

## Texas Supreme Court Identifies Claims that Survive the Payment of an Insurance Appraisal Award

On June 28, 2019, a divided Supreme Court of Texas issued a pair of important opinions addressing how an insurer's timely payment of an appraisal award impacts the viability of a policyholder's contractual and extracontractual claims post-appraisal. The decisions are *Barbara Technologies Corp. v. State Farm Lloyds*, — S.W.3d —, No. 17-0640, 2019 WL 2710089 (Tex. June 28, 2019) and *Ortiz v. State Farm Lloyds*, — S.W.3d —, No. 17-1048, 2019 WL 2710032 (Tex. June 28, 2019). Each decision is addressed below.

### *Barbara Technologies*

The court in *Barbara Technologies* held that the timely payment of an appraisal award neither proves nor disproves liability under the Texas Prompt Payment of Claims Act (TPPCA). The opinion is significant because, as the dissenting opinion notes, it upends years of decisions from Texas intermediate appellate courts, U.S. District Courts, and the Fifth Circuit — which generally held that the timely payment of an appraisal award barred all claims, including TPPCA claims. The decision is also noteworthy because TPPCA claims allow a policyholder to recover penalty interest and attorney's fees in addition to the actual claim amount.

### TPPCA Claims – General Rules

Before we jump into the court's opinion, it is important to understand the contours of the TPPCA. As its name suggests, the TPPCA is intended to facilitate the prompt payment of Texas insurance claims. It does so by requiring insurers to meet pre-determined deadlines when adjusting and making claim decisions — or else face civil liability.

Generally, the TPPCA is triggered once a policyholder provides written notice that “reasonably apprises the insurer of the facts relating to [an insurance] claim.” See TEX. INS. CODE §§ 542.051, 542.055. The insurer has 15 days after written notice is given to “(1) acknowledge receipt of the claim; (2) commence any investigation of the claim; and (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.” *Id.* § 542.055(a). The insurer is then allowed to request additional claim information during its investigation to secure a final proof of loss. *Id.* § 542.055(b).

After the insurer receives all requested claim information, it then has 15 business days to accept or reject the insurance claim in writing or must tell the policyholder more time is needed, which is limited to an additional 45 days. *Id.* §§ 542.056(a), 542.056(d). An insurer must pay a claim within five business days after giving notice it will accept the claim — even if it is only part of the claim. *Id.* § 542.057(a).

With respect to civil liability for a violation of the TPPCA, section 542.058 allows a party to seek those damages that are provided under section 542.060:

[I]f an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060.

*Id.* § 542.058(a).



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Section 542.060 allows a policyholder to recover damages in the form of penalty interest and reasonable and necessary attorney's fees:

[I]f an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees. Nothing in this subsection prevents the award of prejudgment interest on the amount of the claim, as provided by law.

*Id.* § 542.060(a).

Notably, there are many carve-outs or limitations to the general rules discussed above. For example, eligible surplus lines insurers generally have different deadlines, catastrophic weather claims may trigger extended deadlines, and certain types of claims are treated differently in various manners — e.g., suspected arson claims or first-party storm claims under chapter 542A of the Texas Insurance Code.

## Factual Background

*Barbara Technologies* concerned competing traditional motions for summary judgment on the issue of whether a policyholder can recover TPPCA damages “when it is undisputed that the insurer investigated the claim, rejected it, invoked the policy’s provision for an appraisal process, and ultimately paid the insured in full in accordance with the appraisal.” 2019 WL 2710089, at \*1.

In this case, the policyholder, after the insurer paid the appraisal award (which occurred more than 21 months after the claim was first rejected), amended its live pleading to only assert TPPCA claims for the insurer’s “alleged failure to comply with statutory deadlines for acknowledging receipt of the claim, commencing an investigation of the claim, notifying [the policyholder] of its rejection of the claim, and paying the claim.” *Id.* The policyholder then moved for traditional summary judgment on its TPPCA delay-in-payment claim. *Id.* It argued that the insurer’s payment of the appraisal award established liability as a matter of law. *Id.* Specifically, it claimed that the payment of the appraisal award established a late insurance payment because it occurred more than 60 days after the insurer received all items, statements, and forms reasonably requested and required to adjust the claim. *Id.* at \*15.

The insurer also moved for traditional summary judgment on the ground it timely paid the appraisal award and, therefore, was not liable as a matter of law under well-established case law. *Id.* at \*2.

## The Court’s Decision

The majority of the Supreme Court of Texas disagreed with both the insurer and policyholder, and reversed and remanded the case. It found that neither party was entitled to summary judgment based on the record before it. In doing so, it appears that the court focused exclusively on the text of the TPPCA.

With regard to the insurer’s traditional motion for summary judgment on the TPPCA delay claim under section 542.060, the court held that the appraisal process has no effect on the statute. It explained that “[n]othing in the TPPCA would excuse an insurer from liability for TPPCA damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline, regardless of use of the appraisal process.” *Id.* at \*8 (citations and footnote omitted). In that regard, the court found that appraisal was merely a dispute resolution proceeding based on contract principles, not statutory ones. *Id.* at \*6. And under section 542.060, TPPCA damages are exclusively dependent on either (1) an insurer’s admission of liability under the policy and a violation of the statute or, if liability is disputed, (2) a finding of liability and a statutory violation by a court or arbitration panel. *Id.* at \*9. Therefore, because the insurer had rejected the claim and liability was being litigated, the insurer failed to establish that it was not liable under the TPPCA. *Id.* at \*9–12.

Additionally, the court rejected the insurer’s argument that appraisal constituted a request for additional information under section 542.055(b), and therefore implicated the TPPCA and extended

the deadline to pay the claim. *Id.* at \*6–7. It explained that under the facts, appraisal was invoked after the investigation and rejection of the claim. *Id.* at \*6 n.6. Consequently, appraisal did not constitute a request for additional information during investigation of the claim that was necessary to secure a final proof of loss under section 542.055(b). *Id.* at \*6–7.

The court also addressed and rejected the policyholder’s arguments in favor of its traditional motion for summary judgment. It reiterated that the payment of an appraisal award is not an admission or finding of liability under the TPPCA. *Id.* at \*15. As a result, the policyholder could not conclusively establish liability under the policy or the TPPCA as a matter of law. *Id.*

Further, the Court explained that an appraisal award does not constitute “actual damages” under Texas law. *Id.* That is because “[o]rdinarily, a finding of liability is a prerequisite to an actual damages award.” *Id.* (citation omitted). In the case at hand, there was never a finding that the insurer was liable under the policy. *Id.* The court held that the appraisal award did not represent such a finding since the appraisal process is a contractual dispute resolution mechanism — not an award of actual damages. *Id.* (“Consistent with our reasoning above that an appraisal award does not vitiate the insurer’s determination of a claim based on investigation and final proof of loss, but rather represents a contractual mechanism to resolve a dispute as to the amount of loss, an appraisal value also is not an award of actual damages, as Barbara Tech contends.”).

While no party briefed the issue, the court *sua sponte* pointed out that section 542.058 contained different language and exceptions than section 542.060. *Id.* at \*13. It hinted, without taking a position, that an argument could be made that section 542.058 of the TPPCA may be an independent basis for seeking TPPCA damages under a different “liability standard” than 542.060. *Id.* at \*14.

## **Ortiz v. State Farm Lloyds**

*Ortiz* starts where *Barbara Technologies* ends. It addresses whether causes of action for breach of contract, common-law bad faith, and statutory bad faith under chapter 541 of the Texas Insurance Code survive the timely payment of an appraisal award.

### **Factual Background**

*Ortiz* is another wind and hail damage case where the insurer determined that the amount of damage was less than the policy’s deductible — i.e., there was some covered damage — and inspected the property twice. 2019 WL 2710032, at \*1. After the last inspection, the policyholder filed suit against his insurer for breach of contract, common-law bad faith, statutory bad faith under chapter 541 of the Texas Insurance Code, and violations of the TPPCA. *Id.* The insurer then invoked appraisal and paid the actual cash value amount of the appraisal award less the deductible. *Id.* at \*1–2. The trial court granted, and the court of appeals affirmed, the insurer’s motion for summary judgment on all claims based on then-existing case law since the insurer timely paid the appraisal award. *Id.* at \*2.

### **The Court’s Decision**

The court found that summary judgment was properly granted as to causes of action for breach of contract, common-law bad faith, and statutory bad faith. *Id.* at \*3–6. The court held that summary judgment as to the TPPCA claims was improper in light of the *Barbara Technologies* opinion. *Id.* at \*6.

With respect to the claim for breach of contract, the court recognized that appraisal awards do not establish liability. *Id.* at \*4. Instead, it again explained that the appraisal process is a contractual dispute resolution mechanism. *Id.* Consequently, when the dispute resolution process is invoked and properly completed, no breach of contract exists because the insurer complied with its contractual obligations by participating in the appraisal process and paying the binding amount of loss. *Id.*

With respect to the common-law and statutory bad faith causes of action, the court explained that both of those claims were predicated on a finding of actual damages. *Id.* at \*5. In that regard, the

policyholder could neither establish (nor did he allege) actual damages other than the loss of policy benefits. *Id.* at \*5–6. And the loss of policy benefits was a moot issue because the insurer paid the appraisal award in accordance with the appraisal provision. *Id.* at \*6. Consequently, the policyholder lacked an injury independent of his alleged wrongful-denial-of-benefits claim. *Id.* Notably, the court rejected the notion that attorney’s fees and litigation costs are “actual damages” under Texas law. *Id.* at \*5. The court remanded to the trial court for further determination of the TPPCA claims under *Barbara Technologies*.

## Take Away

The court’s opinions are certain to impact the decision by insurers and policyholders, alike, to invoke appraisal. It is a decision that requires a strategic analysis made on a case-by-case basis in light of a number of factors, such as the complexity of the insurance claim, expert testimony, coverages, coverage disputes, defenses, claims handling issues, availability of competent and impartial appraisers and umpire, and litigation considerations in general.

Further, when an insurer is deciding to pay an appraisal award after it has inspected and rejected a claim, footnote 12 of *Barbara Technologies* is instructive because it explicitly addresses how the court’s decision will play out under the three likely scenarios:

[I]f a contractual appraisal provision such as the one in this case is invoked after the insurer has received all information requested from the claimant, conducted an investigation, and rejected the claim, the insurer may choose to: (1) refuse to pay the appraisal amount and maintain its denial of liability for the claim; (2) pay the appraisal amount without accepting liability; or (3) accept the claim, essentially admitting it was incorrect to deny liability initially, and then pay the claim in accordance with the appraisal amount.

2019 WL 2710089, at \*11 n.12.

With respect to the first option — i.e., refusing to pay the appraisal award and denying liability, the court explained:

If the insurer chooses the first option, refusing to pay an appraisal amount and continuing to deny liability, the insured could choose to pursue litigation. And if the litigation resulted in a judgment that the insurer was in fact liable on the claim, the insurer would then owe the amount of the claim, as fixed by the binding appraisal, and TPPCA damages if the insurer failed to pay the claim timely in accordance with section 542.058.

*Id.*

With respect to the second option — i.e., pay the appraisal award and dispute liability, the litigation would play out just as it did in *Barbara Technologies*. It would be the same as the first option, with one exception. The payment of the appraisal award would presumably preclude additional penalty interest from accruing after the date of payment.

With respect to the third option — i.e., the insurer pays the appraisal award **and** admits liability under the policy, “[the insurer] becomes liable for the claim despite its earlier rejection of the claim, and it will be subject to TPPCA damages for failure to pay within the applicable TPPCA deadlines.” *Id.* Under this scenario, it is conceivable that a trial court could grant a policyholder’s motion for summary judgment as a matter of law on its TPPCA claims, provided there is conclusive evidence to support an admission of liability under the policy.

To prevent option three from unintentionally occurring, invocation of appraisal or payment of an appraisal award should be accompanied with language that evidences that the insurer reserves the right to contest liability under the insurance policy. In *Barbara Technologies*, the court found the following language sufficient to reserve liability issues in an appraisal invocation letter:

By this request, State Farm does not waive any of the policy provisions, conditions, defenses,

exclusions or limitations, and in fact, intends to rely on them throughout the appraisal process. The appraisal award will be subject to the Policy's provisions, conditions, exclusions and limitations.

*Id.* at \*9 n.11. It also found the following sufficient to reserve liability issues in the appraisal award payment letter:

State Farm is not waiving any of the policy coverages, limitations, exclusions or provisions, all of which are specifically reserved.

*Id.*

As demonstrated above, the Supreme Court of Texas's decisions are significant. It may be beneficial to invoke appraisal, pay the appraisal award, and eliminate all claims except for TPPCA causes of action under certain circumstances and not in others. In determining whether to pursue the appraisal process, it is important to remember that the appraisal process and appraisal awards do not establish liability under an insurance policy as a matter of law, making coverage an issue reserved for litigation.

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<sup>1</sup> The court explained the notable differences and the parties' failure to brief the issues as follows:

The parties have not briefed the interplay between section 542.058 and section 542.060. Neither party has specifically raised the issue of whether section 542.058's "shall pay damages" language could be the basis for TPPCA damages for late payment, independent of section 542.060's limitation of TPPCA damages to insurers "liable on a claim under an insurance policy." Moreover, the parties have not briefed the interplay between section 542.060's liability requirement and section 542.058's exception for a claim that is found to be "invalid" and "should not be paid."

*Barbara Techs.*, 2019 WL 2710089, at \*13.

<sup>2</sup> See *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009) ("No matter what the appraisers say, State Farm does not have to pay for repairs due to wear and tear or any other excluded peril because those perils are excluded."); *Texas Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.*, 561 S.W.3d 263, 278 (Tex. App.—Houston [14th Dist.] 2018, pet. filed) ("Standing alone, the Appraisal Award simply does not provide sufficient evidence from which a court may determine as a matter of law which Appraisal Award damages, if any, were caused by a covered peril.").