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SUPREME COURT OF TEXAS
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NO. 19-0280

IN THE

SUPREME COURT OF TEXAS

LOUIS HINOJOS,

Petitioner,

v.

STATE FARM LLOYDS AND RAUL PULIDO,

Respondents.

On Petition for Review from the Eighth District Court of Appeals

El Paso, Texas

Cause No. 08-16-00121-CV

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER LOUIS HINOJOS

Jeff Raizner
State Bar No. 00784806
Andrew Slania
State Bar No. 24056338
Ben Wickert
State Bar No. 24066290
RAIZNER SLANIA LLP
2402 Dunlavy Street
Houston, Texas 77006
Telephone: (713) 554-9099
Facsimile: (713) 554-9098
efile@raiznerlaw.com

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STATEMENT OF INTEREST OF UNITED POLICYHOLDERS

Effectuating the purpose of insurance and interpreting insurance contracts, laws, and regulations requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Texas residents and businesses through three programs: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (judicial, regulatory and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of

informational publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org. UP has provided resource libraries and educational programs for Texas policyholders following local disasters such as Hurricane Harvey, the Central Memorial Day Flood of 2015, and the 2011 Central Texas Wildfires.

UP communicates with the Texas Department of Insurance on a regular basis at the tri-annual meetings of the National Association of Insurance Commissioners where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative. United Policyholders also works with the Texas Office of Public Insurance Counsel on consumer initiatives.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. Information and arguments in United Policyholders' briefs have been cited by the US Supreme Court, as well as by numerous state and

federal appellate courts.[1] United Policyholders has also weighed in on important insurance issues affecting homeowners and businesses in matters adjudicated before this Court, Texas appellate courts, and the United States Court of Appeals for the Fifth Circuit.[2]

UP has been engaged for decades in promoting and protecting consumer laws and regulations that aim to dissuade insurers for low-balling and underpaying insurance claims. UP also educates consumers on how to identify these practices. The baseless application of a reasonableness exception to the Texas Prompt Payment of Claims Act (TPPCA) would provide insurers with a loophole opportunity to low-ball the insured, take a gamble on a policyholder paying for appraisal out of their own pocket, and pay the difference if they lose the appraisal,

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[1] *See, e.g. Humana, Inc. v. Forsyth,* No. 97-303, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999).

[2] *See, e.g. In re State Farm Lloyds,* 520 S.W.3d 595, 2017 Tex. LEXIS 482, 60 Tex. Sup. J. 1114, 2017 WL 2323099; *US Metals, Inc. v. Liberty Mut. Ins. Co.,* 490 S.W.3d 20 (Tex. 2016); *In re Universal Underwriters of Tex. Ins. Co.,* 345 S.W.3d 404 (Tex. 2011); *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118 (Tex. 2010); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker,* 246 S.W.3d 603 (Tex. 2008); *Excess Underwriters at Lloyds, London v. Franks Casing Crew & Rental Tools, Inc.,* 246 S.W.3d 42 (Tex. 2008); *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008); *Pendergest-Holt v. Certain Underwriters at Lloyds of London,* 600 F.3d 562 (5th Cir. 2010); *Citigroup Inc. v. Fed. Ins. Co.,* 649 F.3d 367 (5th Cir. 2011); *Advanced Env. Recycling Tech. Inc. v. Am. Int'l Specialty Lines Ins. Co.,* 399 F. App'x 869 (5th Cir. 2010); *Motiva Enters., LLC v. St. Paul Fire & Marine Ins. Co.,* 445 F.3d 381 (5th Cir. 2006).

without any further pecuniary consequence. If that happens, policyholders would not be able to be made whole due to the expenses of appraisal or any further professional involvement.

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of the general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." *R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice*, 570-71 (1986) (quoting *Ennis, Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)). UP seeks to assist this Court in helping preserve policyholders' rights and more appropriately level the playing field beyond just this case.

DISCLOSURE PURSUANT TO TRAP 11(C)

Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, UP is not being paid, nor will it be paid, any fee to prepare this brief.

INTRODUCTION

Since this Court's 2019 decision in *Barbara Technologies v. State Farm Lloyd's,* 589 S.W.3d 806 (Tex. 2019), Texas state and federal courts – including the court of appeals in this case – have continued to apply the so-called "reasonableness" exception to the Texas Prompt Payment of Claims Act (TPPCA). As Petitioner Louis Hinojos already briefed extensively, the reasonableness exception to the TPPCA has no basis under Texas law, and this Court should strike it down. *Amicus curiae* United Policyholders files this brief to illustrate to the Court how problematic the reasonableness exception continues to be in federal district court decisions.

The first case – state or federal – to apply the reasonableness exception after *Barbara Technologies* was the court of appeals in this case, which found that State Farm's pre-appraisal payment was reasonable as a matter of law even though the ultimate appraisal award was 6.8 times greater than that earlier payment. *See Hinojos v. State Farm Lloyds,* 569 S.W.3d 304, 307 (Tex. App.—El Paso 2019, pet. pending). After *Barbara Technologies*, federal courts have consistently applied the reasonableness exception in favor of insurance carriers,

finding that that insurer's pre-appraisal payment was, as a matter of law, "reasonable," and therefore liability under the TPPCA barred.[3]

The first federal court to apply the reasonableness exception after *Barbara Technologies* was *Shin v. Allstate Texas Lloyds.* No. 4:18-CV-01784, 2019 U.S. Dist. LEXIS 149330, at *3 (S.D. Tex. Sept. 3, 2019) (Ellison, J.), *appeal docketed,* No. 19-20698 (5th Cir. Oct. 4, 2019). In *Shin,* the court – citing with approval the court of appeals' opinion in this case – held that a pre-appraisal payment was reasonable "as a matter of law" even though the appraisal award was ultimately "5.6 times greater than the initial [pre-appraisal] payment." *Id.* at *4-5, citing *Hinojos*, 569 S.W.3d at 307. In so holding, *Shin* pronounced that the "reasonableness exception" previously recognized by the Fifth Circuit in *Mainali Corp. v. Covington Specialty, Ins. Co.,* 872 F.3d 255, 259 (5th Cir. 2017) "survives *Barbara Technologies*." *Shin,* 2019 U.S. Dist. LEXIS 149330, at *4.

[3] *See* ***Shin v. Allstate Tex. Lloyds,*** No. 4:18-CV-01784, 2019 U.S. Dist. LEXIS 149330, at *3 (S.D. Tex. Sept. 3, 2019) (Ellison, J.), *appeal stayed in abeyance,* No. 19-20698 (5th Cir. Oct. 4, 2019); ***Reyna v. State Farm Lloyds,*** No. H-19-3726, 2020 U.S. Dist. LEXIS 42866, at *1 (S.D. Tex. March 12, 2020) (Rosenthal, J.); ***Serrano v. Ocean Harbor Cas. Co.,*** No. H-19-1050, 2020 U.S. Dist. LEXIS 58653, at *1 (S.D. Tex. March 31, 2020) (Miller, J.); ***Crenshaw v. State Farm Lloyds,*** 425 F. Supp. 3d 729, 740 (N.D. Tex. 2019) (O'Connor, J.); ***Lakeside FBBC, LP v. Everest Indem. Ins. Co.,*** Civil Action No. SA-17-CV-491-XR, 2020 U.S. Dist. LEXIS 62253, at *38 (W.D. Tex. 2020) (Rodriguez, J.).

Several district courts within the Fifth Circuit have since cited *Shin* with approval and held the reasonableness exception applicable to bar an insured's TPPCA claims.[4]

The plaintiff/insured in *Shin* appealed to the Fifth Circuit. After briefing had closed, on July 22, 2020, the Fifth Circuit entered an order holding the case in abeyance pending this Court's decision in this case. (Appendix A.) The Fifth Circuit, perhaps acknowledging the growing number of cases holding that the reasonableness exception survived this Court's decision in *Barbara Technologies,* and also recognizing that it is constrained by *Erie*[5]*,* invited this Court to announce a clear rule under Texas law. Indeed, the confusion caused by this development bears similarity to the "long line of state and federal" Texas appellate court cases that, for years, had found a "full and timely payment of an appraisal award" to be a complete legal defense to TPPCA liability. *See Barbara Techs. Corp. v. State Farm Lloyds,* 589 S.W.3d 806, 833-34 (Tex. 2019)

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[4] *See supra,* n. 3.

[5] *See Mainali Corp. v. Covington Specialty Ins. Co.,* 872 F.3d 255, 259 (5th Cir. 2017) (recognizing an "*Erie* court's duty to follow state courts' interpretation of state law rather than the interpretation the federal court thinks makes the most sense").

(Boyd, J., concurring in part and dissenting in part). Of course, the Court in *Barbara Technologies* put an end to that confusion, holding that payment of the appraisal award in that case did not foreclose TPPCA damages. *Id.* at 823.

Some of the most experienced federal judges in Texas are continuing to apply the TPPCA in an inconsistent and, frankly, incorrect manner. Given that those courts are constrained by *Erie* and must follow this Court's lead in matters of Texas law, the Court should accept the Fifth Circuit's invitation and announce a clear rule. Namely, the Court should reverse the court of appeals' decision in this case, hold that the reasonableness exception to the TPPCA has no basis under Texas law, and put an end once and for all to the outgrowth of unnecessary litigation on this issue.

ARGUMENT

1. Federal courts in Texas continue to apply the reasonableness exception to the TPPCA after *Barbara Technologies*.

The court of appeals in this case held that "because State Farm made a reasonable payment on Hinojos's claim within the sixty-day statutory limit, the subsequent payment resulting from the appraisal process did not mean State Farm violated the prompt payment deadlines

of the insurance code." *Hinojos v. State Farm Lloyds,* 569 S.W.3d 304, 313 (Tex. App. – El Paso 2019, pet. granted). State Farm distanced itself from this "reasonableness" exception to the PPCA, both in its briefing and at oral argument. *See* State Farm's Brief on the Merits at 8 ("The court did not add a 'reasonableness exception' to the TPPCA"); Appendix B to State Farm's Brief on the Merits, Brief of *Amicus Curiae* Texans for Lawsuit Reform in *Barbara Technologies*, at 28-29 of 43 ("[W]e do not see support for a reasonableness exception in the plain language of the TPPCA"); Oral Argument at 28:34, *available at* https://www.youtube.com/watch?v=BiZLVccqrvs (last accessed on December 16, 2020) (State Farm's counsel stating "we're not asking for a reasonableness standard").

However State Farm wishes to frame its argument, the reasonableness exception is very much alive and well. Since *Barbara Technologies,* no fewer than five federal courts have applied the reasonableness exception to the TPPCA, and granted motions for summary judgment in favor of insurers. (*See supra,* note 3). Beginning with *Shin v. Allstate,* all five of those cases cited both (1) the Fifth Circuit's decision in *Mainali* and (2) this Court's decision in *Barbara*

Technologies, as supporting the reasonableness exception:

Case	Citations to ***Mainali*** **and** ***Barbara Techs.***
Shin v. Allstate Texas Lloyds	The "Court reads *Barbara Technologies*, in conjunction with *Mainali*, as standing for the proposition that, in order for an insurer to avoid a Prompt Payment Act claim by a plaintiff, the insurer must have made a reasonable preappraisal payment within the statutorily-provided period." [6] ... "In *Mainali*, the preappraisal award was 'undeniably reasonable' because it exceeded the amount the appraisal panel found due. 872 F.3d at 259. Reasonableness is harder to assess where, as here, a subsequent appraisal shows the initial payment to have been too low."[7]
Reyna v. State Farm Lloyds	"State Farm argues that its preappraisal payments were reasonable, as required by *Mainali* . . . and *Barbara Technologies*. . . . Here, the appraisal award was only 3.9 times greater than the preappraisal payments. State Farm is entitled to summary judgment on Reyna's Prompt Payment of Claims Act claim because it complied with the statutory deadlines and made reasonable payments."[8]
Serrano v. Ocean Harbor	Quoting from *Shin,* "the Court reads *Barbara Technologies*, in conjunction with *Mainali*, as standing for the proposition that, in order for an insurer to avoid a Prompt Payment Act claim by

[6] *Shin,* 2019 U.S. Dist. LEXIS 149330, at *4.

[7] *Id.*

[8] *Reyna v. State Farm Lloyds,* 2020 U.S. Dist. LEXIS 42866, at *10-11.

	a plaintiff, the insurer must have made a reasonable preappraisal payment within the statutorily-provided period."[9]
Crenshaw v. State Farm Lloyd's	"While the Texas Supreme Court's view on *Mainali* may not be entirely clear, it certainly did not disapprove of it. . . . Instead it appears *Barbara Technologies* distinguishes between those Prompt Payment Act claims where an insurer *accepts and promptly pays a claim* that is later determined to be less than a subsequent appraisal award as occurred in *Mainali*, with those claims that an insurer initially *rejects* but ultimately accepts or is held liable for as described in *Barbara Technologies*."[10]
Lakeside FBBC, LP v. Everest Indemnity	"*Barbara Technologies* approvingly cites *Mainali* . . . and does not discuss whether an insurer can defend its pre-appraisal payment as 'reasonable'."[11]

Try as State Farm may to distance itself from the reasonableness exception in this case, federal courts in Texas continue to apply it. And oddly enough, State Farm itself – which insists in this case that the reasonableness exception does not apply – eagerly (and successfully) embraced the reasonableness exception in *Reyna*:

[9] *Serrano,* 2020 U.S. Dist. LEXIS 58653, at *8-9, citing *Shin,* 2019 U.S. Dist. LEXIS 149330, at *4.

[10] *Crenshaw,* 425 F. Supp. 3d at 739-40.

[11] *Lakeside,* 2020 U.S. Dist. LEXIS 62253, at *29

> **C. State Farm did not violate the TPPCA because it made a reasonable pre-appraisal payments**
>
> 18. State Farm's pre-appraisal payments totaling $8,061.81 were reasonable as a matter of law and, therefore, there is no TPPCA violation in this case and State Farm is entitled to summary judgment on Plaintiff's claims under the TPPCA. In *Barbara Technologies*, the Texas Supreme Court held that "when an insurer complies with the TPPCA in responding to the claim, requesting necessary information, investigating, evaluating, and reaching a decision on the claim, use of the contract's appraisal process does not vitiate the insurer's earlier determination on the claim."[51]
>
> 19. The Supreme Court cited *Mainali Corp. v. Covington Specialty Ins. Co.* with approval,[52] which held there is no statutory violation of the TPPCA if the insurer's pre-appraisal payment is "reasonable."[53] Accordingly, the Supreme Court's opinion in *Barbara Technologies*, in conjunction with the Fifth Circuit's opinion in *Mainali*, stands for the proposition that where an insurer makes a reasonable pre-appraisal payment within the statutorily prescribed period, the insurer does not violate the TPPCA.[54]

(Appendix B, State Farm's Motion for Summary Judgment in *Reyna v. State Farm Lloyd's*, ¶¶ 18 – 19.)

2. This Court should eliminate all doubt as to the continued viability of the reasonableness exception.

In *Shin*, the district court held that the "reasonableness exception [to the TPPCA] survives" this Court's decision in *Barbara Technologies Corp. v. State Farm Lloyds*. *Shin v. Allstate Tex. Lloyds,* No. 4:18-CV-

01784, 2019 U.S. Dist. LEXIS 149330, at *3 (S.D. Tex. 2019). In *Shin,* the Court determined that Allstate's pre-appraisal payment of $4,616.63 was reasonable as a matter of law, even though it constituted approximately 17.8% of the appraisal award of $25,944.94, and Allstate was therefore not liable under the TPPCA. *Id.* Or, inversely as the court phrased it, the appraisal award was "5.6 times greater than the initial preappraisal payment." *Id.* at *4.

Shin is now on appeal, with the Fifth Circuit staying it in abeyance while awaiting Court's decision in this case. (*See* Appendix A.) The Court should use that invitation from the Fifth Circuit as an opportunity to hold unequivocally that Texas law does not recognize a reasonableness exception to the TPPCA.[12] That would provide needed clarity in both state and federal courts, and eliminate the unnecessary litigation that has sprung from it.

a. *Shin* miscasts this Court's passing mention of the Fifth Circuit's *Mainali* decision in the *Barbara Tech* opinion.

Shin is the first known federal opinion after this Court's 2019

[12] Petitioner Louis Hinojos focused a significant portion of his brief on why the reasonableness should not apply. (*See* Petitioner's Brief at 13-18). UP does not repeat those same arguments here, but instead focuses on the litigation that has ensued during and after primary briefing concluded in this case.

ruling in *Barbara Tech* to hold that the reasonableness exception to the TPPCA was still viable after *Barbara Tech*. In *Shin,* the court cited the Fifth Circuit's decision in *Mainali Corp. v. Covington Specialty, Ins. Co*., 872 F.3d 255, 259 (5th Cir. 2017) for the proposition that "there is no statutory violation of the Prompt Payment Act if the insurer's preappraisal payment is 'reasonable.'" *Shin,* 2019 U.S. Dist. LEXIS 149330, at *3. As a federal district court required to make an *Erie* guess, the *Shin* court looked to this Court's decision in *Barbara Technologies* for guidance:

> *Barbara Technologies* does not overrule *Mainali*. In fact, *Barbara Technologies* cites *Mainali* with approval in support of the claim that "when an insurer complies with the TPPCA in responding to the claim, requesting necessary information, investigating, evaluating, and reaching a decision on the claim, use of the contract's appraisal process does not vitiate the insurer's earlier determination on the claim." ***Mainali*'s "reasonableness" exception therefore survives *Barbara Technologies*.**

Shin, 2019 U.S. Dist. LEXIS 149330, at *3-4 (emphasis added).

The *Shin* court's analysis fails to put this Court's limited discussion of *Mainali* into the proper procedural and factual context of *Barbara Technologies*. First, the procedural context in which the Court cited *Mainali* in *Barbara Technologies* was the portion of the opinion holding that State Farm was *not* entitled to summary judgment simply by paying

the appraisal award at issue. *See Barbara Techs.*, 589 S.W.3d at 823. The relevant passage where the Court discussed *Mainali* was as follows:

> We hold that State Farm's payment of the appraisal value neither established liability under the policy nor foreclosed TPPCA damages under section 542.060.
>
> This is not to say that an insurer can simply deny claims outright and pay them later, for the purpose of avoiding TPPCA deadlines and damages. But when an insurer complies with the TPPCA in responding to the claim, requesting necessary information, investigating, evaluating, and reaching a decision on the claim, use of the contract's appraisal process does not vitiate the insurer's earlier determination on the claim. ***See Mainali Corp. v. Covington Specialty Ins.*, 872 F.3d 255, 258-59 (5th Cir. 2017) (holding that an insurer did not violate the TPPCA when it complied with the TPPCA's requirements to investigate and evaluate a claim but later made a payment based on the appraisal)** . . . .

Id. (emphasis added).

The quoted passage was the entirety of the majority opinion's discussion of *Mainali* in *Barbara Technologies*. *Id.* Critically, the majority made no mention of the "reasonableness" exception. *See id.* This is understandable, because in *Barbara Technologies,* there was no pre-appraisal payment, let alone an arguably "reasonable" one. 589 S.W.3d at 809. Yet in *Shin,* the court stretched this Court's citation to *Mainali* to support its holding that Allstate was entitled to summary judgment based on a "reasonable" pre-appraisal payment that constituted 17.8% of

the appraisal award. *Shin,* 2019 U.S. Dist. LEXIS 149330 at *4. To construe this Court's cursory discussion of *Mainali* in *Barbara Tech* as a blanket acceptance of the judge-created "reasonableness" rule, which discussion the Court made in the context of *overturning* State Farm's summary judgment – cannot be the right result.

Second, a closer examination of the Court's holding in *Barbara Technologies* shows that a reasonableness exception cannot survive the Court's holding in that case. The Court explicitly stated that to the extent previous Texas state court opinions "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, we disapprove of these opinions." *Barbara Techs.*, 589 S.W.3d at 819, citing with disapproval *Garcia v. State Farm Lloyds*, 514 S.W.3d 257 (Tex. App.—San Antonio 2016, pet. denied); *In re Slavonic Mut. Fire Ins.*, 308 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding). Indeed, the two opinions the Court explicitly disapproved – *Garcia* and *Slavonic* – served as the basis for the Fifth Circuit's proposition stated in *Mainali* that a "full and timely payment of an

appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions." *See Mainali*, 872 F.3d at 258-59, citing *Garcia,* 514 S.W.3d at 274-75, and *Slavonic,* 308 S.W.3d at 563. Of course, as noted above, this was the precise proposition of law this Court squarely rejected in *Barbara Technologies*:

Mainali	***Barbara Tech***
Citing *Garcia* and *Slavonic* with **approval,** affirming the grant of summary judgment to the insurer and answering **no** to the question of **"whether a payment made to comply with an appraisal award . . . is subject to th[e] penalty" of the TPPCA.** 872 F.3d at 258-59.	Citing *Garcia* and *Slavonic* with **disapproval** "to the extent these opinions 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. 589 S.W.3d at 819.

The comparison illustrates the incongruity of the *Shin* court's holding. If, per *Barbara Technologies*, an insurer cannot be excused from TPPCA liability based on the full payment of an appraisal award, then how can it be excused from liability based on a smaller, partial payment it made *before* it later paid the appraisal award? Unfortunately, that is exactly the path the *Shin* court followed, and subsequent opinions have employed the same flawed reasoning.

b. *Shin* has created a patchwork framework where trial courts are left to guess as to what a "reasonable" pre-appraisal payment is.

The *Shin* holding has metastasized across Texas federal courts, creating a framework whereby those courts are left to guess as to what constitutes a "reasonable" pre-appraisal payment. As Petitioner has already briefed extensively, "reasonableness" has no applicability the TPPCA, and courts should not be making those guesses under any circumstances. But even assuming for argument's sake that the reasonableness exception did have applicability, the results in *Shin* and cases following it illustrate that those courts are employing wildly inconsistent methodologies in doing the calculations underpinning their decisions. In each of those cases, beginning with *Shin,* the courts looked to *Mainali* and referenced a math formula that compared the pre-appraisal payments made to the amounts awarded at appraisal:

Case	Pre-appraisal payment(s)	Appraisal award	Ratio (award to pre-appraisal payment)
Mainali[13]	$389,255.59	$387,925	.9965
Shin[14]	$4,616.63	$25,944.94	5.6

[13] *Mainali*, 872 F.3d at 259.

[14] *See Shin,* 2019 U.S. Dist. LEXIS 149330, at *4-5.

Reyna[15]	*See infra* at 21-22	$31,545.79 (RCV) or $25,884.48 (ACV)	3.9
Serrano[16]	$3,926.88	$4,776.89	1.22
Crenshaw[17]	$1,123.33	$4,086.99	3.64
Lakeside[18]	$1,922,031.67	$4,150,745.57	2.159

First, perhaps the most perplexing aspect about the development of the reasonableness exception to the TPPCA is that none of the cases citing *Mainali* for the reasonableness exception are remotely similar factually. In *Mainali,* the Fifth Circuit held that the pre-appraisal payment was "undeniably reasonable" because it was actually "more than the [appraisal] panel found due ($389,255, above the awarded $387,925)." 872 F.3d at 259. The sole post-appraisal payment of $15,175.82 was merely made "out of an abundance of caution" due to an "allocation issue." *Id.* The appraisal award, indeed, was *less* than the amount that had been paid long before. *See id.* Yet in each of the other cases cited above, beginning with *Shin*, the appraisal award was a

[15] *Reyna,* 2020 U.S. Dist. LEXIS 42866, at *4, 11.

[16] *Serrano*, 2020 U.S. Dist. LEXIS 58653, at *1.

[17] *Crenshaw,* 425 F. Supp. 3d at 740.

[18] *Lakeside*, 2020 U.S. Dist. LEXIS 62253, at *38.

multiple of the pre-appraisal payment. How this has somehow established a rule for what constitutes a "reasonable" pre-appraisal payment is a mystery.

Compounding the confusion surrounding these math problems district courts are undertaking is the inconsistency with which they are inputting the variables for their calculations. For instance, the *Shin* court divided the **gross** amount of the appraisal award ($25,944.94) by the initial pre-appraisal payment ($4,616.63) to arrive at a ratio of 5.6, and found this was "reasonable as a matter of law." *Shin,* 2019 U.S. Dist. LEXIS 149330, at *4-5. The insurer's actual payment was not the full $25,944 figure, but "the award, less deductible and prior payment amount." *See Shin v. Allstate Tex. Lloyds,* No. 4:18-CV-1784, 2019 U.S. Dist. LEXIS 111240, at *2 (S.D. Tex. July 3, 2019) (reconsideration granted by, summary judgment granted by, *Shin,* 2019 U.S. Dist. LEXIS 149330).[19] The Court nonetheless used that gross figure of $25,944 as the numerator for its calculation. *See Shin,* 2019 U.S. Dist. LEXIS 149330, at *4-5.

[19] The opinion cited here was the court's initial, July 3, 2019 opinion that was subsequently withdrawn in favor of the opinion cited elsewhere in the brief. The July opinion is only cited to support the factual basis of the insurer's payment after appraisal, which was not cited in the later opinion.

In contrast to *Shin*, the *Crenshaw* court divided the "appraisal award less the deductible, depreciation, and the initial claim payment" of $4,086.99 by the initial payment of $1,123.33 to arrive at a ratio of 3.64 and to hold this as "reasonable" as a matter of law. 425 F. Supp. 3d at 733. So, for the numerators of their respective fractions, *Shin* used a gross figure that did not account for the deductible or prior payment, and *Crenshaw* used a net figure (deducting the deductible, depreciation, and the prior payment). This is obviously not an equivalent comparison. The *Crenshaw* court's statement that the 3.64 multiplier is "within the range of reasonableness" found by the *Shin* court is of no use.

For its part, to contrast with both *Shin* and *Crenshaw, Reyna* found that the appraisal award was "3.9 times greater than the preappraisal payments." 2020 U.S. Dist. LEXIS 42866, at *11 (S.D. Tex. 2020). The appraisal award in *Reyna* reflected a replacement cost value (RCV) loss of $31,545.79, and an actual cash value (ACV) loss of $25,884.48. *Id.* Dividing the former (RCV) award of $31,545.79 by 3.9 yields $8,088.66; dividing the latter (ACV) award of $25,884.48 by 3.9 yields $6,637.05. For the 3.9 ratio to work, the pre-appraisal payments would need to add up to either $8,088.66 (if using the RCV award) or $6,637.05 (if using the

ACV award). But the record reflects that all of the pre-appraisal payments deducted depreciation, thereby constituting ACV payments:

- $**3,733.56**, the amount payable after depreciation and the deductible;
- **$1,264.49**, the amount payable after depreciation, the deductible, and the earlier payment, plus **$300** for Reyna's personal property loss; and
- **$3,363.76**, the amount payable after the deductible and earlier payments.

Id. at *2-3. These payments total $8,661.81. *See id.* Because all three payments deducted depreciation – thus, amounting to ACV payments – any meaningful ratio would need to be based on the $25,884.48 ACV award. But doing so results in a ratio of 2.99, not 3.9. So it is entirely unclear where the *Reyna* court arrived at its 3.9 ratio, or what that ratio even refers to. To sum up the calculations made by those three courts, there is simply no consistency with the processes for arriving at the multiple that all of them found was a reasonable pre-appraisal payment as a matter of law

Case	Numerator	Denominator	Multiple
Shin	$25,944.94 **(gross appraisal award; no accounting**	$4,616.63 **(preappraisal payment; carrier's "revised**	5.6

	for deductible or first payment)[20]	damage estimate")[21]	
Crenshaw	$4,086.99 (appraisal award less deductible, depreciation, and the initial claim payment) [22]	$1,123.33 (carrier's "valuation of the claim less the deductible and depreciation."[23]	3.64
Reyna	$31,545.79 (RCV) or $25,884.48 (ACV)[24]	?	3.9[25]

The point of all of this is not that one court did the calculation right, and the other did it wrong, or that the courts should employ a uniform standard for what is reasonable. The point is simply that *no court* should be doing these apples-to-oranges calculations at all. If very experienced judges in Texas cannot agree on how to calculate either the numerator or

[20] 2019 U.S. Dist. LEXIS 149330 at *4.

[21] *Shin,* 2019 U.S. Dist. LEXIS 111240 at *2.

[22] 425 F. Supp. 3d at 733.

[23] *Id.* at 738.

[24] *Reyna,* 2020 U.S. Dist. LEXIS 42866, at *11.

the denominator, what possibly validity or value can there be in the fraction they produce? In any event, the very structure of the TPPCA builds in what is reasonable and proportional; the statute is mechanical and mathematical in nature. It contains no additive punishment for bad intent, or exculpatory exceptions for good behavior. It simply uses mathematics to keep the interest and attorney's fees penalties proportionate to the statutory violation, if any, based on amounts that have not been paid within the statutorily required time period. By literally injecting extra numbers of highly questionable validity into a calculation that the statute did not call for, the judicially-created reasonableness exception flies in the face of the text of the statute.

3. Justice Boyd's questioning at oral argument illustrates the absurdity of the continued application of the reasonableness exception.

Justice Boyd's questioning of State Farm's counsel at oral argument illustrates the potentially absurd consequences of the reasonableness exception. As the hypothetical went, if State Farm paid its insured $100, but a subsequent appraisal ultimately valued the claim at $1 million, would State Farm's $100 payment mean that State Farm did not violate

the TPPCA?[26] State Farm's attorney argued that under this scenario, there would be no violation of the TPPCA, and an insured would be left to pursue only a claim for breach of contract or violation of section 541 of the Insurance Code if the insured wanted to recoup attorney's fees.[27]

Albeit an extreme example, Justice Boyd's hypothetical illustrates the potentially absurd results of attempting to applying a uniform "reasonableness" exception. No court has held that a $100 payment would be reasonable in light of a $1 million appraisal award, and maybe no court would ever hold that. But to date, after *Barbara Technologies,* there does not appear to be a single case to hold that a pre-appraisal payment was not reasonable as a matter of law. All have done the opposite, holding the pre-appraisal payments to be reasonable as a matter of law. *See supra,* note 3. Even in a closer, more realistic scenario (such as *Crenshaw*, *Serrano*, or *Lakeside*), if the insured does not have the funds to start or complete repairs based on the supposedly reasonable pre-appraisal payment, and must wait until the final appraisal award to be paid, would that be reasonable from the standpoint of the insured?

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[26] *See* Oral Argument at 23:35 – 24:29, *available at* https://www.youtube.com/watch?v=BiZLVccqrvs (last accessed Dec. 16, 2020).

[27] *Id.* at 24:38 – 25:15.

These hypotheticals raise more questions than answers, which translates into more unnecessary litigation. As of today, it is unclear where a court would draw the line between what constitutes a reasonable and unreasonable pre-appraisal payment. This Court should put an end to that by pronouncing the reasonableness exception extinct, and removing this exercise from the purview of Texas state and federal judges interpreting the TPPCA.

PRAYER

United Policyholders respectfully requests that this Court grant the relief requested by Petitioner, Louis Hinojos, and reverse the judgment of the lower courts and remand for further proceedings.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because this document is generated in Microsoft Word. The brief contains 5,111 words, not including the parts of the brief excluded by Rule 9.4(i)(1).

/s/ Ben Wickert
Ben Wickert

CERTIFICATE OF SERVICE

I certify that on December 17, 2020 a true and correct copy of this brief was served on the following counsel by electronic case filing or e-mail:

ANDREW B. BENDER
abender@thebenderfirm.com
1911 Southwest Freeway
Houston, Texas 77098

CHAD T. WILSON
cwilson@cwilsonlaw.com
455 E. Medical Center Blvd., Suite 555
Webster, Texas 77598

DAVID P. WILSON
dwilson@provostumphrey.com
490 Park Street Suite 100
Beaumont, Texas 77701

Counsel for Petitioner Louis Hinojos

Melissa A. Lorber
ENOCH KEVER PLLC
mlorber@enochkever.com
5918 W. Courtyard Drive, Suite 500
Austin, Texas 78730

Counsel for Respondents State Farm Lloyds and Raul Pulido

APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 22, 2020

Mr. Richard David Daly
Ms. Melissa Waden Wray
Daly & Black, P.C.
2211 Norfolk Street
Suite 800
Houston, TX 77098

Ms. Susan Elizabeth Egeland
Mr. Daniel Alexander Harrell
Ms. Sara Elizabeth Inman
Mr. William Neil Rambin
Mr. Sherman Vance Wittie
Faegre, Drinker, Biddle & Reath, L.L.P.
1717 Main Street
Suite 5400
Dallas, TX 75201-7367

No. 19-20698 Hyewon Shin v. Allstate Texas Lloyd's
USDC No. 4:18-CV-1784

Dear Counsel:

Your appeal has been placed in abeyance this date pending the issuance of a decision in the Texas Supreme Court, case number 19-0280, Hinojosa v. State Farm v. Lloyds.

You have fourteen (14) days to file a letter in response if you believe this stay is inappropriate. All responses will be forwarded to the court for a determination. If developments arise that would impact the stay, you must notify the court. Once the case has been removed from abeyance, you will receive notification from this court with any additional instructions.

Sincerely,

LYLE W. CAYCE, Clerk

Dawn Shulin

By: _____
Dawn M. Shulin, Deputy Clerk
504-310-7658

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRAULIO REYNA,	§	
***Plaintiff*,**	§	
	§	
v.	§	**CIVIL ACTION NO. 4:19-CV-03726**
	§	
STATE FARM LLOYDS,	§	**JURY**
***Defendant*.**	§	
	§	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant State Farm Lloyds files this Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 because State Farm's timely payment of the appraisal award entitles State Farm to summary judgment on Plaintiff's breach of contract and extra-contractual claims as well as his statutory claim for recovery of attorney fees.

I.
SUMMARY

1. Plaintiff brought this suit against State Farm alleging various claims concerning damage to his property from Hurricane Harvey. Plaintiff invoked the appraisal provision of his State Farm Homeowners Policy (the "Policy") before filing suit. Broadly speaking, appraisal is a process described in the Policy that can be invoked by either party by which the amount of loss is determined by agreement of two appraisers, one selected by each party, or, if necessary, by one of the appraisers and an umpire mutually agreed to by the appraisers. The amount of loss in this case was set by an agreement by both appraisers.

2. Plaintiff invoked appraisal, and recent Texas Supreme Court precedent confirms that State Farm, having paid that binding amount, fully complied with its contractual obligations and owes no additional benefits.[1] As a matter of law, State Farm's payment of the award bars Plaintiff's breach-of-contract claim, extra-contractual claims for bad faith or statutory violations of the DTPA or Chapter 541 of the Insurance Code ("Ch. 541"), claim for attorney's fees under any theory of recovery, as limited by Chapter 542A ("Ch. 542A"), and claim under the Texas Prompt Payment of Claims Act ("TPPCA"). State Farm is, therefore, entitled to summary judgment against Plaintiff's breach-of-contract claim, extra-contractual claims, TPPCA claims, and claim for attorney fees.

II.
SUMMARY-JUDGMENT EVIDENCE

3. In support of this motion, State Farm attaches the following summary-judgment evidence and incorporates the same by reference as if fully set forth herein:

Exhibit A: Plaintiff's Homeowners Policy

Exhibit B: Affidavit of Claim Specialist Joshua Cole

- Exhibit B-1: State Farm Claim Activity File Notes Excerpts
- Exhibit B-2: September 30, 2017 State Farm Letter and Estimate
- Exhibit B-3: October 2, 2017 State Farm Letter and Revised Estimate
- Exhibit B-4: May 4, 2018 Plaintiff's Demand and Estimate
- Exhibit B-5: June 8, 2018 State Farm Letter Requesting Second Inspection
- Exhibit B-6: August 8, 2018 State Farm Letter and Estimate Relating to Second Inspection
- Exhibit B-7: August 22, 2018 State Farm Letter Enclosing Interest Payment

[1] *Ortiz v. State Farm Lloyds*, No. 17-1048, 2019 WL 2710032, at *3–6 (Tex. June 28, 2019).

Exhibit B-8: February 22, 2019 Plaintiff's Appraisal Invocation

Exhibit B-9: March 14, 2019 State Farm's Designation of Appraiser

Exhibit B-10: March 14, 2019 Plaintiff's Amended Appraiser Designation

Exhibit B-11: May 10, 2019 Appraisal Award

Exhibit B-12: June 5, 2019 State Farm Letter Issuing Payment of Appraisal Award

III.
UNDISPUTED FACTS

4. Plaintiff filed this lawsuit on August 22, 2019, against his homeowner's insurance carrier, State Farm.[2] At the time of the underlying loss, Plaintiff's house was insured under a State Farm Homeowners Policy ("Policy") for approximately $107,184.00 (Coverage A, Dwelling Limits), which—importantly-- included up to $10,718.00 in coverage for Plaintiff's dwelling extension.[3] On or about August 31, 2017, a claim was reported for damage to Plaintiff's house from a weather event occurring on August 28, 2017.[4] State Farm spoke with Plaintiff on September 3, 2017, to get additional information regarding the loss.[5] On September 10, 2017, State Farm spoke with Plaintiff by way of a Spanish translator to schedule an inspection of the property.[6]

5. State Farm inspected the Property on September 11, 2017, with Plaintiff present.[7] State Farm re-inspected Plaintiff's garage on September 30, 2017, with Plaintiff's wife present.[8] State Farm estimated storm damage to the dwelling.[9] After deducting $877.19 in depreciation and the Policy's $2,030.00 deductible, the actual cash

[2] *See* Plaintiff's Original Petition, filed, August 22, 2019.
[3] Ex. A, Plaintiff's Policy with Business Records Affidavit.
[4] Ex. B, Affidavit of Joshua Cole at ¶ 4; Ex. B-1, Claim Activity File Notes Excerpts.
[5] Ex. B at ¶ 5; Ex. B-1.
[6] Ex. B at ¶ 5; Ex. B-1.
[7] Ex. B at ¶ 5; Ex. B-1.
[8] Ex. B at ¶ 5; Ex. B-1.
[9] Ex. B at ¶ 5; Ex. B-1; Ex. B-2, State Farm Letter and Estimate.

value loss was $3,773.56.[10] On or about September 30, 2017, State Farm issued Plaintiff a letter enclosing State Farm's estimate and the actual cash value payment of $3,733.56.[11]

6. On October 2, 2017, State Farm revised its estimate.[12] The revised estimate included storm damage to the dwelling in the amount of $7,830.74, replacement cost value.[13] After deducting $1,102.69 in depreciation and the Policy's $2,030.00 deductible, the actual cash value loss was $4,698.02.[14] On this same date, State Farm issued Plaintiff a letter enclosing the revised State Farm estimate and the additional actual cash value payment of $964.49.[15] State Farm also issued payment in the amount of $300.00 for the damage to Plaintiff's personal property (Coverage B, Personal Property).[16]

7. On May 4, 2018, Plaintiff sent a demand with an estimate in the amount of $127,200.80.[17] In response, State Farm requested an additional inspection.[18] State Farm inspected the Property for a second time on July 19, 2018, with Plaintiff's counsel and Josemar Di'Silva, Plaintiff's contractor, present.[19] State Farm estimated additional storm damage to the dwelling roof and dwelling extension, bringing the amount of State Farm's repair estimate to $11,695.19, replacement cost value.[20] After deducting $1,603.38 in depreciation and the Policy deductible, the actual cash value loss was $3,363.76.[21] On

[10] Ex. A; Ex. B at ¶ 5; Ex. B-2, State Farm Letter and Estimate.
[11] Ex. A; Ex. B at ¶ 5; Ex. B-2, State Farm Letter and Estimate.
[12] Ex. A; Ex. B at ¶ 6; Ex. B-3, State Farm's Letter and Revised Estimate.
[13] Ex. A; Ex. B at ¶ 6; Ex. B-3, State Farm's Letter and Revised Estimate.
[14] Ex. A; Ex. B at ¶ 6; Ex. B-3, State Farm's Letter and Revised Estimate.
[15] Ex. A; Ex. B at ¶ 6; Ex. B-3, State Farm's Letter and Revised Estimate.
[16] Ex. A; Ex. B at ¶ 6; Ex. B-3, State Farm's Letter and Revised Estimate.
[17] Ex. B at ¶ 7; Ex. B-4, Plaintiff's Demand and Estimate.
[18] Ex. B at ¶ 8; Ex. B-5, State Farm Letter Requesting Second Inspection
[19] Ex. B at ¶ 9;
[20] Ex. B at ¶ 9; Ex. B-6, State Farm Letter and Estimate Relating to Second Inspection.
[21] Ex. A; Ex. B at ¶ 9; Ex. B-6, State Farm Letter and Estimate.

or about August 8, 2018, State Farm issued Plaintiff a letter enclosing State Farm's revised estimate and the actual cash value payment of $3,363.76.[22] Additionally, State Farm issued a payment in the amount of $456.18, on August 22, 2018, to account for any interest to which Plaintiff may claim to be entitled.[23]

8. On February 22, 2019, Plaintiff invoked appraisal and designated Josh Crescenzi as appraiser.[24] On March 14, 2019, State Farm responded to the appraisal demand and designated Robert Hovanec as appraiser.[25] The appraisers did not select an umpire.[26] Plaintiff later changed his appraiser appointment to be Bobby Crowson.[27]

9. On May 15, 2019, State Farm received an appraisal award signed by the parties' appraisers, setting the amount of loss at $31,545.79, on a replacement cost basis, subject to the terms of the Policy.[28] The total replacement cost amount included $12,788.69 for Plaintiff's dwelling and $18,767.10 for Plaintiff's dwelling extension.[29] The award set the amount of loss at $25,884.48, on an actual cash value basis, which included $10,310.56 for Plaintiff's dwelling and $15,573.92 for the dwelling extension.[30] On June 5, 2019, State Farm, subject to a reservation of rights, timely issued to Plaintiff

[22] Ex. A; Ex. B at ¶ 9; Ex. B-6, State Farm Letter and Estimate.
[23] Ex, A; Ex, B at ¶ 9; Ex. B-7, State Farm Letter enclosing Interest Payment.
[24] Ex. B at ¶ 10; Ex. B-8, Plaintiff's Appraisal Demand.
[25] Ex. B at ¶ 11; Ex. B-9, State Farm's Designation of Appraiser.
[26] Ex. B-11, Appraisal Award.
[27] Ex. B at ¶ 12; Ex. B-10, Plaintiff's Amended Appraiser Designation.
[28] Ex. B at ¶ 13; Ex. B-11, Appraisal Award. The Appraisal Award signed by the appraisers expressly stated that it was issued: (1) subject to policy provisions and deductible; (2) less any previous payments per Plaintiff's claim; (3) policy coverage to be addressed by others; (4) the award was a corrected award as there were line in other structures that were identified under dwelling instead of other structures; and (5) the appraisers did not resign or change the date the award was initially executed.)
[29] Ex. B at ¶ 13; Ex. B-11, Appraisal Award.
[30] Ex. B at ¶ 13; Ex. B-11, Appraisal Award.

payment of the award (less depreciation, deductible, prior payments and amounts over dwelling extension coverage) in the amount of $12,996.75.[31]

IV.
ARGUMENT AND AUTHORITIES

10. The Policy allows either party to invoke appraisal.[32] The contractual appraisal process provides a binding, extra-judicial means to determine the amount of loss and resolve disputes between the insurer and insured regarding the amount of loss.[33] Every reasonable presumption should be indulged by the courts to sustain an appraisal award.[34] This prevents the "insured from taking advantage of the binding appraisal process to determine the value of its claim and then, after the insurer fully pays the appraisal award, suing the insurer for its initial failure to pay."[35]

11. Plaintiff invoked appraisal, and having paid the amount of loss determined by appraisal, State Farm complied with its obligations under the Policy and owes no additional benefits.[36] As set forth below, State Farm's payment of the award bars Plaintiff's breach-of-contract claim, common law and statutory extra-contractual claims,

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[31] Ex. A; Ex. B at ¶ 14; Ex. B-12, State Farm Letter Issuing Payment of Appraisal Award. Plaintiff later requested State Farm reissue the checks, and State Farm complied with the request. Id.

[32] Ex. A.

[33] *Barbara Techs. Corp. v. State Farm Lloyds*, No. 17-0640, 2019 WL 2666484, at *5–9 (Tex. June 28, 2019) (mtn. for reh'g filed) (citing *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888, 893–95 (Tex. 2009)).

[34] *Johnson*, 290 S.W.2d at 893–95; *Mainali Corp. v. Covington Specialty Ins. Co*., 872 F.3d 255, 258 (5th Cir. 2017) (citing *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 784–85 (Tex. App.—Houston 2004, no pet.)).

[35] *Garcia v. State Farm Lloyds*, 514 S.W.3d 257, 273 (Tex. App.—San Antonio 2016, pet. denied); *Ortiz*, 2019 WL 2710032, at *3–4.

[36] *Ortiz*, 2019 WL 2710032, at *4–6 ("Having invoked the agreed procedure for determining the amount of loss, and having paid that binding amount, State Farm complied with its obligations under the policy") (citing *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 344–45 (Tex. App.—Corpus Christi 2004, pet. denied) ("The [insureds] may not use the fact that the appraisal award was different than the amount originally paid as evidence of breach of contract, especially when the contract they claim is being breached provides for resolution of disputes through appraisal.").

and attorney's fees claims under the Texas Prompt Payment of Claims Act ("TPPCA") or any other theory.

A. State Farm's payment of the appraisal award estops Plaintiff from maintaining a breach-of-contract claim.

12. Under the appraisal provision in Plaintiff's Policy, the parties agreed that appraisal would set the amount of loss—the amount of all potentially recoverable Policy benefits—for Plaintiff's claim. In *Ortiz v. State Farm Lloyds*, the Texas Supreme Court affirmed the well-settled rule among Texas courts of appeals that an insurer's payment of an appraisal award bars the insured's breach-of-contract claim premised on an alleged pre-appraisal failure to pay the amount of the covered loss.[37] The undisputed law in Texas is that when the insurer pays the amount of loss determined by the appraisal, no additional policy benefits are due and no breach of contract occurs.[38]

13. As the Supreme Court explained in *Ortiz*, the appraisal process establishes the amount of loss, not the liability on the policy.[39] It is wholly inconsistent with the purpose of appraisal and "simply does not follow that an appraisal award demonstrates that an insurer breached [the policy] by failing to pay the covered loss."[40] "If it did, insureds would be incentivized to sue for breach every time an appraisal yields a higher amount than the insurer's estimate (regardless of whether the insurer pays the award), thereby encouraging litigation rather than "short-circuiting" it as intended."[41]

14. Plaintiff's breach-of-contract claim in this case, just as in *Ortiz*, is "premised on the fact that the appraisal award valued the covered loss in an amount greater than

[37] *Ortiz*, 2019 WL 2710032, at *1.
[38] *Id.* at *1, 4–5.
[39] *Id.* at *4.
[40] *Id.*
[41] *Id.* (citation omitted).

State Farm initially assessed."[42] State Farm fully participated in the appraisal process and, subject to a reservation of rights, paid the binding amount determined by appraisal and, therefore, complied with its obligations under the Policy.[43]

15. Consistent with *Ortiz*, Plaintiff's claims are based on the pre-appraisal failure to pay the amount of the covered loss under the Policy, and State Farm is entitled judgment as a matter of law on the breach-of-contract claim.[44]

B. Without a right to additional Policy benefits or an independent injury, Plaintiff cannot maintain any extra-contractual causes of action.

16. Plaintiff has not sustained any damages that could allow him to maintain any of his extra-contractual causes of action against Defendant for violations of Ch. 541 or the DTPA, or breach of the common law duty of good faith and fair dealing.[45] Without a right to additional Policy benefits and without alleging any independent injury, Plaintiff cannot maintain any extra-contractual causes of action.[46]

17. In *Ortiz*, the Texas Supreme Court reaffirmed the longstanding principle that when the insurer pays the binding amount of loss determined by appraisal, the insured has received all benefits owed under the insurance policy and has sustained no "actual damages" under Ch. 541.[47] Plaintiff has, therefore, sustained no actual damages to support his extra-contractual claims for common-law bad faith or statutory violations

[42] *Id.* at *3.

[43] *Id.* at *4 ("Having invoked the agreed procedure for determining the amount of loss, and having paid that binding amount, State Farm complied with its obligations under the policy.").

[44] *Id.* at *4 ("As Ortiz has failed to identify any breach other than the failure to timely pay the amount of the covered loss under the policy, State Farm was entitled to summary judgment on the breach of contract claim.").

[45] *See* Plaintiff's Petition at ¶ 9, 17-29.

[46] *See Ortiz*, 2019 WL 2710032, at *4–6.

[47] *Id.*

under the DTPA or Ch. 541 of the Insurance Code.[48] Likewise, as the court affirmed in *Ortiz*, Plaintiff cannot recover attorney's fees or costs incurred in prosecuting this suit as "actual damages."[49] The *Ortiz* Court held that statutory attorney's fees and litigation costs are not damages under Texas law and cannot be recovered when no policy benefits are due.[50] Defendant is entitled to summary judgment.

C. State Farm did not violate the TPPCA because it made a reasonable pre-appraisal payments

18. State Farm's pre-appraisal payments totaling $8,061.81 were reasonable as a matter of law and, therefore, there is no TPPCA violation in this case and State Farm is entitled to summary judgment on Plaintiff's claims under the TPPCA. In *Barbara Technologies*, the Texas Supreme Court held that "when an insurer complies with the TPPCA in responding to the claim, requesting necessary information, investigating, evaluating, and reaching a decision on the claim, use of the contract's appraisal process does not vitiate the insurer's earlier determination on the claim."[51]

19. The Supreme Court cited *Mainali Corp. v. Covington Specialty Ins. Co.* with approval,[52] which held there is no statutory violation of the TPPCA if the insurer's pre-appraisal payment is "reasonable."[53] Accordingly, the Supreme Court's opinion in *Barbara Technologies*, in conjunction with the Fifth Circuit's opinion in *Mainali*, stands for the

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[48] *Id.* at *5.

[49] *Id.*

[50] *Id.*

[51] *Barbara Techs. Corp.*, No. 04-16-00420-CV, 2017 WL 1423714, at *12–13 (citing *Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255, 258–59 (5th Cir. 2017); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 345 (Tex. App.—Corpus Christi 2004, pet. denied)).

[52] *Barbara Techs. Corp.*, No. 04-16-00420-CV, 2017 WL 1423714, at *2–3 (citing *Mainali*, 872 F.3d at 259).

[53] *Mainali*, 872 F.3d at 258–59.

proposition that where an insurer makes a reasonable pre-appraisal payment within the statutorily prescribed period, the insurer does not violate the TPPCA.[54]

20. The question of whether a pre-appraisal payment is reasonable has also been addressed by the courts. In *Hinojos*, the El Paso Court of Appeals found the insurer's pre-appraisal payment was reasonable where the appraisal award was 6.8 times the pre-appraisal payment (over $22,000 greater).[55]

21. In the present case, State Farm complied with the statutory prompt payment requirements under the TPPCA and issued a reasonable pre-appraisal payment. State Farm acknowledged receipt of the claim and began its investigation within 15 days,[56] notified Plaintiff of acceptance or rejection of the claim within 15 business days of receiving all information required to secure final proof of loss,[57] issued payment within five business days after the date of the notice of the acceptance,[58] and issued payment within the statutory 60 day deadline.[59] Moreover, State Farm's pre-appraisal payment was reasonable as a matter of law. Similar to *Hinojos*, the Appraisal award of $31,545.79 was approximately 3.91 times the $8,061.81 pre-appraisal payment of Plaintiff's claim.

22. Like in *Hinojos*, and *Mainali*, State Farm's pre-appraisal payment was reasonable as a matter of law and made timely within the statutory deadlines established

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[54] *Hyewon Shin v. Allstate Texas Lloyds*, No. 4:18-CV-01784, 2019 WL 4170259, at *1–2 (S.D. Tex. Sept. 3, 2019) ("Accordingly, the Court reads *Barbara Technologies*, in conjunction with *Mainali*, as standing for the proposition that, in order for an insurer to avoid a Prompt Payment Act claim by a plaintiff, the insurer must have made a reasonable pre-appraisal payment within the statutorily-provided period.").
[55] *Hinojos v. State Farm Lloyds*, 569 S.W.3d 304, 311–13 (Tex. App.—El Paso 2019, pet. filed).
[56] *See* TEX. INS. CODE § 542.055.
[57] *See* INS. CODE § 542.056.
[58] *See* INS. CODE § 542.057.
[59] *See* INS. CODE § 542.058; *see also Barbara Techs. Corp.*, No. 04-16-00420-CV, 2017 WL 1423714, at *3–4.

by the TPPCA. As such, State Farm is entitled to summary judgment on Plaintiff's TPPCA claim as a matter of law.

D. Plaintiff is barred from recovering attorney fees pursuant to Chapter 542A of the Texas Insurance Code as a matter of law.

23. In connection with his statutory prompt-payment claim, Plaintiff asserts the right to attorney's fees under the TPPCA. As set forth below, Plaintiff cannot recover attorney fees pursuant to this statute because, under the specific formula for calculating attorney fees adopted by the legislature, Plaintiff is barred from recovering attorney fees because all Policy benefits have been paid. Accordingly, State Farm is entitled summary judgment on Plaintiff's claim for attorney fees under the TPPCA and any other statute or theory of recovery.

24. Texas House Bill 1774, which added Chapter 542A to the Texas Insurance Code ("Ch. 542A" or "542A"), became effective for actions filed on or after September 1, 2017.[60] Chapter 542A applies to first-party actions against an insurer by an insured under a policy providing coverage for real property that arises from certain weather events such as hail, wind, or rainstorms, including claims brought under Chapters 541 and 542 of the Insurance Code.[61] Because Plaintiff filed suit after September 1, 2017, concerning a first-party claim against an insurer arising from a hailstorm and wind, 542A applies.

25. The underlying goal of HB 1774 was to "mitigate a growing trend of frivolous severe-weather-damage lawsuits."[62] To further its stated purpose, the legislature specifically adopted a new method for determining the attorney's fees a court may award

[60] *See* Act of May 17, 2017, 85th Leg., R.S., ch. 151 (H.B. 1774) (codified in Chapter 542A of the Insurance Code).

[61] TEX. INS. CODE § 542A.001(2)(A) & (C); *Id.* at § 542A.002(a)(1) & (a)(3)(B).

[62] House Research Org., *New Texas Law Affects Property Damage Lawsuits*, INTERIM NEWS BRIEFS, No. 85-3, Nov. 2017.

a claimant under Ch. 542A.[63] The applicable provision for calculating attorney fees, set forth in § 542A.007, states in relevant part:

> **Sec. 542A.007. AWARD OF ATTORNEY'S FEES.**
>
> (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 the sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action.[64]

26. In revising the method for determining the amount of attorney's fees, the legislature specifically adopted a model that examined the "amount to be awarded in the judgment . . . under the insurance policy for damage to or loss of covered property"—in other words, the policy benefits to be awarded in the judgment.[65] Specifically, under § 542A.007(a)(3)(A), courts are instructed to divide the amount of policy benefits to be awarded in the judgment by the amount of policy benefits alleged in any notice given under Ch. 542A, and to then multiply that amount by the total reasonable and necessary

[63] TEX. INS. CODE § 542A.007.
[64] *Id.* at § 542A.007(a) (bold added).
[65] *Id.* at § 542A.007(a)(3).

attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred.[66] If this calculation is the lesser of the three stated methods of determining recoverable attorney's fees by the legislature, then it is the maximum amount of attorney fees that can be awarded in connection with an insured's claim under the TPPCA or any other law.[67]

27. Applying the § 542A.007 attorney-fee-calculation methods to this case, Plaintiff cannot recover any attorney fees, and State Farm is entitled to summary judgment on his claim for attorney's fees as a matter of law, regardless of whether the basis for recovering attorney fees arises from the TPPCA or some other statute or theory.[68] Under *Ortiz*, State Farm paid all Policy benefits owed to Plaintiff when it paid the binding appraisal award.[69] The resulting numerator in the § 542A.007(a)(3)(A) attorney-fees formula is therefore zero because the total amount of Policy benefits that could be awarded in the judgment would be $0.00. A fraction with a numerator equal to zero is zero. (That is, $0.00 / the amount of policy benefits alleged in any notice given under Ch. 542A = $0.) It follows that, under the § 542A.007(a)(3)(B) calculation, any number multiplied by zero is zero. ($0 x the total reasonable and necessary attorney's fees supported at trial by sufficient evidence = $0.00.) Accordingly, when an appraisal award is paid, the **lesser** of the § 542A.007 attorney-fee-calculation methods is $0.00. Therefore, Plaintiff is not entitled to recover attorney's fees in this case.

28. Because State Farm paid the binding appraisal award, all Policy benefits to which Plaintiff could be entitled have been paid. Under the plain language of the

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[66] *Id.*
[67] *Id.* at § 542A.007(a)(2).
[68] *Id.* at § 542A.007(a)(2).
[69] *Ortiz*, 2019 WL 2710032, at *3–6.

§ 542A.007(a) attorney-fee-calculation methods, Plaintiff cannot recover any attorney's fees under their TPPCA claims or any other theory of recovery.

29. In *Pearson v. Allstate Fire & Cas. Ins. Co.*, a Northern District of Texas District Court recently adopted this application of the attorney's fee provision of 542A in a case with very similar facts.[70] Specifically, the *Pearson* opinion acknowledged that the plaintiff was not entitled to attorney's fees for any alleged delay in payment of his weather claim because the method by which recoverable attorney's fees are calculated under the TPPCA resulted in a zero sum.[71]

30. As established *supra,* and akin to *Pearson*, the method by which any attorney's fees to which Plaintiff would be entitled result in a zero sum as calculated pursuant to the TPPCA. Thus, because Plaintiff is not entitled to additional benefits under the policy, Plaintiff is not entitled to attorney's fees in this case as a matter of law. Accordingly, State Farm is entitled to summary judgment on Plaintiff's claim for attorney fees.

V.
PRAYER

31. Plaintiff invoked the agreed procedure for determining the amount of loss and, having paid that binding amount, State Farm has fully complied with its contractual obligations under the Policy and owes no additional benefits. Because Plaintiff is not entitled to any additional benefits, Plaintiff cannot maintain a breach-of-contract action; without evidence of an independent injury, Plaintiff's extra-contractual claims also fail. Because State Farm made a reasonable and timely pre-appraisal payment, Plaintiff's

[70] *Pearson v. Allstate Fire & Cas. Ins. Co.*, No. 19-CV-693-BK, 2020 LEXIS 8266, at *11 (N.D. Tex. Jan. 17, 2020).
[71] *Id.*

TPPCA claims also fail. Further, without a right to Policy benefits, Plaintiff is barred from recovering attorney fees pursuant to Ch. 542A as a matter of law. Accordingly, State Farm respectfully requests that the Court grant summary judgment in favor of Defendant on Plaintiff's breach-of-contract claim, extra-contractual claims, and claim for attorney's fees.

Respectfully submitted,

By: */s/ M. Micah Kessler*
State Bar No. 00796878
S.D. Tex. I.D. 21206
1900 West Loop South, Suite 800
NISTICO, CROUCH & KESSLER, P.C.
Houston, Texas 77027
Telephone: (713) 781-2889
Telecopier: (713) 781-7222
Email: mkessler@nck-law.com
COUNSEL FOR DEFENDANT

OF COUNSEL:
Jazmine J. Ford
State Bar No. 24109881
S.D. Tex. I.D. 3451248
Email: jford@nck-law.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on all parties through counsel of record in compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure on January 31, 2020, in the manner(s) prescribed below:

Anthony G. Buzbee
Christopher J. Leavitt
JPMorgan Chase Tower
600 Travis, Suite 7300
Houston, Texas 77002
Telephone: (713) 223-5393
Facsimile: (713) 223-5909
VIA ECF

Gregory J. Finney
Stephen R. Walker
Juan Solis
6657 Navigation Boulevard,
Houston, Texas 77011
Telephone: (713) 223-5393
Facsimile: (713) 223-5909
VIA ECF

/s/ M. Micah Kessler
M. Micah Kessler

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Jeffrey Raizner on behalf of Jeffrey Raizner
Bar No. 784806
jraizner@raiznerlaw.com
Envelope ID: 49055425
Status as of 12/17/2020 2:35 PM CST

Associated Case Party: State Farm Lloyds

Name	BarNumber	Email	TimestampSubmitted	Status
Melissa ALorber		mlorber@enochkever.com	12/17/2020 2:30:56 PM	SENT
Laci Lindsey		llindsey@enochkever.com	12/17/2020 2:30:56 PM	SENT
Craig T.Enoch		cenoch@enochkever.com	12/17/2020 2:30:56 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Andrew Bender		abender@thebenderfirm.com	12/17/2020 2:30:56 PM	SENT
Angela Nickey	14536400	anickey@rbch.net	12/17/2020 2:30:56 PM	SENT
Chad Wilson	24079587	eservice@cwilsonlaw.com	12/17/2020 2:30:56 PM	SENT
Ruben S. Robles	17118400	rrobles@rbch.net	12/17/2020 2:30:56 PM	SENT
David Philip Wilson	21672700	dwilson@pulf.com	12/17/2020 2:30:56 PM	SENT