By Christopher H. Avery

ORTIZ, BARBARA TECHNOLOGIES, AND WHAT THE FUTURE HOLDS FOR APPRAISALS IN TEXAS

Appraisal is not a new concept in insurance law, nor is it intended to be a complicated concept. When an insurer and a policyholder disagree on the value of the loss, they will each appoint appraisers. If the appraisers are unable to agree, an umpire will then decide the amount of loss. Perhaps that is why the Supreme Court of Texas had only addressed the concept five times in its entire history prior to *State Farm Lloyds v. Johnson*.[1] Since then, hurricanes, hailstorms, and an incredible increase in insurance litigation, have led to disputes about almost every aspect of appraisal. Those developments have led to two new decisions in *Ortiz v. State Farm Lloyds* and *Barbara Technologies v. State Farm Lloyds* that signal even more litigation can be expected.

I. The Lead-Up to *Ortiz* and *Barbara Technologies*

Understanding the *Ortiz* and *Barbara Technologies* opinions requires an examination of the cases and issues that have exploded in the last decade. Consider that a simple Westlaw search shows approximately 511 cases dealing with appraisal from 1888 until the Texas Supreme Court's 2009 decision in *State Farm Lloyds v. Johnson*. In the ten years since *Johnson*, there have been approximately 483 cases. The drastic increase in litigation about appraisal is due to a variety of factors, many of which appear to have motivated the Supreme Court's new decisions.

A. State Farm Lloyds v. Johnson

In 2009, the Supreme Court addressed the types of disputes that were appropriate for appraisal, but particularly what constituted a dispute over the "amount of loss" as required by most policy terms. In that case, Ms. Johnson and her insurer, State Farm, disputed the costs of repairing hail damage sustained in a 2003 storm.[2] Ms. Johnson's contractor argued for full replacement at $13,000, while State Farm's inspector argued that only the ridgeline had been damaged at a cost of $499.50.[3] Although Johnson invoked the appraisal provision of her policy,[4] State Farm disagreed and argued that the dispute was over causation, not the "amount of loss."

The Supreme Court disagreed with State Farm that the dispute before it related to causation, and therefore, was beyond the bounds of appraisal. It began its analysis by observing that "[a] dispute about how many shingles were damaged and needed replacing is surely a question for the appraisers."[5] After all, if the parties must agree on every shingle that must be replaced, appraisal would be superfluous. Thus, "[t]o the extent the parties disagree which shingles needed replacing, that dispute would fall within the scope of appraisal."[6]

On the other hand, "when different causes are alleged for a single injury to property, causation is a liability question for the courts."[7] For example, when the parties disagree over whether foundation damage was due to plumbing leaks (a covered loss) or simply settling (an excluded loss), the issue is one of causation for the courts.[8] But the Supreme Court also recognized that there must be some type of agreement as to what was damaged before a court could decide liability, including the issue of wear and tear. Otherwise, no loss could ever be appraised unless the property had been in pristine condition before the alleged loss.[9]

Nevertheless, the Supreme Court was clear that while appraisal should go forward before a challenge to litigation, that process still cannot change a policy's terms. It stated:

> No matter what the appraisers say, State Farm does not have to pay for repairs due to wear and tear or any other excluded peril because those perils are excluded. But whether the appraisers have gone beyond the damage questions entrusted to them will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award (as discussed more fully below). State Farm cannot avoid appraisal at this point merely because there might be a causation question that exceeds the scope of appraisal.[10]

The Supreme Court concluded its opinion with three observations that have led to much of the dispute over appraisal, and which it later revisited in *Ortiz* and *Barbara Technologies*:

Christopher H. Avery is a Partner with Thompson Coe in Houston. He focuses his practice on commercial property and coverage matters involving allegations of bad faith. His experience includes successful litigation of complex coverage issues, as well as large property and business interruption claims.

1. Appraisal is intended to take place before suit is filed as it is a condition precedent to suit.[11] According to the Supreme Court "[a]ppraisal requires no attorneys, no lawsuits, no pleadings, no subpoenas and no hearings."[12] As discussed in more detail below, this observation has largely been proven incorrect and led to the concerns that prompted *Ortiz* and *Barbara Technologies*.

2. Appraisal can be structured to decide the amount of loss without deciding liability.[13] Once again, while such an observation appears clear enough in writing, the opposite can be equally true in practice.

3. The "scant precedent" involving disputes about the scope of appraisal suggests that appraisals "generally resolve such disputes."[14] As time would tell, this would prove to be the most incorrect observation of all.

Ultimately, the Supreme Court refused to say whether the appraisal it ordered on remand would be binding, but it provided some guidance for the thousands of cases that would soon be filed in Texas courts.

B. Hurricane Ike

What the Supreme Court probably could not see when it issued the *Johnson* decision was that tens of thousands of first-party property lawsuits were about to be filed as a result of a major hurricane. Nine months after the Supreme Court heard oral arguments, Hurricane Ike struck Southeast Texas slightly east of Houston. Winds associated with the hurricane damaged properties across most of southeast Texas, causing thousands of policyholders to file claims. The Texas Department of Insurance estimated that Hurricane Ike had generated approximately 815,000 claims within 9-months of the storm.[15] Still more would be filed over the next several years.

Along with the serious amount of claims came an onslaught of lawsuits. Attorneys and public adjusters advertised heavily, leading to tens of thousands of lawsuits in Harris, Galveston, Montgomery, Fort Bend, Chambers, and Jefferson Counties. Both policyholders and insurers sought to gain an advantage through appraisals. Courts then struggled to decide a multitude of issues relating to the process, including whether appraisal could be waived if it had not been demanded during the claims handling process.[16] Policyholders, in particular, argued that if an insurer had already denied a claim and then waited months, or even after suit, to invoke appraisal, that the process had been waived. Insurers, on the other hand, argued that appraisal was a condition precedent that was mandatory even after a delay or suit.

C. In re Universal Underwriters

In 2011, the Supreme Court decided the issue in a way that would impact thousands of pending and future cases. In *In re Universal Underwriters*, the Supreme Court held that waiving appraisal was difficult, if not impossible.[17] In that case, an auto dealer reported a large claim for hail damage that resulted in a payment of $4,081.95.[18] The policyholder disagreed and asked for a re-evaluation that resulted in an additional payment of $3,000.[19] The policyholder then filed suit, but the insurer then invoked appraisal.[20]

At the trial court, the insurer filed a Motion to Compel Appraisal.[21] The policyholder argued that the insurer had waived appraisal by waiting to invoke it until after suit was filed. The trial court agreed with the policyholder and denied the insurer's Motion. The Fort Worth Court of Appeals then affirmed the trial court's decision when the insurer sought mandamus review.[22] The Texas Supreme Court, however, disagreed and reversed the order denying appraisal.

The Supreme Court began its analysis by once again indicating a preference for appraisal over litigation as "[a]ppraisals can provide a less expensive, more efficient alternative to litigation . . . and they 'should generally go forward without presumptive intervention by the courts.'"[23] "Indeed, appraisals . . . proceeded for well over a century with little judicial involvement."[24] Based on that preference, the Supreme Court then reiterated its prior holdings that waiver "'requires intent, either the intentional relinquishment of a known right or intentional conduct inconsistent with that right.'"[25] In the context of appraisals that requires more than a simple delay of time.

To determine if appraisal has been waived, two points must be taken into account: (1) delay from the point of impasse; and (2) prejudice to the opposing party.[26] The Supreme Court first explained that the length of delay is not enough because all circumstances must be taken into account. For appraisals, this means from the point of impasse, which is "not the same as a disagreement about the amount of loss;" rather, it is "apparent breakdown of good-faith negotiations."[27]

Based on the facts before it, the Supreme Court could not conclude that the delay alone was sufficient to constitute waiver.[28] The insurer had never denied liability for the loss, nor had it refused to discover the issue further.[29] And it had invoked within one-month after receiving the suit.[30] Thus, the invocation of appraisal was timely.[31]

The Supreme Court continued by ruling that even if the insurer had delayed in requested appraisal, "mere delay is not enough to find waiver; a party must show that it has

been prejudiced."[32] After all, "it makes little sense to prohibit appraisal when it can provide a more efficient and cost-effective alternative to litigation."[33] The Supreme Court had enforced similar prejudice requirements in other contexts, such as arbitration, and other courts were in agreement. But in the context of appraisal the Supreme Court believed that it would be 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."[34] Therefore, according to the Supreme Court, requiring appraisal in the absence of prejudice could help "short-circuit" litigation.

D. More Storms, More Lawsuits

After *Universal Underwriters*, the Supreme Court's goal of "short circuiting" litigation was put through a series of tests. From 2012 to 2016, Texas experienced several severe weather events that led to several thousand more claims and cases. In 2012, severe hailstorms struck the Rio Grande Valley, once again resulting in the submission of thousands of claims. These storms were different because they also involved an unprecedented number of claims (40% according to the Texas Department of Insurance) that involved either an attorney or public adjuster.[35] In 2014, another severe hailstorm struck the Panhandle, while others caused significant damage in San Antonio and the Dallas-Fort Worth Metroplex in 2015.[36] As if on cue, in 2016, even more storms struck across North Texas, once again resulting in a huge number of claims and lawsuits.[37]

During the same period, Texas courts increasingly relied on a 2004 case from the Corpus Christi Court of Appeals to meet the Supreme Court's encouragement to keep litigation out of the courts. In *Breshears v. State Farm Lloyds*, the Corpus Christi Court of Appeals held that an insurer's timely payment of an appraisal award precluded any finding of breach of contract or of a violation of Chapter 542 of the Texas Insurance Code.[38] Only six courts cited to *Breshears* in the immediate years following the decision, but after *Johnson* and *Universal Underwriters*, the number of citing courts ballooned to 79. At the same time, almost every Court of Appeals followed its lead, as did the Fifth Circuit, and held that timely payment of an appraisal award precluded future litigation, absent some other type of challenge to the award.[39]

The atmosphere caused by an increasing number of storms and claims, as well as an increase in appraisal demands resulted in significant disagreements between policyholders and insurers. Insurers argued that appraisal was frequently being used to create coverage for questionable claims. Indeed, some policyholder attorneys even demanded mediation or appraisal upon filing suit without any prior notice to the insurer.

On the other hand, policyholders argued that the *Breshears* line of cases was being used by insurers essentially as a "cover up" to bad faith. According to those arguments, an insurer could determine it had acted in bad faith, then invoke appraisal, pay the award, and avoid any potential liability for its actions, including for prompt payment penalties.

E. 2017, Menchaca, and Statutory Revisions

As cases continued to test the bounds of appraisal, major new developments were on the horizon. In 2017, three key events occurred: (1) the Supreme Court revisited the Texas standard for bad faith; (2) the Texas Legislature amended the Insurance Code in an attempt to address many instances of lawsuit abuse; and (3) Hurricane Harvey, one of the most expensive hurricanes in Texas history, struck the Texas coast.

Of the three developments, the first two had the largest impact on the issue of appraisal. First, in *USAA Texas Lloyds Co. v. Menchaca*, the Supreme Court re-visited its previous holdings regarding the standard to show bad faith to "eliminate confusion regarding the Court's previous decisions addressing insureds' claims against their insurance companies."[40] In *Menchaca,* USAA challenged whether an "independent injury" was necessary to assert extra-contractual claims, including those under the Texas Insurance Code.[41]

The Supreme Court held that such a finding was generally not necessary, and articulated five rules:

1. **The General Rule**. The "general rule" is that a policyholder cannot recover policy benefits as actual damages if there is no right to the benefits.[42]

2.**The Entitled-to-Benefits Rule**. The natural corollary to the "general rule" is that if a policyholder can establish its right to policy benefits, they may be recovered as damages under the Insurance Code.[43]

3. **The Benefits Lost Rule**. If an insurer's improper action (such as misrepresentation or violation of the Insurance Code) causes a policyholder to lose their policy benefits, they may still be recovered under the Insurance Code.[44]

4. **The Independent Injury Rule**. If an insurer's improper actions cause an injury separate and apart from the policy benefits, they may be recovered under the Insurance Code.[45] But the Supreme Court repeated its previous statements that it had yet see such and injury and questioned whether it could occur.

5. **The No-Recovery Rule**. Finally, the "no-recovery rule" serves as the catch-all to the previous rules and holds that if

a policyholder cannot establish a right to policy benefits or an "independent injury" it cannot recover.[46]

After *Menchaca*, both policyholders and insurers argued as to whether the decision impacted appraisal awards. Most courts that considered the issue agreed that it did not and continued ruling that timely payment of an appraisal award precluded any further litigation.[47] This line of cases reasoned that "[w]hen an insurer has fully paid an appraisal award, no additional benefits are being wrongfully withheld under the policy, and in that situation, the only way an insured can recover any damages beyond policy benefits is where a statutory violation or act of bad faith caused an injury independent of the loss of benefits."[48] Thus, according to these courts, without evidence of some other harm, timely paying an appraisal award fits in the fifth *Menchaca* rule. Although these cases appeared to be unanimous in their holdings, the Supreme Court would soon rule otherwise.

The second development, amendments to the Texas Insurance Code, had been several years in the making. Following the overwhelming number of lawsuits filed as a result of Hurricane Ike and the subsequent hailstorms, many insurers and tort reform organizations petitioned the Texas Legislature to address many perceived lawsuit abuses, including appraisal. Policyholder representatives were quick to respond with their own assertions about protecting Texas consumers. In 2017, the Texas Legislature responded by enacting new revisions to the Texas Insurance Code in the form of new Chapter 542A. The new Chapter modified several previous provisions, including the requirements for a pre-suit demand letter and as to the applicable interest for claims under the Texas Prompt Payment of Claims Act ("TPPCA"). As expected, both sides then began arguing as to what exactly the bill meant and how it should apply.

Ironically enough, the third major event of 2017 occurred mere days before Chapter 542A was to take effect when Hurricane Harvey stalled off the Texas coast and inundated the state with Biblical amounts of rain. Once again, many claims were filed and many arguments were made by both sides. In this context, the Supreme Court once again took up the issue of appraisal.[49]

II. The Supreme Court's Decisions in *Ortiz* and *Barbara Technologies*

All of the factors above came into play in the briefing and oral arguments for both *Ortiz* and *Barbara Technologies*. While policyholders pointed out the potential for abuses by insurers, the insurers responded by pointing out the consistency in application of the previous rulings by almost every state and federal court to encounter them. Ultimately, all of the arguments resulted in two split-decisions that are likely to have major impacts on litigation about appraisal in the future.

A. Ortiz v. State Farm Lloyds

The *Ortiz* decision arose out of a homeowner's claim for hail damage. State Farm inspected the loss and determined the amount of damage caused by wind or hail to be $732.53, which was below the policy's $1,000 deductible.[50] Ortiz disputed that amount and requested a re-inspection that resulted in a revised estimate of $973.94. Ortiz then filed suit against State Farm asserting causes of action for: (1) breach of contract; (2) violations of Chapter 542; and (3) statutory and common law bad faith.[51]

Two months after appearing in the case, State Farm invoked the policy's appraisal provision. Although Ortiz argued that State Farm had waived its right to invoke appraisal, the trial court disagreed and compelled appraisal.[52] That process resulted in an award of $9,447.52 as replacement cost value and $5,243.93.[53] State Farm paid the award within seven days and then moved for summary judgment on all of Ortiz's claims.[54] The trial court granted the motion and the San Antonio Court of Appeals affirmed, but did not specifically address Ortiz's claims for violations of Chapter 542.[55]

At the Supreme Court, Ortiz argued that State Farm necessarily breached the policy because the appraisal award was higher than its original evaluation of damages.[56] The Supreme Court disagreed with Ortiz and sided with the courts that had unanimously rejected such an argument. The Supreme Court explained:

> It simply does not follow that an appraisal award demonstrates that an insurer breached by failing to pay the covered loss. 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-circuit[ing]" it as intended.[57]

Additionally, appraisal is specifically provided for by the policy contract, which is "significant."[58] By invoking the provision and then paying the award, State Farm had complied with the policy terms.[59] Thus, the breach of contract claim could not survive payment of the appraisal award.

The Supreme Court also disagreed that State Farm's actions created a viable claim for bad faith. It began its analysis by reciting *Menchaca*'s "general" rule that a policyholder cannot recover damages for a statutory bad faith violation if the policyholder does not have a right to those benefits under the policy.[60] The corollary to that rule is that if coverage is available, then the policyholder can maintain the claim.[61] And, in any event, if an insurer's violation of the statute results in damages separate and apart from those provided for by the policy, they may be recovered.[62]

On the facts before it, the question was not whether Ortiz had a right to policy benefits.[63] State Farm argued that even if Ortiz was entitled to those benefits, he had received all to which he was entitled because of the appraisal payment.[64] Ortiz, however, maintained that he would be entitled to recover additional attorneys' fees and expenses essentially as independent damages.[65] The Supreme Court disagreed because while such amounts were compensatory in that they helped make a claimant whole, they are not "damages." As such, Ortiz could not recover on his bad faith claim against State Farm.[66]

B. Barbara Technologies v. State Farm Lloyds

Barbara Technologies involved almost identical facts to *Ortiz*. In 2013, Barbara Technologies made a claim with State Farm for wind and hail damage.[67] State Farm determined that the damages were below the policy's deductible.[68] Barbara Technologies then requested a second inspection that resulted in a finding of no additional damage.[69] Barbara Technologies then filed suit and State Farm invoked appraisal.[70] State Farm quickly paid the appraisal award.[71]

Unlike in *Ortiz*, Barbara Technologies then amended its petition to only assert claims seeking payment for Chapter 542 violations.[72] It argued that State Farm had violated that statute by not paying within the sixty-day time limit and moved for summary judgment.[73] State Farm filed a cross-motion for summary judgment and asserted that it could not have violated the statute when it was not yet liable for a claim.[74] The trial court agreed with State Farm as did the San Antonio Court of Appeals.[75]

The Supreme Court described the issue created by the rulings as "whether an insured's claim for prompt pay damages under the TPPCA survives the insurer's payment in full after the amount of loss" was determined in appraisal.[76] The Supreme Court began its analysis by noting that the TPPCA has three main components. First, there are non-payment requirements and deadlines, such as the deadlines to acknowledge a claim and commence an investigation.[77] Second, there are deadlines for paying claims. Third, there is the enforcement mechanism of penalty interest and attorneys' fees.[78]

To prove a claim under the TPPCA, the policyholder must establish that the insurer was liable for the claim and that the insurer failed to comply with one or more of the statutory deadlines.[79] If the policyholder cannot establish either point, the insurer will prevail. Ultimately, the real basis for liability is that the insurer is liable for the claim and failed to pay in the appropriate amount of time.[80]

Although the Supreme Court recognized that these points, and the corresponding timeline, are clearly set out in the TPPCA, the TPPCA says absolutely nothing about the appraisal process.[81] Arguments could be made that this silence meant the deadlines were not to apply to appraisals; however, the Supreme Court pointed out that the Legislature was clearly aware of appraisal, as it had existed for over 150 years and was referenced in other statutes.[82] Under such circumstances, the Supreme Court concluded that the Legislature must have intended "neither to impose specific deadlines for the contractual appraisal process with the TPPCA scheme nor to exempt the contractual appraisal process from the deadlines provided by the TPPCA."[83]

Before analyzing the TPPCA deadlines, the Supreme Court curiously limited its inquiry by stating that it must determine whether an insurer can be liable when it denies a claim, but then pays an appraisal award.[84] State Farm had not denied Barbara Technologies' claim, but determined that it did not reach the deductible. Nevertheless, the Supreme Court deemed that conclusion to have been a "rejection" of the claim in an "inherently adversarial" process.[85] The Supreme Court's determination that the under-deductible conclusion was a "rejection" is key to understanding its analysis and final ruling.

State Farm argued that its invocation of the appraisal process served as an additional information request under Section 542.055(b),[86] which allows insurers to make "additional requests" for information following the initial 15-day deadline to request "all items, statements, and forms that the insurer reasonably believes . .. will be required from the claimant."[87] The Supreme Court disagreed and explained that it read the term "additional requests" to mean two key points in time: (1) the initial request that must be made within fifteen business days after receiving the claim; and (2) additional requests revealed to be necessary during the claim.[88] According to the Supreme Court, an appraisal demand is neither because it is based on a contractual right to engage in a specific dispute resolution process, not a request for additional information.[89]

Nevertheless, to be liable under Section 542.060(a) an insurer must actually be *liable* for a claim. It explained:

> To be clear, nothing in the TPPCA suggests that the invocation of a contractual appraisal provision alters or suspends any TPPCA requirements or deadlines. Rather, under the TPPCA, until an insurer is determined to owe the claimant benefits and thus is liable under the policy—either by accepting the claim and notifying the insured that it will pay, or through an adjudication of liability—the insurer is required to pay nothing, is subject to no payment deadline, and is not subject to TPPCA damages for delayed payment. *See* TEX. INS. CODE § 542.060(a) (imposing prompt pay damages when an insurer is liable under the policy and violated a provision of the TPPCA). This is not to say that a rejected claim can never trigger damages under the TPPCA; to the contrary, if an insurer later accepts a claim after initially rejecting it, or if an insurer is adjudicated liable for a claim it rejected, TPPCA deadlines and prompt pay requirements will apply. *See id.* §§ 542.057–.060. But use of a policy's appraisal process to resolve a dispute as to the value of loss—that is, the amount of benefits the insured would be entitled to under the policy if the insurer were determined liable for the claim—and payment based on the appraisal has no bearing on the TPPCA's payment deadlines or enforcement of those deadlines.[90]

Therefore, "unless and until the insurer later accepts the claim, thereby admitting liability, or there is a judgment that the insurer wrongfully rejected the claim, the insurer is not 'liable for a claim under an insurance policy' under section 542.060."[91]

Having made that determination, the Supreme Court then turned to the question of whether the appraisal process or a subsequent award payment was an acknowledgement of finding of liability. The Supreme Court first observed that in many circumstances, an insurer's payment of an appraisal award may result from a "calculated risk assessment that paying the appraisal value will ultimately be less risky" than litigation.[92] As such, simply paying an appraisal award is not by itself enough to trigger liability under section 542.060. Nevertheless, the Supreme Court was clear that if a determination of liability was ever made with respect to a claim that the insurer had "rejected," prompt payment penalties would apply.[93]

As applied to the facts before it, the Supreme Court concluded that neither party had met its summary judgment of proof to show it was entitled to judgment as a matter of law.[94] Barbara Technologies had not demonstrated that State Farm was liable for the claim as a matter of law; neither had State Farm demonstrated that prompt payment penalties were foreclosed as a matter of law.[95] As such, the Supreme Court remanded the case for further consideration.

III. What Does the Future Look Like After *Ortiz* and *Barbara Technologies?*

Ortiz and *Barbara Technologies* may have been an effort by the Texas Supreme Court to strike a balance between policyholders and insurers, while at the same time maintaining its previous encouragements to keep appraisal disputes out of litigation. The goal, however, may not be met until policyholders and insurers test the bounds of what is clear or not from the decisions.

A. The Size of An Award Will Drive Future Litigation

The most obvious point that can be gleaned from *Barbara Technologies* is that the size of appraisal awards will likely drive which cases are tested in litigation. If the award favors the insurer, the policyholder must weigh whether the amount of Chapter 542 penalties is high enough to justify further litigation. This is particularly true for residential claims where some awards may only result in penalties of few thousand dollars. On the other hand, insurers faced with a large award favoring the policyholder, will likely have to decide whether they wish to challenge coverage in the face of potentially significant Chapter 542 penalties. Between the two, it appears likely that the future cases challenging this point will arise with commercial claims, where costs of repairs are frequently higher than the costs of litigation for both sides.

Such a result appears consistent with the Supreme Court's goals of trying to minimize litigation about appraisal. *Johnson* and *Universal Underwriters* both emphasized that appraisal is a process that does not require judges or lawyers and should best be kept from litigation. *Barbara Technologies* may make that goal a reality for those cases that are not significant enough to warrant further litigation or that may pose questionable arguments for either the policyholder or insurers. Thus, for many claims, the question of future litigation will come down to costs.

B. Partial Payments Will Likely Be An Issue

The corollary to this observation is that further guidance will be needed for appraisal awards involving multiple types of repairs. As larger damage amounts are more likely to result in litigation, it appears that future cases will primarily involve commercial policies, rather than the thousands of residential cases that led to the new decisions. In that regard, there are sharp differences between the two types of cases. Commercial claims frequently include many different types of damages, beyond simply roofing. For example, soft metals and HVAC frequently show signs of hail damage, while roofing surfaces like TPO may show no or few signs of damage. If the insurer elects to pay part of the award, but not all, the question then becomes whether that decision can be challenged as being in bad faith under *Ortiz*. The answer would seem to be "no," if there is a *bona fide* basis for the dispute, but that will not stop future challenges to that decision. As such, not only will future litigation be likely to involve more commercial claims, they may also involve claims where multiple types of damage are at issue.

C. The Potential for Abuses May Have Shifted

One of the primary arguments advanced by the policyholders in both cases was the real or imagined possibility of abuses by insurers. According to those arguments, an insurer could receive a lawsuit, review its file and determine that it had acted in bad faith, but then hide all of those facts simply by paying the appraisal award. Indeed, one justice commented on just such a point during oral argument. Whether real or imagined, the current state of the rulings may have shifted the main argument about appraisal abuses from the insurer to the policyholder.

Based on the current rulings, a policyholder with potentially weak arguments for coverage could wait to challenge an insurer's decision as to coverage for several months or even a year before invoking appraisal. Based on *Universal Underwriters*, the insurer would then probably have to engage in appraisal and address whatever award resulted. Even if the award is in its favor, the insurer would then face arguments that it still potentially owed prompt payment penalties. If the award was favorable, the penalties may be negligible, but if the policyholder dragged out the timeline, the danger for potentially high fees increases. As a result, it would appear that the arguments about abuse of the appraisal process have now shifted from the policyholder to the insurer.

One related question to the potential for abuse is whether it makes a difference if the policyholder, rather than the insurer invokes appraisal. State Farm invoked appraisal in both *Ortiz* and *Barbara Technologies* and improper invocation by insurers was one of the concerns the Supreme Court appeared to address in its opinions. But the invocation of appraisal in a questionable coverage situation is a different matter entirely. Perhaps the insurer had a wholly reasonable basis for denying a claim; it will now have to engage in appraisal and potentially fight an award or deal with settlement demands that essentially hold it hostage. Such a situation has the potential to rewrite coverage terms, or at the very least, set them aside in favor a doctrine taken far out of its context. With such considerations in play, it is not difficult to see that litigation about appraisal is far from over, despite the Supreme Court's goals.

IV. Conclusion

None of these points should be taken as all inclusive. They are offered as initial observations about two new decisions dealing with an issue that has simply exploded over the last decade. More partisan articles will describe the various arguments, but for now, policyholders and insurers should not be deluded into thinking that *Ortiz* or *Barbara Technologies* have offered the guidance to finally eliminate appraisal from the courts. Quite the opposite is true. Thus, like *Johnson* did ten years ago, *Ortiz* and *Barbara Technologies* will likely have further reaching effects than intended.

1 290 S.W.3d 886, 888 (Tex. 2009) ("Although the history of such clauses is both deep and wide, they have required this Court's attention only five times since *Scottish Union*: in 1892, 1897, 1919, 1965, and 2002.").

2 *Id.* at 887.

3 *Id.*

4 The policy used what is arguably the most popular form of the appraisal clause:

> If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire . . . . The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss.

See id. at 887–88.

5 *Id.* at 891.

6 *Id.* Although State Farm argued that the dispute was one of

causation, it had not put forward any evidence or suggestion of a different cause to Ms. Johnson's roof damage other than hail.

7 *Id.* at 892 (citing *Wells v. Am. States Preferred Ins. Co.*, 919 S.W.2d 679, 685–86 (Tex. App.—Dallas 1996, writ denied)).

8 *Id.*

9 *See id.* at 892–93.

10 *Id.* at 893.

11 *Id.* at 894.

12 *Id.*

13 *Id.*

14 *Id.*

15 *See* Texas Department of Insurance, Hurricane Harvey Data Call at 4 (Sept. 30, 2018), *available at* https://www.tdi.texas.gov/reports/documents/harvey-dc-04252019.pdf.

16 *See, e.g.*, *In re Cont'l Cas. Co.*, No. 14-10-00709-CV, 2010 WL 3703664 (Tex. App.—Houston [14th Dist.] Sept. 23, 2010, no pet.) (finding appraisal was a condition precedent to filing suit); *Boone v. Safeco Ins. Co. of Ind.*, No. H-09-1613, 2010 WL 2303311, at *4 (S.D. Tex. June 7, 2010) (concerning pre-suit notice); *Sanchez v. Prop. & Cas. Ins. Co. of Hartford*, No. H-09-1736, 2010 WL 413687 (S.D. Tex. Jan. 27, 2010) (addressing whether insurer's delay before invoking appraisal constituted waiver); *Woodward v. Liberty Mut. Ins. Co.*, No. 3:09-CV-0228-G, 2010 WL 1186323 (N.D. Tex. Mar. 26, 2010) (addressing whether award was substantially in compliance with policy terms); *JM Walker LLC v. Acadia Ins. Co.*, 356 Fed. App'x 744 (5th Cir. 2009) (addressing whether award was enforceable to due to alleged mistake).

17 *See* 345 S.W.3d 404, 405 (Tex. 2011).

18 *Id.* at 405–06.

19 *Id.* at 406.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* at 407 (quoting *Johnson*, 290 S.W.3d at 895).

24 *Id.*

25 *Id.* (quoting *In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006)).

26 *Id.* at 408, 411.

27 *Id.* at 408–10.

28 *Id.* at 410.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 411 (citing 15 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 210:77 (3d ed. 1999)).

33 *Id.*

34 *Id.* at 412.

35 *See* Texas Department of Insurance, Final Presentation to the Legislature, Interim Charges: The Cost of Weather-Related Property Claims and Related Litigation at 13 (Feb. 1, 2017) available at https://www.tdi.texas.gov/reports/documents/weatherrelated-propertyclaims.pdf.

36 *Id.* at 39.

37 *Id.* at 54.

38 155 S.W.3d 340, 345 (Tex. App.—Corpus Christi 2004, pet. denied).

39 *See, e.g.*, *Hinojos v. State Farm Lloyds*, 569 S.W.3d 304, 313 (Tex. App.—El Paso 2019, pet. filed); *Zhu v. First Cmty. Ins. Co.*, 543 S.W.3d 428, 436 (Tex. App.—Houston [14th Dist.] 2018, pet. dismissed); *Anderson v. Am. Risk Ins. Co., Inc.*, No. 01-15-00257-CV, 2016 WL 3438243, at *5 (Tex. App.—Houston [1st Dist.] June 21, 2016, no pet.) (mem. op.); *Bernstien v. Safeco Ins. Co. of Ill.*, No. 05-13-01533-CV, 2015 WL 3958282, at *1 (Tex. App.—Dallas June 30, 2015, no pet.) (mem. op.); *Garcia v. State Farm Lloyds*, 514 S.W.3d 257 (Tex. App.—San Antonio 2016, pet. denied); *Cantu v. S. Ins. Co.*, No. 03-14-00533-CV, 2015 WL 5096858 (Tex. App.—Austin Aug. 25, 2015, no pet.); *Biasatti v. GuideOne Nat'l Ins. Co.*, 560 S.W.3d 739 (Tex. App.—Amarillo 2018, pet. filed); *Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255 (5th Cir. 2017).

40 545 S.W.3d 479, 484 (Tex. 2018).

41 *Id.*

42 *Id.* at 490.

43 *Id.* at 495.

44 *Id.* at 497.

45 *Id.* at 499.

46 *Id.* at 500–01.

47 *See, e.g.*, *Zhu*, 543 S.W.3d at 437–38; *Biasatti*, 569 S.W.3d at 743; *Turner v. Peerless Indem. Ins. Co.*, No. 07-17-00279-CV, 2018 WL 2709489, at *2 (Tex. App.—Amarillo June 5, 2018, no pet.); *Arnold v. State Farm Lloyds*, No. 4:17-CV-01520, 2019 WL 4034771, at *2 (S.D. Tex. June 14, 2019).

48 *Hinojos*, 569 S.W.3d at 311.

49 *Barbara Technologies* and *Ortiz* now mark the fourth time the Supreme Court has addressed appraisal since *Johnson* in 2009. Before that, it had only addressed appraisal five times in its entire history.

50 *Ortiz v. State Farm Lloyds*, No. 17-1048, 2019 WL 2710032, at *1 (Tex. June 28, 2019).

51 *Id.*

52 *Id.* at *2.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at *3.

57 *Id.* at *4.

58 *Id.*

59 *Id.*

60 *Id.* at *5.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 Nevertheless, the Supreme Court limited its holding because Ortiz had not sought any amounts other than those already paid. The Supreme Court chose not to express an opinion on whether other injuries, such a delays causing additional damage to a home or sums related to pre-appraisal damage assessments, could be recoverable.

67 *Barbara Techs. Corp v. State Farm Lloyds*, No. 17-0640, 2019 WL 2710089 at *1 (Tex. June 28, 2019).

68 *Id.*

69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at *2.
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* at *4.
78 *Id.*
79 *Id.* (citing Tex. Ins. Code § 542.060(a); *Progressive Cty. Mut. Ins. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (per curiam); *Allstate Ins. v. Bonner*, 51 S.W.3d 289, 291 (Tex. 2001); *Cox Operating, L.L.C. v. St. Paul Surplus Lines Ins.*, 795 F.3d 496, 505–06 (5th Cir. 2015)*; Tremago, L.P. v. Euler-Hermes Am. Credit Indem. Co.*, 602 F. App'x 981, 983–84 (5th Cir. 2015) (per curiam)).
80 *Id.*
81 *Id.* at *5.
82 *Id.*
83 *Id.*
84 *Id.* at *6.
85 *Id.*
86 *Id.*
87 Tex. Ins. Code § 542.055(a)(3).
88 *Barbara Techs.*, 2019 WL 2710089 at *6.
89 *Id.*
90 *Id.* at *11.
91 *Id.* at * 10.
92 *Id.* at *9.
93 *Id.* at *12.
94 *Id.* at *16.
95 *Id.*