

## The End of a "Forever War"?: Texas Supreme Court Answers Certified Question Concerning Appraisal



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In *Rodriguez v. Safeco Ins. Co. of Ind.*<sup>1</sup> the Texas Supreme Court addressed a key issue concerning appraisal that was dividing lower Texas state courts and Texas federal district courts. The United States Court of Appeal for the Fifth Circuit asked the Texas Supreme Court a certified question:

In an action under Chapter 542A of the Texas Prompt Payment of Claims Act (TPPCA), does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?"

The Texas Supreme Court answered: Yes. The answer is a major victory for insurers and is likely to lead to further such payments of appraisal awards and interest.

### Background

#### Procedural History of Rodriguez

The procedural history of *Rodriguez* is similar to many Texas first-party weather-related claims. It began life as a homeowner's insurance claim for alleged tornado damage.

- The insurer adjusted the claim and paid \$27,449.88 which the policyholder accepted.
- Nevertheless, the policyholder retained counsel and demanded an additional \$29,500.00 accompanied by a threat to sue.
- The policyholder evidently disagreed with the insurer's response to the threats and filed suit, alleging breach of contract and violations of the Texas Insurance Code.
- It was undisputed that Chapter 542A applied to the claim. The insurer removed the case to federal court, the parties mediated unsuccessfully, then the insurer invoked appraisal.
- The appraisers issued an appraisal award. It was undisputed that the insurer timely paid the appraised amount due after application of prior payments: \$32,447.73 on April 12, 2022.
- The same day, the insurer also paid \$9,458.40 which it claimed would cover "any conceivable interest Rodriguez could allege to be owed under the [TPPCA] on the appraisal award payment."<sup>2</sup>
- The insurer then moved for summary judgment, asserting that its timely payment of the appraisal award plus interest under the TPPCA should put an end to the litigation.

In particular, the insurer relied on Texas Insurance Code Chapter 542A.007 which provides:

- Except as otherwise provided by this section, the amount of attorney's fees that may be awarded to a claimant in an action to which this chapter applies is the lesser of:
  - the amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action;
  - the amount of attorney's fees that may be awarded to the claimant under other applicable law; or
  - the amount calculated by:
    - dividing the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy for damage to or loss of covered property (*i.e.*, the numerator) by the amount alleged to be owed on the claim for that damage or loss in a notice given under this chapter (*i.e.*, the denominator); and
    - multiplying the amount calculated under Paragraph (A) by the total amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence

and determined by the trier of fact to have been incurred by the claimant in bringing the action.

### **The Insurer's Motion for Summary Judgment**

The insurer argued in its motion for summary judgment that its payment of the appraised amount plus any possible interest under the TPPCA fully discharged its obligations to the policyholder. Therefore, the numerator in Chapter 542A's attorney's fees equation above was zero, and the resulting award of attorney's fees was \$0.00. The district court agreed.<sup>3</sup>

### **The Fifth Circuit Deferred to the Texas Supreme Court for Guidance**

The policyholder appealed to the Fifth Circuit Court of Appeals.<sup>4</sup> The Fifth Circuit noted a split between Texas federal district courts, which were divided over whether an insurer's timely payment of the appraisal award and TPPCA interest extinguished a policyholder's right to recover attorney's fees. The Fifth Circuit determined that conditions were present that justified certifying a question to the Texas Supreme Court, which it did on July 12, 2023.<sup>5</sup>

### **The Texas Supreme Court's Analysis in *Rodriguez***

The Texas Supreme Court reviewed the procedural posture of the case as well as Texas Insurance Code Chapters 542 and 542A. Chapter 542 imposes deadlines for the payment of certain insurance claims. Failure to meet these deadlines results in statutory liability for interest and an award of "reasonable and necessary attorney's fees" for the claimant. Meanwhile, Chapter 542A applies to claims that arise "from damage or loss to covered property caused, wholly or partly, by forces of nature, including an earthquake or earth tremor, a wildfire, a flood, a tornado, lightning, a hurricane, hail, wind, a snowstorm, or a rainstorm." The Texas Supreme Court noted Chapter 542A changes the rules applicable to litigation of certain statutory and common law claims against insurers, including a number of provisions meant to address litigation abuse in the form of excessive pre-suit demands and gamesmanship to defeat diversity.

### **Math and the Law Meet**

The Court next confronted the issue raised by the insurer's payment of the Chapter 542A interest damages. As mentioned, Chapter 542A limits the recovery of attorney's fees. The Texas Supreme Court was emphatic in how it described its task in analyzing Chapter 542A in relation to the certified question, stating: "We need not and should not seek the answer from any source other than the statute's plain language. The Legislature's 'voted-on language is what constitutes the law, and when a statute's words are unambiguous and yield but one interpretation, 'the judge's inquiry is at an end.'" The Texas Supreme Court continued:

"When there is no "amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy," the numerator of the fraction described by subsection (a)(3)(A) does not exist—which means the fraction's value is zero (or non-existent). Multiplying this zero-value by another number, as required in the calculation's second step, can never yield a non-zero amount of attorney's fees. As a result, in this case and others like it, there will never be a non-zero amount of permissible attorney's fees under the formula described in section 542A.007(a)(3)."<sup>6</sup>

### **After Interpreting the Plain Language of the Statute, the Texas Supreme Court Considered Context**

The Texas Supreme Court confirmed its analysis by reading Chapter 542A.007(a)(3) in conjunction with Chapter 542A.007(c). The latter provision states that a court may not award attorney's fees to the claimant if the amount calculated under subsection (a)(3)(A) is less than 0.2. The equation with zero in the numerator – as in the case with *Rodriguez* – results in a "zero-value fraction" that "operates as an affirmative bar on any award of attorney's fees."

Further, the Texas Supreme Court referred to its prior analysis in *Ortiz v. State Farm Lloyds*.<sup>7</sup> In *Ortiz*, the Texas Supreme Court reinforced precedent that an appraisal award is binding on all

parties and further announced that, by the insurer paying the amount of the loss as stated in the appraisal award, the insurer complied with its obligations under the policy. In *Rodriguez*, the Texas Supreme Court reasoned that there is no further amount that the policyholder can recover as a judgment for a claim under the insurance policy because the insurer complied with its obligations under the policy by paying the appraisal award plus interest under the TPPCA.

Similarly, the Texas Supreme Court referred to its prior analysis in *Barbara Technologies v. State Farm Lloyds*.<sup>8</sup> The Texas Supreme Court explained that, while *Barbara Technologies* left open the possibility that a policyholder could pursue a claim under Chapter 542, having a claim is different than having a judgment on the claim for property damage. Because there can never be a judgment on the property damage claim as in *Rodriguez*, the Texas Supreme Court reasoned that attorney's fees are unavailable under the plain language of the statute that fixes the award of attorney's fees on a non-zero value judgment.

### No Legislating from the Bench

The Texas Supreme Court then turned to the parties' and several amici briefs' public policy arguments and arguments regarding the Texas Legislature's intent in enacting Chapter 542A. In general, the arguments concerned delay tactics by insurers, insurers inflicting appraisal costs on policyholders, and insurers paying the appraisal award and TPPCA interest at the last minute as a "get out of jail free" card. The Texas Supreme Court, in adopting the insurer's argument, refused to speculate:

"[W]e should instead stick with the bedrock principle that the Legislature intends the courts to follow its instructions as written. In this instance, the Legislature has required the use of a mathematical formula that yields zero attorney's fees in cases like *Rodriguez*'s. Whatever else judges or litigants may believe the Legislature intended when it enacted Chapter 542A, we know with certainty that the Legislature instructed courts to use the mathematical formula described in section 542A.007(a)(3) when determining the amount of attorney's fees available to plaintiffs like *Rodriguez*. Whether we think the Legislature envisioned or anticipated the practical consequences of its attorney's-fees formula is beside the point. Much could be said about the oft-debated concept of "legislative intent," but this point is certain: The Legislature intends courts to follow its instructions. Few legislative instructions are as inescapable as a math formula. If the Legislature does not like the consequences of the instructions it has given the courts, it obviously has every right to change them."

Finally, the Texas Supreme Court noted that the Texas Legislature has the power to add or restrict the recovery of attorney's fees.

### Future Handling

*Rodriguez* is an important opinion that has been intently awaited by both sides of the bar. Given the creativity of some of the policyholder arguments in *Rodriguez*, policyholder advocates will doubtless search for other arguments after *Rodriguez*. Cozen O'Connor has already seen some briefs to courts attempting to distinguish *Rodriguez* on the basis of procedural posture, but this seems like a weak argument because the Texas Supreme Court fixed its analysis on whether there was a judgment, rather than the overall procedural posture.

It remains to be seen what the Fifth Circuit will do with the answer to the certified question that it posed. It seems unlikely that the Fifth Circuit would spend much time on the plain language and math holdings by the Texas Supreme Court, but the Fifth Circuit may provide its own analysis on the arguments raised by the policyholder.

Finally, are we returning to the pre-*Ortiz* and pre-*Barbara Technologies* era in which there was finality in the appraisal process? It wasn't that long ago that timely payment of an appraisal award undoubtedly disposed of all possible claims by a policyholder.<sup>9</sup>

<sup>1</sup> 2024 Tex. LEXIS 93 (Tex. Feb. 2, 2024)

<sup>2</sup> *Rodriguez v. Safeco Ins. Co. of Ind.*, 74 F.4th 352, 353 (5th Cir. 2023). The insurer's motion for summary judgment describes the calculation of such payment as follows: "Safeco denies that it owed interest under any legal theory, but issued interest dating back to the initial Property inspection on June 1, 2019 for the sole purpose of resolving a disputed claim and this litigation." The motion is on file with the undersigned and available to the public on PACER. The period between June 1, 2019 and April 12, 2022 is 1,046 days. The dates and payments indicate that the insurer paid an interest rate of 10.17% on the appraisal award. It is unclear if the interest payment was intended to include or did include prejudgment interest, but the percent interest rate indicates that it included only traditional interest that would be owed under Texas Insurance Code Chapter 542.

<sup>3</sup> *Rodriguez v. Safeco Ins. Co. of Ind.*, 2022 U.S. Dist. LEXIS 186991, \*2 (N.D. Tex. 2022) (emphasis in original).

<sup>4</sup> *Rodriguez v. Safeco Ins. Co. of Ind.*, 73 F.4th 352 (5th Cir. 2023).

<sup>5</sup> *Id.* at 356. The Fifth Circuit affirmed summary judgment in favor of the insurer regarding the policyholder's claims under Texas Insurance Code Chapter 541. *Id.*

<sup>6</sup> *Rodriguez*, 2024 Tex. LEXIS at \*13 (Emphasis added. Internal citation omitted). And, the Court disposed of any "math-stickler[s]" assertion that the calculation under (a)(3) is non-existent—as opposed to zero, holding that the statute is concerned with calculating amounts of money, not with number theory. *Id.* at \*8, fn. 5.

<sup>7</sup> *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019).

<sup>8</sup> *Barbara Techs. v. State Farm Lloyds*, 589 S.W.3d 806, 812 (Tex. 2019).

<sup>9</sup> See, e.g., *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 849 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

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