



LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown

Wednesday, September 30, 2026

ISSUE 40

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.

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 Tippet](#), and [Steve Badger](#).



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Upcoming Events

You don't want to miss this!

October 7 – [Steven Badger](#) will present at the [P.L.A.N.](#) Property Loss Appraiser & Umpire Certification appraiser training in Minneapolis, MN.

October 12 – [Steven Badger](#) will present at the Insurance Appraisal and Umpire Association (IAUA) [Appraiser Conference](#) in San Antonio, TX.

October 19 – [Steven Badger](#) will present "What the Hail? Top 10 Hail Claim Issues in 2026" at the Texas Association of Mutual Insurance Companies (TAMIC) [90th Convention](#) in Round Rock, TX.

October 20-23 – [Steven Badger](#) will present “Hail Claims... What the Hail?” at the [Virginia State Claims Association 2026 Conference](#) in Williamsburg, VA.

October 26 – [Steven Badger](#) will present “Hail Claim Abuse – The Big Picture Fixes” at the Joint Claims Executives Association (JCEA) [Fall Conference](#) in Nashville, TN.

November 4-6 – [Steven Badger](#), [Jennifer Gibbs](#), and [Bennett Moss](#) will present at the PLRB [Large Loss Conference](#) in Nashville, TN.

November 10 – [Matt Gonzalez](#), [Bill Zieden-Weber](#), [Michael Upshaw](#), and [Bennet Moss](#), will attend the Onshore Energy Conference in London, UK.

November 25 – [Jason Reeves](#) will co-present during the British Institute of International and Comparative Law (BIICL)'s [online course](#) on *Climate Change Litigation*. (4- 6 pm UK Time)

January 24 – 28 – [Steven Badger](#), [George Reede](#), [Brandt Johnson](#), and [Jessica Port](#) will present at the 2027 [NACA](#) Annual Convention in Reno, Nevada.



1. **First Notice of Loss:** It should include the initial date, time, peril and method of how the loss was reported.
2. **Acknowledgment/ROR Letter:** This should advise the insured of next steps in the investigation, advise of pertinent policy language and request information and documentation needed for the adjustment of the loss.
3. **Policy:** Document the policy number, effective dates, limits, deductibles, and endorsements in effect at the time of loss to help confirm coverage.
4. **Claim notes:** Maintain an ongoing, timestamped log of every action taken, phone call made, letter/email sent, settlement offer made and decision reached.
5. **Statements, Recorded Interviews and EUO Transcripts:** Capture recorded or written statements from the insured, claimants, witnesses, and any involved third parties.
6. **Photos, Videos and other Visual Evidence:** Include date- and time-stamped photographs and video walkthroughs of the claimed damage, showing both wide context and close-up details.
7. **Official Reports:** Collect and file any police reports, fire department logs, or weather data relevant to the claimed loss.
8. **Causation and Damage Analysis:** Document the specific peril or perils of the loss that tie the physical

News from the Trenches

by [Steven Badger](#)

An interesting new study was just released by the Institute for Business and Home Safety (IBHS) entitled “10 Year Wind Performance of Asphalt Shingles.” The report stated that after 10 years of weather exposure, “IBHS research demonstrates that standard test methods do not adequately predict real-world performance, and that roof age is a crucial factor in the wind performance of asphalt shingles.” The IBHS based this conclusion on test results showing that “[t]ested products were all rated to perform to design wind speeds of 190-mph, yet their failure probabilities range from 1% to 100% when evaluated against loads resulting from winds as low as 90 mph, which highlights a substantial gap between performance expectations set by standardized tests and observed performance in laboratory experiments and post-event investigations.”

So what does that mean?

It means that manufacturers are telling us that their shingles are compliant with applicable buildings codes, but in reality after they bake in the sun for more than five years their wind uplift resistance diminishes and the shingles will fail in wind events far lower than represented and fail to comply with code requirements.

Interestingly, the report also notes that the IBHS sees the same results when conducting hail impact testing on aged roofing materials – the roofing materials become less hail resistant over time.

That's nothing new to us here at Zelle. We started conducting hail impact testing of aged roofing materials all the way back in 1994 when we were pursuing subrogation actions against a PVC membrane manufacturer. In testing at Jim Koontz's lab in New Mexico, we compared new PVC membrane to aged PVC membrane and found a dramatic difference in performance. We know that to still be the case today with many PVC and TPO membranes.

So why is this important?

There is a lot of discussion right now in Texas about resilience and fortification of roofing systems. Obviously, if a roofing material isn't damaged in the storm event, then there won't be an insurance claim. And less claims mean less overall expense to the insurance industry. And less overall expense to the insurance industry will translate to lower premiums for everyone.

Thus, the real solution is ensuring that roofing products sold in Texas are truly wind uplift resistant and hail resistant.

But we know they are not. Yet the solutions are very easy....

For hail, it is time for Texas to mandate Class 4 hail rated shingles on all residential and multi-family structures and mandate that shingles maintain their hail impact resistance over an extended period of time.

findings directly to policy terms and exclusions, which can include reports from engineers and other consultants.

9. Itemized Estimates and Valuations: Record and keep itemized repair estimates, contractor bids, independent appraisals, or damaged property inventories necessary to confirm or deny coverage.

10. Position Letter: Record the final position on the claim with a letter that includes the carrier's rationale under the terms and conditions of the policy.

Feel free to contact [Todd M. Tippet](#) at 214-749-4261 or tippet@zellelaw.com if you would like to discuss these Tips in more detail.

For wind, we must create performance requirements to ensure that shingles maintain their wind uplift resistance over an extended period of time consistent with current code requirements.

Only with these significant changes will we have any real success in addressing the emerging insurance affordability crisis in Texas. Mandatory resilience and fortification are the key. Everything else (including grant programs) is just a Band-Aid.

The IBHS report is available here... [IBHS Wind Study](#)



AI Update

Beazley Offers Affirmative AI Coverage in Cyber and Tech E&O Policies

by [Jennifer Gibbs](#)

As artificial intelligence continues to reshape the business landscape, [Beazley](#) has taken a notable step to address growing uncertainty in the market. On September 17, 2026, Beazley [announced affirmative AI coverage](#) within its existing cyber and tech errors & omissions (E&O) policies.

Rather than launching an entirely new product line, Beazley's approach embeds AI-specific wording directly into its current cyber coverage. The endorsement expressly addresses AI-related risks that are already within the scope of existing cyber insurance policies, providing what the company describes as "certainty and clarity" for policyholders.

The announcement comes at a time when businesses are adopting AI at an accelerating pace, while cyber criminals are simultaneously leveraging AI tools to increase the scale and speed of their attacks. As Alessandro Lezzi, Beazley's Group Head of Cyber Risks, explained, AI has become "intrinsically linked to cybersecurity from both an offensive and defensive perspective." By issuing affirmative wording, Beazley is aiming to eliminate ambiguity about whether AI-related incidents trigger policy coverage, a question that has generated widespread uncertainty across the insurance industry.

Lezzi characterized the endorsement as part of Beazley's broader "Full Spectrum" cyber coverage philosophy, which he said is designed to "continuously pre-empt, adapt, and respond to rapidly emerging risks."

The product is available on an admitted basis in select U.S. jurisdictions through licensed insurance brokers, underwritten by [Beazley Insurance Company, Inc.](#) It is also available on a surplus lines basis, underwritten by either Beazley Excess and Surplus Insurance, Inc. or Beazley-managed syndicates at Lloyd's.

This development is worth watching as AI-related exposures grow, from deep-fake-enabled social engineering attacks to vulnerabilities introduced by AI-integrated software, the question of whether traditional cyber insurance policies respond to these risks has become a risk-management concern. Beazley's affirmative endorsement is an early market signal that insurers are beginning to offer coverage to address this evolving need.

Another Strong Endorsement of the Contractual Right to Appraisal

by [Lindsey Bruning](#)

Underwood Financial, Ltd. v. Amco Ins. Co., No. 3:23-cv-00825-L, 2026 WL 2256697 (N.D. Tex. Aug. 5, 2026).

Judge Sam Lindsay of the United States District Court for the Northern District of Texas recently issued one of the most unequivocal decisions upholding the right to appraisal under an insurance policy, compelling appraisal of two claims with dates of loss over four years old, and in which litigation had been pending, and active, since April 2023. Far from breaking new ground, the decision in *Underwood Financial, Ltd. v. Amco Ins. Co.*, continues the long-standing judicial trend of enforcing the parties' contractual agreement to resolve the amount of loss through appraisal.

Underwood Financial, Ltd. v. Amco Ins. Co. involved two hail and wind claims under two consecutive policies with effective dates from January 31, 2021 through January 31, 2023. The first storm event at issue occurred on April 23, 2021. Upon notice of the loss and completion of its investigation, Amco tendered payment totaling \$41,573.22 for hail damage to HVAC units at the property. Importantly, Amco did not identify covered damage to the roofing, however, and accordingly did not accept coverage for the same.

After a June 2, 2022 rainstorm, Underwood filed a second claim for roof and interior damage. After its investigation, Amco denied the claim, citing noncovered and/or excluded preexisting conditions, including long-term ponding and wear and tear.

Underwood disagreed with the claim determination and requested that both claims be reopened. Amco reopened the claims and completed additional investigation, but ultimately denied coverage for any further damage based on noncovered and/or excluded wear and tear and damage from a prior hail storm in April 2017.

On April 19, 2023, Underwood filed a lawsuit on both claims, which was originally set for trial on the Court's August 5, 2024 trial docket. On January 22, 2024, the parties participated in their first mediation, which was ultimately unsuccessful.

The parties agreed to request modification of the scheduling order and trial was reset multiple times, first to the November 4, 2024 docket, and then again to the July 7, 2025 docket. In the interim, the parties engaged in ongoing written and oral discovery, including seven depositions, fourteen third-party subpoenas, and expert disclosures.

On June 17, 2025, Amco filed a Motion to Strike the Opinions and Testimony of Plaintiff's Retained Testifying Expert Scott Jetton and its Motion for Summary Judgment. While these motions were pending, the parties again jointly requested a continuance of the trial setting. The Court reset the case for September 8, 2026 trial docket.

On March 19, 2026, the Court denied Amco's Motion to Strike and Motion for Summary Judgment. In its Order, the Court also "strongly encourage[d] the parties to consider resolution of the remaining claims," further suggesting a magistrate judge conduct a settlement conference. 2026 WL 2256697, at *2.

The Parties agreed to proceed with a second settlement conference with Magistrate Judge Rutherford on April 20, 2026, but were again unable to resolve the dispute. Though the Parties' counsel continued settlement dialogue in May 2026, on May 28, 2026, Amco invoked appraisal under both the 2021 and 2022 Policies and designated its appraiser.

Underwood declined Amco's appraisal request, and Amco accordingly moved to compel appraisal and stay all remaining deadlines for 60 days.

Underwood contested appraisal, arguing that "(1) the appraisal clause has not been triggered 'because this is a coverage dispute, not an amount-of-loss dispute;' (2) Defendant 'waived its right to appraisal,' causing [Underwood] substantial prejudice; and (3) 'appraisal would be futile in this case, because it would not resolve the case.'" 2026 WL 2256697, at *4. In particular, Underwood claimed appraisal was "procedurally inappropriate in light of the active litigation posture, unsupported by the policy language, and rendered futile by the physical changes to the Property, which [Amco] has long been aware." *Id.* at *3.

In considering the Motion, Judge Lindsay rejected Underwood's argument that the dispute was not appraisable due to coverage issues, detailing strong Texas public policy favoring enforcement of appraisal provisions in insurance disputes:

[W]hen an indivisible injury to property may have several causes, appraisers can assess the amount of damage and leave causation up to the courts. When divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it. When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong. And when the parties disagree whether there has been any loss at all, nothing prevents the appraisers from finding "\$0" if that is how much damage they find.

Id. at *5. Ultimately, "unless the 'amount of loss' will never be needed ... appraisals should generally go forward without preemptive intervention by the courts." *Id.* (citing *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009)).

The Court next rejected Underwood's waiver argument, largely relying on the Policies' nonwaiver provisions, which provided that "[its] terms can be amended or waived only by endorsement issued by us and made a part of this policy."

The Court again noted strong Texas public policy favoring the freedom of contract, urging the enforceability of contractual provisions such as the Policies' nonwaiver provisions. While such nonwaiver provisions could themselves be waived, Texas Supreme Court precedent has repeatedly held that such waiver requires intent: "Defendant must, by its conduct, manifest clear intent to waive the nonwaiver provision. Otherwise, the nonwaiver provision is facially dispositive." *Underwood*, 2026 WL 2256697, at *6.

Here, because there was no argument or evidence that Amco had waived *the nonwaiver provisions* by and through endorsement, the Court held that "the parties are bound by the terms of the Policies [and] Defendant, therefore, maintains its right to compel appraisal." *Id.* at *7.

Finally, the Court noted that even if it had found waiver, Underwood's claims of prejudice were legally deficient. To that end, Underwood cited extensive legal expenses it had incurred litigating the case for over three years, including taking and defending

seven depositions taken, working with fourteen tenants in responding to third-party subpoenas, working with its damages expert, extensive briefing on Amco's Motion to Exclude and Motion for Summary Judgment, and preparing for the September 2026 trial setting.

But the Court rejected the same, confirming longstanding Texas law that "arguments of prejudice based on court costs, expert costs, litigation expenses, and attorney's fees, 'are insufficient to establish prejudice.'" *Id.* at *7 (citing *In re Germania Farm Mut. Ins. Ass'n*, No. 13-26-00015-CV, 2026 WL 1628701, at *7 (Tex.App.—Corpus Christi, June 5, 2026)). As the Texas Supreme Court has held:

[I]t is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal. If a party senses that an impasse has been reached, it can avoid prejudice by demanding an appraisal itself. This could short-circuit potential litigation and should be pursued before resorting to the courts.

As such, the Court compelled the Parties to participate in appraisal of the insurance claims in dispute and vacated the trial date and all pretrial deadlines.

Underwood may be an extreme example, but its message is clear: even after years of litigation, a party's demand for appraisal under an insurance policy can be extraordinarily difficult to avoid. Once appraisal is demanded, parties should assume it will be required—and plan accordingly.

Houston Federal Court Holds Repair Estimates Without Causation Opinions Cannot Defeat Summary Judgment in Hurricane Beryl Claim

by [Claire Fialcowitz](#)

Last month, the Houston Division of the Southern District of Texas reminded policyholders that total reliance upon contractors' estimates is not sufficient evidence to demonstrate coverage for claimed damage. In *Villegas v. State Farm Lloyds*, United States Magistrate Judge Dena Hanovice Palermo recommended summary judgment in favor of State Farm Lloyds ("State Farm") on the insureds' claims for breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code. No. 4:25-cv-1644, 2026 WL 2754159, at *1 (S.D. Tex. Aug. 27, 2026).

The insureds' homeowners policy covered accidental direct physical loss caused by wind or hail, subject to a \$4,264.00 wind/hail deductible. *See id.* After Hurricane Beryl struck Houston on July 8, 2024, the insureds reported that shingles had blown off their roof and that water had leaked into their residence. *See id.* State Farm's adjuster inspected the property and observed limited wind damage to the roof's front and back slopes, the roof's right hip/ridge, and the patio's oriented strand board sheathing. *See id.* The State Farm adjuster also noted pre-existing damage to the metal soffits and wood rot on the fascia board. *See id.* Based on her investigation, the State Farm adjuster estimated the cost to repair the wind damage at \$2,099.26. *See id.* As the cost to repair the amount of covered damage fell below the policy's applicable deductible, State Farm explained that no payment was owed to the insureds at that time. *See id.* at *1.

On December 5, 2024, State Farm received a demand from the insureds' counsel for \$13,820.74 in damages, plus statutory interest and attorneys' fees. *See id.* In response, State Farm reiterated that the claimed damage fell below the policy's applicable deductible and denied the insureds' demand. *See id.* The insureds filed suit in state court, alleging that State Farm conducted a bad-faith inspection that resulted in a lowball estimate. *See id.* at *2. State Farm removed the case to federal court and filed its motion for summary judgment on the insureds' contractual and extracontractual claims. *See id.*

To support its motion for summary judgment, State Farm relied upon its adjuster's estimate and its expert's engineering report, which provided that no shingles were creased, torn, displaced, or missing in a manner consistent with wind pressure. *See id.* at *3. Rather, the engineer determined the observed damage to shingles was caused by tree limbs that, based on historical aerial and Google Street View imagery, had been brushing against the roof for several years before Hurricane Beryl. *See id.* The engineer further determined that the wind speeds at the property on the date of loss were below the speed at which laminated shingles are typically rated to withstand. *See id.*

In response, the insureds offered the following evidence:

- One contractor's estimate consisting "of a few line-item pages that tally up to \$26,468.69 in repair costs; seventy caption-less pictures of [the insureds'] roof shingles and fence; images and diagrams from Eagleview...; and pictures of [the insureds'] damaged washer, countertop microwave and refrigerator";
- A second contractor's estimate consisting of "three line-item pages totaling \$12,460 in repairs, along with two unexplained pictures of shingles from Lowe's website,"; and
- A one-page narrative "expert report" from James Wesselski of WesGroup Consulting, LLC ("WesGroup"), explaining that someone from WesGroup inspected the insureds' home on November 25, 2025 and reviewed both the insureds' and State Farm's estimates, and estimating the damage to total \$34,218.23.

The Court emphasized that "[t]he insured bears the burden of proving they suffered a loss and that the loss is covered by the relevant insurance policy." *Id.* (quoting *Matter of New York Inn, Inc.*, No. 24-10338, 2025 WL 999084, at *4 (5th Cir. Apr. 3, 2025)). Highlighting the fact that neither of the contractors' estimates included a narrative or any causation analysis, the Court noted that the contractors "may have simply inspected [the insureds'] property for any damage and calculated what it would cost to fix." *Id.* at *4. Because the only damages at issue were those caused by wind on July 8, 2024, the Court explained that "[e]stimates that do not account for or allocate those damages separately are useless." *Id.*

The insureds' expert report fared no better. Although the report's one-page narrative stated that the damage was caused by a wind loss on the date of loss, the expert abandoned that position at his deposition, testifying that he was not an expert on wind dynamics, had not investigated when wind caused the damage he identified, and did not intend to serve as a causation expert. *See id.*

Based on the evidence, or lack thereof, the Court explained that the parties' competing figures did not actually conflict—it may well cost \$34,218.23 to repair all of the damage observed by the insureds' consultants at the property, but only \$2,099.26 of that damage was caused by wind on the date of loss. *See id.* As the insureds offered no evidence segregating covered damage from non-covered damage, the Court recommended that State Farm be granted summary judgment on the insureds' breach of contract claim. *See id.*

Turning to the insureds' extracontractual claims, the Court applied the well-settled Texas rule that “[w]hen the issue of coverage is resolved in the insurer's favor, extracontractual claims do not survive.” *Id.* at *5 (quoting *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010)). Having found that the insureds' extracontractual claims were predicated entirely on State Farm's determination that the covered wind damage did not exceed the deductible, and that the insureds offered no evidence of any injury independent of their right to policy benefits, the Court recommended that those claims also failed as a matter of law. *See id.*

The Southern District of Texas' reinforcement of the insured's burden to present competent evidence segregating covered damage serves as a useful reminder. When you ask your insureds for their causation analysis and/or expert, remind them that “my contractor said so” is *not* an answer.

Buzzkill in *Bee v. American National Property & Casualty Co.*: A Thorough Coverage Investigation Leads Houston Court of Appeals to Swat Away Theft Claim

by [Nicholas Smetzer](#)



Insurers are no strangers to the sting of litigation following a coverage decision—but a recent memorandum opinion from the Houston Court of Appeals is an excellent reminder that a thorough coverage investigation can be a balm against bad-faith and fraud claims. In *Bee v. Am. Nat'l Prop. & Cas. Co.*, No. 14-25-00730-CV, 2026 WL 2581916 (Tex. App.—Houston [14th Dist.] Sept. 1, 2026) (mem. op.), the Fourteenth Court of Appeals affirmed a judgment following a bench trial in favor of the insurer on a claim arising from a renters' insurance policy. Because the insured never established coverage in the first place, the court agreed that his claims under the Deceptive Trade Practices Act and for bad faith and fraud failed as well. The *Bee* opinion is short and sweet, providing a useful roadmap for insurers facing suspicious theft claims and other questionable losses: a prompt, thorough, and well-documented investigation can resolve a case on coverage before the insurer ever has to prove fraud.

The renters' policy at issue in *Bee* covered personal property when “it is likely to have been stolen,” but excluded property that was “misplaced” or had “mysteriously disappeared.” The policy also contained a concealment clause that voided coverage if an insured willfully concealed or misrepresented any material fact relating to the lost property.

Bee, the insured, was familiar with this aspect of the policy: he had already received payment for a burglary claim submitted three months before the claim at issue. The first payment was a real honey of a deal—\$11,069.16 paid even though Bee had not submitted photographs or maintenance reports supporting his claim that a burglary had even occurred. Bee's second claim, which formed the basis of the litigation at hand, sought payment for jewelry, a microphone, and other property allegedly lost in another burglary. The items were valued at \$26,940.61—more than twice the amount of the first claim.

The insurer denied the claim, and Bee made a buzz, filing the standard swarm of extracontractual causes of action: DTPA violations, bad faith, and fraud. Following a bench trial, the trial court found that the property was not likely to have been stolen and that the insurer had carried its burden on its affirmative defenses of fraud and a reasonable basis for denying coverage. Crucially, on appeal, Bee challenged only the legal sufficiency of the evidence and sought rendition rather than remand.

On appeal, the insurer's investigation supplied the key evidence supporting the denial. First, the insurer established that, as with the first claim, Bee had submitted no photographs corroborating the loss. Second, the insurer examined Bee's receipts and found that they did not add up. Although Bee produced an invoice for the microphone he claimed had been stolen, the seller could find no record of the purchase. The same was true of the claimed jewelry.

During an examination under oath, Bee disclosed that he had been self-employed since 2020 and had been living off his savings. He admitted that only a few thousand dollars remained in his account, that he was paying \$1,650 per month in rent, and that he had missed a payment. An alternative narrative to the burglary Bee described began to present itself: financial pressure may have motivated him to seek insurance proceeds.

The insurer's investigation did not end there—people facing suspicious circumstances can still suffer a burglary, after all. Leaving no stone unturned, the insurer spoke with the apartment complex's security officer, who confirmed that no theft or burglary reports had been made. The officer also directed the insurer to the case's star witness: a doorbell camera on a

neighboring apartment with a view of Bee's unit. A review of footage from the weekend of the alleged burglary revealed . . . nothing.

This evidence, combined with Bee's admission at trial that he had previously been convicted under another name of obtaining money by false pretenses, was legally sufficient for the appellate court to agree with the trial court's finding that the property was not likely to have been stolen.

Bee's arguments against this conclusion failed. He pointed to a police report, proof of ownership, and evidence that a door had been repaired to refute the insurer's position that no burglary had occurred. The appellate court concluded that this evidence merely presented a factual dispute—one the trial court, as factfinder, had already resolved in the insurer's favor. Bee also argued that the trial court had improperly considered his prior conviction because it had since been expunged. The appellate court declined to decide the issue, concluding instead that the remaining evidence independently supported the finding that the loss was not covered.

Perhaps most importantly, Bee argued that Texas Insurance Code § 705.003 prevented his misrepresentations from voiding coverage unless they were fraudulently made, concerned a fact material to the insurer's liability under the policy, or misled the insurer into waiving or losing a valid defense under the policy. Citing *Am. Risk Ins. Co. v. Serpikova*, 522 S.W.3d 497, 505 (Tex. App.—Houston [14th Dist.] 2016, pet. denied), the court emphasized that the anti-technicality statute does not create coverage where none exists. This could have been a fraud case requiring expensive discovery and difficult-to-procure proof of intent. Instead, thanks to the insurer's thorough investigation, it turned on coverage under an unambiguous policy—a straightforward question of fact.

So, what's the lowdown for insurers? It pays to be a busy bee during a coverage investigation. Although Bee's insurer had paid a prior claim under similar circumstances, the adjusters' and investigator's diligence produced evidence that made it into the appellate record: receipts, interviews, and third-party video all undermined Bee's account and supported the finding that the claimed loss was not covered. Even when the facts support a credible inference of fraud, the best defense may be the simplest: a diligent investigation showing that the claim was never covered in the first place.

No Evidence, No Deposition

by Anna Kuhlman

In a significant procedural victory for insurance carriers, a Corpus Christi-Edinburg Court of Appeals conditionally granted mandamus relief in favor of the insurer, in *In Re Allstate Vehicle and Property Insurance Company, Allstate Texas Lloyds, Allstate Fire and Casualty Insurance Company, and James Rudish*, No. 13-26-00576-CV, 2026 WL 2529130, at *1 (Tex. App. Aug. 26, 2026). In the matter, the court of appeals held that the parties seeking presuit depositions under Texas Rule of Civil Procedure 202 had failed to present any evidence in support of obtaining such discovery and further found that the trial court must vacate its previous order authorizing the depositions. *Id.* at *4.

Background

The dispute arose when a group of insureds claimed they were victims of vandalism stemming from the sale and installation of solar panels. *Id.* at *1. The insureds submitted claims to their insurers on the grounds that the installation of inoperable solar panels constituted covered vandalism; however, their insurers denied coverage after finding there was no evidence of vandalism. *Id.*

Subsequently, the insureds filed a petition seeking presuit depositions of Allstate's corporate representatives and claim representatives, as provided under Texas Rule of Civil Procedure 202. *Id.* The insureds alleged generally that the depositions were for use in an anticipated suit and to investigate potential claims or suits. *Id.*

The trial court granted the petition and explained that "[a]llowing the requested depositions may prevent a failure or delay of justice in anticipated litigation," and that "the likely benefit of permitting the requested presuit discovery to investigate the potential claims and anticipated litigation outweighs the burden or expense of the procedure." *Id.*

Allstate sought mandamus relief and put forth two arguments: "(1) the trial court abused its discretion by granting the Rule 202 petition, and (2) they lack an adequate remedy by appeal to cure this error." *Id.* at *2.

Analysis

The court of appeals agreed with Allstate, emphasizing that the insureds presented *no evidence* to support their request for presuit depositions. *Id.* at *3. The court explained that "a petitioner seeking a presuit deposition must present evidence to meet its burden to establish the facts necessary to obtain the deposition." *Id.* (internal citations omitted). Sworn or verified pleadings, counsel's arguments, and documents not admitted into evidence do not satisfy this evidentiary burden. *Id.* Moreover, "the required findings cannot be implied in support of the trial court's order." *Id.* Accordingly, when a petitioner fails to present the required evidence, a trial court abuses its discretion by ordering a Rule 202 deposition. *Id.*

When finding the trial court in this case abused its discretion, the court of appeals stated:

Under the applicable law as discussed above: (1) the [insured] parties' petition, even if verified, does not constitute competent evidence to prove the facts asserted therein; (2) the real parties did not offer their petition or its exhibits into evidence, and documents not admitted into evidence cannot be considered as proof; (3) the trial court could not take judicial notice of the real parties' allegations in their petition; and (4) the arguments of real parties' counsel are not evidence.

The court of appeals further held that mandamus relief was proper given that Allstate lacked an adequate remedy through ordinary appeal. *Id.* at *4. The Court of Appeals explained that “if discovery takes place under an improper order, the error cannot be rectified,” and specifically, that “[o]nce the deposition has been taken, it cannot be untaken.” *Id.* (internal citations omitted).

The Lowdown: *In re Allstate* is a favorable decision for insurers because it squarely places the burden under Texas Rule of Civil Procedure 202 with the party seeking the presuit depositions. When this evidentiary foundation is missing, the associated discovery order is likely improper and vulnerable to mandamus relief.

BEYOND THE BLUEBONNETS

One to Watch: Eleventh Circuit to Address Waiver of Builder’s Risk Flood Deductible Under Georgia Law

by [Maureen Walsh](#) (Atlanta office)

First Solar Electric, LLC v. Zurich American Insurance Company, No. 21-CV-408, 2024 WL 3106748, at *6-7 n.5 (M.D. Ga. June 24, 2024), appeal docketed, No. 25-10606 (11th Cir. Mar. 3, 2025), presents a focused issue concerning waiver: whether an insurer’s claims handling conduct may have waived reliance on a higher deductible. The trial court held that Zurich waived the policy’s \$2.5 million flood deductible after its adjuster initially treated First Solar’s rain-related losses as water damage claims subject to a \$100,000 deductible. On appeal, the Eleventh Circuit is now positioned to address whether, under Georgia law, a deductible operates as a waivable condition affecting the amount payable or as a nonwaivable limitation on an insurance contract’s scope of coverage.

Background

The policyholder, First Solar, contracted to provide engineering, procurement, and construction services for a solar project in Georgia, and obtained builder’s risk coverage through a Zurich master builder’s risk policy. The project site included land in a high-hazard flood zone and its certificate reflected that it was subject to a flood deductible of 2%, with a \$250,000 minimum and \$2.5 million maximum.

The project sustained damage during five heavy rain events, and First Solar tendered a claim. First Solar represented that Zurich’s adjuster initially advised the broker that the losses would be treated as water damage, and Zurich issued three unconditional advance payments. Several months later, Zurich, through counsel, took the position that each rain event constituted a separate flood occurrence subject to the \$2.5 million deductible, and on that basis Zurich asserted that no further amount was owed.

The Waiver Dispute

First Solar filed suit alleging alleged breach of contract, waiver and estoppel, and breach of implied covenant of good faith and fair dealing, among other things.

The dispute centered on the limits of waiver of the terms of an insurance policy. At summary judgment, Zurich argued that the damage resulted from five separate occurrences of “flood” and that the policy unambiguously required a \$2.5 million flood deductible for each occurrence. Zurich contended that waiver could not be used to create or expand coverage, and argued that the deductible was an unwaivable part of the policy’s coverage determination, rather than a procedural condition.

First Solar argued that the flood deductible was \$100,000 or alternatively that the policy’s “water damage” deductible should apply. First Solar asserted that the deductible was a waivable policy condition. It also argued that Zurich waived the right to assert the higher flood deductible through its initial claim handling. First Solar argued that because the losses were covered, regardless of whether they were characterized as flood or water damage, the deductible did not define the scope of coverage but instead operated as a condition reducing Zurich’s payment obligation.

The district court accepted Zurich’s policy-interpretation arguments. It held that the flood definition was unambiguous, that the five rain events were separate flood occurrences, and that the policy and project-specific certificate established a \$2.5 million flood deductible. However, the court ruled for First Solar on the issue of waiver.

Applying Georgia law, the court relied on the distinction drawn in *Sargent v. Allstate Ins. Co.*, 165 Ga. App. 863, 865, 303 S.E.2d 43, 46 (1983), between an insured’s impermissible use of waiver to create coverage for a loss outside a policy and a permissible use of waiver to avoid a condition imposed for the insurer’s benefit. The court noted the critical question was whether First Solar was trying to force Zurich to pay for a loss it never agreed to cover. Because Zurich did not dispute that the rain-related losses were covered under the policy, whether labeled “flood” or “water damage” waiving the higher deductible would not expand the policy to a noncovered risk. The court therefore treated the deductible as a waivable condition to payment rather than a nonwaivable coverage defense.

Turning to the facts, the court concluded that Zurich’s conduct during claims administration was sufficient to establish waiver. The court pointed to Zurich’s adjuster characterizing the losses as water damage, internal claim file reflecting the applicability of the

\$100,000 deductible, and the issuance of advance payments without a reservation of rights. The court held that Zurich could not later change course to impose the higher deductible.

The Appeal

After a damages trial, the jury awarded First Solar \$12.2 million, plus costs and fees. Zurich appealed. The parties completed briefing, and the Eleventh Circuit heard oral argument on July 28, 2026. The waiver ruling now presents the Eleventh Circuit with a useful vehicle to clarify the boundary between a nonwaivable coverage limitation and a waivable policy condition.

Zurich's position rests on the principle that waiver and estoppel cannot be used to create coverage or enlarge an insurance contract beyond its written terms. First Solar framed the issue differently. It argued that Zurich is not being required to insure an excluded or uncovered risk because the rain losses were covered under either characterization. Rather, according to First Solar, the dispute concerns only the consequence of Zurich's claim handling conduct on the amount payable for a covered loss.

Why It Matters

The significance of the appeal lies in how the Eleventh Circuit will characterize the policy's deductible. The decision may sharpen Georgia law on the distinction between coverage defenses and waivable policy conditions.



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