ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Thursday, January 29, 2026 | ISSUE 33

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

In 2025, we focused on Collaboration. We had people reach out with article ideas, their own articles, and ideas for industry events. In 2026, we will continue that effort. We continue to invite our readers to let us know what they are worried about, legal topics that pique their interest, and new advances in the industry – all with a Texas twang.

We are also excited to announce that Zelle is issuing a quarterly newsletter addressing law in the Midwest called the "Midwest Monitor: Heartland Insurance Review." The first edition may be found here.

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

INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

February 5 – Jessica Port will present "The Ethics of Automation: Avoiding Bad Faith Claims in AI-Driven Claims Handling," as part of the PLRB *2025 By Popular Demand* webinar series with co-presenters Gene Strother (AdjustU) and Robin Roberson (Agentech).

February 11 – Steven Badger will attend "The Steve Badger Roast" at the Storm Restoration Contractor (SRC) 2026 Summit in Irving, TX.

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

February 24 – Jennifer Gibbs will present “AI in Claims: Risks and Rewards” at the 2026 Windstorm Insurance Conference in Kissimmee, FL, with co-presenters John Wood (Green Klein Wood & Jones), Sarah Parker (Parker Public Adjusting), and Austin Cocoli (ClaimsCortex).

March 5 – Jane Warring will present “Emerging Cyber Issue: What Happens When First Party Losses Become Third Party Claims?” with co-presenter Peter Halprin (Haynes and Boone LLP) at the ABA 2026 Insurance Coverage Litigation Committee CLE Seminar in Tucson, AZ.

March 6 – Jonathan MacBride will present “Are Bad Faith and Coverage Experts Admissible at Trial?” at the ABA 2026 Insurance Coverage Litigation Committee CLE Seminar in Tucson, AZ.

March 10 – Steven Badger will present “Hot Topics In Texas Property Claims” at the Texas Association of Public Insurance Adjusters - TAPIA Spring Conference in Frisco, TX.

March 11 – Steven Badger will participate in the Appraiser/Umpire Training Course at the P.L.A.N. Property Loss Appraiser & Umpire Certification Conference in New Orleans, LA.

March 12 – Steven Badger will present “Herding the Helpers: Coordination Among Third Parties in the Claims Process” at the DRI 2026 Insurance Coverage and Claims Institute in Chicago, IL.

March 22 - 23 – Brandt Johnson, Lindsey Davis, Seth Jackson, Dennis Anderson, and Jessica Port will present at the 2026 PLRB Claims Conference & Insurance Services Expo in National Harbor, MD.

*****UPDATE*****

We are currently at capacity for the 2026 *What the Hail?* Conference.

Please sign up for the waitlist using the link below, and we will notify you immediately if/when a spot becomes available.

Join the Waitlist

Contact abannon@zellelaw.com with any questions.

1. 12 hours of CE credit.

2. Cheapest two-day conference in the country at $100.

3. Covers all the hot technical topics in the industry (roof dents, dating damage, Xactimate abuse, fraud, collecting weather data, solar panel damage, conducting damage assessments, ethics in claims, and much more).

4. Fast-paced sessions only 20 minutes long.

5. Trade show with over 40 industry partners giving away cool swag.

6. Hang-out, collaborate, and have fun with 700 of your insurance industry friends.

7. Covers all the hot legal issues in the industry (appraisal, fraud, concurrent causation, burdens of proof, and much more).

8. Participate in a charity school supplies drive by filling a backpack with pencils, paper, etc. collected from the sponsor tables.

9. Attend an amazing concert by famous cover band *The Molly Ringwalds* at the Thursday night 80's Party.

10. It's an event (and party!) you will be sorry you missed when your friends are all talking about it.

Coming Soon February 12-13, 2026.

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

Our ***What The Hail?* Conference** is only two weeks away, taking place on February 12-13 at the Irving Convention Center in Irving, Texas.

We held our first WTH Conference in 2012 and were excited that almost 70 people attended. Since then, every conference has been larger than the previous one. Incredibly, we expect over 650 people to attend next month.

It's a great event. The reviews are uniformly positive. People really like the fact that all of the sessions are in the same room. Over 700 people in a single room, all listening to the same speaker. And what our attendees like the most is that all of the sessions (except mine!) are twenty minutes long. Our speakers have a short period of time to get up and educate about their topic.

Our agenda this year is much like our past agendas – if it's a hot topic in the hail claims world, we will be talking about it. We will cover abusive Xactimate estimates, how to date damage, sources for reliable weather data, code interpretation, dent claims, tile claims, the appraisal process, and more. We routinely hear that our conference is the best source of hail claim information in the industry.

And it's also a ton of fun. We begin the conference with a happy hour/reception on Wednesday evening. It's a great opportunity to catch up with industry friends and to make new friends.

Thursday is a full day of technical sessions. We allow time for our attendees to meet and visit with our 45 conference sponsors (and a big thank you to all of our sponsors).

Once the conference sessions are over on Thursday, my personal favorite event takes place that evening – the legendary ***Totally 80's Party.*** Back by popular demand is the best 80's cover band in the country – *The Molly Ringwalds*. Get ready to relive that gnarly decade. It's really fun to see how many of our attendees dress up for this great party. I certainly do!

On Friday, we are back to the convention center for more technical sessions. We wrap up midday so everyone can get out of town that afternoon.

One of the other neat aspects of the conference is our backpack project. When attendees arrive, they are handed a backpack. Each conference sponsor is assigned a school supply. Attendees visit each sponsor booth to fill their backpacks. When the backpack is full, it is turned in. Those who fill their backpacks are entered into a drawing for great prizes. We expect to fill over 400 backpacks and donate them to local schools for unhoused and disadvantaged children. Pretty cool, huh?

But what I think is really the most important aspect of the conference is the camaraderie. Let's be honest. It's not always easy being on the insurance company side of the industry. There is a lot of negativity in society towards our clients. The WTH Conference gives us all an opportunity to attend technical sessions, making us better at what we do and, even more importantly, to celebrate the good and important work that we all do in the claims world. I am proud that Zelle playsa role in supporting our industry through this event.

As of this morning, we have over 700 people registered for the conference. If you are interested in attending and haven't registered, you need to sign up soon as we expect to be fully booked and have a waiting list.

If you are already registered, I look forward to seeing you there. Be sure to come up and say hello at some time during the conference.

AI Update

Global AI Infrastructure Growth Leads to Launch of $750 Million ATA Insurance Facility

by Jennifer Gibbs

London-based Advanced Technology Assurance Ltd. (ATA), recently announced the launch of a first-of-its-kind $750 million insurance facility aimed at supporting the rapid global expansion of AI and data center infrastructure—a sector predicted to attract close to $7 trillion in investment by 2030.

The facility is backed by more than 10 reinsurers and Lloyd's of London syndicates, including Arch Insurance International, Munich Re Specialty, and SCOR. This aggregated capacity allows ATA to provide a single policy to de-risk the complex, large-scale projects essential for the AI revolution.

"We're creating an ecosystem approach," said Michael Coles, Chairman of ATA. "We've brought the capacity and expertise of the world's top (re)insurers to one table to create one specialised policy that aggregates limits across traditional and new coverages. We'll aim to work closely with our (re)insurer partners to build out the team, meaningful line sizes, new specialised coverages, and the risk engineering that keeps pace with the dynamism of these multi-billion dollar projects."

Hyperscale AI data centers bundle hundreds of thousands of specialized computer chips called graphics processing units (GPUs), such as Nvidia's H100s, into synchronized assembles that operate like one giant supercomputer. These chips process massive amounts of data simultaneously. Hundreds of thousands of miles of fiber-optic cables connect the chips like a nervous system, permitting communication at lightning speed.

Industry participants view the facility as an important step in the evolution of AI risk transfer, leveraging Lloyd's syndication and global reinsurance capacity to support the next phase of digital infrastructure development.

No Restarting the Clock: Reinvestigating and Reaffirming Denial Does not Affect a Valid Contractual Suit Limitations Period

by Shannon O'Malley

This is a regular occurrence: an insured makes a claim for damage to its property, the damage is investigated and the insurer finds no evidence that an insured peril caused damage to the property. A year or so later, the insured comes back with a public adjuster, or lawyer, or engineer report that essentially says "here is additional evidence of damage, please reconsider your coverage decision." The insurer then properly reopens its investigation, examines the new evidence provided by the insured, finds some damage that could be contributed to the claimed occurrence, but the cost to repair the damage falls under the policy's deductible. The insurer issues another letter acknowledging the new information, damage found but reaffirms that no payment will be made. Another year goes by. The insured now brings a lawsuit, but it is more than two years and a day after the first coverage denial was sent to the insured.

Can the insurer rely on the policy's suit limitation clause, which prohibits bringing suit more than two-years and one-day after "a cause of action accrues," based on the date of the initial denial?

The court in *Oaks on the Lane Condo. Assoc. v. United. Spec. Ins. Co.*, No. 05-24-00128, 2026 WL 50763 (Tex. App.—Dallas Jan. 7, 2026) recently determined that an insurer's reinvestigation and reaffirmation of a prior denial does not restart the clock to bring suit against an insurer.

In *Oaks on the Lane*, the insurer denied coverage for a 2019 storm claim in January 2020. The insurer determined the roof conditions at the property were attributable to age and weathering rather than storm damage. In the denial letter, the insurer stated it was "unable to make a payment," but noted it would "consider additional information the Association believed brought the claim within coverage." *Id.* at *2.

The Association provided an engineering report which alleged substantial evidence of hail damage requiring roof replacement. The insurer retained its own engineer, who inspected the property, found some hail and wind damage, but concluded that the hail was too small to damage the roofs requiring their replacement. The insurer determined that the limited damage found by its engineer would cost $1,907, which is under the deductible.

The insurer sent a second letter in January 2021 reiterating that the claim had been denied in January 2020, summarizing its review of the additional engineering reports and estimates, that the limited damage could be repaired for far less than the deductible, and concluding "our previous claim decision remains unchanged." *Id.*

In May 2022, the insured brought suit alleging breach of contract and bad faith. The carrier moved for summary judgment alleging that the insured failed to file suit within two years and one day after its claims accrued – January 2022. The insured argued that the

reinspection and reassessment restarted the limitations period and that it had until January 2023 to file suit.

The court determined that all of the plaintiff's claims were based on a two-year statute of limitations or contractual limitations period that starts when the cause of action "accrues."

The court found that a bad faith cause of action accrues "when the insurer wrongfully denies coverage. At that moment, the insurer's wrongful conduct first causes harm to the insured, and limitations begin to run." *Id.* at *4. Similarly, a breach of contract action accrues when the wrongful conduct first occurs.

Notably, the court noted that "for accrual purposes, **an insurer need not use 'magic words' to deny a claim if the insurer clearly communicates, in writing, that it will not pay the claim and the reasons for that determination.**" *Id.*

The insured argued that the limitations period was restarted when the insurer agreed to consider additional information. The court recognized that "in limited circumstances, some Texas state and federal courts have concluded that an insurer may restart the limitations period **by expressly or impliedly withdrawing its prior denial, for example, by making an additional payment or otherwise taking action inconsistent with that denial.**" *Id.* The court recognized that cases finding a limitations period has restarted typically "involve a genuine change in the insurer's position, such as reopening a claim and paying additional benefits." *Id.*

But when an insurer merely considers new information and reaffirms its position, the limitations period is not restarted. "Reinvestigation alone, even when prompted by additional information from the insured does not restart limitations absent a withdrawal or alteration of the original denial." *Id.*

The court rejected the insured's many arguments that the limitations period was restarted. Notably, the court determined the following:

1. Even though a letter does not expressly reference a peril (for example, wind vs. hail), that does not restart the limitations period because accrual turns on the insurer's refusal to pay, not on whether the insurer addressed every asserted theory of coverage.
2. When a letter unambiguously advises that an insurer will not pay the claim and explains the basis, that is sufficient for accrual because once an insured knows the insurer will not pay the claim, the insured has sufficient facts to seek a judicial remedy.
3. An insurer is not required to "close its file" for a limitations period to begin to accrue. "An insurer's claim decision triggers the accrual when it clearly indicates that no payment will be made, whether or not the file is formally closed."
4. A recognition of additional covered damage that is still below deductible along with statements reaffirming the insurer's decision not to make a payment does not restart the limitations period.
5. Even if the insurer sends additional letters addressing information raised by the insured, when the insurer continues to expressly reaffirm its original claim decision (*i.e.* denial and refusal to pay), the limitations period will not restart.

The Lowdown: This case confirms that an insurer should continue to consider information provided by an insured in good faith as part of its investigation. If the additional information supports a finding of coverage, then payment should be made based on that additional information. But if the new information does not lead the insurer to change its initial coverage position, and there is an enforceable suit limitations provision, a court will find that the cause of action against the insurer accrued with the initial denial.

Texas law is very clear on this issue. Reinvestigation alone, even when prompted by additional information from the insured does not restart limitations absent a withdrawal or alteration of the original denial. The *Oaks on the Lane* case addresses the limited and unique situation where the insurer does find some additional damage, but its ultimate coverage position remains the same as the damage measure was below the deductible. In this situation, the revised below deductible measure does not restart limitations.

Texas Supreme Court Clarifies Neutral-Appraiser Impartiality: Lessons for First-Party Property Insurance Appraisals

by Adrienne Nelson

The Supreme Court of Texas does not often weigh in on what the meaning of impartial and nonbiased in the property insurance appraisal context. Therefore, insurance lawyers are often required to look "outside the box" to see how a court *may* analyze impartiality when considering whether an appraiser or umpire should be disqualified or an appraisal award should be vacated. Recently, in *Burke, et al. v. Houston PT BAC Office Limited Partnership (Bank of America)*, No. 24-0135, 2025 WL 3683861, at *1-4 (Tex. Dec. 19, 2025), the Texas Supreme Court provided an opinion assessing impartiality of appraisers in a real estate dispute. While this case does not address insurance appraisal, the analysis will likely be applied in the future.

The parties in *Burke* agreed that Texas' arbitration law and its impartiality principles should apply to the analysis. The Court noted that the opinion did not decide whether arbitration principles should apply but instead took the parties at their word and analyzed impartiality in that context. While the Court made that caveat, it is likely courts would apply those standards in the insurance appraisal context.

The *Burke* decision addresses the duty of neutrality and disclosure in appraisal processes, holding that undisclosed, substantive pre-appointment communications between a party and a proposed "neutral" appraiser can demonstrate partiality warranting vacatur of the appraisal determination under Texas arbitration principles.

Although this case arose in a commercial lease valuation dispute, the Court explicitly relied on impartiality principles from arbitration law at the parties' behest and reaffirmed that appraisers—like arbitrators—owe duties of impartiality. The ruling has immediate implications for first-party property insurance appraisals in Texas, where appraisals are not arbitrations but remain subject to court intervention where bias or prejudice infects the process.

The dispute arose under a long-term lease for a downtown Houston property—home to the Bank of America Building—requiring periodic rent adjustments based on the property's fair market value "as if free and clear of all improvements, encumbrances, and leases." The lease provided for an appraisal process if the parties do not agree on the value. Thereunder, each party chooses an appraiser and if the two do not agree on the value, they will choose a third, "competent and impartial" appraiser. During the first adjustment period, the parties reached an impasse over whether to include value attributable to tunnel connectivity on adjacent land, prompting the contractually specified appraisal process. The landlords—Plaintiffs Burke, et al.—appointed Ronald Little as their appraiser; the tenant—Defendant BAC—interviewed Scott Rando as their potential appraiser on topics including downtown experience and improved vs. unimproved, partial vs. full block, and tunnel-connected vs. non-tunnel-connected properties, but ultimately selected a different appraiser, Curtis Podlewski. The tenant then advised Rando of Podlewski's selection due to concerns over tight timelines, but that Rando would be "at the top of our list" for potential designation as the neutral.

The parties' appraisers could not agree, and they selected Rando as the neutral. But BAC did not disclose its pre-appraisal communications with Rando to the landlord upon his appointment. The landlord's appraiser, Little, valued the land at $14.4 million (including connectivity value), while Podlewski and Rando valued it at $8.2 million and $8.7 million, respectively, excluding value from adjacent tunnel connectivity. Podlewski and Rando settled on $8.475 million as the final value.

The landlords sued for declaratory relief and later added breach-of-contract and fraud claims after discovery revealed the tenant's undisclosed pre-appointment communications with Rando. Little testified he would not have agreed to the use of Rando as the third neutral appraiser had he known the extent of communications between the tenant and Rando about the valuation dispute. The trial court granted summary judgment to the tenant and confirmed the appraisal; the court of appeals affirmed, deeming the communications "non-substantive."

The Supreme Court reversed, holding that the nondisclosure of substantive, pre-appointment communications between the tenant and Rando as the proposed neutral appraiser evidenced "evident partiality" and required vacatur of the appraisal valuation, with remand for further proceedings. The Court accepted the parties' invocation of the Texas Arbitration Act's evident-partiality framework, reiterating that *a prospective neutral's failure to disclose facts that might create a reasonable impression of partiality to an objective observer constitutes evident partiality*, and that nondisclosure itself—without proof of actual bias—can warrant vacatur. While recognizing that appraisals are not arbitrations and may be valid in circumstances where arbitration awards must be vacated, the Court emphasized that appraisers share an obligation of impartiality and that appraisals conducted with prejudice or bias do not bar judicial recourse.

Applying these principles, the Court concluded the landlords were entitled to relief because the undisclosed communications directly concerned the matter under appraisal and went beyond scheduling or availability, including discussion of the very valuation issues in dispute and an assurance that Rando would be "at the top of our list" for neutral appointment. Such pre-appointment, case-specific communications were material, should have been disclosed, and their nondisclosure reasonably created an impression of partiality to an objective observer.

The Lowdown: The Court's holding reaffirms key legal principles implicated in first-party property insurance appraisals. First, appraisers owe duties of impartiality. Where prejudice or bias taints the process, parties may seek judicial intervention notwithstanding appraisal agreements. Second, under the evident-partiality rule, a prospective neutral must disclose facts that might reasonably create an impression of partiality; nondisclosure of material facts is itself a ground for vacatur. Third, communications are "substantive," and thus material, when they concern the matter under appraisal rather than trivial logistics; here, undisclosed discussions about valuation-related topics and the promise of favorable consideration for neutral appointment were dispositive.

The Court's reliance on the evident-partiality doctrine reshapes risk assessments in insurance appraisals where ex parte outreach to potential neutrals has sometimes been treated as routine. This decision underscores the need for parties to have access to all information which might reasonably affect a neutral's partiality and signals elevated scrutiny of neutrality and disclosure for neutrals, particularly regarding undisclosed, case-specific communications with one side before appointment. After this decision, undisclosed discussions that delve into the merits—scope, causation factors, pricing methodologies, comparables, depreciation frameworks, or specific claim features—may be deemed material and therefore be required to be disclosed so to avoid the appearance of partiality. Conversely, the opinion preserves a carveout for trivial or immaterial matters, but the Court's application suggests that the line is crossed once communications relate to the issues being valued or imply preferential consideration for neutral appointment.

Actual Resulting Damages Required to Sue for Breach of Contract in Texas

by Scott Keffer

Late last year, the U.S. District Court for the Northern District of Texas, Fort Worth Division, granted an insurer's motion for summary judgment and dismissed an insured's lawsuit upon finding that the insured failed to establish actual damages resulting from an alleged

breach of contract. *Elim v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:25-CV-00147-O, 2025 WL 3764127 (N.D. Tex. Dec. 30, 2025).

On October 18, 2023, a fire allegedly damaged the insured's home, requiring the insured to relocate during the repairs. The insurer paid $13,732.36 for incurred additional living expenses, as well as $32,062.39 for mitigation and $22,101.66 for repairs performed by the contractor, Spotless Restoration. The insurer also paid $87,467.18 for damaged contents. Thus, total claim payments amounted to $156,422.93. On June 18, 2024, the insured issued a pre-suit notice and demand letter, which sought $155,800 total comprised of $60,000 in actual damages to the insured's dwelling, $85,000 for damaged contents, and $10,800 for incurred attorney's fees. Thereafter, the insured filed suit alleging breach of contract and violations of the Texas Insurance Code. In response, the insurer moved for summary judgment, arguing that the insured failed to provide sufficient evidence of actual damages to support the breach of contract claim and that the extracontractual claims were not viable. Moreover, the insurer emphasized that it had already paid a greater amount on the claim ($156,422.93) than the amount demanded in the insured's pre-suit notice and demand letter ($155,800).

The court ultimately granted the insurer's motion despite the insured's argument that Spotless Restoration may still be owed an undetermined amount, finding that the proffered evidence failed to establish actual resulting damages "because Plaintiff may never be asked to pay." *Id.* at *3. Accordingly, the court granted the insurer's motion for summary judgment in its entirety and held that "[b]ecause Plaintiff has not presented evidence that he has sustained actual damages, Defendant is entitled to summary judgment." *Id.* Likewise, because the court found that the insured was not entitled to additional insurance benefits under the policy, it held "Plaintiff cannot prevail on his claims against Defendant for violation of the insurance code or the duty of good faith." Therefore, the court granted the insurer's motion for summary judgment in full and dismissed the insured's lawsuit with prejudice.

The Lowdown

This case illustrates that an insured may not recover uncertain or unincurred expenses as actual damages under a breach of contract cause of action in Texas.

Understanding the Scope of the Appraisal Process: When Appraisers Can—and Cannot—Make Causation Determinations in Texas

by Andrew Hilgenkamp

In a decision that further defines the power of an appraiser, a Texas federal court analyzed the enforceability of an appraisal award where appraisers specifically determined that damage was caused by wind and hail in *Encalade v. State Farm Lloyds*, No. CV H-24-4310, 2025 WL 3755128 (S.D. Tex. Dec. 29, 2025). While noting that appraisers can overstep their authority by making certain causation determinations, the Court enforced the appraisal award on the basis that the appraisers separated a loss due to a covered event from a pre-existing condition at the property. Importantly, however, the Court also ruled that State Farm's failure to initially pay the appraisal award did not entitle the insureds to summary judgment with respect to their claims for breach of contract, violations of the Texas Prompt Payment of Claims Act ("TPPCA"), and bad faith.

Background

Following a wind and hailstorm, the insureds submitted a claim to State Farm for damage their home allegedly sustained. State Farm subsequently inspected the home and determined that the claimed damage was not covered under the insureds' policy. As disagreements with the insureds continued, State Farm later sent an engineer to inspect the home, who also concluded that the damage was not covered.

A year after receiving State Farm's letter denying coverage, the insureds invoked their policy's appraisal clause. The appraisers failed to agree on the insureds' loss, and an umpire was retained to resolve the dispute. Both appraisers ultimately signed an award finding that the property had suffered approximately $50,000 in storm-caused damage. State Farm, however, declined to pay this award on the basis that its investigation did not uncover damage due to wind or hail. Instead, it asserted the alleged damage was caused by wear and tear—a cause explicitly excluded under the policy.

After State Farm again denied the claim following the insureds' submission of a post-appraisal notice for settlement, the insureds filed suit against State Farm for breach of contract, violations of the TPPCA, and bad faith. The insureds additionally moved for a declaratory judgment to enforce the appraisal award.

The Court's Enforcement of the Award

The primary issue before the Court was whether the appraisal award could be enforced, given the appraisers' conclusion that damages were due to the alleged hailstorm and not wear and tear. Although State Farm did not dispute that appraisal awards are binding, it did dispute whether an appraiser's causation assessment is binding when an insurer disagrees with the assessment. For guidance, the Court looked to the Texas Supreme Court's reasoning in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009) on this matter.

In reaching its decision, the Court emphasized that appraisers cannot allocate loss for a single injury between different causes—i.e., when different causes are alleged for a single injury to insured property, such as plumbing leaks and settling. However, the Court

further reasoned that the job of an appraiser forces them to allocate damages by separating loss due to a covered cause from a pre-existing condition. Therefore, appraisers may distinguish a loss due to a covered event with pre-existing damage, such as wear and tear.

Here, although State Farm argued that other potential causes for the insureds' damage included "excluded damages" like wear and tear, as well as "post-wind hail damage," the Court stressed that State Farm failed to provide any facts to support these causes. Thus, because the record did not establish that the insureds' home was damaged by anything other than wind or hail, the Court concluded that the appraiser's causation determination was within their authority. Accordingly, the Court granted the insureds' motion for declaratory judgment and chose to enforce the award.

The Insureds' Breach of Contract and Extracontractual Claims

The Court arrived at a different conclusion regarding the insureds' breach of contract claim. Rather than assert the individual elements of a breach of contract claim, the insureds simply argued that because the appraisal award was binding, State Farm was liable because it did not initially pay the award.

In denying the insureds' motion for summary judgment on this claim, the Court noted the insureds failed to demonstrate that State Farm breached the terms of the insurance agreement by withholding payment until the Court resolved the causation assessment at issue. For example, the policy did not require that payment be made by a certain date that had since passed, and the insureds did not argue that State Farm breached the policy by delaying payment for an unreasonable period. Thus, this delay in payment alone did not establish a breach of the insurance agreement.

Similarly, because the insureds did not demonstrate that State Farm was liable for breach of contract, a necessary element for their Insurance Code claim was not satisfied. The insureds additionally failed to establish that they sustained injuries independent from a denial of policy benefits, thereby making their bad faith claim insufficient. Accordingly, the Court also denied the insureds' motions for summary judgment on their Insurance Code and bad faith claims.

The Lowdown

Insurers should be cognizant of their reasons for contesting an appraisal award's causation determination. If specific evidence cannot be offered to a potential Texas court as to why the award's causation determination is improper or why it wrongfully allocates loss for a single injury between different causes, it should be prepared to pay the award absent another reason to contest its validity. Notably, while this case does not directly address the enforceability of an appraisal award when a date of loss is in dispute, arguments could be made here that timing determinations should not be part of the appraisal process so long as an insurer has evidence that damage occurred on a different date than claimed.

BEYOND THE BLUEBONNETS

Where There's Smoke, There's . . . Direct Physical Loss?

by Elizabeth (Betsy) Doyle (California Office)

The January 2025 Southern California wildfires destroyed more than 18,000 structures, burned nearly 50,000 acres, and caused the evacuation of more than 200,000 people. One year later, thousands of residents of Altadena and Pacific Palisades whose homes did not burn have nevertheless not returned because they claim their homes are uninhabitable due to toxic smoke exposure. Numerous residents report that their insurers have denied their claims for alternative living expenses because the homes are structurally intact and "look pristine." [1]

California Insurance Code Section 2071 establishes the standard form of fire insurance policies within the state. The standard fire policy provides coverage for "all loss by fire." Ins. Code § 2071(a).) The Standard homeowners form generally covers "direct physical loss or damage" to covered property, unless excluded. Under California law, to trigger coverage, "there must be some physicality to the loss of property – e.g. a physical alteration, physical contamination, or physical destruction."[2] Whether smoke, soot, and/or ash qualify as "direct physical loss" under a first party property policy is one of the primary disputes between policy holders and insurers adjusting fire loss claims. Although the body of case law on the smoke damage issue is likely to develop further over the next few years, there are currently very few state and federal appellate decisions analyzing whether smoke exposure qualifies as "direct physical loss."

To assist the development of strategies for handling fire loss claims in California, we examine the relevant cases decided in 2025 concerning wildfire smoke damage claims:

***Bottega, LLC v. National Surety Corporation*, No. 21-cv-03614-JSC (N.D. Cal. Jan. 10, 2025) ("*Bottega*")**

On January 10, 2025, as the Los Angeles wildfires would burn for the next twenty days, U.S. District Court Judge Jacqueline Corley issued a summary judgment ruling in a suit brought by a Napa Valley restaurant that suffered business income losses as a result of the 2017 Napa / North Bay Fires. Although the fires did not burn the restaurant itself, the plaintiff restaurant claimed that smoke, soot, and ash "inundated" the premises, forcing it to close for one day after the fire and for a week shortly thereafter. Upon reopening, despite the employees' daily cleaning of the wall coverings and upholstery, and eventually replacing the upholstered surfaces, the restaurant could only use one-third of its seating due to the ongoing smell of smoke. The restaurant sought coverage under its commercial property insurance policy, which covered losses due to "direct physical loss or damage."

Plaintiff's insurer, National Surety, denied coverage on the grounds that because the restaurant was still structurally intact, it had not suffered a "physical loss" as required by the policy. In the ensuing coverage litigation, the District Court denied National Surety's motion for summary judgment, finding that: (i) the smoke and soot contamination rendered the property unfit for normal use, meeting the standard for "direct physical loss;" and (ii) National Surety's responses to requests for admissions confirmed that the premises had suffered smoke damage, undermining its "no direct physical loss" argument.

The court rejected National Surety's reliance upon COVID-19 property insurance cases, pointing out that the courts in those cases distinguished COVID-19, described as a "virus that can be disinfected," from "noxious substances and fumes that physically alter property."[3] The court reasoned: "Whereas a virus is more like dust and debris that can be removed through cleaning, [citations] smoke is more like asbestos and gases that physically alter property."

Although *Bottega* is a federal trial court decision and thus not binding precedent, the court's focus on "physical alteration" beyond what can be wiped away offers a window into how other trial courts in California may analyze the "direct physical loss" question in the context of ash, soot and smoke.

***Gharibian v. Wawanesa General Insurance Co.* (2025) 108 Cal.App.5th 730 ("*Gharibian*")**

On February 7, 2025, the California Court of Appeal issued a decision arising from homeowners in Granada Hills, California who sought coverage after the 2019 Saddle Ridge Fire deposited wildfire debris around their home, located a half mile from the burn zone. Although the fire did not reach the plaintiff's property, the exterior of their home was covered in soot and ash, and plaintiffs asserted that smoke odors lingered within the home.

Plaintiff's homeowners' insurer, Wawanesa, paid $23,000 for professional cleaning services, which plaintiffs did not use. Wawanesa eventually denied coverage, taking the position that there was no "direct physical loss to property" because the home was structurally intact and that removable debris did not qualify.

Over the course of the litigation, the plaintiff insureds' expert testified that while soot and ash were present on the property, soot does not physically damage the property, and ash only causes damage if left on metal or vinyl and exposed to water. Plaintiff's expert further testified that "the home could be fully cleaned by wiping the surfaces, HEPA vacuuming, and power washing the exterior."

On summary judgment, the trial court concluded, and the Court of Appeal affirmed, that Wawanesa did not breach the insurance contract because the plaintiffs did not have a covered claim. The court ruled that, as established by the plaintiffs' own experts, wildfire debris did not 'alter the property itself in a lasting and persistent manner' … all evidence indicates that the debris was 'easily cleaned or removed from the property'."[4]

Notably, the *Gharibian* decision was based on Plaintiff's own evidence that the debris could be cleaned up through basic cleaning methods and the property thus restored to its pre-loss condition. It is clear the nature of the impact the soot, ash and smoke have on the property will be critical to a determination of whether there was covered "physical loss or damage." The decision underscores that it is the insured's burden to prove a loss comes within the scope of coverage. As applied to smoke, a homeowner whose property experiences smoke exposure and debris must demonstrate that the debris caused "physical alteration of property."

***Aliff v. California Fair Plan Association, Los Angeles County Superior Court Case No. Case No. 21STCV20095* ("Aliff")**

The California Fair Plan ("the Fair Plan") is a state-mandated, last-resort insurance program providing basic fire coverage for California property owners unable to get homeowners insurance from traditional carriers.

In 2017, the Fair Plan redefined "direct physical loss" in the Fair Plan policy to require "permanent physical changes" to the property and changed the policy's definition of smoke damage to require that the damage be "visible to the unaided human eye" or "detected by the unaided human nose of an average person, and not by the subjective senses of [the insured] or by laboratory testing."

In 2021, plaintiff Jay Aliff filed a class action lawsuit seeking a declaratory judgment that the Fair Plan's policy language violated Insurance Code Section 2071.

In June 2025, Los Angeles County Superior Court Judge Stuart Rice granted Aliff's motion for summary judgment. Judge Rice ruled that the Fair Plan policy requirement that all physical loss be "permanent" violated Insurance Code Section 2071 because it narrowed the coverage required in the Section 2071 standard form, which requires broader coverage for all "loss by fire."

Citing the California Supreme Court decision in *Another Planet Entertainment v. Vigilant Insurance Co.*, the court emphasized that physical loss does not require property damage to be permanent; only that the property be demonstrably altered or changed.[5]

The court also rejected the Fair Plan policy's changed definition of "smoke damage," which required that the damage be "visible to the unaided human eye" or "detected by the unaided human nose of an average person, and not by the subjective senses of [the insured] or by laboratory testing." The court ruled that requiring sensory perception, rather than laboratory testing, in order to satisfy the policy definition was inconsistent with *Another Planet*, which held that "direct physical loss or damage" to property does not have to be visible. Because the changed definition of "smoke damage" resulted in less favorable coverage than required by the standard form policy in Section 2071, the court concluded the FAIR Plan's smoke damage definition was unlawful.

The Fair Plan did not file a Notice of Appeal of the ruling and, based on the court's minute orders contained in the Los Angeles County Superior Court docket for this matter, the parties reached a settlement in November 2025.

Key Takeaways

Based on the foregoing, it is important when adjusting ash, soot and smoke claims to evaluate whether the ash, soot and smoke physically altered property or if it can simply be cleaned. This will likely be driven by expert testing and opinions.

[1] See, e.g. Why some LA fire victims sometimes wish their homes were destroyed – NBC Los Angeles nbclosangeles.com/news/local/toxic-homes-eaton-palisades-fire-insurance-ricardo-lara/3829657

[2] *Inns-by-the-Sea v. California Mutual Ins. Co., 71 Cal.App.5th 688, 707* (2021)

[3] *Bottega, LLC v. National Surety Corporation*, 2025 WL 71989 *4.

[4] *Gharibian v. Wawanesa General Insurance Co.* (2025) 108 Cal.App.5th 730, 739.

[5] *Another Planet Entertainment v. Vigilant Insurance Co.*, 15 Cal.5th 1106 (2024)

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