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SUPREME COURT OF TEXAS
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No. 23-0534

IN THE
SUPREME COURT OF TEXAS

MARIO RODRIGUEZ,
***Appellant*,**

v.

SAFECO INSURANCE COMPANY OF INDIANA,
***Appellee*.**

On Certified Question from the
United States Fifth Circuit Court of Appeals
No. 22-11070

APPELLANT'S BRIEF ON THE MERITS

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[1] The captions of the cases in the trial court, court of appeals, and this Court spell Plaintiff-Appellant's last name "Rodriguez." The correct spelling is "Rodriquez."

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STATEMENT OF THE CASE

Nature of the Case:	First-party insurance dispute arising from claim for storm damage to Mr. Rodriquez's property that was allegedly underpaid by Safeco.
Trial Court:	No. 5:20-CV-168-C; *Mario Rodriguez v. Safeco Insurance Company of Indiana*; In the United States District Court, Northern District of Texas, Lubbock Division
Trial Court Disposition:	Hon. Sam R. Cummings granted summary judgment in Safeco's favor. *See Rodriguez v. Safeco Ins. Co. of Ind.*, No. 5:20-CV-168-C, 2022 WL 6657888 (N.D. Tex. Oct. 3, 2022).
Court of Appeals:	Case No. 22-11070; *Mario Rodriguez v. Safeco Insurance Company of Indiana*; In the United States Court of Appeals for the Fifth Circuit
Judges:	Hon. Patrick E. Higginbotham; Hon. James E. Graves, Jr.; Hon. Dana M. Douglas
Court of Appeals Opinion:	*Rodriguez v. Safeco Ins. Co. of Ind.*, 73 F.4th 352 (5th Cir. 2023).
Court of Appeals Disposition:	The Fifth Circuit certified a question to this Court and this Court accepted the certified question. The appeal remains pending in the Fifth Circuit.

STATEMENT OF JURISDICTION

This Court has jurisdiction to "answer questions of law certified to it by [a] federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent." TEX. R. APP. P. 58.1; *see* TEX. CONST. art. 5, § 3-c (stating that the Texas Supreme Court "[has] jurisdiction to answer questions of state law certified from a federal appellate court").

CERTIFIED QUESTION

"In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" *Rodriguez v. Safeco Ins. Co. of Ind.*, 73 F.4th 352, 356 (5th Cir. 2023).

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Appellant Mario Rodriquez, Plaintiff in the trial court and Appellant in the United States Fifth Circuit Court of Appeals, files his brief on the merits and respectfully asks the Court to answer "no" to the Certified Question. In support, Rodriquez would respectfully show the Court the following:

STATEMENT OF FACTS

In 2010, Plaintiff-Appellant Mario Rodriquez and his wife, Kendra, purchased a home in Plainview, Texas, and insured it under a policy issued by Defendant-

Appellee Safeco Insurance Company of Indiana, with whom they had existing auto policies. (ROA.336)

On May 25, 2019, an EF2 tornado struck the Plainview area. (ROA.311-ROA.312) Mr. and Mrs. Rodriquez saw the rotation as the funnel cloud was building and decided to hide in a closet. (ROA.342-ROA.343) As Mr. Rodriquez held the closet door closed while the whole house shook, the suction of the storm was "trying to jerk [it] out of [his] hand." (ROA.343, ROA.344) He said:

> When that thing hit, I mean, it just like sucks the breath out of you. It just takes your air out. It's like you can't breathe. And I was holding that door as tight as I could and I could feel it where it was trying to suck that door out of my hand.

(ROA.343-ROA.344) It's a feeling he will never forget. (ROA.343) As the storm passed, it "sounded . . . like a train was fixing to come right through [the] house." (ROA.343, ROA.344)

Once the noise stopped and Mr. Rodriquez got his breath back, he and Mrs. Rodriquez surveyed the damage. (ROA.344, ROA.345) Inside the house, furnishings and other items were displaced "like somebody had come in [there] and just got mad and started moving stuff around." (ROA.344) Water was coming in through the living room windows. (ROA.344) Trees were split in half and broken, vehicles were damaged, light poles were knocked over, and porch columns were hanging from the cement. (ROA.345) The carport was sitting on top of a tree. (ROA.345) Mr. Rodriquez also noted structural damage to his home. (ROA.347)

Wood support beams in the living room were bowed, wood planks had buckled, and doors were difficult to open and shut. (ROA.347) The home's metal roof, which was less than a year old, had sunken inward. (ROA.347)

Mr. Rodriquez notified Safeco of the damage to his property that same day. (ROA.345) Safeco dispatched an adjuster to perform an inspection on June 1, 2019. (ROA.365-ROA.366) The adjuster found covered damage to the dwelling, but his estimate reflected a repair cost of only $1,295.55. (ROA.229) The adjuster also found covered damage to other structures on the property (the garage, a shed, the carport, etc.) totaling $40,894.68, but the Policy had an "other structures" sublimit of $25,000.00.[2] (ROA.229) Therefore, after subtracting deductibles and depreciation, Safeco issued payment in the amount of $27,449.88, which included $1,295.55 for the dwelling damage. (ROA.229)

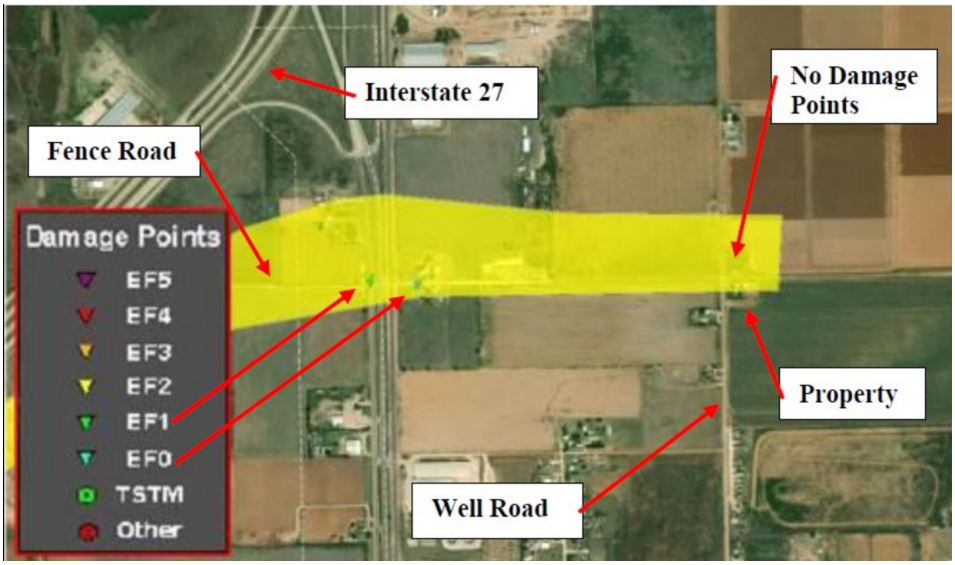
When Mr. Rodriquez voiced concerns about the adjuster's estimate, Safeco retained Donan Engineering, who inspected the property on July 9, 2019. (ROA.367, ROA.372) Donan reported to Safeco three days later that although the damage noted to the dwelling was present, it was not caused by a tornado. (ROA.382-ROA.384) Despite the fact that Mr. Rodriquez explained that none of this damage was present before the tornado, Donan concluded that moisture-related differential movement, excess humidity in the crawlspace, and "inadvertent man-made happenings" had

[2] The Policy also allowed for payment of 5% of the sublimit for debris removal. (ROA.196)

caused the damage. (ROA.382-ROA.384) The implication of Donan's findings, it seems, is that Mr. Rodriquez was lying.

The manner in which Safeco and Donan ruled out tornado damage to the dwelling is troubling. Safeco and Donan purportedly relied upon the National Weather Service's Damage Survey Viewer or "DSV."[3] (ROA.376) The DSV is a web-based resource that allows the public to view data gathered by the National Weather Service after a severe weather event.[4]

Donan's report included this image taken from the DSV:



(ROA.377) The DSV legend that is visible on the photo Donan included in its report reflects that an EF1 tornado would be indicated by a green triangle and an EF2

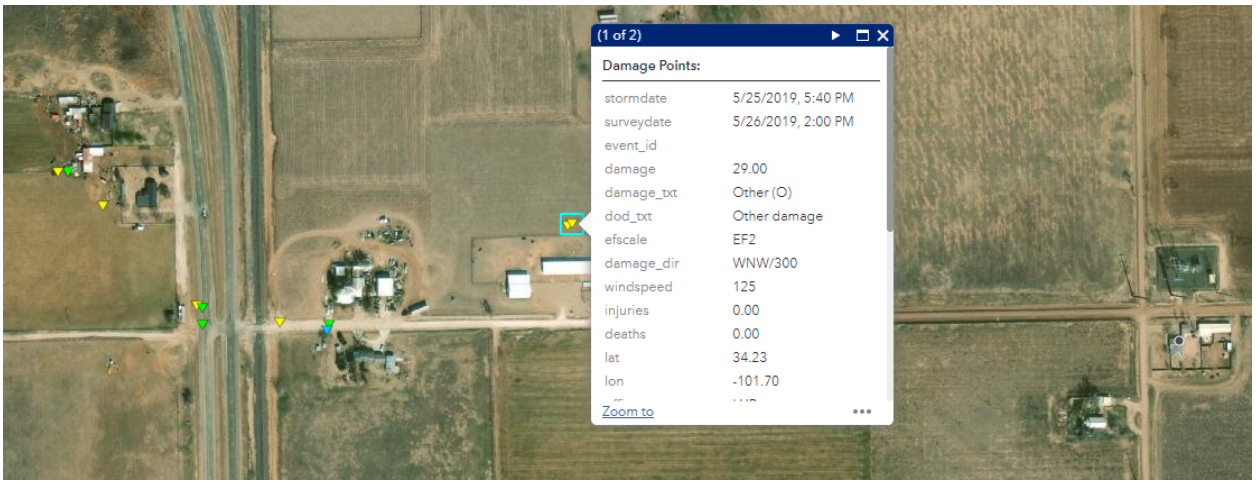
[3] https://apps.dat.noaa.gov/stormdamage/damageviewer/ (last accessed August 16, 2023).

[4] *See id.* ("Welcome to the National Weather Service Damage Assessment Toolkit. Data on this interface is collected during NWS Post-Event Damage Assessments.").

tornado with significantly stronger winds of 111-135 miles per hour would be indicated by a yellow triangle. (ROA.377, ROA.379)

Donan claims that the DSV shows the tornado was at best an EF1, indicated by a green triangle. (ROA.376-ROA.377) Indeed, a green triangle – but no yellow triangle – is visible on the image included in Donan's report. (ROA.377)

But the image in Donan's report did not come straight from the DSV; Donan altered it by adding the yellow highlight, which is not a feature of the DSV. When the same image is pulled up manually on the DSV – without the yellow highlight added by Donan – it shows multiple yellow triangles and reports 125 mph winds:



(ROA.311-ROA.312) In other words, Safeco's hired engineer added yellow highlighting to the image from the DSV that conveniently covered up the yellow triangles indicating an EF2 tornado, included the image in its report without disclosing the alteration, and misrepresented the data reflected on the image.

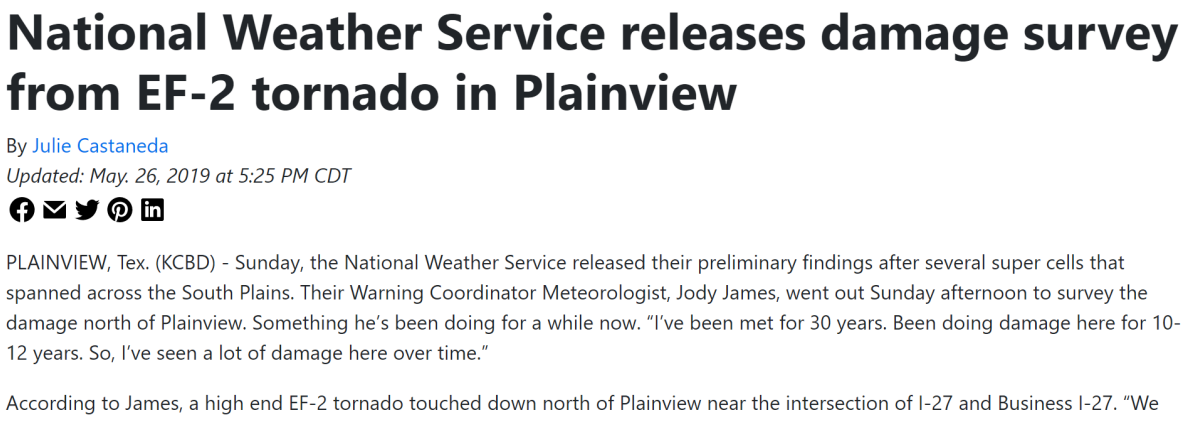
Whether or not the tornado was an EF2 is important. At EF2, a "significant tornado" would cause "considerable damage" consistent with the damage Mr. Rodriquez reported.[5] (ROA.309-ROA.310) Safeco and Donan knew the tornado was an EF2, knew that it carried winds of at least 111 miles per hour, and knew that it would suggest that Safeco is liable for the damage to the Rodriquezes' home. Donan even reported back to Safeco:

> A local news article posted on Sunday, May 26, 2019 reported a storm survey team from the National Weather Service (NWS) in Lubbock and the Plainview Office of Emergency Management confirmed a tornado touched down in the city of Plainview late Saturday afternoon. The NWS reported "the damage path crossed

[5] At EF2, one should expect "[r]oofs torn off frame houses; mobile homes demolished; boxcars pushed over; large trees snapped or uprooted; light objects missiles generated." (ROA.310)

> Business I-27 near Fence Road on the north side of Plainview. The damage included a tractor trailer overturned, a collapsed cellular tower, and damage to numerous outbuilding northwest of the intersection of Business I-27 and Fence Road."

(ROA.376) Donan did not provide a citation to the local news article. (ROA.376) This is unsurprising because the article, which can easily be found through a Google search of Donan's excerpt from it,[6] states that the tornado was an EF2:



National Weather Service releases damage survey from EF-2 tornado in Plainview

By Julie Castaneda

Updated: May. 26, 2019 at 5:25 PM CDT

PLAINVIEW, Tex. (KCBD) - Sunday, the National Weather Service released their preliminary findings after several super cells that spanned across the South Plains. Their Warning Coordinator Meteorologist, Jody James, went out Sunday afternoon to survey the damage north of Plainview. Something he's been doing for a while now. "I've been met for 30 years. Been doing damage here for 10-12 years. So, I've seen a lot of damage here over time."

According to James, a high end EF-2 tornado touched down north of Plainview near the intersection of I-27 and Business I-27. "We

(ROA.295-ROA.296, ROA.319) Safeco and Donan had all of this information, but concluded that the tornado was far less significant in order to to justify the claim decision.

On July 26, 2019, a Safeco representative called Mr. Rodriquez and explained the engineer's findings. (ROA.368) Safeco did not alter its original finding that the dwelling only sustained $1,295.55 in damage and adopted Donan's conclusion that the damage was not related to the tornado. (ROA.368)

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[6] https://www.kcbd.com/2019/05/26/national-weather-service-releases-storm-damage-survey-plainview-after-ef-tornado-saturday-night/ (last accessed August 16, 2023).

Dissatisfied with Safeco's handling of the claim, Mr. Rodriquez hired the undersigned law firm. (ROA.354) On April 17, 2020, Mr. Rodriquez, through his counsel, sent presuit notice of his intent to file an action against Safeco as required by the Texas Insurance Code. (ROA.387-ROA.391) The letter gave Safeco notice, as directed by the statute, that Mr. Rodriquez claimed Safeco owed an additional $29,500 under the Policy. (ROA.389) The presuit notice also advised Safeco of its statutory right to reinspect the property within thirty days. (ROA.388-ROA.389) The notice to Safeco further advised:

> Mr. Rodriquez does not wish to litigate this matter, and would simply like to receive compensation for the damages and move on. However, if a satisfactory resolution is not reached in 60 days, Mr. Rodriquez intends to file a lawsuit.

(ROA.391)

Safeco's internal log notes show that Safeco received the letter no later than April 21, 2020. (ROA.369) A copy of the letter is in Safeco's claim file. (ROA.362) However, Safeco did not respond. (ROA.362)

Mr. Rodriquez filed suit against Safeco in state court on June 18, 2020, alleging breach of contract, violations of Chapter 541 of the Texas Insurance Code, and violations of the Texas Prompt Payment of Claims Act. (ROA.17-ROA.23) On July 21, 2020, Safeco removed the case to federal court. (ROA.11-ROA.14) The parties conducted written discovery and Safeco took Mr. Rodriquez's deposition.

(ROA.333, ROA.393-ROA.397) Mr. Rodriquez retained and designated testifying experts, incurring at least $3,600 in expenses. (ROA.295)

On July 21, 2021, more than two years after the tornado and exactly one year after Safeco answered the lawsuit, Safeco invoked the Policy's appraisal provision. (ROA.199-ROA.200, ROA.258-ROA.259) Mr. Rodriquez incurred an additional $4,302.39 in expenses for his appraiser and the umpire. (ROA.324, ROA.329, ROA.331) On April 5, 2022, the appraisal panel determined the replacement cost value of the damage to Mr. Rodriquez's dwelling to be $36,514.52 – more than twenty-eight times Safeco's $1,295.55 estimate and roughly $7,000 or 25% more than the amount stated in the presuit notice to which Safeco did not respond. (ROA.327)

On April 12, 2022, almost three years after the tornado, Safeco paid the actual cash value of the amount of loss set by the appraisal award. (ROA.277-ROA.282) As of that date, Mr. Rodriquez had incurred reasonable and necessary attorney's fees totaling $29,917.50. (ROA.393-ROA.397) About a week later, Safeco issued a check to Mr. Rodriquez for $9,458.40 representing, according to Safeco, "any conceivable amount of interest [Mr. Rodriquez] could allege to be owed under the Texas Prompt Payment of Claims Act on the $32,447.73 Appraisal Award payment." (ROA.145)

On July 15, 2022, Safeco filed a motion for summary judgment. (ROA.135-ROA.136) Safeco argued that its payment of "the full amount of the Appraisal Award currently owed to Rodriquez" eliminated Mr. Rodriquez's breach of contract cause of action and his claims for violations of Chapter 541 of the Texas Insurance Code as a matter of law. (ROA.147-ROA.149) As for the TPPCA cause of action, Safeco contended that the tender of funds it denominated an "interest" payment eviscerated its liability under the TPPCA because Mr. Rodriquez "has no damages." (ROA.149-ROA.150) Safeco also argued that Mr. Rodriquez is barred from recovering attorney's fees under any theory. (ROA.151-ROA.153)

On October 3, 2022, the trial court granted Safeco's motion. *Rodriguez v. Safeco Ins. Co. of Ind.*, No. 5:20-CV-168-C, 2022 WL 6657888 (N.D. Tex. Oct. 3, 2022) ("*Rodriguez I*"). Mr. Rodriquez appealed. (ROA.560)

The Fifth Circuit Court of Appeals heard oral argument on the appeal on June 5, 2023. On July 12, 2023, the court issued an opinion certifying the following question to this Court: "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" *Rodriguez v. Safeco Ins. Co. of Ind.*, 73 F.4th 352, 356 (5th Cir. 2023) ("*Rodriguez II*"). This Court accepted the certified question on July 21, 2023, and set it for oral argument on October 4, 2023.

SUMMARY OF THE ARGUMENT

For decades, the Texas Prompt Payment of Claims Act ("TPPCA") has existed for the express purpose of obtaining prompt payment of insurance claims and punishing insurers who fail to comply. The statute provides, among other things, that an insurer who does not timely pay an insurance claim owes the insured penalty interest as damages plus attorney's fees and prejudgment interest.

The interplay between the TPPCA and the use of the appraisal process has been the subject of substantial litigation. This Court has held that the use of the appraisal process does not alter the TPPCA's deadlines or enforcement provisions, nor does the payment of an appraisal award either impose or extinguish an insurer's TPPCA liability as a matter of law.

In 2017, the Legislature amended the Insurance Code to enact Chapter 542A, which sets forth provisions relating to presuit notice, inspection, agent liability, and attorney's fees in first-party suits resulting from storm damage claims. The bill was intended, per its sponsors, to curb abusive lawsuits and exorbitant presuit demands. To achieve its purpose, Chapter 542A sets out certain presuit notice requirements and ties the amount and, sometimes, the availability of attorney's fees to the amount alleged to be owed for property damage that an insured sets out in his presuit notice vis-à-vis the amount "to be awarded in the judgment" for property damage.

Importantly, nothing in the 2017 legislation altered the TPPCA's plainly stated purpose. In fact, the 2017 bill reaffirmed it by adding a subsection (c) to the existing TPPCA penalty provision. Largely echoing existing Section 542.060(a), Section 542.060(c) provides that an insurer who violates the TPPCA in handling a claim that falls under Chapter 542A is liable for interest and attorney's fees under the TPPCA just like it is with regard to any other first-party claim.

Since the 2017 bill took effect, however, insurers have been successful in convincing some courts to apply Chapter 542A's attorney fee calculation in a manner that is not consistent with the text of the statute, Texas law, or the Legislature's intent. An insurer will pay an appraisal award, issue a separate check for "interest," then seek summary judgment, arguing that it has paid all the policy benefits and interest it could possibly owe and that there can be no attorneys' fees because there is nothing left "to be awarded in the judgment" for property damage. Insureds argue that the statute does not and should not permit an insurer to systematically avoid attorneys' fees by paying the appraisal award and interest.

Federal courts have come down on both sides of the issue, and the only two intermediate appellate courts who have issued opinions on it have adopted the insurers' construction of the relevant statutory provisions. One of the federal courts that has sided with the insurer is the district court that decided the case underlying the certified question before the Court herein.

This Court's answer to the certified question comes down to the meaning of "to be awarded in the judgment." Mr. Rodriquez contends that it means the amount to be awarded before offsetting any prepayment of property damage. Safeco contends that it means the amount that is actually awarded in a judgment for property damage.

Mr. Rodriquez's interpretation is reasonable and it is supported by the language of the statute and Texas law. Even if the Court finds that Safeco's interpretation is also reasonable, application of the factors the Legislature has directed it to consider in the Code Construction Act – particularly the legislative history and circumstances under which the statute was enacted and the consequences of Safeco's proffered construction – reveals that Mr. Rodriquez's interpretation more accurately effects the Legislature's intent, avoids undesired and unjust consequences, and gives effect to the entire statute.

The Court should answer "no" to the certified question.

ARGUMENT

I. For Almost 150 Years, Texas Law Has Punished Insurers Who Fail to Pay Claims Promptly

"Since at least 1874, there have been Texas statutes punishing an insurer's failure to pay promptly." *State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799, 803 (Tex. 2007) (citations omitted) ("*State Farm v. Martinez*"). Until 1991, those statutes were to be strictly construed. *See id.* (citations omitted); *see also, e.g.*, *First Tex.*

Prudential Ins. Co. v. Long, 46 S.W.2d 297, 298 (Tex. Comm'n App.—Section A, 1932) (noting that statute providing for payment of penalty interest and reasonable attorney's fees in the event of untimely payment of insurance claim was "highly penal in its nature" and therefore must be "strictly construed").

In 1991, the Legislature passed the TPPCA. *See* Act of June 6, 1991, 72nd Leg., R.S., ch. 242, § 11.03(8), 1991 Tex. Gen. Laws 1043-45 (originally codified as TEX. INS. CODE § 21.55), *amended by* Act of Aug. 25, 1991, 72nd Leg., 2d C.S., ch. 12, §§ 7.01-.03, 1991 Tex. Gen. Laws 252, 319-321 ("1991 Act"); *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 845 (Tex. 2019), *reh'g denied* (Hecht, J., dissenting) (reciting timeline of the TPPCA's passage, codification, and amendments); *State Farm v. Martinez*, 216 S.W.3d at 805. That underlying purpose, expressly memorialized by the Legislature in the 1991 statute itself, is "to obtain prompt payment of claims made pursuant to policies of insurance." *See* 1991 Act, § 11.03(8).

To achieve this purpose, the TPPCA, which is now codified in subchapter B of Chapter 542 of the Texas Insurance Code, imposes claims handling requirements and payment deadlines on insurance companies. *See* TEX. INS. CODE §§ 542.055-.058, .060; *Barbara Techs.*, 589 S.W.3d at 812. The payment deadlines are set forth in Sections 542.057 and .058. *See* TEX. INS. CODE §§ 542.057-.058. Section 542.057(a) provides that if the insurer notifies the insured that it has accepted the

insured's claim, it must pay the claim within five business days. *See id.* § 542.057(a); *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651, 652 (Tex. 2021) (per curiam) ("If an insurer accepts the claim, in whole or in part, it has five business days to pay the insured."). If the insurer rejects the claim – or if it neither accepts nor rejects it – and is ultimately found to be liable for the claim, the insurer will be held to have violated the Act if it delayed payment of the claim for more than 60 days. *See* TEX. INS. CODE §§ 542.058(a), .060(a).

Section 542.060, the TPPCA's penalty provision, dictates that "if an insurer that is liable for a claim under an insurance policy is not in compliance with [the TPPCA]," the insurer is liable to the policyholder for penalty interest as damages plus reasonable and necessary attorney's fees and prejudgment interest, if allowed by law, on top of the amount of the claim. *Id.* § 542.060(a).

II. This Court Has Held That the Use of the Appraisal Process Does Not Extinguish Insurer Liability for Penalty Interest and Attorney's Fees Under the TPPCA

As the use of the appraisal process in first-party insurance disputes became more and more prevalent over the last twenty-five years, several Texas intermediate appellate courts – but never this Court – held that an insurer's "payment of an appraisal award precludes an insured from recovering damages under the TPPCA as a matter of law." *Barbara Techs.*, 589 S.W.3d at 818 (citations omitted). The practical effect of these courts' holdings was devastating to insureds. Insurers began

systematically denying or underpaying claims. Naturally, some insureds would give up but others would persevere. Insurers would subject the insureds who fell into the latter category and exercised their right to file suit to months or years of litigation during which the insureds would incur significant attorney's fees and expenses. Then at some point – sometimes years into litigation – the insurer would invoke appraisal[7] and pay the award, ultimately eviscerating any and all of the insurer's liability under the policy, Chapter 541 of the Insurance Code, and the TPPCA.

A. *Barbara Technologies* and *Ortiz*: An Insurer's Payment of an Appraisal Award on a Rejected Claim Does Not Impose TPPCA Liability as a Matter of Law

In 2019, this Court took away the insurers' "get out of jail free" card when it decided companion cases *Barbara Technologies* and *Ortiz*. *See Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019), *reh'g denied*; *Barbara Techs.*, 589 S.W.3d 806.

[7] Both the majority opinion and the dissent in *Barbara Technologies*, 589 S.W.3d at 833, 844, discuss the ability of an insured to establish that an insurer waived appraisal by waiting too long to invoke it. Insureds made this argument unsuccessfully for years. *See, e.g.*, *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 412 (Tex. 2011) (orig. proceeding) (citing with approval an out-of-jurisdiction case finding no waiver when insured waited 2.5 years to invoke appraisal and stating that "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"); *In re GuideOne Mut. Ins. Co.*, No. 09-12-00581-CV, 2013 WL 257371, at *3 (Tex. App.—Beaumont Jan. 24, 2013) (orig. proceeding), *mandamus denied* (declining to find waiver where insurer waited 4.5 years to invoke appraisal two months before trial after parties had engaged in written discovery, taken depositions, and disclosed experts).

Barbara Technologies, 589 S.W.3d at 809, was a first-party homeowner's insurance dispute arising from a storm damage claim. State Farm rejected the claim as under deductible. *See id.* Barbara Tech filed suit, the claim went to appraisal, and State Farm paid it. *See id.* at 810.

Barbara Tech amended its petition so that only its TPPCA claim remained and moved for summary judgment, alleging that State Farm violated the TPPCA as a matter of law by failing to pay the claim within the Act's 60-day time limit. *See id.* (citing TEX. INS. CODE §§ 542.058, .060). State Farm filed a cross-motion, claiming that it did not violate the TPPCA as a matter of law "because it timely paid the appraisal award and was not liable under the policy." *Id.* The trial and appellate courts sided with State Farm. *See id.* This Court granted review to consider whether an insured can prevail on a claim for delayed payment under the TPPCA when the insurer investigated the claim, rejected it, and then ultimately paid an appraisal award setting the amount of loss. *See id.* at 809.

Addressing State Farm's argument that timely payment of an appraisal award forecloses TPPCA damages as a matter of law, the Court disapproved of the intermediate appellate decisions holding that payment of an appraisal award precludes a policyholder from recovering under the TPPCA as a matter of law to the extent that they "could be read to *excuse* an insurer liable under the policy from having to pay TPPCA damages merely because it tendered payment based on an

appraisal award, or to foreclose any further proceedings to determine the insurer's liability under the policy." *Id.* at 819 (emphasis added). "Nothing in the TPPCA," the Court said, "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 process." *Id.* In other words, the Court rejected State Farm's argument, holding that an insurer's timely payment of an appraisal award, standing alone, neither authorizes *nor* forecloses TPPCA damages as a matter of law. *See id.* at 819.

The Court further held that making an appraisal payment does not *satisfy* Section 542.060's liability element, but it also does not *negate* it. *See id.* at 823 & n.14. The court reversed and remanded because neither party had established or negated State Farm's liability as a matter of law, neither party was entitled to summary judgment. *See id.* Rather, liability was a matter to be adjudicated. *See Park Bd. Ltd. v. State Auto. Mut. Ins. Co.*, No. 4:18-CV-382, 2019 WL 3776450, at *6 (E.D. Tex. Aug. 12, 2019) ("Because payment of an appraisal award neither establishes nor forecloses liability, where an insurer has not explicitly assumed it, it is a matter to be adjudicated.").

This Court decided *Ortiz*, 589 S.W.3d 127, the same day it decided *Barbara Technologies*. Under similar facts, State Farm argued, as it did in *Barbara Technologies*, that its payment of the appraisal award foreclosed its liability under the TPPCA. *See id.* at 135. Ortiz contended that "appraisal does not act as a King's

X prohibiting any damages beyond what is owed under the policy." *Id.* (internal punctuation omitted). The Court reversed and remanded, reiterating its holding in *Barbara Technologies* that "an insurer's payment of an appraisal award does not as a matter of law bar an insured's claims under the Prompt Payment Act." *Id.*

This Court has reaffirmed its holdings in *Barbara Technologies* and *Ortiz* six times since it decided them in June 2019.[8]

Barbara Technologies and *Ortiz* are best summed up: An insurer's payment of an appraisal award in full during litigation often eliminates an insured's breach of contract and Chapter 541 claims as a matter of law, but it does *not* eliminate the insured's claim for statutory interest and attorney's fees under the TPPCA as a matter of law.

B. *Alvarez* and *Hinojos*: An Insurer's Partial Payment of an Accepted Claim Within the TPPCA Payment Deadline Does Not Preclude TPPCA Liability Where the Insurer Pays the Remainder of the Claim Outside the Deadline Pursuant to an Appraisal Award

On the heels of *Barbara Technologies* and *Ortiz*, in 2020 the Court decided *Alvarez*, 601 S.W.3d 781. In that case, State Farm did not reject the insured's claims but found covered damage and issued a payment. *See id.* The insured was dissatisfied with the amount of the payment and sued State Farm. *See id.* State Farm invoked

[8] *See Hinojos*, 619 S.W.3d at 653; *Marchbanks v. Liberty Ins. Co.*, 602 S.W.3d 917, 918 (Tex. 2020) (per curiam); *Perry v. United Servs. Auto. Ass'n*, 602 S.W.3d 915, 916 (Tex. 2020) (per curiam); *Biasatti v. GuideOne Nat'l Ins. Co.*, 601 S.W.3d 792, 794 (Tex. 2020) (per curiam); *Lazos v. State Farm Lloyds*, 601 S.W.3d 783, 784 (Tex. 2020) (per curiam); *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781, 783 (Tex. 2020) (per curiam).

appraisal, paid the award, and moved for summary judgment. *See id.* The trial court granted summary judgment and the court of appeals affirmed. *See id.* The insured filed a petition for review in this Court, and while it was pending, the Court decided *Barbara Technologies* and *Ortiz*. *See id.* Citing its opinions in *Barbara Technologies* and *Ortiz*, the Court reversed the court of appeals, holding that it was error to find that the insured could not maintain his TPPCA claim on account of State Farm's payment of the appraisal award. *See id.* at 783.

In March 2021, the Court decided *Hinojos*, 619 S.W.3d 651. It presented facts substantially identical to those in *Alvarez*. *See id.* at 654-65. State Farm argued that its initial payment before the statutory deadline was sufficient to avoid liability under the TPPCA even though it later paid more on the insured's claim when it paid the appraisal award. *See id.* It contended that Chapter 542 requires only a *reasonable* payment within the statutory time limit as opposed to *full* payment. *See id.* at 656.

The Court recapped its holdings in *Barbara Technologies* and *Alvarez* and said that based on its decisions in those cases, State Farm's payment of the award outside the statutory deadline did not relieve it of TPPCA liability. *See id.* Then, the Court addressed the "reasonable payment" argument and rejected it based on its holding in *Republic Underwriters Insurance Co. v. Mex-Tex, Inc.*:

> The Legislature defines "claim" as . . . "a first party claim that (A) is made by an insured or policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract; and (B) must be paid by the insurer directly to the insured or beneficiary."

> Nothing in Chapter 542 discharges prompt payment liability based on the partial payment of the amount that "must be paid" under the policy. Otherwise, an insurer could pay a nominal amount toward a valid claim to avoid the prompt payment deadline that the Legislature has imposed. We rejected such a contention in *Republic Underwriters Insurance Co. v. Mex-Tex, Inc.*, holding in that case that an insurer owes interest on the amount of the claim it did not promptly pay when it makes a partial payment. The phrase "must be paid by the insurer" in the definition of "claim" includes the amount of the claim and "limits 'claim' to the amount ultimately determined to be owed, which of course would be net of any partial payments made prior to that determination." We explained that "[t]his encourages insurers to pay the undisputed portion of a claim early, consistent with the statute's purpose 'to obtain prompt payment of claims made pursuant to policies of insurance.'"

Id. (internal citations omitted); *see Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 426-28 (Tex. 2004).

Ultimately, the Court held that "an insurer's acceptance and partial payment of the claim within the statutory deadline does not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires." *Hinojos*, 619 S.W.3d at 658 ("Chapter 542 does not provide that a partial payment of a valid claim discharges liability for statutory interest."). This holding, the Court said, was in accord with its decisions in *Mex-Tex*, *Barbara Technologies*, and *Alvarez*, as well as the statute's stated purpose of promoting the prompt payment of claims. *See id.* (quoting TEX. INS. CODE § 542.054). The Court said:

> By requiring insurers to promptly satisfy claims that they owe in their entirety, the Legislature incentivizes insurers to resolve disputes and invoke the appraisal process sooner rather than later. Although the statute says nothing about reasonableness, a reasonable payment should

> roughly correspond to the amount owed on the claim. When it does not, a partial payment mitigates the damage resulting from a Chapter 542 violation. Interest accrues only on the unpaid portion of a claim.

Id.

Thus, *Alvarez* and *Hinojos* stand for the proposition that an insurer's pre-appraisal acceptance and partial payment of a claim within the TPPCA's statutory deadlines does not preclude an award of penalty interest and attorney's fees under the Act based on the insurer's payment of the appraisal award outside the statutory deadlines.

III. The Legislature Amended the Insurance Code in 2017, But Did Not Alter the TPPCA's Stated Purpose

Even though they were decided in 2019 and thereafter, *Barbara Technologies*, *Ortiz*, and their progeny were all decided under the Insurance Code as it existed prior to September 1, 2017.

In 2017, the 85th Legislature amended the Code. *See* Act of May 17, 2017, 85th Leg., R.S., ch. 151, 2017 Tex. Gen. Laws 293 ("2017 Act"). The 2017 bill, which took effect September 1, 2017, had two main components. *See generally id*.

First, it added Chapter 542A to the Code. *See id.* § 3. Chapter 542A applies to most first-party insurance suits arising from claims for weather-related property damage, setting out – among other things – certain requirements and procedures regarding presuit notice in those suits. *See* TEX. INS. CODE §§ 542A.002-.003, .005, .007. Among those requirements is that the presuit notice include "the specific

amount alleged to be owed by the insurer on the claim for damage to or loss of covered property." *Id.* § 542A.003(b)(2). It also sets forth a rubric for the calculation of attorney's fees in a 542A case.[9] *See id.* § 542A.007. Section 542A.007 provides that in a case to which Chapter 542A applies, the amount of attorney's fees that may be awarded to a policyholder is the lesser of:

> (1) 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;
>
> (2) the amount of attorney's fees that may be awarded to the claimant under other applicable law; or
>
> (3) the amount calculated by:
>
> > (A) 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 by the amount alleged to be owed on the claim for that damage or loss in a notice given under this chapter; and
> >
> > (B) 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.

Id. § 542A.007(a). However, if the amount calculated under subsection (a)(3)(A) is greater than or equal to 0.8 (in other words, 80% or more of the amount alleged to

[9] Chapter 542A also affords insurers certain rights of inspection following the receipt of a presuit notice and provides for insurer election of legal responsibility of its agents in certain circumstances. *See* TEX. INS. CODE §§ 542A.004, .006. Those provisions are not implicated in the certified question.

be owed in the presuit notice), then the court shall award the full amount of attorney's fees proved up at trial. *See id.* §§ 542.007(a)(3)(A), (b). If it is less than 0.2 (less than 20% of the amount alleged to be owed in the presuit notice), then the court may not award any fees. *See id.* §§ 542.007(a)(3)(A), (c).

Second, the 2017 bill amended and added a new subsection to Section 542.060 of the TPPCA. 2017 Act, § 2. It amended subsection (a) of the statute as follows:

> (a) Except as provided by Subsection (c), if ~~[If]~~ 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. And it added the following subsection:

> (c) In an action to which Chapter 542A applies, if 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, in addition to the amount of the claim, simple interest on the amount of the claim as damages each year at the rate determined on the date of judgment by adding five percent to the interest rate determined under Section 304.003, Finance Code, 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. Interest awarded under this subsection as damages accrues beginning on the date the claim was required to be paid.

Id.

Importantly, nothing in the 2017 bill altered or amended the TPPCA's stated purpose – "to promote the prompt payment of insurance claims" – or disturbed the Legislature's edict that the statute shall be liberally construed. TEX. INS. CODE § 542.054; *see generally* 2017 Act.

IV. Post-Amendment, Courts Have Adopted Different Interpretations of the 2017 Bill in the Appraisal Context

Since the 2017 bill took effect, it has become common practice for an insurer to issue – when it pays an appraisal award – a separate check purporting to represent the "interest" the insured could allege to be owed.[10] The insurer moves for summary

[10] *See, e.g.*, *McCall v. State Farm Lloyds*, No. 3:22-CV-1712-B, 2023 WL 5311485, at *1 (N.D. Tex. Aug. 17, 2023); *Odom v. Central Mut. Ins. Co.*, No. 6:18-CV-00083, 2023 WL 2746050, at *2 (S.D. Tex. Mar. 31, 2023); *Morakabian v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:21-CV-100-SDJ, 2023 WL 2712481, at *1 (E.D. Tex. Mar. 30, 2023); *Arnold v. State Farm Lloyds*, No. H-22-3044, 2023 WL 2457523, at *1 (S.D. Tex. Mar. 10, 2023); *Kahlig Enters., Inc. v. Affiliated FM Ins. Co.*, No. SA-20-CV-01091, 2023 WL 1141876, at *2 (W.D. Tex. Jan. 30, 2023); *Royal Hospitality Corp. v. Underwriters at Lloyd's London*, No. 3:18-CV-102, 2022 WL 17828980, at *2 (S.D. Tex. Nov. 14, 2022); *Atkinson v. Meridian Sec. Ins. Co.*, No. SA-21-CV-00723-XR, 2022 WL 3655323, at *2 (W.D. Tex. Aug. 24, 2022); *Parsons v. Liberty Ins. Corp.*, No. 3:20-CV-1682-K, 2021 WL 6496775, at *1 (N.D. Tex. Oct. 8, 2021), *report and recommendation adopted in part*, 2021 WL 5629145 (N.D. Tex. Dec. 1, 2021) ("*Parsons Report & Rec.*"); *White v. Allstate Vehicle & Prop. Ins. Co.*, No. 6:19-CV-00066, 2021 WL 4311114, at *1 (S.D. Tex. Sept. 22, 2021); *Ahmad v. Allstate Fire & Cas. Ins. Co.*, No. 4:18-CV-4411, 2021 WL 2211799, at *1 (S.D. Tex. June 1, 2021), *report and recommendation adopted*, 2021 WL 1428491 (S.D. Tex. Mar. 24, 2021); *Martinez v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:19-CV-2975, 2020 WL 6887753, at *1 (S.D. Tex. Nov. 20, 2020) ("*Martinez v. Allstate*"); *Moncivais v. Allstate Tex. Lloyds*, No. 5-18-CV-00525-OLG-RBF, 2020 WL 5984058, at *2 (W.D. Tex. Oct. 8, 2020), *report and recommendation adopted*, 2020 WL 13199004 (W.D. Tex. Dec. 14, 2020); *Trujillo v. Allstate Vehicle & Prop. Ins. Co.*, No. H-19-3992, 2020 WL 6123131, at *1 (S.D. Tex. Aug. 20, 2020); *Reyna v. State Farm Lloyds*, No. H-19-3726, 2020 WL 1187062, at *1 (S.D. Tex. Mar. 12, 2020); *Mancha v. Allstate Tex. Lloyd's*, No. 5:18-cv-00524, 2020 WL 8361926, at *3 (W.D. Tex. Feb. 26, 2020); *Pearson v. Allstate Fire & Cas. Ins. Co.*, No. 19-CV-693-BK, 2020 WL 264107, at *2 (N.D. Tex. Jan. 17, 2020); *Gonzalez v. Allstate Fire & Cas. Ins. Co*, No. SA-18-CV-00283-OLG, 2019 WL 13082120, at *1 (W.D. Tex. Dec. 2, 2019); *Kester v. State Farm Lloyds*, ___ S.W.3d ___, ___, 2023 WL 4359790, at *1 (Tex. App.—Fort Worth July 6, 2023, no pet. h.); *Rosales v. Allstate Vehicle &*

judgment on the insured's TPPCA claim,[11] arguing that it cannot proceed because there are no further damages the insured can recover under the statute due to the "interest" payment.[12] And if there are no further damages the insured can recover under the statute, the insurer reasons, the insured can never recover attorney's fees because with no policy benefits remaining to be paid, the "amount to be awarded in the judgment" and therefore the amount calculated under Section 542A.003(a)(3)(A) will always be zero.[13]

Prop. Ins. Co., ___ S.W.3d ___, ___ 2023 WL 3476376, at *1 (Tex. App.—Dallas May 16, 2023, no pet. h.).

[11] In most cases, the insured's TPPCA claim is the only claim that is even arguably viable post-appraisal in light of the Court's holdings in *Barbara Technologies*, 589 S.W.3d 806, and *Ortiz*, 589 S.W.3d 127.

[12] *See, e.g.*, *McCall*, 2023 WL 5311485, at *2, 3-5; *Odom*, 2023 WL 2746050, at *3-5; *Arnold*, 2023 WL 2457523, at *4-5; *Kahlig*, 2023 WL 1141876, at *3, 7-8; *Morakabian v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:21-CV-00100-SDJ-CAN, 2022 WL 17501024, at *5-6, 9-11 (E.D. Tex. Dec. 6, 2022), *report and recommendation adopted*, 2023 WL 2712481 (E.D. Tex. Mar. 30, 2023) ("*Morakabian Report & Rec.*"); *Royal Hospitality*, 2022 WL 17828980, at *7-11; *Atkinson*, 2022 WL 3655323, at *5, 7-8; *Parsons Report & Rec.*, 2021 WL 6496775, at *10-13; *White*, 2021 WL 4311114, at *7-10; *Ahmad*, 2021 WL 2211799, at *2-5; *Martinez v. Allstate*, 2020 WL 6887753, at *1-4; *Moncivais*, 2020 WL 5984058, at *2-5; *Mancha*, 2020 WL 8361926, at *1-3; *Pearson*, 2020 WL 264107, at *4; *Gonzalez*, 2019 WL 13082120, at *2, 5-7; *Kester*, 2023 WL 4359790, at *2-7; *Rosales*, 2023 WL 3476376, at *2, 4-7; *see also Trujillo*, 2020 WL 6123131, at *2 (seeking summary judgment under a different theory); *Reyna*, 2020 WL 1187062, at *1 (same).

[13] TEX. INS. CODE § 542A.003(a)(3)(A); *see, e.g.*, *McCall*, 2023 WL 5311485, at *2, 3-5; *Odom*, 2023 WL 2746050, at *3-5; *Morakabian*, 2023 WL 2712481, at *2-6; *Arnold*, 2023 WL 2457523, at *4-5; *Kahlig*, 2023 WL 1141876, at *9; *Royal Hospitality*, 2022 WL 17828980, at *7-11; *Morakabian Report & Rec.*, 2022 WL 17501024, at *5-6, 9-11; *Atkinson*, 2022 WL 3655323, at *5, 7-8; *Parsons Report & Rec.*, 2021 WL 6496775, at *10-13; *White*, 2021 WL 4311114, at *7-10; *Ahmad*, 2021 WL 2211799, at *2-5; *Martinez v. Allstate*, 2020 WL 6887753, at *1-4; *Moncivais*, 2020 WL 5984058, at *2-5; *Trujillo*, 2020 WL 6123131, at *6; *Mancha*, 2020 WL 8361926, at *1-3; *Pearson*, 2020 WL 264107, at *4; *Gonzalez*, 2019 WL 13082120, at *2, 5-7; *Kester*, 2023 WL 4359790, at *2-7; *Rosales*, 2023 WL 3476376, at *2, 4-7; *see also Reyna*, 2020

In response, insureds contend that the insurers' proffered construction lacks textual support in the statute, which does not except appraisal or require a prospective judgment, pointing to this Court's opinion in *Barbara Technologies* which is instructive on both points. *See, e.g.*, *Morakabian*, 2023 WL 2712481, at *2-6; *Morakabian Report & Rec.*, 2022 WL 17501024, at *5-6, 9-11; *see also Barbara Techs.*, 589 S.W.3d at 827 ("We hold that because paying an appraisal amount, although binding as to the amount of the loss on the claim, is not a determination as to the insurer's liability, it does not represent actual damages as to payment on the claim unless an insurer either accepted liability or is adjudicated liable."). Insureds further argue that the insurers' interpretation of the 2017 amendment runs afoul of the Legislature's intent. *See, e.g.*, *Morakabian*, 2023 WL 2712481, at *2-6; *Morakabian Report & Rec.*, 2022 WL 17501024, at *5-6, 9-11.

All but two of the published opinions considering this issue are federal district court opinions, which are split. Some courts have sided with insurers, determining that in light of Section 542A.007(a), payment of the appraisal award extinguishes a plaintiff's right to recover attorney's fees under the TPPCA.[14] Others, however, have

WL 1187062, at *1 (denying claim for fees without any discussion or analysis of Section 542A.007).

[14] *See Rodriguez II*, 73 F.4th at 355 (quoting *Morakabian*, 2023 WL 27122481, at *5); *McCall*, 2023 WL 5311485, at *2, 3-5 *Morakabian*, 2023 WL 2712481, at *5; *Arnold*, 2023 WL 2457523, at *1; *Kahlig*, 2023 WL 1141876, at *8; *Royal Hospitality*, 2022 WL 17828980, at *7-11; *Rodriguez I*, 2022 WL 6657888, at *1; *Atkinson*, 2022 WL 3655323, at *5, 7-8; *White*, 2021 WL 4311114, at *7-10; *Trujillo*, 2020 WL 6123131, at *6; *Pearson*, 2020 WL 264107, at *4; *see also*

rejected the insurers' approach, concluding that "[a]lthough it is true that the Texas legislature intended to place a limit on attorney's fees through § 542A.007, there is no indication that the Texas legislature intended to read attorney's fees out of [the] statute for all practical purposes.'" *Rodriguez II*, 73 F.4th at 355 (quoting *Gonzalez*, 2019 WL 13082120, at *6); *see Ahmad*, 2021 WL 2211799, at *2-5; *Martinez v. Allstate*, 2020 WL 6887753, at *1-4; *Moncivais*, 2020 WL 5984058, at *2-5; *Mancha*, 2020 WL 8361926, at *1-3; *Gonzalez*, 2019 WL 13082120, at *2, 5-7. As the Fifth Circuit noted in *Rodriguez*, one court has found that such an interpretation of Section 542A.007 would allow insurers to "'systematically avoid liability for TPPCA attorney's fees by (i) first, paying only a small fraction of the alleged claim amount to a claimant, (ii) second, invoking appraisal, and (iii) third, only following appraisal, paying the difference and any interest owed to the claimant.'" *Rodriguez II*, 73 F.4th at 355 (quoting *Gonzalez*, 2019 WL 13082120, at *6).

In May 2023, the Dallas Court of Appeals became the first Texas appellate court to issue an opinion addressing the issue. *See Rosales*, ___ S.W.3d ___, 2023

Odom, 2023 WL 2746050, at *3-5 (failing to reach claim for fees because fact issue remained about interest calculation but indicating that summary judgment would be proper if calculation was correct); *Parsons v. Liberty Ins. Co.*, No. 3:20-CV-1682-K, 2021 WL 5629145, at *1 (N.D. Tex. Dec. 1, 2021) (rejecting recommendation to deny summary judgment on TPPCA claim in light of evidence of how insurer calculated interest payment); *Parsons Report & Rec.*, 2021 WL 6496775, at *10-13 (explaining parties' summary judgment arguments); *Reyna*, 2020 WL 1187062, at *1 (granting summary judgment without any substantive analysis of Section 542A.007); *Crenshaw v. State Farm Lloyds*, No. 4:18-CV-00236-O, 2020 WL 12990985, at *1-2 (N.D. Tex. Feb. 1, 2020) (holding no fees owed, in appraisal context, under Section 542A.007 under "reasonableness" exception to TPPCA liability).

WL 3476376. In a split panel decision, the court affirmed the trial court's summary judgment in favor of Allstate. *See id.* at ___, *7. Several weeks later, its sister court in Fort Worth relied heavily on *Rosales* in reaching a similar result in *Kester*, ___ S.W.3d at ___, 2023 WL 4359790, at *4-7.

In short, although the nuances of the parties' arguments and the specifics of the courts' rationales differ,[15] the common issue in all of these cases – including this case – is the question the Fifth Circuit certified to this Court: "[D]oes an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" *Rodriguez II*, 73 F.4th at 356.

V. To Answer the Certified Question, The Court Must Interpret the Meaning of "to Be Awarded in the Judgment"

Answering the certified question requires this Court to interpret Section 542A.007 of the Code. *See* TEX. INS. CODE § 542A.007. Specifically, the Court must determine the meaning of "to be awarded in the judgment." *See id.* § 542A.007(a)(3)(A).

In the insurers' view, once an insurer pays the appraisal award and any penalty interest, there is nothing left "to be awarded in the judgment" and the attorney's fee calculation under Section 542A.007(a) will always be zero. *See id.* In other words,

[15] Both sides have made arguments in various cases that are not acknowledged or discussed in the courts' opinions.

they argue a prospective judgment for outstanding policy benefits is required in order for an insured to recover attorney's fees.

Insureds point out that the statute does not say "*awarded* in the judgment" but "*to be* awarded in the judgment." *Id.* (emphasis added). They argue that the fee calculation should take into consideration the amount awarded in appraisal for property damage and that, at most, an insurer is entitled to an offset or credit for any payments made prior to judgment.

A. The Tender of "Interest" Does Not Affect the Court's Analysis of the Attorney Fee Issue

As a preliminary matter, it bears noting that while the certified question references a situation where the insurer pays the appraisal award and purports to pay statutory interest – because those are the facts in this case – the tender of an "interest" payment is actually **irrelevant** to the construction of Section 542A.007 as it relates to attorney's fees.

The fee calculation in Section 542A.007 implicates "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*** by the amount ***alleged to be owed on the claim for that damage or loss in a [presuit] notice*** given under" Chapter

542A.[16] *Id.* (emphasis added). Statutory interest under the TPPCA does not represent compensation for damage to or loss of covered property. *See id.* § 542.060(c) (providing for penalty interest in Chapter 542A cases).

So, while it is true that insurers began issuing "interest" payments shortly after the 2017 bill took effect, and the interest payment is relevant to the question whether the insurer has paid all of the damages it owes under the TPPCA (and therefore whether it is entitled to summary judgment on that claim), the Court's analysis of the *attorney fee* issue is the same whether or not the insurer tenders an interest payment.

B. This Court Must Discern and Effectuate the Legislature's Intent

In any event, when construing statutes, this Court's "fundamental goal" is "'to ascertain and give effect to the Legislature's intent.'" *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017) (quoting *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012)).

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[16] The House sponsor of the 2017 bill was very clear to the House Committee on Insurance that the Section 542A.003 presuit notice letter may only state the amount alleged to be owed for property damage:

> So in the Committee [substitute bill], the notice must state the damage or loss to covered property but not other less quantifiable damages. And to be clear, those notices would still be provided under other statutory requirements, but with respect to calculating the defendant's liability for paying attorney's fees, it would be based on what was demanded just on the property damage.

https://tlchouse.granicus.com/MediaPlayer.php?view_id=40&clip_id=13220 at 1:05:18-1:05:42 (last accessed August 21, 2023).

To discern that intent, the Court begins with the Legislature's words. *See id.* But it does not consider them in a vacuum. *See Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010). Rather, it "'examine[s] the entire act to glean its meaning,' tr[ies] to give meaning to each word, and avoid[s] treating statutory language as surplusage where possible." *Id.* (citations omitted). The Court also presumes that the Legislature intended the entire statute to be effective, *see id.*, and that the Legislature intended a just and reasonable result, *see* TEX. GOV'T CODE § 311.021(3).

If a statute is clear and unambiguous, the Court reads it according to its common meaning without resorting to canons of construction or extrinsic aids. *See Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389 (Tex. 2014). But where a statute is capable of more than one reasonable interpretation, the Court is guided by an aid to statutory construction found in the Code Construction Act:

> [A] court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.

HCBeck, Ltd. v. Rice, 284 S.W.3d 349, 352 (Tex. 2009) (quoting TEX. GOV'T CODE § 311.023) (analyzing enumerated factors in considering competing interpretations of the term "provide" in Texas Workers' Compensation Act provision); *see* TEX. GOV'T CODE § 311.023.

VI. The Amount "To Be Awarded in the Judgment" Means the Amount to Be Awarded *Before* Offsetting Any Prepayment of Property Damage

A. If the Legislature Had Intended to Limit or Eliminate Attorney's Fees in the Appraisal Context, It Would Have Said So

The 2017 bill did not place a wholesale limitation on attorney's fees. *See* 2017 Act. Rather, it limited fees in two circumstances: (1) where the specific amount alleged to be owed for property damage in the policyholder's presuit notice exceeds the amount to be awarded in the judgment for property damage, in which case fees may be proportionally reduced or even eliminated, *see* TEX. INS. CODE §§ 542A.003(b)(2), 007(a)-(c); and (2) where the policyholder does not give presuit notice stating a specific amount alleged to be owed for property damage, *see id.* §§ 542A.003(b)(2), 007(d).

Nothing in the 2017 bill indicates that the Legislature intended to limit or eliminate fees in the appraisal context. *See generally* 2017 Act; *see also Barbara Techs.*, 589 S.W.3d at 814, 817 & n.9. In *Barbara Technologies*, this Court interpreted the absence of such language in the TPPCA as an indication that the Legislature did not intend to exempt appraisal payments from the TPPCA's deadlines or enforcement. *See Barbara Techs.*, 589 S.W.3d at 814, 817 & n.9. If it had intended to do so, the Court observed, it certainly knew how. *See Barbara Techs.*, 589 S.W.3d at 814, 817 & n.9 ("there is no question that the Legislature knows how to fit appraisals into a statutory scheme governing the evaluation and

payment of insurance claims, as it did just that in the Texas Windstorm Insurance Association Act"); *see also* TEX. INS. CODE §§ 2210.574, .579. "[I]t could have so provided as it did for other exceptions in Section 542.053 [to the TPPCA], under which the TPPCA does not apply." *Id.* at 817 n.9 (citing TEX. INS. CODE § 542.053).

Here, the Legislature could easily have exempted appraisal payments from Section 542.060's unequivocal language providing that an insurer who does not pay a claim promptly is liable to the policyholder for penalty interest as damages plus reasonable and necessary attorney's fees and prejudgment interest, if allowed by law, on top of the amount of the claim. *See* TEX. INS. CODE § 542.060(a). But it didn't. *See generally* 2017 Act. To the contrary, by adding subsection (c) to Section 542.060 it reaffirmed – in the context of cases to which Chapter 542A applies – existing law providing that an insurer that is liable for a claim under an insurance policy that is not in compliance with the TPPCA is liable for penalty interest, albeit at a different rate, as damages "together with reasonable and necessary attorney's fees" and prejudgment interest, if allowed by law. *Id.* § 542.060(c).

B. If The Legislature Had Intended to Limit or Eliminate Attorney's Fees When an Insurer Pays Damages Before Judgment Is Rendered, It Would Have Said So

Likewise, nothing in the TPPCA or Chapter 542A suggests that the Legislature intended for an insured to be able to avoid attorney's fees by tendering

payment for policy benefits before the entry of judgment. *See* TEX. INS. CODE §§ 542.001 *et seq.*, 542A.001 *et seq.*

Again, the Legislature knew how to do this. *See JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 484-90 (Tex. 2019).

The plaintiff in *JCB*, *see id.* at 483, was a commissioned sales representative for a manufacturer who claimed that the manufacturer had paid approximately $280,000 in commissions late according to the terms of the parties' agreement. JCB sued under the Texas Sales Representative Act, which provides that a principal who fails to pay commissions as agreed is liable for "three times the **unpaid** commission due to sales representative" and attorney's fees and costs. TEX. BUS. & COMM. CODE § 54.004(1) (emphasis added); *see JCB*, 597 S.W.3d at 482-83.

When suit was filed, Horsburgh had paid some of the amount owed but $77,000-$90,000 remained outstanding. *See JCB*, 597 S.W.3d at 483. While the case was pending, Horsburgh paid the outstanding commissions plus interest. *See id.* Horsburgh moved for summary judgment, arguing that the statute did not apply because it only applies to unpaid commissions, and all of the commissions JCB was owed had been paid. *See id.* The court granted the motion. *See id.* On appeal, the Fifth Circuit certified two questions to this Court: (1) What timing standard should courts use to determine the existence and amount of unpaid commissions due under the statute's treble damages provision?; and (2) May a plaintiff recover attorney's

fees and costs even if it does not receive a treble damages award under the statute, and under what conditions? *See id.*

With regard to the first question, the Court agreed with Horsburgh's position that because Horsburgh ultimately paid all commissions owed, albeit while litigation was pending, there were no unpaid commissions to treble. *See id.* at 484-90. But *JCB* does not apply here because neither Section 542.060(c) nor Section 542A.007 refers to or incorporates the word "unpaid." *See* TEX. INS. CODE § 542.060(c), 542A.007(a)(1)(A). If the Legislature's **in**clusion of the word "unpaid" was indicative of its intent in the statute at issue in *JCB*, its **ex**clusion of it must likewise be so in this case.

Importantly, with regard to the second question the Fifth Circuit certified, this Court held in *JCB* that Horsburgh's ultimate payment of the commissions due before trial or summary judgment did not extinguish the sales representative's right to recover attorney's fees under the statute. *See JCB*, 597 S.W.3d at 490-92. JCB argued that under the plain language of the statute, a principal who fails to comply with a commission agreement is liable for the sales representative's attorney's fees. *See id.* at 490. When Horsburgh failed to pay approximately $280,000 in a timely manner under the parties' agreement, JCB said, it incurred statutory liability for JCB's reasonable attorney's fees. *See id.* This Court agreed:

> JCB's entitlement to attorney's fees is triggered by Horsburgh's breach, not by JCB's success in litigation. The statute says, "A principal who

> fails to comply with a provision of a contract ... relating to payment of a commission ... is liable to the sales representative ... for ... reasonable attorney's fees and costs." TEX. BUS & COM. CODE § 54.004(1). Horsburgh failed to comply with the commission contract. It therefore "is liable to" JCB for "reasonable attorney's fees." That is what the statute says, so that is what it means.

Id. at 491. Thus, JCB was entitled to attorney's fees and costs under the statute independently of whether it recovered any unpaid commissions. *See id.* at 490.

Here, Section 542.060(c) – *which was added by the 2017 bill* – unequivocally provides that in a Chapter 542A case, an insurer that is liable for an insurance claim and not in compliance with the TPPCA's deadlines must pay the insured the amount of the claim, penalty interest, and attorney's fees. *See* TEX. INS. CODE § 542.060(c). "That is what the statute says, so that is what it means." *JCB*, 597 S.W.3d at 491. And again, we know from *Barbara Technologies*, 589 S.W.3d at 819, that the interest and attorney's fees owed under the largely identical Section 542.060(a) are owed regardless of the use of the appraisal process.

Moreover, at least one intermediate appellate court has rejected, albeit in a different context, a similar argument. *See Hand & Wrist Ctr. of Houston, P.A. v. Republic Servs., Inc.*, 401 S.W.3d 712, 716-22 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

In the *Republic Services* case, Republic owed the plaintiffs, two medical providers, approximately $20,000. *See id.* at 714. The providers filed suit and after fifteen months of litigation, Republic paid them about $5,500 on the eve of trial. *See*

id. At trial, the parties told the jury about the payments and framed the dispute as one over whether Republic owed the remaining bills under the parties' agreement. *See id.* In closing, Republic's lawyer told the jury the bills were adjusted under the terms of the contract, so Republic had paid all that it owed and the total account balance was zero. *See id.*

The jury sided with the providers and awarded them the remaining balance due and owing (approximately $14,500). *See id.* at 716. In post-judgment motions, the providers asked the trial court to award prejudgment interest on the amount paid before trial. *See id.* Republic took the position that it only owed interest on the amount awarded by the jury. *See id.* The trial court agreed with Republic and awarded prejudgment interest only on the amounts awarded by the jury. *See id.*

On appeal, the Fourteenth Court considered two issues: "(1) whether public policy allows a defendant to avoid prejudgment interest by 'unilaterally tendering' payment just before trial; and (2) whether the trial court abused its discretion in failing to award prejudgment interest on the payments made by Republic before trial." *Id.* at 716-17. The court did not reach the first issue because it found in the providers' favor on the second. *See id.* at 717.

Republic did not dispute on appeal that it owed the full $20,000 – the sum of its pretrial payments and the amount awarded by the jury. *See id.* Nor did the parties disagree about when interest began accruing. *See id.* The issue, the court said in an

opinion authored by Justice Busby, was what happened to the interest owed when partial payments were later made. *See id.* at 717-18.

One of Republic's arguments on appeal was that both equitable principles and Section 304.104 of the Texas Finance Code permit prejudgment interest only on amounts that are actually awarded in a judgment. *See id.* at 720; *see also* TEX. FIN. CODE § 304.104 ("prejudgment interest accrues on the amount of a judgment . . ."). According to Republic, because the judgment did not award the providers the amounts Republic had already paid, the providers could not recover prejudgment interest on those amounts. *See Republic Servs.*, 401 S.W.3d at 720.

The court observed that "Texas courts have rejected the rigid view." *Id.* "For example, section 304.104 of the Texas Finance Code defines when 'prejudgment interest accrues on the amount of a judgment.'" *Id.* (quoting TEX. FIN. CODE § 304.104). The Finance Code does not, however, address interest accrual on pretrial payments. *See id.* Justice Busby pointed out in his opinion that this Court held in *Brainard v. Trinity Universal Insurance Co.* that plaintiffs could recover prejudgment interest on amounts not awarded in the judgment despite the Finance Code's silence on the issue. *See id.* (citing *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 817 (Tex. 2006)).

Relying on *Brainard* and other authority, the court held that Republic could not avoid prejudgment interest by paying the providers' damages in part before

judgment was rendered, and it was an abuse of discretion for the trial court to fail to award it. *See id.* at 718, 721-23. The Court said:

> Republic concedes that if it had made no payment at all, then the trial court could have awarded prejudgment interest on the full amount of damages due under the contract. Republic also concedes that if the judgment had included the full amounts of damages and then provided credits for the amounts of Republic's unilateral partial payments, appellants could have obtained prejudgment interest on the full amount. . . . Yet, Republic contends that because it made a unilateral partial payment and that payment was not recited in the judgment, appellants are not entitled to seek prejudgment interest on the full amount due on the contract. According to Republic, its payment extinguished appellants' claim for prejudgment interest on part of the principal amount due under the contract.
>
> . . . As explained above, the amount of such payments will usually be undisputed, and neither equitable principles nor the Finance Code require the pointless formalism of awarding the payments again in the judgment and providing an offsetting credit simply to trigger an interest award.

Id. at 721-22. And, even though it did not reach the policy question, the court briefly touched on it:

> Conversely, if we did not allow an award of prejudgment interest on the total amount of damages established as a result of the breach, we would be encouraging gamesmanship, expense, and delay: defendants would have free use of the money claimed as damages and could wait until the last possible moment before trial to settle or tender the amount they believe is owed. In addition, depriving plaintiffs of interest on belated partial payments would discourage them from accepting such payments. These results are incompatible with the supreme court's directive that the prejudgment interest scheme should implement the legislative goal of encouraging prompt settlements.

Id. at 722.

The prejudgment interest provision in the Finance Code that was at issue in *Republic Services* did not "require the pointless formalism of awarding the payments again in the judgment and providing an offsetting credit simply to trigger an interest award." *Id.* at 722. Nor does the statute at issue here – when it refers to the amount "to be awarded in the judgment" – require such pointless formalism. *See* TEX. INS. CODE § 542A.007(3)(A). Or, maybe the Court will find that it does. But regardless, *Republic Services* illustrates that a statute that is arguably silent on pre-judgment payments may be construed in a manner that allows those payments to be considered in calculating what is due the plaintiff even though they are not ultimately awarded in the judgment.

In short, the Legislature could have enacted legislation providing that attorney's fees are only available under the TPPCA on ***unpaid*** amounts or amounts that ***are*** awarded in the judgment. But it didn't.

C. The Construction Advanced by Insureds Is Reasonable

Applying this Court's logic in *JCB*, the only reasonable construction of Section 542.060(c) is one where the statute means what it says: that where an insurer pays an appraisal award (or a claim) outside the TPPCA's payment deadlines and is ultimately shown to be liable for the underlying insurance claim (or, as here, accepted liability and made a partial payment during the adjustment process), the insured is entitled to recover attorney's fees. And, under *Republic Services*, 401

S.W.3d at 722, the only reasonable construction of Section 542A.007 is one that allows for fee recovery even though no ***unpaid*** policy benefits remain outstanding and allows fees to be calculated on sums that are not actually awarded in a judgment. *See id.* The insurers' construction, to the extent it reads the word "unpaid" into Section 542A.007 and disregards the words "to be" in "to be awarded in the judgment," would render Section 542A.060(c) meaningless and effectively read attorney's fees out of the statute.

The policyholders' construction is not only supported by the language of the statute, *JCB*, and the *Republic Services* case, but it is also supported by *Barbara Technologies*, 589 S.W.3d at 826. While it is true that *Barbara Technologies* was not a Chapter 542A case, it does not follow that *Barbara Technologies* is wholly irrelevant and should be ignored.

Recall that in that case, Barbara Tech made the argument "that the appraisal value constituted an award of actual damages." *Id.* The Court said it did not, but ***only*** because there had not yet been an "adjudication as to whether State Farm [wa]s liable under the policy – and therefore no determination as to whether State Farm [wa]s liable for TPPCA damages." *Id.* at 827. If and when State Farm accepted liability or was adjudicated liable, the Court said, the amount of the appraisal award ***would*** represent actual damages. *See id.* ("We hold that because paying an appraisal amount, although binding as to the amount of the loss on the claim, is not a

determination as to the insurer's liability, it does not represent actual damages as to payment on the claim unless an insurer either accepted liability or is adjudicated liable."). The reasoning the Court employed in its analysis of Section 542.060(a) applies with equal force to this Court's analysis of Section 542.060(c) and Chapter 542A.

VII. Application of the Factors Set Forth in the Code Construction Act Favors Insureds' Statutory Construction

The construction set forth in Part VI, *supra*, is undoubtedly a reasonable construction of the statute. If the Court finds that the insurers' proffered construction of the statute is also reasonable, the Court must look to the relevant factors in the Code Construction Act. *See* TEX. GOV'T CODE § 311.023; *HCBeck, Ltd.*, 284 S.W.3d at 352-60. The most significant and persuasive factors here are the legislative history and circumstances under which the statute was enacted and the consequences of the insurers' construction.

A. The Legislative History and Circumstances Under Which the Statute Was Enacted

The district court in this case found that the Legislature's intent in enacting Chapter 542A was "to limit attorney's fees." *Rodriguez I*, 2022 WL 6657888, at *3. The court "presumed that the legislature was aware of the conflict Chapter 542A would have with the Prompt Payment Act and chose to limit attorney's fees anyway." *Id.*

The 2017 bill does not explicitly state its intent, nor do the statutory amendments and additions effected by the bill articulate their purpose. *See* TEX. INS. CODE §§ 542.060(c), 542A.001, *et seq.*; 2017 Act. But there is nothing in the 2017 bill or its legislative history that indicates the Legislature intended to limit attorney's fees in *all* Chapter 542A cases. Indeed, the legislative history establishes the opposite.

At a March 28, 2017, meeting of the House Insurance Committee, the House Bill's sponsor, Representative Greg Bonnen, stated when laying out the bill to the Committee that its goal was "to mitigate ***abusive*** lawsuits related to hailstorms and other severe weather events while still protecting the right of every Texas consumer to sue their insurance company if it acts unfairly or in bad faith."[17] Representative Bonnen told the Committee:

> [T]his really is a pre-suit notification bill. That is basically what is happening in this statute. . . . [T]he goal or the purpose of this is to say if a claimant wants to sue their insurer, it seems reasonable that notice be given to the insurer that, first of all, something is wrong and that the claim wasn't paid fully or wasn't paid in time. . . . [T]his doesn't prevent anybody from actually suing their insurer. It simply says, "Before you file the suit, give the insurer notice of what's wrong and an opportunity to cure that."[18]

[17] https://tlchouse.granicus.com/MediaPlayer.php?view_id=40&clip_id=13220 at 51:00-52:05 (last accessed August 21, 2023) (emphasis added).

[18] *Id.* at 54:20-56:06.

And in order to try to get a pre suit demand[19] that is somewhat reasonable, what this legislation does is it says basically if you make a demand and this – and we've narrowed it only to damages that were incurred to the property itself, so not for business interruption or other losses but just damage to the property, and the demand's not met and suit is filed and you go through litigation, the recovery must be at 80% or more of what was demanded for the insurance company to also be liable or responsible for paying 100% of the attorney's fees.

So if a demand was made and let's say it's – the insurance company decides they want to litigate, you go through trial and in the end less than 20% of what was demanded is actually recovered, then the defendant is not responsible for paying the attorney's fees as it pertains to that. They'll still have to pay whatever, the 5% or 10% or 15%, you know, of what was initially demanded if it was awarded. But the purpose – and it's – and it's proportional, in between 20% and 80%. So if it's 50%, then the insurer would pay half of the attorney's fees.

And the reason behind that is to try to get an offer that is somewhat reasonable because the whole goal is to get the money into the hands of the claimant as soon as possible and to do that fairly and reasonably. That's basically the working portion of the bill. That's Section 3.[20]

Now, if presuit notice is simply not given, then it would still remain a factor that, yes, the right to have the insurance company pay the plaintiffs' attorney's fees could be lost. . . . [21]

As you can see, it is essentially a pre-notice, you know, bill. It doesn't stop anybody from suing. It just says, "Before you file this suit, you

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[19] Although Rep. Bonnen and others repeatedly referred to presuit "demands" during the legislative process, Chapter 542A does not require a presuit *demand*. *See* TEX. INS. CODE § 542A.003. It requires a presuit *notice*, *see id.*, and gives a person who receives one a right to make a settlement *offer* within 60 days, *see id.* § 541.156.

[20] https://tlchouse.granicus.com/MediaPlayer.php?view_id=40&clip_id=13220 at 57:55-59:32 (last accessed August 21, 2023).

[21] *Id.* at 1:04:36-:50.

need to give fair notice and give the insurer 60 days to meet your demand."[22]

When taking questions on the bill, Rep. Bonnen had the following exchange with a Committee member:

> Q. Okay. So – so, the attorney's fees, then, if the case goes forward and goes to – goes to trial, then the attorney's fees are subject to -- or decided by the jury, by the –
>
> A. Typically –
>
> Q. – judge?
>
> A. – I think by the jury.
>
> Q. Okay. With – with no stipulations as to how those are calculated? I mean, is – is that the same system as exists today?
>
> A. Yes.[23]

He also told the Committee, "The only way that you would lose attorney's fees is if you went ahead and sued and you went to the trial and you discovered that you really didn't have damages and that actually what you demanded was dramatically more than what you could recover."[24] Rep. Bonnen was also asked, "And you think [the bill]'s focused down on those key things that you anticipate will help us not have

[22] *Id.* at 1:01:50-1:02:11.

[23] https://tlchouse.granicus.com/MediaPlayer.php?view_id=40&clip_id=13236 at 29:35-30:08 (last accessed August 21, 2023).

[24] *Id.* at 1:26:03-:18.

runaway litigation?"[25] He answered, **"I think it's always best to do what needs to be done and no more."**[26]

The companion bill's sponsor, Senator Kelly Hancock, told the Senate Committee on Business and Commerce:

> [The legislation is] designed to protect the consumer's ability to hold their insurance company accountable by preserving the right to sue. At the same time, it restricts bad actors from creating a business model based on frivolous litigation that in the end costs statewide consumers more through increased insurance premiums and reduced coverage and also extends the time of repair for their property.[27]

When Senator Whitmire raised concerns about policyholders being unable to hire counsel due to the fee limiting provisions, Senator Hancock said,

> We are trying to filter out the bad actors so that the competent attorneys aren't damaged and the property owners are not damaged by these bad actors that have abused the system. And so I think you're right. The competent attorneys are going to be well taken care of. The bad actors are going to be filtered out. And the property owners, no matter what happens, they're going to be taken care of with this legislation.[28]

Committee member, Senator Larry Taylor, explained:

> We've had people suing for exorbitant amounts of money when their property claim's a very small amount and much smaller than what they're asking for, and that's really the genesis of it. . . . [T]he genesis

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[25] *Id.* at 35:43-:59.

[26] *Id.*

[27] https://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=12472 at 43:00-:30 (last accessed August 21, 2023).

[28] *Id.* at 59:07-:29.

> of this whole problem is these lawsuits claiming a hundred thousand dollars in losses for a – you know – a smaller amount.[29]

Further, the House Research Organization's Bill Analysis, which Safeco cited and relied on in its briefing in the Fifth Circuit (Appellee's Br. at 19), simply does not support the notion that the Legislature intended to place wholesale limitations on TPPCA damages and attorney's fees in weather-related first-party insurance cases. *See* House Research Org., Bill Analysis, H.B. 1774, 85th Leg., R.S. (May 4, 2017) ("Bill Analysis"). The very first line of the Bill Analysis says, "SUBJECT: Requiring **pre-suit notice** for certain claims against an insurer." *Id.*, p. 1 (emphasis added). It indicates that the bill's supporters said: "CSHB 1774 would mitigate the growing trend of **abusive** severe weather event lawsuits. Opportunistic lawyers have been using extreme weather events as a pretext for **exaggerating damages**, **suing innocent parties**,[30] and **failing to give notice to insurers** before filing lawsuits." *Id.*, p. 4 (emphasis added). It goes on to explain that the bill's supporters said: "The bill would not damage the rights of policyholders to sue their insurers. Consumers still would have seven separate causes of action to sue, and **carriers still would be subject to strict liability if shown to have underpaid** a policyholder's claim. **The**

[29] *Id.* at 47:33-:53.

[30] This refers to Section 542A.006, which affords an insurer the ability to elect to accept liability for the actions of its agents, such as adjusters, in order to eliminate any causes of action its insured may have or bring against such individuals. *See* TEX. INS. CODE § 542A.006; Bill Analysis, p. 3.

bill simply would create penalties to enforce the existing pre-suit notice requirement." *Id.* (emphasis added).

There is no basis in the bill itself, the legislative history, or the Bill Analysis to support the insurers' construction of the statute. There is no indication that the Legislature intended to disincentivize first-party cases, period, by making them less lucrative or limiting attorney's fees in these cases even when the insured follows the rules and gets the notice letter right. What ***is*** clear is that the Legislature intended to curb *abusive* lawsuits – lawsuits where opportunistic lawyers use extreme weather events as a pretext for exaggerating damages, sue innocent parties, and fail to give insurers presuit notice before filing lawsuits.

B. The Consequences of a Particular Construction

If allowed to stand, the insurers' construction of the statute will have devastating consequences for insureds – particularly residential policyholders.

It will allow insurers to avoid paying attorney's fees even in the absence of an "interest" payment. An insurer could pay an appraisal award but no interest, force a trial on TPPCA liability, lose, be ordered to pay interest, and *still* avoid paying the insured's attorney's fees because there was nothing "to be awarded in the judgment" for property damage.

Insurers' proffered interpretation would even allow an insurer to refuse to pay the appraisal award (or, in a non-appraisal case, the claim in general), force the

insured to trial, and avoid attorney's fees by tendering a check for policy benefits so long as it does so before judgment is entered.

Or, an insurer could systematically avoid fees by tendering 80% plus $0.01 of the appraisal award. *See* TEX. INS. CODE §§ 542.003(b)(2), .007(a)-(c). It could then continue to litigate the remaining 20% less $0.01 and interest as long and as vigorously as it desired with no risk of being ordered to pay the insured's attorney's fees even if the insured wins at trial.

A further consequence of insurers' construction will be that policyholders will effectively become unable to sue their insurers, which is something the Legislature clearly did not intend. If attorney's fees are not available in the context of appraisal (or when an insurer may avoid them by simply tendering policy benefits at any time up until the entry of judgment), policyholders will be unable to retain counsel on a contingent fee basis.[31] This, likewise, is not what the Legislature intended. Rep. Bonnen said to the Committee: "We all have to purchase insurance for our homes and for our businesses, and we need attorneys. We need good trial attorneys who can hold accountable the insurers when they don't act properly or when they don't act in good faith."[32]

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[31] Most residential policyholders cannot afford to hire counsel on an hourly basis, nor would it make sense in most cases because of the amount that is typically in controversy.

[32] https://tlchouse.granicus.com/MediaPlayer.php?view_id=40&clip_id=13220 at 1:08:05-:25 (last accessed August 21, 2023).

VIII. The Court Should Answer "No" to the Certified Question

Safeco has never alleged that Mr. Rodriquez's lawsuit was in any way abusive, or that his lawyers were opportunistic, or that they used extreme weather events as a pretext for exaggerating Mr. Rodriquez's property damage, suing innocent parties, or failing to give pre-suit notice. Nor could Safeco do so, because Mr. Rodriquez did everything right.

He promptly made a claim under his Safeco policy after an EF2 tornado caused devastating damage to his home. Safeco accepted the claim but found only about $1300 in roof damage. When Mr. Rodriquez complained, Safeco hired an engineering firm that acknowledged the damage but claimed it was not caused by a tornado. The record is clear that Safeco's hired engineers knew that wasn't true and they blatantly and deceitfully misrepresented the intensity of the storm.

So Mr. Rodriquez hired counsel and sent a presuit notice letter in accordance with 542A. He did exactly what the statute required him to do. The specific amount he alleged was owed for property damage was an additional $29,500.

Safeco got the letter at least as early as April 20. Safeco didn't respond. They didn't exercise their statutory right to further inspect or photograph the property. They didn't request any information from Mr. Rodriquez. They didn't make a settlement offer in an effort to avoid litigation. They did nothing.

After 60 days passed, Mr. Rodriquez filed suit. Safeco vigorously litigated the case for a full year and only after that did they invoke appraisal. Eight months later, the award came back at about twenty-eight times Safeco's estimate and about 25% higher than the number in the presuit notice letter Mr. Rodriquez sent just like he was supposed to in order to give Safeco the opportunity to avoid litigation.

Safeco paid the award and it also paid $9500 that, according to Safeco, was for interest Mr. Rodriquez could allege to be owed under the TPPCA. Then Safeco successfully argued in the trial court that it had extinguished Mr. Rodriquez's TPPCA claim and any right to attorney's fees because there is no "amount to be awarded in the judgment."

The construction of the statute urged by Mr. Rodriquez is reasonable. It effects the Legislature's clear intent and the stated purpose of the TPPCA. It gives effect to the entire statute. It yields a just and reasonable result and avoids an unjust and unreasonable one. It is supported by the text of the statute, its legislative history, and the case law discussed herein. The Court should answer "no" to the certified question.

PRAYER

For these reasons and the reasons set forth in his briefing in the Fifth Circuit Court of Appeals, Mr. Rodriquez respectfully asks the Court, after hearing oral argument, to answer "no" to the Certified Question.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief on the merits complies with the word limit set forth in Texas Rule of Appellate Procedure 9.4(i)(2)(B) because it contains 13,443 words excluding the items listed in Texas Rule of Appellate Procedure 9.4(i)(1). In preparing this certificate, I relied in part on the word count of Microsoft Word 2007, the computer program used to prepare the document, in accordance with Texas Rule of Appellate Procedure 9(i)(3), and hand counted the words in excerpts from the record that are included in the brief.

/s/ Melissa Waden Wray
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No. 23-0534

IN THE
SUPREME COURT OF TEXAS

MARIO RODRIGUEZ,
***Appellant*,**

v.

SAFECO INSURANCE COMPANY OF INDIANA,
***Appellee*.**

On Certified Question from the
United States Fifth Circuit Court of Appeals
No. 22-11070

APPENDIX

Respectfully submitted,

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Tab A

73 F.4th 352
United States Court of Appeals, Fifth Circuit.

Mario RODRIGUEZ, Plaintiff—Appellant,
v.
SAFECO INSURANCE COMPANY
OF INDIANA, Defendant—Appellee.

No. 22-11070
|
FILED July 12, 2023

Synopsis

Background: Insured brought action against homeowners insurer to recover for unfair settlement practices regarding claim for tornado damage. Insurer then invoked appraisal provision and paid appraisal award plus interest. The United States District Court for the Northern District of Texas, Sam R. Cummings, Senior District Judge, 2022 WL 6657888, granted insurer's motion for summary judgment precluding award of attorney's fees. Insured appealed.

The Court of Appeals, Douglas, Circuit Judge, held that Court of Appeals would certify to Texas Supreme Court question of right to attorney's fees after insurer's payment.

Question certified.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Appeal from the United States District Court for the Northern District of Texas, USDC No. 5:20-CV-168, Sam R. Cummings, U.S. District Judge

Attorneys and Law Firms

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Before Higginbotham, Graves, and Douglas, Circuit Judges.

Opinion

Dana M. Douglas, Circuit Judge:

***353** Mario Rodriguez ("Rodriguez") appeals the district court's summary judgment of his claims against Safeco Insurance Company of Indiana ("Safeco") for violating § 541 and § 542 of the Texas Insurance Code. In 2017, the Texas legislature amended § 542, raising an important issue of Texas insurance law as to which there is no controlling Texas Supreme Court authority, and the authority from the intermediate state appellate courts provides insufficient guidance. Thus, we CERTIFY the relevant question to the Supreme Court of Texas. *See* TEX. CONST. art. V, § 3-c(a); TEX. R. APP. P. 58.1.

I.

On May 25, 2019, a tornado struck the home of Rodriguez. At the time of the storm, Rodriguez was insured by Safeco. After inspecting the property, an adjuster found covered damage to the home totaling $1,295.55. Dissatisfied with Safeco's handling of the claim and the amount of the payment, on April 17, 2020, Rodriguez sent Safeco notice that he believed he was entitled to an additional $29,500 under the policy. The notice stated that Rodriguez did not wish to litigate but he intended to file suit if a resolution was not reached in 60 days.

After no response, Rodriguez filed suit on June 18, 2020, alleging unfair settlement practices in violation of § 541 of the Texas Insurance Code, and delayed payment in violation of § 542 of the Texas Insurance Code — known as the Texas Prompt Payment of Claims Act ("TPPCA").

On July 21, 2021, Safeco invoked the appraisal provision under the policy and on April 5, 2022, the appraisal panel determined that the replacement cost value of the damage to Rodriguez's home was $36,514.52. Safeco paid Rodriguez $32,447.73, claiming the amount represented the actual cash value of the appraisal award, less the deductible, policy limits, and prior payment. Safeco also paid Rodriguez $9,458.40, claiming the amount represented "any conceivable interest Plaintiff could allege to be owed under the [TPPCA] on the above-referenced appraisal award payment."

On July 15, 2022, Safeco filed a motion for summary judgment, arguing that, in light of the 2017 amendments to § 542 of the Texas Insurance code, § 542A, its payment of the

appraisal award plus interest foreclosed Rodriguez's claim for attorney's fees under the TPPCA and eliminated all remaining claims. Rodriguez argued that the legislature did not intend the amendments to read attorney's fees out of the TPPCA in the appraisal context.

The district court granted the motion and dismissed all claims,[1] holding that, "[a]lthough the issue presents policy factors that weigh in favor of each possible outcome, the Court finds that the legislature's intent appears clear when enacting Chapter 542A of the Texas Insurance ***354** Code to limit attorney's fees." *Rodriguez v. Safeco Ins. Co. of Ind.*, No. 5:220-CV-168-C, 2022 WL 6657888, at *1 (N.D. Tex. Oct. 3, 2022) (citing TEX. INS. CODE § 542A.007(a)). The district court reasoned that "[i]t must be presumed that the legislature was aware of the conflict Chapter 542A would have with the [TPPCA] and chose to limit attorney's fees anyway." *Id.* (citation omitted).

II.

The TPPCA imposes several requirements on insurers, one of which is that if the insurer delays payment of a claim for more than the applicable statutory period or 60 days, the insurer shall pay TPPCA damages. *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 812-13 (Tex. 2019) (citations omitted). Those damages include statutory interest on the claim along with reasonable and necessary attorney's fees. *See* TEX. INS. CODE § 542.060(a).

In September 2017, the Texas Legislature amended the TPPCA. *See* TEX. INS. CODE § 542A. Codified as Chapter 542A, the amendments changed, among other things, the method for determining the amount of attorney's fees and interest that a court may award under the TPPCA in weather-related insurance disputes.[2] *See* TEX. INS. CODE §§ 542A.001, .007. The new method limits the available attorney's fees by applying the following formula:

> (a) 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:
>
> (1) 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;
>
> (2) the amount of attorney's fees that may be awarded to the claimant under other applicable law; or
>
> (3) the amount calculated by:
>
> (A) 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 by the amount alleged to be owed on the claim for that damage or loss in a notice given under this chapter; and
>
> (B) 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.

TEX. INS. CODE § 542A.007(a).

While the Texas Supreme Court has previously held that payment of an appraisal award does not eliminate a policyholder's ability to collect TPPCA damages, such as attorney's fees, *see* *Barbara Techs.*, 589 S.W.3d at 829; *see also* *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651, 658 (Tex. 2021), and a Texas appellate court clarified that a pre-payment of interest does not change this finding, *see* *Tex. Fair Plan Ass'n v. Ahmed*, 654 S.W.3d 488, 490 (Tex. App.—Houston [14th Dist.] 2022, no pet.), these cases were not subject to the amendments in § 542A.[3]

***355** Thus, the central issue in this case is how, if at all, the amendments in § 542A change a policyholder's ability to collect TPPCA damages, such as attorney's fees, when the insurer pays an appraisal award and estimated interest.

The federal courts that have addressed this issue are split. Some courts have held that, "[t]he plain language of Section 542A.007(a) makes clear that payment of the appraisal award extinguishes a plaintiff's right to attorney's fees under the TPPCA." *Morakabian v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:21-CV-100-SDJ, 2023 WL 2712481, at *5 (E.D. Tex. Mar. 30, 2023). Others, however, have held that, "[a]lthough it is true that the Texas legislature intended to place a limit on attorney's fees through § 542A.007, there is no indication that the Texas legislature intended to read attorney's fees out of statute for all practical purposes." *Gonzalez v. Allstate*

Fire & Cas. Ins. Co., No. SA-18-CV-00283-OLG, 2019 WL 13082120, at *6 (W.D. Tex. Dec. 2, 2019). The court in *Gonzalez* found that such an interpretation of § 542A.007 would mean that "insurers could systematically avoid liability for TPPCA attorney's fees by (i) first, paying only a small fraction of the alleged claim amount to a claimant, (ii) second, invoking appraisal, and (iii) third, only following appraisal, paying the difference and any interest owed to the claimant." *Id.*

III.

Under Texas appellate rules, "[t]he Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court [of Texas] precedent." *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 202 (5th Cir. 2020) (citing TEX. R. APP. P. 58.1). We look to three factors to determine whether certification is proper:

> (1) the closeness of the question and the existence of sufficient sources of state law;
>
> (2) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and
>
> (3) practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

Id. (quoting *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 332 (5th Cir. 2018)). Here, each factor advises that we certify. Applying the first factor, only one state appellate court has ruled on this issue, *see Rosales v. Allstate Vehicle and Prop. Ins. Co.*, No. 05-22-00676-CV, —— S.W.3d ——, ——, 2023 WL 3476376, at *1 (Tex. App. —Dallas, May 16, 2023), and, as stated above, federal courts applying Texas law are split. [4] Turning to the second ***356** factor, there are strong comity interests at play: "the final arbiters of state law should have a say on important questions regarding state insurance law." *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467, 472 (5th Cir. 2021). Finally, practical considerations favor certification: "there is no reason to think that certification would cause undue delay — to the contrary, the Texas Supreme Court is known for its 'speedy, organized docket.' " *Id.* (citation omitted). We therefore conclude that certification is warranted.

IV.

We certify the following question of state law to the Supreme Court of Texas:

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

***

We disclaim any intention or desire that the Court confine its reply to the precise form or scope of the question certified.

QUESTION CERTIFIED.

All Citations

73 F.4th 352

Footnotes

1 As to Rodriguez's § 541 claim, we AFFIRM. The appraisal costs in this case "flow" and "stem" from the denial of Rodriguez's claim, thus, the costs do not meet the independent injury rule under *Menchaca. See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 499-500 (Tex. 2018).

2 The statute defines a first party "claim" as one that "arises from damage to or loss of 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." TEX. INS. CODE § 542A.001.

3 It is undisputed that § 542A applies to this case. Not only do the parties not dispute that § 542A applies, but § 542A applies to all weather-related lawsuits that were filed after September 1, 2017. Here, Rodriguez filed this lawsuit after a tornado that occurred in 2020.

4 *Compare Saleme v. State Farm Lloyds*, No. 1:18-CV-00632-MAC-ZJH, 2021 WL 4206177, at *5 (E.D. Tex. Aug. 27, 2021); *Ahmad v. Allstate Fire & Cas. Ins. Co.*, No. 4:18-CV-4411, 2021 WL 2211799, at *4 (S.D. Tex. June 1, 2021); *Martinez v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:19-CV-2975, 2020 WL 6887753, at *2 (S.D. Tex. Nov. 20, 2020); *Moncivais v. Allstate Tex. Lloyds*, No. 5-18-CV-00525-OLG-RBF, 2020 WL 5984058, at *5 (W.D. Tex. Oct. 8, 2020); *Mancha v. Allstate Tex. Lloyd's*, No. 5:18-CV-00524-OLG, 2020 WL 8361926, at *3 (W.D. Tex. Feb. 26, 2020); *Gonzalez v. Allstate Fire & Cas. Ins. Co.*, No. SA-18-CV-00283-OLG, 2019 WL 13082120, at *6 (W.D. Tex. Dec. 2, 2019) *with Morakabian v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:21-CV-100-SDJ, 2023 WL 2712481, at *3 (E.D. Tex. Mar. 30, 2023); *Royal Hosp. Corp. v. Underwriters at Lloyd's London*, No. 3:18-CV-00102, 2022 WL 17828980, at *9 (S.D. Tex. Nov. 14, 2022); *White v. Allstate Vehicle & Prop. Ins. Co.*, No. 6:19-CV-00066, 2022 WL 2954338, at *2 (S.D. Tex. July 26, 2022); *Atkinson v. Meridian Sec. Ins. Co.*, No. SA-21-CV-00723-XR, 2022 WL 3655323, at *8 (W.D. Tex. Aug. 24, 2022); *Trujillo v. Allstate Vehicle & Prop. Ins. Co.*, No. H-19-3992, 2020 WL 6123131, at *6 (S.D. Tex. Aug. 20, 2020); *Pearson v. Allstate Fire & Cas. Ins. Co.*, No. 19-CV-693-BK, 2020 WL 264107, at *4 (N.D. Tex. Jan 17, 2020).

Tab B

Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 5. Protection of Consumer Interests (Refs & Annos)
Subtitle C. Deceptive, Unfair, and Prohibited Practices
Chapter 542. Processing and Settlement of Claims
Subchapter B. Prompt Payment of Claims (Refs & Annos)

V.T.C.A., Insurance Code § 542.060

§ 542.060. Liability for Violation of Subchapter

Effective: September 1, 2017
Currentness

(a) Except as provided by Subsection (c), if 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.

(b) If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

(c) In an action to which Chapter 542A applies, if 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, in addition to the amount of the claim, simple interest on the amount of the claim as damages each year at the rate determined on the date of judgment by adding five percent to the interest rate determined under Section 304.003, Finance Code, 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. Interest awarded under this subsection as damages accrues beginning on the date the claim was required to be paid.

Credits
Added by Acts 2003, 78th Leg., ch. 1274, § 2, eff. April 1, 2005. Amended by Acts 2017, 85th Leg., ch. 151 (H.B. 1774), § 2, eff. Sept. 1, 2017.

Notes of Decisions (377)

V. T. C. A., Insurance Code § 542.060, TX INS § 542.060
Current through legislation effective July 1, 2023, of the 2023 Regular Session of the 88th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

Tab C

Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 5. Protection of Consumer Interests (Refs & Annos)
Subtitle C. Deceptive, Unfair, and Prohibited Practices
Chapter 542A. Certain Consumer Actions Related to Claims for Property Damage (Refs & Annos)

V.T.C.A., Insurance Code § 542A.003

§ 542A.003. Notice Required

Effective: September 1, 2017
Currentness

(a) In addition to any other notice required by law or the applicable insurance policy, not later than the 61st day before the date a claimant files an action to which this chapter applies in which the claimant seeks damages from any person, the claimant must give written notice to the person in accordance with this section as a prerequisite to filing the action.

(b) The notice required under this section must provide:

(1) a statement of the acts or omissions giving rise to the claim;

(2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; and

(3) the amount of reasonable and necessary attorney's fees incurred by the claimant, calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services.

(c) If an attorney or other representative gives the notice required under this section on behalf of a claimant, the attorney or representative shall:

(1) provide a copy of the notice to the claimant; and

(2) include in the notice a statement that a copy of the notice was provided to the claimant.

(d) A presuit notice under Subsection (a) is not required if giving notice is impracticable because:

(1) the claimant has a reasonable basis for believing there is insufficient time to give the presuit notice before the limitations period will expire; or

(2) the action is asserted as a counterclaim.

(e) To ensure that a claimant is not prejudiced by having given the presuit notice required by this chapter, a court shall dismiss without prejudice an action relating to the claim for which notice is given by the claimant and commenced:

(1) before the 61st day after the date the claimant provides presuit notice under Subsection (a);

(2) by a person to whom presuit notice is given under Subsection (a); and

(3) against the claimant giving the notice.

(f) A claimant who gives notice in accordance with this chapter is not relieved of the obligation to give notice under any other applicable law. Notice given under this chapter may be combined with notice given under any other law.

(g) Notice given under this chapter is admissible in evidence in a civil action or alternative dispute resolution proceeding relating to the claim for which the notice is given.

(h) The giving of a notice under this chapter does not provide a basis for limiting the evidence of attorney's fees, damage, or loss a claimant may offer at trial.

Credits
Added by Acts 2017, 85th Leg., ch. 151 (H.B. 1774), § 3, eff. Sept. 1, 2017.

Notes of Decisions (9)

V. T. C. A., Insurance Code § 542A.003, TX INS § 542A.003
Current through legislation effective July 1, 2023, of the 2023 Regular Session of the 88th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

Tab D

Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 5. Protection of Consumer Interests (Refs & Annos)
Subtitle C. Deceptive, Unfair, and Prohibited Practices
Chapter 542A. Certain Consumer Actions Related to Claims for Property Damage (Refs & Annos)

V.T.C.A., Insurance Code § 542A.007

§ 542A.007. Award of Attorney's Fees

Effective: September 1, 2017
Currentness

(a) 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:

(1) 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;

(2) the amount of attorney's fees that may be awarded to the claimant under other applicable law; or

(3) the amount calculated by:

(A) 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 by the amount alleged to be owed on the claim for that damage or loss in a notice given under this chapter; and

(B) 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.

(b) Except as provided by Subsection (d), the court shall award to the claimant the full 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 if the amount calculated under Subsection (a)(3)(A) is:

(1) greater than or equal to 0.8;

(2) not limited by this section or another law; and

(3) otherwise recoverable under law.

(c) The court may not award attorney's fees to the claimant if the amount calculated under Subsection (a)(3)(A) is less than 0.2.

(d) If a defendant in an action to which this chapter applies pleads and proves that the defendant was entitled to but was not given a presuit notice stating the specific amount alleged to be owed by the insurer under Section 542A.003(b)(2) at least 61 days before the date the action was filed by the claimant, the court may not award to the claimant any attorney's fees incurred after the date the defendant files the pleading with the court. A pleading under this subsection must be filed not later than the 30th day after the date the defendant files an original answer in the court in which the action is pending.

Credits

Added by Acts 2017, 85th Leg., ch. 151 (H.B. 1774), § 3, eff. Sept. 1, 2017.

Notes of Decisions (7)

V. T. C. A., Insurance Code § 542A.007, TX INS § 542A.007

Current through legislation effective July 1, 2023, of the 2023 Regular Session of the 88th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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Tab E

SUBJECT: Requiring pre-suit notice for certain claims against an insurer

COMMITTEE: Insurance — committee substitute recommended

VOTE: 6 ayes — Phillips, R. Anderson, Gooden, Oliverson, Paul, Sanford

3 nays — Muñoz, Turner, Vo

WITNESSES: For —Paul Ehlert, Germania Insurance; David Weber, Hochheim Prairie Insurance; James Dickey, IMGA; Joel Moore, National Association of Independent Insurance Adjusters; Joe Woods, Property Casualty Insurers Association of America (PCI); Felipe Farias, State Farm Insurance; Lee Parsley and Mary Tipps, Texans for Lawsuit Reform; John Stephens, Texas Farm Bureau Insurance Companies; Luz Monarrez; Buddy Steves; (*Registered, but did not testify*: Jay Thompson, Afact; Michael Chatron, AGC Texas Building Branch; Deborah Polan, AIG; Billy Phenix, Allstate Insurance Company; Fred Bosse, American Insurance Association; Keith Hopkinson, Assurant Ins. Group; Kinnan Golemon, Austin White Lime Company; John Marlow, Chubb; Tom Sellers, ConocoPhillips; Frank Galitski, Farmers Insurance; Max Jones, Greater Houston Partnership; Lee Loftis, Independent Insurance Agents of Texas; Bill Oswald, Koch Companies; Mike Toomey, Liberty Mutual; Paul Martin, National Association of Mutual Insurance Companies; Brian Yarbrough, Nationwide; Mark Gipson, Pioneer Natural Resources; Jody Richardson, Plains All American Pipeline LP; Josiah Neeley, R Street Institute; Chris Shields, San Antonio Chamber of Commerce; Luz Monarrez, State Farm; John Stuckemeyer, State Farm Insurance; Tiffany Young, Texans Against Lawsuit Abuse, Citizens Against Lawsuit Abuse; Ned Munoz, Texas Association of Builders; Amanda Martin, Texas Association of Business; Stephanie Simpson, Texas Association of Manufacturers; Robert Flores, Texas Association of Mexican American Chambers of Commerce/TAMACC; Lisa Kaufman, Texas Civil Justice League; Beaman Floyd, Texas Coalition for Affordable Insurance Solutions; Keith Strama, Texas Surplus Lines Association; Anne O'Ryan, The Interinsurance Exchange of the Auto Club and Auto Club County Mutual; Michael Geary, The Texas Conservative Coalition; Lucas Meyers, The

Travelers Companies, Inc. and Subsidiaries; Robert (Bo) Gilbert, Eric Glenn and Kari King, United Services Automobile Association (USAA); Cary Roberts, U.S. Chamber Institute for Legal Reform; Robert Howden)

Against — Robert Ryan, Stallion Oilfield Services; Rene Sigman, Texas Association of Consumer Lawyers; Michael Gallagher, Texas Trial Lawyers Association; Bryan Blevins, Texas Trial Lawyers Association; Ware Wendell, Texas Watch; and eight individuals; (*Registered, but did not testify*: Tim Morstad, AARP; Jacob Smith, Texas Association of Consumer Lawyers; John Hubbard, Texas Association of Rural Schools, Kathleen Field; Cherilyn Stringer)

On — Jamie Walker, Texas Department of Insurance; (*Registered, but did not testify*: Joe Matetich, OPIC; Bill Stevens, Texas Alliance of Energy Producers; Marianne Baker, Cassie Brown, Mark Einfalt, Ginger Loeffler, Jesse McClure, David Muckerheide, Michael Nored, and Brian Ryder, Texas Department of Insurance; Sean Cameron; Kevin Pakenham)

BACKGROUND: Insurance Code, sec. 542.060 states that an insurer liable for a policy claim who violates Insurance Code, ch. 542 regulations for processing and settling claims is liable to pay the policyholder:

- the amount of the claim;
- interest on the amount of the claim at an annual interest rate of 18 percent; and
- reasonable attorney's fees.

DIGEST: CSHB 1774 would require an insured making a claim against an insurer or agent relating to damage to real property caused by an earthquake, earth tremor, wildfire, flood, tornado, lightning, hurricane, hail, wind, snowstorm, or rainstorm to provide written notice to the insurer at least 61 days before filing the claim. This pre-suit notice would have to provide a statement of the acts giving rise to the claim, the specific amount alleged to be owed, and amount of reasonable and necessary attorney's fees already incurred by the claimant. This notice would be admissible as evidence in a civil action or alternative dispute resolution.

Pre-suit notice would not be required if giving notice were impracticable based on a reasonable belief that there was insufficient time to give notice before the statute of limitations would expire or because the action was asserted as a counterclaim.

The bill would authorize persons receiving this pre-suit notice to send a written request to inspect, photograph, or evaluate the property in a reasonable manner.

The bill would require a court to abate the action if the defendant filed a claim for abatement and the court found that the defendant did not receive pre-suit notice or was denied a request to inspect, photograph, or evaluate the property. Abatement would continue for the later of 60 days after complying notice was given or 15 days after the requested inspection occurred.

The bill would allow an insurer to provide written notice to the claimant accepting the liability of its agent, removing any cause of action against that agent. The court would be required to dismiss action against the agent, unless the insurer failed to make the agent available for testimony at a reasonable time and place or the acceptance of liability was conditioned to result in the insurer avoiding liability.

The bill would require a court to dismiss action by the insurer against the claimant occurring within 61 days after notice was provided.

Attorney's fees would be calculated as the lesser of:

- the amount of reasonable and necessary attorney's fees supported by sufficient evidence at trial and determined 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 any other applicable law; or
- the amount to be awarded in the judgment, divided by the amount alleged to be owed, then multiplied by the total amount of

reasonable and necessary attorney's fees supported by sufficient evidence and determined to have been incurred in bringing the action.

The bill would require the court to award the full amount of reasonable and necessary attorney's fees if the amount to be awarded in the judgment divided by the amount alleged to be owed was at least 0.8, not limited by statute, and recoverable. The court would be prohibited from awarding attorney's fees if this fraction was less than 0.2, or if the claimant failed to provide pre-suit notice.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2017, and would apply only to actions filed and claims made on or after that date.

SUPPORTERS SAY:

CSHB 1774 would mitigate the growing trend of abusive severe weather event lawsuits. Opportunistic lawyers have been using extreme weather events as a pretext for exaggerating damages, suing innocent parties, and failing to give notice to insurers before filing lawsuits. The frequency of weather-related lawsuits against property insurers has risen 1,400 percent since 2012. This increase is motivated by profit, not actual damages to real property, and should be discouraged.

The bill also would minimize the increases in homeowners' insurance rates that have resulted from the recent explosion of lawsuits. Mass litigation is expensive for insurance companies, which pass these costs on to consumers in the form of higher premiums.

The bill would not damage the rights of policyholders to sue their insurers. Consumers still would have seven separate causes of action to sue, and carriers still would be subject to strict liability if shown to have underpaid a policyholder's claim. The bill simply would create penalties to enforce the existing pre-suit notice requirement.

OPPONENTS

CSHB 1774 would obstruct the ability and right of property insurance

SAY: policyholders. Texans whose property is damaged by extreme weather should not be restricted from suing insurance companies that deny or underpay their claims, which carriers are especially likely to do in extreme weather situations when they observe an increase in claims. Requiring 61 days' notice before filing would be especially burdensome in extreme weather situations in which damage can worsen over time.

NOTES: A companion bill, SB 10 by Hancock, was reported favorably from the Senate Business and Commerce Committee on April 24.

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