THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, October 10, 2023 | ISSUE 6

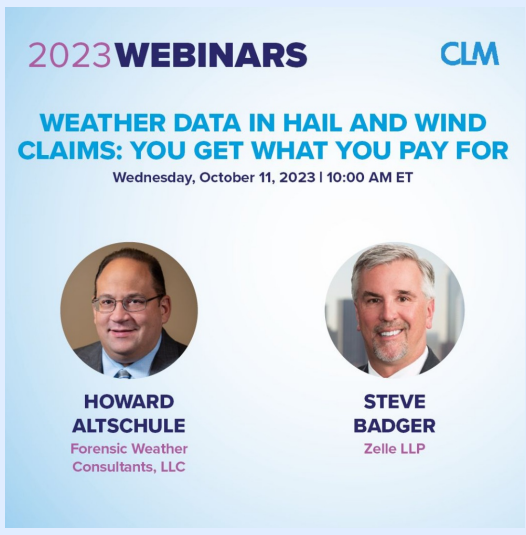
Welcome to The Zelle Lonestar Lowdown, our monthly newsletter bringing you news from the trenches on everything related to Texas first-party property insurance claims and litigation. If you are interested in more information on any of the topics below, please reach out to the author directly. As you all know, Zelle attorneys are always interested in talking about the issues arising in our industry.

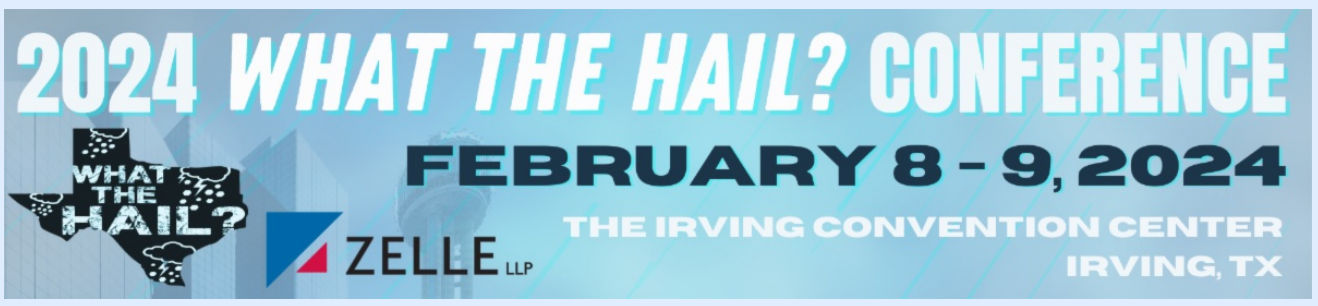
INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

October 11, 2023: **Steve Badger** will be presenting "Weather Data in Hail and Wind Claims: You Get What You Pay For" with Howard Altshule (Forensic Weather Consultants, LLC) as part of the CLM 2023 Webinar Series on Wednesday, October 11, 2023 at 10:00 am EST. More information here.





2024 *WHAT THE HAIL?* Conference February 8-9, 2024!!

REGISTRATION IS OPEN!!!

The **2024 *WHAT THE HAIL?* Conference** will be held on February 8-9, 2024 at the Irving Convention Center at Las Colinas in Irving, Texas. Here are the details:

Key Information

- **Cost:** $100 (inclusive of all classes/meals/events)
- **Dates:** Thursday, February 8 and Friday, February 9, 2024 - Two-day seminar format (all day Thursday/half-day Friday)
- **Location:** Irving Convention Center at Las Colinas
- **Continuing Education:** Approved for 12 hours of Texas CE credit (10 General and 2 Ethics)
- **Rooms:** The Westin Irving Convention Center. Book your rooms **here!**
- **Events:**
    - Welcome Reception Wednesday, February 7, 2024 for all attendees 6:00 pm - 9:00pm.
    - The legendary 80's Party will return on Thursday evening (February 8, 2024) at the Toyota Music Factory, with a full concert by *The Molly Ringwalds* band... and a few other special surprises.

A few sponsorship opportunities remain available! (contact abannon@zellelaw.com)

Register

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. Some interesting new hot topics getting a lot of attention in the industry this month, all relating to the evolving insurance model due to climate change and abuses in the claims/appraisal/litigation process…

There is only one hot topic in the trenches this month – the appraisal process. Last week, the Texas Supreme Court heard oral argument in the *Rodriguez vs. Safeco* matter. This case involves a house reportedly damaged by a tornado. There was a disagreement as to the scope of damage, with Safeco measuring the claim at $1,300 and Rodriguez arguing the damages were much higher. Rodriguez filed a lawsuit. After a year, Safeco demanded appraisal. The appraisal panel awarded $36,000. Safeco timely paid the appraisal award and all potential statutory penalty interest. Safeco then moved for summary judgment, arguing that in cases governed by Tex. Ins. Code 542A (all weather claims), payment of the appraisal award and statutory penalty interest precludes the recovery of attorneys' fees. The federal district court granted that motion and dismissed the lawsuit. Rodriguez appealed to the Fifth Circuit. Noting that Texas law was unclear on this issue, the Fifth Circuit certified the following question to the Texas Supreme Court for consideration:

"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?"

The Texas Supreme Court accepted the question for determination.

The issue turns on the interpretation of a provision in Chapter 542A that governs the recovery of attorneys' fees. That provision ties the ability to recover attorneys' fees to a comparison of the policyholder's judgment at trial to the amount of the policyholder's pre-suit notice letter. Basically, if the policyholder went to trial and recovered more than 80% of the amount stated in its pre-suit notice letter, the policyholder was entitled to 100% of its attorneys' fees. If the recovery at trial was between 20-80% of the amount stated pre-suit, that corresponding percentage could be recovered. And if the recovery at trial was less than 20%, then attorneys' fees were not recoverable. The obvious intent of the legislation was to get policyholder attorneys to provide real (and not inflated) damage numbers in their pre-suit notice letters. The statute basically requires a simple math exercise: divide the amount of the damages recovery by the amount of the pre-suit notice letter.

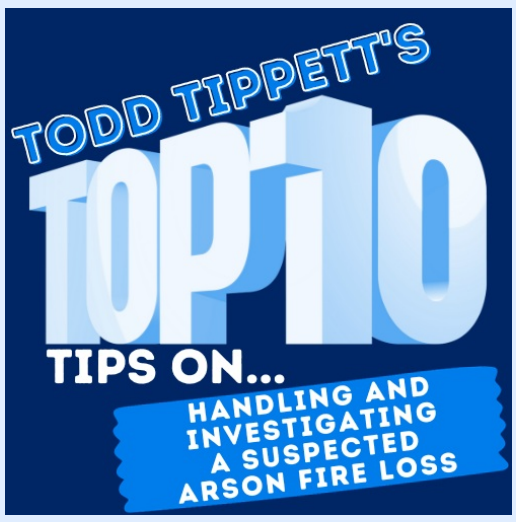
In *Rodriguez*, the issue is how this calculation works in the context of an appraisal award. The key language from the statute provides: "the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy for damage to or loss of covered property." This is the numerator (the top number). The denominator (the bottom number) is the amount stated in the pre-suit notice letter. Numerous previous lower court cases have held that when the appraisal award is paid in full, the numerator is $0, so the math exercise always ends up with a quotient of $0. So no attorneys' fees can be awarded. Policyholder attorneys argue that isn't fair and could not have been the legislature's intent.
For obvious reasons, the case has drawn considerable attention from both insurance industry and policyholder advocates. Numerous *amicus curiae* ("friend of the court") briefs were filed in support of both sides, including one filed by me. A copy of my *amicus curiae* letter is available at this **link.**

My brief focused on the ongoing abuses of the appraisal process by certain Texas policyholder attorneys. I noted numerous examples of these abuses, including the practice by some attorneys of signing up policyholders and dumping all of their matters into appraisal, while still taking a full 45% contingency fee. I also noted the practice by numerous policyholder attorneys of filing lawsuits, litigating a while, and then dumping the matters into appraisal to avoid trial. The obvious purpose of my brief was to inform the Court of the ongoing abuses of the appraisal process by these Texas policyholder attorneys and, more importantly, to warn of what can be expected if the Court allows the recovery of attorneys' fees in every Texas appraisal. The future is fairly predictable – every Texas appraisal will involve a policyholder attorney, a pre-suit notice letter, a lawsuit, an appraisal demand, an appraisal award, and then litigation over what constitutes a reasonable attorneys' fee. This is the complete opposite of what the Texas Legislature intended in enacting Chapter 542A in 2017.

Lots of eyes are watching the Texas Supreme Court for the outcome on this one. A decision could take weeks or months. There is no way to know. What is going to happen? Well, based on the plain language of the statute, Safeco should win. But the Texas Supreme Court has not always gotten it right on insurance issues (note *State Farm v. Johnson* in particular, that led to this whole mess with appraisal). Should Rodriguez prevail, then katy bar the door, as the stampede for attorneys' fees will be on. As stated above, every Texas appraisal will include an attorney, a lawsuit, and litigation over attorneys' fees. The Texas insurance industry might have no choice but to reevaluate whether to even include an appraisal clause in their policies.

If interested in reading more about this important case, you can visit the Texas Supreme Court

website here: **https://www.txcourts.gov/supreme/**. Go to “Case Search”. Enter 23-0534 in the “Case No.” box. Then pour yourself a deep glass of your favorite wine and start reading through all the briefs. When done, shoot me an email and let me know what you think.



Todd Tippett's

Top 10 Tips on...

Handling and Investigating a Suspected Arson Fire Loss:

1. Conduct a thorough and comprehensive investigation and adjustment of the fire loss regardless of suspected arson.

2. In most states, including Texas, remember that the Carrier bears the burden to prove the Insured had the requisite motive, opportunity and set an incendiary fire before it can rely on an arson exclusion or defense.

3. Retain a qualified Cause & Origin investigator to test for an incendiary fire.

4. Obtain a copy of any and all reports from the Fire Marshall and/or Fire Department on their findings and conclusions related to the cause of the fire, including if they found an incendiary fire.

5. Obtain a copy of the Insured’s credit report to determine possible financial instability and/or motive.

6. Request relevant financial information directly from the Insured; including bank statements, credit card statements, balance sheets, proof & loss statements, bankruptcy filings, judgments, liens, and tax returns to determine possible financial instability and/or motive.

7. Obtain a copy of the Insured’s criminal record, especially crimes related to fire, if any.

8. Obtain information related to prior fire loss claims made by the Insured, if any.

9. Obtain recorded statements from the Insured’s employees, business partners, family members and/or neighbors that may have information about the Insured’s whereabouts at the time of the fire to determine opportunity.

10. Request the Insured’s Examination Under Oath to clear up any issues associated with whether the Insured had the requisite motive, opportunity and set an incendiary fire.

Feel free to contact **Todd M. Tippett** at 214-749-4261 or **ttippett@zellelaw.com** if you would

Dealing with 542A Demands: It's All in the Details

by **Megan Zeller**

A recent case from the Southern District of Texas continues to highlight the importance of challenging 542A demands that fail to specify the insured’s damages. In ***Henry v. Nationwide***, No. H-23-2488, 2023 WL 6049519 (S.D. Tex. Sept. 15, 2023), the Southern District determined that an estimate alone does not constitute as presuit notice.

Pursuant to Texas Insurance Code Section 542A.003, an insured must provide written notice to the insurer not later than the 61st day before the date the insured files suit against the insurer, unless notice is impracticable. The notice must include a statement of the acts or omissions giving rise to the claim, the specific amount alleged to be owed by the insured, the amount of reasonable and necessary attorney’s fees, and a statement that a copy of the notice was provided to the claimant (if being submitted by an attorney).

In *Henry v. Nationwide*, the insured sent an estimate for a property damage claim for $102,954.66 Replacement Cost Value (“RC”) approximately four months prior to filing suit. The insured also sent a “542A demand” a mere 13 days before filing suit, requesting $88,402.22 in RC, $56,185.98 in “Recoverable Depreciation (Damage Content),” $78,936.05 in “Actual Cash Value,” and $10,000.00 in “Attorney fees and costs.”

After filing an Answer where the insurer pleaded that the insured did not provide adequate presuit notice as required by Tex. Ins. Code §§ 542A.003 and 542A.007(d), the insurer then filed a motion to preclude the insured’s attorney’s fees. Specifically, the insurer argued that a presuit demand 13-days prior to filing suit was not adequate notice. The insured, however, responded that it did provide proper presuit notice by sending the estimate four months prior to filing suit.

The Southern District found that a damage estimate sent prior to an insurer's final coverage decision does not serve as presuit notice “since an insured's legal claim generally arises when coverage is denied.” *Gilbane Building Co., Inc. v. Swiss Re Corporate Solutions Elite Insurance Co.*, Civil Action No. H-22-2369, 2023 WL 2021014, at *2 (S.D. Tex. Feb. 15, 2023) (citing *Tadeo as Trustee of John E. Milbauer Trust v. Great Northern Insurance Co.*, Civil Action No. 3:2 0-CV-00147-G, 2020 WL 4284710, at *9 (N.D. Tex. July 27, 2020)).

The Court also found that because the original estimate the insured sent four months prior to filing suit did not match the amounts demanded in the 13-day presuit demand, the insured failed to state the “specific amount owed.”

Henry v. Nationwide demonstrates how Texas courts continue to emphasize the importance of detailed, thorough presuit demands under 542A. An active, upfront assessment of any potential flaws in 542A demands continue to be a relatively easy and economical way for carriers to limit potential damages once a claim is in litigation.

Will the 2023 Amendment to Federal Rule of Evidence 702 Affect Property Insurance Coverage Litigation?

by **Shannon O'Malley** and **Claire Fialcowitz**

In most property insurance coverage litigation, the parties engage experts to address the issues in the case, including causation. This is particularly true when there are multiple causes of loss, covered and not covered, that combine to cause the damage claimed. When these property insurance cases find themselves in Federal Court, counsel must adhere to the Federal Rules governing expert witness testimony.

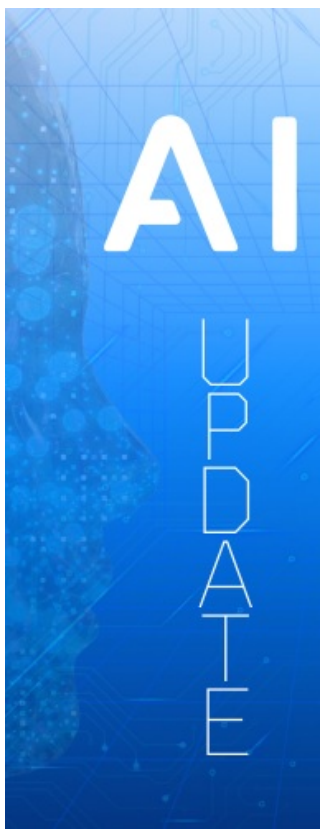
If experts offer opinions that are conclusory and not

like to discuss these Tips in more detail.

supported by generally accepted principles in the field of study, Rule 702 of the Federal Rules of Evidence requires courts to act as gatekeepers and exclude that testimony. But courts sometimes find that an expert's opinion merely goes to the weight of the evidence rather than admissibility, and allow that expert to present the opinion to the factfinder, despite valid objections to the contrary. The Advisory Committee on Evidence Rules recognized this issue and recently amended Rule 702 and provided further guidance in the comments, emphasizing that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in Rule 702.

This article discusses the changes more specifically and what practitioners and insurers should look for in retaining experts to assist in property insurance cases.

Read the full article here



AI Update

Embedded Insurance and Artificial Intelligence in the Insurance Industry

by **Jennifer Gibbs**

One of the hottest topics in insurance today is embedded insurance - insurance that is available as part of a commercial transaction for another product or service. And although the term "embedded insurance" might be new, this type of product isn't.

For example, lenders have required customers to purchase mortgage insurance since the 1880s. Embedded insurance has since evolved to car rental insurance, extended warranties, and travel protection insurance products.

Tesla Insurance is perhaps one of the most well-known examples of embedded insurance, offering policies for Tesla owners based on real-time driver data. Some predict that data-driven insurance could become prevalent in other insurance products such as the commercial property insurance market based on data from security cameras, water leak detection devices, and fire suppression systems.

Considering that insurance is based on assessing and identifying risk, the ability to access data (either big data or real-time data) has the potential to significantly impact the insurance sector. "Artificial intelligence is useless without data, and measuring data is insurmountable without AI."**[1]** However, with data-driven insurance products comes an increased need for digital security and data protection, and insurers must be prepared to not only protect data, but to be mindful of the ethical ramifications of how that data is applied to consumer pricing.

Could AI and its related technologies completely transform the insurance market from traditional policies to insurance products priced, purchased, and bound in real time? It is likely that some traditional insurance products will remain, but industry leaders should be prepared to make the changes necessary to thrive in a rapidly changing digital business landscape.

[1] https://online.maryville.edu/blog/big-data-is-too-big-without-ai/ (last visited October 3, 2023).

10th Circuit Affirms Insurer's Valuation Challenge and Summary Judgment

by **Eric Bowers**

When insurance policies dictate how claim damages should be measured, the insured must present evidence that conforms to those contractual requirements. In ***Frontline Fellowship Inc. v. Brotherhood Mutual Insurance Company***, the U.S. Court of Appeals for the Tenth Circuit affirmed summary judgment in favor of Brotherhood Mutual based on Frontline Fellowship's failure to produce any evidence that the actual cash value of its claim exceeded the policy deductibles. 2023 WL 5949374 (10th Cir. Sept. 13, 2023). Frontline's claim arose from a hailstorm on March 23, 2019, which it alleged damaged metal, thermoplastic polyolefin (TPO) and shingle roof coverings at its church facilities.

During discovery, Frontline produced a damage estimate and supporting expert affidavit reflecting only replacement costs for the roofing assemblies, rather than both replacement cost and actual cash value. Its policy with Brotherhood Mutual contained a typical valuation clause that provided:

> 8. Replacement Cost. When Replacement Cost (RC) is shown on the declarations for covered property, the value is based on replacement cost without any deduction for depreciation.
>
> …
>
> The replacement cost is limited to the cost of repair or replacement with similar materials on the same site and used for the same purpose. The payment shall not

exceed the amount you spend to repair or replace the damaged or destroyed property.

Replacement cost valuation does not apply until the damaged or destroyed property is repaired or replaced. You may make a claim for actual cash value before repair or replacement takes place, and later for the replacement cost if you notify us of your intent within 180 days after the loss.

It was undisputed that Frontline had not repaired the property. Accordingly, the District Court held that Frontline could only recover if the actual cash value exceeded the policy deductibles at issue. Frontline's expert provided no opinion on actual cash value, much less that it exceeded the deductibles. The District Court thus held that Frontline could not show any evidence that it experienced damages flowing from the alleged breach of the insurance contract and granted Brotherhood full summary judgment. (Frontline had previously withdrawn its bad faith claim, so only the breach of contract claim was at issue.)

On appeal, Frontline raised some highly speculative arguments for the first time, such as the "broad evidence rule," which ostensibly considers "all relevant factors and circumstances" in ascribing the amount of property damage. It also argued that it had suffered consequential damages resulting from an increase in construction costs due to Brotherhood's alleged delay in paying insurance benefits. Consistent with Brotherhood's legal briefing, the Tenth Circuit held that these arguments were waived, and that, in any event, Frontline did not present any evidence of actual cash value above its deductible to support an argument for either breach of contract or the broad evidence rule. Frontline also argued that the doctrine of prevention applied despite the Oklahoma Supreme Court having rejected this doctrine and finding valuation conditions like the one relied upon by Brotherhood to be enforceable. *See Bratcher v. State Farm Fire & Cas. Co*., 961 P.2d 828, 830-31 (Okla. 1998).

Insurers' defense counsel should always scrutinize expert opinions to see if they are admissible under the court's gatekeeping function, and to see if they comport with the valuation and coverages allowed by the insurance policy. These issues are routinely at the heart of first-party property litigation. And they absolutely support summary judgments in appropriate circumstances, as *Frontline Fellowship v. Brotherhood Mutual* demonstrates.

Reasonable Payment Found to be a Defense to Texas Prompt Payment Act Penalties

by Bella Arciba

Many insureds seek interest under the Prompt Payment of Claims Act, despite receiving payment within the sixty-day statutory requirement.

Recently the United States District Court of Texas Southern District, Houston Division held that the insurance carrier was not liable for interest under the Prompt Payment of Claims Act because the carrier paid 75% of the of the ultimate award prior to appraisal.

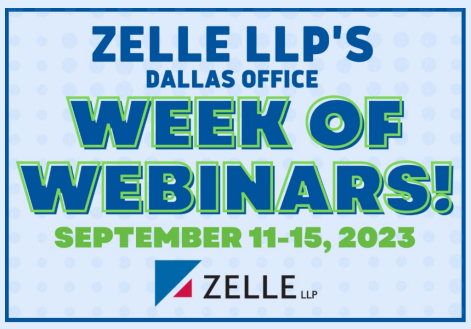
In **Roeder v. Allstate Vehicle and Property Ins. Co.,** No. CV H:22-4275, 2023 WL 5985240, at *3 (S.D. Tex. 2023), the insured filed a freeze claim with the carrier, who promptly adjusted and paid the claim. However, the insured disputed the amount owed. The carrier invoked appraisal but the insured nevertheless filed suit. Both parties' appraisers reached an agreement after the suit was filed finding an additional amount (25% of the entire claim) was owed. In the lawsuit, the insured argued that he was entitled to additional interest on the appraisal award because his initial claim payment was insufficient.

The court rejected that argument, relying on *Breshears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex. App.—Corpus Christi 2004). The court recognized that providing reasonable payment within a reasonable time does not violate the sixty-day statutory limit under the Prompt Payment Act. In *Breshears v. State Farm Lloyds*, the carrier sent the insured an initial payment for their claim, this payment resulted in a dispute regarding the amount owed. The parties completed appraisal and in response the carrier made an additional payment to the insured. Nevertheless, the insured moved to continue its suit for breach of contract and Texas Insurance Code violations suit because he was not paid until after appraisal, which occurred after the sixty-day statutory limit. The court rejected this argument, holding that invoking appraisal later in the process does not alter the fact that providing a reasonable initial payment within a reasonable time complies with the Texas Insurance Code.

Here, the carrier responded and paid the appraisal claim within the sixty-day statutory period. Additionally, the insured did not establish he was not paid the full amount owed following the appraisal process. Therefore, the court held he could not assert a claim under the Texas Prompt Payment Act.

The court further held that "even a pre-appraisal payment that seemed reasonable at the time does not bar a prompt-payment claim if it does not roughly correspond to the amount ultimately owed." *Roeder v. Allstate Vehicle and Property Ins. Co.*, No. CV H:22-4275, 2023 WL 5985240, at *3 (S.D. Tex. 2023) (citing *Randel v. Travelers Lloyds of Texas Ins. Co.*, 9 F.4th 264 (5th

Spotlight:



Thank you to everyone who attended **Zelle LLP's Dallas Office Week of Webinars** during the week of September 11-15, 2023.

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

On September 22, 2023 **Steve Badger**

Cir. 2021)). However, the court noted that there is no official standard that defines what payment amount "roughly corresponds" to the amount owed. Citing other Texas courts, the court acknowledged that when 20% of payments were made pre-appraisal carriers were liable under the Prompt Payment Act and were not liable when 65% of payments were made pre-appraisal. *Roeder v. Allstate Vehicle and Property Ins. Co.*, No. CV H:22-4275, 2023 WL 5985240, at *3 (S.D. Tex. 2023) (citing *Shin v. Allstate Texas Lloyd's*, 848 F. App'x 173 (5th Cir. 2021) and citing *Leev. Liberty Ins. Corp.*, No. 3:19-CV-321, 2021 WL 4502323 (N.D. Tex. 2021)). Here, the carrier paid over 75% of payments prior to appraisal, making the payments reasonable and timely. Therefore, the carrier was not liable for the interest penalty under the Texas Prompt Payment Act.

Importantly, when a court determines a carrier violated the Texas Prompt Payment Act for failure to make reasonable and timely payments for weather-related claims, the court will award simple interest "at the rate determined on the date of the judgment by adding five percent to the interest determined . . . " Tex. Ins. Code § 542.060(c). Based on the foregoing, carriers should continue to make reasonable and timely pre-appraisal payments when warranted, and should be aware that failure to make payments that "roughly correspond" to the ultimate amount owed may result in a Texas Prompt Payment Act violation.

presented **"Insurance and Public Policy Issues Arising From The 911 Terrorist Attack"** at the Oklahoma Claims Association Annual Conference in Midwest City, Oklahoma

---

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

Contact Us!

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

Visit our website to view all previous issues of The Zelle Lonestar Lowdown!

The Lonestar Lowdown All Issues

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.

Follow us on social media to keep up with all Zelle updates!

Visit our Website

THE ZELLE LONESTAR LOWDOWN
Dedicated to Texas First Party Property Claims

Join The Zelle Lonestar Lowdown mailing list!

Sign me up!

ZELLE LLP