

TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME CHANGES APPRAISAL LAW: INSURED CAN PURSUE EXTRA-CONTRACTUAL CLAIMS DESPITE INSURER'S PAYMENT OF APPRAISAL AWARD

Last week, the Texas Supreme Court reversed and remanded an appellate court's decision to limit an insured's statutory and common law bad-faith claims to those under Texas Prompt Payment of Claims Act (TPPCA), even after appraisal benefits were fully paid by the insurer under a policy with an unilateral appraisal clause. In *TopDog Properties v. GuideOne National Insurance Company*, 2020 WL 1898538 (Tex. Apr. 17, 2020), the insured property sustained wind and hail damage. After its first inspection, GuideOne determined that the loss fell below TopDog's \$5,000 deductible. TopDog requested a second inspection and GuideOne reached the same conclusion. After GuideOne declined a request for a third inspection, TopDog sought to invoke the policy's appraisal process. GuideOne refused arguing the policy contained a unilateral appraisal clause, GuideOne was the only party that could invoke appraisal and they considered appraisal unnecessary.

TopDog then sued GuideOne asserting claims for breach of contract, common-law and statutory bad faith, and violations of the TPPCA. Eight months later, GuideOne demanded an appraisal, but TopDog declined their demand. GuideOne went to the court and was able to secure an order compelling an appraisal. The appraisal set the amount of loss at \$168,808—significantly higher than GuideOne's initial estimates. GuideOne then paid TopDog the value of the appraisal award less the deductible and depreciation. After payment by GuideOne, both parties moved for summary judgment. The trial court denied TopDog's motion and granted GuideOne's, based on GuideOne's payment of the appraisal award. TopDog appealed, but the appellate court held, "(1) TopDog failed to raise a fact issue because GuideOne paid all benefits available under the policy when it paid the appraisal award, and (2) TopDog's bad-faith and TPPCA claims failed because it did not allege an injury independent from the policy benefits and did not demonstrate policy benefits were withheld after the appraisal award was paid. TopDog then petitioned the Texas Supreme Court asking whether the court of appeals' holdings were consistent with recent precedent and whether GuideOne's unilateral appraisal clause ought to change the result.

Prior to issuing an opinion in this case, the Texas Supreme Court decided two cases relevant to TopDog's question. The court in *Barbara Technologies Corp v. State Farm Lloyds* 589 S.W.3d 806 (Tex. 2019), held that payment in accordance with an appraisal clause does not foreclose TPPCA damages, but the payment is "neither an acknowledgement of liability nor a determination of liability under the policy for purposes of TPPCA damages under section 542.060." In *Ortiz v. State Farm Lloyds* 589 S.W.3d 127, the court held an appraisal payment eliminates an insurer's liability for breach of contract and common-law and statutory bad faith so long as the insured did not suffer an independent injury. TopDog asked the Court to create an exception to *Ortiz* arguing that "insureds need not establish independent injury to recover for breach of contract and bad faith where an insurer relies on a unilateral appraisal clause to force the insured to file suit, then compels appraisal, and pays the appraisal award." TopDog argued that under these facts "the appraisal award itself constitutes actual damages."

In reversing the court of appeals, the Texas Supreme Court noted last week that *Ortiz* did not involve a unilateral appraisal clause and that the independent injury argument *may be* considered by the trial court on remand. Further, and consistent with its holding in *Barbara Technologies*, not allowing TopDog to maintain their TPPCA claim was error. Accordingly, the Court reversed the judgment of the court of appeals and remanded the case to the trial court to further consider TopDog's claims.

Editor's Note: The Court's willingness to allow statutory and common law bad-faith claims to proceed despite full payment of an appraisal award may be limited to those matters where an insurer has a unilateral right to invoke appraisal and refuses to appraise until after suit is filed. Nevertheless, this case is significant in suggesting that an insurer's refusal to appraise a damage dispute until after suit is filed may support an "independent injury" argument allowing the statutory and common law bad-faith claims, in addition to the TPPCA claims, to proceed. The Court also noted that TopDog is free to brief its argument that unilateral appraisal clauses are illusory and therefore, unenforceable, on remand. We will continue to monitor this case for further developments.

CHAPTER 542 CLAIMS MAY PROCEED DESPITE FULL PAYMENT OF APPRAISAL AWARDS

Continuing its reversal of lower court decisions disallowing Texas Prompt Payment of Claims Act claims after payment of appraisal award, the Texas Supreme Court reversed and remanded two more cases last week based on its rulings in *Barbara Technologies Corp v. State Farm Lloyds* 589 S.W.3d 806 (Tex. 2019) and *Ortiz v. State Farm Lloyds* 589 S.W.3d 127 (Tex. 2019). Last week, in *Lazos v. State Farm Lloyds*, 2020 WL 1898534 (Tex. Apr. 17, 2020) and *Alvarez v. State Farm Lloyds*, 2020 WL 1898528 (Tex. Apr. 17, 2020), the Court held that payment of an appraisal award does not preclude an insured from bringing a claim under the Texas Prompt Payment of Claims Act (TPPCA), found in Chapter 542 of the Insurance Code.

Both *Lazos and Alvarez* involved wind and hail damage to residential property insured by State Farm, and disputes over the amount of damage that were ultimately resolved when State Farm successfully compelled appraisals in the trial court and paid the full amount of the awards after the appraisals exceeded State Farm's prior estimates. State Farm moved for and received summary judgment on all claims. The trial courts granted State Farm's motions and the court of appeals affirmed both decisions, holding (1) payment of an appraisal award entitled an insurer to summary judgment on all of the insured's contractual and extra-contractual claims and (2) the Texas Supreme Court's decision in *USAA Texas Lloyds Co. v. Menchaca* 545 S.W.3d 479 (Tex. 2018) did not change that conclusion. Both insureds petitioned the Texas Supreme Court to determine whether the court of appeals' opinion complied with *Menchaca*.

While these cases were pending, the Texas Supreme Court decided two cases relevant to Lazos's and Alvarez's petitions. The court in *Barbara Technologies Corp v. State Farm Lloyds* 589 S.W.3d 806 (Tex. 2019) held that payment in accordance with an appraisal clause does not foreclose TPPCA damages, but the payment is "neither an acknowledgement of liability nor a determination of liability under the policy for purposes of TPPCA damages under section 542.060." In *Ortiz v. State Farm Lloyds* 589 S.W.3d 127, the court held "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."

After the court decided *Barbara Technologies* and *Ortiz*, Lazos and Alvarez amended their petitions and abandoned all claims other than damages under Chapter 542, arguing that State Farm's payment of the appraisal awards did not preclude them from claims under the TPPCA. Interestingly, neither Lazos or Alvarez expressly alleged a TPPCA claim in their original petitions, but only alleged entitlement to the 18% statutory interest rate and argued they could still pursue his TPPCA claim in their summary-judgment motions. And, the Court noted that by arguing against the insured's TPPCA claims in their own summary-judgment motions, State Farm appeared to acknowledge the claims.

The Court then held that despite State Farm's payment of the appraisal awards, the insureds could still maintain their TPPCA claims. And under *Barbara Technologies* and *Ortiz*, it was error not to allow them to pursue the TPPCA claims. Accordingly, both cases were remanded to the trial court to consider the TPPCA claims.

BEAUMONT COURT OF APPEALS SUPPORTS JURY AWARD OMITTING FUTURE DAMAGES & TRIAL COURT ORDER GRANTING NEW TRIAL WAS IMPROPER

The Beaumont Court of Appeals recently considered a trial court's grant of a new trial based on a jury's failure to award future physical pain and suffering, mental anguish and physical impairment damages and found that there was factually sufficient to support the jury's finding, and therefore, the trial court's granting plaintiff a new trial was improper. In most cases, a trial court's grant of a new trial remains intact but *In re Allstate Property and Casualty Insurance Company*, 2020 WL 1879659 (Tex. App.—Beaumont Apr. 16, 2020, no pet. h.), the Beaumont conditionally granted Allstate's petition for a writ of mandamus effectively reversing the trial court's order granting a new trial.

The insured Depew sought underinsured motorist benefits from Allstate after an auto accident in August of 2014. After a jury trial more than four years later, the jury refused to award future physical pain and suffering, mental anguish and physical impairment damages. So, Depew filed a motion for new trial and the trial court found the jury's rejection of these damages went against the great weight and preponderance of the evidence and, accordingly, ordered a new trial. But the day before the new trial was to begin, Allstate filed a petition for writ of mandamus seeking to have the appellate court overturn the trial court's order granting the new trial. In response, Depew argued (1) Allstate failed to diligently pursue its complaint; (2) the order granting a new trial stated sufficient facts to grant a new trial; and (3) Allstate failed to show an abuse of discretion by the trial court.

The Beaumont Court of Appeals held while there is not an exact timeframe for seeking a mandamus petition, Allstate was able to show a reasonable explanation for their seven-month delay and Depew could not demonstrate a detrimental change in his position. Allstate showed it had communicated with the court reporter about getting a copy of the record the month after Depew's motion was granted, paid for the record a few months later, and filed their mandamus petition shortly after receiving the record and prior to the case being retried. While Depew did show he was inconvenienced, he was not able to show any detrimental change in his position. Thus, the court held Allstate provided a reasonable explanation for its delay in seeking mandamus relief and Depew's position was not detrimentally changed.

Turning its analysis to the order granting a new trial, the court focused on whether the trial court provided an understandable and reasonably specific explanation for setting aside the jury's verdict that was legally appropriate and specific enough to indicate the basis for the trial court's decision. The trial court's rationale was based upon testimony about the insured's daily struggle with knee pain, the likelihood of continued suffering in the future from his knee condition, the jury's failure to award future damages with past damages was inconsistent, and the uncontroverted testimony of Depew, his wife, and an adult granddaughter. Then the court reviewed the entire record, using a factual sufficiency standard, to determine whether the record supported the trial court's reasoning.

The evidence and record showed that, in September 2014, Depew had arthroscopic surgery to his left knee to repair a torn meniscus for injuries from the accident. Depew went on to get post-surgery physical therapy. Towards the end of his physical therapy, he reported that his pain level was probably one out of ten with one being the least amount of pain. An orthopedic surgeon told Depew, he would eventually need a knee replacement, but Depew chose not to have the surgery because he feared possible complications. The last treatment to his left knee was in December 2015, over three years prior to the trial. The only evidence Depew's condition worsened after medical treatment or that he still experienced mental anguish or impairment came from the testimony of Depew, his wife, and his granddaughter. But, their testimonies were not supported by any objective evidence.

In light of their review of the record, the court felt the trial court had (1) credited the record with showing the insured still experienced knee pain; (2) credited that Depew managed his pain with over-the-counter analgesics; (3) credited the testimony of Depew's physical limitations affect his ability to perform household and leisure activities; (4) credited the witness descriptions that Depew had limitations and feared staying employed; (5) failed to rely on the lack of medical records or testimony rejecting the jury's conclusion that Depew had fully recovered from the injury; and (6) relied on the fact the jury awarded sums for past damages, which the trial court viewed as inconsistent with the jury's failure to award future damages.

In doing so the court felt that the trial court usurped the jury's right to weigh the evidence and determine the credibility of the testimony presented. Additionally, the court felt that the trial court failed to recognize that the jury could have compared the testimony of the interested witnesses against a lack of any supporting objective medical evidence of future damages and reached their own conclusion. Finally, the trial court did not explain why the jury could not have considered the fact that it had been several years since Depew has received any medical treatment in making their decision that he had recovered and failed to meet his burden of future damages. The court held the trial court abused its discretion in granting a new trial, since the record did not support the trial court's reasons for granting a motion for new trial.

Accordingly, the Beaumont Court of Appeals conditionally granted Allstate's request for mandamus relief. The order is conditional in that a writ would only issue if the trial court failed to vacate the order granting a new trial.