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IN RE ALLSTATE

ROGERS: The ruling of the TC that the appraisal provision when considering as an arbitration provision is unenforceable ignores over 100 years of Texas jurisprudence enforcing appraisal provisions in insurance policies.

O'NEILL: What if we agree with you on this, but then where do we go from there? The TC seems to have based its decision on that premise. And if we were to throw out that premise, then what sort of discretion does the TC have on a discovery basis to say, as a matter of relevance to the issues involved, I'm not going to allow appraisal at this time. And how much can we review that under Walker v. Packard? Wouldn't there be an adequate remedy by appeal to review that type of decision?

ROGERS: First, that's not what the TC did here. The TC found the appraisal provision unenforceable. Now I assume the TC, as you suggest, found that the appraisal provision was enforceable. As the TC then had the discretion to stay that process until later in the proceeding.

O'NEILL: Well that's my question.

ROGERS: My answer to that is, no other TC in this case doesn't have the discretion to determine that the appraisal process should take place later in the proceeding. In this case no discovery has taken place, no pre-trial conference has been set, no trial date has been set. The policy itself has a no action clause in it that basically provides that no suit shall be brought against the insured until all the terms of the policy have been complied with.

The appraisal provision provides if we or you do disagree as to the amount of loss, either may demand an appraiser.

O'NEILL: I guess my point is, as an evidentiary matter or as a legal condition precedent matter aren't those reviewable on appeal? They wouldn't be mandamusable?

ROGERS: No they are not reviewable on appeal. As CJ Phillips observed in Walker v. Packer, the remedy by appeal is not adequate if the TC's ruling vitiates or compromises the claim or defense of the party. The function of the appraisal provision here is, that once the appraisal process takes place it works as an estoppel as to the amount of damages. It provides the appraisal is binding on the parties.

O'NEILL: Damages as to the loss itself...

ROGERS: As to the amount of loss only.

O'NEILL: But the claims here are very different. And the TC could in fact decide to sever the loss claims. We are very early in the proceedings and if the court were to sever the loss claims and focus only on the fraudulent practices here that are being claimed, then the discovery you are seeking wouldn't be relevant. So again, I get to the question of mandamusable.

ROGERS: Yes it is. Because the determination of the amount of loss is the basic claim underlying not only their breach of contract cause of action, but all their...

HANKINSON: That's not the way I read their pleadings though. They certainly had a breach of contract action with respect to the loss. The appraisal process is a means resolving the dispute about the amount of the loss. But they are challenging the claims handling process at the front-end and the way that the insurance company responds to the claim when it is made, and the procedures used to determine the value at that point in time, and then the insurance company says take it or leave it, we're going to cutoff your other rights under the policy unless you take it. All of that comes very much before there is a dispute over the amount of the loss under the policy. I fail to see the relevancy in the amount of loss as determined by the appraisal process to the damages being claimed under the fraudulent practices theories, which seem to me to be the heart of the case.

ROGERS: The heart of the case all comes back to the amount of the loss, the determination of the actual cash value.

HANKINSON: But that is resolved under the appraisal procedure, is we can't agree in how much we should pay you. So we get one appraiser, there's another appraiser, if they can't agree then a third appraiser decides, and you're basically compromising at that point in time. That procedure is a very different issue than what the pleadings reflect in this case in terms of the damage being caused by the claims handling practices. And the damages that are pled there are very different than the loss that would be determined under the policy using an appraisal process. I realize your briefs all talk about this is the loss, this is the breach of contract action. Your pleadings seem to say something different. And that's what I'm having a hard time with.

ROGERS: The appraisal clause, which is part of the agreement of the parties, provides that upon demand an appraisal shall occur. Now if this court decides that by making extra contractual claim or filing a lawsuit that the insured can somehow circumvent or delay the appraisal process, then each and every time an insurer makes a demand for appraisal, the response of the insured can simply be to file a lawsuit or to file a lawsuit that makes extra contractual claims...

O'NEILL: But that's my question on mandamusability here. Any determination of the value of the proof of the appraisal is a relevancy issue that I think would be within the discretion of the TC. And therefore there would be an adequate remedy by appeal.

ROGERS: I disagree. The result of the appraisal works in estoppel. Let's assume in this case that the appraisal process took place, and the appraisal came back with the same amount of actual cash value that each of the insurers determined.

O'NEILL: But again you're arguing relevance. You're saying that's why it's relevant and that's why we are entitled to it. And that's a TC discretionary standard of what the TC has ruled in terms of relevance.

ROGERS: No. The TC here has determined that the appraisal process is not going to take place at all.

O'NEILL: And they expressed a reason for that in the order, and that was the basis of my question. If we were to find that the reason the court gave in the order is not valid, then what are we to do? Then does it come within the court's discretion to deny it on another ground that's not reviewable by mandamus?

ROGERS: I don't think it's within the court's discretion once the demand for appraisal has been made even if litigation is commenced.

O'NEILL: Tell me how you write that? Do you say we disagree, we the arbitration piece. Now we take it upon ourselves to decide that this is relevant, critical evidence, condition precedent. You're asking us to then make that determination to get the relief that you want.

ROGERS: Yes.

O'NEILL: Those seem to me discretionary matters that are typically subject to appeal.

ROGERS: By analogy to the arbitration agreement this court in Jack B. Anglin Co. Inc. v. Tipps found that the TC's denial of the motion to compel arbitration was subject to remedy by a mandamus for the reason that Jack B. Anglin Co., Inc. would be deprived of the benefit of its bargain, which was a rapid, speedy, inexpensive determination of the dispute.

BAKER: But that statement presupposes that the only dispute in this case, as Justice Hankinson points out, is not the case, that the amount of the loss is the only issue between the parties.

ROGERS: Unlike the Texas arbitration act and the federal arbitration act, which provides a mechanism for judicial intervention when a party resists arbitration, the provision for the appraisal in the auto policy contains no such remedy. Therefore, the only remedy which is to compel one or the other parties to appraisal is a no action clause in the policy.

HANKINSON: It seems to me you can't have it both ways. On the one hand you say it's not an arbitration clause. And Jack Anglin is an arbitration case and that's why mandamus was appropriate. So if this is alike an arbitration clause, then perhaps you fall underneath Jack Anglin and the analysis would be something comparable to that. However, I understand you to say it's not an arbitration clause, and what we've got here is a breach of contract. And I know of no authority in Texas law which allows an appellate court to mandamus a TC in order to prevent a breach of

contract, which is what I understand that you're asking for if we don't look at it as an arbitration clause. You're saying they are breaching the contract. They don't have any business being in court. We want you to mandamus the trial judge to make them perform under the contract. And I don't know of any authority in Texas law that allows us to intervene in a breach of contract action in that way.

ROGERS: In Walker v. Packer in the discovery context, this court articulated a number of reasons why a remedy of law ny appeal wasn't adequate for failure to obtain discovery. One of those grounds was that the order of the TC vitiates a claim or defense of the parties. A defense to not only the breach of contract claim in this case, but the extra contractual claims will be the estoppel to contest the amount of the loss.

HANKINSON: Go back to my question though. What you're asking us to do is to intervene in a lawsuit, agree to what you say is a breach of contract claim, and order the TC to order a party to perform under the contract. And what authority is there if that really is what's going on here for us to start mandamusing to avoid breaches of contract?

ROGERS: We're not asking you to mandamus a breach of contract. We are telling the court that not only does this vitiate a defense, but it's not an error that can be corrected on appeal. Because on appeal, the appellate court can't supply the appraisal. Third, the appraisal...

HANKINSON: But the appellate court can send it back to the TC after an appeal for an appraisal to be done and for the case to be disposed of in that way.

ROGERS: Which makes this analogous again to the relief sought in Anglin.

BAKER: The no action clause policy sounds to me like it's not a jurisdictional requirement for subsequent matter jurisdiction with the TC. Would you agree with that?

ROGERS: Yes.

BAKER: So your argument now has to do with the TC abused its discretion by not staying the trial, granting your plea in abatement?

ROGERS: Yes.

BAKER: And don't we have law that says that the plea in abatement ruling is an incidental trial ruling not subject to mandamus?

ROGERS: Arbor(?) v. Black says that.

BAKER: Yes, and Pope v. Ferguson and about 6 more cases.

ROGERS: Yes. But our position here is assuming that it is an appraisal clause and it is enforceable as such should the court stay it, is going back to Walker v. Packer, that this will not be a part of the record for appeal, cannot be corrected on appeal.

ENOCH: Your argument is, as I understand it, this is not a discovery dispute. This is not a situation where you get into trial and the trial judge could ultimately decided, well you can have your expert go and appraise this car and give me that value. You argument is not this is a discovery dispute. There is a legal effect under the contract through an appraisal. That appraisal comes back, there is a legal effect to that that determines one or more of the issues that will be tried in this case. And so even if there is an extra contractual claim out there that's being sued on or a delay in a payment or a failure to deny timely or for any of those other issues, one of the issues in this case will be affected by this appraisal. That if the court refuses to compel the appraisal under the contract, then on appeal it is not a matter the appellate court can correct. It only results in another trial of the case.

ROGERS: That is correct.

ENOCH: With an appraisal at that trial?

ROGERS: Yes.

ENOCH: And the whole purpose of having this in the contract was in favor of the parties not having to have a new trial on that issue?

ROGERS: That is correct.

ENOCH: And so if the court does not compel it this point, that is the valuable right under the contract that was contracted for, agreed to, that will have been lost?

ROGERS: That's correct.

O'NEILL: What legal effect would an appraisal have here? That's what I'm having trouble with.

ROGERS: The legal effect under the Texas cases which are cited in our brief is that it estopps...

O'NEILL: Estopps what?

ROGERS: A party from contesting the amount of the loss.

O'NEILL: Let's say they drop their amount of the loss claims. You've still got the extra contractual claim.

ROGERS: I would submit that if they drop...

O'NEILL: And then it becomes a relevancy issue as to the extra contractual claims.

ROGERS: I would submit that if they drop the contractual claims, they don't have their extra contractual claims, because their extra contractual claims each and everyone hinge upon a dispute about the amount of the loss. Whether you label that...

HANKINSON: But they don't hinge on the amount of the loss as determined by the appraisal process, which is a dispute resolution procedure. Their claims hinge on how the insurance company values the claim at the point in time the claim is made, and does their take it or leave it offer to the insured. I have the same problem Justice O'Neill is having with respect to relevancy. Because the appraisal process is a means for the insured and the insurance company to compromise when there is a dispute. But that's not what they are complaining about here. They are complaining about how you valued in the first instance and when you gave them that value you said and that's it, your other rights under the policy for your rental car, etc., are going to go away, so take it or leave it. So I don't see how the amount of loss is relevant to those claims, which puts me back to where Justice O'Neill is questioning.

ROGERS: First, I don't believe the record indicates other than the bare allegations of the plaintiffs that it was take it or leave it.

JEFFERSON: That's not exactly correct. There is an exhibit to one of the motions - a letter from Fireman's that said, if you don't take this amount of money, please be advised that we will no longer be responsible for any additional storage charge after a certain date, and fees incurred after the date will be deducted from any settlement, etc. So there is some basis for that.

ROGERS: And that same letter provides that if you have any additional information you would like to provide us of the value, please provide it. The same time it's not a take it or leave it from the standpoint of if the insured...

JEFFERSON: My point is, I think you need to address, at least from my perspective, address Justice Hankinson's question about whether even if we're not talking about the amount of loss, aren't there other claims that the plaintiffs are making here for damages outside of this appraisal issue?

ROGERS: Yes. But I believe they all hinge upon whether or not the insured can make a breach of contract claim. And if the appraisal comes back at the amount of the actual cash value determined by the insured, there is no breach of contract claim.

JEFFERSON: So the insurer is permitted under your theory to withdraw other benefits of the contract pending final resolution of the appraisal claim and that is not a damage that plaintiffs can sue on?

ROGERS: The insurance contract provides that those benefits stop when the loss is paid. In the case of Renita Washington, the loss was paid to her lienholder and until this lawsuit was filed Farmers had no knowledge that she disputed the amount of the loss. And until that dispute as to the amount of loss occurs, Farmers doesn't know it has to invoke or may invoke the appraisal clause. Because the appraisal clause provides: if you, or we disagree as to the amount of loss. But her claim was paid. She accepted the payment. The lien was paid. And two months later the lawsuit was filed, which is the first notice Farmers had that the amount of loss was in dispute, and thrown in with the breach of contract claim were all the extra contractual claims challenging the process for determining the amount of loss at large.

HANKINSON: All of your references to the appraisal clause and the way you present it and your legal context in which you put it, make it sound like an arbitration clause. Can you tell us why legally this should not be treated like an arbitration clause since it seems to me the way that you would apply it in this context would cause it to work that way?

ROGERS: Historically in Texas prior to the adoption of the Texas Arbitration Act, courts looked with disfavor upon agreements to arbitrate future disputes is ousting the court of jurisdiction. Even in that time, pre 1965 however, the courts made and observed a distinction between appraisal on the one hand, and arbitration on the other. Appraisal does just that - appraise. Now the word appraisal comes from the middle English appresin which is a modification of freeze, which means due value. The word arbitration comes from the Latin arbitratis(?), which is the past participle of arbitrai(?), which means to judge. That points out that fundamental distinction between appraisal to set value and to arbitrate, judge on the other hand.

Appraisal does nothing but determine the value of the loss. An arbitration proceeding involves what the courts used to characterize as asking the courts of jurisdiction, as this court observed in Anglin in its definition of arbitration, it was a resolution of the dispute outside the tribunal and normal processes of law.

HANKINSON: But you say that the appraisal process acts as an estoppel. And I take it that you mean by that, that once the appraisal process, the valuing has been done by either two or the third arbitrator in that value has been determined, that it acts as an estoppel and that that determination be binding upon the insured and the insurance company. Why isn't that then while it involve determining value, why isn't the ultimate result to judge the value in a binding way to resolve the dispute?

ROGERS: It does in a binding way.

HANKINSON: Then why isn't it by the definitions you just gave us an arbitration clause?

ROGERS: It doesn't determine liability. It doesn't determine causation. It doesn't determine coverage. It doesn't determine any of the other extra contractual claims.

HANKINSON: But can't arbitration apply? To arbitrate something does not require someone to arbitrate entirely of the matter. You can arbitrate pieces of the matter. Where is there a definition of arbitration that requires the entirety of the claim to be done?

ROGERS: Typically arbitration involves resolution dispute. In a very, very, very narrow sense one could regard the appraisal clause as an agreement to arbitrate the amount of the loss.

HANKINSON: And you've told us that once the insurance company is allowed to invoke that procedure in these cases that will in fact resolve the dispute with these insureds after their contractual claims.

ROGERS: It may have the effect of that. But it is going to be up to the judge and jury to determine whether or not that determination of the amount of the loss _____.

HANKINSON: But as to the contractual claim it is going to resolve the contractual claim in its entirety. That's your interpretation of the policy?

ROGERS: It's going to resolve the amount of the loss. It is still going to be up to the judge and jury to determine whether or not there is a breach of contract. The appraisal clause does not resolve that issue.

HANKINSON: But the insurance company in these cases has acknowledged coverage. The only dispute that remains with respect to the insurance policy itself is as to the amount to be paid under the policy, the amount of the loss which is the amount to be paid.

ROGERS: Yes.

HANKINSON: In this instance, the use of the appraisal clause will operate to resolve that particular dispute in its entirety between the insured and the insurance company?

ROGERS: Only insofar as if it's favorable to the insurer, the insurer can then take the appraisal and go to the court and move for summary judgment.

HANKINSON: That wasn't my question. I'm just talking about, you carve out the one claim in the pleadings, that is breach of contract, you need to pay me the loss under the policy. It will resolve that claim in its entirety.

ROGERS: It resolves the amount of loss. It doesn't resolve the cause of action. You still have to go back to the courthouse because the appraisers can't rule that this is not a breach of contract.

HANKINSON: I understand that. But it resolves all matters as between the two parties so that a final disposition of that claim is made.

ROGERS: It resolves all matters as between the two parties as to the amount of loss. And that's all it does.

OWEN: Assuming we were to say that this is an arbitration clause what evidence is there in the record that this transaction falls under the Federal Arbitration Act?

ROGERS: The business of insurance per se is a business affecting interstate commerce. In the record in this case...

OWEN: Do you have a case that says that?

ROGERS: Yes. US v. Southeastern Underwriters Assn, which is cited in Hartford Ins. Co. of the Midwest v. _____ Computer in the plaintiff's briefing. It's 322 US 533. There in 1944, the US SC said that modern insurance business functions as a result of interrelationship, interdefendants and integration of activities in all states where companies operate. In this case, the Allstate insurers are Illinois companies. The Progressive insurers are Ohio companies. Farmers Ins. Exchange is a California reciprocal or _____ insurance exchange, which has the citizenship of its members which are its policyholders who own the company. And they are the citizens of 29 states. Mid Century Ins. Co is a California stock corporation. They are all licensed to do the business of insurance in Texas. Lastly, the plaintiffs if we understand their allegation, their petition correctly, are attempting to certify a nationwide class of claimants.

So insurance business clearly involves interstate commerce. The courts have historically found that. The record supports the finding in this case. Should the court find it to be an arbitration agreement, then the federal arbitration act would apply, as this court has previously noted.

The federal arbitration act extends to the full extent of congress's power under the commerce clause of the US Constitution and preempts state law. We still submit it is an appraisal clause.

O'NEILL: Your motion to enforce the appraisal provision and your plea in abatement, the motion itself, did it word the request for enforcement as an arbitration?

ROGERS: No. The parties moved in their pleas in abatement and demands for appraisal...

O'NEILL: An appraisal could still be ordered by the TC. The TC as a matter of discovery could still say, yes, it's relevant and you are entitled to an appraisal, but I'm not going to abate while that occurs. And may disagree with you in terms of the effect of what an appraisal would be.

ROGERS: I think if a case proceeds down the road as it did in In re Terra Nova, which

was decided by the Texarkana CA, that at some point in the proceeding if the insurer or insured early on doesn't make a demand for appraisal, the TC does have the discretion to decide we're not going to determine the appraisal issue yet.

O'NEILL: But the TC here said, no way, no how am I ever going to allow an appraisal to take place.

ROGERS: Which is what the TC did here.

O'NEILL: Do we have that in the record?

ROGERS: The TC here found that as an appraisal provision it is unenforceable.

O'NEILL: As an arbitration?

ROGERS: Yes.

O'NEILL: But again, if we disagree with that, then the court has not foreclosed that as a matter of discovery.

ROGERS: Again, it's more than a matter of discovery.

O'NEILL: And we may disagree on that. But the TC has not completely foreclosed the possibility of an appraisal.

ROGERS: As I understand the TC's order, and having participated in the proceedings at the TC, the TC made it abundantly clear that in this proceeding this appraisal clause is of no course and effect and no appraisal will ever take place. And he hinged that on some testimony that Professor Jack Ratliff made in a proceeding...

O'NEILL: Do we have this in the record?

ROGERS: Yes. It's the Allstate v. Trepaso(?) case, where the class certification hearing that was going on in Judge Mehaffey's court the week before we appeared on one of the first motions. And it was a diminution in value case.

O'NEILL: We have that in this case? That's in our record?

ROGERS: The testimony of Prof. Ratliff is. At the end of his expert testimony on whether or not the case should be certified, Judge Mehaffey just simply asked him the question about the appraisal clause.

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GODFREY: And the answer was on Prof. Ratliff to that question - it's in the record: looks like an arbitration to me.

OWEN: If this is an arbitration why aren't we compelled under the Federal Arbitration Act to say _____.

GODFREY: It is not established in this record that this controversy, this issue, is subject to the federal arbitration act. In fact, there is no submission in the record at all. Period. There is no basis in the record that the relators have put it in the record that this involves interstate commerce.

OWEN: Is it not undisputed that they are out of state insurance companies?

GODFREY: Some of the insurers are out of state. Some of them are in state. All of the policy holders are in state. All of them are policies insuring Texas automobiles. And the cases including the one out of the 1st court in Houston that was tried in Judge Mozell's court. Then Justice _____ wrote the opinion that said, the federal act is not applicable because there is not applicable because there is no evidence in this record (and that was a title insurance case) to support a finding that this case involves interstate commerce.

OWEN: What about the cases he cited from the US SC? Do they say that?

GODFREY: In due respect, I don't think that those cases are opposite. It is still a matter of state law. Even if the federal act would be implicated for the party seeking to compel arbitration under the federal act to show evidence in the record that the transactions in question involve interstate commerce. And they haven't done it.

OWEN: Let's talk about the merits real quickly. Assuming that there had been an appraisal, and the appraisal was exactly what the three insurance companies had offered from the get go. What does that do to your extra contractual claim?

GODFREY: It doesn't do anything.

OWEN: What damages are left?

GODFREY: Our damages for the several extra contractual causes of action that are pleaded are not limited to an appraisal or arbitration based calculation of the amount of loss.

OWEN: Could you tell me what damages specifically?

GODFREY: What these claims are is a complaint that contrary to the terms of the policy where the insurance company has an obligation to in the first instance make a good faith

determination of the amount of loss...

OWEN: Let's say in this case they did that. The appraiser says yes the value of the car was exactly what the insurance company initially valued it as. In this case at least as to your plaintiffs...

GODFREY: We have pleaded and we believe we are entitled even if by chance there had been an appraisal before the insurance company purported to discharge its obligation under the policy, which there wasn't, Ms. Washington, Ms. Fernandez, there has never been any appraisal but the insurance company purports...

OWEN: Let's say we disagree with you. We say there's got to be an appraisal. The appraisers come back and say the insurance company offered either more or exactly the amount of what these cars were worth. So that the insurance company did act in good faith. Now what does that do to your extra contractual claim?

GODFREY: Nothing.

OWEN: What damages would you be entitled to?

GODFREY: If we can show pursuant to the claims that we have pleaded that this so called determination of loss by the insurance company that precipitates their first offer to us...

OWEN: Let's assume their first offer was exactly what the appraiser says that the car was worth. What damages have you suffered because of the process?

GODFREY: Because we have been forced because of the way in which they have applied the policy, the way in which they have undertaken their investigation and calculation of what is supposed to be not some - this is a first party insurance company contract. We're not settling with the liability insured.

OWEN: But where is the breach of ____ duty if they offere you exactly what the car is worth?

GODFREY: The breach takes place at the point where they purport to have given us an honest, good faith determination of actual loss of value. And they haven't.

OWEN: And the appraiser says that's exactly what they did. Now what are your damages?

GODFREY: Our damages are that we have been compelled among other things to go through a so-called appraisal process where we have to hire an appraiser. We have to bear half the cost of the process. We have all of the blood, sweat and tears associated with delay in getting that

resolution, including their telling us if you don't take what we are telling you is a good faith determination of amount of loss, not a settlement offer, forget any other rights you have under this policy.

OWEN: Where do you have a contractual right if the insurance company offers you full value for your car to indefinitely drag it out and say, well I disagree, so I get a rental car value for 1-2 years, and you've got to store my car until we go through this process? Then the appraiser tells the insurer you were offered exactly what your car was worth from the beginning. You say you're nevertheless entitled to all of that?

GODFREY: I think that begs the question with due respect. What I am saying is, that the case that we have pleaded and intend to prove is that they breached the insurance contract at the point where they gave us an ultimatum coupled with what they said was a good faith, honest determination of the amount of loss, not something less than that they would like for us to settle for. But they are telling us this is the number.

ENOCH: It is your belief that the insurance companies use a mechanism or a method or some advisors who necessarily always intentionally lowball the value of the property? That's your claim?

GODFREY: Absolutely. Yes.

ENOCH: And the contract that your individual plaintiffs have signed under the insuring agreement anticipates that there could be a bonafide dispute over the value of the property. Now I understand your claim is their offer is not bonafide. But the contract you signed at least anticipates that you will have a dispute with the insurer over the value of that property.

GODFREY: The contract says if there is a good faith disagreement, in so many words, about what the amount of loss is...

ENOCH: But it anticipates that I've got this wrecked car over here, that I, as the owner, will have some just maybe reasonable, maybe unreasonable belief that this is just my little car here and it's really worth a lot of money to me. And the insurance company would necessarily not offer what it was worth to the owner. So I will take it to my car repair place, the insurance company will have their hired gun and we'll get some neutral appraiser and we will put the three together and they will resolve between us the value of that car. Now I'm not going to go to a panel of three and I am going to present my evidence. I'm just going to hire an expert who will be participating in the decision based on what they know. And that's going to decide what the value of that car is.

GODFREY: That's exactly what's wrong with what they do, is a suggestion that that is what is happening. That's precisely what is not happening. There is a piece of paper from Allstate to CCC that says: go do this vehicle valuation report, which is what it's called in the policy, and come back and give us a number that's 85% of that number. And we're going to tell the insured that

we have a vehicle valuation report done by the biggest company in the world, and your vehicle's amount of loss is $1000. When they know that it is 115 or 120% of that figure. And the insured then is faced with the choice, believing pursuant to the terms of the policy that the insurance company has given them their own real, good faith determination of what the loss is of whether or not they are going to take advantage of this expensive and time consuming process that you just describe. I say, we say, if we can prove that, and we believe we can, that as a matter of fact there is a deliberate pretexual(?) outcome determinative scheme just like in Simmons in this case that they are deliberately telling people a lie about what the value of the vehicle is according to their own investigation trying to save 15/20% on these thousands and thousands of transactions.

HECHT: Even if that's the case, that's not a problem inherent in the appraisal process. It's just the way it's being used. The trial judge in this case ruled that it's inherently unenforceable. The trial judge determined in this case you can't use this fraudulent 115%, 200%. It wouldn't matter.

GODFREY: What the orders says, what the record says is that he was not going to stay or abate the trial of the case to first have an appraisal. That's what he said.

HECHT: Well the quote I'm referring to is where he says it's further ordered, adjudged and decreed that the appraisal provision when considered as an arbitration provision is unenforceable. So it wouldn't make any difference if it was fraudulently used or if the insurance company was handing out money. In the trial judge's view it's still unenforceable.

GODFREY: Which I agree with that it is viewed as an arbitration provision unenforceable. And it should be viewed as an arbitration provision, although they do want to have it both ways because obviously the uniform act by its express terms says you can submit anything you want to basically. You can have a trial. You can have whatever you want. Unless as otherwise provided, and then it goes on to say everything that can happen in the arbitration.

OWEN: If the effect of what we would decide today is that in every standard automobile policy these clauses are unenforceable regardless of whether there's been a claim, bad faith or not on the insurance company's part. They are just flat unenforceable.

GODFREY: Not necessarily. Because when this case goes back to the TC, and I'm not saying that it couldn't go back and say we direct you to consider whether or not...

OWEN: The TC has said it's unenforceable.

GODFREY: Let's say that you say to the TC, we disagree that this is unenforceable.

OWEN: But I'm saying based on what the TC has held, and that's what you're asking us to agree with that these are an arbitration clause and that they are void or unenforceable, period. So they would no longer be enforceable in any auto policy in Texas?

GODFREY: They wouldn't be if - that's correct. As a matter of the law of arbitration and what it takes to make one of them enforceable under the arbitration act, they would not be enforceable for not complying with the arbitration act.

HANKINSON: The piece that you all are claiming as part of the fraudulent practice by the insurance company is what happens when the claim is made.

GODFREY: Correct.

HANKINSON: You're not claiming that this appraisal clause when it is invoked if there is a dispute later on is in and of itself a fraudulent practice?

GODFREY: That's correct.

HANKINSON: It's the front-end piece that you are complaining about?

GODFREY: We're not saying that as described in the policy that this procedure is fraudulent or would be fraudulent. What we're saying is that before we ever get to that, and of course we never did get to it...

OWEN: My problem is, you've agreed in the contract that what's going to be a reasonable good faith offer by the insurance company ultimately will be decided by this umpire if it comes to that. And so why aren't you bound by the umpire's decision? If the umpire says yes, your offer was exactly cash value, why aren't you bound by that?

GODFREY: If we can't prove - the breach of contract case - we don't know what the policy...

OWEN: There may be ill motive. There may be ill will. But you actually got market value for your car.

GODFREY: That would be evidence upon which the TC could certainly enter a ruling.

OWEN: What are your damages?

GODFREY: If we prove our enhanced damages case, our fraud case, our DTPA case, our unconscionability case, all of which we've pleaded, if we prove those matters whether or not someone should order an appraisal for example, for Ms. Washington and Ms. Fernandez, where the insurance company has already purported to pay them what the insurance company fraudulently told them was the value of the car doesn't have anything to do with whether or not in a good faith determination under an appraisal proceeding like this you could come out with a number that's the same thing as their original offer.

ENOCH: If there was a decision intentionally to underbid the value of the car up front, then it would seem to me the probabilities are that the appraisal would come at a number of different than what the insurance company offered - 20% higher, 25% higher. It seems to me that would happen and that would - the position you take it almost dictate that that would happen through the umpire. It would be because the umpire would be deciding market value as opposed to an 85% of market value decision. So it would be more. Do you agree though with the insurance company that the appraisal does have a legal effect, the result of that appraisal has a legal effect affecting the rights of the parties under the contract that the parties to the contract lose if the TC simply relegates the appraisal to just a discovery matter as opposed to a contract matter?

GODFREY: I don't agree that the appraisal proceeding properly construed should be binding on the parties or the TC. Because I believe it's an unenforceable arbitration provision. But if the court decided that it is an enforceable provision, and instructed the TC that this appraisal shall have the effect of determining amount of loss for vehicles subject to an appraisal, then obviously the argument of the insurance company, and they are already making it is, and then Justice Hankinson is right, there is no other issue with respect to the breach of contract claim itself other than the amount of loss. There is no reservation of rights. There's no denial of coverage. They don't even initiate this process until they've determined it's a covered auto. So it does dispose. It purports to dispose of the issue on the contract between the insureds and the insurer.

But our position is, this whole process is tainted from the get go. And we have been injured at the point where they give us this offer. Bear in mind, this money has been accepted by two of these three plaintiffs that are in front of the court. We're talking about ordering an appraisal of an automobile that the insurance company has already purported to pay under the terms of the policy, the amount of loss on: pay the lienholder.

O'NEILL: Let me make sure I understand your damage construct, because I think that's what we're struggling with here. If it's someone who's already accepted that amount, your damages are going to be the difference between what you believe the insurance company ordered the appraisal to be, and what she took. And in that instance, the appraisal provision is irrelevant to your damage construct. If someone refuses that amount, then how do you get to damages if they refused the amount the insurance company offers? How are you going to determine what they should have offered?

GODFREY: In our submission, you determine it the way you determine it in other case. But assuming we're going to tell the trial judge that he needs to follow this appraisal procedure at some point in the litigation, and I will come back to that in a minute, but certainly not now.

O'NEILL: Well that was my original question was if we were to hold that this is not an arbitration clause, then does it become a discovery matter for the TC? Isn't that something that you would then want as relevant to your claim?

GODFREY: Yes. This umpire has gotten handed to him or her in the first instance under

our submission a fraudulent piece of information by the insurance company. A deliberate misstatement of what their own calculations shows the amount of loss to be.

HANKINSON: Does that answer my question I'm about to ask you, which is why not do the appraisals now? Why are you asking the TC not to order appraisals at this point in time?

GODFREY: This case is not about a bunch of people that are trying to get an appraisal. These people have taken the money. 99.9%, that's exactly what the procedure is designed to accomplish, is that you take the money. We happen to have one plaintiff here in the TC who has not received the money. The others have. Their damages - we can either show the amount they got differs from the company's own calculation that it made or should have made of market value or we can't. And if we can show that - we have what the company has paid pursuant to the terms of the terms of the policy in the record. They paid it. There is no reason to go have an appraisal to see whether or not the company, which I promise the court claim there is no issue, there is no dispute, there will never be an appraisal. Wwe've already paid and settled it.

HECHT: So what standing do they have to complain about the validity, the enforceability of the appraisal process? That's the troublesome thing.

GODFREY: The people who have received the money. If the carrier is insisting now that they go through an appraisal to show that what the company paid them was correct, they are having to undertake the time, the trouble, the expense and everything else associated with that. If on the other hand, in discovery the proof is what I've suggested to the court we believe it will be, we don't need an appraisal. We have the breach. We have damages. We have the enhanced damages. And you never need to have an appraisal.

OWEN: Then it's your expert verses the company, and there isn't an independent umpire which is what the parties contracted for?

GODFREY: No. In my opinion it's going to be the check they wrote verses the report...

OWEN: But don't you also have to have someone to come in and say the check they wrote is less than the market value?

GODFREY: Less than what they say what their own evaluation says the market value is.

OWEN: But what if everybody in the world agrees that for whatever reason, even though they intended to undervalue but they actually paid you cash value, market value?

GODFREY: We can think up situations in which as a result of discovery in the TC it ultimately was shown that not withstanding what they intended to do, they messed up. And actually...

OWEN: So even though you have no actual damages, they just pay damages for the ill will basically?

GODFREY: Well we paid for that. We've lost our other benefits under the policy, and we have paid to go through that process when the fact is we believe they know and they deliberately underpaid us in the first instance.

HANKINSON: As I understand from your pleadings, part of that is shown by the business practices in the way they actually arrived at the figure. Is that right?

GODFREY: Yes, that's right.

OWEN: How did the scam the umpire? I mean if the umpire agrees with them, the third party neutral, how has the scam been pulled off?

HECHT: If the answer is in the record, or what's your claim?

GODFREY: The umpire is not of course in a position to determine anything with respect to their secret practices.

OWEN: But the umpire is authorized to make an independent judgment in market value, and if they say that the insurance company paid you market value, how is a scam been promulgated?

GODFREY: It will be surprising in the extreme if not knowing what these people did in the first instance, the umpire would not be tainted with and seriously influenced by the number that they give the umpire, which they know, but he won't know is different from their own real calculation of what the amount of loss is.

OWEN: You're saying you just can't find an umpire that can make an independent determination?

GODFREY: There are a whole lot of fact questions involved with that issue that I think belong in the TC. I mean what do you do if we make our discovery, we find that indeed they were deliberately underbidding what do you do then with the appraisal process? Do you tell the umpire that? Do you not tell the umpire that? I think those are issues that are in the province of the TC.

O'NEILL: My question was going to be, I feel like I'm sitting on the TC bench here talking about a discovery dispute. Back to my original question. If we disagree that this acts as an arbitration provision, what power do we have to determine what's relevant to damages or not? I mean you decide what that is and the TC rules, and you all take your chances as to whether we ultimately determine that that was correct. But it's not mandamusable is it at that point?

GODFREY: No. I question why we're here also. I don't think that it's a proper matter of mandamus. I think these are discovery questions. These are going to be disputed fact issues about the relationship between the 99.9% of the people who accepted what they were told was vehicle valuation report and a whole rest of that.

O'NEILL: And I guess my point is, if you argue that it's not relevant to your damage model and the TC agrees with you it's not relevant to your damage model, and you take that chance and it comes up to us and we hold that it was relevant, then...

GODFREY: Then I'm out of luck.

HANKINSON: What does our opinion look like in this case if we disagree with Judge Mehaffey and determine that this is not an unenforceable arbitration clause?

GODFREY: Hopefully it looks like this: We don't agree that this appraisal provision properly should be construed as an arbitration agreement. It only decides part of the controversy, and it only decides the amount of loss and not the other issues with respect to the breach of contract provision. All of which I disagree with. And so, please take into account that the appraisal provision is enforceable, that the parties should have agreed to submit the issue of amount of loss to this appraisal proceeding, and please take further steps consistent with that.

I don't think it should say nor do I think there is any basis for such an order to say you can't proceed with discovery on the issues in the case until and unless these people where the insurance company has already paid them, for example, now go through an appraisal proceeding.

BAKER: Do I understand that argument then, you view the order as having two parts: one, the arbitration verses appraisal; and secondly, the abatement?

GODFREY: Yes.

BAKER: So if I understood what you just said then, if we disagree that it's not an arbitration thing, then the TC still hasn't abused its discretion in not abating the case?

GODFREY: Correct.

O'NEILL: In other words, our only mandamus jurisdiction is to review the arbitrability piece, and the rest of it is not subject to mandamus?

GODFREY: Yes.

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REBUTTAL

BROWN: I think there are three issues that we really have been struggling with here today that all relate to each other. The issue about whether there are damages other than the amount of the loss, the issue about appraisal verses arbitration, and the issue of adequate remedy at law. They are really bound up together. And I think the result is going to be one that's going to require the court to grant the relief that we seek.

Now the issue about the amount of the loss as we have indicated, there really are no damages beyond the amount of the loss if in fact the umpire comes up with the same decision that we have.

O'NEILL: Except for the garbage in/garbage out theory. I mean if all they have is a fundamentally defective intentionally low offer from the insurance company, that's going to affect the umpire's decision isn't it?

BROWN: Not at all. Because an appraisal determines - it's an independent examination by experts as far as the value of the car. What we've got, and I think this really gets to the point that Justice Hankinson has been questioning about, this front-end piece is the problem. Well what we've got is really no different than the situation of where an insured says, insurance company I don't like the fact that your insurance adjuster did not investigate a, b, c and d. That's fraudulent. That's bad. It's a system with which I disagree. But at the end of the day the question is, what's the amount of the loss? The amount of the loss is either $1,000 or it's $500, or whatever it is determined by this independent body. And if it's the amount that the insurance company said it was, then this is a Seinfield(?) case. A case about nothing.

O'NEILL: Except for those who did not accept a payment. There were some who did not demand an appraisal, and they took the money, and then it comes out that it was fixed, then the appraisals would be irrelevant to that determination?

BROWN: That's not correct. Because there is a dispute about the amount of the loss. The fact that they took the money does not mean that there is no dispute about the amount of the loss. The petition specifically alleges that there is a dispute about the amount of the loss because they claim that the amount has been undervalued consistently, and they've not received actual cash value. And whenever there is a dispute about the amount of the loss, that's a subject for appraisal.

HANKINSON: Appraisal is a subjective process, correct?

BROWN: Yes. There are objective factors one can look at at the end of the day you've got individual humans making a subjective determination as to the amount of the loss.

HANKINSON: Which is why the policy had to account for the fact that the two appraisers might not agree, and so that's why you have to have an umpire. Because ultimately that final determination is subjective. As I understand the pleadings in this case that's not what they are complaining about. They are complaining about the business practices of the insurance companies.

For example, CCC, the company that's used to do these appraisals, have been instructed by the carriers to go out and when they determine value, to talk to dealers and find out the lowest amount that anyone was paying for a car as opposed to any other way. And that there were various factors that were part of the test that always put everything as the low ball end, so that it's the objective piece, not the ultimate subjective piece that's part of the process that is being challenged here. Which is why the question I think is being asked here about the front-end piece.

BROWN: But there is no difference between that and the situation where the insurance company says, we are going to rely on the red book, which is one of the books that's used for determining value that in itself is a subjective determination.

HANKINSON: But this goes to the merits of the case in terms of what they are complaining about, about whether or not whatever it is that the insurance companies went to involved a concerted effort on the part of the companies to make sure that they were low-balling in terms of the amount that they were paying for loss contrary to what they've represented. So how then if that's the claim does that tie into the subjective determination in the amount of loss, which is the connection I think on relevancy that you all are trying to make?

BROWN: Where it ties in is really merely from the point that one can allege extra contractual claims. One can allege a fraudulent scheme, but there is a contractual right that must be complied with in this case, and that's the appraisal provision. How it comes out may affect the case in different ways. And we're not here to determine that. We're simply here to enforce a provision that has not been enforced and it will not ever be enforced under the TC's determination.

Now that leads to the question, are we talking about an appraisal or an arbitration? Reality is courts have been confused about this issue for years. And it's not because of any one particular court. The US SC in fact interpreted the issue 75 years ago on the Glidden case. And it was really an appraisal provision. They called it an arbitration. The fact is, both have very similar characteristics. Both accomplish a number of things in common. There are clear distinctions. This court has dealt with it in the Scottish Union case, Standard Fire v. _____ dealt with it. But the reality is on this arbitration in response to your question, one that Justice Hankinson has been dealing with, is that when the 5th circuit in Hartford v. Teachworth analyzed the issue and said we're not going to _____ the FAA, they did so because they determined that Texas law has held that appraisals are different from arbitration, and they are not the same thing. If that's the case, clearly the mandamus has to be issued to correct the order. If it's not, mandamus still has to be issued, because under the FAA we're entitled to the arbitration in the case being stayed.

So if this court is going to say, we now determine under Texas substantive law despite 100 years of courts saying otherwise that this is really an arbitration, then we moved in the TC and we believe we are entitled to relief under the FAA because there is interstate commerce, because the front-end piece that Justice Hankinson is talking about, CCC in the TC's record, is out of Chicago, IL, and did evaluations on a nationwide basis. And that's in the record. That's interstate commerce. And that supports a finding under the FAA. If this court is going to change Texas law,

because CCC makes that connection.