IN THE SUPREME COURT OF TEXAS

NO. 17-0640

BARBARA TECHNOLOGIES CORPORATION, PETITIONER,

v.

STATE FARM LLOYDS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued February 20, 2019

JUSTICE GREEN delivered the opinion of the Court, in which JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BUSBY joined.

JUSTICE BOYD filed an opinion concurring in part and dissenting in part.

CHIEF JUSTICE HECHT filed a dissenting opinion, in which JUSTICE BROWN and JUSTICE BLACKLOCK joined.

In this case, we consider competing motions for summary judgment that present the issue of whether an insured party can prevail on its claim for damages for delayed payment pursuant to the Texas Prompt Payment of Claims Act (TPPCA), *see* TEX. INS. CODE ch. 542, when it is undisputed that the insurer investigated the claim, rejected it, invoked the policy's provision for an appraisal process, and ultimately paid the insured in full in accordance with the appraisal. We hold that the insurer's payment based on the appraisal was neither an acknowledgment of liability under the policy nor an award of actual damages. Because the insured has not established that it is entitled

to TPPCA prompt pay damages as a matter of law and the insurer likewise has not established that it can owe no TPPCA damages as a matter of law, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

Barbara Technologies Corporation contracted with State Farm Lloyds for property insurance covering Barbara Tech's commercial property in San Antonio. The insurance policy covered damage resulting from wind and hail. A wind and hail storm damaged Barbara Tech's property on March 31, 2013. On October 17, 2013, Barbara Tech filed a claim with State Farm pursuant to the insurance policy, requesting coverage of the cost of repairs. State Farm inspected the property about two weeks later. State Farm denied Barbara Tech's claim on November 4, 2013, stating that the property sustained $3,153.57 in damages, which was less than Barbara Tech's $5,000 deductible under the policy. Barbara Tech requested a second inspection on February 21, 2014. State Farm obliged and conducted another inspection on March 4, 2014, finding no additional damage.

Barbara Tech filed suit against State Farm on July 14, 2014, alleging violations of the TPPCA, among other claims. State Farm invoked the appraisal provision under the policy on January 9, 2015.[1] The appraisal provision allowed either party to demand an appraisal of the loss,

[1] Section I(1)(b) of the policy provides:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. Each party will notify the other of the selected appraiser's identity within 20 days after receipt of the written demand for an appraisal. The two appraisers will select an umpire. If the appraisers cannot agree upon an umpire within 15 days, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision

in which each party would select its own appraiser, with an umpire to settle any dispute between the appraisers. On August 18, 2015, approximately seven months after invocation of the appraisal provision, the appraisers agreed to an appraisal value of $195,345.63. State Farm received the appraisal award on August 19, 2015, and then paid $178,845.25—the appraisal value less depreciation and the deductible—on August 25, 2015. Barbara Tech received and accepted the payment and amended its petition to include only claims for violations of the TPPCA[2]—specifically, Barbara Tech claimed statutory damages under Texas Insurance Code chapter 542 for State Farm's alleged failure to comply with statutory deadlines for acknowledging receipt of the claim, commencing an investigation of the claim, notifying Barbara Tech of its rejection of the claim, and paying the claim. *See* TEX. INS. CODE §§ 542.055(a)(1)–(3), .056(a), .058(a), .060. Barbara Tech then moved for traditional summary judgment, asserting that, as a matter of law, State Farm violated the TPPCA by failing to pay the claim within the TPPCA's sixty-day time limit and therefore owed TPPCA damages. *Id.* §§ 542.058, .060. State Farm filed a cross-motion for summary judgment, asserting that it did not violate the TPPCA as a matter of law because it timely paid the appraisal award and was not liable under the policy.

The trial court denied Barbara Tech's summary judgment motion and granted summary judgment in favor of State Farm. Barbara Tech appealed, arguing that "its TPPCA claim survived

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> agreed to by any two will be binding. Each party will: (1) Pay its chosen appraiser; and (2) Bear the other expenses of the appraisal and umpire equally. If there is an appraisal, [State Farm] will still retain [its] right to deny the claim.

[2] Although Barbara Tech initially alleged a bad faith claim related to State Farm's failure to investigate the claim properly, Barbara Tech dropped that claim after State Farm's payment based on the appraisal. Barbara Tech likewise dropped its breach of contract claim.

State Farm's invocation of the appraisal process and its payment of the appraisal" and that "State Farm is strictly liable for interest and attorneys' fees under chapter 542 because it did not pay the claim within sixty . . . days after it received notice of the loss." State Farm countered that an insurer does not violate the TPPCA when it pays in accordance with an appraisal award. The court of appeals affirmed the trial court's judgment and held that a "plaintiff could not sustain a claim under the TPPCA when it [is] undisputed that the insurer had paid the appraisal award." 566 S.W.3d 294, 296 (Tex. App.—San Antonio 2017, pet. granted) (mem. op.).

Specifically, the court of appeals relied on its own precedent, *Garcia v. State Farm Lloyds*, 514 S.W.3d 257 (Tex. App.—San Antonio 2016, pet. denied), in concluding that a full and timely payment of an appraisal award under the policy precludes an insured from recovering damages under the TPPCA as a matter of law. *See* 566 S.W.3d at 296–97 (citing *Garcia*, 514 S.W.3d at 274–79). The court of appeals reasoned that the facts of this case were indistinguishable from *Garcia* and that "undisputed evidence show[ed] that State Farm invoked the appraisal provision in the policy and timely paid the appraisal award," and therefore the trial court did not err in granting summary judgment in favor of State Farm. *Id.* at 297. Barbara Tech petitioned for review in this Court, and we granted the petition. 62 Tex. Sup. Ct. J. 313 (Jan. 18, 2019).

II. Appraisal and the TPPCA

Although presented initially through competing motions for summary judgment, the legal issue before this Court is 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 through an appraisal process provided for in the parties' insurance policy. The parties ask us to determine whether

Barbara Tech is entitled to damages under the TPPCA despite State Farm's use of the appraisal process, and whether State Farm's payment in accordance with the appraisal exempts it from TPPCA damages.

A. Standard of Review

We review summary judgments de novo, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *E.g.*, *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010) (citation omitted); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005) (citation omitted). When both parties move for summary judgment on the same issue, the reviewing court considers the evidence presented by both parties, determining all questions presented. *Dorsett*, 164 S.W.3d at 661 (citation omitted). If we determine that the trial court erred in granting summary judgment, and therefore the court of appeals erred in affirming the trial court's judgment, we render the judgment the trial court should have rendered. *See id.*

B. State Farm's Motion for Summary Judgment

State Farm moved for traditional summary judgment on two grounds. First, State Farm asserted that Barbara Tech cannot maintain its claim under the TPPCA because State Farm paid timely and in accordance with the appraisal. In other words, citing various courts of appeals cases, State Farm took the position that timely payment of an appraisal award forecloses TPPCA damages as a matter of law. *See, e.g.*, *In re Slavonic Mut. Fire Ins.*, 308 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (citations omitted); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied) (mem. op.).

Second, State Farm argued that it is not liable for Barbara Tech's claim, as it has never accepted liability or been adjudicated liable. And, arguing that it cannot be held liable for breach of contract because Barbara Tech nonsuited that claim, State Farm contends that it is not subject to TPPCA damages as a matter of law. The court of appeals decided the case on the first ground, holding that State Farm was entitled to summary judgment because "a full and timely payment of an appraisal award under the policy precludes an insured from recovering [damages] under the TPPCA as a matter of law." 566 S.W.3d at 296–97.

1. Payment of Appraisal Award

We first consider the court of appeals' basis for affirming summary judgment for State Farm—that a plaintiff cannot sustain a claim for prompt pay damages under the TPPCA when it is undisputed that the insurer paid in accordance with the appraisal, in effect paying all benefits to which the plaintiff could be entitled under the policy. *Id.* Because analysis of this issue requires an understanding of the circumstances under which a claimant can sustain a claim for damages under the TPPCA, we begin with a review of the plain language of the TPPCA provisions, as that is the surest indicator of the Legislature's intent. *See Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (recognizing that in interpreting a statute, its plain language is the most reliable guide to the Legislature's intent (citation omitted)); *Molinet v. Kimbrell*, 356 S.W.3d 407, 414–15 (Tex. 2011) ("It is the Legislature's prerogative to enact statutes; it is the judiciary's responsibility to interpret those statutes according to the language the Legislature used, absent a context indicating a different meaning or the result of the plain meaning . . . yielding absurd . . . results." (citations omitted)).

a. The TPPCA

The TPPCA, codified in Texas Insurance Code chapter 542, imposes procedural requirements and deadlines on insurance companies to promote the prompt payment of insurance claims. TEX. INS. CODE § 542.054 ("This subchapter shall be liberally construed to promote the prompt payment of insurance claims."). Though the TPPCA's purpose relates specifically to prompt *payment* of claims, the TPPCA also contains specific requirements and deadlines for responding to, investigating, and evaluating insurance claims. *See id.* §§ 542.055–.056. Both the payment deadlines and the non-payment deadlines and requirements are enforceable under the TPPCA, and damages can be imposed for any violation. *See id.* §§ 542.058, .060.

Section 542.055, which governs receipt of notice of a claim, provides:

> (a) Not later than the 15th day . . . after the date an insurer receives notice of a claim, the insurer shall:
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> (1) acknowledge receipt of the claim;
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> (2) commence any investigation of the claim; and
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> (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.
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> (b) An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary.

Id. § 542.055(a)(1)–(3), (b). Additional TPPCA deadlines are triggered when "the insurer receives all items, statements, and forms required . . . to secure final proof of loss," whether the insurer receives this information in response to its initial request or in response to additional requests. *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 28 (Tex. 2007) (emphasis omitted) (citing TEX. INS. CODE § 542.056(a)); *see also* TEX. INS. CODE § 542.056(b). "[A]n insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business

day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss." TEX. INS. CODE § 542.056(a). If an insurer rejects a claim, its notice must state the insurer's reasons. *Id.* § 542.056(c). "[I]f an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim, . . . the insurer shall pay the claim not later than the fifth business day after the date notice is made." *Id.* § 542.057(a).

As to delayed payment, the Insurance Code provides:

> [E]xcept as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, 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, the insurer shall pay damages and other items as provided by section 542.060.

Id. § 542.058(a). Section 542.060 addresses liability for a violation of the TPPCA:

> (a) Except as provided by Subsection (c), if an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the [insured], . . . in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees . . . .

Id. § 542.060(a).

Taken together, the TPPCA imposes several key requirements on insurers: (1) the insurer must acknowledge receipt of the claim, commence any investigation of the claim, and request any items, statements, or forms required from the claimant within fifteen days of its receipt of notice of the claim; (2) the insurer must notify the claimant of acceptance or rejection of the claim no later than fifteen business days after the insurer receives all items, statements, and forms required to secure final proof of loss; (3) if the insurer notifies the insured that it will pay all or part of the claim, it must pay it by the fifth business day after the date of notice of acceptance of the claim; (4) if the

insurer delays payment of a claim for more than the applicable statutory period or sixty days, the insurer shall pay TPPCA damages; and (5) an insurer that is liable for a claim under an insurance policy and violates a TPPCA provision is liable for TPPCA damages in the form of 18% interest on the amount of the claim per year, with attorney's fees. *See id.* §§ 542.055(a)(1)–(3), .056(a), .057(a), .058(a), 060(a). Thus, the TPPCA has three main components—non-payment requirements and deadlines, deadlines for paying claims, and enforcement. *See generally id.* §§ 542.055–.060. Only the payment deadline and enforcement provisions are at issue here.

In light of the TPPCA's requirements and deadlines, we must determine whether State Farm's invocation of the policy's appraisal provision and subsequent payment leaves State Farm exposed to liability for prompt pay damages under the TPPCA. In considering this question, we remain mindful of the facts of this case—there is no allegation that State Farm failed to request information, investigate, or evaluate the claim in compliance with the TPPCA; following its receipt of necessary information and its investigation, State Farm acknowledged that the insured's loss was covered but rejected the claim because the amount of loss was less than Barbara Tech's deductible; asked to revisit the decision, State Farm inspected a second time and stood by its rejection; Barbara Tech then sued. More than a year after State Farm first rejected the claim, State Farm exercised its contractual right to demand an appraisal; the appraised value was significantly higher than State Farm's assessment and greatly exceeded Barbara Tech's deductible; State Farm paid in accordance with the appraisal, less depreciation and the deductible; State Farm made that payment four business days after receiving the appraisal.

To prevail under a claim for TPPCA damages under section 542.060, the insured must establish: (1) the insurer's liability under the insurance policy, and (2) that the insurer has failed to comply with one or more sections of the TPPCA in processing or paying the claim.[3] *See id.* § 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); *see also 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). If the insured fails to establish either that the insurer is liable for the claim or that the insurer failed to comply with a provision of the TPPCA, the insured is not entitled to TPPCA damages. Thus, the basis for liability for TPPCA damages is "that the requisite time has passed and the insurer was ultimately found liable for the claim." *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 861 (5th Cir. 2003) (per curiam).

Nowhere does the TPPCA mention appraisals or how invocation of an appraisal process affects the TPPCA's deadlines and requirements. There is no question, however, that appraisal clauses were in use and enforceable well before enactment of the TPPCA. *See, e.g., Scottish Union & Nat'l Ins. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888) (providing an example of an appraisal clause and enforcing it). And there is no question that the Legislature knows how to fit appraisals into a statutory scheme governing the evaluation and payment of insurance claims, as it did just that in the Texas Windstorm Insurance Association Act. *See* TEX. INS. CODE § 2210.574 (providing that a

[3] In its petition for review, Barbara Tech arguably sought damages for State Farm's alleged failure to comply with section 542.058. We discuss that section below.

claimant who disputes the amount of loss may demand an appraisal in accordance with the policy); *id.* § 2210.579 (referencing appraisal in establishing when an insurer is to file suit against a claimant). We must interpret the absence of any such language in chapter 542 to mean that the Legislature intends neither to impose specific deadlines for the contractual appraisal process within the TPPCA scheme nor to exempt the contractual appraisal process from the deadlines provided by the TPPCA. *See Tex. Mut. Ins. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012) ("[T]his Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact." (citation omitted)); *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) ("A statute is presumed to have been enacted by the Legislature with complete knowledge of the existing law and with reference to it." (citation omitted)).

b. The Appraisal Process

Today, appraisal clauses are included in most property insurance policies. *See State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888 (Tex. 2009). Access to the appraisal process to resolve disputes is an important tool in the insurance claim context, curbing costs and adding efficiency in resolving insurance claims. *See In re Universal Underwriters of Tex. Ins.*, 345 S.W.3d 404, 407 (Tex. 2011) (orig. proceeding) ("Appraisals can provide a less expensive, more efficient alternative to litigation." (citation omitted)). This Court has reasoned that "[l]ike any other contractual provision, appraisal clauses should be enforced." *Johnson*, 290 S.W.3d at 895. "[I]n every property damage claim, someone must determine the 'amount of loss,' as that is what the insurer must pay."

Id. Appraisal clauses are a means of determining the amount of loss and resolving disputes about the amount of loss for a covered claim.[4] *Id.* at 888–89.

Barbara Tech's and State Farm's policy contained an appraisal provision, which stated that if either party "disagree[d] on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss." In the policy, State Farm expressly retained the right to deny the claim, even after the appraisal process concludes. After Barbara Tech filed suit against State Farm, State Farm invoked this appraisal provision, exercising its right to appraisal.

Under a policy containing no time limitation for exercising the right to the appraisal process, if a party demands the appraisal "within a reasonable time after the parties [reach] an impasse," then invocation of the appraisal process is valid unless waived. *See In re Universal Underwriters of Tex. Ins.*, 345 S.W.3d at 410 (defining "reaching an impasse" as "a mutual understanding that neither will negotiate further"). We have held that if the insured establishes that it has been prejudiced by the insurer's delay in demanding an appraisal, the insurer may have waived use of the appraisal process, even where the policy contains no time limitation for an appraisal request. *See, e.g.*, *id.* at 411 (explaining that mere delay is insufficient to find waiver and that the insured must show it has been prejudiced to establish waiver of the use of an appraisal (citation omitted)). Barbara Tech did not

[4] "Appraisal" is defined as "[t]he determination of what constitutes a fair price for something or how its condition can be fairly stated; the act of assessing the worth, value, or condition of something." *See Appraisal*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Appraisal Clause" is defined as "[a]n insurance-policy provision allowing either the insurer or the insured to demand an independent estimation of a claimed loss." *See Appraisal Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Appraisement" is an "alternative-dispute-resolution method used for resolving the amount or extent of liability on a contract when the issue of liability itself is not in dispute." *See Appraisement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

object to the appraisal request, nor did it complain that State Farm's appraisal demand was untimely and therefore waived.

State Farm received the appraisal award on August 19, 2015, and paid the amount of the appraisal, less depreciation and the deductible, on August 25, 2015—six days (four business days) after receipt.[5] Barbara Tech argues that although State Farm paid the appraisal value, State Farm nevertheless owes damages under the TPPCA because it delayed payment of the claim beyond the applicable statutory period—sixty days from receipt of the information requested under section 542.055. *See* TEX. INS. CODE § 542.058(a) (providing that unless another deadline applies, an insurer that delays payment of a claim for more than sixty days after the insurer receives all information reasonably requested and required under section 542.055 shall pay TPPCA damages as provided by section 542.060). State Farm argues that its timely payment of the appraisal amount, which was binding as to the amount of the loss, satisfied the TPPCA's requirements as a matter of law and forecloses TPPCA damages.

c. Availability of TPPCA Damages for Payment of Appraisal Award

We must determine whether an insurer can be liable for TPPCA damages when it initially denied the claim but later paid the insured in full according to the amount of loss determined through the policy's appraisal process. We note at the outset that the insurance claim process is inherently adversarial. The adversarial process begins as soon as a claim is filed and ends only when the resolution of the claim is finally determined and accepted by the parties. The TPPCA governs the

[5] Although State Farm paid the appraisal amount less the deductible and depreciation, for simplicity we refer to payment of the appraisal amount or value.

insurer's request for necessary information, investigation, and evaluation of the claim, which then allows the insurer to accept and pay, or reject the claim. The appraisal process, as an agreed-upon mechanism for dispute resolution provided by the parties' insurance policy, is also part of the adversarial process; however, it exists to allow the insurer and insured to resolve a dispute as to the value of the property or amount of loss, without having to submit to the time and expense of litigation. *See, e.g.*, *In re Universal Underwriters of Tex. Ins.*, 345 S.W.3d at 412. When the appraisal process is initiated after the insurer has rejected a claim—that is, after the insurer has received all requested information from the claimant, conducted an investigation, evaluated the claim, and concluded that it is not liable under the policy—the issue generally becomes a contractual matter of dispute resolution, rather than a statutory matter of prompt payment of claims. Because the appraisal process provides an alternative to litigation, it often reflects a compromise between the parties. *See generally id.* at 407 (suggesting that appraisals serve as a means of compromise because they "provide a less expensive, more efficient alternative to litigation" (citation omitted)).

We first consider State Farm's argument that its initiation of the contractual appraisal process constituted an additional information request under section 542.055(b), extending the TPPCA's deadline to accept or reject a claim. *See* TEX. INS. CODE §§ 542.055–.056. If considered information necessary to evaluate the claim, State Farm contends that the time period for accepting or rejecting the claim did not begin until its receipt of the appraisal award, and that it therefore paid timely—within four business days after it received the information required to secure final proof of loss. *See id.* §§ 542.056–.057. Asserting that it complied with sections 542.055, .056, and .057,

State Farm argues that Barbara Tech cannot prevail on its claim for TPPCA damages. *See id.* § 542.060(a).

Under section 542.055(a), after receiving a claim, an insurer must acknowledge receipt, begin an investigation, and request from the claimant all items, statements, and forms that the insurer reasonably believes will be necessary to evaluate the claim. *See id.* § 542.055(a). The insured may then make "additional requests" for information when necessary "during the investigation of the claim." *See id.* § 542.055(b). We read "additional" to reference the initial information, meaning that the TPPCA authorizes the insurer to request information from the claimant in two phases: (1) an initial request made within fifteen business days of receiving the claim for information the insurer believes "at that time" will be required; and (2) additional requests for information revealed to be necessary during the course of the investigation. Because State Farm's appraisal demand was based on its contractual right to engage in a specific dispute resolution process and was not a request for items, statements, or forms from Barbara Tech to secure final proof of loss, we conclude that State Farm's use of the appraisal process falls outside the scope of section 542.055.[6]

Further, section 542.056(a) specifies that the "insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss." *Id.* § 542.056(a). As such, the rejection or acceptance of a claim is the insurer's acknowledgment that

[6] Our analysis reflects only the facts at hand—invocation of the appraisal process after the insurer has requested all necessary items, statements, and forms; after the insurer has inspected and investigated; and after the insurer has rejected the claim. We do not address whether invocation of the policy's appraisal provision might have been appropriate during the investigation, before the insurer rejected the claim. Because the TPPCA is silent as to appraisals, we note that when a party can or must initiate the appraisal process is generally a matter of the parties' agreement in the policy. Practically speaking, when an insurance policy provides for an appraisal process to resolve a dispute as to the amount of loss, there is no need for a party to invoke the policy's appraisal provision before the insurer has an opportunity to complete its investigation, determine the value of the loss, and accept or reject the claim.

it had all the information it needed from the claimant to determine whether the claimant was entitled to benefits under the policy.[7] Because an insurer's rejection of a claim is based on all information the insurer deemed necessary, as well as the insurer's investigation, later invocation of the policy's appraisal provision does not somehow start the investigatory period anew. Where the policy provides for an appraisal process if the parties "disagree on the value of the property or the amount of loss," as the policy here does, and the appraisal process was initiated only after State Farm rejected the claim, having determined that the value of the covered loss was below the deductible, use of the contractual appraisal process was not part of the insurer's investigation.[8]

We next address State Farm's argument that full and timely payment in accordance with the appraisal forecloses any possibility of TPPCA damages. We have already explained that nothing in the TPPCA exempts appraisal payments from the TPPCA's payment deadlines or enforcement.[9]

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[7] CHIEF JUSTICE HECHT asserts that "[n]othing in the Act suggests that after an insurer rejects a claim, the investigation cannot be reopened, either at the claimant's request or by the insurer on its own." *Post* at ___. He then concludes that re-opening the investigation resets the deadlines under the TPPCA. *Post* at ___. The TPPCA does not contemplate investigation after acceptance or rejection, just as it does not contemplate a later acceptance of a rejected claim. We do not read the TPPCA to ever prohibit an insurer from investigating and accepting liability when it owes the insured benefits under the policy. In fact, if relevant information becomes available after an insurer has rejected a claim, the insurer should consider it and determine whether that information changes the insurer's liability determination. But we see no support in the TPPCA for deadlines being altered based on an insurer investigating after it rejects a claim.

[8] We note that an insurer could obtain a non-contractual, third-party appraisal during its investigation of the claim to assist the insurer in assessing the value of the insured's loss. But such an appraisal would differ from use of the contractual appraisal process here, as the insurer would use that appraisal in determining the value of the loss, where here the policy's appraisal process resolved a dispute as to the insurer's value of loss; the insurer alone would pay for that appraisal, rather than the parties sharing the costs as the policy here provides; and the insured would not be bound by the appraisal award, as is the case under the policy here.

[9] In fact, the TPPCA contains a section devoted to applicability and a section devoted to exceptions, neither of which suggests that the appraisal process supplants the TPPCA. *See* TEX. INS. CODE §§ 542.052–.053. Had the Legislature intended for appraisal payments to never be subject to TPPCA damages for delayed payment, the Legislature could have so provided as it did for other exceptions in section 542.053, under which the TPPCA does not apply. *See id.* § 542.053 (including an exception where "the damage provisions of Section 542.060" do not apply).

But we must examine the TPPCA's deadline and enforcement provisions to determine how they apply in the context of contractual appraisals.

As explained, the TPPCA's investigation and evaluation requirements culminate in a determination either that the claim is covered and the amount of loss exceeds the deductible, in which case the insurer must notify the insured that it will pay the claim, or that the claim is rejected, in which case the insured must notify the insured of the reasons—for example, because the loss is not covered, the amount of the loss does not meet the deductible, or for some other reason under the policy. *See id.* §§ 542.055–.056. An insurer that accepts a claim must pay it within five business days. *See id.* § 542.057(a). When an insurer rejects a claim in accordance with sections 542.055 and .056 and notifies the insured of the reasons for the rejection, no other TPPCA deadlines or requirements apply at that point that could give rise to a claim under section 542.060, as there is no payment deadline without the insurer owing benefits under the policy. *See id.* § 542.060 (imposing TPPCA damages on "an insurer that is liable for a claim under an insurance policy" and fails to comply with a TPPCA requirement). Under the TPPCA, use of the appraisal process to resolve a dispute has no bearing on any deadlines or enforcing any missed deadlines.

As State Farm points out, courts of appeals have held that full and timely payment of an appraisal award precludes an insured from recovering damages under the TPPCA as a matter of law. *See, e.g.*, *Garcia*, 514 S.W.3d at 274–75 (explaining that payment of an appraisal award precluded TPPCA claims); *In re Slavonic Mut. Fire Ins.*, 308 S.W.3d at 563–64 ("Texas courts considering the issue have concluded that full and timely payment of an appraisal award under the policy precludes an award of [damages] under the Insurance Code's prompt payment provisions as a matter

of law." (citations omitted)). In affirming summary judgment for State Farm, the court of appeals relied heavily on its earlier decision in *Garcia v. Lloyds*. *See* 566 S.W.3d at 296–97 (citing *Garcia*, 514 S.W.3d at 274–79). In a factual scenario that mirrors the case at hand, the insured filed suit after the insurer rejected the claim, and the insurer then invoked the policy's appraisal provision. *See Garcia*, 514 S.W.3d at 274. The insured argued that the insurer was liable for TPPCA damages and attorney's fees, despite the insurer having timely paid the appraisal award. *See id.* The insured relied on the Fifth Circuit Court of Appeals' opinion in *Higginbotham v. State Farm Mutual Automobile Insurance*, 103 F.3d 456, 461 (5th Cir. 1997), which held that an insurer's wrongful rejection of a claim may be considered to have caused a delay in payment under the TPPCA and may be a basis for statutory interest and damages under section 542.060. *See Garcia*, 514 S.W.3d at 274–75 (citing *Higginbotham*, 103 F.3d at 461; *Graber v. State Farm Lloyds*, No. 3:13-CV-2671-B, 2015 WL 3755030, at *10 (N.D. Tex. 2015)). But the court in *Garcia* pointed out that *Higginbotham* did not involve use of an appraisal process and, distinguishing *Higginbotham*, held that payment of the appraisal award precluded the plaintiff's TPPCA claim. *See id.* at 275 (discussing *Higginbotham*, 103 F.3d at 461).

In *Higginbotham*, after the trial court bifurcated the insured's claims into separate trials—one for breach of contract and one for the statutory claims—the jury found State Farm liable for breach of contract and awarded damages. *See* 103 F.3d at 458. The trial court then considered whether State Farm owed TPPCA damages for its failure to pay the claim and ultimately denied the insured the statutory damages. *See id.* The Fifth Circuit reversed, holding that "[a] wrongful rejection of a claim may be considered a delay in payment for purposes of the 60-day rule and statutory

damages." *Id.* at 460; *see also, e.g.*, *Performance Autoplex II Ltd.*, 322 F.3d at 861 (following *Higginbotham*, explaining that "[s]tatutory damages apply if the insurer has delayed payment of a valid claim for more than sixty days")). The court reasoned that the evidence clearly showed that State Farm owed statutory damages under the TPPCA's prompt pay provisions because "State Farm chose to reject [the insured's] claim, which necessarily means it failed to pay within 60 days of its receipt of all necessary paperwork, as specified by [the TPPCA]." *Higginbotham*, 103 F.3d at 461. Moreover, the court explained that "if an insurer fails to pay a claim, it runs the risk of incurring this 18 percent statutory fee and reasonable attorneys' fees, . . . [and] State Farm lost when it was found liable for breach of contract." *Id.*

In contrast to *Higginbotham*, in this case there is no judgment determining that State Farm wrongfully rejected the claim. Instead, the parties used the contractual appraisal process to address the value of Barbara Tech's loss—resolving only the amount of policy benefits State Farm would owe if it owed anything. Because *Higginbotham* did not involve use of an appraisal, and because it involved a wrongful rejection finding, it provides no authority in favor of Barbara Tech's position.

Although generally short on statutory analysis, we do not disagree with the crux of the courts of appeals' opinions on which State Farm relies—use of the appraisal process to fully resolve a dispute as to the amount of policy benefits due, if owed at all, does not subject the insurer to TPPCA damages. *See, e.g.*, *Garcia*, 514 S.W.3d at 275; *In re Slavonic Mut. Fire Ins.*, 308 S.W.3d at 563. While we address the standard for TPPCA damages under section 542.060 below, we caution that 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, we disapprove of these opinions. *See* TEX. INS. CODE §§ 542.058, .060. Nothing in the TPPCA would excuse an insurer from liability for TPPCA damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline, regardless of use of the appraisal process.[10] *See id.*; *see also In re Allstate Cty. Mut. Ins.*, 85 S.W.3d 193, 198 (Tex. 2002) (orig. proceeding) (rejecting "the position that an appraisal's outcome establishes liability when we held that, unlike an arbitration provision, an appraisal provision 'only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss'" (citation omitted)).

2. State Farm's Liability

In its second ground for summary judgment, State Farm argues that it has not been shown to be, and cannot be shown to be, liable under the policy for Barbara Tech's claim. Given the terminology State Farm uses, and especially its use of the word "liable," as well as the language of the TPPCA, we construe State Farm's argument to be that the liability element in section 542.060(a) is negated as a matter of law. In reviewing whether State Farm met its summary judgment burden, we assume without deciding that section 542.060 provides the applicable standard for Barbara Tech to succeed on its claim for TPPCA damages.

[10] Here, State Farm did not even exercise its right to appraisal until well after the statutory deadline.

a. Section 542.060

Section 542.060(a) specifies that, "[e]xcept as [otherwise] provided . . . , if an insurer that is *liable* for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay" the insured damages as specified by this section. *See* TEX. INS. CODE § 542.060(a) (emphasis added). We see no way under the language of the TPPCA that an insurer can be "liable" on the claim within the meaning of section 542.060 until it (1) has completed its investigation, evaluated the claim, and come to a determination to accept and pay the claim or some part of it; or (2) been adjudicated liable by a court or arbitration panel. If an insurer rejects a claim, it has concluded based on its investigation and evaluation that it owes no benefits under the policy and is not liable for the claim; 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.

Having determined that a rejected claim will not trigger TPPCA damages under section 542.060 absent an acknowledgment or finding of liability, we must determine whether the appraisal process, or subsequent payment, satisfies that liability element. We note that an 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. *See Breshears*, 155 S.W.3d at 343 (explaining that "an appraisal decision is intended 'to estop one party from contesting the issue of the value of damages in a suit on the insurance contract,'" not to determine liability (citation omitted)); *see also Tex. Mun. League Intergovernmental Risk Pool v. City of Abilene*, 551 S.W.3d 337, 345 (Tex. App.—Eastland 2018,

pet. dism'd) ("Within the insurance context, appraisal constitutes an alternative dispute resolution procedure because it settles a dispute regarding the amount of damages by means other than litigation . . . . [A]ppraisal may provide a 'less expensive, more efficient alternative to litigation.'" (citation omitted)). An insurer's payment under such circumstances results from a calculated risk assessment that paying the appraisal value will ultimately be less risky or costly than litigating the claims to determine liability. *See generally Breshears*, 155 S.W.3d at 343. As such, the payment in accordance with an appraisal is neither an acknowledgment of liability nor a determination of liability under the policy for purposes of TPPCA damages under section 542.060.[11]

Barbara Tech relies on *Graber v. State Farm Lloyds* in arguing that when State Farm rejected the claim, it took a risk that it would later be subject to TPPCA damages. 2015 WL 3755030, at *8. *Graber*'s holding was predicated upon *Higginbotham*, which we have explained did not involve an appraisal and did involve a liability adjudication. *See id.* at *1, *8 (citing *Higginbotham*, 103 F.3d at 461). In *Graber*, the insured submitted a claim, and State Farm investigated, accepted, and paid the claim. *See id.* at *1. The insured demanded another inspection, State Farm obliged, and then State Farm provided a supplemental payment on the claim after it found additional damage to the property. *See id.* After the insured filed suit, the insurer demanded an appraisal. *See id.* Shortly after completion of the appraisal process, State Farm tendered payment in the amount of the

[11] State Farm reserved its right to contest liability under the policy even after paying the appraisal. In its January 9, 2015, letter invoking the contractual appraisal process, State Farm expressly stated: "By this request, State Farm does not waive any of the policy provisions, conditions, defenses, exclusions or limitations, and in fact, intends to rely on them throughout the appraisal process. The appraisal award will be subject to the Policy's provisions, conditions, exclusions and limitations." And in the August 25, 2015, letter accompanying payment of the appraisal amount, State Farm expressly stated that with the appraisal payment: "State Farm is not waiving any of the policy coverages, limitations, exclusions or provisions, all of which are specifically reserved."

appraisal. *See id.* at *4. The court in *Graber* explained the origins of the defense that prompt payment of an appraisal award precludes a TPPCA claim:

> The first case to recognize a defense to TPPCA liability for the full and timely payment of an appraisal award was *Breshears*, 155 S.W.3d 340. In *Breshears*, the court was confronted with facts very similar to the facts in [*Graber*]. The insurer timely issued payment of the insured's claim, which the insured deemed insufficient. After the insured filed suit, the parties submitted their dispute to appraisal and the appraisers returned an award that exceeded the amount of the insurer's initial payment. Although the insurer timely paid the appraisal award, the insured argued that due to the delay caused by the appraisal process, their claim was not actually paid until long after the sixty-day limit imposed by the TPPCA. The court disagreed, concluding that the insurer's timely initial payment served to satisfy the requirements of the TPPCA. Contrary to the suggestion of later cases and State Farm, however, the *Breshears* court did not hold that the insurer's full and timely payment of the appraisal award precluded the insured's claim for statutory interest under the TPPCA. Rather, the court merely observed that "the fact that the appraisal process was later invoked did not alter the fact that the insurer complied with the Insurance Code . . . ."

Id. at *9 (citations & alterations omitted). Then, the court reasoned that the intent of *Higginbotham* was to hold insurers strictly liable for failure to pay promptly an insured's claims where liability has been established, and that *Breshears* conflicted with this intent. *See id.* at *10. The court also reasoned that *Breshears* conflicted with this Court's precedent holding insurers who partially pay claims liable for TPPCA damages on the unpaid portions of those claims until they are fully paid. *See id.* (citing *Republic Underwriters Ins. v. Mex-Tex*, 150 S.W.3d 423, 427–28 (Tex. 2004)). Concluding that allowing for full and timely payment of an appraisal award to preclude TPPCA claims would conflict with precedent of this Court and the Fifth Circuit, the court in *Graber* held that State Farm's full and timely payment of the appraisal value did not preclude TPPCA claims for statutory interest and attorney's fees. *See id.*

We find *Graber*'s reasoning—that *Higginbotham* speaks to an insurer's failure to pay promptly an insured's claims where liability has been established—to be consistent with our holding today. *See id.* Here, State Farm never denied that Barbara Tech's loss was covered, but merely disputed the extent of the loss and whether it met the deductible—disputing its liability on the claim. And there is no dispute as to State Farm's compliance with the procedural requirements of the TPPCA in responding to, investigating, and evaluating the claim. Thus, our reasoning is consistent with *Graber* to the extent that State Farm's liability on the claim has not been established through the TPPCA process or as a result of the contractual appraisal process.

We also find some of the reasoning in *Breshears* persuasive. *See generally Breshears*, 155 S.W.3d at 343–45. State Farm initially paid the Breshears' claim, and State Farm later made an additional payment in accordance with the appraisal. *See id.* at 342. The court affirmed summary judgment in favor of State Farm regarding the Breshears' claims under the TPPCA. *See id.* at 345. The court explained:

> The Breshears argue that because of the appraisal process, they were not actually paid until after State Farm paid them the difference between the first payment and the appraisal award, which occurred long after the sixty-day statutory limit. The Breshears also argue that by invoking the appraisal process, State Farm did not notify them as to whether it intended to pay their claim within the time required by the code. We disagree. The Breshears were paid by State Farm within the sixty-day limit, and they were notified that State Farm would pay the claim when State Farm sent them an estimate of the cost of their repairs accompanied by a check. The fact that the appraisal process was later invoked does not alter the fact that State Farm complied with the Insurance Code . . . .

Id. Likewise, we hold in this case that State Farm's invocation of the contractual appraisal process did not supplant its earlier rejection of the claim in accordance with the TPPCA.

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.[12] *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

[12] Even after acknowledging receipt of the claim, investigating it, and then rejecting the claim (that is, denying liability), an insurer may later choose to accept the claim, admitting liability under the policy. For example, if a contractual appraisal provision such as the one in this case is invoked after the insurer has received all information requested from the claimant, conducted an investigation, and rejected the claim, the insurer may choose to: (1) refuse to pay the appraisal amount and maintain its denial of liability for the claim; (2) pay the appraisal amount without accepting liability; or (3) accept the claim, essentially admitting it was incorrect to deny liability initially, and then pay the claim in accordance with the appraisal amount. If the insurer chooses the third option, it becomes liable for the claim despite its earlier rejection of the claim, and it will be subject to TPPCA damages for failure to pay within the applicable TPPCA deadlines. *See* TEX. INS. CODE §§ 542.056(a), .057(a), .058, .060. If the insurer chooses the first option, refusing to pay an appraisal amount and continuing to deny liability, the insured could choose to pursue litigation. And if the litigation resulted in a judgment that the insurer was in fact liable on the claim, the insurer would then owe the amount of the claim, as fixed by the binding appraisal, and TPPCA damages if the insurer failed to pay the claim timely in accordance with section 542.058. *See id.* §§ 542.058, .060. This opinion addresses only the second option, as those are the facts of the case before us.

TPPCA's payment deadlines or enforcement of those deadlines. *See In re Allstate Cty. Mut. Ins.*, 85 S.W.3d at 198 (citation omitted).

Here, Barbara Tech filed suit after State Farm investigated, evaluated, and ultimately rejected the claim.[13] The parties' insurance policy sets forth the parameters of the appraisal process, providing the parties an alternative to seeking a judgment to resolve a dispute as to the value of the claim. State Farm invoked the appraisal provision because Barbara Tech disputed the insurer's determination that the amount of the loss was below Barbara Tech's deductible, which resulted in rejection of the claim. At that point, the parties were already in litigation, and the appraisal provision offered an alternative process to resolve the valuation dispute.[14] While the TPPCA does not acknowledge the appraisal process—neither explicitly subjecting it to the TPPCA's deadlines or enforcement, nor exempting it—chapter 542 establishes that an insurer is not subject to TPPCA damages for delayed payment unless it was subject to a payment deadline because it owed benefits

[13] Again, Barbara Tech initially asserted a bad faith claim for failure to conduct a reasonable investigation, but Barbara Tech dropped that claim after State Farm paid the appraisal value, leaving only Barbara Tech's claim for prompt pay damages under the TPPCA. As a result, no allegations of bad faith as to State Farm's investigation and evaluation of Barbara Tech's claim remain. Although we caution that an insurer should not summarily deny a claim without following the investigatory and evaluation procedures outlined in the TPPCA, we do not address whether or how a failure to comply in good faith with the TPPCA's investigation and evaluation requirements might affect a claim for TPPCA damages, as that issue is not before us.

[14] JUSTICE BOYD would hold that voluntarily paying the appraisal amount constitutes acceptance of the claim. *See post* at ___. We disagree. An appraisal is binding only as to the amount of the loss on the claim, not as to liability. *See, e.g., In re Allstate Cty. Mut. Ins.*, 85 S.W.3d at 198 (explaining that an appraisal is not used to determine liability (citation omitted)); *Breshears*, 155 S.W.3d at 343. So an insurer that pays an appraisal amount as to a rejected claim—where the insurer has denied liability—does not satisfy section 542.060's requirement that the insurer be "liable for a claim under an insurance policy," unless the insurer specifically accepts the claim or is adjudicated liable. *See* TEX. INS. CODE § 542.060(a). We find no support for the proposition that payment of an appraisal amount on a rejected claim establishes liability for purposes of section 542.060.

under the policy. 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.[15]

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); *Breshears*, 155 S.W.3d at 345 (same). Here, there is no remaining allegation of bad faith, or that State Farm violated the TPPCA in requesting information, investigating, or evaluating the claim. The only remaining allegation concerns whether State Farm could owe damages under the TPPCA. Because State Farm did not conclusively establish that it is not liable for Barbara Tech's claim, as it must to avoid TPPCA damages as a matter of law under section 542.060, we hold that State Farm was not entitled to summary judgment.

b. Section 542.058

Section 542.058(a) provides that "[e]xcept as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055,

[15] If State Farm had refused to pay the appraisal value, instead taking its chances in litigation, and Barbara Tech obtained a judgment that State Farm was liable on the claim and thus had wrongfully withheld payment of the claim, then the parties agree that the judgment would subject State Farm to TPPCA damages for delay in paying the claim. *See* TEX. INS. CODE §§ 542.058(a), .060; *see also Higginbotham*, 103 F.3d at 461 (holding that an adjudication of the insurer's wrongful rejection of a claim may support statutory damages under section 542.060(a)). We agree.

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, the insurer shall pay damages and other items as provided by Section 542.060." TEX. INS. CODE § 542.058(a). Section 542.058(b) provides an exception, whereby section 542.058(a) "does not apply in a case in which it is found as a result of arbitration or litigation that a claim received by an insurer is invalid and should not be paid by the insurer." *Id.* § 542.058(b).

The parties have not briefed the interplay between section 542.058 and section 542.060. Neither party has specifically raised the issue of whether section 542.058's "shall pay damages" language could be the basis for TPPCA damages for late payment, independent of section 542.060's limitation of TPPCA damages to insurers "liable on a claim under an insurance policy." Moreover, the parties have not briefed the interplay between section 542.060's liability requirement and section 542.058's exception for a claim that is found to be "invalid" and "should not be paid."

We note that when discussing the damages standard under the TPPCA and its predecessor, this Court has recognized the liability element for imposing TPPCA damages. *See Lamar Homes, Inc.*, 242 S.W.3d at 16 ("The prompt-payment statute provides that an insurer, who is 'liable for a claim under an insurance policy' and who does not promptly respond to, or pay, the claim as the statute requires, is liable to the policy holder or beneficiary not only for the amount of the claim, but also for 'interest on the amount of the claim at the rate of eighteen percent a year as damages, together with reasonable attorney's fees.'" (citation omitted)); *Boyd*, 177 S.W.3d at 922 (explaining that "[t]here can be no liability under [the TPPCA] if the insurance claim is not covered by the policy" because TPPCA damages are to be awarded when the insurer is liable under the policy

(citation omitted)); *Bonner*, 51 S.W.3d at 291 ("To successfully maintain a claim under [the TPPCA], a party must establish three elements: (1) a claim under an insurance policy; (2) that the insurer is liable for the claim; and (3) that the insurer has failed to follow one or more sections of [the TPPCA] with respect to the claim."). And this is not the only court to discuss the TPPCA damages standard in such a way. *See, e.g.*, *Cox Operating, L.L.C.*, 795 F.3d at 505–09 ("[Section] 542.058 provides an alternate payment deadline to the one set out in § 542.057 . . . . As referenced in § 542.058, § 542.060 provides the enforcement mechanism for [the TPPCA's] deadlines . . . . In sum, the [TPPCA] (1) imposes on insurers a series of claims-handling deadlines, §§ 542.055–.058; and (2) enforces those deadlines by requiring insurers who fail to comply with them (and who ultimately are liable on the claim) to pay statutory interest." (citations omitted)); *Tremago, L.P.*, 602 F. App'x at 983–84 (holding that "[i]n order to prevail on a [TPPCA] claim, the insured must show '(1) a claim under an insurance policy (2) for which the insurer is liable and (3) that the insurer has not followed one or more sections' of the Act," and that without an admission or finding of liability, the insurer's settlement payment did not subject it to TPPCA damages (citation omitted)). But this Court has yet to conduct a thorough statutory analysis of section 542.058 in relation to section 542.060.

Because it is not necessary to our decision on the summary judgment grounds before us, we do not reach this issue. Therefore, we do not opine on whether section 542.060's liability requirement applies to a claim for TPPCA damages based on late payment under section 542.058.

c. Other Remedies

Importantly, while the TPPCA does not address every aspect of the inherently adversarial insurance claim process—namely, the contractual appraisal process—we observe that an insured is not left without a remedy when the insurer fails to act in good faith in investigating, evaluating, or rejecting a claim. If an insured believes the insurer has rejected a claim in bad faith, the insured may assert a claim under chapter 541 of the Insurance Code or a claim for breach of contract. *See* TEX. INS. CODE ch. 541. *But see Ortiz v. State Farm Lloyds*, ___ S.W.3d ___, ___ (Tex. 2019).

The Insurance Code provides for an action against an insurer that commits "an unfair or deceptive act or practice in the business of insurance." TEX. INS. CODE § 541.151. An insured may have a claim for an insurer's failure to conduct a reasonable investigation, wrongful denial of a claim, or failure to resolve a claim in good faith. *See id.* § 541.060(a). Likewise, an insured may seek recourse for an insurer's wrongful acts under the policy, through a breach of contract claim. *See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 488 (Tex. 2018) (recognizing that an insured may have a claim for both breach of contract and violation of the Insurance Code, and that "an 'insurance policy is a contract' that establishes the respective rights and obligations to which an insurer and its insured have mutually agreed" (citation omitted)). A breach of contract claim, however, is distinct and independent from a claim that an insurer violated the Insurance Code. *See id.* at 489. Thus, we caution that outright denial of insureds' claims without good faith investigation and evaluation is not an insurer's answer to TPPCA prompt pay damages.

Our analysis in this case might be different had the Legislature specified the effect, if any, of invoking an appraisal provision, such as the one in the parties' insurance policy. As noted above,

the Legislature knows how to craft a statutory scheme governing the payment and settlement of insurance claims, with appraisals in mind. *See* TEX. INS. CODE § 2210.574 (creating a role for appraisals in the windstorm insurance context). But the Legislature did not do so in the TPPCA, and "[w]e are not free to rewrite the statute[] to reach a result we might consider more desirable." *See, e.g., Pub. Util. Comm'n of Tex. v. Cofer,* 754 S.W.2d 121, 124 (Tex. 1988) (orig. proceeding); *see also Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995) (orig. proceeding) (per curiam) ("It is not within the province of this Court to reconstrue, rewrite, or contravene a . . . statute when the intent of the Legislature is clear." (citations omitted)). If the Legislature desires for invocation of an appraisal provision, such as the one here, to extend or revive the investigation and evaluation period despite the insurer's rejection of the claim, it is the Legislature's province to provide for that in the statute. Likewise, if the Legislature desires for an insurer's payment of an appraisal award to make the insurer "liable" on a rejected claim, it is the Legislature's province to so provide. In fact, nothing in the TPPCA suggests a legislative intent to encompass contractual appraisal provisions at all—it merely allows for the prompt processing, investigation, evaluation, and payment of claims under the TPPCA without specifying the effect of a contractual appraisal process. If the Legislature wishes to impose penalties for failure to pay an appraisal award within a specific time, akin to the sixty-day rule in section 542.058, it can so provide. Until the Legislature makes clear otherwise, we interpret the language the Legislature enacted and conclude that payment of an appraisal award on a rejected claim does not subject the insurer to prompt pay damages under section 542.060 unless and until the insurer either accepts liability under the policy or is adjudicated liable. *See Molinet*, 356 S.W.3d at 414–15 (citing TEX. GOV'T CODE § 311.011(a) and noting that

it is the Court's responsibility to interpret statutes according to the language the Legislature used, absent a context indicating a different meaning or an absurd result).

C. Barbara Tech's Motion for Summary Judgment

In its traditional motion for summary judgment, Barbara Tech argued that State Farm is liable for TPPCA damages as a matter of law because it failed to pay Barbara Tech's claim within section 542.058's sixty-day deadline, instead later paying after the appraisal. Barbara Tech alleges the law is clear that if an insurer "initially rejects or underpays a claim that is later determined to be due, whether in litigation or appraisal or otherwise, then [the insurer] is strictly liable [for] violating section 542.058 and must pay the statutory penalties." And Barbara Tech asserts that when State Farm rejected a claim that was later determined to be "due and owing," it became liable for having delayed payment and thus owes TPPCA damages. If State Farm is entitled to avoid TPPCA damages because it paid the appraisal value, Barbara Tech contends, this in effect allows insurers to employ dilatory tactics in improperly delaying the payment of claims, or wrongfully denying claims, without any consequences and counter to the purpose of the TPPCA.

We believe Barbara Tech's contention that the appraisal established that the claim was "due and owing" amounts to the same argument as "liable" under section 542.060, which we have already addressed. As explained above, payment of an appraisal award does not determine liability, and there has been no adjudication that State Farm was liable under the policy. Even if we were to read Barbara Tech's argument to be that State Farm is strictly liable under section 542.058—that is, any payment made after the sixty-day deadline subjects an insurer to TPPCA damages barring an adjudication that the claim is invalid and should not be paid—the result is no different. There has

been no proceeding to consider the validity of the claim and whether State Farm should have paid it; as such, we cannot determine that Barbara Tech is entitled to TPPCA damages as a matter of law. Barbara Tech has not carried its burden on summary judgment to prove conclusively that the claim was "due and owing" or that it is entitled to TPPCA damages as a matter of law.

D. Actual Damages

Barbara Tech further argues that the appraisal value constituted an award of actual damages. Barbara Tech bases this argument on this Court's holding in *Menchaca*, which we issued after the trial court and court of appeals ruled in this case. *See* 545 S.W.3d at 489. Specifically, Barbara Tech argues that the appraisal process established that State Farm wrongfully rejected the claim and that the appraisal award established Barbara Tech's right to receive benefits under the insurance policy such that it could recover those benefits as "actual damages," because State Farm's wrongful denial of Barbara Tech's valid claim caused the loss of the benefits. Barbara Tech argues, by extension, that if the policy benefits can be actual damages for the purpose of determining the availability of statutory and other extra-contractual damages, they can also be actual damages for the purpose of assessing damages under the TPPCA. We disagree.

We held in *Menchaca* that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under [the Insurance Code] if the insurer's statutory violation causes the loss of the benefits." *Id.* at 495. We also explained that "an insured cannot recover policy benefits as actual damages for an insurer's statutory violation if the insured has no right to those benefits under the policy." *Id.* We have defined "actual damages" as "damages recoverable at common law," which we held includes "'benefit-of-the-bargain' damages

representing 'the difference between the value as represented and the value received.'" *Id.* at 489 (citations omitted).

Consistent with our reasoning above that an appraisal award does not vitiate the insurer's determination of a claim based on investigation and final proof of loss, but rather represents a contractual mechanism to resolve a dispute as to the amount of loss, an appraisal value also is not an award of actual damages, as Barbara Tech contends. Ordinarily, a finding of liability is a prerequisite to an actual damages award. *See, e.g.*, *Huddleston v. Pace*, 790 S.W.2d 47, 52 (Tex. App.—San Antonio 1990, writ denied) (explaining that a "prerequisite to recovery of damages is the establishment of liability"). Invoking a contractual appraisal provision after having already rejected the claim does not determine liability on a claim. *See In re Allstate Cty. Mut. Ins.*, 85 S.W.3d at 198 (acknowledging that an appraisal is not used to determine liability (citation omitted)); *Breshears*, 155 S.W.3d at 343 (explaining that "an appraisal decision is intended 'to estop one party from contesting the issue of the value of damages in a suit on the insurance contract,'" not to determine liability (citation omitted)). There is not yet an adjudication as to whether State Farm is liable under the policy—and therefore no determination as to whether State Farm is liable for TPPCA damages. As such, there is no liability or right to policy benefits upon which to base an award of actual damages. We hold that because paying an appraisal amount, although binding as to the amount of the loss on the claim, is not a determination as to the insurer's liability, it does not represent actual damages as to payment on the claim unless an insurer either accepted liability or is adjudicated liable.

E. Disposition

In the trial court, the parties submitted cross motions for summary judgment. In its motion, Barbara Tech argued that it is entitled to TPPCA damages as a matter of law. State Farm, in its cross motion for summary judgment and response to Barbara Tech's motion, argued that as a matter of law it is not subject to TPPCA damages.[16] The trial court denied Barbara Tech's motion and granted State Farm's, and the court of appeals affirmed.[17] 566 S.W.3d at 296, 297.

We hold that invocation of the contractual appraisal provision to resolve a dispute as to a claim rejected in accordance with the TPPCA's procedural requirements neither subjects an insurer to TPPCA damages nor insulates the insurer from TPPCA damages.[18] An insurer will become liable for TPPCA damages under section 542.060 only if it (1) accepts liability or is adjudicated liable under the policy, and (2) violated a TPPCA deadline or requirement.

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[16] State Farm expressly incorporated its arguments in its response to Barbara Tech's summary judgment motion in its arguments in its cross motion for summary judgment.

[17] Although Barbara Tech challenged both the denial of its motion and the granting of State Farm's, the court of appeals appears to have ruled only as to State Farm's motion, while addressing the legal issue presented in both motions. *See* 566 S.W.3d at 296–97 (holding that the trial court did not err in granting State Farm's summary judgment motion and rendering judgment that Barbara Tech take nothing on its TPPCA claim).

[18] Contrary to CHIEF JUSTICE HECHT's suggestion that our holding would impede the utility of appraisals, *see post* at ___, our opinion merely recognizes that under the TPPCA, the Legislature did not account for the use of a contractual appraisal process and did not provide an exception for claims resolved through that process. We do not discourage use of appraisals in resolving disputes as to the amount of a claim; to the contrary, we believe, as this Court has previously acknowledged, that appraisals can provide a cost-effective and efficient mechanism for resolving disputes as to the amount of loss. *See In re Universal Underwriters of Tex. Ins.*, 345 S.W.3d at 412. But this Court has never indicated that use of the appraisal process forecloses future proceedings to determine the insurer's liability. *See Johnson*, 290 S.W.3d at 889–90 (concluding that "limiting appraisal to damages and not liability is surely still correct"); *In re Allstate Cty. Mut. Ins.*, 85 S.W.3d at 198 ("[L]ong ago, this Court rejected the position that an appraisal's outcome establishes liability when we held that, unlike an arbitration provision, an appraisal provision 'only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts.'" (quoting *Clancy*, 8 S.W. at 631)). And our holding does not always subject insurers to TPPCA damages for payments of post-claim-rejection appraisal awards as CHIEF JUSTICE HECHT asserts, *see post* at ___; rather, true to the language of the TPPCA, our holding does not insulate insurers from TPPCA damages when they were liable and failed to comply with the TPPCA's deadlines or requirements.

In considering the parties' cross motions for summary judgment, we conclude that neither party has met its burden of establishing that it is entitled to judgment as a matter of law. *See Dorsett*, 164 S.W.3d at 661 (explaining that on summary judgment this Court renders the judgment the trial court should have rendered (citation omitted)). Barbara Tech has not demonstrated that State Farm is liable for TPPCA damages as a matter of law. *See* TEX. INS. CODE §§ 542.058, .060. Nor has State Farm demonstrated that TPPCA damages are foreclosed as a matter of law, as tender of the appraisal amount does not preclude TPPCA damages. And under the TPPCA, an insurer can avoid damages if it is not liable under the insurance policy, if it complied with all requirements and deadlines, or if the claim is invalid and should not have been paid—showings that State Farm has not made on summary judgment. *See* TEX. INS. CODE §§ 542.058, .060.

Having concluded that neither party is entitled to summary judgment, we remand the case to the trial court for further proceedings. On remand, the parties will have the opportunity to present argument as to the applicable TPPCA standard. To the extent that section 542.060 applies, Barbara Tech will have the opportunity to argue that State Farm owed Barbara Tech benefits under the policy, was therefore "liable" under the policy when it rejected the claim, and thus owes damages under the TPPCA. And State Farm will have the opportunity to challenge that assertion of liability and argue that it owed no benefits under the policy. To the extent that section 542.058 applies, State Farm will have the opportunity to argue that Barbara Tech's claim is invalid and should not have been paid, making it not subject to prompt pay damages under the TPPCA.[19]

[19] We do not address the relationship between "liable," "invalid," "should be paid," and "right to receive benefits," as that issue has not been raised or briefed in this Court. *See* TEX. INS. CODE § 542.058(b) (providing that the delayed payment provision in section 542.058(a) "does not apply in a case in which it is found as a result of arbitration

III. Conclusion

Under the TPPCA, an insurer must pay damages in the form of 18% interest on the amount of the claim and reasonable and necessary attorney's fees if it delays payment of a claim for more than the applicable statutory period or sixty days. *See* TEX. INS. CODE §§ 542.058, .060. We hold that neither State Farm's invocation of the policy's appraisal process for resolution of a dispute as to the amount of loss, nor State Farm's payment based on the appraisal amount, exempts State Farm from TPPCA damages as a matter of law. And without State Farm having accepted liability under the policy or having been adjudicated liable, we hold that Barbara Tech is not entitled to TPPCA damages as a matter of law. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

_____

Paul W. Green
Justice

OPINION DELIVERED: June 28, 2019

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or litigation that a claim received by an insurer is invalid and should not be paid by the insurer"); *id.* § 542.060(a) (providing that "if an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay" TPPCA damages); *Menchaca*, 545 S.W.3d at 489 (providing that "an insured who establishes a right to receive benefits under the insurance policy can recover those benefits as 'actual damages' under the Insurance Code if the insurer's statutory violation causes the loss of the benefits").

IN THE SUPREME COURT OF TEXAS

No. 17-0640

BARBARA TECHNOLOGIES CORPORATION, PETITIONER,

v.

STATE FARM LLOYDS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

JUSTICE BOYD, concurring in part and dissenting in part.

The Texas Prompt Payment of Claims Act, TEX. INS. CODE §§ 542.051–.061, requires an insurer that fails to timely respond to or pay an insurance claim to pay interest and attorney's fees in addition to the policy benefits. But does it require an insurer to pay interest and fees if the insurer initially rejects the claim—and thus fails to timely pay it—but later voluntarily pays it after the insured files suit? What if (as happened here) the insurer rejects the claim, the insured files suit, and the insurer then voluntarily and unconditionally pays the claim based on an amount determined through an agreed-upon appraisal process?

The Court holds that the Act requires the insurer to pay interest and fees in such circumstances, but only if the insurer either (1) "accepts the claim, thereby admitting liability" for the policy benefits, or (2) is "adjudicated liable [for the policy benefits] by a court or arbitration panel." *Ante* at ___. Concluding that the insurer here did not "accept the claim" by voluntarily and unconditionally paying the appraisal amount, and that neither party conclusively established

whether the insurer was liable for the benefits claimed, the Court reverses the court of appeals' judgment and remands the case to the trial court to determine whether the insurer was liable for the benefits it has already paid or whether the insured's claim was invalid and should not have been paid. *Ante* at ___.

Like the Court, I conclude that the insurer's invocation of the appraisal process does not affect the insurer's obligations under the Prompt Payment of Claims Act. And I, too, would reverse the court of appeals' judgment and remand to the trial court for further proceedings. But unlike the Court, I conclude that, by voluntarily and unconditionally paying the benefits claimed, the insurer conceded both its liability and the claim's validity. I would therefore remand solely for a determination of the amount of statutory interest and attorney's fees the insurer owes the insured. The Court reverses and remands, but for a different determination, so I respectfully concur in part and dissent in part.

I.
Background

A. The Prompt Payment of Claims Act

The Act imposes several specific requirements on insurers.

- *First*, within fifteen days after receiving notice of a claim,[1] the insurer must (1) acknowledge receipt of the claim, (2) commence its investigation of the claim, and (3) "request from the claimant all items, statements, and forms the insurer reasonably believes, at that time, will be required from the claimant." TEX. INS. CODE § 542.055(a).[2]

[1] "'Notice of claim' means any written notification provided by a claimant to an insurer that reasonably apprises the insurer of the facts relating to the claim." TEX. INS. CODE § 542.051(4). The Act grants eligible surplus lines insurers thirty business days instead of fifteen days. *Id.* § 542.055(a).

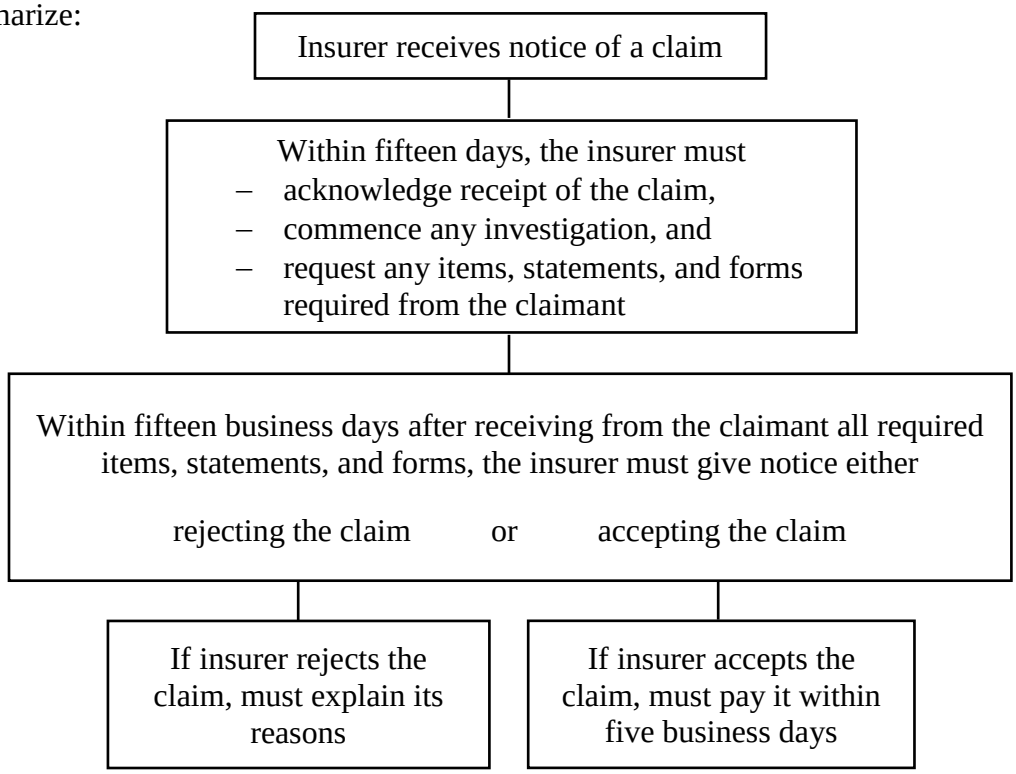
[2] "An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary." *Id.* § 542.055(b).

- *Second*, within fifteen business days of receiving all "items, statements, and forms required by the insured to secure final proof of loss," the insurer must give the claimant written notice either rejecting or accepting the claim. *Id.* § 542.056(a).[3]

- *Third*, if the insurer rejects the claim, its notice to the claimant "must state the reasons for the rejection." *Id.* § 542.056(c).

- And *fourth*, if the insurer accepts the claim in whole or in part, it must "pay the claim not later than the fifth business day" after sending the notice of acceptance. *Id.* § 542.057(a).[4]

To summarize:



[3] If the insurer reasonably believes the loss resulted from arson, the Act grants the insurer thirty days (instead of fifteen business days) to accept or reject the claim. *Id.* § 542.056(b). If the insurer "is unable to accept or reject the claim" by the fifteen-business-day deadline, it must notify the insured by that same deadline of the reasons it needs additional time. *Id.* § 542.056(d). Then it must reject or accept the claim within forty-five days after sending that notice. *Id.*

[4] If the insurer notifies the claimant that it will pay the claim only after the claimant performs a particular act, the insurer must pay the claim within five business days after the claimant performs that act. *Id.* § 542.057(b). The Act grants eligible surplus-lines insurers twenty business days to pay the claim instead of five business days. *Id.* § 542.057(c).

As this flowchart illustrates, sections .055, .056, and .057 impose no payment obligation or deadline when the insurer *rejects* a claim for policy benefits. But if the insurer *accepts* the claim, the Act requires it to pay the claim within five business days. *Id.* § 542.057(a).

After listing these requirements, the Act describes two independent circumstances in which insurers must pay statutory interest and attorney's fees:

- *First*, if an insurer "delays payment of the claim" for more than sixty days[5] after it receives all reasonably required "items, statements, and forms" from the claimant, it "shall" pay interest and attorney's fees "as provided by Section 542.060," unless "it is found as a result of arbitration or litigation" that the claim "is invalid and should not be paid." *Id.* § 542.058(a), (b).[6]

- *Second*, if an insurer "is liable for a claim under an insurance policy" and "is not in compliance with" the Act,[7] it must pay, "in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees." *Id.* § 542.060(a).

Finally, "If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case." *Id.* § 542.060(b).[8]

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[5] If another applicable statute provides a different time period for payment, that time period applies instead of the sixty-day period. *Id.* § 542.058(a).

[6] The Act grants a "life insurer" ninety days to either pay the claim or "properly file an interpleader action." *Id.* § 542.058(c). A court may extend these deadlines for certain insurers for good cause, and the Act automatically extends them in "the event of a weather-related catastrophe or major natural disaster." *Id.* § 542.059.

[7] Section .060 refers to compliance with "this subchapter." *Id.* § 542.060(a). The section appears within subchapter B of chapter 542, which constitutes the Prompt Payment of Claims Act. *Id.* §§ 542.051–.061.

[8] An insurer's obligation to pay interest and fees depends solely on whether the insurer "delays payment on a claim" or fails comply with the Act's requirements; it does not depend on the insurer's unreasonableness, negligence, intentional noncompliance, bad faith, or breach of some other standard. *Id.* §§ 542.058(a), .060(a); *see Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 461 (5th Cir. 1997) ("[A]n insurance company's good faith assertion of defense does not relieve the insurer of liability for penalties for tardy payment, as long as the insurer is finally judged liable."); *Cater v. United Servs. Auto. Ass'n*, 27 S.W.3d 81, 84 (Tex. App.—San Antonio 2000, pet. denied) (noting that because "[t]here is no good faith exception within the statute's plain language," insurer who "chose to reject" claim for policy benefits "necessarily . . . failed to pay the claim within sixty days" and thus violated the statute, "even if in good faith, and subjected itself to [statutory] damages"); *Marineau v. Gen. Am. Life Ins. Co.*, 898 S.W.2d 397, 404 (Tex. App.—Fort Worth 1995, writ denied) ("Good faith of the insurer, by itself, is not a defense to

Two of the Act's features are particularly relevant in this case. First, the Act identifies two separate deadlines by which the insurer must pay a claim for benefits: (1) five business days after the insurer notifies the claimant that it will pay all or part of the claim, *id.* § 542.057(a), or (2) sixty days after the insurer receives all requested and reasonably required items, statements, and forms (unless "other applicable statutes" impose a different deadline), *id.* § 542.058(a). And second, the Act requires the insurer to pay interest and fees under two different circumstances: (1) when the insurer delays payment for more than sixty days after it receives all items, statements, and forms, *unless* it is determined through arbitration or litigation that the claim "is invalid and should not be paid," *id.* § 542.058(b), or (2) when the insurer is not in compliance with the Act, *if* the insurer "is liable" on the claim, *id.* § 542.060(a).

B. State Farm's response to Barbara Tech's claim

State Farm fully and timely complied with all the requirements of sections .055, .056, and .057. It acknowledged the claim and inspected the property thirteen days after receiving the claim. Five days later, it notified Barbara Tech that it would not pay any benefits under the policy because it had determined that the covered loss totaled just over $3,000, which was less than the policy's deductible.[9] It thus timely acknowledged the claim, opened its investigation, requested information from the claimant, rejected the claim, and provided its reasons for the rejection.

Unwilling to accept State Farm's position, Barbara Tech filed suit. More than five months later, State Farm invoked the policy's appraisal process. The appraisers found that Barbara Tech's

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the action of the statute.") (citing *N.Y. Life Ins. Co. v. Veith*, 192 S.W. 605, 606 (Tex. Civ. App.—San Antonio 1917, no writ)).

[9] More than three months later, Barbara Tech requested that State Farm re-inspect the property. Eleven days after receiving that request, State Farm again refused to pay any benefits.

loss totaled just over $195,000—more than sixty-five times the amount State Farm had found before rejecting the claim. Ultimately, 664 days after first inspecting the property, 659 days after completing its investigation and rejecting the claim, and seven days after receiving the appraisal report, State Farm voluntarily and unconditionally paid the appraisal amount, less depreciation and the deductible.

Against this backdrop, the two issues are (1) whether State Farm, having voluntarily and unconditionally paid the claim for benefits—but having "delayed payment" for more than sixty days after receiving all the information it required from Barbara Tech—is also obligated to pay statutory interest and attorney's fees and (2) whether State Farm's invocation of the appraisal process changes the analysis under the Act.

II.
Appraisal

As the Court acknowledges, the Act does not "mention appraisals or how invocation of an appraisal process affects the [Act's] deadlines and requirements." *Ante* at ___. And as the Court explains, the appraisal process, at least under this policy's provision, could only resolve the parties' dispute over the value of the property and amount of the loss. *See ante* at ___ n.14. It could not and did not determine or affect coverage, the claim's validity, or State Farm's liability. Even after appraisal, State Farm retained the right to either deny the claim or voluntarily pay it.

With but one exception, a long line of state[10] and federal[11] courts have consistently held that an insurer that makes a full and timely[12] payment of an appraisal award is not obligated to pay

[10] *See Hinojos v. State Farm Lloyds*, 569 S.W.3d 304, 313 (Tex. App.—El Paso 2019, pet. pending) ("[B]ecause 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."); *Marchbanks v. Liberty Ins. Corp.*, 558 S.W.3d 308, 312–13 (Tex. App.—Houston [14th Dist.] 2018, pet. pending) (holding that "full and timely payment of the amount owed under the policy based on an appraisal award precludes as a matter of law a recovery on a claim under the prompt-payment statute" because payment of "an appraisal award does not resolve whether the insurer is liable under the insurance policy"); *Zhu v. First Cmty. Ins. Co.*, 543 S.W.3d 428, 436 (Tex. App.—Houston [14th Dist.] 2018, pet. pending) ("As this court has recognized, full and timely payment of an appraisal award under the policy precludes as a matter of law an award of penalties under the Insurance Code's prompt-payment provisions."); *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 847 (Tex. App.—Houston [14th Dist.] 2017, pet. pending) ("As this court has recognized, full and timely payment of an appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions as a matter of law."); *Gusma Props., L.P. v. Travelers Lloyds Ins. Co.*, 514 S.W.3d 319, 329 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("[A]n insurer does not delay payment of a claim within the meaning of the Prompt Payment provisions by withholding disputed payments pending appraisal under an insurance policy."); *Garcia v. Lloyds*, 514 S.W.3d 257, 275 (Tex. App.—San Antonio 2016, pet. denied) ("[A] long line of cases has held that full and timely payment of an appraisal award under the policy precludes an insured from recovering penalties under the Act as a matter of law.") (citing *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 563–64 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) ("Texas courts considering the issue have concluded that full and timely payment of an appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions as a matter of law.")); *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.) ("[F]ull and timely payment of an appraisal award under the policy precludes an insured from recovery of penalties under section 542.058 as a matter of law.") (citing *In re Slavonic*, 308 S.W.3d at 563); *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.) ("[T]imely payment of an appraisal award under the policy precludes an award of statutory penalties under the Texas Insurance Code chapter 542."); *Amine v. Liberty Lloyds of Tex. Ins. Co.*, No. 01-06-00396-CV, 2007 WL 2264477, at *4 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007, no pet.) (mem. op.) ("Texas courts that have considered the issue have concluded that full and timely payment of an appraisal award under the policy precludes an award of [the Act's] penalties as a matter of law."); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 345 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied) (concluding same).

[11] *See, e.g.*, *Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255, 259 (5th Cir. 2017) (concluding in an *Erie* guess that the Supreme Court of Texas would agree "with all the lower courts in the state that have addressed the issue in the context of postappraisal payments"); *Garcia v. Liberty Ins. Corp.*, No. CV H-17-1587, 2019 WL 825883, at *8 (S.D. Tex. Jan. 17, 2019), *report and recommendation adopted*, No. CV H-17-1587, 2019 WL 1383011 (S.D. Tex. Mar. 27, 2019) ("Timely payment of the entire appraisal award 'precludes as a matter of law a recovery on a claim under the prompt-payment statute.'") (quoting *Marchbanks*, 558 S.W.3d at 312); *Neff v. Allstate Vehicle & Prop. Ins. Co.*, No. 5:17-CV-191-DAE, 2019 WL 1560473, at *6 (W.D. Tex. Feb. 28, 2019) (holding insurer not liable under the Act because insurer "paid the appraisal award to Plaintiffs within 5 business days after notifying Plaintiffs that [insurer] would pay the claim"); *Dean v. State Farm Lloyds*, No. 5:16-CV-1321-DAE, 2018 WL 6430534, at *8–9 (W.D. Tex. Nov. 20, 2018) (holding insurer not liable for statutory interest or fees because insurer's "voluntary payment of an appraisal award does not imply liability" and insurer "made a full and timely payment of the appraisal award to Plaintiff"); *Gamez v. State Farm Lloyds*, No. 5:17-CV-508-DAE, 2018 WL 2251364, at *3 (W.D. Tex. Mar. 19, 2018) (quoting *In re Slavonic*, 308 S.W.3d at 563); *SPJST Lodge #154 & Am. Sokol Org. v. Century Sur. Co.*, No. 4:15-CV-00710-O, 2017 WL 5642613, at *3 (N.D. Tex. Apr. 11, 2017) (agreeing that a "full and timely payment of an appraisal award" precludes an award under the Act) (citing *Garcia*, 2016 WL 7234064, at

statutory interest or attorney's fees even if it previously failed to comply with the Act or timely pay the claim. In most of these decisions, however, the courts simply recited that rule without conducting any statutory analysis.[13] Those that have described a basis for the rule have offered three justifications, but none of them actually justifies the holding.

First, a few courts have reasoned that an insurer that timely pays some portion of the claim and then pays the full appraisal amount is not liable under the Act because the "fact that the appraisal process was later invoked does not alter the fact that [the insurer] complied with the insurance code, and provided a reasonable payment within a reasonable time" before invoking the

*12); *Carter v. State Auto Prop. & Cas. Ins. Co.*, No. 6:14-CV-00468, 2016 WL 4401292, at *3 (W.D. Tex. Jan. 6, 2016) ("Once an insurer timely pays an appraisal award, the insurer's liability for the initial underpayment becomes extinguished. . . . As a result, irrespective of whether the insured initially underpays the claim, compliance with a contract's appraisal provision extinguishes any claim for attorneys' fees and statutory interest stemming from a prompt pay deadline imposed by § 542.058.") (internal citations and footnote omitted) (citing *Mag-Dolphus, Inc. v. Ohio Caus. Ins. Co.*, 906 F. Supp. 2d 642, 652 (S.D. Tex. 2012)); *United Neurology, P.A. v. Hartford Lloyd's Ins. Co.*, 101 F. Supp. 3d 584, 598 (S.D. Tex.) ("Under Texas law, timely payment of an appraisal award under the policy precludes an award of statutory penalties under the Texas Insurance Code §§ 541 and 542 as a matter of law.") (citing *Breshears*, 155 S.W.3d at 344; *Amine*, 2007 WL 2264477, at *4–6; *Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, No. Civ. A. H-09-3479, 2011 WL 819491, at *3 (S.D. Tex. Mar. 2, 2011), *aff'd*, 459 Fed. App'x 366 (5th Cir. 2012); *Waterhill Cos. Ltd. v. Great Am. Assurance Co.*, No. Civ. A. No. 05-4080, 2006 WL 696577, at *2 (S.D. Tex. Mar. 16, 2006)), *aff'd*, 624 F. App'x 225 (5th Cir. 2015); *Scalise v. Allstate Tex. Lloyds*, No. 7:13-CV-178, 2013 WL 6835248, at *6 (S.D. Tex. Dec. 20, 2013) ("[M]ore relevant authority directs that an insurer commits no prompt payment violation when it submits to the delay inherent in the contractual appraisal process . . . before paying all covered damages determined by that process."); *Waterhill*, 2006 WL 696577, at *3 ("A delay in payment pursuant to the appraisal process does not constitute [a] violation [of the Act].").

[12] Because the Act does not address appraisals at all, the timeliness of any appraisal payment must be based on deadlines provided in the policy's appraisal provision, if any, and not on anything within the Act. But a payment that is timely under a policy appraisal provision may not be timely under the Act.

[13] *See, e.g.*, *Quibodeaux v. Nautilus Ins. Co.*, 655 F. App'x 984, 988 (5th Cir. 2016) ("[A] plaintiff may not seek Chapter 542 damages for any delay in payment between an initial payment and the insurer's timely payment of an appraisal award.") (citing *In re Slavonic*, 308 S.W.3d at 563); *Mattox v. Safeco Ins. Co. of Ind.*, No. 1:16-CV-1037-DAE, 2018 WL 3603102, at *4 (W.D. Tex. May 29, 2018) (quoting *In re Slavonic*, 308 S.W.3d at 563); *McEntyre v. State Farm Lloyds, Inc.*, No. 4:15-CV-00213, 2016 WL 6071598, at *6 (E.D. Tex. Oct. 17, 2016) (same); *Studer v. Lloyds*, No. 4:13-CV-413, 2016 WL 4063782, at *8 (E.D. Tex. July 29, 2016) (same); *Barry v. Allstate Tex. Lloyds*, No. 4:14-CV-00870, 2015 WL 1470429, at *6 (S.D. Tex. Mar. 31, 2015) (same); *Michels v. Safeco Ins. Co. of Ind.*, No. A-12-CA-511-SS, 2013 WL 12076562, at *5 (W.D. Tex. Mar. 13, 2013) (same), *aff'd*, 544 F. App'x 535 (5th Cir. 2013); *Mag-Dolphus*, 906 F. Supp. 2d 642, 652 (S.D. Tex. 2012) (same); *Medistar Twelve Oaks Partners, Ltd. v. Am. Econ. Ins. Co.*, No. CIV.A. H-09-3828, 2011 WL 3236192, at *9 (S.D. Tex. July 27, 2011) (citing *In re Slavonic*, 308 S.W.3d at 563).

appraisal process. *Breshears*, 155 S.W.3d at 345.[14] Of course, this reasoning could not apply here because State Farm did not make *any* payment before the deadline or before invoking the appraisal process, and its valuation of the loss at 1/65 of the appraisal amount was in no way "reasonable." But more fundamentally, the Act does not require statutory interest and attorney's fees based on the violation of a reasonableness standard.[15] When the insurer fails to timely acknowledge, investigate, or pay all or part of the claim, the Act requires it to pay interest and fees regardless of whether it paid a "reasonable" amount. *See* TEX. INS. CODE §§ 542.058, .060.

Second, a few courts have reasoned that insurers that pay an appraisal award are not obligated to pay statutory interest and fees because the voluntary payment of an appraisal award does not establish that the insurer "is liable" for the claim under section .060. *See Amine*, 2007 WL 2264477, at *5 (reasoning that the insurer's voluntary payment of the appraisal award did "not constitute a finding of liability" as the Act requires).[16] As discussed more thoroughly below, however, section .060's "is liable" requirement does not apply when the insurer *rejects* the claim—

[14] *See also Hinojos*, 569 S.W.3d at 313 ("[B]ecause [the insurer] made a reasonable payment on [the insured's] claim within the sixty-day statutory limit, the subsequent payment resulting from the appraisal process did not mean [the insurer] violated the prompt payment deadlines of the insurance code.") (citing *Breshears*, 155 S.W.3d at 345).

[15] To be sure, the Act elsewhere accounts for "reasonableness," but not as to the insurer's initial decision on whether to pay the claim (and if so, how much to pay). *E.g.*, TEX. INS. CODE §§ 542.056(b) (providing an extra fifteen days for written notice of acceptance or rejection if an insurer "has a *reasonable basis to believe* that a loss resulted from arson") (emphasis added), .059(a) ("A court may grant a request by a guaranty association for an extension of the periods under this subchapter on a showing of good cause and after *reasonable notice* to policyholders.") (emphasis added). Thus, the legislature "clearly knew how" to account for whether the insurer acted reasonably in initially accepting or rejecting the claim. *Osterberg v. Peca*, 12 S.W.3d 31, 38 (Tex. 2000) ("The Legislature clearly knew how to require that the actor have knowledge of the Election Code before being charged with a violation. Because the Legislature did not include a similar knowledge requirement in section 253.131, we should not presume to add that requirement ourselves.") (footnoted omitted).

[16] *See also Marchbanks*, 558 S.W.3d at 313 ("[A]n appraisal award does not resolve whether the insurer is liable under the insurance policy."); *Dean*, 2018 WL 6430534, at *8 (reasoning that insurer's "voluntary payment of an appraisal award does not imply liability"); *Carter*, 2016 WL 4401292, at *3 ("Once an insurer timely pays an appraisal award, the insurer's liability for the initial underpayment becomes extinguished").

and even if it did, an insurer concedes its liability for policy benefits by voluntarily and unconditionally paying those benefits.

And third, at least one court suggested that insurers that pay an appraisal award are not obligated to pay statutory interest and fees because the parties contractually agreed "to abide by" the "appraisal valuation of the loss via the appraisal clause of the insurance policy." *Perry v. United Servs. Auto. Ass'n*, No. 07-18-00031-CV, 2018 WL 6442050, at *2–3 (Tex. App.—Amarillo Dec. 7, 2018, pet. pending) (mem. op.) (citing *Hall v. Germania Farm Mut. Ins. Ass'n*, No. 07-16-00304-CV, 2017 WL 4630028, at *4 (Tex. App.—Amarillo Oct. 13, 2017, no pet.) (recognizing that an appraisal award made under the provisions of an insurance contract is binding and enforceable and that tendering the full amount owed pursuant to the conditions of an appraisal clause is all that is required to estop the insured from raising a breach of contract claim)). But whether an insurer that pays an appraisal award as agreed in the policy can be liable for *breaching the contract* presents a different question. Here, the issue is whether the Act requires an insurer that rejected the claim and then paid the appraisal amount after section .058's sixty-day deadline to pay statutory interest and attorney's fees. The appraisal process resolves the parties' dispute only over the amount of the loss. It does not extend the statutory deadline by which the insurer was required to pay the amount of the loss.

One federal district court disagreed with the other state and federal decisions, recognizing that the Act does not provide a good-faith defense but instead holds insurers "strictly liable for their failure to promptly pay insurer's claims where liability has been established" and holding that an insurer's "full and timely payment of the appraisal award does not preclude Plaintiff's claim for statutory interest under the [Act] as a matter of law." *Graber v. State Farm Lloyds*, No. 3:13-

CV-2671-B, 2015 WL 3755030, at *10 (N.D. Tex. June 15, 2015) (footnote omitted). The Fifth Circuit rejected that court's holding, however, based on "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." *Mainali*, 872 F.3d at 259. Although the Fifth Circuit did not completely reject the *Graber* court's reasoning, it concluded that it was not "enough to divine that the Supreme Court of Texas would disagree with all the lower courts in the state that have addressed the issue in the context of postappraisal payments." *Id.*

In this case, State Farm and its amici raise an argument that the courts have not previously addressed. They note that section .055 authorizes an insurer that receives a notice of claim to "request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant," and then to "make additional requests for information if during the investigation of the claim the additional requests are necessary." TEX. INS. CODE § 542.055(a), (b). Section .056 then requires the insurer to accept or reject the claim within fifteen business days after the insurer "receives all items, statements, and forms required by the insurer to secure final proof of loss." *Id.* § 542.056(a). And section .058 requires the insurer to pay statutory interest and fees if it delays payment for more than sixty days after "receiving all items, statements, and forms reasonably requested and required under Section 542.055." *Id.* § 542.058(a). Relying on these provisions, State Farm argues that it did not delay payment for more than sixty days because the appraisal report is part of the "items, statements, and forms" and additional "information" it required to "secure final proof of loss." Because it paid the claim within fifteen days after receiving the appraisal report, State Farm contends that it timely paid the claim

under section .058. The CHIEF JUSTICE dissents from today's decision because he agrees with this argument. *See post* at ___ (HECHT, C.J., dissenting).

Two of the Act's provisions, however, negate this proposed construction. First, the statute specifically refers to "items, statements, and forms" the insurer "request[s] *from the claimant*," and insurers do not request or obtain appraisal reports from the claimant. TEX. INS. CODE § 542.055(a) (emphasis added). And second, the Act refers to such information as information the insurer reasonably requires "during the investigation" to "secure final proof of loss." *Id.* §§ 542.055(b), .056(a). As the Court recognizes, State Farm necessarily completed its investigation and secured final proof of loss when it rejected Barbara Tech's claim—long before it invoked the appraisal process or received the appraisal report. I agree with the Court that, by rejecting the claim, State Farm confirmed it had received all the information it needed to determine whether Barbara Tech had sustained a loss the policy covered, and thus the appraisal it later requested couldn't be part of the information that triggered the Act's payment deadlines.

In short, the appraisal process provides an alternative to litigating only the property's value and the amount of the loss; it does not provide an alternative to litigating coverage, the claim's validity, the insurer's liability, or the insurer's compliance with the Act. The appraisal process, in other words, addresses only the amount of the claim, but the Act's interest and fees depend on *when* the insurer pays the claim, not on the *amount* of claim.

III.
Statutory Interest and Attorney's Fees

Having determined that State Farm's invocation of appraisal does not affect the analysis, the remaining issue is whether State Farm, having voluntarily and unconditionally paid the claim for benefits, but having paid more than sixty days after receiving all the information it required

before rejecting the claim, is obligated to pay statutory interest and attorney's fees. Under the Act's plain language, I must conclude it is. State Farm fully and timely complied with all the Act's requirements under sections .055, .056, and .057, and initially rejected the claim. It ultimately paid the claim, but it delayed that payment for more than sixty days after it received all the information it reasonably required from Barbara Tech to decide to reject the claim. When an insurer delays payment for more than sixty days after receiving all information reasonably required from the claimant, section .058 requires the insurer to pay interest and fees. TEX. INS. CODE § 542.058(a). Section .058 does not apply if "it is found as a result of arbitration or litigation that a claim received by an insurer is invalid and should not be paid by the insurer," *id.* § 542.058(b), but there's been no such finding in this case.

In addressing State Farm's obligation to pay statutory interest and attorney's fees, the Court first "assume[s] without deciding that section 542.060 provides the applicable standard for Barbara Tech to succeed on its claim." *Ante* at ___. Next, the Court holds that State Farm's voluntary and unconditional payment "neither established liability under the policy nor foreclosed" interest and fees under that section. *Ante* at ___. Finally, the Court notes that on remand, "the parties will have the opportunity to present argument" on whether section .058 should apply instead of section .060. *Ante* at ___.

Because the Court does not decide whether section .058 or .060 applies, the trial court will have to make that determination on remand. I would hold that section .058 applies, and section .060 does not. To assist the trial court in that analysis, I explain the three reasons I conclude the Act's plain language requires that result. First, sections .058 and .060 cannot both apply simultaneously: though they impose the same standard, they impose conflicting burdens of proof.

Second, section .060 does not apply because State Farm fully complied with the Act's requirements. And third, even if we could somehow read section .058 and .060 together, section .058 would control because State Farm's only non-compliance was with section .058's sixty-day deadline. Finally, I conclude that, regardless of which section governs, State Farm owes interest and fees because it conceded both the claim's validity and its own liability under the policy by voluntarily and unconditionally paying the benefits.

A. Sections .058 and .060 cannot both apply.

The Court remands this case for further proceedings and suggests that, on remand, the trial court should apply both sections .058 and .060, reading them together. *See ante* at ___. But the trial court cannot apply both sections because they impose opposite burdens on the same issue. These sections enforce different payment deadlines and require an insurer to pay interest and fees under different circumstances. Section .058 (which enforces a sixty-day payment deadline) cannot apply if an insurer *accepts* a claim because section .057 requires an insurer that accepts a claim to pay within five business days. And conversely, section .060 (which applies only when the insurer "is not in compliance") cannot apply when an insurer that *rejects* a claim complies with the Act's requirements.

Applying both section .058 and section .060 would necessarily create an irreconcilable conflict, not only in construing the Act but also in submitting a claim for interest and fees to a jury. *See Arvizu v. Estate of Puckett*, 364 S.W.3d 273, 276 (Tex. 2012) (per curiam) (discussing conflicts in jury findings). Although section .058's reference to the claim's invalidity and section .060's reference to whether the insurer "is liable" for the claim invoke the same standard—that the insured is entitled to benefits under the policy—the two sections require opposite findings and put the

burden of proof on opposite parties. By requiring a late-paying insurer to pay interest and fees "unless" the claim for benefits is invalid and should not be paid, section .058 puts the burden on the insurer to establish the claim's invalidity. And by requiring a non-compliant insurer to pay interest and fees if the insurer "is liable" for policy benefits, section .060 puts the burden on the insured to establish the insurer's liability.

The Court says that, on remand, (1) Barbara Tech can seek to prove "that State Farm owed Barbara Tech benefits under the policy, is therefore 'liable' under the policy, and thus owes" interest and fees under the Act, *and* (2) State Farm can seek to "challenge that assertion of liability" and prove that "it owed no benefits under the policy" or "that Barbara Tech's claim is invalid and should not have been paid," so that it need not pay interest and fees under the Act. *Ante* at ___. But both parties cannot bear opposite burdens on the same issue: if Barbara Tech obtained a finding that State Farm was liable and State Farm obtained a finding that the claim was invalid, the findings would irreconcilably conflict, *see Arvizu*, 364 S.W.3d at 276, and indeed, the trial court would err by submitting both questions. Yet to the extent that the Court's analysis would place the burden entirely on Barbara Tech—requiring Barbara Tech to prove that its claim for policy benefits was "valid" and should have been paid because State Farm was "liable" on the claim—the Court renders section .058(b) completely meaningless.

B. Section .058 applies, and section .060 does not.

Section .060 does not apply here because State Farm fully complied with the Act's requirements. Section .060 only applies "if an insurer that is liable for a claim under an insurance policy is *not in compliance* with" the Act. TEX. INS. CODE § 542.060(a) (emphasis added). As the Court acknowledges, State Farm fully complied with the Act because it timely acknowledged,

investigated, and rejected Barbara Tech's claim and provided the reasons for its rejection. *Ante* at ___. If State Farm had timely *accepted* Barbara Tech's claim, in whole or in part, it would have had to pay that amount within five business days. TEX. INS. CODE § 542.057(a). And had it then failed to pay within five business days, it would have not been "in compliance with" the Act, and section .060 would apply. But sections .055, .056, and .057 do not require an insurer that timely acknowledges, investigates, and *rejects* a claim to pay anything by any particular deadline; they merely require the insurer to explain its reasons for the rejection. *Id.* § 542.056(c). Because State Farm timely acknowledged, investigated, and rejected Barbara Tech's claim, section .057's five-day deadline is irrelevant, State Farm complied with the Act's requirements, and section .060 does not apply.

Section .058, however, does apply here because, after rejecting Barbara Tech's claim, State Farm "delayed payment of the claim" for more than sixty days after receiving from Barbara Tech all the information it required to secure proof of loss. Under these circumstances, section .058 requires State Farm to pay statutory interest and attorney's fees unless "it is found as a result of arbitration or litigation that [the claim] is *invalid* and should *not* be paid." *Id.* § 542.058(a), (b) (emphases added). Because there's been no such finding in this case, section .058 requires State Farm to pay the interest and fees.

C. Reading the sections "together," only section .058 governs the outcome.

Even if we could somehow read section .060 to apply when an insurer timely acknowledges, investigates, and rejects a claim, the Act would still require State Farm to pay the statutory interest and attorney's fees unless the insurer meets its burden to prove that the claim was invalid and should not have been paid. Section .060 applies only if State Farm was "not in

compliance with" the Act. TEX. INS. CODE § 542.060(a). But as the Court agrees, State Farm fully complied with the Act by timely acknowledging, investigating, and rejecting the claim and providing its reasons for rejecting. If State Farm was "not in compliance with" the Act, its only possible act of non-compliance would be its failure to comply with section .058's sixty-day payment deadline. If State Farm's only non-compliance was with section .058, then that section must control whether State Farm owes interest and fees.[17] And as explained, section .058 requires State Farm to pay interest and fees unless an arbitration or litigation determines that the claim was *invalid and should not* have been paid.

D. State Farm conceded liability and validity by voluntarily and unconditionally paying the claim.

Finally, regardless of whether section .058 applies (as I would hold) or section .060 applies (as the Court assumes but does not decide), and regardless of who bears the burden on that issue, we need not remand this case for further proceedings addressing that issue because State Farm conceded its liability and the claim's validity by voluntarily and unconditionally paying the

[17] To the extent we could read section .060 to create an ambiguity or inconsistency, section .058 "controls over" section .060 because it specifically addresses insurers that delay payment for more than sixty days, as opposed to insurers that more generally fail to comply with the Act. *See State ex rel. Best v. Harper*, 562 S.W.3d 1, 10 (Tex. 2018) ("[A] specific provision controls over a general provision . . . .").

claim.[18] Although Texas appellate courts have reached conflicting conclusions on this question,[19] the Act's language confirms that an insurer that voluntarily and unconditionally pays a claim "is liable" on that claim, even if its liability has not been adjudicated.

[18] Of course, a non-compliant insurer is not required to pay interest and fees if the claim for policy benefits is ultimately *adjudicated* to be invalid. *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) ("There can be no liability [for statutory interest or attorney's fees] if there is no coverage under the policy."); *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) ("There can be no liability [for statutory interest or fees] if the insurance claim is not covered by the policy."); *Allstate Ins. Co. v. Bonner*, 51 S.W.3d 289, 290, 292 (Tex. 2001) (holding that insurer that failed to timely acknowledge claim did not owe attorney's fees under the Act because it paid personal-injury-protection benefits exceeding amount awarded for uninsured-motorist benefits and thus "was not liable for the claim under the terms of the insurance policy"); *Triyar Companies, LLC v. Fireman's Fund Ins. Co.*, 515 S.W.3d 517, 529 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (holding insurer was not obligated to pay statutory interest and fees because it had paid more than amount jury found was owed under the policy, and thus insurer was not liable under the policy); *see also Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 861 (5th Cir. 2003) (holding that insurer did not owe statutory interest because "the district court properly granted summary judgment" for the insurer on each of the claims under the policy); *Higginbotham*, 103 F.3d at 461 ("[T]here may be no liability for statutory damages if it is subsequently determined, by litigation, that the claim in question is invalid and not payable.").

And conversely, a non-compliant insurer must pay interest and fees if it is *adjudicated* to be "liable" for the policy benefits claimed. *See Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427–28 (Tex. 2004) (holding insurer found liable for amount of claim that exceeded amount insurer paid was obligated to pay statutory interest on the difference); *United Servs. Auto. Ass'n v. Croft*, 175 S.W.3d 457, 474 (Tex. App.—Dallas 2005, no pet.) (holding insurer found liable on claim for benefits was obligated to pay statutory interest and fees); *Dunn v. S. Farm Bureau Cas. Ins. Co.*, 991 S.W.2d 467, 471 (Tex. App.—Tyler 1999, pet. denied) (holding insurer that failed to timely acknowledge or pay claim and was ultimately found liable for the claim was liable for statutory interest and fees); *Oram v. State Farm Lloyds*, 977 S.W.2d 163, 167 (Tex. App.—Austin 1998, no pet.) (holding insurer that was found liable for claim was obligated to pay statutory interest and fees); *Marineau*, 898 S.W.2d at 404 (same); *First Nat. Life Ins. Co. v. Vititow*, 323 S.W.2d 313, 316 (Tex. Civ. App.—Texarkana 1959, writ dism'd) (holding statutory interest "is collectible if the insurer is finally adjudged to be liable on the policy regardless of how justifiable its unsuccessful defense of non-liability may have appeared") (citing *Lumbermens Mut. Cas. Co. v. Klotz*, 251 F.2d 499, 509 (5th Cir. 1958)); *see also Higginbotham*, 103 F.3d at 461 (holding insurer found liable for wrongfully rejecting claim for benefits was liable for statutory damages).

The issue here, however, is whether the Act requires a non-compliant insurer to pay interest and fees when it voluntarily and unconditionally pays the claim without its liability having been adjudicated at all.

[19] *Compare DeLaGarza v. State Farm Mut. Auto. Ins. Co.*, 175 S.W.3d 29, 33 (Tex. App.—Dallas 2005), *opinion supplemented on denial of reh'g*, 181 S.W.3d 755 (Tex. App.—Dallas 2005, pet. denied) (holding insurer that voluntarily paid claim in full after suit was filed was not liable for statutory interest or fees), *with Cater*, 27 S.W.3d at 84 (holding insurer that voluntarily paid claim in full after suit was filed was liable for statutory interest and fees), *and Nw. Nat'l Cty. Mut. Ins. Co. v. Rodriguez*, 18 S.W.3d 718, 720 (Tex. App.—San Antonio 2000, pet. denied) (holding insurer that settled claim after suit was filed was liable for statutory interest and fees); *see also Tremago, L.P. v. Euler-Hermes Am. Credit Indem. Co.*, 602 F. App'x 981, 983 (5th Cir. 2015) (distinguishing *Cater* and holding that insurer that settled claim was not "liable" on the claim because settlement agreement "did not contain an admission of liability under the Policy").

First, of course, section .060 does not say that the insurer must be "found," "declared," "adjudicated," or "held" liable for policy benefits; it says the insurer must pay interest and fees if it "is liable for the claim under the policy." *Id.* § 542.060(a). As we recently acknowledged, the term liable "broadly" includes "any kind of debt, obligation, or responsibility." *Anadarko Petroleum Corp. v. Hous. Cas. Co.*, 573 S.W.3d 187, 192 (Tex. 2019) (citing *Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "liability" as the "quality, state, or condition of being legally obligated or accountable"); *Liability*, THE AMERICAN HERITAGE DICTIONARY (5th ed. 2014) (defining "liability" as "an obligation, responsibility or debt")). And typically, an insurer's obligation or responsibility to pay a claim—that is, its *liability*—arises when the covered loss occurs, well before any tribunal *announces* liability. *See Wellisch v. United Servs. Auto. Ass'n*, 75 S.W.3d 53, 58 (Tex. App.—San Antonio 2002, pet. denied) (explaining that, outside of the uninsured-motorist context, an insurer's liability arises "at the time of the covered event").[20] Because section .058 requires an adjudication that the claim is invalid but section .060 does not

[20] For certain types of insurance coverage, the insurer's liability will not arise until some subsequent event occurs. *See, e.g.*, *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 31 n.41 (Tex. 2008) (noting insurer's duty to indemnify insured's liability to third party is not "triggered" until "a plaintiff ultimately prevails on a claim covered by the policy"); *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 587 (Tex. 1969) (explaining that excess-coverage insurer's "liability" does "not arise until the limits of the collectible insurance under the primary policy have been exceeded") (quoting 8 Appleman, INSURANCE LAW & PRACTICE, § 4914 (2d ed. 1962)); *Wellisch*, 75 S.W.3d at 58 (noting that uninsured-motorist insurer's liability does not arise until uninsured motorist's liability to insured is determined); *see also Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 880 (5th Cir. 2004) (same). But a primary insurer's first-party liability to cover its insured's loss arises when the loss occurs, or at least when the insured submits valid proof of that covered loss. *Wellisch*, 75 S.W.3d at 58; *see Don's Bldg. Supply*, 267 S.W.3d at 31 (holding duty to defend is "triggered" when "plaintiff alleges facts that would give rise to any claim against the insured that is covered by the policy"); *Clements v. Minn. Life Ins. Co.*, 176 S.W.3d 258, 262 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (holding life insurer was liable "upon receipt of proof of Terry's death"); 19 *Couch on Insurance* 2d, § 82:121, at 864 (Rev. ed. 1983) (explaining that insured's rights under insurance policy "vest upon a loss").

require an adjudication that the insurer "is liable," we should presume that the provisions carry different meanings and not write requirements into a provision from which they are omitted.[21]

But more important, construing "is liable" to require a legal finding or adjudication of liability renders other of the Act's provisions meaningless. Section .060, for example, which requires a non-compliant insurer who "is liable" to pay the insured's attorney's fees, provides, "*If a suit is filed*, the attorney's fees shall be taxed as part of the costs in the case." TEX. INS. CODE § 542.060(b) (emphasis added). If an insurer is only "liable" when an arbiter or court adjudicates it so, a suit must always be filed, and subsection (b) would be superfluous. By specifically addressing how fees must be taxed *if* a suit is filed, the statute recognizes that the insurer may owe fees even if a suit is *never* filed, such as when the insurer voluntarily pays the policy benefits.

Likewise, subsection .058(b) provides that a late-paying insurer must pay interest and fees unless arbitration or litigation determines that the claim is invalid and need not be paid. *Id.* § 542.058(b). If an insurer that fails to pay within sixty days under section .058 must pay interest and fees only if it is adjudicated to be liable for the policy benefits, then subsection .058(b) is meaningless because the insurer is not obligated to pay interest and fees even if it is *not* found through arbitration or litigation that the claim is invalid and need not be paid. All that matters then is whether the insurer is legally adjudicated to be liable, so whether it is found to be *not* liable is irrelevant and subsection .058(b) is completely meaningless.[22]

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[21] *Cf. Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325–26 (Tex. 2017) ("We presume the Legislature 'chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.'") (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)).

[22] Construing the Act to require an adjudication of liability would also render subsection .058(c) meaningless. Subsection .058(c) requires a life insurer to either pay a "bona fide" claim or "properly file an interpleader action and tender the benefits into the registry of the court not later than the 90th day after the date the insurer receives all items,

The Court agrees that the Act requires a late-paying or non-compliant insurer to pay interest and fees even if it is not adjudicated to be liable, but only if the insurer "accepts liability" under the policy. *Ante* at ___. And the Court also agrees that an insurer "accepts liability" if it (1) initially "come[s] to a determination to accept and pay the claim or some part of it," *ante* at ___, (2) "specifically accepts the claim," *ante* at ___ n.14, (3) "accepts liability under the policy," *ante* at ___, or (4) after initially rejecting the claim, "later accepts the claim, thereby admitting liability," *ante* at ___. But it then concludes that an insurer that initially rejects the claim and then voluntarily and unconditionally pays it based on the appraisal amount does not "establish liability" under the Act and thus is not liable on the claim. *See ante* at ___ n.14 ("We find no support for the proposition that payment of an appraisal amount on a rejected claim establishes liability for purposes of section 542.060.").

With regard to an insurer's liability on a claim or the claim's validity, I can't see any difference between (1) an insurer who initially accepts and pays the claim, (2) an insurer who initially rejects but later voluntarily and unconditionally pays a claim, and (3) an insurer who initially rejects but later voluntarily and unconditionally pays the claim in an amount determined through an appraisal process. The Court holds that the insurer concedes its liability and the claim's validity in the first two scenarios but not in the third, yet it never explains any relevant difference

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statements, and forms reasonably requested and required under Section 542.055." TEX. INS. CODE § 542.058(c). It then provides that a "life insurer that delays payment of the claim or the filing of an interpleader and tender of policy proceeds for more than 90 days shall pay damages and other items as provided by Section 542.060 until the claim is paid or an interpleader is properly filed." *Id.* But if "damages and other items as provided by Section 542.060" were never due unless the life insurer is ultimately adjudicated to be liable under the policy, it could not be liable for those damages before "an interpleader is properly filed." *Id.*; *see State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799, 805–06 (Tex. 2007) (holding that life insurer's "interpleader did not render the statute inapplicable" because the "interpleader suffice[s] in place of payment," so insurer that delayed filing interpleader until twelve days after sixty-day deadline was liable for statutory interest and fees up to the date it filed the interpleader, but not thereafter).

between the three. Regardless of whether an insurer initially accepts and pays the claim or initially rejects it and then later accepts and pays it, in each case, by voluntarily and unconditionally paying the claim, the insurer "accepts" the claim and thus concedes its liability for the benefits under the policy. That the amount the insurer voluntarily pays is determined through an agreed appraisal process rather than through an independent investigation, negotiations, or mediation is irrelevant to the question of whether the insurer is liable on the claim. As the Court emphasizes, the appraisal process has no effect whatsoever on the insurer's liability or the claim's validity. *Ante* at ___ n.14.

Here, as the Court agrees, State Farm "never denied that Barbara Tech's loss was covered," *ante* at ___, and instead has only ever disputed the amount of the covered loss. The appraisal determined the amount of the loss, but it did not determine State Farm's liability. After receiving the appraisal, State Farm could have continued to reject the claim. Instead, it voluntarily and unconditionally paid the claim. State Farm cannot now argue that the claim it has voluntarily and unconditionally paid should not have been paid at all.[23]

In summary, State Farm timely acknowledged, investigated, and rejected Barbara Tech's claim just as the Act required. Unsatisfied with State Farm's decision, Barbara Tech filed suit, forcing State Farm to either voluntarily pay the claim or litigate its liability and the claim's validity.

[23] The Court suggests that State Farm's payment of the appraisal amount was "similar to a settlement," *ante* at ___, and the CHIEF JUSTICE suggests State Farm "settle[d]" the claim without admitting liability, *post* at ___ n.30 (HECHT, C.J., dissenting). The record, however, does not support those suggestions. The parties did not "settle" anything; State Farm simply voluntarily and unconditionally paid Barbara Tech's claim for policy benefits. Of course, State Farm could have paid or tendered the appraisal amount conditioned upon an agreement that it was *not* conceding its liability, in which case Barbara Tech would have had to decide whether to accept that payment and forgo any right to pursue interest and fees or reject the conditional payment and insist on both. *See generally Hurst*, 523 S.W.3d at 842–46 (addressing insurer's tender of appraisal amount that was voluntary but was conditioned on insured's release of extra-contractual claims). Nothing in the Act prevents the parties from settling a claim in a manner that negates the insurer's liability under the policy or for interest and fees under the Act. But in the absence of such an agreement, the insurer's voluntary and unconditional payment of the benefits necessarily concedes its liability under the policy, regardless of whether it makes that payment after initially accepting or rejecting the claim, and regardless of whether the amount it pays is based on an appraisal.

State Farm chose to voluntarily and unconditionally pay the claim but did so more than sixty days after receiving from Barbara Tech all the information it reasonably required to initially reject the claim. Because State Farm fully complied with the Act's requirements, section .060 and its "is liable" standard does not apply. Instead, section .058 applies, and because arbitration or litigation has never determined that Barbara Tech's claim was invalid and should not have been paid, section .058 requires State Farm to pay statutory interest and attorney's fees. And even if section .060 could also somehow apply, it requires State Farm to pay interest and fees because State Farm conceded that it "is liable" under the policy by voluntarily and unconditionally paying the claim.

V.
Conclusion

I concur in the Court's judgment reversing the court of appeals' judgment and remanding the case to the trial court, but I would remand solely for a determination of the amount of interest and fees State Farm owes Barbara Tech. I therefore concur in part and dissent in part.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: June 28, 2019

IN THE SUPREME COURT OF TEXAS

NO. 17-0640

BARBARA TECHNOLOGIES CORPORATION, PETITIONER,

v.

STATE FARM LLOYDS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

CHIEF JUSTICE HECHT, joined by JUSTICE BROWN and JUSTICE BLACKLOCK, dissenting.

Appraisal is a process insurance policies commonly afford insurers and insureds for resolving disputes over the amount of a claim. Each side picks an appraiser, the appraisers pick an umpire, and the three inspect the loss and render an award. Appraisals have been used in Texas for more than a century,[1] and to good end. "Access to the appraisal process to resolve disputes", the Court writes, "is an important tool in the insurance claim context, curbing costs and adding efficiency in resolving insurance claims",[2] echoing our earlier observation that "[a]ppraisals can provide a less expensive, more efficient alternative to litigation".[3] But after praising appraisal's effectiveness, the Court proceeds to hobble it. By today's decision, as a practical matter, whenever

[1] *See State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888 (Tex. 2009).

[2] *Ante* at ___.

[3] *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 407 (Tex. 2011) (orig. proceeding).

an appraisal is requested, even by the insured, an insurer is subject to paying 18% interest and attorney fees if the award exceeds what the insurer has found to be due. That certainly discourages use of appraisals, at least by insurers, and may effectively doom the process altogether. I come, then, to bury appraisals, not to praise them.

The Texas Prompt Payment of Claims Act ("the Act")[4] was passed in 1991,[5] amended in 1995,[6] and recodified in 2003.[7] Since then it has been amended four more times.[8] The Act sets deadlines for insurers to process and pay claims, and it penalizes delay. The Act does not mention appraisals. Typically, the right to an appraisal under a policy arises when the insurer and insured dispute the amount of loss after the insurer has rejected all or part of a claim, and thus the appraisal cannot be completed before the Act's final payment deadline. In 2004, one court of appeals held that the Act does not penalize the prompt payment of an appraisal award after the Act's deadline for payment has passed.[9] We declined to review that decision and, 12 years later, a similar decision by

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[4] TEX. INS. CODE §§ 542.051–.061. All statutory references are to the Texas Insurance Code unless otherwise noted.

[5] Act of May 27, 1991, 72nd Leg., R.S., ch. 242, § 11.03, 1991 Tex. Gen. Laws 939, 1043–1045 (originally codified as TEX. INS. CODE art. 21.55), *amended by* Act of Aug. 25, 1991, 72nd Leg., 2d C.S., ch. 12, §§ 7.01–7.03, 1991 Tex. Gen. Laws 252, 319–321.

[6] Act of May 19, 1995, 74th Leg., R.S., ch. 333, § 1, 1995 Tex. Gen. Laws 2839.

[7] Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 2, 2003 Tex. Gen. Laws 3611, 3679–3681, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 206, § 21.35, 2003 Tex. Gen. Laws 907, 959 (amending former Article 21.55 despite the Legislature's codification of the Act in Chapter 542 earlier in the session).

[8] Act of May 17, 2017, 85th Leg., R.S., ch. 151, § 2, 2017 Tex. Gen. Laws 293, 293; Act of May 29, 2009, 81st Leg., R.S., ch. 833, § 1, 2009 Tex. Gen. Laws 2074; Act of May 17, 2007, 80th Leg., R.S., ch. 730, §§ 2D.007–.008, 2007 Tex. Gen. Laws 1356, 1419; Act of May 24, 2005, 79th Leg., R.S., ch. 728, § 11.009, 2005 Tex. Gen. Laws 2188, 2210–2211 (amending Section 542.053(a) to conform to amendments made to former Article 21.55 in the Act of June 2, 2003 and then repealing that act).

[9] *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 345 (Tex. App.—Corpus Christi 2004, pet. denied).

the court of appeals below.[10] In all, over the past two decades, the issue has been addressed by several Texas appellate courts,[11] by the U.S. Court of Appeals for the Fifth Circuit,[12] and by U.S. District Courts in all four Texas districts.[13] Only one federal district court has disagreed,[14] and the

[10] *See Garcia v. State Farm Lloyds*, 514 S.W.3d 257, 275 (Tex. App.—San Antonio 2016, pet. denied) ("We hold that because it is undisputed State Farm paid the appraisal award, Garcia cannot sustain her late payment claim.").

[11] *Hinojos v. State Farm Lloyds*, 569 S.W.3d 304, 313 (Tex. App.—El Paso 2019, pet. filed); *Marchbanks v. Liberty Ins. Corp.*, 558 S.W.3d 308, 312–313 (Tex. App.—Houston [14th Dist.] 2018, pet. filed); *Zhu v. First Cmty. Ins. Co.*, 543 S.W.3d 428, 436 (Tex. App.—Houston [14th Dist.] 2018, pet. filed); *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 844 (Tex. App.—Houston [14th Dist.] 2017, pet. filed); *Gusma Props., L.P. v. Travelers Lloyds Ins. Co.*, 514 S.W.3d 319, 329–330 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *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.); *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 563–564 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Amine v. Liberty Lloyds of Tex. Ins. Co.*, No. 01-06-00396-CV, 2007 WL 2264477, at *5 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007, no pet.) (mem. op.); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343 (Tex. App.—Corpus Christi 2004, pet. denied).

[12] *Quibodeaux v. Nautilus Ins. Co.*, 655 F. App'x 984, 988 (5th Cir. 2016); *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 861 (5th Cir. 2003).

[13] *Neff v. Allstate Vehicle & Prop. Ins. Co.*, No. 5:17-CV-191-DAE, 2019 WL 1560473, at *6 (W.D. Tex. Feb. 28, 2019); *Dean v. State Farm Lloyds*, No. 5:16-CV-1321-DAE, 2018 WL 6430534, at *8–9 (W.D. Tex. Nov. 20, 2018); *Mattox v. Safeco Ins. Co. of Ind.*, No. 1:16-CV-1037-DAE, 2018 WL 3603102, at *4 (W.D. Tex. May 29, 2018); *Gamez v. State Farm Lloyds*, No. 5:17-CV-508-DAE, 2018 WL 2251364, at *1 (W.D. Tex. Mar. 19, 2018); *SPJST Lodge #154 & Am. Sokol Org. v. Century Sur. Co.*, No. 4:15-CV-00710-O, 2017 WL 5642613, at *3 (N.D. Tex. Apr. 11, 2017); *McEntyre v. State Farm Lloyds, Inc.*, No. 4:15-CV-00213, 2016 WL 6071598, at *6 (E.D. Tex. Oct. 17, 2016); *Studer v. Lloyds*, No. 4:13-CV-413, 2016 WL 4063782, at *8 (E.D. Tex. July 29, 2016); *Barry v. Allstate Tex. Lloyds*, No. 4:14-CV-00870, 2015 WL 1470429, at *6 (S.D. Tex. Mar. 31, 2015); *Scalise v. Allstate Tex. Lloyds*, No. 7:13-CV-178, 2013 WL 6835248, at *6 (S.D. Tex. Dec. 20, 2013); *Michels v. Safeco Ins. Co. of Ind.*, No. A-12-CA-511-SS, 2013 WL 12076562, at *5 (W.D. Tex. Mar. 13, 2013); *Mag-Dolphus, Inc. v. Ohio Cas. Ins. Co.*, 906 F. Supp. 2d 642 (S.D. Tex. 2012); *Medistar Twelve Oaks Partners, Ltd. v. Am. Econ. Ins. Co.*, No. H-09-3828, 2011 WL 3236192, at *9 (S.D. Tex. July 27, 2011).

[14] *Graber v. State Farm Lloyds*, No. 3:13–CV–2671–B, 2015 WL 3755030, at *10 (N.D. Tex. June 15, 2015) (concluding that "State Farm's full and timely payment of the appraisal award [did] not preclude Plaintiff's claim for statutory interest under the TPPCA as a matter of law" and denying State Farm's motion for summary judgment on that issue).

Fifth Circuit later disapproved of that decision's reasoning.[15] In eight legislative sessions, not a single bill has been introduced to correct or repudiate this unanimous caselaw.

Today, the Court holds that in 1991, the Legislature not only intended but *clearly* intended, in plain language no less, to penalize the use of the appraisal process to resolve covered claims, contrary to two dozen decisions of a dozen courts, which the Legislature has left undisturbed for more than a decade. There is a better way to read the Act. I respectfully dissent.

I

Petitioner Barbara Technologies Corporation, managed by Bart and Barbara Spaur, owns a small, commercial rental building in northwest San Antonio insured by respondent State Farm Lloyds. The building has a flat, asphalt (modified bitumen) roof, which is a little more than 1,000 square feet in size and at least 20 years old. After a hailstorm on March 31, 2013, leaks developed, and the Spaurs had most of the roof covered with an elastomeric (rubber-like) coating and had some areas covered with roof cement (sealant). But more than six months later, hearing that the hotel across the street and the adjacent strip shopping center were getting new roofs, Bart filed a claim with State Farm on October 17. State Farm tried to reach the Spaurs by phone the next day and left word to set up an appointment for an inspection. Bart called back on October 24, and the inspection was scheduled for a few days later.[16]

[15] *Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255, 259 (5th Cir. 2017) ("The most fundamental problem with *Graber* is that it did not recognize 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.").

[16] The record is conflicting whether the inspection took place on October 30 or 31.

On the day of the inspection, State Farm's adjuster met Bart and his roofer at the building. No roof damage was visible because of the coating and sealant, but the roofer insisted that indentations underneath could still be felt. The adjuster disagreed. The part of the roof that had not been covered with coating and sealant showed no hail damage, and a metal roof over the front entryway was likewise undamaged. Air conditioning units on the roof were also undamaged, but there were splatter marks showing the size of the hail. On November 4, State Farm notified Barbara Technologies that it found only $3,153.57 in damage to the roof, which was less than the policy's $5,000 deductible.

Over three months later, on February 21, 2014, Barbara asked State Farm to have a different adjuster reinspect the roof because several roofers had told her that the roof had hail damage. Although State Farm was not obligated to conduct a second inspection, it agreed to do so. A different adjuster met with the Spaurs and a new roofer on March 4. The roofer tried to expose dents in the roof beneath the coating and sealant but could not do so. The next day, State Farm notified the Spaurs that it still could find no evidence of the hail damage they claimed.

On July 14, Barbara Technologies sued State Farm for refusing to pay its claim. It asserted, among other things, violations of the Act, statutory and common law bad faith, and breach of contract. On January 9, 2015, State Farm invoked its right to an appraisal under the policy. The policy provided:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. Each party will notify the other of the selected appraiser's identity within 20 days after receipt of the written demand for an appraisal. The two appraisers will select an umpire. If the appraisers cannot agree

> upon an umpire within 15 days, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

On August 18, the Spaurs' appraiser and the umpire awarded $195,345.63 in damages due to the hailstorm. On August 25, five business days later, State Farm paid the award less appreciation and the deductible—$178,845.25.

Barbara Technologies amended its petition to drop all its claims except for violations of the Act. The trial court granted summary judgment for State Farm. The court of appeals affirmed, adhering to its precedent, which we had declined to review, as well as "a long line of cases holding that a full and timely payment of an appraisal award under the policy precludes an insured from recovering penalties under the [Act] as a matter of law."[17]

II

As noted at the outset, this Court has always viewed the appraisal process, in use for more than a century, as a positive means for resolving insurance claims. The Legislature has expressly provided for the appraisal of some claims.[18] It is difficult to imagine that the Legislature could have intended anything that would impede the utility of appraisals to insurers and insureds alike, that courts would fail to recognize that intent for 28 years, or that the Legislature would itself acquiesce in the failure.

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[17] 566 S.W.3d 294, 296–297 (discussing *Garcia*, 514 S.W.3d at 275–276).

[18] *See, e.g.*, § 2210.574(b) (authorizing a claimant to demand appraisal of a loss under a windstorm-and-hail-damage insurance policy).

An appraisal establishes the amount of loss, but not liability, though ordinarily little or nothing is left for trial. The right to request an appraisal does not arise until the insurer and insured "disagree on the value of the property or the amount of loss". Ordinarily, disagreement would be precipitated by the insurer's rejection of all or part of the claim. An appraisal cannot resolve a disagreement over coverage. By the time an appraisal offers a means of resolution, coverage issues should have been resolved.

The Act sets deadlines for the prompt payment of insurance claims.[19] Within 15 days of receiving notice of a claim, an insurer must acknowledge receipt, commence any investigation, and "request from the claimant all items, statements, and forms that the insurer reasonably believes, *at that time*, will be required from the claimant."[20] This need not be a one-time request. "An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary."[21] For ease of reference, I refer to all these materials as the "Info". Within 15 days of receiving the Info, an insurer must notify the claimant "of the acceptance or rejection of [the] claim".[22] Finally, within five days of accepting all or part of a claim, the insurer must pay the amount accepted.[23]

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[19] I omit mention of various exceptions immaterial to the present case.

[20] § 542.055(a) (emphasis added).

[21] § 542.055(b).

[22] § 542.056(a).

[23] § 542.057(a).

Nothing in the Act suggests that after an insurer rejects a claim, the investigation cannot be reopened, either at the claimant's request or by the insurer on its own. Neither does the Act provide for reopening an investigation. It is silent on the subject. In this case, after State Farm initially rejected the claim, Barbara Technologies asked State Farm to take a fresh look with additional information, which it did. Had State Farm decided that its first decision was wrong and that the claim should be paid after all, nothing in the Act suggests that its reconsideration, in good faith, would violate the deadlines. In that situation, the deadlines simply reset, lest the insurer be incentivized to stand pat when it would not do so otherwise.

The Court says that "the rejection or acceptance of a claim is the insurer's acknowledgment that it had all the information it needed from the claimant to determine whether the claimant was entitled to benefits under the policy."[24] But as noted, the Act requires only that an insurer request Info that it "reasonably believes, *at that time*, will be required".[25] The necessary implication is that other Info may be required later. The Court agrees that an insurer should reconsider its decision based on new Info but then holds that if the insurer does so, it violates the Act's deadlines. The only way to serve the Act is to violate it.

The Act does not mention appraisals. It is unlikely that an appraisal would be requested by either the insurer or the insured before a claim is rejected in whole or in part, since the policy right to an appraisal is triggered by a "disagree[ment] on the value of the property or the amount of loss". But if a preclaim-determination appraisal were requested, the award would certainly be part of the

[24] *Ante* at ___.

[25] § 542.055(a) (emphasis added).

Info—information the insurer could reasonably need to evaluate the claim. And that information would necessarily come from the claimant through the appraisal of his property. Accordingly, the period for accepting or rejecting the claim would not begin to run until the appraisal award was rendered. An appraisal performed after a claim has been initially rejected in whole or in part and the investigation reopened should be treated no differently than one performed before an initial rejection. Because an appraisal award cannot be contested, that amount becomes the amount of the claim.

The Court concludes that an insurer's request for an appraisal is not a request for Info to determine the claim but an exercise of its contractual right under the policy.[26] The one has nothing to do with the other. An insurer's exercise of its contractual right does not take away from the fact that it unquestionably receives Info from an appraisal. As the Court acknowledges, an insurer could hire its own third-party appraiser to provide Info as part of its investigation.[27] There is no difference between Info supplied by third-party appraisers acting independently or as part of an appraisal.

For violations, the Act contains two provisions for imposing penalties. Section 542.060(a) states that "if an insurer that is liable for a claim . . . is not in compliance with this subchapter, the insurer is liable to pay . . . , in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees."[28] Section 542.058(a)–(b) provides that if the insurer "delays payment of the claim" for more

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[26] *Ante* at ___.

[27] *Ante* at ___ n.8.

[28] *Id.* § 542.060(a).

than 60 days after receiving the Info, "the insurer shall pay damages and other items as provided by Section 542.060" unless "it is found as a result of arbitration or litigation that a claim received by an insurer is invalid and should not be paid by the insurer."[29] While Section 542.060(a) is broader, both sections apply to delayed payments in the same way. An insurer is not "liable for a claim" under Section 542.060(a) that is adjudicated invalid or nonpayable under Section 542.058(b).[30]

Several times the Court insists that the Act is clear, yet it cannot say whether Section 542.060(a) applies to this case or whether the standards for imposing a penalty—liable under Section 542.060(a) and valid and payable under Section 542.058(a)–(b)—are equivalent. The Court concludes that the burden of proving that the standard, whatever it is, has been met is on the insured.[31] But the effect of the Court's application of these sections to payments of postclaim-rejection appraisal awards is to make every appraisal request subject to the penalty. The insured must still prove coverage, but coverage issues are not likely to subsist; otherwise, an appraisal would not go far in resolving the claim and would not be requested. An appraisal can rarely, if ever, be performed in 60 days. An insurer will escape the penalty only if the insured abandons the litigation. At bottom, the Act's complete silence on appraisals, in the Court's view, discourages them, despite their recognized value in resolving disputes, including the one in this case.

The 60-day period in Section 542.058(a) does not begin to run until the insurer has all the Info needed to determine whether to accept or reject the claim. The amount of the claim is a critical

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[29] *Id.* § 542.058(a)–(b).

[30] JUSTICE BOYD would hold that voluntary payment of a claim renders an insurer liable. *See Ante* at ___. In other words, unlike every other person or entity imaginable, an insurer cannot settle a claim without admitting liability.

[31] *Ante* at ___.

piece of information that appraisal supplies. No one would argue that an adjuster's assessment of the amount of damages would be necessary in resolving the claim. That is no different if appraisers perform the same claim's adjustment as part of the appraisal process.

Courts have been unanimous in holding that the Act does not penalize prompt payment of appraisal awards though made more than 60 days after the claim has been rejected in whole or in part. Here is the Court's analysis of those cases in full:

> Although generally short on statutory analysis, we do not disagree with the crux of the courts of appeals' opinions on which State Farm relies—use of the appraisal process to fully resolve a dispute as to the amount of policy benefits due, if owed at all, does not subject the insurer to TPPCA damages. . . . [W]e caution that 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, we disapprove of these opinions. Nothing in the TPPCA would excuse an insurer from liability for TPPCA damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline, regardless of use of the appraisal process.[32]

I think this is a fair paraphrase: the crux of the courts' opinions is that the Act does not penalize a postclaim-rejection payment of an appraisal award, and we do not disagree with that; but the Act does not excuse a postclaim-rejection payment of an appraisal award from its penalties, so we disapprove of them. Well.

Barbara Technologies complains that by requesting appraisals, insurers delay payment in order to exhaust insureds from pursuing payment. But as the Court acknowledges, an insurer that does not timely request an appraisal waives its right,[33] and an insurer that uses the appraisal process

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[32] *Ante* at ___ (citations omitted).

[33] *Ante* at ___.

in bad faith is subject to suit under Chapter 541.[34] Barbara Technologies does not explain why only the Act's penalties are adequate protection of its interests.

The result of today's decision is this: If an appraisal is requested, either by the insurer or the insured, after a claim has been rejected in whole or in part, and the insurer immediately pays the award, it is nevertheless liable for 18% interest and attorney fees if the claim is later adjudicated to be covered by the policy. Unless the insured gives up, litigation is unavoidable, either over the rejection or over the penalty. If that does not make appraisal requests unlikely, it certainly makes them less likely. The Court renders the appraisal process it praises of little use.

We are, of course, bound by the text of the Act and cannot rewrite it to achieve what we think are better policies. Under the Act, an insurer is not to be penalized until it has received all information necessary to evaluate a claim. But an appraisal award can be a critical part of that information. The Court's interpretation of the Act is inconsistent with its clear meaning; discourages continued use of a century-old appraisal process that fosters settlements, which the Legislature cannot possibly have intended; and upends 15 years of unanimous caselaw, which the Legislature has had multiple opportunities to correct if wrong.

Accordingly, I respectfully dissent.

Nathan L. Hecht
Chief Justice

Opinion delivered: June 28, 2019

[34] *Ante* at ___.