ZELLE LLP

# LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Thursday, July 17, 2025 | ISSUE 27

Welcome to The Zelle Lonestar Lowdown, our monthly newsletter bringing you relevant and up-to-date news concerning Texas first-party property insurance law.

Our theme for 2025 is Collaboration. We recognize that we are not an island in this industry and our clients, and ultimately the property owners, best benefit when we collaborate to resolve disputes. In that vein, we invite you to submit an idea for an article that we can include this year in the Lowdown. Our editors will choose one article to include in each issue. Stay tuned for more information about our next quarterly event, collaborating with some of our partners in this industry to encourage networking and discussion on the issues in our field. Let's continue to make 2025 the best year yet for the property insurance industry in Texas!

If you are interested in more information on any of the topics below, please reach out to the author directly. As you all know, Zelle attorneys are always interested in talking about the issues arising in our industry. If there are any topics or issues you would like to see in the Lonestar Lowdown moving forward, please reach out to our editors: Shannon O'Malley, Todd Tippett, and Steve Badger.


## INSIDE THIS ISSUE



## Upcoming Events

You don't want to miss this!

---

**July 22** – Steven Badger will present at the P.L.A.N. Property Loss Appraiser & Umpire Certification Conference in Dallas, TX.

**August 19 –** Steven Badger will present " Insurance Issues - Arising from 9/11 Attacks" at the Illinois Association of Mutual Insurance Companies 2025 Convention in Peoria, IL.

**August 21** – Steven Badger will present at the WIN THE STORM conference in Dallas, TX

**August 26 –** Steven Badger will present "Fraud and Abuse in CAT Claims - What The Hail Is Going On and How Do We Stop It?" at the National Association of Mutual Insurance Companies (NAMIC) General Counsel Connect program in Chicago, IL.

**August 27** - Lindsey Bruning will co-present "Where Good Claims Go Bad and How to Keep it From Getting Ugly," as part of the Windstorm Insurance Network Webinar Series "Stay Current & Connected."

**September 9 - 10 –** Jennifer Gibbs and Jessica Port are presenting at the PLRB Regional Innovation Summit from September 9-10, 2025, in Concord, NC.

**September 17 –** Steven Badger will present "Roofing & Insurance Claims Discussion" at the Roofing Contractors Association of Texas 2025 Texas Roofing Conference in Round Rock, TX.

**October 1 –** Steven Badger will present "Update From The Trenches" at the Western Loss Association 2025 Fall Conference in Lake Geneva, WI.

**October 6 –** Jane Warring will present and serve as co-chair at the NetDiligence Cyber Risk Summit in Philadelphia, PA.

**October 20** – Steven Badger will present "What The Hail? 2025 Update From The Trenches" at the Texas Association of Mutual Insurance Companies 89th TAMIC Annual Convention in Round Rock, TX.

**October 21** – Steven Badger will present at the P.L.A.N. Property Loss Appraiser & Umpire Certification Conference in Denver, CO.

**November 3** – Steven Badger will present “Big Picture Issues – Big Picture Solutions” at the Joint Claims Executives Association meeting in Scottsdale, AZ.

**November 13** – Steven Badger will be the Keynote Speaker presenting “Whoever Said Insurance Was Boring? 30 Years of Fascinating Claims Stories” at the PLRB Large Loss Conference in Dallas, TX.

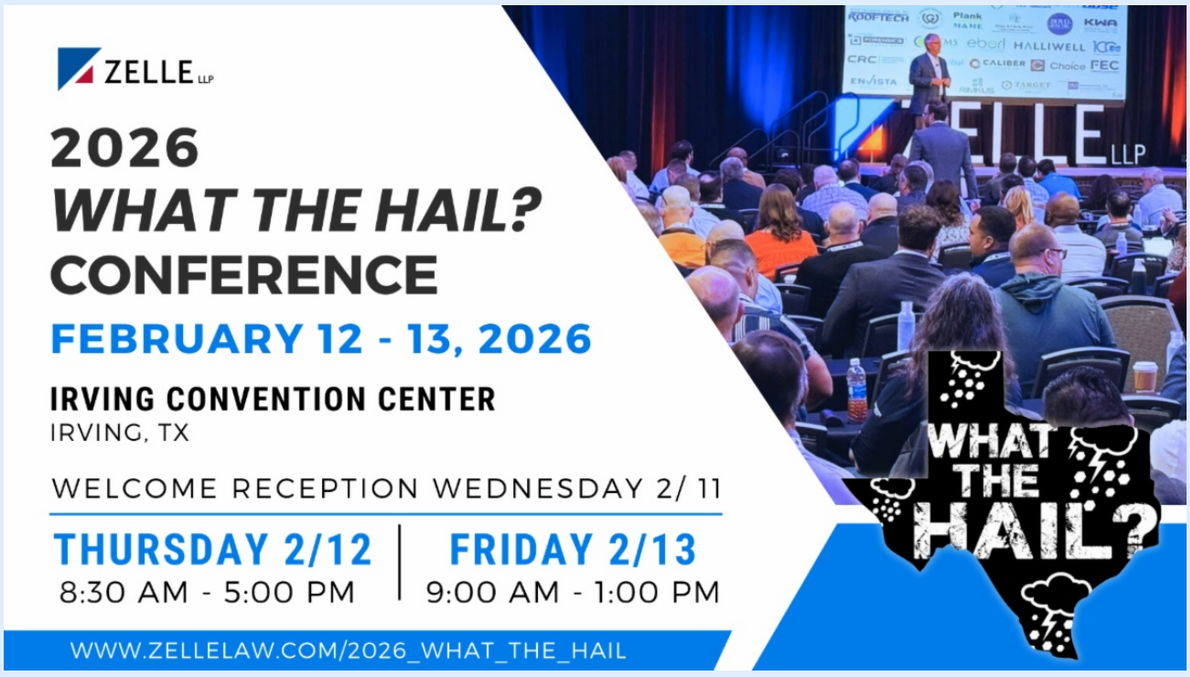
**November 13 - 14** - Brandt Johnson will present “Full of Hot Air or a Legitimate Hail or Wind Claim?" with Howard Altschule (FWC) and Annette Tarquinio (Engle Martin) at the PLRB Large Loss Conference in Dallas, TX.

**December 10** – Steven Badger will present “Badger and Merlin Discuss The Big Issues” at the 2025 First Party Claims Conference (FPCC) in Boston, MA.

**December 10** - Jennifer Gibbs will participate in a panel on the topic of Artificial Intelligence in P&C claims at the 2025 First Party Claims Conference (FPCC) in Boston, MA.

---

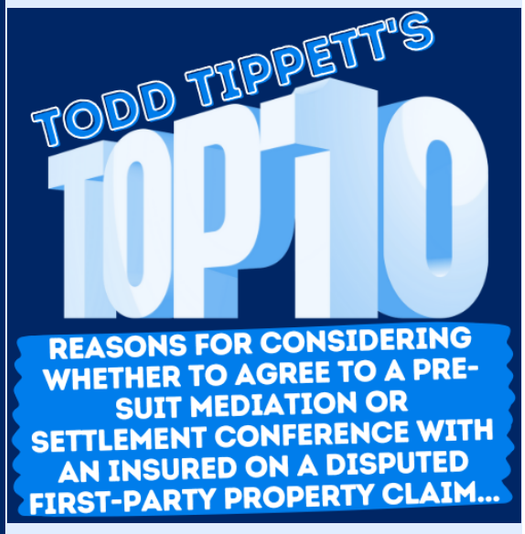
## Registration is now open!




**Register Now!**

Contact abannon@zellelaw.com with any questions.

---




1. When the insured requests the opportunity, thereby showing a willingness to be reasonable in resolving the matter.

2. To contain costs and expenses of protracted litigation for both the insured and the insurer.

3. When the disputed delta is modest.

4. As an alternative to a demand for appraisal

## News From the Trenches

by Steven Badger

In mid-2011, my decade living in New York working on 911 Litigation came to an end. I was back in Dallas trying to figure out what would come next in my career. I expected it would once again involve subrogation. But then two things happened. First, a long-time client called and said: “Badger, we hear you are back in Dallas. We are getting all these hail claims. You know roofing. Can you help us?” And just a few days later, one of our young partners came into my office and said: “Badger, I’ve got a really ugly school district hail claim I could use your help with.”

And with those two events, my career took a radical change.

After just a few weeks, I could obviously see that Texas policyholder advocates (public adjusters and lawyers) had identified hail claims as the “gift that keeps on giving”. While hurricanes only happened every decade or so, PAs and lawyers realized they could inject themselves into the 1000’s of Texas hail claims filed each year. It was clear what was coming.

So we got a trademark on the phrase “*What The Hail?”* and got active in the practice area. The next year, we decided to hold a small seminar for our clients and adjuster friends to share information about this emerging risk area. I asked a couple of engineers I liked to be co-presenters, and in 2012 we held our first ***What The Hail?*** **Conference**. Just a half-day. We were happy to have 70 people attend.

And the legendary ***What The Hail?*** **Conference** was born.

We held subsequent conferences in 2014, 2016, 2018, 2022, and 2024. And now again in 2026. The conference grew to two days, with a pre-party the evening before the conference began and our legendary ***What The 80’s? Party*** after the first day. Each conference was larger than the previous one. In 2024 we had over 600 attendees and 25 sponsors.

We are excited to have recently announced our **2026** ***What The Hail?*** **Conference** to be held on February 12-13, 2026, at the Irving Convention Center. We are sold out of

4. As an alternative to a demand for appraisal under the policy.

5. When there is a dicey coverage or scope dispute with no clear outcome for either party.

6. To have the opportunity to tell your side of the story and communicate directly with the insured during a general session after lawyers are involved.

7. When both parties dispute the meaning or interpretation of one or more provisions in the policy.

8. When there are business reasons, unrelated to the disputed claim, for the parties to resolve the matter – like preserving the contractual relationship.

9. An early pre-suit mediation is more likely to keep the dispute and the resolution confidential, after all court filings are of public record.

10. It saves both parties time in the long run by providing early finality.

---

Feel free to contact **Todd M. Tippett** at 214-749-4261 or ttippett@zellelaw.com if you would like to discuss these Tips in more detail.

sponsorships with 44 generous sponsors participating. We expect to also sell out the conference with over 750 attendees. We have attendees coming from across the country. We even have attendees from England and Germany. And, yes, The Molly Ringwalds are playing once again at the ***What The 80's? Party***.

Needless to say, I am very proud of what our law firm has created with this conference. It is now one of the largest conferences in the insurance industry. And if I do say so myself, it is indeed the absolute best industry conference.

What I like about the conference is that it brings people together. For two purposes. Of course, the conference allows attendees to share their knowledge about this important practice area. But even more importantly in my opinion, it is a darn fun party. All of our industry friends that we work with week after week -- whether they work for insurance companies, adjusting firms, or are consultants – are all in one room together celebrating the good work that we all do. That is really cool.

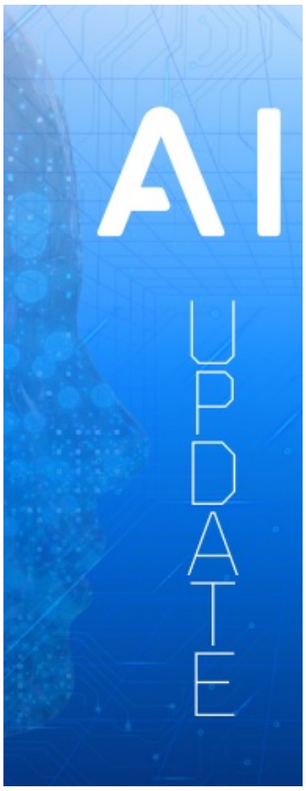
The conference is still seven months away and we are already one-third full. We will sell out. I encourage you to register early to ensure you have a seat at the **2026 *What The Hail?* Conference**.

See you there.

# AI Update

## Lawsuit Against Character Technologies Moves Forward in Florida Federal Court

by Jennifer Gibbs




Similar to a lawsuit against Character Technologies filed in Texas (which has been sent to arbitration), the Florida case, *Megan Garcia and Sewell Setzer, Jr. v. Character Technologies, Inc., et al* , No. 6:24-cv-01903-ACC-DCI, in the United States District Court for the Middle District of Florida, Orlando Division, involves claims against AI software company, Character Technologies, Inc. and Daniel De Freitas and Noam Shazeer, individuals who developed Large Language Models – specifically, Large Model for Dialog Applications (LaMDA) – a program trained on human dialog and stories that allows chatbots to engage in open-ended conversations. Google allegedly denied De Freitas and Shazeer's request to release LaMDA publicly in 2021, citing its safety and fairness policies for the basis of the denial. De Freitas and Shazeer later left Google and formed Character Technologies in November 2021 and launched Character A.I. to the public in 2022.

The Character A.I. application allows users to interact with various A.I. chatbots, referred to as "Characters" including fictional persons, celebrities, and interviewers. In April 2023, 14-year-old Sewell Setzer III, began using Character A.I. to interact with a variety of characters, including Characters portraying a teacher, a licensed CBT therapist, and fictional personas from Game of Thrones. Over the course of several months, Sewell became addicted to the app, and his mental health began to decline significantly. Sewell's therapist did not know Sewell was using Character A.I., and diagnosed him with anxiety and disruptive mood disorder, believing the cause of his mental health issues resulted from social media. Unfortunately, just after interacting with a Daenerys Targaryen character, Sewell shot himself and died.

Defendants were unsuccessful in seeking to dismiss the majority of the causes of action originally filed by Plaintiffs – with the exception of the Intentional Infliction of Emotional Dismiss claim – per an order signed on May 20, 2025 by United States District Judge Anne C. Conway. Notably, in their second amended complaint, filed on July 1, 2025, Plaintiffs seek to recover from the developers of Character A.I. for allegations they intentionally designed and developed their generative AI systems with anthropomorphic qualities to obfuscate between fiction and reality. Notably, in the introduction to the Complaint, Plaintiffs cite the following from a bipartisan letter signed by 54 attorneys general of the 54 undersigned states and U.S. territories, the National Association of Attorneys General (NAAG):

*We are engaged in a race against time to protect the children of our country from the dangers of AI. Indeed, the proverbial walls of the city have already been breached. Now is the time to act.*

Defendants have until early September to answer the Second Amended Complaint. It is expected that the answer will include affirmative defenses based on the First Amendment of the United States Constitution (in that holding Character A.I. liable would allegedly violate the rights of Character A.I.'s users to express and receive information and ideas through the app); and based upon the terms and conditions of the integrated Terms of Service that users enter into before using the Character Technologies' app.

## Invoking 'Our Option' and Preferred Contractor Network Endorsements

by Kiri Deonarine and Michael Upshaw

Increasing abuses in the claims process have caused insurance companies to rethink the traditional model of sending out cash to pay claims. Far too often, that cash is used for purposes other than fixing damage, with a significant portion of claim payments being siphoned off by third parties injecting themselves into the claim process for their own financial gain.

Invoking the “Our Option” provision in existing policies and use of preferred contractor network endorsements in future policies ensures that property insurance serves its intended purpose—repairing damaged property.

Preferred contractor network programs provide a better approach to achieving this intended purpose. Programs that ensure damage is repaired not only eliminate many of the common claim abuses but also ensure that claim payments are used to fix damage and for no other purpose.

**Our Option**

Under the traditional model, property insurance companies generally pay claims by providing the policyholder with money that they may—or may not—use to effectuate repairs. The insurance companies first estimate the value of the claim and make an “actual cash value” (ACV) payment, which represents the depreciated value of the damaged property. If the policy provides “replacement cost coverage” (RCV), once the work is completed and the cost of repairs actually incurred, the insurance company then pays the balance of the claim.

Obviously, under this model a considerable amount of money is put directly into the hands of policyholders. Predictably, sometimes policyholders decide to use this money for other purposes, leaving the damaged property unrepaired. This model also often leads to various third parties, including contractors, supplementers, appraisers, public adjusters, lawyers, and others—all injecting themselves into the claims process hoping to put a portion of that money into their own pockets. In the end, this often leads to increased claim measures and, unfortunately, results in the policyholder not having sufficient funds to complete necessary repairs.

An alternative model to compensate policyholders for their covered damage has also always been included in property insurance policies. This is the “Our Option” provision. This provision quite simply gives the insurance company the right to hire a contractor and fix the covered damage themselves.

Historically, however, insurance companies have been reluctant to invoke this right because of the risks that come with actually stepping in and completing the work.

This reluctance is diminishing. Given the dramatic increase over the past decade in abuses by third parties trying to profit from the claims process, insurance companies are realizing that it is easier and less expensive to complete repairs under the “Our Option” policy provision. Moreover, more insurance companies are including preferred contractor network endorsements in their policies, which require policyholders to have the damage repaired by a selected contractor network.

When properly structured, these programs can provide the proverbial “win win win” for the insurance company, the contractor, and the insured.

**The Historical “Our Option” Policy Provision**

An “Our Option” provision is language in a policy that allows an insurance company to exercise its option to repair the damage, instead of issuing payment for the covered loss.

A typical “Our Option” provision states that in the event of loss or damage covered by the policy, at its option, the insurance company will either: (1) pay the value of lost or damaged property; (2) pay the cost of repairing or replacing the lost or damaged property; (3) take all or any part of the property at an agreed or appraised value; or **(4) repair, rebuild or replace the property with other property of like kind and quality.**

Other simple stand-alone provisions provide that at the insurer’s option, it may choose to repair or replace any portion of the damaged property.

Under either provision, the insurance company clearly has the right to advise the insured that it will not be making a monetary payment on the claim and will instead send out a contractor to repair the damage.

Although most property insurance policies have always contained “Our Option” provisions, insurance companies have historically been hesitant to invoke their right to repair because of potential liability concerns.

In Vainberg v. Avatar Property & Casualty Insurance Company, Florida’s Fourth District Court of Appeal explained that “under Florida law, when the insurer makes its election to repair, that election is binding upon the insured and creates a new contract under which the insurer is bound to perform repairs within a reasonable time.” This is known as a “Drew Contract” based on Drew v. Mobile USA Insurance Company, another case decided by the same court. Notably, in Vainberg, the court pointed out that “where the option to repair has been invoked, the insured and the insurer would become parties to a separate repair contract wherein the insurer is obligated to perform repairs which will adequately return the insured property to its pre-loss condition.”

Ultimately, if an insurer invokes its right to repair, but the repairs are not adequately performed, the insured may be entitled to damages caused by the faulty repairs. Insurance companies have understandably been reluctant to undertake this additional risk.

But things are changing. Over the past two decades there has been a significant increase in third-party involvement in the catastrophe claims process. There is now an entire industry of storm chasing contractors attempting to “win the storm” in every claim. There are supplementing companies who are nothing more than professional Xactimate writers juicing up estimates after the work has been completed and taking a percentage of the claim increase. Use of the appraisal process has grown dramatically, with some appraisers viewing their role as to “win” disputed claims for the insured or even the contractor doing the work.

There is also an ever-increasing number of public adjusters, many of which have no experience and sign up every claim they can get their hands on without regard to the existence of damage or coverage. Finally, of course, there are policyholder attorneys, some of whom take any claim referred to them, regardless of merit, and pocket a 45% contingency fee. All of these interlopers in the claims process have greatly increased abuse and outright fraud in property damage claims. As a result, insurance companies are now asking with increased frequency: “Would it just be easier for us to send our hammers rather than dollars?

Invoking the “Our Option” provision solves all of the problems created by these third parties. It also, however, can create a different problem. Under the traditional “Our Option” policy provision, the insurance company is undertaking repairs itself, arguably putting the insurance company in the contractor role. This has led insurance companies to look for an alternative approach that avoids this potential exposure, such as a preferred contractor network endorsement.

**The Emerging Use of Preferred Contractor Network Endorsements**

A preferred contractor network endorsement is a policy form agreed to by the insured at policy inception providing that the insured agrees to participate in a preferred contractor network. With such an endorsement, the decision to have damage repaired by the network is being made by the insured and not the insurance company.

These endorsements have typically been voluntary, allowing the insured the option whether to participate in the network or retain its own contractor. Often the insured is incentivized to participate in the network with benefits, including a reduced deductible, upgraded construction components, or a top-tier warranty. Some policies also restrict coverage to ACV unless the insured participated in the network.

Recently, there has been a move towards policy endorsements in which the insured selects an endorsement at the time the policy is purchased requiring participation in a preferred contractor network. Under such a mandatory endorsement, the insured agrees that in the event of a loss within the scope of the network, the insured must have its damage repaired through the preferred contractor network program. Often the insured is incentivized to include the endorsement as part of the policy with a discount in

policy premium.

Courts have held that endorsements mandating participation in such networks are fully enforceable when agreed to by the insured at policy inception. (See, e.g., People's Trust Insurance Company v. Hernandez, 400 So. 3d 744 (Fla. 3d DCA 2024)). If the insured refuses to comply with this policy requirement, the insured breaches the policy, and there is no coverage.

The advantages to the insurance company of a mandatory endorsement are obvious. After every storm, insureds are inundated with door-knocking contractors and public adjusters trying to sign up the job. These door knockers will advise the insured not to trust the insurance company and never agree to participate in a voluntary preferred contractor network. Obviously, their motivation is to get the job for themselves. Fearmongering about the purported perils of preferred contractor networks is a common tactic.

But imagine if participation by the insured in a preferred contractor network is mandatory under the policy purchased by the insured. In that situation, the contractor or public adjuster knows that there is no upside to signing up the insured. The contractor cannot get the job. The public adjuster cannot earn a commission (or if it does, the insured will have to pay it out of pocket). With no financial upside, the door-knocking contractor or public adjuster will simply move on.

Insurance companies have realized that mandatory preferred contractor network endorsements provide a mechanism to remove all of the individuals who are trying to profit from the claims process because there is simply no cash for them to put into their own pockets. Eliminating these individuals brings an end to inflated estimates, use of contingency fee supplementing companies, invocation of appraisal just to squeeze a few more dollars out of the claim, and litigation.

**Invoking "Our Option" and Preferred Contractor Network Endorsements**

It is important that insurance companies provide prompt notice to the insured of either their intent to invoke the "Our Option" provision or to remind the insured that it has agreed to participate in a preferred contractor network program. Raising the provision in the first claim communication to the insured can help to set the insured's expectations and avoid a situation in which the insured enters into a contract with an out-of-network contractor and is unable to fulfill its obligations under that contract.

The insurer can then proceed with adjusting the claim as it would any other, confirming the scope of covered damage. At that point, the remaining process is very simple. The insurer would then notify its preferred contractor network program provider of the claim. The program provider would then arrange to have an estimate prepared consistent with the insurer's scope of damage. A contractor would then be selected to perform the work consistent with the scope and estimate. The contractor would in turn contact the insured and confirm a date to complete the work. The contractor would also collect the insured's deductible, with the balance of the cost being paid directly by the insurer to the network program provider (who obviously then pays the contractor). The work would then be completed. Again, no disputes over pricing. No arguments over required supplements. No appraisal demands. No litigation.

**What Can Go Wrong?**

While there may be occasional hiccups with this arrangement, the frequency of such problems are likely to be far, far less than the disputes that typically arise in a large percentage of claims using the ordinary claim process. The risk of insurer liability for faulty repairs can be mitigated by requiring the preferred contractor network program providers to purchase liability insurance covering the work being performed, including providing indemnity to the insurance company. Essentially, all potential exposures are assumed by the program provider.

**Ensuring Program Success**

It is a given that any preferred contractor network program must be fair to all three involved parties. The contractor must be paid a fair price for completing the work. The insurance company must know that it is paying a fair price for the work. And the insured must receive properly installed code- and manufacturer-compliant repairs.

This fairness is not hard to accomplish. There is no shortage of contractors willing to work for Xactimate pricing, especially when there is no salesman involved taking half the profit. Use of Xactimate pricing ensures that the contractor is paid enough to properly complete the work, and the insurance company knows it is paying a fair price. For these reasons, use of Xactimate pricing achieves the necessary objectives of protecting the interests of the contractor, the insurer, and the insured.

*Originally published by Claims Journal*

## Pick Your Poison: Court Grants Insurer's Motion for Summary Judgment on Nearly All of Insureds' Causes of Action

by Zachary D. Fechter

*Schnatzmeyer v. State Farm Ins. Co.*, No. 3:23-CV-02820-K, 2025 WL 1697505, at *1 (N.D. Tex. June 17, 2025).

In a case involving two overlapping freeze claims—and a substantial array of legal issues affecting insurers in Texas—a United States District Court in the Northern District of Texas, Dallas Division, recently granted an insurer's motion for summary judgment on nearly all of two insureds' causes of action.

Mark Schnatzmeyer and Carole Sandlin (the "Insureds") submitted a property insurance claim to State Farm Insurance Company ("State Farm") in February 2021 after a neighbor's pipe burst during a freeze event, allegedly causing water damage (the "2021 Claim"). Within a month, State Farm inspected the property and issued payment for water mitigation and dwelling repairs. State Farm also requested that the Insureds send receipts for repairs to obtain replacement cost benefits, as well as a complete "content sheet" to substantiate reported personal property loss.

State Farm did not hear from the Insureds for over 21 months, when they submitted another claim in December 2022 for another alleged freeze loss (the "2022 Claim"). State Farm immediately authorized payment for water mitigation, plumbing repairs, and additional living expenses ("ALE"). As State Farm investigated the 2022 Claim, the Insureds advised that they did not make any dwelling repairs related to the 2021 Claim, and they advised that damage related to the 2022 Claim affected the same area of flooring purportedly damaged in the 2021 Claim. State Farm then requested the Insureds send documentation supporting alleged flooring and other damage.

In mid-January 2023, State Farm's adjusters inspected the property, during which they did not observe damage to flooring, so the adjusters again requested the Insureds send documentation to support the alleged damage. State Farm also sent the Insureds a reservation of rights letter requesting supporting documentation and advising the Insureds of their "Duties After Loss" under the policy. State Farm further advised the Insureds that, without additional documentation, it measured the 2022 Claim below the applicable deductible.

The Insureds eventually advised State Farm that plumbing repairs were complete, so State Farm advised it would no longer issue payments for ALE. The Insureds objected and requested additional payments until all flooring was replaced. In response, State Farm again advised that, without supporting documentation, it measured the loss below the applicable deductible, so it denied coverage for flooring under the 2022 Claim.

In mid-February 2023, the Insureds advised State Farm that they retained a public adjuster, and the public adjuster sent an estimate of repair costs mostly for flooring repairs. After reviewing the estimate and available evidence, in mid-May 2023, State Farm advised

that it was standing by its coverage position. State Farm also advised that the Insureds failed to comply with their duties after loss by failing to complete water mitigation and necessary repairs.

The Insureds eventually retained counsel, who sent a letter to State Farm in August 2023 demanding payment for flooring, personal property, and ALE related to the 2021 Claim. State Farm advised that it stood by its coverage position. Weeks later, the Insureds' counsel sent a second letter demanding payment for the 2022 Claim. State Farm's adjusters then re-inspected the property, during which they again confirmed that the flooring was not damaged by a covered cause of loss. However, based on some water mitigation and plumbing invoices State Farm received, State Farm revised its prior estimate and issued a payment to settle the 2022 Claim.

In November 2023, the Insureds filed suit against State Farm for several causes of action. Specifically, the Insureds alleged breach of contract, statutory and common-law bad faith, and Prompt Payment of Claims Act penalties for both the 2021 Claim and the 2022 Claim. The Insureds also alleged fraud, misrepresentation, and civil conspiracy related to both claims. After receiving the Insureds' original petition, State Farm removed the Insureds' suit to a United States District Court in the Northern District of Texas, Dallas Division, and then filed a motion for partial summary judgment. In a wide-ranging opinion relying on several legal principles and factual findings, the Court granted almost all of State Farm's motion.

**(1) The 2021 Claim**

State Farm moved for summary judgment on all causes of action related to the 2021 Claim because the Insureds filed suit outside of both contractual and statutory limitations periods. Under the policy, the Insureds were required to bring their breach of contract cause of action within two years and one day after their cause of action "accrued," or when the limitations clock began to run. Likewise, under Texas law, the Insureds were required to bring their extra-contractual causes of action within the two-years. In reaching its decision, the Court observed that State Farm issued a claim payment in March 2021, and that State Farm did not change its position at any time before the Insureds filed suit in November 2023. Thus, all of the Insureds' causes of action related to the 2021 Claim accrued in March 2021. *Schnatzmeyer*, 2025 WL 1697505 at *4–5. By filing suit over two years later, the Insureds were barred from asserting any causes of action related to the 2021 Claim, so the Court granted State Farm's motion for summary judgment as to these causes of action.

**(2) Breach of Contract for Dwelling Coverage – 2022 Claim**

State Farm argued that the Insureds failed to produce competent evidence to show that covered dwelling damage related to the 2022 Claim exceeded State Farm's estimate, so the Court should grant its motion for summary judgment. Agreeing with State Farm, the Court observed that the Insureds' own expert produced an estimate of repair costs that was *less* that State Farm's estimate. In fact, the Insureds' expert stated that the "majority" of observed damage was caused by the 2021 Claim, and the 2022 Claim had a "minimal contribution" to the loss. *Id.* at *5–7. The Insureds' expert further stated that the only new damage caused in the 2022 Claim was to one bathroom, and his estimate of repair costs for this damage was less than State Farm's. *Id.* As such, no reasonable jury could conclude that State Farm owed additional policy benefits for dwelling coverage related to the 2022 Claim, so the Court granted State Farm's motion as to this cause of action.

**(3) Breach of Contract for Personal Property Coverage – 2022 Claim**

The Court granted State Farm's motion for summary judgment as to the Insureds' cause of action for breach of contract related to personal property damaged caused in the 2022 Claim because the Insureds filed suit without first satisfying their "Duties After Loss" under the policy. Specifically, the Insureds' policy required them to "cooperate" with State Farm's investigation by, in part, providing a detailed inventory of damaged personal property, and the policy required the Insureds to satisfy all conditions before filing suit. And yet, the Insureds testified that they did not provide an inventory of damaged personal property before filing suit, and the Court held this failure to comply with the policy before filing suit "inherently prejudiced" State Farm from timely adjusting the Insureds' reported personal property loss. Because "[f]ederal courts in Texas routinely dismiss policyholders' first-party claims where they failed to comply with similar loss inventory provisions," the Court granted State Farm's motion as to this cause of action. *Id.* at *4.

**(4) Statutory and Common-Law Bad Faith – 2022 Claim**

Because the Court granted State Farm's motion for summary judgment as to the Insureds' causes of action for breach of contract related to the 2021 Claim, and related to dwelling and personal property coverage for the 2022 Claim, the Insureds could not use these causes of action to support their statutory and common-law bad faith claims. As well, the Court found that the Insureds' allegations of bad faith were conclusory: the Insureds alleged State Farm knowingly failed to conduct a reasonable investigation, and knowingly denied their claims when its liability was reasonably clear, without citing any actual evidence. Therefore, the Court found the Insureds' allegations established only a "bona fide" dispute which, under Texas law, is insufficient to establish bad faith. The Court thus granted State Farm's motion for summary judgment.

**(5) Fraud, Misrepresentation, and Civil Conspiracy**

The Court granted State Farm's motion for summary judgment as to the Insureds' fraud, misrepresentation, and civil conspiracy causes of action for much the same reasons it granted State Farm's motion on the bad faith causes of action. The Court found that the Insureds failed to produce any evidence of what misrepresentations State Farm made, to whom, when, and what harm was thereby caused. The Court also noted that the Insureds could not rely on any breaches of contract to support these causes of action. Finally, the Court observed that "post-loss communications cannot serve as a basis for misrepresentation under common law fraud, the Texas Deceptive Trade Practices Act, or the Texas Insurance Code," and the Insureds failed to offer any evidence of *pre*-loss communications. *Id.* at *9 (citing *Gooden v. State Farm Lloyd's*, No. 4:20-CV-00698-O, 2021 WL 7906860, at *3 (N.D. Tex. May 11, 2021)). Without evidence of the essential elements for these causes of action, the Court granted State Farm's motion.

**(6) Prompt Payment of Claim Act Penalties**

State Farm lastly moved for summary judgment on the Insureds' cause of action under the Prompt Payment Act in Texas Insurance Code chapter 542. Because the Court granted summary judgment on the Insureds' breach of contract causes of action related to the 2021 Claim, and related to dwelling and personal property coverage for the 2022 Claim, these causes of action could not serve as necessary predicates for Prompt Payment penalties. The Court therefore granted State Farm's motion as to penalties related to these alleged breaches of contract. However, State Farm did not move for summary judgment as to the Insureds' cause of action for breach of contract related to ALE coverage for the 2022 Claim. As such, the Insureds could recover Prompt Payment penalties related to this alleged breach only, so the Court denied State Farm's motion in this respect.

*Schnatzmeyer* is an insurer's one-stop-shop for addressing complicated legal and factual matters in a systematic way. Where, as in this case, policyholders pursue several related causes of action involving several years of claim handling, insurers can leverage several related areas of Texas law to hold policyholders to their evidentiary burden.

## Late Notice, Lost Coverage: Lessons from *RD Management*

by Anna Kuhlman (Law Clerk)

In *RD Management, Inc. v. Third Coast Insurance Company*, No. SA-24-CV-00711-XR, 2025 WL 1699951 (W.D. Tex. June 11, 2025), the United States District Court for the Western District of Texas, San Antonio Division recently granted summary judgement for insurer, Third Coast Insurance Company ("Third Coast"), on RD Management Inc.'s ("RD" or the "insured") breach of contract claim holding that the insured failed to submit a claim within the one-year period required by the Policy's Prompt Notice Provision.

Third Coast issued a policy to RD providing coverage from April 1, 2020, to April 21, 2021. The Policy contained a Prompt Notice Provision requiring the insured to "[g]ive the company prompt written notice of the loss or damage[.]" The Policy's "Windstorm (Including Hail) Notice of Loss Amendment Endorsement" ("Endorsement")—prominently labeled, "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY."—modified the Prompt Notice Provision, providing that any claim for wind or hail damage reported more than one year after the date of loss would not be covered.

RD claimed its property sustained hail and wind damage during a storm on May 27, 2020, but did not notify Third Coast until April 14, 2022, nearly two years after the date of loss. Third Coast inspected the property and found no hail damage attributable to the claimed date. After a second inspection in June 2023 confirmed the same result, RD hired a roofing company, which concluded the damage was caused by the 2020 storm.

On February 16, 2024, RD filed suit against Third Coast alleging breach of contract and violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code. Third Coast moved for summary judgment, arguing that RD's failure to report its loss within one year barred coverage, relieving it of any contractual duty. Third Coast also argued that without a valid breach of contract claim, RD's extracontractual claims fail as a matter of law. RD argued, however, that under Texas law, Third Coast must show prejudice to deny coverage for late notice.

Relying on established Texas law and the policy's express language, the court held that the provision was indeed a condition precedent to coverage. Thus, the general issue before the court was whether, under Texas law, an insurer must show prejudice to deny coverage when an insured fails to comply with such a condition setting a specific notice period.

"[T]o determine whether the insurer needed to show prejudice to deny coverage…a court must look 'to the nature of the bargain underlying [the parties] agreement." *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 659 (5th Cir. 1999). "[R]equiring proof of prejudice depends on whether the notice provision at issue 'was "an essential part of the bargained-for exchange" under the policy.'" *Starr Indem. & Liability Co. v. SGS Petroleum Serv. Corp.* , 719 F.3d 700, 704 (5th Cir. 2013). The Fifth Circuit holds that "a notice provision is an essential part of the bargained-for exchange if it is 'a specific provision negotiated by two sophisticated commercial parties in order to supplement the main insurance policy.'"

Citing *Blanco West Properties, L.L.C. v. Arch Specialty Ins. Co.,* No. H-18-0897, 2018 WL 6573117 , at *1 (S.D. Tex. Oct. 5. 2018), the court here found that the inclusion of the one-year notice requirement in a separate, agreed-upon endorsement showed that the specific notice time requirement was fundamental to the contract. Because the one-year notice requirement was essential to the contract, a showing of prejudice was not required for Third Coast to deny coverage. Further, the court also found that the endorsement was mutually agreed upon by both parties, and both parties were sophisticated commercial entities. Accordingly, the court held that the one-year notice provision barred coverage and did not require a showing of prejudice. Because RD failed to comply with the notice requirement, the Court granted summary judgment for Third Coast, dismissing RD's breach of contract and extracontractual claims.

**The Lowdown**: This case underscores that, under Texas law, when an insurance policy expressly provides a notice time requirement in a clearly worded and separately bargained-for endorsement—courts will enforce that requirement as an essential part of the parties' agreement. An insured's failure to comply with such requirement bars coverage entirely, without a need for the insurer to prove prejudice.

## Texas Appellate Court Affirms That Denial of a Claim Does Not Waive Appraisal Rights

by Grace Zuo (Law Clerk)

Recently, the Houston Court of Appeals granted an insurer's writ of mandamus challenging the trial court's denial of its Motion to Compel Examination Under Oath and Appraisal, affirming that **an insurer's prior denial of an insured's claim does not constitute waiver of the right to appraisal.** *See IN RE ALLIED TRUST INSURANCE COMPANY, Relator,* No. 01-25-00101-CV, 2025 WL 1799523 , at *4 (Tex. App.—Houston [1st Dist.] July 1, 2025, no pet. h.).

In this case, the insured filed a claim for property damage caused by a tornado in January 2022. *Id.* at *1. After inspecting the property, the insurer denied the claim on July 29, 2022, finding that the amount of covered damages fell below the policy's deductible and that other damage resulted from excluded non-storm-related causes. *Id.* In response to the insured's allegation that the field adjuster's estimate removed certain noted "roof repairs," on February 24, 2023, the insurer requested evidence of any such repairs made to the tile roof. The insured did not respond. *Id.*

Thereafter, on June 30, 2023, the insured sent a demand letter, seeking over $1.9 million. *Id.* at *2. On July 26, 2023, while reserving all rights and stating that it was still investigating the claim, the insurer demanded appraisal and requested that the insured appear for an examination under oath ("EUO"). *Id*. The insured rejected the demand and failed to appear for the EUO. *Id.* On August 18, 2023, the insurer again demanded appraisal and an EUO of the insured and his adjuster. Again, the insured failed to respond or appear. *Id.*

Instead, the insured filed a suit on March 22, 2024. *Id.* Together with its answer, the insurer filed a Motion to Compel Examination Under Oath and Appraisal ("Motion"). *Id*. The trial court denied both the Motion and the insurer's subsequent Motion for Reconsideration. Thereafter, the insurer sought mandamus relief. *Id.* at *3.

The insured argued that since the lawsuit was purely a coverage dispute and the insurer denied the claim based on lack of coverage, appraisal was not appropriate. *Id*. Next, the insured argued that the insurer waived its appraisal rights because it delayed its demand for appraisal. *Id.*

Addressing the first argument, the court emphasized that the policy clearly provides the insurer the contractual right to appraisal. *Id.* at *4. Citing *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009), the court reasoned that the Texas Supreme Court made it clear that "appraisal is not precluded merely because there are disputes involving coverage," since "appraisal can be structured in a way that decides the amount of loss without deciding liability questions." *Id.* at *5.

The court held that the appraisal may move forward because an appraisal process can set the amount of damage while leaving "causation up to the courts." "[W]hen an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong." *Id.* Thus, contrary to the insured's argument, an insurer's denial of a claim does not, by itself, render the appraisal clause inapplicable. *Id.*

The court further explained that to determine whether an insurer waives its right to invoke an appraisal clause, it must consider the language of the policy and whether the insurer expresses its intent to reserve its appraisal rights. *Id.*

The insured argued that the insurer "impliedly" waived appraisal by not invoking appraisal until after it denied coverage. The court rejected this argument, stating that the policy did not provide a deadline to invoke appraisal. *Id.* at *7. Moreover, the policy further provided that the "[insurer's] request for an appraisal or examination will not waive any of [its] rights." *Id.*

Although the insurer first received the claim in June 2022, the parties continued to communicate about the claim until at least January 24, 2023. *Id*. The insurer first invoked its appraisal rights one week after receiving the demand for $1.9 million in July 2023 and did so again seven months before the insured filed suit. *Id*. As such, there was no unreasonable delay or conduct inconsistent with the insurer's appraisal rights under the policy. *Id*. "Even if [the insurer] had unreasonably delayed, 'mere delay is not enough to find waiver; a party must show that it has been prejudiced,'" which the insured failed to argue. *Id*.

Additionally, the court held that the insurer did not waive its right to take the insured's EUO. *Id.* at *9. The insured argued that the insurer was not entitled to take the requested EUO because it failed to request the EUOs "during the claim investigation period." *Id.* at *8. The

Policy provision on which the insured relied provided that "[n]o later than 15 days after [insurer] receives [insured's] written notice of claim, [insurer] must … [b]egin an investigation of the claim" and "[s]pecify the information [insured] must provide." *Id.* The policy further provided that once the insurer received the requested information, it "must notify" the insured "in writing whether the claim will be paid or has been denied or whether more information is needed '[w]ithin 15 business days.'" *Id.* The court reasoned that because the policy provided that the insurer could request more information during the investigation of the claim such information was necessary, the insurer therefore was not limited to requesting the EUOs within fifteen days of receiving the initial claim. *Id.* at *9.

Although the insurer first received the claim in June 2022, the parties continued to communicate about the claim until at least January 24, 2023. *Id.* Unlike the insurer in *In re Cypress Texas Lloyds,* where the insurer requested EUO only after the claim was paid and litigation had been filed, the insurer in this case requested the EUOs seven months before the insured filed suit and it did so in response to the insured's demand in June 2023. No. 01-25-00101-CV, 2025 WL 1799523, at *9 (Tex. App.—Houston [1st Dist.] July 1, 2025, no pet. h.). Therefore, the insurer did not waive its right to request EUO of the insured and its adjuster. The trial court's refusal to enforce the appraisal clause and compel the EUOs of the insured and his adjuster cannot be adequately remedied through the normal appellate process. *Id*.

As such, the court granted mandamus relief as to the insurer's request to compel appraisal and the EUOs of the insured and his adjuster. *Id*. This case reaffirms that, under Texas law, an insurer's prior denial of an insured's claim is not sufficient to constitute waiver of the right to appraisal.

---

## Swing for the Fences: Southern District of Texas Grants Motion to Preclude Attorneys' Fees, But Refuses to Abate Litigation, Under Texas Insurance Code Chapter 542A

by Chris Weber (Law Clerk)

Applying the plain language of Texas Insurance Code Chapter 542A, the Southern District of Texas, Houston Division, recently granted an insurer's Motion to Preclude Award of Attorney's Fees after the insured failed to state "the specific amount alleged to be owed" in his pre-suit notice to the insurer. But the court refused to abate litigation because the insurer failed to file a plea in abatement within 30 days of filing its answer. *See Zaceta v. Liberty Ins. Gr.,* No. 4:25-CV-093, 2025 WL 1797557, at *2 (S.D. Tex. June 25, 2025).

In *Zaceta*, an insured submitted a claim alleging wind and water damage to his property. The insurer investigated the claim and issued payment. Disagreeing with the insurer's adjustment of the loss, the insured sent a pre-suit notice letter purporting to comply with Texas Insurance Code Chapter 542A. In the letter, the insured stated three monetary values: $201,570.61 as the total cost of repairs to the insured's home, $380,000.00 as "the amount [the insured] is likely to receive" in litigation, and $300,000.00 as a "reasonable settlement value" to avoid litigation. At least 60 days after sending its notice, the insured filed suit, and the insurer timely filed its answer. Eventually, the insurer filed a motion to preclude the insured from recovering his attorneys' fees on the basis that the insured's pre-suit notice did not comply with § 542A because it did not state "the specific amount alleged to be owed." The insurer also argued in a reply brief in support of its motion that the Court should abate litigation until 60 days after the insured provided proper pre-suit notice.

Under Texas Insurance Code § 542A.003(b)(2), an insured's pre-suit notice letter must state "the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property." If a notice letter fails to state this amount, then, under § 542A.007(d), an insured may not recover attorneys' fees. And under § 542A.005, if an insured's pre-suit notice letter does not comply with § 542A.003, an insurer can seek to abate litigation for 60 days after the insured provides proper pre-suit notice, as long as the insurer files a plea in abatement within 30 days of filing its answer.

The Court agreed with the insurer that none of the three monetary values stated in the insured's pre-suit notice sufficiently stated "the specific amount alleged to be owed." For the first figure on repair costs, the insured argued that the insurer could calculate "the specific amount alleged to be owed" by applying prior payments and applicable deductibles to the repair cost figure, so the notice letter really did state the "specific amount." However, the Court observed that **it is not the insurer's burden to deduce this statutorily-required amount, and, rather, an insured's pre-suit notice must state this amount clearly**. The Court further found that neither "the amount that [the insured] is likely to receive," nor "a reasonable settlement value," can constitute "the specific amount alleged to be owed." The Court decided that these respective figures merely represented the amount that the insured expected to be paid if it was successful in litigation, and the amount that the insured hoped to be paid to resolve the dispute without litigation. Thus, the court held that the insured was not entitled to recover attorneys' fees after the date the insurer filed its motion.

What could have been a home run for the insurer ended in only partial victory, however. As the Court recognized, the insurer had the right to abate the case until the insured provided proper pre-suit notice. But the insurer did not assert its right to abatement under § 542A.005 until it filed its reply brief—well after the 30-day deadline from its original answer. As such, the Court refused to abate the case.

*Zaceta* thus serves as a reminder for insurers in Texas to exercise all of their rights under Texas Insurance Code chapter 542A. An insured's pre-suit notice must state "the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property." If a pre-suit notice letter contains any other monetary value instead, insurers should file a motion to preclude attorneys' fees, citing *Zaceta*. In the face of deficient pre-suit notice, insurers should also be sure to file a plea in abatement within 30 days of filing their answer. Remember—swing for the fences, and don't wait to abate!

# BEYOND THE BLUEBONNETS

## Florida's Rules of Civil Procedure Have Some Changes

by Jacarri Walker (Ft. Lauderdale Office)

Recently, Florida lawmakers enacted amendments to the Florida Rules of Civil Procedure. Rule 1.280 addresses initial disclosures

and now imposes stricter obligations on parties to timely exchange them. Effective January 1, 2025, the amended rule closely follows Federal Rule of Civil Procedure 26(a), signaling a major shift in the procedural landscape of Florida state court civil litigation.

For the first time, Florida state court litigants are now required to provide initial disclosures without awaiting a formal discovery request within sixty (60) days of service of the complaint. These disclosures include:

> (a) contact information and subject of information for individuals "likely to have discoverable information" for party's claims or defenses; (b) copies of documents in party's possession, custody, or control, that party may use to support its claims or defenses; (c) computation of each category of damages and supporting documents; and (d) insurance policies that may be available.

Fla. R. Civ. P. 1.280(a)(1)(A)-(D).

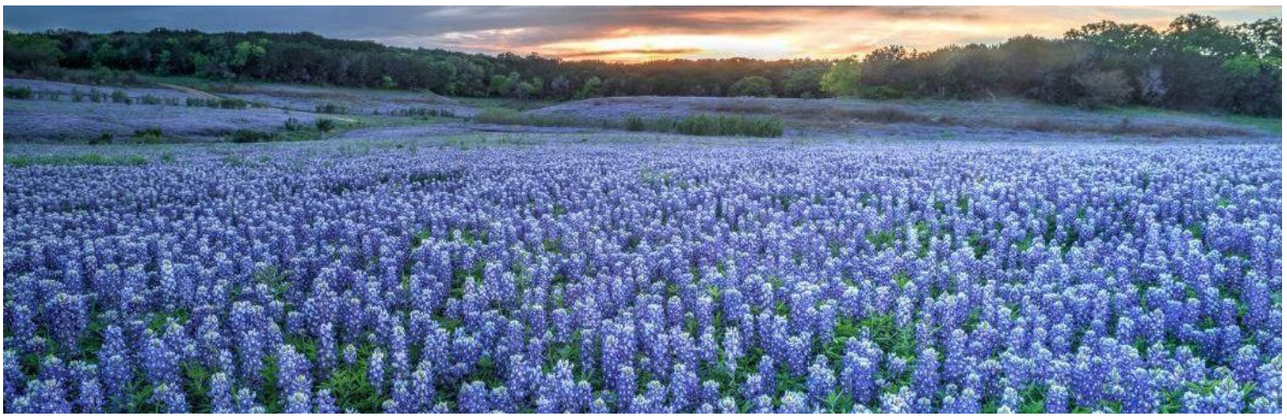
These requirements reflect a clear policy directive: parties must meaningfully engage in discovery from the outset and can no longer delay the exchange of critical, non-privileged information.

Historically, Rule 1.280 contained no mandate for initial disclosures. Under the version effective from October 15, 2021, through December 31, 2024, parties could only obtain discovery through traditional devices, including depositions; interrogatories; requests for production; and request for inspection or entry upon land; without any obligation to initiate disclosure absent a request. Moreover, no time requirements governed the initial exchange of such discovery unless otherwise ordered by the court. *See* Fla. R. Civ. P. 1.280(a) and (f) (2021).

In a departure from this permissive structure, the Florida Supreme Court, acting *sua sponte*, adopted these amendments as part of a broader reform initiative aimed at enhancing case management, streamlining discovery, and promoting the just, speedy, and inexpensive determination of actions.

Most recently, on June 15, 2025, the Court enacted a further amendment to Rule 1.280(f), which provides that "[a] party may not seek discovery from any source before that party's initial disclosures are served on the other party, except when authorized by stipulation or court order." Fla. R. Civ. P. 1.280(f). This amendment codifies the courts' expectation that parties must not only comply with disclosure obligations promptly but also refrain from initiating other forms of discovery until they have done so.

Taken together, these changes represent a shift in Florida's approach to civil litigation. Trial courts are signaling with increasing clarity that the era of delayed discovery, tactical withholding of information, and pretextual "fishing expeditions" is coming to an end. The Florida judiciary is cracking down on litigation gamesmanship and requiring counsel to adhere to a more structured and transparent timeline, with sanctions available for noncompliance, including dismissal of actions and other severe remedies. Accordingly, attorneys practicing in Florida state courts must be prepared to meet these accelerated discovery obligations or risk significant procedural and substantive consequences.



For more information on any of the topics covered in this issue, or for any questions in general, feel free to reach out to any of our attorneys. Visit our website for contact information for all Zelle attorneys at zellelaw.com/attorneys.

**Visit our Website**

---

Reach out to Zelle LLP if your organization would benefit from a presentation, class, discussion, or seminar from one of our attorneys.

**Contact Us!**

---

Follow Zelle LLP on LinkedIn!

## Thank you for reading this issue of The Zelle Lonestar Lowdown!

Visit our website to view all previous issues of The Zelle Lonestar Lowdown!

**The Lonestar Lowdown All Issues**

ZELLE LLP
LONESTAR LOWDOWN
Dedicated to Texas First-Party Property Claims

Join The Zelle Lonestar Lowdown mailing list!

ZELLE LLP

Sign me up!

**If you would like to be taken off this distribution list without unsubscribing from all Zelle emails and updates, please click here.**