ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Thursday, January 16, 2025 | ISSUE 21

Welcome to the first 2025 edition of the Zelle Lonestar Lowdown! Our theme this year is **Collaboration**. We recognize that we are not an island in this industry and our clients, and ultimately the property owners, best benefit when we collaborate to resolve disputes. In that vein, we invite you to submit an idea for an article that we can include this year in the Lowdown. Our editors will choose one article to include in each issue. We also plan to have 4 quarterly events collaborating with one of our partners in this industry to encourage networking and discussion on the issues in our field. There may be a happy hour or two, but we also anticipate events that encourage collaboration (and fun). Let's make 2025 the best year yet for the property insurance industry in Texas!

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. If there are any topics or issues you would like to see in the Lonestar Lowdown moving forward, please reach out to our editors: Shannon O'Malley, Todd Tippett, and Steve Badger.

ZELLE LLP WHAT THE HAIL?

INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

January 16 – Steven Badger will present "Combatting Common Abuses and Schemes in CAT Claims" as part of the PLRB 2025 Your Claims Resolution Webinar Series at 11:00 am CST.

January 27 – Brandt Johnson will co-present "Everything is Bigger in Texas; but, was the Hail Damaging and When Did it Occur?" at the Windstorm Insurance Network 2025 Conference in Dallas, TX.

January 28 – Lindsey Bruning will co-present "The Good, the Bad, and the Ugly: Where Good Claims Go Bad and How to Keep it From Getting Ugly!" at the Windstorm Insurance Network 2025 Conference in Dallas, TX.

January 28 – Steven Badger is speaking on a panel discussion "Appraisal in Texas, Florida, & Colorado" at the Windstorm Insurance Network 2025 Conference in Dallas, TX.

January 28 – Steven Badger will co-present "Are There Any Solutions to the Issues We Always Argue About in the Property Insurance Arena?" at the Windstorm Insurance Network 2025 Conference in Dallas, TX.

February 10 – Steven Badger will present "Update from the Trenches" at the 2025 National Association of Catastrophe Adjusters (NACA) Annual Convention in Little Rock, AR.

February 11 – Jane Warring will be moderating a panel discussion "Breakout A: Breaking Down BI Losses by Industry Class" at the NetDiligence Cyber Risk Summit (Miami Beach) in Miami, FL

February 12 – Brandt Johnson will present "What the Hail? Fraud & Ethical Issues in CAT Claims" at the 2025 National Association of Catastrophe Adjusters (NACA) Annual Convention in Little Rock, AR.

February 12 – Steven Badger will present "The Appraisal Process – How Do We Fix This Mess?" at the 2025 National Association of Mutual Insurance Companies (NAMIC) Claims Conference in Orlando, FL.

February 20 – Steven Badger will present "Roofing and Insurance – When Worlds Collide" at the International Roofing Expo in San Antonio, TX.

February 24 – Steven Badger will present "Fraud in CAT Claims – What the Hail? Is Going On? at the ALM Property Casualty 360 Complex Claims & Litigation Forum in Las Vegas, NV.

1. Promptly acknowledge a notice of a claim with a phone call and a follow-up letter.

2. Promptly schedule and complete an inspection of the claimed loss.

3. If requested, provide a copy of the applicable policy.

4. Promptly request the items and documents reasonably necessary to investigate and adjust the claimed loss.

5. Invite the insured to provide additional documentation and information that he or she believes will be helpful in assisting with the resolution of the claimed loss.

6. Professionally advise the insured of coverage issues and/or policy provisions that may impact the claimed loss.

7. Regularly communicate with the insured on the status of the claimed loss, including outstanding

requests, so he or she stays up to date.

8. Promptly provide a clear coverage position on the entirety of the claim once you have received all the information reasonably necessary to adjust the claimed loss.

9. Promptly pay the undisputed portions of the claimed loss.

10. Invite the insured to discuss the disputed portions of the claimed loss, if any; and consider such items with an open mind.

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.

News From the Trenches

by Steven Badger

Happy New Year! The new year brings of course New Year's resolutions. Both personal and professional. I'll save you all from having to hear my personal New Year's resolutions. You honestly don't want to. Professionally I have several. But two of them are relevant to our industry as a whole. They reflect issues that I want to focus my time and attention on during the next twelve months. You will see me posting about these issues on LinkedIn, writing about them in articles, talking about them in my presentations, and working with our insurance company clients and other interested stakeholders in pushing the issues forward. Here are the two issues:

1. Construction Resiliency -- "Climate Risk" is real. If you didn't believe it before, you have to now having seen what is happening this week in California. We are living in an age of increased catastrophes, both in frequency and severity. Fire. Flood. Hurricane. And hail. We all see the pictures after every CAT of the single house on the street that survived due to one thing -- construction resiliency. As everyone knows, my focus is on the emerging hail risk. Every year, Texas building owners replace thousands of roofs that were damaged in reasonably foreseeable hail events. And the insurance industry keeps paying for it. A billion dollars a year in hail claims. We all know who eventually ends up paying for those roof replacements – Texas building owners through increased insurance premiums. We all also know that roofing products are available that will withstand many of these hailstorms. Our Texas building codes design for rain, wind, and even snow. But we don't design for our most frequent and damaging peril – hail. That is wrong. And it needs to change. One of my New Year's resolutions is to dedicate time this year to creating awareness of this issue and leading the movement for change. Perhaps through building code changes, requiring Class 4 rated roofing products in severe hail zones across Texas. Perhaps legislatively, requiring that only Class 4 rated roofing products are used in Texas. And perhaps legally, with lawsuits against shingle manufacturers selling a product they know darn well will fail in a reasonably foreseeable Texas hailstorm.

2. Preferred Contractor Programs -- An increasing number of our insurance company clients are questioning the historical claims payment process -- send out lots of cash and hope it gets used to fix damage. Unfortunately, what we are seeing with increasing severity is that a large portion of that cash is not used to fix damage. It gets paid to public adjusters, lawyers, and others who inject themselves into the claims process. It is used for vacations or other non-damage repair related purposes. And it is sometimes simply ripped off by assorted crooks and frauds. None of these meet the fundamental purpose of insurance. The purpose of insurance is indemnity. To indemnify in an amount necessary to fix the covered damage. And there is one simple way to ensure that covered damage is fixed – send

a qualified contractor out to do the work consistent with code and manufacturer requirements and pay that contractor a fair price. Yes, there is a lot in that sentence. A qualified contractor. Do the work consistent with code and manufacturer requirements. And pay the contractor a fair price. I view preferred contractor programs like a three legged stool. All three legs are needed or the stool fails. Here, the three legs are the insurance company, the contractor, and most importantly the property owner. All three must be happy for a preferred contractor program to work. There is a way to create and run a preferred contractor program that makes all three participants happy. You can expect to hear me talking a lot this year about what such a program looks like and why it is a win-win-win for all three participants in the process.

And those are my professional New Year's resolutions for 2025.

By the way, I am excited to write my next rant in February. We will then be ready to announce the dates and location for the **2026 *What The Hail?* Conference**.

AI Update

New Lawsuit Highlights Potential Risks Associated with Products Utilizing Artificial Intelligence

by Jennifer Gibbs

Character Technologies, Inc. faces allegations in a Texas lawsuit that its chatbot, Character.AI, encouraged self-harm, violent behavior, and provided sexually inappropriate sexual content to minors. The civil lawsuit requests that the court shut down the platform until the alleged dangers have been resolved. Google and Alphabet Inc. (collectively, Google) have also been named as defendants in the case filed in the Eastern District of Texas, Marshall Division (Civil No. 6:24-cv-01903-ACC-EJK). The complaint asserts causes of action for Strict Liability, Negligence, Violations of the Texas DTPA, Texas Business and Commerce Code, and Injunctive Relief.

The lawsuit stems from interactions between Character.AI "characters" and two Texas minors, "JF" - a 17-year-old with high-functioning autism, and "B.R." an 11-year old girl. The first user, "J.F.," allegedly began using the platform when he was 15, and due to his engagement with Character.AI, J.F. began isolating himself, losing weight, having panic attacks when he tried to leave his home, and became violent with his parents when they attempted to reduce his screen time. Included in the complaint is a screenshot of a conversation between J.F. and a Character.AI chatbot in which the bot encouraged J.F. to push back on a reduction in screen time and suggested that killing his parents may be a reasonable solution.

The second user, "B.R.," allegedly downloaded Character.AI when she was 9 years old and was consistently exposed to hypersexualized interactions that were not age appropriate, causing her to develop sexualized behaviors prematurely and without her parents' awareness.

Notably, exhibits attached to the most recent lawsuit against Character.AI reveal conversations with a chatbot therapist where the patient discloses sexual interactions with a minor and more surprisingly, the chatbot affirmatively provides the therapist's educational background and states she is a licensed therapist in the state of Texas.

The lawsuit follows shortly on the heels of another high-profile incident in which a Character.AI chatbot that infringed a well-known fictional character allegedly encouraged a 14-year-old boy to commit suicide.

Character.AI is an interesting use of AI and has over 20 million active users, many of whom are teenagers. Character.AI offers a range of chatbots, from "tutors" and "therapists" to chatbots developed after celebrities. Critics of Character.AI contend the app can cloud the line between reality and fiction, but its developers have claimed the app is safe, identifying its chatbot interactions as "fictional".

Whether or not the lawsuit will result in tighter restrictions on the use of AI will be interesting to watch as the use of AI chatbot applications have become more prevalent in all industries from travel to banking to insurance.

The Southern District of Texas Reaffirms That an Insured has the Burden to Identify a Covered Loss During the Policy Period and Segregate Its Damages

by Brett Wallingford

This seems like a simple concept; however, this is the exact question that the Honorable Judge Lee Rosenthal was asked to address in Cutchall v. Chubb Lloyd's Ins. Co. of Texas, CIVIL ACTION NO. 23-3745, 2024 WL 5264707, (December 31, 2024).

Chubb Lloyd's Insurance Company of Texas issued a property insurance policy to Kimberly and Michael Cutchall covering certain types of damage to their home occurring between May 29, 2021 to May 29, 2022. *Id.* at 1. The Cutchalls submitted a claim to Chubb claiming they sustained water damage to their home. The Cutchalls and their counsel lost sight of the real issue – probably because they had no evidence to support their claim. Instead of focusing on the evidence, the Cutchalls and their counsel complained about how many adjusters Chubb had involved over the life of the claim but did not have an expert that could definitively determine when the alleged damage to their home occurred. *Id.* at 2.

According to two of Chubb's experts, there were no hail or wind storms at the Cutchalls' address during the policy period that could have caused the damage they claimed to their home. *Id.* at 6.

Judge Rosenthal determined that the Cutchalls asserted that a hailstorm damaged their home on a specific date, but their evidence did not raise a genuine dispute about whether a storm capable of causing the alleged damage affected their neighborhood on that date or at another time during the policy period at issue. *Id.* at 7. Judge Rosenthal also determined that the Cutchalls' evidence contradicted itself as to when the alleged storm occurred. *Id.* Mrs. Cutchall reportedly testified that the damage occurred in "March o[r] April of 2021," — which was before the policy period started in May 2021. *Id.* Mr. Cutchall reportedly testified that he could not identify the date of the storm allegedly causing damage to his home. *Id.*

The Cutchalls' expert also testified that, between him and a professional meteorologist opining about whether a hailstorm hit at a particular date and time, the "Meteorologist is the expert." *Id.* The Cutchalls did not retain a meteorologist and Chubb's meteorology expert determined that there was no evidence there was a storm during the applicable policy period that could have caused the alleged damage to their home. *Id.*

Ultimately, Judge Rosenthal ruled that "No reasonable juror could believe the Cutchalls' evidence—or, really, lack thereof—over Chubb's. Because no genuine dispute exists over whether a covered loss occurred during the policy period, summary judgment on the Cutchalls' breach of contract claim is required." *Id.* at 8.

But Judge Rosenthal did not stop her analysis there. Judge Rosenthal also determined that the Cutchalls also failed to segregate their alleged damages between covered and non-covered claims. *Id.* The Cutchalls admitted during their depositions that they suffered uncovered water damage to their home. *Id.* Judge Rosenthal reiterated Texas law on the issue that "[W]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Id.* The Cutchalls initially claimed the segregation of damages argument fails because Chubb did not plead it as an affirmative defense. *Id.* Judge Rosenthal quickly disposed of that argument finding that "the doctrine of concurrent causation is not an affirmative defense or an avoidance issue. Rather, it is a rule which embodies the basic principle that insureds are entitled to recover only that which is covered under their policy." *Id.* This argument by the Cutchalls' counsel was clearly a desperate attempt to avoid the correct application of Texas law.

Finally, the Cutchalls asserted that their claim was covered because Chubb's experts found some water damage resulting from rainwater intrusion. *Id.* at 9. Judge Rosenthal recognized that this argument "misses the point. The evidence suggests that the Cutchalls had water damage in their house. Not all water damage is a covered loss under the Cutchalls' policy with Chubb. This case turns on what damages, if any, were covered by the policy." *Id.* Judge Rosenthal again reiterated clear Texas law on the issue that "because the Cutchalls have provided no reasonable basis for distinguishing between" covered and non-covered damage, their breach of contract claim fails on summary judgment. *Id.*

While none of the concepts addressed in *Cutchall v. Chubb Lloyd's Insurance Company of Texas* are novel, this case reminds us

While none of the concepts addressed in *Cutchall v. Chubb Lloyd's Insurance Company of Texas* are novel, this case reminds us that the insured always has the burden to identify covered damage that occurred during the policy period and the burden to segregate its alleged damages between covered and non-covered damage.

"With a Gap in the Pleadings and Extrinsic Evidence Unavailable," the Insurer has a Duty to Defend

by Alexander Masotto

On December 11, 2024, the United States District Court for the Southern District of Texas refused to allow extrinsic evidence under the *Monroe* conditions where plaintiff's employment status and the merits of the case overlapped.[i] Thus, Judge Jeffrey Vincent Brown found that the insurer had a duty to defend.

In the underlying lawsuit, *Joshua Galatas v. Marquee Corp., Morgan Enterprises, Inc., Highline Exploration, L.L.C., and Filipp Oilfield Services, LLC,* No. 2023-08751 in the 295th Judicial Court, Harris County, Texas, Plaintiff's bare-boned petition contained just two factual allegations:

> (1) On or about January 23, 2023, Plaintiff was working at a job site owned, operated, an/or managed by Defendants in Harris County; and
>
> (2) While performing his work, a fire and/or explosion occurred that severely burned Plaintiff and caused injuries to multiple parts of his body[.]

The petition also included a photograph depicting plaintiff's injuries and negligence allegations. For example, plaintiff alleged that defendants committed negligence by "[f]ailing to provide proper and/or safe equipment." Notably, however, plaintiff's petition did not mention any employer-employee relationship with defendants.

After suit was filed, the insurer moved for declaratory judgment on its duty to defend and indemnify defendant for the claims asserted by plaintiff, arguing that plaintiff's bodily-injury claims fell under the "Employees, Contractors, Volunteers and Other Workers" exclusion. In response, plaintiff urged the court to find a duty to defend because his factual allegations triggered coverage, and that the factual allegations overlap with the merits of the negligence claims.

Under the long-standing "Eight Corners" rule, a court looks only to the insurance policy and the plaintiff's petition to determine an insurer's duty to defend.[ii] "The court compares the two 'without regard to the truth or falsity' in the allegations or 'without references to facts otherwise known or ultimately proven.'"[iii] Initially, the insured bears the burden to provide that a claim potentially falls within the scope of coverage.[iv] The burden then shifts to the insurer to negate coverage through policy provisions and exclusions. If any doubt exists, the court must find in favor of an existing duty to defend.[v]

Since 2022, Texas law now provides an exception to the rule that extrinsic evidence is generally prohibited in the duty to defend analysis.[vi] The Texas Supreme Court in *Monroe* held that a court may consider extrinsic evidence when a gap exists in the underlying petition that prevents a court to determine whether coverage exists if the extrinsic evidence:

> (1) goes solely to the issue of coverage and does not overlap with the merits of liability;
> (2) does not contradict facts alleged in the pleading; and
> (3) conclusively establishes the coverage fact to be proved. [vii]

Here, the Court found that a "gap" existed in the pleadings because the facts only alleged that plaintiff was "performing his work" without details relating to any sort of relationship with defendants. Because a gap existed, the insurer urged the court to "fill" the gap with extrinsic evidence showing that the plaintiff and insurer had an employer-employee relationship.

Although the Court determined that *Monroe* conditions two and three were satisfied, the Court found that the extrinsic evidence overlapped with the merits of liability. Specifically, the Court refused to consider the extrinsic evidence because providing proper and safe equipment is a nondelegable duty that only arises in an employer-employee relationship.

Ultimately, the court held that the insurer must provide defense because plaintiff's petition alleged that his bodily injury occurred at a jobsite covered under the insurance policy and the factual allegations did not trigger any exclusions. Lastly, the Court found that it could not resolve the question of indemnity until the underlying lawsuit is resolved because the duty to defend and indemnify "are distinct and separate," and the "facts in the underlying lawsuit control the duty to indemnify."

Overall, *Hudson* shows that it is considerably difficult for an insurer to prove all three *Monroe* conditions in an effort to bring in extrinsic evidence to the duty to defend analysis. Moreover, "artful pleading" absent collusion is not an exception to the Eight Corners rule.

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[i] *Hudson Excess Ins. Co. v. Filipp Oilfield Services LLC et al* , No. 3:23-cv-00379, in the U.S. District Court for the Southern District of Texas.
[ii] *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp* ., 640 S.W.3d 195, 199 (Tex. 2022).
[iii] *Id*.
[iv] *State Farm Lloyds v. Richards*, 966 F.3d 389, 393, (5th Cir. 2020).
[v] *Zurich Am. Ins. Co. v. Nokia, Inc.* 268 S.W.3d 497, 491 (Tex. 2008) (nothing the general rule requiring duty to defend if unclear pleadings potentially implicate a case for coverage, even if "the allegations are groundless, false or fraudulent") (citation omitted); *Liberty Surplus Ins. Corp. v. Allied Waste Sys., Inc.* , 758 F. Supp. 2d 414, 420 (S.D. Tex. 2010) ("Artful pleading, absent evidence of collusion between the third-party claimant and the insured, does not create an exception to the general rule.").
[vi] *Monroe*, 640 S.W.3d at 203.
[vii] *Id*. at 196-97.

Spotlight

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Jennifer Gibbs recently earned certification in Insurance Law from the Texas Board of Legal Specialization, a prestigious recognition that highlights her deep knowledge and skill in the field. With years of experience and a proven record of success, including obtaining an LL.M. in Insurance Law, Jennifer consistently delivers outstanding legal counsel and representation to her insurer clients.

Lassoing Liability

with Megan Zeller

How To Be a Reasonably Prudent Insurer Under the *Stowers* Doctrine, Part II

There are a number of factors that Courts review when determining whether an insurer has acted under a "reasonably prudent insurer" standard under the *Stowers* doctrine. We have previously discussed key issues to look out for in a *Stowers* demand that can impact whether an insurer acts reasonably. Today, however, we will be looking at strategies that insurers and their counsel can employ when analyzing *Stowers* demands.

As a brief refresher, 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). While the determination of what an "ordinarily prudent insurer" is often fact-dependent, there are nonetheless a number of general strategies that insurers can rely on during the initial review of an alleged *Stowers* demand.

1. Know Your Facts.
While *Stowers* demands may be made pre-suit, the majority of *Stowers* demands are made during litigation. The key to either scenario is the same: insurers need to ensure that either their adjuster(s) or counsel conduct a thorough investigation. Unless liability is clear, it is extremely important that all phases of discovery be conducted, including depositions of key witnesses or experts. Similarly, it is essential that expert witnesses have reviewed the claim file material. This includes a medical expert to review whether the medical expenses were reasonable and necessary, and various liability experts such as accident reconstructionists, engineers, or field experts to ensure that the insurer understands the proper liability distribution.

If an insured has failed to provide this information, or discovery is ongoing, it is reasonable for the insurer to deny the *Stowers* demand under the reasonably prudent insurer standard.

2. Know Your Venue.
Oftentimes, an insurer will need to look beyond the facts in the claim file to understand the risks involved. Reviewing the jury verdicts and settlement ranges in the venue where the claim is located is essential to understanding the potential risks involved. The more plaintiff-friendly the venue is, the more likely the insured could receive a judgment beyond the policy limits. Accordingly, we recommend that insurers retain counsel to properly review related cases to understand the potential damages involved.

3. Know Your Opponent.
Similar to knowing your venue, it is essential that an insurer's counsel review the jury verdicts and settlement ranges in similar cases with the plaintiff's counsel making the *Stowers* demand. By understanding the dollar amounts that an opposing counsel is used to working with, an insurer should be able to create an effective settlement range to avoid a *Stowers* suit. This is particularly important if the facts of the case are in the insured's favor.

The bottom line is this: even if the facts of the case aren't in the insurer's favor, an insurer should always ensure that it diligently investigates the facts of the case. While analyzing a *Stowers* demand is always tricky and fact-dependent, these are nonetheless a few strategies that can help an insurer develop a proper response.

BEYOND THE BLUEBONNETS

"Amount Of Loss" By Any Other Name: Conditions Precedent and Scope of Appraisals in Minnesota

by Mackenzie Moy (Minneapolis Office)

A recent decision from the Minnesota Court of Appeals serves as a reminder that in the North Star state, appraisal generally occurs before coverage disputes are resolved, and "amount of loss" may not mean what you think it means.

Minnesota courts, like many other jurisdictions, prefer the appraisal process as a means to resolve disputes over the value of an insured loss. Unlike some other jurisdictions, however, Minnesota courts do not require resolution of coverage issues prior to appraisal (unless the policy requires otherwise). To trigger the appraisal process, the party demanding appraisal generally only needs to demonstrate that the parties disagree as to the "amount of loss." Furthermore, although "amount of loss" has traditionally been interpreted to encompass the cause of property damage, and the cost to repair that damage while questions of coverage are left to the courts, over time the meaning of "amount of loss" has slowly but steadily expanded.

The latest example of this is trend is *Gibbs v. SECURA Ins. Co.* , No. 24-cv-1663 (ECT/ECW), 2024 WL 4199804 (Minn. Ct. App. Sept. 16, 2024). In *Gibbs*, the insurer accepted coverage for some components of the claim and paid for those parts of the loss but resisted the insured's appraisal demand on the basis that other components involved coverage disputes that could not be resolved through appraisal. In particular, the insured argued that some of the damage was cosmetic – and therefore excluded under the policy's cosmetic damage exclusion. This dispute, the insurer argued, does not constitute a disagreement over the "amount of loss,"

so the appraisal provision had not been triggered. For its part, the insured asserted that the existence of competing estimates was all that was needed to demonstrate a disagreement as to the "amount of loss." *Id*. The Minnesota Court of Appeals disagreed with the insurer, and granted an insured's motion, sending all components of the claim to appraisal and leaving coverage issues to be sorted out later.

Gibbs also illustrates the expansion of the scope of what appraisal panels can decide in Minnesota. Historically, while coverage issues are reserved for the courts, Minnesota appraisal panels have decided questions of causation. *See Quade v. Secura Ins.*, 814 N.W.2d 703 (Minn. 2012). Relying on *Quade*, the *Gibbs* court reiterated that "an appraiser's assessment of the 'amount of loss' necessarily includes a determination of the cause of the loss, and the amount it would cost to repair that loss." *Id*. In other words, "appraisers have authority to resolve damage questions and causation questions necessary to resolving those damage questions, and courts have authority to resolve coverage questions remaining after the appraisal." *Id*.

Despite this precedent, the scope of appraisal has expanded to include other fact questions. For example, unless a policy says otherwise, Minnesota caselaw requires the completion of repairs with reasonably matching materials. Minnesota courts have effectively left it up to appraisers to decide whether reasonably matching materials are available in the market, or if more extensive repairs are necessary to achieve a cosmetic match. More recently, Minnesota courts have also permitted appraisal panels to decide fact questions that many would consider closer to coverage than to quantum. For example, Minnesota appraisal panels have been tasked with deciding whether losses occurred during the policy period, even when the answer to that question would be dispositive of whether the claim is covered.

In *Gibbs*, the court may have expanded the scope again to include another coverage-adjacent question: whether damage was functional or merely cosmetic. As noted above, the policy in *Gibbs* included a cosmetic damage exclusion. By sending the claim to appraisal with that dispute pending, the court seems to have left it up to the appraisers to decide whether the dispute damage was cosmetic (excluded) or functional (covered).

The court's decision in *Gibbs* reminds us that in Minnesota, appraisal generally comes first, and coverage issues are addressed later, and that Minnesota's already broad scope of appraisal continues to expand.

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

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