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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 17-____

IN THE SUPREME COURT OF TEXAS

LON SMITH & ASSOCIATES, INC. AND A-1 SYSTEMS, INC. D/B/A LON SMITH ROOFING AND CONSTRUCTION

PETITIONERS

V.

JOE KEY AND STACCI KEY

RESPONDENTS

On Petition for Review from the Second District Court of Appeals
Appeal No. 02-15-00328-CV
On Accelerated Appeal from Order Certifying Class Action With Trial Plan
Cause No. 236-267881-13, 236th Judicial District Court, Tarrant County, Texas
The Honorable Judge Thomas Lowe, III presiding

PETITION FOR REVIEW

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In accordance with Rule 53.2(a) of the Texas Rules of Appellate Procedure, Petitioners Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction hereby provide the following list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel:

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STATEMENT OF THE CASE

Joe and Stacci Key filed a lawsuit on September 4, 2013 against A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction ("A-1") and Lon Smith & Associates, Inc. ("LSA") (collectively referred to as "LSRC"), in the 236th Judicial District Court, Tarrant County, Texas, Cause No. 236-267881-13, the Honorable Judge Thomas Lowe, III presiding.

The Keys asserted that LSRC, by use of an Agreement for the installation of a new roof at their residence, "both held itself out to be and promised to act as a 'public insurance adjuster' in relation to Plaintiffs' insurance claim." (1CR8.) The Keys requested a declaratory judgment that, because LSRC is not a licensed or certified public insurance adjuster, LSRC "violated Section 4102.[0]51 [sic] of the Texas Insurance Code, . . . and rendered any contract for [LSRC]'s services void." (1CR8; App. I at 4.) The Keys also demanded that LSRC "return to Plaintiffs the approximate $19,426.69 Plaintiffs paid to [LSRC]." (1CR14.)

On September 30, 2014, the Keys filed Plaintiffs' Third Amended Petition and Motion for Class Certification, requesting that the trial court "certify Plaintiffs as class representatives pursuant to Rule 42 of the Texas Rules of Civil Procedure and that this litigation proceed as a class action." (1CR52-81; *see* 2CR374-708.)

On October 15, 2015, the trial court signed an Order Certifying Class Action With Trial Plan (2CR852-73; App. E), and noted "[t]he primary issue to be resolved is whether the contractual provision violates the Texas Insurance Code and, thereby, renders such contracts illegal, void, and unenforceable." (2CR852.) The trial court ordered:

> this action will be certified as a class action as to (a) Plaintiffs' declaratory judgment claim, (b) Plaintiffs' DTPA claim based on Section 17.50(a)(3) (Unconscionability), and (c) Plaintiffs' DTPA claim based on Section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) pursuant to the provisions of Rule 42 of the Texas Rules of Civil Procedure.

(2CR853; App. E at 2.) The trial court stated "the merits of the case are not central to this inquiry" regarding the Rule 42(b)(3) class action requirements of predominance of common issues and superiority of a class action as to other methods of adjudicating the controversy. (2CR860-61; App. E at 9-10.)

The trial court also ordered that the certified class shall consist of:

> All Texas residents who from June 11, 2003 through the present signed agreements with Lon Smith that included the following language, or language substantially similar to the following: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners['] best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price."

(2CR853-54; App. E at 2-3.)

On August 3, 2017, the Second District Court of Appeals at Fort Worth, Texas issued its published opinion, authored by Justice Walker, and joined by Chief Justice Livingston and Justice Meier, in Appeal No. 02-15-00328-CV. *Lon Smith & Associates, Inc. v. Key*, No. 02-15-00328-CV (Tex. App.—Fort Worth Aug. 3, 2017, pet. filed) (App. F). The Court of Appeals "affirm[ed] that portion of the trial court's October 15, 2015 'Order Certifying Class Action With Trial Plan' that certifies for class treatment Joe and Stacci Keys' declaratory judgment claim and the Keys' Deceptive Trade Practices Act (DTPA) claim based on section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code); . . . ." *Id.* at *2. The Court of Appeals reversed the portion of the Order Certifying Class Action With Trial Plan that certified for class treatment "the Keys' DTPA claim based on section 17.50(a)(3) (Unconscionability) . . . ." *Id.*

STATEMENT OF JURISDICTION

This case involves an accelerated appeal from an interlocutory Order Certifying Class Action With Trial Plan pursuant to Section 51.014(a)(3) of the Texas Civil Practice and Remedies Code ("A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that . . . certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure").

This Court has jurisdiction as to this Petition for Review pursuant to Rule 53 of the Texas Rules of Appellate Procedure, and:

(1) Section 22.225(c) of the Texas Government Code ("This section does not deprive the supreme court of jurisdiction of a civil case brought to the court of appeals from an appealable judgment of a trial court . . . in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court, ..."); and

(2) Section 22.225(d) of the Texas Government Code ("A petition for review is allowed to the supreme court for an appeal from an interlocutory order described by Section 51.014(a)(3), . . . Civil Practice and Remedies Code.").[1]

[1] The repeal of section 22.225(d) of the Texas Government Code set forth in Texas House Bill 1761 "applies only to an interlocutory order signed on or after the effective date of this Act [September 1, 2017]. An interlocutory order signed before the effective date of this Act is governed by the law applicable to the order immediately before the effective date of this Act, and that law is continued in effect for that purpose." (Act of May 26, 2017, 85th Leg., R.S.) The Order Certifying Class Action With Trial Plan was signed by the trial court on October 15, 2015. (2CR852-73; App. E.)

Note that Section 22.225(e) of the Texas Government Code provides "[f]or purposes of Subsection (c), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." Tex. Gov't Code Ann. § 22.225(e) (Vernon 2017).

In addition, this Court has jurisdiction over this case pursuant to Section 22.001(a) of the Texas Government Code, which provides that "[t]he supreme court has appellate jurisdiction . . . extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgments of the trial courts:

> ***
>
> (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
>
> (3) a case involving the construction or validity of a statute necessary to a determination of the case;
>
> *** and
>
> (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, ...

Tex. Gov't Code Ann. § 22.001(a) (Vernon 2017).

This Court also has jurisdiction over this case pursuant to section 22.001(a) of the Texas Government Code as amended by Texas House Bill 1761 to read as follows:

> The supreme court has appellate jurisdiction, except in criminal law matters, of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state. The supreme court's jurisdiction does not include cases in which the jurisdiction of the court of appeals is made final by statute.

(Act of May 26, 2017, 85th Leg., R.S.) This appeal presents questions of law that are important to the jurisprudence of the state regarding (1) the class certification requisites under Rule 42 of the Texas Rules of Civil Procedure, (2) "whether the contractual provision violates the Texas Insurance Code and, thereby, renders such contracts illegal, void, and unenforceable," and (3) mutual restoration of consideration pursuant to this Court's opinion in *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817 (Tex. 2012).

This case involves construction of Chapter 4102 of the Texas Insurance Code (regarding acting or holding oneself out as a public insurance adjuster, and application of the "Insured Option to Void Contract" provision), Chapter 541 of the Texas Insurance Code (regarding unfair or deceptive acts or practices in the business of insurance), as well as section 17.50(b)(3) of the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).

The Court of Appeals' opinion in this case holds differently from prior decisions of this Court on various class action issues and questions of law material to a decision of the case, including but not limited to:

(1) the standard of review for class certification orders and "rigorous analysis" of all class certification prerequisites (*Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007), *Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004));

(2) substantive law must be considered and dispositive issues should be resolved before class certification (*State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550 (Tex. 2004), *Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124 (Tex. 2009));

(3) class certification prerequisites per rule 42 of the Texas Rules of Civil Procedure, including the rule 42(b)(3) requirement of predominance of common issues (*Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007), *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124 (Tex. 2009), *Snyder Commc'ns, L.P. v. Magana*, 142 S.W.3d 295 (Tex. 2004), *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002)); and

(4) mutual restoration of consideration (*Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012) and *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)).

The Court of Appeals' opinion in this case holds differently from the rules adopted by the Texas Department of Insurance Commissioner allowing that a "roofer or contractor may discuss the scope of work in its repair estimate with the consumer's insurance company." (App. K.)

The Court of Appeals' opinion in this case holds differently from *Regional Props., Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552 (5th Cir. 1982), which held (1) an illegal agreement was "voidable" and not void, and (2) customers who received goods or services from unlicensed persons are not entitled to restitution of payments made for those goods or services.

The errors of law committed by the Court of Appeals as to (1) the class certification requisites under Rule 42 of the Texas Rules of Civil Procedure, (2) "whether the contractual provision violates the Texas Insurance Code and, thereby, renders such contracts illegal, void, and unenforceable," and (3) mutual restoration of consideration pursuant to this Court's opinion in *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012), are of such importance to the jurisprudence of the State of Texas that they require correction by this Court.

ISSUES PRESENTED

FIRST ISSUE PRESENTED

The Court of Appeals erred in affirming the trial court's Order Certifying Class Action With Trial Plan, and holding that Plaintiffs satisfied the requirements under Rule 42 of the Texas Rules of Civil Procedure. The trial court did not perform a rigorous analysis, consider substantive law, or resolve dispositive issues. Class members signed six (6) versions of the Agreement, and at least some versions of the Agreement include an arbitration provision—including the Keys' Agreement—but the trial court's Order Certifying Class Action With Trial Plan does not reference the arbitration provision.

As noted by this Court in *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007), "[b]ecause predominance is one of the most stringent prerequisites to class-action certification, it is considered first in our review and must be rigorously applied." The Keys failed to prove the Rule 42(b)(3) requirements that the questions common to the members of the class predominate over questions affecting only individual members, and that a class action is superior to other methods of adjudication.

The Keys claimed common questions predominate based merely on the form language of the agreements. However, in *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124 (Tex. 2009), this Court reversed a class certification order where each class members' agreement "contained essentially the same . . . provision, ..." Other questions affecting individual class members and which are not predominated by questions common to the class members include: (1) individualized damages (including mental anguish) as to each class member; (2) statute of limitations affirmative defense bars claims from class members who signed agreements going back to 2003; (3) class members who may elect to void their Agreements per section 4102.207's "Insured Option to Void Contract"; (4) offsets for the values of the roofs; and (5) which class members had homeowners insurance policy proceeds that paid for their roofs.

SECOND ISSUE PRESENTED

In a case of first impression for this Court, the Court of Appeals erred in holding that LSRC held itself out as a public insurance adjuster, and violated section 4102.051 of the Texas Insurance Code, merely due to this language in the Agreement: "[b]y signing this agreement homeowner authorizes [LSRC] to pursue homeowners' best interest for all repairs, at a price agreeable to the insurance company and LSRC."

The Texas Department of Insurance stated in a Commissioner's Bulletin that "Texas Insurance Code Chapter 4102 does not prohibit contractors from providing estimates or discussing those estimates and other technical information with an insurer or its adjuster." TDI also allows a roofer or contractor to discuss the amount of damage to the consumer's home, the appropriate replacement, and reasonable cost of replacement with the insurance company.

LSRC pursued homeowners' best interest for "all repairs," but did not negotiate for or effect the settlement of a claim, or advocate on behalf of the Keys or discuss insurance policy coverages and exclusions. LSRC did not violate section 4102.051 or chapter 541 of the Texas Insurance Code (unfair or deceptive act or practice in the business of insurance). Thus, the Agreement is not illegal, void, or unenforceable as a matter of law.

In addition, section 4102.207 provides under "Insured Option to Void Contract" that an agreement that violates section 4102.051 is voidable at the option of the insured. The Court of Appeals erred in holding the Agreement was "void per se" (but only as to LSRC).

This issue is important to the jurisprudence of the State of Texas, given the number of roofing and restoration contractors who have analogous provisions in their agreements, as noted in the Amicus Curiae Briefs attached in the Appendix.

THIRD ISSUE PRESENTED

The Keys claimed they were "entitled to a judgment restoring all monies paid to [LSRC] . . . ." However, the Texas Legislature omitted any remedy of restoration of consideration for a violation of Texas Insurance Code section 4102.051.

The Court of Appeals disregarded this Court's holding in *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817 (Tex. 2012) that restoration of consideration requires an "unwinding of the transaction, returning the parties to the status quo ante," and "[p]utting the parties back where they started means restoring both parties to their original positions." This Court held in *Cruz* that a homeowner was "not entitled to an order restoring all amounts paid under the contracts without deducting the value received under those agreements."

The Court of Appeals erred in holding that section 4102.207(b) does not contemplate "mutual restitution." According to this Court, "rescission is not a one-way street," as it "requires a mutual restoration" and a "mutual restitution of benefits among the parties," and the homeowner is not entitled to a "windfall." In addition, the Fifth Circuit Court of Appeals held that customers are not entitled to restitution of payments made to an unlicensed person who actually provided goods or performed services as promised merely because that person was not licensed.

The Keys are not entitled to restoration of the amounts paid to LSRC, given that the Keys received the roof as promised, and the Keys' insurance company paid some or all of that amount. Any restoration of consideration to the Keys would have to be reduced by the value of the roof they received from LSRC and/or the amount paid by homeowners insurance, to preclude a "windfall" prohibited by this Court in *Cruz*.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The Court of Appeals' affirmance of the Order Certifying Class Action could cause Texas' largest residential roofing company, family-owned and founded in 1974, to refund tens of millions of dollars to homeowners who received roofs since 2003—due to a provision in its agreements, as no class members complained about the quality or cost of the roofs, and most of the costs were paid by insurance companies.

A. Joe Key's Agreement with A-1 for Roof Replacement.

In May 2011, hail damaged the roof of the Keys' residence. (1CR6, 53, 83; 2CR379.) In April 2012, Thomas Kirkpatrick, an estimator for A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction (A-1), inspected the roof, "estimated the labor and materials necessary to replace [the] roof and presented Joe Key with a written agreement." (1CR49; App. B.) Joe Key executed the Agreement with A-1 at a price of $33,769.50. (3RR:P.Ex.2; App. A.) A-1 replaced the Keys' roof, and the Keys did not complain about the quality or cost of the roof. (1CR9, 28-29, 58, 83, 320, 323.) The Keys "paid insurance proceeds of approximately $18,926.69 . . . ." (1CR9, 58; 1RR52.)[2]

[2] The Keys' roof was damaged in 2008, and although the Keys received $11,390.96 from their insurance claim, the Keys did not repair their roof, which the Keys' homeowners insurance company accounted for on the Keys' 2011 claim. (1CR323; 1RR58; 3RR:D.Ex.1.) A-1 filed a lawsuit against Joe Key for the unpaid balance, and that case has been stayed. (1CR9, 58; App. F at 3.)

B. The Keys' Lawsuit Against LSRC and Motion for Class Certification.

The Keys filed a lawsuit against A-1 and Lon Smith & Associates, Inc. (LSA) (collectively LSRC), relying on the Agreement provision:

> By signing this agreement homeowner authorizes [LSRC] to pursue homeowners' best interest for all repairs, at a price agreeable to the insurance company and LSRC.

(1CR7.) Plaintiffs argued LSRC "held itself out to be . . . a 'public insurance adjuster' in relation to Plaintiffs' insurance claim" thereby violating chapter 4102 of the Texas Insurance Code. (1CR8, 14.) Plaintiffs requested a declaratory judgment "the 'Agreement' is illegal in its entirety, void and unenforceable," and demanded LSRC "return to Plaintiffs the approximate $19,426.69 Plaintiffs paid to [LSRC]." (1CR8-14.)

More than a year later, Plaintiffs filed their Motion for Class Certification. (1CR52-81.) Summary judgment motions were filed by LSRC (1CR82-295, 302-08), and set for hearing, but the trial court "ORDERED that no hearings will be set on any motion for summary judgment until this Court makes a ruling as to whether a class should be certified . . . ." (1CR313; App. D.)

C. Order Certifying Class Action.

Following a hearing, the trial court signed the Order Certifying Class Action (Order), ordering:

> this action will be certified as a class action as to (a) Plaintiffs' declaratory judgment claim, (b) Plaintiffs' DTPA claim based on Section 17.50(a)(3) (Unconscionability), and (c) Plaintiffs' DTPA claim based on Section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) . . . .

(2CR853; App. E at 2.) The trial court ordered the certified class shall consist of:

> All Texas residents who from June 11, 2003 through the present signed agreements with [LSRC] that included the following language, or language substantially similar to the following: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes [LSRC] to pursue homeowners['] best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price."

(2CR853-54; App. E at 2-3.) The Order does not reference the arbitration provision in section 13 of the Keys' Agreement (and other class members' agreements). (3RR:P.Ex.2; App. A.)

D. Court of Appeals Affirms in Part the Order Certifying Class Action.

The Court of Appeals affirmed the Order under rule 42(b)(3) as to the declaratory judgment claim and the DTPA section 17.50(a)(4) claim (violation of Texas Insurance Code chapter 541), and reversed as to the DTPA section 17.50(a)(3) claim (unconscionability). *Lon Smith & Associates, Inc. v. Key*, No. 02-15-00328-CV, slip op. at *2, 20-34 (Tex. App.—Fort Worth Aug. 3, 2017, pet. filed) (App. F).

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in affirming the Order Certifying Class Action, wherein the trial court did not perform a rigorous analysis, as class members signed 6 versions of the Agreement (App. G), and some versions include an arbitration provision—including the Keys' Agreement (App. A)—but the Order does not reference the arbitration provision.

Plaintiffs failed to prove the "most stringent prerequisites" of Rule 42(b)(3), as questions affecting individuals which are not predominated by questions common to class members include: (1) individualized damages; (2) statute of limitations bars claims from class members who signed agreements going back to 2003; (3) class members may elect to void their Agreements per section 4102.207's "Insured Option to Void Contract"; (4) offsets for the values of the roofs; and (5) class members with homeowners insurance policies that paid for their roofs.

The Court of Appeals erred in holding LSRC violated section 4102.051 (App. H) due to the Agreement provision "[b]y signing this agreement homeowner authorizes [LSRC] to pursue homeowners' best interest for all repairs, at a price agreeable to the insurance company and LSRC." The Texas Department of Insurance allows roofers to "provid[e] estimates or discuss[] those estimates and other technical information with an insurer or its adjuster." (Apps. J, K.)

Section 4102.207 provides an agreement violating section 4102.051 is voidable at the option of the insured. (App. I.) The Court of Appeals erred in holding the Agreement was "void per se" (but only as to LSRC), and going beyond determining the viability of the class members' claims to adjudicate the merits and render a *de facto* summary judgment against LSRC.

Plaintiffs claimed they were "entitled to a judgment restoring all monies paid to [LSRC]," but the Texas Legislature omitted any remedy of restoration of consideration for a violation of sections 4102.051 and 4102.207. As in *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817 (Tex. 2012), any restoration to Plaintiffs would have to be reduced by the value of the roof they received from LSRC, and the amount paid by homeowners insurance. According to this Court, "rescission is not a one-way street," as it "requires a mutual restoration." *Id.* The Court of Appeals erred in holding that section 4102.207(b) does not contemplate "mutual restitution."

ARGUMENT AS TO FIRST ISSUE PRESENTED

A. This Court Reviews a Class Certification Order "Without Indulging Every Presumption in Favor of the Trial Court's Decision."

"This Court reviews a trial court's decision to certify a class under an abuse of discretion standard, but does so without indulging every presumption in favor of the trial court's decision." *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 204-05 (Tex. 2007).

B. "Rigorous Analysis" Required of All Class Certification Prerequisites.

"'Courts must perform a 'rigorous analysis' before ruling on class certification to determine whether *all* prerequisites to certification have been met.'" *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 671 (Tex. 2004).

C. Substantive Law Must Be Considered and Dispositive Issues Should Be Resolved Before Class Certification.

"[D]efendants must be afforded an opportunity before class certification to defeat" the merits of plaintiffs' case. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2417 (2014). "[D]ispositive issues should be resolved by the trial court before certification is considered." *State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550, 557 (Tex. 2004). "'[A] court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

D. The Trial Court Did Not Perform a Rigorous Analysis as to the Arbitration Provision in the Keys' Agreement and Other Class Members' Agreements.

The trial court "ORDERED that no hearings will be set on any motion for summary judgment until this Court makes a ruling as to whether a class should be certified in this case." (1CR313; App. D.) In the Order Certifying Class Action, the trial court stated "the merits of the case are not central to this inquiry,"[3] and does not reference the arbitration provision in some class members' agreements. (2CR860-61; App. E at 9-10.)

A-1 used 6 agreements from 2003 to 2014, and those agreements were admitted into evidence at the class certification hearing, with the arbitration provision on the second page of some agreements (including the Keys' Agreement.) (3RR:P.Ex.2; App. A; 3RR:P.Ex.3 at 11-23 & Exs.2-7; App. G.) The Court of Appeals erroneously held "LSRC failed to prove that the contracts contain an arbitration clause." *Lon Smith*, slip op. at *38.[4]

E. Rule 42(b)(3) Requires Predominance of Issues Common to Class Members and Superiority of a Class Action.

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[3] The Court of Appeals proceeded beyond determining the viability of the class members' claims to adjudicate the merits and render a *de facto* "case dispositive" summary judgment against LSRC. *Clark v. Strayhorn*, 184 S.W.3d 906, 909 (Tex. App.—Austin 2006, pet. denied), *cert. denied*, 549 U.S. 995 (2006).

[4] This Court held in *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 649 (Tex. 2009), involving beneficiaries "challeng[ing] the contract on the ground that an illegal clause renders the whole contract void," that "the question of a contract's validity is for the arbitrator and not the courts." The Keys did not present any evidence that the Better Business Bureau allows class actions as part of its arbitration proceedings.

Rule 42(b)(3) provides a class action may be maintained if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Tex. R. Civ. P. 42(b)(3).[5] "Because predominance is one of the most stringent prerequisites to class-action certification, it is considered first in our review and must be rigorously applied." *Stonebridge*, 236 S.W.3d at 205. "If there are some common questions of law or fact, but the focus of the litigation will be mainly on individual issues, the court cannot certify the class under rule 42(b)(3)." *Snyder Commc'ns, L.P. v. Magana*, 142 S.W.3d 295, 300 (Tex. 2004).

F. The Keys Did Not Satisfy Rule 42(b)(3) for Class Certification Because Questions Common to the Class Members Do Not Predominate.

The Keys claimed that common questions predominate based merely on the language of the agreements. (1CR69-70.) However, *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124, 126 (Tex. 2009) reversed a class certification order where "[t]he parties do not dispute that each dealer's sales agreement with Exxon contained essentially the same . . . provision . . . ."

[5] The Court of Appeals affirmed the class certification under Rules 42(b)(2) and 42(b)(1)(A) by holding "the rule 42(b)(2) class essentially collapses into the rule 42(b)(3) class," "the Rule 42(b)(2) class is indistinguishable from the Rule 42(b)(3) class," and "we need not address whether or not the trial court abused its discretion by alternatively certifying a class under rule 42(b)(1)(A)." *Lon Smith*, slip op. at *64-66.

1. Class Members Signed 6 Different Versions of the Agreement.

This Court noted in *Phillips Petroleum Co. v. Yarbrough*, 405 S.W.3d 70, 79-80 (Tex. 2013) that predominance and typicality were not satisfied because 3 forms were used by class members. In this case, class members signed 6 different versions of the agreements, some of which included an arbitration provision. (3RR:P.Ex.3 at 11-23 & Exs.2-7; App. G.)

2. Statute of Limitations Bars Class Members Who Signed Agreements Going Back to 2003.

The trial court ordered the class shall consist of "[a]ll Texas residents who from June 11, 2003 through the present signed agreements . . . ." (2CR853-54; App. E at 2-3.) In *National Western Life Ins. Co. v. Rowe*, 164 S.W.3d 389, 392 (Tex. 2005), this Court held the trial court did not perform a rigorous analysis as to "limitations issues, including discovery rule" when it reversed a class certification order due to lack of predominance of common issues.

In *Corley v. Entergy Corp.*, 220 F.R.D. 478, 487 (E.D. Tex. 2004), *aff'd*, 152 Fed. Appx. 350 (5th Cir. Oct. 13, 2005), in denying class certification, the court held "a statute of limitations defense is fact-intensive and individualized." "The presence of this affirmative defense and its varying applicability may defeat predominance and thus preclude class certification." *Id.* The Court concluded:

> Overall, there are too many individualized issues regarding the applicable statutes of limitations. These individualized issues render this case unsuitable for class certification under Rule 23(b)(3).

Id. at 488.

3. Class Members' "Insured Option to Void Contract" Per Section 4102.207 Precludes Predominance of Common Issues.

Section 4102.207 provides an agreement that violated section 4102.051 is voidable and "may be voided at the option of the insured"—not "void per se" as held by the Court of Appeals. Tex. Ins. Code Ann. § 4102.207(a) (Vernon 2017) (App. I); (1CR94-95.)

4. Individualized Damages Precludes Predominance of Common Issues and Superiority of Class Action.

"Class certification may be inappropriate when individualized damage determinations predominate over common issues." *Lon Smith*, slip op. at *50. The Court of Appeals cited a case from the Ninth Circuit in suggesting "damages of each class member may be established solely by reference to the amount of LSRC's contract with that class member." *Id.* at *50-52. However, Section 4102.207(b) does not provide for a refund to a homeowner—"the insured is not liable for the payment of any past services rendered" which have not yet been paid. Tex. Ins. Code Ann. § 4102.207(b) (Vernon 2017) (App. I).

The amount of each class member's purported "damages" cannot be ascertained solely by reference to A-1's agreements because Plaintiffs pleaded for mental anguish damages. (1CR13.) Plaintiffs' counsel stated at the class certification hearing: "we're not seeking mental anguish on behalf of the class."

(2RR59.)[6] The Order Certifying Class Action provides "[t]he Named Plaintiffs do not seek to recover damages for mental anguish . . . ." (2CR869; App. E at 18.)

In *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002), this Court reversed a class certification where plaintiffs on appeal were "willing to forego their claims for consequential damages." As in *Henry Schein*, Plaintiffs have not amended their pleadings to strike mental anguish damages, and it is not clear that other class members are willing to forego possible "substantial rights" and mental anguish damages. *Id.* at 695. The amount paid to A-1 was $19,426.69 (1CR14), but Plaintiffs pleaded for over "$1,000,000.00" (1CR71), contradicting the Court of Appeals' holding that mental anguish constituted "de minimis damage claims" that could be waived. *Lon Smith*, slip op. at *39.

5. Offsets for the Values of the Roofs Installed by LSRC for Each Class Member Constitutes an Individualized Issue.

This Court held in *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817, 824 (Tex. 2012) a homeowner was "not entitled to an order restoring all amounts paid under the contracts without deducting the value received under those agreements." Any restoration of consideration to class members would have to be offset and reduced by the value of the roof each class member received from LSRC to preclude a "windfall" prohibited by this Court.

[6] *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001) ("To recover under the DTPA, the plaintiff must also show that the defendant's actions were the 'producing cause' of actual damages.").

6. Different Damages for Class Members Who Paid for Roofs With Homeowners Insurance Proceeds.

The Court of Appeals acknowledged a "majority of A-1's roofing work involved insurance-backed customer agreements." *Lon Smith*, slip op. at *39. Plaintiffs pleaded they "paid insurance proceeds of approximately $18,926.69," and Joe Key testified "[m]y insurance covered everything that was paid to" LSRC. (1CR9, 58, 84; *see* 1RR52; 3RR:D.Exs.1-3; App. F at 3.) Amounts paid by class members like Plaintiffs who had homeowners' insurance claims would be less than as indicated on the agreements with A-1.[7]

[7] Plaintiffs merely tracked rule 42(b)(3): "a class action in this case is superior to the other available methods for the fair and efficient adjudication of the controversy." (1CR70.) Plaintiffs' briefs did not address superiority. (2CR374-718) Neither Plaintiffs' counsel nor the trial court discussed superiority at the class certification hearing. (2RR *passim*.) Plaintiffs did not satisfy the Rule 42(a) requirements of commonality, typicality, and adequacy as class representatives on the same bases that Plaintiffs failed to satisfy Rule 42(b)(3).

ARGUMENT AS TO SECOND ISSUE PRESENTED

A. Prohibition Against Acting as or Holding Oneself Out as a Public Insurance Adjuster.

Section 4102.051(a) prohibits a person from acting as or holding themselves out to be a public insurance adjuster (PIA) of claims for loss or damage under any policy of insurance without a license or certificate. Tex. Ins. Code Ann. §§ 4102.001(3), 4102.051(a) (Vernon 2017) (App. H). Plaintiffs did not allege LSRC acted as a PIA, pleading LSRC "held itself out to be and promised to act as a '[PIA],'" which the Court of Appeals erroneously held was "a distinction without a difference . . . ." (1CR8, 57, 88, 90; *Lon Smith*, slip op. at *23.)

B. Texas Department of Insurance Commissioner's Bulletins.

Texas Department of Insurance Commissioner Bulletin #B-0051-08 allows roofers to "provid[e] estimates or discuss[] those estimates and other technical information with an insurer or its adjuster." (1CR121-23, 353-54; App. J.) Bulletin No. B-0017-12 states a roofer may "discuss the amount of damage to the consumer's home, the appropriate replacement, and reasonable cost of replacement with the insurance company." (1CR91, 124, 126, 356; App. K.). Also, "[t]he roofer or contractor may discuss the scope of work in its repair estimate with the consumer or the consumer's insurance company." *Id.*

C. The Agreement to "Pursue Homeowners Best Interest for all Repairs" Does Not Constitute Holding Itself Out as a Public Insurance Adjuster.

The Agreement only authorized LSRC "to pursue homeowners['] best interest for all repairs" (3RR:P.Ex.2; App. A), and merely referred to LSRC providing and discussing estimates with an insurer or its adjuster, discussing the amount of damage, the appropriate replacement, and the reasonable cost of the roof with a homeowner and their insurance company.

D. LSRC's "Estimators" Did Not Advocate for Plaintiffs or Discuss Insurance Policy Coverages and Exclusions.

The Court of Appeals held "LSRC explicitly agreed to 'advocate on behalf of a consumer' . . . ." *Lon Smith*, slip op. at *24. However, the Agreement does not state that LSRC will "advocate," nor is there any evidence LSRC advocated on behalf of Plaintiffs. Thomas Kirkpatrick, "an estimator for A-1," "estimated the labor and materials necessary to replace [Plaintiffs'] roof and presented Joe Key with a written agreement." (1CR49; App. B.) Slade Watts (not an employee of LSRC) was the "adjustor." (3RR:P.Ex.2; App. A.) David Cox, A-1's President, noted the delineation between A-1's "estimators" and insurance company adjusters. (3RR:P.Ex.3 at 25-27, 51-56, 62-64, 66, 72-73.)[8]

[8] The Court of Appeals held the Agreement "violates chapter 4102 . . . and constitutes an unfair or deceptive act or practice in the business of insurance under chapter 541 . . . ." *Lon Smith,* slip op. at *28-29. Chapter 541 does not make a violation of chapter 4102 a violation of chapter 541, and chapter 4102 does not make a violation of that chapter a violation of chapter 541.

E. LSRC Agreement Merely Voidable Under Section 4102.207 "Insured Option to Void Contract"—Not "Per Se Void as to LSRC."

Section 4102.207 provides an agreement that violates section 4102.051 "may be voidable at the option of the insured." Tex. Ins. Code Ann. § 4102.207 (Vernon 2017) (App. I). Without citing any authority, the Court of Appeals held section 4102.207 was a "statutory disgorgement provision" and "does not alter the void-per-se status of the contracts as to LSRC." *Lon Smith*, slip op. at *21, 52-53.[9] However, *Regional Props., Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 557-60 (5th Cir. 1982) held even where the statute provides "[e]very contract made in violation of any provision . . . shall be void," the "illegal" agreements were "voidable."[10]

The Court of Appeals agreed "courts will generally leave parties to an illegal contract as they find them." *Lon Smith*, slip op. at *19.[11] Nonetheless, the Court of Appeals *sua sponte* held section 4102.207 "codifies the not-in-*pari-delicto*

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[9] *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010) (noting disgorgement is typically an equitable remedy for breach of fiduciary duty).

[10] *See Building Permit Consultants, Inc. v. Mazur*, 122 Cal. App. 4th 1400, 1414 (2004) (holding agreement involving unlicensed public insurance adjusting "may be voided at the option of the insured . . . ."); Josh Shettle, *Shifting Gears—Toward Better Enforcement of the Prohibition Against the Unauthorized Practice of Public Adjusting*, at 4 (2012) ("[i]f an insured mistakenly hires an unlicensed public adjuster, the contract with the adjuster is voidable."), *available at* http://www.napia.com/Files/PCMA%20Papers/2012%20PCMA%20Award%20Winner%20Josh%20Shettle.pdf.

[11] The Court of Appeals held "LSRC does not address this ground of illegality in its brief." *Lon Smith*, slip op. at *17. LSRC addressed illegality and cited this Court's opinion in *Lewis v. Davis*, 199 S.W.2d 146, 149 (Tex. 1947), wherein this Court noted "[w]hen two constructions of a contract are possible, preference will be given to that which does not result in violation of law."

exception to the general rule . . . ." *Id.* at *21. However, in *Regional Props.*, 678 F.2d at 564, the Court held parties to illegal agreements were in *pari delicto* and "public policy . . . is not alone a sufficient reason to allow even an innocent party to retain an unjust enrichment at the expense of a culpable one."

ARGUMENT AS TO THIRD ISSUE PRESENTED

A. The Keys Pleaded for "Judgment Restoring All Monies Paid" to LSRC, But Section 4102.207(b) Does Not Provide for the Remedy of Restoration of Consideration.

The Keys pleaded for "a judgment restoring all monies paid to [LSRC] . . . ." (1CR13-14, 16-17, 61-63, 65, 69, 70.). Section 4102.207(b) provides that if an agreement violates chapter 4102, "the insured is not liable for the payment of any past services rendered, or future services to be rendered, ..." Tex. Ins. Code Ann. § 4102.207(b) (Vernon 2017) (App. I). The Texas Legislature did not include the words "return," "restore," and "refund" in section 4102.207(b).

B. No Restitution of Payments Made to an Unlicensed Person Who Actually Provided Goods or Performed Services as Promised.

In *Regional Props., Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 564 (5th Cir. 1982), the Fifth Circuit Court of Appeals stated:

> When the services contracted for have been performed by an unlicensed person, courts have "nearly always" denied restitution of payments made for such services. Because he has done the work promised, the unlicensed person who received the fee is not unjustly enriched. The person who paid his fee has received actual services. The law, therefore, leaves the parties where it found them.[12]

[12] *See Fausnight v. Perkins*, 994 So.2d 912, 921 (Ala. 2003) ("we conclude that the fact that the home builder in this case was not licensed, standing alone, is not a sufficient basis on which to require [home builder] to return the funds he has received from [homeowners]."); *Electrovoice Int'l, Inc. v. Sarsohn Adjusting Co., Inc.*, 567 N.Y.S.2d 568, 570 (1990) (holding an unlicensed public insurance adjuster "will not be required to return compensation paid after completion of the job . . . ."); Shettle, at 4 (noting if the insured "pays the unlicensed public adjuster and the adjuster has performed under the contract, the insured likely will not be able to recoup this payment.").

C. The Court of Appeals Disregarded this Court's Opinions in *Cruz* and *Morton* that Require Plaintiffs Deduct the Value of the Roof Installed by LSRC, and Prohibits Plaintiffs From Recovering Restoration of Amounts Paid by Their Insurer to LSRC.

The Court of Appeals acknowledged its holding that section 4102.207(b) does not include mutual restitution was contrary to this Court's opinions in *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817 (Tex. 2012) and *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013). *Lon Smith*, slip op. at *53-54. In *Morton*, this Court held the "cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties." *Morton*, 412 S.W.3d at 508.

In *Cruz*, this Court held that homeowner Cruz was "not entitled to an order restoring all amounts paid under the contracts without deducting the value received under those agreements." *Cruz*, 364 S.W.3d at 824. According to this Court:

> Cruz seeks to rescind the agreements—he asks for all the money paid by him or on his behalf under the agreements—without surrendering the benefits he received. But rescission is not a one-way street. It requires a mutual restoration and accounting, in which each party restores property received from the other.

Id. at 825 (underline added). This Court noted that "Cruz concedes that adopting his approach would give him a windfall." *Id.* at 826.

This Court held that restoration "merely provides a prevailing consumer the option of unwinding the transaction, returning the parties to the status quo ante. Putting the parties back where they started means restoring both parties to their original positions." *Id.* This Court noted:

> there was no deduction for the value Cruz received under the contracts. And it was undisputed that Cruz benefitted from the agreements. . . . Not only that, but Cruz did not pay the entire amount himself—Chubb paid some portion of it. The DTPA does not authorize an order restoring to Cruz amounts paid by him and his insurer under the contract, unaccompanied by a deduction for the value of services Protech provided.

Id. at 827. Likewise, Plaintiffs are not entitled to restoration of the amounts paid to LSRC because (1) they failed to deduct the value of the roof installed by LSRC, and (2) their insurance company paid some or all of that amount paid to LSRC. (1CR9, 58, 84; *see* 1RR52; 3RR:D.Exs.1-3.)

CONCLUSION AND PRAYER FOR RELIEF

Petitioners request the Court grant this Petition for Review, sustain the issues presented, reverse the opinion and judgment of the Second District Court of Appeals (App. F), and reverse the Order Certifying Class Action With Trial Plan (2CR852-73; App. E).[13]

[13] The Court of Appeals stated "[t]he trial court's class certification order made no findings regarding collateral estoppel" from a default judgment in *Reyelts v. Cross*, No. 4:12-CV-0112-BJ, 2013 U.S. Dist. LEXIS 105320 (N.D. Tex. July 26, 2013) (App. C), and "[t]he Keys argue on appeal that they do not rely on collateral estoppel to establish their class claims." *Lon Smith*, slip op. at *25. The Court of Appeals held "we review the propriety of the class certification order without applying collateral estoppel," but the Court of Appeals repeatedly cited the *Reyelts* default judgment. *Id.* at *6-8, 15-16, 25, 29.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

My name is Shawn M. McCaskill. I am over eighteen (18) years of age. I am an attorney and a shareholder in the law firm of Godwin PC in Dallas, Texas. I am licensed by the Supreme Court of Texas to practice law in the State of Texas. I am Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. I have never been convicted of a crime, and I suffer no legal disabilities. All statements contained herein are based on my personal knowledge and are true and correct.

I am one of the attorneys of record representing Petitioners Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction in this Petition for Review. I have prepared and reviewed this Petition for Review. I have personal knowledge of the word count in this document, as I initiated the word count feature in Microsoft Word for this document.

I hereby certify that this Petition for Review is a computer-generated document containing 4489 words in the document, excluding the cover page, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature page, certificate of service, certificate of compliance, and appendix, per Rule 9.4(i) of the Texas Rules of Appellate Procedure.

/s/ Shawn M. McCaskill
Shawn M. McCaskill

CERTIFICATE OF SERVICE

The undersigned counsel of record for Petitioners Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction hereby certifies that a true and correct copy of this Petition for Review was served to the following counsel of record by e-service on September 15, 2017:

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APPENDIX

App. A — Agreement—Joe Key and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction (May 2, 2012) (3RR:P.Ex.2)

App. B — Affidavit of Thomas Kirkpatrick (October 23, 2013) (1CR49-50)

App. C — Memorandum Opinion and Order and Findings of Fact and Conclusions of Law in *Reyelts* (entered July 26, 2013) (1CR267-91)

App. D — Order Staying Motions for Summary Judgment Until Class Certification Issues Are Resolved (signed December 9, 2014) (1CR313)

App. E — Order Certifying Class Action With Trial Plan (signed October 15, 2015) (2CR852-73)

App. F — *Lon Smith & Associates, Inc. v. Key*, No. 02-15-00328-CV (Tex. App.—Fort Worth Aug. 3, 2017, pet. filed) – Court of Appeals Opinion

App. F-1 — Court of Appeals Judgment

App. G — A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction Agreements (3RR:P.Ex.3 Exs.2-7)

App. H — Tex. Ins. Code Ann. § 4102.051 (Vernon 2017)

App. I — Tex. Ins. Code Ann. § 4102.207 (Vernon 2017)

App. J — Texas Department of Insurance Commissioner's Bulletin #B-0051-08 (August 8, 2008) (1CR353-54)

App. K — Texas Department of Insurance Commissioner's Bulletin No. B-0017-12 "Frequently Asked Questions" "Unlicensed Individuals and Entities Adjusting Claims" (May 2014) (1CR356)

App. L — Amicus Curiae Brief on Behalf of the North Texas Roofing Contractors' Association (filed April 19, 2016)

App. M Brief of Amicus Curiae Stellar Restoration Services, LLC (filed April 19, 2016)

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236-267881-13

Insurance Co	OTHER
Claim No	HL11011105
Phone	
Adjustor	SLADE WATTS
Mortgage Co	

AGREEMENT

181131-1

Name JOE KEY	Home No [redacted]	Date	04/27/2012
Address [redacted]	Work No	Mapsco	F88B
City & St [redacted]	Addl No [redacted]	Addl Desc	CELL #
Billing Address			

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	1 Layer(s) Wood	49.00	40.00	$1,960.00
Install New Decking	OSB Tech Shield 7/16 in.	56.35	150.00	8,452.50
Deck Protection/Felt	#30 Deck Protection	56.35	17.00	957.95
Perimeter Metal	Size 1 1/2 in Color Almond	400.00	1.25	500.00
Ventilation	84-Ridge Vent-New @ $10			840.00
Ventilation				
Heater Vents	Size			
Leads/AutoCaulks	Size 7-3N1 AC	7.00	45.00	315.00
Rmv/Repl Valley	Closed( ) Open(X) W Valley Bronze	180.00	5.75	1,035.00
Install Shingles	Brand GAF/Elk Style Armor Shield II UL2218c4	56.35	263.00	14,820.05
	Color Barkwood Warranty LLT			
Ridge Application	Seal-A-Ridge	460.00	4.75	2,185.00
Skylight(s)				
Skylight(s)				
Steep Off	49.00 sq 8/12 @ $0.00/sq	49.00		
Steep On	56.35 sq 8/12 @ $40.00/sq	56.35	40.00	2,254.00
Two Story				
	Color			
	Color			
Clean Up	Clean up and haul away debris Magnetize lawn and driveway for nails.			N/C

Ventilation (Intake and Exhaust) does not meet FHA minimum requirements.

T&C.

Credit $3,000 for Advertising

Tax	
Permit	450.00
Overhead/Profit	
Total	$33,769.50

This contract is subject to Chapter 27 Property Code. The requirements of that chapter may affect your right to recover damages from the performance of this contract. If you have a complaint concerning a defect arising from the performance of this contract and that defect has not been corrected through normal warranty service you must provide notice to the contractor by certified mail return receipt requested not later than the 60th day after the day you first be able to discover damages in a court of law. The notice must refer to Chapter 27 Property Code and must describe the construction defect. If requested by the contractor you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 Property Code.

ACCEPTANCE OF AGREEMENT

This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement Homeowner(s) authorizes Lon Smith Roofing and Construction (LSRC) to pursue homeowners best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the new contract price.

REPLACEMENT COST INSURANCE CLAIMS HOMEOWNER AGREES TO PAY INSURANCE PROCEEDS DEDUCTIBLE AND UPGRADES
ACTUAL CASH VALUE INSURANCE CLAIMS HOMEOWNER AGREES TO PAY INSURANCE PROCEEDS ACV DEPRECIATION DEDUCTIBLE AND UPGRADES
NON INSURANCE RELATED CONTRACTS HOMEOWNER AGREES TO PAY CONTRACT AT COMPLETION

Ask your Estimator about our "Refer a Friend" program!

Ms. _____ Date 5/2/12

Mr. _____

Thomas Kirkpatrick
Sales Representative

Mgmt Approval

EXHIBIT
tabbies
A

PLAINTIFF'S EXHIBIT
tabbies
2

THIS CONTRACT AND ANY AGREEMENT PURSUANT HERETO BETWEEN LON SMITH ROOFING & CONSTRUCTION HEREINAFTER REFERRED TO AS "COMPANY" AND THE CUSTOMER(S) NAMED HEREIN ON THE REVERSE SIDE WILL BE SUBJECT TO ALL APPROPRIATE LAWS, REGULATIONS AND ORDINANCES OF THE STATE OF TEXAS AND THE FOLLOWING TERMS AND CONDITIONS.

1. All proposals subject to approval of our Credit Department & Management.
2. The company shall have no responsibility for damages from rain, fire, tornado, windstorm, hail, ice, or other perils, as is normally contemplated to be covered by homeowners insurance or business risk insurance, unless a specified written agreement be made prior to commencement of the work.
3. Company agrees to perform the described work for Customer in accordance with normal common roofing practices unless otherwise specified.
4. Replacement of deteriorated decking, roof jacks, ventilators, flashing or other materials, unless otherwise stated in this contract, are not included and will be charged as an extra.
5. This agreement, if not signed by both parties will expire 30 days from estimate date unless extended in writing by the Company. After 30 days, we reserve the right to revise our price in accordance with costs in effect at that time.
6. The Company shall not be liable for failure of performances due to labor controversies, strikes, fires, weather, inability to obtain materials from usual sources, or any other circumstances beyond the control of the Company whether of similar or dissimilar nature.
7. The Company is not responsible for any damage below the roof, due to leaks by gale force winds (54 mph), hail, or preexisting construction defects during the period of the warranty.
8. If this Contract is cancelled by the Customer later than three (3) days from execution, customer shall pay to the Company ten percent (10%) of the contract price as liquidated damages, not as a penalty, and the Company agrees to accept such as a reasonable and just compensation for said cancellation.
9. If any provision of this agreement should be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this agreement shall not be affected thereby.
10. Any representation, statements, or other communications, not written in this Contract are agreed to be immaterial, and not relied on by either party, and do not survive the execution of this Contract. This Agreement constitutes the entire agreement between the parties. It may be changed only by written instrument signed by both parties.
11. The Company will provide the Customer with a two (2) year limited warranty. The Contract and warranty shall not be assigned and is non-transferable. For the warranty to be valid the contract must be paid in full.
12. The Company will have the right to supplement the Insurance Co., in the event material and/or labor increases from the date of the damage. Any supplements paid by the insurance company for additional labor and or materials needed beyond the original scope of repairs are authorized to be paid directly to the Company.
13. All Parties agree to settle any disputes regarding damages, quality of materials or workmanship through binding arbitration with the local Better Business Bureau before either party may officially file suit with any court. ARBITRATION SHALL BE BINDING.
14. Full scope of Insurance proceeds shall be defined as the full price for repairs allowed by the insurance company before any deduction for deductible, depreciation or ACV adjustment is subtracted.
15. These conditions shall be considered a part of any contract entered into or authorized to proceed, the same as if they were included therein.
16. Payment is due upon completion at Tarrant County, Texas. Any portion remaining unpaid will bear interest at the rate of 1.5% per month not to exceed the maximum rate allowed by law commencing 30 days after completion. Purchaser agrees to pay reasonable collection fees and or legal fees needed in pursuit of collecting any remaining unpaid portion commencing 60 days after installation.
17. Payment for work completed will immediately become due should a delay in work be initiated by the customer.
18. All parties agree that the Company will not be held responsible for punctures to air conditioner, gas, security, or electrical lines that have been installed closer than 3" to the underside of roof deck.
19. The Customer grants the Company full access to entire perimeter of building and electricity for staging and execution of work unless otherwise agreed.

THREE DAY RIGHT OF RESCISSION: I HAVE HEREBY BEEN NOTIFIED THAT I MAY CANCEL THIS AGREEMENT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS AGREEMENT.

Any person or company supplying labor or materials for this improvement to your property may file a lien against your property if that person or company is not paid for the contributions.

Thank you for considering Lon Smith Roofing and Construction for your repair and re-roofing needs! Our **commitment to excellence** with over 70,000 customers since 1974 has established a reputation as the "Premier Roofing Contractor" with homeowners and insurance companies alike. We look forward to adding your name to our long list of satisfied customers.

CAUSE NO. 17-267881-13

JOE KEY and STACCI KEY	§	IN THE DISTRICT COURT OF
	§	
Plaintiffs	§	
	§	
v.	§	TARRANT COUNTY, TEXAS
	§	
LON SMITH & ASSOCIATES, INC. and A-1 SYSTEMS, INC. *d/b/a* LON SMITH ROOFING AND CONSTRUCTION	§	
	§	
	§	
	§	
Defendants	§	17TH JUDICIAL DISTRICT

AFFIDAVIT OF THOMAS KIRKPATRICK

THE STATE OF TEXAS)

COUNTY OF TARRANT)

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared Thomas Kirkpatrick, who is personally known to me, and after being duly sworn according to law, upon his oath, duly deposed and said:

1. My name is Thomas Kirkpatrick, I am over twenty-one years of age, of sound mind, capable of making this affidavit; and otherwise fully competent to testify as to the matters stated herein. The facts stated in this affidavit are based upon my personal knowledge and are true and correct.

2. I am an estimator for A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction ("A-1"). As an estimator for A-1, I inspect A-1 customer's roofs for damage and then estimate the cost to repair or replace the roof. I inspected Joe and Stacci Key's house at 6905 Battle Creek Road, Fort Worth, Texas in April 2012. The roof on the home was in need of replacement due to, among other things, damage caused by a hail storm in March 2012. I estimated the labor and materials necessary to replace Joe and Stacci Key's roof and presented Joe Key with a written agreement. Joe Key executed the agreement. A true and correct copy of that agreement (hereinafter the "Agreement") is attached to the September 20, 2012 Original Petition filed by A-1 in a lawsuit styled *A-1 Systems, Inc. d/b/a Lon Smith Roofing v. Joe Key*; Cause No. JP06-12-SC00012402, in the Small Claims Court, Justice of the Peace Precinct No. 6 of Tarrant County, Texas, which is attached as Exhibit "A" to Defendant A-1's Motion for Partial Summary Judgment.

EXHIBIT C

3. The Agreement is the only written agreement I ever provided to Joe Key, and therefore must be the "Agreement" referenced in Plaintiffs' First Amended Original Petition and Request for Disclosure at ¶ 16.

FURTHER, AFFIANT SAYETH NOT.

Thomas Kirkpatrick

Thomas Kirkpatrick

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 23 day of October, 2013.

Mona Barefield

Notary Public, State of Texas

MONA J. BAREFIELD
Notary Public, State of Texas
My Commission Expires
November 16, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GERALD REYELTS and BEATRIZ REYELTS,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 4:12-CV-0112-BJ
CARY JAY CROSS, CARY J. CROSS, P.C., LON SMITH & ASSOCIATES, INC. and A-1 SYSTEMS, INC. d/b/a LON SMITH ROOFING AND CONSTRUCTION,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 23, 2013, the Court entered its Order Granting Plaintiffs' Motion for Default Judgment and Setting Hearing on Damages and Denying Defendants' Motion to Set Aside Clerk's Entry of Default and Motion for Leave to File Amended Answer ("April 23 Order"), which such order is incorporated herein for all purposes. Pursuant to the notice given in the Court's April 23 Order, this Court held a hearing on the issue of damages on May 28, 2013.

At the hearing on May 28, Plaintiffs Gerald and Beatriz Reyelts ("Gerald," "Beatriz," or collectively, "the Reyelts") appeared in person and by and through their counsel of record, H. Dustin Fillmore III and Charles W. Fillmore of The Fillmore Law Firm. Defendants Cary Jay Cross and Cary Jay Cross, P.C. ("Cross Defendants") appeared in person by and through Cary Jay Cross. Defendants Lon Smith & Associates Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and

Construction ("Lon Smith Defendants") appeared by and through their counsel of record, Kathryn Shilling, and their corporate representative, Chief Executive Officer David Cox.[1]

After all parties made opening remarks, the Court heard evidence on the two remaining issues before the Court, namely, (1) the amount, if any, that would reasonably compensate Plaintiffs for their actual damages caused by Defendants' unlawful conduct as already determined by the Court; and (2) the amount of Plaintiffs' attorneys' fees. With the Court having taken judicial notice of its file in this matter, Plaintiffs called three witnesses (Gerald, Beatriz, and their counsel H. Dustin Fillmore III), and the Court admitted without objection Plaintiffs' Exhibits 1 though 14. Defendants called two witnesses (Cary Jay Cross and David Cox), and the Court admitted without objection Defendants' Exhibits 1 and 2.

Pursuant to an order dated May 29, Plaintiffs submitted a proposed Final Judgment[2] to the Court, which has not been objected to by the Defendants, and Defendants filed a trial brief on damages [doc. # 42] and objections to Plaintiffs' attorneys' fees [doc. # 43]. The Court is now ready to enter its findings of fact and conclusions of law in this matter. A separate Final Judgment will be entered this same day.

Accordingly, the Court, after having considered, *inter alia*, the Clerk's Entry of Default, the Court's prior orders and docket in this matter, the evidence before the Court, the arguments of counsel, and all law applicable thereto, is of the opinion and so finds that Plaintiffs are entitled to final judgment from and against Defendants as follows.

---

[1]The Court notes that on July 1, 2013, the Court granted Defendants' Motion to Substitute Attorney, substituting Rick Disney with the law firm of Cotten Schmidt & Abbott, LLP, as lead attorney for Defendants Lon Smith & Associates Inc. and A-1 Systems, Inc.

[2]Defendants have not objected to nor submitted any opposing proposal to Plaintiffs' proposed Final Judgment. However, after researching the issues further, the Court has made some modifications to the Plaintiffs' proposed Final Judgment to comport with the law and the record before the Court.

I. FINDINGS OF FACT

Accepting as true the well-pleaded facts in Plaintiffs' First Amended Complaint, *see Nishimatsu Constr. Co. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *see also Motley v. Rundle*, 340 F. Supp. 807, 809 (E.D. Pa. 1972), and the evidence adduced at the May 28 hearing, the Court finds as follows:

In or around May 2011, hail damaged the roof on the home of the Reyelts. Soon after, a representative of the Lon Smith Defendants visited the Reyelts' home and offered their roofing services, including assessment of the damage to the Reyelts' roof caused by the hail.

Beatriz is a 69-year-old, retired first grade school teacher who does not possess any special knowledge or expertise regarding assessing roof damage caused by hail or estimating the materials, services, and costs needed to repair such damage. At all times relevant to this matter, the Reyelts relied upon the Lon Smith Defendants' knowledge and expertise to determine the extent of the repairs, if any, that were necessary to protect their roof from future damage and whether any proposed upgrades would be reasonable in light of the cost.

After assessing the damage to the roof, the Lon Smith Defendants recommended to Beatriz that the Reyelts replace the roof on their home. On June 27, 2011, Beatriz signed an "Agreement" that the Lon Smith Defendants had prepared and furnished to her that day. Beatriz signed the "Agreement" relying upon the Lon Smith Defendants' representations, including the representations and promises set forth in the "Agreement." A true and correct copy of the "Agreement" is attached to Plaintiffs' First Amended Original Complaint as Exhibit A and was admitted into evidence at the May 28, 2013 hearing.

The "Agreement" provides, among other things, the following:

> This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner [the Reyelts] authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners['] best interest for all repairs, at a price agreeable to the insurance company and LSRC, and at NO ADDITIONAL COST TO HOMEOWNER EXCEPT THE INSURANCE DEDUCTIBLE AND UPGRADES. The final price agreed to between the insurance company and LSRC shall be the final contract price.

By signing the "Agreement," Beatriz purportedly authorized the following: "I hereby authorize my insurance company and/or mortgage company to make payment for completed repairs directly to LSRC and mail directly to same."

At all times relevant to this cause, the Lon Smith Defendants were aware that the Reyelts' roof was covered by a homeowners insurance policy insured by Farmers Insurance Group ("Farmers"), which insured the Reyelts' property for losses caused by events such as hail. The Lon Smith Defendants, as part of their practice and routine in the roofing construction business, were experienced and knowledgeable in working with various insurance carriers to secure payment for their services from clients' homeowners insurance policies.

Beatriz was not experienced or sophisticated in terms of knowing how to secure Farmers' agreement to pay the Lon Smith Defendants for the roof repairs that the Lon Smith Defendants had said were necessary. By signing the "Agreement," Beatriz reasonably believed that she had authorized the Lon Smith Defendants to act on the Reyelts' behalf in coming to an agreement with Farmers concerning the price Farmers would pay for the repairs to the Reyelts' roof. By signing the "Agreement," Beatriz reasonably believed that she had authorized Farmers to make payment for completed repairs directly to the Lon Smith Defendants. The "Agreement" purported to give the Lon

Smith Defendants, in exchange for compensation, the authority and obligation to act on behalf of the Reyelts in negotiating for or effecting the settlement of a claim for the loss or damage to the Reyelts' roof under the Farmers' homeowners insurance policy covering their home.

On June 27, 2011, the day Beatriz signed the "Agreement" with the Lon Smith Defendants, Chris Cook ("Cook"), a representative of the Lon Smith Defendants, was present in the Reyelts' home. In all of his dealings with Beatriz, Cook was acting in the course and scope of his employment for the Lon Smith Defendants. While present in the Reyelts' home, Cook requested Beatriz to call her Farmers agent and request a claim number. In Cook's presence, Beatriz called her Farmers insurance agent and, after notifying her agent of the damage to the their roof and the Reyelts' intent to use the Lon Smith Defendants to repair such damage, requested a claim number.

In response to Beatriz's specific request for a claim number, her Farmers agent gave her a number, 923671457, which Beatriz gave to Cook, who wrote the number down on the "Agreement" as the Reyelts' claim number under their insurance policy. The "claim number" appearing on the "Agreement" is 923671457. Beatriz was not aware at the time that the number her Farmers agent gave her was not a claim number but her insurance policy number. The Lon Smith Defendants knew or had reason to know that the number Beatriz received from her Farmers agent was not a Farmers claim number.

Beatriz and Cook signed and initialed the "Agreement." Prior to any upgrades, the total price under the "Agreement" was $14,775.48. As a part of the "Agreement," Beatriz and Cook also initialed and signed a "Change Order," which purported to require the Reyelts to pay an additional $1,176.00 for alleged upgrades. As to the upgrade charge of $1,176.00, Cook represented that the upgrades would lower the Reyelts' homeowners insurance costs and that he would contact the

Reyelts' insurance carrier to make sure that the Reyelts received credit for the upgrade and an improved insurance rate from their insurance carrier. In addition, Cook assured Beatriz that he would "handle all of that." The total price under the "Agreement" was $15,951.48, including the upgrades.

From the time Beatriz signed the "Agreement" on June 27, 2011, until the Lon Smith Defendants represented that they had completed working on the Reyelts' home on or about August 15, 2011, the Lon Smith Defendants did not (1) contact Farmers in any form or manner, directly or indirectly, whether by direct contact, telephone, fax, email, mail or other form of communication, with respect to the Reyelts, the Reyelts' home, or the repairs to the roof on the Reyelts' home; (2) contact the Reyelts' Farmers insurance agent, Valerie Webber, in any form or manner, directly or indirectly, whether by direct contact, telephone, fax, email, mail or other form of communication, with respect to the Reyelts, the Reyelts' home, or the repairs to the roof on the Reyelts' home; or (3) contact any person purporting to act with or on behalf of Farmers in any form or manner, directly or indirectly, whether by direct contact, telephone, fax, email, mail or other form of communication, with respect to the Reyelts, the Reyelts' home, or the repairs to the roof on the Reyelts' home.

Prior to the Lon Smith Defendants completing the installation of a new roof on the Reyelts' home, the Lon Smith Defendants did not reach an agreement nor attempt to reach an agreement with Farmers regarding the price for the repairs to the Reyelts' roof. Likewise, prior to the Lon Smith Defendants' completing the installation of a new roof on the Reyelts' home, the Lon Smith Defendants did not speak with or work with any adjuster or representative from Farmers to come to an agreement regarding any of the following:

a. the extent of the damage to the Reyelts' roof;

b. the repairs deemed necessary to repair such damage; or

c. the price Farmers was willing to pay for the repairs to the Reyelts' roof.

On or about August 15, 2011, a Lon Smith Defendants' representative visited the Reyelts' home and requested the Reyelts to initial a "20 Point Checklist" purportedly confirming the work performed by the Lon Smith Defendants. In addition to initialing the "20 Point Checklist," the Lon Smith Defendants' representative also requested that the Reyelts pay what was represented to be the amount owed by the Reyelts' under the "Agreement." As of August 15, 2011, the amount the Lon Smith Defendants' representative represented the Reyelts owed under the "Agreement" was $1,176.00. As of August 15, 2011, the amount the Lon Smith Defendants' representative requested that the Reyelts pay under the "Agreement" was $1,176.00.

On or about August 15, 2011, in response to the Lon Smith Defendants' request for the Reyelts to confirm that the Lon Smith Defendants had performed all work specified, Beatriz notified the Lon Smith Defendants' representative that she had no means of confirming whether the Lon Smith Defendants had performed all such work. In response to Beatriz's notification, the Lon Smith Defendants' representative suggested that Beatriz climb onto the roof and inspect the roof herself. Due to her age and physical limitations, Beatriz could not and, thus, did not climb onto the roof to inspect the Lon Smith Defendants' work. The Reyelts relied upon the Lon Smith Defendants' representations that the work the Lon Smith Defendants promised to perform and allegedly performed was actually performed.

On or about August 15, 2011, the Reyelts initialed and signed the Lon Smith Defendants' "20 Point Checklist" and tendered a check to the Lon Smith Defendants in the amount of $1,176.00.

On or about August 15, 2011, the Lon Smith Defendants accepted the Reyelts' tendered payment of $1,176.00. At no point in time during the Lon Smith Defendants' August 15, 2011 conversation with the Reyelts did the Lon Smith Defendants, through their agents or otherwise, indicate that the Reyelts owed anything beyond the tendered amount of $1,176.00 under the "Agreement" or indicate that the Lon Smith Defendants would pursue the remaining balance of $14,775.48 under the "Agreement" from the Reyelts and not Farmers. Further, at no point in time during the August 15, 2011 conversation with the Reyelts did the Lon Smith Defendants, through their agents or otherwise, inform the Reyelts that the Lon Smith Defendants had not taken the following actions:

a. contacted Farmers in an attempt to secure an agreement with Farmers concerning the price Farmers would pay for the roof repairs as set forth in the "Agreement;"

b. secured an agreement with Farmers concerning the price Farmers would pay for the roof repairs as set forth in the "Agreement;" or

c. obtained payment from Farmers for the roof repairs performed by the Lon Smith Defendants.

Despite the Reyelts' tendering payment and despite the Lon Smith Defendants' failure to pursue a claim under the Reyelts' homeowners insurance policy, on or about September 14, 2011, the Lon Smith Defendants sent Beatriz a demand letter for the balance allegedly owed under the "Agreement." (Plaintiffs' Exhibit ("Pls.' Ex.") 3B at May 28, 2013 Hearing ("May 28 Hr'g").) As of September 14, 2011, the amount the Lon Smith Defendants claimed was owed under the "Agreement" was $14,775.48, or the difference between the $1,176.00 paid by the Reyelts and the total amount of $15,951.48 set forth in the "Agreement." (*Id.*) The Lon Smith Defendants' September 14, 2011 demand letter threatened "further collection activity" if Beatriz failed to "remit the balance due or contact our office immediately." (*Id.*)

Believing that Farmers had not paid the Lon Smith Defendants, Beatriz immediately contacted her Farmers agent to ascertain the reason Farmers had failed to do so. Upon speaking with her agent, Beatriz discovered the following:

a. the "claim number" on the "Agreement" was not a claim number but the Reyelts' policy number;

b. prior to the Lon Smith Defendants' installing the new roof on the Reyelts' home, the Lon Smith Defendants never contacted Farmers in an attempt to secure an agreement with Farmers concerning the price Farmers would pay for the roof repairs as set forth in the "Agreement;"

c. prior to the Lon Smith Defendants' installing the new roof on the Reyelts' home, the Lon Smith Defendants did not reach an agreement nor attempt to reach an agreement with Farmers regarding the price for the repairs to the Reyelts' roof; and

d. prior to the Lon Smith Defendants' installing the new roof on the Reyelts' home, the Lon Smith Defendants did not speak with or work with an adjuster or a representative from Farmers to come to an agreement regarding the extent of the damage to the Reyelts' roof, the repairs deemed necessary to repair such damage, or the price Farmers was willing to pay for the repairs to the Reyelts' roof.

Beatriz immediately thereafter contacted Farmers' home office and, thereafter, a Farmers insurance adjuster visited the Reyelts' home to examine the roof.

On or about October 6, 2011, the Reyelts learned that Farmers was refusing to pay for any of the repairs performed by the Lon Smith Defendants allegedly because the repairs to the Reyelts' roof were completed prior to Farmers' evaluation of the damage. (Pls.' Ex. 4 at May 28 Hr'g.) On or about October 31, 2011, the Lon Smith Defendants sent a second demand letter for the unpaid balance allegedly owed under the "Agreement." (Pls.' Ex. 3E at May 28 Hr'g.) Under the second demand letter, the Lon Smith Defendants sought an amount of $14,877.49, which included the initial

amount of $14,775.48 sought in the Lon Smith Defendants' September 14, 2011 demand letter, plus a finance charge of $102.01. (*Id.*)

The Lon Smith Defendants' October 31, 2011 demand letter threatened Beatriz to act immediately in order "to preserve your good credit standing," claiming that she had "done nothing yet to protect it [her credit standing]." (*Id.*) The Lon Smith Defendants' October 31, 2011 demand letter also threatened that if Beatriz failed "to bring [the Reyelts'] account up to date or to contact [the Lon Smith Defendants] and make some accommodations, [the Lon Smith Defendants] will have to pursue further collection activity." (*Id.*) After receiving the Lon Smith Defendants' October 31, 2011 demand letter, Beatriz requested the assistance of The Fillmore Law Firm to represent the Reyelts concerning the debt allegedly owed under the "Agreement."

On November 4, 2011, Charles W. Fillmore contacted Mark Blahitka ("Blahitka"), Director of Agency Services for the Lon Smith Defendants and informed Blahitka that he was representing the Reyelts. As of November 4, 2011, the Lon Smith Defendants were on notice and fully aware that the Reyelts were represented by an attorney. Despite the Lon Smith Defendants' awareness of the Fillmore Law Firm's representation of the Reyelts, on or about January 25, 2012, the Cross Defendants, on behalf of the Lon Smith Defendants, sent a letter directly to the Reyelts demanding payment. (Pls.' Ex. 5B at May 28 Hr'g.)

In the Defendants' demand letter, Mr. Cross, immediately after specifying that he had been retained by the Lon Smith Defendants, stated the following:

> On or about June 27, 2011, you entered into an agreement with Lon Smith Roofing to re-roof your home. It is our understanding that your insurance company has fully funded your claim and that you have received a check. This payment has been received by you and now you are wrongfully withholding said payment in breach of your written and fully executed contract. You currently owe Lon Smith Roofing $15,951.48.

(*Id.*) The Cross Defendants also threatened to file suit, attaching a draft of a court petition to the letter. (*Id.*) The Cross Defendants also asserted that under their employment agreement with the Lon Smith Defendants, "[Mr. Cross has] been assigned an interest in the claim against you." (*Id.*)

The present case was filed by Plaintiffs on February 24, 2012. Approximately a week after being served with the instant lawsuit, the Lon Smith Defendants, by and through the Cross Defendants, filed a civil lawsuit against Beatriz in County Court at Law No. 1, Tarrant County, Texas, on March 5, 2012.

As a proximate cause of Defendants' conduct, the Reyelts have sustained damages, including economic damages as well as severe mental distress and anguish.

II. CONCLUSIONS OF LAW

A. Lon Smith "Agreement" Declared Illegal, Void and Unenforceable.

On November 27, 2012—prior to Defendants' default in this matter—the Court entered its Order Granting Plaintiffs' Rule 12(c) Motion for Partial Judgment. For the reasons set forth in Plaintiffs' Rule 12(c) motion and based on the Lon Smith Defendants' judicial admissions, including those voluntarily made in their original answer, the plain language of the "Agreement" dated June 27, 2011, between Plaintiffs and the Lon Smith Defendants, and the applicable law, including relevant provisions of Chapter 4102 of the Texas Insurance Code, the Court ruled that the June 27, 2011 "Agreement" was illegal in its entirety, void and unenforceable. The Court's November 27, 2012 order is now final. In further view of the Court's April 23 Order, Plaintiffs are entitled to a judicial declaration declaring that the June 27, 2011 "Agreement" is illegal in its entirety, void and unenforceable, and that Plaintiffs are not liable for payment of any past or future services rendered under said "Agreement." *See* Tex. Ins. Code §§ 4102.206(a), 4102.207(a), (b).

B. Lon Smith Defendants Liable to Each Plaintiff for Damages, Attorneys' Fees, and Costs.

1. Texas Debt Collection Practices Act.

Based upon the facts found by the Court herein and in view of the evidence presented at the hearing on May 28, 2013, the Lon Smith Defendants are liable to Plaintiffs for violations of the Texas Debt Collection Practices Act, Texas Finance Code § 392.001 *et seq.* ("TDCPA"), which such violations were a proximate cause of mental anguish damages to Plaintiffs. In particular, the Lon Smith Defendants, directly and through the conduct of their agents, including their retained debt collection counsel, the Cross Defendants, violated the TDCPA, including section 392.303(a)(2) and section 392.304(a)(8) and (a)(19). Accordingly, Plaintiffs are entitled to recover from the Lon Smith Defendants their mental anguish damages together with an award for their attorneys' fees reasonably related to the amount of work performed and costs. *See* Tex. Fin. Code § 392.403(a)(1), (b).

2. Texas Deceptive Trade Practices Act.

Based upon the facts found by the Court herein and in view of the evidence presented at the hearing on May 28, 2013, the Lon Smith Defendants are liable to Plaintiffs for violations of the Texas Deceptive Trade Practices Act, Texas Business and Commerce Code § 17.41 *et seq.* ("DTPA"), which such violations were a producing cause of both economic damages and mental anguish damages to Plaintiffs. In particular, the Lon Smith Defendants engaged in false, misleading and deceptive acts and practices declared to be unlawful under section 17.46 of the DTPA, including sections 17.46(b)(5), (b)(7), (b)(9), and (b)(12). The Lon Smith Defendants also engaged in an unconscionable action or course of action as prohibited by section 17.50(a)(3) of the DTPA. The Lon Smith Defendants' use and employment of an agreement that was and is illegal and violative of Chapter 4102 of the Texas Insurance Code constituted an act or practice in violation of Chapter 541

of the Texas Insurance Code and, thus, a violation of section 17.50(a)(4) of the DTPA. *See* Tex. Ins. Code § 4102.206(c). Moreover, the Lon Smith Defendants' violations of the TDCPA—both directly and through the conduct of their agents, including their retained debt collection counsel, the Cross Defendants—constituted a deceptive trade practice under the DTPA for which the Lon Smith Defendants are liable to Plaintiffs. *See* Tex. Fin. Code § 392.404 ("A violation of this chapter is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter.").

As previously determined by the Court, such wrongful conduct was committed "knowingly" and "intentionally," as those terms are defined in section 17.45(9) and (13), respectively, of the DTPA. *See* April 23 Order at 4. Accordingly, Plaintiffs are entitled to recover from the Lon Smith Defendants their economic damages and mental anguish damages together with an award of not more than three times actual damages.[3] *See* Tex. Bus. & Com. Code § 17.50(b)(1). Plaintiffs are

[3]Plaintiffs' proposed judgment appears to interpret section 17.50(b)(1) as meaning that they can add up to three times the original economic and mental anguish awards for a knowing and intentional violation *in addition* to the original amount of the economic and mental anguish awards. Plaintiffs' position has support, albeit in dicta, in *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006). In that case, the Texas Supreme Court made a statement in dicta that has been interpreted by some as stating, as proposed by Plaintiffs, that the plaintiff in a DTPA case could, in addition to the original award of economic and mental anguish damages, recover up to three times the amount of economic and mental anguish damages for a knowing and intentional violation. *See id.* at 304 & n.6 ("For a DTPA violation, she could recover economic damages, mental anguish, and attorney's fees, but not additional damages beyond $21,639 (three times her economic damages.)"). In other words, the court in *Chapa* treated the language in section 17.50(b) as allowing a quadruple multiplier. However, prior to the court's decision in *Chapa*, "the Texas Supreme Court had held in *Jim Walter Homes, Inc. v. Valencia* [, 690 S.W.2d 239, 241 (Tex. 1985),] that the 1979 version of the DTPA section on additional damages . . . allowed no more than a total of three times actual damages." Joseph Vale, *Not More Than Dicta? Whether the DTPA's Additional Damages Can Quadruple Economic and Mental Anguish Damages Under Tony Gullo Motors I, L.P. v. Chapa*, 63 Baylor L. Rev. 934, 937 (2011) (footnotes omitted).

Since the court's decision in *Chapa*, there is a lack of consistency in the district and appellate courts in Texas in whether to apply the quadruple multiplier suggested in *Chapa* in claims under the DTPA. *Compare Bossler Chrysler-Dodge II, Inc. v. Riley*, 221 S.W.3d 749, 752 (Tex. App.—Waco 2007, pet. denied) and *Lin v. Metro Allied Ins. Agency*, 305 S.W.3d 1, 3-4 (Tex. App.—Houston [1st Dist.] 2007 (mem. op.), *rev'd per curiam on other grounds*, 304 S.W.3d 830 (Tex. 2009), *with Texas Mut. Ins. Co. v. Morris*, 287 S.W.3d 401, 434 (Tex. App.—Houston [14th Dist.] 2009), *rev'd per curiam on other grounds*, 383 S.W.3d 146 (Tex. 2012) *and Ramsey v. Spray*, No. 2-08-129-CV, 2009 WL 5064539, at *1 (Tex. App.—Fort Worth Dec. 23, 2009, pet. denied). After reviewing the cases, the Court concludes that it cannot rely on the dicta in *Chapa* to find that a quadruple multiplier is allowed under the provisions set forth in section 17.50(b)(1). The Court is not convinced that the Texas Supreme Court, if squarely presented with the issue, would rule

also entitled to an award for their court costs and reasonable and necessary attorneys' fees. *See* Tex. Bus. & Com. Code § 17.50(d).

C. Cross Defendants Liable to Each Plaintiff for Damages, Attorneys' Fees and Costs.

Based upon the facts found by the Court herein and in view of the evidence presented at the hearing on May 28, 2013, the Cross Defendants are liable to Plaintiffs for violating the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), which such violations resulted in mental anguish damages to Plaintiffs. In particular, the Cross Defendants violated multiple provisions of the FDCPA, including sections 1692c, 1692d, 1692e, 1692e(2), 1692e(5), 1692f, 1692g(a)(3), 1692g(a)(4), and 1692g(a)(5). Accordingly, Plaintiffs are entitled to recover from the Cross Defendants mental anguish damages for their "personal humiliation, embarrassment, mental anguish and emotional distress." *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 957 (9th Cir. 2011); Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50109 (Dec. 13, 1988) (FDCPA damages include "damages for personal humiliation, embarrassment, mental anguish, or emotional distress"). Additionally, Plaintiffs are entitled to recover from the Cross Defendants "the costs of the action, together with a reasonable attorney's fees as determined by the court." 15 U.S.C. § 1692k(a)(3).

III. Calculation of Plaintiffs' Actual Damages, Attorneys' Fees, and Costs.

A. Plaintiffs' Actual Damages.

As the Court previously determined, Plaintiffs are entitled to recover from the Lon Smith Defendants $1,176.00, which represents the amount Plaintiffs paid to the Lon Smith Defendants

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that section 17.50(b)(1) allows for a quadruple multiplier of economic and mental anguish damages. Instead, the Court, relying on the case precedent in *Valencia* and its progeny and the language in section 17.50(b)(1), concludes that section 17.50(b)(1) only allows for the adding of up to two times the original economic and mental anguish awards for a total of a triple multiplier.

under the illegal, void and unenforceable June 27, 2011 "Agreement." *See* April 23 Order at 3-4. The "Agreement" and the debt that Defendants sought to collect in relation to such "Agreement" pertained to services and goods that Plaintiffs jointly sought and acquired by purchase from the Lon Smith Defendants in relation to their homestead. Accordingly, Plaintiffs are entitled to recover from the Lon Smith Defendants $1,176.00 in economic damages. *See* Tex. Bus. & Com. Code § 17.50(b)(1), (b)(3).

As to mental anguish damages, a plaintiff may recover actual damages for mental anguish under the FDCPA, 15 U.S.C. § 1692k(a)(1); the TDCPA, Tex. Fin. Code § 392.403(a)(2); and the DTPA,[4] Tex Bus. & Com. Code 17.50(b)(1). *See Browne v. Portfolio Recovery Assocs., Inc.*, No. H-11-02869, 2013 WL 871966, at *5 (S.D. Tex. Mar. 7, 2013) ("Actual damages [recoverable under the FDCPA] include not only out-of-pocket expenses, but also damages for personal humiliation, embarrassment, mental anguish, and emotional distress."); *Monroe v. Frank*, 936 S.W.2d 654, 661 (Tex. App.—Dallas 1996, writ dism'd w.o.j.). To recover such damages, the Plaintiffs must introduce direct evidence of the nature, duration, and severity of the mental anguish, thus establishing a substantial disruption in the Plaintiffs' daily routine. *See Bullock v. Abbott & Ross Credit Services, L.L.C.*, No. A-09-413-LY, 2009 WL 4598330, at *3 (W.D. Tex., Dec. 3, 2009); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 (Tex. 1997); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). The evidence must show a "high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *Jabri v. Alsayyed*, 145 S.W.3d 660, 669 (Tex. App.–Houston [14th Dist.] 2004, no pet.). There must also be proof that the

[4]As set forth above, to be liable for mental anguish damages under the DTPA, the Defendants must have acted knowingly. Tex. Bus. & Com. Code § 17.50(b)(1). The Court has previously found that Defendants in this case did act knowingly (as well as intentionally) in violating the DTPA.

knowing, unconscionable action or course of action was a producing cause of the mental anguish. *Jabri*, 145 S.W.3d at 669 (citing *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998)).

In this case, Beatriz testified that the actions of the Lon Smith Defendants caused, *inter alia:* (1) her to feel devastated, scared, upset, angry, afraid, and embarrassed; (2) her and Gerald to have trouble sleeping; (3) her to have physical problems, including colitis exacerbation and stomach pain; (4) her to increase her dosage of Prozac medication; (5) her and Gerald to cancel a planned wedding anniversary trip; and (6) her and Gerald to contribute less money than they wanted to their son's wedding. (May 28, 2013 Hr'g Tr. ("Tr.") at 32-34, 38, 40-42, 48-50, 53-54.) Beatriz further testified that the actions of the Cross Defendants caused her to feel worried, upset, devastated, embarrassed, angry, and scared. (Tr. at 45, 48-50.) Beatriz also testified that the actions of the Lon Smith Defendants, through their attorney Cary J. Cross, in filing suit against her and Gerald in County Court at Law No. 1, Tarrant County, Texas on March 5, 2012, approximately a week after the Reyelts had filed the instant suit in this Court, further caused her to become very afraid, angry, humiliated, and scared. (Tr. at 47-52.)[5] Beatriz further stated that she cries more, worries about spending money, has recently seen a doctor for stress and been prescribed medication for anxiety, and has had to come out of retirement and go back to work as a result of the Defendants' actions. (Tr. 52-55.)

Gerald testified at the hearing that he agreed with all of Beatriz's testimony and confirmed that the Defendants' actions caused him and Beatriz to be worried, upset, angry, and embarrassed. (Tr. at 67-69.) He also confirmed that Defendants' actions had affected his ability to sleep. (*Id.*)

[5] According to the information provided by the parties at the May 28 hearing, the suit in the Tarrant County Court at Law #1 had been abated but not dismissed as of the date of the hearing. (Tr. 51.)

He further testified that Defendants' actions had caused him and Beatriz Reyelts to have marital difficulties, including geting irritated with each other sometimes and arguing. (Tr. at 68.)

Based upon the evidence in the record and Plaintiffs' testimony at the May 28 hearing before the Court, the Court finds that Plaintiffs have each sustained compensable mental anguish for which Defendants are liable. Although mere worry, anxiety, embarrassment, or anger by itself would not be enough to support an award of mental anguish, there is evidence that Defendants' conduct caused a high degree of mental pain and distress in that it affected the Plaintiffs' ability to sleep, substantially disrupted their daily routine, forced Beatriz Reyelts to go back to work after she had retired and to see a doctor for stress, forced Plaintiffs to cancel a planned vacation and contribute less money to their son's wedding, and caused difficulties in Plaintiffs' marriage. In addition, the evidence shows that the Defendants' actions were the producing cause of Plaintiffs' mental anguish.

The Court finds that the sum of money, if paid now in cash, that would fairly and reasonably compensate Plaintiff Beatriz Reyelts for her damages that resulted from Defendants' wrongful conduct as determined by the Court is as follows:

Mental anguish sustained in the past:

$25,000.00;

Mental anguish that, in reasonable probability, will be sustained in the future:

$0.

The Court further finds that the sum of money, if paid now in cash, that would fairly and reasonably compensate Plaintiff Gerald Reyelts for his damages that resulted from Defendants' wrongful conduct as determined by the Court is as follows:

Mental anguish sustained in the past:

$5,000.00;

Mental anguish that, in reasonable probability, will be sustained in the future:

$0.

Pursuant to section 33.003 of the Texas Civil Practice & Remedies Code, the Court finds that the following percentages of responsibility should be assigned to the Defendants for Plaintiffs' damages:

The Lon Smith Defendants:	70 %
The Cross Defendants:	30 %
Total:	100 %.[6]

Moreover, the Court further determines that the Lon Smith Defendants are jointly and severally liable for all of the damages recoverable by the Plaintiffs. *See* Tex. Civ. Prac. & Rem. Code § 33.013(b)(1).

Accordingly, Plaintiff Beatriz Reyelts shall have and recover as her actual damages for her mental anguish, **$25,000.00,** constituting the total sum for all such damages found by the Court to result from the Defendants' wrongful conduct toward her. Such mental anguish damages shall be recovered as follows:

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[6]The Court notes that Plaintiffs, in their proposed Final Judgment, request the Court to apply Texas law regarding proportionate liability set forth in Chapter 33 of the Texas Civil Practice and Remedies Code. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 33.002(a)(2) ("This chapter applies to: . . . any action brought under the [DTPA] in which a defendant . . . is found responsible for a percentage of the harm for which relief is sought."). Because Defendants did not object to any provision of the Plaintiffs' proposed final judgment, the Court will apply Chapter 33 and proportion the damages accordingly. However, even if Chapter 33 does not apply, the Court would find that the Cross Defendants' actions caused the Plaintiffs $9,000 in mental anguish damages ($7,500 to Beatriz and $1,500 to Gerald) and the Lon Smith Defendants' actions caused the Plaintiffs $21,000 in mental anguish damages ($17,500 to Beatriz and $3,500 to Gerald).

(a) Plaintiff Beatriz Reyelts shall have and recover from the Lon Smith Defendants, jointly and severally, as her actual damages for her mental anguish, the sum of **$17,500.00**, constituting the total sum for all such damages found by the Court multiplied by the percentage of responsibility proportioned to the Lon Smith Defendants, namely, 70%. *See* Tex. Civ. Prac. & Rem. Code §§ 33.002(a)(2), 33.003;

(b) Plaintiff Beatriz Reyelts shall have and recover from the Cross Defendants, jointly and severally, as her actual damages for her mental anguish, the total sum of **$7,500.00**, constituting the total sum for all such damages found by the Court multiplied by the percentage of responsibility proportioned to the Cross Defendants, namely, 30%. *See* Tex. Civ. Prac. & Rem. Code §§ 33.002(a)(2), 33.003.

Accordingly, Plaintiff Gerald Reyelts shall have and recover as his actual damages for his mental anguish, **$5,000.00**, constituting the total sum for all such damages found by the Court to result from the Defendants' wrongful conduct toward him. Such mental anguish damages shall be recovered as follows:

(a) Plaintiff Gerald Reyelts shall have and recover from the Lon Smith Defendants, jointly and severally, as his actual damages for his mental anguish, the sum of **$3,500.00**, constituting the total sum for all such damages found by the Court multiplied by the percentage of responsibility proportioned to the Lon Smith Defendants, namely, 70%. *See* Tex. Civ. Prac. & Rem. Code §§ 33.002(a)(2), 33.003;

(b) Plaintiff Gerald Reyelts shall have and recover from the Cross Defendants, jointly and severally, as his actual damages for his mental anguish, the sum of $1,500.00, constituting the total sum for all such damages found by the Court multiplied by the percentage of responsibility proportioned to the Cross Defendants, namely, 30%. *See* Tex. Civ. Prac. & Rem. Code §§ 33.002(a)(2), 33.003.

The Court further finds that Plaintiff Beatriz Reyelts shall have and recover from the Lon Smith Defendants, jointly and severally, the additional sum of $35,000.00, constituting an award of not more than three times the amount of her actual damages for her mental anguish and consistent with the Lon Smith Defendants' proportion of such damages.

The Court further finds that Plaintiff Gerald Reyelts shall have and recover from the Lon Smith Defendants, jointly and severally, the additional sum of $7,000.00, constituting an award of not more than three times the amount of his actual damages for his mental anguish and consistent with the Lon Smith Defendants' proportion of such damages.

B. Plaintiffs' Attorneys' Fees and Costs.

With regard to Plaintiffs' request for attorneys' fees, the Court has considered the evidence presented at the May 28 damages hearing, including the very thorough testimony on the issue presented by the Fillmore Law Firm, the voluminous and detailed billing records of the Fillmore Law Firm, and the full record in this case.

Accordingly, the Court finds that the number of hours expended by the following individuals involved in the representation of Plaintiffs in this matter is as follows:[7]

[7]The Court compiled these hour calculations by considering: (1) Plaintiffs' Exhibit 10 ("Ex. 10") submitted at the May 28 hearing (for hours expended between November 21, 2011 and May 26, 2013); (2) Tab F to Plaintiffs' Appendix in Support of Plaintiffs' Responses to Defendants' Post-Hearing Briefs Regarding Damages and Attorneys' Fees [doc. # 46] ("Tab F")(for hours expended from May 27, 2013 to June 19, 2013); and (3) Appendix G to Plaintiffs'

Attorney / Partner H. Dustin Fillmore III:	48	hours;
Attorney / Partner Charles W. Fillmore:	445	hours;
Attorney / Associate R. Layne Rouse:	307	hours;
Paralegal Susan Garay:	1	hour;
Paralegal Jamie Aliff:	7	hours.

Moreover, in determining the reasonable and appropriate hourly rates within the community for the services rendered by the following individuals, the Court finds, based on the evidence presented by Plaintiffs at the May 28 hearing and not objected to by Defendants at or after the hearing, that the following hourly rates are reasonable and within the prevailing market rate, including in particular for attorneys of a similar skill and experience level and reputation:

Attorney / Partner H. Dustin Fillmore III:	$400 per hour;
Attorney / Partner Charles W. Fillmore:	$400 per hour;
Attorney / Associate R. Layne Rouse:	$200 per hour;
Paralegal Susan Garay:	$120 per hour;
Paralegal Jamie Aliff:	$120 per hour.

Accordingly, multiplying the number of hours expended by the appropriate hourly rates found by the Court, Plaintiffs seek to recover the total sum of $259,560.00 as their reasonable attorneys' fees from Defendants.

Following the May 28 hearing, Defendants filed objections to the amount of attorneys' fees claimed by Plaintiffs. First, Defendants object that The Fillmore Law Firm billing records include

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Appendix in Support of Combined Response to the Motions and Briefs to Reconsider the Order Granting Plaintiffs' Motion for Default Judgment and Setting Hearing on Issue of Damages and Denying Defendants' Motion to Set Aside Clerk's Entry of Default and Motion for Leave to File Amended Answer [doc. 63] (for hours expended from June 27, 2013 to July 2, 2013). Also, the number of hours have been rounded to the nearest hour.

hours expended on work not attributable to Defendants in this case. In sum, Defendants claim that fee entries "beginning 11/21/2011 and continuing to 1/16/12 pertain only to Farmers and are not attributable to the Claims against Defendants" and "all pleading drafting prior to 2/13/12 pertains to claims against Farmers." (Defendants' Objections to Attorney's Fees ("Defs.' Objs.") at 3.) Thus, Defendants assert that such fees should be segregated from inclusion in the attorneys' fees award in this case. The Court disagrees. Such billing entries and work performed by The Fillmore Law Firm share a "common core of facts" with Plaintiffs' claims against Defendants in the present case, and the Court declines to sift through the voluminous entries to try to parse out the pre-suit entries and work performed by The Fillmore Law Firm in this regard. *See La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir. 1995).

Next, Defendants claim that the Court should "segregate" the attorneys' fees claimed by the Fillmore Law Firm between the defendants themselves, i.e. "[t]o the extent these itemizations can be segregated, Plaintiffs should so segregate their fees between the Defendants." (Defs.' Objs at 3.) In this case, Plaintiffs have segregated their claim for attorneys' fees for services provided before the Cross Defendants' letter of January 27, 2012, such that all attorneys' fees sought by Plaintiffs prior to that date are sought only as to the Lon Smith Defendants. All fees after that date are claimed by Plaintiffs against all Defendants as being so "interrelated" as to not require segregation. *See Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 298 (5th Cir. 2007) (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991)). The Court agrees with Plaintiffs on this issue. Accordingly, the only fee segregation that will be performed will be for those fees incurred prior to January 27, 2012. Based upon the foregoing, the Court finds that all fee entries contained in Plaintiffs' Counsels' fee statement admitted at the May 28 hearing, Ex. 10, prior to January 27, 2012,

the date Plaintiffs received the letter from the Cross Defendants, should be assessed only against the Lon Smith Defendants.

Finally, Defendants object that the total fees claimed by Plaintiffs are "excessive and unreasonable." (Defs.' Objs at 4.) Plaintiffs respond that Defendants have not challenged the billing entries submitted by Plaintiffs nor have they refuted any of the "lodestar" factors evidence presented by counsel for Plaintiffs. The Court recognizes the "strong presumption" that the lodestar amount is reasonable, and it should only be those "rare circumstances" in which the lodestar does not adequately reflect a reasonable fee. *See Perdue v. Kenny A.*, 130 S. Ct. 1662, 1672-73 (2010). However, in the present case, the totality of the circumstances and the nature of the claims ultimately presented cause the Court to conclude that the total attorneys' fees amount sought by Plaintiff is excessive. This is in no way a criticism by the Court regarding the efforts of The Fillmore Law Firm in zealously pursuing Plaintiffs' claims in this case. In fact, The Fillmore Law Firm's very thorough representation of Plaintiffs in this matter is commendable and the briefing provided by Plaintiffs has been exceptional. But in the end, the Court concludes that a reduction of attorneys' fees in the amount of 25% is appropriate in this case.[8] Thus, the total amount of attorneys' fees to be awarded to Plaintiffs in this case is **$194,670.00**.

Accordingly, Plaintiffs are entitled to recover from the Lon Smith Defendants the sum of **$4,780.00**, which represents the Plaintiffs' attorneys' fees incurred between November 21, 2011 and through January 27, 2012, the date that Plaintiffs received the letter from the Cross Defendants dated January 25, 2012.

[8]This reduction will be applied to post-January 27, 2012 attorneys' fees which are assessed against all Defendants.

Plaintiffs are entitled to recover and shall have and recover all remaining attorneys' fees awarded herein, **$189,890.00**, from all Defendants, jointly and severally.

Moreover, the Court further finds that the total sum of **$2,025.82**[9] was expended in reasonable and necessary costs in representing Plaintiffs in this action and that the charges for such services were reasonable and customary, which sum Plaintiffs are entitled to recover from Defendants, jointly and severally.

Finally, the Court further finds that Plaintiffs are entitled to recover from all Defendants, jointly and severally, the attorneys' fees and costs incurred by Plaintiffs on any appeal of the Court's judgment in an amount not to exceed **$50,000.00**.

C. Pre- and Post-Judgment Interest

Plaintiffs shall have and recover from Defendants, respectively, prejudgment interest on the $1,176.00 in economic damages and $30,000.00 in mental anguish damages awarded herein against Defendants at the rate of 3.25% per annum, compounded annually, beginning on February 24, 2012, the date that this action was filed, and ending on the date before this judgment is signed. *See Jones v. Lockhart, Morris & Montgomery, Inc.*, No. 1:11-CV-373, 2012 WL 1580759, at *5 (E.D. Tex. Feb. 3, 2012) (awarding prejudgment interest on damages assessed under both the FDCPA and the Telephone Consumer Protection Act, 47 U.S.C. § 227, concluding "that the prime rate, compounded annually, is reasonable in calculating the award of prejudgment interest in this case"), *adopted in* 2012 WL 1580636 (E.D. Tex. May 4, 2012); *Giddy Up, LLC v. PRISM Graphics, Inc.*, No. 3:06-CV-948-B, 2007 WL 3125312, at *1 (N.D. Tex. Oct. 24, 2007) (awarding prejudgment interest on

[9] $1,094.54 (for expenses incurred from 1/27/2012 through 5/26/2013; *see* Ex. 10) + $931.28 (for expenses incurred from 5/27/2013 through 6/19/2013; *see* Tab F) = $2025.82.

actual damages assessed under Texas state law claims, including DTPA violations); *see also* Bd. of Governors of the Fed. Reserve Sys., *Selected Interest Rates (Weekly)* (July 22, 2013), http://www.federalreserve.gov/releases/h15/current/ (reporting that the prime rate as of July 22, 2013 is 3.25%). Plaintiffs shall not recover prejudgment interest on the additional damages awarded under the DTPA because the DTPA prohibits an award of prejudgment interest applicable to such additional damages. *See* Tex. Bus. & Com. Code § 17.50(f);

Plaintiffs shall have and recover from Defendants, respectively, postjudgment interest on all amounts awarded herein against them (damages, attorneys' fees, costs, and prejudgment interest) at the rate of 0.11% per annum, compounded annually, from the date of judgment until the judgment is paid in full. *See Fuchs v. Lifetime Doors, Inc.*, 939 F.2d 1275, 1280 (5th Cir. 1991) (pointing out that "[p]ostjudgment interest on money judgments recovered in federal district court is governed by 28 U.S.C. § 1961(a)" and "direct[ing] the district court to award post-judgment interest on the entire amount of the final judgment, including damages, prejudgment interest, and attorney's fees"); United States District Court for the Northern District of Texas, *Publications - Post Judgment Rate* (July 22, 2013), http://www.txnd.uscourts.gov/publications/pjrate.html (reporting that the current postjudgment interest rate from July 22 to July 28, 2013 is 0.11%).

SO ORDERED.

SIGNED this 26th day of July, 2013.

JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE

CAUSE NO. 236-267881-13

JOE KEY and STACCI KEY, Plaintiffs, individually and on behalf of all others similarly situated. v. LON SMITH & ASSOCIATES, INC., and A-1 SYSTEMS, INC. d/b/a LON SMITH ROOFING AND CONSTRUCTION, Defendants.	§ § § § § § § § § § § § §	IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 236TH JUDICIAL DISTRICT COURT

ORDER STAYING MOTIONS FOR SUMMARY JUDGMENT UNTIL CLASS CERTIFICATION ISSUES ARE RESOLVED

On the 21st day of November 2014, the Court heard argument from the parties concerning the scheduling of hearings on motions for summary in relation to class certification issues. After considering this issue, it is hereby ORDERED that no hearings will be set on any motion for summary judgment until this Court makes a ruling as to whether a class should be certified in this case.

SIGNED this 9 day of December, 2014.

The Honorable Judge Tom Lowe
Judge, 236th Judicial District Court
Tarrant County, Texas

Court's Minutes
Transaction # 221 R

12/12/14 E-MAILED WARD FILLMORE, WIEGAN DISNEY

EXHIBIT
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THOMAS A. WILDER
DISTRICT CLERK

CAUSE NO. 236-267881-13

JOE KEY and STACCI KEY, Plaintiffs, individually and on behalf of all others similarly situated. v. LON SMITH & ASSOCIATES, INC., and A-1 SYSTEMS, INC. d/b/a LON SMITH ROOFING AND CONSTRUCTION, Defendants.	§	IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 236TH JUDICIAL DISTRICT COURT

ORDER CERTIFYING CLASS ACTION WITH TRIAL PLAN

Factual Background and Claims

This case centers on a contractual provision that appears in form contracts used by Defendants Lon Smith & Associates, Inc. ("LSA") and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction ("A-1") (collectively "Lon Smith" or "Defendants"). The primary issue to be resolved is whether the contractual provision violates the Texas Insurance Code and, thereby, renders such contracts illegal, void, and unenforceable.

Named Plaintiffs Joe and Stacci Key have asserted five separate causes of action, but only seek class certification as to three causes of action here. The claims Plaintiffs seek to certify a class on are (1) Plaintiffs' claim for declaratory relief; (2) Plaintiffs' Deceptive Trade Practices claims; and (3) Plaintiffs' fraud claim.

EXHIBIT
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COURT'S MINUTES
TRANSACTION # 8152A

Order

On the 26th day of May 2015, the Court heard argument from the parties concerning Plaintiffs' Motion for Class Certification. After considering Plaintiffs' Motion for Class Certification, all briefing, evidence, and arguments of counsel, this Court finds that as to Plaintiffs' claim for declaratory judgment and Plaintiffs' DTPA claims based on the Texas Insurance Code and Unconscionability:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims of the representative parties are typical of the claims of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members, which would establish incompatible standards of conduct for Lon Smith of the class;

(6) Lon Smith has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; and

(7) the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

It is therefore, ORDERED that this action will be certified as a class action as to (a) Plaintiffs' declaratory judgment claim, (b) Plaintiffs' DTPA claim based on Section 17.50(a)(3) (Unconscionability), and (c) Plaintiffs' DTPA claim based on Section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) pursuant to the provisions of Rule 42 of the Texas Rules of Civil Procedure. It is, further, ORDERED that the certified class shall consist of:

> All Texas residents who from June 11, 2003 through the present signed agreements with Lon Smith that included the following language, or language

> substantially similar to the following: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price."[1]

In support of its rigorous analysis as to this Order, the Court puts forth the following analysis and trial plan that will guide the Court in trying the claims in this case.

1. Burden of Proof and Presumptions

The Named Plaintiffs bear the burden of establishing the requirements of TRCP 42(a) and any one of the alternative requirements listed in TRCP 42(b). The Named Plaintiffs are not entitled to a presumption, and the Court did not presume, that any of the requirements of TRCP 42(a) or TRCP(b) have been met.

2. Class Definition

Pursuant to TRCP 42(d), the Court certifies the following class:

> All Texas residents who from June 11, 2003 through the present signed agreements with Lon Smith that included the following language, or language substantially similar to the following: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price."

3. Appointment of Class Representatives

The Named Plaintiffs Joe and Stacci Key are appointed class representatives for the Class.

4. Appointment of Counsel

[1] The Court has amended Plaintiffs' requested class definition to reflect a class beginning on June 11, 2003 (rather than January 1, 2003) because the Texas Insurance Code provision at issue became effective on June 11, 2003. See http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=78R&Bill=SB127.

The Court appoints the following as class counsel for the Class: Marshall Searcy, Bill Warren, and David Garza of Kelly, Hart & Hallman, L.L.P., and H. Dustin Fillmore, III and Charles W. Fillmore of The Fillmore Law Firm, L.L.P. Specific findings related to class counsel are described below.

5. Findings of Fact and Conclusions of Law

The Court issues the following findings of fact and conclusions of law. In addition, the Court finds that the Named Plaintiffs Joe Key and Stacci Key have standing to be members of the Class.

5.1 Rule 42(a) Findings and Conclusions

Rule 42(a) provides that "[o]ne or more members of a class may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law, or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." TRCP 42(a). The Court finds that the Named Plaintiffs have carried their burden to satisfy all of the TRCP 42(a) requirements and that the TRCP 42(a) requirements are met. More particularly, the Court finds as follows:

TRCP 42(a)(1): Numerosity.

The Court finds that the members of the Class are so numerous that joinder of all members is impracticable. Plaintiffs provided a stipulation between the parties wherein A-1 stipulated that it has used six versions of a standard form contract since 2003 and that at least 500 customers have entered in to each version of the standard form contract. Plaintiffs presented additional evidence wherein A-1's corporate representative testified that sometimes the contractual provision at issue is changed by the customer however, the corporate representative

also testified that this occurred in less than half of the form contracts. Based on this record, the Court concludes that the numerosity requirement of TRCP 42(a)(1) is met.[2] The Court bases this finding on the totality of the record, including the trial plan in § 6, infra. The Named Plaintiffs satisfied their burden to prove the numerosity requirement.

TRCP 42(a)(2): Commonality.

The Court finds that there are questions of law or fact common to the Class. The evidence presented established that all of the class members signed a form contract containing an identical or virtually identical provision apparently obligating Defendants and/or their agents and employees to negotiate the settlement of each class member's insurance claim in connection with the Defendants' repairing and/or replacing of such class member's roof; whether such a provision renders the contract void and illegal is the primary subject of this lawsuit and is common to all class members. A related common issue is the manner in which the class members' relief shall be calculated; specifically, whether using such illegal language ultimately requires Defendants to disgorge all monies received under the class members' contracts. The interpretation of such provision and the manner in which damages are calculated are common to all putative class members, as well as the common issues more specifically identified in § 5.3. Given the commonality of claims and the common bases of fact out of which that claim arises, the Court concludes that the commonality requirement of TRCP 42(a)(2) is met with respect to the Class. The Court bases this finding on the totality of the record, including the trial plan in § 6, infra, which are incorporated herein by reference. The Named Plaintiffs satisfied their burden to prove the commonality requirement.

TRCP 42(a)(3): Typicality.

[2] The Court notes that even if it determines that a statute of limitations applies, numerosity would still be met based on the evidence presented.

The Court finds that the claims or defenses of the Named Plaintiffs are typical of the claims or defenses of the Class. As noted above, the Named Plaintiffs have the same class claims as do the class members, which are: declaratory judgment, DTPA violations based on unconscionability and violations of Chapter 541 of the Texas Insurance Code. Moreover, these claims arise out of Defendants' use of an identical or virtually identical contractual provision in their form contracts. While the Court recognizes that the Named Plaintiffs have additional claims, Texas case law states that having such claims will not bar a finding of typicality. *See Graebel/Houston Movers, Inc. v. Chastain*, 26 S.W.3d 24, 31 (Tex. App.—Houston [1st Dist.] 2000, pet dism'd w.o.j.). The Court also recognizes that Stacci Key is not a signatory to a contract with Defendants; however, the class evidence establishes that Joe Key is a signatory, that he signed the contract during marriage, and that it was for repairs/improvement to a community asset, to wit, the homestead of the Named Plaintiffs; accordingly, the obligations and rights created by that contract are presumptively community in nature. Thus, the Court concludes that the typicality requirement of TRCP 42(a)(3) is met with respect to the Class. The Court bases this finding on the totality of the record, including the trial plan in § 6 infra, which are incorporated herein by reference. The Named Plaintiffs satisfied their burden to prove the typicality requirement.

TRCP 42(a)(4): Adequacy.

The Court finds that the representative parties and their counsel will fairly and adequately protect the interests of the Class. The Named Plaintiffs have already pursued this suit for a year in the face of staunch opposition, and have not been shown to have a conflict of interest that would undermine their ability to represent the Class. While Defendants claim that a conflict exists by reason of the Named Plaintiffs' decision not to pursue mental anguish for the class members, this objection suffers from two defects. First, the Defendants did not present evidence

that other members actually had suffered mental anguish, rendering the objection speculative and hypothetical. *See Riemer v. State*, 392 S.W.3d 635, 639 (Tex. 2012) ("[a] conflict that is merely speculative or hypothetical will not defeat the adequacy-of-representation requirement."). Moreover, even if some evidence were produced that showed the claimed conflict was more than hypothetical, there is also nothing in the record suggesting that any mental anguish damages would be sufficiently widespread and individually large to overcome the benefits of class treatment. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) Their chosen counsel, in addition, has already committed years of time and resources to this issue, and have many years of experience representing persons in complex litigation, class action litigation, and have experience involving similar cases construing a virtually identical contract. Thus, the Court concludes that the adequacy requirement of TRCP 42(a)(4) is met. The Court bases this finding on the totality of the record, including the findings in § 5.4 and the trial plan in § 6 infra, which are incorporated herein by reference. The Named Plaintiffs satisfied their burden to prove the adequacy requirement.

5.2 Rule 42(b) Findings and Conclusions

In addition to satisfying all four requirements of TRCP 42(a), the Named Plaintiffs must meet their burden to prove that the proposed class action satisfies the requirements of one or more sections of TRCP 42(b). The Court finds that the Named Plaintiffs have carried their burden under TRCP 42(b)(1)(A), TRCP 42(b)(2), and TRCP 42(b)(3). The Court further finds that the Named Plaintiff has satisfied all of the TRCP (b)(1)(A) requirements, all of the TRCP 42(b)(2) requirements, and all of the TRCP 42(b)(3) requirements and that the requirements of each of these three subsections have been proved and met.

TRCP 42(b)(1)(A) Findings & Conclusions.

Without limitation, the Court finds that the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for Lon Smith. For example, the record reflects that several courts have concluded that contract language such as that present here results in an illegal and void contract, whereas the Defendants initially enforced such a contract against Joe Key by obtaining judgment against him in justice court. Judgments enforcing the contracts and judgments finding such contracts illegal are necessarily at odds and establish that a risk of varying adjudications exists which would result in incompatible standards of conduct for Lon Smith. Because the record before the Court supports the proposition that that individual suits are not likely to have uniform results, then Court finds that the Class may be certified under Rule 42(b)(1)(A). *See FirstCollect, Inc. v. Armstrong*, 976 S.W.2d 294, 303 (Tex. App.—Corpus Christi 1998, pet. dism'd w.o.j.); *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360, 368 (Tex. App.—Houston [14th Dist.] 1994, no writ).

The Court bases these findings on the totality of the record, including the findings and conclusions made in the trial plan in § 6 infra, which are incorporated by reference.

The Court will order notice to the class and will grant class members the right to opt-out, as more particularly provided in § 7 below. The Court finds and concludes that the Named Plaintiffs satisfied their burden and that the requirements of TRCP 42(b)(1)(A) are satisfied with respect to the Class.

TRCP 42(b)(2) Findings & Conclusions.

Without limitation, the Court finds that Lon Smith has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The record reflects that Defendants and their agents and/or employees have entered contracts with all members of the

Class that includes the same relevant language.[3] If such language violates Texas Insurance Code chapter 4102, as others courts have previously found, then that violation would give rise to declaratory relief to the class as a whole pertaining to the illegality and void nature of the contracts. *See, e.g., Reyelts v. Lon Smith & Assoc., Inc.*, 968 F.Supp.2d 835, 843 (N.D. Tex. 2013) *affirmed*, 2014 U.S.App.LEXIS 8247 (5th Cir. Tex. May 1, 2014). *See also TCI Cablevision, Inc. v. Owens*, 8 S.W.3d 837, 847-48 (Tex.App.—Beaumont 2000, pet. dism'd by agr.); *Wiggins v. Enserch Exploration; Inc.*, 743 S.W.2d 332, 338 (Tex.App.—Dallas 1987, writ dism'd w.o.j.).

The Court bases these findings on the totality of the record. Without limitation, the findings and conclusions made in the trial plan in § 6 infra, which are incorporated by reference as part of the basis on which the Court finds the (b)(2) requirements are satisfied.

The Court will order notice to the class and will grant class members the right to opt-out, as more particularly provided in § 7 below. The Court finds and concludes that the Named Plaintiffs satisfied their burden and that the requirements of TRCP 42(b)(2) are satisfied with respect to the Class.

TRCP 42(b)(3) Findings & Conclusions.

The Court finds that the questions of law predominate over any questions affecting only individual members and that a class is superior to other available methods for the fair and efficient adjudication of the controversy. In particular, and with respect to predominance, the

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[3] The specific language at issues states, with little variation, that

> This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ('LSRC') to pursue homeowners['] best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.

record reflects that issues as to whether the contract is illegal and void is a both a common issue for the class and an issue subject to great controversy between the parties. In fact, Defendants have committed substantial briefing to that issue at this stage, even though the merits of the case are not central to this inquiry. Related issues that the Court also believes will predominate are whether the Defendants may legally both perform the work of a public insurance adjuster and perform the repairs that underlie the claim adjusted; whether – by providing the various agreements to the class members – Defendants have held themselves out as public insurance adjustors; whether the contracts are unconscionable for the reasons stated in the live petition; and, the manner of calculating the resulting damages, The Court finds that the Named Plaintiffs satisfied the requirements of TRCP 42(b)(3).

The Court further finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In support of this finding, the Court finds that the question of the interest of members of each class in individually controlling the prosecution of separate actions favors certification of each class because, under the record presented, it simply is not practical for the normal, individual class member to prosecute this case individually, and there is no evidence of an interest in individuals prosecuting this case individually. Indeed, it appears from the opinion in *Reyelts* and the facts of this case that the parties' respective claims against Defendants were not raised individually until Defendants had taken action to enforce their contracts against them.

This same fact also supports the Court's finding that the extent and nature of any litigation concerning the controversy already commenced by or against members of the classes favors certification because no party has identified other litigation brought by members of the classes as individual actions other than the claims brought, and already resolved, by Beatrice Reyelts and the claims brought by the Named Plaintiffs in this case. This dearth of claims also

establishes the lack of any persuasive evidence that potential class members would want to prosecute their own actions in light of the financial resources necessary to prosecute such a claim.

The Court further finds that the desirability or undesirability of concentrating the litigation of the claims in this forum favors certification of the classes because it would be wasteful to duplicate them in multiple actions, and this Court (and the parties and their counsel) has already invested a great deal of time and study.

In support of these findings regarding Rule 42(b)(3), the Court additionally refers to the findings stated in § 5.3 and the trial plan located in § 6, both of which are incorporated by reference as part of the basis on which the Court finds the (b)(3) requirements are satisfied.

The Court further finds that the difficulties likely to be encountered in the management of the classes favors certification of the classes because the issues that will require most of the effort of the Court and parties will be resolved by class-wide evidence.

The Court will order notice to the class and will grant class members the right to opt-out, as more particularly provided in § 7.

5.3 Rule 42(c) Findings and Conclusions

TRCP 42(c)(1) Findings & Conclusions.

Pursuant to TRCP 42(c)(1)(A), this is an order at an early practical time, given the history of this litigation.

Pursuant to TRCP 42(c)(1)(B), the Class is defined above. The class claims, issues, or defenses are defined herein. Class counsel are appointed above.

TRCP 42(c)(1)(C) is not applicable at this time, but is acknowledged as being within the power and discretion of the Court if and when appropriate.

Pursuant to TRCP 42(c)(1)(D)(i), the elements of each of the certified class claims are

outlined and discussed more fully in the trial plan in §6 below, and is incorporated by reference herein. In accordance with *State Farm Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550 (Tex. 2004), the Court finds that the certified class claims are viable. The Court, however, makes no finding as to the merits of the underlying claims as a matter of law and neither party is precluded from filing dispositive motions on any claim that has been pled.

Pursuant to TRCP 42(c)(1)(D)(ii), the issues of law and fact common to the Class members include, for example:

(i) Whether the Lon Smith Contract promised to provide services that fall within the services of a licensed public insurance adjuster;

(ii) Given Lon Smith's lack of the requisite public insurance adjuster license, whether the Lon Smith Contract promised to provide services that were illegal under Chapter 4102 of the Insurance Code;

(iii) Whether, by giving Plaintiffs and the members of the class the Lon Smith Agreement, Lon Smith held itself out as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property, in violation of Chapter 4102 of the Insurance Code;

(iv) Whether the Lon Smith Contract is illegal, void, and/or unenforceable;

(v) Whether, because of Lon Smith's violation of Chapter 4102 of the Insurance Code, Plaintiffs and the members of the class are entitled to a judgment restoring all monies paid to Lon Smith under the illegal contract;

(vi) Whether Lon Smith was legally barred by Texas Insurance Code chapter 4102 from both negotiating and effecting a settlement of the class's insurance claim and performing the repairs.

The trial plan, § 6, also is an integral part of these findings regarding common issues, and incorporated by reference in support of the foregoing.

Pursuant to TRCP 42(c)(1)(D)(iii), the issues of law and fact affecting only individual class members are:

(i) Membership in the Class; and

(ii) If damages are ordered, then the amount owed to each member based on

the amount paid to Defendants pursuant to the Lon Smith contract.

The trial plan, § 6, also is an integral part of these findings regarding individual issues.

Pursuant to TRCP 42(c)(1)(D)(iv), the issues that will be the object of most of the efforts of the litigants and the Court include:

(i) Whether the Lon Smith Contract promised to provide services that fall within the services of a licensed public insurance adjuster;

(ii) Given Lon Smith's lack of the requisite public insurance adjuster license, whether the Lon Smith Contract promised to provide services that were illegal under Chapter 4102 of the Insurance Code;

(iii) Whether, by giving Plaintiffs and the members of the class the Lon Smith Agreement, Lon Smith held itself out as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property, in violation of Chapter 4102 of the Insurance Code;

(iv) Whether the Lon Smith Contract is illegal, void, and/or unenforceable;

(v) Whether, because of Lon Smith's violation of Chapter 4102 of the Insurance Code, Plaintiffs and the members of the class are entitled to a judgment restoring all monies paid to Lon Smith under the illegal contract;

(vi) Whether Lon Smith was legally barred from both negotiating and effecting a settlement of the class's insurance claim and performing the repairs.

The trial plan, § 6, also is an integral part of these findings regarding the issues that will be the object of most of the efforts of the litigants and the Court and is incorporated by reference in support of the foregoing.

Pursuant to TRCP 42(c)(1)(D)(v), the other available methods of adjudication that exist for the controversy are: other class actions and individual actions.

Pursuant to TRCP 42(c)(1)(D)(vi), the issues common to the members of the classes predominate over individual issues because of the following:

(i) the law of one state (Texas) governs;

(ii) common issues as identified above will be the object of most of the efforts of the parties and the Court;

(iii) the factors for finding predominance that are spelled out in Rule 42(b)(3) favor certification;

(iv) an analysis of the claims and defenses and how those claims can be tried demonstrate that all claims and defenses can be tried by class-wide evidence or manageable individual evidence; and

(v) the other findings and conclusions stated herein further support the finding and conclusion that issues common to the members of the class predominate over individual issues. These findings are expanded in other parts of this Order which are part of the findings and conclusions made in this section.

Pursuant to TRCP 42(c)(1)(D)(vii), the class action is superior to other means available for a fair and efficient adjudication of the controversy because:

(i) there are no practical alternatives to a class action for resolving this dispute;

(ii) the factors for finding superiority that are spelled out in Rule 42(b)(3) favor certification;

(iii) the trial plan demonstrates that this case can be tried as a class action fairly and efficiently; and

(iv) the other findings and conclusions stated herein further support the finding and conclusion that this action is superior to other means available for a fair and efficient adjudication of the controversy. These findings are expanded in other parts of this Order which are part of the findings and conclusions made in this section.

Pursuant to TRCP 42(c)(1)(D)(viii), the trial plan in § 6 sets forth how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable and time efficient manner.

5.4 Rule 42(g) Findings and Conclusions

The Court appoints the following as class counsel for the Class: Marshall Searcy, Bill Warren, and David Garza of Kelly, Hart & Hallman, L.L.P. and H. Dustin Fillmore, III and Charles W. Fillmore of The Fillmore Law Firm, L.L.P. The Court finds that the appointed class counsel will fairly and adequately represent the interests of the Class. In appointing class

counsel, the Court has considered:

(i) The work counsel has performed in identifying or investigating potential claims in the action and finds that they have devoted a large effort to development of the case and identifying and investigating potential claims.

(ii) Counsel's experience in handling complex litigation and claims of the type asserted in this action and finds all of them have successful experience in large and complex litigation, and apparent knowledge of class action lawsuits;

(iii) Counsel's knowledge of the applicable law and experience litigating the similar contractual provisions to the provisions applicable here and finds them to be knowledgeable of the procedural and substantive law that governs this case; and

(iv) The resources counsel will commit to representing the class and finds that class counsel has already devoted over a year to this case and has and will commit the resources necessary to adequately represent the class. This is evidenced by the pleadings, papers, discovery, analysis, and hearings on file in this case and the entire certification record also on file in this case.

The Court finds and concludes that the Named Plaintiffs satisfied their burden and that class counsel will fairly and adequately represent the interests of the Class. The Court finds that the representative parties will fairly and adequately protect the interests of the Class. Thus, the adequacy requirement of TRCP 42(a)(4) is met. The Court bases this finding on the totality of the record.

6. Trial Plan

The Court hereby adopts the following trial plan as the Court's specific explanation of how class claims and Defendants' defenses are to proceed to trial in a manageable, time efficient manner in compliance with Rule 42(c)(1)(D)(viii) and applicable case law, including *State Farm Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550 (Tex. 2004); *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295 (Tex. 2004); *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657 (Tex. 2004), *Union Pac. Res. Group, Inc. v. Hankins*, 111 S.W.3d 69 (Tex. 2003); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002); and *Southwestern Ref. Co., Inc. v. Bernal*, 22 S.W.3d

425 (Tex. 2000). This is a trial plan for the trial of all class claims and all defenses, alternatively certified under TRCP 42(b)(1), 42(b)(2), or 42(b)(3).

If a class is certified, the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, can be tried in a manageable, time efficient manner:

The law to be applied is the law of the State of Texas.

The class claims will be tried the same as an individual suit pursuing these claims, with the exceptions that the Court will be required to establish the notice, proofs of claim, and other class procedures in accordance with Rule 42.

As to the class claims, the jury trial will proceed substantially as it would if only the Named Plaintiffs' individual case was being tried, though class-wide evidence will be utilized to establish damages.

The Court will also establish a procedure for reviewing proof of claim forms (if required by the judgment) as set forth below.

The Court now turns to the jury trial, to identify the substantive issues that likely will be tried if tried before a jury or before the Court if tried before the Court. The following issues may be decided or narrowed by summary judgment or directed verdict or other bench judgment by the Court:

6.1 Declaratory Judgment.

To establish a claim for declaratory relief Plaintiffs must establish that the Defendants' contracts with the Class each includes a clause that violates Texas Insurance Code chapter 4102, and that the violation renders the contracts illegal, void and unenforceable.

The Named Plaintiffs will prove or fail to prove their request for declaratory relief for themselves and the rest of the class by the same class-wide evidence. Such evidence includes,

for example and without limitation, the six versions of Defendants' form contract used during the relevant time period; the contract that was at issue in the *Reyelts* case; the deposition testimony of David Cox regarding the contracts at issue and the policies and procedures concerning the manner in which Defendants interacted with insurance carriers to negotiate for and/or effect the settlement of claims for loss or damage under policies of insurance covering real or personal property; documents and testimonial evidence concerning the Defendants' internal policies and procedures for such interaction with insurance carriers; and, documents and testimonial evidence establishing Defendants' lack of any license to act as a public insurance adjuster.

The Court concludes that this class-wide evidence will permit the declaratory judgment claim to be tried to one jury, without the necessity or right to introduce any evidence regarding any individual issues concerning the Named Plaintiffs or each class member.

With respect to damages, the issue is economic and objective. The jury will be asked to return monies paid by or on behalf of the class members. The amount of these monies may be reasonably obtained from Defendants' records.

6.2 Deceptive Trade Practices Claims.

To establish a claim under the Texas Deceptive Trade Practices Act § 17.50(a)(3) Plaintiffs must establish:

(1) the plaintiff is a consumer;

(2) defendant can be sued under the DTPA;

(3) defendant committed . . .:

(c) any unconscionable action or course of action,

(4) defendant's action was a producing cause of the plaintiff's damages.

To establish a claim under the Texas Deceptive Trade Practices Act § 17.50(a)(4) Plaintiffs must establish:

(1) the plaintiff is a consumer;

(2) defendant can be sued under the DTPA;

(3) defendant committed . . .:

(d) the use or employment of an act or practice in violation of Texas Insurance Code chapter 541;

(4) defendant's action was a producing cause of the plaintiff's damages.

The Named Plaintiffs will prove or fail to prove their Deceptive Trade Practices Act claims for themselves and the rest of the class by the same class-wide evidence. Such evidence includes, for example and without limitation, the six versions of Defendants' form contract used during the relevant time period; the contract that as at issue in the *Reyelts* case; the representations contained in the contracts at issue; the deposition testimony of David Cox regarding the contracts at issue and the policies and procedures concerning the manner in which Defendants interacted with insurance carriers to negotiate for and/or effect the settlement of claims for loss or damage under policies of insurance covering real or personal property; documents and testimonial evidence concerning the Defendants' internal policies and procedures for such interaction with insurance carriers; document and testimonial evidence concerning who performed the repairs at issue in the contracts; and, documents and testimonial evidence establishing defendants' lack of any license to act as a public insurance adjuster. Each of the elements above will be proven through the same evidence for both the Named Plaintiffs and the other class plaintiffs.

With respect to damages, the issue is economic and objective. The Named Plaintiffs do not seek to recover damages for mental anguish or other subjectively determined damages. The jury will be asked to return monies paid by or on behalf of the class members. The amount of these monies may be reasonably obtained from Defendants' records.

6.3 Affirmative Defenses – Res Judicata, Mitigation of Damages, and Statute of Limitations.

Some of Defendants' affirmative defenses are subsumed in the above elements of the trial plan and may or may not be, in fact, viable or reached. Also, some of these alleged defenses are strictly matters of law or are not viable defenses (or both). Nevertheless, the Court finds that Defendants' affirmative defenses may be tried using class-wide evidence and that individual issues, if any, are manageable.

As to Defendants' affirmative defense of res judicata, as of the date of this order, that is no longer a viable defense against the Named Plaintiffs because the justice of the peace default judgment it was based on has been vacated.

As to Defendants' affirmative defense of mitigation of damages, the Court finds that that defense could only be applicable to the Named Plaintiffs' individual claims, which they are not seeking to have the class certified as to.

As to Defendants' affirmative defense of statute of limitations, the Court notes that Defendants merely argue that because statute of limitations is a possible defense, individual issues will predominate. That is not enough. *See In re Enron*, 529 F.Supp.2d 644, 712 (S.D. Tex. 2006) ("a court should not adopt a *per se* rule against certification where a limitations defense is raised by some defendants because the result would foreclose use of the class action device for a broad subset of claims, a result inconsistent with the efficiency aims of rule 23. Though class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants' common scheme"); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) ("Although a necessity for individualized statute-of-limitations determination invariably weighs against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an automatic disqualifier. In other words, the

mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones."). The record contains a dearth of evidence as to how the statute of limitations would be applied differently between individual plaintiffs. This lack of evidence appears at least in part to be self-inflicted, as Defendants only stipulated to a minimum number of customers that entered into their form contract beginning in 2010. Because of this dearth of evidence, nothing in the record supports Defendants' argument that individual issues would predominate due to its limitations defense.

Further, the Court finds that any individual issues that may exist with the limitations defense will be easily managed on a class-wide basis. Specifically, the evidence relevant to the statute of limitations defense will include the six versions of Defendants' form contract used during the relevant time period June 11, 2003 to the present. Inasmuch as the first Class petition was filed on September 30, 2014, then for the declaratory judgment and fraud claim, such defense applies only to contracts entered between June 11, 2003 and September 29, 2010; for the DTPA claims, such defense applies only to contracts entered between June 11, 2003 and September 29, 2012. The Court will make a determination as to whether the discovery rule should apply on a class-wide basis, *i.e.* the Court will determine whether the class plaintiffs causes of action should have been discovered based on the contractual provision(s) at issue and considering the interpretation of any other applicable Texas law, including but not limited to the Texas Insurance Code. Should the Court determine that a statute of limitations does apply, the Court will then determine the applicable date before which claims are barred and adjust the class definition to reflect such date. These issues are easily manageable and can also be addressed through the Proof of Claim process.

6.4 Proof of Claim.

The Court will implement a proof of claim process. The use of proofs of claim forms was approved by the Texas Supreme Court in *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). At this point it appears that the only issues that will be covered by the proofs of claim, if contested and relevant at time of trial, are: identity of the claimant-class members; membership in the classes; and amount of money paid by or on behalf of each claimant-class member. It is possible that additional issues will be determined by proofs of claim.

7. Notice and Opt-Out Rights.

Pursuant to TRCP 42(c)(2)(A) and TRCP 42(c)(2)(B), this Court requires notice and opt-out rights, applicable to certification under TRCP 42(b)(1), TRCP 42(b)(2), and TRCP 42(b)(3). *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657,667 (Tex. 2004). Notice, for certification under (b)(1), (b)(2), and (b)(3) will comply with TRCP 42(c)(2)(B).

The Named Plaintiffs or class counsel are ordered to bear the cost of notice.

The certification record demonstrates that notice which complies with TRCP 42(c)(2)(B) is practical and that appointed class counsel has agreed to devote the resources to effect such notice.

Without making a final decision on the means, manner, and form of notice, the Court finds that the minimum notice required will be: (1) by Court approved first class mail to all members of the class established by the records of Defendants; (2) by Court approved press release paid for by Named Plaintiffs; and (3) by Court approved publication paid for by the Named Plaintiffs designed to reach the Texas class members.

The Court will give such other notice as it or any appellate court may determine is required by Rule 42, due process, the Texas Supreme Court's decision in *LaPray*, any subsequent appellate decisions, or other applicable law.

The parties are ordered to submit an agreed proposed order setting the means, manner and form of notice within thirty (30) days after this Order becomes final. Failing such agreement, the parties are ordered to submit their respective proposed form of such order within thirty-five (35) days after this Order becomes final. In any event, the Court will order a hearing on the means, manner and form of notice after receipt of the proposed form of order. The Court will assure that the notice satisfies TRCP 42(c)(2)(B), due process, and any other applicable law.

If necessary or desirable, the Court may order, after this Order becomes final, additional discovery related to these notice issues. Notice is not to be sent or made until further order of this Court following said hearing.

SIGNED this the 15 day of Oct 2015.

THE HONORABLE THOMAS LOWE, III
236th District Court of Tarrant County, Texas

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00328-CV

LON SMITH & ASSOCIATES, INC. AND A-1 SYSTEMS, INC., D/B/A LON SMITH ROOFING AND CONSTRUCTION — APPELLANTS

V.

JOE KEY AND STACCI KEY — APPELLEES

FROM THE 236TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 236-267881-13

OPINION

I. INTRODUCTION

This is an interlocutory appeal from an order certifying a class action.[1] Appellants Lon Smith & Associates, Inc. and A-1 Systems, Inc., d/b/a Lon Smith

[1]*See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(3) (West Supp. 2016).

EXHIBIT F

Roofing and Construction[2] raise five issues claiming that the trial court erred by certifying a class because various class-certification requirements of Texas Rule of Civil Procedure 42 were not met.[3] For the reasons set forth below, we will affirm that portion of the trial court's October 15, 2015 "Order Certifying Class Action with Trial Plan" that certifies for class treatment Joe and Stacci Keys' declaratory-judgment claim and the Keys' Deceptive Trade Practices Act (DTPA) claim based on section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code); we will reverse the portion of the trial court's October 15, 2015 "Order Certifying Class Action with Trial Plan" that certifies for class treatment the Keys' DTPA claim based on section 17.50(a)(3)[4] (Unconscionability); and we will remand this cause to the trial court: (1) with instructions to decertify the DTPA

[2]We will refer to Lon Smith & Associates, Inc. as "Associates" and to A-1 Systems, Inc., d/b/a Lon Smith Roofing and Construction as "A-1." We will refer to Associates and A-1 collectively as "LSRC."

[3]LSRC includes numerous contentions in the text of each of its five issues but does not restate the issues in connection with its briefing on the merits. LSRC briefs some of these individual contentions in multiple portions of its briefing on the merits, while failing to brief other contentions. In its briefing on the merits, LSRC includes several stand-alone, one- or two-sentence complaints untethered to a stated issue. We will address the individual contentions that LSRC addresses in multiple portions of its brief only once. We will not address any contention stated in an issue that LSRC did not brief. Finally, we will address any stand-alone complaint to the extent it is fairly subsumed within a stated and briefed issue. *See, e.g.*, *Bullock v. Am. Heart Ass'n*, 360 S.W.3d 661, 665 (Tex. App.—Dallas 2012, pet. denied).

[4]*See* Tex. Bus. & Com. Code Ann. § 17.50(a)(3) (West 2011).

section 17.50(a)(3) (Unconscionability) claim, and (2) for further class proceedings.

II. FACTUAL BACKGROUND, EXISTING LEGAL LANDSCAPE, AND CERTIFICATION HEARING AND ORDER

A. The Keys' Lawsuit

A May 2011 hailstorm damaged the roof of the Keys' residence. The Keys notified their homeowners' insurance carrier of the damage, and Joe signed a contract with A-1 for the installation of a new roof with a total price of $33,769.50. Stacci did not sign the contract; the Keys allege that Joe signed it on her behalf. The "Acceptance and Agreement" provision of the contract provided that

> [t]his Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners['] best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.

A-1 installed the new roof. The Keys paid their homeowners' insurance proceeds of $18,926.69 to A-1, leaving a balance on the $33,769.50 amount. To collect the amount A-1 claimed that the Keys owed, A-1 filed suit against Joe in a justice court and obtained a default judgment. Joe subsequently challenged the default judgment and obtained a June 23, 2015 judgment setting it aside as void. A-1 appealed the June 23, 2015 judgment to the county court at law. *See* Tex. R. Civ. P. 506.1.

Meanwhile, in September 2013, the Keys sued LSRC, asserting that the Acceptance and Agreement provision in the contract with A-1, which did business collectively with Associates, violated Texas Insurance Code section 4102.051's prohibition against a corporation acting or holding itself out as a public insurance adjuster in the absence of a license. *See* Tex. Ins. Code Ann. § 4102.051(a) (West Supp. 2016). Accordingly, the Keys claimed the agreement was illegal, void, and unenforceable. *See id.* § 4102.207(a), (b) (West 2009) (setting forth remedies for violation of chapter 4102).

Based on the alleged illegality of LSRC's agreement under section 4102.051, the Keys pleaded a claim for declaratory relief—to declare the agreement with LSRC illegal, void, and unenforceable and to declare, consequently, that they and other class members are "entitled to a judgment restoring all monies paid to [LSRC] under the illegal contract" pursuant to the statutory remedy provided by section 4102.207(b). *See* Tex. Ins. Code Ann. §§ 4102.051, .207(b); Tex. Civ. Prac. & Rem. Code Ann. §§ 37.002, .011 (West 2015). The Keys also pleaded causes of action for damages based on DTPA violations, fraud, violations of the Texas Debt Collection Practices Act, and fraudulent use of court records.

In due course, the Keys obtained class certification of their declaratory-judgment claim and their DTPA claims under sections 17.50(a)(3)

(Unconscionability) and 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code).[5]

B. Chapter 4102 of the Texas Insurance Code

The Texas Legislature enacted chapter 4102 of the Texas Insurance Code effective September 1, 2005. *See* Act of May 24, 2005, 79th Leg., R.S., ch. 728, § 11.082(a), 2005 Tex. Gen. Laws 2259, 2259–72 (codified at Tex. Ins. Code Ann. §§ 4102.001–.208). Chapter 4102 is a comprehensive licensing statute regulating public insurance adjusters. *See* Tex. Ins. Code Ann. §§ 4102.001–.208 (West 2009 & Supp. 2016). According to an amicus brief tendered in this case by the National Association of Public Insurance Adjusters and the Texas Association of Insurance Adjusters, forty-five states plus the District of Columbia have enacted such statutes.[6]

Chapter 4102 expressly prohibits a "person" from acting as a public insurance adjuster in Texas without a license. *See* Tex. Ins. Code Ann. § 4102.051(a) (providing that "[a] person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license issued by the commissioner"). The term "person" is defined as including a corporation. *Id*.

[5]The Keys sought class certification of other claims as well, but the trial court certified only these three claims.

[6]North Texas Roofing Contractors Association and Stellar Restoration Services, LLC both tendered amicus briefs as well.

§ 4102.001(2). And a "public insurance adjuster" is "a person who, for direct, indirect, or any other compensation . . . acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims" while acting as a public insurance adjuster and "also includes advertising, soliciting business, and holding oneself out to the public as an adjuster of claims." *Id.* § 4102.001(3)(A)(i), (ii). A licensed public insurance adjuster is expressly prohibited from participating directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder; acting as a public insurance adjuster and a contractor on the same claim is a statutorily-defined conflict of interest. *Id*. § 4102.158(a)(1).[7] Any contract for services regulated by chapter 4102 that is entered into by an insured with a person in violation of the chapter's licensing requirements "may be voided at the option of the insured." *Id.* § 4102.207(a). If a contract is so voided, "the insured is not liable for the payment of any past services rendered, or future services to be rendered, by the violating person under that contract or otherwise." *Id.*

C. The *Reyelts* Opinion

In addition to Texas Insurance Code chapter 4102, the legal landscape forming the basis of the Keys' motion for class certification includes a federal

[7] *See also* Tex. Dep't Ins. Comm'r Bulletin B-0051-08 (Aug. 8, 2008) (warning that "contractors may not act on behalf of an insured in negotiating or effecting settlement of claims for loss or damage under any policy of insurance").

court case, *Reyelts v. Cross*, 968 F. Supp. 2d 835 (N.D. Tex. 2013), *aff'd*, 566 F. App'x 316 (5th Cir. 2014).[8] The Keys cited and relied upon the *Reyelts* case in their pleadings and in their motion for class certification.[9]

In the *Reyelts* case, the Reyeltses signed a contract with LSRC.[10] *Id.* at 839. The Reyeltses' contract with LSRC, like the contract signed by Joe, contained the provision quoted above. *See id.* The Reyeltses alleged, and Magistrate Judge Cureton found, that the inclusion of the Acceptance and Agreement provision in the contract rendered it "illegal, void[,] and unenforceable" as violative of Texas Insurance Code chapter 4012 and that the Reyeltses were not liable for payment of any past or future services rendered

[8]The Reyeltses filed suit against Lon Smith & Associates, Inc. and A-1 Systems, Inc., d/b/a Lon Smith Roofing and Construction, its owner Cary Jay Cross, and its retained debt collector Cary J. Cross, P.C.

[9]The Fifth Circuit's *Reyelts* affirmance is unpublished and therefore is not precedential except for the limited circumstances set forth in Fifth Circuit Rule 47.5.4, which are not present here. *See* 5th Cir. R. 47.5.4. Magistrate Judge Jeffrey L. Cureton's memorandum opinion and order in the *Reyelts* case, however, constitutes persuasive authority, enunciating guiding principles applicable here. *See* 28 U.S.C.A. § 636(c)(1), (3) (West 2009) (providing that in consent cases before a United States magistrate judge, a magistrate judge's order carries the same weight as an order of a federal district judge).

[10]The Reyeltses, like the Keys, filed suit against Lon Smith & Associates, Inc. and A-1 Systems, Inc., d/b/a Lon Smith Roofing and Construction. *Reyelts*, 968 F. Supp. 2d at 835. In the *Reyelts* opinion, these defendants are collectively referred to as "the Lon Smith Defendants," while here we refer to them as the parties do—as LSRC. *See id.* at 838.

under the agreement. *See id.* at 843–44; *see also* Tex. Ins. Code Ann. §§ 4102.206(a), .207(a), (b).[11]

In *Reyelts*, Magistrate Judge Cureton also determined that LSRC had "engaged in an unconscionable action or course of action as prohibited by section 17.50(a)(3) of the DTPA." 968 F. Supp. 2d at 844. He found that LSRC had used an "agreement that was and is illegal and violative of Chapter 4102 of the Texas Insurance Code [and] constituted an act or practice in violation of Chapter 541 of the Texas Insurance Code and, thus, a violation of section 17.50(a)(4) of the DTPA." *Id*. Magistrate Judge Cureton found that LSRC committed such wrongful conduct knowingly and intentionally and ultimately signed a judgment awarding the Reyeltses their economic damages, mental anguish damages, a trebling of the economic damages, court costs, and reasonable and necessary attorney's fees. *Id*. at 845.

[11]During the class-certification hearing, the Keys informed the trial court that in addition to Magistrate Judge Cureton in *Reyelts*, a Tarrant County judge, Judge Donald J. Cosby in *Spracklen*, had held that a contract containing a provision that purportedly authorized a roofing contractor to act as an insurance adjuster for the insured was illegal, void, and unenforceable. A copy of the *Spracklen* partial summary judgment was provided to the trial court. *See Spracklen v. Hill*, No. 067-276646-15 (67th Dist. Ct. Tarrant Cty., Tex. May 19, 2015) (granting partial summary judgment for the Spracklens; declaring that "the contracts of Defendant identified in the summary judgment record are hereby declared illegal, void[,] and unenforceable, and Plaintiffs are not liable for the payment of any past services rendered, or future services to be rendered, by Defendant under those contracts or otherwise"; and citing Insurance Code sections 4102.206(a) and 4102.207(a), (b) and *Reyelts*, 968 F. Supp. 2d at 843–44).

D. Class-Certification Requisites[12]

All class actions must satisfy the four threshold requirements contained in Texas Rule of Civil Procedure 42(a): (1) numerosity ("the class is so numerous that joinder of all members is impracticable"); (2) commonality ("there are questions of law or fact common to the class"); (3) typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"); and (4) adequacy of representation ("the representative parties will fairly and adequately protect the interests of the class"). Tex. R. Civ. P. 42(a)(1)–(4); *see Bernal*, 22 S.W.3d at 433. In addition to the subsection (a) prerequisites, class actions also must satisfy at least one of the subdivisions of rule 42(b). *See* Tex. R. Civ. P. 42(b) (subsection (b) directs that only certain kinds of actions can be class actions); *Bernal*, 22 S.W.3d at 433. The plaintiffs, here the Keys, bore the burden of establishing each of the requisites for class certification. *See, e.g.*, *Bailey v. Kemper Cas. Ins. Co.*, 83 S.W.3d 840, 847 (Tex. App.—Texarkana 2002, pet. dism'd w.o.j.).

E. The Class-Certification Hearing

At the hearing on the Keys' motion for class certification, both the Keys and LSRC presented evidence. Joe Key testified that he had signed the contract with LSRC. Joe testified that Thomas Kirkpatrick, an A-1 salesman and

[12]Because Texas Rule of Civil Procedure 42 is patterned after Federal Rule of Civil Procedure 23, federal class-certification authority is persuasive in our analysis of state class-certification issues. *See Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

estimator, said LSRC was "handling everything as far as insurance." According to Joe, LSRC never told him that he could or should get a public insurance adjuster involved in his roof-damage claim under his homeowners' policy. Joe understood that LSRC was contracting to discuss his insurance claim with his insurer and was also contracting to repair his roof. But the Keys' insurer did not pay LSRC the price ultimately set forth in the LSRC contract, and LSRC sued Joe in a justice court for the difference. Joe explained that he was suing LSRC to recover the monies paid under the contract and that if the class were certified, he would seek recovery of those same monies for each class member—that is, the monies each class member paid LSRC for a new roof pursuant to an illegal, void contract.

In support of their motion for class certification, the Keys admitted into evidence the deposition of David Cox, the corporate representative for A-1, and the exhibits attached to Cox's deposition. Cox's deposition and the attached exhibits established that since 2003, A-1 has utilized a standard form contract containing the Acceptance and Agreement provision, which the Keys and thousands of others have signed. Included in the Keys' evidence was A-1's admission, in response to the Keys' requests for admission, that A-1 was not and never had been a licensed public insurance adjuster.

In their brief in support of their motion for class certification, the Keys explained,

> The issue here is simple—given the existence of thousands of standardized form contracts that have been held by multiple courts to be "illegal, void, and unenforceable," is it more appropriate for the claims arising from the illegal contract to be adjudicated in one big lawsuit or in thousands of smaller lawsuits scattered around the State? The answer is clear—this case should be certified to proceed as a class.

At the class-certification hearing, LSRC proffered no live testimony but obtained admission of nineteen exhibits.[13] Twelve of LSRC's nineteen exhibits related to, or were documents filed in, the *Reyelts* case. LSRC's exhibits O and P are the "Memorandum Opinion and Order and Findings of Fact And Conclusions of Law" and the final judgment against LSRC, respectively, that were signed by Magistrate Judge Cureton in the *Reyelts* case.

F. The Class-Certification Order

The trial court signed a twenty-two page "Order Certifying Class Action with Trial Plan." The trial court found that the Keys had met their burden of establishing the class-certification requirements of rule 42(a), 42(b)(3), 42(b)(2), and 42(b)(1)(A).

[13]LSRC's exhibits included the following: (1) Letter to Joe Key dated 11/7/11; (2) Statement of loss; (3) Claim journal; (4) Agreement; (5) Affidavit of Kathryn Shilling; (6) Insurance Commissioner's Bulletin B-0051-08; (7) Texas Department of Insurance - Frequently asked questions; (8) Affidavit of Robert C. Wiegand; (9) Plaintiffs' Rule 12(c) Motion; (10) Plaintiffs' Notice of Defendants' Failure to File Response; (11) Order Granting Plaintiffs' Rule 12(c) Motion; (12) Plaintiffs' Motion for Leave to File First Amended Original Complaint and Brief; (13) Order Granting Plaintiffs' Motion for Leave; (14) Plaintiffs' First Amended Original Complaint; (15) Clerk's Entry of Default against Defendants; (16) Plaintiffs' Motion for Default Judgment; (17) Order Granting Plaintiffs' Motion for Default Judgment; (18) Memorandum Opinion and Order; and (19) Final Judgment.

The class-certification order appointed the Keys to represent a class defined as follows:

> All Texas residents who from June 11, 2003 through the present signed agreements with [LSRC] that included the following provision, or language substantially similar to the following provision: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners['] best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price."

The order certified three claims for class treatment: "(a) Plaintiffs' declaratory judgment claim, (b) Plaintiffs' DTPA claim based on Section 17.50(a)(3) (Unconscionability), and (c) Plaintiffs' DTPA claim based on Section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code)."

The class-certification order set forth the trial court's findings of fact and conclusions of law that the Keys had met their burden of establishing all four requirements of rule 42(a) and three subdivisions of rule 42(b)—42(b)(3), 42(b)(2), and 42(b)(1)(A). The order certified the class alternatively under each of these subsections of rule 42(b); provided for notice and opt-out provisions for each of the classes certified alternatively under rule 42(b)(3), 42(b)(2), and 42(b)(1)(A); appointed class counsel; and set forth a trial plan.

III. STANDARD OF REVIEW

We review a class-certification order for an abuse of discretion. *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 696 (Tex. 2008); *Compaq Comput.*

Corp. v. Lapray, 135 S.W.3d 657, 671 (Tex. 2004). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding principles. *Bowden,* 247 S.W.3d at 696. We do not indulge every presumption in the trial court's favor, however, "as compliance with class action requirements must be demonstrated rather than presumed." *Id.* (citing *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002)). "Courts must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites have been met." *Bernal,* 22 S.W.3d at 435. Appellate courts have traditionally construed this directive to require trial courts to, among other things, look "'beyond the pleadings . . . as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Id*. at 435 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)).

IV. THE TRIAL COURT'S UNDERSTANDING OF THE SUBSTANTIVE LAW CONCERNING THE CERTIFIED CLAIMS

LSRC's first issue asserts that "the trial court misunderstood or failed to consider the law underlying the substantive claims at issue." LSRC complains that the trial court failed to properly analyze the substantive law concerning chapter 4102 of the insurance code, concerning the DTPA unconscionability claim, and concerning the DTPA violation-of-chapter-541-of-the-insurance-code claim and that the trial court's misunderstanding of the substantive law "resulted in the wrongful certification of a cause of action that does not exist." LSRC

argues in its brief and reply brief that the trial court "improperly refused[] to analyze the dispositive issue of whether any putative class member can state viable claims." In response, the Keys contend that these arguments are prohibited "merits-based attacks" disguised as "misunderstanding of the law" contentions.

Trial courts do not certify class actions based upon the probability of success on the merits, and in determining the certification issue, trial courts should not rule on the merits of the class members' claims. *See Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 404 (Tex. 2000). Nonetheless, to properly analyze certification issues, trial courts must go beyond the pleadings and must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. *Bernal*, 22 S.W.3d at 435. Frequently, the rigorous analysis required under rule 42 will entail some overlap with the merits of the plaintiffs' underlying claim, which cannot be helped. *See Wal–Mart v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011). Accordingly, we review the merits of the Keys' claims below as necessary to address LSRC's contentions and to determine whether the trial court conducted a rigorous analysis in determining that the prerequisites of rule 42 were satisfied.[14]

[14]We agree with the Keys that many of LSRC's complaints on appeal are merits based. But faced with a decision between simply not addressing many of LSRC's complaints because they are merits based and addressing them at the risk of straying into the merits, we choose the latter. *See, e.g., Denton Cty. Elec.*

A. Putative Class Members Can State Viable Claims

In part of its first issue, LSRC argues that the trial court "improperly refused[] to analyze the dispositive issue of whether any putative class member can state viable claims" by failing to conduct a hearing on LSRC's motion for summary judgment prior to the class-certification hearing.[15] And the evidence presented to the trial court at the class-certification hearing—including the "Memorandum Opinion and Order and Findings of Fact," the judgment, and other documents from the *Reyelts* case—show that putative class members can state viable claims. Magistrate Judge Cureton made a conclusion of law in the *Reyelts* case that the very same contractual provision that forms the basis of the Keys' claims here made LSRC's contract with the Reyeltses "[i]llegal, void[,] and unenforceable" and awarded DTPA damages to the Reyeltses based on facts substantially identical to those forming the basis of the Keys' claims and the

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Coop. v. Hackett, 368 S.W.3d 765, 776 (Tex. App.—Fort Worth 2012, pet. denied).

[15]In its brief and reply brief, LSRC relies on *State Farm Mut. Auto Insurance Company v. Lopez*, 156 S.W.3d 550, 557 (Tex. 2004), for this proposition. But in *Lopez*, "[i]n its certification order, the trial court did not identify the specific causes of action to be decided . . . , nor did it indicate how they would be tried or the substantive issues that would control their disposition." *Id.* Consequently, because the certification order in *Lopez* failed to identify any causes of action to be asserted by putative class members, the supreme court wrote, "If it is true, as State Farm contends, that no class member can state a viable claim, dispositive issues should be resolved by the trial court before certification is considered." *Id*. Here, the trial court certified three specific causes of action to be decided, indicated how they would be tried, and set forth the substantive issues that would control their disposition. Thus, *Lopez*'s holding is inapplicable to the present facts.

claims certified in the class-certification order. And the order granting partial summary judgment for the plaintiffs in the *Spracklen* case was also presented to the trial court, reflecting that Judge Cosby had declared a similar provision included in a roofing-repair contract to be "illegal, void[,] and unenforceable." Indeed, at the hearing on a motion to compel, LSRC's counsel agreed that the form contract signed by Joe Key had in fact been declared illegal but argued that LSRC disagreed and did not think it was illegal. Given the evidence presented to the trial court, some of it by LSRC, concerning the *Reyelts* and *Spracklen* cases, we cannot agree with LSRC's contentions in its first issue that no putative class member can state a viable claim.[16] We overrule this portion of LSRC's first issue.

B. The Declaratory Judgment Claim

LSRC also asserts under its first issue that the trial court "misunderstood the law related to the Keys' claim for declaratory relief." LSRC argues that "[a]ssuming *arguendo* that by using the Agreement LSRC acted as or held itself out as a public insurance adjuster, and that LSRC did not have the proper license

[16]According to LSRC's reply brief, the Keys contend that "a form contract simply equals class certification." LSRC points to *Supportkids, Inc. v. Morris* as defeating any form-contract-simply-equals-class-certification contention. 167 S.W.3d 422, 425 (Tex. App.—Houston [14th Dist.] 2005, pet. dism'd w.o.j.). We agree with LSRC that a form contract does not automatically equal class certification, but we do not read the Keys' contention so broadly, and we do not so hold. Instead, we examine the record to determine whether the Keys have satisfied their burden of establishing each of the class-certification elements. *See, e.g.*, *Peter G. Milne, P.C. v. Ryan*, 477 S.W.3d 888, 905 (Tex. App.—Texarkana 2015, no pet.).

or certificate, doing so could not render the contract illegal, void, or unenforceable, which is the entire underlying basis of the request for declaratory judgment." LSRC asserts that Texas Insurance Code section 4102.207 makes contracts with unlicensed public insurance adjusters merely voidable, not void, thereby purportedly defeating any claim for a declaratory judgment that the contracts are void.[17]

Under the Uniform Declaratory Judgments Act, a person interested under a written contract may have determined a question of construction or validity arising under the contract and obtain a declaration of rights. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.004 (West 2015). The law is well-settled that a contract to fulfill an obligation that cannot be performed without violating the law contravenes public policy and is void. *See Lewis v. Davis*, 145 Tex. 468, 471–72, 199 S.W.2d 146, 148–49 (1947); *see also Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 490–91 (Tex. 2016) (recognizing that when agreement cannot be performed without violating law or public policy, it is per se void). Courts will not enforce an illegal contract, particularly when the contract involves the doing of an act prohibited by statutes that were enacted for the protection of the public

[17]The Keys pleaded in the trial court and point out in their appellate brief that the LSRC contract they signed is also illegal because acting as a public insurance adjuster without a license—as the Keys contend that LSRC contracted to do—is a Class B misdemeanor offense. *See* Tex. Ins. Code Ann. § 4102.206(a) (providing that "[a] person commits an offense if the person violates this chapter. An offense under this subsection is a Class B misdemeanor"). LSRC does not address this ground of illegality in its brief.

health and welfare. *See, e.g.*, *Merry Homes, Inc. v. Luu*, 312 S.W.3d 938, 949–50 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (affirming judgment declaring lease void when lease required use of leased premises only for purposes prohibited by ordinance because of leased premises' proximity to school); *Swor v. Tapp Furniture Co.*, 146 S.W.3d 778, 783–84 (Tex. App.—Texarkana 2004, no pet.) (holding oral agreement for finder's fee void because "finder" was not licensed real-estate broker in violation of Real Estate License Act); *Peniche v. Aeromexico*, 580 S.W.2d 152, 155 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (holding contract for driving services void and illegal because driver did not have chauffeur's license and, consequently, performance of contract would violate law requiring chauffeur's license, which was enacted for purpose of public safety). The rationale behind this rule—that courts will not enforce an illegal contract that involves the doing of an act prohibited by statutes enacted for the protection of the public's health and welfare—is not to protect or punish either party to the contract but to benefit and protect the public. *See, e.g.*, *Cruse v. O'Quinn*, 273 S.W.3d 766, 776 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *see also Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 210 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (explaining that the appropriate test when considering whether a contract violates public policy "is whether the tendency of the agreement is injurious to the public good, not whether its application in a particular case results in actual injury").

Because parties to a contract are presumed to be knowledgeable of the law, including public-safety laws, courts will generally leave parties to an illegal contract as they find them. *See Plumlee v. Paddock,* 832 S.W.2d 757, 759 (Tex. App.—Fort Worth 1992, writ denied). That is, courts are no more likely to aid one attempting to enforce such a contract than they are disposed in favor of the party who uses the illegality to avoid liability. *Id*. But an exception exists to this general common-law rule—that courts will not exercise equitable powers to aid parties to an illegal contract—when the parties are not in *pari delicto* and it is the least culpable party that is seeking relief. *See, e.g.*, *Oakes v. Guarantee Ins. Co.*, 573 S.W.2d 899, 902 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (citing *Am. Nat'l Ins. Co. v. Tabor*, 111 Tex. 155, 161, 230 S.W. 397, 400 (1921)). The exception is particularly applied when the illegality of the transaction depends on the existence of peculiar facts known to the defendant but unknown to the plaintiff and when the plaintiff had no intention of violating the law. *Id*. Thus, "where a person sues for services rendered another in an occupation which is illegal, unless the employer is duly licensed to carry it on, which he is not, such person may recover unless he knew that the employer had no license, for while he is bound to know that the employer must have a license to make the business legal, his mistake as to his having such license is a mistake of fact and not of law." *Id*.

Texas's regulation of the business of and licensing of public insurance adjusters is based on the policy of protecting the public. *See, e.g*., Tex. Ins.

Code Ann. § 4102.004(1) (authorizing commissioner to adopt reasonable and necessary rules including qualifications of license holders necessary to protect public interest), § 4102.005 (requiring commissioner to adopt a code of ethics for public insurance adjusters), § 4102.057 (requiring, with certain exceptions, each applicant for a license as a public insurance adjuster to take and pass an examination), § 4102.103 (prohibiting licensed public insurance adjuster from utilizing contract for adjusting services not approved by commissioner), §§ 4102.104, .105, .106 (setting forth requirements concerning licensed public adjuster's commissions, proof of financial responsibility, and maintenance of place of business, respectively), § 4102.111 (requiring licensed public adjuster to hold funds received as claims proceeds in a fiduciary capacity).[18] And, in responses to requests for admission, A-1 admitted that it is not and never has been a licensed public insurance adjuster. Therefore, a declaratory-judgment action by the Keys and putative class members (as the least culpable parties who lacked knowledge of the fact that LSRC was not a licensed insurance adjuster) declaring any contracts in which LSRC agreed to engage in acts that constituted acting as or holding itself out as a public insurance adjuster (which is

[18] *See also* Tex. Dep't Ins. Comm'r Bulletin B-0017-12 (June 26, 2012); *id*. B-051-08.

illegal as violative of insurance code section 4102.051(a)) void and unenforceable by LSRC is viable under substantive law.[19]

LSRC argues that its contracts cannot be declared void per se because section 4102 makes them only voidable at the option of the insured. *See* Tex. Ins. Code Ann. § 4102.207(a). Contrary to LSRC's position, however, the fact that insurance code section 4102.207 provides that a contract for public insurance adjusting services to be performed by a person lacking a license "may be voided at the option of the insured" does not alter the void-per-se status of the contracts as to LSRC. Instead, as provided by the common law of contracts and as discussed above, such a contract violates public policy and is per se void as to LSRC. Section 4102.207 simply statutorily codifies the not-in-*pari-delicto* exception to the general rule that courts will not enforce contracts that are void for illegality so that "[a]ny contract for services regulated by [chapter 4102 of the insurance code] may be voided at the option of the insured." *See id.* That is, the legislature has statutorily made a contract that is void for illegality under the

[19]To the extent LSRC's first issue contends that its contract is a "legal contract [that] may be performed in an illegal manner," we cannot agree. Because LSRC does not possess a public insurance adjuster's license, any contract entered into by LSRC to perform such services is an illegal contract. *See* Tex. Ins. Code Ann. § 4102.051(a) (providing that "[a] person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license issued by the commissioner"), § 4102.206(a) (providing that "[a] person commits an offense if the person violates this chapter"); *White*, 490 S.W.3d at 490–91; *Lewis*, 145 Tex. at 471–73, 199 S.W.2d at 148–49; *Merry Homes, Inc.*, 312 S.W.3d at 949–50; *Swor*, 146 S.W.3d at 783–84; *Peniche*, 580 S.W.2d at 155.

common law enforceable or voidable at the option of the least culpable party—the insured—when a person contracts with the insured to perform services as a public insurance adjuster but does not have a public insurance adjuster's license. *See Int'l Risk Control, LLC v. Seascape Owners Ass'n, Inc.*, 395 S.W.3d 821, 824–25 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (explaining that when licensed public insurance adjuster acts in violation of chapter 4102, adjuster's contract is not void—administrative penalties apply; but when unlicensed person acts as public insurance adjuster in violation of chapter 4102, contract is void at option of insured under section 4102.207).[20] We overrule the portions of LSRC's first issue claiming that the trial court misunderstood the law related to the Keys' claim for declaratory relief because even if LSRC acted as or held itself out as a public insurance adjuster and did not have the proper license, "doing so could not render the contract illegal, void, or unenforceable, which is the entire underlying basis of the request for declaratory judgment."

LSRC also claims under its first issue that the trial court misunderstood the law regarding public insurance adjusting because the Keys did not actually plead

[20] *See also* Brief of Amici Curiae National Association of Public Insurance Adjuster and Texas Association of Public Insurance Adjusters in Support of Appellees at 5–16 (explaining the public policy behind enforcing the licensing requirement for public insurance adjusters and stating that "[a]llowing unlicensed intermediaries between the homeowner and an insurance company would wreak havoc on the licensed and regulated public insurance adjuster profession" and therefore "would allow contractors to take advantage of homeowners – particularly in the face of a catastrophic natural disaster, when they are most vulnerable – in situations where the contractors' financial interests obviously conflict with those of the homeowner").

that LSRC *acted* as a public insurance adjuster but merely that LSRC *held itself out* as a public insurance adjuster and promised to act—without actually acting—as a public insurance adjuster. This contention by LSRC is a distinction without a difference; section 4102.207 gives an insured the option to void a contract entered into with a person "who is in violation of Section 4102.051." *See* Tex. Ins. Code Ann. § 4102.207(a). And section 4201.051 prohibits a person both from acting as a public insurance adjuster and from "hold[ing] himself or herself out to be a public insurance adjuster" if the person does not have a license. *See id.* §§ 4102.051(a), .207(a). LSRC did not have a public insurance adjuster license, so it was prohibited from both acting as and holding itself out as a public insurance adjuster; either type of conduct violates section 4102.051. We overrule this portion of LSRC's first issue.

Also under its first issue, LSRC argues that, in fact, it never acted as or held itself out as a public insurance adjuster. LSRC points to an Insurance Commissioner Bulletin authorizing roofing companies to "discuss the amount of damage to the consumer's home, the appropriate replacement, and reasonable cost of replacement with the insurance company."[21] The same Bulletin, however, provides that a roofing company may not "advocate on behalf of a consumer" or "discuss insurance policy coverages and exclusions." *See* Tex. Dep't Ins.

[21]*See* Tex. Dep't Ins. Comm'r Bulletin B-0017-12.

Comm'r Bulletin B-0017-12. As set forth above, the LSRC Acceptance and Agreement provision provided:

> This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowner[s'] best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.

To the extent LSRC asserts that it never acted or held itself out as a public insurance adjuster because LSRC merely agreed to "discuss the amount of damage to the consumer's home, the appropriate replacement, and reasonable cost of replacement with the insurance company" but did not agree to "advocate on behalf of a consumer" or "discuss insurance policy coverages and exclusions[,]" we cannot agree. By the express terms of the contractual provision set forth above, LSRC agreed to "pursue homeowners[']s best interest" and to reach an agreement with the insurance company for the final roofing contract price—"[t]he final price agreed to between the insurance company and LSRC shall be the final contract price." By contracting to "pursue homeowners[']s best interest" and to reach a settlement with the Keys' insurance company, LSRC explicitly agreed to "advocate on behalf of a consumer [the Keys]"—which is conduct prohibited by the same Insurance Commission Bulletin that LSRC claims authorized its conduct. *See generally* Tex. Ins. Code Ann. § 4102.001(3) (defining "public insurance adjuster" as including a "person" who acts on behalf of

an insured in negotiating settlement of a claim). We overrule this portion of LSRC's first issue.

LSRC also argues that the trial court misunderstood the law of collateral estoppel and res judicata concerning Magistrate Judge Cureton's holdings in *Reyelts*.[22] The trial court's class-certification order made no findings regarding collateral estoppel. The Keys argue on appeal that they do not rely on collateral estoppel to establish their class claims; the Keys assert that "[t]he class-wide claims are rock solid and stand on their own merit." Accordingly, we review the propriety of the class-certification order without applying collateral estoppel or any benefits from application of that doctrine to the alleged class claims. We overrule this part of LSRC's first issue; neither the Keys, the trial court, nor the class-certification order purport to apply the doctrine of collateral estoppel to support class certification.

C. The DTPA Section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) Claim

Also within its first issue, LSRC complains that the trial court "did not vigorously analyze the DTPA section 17.50(a)(4) claim." LSRC asserts that a violation of chapter 4102 does not constitute a violation of chapter 541 and therefore is not actionable under DTPA section 17.50(a)(4).

The Keys pleaded the following in their petition for class certification:

[22]LSRC makes this statement in a heading in its briefing. The argument portion of LSRC's brief addresses collateral estoppel only. We address that contention.

> Of critical importance to Plaintiffs, [LSRC]'s form contracts, including the "Agreement" executed by Plaintiffs, expressly provided that [LSRC] would act on Plaintiffs' behalf in negotiating for and effecting the settlement of Plaintiffs' claim with their insurance carrier and that [LSRC] would do so with Plaintiffs' "best interest" in view.
>
> . . . .
>
> What Plaintiffs did not know and what [LSRC] never told them was that at the time [LSRC] had Plaintiffs sign the "Agreement," [LSRC] could not legally provide the insurance claims negotiation services that it was promising because [LSRC] lacked the requisite license to provide such services. As Lon Smith was well aware, the Texas Insurance Code has provided since 2003 that "a person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state ***unless the person holds a license of certificate issued by the commissioner under Section 4102.053, 4102.054, or 4102.069***." *See* Tex. Ins. Code § 4102.051(a) (Emphasis added).
>
> . . . .
>
> 46. [LSRC]'s conduct, as outlined above, violated multiple provisions of the DTPA, including, but not necessarily limited to, the following:
>
> . . . .
>
> h. Section 17.50(a)(4), by use and employment of an agreement that was and is illegal and violative of Chapter 4102 of the Texas Insurance Code, which constituted an act or practice in violation of Chapter 541 of the insurance code.[23]

Looking beyond the pleadings at the substantive law, DTPA section 17.50(a)(4) authorizes a consumer to maintain an action for restitution damages

[23]LSRC did not specially except to the Keys' pleadings concerning the DTPA section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) claim.

when a person's use or employment of an act or practice in violation of chapter 541 of the insurance code is a producing cause of such damages. *See* Tex. Bus. & Com. Code Ann. § 17.50(a)(4), (b)(3); *United Neurology, P.A. v. Hartford Lloyd's Ins. Co*., 101 F. Supp. 3d 584, 601–02 (S.D. Tex.) (explaining that "chapter 541, subchapter B, of the Texas Insurance Code, . . . provides a cause of action to any 'person' injured by another's deceptive acts or practices in the business of insurance"), *aff'd,* 624 F. App'x 225 (5th Cir. 2015).

The purpose of chapter 541 is to regulate trade practices in the business of insurance by defining practices that are unfair or deceptive and prohibiting those practices. *See* Tex. Ins. Code Ann. § 541.001 (West 2009). Section 541.008 provides that "[t]his chapter shall be liberally construed and applied to promote the underlying purposes as provided by Section 541.001." *Id*. § 541.008 (West 2009). Subchapter B of chapter 541, specifically section 541.051(1)(A) and (B), provide that it is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to make an estimate that misrepresents the terms of a policy or the benefits of a policy and that it is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to make a statement misrepresenting the benefits of a policy. *Id.* § 541.051(1)(A), (B) (West 2009).

The conduct of a person acting as an insurance adjuster may violate chapter 541 of the insurance code. *See id.* § 541.002 (West 2009) (defining "person" as including an adjuster); *Gasch v. Hartford Accident & Indem. Co.*, 491

F.3d 278, 283 (5th Cir. 2007); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998); *see also* 28 Tex. Admin. Code Ann. § 21.1 (Tex. Dep't of Ins., Deceptive Acts or Practices of Insurers, Agents, and Connected Persons) (further defining those persons who may commit acts violating the insurance code as including "other persons" in their conduct of the business of insurance or in connection therewith, whether done directly or indirectly); *Exch. Servs., Inc. v. Seneca Ins. Co*., No. 3:15-CV-01873-M, 2015 WL 6163383, at *4 (N.D. Tex. Oct. 16, 2015) (mem. op. & order) (collecting Fifth Circuit cases recognizing that adjusters may be individually liable under chapter 541 of the insurance code); *Centro Cristiano Cosecha Final, Inc. v. Ohio Cas. Ins. Co.*, No. H-10-1846, 2011 WL 240335, at *5 & n.8 (S.D. Tex. Jan. 20, 2011) (op. & order) (explaining that "Texas law recognizes that unfair insurance settlement conduct under the Texas Insurance Code may be asserted against individual[,] independent[,] and corporate adjusters").

Because LSRC contractually promised that it would pursue the Keys' best interest in negotiating an agreement with the Keys' insurance company and that LSRC's negotiated contract price would be agreed to by the Keys' insurance company—acts that under chapter 4102 of the insurance code LSRC could perform only if it were a licensed insurance adjuster—LSRC's contract misrepresenting that it could and would perform these acts in connection with the Keys' homeowners' insurance claim violates chapter 4102 of the insurance code and constitutes an unfair or deceptive act or practice in the business of insurance

under chapter 541 of the insurance code. *See, e.g.*, Tex. Ins. Code Ann. §§ 541.001–.454 (West 2009 & Supp. 2016); *Reyelts*, 968 F. Supp. 2d at 844 ("The Lon Smith Defendants' use and employment of an agreement that was and is illegal and violative of Chapter 4102 of the Texas Insurance Code constituted an act or practice in violation of Chapter 541 of the Texas Insurance Code and, thus, a violation of section 17.50(a)(4) of the DTPA.").

We overrule the portion of LSRC's first issue complaining that the trial court misunderstood the law concerning the Keys' DTPA section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) claim.

D. The DTPA Section 17.50(a)(3) (Unconscionability) Claim

In portions of LSRC's first and second issues, LSRC complains that "[i]ndividual issues would predominate with respect to the class's unconscionability claim pursuant to DTPA section 17.50(a)(3)" and that the DTPA unconscionability claim lacks rule 42(a)(2) commonality. LSRC argues that "unconscionability claims involve highly individualized inquiries that are not appropriate for resolution by a class action."

The DTPA provides that a consumer may maintain an action in which an unconscionable action or course of action by any person constitutes a producing cause of economic damages. *See* Tex. Bus. & Com. Code Ann. § 17.50(a)(3). The DTPA defines "[u]nconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair

degree." *Id*. § 17.45(5) (West 2011). The term "gross" should be given its ordinary meaning, and therefore, the resulting unfairness must be "glaringly noticeable, flagrant, complete and unmitigated." *Dwight's Discount Vacuum Cleaner City, Inc. v. Scott Fetzer Co.*, 860 F.2d 646, 650 (5th Cir. 1988) (citing *Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985)), *cert. denied,* 490 U.S. 1108 (1989); *see also Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998). Unconscionability is an objective standard for which scienter is irrelevant. *See Koonce*, 700 S.W.2d at 583 ("This should be determined by examining the entire transaction and not by inquiring whether the defendant intended to take advantage of the consumer or acted with knowledge or conscious indifference.").

The Keys assert that that "[n]o . . . factual circumstance can rescue a contract that expressly violates Texas public policy from being found unconscionable." Accordingly, the Keys argue that because the legislature determines public policy through the statutes it passes[24] and because LSRC's form contract violates a statute—various provisions of insurance code chapter 4102[25]—LSRC's contract therefore violates public policy set by the legislature (via insurance code chapter 4102) and is unconscionable. This is true. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006) (holding

[24]*See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 665 (Tex. 2008) ("The Legislature determines public policy through the statutes it passes.").

[25]The Keys cite to Texas Insurance Code sections 4102.001(3), 4102.051, and 4102.158.

provision in attorney's fee contract requiring client that terminated contract to immediately pay attorney fee equal to present value of attorney's interest in case was inconsistent with public policy and unconscionable); *Sec. Serv. Fed. Credit Union v. Sanders*, 264 S.W.3d 292, 297 (Tex. App.—San Antonio 2008, no pet.) (holding provision in arbitration agreement requiring arbitrator to assess attorney's fees and costs against consumer if consumer were unsuccessful in DTPA action—without finding of groundlessness required by DTPA statute—was inconsistent with public policy of DTPA and therefore substantively and procedurally unconscionable); *see also* Tex. Bus. & Com. Code Ann. § 2.302 (West 2009) (discussing unconscionable contracts under the Uniform Commercial Code). But the fact that a contract may be substantively or procedurally unconscionable as violative of public policy does not automatically shoehorn a party's conduct in entering into the contract with a consumer into the DTPA's definition of "unconscionable action or course of action." *See* Tex. Bus. & Com. Code Ann. § 17.45(5) (defining "unconscionable action or course of action" as meaning "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree"). Case law uniformly holds to the contrary; the unconscionable-act-or-course-of-action element of a DTPA section 17.50 unconscionability claim requires proof of each consumer's knowledge, ability, experience, or capacity. *Id*. § 17.50. A DTPA section 17.50(a)(3) unconscionability claim requires a consumer (here the Keys and each class

member) to show that the defendant's acts (the acts of LSRC) took advantage of the consumer's lack of knowledge and that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated. *See, e.g.*, *Morris*, 981 S.W.2d at 677; *Koonce*, 700 S.W.2d at 583. Because the unconscionable-act-or-course-of-action element of a DTPA section 17.50 unconscionability claim requires proof of each consumer's knowledge, ability, experience, or capacity, courts generally refuse to certify DTPA unconscionability claims for class treatment. *See, e.g.*, *Ryan*, 477 S.W.3d at 913–14 (reversing class certification of DTPA unconscionability claim because "determining whether Hicks'[s] actions were unconscionable requires evaluation of each member's individual circumstances"); *Wall v. Parkway Chevrolet, Inc*., 176 S.W.3d 98, 105–06 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (affirming denial of class certification of DTPA unconscionability claim because individualized inquiry into each buyer's circumstances is required to answer the question "whether the charging of a fee under the designations such as 'NACC,' 'Consumer Benefits & Services (ECBP),' 'NADW,' 'Intelesys,' and/or other similar designations is an unconscionable . . . act"); *Peltier Enter., Inc. v. Hilton*, 51 S.W.3d 616, 623–24 (Tex. App.—Tyler 2000, pet. denied) (reversing class certification of DTPA unconscionability claim because "[t]here must be a showing of what the consumer could have or would have done if he had known about the information . . . there would need to be some showing of each customer's 'knowledge, ability, experience, or capacity'"); *see also Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 228 (Tex. 2014)

(holding that even under the UCC—as opposed to the DTPA here—court is to make a "highly fact-specific inquiry into the circumstances of the bargain, such as the commercial atmosphere in which the agreement was made, the alternatives available to the parties at the time and their ability to bargain, any illegality or public policy concerns, and the agreement's oppressive or shocking nature" when determining unconscionability).

Here, as in *Ryan*, *Wall*, and *Peltier*, individual issues concerning each class-member consumer's knowledge, ability, experience, or capacity is required to establish the unconscionable-act-or-course-of-action element of a DTPA unconscionability claim.[26] *Ryan*, 477 S.W.3d at 913–14; *Wall*, 176 S.W.3d at 105–06; *Peltier*, 51 S.W.3d at 623–24. Because this primary element of a DTPA unconscionability claim requires individualized proof concerning each class member, we hold that the trial court failed to conduct a rigorous analysis of the substantive law surrounding a DTPA unconscionability claim—specifically the unconscionable-act-or-course-of-action element. Because the unconscionable-

[26]Unlike the DTPA violation-of-chapter-541-of-the-insurance-code claim in *Reyelts*, which was premised on the use of contractual language identical to that used here, the DTPA unconscionability claim in *Reyelts* was premised on specific facts relating to Beatriz Reyelts's lack of knowledge, ability, and experience concerning roof damage and insurance claims. *See* 968 F. Supp. 2d at 839–40 (stating that "Beatriz is a 69-year-old, retired first grade school teacher who does not possess any special knowledge or expertise regarding assessing roof damage caused by hail or estimating the materials, services, and costs needed to repair such damage" and that "Beatriz was not experienced or sophisticated in terms of knowing how to secure Farmers'[s] agreement to pay the Lon Smith Defendants for the roof repairs that the Lon Smith Defendants had said were necessary").

act-or-course-of-action element of DTPA unconscionability claims is not subject to class-wide proof here, we hold that the trial court abused its discretion by certifying this claim for class treatment. We sustain the portion of LSRC's second issue complaining that the DTPA unconscionability claims were improperly certified because they "involve highly individualized inquiries that are not appropriate for resolution by a class action."[27]

V. THE CHALLENGED REQUISITES OF RULE 42(a) ARE SATISFIED

In its fourth issue, LSRC complains that the Keys failed to satisfy their burden of proving rule 42(a)'s requirements of numerosity, typicality, and adequacy of representation.

A. Numerosity

LSRC complains that the Keys failed to establish numerosity because LSRC's contracts—with the approximately 3,000 persons falling within the certification order's class definition—were voidable, not void, and because the Keys failed to prove how many of those persons pursued actions to void the contract or had homeowners' insurance.

Numerosity is not based on numbers alone; rather, the test is whether joinder of all members is practicable in view of the size of the class and includes such factors as judicial economy, the nature of the action, geographical location

[27]Because we hold that the class DTPA unconscionability claim fails on predominance grounds, we need not address LSRC's commonality challenge to this claim.

of class members, and the likelihood that class members would be unable to prosecute individual lawsuits. *Graebel/Hous. Movers, Inc. v. Chastain*, 26 S.W.3d 24, 29, 32 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.) (citing *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 653 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd w.o.j.)); *Rainbow Grp., Ltd. v. Johnson*, 990 S.W.2d 351, 357 (Tex. App.—Austin 1999, pet. dism'd w.o.j.).

The record before us confirms that the Keys met their burden to establish numerosity. LSRC conceded in the trial court that it had maintained copies of all contracts signed by consumers with LSRC. And LSRC entered a signed stipulation in the trial court stating that "A-1 stipulates that at least 500 customers have entered into each standard form of residential roofing contract that A-1 has utilized in its business between 2010 and the present." The Keys attached to their request for class certification a copy of each of the six form contracts utilized by LSRC between 2010 and the present, and each of the six contracts contains the identical Acceptance and Agreement provision contained in the Keys' contract. If each of the six residential roofing contracts used sequentially by LSRC since 2010 was signed by at least 500 customers, 500 customers per six contracts equals a pool of at least 3,000 customers.

The certification order defines the class as limited to Texas residents who from June 2003 to the present signed one of the six agreements with LSRC containing the Acceptance and Agreement provision, constituting in excess of 3,000 putative class members. After examining the numerosity factors set forth

above—joinder of all 3,000 plus class members is not practicable in view of the size of the class, judicial economy is served by a class action, the nature of the declaratory-judgment and the DTPA violation-of-chapter-541-of-the-insurance-code claims makes them amenable to class action litigation, the geographical location of the class members is Texas, and the likelihood that class members would be unable to prosecute individual lawsuits because most do not know of the existence of the causes of action accruing to them as a result of LSRC's unlicensed-public-adjuster status—all weigh in favor of class certification. The Keys satisfied rule 42(a)'s numerosity requirement. *See, e.g.*, *Durrett v. John Deere Co.*, 150 F.R.D. 555, 557 (N.D. Tex. 1993) ("Because the estimate of potential class members ranges as high as 14,000, the Court has no difficulty concluding that a class certified in this cause would satisfy the numerosity requirement"); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (recognizing that in determining numerosity, courts must consider "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim"); *Phillips v. J. Legis. Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981) (recognizing that in determining numerosity, "[t]he proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors"), *cert. denied*, 456 U.S. 960 (1982).

B. Typicality

The test for typicality is not demanding. *See, e.g*., *Ryan*, 477 S.W.3d at 908. Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Bernal,* 22 S.W.3d at 433. A class representative must be part of the class and must possess the same interest and suffer the same injury as the class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156, 102 S. Ct. 2364, 2370 (1982). Although the named representatives need not suffer precisely the same injury as the other class members, there must be a nexus between the injury suffered by the representatives and the injury suffered by the other members of the class. *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 4 S.W.3d 805, 812 (Tex. App.—Houston [14th Dist.] 1999, no pet.). To be typical, the class representatives' claims must also be based on the same legal theory. *Id.*

LSRC argues that the Keys' claims are not typical of the class because (1) the contracts are not illegal; (2) LSRC may elect to enforce an arbitration clause in the contracts; (3) Stacci did not sign the contract with LSRC; (4) many of the LSRC contracts had substantially similar clauses, not identical clauses; (5) the Keys failed to prove how many class members had homeowners' insurance; and (6) mental anguish damages were not sought on behalf of the class members under the DTPA claims. We address each of these contentions by LSRC. For the reasons set forth below, we determine LSRC's challenges to the trial court's typicality finding to be without merit.

First, the contracts are illegal, as set forth in section IV.B. above. Second, LSRC failed to prove that the contracts contain an arbitration clause.[28] Third, the Keys pleaded that Joe's signature bound Stacci, and regardless of whether Stacci signed the contract with LSRC, under Texas law, she is presumed responsible for community debt incurred during the marriage and thus possesses status as a plaintiff identical to Joe. *See, e.g.*, *Richardson v. Richardson*, 424 S.W.3d 691, 697 (Tex. App.—El Paso 2014, no pet.) ("The community property presumption applies to both assets and liabilities. Therefore, there is a presumption that debt acquired by either spouse during marriage was procured on the basis of community credit.") (internal citations omitted). Fourth, as testified to by A-1's corporate representative David Cox in his deposition

[28]As explained in the Keys' brief on pages 25–26 and borne out by the record:

> [LSRC]'s frivolous argument that an arbitration clause undermines typicality fails for several reasons. First, the record fails to support [LSRC]'s suggestion that an arbitration clause even existed in any form contract. [LSRC] produced six form contracts—five of those form contracts were one page and did not contain any arbitration clause. [2 CR 455–60]. The sixth form contract was followed by two extra terms and conditions pages not included in the other five form contracts—one of those terms and conditions pages contained an arbitration clause, and the other did not. [2 CR 461–62]. [LSRC]'s counsel admitted on the record that both of those terms and conditions pages could not be part of the same form contract. [2 CR 416 ("So only one of those could be part of the [sixth] contract.")]. [A-1]'s corporate representative agreed it would be "impossible" for both terms and conditions sheets to be a part of the sixth form contract. [*Id*.]. Neither [LSRC], nor [their] counsel, however, ever indicated that the terms and conditions page containing the arbitration clause was part of the sixth form contract. [*Id*.].

attached to the Keys' motion for class certification and as reflected in the six actual form contracts utilized by LSRC and attached to the Keys' motion for class certification, all of the contracts contain the exact same Acceptance and Agreement provision, despite LSRC's complaint concerning the trial court's use of the phrase "substantially similar" in the certification order.[29] Fifth, whether or not a homeowner had insurance does not change the fact that the LSRC contract is void as to A-1, and Cox conceded that the vast majority of A-1's roofing work involved insurance-backed customer agreements. Sixth, a representative plaintiff is allowed to forgo "person-specific" de minimis damage claims to achieve class certification; when a few class members' person-specific injuries prove to be substantial, they may opt out and litigate independently. *Murray v. GMAC Mortg. Corp*., 434 F.3d 948, 953 (7th Cir. 2006). None of LSRC's contentions preclude the trial court's finding of typicality.

The record before us establishes that the Keys met their burden of establishing typicality.

C. Adequacy of Representation

The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality requirements that "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that

[29]LSRC raises this same complaint in its fifth issue. We overrule this portion of LSRC's fifth issue.

the interests of the class members will be fairly and adequately protected in their absence." *Falcon,* 457 U.S. at 157 n.13, 102 S. Ct. at 2370 n.13. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S. Ct. 2925, 2930 (1974)). In determining the adequacy requirement, the trial court must inquire into the zeal and competence of class counsel and into the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of the absentees. *Rainbow Grp., Ltd.*, 990 S.W.2d at 357. The primary issue to be considered is whether conflict or antagonism exists between the interests of the representatives and those of the remainder of the class. *Id.* However, only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. *Id.*

The Keys met their burden of establishing that they will fairly and adequately protect the interests of the class. The Keys proved that they share with other class members the same declaratory-judgment and DTPA (Violation of Chapter 541 of the Texas Insurance Code) claims based on identical contractual provisions set forth in a contract with LSRC. No antagonistic interests exist among class members nor has LSRC asserted any specific antagonistic interests between class members. *See Farmers Ins. Exch. v. Leonard*, 125 S.W.3d 55, 66 (Tex. App.—Austin 2003, pet. denied); *see also Adams v. Reagan*, 791 S.W.2d

284, 291 (Tex. App.—Fort Worth 1990, no writ) (recognizing that "[t]he primary issue to be considered in whether 'the representative parties will fairly and adequately protect the interest of the class' is a determination of whether any antagonism exists between the interests of the plaintiffs and those of the remainder of the class").

The Keys have retained counsel with class-action experience in other cases, which was acknowledged by LSRC during the class-certification hearing. The Keys' retained counsel appealed the *Riemer* case to the Texas Supreme Court along with the same counsel who successfully prosecuted the same causes of action against LSRC in the *Reyelts* case. *See generally Riemer v. State*, 392 S.W.3d 635, 641 (Tex. 2013) (reversing trial court and court of appeals for denying class certification based on lack of rule 42(a)(4) adequacy and noting, "to the extent Mr. Johnson's relatives disagree with the propriety of the litigation, the class representative, or the class representative's counsel, they may utilize Rule 42's procedures for opting out of the class"). The record reflects that the Keys have a sufficient interest in, and nexus with, the class to insure vigorous and tenacious prosecution—through the experienced class counsel they retained—of the class declaratory-judgment and the DTPA violation-of-chapter-541-of-the-insurance-code claims. *See, e.g.*, *Durrett*, 150 F.R.D. at 558.

To the extent LSRC complains that the Keys are not adequate class representatives because of their "willingness to [forgo] mental anguish damages" on behalf of the class, the Texas Supreme Court has rejected this contention.

See Bowden v. Phillips Petroleum Co., 247 S.W.3d 690, 697 (Tex. 2008) (rejecting contention that class representative's abandonment of some claims to achieve commonality makes the representative inadequate because such a holding would require class representatives to assert every possible claim for each individual class member, which would almost always defeat typicality and predominance requirements). As set forth below, in connection with the superiority analysis, the lack of individual lawsuits against LSRC and the likelihood that any insureds suffering mental anguish damages, like the Reyeltses and the Keys, would have already pursued individual lawsuits supports not only the trial court's finding of superiority but also of adequacy of representation.

We overrule LSRC's fourth issue and conclude that the Keys met their burden of establishing rule 42(a)'s requirements of numerosity, typicality, and adequacy of representation.

VI. SATISFACTION OF RULE 42(b)

The trial court found that the Keys had satisfied their burden to prove certification of the class claims under rule 42(b)(3), (b)(2), and (b)(1)(A) and certified the class claims alternatively under these subsections of rule 42(b). In its second issue, LSRC challenges the trial court's certification of the class under rule 42(b)(3), specifically attacking predominance and superiority.[30] In its third

[30]LSRC's second issue primarily asserts that class certification of the DTPA section 17.50(a)(3) (Unconscionability) claim runs afoul of rule 42(b)(3)'s

issue, LSRC challenges the trial court's certification of the class under rule 42(b)(2) and 42(b)(1).

A. The Requirements of Rule 42(b)(3) Are Satisfied

To certify a class under rule 42(b)(3), the court must find that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Tex. R. Civ. P. 42(b)(3); *see, e.g*., *Lapray*, 135 S.W.3d at 663.

1. Predominance

To establish predominance, a plaintiff seeking class certification is not required to prove that each and every element of her claim is susceptible to class-wide proof*. Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 468, 133 S. Ct. 1184, 1196 (2013). Rule 42(b)(3) certification is proper if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Tex. R. Civ. P. 42(b)(3). "In order to 'predominate,' common issues must constitute a significant part of the individual cases." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999) (quoting *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir.

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predominance and superiority requirements. Because we have held that the trial court abused its discretion by certifying the DTPA section 17.50(a)(3) (Unconscionability) claim, we need not address the portions of LSRC's second issue raising complaints regarding certification of this claim. *See* Tex. R. App. P. 47.1 (requiring appellate court to address only issues necessary to disposition of appeal).

1986)), *cert. denied*, 528 U.S. 1159 (2000). As explained by Circuit Judge Richard A. Posner, predominance is not "determined simply by counting noses: that is, determining whether there are more common issues or more individual issues, regardless of relative importance," but "predominance requires a qualitative assessment too; it is not bean counting." *Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). What is required is that common questions "*predominate* over any questions affecting only individual [class] members." *Amgen Inc.*, 133 S. Ct. at 1196 (quoting Fed. R. Civ. P. 23(b)(3)) (alteration and emphasis in the original). The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249 (1997).

In making a predominance determination, courts must give careful scrutiny to the relation between common and individual questions in a case. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Id.* (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:50, pp. 196–97 (5th ed. 2012)) (internal quotation marks omitted). The predominance inquiry "asks whether the common, aggregation-enabling[] issues in the case are more

prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (quoting 2 W. Rubenstein, *supra*, at §4:49, pp 195–96). When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." 7AA Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1778, pp. 123–24 (3d ed. 2005) (footnotes omitted).

Determining whether legal issues common to the class predominate also requires that the court inquire how the case will be tried. *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737–38 (5th Cir. 2003). "This entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class." *Id*.

LSRC argues that predominance is not satisfied for two reasons: because LSRC will assert a statute-of-limitations defense against some proposed class members that will require individual factual inquiries concerning each plaintiff and because "the calculation of damages requires individualized inquiry." We address these two challenges by LSRC to rule 42(b)(3)'s predominance requirement.

a. LSRC's Statute-of-Limitations Defense Is a Common Issue with Common Answers

LSRC makes a one-sentence attack on predominance based on LSRC's statute-of-limitations defense:

> The Keys also failed to articulate how individual issues can be addressed fairly to allow LSRC the opportunity to adequately and vigorously present their viable claims or defenses, such as their statute-of-limitations defense, or their right to an offset for the value of the roof installed on each potential class member's home, and this failure is fatal to class certification.

LSRC's statute-of-limitations argument is addressed here; its damages arguments regarding predominance are addressed in subsection VI.A.1.b.

The predominance of individual issues necessary to decide an affirmative defense, such as a statute-of-limitations defense, may preclude class certification. *In re Monumental Life Ins. Co*., 365 F.3d 408, 420 (5th Cir.), 543 U.S. 870 (2004); *see O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 414 (C.D. Cal. 2000) (explaining that when a statute-of-limitations defense "raises substantial individual questions that vary among class members," such questions may defeat predominance); *see also* Tex. R. Civ. P. 94 (listing limitations as an affirmative defense). As recognized by the Fifth Circuit, however, "[t]hough individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate[.]" *Monumental Life Ins. Co*., 365 F.3d at 420;[31]

[31]In *Monumental Life Ins. Co.*, a class of plaintiffs alleged that the defendant had engaged in a "common scheme of fraudulent concealment," but

Williams v. Sinclair, 529 F.2d 1383, 1388 (9th Cir. 1975) (explaining that for purposes of class certification, "[t]he existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones"), 426 U.S. 936 (1976); *see also Castro v. Collecto, Inc*., 256 F.R.D. 534, 542–43 (W.D. Tex. 2009) (certifying class over defendants' assertions that their statute-of-limitations defense would require "mini-trials" as to each class member to determine whether that member's claim was time-barred). In particular, lower courts have found that predominance is not defeated when the doctrines used by plaintiffs for tolling a statute of limitations involve proof common to the defendants. *See Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 485–86 (C.D. Cal. 2012). That is, even as concerning the affirmative defense of statute of limitations, "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350, 131 S. Ct. at 2551.

Limitations defenses generally present common questions, rather than individual ones, because a limitations defense's merits rest on two facts: (1) the

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the district court denied class certification because "individualized hearings [were] necessary to determine expiration of the statute of limitations for particular sets of [insurance] policies." *Id.* at 420–21. The Fifth Circuit held that this was insufficient to preclude class certification in light of the "efficiency aims of rule 23." *Id*. Thus, the Fifth Circuit reversed the trial court's denial of class certification that was based on lack of predominance concerning the statute-of-limitations affirmative defense. *Id*.

date on which the statute of limitations accrued and (2) the date on which the action was filed. *See, e.g.*, *Abraham v. WPX Prod. Prods.*, *LLC*, 317 F.R.D. 169, 229 n.33 (D.N.M. 2016). Fact (2) is a common issue in virtually every class action because the entire class gets credit for the filing date of the class-action petition. *Id*. Fact (1) may or may not be truly common; it may be, if, for example, the discovery rule delays accrual of a statute of limitations until the cause of action is discovered and all class members' causes of action are discovered at the same time, or if a single act by the defendant breached contracts with all class members at once. *Id*.

Here, the Keys' arguments to rebut LSRC's limitations defense point to common questions of law that may be resolved on a class-wide basis. The Keys explain that they

> sought class certification on September 30, 2014. Contract claims carry a four-year limitations period, while DTPA claims carry a two-year limitation[s] period. Thus, no limitations issues exist for contracts entered after September 30, 2010 and September 30, 2012, respectively, for those claims. Because the class is limited to Texas residents, all these limitations periods will apply equally to all class members.
>
> . . . .
>
> Here, there is no evidence that any of the class members were unaware that they signed the form contracts at issue and thereby failed to discover the facts underlying their claim. Rather, the predominant question for limitations is a purely legal one; that is, when does the period expire for recognizing a contract is void? [Citations omitted.]

Based on this analysis, facts (1) and (2) relevant to LSRC's limitations defense are common, class-wide issues subject to common, class-wide answers. Here, fact (2)—the date on which the action was filed—is the same for all class members: September 30, 2014. Fact (1)—the date on which the statute of limitations accrued—is likewise the same for all class members subject to the affirmative defense of limitations.[32] That is, fact (1) will be decided as to the declaratory-judgment-action class members who signed contracts with LSRC prior to September 30, 2010, and as to the DTPA violation-of-chapter-541-of-the-insurance-code-claim class members who signed contracts with LSRC prior to September 30, 2012, on a class-wide basis. The trial court will determine the legal issue of whether or not the time period for seeking a declaratory judgment declaring the LSRC contract void as to LSRC expired and the legal issue of whether or not the time period for bringing a DTPA (Violation of Chapter 541 of the Texas Insurance Code) claim expired, and those legal determinations will apply uniformly to all class members whose claims are subject to LSRC's limitations defense. Consequently, a class-wide proceeding here will generate common answers to LSRC's statute-of-limitations defense that will drive the resolution of this litigation. *See Tait*, 289 F.R.D. at 486 (upholding class certification as satisfying rule 23(b)(3) predominance requirement because

[32]Suit was filed timely as to class members signing contracts with LSRC after these dates; hence these class members are not subject to LSRC's limitations defense.

plaintiffs' arguments to rebut defendant's statute-of-limitations defense raised common questions of law susceptible to common proof and common answers). Accordingly, we overrule the one-sentence contention set forth under LSRC's second issue that challenges predominance as applied to its statute-of-limitations defense. *See, e.g*., *Monumental Life Ins. Co*., 365 F.3d at 420; *Williams*, 529 F.2d at 1388; *Castro*, *Inc*., 256 F.R.D. at 542–43.

b. Calculation of Damages Will Depend on Objective Criteria—LSRC's Records—and Will Not Require Testimony

Class certification may be inappropriate when individualized damage determinations predominate over common issues. *See O'Sullivan*, 319 F.3d at 744–45 ("Where the plaintiffs' damages claims focus almost entirely on facts and issues specific to individuals rather than the class as a whole, the potential exists that the class action may degenerate in practice into multiple lawsuits separately tried."). But generally, individualized damage calculations will not preclude a finding of predominance, *see Tyson Foods, Inc.*, 136 S. Ct. at 1045, so long as individual damages may be readily calculated from a defendant's records. *See, e.g.*, *Leyva v. Medline Indus. Inc*., 716 F.3d 510, 514 (9th Cir. 2013) (allowing class certification when individualized damages could be readily calculated from defendant's computerized payroll records); *Arreola v. Godinez,* 546 F.3d 788, 801 (7th Cir. 2008) (recognizing that "the need for individual damages determinations does not, in and of itself, require denial of [a] motion for certification" under rule 23(b)(3)); *Allapattah Servs. v. Exxon Corp.,* 333 F.3d

1248, 1261 (11th Cir. 2003) ("[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate[.]"), *aff'd in part and rev'd in part on other grounds,* 545 U.S. 546 (2005).

The Keys pleaded that "[b]ecause of [LSRC's] violation of Chapter 4102 of the Insurance Code, Plaintiffs and members of the class are entitled to a judgment restoring all monies paid to [LSRC] under the illegal contract, as ruled in the *Reyelts* Action." At the class-certification hearing, the Keys introduced into evidence the deposition of A-1 corporate representative David Cox. Cox testified in his deposition that A-1 maintained paper copies of all of its contracts; each contract was assigned a job number, which was a letter followed by a number between one and one thousand; for example, A 0001, A 0002, to A 1000 followed by B 0001, B 0002, etc. Cox said that the A's and B's had been destroyed but that "the C's forward are . . . still back there [in the storage area at the office]." Exhibit 10 attached to Cox's deposition is an A-1 contract labeled with job number H0687 that appears to have been signed on May 5, 1999, for a total price of $5,934. The class-certification order provides that "[w]ith respect to damages, the issue is economic and objective. The jury will be asked to return monies paid by or on behalf of the class members. The amount of these monies may be reasonably obtained from [LSRC's] records."

Thus, the Keys proved that through the time-sequential job numbers assigned to each of LSRC's contracts with putative class members from a point

certain in time (i.e., from whatever point in time suit is timely based on the application, if any, of LSRC's statute-of-limitations affirmative defense to the certified class claims for declaratory-judgment and DTPA section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) claims, the damages of each class member may be established solely by reference to the amount of LSRC's contract with that class member. *See Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 923–24 (Tex. 2010) (holding that trial court did not abuse its discretion by determining predominance was not defeated by differing amount of damages each class member would be entitled to when calculations could be computed from defendant's records).

LSRC asserts that even if this is true—so that every class member is entitled to statutory disgorgement from LSRC of all monies paid to LSRC under that class member's contract—LSRC nonetheless is entitled to an offset under every contract for the value of the roof it installed. Relying on *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817 (Tex. 2012), LSRC claims DTPA restoration damages necessarily encompass the common-law right of mutual restitution, entitling LSRC to an offset.[33] *See* Tex. Bus. & Com. Code Ann. § 17.50(b)(3)

[33]LSRC limits its argument—that its claimed right of offset defeats rule 42(b)(3) predominance—to the DTPA claims. LSRC's only lack-of-predominance argument concerning the Keys' declaratory-judgment claim is not based on LSRC's claimed right of offset. Instead, LSRC's only lack-of-predominance argument concerning the Keys' declaratory-judgment claim is that "[t]he Keys' declaratory[-]judgment claim also fails on predominance grounds because it will require an inquiry into whether each claimant has elected to void his or her roofing contract with LSRC—an inquiry not susceptible to class-wide proof . . .

(setting forth remedy of restoration). LSRC argues that this right of offset as to the damages of each class member defeats rule 42(b)(3) predominance. According to the Keys, the plain language of insurance code section 4102.207's statutory disgorgement provisions precludes LSRC's entitlement to any offset.

We begin with the text of section 4102.207. It provides:

> (a) Any contract for services regulated by this chapter that is entered into by an insured with a person who is in violation of Section 4102.051 may be voided at the option of the insured.
>
> (b) If a contract is voided under this section, the insured is not liable for the payment of any past services rendered, or future services to be rendered, by the violating person under that contract or otherwise.

Tex. Ins. Code Ann. § 4102.207. This statutory remedy expressly provides that if an insured voids a contract with an unlicensed insurance adjuster, "the insured is not liable for the payment of any past services rendered, or future services to be rendered, by the violating person under that contract or otherwise." *Id*. § 4102.207(b).

Examining the plain language of section 4102.207(b)'s statutory disgorgement provision, no words or phrases are utilized that could be construed as contemplating inclusion of the common-law doctrine of mutual restitution. *Cf. Morton v. Nguyen*, 412 S.W.3d 506, 509–12 (Tex. 2013) (holding statutory

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[because] a violation of Chapter 4102 merely renders the contract voidable." We previously addressed this argument in section IV.B. above; the contract is void as to LSRC, and putative class members who wish to enforce their contract with LSRC may opt-out.

property code remedy of "cancellation and rescission" contemplated inclusion of the common-law requirement of mutual restitution); *Cruz*, 364 S.W.3d at 825–26 (explaining DTPA remedy of restoration "provides a prevailing consumer the option of unwinding the transaction, returning the parties to the status quo ante" and therefore contemplates mutual restitution). Unlike the property code provision in *Morton* and the DTPA restoration provision in *Cruz*, the insurance code provision here does not include any language contemplating mutual restitution. *See* Tex. Ins. Code Ann. § 4102.207(b). To the contrary, the insurance code provision here expressly provides that when an insured voids his contract with an unlicensed insurance adjuster, the insured "*is not liable for the payment of any past services rendered*, *or future services to be rendered, by the violating person under that contract or otherwise*." *Id*. (emphasis added).

Looking to the entirety of chapter 4102, the legislature's enactment of the following provisions applicable to licensed public insurance adjusters demonstrates that the disgorgement provisions of section 4102.207 are punitive—intended to punish and to deter roofing and construction companies from taking advantage of Texas consumers by purporting to act, while unlicensed, as public insurance adjusters for insureds. *See id.* § 4102.103 (providing that the contract used by a public insurance adjuster must include "a prominently displayed notice in 12-point boldface type that states 'WE REPRESENT THE INSURED ONLY'"), § 4102.111 (providing that all funds received as claim proceeds by a license holder acting as a public insurance

adjuster are received and held by the license holder in a fiduciary capacity), § 4102.151 (prohibiting a license holder from soliciting or attempting to solicit a client for employment during the progress of a loss-producing, natural-disaster occurrence), § 4102.158 (prohibiting a license holder from participating directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder). Because unlicensed public insurance adjusters are not subject to the checks, balances, and penalties that licensed public insurance adjusters are, section 4102.207's disgorgement provision is a punitive deterrent.[34] *Cf. Morton*, 412 S.W.3d at 511 (holding property code provision was subject to common-law rescission principles because it "was not intended to be punitive"). To construe section 4102.207 as LSRC desires would in effect render it toothless; if construction companies and roofing companies that are unlicensed as public insurance adjusters are able to successfully solicit repair contracts by agreeing to act as the insured's public insurance adjuster and nonetheless retain the monies paid to them for their repair or roofing services, then from a cost-benefit standpoint, the statute imposes no financial incentive for such companies to stop acting as unlicensed public insurance adjusters. In recognition of this fact, several states have enacted statutory disgorgement provisions similar to section 4102.207(b) that are

[34]The brief of Amici Curiae National Association of Public Insurance Adjusters and Texas Association of Public Insurance Adjusters outlines many pertinent policy considerations supporting this construction of the statutory remedy created by the legislature in Texas Insurance Code section 4102.207(b).

applicable to unlicensed contractors or public insurance adjusters and preclude an offset or any type of recovery by the unlicensed contractor or adjuster for any services rendered.[35] *See, e.g.*, Cal. Bus. & Prof. Code § 7031 (West 2017) (providing that person who utilizes the services of unlicensed contractor may bring action to "recover all compensation paid to unlicensed contractor"); Nev. Rev. Stat. § 624.700(4) (West 2015) (providing that contract entered into by unlicensed contractor is void ab initio).[36]

The trial court here found—albeit in connection with its analysis of rule 42(a)(2)'s commonality requirement—that "[a] related common issue is the manner in which the class member's relief shall be calculated; specifically, whether using such illegal language ultimately requires Defendants to disgorge all monies received under the class members' contracts." This issue is central to the validity of each putative class member's damage claim, and it can be resolved "in one stroke," justifying class treatment. *Dukes*, 564 U.S. at 350, 131 S. Ct. at 2551*; see Amchem Prods., Inc.*, 521 U.S. at 623, 117 S. Ct. at 2249–50. Because the right of every class member (who does not opt out of the class action) to recover damages or to not recover damages may be resolved in one

[35]The Keys assert that superimposing a right of offset upon section 4102.207(b)'s disgorgement remedy would "grant the violator the benefits of his illegality."

[36]*See also Morgan Drexen, Inc. v. Wis. Dep't of Fin. Insts., Div. of Banking*, 862 N.W.2d 329, 334 (Wis. Ct. App. 2015) (requiring unlicensed adjustment service company to disgorge all fees paid to it).

stroke, and because the Keys proved that the amount of each class member's damages, if any, is calculable from LSRC's records; that LSRC still possesses such records; and that such records are maintained sequentially in order of the year and date the LSRC contract was signed, we hold the fact that the amount of damage, if any, awardable to each individual class member will vary according to the amount of that class member's contract with LSRC does not defeat predominance. That is, the common question of whether class members are entitled to statutory disgorgement of monies paid pursuant to the LSRC contract "*predominate*[s] over any questions affecting only individual [class] members." *See Amgen Inc.*, 568 U.S. at 468, 133 S. Ct. at 1196.

We hold that the trial court did not abuse its discretion by determining that the common, aggregation-enabling declaratory-judgment claim; the DTPA (Violation of Chapter 541 of the Texas Insurance Code) claims; and the damages issues in the case are more prevalent or important than any noncommon, aggregation-defeating individual issues and specifically are more prevalent and important than the allegedly noncommon statute-of-limitations and damages issues argued on appeal by LSRC as defeating predominance. *See id.* We overrule the portion of LSRC's second issue challenging rule 42(b)(3)'s predominance requirement.

2. Superiority

LSRC raises four challenges to the trial court's superiority finding under rule 42(b)(3): the trial court's superiority analysis was "conclusory"; the Keys

"failed to address superiority"; "the trial court also improperly shifted the burden to LSRC to adduce evidence defeating some kind of assumption of superiority"; and the Keys' decision not to pursue mental-anguish damages on behalf of the class defeats superiority.

Superiority exists when "the benefits of class-wide resolution of common issues outweigh any difficulties that may arise in the management of the class." *Union Pac. Res. Grp., Inc. v. Hankins*, 51 S.W.3d 741, 754 (Tex. App.—El Paso 2001), *rev'd on other grounds,* 111 S.W.3d 69 (Tex. 2003); *Chastain,* 26 S.W.3d at 34. In determining whether a class action is superior, the trial court may consider the following factors: (1) whether class members will benefit from the discovery that has already been completed, thereby eliminating duplication of effort; (2) whether the trial court has already spent substantial time and effort becoming familiar with the issues of the case, which weighs favorably for a fair and expeditious result; and (3) whether class members have an interest in resolving common issues by class action. *Hankins,* 51 S.W.3d at 754–55; *Chastain,* 26 S.W.3d at 35.

The class-certification order explained:

> The Court further finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In support of this finding, the Court finds that the question of the interest of members of each class in individually controlling the prosecution of separate actions favors certification of each class because, under the record presented, it is simply not practical for the normal, individual class member to prosecute this case individually, and there is no evidence of an interest in individuals prosecuting this case individually. Indeed, it appears

> from the opinion in *Reyelts* and the facts of this case that the parties' respective claims against Defendants were not raised individually until Defendants had taken action to enforce their contracts against them.
>
> This same fact also supports the Court's finding that the extent and nature of any litigation concerning the controversy already commenced by or against members of the classes favors certification because no party has identified other litigation brought by members of the classes as individual actions other than the claims brought, and already resolved, by Beatrice Reyelts and the claims brought by the Named Plaintiffs in this case. This dearth of claims also establishes the lack of any persuasive evidence that potential class members would want to prosecute their own actions in light of the financial resources necessary to prosecute such a claim.
>
> The Court further finds that the desirability or undesirability of concentrating the litigation of the claims in this forum favors certification of the classes because it would be wasteful to duplicate them in multiple actions[,] and this Court (and the parties and their counsel) has already invested a great deal of time and study.
>
> In support of these findings regarding Rule 42(b)(3), the Court additionally refers to the findings stated in § 5.3 and the trial plan located in § 6, both of which are incorporated by reference as part of the basis on which the Court finds the (b)(3) requirements are satisfied.
>
> The Court further finds that the difficulties likely to be encountered in the management of the classes favors certification of the classes because the issues that will require most of the effort of the Court and parties will be resolved by class-wide evidence.
>
> The Court will order notice to the class and will grant class members the right to opt-out, as more particularly described in § 7.

Contrary to LSRC's contention, the trial court's superiority analysis here, as set forth in the class-certification order and quoted above, is very different from the cursory superiority analysis conducted by the trial court in *Schein. See*

102 S.W.3d at 699 (holding inadequate the trial court's single-sentence superiority analysis that stated, "[i]n light of the amount any individual Plaintiff could recover in this case and the fact that Plaintiffs are owners and operators of small businesses, the Court finds that the economics of pursuing their claims individually would not be feasible for the members of both the DOS and Windows subclasses"). Concerning LSRC's complaint that the Keys "failed to address superiority," the Keys' extensive brief in support of class certification specifically addressed and explained how and why rule 42(b)(3)'s superiority requirement is met here.[37] And concerning LSRC's complaint that "the trial court also improperly shifted the burden to LSRC to adduce evidence defeating some kind of assumption of superiority," the record does not support this claim. To the contrary, the record before us reflects that the trial court was aware that the Keys bore the burden of establishing each of the class-certification requisites and did not shift that burden to LSRC.

Concerning LSRC's contention that the Keys' decision not to pursue mental-anguish damages on behalf of the class defeats superiority, no requirement exists that the Keys pursue every claim that they possess on behalf of the class.[38] And no rule precludes the Keys from deciding not to pursue de

[37]Although the Keys' brief in support of class certification references rule 42(b)(4), that subsection was renumbered to 42(b)(3) effective January 1, 2004. *See, e.g.*, *Lopez*, 156 S.W.3d at 553 n.2 (reciting that former rule 42(b)(3) was eliminated and that former rule 42(b)(4) became rule 42(b)(3)).

[38]The Keys explain that their claim for mental-anguish damages arose

minimis damage claims on behalf of the class. *See Bowden*, 247 S.W.3d at 697. Moreover, any potential class members having allegedly suffered mental-anguish damages by virtue of their dealings with LSRC would have known of LSRC's mental-anguish-causing conduct and likely would have pursued their own claims, as the Reyeltses did. If few class members have filed individual suits, a court may conclude that the members do not possess strong interests in controlling their own litigation; this lack of individual lawsuits supports a finding of superiority.[39] *See, e.g.*, *Schuler v. Meds. Co.*, No.:14-1149 (CCC), 2016 WL 3457218, at *5 (D.N.J. June 24, 2016) (holding superiority requirement satisfied in part because "the record in this case does not indicate an interest among Class Members in individually controlling the prosecution of separate actions"); *In re PE Corp. Sec. Litig.*, 228 F.R.D. 102, 111 (D.C. Conn. 2005) (ruling on class certification and holding superiority requirement satisfied in part because "[t]he

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> because [LSRC] submitted an altered contract to the Justice Court and obtained a default judgment [against Joe Key]—while simultaneously assuring Joe Key that [LSRC was] working with him to reach an amicable settlement. [LSRC] then began collection efforts. These acts caused mental anguish. Accordingly, [the Keys] have additional non-contractual claims as class representatives often maintain.

The class members' claims are based on the contractual language at issue, not on extracontractual actions by LSRC.

[39]The Keys proved through the deposition testimony of David Cox that LSRC had not taken the position that the Acceptance and Agreement provision that was contained in LSRC's standard form contracts from 2003 to 2013 was ambiguous until "these . . . lawsuits." That is, until the *Reyelts* lawsuit and the Keys' petition. This is further evidence of the lack of separate lawsuits.

parties have not identified any other cases involving Celera common stock, which further may indicate a lack of interest in individual prosecution of claims"); 5 James WM Moore, *Moore's Federal Practice* § 23.49[2][b] (3d ed. 1997). We overrule the portions of LSRC's second issue challenging the superiority element of rule 42(b)(3) certification; the trial court did not abuse its discretion by finding this element had been satisfied. *See, e.g.*, *Chastain*, 26 S.W.3d at 34–35 (rejecting challenge to trial court's superiority finding because "discovery ha[d] commenced," the plaintiffs had deposed corporate representatives of defendant, and the defendant had produced voluminous documents; "[t]hus, the class members would benefit from the time and effort invested thus far by the trial court and the parties").

B. LSRC Agreed to the Trial Court's Consideration of Rule 42(b)(1) and Rule 42(b)(2) Certification

LSRC's third issue is "[w]hether class certification under Rules 42(b)(1) and (b)(2) should be reversed when (a) there is no pleading to support the request under either rule, (b) there is no risk of competing judgments necessary for a (b)(1) class, (c) the class is seeking individualized nonmonetary claims inappropriate for a (b)(2) class, and (d) there is no or insufficient evidence of cohesiveness required for a (b)(2) class."[40] The Keys argue that LSRC waived

[40]LSRC argues in two headings in the argument portion of its fourth issue that "Opt-Out Provision Does Not Trump Adequacy Requirement" and that "Not All Class Members Want to void Their Contracts With LSRC." While both of these statements are true, they present no argument that we have not already addressed.

its pleading complaint concerning rule 42(b)(1) and 42(b)(2) certification. We agree.

On the record at the class-certification hearing, LSRC pointed out that the Keys' motion for class certification requested certification under only rule 42(b)(3) and that the Keys' requests for certification under rule 42(b)(1) and (b)(2) were added in a later-filed brief. LSRC's counsel stated, "If Your Honor will allow me to file a brief responsive to those sections of their brief related to (b)(1) and (b)(2) after today, then I do not need to file a motion for continuance." The trial court stated that it was "open" to resetting the hearing but after conferring with counsel for the Keys, LSRC's counsel stated, "We're going to formally object to arguing (b)(1) and (b)(2). But [the Keys' counsel] and I agreed . . . that within two weeks of receiving a transcript from the court reporter of the proceedings here today, that we be allowed to file a brief related to the (b)(1) and (b)(2) matters." LSRC subsequently did file a brief with the trial court addressing rule 42(b)(1) and 42(b)(2) certification. LSRC cannot—having failed to move for a continuance, having agreed for the trial court to consider certification under rule 42(b)(1) and 42(b)(2) if LSRC were allowed to file a brief addressing those issues within two weeks of receiving a transcript of the class certification hearing, and having filed such a brief—now assert that the trial court erred by considering certification under rule 42(b)(1) and 42(b)(2). *See In re Dep't of Family & Protective Servs.,* 273 S.W.3d 637, 646 (Tex. 2009) (orig. proceeding) ("The invited error doctrine applies to situations where a party requests the court to make a specific ruling,

then complains of that ruling on appeal."); *Keith v. Keith,* 221 S.W.3d 156, 164 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that party who asked trial court to take certain action could not complain on appeal that action was wrong). We hold that LSRC waived its complaint that the Keys did not plead for certification under rule 42(b)(1) or 42(b)(2). We proceed to address LSRC's other complaints regarding rule 42(b)(1) and (b)(2) certification.

C. The Requirements of Rule 42(b)(2) Are Satisfied; the Rule 42(b)(2) Class Is Indistinguishable from the Rule 42(b)(3) Class

Rule 42(b)(2) permits "class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Cf. Amchem Prods., Inc.*, 521 U.S. at 614, 117 S. Ct. at 2245 (applying Federal Rule of Civil Procedure 23(b)(2), which is substantively identical to rule 42(b)(2)). The rule specifically mentions that claims for declaratory relief may be appropriate for rule 42(b)(2) certification. *See* Tex. R. Civ. P. 42(b)(2). Class-action treatment is particularly useful in this situation because it will determine the propriety of the behavior of the party opposing the class in a single action. *See* 7 Charles Alan Wright et al., *Federal Practice and Procedure* § 1775, at pp. 19–20, 21 (1972). The key to the rule 42(b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360, 131 S. Ct. at 2557 (quoting Richard A. Nagareda, *Class Certification in the Age*

of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)). That is, a rule 42(b)(2) class must be sufficiently cohesive to warrant adjudication by representation. *See Lapray*, 135 S.W.3d at 667. But the cohesion needed logically lessens if rule 42(b)(2) class members have the right to opt out. *Id*. at 671 (citing John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 435 (2000)). When notice and opt-out provisions are provided to a class certified under rule 42(b)(2), thereby satisfying due-process concerns, a rule 42(b)(2) class becomes virtually indistinguishable from rule 42(b)(3) classes. *Id*. at 667.

Here, the trial court certified the class alternatively under rule 42(b)(3), (b)(2), and (b)(1)(A). The class-certification order mandated notice and opt-out provisions under each of these alternatively-certified rule 42(b) subsections. Because we have held that the trial court did not abuse its discretion by certifying the class pursuant to rule 42(b)(3) and because notice and opt-out provisions are required under the trial court's rule 42(b)(2) certification, the rule 42(b)(2) class essentially collapses into the rule 42(b)(3) class. Accordingly, we hold that the trial court did not abuse its discretion by alternatively certifying a class pursuant to rule 42(b)(2). Because the rule 42(b)(2) class collapses into the rule 42(b)(3) class, we affirm the certification of the class declaratory-judgment and DTPA (Violation of Chapter 541 of the Texas Insurance Code) claims under rule 42(b)(3).

We overrule the portion of LSRC's third issue challenging class certification under rule 42(b)(2).

D. Rule 42(b)(1)(A) Certification Is Unnecessary

Because we have held that the trial court did not abuse its discretion by certifying the class declaratory-judgment and DTPA (Violation of Chapter 541 of the Texas Insurance Code) claims for class treatment under rule 42(b)(3) or by certifying the class declaratory-judgment claim under rule 42(b)(2) and because we have held that the rule 42(b)(2) class has collapsed into the rule 42(b)(3) class by virtue of the notice and opt-out provisions required for the rule 42(b)(2) class in the certification order, we need not address whether or not the trial court abused its discretion by alternatively certifying a class under rule 42(b)(1)(A).[41] We overrule the balance of LSRC's third issue.

VII. MISCELLANEOUS COMPLAINT

In one sentence in its fifth issue LSRC complains that "[t]he class certification order is also defective because it fails to include jury instructions. *Vega v. T-Mobile*, 564 F.3d 1256, 1279 n.20 (11th Cir. 2009)." But neither the text of the *Vega* opinion nor the text of footnote 20 supports this contention.[42] We overrule LSRC's fifth issue.

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[41]The class-certification order's certification of the rule 42(b)(1)(A) class also mandates notice and sets forth opt-out provisions.

[42]To the extent LSRC's fifth issue contains other one-sentence complaints that we have not addressed elsewhere, these complaints are waived. *See* Tex. R. App. P. 38.1(i) (requiring appellant's brief to "contain a clear and concise

VIII. CONCLUSION

Having sustained the portions of LSRC's first, second, and third issues challenging class certification of the Keys' DTPA section 17.50(a)(3) (Unconscionability) claim, we reverse that portion of the trial court's class certification order and remand the cause to the trial court with instructions to decertify the DTPA section 17.50(a)(3) (Unconscionability) claim. Having overruled the remaining portions of LSRC's first and third issues, having overruled LSRC's fourth and fifth issues, and having determined that we need not address the portions of LSRC's third issue challenging class certification under rule 42(b)(1)(A), we affirm the remainder of the trial court's class-certification order. We remand this cause to the trial court for further class proceedings.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and MEIER, JJ.

DELIVERED: August 3, 2017

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argument for the contentions made, with appropriate citations to authorities and to the record"); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994) (recognizing long-standing rule that error may be waived through inadequate briefing); *Magana v. Citibank, N.A.*, 454 S.W.3d 667, 680–81 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding party failing to adequately brief complaint waived issue on appeal), *abrogated on other grounds by Kinsel v. Lindsey*, No. 15-0403, 2017 WL 2324392, at *8 n.4 (Tex. May 26, 2017).

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00328-CV

Lon Smith & Associates, Inc. and A-1 Systems, Inc., d/b/a Lon Smith Roofing and Construction	§	From the 236th District Court
	§	of Tarrant County (236-267881-13)
v.	§	August 3, 2017
Joe Key and Stacci Key	§	Opinion by Justice Walker

JUDGMENT

This court has considered the record on appeal in this case and holds that there was error in part of the trial court's October 15, 2015 class certification order. It is ordered that the class certification order of the trial court is affirmed in part and reversed in part. We affirm that portion of the trial court's class certification order that certifies for class treatment the Keys' declaratory-judgment claim and the Keys' DTPA claim based on section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code). We reverse that portion of the trial court's class certification order that certifies for class treatment the Keys' DTPA claim based on section 17.50(a)(3) (Unconscionability). We remand this cause

EXHIBIT
F-1

to the trial court: (1) with instructions to decertify the DTPA section 17.50(a)(3) (Unconscionability) claim, and (2) for further class proceedings.

It is further ordered that all parties shall bear their own costs of this appeal, for which let execution issue.

SECOND DISTRICT COURT OF APPEALS

By __/s/ Sue Walker_____
Justice Sue Walker

Fort Worth
904 E. Waggoman
Ft. Worth, TX 76110
(817) 926-8400
Fax (972) 445-5989

Dallas
13663 Jupiter Road • Ste. 403
Dallas, TX 75238
(214) 221-1400
Fax (214) 221-1410

Insurance Co: ST. FARM
Claim No.: 43 M984-6A6
Phone:
Adjustor
Mortgage Co.:

AGREEMENT

NAME
ADDRESS REDACTED
CITY AND STATE ZIP
BILLING ADDRESS SAME

HOME #
WORK #
MOBILE REDACTED

ESTIMATE DATE 7-13-03
MAPSCO 31 HNT
FAX #

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	COMPOSITION	39.58	20 SQ	791 00
Remove ___ Additional Layers				
Install New Decking				
Install Deck Protection / Felt	#15			
Perimeter Metal	Size Color			
Ventilations Type	RIDGE VENT	28	5 LF	140 00
Low Profile 12 x 12 Vent				
Heater Vents	Size			
Lead Jacks (Auto Caulk)	Size 3N1	6	15 EA	90 00
Remove & Replace Valley	Closed (✓) Open ( )			
Install Shingles	Brand GAF TIMBERLINE			
	Color CHARCOAL BLEND Warranty 30 YR.	45.75	100 SQ	4575 00
Ridge Application	STANDARD			
Skylights	Size Color			
Two Story				
Steep / Toe Boards	9/12	45.75	10 SQ	457 00
Remove & Replace Gutters	Size Color			
Remove & Replace Downs	Size Color			
	REMOVE + REPLACE SAT. DISH	1	125 EA	125 00

Clean up and haul away all roofing debris. Magnetize lawn and driveway for nails.
Any recoverable taxes will be added to total.

Tax
Permit
Over Head/Profit
Total 6178 00

"This contract is subject to Ch. 27, Property Code. The provisions of that chapter may affect your right to recover damages from the performance of this contract. If you have a complaint concerning a construction defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide notice to the contractor by certified mail, return receipt requested, not later than the 60th day before the day you file suit to recover damages in a court of law. The notice must refer to Ch. 27, Property Code, and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004, Property Code."

ACCEPTANCE OF AGREEMENT

This agreement is for FULL SCOPE OF INSURANCE PROCEEDS AND UPGRADES IF ANY and is subject to insurance company approval and does not obligate homeowner or Lon Smith Roofing & Construction, hereinafter referred to as LSRC, unless repairs are approved by homeowners insurance company. By signing this agreement the homeowner authorized LSRC to pursue homeowners best interest for all repairs at a price agreeable to the insurance company and LSRC at NO ADDITIONAL COST TO THE HOMEOWNER, EXCEPT FOR THE INSURANCE DEDUCTIBLE AND UPGRADES IF ANY. The final price agreed on between the insurance company and LSRC shall become the final contract price. The specifications are set out herein and on the reverse side to accomplish the replacement or repair. Any items not covered by property damage settlement will be paid from homeowner at completion.

I hereby authorize LSRC to negotiate directly with my insurance company for all property damage repairs at the above address and hereby grant power of attorney to the same to act as my agent to negotiate a property damage claim settlement. LSRC is hereby authorized to perform at their discretion all work to prescribed repairs for the price of full scope of insurance proceeds agreed upon by insurance company and LSRC and upgrades if any. The terms and specifications stated herein and special conditions hereto are hereby accepted. I hereby authorize my insurance company and/or mortgage company to make payment for completed repairs directly to LSRC and mail directly to same.

REDACTED Date: 7/13/03

SALESMAN MICHAEL
Representative

A-1-007 42
Mgmt. Approval

DEPOSITION EXHIBIT 2

EXHIBIT tabbies 6

Fort Worth
904 E. Waggoman St.
Fort Worth, TX 76110
(817) 926-8400
Fax (972) 445-5889

3731 Cavalier
Garland, TX 75042
(214) 221-1400
Fax (214) 221-1410

Insurance Co: Allstate
Claim No: 0012 8213
Phone: 877-635-5278 x5/C
Adjustor: Scott Smith -
Mortgage Co: 1044138

AGREEMENT

By 15th June

Address REDACTED
City & St

Home No: REDACTED
Work No.
Addl No.

Estimate Date Jun 07, 2006
Manoco
Addl Desc:

Billing Address SAME

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	1 Layer(s) Dimensional	76.37	$27.00	$2,061.99
Install New Decking				
Deck Protection/Felt	#30 Deck Protection	87.06		N/C
Perimeter Metal	Size 1 1/2 In. Color Galvanized	508.00		N/C
Ventilation	2-Power Vent @ $125			250.00 ~~375.00~~
Ventilation	1-Econovent 12x12in @ $25			25.00
Heater Vents	Size			
Leads/AutoCaulks	Size 4-1.5"Lead 3-2"Lead	7.00	15.00	105.00
Rmv/Repl Valley	Closed(X) Open( )	189.00		N/C
Install Shingles	Brand GAF Style Timberline 30	87.06	114.00	9,924.84
	Color Weathered Wood Warranty 30 YR.			
Ridge Application	Standard	486.00		N/C
Skylight(s)				
Skylight(s)				
Steep Off	67.66 sq 12/12 @ $10.00/sq	67.66	10.00	676.60
Steep On	77.13 sq 12/12 @ $20.00/sq	77.13	20.00	1,542.60
Two Story				
Other	24 months workmanship warranty			
Other	Cover all landscaping			
Other	Estimate includes boathouse			
Other	Remove and reset satellite dish	1	125.00	125.00
Other	H/O responsible for electrical hookup to power			
Other	vents			
Other	Remove addtl sat dish stand, do not reinstall			
Clean Up	Clean up and haul away debris Magnetize lawn and driveway for nails.			N/C
THANK YOU FOR CHOOSING LON SMITH ROOFING				N/C

"This contract is subject to Ch. 27, Property Code. The provisions of that chapter may affect your right to recover damages from the performance of this contract. If you have a complaint concerning a construction defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide notice to the contractor by certified mail, return receipt requested, not later than the 60th day before the day you file suit to recover damages in a court of law. The notice must refer to Ch. 27, Property Code, and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004, Property Code."

Tax	0
Permit	0
Overhead/Profit	0
Total	~~$14,936.03~~ 11711.0

ACCEPTANCE OF AGREEMENT

This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners best interest for all repairs, at a price agreeable to the insurance company and LSRC, and ZERO ADDITIONAL COST TO HOMEOWNER EXCEPT THE INSURANCE DEDUCTIBLE AND UPGRADES. The final price agreed to between the insurance company and LSRC shall be the final contract price. Replacement cost depreciation, ACV depreciation, and deductibles may not be excluded from the final proposal and owed to LSRC by homeowner. Any items not covered by property damage settlement will be due from homeowner at completion.

I hereby authorize my insurance company and/or mortgage company to make payment for completed repairs directly to LSRC and mail directly to same. If this is not an insurance claim, the contract amount will be due upon completion.

The terms and specifications stated herein and special conditions hereof are hereby accepted.

Ms. REDACTED Date 6-7-06

Robert Gibson
Sales Representative

Robert Gibson

Mgmt Approval

A-1-00743

PENGAD 800-631-6989

DEPOSITION EXHIBIT 3

...th - 904 E. Waggoman, Fort Worth, TX 76110, 817-926-6400, Fax 817-926-5124
Dallas - 3731 Cavalier, Garland, TX 75042, 214-221-1400, Fax 214-221-1410
Austin - 9518 Hwy 290 West, Austin, TX 78736, 512-615-7111, Fax 512-615-7120
Corporate Office - Fort Worth, TX, 800-317-4791, Fax 888-829-2345

Insurance Co: STATEFRM
Claim No: 43-V139-483
Phone:
Adjustor:
Mortgage Co:

AGREEMENT

108924-3

Name		Home No. REDACTED	Estimate Date Apr 12, 2007
Address REDACTED		Work No.	Mapsco F82X
City & St		Addl No	Addl Desc
Billing Address			

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	1 Layer(s) ThreeTab	24.54	$25.00	$613.50
Install New Decking				
Deck Protection/Felt	#15 Deck Protection	28.22		N/C
Perimeter Metal	Size 2 In. Color Brown	210.00		N/C
Ventilation				
Ventilation	2-Turbine 12in @ $0			
Heater Vents	Size			
Leads/AutoCaulks	Size 5-3N1 AC	5.00		0
Rmv/Repl Valley	Closed(X) Open( )	70.00		N/C
Install Shingles	Brand Owens Corning Style Classic	28.22	92.00	2,596.24
	Color ~~Oak Wood~~ ESTATE GRAY Warranty 20 YR.			
Ridge Application	Standard (M1) (E)	200.00		N/C
Skylight(s)	1 ea 2x2 DD Wht/Clr @ $215			215.00
Skylight(s)				
Steep Off				
Steep On				
Two Story				
Flat/Patio	Rmv 1 layers 90#, Inst 1.2 sq Modified over	1.20	445.96	535.15
Flat/Patio	#43 Organic Felt, Inst 25 lf 4x4 Metal, Tie In 10 lf to Comp			
Clean Up	Clean up and haul away debris. Magnetize lawn and driveway for nails.			N/C
				N/C

"This contract is subject to Ch. 27, Property Code. The provisions of that chapter may affect your right to recover damages from the performance of this contract. If you have a complaint concerning a construction defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide notice to the contractor by certified mail, return receipt requested, not later than the 60th day before the day you file suit to recover damages in a court of law. The notice must refer to Ch. 27, Property Code, and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004, Property Code."

Tax	0
Permit	0
Overhead/Profit	0
Total	$3,959.89

ACCEPTANCE OF AGREEMENT

This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction (LSRC) to perform homeowners best interest for all repairs, at a price agreeable to the insurance company and LSRC, and at NO ADDITIONAL COST TO HOMEOWNER, EXCEPT THE INSURANCE DEDUCTIBLE AND UPGRADES. The final price agreed to between the insurance company and LSRC shall be the final contract price. Replacement cost depreciation, ACV depreciation, and deductibles may not be excluded from the final price and are owed to LSRC by homeowner. Any items not covered by property damage settlement will be due from homeowner at completion.

I hereby authorize my insurance company and/or mortgage company to make payment for completed repairs directly to LSRC and mail directly to same. If this is not an insurance claim, the contract amount will be due upon completion.

The terms and specifications stated herein and special conditions hereof are hereby accepted.

Ms. REDACTED Date 4-12-07

Mr.

Mark Ruddls
Sales Representative

A-1-00744 Mgmt Approval

DEPOSITION EXHIBIT 4

PENGAD 800-631-6989

Fort Worth - 904 E. Waggoman, Fort Worth, TX 76110, 817-926-8400, Fax 817-926-8724
Dallas - 3731 Cavalier, Garland, TX 75042, 214-221-1400, Fax 214-221-1410
Austin - 9518 Hwy 290 West, Austin, TX 78736, 512-615-7111, Fax 512-615-7120
Corporate Office - Fort Worth, TX, 800-317-4791, Fax 888-829-2346

Insurance Co.:
Claim No: 111127247
Phone:
Adjustor:
Mortgage Co:

AGREEMENT

136864-1

Name		Home No.	REDACTED	Estimate Date	Jun 18, 2008
Address		Work No.		Maosco	F124H
City & St	REDACTED	Addl No.		Addl Desc.	
Billing Address					

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	1 Layer(s) Dimensional	36.60	$36.00	$1,317.60
Install New Decking				
Deck Protection/Felt	#15 Deck Protection	42.09		N/C
Perimeter Metal	Size Reuse Existing Color Matches Trim	.00		N/C
Ventilation	2-Turbine-12in-Repl @ $87			174.00
Ventilation	1-Econo-12x12in-Repl @ $25			25.00
Heater Vents	Size			
Leads/AutoCaulks	Size 4-1.5"Lead 1-3" Lead	5.00	15.00	75.00
Rmv/Repl Valley	Closed(X) Open( )	120.00		N/C
Install Shingles	Brand Owens Corning Style Oakridge 30	42.09	165.00	6,944.85
	Color Driftwood Warranty 30 YR.			
Ridge Application	Standard	325.00		N/C
Skylight(s)	1 ea 2x4 DD Brz/Clr @ $307			307.00
Skylight(s)				
Steep Off	36.60 sq 8/12 @ $0.00/sq	36.60		
Steep On	42.09 sq 8/12 @ $33.00/sq	42.09	33.00	1,388.97
Two Story Flashing	1 ea Chimney Base Flashing @ $240	1.00	240.00	240.00
Clean Up	Clean up and haul away debris. Magnetize lawn and driveway for nails.			N/C
				N/C

"This contract is subject to Ch. 27, Property Code. The provisions of that chapter may affect your right to recover damages from the performance of this contract. If you have a complaint concerning a construction defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide notice to the contractor by certified mail, return receipt requested, not later than the 60th day before the day you file suit to recover damages in a court of law. The notice must refer to Ch. 27, Property Code, and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004, Property Code."

Tax	0
Permit	0
Overhead/Profit	0
Total	$10,472.42

ACCEPTANCE OF AGREEMENT

This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lyn-Smith Roofing and Construction ("LSRC") to pursue homeowners best interest for all repairs, at a price agreeable to the insurance company and LSRC, and at NO ADDITIONAL COST TO HOMEOWNER EXCEPT THE INSURANCE DEDUCTIBLE AND UPGRADES. The final price agreed to between the insurance company and LSRC shall be the final contract price. Replacement cost depreciation, ACV depreciation and deductibles may not be excluded from the final price and are owed to LSRC by homeowner. Any items not covered by property damage settlement will be due from homeowner at completion.

I hereby authorize my insurance company and/or mortgage company to make payment for completed repairs directly to LSRC and hold directly responsible. If this is not an insurance claim, the contract amount will be due upon completion.

The terms and specifications stated herein and special conditions hereof are hereby accepted.

Ms. REDACTED Date 6/18/08

6.18.0

A-1-00745

PENGAD 800-631-6989 DEPOSITION EXHIBIT 5

...orth - 904 E. Waggoman, Fort Worth, TX 76110, 817-926-8400, Fax 817-926-8124
Dallas - 3731 Cavalier, Garland, TX 75042, 214-221-1400, Fax 214-221-1410
Austin - 9618 Hwy 290 West, Austin, TX 78736, 512-615-7111, Fax 512-615-7120
Corporate Office - Fort Worth, TX, 800-317-4781, Fax 888-829-2345

Insurance Co.:
Claim No: 43R222-133
Phone: 8664437556
Adjustor:
Mortgage Co: F877732-6556

In parking lot in front of house

AGREEMENT

145823-1

Name		Home No	REDACTED	Estimate Date	Apr 13, 2009
Address	REDACTED	Work No.	REDACTED	Memo	NOMAP
City & St		Addl No		Addl Desc	
Billing Address					

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	1 Layer(s) ThreeTab	17.00	$36.00	$612.00
Install New Decking	n/a	17.00		
Dock Protection/Felt	#15 Deck Protection	18.70		N/C
Perimeter Metal	Size 1 1/2 in. Color ~~White~~ almond	230.00	1.50	345.00
Ventilation	8-Econo-12x12in-Repl @ $39			312.00
Ventilation				
Heater Vents	Size			
Leads/AutoCaulks	Size 3-3N1 AC	3.00	15.00	45.00
Rmv/Repl Valley	Closed(X) Open( )	35.00		N/C
Install Shingles	Brand Owens Coming Style Classic Color Onyx Black Warranty 20 YR	18.70	164.00	3,066.80
Ridge Application	Standard	100.00		N/C
Skylight(s)				
Skylight(s)				
Steep Off				
Steep On				
Two Story				
Other	Partial 2nd layer tearoff	8.00	30.00	240.00
Other	Shed roof is not included			
Clean Up	Clean up and haul away debris. Magnetize lawn and driveway for nails.			N/C
				N/C

Tax	0
Permit	0
Overhead/Profit	0
Total	$4,620.80

"This contract is subject to Ch. 27, Property Code. The property description matter may affect your right to recover damages from the performance of this contract. If you have a complaint concerning a construction defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide notice to the contractor by certified mail, return receipt requested, not later than the 60th day before the day you file suit to recover damages in a court of law. The notice must refer to Ch. 27, Property Code, and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004, Property Code."

ACCEPTANCE OF AGREEMENT

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I hereby authorize my insurance company and/or mortgage company to make payment for completed repairs to LSRC and mail directly or same. If not an insurance claim, this contract amount will be due upon completion.

The terms and specifications stated herein and special conditions hereof are hereby accepted.

Ask your Estimator about our "Refer a Friend" program!

Mail: REDACTED
Date: 5-20-09

Thomas Kirkpatrick
Sales Representative

Mgmt Approval

A-1-00748

DEPOSITION EXHIBIT 6

PENGAD 800-631-6989

approved

Worth - 904 E. Waggoman, Fort Worth, TX 76110, 817-926-8400, Fax 817-926-6124
Dallas - 9731 Cavalier, Garland, TX 75042, 214-221-1400, Fax 214-221-1410
Austin - 9518 Hwy 290 West, Austin, TX 78736, 512-618-7111, Fax 512-618-7120
Corporate Office - Fort Worth, TX, 800-317-4791, Fax 888-829-2345

Insurance Co: ALLSTATE
Claim No: 0250631377
Phone: ( )
Mortgage Co:

AGREEMENT

183578-1

REDACTED	Home No. REDACTED	Date	07/16/2012
	Work No.	Mapsco	D1B-N
City & St	Addl No REDACTED	Addl Desc.	HER CELL

Billing Address SUSAN MCNAMARA, 940 GIBBS CROSSING, COPPELL, TX 75019

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	1 Layer(s) Dimensional	40.00	38.17	$1,526.80
Install New Decking				
Deck Protection/Felt	#30 Deck Protection	46.00		
Perimeter Metal	Size 1 1/2 in. Color White	300.00		
Ventilation				
Ventilation	3-Econo-12x12in-Repl @ $39 1-Power-Elec Incl-Repl @ $240			357.00
Heater Vents	Size 2 ea VC3050 2 ea VC5070	4.00	44.00	176.00
Leads/AutoCaulks	Size 9-3N1 AC	9.00	28.00	252.00
Rmv/Repl Valley	Closed(X) Open( )	140.00		
Install Shingles	Brand GAF/Elk Style Timberline HD	46.00	198.00	9,108.00
	Color Weathered Wood Warranty LLT			
Ridge Application	Standard	310.00		
Skylight(s)				
Skylight(s)				
Steep Off	21.00 sq 8/12 @ $0.00/sq 19.00 sq 12/12 @ $0.00/sq	40.00		
Steep On	24.15 sq 8/12 @ $36.85/sq 21.85 sq 12/12 @ $57.00/sq	46.00	45.90	2,111.23
Two Story	36.80 sq 2 Story	36.80	18.26	671.97
Flashing	1 ea Chimney Base Flashing @ $240	1.00	240.00	240.00
	Color			
	Color			
Other	Quote is inclusive of base charges sales tax			
Other	L.S.R. not liable for any collateral damage to			
Other	Rain gutters,due to severe slope of roof			
Other	We will cover pool area during job			

Clean up, haul away debris and magnetize lawn and driveway for nails at no additional charge.

Permit .00
Overhead/Profit
Total $14,443.00

Ventilation (Intake and Exhaust) does not meet FHA minimum requirements.

"This contract is subject to Chapter 27, Property Code. The provisions of that chapter may affect your right to recover damages from the performance of this contract. If you have a complaint concerning a defect arising from the performance of this contract and that defect has not been corrected through normal warranty service, you must provide notice to the contractor by certified mail, return receipt requested, not later than the 60th day before the day you file suit to recover damages in a court of law. The notice must refer to Chapter 27, Property Code, and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004, Property Code."

ACCEPTANCE OF AGREEMENT

This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company, and LSRC shall be the final contract price.

REPLACEMENT COST INSURANCE CLAIMS: HOMEOWNER AGREES TO PAY INSURANCE PROCEEDS, DEDUCTIBLE AND UPGRADES.
ACTUAL CASH VALUE INSURANCE CLAIMS: HOMEOWNER AGREES TO PAY INSURANCE PROCEEDS, ACV DEPRECIATION, DEDUCTIBLE, AND UPGRADES.
NON-INSURANCE RELATED CONTRACTS: HOMEOWNER AGREES TO PAY CONTRACT AT COMPLETION.

REDACTED Date 7/16/12

Thomas Kirkpatrick
Representative

Mgmt Approval
A-1-00747

DEPOSITION EXHIBIT 7

PENGAD 800-631-6989

THIS CONTRACT AND ANY AGREEMENT PURSUANT HERETO BETWEEN LON SMITH ROOFING & CONSTRUCTION HEREINAFTER REFERRED TO AS "COMPANY" AND THE CUSTOMER(S) NAMED HEREIN ON THE REVERSE SIDE WILL BE SUBJECT TO ALL APPROPRIATE LAWS, REGULATIONS AND ORDINANCES OF THE STATE OF TEXAS AND THE FOLLOWING TERMS AND CONDITIONS.

1. All proposals subject to approval of our Credit Department & Management.
2. The company shall have no responsibility for damages from rain, fire, tornado, windstorm, hail, ice, or other perils, as is normally contemplated to be covered by homeowners insurance or business risk insurance, unless a specified written agreement be made prior to commencement of the work.
3. Company agrees to perform the described work for Customer in accordance with normal common roofing practices unless otherwise specified.
4. Replacement of deteriorated decking, roof jacks, ventilators, flashing or other materials, unless otherwise stated in this contract, are not included and will be charged as an extra,
5. This agreement, if not signed by both parties will expire 30 days from estimate date unless extended in writing by the Company. After 30 days, we reserve the right to revise our price in accordance with costs in effect at that time.
6. The Company shall not be liable for failure of performances due to labor controversies, strikes, fires, weather, inability to obtain materials from usual sources, or any other circumstances beyond the control of the Company whether of similar or dissimilar nature.
7. The Company is not responsible for any damage below the roof, due to leaks by gale force winds (54 mph), hail, or preexisting construction defects during the period of the warranty.
8. If this Contract is cancelled by the Customer later than three (3) days from execution, customer shall pay to the Company ten percent (10%) of the contract price as liquidated damages, not as a penalty, and the Company agrees to accept such as a reasonable and just compensation for said cancellation.
9. If any provision of this agreement should be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this agreement shall not be affected thereby.
10. Any representation, statements, or other communications, not written in this Contract are agreed to be immaterial, and not relied on by either party, and do not survive the execution of this Contract. This Agreement constitutes the entire agreement between the parties . It may be changed only by written instrument signed by both parties.
11. The Company will provide the Customer with a two (2) year limited warranty. The Contract and warranty shall not be assigned and is non-transferable. For the warranty to be valid the contract must be paid in full.
12. The Company will have the right to supplement the Insurance Co., in the event material and/or labor increases from the date of the damage. Any supplements paid by the insurance company for additional labor and or materials needed beyond the original scope of repairs are authorized to be paid directly to the Company.
13. All Parties agree to settle any disputes regarding damages, quality of materials or workmanship through binding arbitration with the local Better Business Bureau before either party may officially file suit with any court. ARBITRATION SHALL BE BINDING.
14. Full scope of Insurance proceeds shall be defined as the full price for repairs allowed by the insurance company before any deduction for deductible, depreciation or ACV adjustment is subtracted.
15. These conditions shall be considered a part of any contract entered into or authorized to proceed, the same as if they were included therein.
16. Payment is due upon completion at Tarrant County, Texas. Any portion remaining unpaid will bear interest at the rate of 1.5% per month not to exceed the maximum rate allowed by law commencing 30 days after completion. Purchaser agrees to pay reasonable collection fees and/or legal fees needed in pursuit of collecting any remaining unpaid portion commencing 60 days after installation.
17. Payment for work completed will immediately become due should a delay in work be initiated by the customer.
18. All parties agree that the Company will not be held responsible for punctures to air conditioner, gas, security, or electrical lines that have been installed closer than 3" to the underside of roof deck.
19. The Customer grants the Company full access to entire perimeter of building and electricity for staging and execution of work unless otherwise agreed.

THREE DAY RIGHT OF RESCISSION: I HAVE HEREBY BEEN NOTIFIED THAT I MAY CANCEL THIS AGREEMENT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS AGREEMENT.

Any person or company supplying labor or materials for this improvement to your property may file a lien against your property if that person or company is not paid for the contributions.

Thank you for considering Lon Smith Roofing and Construction for your repair and re-roofing needs! Our **commitment to excellence** with over 70,000 customers since 1974 has established a reputation as the "Premier Roofing Contractor" with homeowners and insurance companies alike. We look forward to adding your name to our long list of satisfied customers.

THIS CONTRACT AND ANY AGREEMENT PURSUANT HERETO BETWEEN LON SMITH ROOFING & CONSTRUCTION HEREINAFTER REFERRED TO AS "COMPANY" AND THE CUSTOMER(S) NAMED HEREIN ON THE REVERSE SIDE WILL BE SUBJECT TO ALL APPROPRIATE LAWS, REGULATIONS AND ORDINANCES OF THE STATE OF TEXAS AND THE FOLLOWING TERMS AND CONDITIONS,

1. All proposals subject to approval of our Credit Department & Management.
2. The company shall have no responsibility for damages from rain, fire, tornado, windstorm, hail, ice, or other perils covered by the standard forms approved by the Texas Insurance Commissioner or business risk insurance, unless a specified written agreement be made prior to commencement of the work.
3. Replacement of deteriorated decking, roof jacks, ventilators, flashing or other materials, unless otherwise stated in this contract, are not included and will be charged as an extra.
4. The Company shall not be liable for failure of performances due to labor controversies, strikes, fires, weather, inability to obtain materials from usual sources, or any other circumstances beyond the control of the Company whether of similar or dissimilar nature.
5. The Company is not responsible for any damage below the roof, due to leaks by gale force winds (54 mph), hail, or preexisting construction defects during the period of the warranty.
6. If this Contract is cancelled by the Customer later than three (3) days from execution, customer shall pay to the Company ten percent (10%) of the contract price as liquidated damages, not as penalty, and the Company agrees to accept such as a reasonable and just compensation for said cancellation.
7. If any provision of this agreement should be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this agreement shall not be affected thereby.
8. Any representation, statements, or other communications, not written in this Contract are agreed to be immaterial, and not relied on by either party, and do not survive the execution of this Contract. This Agreement constitutes the entire agreement between the parties, it may be changed only by written instrument signed by both parties.
9. The Company will provide the Customer with a two (2) year limited warranty. The Contract and warranty shall not be assigned and is non-transferable. For the warranty to be valid the contract must be paid in full.
10. The Company will have the right to require the homeowner to supplement the Insurance Co., in the event material and/or labor increases from the date of the damage. Any supplements paid by the insurance company for additional labor and/or materials needed beyond the original scope of repairs are authorized to be paid directly to the Company.
11. Full Scope of Insurance proceeds shall be defined as the full price for repairs allowed by the insurance company before any deduction for deductible, depreciation or ACV adjustment is subtracted.
12. Payment is due upon completion at Tarrant County, Texas. Any portion remaining unpaid will bear simple interest at the rate of 1.5% per month not to exceed the maximum rate allowed by law commencing 30 days after completion. Purchaser agrees to pay reasonable collection fees and/or legal fees needed in pursuit of collecting any remaining unpaid portion commencing 60 days after installation.
13. Payment for work completed will immediately become due should a delay in work be initiated by the customer.
14. All parties agree that the Company will not be held responsible for punctures to air conditioner, gas, security, or electrical lines that have been installed closer than 3" to the underside of roof deck.
15. The Customer grants the Company full access to entire perimeter of building and electricity for staging and execution of work unless otherwise agreed.
16. The Customer acknowledges and agrees to the terms and conditions outlined herein. _____

THREE DAY RIGHT OF RESCISSION: I HAVE HEREBY BEEN NOTIFIED THAT I MAY CANCEL THIS AGREEMENT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS AGREEMENT.

Any person or company supplying labor or materials for this improvement to your property may file a lien against your property if that person or company is not paid for the contributions.

Thank you for considering Lon Smith Roofing and Construction for your repair and re-roofing needs! Our commitment to excellence with over 100,000 customers since 1974 has established a reputation as the "Premier Roofing Contractor" with homeowners and insurance companies alike. We look forward to adding your name to our long list of satisfied customers.

7-9-13

A-1-00749

Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 13. Regulation of Professionals (Refs & Annos)
Subtitle C. Adjusters
Chapter 4102. Public Insurance Adjusters
Subchapter B. License Requirements

V.T.C.A., Insurance Code § 4102.051

§ 4102.051. License Required; Exemption

Effective: September 1, 2015
Currentness

(a) A person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license issued by the commissioner under Section 4102.053 or 4102.054.

(b) A license is not required for:

(1) an attorney licensed to practice law in this state who has complied with Section 4102.053(a)(6); or

(2) a person licensed as a general property and casualty agent or personal lines property and casualty agent under Chapter 4051 while acting for an insured concerning a loss under a policy issued by that agent.

Credits
Added by Acts 2005, 79th Leg., ch. 728, § 11.082(a), eff. Sept. 1, 2005. Amended by Acts 2007, 80th Leg., ch. 548, § 2.31, eff. Sept. 1, 2007; Acts 2015, 84th Leg., ch. 1178 (S.B. 1060), § 1, eff. Sept. 1, 2015.

V. T. C. A., Insurance Code § 4102.051, TX INS § 4102.051
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

EXHIBIT
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Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 13. Regulation of Professionals (Refs & Annos)
Subtitle C. Adjusters
Chapter 4102. Public Insurance Adjusters
Subchapter E. Enforcement

V.T.C.A., Insurance Code § 4102.207

§ 4102.207. Insured Option to Void Contract

Effective: September 1, 2005
Currentness

(a) Any contract for services regulated by this chapter that is entered into by an insured with a person who is in violation of Section 4102.051 may be voided at the option of the insured.

(b) If a contract is voided under this section, the insured is not liable for the payment of any past services rendered, or future services to be rendered, by the violating person under that contract or otherwise.

Credits
Added by Acts 2005, 79th Leg., ch. 728, § 11.082(a), eff. Sept. 1, 2005.

V. T. C. A., Insurance Code § 4102.207, TX INS § 4102.207
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

236-267881-13

TDI.TEXAS.GOV
TEXAS DEPARTMENT OF INSURANCE

Archived File - for Reference Use

This file is historical in nature. Links and contact information may be outdated and no longer valid.

COMMISSIONER'S BULLETIN # B-0051-08

August 08, 2008

TO: ALL INSURANCE COMPANIES, CORPORATIONS, EXCHANGES, MUTUALS, RECIPROCALS, ASSOCIATIONS, LLOYDS, OR OTHER INSURERS WRITING PROPERTY AND CASUALTY INSURANCE IN THE STATE OF TEXAS AND TO AGENTS AND REPRESENTATIVES, ADJUSTERS, AND PUBLIC INSURANCE ADJUSTERS, AND THE PUBLIC GENERALLY

RE: PUBLIC INSURANCE ADJUSTERS

When property is damaged, whether it is real or personal, residential or commercial, owned by an individual, business entity or governmental entity, a public insurance adjuster can act on behalf of the insured in negotiating settlement of a claim under an insurance policy covering the damaged property.

The Texas Department of Insurance (TDI/Department) reminds all persons, including building and repair contractors, that Texas Insurance Code Chapter 4102 requires all persons acting as public insurance adjusters to be licensed by the Department. The Texas Insurance Code provides for both civil and criminal penalties for violating this licensing requirement.

Texas Insurance Code §4102.001(3) defines a public insurance adjuster as:

(A) a person who, for direct, indirect, or any other compensation:

1. acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
2. on behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance covering real or personal property; or

(B) a person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property.

Pursuant to 28 TEX. ADMIN. CODE §19.713 (b)(1), public insurance adjusters must conduct business with their clients, insurance companies, and the public, in a spirit of fairness and justice. Additionally, under §19.713(b)(1), public insurance adjusters may not employ improper solicitation or use misrepresentation to solicit a contract to adjust a claim. Furthermore, as provided in Texas Insurance Code §4102.152, public insurance adjusters may only solicit business between 9 a.m. and 9 p.m. on a weekday or a Saturday and between noon and 9 p.m. on a Sunday.

Public insurance adjusters must enter into written contracts with the insured or the insured's duly authorized representative. The contracts must comply with Texas Insurance Code §4102.103 and 28 TEX. ADMIN. CODE §19.708. Failure to comply with these provisions gives an insured the option to void the contract without being liable for payment of past and/or future services.

As provided in Texas Insurance Code §4102.104, contracts with public insurance adjusters may provide for compensation for services on an hourly basis, a flat rate or a percentage of the total amount paid by the insurer to resolve a claim. The total amount received may not exceed 10 percent of the amount of the insurance settlement. Under §4102.104(b) if the insurer pays or commits in writing to pay the insured the policy limits within 72 hours of the loss being reported to the insurer, the public insurance adjuster is not entitled to compensation based on a percentage of the insurance settlement. However, the public insurance adjuster can still receive reasonable compensation for time and expenses provided to the insured before the claim was paid or the written commitment to pay was received.

Texas Insurance Code §4102.158 prohibits public insurance adjusters from participating directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder. Additionally, public insurance adjusters may not engage in any other activities that may reasonably be construed as presenting a conflict of interest, including soliciting or accepting any remuneration from, or having a financial interest in, any salvage firm, repair firm, or other firm that obtains business in connection with any claim the licensee has a contract or agreement to adjust.

Contractors are not listed among the persons exempt from the licensing requirement in Texas Insurance Code §4102.002.

Texas Insurance Code Chapter 4102 does not prohibit contractors from providing estimates or discussing those estimates and other technical information with an insurer or its adjuster. However, contractors may not act on behalf of an insured in negotiating or effecting settlement of claims for loss or damage under any policy of insurance.

You can check the status of a public insurance adjuster's license on the Department's website at: http://www.tdi.state.tx.us/licensing/agent/index.html.

Additional information regarding public insurance adjusters, including the fees public insurance adjusters are allowed to charge for services, is available on the Department's website.

Questions regarding this bulletin may be directed to the Department's Enforcement Division at (512) 305-7625 or the Fraud Unit at (512) 463-6492.

Mike Geeslin

Commissioner of Insurance

Last updated: 09/07/2014

Texas Department of Insurance
333 Guadalupe, Austin, TX 78701
P.O. Box 149104, Austin, TX 78714
512-676-6000 | 1-800-578-4677

Texas Department of Insurance
Frequently Asked Questions
Unlicensed Individuals and Entities Adjusting Claims
(As of May 2014)

1. **What are some best practices consumers should look for when hiring a roofer or a contractor?**
   - Confirm that the roofer or contractor has workers' compensation and general liability insurance. Ask for the roofer's or contractor's certificate of insurance. Call the insurance company to confirm that the policy is valid.
   - Check references.
   - Review the Better Business Bureau rating and any other available services for rating or review of roofers or contractors.
   - Confirm that the roofer or contractor has a manufacturer's certification.
   - Confirm that the roofer or contractor is bonded.
   - Require a written contract and review it carefully. You may want to consult an attorney.

2. **May a roofer or contractor discuss the amount of damage to the consumer's home, the appropriate replacement, and reasonable cost of replacement with the insurance company?**
   Yes. A roofer or contractor may discuss these things with the consumer or insurance company to the extent that they are relevant to the estimate to repair damage to the consumer's home.

3. **May a roofer or contractor advocate on behalf of a consumer and discuss insurance policy coverages and exclusions?**
   No.

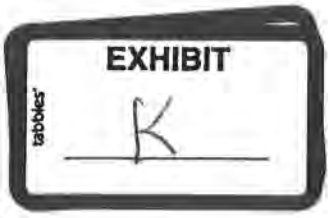
4. **May a roofer or contractor answer questions about its estimate for a consumer's claim?**
   Yes. The roofer or contractor may discuss the scope of work in its repair estimate with the consumer or the consumer's insurance company.

5. **If an original estimate is later found to be insufficient, may a roofer or contractor answer questions about its revised estimate?**
   Yes. The roofer or contractor may discuss supplements and clarifications concerning the revised estimate with the consumer or the consumer's insurance company.

6. **What is an insurance adjuster?**
   A person who investigates or adjusts losses on behalf of an insurer. An insurance adjuster also supervises the handling of claims. For more information, see Texas Insurance Code Section 4101.001.

7. **What is a public insurance adjuster?**
   A person who acts on behalf of homeowner to negotiate the settlement of an insurance claim. For more information, see Texas Insurance Code Section 4102.001. A public insurance adjuster may receive compensation.

8. **What do public insurance adjusters do?**
   Public insurance adjusters negotiate the settlement of insurance claims on behalf of homeowners. This might include investigating, settling, adjusting, advising, or assisting insured homeowner with a claim. Additionally, public insurance adjusters may advertise and solicit business. For more information, see Texas Insurance Code Section 4102.001.



9. **What are public insurance adjusters prohibited from doing?**
Public insurance adjusters may not:
   - use a badge in connection with the official activities of their business.
   - use any letterhead, advertisement, or printed materials that imply that they work for or represent the federal government, a state, or a political subdivision of a state.
   - use a name different from the name under which the public insurance adjuster is currently licensed in an advertisement, solicitation, or business contract.
   - participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder. A public insurance adjuster may not engage in any other activity that would reasonably be understood to be a conflict of interest. This includes soliciting or accepting any payment from, or having a financial interest in, any salvage firm, repair firm, or other firm that obtains business in connection with any claim the public insurance adjuster has a contract or agreement to adjust.
   - acquire an interest in salvaged property that is the subject of a claim adjusted by the public insurance adjuster without the knowledge and written consent of the insured.
   - represent an insured on a claim or charge a fee to an insured while representing the insurance company against which the claim is made.
   - give legal advice.
   - advance money to any potential client or insured.
   - pay a fee or commission or offer or give anything of value to someone who is not a public insurance adjuster in exchange for referring an insured.

   For more information, see Texas Insurance Code Chapter 4102, Subchapter D.

10. **Do consumers have to hire public insurance adjusters?**
No.

11. **Are there limits on the amount of money a public insurance adjuster may charge?**
Yes. Typically, public insurance adjusters charge an hourly fee, a flat rate, or a percentage of the claim
settlement. The public insurance adjuster's total compensation may not exceed 10 percent of the amount of the insurance settlement on the claim.

   If the insurance company pays or agrees in writing to pay the limits of the insurance policy to the insured within 72 hours of the receipt of the claim, the public insurance adjuster may not base the fee on a percentage of the total amount paid by the insurance company. For more information, see Texas Insurance Code Section 4102.104.

12. **May a licensed insurance adjuster also be a roofing contractor or provide roofing services?**
Yes. However, the insurance adjuster may not adjust any losses relating to roofing damage on behalf of an insurer. See Texas Insurance Code Section 4101.251 (a).

13. **May a licensed public insurance adjuster also be a roofing contractor or provide roofing services?**
Yes. However, the public insurance adjuster may not directly or indirectly participate in the reconstruction, repair, or restoration of property that is the subject of a claim adjusted by the license holder. See Texas Insurance Code Section 4102.158 (a)(1).

14. **May a roofing contractor act as an insurance adjuster or a public insurance adjuster or advertise to adjust claims?**
Anyone acting as an insurance adjuster or a public insurance adjuster or advertising to adjust claims must hold the appropriate license issued by TDI. However, even a licensed insurance adjuster or public insurance adjuster may not act as such if the individual is providing or may provide roofing services on the subject property. See Texas Insurance Code Sections 4101.251 (b) and 4102.163.

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02-15-00328-CV
SECOND COURT OF APPEALS
FORT WORTH, TEXAS
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CLERK

NO. 02-15-00328-CV

IN THE SECOND DISTRICT COURT OF APPEALS
AT FORT WORTH, TEXAS

LON SMITH & ASSOCIATES, INC. AND A-1 SYSTEMS, INC.
D/B/A LON SMITH ROOFING AND CONSTRUCTION

APPELLANTS

V.

JOE AND STACCI KEY

APPELLEES

Original Proceedings from the
236th Judicial District Court, Tarrant County, Texas
The Honorable Judge Thomas Lowe, III presiding

AMICUS CURIAE BRIEF ON BEHALF OF THE NORTH TEXAS ROOFING CONTRACTOR'S ASSOCIATION IN SUPPORT OF APPELLANTS' ACCELERATED APPEAL FROM ORDER CERTIFYING CLASS ACTION WITH TRIAL PLAN

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II. Because violation of the Statute is also a criminal act, any ambiguities regarding the penalties incurred by one violating the Statute must be resolved in favor of the accused; because the Statute does not explicitly authorize disgorgement the court did not have discretion to order this extraordinary remedy.

III. The trial court's ruling that disgorgement is the proper measure of damages for violation of the Statute is contrary to the plain language of the statute and legislative intent.

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B. While Texas case law is scarce on the remedy for a violation of the Public Adjuster statute, New York has a statue with similar language and case law that does not support disgorgement.

C. The trial court's ruling that Appellant must disgorge any monies paid it for its work is contrary to the very purpose of the statute, which is

to terminate any further obligations the parties may have to each other.

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Mo. Pac. Ry. Co. v. Brazil, 10 S.W. 403, 406 (Tex. 1888). 20

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Texas Government Code Annotated, §82.0651

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OTHER

June 26, 2012 Texas Department of Insurance Commissioner 's Bulletin No. B-0017-12

August 8, 2008 Texas Department of Insurance Commissioner's Bulletin No. B-0051-08

Restatement (Second) of Contracts § 7 (Am. Law Inst. 1981)

10 Tex. Jur.3d Building Contracts § 49, at 292 (1980).

http://www.claimspages.com/directories/texas/contractors-general

http://www.merriam-webster.com/dictionary/advocating

http://www.merriam-webster.com/dictionary/pursuing

IDENTITY OF PARTIES AND COUNSEL

The identity of the parties to this appeal and their counsel are correctly set forth in their respective briefs. Amici curiae for this brief are:

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and

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ISSUE PRESENTED BY AMICUS CURIAE

Whether the trial court improperly certified a class action suit based on a misunderstanding of the proper interpretation and application of the Public Insurance Adjuster's Statute, § 4102 of the Texas Insurance Code.

Whether the proper measure of damages for violation of the Public Insurance Adjuster's Statute is disgorgement.

STATEMENT OF INTEREST

This Amicus Curiae Brief in support of Appellants' Accelerated Appeal from Order Certifying Class Action With Trial Plan is supported and sponsored by the North Texas Roofing Contractor's Association (NTRCA) and The Subcontractors' Association of the Metroplex (SAM). The NTRCA and SAM are not parties to this suit or appeal, have not received, and will not receive, payment from Appellants to file this Brief.

The NTRCA is an association of commercial and residential roofers, many of whom regularly perform work paid from property insurance claims, and who will be directly impacted by the Court's ruling.

SAM is a trade association dedicated to assisting commercial construction trade subcontractors in improving the quality of the construction business in North Texas. SAM represents subcontractors across the spectrum of construction trades, and has done so since its founding in 1992.

SAM is an affiliate of the Texas Construction Association (TCA), a statewide organization representing the interests of the subcontracting industry across the state of Texas, and the National Subcontractors Alliance (NSA), a national association of over 4,000 commercial trade subcontractors and their local associations.

The NTRCA and SAM support Appellants' position that the district court has

improperly interpreted the provisions of Section 4102 in certifying the instant class action suit. Contractors who perform work arising from property and casualty claims all over Texas will be negatively affected if the Court's class certification is upheld.

For the foregoing reasons, the NTRCA and SAM support the filing of this Brief of Amicus Curiae in support of Appellant's Accelerated Appeal from Order Certifying Class Action With Trial Plan.

SOURCE OF FEE

NTRCA is paying a portion of the fees incurred in preparing this brief. SAM has paid no fees incurred in preparing this brief.

TO THE HONORABLE COURT OF APPEALS:

INTRODUCTION

Over 10,000 contractors in the State of Texas work with insurance companies remediating damaged properties for the benefit of the Texas public, Texas businesses and Texas consumers. http://www.claimspages.com/directories/texas/contractors-general/. *See* App. C. As such, this matter of first impression in the Second District Court of Appeals, Fort Worth Division, will have far reaching ramifications across the construction industry and beyond.

The trial court's improper understanding of the law related to class certification requires that this appellate court reverse the Order Certifying Class Action signed by the trial court has resulted in a ruling in this case has extended far beyond the clear language of the Public Adjuster's statute in two significant respects. First, the Court has determined that language in the Lon Smith Roofing contract constitutes an advertisement or promise to perform public insurance adjusting services in violation of the Public Insurance Adjuster's Statute (the Statute). Second, the Court has read into the Statute a measure of damages, specifically disgorgement of the contract proceeds, which a fair reading of the Statute does not support. Because violation of this Statute subjects the offender to criminal liability, the acts forbidden under the Statute, as well as the penalties for violating the Statute, must be clearly identified within the statute,

and any doubt as to liability be resolved in favor of the accused.

The trial court's failure to correctly interpret, and then apply, the Public Adjuster's Statute will, if allowed to stand, have a serious and chilling effect on the willingness of the contractors to continue providing construction services to property owners.

On behalf of the North Texas Roofing Contractor's Association, and in favor of all construction related business in this state, this Court of Appeals must overturn this dangerously inequitable precedent.

ARGUMENTS

I. The trial court's reliance on the proposition that the language of the agreement violates the Public Insurance Adjuster's Statute is not supported by the Statute itself, traditional definitions, nor the definitions within the Bulletins released by the Texas Department of Insurance Commissioner.

There are many thousands of contractors who, like Defendants Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction (hereafter "Lon Smith"), work alongside insurance companies and their agents in order to repair, replace, remove and restore damaged property.

Because of their close association with insurance companies and adjusters, and the repetitive nature of the repairs commonly performed, these contractors will commonly include language in their contracts agreeing to work cooperatively with the insurance representatives tasked with approving the scope and costs of the work to be performed.

The provision in the Lon Smith contract upon which the Court relies in rendering its decision is:

> This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners['] best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.

See App. B.

This statement is no more than a recognition of Lon Smith's obligation to work cooperatively with the insurance company for the best interests of the property owner. This language, without additional statements or actions on the part of Lon Smith, simply does not equate to public insurance adjusting.

Per the Texas Insurance Code § 4102.001(3), a public insurance adjuster is defined as:

> (A) a person who, for direct, indirect, or any other compensation:
>
> (i) acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
>
> (ii) on behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance covering real or personal property; or (B) a person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property.
>
> Tex. Ins. Code Ann. § 4102.001(3).

Thus, the Legislature determined and clearly set forth the two distinct bases upon which the Statute can be violated. First, § 4102.001(3) can be violated by a person performing some *action* violative of the Statute. Without conducting a factual inquiry,

on a case by case basis, of the actions taken by the alleged violator, the finder of fact cannot accurately determine whether the Statute was actually violated. Thus, a class action suit based on a violation of § 4102.001(3)(A) would be improper.

Second, § 4102.001(3) can be violated when a person who is not a licensed public insurance adjuster *advertises*, *solicits business*, or *holds him or herself out to the public as a public insurance adjuster*. The district court has determined that Lon Smith Roofing's promise to "pursue homeowners['] best interest for all repairs, at a price agreeable to the insurance company and LSRC" is a violation of § 4102.001(3)(B). However, this conclusion is not supported by a fair reading of the statute and the constitutional requirement narrowly construing the language of any statute which provides for criminal penalties upon violation.

Texas Dept of Insurance Section 4102.004

In seeking to determine whether Lon Smith has violated the Public Insurance Adjuster's Statute, the court should first look to any statements or positions taken by the Insurance Commissioner, who has a legal duty to "administer and enforce" the Texas Insurance Code. *Tex. Ins. Code Ann.* § 31.021 (2015).

To assist the Commissioner in this duty, § 4102.004 grants to the Commissioner the authority to "adopt reasonable and necessary rules to implement" Chapter 4102. *Tex. Ins. Code Ann.* § 4102.004 (2015). Thus, we should look to the Commissioner

when determining what it means to be or hold oneself out as a Public Insurance Adjuster."

From his August 8, 2008[1] Commissioner's Bulletin No. B-0051-08, the Commissioner wrote that the "Texas Insurance Code Chapter 4102 does not prohibit contractors from providing estimates or discussing those estimates and other technical information with an insurer or its adjuster." *Tex. Dep't of Ins. Comm'r Bulletin B-0051-08* (Aug. 8, 2008).

This August 8, 2008, Bulletin is further supported by the Frequently Asked Questions (FAQ) portion of the June 26, 2012 Commissioner's Bulletin, which specifically authorizes contractors to "discuss the amount of damage to the consumer's home, the appropriate replacement, and reasonable cost of replacement with the insurance company"... "to the extent that they are relevant to the estimate to repair damage to the consumer's home." *See* App. E, *Tex. Dep't of Ins. Comm'r Bulletin B-0017-12* (June 26, 2012) and *FAQ*. Further, a contractor is free to "answer questions about its estimate for a consumer's claim," and "discuss the scope of work in its repair estimate with the consumer or the consumer's insurance company." *Id.*

The only act or practice that the Commissioner has disallowed in the contractor/claims process is "advocat[ing] on behalf of a consumer and discuss[ing]

---

[1]Issued 3 years after the Public Insurance Adjuster's Statute was enacted

insurance policy coverages and exclusions." *Id.*

Thus, it is necessary to compare the language at issue in the Lon Smith contract "to pursue homeowners[']s best interest" with the Commissioner's statement that a contractor may not "advocate on behalf of a consumer." According to Merriam-Webster, the actual definitions of these two words are as follows:

> A. Advocating
>
> 1. one that pleads the cause of another; specifically: one that pleads the cause of another before a tribunal or judicial court
> 2. one that defends or maintains a cause or proposal
> 3. one that supports or promotes the interests of another
>
> http://www.merriam-webster.com/dictionary/advocating.
>
> B. Pursuing
>
> 1. to follow in order to overtake, capture, kill, or defeat
> 2. to find or employ measures to obtain or accomplish: seek
> 3. to proceed along
> 4. a : to engage in
>
> b : to follow up or proceed with
>
> http://www.merriam-webster.com/dictionary/pursuing

The definitions above show that to advocate is to act on behalf of another, while to pursue is to employ measures to obtain, seek or accomplish a task, in this case the repair of a homeowner's roof.

There is a crucial difference between stating that one will "pursue the

homeowner's best interest for all repairs, at a price agreeable to the insurance company [i.e. price and scope]," which does not promise or even require that the contractor speak directly with the insurance company, and discussing what duties an insurance company may have to its insured in determining what items of repair should be covered under the property owner's insurance policy. The Commissioner has clearly stated that the former, which addresses only price and scope, does not violate the Statute.

The promises contained on Lon Smith's contract are clearly not an advertisement. Nor are they a promise to discuss or address coverage issues with Appellees' insurance company. As such, the contractual language at issue does not support the court's finding that Lon Smith has violated the Statute, without which the court's certification of a class action suit cannot be supported.

II. Because violation of the Statute is also a criminal act, any ambiguities regarding the penalties incurred by one violating the Statute must be resolved in favor of the accused; because the Statute does not explicitly authorize disgorgement the court did not have discretion to order this extraordinary remedy.

Because violation of the Statute carries criminal as well as civil penalties, due process requires that the Statute give fair notice of the activity that is outlawed. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972). A forbidden act must come within the prohibition of the statute and any doubt as to whether an offense has been committed should be resolved in favor of the accused. *Bailey v. State*, 2004 Tex. App.

LEXIS 7988, at *12 (App. Aug. 31, 2004); *Engelking v. State, 750 S.W.2d 213 (Tex.Crim.App.1988); Bruner v. State*, 463 S.W.2d 205, 215-16 (Tex. Crim. App. 1970); *Kadane v. Clark*, 143 S.W.2d 197 (1940).

As a result of the constitutional requirement of fair notice of criminal acts, the trial court must narrowly construe the action that are violative of the Statute. When viewing Defendants' actions/representations in light of this narrow construction, it is clear that Defendants have not violated the Statute.

III. The trial court's ruling that disgorgement is the proper measure of damages for violation of the Statute is contrary to the plain language of the statute and legislative intent.

A. The Public Insurance Adjuster's Statute provides the property owner with the option to void its contract and thereby avoid further payment obligations to the unlicensed public adjuster.

The Statute Provides Only That the Contracts are Voidable, Not Void

Section 4102.207 of the Texas Public Adjuster statute states:

> Insured Option to Void Contract
> (a) Any contract for services regulated by this chapter that is entered into by an insured with a person who is in violation of Section 4102.051 may be voided at the option of the insured.
> (b) If a contract is voided under this section, the insured is not liable for the payment of any past services rendered, or future services to be rendered, by the violating person under that contract or otherwise.
> (emphasis added)
> Tex. Ins. Code Ann. § 4102.207 (2015)

"With respect to contracts, "voidable" means that a contract is valid and effective unless and until the party entitled to avoid it takes steps to disaffirm it." *Neese v. Lyon*, 479 S.W.3d 368, 378 (Tex. App. Dallas 2015, pet. denied) (citing *Cole v. McWillie*, 464 S.W.3d 896, (Tex. App.—Eastland May 29, 2015, no pet. h.) ("[A] voidable contract continues in effect until active steps are taken to disaffirm the contract . . ."); *Mason v. Abel*, 215 S.W.2d 377, 381-82 (Tex. Civ. App.—Dallas 1948, writ ref'd n.r.e.) (contract voidable under statute of frauds is valid unless avoided by a party); see also *Restatement (Second) of Contracts § 7* (Am. Law Inst. 1981) ("A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance."). Because a voidable contract continues in effect until active steps are taken to disaffirm the contract, and a void contract is wholly ineffective from the outset, the distinction is significant. *Mo. Pac. Ry. Co. v. Brazil*, 10 S.W. 403, 406 (Tex. 1888); *Country Cupboard, Inc. v. Texstar Corp.*, 570 S.W.2d 70, 74 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). *Cole v. McWillie*, 464 S.W.3d 896, 899 (Tex. App. 2015).

The language of the Public Insurance Adjuster's Statute makes it clear that the contract is voidable, not void from the outset.

Were the Contract at issue void rather than voidable, Appellees might have been

entitled to seek disgorgement of any fees paid under the contract, although fee forfeiture generally requires a fiduciary relationship between the parties. *Neese v. Lyon*, 479 S.W.3d 368, 387 (Tex. App. 2015) citing *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). Nothing in the Statute or Contract creates a fiduciary relationship between Appellant sand Appellees. Accordingly, the class action certification by the district court, which relies heavily on the simple expediency of fee disgorgement, fails in favor of an evaluation, on a case-by-case basis, of each claimant's damage claim.

B. While Texas case law is scarce on the remedy for a violation of the Public Adjuster statute, New York has a statue with similar language and case law that does not support disgorgement.

A New York court, in a case styled *Electrovoice Int'l, Inc. v. Sarasohn Adjusting Co.*, is instructive its reasoning behind rejecting the remedy of disgorgement. *Electrovoice Int'l, Inc. v. Sarasohn Adjusting Co.*, 567 N.Y.S.2d 568, 570 (Sup. Ct. 1990). The *Electovoice* court held that, while the agreements in question were unenforceable under New York law, a defendant who has violated a licensing statute will not be required to return compensation paid after completion of the job even though he would have been unable to sue upon the contract. The court went on to say that to allow plaintiffs to obtain the benefit of services properly and completely performed, and to recoup the consideration paid therefor, is not equitable under the circumstances. *Id.*

The New York courts have provided a standard that should be followed in Texas. Any other result is contrary to the statute, existing case law, traditional principles of contract law, and the precedent found in other jurisdictions.

C. The trial court's ruling that Appellant must disgorge any monies paid it for its work is contrary to the very purpose of the statute, which is to terminate any further obligations the parties may have to each other.

Disgorgement is Not the Proper Remedy for Illegal Contracts

Appellants have urged, and the trial court has ruled, that the Lon Smith contract is illegal. *See* App. A. Assuming, arguendo, that the Contract is illegal, Texas case law explicitly denies disgorgement as a remedy under an illegal contract. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010); *Bigham v. Se. Tex. Envtl.*, LLC, 458 S.W.3d 650, 674 (Tex. App. 2015).

Disgorgement is Not the Appropriate Remedy under the Public Adjuster Statute

1. Disgorgement is not allowed under the Public Adjuster Statute.

The trial court has mistakenly concluded that a violation of the Statute requires Lon Smith to disgorge to Appellees the monies paid to Lon Smith for its work at Appellee's home. But such a finding ignores both the legislative intent underlying the statute, and the language the Legislature used to bring about that purpose.

The title of Public Adjuster Statute is "Insured Option to Void Contract." *Tex.*

Ins. Code. Ann. §4102.207 (West 2016). The text of the Statute provides that any contract for services controlled by the Statute may: (1) be voided by the insured; and that (2) if such a contract is voided, the insured is not responsible for the payment of past or future payments under that contract, or otherwise. *Id.*, at (a),(b). Thus, the Statute sets forth both a condition, and a remedy to that condition.

A plain language reading of the title and content of the statute make it clear that the legislative intent thereof is to provide an insured with the option to void a contract. Id. It further, and less clearly, provides that the insured thereby avoids liability for payment for [presumably any] past and future services under that contract. The statute contains no provision allowing a trial court to sua sponte alter the effect of the Statute by conveying additional benefits to insureds,[2] nor by crafting new penalties for potential violators.

2. The Court substitutes its will in place of the Legislature's by awarding disgorgement in this case

The Legislature had few limits when choosing both the number and type of remedies to include in the Statute, as well as what range, if any, of equitable powers to build into the Statute in order to achieve its purpose. One example of the legislature combining the two is seen in Texas Property Code section 53.156 which serves as a

[2]In addition to the insured's ability to avoid any further payment to the violator under the contract

statutory grant to award attorney's fees, in an amount to be determined by a court subject only to being "reasonable . . . equitable and just." *Texas Prop. Code* § 53.156 (2015).

Had the legislature intended disgorgement, the legislature was eminently capable of saying so, as it has done elsewhere.

For example, Texas Government Code § 82.0651,Civil Liability for Prohibited Barratry, provides that an aggrieved party may bring an action to void a contract for legal services in violation of the statute:

> (a) A client may bring an action to void a contract for legal services that was procured as a result of conduct violating Section 38.12(a) or (b), Penal Code, or Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, regarding barratry by attorneys or other persons, and to recover any amount that may be awarded under Subsection (b). A client who enters into a contract described by this subsection may bring an action to recover any amount that may be awarded under Subsection (b) even if the contract is voided voluntarily.
> *Tex. Gov't Code* § 82.0651(a) (2015).

Unlike the Public Insurance Adjuster Statute, within the barratry statute the Legislature specifically provides that an aggrieved party may, in an action to void the contract, recover all fees and expenses paid to that party:

> (b) A client who prevails in an action under Subsection (a) shall recover from any person who committed barratry:
> *(1) all fees and expenses paid to that person under the contract;*

(2) the balance of any fees and expenses paid to any other person under the contract, after deducting fees and expenses awarded based on a quantum meruit theory as provided by Section 82.065(c);
(3) actual damages caused by the prohibited conduct;
(4) a penalty in the amount of $10,000; and
(5) reasonable and necessary attorney's fees.
(emphasis added).
Tex. Gov't Code § 82.0651(b) (2016).

The Legislature, in crafting Tex. Gov't Code § 82.0651, has demonstrated its ability to explicitly identify the damages available to a party aggrieved by actions taken in contravention of the Barratry Statute. The absence of such explicit language in the Public Insurance Adjuster' Statute makes it clear that the Legislature did not intend the disgorgement to the insured of all monies received by the person found to have violated § 4102.051 of the Public Adjuster's Statute.

Other examples of Legislative intent of fee disgorgement can be seen in the Texas Deceptive Trade Practices Act (DTPA), which "expressly allows a prevailing consumer to obtain orders restoring consideration acquired in violation of the DTPA." *Neese 479 S.W.3d at* 379 *(*citing Tex. Bus. & Com. Code Ann. § 17.50(b)(3) (West 2011)), and under the Texas Property Code, *Id.*, (permitting certain purchasers "to cancel and rescind" executory contracts and recover a "full refund" of amounts under certain circumstances under Tex. Prop. Code Ann. §§ 5.069(d)(2), 5.070(b)(2) (2014))."

The Legislature could, and did, in many other codes or statutes, prescribe the remedy of fee forfeiture. However, in the Public Adjuster Statute, it is manifestly obvious from a plain language reading that the Legislature neither did, nor did they intend, to extend this extreme remedy to those the Statute was designed to cover.

The only statutory remedies which a fair reading of the statute incorporates into a violation of § 4102.000(3) is the insured's right to void its contract and refuse to pay for any heretofore unpaid work. The Legislature did not authorize the disgorgement of any payments previously issued.

3. Because the Statute functions as a penal statute, and because parts of the Statute remain ambiguous, the Court should strictly construe the Statute in a manner which benefits Appellant.

The Statute functions as a penal statute because the penalties it imposes could produce great hardship, including the penalties associated with being found guilty of a Class B misdemeanor, and sanctions pursuant to sections 541.108-.110 of the Texas Insurance Code. Tex. Ins. Code. Ann. § 4102.206. see *Hovel v. Batzri*, No. 01-14-00305-DV, 2016 Tex. App. LEXIS 2127, at *9 (Tex. App.–Houston [1st Dist.] March 1, 2016, no pet.) citing *Schwab v. Schlumberger Well Surveying Corp.* 198 S.W.2d 79, 81 (Tex. 1946). Further, as shall be shown below, there is clearly ambiguity with regard to sec (b), the enforcement provision of the Statute. *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 83 (Tex. 2015) (holding that a statute is ambiguous when the language

it employs is reasonably susceptible to more than one meaning). Finally, it is a matter of law that an ambiguous penal statute must be strictly construed to protect those individuals against whom liability is sought. *Hovel v. Batzri*,. App. LEXIS 2127, at *10-11.

The trial court seemingly acknowledges this ambiguity, as reflected in its decision which seeks to do justice by creating a new remedy from whole cloth. However, these ambiguities in the Statute are evident from a plain-language reading. For example, it is a matter of hornbook law that the act of voiding the contract terminates all future obligations of the parties, because a voided contract is considered to never have existed. *Bannum, Inc. V. Mees*, No. 07-12-00458-CV, 2014 Tex. App. LEXIS 6804, at *4 (Tex. App. Amarillo June 24, 2014, reh'g overruled). The legislature can certainly be presumed to know the meaning and legal import of the word "void." Nonetheless, the legislature drafted section (b) of the Statute to include two, italicized problematic clauses: "If a contract is voided . . . the insured is not liable for . . . payment . . . of . . past services rendered, or future services to be rendered, by the violating person under that contract or otherwise." *Tex. Ins. Code. Ann.* §4102.207(b) (2015).

Of first concern is that it remains unclear why the legislature included the first problematic clause " . . . or future services to be rendered . . . ." *Id.* It is a matter of law that there are no future services to be performed pursuant to a void contract. Thus,

while it remains unclear exactly what the legislature meant, read critically, the Statute's language could free an insured from the requirement to pay for future services, while leaving him or her obligated to consummate a pending purchases of goods required by the contract.

The second clause is problematic for two reasons. First, it states "by the violating person under that contract." *Id.* Again, there are no future services to be performed by any person "under that contract." *Id.* However, increasing the level of ambiguity is the language "or otherwise" in this second problematic clause.

"Under that contract or otherwise" might be read to extend the reach of the Statute beyond a given contract, and into potential future relationships of the parties. It could also be reasonably read to mean that the insured is relieved from his or her obligation to pay other, non-violating parties, who may also be party to the voided contract. If that is the case, then the Statute is entirely unclear regarding the rights of those third parties.

"Or otherwise" might be reasonably read as "the violating person . . . or otherwise," which would foreclose the rights of all persons associated with the voided contract. Alternatively, "or otherwise" might foreclose all common law rights of the "violating person," or of any and all parties to the contract. However, it is certainly not clear which rights, if any, the legislature intends to restrict by merely stating "or

otherwise; and it thus remains unclear which, if any, common law rights survive the application of the Statute. Appellant asks the Court to consider that, for example, no contract is required for recover on principles including quantum meruit; yet the Statute again seemingly limits itself to contract rights by expressly using the term "contract," and never mentioning any common law remedies.

Thus, because the Statute functions as a penal statute, and because it is ambiguous, the Court must strictly construe any ambiguity in favor of the party penalized by it. *Hovel v. Batzri*, 2016 Tex. App. LEXIS 2127, at *8-9. "Strict construction" in this context does not require a narrow reading of each individual term. *Id.*, at *11. It means that "when a statutory provision is unclear, the statute is read in its entirety in a way that benefits the party facing the possibility of a penalty if a fair reading permits it. *Id.*, at 11-12. And, even though this particular case represents a question of first impression regarding a relatively new law adopted in 2005; the law regarding strict construction of penal statutes to the benefit of the party facing penalty has been unchanged for at least seventy years. *Schwab*, 198 S.W.2d, at 81 (Tex. 1946).

In the instant case, the clearest path to a proper strict construction is for this Court to read and apply the black letter law of the Statute. On any fair reading, it is evident that ambiguity exists regarding the implementation section (sec. (b)) of the Statute. But

one thing which remains very clear is that every plausible reading of section (b) leads to the conclusion that the only penalties the legislature intended to impose was the right to void a contract along with some (currently indeterminate) rights which flow therefrom. Disgorgement is clearly not such a remedy.

The Court would be well guided in following the example of the *Electrovoice Int'l, Inc.* Court in performing an analysis of the value received by the property owner when determining whether the property owner is due any refund from the unlicensed public adjuster. In any such analysis, the value Appellees and any future Plaintiffs received from Defendants' work would require a fact intensive analysis based on the particular dealings between Defendants and each affected homeowner, further militating against class action certification.

IV. The trial court's ruling will create an unjust and inequitable result against public policy and will seriously effect the construction field.

A. Disgorgement of the contract proceeds to the property owner would result in a windfall to the property owner for repairs paid for by the property owner's insurance company.

The court's ruling, should it be allowed to stand, will result in a double windfall to the insured, who in most cases, has personally paid little or nothing toward the cost of the repairs effected by the contractor. First, the insured will have the benefit of a new roof, fence, flooring, etc., most, if not all of which was paid for by the insurance

company. Then, the insured would recover from the contractor the monies paid to the contractor for that work, *paid by the insurance company.* Such a result is clearly inequitable.

Even those statutes that support disgorgement require that the funds be returned to the entity that issued the payment. Texas bankruptcy law authorizes the bankruptcy court to order disgorgement of a payment to the "entity that made the payment"." *In re Estrada, Inc.*, No. 09-50324, 2010 Bankr. LEXIS 793, at *33 (U.S. Bankr. S.D. Tex. 2010); 11 U.S.C.S. § (2015)

Similarly, in Texas barratry cases, the party that made the prohibited payment is entitled to the refund. Allowing a client, rather than the insurer that actually paid the legal fees, to recover the fees from the attorney "would not be compensation but a windfall." *Swank v. Cunningham*, 258 S.W.3d 647, 673 (Tex. App.—Eastland 2008). "Equity does not support such a "windfall" result; therefore, fee forfeiture is not an appropriate remedy in this cause." *Id.* (citing *Cf. Tener v. Bracewell*, 2002 Tex. App. LEXIS 68 (Tex. App.--Houston [14th Dist.] June 3, 2002, no pet.)(not designated for publication)).

Allowing this ruling to stand will encourage an insured to induce a contractor to perform work at the insured's property only to then initiate legal action against the contractor to have the contract declared void and the insurance proceeds paid over to

the insured.

B. Disgorgement to the insurance company would reward the insurance company, with actual or constructive knowledge that the Statute was being violated, with return of the payment proceeds.

Nor is disgorgement to the insurance company appropriate. Such a result would reward the insurance company who knew or should have known that they were working with an unlicensed public insurance adjuster, in violation of the statute. The Texas Department of Insurance Commissioner's Bulletin B-0017-12 states that "insurers cannot utilize roofers as de facto public insurance adjusters." *See Tex. Dep't of Ins. Comm'r Bulletin B-0017-12*, June 26, 2012. App. E.

The Commissioner of Insurance urges all insurers and agents to report unlicensed public insurance adjusters, not encourage their continued violative actions. It only follows that an insurance company working with unlicensed persons in violation of the Statute should not receive a windfall in the form of returned insurance proceeds for work performed.

C. Disgorgement will result in fewer contractors willing to undertake repairs to property subject to the Statute.

The potential of non-payment for one's work is a risk that all contractors face. It would be naive in the extreme to believe that a ruling such as the one rendered by the trial court ordering disgorgement of contract funds for violation of the Public Insurance

Adjuster's Statute will not have a chilling effect on the willingness of contractors to perform work under contracts governed by this Statute.

CONCLUSION

In certifying this dispute as a class action, the district court misunderstood and misapplied the language of the Public Insurance Adjuster's Statute to the Defendants Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction contracts.

Disgorgement is not the proper remedy for a violation of the Public Adjuster's Statute, which would result in a windfall to the insured or insurance company.

Instead, an individual inquiry must be made into the facts and circumstances of each contract the insured wishes to void, to determine whether Defendants actually violated any of the provisions in the Public Insurance Adjuster's Statute, and if so, what damages should be awarded to the injured party.

On behalf of the North Texas Roofing Contractor's Association and all similarly affected construction related business in this state, we respectfully request that this Court of Appeals sustain the issues presented in Appellant's brief and reverse the Order Certifying Class Action signed by the Honorable Judge Thomas Lowe, III, presiding judge of the 236th Judicial District Court, Tarrant County, Texas, and render judgment denying Appellees' Motion for Certification, or, in the alternative, remand this case to

the district court for further proceedings.

PRAYER

For the foregoing reasons, NTRCA and SAM urge the Court to affirm the order certifying the class against Lon Smith.

Respectfully submitted,

CUTLER ▪ SMITH, P.C.

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CERTIFICATE OF SERVICE

I certify that on the 19th day of April 2016, a true and correct copy of this Amicus Curiae Brief in support of Appellant was served on the following counsel by electronic mail:

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 5,749 words (excluding the caption, table of contents, table of authorities, signature, proof of service, certification, and certificate of compliance). This is a computer-generated document created in Word Perfect, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Karen Ensley
Karen Ensley
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APPENDIX/EXHIBIT LIST

App. A: Trial Court Order Certifying Class Action with Trial Plan

App. B: Lon Smith Agreement with Appellees

App. C: The Claims Pages, Texas Construction companies who work with insurance companies: 10,353 providers.

App. D: United States Department of Labor, Bureau of Labor Statistics, Texas Quarterly Statistics of Employment and Wages, Average Annual Construction Employment, 651,290 persons for year 2014

App. E: COMMISSIONER'S BULLETIN # B-0017-12

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DISTRICT CLERK

CAUSE NO. 236-267881-13

JOE KEY and STACCI KEY,	§	IN THE DISTRICT COURT OF
	§	
Plaintiffs,	§	
	§	
individually and on behalf of all others similarly situated.	§	
	§	
	§	
v.	§	TARRANT COUNTY, TEXAS
	§	
LON SMITH & ASSOCIATES, INC., and A-1 SYSTEMS, INC. d/b/a LON SMITH ROOFING AND CONSTRUCTION,	§	
	§	
	§	
	§	
Defendants.	§	236TH JUDICIAL DISTRICT COURT

ORDER CERTIFYING CLASS ACTION WITH TRIAL PLAN

Factual Background and Claims

This case centers on a contractual provision that appears in form contracts used by Defendants Lon Smith & Associates, Inc. ("LSA") and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction ("A-1") (collectively "Lon Smith" or "Defendants"). The primary issue to be resolved is whether the contractual provision violates the Texas Insurance Code and, thereby, renders such contracts illegal, void, and unenforceable.

Named Plaintiffs Joe and Stacci Key have asserted five separate causes of action, but only seek class certification as to three causes of action here. The claims Plaintiffs seek to certify a class on are (1) Plaintiffs' claim for declaratory relief; (2) Plaintiffs' Deceptive Trade Practices claims; and (3) Plaintiffs' fraud claim.

E-MAILED 10-15-15 LA Disney, Fillmore Wiegand, Skelly, Warren, Ochoa

COURT'S MINUTES TRANSACTION # 3144A

Order

On the 26th day of May 2015, the Court heard argument from the parties concerning Plaintiffs' Motion for Class Certification. After considering Plaintiffs' Motion for Class Certification, all briefing, evidence, and arguments of counsel, this Court finds that as to Plaintiffs' claim for declaratory judgment and Plaintiffs' DTPA claims based on the Texas Insurance Code and Unconscionability:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims of the representative parties are typical of the claims of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members, which would establish incompatible standards of conduct for Lon Smith of the class;

(6) Lon Smith has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; and

(7) the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

It is therefore, ORDERED that this action will be certified as a class action as to (a) Plaintiffs' declaratory judgment claim, (b) Plaintiffs' DTPA claim based on Section 17.50(a)(3) (Unconscionability), and (c) Plaintiffs' DTPA claim based on Section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code) pursuant to the provisions of Rule 42 of the Texas Rules of Civil Procedure. It is, further, ORDERED that the certified class shall consist of:

> All Texas residents who from June 11, 2003 through the present signed agreements with Lon Smith that included the following language, or language

substantially similar to the following: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price."[1]

In support of its rigorous analysis as to this Order, the Court puts forth the following analysis and trial plan that will guide the Court in trying the claims in this case.

1. Burden of Proof and Presumptions

The Named Plaintiffs bear the burden of establishing the requirements of TRCP 42(a) and any one of the alternative requirements listed in TRCP 42(b). The Named Plaintiffs are not entitled to a presumption, and the Court did not presume, that any of the requirements of TRCP 42(a) or TRCP(b) have been met.

2. Class Definition

Pursuant to TRCP 42(d), the Court certifies the following class:

All Texas residents who from June 11, 2003 through the present signed agreements with Lon Smith that included the following language, or language substantially similar to the following: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price."

3. Appointment of Class Representatives

The Named Plaintiffs Joe and Stacci Key are appointed class representatives for the Class.

4. Appointment of Counsel

[1] The Court has amended Plaintiffs' requested class definition to reflect a class beginning on June 11, 2003 (rather than January 1, 2003) because the Texas Insurance Code provision at issue became effective on June 11, 2003. See http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=78R&Bill=SB127.

The Court appoints the following as class counsel for the Class: Marshall Searcy, Bill Warren, and David Garza of Kelly, Hart & Hallman, L.L.P., and H. Dustin Fillmore, III and Charles W. Fillmore of The Fillmore Law Firm, L.L.P. Specific findings related to class counsel are described below.

5. Findings of Fact and Conclusions of Law

The Court issues the following findings of fact and conclusions of law. In addition, the Court finds that the Named Plaintiffs Joe Key and Stacci Key have standing to be members of the Class.

5.1 Rule 42(a) Findings and Conclusions

Rule 42(a) provides that "[o]ne or more members of a class may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law, or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." TRCP 42(a). The Court finds that the Named Plaintiffs have carried their burden to satisfy all of the TRCP 42(a) requirements and that the TRCP 42(a) requirements are met. More particularly, the Court finds as follows:

TRCP 42(a)(1): Numerosity.

The Court finds that the members of the Class are so numerous that joinder of all members is impracticable. Plaintiffs provided a stipulation between the parties wherein A-1 stipulated that it has used six versions of a standard form contract since 2003 and that at least 500 customers have entered in to each version of the standard form contract. Plaintiffs presented additional evidence wherein A-1's corporate representative testified that sometimes the contractual provision at issue is changed by the customer however, the corporate representative

also testified that this occurred in less than half of the form contracts. Based on this record, the Court concludes that the numerosity requirement of TRCP 42(a)(1) is met.[2] The Court bases this finding on the totality of the record, including the trial plan in § 6, infra. The Named Plaintiffs satisfied their burden to prove the numerosity requirement.

TRCP 42(a)(2): Commonality.

The Court finds that there are questions of law or fact common to the Class. The evidence presented established that all of the class members signed a form contract containing an identical or virtually identical provision apparently obligating Defendants and/or their agents and employees to negotiate the settlement of each class member's insurance claim in connection with the Defendants' repairing and/or replacing of such class member's roof; whether such a provision renders the contract void and illegal is the primary subject of this lawsuit and is common to all class members. A related common issue is the manner in which the class members' relief shall be calculated; specifically, whether using such illegal language ultimately requires Defendants to disgorge all monies received under the class members' contracts. The interpretation of such provision and the manner in which damages are calculated are common to all putative class members, as well as the common issues more specifically identified in § 5.3. Given the commonality of claims and the common bases of fact out of which that claim arises, the Court concludes that the commonality requirement of TRCP 42(a)(2) is met with respect to the Class. The Court bases this finding on the totality of the record, including the trial plan in § 6, infra, which are incorporated herein by reference. The Named Plaintiffs satisfied their burden to prove the commonality requirement.

TRCP 42(a)(3): Typicality.

[2] The Court notes that even if it determines that a statute of limitations applies, numerosity would still be met based on the evidence presented.

The Court finds that the claims or defenses of the Named Plaintiffs are typical of the claims or defenses of the Class. As noted above, the Named Plaintiffs have the same class claims as do the class members, which are: declaratory judgment, DTPA violations based on unconscionability and violations of Chapter 541 of the Texas Insurance Code. Moreover, these claims arise out of Defendants' use of an identical or virtually identical contractual provision in their form contracts. While the Court recognizes that the Named Plaintiffs have additional claims, Texas case law states that having such claims will not bar a finding of typicality. *See Graebel/Houston Movers, Inc. v. Chastain*, 26 S.W.3d 24, 31 (Tex. App.—Houston [1st Dist.] 2000, pet dism'd w.o.j.). The Court also recognizes that Stacci Key is not a signatory to a contract with Defendants; however, the class evidence establishes that Joe Key is a signatory, that he signed the contract during marriage, and that it was for repairs/improvement to a community asset, to wit, the homestead of the Named Plaintiffs; accordingly, the obligations and rights created by that contract are presumptively community in nature. Thus, the Court concludes that the typicality requirement of TRCP 42(a)(3) is met with respect to the Class. The Court bases this finding on the totality of the record, including the trial plan in § 6 infra, which are incorporated herein by reference. The Named Plaintiffs satisfied their burden to prove the typicality requirement.

TRCP 42(a)(4): Adequacy.

The Court finds that the representative parties and their counsel will fairly and adequately protect the interests of the Class. The Named Plaintiffs have already pursued this suit for a year in the face of staunch opposition, and have not been shown to have a conflict of interest that would undermine their ability to represent the Class. While Defendants claim that a conflict exists by reason of the Named Plaintiffs' decision not to pursue mental anguish for the class members, this objection suffers from two defects. First, the Defendants did not present evidence

that other members actually had suffered mental anguish, rendering the objection speculative and hypothetical. *See Riemer v. State*, 392 S.W.3d 635, 639 (Tex. 2012) ("[a] conflict that is merely speculative or hypothetical will not defeat the adequacy-of-representation requirement."). Moreover, even if some evidence were produced that showed the claimed conflict was more than hypothetical, there is also nothing in the record suggesting that any mental anguish damages would be sufficiently widespread and individually large to overcome the benefits of class treatment. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) Their chosen counsel, in addition, has already committed years of time and resources to this issue, and have many years of experience representing persons in complex litigation, class action litigation, and have experience involving similar cases construing a virtually identical contract. Thus, the Court concludes that the adequacy requirement of TRCP 42(a)(4) is met. The Court bases this finding on the totality of the record, including the findings in § 5.4 and the trial plan in § 6 infra, which are incorporated herein by reference. The Named Plaintiffs satisfied their burden to prove the adequacy requirement.

5.2 Rule 42(b) Findings and Conclusions

In addition to satisfying all four requirements of TRCP 42(a), the Named Plaintiffs must meet their burden to prove that the proposed class action satisfies the requirements of one or more sections of TRCP 42(b). The Court finds that the Named Plaintiffs have carried their burden under TRCP 42(b)(1)(A), TRCP 42(b)(2), and TRCP 42(b)(3). The Court further finds that the Named Plaintiff has satisfied all of the TRCP (b)(1)(A) requirements, all of the TRCP 42(b)(2) requirements, and all of the TRCP 42(b)(3) requirements and that the requirements of each of these three subsections have been proved and met.

TRCP 42(b)(1)(A) Findings & Conclusions.

Without limitation, the Court finds that the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for Lon Smith. For example, the record reflects that several courts have concluded that contract language such as that present here results in an illegal and void contract, whereas the Defendants initially enforced such a contract against Joe Key by obtaining judgment against him in justice court. Judgments enforcing the contracts and judgments finding such contracts illegal are necessarily at odds and establish that a risk of varying adjudications exists which would result in incompatible standards of conduct for Lon Smith. Because the record before the Court supports the proposition that that individual suits are not likely to have uniform results, then Court finds that the Class may be certified under Rule 42(b)(1)(A). *See FirstCollect, Inc. v. Armstrong*, 976 S.W.2d 294, 303 (Tex. App.—Corpus Christi 1998, pet. dism'd w.o.j.); *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360, 368 (Tex. App.—Houston [14th Dist.] 1994, no writ).

The Court bases these findings on the totality of the record, including the findings and conclusions made in the trial plan in § 6 infra, which are incorporated by reference.

The Court will order notice to the class and will grant class members the right to opt-out, as more particularly provided in § 7 below. The Court finds and concludes that the Named Plaintiffs satisfied their burden and that the requirements of TRCP 42(b)(1)(A) are satisfied with respect to the Class.

TRCP 42(b)(2) Findings & Conclusions.

Without limitation, the Court finds that Lon Smith has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The record reflects that Defendants and their agents and/or employees have entered contracts with all members of the

Class that includes the same relevant language.[3] If such language violates Texas Insurance Code chapter 4102, as others courts have previously found, then that violation would give rise to declaratory relief to the class as a whole pertaining to the illegality and void nature of the contracts. *See, e.g., Reyelts v. Lon Smith & Assoc., Inc.*, 968 F.Supp.2d 835, 843 (N.D. Tex. 2013) *affirmed*, 2014 U.S.App.LEXIS 8247 (5th Cir. Tex. May 1, 2014). *See also TCI Cablevision, Inc. v. Owens*, 8 S.W.3d 837, 847-48 (Tex.App.—Beaumont 2000, pet. dism'd by agr.); *Wiggins v. Enserch Exploration; Inc.*, 743 S.W.2d 332, 338 (Tex.App.—Dallas 1987, writ dism'd w.o.j.).

The Court bases these findings on the totality of the record. Without limitation, the findings and conclusions made in the trial plan in § 6 infra, which are incorporated by reference as part of the basis on which the Court finds the (b)(2) requirements are satisfied.

The Court will order notice to the class and will grant class members the right to opt-out, as more particularly provided in § 7 below. The Court finds and concludes that the Named Plaintiffs satisfied their burden and that the requirements of TRCP 42(b)(2) are satisfied with respect to the Class.

TRCP 42(b)(3) Findings & Conclusions.

The Court finds that the questions of law predominate over any questions affecting only individual members and that a class is superior to other available methods for the fair and efficient adjudication of the controversy. In particular, and with respect to predominance, the

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[3] The specific language at issues states, with little variation, that

> This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ('LSRC') to pursue homeowners['] best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.

record reflects that issues as to whether the contract is illegal and void is a both a common issue for the class and an issue subject to great controversy between the parties. In fact, Defendants have committed substantial briefing to that issue at this stage, even though the merits of the case are not central to this inquiry. Related issues that the Court also believes will predominate are whether the Defendants may legally both perform the work of a public insurance adjuster and perform the repairs that underlie the claim adjusted; whether – by providing the various agreements to the class members – Defendants have held themselves out as public insurance adjustors; whether the contracts are unconscionable for the reasons stated in the live petition; and, the manner of calculating the resulting damages, The Court finds that the Named Plaintiffs satisfied the requirements of TRCP 42(b)(3).

The Court further finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In support of this finding, the Court finds that the question of the interest of members of each class in individually controlling the prosecution of separate actions favors certification of each class because, under the record presented, it simply is not practical for the normal, individual class member to prosecute this case individually, and there is no evidence of an interest in individuals prosecuting this case individually. Indeed, it appears from the opinion in *Reyelts* and the facts of this case that the parties' respective claims against Defendants were not raised individually until Defendants had taken action to enforce their contracts against them.

This same fact also supports the Court's finding that the extent and nature of any litigation concerning the controversy already commenced by or against members of the classes favors certification because no party has identified other litigation brought by members of the classes as individual actions other than the claims brought, and already resolved, by Beatrice Reyelts and the claims brought by the Named Plaintiffs in this case. This dearth of claims also

establishes the lack of any persuasive evidence that potential class members would want to prosecute their own actions in light of the financial resources necessary to prosecute such a claim.

The Court further finds that the desirability or undesirability of concentrating the litigation of the claims in this forum favors certification of the classes because it would be wasteful to duplicate them in multiple actions, and this Court (and the parties and their counsel) has already invested a great deal of time and study.

In support of these findings regarding Rule 42(b)(3), the Court additionally refers to the findings stated in § 5.3 and the trial plan located in § 6, both of which are incorporated by reference as part of the basis on which the Court finds the (b)(3) requirements are satisfied.

The Court further finds that the difficulties likely to be encountered in the management of the classes favors certification of the classes because the issues that will require most of the effort of the Court and parties will be resolved by class-wide evidence.

The Court will order notice to the class and will grant class members the right to opt-out, as more particularly provided in § 7.

5.3 Rule 42(c) Findings and Conclusions

TRCP 42(c)(1) Findings & Conclusions.

Pursuant to TRCP 42(c)(1)(A), this is an order at an early practical time, given the history of this litigation.

Pursuant to TRCP 42(c)(1)(B), the Class is defined above. The class claims, issues, or defenses are defined herein. Class counsel are appointed above.

TRCP 42(c)(1)(C) is not applicable at this time, but is acknowledged as being within the power and discretion of the Court if and when appropriate.

Pursuant to TRCP 42(c)(1)(D)(i), the elements of each of the certified class claims are

outlined and discussed more fully in the trial plan in §6 below, and is incorporated by reference herein. In accordance with *State Farm Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550 (Tex. 2004), the Court finds that the certified class claims are viable. The Court, however, makes no finding as to the merits of the underlying claims as a matter of law and neither party is precluded from filing dispositive motions on any claim that has been pled.

Pursuant to TRCP 42(c)(1)(D)(ii), the issues of law and fact common to the Class members include, for example:

(i) Whether the Lon Smith Contract promised to provide services that fall within the services of a licensed public insurance adjuster;

(ii) Given Lon Smith's lack of the requisite public insurance adjuster license, whether the Lon Smith Contract promised to provide services that were illegal under Chapter 4102 of the Insurance Code;

(iii) Whether, by giving Plaintiffs and the members of the class the Lon Smith Agreement, Lon Smith held itself out as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property, in violation of Chapter 4102 of the Insurance Code;

(iv) Whether the Lon Smith Contract is illegal, void, and/or unenforceable;

(v) Whether, because of Lon Smith's violation of Chapter 4102 of the Insurance Code, Plaintiffs and the members of the class are entitled to a judgment restoring all monies paid to Lon Smith under the illegal contract;

(vi) Whether Lon Smith was legally barred by Texas Insurance Code chapter 4102 from both negotiating and effecting a settlement of the class's insurance claim and performing the repairs.

The trial plan, § 6, also is an integral part of these findings regarding common issues, and incorporated by reference in support of the foregoing.

Pursuant to TRCP 42(c)(1)(D)(iii), the issues of law and fact affecting only individual class members are:

(i) Membership in the Class; and

(ii) If damages are ordered, then the amount owed to each member based on

the amount paid to Defendants pursuant to the Lon Smith contract.

The trial plan, § 6, also is an integral part of these findings regarding individual issues.

Pursuant to TRCP 42(c)(1)(D)(iv), the issues that will be the object of most of the efforts of the litigants and the Court include:

(i) Whether the Lon Smith Contract promised to provide services that fall within the services of a licensed public insurance adjuster;

(ii) Given Lon Smith's lack of the requisite public insurance adjuster license, whether the Lon Smith Contract promised to provide services that were illegal under Chapter 4102 of the Insurance Code;

(iii) Whether, by giving Plaintiffs and the members of the class the Lon Smith Agreement, Lon Smith held itself out as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property, in violation of Chapter 4102 of the Insurance Code;

(iv) Whether the Lon Smith Contract is illegal, void, and/or unenforceable;

(v) Whether, because of Lon Smith's violation of Chapter 4102 of the Insurance Code, Plaintiffs and the members of the class are entitled to a judgment restoring all monies paid to Lon Smith under the illegal contract;

(vi) Whether Lon Smith was legally barred from both negotiating and effecting a settlement of the class's insurance claim and performing the repairs.

The trial plan, § 6, also is an integral part of these findings regarding the issues that will be the object of most of the efforts of the litigants and the Court and is incorporated by reference in support of the foregoing.

Pursuant to TRCP 42(c)(1)(D)(v), the other available methods of adjudication that exist for the controversy are: other class actions and individual actions.

Pursuant to TRCP 42(c)(1)(D)(vi), the issues common to the members of the classes predominate over individual issues because of the following:

(i) the law of one state (Texas) governs;

(ii) common issues as identified above will be the object of most of the efforts of the parties and the Court;

(iii) the factors for finding predominance that are spelled out in Rule 42(b)(3) favor certification;

(iv) an analysis of the claims and defenses and how those claims can be tried demonstrate that all claims and defenses can be tried by class-wide evidence or manageable individual evidence; and

(v) the other findings and conclusions stated herein further support the finding and conclusion that issues common to the members of the class predominate over individual issues. These findings are expanded in other parts of this Order which are part of the findings and conclusions made in this section.

Pursuant to TRCP 42(c)(1)(D)(vii), the class action is superior to other means available for a fair and efficient adjudication of the controversy because:

(i) there are no practical alternatives to a class action for resolving this dispute;

(ii) the factors for finding superiority that are spelled out in Rule 42(b)(3) favor certification;

(iii) the trial plan demonstrates that this case can be tried as a class action fairly and efficiently; and

(iv) the other findings and conclusions stated herein further support the finding and conclusion that this action is superior to other means available for a fair and efficient adjudication of the controversy. These findings are expanded in other parts of this Order which are part of the findings and conclusions made in this section.

Pursuant to TRCP 42(c)(1)(D)(viii), the trial plan in § 6 sets forth how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable and time efficient manner.

5.4 Rule 42(g) Findings and Conclusions

The Court appoints the following as class counsel for the Class: Marshall Searcy, Bill Warren, and David Garza of Kelly, Hart & Hallman, L.L.P. and H. Dustin Fillmore, III and Charles W. Fillmore of The Fillmore Law Firm, L.L.P. The Court finds that the appointed class counsel will fairly and adequately represent the interests of the Class. In appointing class

counsel, the Court has considered:

(i) The work counsel has performed in identifying or investigating potential claims in the action and finds that they have devoted a large effort to development of the case and identifying and investigating potential claims.

(ii) Counsel's experience in handling complex litigation and claims of the type asserted in this action and finds all of them have successful experience in large and complex litigation, and apparent knowledge of class action lawsuits;

(iii) Counsel's knowledge of the applicable law and experience litigating the similar contractual provisions to the provisions applicable here and finds them to be knowledgeable of the procedural and substantive law that governs this case; and

(iv) The resources counsel will commit to representing the class and finds that class counsel has already devoted over a year to this case and has and will commit the resources necessary to adequately represent the class. This is evidenced by the pleadings, papers, discovery, analysis, and hearings on file in this case and the entire certification record also on file in this case.

The Court finds and concludes that the Named Plaintiffs satisfied their burden and that class counsel will fairly and adequately represent the interests of the Class. The Court finds that the representative parties will fairly and adequately protect the interests of the Class. Thus, the adequacy requirement of TRCP 42(a)(4) is met. The Court bases this finding on the totality of the record.

6. Trial Plan

The Court hereby adopts the following trial plan as the Court's specific explanation of how class claims and Defendants' defenses are to proceed to trial in a manageable, time efficient manner in compliance with Rule 42(c)(1)(D)(viii) and applicable case law, including *State Farm Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550 (Tex. 2004); *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295 (Tex. 2004); *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657 (Tex. 2004), *Union Pac. Res. Group, Inc. v. Hankins*, 111 S.W.3d 69 (Tex. 2003); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002); and *Southwestern Ref. Co., Inc. v. Bernal*, 22 S.W.3d

425 (Tex. 2000). This is a trial plan for the trial of all class claims and all defenses, alternatively certified under TRCP 42(b)(1), 42(b)(2), or 42(b)(3).

If a class is certified, the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, can be tried in a manageable, time efficient manner:

The law to be applied is the law of the State of Texas.

The class claims will be tried the same as an individual suit pursuing these claims, with the exceptions that the Court will be required to establish the notice, proofs of claim, and other class procedures in accordance with Rule 42.

As to the class claims, the jury trial will proceed substantially as it would if only the Named Plaintiffs' individual case was being tried, though class-wide evidence will be utilized to establish damages.

The Court will also establish a procedure for reviewing proof of claim forms (if required by the judgment) as set forth below.

The Court now turns to the jury trial, to identify the substantive issues that likely will be tried if tried before a jury or before the Court if tried before the Court. The following issues may be decided or narrowed by summary judgment or directed verdict or other bench judgment by the Court:

6.1 Declaratory Judgment.

To establish a claim for declaratory relief Plaintiffs must establish that the Defendants' contracts with the Class each includes a clause that violates Texas Insurance Code chapter 4102, and that the violation renders the contracts illegal, void and unenforceable.

The Named Plaintiffs will prove or fail to prove their request for declaratory relief for themselves and the rest of the class by the same class-wide evidence. Such evidence includes,

for example and without limitation, the six versions of Defendants' form contract used during the relevant time period; the contract that was at issue in the *Reyelts* case; the deposition testimony of David Cox regarding the contracts at issue and the policies and procedures concerning the manner in which Defendants interacted with insurance carriers to negotiate for and/or effect the settlement of claims for loss or damage under policies of insurance covering real or personal property; documents and testimonial evidence concerning the Defendants' internal policies and procedures for such interaction with insurance carriers; and, documents and testimonial evidence establishing Defendants' lack of any license to act as a public insurance adjuster.

The Court concludes that this class-wide evidence will permit the declaratory judgment claim to be tried to one jury, without the necessity or right to introduce any evidence regarding any individual issues concerning the Named Plaintiffs or each class member.

With respect to damages, the issue is economic and objective. The jury will be asked to return monies paid by or on behalf of the class members. The amount of these monies may be reasonably obtained from Defendants' records.

6.2 Deceptive Trade Practices Claims.

To establish a claim under the Texas Deceptive Trade Practices Act § 17.50(a)(3) Plaintiffs must establish:

(1) the plaintiff is a consumer;

(2) defendant can be sued under the DTPA;

(3) defendant committed . . .:

(c) any unconscionable action or course of action,

(4) defendant's action was a producing cause of the plaintiff's damages.

To establish a claim under the Texas Deceptive Trade Practices Act § 17.50(a)(4) Plaintiffs must establish:

(1) the plaintiff is a consumer;

(2) defendant can be sued under the DTPA;

(3) defendant committed . . .:

(d) the use or employment of an act or practice in violation of Texas Insurance Code chapter 541;

(4) defendant's action was a producing cause of the plaintiff's damages.

The Named Plaintiffs will prove or fail to prove their Deceptive Trade Practices Act claims for themselves and the rest of the class by the same class-wide evidence. Such evidence includes, for example and without limitation, the six versions of Defendants' form contract used during the relevant time period; the contract that as at issue in the *Reyelts* case; the representations contained in the contracts at issue; the deposition testimony of David Cox regarding the contracts at issue and the policies and procedures concerning the manner in which Defendants interacted with insurance carriers to negotiate for and/or effect the settlement of claims for loss or damage under policies of insurance covering real or personal property; documents and testimonial evidence concerning the Defendants' internal policies and procedures for such interaction with insurance carriers; document and testimonial evidence concerning who performed the repairs at issue in the contracts; and, documents and testimonial evidence establishing defendants' lack of any license to act as a public insurance adjuster. Each of the elements above will be proven through the same evidence for both the Named Plaintiffs and the other class plaintiffs.

With respect to damages, the issue is economic and objective. The Named Plaintiffs do not seek to recover damages for mental anguish or other subjectively determined damages. The jury will be asked to return monies paid by or on behalf of the class members. The amount of these monies may be reasonably obtained from Defendants' records.

6.3 Affirmative Defenses – Res Judicata, Mitigation of Damages, and Statute of Limitations.

Some of Defendants' affirmative defenses are subsumed in the above elements of the trial plan and may or may not be, in fact, viable or reached. Also, some of these alleged defenses are strictly matters of law or are not viable defenses (or both). Nevertheless, the Court finds that Defendants' affirmative defenses may be tried using class-wide evidence and that individual issues, if any, are manageable.

As to Defendants' affirmative defense of res judicata, as of the date of this order, that is no longer a viable defense against the Named Plaintiffs because the justice of the peace default judgment it was based on has been vacated.

As to Defendants' affirmative defense of mitigation of damages, the Court finds that that defense could only be applicable to the Named Plaintiffs' individual claims, which they are not seeking to have the class certified as to.

As to Defendants' affirmative defense of statute of limitations, the Court notes that Defendants merely argue that because statute of limitations is a possible defense, individual issues will predominate. That is not enough. *See In re Enron*, 529 F.Supp.2d 644, 712 (S.D. Tex. 2006) ("a court should not adopt a *per se* rule against certification where a limitations defense is raised by some defendants because the result would foreclose use of the class action device for a broad subset of claims, a result inconsistent with the efficiency aims of rule 23. Though class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants' common scheme"); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) ("Although a necessity for individualized statute-of-limitations determination invariably weighs against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an automatic disqualifier. In other words, the

mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones."). The record contains a dearth of evidence as to how the statute of limitations would be applied differently between individual plaintiffs. This lack of evidence appears at least in part to be self-inflicted, as Defendants only stipulated to a minimum number of customers that entered into their form contract beginning in 2010. Because of this dearth of evidence, nothing in the record supports Defendants' argument that individual issues would predominate due to its limitations defense.

Further, the Court finds that any individual issues that may exist with the limitations defense will be easily managed on a class-wide basis. Specifically, the evidence relevant to the statute of limitations defense will include the six versions of Defendants' form contract used during the relevant time period June 11, 2003 to the present. Inasmuch as the first Class petition was filed on September 30, 2014, then for the declaratory judgment and fraud claim, such defense applies only to contracts entered between June 11, 2003 and September 29, 2010; for the DTPA claims, such defense applies only to contracts entered between June 11, 2003 and September 29, 2012. The Court will make a determination as to whether the discovery rule should apply on a class-wide basis, *i.e.* the Court will determine whether the class plaintiffs causes of action should have been discovered based on the contractual provision(s) at issue and considering the interpretation of any other applicable Texas law, including but not limited to the Texas Insurance Code. Should the Court determine that a statute of limitations does apply, the Court will then determine the applicable date before which claims are barred and adjust the class definition to reflect such date. These issues are easily manageable and can also be addressed through the Proof of Claim process.

6.4 Proof of Claim.

The Court will implement a proof of claim process. The use of proofs of claim forms was approved by the Texas Supreme Court in *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). At this point it appears that the only issues that will be covered by the proofs of claim, if contested and relevant at time of trial, are: identity of the claimant-class members; membership in the classes; and amount of money paid by or on behalf of each claimant-class member. It is possible that additional issues will be determined by proofs of claim.

7. Notice and Opt-Out Rights.

Pursuant to TRCP 42(c)(2)(A) and TRCP 42(c)(2)(B), this Court requires notice and opt-out rights, applicable to certification under TRCP 42(b)(1), TRCP 42(b)(2), and TRCP 42(b)(3). *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657,667 (Tex. 2004). Notice, for certification under (b)(1), (b)(2), and (b)(3) will comply with TRCP 42(c)(2)(B).

The Named Plaintiffs or class counsel are ordered to bear the cost of notice.

The certification record demonstrates that notice which complies with TRCP 42(c)(2)(B) is practical and that appointed class counsel has agreed to devote the resources to effect such notice.

Without making a final decision on the means, manner, and form of notice, the Court finds that the minimum notice required will be: (1) by Court approved first class mail to all members of the class established by the records of Defendants; (2) by Court approved press release paid for by Named Plaintiffs; and (3) by Court approved publication paid for by the Named Plaintiffs designed to reach the Texas class members.

The Court will give such other notice as it or any appellate court may determine is required by Rule 42, due process, the Texas Supreme Court's decision in *LaPray*, any subsequent appellate decisions, or other applicable law.

The parties are ordered to submit an agreed proposed order setting the means, manner and form of notice within thirty (30) days after this Order becomes final. Failing such agreement, the parties are ordered to submit their respective proposed form of such order within thirty-five (35) days after this Order becomes final. In any event, the Court will order a hearing on the means, manner and form of notice after receipt of the proposed form of order. The Court will assure that the notice satisfies TRCP 42(c)(2)(B), due process, and any other applicable law.

If necessary or desirable, the Court may order, after this Order becomes final, additional discovery related to these notice issues. Notice is not to be sent or made until further order of this Court following said hearing.

SIGNED this the 15 day of Oct 2015.

THE HONORABLE THOMAS LOWE, III
236th District Court of Tarrant County, Texas

017-267881-13

017-267881-13

OTHER

SLADE WATTS

AGREEMENT

181131-1

Name JOE KEY	Home No [redacted]	Date	04/27/2012
Address [redacted]	Work No	Mapsco	F88B
[redacted]	Addl No [redacted]	Add Desc	CELL #
Bldng Address			

Specifications	Description	Qty	Unit Cost	Total
Remove Shingles	1 Layer(s) Wood	49.00	40.00	1,960.00
Install New Decking	OSB Tech Shield 7/16 in	56.35	150.00	8,452.50
Deck Protection/Felt	#30 Deck Protection	56.35	17.00	957.95
Perimeter Metal	Size 1 1/2 in. Color Almond	400.00	1.25	500.00
Ventilation	84-Ridge Vent New @ $10			840.00
Ventilation				
Heater Vents	Size			
Lead/AutoCaulks	Size 7-3N1 AC	7.00	45.00	315.00
Rem/Repl Valley	Closed( ) Open(X) W Valley Bronze	180.00	5.75	1,035.00
Install Shingles	Brand GAF/Elk Style Armor Shield II UL2218c4	56.35	263.00	14,820.05
	Color Barkwood Warranty LLT			
Ridge Application	Seal-A-Ridge	460.00	4.75	2,185.00
Skylight(s)				
Skylight(s)				
Steep Off	49.00 sq 8/12 @ $0.00/sq	49.00		
Steep On	56.35 sq 8/12 @ $40.00/sq	56.35	40.00	2,254.00
Two Story				
	Color			
	Color			
Clean Up	Clean up and haul away debris Magnetize lawn and driveway for nails.			N/C
Ventilation (Intake and Exhaust) does not meet FHA minimum requirements.			Tax	
			Permit	450.00
			Owner/Prof	
			Total	$33,769.50

Credit $1,000 for Advertising T/C

ACCEPTANCE OF AGREEMENT

Ask your Contractor about our Refer a Friend program

5/2/12

Mgmt Approval

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017-267881-13

THIS CONTRACT AND ANY AGREEMENT PURSUANT HERETO BETWEEN LON SMITH ROOFING & CONSTRUCTION HEREINAFTER REFERRED TO AS "COMPANY" AND THE CUSTOMER(S) NAMED HEREIN ON THE REVERSE SIDE WILL BE SUBJECT TO ALL APPROPRIATE LAWS, REGULATIONS AND ORDINANCES OF THE STATE OF TEXAS AND THE FOLLOWING TERMS AND CONDITIONS.

1. All proposals subject to approval of our Credit Department & Management
2. The company shall have no responsibility for damages from: rain, fire, tornado, windstorm, hail, ice, or other perils, as is normally contemplated to be covered by homeowners insurance or business risk insurance, unless a specified written agreement be made prior to commencement of the work
3. Company agrees to perform the described work for Customer in accordance with normal common roofing practices unless otherwise specified.
4. Replacement of deteriorated decking, roof jacks, ventilators, flashing or other materials, unless otherwise stated in this contract, are not included and will be charged as an extra
5. This agreement, if not signed by both parties will expire 30 days from estimate date unless extended in writing by the Company. After 30 days, we reserve the right to revise our price in accordance with costs in effect at that time
6. The Company shall not be liable for failure of performances due to labor controversies, strikes, fires, weather, inability to obtain materials from usual sources, or any other circumstances beyond the control of the Company whether of similar or dissimilar nature
7. The Company is not responsible for any damage below the roof, due to leaks by gale force winds (54 mph) hail or preexisting construction defects during the period of the warranty
8. If this Contract is cancelled by the Customer later than three (3) days from execution, customer shall pay to the Company ten percent (10%) of the contract price as liquidated damages, not as a penalty, and the Company agrees to accept such as a reasonable and just compensation for said cancellation.
9. If any provision of this agreement should be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this agreement shall not be affected thereby
10. Any representation, statements, or other communications, not written in this Contract are agreed to be immaterial, and not relied on by either party, and do not survive the execution of this Contract. This Agreement constitutes the entire agreement between the parties. It may be changed only by written instrument signed by both parties
11. The Company will provide the Customer with a two (2) year limited warranty. The Contract and warranty shall not be assigned and is non-transferable. For the warranty to be valid the contract must be paid in full.
12. The Company will have the right to supplement the Insurance Co., in the event material and/or labor increases from the date of the damage. Any supplements paid by the insurance company for additional labor and or materials needed beyond the original scope of repairs are authorized to be paid directly to the Company.
13. All Parties agree to settle any disputes regarding damages, quality of materials or workmanship through binding arbitration with the local Better Business Bureau before either party may officially file suit with any court. ARBITRATION SHALL BE BINDING.
14. Full scope of Insurance proceeds shall be defined as the full price for repairs allowed by the insurance company before any deduction for deductible, depreciation or ACV adjustment is subtracted.
15. These conditions shall be considered a part of any contract entered into or authorized to proceed, the same as if they were included therein.
16. Payment is due upon completion at Tarrant County, Texas. Any portion remaining unpaid will bear interest at the rate of 1.5% per month not to exceed the maximum rate allowed by law commencing 30 days after completion. Purchaser agrees to pay reasonable collection fees and/or legal fees needed in pursuit of collecting any remaining unpaid portion commencing 60 days after installation
17. Payment for work completed will immediately become due should a delay in work be initiated by the customer
18. All parties agree that the Company will not be held responsible for punctures to air conditioner, gas, security, or electrical lines that have been installed closer than 3" to the underside of roof deck
19. The Customer grants the Company full access to entire perimeter of building and electricity for staging and execution of work unless otherwise agreed

THREE DAY RIGHT OF RESCISSION: YOU ARE HEREBY BEING NOTIFIED THAT YOU MAY CANCEL THIS AGREEMENT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS AGREEMENT.

Any person or company supplying labor or materials for this improvement to your property may file a lien against your property if that person or company is not paid for the contributions.

Thank you for considering Lon Smith Roofing and Construction for your repair and re-roofing needs! Our commitment to excellence with over 70,000 customers since 1974 has established a reputation as the "Premier Roofing Contractor" with homeowners and insurance companies alike. We look forward to adding your name to our long list of satisfied customers.

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Texas Providers Get Listed

National Providers Get Listed

Related Occupations

Quarterly Census of Employment and Wages

Private, Construction, All States and U.S.
2015 First Quarter, All establishment sizes
Source: Quarterly Census of Employment and Wages - Bureau of Labor Statistics

Table Filter: (Filter Value) Apply Clear Page 1 of 1

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State	Quarterly Establishments	January Employment	February Employment	March Employment	Total Quarterly Wages	Average Weekly Wage	March Employment Location Quotient	Total Quarterly Wages Location Quotient
U.S. TOTAL	758,888	5,919,408	5,926,182	6,022,574	$78,570,449,416	$1,015	1.00	1.00
Alabama	8,954	78,540	79,073	80,127	890,885,282	865	0.98	1.03
Alaska	2,483	14,881	15,308	15,859	277,834,341	1,392	1.12	1.51
Arizona	11,672	122,083	123,331	124,151	1,445,557,729	903	1.09	1.10
Arkansas	6,606	45,858	46,160	46,006	446,575,436	747	0.90	0.89
California	68,115	677,669	683,425	693,573	9,975,383,458	1,120	0.99	0.95
Colorado	17,394	139,660	140,332	141,759	1,823,022,394	998	1.32	1.27
Connecticut	9,135	52,257	50,941	51,637	735,933,458	1,097	0.72	0.59
Delaware	2,843	19,386	19,347	19,457	246,384,826	977	1.05	0.97
District of Columbia	948	13,503	13,362	13,512	202,290,646	1,156	0.42	0.29
Florida	62,029	406,632	411,859	416,006	4,419,522,532	826	1.18	1.14
Georgia	21,919	158,328	160,432	160,219	1,996,562,713	962	0.89	0.90
Hawaii	3,447	31,734	32,019	32,671	526,708,542	1,261	1.17	1.73
Idaho	6,645	31,951	32,329	33,819	297,537,770	700	1.19	1.15
Illinois	40,668	181,917	181,512	189,690	2,841,526,207	1,186	0.76	0.80
Indiana	14,383	112,735	112,308	116,548	1,395,377,686	943	0.92	1.03
Iowa	9,340	67,208	66,795	69,290	866,842,093	984	1.05	1.25
Kansas	7,532	55,082	56,162	58,318	653,719,887	890	0.98	1.04
Kentucky	9,490	69,097	68,818	69,994	799,405,784	887	0.88	0.98
Louisiana	10,272	136,147	137,007	138,259	1,892,504,838	1,062	1.64	2.03
Maine	5,190	23,299	22,680	22,698	243,960,264	820	0.91	0.98
Maryland	16,083	144,070	143,723	145,407	2,017,384,359	1,075	1.31	1.31
Massachusetts	19,303	123,854	119,037	121,346	2,018,781,944	1,279	0.83	0.83
Michigan	19,062	130,401	128,343	131,105	1,694,301,881	1,003	0.73	0.79
Minnesota	15,850	94,474	93,942	96,314	1,394,065,792	1,130	0.81	0.87
Mississippi	5,808	44,524	45,829	45,775	489,660,893	830	0.95	1.14
Missouri	14,760	104,227	104,192	107,529	1,344,314,450	982	0.92	1.04
Montana	5,565	22,378	22,641	23,624	242,007,499	814	1.23	1.35
Nebraska	6,769	43,002	43,268	45,097	476,480,482	837	1.09	1.13
Nevada	6,041	65,163	65,714	65,717	817,383,877	959	1.22	1.41
New Hampshire	4,049	21,746	21,117	21,176	264,186,555	952	0.78	0.79
New Jersey	22,069	133,778	131,050	134,346	2,023,511,647	1,170	0.80	0.75
New Mexico	5,098	42,265	42,074	42,186	430,255,227	785	1.20	1.22
New York	47,028	321,882	314,853	324,215	4,878,364,938	1,172	0.83	0.69
North Carolina	24,951	178,629	180,062	182,285	1,974,904,697	842	1.02	0.95
North Dakota	4,221	31,645	30,783	30,390	476,615,300	1,185	1.59	2.02
Ohio	22,527	175,801	173,878	179,092	2,270,993,435	991	0.79	0.88
Oklahoma	9,557	74,868	75,961	75,863	842,614,773	858	1.09	1.11
Oregon	12,156	76,388	76,838	77,916	950,060,133	949	1.02	1.08
Pennsylvania	27,837	209,174	205,722	211,471	2,873,474,276	1,059	0.86	0.91

Rhode Island	3,487	14,834	14,026	14,443	189,874,094	1,012	0.72	0.76
South Carolina	10,688	83,187	83,717	84,862	939,175,122	861	1.01	1.12
South Dakota	3,693	18,728	18,680	19,706	200,591,903	810	1.11	1.19
Tennessee	11,198	105,660	106,376	106,787	1,205,284,078	872	0.88	0.90
Texas	45,252	661,795	673,007	672,885	9,685,271,929	1,113	1.33	1.41
Utah	9,883	76,781	77,679	79,803	837,755,029	825	1.38	1.38
Vermont	2,747	13,237	12,812	12,751	140,665,199	837	0.96	1.02
Virginia	20,111	172,985	172,715	174,884	2,043,653,050	906	1.09	0.96
Washington	22,704	151,961	152,913	155,872	2,039,465,823	1,021	1.16	1.13
West Virginia	4,508	29,291	28,533	29,746	344,101,369	907	0.98	1.15
Wisconsin	13,352	93,725	92,489	94,888	1,238,315,193	1,017	0.79	0.95
Wyoming	3,466	20,988	21,008	21,500	249,398,583	906	1.76	1.84
Puerto Rico	1,849	25,143	25,159	25,600	135,475,416	412	0.65	0.53
Virgin Islands	303	1,542	1,545	1,556	14,373,453	714	0.92	0.92

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TEXAS DEPARTMENT OF INSURANCE

COMMISSIONER'S BULLETIN # B-0017-12

June 26, 2012

TO: ALL AGENTS, PUBLIC INSURANCE ADJUSTERS, AND ADJUSTERS, AND TO ALL INSURANCE COMPANIES, CORPORATIONS, EXCHANGES, MUTUALS, COUNTY MUTUALS, RECIPROCALS, ASSOCIATIONS, LLOYDS, AND OTHER INSURERS WRITING PROPERTY AND CASUALTY INSURANCE IN THE STATE OF TEXAS

RE: ADJUSTING CLAIMS BY UNLICENSED INDIVIDUALS AND ENTITIES

It has come to the attention of the Texas Department of Insurance that a number of contractors, roofing companies, and other individuals and entities not licensed by the department have been advertising or performing acts that would require them to hold a public insurance adjuster license. Additionally, the department has learned that the tactics used by these unlicensed individuals include visiting neighborhoods and areas of the state where languages other than English are commonly spoken. These unlicensed individuals often prey on unknowing consumers by promising to 'work' insurance claims to achieve a higher settlement.
All agents, adjusters, and insurers should be mindful that, pursuant to the Insurance Code Chapter 4102:
1. A person who, for direct, indirect, or any other compensation, acts on behalf of an insured to negotiate or effect the settlement of an insurance claim is performing the acts of a public insurance adjuster.
2. A person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property is also performing the acts of a public insurance adjuster.
With limited exceptions, a person performing the acts of a public insurance adjuster or holding himself or herself out as a public insurance adjuster in this state must be licensed under the Insurance Code Chapter 4102. Additionally, insurers cannot utilize roofers as de facto public insurance adjusters nor provide commissions to them in the form of direct or indirect payments or rebates that are in excess of amounts owed under the policy.

The department takes seriously the harm unlicensed individuals and entities can cause on the marketplace when they prey on unsuspecting consumers and the industry. I urge insurers, agents, adjusters, and consumers to help call attention to and halt attempts by unlicensed persons to negotiate insurance claims, and I encourage everyone to report these practices to the department and the TDI Fraud Unit (1-800-252-3439 - Report Fraud). The Insurance Code provides for both civil and criminal penalties for violating this licensing requirement. The department will refer unlicensed persons performing the acts of a public insurance adjuster to the Texas Attorney General, pursue all remedies available under the Insurance Code, and highlight these practices to the Legislature so that it may consider further steps to regulate these persons and activities.

Eleanor Kitzman
Commissioner of Insurance

Frequently Asked Questions (FAQs) - Unlicensed Individuals, Entities Adjusting Claims

For more information contact: ConsumerProtection@tdi.texas.gov or 1-800-252-3439
Texas Department of Insurance
333 Guadalupe, Austin, TX 78701
P.O. Box 149104, Austin, TX 78714
512-676-6000 | 1-800-578-4677

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02-15-00328-CV
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NO. 02-15-00328-CV

IN THE SECOND DISTRICT COURT OF APPEALS
AT FORT WORTH, TEXAS

LON SMITH & ASSOCIATES, INC. AND A-1 SYSTEMS, INC. D/B/A LON SMITH ROOFING AND CONSTRUCTION,

Appellants,

VS.

JOE KEY AND STACCI KEY,

Appellees.

Appeal from the 236th Judicial District Court, Tarrant County, Texas
Trial Court No. 236-267881-13
Hon. Thomas Lowe, III presiding

BRIEF OF AMICUS CURIAE STELLAR RESTORATION SERVICES, LLC

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STATEMENT OF INTEREST OF AMICUS

Stellar Restoration Services, LLC has been engaged in the business of insurance loss restoration and general contracting since 2011.[1] Stellar contracts with business owners to assist in the repair and restoration of their property following destruction or damage by wind or storm. Most of these services involve communicating with insurance companies regarding the scope and costs of repair. Stellar is not a public adjuster and does not settle claims or otherwise address policy issues, such as coverage or exclusions, with insurance companies. Stellar works with its customers and their insurance companies to determine the scope of work and price to repair the property to its pre-damage condition. Stellar is usually consulted to determine the nature and extent of damage to property, including damage to commercial roofs.

Stellar files this amicus brief at this early procedural stage to respectfully advise the Court of the state of the industry, as well as the potential effects of any opinion by the Court on the merits, and respectfully requests the Court be cautious in discussing the underlying merits of the claim regarding whether the agreement at issue in this appeal violates, or even implicates, Section 4102.001(3) of the Texas Insurance Code, also known as the public adjuster statute.

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[1] This brief is filed on behalf of Stellar Restoration Services, LLC. Stellar is not interested in this suit. Stellar paid for this brief, and no party other than Stellar has contributed to the preparation or filing of this amicus brief. A copy of this brief has been served on all parties to this appeal. TEX. R. APP. P. 11.

ARGUMENT & AUTHORITIES

I. Repair and Restoration Industry

It is important for the Court to note that hundreds of companies provide repair and restoration services for property owners and two things are true about virtually all of them. First, they are required to interface with insurance companies to some extent regarding the scope and price of repairs. Second, virtually all of the companies have contracts allowing—or requiring—them to ensure that the property is fully repaired or restored to its pre-damage condition.

In other words, companies like Stellar, ranging from roofing companies to water damage restoration companies, do not simply perform repairs based on an insurance policy or an insurance company's budget. Restoration companies, such as Stellar, have an independent contractual duty to the property owner to restore the property to its pre-damage condition. With some companies, the customer remains liable for repair costs not paid by the insurance company. Under these circumstances, it is important for any agreement to acknowledge that the restoration company must advance the best interest of the property owner, its customer, with respect to the scope and price of the repair and restoration services.

II. Amicus Concerns

Stellar respectfully requests that the Court, when addressing the statute and the agreement at issue, take care not to endanger or otherwise jeopardize agreements that simply confirm that companies such as Stellar can and should act with the property owner's best interest with respect to the scope and price of allowed repairs, without

regard to coverage, exclusions, or settlement of the claim. In the event the Court decides to address the merits regarding the applicable insurance code provisions, Stellar makes the following observations for the Court's consideration.

A. Contract vs. Conduct

First, the contract language should not carry more weight than the actual conduct of the parties, *i.e.*, the actual services performed should inform whether the parties intended the company to perform services prohibited by section 4102.001(3) *See Consol. Eng'g Co. Inc. v. S. Steel Co.*, 699 S.W.2d 188, 192-93 (Tex. 1985) ("Conduct of the parties which indicates the construction that the parties themselves placed on the contract may therefore be considered in determining the parties' true intent.") (citing *Danaho Refining Company v. Dietz*, 398 S.W.2d 307, 311 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.)). Here, the Court needs more information on a customer-by-customer basis to determine whether representatives of the company actually committed prohibited conduct by acting as a public adjuster in negotiating coverage on behalf of a client, or simply discussed the scope and cost of repairs as permitted.

B. Construe Agreement Narrowly

Second, when confronted with different interpretations of an ambiguous agreement, the Court should opt for the one that contemplates lawful conduct. *See Lewis v. Davis*, 199 S.W.2d 146, 149 (Tex. 1947). Here, the language of the agreement itself is likely not dispositive in light of the undisputed fact that restoration companies are not prohibited from communicating with insurance companies on the property owner's behalf. Consequently, the Court may simply adopt a construction of the agreement that

contemplates only scope and cost of repairs and does not otherwise run afoul of section 4102.

C. Construe Statute Narrowly

Third, and finally, because a violation of Chapter 4102 is also a crime[2], the rule of lenity requires the Court to adopt the construction of the statute that avoids criminal liability. *See City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006); *Cuellar v. State*, 70 S.W.3d 815, 823 n.8 (Tex. Crim. App. 2002) (Cochran, J., concurring) ("The Rule of Lenity only applies when both alternative choices or definitions are more-or-less equally reasonable. In that situation, courts are required to choose the less harsh alternative."). Here, the Court is faced with a broad interpretation of the statute that subjects the restoration company and its employees to criminal penalties, including jail time.[3] This construction could also be used against countless other companies and their employees. Thus, the Court should favor an interpretation of the statute that does not result in criminalizing the conduct of an entire industry, unless the text of the statute unambiguously compels such a result.

CONCLUSION AND PRAYER

As noted above, while it is not clear that the Court needs to address the merits of the underlying claim in depth in order to decide whether a class should be certified, Stellar respectfully requests the Court be aware of the concerns discussed herein when

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[2] *See* TEX. INS. CODE § 4102.206(a) (violation constitutes Class B misdemeanor).

[3] *See* TEX. PEN. CODE § 12.22 (providing individual guilty of Class B misdemeanor shall be punished by fine not to exceed $2,000, confinement in jail not to exceed 180 days, or both).

resolving the issues before the Court in this appeal, and construe the agreement and the statute at issue narrowly as to not prohibit or criminalize more conduct than is required by the text of both.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of April, 2016, a true and correct copy of this Amicus Brief was delivered pursuant to TEX. R. APP. P. 9.5 to counsel of record as indicated below:

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