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BREAKING NEWS ALERT

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This is a Zelle Lonestar Lowdown Breaking News Alert, bringing you the latest news from the trenches on everything related to Texas first-party property insurance claims and litigation. If you are interested in more information on the topic below, please reach out to the author directly. As you all know, Zelle attorneys are always interested in talking about the issues arising in our industry.

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Texas Supreme Court Confirms No Recovery of Attorneys' Fees under Chapter 542A When an Insurer Pays an Appraisal Award and any Statutory Penalty Interest

by **Shannon O'Malley**

The Texas Supreme Court just released its opinion in the closely watched ***Rodriguez v. Safeco Ins. Co. of Ind.*** case. That case involved a claim for tornado-related damage to a home. The insured and insurer disagreed as to the amount of loss and the insured then brought suit against the carrier. After an unsuccessful mediation, Safeco invoked the appraisal provision in the policy. The appraisal panel issued an award, which Safeco promptly paid. Safeco also paid an additional amount that would cover any statutory penalty interest possibly owed on the appraisal award amount.

Safeco filed a motion for summary judgment arguing that Section 542A.007 of the Texas Insurance Code precluded recovery of attorneys' fees upon prompt payment of an appraisal award and statutory penalty interest. The district court agreed and dismissed the Plaintiff's case. The dismissal of the case was appealed to the Fifth Circuit. The Fifth Circuit certified the following question to the Texas Supreme Court:

> In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?

Today, the Texas Supreme Court answered: **Yes.**

The Court analyzed Section 542A.007 and recognized that the Texas Legislature provided a mathematical calculation for courts to follow when assessing attorneys' fees for claims subject to Section 542A. The Court recognized that when an insurer pays an appraisal award and statutory penalty interest, under the mathematical calculation, the amount owed is zero. The Court used its prior discussion in *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019) to confirm that "an insurer's payment of an appraisal award in the face of similar allegations of pre-appraisal underpayment forecloses liability on a breach of contract claim." *Id.* at 132. And under *Ortiz* and the plain language of 542A, the Court determined that because the insurer discharged its liability under the policy by paying the appraisal amount plus any possible statutory interest, there is no further amount that the insured can recover in a judgment for his claim under the insurance policy.

In addition to its general discussion of the statute and its precedent, the Texas Supreme Court addressed the purported fairness questions raised by the insured and amici. The Court decided against speculating on legislative intent and instead noted that the plain language of the statute applied. The Court recognized that whatever the legislature may have intended, "we know with certainty that the Legislature instructed courts to use the mathematical formula described in section 542A.007(a)(3) when determining the amount of attorney's fees available to plaintiffs like Rodriguez." The Court issued this maxim: "Few legislative instructions are as inescapable as a math formula."

Ultimately, the Court recognized the default "American Rule" when it comes to attorneys' fees: parties pay their own. The Court found that the Texas Legislature restricted (if not eliminated) the exception to the American Rule when it issued 542A.

Accordingly, we now have further clarity: When Section 542A of the Texas Insurance Code applies and an insurer promptly pays an appraisal award and any potential statutory penalty interest under 542A, an insured cannot recover attorney's fees.

This decision should curtail policyholder attorneys from signing up clients on a full contingency fee basis when there is the expectation and strategy to simply demand appraisal. Rather than earning a fee for what is essentially no work, lawyers will be discouraged from charging what is arguably an unconscionable fee. Otherwise, policyholder attorneys run the risk of violating Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct ("(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."). As the Texas Supreme Court has previously said "appraisal requires no attorney, no lawsuits, and no pleadings." It stands to follow that signing up a client and charging a full contingency fee in a process that requires no attorneys and where attorneys' fees are unavailable would be unethical.

So, what is the takeaway? The best practice is to send disputes to appraisal early. Appraisal should be a process that does not involve attorneys. We also recommend that carriers strictly follow the guidance from Chapter 542 in terms of requesting information, meeting deadlines to accept or deny coverage, and continually communicating the carrier's needs for reasonable information. Further, by promptly paying appraisal awards and any potential statutory penalty interest on alleged late payments, carriers can continue to try to stem the tide of abusive and unnecessary litigation.

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