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## A New Formula for Waiver of Appraisal Clauses: Conduct + Prejudice

By **Chris Thompson**

On May 6, 2011, the Texas Supreme Court clarified an important issue for property insurers in Texas: **appraisal clauses are not waived merely by the passage of time**. Instead, the Court's decision in *In re Universal Underwriters of Texas Insurance Company* bolsters the already strong preference for appraisal clauses by holding such provisions are enforceable absent (1) conduct indicating waiver; **and** (2) prejudice to the other party. The ruling not only fills a void in Texas jurisprudence, it deals a nearly fatal blow to appraisal waiver arguments. Moreover, because an appraisal typically occurs early in the life of a disputed claim (often before substantial discovery and motion practice), the *Universal Underwriters* case will be a tool that both insurers and policyholders can use to quickly determine the amount of loss at issue through appraisal, thereby potentially reducing their litigation expenses.

### A Familiar Background

The facts presented in *Universal Underwriters* followed a not-so-uncommon pattern for property damage claims. The insurer, Universal, inspected and paid a claim for hail damage to the insured's buildings. The insured, Grubbs, contended that its damage was more extensive than Universal found and requested a reinspection. Universal reinspected the loss and issued a supplemental payment. Universal also invited Grubbs' roof expert to discuss Universal's reinspection findings. Grubbs made no further demands or inquiries, however, until it filed suit four months later for breach of contract, bad faith, and the usual statutory claims (alleged DTPA and Insurance Code violations).

Universal invoked the appraisal clause in response to the suit and moved to compel the appraisal, which the trial court denied. Universal petitioned the Supreme Court for a writ of mandamus, seeking an order requiring the trial court to compel appraisal.

### Disagreement and Invitation to Discuss a Claim is Not "Conduct Indicating Waiver"

The Supreme Court first addressed Grubbs' argument that Universal "waived the right to invoke appraisal by waiting eight months, from the date that Grubbs asked for a reinspection of its property to the date that Grubbs sued, before demanding appraisal." The Court rejected the premise that mere passage of time is enough to establish waiver. Rather, a party's conduct must indicate an intent to waive appraisal.

While the Court recognized that unreasonable delay after "the point of impasse" can support a waiver finding, the Court held that neither the "delay" in requesting appraisal, nor Universal's communications with Grubbs, supported waiver. Here, the parties were not at an "impasse" once Universal sent its supplemental payment after Universal's reinspection. In fact, Universal's letter expressly invited further discussion and expressly reserved

Universal's rights under the policy. Not only did Grubbs fail to notify Universal that it refused to discuss the claim further, the Court went on to hold that "[w]hether Universal was aware of Grubbs' disagreement as to the estimate of damages is also irrelevant, since mere disagreement does not in itself signal an unwillingness to negotiate further."

The Court also rejected Grubbs' argument that Universal "effectively acknowledged that the parties were at an impasse" by advising Grubbs about the applicable limitations period for filing suit in Universal's letter accompanying its supplemental payment. Instead, the Court refused to "infer waiver where neither explicit language nor conduct indicates that such was the party's intent." Therefore, because there was not a "mutual understanding that neither will negotiate further" until suit was filed, Universal's demand for appraisal one month later was not an unreasonable delay and Universal did not waive its appraisal right.

### ***Prejudice Is Essential to a Waiver of Appraisal Argument***

The Supreme Court's decision in *Universal Underwriters* adds yet another requirement for a party claiming waiver of appraisal: prejudice. Acknowledging that Texas jurisprudence had not "explicitly require[d] prejudice" as a requirement to establish waiver of an appraisal clause, the Supreme Court turned to decisions addressing other contractual provisions (such as forum selection and arbitration clauses) and from other jurisdictions that support the conclusion that prejudice is a requirement for waiver. The Court also explained that "waiver is an equitable doctrine, and we have frequently required a showing of prejudice before concluding that rights are waived." The Supreme Court, therefore, eliminated any uncertainty cause by the "paucity of cases" on this issue by expressly and explicitly making prejudice a requisite for waiver of appraisal.

Finally, in what may be the ultimate death knell for waiver of appraisal arguments, the Supreme Court noted "it is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal" and that a party "can avoid prejudice by demanding appraisal itself." As a result, any party wishing to avoid appraisal cannot simply wait for the other side to request appraisal, endure some prejudice or harm that could be avoided by invoking the appraisal clause itself, and then later claim waiver. Such gamesmanship goes against the very objective of the appraisal clause as recognized by the Supreme Court: "a more efficient and cost-effective alternative to litigation."

If you have any questions regarding this e-Alert, please contact **Chris Thompson** at 214.953.6032 or [cthompson@jw.com](mailto:cthompson@jw.com).

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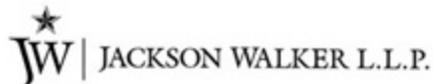
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