No. 16-0347

In the Supreme Court of Texas

RICHARDSON EAST BAPTIST CHURCH
Petitioner

v.

PHILADEPHIA INDEMNITY INSURANCE COMPANY and JAMES GREENHAW
Respondents

On Petition for Review from the fifth
Court of Appeals, Dallas, Texas
No. 05-14-01491-CV

BRIEF OF TEXAS OFFICE OF PUBLIC INSURANCE COUNSEL AS *AMICUS CURAIE* IN SUPPORT OF REVIEW

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ISSUE PRESENTED

Is appraisal a process to determine covered damages, not liability, or is it an arbitration clause, that when invoked, forecloses all causes of action if the award is timely paid?

To the Honorable Supreme Court of Texas:

INTEREST OF *AMICUS CURAIE*

Under Texas law, the Office of Public Insurance Counsel ("OPIC") represents the interests of Texas insurance consumers and advocates positions determined by the public counsel to be most advantageous to a substantial number of insurance consumers.[1] OPIC has a strong interest in ensuring that the appraisal process in Texas is fair to consumers and accurately reflects the common law that has developed on this subject. No party has paid a fee in connection with this brief.

STATEMENT OF FACTS

For purposes of this brief, OPIC incorporates by reference the Statement of Facts provided in Petitioner Richardson East Baptist Church's Brief on the Merits filed May 9, 2017.

SUMMARY OF ARGUMENT

OPIC agrees with the Petitioner that the guidance of the Court is needed in this important matter to clarify how appraisal should work in Texas. The process that has recently been described by Texas state and federal courts in *Hurst* and

[1] Tex. Ins. Code §§ 501.002, 501.151, & 501.153(3).

Losciale is grossly unfair to insurance consumers.[2] OPIC does not believe these cases are consistent with Texas law and we are hopeful that their holdings are not what was intended by this Court. If they are allowed to stand, then we will continue to see an increase in cases where insurers use appraisal as a shield to protect themselves when they know they have violated consumer protection statutes and, even worse, we will see systematic business practices where insurers knowingly violate consumer protection statutes and simply invoke appraisal when it looks like they may be held responsible. We ask that the Court clarify its holdings in *State Farm Lloyds v. Johnson* and *In Re Universal Underwriters* and explain that *Hurst* and *Losciale* are misguided because the appraisal process only addresses covered damages and does not foreclose the pursuit of extracontractual damages when there is evidence to support them.

ARGUMENT

This case provides an important opportunity for this Court to clarify the role appraisal plays in resolving insurance disputes in Texas in a post-*Menchaca* world. This brief is limited to supporting the Petitioner Richardson East's arguments that appraisal clauses and awards should not limit an insured's ability to recover for any common law or statutory damages that an insured can prove at trial.

[2] *See National Security Fire & Casualty Co. v. Hurst*, No. 14-15-00714-CV, 2017 WL 2258243 (Tex.App.—Houston [14th Dist.] May 23, 2017, no pet. History); *Losciale v. State Farm Lloyds*, No. 4-17-0016, 2017 WL 3008642 (S.D. Tex. July 14, 2017).

The *Menchaca* opinion addressed Texas law related to insurance claims and clarified the "entitled to benefits" rule.[3] However, *Menchaca* did not address appraisal.[4]

Guidance from this Court is necessary to clarify its holdings in *State Farm Lloyds v. Johnson* and *In Re Universal Underwriters* to address the scope of appraisal clauses and whether appraisal is a process to determine covered damages, not liability, or is it an arbitration clause that, when invoked, forecloses all causes of action if the award is timely paid.

State Farm Lloyds v. Johnson

An insurance policy is a contract of adhesion and an appraisal clause appears in almost every homeowners, automobile, and property insurance policy in Texas. The appraisal process allows the parties to use a system outside of the judicial process to resolve their disagreement regarding the "amount of loss."[5] This court, in *Johnson*, cited the 1888 case of *Scottish Union & National Insurance Co. v. Clancy* to rule that appraisal clauses are not arbitration clauses and that the scope of appraisal is damages, not liability.[6] For support, *Johnson* cited the dissenting opinion in this Court's 2002 *In Re Allstate County Mutual Ins. Co.* opinion, which states:

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[3] *See USAA Texas Lloyds Co. v. Menchaca,* No. 14-0721, 2017 WL 1311752 (Tex. April 7, 2017).
[4] *Id.*
[5] *State Farm Lloyds v. Johnson,* 290 S.W.3d 886 (Tex. 2009).
[6] *Id.*

> First, long ago, this Court rejected the position that an appraisal's outcome establishes liability when we held that, unlike an arbitration provision, an appraisal provision "only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts."[7]

In Re Universal Underwriters of Texas Ins. Co.

Two years after *Johnson*, this Court, in *In Re Universal Underwriters,* cited portions of *In Re Allstate* to justify mandamus relief. In *In Re Universal Underwriters*, the Court stated:

> We have held that mandamus relief is appropriate to enforce an appraisal clause because denying the appraisal would vitiate the insurer's right to defend its breach of contract claim. *In Re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002). There, as here, "the parties agreed in the contracts' appraisal clause to the method by which to determine whether a breach has occurred," and, if the appraisal determined that the full value was what the insurer offered, there would be no breach of contract. *Id.* The same is true here. We conditionally grant the writ of mandamus and direct the trial court to grant Universal's motion to compel appraisal. *See id.* (holding that refusal to order appraisal would "den[y] the development of proof going to the heart of a party's case and cannot be remedied by appeal").[8]

This paragraph seems to say that if an appraisal occurs and the award is the same as the insurer's initial offer, then there is no breach of contract. However, it

[7] *Id.* at n. 19.
[8] *In re Universal Underwriters of Texas Insurance Co.*, 345 S.W.3d 404, 412-413 (Tex. 2011).

is silent as to what should happen if there is an appraisal award and it is larger than the insurer's initial offer? Also, this paragraph strongly implies that the failure to conduct an appraisal impairs the ability of the parties to develop proof for trial, but how can there be a trial if the appraisal award is the final decision?

The Court could use this case to provide some clarification on this issue.

The Way Forward

Pursuant to *Johnson's* finding that appraisal clauses are not arbitration clauses and the scope of appraisal is damages, not liability, there is no reason an appraisal award should limit an insurer's exposure to extracontractual damages if they can be proved at trial. Appaisal should set the monetary value of the damages alleged to be covered by the insurance policy. Whether the insurer breached the contract or is liable for extracontractual damages should be determined separately by the court.

PRAYER

The Court should grant the petition for review because this case provides the Court the opportunity to clarify the common law regarding appraisal in Texas. We ask that the Court clarify that *Hurst* and *Losciale* are misguided and the appraisal process does not foreclose the pursuit of extracontractual damages when there is evidence to support them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 28, 2017, this Amicus Brief was served on the following attorneys of record via electronic filing with the Clerk of the Court by filing it through www.efileTexas.gov, which will send notification of such filing to all counsel of record, including the following:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Texas Rule of Appellate Procedure 9.4(i)(2)(C) because this brief contains 1134 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1). The word count was calculated using Microsoft Word 2010, the word processing system used to prepare this brief.

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August 28, 2017