# ZELLE LLP LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Tuesday, August 13, 2024 | ISSUE 16

Welcome to The Zelle Lonestar Lowdown, our monthly newsletter bringing you relevant and up-to-date news concerning Texas first-party property insurance law. This month and in each newsletter going forward, we will have an article Beyond the Bluebonnets—a contribution from one of the non-Texas Zelle offices. This month, Lindsey Davis from the Minneapolis office boasts of Minneapolis' propensity for hail storms and how that state addresses those claims through appraisal.

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


## INSIDE THIS ISSUE



## Upcoming Events

You don't want to miss this!

**August 23, 2024** - Steven Badger will present "Fraud in CAT Claims – What the Hail is Going On? and Insurance and Public Policy Issues Arising From The 911 Terrorist Attack" at the Mutual Insurance Association Loss Prevention Seminar from August 22 - 23, 2024 in Des Moines, IA.

**August 27 - 28 , 2024 –** Seth Jackson, a partner in Zelle's Boston, MA office, will present "Code Enforcement Coverage in Commercial Cases" at the PLRB 2024 Central Regional Adjusters Conference on August 27 - 28, 2024, in St. Louis, MO.

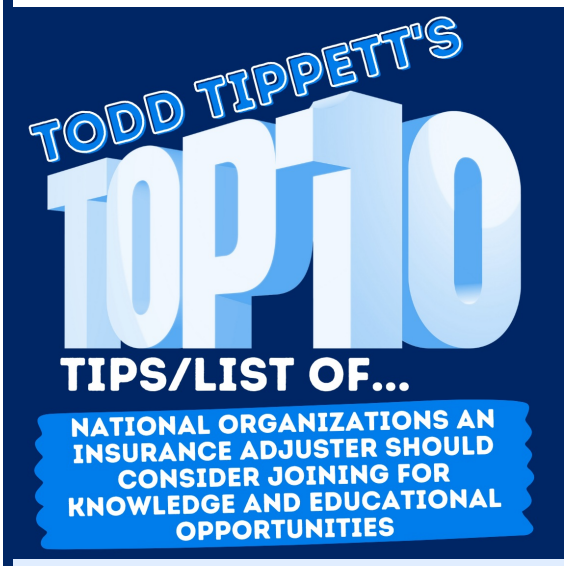
**August 27 - 28 , 2024 –** Jessica Port, a senior associate in Zelle's Washington, D.C. office, will present "In Defense of the Insurance Adjuster: How to Navigate Written and Implied Duties" at the PLRB 2024 Central Regional Adjusters Conference on August 27 - 28, 2024, in St. Louis, MO.

**September 4, 2024** - Steven Badger will present "Common Abuses In The Appraisal Process" Webinar for National Association of Mutual Insurance Companies at 2:00 pm EST. More information here.

**September 11, 2024** - Steven Badger will present "Public Policy Issues Arising From The 911 Terrorist Attack" at the Austin Claims Association Meeting in Austin, TX. More information here.

**September 11, 2024 –** Jennifer Gibbs**,** a partner in Zelle's Dallas, TX office, will present "Lawyer Discernment Is Critical in The World Of AI" at the Inaugural Navigating Artificial Intelligence and It's Emerging Risks ExecuSummit September 10 - 11, 2024, in Uncasville, CT.

**September 13, 2024** - Steven Badger will participate in the Roofing Contractors Association of Texas Conference Panel Presentation "Roofing & Insurance - What the Future Holds for Policies & Claims" The conference is from September 11 - 13, 2024 in Irving, TX.




1. Property Loss Research Bureau (www.plrb.org)

2. Loss Executives Association (www.lossexecutives.com)

3. Association of Claims Professionals (www.claimsprofession.org)

4. National Association of Mutual Insurance Companies (www.namic.org)

5. National Association of Independent Adjusters (www.naiia.com)

6. Association of Professional Insurance Women (www.apiw.org)

7. Risk & Insurance Management Society, Inc. (www.rims.org)

8. Claims and Litigation Management Association (www.theclm.org)

## News From the Trenches

by **Steven Badger**

The lawyers in our office jokingly refer to this section of the Lowdown as "Badger's Rant". I guess there is some truth to that, as I get to talk about whatever I want, especially when a topic makes me hot under the collar. But I do make an effort to talk about real current issues in the industry rather than simply use this platform to air my complaints about the many acts of misconduct I see on a daily basis from so-called policyholder advocates.

Well, that's not the case today. The garbage that Zelle clients have to deal with is foremost on my mind and I'm ready to rant about it.

I have spent a considerable portion of my past year, indeed the past decade, handling cases that involve blatant abuse and manipulation of the insurance claims process for financial gain. These cases are entirely unrelated to the fair assessment of covered property damage. And this financial gain isn't for the benefit of the policyholder. Usually, it is for the benefit of third-parties who have injected themselves into the claims process to further their own interests -- policyholder attorneys, public adjusters, contractors, and now even litigation investors. All of these "advocates" see that if they can get a toehold into the insurance claims world, they can bleed off lots of money into their own pockets. Best of all for them, anyone can do it. Generally, there is no education, experience, or license needed to get in the game.

People ask why we have a looming property insurance crisis in this country? Of course, increased claims and claim costs due to climate change and inflation are contributing factors. But there is undoubtedly another factor -- greed. Pure utter human greed.

Here are a few of the cases that have crossed my desk over the past couple years….

- a real estate investor purchasing a nearly and amicably resolved hurricane claim and then immediately jacking up the damages claim by $30 million.
- a lawyer taking a case about ready to go to trial and then dumping it into appraisal and increasing the damages by hundreds of millions of dollars.
- a lawyer getting a unilateral umpire appointment from a state court judge

Association (www.theclm.org)

9. American Property Casualty Insurance Association (www.apci.org)

10. National Association of Catastrophe Adjusters (www.nacatadj.org)

Each of these organizations have online educational seminars and in-person conferences targeted at helping the claims professional learn his or her craft.

---

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.

- who is married to a public adjuster and sits 300 miles from the loss site.
- a public adjuster arguing for total roof replacement due to a single gunshot hole in a roof.
- a public adjuster pushing an obviously baseless claim for six months and then withdrawing from the claim two days after I appear.
- an appraiser submitting a $1.5m RCV estimate to the panel for a roof that he knew actually cost only $550,000 to replace.
- a contractor submitting a hail damage claim for his own building, despite collecting on a claim eight years ago and not replacing the roof.

These are just a few of the insurance fraud, manipulation, and abuse matters that I have recently worked on. There are dozens of others. I could also list all the situations involving public adjusters and contractors, even a couple lawyers, who seem to be flat out ripping off their own clients. I have a a whole list of those.

And then there is attorney Zach Moseley. But he's in a category all his own. Well, maybe public adjuster Drew Aga matches his misdeeds and belongs in the same category.

It's as though all these people think it's okay to defraud the big rich insurance companies. They claim they have a Robin Hood mentality. We know better. It's not okay to rip off insurance companies. Just like it's not okay to walk into an Apple Store and steal an iPad because Apple is rich. Or get gas without paying because Exxon is rich. It's wrong. It's illegal. And I'm here to stop it.

The cost of all this bad conduct adds up. Who pays for it in the end? Everyone who buys property insurance. All of us. Insurance companies are not benevolent societies. They are for profit companies. The more they pay to fight baseless claims, the more they have to charge. Pure human greed is absolutely a contributing factor to our looming insurance crisis.

There needs to be a gut check here. This can't continue. I don't know the answer. I do know one thing. It's wrong to cheat insurance companies. And the Zelle team will keep fighting these bad actors day after day after day. It's our perpetual game of Whack-A-Mole. And we are pretty good at it.

And there is Badger's rant. We will return to regularly scheduled broadcasting next month.

## Once More for Those in the Back: Payment of Any Potential Statutory Interest Along with Payment of an Appraisal Award Precludes Claim for Attorneys' Fees

by **Kristin C. Cummings**

We at Zelle thought the Texas Supreme Court could not have been clearer in its holding in *Rodriguez v. Safeco Insurance Company of Indiana* that prompt payment of an appraisal award, together with any possible statutory interest, precludes the award of attorneys' fees. [See February 2, 2024 Lonestar Lowdown Breaking News Alert, "Texas Supreme Court Confirms No Recovery of Attorneys' Fees under Chapter 542A When an Insurer Pays an Appraisal Award and any Statutory Penalty Interest" by Shannon M. O'Malley; May 13, 2024 Lonestar Lowdown, Issue 13, "A Year in the Life of the Lonestar Lowdown" by Kristin C. Cummings]

But it seems some plaintiffs' lawyers are still confused, because, more than six months after the Texas Supreme Court issued its ruling in *Rodriguez*, we continue to see claims for attorneys' fees after payment of an appraisal award, even when insurers pay any potential interest that may be owed. And some of these claims are making their way through the courts.

Last month Judge Kinkeade of the United States District Court for the Northern District, Dallas Division issued an Order explaining why the *Rodriguez* decision meant the insured before him was not entitled to attorneys' fees.

In *Peterson v. Safeco Inx. Co. of Ind.* ***[1]***, Plaintiff Peterson suffered damage to her home from a tornado. Safeco adjusted the loss and issued that amount it found was owed. Ms. Peterson disagreed with Safeco and filed a

lawsuit, at which point Safeco demanded appraisal. The appraisal award came down with a number that was more than Safeco had paid during the adjustment. Thereafter, Safeco timely issued payment of the remaining amount of the appraisal award. Safeco also calculated and paid the interest that it might owe under Texas's Prompt Payment of Claims Act, Tex. Ins. Code, Chapter 542, Subchapter B.

Notwithstanding that Safeco had then paid the amount owed under the Policy AND any potential Prompt Payment interest, Ms. Peterson alleged Safeco still owed her damages for breach of contract, prejudgment interest and attorneys' fees under the Prompt Payment of Claims Act, and exemplary damages for alleged bad faith. Safeco filed a Motion for Summary Judgment on all of Ms. Peterson's claims.

In his order granting summary judgment for Safeco, Judge Kinkeade walked through each of the components of Ms. Peterson's claims:

First, Judge Kinkeade found that because Safeco had paid the full Actual Cash Value of the appraisal award (all that was owed unless and until repairs had been completed), there could be no breach of contract. While Ms. Peterson tried to argue that the court should withhold summary judgment until Safeco issued the full Replacement Cost Value identified in the appraisal (the additional amount only owed upon completion of repairs), Judge Kinkeade held that since repairs had not been completed, "no jury could find that Safeco has an obligation to pay the replacement cost of the property, much less that Safeco had breached that obligation." Accordingly, Judge Kinkeade dismissed the breach of contract claim.

Second, Judge Kinkeade found that Safeco had paid everything potentially owed under the Prompt Payment of Claims Act. Judge Kinkeade explained that there was no dispute that some payment under the Act was necessary because Safeco only paid the full amount of Ms. Peterson's claim after it received the appraisal award fixing that amount, and Safeco did not contest that the deadline to pay the claim had passed by that point. (While Safeco may not have disputed that some amount was owed, we here at Zelle do, in fact, dispute that Prompt Payment interest is owed on an appraisal payment without a legal finding that the insurer is liable for that interest. See May 14, 2024 Lonestar Lowdown, Issue 13, "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 for a detailed discussion of this issue.) Judge Kinkeade found that Safeco calculated the interest owed and paid that amount, and thus no additional interest was owed.

When Judge Kinkeade turned to the question of attorneys' fees under the Prompt Payment of Claims Act, he cited to the Texas Supreme Court's decision in *Rodriguez* as "binding precedent forclos[ing] Ms. Peterson's argument that she should recover more than the zero dollars [in attorneys' fees] Safeco calculated." He went on to explain that the Insurance Code fixes the recoverable attorneys' fees as the lesser of three calculations, one of which calls for a multiple of "the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy for damage to or loss of covered property…divided by the amount alleged to be owed on the claim for that damage or loss in a notice given under this chapter." Judge Kinkeade explained (as did the Texas Supreme Court in *Rodriguez*), that when an insurer has paid the amount of an appraisal award, "the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy" is zero. Since zero divided by any number is zero, the attorneys' fee calculation when an appraisal award has been paid is $0.

Finally, Judge Kinkeade looked at Ms. Peterson's claim for bad faith, which was based on her allegations that Safeco failed to pay her promptly. Judge Kindeade found that because Safeco had paid all substantiated damaged caused by its alleged delays and Ms. Peterson offered no evidence of an "independent injury," entitling her to additional relief, her claim for bad faith failed.

Judge Kinkeade also explained that Ms. Peterson's claim for regular prejudgment interest (not the Prompt Payment of Claims interest) failed because "that puts the cart before the horse. Since Ms. Peterson has not prevailed on her claims, there is no judgment in her favor and therefore no prejudgment interest to collect." For that bit of Texas law, Judge Kinkeade cited the recent decision in *Kahlig Enters. Inc. v. Affiliated FM Ins. Co.* , a case argued and won by Zelle's own Shannon O'Malley.**[2]**

For a set of laws that have been in effect for almost 20 years now, it's a little surprising how much litigation we are currently seeing around the Texas Prompt Payment of Claims Act. Hopefully, Judge Kinkeade's thoughtful discussion of the Act in the context of appraisal will make it clear to everyone (even those in the back!) that payment of potential statutory interest upon along with payment of an appraisal award precludes the claim of attorneys' fees.

**[1]** Civ. No. 3:21-CV-02186-K, 2024 WL 3378393 (N.D. Tex., July 11, 2024).
**[2]** 2024 WL 1554067, at *4 (5th Cir. Apr. 10, 2024).

## Same Song, Different Tune: Dallas Court of Appeals Rejects

# Insureds' Breach of Contract and Bad Faith Allegations after "Late" Payment of Appraisal Award

by **Shannon O'Malley**

Texas state court judges are often wary of granting summary judgments because they presume there are fact issues that should be considered by juries. But the Texas Court of Appeals, Dallas Division, has issued another opinion proving, once again, that following the Texas Supreme Court's guidance on legal issues surrounding appraisal payments and prompt payment penalties is both safe and supported by the law.

In *Knopp v. State Farm Lloyds*, No. 05-22-00749-CV, 2024 WL 3579432, at *1 (Tex. App. July 30, 2024), the Dallas Court of Appeals affirmed summary judgment in favor of an insurance carrier who paid an appraisal award and any potential prompt payment penalties. The case arose from – you guessed it – storm damage to a home in Collin County, Texas. The insured and insurer disagreed over the amount of damage, the cause of damage, and the amount of loss. During the adjustment, the insurer paid approximately $6,000 to repair claimed damage.

About a year after the claim was made, a roofing contractor sent a letter from the manufacturer of the home's roof tiles claiming the tiles were "extremely difficult to repair" and recommended replacement of all tiles in an area of damage. But the carrier contacted that manufacturer who contradicted the statements in the letter. That witness stated the tiles were easily replaced and the location of the damage (whether in a sloped area or not) did not affect their repairability. The carrier provided its proposed scope of repairs to two other roofing companies, both of whom agreed that repairs were possible, and the scope was sufficient for repair of the claimed damage.
The insureds demanded appraisal in December 2020. In January 2021, an appraisal award was issued stating the monetary amount to replace the roof was over $96,000 with an actual cash value of about $91,000. The award stated that it was not a determination of coverage or cause of loss.

Although the carrier received the award in January 2021, it maintained that there were coverage questions, and it would not pay to replace the roof because damage to the shingles was not caused by hail or wind. But the carrier made a supplemental payment of about $2,500 for minor additional repairs.

The insured's counsel sent a demand letter maintaining the insured was entitled to the full amount of the appraisal award. The insured brought suit in August 2021. As part of its damages, the insured argued that market costs of repair had significantly increased since the date of the appraisal award (by over $100,000). After answering the suit, the carrier eventually paid over $77,000, which was the actual cash value balance of the appraisal award. The insurer also paid an additional $20,000 for "potential" statutory interest under Chapter 542 of the Texas Insurance Code.

In March 2022, the carrier moved for summary judgment on the basis that its payment of the appraisal award disposed of the breach of contract, bad faith, and any other claims. The insured argued, on the other hand, that the carrier did not timely pay the appraisal award. Specifically, the award was paid 11-months after it was issued. The insured also argued that the increased costs should be covered as bad faith damages. The court granted summary judgment.
On appeal, the court first addressed the breach of contract and purported untimely payment of the appraisal award. The insured argued the carrier was "obligated to pay the appraisal award and that [it] breached or 'repudiated' the policy when [the carrier] did not pay the award on demand." *Id.* at *3.

The court looked to the language of the policy's appraisal provision, which stated: "You and we do not waive any rights by demanding or submitting to an appraisal and retain all contractual rights to determine if coverage applies to each item in dispute." *Id.* at *4. The court further recognized that appraisals do not establish a party's liability under Texas law. "Rather, appraisal awards contractually resolve a particular type of dispute among insurers and insureds: the amount of loss." *Id.* Therefore, while the appraisal award is binding on the amount of loss, it does not determine liability under the policy.

Based on this analysis, the court rejected the insured's premise that appraisal awards should be paid "on

demand." "Therefore, as a matter of law, [the insurer] did not 'repudiate' or breach the policy due to its denial of appellants' demands to pay the appraisal award." *Id.*
The court then examined the Texas Supreme Court's analyses in *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 131 (Tex. 2019) and *Rodriguez v. Safeco Ins. Co. of Indiana* , 684 S.W.3d 789, 790 (Tex. 2024), where the court "clarified the full payment of an appraisal award *does* discharge the insurer's liability for a claim under the insurance policy." *Id.* at *5 (emphasis in original). Therefore, although the appraisal payment was made 11-months after it was issued, once the award was paid, the insurer can show "as a matter of law" that it satisfied its policy obligations and the insured's claim for breach of contract is barred. *Id.*

The court specifically rejected the insured's argument that the insurer's "repudiation" of the award (*i.e.* failure to pay for 11-months) distinguished the case from *Ortiz* and *Rodriguez*. The court disagreed based on the policy's appraisal provision language and the Supreme Court's analyses in those cases.

Next, the insured argued that the increased costs should be recoverable as bad faith damages. Once again, however, the appellate court rejected that argument, holding that under *Ortiz*, payment of an appraisal award forecloses bad faith penalties. The court specifically rejected the insured's argument that its injuries were "independent" of the policy damages. The court noted that the "costs of repair for [the insured's] claimed damage—whether increased or not—were not separate from or different from the benefits under the contract and, thus, do not constitute independent injury." *Id.* at * 7. Therefore, the court declined to find that this type of "damage" falls under the "rare" successful independent-injury claim.

Ultimately, this case demonstrates that courts recognize the "same song, different tune." The Texas Supreme Court has issued a number of decisions recently addressing appraisal and prompt payment penalties. These decisions are consistent: when an insurer pays a claim based on an appraisal award, it has satisfied its contractual obligations, and payment of potential prompt payment penalties forecloses additional legal claims.

# AI Update

## Eleven States Adopt NAIC's Model Bulletin on the Use of Artificial Intelligence Systems by Insurers


by **Jennifer Gibbs**

In December 2023, the NAIC issued a Model Bulletin on the Use of Artificial Intelligence Systems by Insurers. To date, 11 states have adopted some form of the Model Bulletin, with many more expected to follow suit.

The bulletin addresses key issues related to the usage of AI, such as potential inaccuracies, unfair biases leading to discrimination, and data vulnerabilities. The AI model bulletin is intended to serve as a "guiding document" which fosters uniformity among state insurance regulators regarding expectations for insurance carriers utilizing AI and highlights the importance of responsible governance as well as risk management policies and procedures to ensure fair and accurate outcomes for consumers.

The state-specific bulletins are as follows:

Adopted States

• Alaska: Bulletin B 24-01 – Adopted February 1, 2024
• Connecticut: Bulletin No. MC-25 – Adopted February 26, 2024
• Illinois: Company Bulletin 2024-08 – Adopted March 13, 2024
• Kentucky: Bulletin No. 2024-02 – Adopted April 16, 2024
• Maryland: Bulletin No. 24-11 – Adopted April 22, 2024
• Nevada: Bulletin 24-001 – Adopted February 23, 2024
• New Hampshire: Bulletin Docket #INS 24-011-AB – Adopted February 20, 2024
• Pennsylvania: Insurance Notice 2024-04, 54 Pa.B. 1910 – Issued April 6, 2024
• Rhode Island: Insurance Bulletin No. 2024-03 – Issued March 15, 2024

• Vermont: Insurance Bulletin No. 229 – Adopted March 12, 2024
• Washington: Technical Assistance Advisory 2024-02 – Adopted April 22, 2024

Insurance Specific Regulation/Guidance

• California: Bulletin 2022-5 – Issued June 30, 2022
• Colorado: 3 CCR 702-10 – Effective November 13, 2023
• New York: Insurance Circular Letter No. 7, Issued July 11, 2024
• Texas: Bulletin # B-0036-20 – Issued September 30, 2020

---

# Lassoing Liability

**with Megan Zeller**


## Courts in Texas Continue to Define Allegations Involving Trespass as Voluntary and Intentional Acts

A basic principal involving an insurer's duty to defend is determined by whether an "occurrence" has taken place, which results in property damage and/or bodily injury. Most commercial general liability policies define an "occurrence" as "an accident, including continuous or repeated exposure to the same general harmful conditions." Surprisingly, CGL policies typically do not define what qualifies as an "accident." The Texas Supreme Court filled in this gap in 2007 by holding that "[a]n accident is generally understood to be a fortuitous, unexpected, and unintended event." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007). As a result, the key to determining whether an insurer has a duty to defend often depends on whether the allegations against the insured involve an "accident," as defined by *Lamar Homes*.

In *Lavender Road Management, LLC v. Hanover Insurance Company,* the United States District Court for the Eastern District of Texas, Tyler Division, recently found that allegations involving trespass did not trigger the duty to defend. 2024 WL 3737336 (E.D. Tex. July 23, 2024). Here, the underlying suit alleged that the insured, the owner and operator of a mobile home park, constructed an unauthorized sewage pipeline without prior consent from the affected property owners. After the affected property owners sued the insured, the insured requested coverage from the insurer. The insurer, however, ultimately denied coverage to the insured, arguing that the design and implementation of the pipeline was not an "accident," and therefore, not an "occurrence" under the applicable CGL policy. As a result, the insured sued the insurer, and the insurer filed summary judgment on whether "trespass" qualified as an "accident."

The Eastern District of Texas reiterated the Texas Supreme Court's prior ruling on "trespass," where the "act in trespassing upon the [owners'] property did not constitute an accident" because the "acts were voluntary and intentional, even though the result or injury may have been unexpected, unforeseen and unintended." *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973). Accordingly, it is not the result of the injury that determines whether an accident occurs, but the intent behind the act itself. *See Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720, 724 (5th Cir. 1999) (the inquiry into whether an expected or intended act is not relevant in determining if the tort had been committed). By relying on this framework, the Eastern District was able to rather quickly reaffirm that in general, "trespass" in Texas was intentional, as the act itself demonstrated the intent to commit the act.

Although determining "occurrences" continue to be a tricky area for insurers to navigate, *Lavender Road* demonstrates that courts in Texas typically take no-nonsense stances on how an "accident" can be defined, which often yields favorable results for insurers.

---

BEYOND THE

BEYOND THE BLUEBONNETS

# Hail and Related-Litigation Is Not "Minnesota Nice" in that State

by Lindsey Davis

The Minnesota State Fair, referred to by locals as "The Great Minnesota Get-Together" is just days away. The Fair brings with it many time-honored traditions, including trying the newest foods (deep-fried ranch dressing, anyone?) and proudly defending its status as the biggest and best fair in the United States. The Minnesota State Fair boasts higher daily attendance and a larger footprint than the Texas State Fair. Facts matter.

Minnesota also has Texas beat when it comes to hail. According to a 2023 analysis by State Farm, the company paid out over $3.5 billion in hail claims in 2022, an increase of more than $1 billion from 2021 due to increased hail claims and inflation. Minnesota topped State Farm's list with $799 million in hail claims (Texas followed with $510 million in hail claims). And the number of hail storms continues to increase in Minnesota. According to the National Centers for Environmental Information, Minnesota had an average of 237 hail storms each year from 2000 to 2003. But from 2020 to 2023, there were an average of 363 hail storms each year. Minnesota's costliest storm year on record was 2022, according to the Minnesota Department of Commerce, with storms causing about $6.3 billion in property damage. Last summer, a single hail and wind storm caused more than $1 billion in property damage in the Twin Cities and central Minnesota.

In Minnesota, appraisal is a statutorily mandated method to resolve disputes over the amount of an insured loss that is required to be included in all contracts of insurance under Minn. Stat. §§ 65A.01 (fire insurance policies) and 65A.26 (policies insuring against damage caused by hail). Minnesota courts have long recognized that appraisers have the authority to decide the "amount of loss" but may not construe the policy or decide whether the insurer should pay. Recognizing that "the line between liability and damage questions is not always clear," the Minnesota Supreme Court held in 2012 that "questions of law or fact, which are involved as mere incidents to a determination of the amount of loss or damage' are appropriate to resolve in an appraisal in order to ascertain the 'amount of the loss." *Quade v. Secura Ins.*, 814 N.W.2d 703, 706 (Minn. 2012). In *Quade*, the appraisers were allowed to decide whether the damage was caused by a windstorm, a covered peril, or inadequate maintenance, an excluded peril.

The *Quade* decision coupled with an increasing number and severity of hail storms has resulted in a corresponding uptick in appraisal demands and related litigation in Minnesota. Minnesota courts continue to grapple with the line between liability and damage questions, sometimes within a single case.

In a relatively recent case, for example, the insurer denied the policyholder's 2018 hail damage claim after concluding the hail damage occurred before its policy period. While the insurer argued that appraisal was unjustified because the amount of loss was not in dispute given its coverage denial, the United States District Court for the District of Minnesota disagreed and compelled appraisal. *Axis Surplus Ins. Co. v. Condor Corp.*, 2020 WL 7974330 (D. Minn. Oct. 8, 2020). The Eighth Circuit affirmed the district court's decision. *Axis Surplus Ins. Co. v. Condor Corp.*, 19 F.4th 1062 (8th Cir. 2021). While this decision is not binding on Minnesota state courts, it is binding on Minnesota's federal courts when applying Minnesota law.

The appraisal panel issued an award in August 2022, concluding that the loss occurred during the policy period rather than outside the policy period. *Axis Surplus Ins. Co. v. Condor Corp.*, 2023 WL 1767269, at *1 (D. Minn. Feb. 3, 2023). The appraisal panel also determined the amounts of loss as follows.

- The actual cash value of the loss ("ACV") was $568,302.81;
- As of May 2018 (the date of loss) the replacement cost value ("RVC") was $1,671.327.27; and
- As of July 2022 (the date of appraisal), the RCV was $2,094.396.03.

*Id.*

The policy's replacement cost provision stated that the recoverable depreciation is not due "(1) [u]ntil the lost or damaged property is actually repaired or replaced; and (2) [u]nless the repair or replacement is made as soon as reasonably possible after the loss or damage." The policy did not define "as soon as reasonably possible." *Id.* at *2. In August 2022, the policyholder demanded payment for the RCV amount plus interest so it could begin replacing the roofs damaged in 2018. The insurer refused to issue the RCV because the policyholder had not and could not satisfy the condition precedent in the policy that the policyholder replace the damaged roofing "as soon as reasonably possible." The policyholder moved for summary judgment and a declaratory judgment, asking the court to hold that the insurer must pay the July 2022 RCV amount.

Where "as soon as reasonably possible" is not defined, Minnesota courts engage in a case-specific inquiry into the facts and circumstances presented. In *Condor,* the insurer argued that the policyholder should have begun repairs soon after the insurer completed its investigation in October 2019. The court disagreed and concluded that the policyholder "reasonably waited" for the coverage dispute to resolve before committing to over $2 million in replacement work. The delay was due to the insurer's coverage denial, which included a lawsuit and a related appeal, rather than the policyholder's lack of action. Under the circumstances, the policyholder in *Condor* was entitled to recover the RCV. *Id.* at *2.

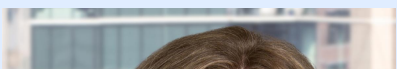
The court in *Condor* also held that the policyholder was entitled to recover the RCV as of the July 2022 appraisal rather than as of the May 2018 loss. *Id.* at *3. According to the court, "[t]he RCV amount is designed to allow the insured to replace the damaged property based on current – or nearly current – price lists." *Id.* Given the substantial delays, the court concluded it would be unfair to the policyholder to use the date of loss as the basis for the RCV. Critically, and in contrast to the policy's ACV provision, the replacement cost provision did not state that the RCV is based on the date of loss. *Id.* at *3 fn.3. Earlier this year, the United States District Court for the District of Minnesota held that replacement cost language stating that "we will determine the value of Covered Property at the actual amount spent to repair, replace or rebuild the damaged property *as of the time of the loss or damage*" unambiguously defined the RCV measure as of the time of the loss. *Maplebrook Ests. Homeowner's Ass'n, Inc. v. Hartford Fire Ins. Co.* , 2024 WL 869069, at *16 (D. Minn. Feb. 29, 2024) (emphasis added).

Where the parties dispute whether the RCV should be determined in light of the costs at the time of loss or at the time of the appraisal, the parties should ask for the appraisal panel to determine the amount of loss based on pricing as of the date of loss and as of the date of the appraisal. This allows the parties to have the court resolve this policy interpretation issue after the appraisal.

## Is a Tornado a Named Storm in the Context of a Property Insurance Policy?

by Brett Wallingford

## Spotlight



This seems like a simple question, yet this is the exact question Senior United States District Judge Sim Lake from the Southern District of Texas was faced with recently. The Parties agreed the damage to the property was caused by a tornado. They disagreed on everything else.

QBE Specialty Insurance Company and Tokio Marine United Underwriting Limited issued an insurance policy to Eduro Healthcare, LLC. The policy the insurers issued was limited by endorsement to only cover the perils of "Windstorm or Hail caused by or resulting from Named Storm." *QBE Specialty Insurance Company and Tokio Marine United Underwriting Limited v. Eduro Healthcare, LLC,* Civil Action No. H-23-2626, 2024 WL 3378451 (July 11, 2024). The policy provided that the "term 'Named Storm' shall include, but not be limited to, storm, cyclone, typhoon, atmospheric disturbance, depression or other weather phenomena designated by the US National Hurricane Center [("NHC")] and where a name (and not only a number) has been applied." *Id.* at 1. QBE and Tokio Marine filed a declaratory judgment action against Eduro for a determination that the tornado damage claimed by Eduro was not covered by the policy.

Eduro filed counterclaims against the insurers for breach of contract and violations of the Texas Insurance Code. After agreeing the damage was caused by a tornado, the parties filed cross-motions for summary judgment. Eduro alleged there was coverage under the policies based on four separate arguments: "(1) that the Policy uses "inconsistent and contradictory language which creates an illogical patchwork of incongruous and thus ambiguous coverage[,]" (2) that "the definition [of a Named Storm] does not appear in or apply to Endorsement 1," (3) that "coverage is illusory" because the NHC "only gives actual names to [cyclones] and not the other storms enumerated in the definition," and (4) that the restriction to storms designated by the NHC applies only to part of the Named Storm definition." *Id.* at 3. In the alternative, Eduro argued that the tornado was a Named Storm.

The Court easily rejected the first two arguments finding that the Named Storm definition unambiguously applies to the entire policy. With respect to the illusory coverage argument, the Court noted that Texas does recognize the doctrine of illusory coverage but if there is some potential for coverage under the policy that means the coverage is not illusory. Because there would be coverage for a "Named Storm" as that term was defined in the policy the Court found coverage was not illusory.

The Court ultimately concluded that "the Policy unambiguously limits coverage to '[w]indstorm[s] or hail caused by or resulting from Named Storm[s],' that the Property Endorsement's Named Storm definition applies, and that the Named Storm definition unambiguously limits coverage to storms that are designated by the NHC and given a name." *Id.* at 5.

Eduro also advanced a final novel argument that because the tornado was designated by local media as the "Pasadena Tornado" it qualifies as a "Named Storm." The Court found that "It would be very surprising for parties to a property insurance contract to intend that coverage would depend on how local media happened to describe a storm instead of the NHC's objective classification criteria, which are publicly and specifically defined in advance." *Id.*

Ultimately Judge Lake found that it was undisputed that the tornado was not designated or named by the NHC and therefore it was neither a Named Storm nor caused by a Named Storm *Id.* Therefore, the policy provided no coverage for the claimed damage. ***Id.***

Although the Court found no coverage under the facts of this particular case, it should

Jennifer Gibbs, a partner in Zelle's Dallas office, has been named among the honorees for Corporate Counsel's 2024 Women, Influence & Power in Law (WIPL) Awards. The WIPL awards honor in-house and law firm women leaders and allies who have demonstrated a commitment to advancing the empowerment of women in law. Jennifer was selected as a winner in the Mental Health & Well Being Initiative category.

The honorees will be recognized at an awards dinner in Chicago on September 24, 2024, as part of Corporate Counsel's WIPL Conference.

be noted that some Named Storms (such as a Hurricane) can spawn tornadoes at times. In that instance tornado damage that was caused during the time when a hurricane made landfall could qualify as a Named Storm. However, as a general rule, a tornado would not be a Named Storm under the definition in the policy issued by insurers in this case.

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](zellelaw.com/attorneys).

**Visit our Website**

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

**Contact Us!**

[Follow Zelle LLP on LinkedIn!]

ZELLE LLP

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

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

**The Lonestar Lowdown All Issues**


Join The Zelle Lonestar Lowdown mailing list!

**Sign me up!**

**If you would like to be taken off this distribution list without unsubscribing from all Zelle emails and updates, please click here.**

Zelle LLP | 901 Main Street Suite 4000 | Dallas, TX 75202 US