IN THE SUPREME COURT OF TEXAS

No. 17-0719

OZIER HURST, PETITIONER,

v.

NATIONAL SECURITY FIRE & CASUALTY COMPANY, ACTION CLAIM SERVICE, INC., AND AARON TIMMINS, RESPONDENTS

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

JUSTICE BOYD, joined by Justice LEHRMANN, dissenting to the denial of the petition for review.

We held last term that an insurer that invokes an agreed-to appraisal process and then pays the appraisal award (1) can still be liable under the Texas Prompt Payment of Claims Act for statutory interest and attorney's fees if the insurer is adjudicated to have been liable for policy benefits or voluntarily accepts that liability; (2) cannot be liable for breaching the contract by failing to pay the amount of the covered loss; and (3) cannot be liable for common-law or statutory bad-faith "to the extent" the insured seeks only policy benefits, attorney's fees, or treble damages.[1]

Here, the insurer tendered payment of an appraisal award, but it conditioned the tender on the insured's agreement to release all claims, including claims against a third-party adjuster. The

[1] *Ortiz v. State Farm Lloyds*, — S.W.3d —, No. 17-1048, 2019 WL 2710032, at *1, *5 (Tex. June 28, 2019); *Barbara Techs. Corp. v. State Farm Lloyds*, — S.W.3d —, No. 17-0640, 2019 WL 2710089, at *17 (Tex. June 28, 2019).

insured rejected the tender, and the parties proceeded to trial. The jury found that the insurer breached the policy and violated the Prompt Payment Act and that all defendants acted in bad faith. Without the benefit of our opinions in last term's cases, the court of appeals reversed and rendered judgment for the insurer, holding that the insurer's tender of the appraisal amount foreclosed all of the insured's claims.[2]

Through our decisions last term and the term before,[3] we have provided much-needed clarity regarding the relationships between contract, statutory, and common-law claims in the insurance context. But as this case demonstrates, many questions remain. Do last term's holdings apply when the insurer *conditionally* tenders payment? What if the insurer conditions the tender on the release of claims that remain viable despite the insurer's payment of the appraisal award, or on the release of claims against third parties? Does the jury's finding of contractual liability in this case constitute an "adjudication of liability" under *Barbara Technologies*, triggering liability under the Prompt Payment Act? Does the jury's apparent finding of damages beyond policy limits, attorney's fees, and treble damages trigger liability for a bad-faith claim under *Ortiz*? And if the prompt-pay or bad-faith claims survive under our decisions last term, does the insurer's tender of payment conditioned on the insured's release of those claims constitute a payment at all?

These issues arise naturally and necessarily from our recent decisions, and the parties have fully briefed them in this case. By denying this petition for review, the Court neither affirms nor rejects the court of appeals' reasoning or holdings. But neither does it relieve the ongoing

[2] *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 844–45 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

[3] *See USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 484 (Tex. 2018).

confusion on these recurring[4] and important issues. I would grant the petition for review and decide the case. Because the Court does not, I respectfully dissent.

Jeffrey S. Boyd
Justice

Opinion delivered: December 20, 2019

[4] *Hurst* was just one of twenty-five cases in the Multi-District Litigation (MDL) Court. *In re Nat'l Sec. Fire & Cas. Co. Hurricane Litig.*, No. 12-0271 (Tex. M.D.L. Panel May 22, 2012). Since the creation of that MDL court, at least sixteen other MDL courts have been created to handle some 3,000 cases of insurance coverage for hurricanes, hail, and other storm damage.