IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CARL SCALISE	§	
	§	
V.	§	CIVIL ACTION NO. 7:13-cv-178
	§	
ALLSTATE TEXAS LLOYDS	§	
AND STEPHEN MEDEIROS	§	

PLAINTIFF CARL SCALISE'S OBJECTION AND RESPONSE TO DEFENDANT ALLSTATE TEXAS LLOYDS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE RANDY CRANE:

COMES NOW, CARL SCALISE ("Plaintiff"), and files this, his Objection and Brief in Response to Defendant Allstate Texas Lloyd's ("Allstate" or "Defendant") Motion for Summary Judgment ("MSJ"). In support of denying the summary judgment motion filed by Defendant, Plaintiff would show the Court as follows:

I. OBJECTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR CONTINUANCE ON HEARING

1. Pursuant to FED. R. Civ, P.56(d), Plaintiff objects to the filing of Defendant's Motion for Summary Judgment as premature and requests that the Court either defer consideration of the Motion to a later date or allow Plaintiff adequate time to conduct discovery prior to responding to Defendant Allstate's Motion.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

2. Defendant Allstate performed a substandard claims investigation of Plaintiff's home following a March 29, 2012 wind and hail storm. It undervalued Plaintiff's insurance claim, and failed to provide adequate payment to Plaintiff.

3. Plaintiff made a claim for wind and hail damages to his home located at 200 West Houston, McAllen, Texas on or about March 29, 2012, resulting from the March 29, 2012 Hail Storm.

4. Defendant Allstate assigned claim number 0240311084 to Plaintiff's claim. After an alleged complete and thorough investigation of Plaintiff's home, by Allstate's adjuster he determined the total amount of damages to be approximately $551.79; since Plaintiff had a $500 deductible, Defendant Allstate sent Plaintiff a check in the amount of $51.79 for all the damages to his home. ***See Exhibit "D".***

5. Plaintiff invoked appraisal on July 30, 2012 and named James Ward as his competent and independent appraiser. On September 13, 2012 Defendant Allstate named Stephen Medeiros as its appraiser. Both appraiser James Ward and appraiser, Defendant Stephen Medeiros agreed on Paul Poncio to serve as the appraisal umpire. Thereafter, the appraisers inspected the property and exchanged their appraisal estimates. James Ward's appraisal estimate for all the damages to Plaintiff's home totaled approximately $56,881.88 and Defendant Stephen Medeiros' appraisal estimate totaled approximately $423.76. ***See Exhibit "C" and "G".***

6. Plaintiff withdrew his request for appraisal on March 11, 2013, based upon the fact that Defendant Allstate breached the "Appraisal Provision" in Plaintiff's policy of insurance by naming Defendant Stephen Medeiros, who was neither competent, nor independent. ***See Exhibit "B".*** In this respect, Defendant Stephen Medeiros was not independent, nor competent because his estimate for all the damages to Plaintiff's home was nearly identical to Allstate's adjuster in both scope and price. ***See Exhibit "C" and Exhibit "D".*** In addition, Defendant Medeiros was not competent because his estimate omitted obvious damages to Plaintiff's home. Additionally, Medeiros knew the exact damages being appraised and claimed by Plaintiff. Said damages were delineated in James Ward's May 28, 2012 estimate in the approximate amount of $56,881.88. ***See Exhibit "G"*** Furthermore, Defendant Medeiros misrepresented the qualifications and status of his company by representing that his company was a

limited liability company registered and in good standing with the Texas Secretary of State, when in fact his company was non-active for "tax forfeiture" matters.

7. Plaintiff filed his Original Petition on March 19, 2013 and served both Defendant Allstate and Defendant Stephen Medeiros. Despite the fact that Allstate had actual knowledge of the fact that Plaintiff had withdrawn his appraisal request and had filed suit, Defendant Allstate and Defendant Stephen Medeiros unilaterally chose to continue with the appraisal process. On April 11, 2013, Allstate submitted an appraisal award in the RCV amount of $9,795.80 and on April 30, 2013 Defendant Allstate tendered payment in the amount $9,243.51; however, Plaintiff refused to accept the tender. ***See Exhibit "E".*** Plaintiff contends that Defendant Allstate breached the "Appraisal Provision" in Plaintiff's policy of insurance by failing to name a competent and independent appraiser and by unilaterally continuing with the appraisal process after Plaintiff gave written notice to Defendant Allstate and Defendant Stephen Medeiros of his notice to withdraw from appraisal. ***See Exhibit "B".***

8. Defendant Allstate subsequently filed its Motion for Summary Judgment on June 14, 2013, before the parties conducted any discovery.

9. As it is necessary for Plaintiff to obtain the claim file in order to fully respond to the pending summary judgment motion, Plaintiff sent written discovery requests to Defendant Allstate along with the filing of Plaintiff's original petition on March 19, 2013. Defendant Allstate has failed to properly respond to Plaintiff's discovery requests. Moreover, Defendant, Allstate, has failed to produce the claim file in its initial disclosures, as required by Federal Rule of Civil Procedure 26(a)(1)(A). As such, a ruling on Defendant's Motion for Summary judgment is premature.

10. In the alternative and without waiving its objection and motion for continuance, Plaintiff files this Response to the MSJ, demonstrating why the MSJ should be denied.

11. There was no reason other than Defendant Allstate's substandard claims investigation for its under-payment of Plaintiff's claim, and Plaintiff should not have been required to undergo the expense of litigation or appraisal to receive full compensation for his covered loss.

12. All of the cases cited by Defendant Allstate are distinguishable on their facts and the legal issues before the Court in this case. It uses "strawman" arguments, and string cites to create only the image of a proper legal argument, because it has no facts or law to support its claim of entitlement to summary judgment. Other judges, including federal court judges, have refused to grant summary judgment for Defendant based on these identical "canned" arguments. ***See Exhibit "F".***

13. On the other hand, Plaintiff's evidence establishes multiple fact issues on Defendant's breach of contract; its violations of the Texas Insurance Code and its duty of good faith and fair dealings and its violations of the DTPA. Therefore, summary judgment is improper.

II. PLAINTIFF'S SUMMARY JUDGEMENT EVIDENCE

14. Plaintiff hereby gives notice that he intends to rely on the following documents as summary judgment evidence. These documents are incorporated by reference as if fully set forth herein:

EXHIBIT NUMBER	**TITLE OF DOCUMENT**
Plaintiff's Exhibit "A"	Affidavit of F. Blake Dietzmann
Plaintiff's Exhibit "B"	3/11/2013 Appraisal Withdrawal
Plaintiff's Exhibit "C"	Stephen Medeiros appraisal estimate
Plaintiff's Exhibit "D"	Allstate's 4/18/2012 payment of $51.79
Plaintiff's Exhibit "E"	Appraisal Award Payment $9,243.51
Plaintiff's Exhibit "F"	Summary Judgment Orders
Plaintiff's Exhibit "G"	James Ward appraisal estimate

III. STATEMENT OF ISSUES

15. Whether appraisal, as a matter of law, absolves Defendant Allstate of all liability for breach of contract, breach of the duty of good faith and fair dealing, violations of Texas Insurance Code Chapters 541 and 542.

IV. STANDARD OF REVIEW

16. A movant is entitled to summary judgment when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrelt, 477 U.S. 317, 322-24 (1986);* FED.R.CIV.P. 56(c). An issue is genuine if the evidence presented is sufficient for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242,255-56 (1986).* An issue is material if its resolution could affect the outcome of the action. *Id.* at 248. The admissibility of evidence is held to the same standards and rules that govern the admissibility of evidence at trial. *Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 650 n. 3 (5th Cir. 1992).* After adequate time for discovery and upon motion, summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex, 477 U.S. at 322.*

V. STATEMENT OF FACTS AND NATURE AND STAGE OF PROCEEDINGS

17. Plaintiff's home sustained significant damages during a March 29, 2012 hailstorm and/or windstorm. The storm caused substantial damage to the interior and exterior of the home.

18. Immediately after the storm, Plaintiff filed a claim with Allstate for damages to his property caused by the storm and Allstate determined damages to be $51.79 after deductible.

19. Plaintiff invoked appraisal on July 30, 2012 and soon after, Plaintiff, withdrew the appraisal request on March 11, 2013 and filed suit in County Court at Law Number 6. Plaintiff's withdrawal was

based on the fact that Defendant Allstate breached the "Appraisal Provision" in Plaintiff's policy of insurance by naming Defendant Stephen Medeiros that was neither competent, nor independent.

20. Defendant removed the case to Federal Court on April 19, 2013 and filed its MSJ on June 14, 2013, arguing that any wrongdoing to Plaintiff was absolved by appraisal. Plaintiff contends the appraisal that was invoked by Plaintiff was withdrawn by Plaintiff for the reasons stated above. Defendant's Motion for Summary Judgment should be denied.

VI. ARGUMENT AND AUTHORITIES

A. DEFENDANT ALLSTATE BREACHED THE APPRAISAL PROVISION IN PLAINTIFFS POLICY OF INSURANCE.

21. Plaintiff contends that Defendant Allstate breached the policy of insurance by failing to name a competent and independent appraiser as stated in the "Appraisal Provision" in Plaintiff's policy of insurance, more specifically,

> "**Appraisal.** If you and we fail to agree on the actual cash value, amount of loss, or cost of repair or replacement, either can make a written demand for appraisal. Each will then select a **competent, independent** appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers will then set the amount of loss, stating separately the actual cash value and loss to each item. If you or we request that they do so, the appraisers will also set:
>
> a. the full replacement cost of the dwelling
> b. the full replacement cost of any other building upon which loss is claimed
> c. the full cost of repair or replacement of loss to such building, without deduction for depreciation
>
> If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these and filed with us will set the amount of the loss. Such award shall be binding on you and us.
>
> Each party will pay its own appraiser and bear the other expense of the appraisal and umpire equally.

B. APPRAISAL AWARD NOT VALID

22. In the event this Honorable Court finds that the Appraisal Award is valid and enforceable,

Plaintiff contends that Defendant Allstate has breached the policy of insurance by failing to pay policy benefits to Plaintiff, Defendant Allstate has breached its duty of good faith and fair dealings and has violated Chapters 541 and 542 of the Texas Insurance Code and the DTPA.

C. DEFENDANT ALLSTATE BREACHED THE CONTRACT WITH PLAINTIFF

23. When an insurer underpays a claim, it is liable to the insured in damages for breach of contract for the amount found that the insurer should have paid on the claim, as well as for interest under the Prompt Payment of Claims Act ("PPCA") on amounts "ultimately determined to be owed." *Republic Underwriters Ins. Co. v. Mex-Tex*, 150 S.W.3d 423, 426 (Tex. 2004). While *Mex-Tex* was not an "appraisal" case, its holding was not limited to its facts.

24. In this case, had the amount of loss been determined to be zero dollars, Defendant Allstate would have not have been liable to Plaintiff for breach of contract or penalty interest and attorneys' fees under the PPCA—"if the appraisal determine[s] that the full value [is] what the insurer offered, there [is] no breach of contract."

25. Defendant Allstate argues the exact converse of *In re Universal*: if appraisal determines that the full value is more than what the insurer offered, there is no breach of contract. From this upside down argument, Defendant Allstate then bypasses *Mex-Tex* and the PPCA completely under the false supposition it is not in breach of the policy after having been found to have underpaid on amounts owed under the policy. Defendant Allstate continues with its faulty logic in claiming that by tendering the difference between what they originally paid on Plaintiff's claim and the amount determined to be owed by appraisal, it is completely excused of any actionable conduct.

26. In Defendant Allstate's view of the world, the insurer never loses if it goes to appraisal. If appraisal determines the insurer owes nothing, the insurer wins on breach of contract and bad faith. If appraisal determines the insurer owes more than what it paid on the claim, the insurer wins on breach of

contract and bad faith. Certainly if that were true, there would be no need for the long appellate court opinions Defendant cites in its motion—or for the Texas Insurance Code for that matter. Further, if that were true, all bad faith would disappear and the Insurance Code provisions could all be repealed as serving no useful purpose in light of appraisal's dispositive powers.

27. To the contrary of Defendant Allstate's arguments, when an insurer breaches its duty of good faith and fair dealing, it is in material breach of its contract with the insured, and it is liable to the insured for additional damages, including but not limited to punitive damages and mental anguish. This result is entirely consistent with the law as applied to all contracts:

> "The Restatement lists five circumstances significant in determining whether a failure to perform is material:
>
> a. the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> b. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> c. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> d. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances;
> e. *the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing*." ***Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 199 (Tex. 2004).**

28. In the context of an insurance policy, the standard of good faith and fair dealing is defined to track the statutory prohibition on unfair refusal to settle, *i.e*, "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." *Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997). As such, when an insurer commits bad faith it materially breaches its contract.

29. While it is true that because appraisal has determined the amount owed by the insurer on the claim that the trial court is now excused from submitting that issue to the jury, the case is not over. Defendant has not admitted liability. As the cases relied upon by Defendant expressly state, appraisal does not fix the insurer's liability. *Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, 2011 U.S. Dist. LEXIS 20604 (S.D. Tex. Mar. 2, 2011); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex. App.—Corpus Christi 2004).

30. In this case, the court still needs to make a factual determination as to the point in time when the Defendant Allstate's liability for the amount owed on the claim became fixed and clear. Defendant Allstate appears to claim that its liability did not become fixed until it paid the appraisal. Appraisal in and of itself does not accomplish that proof, and none of the cases relied on by Defendant Allstate so hold.

31. Moreover, whether an insurer's liability was reasonably clear, and, consequently, whether it acted within the standards of good faith and fair dealing, is a question for the fact-finder. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d at 55. In *Giles*, the Texas Supreme Court held:

> "However, we reject the suggestion that whether an insurer's liability has become reasonably clear presents a question of law for the court rather than a fact issue for the jury. Treating the issue as one of law would undeniably expand this Court's ability to overturn bad-faith judgments. We do not believe, however, that the difficulty of no-evidence review in bad faith cases could possibly justify this judicial sleight-of-hand to circumvent the constraints our Constitution imposes upon this Court. We have long recognized that the Texas Constitution confers an exceptionally broad jury trial right upon litigants. And we have warned that courts must not lightly deprive our people of this right by taking an issue away from the jury. A court may be entitled to decide an issue as a matter of law when there is no conflict in the evidence, but when there is evidence on either side, the issue is a fact question… **We therefore hold that whether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is a question for the fact-finder**."

32. Thus, the determination of when the liability of Defendant Allstate was clear is a question to be answered by the jury, and summary judgment on this issue is not proper. Further, as a matter of law,

Defendant Allstate did not necessarily absolve itself of liability for breach of contract by submitting to appraisal after it demonstrably failed to pay the Plaintiff the full value of the claim when Defendant Allstate's liability under the policy was reasonably clear.

33. All of the cases cited by Defendant Allstate in support of its claim of entitlement to absolution through appraisal are appeals of summary judgments by plaintiffs who offered only two kinds of evidence: (1) the difference between the amount the insurer paid on the claim and the amount determined to be owed through appraisal; and (2) the appraisal was flawed. Here, Plaintiff is not relying on such evidence alone, and instead is demonstrating that Defendant Allstate performed a substandard claims investigation by failing to identify and compensate Plaintiff for obvious damage covered under the policy, and then forcing Plaintiff unnecessarily to file suit and/or submit to appraisal just to receive payment for amounts Defendant knew it should have paid as part of a proper claims investigation.

D. PLAINTIFF'S EXTRA-CONTRACTUAL CLAIMS REMAIN BECAUSE DEFENDANT ALLSTATE BREACHED ITS DUTY OF GOOD FAITH AND FAIR DEALING AND FAILED TO CONDUCT A REASONABLE INVESTIGATION OF PLAINTIFFS CLAIM.

34. Plaintiff has already raised a fact issue on whether his breach of contract claim survives. However, even if this Court finds that Plaintiff's breach of contract claim has been remedied by appraisal, Plaintiff is entitled to maintain his extra-contractual claims. The Northern District of Texas court in *Church On The Rock North d/b/a North Church v. Church Mutual Ins. Co., No. 3:10-CV-0975-L (N.D. Tex. Feb. 11, 2013)* determined that an insured's claims for violations of Texas Insurance Code and bad faith remained even after an appraisal award is issued. The court ruled as follows:

> "**Moreover, contrary to CMIC's contention, the courts in *Amine* and *Breshears* did not hold that timely payment of an appraisal award under the policy precludes an award of statutory penalties as a matter of law. In *Breshears,* the court noted that an appraisal decision merely estops one party from contesting the issue of the value of damages in a suit on the insurance contract.**

> **The court says nothing about an appraisal decision estopping an insured from asserting extra-contractual claims. Rather, the court held merely: 'As there was no breach of contract by State Farm, and consequently no judgment against it on which to base interest calculations, prejudgment interest cannot be awarded against State Farm**.'
> …
> CMIC also cites *Amine* for the proposition that Texas law clearly holds that payment of an appraisal award does not constitute a liability finding required under Tex. Ins. Code §542. CMIC contends that, '[b]ecause there has been no finding of liability, [North Church] cannot sue for pre-appraisal violations.' CMIC correctly notes that to maintain a claim for delay of payment under the Texas Insurance Code, an insured must establish that: (1) a claim exists under an insurance policy; (2) the insurer is liable for the claim; and (3) the insurer failed to comply with the Texas Insurance Code. CMIC's contention that North Church cannot sue for pre-appraisal violations under the Texas Insurance Code because there was no finding of liability in the appraisal process, however, is based on faulty logic. *Amine* and other Texas courts have concluded that unless the parties agree to permit liability to be addressed through the appraisal process, the appraisal is limited to determining the amount of loss. Both parties acknowledge that there has been no finding of liability to date and that the appraisal dealt only with the amount of the loss sustained by North Church, not CMIC's liability. **That CMIC's liability was not considered or determined in the appraisal process, however, is not evidence that CMIC is not liable under the Policy**."

35. Just like the insurer in *Church*, Defendant Allstate's arguments are based on faulty logic. The only effect of the appraisal award on Plaintiffs' claims is estopping Plaintiff from contesting the amount of his loss. It does not estop Plaintiff from pursuing his extra-contractual claims, or absolve Allstate of liability for its bad faith or violations of the Texas Insurance Code.

36. Further, Texas law recognizes three exceptions to the general rule that an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract. These three exceptions are:

> (1) The duty of an insurer to timely investigate its insured's claims is an tort which can be pursued in the absence of a showing that the insurer breached the insurance contract;
>
> (2) This same rationale supports Plaintiff's statutory claims under the Texas Insurance Code, as the provisions of these statutes are in addition to any other remedies permitted by law. If Plaintiff can prove that Defendants may have

> unduly delayed payment of their claim after Defendants' liability became reasonably clear, it would establish a case under the Texas Insurance Code; and
>
> (3) An insured can also recover tort damages, independent of a breach of contract claim, if it is shown that the insurer committed some extreme act that caused injury independent of the policy claim. ***Intermodal Equipment Logistics, et al. v. Hartford Accident and Indemnity,*** **Case No. G-10-458 (S. D. Tex. April 18, 2012).**

37. "An extreme act by the insured" is not the only way Plaintiffs can move forward with their extra-contractual claims. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). Moreover, even though Defendant cites *Republic Ins. Co. v. Stoker*, the facts in *Stoker* are entirely different than the facts here because in *Stoker* no coverage existed for the damages under the policy; coverage for the damages is not in dispute in this case. Plaintiff here presents competent summary judgment evidence to raise a fact issue precluding summary judgment on her claims. Plaintiff presents summary judgment evidence on Defendant's breach of the duty of good faith and fair dealing and of its violations of Chapters 541 and 542 of the Texas Insurance Code.

a. Defendant Allstate failed to reasonably and timely investigate Plaintiff's claim.

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

39. Plaintiff presents summary judgment evidence that concludes that Defendant Allstate did not properly adjust Plaintiff's claim, which resulted in an inaccurate, insufficient, and unreliable claim settlement. ***See Exhibit "C" and Exhibit "D".*** This is precisely what Plaintiff has alleged in this case.

40. More importantly, Defendant Allstate has provided no evidence showing that its adjustment of Plaintiff's claim was reasonable. Contrary to the plaintiffs in *Breshears* and its progeny, Plaintiff here presents competent summary judgment evidence on Defendant Allstate's failure to conduct a reasonable investigation in violation of its duty of good faith and fair dealing. As such, the facts of *Breshears* are undoubtedly distinguishable from this case, and Defendant Allstate's MSJ should be denied.

b. Prompt payment of an appraisal award does not preclude a finding of liability for extra-contractual claims on pre-appraisal policy violations

41. Defendant Allstate urges that because Plaintiff invoked the appraisal provision under the Policy and since Allstate participated and ultimately paid the appraisal award, that it is not liable for breach of contract or any other of Plaintiff's claims under the Policy. Specifically, Defendant Allstate states, "Allstate complied with the terms of insurance contract, participated in the appraisal process – which Plaintiff invoked – and tendered payment of the appraisal award upon completion of the process. Accordingly, there is no breach of contract as a matter of law." Defendant Allstate goes on to cite various case law allegedly supporting its conclusions. However, Defendant Allstate has misinterpreted Texas law on the issue of appraisal awards, and Plaintiff is entitled to recovery on its claims.

42. Depending on the policy language, appraisal clauses may be invoked despite an insurance company's failure to comply with claims handling provisions of the insurance policy and provisions of the Texas Insurance Code. *EMD Office Services, Inc. v. Hartford Lloyds Ins, Co., 2011 U.S. Dist.* LEXIS 71209 at *10-11 (S.D. Tex., July 1, 2011). Therefore, compliance with claims handling provisions and the Texas Insurance Code may not necessarily be conditions precedent to invoking the appraisal process. *Id.* Although the *EMD Office Services, Inc*. case held an insurer may invoke an

appraisal clause despite failing to comply with the terms of its own policy, the Court failed to find that such a ruling precludes an insured party from filing suit on extra-contractual claims under the policy. *Id.* On the contrary, it would appear that the appraisal process is to be enforced apart from the other provisions of the policy, not in spite of them. As such, the remaining policy provisions would be subject to enforcement.

43. Defendant Allstate cites *Franco v. Slavonic Mut. Fire Ins. Ass'n* 154 S.W.3d 777, 787 (Tex. App. – Houston-14th Dist.) 2004, no pet), "If payment of the appraisal award negates the claim for breach of contract, there can be no bad faith related to the handling of the claim". The court in *Franco v. Slavonic Mut. Fire Ins. Ass'n,* also explained, "The effect of appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court."

44. In fact, extra-contractual and statutorily-based claims such as the breach of the duty of good faith and fair dealing are "outside the bounds" of an appraisal decision, and such damages "are not limited to the amount of the appraisal decision." *Allison v. Fire Ins, Exch.,* 98 SW.3d 227, 256 (Tex.App.— Austin 2002, pet. granted, judgment vacated w.r.m.).

45. In the *Allison* case, despite an appraisal award, the case proceeded to jury trial a year following the appraisal decision, which found the defendant breached its duty of good faith and fair dealing toward the plaintiff, and that defendant committed a DTPA violation. *id.,* at 233. On appeal, the Texas Court of Appeals held that a jury could have found that the defendant misrepresented to plaintiff why they needed more time to handle the claim, and that because there was "some evidence of a pattern of failure to promptly pay that caused further damage to the house" the jury award as to breach of the duty of good faith and fair dealing was affirmed, *Id.,* at 249-250. The DTPA award was also upheld. *Id.,* at 251.

Therefore, if given the opportunity to pursue discovery of its claims, Plaintiff may also uncover similar evidence supportive of her claims against Defendant.

46. In *Breshears,* the plaintiffs were claiming breach of contract and extra-contractual damages because the amount of the appraisal award was different from the amount initially offered by the insurance company, not because the insurance company breached the policy of insurance and violated the Texas Insurance Code, prior to invoking the appraisal process. *Breshears v. State Farm Lloyds,* 155 S.W.3d 340, 344 (Tcx. *App.*— Corpus Christi 2004, pet. denied). Therefore, *Breshears* is also easily distinguished from the case before this Court. In this case, it is Plaintiff's contention that Allstate breached the policy of insurance, when Allstate, through its adjuster, Brian Northcutt failed to correctly determine the amount of the loss that led to the coverage dispute, and ultimately the appraisal. Plaintiff contends that despite the fact that Allstate later fulfilled the separate obligation to pay the appraisal award, Allstate was already in breach of the contract by having not adequately and timely paid the amount owed for the covered loss and is liable for attorney fees.

47. In *Brownlow*, the plaintiff argued that the insurer failed to notify her within 45 days that it was accepting or rejecting her claim, but the evidence showed otherwise, and in any event this issue was not submitted to the jury for decision. *Brownlow v. United Services Automobile Ass'n,* 2005 Tex. App. LEXIS 1987 at *8-9 (Tex. App.— Corpus Christi [13th Dist.], March 17.2005). Therefore, the Court concluded there was no violation of the Texas Insurance Code. *Id*. The Court did not state that the plaintiff was precluded from producing such evidence, or that Plaintiff had no cause of action. The Court merely stated that no evidence was presented.

48. In *State Farm Lloyds v. Johnson*, the Supreme Court of Texas held that litigating the scope of appraisal was prohibited, and that appraisal clauses were favored for determining the amount of loss, though, not liability. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895, 890 (Tex. 2009). The Court

did not address pre-appraisal breaches of an insurance policy or extra-contractual claims, nor did the Court preclude any such claims from proceeding after an appraisal award was rendered. *Id.*

49. In the recent unpublished opinion of *Blum's v. Furniture Co. v. Certain Underwriters at Lloyds London*, the plaintiff argued that because the appraisal award was greater than the initial payments made by the carrier it was untimely payment under the policy and therefore a breach of contract. *Blum's v. Furniture Co. v. Certain Underwriters at Lloyds London*, 2012 U.S. App. LEXIS 1400 at *7 (5th Cir. 2012). However, this is clearly contrary to the *Breshears* holding. *Id.* The parties were permitted to complete discovery, and the Court held that the plaintiff had no evidence it had suffered any independent injury or untimely payment due to the defendant's actions. *Id.*, at *9. The Court did not look at any pre-appraisal actions of the defendant, nor was the plaintiff asserting any other complaint other than the amount of the award and timeliness of the payment. *Id.* Therefore, the *Blum's v. Furniture Co.* case does not preclude claims for violations of insurance policies prior to the invocation of the appraisal process.

50. In this case, Allstate failed to properly and thoroughly investigate all the damages to Plaintiff's home, and Plaintiff was forced to retain an attorney to assist him with his insurance disputes. The duty to investigate and evaluate the amount of the loss falls squarely on the insurer. In *Viles v. Sec. Nat'l Ins. Co., 788 S.W.2d 566 (Tex. 1990),* the Court held that the insurer has a "duty to investigate thoroughly and in good faith".

51. In *Church on the Rock North d/b/a the North Church v. Church Mutual Insurance Company*, Slip Copy (2013 WL 497879), the court held that the Defendant failed to demonstrate the absence of a genuine issue of material fact as to Plaintiff's claims. The Court in this case denied Defendant's motion for summary judgment (which was similar to Allstate's motion for summary judgment) and Plaintiff's

claims based on breach of contract, breach of duty of good faith and fair dealing, and violations of the Texas Insurance Code and DTPA were allowed to proceed to trial.

52. The Texas Supreme Court is very clear that the appraisal process only resolves a discrete *factual* matter and is not determinative of the liability issues such as breach of contract or bad faith. *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002); *Scottish Union & Nat'l Ins. Co. v. Clancy*, 71 Tex. 5, 8 S.W. 630, 631 (Tex. 1888) (appraisal "only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts.") see also *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009) (explaining that appraisal resolves a dispute about the amount of the loss, but liability questions are the province of the courts). Thus, the appraisal only arises when the parties already have a "dispute" about whether the insurer adequately investigated and paid the amount of covered loss, and through the contractual appraisal process, the most that can be resolved by the appraisal process is the discreet factual question of what should have been determined as the amount of the loss. Because an appraisal clause may be invoked separate and apart from other policy provisions, and because an insured party is entitled to bring extra-contractual claims based on the insurer's lack of compliance with the policy prior to invocation of the appraisal clause, based on the following evidence Plaintiff is entitled to pursue its extra-contractual claims against Defendant.

53. Texas district courts have consistently rejected Defendant's simplistic "no contract claim = no bad faith claim" arguments. For instance, in *Cloud v. Certain Underwriters at Lloyd's, London, et al.* (No. 2010-23268, in the 281st Judicial District Court), Judge Sylvia Matthews was faced with a similar summary judgment argument made by Lloyds, London. Judge Matthews granted summary judgment on plaintiffs' contract claims. ***See Exhibit "F".*** At the same time, however, Judge Matthews denied summary judgment on plaintiffs' common-law bad faith and statutory bad faith claims. ***See Exhibit***

"F". Other district courts—including Judge Patricia Kerrigan and Judge Mike Miller—have ruled similarly, allowing plaintiffs to pursue their insurers for their bad faith. ***See Exhibit "F".***

54. Recently, the Honorable Stephen Wm. Smith, United States Magistrate Judge for this United States District Court for the Southern District of Texas permitted a plaintiff in a Hurricane Ike case to prosecute its breach of contract and bad faith claims against an insurer following the entering of an appraisal award. ***See Exhibit "F".*** In *Essex Insurance Company v. Jeffrey Helton and Deborah Helton*, the Heltons made a claim with their insurer, Essex, for Hurricane Ike damages to a business building. After submitting the claim to an appraisal panel pursuant to the insurance policy, an appraisal award of $417,000 was entered. Following this, Essex filed a declaratory judgment action seeking to set aside the appraisal award. The Heltons filed a counterclaim for breach of contract and bad faith, and filed a summary judgment motion seeking the dismissal of Essex's declaratory judgment action. After affirming the validity of the appraisal award, Magistrate Judge Smith dismissed the insurer's declaratory judgment action, and allowed the Heltons' counterclaim for breach of contract and bad faith to go to trial.

55. This determination by the Southern District of Texas court demonstrates that, contrary to Defendant's contentions, Plaintiffs' extra-contractual and bad faith causes of action are not precluded to be adjudicated by the trier of fact because of an appraisal award having been entered in this case.

56. Additionally, Magistrate Judge Froeschner from the United States District Court for the Southern District of Texas recently denied a summary judgment in part on similar grounds. Moreover, as discussed above, recently a jury in a case pending in state district court determined that an insurer had breached the insurance contract, and had acted in bad faith and in violation of the Texas Insurance Code in the handling of a hurricane claim, despite the fact that an appraisal award had been entered and paid by the insurance company. ***See Exhibit "F".*** Thus, it is clear that appraisal does not dispose of

Plaintiff's claims for Defendant Allstate's bad faith and violations of their statutory duties under the Texas Insurance Code. As such, Plaintiffs respectfully requests that this Court deny Defendant's meritless MSJ.

c. Defendant Allstate did not comply with the Texas Insurance Code or Policy provisions

57. The provisions of the Texas Insurance Code are in addition to any other remedies permitted by law. *Higginbotham v. State Farm Mutual Auto Ins. Co., 103 F.3d 456, 460 (5th Cir. 1997).* If Plaintiff can prove that Defendant may have unduly delayed payment of the claim after its liability became reasonably clear, they will establish a submissible case under the Texas Insurance Code for the jury to decide. *Universe Life Ins. Co. v. Giles, 950 S.W.2d at 56.* The point in time when liability became reasonably clear is a question of fact for the jury.

58. The prompt payment of claims is mandated by the Texas Insurance Code. TEX. INS. CODE Ann. §542.05l-.06I (Vernon 2009). It is to be liberally construed to promote the Act's purpose of obtaining prompt payment of insurance claims. Id., §542.054. An insurer must acknowledge receipt of a claim, begin an investigation, and request documentation from its insured within 15 days of notification of the claim. TEX. INS. CODE Ann. §542.055(a) (Vernon 2009). The claimant must be notified by the insurer in writing of the acceptance or rejection of the claim within 15 business days after it receives all items, statements and forms that are required for the insurer to secure final proof of loss. Id., §542.056(a). If the insurer notifies the insured that it needs more time for claims investigation, the acceptance or rejection must be made within 45 days of the notice. Id., §542.056(d). A claim must be paid within **five business days** after notice that the claim, or a part of the claim, will be paid. Tax. INS. CODE Ann. §542.057(a) (Vernon 2009). If an insurer fails to comply with the statutorily-based time frames, it will be subjected to damages, including interest on the amount of the claim and attorney's fees. TEX. INS. CODE Ann. §542.058(a) and 542.060 (Vernon 2009).

59. An insurer violates the DTPA when it engages in a false, misleading, or deceptive act or practice by: (1) representing services had or would have characteristics or benefits they did not have; (2) representing services are or will he of a particular standard or quality when they are of another; (3) representing an agreement confers or involves rights, remedies, or obligations it did not have or involve; or (4) violating the provisions of the Texas Insurance Code. Thx. Bus. & COM. CODE Ann. §l7.46(b)(5), (7), (12) and 17.50(a)(4) (Vernon 2006).

60. Defendant Allstate violated the DTPA by representing services, characteristics or benefits that it did not have, specifically, naming Stephen Medeiros as its appraiser. More specifically, Allstate's appraiser, Stephen Medeiros performed his appraisal services and presented his estimates under a company, *Medeiros Appraisal Services, LLC* that was "inactive" with the Texas Secretary of State for failure to pay taxes.

61. An appraisal award does not shield an insurer from extra-contractual claims on such non-compliance prior to the appraisal process. *Allison v. Fire ins. Exch.*, 98 *S.W.3d* 227, 256 (Tex.App.—Austin 2002, pet. granted, judgment vacated w.r.m.); *Amine v Liberty Lloyds qf Texas Ins. Co.*, 2007 Tex. App. LEXIS 6280 at *15 (Tex. App—Houston [I' Dist.], August 9, 2007). In fact, the appraisal award is a value of damages only, and does not determine liability. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 890 (Tex. 2008). Because Plaintiff has shown a genuine issue of material fact as to whether Defendant's delay in paying appraisal award and Defendant's misrepresentations regarding the legitimacy of *Medeiros Appraisal Services, LLC*, Defendant's motion for summary judgment must be denied.

d. Plaintiff has suffered injuries independent of his policy claim.

62. Even if the Court finds that there is no breach of contract and that Plaintiff is thus precluded from bringing his extra-contractual claims based on pre-appraisal misconduct by Defendant, Plaintiff may

bring his claims based upon the exception in the event of additional damage. Under Texas law, in the event that the insured has no evidence of pre-appraisal misconduct by the insurer, it has been held that while an insured cannot generally prove a bad faith claim absent a breach of contract, there is an exception. *Bunting v State Farm Lloyds.* 2000 US. Dist. LEXIS 1674 at *4 (ND. Tex., February 14, 2000). The insurer must "commit some act, so extreme, that would cause injury independent of the policy claim" or fail "to timely investigate the insured's claim." *Id.,* quoting *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995); *Toonen United States Automobile Ass'n, 935* S,W.2d 937, 941 (Tex. App.— San Antonio 1996, no writ). Liability under TEX. INS. CODE §541 and under the Texas Deceptive Trade Practices Act ("DTPA") includes the same standard as a common-law bad faith claim. *Spicewood Summit Office Condominiums Ass'n, Inc. v. Amer. First Lloyds Ins. Co.,* 287 SW.3d 461, 468 (Tex. App—Austin 2009, rev, den.); *Douglas v. State Farm Lloyds,* 37 F.Supp.2d 532, *544* **(**S.D. Tex. 1999). "The issue of the breach of the duty of good faith and fair dealing 'focuses not on whether the claim was valid but on the reasonableness of the insurer's conduct' in handling the claim." *Allison v. Fire Ins. Exch.,* 98 S.W.3d 227, 248 (Tex.App.— Austin 2002, pet. granted, judgm't vacated w.r.m) (quoting *Lyons v. Millers Cas. Ins. Co.,* 866 S.W.2d 597, 601 (Tex. 1993)). It is an issue of fact whether an insurer breached its duty of good faith and fair dealing, and is peculiarly tailored to the province of the jury. *Id.* At no time from the start of the claim on March 29, 2012, through the invocation of appraisal on July 31, 2012, was Plaintiff issued sufficient funds by Defendant to make the necessary repairs to his property. Rather, Plaintiff was forced to only make temporary and partial repairs with the monies Defendant Allstate determined were owed under his policy of insurance.

VII.CONCLUSION

63. Plaintiff submits this, his late response to Defendant Allstate's summary judgment. The summary judgment response was agreed to be due on August 25, 2013, by Allstate counsel and

Plaintiff's counsel. Due to technical difficulties Plaintiff was not able to file his response until August 28, 2013. Plaintiff prays this Honorable court accepts this response to Defendant Allstate's summary judgment.

Plaintiff objects to Defendant Allstate's motion for summary judgment for the reasons outlined in Section (1) above. Alternatively, and in the event Plaintiff's objection is overruled, Defendant Allstate has failed to produce any evidence that it is entitled to dismissal as a matter of law. Plaintiff has presented ample evidence of Defendant Allstate's unfair settlement practices, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code, policy provisions, and DTPA, and Plaintiff's right to damages based on such actions regarding the Property. Defendant remains liable in its capacity as an insurer under both the Texas Insurance Code and the DTPA, and for extra-contractual damages. Therefore, the Court should grant oral argument for assistance in evaluating the assertions of the parties, and deny Defendant's motion for summary judgment as Defendant has failed to meet its burden of proof to show that there are no genuine issues of material facts regarding Plaintiff's breach of contract and extra-contractual claims. Plaintiff's further request that this Court grant him all such relief to which he may show himself to be justly entitled.

Respectfully submitted,

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