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October 2, 2023

TEXAS SUPREME COURT
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: *Amicus Curiae* Letter
No. 23-0534; *Rodriguez vs. Safeco Insurance Co. of Indiana*

To the Honorable Members of the Texas Supreme Court:

In 2009, this Court issued its decision in the seminal appraisal case *State Farm Lloyds vs. Johnson*. The Court stated:

> [A]ppraisal is intended to take place before suit is filed; this Court and others have held it is a condition precedent to suit. ***Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings***.

State Farm Lloyds vs. Johnson, 290 S.W.3d 886, 894 (Tex. 2009)(emphasis added). Today, often the very opposite is true. Texas appraisals now regularly involve attorneys and lawsuits, and a large number of appraisals take place after a lawsuit is filed. Unfortunately, an increasing number of Texas policyholder attorneys now routinely dump their clients' claims into appraisal, wait for an appraisal award in any increased amount to be issued, and then argue for hefty contingency fees –

despite doing virtually nothing other than signing up the client and hiring an appraiser.

Counsel for Rodriguez argues in their Reply brief that "Safeco's Interpretation 'Blunts' The Effectiveness Of Appraisal". This is a curious argument, given – as this Court has stated – that the appraisal process requires no attorneys, no lawsuits, and no pleadings. To the contrary, Safeco's argument is entirely consistent with the historic "effectiveness of appraisal" by avoiding the need for attorneys and litigation as part of every appraisal process.

Moreover, a reasonable argument can be made that allowing attorneys' fees to be awarded in every appraisal jeopardizes the very existence of a process that has served Texas policyholders and insurance companies well for over a century. Faced with an increase in attorneys and lawsuits in appraisals involving claims governed by Chapter 542A, which comprises the large majority of disputed first-party claims in this state, Texas insurance companies may have no choice but to reconsider inclusion of an appraisal provision in their policies.

That would be very unfortunate.

Accordingly, I respectfully submit this *amicus* letter to the Court asking that the Certified Question from the Fifth Circuit be answered in the **affirmative**.

Statement of Interest

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Steven J. Badger files this letter in the above-referenced cause in support of Safeco Insurance Company of Indiana. While I represent Safeco's related company, Liberty Mutual, in unrelated commercial insurance disputes, I do not represent Safeco in the *Rodriguez* matter. This letter has been prepared during my own time. No one has paid me for my time spent preparing this letter

Amici Background With The Appraisal Process

I am a Dallas attorney. After having the honor of working at the Court as a Briefing Attorney for Justice Jack Hightower in the 1991-1992 term, I joined the Dallas law firm Zelle LLP. I still practice there today.

For over thirty years, the entirety of my practice has been devoted to representing the Texas first-party property insurance industry in disputed claims. In addition to representing my insurance industry clients in their individual disputes, I am also very involved in addressing the broad issues arising in the Texas insurance industry. I have advocated before the Texas Legislature on insurance issues during the past five legislative sessions. Specifically, I was closely involved in working with the bill sponsors and interested stakeholders in advocating for passage of the legislation

(HB1774) at issue in this matter, testifying at several committee hearings in support of the legislation. I am not a lobbyist, but just a lawyer with a significant interest in finding solutions, legislative or otherwise, that help avoid disputed claims and other issues in the Texas insurance claims process.

I am a frequent speaker at insurance industry events and have written numerous articles on issues of interest to the first-party property insurance industry, including several articles on the appraisal process. *See Fixing Problems In The Texas Insurance Appraisal Process*, Law360; January 24, 2018 (Exhibit A).

For the first two decades of my career, most of the disputes handled by the 28 attorneys in my Dallas office involved actual lawsuits, in which our insurance company clients and their insureds resolved their disputed claims in a courtroom before a judge or a jury. We had perhaps one or two appraisal disputes in our office at any given time. But they were very few compared to our litigated matters.

In 2010, this started to change. Subsequent to this Court's 2009 decision in *State Farm Lloyds v. Johnson*, the number of matters in my office involving the appraisal process increased significantly. This trend increased even more significantly subsequent to this Court's 2019 decision in *Barbara*

Technologies Corporation v. State Farm Lloyds. Today, I estimate that almost half of the matters in my office involve the appraisal process.

Brief History of the Appraisal Process in Texas

As this Court wrote in *Johnson*, for over a century the insurance appraisal process received little attention by the Texas courts. From the first time this Court addressed the appraisal process in its 1888 decision in *Scottish Union & National Insurance Co. v. Clancy,* until this Court's 2009 decision in *Johnson*, the appraisal process worked. It was reserved as a means to resolve disputed claims where the dispute involved only a question as to the cost to repair agreed damage to covered property. Use of the appraisal process was limited.

This all changed with *Johnson*, when this Court held for the first time that disputes as to the existence and extent of damage, particularly in disputed hail damage claims, could be within the scope of the appraisal process. From the perspective of preserving judicial resources, the decision made sense – keep as many disputed insurance claims as possible out of the courts and let them be resolved through a nifty alternative dispute resolution process called appraisal. Unfortunately, and with all due respect to the Court, Justice Brister's opinion was not a model of clarity. The opinion can be read various ways, including allowing disputes as to the

existence and extent of damage (the most commonly disputed issue in the thousands of disputed Texas hail damage claims each year) to be placed into the appraisal process.

And with this, the floodgates opened. Invocation of the appraisal process increased dramatically.

Litigation concerning the appraisal process also increased. A quick review of the Westlaw database confirms this point. In the century of Texas jurisprudence prior to *Johnson*, Westlaw contains only a couple dozen reported decisions involving the appraisal process. That's it. In the decade after *Johnson,* there were over a hundred reported decisions. Today, appellate decisions involving appraisal come out almost weekly.

But this Court's decision in *Johnson* was not the only reason for the expanded use of the appraisal process. In 2008, Hurricane Ike struck the Texas gulf coast. Soon thereafter, entrepreneurial plaintiffs' attorneys identified the first-party insurance claims world as an area ripe for mass-tort-style litigation. Claim disputes increased. Lawsuit numbers skyrocketed.

An entire cottage-industry arose of attorneys ready to help Texans sue their insurance companies after wind and hail events. And how did Texas homeowners find these attorneys (or vice versa)? That was easy. Every

Texas contractor or public insurance adjuster has met a policyholder attorney at a storm-chasing contractor or public adjuster conference.[1] Most Texas policyholder attorneys actively market at these or similar conferences. Contractors and public adjusters refer their policyholder clients to these attorneys with the simple message: "*I've got this attorney who will help you for free*."

Seeing what was happening in my insurance company clients' disputed claims, in 2014 I wrote an article entitled *The Emerging Hail Risk; What The Hail Is Going On?;* Claims Journal, May 2, 2014 (Exhibit B). In this article I provided the following conclusion:

> It is very clear what the hail is going on. The property insurance industry is under attack. The present battle has nothing to do with repairing roofs actually damaged by hail, but instead putting money in the pockets of individuals who can find a way to inject themselves into the insurance claims process.

This attack included individuals who injected themselves specifically into the appraisal process. For the first time, Texas had an entire cottage-

[1] The storm-chasing industry has become big business. Contractors, public adjusters, policyholder attorneys, and others all convene at these conferences and learn how to maximize their payouts from insurance claims. They can attend a conference that teaches them how to "Win The Storm" - https://winthestorm.com/. They can also attend training classes that literally refers to hail as "Sky Diamonds" - https://www.skydiamondsuniversity.com/. They can also hire professional estimate writers who know how to "juice a claim" - https://claimjuicer.com/.

industry of professional appraisers and umpires who made a living by doing nothing but insurance appraisals.

By 2017, the "hail litigation" problem was so great that the Texas legislature was forced to act. The Legislature responded by enacting HB1774, the legislation at issue in this matter. HB1774, however, was directed primarily at addressing litigation abuse and did not specifically address the appraisal process. Despite some abuses in the appraisal process, the insurance industry was not overly concerned at that time about the appraisal process. This was in large part because under clear Texas law at the time, an insurance company that paid an appraisal award was protected from any "bad faith" exposure, either under the common law or the Texas Insurance Code. *See, e.g.*, *In re Slavonic Mut. Fire Ins.*, 308 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2010 (orig. proceeding); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied) (mem. op.). There was no liability for statutory penalty interest or attorneys' fees. Any abuse of the appraisal process existed as a manageable exposure for the Texas insurance industry. There was no reason to specifically address appraisal within HB1774.

But that all changed with this Court's 2019 decision in *Barbara Technologies Corporation v. State Farm Lloyds*. That decision changed

settled Texas law and held that the statutory penalties provided under Chapter 542 (attorneys' fees and penalty interest) were not barred as a matter of law by an insurer's payment of the amount owed under an appraisal award. This meant that in any situation where the appraisal award exceeded the adjusted claim measure by even a nominal amount, statutory penalty interest and attorneys' fees could potentially be recovered if the insured also established liability on the claim by dispositive motion or a trial on the merits.[2]

The response from the Texas policyholder attorney bar was swift:

And predictably lawsuit totals continued to increase. As did post-appraisal litigation brought for the sole purpose of recovering attorneys' fees, which is

[2] In enacting Chapter 542 in 2003, the Texas Legislature was not thinking about how the statute applied to the appraisal process. As noted above, use of the appraisal process was very limited at that time. Nevertheless, this Court held that the plain language of Chapter 542 compelled a finding that the legislation applied to appraisal awards. The very same can be said of Chapter 542A. In enacting Chapter 542A in 2017, the appraisal process was not directly before the Texas Legislature, as at that time the statutory penalties set forth in Chapter 542 did not apply to appraisal awards. But, like this Court found in *Barbara Technologies* as to Chapter 542, the plain language of Chapter 542A compels the conclusion that the legislation applies to appraisal awards.

exactly what Mr. Moseley, a policyholder attorney with McClenny Moseley & Associates in Houston, was looking for in his social media message above.[3]

Fortunately, over the past few years, the stampede to recover post-appraisal attorneys' fees has been thwarted by the line of cases clearly holding that in matters governed by Chapter 542A (which as stated above comprises the vast majority of disputed first-party insurance claims) the payment by an insurance company of the appraisal award and the statutory penalty interest potentially applicable on the claim precludes the recovery of attorneys' fees. Today, when an appraisal award is issued, the insurance company determines the additional claim payment owed, calculates the

[3] The author of the social media post above, Zach Moseley and his law firm McClenny Moseley & Associates currently find themselves in considerable trouble in the Louisiana federal courts, where they face allegations of fraud and barratry in the filing of thousands of hurricane lawsuits. These allegations have recently received significant press. An excellent summary of the story is available here: https://www.youtube.com/watch?v=V4XH2aUnJ0w. Moseley is not the only Texas policyholder attorney to face allegations of improper conduct in insurance claim litigation. He has plenty of company. In 2018, Texas policyholder attorney Kent Livesay was sentenced to five years in prison for fraud and barratry in hail claims: https://www.insurancejournal.com/news/southcentral/2018/06/26/493311.htm. A Galveston policyholder attorney, Chris Bertini, was also charged with barratry in representing clients he had never met: https://www.yahoo.com/now/galveston-attorney-charged-representing-clients-125359088.html And a San Antonio law firm closed shop after facing allegations of conspiracy, barratry and other improper conduct: https://www.claimsjournal.com/news/southcentral/2016/05/17/270866.htm. While there are of course some very reputable and professional Texas policyholder attorneys, others are not; which leads to the potential for significant attorney abuse in this practice area.

potential statutory penalty interest, and makes payment. And with that, the matter is resolved. There is no need for a lawsuit.

The Texas Appraisal Process Today

The Texas appraisal process exists today in a delicate state of balanced equilibrium.[4] The process is far from perfect. But it works for both sides. Insurance companies complain about paying the statutory penalty interest potentially applicable to an appraisal award (with such payment made in order to avoid the time, burden, and expense of further litigating liability on the claim). Policyholder attorneys complain about not being able to recover their attorneys' fees. The "equity" in this balance is that when policyholder attorney involvement is necessary, statutory penalty interest is often used to pay the attorneys' fees, leaving the insured with proceeds to repair the claimed damage. Additionally, insurance companies complain about abuses by policyholder-side participants in the process and policyholder advocates complain about insurance company abuses in the process. The equitable balance is that insurance companies have the ability to address

[4] Several states, including Florida, Louisiana, and California are all presently experiencing what is being called an "insurance crisis". Numerous articles describe the current crisis *See* https://www.washingtonpost.com/politics/2023/06/27/climate-change-is-fueling-an-insurance-crisis-there-no-easy-fix/. Because of proactive action by the Texas insurance industry, including the passage of HB1774 and other legislative action, Texas is not presently on the list of states in crisis. Indeed, the entire Texas insurance industry exists in a delicate state of balanced equilibrium.

abuses through policy form changes, with consumers being protected from any overreaching changes with required policy form approval by the Texas Department of Insurance.

A disruption of this balance – which is certain to occur by opening up appraisal not only to the potential recovery of statutory penalty interest but also attorneys' fees – may not only "blunt" the appraisal process but could actually destroy the appraisal process as it exists today.

This is not a hyperbolic panic button. It is a realistic possible outcome. Examining what the appraisal process looks like today illustrates why this could actually happen.

There are essentially three types of appraisals taking place today in Texas:

1. The Traditional No Lawsuit No Attorney Appraisal

This is the way appraisal is supposed to work. No attorneys. No lawsuits. The parties appoint appraisers. The appraisers agree on an umpire. The appraisal panel issues an award. The award is paid by the insurance company consistent with coverage. The dispute is resolved. A large number of appraisals are completed in Texas following this preferred process consistent with how the appraisal process is supposed to work.

2. Appraisal Led By Attorneys Signing-Up Clients And Immediately Dumping All Of Them Into Appraisal

The self-proclaimed "'King' of first-party homeowner's insurance claims in Texas", Eric Dick, is an example of an attorney engaging in this practice.[5] One day last week, Dick filed four lawsuits in Harris County District Court. In these **Dick Matters** (Exhibit C), all of which are virtually identical in form and content, Dick first pleaded the typical insurance dispute causes of action. And then, as he always does, Dick used the lawsuit to demand appraisal. Dick has filed hundreds of identical lawsuits across Texas following this approach.

One must ask: Why? If, as this Court has said, appraisal requires no lawsuits, no pleadings, and not attorneys, why is Dick filing lawsuits for matters he is immediately putting into appraisal? Why is Dick even being engaged in a process that requires no attorneys?

Dick does not answer these questions in his *amicus* brief.

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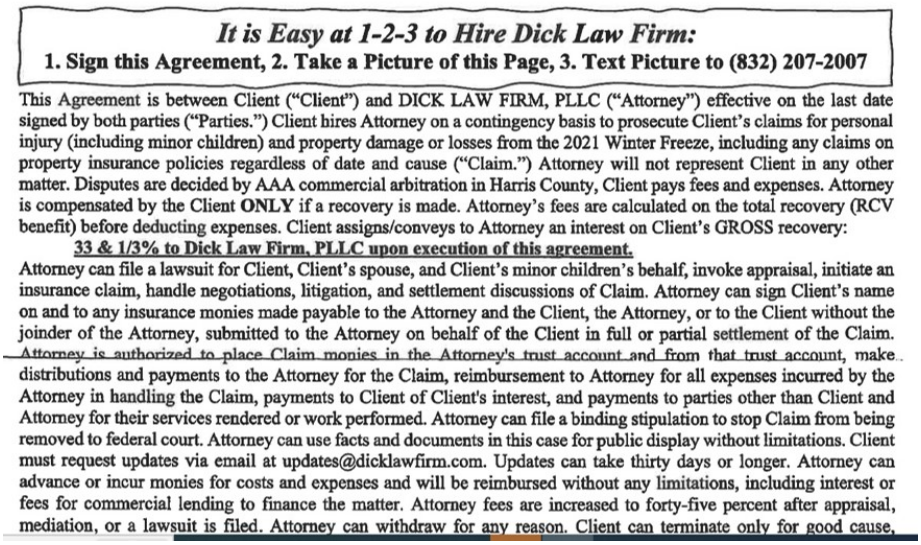
[5] Before he bestowed this benevolent title upon himself, I have never heard anyone in the Texas insurance industry refer to Dick as the "King" of anything, other than perhaps creative advertising in which he uses the marketing slogans: "*Need A Lawyer Hire A Dick*", "*Better Get Dick*", "*I Will Work Long And Hard For You*", "*I Like Dick*", and "*Can't Lick This Dick*." His slogans are even available on t-shirts and other merchandise by clicking the link "BUY A SHIRT" on the Dick Law Firm website: https://www.dicklawfirm.com/ .

Perhaps the answer to these questions lies in Dick's fee agreement with his clients. One version of this fee agreement, mailed last year to thousands of Harris County residents, states as follows:



It is Easy at 1-2-3 to Hire Dick Law Firm:

1. Sign this Agreement, 2. Take a Picture of this Page, 3. Text Picture to (832) 207-2007

This Agreement is between Client ("Client") and DICK LAW FIRM, PLLC ("Attorney") effective on the last date signed by both parties ("Parties.") Client hires Attorney on a contingency basis to prosecute Client's claims for personal injury (including minor children) and property damage or losses from the 2021 Winter Freeze, including any claims on property insurance policies regardless of date and cause ("Claim.") Attorney will not represent Client in any other matter. Disputes are decided by AAA commercial arbitration in Harris County, Client pays fees and expenses. Attorney is compensated by the Client **ONLY** if a recovery is made. Attorney's fees are calculated on the total recovery (RCV benefit) before deducting expenses. Client assigns/conveys to Attorney an interest on Client's GROSS recovery:

33 & 1/3% to Dick Law Firm, PLLC upon execution of this agreement.

Attorney can file a lawsuit for Client, Client's spouse, and Client's minor children's behalf, invoke appraisal, initiate an insurance claim, handle negotiations, litigation, and settlement discussions of Claim. Attorney can sign Client's name on and to any insurance monies made payable to the Attorney and the Client, the Attorney, or to the Client without the joinder of the Attorney, submitted to the Attorney on behalf of the Client in full or partial settlement of the Claim. Attorney is authorized to place Claim monies in the Attorney's trust account and from that trust account, make distributions and payments to the Attorney for the Claim, reimbursement to Attorney for all expenses incurred by the Attorney in handling the Claim, payments to Client of Client's interest, and payments to parties other than Client and Attorney for their services rendered or work performed. Attorney can file a binding stipulation to stop Claim from being removed to federal court. Attorney can use facts and documents in this case for public display without limitations. Client must request updates via email at updates@dicklawfirm.com. Updates can take thirty days or longer. Attorney can advance or incur monies for costs and expenses and will be reimbursed without any limitations, including interest or fees for commercial lending to finance the matter. Attorney fees are increased to forty-five percent after appraisal, mediation, or a lawsuit is filed. Attorney can withdraw for any reason. Client can terminate only for good cause,

(Exhibit D). As you see, Dick initially charges his clients a 33 1/3% contingency fee. But buried in the fine print is a statement that this contingency fee is **"increased to forty five percent after appraisal, mediation, or a lawsuit is filed."**

Yes, the Court read that correctly. According to the fee agreement contained in this advertising mailer, Dick charges his Texas clients 45% of their appraisal award plus reimbursement for "all expenses incurred" to represent them in an alternative dispute resolution process that, according to this Court, requires no attorneys, no lawsuits, and no pleadings.

As shown on Exhibit C, Dick is not alone in the practice of Texas policyholder attorneys signing up clients and putting their matters into appraisal. The **Muriki** matter is an example of the practice also being used by the Jose Chapa Law Firm. The practice is becoming more widespread as Texas policyholder attorneys realize they can avoid having to litigate matters by just dumping them in appraisal, letting someone else do the work, and awaiting their payday.

3. Appraisals Involving Attorneys Who Litigate For A While And Then Dump Their Matters Into Appraisal

In my 2018 article *Fixing Problems In The Texas Insurance Appraisal Process*, I wrote about the concern with attorneys filing lawsuits and then belatedly demanding appraisal:

> Appraisal should not be used as a litigation tactic. It should not be demanded by an insured years after the lawsuit was filed to avoid a trial when the facts did not come together as hoped. Likewise, it should not be demanded by an insurance company on the eve of trial to avoid bad facts and extracontractual exposure.
> Unfortunately, this abuse is taking place — on both sides. It is wrong. Appraisal should not be demanded on the eve of trial, nor should it be used for purposes of litigation-related gamesmanship.

(Exhibit A).[6] I recognize that in the *Rodriguez* matter Safeco demanded appraisal approximately one year after the lawsuit was filed. I understand some Texas residential insurance companies have a practice of conducting limited discovery and engaging in mediation, thereafter invoking appraisal in the event mediation was unsuccessful. I understand the logic behind this approach. Regardless, just as I believe policyholders should invoke appraisal before filing a lawsuit, I believe insurance companies should demand appraisal immediately after receiving a pre-suit notice letter from the policyholder (or even earlier if it believes appraisal is appropriate).[7]

With respect to this issue, it is important that the Court not be led to believe, as is suggested in the Rodriguez Reply brief, that the late invocation of appraisal is a practice occurring only on the insurance industry side. In the hundreds of appraisal matters handled by my attorneys over the past several years, the practice of belatedly demanding appraisal deep into litigation is much more common with Texas policyholder attorneys than it is with Texas defense attorneys.

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[6] Admittedly, my law firm has on occasion belatedly invoked appraisal later in litigation. But always at the request of a client and with an admonition to the client against this disfavored practice.

[7] Unfortunately, current Texas law makes it virtually impossible for a party to waive the right to invoke the appraisal process. *See In re Universal Underwriters of Tex. Ins. Co.,* 345 S.W.3d 404, 410 (Tex. 2011). This obviously leads to these belated appraisal demands.

And belated appraisal demands are only part of the scheming that is taking place. Many belated appraisal demands include other schemes as well, including the common scheme of using appraisal to grossly inflate the insured's previous claim measure. Numerous examples are included in Exhibit C and described in the examples below.

In the **FBCO** matter, McClenny Moseley issued a Chapter 542A pre-suit notice letter and filed a lawsuit seeking damages of $10.6 million. Their litigation expert repeated this same damage measure during the federal court litigation. As trial approached, McClenny Moseley demanded appraisal. Instead of asking the federal judge presiding over the matter to appoint an umpire, McClenny Moseley unilaterally (without notice to the insurance company or its counsel) asked a state court judge hundreds of miles away to appoint a friendly umpire. The insurance company objected and refused to participate in the appraisal process. So the insured's appraiser and friendly umpire moved forward with the appraisal process -- with the result being a $56 million appraisal award. The insurance company spent over a year and almost $1 million in litigation expenses getting the award set aside.

In the **YMCA** matter, long after the parties commenced litigation, counsel for the insured, Puls Haney Lyster, invoked appraisal. While the matter was

in litigation, the insurance company measured the claim at $864,000 and the insured measured the claim at $1.1 million. In appraisal, the insured's appraiser increased the damages measure to $2.1 million. The appraisal panel issued an award (signed by the insured's appraiser and umpire) totaling $5 million.

The **Alice ISD** matter is particularly egregious as a belatedly demanded appraisal. That matter involves a 2014 hail event. The claim was adjusted and paid in 2016. Four years later, in April 2020, Gravely PC filed a lawsuit. The matter was thereafter litigated for three years. Just recently, over nine years after the date of loss, the insured demanded appraisal. That's right. Nine years after the date of loss.

Another matter involving Gravely PC is the **Army Residences** matter. In that matter the insured measured its claim at $13.8 million and the insurance company placed the measure at $7.3 million. In August 2017, the insured filed a lawsuit. After almost four years of litigation, the insured demanded appraisal. The appraisal panel issued an award (signed by the insured's appraiser and umpire) totaling $19.5 million.

The **Kobrinsky** matter filed by Loree & Lipscomb involves a lawsuit filed in December 2022. After litigating for eight months, and after the insurance

company raised potential fraud allegations against the insured, the insured demanded appraisal.

Counsel for Rodriguez in this matter, Daly & Black, also engages in the practice of belated appraisal demands. In the **Magnolia Church** matter, the insured filed a lawsuit against the insurance company. Over a year after filing a lawsuit, the insured demanded appraisal. Another example is the **Methodist Church** matter. The insured filed suit in June 2021 and demanded appraisal in March 2022.

In all of these examples, Texas policyholder attorneys signed-up clients, filed lawsuits, and long thereafter demanded appraisal. Why? If appraisal requires no attorneys, no lawsuits, and no pleadings, why are Texas policyholder attorneys filing lawsuits and then demanding appraisal?[8] Why aren't they just demanding appraisal to begin with?[9]

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[8] Obviously, both sides of the industry are guilty of "late invocation". Perhaps the solution is for the Texas Department of Insurance to promptly approve proposed appraisal forms requiring appraisal to be invoked by a plaintiff prior to filing a lawsuit or by a defendant soon after receiving a lawsuit. Perhaps there is also a legislative solution that both sides could work towards. In my *Fixing Problems In The Texas Appraisal Process* article, I specifically discuss a "use it or lose it" requirement.

[9] In their reply brief, Rodriguez's counsel mentions—but does not meaningfully discuss —the absurdity doctrine. This Court has addressed the high bar that must be met for that doctrine to apply. *Combs v. Health Care Servs. Corp*., 401 S.W.3d 623, 630 (Tex. 2013) (noting that a particular result "even if unintended, even if improvident, even if inequitable," does not implicate the absurdity doctrine if it "falls short of being unthinkable or unfathomable"); *see also* Antonin Scalia and Bryan A. Garner, READING LAW 237 (2012) ("[E]rror correction for absurdity can be a slippery slope. It can lead to judicial revision of public and private texts to make them (in the judges' view) more

Attorneys' fees. It's all about the attorneys' fees.

One would think that for a process requiring no attorneys, no lawsuits, and no pleadings, Texas policyholder attorneys would be mindful of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct requiring that they not charge an "unconscionable fee". One would think that Texas policyholder attorneys would handle appraisal matters either on an hourly fee basis or a reduced contingency fee. But that does not appear to be the case. Documents obtained in discovery and through public records requests show that these matters are often handled on a full contingency fee or hourly lodestar plus multiplier basis. For example, the fee agreement between Gravely PC and Alice ISD, obtained through an open records request to the Texas Attorney General, states that the law firm is being paid "the lesser of 29% of the total recovery or four times SPECIAL COUNSEL'S base fee", with the base fee calculated at "$1,000 an hour for Marc Gravely" (Exhibit E).[10] And we have already discussed Mr. Dick

reasonable."). Rodriguez's preferred construction of the statute, if adopted, would unquestionably lead to an absurd result by allowing for the recovery of attorneys' fees where all policy benefits have already been paid under an agreed alternative dispute resolution procedure that this Court has held requires no attorneys, no lawsuits, and no pleadings.

[10] Texas law requires that an attorney fee agreement with a political subdivision, including school districts, be approved by the Texas Attorney General. *See* Tex. Govt. Code §2254.1038. Certain Texas policyholder attorneys are obtaining Attorney General approval with the representation that the matter will involve litigation. But thereafter the

charging a 45% contingency fee in his matters put into the appraisal process.

What is happening in these matters is patently obvious. Texas policyholder attorneys know that they can dump their matters in appraisal, let someone else do the work at the policyholder's expense (appraiser and umpire fees are typically considered a litigation expense), and still collect their contingency fee. Moreover, they know that the appraisal process is devoid of meaningful ethical standards or procedural rules. And absent such standards or rules, they know that their appraisers are more likely to find a way to manipulate the appraisal process to increase their damages measure from what it was during the claim process and in litigation. We even have a name for it: "The Law of Large Numbers" (further discussed in Exhibit A).

Finally, these attorneys know one additional fact that is also very important in this Court's consideration of the present matter. These attorneys all know that most appraisals end with a compromise outcome resulting in some additional payment to the insured. That is simply the nature of the appraisal process. Most appraisals include some increase in the claim

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matter is resolved through the appraisal process. This practice of misrepresenting the nature of the attorney's representation to the Attorney General is particularly troublesome.

measure. It is uncommon for an award to be at either the insurance company appraiser's measure or the policyholder appraiser's measure. Appraisal awards are most often the result of compromise, falling somewhere in between the two respective appraiser numbers.

This becomes a critical issue as to what we can expect to see in the Texas appraisal process should this Court answer the Certified Question in the negative.

The Future

As stated previously, the Texas appraisal process exists today in a delicate state of balanced equilibrium. The process is not perfect. But it works. Both sides can cite to examples of abuse by the other. But, again, overall, the process works.

Should this Court sanction the potential recovery of attorneys' fees in every Texas appraisal matter governed by Chapter 542A, it is predictable that there will be a policyholder attorney standing ready to sign up every disputed insurance claim so that the required lawsuit can be filed and the matter thereafter dumped into appraisal.

Yes, the "required" lawsuit. If attorneys' fees are allowed in matters governed by Chapter 542A, lawsuits will be filed prior to every appraisal demand.

Remember, Section 542A.003 requires that the insured provide a pre-suit notice letter. Section 542A.003(b)(2) requires that the pre-suit notice letter state the "specific amount alleged to be owed by the insurer on the claim." *See, e.g., In re Westchester Surplus Lines Ins. Co*., No. 07-22-00329-CV, 2023 WL 4488269 (Tex. App.-Amarillo, July 10, 2023 (orig. proceeding). Most importantly, under Section 542A.007(d), if the insured fails to provide the required pre-suit notice letter stating the specific amount alleged to be owed on the claim, there can be no award of attorneys' fees. None. The statute is crystal clear on this issue.

Texas policyholder attorneys' are well aware of this requirement. They know that they must provide a Chapter 542A compliant pre-suit notice letter if they want to recover attorneys' fees. As a result, moving forward, every appraisal demand will be preceded by a Chapter 542A pre-suit notice letter and, thereafter, a lawsuit. Of course, to assert a colorable claim for attorneys' fees in a matter governed by Chapter 542A, an insured must not only provide the insurer with pre-suit notice meeting the requirements of Section 542A.003, after the expiration of the sixty-day notice period, the insured must also file suit on a cause of action for which attorneys' fees are potentially recoverable. *See* Tex. Ins. Code § 542.060(b) ("*If a suit is filed*, the attorney's fees shall be taxed as part of the costs in the case.")

(emphasis added). A claimed right to recover attorneys' fees cannot exist without the filing of a lawsuit.

Thus, the future of the Texas appraisal process becomes clear. Virtually all disputed Texas first-party insurance will be resolved through this process: pre-suit notice – lawsuit – appraisal demand. Thereafter, as the appraisal panel completes their work, the policyholder attorney will be waiting in the background building up a claim for attorneys' fees. Once the appraisal process is completed, the demand for attorneys' fees is certain to follow. And litigation can be expected as to the appropriate attorneys' fees measure.[11]

Faced with this predictable greatly expanded litigation exposure, the present balance could become disrupted and Texas insurance companies may have no choice but to respond accordingly, including perhaps altogether removing the appraisal clause from their policies.[12]

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[11] Often this litigation will be about nothing other than attorneys' fees, as the insurance companies, as they do today, will pay the amount owed on the claim as determined by the appraisal panel and potential statutory penalty interest. All that will be left is a lawsuit over attorneys' fees.

[12] The anticipated policyholder attorney retort is of course: "Well if the insurance companies just fairly paid claims there would be no need for appraisal." The answer is not that simple. First, there are lots of legitimately disputed claims. The existence of hail damage on a roof and the necessary scope of repair as a result of such damage is not an exact science. Second, nothing prevents a policyholder from demanding appraisal on a baseless claim. A large number of these claims, though arguably baseless, are resolved through compromise in the appraisal process.

Conclusions

The plain language of Section 542A.007 is crystal clear that in any action brought under Chapter 542A the insurer's payment of the appraisal award and statutory penalty interest precludes the recovery of attorney's fees. Numerous state appellate and federal courts have reached this inescapable conclusion. As amply discussed in *Safeco's* briefing and *amicus* briefs filed by numerous other interested stakeholders, there is no other possible outcome consistent with the applicable statutory language. That outcome is also entirely consistent with the very purpose of HB1174 in limiting litigation and attorneys' fees. The other outcome is not. In fact, it would be entirely inconsistent with the very purpose of HB1774.

Should the Court desire to look beyond the clear statutory language and engage in an analysis of policy issues and the potential real-world effects of its decision, I am hopeful that this *amicus* brief demonstrates what is actually happening in the "Texas appraisal process trenches" and informs the Court as to what the future of appraisal could look like should the Court choose to reject plain statutory construction of Section 542A.007 in favor of allowing Texas policyholder attorneys to recover fees in an appraisal related matter where the insurer's payment of the appraisal award plus any

statutory penalty interest potentially owed, leaves no substantive issue for trial on the merits.

Are there problems in the Texas appraisal process? Absolutely. But these problems should be addressed through policy form changes or a legislative solution.

I respectfully submit this *amicus* letter to the Court asking that the Certified Question from the Fifth Circuit be answered in the **affirmative**.

Respectfully,

Steven J. Badger
Texas Bar No. 01499050

Enclosures (Exhibits A – E)

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated letter by *amicus curiae* Steven J. Badger contains approximately 4200 words and otherwise complies with TRAP 9.4.

Steven J. Badger
October 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this amicus letter has been served on the following individuals via e-filing on this 2nd day of October, 2023:

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Steven J. Badger

4886-9834-5347v1

Exhibit A

ZELLE LLP

Fixing Problems in the Texas Insurance Appraisal Process

By Steven J. Badger
Published in *Texas Law360*
January 24, 2018

In *Scottish Union & National Insurance vs. Clancy*, the Supreme Court of Texas held that compliance with an appraisal provision in an insurance policy was a condition precedent to suit and had not been waived by the insurance company. In *American Fire Insurance Company vs. Stuart*, the Court of Civil Appeals of Texas held that appraisal was not proper when there had not yet been an attempt at settlement of the claim by both parties. In *Royal Insurance Company vs. Parlin & Orendorff Company*, the Court of Civil Appeals of Texas held that a jury properly set aside an appraisal award where an appraiser was "neither impartial nor disinterested."

These three cases addressed issues commonly disputed in Texas appraisals. All three of these cases were decided in the late 1800s.

And here we are 120 years later still arguing about the same issues.

Interestingly, during the 1900s, there was very little litigation concerning the appraisal process. The Supreme Court of Texas issued only a handful of decisions concerning appraisal. For a century, Texas law was fairly well-settled that appraisal only addressed disputes as to the cost to repair an agreed amount of damage. Disputes as to the existence or extent of damage were outside the scope of the appraisal process.

That all changed in 2009, for two reasons.

First, Hurricane Ike had just struck the Texas coast. Damage was catastrophic. Underemployed Houston and San Antonio personal injury attorneys became "policyholder attorneys." The number of licensed public insurance adjusters in Texas more than doubled.

And so-called "insurance restoration contractors" from across the country descended on Houston. With a large portion of the estimated $30 billion in Ike damage being paid for by the insurance industry, there was big money to be made hanging around insurance claims. The first-party insurance claims process became an entrepreneurial business model.

And then July 3, 2009, arrived — a day that would forever change the Texas appraisal process. On that date the Supreme Court of Texas issued its decision in *State Farm vs. Johnson*, a decision that changed over a century of precedent governing the scope of the Texas appraisal process.

Insurance practitioners still argue over what the case actually holds in its lengthy discussion of divisible versus indivisible injuries, and the differences between causation and liability. Let's be honest. No one really knows exactly what the court actually held. But what is clear now is that as a result of *Johnson*, arguably all types of disputes are now going to appraisal — including disputes as to the existence and scope of hail (and other types of) damage.

With the convergence of these two events, use of the appraisal process in Texas has grown exponentially. Gone are the days where three reputable and smart insurance professionals (two appraisers and an umpire they both respected and agreed upon) would get in a room and work cooperatively to fairly resolve a disputed claim.

Instead, appraisal has become a tactical game, with many of the involved parties working to achieve their desired outcomes and, in many cases, advance their personal interests. There now even exists a cottage industry of professional appraisers, who advertise their success rates and employ strategies to maximize success in the process — a process that was intended to be quasi-judicial, independent and amicable in nature.

Abuses of the process are widespread. And, yes, these abuses come from all involved parties. Some policyholder attorneys sign up clients and dump them right into appraisal, knowing that they won't have to litigate and can still take a 45 percent contingency fee out of the award. Some professional appraisers employ the law of large numbers, dramatically increasing the policyholder's claimed damage allegations in appraisal hoping that the umpire will then believe that the policyholder's original claimed damage figure was reasonable or, better yet, just "split the baby."

Some insurance restoration contractors are demanding appraisal on behalf of property owners, appointing other friendly contractors as appraisers in a *quid pro quo* type of arrangement. Some insurance industry attorneys demand appraisal after years of litigation and on the eve of trial, hoping to avoid bad facts and extracontractual damages. And everyone does whatever they can do to get their desired umpire — because everyone knows that the outcome of appraisal is all about the umpire.

And unfortunately, it's likely to get worse before it gets better. In Florida, one insurance company has taken the word "impartial" out of its appraisal provision. The rationale was that if public adjusters with a contingency fee interest in the outcome of the appraisal are allowed to be appraisers (as they are in Florida, but, thank goodness, not in Texas) then why shouldn't the insurance company just use one of its own employees as its appraiser?

Appraisal has become a non-judicial dispute resolution process entirely devoid of ethical guidelines and procedural requirements. It should therefore come as no surprise that one insurance company just rewrote its appraisal provision — turning what used to be one simple paragraph into three full pages.

Yes, often lost in all of this is the policyholder who just wants a quick and fair assessment of their damages. That is what appraisal was intended to be. As the Supreme Court of Texas recognized in *State Farm vs. Johnson*, appraisal was "intended to take place before suit is filed" and "requires no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings."

So how do we get appraisal back to what it used to be/what it was intended to be? I wish I had an easy answer.

Appraisal is a creature of contract. It exists only because it is set forth in the insurance policy contract between the insurance company and its insured. There is no doubt that additional changes to the standard appraisal language are coming to address some of the common problems and abuses.

Some believe that legislative intervention is needed. They argue for the creation of a "statutory appraisal process" similar to what the Texas legislature created in 2011 for the Texas Windstorm Insurance Association. Others despise the TWIA process as they find it unfair to insureds.

At the request of the Office of Public Insurance Counsel, Texas House of Representatives Speaker Joe Strauss has included "use of appraisal processes under property insurance policies" in his Interim Committee Charges as an issue for the House Committee on Insurance to consider prior to the 2019 legislative session.

Other than creating a statutory appraisal process, it is unclear what else the Committee on Insurance would or even could consider. Again, appraisal is a contractually agreed process. Perhaps the legislature would mandate the terms to be included in Texas appraisal provisions. That appears unlikely.

Or perhaps the legislature will explore whether there are other ways to address some of the current hot topics, common issues and abuses in the appraisal process. If that is the desire, here are a few.

Finality of Appraisal Awards

Texas law has become very clear, with almost every Texas appellate and federal court weighing in on the issue, that the timely payment of an appraisal award bars all extracontractual remedies. Given that appraisal is a contractually agreed part of the adjustment process, this result makes sense. It is also consistent with the language in *Johnson* that appraisals do not require litigation or attorneys.

If a dispute arises during a claim process, appraisal is timely demanded, and the appraisal award is timely paid, the process worked as intended and there is no reason for litigation. There was a dispute, and it was timely resolved during the claim process. If the objective of the appraisal process is to avoid litigation by getting disputed claims quickly resolved, the case law on the finality of appraisal awards should not be disturbed.

Use It or Lose It

Appraisal should not be used as a litigation tactic. It should not be demanded by an insured years after the lawsuit was filed to avoid a trial when the facts did not come together as hoped. Likewise, it should not be demanded by an insurance company on the eve of trial to avoid bad facts and extracontractual exposure.

Unfortunately, this abuse is taking place — on both sides. It is wrong. Appraisal should not be demanded on the eve of trial, nor should it be used for purposes of litigation-related gamesmanship.

Perhaps a "use it or lose it" requirement is needed. The insured loses the right to demand appraisal when it files a lawsuit. The insurance company loses the right to demand appraisal a short time after suit is filed once it becomes apparent that further claim settlement discussions would be futile and the matter cannot be resolved by agreement of the parties. This is fair to both sides.

Lawyers Signing Up Clients and Dumping Them into Appraisal

Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct plainly states that a lawyer may not collect an unconscionable fee. Under this rule, the first factor to be considered in evaluating the reasonableness of a fee is the "time and labor required."

Some attorneys are signing up Hurricane Harvey clients on a 45 percent contingency fee and immediately dumping their cases into appraisal. These attorneys are well aware that appraisal will bring finality to the dispute and there will be no resulting litigation.

Essentially, the lawyer pockets almost half the appraisal award for doing virtually nothing — other than sending an appraisal demand and advancing the costs of the appraiser and umpire. One would think that the same outcome could be achieved by retaining a licensed public adjuster who, for a 10 percent fee, would first try to resolve the claim and, if such efforts were unsuccessful, would then invoke the appraisal process.

Contractors Acting as Wanna-Be Lawyers Demanding Appraisal for Homeowners

Prior to enactment of the Texas public insurance adjuster licensing statute in 2003, cases held that it was considered the unauthorized practice of law to advise building owners on their insurance claims. These cases held:

> Contracting with persons to represent them with regard to their personal causes of action for property damages and/or personal injury constitutes the practice of law. Advising persons as to their rights and the advisability of making claims for personal injuries and/or property damages constitutes the practice of law. Advising persons as to whether to accept an offered sum of money in settlement of claims for personal injuries and/or property damages entails the practice of law. Entering into contracts with persons to represent them in their personal injury and/or property damage matters on a contingent fee together with an attempted assignment of a portion of the person's cause of action involves the practice of law. Entering into contracts with third persons which purport to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding constitutes the practice of law. Advising "clients" of their rights, duties, and privileges under the laws entails the practice of law.

Brown v. Unauthorized Practice of Law Committee, 742 S.W.2d 34 (Tex. App.—Dallas 1987, writ denied) (citations omitted). *See also Greene vs. Unauthorized Practice of Law Committee*, 883 S.W.2d 293 (Tex.App.—Dallas 1994, no writ).

There was no ambiguity in these decisions. You have to be an attorney — or, today, a licensed public adjuster — to advise people as to their rights in property insurance claims. If you are neither, you cannot provide such advice.

But it's going on in countless Hurricane Harvey matters. Roofing contractors, insurance restoration contractors and "insurance claim professionals" are attempting to handle insurance claims for building owners. When a dispute arises, they are invoking appraisal "on behalf of" the building owner. They prepare the appraisal demand form, select the appraiser, ask the homeowner to "sign here" and then send in the appraisal demand. It is absolutely illegal. It needs to be stopped.

The Law of Large Numbers

Appraisals are intended to resolve a dispute as to the amount of loss. Take a typical hail damage dispute. The insured measures the roof replacement cost at $20,000. The insurance company measures the roof repair cost at $1,500. The appraisal panel will decide whether the right number is $20,000, $1,500 or perhaps something in between.

Some "professional appraisers" are using "the law of large numbers" to change this typical scenario. Instead of accepting their client's previous damage estimate of $20,000, these professional appraisers come up with a new number multiples above the original estimate. They add windows, siding, brick, the trampoline, a bbq, interior damage and whatever else they can use to get the number as high as possible.

They are limited only by their imagination (and their conscience, one would hope). Obviously, when they submit their new $100,000 damage figure, it is with the hope that the umpire will consider the insured's original $20,000 figure as a fair result — or just "split the baby."

This is wrong. Section 35.02 of the Texas Penal Code defines insurance fraud as providing false or misleading material information in support of an insurance claim. Since appraisal is part of the insurance claim process, it is reasonable to conclude that an appraiser's use of inflated baseless damage figures solely as a tactical move to drive up a potential appraisal award constitutes criminal insurance fraud.

Or, if this is how it's going to be, perhaps the insurance companies should all change their measures and start every appraisal at $0. What's that old saying about a goose and a gander?

Appraisal Without a Dispute

As the Court of Appeals of Texas held over a century ago in *American First*, you can't have a dispute as to the amount of loss unless both sides have stated their positions and attempted to reach agreement on the claim measure. That's a pretty simple concept.

Surprisingly — well, actually, not very surprisingly — some attorneys and public adjusters are attempting to drive matters into appraisal without ever advising the insurance company of their measure, or that there even exists a dispute as to the claim measure. They make no effort to resolve the claim, preferring to never state a reasonable damage estimate during the claims process and allowing "the law of large numbers" strategy to be employed by their "professional appraiser" in front of a hopefully friendly umpire.

A similar abuse by a few mass-marketing public adjusters was addressed in 2015 by the Texas legislature. These public adjusters were nothing more than referral sources for lawyers. In 2015 the Texas public adjuster licensing statute was amended to require public adjusters to actually perform the services typically provided by a public adjuster.

Obviously, this would include preparing an estimate and making at least some effort to work with the insurance company in negotiating a resolution of the claim before invoking appraisal. Fortunately, several Texas courts have recently seen right through this strategy and are requiring both sides to state their claim measures and attempt to resolve the disputed claim before allowing the appraisal process to go forward.

So that’s pretty much what's going on in the Texas appraisal process. Is it a perfect process? No. Is it a preferable process to litigation? Absolutely — so long as it is conducted on a level playing field by a competent and impartial appraisal panel that completes its work in substantial compliance with the policy and without fraud, accident or mistake.

When those simple — but sometimes elusive — parameters are met, the appraisal process is unquestionably the best way to resolve disputed insurance claims for the benefit of the property owner.

Steven J. Badger is a partner with Zelle LLP in Dallas.

Exhibit B

CLAIMS JOURNAL

View this article online: https://www.claimsjournal.com/news/national/2014/05/02/248354.htm

The Emerging Hail Risk: What The Hail Is Going On?

The number of reported claims involving hail damage to residential and commercial roofing products has increased dramatically over the past few years. Some reports place the increase at almost double historical claim totals.

What is the cause of this significant increase? There is no disputing that in recent years there have been significant hail events in large metropolitan areas. But does this alone account for the near-double increase in claim filings? Plus, in addition to the increase in the number of claims, an abnormally high percentage of these claims are ending up disputed and ultimately in appraisal or litigation. In Texas, hundreds, literally hundreds, of lawsuits are being filed each week in Dallas, Tarrant, Potter, Hidalgo, and other counties involving alleged underpayment of hail related roof damage claims – far, far more than has ever previously been the case.

Has the property insurance industry suddenly stopped paying these claims? Or are more sinister forces involved, causing both the increase in number of claims being submitted and number of claims resulting in litigation.

There is no question it is the latter.

What The Hail Is Going On?

Over the past decade, a cottage industry has emerged of individuals who believe they can make a living by involving themselves in the insurance claims process. These individuals have previously focused primarily in hurricane claims, fighting over what constitutes wind damage and the never-ending debate over wind versus water damage.

Most significantly, in 2008, Hurricane Ike struck the Texas coast. The feeding frenzy was on. Almost overnight, an entirely new industry of roofing contractors, general contractors, claims consultants, and professional appraisers appeared ready to help building owners take-on the "greedy insurance companies." A new generation of public adjusters also appeared. In the past two years alone, membership in the Texas Association of Public Insurance Adjusters has more than doubled. Further, to assist these individuals in pursuing their claims, a new generation of "roofing experts" emerged, many with absolutely no previous experience with roofing systems but prepared to issue reports.

Finally, when the insurers refused to pay claims that lacked merit, attorneys were everywhere. With Texas tort reform making it difficult for plaintiffs' attorneys to earn a living handling their usual docket of fender bender and slip-and-fall cases, fighting evil insurance companies became the go-to practice area. All of a sudden, every personal injury plaintiffs' attorney was also a policyholder attorney. Armed with favorable Texas laws governing the underpayment of insurance claims (automatic 18 percent statutory penalty, attorneys' fees, treble damages and potential bad faith damages), the race to the courthouse was on.

Today, almost six years later, most of the Hurricane Ike lawsuits are gone. But lawsuit coffers needed to be filled. Hail claims have become the obvious next target. Unlike major hurricanes, which only arrive every few years, hail falls many times a year all across Texas. Plus, like wind damage, determining what constitutes hail damage to a roofing product is often subject to debate. With favorable Texas law, hail claims present the perfect full employment opportunity until the next hurricane comes along.

For all of these reasons, it is obvious – the increase in hail damage claims and resulting lawsuits have nothing to do with abnormally large or frequent storms. It also has nothing to do with insurance companies refusing to pay meritorious claims. Instead, it has everything to do with strangers to the insurance policies in question injecting themselves into the claims process with the intent to bleed-off whatever money they can into their own pocketbooks. That is what the hail is going on.

Managing the Current Crisis

These claims are predictable. They all have the same warning signs:

• ***Late notice***. Most of these claims originate with a contractor knocking on the building owner's door promising "a free roof from your insurance company" in exchange for execution of a "roofer contingency contract" allowing the contractor to negotiate the claim and perform the roof replacement work. The contractor then orders a "hail report" to find a recent storm somewhere in the general area to use as the date of loss. The claim is then reported. Often this is months or even years after the reported hail event.

• ***Absence of the insured***. The building owner itself is noticeably absent from the claims process. Only the contractor or public adjuster is involved in the actual handling of the claim. The insured, with no out-of-pocket risk, figures "What the hail? If he's gonna get me a free roof, I might as well let him try."

• ***Microscopic damage***. Roofs seldom actually leak from hail damage. When they do, building owners call their insurance companies right after the hail event and the claims get paid. The claims at issue today almost always involve roofs that are not leaking and the alleged damage is not visible to the naked eye. Instead, the alleged roof damage "requires microscopic technology to see," "might leak in the future," "will cause the roof to prematurely fail," or "will void the warranty."

• ***Modified bitumen, built-up, or metal roofs***. Again, when damage is obvious, insurance companies pay claims. With a single-ply membrane, the holes or fractures in the membrane are usually quite apparent. With composition shingles, holes and soft spots are readily apparent. But creativity abounds when identifying alleged damage to other types of roofing systems – "the modified membrane lost granules, which are needed to protect the interplys from long term deterioration," "the hail struck and displaced the gravel, which exposed the asphalt flood coat of the built-up membrane which will now deteriorate," and of course, "the minor dings in the metal roof will collect water and particulates, which will cause rusting and leaks over time."

With these similarities in issues, these claims all follow a predictable pattern. Once a dispute arises as to the existence or scope of damage, the contractor or public adjuster has all he needs to demand appraisal. With courts now holding that such disputes are subject to appraisal, all that is needed for a guaranteed payday is an aggressive, manipulative appraiser and a favorable umpire appointment.

Finally, for those claims that are not dumped into appraisal, litigation is also an attractive option. What constitutes physical loss or damage to a roofing product will often be a factual issue driven by expert testimony. With new "roofing experts" having broad views as to what constitutes hail damage, policyholder attorneys have no problem getting cases to trial. Faced with this reality, the significant cost of litigation, and draconian penalties if they happen to be wrong in their position, insurers typically have no choice but to settle claims. They are in damage control mode. Every day, claims are settled that have absolutely no merit whatsoever.

Of course the contractors, public adjusters, and policyholder attorneys all know this. With absolutely no downside, there exists no impediment to submitting meritless claims or filing meritless lawsuits. Search Craigslist, read the roofing contractor forums, and follow the policyholder attorney blogs. It is a feeding frenzy for claim referrals.

In response, insurers can do no more to protect themselves than carefully proceed through the claims process and hope to mitigate the predictable outcome. Below are a few recommended strategies that can help:

- Engage qualified engineers with real experience in identifying hail damage;
- Refuse to negotiate claims with contractors and other individuals acting as unlicensed public adjusters;
- Hold the insured to its policy burdens (establishing physical loss or damage and establishing a date of loss within the insurer's policy period);
- Refuse to accept inflated Xactimate estimates but instead require real bids from real contractors;
- Refuse to pay "10+10" overhead and profit when general contractors are not reasonably necessary and their costs not incurred (there is no "TDI Bulletin" or "three trade rule" dictating otherwise);
- Closely monitor appraisals to avoid the inevitable manipulation of the process and race to the courthouse for a favorable umpire appointment; and steer clear of the predictable traps.

Finally, insurers can also decide to step up and start fighting the worst abusers, not only in the claims process itself, but also in the shady underworld of referral fees, inflated invoices, kickbacks and outright fraud.

The Underwriting Solution

Given the current crisis, insurers have no choice but to eventually restrict coverage. Several policy wording changes are on the horizon:

Increased deductibles. Percentage and per building deductibles are becoming the norm. Unfortunately, the effect of this change is easily overcome by a contractor's promise to waive the building owner's deductible. The contractor or public adjuster knows that by inflating the estimate he can recover enough on the claim to hire a subcontractor to actually perform the work, absorb the deductible, and still make a healthy profit.

ACV only coverage. Most of the disputed claims involve old roofs which have suffered from years of deterioration, lack of maintenance, and quite often non-damaging impact from numerous hail events. By providing actual cash value coverage for roofs older than 10 or 15 years, the building owner is forced to shoulder a significant portion of the roof replacement cost. If the roof is not leaking, the building owner will typically defer that capital cost. Only when a "free roof" has been promised will it be motivated to pursue the insurance claim.

Endorsements limiting coverage. Given that most disputes involve the issue of what constitutes physical loss or damage, one solution is to provide an actual definition for damage to roofing systems, roof top accessories, and roof top equipment. One possible definition would be: "For purposes of covered property that is the subject of this endorsement, we define "physical loss or damage" as a reduction in the roof's water shedding capacity or life expectancy." More specifically, language can be provided for a particular roof type, such as metal: "For purposes of this endorsement and the definition of physical loss or damage set forth above, dents, dings, and dimples to metal roofing systems and metal roof top accessories do not constitute physical loss or damage." Or, quite simply: "We do not provide coverage for dents, dings, and dimples to metal roofing systems and metal roof top accessories." Similar specific provisions can be used for other types of roofing systems and HVAC equipment.

Choice of law/venue endorsement. Some states have laws more favorable to insurers than others. For example, Texas law provides that disputes as to the existence or scope of damage are subject to appraisal. New York law does not. Texas law does not recognize suit limitation provisions less than two years and a day. New York law allows such provisions if they are reasonable under the circumstances. Some insurers are including mandatory New York choice of law and choice of venue provisions to avoid the inequities of current Texas law.

Appraisal provision changes. Appraisal has become a non-judicial dispute resolution process entirely devoid of procedural rules or ethical guidelines. Manipulation and outright fraud is rampant in the process. Appraisal provisions are being rewritten to limit appraisal to situations where both parties agree to the process. Other changes include requiring the parties to jointly seek the appointment of an umpire (to avoid the race to the courthouse) and to allow the parties to execute an Appraisal Protocol identifying the issues to be appraised and procedures to be followed (to ensure an equitable appraisal process and clear award).

Hail damage exclusions. Like high winds in hurricane prone areas, unless this problem is solved, the inevitable result will be the complete exclusion of all physical loss or damage resulting from hail events.

In addition to these policy wording changes, another underwriting solution is to document the condition of a roof on or near the date of policy inception. This can be done with pictures and video. No report or opinions are necessary. A simple "snapshot" showing the condition of the roof as it existed on the date the insurer commenced coverage on the risk. This would allow the insurer to compare the reported damage to what was present on the date of inception. This would solve the common problem of claims being submitted for alleged "hail impact damage" that has been present for years but was of no concern to the building owner until a roofing contractor knocked on its door and advised that a free roof was in its future.

Other Solutions

To avoid the inevitable significant restrictions on available coverage absent other solutions, the crisis can be managed with legislative change. For example, roofing contractor licensing could be required accompanied by guidelines as to impermissible conduct. This could include a ban on all "roofer contingency contractors", a clear prohibition against contractor involvement in the claims handling process, and a ban against waiving deductibles. Additionally, legislative change could remedy problems created by the courts in expanding the scope of the appraisal process and return the process to what it was originally intended to address – situations where the parties agree on the existence and scope of damage but disagree only as to the cost to repair such damage. Another potential legislative change would be to require an inspection and written report from a licensed professional engineer to be filed with any lawsuit involving a dispute as to the existence of physical loss or damage. Finally, for those states with automatic statutory penalties for delays in claim payment, such as Texas, fairness and equity could be restored by requiring a finding of bad faith prior to the imposition of such penalties, limiting statutory penalties to residential claims where consumer protection is more important, and requiring the building owner to pay the insurer's attorneys' fees if a lawsuit is found to have been filed without a reasonable basis.

Conclusions

It is very clear what the hail is going on. The property insurance industry is under attack. The present battle has nothing to do with repairing roofs actually damaged by hail, but instead putting money in the pockets of individuals who can find a way to inject themselves into the insurance claims process. Like mold and similar previous attacks on the industry, in the end the insurance companies will respond by limiting or even excluding coverage. That effort is already underway. While that will provide the necessary and inevitable end to the battle, the unfortunate loser in all of this is the building owner who truly had holes knocked in his roof by large hail. Because of all the money being paid today to contractors, public adjusters, policyholder attorneys, and other assorted crooks and frauds, the guy with water pouring through large holes in his roof caused by large hail will no longer have coverage.

And that is truly unfortunate but inevitable absent legislative change.

An abbreviated version of this article first appeared in the spring issue of Claims Journal magazine.

Steven Badger represents the commercial property insurance industry, both as a plaintiff in large loss catastrophe subrogation matters and as a defendant in coverage matters involving roofing and other construction issues.

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Exhibit C

EXAMPLES OF TEXAS POLICYHOLDER ATTORNEYS FILING LITIGATION AND INVOKING APPRAISAL PROCESS

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1. Dick Law Firm

Style: Mallett v. State Farm Lloyds
(collectively "**Dick Matters**")
2023-66166 (Harris County; 157th Judicial District)
Cornejo v. Benchmark Insurance Co.
2023-66191 (Harris County; 61st Judicial District)
Martha Gonzalez v. Amguard Insurance Company
2023-65974 (Harris County; 190th Judicial District)
Forney v. Allstate Vehicle & Property Insurance
2023-66009 (Harris County; 270th Judicial District)

Fee Agrmnt: Unknown (Dick marketing flyer shows a 45% contingency fee)

Facts: These four essentially identical lawsuits were all filed on September 26, 2023, in Harris County District Court. In all four matters, Dick asserts various causes of action, including statutory penalties under Chapter 542/542A of the Texas Insurance Code. Dick also invokes the appraisal process in his original petition.

Status: Pending

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2. McClenny Moseley Law Firm

Style: First Baptist Church Odessa vs. Brotherhood Mutual Insurance Co.
("**FBCO**")
18-cv-00208 (USDC Western Dist.)

Fee Agrmnt: 30% contingency

Facts: Church submits hail damage claim totaling $10.6m. Insurance company measures claim at $1m. Church files lawsuit. Insurance Company removes case to federal court. Church maintains $10.6m damages claim. Shortly before trial, Church demands appraisal. During appraisal process, Church's attorneys and appraiser obtain unilateral umpire appointment by state court judge hundreds of miles from loss location. While insurance company is objecting, Church appraiser and umpire issue $56m appraisal award. Insurance company moves to vacate award. Court grants motion

Status: Confidential Settlement

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3. Puls Haney Lyster, PLLC

Style: Philadelphia Indemnity Insurance Company vs. Odessa Family YMCA
("**YMCA**")

Court: 19-cv-00107 (USDC Western Dist.)

Fee Agrmnt: Unknown

Facts: YMCA submits hail damage claim totaling $1.1m. Insurance company measures claim at $864k. YMCA files lawsuit. Insurance Company removes case to federal court. During litigation, YMCA demands appraisal. During appraisal process, YMCA appraiser increases measure to $2.1m. Insurance company maintains same measure. Umpire and YMCA appraiser sign appraisal award for $5m. Insurance company moves to vacate award.

Status: Confidential settlement

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4. Gravely PC

Style: Alice Indep. School District vs. Property Casualty Alliance of Tx. ("**Alice ISD**")

Court: 21-04-61041 (Jim Wells County; 79th Judicial District)

Fee Agrmnt: Lesser of "29% of total recovery or four times SPECIAL COUNSEL'S base fee" (calculated at "$1,000 an hour for Marc Gravely")

Facts: Reported hail damage from May 27, 2014. Claim adjusted and measure provided in February 2016. In April 2020, Insured seeks to re-open claim. Lawsuit filed in May 2020. Parties litigate for over three years. Insured demands appraisal on September 11, 2023.

Status: Pending

- - - - - - - - - - - -

Style: Army Retirement Residence Fndtn. v. Philadelphia Indemnity Ins. Co. ("**Army Residences**")

Court: 2017-CI-16586 (Bexar County; 438th Judicial District)

Fee Agrmnt: Unknown

Facts: Claim for damage resulting from 2016 hail event. Insured measures claim at $13.8m. Insurer measures claim at $7.3m. Insured files lawsuit on August 30, 2017. Parties litigate for four years. Insured demands appraisal on June 11, 2021. Appraisal panel issues award in amount of $19.5m.

Status: Confidential settlement

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5. Daly & Black

Style: Magnolia Church vs. Church Mutual Insurance Co. ("**Magnolia Church**")

Court: 21-12-17082 (Montgomery County; 457th Judicial District)

Fee Agrmnt: Unknown

Facts: Insured submits hail damage claim alleging damage of $31k. Church files suit alleging damages of $31k. After failed mediation and one year after the lawsuit was filed, Insured demands appraisal. Appraisal panel issues appraisal award in amount of $45,000.

Status: Confidential settlement

- - - - - - - - - - - -

Style: First United Methodist Church of Sulphur Springs vs. Steadfast Ins. Co. ("**Methodist Church**")
Court: 4:21-cv-00582 (Usd E.D. TX)
Attorney: Daly & Black
Fee Agrmnt: Unknown
Facts: Insured submits hail damage claim for damage from March 2019 storm. Dispute arises. On June 17, 2021, Insured files lawsuit. Parties litigate for nine months. Thereafter, on March 22, 2022, Insured demands appraisal.
Status: Confidential settlement

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6. Loree & Linscomb

Style: Samuel Kobrinsky vs. Great American Insurance Company ("**Kobrinsky**")
Court: 5:23-cv-000239 (USDC Western Dist.)
Fee Agrmnt: Unknown
Facts: Insured files claim for damages arising from February 2021 freeze event. Dispute arises as to claim measure. Insured files lawsuit on December 5, 2022. Insurer raises fraud allegations in litigation. After litigating for eight months, Insured demands appraisal.
Status: Pending

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7. Jose Chapa Law Firm

Style: Venugopal Muriki vs. General Star Indemnity Company ("**Muriki**")
Court: Dallas County Court at Law
Fee Agrmnt: Unknown
Facts: Insured claims damage from June 2, 2022, storm event. Dispute arises as to claim measure. On September 1, 2022, Insured demands appraisal. On November 4, 2022, Insured files lawsuit. On August 9, 2023, appraisal award issued. On same date Insured sends demand for statutory interest and attorneys' fees.
Status: Pending

Exhibit D

ADVERTISEMENT

Eric Dick is a proud graduate of Rice University. RICE

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Eric B. Dick, Attorney at Law
3701 Brookwoods Dr., Hou, Tx 77092

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eric@dicklawfirm.com
FREEZE DAMAGE LAWYER

You receive this letter because your information was obtained from the Harris County Appraisal District property records listing you as a property owner.

Many residents of your neighborhood have suffered severe damage to their home. We are helping your friends and neighbors protect their legal rights against ERCOT from the 2021 Winter Freeze. We want to help you. Let our experts inspect your house for freeze damage. You have nothing to lose and the results may shock you. ***Hiring Dick Law Firm is easy at 1-2-3:***
1. Sign Agreement, 2. Take Picture of Agreement, and 3. Text Picture to (832) 207-2007

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1. Sign this Agreement, 2. Take a Picture of this Page, 3. Text Picture to (832) 207-2007

This Agreement is between Client ("Client") and DICK LAW FIRM, PLLC ("Attorney") effective on the last date signed by both parties ("Parties.") Client hires Attorney on a contingency basis to prosecute Client's claims for personal injury (including minor children) and property damage or losses from the 2021 Winter Freeze, including any claims on property insurance policies regardless of date and cause ("Claim.") Attorney will not represent Client in any other matter. Disputes are decided by AAA commercial arbitration in Harris County, Client pays fees and expenses. Attorney is compensated by the Client **ONLY** if a recovery is made. Attorney's fees are calculated on the total recovery (RCV benefit) before deducting expenses. Client assigns/conveys to Attorney an interest on Client's GROSS recovery:

33 & 1/3% to Dick Law Firm, PLLC upon execution of this agreement.

Attorney can file a lawsuit for Client, Client's spouse, and Client's minor children's behalf, invoke appraisal, initiate an insurance claim, handle negotiations, litigation, and settlement discussions of Claim. Attorney can sign Client's name on and to any insurance monies made payable to the Attorney and the Client, the Attorney, or to the Client without the joinder of the Attorney, submitted to the Attorney on behalf of the Client in full or partial settlement of the Claim. Attorney is authorized to place Claim monies in the Attorney's trust account and from that trust account, make distributions and payments to the Attorney for the Claim, reimbursement to Attorney for all expenses incurred by the Attorney in handling the Claim, payments to Client of Client's interest, and payments to parties other than Client and Attorney for their services rendered or work performed. Attorney can file a binding stipulation to stop Claim from being removed to federal court. Attorney can use facts and documents in this case for public display without limitations. Client must request updates via email at updates@dicklawfirm.com. Updates can take thirty days or longer. Attorney can advance or incur monies for costs and expenses and will be reimbursed without any limitations, including interest or fees for commercial lending to finance the matter. Attorney fees are increased to forty-five percent after appraisal, mediation, or a lawsuit is filed. Attorney can withdraw for any reason. Client can terminate only for good cause, afterward the Attorney is entitled to fees for his work performed and reimbursement of all expenses and costs. Client requested advice of the Attorney and to be contacted to discuss legal options. Client was not solicitated by Attorney. Client's decisions are voluntary, and no one tried to force, coerce, trick, mislead, harass, deceive, or intimidate Client's into hiring Attorney. When entering into this agreement, no one paid, gave, or advanced money or anything of value to Client (or anyone). Client believes this Agreement is reasonable, and entering it without duress, undue influence, or pressure. This is the final understandings of the Parties and may not be modified without another signed Agreement.

Sign Here

CLIENT SIGNATURE | CLIENT PRINT NAME | DATE

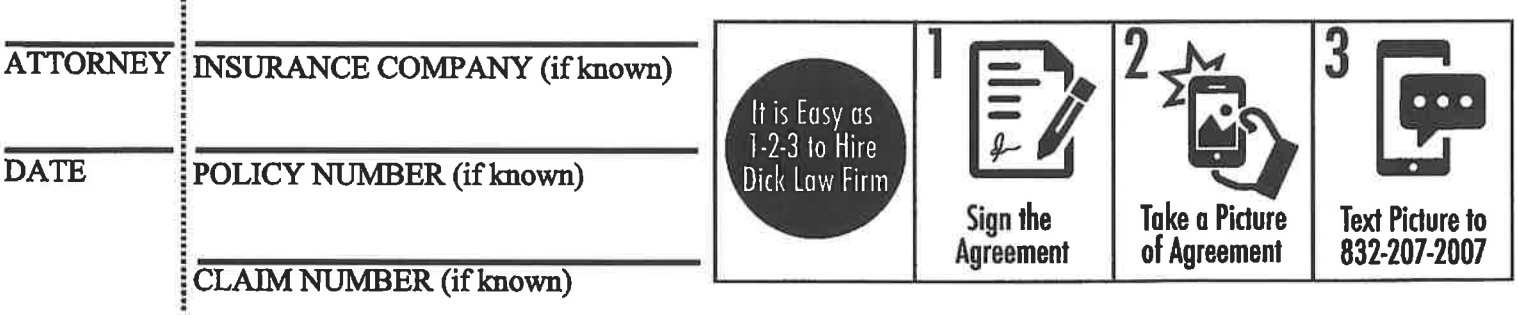
ADDRESS | CITY | ZIP CODE

PHONE NUMBER | EMAIL ADDRESS

ATTORNEY | INSURANCE COMPANY (if known)

DATE | POLICY NUMBER (if known)

CLAIM NUMBER (if known)



Questions? Call or Text (832) 207-2007 or Email Eric@dicklawfirm.com

Exhibit E

PROFESSIONAL SERVICES AGREEMENT

The Parties to this Agreement ("Agreement") are Alice ISD ("CLIENT") and Gravely P.C. ("SPECIAL COUNSEL").

In consideration of the mutual promises herein contained, the parties hereto agree as follows:

I. Purpose of Representation

1.01 CLIENT has found a substantial need to employ SPECIAL COUNSEL to assist CLIENT'S attorney in the prosecution of a lawsuit arising under the laws of the State of Texas against one or more of the following: insurance company, interlocal offering insurance type services and related entities responsible for insuring and/or re-insuring CLIENT Alice Independent School District's buildings (collectively, "Defendants"). The lawsuit concerns claims for breach of contract with respect to adjustment and underpayment of hail and/or wind damage to CLIENT'S property. ("Defendants' Violations").

1.02 CLIENT has found a substantial need for the legal services which cannot be adequately performed by CLIENT'S attorneys or the attorneys of a governmental entity, nor, because of the nature of the matter for which legal services will be obtained, can they be reasonably obtained from attorneys in private practice under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter. The estimated amount that may be recovered from the litigation exceeds $100,000.00.

1.03 Subject to the supervision, direction, and control of the Superintendent of Schools Dr. Carl Scarbrough, SPECIAL COUNSEL will prosecute a civil case on behalf of CLIENT against Defendants or other defendants deemed necessary to the prosecution of the civil case. In the civil case, SPECIAL COUNSEL shall seek necessary and appropriate temporary and permanent injunctive relief, damages, civil penalties, and attorney's fees and such other pecuniary recovery as may be provided for by the laws of the State of Texas and/or any relevant local, state and/or federal statutory and/or common law in connection with the Defendants' actions and any other applicable common law or statutory causes of action, including but not limited to all relevant laws of the State of Texas ("the Representation").

1.04 CLIENT has determined pursuant to Local Government Code §262.024(a)(4) that this Agreement is for *professional services,* requiring work that is predominantly mental or intellectual, rather than physical or manual, requiring special knowledge or attainment and a high order of learning, skill, and academic intelligence.

1.05 The term of this Agreement shall end after the conclusion of the Representation, unless either party extends or terminates this Agreement in accordance with its provisions.

1.06 SPECIAL COUNSEL shall prosecute the construction action on behalf of CLIENT against Defendants and seek necessary and appropriate temporary and permanent injunctive relief, damages, civil penalties, and attorney's fees and such other pecuniary recovery

as may be provided for by the laws of the State of Texas and/or any relevant local, state, federal statutory and/or common law in connection with the activities of Defendants. The primary attorneys handling this representation are: Marc E. Gravely and Jonathan C. Lisenby of Gravely P.C., SPECIAL COUNSEL shall furnish the services for the Representation. SPECIAL COUNSEL agrees to perform necessary legal work with reference to the Representation, and will work specifically with the Alice ISD Board of Trustees or their designee. SPECIAL COUNSEL will work under the supervision, direction, and control of the Alice ISD Board of Trustees or their designee.

1.07 To enable SPECIAL COUNSEL to provide effective representation, CLIENT agrees to do the following: (I) disclose to SPECIAL COUNSEL, fully and accurately and on a timely basis, all facts and documents within CLIENT's knowledge that are or might be material or that SPECIAL COUNSEL may request, (2) keep SPECIAL COUNSEL apprised on a timely basis of all developments relating to the Representation that are or might be material, (3) attend meetings, conferences, and other proceedings when it is reasonable to do so, and (4) otherwise, cooperate fully with SPECIAL COUNSEL.

1.08 Neither party shall assign, in whole or in part, any duty or obligation of performance under this Agreement, without the express written permission of the other parties, unless otherwise authorized in this Agreement.

1.09 The person or entity that SPECIAL COUNSEL represents is CLIENT, and SPECIAL COUNSEL's attorney-client relationship does not include any related persons or entities. If any potential conflict arises with respect to the Representation, SPECIAL COUNSEL will make full disclosure of the possible effects of such Representation on the professional judgment of each individual associated with SPECIAL COUNSEL working on the Representation. In the event a potential conflict occurs during the course of the Representation, SPECIAL COUNSEL will make full written disclosure of such to the Superintendent of Schools Dr. Carl Scarbrough.

1.10 It is understood and agreed that SPECIAL COUNSEL's engagement is limited to the Representation. SPECIAL COUNSEL is not being retained as general counsel, and SPECIAL COUNSEL's acceptance of this Agreement does not imply any undertaking to provide legal services other than those set forth in this Agreement.

1.11 Any expressions on SPECIAL COUNSEL's part concerning the outcome of the Representation, or any other legal matters, are based on SPECIAL COUNSEL's professional judgment and are not guarantees. Such expressions, even when described as opinions, are necessarily limited by SPECIAL COUNSEL's knowledge of the facts and are based on SPECIAL COUNSEL's views of the state of the law at the time they are expressed. SPECIAL COUNSEL has made no promises or guarantees to CLIENT about the outcome of the Representation, and nothing in these terms of engagement shall be construed as such a promise or guarantee.

II. Compensation and Other Matters

2.01 For and in consideration of the services performed under this Agreement, subject to the limitations in this Agreement, CLIENT agrees to pay SPECIAL COUNSEL as follows:

2.02 Any fee payable to SPECIAL COUNSEL will be from the portion of any award, judgment, and/or settlement allocated by law to CLIENT. This Agreement shall not confer upon SPECIAL COUNSEL any rights to any portion of any sum awarded to the State of Texas as a result of the Representation.

2.03. In the event of a recovery against the Defendant(s) and only to the extent collected from any Defendant(s), the CLIENT agrees to pay SPECIAL COUNSEL the lesser of 29% of the total recovery or four times SPECIAL COUNSEL'S base fee.

2.04 The contingent fee set forth in this section will be subject to the limitations set forth in this Agreement pursuant to Subchapter C, Chapter 2254 of the Texas Government Code.

2.05 The amount recovered for purposes of the contingent fee computation in paragraphs 2.03 and 2.04 is the amount CLIENT receives before reimbursable expenses are deducted.

2.06 This Contract is not for mixed hourly and contingent fee services. The amount of the contingent fee and reimbursement of expenses under this Agreement will be computed in accordance with Subchapter C, Chapter 2254 of the Texas Government Code. Because of the expected difficulties in performing the work under this Agreement, the amount of expenses expected to be risked by SPECIAL COUNSEL, the expected risk of no recovery, and the expected long delay in recovery, a reasonable multiplier for the base fee in this matter is four. SPECIAL COUNSEL's reasonable hourly rate for the work performed under the Agreement is $1,000 an hour for Marc Gravely; $800 an hour for attorney Jonathan Lisenby; $750 an hour for attorney Matthew Soliday; $750 hour for attorney Michael Gavito; $500 an hour for other associate attorneys of Gravely PC; and $200 an hour for paralegals or law clerks based on the relevant experience, demonstrated ability, and standard hourly billing rates for these attorneys, paralegals and law clerks. These rates apply to the subcontracted work performed, if any, by an attorney, law clerk, or paralegal. The base fee will be computed pursuant to Chapter C, Section 2254 of the Texas Government Code by multiplying the number of hours the attorney, paralegal or law clerk worked in providing legal or support services for the CLIENT times the reasonable hourly rate for the work performed by the attorney, paralegal or law clerk. The base fee is computed by adding the resulting amounts. The computation of the base fee does not include hours or costs attributable to work performed by a person who is not SPECIAL COUNSEL or a partner, shareholder, or employee of SPECIAL COUNSEL or law firm. There are no differences in the method by which the contingent fee is computed if the matter is settled, tried, or tried and appealed.

2.07 Reimbursement of subcontracted work, if any, under Texas Government Code Section 2254.107 shall meet the requirements of Subchapter C, Chapter 2254 of the Texas Government Code's requirements, without regard to the expected or actual amount of recovery under this Agreement.

2.08 Payment of the contingent fee and reimbursement of expenses under this Agreement will be paid and limited by the requirements set forth in Subchapter C, Chapter 2254 of the Texas Government Code, including Section 2254.105(5) and all other applicable sections.

2.09 SPECIAL COUNSEL assumes responsibility for the Representation. If there is a recovery then upon recovery, the Defendant will be instructed to transfer all of the recovery funds to Alice ISD by wire or check payable to Alice ISD. Upon receipt of the information required by Section 3.04 of this Agreement and upon approval by the Alice ISD Board of Trustees of SPECIAL COUNSEL's computation of the amount of the contingent fee which SPECIAL COUNSEL is required to submit by Section 3.04 of this Agreement, Alice ISD shall distribute fee to Gravely, P.C.. Thereafter, out of the remaining funds received from the Defendants after payment of the fee to Gravely P.C., then Alice ISD shall distribute a separate sum to Gravely P.C. to reimburse it for the Reimbursable Expenses due it as provided for by this Agreement and approved by the Alice ISD Board of Trustees based upon the information delivered to it as required by Section 3.04 of this Agreement.

2.10 CLIENT shall have the absolute right to settle the case for no penalty, which would yield no contingent fee on penalties to SPECIAL COUNSEL. Client will not be liable for reimbursable expenses in the event that Client settles the case for no penalty and makes no recovery of expenses or attorney's fees. CLIENT will assign any award of attorney's fees to SPECIAL COUNSEL, who shall have the obligation to collect them from the Defendants. SPECIAL COUNSEL will be responsible for paying all expenses of litigation directly to the vendor, such as, expert witness fees, deposition expenses, and other court costs/fees. CLIENT will not advance any litigation expenses under this Agreement. Alice ISD will pay nothing in advance of resolution of the case and afterwards will pay nothing unless there is a recovery from Defendants and the payment will come only from the funds paid by the Defendants.

2.11 The fee to be paid under this Agreement shall come exclusively out of any recovery (including but not limited to any attorney's fees and expenses, as well as penalties) awarded in any judgment resulting from the Representation, or any settlement during the Representation, and CLIENT shall be liable to SPECIAL COUNSEL for no more than the fee and reimbursable expenses as described below. CLIENT has specifically allocated and made available from currently budgeted funds the sum of $0 to discharge any obligation that CLIENT may incur arising out of this Agreement in the event the fee is determined to be prohibited by law.

2.12 It is expressly understood that the fee described above shall be the sole source of compensation to SPECIAL COUNSEL for overhead costs and expenses (with the exception of the reimbursable expenses listed below) and includes, but is not limited to, all costs for clerical work, including overtime, computer time, meals, clerical filing, and proofreading. SPECIAL COUNSEL agrees that they are neither authorized to seek reimbursement nor is CLIENT obligated to pay for mileage within Jim Wells County, parking fees, local facsimile (fax)

transmissions, use of law library, or other costs or expenses (similar or dissimilar) except for those for which reimbursement is specifically provided for in this Agreement, if any. Expert witness fees, mediation fees, expenses associated with depositions and hearings or trial (such as costs of the transcript, and court reporter or videographer fees), travel outside Jim Wells County, research and investigation related fees and expenses, Westlaw expenses, and expenses associated with creating demonstrative exhibits or other means of evidence presentation during trial or hearings (such as trial graphics) shall constitute the reimbursable expenses ("the Reimbursable Expenses"). SPECIAL COUNSEL shall advance all the Reimbursable Expenses. Reimbursable Expenses shall be recovered by SPECIAL COUNSEL out of any settlement or judgment that arises out of the Representation.

2.13 SPECIAL COUNSEL has been engaged to provide legal services in connection with the Representation, as specifically defined in this Agreement. After completion of the Representation, changes may occur in the applicable laws or regulations that could affect CLIENT's future rights and liabilities in regard to the Representation. Unless SPECIAL COUNSEL is actually engaged after the completion of the Representation to provide additional advice on such issues, SPECIAL COUNSEL has no continuing obligation to give advice with respect to any future legal developments that may pertain to the Representation other than the obligations set out in this Agreement.

2:14 At the conclusion of the Representation, SPECIAL COUNSEL will return to CLIENT any documents that SPECIAL COUNSEL is specifically requested to return. As to any documents so returned, SPECIAL COUNSEL may elect to keep a copy of the documents in SPECIAL COUNSEL's stored files. CLIENT owns all final work product generated from the Representation.

2.15 Any notice required or permitted to be given by the CLIENT to SPECIAL COUNSEL hereunder may be given by hand delivery, facsimile, email, or certified United States Mail, postage prepaid, return receipt requested, addressed to:

Marc E. Gravely
Gravely, P.C.
16018 Via Shavano
San Antonio, TX
78249
E-Mail: mgravely@gravely.law

Any notice required or permitted to be given by SPECIAL COUNSEL to the CLIENT hereunder may be given by hand delivery, facsimile, email, or certified United States Mail, postage or fee prepaid, return receipt requested, addressed to:

Dr. Carl Scarbrough
Superintendent of Schools
2 Coyote Trl
Alice, Texas 78332
Telephone: 361-664-0981
Fax:
Email: drcarl.scarbrough@aliceisd.net

Such notices shall be considered given and complete upon successful transmission or upon deposit in the United States Mail.

2.16 SPECIAL COUNSEL affirmatively consents to the disclosure of email addresses that are provided to CLIENT. This consent is intended to comply with the requirements of the Texas Public Information Act, TEX GOV'T CODE ANN. §552.137, *et sequitur*, as amended, and shall survive termination of this Agreement. This consent shall apply to email addresses provided by SPECIAL COUNSEL and agents acting on SPECIAL COUNSEL's behalf and shall apply to any email address provided in any form for any reason whether related to this Agreement or otherwise.

2.17 It is expressly understood that SPECIAL COUNSEL has no authority to settle or otherwise compromise the position of CLIENT or any of its officers. CLIENT retains all authority to settle the case.

2.18 Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of CLIENT.

2.19 If any provision of this Agreement is held in whole or in part to be unenforceable, void, or voidable for any reason, then such provision will be modified to reflect the parties' intention and to make the provision enforceable. It is the parties' intention that the suit against Defendants shall continue regardless of whether any single part of this Agreement is unenforceable, void or voidable. In the event that one or more provisions of this Agreement is held unenforceable, all remaining provisions of this Agreement that have not been determined by a court as being unenforceable, void, or voidable, shall remain in full force and effect.

III. Required Recitals

3.01 This Agreement is effective only after review and approval by the Office of the Attorney General for the State of Texas

3.02 SPECIAL COUNSEL must and shall keep complete written time and expense records that describe in detail the time and money spent each day in performing the contract (this Agreement) as required by Section 2254.104(a) Texas Government Code.

3.03 SPECIAL COUNSEL shall permit CLIENT or CLIENT's attorney or CLIENT's governing body or other governing officials, the Attorney General for the State of Texas, the State Auditor, or any other appropriate official, to inspect or obtain copies of the time and expense records kept in accordance with Section 3.02, at any time on request, as required by Section 2254.104(b) Texas Government Code. SPECIAL COUNSEL shall provide CLIENT interim statements that describe the job-to-date time and expense records of SPECIAL COUNSEL, plus the expenses that are subject to reimbursement.

3.04 Upon conclusion of any matter for which SPECIAL COUNSEL was retained, SPECIAL COUNSEL shall provide CLIENT with a complete written statement that describes the outcome of the matter, states the amount of any recovery, shows SPECIAL COUNSEL's computation of the amount of the contingent fee, and contains the final complete time and expense records required by Section 2254.104(c) Texas Government Code. The complete written statement required under this section is public information under Chapter 552 of the Texas Government Code and may not be withheld from a requester under that chapter under Section 552.103 or any other exception from required disclosure.

3.05 All time and expense records required by Section 3.02 are public information subject to

required disclosure under Chapter 552 of the Texas Government Code. Information contained in the time and expense records may be withheld from a member of the public under Section 552.103 only if, in addition to meeting the requirements of Section 552.103, the chief legal officer or employee of CLIENT determines that withholding the information is necessary to protect the CLIENT's strategy or position in pending or reasonably anticipated litigation. If any information is withheld from public disclosure in accordance with this subsection, CLIENT shall segregate said information from information that is subject to required public disclosure.

3.06 The amount recovered for purposes of the contingent fee computation is the amount obtained before expenses are deducted.

3.07 Any subcontracted legal or support services performed by a person who is not SPECIAL COUNSEL or a partner, shareholder, or employee of SPECIAL COUNSEL is an expense subject to reimbursement only after receiving written permission from CLIENT and only in accordance with Subchapter C, Chapter 2254 of the Texas Government Code.

3.08 SPECIAL COUNSEL, pursuant to Tex. Gov't Code § 2254.1032. agrees to indemnify and hold harmless the political subdivision from claims and liabilities resulting from negligent acts or omissions of Gravely, P.C. or any of its employees or agents as allowed under Tex. Gov't Code § 2254.1034

Jim Wells County, Texas

By: Carl Scarbrough — 9/15/2020
Name — Date
Superintendent
Title

Marc Gravely — 9/17/2020
Marc E. Gravely — Date

APPROVED BY:

OFFICE OF THE ATTORNEY GENERAL FOR THE STATE OF TEXAS

BY: _____ _____
Attorney General or his designee — Date

ATTACHMENT A

Rate Schedule for Named and Unnamed Persons in the Agreement

Rate Schedule for Gravely, P.C.

Gravely P.C. Personnel	Position	**Hourly Rate**
Marc Gravely	Principal	$1,000
Jonathan Lisenby	Attorney	$800
Matthew Soliday	Attorney	$750
Michael Gavito	Attorney	$750
Adriana Casablanca	Paralegal	$200
Associate Attorney	Attorney	$500

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sbadger@zellelaw.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stephen Barrick		sbarrick@hicks-thomas.com	10/2/2023 4:41:18 PM	SENT
Diane Ferguson		diane.ferguson@tb-llp.com	10/2/2023 4:41:18 PM	SENT
Michael Diksa		mike.diksa@tb-llp.com	10/2/2023 4:41:18 PM	SENT
Melissa Wray	24008614	mwray@dalyblack.com	10/2/2023 4:41:18 PM	SENT
Jay Old		jold@hicks-thomas.com	10/2/2023 4:41:18 PM	SENT
Shannon Loyd		shannon@lp-lawfirm.com	10/2/2023 4:41:18 PM	SENT
Alison Kelly		alison@lp-lawfirm.com	10/2/2023 4:41:18 PM	SENT
Amanda Guerrero		aguerrero@hicks-thomas.com	10/2/2023 4:41:18 PM	SENT
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Michael Diksa		mike.diksa@tb-llp.com	10/2/2023 4:41:18 PM	SENT
Adela Garcia		adela@lp-lawfirm.com	10/2/2023 4:41:18 PM	SENT
Susan E.Egeland		susan.egeland@faegredrinker.com	10/2/2023 4:41:18 PM	SENT
Sara Inman		sara.inman@faegredrinker.com	10/2/2023 4:41:18 PM	SENT
D. AlexanderHarrell		alex.harrell@faegredrinker.com	10/2/2023 4:41:18 PM	SENT
George S.Christian		george@tcjl.com	10/2/2023 4:41:18 PM	SENT
Alexander B.Wathen		alex@wathenlaw.com	10/2/2023 4:41:18 PM	SENT
Kyle D.Hawkins		kyle@lkcfirm.com	10/2/2023 4:41:18 PM	SENT
Leah F.Bower		leah@lkcfirm.com	10/2/2023 4:41:18 PM	SENT
Levon G.Hovnatanian		hovnatanian@mdjwlaw.com	10/2/2023 4:41:18 PM	SENT
Steven Badger		sbadger@zellelaw.com	10/2/2023 4:41:18 PM	SENT
Glenda Smith		gsmith@zellelaw.com	10/2/2023 4:41:18 PM	SENT

Associated Case Party: Mario Rodriguez

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Associated Case Party: Mario Rodriguez

Name	BarNumber	Email	TimestampSubmitted	Status
Richard D.Daly		ecfs@dalyblack.com	10/2/2023 4:41:18 PM	SENT

Associated Case Party: EricB.Dick, LLM

Name	BarNumber	Email	TimestampSubmitted	Status
Alexander Wathen		alexwathenattorney@gmail.com	10/2/2023 4:41:18 PM	SENT
Eric B.Dick, LLM		eric@dicklawfirm.com	10/2/2023 4:41:18 PM	SENT
Joseph J.Synoradzki		joe@dicklawfirm.com	10/2/2023 4:41:18 PM	SENT