THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Friday, February 16, 2024 | ISSUE 10

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!

February 21, 2024: Steve Badger will be presenting "Fraud in CAT Claims – What the Hail is Going On?" at the NAMIC Claims Conference in Denver, CO. More information here.

February 21, 2024: Steve Badger will be speaking at the P.L.A.N. Property Loss Appraiser & Umpire Certification Conference in Denver, CO. More information here.

February 27, 2024: Jennifer Gibbs will be speaking in panel discussion "Succeed with Empathy: How Being Empathetic Wins Customers and Cases" at the Complex Claims Conference in Las Vegas, NV joined by co-panelists Lori Ann Franek (DBI Consultants) and Joe Patten (Sompo International). More information here.

February 28, 2024: Kristin Cummings will be presenting "All About OLLE (Occurrence Limit of Liability Endorsement)" at An Afternoon with Zelle at The Old Library at Lloyd's in London, UK.

March 5, 2024: Steve Badger will be presenting "Working with Policyholder Advocates" at the 2024 GenRe Property Casualty Claims Seminar in Austin, TX. More information here.

News From the Trenches

by **Steve Badger**

Thanks to the 600 of our industry friends and colleagues who joined us last week at our sixth biennial **2024 *What The Hail?* Conference.** We packed the room for two days of fast-paced presentations dealing with all the hot topics in the first-party property insurance industry, mostly relating to the endless onslaught of hail damage claims. And a special thanks to our 29 sponsors who helped defray the cost so we could make this the cheapest -- and by all accounts the best -- conference in our industry. If you weren't there, I'm sure you heard that you missed a

fantastic couple days.

I love this event for three reasons.

First, the education. A lot of information crosses my desk every day. The Conference provides me with an opportunity to ensure that everyone in the industry is aware of all the hot topics and, unfortunately, all of the abuse schemes. Our engineers and other consultants also provided valuable information on various hot topics and emerging issues. We are all better served when the entire industry is aware of the reoccurring issues and how to deal with them. Thanks to all of our fantastic speakers. I know that everyone left the Conference with cutting-edge information on what is happening in our industry.

Second, the Totally Awesome 80's party. Yes, the 80's were my formative years. It's a ton of fun to go back to that era for an evening of great music, video games, and silly clothing. A special thanks to everyone who dressed up!

Third, and most importantly, the camaraderie. Let's be honest. Working in the insurance industry is not always easy. We take a lot of abuse and criticism. The Conference gives us an opportunity to come together and be proud of what we do. I know that I am. And I hope everyone left the Conference also feeling proud of the work that we do.

So what's next?

We are keeping the two-year schedule. It's just too much work to do it every year. We will see you in 2026 for the next Conference. Same location. Same general format.

Again, thanks to everyone who attended. And most of all thanks to all of our generous sponsors listed below.

Steve

Dating hail damage can be straight forward if it can be established that there has been only one hail event at the property since installation of the damaged roofing system. But if the roof has experienced multiple hail events, including events outside the applicable policy period, the date on which the damage at issue occurred must be investigated. The following should be considered when determining when hail damage occurred:

1. It is the insured's burden under Texas law to establish when the hail damage occurred. The insured should provide a specific date of loss for the carrier to investigate and information to support the reported date of loss.

2. A site visit to collect on-site data should always take place as soon as possible. Indicators of a recent hail

Losses Reportedly Arising From the Presence of the COVID 19 Virus at a Property Are Excluded by a Contamination and Pollution Exclusion According to the Houston 14th Court of Appeals!

by Brett Wallingford

Although several Federal Courts around the country have addressed the issue, no Texas State Appellate Court had previously addressed whether losses reportedly arising from the presence of the COVID-19 Virus at a property were excluded by a Contamination and Pollution Exclusion that specifically excludes viruses. That has now changed.

The Houston14th Court of Appeals addressed this issue in *Baylor College of Medicine v. XL Insurance America, Inc.*, et.al, No. 14-22-00145, 2024 WL 438019 (February 6, 2024).

The exclusion at issue reads as follows:

> This Policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of Contaminants or Pollutants, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this Policy.

event, or the lack of a recent hail event, should be well-documented. Security camera footage and any visual observations of the hail event should be requested.

3. The carrier should always obtain readily available weather data resources to determine if there was a hail event on the reported date of loss and whether there have been other pre- and post- hail events. These resources can include information from the NOAA website, other internet weather resources, and a simple hail report.

4. If warranted by the size of the claim, the carrier should consider retaining a licensed professional engineer to collect on-site indicators of a hail event.

5. The carrier and its professional engineer should look for burnish marks that coincide with the date of loss. Burnish marks tend to fade with time. If there are no burnish marks at the property, the claimed damage is likely not recent.

6. The carrier and its professional engineer should always consider the size of hail dents (or lack thereof) to materials at the property. If the size of the dents present does not coincide with the information obtained from the weather data resources, it is possible that the hail damage occurred on another date.

7. The carrier and its professional engineer should consider the type of materials associated with the property at issue. A conventional shingle roof can be more susceptible to hail damage than a gravel-ballasted built-up roof. Additionally, a thicker gauged metal roof is likely less susceptible to hail damage than a thinner-gauged metal roof.

8. The carrier and its professional engineer should consider fresh fractures or breaks in materials. If the insured is claiming a recent date of loss, but the cuts, fractures, indentations, tears, chips or punctures are weathered or old; it is likely that the hail damage is old.

9. The carrier and its professional engineer should consider the manufacturing dates on HVAC units. If the insured is claiming a recent date of loss, but if recently installed HVAC units show no damage, it is more likely that the hail damage claimed is old.

10. Whenever the date of loss is disputed, retain a forensic meteorologist to conduct a historical site-specific investigation of all hail events occurring since roof installation.

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.

....

> Contaminants or Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency....

On appeal, Baylor alleged that the exclusion was ambiguous because a virus is not a "pollutant" or "contaminant."

The Court of Appeals analyzed the language in the exclusion and determined that "as commonly understood, 'bacteria, virus, or hazardous substances' are not themselves types of 'damage to human health or property.' Rather, 'bacteria, virus, or hazardous substance' are things that can 'cause or threaten damage to human health or human welfare.' A virus can be 'the causative agent of an infectious disease' and can 'cause various important diseases.'" *Id.* at 3.

Ultimately the Court of Appeals found that "the only reasonable interpretation of the Exclusion is that 'bacteria, virus, or hazardous substance' are listed as additional types of pollutants or contaminants because they are capable of causing or threatening damage to human health or human welfare." *Id*.

Baylor further claimed that a virus cannot be a pollutant or contaminant because a virus is not a "solid, liquid, gaseous or thermal" irritant or contaminant. The Court was not swayed by this argument and found that "regardless of whether a virus can be classified strictly as solid, liquid, gaseous or thermal, the Exclusion identifies "virus" as a type of contaminant or pollutant…." *Id.*

Baylor also claimed that it had not alleged that the virus has been "released, discharged, escaped or dispersed"—only that the virus is "physically present" on its property. The Appellate Court addressed these contentions and found that "Disperse" means "to cause or become spread widely" citing Webster's Dictionary. Thus, the Court found that Baylor's claims are for "loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened ... dispersal" of the virus, as required by the Exclusion. *Id.*

Finally, Baylor contended that the insurers amended their policies for the subsequent coverage period to specifically exclude communicable diseases. Because the Court found there was no ambiguity, it did not consider the subsequent policies. Specifically, the Court found that the applicable Exclusion identifies "virus" as a type of pollutant or contaminant for which there is no coverage. But the Court went a step further and found that even if it had considered the subsequent policies there was nothing in the subsequent exclusions that undermines the conclusion that the parties had agreed to exclude coverage for losses caused by a virus under the Pollution and Contamination Exclusion in the applicable policy. *Id*.

The 14th Court of Appeals upheld the trial court's grant of summary judgment based on the Contamination and Pollution Exclusion. This is the first State Court of Appeals in Texas to address this issue; however, the same issue will likely be decided by other Courts of Appeals in Texas in the coming year.

The 14th Court of Appeals did not address the issue of whether or not the COVID-19 Virus can cause "direct physical loss" because it disposed of the case based on the Contamination and Pollution Exclusion. The issue of whether or not the COVID-19 Virus can cause "direct physical loss" is for another day in the State Appellate Courts in Texas!

Fifth Circuit Holding Addresses Scope of Business Interruption Coverage Under Cyber Policy

by **James Holbrook** and **Megan Zeller**

To kick-start 2024, the Fifth Circuit added to the emerging body of caselaw addressing

the recovery of business income losses in the cyber insurance coverage context. In *Southwest Airlines Company v. Liberty Insurance*, a case of first impression for the Fifth Circuit, a three-judge panel held that mitigation costs incurred by an insured following a cyber event were not barred from coverage as a matter of law, even though such costs were incurred voluntarily by the insured as a matter of business discretion.

The Emergence of Business Interruption Claims Under Cyber Policies

As insureds continue to navigate the consequences of cyber threats, courts across the country have begun to grapple with questions concerning what constitutes a covered business interruption loss under cyber policies. In 2023 alone, the estimated average cost of a data breach was $4.46 million.**[1]** In fact, the cost of cybercrime, which was estimated to be around $8 trillion in 2023, is predicted to hit $10.5 trillion by 2025.**[2]** Accordingly, understanding what costs an insured may recover under a cyber policy are critical for both carriers and policyholders alike.

Traditionally, property insurance policies have provided coverage for certain financial losses while an insured is unable to operate its business due to a covered form of property damage. For instance, if storm-caused damage causes the temporary shutdown of an insured's manufacturing facility, that insured may be entitled to recover the lost business income it would have earned in the absence of the shutdown.

Similarly, if a business is impacted by a data breach or cyber event, that business may be entitled to recover financial losses the business incurred as a result of that event under certain cyber policies. However, questions arise as to how closely must a loss be linked to a cyber event to trigger coverage, and when is a business truly interrupted by a cyber event?

Courts across the country have only recently begun to address these questions. In one notable case, the United States District Court for the District of Minnesota held that Fishbowl Solutions, Inc., a software company, was entitled to $148,000 in coverage for losses that Fishbowl's insurer argued were only related to income-generating activities.**[3]** In that case, Fishbowl sued its insurer seeking coverage after an unknown bad actor gained access to the company's email and sent fraudulent instructions to a client, which resulted in the client sending payment to the hacker by mistake.**[4]** With respect to business income losses, the cyber policy provided:

> We will pay actual loss of "business income" and additional "extra expense" incurred by you during the "period of restoration" directly resulting from a "data breach" which is first discovered during the "policy period" and which results in an actual ***impairment*** or denial of service of "business operations" during the "policy period".**[5]**

Even though Fishbowl was able to continue its business operations after the cyber event, the Court found that the cyber policy's use of the term "impairment" rather than "interruption" provided a broad grant in coverage.**[6]** As a result, the court concluded the losses at issue were covered under the policy.

Similarly, in *New England Systems Inc. v. Citizens Insurance Co. of America*,**[7]** an insured relied on virtually identical policy language to argue (like the insured in *Fishbowl*) that it was entitled to recover alleged business interruption losses, even though it was able to continue operations at all times after a cyberattack and related data breach. The case ultimately settled, but not before the United States District Court for the District of Connecticut denied (in part) the insurers' motion for summary judgment, holding that a fact issue existed as to whether the insured sustained covered business interruption losses as a result of the data breach.**[8]** As in *Fishbowl*, the court concluded that the policy's use of the term "impairment" as a trigger for business income coverage provided a broader grant of coverage than more common provisions requiring an "interruption" of the insured's business.**[9]**

Although the holdings in *Fishbowl* and *New England Systems* turned on policy-specific distinctions between the terms "impairment" and "interruption," insureds and insurers have presented similar arguments in the absence of such policy language. For example, in a recent Michigan case arising out of a two-week shutdown of the insured's computer systems, an insurer sought summary judgment on its insured's resulting business income claim,**[10]** arguing that the insured sustained no compensable business income loss at all, because the insured—which conducted nearly all of its sales via telephone—was able to continue its business operations during the time its computer systems were inoperable.**[11]** The case settled before the court ruled on the insurer's motion for summary judgement; however, the parties' briefing provides an insightful example of how litigants on both sides of the docket are attempting to achieve clarity regarding the requisite link between a cyber event and covered business income loss.

The Fifth Circuit Addresses the Scope of Business Income Loss in the Cyber Context

In the latest federal court opinion to address claimed business income losses arising from a cyber event, the Fifth Circuit reversed a lower court's grant of summary judgment in favor of an insurer, holding that costs incurred by Southwest Airlines to compensate customers affected by a massive network failure were not barred from coverage simply because they were incurred at the business discretion of the insured.
On July 20, 2016, Southwest Airlines suffered a massive system failure that impacted

its flight operations for approximately three days, ultimately causing 475,839 customers to experience flight cancellations and/or delays.**[12]** As a result of the system failure (and related impact on flight operations), Southwest Airlines compensated passengers with a several perks, aimed at maintaining customer loyalty and mitigating long-term income losses, including:

1. Distributing FareSaver Promo Codes to customers whose flights were canceled or delayed two hours or more;
2. Giving travel vouchers to customers whose flights were canceled or delayed two hours or more;
3. Issuing refunds to customers (upon request) to compensate for alternate travel arrangements;
4. Distributing Rapid Rewards Points to frequent flier program members whose flights were canceled or delayed two hours or more; and
5. Advertising costs for a sale that was underway during the system failure, which was extended by one week.**[13]**

Southwest Airlines sought to recoup these mitigation costs under the "System Failure Coverage" coverage afforded by its cyber policy, which stated the insurer would "pay all Loss . . . that an Insured incurs . . . solely as a result of a System Failure."**[14]** The Policy defined "Loss" as "costs that would not have been incurred but for a Material Interruption," and it defined "Material Interruption" as "the actual and measurable interruption or suspension of an Insured's business directly caused by ... a System Failure."**[15]**

The lower court granted summary judgment for the insurer, holding that the costs claimed by Southwest Airlines were not solely caused by the system failure, but rather were the result of "'various and purely discretionary customer-related rewards programs, practices and market promotions'" employed by Southwest Airlines.**[16]**

On appeal, Southwest Airlines acknowledged that all five cost categories at issue were the result of business decisions made by Southwest Airlines but argued that they were covered under the plain terms of the cyber policy. The insurer—like the insurers in *Fishbowl* and *New England Systems*—argued that Southwest Airlines' claimed losses stemmed from intervening factors, not the cyber event itself.

The Fifth Circuit reversed the lower court's summary judgment in favor of the insurer, holding that the costs claimed by Southwest Airlines were not barred from coverage simply because they were discretionary. Applying the "lenient but-for causation standard" set forth in the cyber policy, the panel concluded that Southwest Airlines' claimed costs were inextricably linked to the system failure and, therefore, constituted "losses" (as defined in the policy).**[17]** The Fifth Circuit remanded the case to the lower court to determine whether the system failure was the sole cause of each cost category claimed by Southwest Airlines, thus triggering coverage.

The insurer argued that allowing Southwest Airlines to recover purely discretionary costs would permit Southwest Airlines to "literally dictate the amount of its own 'loss;'"**[18]** however, the Fifth Circuit rejected this contention, stating that the policy's language and "basic insurance principles" would prohibit any "recovery that would put Southwest in a better position than it would have occupied without the interruption."**[19]** As the panel explained:

> The policy still requires a causal nexus between the system failure and Southwest's costs. Indeed, it even contains a provision to guide that causation inquiry, limiting coverage to only the costs that are deemed appropriate based on Southwest's "probable business" if no system failure occurred."**[20]**

As the panel further noted, to resolve the coverage question on remand, the lower court would be required to consider the extent to which recovery for each category of loss at issue comports with these 'basic insurance principles.'**[21]** The insurer "w[ill] need to explain how the cover refunds in particular would not qualify as recoverable mitigation costs that arose solely as a result of the system failure; just as Southwest w[ill] need to explain how its claims for a week of advertising (for a single-day interruption of its ad campaign) and for FareSaver Promo codes (which potentially allowed redemption for those who were not impacted by the cancelations) would not grant the company a windfall."**[22]**

The Fifth Circuit's opinion in *Southwest Airlines* demonstrates the limited guidance currently available to courts when interpreting and applying cyber policies in the business interruption context. Because cyber insurance is a relatively new area of insurance coverage, courts—like the Fifth Circuit—are often left to look outside the cyber context or rely on dictionary definitions for the plain meaning of words that, by their very nature, continue to develop as the law and technology rapidly evolve. While it is difficult to draw bright-line line rules as to how future courts will define and value business income losses in the cyber context, cases like *Southwest Airlines*, *Fishbowl,* and *New England Systems* demonstrate the impact a single word or phrase in a policy can have in such a coverage dispute—especially when applied to the complex set of facts and resulting chain of events frequently accompanying a cyber event. And, as technology, policy language, and the substantive law on these matters continue to evolve, courts and practitioners must take a fact-intensive and case-specific approach to the novel issues presented by claims for business income losses resulting from a cyber event.

[1] Cost of Data Breach Report 2023, **https://www.ibm.com/reports/data-breach** (last visited February 13, 2024).

[2] Cybersecurity Trends & Statistics for 2023; What you need to know,

https://www.forbes.com/sites/chuckbrooks/2023/03/05/cybersecurity-trends--statistics-for-2023-more-treachery-and-risk-ahead-as-attack-surface-and-hacker-capabilities-grow/?sh=1ae3434819db (last visited February 13, 2024).

[3] *Fishbowl Solutions Inc. v. Hanover Ins. Co*., 2022 WL 16699749 (D. Minn. Nov. 3, 2022).

[4] *Id.* at *2.

[5] *Id.* (emphasis added).

[6] *Id.* at *6-*7.

[7] 2022 WL 17585966 (D. Conn. Dec. 12, 2022).

[8] *Id.* at *1.

[9] *Id.* at *10.

[10] *See Travelers Casualty and Surety of America Motion for Summary Judgment* , 2022 WL 18456129 (E.D. Mich.).

[11] *Id.* at 5.

[12] *Sw. Airlines Co. v. Liberty Ins. Underwriters, Inc.* , 90 F.4th 847 (5th Cir. Jan. 16, 2024).

[13] *Id.* at 851-52.

[14] *Id.* at 850.

[15] *Id.*

[16] *Id.* at 851.

[17] *Sw. Airlines*, 90 F.4th 847 at 852.

[18] *Id.* at 853.

[19] *Id.* at 853-54 (emphasis in original).

[20] *Id.* at 853.

[21] *Id.* at 854.

[22] *Sw. Airlines*, 90 F.4th 847 at 854.

AI Update

Insurers Face Challenges as Artificial Intelligence Expands

by **Jennifer Gibbs**

Insurers are already using Artificial Intelligence ("AI") in underwriting, claims processing, customer service, and fraud detection. However, in a recent report prepared by Xceedance**[1]** insurers and MGAs worldwide have identified four primary challenges for utilizing AI in 2024 and beyond.

1. BUILDING TRUST IN AI

According to the Xceedance report, trust is the cornerstone of AI's successful adoption in insurance. **[2]** To establish this trusting relationship, it is suggested that insurers focus on creating a transparent AI system subject to rigorous testing. AI systems should not only be efficient, but also reliable and trustworthy.

2. EVOLVING RISK ASSESSMENTS

It is predicted that integrating AI into extracting and interpreting data in both the claims and underwriting processes will improve accuracy and efficiency. For example, underwriters spend considerable time manually reviewing property survey reports. Utilizing the ChatGPT platform integrated with Azure OpenAI Service can reduce the time taken for comprehending the report from hours to minutes, freeing underwriter time and arguably reducing errors.

3. MANAGING POLICYHOLDER EXPECTATIONS AND OFFERING PERSONALIZED COVERAGES

AI can allow insurers to offer custom policies tailored to each customer's individual needs. For example, instead of requesting driving history and vehicle information in underwriting an auto policy, the use of Telematics data, location and geospatial data, and sensor data can allow a carrier to provide hyper-personalized insurance products.

4. ENABLING ACCELERATED AI INTEGRATION

In order to deploy AI in the insurance marketplace in both an effective and safe manner, it is important that the integration is supervised by a team of experts within a sandbox environment in order to allow users to explore AI capabilities, identify valuable use cases, and adapt the technology to the customers' needs. Without such safeguards, it is unlikely that insurers will be able to market such products in a heavily regulated industry subject to bad faith statutes.
In conclusion, the use of AI is interesting, exciting, and potentially concerning. Implementing such technology requires a prudential, thoughtful approach. However, with the continued increase in premiums, the viability of the insurance marketplace requires insurers to remain innovative and competitive. The expected paradigm shift to AI solutions may position insurers for future-ready resilience.

[1] **https://xceedance.com/wp-content/uploads/2024/01/Xceedance_Insurance_AI-Trends_2024.pdf** (last visited Feb. 12, 2024).

[2] *Id.*

Lassoing Liability
with Megan Zeller

The Assault and Battery Exclusion Continues to be Firmly Upheld in Texas

Although most commercial general liability ("CGL") policies contain Expected or Intended Injury exclusions, many CGL policies also go a step further and contain Assault and Battery exclusions. The Assault and Battery exclusion is typically limited only to tortious acts, and is therefore much more streamlined in its application compared to an Expected or Intended Injury exclusion. However, because Assault and Battery exclusions are consistently upheld by most Texas courts, these exclusions are extremely important for carriers insuring businesses that potentially have higher crime risks or serve alcohol on the premises, such as bars, restaurants, and property management companies. A recent case out of the United States District Court for the Southern District of Texas, Houston Division, demonstrates the importance of this exclusion.

In **Mesa Underwriters Specialty Insurance Company v. GRIF, LLC et al.**, the insurer issued a CGL policy to the insured, a property management company. The policy contained the following Assault or Battery Exclusion, which provides, in relevant part:

> This insurance does not apply to ... "bodily injury" ... caused by, arising out of, resulting from, or in any way related to an "assault" or "battery" when that "assault" or "battery" is caused by, arising out of, or results from, in whole or in part from:
>
> ***
>
> B. The failure to provide a safe environment including but not limited to the failure to provide adequate security, or to warn of the dangers of the environment, or
>
> ***
>
> D. Negligent, reckless, or wanton conduct by you, your employees, patrons or any other persons …
>
> ***

In this case, the insured sued the insurer for its alleged failure to defend the insured in an underlying suit that had been filed by an estate of a former tenant of the insured. The facts of the underlying case, however, established that the former tenant had been fatally wounded by a third-party when he lived in an apartment that was owned or controlled by the insured. As a result, the insurer argued that it had no duty to defend the insured under the applicable policy's Assault and Battery exclusion.

The Court agreed. Specifically, the Court found that:

> In the underlying lawsuit against [the insured], decedent Walters' bodily injury allegedly arose from a battery against him, which in turn allegedly arose from [the insured's] failure to provide decedent with a safe environment and other forms of negligence. . . This alleged conduct, as well as the claims asserted against [the insured], clearly fall within the scope of the insurance policy's Assault or Battery Exclusion.

Specifically, the Court relied on a previous Fifth Circuit ruling, which held that when an exclusion precludes coverage for injuries "arising out of" described conduct, "the exclusion is given a broad, general, and comprehensive interpretation." *Scottsdale Ins. Co. v. Texas Sec. Concepts & Investigation*, 173 F.3d 941, 943 (5th Cir. 1999). Accordingly, the Court found that the insured did not have a duty to defend the insured. Notably, the Court found that because the Assault and Battery exclusion was so extensive, it also precluded the insurer from any duty to indemnify the insured.

Although Assault and Battery exclusions are not necessary for every insured, this exclusion is nonetheless extremely useful with high-risk businesses, particularly in states like Texas where the courts consistently find in favor of such exclusions.

An Insured Must Have Sufficient Evidence to Support a Delayed Payment Claim

by **Bella Arciba**

Recently, the Houston Court of Appeals held that conclusory and late evidence is insufficient to establish that an insurance company breached its policy, engaged in bad faith, or violated the Texas Insurance Code or DTPA.

In **Haight Family, LLC v. Germania Farm Mutual Insurance Company, No. 04-22-00508-CV, 2024 WL 234678 (Jan. 23, 2024)**, a fire damaged the insured's home. Prior to paying the claim, the carrier, Germania, investigated the claim to determine whether the fire resulted from arson. During the investigation period, Germania refused to clean up or clear the property. Notably, Haight also did not clean up or clear its property. Consequently, Haight's homeowners association filed suit against Haight for failure to maintain its property in a neat and orderly condition. While that lawsuit was pending, Haight sued Germania for its failure to pay Haight's claim for over 16 months.

In the suit between Haight and Germania, Germania filed a no-evidence summary judgment motion. In response to this motion, Haight did not present any evidence instead, Haight relied on statements Germania made in court records in separate proceedings. Ultimately, the trial court granted Germania's no-evidence summary judgment motion. Haight appealed and argued that there are fact issues as to Germania's knowledge and intent in delaying payment of the claim, and that Germania judicially admitted that it did not pay for the claim for almost two years.

The court determined that Haight failed to meet its summary judgment burden for three reasons. First, the court held that the Germania statements Haight relied on as summary judgment evidence were not judicial admissions, therefore, the statements were not conclusive

against the party making the statement.

Second, the court found that Haight's allegations were conclusory because they did not identify any underlying statements to support them. Haight claimed that Germania admitted that it failed to pay the claim for over 16 months after the fire, had no reasonable basis for denying the claim or delaying payment, and knew or should have known that liability was reasonably clear. To support these allegations, Haight relied on its motion to dismiss the interpleader action. In evaluating this argument, the court noted that arguments from a motion are not evidence and therefore, Haight presented no evidence in response to Germania's summary judgment motion.

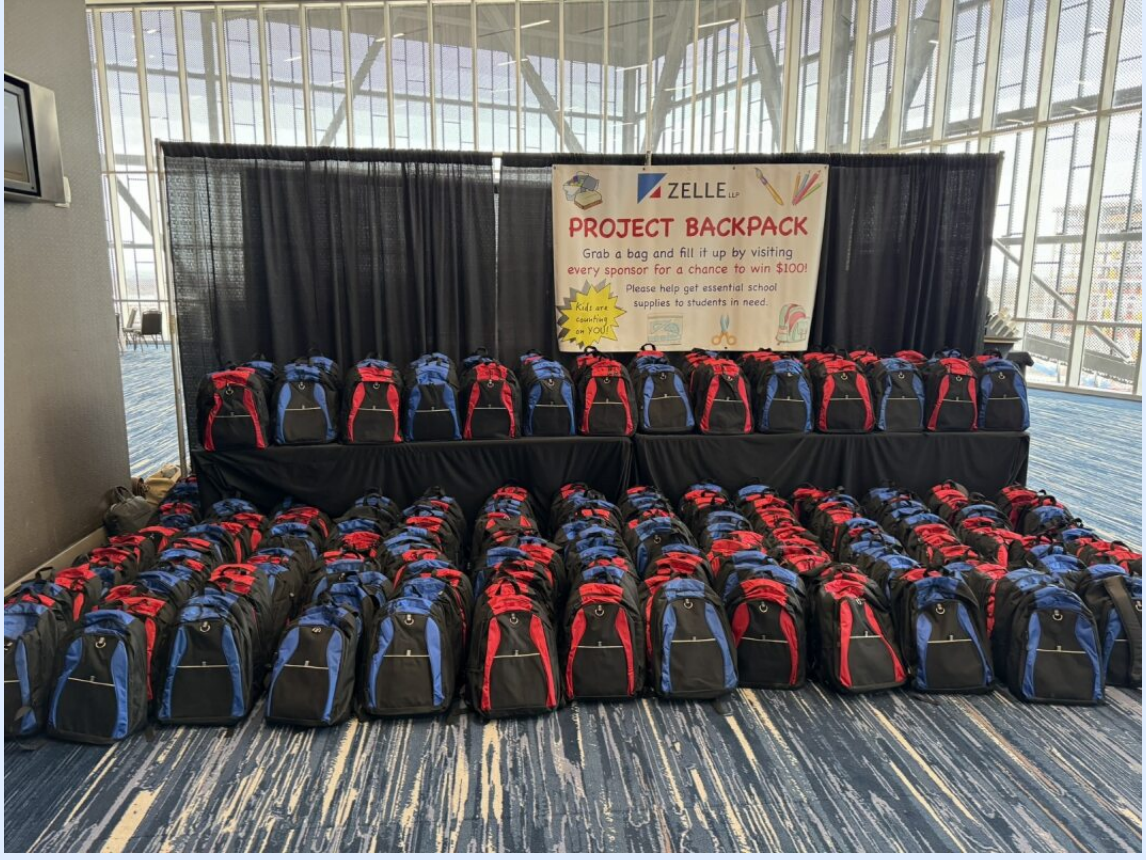
Third, the court held that Haight filed the court records it relied on after the deadline to present summary judgment evidence and did not attach certified or authenticated copies. Accordingly, the court opined that it was within the trial court's discretion to exclude the late-filed, unauthenticated evidence. Therefore, the evidence struck by the trial court was not part of the summary judgment record and could not be considered on appeal.

But the court's analysis did not stop there. The court also noted that Haight did not provide any evidence or identify statements that demonstrated Germania's knowledge or intent in delaying payment of the claim.

Based on these findings, the court affirmed the trial court's judgment and found that the evidence was insufficient to support Haight's summary judgment burden. Going forward, carriers should continue to hold an insured to its burden to provide sufficient evidence to support its delayed payment claim.

Spotlight:

Thank you to all who attended the 2024 *What the Hail?* Conference last week and participated in our Project Backpack charity drive!



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