UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

INDUSTRIAL PACKAGING CORP	**DOCKET NO. 5:22-CV-05972**
VERSUS	**JUDGE DONALD E. WALTER**
UNION INSURANCE COMPANY OF PROVIDENCE	**MAG. JUDGE KAYLA D. MCCLUSKY**

UNION INSURANCE COMPANY OF PROVIDENCE'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

PETTIETTE, ARMAND, DUNKELMAN,
WOODLEY & CROMWELL, L.L.P.

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ATTORNEYS FOR UNION INSURANCE
COMPANY OF PROVIDENCE

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Rules

1. Introduction.

This is a first party insurance case. Union Insurance Company of Providence issued a commercial property policy to Industrial Packaging Corporation. Industrial claims the weight of snow and ice damaged its already leaky roof. Union found no storm created roof damage, but did find rust and evidence of pre-existing leaks.

The policy does not cover pre-existing roof damage. But it does cover interior damage caused by snow melt, even through pre-existing openings. Union hired an engineer to determine damages, cause of damages, and comment on interior damage caused by snow and ice melt. The engineer ruled out storm created roof damage, but he did discover wet insulation at high elevations (interior damage). Further to Union's request, the engineer designed a repair plan. Plan in hand, Union asked Industrial's permission for a follow up inspection so that an estimate could be generated. Industrial refused and invoked appraisal.

Industrial then engaged in a series of actions that delayed the appraisal process. Industrial changed appraisers four (4) times and caused the original umpire to recuse. Eventually, appraisal moved forward, appraisers submitted competing designs and estimates, and an umpire issued an award. Industrial countersigned the award. Union did not. Nevertheless, Union paid the award within 30 days.

With this motion, EMC seeks two separate and independent rulings:

1. **No breach of contract.** Industrial is not entitled to additional policy payments in light of the appraisal award. The appraisal award covers the building. Industrial has not presented satisfactory proof that it is entitled to policy payments unrelated to the building; and

2. **No bad faith.** There is no evidence Union acted arbitrarily and capriciously before Industrial invoked appraisal. As a matter of law, Union is not liable for not tendering after Industrial invoked appraisal, but before the award itself. And Union paid the umpire award timely.

This Court should grant summary judgment on the two issues, consistent with courts who considered similar fact patterns. *See, e.g.*, *Wells v. Southern Fidelity Insurance Company*, No. 18-1696, 2019 WL118015, at *4 (E.D. La. 01/07/2019) (court granted summary judgment dismissing breach of contract and bad faith claims after carrier timely paid appraisal award); *Island Concepts, LLC v. Certain Underwriters at Lloyd's, London*, No. 13-6725, 2014 WL5524379, at *12 (E.D. La. 10/31/2014) (dismissing bad faith claims noting that "complying with a contracted and self-invoked appraisal process fails to provide evidence or factual proof of vexatious, arbitrary, capricious, or conduct without probable cause."); *Western Consol. Premium Properties v. Westchester Surplus Lines Ins. Co.*, No. 06-4845, 2011 WL 6300334, at *3 (E.D. La. 12/06/2011) ("because [the insurer] paid plaintiffs the amount due under the appraisal award well within the statutory period ... [the insurer] made timely payment of the claim, and it is therefore entitled to summary judgment."); *Long v. American Sec. Ins. Co.,* 52 So. 3d 260, (La. App. 4 Cir. 11/17/10), (homeowners insurer complied with the appraisal clause of insurance policy by tendering balance of policy limits to insured within 30 days after it received umpire's appraisal award, and thus, did not act in a vexatious, arbitrary, or capricious manner in refusing to tender additional amounts to insured prior to umpire's ruling, where by not tendering payments during completion of appraisal process, insurer provided credence to its claim that the amount owed insured was in dispute).

2. Undisputed Facts Material to Motion.

2.1. The Union policy.

Union issued policy number 5A5-03-31 to Industrial for the period July 1, 2020 to July 1, 2021.[1] The policy provides commercial property insurance and covers a building located in Homer, Louisiana.[2]

Under the policy, Union agrees to pay for "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."[3] Union will not pay for damage caused by or resulting from wear and tear, rust or other corrosion, decay or deterioration.[4]

Under the policy, Union will not pay for damage to the interior of any building or structure caused by or resulting from snow, sleet or ice, unless (1) "[t]he building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the . . . snows, sleet, ice . . . enters; or (2) [t]he loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure."[5]

By endorsement, the policy contains an Appraisal provision that states:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. Each appraiser will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. Any outcome of the appraisal will not be binding on either party. Each party will:

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[1] *See* Union Policy, Exhibit 1, Declarations page, p. 1 of 102.
[2] *Id.*
[3] *See* Exhibit 1, p. 11 of 102.
[4] *See* Exhibit 1, p. 48 of 102, Exclusion 2(d).
[5] *See* Exhibit 1, p. 51 of 102, Limitations (1)(c)(1)-(2).

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.[6]

2.2. Events before appraisal (February 22, 2021 – May 27, 2021).

In February 2021, frigid weather engulfed a region that included plaintiff's property.[7] On February 22, 2021, Industrial reported a loss.[8] The next day, Union assigned the claim to Superior Claims, an independent adjuster.[9]

On March 5, 2021, Superior Claims inspected the property.[10] Industrial reported water leaks in several areas as the snow and ice started melting. Wilder claimed the leaks worsened significantly after the storm and demanded a full roof replacement.[11] Superior noted the roof was about 35 years old and original to the building (1986). Superior noted that "[i]t is obvious the insured has had issues with the roof leaking in the past as we noted an application of elastomeric coating in place over roof seams."[12] Superior further noted that "[w]e did not readily recognize any openings or damage to the roof caused by the weight of ice and snow from any other peril insured against."[13] Given the difference in opinion, Superior recommended hiring an engineer.[14]

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[6] *See* Exhibit 1, p. 39 of 102.
[7] *See* Doc. 24 Second Amended Complaint, par. 8.
[8] *See* Exhibit 2, Union000001.
[9] *See* Exhibit 2, Union000031.
[10] *See* Exhibit 2, Union000065-66. Union redacted the suggested reserve amount on the grounds articulated in *Pain Clinic, Inc. v. Bankers Insurance Company*, 2007 WL 9780346 (E.D. La. 03/19/2007).
[11] *Id.*
[12] *See* Exhibit 2, Union000065-66; *see also* Union000076-107, photos of rust and prior roof repairs.
[13] *See* Exhibit 2, Union000065-66.
[14] *Id.*

On March 11, 2021, Union started the hiring and scheduling process with an engineer knowledgeable about standing seam roofs.[15] Union requested the engineer determine damages, cause of damages, and comment on interior damage caused by snow and ice melt.[16]

Meanwhile, on March 18, 2021, Industrial hired a licensed general contractor to inspect its building and "develop a full scope of damage to your property[.]"[17] Industrial sent Union the general contractor's "Written Notification of Claim and Selection of General Contractor Record."[18]

On March 29, 2021, Union acknowledged the general contractor appointment and sent Industrial a Proof of Loss, which requested loss estimates.[19]

On April 6, 2021, Leif Lindblom, P.E. (ProNet Group) inspected the roof with the insured's licensed general contractor.[20] On April 22, 2021, Lindblom issued his report. Lindblom found prior repairs and no damage to the roof covering or structure. Lindblom found the roof typical for a 36-year-old roof with attendant long-term deterioration. Lindblom did detect wet roof insulation. Lindblom concluded that (1) there was no damage to the roof covering or structure as a result of the winter storm, (2) no damage to roof or exterior as a result of wind, and (3) the water intrusion occurred through pre-existing avenues created by long-term deterioration in the roof.[21]

On April 29, 2021, Union asked the engineer to design a repair plan for the moisture damaged roof insulation.[22]

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[15] *See* Exhibit 2, Union000034.
[16] *Id.*
[17] *See* Exhibit 2, Union000049-60, at 52.
[18] *Id.* at 58-60.
[19] *See* Exhibit 2, Union000130-133.
[20] *See* Exhibit 2, Union000143-201, at 150.
[21] *Id.* at 148.
[22] *See* Exhibit 2, Union000214-217, at 216.

On May 4, 2021, Union sent the original report to Industrial.[23]

On May 12, 2021, the engineer provided insulation repair recommendations.[24]

On May 14, 2021, Union provided the supplemental report to Industrial and requested a site revisit with a local contractor who would actually do the work for the forthcoming quote.[25]

On May 27, 2021, Industrial refused permission for the follow-up inspection and invoked appraisal.[26]

Neither Industrial nor its licensed general contractor submitted any estimates or recommended repair plans before invoking appraisal.[27]

2.3. Events during appraisal (May 27, 2021 – February 12, 2024).

On June 3, 2021, Union appointed Al Mallet as its appraiser.[28] On June 7, 2021, Industrial changed appraisers (change #2).[29] By June 22, 2021, the two appraisers were communicating and discussing estimates.[30]

The new appraiser demanded a temporary roof coating.[31] The appraisal clause calls for an impartial appraiser,[32] and Union expressed concerns about Industrial's appraiser acting as a public adjuster.[33] Union noted the engineer report that found no damage to the roof and asked for evidence

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[23] *See* Exhibit 2, Union000212.
[24] *See* Exhibit 2, Union000214-217, at 216-217.
[25] *See* Exhibit 2, Union000222; Union000231.
[26] *See* Exhibit 2, Union000231; Union000236-237.
[27] *See* Exhibit 2, Affidavit of Bill Mohrhauser, at par. 3.
[28] *See* Exhibit 2, Union000244-246.
[29] *See* Exhibit 2, Union000254.
[30] *See* Exhibit 2, Union000283.
[31] *See* Exhibit 2, Union000275.
[32] *See* Exhibit 1, p. 39 of 102, (Section G, which requires that "each party will select a competent and impartial appraiser.")
[33] *See* Exhibit 2, Union000291.

to the contrary.[34] Union renewed its request for a roof inspection so it could complete its work and generate an estimate.[35] Industrial's appraiser agreed.[36]

On July 16, 2021, a joint inspection took place.[37] On August 9, 2021, Union estimated $14,886.49 to repair the insulation. That same day, the Industrial appraiser submitted an estimate totaling $1,907,759.55.[38] On August 10, 2021, Union issued the amount of its estimate, less a $1,000 deductible.[39] On August 12, 2021, that amount was sent to Industrial.[40]

The Union appraiser and Industrial appraiser selected Bree McCorkle to serve as an umpire. The two appraisers and umpire met at the facility in December 2021.[41] The parties awaited a decision. As of February 2022, the parties expected a decision any day.[42]

What happened next has been addressed, in part, in a related lawsuit entitled *Temple Baptist Church v. Employers Mutual Casualty Company*, No. 3:21-CV-4324, U.S.D.C., Western District of Louisiana, at Doc. 21-1. The affidavit filed as Doc. 21-2 in that lawsuit sets forth the relevant chain of events, including events in the instant lawsuit.[43]

On March 9, 2022, counsel for Industrial sent an *ex parte* communication to Mr. McCorkle (Union's appraiser was not copied).[44] In that letter, Mr. McCorkle received the following threat:

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *See* Exhibit 2, Union000435 – 448.
[38] *See* Exhibit 2, Union000486, 480.
[39] *See* Exhibit 2, Union000652. Union redacted the suggested reserve amount on the grounds articulated in *Pain Clinic, Inc. v. Bankers Insurance Company*, 2007 WL 9780346 (E.D. La. 03/19/2007).
[40] *See* Exhibit 2, Union000491-495; *See* also Exhibit 2, Affidavit of Bill Mohrhauser, at par. 5. For whatever reason, Industrial never negotiated the check.
[41] *See* Exhibit 2, Union000540.
[42] *See* Exhibit 2, Union000573-584.
[43] Relevant portions of that affidavit are attached as Exhibit 3.
[44] *See* Exhibit 2, Union000571-572.

"if you do not elect to recuse yourself from his appraisal within the next 5 days . . . we will immediately file a lawsuit against you . . . ."[45]

McCorkle denied the accusations and refused to recuse.[46] So Industrial fired its appraiser[47] and hired one that had a conflict with McCorkle (appraiser #3).[48] As his first act, the new appraiser declared McCorkle had a conflict.[49] The new appraiser refused to resign, insisting McCorkle should do so instead. So, on May 26, 2022, McCorkle resigned.[50]

In August 2022, just two months after McCorkle recused, Industrial's third appraiser (the one with the conflict) quit or was fired.[51] Industrial Packaging appointed a fourth appraiser.[52]

On October 31, 2022, Industrial filed the instant lawsuit that demanded appointment of a second umpire.[53] After this point in time, the parties communicated through pleadings and counsel, eventually agreeing to a second umpire (Michael Fried).[54] The appraisal process began again.[55]

Union received little information after appraisal restarted. Union was not provided a copy of the engineer report submitted by Industrial for the umpire's consideration.[56] Nor was Union

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[45] *Id.* at 571.
[46] *See* Exhibit 2, Union000587-88.
[47] *See* Exhibit 2, Union000591, 604; *see also* Exhibit 3, Doc. 21-2 Affidavit of Al Mallet, at Ex. A18 (On March 15, 2022, the Industrial Packaging appraiser emailed Mr. Mallett and Mr. McCorkle and stated that "[t]his file has gotten weird, I've been asked to bill for my hours and excuse myself. So that is what I'm going to do.")
[48] *See* Exhibit 2, Union000606, 618. The redacted portion is an attorney-client communication between prior defense counsel and Union.
[49] *See* Exhibit 2, Union000613, 618.
[50] *See* Exhibit 2, Union000611-12.
[51] *See* Exhibit 4, August 2022 email from counsel for Industrial. The redacted portion is an attorney-client communication between undersigned counsel and Union.
[52] *Id.*
[53] *See* Doc. 1-1 Petition to Appoint Impartial Umpire.
[54] *See* September 13, 2023 Appointment of Umpire, attached to Exhibit 5.
[55] *See* Doc. 12, paragraph 12 and Doc. 17, paragraph 2.
[56] *See* Exhibit 2, Affidavit of Bill Mohrhauser, at par. 3, 6; *see also* Exhibit 5, Affidavit of Al Mallet, at par. 7.

provided a copy of the Industrial appraiser's estimate. Union did not receive a copy of these documents after the umpire rendered his award.[57]

2.4. Events after Umpire award (February 12, 2024 – March 11, 2024).

On February 12, 2024, the umpire (Michael Fried) rendered an award of $714,031.15 ACV/ $754,039.04 RC. The appraiser for Industrial signed the award same day. Union's appraiser did not sign the award.[58]

The countersigned award was communicated to Union on February 14, 2024.[59]

On March 11, 2024, Union delivered the ACV portion of the award, less the $1,000 deductible.[60]

According to Mr. Mallet, most of the dispute centered on wet insulation.[61] Industrial's appraiser claimed that the entire roof system needed replacement to fix the wet insulation problem.[62] Union's appraiser claimed the industry accepts retrofitting insulation and provided an estimate for that.[63] The umpire chose neither option, instead ordering a removal and reset of the existing roof.[64]

3. Reasons to Grant Summary Judgment.

3.1. Summary Judgment Standard.

Federal Rule of Civil Procedure 56(a) directs that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is

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[57] *See* Exhibit 2, Affidavit of Bill Mohrhauser, at par. 6; s*ee also* Exhibit 5, Affidavit of Al Mallett, at par. 7.
[58] *See* Umpire Award, attached to Exhibit 5.
[59] *See* Exhibit 2, Affidavit of Bill Mohrhauser, at par. 7.
[60] *See* Exhibit 2, Affidavit of Bill Mohrhauser, at par. 8; *see also* Union000696-697.
[61] See Exhibit 5, Affidavit of Al Mallet, at par. 9.
[62] *See* Position Paper and Estimate submitted by Industrial's appraiser, attached to Exhibit 5.
[63] *See* Position Paper and Estimate submitted by Al Mallet, attached to Exhibit 5.
[64] *See* Estimate of Umpire Michael Fried, attached to Exhibit 5.

entitled to judgment as a matter of law." An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[65] A genuine issue can be resolved only by a trier of fact because it may be resolved in favor of either party.[66] A fact is "material" if it can "affect the outcome of the suit under the governing law."[67] Facts that are irrelevant or unnecessary for determination of the suit should not be considered.[68] The substantive law will determine which facts are "material."[69]

The burden of proof in a summary judgment proceeding is on the party moving for summary judgment.[70] When a defendant moves for summary judgment on the plaintiff's claim, he may satisfy the summary judgment burden in one of two ways: (1) show there is no evidence to support an essential element of the plaintiff's claim, or (2) submit summary judgment evidence that negates one of the essential elements of the plaintiff's claim.[71] If the motion is properly made, the plaintiff "must set forth facts showing that there is a genuine issue for trial."[72] The plaintiff "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial."[73]

3.2. Breach of Contract.

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[65] *Mt. Bethel No. 1 Baptist Church v. Church Mut. Ins. Co.*, No. 14-3363, 2015 WL 12591682, at *3 (W.D. La. Oct. 23, 2015) (J. Walter), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[66] *Id.* at 248-49.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Mt. Bethel No. 1 Baptist Church*, 2015 WL 12591682, at *3, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986).
[71] *Id.*, citing *Celotex*, 477 U.S. at 322-24; *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990).
[72] *Id.*, citing *Anderson*, 477 U.S. at 250.
[73] *Id.*, citing *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted).

The point of appraisal is to determine "the amount of the loss."[74] Contractually specified appraisal awards are presumed accurate.[75] The instant appraisal clause states it is non-binding, but Industrial signed off on the award, signifying its agreement. Industrial was under no obligation to countersign the award. Union did not.

Industrial invoked appraisal under the policy to determine the amount of money Union owed for damage to its property caused by the ice storm. A valid appraisal award resulted from the process. The subject of the appraisal was the damage to the building. Since Industrial signed and agreed to the umpire's decision, no dispute exists that Industrial is entitled to more money. *See Wells,* 2019 WL118015 at *4, (E.D. La. 01/07/2019) (court granted summary judgment dismissing breach of contract claims when carrier paid appraisal award).

In its Second Amended Complaint, Industrial advances claims outside damage to the building. For example, Industrial seeks mental anguish and loss of business income. A corporate entity cannot experience mental anguish.[76] And the policy only pays for loss of business income sustained due to the necessary suspension of operations during a period of restoration.[77] Industrial submitted no evidence of suspension of operations or period of restoration.

Industrial has presented no evidence that it is entitled to sums outside the appraisal award. Indeed, in its May 29, 2024 Initial Disclosures, Industrial identified as its computation of damages only (1) bad faith penalties and attorneys fees, and (2) recoverable depreciation.[78] Recoverable depreciation is not due and owing until the insured provides proof of repairs.[79]

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[74] *See* Exhibit 1, p. 39 of 102.
[75] *St. Joseph Med. Clinic AMC v. Bankers Ins. Co.,* No. 22-4521, 2023 WL 4485084, at *3 (E.D. La. 6/7/23).
[76] *Bayou Fleet P'ship v. Clulee*, 150 So. 3d 329, 334 (La. App. 5 Cir. 9/10/14).
[77] *See* Exhibit 1, p. 27 of 102.
[78] *See* Exhibit 6, Industrial's Initial Disclosures.
[79] *See* Exhibit 1, p. 25 of 102 ("[w]e will not pay on a replacement cost basis for any loss or damage . . . [u]ntil the lost or damaged property is actually repaired or replaced[.]")

Industrial's lack of evidence on additional policy payments warrants summary judgment.

3.3. Bad Faith Claims.

In order to recover penalties under either bad faith statute, the insured has the burden of proving that the insurer "(1) received a satisfactory proof of loss; (2) that the insurer failed to pay within the designated time period, and (3) that the failure to pay was arbitrary, capricious or without probable cause."[80]

The phrase "'arbitrary and capricious' means '[v]exatious' or 'unjustified, without reasonable or probable cause or excuse.'"[81] An insurer does not act arbitrarily and capriciously…when it withholds payments based on a genuine (good faith) dispute about the amount of a loss or the applicability of coverage. Whether or not a refusal to pay is arbitrary and capricious, or without probable cause depends on the facts known to the insurer at the time of its action.[82]

(A) No bad faith before Industrial invoked appraisal.

Industrial bears the burden of proving that, before it invoked appraisal, Union had satisfactory proof of loss and arbitrarily failed to pay within 30 days. The facts do not support this claim. For its initial inspection, Industrial did not see any storm-created damage. Indeed, its inspection revealed pre-existing leaks and roof repairs.[83]

Nevertheless, Union moved forward without delay with an engineer evaluation. That engineer also found no storm-created roof damage, but he did identify wet insulation. Interior damage caused by snow melt is covered, but the fix not readily apparent for an older, out of code

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[80] *Wells v. Southern Fidelity Insurance Company*, 2019 WL118015, at *3 (E.D. La. 01/07/2019).
[81] *Id.*
[82] *Island Concepts, LLC v. Certain Underwriters at Lloyd's, London*, 2014 WL5524379, at *12 (E.D. La. 10/31/14) (internal citations omitted).
[83] *See* Exhibit 2, Union000065-66; Union000076-107.

warehouse with encapsulated insulation at high elevation.[84] (Indeed, there would be continued disagreement on the fix until the final umpire ruling, and he came up with something entirely different).[85] Union asked its engineer to design a repair plan, then asked the insured for permission to reinspect the property with a local contractor.[86] Industrial refused and invoked appraisal.[87]

All of this took place in a relatively short time frame. Union did not delay but instead moved expeditiously to determine what might be covered and the scope of repairs. Industrial did not provide estimates of its own, even though it had a retained general contractor at the April 6, 2021 inspection, and even though Union asked for estimates.[88] Neither Industrial nor its retained general contractor submitted proof of a storm created opening, or even identified the wet insulation. Union's engineer did that, and further to Union's prompting, recommended an appropriate repair. Then Industrial thwarted Union's efforts to generate a repair. Under these facts, Industrial cannot prove Union's pre-appraisal actions were "vexatious." *See Bainbridge, LLC v. Western World Insurance Company*, 682 F.Supp.3d 634, 640 (E.D. La. 7/13/2023); (in granting insurer's motion for summary judgment the court recognized that insurers are entitled perform an investigation of the facts and circumstances surrounding a claim, and held that "it is reasonable for [an insurer] to seek out all information that could affect coverage under the Policy"); *Wells*, 2019 WL 118015, at *3 ("[a]n insurer does not act arbitrarily and capriciously ... when it withholds payment based on a genuine (good faith) dispute about the amount of a loss or the applicability of coverage"); *see also Island Concepts, LLC*, 2014 WL 5524379, at *14 (court concluded that bad

[84] *See* Exhibit 2, Union0000143-201; Union0000214-217.
[85] *See* Estimate of Umpire Michael Fried, attached to Exhibit 5.
[86] *See* Exhibit 2, Union000214-217, at 216; *see also* Union000222 and 231.
[87] *See* Exhibit 2, Union000231; Union000236-237.
[88] *See* Exhibit 2, Union000130-133.

faith cannot be inferred from an insurer's decision to withhold payment when there is a reasonable and legitimate question as to the extent of the claim).

(B) No bad faith during appraisal process.

As a matter of law, Union cannot be liable for failing to tender after Industrial invoked appraisal, but before the award itself. *Long,* 52 So. 3d, at 264 ("Mr. Long argues that ASIC should have tendered a payment to him during the appraisal process. However, complying with a contracted and self-invoked appraisal process fails to provide evidence or factual proof of vexatious, arbitrary, capricious, or conduct without probable cause"); *Wells*, 2019 WL 118015, at *4 ("SFIC's failure to pay Plaintiff the amount of the appraisal award before the award was given does not constitute evidence of bad faith"); *Western Consol. Premium* Properties, 2011 WL 6300334, at *3 ("[t]he Court finds that Travelers' failure to pay plaintiff's claim prior to the arbitration award was not 'arbitrary, capricious or without probable cause' as a matter of law"). *Island Concepts, LLC*, 2014 WL 5524379, at *14 (granting insurer's motion for summary judgment on bad faith, and rejecting claim that tender should have been made during appraisal; "Lloyd's compliance with the contractual appraisal process does not provide evidence of bad faith").

If anyone was in bad faith during the appraisal process it was Industrial. In February 2022, the parties expected an award from the original umpire any day.[89] Anticipating a bad result, Industrial threatened the original umpire and demanded his recusal.[90] When the umpire declined, Industrial fired its own appraiser, which halted the appraisal process.[91] Then Industrial hired a new

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[89] *See* Exhibit 2, Union000540.
[90] *See* Exhibit 2, Union000571-572.
[91] *See* Exhibit 2, Union000591, 604; *see also* Exhibit 3, Doc. 21-2 Affidavit of Al Mallet, at Ex. A18 (On March 15, 2022, the Industrial Packaging appraiser emailed Mr. Mallett and Mr. McCorkle and stated that "[t]his file has gotten weird, I've been asked to bill for my hours and excuse myself. So that is what I'm going to do.")

appraiser (its third), whose first order of business was to demand that McCorkle recuse due to a conflict of interest.[92] Industrial then hired yet another appraiser (its fourth), and the process started all over.[93]

The undisputed facts show that Industrial, not Union, acted in bad faith during the appraisal process.

(C) No bad faith after the appraisal award.

Union paid the umpire award within 30 days of notice.[94] Union cannot be in bad faith for paying the award timely. *Wells*, 2019 WL118015, at *4 (court granted summary judgment after finding that the carrier did not engage in bad faith when it timely paid the undisputed amount and the appraisal award to the insured); *Island Concepts*, 2014 WL5524379, at *12 (no bad faith because tendered the additional amounts settled by the appraisal award within thirty days).[95] The court in *Island Concepts* recognized the Louisiana Fourth Circuit's explanation that "complying with a contracted and self-invoked appraisal process fails to provide evidence or factual proof of vexatious, arbitrary, capricious, or conduct without probable cause."[96]

4. Conclusion.

Based on the foregoing, this Court should (1) grant summary judgment dismissing Industrial's breach of contract claims with prejudice, and/or (2) grant summary judgment dismissing Industrial bad faith claims with prejudice.

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[92] *See* Exhibit 2, Union000613, 618; *see also* Union000611-12.
[93] *See* Exhibit 4, August 2022 email from counsel for Industrial. The redacted portion is an attorney-client communication between undersigned counsel and Union.
[94] *See* Exhibit 2, Affidavit of Bill Mohrhauser, at par. 8; *see also* Union000696-697.
[95] *Island Concepts, LLC*, 2014 WL5524379 at *1-2.
[96] *Id.* at *13 (citing *Long v. American Security Insurance Company*, 52 So.3d 260, 264 (La. App. 4 Cir. 11/17/10).

[Signature on following page]

Respectfully submitted,

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ATTORNEYS FOR UNION INSURANCE
COMPANY OF PROVIDENCE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Support of Motion for Summary Judgment was served upon all counsel of record through electronic transmittal by filing it on the Court's ECF system.

Shreveport, Louisiana, this 1st day of July, 2024.

/s/ Meredith P. Bro
COUNSEL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

INDUSTRIAL PACKAGING CORP	CASE NO. 5:22-CV-05972
VERSUS	JUDGE DONALD E. WALTER
UNION INSURANCE CO OF PROVIDENCE	MAG. JUDGE KAYLA D. MCCLUSKY

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, comes Plaintiff, Industrial Packaging Corp ("Industrial Packaging"), who offers the following memorandum in opposition to the motion for summary judgment filed by Defendant, Union Insurance Co of Providence ("Union"), Doc 35:

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I. INTRODUCTION

This is a breach of contract case and a bad faith case under La. R.S. 22:1973 and 22:1892. In this case, the insured, Industrial Packaging, suffered a loss resulting from the February 2021 frigid weather that engulfed the region. The insurance company, Union, was aware of a covered loss as early as February 2021. The loss involved wet and damaged insulation and other related building components caused by melting snow and ice. Despite this knowledge, Union failed to provide an estimate of damages or to tender any money to Industrial Packaging for nearly six (6) months. During this period, Union cancelled Industrial's insurance policy, rendering the property uninsurable, which – likely intentionally – put undue pressure on its insured to settle this claim for less than what was owed. When Union finally did tender indemnity money after the policy cancelled, it was a paltry sum; significantly less than the appraisal value. The tendered payment

was less than 2% of the total amount ultimately awarded to Industrial Packaging through the appraisal process.

Union claims they relied on engineer reports; however, the estimate prepared by Union did not align with its own engineer's recommendations. Union's engineer's report was effectively disregarded by Union's adjuster.

Union also claims there was a dispute about whether the roofing cover or structure was damaged. This is correct. However, from the very beginning, there was never a dispute about whether the insulation was wet, damaged and covered under the terms of the policy. The parties disputed, among other things, how to remedy the damage and the cost of the same. The appraisal panel rejected Union's argument that the insulation could merely be dried out and new insulation retrofitted. Rather, the appraisal panel determined that the metal roofing panels and metal siding must be at least removed and reset to allow new insulation to be installed. Any experienced adjuster, building consultant and/or engineer would have (or should have) known this immediately upon examining the covered loss.

Jurisprudence dictates that summary judgment is not appropriate when a claim for bad faith penalties depends on factual determinations underlying the reasonableness of the insurer's refusal to pay. For the foregoing reasons, and for others discussed below, summary judgment is not appropriate in this case because this case is about the reasonableness of the insurer's actions.

II. FACTS

A. The Policy

Union issued Policy Number 5A5-03-31 ("Policy") to cover Industrial Packaging and its property at located at 274 Wilder Drive, Homer, LA 71040 (the "Property) at all relevant times.[1] The policy covered loss or damage that resulted from thawing of snow, sleet, or ice on the building or structure.[2] Specifically, Union agreed to pay for "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss".[3] The policy covered loss or damage that resulted from thawing of snow, sleet, or ice on the building or structure.[4] The policy did not cover damage to the interior of any building or structure caused by or resulting from snow, sleet, or ice, **unless** the building or structure first sustained damage by a Covered Cause of Loss to its roof or walls through which the snow, sleet, or ice entered, **or if the loss or damage resulted from the thawing of snow, sleet, or ice on the building or structure**.[5]

B. The Loss, Initial Claims Process

During the Policy Period, the Property suffered damage caused by the frigid weather that engulfed the region in February of 2021.[6] The plaintiff notified Union of the loss on February 22, 2021.[7] On February 23, 2021, Eric Shawler, an internal adjuster with Union, called and spoke to Wood Wilder, president of Industrial Packaging, who reported water leaking in several areas of

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[1] Union MSJ, Exhibit 1
[2] Union MSJ, Exhibit 1, p. 51 of 102, Limitations (1)(c)(1)-(2)
[3] Union MSJ, Exhibit 1, p. 11 of 102
[4] Union MSJ, Exhibit 1, p. 51 of 102
[5] Union MSJ, Exhibit 1, p. 51 of 102
[6] Exhibit P1 (Affidavit of Lawson Wilder, Jr.)
[7] *Id.*

the building due to melting snow and ice.[8] Wilder indicated that the roof was free of ice and snow at that point and that the leaks had ceased.[9] An Independent Adjuster (IA) with Superior Claims was to schedule an inspection.[10]

On February 23, 2021, internal notes from Union show that Union verified coverage for the loss, noting that the cause of the interior leaking was due to the melting of ice and snow on the roof.[11] The coverage for this type of loss was verified along with the policy details and limits.[12]

The internal notes show that IA Tom Williams inspected the large metal commercial structure on March 5, 2021.[13] He reported his findings in a call to Union on March 9, 2021. Williams found several leaks from the recent snow/ice melt.[14] Wilder claimed that the roof needed replacement and that it did not leak before the snow/ice storm.[15] Williams recommended an engineer inspect the roof to determine if there was damage from the snow/ice to the roofing structure.[16] If the roof required replacement due to damage, the claim could exceed $500,000.[17]

IA Williams issued his first report, dated March 11, 2021.[18] Not included in the report, but included in the internal notes from Union addressing the report, was confirmation that the insulation was wet and may require removal of the standing seem roof.[19] An engineer, Leif Lindblom with ProNet Group, Inc. ("Lindblom") was assigned to inspect the roof.[20]

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[8] Exhibit P2, Union 657
[9] *Id*.
[10] *Id*.
[11] Exhibit P2, Union 658
[12] *Id*.
[13] Exhibit P2, Union 659
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] Union MSJ, Exhibit 2, Union 65. It should be noted that this exhibit was produced in discovery to Industrial Packaging, however, the version produced to Industrial Packaging was fully redacted.
[19] Exhibit P2, Union 661
[20] *Id*.

C. Lindblom's Report and Supplemental Report Confirms the Covered Loss

Lindblom's report and supplemental report can be summarized succinctly: Lindblom did not find damage to the roofing cover or the structure, but found damage to the insulation from melting snow and ice, a covered loss.

On April 22, 2021, Lindblom's report, clearly noting areas of wet insulation, was provided to Union.[21] The report stated that the roofing structure was not damaged by the snow and ice but that melting snow and ice "penetrated the building envelope…"[22] Nothing was done regarding the report for nine (9) days. On May 3, 2021, the insurance agent for Industrial Packaging emailed Eric Shawler, adjuster with Union, to follow up on the engineer's report. Shawler replied that he had questions for the engineer.[23] Union's internal notes indicate that the same day Eric Shawler called the engineer to discuss the wet insulation and repair/replacement suggestions.[24] Shawler requested an additional report to address the wet insulation at that time.[25]

On May 4, 2024, Union called Wood Wilder, Industrial Packaging's president, to explain what the engineer found, stating "[Union] would owe for the new water damages to the interior related to snow and ice melt like insulation...that got wet"[26] This was consistent with what Union knew since the day of the first reported loss.

On May 10, 2021, Union's internal notes show that Union was informed the following:

> Received a call from Engineer advising they will not be able to just remove the insulation blankets that are layed over the top of perlins/rafters and sandwiched between the metal roof panels and perlins/rafters. Engineer said the insulation would need to be dried out and then new insulation would need to be added to bring building back to pre-loss R-value or code.

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[21] Exhibit P2, Union 144-201
[22] Exhibit P2, Union 166
[23] Exhibit P2, Union 207
[24] Exhibit P2, Union 665
[25] *Id.*
[26] Exhibit P2, Union 666

> Discussed with Bill-Mo. Decided to have Engineer move forward with writing up supplemental report detailing recommendations on drying out the insulation and adding new insulation to bring R-value up to pre-loss or code. Will send supplemental report once received to IA for writing repair estimate.

The supplemental report received on May 13, 2021, recommended a repair method for torn or moisture-damaged insulation in a single-layer system.[27] The report recommended drying out the insulation and installing a new layer of insulation on top of the original layer, between the roof purlins.[28] This method involved installing a system of straps, fabric, or mesh fastened to the purlins, with the new blanket insulation fed between the purlins.[29] The work should be conducted by a commercial contractor familiar with steel building insulation retrofitting. Union internal notes indicate that Union would have IA Tom Williams write up an estimate to dry out the wet areas related to the snow/ice melt and add insulation.[30] Clearly, Union knew (or should have known) at this time that its alleged "fix" was insufficient and did not comply with the coverage provided by the Policy.

D. Appraisal Accepted, Coverage Cancelled, then Appraisal Declared Premature

On May 27, 2021, Industrial Packaging invoked appraisal under the policy and named Adam Posan as appraiser. [31] Kevin Donlon was subsequently named appraiser 10 days later because Mr. Posan was facing time-sensitive contracts.[32] On June 3, 2021, Union accepted appraisal, indicating that the policy would provide coverage for the new interior water damages related to recent snow and ice melting.[33] On June 15, 2021, Union declined renewing Industrial

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[27] Union MSJ, Exhibit 2, Union 214-222
[28] *Id.*
[29] *Id.*
[30] Exhibit P2, Union 668
[31] Exhibit P2, Union 236
[32] Exhibit P2, Union 254
[33] Exhibit P2, Union 244

Packaging's insurance policy, knowingly leaving the property uninsured and likely uninsurable until the damage from the covered loss was fixed.[34] On June 25, 2021, an email from Eric Shawler to Kevin Donlon stated that "the appraisal process is premature until EMC has completed that work and there is a disagreement as to the amount of loss if any".[35]

E. Union's Untimely, Low-Ball Estimate

On August 2, 2021, IA Tom Williams provided a second report and estimate ("Union Estimate") with a total RCV value of $14,886.49. The report did not appear to provide anything for the removal of the wet insulation or for drying out of the insulation.[36] On August 9, 2021, Kevin Donlon sent an email to Al Mallet (Union's appraiser) with his estimate of $1,907,759.55, which included full roof replacement and new insulation.[37] On August 12, 2021, Union tendered its first payment of merely $13,886.49.[38] According to Union, the appraisal could now proceed since there was a disagreement.

F. Appraisal

On September 9, 2021, Al Mallet emailed IA Tom Williams asking for more information regarding the estimate and pointed to numerous deficiencies, including the lack of details such as the quantity of insulation being replaced, the areas of replacement, and the method to be used for the replacement. He also requested a diagram indicating where and how much insulation was being replaced.[39]

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[34] Exhibit P2, Union 259
[35] Exhibit P2, Union 291
[36] Exhibit P2, Union 435
[37] Exhibit P2, Union 454-480
[38] Exhibit P2, Union 492-493
[39] Exhibit P2, Union 500

The appraisal inspection took place sometime in September 2021. As of October 14, 2021, Mr. Mallet had not completed his estimate.

On May 26, 2022, appraisal umpire Bree McCorkle recused himself. Union attacks the actions of Plaintiff's counsel based on a letter that was mailed to Mr. McCorkle. This letter, written by undersigned Jason R. Smith, is self-explanatory. Undersigned's action was based on reports from Adam Posan regarding an alleged improper relationship between Mr. Mallet and Mr. McCorkle. Union referenced another case in the Western District of Louisiana, *Temple Baptist Church v. Employers Mutual Casualty Company*, No. 3:21-CV-4324. Union cited an affidavit by Mr. Mallet filed in that case but did not mention countervailing affidavits from Adam Posan and Richard Collins, which disprove Union's allegations.[40] The affidavits show that Posan voluntarily chose to resign and nobody associated with the Plaintiff knew of Collins's potential conflict prior to hiring Collins. In the Temple Baptist case, the defendant, represented by the same defense counsel, filed a motion to remove Mr. Collins which was denied.[41] The court appointed Cade Cole as the umpire in that matter.[42]

Regardless, in the matter at hand, the parties subsequently agreed to Michael Fried as the umpire.[43] George Keys eventually replaced Richard Collins and became the appraiser for Plaintiff.[44] Mr. Keys submitted an estimate of $1,155,537.70.[45] Mr. Mallet submitted an estimate of $30,236.82 actual cash value.

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[40] Exhibit P3-A (Affidavit of Adam Posan); Exhibit P3-B – (Affidavit of Richard Collins)
[41] Exhibit P3-C (Judgment from Case No. 3:21-CV-4324)
[42] *Id.*
[43] Doc. 17
[44] *Id.*
[45] Exhibit P4-C (George Key's Estimate produced by Michael Friend)

The appraisal resulted in an award to Industrial Packaging for an actual cash value ("ACV") award of $714,031.15, with a replacement cost value ("RCV") of $754,039.04.[46] The umpire Michael Fried and George Keys signed the award. The award was supported by an estimate prepared by umpire Michael Fried and produced by Mr. Fried pursuant to a records deposition. While the appraisal award did not call for a full replacement of the entire roofing structure, the appraisal panel properly determined that the metal roofing panels and metal siding had to be removed and reset to allow new, similar insulation to be installed. This award signed by the neutral umpire clearly demonstrates that Union knew (or should have know) from the beginning of this claim that, in the least, the roofing system needed to be removed and reset to replace the wet/damaged insulation at the covered property. This scope of work was irrefutably covered under the Policy.

III. LAW & ARGUMENT

A. Motion for Summary Judgment Standard

Under Fed. R. Civ. P. Rule 56(a), summary judgment must be granted if the movant demonstrates that there is no genuine dispute regarding any material fact and that they are entitled to judgment as a matter of law. Initially, the moving party has the responsibility to identify parts of the pleadings and discovery that indicate the absence of a genuine issue of material fact.[47] This can be achieved by highlighting the lack of evidence supporting the non-moving party's case.[48] Once this burden is met, the non-moving party must go beyond the pleadings and demonstrate that a genuine issue of material fact exists for trial, requiring them to present significant probative

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[46] Union MSJ, Exhibit 5, page 105 (Appraisal Award); Exhibit P4-A (Appraisal Award Stipulation); Exhibit P4-B (Appraisal Award Estimate from Umpire Michael Fried).
[47] *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)
[48] *Malacara v. Garber*, 353 F.3d 393, 404 (5th Cir. 2003)

evidence in support of their claim.[49] If the evidence is merely colorable or not significantly probative, summary judgment may be granted.[50]

When ruling on a motion for summary judgment, the court cannot make credibility determinations or weigh the evidence.[51] All evidence must be viewed in the light most favorable to the non-moving party, with all reasonable inferences drawn in their favor.[52] A genuine issue of material fact exists if a reasonable trier of fact could find in favor of the non-moving party.[53]

B. Motion for Summary Judgment in La. R.S. 22:1973/22:1892 Cases

Countless motions for summary judgment have been denied in bad faith cases such as the case at hand because it is well established that summary judgment is not appropriate when a claim for bad faith penalties depends on factual determinations underlying the reasonableness of the insurers refusal to pay.[54]

La. R.S. 22:1892 makes an insurer liable for penalties and attorney fees in certain circumstances based on its bad faith handling of a claim. To prevail under this statute, the insured must show that (1) the insurer received satisfactory proof of loss; (2) the insurer failed to tender payment within 30 days of receiving this proof; and (3) the insurer's failure to pay is "arbitrary, capricious, or without probable cause."[55] Similarly, La. R.S. 22:1973(B)(5) provides for an award

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[49] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990)
[50] *Id.*
[51] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)
[52] *Clift v. Clift*, 210 F.3d 268, 270 (5th Cir. 2000)
[53] *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)
[54] *Carrier v. QBE Specialty Ins. Co.*, 2:21-CV-00790, 2022 WL 211682, at *2 (W.D. La. Jan. 24, 2022); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 1745497, at *4 (E.D.La. May 16, 2012); *Hartenstein v. State Farm Fire and Casualty Ins. Co*., No. 07-4594, 2008 WL 2397713, at *3 & n. 22 (E.D.La. June 10, 2008); *Lamar Advertising Co. v. Zurich American Ins. Co.*, 473 F.Supp.3d 632 (M.D.La. July 20, 2020)
[55] *Guillory v. Lee*, 16 So.3d 1104, 1126 (La. 2009).

of penalties when an insurer fails to pay within 60 days and that failure is "arbitrary, capricious, or without probable cause."[56]

Under Louisiana law, "satisfactory proof of loss" means "only that which is sufficient to fully apprise the insurer of the insured's claims."[57] "Louisiana decisions demonstrate that 'proof of loss' is a flexible requirement. An insurer of course must receive some kind of notice of a claim before it can act. So long as it receives enough information, the manner in which it obtains the information is immaterial."[58] "Satisfactory proof of loss can be established through the insurer's inspection of the site through its own adjuster. Whether and when the insurer received 'satisfactory proof of loss' sufficient to trigger its payment obligations is a question of fact."[59]

An insurer's actions are found to be arbitrary, capricious, or without probable cause when it's refusal to pay is unjustified[60] or "is not based on a good-faith defense."[61] The court will look to whether the insurer's actions were reasonable under the totality of the facts.[62] An insurer's duty of good faith includes a duty to conduct "a thorough investigation" and determine whether to settle or litigate based on "the evidence developed in the investigation."[63]

C. Genuine Issues of Material Fact Preclude Summary Judgment

There are many material facts in dispute in this litigation that prevent the granting of summary judgment, including the date Union received satisfactory proof of loss, the timeliness of Union's payment, and the reasonableness or lack thereof of Union's claims handling. These factual

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[56] *LeBleu v. Allied Tr. Ins. Co.*, 2:22-CV-00735, 2023 WL 1768152, at *2 (W.D. La. Feb. 3, 2023)
[57] *La. Bag Co., Inc. v. Audubon Indem. Co*., 999 So.2d 1104, 1119 (La. 2008)
[58] *Austin v. Parker*, 672 F.2d 508, 520 (5th Cir. 1982); *LeBleu v. Allied Tr. Ins. Co.*, 2:22-CV-00735, 2023 WL 1768152, at *2 (W.D. La. Feb. 3, 2023)
[59] *Drounette v. ASI Lloyds*, No. 2:21-CV-03853, 2023 WL 4832545, at *2 (W.D.La. July 27, 2023) citations omitted.
[60] *Dudenhefer v. Louisiana Citizens Prop. Ins. Corp.*, 2019-0387, p. 7 (La.App. 4 Cir. 9/25/19); 280 So.3d 771, 777
[61] *Guillory v. Lee*, 16 So.3d 1104, 1127 (La. 6/26/09)
[62] *Merwin v. Spears*, 90 So.3d 1041, 1042 (La. 6/22/12)
[63] *Korndorffer v. USAA Cas. Ins. Co.*, CV 22-2035, 2023 WL 2351725, at *9 (E.D. La. Mar. 3, 2023)

disputes present genuine issues of material fact for a trier-of-fact alone to determine. Industrial Packaging has presented substantial evidence upon which the factfinder could find that Union breached the insurance contract and that Union's claims handling was done in bad faith and in violation of Louisiana laws.

1. Union's bad faith depends on the reasonableness of its failure to pay

There are numerous genuine issues of material fact regarding the reasonableness of Union's investigation into this claim and untimely refusal to pay, thus subjecting Union to an assessment of penalties and attorney fees under La. R.S. 22:1892 and 22:1973. Union clearly knew coverage existed as early as February 23, 2021. Union admits in its motion that the policy "does cover interior damage caused by snow melt, even through pre-existing openings." The claim file shows that Union internally noted that coverage existed as a result of thawing snow, sleet & ice on February 23, 2021. Union's independent adjuster, Tom Williams inspected on March 5, 2021 and reported his findings to the carrier, confirming that the insulation was wet and damaged and "may require removal of the standing seem roof" on March 11, 2021. Yet, Union failed to give an estimate or tender any funds until August 12, 2021 – more than *five (5) months* later! A factfinder could readily conclude that Union's payment was untimely under Louisiana law thereby subjecting it to bad faith penalties. Whether and when the insurer received 'satisfactory proof of loss' sufficient to trigger its payment obligations is a question of fact."[64] Accordingly, summary judgment is not appropriate.

Union claims that it acted reasonably in the intervening time, but countless cases show that summary judgment is not appropriate when a claim for bad faith penalties depends on factual

[64] *Drounette v. ASI Lloyds*, No. 2:21-CV-03853, 2023 WL 4832545, at *2 (W.D.La. July 27, 2023) citations omitted.

determinations underlying the reasonableness of the insurers failure to pay. For these reasons alone, Union's motion for summary judgment should be denied.

2. Union's bad faith was extensive and consistent

If anything, the "totality of the facts" show that Union's actions were entirely unreasonable and that, despite having satisfactory proof of loss, it failed to tender funds to remedy the wet insulation and, at least, to remove and reset the roof. As mentioned previously, Union had satisfactory proof of loss at the latest when it received the report from IA Tom Williams following his inspection on March 11, 2021. The result of this inspection was undoubtedly "sufficient to fully apprise the insurer of the insured's claims."[65]

The record shows Union knew (1) the insulation was wet, damaged, and covered under the policy and (2) there could be damage to the roofing structure or cover. Union did not sufficiently investigate and tender payment on the damaged insulation. Instead, Union set off to investigate the allegation that the roofing cover or structure was damaged from the snow/ice. Union failed in its duty to conduct a "thorough investigation". Leif Lindblom, the engineer retained by Union, reported on April 22, 2021 that the roofing cover and structure was not damaged.[66] The report implies that the insulation was wet (information already known to Union). Union did nothing with this report until Industrial Packaging's insurance agent followed up with Union on May 3, 2021.[67] At that point, Union finally called Lindblom to request another report.[68] According to Linblom's

[65] *La. Bag Co., Inc. at* 1119
[66] Union MSJ, Exhibit 2, Union 149
[67] Exhibit P2, Union 207
[68] Exhibit P2, Union 665

second report, Union asked him to provide the recommended "method of repair for the moisture damaged roof insulation". [69] The second report actually recommended somehow *drying out the insulation* and installing a new layer of insulation on top of the damage insulation, using a system of straps, fabric or mesh materials fastened to the purlins, which was to be performed by a commercial contractor.[70] Any knowledgeable professional in the claims adjusting or contracting or engineering industry should have known this was not acceptable in the contracting industry, nor did it comply with the relevant coverage under the Policy.

In the meantime, months passed with no payment and no funds to commence repairs. Accordingly, on May 27, 2021, Industrial Packaging invoked appraisal under the terms of the policy.[71]

3. Union's eventual tender was based on an incomplete and unreasonable estimate and failed to comply with Union's prior engineering report

The bad faith intensified when Union finally submitted an incomplete estimate that did not even comply with Union's own engineer's second report. Union tendered an estimate to Industrial Packaging with a payment in the amount of just $13,886.49 on August 12, 2021.[72] The tender was purportedly based on a report from Tom Williams and estimate from Tempco Insulation, Inc.[73] The estimate states "place 3 vinyl insulation to 10 damaged areas on roof line."[74] In other words, the proposed fix did not even appear to meet the requirements of Union's own engineer. There was no mention of how to somehow "dry" the insulation and no mention of a system of straps, fabric,

[69] Exhibit P2, Union 216
[70] Exhibit P2, Union 668
[71] Exhibit P2, Union 236.
[72] Exhibit P2, Union 491
[73] Exhibit P2, Union 435-448
[74] Exhibit P2, 437

or mesh materials fastened to the purlins being installed, all to be performed by a licensed, commercial contractor.

Even worse Al Mallet, the appraiser for Union, emailed Union on September 9, 2021, and stated the following:

> Mr. Williams, if I could impose on you to contact the insulator that estimated this project for you and ask him to call me? He does not have any details with his estimate such as the quantity of insulation being replaced, the areas of replacement, and the method he will use to replace the insulation.
>
> Also Mr. Williams, if you have some sort of a diagram as to where and/or how much insulation is being replaced I would appreciate it if you would send it to me.
>
> Both the other appraiser and myself have questions about this estimate. We have called and left a message for him to call me; however, he may be hesitant to call me because he does not know who I am. He can call my cell phone number below.[75]

These emails clearly demonstrate that even Union's own appraiser knew its claims adjusting was insufficient and lacked detail and compliance with its alleged "expert" reports.

Industrial Packaging agrees with and adopts the statement of Al Mallet, appraiser for Union. The estimate, and the tender associated therewith, does not have any details such as the quantity of insulation being replaced, the areas of replacement, and the method used to replace the insulation. This is clear, unequivocal proof that Union's proposed estimate, the one which Union based its deficient tender upon, did not rely on Union's own engineer's report and that it was so incomplete and deficient that it could not be understood even by Union's own alleged expert in

[75] Exhibit P2, Union 500

the field of construction, Al Mallet. This is a classic example of a failure to thoroughly investigate the claim and a failure to act in good faith.

4. Union's June 2021 Conduct

Union's conduct in June 2021 is further evidence of its unreasonable, bad faith conduct. Union accepted appraisal on June 3, 2021 and acknowledged coverage of the wet insulation. On June 15, 2021, Union did not renew the insurance policy, leaving the knowingly damaged property uninsured.[76] On June 25, 2021, an email from Eric Shawler to Kevin stated that "the appraisal process is premature until [Union] has completed that work and there is a disagreement as to the amount of loss if any".[77]

To summarize, Union knew since February that there was a covered loss due to melting snow/ice. No estimate had been completed by Union in six (6) months even though Union acknowledged coverage. Union accepted appraisal and acknowledged coverage. Union unilaterally cancelled the policy 12 days after invocation of appraisal. Union then declared that appraisal was premature because of their own failure to obtain an estimate and then tendered $13,886.49 to its former insured who had an uninsurable roof due to the unremedied damages! At this time, Union knew (or should have known) that this would likely put pressure on its former insured to possibly accept the low ball offer being put forward to help Industrial Packaging defer the cost of repairing the property to allow it once again to gain property insurance coverage.

5. Appraisal Results Further Shows Bad Faith

[76] Exhibit P2, Union 259
[77] Exhibit P2, Union 291

The appraisal resulted in an award to Industrial Packaging for an actual cash value award of $714,031.15.

In view of the appraisal award of $714,031.15, Union's initial valuation of the damages at a mere $14,886.49 cannot be viewed any other way than as arbitrary, capricious and without probable cause. The appraisal award was nearly *fifty two (52) times greater* than Union's valuation of the damages!

This case is akin to *Langley v. Allied Tr. Ins. Co.,* No. 2:21-CV-03621, 2023 WL 2875148, at *2 (W.D.La. Apr. 10, 2023). There, like Union, the insurer argued that it relied on its independent field adjuster's estimate and timely tendered payment following the appraisal process. This Court correctly pointed out that the RCV of Coverage A (building) damages in the appraisal award was over three times the RCV of Coverage A damages determined by the insurer's adjuster. "These staggering increases raise fact issues as to whether [the insurer's] original adjustment was conducted in good faith and whether it could have reasonably relied on the numbers its own retained adjusters supplied." *Id*. (emphasis added). The insurer's motion for summary judgment on the bad faith claims was denied, and the same ruling applies here.

Likewise, in *Aghighi v. Louisiana Citizens Prop. Ins. Corp.*, No. 2012-1096 (La.App. 4 Cir. 6/19/13), 119 So.3d 930, 935, writ denied sub nom. *Aghighi v. Lousiania Citizens Ins. Corp.*, 2013-1737 (La. 10/30/13), 124 So.3d 1102, the Court noted:

> The insurer's duty under La. R.S. 22:1892 mandates more than merely sending an adjuster to the insured's property to take pictures and calculate the numbers on less than all the damage. It would defeat the purpose of the statute to allow an inadequate and unreasonably low adjustment, done within the requisite time delays, to satisfy the insurer's obligation to the insured. Likewise, allowing a 'readjustment' done approximately six months later to cure the original bad conduct without any penalty would be condoning the insurer's actions.

The same reasoning is applicable in this case. Union cannot ignore its original acts of bad faith and untimely, low-ball payment because it eventually paid the appraisal award.

It is clear that genuine issues of material fact exist regarding Union's handling and decision making. Union's motion seeking summary judgment should be denied.

6. Breach of Contract Claims

Union advances the argument that there is no breach of contract claim. Union states "Industrial has presented no evidence that it is entitled to sums outside the appraisal award." Union claims that Industrial has only identified bad faith penalties, attorneys fees and recoverable depreciation. This is plainly and simply incorrect.

First, recoverable depreciation can be presented to the jury contrary to what Union claims. In *Schumacher v. United Prop. & Cas. Ins. Co.*, No. 2:21-CV-01435, 2022 WL 3330085, at *2 (W.D. La. Aug. 11, 2022), the court addressed an insurer's motion for summary judgment on the issue of whether the jury could consider RCV, when repairs were not yet complete. The court found:

> As the undersigned held in Touchet v. UPC, another Hurricane Laura case, the plain language of the policy in this matter provides that repair or replacement cost is not due until that work is complete. 2022 WL 710621 (W.D. La. Mar. 9, 2022). As in Touchet, UPC has made its motion in anticipation of a jury verdict and argues that the jury should be limited to considering its liability only in terms of ACV. Plaintiffs, however, have argued that they have been unable to start repair work because of the low amount of payments that they have received thus far from UPC.
> …UPC has not presented adequate evidence to take that issue from the jury in this matter, and the jury can thus determine whether plaintiff is entitled to recover replacement costs. Mason v. Shelter Mutual Ins. Co., 209 So.3d

> 860, 867 (La. Ct. App. 3d Cir. 2016). Accordingly, the motion will be denied in this regard.[78]

Industrial has been unable to repair the Property and return it to the same condition even with the tendered appraisal award due to the high costs of the going through the appraisal process. The appraisal process was a direct result of Union's unreasonable tender of $13,886.49.

Second, other than recoverable depreciation, Union has presented evidence of other damages: the costs of appraisal which is more than $136,000.[79] This is a consequential damage under La. R.S. 22:1973 and under a theory of a breach of contract. An obligor is liable for the damages caused by his failure to perform a conventional obligation.[80] A failure to perform results from nonperformance, defective performance, or delay in performance.[81] Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.[82]

Industrial Packaging incurred steep damages as a result of Union tendering low ball estimates not in conformity with their own engineers. The most obvious is the cost of the appraisal process which exceeds $136,429.12.[83] This is in addition to the temporary repairs completed by Trademark Roofing Services. These damages are clearly a consequence of the initial, already

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[78] See also, *Lake Charles Pilots Inc. v. Landmark Am. Ins. Co*., No. 2:21-CV-03152, 2023 WL 5490294, at *3 (W.D. La. Aug. 24, 2023) ("One could not reasonably expect an insured to make over a million dollars in repairs when its insurer has paid less than $20,000.00 to fund said repairs."); *TGS Properties LLC v. Covington Specialty Ins. Co.*, No. 2:22-CV-01935, 2023 WL 6340676, at *2 (W.D. La. Sept. 28, 2023) ("To the extent that plaintiff can show that it was unable to complete repairs due to an underpayment of the claim, it may establish a right to recover Replacement Cost Value and/or Increased Cost of Construction."); *Dollar Elec. Inc. v. Covington Specialty Ins. Co.*, No. 2:21-CV-03041, 2023 WL 5942313, at *2 (W.D. La. Sept. 12, 2023) (same).

[79] Exhibit P1 (Affidavit of Lawson Wilder, Jr.); Exhibit P3 (Industrial Packaging Discovery Responses)

[80] La. C.C. art. 1994.

[81] *Id.*

[82] La. C.C. art. 1995.

[83] Exhibit P1 (Affidavit of Lawson Wilder, Jr.); Exhibit P4 (Industrial Packaging Discovery Responses)

delayed, tender of $13,886.49. As such, the breach of contract claim remains as well as any other claim for consequential damages pursuant to La. R.S. 22:1973.[84]

IV. CONCLUSION

There are clear, disputed facts involving the reasonableness of Union's actions and the amounts due to Industrial Packaging as a result of a breach of insurance contract and the breach of La. R.S. 22:1973 and 22:1892. This matter must be tried and left to the jury to decide the numerous disputed issues of material fact. Union was aware of a covered loss involving wet and damaged insulation caused by melting snow and ice as early as February 2021. Despite this knowledge, Union failed to provide an estimate of damages or tender any money to Industrial Packaging for nearly six (6) months and cancelled Industrial's insurance policy, making the property uninsurable in its knowingly damaged state. When Union finally tendered a payment after the policy was cancelled, it was a paltry sum, significantly less than the appraisal value, amounting to less than 2% of the total amount ultimately awarded to Industrial Packaging via the appraisal process.

Union claims reliance on engineer reports; however, the estimate prepared by Union did not align with their engineer's recommendations, effectively disregarded by Union's adjuster. While Union acknowledged a dispute about the damage to the roofing cover or structure, there was no dispute about the wet, damaged insulation being covered under the policy. The appraisal award of $754,039.04 was a staggering *fifty two (52) times greater* than Union's valuation of the damages. The appraisal panel rejected Union's argument that the insulation could merely be dried

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[84] *Roofing & Reconstruction Contractors of Am. LLC v. Church Mut. Ins. Co*., 2:21-CV-03551, 2023 WL 8814596, at *4 (W.D. La. Dec. 20, 2023) (holding that the costs of the appraisal are a consequential damage). The same concept would apply insofar as a breach of contract claim is implicated.

out and retrofitted, determining instead that the metal roofing panels and siding needed to be removed and reset to install new insulation. Jurisprudence dictates that summary judgment is inappropriate when a bad faith penalty claim depends on factual determinations about the reasonableness of the insurer's refusal to pay, making summary judgment inappropriate in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2024, I presented the foregoing Opposition to Motion for Summary Judgment to the Clerk of Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

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