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# In the Supreme Court of Texas

Barbara Technologies Corp., *Petitioner*

v.

State Farm Lloyds, *Respondent*

Oscar Ortiz, *Petitioner*

v.

State Farm Lloyds, *Respondent*

## BRIEF OF *AMICI CURIAE* INSURANCE COUNCIL OF TEXAS, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF MOTIONS FOR REHEARING

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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 homeowner's 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: the American Insurance Association and the 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—cases such as these. To ensure that the Court is fully-informed about

the errors in and consequences of its recent decisions in these cases, ICT, NAMIC, and APCIA are paying the fee for preparing this amicus brief.[1]

[1] Respondent State Farm Lloyds and other State Farm entities are members of ICT, and another State Farm company, State Farm Mutual Automobile Insurance Company, 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

For more than fifteen years, Texas 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, including claims under the Texas Prompt Payment of Claims Act (PPCA).[2] Federal courts have followed those Texas cases, with a single exception that was subsequently disapproved by the Fifth Circuit.[3] In the last eight legislative sessions, the Texas Legislature has never

[2] An illustrative but partial list includes: *Marchbanks v. Liberty Ins. Corp.*, 558 S.W.3d 308, 311-16 (Tex. App.—Houston [14th Dist.] 2018, pet. filed) (PPCA claim only); *Biasatti v. GuideOne Nat'l Ins. Co.*, 560 S.W.3d 739, 742-44 (Tex. App.—Amarillo 2018, pet. filed); *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); *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) (contract and bad faith claims 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) (contract and bad-faith 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.) (PPCA claim only); *Lundstrom v. United Servs. Auto. Ass'n*, 192 S.W.3d 78, 87-98 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343-45 (Tex. App.—Corpus Christi 2004, pet. denied); *Franco v. Slavonic Mut. Fire Ins. Co.*, 154 S.W.3d 777, 785-88 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 940-42 (Tex. App.—San Antonio 1996, no writ) (contract and bad-faith claims only).

[3] An illustrative but partial list includes: *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 Lloyd's London*, 459 Fed. App'x 366, 368-69 (5th Cir. Jan. 24, 2012); *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); *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). *But see Graber v. State Farm Lloyds*, No. 3:13-CV-2671-B, 2015 WL 3755030, at *10 (N.D. Tex. June 15, 2015), *disapproved by Mainali Corp.*, 872 F.3d at 259.

attempted to amend the statute to overrule this uniform line of decisions. It could be said that this Court stood silently by too, although that would not be entirely accurate. The Court denied policyholders' petitions for review in five of the Texas cases, including at least two (*Garcia* and *Breshears*) in which the effect of the payment of an appraisal award on PPCA claims was squarely at issue.

In this Court's recent decisions, however, the majority justices effectively disapproved of the entire *Breshears* line of cases. Based on the slender reed of the Legislature's "silence" about appraisal when it enacted the PPCA (before the recent explosion in the use of appraisal caused by this century's hurricanes and catastrophic storms), the majority concluded that there is no appraisal exception to the statute. The consequence is that an insurer will invariably violate the PPCA and pay damages and attorney's fees whenever appraisal is requested, so long as the insurer's liability for the award is later admitted or established. The Court's decisions will undermine the contractual right of appraisal and its purpose—serving as a cheaper, more efficient alternative to litigation—by extending and creating litigation. The decisions also leave many unanswered questions that will generate even more litigation in the years to come. Accordingly, the *amici* urge the Court to grant rehearing and reverse or clarify its decisions.

## ARGUMENT

### I. The Legislature Has Spoken

The primary thrust of the majority's decisions is that the Legislature consciously chose not to include an appraisal exception in the PPCA's deadlines when enacting the statute in 1991, and this Court is not free to rewrite the statute to create such an exception. *See Barbara Techs. Corp. v. State Farm Lloyds*, No. 17-0640, 2019 WL 2710089, at *5, 14 (Tex. June 28, 2019); *Ortiz v. State Farm Lloyds*, No. 17-1048, 2019 WL 2710032, at *6 (Tex. June 28, 2019) (following the Court's companion decision in *Barbara Technologies* on the PPCA issue). The majority found the Legislature's silence on the appraisal issue particularly significant given that (1) appraisal clauses have been in use since the 1800s, and (2) the Legislature obviously knows how to address appraisal in a statute because it did so in the Texas Windstorm Insurance Association (TWIA) Act. *See Barbara Techs.*, 2019 WL 2710089, at *5 (citing Tex. Ins. Code §§ 2210.574, 2210.579).

There are two fundamental problems with the Court's analysis. To begin with, although appraisals were certainly around before 1991, the enactment of the PPCA that year predated the explosion in the use of appraisals that followed Hurricane Rita in 2005 and, especially, Hurricane Ike in 2008. A review of the dates on the appraisal decisions cited above proves that point. Of those decisions, only one of them that was issued before 2005 addresses the effect of the payment

of an appraisal award on a PPCA claim (the 2004 *Breshears* decision). And the parties have cited no pre-1991 cases that address the effect of the payment of an appraisal award on an insurer's liability.

It is therefore a stretch to say that the Legislature had appraisal on the mind when it enacted the PPCA in 1991 and consciously omitted an appraisal exception. Conversely, given the dramatic uptick in litigation and litigation-related appraisals in the latter half of the last decade, it is hardly surprising that the Legislature amended the TWIA statute in 2011 to require appraisal as the exclusive remedy if the insured wishes to dispute the amount of the loss for a claim where TWIA has accepted or partially accepted coverage. *See* Tex. Ins. Code § 2210.574(b). The Legislature also exempted TWIA from Chapters 541 and 542 of the Insurance Code altogether. *See* Tex. Ins. Code § 2210.014. But what the Legislature did to protect a unique, quasi-governmental entity like TWIA[4] has no relevance to the Legislature's intent regarding contractual appraisal, private insurers, and liability under the PPCA.

With respect to the PPCA and the subject of appraisal, the salient silence by the Legislature is not its 1991 silence but its post-2004 silence. The Legislature could have amended the PPCA in the 2005 session in response to the *Breshears*

[4] The Legislature created TWIA and subjected it to the supervision of the Texas Department of Insurance. *See* Tex. Ins. Code § 2210.001, *et seq*.; *Tex. Catastrophe Prop. Ins. Ass'n v. Council of Co-owners of Saida II Towers Condo. Ass'n*, 706 S.W.2d 644, 644-47 (Tex. 1986) (discussing TWIA's predecessor and former Tex. Ins. Code art. 21.49).

decision (and this Court's denial of review in that case). The Legislature could have amended the PPCA in 2007 (after Hurricane Rita) or in 2009, as the deluge of Hurricane Ike lawsuits began. It could have amended the PPCA in 2011, when it amended the TWIA statute to address appraisal and as the appraisal-related decisions in Hurricane Ike cases became legion. The Legislature likewise could have amended the PPCA in 2013 or 2015, as Texas and federal courts continued to uniformly hold that an insurer's timely payment of an appraisal award precludes PPCA liability. And the Legislature could have amended the statute in 2017 (after this Court denied review in *Garcia*) or 2019 (after the Fifth Circuit disapproved of the lone outlier decision). Tellingly, however, the Legislature never amended the PPCA to overrule *Breshears* and its progeny in any of those eight sessions.

Yet the Legislature has hardly ignored the PPCA since its enactment. The Legislature recodified the statute in 2003 and has amended it in other ways several times since.[5] *See Barbara Techs.*, 2019 WL 2710089, at *28 & n.7-8 (Hecht, C.J., dissenting). On one such occasion, the Legislature even amended the PPCA to overrule a court decision. *See* Tex. Ins. Code § 542.058(c) (creating an interpleader exception to the PPCA for life insurance claims); House Comm. on Insurance, Bill Analysis, Tex. S.B. 1812, 81st Leg., R.S. (2009) (discussing how *State Farm Life Insurance Co. v. Martinez*, 216 S.W.3d 799 (Tex. 2007) held that the common-law

[5] Most recently, the Legislature amended the PPCA to modify the statutory interest rate on claims subject to Chapter 542A. *See* Tex. Ins. Code § 542.060(c).

interpleader exception for life insurance claims did not survive the 1991 changes to the statute); Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 1812, 81st Leg., R.S. (2009) (same).[6] But the Legislature never amended the PPCA to overrule the appraisal decisions.

Under these circumstances, the Legislature's inaction reflects that it has accepted the courts' interpretation of the PPCA in the *Breshears* line of cases. Although the dissent in *Barbara Technologies* discusses the legislative-acceptance issue, the majority never does. But this Court previously stated:

> 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. Md. 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)). Thus, the *Grapevine* Court presumed the Legislature had adopted the long-running judicial construction of section 38.006 of the Texas Civil Practice & Remedies Code by not substantively

[6] The bill analysis of the Senate and House committees can be found at https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=81R&Bill=SB1812 (last visited on August 20, 2019).

changing the statute and by codifying it in the wake of those decisions. 35 S.W.3d at 5.

And just last year, a majority of the Court's justices rejected the dissent's arguments that the legislative-acceptance doctrine did not apply in the context of the Legislature's failure to amend section 101.001 of the Texas Tort Claims Act to overrule one of this Court's prior decisions.[7] *See City of San Antonio v. Tenorio*, 543 S.W.3d 772, 779-80 (Tex. 2018). More specifically, the *Tenorio* majority—which included two of the justices in the majority in *Barbara Technologies* and *Ortiz*—rejected the dissent's arguments that a failure to act can never equate to legislative acceptance. *Id.* The majority explained that the significance attributed to legislative inaction varies with the circumstances, and cited a case where the Court had applied the doctrine when the Legislature failed to act for twenty-six years following a Court decision interpreting a statute. *Id.* at 779 (citing *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963)). The majority also disagreed with the dissent's argument that the legislative-acceptance doctrine only applies when the Legislature re-enacts a statute without change after a court decision; the majority instead found it sufficient that the Legislature had amended other sections of the statute without amending the section at issue. *Id.* at 780.

[7] *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

Here, the Legislature recodified the PPCA in 2003 and amended the statute in other ways several times after the court of appeals' decision in *Breshears* and in the midst of its ever-increasing progeny, including most recently in 2017. *See Barbara Techs.*, 2019 WL 2710089, at *28 & n.7-8 (Hecht, C.J., dissenting). So why doesn't the doctrine apply here too? The Legislature speaks both by action and inaction, by words and by silence. The Legislature spoke here, just as surely as it spoke in *Grapevine* and *Tenorio*.[8]

## II. The Court's Decisions Will Discourage Insurers' Use of Appraisals and Increase and Expand Litigation

As noted by the dissenting opinion in *Barbara Technologies*, appraisals will rarely (if ever) be completed within the PPCA's deadline for accepting/rejecting and paying claims. *Barbara Techs.*, 2019 WL 2710089, at *31-32 (Hecht, C.J., dissenting). This will unquestionably discourage insurers from requesting appraisal, which will not be a favorable development for our judicial system.

As the majority opinion recognizes, "appraisal . . . is an important tool in the insurance claim context, curbing costs and adding efficiency in resolving insurance claims." *See Barbara Techs.*, 2019 WL 2710089, at *5. The majority also quotes one of the Court's prior decisions for the proposition that "[a]ppraisals can provide

[8] To the extent the majority thinks that the Legislature can easily fix the statute if it disagrees with the Court's decisions, that may not be a feasible solution. Any legislative fix is at least two years away. Meanwhile, all sorts of chaos will ensue in the lower courts, particularly if the Court does not at least clarify its opinions on rehearing. A legislative fix in 2021 is also uncertain given the unpredictable impact of the presidential election on the 2020 Texas election.

a less expensive, more efficient alternative to litigation." *Id.* (quoting *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 407 (Tex. 2011)). And as the Court observed in yet another appraisal decision, "[a]ppraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings." *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 894 (Tex. 2009). This Court should be wary of interpreting the PPCA in a manner that undermines the contractual right of appraisal and the undeniably salutary purposes it serves.

To be sure, policyholders can be expected to grasp the undeniable advantage created by the Court's decisions and request appraisal more often. But such requests will not end or discourage litigation. Rather, policyholders will use an appraisal award as a launching pad to initiate or continue litigation in order to prove the insurer's liability for the appraisal award, the amount of PPCA damages, and the amount of attorney's fees. *See Barbara Techs.*, 2019 WL 2710089, at *16-17 (remanding case for a determination of State Farm's liability for the appraisal award and PPCA damages and attorney's fees). The Court's decisions are doubly disastrous in that they both undermine appraisal and encourage litigation.

This point is underscored by the *Ortiz* majority's reasoning for holding that State Farm's prompt payment of the appraisal award precludes liability on the insured's breach of contract claim. *Ortiz*, 2019 WL 2710032, at *3-4. In so holding, the majority explained:

> It simply does not follow that an appraisal award demonstrates that an insurer breached [the policy] by failing to pay the covered loss. If it did, insureds would be incentivized to sue for breach every time an appraisal yields a higher amount than the insurer's estimate (regardless of whether the insurer pays the award), thereby encouraging litigation rather than "short-circuit[ing]" it as intended.

*Id.* at *4 (citing *In re Universal Underwriters*, 345 S.W.3d at 412). But if the phrase "sue under the PPCA" is substituted for the phrase "sue for breach" in the last sentence of that quote, the sentence would be equally true. Incentivizing insureds to sue under the PPCA, whenever an appraisal award is higher than the insurer's estimate, will encourage litigation rather than preventing or ending it.

The equal applicability of the *Ortiz* majority's logic to the PPCA issue is not altered by the majority's observation about the significance of the contractual nature of appraisal. *Id.* at *4. After all, the PPCA effectively incorporates the insurance contract by requiring that the insurer be liable on the insurance claim. *See* Tex. Ins. Code §§ 542.058(b), 542.060(a). The insurance contract in turn provides a right of appraisal to determine the amount of the loss, and State Farm timely exercised that right. *See Barbara Techs.*, 2019 WL 2710089, at *5 (noting the insured did not object to the appraisal request or complain it was untimely); *Ortiz*, 2019 WL 2710032, at *2 (noting the trial court granted State Farm's motion to compel appraisal despite insured's argument that appraisal request was untimely). Thus, no contractual liability necessarily means no PPCA liability.

## III. Other Issues That the Court Should Address on Rehearing

After waiting more than fifteen years to address the effect of payment of an appraisal award on an insurer's contractual and extracontractual liability, the Court's opinions unfortunately raise more questions than they answer. State Farm's Motion for Rehearing in the *Barbara Technologies* case outlines the questions that need to be answered. (MFR at 13-18). Given the number of appraisal cases in the judicial pipeline, the Court should address those questions now rather than letting them be litigated in lower courts for years to come.

In particular, the *amici* wish to focus the Court on three of those questions. *First*, the Court's opinions describe periods of delay caused by the insureds in the appraisal process. In *Ortiz*, for instance, the insured requested a second inspection after State Farm's initial inspection resulted in no payment on the claim because the damage amount was within the deductible. *See Ortiz*, 2019 WL 2710032, at *1. The second inspection was originally scheduled for February 4, 2015, but was postponed for three weeks after the insured's public adjuster representative failed to show up at the inspection. *Id.* at *1 n.1. After the second inspection, the insured waited another six weeks to file suit and then opposed State Farm's request for appraisal, unsuccessfully arguing that State Farm had waived the right of appraisal by waiting too long to demand it. *Id.* at *1-2. The insured did not challenge that adverse ruling on appeal.

In *Barbara Technologies*, the insured waited over six months after the storm event to report a claim. *See Barbara Techs.*, 2019 WL 2710089, at *1. Although that particular delay would not impact the accrual of PPCA interest damages, the delay was a harbinger of things to come. After State Farm inspected the property and concluded that the damage was within the policy's deductible, the insured waited over three and a half months to request a second inspection. *Id.* The insured then waited more than four months after the second inspection (where State Farm found no additional damage) to sue. *Id.*

In contrast, the opinions reflect that State Farm acted quickly in inspecting the insured properties in both cases, conducting second inspections once requested, and notifying the insureds of its claim decisions—taking those steps within a matter of days and weeks. *See Ortiz*, 2019 WL 2710032, at *1; *Barbara Techs.*, 2019 WL 2710089, at *1. Presumably, the reason for this contrast is that State Farm was operating under the PPCA deadlines and the insureds were not. But the Court's opinions and the statutory damages (18% interest) will also incentivize intentional delays of the appraisal process by some insureds and their counsel.

Regardless of whether such delays are innocent or intentional, imposition of statutory damages during periods of delay caused by policyholders is unwarranted. This Court suggested as much in one of its prior decisions interpreting the PPCA. *See Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 426 n.9

(Tex. 2004) (citing the statement in *Allison v. Fire Insurance Exchange*, 98 S.W.3d 227, 264 (Tex. App.—Austin 2002, pet. granted, judgm't vacate w.r.m. by agr.) that the "18% statutory penalty could not be imposed against insurer for periods of time when delay in payment was caused by the insured"). The Court can avoid much mischief and encourage the quick resolution of the appraisal process by so holding now.

*Second*, does the Court really mean to suggest that the PPCA investigation and other deadlines can never be restarted once the insurer has "rejected"[9] the claim? *See Barbara Techs.*, 2019 WL 2710089, at *5 n.7. State Farm correctly asserts that insureds often submit their claims in piecemeal fashion by, for instance, alerting the insurer to additional damage that is revealed when repairing the original damage. (MFR [*Barbara Techs.* case] at 16-17). If the additional damage is potentially covered but the original damage was not (or was within the deductible), it is entirely appropriate for an insurer to reopen an investigation and request additional information, including appraisal. The PPCA deadlines should restart under those and similar circumstances.

*Third*, the *Ortiz* majority decision raises but declines to decide whether appraisal costs can constitute injury independent of policy benefits for the purposes

[9] For the reasons explained by State Farm, the *amici* agree that the Court's use of the term "rejected" to refer to an insurer's determination that a claim is within the policy's deductible is both inaccurate and problematic. (MFR [*Barbara Techs.* case] 1-4).

of common law or statutory bad-faith claims. *See Ortiz*, 2019 WL 2710032, at *6. The Court's suggestion that appraisal costs might be "independent injury" has the potential to cause even more mischief, as such costs are by definition present in every appraisal case.

This Court has stated that the independent-injury rule applies only if the alleged damages are truly independent of the insured's right to recover policy benefits. *See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 499-500 (Tex. 2018). Appraisal costs cannot be truly independent injury because the insurance contract expressly provides that the parties are to split the costs. (CR [Ortiz case] 179). When, as here, the insurance contract specifies how those costs are to be borne, there can be no recovery of those costs under an extracontractual theory. *Cf. Gotham Ins. Co. v. Warren E & P, Inc.*, 455 S.W.3d 558, 562-65 (Tex. 2014) (holding that insurer could not recover claim payments from insured under equitable theories when the insurance policy addressed the matters at issue).

Furthermore, the *Menchaca* Court cautioned that independent injury is extremely rare and that the Court has yet to encounter such injury. *Menchaca*, 545 S.W.3d at 500. Appraisal costs cannot possibly qualify as independent injury under this standard because they are present in every appraisal case. For these reasons, the Court should clarify on rehearing that appraisal costs are not independent injury for the purpose of extracontractual claims and liability.

## CONCLUSION

The Legislature has clearly spoken by refusing to amend the PPCA to overturn the uniform court precedent over the last fifteen years. This Court should therefore grant rehearing and rule, consistent with that precedent and the Legislature's acceptance of that precedent, that State Farm's timely payment of the appraisal award bars all claims against it, including the PPCA claim. Such a ruling will have the added benefit of preserving the contractual right of appraisal and its purpose of providing a cheaper, faster alternative to litigation for resolving insurance claims.

Alternatively, the Court should grant rehearing and clarify that (1) the PPCA damages do not accrue in periods of delay caused by the insured, (2) the PPCA deadlines can be restarted when new information is brought to the insurer's attention after a claim is "rejected," and (3) contractually-allocated appraisal costs cannot be independent injury for the purposes of extracontractual liability.

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)(D) because it contains 4,394 words, not including the parts of the brief excluded by Rule 9.4(i)(1).

*/s/ Wade C. Crosnoe*
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I certify that on August 23, 2019, a true and correct copy of this brief was served on the following counsel by electronic case filing or e-mail:

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