

Post-Appraisal Summary Judgment Affirmed – and Gutted

Texas Supreme Court issues two post appraisal summary judgment opinions.

By: Will Beasley

We love appraisal. It has been, and remains, an important tool for insurers dealing with Texas' cottage hail claim industry. For years the law was that, after timely paying an appraisal award, *all* the insured's claims (which usually include everything creative counsel can think of) are resolved. But this result has been under attack. As we previously wrote, after a concerted effort by insureds to force the issue through the appellate food chain, the Texas Supreme Court took up two post-appraisal summary judgment cases. We now have the Court's opinions.



The result: you're probably going to have to pay a little more after appraisal.

While you likely won't have to pay so much that you should fear appraisal, this is a big deal. It changes over a decade of solid Texas law, and leaves both sides of the bar unhappy. Plaintiffs' bar thinks that the Court should have gone farther to allow additional claims. The defense bar thinks that the longstanding precedent should have remained unchanged. Given that there is unhappiness on both sides, as well as murky issues left open, only time will tell how it will play out in the lower courts—or if the Supreme Court has more to say down the road (we think they do). In the meantime, it is likely that lower courts will find (though we strongly disagree) that Insurers face extra liability in the form of Prompt Pay Act damages—18% interest and attorneys' fees.

The opinions separate an insured's claims into three groups: (1) breach of contract; (2) bad faith;¹ and (3) Prompt Pay. The good news is that there is no news for breach of contract and bad faith claims. The opinions cemented appraisal's effectiveness in defeating them. Once an appraisal award is paid, there can be no breach of contract; and there can be no bad faith liability, unless there is an "independent injury," which would be extremely rare.

¹ Though the Court did not issue an opinion on fraud and other extra-contractual claims (those claims were not appealed), the Court's bad faith analysis should apply to them as well.

Texas • Florida
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Dallas

1301 Solana Blvd.
Bldg. 1, Suite 1545
Westlake, Texas 76262
(214) 722-7160

Miami

1200 Brickell Avenue
Suite 1950
Miami, Florida 33131
(305) 961-1691

www.langley.law

To “Go Green”, our firm uses recy-
clable paper or ceramic cups and
no longer uses Styrofoam cups. In
addition, we have adopted a
less-paper office environment.

We hope that these changes make
big differences in the future.

Well done is better than well said.

- Benjamin Franklin



But what about Prompt Pay? Well, that’s where the extra liability is. The Texas Prompt Pay Act requires an insurer to pay 18% interest and attorneys’ fees to an insured when a valid claim is not timely paid; generally, 60 days after the insurer completes its investigation.² The law had been that there can be no Prompt Pay interest (or fees) once an appraisal award was timely paid. This is no longer the case.

The Court ruled that “[n]othing in the [Prompt Pay Act] would excuse an insurer from liability for [Prompt Pay] damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline, regardless of the use of the appraisal process.”³ While we believe this result is wrong, and indeed so did Chief Justice Hecht in an impassioned dissent; is the outcome really that bad?

In most cases, no. In most cases, copy paste claims (usually hail related) result in appraisal awards of only a few grand. In most cases, 18% interest is a small price to pay to quickly and efficiently close the door on other claims (as well as limit recoverable fees). However, in cases where there is the potential for a large appraisal award, especially if a long time has passed since the claim was filed, the possibility of prompt pay interest will play a key role in the decision to invoke appraisal (by either party).

Our advice in light of this change? Don’t be afraid to invoke appraisal on your next insurance dispute. It is still a very useful tool in combatting cut and paste “claims” that are filed once an insured retains counsel. However, factoring in the potential for 18% interest and attorneys’ fees should be part of the decision.

² The exact dates for when interest will accrue are murky under the Court’s opinion. Luckily, in most cases, the potential differences in time should be inconsequential.

³ While the insured must still prove liability under the policy to obtain prompt pay interest, in most cases, once an appraisal award has been paid, coverage under the policy is generally a foregone conclusion.