

No. 16-0347

IN THE SUPREME COURT OF TEXAS

RICHARDSON EAST BAPTIST CHURCH,
Petitioner,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY
and JAMES GREENHAW,
Respondents.

On Appeal from the Fifth Court of Appeals, Dallas, Texas
Case No. 05-14-01491-CV

JAMES GREENHAW'S RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

- Nature of the Case:** This is a property insurance coverage dispute. After the insurer timely paid an agreed appraisal award, the trial court dismissed the insured's breach of contract claims. Because there was no evidence of an "extreme" act or damages beyond policy benefits, the trial court also dismissed the insured's extra-contractual claims.
- Trial Court:** Cause No. DC-13-13868
298th District Court, Dallas County, Texas
The Honorable Emily G. Tobolowsky
- Trial Court
Disposition:** The trial court granted summary judgment on all of Richardson's claims. (R. 591-592.)
- Appellate Court:** Case No. 05-14-01491-CV
Fifth Court of Appeals, Dallas, Texas
Justices Francis, Lang-Miers, Myers
- Appellate
Disposition:** A unanimous panel in the Fifth Court of Appeals affirmed the judgment. The court of appeals' opinion is published at 2016 Tex. App. LEXIS 3267.

STATEMENT OF JURISDICTION

This Court does not have jurisdiction. Notably, Petitioner argues that jurisdiction exists only under the general concept in TEX. GOV'T CODE §22.01(a)(6) of an error “of such importance” that this Court must intervene. However, there is no egregious result here – a party paid the agreed contract amount owed pursuant to the parties’ agreed dispute resolution method (appraisal). Further, there are no conflicts in Texas law with the court of appeals’ opinion, and the court of appeals’ opinion in this case was unanimous. Every court that has examined this issue has come to the same conclusion that the court of appeals did here.

RESPONSE TO ISSUES PRESENTED

Issue No. 1:

A party cannot be held liable for breach of contract when it timely pays an agreed amount pursuant to the parties' agreed dispute resolution method.

Issues Nos. 2 and 3 (not briefed by Petitioner):

Petitioner presented no evidence of any damages other than policy benefits, which were resolved through appraisal. Attorneys and public adjuster's fees are not actual damages.

STATEMENT OF FACTS

This is a commercial property insurance case involving damage to Richardson East Baptist Church's ("Richardson") property due to a hail storm. Richardson and its insurer, Philadelphia Indemnity Insurance Company ("Philadelphia"), disagreed as to the amount of damage to the property. So, they agreed to submit the dispute to the agreed dispute resolution process in the insurance contract: appraisal. The parties' appraisers agreed on an amount for the appraisal award, Philadelphia timely paid it, and Richardson accepted the award payment. Because there was no evidence of any "extreme" act or any other damages, the trial court dismissed Richardson's claims.

I. Philadelphia and Greenhaw timely adjusted Richardson's claim.

On April 23, 2013, Philadelphia received a Property Loss Notice from Richardson making a claim for roof damage from the summer of 2012. (R. 151-152.) Philadelphia immediately forwarded the notice to an independent adjusting company, Property Claims Services, Inc., which assigned licensed general adjuster James Greenhaw to assist Philadelphia with the investigation of the claim. (R. 61, 154-56, 158.) Within two days, Greenhaw inspected the property. Less than a week later, he issued his report finding \$10,441.55 in damages. (R. 61.)

Richardson disputed the amount of damage in Greenhaw's report, so Philadelphia retained a professional engineer to provide a second opinion. The

engineer inspected the property on June 12, 2013 and issued his report six days later. (R. 62, 162-178.) The engineer found *less* damage than Greenhaw did. (*Id.*) Still, six days later, Philadelphia paid the *higher* amount based upon Greenhaw's estimate. (R. 62, 180.)

Almost three weeks later, Richardson notified Philadelphia that it still disputed the amount of damage and that it had hired a public adjuster who produced a \$36,372.58 repair estimate. (R. 62, 363-364.) Three weeks after that, Richardson had retained a lawyer who had a new "expert litigation adjuster" produce a \$112,077.32 repair estimate. (R. 62, 423-437.)

II. The parties agreed to attend mediation and then appraisal.

Because the parties did not agree on the amount of damage, on October 3, 2013, Philadelphia asked Richardson to attend a mediation with Philadelphia. (*See* R. 308.) Richardson agreed to submit the dispute to mediation. (*Id.*) On November 15, 2013, Philadelphia and Richardson attended mediation, but they did not settle. (*See id.*)

Ten days after the unsuccessful mediation, Philadelphia invoked appraisal in writing, as required by the policy. (R. 62, 308.) This was in line with Richardson's prior indications that the parties should proceed to appraisal "[i]f we cannot reach an agreement." (*See* R. 402.) Soon after Philadelphia demanded

appraisal, Richardson served Philadelphia and Greenhaw with this lawsuit. Still, Richardson and Philadelphia proceeded through the appraisal process. (R. 62.)

III. Richardson’s and Philadelphia’s appraisers agreed on the amount of the loss in the appraisal award.

On April 21, 2014, Philadelphia’s and Richardson’s appraisers reached an agreement on the amount of the loss at \$30,175.00 replacement cost value and \$18,375.00 actual cash value. (R. 62, 188.) Notably, they agreed on the amount of the loss without the need to select an umpire. The agreed amount was nearly \$82,000.00 less than the estimate created by Richardson’s “expert litigation adjuster,” and it was only \$20,000 more than Greenhaw’s estimate.

Within five business days of the appraisal award, Philadelphia issued payment to Richardson in the amount of \$7,933.45 (the actual cash value of the award (\$18,375.00) less Philadelphia’s previous payment (\$7,941.55) and the deductible (\$2,500.00)). (R. 62.) Richardson received that payment on April 28, 2014. (R. 62, 184.)

IV. The trial court correctly granted summary judgment in favor of Philadelphia and Greenhaw, and the court of appeals affirmed.

Richardson’s lawsuit against Philadelphia included claims against Greenhaw for violations of Chapter 541 of the TEXAS INSURANCE CODE. (R. 6-8.) Richardson did not plead any actual damages other than policy benefits. (R. 14-15.) The trial court granted Philadelphia’s and Greenhaw’s motions for summary

judgment. (R. 591-592.) A unanimous court of appeals affirmed. 2016 Tex. App. LEXIS 3267.

SUMMARY OF THE ARGUMENT

Richardson accepted the result of an agreed appraisal award made pursuant to the agreed dispute resolution mechanism in its contract with Philadelphia. Richardson does not challenge the validity the appraisal award or ask the Court to set it aside. Richardson does not even challenge that existing Texas law holds that Philadelphia's payment of the appraisal award extinguishes Richardson's claims. Rather, Richardson asks the Court to write new law that allows a party to accept the benefits of an agreed contractual dispute process and yet still sue for breach of that same contract. In essence, Richardson asks this Court to rule that insureds are not bound by the agreed dispute resolution process in their contracts.

The purpose of an appraisal clause is to provide a binding, extra-judicial remedy for any disagreement regarding the amount of the loss. When a party accepts payment pursuant to this contractual dispute resolution mechanism, it should not be allowed to turn around and sue for a breach of that very contract. To hold otherwise would nullify the agreed dispute process in the contract.

Richardson's only arguments to counter this time-tested principle of Texas law is to offer outlandish hypotheticals of nefarious insurers that might one day purposefully engage in extreme delay tactics and then attempt to use appraisal as a

get-out-of-jail-free card. Richardson resorts to such strained hyperbole because nothing of the sort is at issue here, nor has it been in any case cited by Richardson. The Court should not accept Richardson's invitation to provide advisory opinions on hypothetical situations that may never occur.

This Court has consistently held that an insured may not prevail on an extra-contractual claim without first showing that the insurer breached the policy. Here, the loss was appraised and timely paid by Philadelphia, thereby extinguishing Richardson's contractual claim. Without a valid contractual claim under the insurance policy or any evidence of an "extreme" act, Richardson cannot bring its extra-contractual claims. Further, Richardson neither pled nor presented any actual damages other than policy benefits, and that damage claim was resolved in the appraisal.

Accordingly, the Court should deny review.

ARGUMENT

I. Richardson's contractual claims were resolved through appraisal.

Texas public policy strongly supports extrajudicial dispute resolution. "It is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures." *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 865 (Tex. 2010) (quoting TEX. CIV. PRAC. & REM. CODE § 154.002). In the insurance context, "[a]ppraisal

clauses, a common component of insurance contracts, spell out how the parties will resolve disputes concerning a property's value or the amount of a covered loss." *In re Univ. Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 405 (Tex. 2011). "[T]he parties having agreed that the amount of loss shall be determined in a particular way, we are constrained to hold that such stipulation is valid." *Id.* (quoting *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888)). Texas enforces appraisal provisions as a dispute resolution mechanism because, among other reasons, "[a]ppraisals can provide a less expensive, more efficient alternative to litigation." *Id.*

A. Philadelphia's timely payment of the appraisal award bars Richardson's breach of contract claim.

When an insurer timely pays a binding and enforceable appraisal award, it resolves any contractual issues between the parties. *See Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, 459 Fed. App'x. 366, 367 (5th Cir. Tex. 2012) (insurer's payment of the difference between the appraisal award and the initial payment extinguished the insured's contractual and bad faith claims); *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 787 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (payment of an appraisal award precludes breach of contract claims); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343-45 (Tex. App.—Corpus Christi 2004, pet. denied) (insurer did not breach contract,

and insureds were entitled to payment of interest penalty, even though payment was delayed until completion of appraisal process).

Here, Philadelphia timely paid Richardson pursuant to an enforceable and valid appraisal award. Richardson has not contested the validity of the appraisal award. Accordingly, Philadelphia's timely payment of the appraisal award extinguished Richardson's breach of contract claim. Contrary to its approach in the court of appeals, Richardson now admits that this principle has been applied many times over in Texas case law without conflict and, instead, now seeks a wholesale rewriting of this precedent.

B. Accepting the benefits of a contract's agreed dispute resolution mechanism estops a party from suing for breach.

Texas law has long held that a party to a contract is estopped from disclaiming the results of a contract's dispute resolution process when that party accepts a benefit from or seeks enforcement of that very contract. *See Rachal v. Reitz*, 403 S.W.3d 840, 846-48 (Tex. 2013). In the insurance context, appraisal "is intended 'to estop one party from contesting the issue of the value of damages in a suit on the insurance contract,' not facilitate contractual liability." *Breshears*, 155 S.W.3d at 343 (internal quotation omitted). This is especially so "when the contract they claim is being breached provides for resolution of disputes through appraisal." *Id.* Thus, when a party "accepted payment of the award . . . appellants

are estopped by the appraisal award from maintain a breach of contract claim against” the insurer. *Franco*, 154 S.W.3d at 787.

This is because “[t]he purpose of an appraisal clause is to provide a binding, extra-judicial ‘remedy for any disagreement regarding the amount of the loss.’” *Amine v. Liberty Lloyds of Tex. Ins. Co.*, No. 01-06-00396-CV, 2007 Tex. App. LEXIS 6280, at *9 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (quoting *Breshears*, 155 S.W.3d at 344). When a party accepts payment pursuant to this contractual dispute resolution mechanism, it cannot turn around and sue for a breach of that very contract. *Blum’s Furniture*, 459 Fed. App’x at 368.

Thus, “[t]he reason for this defense is to prevent the insured from taking advantage of the binding appraisal process to determine the value of its claim and then, after the insurer fully pays the appraisal award, suing the insurer for its failure to pay.” *Devonshire Real Estate & Asset Mgmt., LP v. Am. Ins. Co.*, No. 3:12-CV-2199-B, 2014 U.S. Dist. LEXIS 135939, at *44-45 (N.D. Tex. Sept. 26, 2014). This policy is in line with “the very object of the binding appraisal process is to avoid litigation on the issue of damages and not to facilitate liability.” *Id.* at *47.

“[T]his reasoning applies with special force where, as here, the parties agreed to provide for a binding appraisal process in their contract.” *Id.*; see *Quibodeaux v. Nautilus Ins. Co.*, No. 1:10-CV-739, 2015 U.S. Dist. LEXIS 39324,

at *10-11, 20-21 (E.D. Tex. March 10, 2015) (same). If the Court were to adopt Richardson's argument that an appraisal award does not resolve the contractual dispute, it would render appraisals *nonbinding* and, thus, a nullity. Such a result would be an unprecedented departure from Texas' long-standing public policies of freedom of contract and enforcing valid contracts. See *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983) (holding that parties to a contract intend for each clause to have meaning and effect); *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009) (refusing to "render appraisal clauses largely inoperative, a construction we must avoid"). This is why courts interpret appraisal clauses in Texas as a "mandatory contractual remedy" in line with "the strong public policy favoring appraisal clauses." *Michels v. Safeco Ins. Co. of Ind.*, 544 Fed. App'x. 535, 540 (5th Cir. 2013).

C. There is no evidence of any other breach of contract.

Richardson argues that Philadelphia breached the policy by not responding to Richardson's initial indications that appraisal might be appropriate. However, during that time period, the parties continued to negotiate and Richardson never made a written demand for appraisal, as required by the policy to invoke the policy's appraisal provision. (R. 62, 102.) Further, Philadelphia itself invoked appraisal, and that appraisal resulted in an agreed award in which Richardson's appraiser joined.

1. A 10-day “delay” is not evidence of breach.

Richardson bemoans the fact that Philadelphia did not demand appraisal until 10 days after the parties’ unsuccessful mediation. Richardson makes much of the fact that it had filed suit a few days before Philadelphia’s appraisal demand, even though Richardson did not actually serve the lawsuit until after Philadelphia’s written appraisal demand.

However, this Court has already rejected the argument that a party somehow waives the protections of the insurance contract’s appraisal clause when the appraisal demand is made after litigation begins. *See In re Universal*, 345 S.W.3d at 405, 410. Further, this Court explained that the reasonableness of any “delay” must be measured from the point of *impasse*, explaining:

An impasse is not the same as a disagreement about the amount of loss. Ongoing negotiations, even when the parties disagree, do not trigger a party’s obligation to demand appraisal. Nor does an insurer’s offer of money to cover damages necessarily indicate a refusal to negotiate further, or recognize additional damages upon reinspection.

Id. at 408. Further, in addition to showing that an impasse was reached, a party must also show “that any failure to demand appraisal within a reasonable time prejudiced the opposing party.” *Id.* at 412. This Court went on to hold that a one-month delay after the insured sued was reasonable. *Id.* at 410.

Here, Philadelphia and Richardson exchanged competing repair estimates and had ongoing negotiations. At no point did Philadelphia indicate that it refused

to discuss the matter further. Indeed, Philadelphia initiated a mediation, which Richardson agreed to attend, a mere 10 days before it initiated the appraisal. While Richardson had indicated that the parties should proceed to appraisal “[i]f we cannot reach an agreement,” this was before the parties exchanged further estimates and agreed to attend a mediation. Thus, whether it was the conclusion of the unsuccessful mediation or Richardson’s initiation of litigation, Philadelphia’s written appraisal demand was made within mere days of the parties reaching an impasse. Richardson makes no effort to show – and it cannot show – how it was prejudiced by these 10 days.

2. The agreed appraisal award is not a breach of contract.

Despite losing at the summary judgment stage, in an attempt to recover attorneys’ fees, Richardson posits that it “prevailed on its breach of contract claim” because Philadelphia paid the appraisal award. However, no Texas court has ever allowed an insured to use an appraisal award as evidence to support a breach of contract claim, let alone a compromised, agreed award.

To the contrary – courts have consistently rejected Richardson’s argument that a difference between the insurer’s pre-appraisal payment and the appraisal award may be used as evidence of breach. *See, e.g., Breshears*, 155 S.W.3d at 343-344; *Brownlow v. United Services Auto. Assoc.*, No. 13-03-00758-CV, 2005 Tex. App. LEXIS 1987, at *5-6 (Tex. App.—Corpus Christi March 17, 2005, pet.

denied); *Caso v. Allstate Tex. Lloyds*, No. 7:12-CV-478, 2014 U.S. Dist. LEXIS 15279, at *23-24 (S.D. Tex. Feb. 7, 2014); *Devonshire* 2014 U.S. Dist. LEXIS 135939, at *44; *Barry v. Allstate Tex. Lloyds*, No. 4:14-cv-00870, 2015 U.S. Dist. LEXIS 40953, at *8-9 (S.D. Tex. March 31, 2015); *Quibodeaux*, 2015 U.S. Dist. LEXIS 39324, at *9-10; *Scalise v. Allstate Tex. Lloyds*, No. 7:13-cv-178, 2013 U.S. Dist. LEXIS 179692, at *15-16 (S.D. Tex. Dec. 20, 2013).

This is because appraisal provides a mechanism for resolving an insurance claim that serves as an alternative, and not as an adjunct, to a breach of contract claim. An appraisal award is not a stepping stone to be used to further pursue a breach of contract claim. If it were, this would frustrate appraisal's purpose of providing an independent means of final resolution of an insurance claim. Appraisal is a dispute resolution tool, not a dispute enhancement tool. For this reason, the law in Texas is that an appraisal award prevents the insured from maintaining a breach of contract claim. *Franco*, 154 S.W.3d at 787; *Blum's*, 459 Fed. App'x. at 368.

D. Consequential damages are only available for breach of contract.

Richardson also argues that it is somehow entitled to attorney and public adjuster's fees as consequential damages, even without a breach of the insurance contract. However, a party must first prove a breach of contract before being entitled to *any* damages, and then it must prove a nexus of the breach to any

alleged consequential damages. *See generally Mead v. Johnson Grp.*, 615 S.W.2d 685, 687 (Tex. 1981). There is no breach here, so there can be no nexus to damages. Richardson's argument would turn hundreds of years of contract law on its head.

II. After accepting the appraisal result, Richardson's extra-contractual claims fail as a matter of law.

A. Without a viable contract claim, Richardson has no extra-contractual claim.

This Court has consistently held that, in most circumstances, an insured may not prevail on an extra-contractual claim without first showing that the insurer breached the policy. *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 602 (Tex. 2015); *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005); *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994).

Here, Richardson's contractual claims were extinguished when it accepted the agreed appraisal award. Accordingly, it is impossible for Richardson to first show that Philadelphia breached the policy. Its extra-contractual claims must, therefore, fail as a matter of law.

B. There is no evidence of any “extreme” act or untimely investigation.

Stoker presented two exceptions to this established rule: “some act, so extreme, that would cause injury independent of the policy claim” or failure “to timely investigate [the] insureds’ claims.” 903 S.W.2d at 341. While these exceptions exist in theory, as the Fifth Circuit noted: “in seventeen years since [*Stoker*] appeared, no Texas court has yet held that recovery is available for an insurer’s extreme act....” *Mid-Continent Cas. Inc. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 521-22 (5th Cir. 2013).

Here, Richardson does even not allege that a *Stoker* exception occurred. There is certainly nothing special about the facts in this case to break new ground and find an “extreme” act for the first time in Texas jurisprudence. Similarly, the investigation was timely, and there certainly were no delays rising to the level of bad faith.

After receiving the claim at the end of April 2013, Greenhaw inspected the property and issued his report by the beginning of May. At the end of May, Richardson notified Philadelphia that it disagreed with Greenhaw’s estimate, and Philadelphia’s engineer reinspected the property and provided his report by mid-June. Philadelphia then paid the higher amount between the two estimates. In July and August, Richardson provided two vastly differing estimates from a public adjuster and an “expert litigation adjuster.” In October, the parties agreed to

mediate, and Philadelphia made a written demand for appraisal less than two weeks after the mediation concluded unsuccessfully. Richardson's appraiser agreed to an amount with Philadelphia's appraiser, without the need of an umpire, which resulted in Richardson receiving more money.

There were no unreasonable delays, Philadelphia requested appraisal very soon after the parties reached an impasse, and Richardson agreed to the appraisal result. Thus, there is nothing here that *Stoker* theorized about.

C. There is no evidence of any damages beyond policy benefits, which were resolved through appraisal.

Richardson has neither pled nor presented any evidence of actual damages other than policy benefits, and proof of damages is a required element of both a breach of contract claim and claims under the Texas Insurance Code. *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 214 (Tex. 1988); *see also Provident Amer. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 198-99 (Tex. 1998). To recover extra-contractual damages, a plaintiff must show a "serious injury that is independent and qualitatively different from the breach of the insurance contract." *Moriel*, 879 S.W.2d at 23-24. Thus, breach of contract claims under the policy are independent of bad faith claims. *Stoker*, 903 S.W.2d at 341.

Here, Richardson only alleged as actual damages that it was owed policy benefits for the property damage from the June 13, 2012 loss. (R. at 246-247.) The appraisal award set the amount of the contractual claim (the loss regarding the

property damage). Philadelphia's timely payment of the appraisal award compensated Richardson for the entirety of its actual damages, leaving Richardson with no viable claim for actual damages.

D. Attorney and public adjuster's fees are not actual damages.

Richardson does not possess a viable claim for attorneys' fees because it has not prevailed on a cause of action for which attorneys' fees are recoverable (here, breach of contract). See *Ashford Partners v. Eco Res., Ltd.*, 401 S.W.3d 35, 40-41 (Tex. 2012). Further, all of Richardson's alleged property damages made the basis of its breach of contract action were included in the appraisal award and paid by Philadelphia, leaving no contract damages for Richardson to claim.

Irrespective of whether a party may obtain attorneys' fees, though, attorneys' fees are not actual damages. *Haden v. Sacks*, 222 S.W.3d 580, 597-98 (Tex. App.—Houston [1st Dist.] 2007) (“Attorney’s fees are ordinarily not recoverable, therefore, as actual damages in and of themselves.”), *rev'd on other grounds*, 266 S.W.3d 447, 448 (Tex. 2008); *Melson v. Stemma Exploration & Prod. Co.*, 801 S.W.2d 601, 603 (Tex. App.—Dallas 1990, no writ) (“Attorney’s fees incurred in prosecuting a suit for or defending against a wrong are not ordinarily recoverable as actual damages.”)

Similarly, Richardson has cited no authority to hold that its public adjuster's fees should be considered actual damages under the contract. The policy expressly

excludes any fees incurred “by retaining a public adjuster or appraiser.” (R. at 132.) Moreover, Greenhaw and Philadelphia were not parties to the contract between Richardson and its public adjuster. (R. at 361.) Accordingly, Richardson’s public adjuster fees are not recoverable as damages.

Courts that have examined this argument have held that neither attorneys’ fees nor public adjuster fees are independent injuries to support extra-contractual claims. *See, e.g., Admiral Ins. Co. v. Petron Energy, Inc.*, 1 F.Supp.3d 501, 503-504 (N.D. Tex. 2014); *see also Barry*, 2015 U.S. Dist. LEXIS 40953, at *12. Indeed, if that were not the case, a party could manufacture “damages” simply through its own choice to utilize counsel to assist it in making its insurance claim.

III. The Court should not issue an advisory opinion on Richardson’s hypotheticals.

Because Richardson has no contractual claim, and because there is no evidence of any “extreme” act or damages beyond policy benefits in *this* case, Richardson retreats to baseless hypotheticals of unlikely and hyperbolic scenarios in which an insurer engages in ridiculously long delays before invoking appraisal just to take advantage of an unwitting insured. Notably, Richardson must create these hypotheticals from whole cloth, as it failed to point this Court to a single example of this occurring in any Texas case, giving an indication of the likelihood that Richardson’s hypotheticals would ever occur.

A. This Court consistently declines to provide advisory opinions.

This Court has repeatedly declined to provide advisory opinions based on hypotheticals not present in the case before the Court, especially when the petitioner cannot point the Court to a single instance of that hypothetical having actually occurred:

As a judiciary, our constitutional role dictates that we decide concrete cases and not dispense contingent advice. “[T]he judicial power does not embrace the giving of advisory opinions,” and prudent development of the law requires that courts refrain from speculating on situations that may never arise.

Loisiga v. Cerda, 379 S.W.3d 248, 265 (Tex. 2012) (Willet, J., dissenting) (quoting *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968)); *see also* *Correa v. First Court of Appeals*, 795 S.W.2d 704, 705 (Tex. 1990) (the “judicial power does not embrace the giving of advisory opinions.”); *Firemen’s Ins. Co.*, 442 S.W.2d at 333-34 (Tex. 1968) (“The courts do not make mere hypothetical adjudications, where there is no presently justiciable controversy before the court, and where the existence of a ‘controversy’ is dependent on the happening of future events.”). The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

Here, Richardson pontificates about various scenarios in which an insurer may attempt to abuse the process and strategically engage in lengthy delays or

purposeful underpayments of the loss. However, the fact that Richardson must argue these concepts in the abstract exposes the fallacy in its approach: the facts here in no way resemble Richardson's hypotheticals made the crux of its petition for review. Thus, Richardson asks this Court not to rule on *this* case but on abstract hypotheticals of a partial fact pattern. The Court should decline such an invitation.

B. Texas law already provides protections for Richardson's hypotheticals.

Richardson's hypotheticals involve outrageous circumstances where an insurer would purposefully drawing out the claim adjustment to nefarious ends. As already discussed, Texas law provides remedies for "extreme" conduct outside bounds of reasonable claim adjustment. *See Stoker*, 903 S.W.2d at 341. Further, the TEXAS INSURANCE CODE creates liability for failing to effect a prompt settlement of a claim within a reasonable time. *See, e.g.,* TEX. INS. CODE 541.060(a)(2); 542.003(a)(4). Additionally, this Court has already recognized that an insurer may very well be found to waive the protections of an insurance policy's appraisal clause when the insurer's actions are "reasonably calculated to induce the assured to believe that compliance by him with the terms and requirements of the policy is not desired, or would be of no effect if performed." *In re Universal*, 345 S.W.3d at 407 (quoting *Scottish Union*, 8 S.W. at 632). Separately, even when

appraisal occurs, a party may challenge the validity of an appraisal award if it is obtained through improper means. *See In re Universal*, 345 S.W.3d at 407.

Thus, while the Court should not engage in providing an advisory opinion on situations not at issue here, Texas law already provides responsive protections to those hypotheticals. In Richardson's hypotheticals, an insurer could still have contract and bad faith exposure if the insurer waived the benefits of the appraisal clause, committed an Insurance Code violation or "extreme" act, or obtained an invalid appraisal award. In other words, Texas law already prevents insurers from abusing the appraisal process as posited by Richardson. None of those situations exists here.

PRAYER

Greenhaw respectfully requests that this Court deny Richardson's Petition for Review and grant Greenhaw all other relief he is entitled to receive.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirement of Tex. R. App. P. 9.4(E) because it has been prepared in conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Texas Rule of Appellate Procedure 9.4(i)(2)(D) because it contains 4,451 words, excluding any parts exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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CERTIFICATE OF SERVICE

I certify that on November 16, 2016, the foregoing instrument was served on the following counsel for appellants via electronic filing in accordance with the Texas Rules of Appellate Procedure:

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