ZELLE LLP LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, May 14, 2024 | ISSUE 13

Welcome to The Zelle Lonestar Lowdown's One-Year Anniversary Issue! We are so excited our newsletter has reached the one-year milestone! We created this monthly newsletter to bring you relevant and up-to-date news concerning Texas first-party property insurance law. We hope you have enjoyed the legal topics and learned something, too. Our lawyers have been instrumental in shaping a lot of the principles and law discussed in these newsletters and we will continue doing so going forward. This issue reflects on the past year and identifies new issues. 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

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Upcoming Events

You don't want to miss this!

May 15, 2024 – Join Zelle LLP for the second half of our two-day webinar series, **Hot Topics with Zelle** as we explore the latest trends, challenges, and innovations shaping the global insurance landscape today. Each session will feature 15-minute presentations on several hot topics from 8:30 am - 10:00 am Central. More information and registration here.

May 16, 2024 – Steven Badger will be speaking at the Central Claims Executives Meeting in Oklahoma City, OK.

May 23, 2024 – Steven Badger will be speaking at the Skip Rush Hour Event hosted by BSC Forensics at the Westin Galleria Dallas, from 4:00 pm - 8:00 pm.

June 5, 2024 – Zelle LLP and J.S. Held will be hosting a Sip, Snack & Socialize Happy Hour on Wednesday, June 5th from 5:00-8:00 pm at LORO (14999 Montfort Dr). All DFW area insurance industry professionals are invited to attend. RSVP here.

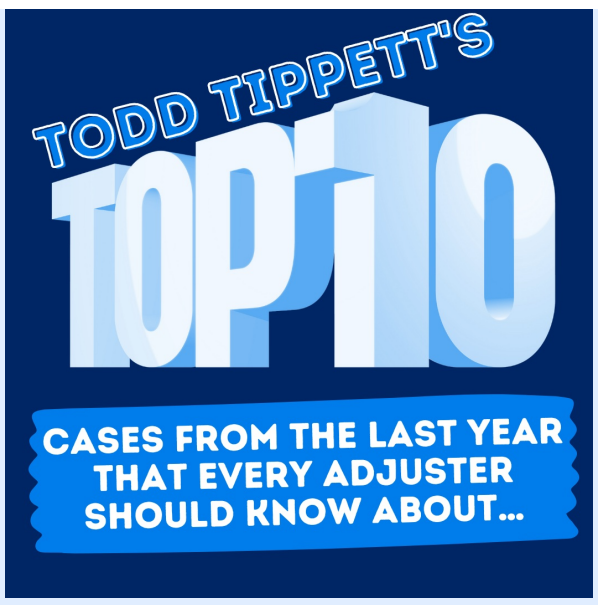
June 6, 2024 – Kristin Cummings and Christine Renella will be presenting "Navigating the Gulf Coast: The Latest Developments Impacting Insurance Laws in Florida, Texas, and Louisiana" on Thursday, June 6th at the LEA 2024 Spring Meeting & Educational Conference in Newport, RI. More information here.

The Doctrine of Prevention is not an Avenue To Avoid Repairs

by **Shannon O'Malley**

Many insureds and their counsel continue to demand replacement cost value and code upgrade costs as breach of contract or bad faith damages, even when they have not actually made the repairs or incurred code costs. They argue they are excused from complying with their policies' conditions precedent to recovery of those extra costs when there is a dispute under the Doctrine of Prevention. And, they argue there is a fact issue as to whether that doctrine applies to avoid summary judgment. But a close review of Texas law on that issue reveals that insureds have a very high burden to prove the doctrine applies and must demonstrate they have "clean hands" to raise this equitable doctrine. Essentially, the Doctrine of Prevention should rarely be a bar to summary judgment for an insurer when a commercial insured has not met the policy's conditions precedent.

Read the full article here!



1. *Rodriquez v. Safeco Insurance Co. of Indiana*, No. 23-0534, 2024 WL 388142 (Tex. - February 2, 2024). The Texas Supreme Court confirms no recovery of attorneys' fees under TIC Chapter 542A when an Insurer pays an appraisal award with statutory penalty interest.

2. *Baylor College of Medicine v. XL Insurance America, Inc.*, et.al, No. 14-22-00145, 2024 WL 438019 (Tex. - February 6, 2024). Houston Court of Appeals states that losses arising from the presence of the COVID 19 Virus at a property are excluded by a policy's Contamination and Pollution Exclusion.

3. *Khalig Enter., Inc. v. Affiliated FM Insurance Co.*, No. 23-50144, 2024 WL 1554067 (5th Cir. April 10, 2024). The Fifth Circuit holds that the Insured bears the burden to prove whether it made timely repairs in order to collect the Replacement Cost holdback under the Valuation provision.

4. *Shree Rama, LLC v. Mt. Hawley Insurance Co.*, No. 23-40123, 2023 WL 8643630 (5th Cir. Dec. 14, 2023). Texas courts should use common sense when holding the insured to its burden of allocating its damages between the covered and non-covered perils under the Doctrine of Concurrent Causation.

5. *Landmark Partners, Inc. v. Western World Ins.*, No. 02-23- 00116-CV, 2023 WL 8940812 (Tex. App. – Fort Worth, Dec. 28, 2023). The Fort Worth Court of Appeals found a simple and straightforward three-tiered approach for applying the Doctrine of Concurrent Causation to first-party claims.

6. *Montgomery v. State Farm Lloyds*, No. 3:21-CV-3039, 2023 WL 6465134 (N.D. Tex. Oct. 2, 2023). A court interpreting Texas law held that Attorneys' Fees must correspond to the damages awarded, and thus cannot be excessive.

7. *Mankoff v. Privilege Underwriters Reciprocal Exchange*, No. 05-22-00963-CV, 2024 WL 322297 (Tex. App.-Dallas, Jan. 29, 2024). When the term Windstorm is undefined in an insurance policy, it is found to be ambiguous as to whether a Wind and Hail deductible applies to a storm loss.

8. *Sims v. Allstate Fire & Cas. Insurance Co.*, No. SA-22-CV-00580-JKP, 650 F.Supp.3d 540 (W.D. Tex. 2023). When the term Actual Case Value is undefined in an insurance policy, it is found to be ambiguous as to whether both labor and materials can be depreciated when determining the Actual Cash Value.

News From the Trenches

by **Steve Badger**

As we celebrate the one-year anniversary of the Lonestar Lowdown, the focus this month is on the big issues that we have seen over the past year. Issues that have gotten a lot of attention in our short articles, case summaries, updates from the trenches, top ten lists, etc. So that got me thinking: What is the single issue that more than any other dominated the dialogue "in the trenches" over the past year?

New policy forms? Perhaps, as we are seeing many.

Preferred contractor programs? They are coming.

Concurrent causation? Always a topic in Texas.

Fraud schemes? Yes, my perpetual game of Whack-A-Mole continues. But more than any other issue, the topic that dominated the discussion over the past year is --- Appraisal.

I started at Zelle in 1992. We always had one or two appraisal disputes in the office. But they were typically large complex disputes, often involving business interruption issues. We were also involved in an appraisal of the World Trade Center Complex after the 9/11 Terrorist Attack—a multi-billion dollar appraisal. Besides these complex disputes, we had very few appraisals in our office.

Obviously, that has now changed. I would estimate that over a third of all the matters in our office right now involve appraisal in some way. Either we are involved in supervising matters during the appraisal process or handling disputes after an appraisal has been completed. And that's unfortunate. Remember, as the Texas Supreme Court stated in *State Farm vs. Johnson*: "Appraisals require no attorneys, no lawsuits, no pleadings…." Sadly, a large number of appraisals end up in the hands of attorneys.

And why is that?

A number of reasons.

First, use of the appraisal process has increased exponentially. More appraisals mean more disputes. Attorneys handle disputes.

Second, the standard appraisal clause is one simple paragraph. It doesn't address all potential scenarios that could arise during the process. Attorneys interpret policy language.

Third, abuses of the appraisal process. Appraisal is a non-judicial dispute resolution process, with no rules of procedure or ethical guidelines other than a requirement that the appraisers and umpire are competent and disinterested. With no person in a black robe supervising the process, accountability is lacking. Bad actors have near free reign to manipulate the process. Attorneys are needed to fight bad conduct.

All of this puts appraisal in the hands of attorneys and the courts, which is exactly the opposite of where it was intended to be.

That's really too bad.

So what do we do?

Insurance companies are already revising their appraisal clauses to address all of the issues commonly arising in the process. What used to be a one-paragraph provision is now much longer. Our recommended appraisal form is three pages long. Unfortunately, improved policy language is needed to address the known abuses and ensure that the process proceeds fairly, quickly, and results in a clear award.

Then there is the issue of legislation. Should we legislate the appraisal process? In my opinion, legislation should be the last resort. Appraisal is a creature of contract. It exists because it is in the insurance policy. Revising the policy language is a far preferable option to legislating the process. With that said, maybe there are some issues that could be legislated to address poorly developed case law. Such as the timing of appraisal demands. Texas case law makes it damn near impossible to waive appraisal. Appraisal should not be demanded on the eve of trial years after a lawsuit was filed. But the courts allow it. Common-sense "use it or lose it" legislation stating deadlines to demand appraisal does make some sense. I would also support a statutorily created appraisal

9. *Amphay v. Allstate Vehicle & Prop. Insurance Co.*, No. 2:21-CV-219, 2023 WL 2491285 (N.D. Tex. Mar. 13, 2023) The Court held that under the Cosmetic Damage Exclusion in the policy issued by Allstate, the damage caused by hail is not covered unless it results in water leaking through the roof surface.

10. *Newcrestimage Holdings, Inc. v. Travelers Lloyds Insurance Co.*, No. 2:23-CV-039-BR, 2023 WL 6849999 (N.D. Tex. Oct. 17, 2023). Including notice for causes of action under TIC 541 and 542A in an Original Petition, does not alleviate an Insured from sending the required 61-day Notice Letter under TIC 542A before it files suit.

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.

process exclusively for small matters less than $50,000. I have previously circulated my proposed statutory framework.

With all that said, yes, appraisal has been the topic of the year in the trenches. And without needed change, it is also likely to remain the topic of the upcoming year as well, and the next year, and the next year……

An INTERESTing Question: Does a Texas Insurer Owe Statutory Penalty Interest on Disputed Claim Payments Without a Legal Judgment?

by Brandt Johnson and Mariana Best

The Texas Supreme Court has issued four recent opinions addressing the Texas prompt payment of claims statute, set forth at Chapter 542 and 542A of the Texas Insurance Code. Despite these four opinions, one hotly debated question remains: Does a Texas insurer owe statutory penalty interest on disputed claim payments without a legal judgment?

The short answer to this question is a simple “No”.

Read the full article here!

A Year in the Life of the Lonestar Lowdown

by **Kristin C. Cummings**

It’s hard to believe our little newsletter has turned One! And yet here we are! Even though the Lonestar Lowdown is just barely out of its infancy, it has seen a lot in its short little life – too much to address it all right here. (Go check out the last 12 issues of the Lonestar Lowdown for all the moments!) But here’s a highlight reel of the some of the Big Issues from the past 12 months.

The Prompt Payment Statute and Appraisal

A big issue throughout this first year of the Lonestar Lowdown’s life was how the Texas Prompt Payment of Claims Act (“TPPCA”) applied in the context of an appraisal. The Texas Supreme Court’s ruling in 2019’s *Barbara Technologies Corp. v. State Farm Lloyds* that payment of an appraisal award “neither establishe[s] liability…not foreclose[s] TPPCA damages under section 542.060,” created a number of questions around an issue that the property damage world thought had been answered. This year gave us some answers.

Shortly after the Lonestar Lowdown made its first appearance last year, the Dallas Court of Appeals issued its opinion in *Rosales v. Allstate Vehicle & Prop. Ins. Co.* , No. 05-22-00676-CV, 2023 WL 3476376, at *1 (Tex. App. May 16, 2023), which affirmed that prompt payment of an appraisal award precludes recovery of attorneys’ fees under Chapter542A of the TPPCA, even when litigation is pending. The Fort Worth Court of Appeals soon followed with a similar holding in *Kester v. State Farm Lloyds*, No. 02-22-00267-CV, 2023 WL 4359790 (Tex. App.—Fort Worth July 6, 2023).

As other state and federal courts followed suit, the Texas Supreme Court decided to weigh in and accepted a certified a question from the Fifth Circuit Court of Appeals in *Rodriguez v. Safeco Insurance Company of Indiana* to specifically answer the question: “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?”

In February, the Texas Supreme Court answered the question with a “yes,” holding that “Section 542A.007 of the Insurance Code prohibits an award of attorney’s fees when an insurer has fully discharged its obligations under the policy by voluntarily paying the appraisal amount, plus any statutory interest, in compliance with the policy’s appraisal provisions.”

While this decision is no surprise to us as Zelle who have been making this argument since the *Barbara Technologies* opinion was issued, it is a significant blow to policy-holder lawyers who have continued to try to corrupt the *Barbara Technologies’* opinion and the spirit of the appraisal process into a “lawyers get rich quick” scheme.

Concurrent Causation

Texas likes to do things its own way. Texas is one of the minority of jurisdictions that does not follow the “efficient proximate cause” approach to determining the cause of a loss. Instead, Texas employs the “concurrent causation” model. This year saw challenges to this long-standing legal theory by policy-holder attorneys, but ultimately concurrent causation remains the law of the land.

In *Landmark Partners, Inc. v. Western World Ins.* , No. 02-23-00116-CV, 2023 WL 8940812, at *1 (Tex. App. Dec. 28, 2023), the Fort Worth Court of Appeals reaffirmed the established rule that it is the insured’s burden to segregate covered damage from non-covered damage and concluded that when evidence establishes as a matter of law that such segregation is impossible, summary judgment for the insurer is appropriate. Specifically, the court held that when covered and non-covered perils combine, the *insured* MUST show one of three circumstances to avoid summary judgment:

(1) that the damage had only one cause, which was covered by the policy;
(2) that the damage had multiple independent causes, one of which was covered; or
(3) although covered and non-covered events combined to cause the damage, the insured segregated between the covered damage and non-covered damage.

If the insured cannot establish one of these three elements, summary judgment for the insurer is appropriate. Once again, Texas courts recognize that it is the *insured’s burden* to support its claim and, therefore, when there are concurrent causes of loss that combine to cause the insured’s damage, the insured is the appropriate party to provide some evidence to segregate the covered from non-covered damage. And despite their best efforts, policy-holder attorneys cannot defeat this basic tenet of Texas law.

COVID-19 and Property Damage

While we try not to focus on it too much, the Lonestar Lowdown is a COVID-19 baby – conceived during the pandemic and born to a property insurance world struggling to resolve once and for all that a standard property damage policy does not provide coverage for lost income due to the pandemic. While the vast majority of courts across the United States arrived at this conclusion before our Lonestar Lowdown entered the world, Texas remained the Wild West on this issue. Though federal courts, interpreting Texas law, including the Fifth Circuit Court of Appeals, have fallen in line with the vast majority of courts and have repeatedly held that the virus that causes COVID-19 does not cause property damage and that various virus and contamination exclusions provide a second basis for no coverage, no Texas State Appellate Court (or the Texas Supreme Court) had yet weighed in until February 2024.

In February, the Houston 14th Court of Appeals issued its opinion in *Baylor College of Medicine v. XL Insurance America, Inc.*, et.al, No. 14-22-00145, 2024 WL 438019 (February 6, 2024), holding that a policy's Contaminants and Pollutants Exclusion unambiguously precluded coverage. That exclusion defined Contaminants or Pollutants to include "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...." The insured argued that the exclusion was ambiguous because a virus is not a "pollutant" or "contaminant" but the Court rejected this based on the plain language of the exclusion and the fact it specifically included the term "virus." (The Court did not address the issue of whether the COVID-19 virus can cause direct physical loss because it disposed of the case on the exclusion.)

While we still don't have a state appellate-level decision on the physical loss or damage issue when it comes to COVID, the Baylor decision confirms what we have long understood – Texas isn't going to be an outlier and go against the rest of the country in its handling of COVID-19 property damage claims. While we may be a little later to the party than the rest of the country, save us a piece of cake – we're almost there.

Happy Birthday Lonestar Lowdown! Can't wait to see what your second year brings!

AI Update

Can ChatGPT Draft a Newsletter Article on AI and Insurance?

by **Jennifer Gibbs**

As we progress through 2024, the intersection of artificial intelligence (AI) and the insurance industry continues to be a focal point, driving transformative changes and raising critical questions. Here's a roundup of the top AI and insurance issues shaping this year:

1. AI-Powered Underwriting

One of the standout trends is the accelerated adoption of AI in underwriting processes. Insurers are increasingly leveraging machine learning algorithms to analyze vast datasets and assess risks more accurately and efficiently. This shift promises streamlined operations and more personalized offerings. However, ethical considerations around data privacy and algorithmic bias remain pivotal concerns.

2. Enhanced Customer Experience

AI technologies are reshaping customer interactions within insurance. Chatbots equipped with natural language processing (NLP) capabilities are handling routine inquiries and claims processing, providing customers with immediate responses and improving overall satisfaction. Additionally, AI-driven tools are facilitating personalized recommendations and dynamic pricing based on individual behavior and risk profiles.

3. Risk Prediction and Prevention

In 2024, insurers are embracing predictive analytics fueled by AI to forecast and mitigate risks effectively. By analyzing historical data and real-time information, AI models can anticipate potential claims, detect fraud patterns, and even prevent losses through proactive interventions. This shift toward proactive risk management is reshaping traditional insurance practices.

4. Regulatory Challenges

With the expanding role of AI in insurance, regulatory frameworks are evolving to address associated risks and safeguard consumer interests. Debates surrounding transparency, accountability, and fairness in AI decision-making continue to influence regulatory initiatives globally. Striking a balance between innovation and regulatory compliance remains an ongoing challenge.

5. Ethical AI Practices

The ethical implications of AI applications in insurance are gaining prominence. Ensuring fairness and transparency in AI-driven decisions, especially related to pricing, claims processing, and customer profiling, is paramount. The industry is exploring frameworks for ethical AI deployment to maintain trust and address societal concerns.

Looking Ahead

As AI reshapes the insurance landscape in 2024, collaboration between insurers, regulators, and technology experts will be crucial. Embracing responsible AI practices, enhancing digital capabilities, and prioritizing customer-centric solutions will define success in this dynamic era.

Stay tuned for more insights as we navigate the evolving landscape of AI and insurance.

Human commentary:

Although the above article hits some of the high points, it's very broad and seems to lack that "personal" flair of the regular author of this column - therefore, we will rate it a solid "B." Therefore, next month's AI Update will be created with human vs. artificial intelligence.

Lassoing Liability

with Megan Zeller

An Overview of Key Cases and Trends in Texas Liability Law from 2023-2024

To commemorate the one-year anniversary of Lonestar Lowdown, Zelle presents the top liability cases and trends in Texas in the last year.

The Use of Extrinsic Evidence When Determining the Duty to Defend

When determining the duty to defend in Texas, insurers are typically confined to the eight-corners rule, where insurers may only consider (1) the complaint against the insured and (2) the terms of the insurance policy, without regard to the truth or falsity of those allegations and without reference to facts known or ultimately proven. *See, e.g., GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church* , 197 S.W.3d 305, 308 (Tex. 2006). However, in 2022, the Texas Supreme Court recognized that under limited circumstances, extrinsic evidence may be used in determining the duty to defend when "the extrinsic evidence (1) goes solely to an 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." *Monroe Guar. Ins. v. BITCO Gen. Ins.*, 640 S.W.3d 195, 197 (Tex. 2022). Within the last year alone, eleven cases have grappled with *Monroe*. Notably, in all but two of these cases did the courts find that any extrinsic evidence was necessary when determining an insurer's duty to defend.

First, in *LM Ins. Corp. v. Nautilus Ins. Co.*, the Southern District of Texas, Houston Division, relied on extrinsic evidence that two insurers brought forward via stipulations to determine that an insurer had a duty to defend under its policy's additional insured provision. 2024 WL 1185122 (S.D. Tex. March 18, 2024). Importantly, the Court relied on stipulations that both parties had previously agreed to and filed with the Court. In other words, the Court relied on undisputed facts, even if some of these facts were outside of the pleadings and the policy. Moreover, the facts clearly established the identity of the insured, which, once proven, conclusively established that there was a duty to defend.

Similarly, in *Twin City Management, LLC v. Federal Ins. Co* ., the Western District of Texas, Austin Division, relied on tolling agreement between the parties as extrinsic evidence because it was consistent with the pleadings. 2023 WL 4093404 (W.D. Tex. June 19, 2023). Like the court in *LM Ins. Corp.*, the Court here relied on an extrinsic document, the validity of which was undisputed by the parties. The tolling agreement – much like the stipulations – conclusively established coverage. As such, while it appears that courts in Texas are still hesitant to liberally interpret *Monroe*, courts do seem willing to rely on extrinsic evidence when it is undisputed and conclusively establishes coverage.

***Copart*: One Year Later**

In *Liberty Mutual Fire Ins. Co. v. Copart of Connecticut* , 75 F.4th 522 (5th Cir. 2023), the Fifth Circuit overruled in part a lower Texas court's decision when it concluded "the assumption that the duty to indemnify cannot exist where there is no duty to defend is 'faulty.'" In other words, even if a duty to defend does not exist based on the eight-corners analysis, a duty to indemnify may still exist if a jury determines that some damages at trial are unrelated to applicable exclusions or endorsements that could potentially prevent an insurer's duty to defend. While most critics initially agreed that while the reasoning in *Copart* was valid, it was nonetheless speculative and many wondered how the courts would actually utilize it in ongoing cases.

Nonetheless, in the last year, courts in Texas – particularly the Western District – have appeared to embrace *Copart* as an additional preventative measure against insurers from prematurely denying the duty to indemnify. For instance, in *FCCI Ins. Co. v. Easy Mix Concrete Services, LLC* , the Western District of Texas, Austin Division, found that "future discovery in the underlying suits here could reveal a cause for concrete damage" other than the currently known components that were excluded from coverage. 2024 WL 2031712 at *3 (W.D. Tex. May 7, 2024). As a result, the insurer's request for declaratory relief for its duty to indemnify an insured was premature. The Western District of Texas, Pecos Division also applied this reasoning when it found that an insurer's arguments against its duty to indemnify as unripe. *See Berkley National Ins. Co. v. Orta Gonzalez*, 2024 WL 166012 (W.D. Tex. January 13, 2024). Based on the caselaw thus far, it is likely that *Copart* will continue to serve as a warning to insurers that a duty to indemnify is a separate, distinct analysis from the duty to defend, and that in high-risk cases, insurers may want to consider taking on the defense of a claim to control defense costs, even when coverage is potentially excluded.

Excess Verdict Cases Continue to be Highly Risky Ventures for Insurers

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). 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 a *Stowers* claim, where punitive damages can be extremely high. Key cases in the last year continue to highlight the uphill battle insurers in these Stowers disputes.

In *Jeffrey W. Carpenter v. Twin City Fire Ins. Co.* , the Northern District of Texas recently significantly limited an insurer's discoverable defenses, and opened the case to excessive litigation costs when it found that the discovery period could not be limited to just the timeframe of the actual *Stowers* demand. 2024 WL 947589 (N.D. Tex. 2024). Similarly, the Southern of Texas liberally construed what it considers to constitute a *Stowers* demand, thereby making it more difficult for insureds to deny *Stowers* demands. *Westport Ins. Corporation v. Pennsylvania National Mutual Casualty Ins. Co.*, 2023 WL 5352619 (S.D. Tex. August 21, 2023). Here, the Court determined that a demand made by the insured that did not consider potential claims made by third parties nonetheless included a full release of claims, as required by *Stowers*. These cases continue to highlight how, once an insurer faces an excess verdict, courts in Texas tend to favor the insured.

Noncompliance Could Mean No Appraisal

by **Kiri Deonarine**

As a court in the Northern District of Texas recently explained, an insured bears the burden of showing that all conditions precedent to appraisal are met *before* appraisal is compelled. Therefore, when an insured fails to comply with its duties under a policy, it could be precluded from demanding appraisal. While this is not a new concept, it seems insureds often overlook those duties in the appraisal context.

In *Wright v. State Farm Lloyds*, a court in the Northern District of Texas, Fort Worth Division considered two issues: (1) whether an insurer's denial of coverage affects an insured's appraisal right; and (2) under the appraisal provision at issue, whether an insured is entitled to invoke appraisal when the insured failed to show that all conditions precedent to appraisal were fulfilled. No. 4:23-CV-01248-O, 2024 WL 1587057, at *1 (N.D. Tex. Mar. 25, 2024), report and recommendation adopted, No. 4:23-CV-01248-O, 2024 WL 1588504 (N.D. Tex. Apr. 11, 2024).

The appraisal provision in this case stated, in relevant part, that the insured "must comply with **SECTION I – CONDITIONS, Your Duties After Loss** before making a demand for appraisal."

The **SECTION I – CONDITIONS, Your Duties After Loss** provision explained that after a loss, among other things, the insured "must cooperate with [the insurer] in the investigation of the claim[,] . . . .provide [the insurer] with any requested records and documents[,] . . . and submit to examinations under oath."

Here, State Farm asserted that the dispute involved a renter's policy and two fires occurring within two days under suspicious circumstances that resulted in damage to a mobile home. The insured filed suit against State Farm in state court claiming breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Deceptive Trade Practices-Consumer Protection Act, violations of the Texas Insurance Code, fraud, and ongoing conspiracy to commit illegal acts in connection with damage to the insured's property. State Farm removed the case to federal court based on diversity jurisdiction, and the insured moved to compel appraisal and to abate the case pending appraisal.

State Farm opposed the insured's motion for the following two reasons: (1) The dispute relates to coverage under the policy rather than the value of damage to the property; and (2) The appraisal provision does not support granting appraisal because the insured failed to satisfy his duties after loss by failing to cooperate with State Farm's Special Investigation Unit's review, refusing an examination under oath, and failing to provide requested documentation.

The court rejected State Farm's first argument, holding that an insurer's denial of coverage does not affect an insured's appraisal right and pointed out that the right to an appraisal exists even if the insurer denies coverage and there is a question whether the policy covers some or all of the claimed loss.

Nevertheless, the court accepted State Farm's second argument, finding that under the appraisal provision at issue, the insured had an obligation to show that he fulfilled his duties after loss before he could invoke appraisal. Because the insured failed to offer *any* evidence that he performed all the conditions precedent to his right to compel appraisal and failed to file a reply to State Farm's briefing, the court denied the insured's Motion to Compel Appraisal and Abatement. Notably, the court found that because the insured made no effort to show that the conditions precedent to appraisal were satisfied, there was no need for factfinding.

Wright is a reminder to enforce the conditions precedent to an appraisal in a policy before continuing to appraisal. Most appraisal provisions require compliance with policy conditions. Therefore, if an insured refuses to comply with the policy by failing to submit to an examination under oath, submit a proof of loss, or satisfy some other condition, the insurer may have a reasonable defense to refuse appraisal.

Court Holds Prevention Doctrine Not Applicable in Commercial Case Where Prior Payments Made

By: **Crystal L. Vogt** and **Claire Fialcowitz**

The Northern District of Texas recently addressed the Prevention Doctrine in the context of a summary judgment motion brought by an insurer on an insured's breach of contract claim. In *Samurai Global, LLC v. Landmark Ins. Co.,* Landmark Insurance Company ("Landmark") filed a Motion for Summary Judgment on multiple grounds, including Samurai's breach of contract claim. 2024 WL 1837960 at *6 (N.D. Tex. April 26, 2024). In part, Landmark argued that Samurai had no evidence that Landmark breached the policy by failing to provide replacement cost coverage. Under the policy, Landmark was not required to pay replacement cost for damages until the property was actually repaired or replaced, and "unless the repair or replacement is made as soon as reasonably possible after the loss or damage." ***Samurai Global, LLC v. Landmark Ins. Co., 2024 WL 1837960*** at *6 (N.D. Tex. April 26, 2024). Samurai admitted in its interrogatory responses that it did not repair the property, only mitigated further damage, and ultimately demolished the buildings. As a result, Landmark argued that it did not breach the policy by failing to provide replacement cost coverage. In response, Samurai argued that Landmark prevented it from repairing the property soon after the tornado by refusing to pay for the loss, and Samurai therefore lacked the funding to repair the property.

The Court, however, held that Landmark was entitled to summary judgment on Samurai's breach of contract claim to the extent it was based on Landmark's failure to provide replacement cost coverage. "[I]n cases where the [prevention] doctrine has been applied to allow an insured to recover replacement costs, the insurer either completely denied the claim or refused to make any payments until it was too late for the insured, who was frequently an unsophisticated party, to make repairs. By contrast, courts have refused to extend the doctrine where the insurer already paid the insured actual cash value or where the dispute took place in a commercial setting and involved relatively sophisticated parties." *Id.* (internal citations omitted). The Court noted that both Landmark and Samurai are relatively sophisticated parties, and the dispute is commercial in nature. Further, Landmark had paid Samurai $2 million to make repairs. "In the absence of Texas authority, such equities do not merit extending the [prevention] doctrine to relieve [Samurai] of its contractual obligation to make repairs before receiving replacement costs." *Id.* As a result, the Northern District upheld prior Texas legal precedent limiting the application of the Prevention Doctrine in commercial contexts.

Spotlight:

Introducing the editors of The Zelle Lonestar Lowdown

Shannon O'Malley

Steven Badger

Todd Tippett

Howdy, Puzzlers!
The Lonestar Crossword Puzzle

by Bennett Moss

Do you know insurance? Did you read the articles in this month's Lonestar Lowdown?

Prove it!

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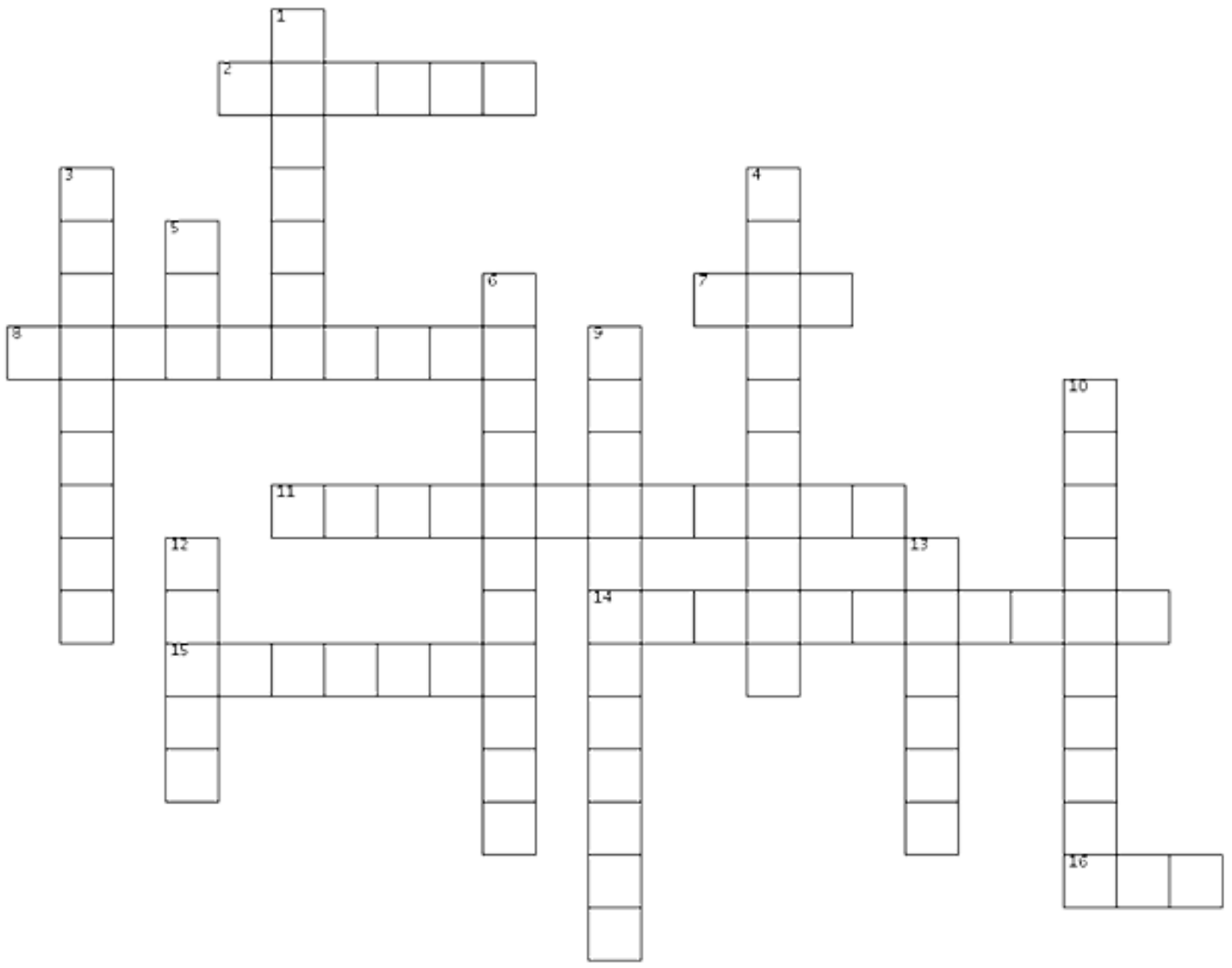

ACROSS

2. The contract between the carrier and its insured.
7. What a carrier may pay after proof of repairs.
8. Doctrine of _____ is implicated when an insured claims a carrier hindered its ability to timely complete repairs (see article from Shannon O'Malley above!).
11. Insurers are leveraging AI to assist this early policy process (see article from Jennifer Gibbs above!).
14. Penalty for not insuring property to value.
15. What an insured pays for a policy.
16. Questioning of the insured under oath (abbr.).

DOWN

1. Texas Supreme Court precedent holding ""“Appraisals require no attorneys, no lawsuits, no pleadings. . ." (see Steve Badger's "In the Trenches" above!).
3. May be invoked in the event of disagreement.
4. Removes cited perils from coverage.
5. What an insurer may pay before repairs are made (abbr.).
6. Additional policy form changing the policy.
9. Not included in an ACV payment.
10. Contractors cannot offer to waive these in Texas.
12. Shorthand for Act Codified in Texas Ins. Code 542 (see article from Shannon O'Malley, Brandt Johnson, and Mariana Best above!).
13. New caselaw precluding appraisal demand (see article from Kiri Deonarine above!)

Enjoy the puzzle? Let me know at bmoss@zellelaw.com!

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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