THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, July 11, 2023 | ISSUE 3

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.

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Upcoming Events

You don't want to miss this!

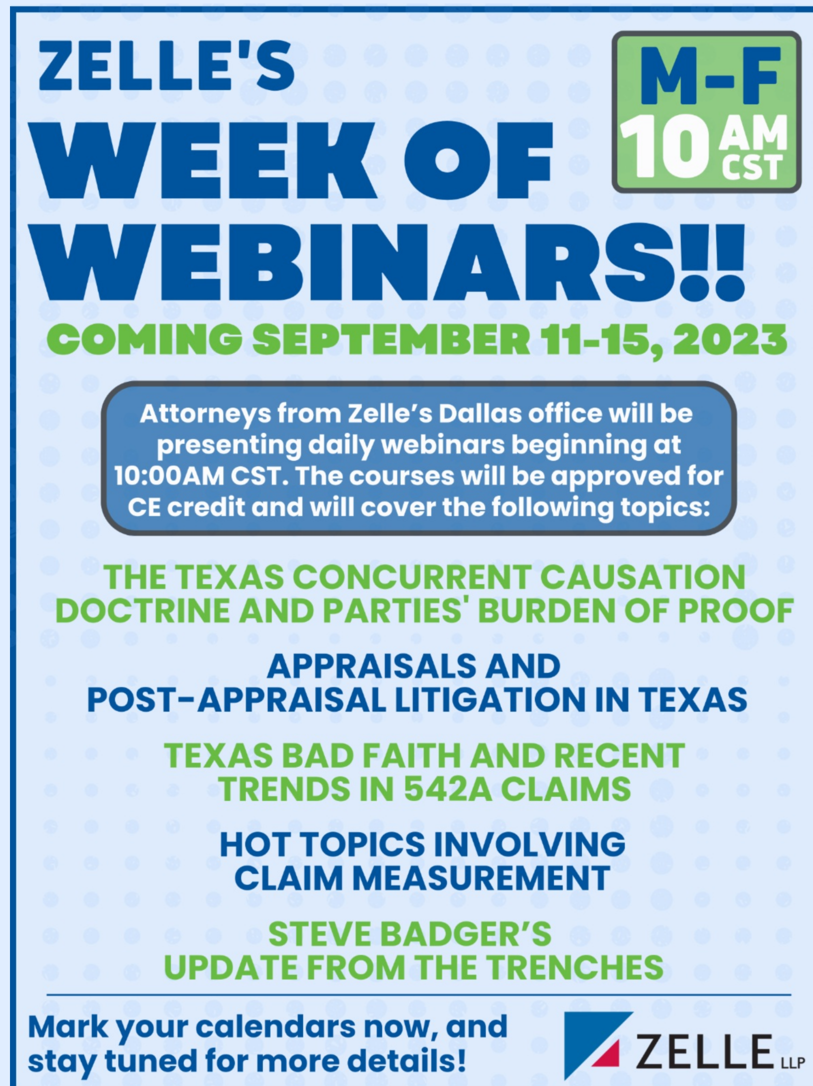
Coming September 11-15, 2023: Zelle's Week of Webinars!

Attorneys from Zelle's Dallas office will be presenting daily webinars beginning at 10:00 AM CST. The

courses will be approved for CE credit and will cover the following topics:

- The Texas Concurrent Causation Doctrine and Parties' Burden of Proof
- Appraisals and Post-Appraisal Litigation in Texas
- Texas Bad Faith and Recent Trends in 542A claims
- Hot Topics Involving Claim Measurement
- Steve Badger's Update from the Trenches

Mark your calendars now, and stay tuned for more details!



2024 *What The Hail?* Conference February 8-9, 2024!!

Plans are coming together for the ***2024 What The Hail? Conference***. Dates are confirmed, venue is set, agenda is being put together, band is booked, and lots of sponsors are signed up. Here are the details:

- 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)
- 12 hours of CE credit pending
- 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 *The Molly Ringwalds* band
- Cost: $100 (inclusive of all classes/meals/events)
- A few sponsorship opportunities remain available (contact **abannon@zellelaw.com**)

Registration email will be sent out the first week of August.

2024 WHAT THE HAIL? CONFERENCE

FEBRUARY 8 - 9, 2024

THE IRVING CONVENTION CENTER
IRVING, TX

Breaking News: Amarillo Court of Appeals Holds Pre-Suit Notice Letters Under 542A Must State "The Specific Amount Alleged To Be Owed"

by Steve Badger

When the “Hail Bill” (Tex. Ins. Code. 542A) was enacted in 2017, one of its primary requirements was for a plaintiff to provide a pre-suit notice letter stating “the specific amount alleged to be owed”. This specific amount was then tied to the plaintiff’s ability to recover attorneys’ fees at the end of the case (the lower the number as compared to the verdict, the more likely attorneys fees could be recovered). The intent of the requirement was to encourage plaintiffs to give reasonable pre-suit demands and, hopefully, lead to more pre-suit settlements. The statute provided that the failure to provide a proper pre-suit notice letter stating a specific amount resulted in abatement of the lawsuit until proper notice was provided and a preclusion on the recovery of attorneys fees.

Some manipulative Texas policyholder attorneys have been circumventing this requirement by stating a very low-ball “specific amount” in their pre-suit notice letters and advising that the amount stated cannot be accepted in settlement of the dispute. Their apparent logic was that this would help ensure their ability to recover attorneys fees at the end of the case.

Just yesterday, the Amarillo Court of Appeals issued a well-written decision squarely rejecting this ill-advised practice. The Amarillo Court of Appeals squarely held that the statute means what it says – the plaintiff must provide “the specific amount alleged to be owed”, which means a number that accurately reflects the plaintiff’s damages and that can be accepted in resolution of the dispute. The failure to do so requires abatement of the lawsuit until such a number is provided.

This significant decision should bring an end to the gamesmanship by these policyholder attorneys and ensure that plaintiffs accurately state “the specific amount alleged to be owed” in their 542A pre-suit notice letters.

Congrats to Zelle LLP attorneys Brian Odom, Michael Upshaw, and David Winter for obtaining this important decision for the Texas first-party insurance industry. A copy of the opinion is available here.

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. So what’s new this month? Here are a few tidbits….

1. Governor Abbott Vetoes Arbitration Legislation

As mentioned last month, the Texas Legislature passed a bill that precluded insurance policies from containing requirements that disputes be arbitrated in foreign venues (typically New York or London). Governor Abbott vetoed the legislation. Honestly, I have mixed emotions. I acknowledge the argument that small Texas-based businesses and Texas school districts should not be required to arbitrate their disputed insurance claims in New York. But there is nothing wrong with a sophisticated multi-national company represented by an experienced broker in the insurance procurement process agreeing to such an arbitration clause. Unfortunately, the legislation broadly applied to all insureds. Perhaps in the next legislative session a more narrowly drafted bill that all stakeholders can support will be submitted.

2. No Attorneys Fees Post-Appraisal in 542A Matters

Be sure to see the Lonestar Lowdown write-up by Michael O'Brien and Christopher Edwards regarding another Texas appeals court recently holding that attorneys fees are not recoverable if an insurance company pays the appraisal award and statutory interest in matters governed by TIC 542A. The law is now well-settled on this issue. And there is no reason to expect that the Texas Supreme Court would hold otherwise. Thus, moving forward, I would argue that all Texas policyholder attorneys who sign up clients with the intent of dumping their claims into appraisal have an ethical obligation to advise their clients that attorneys' fees are not recoverable and that any attorneys' fees will have to come out of the appraisal award itself or the statutory interest.

3. Growing Interest In Policy Form Revisions

We are seeing an increase in interest from our insurance company clients in revising long-standing policy form language to address common issues and abuses in the claims process. This includes issues such as new appraisal clauses, revised "cosmetic damage" endorsements, prompt notice requirements with absolute claims filing deadlines, revised definitions of "actual cash value", depreciation schedules, and more. We are pleased to see this, as many of the issues we deal with on a daily basis can be addressed with revised policy language. Again, we are always happy to help our insurance company clients with their policy language revisions.

4. McClenny Moseley's Death March

The sign is off the door at their Louisiana office. All of their Louisiana cases are being referred to other attorneys. Their Houston office is down to just a handful of people. And the lawsuits against them keep coming in. That pretty much sums up the past month for MMA. There's really not much more to say.

5. Waiving of Deductibles

In 2019, I spent six months working cooperatively with the Texas roofing contractor trade groups (RCAT and NTRCA) to pass legislation making it 100% clear that insureds had to pay their deductibles and any contractor schemes to waive deductibles were improper. Unfortunately, without active enforcement of the law by either the Texas Attorney General or Texas Department of Insurance, some bad actors are still out there waiving deductibles. And that really pisses me off (to say it bluntly). It's unfair to the reputable contractors complying with the law. And it implicates homeowners in an insurance fraud scheme. Texas insurance companies can help stop this practice by refusing to pay RCV holdback until "reasonable proof" is provided that the deductible has been paid. I strongly encourage every Texas insurance company to implement a strict policy that RCV holdback payments are not issued until the insured provides reasonable proof the deductible has been paid. That would be a huge step forward in stopping the deductible eaters.

6. Use of "Insurance Proceeds" Contracts

The recent week of large hail in Dallas has brought a swarm of roofing contractors into North Texas. A lot of their contracts have recently crossed my desk. I find it surprising that many of these contracts are what we call "Insurance Proceeds Contracts" -- the contractor agrees to do the work for whatever the insurance company agrees to pay. That's fine, so long as the contractor actually does the work for the insurance company claim measure. But we all know that isn't always the case. So what happens then? We often see the contractor trying to negotiate a higher claim measure. But contractors are not allowed to negotiate insurance

claims. We also often see the contractor demanding appraisal. But contractors cannot demand appraisal. And we also sometimes see contractors filing liens against the homeowner's property. But how is that proper when the contractor agreed to do the work for the insurance proceeds? Given these issues, I fail to understand why any contractor would ever use an "insurance proceeds" contract. They have no remedy to seek payment above the insurance company claim measure. Do you have an insured being harassed by a contractor for additional payments? We are happy to help educate the insured on their rights in this situation.

Todd Tippett's

Top 10 Tips on...

working with Public Adjusters:

1.Cooperate with the Public Adjuster, as they typically also want the claim timely and fairly resolved.

2. Confirm that the Public Adjuster has the necessary license to work in the jurisdiction and has a written contract with the Insured.

3. Hold the Public Adjuster to the Insured's duties under the first-party property policy, including production of relevant documents.

4. Ensure that the Public Adjuster complies with the legal obligation to actually investigate and measure the claim on behalf of the Insured.

5. Timely respond in writing to all communications from the Public Adjuster, just as you would with the Insured.

Court Limits Use of Approaching Statute of Limitations Exception to Presuit Notice Letter Requirement

by Mariana Best and Emaan Bangesh, Dallas Law Clerk

Under Chapter 542A of the Texas Insurance Code, presuit notice must be offered at least 61 days before suit unless providing such notice is "impracticable because: (1) the claimant has a reasonable basis for believing there is insufficient time to give the presuit notice before the limitations period will expire; or (2) the action is asserted as a counterclaim." Tex. Ins. Code § 542A.003(d). Any argument claiming impracticability must be supported by a "reason independent from simply stating that the impending expiration of the limitations period made the notice impracticable." **M Central Residences Condominium Ass'n Inc. v. Technology Insurance Co., Inc., 2023 WL 4089388, at *2 (N.D. Tex. 2023).**

Citing other Texas courts, the United States District Court for the Northern District of Texas recognized that the "reasonable basis" standard for impracticability is "not an easy threshold to satisfy and 'ought to be reserved for those instances in which presuit notice genuinely cannot be provided.'" *Id*. (citation omitted). In *M Central Residences,* the plaintiff argued that its duty to provide presuit notice was impracticable due to its belief that the statute of limitations would "soon expire" and contended that it could not feasibly predict when the limitations period would expire because it did not possess a certified copy of the policy.

The court rejected plaintiff's arguments, finding that possession of a certified copy of the policy is "inconsequential to the calculation of the limitations period" and is no excuse for failing to provide presuit notice. *Id.* at *3. Additionally, the court further found that the fact that the parties had spent significant time negotiating a resolution prior to suit did not render the required notice impracticable. Considering the foregoing, the court ultimately held that the plaintiff's proffered explanations, or lack thereof, did not constitute a reason *independent* from simply asserting that an approaching limitations deadline made the required notice impracticable, and consequently the presuit notice requirement was not excused. The above opinion reaffirms the notion that an approaching limitations deadline alone does not exempt a claimant from their duty to provide the required notice as prescribed under Chapter 542A.

6. Do not allow the Public Adjuster to also act as either a contractor or appraiser on the same claim.

7. Copy the insured on claim communications if the Public Adjuster becomes uncooperative or unresponsive.

8. Watch closely for any kickback or other financial arrangements between the Public Adjuster and the contractor.

9. Be aware of the common traps set by certain Public Adjusters who find it necessary to manipulate the process.

10. Be nice (regardless of how the Public Adjuster behaves).

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.

Morakabian and Rosales Signal a Consensus View on Recovery of Attorneys' Fees After Appraisal

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

Two more courts have held that an insured has no viable claim for attorneys' fees in a weather-related claim governed by Chapter 542A of the Texas Insurance Code when the insurer pays an appraisal award and all statutory interest potentially owed on the claim.

With the issuance of the Eastern District's opinion in *Morakabian v. Allstate Vehicle and Property Insurance Company*, judges in all four federal district courts in Texas have now held that an insurer's payment of an appraisal award in a weather-related claim, plus all related interest that may be owed under Texas' Prompt Payment of Claims Act, precludes an insured from recovering attorneys' fees under section 542A.007 of the Texas Insurance Code.

The Dallas Court of Appeals reached the same conclusion in *Rosales v. Allstate Vehicle and Property Insurance Company*, becoming the first Texas state appellate court to weigh in on the issue. These well-reasoned opinions not only signal a clear consensus regarding Chapter 542A.007's preclusive effect on the recovery of attorneys' fees in the post-appraisal context, but also confirm that the few early federal court holdings to the contrary have been stripped of any purported precedential value.

Read the full article here.

AI Update

A BAD TRIP: AI HALLUCINATIONS LEAD TO ORDERS REQUIRING DISCLOSURE OF AI USE IN LEGAL BRIEFING

by **Jennifer Gibbs**

Federal Judge Brantley Star with the Northern District of Texas has issued a Mandatory Certification Regarding Generative Artificial Intelligence which requires lawyers to list a certification on their court filings that the court filing will not be created by AI, or if the lawyer does intend to use AI to prepare the court filing, that the language drafted by generative AI will be independently checked for accuracy by a human being.
See **https://www.txnd.uscourts.gov/judge/judge-brantley-starr**.

The specific text of the judge's requirement states:

All attorneys and pro se litigants appearing before the Court must,

together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

A second Judge, Hon. Stephen Vaden who presides over the U.S. Court of International Trade, recently issued an "Order on Artificial Intelligence" which requires lawyers with cases before the Court to certify that the lawyers employed specific precautions if using novel AI technologies such as OpenAI's ChatGPT, Google Bard or Microsoft's Bing.
See
https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf

These orders come on the heels of a recent case in which a federal judge ordered two attorneys to pay $5,000 fines after they submitted legal briefs using bogus case citations invented by the AI chatbot ChatGPT. U.S. District Judge P. Kevin Castel in Manhattan ordered lawyers Steven Schwartz, Peter LoDuca and their law firm Levidow, Levidow & Oberman to pay a $5,000 fine in total. The judge found the lawyers acted in bad faith and made "acts of conscious avoidance and false and misleading statements to the court."
See **https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/**.

Fort Worth Appeals Court Confirms Prompt Payment of Appraisal Award Means No Attorney's Fees

By: Michael O'Brien and Christopher Edwards, Dallas Law Clerk

In last month's newsletter, we wrote about the Dallas Court of Appeals' decision that prompt payment of an appraisal award precludes recovery of attorney's fees, in **Rosales v. Allstate Vehicle & Prop. Ins. Co., No. 05-22-00676-CV, 2023 WL 3476376, at (Tex. App.—Dallas May 16, 2023, no pet. h.)**. The Fort Worth Court of Appeals has now joined that court with a similar holding in

Spotlight:

Kester v. State Farm Lloyds, No. 02-22-00267-CV, 2023 WL 4359790 (Tex. App.—Fort Worth July 6, 2023, no pet. h.). With respect to claims brought under Chapter 542A of the Texas Insurance Code, there is a growing consensus that if the insurer pays the appraisal award and any interest under the Texas Prompt Payment of Claims Act (TPPCA), then the insured cannot recover attorney's fees.

In *Kester*, the insured submitted a claim for alleged storm-damage to his home. The insurer inspected multiple times and found some covered damage, for which it paid. The insured disputed the amount, made a demand for actual damages as well as attorney's fees, and then invoked appraisal. Appraisal resulted in an award close to the amount of the insured's demand. Within two months of the award, the insurer paid the full amount of the appraisal award less depreciation, deductible, and its earlier payment. The insurer also voluntarily paid any potential interest under the TPPCA as well as $5,000 in attorney's fees.

Following these payments, the insurer moved for summary judgment, which the trial court granted on the basis that there were no further amounts that the insured could possibly recover from the insurer, including any attorney's fees. The Fort Worth Court of Appeals affirmed, holding that paying an appraisal award leaves "no amount to be awarded in the judgment," and since the attorney's fee formula is a multiple based on that amount under Chapter 542A, the amount of attorney's fees in such a case are zero. In doing so, the court approvingly cited the *Rosales* case as well as a number of federal court decisions. *Kester* and these cases all agree that if an insurer pays the appraisal award and any TPPCA interest, then the policyholder cannot recover any attorney's fees.

Jessica Port,
of Zelle's Washington DC office, presented:
"In Defense of the Insurance Adjuster: Defensively Navigating Written and Implied Duties"
at the PLRB 2023 Western Regional Adjusters Conference on June 27-28 in Allen, TX.

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

Contact Us!

Zelle Updates:

Zelle would like to thank everyone who attended our co-sponsored Happy Hour on June 26th!

Zelle was proud to sponsor the 2023 Dallas Claims Association Golf Classic Charity Tournament on June 23rd.

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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