By Stephen Gibson[1]

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***Insurance Law*: An insurer *may*, but not necessarily will, avoid liability under the Prompt Payment of Claims Act for a claim it initially refused to pay if it later requests an appraisal and timely pays the appraisal award. The outcome depends on whether the insurer was liable under the policy for the loss and liability is not conclusively established by payment of the appraisal award.**

Under the Texas Prompt Payment of Claims Act ("TPPCA"), an insurer commits a violation if it "delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days" after the insurer receives all the information reasonably requested about the claim. According to the TPPCA,

if an insurer … *is liable for a claim* [but] is not in compliance with this subchapter, the insurer is liable to … the [insured], ... in addition to the amount of the claim, [for] interest … at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees ....

Tex. Ins. Code § 542.060 (emphasis added).

After conducting an inspection, the insurer in *Barbara Technologies Corp. v. State Farm Lloyds* denied coverage for the insured's wind and hail damage claim. The insurer deemed the amount of the damage less than the insured's $5,000 deductible. At the insured's request, the insurer conducted a second inspection, but reached the same conclusion.

The insured sued under the Texas Prompt Payment of Claims Act ("TPPCA"). Six months later, the insurer invoked the policy's appraisal provision. Appraisal submits the amount of the covered loss to a panel of two partisan-selected appraisers and an umpire to resolve the partisan appraiser's differences. The insured's covered loss was ultimately appraised at nearly $179,000 dollars – more than 65 times greater than the insurer's earlier evaluations. The insurer surrendered and paid the appraised amount four days later. The insured pared down its suit to the insurer's alleged violation of the TPPCA by failing to pay the claim timely. The trial court rendered summary judgment that the insured take nothing.

The question was whether payment was untimely under the TPPCA when the insurer delayed payment until the amount of its liability was fixed by appraisal and accepted by the insurer. Stated differently, when is an insurer "liable" for a claim it previously rejected if it seeks an appraisal the insurer ultimately accepts and pays?

The bottom line: Even if paid, the appraisers' determination does not conclusively establish the insurer's liability under the policy and, therefore, does not conclusively establish liability under the TPPCA.

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[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

According to the majority, an insurer who rejects a claim is not "liable" as a matter of law if it later seeks appraisal of a rejected claim unless and until it accepts liability by paying the appraisal award. However, requesting appraisal alone does not conclusively establish the absence of liability. To avoid liability, the insurer must show either: (1) it was not liable under the policy; (2) it complied with all statutory deadlines and requirements which do not apply until the insurer accepts its liability or is adjudged liable; or (3) the claim is invalid and should not have been paid under the policy. Absence of liability under the TPPCA, according to the majority, also requires the insurer to investigate and seek the additional information necessary to resolve the claim. Neither insurer nor insured conclusively established liability or lack thereof under the TPPCA. Neither was entitled to summary judgment. Accordingly, writing for a 5-justice majority, Justice Green reversed the insurer's summary judgment and remanded the case to the trial court.

Apparently, the insurer's payment of the appraisal award is not tantamount to an acceptance or adjudication of liability. On remand, the insured can argue, to the extent that §542.060 applies, the insurer was liable under the policy when it rejected the claim so that it owes TPPCA damages. Even though it paid the appraisal award, the insurer can argue the appraiser's award was invalid because it owed no benefits under the policy. The majority appears to treat payment of the appraisal as a settlement of a disputed liability, not an acknowledgement or admission of liability. One can fairly ask how the payment of the appraisal award can be deemed a "settlement" of a contractual liability when the contract itself defines the contractual liability *by the same appraisal award.*
The majority's explanation – the "rest of the story."

Justice Green begins his majority opinion by asking whether an insurer is "liable" on the initial rejection of the claim if its amount is not paid until after the appraisal? More than two decades ago, *Higginbotham v. State Farm Mutual Automobile Insurance*, 103 F.3d 456, 461 (5th Cir. 1997), decided wrongful refusal of a claim could cause a delay subject to TPPCA penalties.

State Farm argued the opposite: prompt payment of an appraisal award categorically insulated the insurer from TPPCA liability. *Barbara Tech*'s majority rejected this argument. "Nothing in the TPPCA would excuse … liability for TPPCA damages if [the insurer] delayed payment beyond the applicable statutory deadline, regardless of use of the appraisal process." But the majority also did "not disagree … [that] use of the appraisal process to fully resolve … the amount … due … does not subject the insurer to TPPCA damages."

In this case, however, the insurer did not simply *invoke* the appraisal process. *It rejected the claim*. Twice. Only after the insured sued for breach of contract did the safe-harbor-seeking insurer request appraisal. It would appear ineluctable that the insurer failed to timely pay a claim ultimately determined to be valid and was thereby liable under the TPPCA. So how does one reconcile the majority's seemingly irreconcilable declarations?

"Liability" requires the insurer's acceptance or a legal adjudication; *payment of an appraisal award is neither.*

The particular fence rail the majority straddles is the meaning of "liable" as used in §542.060. The majority distinguished *Higginbotham* because there was a *judgment* in that case holding the insurer liable for breach of contract. In *Barbara Tech*, however, the insurer *voluntarily* accepted the appraisal award as the measure of its contractual obligation by paying it. According to the majority, however, surrender is not enough. They ruled citing no authority §542.060's "liable" requirement is unsatisfied "unless and until the insurer later *accepts* the [previously rejected] claim, thereby admitting liability, or there is a judgment that the insurer wrongfully rejected the claim."

Appraisal establishes amount, not fact, of liability.

In the majority's view, payment of the appraisal award is the settlement of a disputed claim, not an *acceptance* of liability for that claim. "[A]n insurer's use of the policy's appraisal process represents a willingness to resolve a dispute outside of court—often without admitting liability on the claim, or even specifically disclaiming liability—similar to a settlement." The majority rests this tissue-thin distinction of payment from acceptance on a court of appeals decision that appraisals determine only the *amount* of damages. It does not determine liability, which is a question for the court. The majority reasons, under *State Farm v. Johnson*, appraisal is a defeasible liability determination that can later be set aside if challenged by a party. It concludes "an insurer's "payment in accordance with an appraisal is neither an acknowledgment … nor a determination of liability … for purposes of … section 542.060."

Essentially, *Barbara Tech* holds that the payment of a denied claim does not establish liability under §542.060 so that the insured is entitled to summary judgment. But payment neither conclusively establishes absence of liability so that the insurer is likewise not entitled to a take-nothing summary judgment. The *Barbara Tech* majority declares that "when an insurer complies with the TPPCA in responding to the claim by 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." If so, it necessarily follows that an insurer's *payment* of the appraisal – which the *Barbara Tech* majority labels an "estoppel" – of necessity is a final acceptance of the liability determination inherent in the appraiser's award under the court's decision in *State Farm v. Johnson.*

Conflict with Johnson*?*

In *Johnson,* the Texas Supreme Court allowed appraisers to initially decide matters of policy interpretation – the other requisite to contractual liability which *Barbara Tech*'s majority otherwise deems a question for the court – as part and parcel of evaluating the amount of covered damages. Under *Johnson,* appraisers could decide both because their decision could later be set aside if one of the parties did *not accept* the appraisal as an honest damage assessment.

The majority does not explain how that reasoning could be valid if the award did not determine both questions of liability and damages. The majority also fails to explain how the validity of the appraisal determination of either liability or amount remains justiciable once the insurer pays the award. Ordinarily, an unconditional voluntary payment renders moot any further contractual dispute. Upon payment, the award ceases to be "defeasible" because there is no mechanism by which it can be vacated or overturned other than a collateral attack based on fraud.

Although the court routinely recites that it cannot read words into a contract, the majority's reasoning does exactly that. It is logically inescapable the majority *reads into the policy* an agreement that payment of an appraisal award is neither acceptance nor adjudication of contractual liability. But the policy itself says that the "decision agreed to by any two [of the appraisers or an appraiser and the umpire] *will be binding.*" (Emphasis added). The majority's treatment of the payment of the award as something less than a final and binding determination of the insurer's liability under the policy cannot be reconciled with the policy's explicit agreement.

Does the reconciliation really reconcile?

The majority reconciled its distinction concerning when an insurer was and was not liable on a claim on two decisions where an insurer paid a claim and was sued when the insured thought the amount paid inadequate. The appraisers in those cases agreed with the insureds and the insurers paid the additional amount. The insureds argued that the additional sum ultimately assessed as appraised damages was not paid timely under the TPPCA. However, the courts ruled that the initial payment, though ultimately insufficient in amount, satisfied the timely payment requirement of the TPPCA.

Even if one accepts these rulings as correct, the facts in *Barbara Tech* differed in one particular. There was no initial payment of any portion of the claim. Even if partial payment satisfies the TPPCA, the payment necessarily served as an acceptance of liability for the claim, if not the amount. Indeed, one would think that *State Farm* conceded *liability* when the sole basis of its initial refusal to pay the claim was not that the claim was one that would not have been covered under its policy, but rather that the *amount* was insufficient to meet the policy's deductible.

Nevertheless, *Barbara Tech*'s majority ruled the insurer is not liable under the TPPCA until the insurer is determined liable for that amount under the policy. According to the majority, that liability must established "either by [the insurer] accepting the claim and notifying the insured that it will pay, or through an adjudication of liability." Otherwise, "the insurer is required to pay nothing, is subject to no payment deadline, and is not subject to TPPCA damages for delayed payment."

Payment of the appraisal award is not a determination that the claim is valid.

The majority bolsters its discussion about the necessity of liability by looking to the exception under §542.058. Under §542.058 an insurer is free of TPPCA liability if the claim is ultimately determined to be invalid. In other words, the majority perceives that an insurer has no TPPCA liability *until* the claim is determined by the insurer or a court to be valid. The majority refuses to commit, however, to this rationale. Due to the presentation of the issue in the context of cross-summary judgment motions, the majority deemed it unnecessary to decide the effect §542.058 has on when the insurer is liable under §542.060.

Majority justifies its reasoning by pointing to availability of other remedies even though remedies under the TPPCA are cumulative.

The majority justifies its holding that payment of the appraisal award is not an acceptance of liability for purposes of the TPPCA on the ground that lack of recovery under the TPPCA does not deprive an insured of all the remedies available when adversely affected by the insurer's conduct in the "adversarial insurance claim process" of which appraisal is a part. After all, the majority reasons, the insured can assert a claim for unfair claims settlement under chapter 541. The majority does not explain how the appraisal process continues to be "adversarial" after the insurer elects to abide by its result.

Further. the suggestion that denying recovery under §542.060 is appropriate due to the availability other remedies was expressly rejected by the Legislature. The TPPCA expressly says in the very next section that its remedies under §542.060 "are *in addition to* any other remedy or procedure provided by law or at common law." Tex. Ins. Code §542.060. So much for the oft-ballyhooed deference to legislative intent.

Majority says the Legislature failed to address application of the TPPCA when an insurer invokes appraisals.

The majority identifies as dispositive the failure of the Legislature to specifically address how the TPPCA applies when the appraisal process is invoked. They point out that other insurance code provisions show that the Legislature is well aware of how to address appraisals for other purposes. Here, according to the majority, the Legislature failed to make payment of the appraisal award for a previously-rejected claim a liability that §542.060 requires to be paid in 60 days.

One can fairly question whether this reasoning fully plumbs the plain meaning of what "if an insurer … *is liable for a claim*" must mean. Nothing in §542.060 says what it really means is "when an insurer is determined by itself or a court to be liable for a claim." Nothing in the statute authorizes an advisory opinion by allowing the parties to continue to contest liability after the payment of a claim as determined by appraisers. Nothing in the opinion addresses the voluntary payment rule. Since at least 1887, it has been "well settled that money paid … with full knowledge of all the facts on which the claim for payment is based, and on which the right to resist it depends, cannot be recovered." *Gilliam v. Alford*, 6 S.W. 757, 759 (Tex. 1887).

Nevertheless, the majority remands the case to the trial court so the parties can "argue" whether the insurer was liable under its policy for the appraisal award. The majority does not identify any facts that require additional evidentiary development. Perhaps, without saying so, the majority did not consider that question sufficiently presented to dispose of it without necessity of a remand.

Justice Boyd's concurring and dissenting opinion

Justice Boyd separately concurred, agreeing with the disposition of the case. But he disagreed about why it was necessary to remand. He asserts the insurer's voluntary payment of the appraisal award conclusively established its liability for the insured's claim. In his view, the insurer violated the TPPCA by failing to pay the claim for 659 days

after it completed its "investigation." Justice Boyd reasons that all that remains for the trial court was to determine how much the insurer owes as interest and attorney's fees.

Justice Boyd begins his analysis by emphasizing that an insurer is liable under the TPPCA if either: (1) it delays payment more than sixty days after it receives all the information requested *unless* arbitration or litigation determines the claim is invalid; or (2) when the insurer is liable for the claim but fails to comply with the TPPCA. Acknowledging the TPPCA is silent about what happened in case of appraisal, he dismantles the reasoning of the cases "holding" that payment of the appraisal award precludes liability under the TPPCA.

He observes that most cases cited by the majority for this proposition are unanalyzed recitations of previous decisions. Beyond this uncritical parroting of precedent, Justice Boyd identifies three justifications offered for the majority's departure from the TPPCA's plain language: (1) payment of a reasonable amount in a reasonable time excuses the delay if the insurer complied with the TPPCA *before* demanding the appraisal; (2) voluntary payment of the appraisal award does not establish liability for the claim; and (3) payment of the appraisal fully complies with the insurer's contractual obligations.

For Justice Boyd, none of these justify excusing an insurer from TPPCA liability. The pre-appraisal payment excuse is unavailable here because State Farm paid Barbara Tech nothing. The second excuse was inapplicable because a finding of liability is unnecessary when the insurer rejects the claim. That's what State Farm did for its insured's claim in this case. The excuse that the insurer complied with the policy by ultimately paying the appraisal award, according to Justice Boyd, has nothing to do with compliance with the TPPCA, even if it prevents breach-of-contract liability.

Justice Boyd rejects the insurer's contention that an appraisal request is one for more information that delays when payment is due. He points out that the statutory trigger for the countdown of TPPCA's payment clock is information requested *from the claimant.*, not third-party appraisers. For Justice Boyd, the only excuse for failing to pay timely is if the claim is later found invalid, which never occurred here.

Justice Boyd posits that the majority goes astray when it suggests §542.058 and §542.060 impose contradictory burdens of proof. He explains the former obliges the insurer to establish a claim's *invalidity*; the latter requires the insured to prove its *validity*. If validity is a fact issue, Justice Boyd submits that a trial court would err reversibly to submit in a jury charge irreconcilable burdens of proof. Imposing the burden of proof required in one section of the TPPCA renders the other meaningless. In Justice Boyd's view, §542.058 applies exclusively because State Farm delayed paying the insured's claim for more than 60 days.

Justice Boyd would hold that the insurer's payment of the appraisal award was sufficient to establish its liability for the claim without need for an adjudication. Liability is a fact that exists, regardless of when it is recognized. The actual existence, not the perception, is dispositive. A later adjudication of invalidity only matters under §542.058. Because no such adjudication occurred in *Barbara Tech*, Justice Boyd believes the insurer's voluntary payment of the appraisal award establishes the *fact* of its liability. According to him, only the *amount* of interest and attorney's fees remains to be decided.

Chief Justice Hecht's dissenting opinion

Chief Justice Hecht, joined by Justices Brown and Blacklock, also assails the majority's reasoning. They point out that courts have repeatedly and, with one later-overturned exception, unanimously ruled that the TPPCA does not apply when the appraisal process is invoked. The dissenting opinion does not address, however, Justice Boyd's explanation that none of these justify State Farm's delayed payment of Barbara Tech's claim.

The Hecht dissent concludes the majority punishes an insurer who invokes appraisal, even though it is an otherwise-favored method of alternative dispute resolution. It was enough for the dissent that cases previously decided ruled that payment of appraisal awards were enough to avoid liability under the TPPCA. The dissent reasoned the Legislature acquiesced in rulings on the books for three decades without addressing them by amending the TPPCA to correct them when it had amended other portions of the TPPCA several times.

Interestingly, Antonin Scalia, the most notable proponent of the court's oft-professed duty to adhere to plain meaning and original intent, argued *against* giving positive meaning to legislative inaction. W. Eskridge, *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 68 (1989).

Perhaps the dissent's greater departure from its interpretative bedrock is its approach *adds* words to §542.058. That section does not say deadlines run from the date the claim is due to be paid. It says they run from the date the insurer has all the *information* it asks of the claimant to decide the claim. Invoking the appraisal process might delay the date the claim should have been paid, but it does not delay the date on which the insurer's information requests necessary to resolve the claim have been fulfilled.

After detailing the facts illustrating the reasons why an insurer could question the validity of the insured's claim, the dissent urges that nothing in the TPPCA prevents an insurer from seeking additional information that, at the time of the appraisal request, the insurer reasonably deems necessary to resolve the claim. In the view of the dissent, the insured's request for re-assessment of the denied claim restarts the clock under the TPPCA. The dissenters dispute the majority's rejection of an appraisal as a request for additional information.

They reason a pre-dispute appraisal is unlikely before a dispute over the, and the need for additional, facts arises. To them, an appraisal request necessarily resets the TPPCA's deadlines. If not, it could rarely be timely completed. The Hecht dissent especially takes the majority to task over its luke-warm approach that neither accepts nor rejects the notion that a post-rejection appraisal award payment excuses the insurer from TPPCA liability.

The Hecht dissent makes an interesting and cogent critique of the way the TPPCA was drafted. However, it does not explain why, in light of Texas's explicit and strict separation of legislative, executive and judicial power, a court should be able to re-write legislation to conform to its view of sound policy – especially when that view mandates a crabbed reading of a remedial statute.

***Insurance Law*: An insurer's timely payment of an appraisal award bars: (1) breach-of-contract recovery for failure to pay the covered loss; and (2) liability for common law and statutory bad faith claims to the extent the only actual damages sought are lost policy benefits.**

Barbara Tech only addressed whether recovery under the Prompt Payment of Claims Act was foreclosed as a matter of law if an insurer demands an appraisal and pays the appraisal award promptly. *Ortiz v. State Farm Lloyds* completes the picture by addressing whether the prompt payment of an appraisal award precludes an insurer's liability for the amount of policy benefits under breach of contract (it does) and both common law and statutory bad faith claims (yes and yes). However, in accordance with *Barbara Tech*, the it ruled the insured could "proceed" beyond the summary judgment phase with his claim under the Prompt Payment Act.

Whether coincidence or consequence of company policy, State Farms Lloyds' pattern of behavior was virtually the same here and in *Barbara Tech*. The insurer estimated hail and wind damage to the insured's home to be less than the deductible. Reinspection also resulted in a sub-deductible estimated loss. After the insured sued, State Farm Lloyds demanded an appraisal that resulted in an award ten times greater than the insurer's previous loss estimates. State Farm Lloyds again promptly surrendered and paid the award. Based on this payment, State Farm Lloyds later obtained a take-nothing summary judgment on the insured's breach of contract claim, its common law and statutory bad faith claims, and its claim under the TPPCA.

The majority opinion

Justice Lehrmann wrote a majority opinion for a court that was unanimous about everything but the TPPCA claim. On that portion of the opinion, the majority only carried five of the nine justices. Chief Justice Hecht, joined by Justices Brown and Blacklock, and Justice Boyd adhered to their positions in Barbara Tech about the appropriate disposition of the TPPCA claims. The majority ruled the insurer's payment of the appraisal award bars: (1) breach-of-contract recovery for failure to pay the covered loss; and (2) the insured's common law and statutory bad faith claims to the extent the only actual damages sought are lost policy benefits.

Can't say what is "prejudice" necessary to waiver of the right to appraisal but whatever it is it didn't happen here.

The threshold issue for the majority was whether the insurer's failure to request an appraisal until after refusing payment on the claim and being sued for non-payment waived the right to appraisal. The majority rules that waiver occurs only if: (1) there is failure to demand appraisal within a reasonable time after the parties reach an impasse on the loss amount; and (2) the delay prejudices the other party. The opinion, however, offers no insight about *when* prejudice can result. It unhelpfully only says that showing prejudice is "difficult[]" because either party can demand appraisal and thereby "short-circuit" the need to resort to litigation. Without specifying any objective criteria for prejudice, the majority only says the insurer's delay here was not.

What happened to the bigger picture?

Wait a minute. Hasn't the Legislature answered this question? The manner of expression as applied to appraisals may not be sufficiently clear for those disinclined to penalize delayed claims payments. However, the Legislature made it perfectly clear that such delays, the true origins of which are easily concealed by black box bureaucracy, are inherently prejudicial to insureds in particular and the public interest in general. Thus, it created a statutory discouragement for such delays independent of motive, honest or otherwise, because of the insurer's self-serving interest in delaying or denying payment for as long as possible. The majority says nothing whatsoever about this consideration. It doesn't have to. In *Barbara Tech*, they were sufficiently able to dissemble the language of the statute under the guise of fidelity to legislative intent to create room for an exception to this broader principle

Appraisal doesn't establish contractual liability so an insurer's failure to pay an amount equal to the ultimate appraisal award is not a breach of the policy.

Allowing quantity of repetition to outweigh the quality of reasoning, the majority rejects the insured's argument an insurer fails to comply with the TPPCA when it uses a belated appraisal request to delay paying the correct amount. Instead, the majority rules payment of the appraised loss amount forecloses breach of contract liability. It justifies this decision because otherwise "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."

Other than the fulfilling a desire to avoid litigation, the majority adopts conflicting rationales for why there is no breach of contract when the insurer pays the appraisal award. On one hand, it declares, as it did in *Barbara Tech*, that "appraisal awards do not serve to establish a party's liability" but instead "contractually resolve a … dispute among insurers and insureds[over] the amount of the covered loss." This award is "binding on the parties" by virtue of the contract itself and an insurer satisfies its contractual obligation by paying that award. Fair enough.
But on the preceding page of the majority opinion in *Ortiz*, and in *Barbara Tech*, the majority treats the appraisal clause as if it is aliunde to the policy for purposes of resolving *liability*. The majority posits appraisal only resolves the liability amount so that payment of the award is no admission of liability. How the appraisal award can be an alternative method of resolving a contractual liability without also being part and parcel of that liability is difficult to understand. Nevertheless, the opinions in *Barbara Tech* and *Ortiz* straddle the line so that payment of an appraisal award is a full satisfaction of the insurer's contractual liability for purposes of breach of contract liability without also establishing liability for purposes of the TPPCA.

Statutory and common law bad faith damages not recoverable when the insured alleged no damages other than loss of policy benefits.

The insured was equally unsuccessful on his claim for statutory and common law bad faith for the delay in the payment of his claim. In *Universe Life Ins. Co. v. Giles* the court held an insurer breaches its common law duty of good faith and fair dealing if it unreasonably delays payment of a claim when if the insurer knew or should have known that it was reasonably clear the claim was covered." Insurance Code chapter 541 (formerly article 21.21) also proscribed unfair claims settlement practices, including failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of … a claim [for] which the insurer's liability has become reasonably clear."

The insured asserted the payment of his claim was unreasonably delayed because the insurer did not reasonably investigate. In addition to the insurer's initial failure to pay the claim, the insured also pointed to the roughly 1000%

disparity between the insurer's evaluation and the ultimate appraisal award. The insurer ignored the substantial delay involved, urging that ultimately paying the appraisal award gave the insured all the relief to which he was entitled under the contract so that there was no independent injury for which the insured could recover under a common law or statutory extra-contractual theory.

The majority agreed. The insured did not allege any damages from the delay in payment other than the loss of policy benefits. Under the recent holding in *Menchaca*, the general rule is that recovery for bad faith is barred unless there is some evidence of an injury independent of the loss of policy benefits. This is an offshoot of the distinction between the damages that can only be recovered, if at all, under a breach-of-contract theory and those that must be recovered, if at all, in a tort action.

Attorney's fees incurred because of the delayed payment are not "damages" and do not support recovery for anything other than policy benefits.

Because the insured failed to allege any damages not recoverable in a contract action, there was no damage supporting recovery under a common law or statutory bad faith claim. The majority ruled attorney's fees and other fees and expenses he was caused to incur by the alleged unreasonable investigation of the insured's claim are not "damages" as such. Without damages for an injury independent of the denial of policy benefits, the insured had no viable bad faith claim. The majority reserved judgment whether such a claim would have existed had the insured alleged unreasonable investigation resulted in further damage to his property or had the insured sought the costs of appraisal or pre-appraisal expenses allegedly resulting from the manner of investigation.

Majority remands TPPCA claim for further proceedings in light of Barbara Technologies.

As in *Barbara Technologies*, the *Ortiz* majority ruled that the insurer's payment of the appraisal award was not dispositive of the insurer's TPPCA liability. Accordingly, it remanded for further proceedings on that claim. However, it is unclear what is involved in "proceeding" according to *Barbara Tech*'s holding. The tenor of the opinions of all but Justice Boyd clearly signal that the court is inclined against allowing a TPPCA claim against an insurer who invokes appraisal and pays an appraisal award. Moreover, as discussed above *Barbara Tech*'s holding appears to be based more on the procedural niceties of cross-summary judgment motions, more than any suggestion that an insured would ultimately prevail. So take the suggestion that a claimant can proceed with a TPPCA claim under the facts with a considerable dose of salt.

The partial dissents were limited to the disposition of the TPPCA claim.

Chief Justice Hecht, joined by Justices Brown and Blacklock, dissented from the majority's holding about the insurer's liability under the TUPAC for the reasons stated in his opinion there. He and his fellow Justices would have denied recovery on the TPPCA claim along with all of the insured's other theories of recovery. Justice Boyd adhered to his position in *Barbara Tech* that the applicable statutory standard under the TPPCA was §542.058 instead of §542.060. Otherwise, the decision concerning the breach of contract and bad faith claims were unanimous.