ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Monday, August 25, 2025 | ISSUE 28

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.

ZELLE LLP WHAT THE HAIL?

INSIDE THIS ISSUE

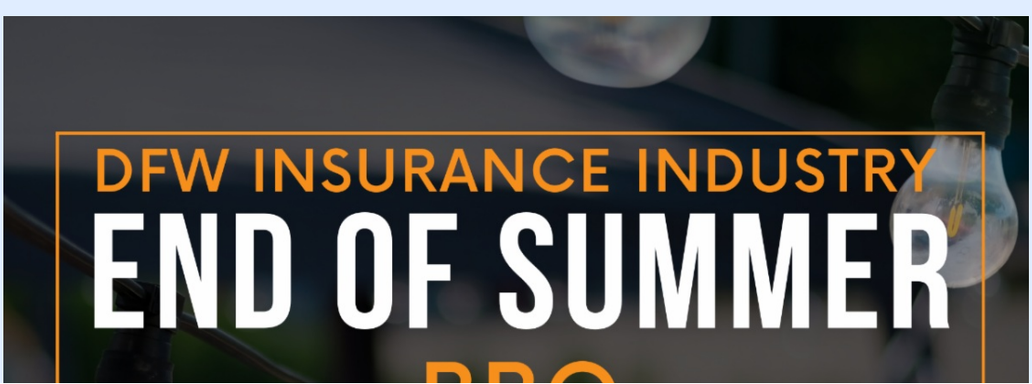
Upcoming Events

You don't want to miss this!

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."

August 28 - Wrap up the summer with Zelle LLP, Walter P. Moore, Unified Building Sciences, and Electrostar LLC. We'll have great food, cold drinks, and classic BBQ games including cornhole, horseshoes, and more. RSVP here.



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 9 – Jessica Port will present “In Defense of the Insurance Adjuster: How to Navigate Written and Implied Duties” as part of the PLRB *2025 By Popular Demand* webinar series.

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 filling up quickly!

Register Now!

Contact abannon@zellelaw.com with any questions.

When Failure to Satisfy Insured Duty Is Fatal to Texas Claims

Bennett Moss and Scott Keffer review the typical duties required of insured in an article recently published on Law360. In that article, we address which of the Insured's duties are fatal to recovery and which result in abatement under Texas law.

Read the full article here.

1. Determine if you need a consultant. Not every claim requires assistance beyond your skills as an adjuster.

2. If one is needed, select the right consultant for the task at hand. Consider education, experience, and the location of both the loss and the consultant.

3. Do not select a consultant that you know to have or you believe to have a bias in favor of insurance carriers.

4. Select a consultant that you believe will be objectively reasonable, and that will give you an honest assessment.

5. Do not hire or retain the same consultant for every claim on your desk.

6. Make sure the scope of the assignment for the consultant is clear.

7. Ensure that you understand what the consultant plans to charge for the assignment, and that regular invoices are sent and paid. Consider a written retention agreement.

8. Request regular updates on the task assigned and stay in touch with the consultant so that the task assigned is completed timely.

9. It is not the consultant's job to adjust the claim – it is your job as the adjuster to make coverage determinations and communicate your position to the insured.

10. Give the consultant a courtesy call when the adjustment of the claim is complete and/or the loss has been resolved.

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.

News From the Trenches

by Steven Badger

It is not easy to pass legislation. That has become clear to me over the past decade. Even when the legislation makes perfect sense and should have widespread support – like the regulation of roofing contractors – dozens of roadblocks exist on the way to passage.

I have had the privilege of working on several legislative efforts to fix abuses in the Texas insurance claims process. We addressed improper public adjuster conduct in 2015. We passed "The Hail Bill" in 2017. And in 2019, on the last day of the session after a revote in the House, we enacted strongly worded legislation clearly and unequivocally banning the waiving of insurance deductibles by contractors.

Of those three pieces of legislation, I truly believed the deductible bill would be the most meaningful. Why? Because if homeowners always had to go out of pocket in paying their deductibles, they would think twice before agreeing to suggestions by door-knocking contractors that they file questionable or even meritless hail damage claims. Only those homeowners truly having legitimate damage would be willing to contribute their substantial 1% or 2% deductibles to the roof replacement cost. I expected that a large segment of the meritless homeowner hail damage claims would go away.

Oh, how I was mistaken. But not because my logic was wrong.

Unfortunately, the Texas deductible-eating contractors are still out there in force. While there are less of them than before the legislation was passed, a significant number of Texas contractors are still willing to skirt the law and waive deductibles.

"How can they get away with this?" is a legitimate question.

Unfortunately, enforcement of the law by the Texas Attorney General and Texas Department of Insurance is entirely nonexistent. I am not aware of a single contractor over the past five years that has faced either an administrative or criminal action for violating this law. And until such enforcement occurs, the crooked contractors will continue waiving deductibles.

But there is a very simple solution.

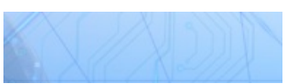
When I drafted this legislation, at the recommendation of a wise Austin lobbyist, I added a provision creating a "private right of enforcement"; a way to ensure that deductibles are paid without administrative or criminal action being filed. Under this provision, Texas insurance companies have the absolute right to require "reasonable proof" that the applicable deductible has been paid prior to making payment of recoverable depreciation (also at times called the replacement cost holdback). Texas insurance companies have always had the right to ensure that the work was performed and ask for the amount actually incurred to complete the work before making such payments. Now they have the right to ask for reasonable proof that the deductible has been paid as well.

Easy. If the contractor waived the deductible, there won't be any proof that it was paid. Thus, the depreciation doesn't have to be released. That means the contractor won't be paid in full for its work. Given that contractors like to be paid for their work, they will stop waiving deductibles so that reasonable proof of deductible payment can be provided.

So logical. So simple.

Yet six years later, besides the lack of enforcement, there remains another big problem. And it's one of our own making. Some insurance companies aren't asking for reasonable proof of deductible payment. Nope. They aren't exercising this simple right. And I can't imagine any reason why they wouldn't. But they should. As proof, I am aware of one Texas insurance company strictly mandating that their adjusters ask for reasonable proof of deductible payment. And they always get it. Why is that? Because the contractors all know that this insurance company always asks for reasonable proof. So they don't even bother trying to waive deductibles for homeowners insured by this company.

Shame on any insurance company doing business in Texas – residential or commercial – that is not asking for reasonable proof that their insureds' deductibles are being paid. You are part of the deductible waiving problem. I suggest you start asking and become part of the solution.



AI Update

The Long Crazy Trip of Hallucinating Artificial Intelligence Continues – Another Day, Another Sanction for Use of Fabricated Caselaw

by Jennifer Gibbs

The list of attorneys sanctioned for filing pleadings containing fictitious or materially inaccurate case citations (e.g., hallucinated case law) is growing by the day.

In a recent case, *Elizondo v. City of Laredo* , 5:35-cv-00040 (W.D. Tex. – Laredo, July 23, 2025), Plaintiff's counsel filed a response to Defendant's Motion to Dismiss, which included multiple fictitious and materially inaccurate case citations. Finding that the attorney violated Rule 11 of the Federal Rules of Civil Procedure by failing to properly review the citations for accuracy, the Court imposed a $2,500 monetary sanction and required the attorney to complete at least 3 hours of CLE on ethics or legal technology, including at least one hour of the use of generative AI in the legal context.

It has been widely reported that AI language models commonly generate fictional legal case information, including case names, citations, and even fabricated details of court decisions. This issue has become prominent as lawyers increasingly utilize AI tools for legal research and drafting court documents, sometimes without proper verification. The phenomenon is concerning because these AI-generated "hallucinations" can lead to inaccurate legal advice, misleading representations to courts, and potential sanctions for lawyers who rely on them.

Over an approximately 2-year period, there have been over 160 reported incidents (in the United States alone) regarding fabricated case law, with penalties and fines ranging from a simple warning, to the striking of briefs, monetary sanctions of up to $30,000, and public reprimands.

And although the use of generative AI can be beneficial in the legal industry, if unchecked, using generative AI for legal research can result in a costly mistake in litigation.

Rescission: Timing Matters Under Texas Law

by Michael Upshaw

As discussed in an article Zelle drafted in November 2023, "Viewpoint: Non-renewal, Cancellation, Reformation and Rescission of Insurance Policies in Texas", an insurer that wishes to rescind an insurance policy on the basis of misrepresentation or fraud, among other requirements, must do so within 90-days of the date the insurer discovers the falsity of a material misrepresentation by an insured. This requirement was recently addressed by a court in Houston.

In *Century Sur. Co. v. Carriage Place Apartments Houston LLC* , the United States District Court for the Southern District of Texas, Houston Division, focused on this 90-day requirement as laid out in Tex. Ins. Code Section 705.005(b). *Carriage Place* involved the attempted rescission of a liability policy because the insured affirmatively checked a "No" box on a renewal application, questioning whether there had ever been any assault and battery incidents or claims on the insured premises. Contrary to the insured's assertion, a September 2023 lawsuit alleged a former tenant of the apartment complex had been sexually assaulted at the property. The assault lawsuit further stated that there had been roughly 1,000 9-1-1 calls from the property, including reports of one sexual assault, nine aggravated assaults, and other crimes.

As part of the investigation of the underlying assault claim, Century Surety Company ("Century") received a report from an independent adjuster on September 26, 2023, which included a sheriff's department location inquiry listing the 9-1-1 calls from the property. Century then issued a reservation of rights letter referencing the allegations in the underlying assault lawsuit on October 13, 2023. But Century alleged in *Carriage Place* that it discovered the material misrepresentation on January 5, 2024, and then timely provided notice of the rescission on March 8, 2024, less than 90-days later. Century argued that despite the fact that it was made aware that the information provided in the renewal application was potentially inaccurate, it did not "discover" the falsity of the application statement until after it had time to determine whether the misrepresentation was material under Tex. Ins. Code Section 705.004.

The court rejected the argument stating:

> Texas courts have repeatedly held that the 90-day clock under § 705.005 begins running when the insurer possessed the facts indicating a potential misrepresentation, not when the insurer completes its investigation or determines the misrepresentation was material. *Myers v. Mega Life & Health Ins. Co.* , 2008 WL 1758640, at *5 (Tex. App.—Amarillo Apr. 17, 2008) ("The statute contains no... pre-condition [that the insurer determine materiality] to the running of the [90] day period and we will not create one."); *see e.g., Prudential Ins. Co. v. Torres* , 449 S.W.2d 335, 337-38. Century's interpretation would render § 705.005's deadline meaningless, as insurers could indefinitely delay notice by claiming they were still investigating materiality. The statute requires notice within 90 days of discovering the falsity—not the legal significance—of the representation.

The court then pointed to the contradictory exhibits filed by Century, establishing Century had knowledge of the alleged misrepresentation by September 26, 2023, at the latest. Accordingly, the court held that Century's rescission claim failed as a matter of law.

The court went on to dismiss Century's Fraudulent Misrepresentation and Negligent Misrepresentation claims based on the heightened pleading standard in Fed. R. Civ. P. 9(b).

Importantly, the court did not address the substantive issue of whether the facts alleged gave rise to the rescission claim. The Texas Supreme Court has outlined five elements an insurance carrier must establish in order to rescind an insurance policy based on a material misrepresentation: 1) the making of the misrepresentation; 2) the falsity of the misrepresentation; 3) the reliance thereon by the insurer; 4) the intent to deceive on the part of the insured making the misrepresentation; and 5) the materiality of the representation.

While Tex. Ins. Code § 705.004 does not explicitly require an intent to deceive, which is often the most arduous element to substantiate, the Texas Supreme Court has required that intent nonetheless.

It can be difficult for an insurer to satisfy each of the elements required for rescission under Texas law. But, as *Carriages* illustrates, the satisfaction of the five elements becomes moot if the insurer does not assert its right to rescission within 90-days of discovering the facts indicating a potential misrepresentation. Accordingly, it is imperative that insurers establish mechanisms for a coordinated effort between their claims and underwriting departments to promptly identify potential misrepresentations, investigate whether the misrepresentations are indeed false, material to the risk, and relied upon, and issue rescission notices, if appropriate.

Century Sur. Co. v. Carriage Place Apartments Houston LLC, No. 4:24-CV-00992, 2025 WL 1938777 (S.D. Tex. July 15, 2025)

Texas Appellate Court Granted Mandamus and Allowed Insurer to Intervene in Case Brought Against Adjusting Company and Individual Adjuster

by Hannah Motsenbocker

Plaintiffs attorneys have been doing their darnedest to avoid litigating in federal court. That's because federal court judges are more likely to consider dispositive motions and are stricter in enforcing deadlines and discovery standards. Therefore, to avoid federal court jurisdiction, attorneys try to add non-diverse parties – *i.e.,* defense parties who have the same state residency as the plaintiff – even when the true defendant should only be the insurance company. One recent scheme used to avoid federal courts is to avoid suing the insurance company altogether and instead sue the adjuster, independent adjuster companies, and even third-party administrators. But recently in the mandamus action *In re Trisura Ins. Co* ., No. 13-25-00139-CV, 2025 WL 2094147, at *1 (Tex. App. July 25, 2025), the Corpus Christi- Edinburg Court of Appeals recognized the scheme for what it was and granted mandamus relief in part.

Specifically, Trisura Insurance Company (Trisura), Eagle 1 Adjusting LLC (Eagle 1), and Thomas Maretzki (Maretzki) (collectively Relators) filed for mandamus relief to the Corpus Christi- Edinburg Court of Appeals alleging that the trial court abused its discretion by: (1) striking their plea in intervention; (2) denying their motions to dismiss Eagle 1 and Maretzki from the lawsuit; and (3) denying Eagle 1's motions to quash and for protective relief from depositions. The Court granted mandamus relief in part and denied in part.

Here, Maria De La Luz Selvera (the Insured) submitted a property damage claim for extensive damage to her home due to an alleged storm. Trisura's third-party administrator (TPA) assigned Eagle 1 and its adjuster, Maretzki, to inspect the property and investigate the claim. Trisura thereafter determined that the part of the Insured's claim relating to wind damage to the roof and collateral damage to the fence was covered under the policy at issue, but the wear and tear damages to the roof, interior damages resulting from wind-driven rain, and interior damages resulting from other sources were not covered. On September 8, 2023, the Insured's counsel contacted Trisura's TPA for additional information, and sometime after, sent a pre-suit notice and demand letter to Maretzki.

On March 14, 2024, the Insured filed suit against Eagle 1 and Maretzki, alleging that they failed to properly investigate and adjust her property damage claim. The Insured asserted causes of action against them for negligence, violations of the Texas Insurance Code, and violations of the Texas Deceptive Trade Practices Act. **Notably, the Insured did not name the insurer, Trisura, as a defendant in the lawsuit**.

On April 5, 2024, Trisura invoked its right to appraisal under the insurance policy and elected to assume whatever liability its agents might have to the Insured under § 542A.006 of the Texas Insurance Code. See Tex. Ins. Code Ann. § 542A.006 (governing an insurer's election of legal responsibility in an action against its agents).

On January 27, 2025, Trisura filed a plea in intervention in the lawsuit. Trisura alleged that it issued the insurance policy at issue; hired Eagle 1 and Maretzki to inspect the Insured's property; found partial coverage for the claim; and issued payment to the Insured minus her deductible and depreciation. Trisura argued that the Insured's claims were either its sole responsibility or a responsibility that it shared with Eagle 1 and Maretzki and explained that it was the only party liable under the insurance policy as all the Insured's claims arose from her contention that she was wrongfully underpaid under the policy. Trisura also alleged that it had previously elected to accept whatever liability its agents, including Eagle 1 and Maretzki, pursuant to § 542A.006 of the Texas Insurance Code. On the same ground, Trisura also filed a motion to dismiss the Insured's causes of action against Eagle 1 and Maretzki with prejudice. Eagle 1 and Maretzki filed a separate motion to dismiss the claims against them on this same basis.

On January 28, 2025, the Insured filed notices of intent to take the oral depositions of Maretzki and a corporate representative for Eagle 1 and in response, each filed motions to quash and for protective relief on grounds that the lawsuit against them should be dismissed. In response, the Insured filed a third amended petition and clarified that she "[was] seeking only tort claims" against Eagle 1 and Maretzki, that "no breach of contract claims are alleged or sought," and that she [was] not "seeking any form of 'policy benefits' or asserting entitlement to same in any manner or way." The Insured filed an emergency motion to compel the depositions of Maretzki and Eagle 1 and for sanctions based on their refusal to participate in discovery. The Insured also filed a motion to strike Trisura's plea in intervention and response to its motion to dismiss. The Insured again argued that she had "expressly limited" her claims to include only those against the adjusters "for their individual tortious conduct" and that she had not asserted any claims for policy benefits or payment under the policy. The Insured further argued that Trisura could not rely on § 542A.006 to support its plea in intervention and the motions to dismiss because that section only applied to instances in which the insurer was a party to the lawsuit. Trisura, Eagle 1, and Maretzki all filed the proper responses to such motions.

The trial court granted the Insured's motion to strike Trisura's plea in intervention; denied Trisura's motion to dismiss as moot on grounds it was "not a proper intervenor"; and denied Eagle 1 and Maretzki's motion to dismiss. On March 26, 2025, Relators filed the petition for writ of mandamus and a motion to stay.

Plea in Intervention

Trisura argued in part that it possessed a justiciable interest because it accepted the liability that Eagle 1 and Maretzki might have to the Insured under Texas Insurance Code § 542A.006. The Insured argued that § 542A.006 did not apply because Trisura was not a party to the action at issue.

The Court expressly rejected the Insured's argument and reiterated its prior holding(s) stating that "*subsection (a) of § 542A.006 states that "an insurer that is a party to the action may elect to accept" its agents' liability, subsection (b) explicitly allows an insurer to make an election 'before a claimant files an action,' and, accordingly, § 542A.006 does not apply only to insurers who are named defendants in a lawsuit and 'that this interpretation does not extinguish causes of action against insurance agents, because the election procedure under § 542A.006 instead shifts liability for those causes of action to the insurer."*" The Court held that the trial court abused its discretion by refusing to allow Trisura to intervene because it possessed a justiciable interest: (1) a judgment in favor of the insured would likely lead to an action against Trisura because it elected to accept its agents' liability under § 542A.006; (2) the agents, as non-parties to the insurance policy, could not invoke appraisal which might defeat the Insured's claim or a part thereof; and (3) the Insured's claims, however characterized (even as "pure tort claims"), were factually premised on the insurance policies and Trisura's partial rejection of the claim.

The Court also determined that allowing Trisura to intervene would not excessively multiply the issues because the causes of action, defenses, and relevant facts were largely the same.

Motion to Dismiss

The Court held that Trisura elected to accept whatever liability that Eagle 1 and Maretzki may have to the Insured, and it did so after the Insured filed suit. The Court emphasized and agreed with the Fifth Circuit's assessment that "an insurer's § 542A.006 election 'eviscerates any claim against an agent'" and reiterated that the Legislature drafted § 542A.006 to provide that the trial court "shall" dismiss the claimant's action against an agent when the statutory prerequisites are satisfied and that **the use of the word "shall" imposes a mandatory duty**. *See In re Rogers,* 690 S.W.3d 296, 300–01 (Tex. 2024) (orig. proceeding) (per curiam).

Accordingly, the Court held that because Trisura made an election after suit was filed to assume whatever liability that Eagle 1 and Maretzki might have had, the insurance code imposes a mandatory duty on the trial court to dismiss the action against Eagle 1 and Maretzki with prejudice and therefore, the trial court abused its discretion.

Depositions of Eagle 1 and Maretzki

Relators again alleged § 542A.006 requires Maretzki and Eagle 1 to be dismissed from the lawsuit, and that Trisura [had] the right to invoke appraisal and have the case abated pending the outcome of appraisal. Trisura argued that appraisal must move forward before any discovery could take place. The Court rejected this argument on the basis that while the ruling required that the trial court to dismiss Eagle 1 and Maretzki from suit, the argument failed to consider that a party may seek discovery from both parties and nonparties to suit. Tex. R. Civ. P. 205 (governing discovery from nonparties). The Court also held that Relators cited no authority in favor of the assertion that discovery must be stayed pending the completion of appraisal. Accordingly, the Court held that the trial court did not abuse its discretion.

The Lowdown: This case highlighted that under Texas law an insurer **does not** need to be a party to the case to make an election under § 542A.006 and that the language of the statute imposes a mandatory duty on the trial court to dismiss the suit against the insurer's agents once election is made. This case is also important because over the last several years there have been similar cases where an insured has only named an insurer's adjusters/agents in the lawsuit as an attempt to avoid the breach of contract claim and the applicable defenses/limitations pursuant to the insurance policy but this case reiterated that an insurer, such as Trisura, has a right to intervene – *i.e.* possesses a justiciable interest under such facts, because (1) a judgment in favor of the insured would likely lead to an action against the insurer because the insurer had elected to accept its agents' liability under § 542A.006; (2) the agents, as non-parties to the insurance policy, could not invoke appraisal which might defeat the insured's claim or a part thereof; and (3) the insured's claims, however characterized, were factually premised on the insurance policy and the insurer's rejection of the claims.

Western District of Texas Batches Thousands of Stucco Claims into Single Occurrence Pursuant to "Single Occurrence Clause" Endorsement, Holds SIR Exhausted by Initial Settlements

by Alexander Masotto

Meritage Homes of Texas, Florida, and Meritage Homes Corporation (collectively, "Meritage"), a national residential homebuilder, brought suit against its umbrella insurer, AIG Specialty Insurance Company ("AIG"), over coverage for more than 1,300 stucco system construction defect claims asserted by homeowners in Florida and Texas.

On July 8, 2025, Judge David Alan Ezra in *Meritage Homes of Texas, LLC v. AIG Specialty Ins. Co.* , No. 1:22-CV-01375-DAE (W.D. Tex. July 8, 2025), addressed three critical issues: (1) whether the stucco claims qualified as "property damage"; (2) whether the claims constituted one or many "occurrences" under 12 umbrella policies issued between 2005 and 2018; and (3) whether Meritage satisfied its self-insured retention (SIR) obligations to trigger AIG's indemnity duty.

Meritage sought declaratory relief establishing AIG's coverage obligations and also alleged breach of contract for AIG's refusal to fund certain settlements. AIG filed counterclaims, arguing that the claims involved multiple occurrences across policy years, each requiring separate SIRs.

Property Damage and Occurrence

The Court first held that each stucco claim involved "property damage" under Texas law. Relying on *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 10 (Tex. 2007), the Court also found that unintended faulty workmanship under liability policies can qualify as an "occurrence." Because the damage continued into the 2017–18 policy period, the policies' temporal coverage requirements were satisfied.

Single Occurrence Clause ("SOC") Endorsement

The central dispute concerned the 2017–18 SOC endorsement, which allowed multiple claims "arising out of a single act or a series of related acts or causes" to be treated as one occurrence. Meritage argued that the widespread stucco defects all stemmed from the same defective installation practices, including violations of nationally recognized ASTM construction standards. The Court agreed, concluding that the claims were both logically and causally connected. Importantly, the Court rejected AIG's effort to divide the claims by state or by policy year. Instead, the Court held that the SOC endorsement's broad wording required all claims with property damage during the 2017–18 policy period to be treated as a single occurrence. At the core of the dispute was the 2017–18 SOC endorsement, which allows batching of "a series of related acts or causes" into a single occurrence.

In reaching this conclusion, the Court emphasized that endorsements control when they conflict with other policy language, and that "related acts or causes" must be given their plain and expansive meaning. The Court also noted the systemic nature of the construction practices at issue, observing that all of the defects shared a common thread in their noncompliance with building standards. By enforcing the SOC endorsement in this way, the Court significantly limited the number of SIRs Meritage had to satisfy, collapsing more than a thousand homeowner claims into one occurrence.

Although Meritage also sought to place all claims exclusively into the 2006–07 policy year under the SOC's "deeming clause," the Court declined to grant that relief because it had not been properly pled in the complaint.

Self-Insured Retention (SIR)

Another key issue was whether Meritage had satisfied the policies' self-insured retention obligations so as to trigger AIG's indemnity duty. Bearing the burden of proving SIR exhaustion, Meritage presented evidence that it had paid more than $11 million in settlements to resolve underlying homeowner claims. In response, AIG argued that these payments could not properly exhaust the SIR because Meritage subsequently recovered approximately the same amount from subcontractors and their insurers through indemnity agreements and third-party claims. According to AIG, such reimbursements effectively nullified Meritage's payments, leaving the SIR unsatisfied.

The Court rejected AIG's position, emphasizing that the plain language of the policies defined "Loss" to include judgments and settlements actually paid by Meritage, and required only that such sums be "paid by" the insured. The Court observed that the policies did not contain

any qualifying language requiring that the insured's payments be "net of recovery," "unreimbursed," or "borne solely by the insured." Because Meritage had in fact made direct payments to homeowners to settle covered claims, the SIR was deemed satisfied notwithstanding subsequent reimbursements.

In reaching this conclusion, the Court noted that Texas law does not permit courts to rewrite insurance contracts to include limitations that the parties themselves did not adopt. Had AIG intended to preclude the erosion of the SIR by reimbursed payments, it could have expressly included such restrictive wording.

Duty to Defend

"Finally, the Court granted AIG summary judgment with respect to its defense obligations, holding that upon exhaustion of the SIR through payment of 'Loss,' AIG retained the right, but not the duty, to assume Meritage's defense."

This ruling demonstrates how Texas federal courts interpret single occurrence endorsements in construction defect cases, even when thousands of homes suffer systemic defects. Courts may broadly construe "related acts or causes" to batch widespread defect claims into a single occurrence, limiting an insurer's ability to multiply SIR obligations across years or jurisdictions. Insurers should ensure defense provisions are consistent with the carrier's intended role in large-scale construction defect litigation. The decision also reflects the importance of how reimbursements from subcontractors may not negate SIR exhaustion.

***Bonus Reading*:** Arising out of the largest multidistrict litigation in U.S. history, the Delaware Supreme Court recently held that only the Aearo entities specifically listed as "Named Insureds" could satisfy the self-insured retentions (SIRs) in their liability policies. Payments by 3M, Aearo's parent company, could not be credited toward the SIRs because 3M was not a Named Insured. The Court concluded that the SIRs operated as conditions precedent to coverage, and because they were never satisfied by the proper insureds, the insurers' coverage obligations were not triggered. See Order here.

No Exceptions (Unless Prescribed by Law): Court Grants Motion to Preclude Attorneys' Fees Even Though Carrier Will "Not Entertain" Settlement

by Christopher Edwards

In this case, Safeco Insurance Company of Indiana ("Safeco") issued a residential policy to Venugopal Muriki (the "Insured") covering the Insured's dwelling. On December 10, 2024, the Insured submitted a claim with Safeco after his home allegedly sustained storm damage on or around June 2, 2024. *Muriki v. Safeco Ins. Co. of Indiana* , No. 4:25-CV-84, 2025 WL 2230008, at *1 (E.D. Tex. Aug. 5, 2025). Two days later, Safeco sent out an adjuster to inspect the property. The adjuster determined that the damage stemmed from a prior 2021 claim, and Safeco accordingly denied the claim as pre-existing damage. The Insured then attempted to invoke his contractual right to appraisal, which Safeco refused to participate in. On December 23, 2024, the Insured sent a pre-suit notice letter to Safeco alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act. In particular, the Insured demanded over $50,000 and noted the potential to seek treble damages.

Three days later, the Insured filed suit in state court asserting various breach of contract claims and violations of the Texas Deceptive Trade Practices Act and Texas Insurance Code. In response, Safeco filed a motion to limit the Insured's claim for attorney's fees and a motion for verified plea in abatement. After removing the case to federal court, Safeco re-urged the motions.

Safeco's request to limit fees arises under § 542A.003 of the Texas Insurance Code and § 17.505 of the Texas Deceptive Trade Practices Act. At first glance, these statutes appear to be procedural and thus would warrant application of federal law under the *Erie* doctrine procedural rules. But the district courts recognize that federal courts sitting in diversity should apply these statutes' pre-suit notice provisions as state law rather than tools or procedure.[1] *Id*.; *see also Davis v. Allstate Fire & Cas. Ins. Co* ., No. 4:18-CV-00075, 2018 WL 3207433, at *3 (E.D. Tex. June 29, 2018); *see*, e.g., *Franklin v. Apple Inc* ., 569 F. Supp. 3d 465, 479 (E.D. Tex. 2021) ("Although providing sufficient notice is a procedural process, federal courts should apply the notice provision in the DTPA because its purpose is intertwined with Texas's substantive policy.").

In relevant part, Section 542A.003 provides that:

> (a) [N]ot later than the 61st day before the date a claimant files an action to which this chapter applies in which the claimant seeks damages from any person, the claimant must give written notice to the person in accordance with this section as a prerequisite to filing the action.
>
> (b) The notice required ... must provide:
>
> (1) a statement of the acts or omissions giving rise to the claim; the specific amount alleged to be owed by the insurer;
>
> (2) on the claim for damage to or loss of covered property; and
>
> (3) the amount of reasonable and necessary attorney's fees incurred by the claimant ...
>
> (c) If an attorney or other representative gives the notice ... on behalf of a claimant, the attorney or representative shall:
>
> (1) provide a copy of the notice to the claimant; and
>
> (2) include in the notice a statement that a copy of the notice was provided to the claimant.

Tex. Ins. Code Ann. § 542A.003(a)-(c). Section 542A allows a defendant who "did not receive a pre-suit notice complying with Section 542A.003" to "file a plea in abatement not later than the 30th day after the date the person files an original answer in which the action is pending" until proper notice is given. *Muriki*, 2025 WL 2230008, at *2 (*citing* Tex. Ins. Code Ann. § 542A.005(a)(1)). "The court shall abate the action if the Court finds the person filing the plea…did not, for any reason, receive a pre-suit notice complying with Section 542.003." *Id.* (b)(1). The burden of proof lies with the party seeking abatement to establish its propriety. *Muriki*, 2025 WL 2230008, at *2 (*citing Carrizales v. State Farm Lloyds* , No. 3:18-CV-0086-L, 2018 WL 1697584, at *2 (N.D. Tex. Apr. 6, 2018)).

Similarly, § 17.505(a) of the Deceptive Trade Practices Act provides:

> As a prerequisite to filing suit seeking damages under [the Texas Deceptive Trade Practices Act] ... a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages ... and expenses, including attorney's fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.

Tex. Bus. & Com. Code Ann. § 17.505(a). Courts routinely recognize that when a party entitled to notice does not receive it, that party "may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending." *Muriki*, 2025 WL 2230008, at *2. "Abatement of a claim is proper where the plaintiff gives written notice within 60 days but fails to adequately provide enough information for the party to determine whether to pursue settlement or litigation." *Benny White Fying Serv., Inc. v. Prof'l Aviation Ins. Reciprocal* , No. 5:13-CV-093-C, 2013 WL 12124596, at *1 (N.D. Tex. July 22, 2013) (citing Tex. Bus. & Com. Code Ann. § 17.505(c)-(d)).

In support of its motions, Safeco argued that the Insured did not provide it with proper pre-suit notice pursuant to either § 542A.003 of the Texas Insurance Code or § 17.505 of the Texas Deceptive Practices Act. Determining that the Insured's December 23, 2024, demand letter complied with the necessary substantive requirements of either section, the district court determined the Insured clearly did not comply with the requisite sixty-day period before filing suit by filing suit three days later. *Muriki*, 2025 WL 2230008, at *3. The Insured argued its lack of notice fell within the statutes' exceptions because the purpose of the notice requirement is to encourage settlement, and Safeco "was not even entertaining settlement." Therefore, the Insured argued, attorney's fees should not be limited. *Id*.; *see* Tex. Ins. Code Ann. § 542A.003(d) (noting that "[a] presuit notice…is not required if…impracticable because: (1) the claimant has a reasonable basis for believing there is insufficient time to give ... notice before the limitations period will expire; or (2) the action is asserted as a counterclaim.").

The district court found that argument unpersuasive, noting that a lack of interest in settlement does not fall into either statutes'

exceptions. Moreover, the district court found no reason to create a new exception to the statutes, especially where district courts have previously declined to do so. *See Rahe v. Meridian Sec. Ins. Co*., No. 3:21-CV-545-E, 2022 WL 614995, at *2 (N.D. Tex. Feb. 28, 2022) (holding that "[p]laintiff was required to wait sixty days prior to filing suit" despite her argument "that it was unnecessary to wait the full duration based on the purpose of the presuit notice"). Accordingly, the Court granted Safeco's Motion to Limit Attorney's Fees.

Turning to Safeco's Verified Plea in Abatement, the district court determined the plea was not appropriate under either § 542A of the Texas Insurance or § 17.505 of the Texas Deceptive Trade Practices Act given that the district court was considering the plea in abatement more than 60 days since the Insured provided its pre-suit notice letter to Safeco. Normally, while the abatement period would run until "the 60th day after the date a notice complying with Section 542A.003 is given," a plea in abatement can be denied as moot where courts address the abatement issue more than sixty days after notice is given. Here, since Safeco has not demonstrated that Plaintiff's notice is substantively deficient other than its untimeliness, the district court determined that abatement would not be appropriate under the circumstances. Accordingly, the Verified Plea in Abatement was denied as moot.

The Lowdown: This case serves as another important reminder that Plaintiff-policyholders must follow the statutorily prescribed steps outlined in section 542.003(a)-(c) to avoid being at risk of forfeiting their claim for attorney's fees or abatement of their suit until proper notice is given to the Defendant. However, this case also demonstrates that courts recognize the practical realities of the timeline of litigation and can deny a plea in abatement where the time to abate has already been exhausted by the timeline of litigation.

BEYOND THE BLUEBONNETS

Choosing the Right Lawyer: What Should You Ask and What Should You Expect?

by Jason Reeves and Hernán Cipriotti (London Office)

Working in insurance coverage and dispute resolution, my clients are almost always repeat business. My friendly competitors are all highly skilled service providers who meet high performance standards over and over again. So what should clients ask and expect of lawyers who they hire? And what does every procurement/panel selection process miss?

1. How are lawyers financially incentivized?

Many law firms are shark tanks with significant internal competition to win business, control client relationships, and generate personal income. And this reality, usually hidden from clients, directly impacts the conduct and quality of legal work. I would ask:

- Do partners market and work together?
- Does the lawyer instructed involve other people from the law firm on the file?
- If two partners are instructed on the same matter for different clients will they work together, defray costs and work towards both clients' best interests?
- How are partners remunerated?
- Are billable hour expectations reasonable?

Don't accept platitudes – get some real answers that you can depend on. Then pause and reflect on whether the answers match your actual experience. If the answer to any of these questions is not a resounding yes, run. I have some truly hilarious experiences with lawyers from the same "Global Law Firm(s)" with extremely high rates not working together, red lining each other's work, and keeping others in their law firm away from specific clients. Happy to tell you those stories (over a beer or a coffee) but I'd prefer to tell you about the firms that work like we do: joined up working together for your best interests.

Clients assume they hire a good lawyer from a good firm and they'll get good results. But if the instructed lawyer is not incentivized to work and play nicely with others in the same law firm you'll only be getting the best that lawyer can provide with the limited resources that lawyer can access.

What you want: getting the best out of all the resources available in a law firm.

2. How does the legal team actually work together?

Law is a team sport. Clients should ask how partners, associates, and support staff collaborate:

- Does the lead partner handle everything solo, or is there a collaborative model with different strengths on the team?
- Do associates have real responsibility or are they just gears in the machine who bill?
- Can the firm scale its team up or down as the matter evolves?

On any matter of real substance, a single lawyer working on a file alone should terrify anyone hiring a law firm.

For all the procurement folks who impose billing guidelines via portals who are still reading, please understand the best legal work any client can get from any lawyer in every situation is when the legal team talks together, collaborates, and discusses the file. This is true no matter what the billing guidelines are.

What you want: a clear and confident answer that shows the team has worked together before, shares knowledge, and communicates openly—not just with each other, but with you.

3. Who will I actually be working with day-to-day?

You're not hiring a logo or a name on a door—you're hiring people. (Everyone says they're hiring the lawyer not the firm but in reality many have very restrictive panels.) It's fair to ask:

- Who writes the first drafts?
- Who responds to emails?
- Who do I call when I need an answer fast?

- Who do I call when I need an answer fast?
- Does the team have capacity and expertise?

If you only meet the partner but never hear from the associate until discovery's due, that's a red flag.

And for those that insist they are hiring a specific lawyer for a specific task, but nevertheless restrict choices to a limited panel, maybe you don't *really* hire the best lawyer for the job.

What you want: a firm that introduces the whole team early, encourages direct communication, and empowers associates to build real relationships with clients.

4. How do you keep me informed?

Some clients want weekly updates. Others prefer milestone-only check-ins. The best firms tailor their communication to your preference. Ask how the firm updates clients:

- Do they offer concise summaries?
- Quick calls?
- Dashboards / speadsheets?
- Are they proactive when something changes, or reactive when something breaks?
- Do they send 40-page legal opinions without Executive Summaries?

Reliable communication isn't about volume—it's about relevance.

What you want: a legal team that keeps you updated how you want so you have confidence, not homework.

5. How do you make sure the team understands my goals?

Not every legal win looks the same. For one file, it's a motion to dismiss. For another, it's early settlement. For some, it's simply minimizing risk with minimal noise. You want a firm that listens first. You are making the strategic calls. Ask how the team gets to know your business, your pain points, and your priorities:

- Do they start with a strategy memo?
- A kickoff call?
- An internal Q&A?

What you want: A discussion about the results you want, not the results we want.

6. What's your working style—and does it match mine?

Some legal teams are formal and hierarchical. Others are flat, collaborative and fast-moving. There's no one-size-fits-all clients and files:

- Are you a short-text client or a long-memo client?
- Do you expect same-day turnaround or deep analysis over time?
- Does the firm mirror your pace and tone, or do you constantly feel out of sync?

Ask about working style. Ask how they handle urgent issues, and how they manage expectations. Fit doesn't mean perfection—it means communication, adaptability, and mutual respect.

What you want: someone who won't drive you crazy over the course of a file – potentially you will be working closely together for a long time.

7. How do you build trust with your clients?

There's no rehearsed answer on this; how the team responds is what matters. Look for answers that focus on consistency, candor, and availability. Check it against your actual experience:

- Do they flag risks early?
- Are they honest when a motion is a long shot?
- Do they follow through without being chased?
- Do they amend core legal analysis half-way through the file?
- Do they frequently settle a claim in litigation at the last minute after billing the file for years?

What you want: good habits build trust and helps manage out surprises.

Final Thought: Ask About the Relationship.

In law, technical competence is a minimum expectation. What really defines the client experience is how a legal team shows up: with clarity, communication, and commitment to shared goals. They understand your business and your strategic legal and commercial goals. So don't be afraid to ask:

- Who's on my team?
- How will you work with me?
- Are you reliable when things get hard?

The best firms aren't just ready for these questions. They welcome them.

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.

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