ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Wednesday, December 18, 2024 | ISSUE 20

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!

January 15 – Steven Badger will present at the Intl. Association Umpires & Appraisers Appraiser/Umpire Training in New Orleans, LA.

January 16 – Steven Badger will present "Whoever Said Insurance Was Boring? 30 Years Of Fascinating Claims Stories" for the Tampa Bay Claims Association in Tampa, Florida.

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

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

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

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

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

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

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

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

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

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

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

1. Building Consultants – Building Consultants can assist with repair scopes and estimates. They can also assist with obtaining real bids from real contractors.

2. Engineers/Architects – Engineers and Architects have the expertise to assist with causation and code upgrade issues.

3. Metallurgists – In Texas, disputes over the application of the Cosmetic Damage Limitation to metal roofs have become active. A metallurgist can address the effect, if any, of the hail impact marks on the performance of the metal roof.

4. Hygienists – When investigating a large water claim that may involve mold or other fungi (whether covered or not) the adjusting team should consider retaining a hygienist to assist with the scope of work.

5. Forensic Accountants – Often times, a property loss also involves a Business Interruption loss. A qualified forensic accountant will be necessary to assist with requesting application information for calculating the BI loss.

6. HVAC Specialists – During hail season in Texas, it is likely that HVAC systems will be impacted by the storms. An HVAC specialist can assist with determining the proper scope of work and the amount of loss.

7. Meteorologists – If a claim involves a weather-related claim, a meteorologist can assist with pin-pointing the date of loss and the severity of the storm.

8. Origin & Cause Expert for Fire Loss – If the carrier believes arson may be a factor in a disputed fire loss, the adjustment team should retain an O&C Expert to determine if the fire is incendiary.

9. Appraisers – Appraisal is more common today than in the past, largely because more states, including Texas, allow an appraisal panel to consider some aspects of causation. An appraisal is no longer necessarily limited to a pure cost to repair dispute.

10. Lawyers – Yep, here is the shameless plug. If a coverage dispute arises during the adjustment of the claim, consider retaining a lawyer to assist with a coverage opinion or assist with helping you find the right consultants for your loss.

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

Since we started the *Lonestar Lowdown* last year, I’ve used this column - being referred to in my office as “*Badger’s Rant*” - to raise a lot of issues that we see in our litigated (and appraised) matters. I’ve complained about contractor greed, a few bad public adjusters, and certain scheming policyholder attorneys. I’ve pointed out all the abuses by these so-called “policyholder advocates”, who apparently believe they are modern day Robin Hoods – stealing from the evil rich insurance companies and giving to poor consumers. While, of course, bleeding off a nice profit for themselves. These assorted crooks and frauds leave me with no shortage of things to write about.

But with that said, I am always very deliberate about stepping back and reminding myself to avoid “tilting at windmills”, an idiom that means to attack imaginary threats or enemies (from the literary classic Don Quixote). Not all policyholder advocates are bad. Not all contractors, public adjusters, and policyholder attorneys are trying to rip off my insurance company clients. For this reason, you will never hear me disparage an entire profession on “the other side”. And you will also see me accepting almost every possible opportunity to engage in dialogue with policyholder advocate groups. Conversation is good. I learn from listening to what others have to say about insurance company conduct. Hopefully, others learn from what I have to say from the insurance company perspective.

My wise mother taught me to employ the 80/20 rule: You aren’t learning anything new when you are talking; so listen 80% of the time and talk 20% of the time.

But not everyone shares this attitude. I get angry when I see online posts promoting the “all insurance companies and everyone who works for them sucks” mentality. It is wrong. The vast majority of insurance professionals – whether an in the trenches adjuster or a company CEO – are honest, hardworking people just trying to do the right thing. What is “the right thing” in this world? Measure claims consistent with the damage, the policy language, and the law. Sure, there will always be disputes as to what constitutes damage and the reasonable cost to fix it. That’s expected. But most disputes are legitimate and resolvable. It doesn’t mean that everyone on the insurance company side of the dispute is hell bent on cheating consumers.

That is absolutely not the case.

Obviously, behind this rant are my reflections on the recent assassination of United Healthcare CEO Brian Thompson. There is no argument that can be made in a civilized society supportive of what happened to Mr. Thompson. None. I won't even engage on that topic. You can catch me at a hotel lobby bar one evening for a discussion of the erosion of the rule of law in this country.

With that said, I encourage everyone in our industry, “on both sides”, to avoid becoming Don Quixote. Give every professional you encounter in the claims process the initial benefit of the doubt. Put prejudices and emotions aside. Always attempt to find a compromise that resolves claims amicably and promptly. Put me out of a job.

To quote the legendary words of James Dalton, the bouncer boss played by Patrick Swayze in *Roadhouse*…..

“I want you to remember that it's only a job. It’s nothing personal.”

AI Update

AI and Insurance – Predictions for 2025

by Jennifer Gibbs

As set forth in the prior articles in AI Update column of the Lonestar Lowdown, the insurance industry has adopted and implemented Artificial Intelligence in numerous ways. As this trend continues, Insurance Newsnet has the following predictions regarding how AI will impact insurers in 2025:

1. **Insurers' key to success in 2025 is operational effectiveness.** Pricing will no longer be a differentiator in 2025. To increase margins while keeping costs down, insurers will focus on bolstering productivity while offering customization for better client service across their claims and underwriting departments.

2. **The insurance industry will lean on robust upskilling platforms to counteract the increasingly aging workforce.** Companies will intensify efforts to close the skills gap. Initiatives will leverage artificial intelligence and digital tools to provide adaptive training and operational resources tailored to modern needs. Successful players will combine these technologies with flexible work arrangements to align with shifting employee expectations. This dual approach will drive competitiveness by balancing workforce transformation with effective talent retention strategies.

3. **AI will disrupt the traditional insurance outsourcing model by automating routine tasks that were typically offshored, cutting outsourcing jobs in half in the next three years.** Intelligent workflow agents will dramatically change work design. Dynamically distributing work based on real-time capacity, expertise and improved process orchestration will reduce outsourcing costs. AI systems will manage document processing, data entry and basic customer service - traditionally handled by business process outsourcing providers - by shifting the focus from outsourcing to specialized services such as AI model training and complex technical support. AI training will occur in the U.S., not at offshore locations.

4. **Next year will mark the rise of a trainable agentic platform in insurance that will push towards parity of onboarding for digital and human workers.** This platform will include training materials and standard operating procedures that can be ingested and leveraged. The technology winners in this space will provide guardrails for agentic AI that operates with limited human intervention and scales easily.

5. **First-mover technology advantage will unlock a $1 trillion global insurance opportunity.** The underinsured coverage gap, estimated to be a trillion-dollar opportunity, represents a prime area for innovation in 2025. Technological advancements will drive this transformation, allowing us to quickly meet shifting consumer expectations and respond to evolving risk landscapes. Insurers can tap into this vast market and secure the reward by developing AI-driven innovative products, leveraging data analytics and building strong customer relationships.

Although we cannot know precisely how an emerging technology such as AI will ultimately impact the historically slow-to-modernize insurance industry, we do know that this industry is undergoing significant transformation, and it will be exciting to watch what is to come.

Federal Court Correctly Concludes that a Simple Disagreement Between Experts Does Not Support a Claim for the Breach of the Duty of Good Faith and Fair Dealing — *Beka One, LLC V. RLI Insurance Company*

by Austin Taylor

U.S. District Court Xavier Rodriguez of the United States District Court for the Western 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 commercial property. In granting summary judgment, the Court concluded that only a bona fide dispute between the parties' experts existed and this did not rise to the level of bad faith necessary to support a claim for the breach of the duty of good faith and fair dealing.

Beka One, LLC v. RLI Insurance Company involved alleged damage to a commercial property in the San Antonio area from a May 27, 2020 storm. No. 5:23-CV-000642024, WL 4839166, *1 (W.D. Tex. Sept. 13, 2024). Beka One, LLC (“Beka One”) submitted a claim for damages to the property’s roof, HVAC, and exhaust outlets. *Id.* RLI Insurance Company (“RLI”) then investigated the claim by retaining Engle Martin & Associates (“EMA”). At EMA’s suggestion, RLI also retained an engineering firm Nelson Forensics, LLC (“Nelson”), and a building consultant, JS Held, LLC (“JS Held”). *Id.*

Nelson inspected the property and prepared two reports documenting its findings. *Id.* The first report focused on the property's roof and concluded that the May storm had not damaged the roof. *Id.* The second report detailed Nelson’s findings on the property's HVAC and exhaust outlets. *Id.* The second report concluded that the May storm had caused some damage to these components. Consistent with Nelson’s findings and its inspection of the property, JS Held prepared an estimate of loss for the damaged components noted in Nelson’s second report. *Id.* This estimate totaled less than Beka One’s deductible. *Id.*

Consistent with the findings of its consultants RLI issued two letters to Beka One. *Id.* RLI’s first letter cited the findings of Nelson’s first report and explained that there was no covered damage to the property’s roof. *Id.* RLI’s second letter explained that while some covered damage had been noted in Nelson’s second report this damage did not exceed the policy’s deductible. *Id.*

Beka One then hired a roofer to carry out repairs to the property as well as Needham Rice & Associates LLC (“Needham”), a public adjuster. *Id.* Needham sent RLI a damage report that included an estimate from an HVAC contractor that included a different scope of repairs than the estimate prepared by JS Held, which exceeded the Policy’s deductible. *Id.* These were forwarded to JS Held for review. *Id.* In turn, JS Held retained its own HVAC specialists from Comfort Air Engineering, Inc. (“Comfort Air”). *Id.* at *2. Comfort Air inspected the property and reviewed the competing repair scopes before preparing its own repair estimate. *Id.* Comfort Air’s estimate, while higher than JS Held’s estimate, was still below the policy’s deductible. *Id*. RLI reaffirmed its prior claim position. *Id.*

Beka One filed suit a few months later alleging among other causes of action, that RLI breached the common law duty of good faith and fair dealing. *Id.* Over a year after filing suit, Beka One retained Mayfield Building Envelope Consultants (“MBEC”), a consulting company. *Id.* In contrast to Nelson, MBEC concluded that the property’s roof had been damaged by the May storm. *Id.*

RLI moved for summary judgment on Beka One’s claim for breach of the duty of good faith and fair dealing, arguing that the evidence demonstrated nothing more than the bona fide coverage dispute. *Id.* Judge Rodriguez agreed.

Under Texas law, an insurer owes a duty “to deal fairly and in good faith with an insured in the processing of claims.” *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 459 (5th Cir. 1997) (citing *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). A claim for breach of the duty of good faith and fair dealing exists “when the insurer has no reasonable basis for denying or delaying payment of a claim.” *Higginbotham*, 103 F.3d at 459. An insurer may also “breach its duty of good faith and fair dealing by failing to reasonably investigate a claim” before denying it. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 n.5 (Tex. 1997). An insurer fails to reasonably investigate a claim if the investigation is conducted as a pretext for denying the claim. In

addition, while an insurer is generally entitled to rely on the opinions of its experts, an insurer cannot rely on expert opinions that are unreliable or not objectively prepared. *See Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 194 (Tex. 1998).

The Court observed that "Plaintiff has proffered no evidence suggesting that Defendant failed to conduct a reasonable investigation or that its experts' reports were not objectively prepared or were otherwise unreliable." *Id.* at *4. Further, Beka One "has [not] offered any evidence that Defendant 'knew or should have known' that Plaintiff's claim was covered . . . based on the facts available to Defendant when it denied Plaintiff's claims." *Id.* Rather Beka One relied on the disagreements between the MBEC report and Nelson's reports relied on by RIL. *Id.* The Court observed that contradictions in the ultimate opinions reached in MBEC's and Nelson's reports "only demonstrate that there is a bona fide dispute between experts and do not rise to the level of bad faith, especially considering that the [MBEC] report was not available to Defendant when it denied Plaintiff's claims." *Id.* Judge Rodriguez concluded that summary judgment was appropriate under these facts.

The Court's decision on RLI's Motion for Summary Judgment was thorough and well-reasoned, appropriately holding Beka One to its burden to produce evidence of more than a bona fide coverage dispute to support a claim for the breach of the duty of good faith and fair dealing.

Appraisal Panel Acted Within its Rights when Considering Causation

by Alexander Masotto

The Southern District of Texas recently denied an insured's Motion to Set Aside the Appraisal Award after the Appraisal Panel considered causation relating to the damages claimed by the insured.

In *Rios v. Homesite Insurance Company, et al,* No. 5:23-CV-00006, 2024 WL 4984446 (S.D. Tex. Sept. 26, 2024), the insured filed a windstorm/hail claim for damage to her roof and fence at her residence located in Webb County, Texas occurring on or around May 24, 2022. After investigating the property, the insurer confirmed wind damage to the insured's fence; however, the investigation did not reveal any storm damage to the insured's shingle roof. Based on the investigation findings, the insurer issued a partial denial letter stating that the covered damage to the insured's fence ($2,354.67) fell below the policy's deductible ($2,500).

Following the coverage determination, the insured disputed the claim and issued a pre-suit notice letter demanding, among other things, $35,146.27 in actual damages. In response, the insurer reinspected the property, but the covered damages still fell below the policy's deductible.

Eventually, the insured filed suit against the insurer, and the case was removed thereafter to the Southern District of Texas. Shortly after removal, the parties agreed to invoke the appraisal provision under the policy to determine the amount of loss.

On May 31, 2023, the umpire and the insurer's appraiser signed an appraisal award for the amount of loss totaling $3,425 for storm damage. Notably, the award did not include purported wind damage to the insured's roof or exterior. The insurer proceeded to pay $1,066.61, representing the appraisal award plus prompt payment penalties, pre-judgment interest, and less the $2,500 deductible. The insured's appraiser swiftly disputed award, stating that the appraisal panel exceeded its authority by making "a coverage determination by asserting that the damages to the roof were caused by improper installation and not wind."

The insurer then filed a Motion for Summary Judgment, arguing in relevant part that: (1) the appraisal award payment estopped the insured's breach of contract claim, and (2) the insured's extra-contractual claims fail based on the prompt payment and pre-judgment interest payments made. In response, the insured filed a Motion to Set Aside the Appraisal Award based on: (1) the appraisal panel exceeding its authority by considering causation; and (2) the payment of a "faulty appraisal award and some statutory interest does not absolve [the insurer] from liability under the [p]olicy and the Texas Insurance Code.

Relying on *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009), the Court recognized that "[a]ny appraisal necessarily includes some causation element, because setting the 'amount of loss' requires appraisers to decide between damages for which coverage is claimed, from damages caused by everything else." Here, the Court ultimately found that the appraisal panel did not exceed its authority when it "distinguished between covered damage to Plaintiff's wood fence caused by the storm and uncovered damage to [the insured's] composition shingle roof caused by improper installation." *See MLCSV10 v. Stateside Enter., Inc.* 866 F. Supp. 2d 691, 705 (S.D. Tex. 2012) ("[The appraiser]'s causation evaluation involved no more than 'separating loss due to a covered event from a property's pre-existing condition.'"). Additionally, the Court noted that the fact the insured's appraiser's findings differed from those of the insurer's appraiser and the umpire was not sufficient proof to hold that the panel was either incompetent, biased, or otherwise acted outside the scope of its authority. Accordingly, the Court denied the insured's Motion.

The Court then analyzed the insurer's Motion for Summary Judgment and granted the same on the basis that: (1) the insured cannot maintain a breach of contract claim after the timely payment of an appraisal award; and (2) "because timely and full payment of an appraisal award precludes a breach of contract claim, extra-contractual claims for fraud, bad faith, and violations of the DTPA and Texas Insurance [C]ode also fail." *Losciale v. State Farm Lloyds*, 2017 WL 3008642 at *2 (S.D. Tex. July 14, 2017). Here, the insurer paid any statutory interest and prompt payment penalties to the insured in addition to the appraisal award payment. Additionally, the insured failed to show any injury independent from the alleged loss of benefits. Thus, the Court granted summary judgment on the insured's breach of contract and extra-contractual claims.

Overall, the Court in *Rios* soundly relied on controlling Texas law relating to the specific rights an appraisal panel may have during the appraisal process, and properly granted summary judgment in favor of the insurer.

Spotlight

Effective January 1, 2025, Zelle LLP will welcome Brandt Johnson to the partnership along with Peter Golfman (New York) and Katharina Kraatz-Dunkel (Boston).

"I am incredibly grateful to be joining the partnership here at Zelle. From the moment I arrived at the firm, I knew this was a special place, and it has exceeded my expectations beyond measure.

I am honored to work with an extremely talented group of professionals who are at the forefront of our industry, and I am thankful for each and every one of our clients who have put their trust and confidence in our firm.

Happy Holidays, and I wish you the very best in 2025."

Lassoing Liability

with Megan Zeller

Stowers Demands: The Gift That Keeps on Giving

For this holiday season, we're looking at a recent case out of Texas that operates as a small gift for insurers, which provides a relatively bright-line rule for future *Stowers* analyses. As we have previously written, while plaintiff's counsel may make *Stowers* demands during third-party liability claims, these demands are directed to the insurers, who are required 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). Insurers consider three prerequisites when determining if a *Stowers* duty has been triggered:

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).

In *Golden Bear Insurance Co. v. 34th S&S*, an insured recently argued that a plaintiff failed to make a proper *Stowers* demand because (1) the *Stowers* demand was not within policy limits, and (2) the *Stowers* demand was not one that an ordinarily prudent insurer would accept. See *Golden Bear Insurance Co. v. 34th S&S*, 2024 WL 3321508 (S.D. Tex. June 26, 2024). Here, a plaintiff's demand letter offered to settle all claims "in exchange for the payment of all policy limits of any and all insurance contracts." The insurer argued that this vague and ambiguous demand failed to specify either the amount requested under the policy or the policy limits of a specific policy, and therefore did not meet the *Stowers* demand requirements. The Court agreed, finding that the demand "lacked the necessary specificity to invoke an obligation under *Stowers*." As a result, the Court determined that no additional analysis regarding the reasonableness of the demand was necessary, because the demand automatically failed under one of the three necessary *Stowers* prerequisites.

While the majority of *Stowers* cases tend to operate as examples of what insurers should not do while assessing a plaintiff's demand, *Golden Bear Insurance* is a rare gift for insurers. Here, the Court agreed with key prior cases, all of which require some degree of specificity for policy limits demands. While it is perfectly adequate for a plaintiff to merely request "policy limits," the demand must specify **which** policy it is addressing. Vague requests for "all insurance contracts" or "any applicable policy" will automatically fail under this standard. For once, courts in Texas continue to appear to embrace a bright-line rule with a *Stowers* prerequisite, giving insurance carriers some degree of certainty with at least one aspect of a *Stowers* analysis.

BEYOND THE BLUEBONNETS

Is Your War Exclusion Fit for Purpose?

As global threats evolve, so does the question of what constitutes a 'war' risk under a standard property insurance policy, and how this might impact coverage.

by Olu Dansu and Tom Papa (London Office)

Historically, a war was a physical conflict between two or more states, with little doubt as to its status or participants. However, modern warfare has evolved and now goes beyond physical attacks on assets to include non-physical attacks, such as cyber warfare. Russia's war against Ukraine has also revealed a new front in war risks that was not previously envisaged, e.g., carrying out attacks and acts of sabotage in Western countries offering support to Ukraine.

In July 2024, a series of parcel fires occurred at depots of courier companies in Poland, Germany, and the UK. The fires were said to have been caused by Russian agents sending parcels containing hidden explosives via courier companies, which then burst into flames. Security officials have confirmed that this was part of an orchestrated campaign by Russia's intelligence agency to cause fear and disruption in Western nations.

In October 2024, a man pleaded guilty under the UK's National Security Act 2023 to aggravated arson for burning down a warehouse in London, at the behest of Russian agents. The warehouse was targeted because it was apparently used by a Ukraine-linked company. There have also been reported acts of Russian-inspired sabotage on warehouses and railway networks in Sweden and the Czech Republic. Whilst these attacks have so far focused on European allies of Ukraine, intelligence sources have indicated that they expect similar attempts to be made in the US in due course. Polish officials allege that the targeting of courier companies was a test run for parcels to be sent by courier to the US and Canada.

These developments demonstrate that the dangers of war are no longer confined to the physical jurisdictions of the direct warring parties and require special underwriting considerations. To combat the exposure to war risks, property policies contain standard war exclusion clauses. The question however, is whether the wording of the relevant exclusion covers scenarios where property located in a non-warring country is targeted by arsonists due to the property's (perceived) connection to Ukraine.

Most policies will cover damage caused by, for example, fire/arson, so it is likely that such claims will fall within the scope of cover of the property policy, unless the war exclusion applies. A typical war exclusion will exclude cover for any liability caused by or arising from war. The issue for determination therefore is whether property damaged in, for example, London, at the instigation of Russian agents and due to the property's connection with Ukraine, can be said to have been 'caused by' or 'arisen from' the war in Ukraine.

In English law, causation in an insurance policy is to be determined by the 'proximate cause' test, unless the wording expresses a wider or narrower test. Furthermore, the Supreme Court has confirmed in *FCA v Arch* that terms such as 'caused by' or 'arising from' are all expressions of the proximate cause test.

A proximate cause is that which is proximate in efficiency. This means that it is the dominant, effective or efficient cause of the loss, and does not have to be the last in time. In *Allianz Insurance v University of Exeter,* it was decided that damage caused in 2021 by the controlled detonation of a WWII bomb during attempts to make it safe was proximately caused by WWII, notwithstanding the fact that the war ended almost 80 years prior to the occurrence of the damage. The court held that the dropping of the bomb by German forces over England was an act of war. Although the bomb did not actually cause any damage until decades later, this did not alter the fact that the dropping of the bomb was a war act which was sufficient to bring the damage within the scope of the policy's war exclusion. The exclusion therefore applied in that case and the insurer did not have to cover the loss.

In a hypothetical scenario where a property insured under a policy with a ‘proximate cause’ war exclusion becomes damaged, for example by arsonists acting at the behest of Russian agents, can it be argued that the damage is excluded by the war exclusion (on the basis that the proximate cause of the damage is war because the property was targeted because of its connection to Ukraine)? In other words, the property would not have been targeted and no damage would have occurred but for the war.

Such a view is unlikely to find attraction with the courts. In English law, a policy of insurance is to be interpreted objectively, as it would reasonably be understood by an ordinary policyholder at the time the policy incepted. This means that the interpretation is premised on the presumed intention of the contracting parties, and the burden of proving the application of the exclusion will fall on the insurer.

Against this background, the question is whether it can be said that the intention of the parties at the time the policy incepted was that the war exclusion would apply in cases where there was no physical war taking place in the country where the insured property is located.

In *Allianz Insurance v University of Exeter* the Court of Appeal stressed that it was not being asked in that case to consider issues such as whether the “war” referred to in the policy could mean a war that had ended at the time the policy was incepted; or whether the damage caused by the bomb did not result from a war-like desire to damage, but from a controlled detonation which had been an attempt to eliminate or minimise damage. This was because the parties in that case were in agreement on the proper interpretation of the war exclusion clause, so the court only had to determine the proximate cause of the loss. Consequently, it is open to an insured to argue that the reference to ‘war’ in the exclusion must be interpreted to mean a ‘war’ taking place in the country or vicinity where the insured property is located, as opposed to a war occurring in a separate country. In other words, there must be a physical connection between the war and the insured property for the damage to be deemed to be proximately caused by war, as opposed to a looser and tangential connection.

If insurers wish to have the comfort of relying on a war exclusion in the hypothetical scenario described above, a court is likely going to require the wording of the war exclusion to be wider and broader than a proximate cause test. Such a wording needs to be clear in its intent that it is designed to apply to circumstances where the cause of the damage is not only proximately caused by war, but also where the cause is directly or indirectly connected with a war, irrespective of whether the war takes place physically within the territory where the insured property is located.

Consequently, rather than an exclusionary wording simply excluding cover for loss/damage “*caused by*” or “*arising from*” war, a more appropriate **sample** wording looking to exclude cover for loss/damage could read, “*directly or indirectly caused by or connected to or as a consequence of war (whether or not such war occurs physically within the territory where the Insured Property is located)*”.

Obviously, the consideration of any claim will turn on the wording of the relevant policy and the specific facts of each case, so it is not possible to assert that a particular wording would guarantee that an exclusion would apply in every case. Nonetheless, a broader exclusion along the above lines should at least afford the insurer better grounds for arguing that the war exclusion applies where the motivation for the loss/damage is linked or connected to a war event.

The reality is that the evolving nature of modern warfare will continue to create new and unexpected risks which standard property war exclusion wordings may not be suited to fully capture. It would therefore be wise for property insurers to ensure that their war exclusion wordings are regularly reviewed as new war threats emerge, to ensure their war exclusion wordings are fit for purpose.

For over twenty years, the attorneys in Zelle's Dallas office have taken photos together in different locations all around Dallas. We try to find new and creative spots each year to help our clients get the quintessential Dallas experience. This year, we went to a historic mural in Deep Ellum.

Happy Holidays!

For more information on any of the topics covered in this issue, or for any questions in general, feel free to reach out to any of our attorneys. Visit our website for contact information for all Zelle attorneys at zellelaw.com/attorneys.

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

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The Lonestar Lowdown All Issues

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