ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Wednesday, September 11, 2024 | ISSUE 17

Welcome to The Zelle Lonestar Lowdown, our monthly newsletter bringing you relevant and up-to-date news concerning Texas first-party property insurance law.

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.

INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

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**,** 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 "Public Policy Issues Arising From The 911 Terrorist Attack." The conference is from September 11 - 13, 2024 in Irving, TX.

September 20, 2024 – Steven Badger will be presenting "Ethics Jeopardy" at the Oklahoma Claims Association Fall Conference in Midwest City, OK

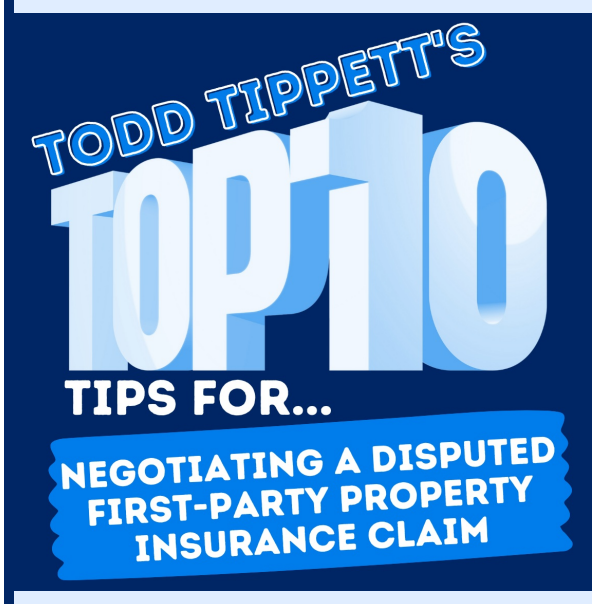
September 25, 2024 – Steven Badger will co-present "Combating Litigation Abuse and its Impact on the Market" with Lee Parsley (TLR) at the State Insurance Trade Association (SITA) 2024 Annual Conference in Austin, TX from 10:15 – 11:15 am.

October 2, 2024 - Jane Warring, a partner in Zelle's Atlanta, GA office, will serve on the Cyber Business Income Loss Disputes panel at the upcoming NetDiligence Cyber Risk Summit in Philadelphia, PA.

October 21, 2024 – Steven Badger will present "Texas Hail Damage Claims – Update from the Trenches" at the Texas Association of Mutual Insurance Companies TAMIC 88th Convention & Seminar in Round Rock, TX from 3:45 pm – 4:45 pm.

October 24, 2024 - Steven Badger will present "Fraud and Other Abuses In CAT Claims, What The Hail Is Going On?" as the Keynote Speaker at the 2024 PLRB Large Loss Conference in Tampa, FL.

October 24 & 25, 2024 - Brandt Johnson will co-present "Back to the Future: How Adjusters Can Use Forensic Meteorology in Hail and Wind Claims" at the 2024 PLRB Large Loss Conference in Tampa, FL with co-presenters Howard Altschule (Forensic Weather Consultants) and Annette Tarquinio (Engle Martin).



1. Know the Policy – you lose credibility if you incorrectly cite the Policy.

2. Know the facts of the Claim – you look unprepared if you inaccurately characterize the facts.

3. Prior to negotiating any claim, retain qualified experts to support your position.

4. During the negotiation; always be honest, polite, and professional.

5. Never negotiate undisputed issues or amounts owed – that can be characterized as bad faith. Always pay undisputed measures.

6. Be open minded; and remember you will always learn more about what is important to the insured when you listen rather than talk.

7. Require the parties make all offers and agreements to terms in writing.

8. Negotiate all terms of the deal before you accept a resolution.

9. If you are going to compromise a disputed claim, obtain a release for the claim (yes, that is allowed when the claim is disputed).

10. Consult an attorney to assist if you have concerns or questions about negotiating a disputed first-party property insurance claim.

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

The Texas Legislature convenes only every other year. The next legislative session begins in just over four months (January 14, 2025). With the next session approaching, there is already lots of discussion about potential legislation relevant to the first-party property insurance industry. Here is what I am hearing and my views on the topics….

1. Revisions to Tex. Ins. Code §542A (the "Hail Bill")

Policyholder attorneys are creative. I gotta give them credit. Some of them are trying to find ways to get around the clear intent of the original legislation. So some technical amendments are needed. First, the intent of the legislation was to require the plaintiff to give a real "specific amount alleged to be owed" plus incurred attorneys' fees that could be accepted by the insurance company in full and final settlement of the dispute. The statute needs to be amended to clarify that intent. Second, plaintiffs should not be able to give a low ball "specific amount alleged to be owed" and then greatly increase their damages later in the lawsuit, thereby circumventing the limitations on attorneys fees in §542A.007. That needs to be fixed. Third, this new practice of just suing the adjuster and not the insurance company needs to stop. A simple change to the statute can make it crystal clear that the insurance company can adopt the adjuster's (or other agents) liability, thereby precluding a suit against the adjuster, even if the insurance company isn't a party. That solves that problem. Fourth, policyholder attorneys should not be able to file a lawsuit, dump the matter into appraisal, and then seek to recover statutory interest. The Hail Bill can easily be amended to make clear that if the insured files a lawsuit and then demands appraisal, there is no right to statutory interest under §542. None of these provisions take any legitimate rights away from policyholders. They just fix abuses by policyholder attorneys. I support all of these changes to the Hail Bill.

2. Appraisal Legislation

Some believe that we need a statutory solution to address problems in the appraisal process. I disagree. The appraisal process is a creature of contract. If insurance companies don't like what is happening in their appraisals, they should change their policy language. That is a far better solution than a statutory scheme mandating how all appraisals are to be conducted. We should not legislate appraisal.

3. Roofing Contractor Licensing

After every storm, local television stations warn people to watch out for contractor scams. Texans are ripped off after every storm. Why? In part because anyone can slap a sign on their pickup truck and call themselves a roofing contractor. Texas needs to regulate roofing contractors. Every two years we show up in Austin and try to pass simple legislation requiring roofing contractors (companies not individuals) to be registered. Such legislation would allow municipalities to deny roofing permits to contractors who either aren't registered or have had their registrations revoked. The politicians who oppose any regulation and those who falsely relate this to an attack on immigrant labor need to put stances aside and protect Texas consumers. Texas should finally pass roofing contractor regulation.

4. Foreign Venue Arbitration Provisions in Surplus Lines Policies

Legislation was passed in 2023 that would prohibit surplus lines insurance policies from having provisions requiring arbitration in foreign states (typically New York or London). The Governor vetoed that legislation. Similar legislation is certain to be filed again this session. Some are already discussing a compromise approach -- foreign arbitration requirements would not be allowed in policies issued to schools, municipalities and companies with property solely within Texas, while they would be allowed in policies issued to companies with properties in multiple states.

5. Building Resiliency

If the Texas legislature truly wants to do something to address the looming climate risk crisis, it should consider legislation mandating improved building construction, with an emphasis on improving the wind and hail resistance of roofing materials. But that ain't gonna happen.

Watch my LinkedIn page in the months ahead for more information as proposed legislation is filed.

AI Update

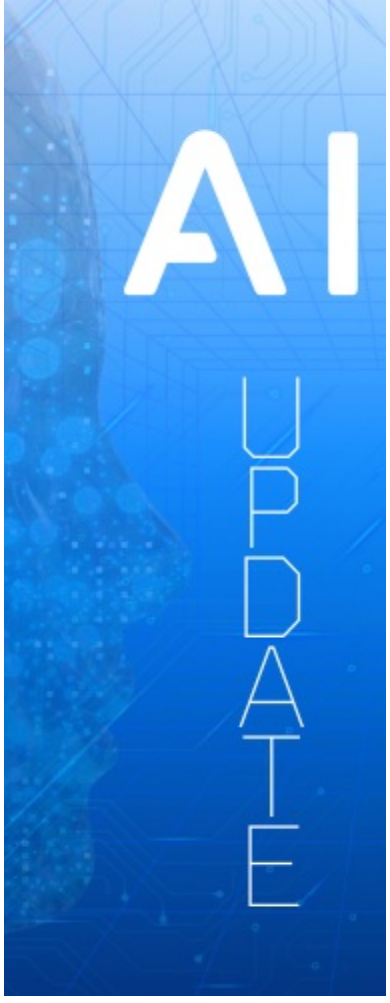
What is Zero Shot Learning?

by **Jennifer Gibbs**

In the AI context, there are areas in which conventional supervised learning approaches are incapable of solving -- specifically in areas that encompass a large or increasing number of uncountable classes. "This is where Zero-Shot learning takes the wheel and attempts to solve these otherwise seemingly impossible tasks for a conventional supervised learning model to handle."

Zero-shot learning (ZSL) is a machine learning pattern where an AI model is trained to recognize and categorize objects or concepts without having been given any examples of those categories or concepts in advance. The concept behind ZSL is to train a machine to mimic the way humans can naturally find similarities between data classes.

The main goal of ZSL is to gain the ability to predict the results without any training samples. ZSL is programmed to learn intermediate semantic layers and properties, then apply it to predict a new class of unseen data.



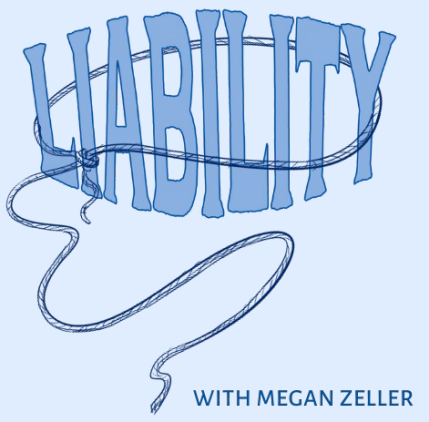
Unlike humans who already possess ZSL ability, machines typically require input labeled data to learn and then be able to adapt to variances that may naturally occur. More and more researchers are interested in automatic attribute recognition (ZSL) to compensate for areas in which there is a lack of available data.

ZSL can unlock new levels of AI flexibility, enabling models to extend to entirely new data and tasks without additional labeling or additional training. "This allows efficiently scaling AI to new products, geographical markets, customer segments, and business needs as they emerge." ZSL models have the potential to dynamically recognize an open-ended set of new concepts over time from descriptions alone. This adaptable intelligence (ZSL) can assist companies to cost-effectively innovate, personalize offerings, assess risks, flag anomalies, and create a "future-proof" AI that aligns with rapidly-changing business environments.

Lassoing Liability

with Megan Zeller

Excess *Stowers* Verdicts Continue to be Risky Ventures for Primary 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). Although excess insurers may be involved at this initial stage, the reasonable duty to settle is usually solely at issue for the primary insurer. As a result, not only can a primary insurer face a *Stowers* lawsuit by the insured for failure to reasonably settle a case, but a primary insurer can also face a *Stowers* lawsuit by any excess insurer that is then stuck paying for the excess verdict.

A recent case from the Northern District of Texas, Dallas Division, demonstrates the risks that primary insurers face when dealing with the aftermath of an excess verdict with an excess insurer. Here, an excess insurer (Endurance) sued a primary insurer (Hiscox) on an excess judgment, arguing that a reasonable insurer would have accepted the settlement. *See* Endurance American Ins. Co. et al. v. Lloyd's Syndicate 3624, 2024 WL 3625671 (N.D. Tex. July 31, 2024).

The underlying case involved a plaintiff (the "Plaintiff") who was electrocuted and filed suit against a property management company. Hiscox, as the primary insurer, defended the property management company and engaged in numerous settlement discussions with Plaintiff throughout litigation. Initially Plaintiff offered to settle the suit in writing for $3,000,000.00, which was above Hiscox's policy limits. Even though this demand was labeled a "*Stowers* Demand," it was undisputed that this demand was not a proper *Stowers* demand, as it did not meet the second *Stowers* prerequisite:

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).

Plaintiff then offered to settle the case in writing for $1,000,000.00, which was the full value of the Hiscox insurance policy. This demand was clearly labeled "*Stowers* Demand." However, less than a week after making the $1,000,000.00 settlement offer, and prior to the demand's deadline, Plaintiff's counsel indicated over the phone that Plaintiff would settle for $500,000.00. Ultimately, Hiscox failed to settle with either demand and the jury awarded Plaintiff $3,500,000.00.

As a result of the excess verdict, Endurance brought suit against Hiscox. Hiscox then filed a motion for summary judgment, arguing that: (1) a reasonably prudent insurer would not have accepted the terms of the demands, and that (2) the demands were not proper *Stowers* demands. The Court, however, struck down both arguments, and found that these issues were fact-issues that would be decided by a jury.

Specifically, Hiscox argued that no reasonably prudent insurer would have accepted the $1,000,000.00 demand because the timing of the phone call regarding the $500,000.00 demand made it unreasonable for Hiscox to accept the $1,000,000.00 offer. The Court, however, was not swayed by this argument. First, the Court noted that Endurance produced an expert who disputed this position and argued that a $1,000,000.00 demand was reasonable for the circumstances. Moreover, the Court relied on previously-established caselaw, where "the question whether an insurer has had a reasonable amount of time to respond to a *Stowers* demand will generally present a quintessential, constituent fact issue that is subsumed within the jury's application of the reasonably prudent insurer standard." *Bramlett v. Med. Protective Co. of Ft. Wayne, Ind*., No. 3:10-CV-2048-D, 2013 WL 796725, at *5 (N.D. Tex. Mar. 5, 2013) (Fitzwater, C.J.). As a result, the Court found that a motion for summary judgment on this issue was improper, and that this issue should proceed to trial.

Hiscox also argued that the $500,000.00 demand was not a proper *Stowers* demand because it was not labeled a *Stowers* demand like the prior two demands, and was made over the phone. While this argument may be somewhat compelling, the caselaw is nonetheless clear: verbal demands may be considered proper *Stowers* demands if they contain sufficiently clear terms to trigger the *Stowers* duty. *See, e.g., Westport Ins. Corp. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.* , No. CV H-16-1947, 2018 WL 6313478, at *28–29 (S.D. Tex. Aug. 31, 2018). Once again, the Court found this sufficient evidence to be a fact-issue for the jury.

As a result, Hiscox now faces either settling with Endurance or going to trial on these issues. Again, jury verdicts in *Stowers* cases **rarely** favor the primary insurer, and as a result, are highly risky. Even if the primary insurer has a valid argument under the

reasonableness standard, the primary insurer is still nonetheless at the mercy of the jury if they decide to go forward with a *Stowers* trial. Accordingly, if a primary insurer denies a *Stowers* demand purely on a reasonableness standard, we recommend that the primary insurer have a clear-cut argument that an average juror would be able to agree with, considering the circumstances. Part of this analysis includes a thorough jury verdict and settlement analysis to ensure the primary insurer understands what they are up against if a case does end up going above the policy limits. In cases like these, it is extremely important that a primary carrier conduct as much of the risk analysis it can during the *Stowers* demand negotiations.

Insureds' Failure to Comply with Their Duties Under a Policy Could Bar Claims

by Kiri Deonarine

A court can deny coverage if insureds fail to comply with their duties under a policy as a court in the Southern District of Texas, Houston Division recently explained in *Ansah v. Nationwide Property and Casualty Insurance Co.*, No. H-23-2488, 2024 WL 3929895, at *5 (S.D. Tex. Aug. 23, 2024).

The policy in that case contained the following provision:

> **1. Your Duties After Loss**
>
> In case of a loss to covered property, we have no duty to provide coverage under this Policy if the failure to comply with the following duties is prejudicial to us . . .
>
> ***
>
> d. Protect the property from further damage....
> e. Cooperate with us in the investigation of a claim;
> f. Prepare an inventory of damaged personal property showing the quantity, description, "actual cash value" and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;
> g. As often as we reasonably require:
> (1) Show the damaged property;
> (2) Provide us with records and documents we request and permit us to make copies ...

On February 18, 2021, the insureds submitted a claim for freeze damage to their dwelling and personal property that occurred the day before. On March 5, 2021, the insurer contacted the insureds to begin the investigation and ultimately paid $87,122.07 for dwelling damage and at least $35,984.83 for personal property damage.

The insureds disputed the insurer's valuation of the loss and demanded appraisal. The appraisers determined that the actual cash value of the dwelling damage was $78,936.05—less than what the insurer already paid.

During the appraisal of the personal property, it became clear that none of the claimed personal property was available for inspection because the insureds supposedly disposed of it. Additionally, the insureds did not have any photos or documentation of the alleged personal property damage. Instead, the insureds merely provided a list of items claimed.
The court held that the evidence showed that the insureds disposed of the allegedly damaged personal property without submitting an inventory supported by bills and receipts and without showing the property as required by the policy. Because the insureds' failures prejudiced the insurer's appraisal rights, the insurer had no obligation under the policy to make further payment for the damaged personal property.

The court also found that the insureds' remaining claims for bad faith, unfair insurance practices, fraud and ongoing conspiracy, violations of the DTPA, and their TPPCA claims failed for lack of evidence, lack of independent injury, and inadequate pleading.

Consequently, the court granted the insurer's motion for summary judgment, and the court explained that the action would be dismissed with prejudice.

Ansah is a good reminder to insurers that when insureds are not cooperating with an investigation and failing to comply with their duties under a policy, the insurer may want to explore whether it has an obligation under the policy to make further payments in the claim.

Case Study: *Palma V. Allied Tr. Ins. Co.* - You've Got Some Fact Issues (Or Maybe You Don't)

by **Michael C. Upshaw**

As discussed in our recent article, it can be a difficult endeavor for insurers to successfully rescind an insurance policy under Texas law. To rescind a policy based on a misrepresentation in an insurance application, insurers must prove:

1. The making of the misrepresentation;
2. The falsity of the representation;
3. Reliance on the representation by the insurer;
4. The intent to deceive on the par of the insured in making the representation; and
5. The materiality of the representation.

Mayes v. Mass. Mut. Life Ins. Co., 608 S.W.2d 612, 616 (Tex. 1980).

Typically, these are fact issues to be decided by the trier of fact and are not decided at the summary judgment phase of litigation. A recent holding in the Court of Appeals of Texas, Houston (14th Dist.) confirms, however, that a policyholder must put forth *some* evidence to rebut facts presented by an insurer to avoid summary judgment and that, at times, misrepresentation may be determined as a matter of law.

In *Palma v. Allied Tr. Ins. Co.*, No. 14-23-00063-CV, 2024 WL 3765821, at *1 (Tex. App.—Houston [14th Dist.] Aug. 13, 2024, no pet. h.), Allied Trust Insurance Company sought to rescind the policyholder's policy after the policyholder submitted a claim. Allied's investigation of the claim revealed the policyholder had a prior conviction for insurance fraud that he did not disclose in his application for insurance. Allied rescinded the policy and the policyholder filed suit. Allied moved for summary judgment and provided evidence to meet each of the five misrepresentation elements. The policyholder responded that "it is a question of fact whether a misrepresentation for the policy or in the policy itself was material to the risk or contributed to the contingency or event on which the policy became due and payable." *Id.* at *1 (citing Tex. Ins. Code § 705.004(c)). But the policyholder did not provide any evidence to rebut the facts presented by Allied. Accordingly, the trial court granted summary judgment in favor of Allied and the policyholder appealed.

Spotlight

Zelle's Dallas office welcomes two new associates!

Christopher Edwards

Zach Fechter

The Court of Appeals analyzed the evidence presented at trial, which included: the policy's "concealment or fraud" provision; the policyholder's application; the policyholder's criminal record; and a letter from Allied to the policyholder stating that the policy would have never been issued if Allied knew of the criminal conviction for insurance fraud. The Court then noted that the policyholder did not point to any evidence raising a "genuine issue of material fact." The Court explained, "[v]arious elements of claims may be a 'question of fact' where there is an actual, genuine dispute between the parties about the facts. However, when no genuine issues of material facts exist, a court may properly grant summary judgment because there are no facts to find. *Id.* at *4.

The takeaway from *Palma* is that just because an issue is a fact issue, whether it relates to rescission or anything else, there must be a genuine dispute over those facts supported by evidence to avoid summary judgment. During adjustment of the claim, development of those facts is important.

Christopher and Zach previously participated in the 2023 summer law clerk program at Zelle. We are very happy to welcome them back as associates.

Calling an Audible: What Happens When the Insurance Company Changes the Game Plan After Plaintiff Files Suit?

by Marsheldondria "Dondria" Johnson

In *Chester & Sherry Hurst v. Liberty Mut. Ins. Co.*, No. 1:22-CV-1093-DAE, 2024 WL 3812295, the court granted the Defendant's Motion for Summary Judgment, highlighting several critical points in breach of contract and Texas Insurance Code violation disputes arising after late appraisal payments subsequent to the Plaintiff filing suit.

The dispute arose from hailstorm damage to the Plaintiffs' home. Defendant Liberty Mutual initially determined the damage was below the deductible and did not issue any payment. Following this, the Plaintiffs invoked the policy's appraisal provision. The policy required each side to select an appraiser within 20 days of receiving a written request. Liberty delayed responding to the Plaintiffs' request and exceeded the 20-day deadline. Nevertheless, each designated appraisers, who ultimately could not agree on the value of the claim, and an umpire was appointed. The umpire determined the damage's Actual Cash Value (ACV) to be $248,696.05. Despite this appraisal award, Liberty Mutual informed the Plaintiffs that the damage was not covered under the policy and that the company would continue to deny the claim.

Plaintiffs filed suit, including alleging breach of contract, violations of the Deceptive Trade Practices Act, violations of Chapters 541, 542, and 542A of the Texas Insurance Code, misrepresentations, and breach of the duty of good faith and fair dealing. After Plaintiffs filed suit and 500 days after the original appraisal award was determined, Liberty Mutual tendered the full appraisal payment. Plaintiffs refused to accept the tender and decided to proceed with their case. Liberty Mutual filed a Motion for Summary Judgment arguing the appraisal payment resolved the dispute. The court agreed and discussed the following legal issues.

1. Impact of Appraisal Award on Breach of Contract Claims:

The court noted that the payment and acceptance of an appraisal award generally bars breach of contract claims. Despite Plaintiffs' argument that Liberty Mutual's late payment (500 days after the award) should prevent summary judgment, the court held that tendering the full amount as per the appraisal clause estops the Plaintiffs from raising a breach of contract claim.

2. Timeliness of Payment:

Plaintiffs argued that Liberty Mutual's delay in payment justified their breach of contract claims. However, the court found that the payment of the appraisal award, even if delayed, barred the breach of contract claim. The court did acknowledge that Plaintiffs might be entitled to interest under the Texas Prompt Payment of Claims Act (TPPCA) for the late payment but ruled that this does not negate the effect of the appraisal payment on breach of contract claims.

3. Evaluation of Independent Damages:

The Plaintiffs' claims for bad faith and attorney's fees were also scrutinized. The court referenced the Texas Supreme Court's ruling in *Rodriguez v. Safeco Ins. Co. of Indiana* , 684 S.W.3d 789 (Tex. 2024), which limits bad faith claims and the recovery of attorney's fees if the insurer has fully discharged its obligations by paying the appraised amount and statutory interest. Since Liberty Mutual paid the full appraisal amount plus any potential statutory interest, the court ruled that Plaintiffs could not sustain a bad faith claim or recover attorney's fees.

4. Insufficiency of Payment

Plaintiffs challenged the appraisal award, arguing it was insufficient and did not cover interior damages. However, the court found no substantial evidence that the appraisal was incomplete or that the umpire failed to consider all relevant damages. Plaintiffs' arguments lacked evidence to dispute the thoroughness of the appraisal.

Key Takeaways:

Appraisal Clause Compliance: Adherence to the policy's appraisal clause and timely payment of appraisal awards is crucial. Failure to comply with these requirements can lead to significant legal consequences. Still, the payment of the full appraisal amount, even after suit is filed, generally precludes breach of contract claims.

Timeliness vs. Compliance: While timely payment is essential, delays in payment do not necessarily defeat a breach of contract claim if the insurer ultimately pays the full appraisal amount. However, it may trigger interest obligations under the TPPCA.

Independent Injury and Bad Faith Claims: To sustain a bad faith claim, there must be independent damages beyond the benefits owed under the policy. Costs incurred in pursuing the claim or repair expenses related to the denial are generally not considered independent injuries.

Attorney's Fees: Recovery of attorney's fees is not guaranteed and often depends on whether the insurer has fulfilled its obligations under the policy. The general rule remains that parties bear their own legal costs unless an exception applies.

The Lowdown:

This case allows insurance companies room to investigate claims further after the suit is filed and, if warranted, reconsider their initial position on coverage without the fear of additional penalties.

BEYOND THE BLUEBONNETS

The First Circuit Weighs in on a Challenge to the Impartiality of an Appraiser and Competence and Impartiality of an Umpire Under Rhode Island Law in *B.R.S. Real Estate Inc. v. Certain Underwriters At Lloyds, London*

by Wm. Gerald McElroy, Jr. (Boston office)

In *B.R.S. Real Estate Inc. v. Certain Underwriters At Lloyds, London*, 110 F.4th 442 (lst Cir. 2024), the First Circuit upheld a decision by a federal district court granting summary judgment in an insurer's favor and declining to vacate an appraisal award. This commentary will focus on the court's treatment of the requirements under Rhode Island law for challenging the impartiality of an appraiser and the impartiality and competence of an umpire in a tri-partite appraisal.

The case involves a dispute concerning the amount due to B.R.S. Real Estate, Inc. ("B.R.S.") under an insurance policy issued by Certain Underwriters at Lloyds ("Lloyds") for a loss involving the freezing and bursting of pipes at a building owned by B.R.S. (hereinafter the "Property"). Quaker Special Risk, which managed the policy, and Lloyds (collectively the "Insurers") retained Rebecca Girouard of LaMarche Associates ("Girouard") as their loss adjustment investigator. B.R.S. retained Douglas Soscia of RI Adjusting Services ("Soscia") as its public adjuster for the claim. After initial remediation work was performed on the Property, Girouard and Soscia submitted differing preliminary replacement cost and remediation cost estimates. The Insurers then issued a payment to B.R.S. for the undisputed portion of the claim. 110 F. 4th at 445.

Given the dispute over the remaining amount due for the claim, B.R.S. demanded an appraisal under the terms of the Policy, which provided:

> If [the Insurers] and [B.R.S.] disagree on the value of the property or the amount of the loss, either may make a written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences [*Id*., at 445-46]

B.R.S. made a second demand for an appraisal after the Insurers and Soscia evaluated further the electrical portion of B.R.S.'s claim and B.R.S. submitted an additional estimate for repairs. *Id*., at 446.

B.R.S. selected John Zarlenga of Adrien & Son ("Zarenga") as its appraiser. The Insurers chose James Boudreau ("Boudreau"), an engineer/building consultant at Vertex Companies, Inc. ("Vertex") as their appraiser. Boudreau had previously been hired by the Insurers in connection with the evaluation of B.R.S.'s additional estimate for repairs. Neither B.R.S. nor the Insurers objected to these appraiser selections at that time. Zarenga and Boudreau then selected William Monahan of Monahan & Associates ("Monahan") to serve as the umpire *Id*.

After an inspection of the Property by the appraisers and a series of "back-and-forths between Soscia and Girouard," Monahan and Boudreau signed an appraisal award on August 15, 2019. Zarenga did not sign the award. [*Id*.] After Soscia notified the Insurers that the initial appraisal award did not take into account the replacement cost value of certain materials and appliances, Monahan and Boudreau signed an amended award. Zarenga again did not sign the award. *Id*.

B.R.S. subsequently filed suit in Rhode Island state court, and the Insurers removed the case to federal court. B.R.S. alleged the appraisal award was invalid because Boudreau was not an "impartial" appraiser as required by the Policy since he had previously performed work for the Insurers related to the insurance claim at issue and in the past had done extensive work for insurance companies. B.R.S. also claimed the umpire was incompetent and biased because he was a lawyer who worked for insurance companies. *See B.R.S. Real Est., Inc. v. Certain Underwriters at Lloyd's*, London, 682 F.Supp.3d 204, 206 (D.R.I. 2023).

After discovery was completed, the Insurers moved for summary judgment and to confirm the appraisal award. The court granted the Insurers' motion. Based on the record before it, the court concluded that no reasonable jury could conclude that Boudreau was an impermissibly biased appraiser or that Monahan was an incompetent umpire. 110 F.4th at 447. BRS then filed an appeal seeking to vacate the arbitration award.

The Rhode Island Supreme Court has ruled that an appraisal process involving two party-appointed appraisers and a disinterested umpire can be equated with arbitration and therefore is subject to the same standards of review. *See Waradzin v. Aetna Cas. & Sur. Co.*, 570 A.2d 649, 650 (R.I. 1990). According to the First Circuit, B.R.S. faced an "uphill battle" in challenging the appraisal award since there is a "strong presumption" under Rhode Island law in favor of the validity of arbitration awards "given the 'strong public policy in favor of the finality of arbitration awards.'" 110 F.4th at 448 (quoting *Pierce v. R.I. Hosp*., 875 A.2d 424, 426 (R.I. 2005) (quoting *Prudential Prop. & Cas. Ins. Co. v. Flynn*, 687 A.2d 440, 441 (R.I. 1996).

B.R.S argued on appeal that Beaudreau was an **impermissibly partial appraiser** and the appraisal award should be vacated based on Boudreau's pre-existing business relationship with the Insurers and the Insurers' prior retention of Boudreau to appraise the Property and assess B.R.S.'s supplemental claims. 110 F.4th at 448. According to the First Circuit, a court must "make an order vacating [an arbitration] award…[w]here there was evident partiality or corruption on the part of the arbitrators, or either of them." 110 F.4th at 448 (quoting R.I. Gen. Laws §10-3-12(2)) Under Rhode Island law, "evident partiality" exists where a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Aetna Cas. & Sur. Co. v. Grabbert*, 590 A.2d 88, 96 (R.I. 1991). It "requires a showing of more than an appearance of bias but less than actual bias." *Id*. The party challenging the award bears the burden of providing facts that would establish a reasonable impression of partiality. 110 F.4th at 448.

The federal district court ruled that Boudreau's previous work for insurance companies raised an appearance of impartiality and bias but nothing more. 682 F.Supp.3d at 209. The First Circuit did not rule on the merits of B.R.S.'s claim regarding Boudreau's bias but instead ruled that BRS was barred from asserting such a claim based on its failure to raise the issue before the appraisal took place. According to the court, "B.R.S. knew well before the appraisal began that the Insurers had previously retained Boudreau to reinspect the Property." Under Rhode Island law, B.R.S. could not "debut its challenge to Boudreau post-decision." 110 F.4th at 448.

Similarly, the First Circuit ruled that B.R.S. could not obtain a "redo" with respect to the issue of the **competence and credentials of the umpire Monahan**. In seeking to vacate the appraisal award, B.R.S. argued that "because Monahan is a lawyer without

specific construction knowledge or an understanding of what is required to repair a commercial building like the Property, he was not a 'competent' umpire under the terms of the Policy." 110 F.4th at 448. Nor, B.R.S. added, "would a competent umpire have 'permitted' Girouard and Soscia to be so heavily involved in the appraisal process, treating the process as a 'free for all' settlement between the parties." *Id*.

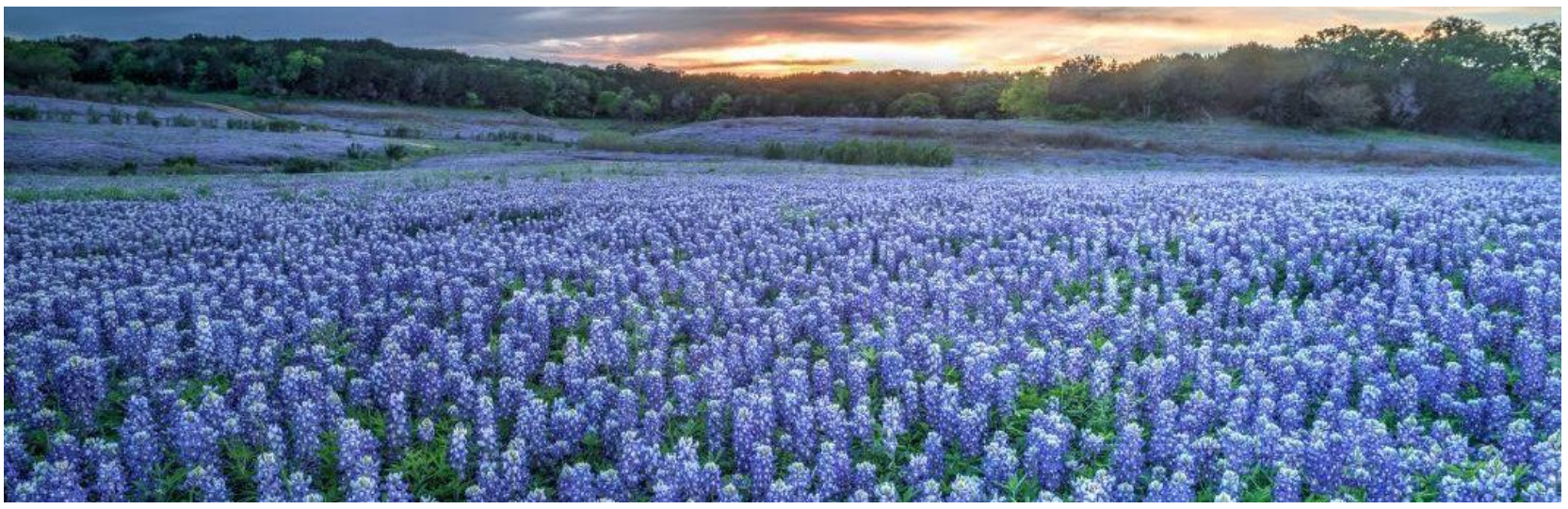
The First Circuit's "simple rejoinder" to B.R.S.'s argument is that "B.R.S. seeks a redo based on information that it had before the appraisal was undertaken. Indeed, B.R.S.'s appointee helped pick the umpire. That B.R.S. now claims to have second thoughts provides no basis for challenging the award." 110 F.4th at 448-49.

In contrast to its treatment of the impartiality argument with respect to Boudreau, the First Circuit gave a "longer rejoinder" with respect to the umpire competence issue and stated in *dicta* is disagreement with B.S.R.'s position. *Id*. at 449. According to the court:

> …."it is not essential to competency that an arbitrator be an expert qualified to determine the submitted matters from personal knowledge and examination without the aid of the other evidence." 15 Couch on Insurance § 211.27 (3d ed. 2024) Instead, "an attorney, otherwise qualified, may act as an appraiser …even though he or she is not a contractor or architect." *Id*.

The First Circuit's position on this issue is consistent with insurance industry practice with respect to appraisals since attorneys are frequently selected as umpires in property insurance loss appraisals. The First Circuit also rejected B.R.S.'s argument that it was improper for Monahan to allow Soscia and Girouard to be involved in the appraisal process or that such involvement led to an award that "substantially prejudiced" the rights of the parties. *Id*. In sum, the court stated, "B.R.S.'s challenge to the umpire on his conduct is too little and too late."

As reflected in the First Circuit's *B.R.S.* decision, it is extremely difficult under Rhode Island law to convince a court that an appraisal award should be vacated based upon the purported lack of competence or impartiality of an umpire or the impartiality of a party-appointed appraiser. The decision also emphasizes the importance of the "you snooze you lose rule:" a party failing to challenge on a timely basis the competence and impartiality of an umpire or impartiality of the party appointed appraiser in connection with a tri-partite appraisal proceeding will not succeed in later raising these challenges in connection with an attempt to vacate an appraisal award.



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