IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

INTERMODAL EQUIPMENT LOGISTICS, LLC., SEA TRAIN LOGISTICS, LLC	§	
	§	
VS.	§	CIVIL ACTION NO. G-10-458
	§	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	§	

ORDER ADOPTING REPORT AND RECOMMENDATION

On April 18, 2012, Magistrate Judge John R. Froeschner submitted a Report and Recommendation to this Court in which he recommended that the Motion for Summary Judgment of Defendant, Hartford Accident and Indemnity Company (Hartford), be granted in part and denied in part. On May 2, 2012, Hartford filed timely objections to the Report and Recommendation and eight days later Plaintiff, Intermodal Equipment Logistics, LLC, Sea Train Logistics, LLC (IEL), filed a response urging the Court to reject Hartford's objections and adopt Judge Froeschner's recommendations.

As required by 28 U.S.C. § 636(b)(1)(C), this Court has reviewed the entirety of the file and subjected the Report and Recommendation to a *de novo* review. Having done so, this Court has concluded that Judge Froeschner's findings and conclusions are well-grounded in law and in fact.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1) Hartford's objections to the Report and Recommendation are **OVERRULED**;

2) the Report and Recommendation of Magistrate Judge Froeschner is **APPROVED** and **ADOPTED** by this Court;

3) Hartford's Motion for Summary Judgment (Instrument no. 21) is **GRANTED** as to Plaintiff's claims for breach of contract, violations of the Prompt Payment of Claims Act (Tex. Ins. Code §§ 542.051-.061) and common law fraud and those claims are **DISMISSED**; and

4) Hartford's Motion for Summary Judgment (Instrument no. 21) is **DENIED** as to Plaintiff's bad faith claims.

DONE at Galveston, Texas, this 24th day of May, 2012.

Gregg Costa
United States District Judge

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VS.	§	CIVIL ACTION NO. G-10-458
HARTFORD ACCIDENT AND INDEMNITY COMPANY	§	

REPORT AND RECOMMENDATION

Before the Court, by referral from the Honorable Kenneth M. Hoyt, United States District Judge, is the "Motion for Summary Judgment" of Defendant, Hartford Accident and Indemnity Company (Hartford); the Motion seeks the dismissal of all claims asserted by Plaintiff, Intermodal Equipment Logistics, LLC, Sea Train Logistics, LLC (IEL), against Hartford in its original petition filed in the 10th Judicial District Court of Galveston County, Texas, prior to its removal.

This case is the first of the Hurricane Ike related cases to require this Court to actually consider the merits of the extra-contractual claims that seem omnipresent in these cases, but which, in this Court's experience, have not yet been litigated. For the last few days this Court has attempted to master the Texas jurisprudence of bad faith tort litigation relevant to these cases and, with the sense of fatigue, frustration and, maybe, accomplishment, it now submits this Report and Recommendation to the District Judge.

The underlying facts giving rise to this case are hotly contested. However, given the need, at summary judgment, to view the evidence in the light most favorable to IEL and to draw all reasonable inferences therefrom in its favor, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and the inability to make credibility determinations or weigh the evidence, Dibidale of La.,

Inc. v. American Bank & Trust Co., 916 F.2d 300, 307-08 (5th Cir. 1990), those alleged facts are all but irrelevant to the disposition of Hartford's Motion. It will suffice to know that IEL claims to have suffered a substantial loss of business income caused by the hurricane for which it was insured by Hartford. According to IEL, Hartford grossly, and in bad faith, undervalued the loss by paying only a total of approximately $208,000.00, thereby prompting the filing of this case for breach of contract and related extra-contractual torts. This Court, therefore, has little doubt that if IEL's petition survives Hartfords' present summary judgment motion, the existence of genuine issues of material fact would preclude any future summary dismissal.

On the other hand, the procedural history of this case is of vital significance to the proper disposition of Hartford's Motion. IEL filed suit on September 10, 2010, and Hartford removed it on October 22, 2010. An agreement to mediate the case was reached, however, Hartford, on November 11, 2010, pursuant to the standard appraisal provision in the policy, demanded an appraisal in the event mediation proved unsuccessful. The case was mediated without success on May 4, 2011. On October 7, 2011, Hartford's Motion to Compel Appraisal was granted. The appraisal was completed on January 12, 2012, and an award was issued in IEL's favor in the amount of $705,539.00. Both Parties agreed to the award[1] and Hartford paid the amount awarded to IEL on January 17, 2012. Following payment of the award, Hartford filed the instant Motion on the premise that "payment of the award constitutes policy compliance" which resolves IEL's breach of contract claim and "renders Plaintiff's extra-contractual claims meritless" as a matter

[1] Although it agreed to the amount of the award, IEL has not cashed the check because it fears that doing so could negate its extra-contractual claims; the Court now finds this belief to be unfounded.

of law. IEL, of course, completely disagrees. For the reasons stated below, this Court finds some merit to both sides of the dispute.

BREACH OF CONTRACT

The Court agrees with Hartford that once it paid the binding, agreed upon appraisal award Hartford had complied with the contract and IEL's breach of contract claim was, under Texas law, defeated. See Franco v. Slavonich Mutual Fire Insurance Ass'n, 154 S.W.3d 777, 787 (Tex. App. -- Houston, [14th Dist] 2004, no pet.) (Payment and acceptance of a binding appraisal award estops further prosecution of a breach of contract claim.) The fact that the appraisal award was substantially greater than Hartford's earlier payments is of no consequence because the contract IEL claims was breached specifically provides for appraisal. Blum's Furniture Co., Inc. v. Certain Underwriters at Lloyds London, 2012 WL 181413 (5th Cir. 2012) (unpublished) (citing Breshears v. State Farm Lloyds, 155 S.W.3d 340 (Tex. App. -- Corpus Christi, 2004, no pet.) The Court finds IEL's argument that the amount of the award determines, as a matter of law, that Hartford breached the contract by underpayment to be unpersuasive. An insured "may not use the fact that the appraisal award was different than the amount originally paid as evidence of breach of contract, especially when the contract they claimed is being breached provides for resolution of disputes through appraisal." Breshears, 155 S.W.3d at 343

The Court, therefore, **RECOMMENDS** that Hartford's Motion (Instrument no. 21) as to IEL's breach of contract claim be **GRANTED** and that the claim be **DISMISSED**.

PROMPT PAYMENT OF CLAIMS ACT

The Court also agrees with Hartford that the appraisal negates IEL's claim that Hartford failed to make prompt payment of its claim. The Texas Insurance Code, §§ 542.051-.061, mandates prompt payment of claims. Generally, an insurance company has 60 days to pay a covered claim or face the imposition of statutory penalties and attorneys' fees. The Code, however, does not provide a deadline for the completion of an appraisal. When the right to an appraisal under an insurance policy is invoked, Texas Courts have held that full and timely payment of the appraisal award precludes an award of penalties under the Code's prompt payment provisions as a matter of law. In re Slavonic Mutual Fire Insurance Ass'n, 308 S.W.3d 556, 563-64 (Tex. App. -- Houston [14th Dist.] 2010) None of the cases cited by IEL in support of this claim involve appraisals; they are, consequently, inapposite.

The Court, therefore, **RECOMMENDS** that summary judgment be **GRANTED** in favor of Hartford as to IEL's Prompt Payment of Claims Act cause of action and that the claim be **DISMISSED**.

FRAUD

IEL accuses Hartford of committing common law fraud. Under Texas law a material misrepresentation can only be the foundation for actionable fraud if the following two elements can also be shown: that Plaintiff acted in reliance of the representation and that Plaintiff suffered injury. Johnson & Higgins of Texas v. Kenneco Energy, 962 S.W.2d, 507, 524 (Tex. 1998) Even were the Court to concede that Hartford's original, but short lived, denial of IEL's claim as not covered due to a "Wind/Hail Exclusion" was a potentially actionable misrepresentation, IEL cannot prove that it relied to its detriment on that misrepresentation. IEL never trusted Hartford's

interpretation or depended upon it with resultant injury. In fact, IEL continually disputed Hartford's assessment of its claim until it agreed to the favorable appraisal award. IEL never, as it asserts, "actually relied" upon an misrepresentation by Hartford and its fraud claim, therefore, fails.

The Court, therefore, **RECOMMENDS** that Hartford's Motion for Summary Judgment (Instrument no. 21) be **GRANTED** as to this claim and that the claim be **DISMISSED**.

BAD FAITH

In most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract. See Liberty National Fire Ins. Co. v. Akin, 927 S.W.2d 627, 629 (Tex. 10996) Hartford argues that this general rule bars IEL's bad faith claims, but, after its research, this Court has concluded that Texas law recognizes three exceptions to this general rule which are potentially applicable to this litigation. The Court will address them *seriatim*.

The Texas Supreme Court recognized a claim for the breach of an insurer's duty of good faith and fair dealing in Arnold v. National County Mutual Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987) That tort is now established if an insured can prove that a carrier denied or delayed the payment of the insured's claim when it knew or should have know that it was reasonably clear that the claim was covered. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 49 (Tex. 1987) The tort was adopted to provided tort damages against an insurer's wrongful denial of a claim or wrongful attempts to coerce unfair settlements through unreasonable delay in payment. In Republic Insurance Co. v. Stoker, 903 S.W.2d 338, 341 (Tex. 1995), the Court expressly stated "the duty of an insurer to timely investigate its insured's claims" was an independent tort which

could be pursued in the absence of a showing that the insurer breached the insurance contract." This is precisely what IEL has alleged in this case.

The same rationale supports IEL's statutory claims under the Texas Insurance Code and the Deceptive Trade Practices Act (DTPA). The provisions of these statutes are in addition to any other remedies permitted by law. Higginbotham v. State Farm Mutual Auto Ins. Co., 103 F.3d 456, 460 (5th Cir. 1997) "Texas courts have clearly ruled that these extra-contractual tort claims require the same predicate for recovery as bad faith causes of action in Texas." Id. (citing Emmeret v. Progressive County Mutual Ins. Co., 882 S.W.2d 32, 36 (Tex. App. -- Tyler, 1994, writ denied) If IEL can prove Hartford may have unduly delayed payment of its claim after its liability became reasonably clear, it will establish a submissible case under these statutes for the jury to decide. See Giles, 950 S.W.2d at 56

Texas Courts have also recognized that in the absence of proof of a breach of contract, an insured may recover tort damages if it is shown that an insurer committed some extreme acts that caused injury independent of the policy claim. Stoker, 903 S.W.2d at 341 (citing Aranda v. Insurance Company of North America, 748 S.W.2d 210, 214 (Tex. 1988) In this case, IEL contends that Hartford's intentional or unreasonable delay in the payment of its valid claim, evidenced in part by the $700,000.00 appraisal award, forced IEL's owner to sell his family's real property, exhaust his personal savings, incur substantial property tax penalties due to late payment and borrow almost $60,000.00 just to keep IEL "from going bankrupt." Moreover, IEL claims the company lost "over $100,000.00 in 'early payment discounts'" and suffered irreparable damage to its business reputation due to its failure to pay its bills on time. These damages, alleged to be the result of Hartford's purposeful withholding payment of its valid claim could constitute

independent tort damages to support its claims that Hartford's tactics were sufficiently extreme to establish an actionable bad faith tort.

Of course, IEL's efforts to prove its bad faith claims may ultimately fail, as Hartford suggests; however, this Court cannot find that these claims do not survive the dismissal of IEL's breach of contract claim as a matter of Texas law, or that there exists no genuine issue of material fact to be resolved by a jury. Giles, 950 S.W.2d 56 ("We therefore hold whether an insurer acted in bad faith . . . is a question for the fact finder.")

The Court, therefore, **RECOMMENDS** that Hartford's Motion for Summary Judgment (Instrument no. 21) as to IEL's bad faith claims be **DENIED**.

The Clerk **SHALL** send a copy of this Report and Recommendation to the Parties who **SHALL** have until **May 2, 2012**, to have written objections, filed pursuant to 28 U.S.C. §636(b)(1)(C), **physically on file** in the Office of the Clerk. The Objections **SHALL** be electronically filed and/or mailed to the Clerk's Office at P.O. Drawer 2300, Galveston, Texas 77553. Failure to file written objections within the prescribed time **SHALL** bar any Party from attacking on appeal the factual findings and legal conclusions accepted by the District Judge, except upon grounds of plain error.

DONE at Galveston, Texas, this 18th day of April, 2012.

John R. Froeschner
United States Magistrate Judge