ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Wednesday, November 13, 2024 | ISSUE 19

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

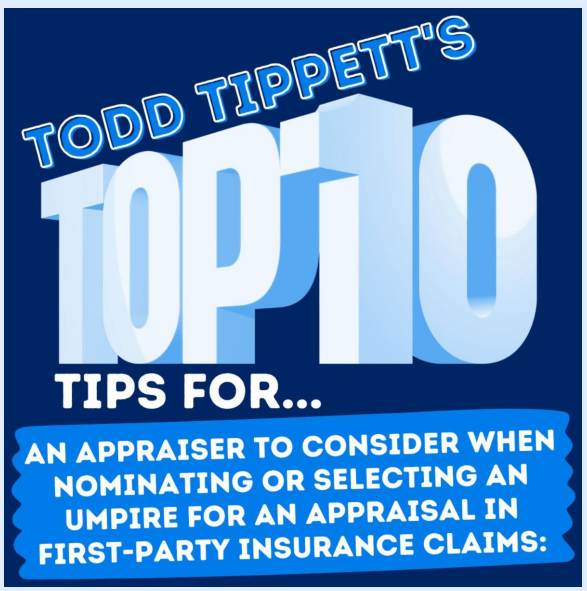
You don't want to miss this!

November 20 – Bennett Moss is presenting at the Austin Claims Association Winter Seminar in Austin, TX.

January 26-29 – Steven Badger, Lindsey Bruning, and Brandt Johnson will presenting at the Windstorm Insurance Network 2025 Conference in Dallas, TX.

February 12, 2025 – Brandt Johnson will present at the 2025 National Association of Catastrophe Adjusters (NACA) Annual Convention in Little Rock, AR.

March 30 – April 2, 2025 – Shannon O'Malley, Brandt Johnson, and Bryant Green will be speaking at the PLRB 2025 Claims Conference in Indianapolis, IN.



News From the Trenches

by Steven Badger

Everyone knows that it's been about a year since I discovered the value of LinkedIn. Being a baby-boomer, I'm not a social media guy. You won't find me on Facebook or Instagram. But I did always keep an eye on Linkedin. And in doing so, I grew tired of always seeing posts complaining about insurance companies. These posts perpetuated the "*all insurance companies and everyone who works for them sucks*" attitude. I also noticed that no one was out there defending insurance companies and, more importantly, defending their honest, hardworking employees. The reason was obvious. I knew that insurance industry adjusters and their consultants couldn't post, as anything they said would be used against them in litigation. Understandable. But as a lawyer I didn't have that problem. My job is to advocate for my clients. So I could post, pretty much whatever I wanted, without concern.

1. Like the appraisers involved in the appraisal, the Umpire should be independent and competent in the area of first-party claims.

2. Additionally, the Umpire should be impartial and fair to both sides. The Umpire is likely the most important person involved in the appraisal process and will be key to resolving the matter.

3. Appraisers should consider mediators as Umpires. Mediators are known to be neutrals with a mind toward resolving disputes.

4. Appraisers may also consider contractors that never will be or never intend to be involved in the repair of the damage at issue.

5. Appraisers should interview any and all Umpire candidates proposed by the other side to discuss their backgrounds and past appraisal experience before agreeing on an Umpire candidate.

6. The Umpire should agree to charge a reasonable hourly fee or flat fee.

7. In Texas, the Umpire should agree to only determine the amount of loss and avoid making coverage or liability decisions that will impact the outcome of the appraisal.

8. Any Umpire nominated or selected should agree to use best efforts to help resolve the disputed claim through the appraisal process and avoid creating issues that will require litigation after the appraisal process is complete.

9. Appraisers should never seek the unilateral appointment of an Umpire through the courts. Always involve all parties so the entire appraisal process is fair. Failing to follow this advice will simply cause more problems in the appraisal process.

10. If the other side seeks and obtains the unilateral appointment of an Umpire who is known to be biased, the Appraiser and his or her client should consider challenging the appointment with the Court that made the unilateral appointment.

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.

I've been pleasantly surprised at how much attention my LinkedIn posts have received this past year. Most importantly, we have created a forum for dialogue, usually productive, about important issues in the industry. We debate issues and educate one another about our respective positions. Everywhere I go people say: "Badger, I love your LinkedIn posts, especially the comments." I am glad to hear this, as I have always been about dialogue. It is why I am always happy to speak at policyholder advocate events, such as public adjuster conferences and contractor seminars.

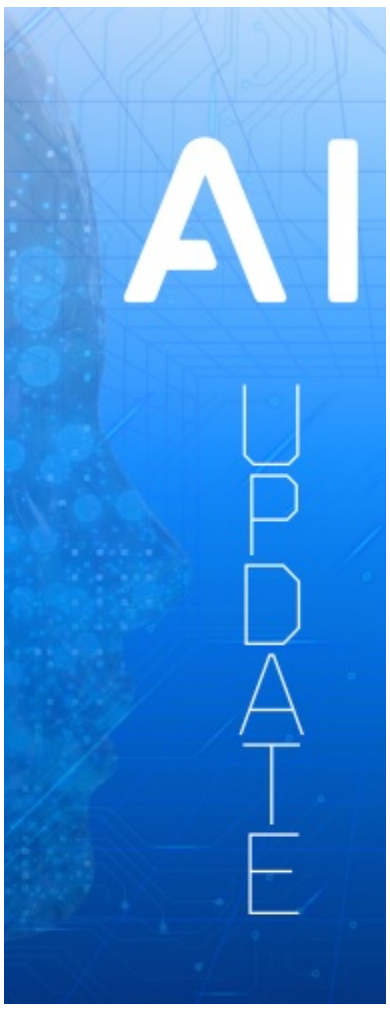
But a downside of posting on LinkedIn is that I also see lots of posts by others. And some of them make me angry. Admittedly, I recently "trolled" a post by a restoration contractor group advertising an upcoming podcast called something like "Debunking The 10+10 Myth", in which the topic was how to respond when insurance companies purportedly limited restoration contractors to 10% overhead and 10% profit. That one in particular made me angry, as it was perpetuating a fallacy. So I posted a comment noting that they were conflating subcontractor/trade O&P (which is not limited to 10+10) and general contractor O&P (which, yes, uses the construction industry norm of 10+10). To their credit, the group invited me on their podcast and allowed me to explain my position. I argued that they were confusing two different standards and until they realized that, their continued head-banging would do nothing but give them a headache. Did they hear me? I don't know. But I at least gave a voice to the industry's position on the issue.

And that is why I spend so much time on LinkedIn -- to give a voice to the good work of the adjusters and consultants handling claims for our insurance company clients. I can say what they cannot say in a public forum. I can also demonstrate that while some insurance companies may at times overreach or make mistakes, the people who work for them do not "suck" and are always out there doing their best in a sometimes difficult and stressful profession.

Speaking of which, I've been on the road for the past two months speaking at various insurance industry events across the country. These events include insurance company adjuster team meetings, state claim association seminars, appraisal training classes, and insurance executive conferences. It is always informative for me to speak directly with insurance company professionals, as it is through these events that I learn what it is like to work day-to-day in the first-party claims world and what is actually going on in "the trenches". And what I've learned, as mentioned above, is that the first-party insurance industry is comprised of smart, hard-working, and honest people who always want to do the right thing for their insureds. They want to pay their claims timely and fully. And they usually do. I've never heard an insurance adjuster suggest they enjoy denying claims or intentionally try to underpay insureds. That doesn't happen. Do disputes sometimes arise? Sure. But this industry is full of good people who are always trying to do right for their insureds.

And I'm proud to work with all of you. Thanks for allowing me, and all of us at Zelle, to be part of your industry.

Steve



AI Update

Texas Department of Insurance Approves ZestyAI's Severe Convective Storm Models

by Jennifer Gibbs

Severe Convective Storms ("SCS") are one of the most common and most damaging natural catastrophes in the United States. SCSs are intense atmospheric disturbances that can cause powerful winds, large hail, heavy rainfall, and tornadoes. To that end, SCSs caused $76 billion in losses in North America and Europe – a record for such weather events.

Based on preliminary data from NOAA, Texas tops the list of states with the highest incidence of hail in 2024, with predictions indicating that Texas hailstorms likely caused more than $28 billion in property damage during only the first four months of the year.

ZestyAI recently received regulatory approval from the Texas Department of Insurance for some of the first Artificial Intelligence-powered property-based predictive risk analytics products, which include Z-HAIL, Z-WIND, Z-STORM, AND Z-FIRE. According to ZestyAI, the high incidence of severe storms (with over 1,100 hail events in 2023 alone) is why it chose Texas as one of the first states to directly file its Severe Convective Storm product suite as a licensed Advisory Organization. The Colorado Division of Insurance and the Illinois Department of Insurance have approved these products earlier this year. Approval from other states is expected in the coming months.

ZestyAI's products are AI-powered climate risk models that predict the frequency and severity of severe storm claims for properties in the United States and examine the interaction of climatology, geography, and the unique characteristics of every structure and roof, analyzed in 3D, including accumulated damage from historical storms. These predictions can then allow carriers to move from territory-based rate segmentation to property-by-property segmentation to better align pricing to risk. ZestyAI's products also promise carriers the benefits of enhanced underwriting, improved loss cost control measures, and portfolio optimization.

According to a recent survey, there appears to be a growing consensus that AI is important for the future of the insurance industry with 80% of senior insurance leaders reporting that AI is enabling new avenues of profitable growth and 73% stating that carriers who adopt AI will outcompete those that do not. Of the leaders surveyed who have already adopted AI risk models, 81% believe they are ahead of their competitors when adapting to the challenges of climate change.

Although not everyone agrees as to which form of predictive modeling is most accurate, an overwhelming 90% of insurance executives agree that predictive risk models should be transparent.

The benefits of transparency serve both insurers and policyholders in that transparent models can open the lines of communication regarding risk management and risk mitigation strategies - fostering trust and collaboration between insurers and insureds and potentially minimizing catastrophic losses.

Federal Court Properly Applies Concurrent Causation and Rejects an "Expert" Opinion – *Thompson v. State Farm Lloyds*

by Lindsey Bruning

U.S. Magistrate Judge Andrew Edison of the United States District Court for the Southern District of Texas recently issued a decision granting summary judgment for an insurance carrier in a first-party case involving alleged hail damage to a residential property. In granting summary judgment, the Court rejected an improper disclosure of experts and applied the concurrent causation doctrine where the insured could not produce evidence to allocate damage between hail events.

Thompson v. State Farm Lloyds involved alleged damage to a residential property in the Houston area resulting from a September 28, 2021 storm. 2024 WL 4544783, *1 (S.D. Tex. Oct. 22, 2024). Thompson reported that a roofer, Shingle Hut, LLC, had inspected her property and concluded that her roof damage was caused by a September 28, 2021 hailstorm, which led to her filing a claim with State Farm. *Id.* State Farm investigated the loss, completing multiple inspections, and identified only minor covered hail damage to the gutters and a window screen, repairs for which fell below the applicable deductible. *Id.*

Disagreeing with State Farm's coverage determination, Thompson initiated the lawsuit, asserting claims for breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, and common law bad faith. *Id.* During litigation, State Farm designated engineer Jordan Beckner as an expert regarding causation. *Id.* Beckner inspected the property and concluded that no hailstorm occurred at the property on September 28, 2021, and further, that any damage to the roofing was caused by wear, tear, and deterioration (all excluded causes of loss under the applicable policy). *Id.*

State Farm moved for summary judgment for two independent reasons:

> (1) Thompson failed to produce evidence that hail or wind damaged the Property on September 28, 2021, and the amount of loss exceeded the Policy's deductible; and
>
> (2) even if Thompson could present some evidence of wind or hail damage on September 28, 2021, which exceeded the Policy's deductible, she failed to segregate the covered losses under the concurrent causation doctrine.

Id. at *3.

The Court first addressed State Farm's objections to Thompson's summary judgment evidence, namely an estimate prepared by Martin Langley of Shingle Hut, LLC and accompanying letter signed by Shingle Hut's owner, Kevin Catchings, opining that damage was caused by the September 28, 2021 hailstorm requiring a "complete reroof and any associated repairs…which will cost $44,419.05." *Id.* at *1-2. Though the Court also questioned the admissibility of this 'opinion' evidence, a full analysis was ultimately unnecessary—the Court sustained State Farm's objection to the letter and estimate based on the simple fact that neither Langley nor Catchings had been properly disclosed as testifying experts in compliance with the Federal Rule of Civil Procedure, and there was no indication that the failure to designed Langley and/or Catchings was substantially justified or harmless. *Id.* at *2.

Without this evidence, the Court held that Thompson could not meet her burden to plead and prove facts that show hail or wind damaged the property on September 28, 2021. *Id.* at *3. The Court reasoned: "[T]here is not a shred of evidence in the summary judgment record that the cost to repair the roof is above the $14,186 Policy deductible. This is a death knell to her breach of contract claim." *Id.*

Turning to the secondary basis for summary judgment, the Court held that, even assuming Thompson could create a genuine dispute as to whether hail damaged the property on September 28, 2021, the concurrent causation doctrine barred her breach of contract claim. *Id.* at *4.

Under the concurrent causation doctrine, "[w]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Id.* at *3 (quoting *Lyons v. Millers Cas. Co. of Tex.*, 866 S.W.2d 597, 601 (Tex. 1993). In its analysis, the Court recognized that considerable confusion exists over how district courts should apply the doctrine, though the Fifth Circuit recently confirmed that it does not preclude recovery where the insured presents evidence demonstrating that *all* of the claimed damage resulted from a covered cause. *Id.* at *3 (citing *Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F4th 469, 477 (5th Cir. 2022).

Here, Thompson's properly designated expert opined: "it's possible the impacts [to Thompson's roof] originate from a single storm that had a variation of sizes *or could be the result of more than one event.*" *Id.* Such concession by her own expert that more than one event could have caused the damage to her roof was enough to trigger the concurrent causation doctrine, thereby obligating Thompson to "present some evidence affording the jury a reasonable basis on which to allocate the damage." *Id.* Again, upon exclusion of the estimate and letter from Shingle Hut, Thompson had no other evidence to allow a jury to reasonably allocate the damage.

As such, the Court found both of State Farm's arguments persuasive and granted summary judgment on Thompson's breach of contract claim. *Id.* at *3-4.

The Court further granted summary judgment on Thompson's extracontractual claims, finding that State Farm conducted a reasonable investigation by relying on two separate property inspections that both determined that the September 28, 2021 hailstorm did not result in a covered loss. *Id.* at *4. Ultimately, the differing positions evidenced nothing more than a *bona fide* coverage dispute, which does not rise to the level of bad faith or support the alleged violations of Chapter 541 of the Texas Insurance Code. *Id.*

The Court's decision on State Farm's Motion for Summary Judgment was thorough and well-reasoned, appropriately holding Thompson to her burdens under the Federal Rules of Civil Procedure and Texas's concurrent causation doctrine.

Claims for Statutory Interest and Attorney's Fees Do Not Survive Insured's Death

Spotlight

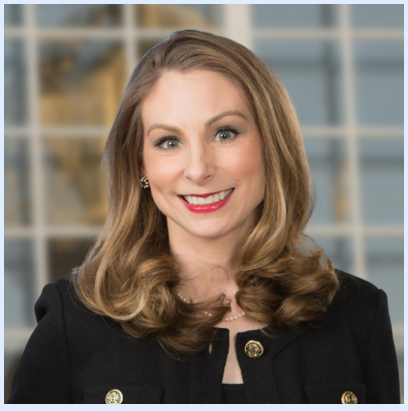
by Crystal L. Vogt

Recently, a magistrate judge for the Eastern District of Texas recommended granting an insurer's motion for summary judgment, holding that an insured's claims for statutory interest and attorneys' fees under Chapter 542 of the Texas Insurance Code do not survive the death of the insured and should be dismissed.[1] In *Barron v. Century Surety Company d/b/a Century Insurance Group*, the insured's commercial building, which was insured by Century, was damaged by a winter storm.[2] A dispute arose and the insured sued Century for breach of contract, statutory bad faith, and statutory interest and attorney fees under chapter 542.[3] The Court had previously dismissed the insured's bad faith claims.[4]

Unfortunately, the insured passed away during the pendency of the lawsuit, and his wife replaced him as the administratrix of his estate in this lawsuit.[5] Century then filed a Motion for Summary Judgment arguing that none of the insured's extra-contractual claims survive his death because they are penal and personal in nature.[6] The Court noted that "[i]n general, statutory interest and attorney fees under chapter 542 are penal in nature and, as a result, do not survive [the death of an insured]. A statute is penal if it 'permits a recovery ... for the purpose of enforcing obedience to the mandate of the law. In contrast, a statute is remedial if the recovery is permitted as a remedy for the injury or loss suffered. Neither statutory interest nor attorney fees are designed to remediate harm from a plaintiff's injury.'"[7] As a result, the administratrix could not recover attorney's fees or statutory interest under Chapter 542 based on the magistrate's recommendation. However, the magistrate judge did note that Century's Motion for Summary Judgment did not address the insured's claim for breach of contract, and that the administratrix may be able to recover attorney's fees under that cause of action.[8]

The facts in this one are rather unique, but the magistrate's analysis is a reminder that insurance contracts are, in fact, personal contracts and under Texas law cannot be transferred.

[1] *Barron v. Century Sur. Co.,* No. 1:22-CV-144-MAC-ZJH, 2024 WL 4525503, at *1 (E.D. Tex. Oct. 4, 2024).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id. at 2.*
[7] *Id. at 3 (internal citations omitted)*
[8] *Id. at 2.* The administratrix filed objections to the magistrate report seeking a *de novo* review by the judge, however, the parties have also filed a Motion for Continuance in light of the death of the administratrix.



Zelle LLP welcomes Adrienne Nelson!

Adrienne is Counsel in the firm's Dallas office, where her practice is focused on all aspects of first-party property coverage, commercial litigation, and insurance defense.

Cade v. State Farm Lloyds — Insured's Failure To Comply With Policy Conditions Bars Personal Property Claims

By Christopher Edwards

In *PAJ, Inc. v. Hanover Ins. Co.* , the Texas Supreme Court set forth the "notice-prejudice rule," which states that unless an insurer was prejudiced by an insured's delay in giving timely notice of its claim or suit, an insurer cannot deny coverage solely based on untimely notice.[1] Whether this rule applies to other insurance policy provisions is less certain, as Texas courts and federal courts applying Texas law grapple with its scope.[2] The Tyler Court of Appeals recently tackled its application in *Cade v. State Farm Lloyds*, where the court was presented with a dispute regarding whether the insurer was prejudiced by any failure to comply with conditions precedent in the policy.

In this case, State Farm Lloyds ("State Farm") issued a residential policy to Kenneth and Barbara Cade (the "Insureds") covering the Insureds' dwelling and the contents within the property. During the applicable policy period, a windstorm blew a large tree onto a portion of the dwelling. The Insureds submitted a claim to State Farm for damage to the house, and State Farm performed several inspections of the property.[3] State Farm issued payment for repairs to the affected portion of the real property. Approximately eighteen months after the windstorm, the Insureds asserted that several items of their personal property inside the house were damaged or destroyed. Moreover, they asserted that the house was a total loss, and the initial payment was inadequate. Subsequently, the Insureds filed suit against State Farm, asserting claims for breach of contract and violations of the Texas Insurance Code and Deceptive Trade Practices Act. In response, State Farm filed two motions for summary judgment, one for the personal property claim and one for the real property claim. In the motions, State Farm asserted that (1) the Insureds failed to comply with certain policy conditions, (2) the house contained no personal property of value, and (3) that any further damage to the house was not caused by the windstorm. In response, the Insureds argued that State Farm failed to prove it was prejudiced by any failure to comply with conditions precedent.[4] The trial court granted both motions without specifying its basis for the ruling.

In reviewing the trial court's decision, the appellate court evaluated State Farm's adjuster and engineer reports, which indicated that (1) the house had been abandoned for years; (2) the house had pre-existing damage caused by wear and tear, lack of maintenance, and long-term deterioration; and (3) the tree impacted only a portion of the house while unaffected areas of the interior suffered from dry-rot and deterioration, likely resulting from years of neglect and little maintenance. In response, Cade offered his deposition as evidence, but his deposition revealed that he had not been living in the house for a decade prior to the reported date of loss, he had no personal knowledge of the home's pre-loss condition, and he thought his wife had been tending to the property. Because Cade did not include an affidavit or estimate to support his claim that the house was a total loss and because State Farm's evidence indicated that it paid for covered damages and any further damage to the property resulted from non-covered perils, the court granted State Farm's motion for summary judgment on the real property claim.[5]

Regarding the personal property claim, State Farm asserted that the Insureds failed to: (1) provide immediate notice to State Farm; (2) protect the property from further damage or loss; (3) prepare an inventory of damaged personal property showing in detail the quantity, description, age, replacement cost, and amount of loss substantiated by bills, receipts, and related documents; (4) comply with requests for exhibitions of the damaged property, records, documents, and statements; and (5) submit a signed, sworn proof of loss within 91 days of the loss.[6] In response, Cade contended that State Farm failed to show that it was prejudiced by the Insureds' failure to abide by these policy conditions. First, the court noted that it was "undisputed that Cade did not comply with the conditions regarding his personal property claim" because he (1) did not notify State Farm of the personal property claim until eighteen months after the reported date of loss and a month before filing suit; (2) failed to testify in detail or provide support regarding the items he claimed damaged; and (3) admitted to not removing any of the home's contents until "much, much later."[7] The crucial inquiry for the court was determining whether State Farm must show that it was prejudiced by Cade's failure to comply with the policy conditions.

Here, the court considered how Texas courts and federal courts applying Texas law have grappled with the "notice-prejudice" rule in the context of various policy conditions. The court noted that federal courts applying Texas law consistently conclude that "an insured's failure to provide a sworn proof of loss is subject to the notice-prejudice rule."[8] In rarer instances, a showing of prejudice would not be required when considering a proof of loss provision.[9] Moreover, some courts are reluctant in extending this rule to appraisal provisions.[10] Without deciding whether State Farm had to prove prejudice resulting from the Insured's failure to abide by the policy conditions, the court concluded that State Farm "has in fact demonstrated prejudice."[11] Explaining its basis, the court reasoned that State Farm had no opportunity to perform an investigation of the personal property because by the time it had

received notice of the Insured's personal property claim, the Insured did not provide State Farm with detailed inventory and documentation of the property and sold the house and filed suit a month later.[12] Accordingly, the court affirmed the trial court's grant of summary judgment regarding the personal property claim.

The Lowdown: *Cade* is a good reminder that the notice-prejudice rule does not have universal application when considering certain policy provisions at dispute. The purpose of the notice-prejudice rule is to ensure coverage is not forfeited when there are immaterial deviations from compliance with notice of loss or claim provisions. However, where coverage is already found but the insured has failed to comply with another policy provision, such as the appraisal provision, a showing of prejudice is not required when it would not frustrate the purpose of the rule.[13] Despite indications from federal courts that the notice-prejudice rule applies to an insured's failure to provide a sworn proof of loss, it is imperative to remember that some Texas courts are not so eager to apply that rule.[14]

[1] 243 S.W.3d 630, 636-637 (Tex. 2008) (where the Texas Supreme Court determined that an insured's failure to abide by the timely notice provision under an occurrence-based policy does not defeat coverage absent prejudice by the delay); *see also Prodigy Communications Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 383 (Tex. 2009)(where the Texas Supreme Court extended the notice-prejudice rule to claims-made policies that require an insured to notify its insurer of a claim within the policy term or other reporting period specified, even if the insured failed to provide notice "as soon as practicable").
[2] *Cade v. State Farm Lloyds*, No. 12-23-00285-CV, 2024 WL 4363341, at *5 (Tex. App.—Tyler Sept. 30, 2024, no pet. h.)
[3] Id, at *1.
[4] Barbara Cade passed away shortly after suit was filed.
[5] Id. at *4.
[6] Id, at *5.
[7] Id.
[8] Id. (citing *Cunningham v. Allstate Vehicle & Prop. Ins. Co*, No. 4:18-CV-4, 2018 WL 2020723, at *2-3 (E.D. Tex. May 1, 2018)(where the Eastern District of Texas discusses its series of rulings in denying insurers' motions for summary judgment on the basis that the insured failed to abide by the proof of loss provision).
[9] Id. (citing *City of Spearman v. Tex. Mun. League Intergovernmental Risk Pool* 601 S.W.3d 72, 76-77 (Tex. App.—Amarillo 2020, pet. denied)(where the Amarillo appellate court expressed its reluctance in extending the notice-prejudice rule to a proof of loss provision because the very nature of the provision "serves a key purpose that differs" from a notice of loss or claim provision, the latter of which a showing of prejudice would be required under *PAJ*).
[10] Id. (citing *GuideOne Mut. Ins. Co. v. First Baptist Church of Brownfield*, 495 F. Supp. 3d 428, 438 (N.D. Tex. 2020) (where the Northern District of Texas, Lubbock Division, determined that a "sworn proof of loss is a condition precedent to appraisal" and the insurer need not prove prejudice resulting from the insured's failure to provide a sworn proof of loss as required under the policy).
[11] Id.
[12] Id., at *6 (with the court noting that while State Farm's adjuster investigated the interior of the house and noted no personal property of value, he was there to inspect damage to the house itself as opposed to damage to the personal property).
[13] *GuideOne Mut. Ins. Co*., 495 F.Supp.3d at 438.
[14] *City of Spearman*, 601 S.W.3d at 77 (where the Amarillo appellate court discussed the federal district court trend of expanding the notice-prejudice rule to apply to the insured's obligation of submitting proofs of loss, ultimately concluding that "opinions issued by federal courts dealing with Texas law do not bind [the court]").

Lassoing Liability
with Megan Zeller

The Fifth Circuit Finds CGL's Motorized Vehicles Endorsement to Preclude Coverage for Drag Racing

In what perhaps is truly a "sign of the times," the Fifth Circuit recently analyzed whether a Commercial General Liability ("CGL") policy covered drag racing events. *See Kinsale Insurance Company v. Flyin' Diesel Performance & Offroad LLC*, 99 F.4th 821 (2024). While the Western District of Texas partially granted the insured's motion for summary judgment finding that an insurer owed the insured a duty to defend, the Fifth Circuit reversed and remanded this position.

In a one-day amateur "no prep" drag racing event in Texas, a car careened off the raceway and collided into spectators, which resulted in multiple fatalities and severe injuries. Prior to the event, the host, Flyin' Diesel, purchased a CGL policy, which included a Motorized Vehicles Endorsement, which excluded coverage for:

> [A]ny claim or 'suit' for 'bodily injury,' 'property damage' or 'personal and advertising injury' arising directly or indirectly out of, related to, or, in any way involving the operation, maintenance, use, entrustment to others, or 'loading or unloading' of any motorized vehicle of any type.

Additionally, the Motorized Vehicles Endorsement stipulated that:

> This exclusion applies to any claim or "suit" regardless of whether any motorized vehicle is the initial precipitating cause or is in any way a cause, and regardless of whether any other actual or alleged cause contributed concurrently, proximately, or in any sequence, including whether any actual or alleged "bodily injury", "property damage" or "personal and advertising injury" arises out of a chain of events that involves any motorized vehicle.

Finally, all endorsements in the policy – including the Motorized Vehicle Endorsement – contained a statement in the header that "This endorsement changes the policy. Please read it carefully." All policy endorsements also included a footer statement, which read: "All other terms and conditions of the policy remain unchanged."

The lower court initially found that the policy was ambiguous, due to header and footer statements in the Motorized Vehicle Endorsement. Specifically, Flyin' Diesel argued that the multiple endorsements created a conflict amongst the endorsements and, therefore, an ambiguity in the policy because any endorsement containing a footer statement ignored and denied the existence of other exclusionary endorsements. The Fifth Circuit, however, disagreed. Specifically, the Fifth Circuit found that this policy construction was "piecemeal" and failed to consider each part of the CGL policy "with reference to the whole instrument as well as with reference to every other clause." *Wynnewood State Bank v. Embrey*, 451 S.W.2d 930, 932 (Tex. App.— Dallas 1970, writ ref'd n.r.e.) (cleaned up). As a result, Flyin' Diesel "incorrectly g[ave] priority to a single section of the policy instead of considering the entire policy in its analysis." *Gastar Expl. Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 588 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

Instead, by construing every part of the policy "simultaneously," the Fifth Circuit found that the policy was not ambiguous because:

> As the . . . [Motor Vehicle] Endorsement illustrate[s], the CGL Endorsements modify express subsets of provisions in the CGL Form. They do not, however, expressly purport to modify the CGL Declaration, other provisions in the CGL Form, or other CGL Endorsements.

As a result, Flyin' Diesel was unable to argue against a policy exclusion that clearly denied coverage for motor vehicles and therefore, drag racing. Instead, insurers should be able to breath a sigh of relief with this ruling: the Fifth Circuit upheld an endorsement that historically has been considered clear and unambiguous, with relatively good caselaw in Texas behind it. Overall,

this was a positive ruling that insurers can rely on not only for the Motor Vehicle Endorsement, but also for general CGL policy interpretation.

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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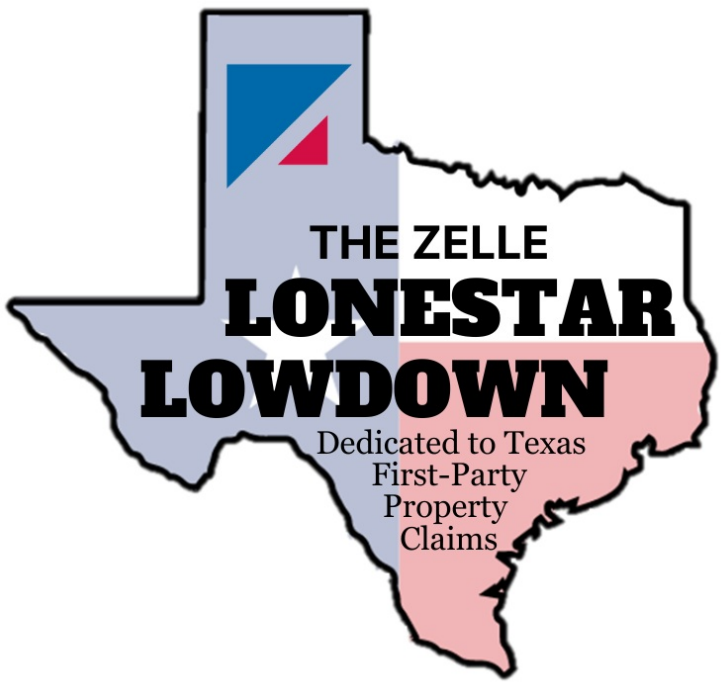

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