THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, MAY 9, 2023 | VOLUME ONE

Welcome to the first edition of the The Zelle Lonestar Lowdown, our monthly newsletter bringing you news from the trenches on everything related to Texas first party property insurance claims and litigation. 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.

INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

May 11, 2023 - **Brandt Johnson** will be speaking on Fraud in CAT Claims at the TASIU 21st Annual Gulf Coast Insurance Fraud Seminar in Pasadena, TX

May 12, 2023 - Zelle LLP is proud to sponsor the After Party & Awards Ceremony at the 39th Annual DCA Golf Classic on May 12th at Indian Creek Golf Club in Carrollton, TX

May 18, 2023 - Zelle LLP and JS Held will be sponsoring a **Sip, Snack & Socialize Happy Hour** on Thursday, May 18 from 5:00-8:00 pm at Sidecar Social (5100 Belt Line in Addison). All DFW area insurance industry professionals are invited to attend.

June 1 - 2, 2023 - Zelle LLP Dallas partner **Eric Bowers** will be presenting his paper entitled Holding an Insured to its Burden to Support its Claim: Texas' Concurrent Causation Doctrine at the 20th Annual Advanced Insurance Law Course to be held on June 1-2, 2023, in San Antonio.

RSVP!

News From the Trenches by Steve Badger

Our Zelle attorneys pride themselves on being "in the trenches" and knowledgeable about all

aspects of a claim – offering legal advice on issues concerning adjustment, coverage, appraisal, and litigation. We stay informed on the issues that our clients' adjusters are dealing with on a daily basis. Unfortunately, this often includes the abuses, schemes, and sometimes outright fraud that have sadly become more frequent in recent years.

Keenly aware of all these issues, we work with our clients to address the misconduct, always with the intent to help get claims resolved quickly and amicably to avoid having to retain us down the road in litigation. It is our preference to see a claim resolved without the need for lawyer involvement. It really is. We will still have plenty of work.

I'll use the **Lonestar Lowdown** to write each month about the hot topics crossing our desks. And this month those topics are:

1. *McClenny Moseley*
The talk of the industry right now is the big trouble facing McClenny Moseley in their thousands of Louisiana hurricane lawsuits. If you haven't followed the story, you need to. The allegations against MMA provide a textbook lesson on all of the bad conduct taking place on the policyholder advocate side of the industry. The allegations include improper contractor AOBs, fraudulent misrepresentations to insurance companies, barratry, forgery, investment schemes, and theft of insurance proceeds. A simple Google search will direct you to dozens of articles and television news reports about this sad situation. If you want to stay caught up on the story, please connect with me on **LinkedIn**. I am regularly posting updates on this important story.

2. *Appraisal*
Use of the appraisal process has exploded over the past decade. For the first couple decades of my career, we maybe had one or two appraisal matters in our office. Now we have hundreds. And with the increased use of appraisal comes increased abuses. The days of receiving an appraisal demand, turning it over to an appraiser, and stating "call me when there's an award" are over. With no ethical guidelines or procedure rules governing the process, appraisal abuses are now rampant. As a result, things are changing. Insurers are now drafting greatly expanded appraisal clauses providing more specificity as to how the process should be conducted (the TDI is presently considering approval of Zelle's proposed revised appraisal clause). The Texas Legislature is presently considering a bill that addresses some of the common problems in the appraisal process. And insurance companies are aggressively fighting back against some of the most common appraisal abuses (such as expanded claim measures, biased appraisers, and unilateral umpire appointments). We plan to write regularly on these issues in the **Lonestar Lowdown**. Until then, for a summary of the issues we are dealing with, take a look at this article I wrote a few years ago entitled **Fixing Problems In the Texas Insurance Appraisal Process.**

3. *Public Adjuster Conduct*
I support the role of the professional public adjuster in the claims process. A policyholder should have the right to retain a public adjuster to assist in the handling of its claim. There is currently legislation pending before the Texas legislature that would prohibit Texas insurers from including "anti-public adjuster endorsements" in their policies. I have supported, and encouraged the insurance industry to support, this legislation.

But with that said, there is a growing problem with abusive public adjuster conduct. Over the past 15 years, we went from less than 100 to over 1000 licensed public adjusters in Texas. All it takes to become a public adjuster is an application and sitting for a very simple exam. That's it. With little barrier to entry in joining this "profession", it is not surprising that public adjusting is a magnet for fraudsters and other bad actors. To be clear, I am not saying all public adjusters are bad. But the growing numbers of bad ones is drawing increased attention to the industry. We are routinely seeing examples of public adjusters stealing millions of dollars from their clients (the Drew Aga/Mitchell story is just plain sad), public adjusters engaged in referral/kickback schemes with contractors (yes, we know this is going on and we will expose examples of it soon), and public adjusters misrepresenting replacement cost claim measures so they can take their commissions out of the claims proceeds (we all know this is common).

No one can deny that all of these problems exist.

So what are we going to do about it? I will continue to talk about these issues in my **LinkedIn** posts and work with our insurance company clients to expose bad conduct involving these issues. Perhaps it's time for leaders of the public adjusting profession to acknowledge these issues and work with us in addressing them. There has to be a discussion about how to stop this conduct (yes, perhaps including a discussion of precluding the naming of public adjusters on claim payment checks). As always, I welcome a productive dialogue about these issues. Oh, I could go on. More to come in the months ahead. Until then, be certain to follow me on **LinkedIn** as I post almost daily on various issues of interest to our industry.

Todd Tippett's
Top 10 Tips...
on Appraisal

1. Know Your Jurisdiction
2. Amount of Loss – Does it

Clarifying Concurrent Causation in Texas:

Eric Bowers, Shannon O'Malley, and Claire Fialcowicz explain how this doctrine works.

Texas courts have applied the concurrent causation doctrine in Texas for over fifty years. Concurrent causation comes into play when there may be multiple causes of a loss, such as the combination of wind and flood damage, or pre-existing damage combined with storm damage. Under Texas law, "when 'excluded and covered events combine to cause' a loss and 'the two causes cannot be separated,' concurrent causation exists and 'the exclusion is triggered' such that the insurer has no duty to provide the requested coverage. But when a covered event and an excluded event 'each independently cause' the loss, 'separate and independent causation exists, and the insurer must provide coverage despite the exclusion.'" *JAW The Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597, 608 (Tex. 2015).

Based on the Texas Supreme Court's analysis, the

include Coverage Issues?
3. Timing is Everything – Request Appraisal before Suit is Filed.
4. Retain a Competent & Impartial Appraiser
5. The Umpire is Critical
6. The Form of the Appraisal Award is Even More Critical
7. Consider an Appraisal Protocol
8. Appraisal Awards Should be Paid Timely
9. Pay Attention to the Appraisal Process
10. Enforce Your Rights Under the Policy

Feel free to contact **Todd Tippett** at 214-749-4261 or **ttippett@zellelaw.com** if you would like to discuss these Tips in more detail.

doctrine of concurrent causation limits an insured's recovery to the amount of damage caused solely by the covered peril. Because insureds are entitled to recover only that which is covered under their policy, courts have repeatedly found that the burden of segregating the damage attributable solely to the covered event is the insureds'. Despite this established law, policyholder lawyers have been waging a war to upend the doctrine and flip the burden from the insured to insurer.

Eric Bowers, Shannon O'Malley, and Claire Fiacolwicz drafted a paper explaining the doctrine and addressing some of these attacks. Reach out to Eric, Shannon, or Claire for more information.

Read the full article here.

Wall of Precedent Just Got Taller – Fifth Circuit Again Denies COVID-19 Claim

by **Shannon O'Malley**

When Americans were asked to social distance and stop the spread of COVID-19, many businesses sustained lost income. Many turned to their property insurance policies seeking coverage for business interruption loss. But those policies almost universally require "physical loss or damage" to property in order to trigger coverage for both property damage and business interruption loss.

Nevertheless, businesses sued their carriers seeking coverage for their lost income. A number of plaintiffs sued in Louisiana and Texas Federal Courts, arguing the COVID-19 virus caused property damage due the presence of the virons, that there was loss of function of the property, the policies did not have exclusions for virus (or the exclusions were ambiguous, and on and on. Many District Courts granted motions to dismiss, which were appealed to the Fifth Circuit.

In January 2022, the Fifth Circuit first addressed a COVID-19 business interruption claim in **Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450 (5th Cir. 2022).** In *Terry Black's*, the Fifth Circuit determined that under Texas law, physical loss requires a tangible alteration or deprivation of property and that a "'physical loss of property' cannot mean something as broad as the 'loss of use of property for its intended purpose.'" *Id.* at 458.

Since *Terry Black's*, the Fifth Circuit has issued twelve additional opinions. Some of these addressed appeals from Louisiana, but the court specifically noted in **Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co., 29 F.4th 252, 258 (5th Cir. 2022)** that it was "persuaded Texas and Louisiana courts would reach the same conclusion regarding the interpretation of the language in these policies."

In 2023 alone, the Fifth Circuit issued five new opinions addressing COVID-19 claims. *See e.g.* **New Orleans Equity L.L.C. v. U.S. Specialty Ins. Co., No. 21-30544, 2023 WL 128925 (5th Cir. Jan. 9, 2023)**; **PHI Grp., Inc. v. Zurich Am. Ins. Co., 58 F.4th 838 (5th Cir. 2023)**; **S. Orthopaedic Specialists, L.L.C. v. State Farm Fire & Cas. Co., 64 F.4th 657 (5th Cir. 2023)**; **Exceptional Dental of Louisiana, L.L.C. v. Bankers Ins. Co., No. 22-30705, 2023 WL 2890163 (5th Cir. Apr. 11, 2023)**; and **Hotel Management of New Orleans, LLC v. General Star Indemnity Co., No. 22-30354, 2023 WL 3270904 (5th Cir. May 5, 2023)**. In each case, the insureds argued their policy was unique or their factual allegations demonstrated tangible physical alteration to property. And in each case, the Fifth Circuit rejected these arguments, finding that the virus that causes COVID-19 did not cause physical loss or damage and there was no coverage.

For example, in *S. Orthopaedic Specialists*, 64 F.4th 657, the Fifth Circuit addressed whether COVID-19 "particles cause 'accidental direct physical loss' to property." The Court answered this question in the negative, recognizing that COVID-19 does not "cause damage or loss that was physical in nature." Even with citations to numerous scientific studies as well as an expert report to show that the covid virus attaches to surfaces and can remain there, capable of causing infections for weeks, the court determined these allegations necessitated lasting alterations to property or required physical repair or replacement of property. The Court also rejected the argument that the plaintiff suffered direct physical loss due to the loss of functionality of the insured property for its intended purpose as a direct result of governmental actions and civil orders. With this latest opinion, the Fifth Circuit further foreclosed recovery for COVID-19-related business interruption claims.

For questions concerning COVID-19 claims in Texas or other complex business interruption claims generally, please contact **Shannon O'Malley.**

Court Rejects Metal Fatigue Argument in Upholding Cosmetic Damage Exclusion

by **Bennett Moss**

Many insurers have begun incorporating cosmetic damage

Spotlight:

exclusions into their property policies. These provisions typically exclude indentations, dents, and scratches to metal roofs caused by hail. While carriers often rely on these exclusions during the adjustment of claims, litigating a cosmetic damage exclusion has historically been met with resistance in Texas.

Policyholders will retain metallurgists or other experts who claim that even though cosmetic damage to a metal roof does not alter the roof's immediate water-shedding capabilities, it may nevertheless result in "metal fatigue," allegedly leading to expedited roof failure in the future. Some courts in Texas have found that such an argument is sufficient to create a fact issue precluding summary judgment. Despite these "metal fatigue" arguments, we have yet to see an actual example of a roof that has actually rusted through and is leaking at the point of a hail impact dent. Does anyone have such a picture?

Recently, the United States District Court for the Northern District of Texas took issue with an insured's argument that cosmetic damage could lead to roof failure some time in the future. In **Amphay v. Allstate Veh. & Prop. Ins. Co.** , the insured attempted to avoid the application of a cosmetic damage exclusion by presenting so-called expert testimony that "metal fatigue . . . can cause the roof to retain sediment that eats at the roof coating and causes it to deteriorate faster and fail prematurely." The court was not receptive to this argument, finding that the Plaintiff's expert did not observe any areas of water leakage due to the cosmetic damage. Despite the insured's expert's contention that "the roof *could* leak sometime in the future," the court held that the expert's inability to quantify the amount of time that would take did not create a fact issue and granted summary judgment to the insurer.

Moving forward, carriers would be wise to rely on this opinion as well as the logic it represents. While it is important for carriers to retain their own experts to provide opinions on the nature of the cosmetic damage, that alone has historically been insufficient to obtain summary judgment on a cosmetic damage exclusion. The *Amphay* opinion represents a concerted effort by the carrier to discredit a policyholder expert's suspect opinions on "metal fatigue." To obtain summary judgment on a cosmetic damage exclusion, it is vital to show the court the lack of science supporting these metal fatigue arguments with thorough deposition questioning.

If you have any questions about this case or cosmetic damage exclusions generally, please contact **Bennett Moss.**

Senior Associate Michael O'Brien speaks to UBSE engineers about how to prepare for a deposition.

Reach out to Zelle LLP if your organization would benefit from a presentation, class, discussion, or seminar from one of our attorneys.

Contact Us!

Insurer's Payment of Appraisal Award and Interest Precludes Claim for Attorneys' Fees.

by **James Holbrook** and **Austin Taylor**.

Chapter 542 of the Texas Insurance Code, also known as the Texas Prompt Payment of Claims Act ("TPPCA"), generally allows an insured to recover interest and attorneys' fees, in addition to the amount of the insurance claim, when an insurer delays payment of a claim longer than the statute's imposed deadlines. Following the Texas Supreme Court's opinion in Barbara Techs. Corp. v. State Farm Lloyds, 589 S.W.3d 806 (Tex. 2019), state and federal courts applying Texas law have grappled with issues concerning the interplay between the TPPCA and the contractual loss appraisal process.

In the most recent of these opinions, *Morakabian v. Allstate Vehicle and Property Insurance Company*, No. 4:21-CV-100-SDJ, 2023 WL 2712481 (E.D. Tex. Mar. 30, 2023) (slip op.), the United States District Court for the Eastern District of Texas (Sherman Division) became the latest in a growing list of courts to hold that an insurer's payment of an appraisal award in a weather-related claim, plus all related interest that may be owed under the TPCCA, operates to defeat any remaining claim for interest and attorneys' fees as a matter of law.
Morakabian arose out of a disputed claim for storm-caused damage. When Morakabian's homeowner's insurer declined to pay his claim, Morakabian filed suit and demanded appraisal. Upon completion of the appraisal process, the insurer paid the resulting award and an additional $4,699, which represented the insurer's calculation of the maximum amount of TPPCA interest potentially owed on the claim. The payment included no attorneys' fees.

The insurer subsequently moved for summary judgment on the insured's case in its entirety, and Morakabian responded by nonsuiting all but his claims for interest and attorneys' fees under the TPPCA. Relying on section 542A.007 of the Texas Insurance Code, which includes a statutorily-prescribed formula for calculating the maximum amount of attorneys' fees potentially recoverable by an insured in a weather-related action, the insurer argued that its payment of the appraisal award and all TPPCA interest potentially owed on the claim rendered the amount potentially recoverable by Morakabian at trial $0, which – in turn – yielded a calculated fee award of $0.

In response to the insurer's motion, Morakabian did not contend that the insurer failed to pay the full amount of the appraisal award, nor did it argue that the insurer's additional payment of $4,699 was insufficient to cover all TPPCA interest potentially owed on the claim. Instead, Morakabian argued more generally that the insurer could not preclude the insured from litigating its TPPCA claim through trial (and recovering attorney fees) by preemptively paying all interest potentially due under the TPCCA.

After analyzing the plain language of section 542A.007 and examining several recent opinions addressing the post-appraisal recovery of attorneys' fees, the court rejected Morakabian's argument and granted summary judgment for the insurer. As the court reasoned, the insurer's payment of the appraisal award and all interest potentially recoverable under the TPPCA, Morakabian's potential recovery on the claim at trial was $0, which – under the fees-calculation formula set forth in section 542A.007 – could not support an award of attorneys' fees.

In resolving this matter of first impression in the Eastern District, the *Morakabian* court joined the many state and federal courts in Texas that have concluded an insurer's payment of an appraisal

award in a weather-related claim, plus all related interest that may be owed under the TPCCA, precludes an insured from recovering any additional interest or attorneys' fees. And, in so doing, the *Morakabian* court expressly noted that it was "unpersuaded by [the] analysis" of the only two cited holdings to the contrary, further relegating those two opinions to outlier status.

Insuring the Future: How Artificial Intelligence Could Revolutionize the Insurance Industry

by **Jennifer Gibbs**

Experts predict that with the help of advanced AI technologies, the insurance sector can now tackle complex data analysis and decision-making processes like never before. According to a recent article published by financial services company McKinsey,**,** core technology trends expected to reshape the insurance industry over the next decade include:

- **Connected devices** (such as cars, fitness trackers, home assistants, smartphones, and smartwatches) could allow carriers to analyze data to understand their clients more deeply, resulting in personalized pricing and increasingly real-time service delivery.
- **Robotics**, including 3-D printed buildings, autonomous vehicles (including cars, drones, and even farming equipment), and enhanced surgical robots have the potential to shift risk pools, change customer expectations, and enable new insurance products.
- **Data sharing** through open-source protocols will likely emerge to ensure that data can be used across industries, such as wearable data that can be made available through Amazon, Google, Apple, and other consumer device manufacturers.
- **Cognitive technologies**, which are loosely based on the human brain's ability to learn through decomposition and interference (such as image, voice, and unstructured text processing) could become the standard approach for processing large data streams - enabling new "active" insurance products tied to an individual's behavior and activities.

The full article can be found **here**.

Thank you for reading this issue of The Zelle Lonestar Lowdown!

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**

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