

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**ARTURO BARONA**

**vs.**

**STATE FARM LLOYDS**

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§

**C.A. NO. 4:24-cv-01393  
(JURY)**

**DEFENDANT STATE FARM LLOYD'S BRIEF IN SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT**

Defendant State Farm Lloyds files this Motion for Summary Judgment pursuant to Texas Rule of Civil Procedure 166a(c) and would respectfully show the Court as follows:

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES .....3

I. SUMMARY .....4

II. SUMMARY JUDGMENT EVIDENCE .....5

III. SUMMARY JUDGMENT STANDARD .....5

IV. UNDISPUTED FACTS .....6

V. SUMMARY JUDGMENT ON CONTRACT CLAIM .....8

    A. Plaintiff cannot maintain his breach of contract action because there was no covered loss under the Policy. .... 8

    B. Plaintiff cannot maintain his breach of contract action because Plaintiff did not properly invoke appraisal.....9

    C. SUMMARY JUDGMENT ON EXTRA-CONTRACTUAL CLAIMS ..... 11

VI. PRAYER..... 12

**Cases**

<i>Am. Century Ins. v. Terry</i> , 298 S.W. 658, 659-60 .....	10
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 248 (1986) .....	5
<i>Avila v. Loya</i> , No. 07-04-0096-CV, 2005 WL 1902120, at *5 (Tex. App.—Amarillo Aug. 10, 2005, no pet.).....	12
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322 (1986) .....	5-6
<i>Druker v. Fortis Health</i> , Civ. A. No. 5:06-CV-00052, 2007 WL 38322, at *4–5 & n.6 (S.D. Tex. Jan. 4, 2007) .....	12
<i>First Nat’l Bank of Ariz. v. Cities Servs. Co.</i> , 391 U.S. 253, 28–90 (1968) .....	6
<i>Griggs v. State Farm Lloyds</i> , 181 F.3d 694, 701 (5th Cir. 1999) .....	12
<i>Gulf States Underwriters of La., Inc. v. Wilson</i> , 753 S.W.2d 422, 430–31 (Tex. App.—Beaumont 1988, writ denied) .....	12
<i>In re Universal Underwriters of Tex. Ins. Co.</i> , 345 S.W.3d 404, 410 (Tex. 2011) .....	10
<i>Johnson v. Geovera Specialty Ins. Co.</i> , 657 Fed. Appx. 301, 304 (5th Cir. 2016).....	10
<i>Lundstrom v. United Servs. Auto Ass’n-CIC</i> , 192 S.W.3d 78, (Tex. App.—Hous. [14th Dist] 2006, pet. denied) .....	10
<i>Ortiz v. State Farm Lloyds</i> , 589 S.W.3d 127, 133 (Tex. 2019) .....	11
<i>Paragon Gen. Contractors, Inc. v. Larco Constr. Inc.</i> , 227 S.W.3d 876, 883 (Tex. App.—Dallas 2007, no pet.).....	9
<i>Provident Am. Ins. Co. v. Castaneda</i> , 988 S.W.2d 189, 200 n.55 (Tex. 1998) .....	12
<i>Royal Globe Ins. Co. v. Bar Consultants, Inc.</i> , 577 S.W.2d 688, 694–95 (Tex. 1979) .....	12
<i>State Farm Lloyds v. Johnson</i> , 290 S.W. 886 (Tex. 2009).....	10
<i>St. Paul Surplus Lines Ins. Co., Inc. v. Dal-Worth Tank Co., Inc.</i> , 974 S.W.2d 51, 53 (Tex. 1998).....	11
<i>United States Fid. &amp; Guar. Co. v. Bimco Iron &amp; Metal Corp.</i> , 464 S.W.3d 353, 358 (Tex. 1972).....	9
<i>USAA Tex. Lloyds Co. v. Menchaca</i> , 545 S.W.3d 479, 499-500 (Tex. 2018) .....	11
<i>Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.</i> , 107 S.W.3d 729, 733 (Tex. App.—Fort Worth 2003, pet. denied). .....	9
<i>Walker v. Fed Kemper Life Assurance Co.</i> , 828 S.W.2d 442, 453 (Tex. App.—San Antonio 1992, no writ) .....	12

**DEFENDANT STATE FARM LLOYDS' BRIEF IN SUPPORT OF ITS  
MOTION FOR SUMMARY JUDGMENT**

**I.  
SUMMARY**

State Farm issued Policy Number 90-GR-E796-8, with effective dates of September 7, 2022 to September 7, 2023 (“Policy”), to Plaintiff. The Policy excludes coverage for damages caused by frozen plumbing unless attempts are made to maintain heat or, if heat is not maintained, drain plumbing and shut off the water in the building. However, Plaintiff admittedly turned off the heat in the building since it was undergoing renovations and did not drain the pipes or turn off the water.

State Farm, therefore, brings this Motion seeking dismissal of Plaintiff’s claims for breach of contract, violation of Insurance Code Chapter 541 and the Deceptive Trade Practices Act, breach of the duty of good faith and fair dealing, and fraud on the following grounds:

Contract:

- Plaintiff’s claim for breach of contract fails as a matter of law. The cause of loss—failure to maintain heat and drain plumbing—is specifically excluded under the Policy. Plaintiff is not entitled to any benefits under the policy.
- Regardless of the scope of coverage, which State Farm disputes, Plaintiff lost his right to invoke appraisal when he completed repairs on the property prior to demanding appraisal. Further, appraisers have no authority to determine coverage.

Chapter 541, Fraud, DTPA and Bad Faith:

- Plaintiff’s claims for extra-contractual damages fail as a matter of law. Plaintiff is not entitled to any benefits under his Policy, and there is no evidence that any conduct by State Farm caused an injury “independent from the loss of the benefits.”
- Plaintiff cannot recover attorney’s fees or treble damages under Texas Insurance Code Chapter 541 or under the DTPA because he cannot recover damages on his statutory claims.

## **II.**

### **SUMMARY-JUDGMENT EVIDENCE**

State Farm relies upon the following summary judgment evidence, which is included in the attached Appendix and incorporated herein by reference<sup>1</sup>:

Appendix 1-80: Ex. A, Plaintiff's Business Owner's Policy

Appendix 81-82: Ex. B, Unsworn Declaration of Team Manager Stephen Malinda

Appendix 83: Ex. B-1, State Farm Claim Activity File Notes Excerpts

Appendix 84-89: Ex. B-2, Plaintiff Auturo Barona's Deposition Transcript

Appendix 90-91: Ex. B-3, January 24, 2023, State Farm's Inspection Results Letter

Appendix 92-97: Ex. B-4, September 8, 2023, Plaintiff's Appraisal Demand

Appendix 98-99: Ex. B-5, September 20, 2023, State Farm Response to Plaintiff's Appraisal Demand.

Appendix 100: Ex. B-6, November 9, 2023, State Farm's Inspection Results Letter

## **III.**

### **SUMMARY JUDGMENT STANDARD**

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The rule mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 324.

In response to a summary judgment motion, the plaintiff must set forth specific facts showing a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49

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<sup>1</sup> Exhibits are referenced throughout the Motion and in the Appendix to correspond with exhibits referenced in Declaration of Stephen Malinda (App. 81-82).

(1986). To meet this burden, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts” by “coming forward with specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S. at 324 (quotation omitted). A non-movant may not merely rely on their pleadings but must affirmatively set forth specific facts supporting its claims. *First Nat’l Bank of Ariz. v. Cities Servs. Co.*, 391 U.S. 253, 28–90 (1968).

#### **IV. UNDISPUTED FACTS**

Plaintiff contends that, on or about December 24, 2022, Plaintiff’s property was damaged, that Plaintiff made a claim under the Policy, and that Defendant did not pay Plaintiff’s claim for the covered loss which was owed under the Policy.<sup>2</sup> Plaintiff reported the December 24, 2022 claim under State Farm Policy No. 90-GR-E796-8, on January 4, 2023, and State Farm assigned the claim with Claim No. 53-43W5-62K.<sup>3</sup>

At State Farm’s initial inspection, Plaintiff advised the adjuster that he turned off the heat in the building while it was undergoing renovations.<sup>4</sup> Plaintiff also advised that he did not drain or turn off the water.<sup>5</sup> Plaintiff further confirmed those facts in his deposition taken on October 10, 2024.

**Q. Once the tenant was in place when you purchased the property had left, how long was it until you rented the property again?**

A. When they left, it was approximately two months, maybe a month and a half because I was making repairs on it; and then that’s when the accident occurred, the hurricane -- well, no, the freeze.

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**Q. As these repairs were ongoing before the freeze, did you have the heat and the air-conditioning system turned off?**

A. Yes

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<sup>2</sup> See Pl.’s Orig. Pet. (filed Mar. 4, 2024), ECF No. 1-2

<sup>3</sup> App. 83.

<sup>4</sup> App. 81, 90-91.

<sup>5</sup> *Id.*

**Q. And why did you have the heating and air-conditioning units turned off while you were doing these repairs?**

A. It's just so simple, that there wasn't anything -- there was no cold and no heat.

**Q. Did you have them turned off to save money?**

A. No, I wasn't -- the contractors didn't need anything of the sort. The doors were open.

\*\*\*

**Q. As the repairs were underway before the freeze, why did you not turn on the heat once it started getting cold?**

A. Well, because it's a commercial building. It was empty, you know. We were out away on vacation with my sons, and that's the reason why.

**Q. Where were you on vacation?**

A. Well, just a few days before, we had gone to my son's house for Christmas; and that's what we did.

**Q. You were still in town at the time of the freeze?**

A. No. We had already made it to my son's house.

**Q. And where -- which son?**

A. Alejandro Barona. He lives on the north side.

**Q. Lives on the north side of Houston?**

A. No, New Caney.

**Q. Okay. About 30 minutes from Houston?**

A. It's more like an hour, more or less.

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**Q. Which day did you go to your son's house, if you recall. Was it on Christmas day?**

A. Two days before we arrived.

**Q. I'm sorry, I didn't hear the interpreter.**

A. Two days prior, we arrived to prepare.

**Q. So, you arrived at your son's house two days before Christmas?**

A. Yes, more or less.

**Q. Okay. And then you came home from your son's house. Was it Christmas Day or a day or so after Christmas?**

A. Yes, it was two days after.

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**Q. At that point, did you turn off the water outside?**

A. Yes, it was the first thing I did.

**Q. Had the water remained on before Christmas while JP was starting the painting repairs and removing the rugs?**

- A. Yes, it was on because they would use it; but we never thought that it would become a freeze such as this.<sup>6</sup>

On January 24, 2023, State Farm informed Plaintiff in writing that the alleged damages were excluded under the Policy.<sup>7</sup>

On September 8, 2023, Plaintiff's attorney, Dick Law Firm., sent an Invocation of Appraisal.<sup>8</sup> State Farm responded on September 20, 2023 and requested an additional inspection.<sup>9</sup> State Farm inspected the Property for a second time on October 31, 2023.<sup>10</sup> State Farm's adjuster found that repairs had been completed, and the building was habitable.<sup>11</sup> On November 9, 2023, State Farm informed Plaintiff in writing it was standing on its denial that the alleged damage was excluded from the Policy and objecting to appraisal because Plaintiff waived his right to appraisal by completing repairs.<sup>12</sup>

**V.**  
**SUMMARY JUDGMENT OM CONTRACT CLAIM**

State Farm is entitled to judgment as a matter of law on Plaintiff's contract claim because the alleged loss is excluded under the Policy and Plaintiff lost his right to invoke appraisal.

- A. **Plaintiff cannot maintain his breach of contract action because there was no covered loss to the Policy.**

To prove that State Farm breached its contract with Plaintiff, Plaintiff must establish the following: (1) State Farm had a valid contract with the Plaintiff (2) the Plaintiff tendered performance to the State Farm; (3) the State Farm materially breached the terms of the policy it had with the Plaintiff; and (4) the Plaintiff suffered damages as a result of the alleged breach. *See*

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<sup>6</sup> App. 84-89.

<sup>7</sup> App. 91-92.

<sup>8</sup> App. 92-97.

<sup>9</sup> App. 82, 98-99, 100.

<sup>10</sup> App. 82; App. 100.

<sup>11</sup> *Id.*

<sup>12</sup> App. 100.



*Paragon Gen. Contractors, Inc. v. Larco Constr. Inc.*, 227 S.W.3d 876, 883 (Tex. App.—Dallas 2007, no pet.). In general, the insured bears the initial burden of showing coverage and the insurer bears the burden of proving applicability of an exclusion. *Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App.—Fort Worth 2003, pet. denied). The burden then shifts back to the insured to prove an exception to the exclusion. *Id.* Here, Plaintiff has no evidence to create an issue of fact regarding a breach by State Farm because Plaintiff cannot show coverage.

The Policy specifically excludes damage caused by frozen plumbing. SECTION I of the Policy, attached as Exhibit A, states:

#### **SECTION I – EXCLUSIONS**

2. We do not insure under any coverage for loss whether consisting of, or directly and immediately caused by, one or more of the following:

- e. **Frozen Plumbing**

Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by freezing, unless:

- (1) You do your best to maintain heat in the building or structure; or
    - (2) You drain the equipment and shut off the water supply if the heat is not maintained.<sup>13</sup>

Plaintiff statement's regarding turning off the heat and not draining the water supports that Plaintiff's damages are excluded from coverage under the Policy.

State Farm has shown that the Plaintiff's property did not sustain any damage caused by a covered loss. Rather, the claimed damages are specifically excluded under Plaintiff's Policy.

**B. Plaintiff cannot maintain his breach of contract action because Plaintiff did not properly invoke appraisal**

By making repairs before appraisal was invoked, Plaintiff has waived his contractual right to appraisal. *See United States Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.3d 353,

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<sup>13</sup> App. 48.

358 (Tex. 1972). Courts have held that repairing or disposing of property renders appraisal impractical because the damaged property is no longer available for an appraisal panel to inspect. *See Johnson v. Geovera Specialty Ins. Co.*, 657 Fed. Appx. 301, 304 (5th Cir. 2016) (“by significantly altering the state of the house before GeoVera’s agent could appraise it, Johnson effectively negated GeoVera’s appraisal right, as GeoVera could no longer inspect the extent of the smoke damage.”). This comports with the Policy’s Duties in The Event of Loss, requiring Plaintiff to exhibit damaged property for inspection.<sup>14</sup>

The right to appraisal is not unfettered. When evaluating a party’s contractual right to appraisal, Texas courts determine whether the appraisal language contains a restriction or condition on the right of appraisal. *See In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 410 (Tex. 2011) (noting that “[t]he policy contained no time limit for the appraisal request...”); *Am. Century Ins. v. Terry*, 298 S.W. 658, 659-60 (Tex. Civ. App.—Texarkana 1927, no writ) (finding an actual disagreement between the adjuster and insured was a condition to make operative the appraisal provision). Plaintiff has not met the conditions precedent to invoking appraisal as to his damages. Even if he had, any potential damage found in appraisal would be barred by the Policy’s exclusion. *See State Farm Lloyds v. Johnson*, 290 S.W. 886, 893 (Tex. 2009) (“No matter what the appraisers say, State Farm does not have to pay for repairs due to wear and tear or any other excluded peril because those perils are excluded.”); *see also Lundstrom v. United Servs. Auto Ass’n-CIC*, 192 S.W.3d 78, 89 (Tex. App.—Hous. [14th Dist] 2006, pet. denied) (“appraisers exceed their authority when they engage in making the legal determination of what caused the loss or a portion of it”). Therefore, summary judgment is proper.

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<sup>14</sup> App. 58.

**VII.**  
**SUMMARY JUDGMENT ON EXTRA-CONTRACTUAL CLAIMS**

Plaintiff has not sustained any damages that could allow him to maintain any of his extra-contractual causes of action against Defendant for violations of Ch. 541 or the DTPA, for fraud, or breach of the common law duty of good faith and fair dealing.<sup>15</sup> Therefore, without a right to additional Policy benefits or an independent injury, Plaintiff cannot maintain any extra-contractual causes of action, and State Farm is entitled to summary judgment. *See Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 132-33 (Tex. 2019).

The general rule, as reaffirmed by *Menchaca*, 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.” *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489 (Tex. 2018). An insured also “cannot recover any damages based on an insurer’s statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.” *See St. Paul Surplus Lines Ins. Co., Inc. v. Dal-Worth Tank Co., Inc.*, 974 S.W.2d 51, 53 (Tex. 1998).

Plaintiff has, therefore, sustained no actual damages to support his extra-contractual claims for an alleged common-law bad faith, fraud or statutory violations under the DTPA or Ch. 541 of the Insurance Code. *Id.* at 133. Likewise, as the court affirmed in *Ortiz*, Plaintiff cannot recover attorney’s fees or costs incurred in prosecuting this suit as “actual damages.” *Id.* The *Ortiz* Court held that statutory attorney’s fees and litigation costs are not damages under Texas law and cannot be recovered when no policy benefits are due.

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<sup>15</sup> Pl.’s Orig. Pet., ECF No. 1-2

Further, Plaintiff has put forth no evidence of State Farm’s alleged violations of the notice requirements, let alone any showing that any resulting alleged wrongful delay was committed knowingly.<sup>16</sup> As such, all of Plaintiff’s Section 541 claims should be dismissed.

Finally, the alleged misrepresentations pled by Plaintiff,<sup>17</sup> including his post-loss allegations, are not actionable, as a matter of law, and will not support his claims. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999) (statements about claims being handled professionally “more in the nature of non-actionable puffery than actionable representations of specific material fact”); *Druker v. Fortis Health*, Civ. A. No. 5:06-CV-00052, 2007 WL 38322, at \*4–5 & n.6 (S.D. Tex. Jan. 4, 2007) (general assurance policy would be honored is not a material misrepresentation that can support a fraud claim); *Avila v. Loya*, No. 07-04-0096-CV, 2005 WL 1902120, at \*5 (Tex. App.—Amarillo Aug. 10, 2005, no pet.); *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 200 n.55 (Tex. 1998) (citing *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694–95 (Tex. 1979)); *Gulf States Underwriters of La., Inc. v. Wilson*, 753 S.W.2d 422, 430–31 (Tex. App.—Beaumont 1988, writ denied) (letter to insured opting not to renew policy did not constitute misrepresentation). Further, Plaintiff has not relied on or been harmed by the alleged post-loss misrepresentations. *See Walker v. Fed Kemper Life Assurance Co.*, 828 S.W.2d 442, 453 (Tex. App.—San Antonio 1992, no writ) (“As a result, a post-loss denial of liability for a questionable claim is not actionable under the DTPA or the Insurance Code.”). Accordingly, Therefore, Defendant is entitled to summary judgment against Plaintiff’s claimed violations of Ch. 541 and the DTPA, and State Farm’s fraud and breach of the common law of duty of good faith and fair dealing.

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<sup>16</sup> App. Pl.’s Orig. Pet.

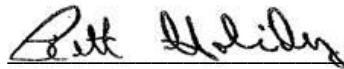
<sup>17</sup> App. Pl.’s Orig. Pet.

**VIII.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant State Farm Lloyds prays that upon final consideration hereof, that its Motion for Summary Judgment be granted, and that Plaintiff's above claims against State Farm be dismissed with prejudice. State Farm further prays for all other relief the Court finds just and equitable.

Respectfully submitted,

**GERMER PLLC**

By: 

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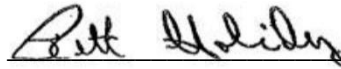
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record on this 5<sup>th</sup> day of May, 2024.

Eric B. Dick  
Dick Law Firm, PLLC  
3701 Brookwoods Drive  
Houston, Texas 77092

**VIA CM/ECF**

A handwritten signature in black ink, appearing to read "Dale M. 'RETT' Holiday", is written over a horizontal line.

**DALE M. "RETT" HOLIDAY**