THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, June 13, 2023 | ISSUE 2

Welcome to 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!

June 23, 2023 - Zelle LLP is proud to sponsor the After Party & Awards Ceremony at the 39 thAnnual DCA Golf Classic on June 23 at Indian Creek Golf Club in Carrollton, TX.

June 27 - 28, 2023 - Zelle LLP's **Jessica Port** from our Washington, DC office, will be presenting on Ethics for Insurance Adjusters at the **2023 PLRB Western Regional Adjusters Conference in Allen, TX**. Jessica will present *"In Defense of the Insurance Adjuster: How to Navigate Written and Implied Duties."* from 8:30-10:00 a.m. on both June 27 and June 28. For more information click **here**.

2024 *What the Hail?* Conference - Updated Date/Location!!

Let's try this again. Last month, we announced the dates and location for *the 2024 What The Hail? Conference*. But unfortunately, conflicts arose and we have found an even better date and location for the event.

- Dates: Thursday, February 8 and Friday, February 9, 2024
- Location: Irving Convention Center
- Hotel Block: Westin Hotel Irving Convention Center
- Two-day seminar format (all day Thursday/half-day Friday)
- Welcome Reception on Wednesday evening for all attendees
- The legendary "80's Party" will return on Thursday evening at the Toyota Music Factory (with a full concert by an amazing 80's cover band -- stay tuned)
- Cost: $100 (inclusive of all classes/meals/events)
- Sponsorship opportunities available (contact **abannon@zellelaw.com**)

Watch for a new "Save The Date" email blast next week.

Todd Tippett's

Top 10 Tips...

on Complying with Texas Ins. Code §§542/542A

1. Within 15 days after notice of the claim, acknowledge in writing.

2. Commence the investigation and adjustment within 15 days after notice of the claim.

3. Request all reasonable information necessary to adjust and investigate the claim within 15 days after notice of the claim.

4. Conduct a thorough and reasonable investigation of all aspects of the claimed losses.

5. Provide instructions and a blank proof of loss form to the insured within 15 days after notice of the claim.

6. Provide instructions and a blank proof of loss form to the insured if one is needed.

7. Accept or reject the claim, in whole or in part, within 15 business days after receiving all items, statements and forms required to secure a final proof of loss.

8. The carrier is allowed to request an additional 45 days to investigate if it makes such a request in writing within 15 business days after receipt of all items, statements and forms required to secure a final proof of loss.

9. Tender all undisputed payments to the insured within 5 business days after accepting the claim.

10. All deadlines are extended by 15 days if the carrier is Surplus Lines or the claim involves a weather-related catastrophe.

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.

Prompt Payment of Appraisal Award Alleviates Attorneys' Fees

by **Shannon O'Malley** and Zach Fechter, Dallas Law Clerk

When bringing a breach of contract action against a carrier, insureds generally have multiple means to recover attorneys' fees: under the Civil Practices and Remedies Code for breach of contract and under various provisions in the Texas Insurance Code when alleging bad faith or breach of the prompt payment of claims act.

But in 2017, Chapter 542A of the Texas Insurance Code was enacted and has been determined by multiple courts to restrict recovery of attorneys' fees upon prompt payment of claims. Most recently, the Dallas Court of Appeals in **Rosales v. Allstate Vehicle & Prop. Ins. Co., No. 05-22-00676-CV, 2023 WL 3476376, at *1 (Tex. App. May 16, 2023)** affirmed that prompt payment of an appraisal award precludes recovery of attorneys' fees, even when litigation is pending.

In *Rosales*, a policyholder's property was damaged by hail. During the adjustment, the insurer determined the damages did not exceed the deductible and paid nothing. The policyholder sued for breach of contract, bad faith, and damages under the Texas Prompt Payment of Claims Act (TPPCA) violations. The policyholder also invoked the appraisal process and the case was abated pending appraisal.

The appraisers determined the actual cash value of the loss was greater than the deductible. The insurer then paid the appraisal amount less the deductible within three days of the award. At the same time, the insurer issued an additional check for the amount that could be alleged due under the TPPCA. Following these payments, the insurer moved for summary judgment to dismiss the breach of contract and bad faith claims, including all claims under the TPPCA and any claim for attorneys' fees. The trial court granted the carriers' summary judgment motion and dismissed the suit.

The policyholder appealed, arguing he was entitled to attorney's fees under Chapter 542A despite the insurer's payment. In particular, the policyholder argued the Texas Supreme Court's decision in **Barbara Technologies Corp. v. State Farm Lloyds, 589 S.W.3d 806 (Tex. 2019)** permitted recovery of attorneys' fees. The Dallas Court of Appeals disagreed. The Court determined *Barbara Technologies* was not governed by Chapter 542A. And under that Chapter, the Court found that insurer's preemptive payment of the appraisal award eliminated any "amount to be awarded in the judgment," totaling the attorneys' fees to zero. The court also determined that interest on delayed payments owed to a policyholder is not relevant for calculating attorneys' fees under Chapter 542A because interest is not an amount to be awarded for a "claim under the insurance policy."

Going forward, carriers might view this opinion as endorsing one possible dispute strategy. The Court recognized that most federal courts support its conclusion regarding preclusion of attorneys' fees upon prompt payment of appraisal awards and TPPCA interest. The Court further acknowledged that under Texas law, prepayment of damages offsets statutory damages calculations without constituting involuntary, unilateral, or unfair settlements. Depending on the circumstances, and given this opinion, payment prior to the end of litigation may then be a strategic option. Above all, this opinion clarifies that policyholders are barred from recovering attorneys' fees under Chapter 542A when an insurer has already paid the appraisal award and any statutory interest.

Spotlight:

Viewpoint: Evidentiary Issues With Google Earth Images in Property Claims

by **Brandt Johnson** and **Mariana Best**

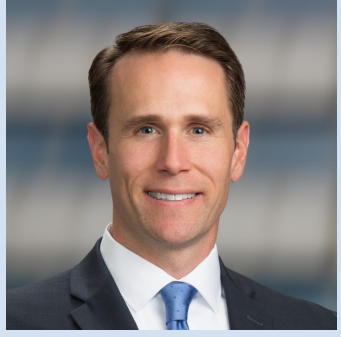
In the era of modern technology, Google Earth images have become a useful source for legal evidence. For example, in the context of property insurance, such images can assist in establishing a property's pre-loss condition, which may eventually be used to prove or disprove coverage. Therefore, in litigated claims, the admissibility of Google Earth images may be critical for insurers and policyholders alike.

One of the many features included in the Google Earth platform is that it allows users to manually place both labels and markers onto their images. As a result of this, some courts have opted to stringently apply evidentiary rules against the admissibility of Google Earth images, placing specific focus on timestamps.

For example, in **Ory v. City of Naperville, 2023 IL App (3d) 220105, 2023 WL 3359731**, at *6 (Ill. App. Ct. May 11, 2023), the court held that because the proponent of the Google Earth images failed to identify the accuracy behind the photos' timestamps, the photos were deemed inadmissible. Because of this, the court also refused to take judicial notice of the timestamps. *Id.* at *4; *see also* **Jones v. Mattress Firm Holding Corp., 558 S.W.3d 732 (Tex. App.—Houston [14th Dist.] 2018, no pet.)** (refusing to admit or take judicial notice of Google Earth images without evidence proving the accuracy of the timestamps at issue).

In their article, **Brandt Johnson** and **Mariana Best** discuss this and other cases and how states are recognizing the importance of this tool.

Read the full article here.



Eric Bowers presented 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 on June 1 & 2, 2023, in San Antonio.

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

Contact Us!

News From the Trenches by Steve Badger

This is the place where Steve Badger gets to rant about all the issues we are dealing with in the first-party claims world. Yes, most of them involve abuses, schemes, and outright fraud. But some of them do involve legitimate coverage questions and litigation issues. Here are some issues we are addressing this month….

1. Roofing Contractor Owned Law Firms

Yes, that's what I said. Law firms owned by roofing contractors. Incredibly, two jurisdictions (Arizona and Washington DC) allow non-attorneys to be owners of law firms. And the storm chasing contractor industry is already trying to figure out how to take advantage of this for their own financial gain. In the past couple weeks, two schemes have crossed my desk. The model is clear. The contractor solicits and signs up building owners after a storm. The contractor helps with the claim submission and then refers the building owners to its related law firm. That law firm, which really doesn't actively practice law, refers the building owners to a local policyholder attorney to pursue a lawsuit. When the lawsuit settles, the contractor owned law firm takes a percentage of the recovery as a referral fee. And then also does the repair work.

Anyone see any problems here?

To begin with, how about the fact that the contractor writing the estimate given to the insurance company as the claim measure has a contingency fee interest in the outcome of the lawsuit (in addition to doing the work). And that's just the beginning. I posted more about this issue on LinkedIn. Zelle will also be writing an article about this disturbing trend in the months ahead.

2. Texas Legislative Update

The 2023 Texas legislative session ended last week. A few highlights relating to property insurance claims…

- Several bills seeking to regulate the appraisal process all failed to pass. Appraisal is a creature of contract. It exists only because it is in our policies. If there are problems in the appraisal process, they should be fixed through revised policy language (TDI? Do you hear this? Please approve our clients' proposed forms.)
- Some new fringe policyholder advocate groups advanced goofy appraisal bills this session that were doomed to fail. And they did. If appraisal is going to be regulated, then let's get all the interested stakeholders in a room and hammer out a fair bill that everyone can get behind.
- A bill was passed banning "anti-public adjuster endorsements" in Texas policies. The Governor has already signed this bill into law. Congrats to the Texas Association of Public Adjusters for passing a bill that protects the rights of Texas policyholders to retain a public adjuster. Yes, I agree with that right. But know that I will always respond strongly to abusive conduct by public adjusters.
- A bill was passed prohibiting policy language requiring Texas policyholders to arbitrate their claims in a foreign jurisdiction under foreign law. However, this bill is still sitting on the Governor's desk. There are some who believe the Governor will veto this bill.

- Several additional bills also failed. These bills attempted to limit the use of cosmetic damage endorsements, limit depreciation to 20% of the claim value, and – get this – require insurance companies to pay public adjuster commissions.

3. Appraisal Abuse

I could probably write about appraisal abuse every month. One of the abuses that concerns me the most right now is the inclusion of new claim components for the first time in appraisal. We currently have a matter where the insured submitted a $15 million claim, filed a lawsuit, and then litigated for four years asserting its $15 million claim. Then, on the eve of trial, almost six years after the date of loss, the insured belatedly demanded appraisal. In appraisal, the insured's appraiser submitted a $357 million estimate. Yes, the claim went from $15 million to $357 million. Anyone think that's proper? Of course not. And, fortunately, a Bexar County district court judge also didn't think it was proper. The court stayed the appraisal process and required the insured to formally submit its full claim and a sworn statement in proof of loss. What's the lesson here? Insurance companies should not hesitate to call out and fight abusive conduct during the appraisal process. Don't wait until the appraisal process is over. If the insured is adding new damage components for the first time during the appraisal process, the insurance company should first have an opportunity to adjust the claim. How can there be a dispute as to the amount of loss if a claim was never submitted?

4. Contractor/Public Adjuster Kickback Schemes

This one has me really upset. We have received information about several public adjusters who are requiring contractors to include enough money in their invoicing to the insurance companies so that the contractor can then kickback 10% of the claim proceeds to the public adjuster. No, that is not legal. It's called insurance fraud. And it also violates the public adjuster's ethical obligations not to accept payments from anyone other than the insured. I expect there will be more disclosure regarding this issue in the months ahead. Be forewarned!

5. McClenny Moseley

This unfortunate saga is well-documented and discussed on my **LinkedIn** page. This saga is a train-wreck and sinking ship all rolled into one and the parties who suffer most are the policyholders. At its core, the entire mess illustrates that the mass-torts model just doesn't work in first-party claims. And a lot of people lost a lot of money learning that lesson.

AI Update

Lawyers Who Used ChatGPT As A Search Engine And Cited Fake Cases Could Be Sanctioned

by **Jennifer Gibbs**

In *Mata v. Avianca*, the court questioned lawyers about the use of ChatGPT to conduct legal research. The case now involves sanctions against the lawyers who filed a brief with at least six non-existent or hallucinated cases. The lawyers admitted they did not read the cited cases and apparently were under the assumption that ChatGPT was a search engine. At the hearing for sanctions, counsel for one of the lawyers stated: "There used to be only Lexis, Westlaw, and the books. Now there are many, many more. There are 100s of AI vendors that law firms use. Many lawyers have been burned. My client was playing with live ammo, which made up caselaw. He had no idea."

The court is considering whether the lawyers failed to fulfill their obligation to be factual and truthful. The *Avianca* case has captivated the tech world, where there has been an increasing debate about the dangers — even an existential threat to humanity — posed by artificial intelligence, and has also caught the attention of lawyers and judges worldwide.

"This case has reverberated throughout the entire legal profession," said David Lat, a legal commentator. "It is a little bit like looking at a car wreck." *See* https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html

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Jury Affirms that an Insured Must Have Actual Evidence to Demonstrate Bad Faith

By: **Mariana Best** and Emaan Bangash, Dallas Law Clerk

Recently, the San Antonio Court of Appeals held that conclusory and sparse evidence does not conclusively establish that an insurance company breached its policy or engaged in unfair or deceptive practices.

In **Jones v. Allstate Vehicle and Property Insurance Company, No. 04-22-00012-CV, 2023 WL 3733917 (May 31, 2023) (mem. op.)**, a hailstorm damaged Brian Jones' home in April 2016. After applying a $2,000.00 deductible to its estimate for covered damages totaling $4,840.62, the carrier, Allstate, issued a payment in the amount of $2,840.62, which included coverage for a metal patio roof, turbine vents, and metal flashing. Dissatisfied with this amount, Jones requested an additional inspection, which resulted in a supplemental payment of $425.26.

Allstate, however, refused to pay for the entire roof on the basis that its investigation concluded that the roof did not sustain covered damages as a result of the reported hail event. Consequently, Jones sued for both breach of contract and violations of the Texas

Insurance Code. In the meantime, in 2018, Jones found claims adjuster Earl Stigler to estimate his repair costs. Stigler produced a $45,880.00 estimate for the reported damages. By 2021, Jones paid for the roof repairs himself.

At trial, Jones relied on (1) his and his wife's recollection of the storm's severity, (2) Stigler's estimate and findings, which concluded that golf ball sized hail damaged the roof, several windows, and some siding of the Jones' home, and (3) a photograph of damage to a wind turbine, which Allstate had already issued payment for. Ultimately, the jury found in favor of Allstate. Jones appealed and argued that he had conclusively established his claims for breach of contract and unfair settlement practices, and that the jury had insufficient facts to reject both of these claims.

After a brief discussion of the definition of "loss" (because neither the policy nor the jury defined it in relation to a breach of contract or unfair settlement claims), the appellate court found that while Jones conclusively established that a hailstorm indeed struck his home, Jones had failed to show any evidence that his home, particularly the home's roof and siding, was destroyed in excess of Allstate's estimate. The court determined that Stigler made conclusory statements about the extent of damages—he could not explain how the damages required so many repairs or how the damages were different from those Allstate found and had compensated for. Interestingly, the court opined that the jury "may have determined that Stigler's observation of hail 'hits' spoke to only cosmetic concerns," particularly because Jones and his wife admitted that the home never leaked since the storm and they did not repair the roof until 2021.

In the end, the court affirmed the trial court's ruling and found that the evidence was legally sufficient to support the jury verdict. Based on the foregoing, an estimate and conclusory testimony regarding a reported loss may not sway a jury and carriers should hold an insured to its burden to accurately support a claim.

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/attorneys.

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