THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, August 8, 2023 | ISSUE 4

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!

September 11-15, 2023:

Zelle LLP's Dallas Office Week of Webinars!

Zelle LLP invites you to join us for a week of webinars featuring topics that are of critical importance to Texas adjusters and insurance professionals. All webinars will be offered free of charge and 1.0 of Texas CE credit will be given to all attendees for each class.

The following topics will be covered:

- 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

Registration Instructions: Each webinar requires separate registration.

ZELLE LLP'S
DALLAS OFFICE
WEEK OF WEBINARS!
SEPTEMBER 11-15, 2023
Attorneys from Zelle's Dallas office will be presenting daily webinars beginning at 10:00AM CST. 1.0 of Texas CE credit will be given and the following topics will be covered:
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
M-F 10 AM CST
Register at https://lp.constantcontactpages.com/cu/aSxtpkJ
ZELLE LLP

There is no charge to attend. You will receive confirmation after your registration has been approved.

Register Here!

September 18, 2023: Brandt Johnson will be presenting "What the Hail is Going On? Fraud in CAT Claims" on September 18, 2023 at the 2023 IASIU Annual Conference on Insurance Fraud in Dallas, TX.

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 (block opens on September 6th)
- Two-day seminar format (all day Thursday/half-day Friday)
- Approved for 12 hours of Texas CE credit
- 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 in the first week of September.

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. Contractor/PA Kickback Schemes -- This continues to be a hot topic. My recent LinkedIn post on the issue has received considerable attention (over 20,000 views). A half-dozen former employees of a couple public adjuster and contracting firms have reached out to me and confirmed that this is going on. There is no question such schemes are wrong. A contractor cannot include an undisclosed 10% kickback to the public adjuster in its final RCV invoice sent to the insurance company. That is a material misrepresentation as to the cost to complete the work stated in the invoice. Watch for more on this issue in the months ahead.

2. Complaints About Experts -- I am hearing a growing chorus of complaints from policyholder advocates about "result-oriented insurance company experts". Chip Merlin blogged about the issue earlier this week. Link: **MerlinBlog**. Of course, experts should not be result-oriented and should always provide objective findings based on their investigations and experience. But let's be honest. Are the experts on the policyholder advocate side any less "result-oriented"? I know that Policyholder Lawyer X from Houston always uses Expert A and that Expert A will always find wind damage. I know that Policyholder Lawyer Y from San Antonio always uses Expert B and that Expert B will always conclude that small dents to metal will cause the roof to rust out and leak. So why are my "insurance company experts" who reach opposite conclusions the ones accused of being "result-oriented"? I could also easily say, as Chip said in his blog, that "~~Policyholders~~ Insurance Companies simply cannot trust the opinions of most ~~insurance company~~ policyholder advocate claims consultants." All experts should be objective and accurately state their professional opinions. That's a given. But its entirely unfair to condemn "most" of the consultants who work for the other side simply because you don't like their opinions.

3. My Quest -- Speaking of result-oriented experts, the classic Monty Python comedy film "The Holy Grail" chronicles King Arthur's quest to find The Holy Grail. I am on a quest as well. My quest is to find a picture of a metal roof that has actually rusted through and leaking at a point of hail impact. I've asked and asked and asked for such a photo at dozens of public adjuster, contractor, and insurance company conferences. But no one has ever sent me one. Of course, one must exist, because every week I read a policyholder expert report stating: "The metal roof will prematurely rust through and leak at the point of impact." All these policyholder experts, who are not result-oriented of course, must have some support for this position. One would think they have an example showing this condition actually existing on a real roof. So my quest continues. Anyone got such a picture?

4. Deductible Waiving -- I continue to work with NTRCA and RCAT in encouraging the Texas Department of Insurance and Texas Attorney General to crack-down on roofing contractors engaged in the illegal waiving of deductibles. Everyone involved in the claim process - reputable contractors, insurance companies, and insureds – suffers from this improper conduct. If you have documents confirming that a contractor is waiving deductibles, I want to see them. We need the TDI and AG to make an example of someone.

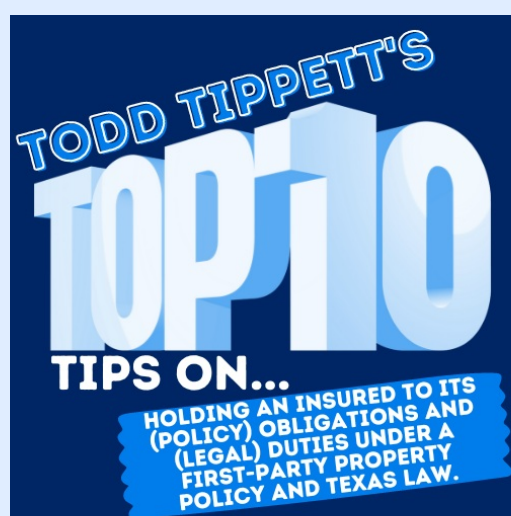
5. Appraisal Abuses -- Perhaps we are finally making some progress in ending the unilateral umpire appointment scheme. I have not received a new file in several months in which this has occurred. And a well-known policyholder appraiser (also a public adjuster) recently confirmed for me that he will not pull this stunt in an ongoing matter with one of our clients. I'm glad to see that there are some things we can all agree are improper and shouldn't be done.

6. Proofs of Loss -- Speaking of appraisal abuses, one of my biggest pet-peeves involves a policyholder appraiser grossly increasing a claim value as soon as the matter goes into appraisal. I guess the public adjuster (and sometimes policyholder attorney) who previously had the claim was incompetent and couldn't come up with an accurate number (note tongue-in-cheek). One way to combat this tactic is to require the insured to sign a proof of loss during the adjustment process and before the claim goes into appraisal. A sworn statement signed by the insured attesting to the value of her claim is strong evidence before an umpire. That proof of loss, along with a real bid from a real contractor stating the actual cost to fix the damage, should be sufficient to convince any honest umpire that the appraiser's grossly inflated

Xactimate estimate is far from exact.

7. Public Adjuster Licensing -- The number of public adjusters in Texas continues to rise significantly each year. In 2004, there were only 77 licensed PAs in Texas. That number increased to 800 in 2009 and 975 in 2019. Today, there are 1734 licensed public adjusters in Texas. That is a very large number of people trolling for disputed claims. And it's very easy to get a Texas PA license. All that is needed is to fill out an application, pay a small fee, post an inexpensive small bond, and pass a very easy exam. That's it. Some are now asking if it's too easy to become a Texas-licensed PA, especially in light of recent news about a public adjuster stealing millions of dollars from his clients. Link: **Drew Aga/Mitchell**. Public adjusters enjoy a narrow carve-out from what is otherwise considered to be the practice of law. Accordingly, shouldn't public adjusters be required to have education, licensing standards, ethical rules, trust accounts, and fiduciary duties similar to lawyers? There is a growing belief -- held by some public adjusters as well -- that the standards to become a PA should be higher. Watch for more on this in the months ahead.

8. MMA -- Things continue to look gloomy for what is left of MMA. The Louisiana federal courts, the Louisiana State Bar, the FBI (yes, the FBI), the Louisiana Department of Insurance, and many privately filed lawsuits are all keeping a keen eye on them. Fortunately, the Louisiana courts and State Bar have been well-organized in ensuring that their clients are protected. Now we just wait and see how this whole mess plays out for them. As I have said before, the most-important lesson here is that the mass torts model just doesn't work in first-party property insurance claims, so long as insurance companies are not complicit in allowing these claims to be mass-mediated and settled.



Todd Tippett's
Top 10 Tips on...
Holding an Insured to its (Policy) *Obligations* and (Legal) *Duties* Under a First-Party Property Policy and Texas Law:

1.The Insured has an obligation to provide prompt notice of a claim. (some policies actually contain a stated claim notice deadline; such as one year from date of loss)

2. The Insured has a duty to prove the alleged damage is covered under the policy. (yes, that's the insured's duty under Texas law; the insurer's duty is to conduct a reasonable investigation)

3. The Insured has a duty to prove the alleged damage occurred during the policy period. (and it's ok to ask for documents and information to fulfill that duty during the adjustment process)

4. The Insured has a duty to segregate covered from non-covered damage. (if you are not familiar with the Texas concurrent causation doctrine, you need to be)

5. The Insured has an obligation to provide reasonably requested books and records to support the claim. (policies clearly require the insured to respond to reasonable requests)

6. The Insured has an obligation to submit to an Examination Under Oath when requested. (an EUO should be requested whenever a question arises as to potential fraud in a claim submission)

7. The Insured has an obligation to

Tales From The Trenches of Remote Depositions

by **Jennifer Gibbs** and **Bennett Moss**

After the COVID-19 pandemic shook the world in early 2020, Courts were fast to transition to virtual hearings and even conduct some trials via the web. Private law firms, to the extent they had not already, implemented Zoom, Skype or Microsoft Teams into their everyday practice.

With the adoption of this technology into the litigation process, perhaps the most significant component of litigation to replace was the in-person deposition. As the pandemic continued, remote depositions became the norm, replacing in-person depositions almost entirely. Remote depositions proved to be so practical during the COVID-19 pandemic that many practitioners continue to conduct depositions virtually in the post-pandemic world. However, despite the convenience of remote depositions, these virtual environments are rife with opportunities for improper behavior, particularly when it comes to witness coaching.

Courts across the country have now issued opinions detailing a variety of illicit behaviors exhibited at remote depositions by questioning attorneys, defending attorneys, and even witnesses. Witness coaching, scripted testimony, and general lack of civility have all been the topic of sanctionable conduct in these orders. In the below article, attorneys **Jennifer Gibbs** and **Bennett Moss** dive into the details of these cases and provide suggestions for preventing and combating these behaviors.

Read the full article here.

Viewpoint: Defining the Doctrine of Prevention in Texas

by **Todd M. Tippett** and **Mariana P. Best**

The prevention doctrine, also referred to as the equitable doctrine of prevention, excuses a contracting party from performing a condition when the other contracting party wrongfully prevents them from doing so. In Texas, courts have routinely held that the prevention doctrine applies only in limited circumstances.

In some cases, policyholders have sought the application of this doctrine as a means to avoid typical replacement cost value (RCV) provisions, many of which require that the insured actually repair or replace the damaged

provide a signed and sworn Proof of Loss when reasonably requested. (there is nothing wrong with asking an insured to swear under oath that the claim measure being submitted by a public adjuster or contractor is accurate)

8. The Insured has a duty to present its entire claim before it requests an appraisal of the loss. (Texas case law supports a refusal to go to appraisal until the insured tells you its claimed amount of loss)

9. The Insured has an obligation to cooperate in the investigation, adjustment and settlement of the claim. (the breach of any policy obligation can be considered as a breach of the obligation to cooperate and provide a potential policy defense)

10. When a potential crime is involved with the alleged property damage, the Insured has an obligation to report the matter to the police. (similarly, insurance companies have a duty to report insurance fraud to the Texas Department of Insurance)

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

property to recover RCV.

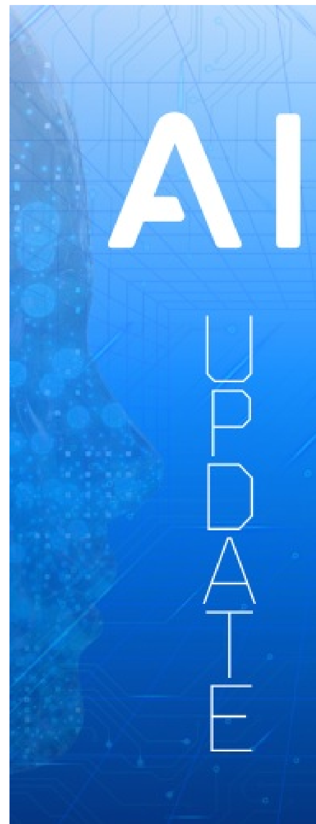
The majority of Texas courts choose to stringently apply the plain meaning of these RCV provisions, thereby rejecting application of the prevention doctrine and holding that such doctrine applies only where: (i) there are sophisticated parties; (ii) the transaction is completed in a commercial setting; or (iii) the insurer has already paid the actual cash value (ACV) to the insured. *Devonshire Real Estate & Asset Management, LP v. American Insurance Co.*, No. 3:12-CV-2199, 2014 WL 4796967, at *4-*8 (N.D. Tex. Sep. 26, 2014).

A few courts, however, have misinterpreted *Devonshire* to mean that "if coverage is forfeited by not making the repair within the contractual time for doing so, and the insurance company caused a delay pas the contractual deadline, the insurance company cannot use the deadline as an excuse for its failure to pay." *A&E Austin 1, Ltd., v. Nationwide General Insurance Co.,* No. SA-21-CV-01031-JKP, 2023 WL 4921531, at *4 (W.D. Tex. Aug. 1, 2023). For example, in *Kabir Marina Grand Hotel, Ltd. v. Landmark American Insurance Co.,* the court held that the insured could present trial evidence to support an argument consistent with the prevention doctrine, including any unreasonable delay caused by the insurer. *See* No. 2:18-CV-00237, 2022 WL 19517466, at *5 (S.D. Tex. Jan. 18, 2022).

Such cases signal a departure from settled precedent that seeks to enforce clearly worded replacement cost provisions, including those requiring repair and/or replacement within a specified timeframe.

For a more detailed discussion on the current legal landscape of the prevention doctrine in Texas, please visit **Todd M. Tippett** and **Mariana P. Best**'s article **here.**

Read the full article here.



AI Update

Hurricanes, Artificial Intelligence, and Insurance – Oh My!

by **Jennifer Gibbs**

Meteorologists at Colorado State University recently forecasted 18 named storms, including nine hurricanes, and four major hurricanes will occur this year. The CSU research team previously **upped their projections** twice this year due to "extreme anomalous warmth" of ocean temperatures. *See* **https://news.yahoo.com/hurricane-season-is-about-to-peak-and-its-likely-to-be-bad-184613873.html**.

Notably, one global reinsurer, Swiss Re, is leveraging predictive analytics and Artificial Intelligence to help its clients better anticipate claims and process claims resulting from these disasters more quickly. Late last year, Anil Vasagiri, SVP and head of property solutions at Swiss Re, worked with the company's property solutions division to release a significant new tool to help its clients. This new tool, dubbed Rapid Damage Assessment (RDA), is a platform that combines advances in computer vision with other modeling techniques to help its insurance clients better understand, plan, and analyze their portfolios before disasters strike, monitor their portfolios as events unfold, and then leverage technology to find and mitigate claims in the wake of an event. "If you identify certain claims sooner and put them in remediation, it reduces the severity of losses," Vasagiri explains. "For instance, putting up a temporary tarp covering a roof that had been blown off minimizes your loss," he adds as an example as to how RDA can help identify and mitigate losses as a result of a National Catastrophe. A link to the full article regarding RDA is below.

See **https://www.cio.com/article/647713/swiss-re-streamlines-insurers-natural-disaster-response-with-ai.html/**.

Texas Supreme Court Grants Certification of Question from Fifth Circuit Regarding Whether Insurer's Payment of Full Appraisal Award and Statutory Interest Precludes Recovery of Attorneys' Fees

by **Kristin Cummings**

Spotlight:

On July 22, Zelle attorneys and summer clerks attended the annual volunteer event as part of the Dallas office's summer clerk program.

This year, Zelle worked with Mosaic Family Services, which

In the last few months, we have watched as federal and state courts throughout Texas have held that an insurer's prompt payment of a full appraisal award and accompanying statutory interest precludes the recovery of attorneys' fees from the insurer. Now, however, the Supreme Court of Texas has decided to weigh in.

The case at issue is ***Rodriquez v. Safeco Ins. Co. of Ind***. In October of last year, Judge Cummings in the Northern District of Texas, Lubbock Division, granted the insurer's Motion for Summary Judgment, finding that the insurer's payment of an appraisal award, plus payment of interest due under the Prompt Payment Act, absolves the insurer from paying the insured's attorneys' fees that would otherwise be due under the Prompt Payment Act. 2022 WL 6657888, Civ. Action No. 5:20-CV-168-C (N.D. Tex. – Lubbock, Oct. 3, 2022).

The Insured appealed to the Fifth Circuit Court of Appeals. Last month, the Fifth Circuit certified the question to the Supreme Court of Texas for clarification. Specifically, the Fifth Circuit requested that the Supreme Court of Texas answer the following:

> In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?

On July 21, 2023, the Court accepted the certified question and set oral argument for October 4, 2023. If the Supreme Court of Texas agrees with the growing consensus among courts that have addressed this issue, policy holder attorneys will no longer be able to file frivolous lawsuits against insurers who have paid all that is owed pursuant to an Appraisal Award.

provides safe emergency housing and opportunities for self-sufficiency for hundreds of women and children fleeing domestic violence and human trafficking in the DFW area.

The attorneys and summer clerks provided games and activities for the children at the shelter and assisted with on-site tasks.

Megan Zeller also organized a donation drive for Mosaic within the Dallas office, which resulted in the purchase of bedding, toiletries, diapers, and clothing for the women and children at Mosaic.

If you would like to support Mosaic, you can donate here: **https://mosaicservices.org/donate/**

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

Contact Us!

Court Requires Evidence of the Delta between the Parties' Respective Appraisal Positions to Determine Amount in Controversy

By: **Claire Fialcowitz**

Last month, the United States District Court of Texas Northern District, Dallas Division held that it lacked jurisdiction to decide an insurer's judicial appointment of an umpire where the parties' appraisers failed to provide their opinions on the amount of loss.

In **Sentry Ins. A Mut. Co. v. James J. Morgan d/b/a Morgan & Son Racing Engines, No. 3:22-CV-1185-X (N.D. Tex. July 21, 2023)**, the insurer reimbursed the insured for covered property allegedly damage caused by a December 7, 2020 storm. Thereafter, on August 25, 2022, the insured demanded additional reimbursement totaling $349,657.22. When the insurer refused to issue this additional amount, the insured demanded appraisal pursuant to its property insurance policy. Specifically, the policy provided "that if the parties couldn't '[]agree on the amount of loss, either may make written demand for an appraisal of the loss.'" In accordance with the policy, both parties named appraisers to represent them in the appraisal process.

When the appraisers could not agree on an umpire, the insurer asked the Northern District to appoint one. The insured then moved to dismiss the action, asserting that the court lacked subject matter jurisdiction because the insurer did not plead an amount in controversy greater than the required minimum of $75,000 to establish diversity jurisdiction in federal court.

Agreeing with the insured, the Northern District explained that the amount in controversy "is the value of the right to be protected or the extent of the injury to be prevented." Here, where the insurer only requested that the court appoint an umpire, "the value of the right to be protected is the difference between the appraisers' estimates." (explaining that the "right to be protected" in an umpire appointment case is "the right to have an umpire examine the 'differences' between two appraisers' estimates and reach a 'decision' in accord with one of the appraisers as to the amount of loss."). However, as the appraisal in this matter was not completed and neither appraiser provided estimates on the amount of loss, the court found that it could not "determine the value of the contractual right to be protected."

In asserting that it could rely on the insured's amount of claimed damages to establish the amount in controversy for its umpire appointment case, the insurer relied on Fifth Circuit precedent analyzing the amount in controversy requirement in arbitrator appointment cases. The Northern District rejected the comparison for two reasons. First, the court explained that it could rely on arbitrating parties' delta to determine the amount of controversy "because arbitration resolves 'the entire controversy between parties' by the arbitrator's decision about the parties' delta". (explaining that the "delta" is the difference "between what the defendant wants to pay and what the plaintiff wants to be paid."). However, in appraisal, where the umpire relies on the *appraisers'* delta to determine the amount of loss, the court cannot use the *parties'* delta to determine the amount in controversy. Therefore, the insurer here could not rely on the insured's additional demand of $349,657.22 to satisfy the amount in controversy requirement and establish diversity jurisdiction.

Second, "in arbitrator-appointment cases, the 'eventual dispute is [] the basis of the action before the court,'" and "the parties can readily point to the amount in controversy in the underlying dispute." The same is not true in the appraisal process. In appraisal, both the parties and the umpire rely on the appraisers to complete their estimates "to

develop the dispute." Appraisers only involve an umpire in the appraisal process when they cannot agree on an amount of loss. Even after an umpire provides his or her award to the parties, the insurer may then decide whether to deny the claim or portions of the claim and the insured may decide to file suit against the insurer. Therefore, according to this federal court, when the court is asked to appoint an umpire, the parties' dispute has not yet developed—at best, the dispute is just beginning. For these reasons, the Northern District granted the insured's motion to dismiss the insurer's action to appoint an umpire without prejudice for lack of subject matter jurisdiction.

Going forward, in order to maintain federal court jurisdiction, parties should not solely rely on the amount of loss claimed by the insured. Instead, parties should, at the very least, agree to have their respective appraisers provide competing estimates to establish that the delta between the appraisers, and therefore the amount in controversy, is greater than the required $75,000 before seeking the appointment of an umpire from a federal judge. If the parties cannot even reach an agreement on the amount in controversy, the insurer should provide further evidence of the delta between the parties' positions that led to the amount of loss dispute in the first place. Ultimately, the focus is on the delta.

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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