ZELLE LLP LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Friday, September 26, 2025 | ISSUE 29

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!

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.

October 23 – Jason Reeves presenting at the London Market Association (LMA) General Liability Claims Group Annual Symposium in London.

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

November 4 – Dennis Anderson presenting at the Wisconsin Fire Loss Association in Fond du Lac, WI.

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.

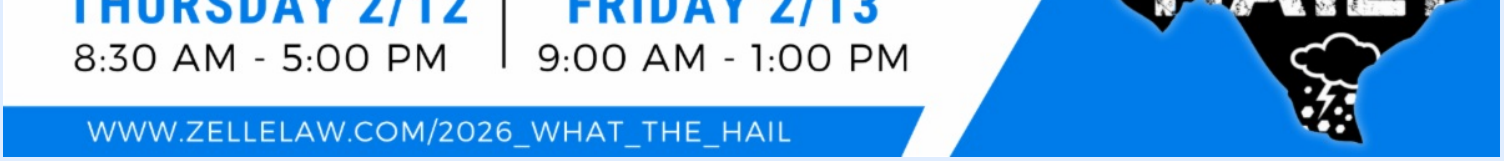
December 10 – Steven Badger will present “Badger and Merlin Discuss The Big Issues” at the 2025 First Party Claims Conference (FPCC) in Boston, MA.

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.

January 25 – Lindsey Davis will present “Common Abuses in First Party Property Claims” at the 2026 NACA Annual Convention in Durant, Oklahoma.

January 25 – Steven Badger will deliver the keynote presentation “Insurance and Public Policy Issues Arising from the 9/11 Terrorist Attack” at the 2026 NACA Annual Convention in Durant, Oklahoma.

Registration is over half full, secure your spot today!



Register Now!

Contact abannon@zellelaw.com with any questions.

1 . An immediate inspection of the property to document conditions.

2 . Photographs of the property and the claimed damage taken by the insured or its representatives prior to the date of loss, during the storm event, and after the date of loss.

3 . A list of all prior insurance claims and payment information

4 . Identification of any non-insurance claim related to pre-existing damage or deferred maintenance existing prior to the storm event.

5 . Maintenance records and an opportunity to visit with the person providing the maintenance services.

6 . Inspection reports/real estate appraisal reports, especially if the insured recently purchased the property.

7 . An opportunity to freely visit with the insured or its representatives about the severity of the weather event, the scope of damage caused by the weather event and the insured's preferred method to repair or replace the covered damage.

8 . Bids, invoices, receipts, or estimates obtained by the insured or its representatives for the repair or replacement of the covered damage.

9 . Any and all correspondence regarding required code/ordinance & law issues at the property that are necessary due to the repair or replacement of the covered damage and an opportunity to speak with the code official.

10. Engineering reports obtained by the insured or its representatives regarding the cause of the claimed damages and an opportunity to visit the engineering professional about their findings and opinions

News From the Trenches

by Steven Badger

I received an interesting call last week. One of our clients is considering whether to write a new program in Texas insuring a specialized type of commercial risk. They asked me this question:

"If you owned a Texas insurance company, what are the top two things you would do to eliminate policyholder-side abuses in the claim process while still protecting the insured's interests?"

Wow. What a softball for me.

I told them the answer was easy. The two things are obvious to me…..

First, I would entirely abandon the traditional model of paying actual cash value first and then paying replacement cost later. The problem with that model is that by sending out cash, lots of people other than the insured are trying to get their hands on it -- the contractor, the public adjuster, the supplementing company, the appraiser, and the policyholder attorney. We need a process that better ensures our claim payments end up being used solely to fix the insured's damage and for no other purpose. Thus, I would stop sending out ACV payments. Instead, I would draft a pure indemnity policy, where we make payments based on the insured having actually incurred costs to repair covered damage. Show me you spent the money to replace your roof, we will reimburse you the cost you incurred. Thus, money is only used to reimburse for costs incurred. That's it. Yes, I know that certain insureds don't have the money to advance the repair costs. Fair enough. The policy will state that we can make discretionary advance payments once an insured is contractually obligated to a contractor and that such payments will only be made directly to the contractor. Obviously, the intent here is for our claim proceeds to be used for one and only one purpose -- fixing damage. Will this upset public adjusters? It shouldn't, as they should be telling their clients that their commissions must be paid separate from the claim proceeds. As I am sure they all do, right?

Second, I would offer the following endorsement at the time of policy purchase: Mandatory Approved Contractor Program For Wind/Hail Roof Claims Endorsement. In exchange for a discounted premium, the insured agrees to an endorsement stating that any roof replacement due to hail or wind will be performed under an approved contractor network program. Use of the program is mandatory. The insured agrees to use the program when it buys the policy. It was the insured's choice to participate in the program. Once again, the obvious intent here is to avoid third-parties siphoning off part of the claim proceeds into their own pockets. We ensure that our claim payments are used for one purpose only – fixing damage.

With those two simple policy provisions, I can fix the majority of abuses we face in the Texas claims process. No, it does not fix scope of damage or date of damage disputes. But we end all fighting about the cost to replace agreed hail or wind damage to roofs. We also make it unprofitable for third-parties to inject themselves into the claims process as there is no way for them to be paid from the claim proceeds.

When I retire from Zelle and start *Tejon Insurance*, I can assure you these two provisions will be in my policies. Along with a strong dents endorsement, detailed appraisal clause, one year notice of claim deadline, etc. I am confident that people will buy these policies with these provisions, as I will educate them that the purpose of these provisions is to ensure that our claim payments are used to fix their damages. And without others profiting from our claim process, we can keep down

premium costs and reduce deductibles.

I truly believe it would work.

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.

AI Update

Sandbox or Sandstorm? AI's New Playground

by Jennifer Gibbs

On September 10, 2025, Sen. Ted Cruz (R-TX) introduced the SANDBOX Act (Strengthening Artificial Intelligence Normalization and Diffusion by Oversight and eXperimentation). The bill would grant AI developers regulatory lenience to launch new technologies — but some experts argue that the bill poses risks to consumers' privacy.

Key Points:

- AI developers and deployers can apply for temporary waivers or modifications of regulations in order to test, experiment, or temporarily provide to consumers AI products or services.
- Companies must show benefits outweigh risks and report harms or incidents.
- Oversight sits with the White House's Office of Science and Technology Policy (OSTP).

Why it matters:

There are currently no federal regulations establishing broad regulatory authorities for the development or use of AI or prohibitions on AI, although there appears to be bipartisan agreement that some basic AI regulatory protections are necessary, such as a ban on lethal autonomous weapons and requirements that AI programs pass a governmental test before use.

Supporters say the Act will help the U.S. stay globally competitive in AI by cutting through red tape. Critics warn it could weaken consumer protections, privacy, and safety rules—with long waivers allowing risky practices to linger.

What to watch:

- How Congress amends the bill to add safeguards.
- Who gains access to the sandbox (big tech vs. startups).
- The impact on state-level AI regulations.

Ultimately, the SANDBOX Act will be judged on whether it can accelerate AI while also protecting privacy, ensuring fairness, and guarding against discrimination.

Hail to the Promptness: Northern District of Texas Finds Insured's Two-Year Delay in Providing Notice Untimely and Prejudicial

by Alexander Masotto

On August 29, 2025, Judge James Wesley Hendrix in *Indiana Affordable Storage, Inc. v. The Ohio Casualty Insurance Company* , No. 5:24-cv-00050-H-BV (N.D. Tex. Aug. 29, 2025) granted summary judgment in favor of The Ohio Casualty Insurance Company ("Ohio Casualty"), holding that Indiana Affordable Storage ("Indiana Storage") failed to provide prompt notice of its loss as required by the insurance policy, and that this delay prejudiced Ohio Casualty, thus voiding coverage under Texas law. All contractual and extra-contractual claims were dismissed with prejudice, including claims for violations of the Texas Insurance Code, the DTPA, and breach of the duty of good faith and fair dealing.

This case involved a storage facility operator and owner, who was insured by Ohio Casualty under a builders risk policy for ten self-storage buildings constructed in Lubbock, Texas, effective August 27, 2018, through August 27, 2019.

The storage facility construction began in August 2018, and the last building was completed in October 2019. Following construction

of eight of the ten buildings, several storms occurred in May 2019 at the property. After completion, Indiana Storage insured the property under a different policy with Starr Surplus lines ("Starr"), that became effective November 1, 2019.

One year later, a May 2020 storm also impacted the property. Immediately following the May 2020 storm, Indiana Storage filed notice of a claim under the Starr policy. Following the investigation, Starr advised that any observed damage was cosmetic in nature and thus excluded from coverage under the policy's cosmetic damage exclusion.

Following the Starr denial, Indiana Storage filed notice of a claim two years later with Ohio Casualty on May 20, 2021, for storm damage caused by the May 2019 storm. Notably, Indiana Storage asserted that it was "unaware" of the May 2019 storm damage. Without inspecting the property, Ohio Casualty denied the claim because Indiana Storage failed to provide "prompt notice," and its insurable interest ceased after Indiana Storage accepted the building.

Indiana Storage proceeded to retain counsel and requested that Ohio Casualty reconsider its position. Under a reservation of rights, Ohio Casualty agreed to inspect the property with an engineer. The inspection revealed that a total of eight hail events occurred at the property between May 2019 and May 2020, and the May 2020 storm produced the largest hail. Ultimately, Ohio Casualty reaffirmed its denial, and Indiana Storage filed suit.

During the course of litigation, Ohio Casualty moved for summary judgment on all claims asserted by Indiana Storage, arguing that: (1) Indiana Storage's untimely notice prejudiced Ohio Casualty; and (2) Indiana Storage could not meet it burden to segregate damage under the concurrent causation doctrine.

Notice of the loss was not prompt.

As a condition to coverage, Ohio Casualty's policy requires that Indiana Storage "must promptly notify" Ohio Casualty in the event of a loss, and that notice must be in writing. Although most insurance policies do not define "prompt notice," many Texas courts have construed this phrase to mean that notice must be given ***within a reasonable time after the occurrence***. *Alaniz v. Sirius Int'l Ins. Corp.*, 626 F. App'x 73, 76 (5th Cir. 2015). In the event an insurer demonstrates that notice was untimely, the insurer must also prove that it was prejudiced by lack of prompt notice. *Id*. at 78.

The principal role of notice provisions "is to allow the insurer to investigate the incident close in time to the occurrence, while the evidence is fresh, and so that it may accurately determine its rights and liabilities under the policy (and take appropriate remedial action)." *Id*.

Here, it was undisputed that Indiana Storage reported the loss two years after the May 2019 storm. Nonetheless, Indiana Storage argued that the delay was reasonable under the circumstances because: (1) the hail damage was difficult for a non-expert to see because it does not manifest until debris collects or leaks begin; (2) the COVID-19 pandemic made it difficult for Indiana to inspect the Property; and (3) the buildings were still under construction at the time of the storm and it was impossible to conduct on roof inspections during construction. The Court held that a two-year delay was not prompt.

While the Court acknowledged that the Texas Supreme Court and other Texas federal district courts have held the discovery of damage is irrelevant when evaluating prompt notice, the Court analyzed the surrounding facts and circumstances. *See e.g. Don's bldg. Supply Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24 (Tex. 2009); *Hamilton Props, v. Am. Ins. Co.* , No. 3:12-CV-5046-B, 2014 WL 3055801, at *8 (N.D. Tex. July 7, 2014). After considering the evidence, the Court found that Indiana Storage Indiana Storage knew of the May 2019 damage no later than May 2020 and failed to produce any other evidence suggesting otherwise. Even under the unrecognized "discovery approach," the Court determined the two-year notice delay was untimely.

Indiana Storage's late notice prejudiced Ohio Casualty.

Regarding prejudice, Ohio Casualty believed it was prejudiced by Indiana Storage's late notice due to: (1) its inability to properly document the condition of the property immediately after the May 2019 loss; (2) Ohio Casualty suffered financial prejudice because repair costs increased by 17% (2019–2021) and 44% (2019–2024); and (3) the scope of work broadened due to building occupancy and contents manipulation expenses that did not exist at the time of the May 2019 storm.

Although the Court found that a fact issue existed as to whether Ohio Casualty was able to complete a reasonable investigation of the claim, it held that Ohio Casualty suffered financial prejudice due to the increased repair costs, and suffered prejudice by the increased scope of work needed to restore the property.

Lastly, the Court swiftly dismissed the insured's attempt to "cure any potential prejudice" by stipulating to date-of-loss pricing, as the insured raised this argument for the first time in its objections to the Magistrate Judge's recommendations.

Takeaways

Texas law does not, and should not, recognize a discovery rule for evaluating the prompt-notice requirement in property insurance claims. Allowing notice to run from the date of discovery undermines an insurer's critical duty to promptly investigate, assess, evaluate, and pay covered losses in a timely manner.

Thus, Texas courts should not analyze prompt notice defenses under the discovery framework. An insured's obligation to provide "prompt notice" runs from the date of the **loss itself**, not from when the insured discovers, or should have discovered, the damage. Courts consistently hold that, unless the policy explicitly allows notice upon discovery, the clock begins at the time of the occurrence. Consequently, arguments that late notice should be excused due to delayed discovery are routinely rejected, and the insured bears the risk of any delay in reporting the loss.

This case also highlights the importance of timely reporting insurance claims and signals that courts applying Texas law will not excuse delays absent substantial justification. Moreover, the prejudice requirement is not merely formal, and can be satisfied by tangible increases in cost, lost investigative opportunities, or other demonstrable harm to the insurer.

The Policy Period Predicament: Insureds Must Bring Claims Under the Correct Policy

by Scott Keffer

Recently, the U.S. District Court for the Northern District of Texas, Dallas Division, granted an insurer's motion for summary judgment, finding that the insured's hail damage claim under a 2022 policy should have been brought under the prior policy in effect at the time of the alleged loss. *Gann et al. v. Depositors Ins. Co.*, No. 3:24-CV-2168-S, 2025 WL 2483339 (N.D. Tex. Aug. 28, 2025).

Although the insured reported a date of loss on August 9, 2022 (which would fall within the 2022 policy period), the insurer's experts determined that the claimed damage was sustained on March 16, 2023 and/or April 21, 2023 (which would fall outside the 2022 policy period). On the other hand, the insured's experts concluded that the damage was caused by an earlier storm event on June 5, 2018, and insured's counsel utilized this date in subsequent claim correspondence. *Id.* at *2. Accordingly, the insurer denied coverage under the 2022 policy for damage caused by the 2018 storm, explaining that such damage occurred outside the effective period (from January 29, 2022 to January 29, 2023) of the 2022 policy. *Id.*

With respect to the insurer's motion for summary judgment, the court found that the insured's breach of contract claim was not viable because (1) any damage from the 2018 storm was not covered by the 2022 policy, (2) any alleged breach of the 2018 policy would also fail because such allegations were not included in the insured's live pleading and because the insured did not make a claim under the 2018 policy, and (3) even if the insured were to make a claim under the 2018 policy, it would also fail as prompt notice was not provided and the insurer would now be prejudiced by the delay. *Id.* at *3-*4. The court reasoned that upon the insurer's claim denial the burden was on the insured to make a new claim under the effective policy. *Id.* at *5. Likewise, the court found that the insured's extracontractual claims were not viable because the insured did not establish any independent injury separate from the denial of policy benefits and that the insurer was not liable under Chapter 542 of the Texas Insurance Code because it was not liable for breach of any insurance policy. *Id.* at *8.

As such, the court granted the insurer's motion for summary judgment and dismissed the case with prejudice. *Id.*

The Lowdown: An insured must make a claim under the policy that provides coverage for losses during that effective period or risk subsequent dismissal if a new claim under the effective policy is not made upon a denial of coverage due to the timing of the alleged loss.

Spotlight

Tom Papa has expanded his international licensure with his recent admission to the Texas Bar.

Fifth Circuit Affirms that Texas Law Does Not Permit Tort Recovery When the Insured Has Already Been Made Whole Under Their Policy

by Katherine Jakeway

This month, the Fifth Circuit made clear that Texas law does not permit tort recovery when an insured has already been made whole under their policy. In *Wilhite v. Ark Royal Ins. Co.* , No. 24-20401, 2025 WL 2588992 (5th Cir. Sept. 8, 2025), the Court held that a plaintiff's tort claims following a loss caused by a burst pipe in a home are foreclosed under binding circuit and Texas Supreme Court precedent if their damages have already been paid under their policy.

In this case, plaintiff George Wilhite submitted a claim to his insurer Ark Royal for damage caused by a burst water pipe in his home. Following the invocation of Wilhite's appraisal provision, Ark Royal paid Wilhite the balance and statutory interest due to him under the homeowner's policy.

Despite this payout, Wilhite proceeded to file suit against Ark Royal in state court, which Ark Royal removed to the United States District Court for the Southern District of Texas. Wilhite asserted four causes of action in his amended complaint: (1) breach of contract; (2) violations of the Texas Prompt Payment Claims Act (TPPCA); (3) breach of the common law duty of good faith and fair dealing, and (4) violations of Chapter 541 of the Texas Insurance Code (Unfair Methods of Competition and Unfair or Deceptive Acts or Practices). Ark Royal argued that Wilhite could prove no independent injury, as he was already made whole by the appraisal award and interest paid to him under his policy. Wilhite conceded that his contract and TPPCA claims were not viable but maintained that he was entitled to recover under his common law tort and Chapter 541 claims despite the appraisal payment. The district court disagreed and granted Ark Royal summary judgment on all claims.

On appeal, Wilhite argued again that Chapter 541 of the Texas Insurance Code entitled him to tort relief even if Ark Royal's payment to him precluded recovery on a breach of contract claim. However, the Fifth Circuit emphasized that this argument was barred by its recent decision in February of this year, *Mirelez v. State Farm Lloyds*, 127 F.4th 949 (5th Cir. 2025). In *Mirelez*, the insured submitted a homeowner's claim and invoked appraisal, which the insurer paid in full, plus interest. The insured sued and asserted the exact same claims as Wilhite. Mirelez alleged that he was entitled to actual and treble damages in tort despite being paid an appraisal award and applicable interest. Moreover, he specifically argued that Texas case law did not require him to prove an independent injury. The court

disagreed, and reiterated precedent from the Texas Supreme Court which "held, quite explicitly, that if the only 'actual damages' that a plaintiff seeks are policy benefits that have already been paid pursuant to an appraisal provision in that policy, an insured cannot recover for bad faith either under Chapter 541 of the Texas Insurance Code or in common law tort." *Id.* at 951 (citing *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 135 (Tex. 2019)). Moreover, the court highlighted that when a plaintiff has recovered his benefits in full through the payment of an appraisal award and interest, "[he] cannot maintain his extracontractual bad faith claims in the absence of evidence supporting an independent injury caused by alleged violations of Chapter 541 of the Insurance Code or an alleged breach of duty owed." *Id.* at 953.

Further, the Fifth Circuit reaffirmed *Mirelez* less than a week later in *Senechal v. Allstate Vehicle and Prop. Ins. Co.*, 127 F.4th 976 (5th Cir. 2025), where the court affirmed an order of summary judgment against the insured's tort claims because his insurer paid the appraisal award and because the insured presented no evidence of independent injury.

Surprisingly, despite this precedent, the court highlighted in a footnote that Wilhite's brief never even acknowledged *Mirelez* despite its publication three weeks prior and Wilhite's counsel being the counsel of record in *Mirelez*. Because Wilhite's claim was directly barred by the holdings in both the Fifth Circuit in *Mirelez* and Texas Supreme Court precedent in *Ortiz*, the court affirmed the order of summary judgment in favor of Ark Royal.

In sum, *Wilhite v. Ark Royal Ins. Co.* adds to a line of strong precedent, reaffirming that without an independent injury, Texas law does not permit tort recovery for an insured if they have been made whole by payment of an appraisal award under their policy.

Fatal to Recovery: *AZ Wealth Big Springs, LLC. v. Third Coast Insurance Co.* Confirms that the Insured Bears the Burden of Demonstrating that Damage Occurred Due to a Covered Peril Under Concurrent-Cause Doctrine

by Nicholas Smetzer

Texas Courts apply the concurrent-causation doctrine, which sets out that "when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril." *Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F.4th 469, 477 (5th Cir. 2022) (quoting *Dall. Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210. 222 (Tex. App. 2015). Texas courts routinely encounter insured parties who have proof that damage occurred yet fail to properly document and separate the covered damage from the uncovered damage.

Oftentimes it appears as though insured parties mistake their duty under the concurrent-cause doctrine as simply proving that damage occurred within the relevant policy period. This is a mistake and frequently prevents an insured's recovery. Under Texas law, the insured is obligated to both establish covered damage and, if there are covered and non-covered causes that contributed to that damage, separate the damages caused by the covered cause of loss from other non-covered causes. The Northern District Court of Texas's recent decision in *AZ Wealth Big Springs, LLC v. Third Coast Insurance Co.* joins a growing body of caselaw supporting the use of the concurrent-cause doctrine, and further establishes that being mistaken about the requirements to allocate and separate covered could be "fatal to recovery".

Third Coast issued a property insurance policy to AZ Wealth for buildings in Big Spring, Texas. AZ Wealth alleged that a hailstorm, which was a covered peril under the policy, caused damage to all roofs of the property. AZ Wealth relied predominantly on the opinions of its public adjuster that the roofs required replacement, as well as that a particular hailstorm that occurred during the March of the coverage period of the policy was a "likely" cause of damage. When Third Coast received the claim, the insurance company's adjuster pushed back on these assertions, determining that further investigation was required, particularly concerning the extent of the damage. While Third Coast eventually made a series of payments totaling $575,659.32, AZ Wealth continued to assert

that the entirety of the damage to the roofs was caused by the March hailstorm and that it was entitled to further payment under the policy.

The initial decision of Magistrate Judge John R. Parker was reviewed by Judge James Wesley Hendrix, who, relying on straightforward precedent in the Texas common law, found that a mere agreement between the parties that the roofs required replacement could not provide a jury with grounds to find that one storm was the sole cause of the loss. *See also Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 892 F.3d 167, 170 (5th Cir. 2018). The opinion in *Lowen Valley*, echoed by Judge Hendrix in his decision in *AZ Wealth*, emphasizes that to satisfy concurrent-cause doctrine, a plaintiff may not merely provide evidence that a covered event *caused* or *potentially caused* damage. Rather, a jury must be provided with evidence that allows them to reasonably segregate the amount of damage caused by the covered event from the damage caused by uncovered events. Merely addressing a particular event as the most likely cause or baselessly concluding that one storm caused all damage when other storms of similar strength could have been equally capable fail to meet this standard.

In *Lowen Valley,* the insured failed to provide data supporting its experts' claims that all damage suffered by the insured was due to a storm within the coverage period. While the insured's engineers definitively provided proof that the property sustained damage, their failure to prove *when* the damage occurred entitled the insurer to summary judgment.

Crucially in *AZ Wealth Big Springs*, the plaintiff's own expert failed to sufficiently rely on documentary or numeric data to establish that the March storm caused damage and even acknowledged the possibility of other storms occurring in April and May of that same year being partially responsible for the damage. In fact, all the evidence used by AZ Wealth in response to the summary judgment motion was deemed unsatisfactory, including proof of agreement between AZ Wealth and Third Coast that March 13th was the date of loss and physical evidence of hail splatter and hail-impact on roof surfaces. AZ Wealth's failure to supply an accounting for the damages to which the March storm was fatal to its recovery, and Third Coast was awarded summary judgment.

damages to which the March storm was fatal to its recovery, and Third Coast was awarded summary judgment.

Both insureds and insurers should take note of this decision. Texas courts will not make insurers pay for incidental damages simply because they occurred alongside a covered event, and the burden is on the insured to demonstrate the extent to which its damage falls under its policy.

BEYOND THE BLUEBONNETS

The Minnesota Supreme Court's Latest Interpretation of Replacement Cost – Insurers' Coverage Obligations Under Minnesota Statute Section 65A.10

by Lindsey Davis and Alex Buri (Minneapolis Office)

Minnesota Statute section 65A.10, subdivision 1 requires replacement cost insurance to cover, in the case of a partial loss, the "cost of replacing, rebuilding or repairing" the damaged part of the property "in accordance with the minimum code as required by state or local authorities." Earlier this summer, the Minnesota Supreme Court held that when hail-damaged shingles cannot be replaced without first installing new sheathing to comply with the applicable building code, section 65A.10 requires an insurer to cover the cost of replacing undamaged sheathing. *Great Northwest Ins. Co. v. Campbell*, 24 N.W.3d 256 (Minn. 2025). In so holding, the court invalidated the policy's "Roof Damage Limitation" Endorsement which provided coverage only for "direct physical loss" and not for "any layer of roofing material … beneath the outermost layer." The court also held that section 65A.10 does not require the insurer to pay for overhead and profit costs unless the insured shows that those costs are part of the "cost of replacing, rebuilding, or repairing any loss or damaged property in accordance with the minimum code as required by state or local authorities."

I n *Campbell*, the insurer approved the removal and replacement of its insureds' hail-damaged shingles. While replacing the damaged shingles, the contractor discovered that the roof's decking, which was not damaged, had gaps that were larger than permissible under the applicable state building code governing the installation of replacement shingles. The contractor installed sheathing over the existing decking and affixed the new shingles to the new sheathing.

The insurer denied coverage for installation of the new sheathing and the contractor's overhead and profit. The insurer brought a declaratory judgment action and argued that the Policy's "Roof Damage Limitation" and "Overhead and Profit" Endorsements explicitly bar coverage for these costs.

The "Roof Damage Limitation Endorsement" provided:

> There is no coverage for and "we" will not pay for tear off, repair, removal, or replacement of any layer of roofing material, including "decking", beneath the outermost layer. This limitation applies even if the tear off, repair, removal, or replacement of any layer of roofing material beneath the outermost layer or "decking" is necessary to repair, remove, or replace the outermost layer of roofing material. **This limitation also applies even if the tear off, repair, removal, or replacement of any layer of roof material, including "decking", other than the outermost layer, is required by any law or ordinance, including any building code.**
>
> "We" do pay for direct physical loss to "decking" below all layers of roof material, if a covered peril causes the direct physical loss to the "decking" and the loss is not subject to any exclusions in the policy.
>
> (Emphasis added).

The Endorsement defined "decking" as "the wood, plywood, wood fiber, or other material applied to the structure of a building or other structure and to which a roof assembly is attached." Because the gaps in the decking were not caused directly by the hailstorm, the insurer argued this Endorsement excluded coverage for installation of the new sheathing.

The "Overhead and Profit" Endorsement excluded coverage for "[o]verhead and profit on the materials and labor associated with roofing or the roofing system" unless the damage was caused by fire or lightning. Because the damage to the shingles was not due to fire or lightning, the insurer argued it did not have to provide coverage for the contractor's overhead and profit.

The insureds argued that both Endorsements were invalid because they conflicted with section 65A.10, subdivision 1, which states:

> Subject to any applicable policy limits, where an insurer offers replacement cost insurance ... the insurance must

cover the cost of replacing, rebuilding, or repairing any loss or damaged property in accordance with the minimum code as required by state or local authorities .... ***In the case of a partial loss, unless more extensive coverage is otherwise specified in the policy, this coverage applies only to the damaged portion of the property***.

(Emphasis added.)

In invalidating the policy's "Roof Damage Limitation" Endorsement and holding that an insurer's obligation under section 65A.10, subdivision 1 in the event of a partial loss "is limited to 'bringing up to code that "portion of the property" that was damaged,'" the court revisited its 2022 decision in *St. Matthews Church of God & Christ v. State Farm Fire & Cas. Co.* , 981 N.W.2d 760 (Minn. 2022). In that case, the insurer approved the repair and replacement of the church's hail-damaged drywall. When the damaged drywall was removed, cracks in the masonry behind the damaged drywall were discovered. The building official would not issue a building permit for the repair and replacement of the damaged drywall until the cracked masonry was repaired. The insurer denied coverage for the masonry repair because those issues were "unrelated to the storm event." The insured argued that the masonry repairs were a covered cost of repairing the "damaged portion of the property" under section 65A.10.

The court in *St. Matthews* agreed with the insurer and held that because the masonry was not "the damaged portion of the property," section 65A.10, subdivision 1 did not require coverage. As the court in *St. Matthews* explained, there was "no dispute that [the insurer] fully covered the cost of replacing the drywall consistent with any municipal codes related to the drywall," and "there is nothing in the record to suggest that [the insured] could not have installed the drywall without any additional repairs to the masonry." So repairs to the masonry were not covered under section 65A.10.

The court in *Campbell* concluded that the damaged part of the property was the shingles alone—not the decking. But critically, the state building code governing shingle installation incorporated the instructions set forth by the shingle manufacturer, which stated that the replacement shingles could be installed only on a roofing layer with gaps smaller than those on the home's current decking. Because the code governing the damaged property (i.e., the shingles) required the installation of new sheathing, the court concluded coverage is required by section 65A.10, subdivision 1.

The court in *Campbell* observed that its reasoning "align[ed]" with its reasoning in *St. Matthews.* In *St. Matthews*, the code relating to drywall installation did not require the masonry to be repaired before the new drywall could be installed. This was not the case in *Campbell* because the contractor could not have complied with the code governing the replacement of the damaged shingles without installing new sheathing. In *Campbell,* the insurer's failure to cover the cost of installing a new sheathing surface meant that they did not "fully cover[ ] the cost of replacing the [shingles] consistent with any municipal codes related to the [shingles]." This was not the case in *St. Matthews.*

The court held that section 65A.10, subdivision 1 does not obligate an insurer to pay for overhead and profit costs unless the insured shows that those costs are part of the "cost of replacing, rebuilding, or repairing any loss or damaged property in accordance with the minimum code as required by state or local authorities." In *Campbell*, the insureds cited no code provision supporting his argument that the contractor's overhead and profit were a "cost of repairing" the damaged property "in accordance with the minimum code as required by state or local authorities." The insurer's refusal to pay for overhead and profit costs was proper under the policy's "Overhead and Profit" Endorsement.

While it is critical that insurance professionals handling Minnesota property claims understand the implications of *Campbell*, it is important to recognize this case was decided under Minnesota's statutory scheme for fire insurance (i.e., Minnesota Statute section 65A). Its import fades outside of Minnesota where state legislatures have passed different statutory schemes and courts have interpreted an insurer's replacement cost obligations in partial losses differently.

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