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 BRIEF ON THE MERITS

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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 in favor or Respondents 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 panel consisted of Justices Francis, Lang-Miers, and Myers. The court of appeals' opinion is published at 2016 WL 1242480.

STATEMENT REGARDING ORAL ARGUMENT

While the Court should deny Richardson's petition for review, if it were to grant the petition, it should grant oral argument because Richardson is asking this Court to issue new law by (a) extending *Menchaca* far beyond its current holding and scope and (b) overturning long-standing, well-established appraisal law and the multitude of cases holding that timely payment of an appraisal award extinguishes an insured's claims for policy benefits.

STATEMENT OF JURISDICTION

This Court does not have jurisdiction. Notably, Richardson argues that jurisdiction exists only under the general concept in Texas Government 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

Response to Issue No. 1:

A party cannot be held liable for breach of contract or attorneys' fees when it timely pays an agreed amount pursuant to the parties' agreed dispute resolution method. This Court's ruling in *USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, 2017 WL 1311752 (Tex. Apr. 7, 2017) in no way addresses or modifies this long-standing principle of Texas law.

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. Finding 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 in which Richardson presented a claim for roof damage that reportedly occurred in June 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 a report outlining his findings and an estimate of $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 had. (*Id.*) Six days later, Philadelphia nonetheless paid the *higher* amount based upon Greenhaw's original 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 issued a $36,372.58 repair estimate. (R. 62, 363-364.) Three weeks after that, Richardson had retained counsel who had a new "expert litigation adjuster" prepare 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 mediate with

Philadelphia. (*See* R. 308.) 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 consistent 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. Although the agreed amount was nearly $82,000.00 less than the estimate created by Richardson's "expert litigation adjuster," 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 WL 1242480.

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 of 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 attorneys' fees, public adjuster's fees, and costs because the insurer still somehow breached the 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 attorneys' fees, public adjuster's fees, and costs due to the alleged breach of that very contract. To hold otherwise would nullify

the agreed dispute resolution process in the contract.

Richardson's only arguments to counter this time-tested principle of Texas law is to offer extreme 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 or in any case that Richardson has cited. 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 failed to pay owed policy benefits. Here, the loss was appraised and timely paid by Philadelphia, thereby providing Richardson with all owed policy benefits. Because the insurer timely paid the policy benefits, Richardson has no contractual claim or damages. 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 through

appraisal. Thus, to the extent Richardson is still pursuing extra-contractual claims, the trial court was correct to dismiss those claims as well.

Lastly, this Court's holding in *Menchaca*, and specifically the "entitled-to-benefits" rule, has no bearing on appraisal. The entitled-to-benefits rule in *Menchaca* is premised on a "loss of the benefits." The opposite occurred here: Richardson's appraiser agreed to an amount of the loss, and Richardson accepted that amount as all owed policy benefits. Thus, Richardson's loss was never "transformed into a legal damage" from a "wrongfully denied claim."

This Court should decline Richardson's invitation to issue an advisory opinion radically changing well-established principles of Texas appraisal law and turning appraisal into a dispute-enhancement mechanism.

Indeed, this Court recently denied a petition for review in a case involving similar issues of appraisal law. *See Garcia v. State Farm Lloyds and Sylvia*, No. 17-0207, __ S.W.3d __ (Tex. June 2, 2017).

Accordingly, the Court should deny review.

ARGUMENT

I. Richardson's claim for policy benefits was resolved through appraisal.

Texas public policy strongly supports extra-judicial 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); *Wright v. Sydow*, 173 S.W.3d 534, 551 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (Texas law strongly favors and encourages voluntary settlement and orderly dispute resolution); *Hernandez v. Telles*, 663 S.W.2d 91, 93 (Tex. App.—El Paso 1983, no writ) ("The law has always favored the resolution of controversies through compromise and settlement rather than through litigation and it has always been the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.")

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 Universal 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.*; *National Security Fire & Casualty Co. v. Hurst*, No. 14-15-00714-CV, 2017 WL 2258243, at *5-6 (Tex. App.—Houston [14th Dist.] May 23, 2017, no pet. history). "From a policy point of view, appraisal clauses allow the insured and insurer to resolve disputes about damages with greater efficiency by eliminating the cost and delay of traditional litigation.")

A. Philadelphia's timely payment of the agreed appraisal award gave Richardson all policy benefits that were owed.

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. 2012) (applying Texas law) (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 claims for policy benefits. 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 the contract's agreed dispute resolution mechanism estops Richardson 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 maintaining 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 WL 2264477, 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 WL 4796967, at *44-45 (N.D. Tex. Sept. 26, 2014). This policy is in line with "the very object of the binding appraisal process . . . to avoid litigation on the issue of damages and not to facilitate liability." *Id.* at *47. Timely payment of the appraisal award does not "cure" the breach, as Richardson argues. *See* Richardson's Brief, p. 11. Indeed, no case addressing appraisal uses this terminology. Following a contract's agreed dispute resolution process is not a breach of that contract. Instead, timely payment of the appraisal award estops a party from suing for breach of contract, as an insurer never breaches the insurance contract. Indeed, when an insurer fails to timely pay the appraisal

award, a new breach claim (breach of the appraisal provision) exists. Notably, though, Richardson's arguments concerning the breach being "cured" constitute Richardson's admission that it has no breach claim in this case.

"[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 holding). If the Court were to adopt Richardson's argument that an appraisal award does not resolve the contractual dispute, it would render appraisals *non*-binding 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); *Garcia v. State Farm Lloyds*, 514 S.W.3d 257, 272 (Tex. App.—San Antonio Dec. 14, 2016, pet. denied) (citing *Michels* for the same proposition).

C. There is no evidence of any 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, Richardson proceeded to appraisal at Philadelphia's request, 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 Philadelphia had already made its written demand for appraisal.

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 Underwriting*, 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 attended 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 (at most).

2. The extrajudicial payment of the agreed appraisal award is not a finding of 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., Barbara Techs. Corp. v. State Farm Lloyds*, No. 04-16-00420-CV, 2017 WL 1423714 (Tex. App.—San Antonio April 19, 2017, no pet.); *Gusma Props., L.P. v. Travelers Lloyds Ins. Co.*, 514 S.W.3d 319, 329 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing this *Breshears* holding approvingly); *Garcia*, 514 S.W.3d at 266; *Anderson v. Am. Risk Ins. Co., Inc.*, 01-15-00257-CV, 2016 WL 3438243, at *5 (Tex. App.—Houston [1st Dist.] June 21, 2016, no pet.) ("The fact that State Farm did not pay the amount of the award earlier, alone, does not raise a fact issue on Anderson's claim for breach of contract."); *Breshears*, 155 S.W.3d at 343-44; *Brownlow v. United Services Auto. Assoc.*, No. 13-03-00758-CV, 2005 WL 608252, at *5-6 (Tex. App.—Corpus Christi March 17, 2005, pet. denied); *McEntyre v. State Farm Lloyds, Inc.*, No. 4:15-CV-00213, 2016 WL 6071598 (E.D. Tex. Oct. 17, 2016); *Graber v. State Farm Lloyds*, No. 3:13-CV-2671-B, 2015 WL 3755030, at *4 (N.D. Tex. June 15, 2015) (concluding insured "estopped from relying on the appraisal award to demonstrate that [insurer] breached the Policy when

it initially issued payment to [insured] for an amount less than the appraisal"); *Quibodeaux*, 2015 U.S. Dist. LEXIS 39324, at *9-10; *Barry v. Allstate Tex. Lloyds*, No. 4:14-cv-00870, 2015 WL 1470429, at *8-9 (S.D. Tex. March 31, 2015); *Devonshire*, 2014 WL 4796967, at *44; *Caso v. Allstate Tex. Lloyds*, No. 7:12-CV-478, 2014 WL 528192, at *23-24 (S.D. Tex. Feb. 7, 2014); *Scalise v. Allstate Tex. Lloyds*, No. 7:13-cv-178, 2013 WL 6835248, at *15-16 (S.D. Tex. Dec. 20, 2013); *Gabriel v. Allstate Texas Lloyds*, No. 7:13-CV-181, 2013 WL 7885700, at *3 (S.D. Tex. Nov. 1, 2013) ("Texas law clearly holds the discrepancy between the initial estimate and the appraisal award cannot be used as evidence of breach of contract.")

Contrary to Richardson's argument that the *Breshears* holding is just "one opinion" (Richardson's Brief, p. 15), there are at least 13 opinions that have upheld *Breshears*. Those opinions come from the San Antonio, Houston, and Corpus Christi courts of appeals and federal district courts in the Northern, Southern, and Eastern Districts of Texas.

The difference between the insurer's pre-appraisal payment and the appraisal award may not be used as evidence of breach 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. Appraisal is not a means to "facilitate liability." *Hurst*, 2017 WL 2258243, at *7. 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's fees 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 loss of policy benefits 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. *Menchaca*, 2017 WL 1311752, at *11-12. *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); *Trans. 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 for 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. Because there is no evidence of a *Stoker* exception concerning Greenhaw and no evidence of any bad faith conduct of Greenhaw, this Court should affirm the judgment as to Greenhaw.

C. There is no evidence of any independent 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. Attorneys' fees and public adjuster's fees are neither covered by the policy nor are they 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 WL 1470429, 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.

Further, as this Court has held, a party does not need to hire an attorney to engage in appraisal. *See e.g. Johnson*, 290 S.W.3d at 893 ("Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings."). For this reason, Richardson's argument that it was forced to hire an attorney to engage in appraisal wholly lacks merit. Indeed, if this Court adopts this argument, an insured could create "damages" simply by seeking an attorney's advice.

III. *Menchaca* has no bearing here as it does not involve appraisal and because Richardson received all its policy benefits.

Richardson asks this Court to strain in significantly extending the *Menchaca* holding to appraisal, despite the fact that *Menchaca* has nothing to do with appraisal. Richardson's requested extension of *Menchaca* would constitute a radical change of Texas appraisal law that would frustrate the fundamental dispute-resolution purpose of appraisal of insurance claims. Further, Richardson's *Menchaca* arguments suggest holdings that find no support in the text or reasoning of *Menchaca*.

Richardson relies on the holding in *Menchaca* that "an insured who establishes a right to receive benefits under the insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits." Richardson's Brief, p. 6 (citing *Menchaca*, 2017 WL 2258243, at *10.) Richardson incorrectly posits that the "entitled-to-benefits" rule means that an appraisal award that is higher than the claim payment constitutes a breach that affords the insured the right to recover attorneys' fees and expenses incurred in obtaining the award.

Richardson's Brief, p. 5. Quite the contrary, this "entitled-to-benefits" rule means simply that an insured may recover wrongfully withheld policy benefits through a contract claim or a bad faith claim if the insurer's bad faith was a producing cause of the wrongfully withheld benefits. *Id*. at *24 – 30.

In its detailed recitation of the entitled-to-benefits rule, this Court makes absolutely no mention of appraisal. Indeed, the entire *Menchaca* opinion mentions the word appraisal only once, in a footnote, to state that neither party invoked the appraisal provision of the policy. *Id*. at *4, n.2. This is because *Menchaca* has *nothing* to do with appraisal. Indeed, as discussed, *Breshears* wholly rejects Richardson's argument that the "entitled-to-benefits" rule applies to appraisal. While Richardson ostensibly disclaims its old argument that an appraisal award being higher than the claim payment constitutes a breach, Richardson still implicitly presents this flawed position in its "entitled-to-benefits" argument.

A. *Menchaca* is premised on a "loss of policy benefits," which did not occur here.

Richardson attempts to use the "entitled-to-benefits" rule from *Menchaca*, but that route of recovery is premised on a "statutory

violation [that] causes the loss of benefits." *Id.* at *7. That did not occur here – rather, Richardson accepted the agreed appraisal award and has never challenged that it received all owed policy benefits. As a result, while Richardson "suffered a *loss* . . . for which they were entitled to claim under the insurance policy," that loss never "transformed into legal *damage*" from a "wrongfully denied claim," as required by *Menchaca*. *Id.* at *8 (emphases added by the Court) (quoting *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129, 136 (Tex. 1988)).

Instead, Richardson and Philadelphia simply had a bona fide dispute in the early stages of the claim adjustment as to the covered amount of policy benefits, and that bona fide dispute was resolved through the appraisal. There was never a "statutory violation [that] caused the insured not to receive those benefits."

Separately, the entitled-to-benefits rule in *Menchaca* does not apply here because *Menchaca* addresses trial judgments—judicial process determinations—while appraisal is an extra-judicial remedy. Here, there was no finding in the judicial process that Philadelphia wrongfully withheld policy benefits. *See id.* at *7 (". . . if the jury finds

that . . . the insurer's statutory violation caused the insured not to receive those benefits . . . ."). Rather, the policy benefits were paid in full outside of the judicial process pursuant to the contract's terms.

B. Post-*Menchaca* decisions of this Court and others demonstrate that *Menchaca* does not alter existing appraisal law.

After this court issued its *Menchaca* opinion, it recently denied a petition for review in a case involving similar issues of appraisal law. *See Garcia v. State Farm Lloyds and Sylvia*, No. 17-0207, __ S.W.3d __ (Tex. June 2, 2017). Notably, the Fourth Court of Appeals in *Garcia* agreed with existing precedent that "the discrepancy between the initial estimate and the appraisal award cannot be used as evidence of breach of contract" and "full and timely payment of an appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions as a matter of law," rejecting the very arguments that Richardson makes here. *Garcia*, 514 S.W.3d at 273-275.

Similarly, the Fourteenth Court of Appeals recently examined *Menchaca* and confirmed that it does not change Texas appraisal law. *See Hurst*, 2017 WL 2258243, at *5-9. The *Hurst* court rejected the

insured's arguments that an appraisal award that is higher than the insurer's initial payment can form the basis of a breach of contract or statutory violation, holding that the trial court should have entered directed verdict on the insured's claims. *Id*. at *5-7, 11, 17. The *Hurst* court also noted that an appraisal award does not equate to a judicial finding of wrongfully withheld policy benefits. *Id*.

In sum, Richardson cannot avail itself of the entitled-to-benefits rule in *Menchaca* because there was not a loss of policy benefits and there was not a judicial determination (nor was there any evidence) that the insurer engaged in a statutory violation to cause Richardson to lose any policy benefits.

IV. 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 Richardson 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.

Loaisiga 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, especially as here there is no circuit split on the issue, or any case that contravenes the well-established appraisal law in Texas.

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

Richardson's hypotheticals involve outrageous circumstances where an insurer would purposefully draw 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 Underwriters*, 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 Id.*; *see also Menchaca*, 2017 WL 1311752, at *29-30 (the Benefits-Lost Rule).

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.

C. Adopting Richardson's appraisal doctrine would have negative public policy implications.

Adopting Richardson's radical change to Texas appraisal law would turn appraisal into a dispute-enhancement tool and would render it a nullity, as it would no longer have the capacity to resolve disputes. Further, if the difference between initial estimates and appraisal awards constitutes wrongful conduct, insurers could use this new doctrine to argue that appraisal awards that are less than the insured demanded should allow the insurer to obtain its fees from the insured. This change to appraisal law would result in fewer policies with appraisal provisions, more insurance litigation, higher claim costs for insurers, and higher premiums for policyholders (due to the higher claim costs).

Lastly, giving any party with a dispute the ability to obtain attorneys' fees for merely having a dispute would be disastrous for the Texas legal system. Allowing plaintiffs in such a position, who have not been damaged, to recover attorneys' fees would result in a massive increase in lawsuits filed, significantly draining resources from the

Texas economy and the courts. A rule that gives insureds automatic damages merely for engaging an attorney would be nonsensical: it makes no sense to allow a plaintiff to generate its own damages.

PRAYER

Accordingly, Greenhaw respectfully requests that this Court (1) deny Richardson's Petition for Review or (2) affirm the court of appeals. Greenhaw also requests that this Court grant him all other relief he is entitled to receive.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certifiy 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 6,458 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 June 30, 2017, 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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