ZELLE LLP LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Friday, November 21, 2025 | ISSUE 31

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

Todd Tippett's Top Ten Reasons to Properly Document a First-Party Insurance Claim File

News from the Trenches by Steve Badger

AI Update: Washington Eyes Federal Control of AI Regulation

Courts Stay Consistent in 'Period Of Restoration' Rulings

Fracking the Fine Print: The Fifth Circuit Analyzes the Duty to Defend, Bankruptcy Assignments, and the Contours of Third-Party Bad Faith

Beyond the Bluebonnets:
- **I Missed the Northern Lights Again, But the Insurance Industry Should Be Watching Carefully**
- **Sins of Policy Interpretation: A Call to Repentance**

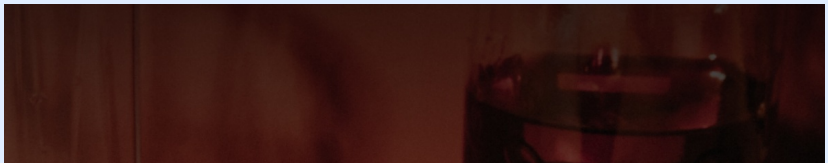
Collaboration Corner - Bridging the Gap: Why Collaboration Is the Strongest Material in Construction by Jeanne Boyd Curtis (Boyd BoneDry Commercial Roofing & Construction Consultants)

Upcoming Events

You don't want to miss this!

December 2 – Bennett Moss will present "Insurance Jeopardy" at the ABA TIPS Meeting in Dallas, TX.

December 8 – Steven Badger will present "Badger and Merlin Discuss The Big Issues" at the 2025 First-Party



Claims Conference (FPCC) in Boston, MA.

December 10 – Zelle LLP will host our 4th event in our quarterly collaboration Happy Hour series at Birdies Eastside from 5:00 - 8:00 pm alongside Polaris Forensics, ATI Restoration, and LFG Building Consultants. RSVP here.

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 13 – Steven Badger will present at the P.L.A.N. Appraiser & Umpire Certification Conference in Naples, Florida.

January 19 – Steven Badger will present "What the Hail is Going On? Update from the Trenches" at the MidAmerica Catastrophe Services Annual Claims Conference in Biloxi, Mississippi.

January 21 – Steven Badger will present "Roofing and Insurance – When Worlds Collide**"** at the International Roofing Expo Roofing Conference in Las Vegas, NV.

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

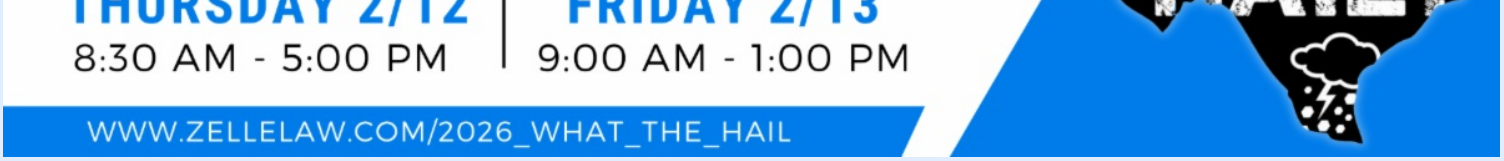
January 25 – Brandt Johnson will present "What the Hail is Going On? Fraud in CAT Claims" at the 2026 NACA Annual Convention in Durant, Oklahoma.

January 26 – 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.

February 12 - 13 – Zelle LLP 2026 What the Hail? Conference in Irving, TX. More information below.

March 23 – 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 2026 PLRB Claims Conference & Insurance Services Expo in National Harbor, MD.

Registration is over half full, secure your spot today!



Register Now!

Contact abannon@zellelaw.com with any questions.

1. **Consistent File Handling:** A well-documented file ensures that any adjuster or staff member can quickly understand the claim's history and pick up where another may have left off, which is especially important in a company where multiple people may handle a single file.

2. **Accurate Coverage Decision Making:** Detailed notes, including objective facts associated with the claim allow adjusters and their supervisors to make informed and accurate coverage decisions.

3. **Clear Communication:** Keeping a log of all interactions, including names, dates, and the content of conversations, ensures clear communication and a reliable point of reference throughout the claims process. Requesting information and written documentation from the insured to support the claim creates a formal record.

4. **Compliance with Statutes & Regulations:** Carriers obligated by Texas state law and the Texas Department of Insurance to process first-party claims within a specific time frame and provide detailed reasons for denials, all of which require a clear, documented file.

5. **Legal Readiness:** When a claim escalates to litigation or appraisal, your detailed file and notes provide the best defense for that proceeding. Insurers anticipate the possibility of litigation, and a complete claim file is essential for defending their coverage positions.

6. **Legal Protection:** Certain internal communications, notes and materials within the claim file are discoverable in legal proceedings. A complete and properly papered claim file helps to show the carrier acted in good faith.

News From the Trenches

by Steven Badger

Not a day goes by that I don't hear about "UPPA" – the unauthorized practice of public adjusting.

It's a pretty simple issue. If you are not an attorney or licensed public adjuster, you cannot negotiate an insurance claim on behalf of an insured. But it happens every day. Open any social media platform and you will be bombarded with contractors talking about their ability to get claims approved. Drive down any street after a hailstorm and you will see countless yard signs advertising contractors as "Insurance Claims Specialists." And read any claim file and you will find emails from contractors negotiating claim payments and threatening bad faith litigation.

We also have a huge problem now with "contractor driven appraisals". I would guestimate that 75% of the appraisal demands we see in residential claims are being pursued not by the homeowner, but instead by the contractor. Some contractors even have homeowners sign appraisal demand forms when they first sign the original contract. The contractor decides when to dump the matter into appraisal. The contractor selects the appraiser. The contractor pays all the costs of appraisal. And the contractor is the party who actually profits from the appraisal process. I posted about this issue recently on LinkedIn…. UPPA_Appraisal_Contractor

The problem is rampant. But why?

It's simple. There is presently no enforcement by the Texas Department of Insurance going after offending contractors. For the same reason, the waiving of deductibles remains rampant. Again, there is no enforcement by the TDI or Texas Attorney General to stop deductible eaters.

But is it fair to blame the TDI and Texas AG for this lack of enforcement?

Partially. Both agencies have limited staffs. They must prioritize issues. And when there are limited resources, the squeaky wheels get the grease. If we believe that UPPA and the waiving of deductibles are problems, we have to do a better job making sure the TDI and Texas AG are aware of our concerns. We do that by filing complaints. And we have to do a better job filing complaints. I am guilty of slacking off here as well. There was a rumor going around the storm chasing contractor world ten years ago that "Badger turns in five contractors a week". Actually, that rumor was fairly accurate. I submitted complaints weekly. But I haven't filed a single complaint in the past few years. I need to do better. We all need to do better.

I am pleased to let you know that leadership from the Texas Department of Public Insurance Adjusters is meeting today with the Commission of the Texas Department of Insurance to discuss this important issue. Hopefully, as a result of this meeting we will see renewed interest by the TDI in taking on this significant problem.

But, again, we have to do our part and file complaints. Are you dealing with a UPPA problem? Let me know. Send me the communications and social media posts. I'll help you file the appropriate complaints. Or I'll do it myself.

As I said, I will do better in addressing this important issue. I am asking you to as well.

7. **Ensures a Proper and Prompt Resolution:** Having all necessary documentation, including the information necessary to secure a "Proof of Loss" when required, helps ensure the adjuster is handling the claim promptly and avoids delays or premature denials due to incomplete information.

8. **Appropriate Negotiation:** A consistent and properly papered claim file provides the factual basis needed to challenge an insured's unreasonable claim position or settlement offer. When an adjuster disagrees with an insured's claim position, clear written communication and documentation supports the carrier's counter-arguments and a reasonable resolution.

9. **Protection Against Fraud:** A thorough investigation and a well-documented claim file assists in showing when an insured is not making a claim in good faith, which allows denials on suspicion of fraud, when appropriate.

10. **It is Simply the Right Thing to Do.** A complete and properly papered claim file shows that the carrier and its adjusters have done everything possible to put the insured's best interests first.

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

Washington Eyes Federal Control of AI Regulation

by Jennifer Gibbs

In a bold shift toward centralized oversight of artificial intelligence (AI), the White House is reportedly preparing an executive order dramatically reducing the regulatory power of individual states and consolidating AI policy at the federal level.

According to a draft executive order titled "Eliminating State Law Obstruction of National AI Policy," the Department of Justice would establish an AI Litigation Task Force assigned to challenge state AI laws deemed "burdensome, unconstitutional, or interfering with interstate commerce."

Additionally, federal funding could be withheld from states whose AI regulations conflict with the White House's goal of establishing a "light-touch" national framework.

Why this matters:

- For businesses and tech innovators, this move promises fewer state laws to navigate and potentially easing the compliance burden and supporting a more unified operating environment.
- For citizens and state advocates, however, it raises red flags about the loss of local safeguards around algorithmic bias, transparency, and consumer protections.

What to watch:

1. Whether the executive order is signed, and when.
2. How states respond, such as California and Colorado whose AI transparency laws are specifically cited in the draft of the proposed executive order.
3. How advocacy groups and civil-rights organizations react and address constitutional concerns such as free speech, state's rights, and privacy.

Take-away message:

Whether you support the proposed order or have concerns it could weaken consumer protections, what appears to be unanimous is that this move from the White House could become the most important shift in AI policy to date, and could significantly reshape how businesses, creators, and everyday citizens engage with one the most rapidly-evolving technologies of our time.

Courts Stay Consistent In 'Period Of Restoration' Rulings

by Jennifer Gibbs and Adrienne Nelson

A necessary and critical component of a lost business income claim is the calculation of the period of restoration. However, despite its recognized importance, the period of restoration appears to be one of the least litigated, but most consequential, dimensions of first-party property and time element coverage.

A Sept. 19 decision from the U.S. District Court for the District of Arizona, *Madrona Health Inc. v. Nationwide General Insurance Co.*, underscores both the hypothetical, policy-tethered nature of the period and the fact-intensive character of its duration. *Madrona Health Incorporated v. Nationwide General Insurance Company*, 2025 WL 2689771 (D. Arizona 2025).

Considering the *Madrona* decision, this article outlines the contractual basis for the period of restoration, typical triggers and endpoints, how courts have treated disputes over its application and scope, and best practices in addressing period-of-restoration issues during the claim adjustment process.

Contractual Architecture: What the Period of Restoration Is — and Is Not

Most property and time element forms define the period of restoration as the theoretical time needed — using "due diligence and dispatch" or "reasonable speed" and materials of a "similar quality" — to repair, rebuild or replace damaged property and resume operations. The clause is typically prospective and hypothetical, often keyed to when the property should be repaired or replaced, not the date when it is actually restored.

Two corollaries flow from this baseline.

First, the period of restoration is a tool of temporal allocation. It limits indemnity for business income and extra expense to a period tethered to the repair/replace/rebuild horizon for the damaged property. It does not, standing alone, guarantee protection until the insured's operations are fully restored in a business performance sense; that role — if purchased — may be played by an extended business income (EBI) or extended period of indemnity provision.

Second, the provision is property-centric, not market-centric. Losses caused by marketplace dislocation, customer behavior or policy-excluded impediments do not generally extend the restoration period, though such downstream effects may be relevant under separate, extended coverages or distinct insuring agreements (e.g., leasehold interest).

Triggers and Endpoints: How the Clock Starts and Stops

Policies usually commence the period of restoration upon the date of direct physical loss or damage at the described premises, often after applying any waiting-period deductible. The period's end date is typically the earlier of the time by which the property should be repaired, rebuilt or replaced with reasonable speed and similar quality or the time at which operations resume at a new, permanent location.

Courts have consistently emphasized the hypothetical nature of the period's endpoint. In practice, that generally means:

- The endpoint is not extended by unrelated or excluded delays. For example, delays caused by third-party acts or omissions, governmental permitting where excluded, or subsequent excluded causes of loss are typically out of bounds for measuring the restoration period.
- The endpoint is not pegged to the literal rebuilding of an entire complex if the insured occupied a suite or store within a larger structure. Instead, it is measured by the reasonable time to replace the insured's premises and critical property interests necessary to resume operations.
- The endpoint of the period of restoration often diverges from actual time needed to restore the business to its profitability, including making up for lost market share. Extended business income coverages, including EBI or extended period of indemnity coverage, are designed to bridge the gap between physical restoration and the return of business to preloss levels, preventing the period-of-restoration clause from being stretched to cover pure post-reopening market recovery.

How Courts Frame and Resolve Period-of-Restoration Disputes

While the body of case law addressing the period of restoration is sparse, both older and newer decisions reflect consistent themes: The period is hypothetical, property-focused and often separable from causation and market-recovery questions.

In the seminal case, Duane Reade Inc. v. St. Paul Fire & Marine Insurance Co., which involved the period of restoration for a drugstore destroyed in the Sept. 11 attack on New York's World Trade Center, the U.S. District Court for the Southern District of New York construed the period as a hypothetical timeline to rebuild or replace the damaged store and resume operations at the World Trade Center location. *Duane Reade Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F.Supp.2d 235 (S.D.N.Y. 2003), aff'd as modified, *Duane Reade Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 at *392 (2d Cir. 2005), quoting 279 F.Supp.2d at 239.

Absent language that conflicted with the coverage provided in the insurance policy, the U.S. Court of Appeals for the Second Circuit refined the district court's formulation, holding, in 2005, that coverage continues for the time reasonably required to repair, rebuild or replace the functional equivalent of the lost store and resume operations in a permanent location reasonably equivalent to the prior site — not tied to rebuilding the World Trade Center itself. *Duane Reade*, 411 F.3d at *394-395.

The appellate court also made clear that once the legal question concerning the scope of coverage provided by the insurance policy is resolved, the length of the period is a valuation question that can be sent to appraisal. *Id.* at 398-99.

In 2025, there has been a recent flurry of decisions addressing the period of restoration.

Madrona Health v. Nationwide General Insurance

Madrona underscores both the hypothetical, policy-tethered nature of the period and the fact-intensive character of its duration. Following a June 2021 fire at an administrative office, an insurer paid business income through November 2021. The policy defined the endpoint as the date when the property should be repaired, rebuilt, or replaced with reasonable speed and similar quality.

The parties had initially targeted an Oct. 31, 2021, completion, and the insurer later issued a letter contemplating a contingent extension through year-end. On summary judgment, the court declined to fix the endpoint as a matter of law and denied the insurer's motion on the breach-of-contract theory.

The policyholder had adduced evidence that landlord-related factors impeded progress, creating a genuine dispute over what reasonable speed meant in the circumstances. In line with authority recognizing that what constitutes reasonable speed is often a jury question, the court left the restoration period duration for trial.

At the same time, the court rejected bad faith and punitive damages claims, finding no probative evidence that the insurer subjectively knew its handling was unreasonable, including as to cessation of payments after November and the contingent nature of any December extension.

Madrona thus illustrates a recurring pattern: Courts are receptive to fact-driven disputes over the period's length while remaining skeptical of tort liability premised on reasoned, supported differences in scheduling or methodology. Absent evidence that an insurer's calculations were made intentionally or maliciously to reduce its payment obligations, courts are unlikely to view its actions as improper to support bad faith and punitive damages claims.

Comprehensive Medical Center v. State Farm

In *Comprehensive Medical Center Inc. v. State Farm Mutual Automobile Insurance Co.* , the U.S. Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of State Farm where the record supported a period-of-restoration endpoint of six months or less. *Comprehensive Medical Center Inc. v. State Farm*, 2025 WL 416814 (9th Cir. 2025).

The court concluded in its Feb. 6 ruling that the policy's "should be repaired ... with reasonable speed" language excluded from the hypothetical period of restoration time attributable to acts or decisions of third parties, ordinance or law delays, and subsequent excluded leakage events. The court also recognized that appraisal panels may resolve factual disputes and arrive at a valuation of the loss, including preloss condition and trajectories relevant to amount of loss.

Inland Fresh Seafood v. Travelers

In its Sept. 22 ruling in *Inland Fresh Seafood Corp. of America Inc. v. Travelers*, the U.S. District Court for the Eastern District of Louisiana distinguished the period of restoration from EBI, rejecting an interpretation that would make EBI meaningless by ending it the day it begins. *Inland Fresh Seafood Corp. of America, Inc. v. Travelers* (E.D. La. 2025).

Addressing bad faith allegations tied to competing expert analyses of the restoration timeline, the court found a legitimate expert dispute does not establish bad faith. Separate issues of untimely payment and EBI interpretation proceeded to the jury.

Collectively, these decisions define period of restoration as:

- Hypothetical: measured by what should have occurred with due diligence and reasonable speed, not what actually happened.
- Property-oriented: tied to repairing, replacing or rebuilding of the damaged property at the described premises (or relocation to a reasonably equivalent permanent location), excluding external causes and policy-excluded delays.
- Separate from EBI: preserving the distinct function of any extended indemnity provision to address post-reopening market recovery.

Common Pitfalls in Adjusting and Litigating the Period of Restoration

The reported decisions identify issues that can arise in the adjustment of time element claims involving a dispute over the appropriate period of restoration under the policy.

Conflating Operations Restoration and Property Restoration

Courts have repeatedly rejected attempts to extend the period of restoration to encompass the time needed to regain preloss customer levels or market share, finding that is a distinct coverage inquiry under EBI, not the restoration period.

Anchoring to Actual Repair Durations Laden With Excluded or Extraneous Delay

The "should be repaired" standard is theoretical and forward-looking. Tethering the period to real-world delays that policies expressly exclude or that fall outside due diligence benchmarks is not appropriate.

Overreliance on "Same Site" Arguments

Unless the policy language uniquely ties the period to rebuilding the exact same premises, courts measure reasonable restoration by the time to replace or relocate to a reasonably equivalent permanent location.

Ignoring Jurisdictional Differences in Appraisal Scope

Disputes about whether appraisers can determine causation and restoration duration should be examined with state-specific appraisal statutes and jurisprudence in mind.

Interplay With Bad Faith and Statutory Interest

From the above-cited opinions, two themes emerge. First, courts are skeptical of bad faith theories premised on reasonable, expert-driven disputes over restoration timelines, payments made as a good faith gesture to resolve disputes between experts, or where the evidence reflects transparent calculations and communications.

Inland Fresh illustrates that reliance on a qualified expert's critical-path estimate — where both sides present experts — generally defeats bad faith theories tied to the period's length. 2025 WL 2694628 at *10.

Madrona demonstrates that no bad faith or punitive claim tied to payment cessation and methodology changes exists where the record fails to show the insurer intentionally made those changes to reduce its payment obligations and instead reflects transparent calculations, contingent communications and/or payment offered in good faith to resolve a disagreement between expert opinions. 2025 WL 2689771 at *2-3.

Second, separate timeliness and payment-handling issues can still create exposure. 2025 WL 2694628 at *8.

In *Inland Fresh*, the court found a per se statutory violation where an undisputed payment was delayed beyond the statute's deadline; and it allowed a bad faith theory to proceed based on an arguably unreasonable interpretation of EBI that would make that coverage illusory. *Id.* at *9 and *12. These determinations are jurisdiction-specific and turn on proof-of-loss rules and statutory timing requirements.

This article was originally published by Law360.

Fracking the Fine Print: The Fifth Circuit Analyzes the Duty to Defend, Bankruptcy Assignments, and the Contours of Third-Party Bad Faith

by Alexander Masotto

The Fifth Circuit in *BPX Production Company v. Certain Underwriters at Lloyd's London*, No. 23-20034, 2025 WL 2952911 (5th Cir. Oct. 20, 2025), revived oil and gas producer BPX Production Company's contractual coverage claims as assignee of oilfield services company BJ Services. The Court held that insurers may not leverage procedural "consent-to-suit" conditions after denying coverage and that underlying liability and indemnity can be litigated together in a coverage action when the insurer denied the duty to defend. At the same time, the Court affirmed the dismissal of extra-contractual third-party bad-faith claims, and clarified the limits of Stowers liability where the insured has obtained a bankruptcy discharge.

Background

BPX retained BJ Services to cement production casing on a West Texas well. BJ Services used the wrong cement components, causing the slurry to set prematurely and creating a 7,000-foot cement plug. The well was ultimately abandoned and redrilled. BPX invoked the Master Services Agreement's ("MSA") dispute-resolution process and demanded payment. BJ Services notified its insurers and requested a defense and indemnity. However, Insurers denied coverage, citing a property-damage exclusion and noncompliance with requirements tied to a supplemental endorsement. In addition, insurers generally reserved their rights but did not identify lack of consent as a basis to refuse any defense.

Notwithstanding the denial, BPX and BJ Services proceeded with settlement negotiations pursuant to the MSA. Soon after, BJ Services filed Chapter 11, and, in January 2022, the bankruptcy court approved a settlement by which BJ Services assigned to BPX "any and all" insurance claims against Insurers related to Insurers' refusal to defend and indemnify, and BPX released its claims against BJ Services. BPX, standing in BJ Services' shoes, then sued Insurers for breach of the duties to defend and indemnify, and for extra-contractual claims.

The Bankruptcy

BJ Services' Chapter 11 filing intervened while BPX's claim was pending. Rather than litigate liability within the estate (or pursue a late proof of claim), the bankruptcy court approved a stipulation and agreed order assigning BJ Services' insurance claims against Insurers to BPX in full satisfaction of BPX's claims against BJ Services, and expressly foreclosing BPX from pursuing recovery against BJ Services or the estate. The Fifth Circuit held that this structure did not bar BPX's pursuit of coverage. Relying on its precedent, the Court reaffirmed that a debtor's discharge and a creditor's failure to file a proof of claim do not extinguish the creditor's ability to prosecute a liability-fixing suit for the limited purpose of recovering from insurance proceeds. The Court further recognized that where an insurer wrongfully refuses to defend, underlying liability and coverage may be tried together in the coverage action, avoiding duplicative and non-adversarial proceedings that bankruptcy realities often produce. *See Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655, 669 (Tex. 2017).

Duty to Defend - Duty to Indemnify

Ultimately, the Court held that the CGL policy defined "suit" to include "any other alternative dispute resolution proceeding" in which damages are claimed and to which the insured submits with the insurer's consent. The Court held that the MSA's formal, mandatory dispute-resolution process qualified as an "alternative dispute resolution proceeding," distinguishing "informal" pre-suit discussions addressed in prior unpublished authority. Crucially, the Court held that Insurers waived any consent-to-ADR requirement by wrongfully denying coverage without asserting lack of consent as a ground. Under Texas law, an insurer that wrongfully refuses to defend forfeits reliance on post-loss procedural conditions. Construing ambiguity in favor of the insured, the Court rejected a cramped view of "suit" that would exclude ADR not amounting to a civil proceeding.

Although indemnity typically depends on the outcome of the underlying liability action, the Court applied Texas's *Hamel* doctrine to permit adjudication of both underlying liability and coverage in the same suit when the insurer refused to defend and bankruptcy dynamics make a fully adversarial underlying judgment unlikely. The bankruptcy court's assignment and BPX's agreement not to seek estate recovery did not preclude BPX's indemnity claims; a discharge or failure to file a proof of claim does not allow an insurer to escape coverage where liability may be fixed solely to collect from insurance.

Extra-Contractual Claims

Lastly, the Court affirmed the dismissal of BPX's extra-contractual duty-of-good-faith claim. Texas recognizes no common-law third-party bad-faith claim outside the Stowers duty. *See Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co.* , 236 S.W.3d 765, 776 (Tex. 2007). Any Stowers theory also fails because a Stowers claim requires actual excess liability imposed on the insured. BJ Services' bankruptcy discharge eliminates the requisite "legal injury" to the insured, foreclosing Stowers-based recovery as a matter of law.

Significance

Insurers should recognize that contractually mandated alternative dispute resolution (ADR) processes can trigger the duty to defend under commercial general liability (CGL) policies that broadly define "suit" to include ADR proceedings. Insurers risk waiving key procedural defenses, such as consent-to-suit and settlement-without-consent clauses, if they wrongfully deny coverage without timely raising these defenses. Moreover, bankruptcy of the insured does not absolve insurers of their indemnity obligations; assignments of insurance claims through bankruptcy proceedings remain enforceable. Finally, insurers should note that extra-contractual third-party bad-faith claims are limited by Stowers liability principles, which require actual excess liability to the insured, a condition often negated by bankruptcy discharge. Overall, this ruling highlights the need for insurers to carefully evaluate coverage denials, defense obligations, and procedural conditions early to avoid forfeiture of rights and unexpected exposures.

Spotlight

Zelle's Dallas office welcomes new associates Katherine Jakeway and Nicholas Smetzer.

Katherine Jakeway

Nicholas Smetzer

BEYOND THE BLUEBONNETS

I Missed the Northern Lights Again, But the Insurance Industry Should Be Watching Carefully

Insurance Industry Should Be Watching Carefully

by Kristin Suga Heres (Boston office)

On November 11 at 9:18 p.m., my phone erupted with the dings of incoming text messages advising me to go outside and "look north." Those texts were soon followed by photos of the brilliant night sky above my small Massachusetts town. The northern lights were back! I'd missed them back in October 2024, when New England was abuzz with the rare appearance of the aurora in our corner of the world. Unfortunately, I was about to miss it again, unable to find a view unobstructed by trees or light pollution.

It struck me as odd that these (missed) viewing opportunities appeared to be occurring with increasing frequency in my area. What was once rare now seemed to be a recurring phenomenon. But why?

It turns out that these events are caused by active cycles of solar activity. The auroras visible on November 11 were sparked by the sun's release of an intense X5.1-class solar flare – the strongest one of the year to date. While the flare and coronal mass ejections that followed had no impact in my town (except to delight the inhabitants lucky enough to witness the resulting show), Europe and Africa were left to deal with widespread disruptions of high frequency radio communications. *See https://www.space.com/astronomy/sun/sun-unleashes-strongest-solar-flare-of-2025-sparking-radio-blackouts-across-africa-and-europe*

This is not the first time that extreme space weather has had an impact here on Earth. Back in 1859, the "Carrington Event", an incredibly intense geomagnetic storm, caused major telecommunications disruptions by causing sparking and fires at telegraph stations. https://en.wikipedia.org/wiki/Carrington_Event Other consequential impacts from space weather have occurred in the years since then. Such events can have widespread impacts on infrastructure, satellites, communication networks and more. The potential effects of space weather reach beyond risks to electrical grids and other technologies. According to the European Space Agency, space weather poses a threat to the integrity of pipelines. Specifically, geomagnetic disturbances can corrupt cathodic protection survey data and reduce the useful life of pipelines.

https://swe.ssa.esa.int/TECEES/sda/pipelinesws/index.html#:~:text=SDA objective,layers of special isolating coating.

In a world dependent upon electrical power, communication networks, and critical pipelines—all of which can be affected by solar activity—the potential impact of disruptions is significant and can have a ripple effect on commerce and the orderly functioning of society more generally. In 2013, Lloyd's, together with AER (Atmospheric and Environmental Research) produced a report that discussed the impact that an event like the Carrington Event would have if it had occurred in modern times. https://assets.lloyds.com/assets/pdf-solar-storm-risk-to-the-north-american-electric-grid/1/pdf-Solar-Storm-Risk-to-the-North-American-Electric-Grid.pdf

The report's conclusions are sobering:

"The total U.S. population at risk of extended power outage from a Carrington-level storm is between 20-40 million, with durations of 16 days to 1-2 years. The duration of outages will depend largely on the availability of spare replacement transformers. If new transformers need to be ordered, the lead-time is likely to be a minimum of five months. The total economic cost for such a scenario is estimated at $0.6-2.6 trillion USD."

The report also predicted that such a disruption would have major implications for the insurance industry.

Given the wide range of risks to various interests around the world posed by space weather and solar storms, there are lots of different needs for the insurance industry to address, and the insurance industry is taking notice—and action. For instance, Lloyd's is educating its policyholders on the risks posed by extreme space weather and designing insurance products to meet their evolving needs. https://www.lloyds.com/insights/futureset/futureset-insights/systemic-risk-scenarios/extreme-space-weather/insurance-industry-impact

While space weather can put on a show that delights multitudes, it also presents myriad risks to our technology-dependent existences. The insurance industry is right to keep a close eye on the skies.

Sins of Policy Interpretation: A Call to Repentance

by George E. Reede, Jr. (Washington, D.C. office)

Written words have an intended meaning. Fair-minded readers try to grasp that meaning. But other readers impute motives to the writer either to serve their own ends or to protect the writer from unforeseen consequences.

Once, early in my career, I met with an insured and his attorney to prepare for the insured's deposition in a subrogation case. Our theory was that a certain defective product had caused the fire. A critical question, and our first to him at the meeting, was where the product was located at the area of origin. His response, to our horror: "Where do you need it to be?"

Unfortunately, for some coverage attorneys, the only real question about policy language is: "What do you need it to mean?"

This ought not to be.

Those looking for scholarly exegesis on ejusdem generis or the contra proferentem canon should look elsewhere. Our goal here is a simple one: to call to repentance those among us who omit, ignore, or otherwise misuse and abuse the words of an insurance policy to achieve a desired end.

The Stated Objective: Discerning Actual Intent

In the prefatory language of insurance coverage decisions, courts routinely emphasize the objective of contract interpretation: to determine what the parties intended based on their chosen language. In TravCo Ins. Co. v. Ward, the Supreme Court of Virginia put it this way:

> *"Courts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document. Each phrase and clause of an insurance contract should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done, so as to effectuate the intention of the parties as expressed therein."*

Interpretive tools are available to achieve that goal in good faith. But the temptation to resort to other, darker means can be strong when the stakes are high.

Mistakes are made, to be sure—sins of interpretation are not always intentional. And anyone with a dose of humility who does coverage work will acknowledge that policy interpretation is not an exact science. But we should all aspire to discern actual intent from the words used in the policy.

Before turning to interpretation, we should, in fairness, begin with the drafter who starts it all—the one who sometimes commits the original sin.

Ambiguity—The Original Sin (of The Drafter)

In a sense, the first and most fundamental sin is poor expression; the drafter's failure to clearly convey the intent behind the words chosen. There should be one, and only one, "plain meaning" that leaves no room for another reasonable, alternative interpretation. Inartful words have consequences. And if the plain meaning is literally "undiscoverable," drafters can expect to face the contra proferentem consequences. As Judge Learned Hand once put it, "insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion."

This caution is not just for insurers; it extends to everyone involved in the drafting process. Policy drafting can be a team sport, involving brokers and insureds as well as underwriters and agents. Without careful consideration, the placement process itself can become the enemy of clarity if brokers and underwriters cobble together manuscript forms and recycle them year after year.
The key takeaway is that anyone who takes up the pen (so to speak) should draft policy language with these principles firmly in mind. If the insurance coverage actually intended is to be the insurance coverage actually provided, drafters must avoid the sin of ambiguity.

Faux Ambiguity

But this leads us to a related sin. In Erie Ins. Exchange v. EPC MD 15, LLC , the court cautioned that "a court may give up quickly on the search for a plain meaning by resorting to the truism that a great many words—viewed in isolation—have alternative, and sometimes quite different, dictionary meanings." The court characterized this as a "temptation" to be "resisted" when interpreting an insurance policy.

Thus, rushing to declare words ambiguous is also a sin.

Sins of Omission

Plutarch, the ancient Greek philosopher, observed: "The omission of good is no less reprehensible than the commission of evil." We have a similar concept in mind here. The interpreter knows the right answer—or should—and obfuscates that answer through critical omissions. By way of a telltale ellipsis or otherwise, inconvenient words are sometimes overlooked or ignored in ways that frustrate the express intent of the drafter.

For example, in Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co. , the court acknowledged that a virus exclusion was subject to an anti-concurrent causation clause but then failed to interpret or apply it. Despite language referencing "other causes acted concurrently or in any sequence with the excluded event to produce the loss," the court found the virus exclusion inapplicable:

> *Therefore, in applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not, as the Defendants argue, a tenuous connection anywhere in the chain of causation. That is, although the Virus Exclusion does require that the virus be the cause of the policyholder's loss, the connection must be the immediate cause in the chain.*

By requiring a direct connection between the exclusion and the loss, and that the virus be the immediate cause in the chain, the court treated the anti-concurrent causation language as if it did not exist, with no meaning assigned to the words whatsoever.
Simply put, as the EPC court emphasized, words should not be ignored; the meaning of every word should be carefully considered to achieve what the parties intended based on all of the language used in the policy.

Sins of Commission

The English language is subject to overt abuse and misuse. The English poet, John Gay, wrote:

> *I know you lawyers can, with ease, / Twist words and meanings as you please; /*
>
> *That language, by your skill made pliant, / Will bend to favor every client."*

The range of creative possibilities is seemingly endless. For example, some among us feel free to rewrite inconvenient language, as if it were within our power to unilaterally reform the policy to suit our client's purposes. Words are added where needed. An "exclusion" is transformed into a "coverage," or vice versa. A singular occurrence becomes multiple occurrences to implicate multiple limits or render sublimits meaningless—but becomes a singular occurrence once again to avoid a deductible. And so on.

In perhaps its most common iteration, the sin of commission involves straining the meaning of words beyond their reasonable breaking point. In Bratton Estate of Slone v. Selective Ins. Co. of Am. , Justice Kelsey's exasperation with the majority's strained policy interpretation was palpable. The question for the court was whether the driver was "occupying" his vehicle, i.e., "in, upon, using, getting in, on, out of or off" the vehicle at the time of the accident for purposes of uninsured/underinsured motorist insurance. Before being struck and killed, the driver of a dump truck "had gotten out of the dump truck. He had closed the door to the truck cab, and he had walked at least nine feet prior to the accident." Applying a "vehicle-oriented" standard, the majority nevertheless held that the driver was still "getting out of" the vehicle at the time of the accident.

Justice Kelsey's dissent is worth quoting at length:

> *In effect, the majority holds that the process of "getting out of" a vehicle continues after one has already gotten out of it, so long as the "getting out" process is "vehicle-oriented." I have no idea what this means.*
>
> * * *
>
> *To the ordinary person, getting out of a vehicle means physically getting out of it and closing the door. A generous construction would allow the "process" of getting out of a vehicle to include getting other things out, such as grocery bags out of the back seat or children out of a minivan. In a commercial context, it might even include getting tools or supplies out of the back of a truck. But if the expression is to mean anything, it simply cannot mean getting out, closing the door, and walking at least nine feet away. That is not "getting out;" it is "gotten out."*

A Word About Outright Lies

Only a brief word should be necessary on this point. Our duty of candor is crystal clear. When vigorous advocacy strays beyond the boundaries of what we know is true, we have strayed too far. Policy interpretation is no exception.

A Call to Repentance

Coming full circle, those who draft policies have an intended meaning, and discerning their actual intent is our stated goal. There is a true and a false, a right and wrong—the coverage intended and paid for, not the coverage preferred in hindsight.
In the fog of coverage war, we can lose sight of the goal and, perhaps unwittingly, find ourselves committing the sins of policy interpretation in all sorts of Machiavellian combinations. And the truth becomes a casualty.

If you are already fighting the good fight, consider this a chance for dramatic renewal of purpose.

But if you have lost sight of the real goal, consider this a call to repentance. Let the truth—or at least the true intent—set you free.

This article was originally published by *Claims Journal*

Bridging the Gap: Why Collaboration Is the Strongest Material in Construction

by Jeanne Boyd Curtis Boyd BoneDry Commercial Roofing & Construction Consultants

COLLABORATION CORNER

When I read that this year's Zelle Lonestar Lowdown theme was collaboration, I couldn't resist the urgency to submit an article. As a fourth-generation general contractor and a third-generation commercial roofer, I've seen firsthand how disputes between contractors, insurers, and property owners can delay projects, increase costs, and strain relationships. But I've also seen the opposite: when all parties commit to collaboration, disputes can become opportunities for clarity, efficiency, and trust-building. When we stop focusing on numbers and turn our focus to the people we're working with, claims can be solved quicker,

people feel valued and important, and the entire climate of our industry can shift.

As a former school principal turned contractor & appraiser, collaboration was a vital life-skill I saw missing in so many of our industries communities. Working effectively with others to achieve shared goals, fostering innovation and building stronger communities helps achieve the end result we all want…to preserve the integrity of the industry and honor the people who rely on us…the property owner! But how do we do that when some people are so contentious you just can't get a word in edge wise or when some people are such blowhards you know they'll never hear your side of things? Well, as all the research will show you, the ability to connect personally with people directly ties to collaboration. Genuine, relationship-based networking leads to trust and people like to do business with people they like, trust and feel connected to. But to make that happen, we have to take time out of our busy schedules to build rapport with the person we're "opposing". Be an active listener. Go outside the scope of your assignment and humanize the other side. See them as a person, not an opponent. Take the time to ask the questions, "how's your day going?"

And then listen to WHAT they say and HOW they said it…is there room there for you to expand on a more personal relationship with them or did they just say, "fine, thanks". If there's room to expand then do so, if there's not then try again. For example when I go out on insurance inspections or appraisals, of course it's polite to ask the "other side" how their day is going but if the response is short and unapproachable then I open up the conversation to them, for example, I might say, "I haven't been out to this property before, tell me, what do you see?" People are usually surprised when you ask them to hear their side first and where they're coming from.

Then again, listen! You don't have to agree with them, you just have to hear them. And when you're listening is there anything you can find common ground on? If there is, expand on that and create that first building block of trust. When people feel personally connected they move from defending their position to understanding the other person's interests because at the end of the day, collaboration isn't about who's right - it's about doing right by the people who trust us to build, repair, and restore what matters most.

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!

ZELLE LLP

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

Join The Zelle Lonestar Lowdown mailing list!

Sign me up!

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm or its clients. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

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