

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

KIMBERLY CUTCHALL AND  
MICHAEL CUTCHALL,

*Plaintiffs,*

V.

CHUBB LLOYD’S INSURANCE  
COMPANY OF TEXAS,

*Defendant.*

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CIVIL ACTION NO. 4:23-cv-03745

**DEFENDANT’S MOTION TO EXCLUDE PLAINTIFFS’ EXPERTS**

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CIVIL ACTION NO. H-23-3745

**DEFENDANT’S MOTION TO EXCLUDE PLAINTIFFS’ EXPERTS**

Defendant, Chubb Lloyd’s Insurance Company of Texas (“Defendant”), files this Motion to Exclude Plaintiffs’ Experts. This motion is filed subject to and without waiving Defendant’s motion for summary judgment. The Court should grant both motions. In support of its motion, Defendant offers the following:

***Summary of the Argument***

- This is a first party property insurance case involving alleged hail damage to Plaintiffs’ home.
- Plaintiffs designated an adjuster, Brandon Allen, to opine regarding exterior and interior damage to the home. On the morning of his deposition, Mr. Allen withdrew all of his opinions except as to the roof. Mr. Allen based his opinions on a snippet of internet weather information and conceded that he would defer to a professional meteorologist. A professional meteorologist demonstrated that no hail fell at the home on the date of loss selected by Mr. Allen. Mr. Allen also failed to rule out other causes of loss. His repair estimate is incompetent to demonstrate reasonable and necessary remedial repair costs.
- Plaintiffs designated their public adjuster, Nick Halliday, to opine regarding wind and hail damage. Mr. Halliday guessed at a date of loss that is outside the policy period. He also failed to rule out other causes of loss. His repair estimate is incompetent to demonstrate reasonable and necessary repair costs.

- The Court should grant this motion and exclude Brandon Allen and Nick Halliday, their testimony, and their opinions from all proceedings including pretrial and trial of this matter.

### **I. NATURE AND STAGE OF PROCEEDING**

1. This is a first-party property insurance dispute concerning alleged hailstorm damage to Plaintiffs' home. This case began with Plaintiffs making sweeping allegations of damage to their home. In particular, the Court will recall that Plaintiffs alleged that a hailstorm penetrated their roof, storm water then entered their attic where it mixed with rodent feces to become Category 3 contaminated water, and such water flowed down throughout their home, necessitating extensive repairs. Plaintiffs have engaged in advocacy shifts, abandoned allegations, created conflicts within their claims, and failed to establish a covered loss during the policy period. Plaintiffs present mere "unconfirmed rumors of loss" that are insufficient to satisfy their burdens of proof.<sup>1</sup>

2. Defendant has deposed both Plaintiffs, their retained expert Brandon Allen, and their non-retained expert Nick Halliday. Plaintiffs have not taken or requested any depositions from Defendant. This matter is ripe for this motion to be determined by the Court.

### **II. ISSUES TO BE RULED UPON**

3. Defendant requests that the Court rule upon whether Messrs. Allen and Halliday and their opinions and testimony are admissible at pretrial and trial of this matter under the well-settled law governing admissibility of expert testimony.

### **III. STANDARD OF REVIEW**

4. The party proffering expert testimony that has been challenged has the burden of establishing by a preponderance of the evidence that the challenged expert testimony is

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<sup>1</sup> See *343 West Sunset, LLC v. Seneca Ins. Co.*, 2021 U.S. Dist. LEXIS 218459, \*8-\*13 (W.D. Tex. 2021), adopted by, 2021 U.S. Dist. LEXIS 218456 (W.D. Tex. 2021).

admissible.<sup>2</sup> The trial court’s decision concerning the exclusion of expert testimony is reviewed for an abuse of discretion and the ruling will not be disturbed unless it is manifestly erroneous.<sup>3</sup>

5. Federal Rule of Evidence 702 governs the admissibility of expert testimony, permitting opinion testimony by a witness “qualified as an expert by knowledge, skill, experience, training, or education” if the opinion is: (1) “scientific, technical, or other specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact in issue”; (2) “based on sufficient facts or data”; (3) “the product of reliable principles and methods”; and (4) “the expert has reliably applied the principles and methods to the facts of the case.”<sup>4</sup>

6. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court held that trial courts must determine whether expert testimony is “not only relevant, but reliable,” under Rule 702.<sup>5</sup> The Fifth Circuit Court of Appeals held in *Brown v. Illinois Cent. R. Co.*, that in order for a trial court to determine the reliability of expert testimony, the court “must make ‘a preliminary assessment of whether the reasoning or methodology underlying the testimony is . . . valid and of whether that reasoning or methodology properly can be applied to the facts in issue.’”<sup>6</sup> The reliability of an expert opinion is essential, otherwise, “it offers no expert assistance to the jury.”<sup>7</sup> An expert’s opinion is not reliable and will not assist the jury when he defers to another expert on a crucial point.<sup>8</sup> Under certain circumstances, the source upon which an expert’s opinion relies is of such little weight that the jury should not be permitted to receive the opinion.<sup>9</sup>

<sup>2</sup> See Fed. R. Evid. 104(a); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

<sup>3</sup> *Macy v. Whirlpool Corp.*, 613 Fed. Appx. 340, 342 (5th Cir. 2015).

<sup>4</sup> *Jenkins v. Helmerich & Payne Int’l Drilling Co.*, 577 F. Supp. 3d 587, 591 (S.D. Tex. 2021); See Fed. R. Evid. 702.

<sup>5</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

<sup>6</sup> *Brown v. Illinois Cent. R. Co.*, 705 F.3d 531, 535 (5th Cir. 2013) (quoting *Daubert*, 509 U.S. at 592-93).

<sup>7</sup> *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).

<sup>8</sup> See *Castellow v. Chevron USA*, 97 F. Supp. 2d 780, 786 (S.D. Tex. 2000).

<sup>9</sup> *Fair v. Allen*, 669 F.3d 601, 607 (5th Cir. 2012).

**A. The Expert Must Have a Reliable, Independently Validated Methodology That Assists the Jury**

7. To satisfy the “reliability” prong, a party must demonstrate (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>10</sup> “Reliability” requires that the proponent of the expert testimony must present some objective, independent validation of the expert’s methodology.<sup>11</sup> The objective of the Court’s gatekeeping role is to ensure that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field.”<sup>12</sup> In summary, where a challenged opinion “is fundamentally unsupported, then it offers no expert assistance to the jury.”<sup>13</sup>

**B. Ruling Out Other Plausible Causes of Injury or Damage is a Threshold Requirement for Admissibility**

8. The “reliability” prong also requires the expert to rule out other plausible causes of injury or damage.<sup>14</sup> The failure to rule out other plausible causes of injury is fatal to the admissibility of the expert’s opinions.<sup>15</sup>

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<sup>10</sup> *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007)); *see also Carlson v. Bioremediation Therapeutic Sys., Inc.*, 822 F.3d 194, 199 (5th Cir. 2016).

<sup>11</sup> *Brown*, 705 F.3d at 536.

<sup>12</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188 (5th Cir. 2006).

<sup>13</sup> *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005); *Guzman*, 456 F. Supp. 2d at 853.

<sup>14</sup> *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 423 (5th Cir. 1987); *Guzman v. State Farm Lloyds*, 456 F. Supp. 3d 846, 853 (S.D. Tex. 2020) (excluding public adjuster’s storm damage opinions for failure to rule out other possible causes, such as normal wear and tear); *Emmett Props. v. Halliburton Energy Servs.*, 157 S.W.3d 365, 373 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (striking water expert’s report for failure to consider alternative causes of contamination).

<sup>15</sup> *Id.*



**C. An Expert Must Offer Something More Than Mere Reliance on Xactimate**

9. Under Texas law, an estimate for remedial repairs based solely on Xactimate is no evidence of reasonable and necessary damages and cannot establish the element of damages in a breach of contract claim; something more is required.<sup>16</sup>

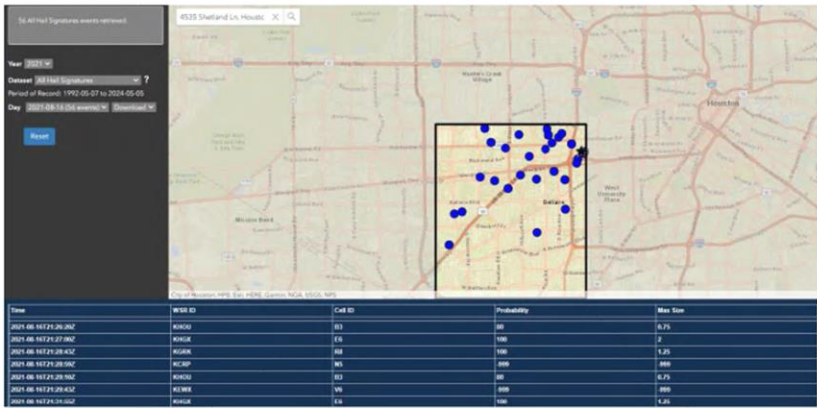
**IV. MOTION TO EXCLUDE MR. ALLEN**

**A. Weather and Meteorology**

10. Establishing the date of the alleged hailstorm is crucial for Plaintiffs’ breach of contract claim.<sup>17</sup> Mr. Allen did so by taking a barely-legible snippet of NOAA weather data available online and plugging it into his report:<sup>18</sup>

**CIRCUMSTANCES OF LOSS**

On 8/16/21, it was reported severe storms on the date of loss inclusive of hail impacted the property. We researched historical weather reports on the NOAA severe weather inventory. The NOAA report supports hail up to 2" in diameter on the date of loss. A snippet of the storm report from that source is below:



Time	WFO ID	Cell ID	Probability	Max Size
2021-08-16T21:26:26Z	KHXD	03	100	0.75
2021-08-16T21:27:36Z	KHXD	08	100	2
2021-08-16T21:28:43Z	KHXD	08	100	1.25
2021-08-16T21:29:50Z	KHXD	03	100	0.75
2021-08-16T21:29:50Z	KHXD	03	100	0.75
2021-08-16T21:29:53Z	KHXD	08	100	0.75
2021-08-16T21:31:02Z	KHXD	08	100	1.25

The National Oceanic and Atmospheric Administration (NOAA) provides free access to the NOAA Severe Weather Data Inventory (SWDI). The SWDI uses Next Generation Radar (NEXRAD) to record storm activity in real time. This is a regularly used resource in the insurance industry for evaluating storm and peril conditions. SWDI weather reports in the area show hail up to 2" in diameter with 100% probability.

<sup>16</sup> *McGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012); *Knight Renovations, LLC v. Thomas*, 525 S.W.3d 446, 450 (Tex. App.—Tyler 2017, no pet.).

<sup>17</sup> *See 343 West Sunset*, 2021 U.S. Dist. LEXIS at \*8-\*13.

<sup>18</sup> Exhibit A, Allen Report.

In deposition, Mr. Allen, who has no background in meteorology, admitted that he didn't know what the codes on the bottom of the map mean.<sup>19</sup> He also admitted that he didn't know which blue dot allegedly represented the 2" hail in relation to the black star representing Plaintiffs' home.<sup>20</sup> He did nothing to confirm that the black star accurately represented where the home was located.<sup>21</sup> He admitted that the weather data was predictive and he had no weather data actually confirming hail on the alleged date of loss, August 16, 2021.<sup>22</sup> Because Mr. Allen premised his opinions on a mere snippet of data he did not understand but which anybody can download from the Internet, he lacks a reliable basis of sufficient facts or data for his opinion regarding the date of loss and magnitude of hail, he lacks any sort of reliable methodology, and his opinions will not assist the jury.<sup>23</sup>

11. Further, Mr. Allen conceded that he would defer to a professional meteorologist regarding matters of weather and meteorology.<sup>24</sup> Defendant retained a professional meteorologist, David Finfrock, who conducted a scientific analysis and determined that no hail fell on Plaintiffs' home on August 16, 2021.<sup>25</sup> At a minimum, Mr. Allen's unsupported opinions regarding the date of loss and magnitude of hail will confuse the jury when set alongside Mr. Finfrock's opinions. Further, Mr. Allen's opinions will not be of assistance to the jury because he has deferred to Mr. Finfrock.<sup>26</sup>

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<sup>19</sup> Exhibit B, Brandon Allen Deposition Excerpts, Page 53, lines 2-3.

<sup>20</sup> *Id.* at Page 51, line 2 to Page 52, line 2.

<sup>21</sup> *Id.* at page 50, lines 14-18.

<sup>22</sup> *Id.* at Page 52, line 3 to Page 53, line 13.

<sup>23</sup> *See Guile*, 422 F.3d at 227; *Jenkins*, 577 F. Supp. 3d at 591; Fed. R. Evid. 702.

<sup>24</sup> *Id.* at Page 44, line 16 to Page 46, line 2.

<sup>25</sup> Exhibit C, Finfrock Report.

<sup>26</sup> *See Castellow*, 97 F. Supp. 2d at 786.

**B. Mr. Allen Did Not Rule Out Other Plausible Causes of Loss**

12. Mr. Allen testified in deposition that it was “likely” that Plaintiffs’ home was impacted by hail before and after the claimed loss.<sup>27</sup> However, he did nothing to rule out that hailstorms outside the policy period of May 29, 2021 to May 29, 2022<sup>28</sup> -- as opposed to occurring on his claimed date of loss of August 16, 2021 -- caused the alleged damage to Plaintiffs’ roof.<sup>29</sup> Mr. Allen’s failure to do so is fatal to his opinions.<sup>30</sup>

**C. Mr. Allen Relied on Xactimate Only, Which is Impermissible**

13. Mr. Allen testified in deposition that he relied solely on Xactimate<sup>31</sup> to prepare his repair estimate, without any independent verification such as obtaining comparison bids or checking costs with actual suppliers and craftsmen.<sup>32</sup> Under Texas law, something more is required, and an opinion based solely on Xactimate cannot establish reasonable and necessary remedial repair costs.<sup>33</sup>

**V. MOTION TO EXCLUDE MR. HALLIDAY**

**A. Vague and Insufficient Designation**

14. Plaintiffs designated Mr. Halliday as a non-retained expert as follows:<sup>34</sup>

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<sup>27</sup> Exhibit B, Brandon Allen Deposition Excerpts, Page 21, line 24 to Page 22, line 3.

<sup>28</sup> Exhibit D, Policy.

<sup>29</sup> See *id.* at Page 21, line 2 to Page 22, line 7; Page 52, line 20 to Page 53, line 13 (conceding that he is claiming hail up to 2” which could include no hail or hail of smaller sizes; he also conceded that hail likely fell in other time periods but has no confirmatory data as to any hailfall).

<sup>30</sup> *Viterbo*, 826 F.2d at 423.

<sup>31</sup> See <https://www.verisk.com/products/xactimate/> (last accessed September 13, 2024)

<sup>32</sup> Exhibit B, Brandon Allen Deposition Excerpts, Page 59, line 5 to Page 60, line 8.

<sup>33</sup> *McGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012); *Knight Renovations, LLC v. Thomas*, 525 S.W.3d 446, 450 (Tex. App.—Tyler 2017, no pet.).

<sup>34</sup> Dkt. No. 14, Plaintiffs’ Expert Designation. The designation makes no mention interior damage, rat feces, water damage, or Category 2 or 3 contaminated water damage, so Plaintiffs have abandoned those theories. In any event, Mr. Halliday conceded that he could not identify any wind or hail caused penetration in the roof, so any interior damage is unsupported. Exhibit E, Nick Halliday Deposition Excerpts, Page 63, line 16 to Page 68, line 10.

Plaintiffs have designated the following unretained experts:

1. Nick Halliday  
Copperhead Claims  
1924 Carol Lane  
Anna, Texas 75409  
Telephone: (972) 998-3535  
*Plaintiff's Public Adjuster*

Nick Halliday may provide testimony regarding hail and wind damage sustained by Plaintiffs' property at time of loss and the estimated damages and cost to repair. A copy of his report and photos has been previously produced. Mr. Halliday may also testify as to any communications he had with the insurance company.

Federal Rule of Civil Procedure 26(a)(2)(C) provides as follows regarding non-retained experts:

(C) Witnesses Who Do Not Provide a Written Report.

Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

Defendant objects that Plaintiffs' designation of Mr. Halliday lacks the summary of facts and opinions to which the witness is expected to testified. The designation states no facts and no opinions, only subject areas. Plaintiffs could have incorporated Mr. Halliday's reports and photos by reference, but rather made only a vague reference to the reports and photos previously produced. As a threshold matter, Plaintiffs' designation of Mr. Halliday is defective and should be excluded.

**B. Weather and Meteorology**

15. Mr. Halliday has no background in weather or meteorology and was not designated as an experts in those topics, as shown above. He conceded in deposition that he would defer to a forensic meteorologist.<sup>35</sup> In selecting May 18, 2021 as the "possible" alleged date of the

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<sup>35</sup> See Exhibit E, Nick Halliday Deposition Excerpts, Page 50, line 1 to Page 52, line 2.

hailstorm,<sup>36</sup> Mr. Halliday conceded in deposition that he was making an “educated guess.”<sup>37</sup> However, a guess cannot serve as the proper basis for an expert opinion as a matter of law.<sup>38</sup> Mr. Halliday’s opinions regarding date of loss and damage resulting from any certain loss must be excluded because they lack a reliable foundation.

**C. Mr. Halliday Did Not Rule Out Other Plausible Causes of Loss**

16. Mr. Halliday failed to rule out the following plausible causes of loss or damage at Plaintiffs’ home:

- Foot traffic on the roof, or any other force that could cause gaps between roof tiles;<sup>39</sup>
- Problems with air conditioning equipment and ventilation, as identified in reports by Mold Inspection Sciences of Texas and Freedom 76 at Plaintiffs’ request during the claim phase;<sup>40</sup>
- Plumbing leak;<sup>41</sup> and
- Multiple storms over time.<sup>42</sup>

These other causes of loss are plausible because they were identified by Plaintiffs’ own experts retained during the claim phase or such causes are common to weather-related claims. Mr. Halliday’s failure to rule out such other causes of loss is fatal to his opinions.<sup>43</sup>

**D. Mr. Halliday Relied on Xactimate Only, Which is Impermissible**

17. Like Mr. Allen, Mr. Halliday relied solely on Xactimate to create his repair estimate, which is insufficient as a matter of law to establish reasonable and necessary remedial

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<sup>36</sup> Note that May 18, 2021 is outside the policy period of May 29, 2021 to May 29, 2022. *Cf.* Exhibit D, Policy. Mr. Halliday’s opinion regarding alleged date of loss is confusing to the jury and irrelevant for this reason.

<sup>37</sup> Exhibit E, Nick Halliday Deposition Excerpts, Page 51, line 20 to Page 53, line 24.

<sup>38</sup> *See Huss v. Gayden*, 571 F.3d 442, 460 (5th Cir. 2009) (“Courts must be arbiters of truth, not junk science and guesswork.”).

<sup>39</sup> *Id.* at Page 68, line 11 to Page 69, lines 24.

<sup>40</sup> *See* Exhibit F, Mold Inspection Report Excerpts; Exhibit G, Freedom 76 Invoice; Exhibit E, Nick Halliday Deposition Excerpts, Page 139, line 4 to Page 140, line 9; Page 116, lines 3-18.

<sup>41</sup> Exhibit E, Nick Halliday Deposition Excerpts, Page 109, line 19 to Page 110, line 20.

<sup>42</sup> *Id.* at Page 51, lines 10-24.

<sup>43</sup> *Viterbo*, 826 F.2d at 423.

repair costs.<sup>44</sup> Therefore, Mr. Halliday should likewise be precluded from testifying as to repair costs.

## VI. CONCLUSION

18. The precise relief sought by Defendant is exclusion of Mr. Allen and Mr. Halliday, their opinions, and their testimony from all proceedings including pretrial and trial of this matter. In this case, as shown above, the source and methodology of Plaintiffs' expert opinions is of such little weight that the jury should not be permitted to receive the opinions.<sup>45</sup>

## VII. REQUEST FOR RELIEF

Defendant Chubb Lloyd's Insurance Company of Texas prays that this Court exclude Brandon Allen and Nick Halliday and their opinions from pretrial and trial of this matter. Defendant requests all other relief to which it may be entitled.

Respectfully Submitted,

s/ Karl A. Schulz

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CHUBB LLOYD'S INSURANCE COMPANY OF  
TEXAS

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<sup>44</sup> *McGinty*, 372 S.W.3d at 627; *Knight Renovations*, 525 S.W.3d at 450.

<sup>45</sup> *See Fair*, 669 F.3d at 607.

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served on all counsel of record on September 15, 2024 via the Court's electronic filing system.

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*s/ Karl A. Schulz* \_\_\_\_\_  
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