of determining the amount of the loss and is therefore subject to appraisal upon demand of either party. The legislature did not intend to except disputes regarding whether or not there is a total loss from the appraisal provision. They have merely reiterated and affirmed that in the event of a total loss, the full amount of the policy limits is payable. The appraisal provisions of the standard fire policy are remedial and should be construed liberally to provide the remedy of an expeditious and inexpensive resolution to all parties to the insurance contract when the sole dispute is the amount of the loss.

Respectfully submitted,

HANSON, LULIC & KRALL, LLC

July 22, 2011.

A handwritten signature in black ink, appearing to read 'J. Lulic', is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record, pursuant to Rule 132.01, subd. 3(a) of the Rules of Civil Appellate Procedure, hereby certifies that the attached brief has been prepared using Microsoft Word 2003, Arial, with a font size of 13 pt. and a word count of 2,560.

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