Case No. 22-11213

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE POINTE DALLAS, L.L.C.,

Plaintiff-Appellant,

vs.

UNDERWRITERS AT LLOYD'S LONDON; IRONSHORE EUROPE DAC,

Defendants-Appellees.

On Appeal from the United States District Court
Northern District of Texas
Trial Court Civil Docket No. 3:21-CV-855

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

I certify that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Pointe Dallas, L.L.C., ("TPD") is the Plaintiff-Appellant. TPD's sole member is Zemen Woldberhan. His wife, Kishani Mathiasz Wolderbahn, is TPD's manager and agent. TPD is represented on appeal by Melissa Waden Wray and James Winston Willis of DALY & BLACK, P.C., and was represented in the district court by Mr. Willis and Richard D. Daly of DALY & BLACK and by Mark D. Cronenwett and Stephen Weikai Wu of MACKIE WOLF ZIENTZ & MANN, P.C.

2. Underwriters at Lloyd's London and Ironshore Europe DAC are the Defendants-Appellees. Underwriters and Ironshore are represented on appeal by Ian Ranier Beliveaux, Robbie Moehlmann, and Robin Howard Wexler of DONATO BROWN POOL & MOEHLMANN, P.L.L.C., and by Gary S. Kessler of KESSLER COLLINS, P.C. Underwriters and Ironshore were represented in the trial court by Mr. Moehlmann, Ms. Wexler, and Sara Catherine Vanderford-West of DONATO BROWN POOL & MOEHLMANN and by Mr. Kessler.

/s/ Melissa Waden Wray
Melissa Waden Wray
Attorney of Record for
Appellant The Pointe Dallas, L.L.C.

STATEMENT REGARDING ORAL ARGUMENT

TPD respectfully requests oral argument because the undersigned believes the Court would benefit from the opportunity to hear argument regarding the nuances of the legal issues presented and that oral argument would significantly aid the decisional process.

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STATEMENT OF JURISDICTION

TPD appeals a final judgment from the United States District Court for the Northern District of Texas, Dallas Division. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE ONE:

Whether the district court erred when it granted summary judgment in favor of Certain Underwriters on TPD's breach of contract claim based on the application of the Protective Safeguards Exclusion.

ISSUE TWO:

Whether the district court erred when it granted summary judgment in favor of Certain Underwriters on TPD's Chapter 541 and TPPCA claims.

ISSUE THREE:

Whether, if this Court finds TPD's loss is excluded by the PSE as a matter of law, it should nonetheless reverse summary judgment as to TPD's Chapter 541, TPPCA, and Fraud Claims because lack of coverage is not dispositive of them.

ISSUE FOUR:

Whether, if this Court finds TPD's loss is excluded by the PSE as a matter of law, it should nonetheless reverse summary judgment as to TPD's equitable estoppel claim because fact issues exist.

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APPELLANT'S BRIEF

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

Plaintiff-Appellant The Pointe Dallas, L.L.C., ("TPD") files its brief in support of its appeal of the district court's summary judgment in favor of Defendants-Appellees Underwriters at Lloyd's London and Ironshore Europe DAC (collectively, "Certain Underwriters"), and would respectfully show the Court the following:

STATEMENT OF THE CASE

The Insured Property

TPD is a limited liability company doing business in the State of Texas. (ROA.1520, ROA.1532) Zemen Woldberhan is TPD's sole member and his wife, Kishani Mathiasz Woldberhan, is the manager and an agent of TPD. (ROA.1520, ROA.1532) TPD owns and manages The Pointe Apartments ("The Pointe"), an apartment complex located at 6514 Ridgecrest Rd. in Dallas. (ROA.1520)

The Pointe is made up of five buildings that house a total of seventy-one residential units and a leasing office. (ROA.1520) The Pointe's units are private entrance apartments, meaning that residents and their guests enter the apartments from the outdoors rather than from shared interior hallways. (ROA.1520) The Pointe does not have any indoor common areas or amenities, and it does not have elevators. (ROA.1520) In other words, The Pointe's only indoor spaces are the residential units and the leasing office. (ROA.1520)

The Protective Safeguards in Place at the Insured Property

Each of The Pointe's residential units is equipped with either three or four ceiling-mounted smoke detectors: one in the living area, one in the hallway, and one in every bedroom. (ROA.1520) The leasing office is also equipped with ceiling-mounted smoke detectors. (ROA.1520) Each detector is battery-operated. (ROA.1520) When an individual ceiling-mounted detector senses smoke, it triggers

an alarm that sounds from that particular ceiling-mounted apparatus. (ROA.1520) However, the detectors are not wired together as part of a fire alarm system such that when a detector in a unit's living area senses smoke, it triggers other alarms in addition to that detector's alarm. (ROA.1520-ROA.1521) And, when a detector senses smoke and triggers its individual alarm, it does not send a signal to the fire department, police, or a monitoring company. (ROA.1521) The Pointe has had these protective safeguards in place, operating in this manner, for about ten years. (ROA.1521)

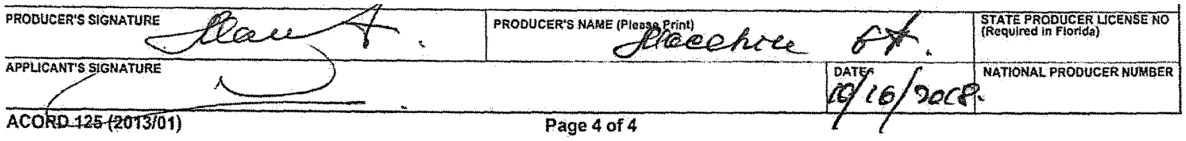
The Alleged Misrepresentations in the Insurance Application

In 2018, Kishani Mathiasz Woldberhan was responsible for and involved in procuring property insurance for The Pointe. (ROA.1521) Certain Underwriters alleged in their summary judgment briefing in the district court that in applying for insurance coverage, TPD provided false information about its protective safeguards relating to fire. (ROA.1026) Specifically, Certain Underwriters said that TPD submitted a signed insurance application misrepresenting the nature of the safeguards that were in place at The Pointe. (ROA.1521)

But importantly, **the representation Certain Underwriters contend was false does not appear in the Commercial Insurance Application**. (ROA.1188-ROA.1194) Rather, it appears in a different document entitled "Property Section."

(ROA.1192-ROA.1194) That document is neither referenced, identified, nor incorporated in the Application. (ROA.1188-ROA.1191)

More importantly, even if the allegedly false representation *was* contained in the Application, **TPD did not make the representation because it did not sign the Application**. (ROA.1522, ROA.1532) Both Kishani Mathiasz Woldberhan and Zemen Woldberhan testify that they did not sign it.[1] (ROA.1521, ROA.1532) And, importantly, comparison of the signature on the Application with the Woldberhans' signatures on other instruments supports their testimony:



(ROA.1191)

(ROA.1521, ROA.1523)

[1] The Woldberhans also testify that they did not authorize anyone to sign the Application on TPD's behalf and, in fact, that they do not recall ever seeing the document until after Certain Underwriters filed their amended motion for summary judgment in the district court. (ROA.1521, ROA.1532)

(ROA.1532-ROA 1533, ROA.1534)

Moreover, documents in the underwriting file produced by Certain Underwriters reflect that Certain Underwriters were aware of the protective safeguards The Pointe had in place. (ROA.1537-ROA.1561) Certain Underwriters' discovery responses indicate that in or around September 2018, Alla Macchia of Macchia General Agency and Remy Bickoff of Novus Underwriters conducted an underwriting inspection. (ROA.1568) An email in the underwriting file from Macchia to Bickoff dated September 22, 2018, says:

> Please see attach 125/126/140 Loss runs was Requested. Apartment complex 5 Buildings (Total 71 Units) No Losses in the past 5 Years . Roof was replaced in 2013 . No sprinkle system , Fire/ smoke detectors in Each unit . Expiring Policy rates and limits attach . Let me know if we can be competitive with your markets . I already send to Century and Seneca. Let me know if you need additional info from me

(ROA.1541)

The Policy

Ultimately, Certain Underwriters issued a policy to TPD, effective October 16, 2018, through October 16, 2019, that covered The Pointe for losses caused by

fire and other perils in exchange for an annual premium of $18,975.00. (ROA.1047-ROA.1117) The Policy renewed in October 2019 with an increased premium of $20,872.00. (ROA.1124)

The Protective Safeguards Endorsement

The Policy contained a Protective Safeguards Endorsement ("PSE") providing, in pertinent part, as follows:

PROTECTIVE SAFEGUARDS

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number	Building Number	Protective Safeguards Symbols Applicable
Describe Any "P-9":		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations or the Commercial Property Insurance Schedule.		

A. The following is added to the Commercial Property **Conditions:**

Protective Safeguards

1. As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above.
2. The protective safeguards to which this endorsement applies are identified by the following symbols:

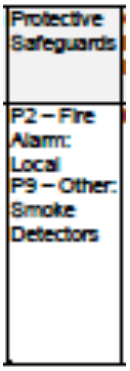
"P-2" Automatic Fire Alarm, protecting the entire building, that is:

a. Connected to a central station; or
b. Reporting to a public or private fire alarm station.

"P-9", the protective system described in the Schedule.

(ROA.1157) Note the language at the bottom of the PSE's Schedule indicating that "[i]nformation required to complete" the PSE's Schedule, if not in the PSE's Schedule, "will be shown in the Declarations or the Commercial Property Insurance

Schedule." (ROA.1157) A Commercial Property Insurance Schedule in the Policy[2] includes the following column:



(ROA.1127)[3] However, Certain Underwriters did not use this information to complete the Schedule in the PSE. (ROA.1127) The Schedule in the PSE is completely blank. (ROA.1127)

In February and March 2019, insurance agent Ray Mora notified TPD that Certain Underwriters had requested, pursuant to the underwriting inspection conducted by Macchia and Bickoff, that TPD correct two items related to fire safety in order to maintain coverage under the Policy: (1) have electrical panels inspected by a licensed electrician and have the system updated as needed to reduce risk of shock/injury and fire; and (2) install fire extinguishers per local fire code and mount them in a visible location so that they would be available in the event of an incident.

[2] The Commercial Property Insurance Schedule contained in the Declarations is an exact copy of a document that was included in the Policy binder dated October 19, 2018. (ROA.1056, ROA.1127)

[3] The relevant Policy provisions and documents are identical in the initial policy and the renewal. (ROA.1056, ROA.1090-ROA.1091, ROA.1127, ROA.1157-ROA.1158)

(ROA.1521-ROA.1522, ROA.1528-ROA.1532) Certain Underwriters indicated that they would require proof that the two tasks had been completed in order to continue coverage. (ROA.1521-ROA.1522, ROA.1528-ROA.1532) TPD completed the two tasks and provided proof as requested. (ROA.1521-ROA.1522, ROA.1529)

The Loss and the Claim

On April 10, 2020, twelve of The Pointe's units were damaged by a fire. (ROA.1258-ROA.1259, ROA.1261-ROA.1262, ROA.1522) TPD promptly notified Certain Underwriters of the loss and made a claim under the Policy. (ROA.1211) Defendants engaged Engle Martin & Associates to adjust the claim. (ROA.1213) On or about April 21, 2020, adjuster Brian Debrowski of Engle Martin inspected the property. (ROA.1214)

The Claim Decision

In a letter to TPD dated May 22, 2020, Debrowski said, "At this time, we wish to bring your attention to the language contained within the Protective Safeguards Endorsement, policy form CP 04 11 10 12." (ROA.1214) The letter quoted language in the PSE and then said:

> **Based on the "Protective Safeguards" portion of the Commercial Property Insurance Schedule the property must the have the following protective safeguards in place:**
>
> * * * * *
>
> *P2 – Fire Alarm: Local*
> *P9 – Other: Smoke Detectors*

(ROA.1215) Debrowski went on to say that Engle Martin "did not observe the local fire alarm system that is required in the 'P2' protective safeguard." (ROA.1215) The letter said that Certain Underwriters would continue its investigation subject to a reservation of rights and notify TPD in writing of its coverage decision at the conclusion of the investigation. (ROA.1215-ROA.1216)

While it is undisputed that Certain Underwriters did not pay the claim, neither Certain Underwriters nor anyone acting on their behalf ever provided TPD with a written claim decision as promised in Debrowski's letter and required by the Texas Insurance Code. (ROA.1522)

The Lawsuit

As a result of Certain Underwriters' failure to pay the claim, TPD engaged counsel and filed suit in state court on March 2, 2021. (ROA.16, ROA.1522) Defendants removed the case, asserting federal court jurisdiction based on diversity of citizenship. (ROA.10) Certain Underwriters moved for summary judgment on all of TPD's causes of action – breach of contract, violations of the Texas Prompt Payment of Claims Act ("TPPCA"), equitable estoppel, violations of Chapter 541 of the Texas Insurance Code, and fraud. (ROA.992)

The District Court's Summary Judgment Ruling

After hearing oral argument, the district court stated its conclusions on the record and granted summary judgment in Certain Underwriters' favor. (ROA.1792,

ROA.1820-ROA.1823) Specifically, the court concluded that the PSE unambiguously requires "linkage to a central station or reporting to a private – public or private fire alarm station" and "d[id] not regard the reference in the policy to 'P-2 [sic] – Fire Alarm: Local,' as creating a sufficient ambiguity as to eliminate the definition of P-2 in the Endorsement itself." (ROA.1820) Because TPD did not have the required safeguard in place, the court said, its breach of contract claim is untenable. (ROA.1820-ROA.1821) The court rejected TPD's argument that Certain Underwriters are equitably estopped from relying on the PSE based on false representations made by their agents during the underwriting process because the court found no false representations were made. (ROA.1821) It further found, based on its finding that the coverage denial was appropriate, that TPD's Chapter 541 claim fails as a matter of law and that TPD lacks a basis for a fraud claim.[4] (ROA.1822)

Later that day, the court entered an order referencing the findings stated on the record and granting summary judgment in Certain Underwriters' favor (ROA.1791) as well as a final judgment (ROA.1792).

The Appeal

TPD timely filed a notice of appeal. (ROA.1793-ROA.1794)

[4] The district court did not state a finding on the record regarding TPD's claim under the TPPCA. (ROA.1820-ROA.1823)

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *See Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270, 273 (5th Cir. 2015); *American Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 323 (5th Cir. 2001). It likewise reviews policy language, the legal standards for insurance coverage, and the district court's interpretation of an insurance policy *de novo*. *See Playa Vista Conroe v. Insurance Co. of the W.*, 989 F.3d 411, 414 (5th Cir. 2021) (citing *Ryan*, 274 F.3d at 323). This Court will affirm a district court's grant of summary judgment "when, viewing the evidence in the light most favorable to the moving party, the record reflects that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Ryan*, 274 F.3d at 323 (citing FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986)).

SUMMARY OF THE ARGUMENT

In order to be entitled to judgment as a matter of law on TPD's breach of contract claim, Certain Underwriters must prove "beyond peradventure" that the PSE applies and precludes coverage. In other words, it must show as a matter of law that the PSE requires a safeguard that The Pointe did not have in place at the time of the loss. It did not do so, and the trial court's interpretation of the Policy on which it based its summary judgment was erroneous.

First, it was erroneous because the PSE – whose Schedule is completely blank and neither reflects nor incorporates any requirements set forth elsewhere in the Policy – does not mandate any protective safeguards whatsoever. Second, it was erroneous because the PSE is ambiguous in several respects and must therefore be construed in favor of coverage. At *most*, all that was required was a local alarm, and the summary judgment evidence demonstrates a fact issue with regard to whether The Pointe had one in place at the time of the loss. Under any plausible analysis, summary judgment on TPD's contract claim is improper.

The district court's grant of summary judgment on TPD's extracontractual claims was largely derivative of its coverage finding and should therefore be reversed if summary judgment on TPD's contract claim is reversed. But even if it is not, this Court should still reverse summary judgment on TPD's extracontractual claims.

Lack of coverage is not dispositive of TPD's Chapter 541, TPPCA, and fraud claims. Under the Benefits-Lost Rule announced by the Texas Supreme Court in *Menchaca*, TPD may recover policy benefits as damages under a tort theory even though the loss is not covered. If TPD recovers policy benefits under a tort theory, Certain Underwriters may still be adjudicated liable and owe penalty interest and attorneys' fees under the TPPCA. And finally, TPD's equitable estoppel claim

should survive regardless because the summary judgment evidence demonstrates a fact issue with regard to each element of the doctrine.

This Court should reverse the district court's summary judgment and remand for further proceedings.

ARGUMENT

I. The District Court Erred When It Granted Summary Judgment in Favor of Certain Underwriters on TPD's Breach of Contract Claim

A. Certain Underwriters Is Only Entitled to Summary Judgment If It Proves "Beyond Peradventure" That the PSE Precludes Coverage

TPD's Policy is an all-risk policy that provides coverage for direct physical loss unless the loss is excluded or limited by the Policy. (ROA.1058) Certain Underwriters contended in the district court that the loss at issue is excluded under the PSE. (ROA.1001-ROA.1022) Because Certain Underwriters would bear the burden of proof at trial with respect to the PSE, it must establish "beyond peradventure" that the PSE applies in order to be entitled to judgment as a matter of law based on the application of the exclusion. *See Sustainable Modular Mgmt., Inc. v. Travelers Lloyds Ins. Co.*, No. 3:20-CV-1883-D, 2022 WL 2134022, at *5 (N.D. Tex. June 14, 2022); *Bank One, Tex. N.A. v. Prudential Ins. Co. of Am.*, 878 F. Supp. 943, 962 (N.D. Tex 1994) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)). This means that it "must demonstrate that there are no genuine and material factual disputes." *Sustainable Modular Mgmt.*, 2022 WL 2134022, at *4.

The "beyond peradventure" standard is a heavy one. *See id.* (quoting *Carolina Cas. Ins. Co. v. Sowell*, 603 F. Supp. 2d 914, 923-24 (N.D. Tex. 2009)).

B. Ambiguous Policy Language Must Be Construed Against Certain Underwriters, Especially When It is Exclusionary in Nature

Texas rules of contract interpretation guide this Court's *de novo* review of the district court's interpretation of the Policy language at issue in this diversity case. *See id.* (citing *American States Ins. Co. v. Bailey*, 133 F.3d 363, 369 (5th Cir. 1998)). Under Texas law, courts apply the same rules of contract interpretation to insurance policies that they apply to other contracts. *See International Ins. Co. v. RSR Corp.*, 426 F.3d 281, 291 (5th Cir. 2005) (citing *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *Sustainable Modular Mgmt.*, 2022 WL 2134022, at *13; *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994).

Those rules provide that a court's primary concern is to give effect to the parties' intentions as expressed by the Policy language. *See Ideal Lease Serv., Inc. v. Amoco Prod. Co.*, 662 S.W.2d 951, 953 (Tex. 1983). Policy terms are given their plain, ordinary meaning unless the policy shows that the parties intended them to have a different meaning. *See Puckett v. U.S. Fire Ins. Co.*, 678 S.W.3d 936, 938 (Tex. 1991). And, a court must give effect to all of an insurance policy's provisions so that none of them is rendered meaningless. *See Sustainable Modular Mgmt.*, 2022 WL 2134022, at *13.

If a contract can be given a definite meaning, it is unambiguous and must be construed as a matter of law and enforced as written. *See Sustainable Modular Mgmt.*, 2022 WL 2134022, at *13 (quoting *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008)); *see also National Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). If, however, contract language is susceptible to more than one reasonable interpretation, it is ambiguous and must be "liberally" construed in favor of coverage. *Certain Underwriters at Lloyds, London v. Law*, 570 F.3d 574, 577 (5th Cir. 2009) (quoting *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987)) (internal quotation marks omitted); *see Sustainable Modular Mgmt.*, 2022 WL 2134022, at *13 (quoting *Don's Bldg. Supply*, 267 S.W.3d at 23); *see also Hudson Energy*, 811 S.W.2d at 555. This is true even when the insurer's interpretation of the policy language seems to be the more likely reflection of the parties' intent, so long as the insured's interpretation "is not itself unreasonable." *See Law*, 570 F.3d at 577 (quoting *U.S. Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 355 (Tex. 1971)) (internal quotation marks omitted). And, "[t]he policy of strict construction against the insurer is especially strong when the court is dealing with exceptions and words of limitation." *Blaylock v. American Guar. Bank Liab. Ins. Co.*, 632 S.W.2d 719, 721 (Tex. 1982).

C. The District Court's Interpretation of the PSE Was Erroneous

The relevant portions of the PSE, excerpted above, are as follows:

PROTECTIVE SAFEGUARDS

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number	Building Number	Protective Safeguards Symbols Applicable
Describe Any "P-9":		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations or the Commercial Property Insurance Schedule.		

A. The following is added to the Commercial Property **Conditions:**

Protective Safeguards

1. As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above.
2. The protective safeguards to which this endorsement applies are identified by the following symbols:

"P-2" Automatic Fire Alarm, protecting the entire building, that is:

a. Connected to a central station; or
b. Reporting to a public or private fire alarm station.

"P-9", the protective system described in the Schedule.

(ROA.1157) The relevant portion of the Commercial Property Insurance Schedule included in the Policy but not incorporated by reference in the PSE's Schedule, also excerpted above, is as follows:

Protective Safeguards
P2 – Fire Alarm: Local P9 – Other: Smoke Detectors

(ROA.1127)

The district court found that the PSE unambiguously requires "linkage to a central station or reporting to a private – public or private fire alarm station" and "d[id] not regard the reference in the policy to 'P-2 [sic] – Fire Alarm: Local,' as creating a sufficient ambiguity as to eliminate the definition of P-2 in the Endorsement itself." (ROA.1820) For the reasons that follow, the district court's interpretation of the PSE was erroneous.

1. The PSE Is Unambiguous: It Does Not Require *Any* Protective Safeguards

First, the district court's interpretation of the PSE was erroneous because the PSE cannot be construed to require *any* protective safeguards.

The PSE provided that as a condition of insurance, TPD must "maintain protective devices or services ***listed in the Schedule above***." (ROA.1157 (emphasis added)) **The Schedule to which this language refers – the Schedule in the PSE itself – does not list any protective devices or services.** (ROA.1157)

The PSE's Schedule ***does*** reference the Policy's "Declarations or . . . Commercial Property Insurance Schedule" as a source or sources of information "***required to* complete**" the PSE's Schedule. (ROA.1157 (emphasis added)) But it does **not** incorporate that information into the PSE or the PSE's Schedule.[5] (ROA.1157)

[5] While accusing TPD of picking and choosing Policy language, Certain Underwriters' briefing in the district court disingenuously alleges that the PSE required TPD to "maintain the protective

If Certain Underwriters had intended for any protective safeguards listed in "the Declarations or the Commercial Property Insurance Schedule" to be incorporated by reference in the PSE's Schedule, it could have easily said so in the PSE. Or, if it had intended to use the information contained in the Commercial Property Insurance Schedule to "complete" the PSE's Schedule – as specifically contemplated by the PSE – it could have easily done so. But it didn't. (ROA.1157-ROA.1158)

Moreover, the PSE – by its own terms – does not and cannot apply to a protective safeguard entitled "P2 – Fire Alarm: Local." (ROA.1157-ROA.1158) Section A.2. of the PSE says:

2. The protective safeguards to which this endorsement applies are identified by the following symbols:

"P-1" Automatic Sprinkler System, including related supervisory services.

Automatic Sprinkler System means:

a. Any automatic fire protective or extinguishing system, including connected:
   (1) Sprinklers and discharge nozzles;
   (2) Ducts, pipes, valves and fittings;
   (3) Tanks, their component parts and supports; and
   (4) Pumps and private fire protection mains.
b. When supplied from an automatic fire protective system:
   (1) Non-automatic fire protective systems; and
   (2) Hydrants, standpipes and outlets.

"P-2" Automatic Fire Alarm, protecting the entire building, that is:

a. Connected to a central station; or
b. Reporting to a public or private fire alarm station.

"P-3" Security Service, with a recording system or watch clock, making hourly rounds covering the entire building, when the premises are not in actual operation.

"P-4" Service Contract with a privately owned fire department providing fire protection service to the described premises.

"P-5" Automatic Commercial Cooking Exhaust And Extinguishing System installed on cooking appliances and having the following components:

a. Hood;
b. Grease removal device;
c. Duct system; and
d. Wet chemical fire extinguishing equipment.

"P-9", the protective system described in the Schedule.

devices or services listed in the Schedule" (omitting the key word, "above") and then alleges that "the Schedule" (which, in the PSE, refers to *the Schedule in the PSE itself*, not the Commercial Property Insurance Schedule) listed two required safeguards. (ROA.1015, ROA.1157)

(ROA.1157) Thus, PSE can only apply to protective safeguards that are identified by the symbols listed within Section A.2. (ROA.1157) Neither a safeguard described as "Fire Alarm: Local" nor a symbol "P2," much less one described as "Fire Alarm: Local" *and* identified by the symbol "P-2" is listed within Section A.2. (ROA.1157) And, neither a safeguard identified by the symbol "P-2" nor one described as "Automatic Fire Alarm" is shown in the Commercial Property Insurance Schedule. (ROA.1127)

Therefore, the district court should have held that the Policy is unambiguous and that the PSE does not require any protective safeguards.

2. Alternatively, the PSE Is Ambiguous and Must Be Construed in Favor of Coverage

Even assuming *arguendo* that the PSE can be construed to require an alarm of any kind, the Policy is subject to more than one reasonable interpretation when it comes to what kind of alarm is required.[6] The only alarm referenced in the PSE is an "**Automatic Fire Alarm,** protecting the entire building, that is: a) Connected to a central station; or b) Reporting to a public or private fire alarm station." (ROA.1157) The PSE does not define "central station" or "public or private fire alarm station." (ROA.1157) The Commercial Property Insurance Schedule, on the other hand, references a "Fire Alarm: Local." (ROA.1127) But it does not define it.

[6] Certain Underwriters do not dispute that The Pointe maintained smoke detectors. (ROA.1012)

Two layers of ambiguity exist here.

First, the Policy is subject to more than one reasonable interpretation because it could be construed as requiring, if anything, 1) an "**Automatic Fire Alarm,** protecting the entire building, that is: a) Connected to a central station; or b) Reporting to a public or private fire alarm station," as identified in the PSE; or 2) a "Fire Alarm: Local" as identified in the Commercial Property Insurance Schedule.

Importantly, **these two types of alarms are not interchangeable**. *See Landmark Am. Ins. Co. v. Green Lantern Roadhouse LLC*, No. 07-CV-0535-MJR, 2009 WL 413086, at *5 n.4 (S.D. Ill. 2009). A **local** alarm is one that merely sounds at the premises, while a **central station** alarm or one that **reports to a public or private station** is one that "alerts an outside monitor, such as a security company or fire or police department" when triggered. *See id.*; *see also Insurance Corp. of Hannover v. Vantage Prop. Mgmt., L.L.C.*, No. 04-1012-CV-W-SOW, 2006 WL 2385138, at *8 (W.D. Mo. 2006); *Four J's Community Living Ctr. v. Wagner*, 630 S.W.2d 502, 511 (Tex. App.—Houston [1st Dist.] 2021, pet. denied), *reh'g denied* (noting that alarm at residential facility was a "local alarm only" that "did not automatically notify the HFD if a fire occurred"); *In re Wagner*, 560 S.W.3d 309, 315 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding).

A second layer of ambiguity exists, specifically, with regard to the language in the PSE. At least one court has held an identical policy provision ambiguous as a

matter of law. *See Vantage Prop. Mgmt.*, 2006 WL 2385138, at *8. In the *Vantage Property Management* case, *see id.* at *7, the insurer attempted to avoid coverage based on the insured's alleged failure to comply with the PSE, which – like the Policy in this case – required the insured to have an "'Automatic Fire Alarm, protecting the entire building that is (1) Connected to a central station; or (2) Reporting to a public or private fire alarm station.'" *Id.* at *8. The insured contended, among other things, that the terms "central station" and "private fire alarm station" should have been defined in the policy because they are not well known by laymen. *See id.* In fact, the insurance company's own expert testified that "people not in the fire alarm industry would not know what a central station was." *Id.* The court agreed, finding the terms "ambiguous as used in the policy, without an accompanying definition" and granting partial summary judgment in the insured's favor. *Id.*

At a minimum, the district court should have found the Policy is ambiguous and, in accordance with Texas rules of contract interpretation, construed it in favor of TPD.

3. The Cases Cited in Certain Underwriters Summary Judgment Briefing Are Inapposite

Certain Underwriters' summary judgment briefing cites a number of cases wherein courts examining PSEs with the same or substantially similar language as the PSE in TPD's Policy found them unambiguous and held that the PSEs precluded coverage. But there is a key distinction between this case and the cases on which

Certain Underwriters relied in the district court: ***the PSEs in those cases actually identified the protective safeguard the insured was required to implement and did not reference two different types of alarms.***

For instance, Certain Underwriters' briefing in the district court cites *Scottsdale Ins. Co. v. Logansport Gaming, L.L.C.*, 556 Fed. App'x 356 (5th Cir. 2014). It is true that this Court held in the *Scottsdale* case that the PSE defeated coverage. *See id.* at 358-60. But the PSE in *Scottsdale* looked like this:

SCHEDULE*

Prem. No.	Bldg. No.	Protective Safeguards Symbols Applicable
1	1	P-9

Describe any "P-9":
FIRE EXTINGUISHERS
ANSUL SYSTEM

* Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

"P-9" The protective system described in the Schedule.

(ROA.1588) The PSE in *QB Investments, LLC v. Certain Underwriters at Lloyd's, London*, No. 01-10-00718-CV, 2011 WL 3359683 (Tex. App.—Houston [1st Dist.] Aug. 4, 2011, no pet.), another case on which Certain Underwriters relied in the district court, looked like this:

SCHEDULE*

Prem. No.	Bldg. No.	Protective Safeguards Symbols Applicable	
1	1	"P-9":	Central Station FIRE Alarm Flammables kept in approved containers

* Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

"P-9" The protective system described in the Schedule.

(ROA.1714) This was the PSE in *Chaucer Corp. Capital (No. 2) Ltd. v. Normal W. Paschall Co.*, 525 Fed. App'x 895 (11th Cir. 2013):

SCHEDULE*

Prem. No. **	Bldg. No. **	Protective Safeguards Symbols Applicable P-1
Describe any "P-9": **As applicable per AmRisc application - statement of values.		

* Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

"P-1" **Automatic Sprinkler System,** including related supervisory services.

Automatic Sprinkler System means:

a. Any automatic fire protective or extinguishing system, including connected:
   (1) Sprinklers and discharge nozzles;
   (2) Ducts, pipes, valves and fittings;
   (3) Tanks, their component parts and supports; and
   (4) Pumps and private fire protection mains.

b. When supplied from an automatic fire protective system:

(1) Non-automatic fire protective systems; and

(2) Hydrants, standpipes and outlets.

(ROA.1760)

D. Under Any Plausible Analysis, This Court Should Reverse the District Court's Summary Judgment on TPD's Breach of Contract Claim

As discussed *supra*, the PSE is unambiguous and requires no protective safeguards, in which case Certain Underwriters are not entitled to summary judgment. Alternatively, the Policy is ambiguous on multiple levels and must be construed in TPD's favor as a matter of law, requiring denial of summary judgment.

At *most*, the Policy requires exactly what is stated in the Commercial Property Insurance Schedule: a local alarm. At the time of the loss, The Pointe had smoke detectors in every interior space of every building on the premises that, when activated, triggered an alarm that would sound in the location of that individual detector. (ROA.1520) This, at a minimum, demonstrates a fact issue with regard to whether TPD was in compliance with the PSE, if any, and precludes summary judgment in Certain Underwriters' favor.

Accordingly, this Court should reverse the district court's summary judgment on TPD's contract claim and remand the case for further proceedings.

II. The District Court Erred When It Granted Summary Judgment in Favor of Certain Underwriters on TPD's Chapter 541 and TPPCA Claims

The only argument Certain Underwriters made in the district court as to TPD's Chapter 541 and TPPCA claims is that those claims cannot proceed in the absence of coverage. (ROA.1029) For the reasons set forth in Part I, *supra*, Certain Underwriters cannot establish that the PSE precludes coverage as a matter of law. If the Court reverses summary judgment as to TPD's breach of contract claim, it should reverse summary judgment as to its Chapter 541 and TPPCA causes of action and remand.

III. Even If This Court Finds TPD's Loss Is Excluded by the PSE as a Matter of Law, It Should Nonetheless Reverse Summary Judgment as to TPD's Chapter 541, TPPCA, and Fraud Claims Because Lack of Coverage Is Not Dispositive of Them

However, even in the unlikely event that the Court finds that TPD's claim is not covered under the Policy, Certain Underwriters is *still* not entitled to summary judgment on TPD's Chapter 541, TPPCA, and fraud claims.

Certain Underwriters' argument in the district court as to TPD's extracontractual claims relied almost exclusively on the Texas Supreme Court's opinion in *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).[7]

[7] Besides *Menchaca*, the only authorities Certain Underwriters summary judgment briefing cites to support their argument regarding TPD's Chapter 541 and TPPCA claims are a single section of the TPPCA and a Fifth Circuit case discussing *Menchaca*. (ROA.1029)

Certain Underwriters' summary judgment briefing quotes the Supreme Court's statement in *Menchaca*, *id.* at 500, that "[a]n insured cannot recover *any* damages based on an insurer's statutory violation unless the insured establishes a right to receive benefits under the policy or an injury independent of a right to benefits." (ROA.1029) Certain Underwriters' reliance on this language, cherry-picked from *Menchaca*, to defeat TPD's extracontractual claims is misplaced.

A. Under the Benefits-Lost Rule, TPD Can Recover Policy Benefits as Actual Damages Under Chapter 541 of the Code Even Though the Loss Is Not Covered

Chapter 541 of the Texas Insurance Code prohibits individuals and entities that are "engaged in the business of insurance," *see* TEX. INS. CODE § 541.002(2), including insurance companies and their agents, brokers, and adjusters, from engaging in certain trade practices that constitute "unfair methods of competition or unfair or deceptive acts or practices," *id.* § 541.001(1). In addition to "imposing procedural requirements that govern the manner in which insurers review and resolve an insured's claim for policy benefits," *Menchaca*, 545 S.W.3d at 488, Chapter 541 bars insurers from making misrepresentations regarding coverage and other matters related to the insurance policy itself, *see generally* TEX. INS. CODE §§ 541.051 *et seq.*

In 2018, the Texas Supreme Court decided *Menchaca*, 545 S.W.3d 479, issuing a landmark opinion wherein the Court set out to articulate rules that explain

the interplay between breach of contract and extra-contractual causes of action in the first-party insurance context. *See id.* at 484, 490-503.

The first rule set forth in *Menchaca* – the General Rule – "is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy." *Id.* at 490. This is a matter of simple logic: if the policyholder was never entitled to policy benefits, *i.e.*, the claim was not covered, the insurer's statutory violation cannot, as a general matter, "cause damages in the form of policy benefits that the insured has no right to receive under the policy." *Id.* at 493; *see Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995) ("[a]s a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered").

The second rule announced in *Menchaca* is the Entitled-To-Benefits Rule. *See Menchaca*, 545 S.W.3d at 495-97. The Entitled-to-Benefits Rule dictates that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the statute if the insurer's statutory violation causes the loss of the benefits." *Id.* at 495. This is a "logical corollary" to the General Rule.

The third rule crystallized in *Menchaca* – the **Benefits-Lost Rule** – articulates an ***exception*** to the General Rule. *See id.* at 497. Under the Benefits-Lost Rule, "**an insured can recover benefits as actual damages under the Insurance Code even**

if the insured has no rights to those benefits under the policy, *if the insurer's conduct caused the insured to lose that contractual right*." *Id.* at 497. The Court explained that it has recognized this principle in at least three contexts. *See id.* at 497-99.

First, the Court has recognized that "an insurer that violates [Chapter 541] by misrepresenting that its policy provides coverage that it does not in fact provide can be liable under the statute for such benefits if the insured is 'adversely affected' or injured by its reliance on the misrepresentation." *Id.* at 497 (citing *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex. 1979)). "Although the policy does not give the insured a contractual right to receive the benefits," the Court explained, "the insurer's misrepresentation of the policy's coverage constitutes a statutory violation that causes actual damages in the amount of the benefits that the insured reasonably believed [it] was entitled to receive." *Id.* (citing *Royal Globe*, 577 S.W.2d at 694). A misrepresentation claim of this nature is ***not*** dependent upon a determination that the insurer has a contractual duty to pay the insured's claim and it is ***not*** rendered moot if the insurer prevails on coverage. *See In re Allstate County Mut. Ins. Co.*, 447 S.W.3d 497, 503-04 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding); *see also Tapatio Springs Builders, Inc. v. Maryland Cas. Ins. Co.*, 82 F. Supp. 2d 633, 647 (W.D. Tex. 1999) ("A misrepresentation claim is independent, and may exist in the absence of coverage.").

Second, the Court has recognized that the Benefits-Lost Rule might apply when an insured's statutory claim is based on waiver or estoppel. *See Menchaca*, 545 S.W.3d at 498. Waiver and estoppel cannot be used to rewrite a policy so that the policy provides coverage it did not originally provide. *See id.* But, if the insurer violates the Insurance Code and the insured is prejudiced, the insurer "may be estopped 'from denying benefits that would be payable under its policy as if the risk had been covered.'" *Id.* (quoting *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 775 (Tex. 2008)). In this situation, "the insured may recover 'any damages it sustains because of the insurer's actions,' even though the policy does not cover the loss." *Id.* (quoting *Ulico Cas. Co.*, 262 S.W.3d at 787).

Third, the Court has recognized that the Benefits-Lost Rule may apply "when the insurer's statutory violation actually caused the policy not to cover losses that it otherwise would have covered." *Id.* (citing *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 602 (Tex. 2015)). Stated differently, "an insurer that commits a statutory violation that eliminates or reduces its contractual obligations cannot then avail itself of the general rule." *Id.* at 499.

The fourth rule, the Independent-Injury Rule, is another exception to the General Rule. *See id.* at 499-500. The Independent-Injury Rule is twofold. *See id.* at 499 ("There are two aspects to this independent-injury rule."). First, the Rule provides that "if an insurer's statutory violation causes an injury independent of the

insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits." *Id.* (citing *Stoker*, 903 S.W.2d at 341); *see Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 n.3 (Tex. 1995) (identifying mental anguish damages as an example of damages that are separate and different from policy benefits). Second, the Rule holds that "an insurer's statutory violation does not permit the insured to recover *any* damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits." *Menchaca*, 545 S.W.3d at 500 (explaining that an insured who prevails on a statutory claim cannot recover punitive damages unless the insured can demonstrate that independent actual damages arose from the insurer's bad-faith conduct).

The fifth and final rule the Court articulated in *Menchaca*, the No-Recovery Rule, "is simply the natural corollary to the first four rules: An insured cannot recover *any* damages based on an insurer's statutory violation unless the insured establishes a right to receive benefits under the policy or an injury independent of a right to benefits." *Id.* at 500.[8]

[8] Rule 5 is somewhat confusing in that if it is read in a vacuum, it appears not to account for the exception to the General Rule laid out in detail in the Court's discussion of the Benefits-Lost Rule. The five rules can be harmonized, however, when the application of the Benefits-Lost Rule is interpreted as having the effect of establishing a right to receive benefits under the policy even in the absence of coverage. Indeed, this interpretation is supported by the Court's subsequent statement in *Menchaca*, 545 S.W.3d at 504: "[A]s we have explained, the insured can prevail under the entitled-to-benefits rule or the benefits-lost rule if [it] establishes (1) the insurer violated the

Menchaca makes it clear that Defendants' contention that an insured's Chapter 541 claim rises and falls on coverage is simply not accurate. While the General Rule precludes liability under Chapter 541 in the absence of coverage, the Benefits-Lost Rule and the Independent Injury Rule establish exceptions to that rule. It is the Benefits-Lost Rule that applies and was pled by TPD here. (ROA.956-ROA.957)

Even in the unlikely event that this Court finds that TPD's claim is not covered and does not reverse as to breach of contract, it should reverse as to TPD's Chapter 541 cause of action because Defendants did not argue that TPD cannot demonstrate a fact issue with regard to the application of the Benefits-Lost Rule. *See* FED. R. CIV P. 56(f)(2) (providing that a court may not grant summary judgment on grounds not raised by the moving party without giving the nonmovant notice and a reasonable time to respond).

B. If the Benefits-Lost Rule Applies and Certain Underwriters Are Adjudicated Liable Under Chapter 541, Certain Underwriters Will Owe Interest and Attorneys' Fees Under the TPPCA

The TPPCA, which is to be liberally construed, "imposes procedural requirements and deadlines on insurance companies to promote the prompt payment of insurance claims." *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806,

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statute and (2) the violation resulted in [the insured's] loss of benefits [it] was entitled to under the policy."

812 (Tex. 2019), *reh'g denied* (citing TEX. INS. CODE § 542.054); *see* TEX. INS. CODE § 542.054. These requirements and deadlines pertain to an insurer's acknowledgment of receipt of a claim, its commencement and completion of its investigation of the claim, its communication with the insured regarding the claim, and its payment of the claim. *See* TEX. INS. CODE §§ 542.055-.058. "If an insurer that is liable for a claim under an insurance policy is not in compliance with" the TPPCA's claims handling requirements and deadlines, it must pay the insured – in addition to the benefits owed – 18 percent interest on the amount of the claim as damages, plus attorneys' fees. *See id.* § 542.060(a). The statute is penal in nature. *See Devonshire Real Estate & Asset Management, LP v. American Ins. Co.*, No. 3:12-cv-2199, 2014 WL 4796967, at *22 (N.D. Tex. Sept. 26, 2014) (citations omitted).

In order to prevail on a claim under the TPPCA, the insured must establish (1) that the insurer is "**liable for a claim** under an insurance policy;" and (2) that the insurer has **failed to comply** with one or more of the claims handling or timely payment sections of the TPPCA. *See Barbara Techs.*, 589 S.W.3d at 813. In *Barbara Technologies*, *see id.* at 819-20, the Texas Supreme Court explained what "liable for a claim" means in the context of the TPPCA.

Barbara Technologies was a first-party homeowner's insurance dispute arising from a storm damage claim. *See id.* State Farm rejected the insured's claim.

See id. Barbara Tech filed suit and the claim went to appraisal. *See id.* at 810. The appraisal award came back in Barbara Tech's favor and State Farm paid it. *See id.*

Barbara Tech amended its petition so that only its TPPCA claim remained, and both parties moved for summary judgment. *See id.* The trial and appellate courts sided with State Farm, finding that State Farm was entitled to summary judgment because payment of an appraisal award precludes the insured from recovering under the TPPCA as a matter of law. *See id.*

On review, the Supreme Court reversed, holding that an insurer's timely payment of an appraisal award, standing alone, neither authorizes nor forecloses TPPCA damages as a matter of law. *See id.* at 819. In light of this holding, the Court went on to consider the second argument State Farm had made in the courts below: that it was further entitled to summary judgment on Barbara Tech's TPPCA claim because State Farm had not been and could not be shown to be liable for the claim. *See id.* at 819-26. The Court construed State Farm's second summary judgment argument to be that its payment of the appraisal award negated Section 542.060's liability element as a matter of law. *See id.* at 819.

In order to consider this argument, it was necessary for the Court to address the meaning of "liable for a claim" under the TPPCA. *See* TEX. INS. CODE § 542.060(a). The Court said it means that the insurer has either (1) completed its investigation and accepted and paid the claim in full or in part; or (2) been

adjudicated liable for the claim. *See id.* Importantly, "a judgment that the insurer wrongfully rejected the claim" constitutes an adjudication of liability that is sufficient to satisfy the TPPCA's liability element. *Barbara Techs.*, 589 S.W.3d at 819-20 (emphasis added).

Note that neither the statute nor *Barbara Technologies* says that the claim must be ***covered*** or that the insured must ***prevail on a contract claim*** in order to prevail on a TPPCA claim. The legislature and the Supreme Court could have easily said as much, but they didn't. Rather, the insured must simply procure an adjudication that the insurer "wrongfully rejected the claim." *Id.* at 819. And, as discussed above, *Menchaca* tells us that under the Benefits-Lost Rule, an insured can recover policy benefits as actual damages under the Code, even if the absence of coverage, if the insurer's conduct caused the insured to lose its contractual right to benefits under the insurance policy. *See Menchaca*, 545 S.W.3d at 497.

Thus, in a situation where the Benefits-Lost Rule applies and the insured is entitled to recover benefits under the insurance policy even though the claim is not covered, lack of coverage does not preclude a claim under the TPPCA because a judgment that the insurer wrongfully rejected the claim will be sufficient to establish the liability element of the TPPCA claim. In other words, Certain Underwriters' wholesale argument in the district court that coverage is **always** a prerequisite to an

insurer's TPPCA liability and, therefore, Certain Underwriters is entitled to summary judgment in this case, lacks merit.

In the event this Court declines to reverse summary judgment as to breach of contract but reverses as to Chapter 541, because Certain Underwriters may still be adjudicated liable under Chapter 541, the Court should reverse summary judgment on TPD's TPPCA claim.

C. TPD's Ability to Recover Damages for Common Law Fraud Is Not Dependent on Coverage

The elements of common law fraud under Texas law are "(1) a material misrepresentation; (2) the defendant knew the statement was false or made the statement with reckless disregard for the truth; (3) the defendant intended for the plaintiff to rely upon the statement; and (4) the plaintiff relied upon the statement (5) to his detriment." *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 762 (5th Cir. 2002) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990)). A common law fraud claim is similar, though not identical, to a statutory misrepresentation claim under Chapter 541. *See Partain v. Mid-Continent Specialty Ins. Servs., Inc.*, 838 F. Supp. 547, 558 (S.D. Tex. 2012) (explaining that Chapter 541 misrepresentation claim does not require a mental state of knowledge or recklessness while a common law fraud claim does).

As noted above, Certain Underwriters summary judgment argument in the district court as to TPD's extracontractual claims relied almost exclusively on

Menchaca, wherein the "primary question" before the Court was "whether an insured can recover policy benefits as 'actual damages' caused by an insurer's **statutory violation** absent a finding that the insured had a contractual right to the benefits under the insurance policy." *Menchaca*, 545 S.W.3d at 489 (emphasis added). *Menchaca* does not discuss the viability of a common law fraud claim in the absence of coverage. *See generally id.*

Thus, Certain Defendants cited no authority in the district court to support the proposition that an insurer is entitled to summary judgment on an insured's common law fraud claim when the insured's claim is not covered under the policy. This is unsurprising, because it is not the law. For the same reasons, discussed *supra*, that TPD's Chapter 541 claim would not be barred by lack of coverage, neither would its fraud claim.

IV. Even If This Court Finds TPD's Loss Is Excluded by the PSE as a Matter of Law, It Should Nonetheless Reverse Summary Judgment as to TPD's Equitable Estoppel Claim Because Fact Issues Exist

If this Court reverses summary judgment as to TPD's breach of contract claim, TPD's equitable estoppel claim is effectively moot. But if for some reason the Court affirms summary judgment as to TPD's contract claim, it should reverse as to the equitable estoppel claim and remand.

Under Texas law, a plaintiff relying on the doctrine of equitable estoppel must show:

> (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations.

Medical Care Am., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 341 F.3d 415, 422 (5th Cir. 2003) (quoting *Johnson & Higgins v. Kennco Energy*, 962 S.W.2d 507, 515-16 (Tex. 1998)).

Because the summary judgment evidence discussed at length in the Statement of Facts, *supra*, establishes a fact question with regard to each of the elements of equitable estoppel, the Court should reverse summary judgment as to that claim and remand.

CONCLUSION AND PRAYER

For these reasons, Plaintiff-Appellant The Pointe Dallas, L.L.C., respectfully asks this Court to reverse the district court's summary judgment in favor of Defendants-Appellees Underwriters at Lloyd's London and Ironshore Europe DAC and remand the case for further proceedings. TPD also requests all other relief to which it may show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 2, 2023, the foregoing brief was filed in portable document format using the Court's CM/ECF system and served electronically by the Court's NEF system upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,333 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This was determined using the word count feature in Microsoft Word 2010 and hand-counting words in excerpts from documents that appear within the brief.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

3. Pursuant to Fifth Circuit Rule 25.2.1 and .13, this electronic filing is an exact copy of the paper document and no privacy redactions are necessary. This filing has been scanned for viruses and has been found to be free of viruses.

Dated: May 2, 2023.

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