FILED
17-1048
2/13/2019 3:45 PM
tex-31177521
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 17-1048

In the Supreme Court of Texas

Oscar Ortiz,

Petitioner,

v.

State Farm Lloyds,

Respondent.

On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas

BRIEF OF *AMICI CURIAE* INSURANCE COUNCIL OF TEXAS, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

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To the Honorable Supreme Court of Texas:

STATEMENT OF INTEREST

The Insurance Council of Texas (ICT) is a nonprofit trade association of over 400 property and casualty insurers writing business in Texas. ICT's members represent 78% of the private property and casualty insurance market in Texas, with $32.4 billion in Texas premiums written in 2017. Among other functions, ICT advocates on behalf of its members in the regulatory process, reports to its members on important legislative and regulatory changes and key court decisions, and presents seminars and conferences on insurance-related issues.

The National Association of Mutual Insurance Companies (NAMIC) is the oldest property/casualty insurance trade association in the country, with more than 1,400 member companies representing 41% of the total market. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies serve more than 170 million policyholders and write more than $253 billion in annual premiums. Its members account for 54% of the national homeowners insurance market, 43% of the automobile insurance market, and 35% of the business insurance market. Through its advocacy programs, NAMIC promotes public policy solutions that (1) benefit its member companies and the policyholders they serve

and (2) foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

The American Property Casualty Insurance Association (APCIA) is the preeminent national trade association representing property and casualty insurers doing business in Texas, nationwide, and globally. APCIA was recently formed through a merger of two longstanding trade associations: American Insurance Association and Property Casualty Insurers Association of America. APCIA's members, which range from small companies to the largest insurers with global operations, represent nearly 60% of the property and casualty marketplace in the United States. On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels. APCIA's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

In order to share their broad national and statewide perspectives with the judiciary on matters that shape and develop the law, ICT, NAMIC, and APCIA also submit amicus briefs in court cases that are of widespread interest to their members. This is such a case. For the last fifteen years, Texas and federal courts have consistently held that an insurer's timely request for appraisal and payment of the resulting award bars the insured's contractual and extracontractual claims. Mr.

Ortiz and insureds in other cases seek to undermine the contractual right of appraisal and its purpose—serving as a cheaper, more efficient alternative to litigation—by arguing that they can continue to pursue litigation even after their claims have been paid in full. To ensure that the Court is fully-informed about this important issue, ICT, NAMIC, and APCIA are paying the cost of preparing this amicus brief.[1]

[1] Respondent State Farm Lloyds and other State Farm entities are members of ICT, and the parent company of State Farm Lloyds is a member of NAMIC. In the interest of full disclosure, counsel for the *amici curiae* also notes that he and his firm represent the insurer in a case involving the same issue in this Court—*Zhu v. First Community Insurance Co.*, No. 18-0270—and that his firm represents State Farm Lloyds and other State Farm entities in other cases.

INTRODUCTION

Appraisal provisions are part of virtually every homeowners, auto, and commercial property insurance policy sold in this state. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 889 (Tex. 2009). This Court has enforced such provisions for over 130 years. *See Scottish Union & Nat'l Ins. Co. v. Clancy*, 71 Tex. 5, 8 S.W. 630, 631 (1888) (stating that an appraisal provision in a fire insurance policy was a valid condition precedent to the insured's right of action); *Johnson*, 290 S.W.3d at 895 (stating that appraisal clauses, like any other contract provision, should be enforced). The *Johnson* Court explained that "appraisal is intended to take place before suit is filed" and "require[s] no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings." *Johnson*, 290 S.W.3d at 894. As the Court observed in another case, "[a]ppraisals can provide a less expensive, more efficient alternative to litigation . . . ." *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 407 (Tex. 2011) (orig. proceeding).

Although exact figures are unavailable, ICT estimates that its members are involved in thousands of appraisals in Texas each year. Appraisal works well and is an effective tool for expediting the resolution and payment of disputed claims. However, this case and other similar cases before the Court represent the third phase of a three-phased attack on the contractual right of appraisal and its underlying purpose.

First, in the wave of litigation following Hurricane Ike in 2008, the plaintiff's bar argued—with some initial success—that insurers had waived the right of appraisal by "waiting" until after suit was filed to request appraisal. *See, e.g.*, *Universal Underwriters*, 345 S.W.3d at 406 (granting mandamus relief from trial court's denial of appraisal); *In re Slavonic Mut. Fire Ins. Ass'n,* 308 S.W.3d 556, 560-65 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (same[2]); *Sanchez v. Prop. & Cas. Ins. Co. of Hartford*, No. H-09-1736, 2010 WL 416387, at *8-9 (S.D. Tex. Jan. 27, 2010) (denying insurer's motion to compel appraisal). This argument was made even though suit was often filed before the insurer had notice of an impasse over the value of the loss (or even a dispute), and simultaneously with the service of a DTPA/Insurance Code notice letter[3] demanding payment of (1) damages that often exceeded the insured value of the property and (2) a six-figure amount of attorney's fees. *See, e.g.*, *Slavonic Mut.*, 308 S.W.3d at 558-60 (notice letter demanded $449,887.50 in damages on policy with $135,000 dwelling limit and attorney's fees/costs of $116,629.16); *Sanchez*, 2010 WL 413687, at *2 (notice letter demanded treble the policy limit).

Universal Underwriters rightly rejected this waiver theory, holding that the right of appraisal is not waived unless (1) the insurer unreasonably delays in

[2] This decision was overruled on other grounds as recognized in *In re Cypress Texas Lloyds*, No. 14-11-00713-CV, 2011 WL 4366984, at *1 (Tex. App.—Houston [14th Dist.] Sept. 20, 2011, orig. proceeding [mand. dism'd]).

[3] Ortiz likewise served his notice letter at the same time he filed suit. (CR 8-14, 50-51).

requesting appraisal after the parties reach an impasse in negotiations over the amount of the loss, and (2) the delay prejudices the insured. 345 S.W.3d at 410-12. Importantly, the Court also observed that it was difficult to see how prejudice could ever be shown given that both sides could avoid prejudice by simply requesting appraisal. *Id.* at 412. As the Court noted, "[t]his could short-circuit potential litigation and should be pursued before resorting to the courts." *Id.*

In the second phase of the attack on appraisal, the plaintiff's bar has been more successful. Once this Court ruled that appraisal provisions would be enforced, insureds switched tactics and opposed abatement of litigation during the appraisal process. This tactic partially undermined the purpose of appraisal, which again is to serve as a cheaper and more efficient alternative to litigation. But Texas courts, including this Court, concluded that abatement during the appraisal process was discretionary with the trial court and not subject to challenge by mandamus. *See, e.g., Universal Underwriters*, 345 S.W.3d at 412 n.5; *In re Cypress Tex. Lloyds*, 2011 WL 4366984, at *1. This has generally meant that litigation continues during the appraisal process.

The third phase of the attack on the contractual right of appraisal is represented in this case and similar cases pending before the Court. In this phase, the plaintiff's bar argues that an insurer's timely payment of an appraisal award does not end the litigation. They instead contend that they can continue to pursue

breach of contract, common law and statutory bad faith, and Prompt Payment Act claims on behalf of their clients and, most importantly, pursue recovery of attorney's fees. At least until now, however, Texas courts and federal courts applying Texas law have uniformly rejected this argument and held that the timely payment of an appraisal award bars both contractual and extracontractual claims. Ortiz and other plaintiffs ask this Court to overturn this well-settled case law spanning fifteen years, even though the Legislature has never seen fit to amend the Insurance Code to overturn those cases. Plaintiffs insist that they should be able to recover attorney's fees incurred before, during, and after the appraisal process.

These cases are all about the right to recover those unnecessary fees.

ARGUMENT

I. Overview of the Appraisal Process

Appraisal provisions, like the one at issue here, generally state that if the insurer and insured disagree on the amount of the loss, either may demand appraisal and select a competent and disinterested appraiser. Those two appraisers then select a competent, impartial umpire. If the two appraisers cannot agree on an umpire, a judge can be asked to select the umpire. The appraisers then determine the amount of the loss. If they cannot agree, they submit their differences to the umpire. In that scenario, the agreement of two of the three will set the amount of the loss. Each party pays the appraiser that party selected, and the parties equally

share the other appraisal expenses, including compensation of the umpire. (CR 354).

As expressly stated in appraisal clauses and recognized by this Court, appraisals determine the amount of the loss only—not coverage or liability for the loss. *Johnson*, 290 S.W.3d at 888-90. But drawing the line between a valuation issue and a coverage issue can be difficult. *Id.* at 891-93. For that reason, and also because appraisals may occur months or even years after the loss when noncovered events such as wear and tear have occurred, appraisal awards often contain uncovered or partially-covered amounts. Moreover, appraisal awards tend to reflect compromise valuations because of the structure of the appraisal panel: each side selects one appraiser, and the appraisers chose a neutral umpire, often a former judge or mediator who may have little or no experience in valuing property losses.

II. Impact of Appraisal and Payment of Award on Insurer's Liability

Given that appraisal awards may include uncovered amounts and are the product of compromise, the unsurprising fact that an award may exceed the amount originally offered or paid by the insurer on the claim does not establish a breach of the policy. *See, e.g., Marchbanks v. Liberty Ins. Corp.*, 558 S.W.3d 308, 313-14 (Tex. App.—Houston [14th Dist.] 2018, pet. filed). Nor does the insurer's decision to pay the appraisal award, in lieu of incurring the economic and other costs of litigating with its customer (the insured), constitute an admission of liability for the

award amount. Appraisal is the contractually-recognized mechanism for determining a dispute over the amount of the loss. *Universal Underwriters*, 345 S.W.3d at 407 (citing *Johnson*, 290 S.W.3d at 886). An insurer does not breach the insurance contract by timely invoking the contractual mechanism for determining the amount of the loss and then timely paying the appraisal award, which represents the maximum possible amount owed under the policy.[4]

Ortiz argues that under the *Menchaca* decision, an insurer can have liability under the Texas Insurance Code even if it does not breach the contract. (Ortiz's Brief on Merits [BOM] at 12). *See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018) (opin. on reh'g). But *Menchaca* was not an appraisal case and does not specifically speak to the issues presented in such cases. And although Ortiz is correct that a formal finding of breach of contract is not required under *Menchaca*, the insured must establish either (1) a right to policy benefits that have not already been paid, or (2) some injury independent of the right to recover policy benefits—injury that this Court has characterized as rare and has never, in fact, found. *Id.* at 494 & n. 17, 499-501, 506 n.27. Ortiz cannot establish the former

[4] *Universal Underwriters* does not hold otherwise. The issue there was whether the insurer had waived the right of appraisal, as opposed to what the legal effect of an appraisal award was. In the course of explaining why the insurer lacked an adequate remedy for the denial of appraisal, the Court used overly-broad language in characterizing appraisal as the method for determining whether a breach of contract has occurred. *Id.* at 412 (citing *In re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002)). The Court did not say, however, that a breach is established by an appraisal award that exceeds the amount the insurer previously offered or paid. Any such statement would have been contrary to *Johnson*, which recognized that appraisal determines only the amount of the loss rather than liability for the loss. *Johnson*, 290 S.W.3d at 888-90.

given State Farm's timely request for appraisal and payment of the appraisal award, and he does not appear to argue the latter.[5]

Similarly, liability under the Prompt Payment statute—Texas Insurance Code §§ 542.051-.061—requires that the insurer be liable on the claim. *Allstate Ins. Co. v. Bonner*, 51 S.W.3d 289, 291 (Tex. 2001). This means liability for the amount ultimately determined to be owed, net of any amount the insurer paid before the determination. *See Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 426 (Tex. 2004).[6] This "liability" requirement is not satisfied when the insurer timely requests appraisal and timely pays the appraisal award before any legal determination of liability. *See Marchbanks*, 558 S.W.3d at 313.

Moreover, the Prompt Payment statute allows an insurer to request information and forms from the claimant necessary to adjust the claim, and requires the insurer (1) to notify the insured of the acceptance or rejection of the claim within fifteen business days after receiving the requested items and (2) to pay an accepted claim within five business days thereafter. *See* Tex. Ins. Code

[5] To the extent Ortiz argues that the costs of appraisal constitute independent injury, he is incorrect. The appraisal clause expressly requires that the parties split appraisal costs. (CR 354).

[6] Notably, the *Mex-Tex* Court cited with apparent approval a court of appeals' decision holding that the statutory penalty could not be imposed against the insurer for periods of delayed payment caused by the insured. *Id.* at 426 n.9 (citing *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 264 (Tex. App.—Austin 2002, pet. granted, judgm't vacated w.r.m. by agr.)). In the event that the Court agrees with Ortiz's argument that timely payment of an appraisal award does not bar liability under the Prompt Payment statute, the Court should, at minimum, make clear that the statutory penalty and attorney's fees cannot be recovered for periods of delay caused by the insured—for example, delays in giving notice of a claim or filing suit or delays caused by the insured opposing appraisal.

Ann. §§ 542.055-.057 (West 2009). An insurer's request for appraisal should be considered an information request under section 542.055 that extends the deadline to accept a claim until fifteen business days after receipt of the appraisal award.

If the contrary argument of the insureds in this case and the companion case[7] are accepted, the consequence will be that insurers will *always* incur Prompt Payment liability whenever they exercise their contractual right of appraisal. Although appraisal is expeditious compared to litigation, appraisal generally takes at least a few months to complete. Unless a request for appraisal is considered to be a request for information under section 542.055, there is no practical way to complete the process within the statutory deadlines for acknowledging a claim, notifying the insured of the claim decision, and paying the claim. This Court should not construe the Prompt Payment statute in a manner that undermines the contractual right of appraisal and its purpose of providing a cheaper, more efficient alternative to litigation.

III. Texas and Federal Courts Uniformly Hold That an Insurer's Timely Payment of an Appraisal Award Bars an Insured's Contractual and Extracontractual Claims

Given the purpose of appraisal provisions and the general principles on contractual and extracontractual liability discussed above, it is unsurprising that Texas appellate courts have consistently held that an insurer's timely payment of

[7] *Barbara Technologies Corp. v. State Farm Lloyds*, No. 17-0640.

an appraisal award precludes both contractual and extracontractual liability (absent independent injury). Although the *Breshears* decision in 2004 is most often cited as the first Texas appellate decision, the Texas cases so holding actually date back to 1996. *See Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 940-42 (Tex. App.—San Antonio 1996, no writ); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343-45 (Tex. App.—Corpus Christi 2004, pet. denied). The Texas appellate court decisions following *Toonen* and *Breshears* are legion.[8] And this Court has denied review in five of those cases over the last fifteen years: in 2004, 2006, 2016 (twice), and 2017.

[8] *See, e.g.*, *Hinojos v. State Farm Lloyds*, No. 08-16-00121-CV, 2019 WL 257883, at *3-7 (Tex. App.—El Paso Jan. 18, 2019, no pet. h.); *Marchbanks v. Liberty Ins. Corp.*, 558 S.W.3d 308, 311-16 (Tex. App.—Houston [14th Dist.] 2018, pet. filed) (Prompt Payment claim only); *Biasatti v. GuideOne Nat'l Ins. Co.*, 560 S.W.3d 739, 742-44 (Tex. App.—Amarillo 2018, pet. filed); *Turner v. Peerless Indem. Co.*, No. 07-17-00279-CV, 2018 WL 2709489, at *2-5 (Tex. App.—Amarillo June 5, 2018, no pet.); *Zhu v. First Cmty. Ins. Co.*, 543 S.W.3d 428, 434-39 (Tex. App.—Houston [14th Dist.] 2018, pet. filed); *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 845-49 (Tex. App.—Houston [14th Dist.] 2017, pet. filed); *Ortiz v. State Farm Lloyds*, No. 04-17-00252-CV, 2017 WL 5162315, at *3 (Tex. App.—San Antonio Nov. 18, 2017, pet. granted); *Floyd Circle Partners, LLC v. Republic Lloyds*, No. 05-16-00224-CV, 2017 WL 3124469, at *6-10 (Tex. App.—Dallas July 24, 2017, pet. denied); *Barbara Techs. Corp. v. State Farm Lloyds*, No. 04-16-00420-CV, 2017 WL 1423714, at *2 (Tex. App.—San Antonio Apr. 19, 2017, pet. granted) (Prompt Payment claim only); *Garcia v. State Farm Lloyds*, 514 S.W.3d 257, 273-79 (Tex. App.—San Antonio 2016, pet. denied); *Anderson v. Am. Risk Ins. Co.*, No. 01-15-00257-CV, 2016 WL 3438243, at *4-8 (Tex. App.—Houston [1st Dist.] June 21, 2016, no pet.); *Richardson E. Baptist Church v. Philadelphia Indem. Ins. Co.*, No. 05-14-01491-CV, 2016 WL 1242480, at *4-6 (Tex. App.—Dallas Mar. 30, 2016, pet. denied); *Bernstein v. Safeco Ins. Co. of Ill.*, No. 05-13-01533-CV, 2015 WL 3958282, at *1-2 (Tex. App.—Dallas June 30, 2015, no pet.) (bad faith and Prompt Payment claims only); *Amine v. Liberty Lloyds of Tex. Ins. Co.*, No. 01-06-00396-CV, 2007 WL 2264477, at *4-6 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007, no pet.) (Prompt Payment claim only); *Lundstrom v. United Servs. Auto. Ass'n*, 192 S.W.3d 78, 87-98 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Franco v. Slavonic Mut. Fire Ins. Co.*, 154 S.W.3d 777, 785-88 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Federal courts applying Texas law, including the Fifth Circuit, have likewise held that an insurer's timely payment of an appraisal award bars contractual and extracontractual liability (absent independent injury).[9] The partial outlier decision is *Graber v. State Farm Lloyds*, No. 3:13-CV-2671-B, 2015 WL 3755030 (N.D. Tex. June 15, 2015). There, the district court held that the insurer's payment of the appraisal award precluded liability for breach of contract and common-law and statutory bad faith, but not liability under the Prompt Payment statute. *Id.* at *3-10. However, the Fifth Circuit subsequently disapproved *Graber*'s holding on the Prompt Payment issue, concluding that the district court violated its *Erie* duty to follow the Texas state court decisions and misread one of the Fifth Circuit's decisions. *See Mainali Corp.*, 872 F.3d at 259 (holding that insurer's timely payment of appraisal award precluded liability on contract and Prompt Payment claims); *see also Zhu*, 543 S.W.3d at 435 (noting that *Graber* conflicts with Texas law and has been disapproved by the Fifth Circuit).

[9] *See, e.g.*, *Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255, 258-59 (5th Cir. 2017); *Quibodeaux v. Nautilus Ins. Co.*, 655 Fed. App'x 984, 986-88 (5th Cir. July 7, 2016); *Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, 459 Fed. App'x 366, 368-69 (5th Cir. Jan. 24, 2012); *McEntyre v. State Farm Lloyds, Inc.*, No. 4:15-CV-00213, 2016 WL 6071598, at *4-6 (E.D. Tex. Oct. 17, 2016); *Carter v. State Auto Prop. & Cas. Ins. Co.*, No. 6:14-CV-00468, 2016 WL 4401292, at *2-4 (W.D. Tex. Jan. 6, 2016); *United Neurology, P.A. v. Hartford Lloyd's Ins. Co.*, 101 F. Supp. 3d 584, 617-20 (S.D. Tex. 2015), *aff'd*, 624 Fed. App'x 225 (5th Cir. Dec. 11, 2015); *Scalise v. Allstate Tex. Lloyds*, No. 7:13-CV-178, 2013 WL 6835248, at *4-8 (S.D. Tex. Dec. 20, 2013); *Mag-Dolphus, Inc. v. Ohio Cas. Ins. Co.*, 906 F. Supp. 2d 642, 647-52 (S.D. Tex. 2012); *Waterhill Cos. Ltd. v. Great Am. Assurance Co.*, No. Civ.A. H-05-4080, 2006 WL 696577, at *2-3 (S.D. Tex. Mar. 16, 2006).

It is difficult to believe that the hundreds of state and federal court judges who have addressed this issue over the last fifteen years have all been wrong, and that therefore the insurers who relied on those decisions have all been wrong too.

IV. The Legislature's Failure to Correct These Court Decisions Suggests Legislative Acceptance of the Courts' Interpretation of the Effect of Payment of Appraisal Awards on Statutory Claims

The Legislature has met in seven regular sessions since 2004, when the *Breshears* court rejected the insured's argument that the insurer violated the Prompt Payment statute by invoking appraisal and then "delaying" payment until after the appraisal award. *Breshears*, 155 S.W.3d at 345. Granted, the full body of case law—including the cases expanding that ruling to other Insurance Code claims—had not been developed as of the first of those sessions. But it certainly was clear by the legislative sessions in 2015 and 2017 how Texas and federal courts were consistently construing Texas Insurance Code chapters 541 (governing unfair or deceptive acts or practices in the insurance business) and 542 (the Prompt Payment statute) in the appraisal context. Although the Legislature has amended both statutes since 2004, including the Prompt Payment statute in 2017, it has never amended either statute to overrule this uniform stream of court decisions.

"It is a firmly established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies that statute without substantial change, we presume that the Legislature has adopted the

judicial interpretation." *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) (citing *Ector Cnty. v. Stringer*, 843 S.W.2d 477, 479-80 n.4 (Tex. 1992); *Robinson v. Cent. Tex. MHMR Ctr.*, 780 S.W.2d 169, 171 (Tex. 1989); *First Employees Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983)). This so-called legislative-acceptance doctrine "'has its greatest force' in 'the area of statutory construction' because 'the Legislature can rectify a court's mistake, and if the Legislature does not do so, there is little reason for the court to reconsider whether its decision was correct.'" *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 779 (Tex. 2018) (quoting *id.* at 799 (Boyd, J., dissenting) (quoting *Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008))).

This Court has sometimes said that the legislative-acceptance doctrine only applies when an ambiguous statute has been construed by a court of last resort (or been given a longstanding construction by a proper administrative officer). *See, e.g., Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). But if not ambiguous in general, chapters 541 and 542 are ambiguous as applied in this specific context because neither mentions appraisal or addresses the legal effect of requesting appraisal and paying an appraisal award. Moreover, the majority opinions in *Grapevine Excavation* and

Tenorio did not mention a "court of last resort" requirement.[10] And in *Grapevine Excavation*, the majority described the legislative-acceptance doctrine as applying when "appellate courts" construe a statute. *Grapevine Excavation, Inc.*, 35 S.W.3d at 5. The Court also relied on "numerous Texas court of appeals decisions . . . over the past twenty years," in addition to two of its opinions (including a per curiam opinion denying writ of error), to support application of the doctrine. *Id.* at 3-5.

The legislative-acceptance doctrine should likewise apply here in light of the Legislature's inaction[11] and the volume and uniformity of Texas and federal court decisions over the last fifteen years. This Court's denial of review in five of the Texas cases, although not dispositive, should also bolster the argument for legislative acceptance. *Cf. Grapevine Excavation, Inc.*, 35 S.W.3d at 3-5 (basing conclusion of legislative acceptance in part on per curiam opinion denying writ of error). At the very least, the Legislature's apparent acceptance of this well-established line of cases should give this Court great pause about reaching a contrary result.

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[10] One of the dissenting opinions in *Tenorio* did refer to the "court of last resort" element. *Tenorio*, 543 S.W.3d at 799 (Boyd, J., dissenting).

[11] The *Tenorio* majority also rejected the dissent's argument that the doctrine does not apply to legislative inaction, noting that the Court has applied the doctrine in instances when the Legislature failed to act, and that the Legislature had in fact amended other provisions of the statute at issue. *Tenorio*, 543 S.W.3d at 780. Similarly, the Legislature has amended various provisions in chapters 541 and 542 since the *Breshears* decision in 2004, without amending those chapters to overrule the *Breshears* line of cases.

V. The Practical Consequences of the Court's Decision: Real and Imagined

Ortiz and the insured in the *Barbara Technologies* case argue that current Texas law encourages insurers to deny or underpay meritorious claims, knowing that their liability will be capped by the appraisal award. But when an insurer requests appraisal, it is faced with a series of unknowns: (1) who the appraiser selected by the insured will be, (2) which umpire the appraisers will pick, (3) what uncovered items may be included in the award, (4) whether and to what extent the award will reflect a compromise by the appraisers and umpire, and (5) what the appraisal award ultimately will be. These unknowns discourage insurers from demanding appraisal without first making a good-faith effort to settle the claim.

Ortiz also complains that the appraisal costs and litigation costs, including attorney's fees, consumed his appraisal award. (BOM at 2). But the appraisal costs are split because that is what the parties' contract requires. (CR 354). And his litigation costs are entirely self-inflicted (or, perhaps more accurately, inflicted by his attorneys). As this Court recognized in *Johnson*, appraisal is intended to occur before suit is filed, and thus before the costs of litigation are incurred. *See Johnson*, 290 S.W.3d at 894; *see also Universal Underwriters*, 345 S.W.3d at 407, 412 (characterizing appraisal as a cheaper, more efficient alternative to litigation and admonishing that it should be pursued before resorting to litigation). Ortiz could have avoided the litigation costs entirely by demanding appraisal before

filing suit—as many other insureds do—and could have at least limited those costs by agreeing to appraisal once State Farm demanded it. (CR 88-93).

In an argument of perhaps unintended irony, the insured in *Barbara Technologies* contends:

> *Breshears* immunity gives the insurer the financial incentive to engage its insured in protracted litigation. Instead of timely exercising its appraisal rights to avoid litigation, an insurer can lie behind the log, evaluate its chances in discovery, and invoke appraisal if the litigation is proceeding poorly.

(Petitioner's Brief on the Merits in No. 17-060, at 21).

That is exactly backwards. The insureds in this case and *Barbara Technologies* could have demanded appraisal before filing suit, but chose not to. Once the insureds filed suit, State Farm timely demanded appraisal. The insured in this case (Ortiz) even opposed appraisal once it was requested. (CR 88-93). These cases and other similar cases are about insurers' attempts to avoid and end litigation by requesting appraisal and timely paying appraisal awards. The insurers are not trying to prolong litigation, which would be contrary to their economic interests.

Rather, the plaintiff's bar is attempting to prolong litigation by opposing the contractual right of appraisal at every step—first trying to prevent appraisal from happening at all by filing suit and arguing waiver of appraisal, then opposing abatement of litigation during appraisal, and finally seeking to continue litigation

even after appraisal awards have been fully and timely paid. If they get their way, the result will be:

- fewer appraisals;
- more and more protracted litigation;
- more delays in insureds being paid on disputed claims; and
- higher premiums.

The only winners will be the attorneys.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Texas Rule of Appellate Procedure 9.4(i)(2)(B) because it contains 4,816 words, not including the parts of the brief excluded by Rule 9.4(i)(1).

/s/ Wade C. Crosnoe
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CERTIFICATE OF SERVICE

I certify that on February 13, 2019, a true and correct copy of this brief was served on all counsel of record by electronic case filing or e-mail:

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