

Texas Court Follows Through on *Barbara Technologies* and *Ortiz* with Three Important New Decisions

When the Texas Supreme Court issued its opinions in *Barbara Techs. 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), a badly fractured court overturned prior precedent regarding appraisal and recovery on extracontractual claims following appraisal. Now the justices have apparently set aside their differences, issuing three *per curiam* opinions that revived policyholder suits that were in limbo when *Barbara Technologies* and *Ortiz* were decided.

The newly released opinions are *Alvarez v. State Farm Lloyds*, 2020 Tex. 318 (Tex. April 17, 2020), *Lazos v. State Farm Lloyds*, 2020 Tex. 324 (Tex. April 17, 2020), and *Biasatti v. GuideOne Nat'l Ins. Co.*, 2020 Tex. 319 (April 17, 2020). The opinions are short and track the same format.

Alvarez

In *Alvarez*, State Farm denied the claim as below deductible, the dispute contained, and State Farm compelled appraisal. The appraisal panel issued an award that exceeded the deductible. State Farm paid the award, then moved for summary judgment on all of the policyholder's contractual and extracontractual claims. The trial court granted the summary judgment motion, and the Court of Appeals affirmed, also holding that *USAA Tex. Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018) did not change the outcome. In the meantime, though, the court issued the *Barbara Technologies* and *Ortiz* opinions.

In *Barbara Technologies*, the court held that "payment in accordance with an appraisal is neither an acknowledgment of liability nor a determination of liability under the policy for purposes of [Texas Prompt Payment of Claims Act (TPPCA)] damages under section 542.060." On the same day, the court held in *Ortiz* that in "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."

In light of these rulings, the court held that the Court of Appeals was in error when it concluded that the policyholder could not maintain his TPPCA claim due to State Farm's payment of the appraisal award. The court reversed the Court of Appeals and remanded the case to the trial court for consideration of the policyholder's TPPCA claims in light of *Barbara Technologies* and *Ortiz*.

Lazos

Lazos is similar to *Alvarez*. Indeed, the two cases involved the same policyholder attorney and many of the same attorneys for the State Farm Lloyds, including former Texas Supreme Court Justice Craig Enoch.

Biasatti

Biasatti involved TPPCA and common law bad faith claims. The policy's appraisal clause allowed only GuideOne to invoke appraisal. When a dispute arose, GuideOne refused appraisal, citing the unilateral clause. The policyholder sued alleging the usual battery of claims including breach of contract, bad faith, and violation of the TPPCA. GuideOne then demanded appraisal and obtained an order compelling appraisal when the policyholder refused to participate. The appraisal panel issued an award that was well above GuideOne's initial estimates. GuideOne paid the award, and then both parties moved for summary judgment.

The trial court denied the policyholder's motion and granted GuideOne's motion, citing the payment of the appraisal award. The Court of Appeals agreed and held that the GuideOne's payment of the appraisal award extinguished the contractual, TPPCA, and bad faith claims. The



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Court of Appeals observed that the policyholder failed to allege an injury independent from the loss of policy benefits and did not demonstrate that GuideOne withheld benefits after the appraisal award was paid.

The policyholder asked the court to reconsider the outcome based on *Barbara Technologies* and *Ortiz*. The court finessed an argument by the policyholder that the policyholder need not establish an independent injury when a unilateral appraisal clause results in an appraisal award that constitutes actual damages. The court merely held that the Court of Appeals was in error by holding that the policyholder could not maintain its TPPCA claim because it failed to allege an independent injury and all available policy benefits had been paid.

The court further held that the instant claims for breach of contract and bad faith were different from *Ortiz*, under which such claims would be extinguished by payment of the appraisal award, because they involved a unilateral appraisal clause. The court remanded the questions of whether breach of contract and bad faith claims survived payment of the appraisal award when the appraisal clause was unilateral.

Commentary

The policyholder attorneys still have their work cut out for them. Although payment of an appraisal award may not extinguish the policyholders' TPPCA and bad faith claims under some circumstances, the policyholders must still prove coverage and a violation of the TPPCA. See *Barbara Techs.*, 589 S.W.3d at 829 ("Without State Farm having accepted liability under the policy or having been adjudicated liable, we hold that Barbara Tech is not entitled to TPPCA damages as a matter of law); *Amtrust Ins. Co. of Kan., Inc. v. Starship League City, LP*, 2012 U.S. Dist. LEXIS 101835, *11 (E.D. Tex. 2012) (appraisal process does not replace judicial process; party still has the right to ask a court to interpret its rights and obligations under the policy). The insurer's payment of an appraisal award is not an acknowledgment of liability under the policy nor a determination of liability for purposes of awarding TPPCA damages. *Barbara Techs.*, 589 S.W.3d at 820.

A good recent example of this dynamic can be found in *Ripley v. State Farm Lloyds*, 2020 U.S. Dist. 58014 (N.D. Tex. April 1, 2020). In *Ripley*, State Farm Lloyds refused to pay the full amount of the appraisal award because it viewed the award as including non-covered damages. The policyholder amended its petition to include claims for breach of contract and violation of the TPPCA. State Farm Lloyds filed a motion to dismiss for failure to state a claim upon which relief can be granted. The court granted the motion:

Plaintiffs purport to state a claim for breach of contract. This claim is premised on defendant's failure to pay the full amount of the appraisal award. However, an insurer does not have a contractual obligation to pay appraisal awards unless the appraised damage is covered by the policy.

...

Further, plaintiffs fail to allege any facts regarding the damages assessed by the appraisal, such as whether all the damage was caused by the storm or how such damage is otherwise covered by the insurance policy. Because plaintiffs fail to plead a basis for the appraised damage being covered by the policy, and because merely being subject to appraisal does not bring the damage under the policy's coverage, the breach of contract claim fails.

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Finally, defendant maintains that plaintiffs have not alleged a plausible claim regarding prompt payment. First, plaintiffs have failed to articulate a breach of contract claim upon which prompt payment would depend. Second, they have not alleged any facts to support a prompt payment claim even had they properly asserted breach of contract. The court agrees.

Thus, TPCCA liability is not automatic.

The impact of *Biasatti* is also limited because the court focused on the unilateral appraisal clause as justification for its reasoning. Such clauses are less common than bilateral appraisal clauses and may be replaced in Texas policies going forward in light of *Biasatti*.

