2010 WL 5139255 (Tex.)

For docket see 10-0238

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Supreme Court of Texas.
In re Universal Underwriters of Texas Insurance Company.
No. 10-0238.

December 8, 2010.

Appearances:
Don Martinson of Fanning Harper Martinson Brandt & Kutchin for relator, for petitioner.
Scott M. Keller of the Law Offices of Scott M. Keller for Real Party In Interest, for respondent.
Peter M. Kelly of Kelly, Durham & Pittard, LLP for amicus curiae, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, and Eva M. Guzman, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10 matter 238 In re Universal Underwriters of Texas Insurance Company. MARSHAL: May it please the Court, Mr. Martinson will present argument for the relator. The relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DON MARTINSON ON BEHALF OF THE PETITIONER

ATTORNEY DON MARTINSON: May it please the Court, the one common denominator in every property damage insurance claim that's filed in the State of Texas needs to determine the amount of the loss. We know from this Court's 1888 opinion in Scottish Union v. Clancy that the appraisal process and appraisal clause was in use at least 100 years ago and that appraisal clause and that appraisal process was put in place in order to address this common issue in every property damage insurance claim in a quick, efficient, inexpensive, nonjudicial process.

JUSTICE DAVID M. MEDINA: When if ever can that be waived by an insurance carrier?
ATTORNEY DON MARTINSON: An insurance company can waive it by denying coverage, by saying there is no coverage for this client. It can be waived by taking actions that are inconsistent with insisting on the right of appraisal.
JUSTICE DAVID M. MEDINA: What about a lengthy delay for whatever reason? Does the claims adjustor perhaps in a situation like a hurricane or catastrophe has hundreds of claims to deal with and just doesn't get to a specific claim on a certain period of time or because the owner or the insurer is just not happy?
ATTORNEY DON MARTINSON: Sure, Judge. Delay itself is not waiver. However, one can look at that passage of time and argue to be an unreasonable delay, but when you look there, you're looking for some conduct by the insurance company or by the insurer if they're the party of issue, that is inconsistent with asking for appraisal.
JUSTICE EVA M. GUZMAN: And what type of conduct would you be looking at to establish, I guess, a point of reference or for determining waiver?
ATTORNEY DON MARTINSON: I would be looking for something like the adjustor telling the insurer that there's not going to be any coverage for this claim or--
JUSTICE EVA M. GUZMAN: And can that be inferred from language in a letter that basically says you have two years and a day to sue? Couldn't an insured reasonably believe that that language would suggest that?
ATTORNEY DON MARTINSON: Absolutely not.
JUSTICE EVA M. GUZMAN: Why not?
ATTORNEY DON MARTINSON: The reason that that language appeared in that letter and it appears in lots of reservation of rights letters is because for a suit on a breach of contract for an insurance contract, the limitations period is two years and a day. For all other written contracts in Texas, that limitation period is four years. So that letter was putting that insured on notice of something that they might not be aware of, but the insurance industry is aware of because we deal with those contracts all the time.
JUSTICE EVA M. GUZMAN: So it was a courtesy to the insured?
ATTORNEY DON MARTINSON: Absolutely, a service to the insured. As was asking the insurer to please take a look at your policy and govern your own conduct accordingly.
CHIEF JUSTICE WALLACE B. JEFFERSON: Given the circumstances presented here, the facts they seem pretty undisputed about the timelines, etc. Could Universal have invoked the appraisal clause earlier than the lawsuit was filed?
ATTORNEY DON MARTINSON: I don't see on any basis that they could have invoked the appraisal clause because there never came a point at which Grubbs demanded a specific amount in payment. In other words, we had an adjustment process. A check was issued. We have a 15-month delay and then the insured asked if that adjustment process began again. It begins again. In November of 2008, Universal sends another letter saying here's another $3,000 and you can talk to our expert and we're going to leave our file open for 15 days in case you have any question or objection or any comment about our letter. We received no response. So as far as Universal was concerned, as of December of 2008, the claim was resolved. There was no reason to be invoking appraisal.

JUSTICE EVA M. GUZMAN: At some point did you know though that Grubbs was asking that more of the roof be replaced. Didn't you know that at some point?
ATTORNEY DON MARTINSON: We knew that was a position that their expert was taking. We've got his affidavit as part of our record.
JUSTICE EVA M. GUZMAN: Well why isn't that a disagreement on the claim if you think the claim is for $3,000 and someone's asking for something else?
ATTORNEY DON MARTINSON: Because the claims process is a negotiation and the person who speaks as far as Universal's concerned is the insurance company and it doesn't matter that an expert may have been of the opinion that the entire roof had to be replaced instead of it being a limited amount of money. It's what Grubbs says. Grubbs never on this record took a position that we owed them any specific amount of money and when given the opportunity to contest our belief that the total amount of the claim was $4,000 plus the supplemental payment of $3,000, they did not respond at all. They filed a lawsuit.
JUSTICE EVA M. GUZMAN: Does he have to make a claim for a specific amount of money versus a claim for a repair which may cost a specific amount of money and which may differ from what you suggest the covered repairs are?
ATTORNEY DON MARTINSON: I think the demand could be either way, but it was not done in this case. Grubbs never on this record took the position about what amount of money whether you measured it by the scope of the work or by a specific dollar amount that they believe Universal was obligated to pay them and until you have that number, I don't believe that the appraisal process can be invoked by either party. And this Court back in 1888 established two rules of law that still are valid today. The first is that the appraisal process can be enforced by either party to the contract and today as this Court noted in State Farm Lloyds v. Johnson, the appraisal clause appears in virtually every property insurance policy issued in the State of Texas.
JUSTICE DAVID M. MEDINA: And there's no specific limitation in that contract, right? It says it can be invoked by any part at any time.
ATTORNEY DON MARTINSON: There's no time limitations unless Grubbs had made a demand, which they did not on this record. Absent a demand, there is no contractual time limitation. If you look at what I call the standard appraisal clause that appears in most property insurance policies, they have no time restrictions of any kind. There are no time limitations stated. We have an amendatory endorsement. In this case, it suggests that if a demand had been made, then there would have been a response time, but on this record, there's no demand ever made by Grubbs to pay a sum certain to satisfy their hail damage claim until they filed the lawsuit and our immediate response to the filing of the lawsuit was to include as a first paragraph in our answer the invocation of the appraisal clause. As the Court has already noted, we believe the evidence is uncontroverted. It consists of the affidavits of Ridgley Willis who was our claims adjustor, George Lankford, an attorney in our office who through the summer of 2009 attempted to get an agreement on appraising even though the lawsuit had been filed and then Peter Wilson, an expert retained by Grubbs to act on their behalf in investigating the loss.
JUSTICE EVA M. GUZMAN: When did Universal first anticipate litigation?
ATTORNEY DON MARTINSON: According to our interrogatory answers, it was August of 2008 when after this 15-month delay, Grubbs came back and said we'd like for you to reinspect the property.

JUSTICE EVA M. GUZMAN: Is that, if there was a dispute about that number, about when you anticipated litigation, is that a relevant inquiry to determining whether some action on your part constituted a waiver?
ATTORNEY DON MARTINSON: Well, first, there's no dispute about it. That is the date on which we say we anticipated litigation, but on that date, we were still engaged in the investigation of the loss and the negotiations involving the claim even though there had been a 15-month delay because the insured said nothing for 15 months. When they came back and said we want you to reinspect the loss, we began the claims process again. We hired an engineer. We sent him out there to look at the building. He wrote a report. Based on that report, we sent our letter of November 17, 2008. That November 17 letter of 2008 said several things. We've inspected the loss again. We believe we owe you another $3,000 and here's your check. You're welcome to talk to our engineer if you have any questions about the scope of the loss.
JUSTICE DAVID M. MEDINA: That burden kind of shifts back to the insured to do something.
ATTORNEY DON MARTINSON: Absolutely.
JUSTICE DAVID M. MEDINA: To let you know they're not happy, correct?
ATTORNEY DON MARTINSON: And we told them, we're leaving our file open for 15 days and please respond if you will and when they did not respond, Universal's conclusion as any insurer's conclusion would be that they were satisfied and there's nothing further to be done with the claim.
JUSTICE DAVID M. MEDINA: If this is an abuse of discretion, why isn't it harmless error?
ATTORNEY DON MARTINSON: Because if we deprive of the right to have the amount of the loss resolved in this nonjudicial process, then we're going to potentially adversely impacted in our ability to defend the breach of contract claim. We're much better off going into the courthouse on a breach of contract claim and having an appraisal award and if that appraisal award happens to match up with what we've already paid, then we've not breached the contract. More importantly, if the appraisal award ends up being the amount of money that we paid previously, then that's going to adversely or positively impact us, adversely impact the insurer with regard to many if not all of their extra contractual claims in this case. Excuse me.
CHIEF JUSTICE WALLACE B. JEFFERSON: You suggested and I think it's true that most of the facts were not disputed, but I thought that your opponent's position was that you acknowledged you could have invoked the appraisal process at the time you anticipated litigation on August 29, 2008, could have but didn't. Do you disagree with that?
ATTORNEY DON MARTINSON: I don't have the interrogatory answer is what it is, I'm sorry that I don't recall it as I sit here, but I thought what we stated was that we anticipated litigation. We knew that there was a potential dispute between us and the insured in August of 2008 and I don't know on what basis we could have invoked the appraisal clause at that point in time based on the uncontroverted facts in this record and I'm sorry I can't be more precise. I will look at before I do the rebuttal. It is an abuse of discretion standard and we believe there's an abuse of discretion in this case for three reasons. One, we never had a demand for payment and on Universal's part, we never denied coverage. We never said that we wouldn't pay all damages caused by the hailstorm. We never said that we wouldn't agree to go to appraisal. We never said that we wouldn't agree to

abide by the appraisal award. So there was no contractual time limitation on when we could invoke appraisal. The second thing is that nothing occurred during the claims handling process between April of ' 07 when the notice of claim was received and April of '09 when the lawsuit was filed that suggested that Grubbs, that Universal was waiving its right to invoke the appraisal process. As this Court described waiver both in Scottish Union 1888 and also in the Ulico Casualty case in 2008, waiver is an intentional relinquishment of a known right. That is we had to have engaged in conduct that told our insured that we were not interested in and we're not going to seek to enforce our appraisal rights under the contract and there is absolutely nothing in this factual record either in terms of our claims handling conduct between the date of loss and April of '09 when this lawsuit was filed or between the date the lawsuit was filed and the date that the district court denied our motion to compel appraisal that in any matter directly or indirectly suggested to anyone, to the court or to Grubbs that we intended to waive our right to appraisal.

CHIEF JUSTICE WALLACE B. JEFFERSON: At least one Federal judge has said well if it becomes clear that there are diametrically opposed calculations as to damages then that establishes that an impasse has been reached and the appraisal process can begin. What's your answer?

ATTORNEY DON MARTINSON: Your Honor, I think that the intermediate appellate court in Houston, the Fourteenth Court In re Slavonic most accurately describes how to approach the question of when impasse arrives and they say that impasse is that point in time at which both sides are aware that there's no ability to resolve the claim and we don't agree that delay in time constitutes waiver by any stretch, but in this particular case, that moment in time at which impasse would begin under In re Slavonic and these other Houston cases never came to pass. We never reached a point in which we had an opportunity to settle the claim for a sum certain by a demand from our insurers and chose not to do so and, therefore, there was no point in time in this process in which we were in a position to have invoked appraisal nor was Grubbs in a position to have done that because we never reached a point of impasse.

JUSTICE EVA M. GUZMAN: How many times does an insured have to come to you to let you know that they disagree, they're not satisfied with your coverage assessment? How many times before you would have to invoke that appraisal right?

ATTORNEY DON MARTINSON: Once. All they have to tell us is that the amount you're offering is unacceptable. We want X number of dollars.

JUSTICE EVA M. GUZMAN: Or how about that I think that the scope of the work is greater than what you've assessed it to be?

ATTORNEY DON MARTINSON: I think that their decision-making communicated to us has to be more precise than we're unhappy. I think they have to tell us that we are not going to accept this amount. We believe that our damages are greater than that and once they say that and we respond in kind that we can't do that, we do not agree that the number is as large as you say it is, that's impasse and that never happened in this case. The lawsuit was our notice that Grubbs was unhappy. I see my time--

JUSTICE EVA M. GUZMAN: So that would be the measure, the measure of impasse would be as described by you.

ATTORNEY DON MARTINSON: That moment in time when both sides understand each other's position. Thank you, Your Honor.

JUSTICE DALE WAINWRIGHT: Actually, you received a letter July 16, 2009

saying my client will not agree to appraisal. So was that just before the lawsuit?
ATTORNEY DON MARTINSON: That's post litigation.
JUSTICE DALE WAINWRIGHT: Post litigation?
ATTORNEY DON MARTINSON: Those were our efforts to try to get it done even though they had filed the lawsuit in April of '09.
JUSTICE DALE WAINWRIGHT: Litigation sent you the message and the letter was the suspender on top of the belt in your opinion.
ATTORNEY DON MARTINSON: Invoking appraisal in our answer and then we worked through the summer to see if we could get that accomplished despite the lawsuit and were unable to do so. Thank you, Your Honor.
CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear now from the Real Party In Interest.
MARSHAL: May it please the Court, Mr. Keller will present argument for the Real Party In Interest. Mr. Kelly will present argument for the Amicus. Mr. Keller will open with the first 15 minutes.

ORAL ARGUMENT OF SCOTT M. KELLER ON BEHALF OF THE RESPONDENT

ATTORNEY SCOTT KELLER: May it please the Court. This is an insurance case. This is an appraisal case, but the issue before this Court is whether or not Judge Chupp abused his discretion when he denied the motion by Universal Underwriters to compel appraisal and abate the case. The answer's unequivocally and undeniably no. This is a waiver case. They waived their right to appraisal. This Court's analysis and that of lower courts' analysis of any case involving waiver first has to start by looking at a couple of things. The first thing that the Court needs to look to is the actual appraisal clause, what type of appraisal clause is it. Also, the Court needs to be guided by the principles that are set forth in common law, statutory and public policies consenting.
JUSTICE DAVID M. MEDINA: When did the waiver occur?
ATTORNEY SCOTT KELLER: Well, on August 29 of 2008, they anticipated litigation. What did that mean? Well, what do they say it means? In their brief and the Petition for the Writ of Mandamus, they state well Underwriters could certainly have invoked its right to appraisal as early as August of 2008 when Grubbs first disputed the valuation of the claim, the appraisal clause does not state or imply that it is waived, did not immediately invoke.
JUSTICE DON R. WILLETT: But they paid additional money on the claim a few months later, right? In November.
ATTORNEY SCOTT KELLER: That is correct. They did pay additional monies.
JUSTICE DON R. WILLETT: And would that additional payment somehow diminish your argument that there was a disagreement?
ATTORNEY SCOTT KELLER: I didn't pick the date. They picked the date. When I asked them when did you anticipate litigation, they picked that date. That's the date they decided. I didn't decide that.
JUSTICE DAVID M. MEDINA: I was talking about the claims handling process because this is what this is about.
ATTORNEY SCOTT KELLER: Right. The claims handling process.
JUSTICE DAVID M. MEDINA: You got reservation of rights letter, pretty standard language, the reservation of rights letter, pretty standard language, this clause right here, very standard.

ATTORNEY SCOTT KELLER: Their reservation of rights letter, is it standard?
JUSTICE DAVID M. MEDINA: It looks like standard language to me.
ATTORNEY SCOTT KELLER: Yes, I think it is other than it has that middle sentence. They start off and say we reserve all our rights.
JUSTICE DAVID M. MEDINA: Well you can pick and choose which sentence applies, but if you read the entire paragraph, it seems pretty clear to me. Here's a check. If you don't agree with this, we'll give you some more money. If you have any problems call us and by the way, we're reserving our rights. You need to look at the policy and to comply with the policy.
ATTORNEY SCOTT KELLER: But the lawyer doesn't say call us. What the letter says is you can have your contractor, we left it open so that your contractor can talk to our expert. Well that affidavit testimony clear on that. The Grubbs roofing contractor stated continually throughout the entire re-inspection of the property that the roof needed to be an entire replacement and that was in September of 2008. That's more than 245 days prior to the time that they demanded appraisal in this case. You couple that with their admission that they could have demanded it 259 days prior to it and you couple it with the fact that they get this engineer's report that says on October 2 of 2008, hey, an entire roof replacement isn't necessary. That's about 200 days prior.
JUSTICE DAVID M. MEDINA: Just because you get a report doesn't mean they have to accept it. There's no--
ATTORNEY SCOTT KELLER: It was their own report. It was their own report letting them know, hey, even though the roofing contractor's saying this, I don't agree with him. I'm saying no, it's something less than that. It is not entire roof replacement. You know there's a dispute. One guy's saying an entire roof replacement. One guy's saying no, something less.
JUSTICE PAUL W. GREEN: Why wouldn't the company at that point have been entitled to think that well having sent that report back to Grubbs and Grubbs looks at it and says well, we're going to give up. We don't continue with the claim because we decided to give up. Maybe they're right. We'll just leave it alone. Where is there any dispute at that point that needs to be decided?
ATTORNEY SCOTT KELLER: That, that--
JUSTICE PAUL W. GREEN: I mean the parties get together. They knock heads. Money's paid, so forth and so on, the reports go back and forth and somebody says okay, the ball's in your court and they hear radio silence.
ATTORNEY SCOTT KELLER: Well I think that when there becomes a disagreement between the parties that the court in Brodie got it right, there's three things that the insurer gets to do at that point. They can pay what the insured wants. They can do nothing or they can invoke the appraisal clause. Brodie got that right, but that's what you're supposed to do when there's a disagreement, what you're supposed to do is, you don't to piecemeal along the claims process. The claims process doesn't, you look at 541, 542, does it say anything about negotiations in any of that?
JUSTICE DALE WAINWRIGHT: Counsel, you understand that any type of negotiation starts with the parties having different opinions. Otherwise, it wouldn't be a negotiation. The first conversation it would be settled. So the very first conversation and your client's going to take position A, the endorser's going to take position B, and you negotiate. If that's not the case, then the very first conversation is always going to trigger the impasse in your opinion because otherwise it won't be a negotiation.
ATTORNEY SCOTT KELLER: Right, right. And there would be--

JUSTICE DALE WAINWRIGHT: So the very first telephone call, the very first time a client says I think you owe $100,000 and the insured said no, it's $15,000. Let's talk about it. Is it your position that that's the impasse, the first telephone call?
ATTORNEY SCOTT KELLER: That is the impasse. When they voiced their disagreement as to the valuation, what does the policy say? The policy doesn't say when we reach impasse. It says when you and I disagree, you and I can't agree, you and I fail to agree.
JUSTICE DALE WAINWRIGHT: Well there's a difference between a negotiation and you and I can't agree, the term you just used.
ATTORNEY SCOTT KELLER: Right.

JUSTICE DALE WAINWRIGHT: If the parties are talking and making progress and one side is paying money and paying money, you still think that's an impasse?
ATTORNEY SCOTT KELLER: They haven't paid what they're entitled to. The--
JUSTICE DALE WAINWRIGHT: So the very first conversation in a negotiation process triggers the impasse?
ATTORNEY SCOTT KELLER: Yes, because negotiation isn't part of the client claims adjusting process. The claims adjusting process consists of four distinct parts. You've got the first part being the acknowledgment of the claim. Barred to do that under 542. Got the second part, the actual investigation of the claim. You have to send out a letter. It tells you you got so many days to provide information. You need to provide this following information and then we're going to continue on with our investigation. Then you've got the actual adjustment of the claim where they're adjusting it, figuring out the amount that they think the value is and then under the statute, they're supposed to pay and there's specific time deadlines for them to do everything.
JUSTICE DALE WAINWRIGHT: Under your position, the first phone call when the parties say well, we're going to take a little different position, neither side gets the opportunity to investigate it further or even hire experts to inform their opinions because if they come in that first negotiation and say I think I'm owed a lot and the other side says I think you're not owed so much, there's no opportunity for continuing investigation because from your standpoint, that first difference of opinion on the amount is an impasse. So it precludes getting anybody to do an investigation--
ATTORNEY SCOTT KELLER: It's a disagreement I don't think impasse is the standard. I don't think it's ever been the standard here in the state of Texas.
JUSTICE DALE WAINWRIGHT: Well, as you rightly said, we need to start with the terms of the insurance contract which says if you or we can't agree on the value of the property or the amount of your property loss, either can demand in writing an appraisal within a certain period of time. So it does use the term can't agree. Not don't agree, couldn't agree, but can't agree. So it suggests some of the briefing has called it impasse. If you don't like that language, we'll call it can't agree. But doesn't that from your perspective preclude the negotiation process even if it shows movement?
ATTORNEY SCOTT KELLER: Well I don't think the negotiation process is part of the claims adjustment process, I guess. The legislature put in 541 and

542 and this Court has found that there's a duty of good faith and fair dealing between them. You have to look at those when you're determining whether or not when it's reasonable for an insurance company to invoke the clause. I believe that once an insurer is aware of a disagreement as to the value of a loss, it must evoke appraisal without any undue delay.
JUSTICE PHIL JOHNSON: If that's the situation then, every time an insurance company gets a claim and says something to the insurer makes an offer and the insured said you know, it's just really worth more than that, the insured, the insurer at that point has to invoke an appraisal that's going to cost the insured money because this says each of this will pay our own appraiser. It looks to me like that to cut that off immediately right there is really not of much benefit to the insured until you try to work it out.
ATTORNEY SCOTT KELLER: If you invoke, if the insurance company invokes their right to appraisal, they haven't given up anything.
JUSTICE PHIL JOHNSON: No, I'm just saying the insured is going to have to pay for an appraiser if the insurer immediately--
ATTORNEY SCOTT KELLER: Nothing prevents the insured and the insurance company to continue to talk during the appraisal process or prior to the appraisal getting started. They don't start immediately. From a practical matter, they just don't start immediately.
JUSTICE PHIL JOHNSON: But they have to start paying an appraiser. You don't hire an appraiser and they give you their time. It seems to me like if you're trying to work it out, why would the insured even want to jump right into that process. That's like filing a lawsuit the day after the accident happens. All of a sudden you got all the costs built into it. Everybody hardens their positions. Looks to me like that that's going to be to, I mean from the big picture view, a little detrimental to the whole process.
ATTORNEY SCOTT KELLER: Well the insured shouldn't have to adjust his own loss. That's what the insurance companies are paid to do. That's why we pay the premium.
JUSTICE DAVID M. MEDINA: But you said there's no adjustment. You said once the insurer makes a demand, the insurance company has to meet it otherwise they're at an impasse. That's what you just said.
ATTORNEY SCOTT KELLER: Yeah. But well I'm assuming first they go through the entire appraisal process and the insurance company, what happens the vast majority of the time is that it's paid and it's done, but there are times where the insured disagrees with the amount that's being paid and when they voice that disagreement, that's when you have to invoke the appraisal process.
JUSTICE EVA M. GUZMAN: Before they waived that, is Scottish Union still instructive? Was there ever in this case an act that amounted to a denial of liability or to a refusal to pay the loss?
ATTORNEY SCOTT KELLER: Well it was clearly a refusal to pay at least a portion of the loss. The amount that I say versus the amount that they say entire roof replacement versus covering up $3000 worth of scuff marks.
JUSTICE EVA M. GUZMAN: Was there a point in time when that was made abundantly clear that they were not going to pay this loss, the loss as you claim it?
ATTORNEY SCOTT KELLER: Well, when they send you a letter that says if you disagree with their decision and I'll try to read--
JUSTICE EVA M. GUZMAN: I've seen that.

ATTORNEY SCOTT KELLER: I'm sure everybody's seen the letter. I've talked about it at length, but when you start sending letters saying that if you disagree with our decision and you want to contest our decision, be mindful that policy requirements that legal action must be brought within two years and one day. I think you're making your position pretty clear.
CHIEF JUSTICE WALLACE B. JEFFERSON: How's your client harmed by going through an appraisal and were you prejudiced by any delay In requesting appraisal?
ATTORNEY SCOTT KELLER: I don't, I'll attack the back one first, the prejudice. When I looked at this Court's decisions concerning prejudice, I don't see, or concerning waiver and prejudice, I don't see a prejudice requirement in anything other than and I'm sure I'm probably going to find out that I'm wrong on this, but in the waiver by litigation context, when you get involved in a thing like Cull v. Perry Homes was a case where there was no argument over whether or not an agreement to arbitrate can be waived through litigation conduct and the Court found here yes. Not only does there have to be an intentional relinquishment of [inaudible] and right, but also there has to be prejudice. But this Court's gone at great lengths to differentiate between appraisal and arbitration and there's no other case that I can find where you all have discussed and said yeah, there's a prejudice requirement with respect to waiver in some other context.
JUSTICE DALE WAINWRIGHT: What about Prodigy, the Prodigy opinion and prejudice on notice to invoke insurance or waive insurance coverage?
ATTORNEY SCOTT KELLER: And as I is that the waiver of proof of loss?
JUSTICE DALE WAINWRIGHT: There's a notice provision at issue and the Court held prejudice was required.
ATTORNEY SCOTT KELLER: And that was probably prejudice by the insured or the insurer?
JUSTICE DALE WAINWRIGHT: Prejudice to the insurer.
ATTORNEY SCOTT KELLER: Prejudice to the insurer. The insurer had to show prejudice. Seems to me to be entirely consistent with the statutory, the common law duty that has been placed upon them under the duty of good faith and fair dealing and the statutory duties that have been placed to them under 541 and 542. An insurer doesn't have those same type of duties. An insurer doesn't have to negotiate with the insurance company over their loss. They can sit back and say I don't agree.
JUSTICE PAUL W. GREEN: So you say that you don't have to show prejudice?
ATTORNEY SCOTT KELLER: Yeah.
JUSTICE PAUL W. GREEN: Is that your answer?
ATTORNEY SCOTT KELLER: Right. I don't believe. I'm sorry, I forgot the first part of your question.
CHIEF JUSTICE WALLACE B. JEFFERSON: Well the first is how's your client harmed by an appraisal process by going through an appraisal process?

ATTORNEY SCOTT KELLER: Well, my client has been harmed because it had to go out and hire a lawyer. One of the things that I haven't had an opportunity to talk about is the second letter, the December 15th letter that comes to my client is sent from a lawyer, not from an adjustor. It's sent from a lawyer and he tells us the same thing about invoking the appraisal clause within two years and or invoking the suit within two years and one

day from the date of loss.
JUSTICE DAVID M. MEDINA: Why does that matter?
ATTORNEY SCOTT KELLER: Well in Johnson, it seemed to me that one of the focuses that the Court took on in Johnson concerning appraisal clauses was hey, we want to get this, all this stuff done before you hire experts and before you have to hire an attorney. They'd already hired an attorney and had already hired an expert. They had hired an engineer and they hired an attorney and my client had a roofing [inaudible].
CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the Amicus Curiae Counsel, Mr. Kelly.

ORAL ARGUMENT OF PETER M. KELLY ON BEHALF OF THE RESPONDENT FOR AMICUS CURIAE

ATTORNEY PETER KELLY: May it please the Court, this case is not the case the insurance industry wants you to think it is. They want you to think this case is impacted by public policy considerations caused by a massive hurricane Ike litigation going on in Harris County and Galveston County and they have created deliberate misimpression that for some reason this Court needs to change hundreds of years of common law, needs to abrogate the public policy considerations behind insurance codes Section 541 and 542 and somehow let this waiver provision in the insurance contracts swallow up all these other public policy considerations just because there are a lot of Hurricane Ike cases in which waiver might be invoked. If you look at the actual numbers of what's going on with the Hurricane Ike litigation, we're not seeing a choking of litigation system because of waiver trials. Of 6336 cases that are pending in the Harris County Residential Ike litigation, there have only been nine denials of appraisal. Now that number may go up as some of these cases most recently filed statute of limitations cases come through, but the proportions indicate that we're talking less than 1% of these cases is appraisal being denied and the insurance company in any way being affected by this. So to, it's disingenuous for ICT and the PCI and the insurance industry to suggest that this Court needs to change the common law, abrogate the public policy by restricting the rules regarding waiver and appraisal.
JUSTICE DAVID M. MEDINA: Mr. Kelly, let's say there's no catastrophe here and this is just a standard letter that goes out. What clause in that letter waives their right to seek an appraisal? Have you looked at the letter or are you only here to talk about the policy?
ATTORNEY PETER KELLY: No, I'm familiar with the record. The waiver can be concurred by conduct and by inaction and this Court has said that in the Tenneco case and elsewhere, but, again, we can't look at it in just a vacuum. We can't just look at the appraisal process in a vacuum. You have to look at it in terms of common law, good faith and fair dealing owed to the insured and within the statutory 541 and 542. There are deadlines they have to follow. So we have here is the claims adjustment process. There's notice to the insurer, investigation of the claim, prompt payment of the claim. Once that claim is paid and this goes to the question whether there's an impasse or a disagreement, once that claim is paid and it's not enough and the insured thinks it's not enough, that's when you have a disagreement.

JUSTICE DAVID M. MEDINA: I agree. In this instance, there was a subsequent check sent to the insurer.
ATTORNEY PETER KELLY: That still wasn't enough. There was an extension or reiteration of that claims adjustment process.
JUSTICE DAVID M. MEDINA: Does the insured have any other obligation other than what it did which was file a lawsuit? Does it call the adjustor and say look, I don't agree? Certainly they can file a lawsuit at any time.

ATTORNEY PETER KELLY: Well, this goes to the second point. It just ties directly into the second point that we're making as Amicus that it's not a condition precedent to filing suit. There are no further obligations on the insured to pursue appraisal. This is sort of trying to put the tooth-paste back in the tube, but in the Johnson opinion from last year, in footnote 42, there's a statement that was made in the general opinion that appraisal, this Court and others have held that appraisal clauses are con-ditions precedent. Then it cited to four cases. In the first two cases it cited, Clancy and Terry, the appraisal clause was clearly mandatory. Upon disagreement, the parties shall seek appraisal, go through the appraisal process. The next two cases, it said similar to this case and frankly in all of the modern policies I've seen in Texas whether residential or com-mercial, it said the party on demand by one party over the other, the ap-praisal process begins or either party can demand, either party may de-mand, but its permissive optional clause. That takes it out of the realm of conditional precedent and I don't know. Determining whether it's a con-dition precedent is not necessarily to the adjudication of the issue pre-sented squarely in this case, but it is necessary for what the trial court is going to be doing later on after it goes back down to the trial court what instructions the Court might give. If it is a condition precedent, well let me back up a second. The analysis that a trial court would follow is, they get the case in. They see that there's an appraisal clause. The plaintiff alleges waiver. The claimant alleges waiver. If it has been waived, appraisal clause has been waived either by inaction or by ex-pressed waiver, then the analysis ends there and the suit progresses. If it has not been waived, or if there's a fact issue about whether it's been waived, the Court then looks to see whether it's condition precedent or a mere covenant and I don't say mere in terms to lighten contractual obliga-tions, but just as opposed to a condition precedent. If it is a condition precedent, then the Court, if appraisal has not been waived at that point, then the Court can abate the lawsuit, but only that portion relating to the breach of contract claims and this Court said in Allstate back in 2002, the remainder of the case can go forward. The bad faith claims and insurance code and the statutory penalties can be adjudicated. Discovery on those and in litigation with regard to those goes forward while the contract claim and only the contract claim is abated for appraisal because the only thing that appraisal can resolve is the amount of the property loss. In that particular aspect of a breach of a contract claim is what is the property loss. So the remainder of the case goes forward. Now if it's not a condition precedent and it is merely a covenant, then the Court does not have the option of abating because this Court has never found that you abate for enforcement of a mere covenant. It's found that you abate for enforcement of a condition precedent. So what has happened is in the John-son case and it was obiter dicta, you have the statement supported by con-

tradictory cases. That language has been picked up by other cases in the Courts of Appeal, Slavonic and others, just assuming without further analysis that it is a condition precedent and I would urge this Court to perhaps correct or elucidate the dicta and further dicta clarifying that the condition precedent analysis needs to be engaged in by the trial courts and there is a distinction between the mandatory condition precedent appraisal clauses and those that are optional and mere covenants. I see I'm out of time.
CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Kelly. Any questions? Thank you.

REBUTTAL ARGUMENT OF DON MARTINSON ON BEHALF OF PETITIONER

ATTORNEY DON MARTINSON: Justice Jefferson, if I could answer your question of me earlier. The interrogatory that was propounded to Universal asked [inaudible] the date you anticipate litigation in this matter. When Plaintiff called for reinspection of the property around August 29, 2008 was the response. As I noted earlier, anticipating litigation is not at odds with continuing the negotiation and adjustment process, which is what happened.
CHIEF JUSTICE WALLACE B. JEFFERSON: Well Mr. Keller was quoting from your brief, I thought, when he said you had agreed that at that point you could have invoked the appraisal process.
ATTORNEY DON MARTINSON: I did not go back to look at the brief. You had asked me about the interrogatories.
CHIEF JUSTICE WALLACE B. JEFFERSON: We'll do that. That's all right.
ATTORNEY DON MARTINSON: Second, there was a comment about impasse is the equivalent of can't agree and I have no quarrel with that. In this particular case, we never got to a point of can't agree because we extended a payment of $3,000 and solicited a response if Grubbs was unhappy with that resolution of the claim to which there was no response from November of 2008 until they served us with suit papers in April of 2009.
JUSTICE EVA M. GUZMAN: There is a suggestion in the Amicus brief that In re Slavonic, citing loss is somehow has muddied the waters concerning the tests articulated in Scottish Union. Is that denial of liability or refusal to pay clearly expressed so different from simply reaching an impasse? Is it really that different. If someone says we can't agree, is that really that different?
ATTORNEY DON MARTINSON: Scottish Union stands for two things. One that the appraisal process is an enforceable nonjudicial process and number two, it can only be lost by waiver and this Court has defined waiver then and in Ulico two years ago as the intentional relinquishment of a known right and so until we engage in some conduct either in the claims handling process or post lawsuit that tells Grubbs and infinity or tells the District Court that we are not going to invoke our right of appraisal. We're entitled to do so.
JUSTICE EVA M. GUZMAN: Or we're not going to pay meaning we're done basically.
ATTORNEY DON MARTINSON: If we ever reach a point where we say either there is no coverage or we're not going to pay, that's impasse and the clock starts running. I think where the waters have been muddied from the standpoint of the insurance industry is that In re Slavonic and some of these

other cases out of the Houston Court of Appeals, the impression is sometimes left that mere delay by itself somehow is the equivalent of waiver and I'm here to tell you that that's not the case and I don't think that's what the Court should say. I think what the court should say in this case is that a delay in time or a measurement of time is relevant in the consideration of whether somebody waived their rights, but that otherwise Scottish Union is still the law and that is there must be some conduct during that period of delay that evidences an intentional relinquishment of your right to appraisal and clearly that hasn't happened in this case, but cases like Slavonic suggest that perhaps just the introduction of a passage of time standing alone could constitute waiver and that's absolutely inconsistent with the Court's opinion in the Scottish Union.

JUSTICE DAVID M. MEDINA: Do you have a reply to Mr. Kelly's position on the condition precedent and covenants?

ATTORNEY DON MARTINSON: I do. This is not Hurricane Ike. This is a hailstorm loss up in North Texas, which is common all across the state. We and the trial court haven't gotten there yet. When the court denied the motion to compel appraisal, we never got to discuss what's going to happen if appraisal occurs. If this Court grants our writ and instructs the court that appraisal should be done in this case, then we will go back to the trial court and one of the things we're going to say is we don't think you should go forward with the rest of the lawsuit, including these extra contractual claims until we get the appraisal clause done just as a matter of judicial efficiency, but it's at that point in time if someone's going to have an argument about whether it's condition precedent or not, that's when that argument will be made. It's not been briefed in this case and I just heard about it yesterday when I got this Amicus brief. I'm sure that Universal and the insurance industry is going to weigh in on that and have a position, but we don't have a position today and we will have a position if there is a disagreement with the trial court on this point later on, but right now there's not a record upon which anyone can opine about the argument that there's a condition precedent represented by the appraisal clause and with that I thank the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you Mr. Martinson and Counsel. That concludes the argument for this cause and all arguments are completed for the day. The Marshal will now adjourn the Court.

MARSHAL: All rise.

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