THE ZELLE LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Wednesday, March 13, 2024 | ISSUE 11

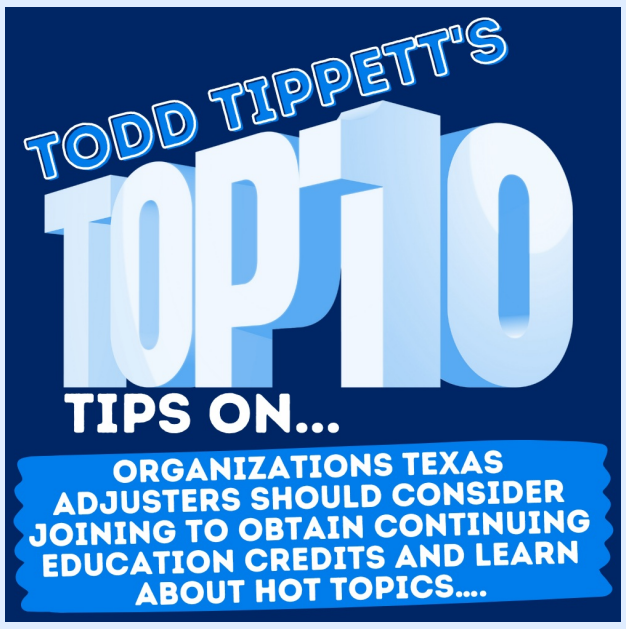
Welcome to The Zelle Lonestar Lowdown, our monthly newsletter bringing you news from the trenches on everything related to Texas first-party property insurance claims and litigation. If you are interested in more information on any of the topics below, please reach out to the author directly. As you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

March 26, 2024: **Steve Badger** will serve on the panel "If the Appraisal Process is Broken, How Do We Fix It?" at the Texas Association of Public Insurance Adjusters (TAPIA) 2024 Spring Conference in Fort Worth, TX.



1. Dallas Claims Association (**https://dallasclaims.clubexpress.com**) DCA meets the first Wednesday of every month in Grapevine.

2. Houston Claims Association (**https://houclaimsassoc.clubexpress.com**) HCA meets the second Wednesday of every month in Cypress.

3. Blue Goose (**https://www.bluegoosetx.org**) The next Blue Goose meeting is on Monday, April 8 in Addison.

News From the Trenches

by **Steve Badger**

One more round of thanks to everyone who attended the **2024 *What The Hail?* Conference** last month. We've received tremendous feedback. It sounds like everyone had a great time. And a sincere thank you one final time to all of our sponsors. We are already making plans for 2026!

In other news, a few big issues are getting all the attention right now….

1. Roof Dents Endorsement

A couple months ago I posted our recommended Roof Dents Endorsement on **LinkedIn**. The Endorsement is intended to address all roof dents to anything on the roof. Period. Plain and simple. So it covers all types of roofing materials, HVAC units, piping, vents, flashing, etc. The intent is obvious – any dents to anything on a roof are not covered unless they cause immediate leaking or are visible from the ground. My LinkedIn post generated a lot of discussion. It was my highest viewed post ever, with over 70,000 impressions. And why is that? Because whether there is coverage for dents to metal roofs and now also whether there is coverage for dents to TPO roofs (or just the insulation below) are two very hot topics in the industry. Our recommended endorsement is clear -- unless the dent makes the roof leak immediately or the dent is visible from the ground, there is no coverage. A number of our clients are considering using the Dents Endorsement, including asking states to approve our form. A copy of our Roof Dents Endorsement is available **here.**

2. Technical Paper on Dents to Metal

4. Federation of Insurance Women in Texas - Dallas (**https://www.fiwt.com/locals.htm**) FIWT has a monthly meeting the second Monday of each month in Dallas.

5. Austin Claims Association (**https://austinclaims.clubexpress.com**) ACA has a quarterly seminar series. The next one is on March 27 in Austin.

6. CLM – Dallas Chapter (**https://www.theclm.org/ShowLocalChapterDetails?localChapterID=27**) The next CLM-Dallas meeting is on April 25 in Dallas.

7. DFW Women in Property Insurance. For more information please email: **dfwwomeninpropertyinsurance@gmail.com**

8.DFW RIMS (**https://dfwrims.org**) The next DFW RIMS lunch meeting is on April 24 in Las Colinas.

9. National African American Insurance Association – Dallas Chapter (**https://www.naaiadfw.org**) The next NAAIA meeting is on March 28 in Addison.

10. Dallas Chartered Property & Casualty Underwriters Society (**https://dallas.cpcusociety.org**) The Dallas CPCUS meets the second Monday of each month in Plano.

Insurance Professionals should consider joining and getting involved with these great organizations. Each meeting provides an opportunity to earn CE credits and meet other leading insurance industry professionals.

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.

Two engineers from Roof Technical Services, Stephen Patterson and Jordan Beckner, recently issued a really interesting technical paper regarding dents to metal roofing. The most interesting part of the paper involves an analysis of a metal roof in Fort Worth that they first inspected when it was dented in the May 5, 1995, hail storm. Since that storm, for almost 30 years now they have periodically inspected the roof to see if the dents were causing any deterioration of the metal. And, not surprisingly, they have found no deterioration. Almost 30 years after the date of loss, the hail dented roof is still performing its intended function and there is no rusting or corrosion of the metal. Imagine that. The technical paper is available **here.**

3. Right To Repair

Insurers used to be adamantly opposed to invoking the right to repair included in their policies. They were afraid of recommending a roofing contractor and potentially being responsible if something went wrong. But that opposition is fading. Comparing that potential exposure to the abuses they are facing in the claims process, even when they agree the roof is damaged, insurers are now deciding that it's just easier to tell the insured that they are going to send a contractor out to replace the roof. Especially in simple garden-variety residential roof replacements. We have assisted clients in putting together programs in which they will invoke the right to repair whenever they agree to buy a roof. As soon as the call is made to buy the roof, a letter is sent to the insured advising that they will be getting a call from a contractor to schedule replacement. The contractor then comes out and installs a code and manufacturer compliant roof. The contractor collects the deductible from the insured and the balance from the insurance company. A win-win-win for everyone (insured, insurer, and contractor). These programs are coming. Contractors would be well-advised to recognize the industry is changing and that they should focus their efforts on working with rather than against the insurance company in the claims process.

AI Update

Who is at Fault When a Self-Driving Car Crashes?

by **Jennifer Gibbs**

Driverless car startup company, Cruise, made news last October, when one of its autonomous vehicles struck a pedestrian in San Francisco.

In response to the incident, top executives at Cruise were called before a California administrative judge in early February to explain allegations it misled the public and California regulatory agencies. The alleged misrepresentations involved whether Cruise advised regulators that the Cruise vehicle not only hit the woman, but after initially stopping, started up again and dragged the woman 20 feet after failing to recognize she was trapped underneath the vehicle.

These incidents beg the question as to who is liable in an autonomous vehicle crash? The short answer is: We don’t know yet. Unlike accidents involving two actual drivers, insurance companies may begin to rely more heavily on information provided by electronic control modules – a.k.a., black boxes – commonly found in autonomous vehicles to evaluate liability. It is also likely that the burden will fall on the manufacturers of the vehicles to prove that its vehicle did not cause the crash.

Experts caution, however, that some of the potentially liable parties may have disproportionate control over the black box data, which may lead to the evolution of tamper-resistant automation and an increasing need for post-accident forensic analysis. And like any technology connected to the internet, self-driving vehicles could be susceptible to hacking – posing significant safety concerns.

Because of the complexity in evaluating fault in novel claim scenarios involving technologies such as self-driving vehicles, it is important that legal and insurance professionals keep a close eye on these hot issues and evolve at a similar pace to meet the needs of regulators, insurers, consumers, and manufacturers.

Lassoing Liability

with Megan Zeller

Insurers Continue to Face Significant Risks in *Stowers* Claim Litigation

In Texas, one of the biggest issues liability insurers face is when an excess verdict is awarded against the insured. Prior to trial, Texas requires insurers to exercise ordinary care in the settlement of covered claims to protect insureds from excess judgments under the *Stowers* doctrine. *See G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved). Notably, an insurer's *Stowers* duty is not triggered by a settlement demand unless all three of the following prerequisites are met:

1. the claim against the insured is within the scope of coverage,
2. the demand is within the policy limits, and
3. the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment.

See Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 848–49 (Tex. 1994).

However, in many cases, even if an insurer properly determined that the demand was not a *Stowers* demand, an insurer may still face additional exposure if an excess verdict is awarded against the insured. Insurers often face secondary cases to enforce the *Stowers* claim, where punitive damages can be extremely high. Providing a strong litigation defense is critical in these cases, but are often an uphill battle. In a recent case from Northern District of Texas, Dallas Division, demonstrates the many difficulties that insurers face.

In *Jeffrey W. Carpenter v. Twin City Fire Ins. Co.*, the Northern District significantly limited the insurer's defenses during the discovery phase of litigation. **Jeffrey W. Carpenter v. Twin City Fire Ins. Co., 2024 WL 947589 (N.D. Tex. 2024).** In the underlying case, Carpenter sued his employer, which was insured by Twin City, for breach of contract. *Id*. at *1. Prior to trial, Carpenter offered to settle his case against his employer within the limits of his employer's insurance policy with Twin City, but Twin City declined the settlement offer. *Id*. At Carpenter prevailed at trial against his employer, where the jury awarded damages that exceeded the limits of the insurance policy. *Id*. As a result, Carpenter brought the current case against Twin City to collect on his *Stowers* claim by proving that Twin Cities failed to properly settle his *Stowers* demand, and to seek punitive damages. *Id*.

Although the case is currently ongoing, recently, the Court sided with Carpenter on key discovery issues that are often critical for the defense of insurers. Specifically, Twin City attempted to limit Carpenter's discoverable materials during the timeframe of the actual *Stowers* demand, which was around June 1, 2016. *Id*. at *2. Twin City argued that because a Stowers claim is dependent on what an insurer knew at the time it rejected a settlement demand, the only information that is relevant to the present litigation is that which occurred before the date that Twin City and Carpenter's employer rejected the settlement. *Carpenter*, 2024 WL 947589 at *2.

The Court, however, rejected this argument, and held that although Twin City may object specifically to individual requests on relevance grounds, the Court will not hold that no document created after June 1, 2016, is relevant in this case. *Id*. By doing so, the Court has, in theory, limited Twin City's discoverable defenses, and opened the case to excessive litigation costs.

Although the impact of this ruling has yet to be determined in this specific case, it nonetheless exemplifies the inherent risks insurers have when facing excess verdict claims, particularly with costs that can often quickly accumulate. This case continues to highlight the importance of a proper *Stowers* analysis prior to litigation. While insurers should never accept a *Stowers* demand at face value, insurers nonetheless need to spend significant time analyzing a *Stowers* demand to ensure that they have all the proper defenses lined up to prepare for a potential excess verdict.

How to Obtain Costs After Winning Summary Judgment

by **Michael O'Brien**

Following a successful summary judgment motion, a court in the Eastern District of Texas recently awarded nearly $160,000 in costs to the defendant. The case is Cinemark Holdings, Inc., et al., v. Factory Mutual Insurance Company, Civil Action No. 4:21-CV-00011, in the Eastern District of Texas. This article intends to offer some suggestions for navigating the complicated process for seeking such costs, particularly in the context of a summary judgment win.

Federal Rule of Civil Procedure 54 allows costs, other than attorney's fees, to be awarded to the prevailing party. Where a Court grants all requested relief to a defendant and dismisses a case with prejudice, as on a motion for summary judgment, then the defendant is the prevailing party. There is a strong presumption under the law that the prevailing party should be awarded costs.

The party seeking to recover costs has the burden of producing evidence properly documenting and establishing the costs incurred. Generally, it is sufficient to provide (a) an affidavit from the party or its attorney affirming that the claimed costs were incurred, (b) an itemized list of the costs claimed, and (c) invoices, receipts, and other documentation of the costs.

Not everything a party might consider a cost can be awarded, however. 28 U.S.C. § 1920 sets out the *only* categories of costs that are recoverable under FRCP 54:

1. Fees of the clerk and marshal;
2. Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
5. Docket fees under section 1923 of this title;
6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The categories are generally strictly interpreted. For example, while courts may award costs under Section 1920(1) for using a marshal to serve a subpoena, courts will not award costs for private subpoena servers.

One of the costliest areas of contemporary litigation is electronic discovery, and courts differ on the extent to which electronic discovery costs are taxable. For example, many but not all jurisdictions award costs for video recordings of depositions as "electronically recorded transcripts" under Section 1920(2). Some jurisdictions

allow for certain electronic discovery costs, such as loading documents or converting files to different formats, under "exemplification and the costs of making copies" in Section 1920(4). Since these costs can be sizeable, check the pertinent jurisdictional law as well as any electronic discovery order to determine whether those costs are recoverable.

Finally, it is important to note that two of the categories—2 and 4—require that the items were "necessarily obtained for use in the case." The Fifth Circuit has held that the cost of deposition transcripts can be taxed if, at the time it was taken, the deposition could reasonably be expected to be used for trial preparation, rather than merely for discovery. *Fogleman v. ARAMCO*, 920 F.2d 278, 285–86 (5th Cir. 1991). But what happens if the case does not go to trial but is disposed of on summary judgment? The court in *Cinemark* found that the transcripts were taxable because they were used by both parties in making and responding to motions for summary judgment. The court also looked to the parties' pretrial designations in determining which transcripts and videos were taxable as trial preparation.

A summary judgment victory can be sweet and recovering costs on top can be even sweeter. Of course, given the limited categories of recoverable costs, one should first determine whether the price of moving for costs outweighs the amount the court may award. In a case with numerous depositions or other costs falling under Section 1920, however, moving for costs is likely to be worthwhile.

Texas Federal Courts Uphold Pleading Standards to Insured's Unsupported Claims

by **Bella Arciba**

While many insureds routinely file boilerplate complaints, federal courts continue to uphold pleading standards, providing defendants with an avenue for early dismissal.

In **Ganim v. Zurich American Insurance Company, No. H-23-1897, 2024 WL 420149, at *1 (S.D. Tex. Feb. 05, 2024),** the insured filed suit for breach-of-contract, breach of the duty of good faith and fair dealing, and violations of the DTPA and §§ 541 and 542 of the Texas Insurance Code. Shortly thereafter, the insurer filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), 9(b) and 8(a). The court partially agreed with the insurer and dismissed the insured's extra-contractual claims for failure to satisfy the heightened pleading standard. However, the court allowed the insured to replead these allegations. Accordingly, the insured filed a second amended complaint. Following the amended complaint, the insurer filed another Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), 9(b) and 8(a).

Agreeing with the insurer, the Southern District found that all of the insured's allegations, except his breach-of-contract and § 541.060(a)(3) claims, failed as a matter of law.

First, the court analyzed the insured's allegation that the insurer breached the duty of good faith and fair dealing by "failing to reasonably investigate his property damage." The court determined that the Plaintiff's conclusory allegation failed to show how the investigation was unreasonable. Accordingly, the court found that conclusory allegations did not state a claim upon which relief could be granted. Thus, the court dismissed the claim with prejudice.

Second, the court analyzed the insured's DTPA allegations under 9(b)'s heightened pleading standard. Fed. R. Civ. P. 9(b) requires the insured to allege "the who, what, when, and where" behind the allegation. However, the insured failed to include this information in his second amended complaint. Accordingly, the court dismissed the insured's DTPA claim with prejudice.

Third, the court found that the insured's allegation that the insurer violated the Texas Prompt Payment of Claims Act was unsupported because the insured did not include the date he filed his claim nor the date that the insurer acknowledged receipt of the claim or commenced its investigation. Further, the court found that the insured's conclusory allegations failed to allege the date the insurer received the reasonably required information, the date the insurer accepted or rejected his claim, or the date the insurer paid his claim. As such, the court held that the insured failed to state a claim for these allegations.

Finally, the court addressed the insured's allegations under § 541 of the Texas Insurance Code. The court concluded that the insured failed to state a §§ 541.060(a)(2) and 541.060(a)(4) claim because his allegations were conclusory and insufficient. Specifically, the court found that the insured's allegations did not show how the payments made by the insurer were insufficient, when the insured filed the claim, or when the insurer affirmed or denied coverage. Once again, the court found that conclusory allegations do not meet pleading standards, and therefore, the insured failed to properly plead his § 541 allegations.

The court also applied Fed. R. Civ. P. 9(b) to determine that the insured failed to state a § 541.061 claim. The court concluded that the insured, yet again, did not allege "the who, what, when, where, and how" behind the allegation. Accordingly, the insured failed to satisfy the heightened pleading standard.

The court's analysis illustrates how serious courts apply pleading standards to unsupported claims and is a good reminder for insurers to continue to seek dismissals of boilerplate complaints to avoid litigating unsupported claims.

Spotlight:

Kristin Cummings presented "All about the OLLE" at Zelle LLP's Afternoon with Zelle event at Lloyd's of London in February.

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

Contact Us!

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Lowdown!

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The Lonestar Lowdown All Issues

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