ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Wednesday, February 19, 2025 | ISSUE 22

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

Our theme for 2025 is Collaboration. We recognize that we are not an island in this industry and our clients, and ultimately the property owners, best benefit when we collaborate to resolve disputes. In that vein, we invite you to submit an idea for an article that we can include this year in the Lowdown. Our editors will choose one article to include in each issue. Our first of four quarterly events collaborating with some of our partners in this industry to encourage networking and discussion on the issues in our field will take place on Thursday, March 27, 2025. Let's continue to make 2025 the best year yet for the property insurance industry in Texas!

If you are interested in more information on any of the topics below, please reach out to the author directly. As you all know, Zelle attorneys are always interested in talking about the issues arising in our industry. If there are any topics or issues you would like to see in the Lonestar Lowdown moving forward, please reach out to our editors: Shannon O'Malley, Todd Tippett, and Steve Badger.

ZELLE LLP WHAT THE HAIL?

INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

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.

March 6 – Jennifer Gibbs will participate in the panel discussion "Breakout: Choice of Law: How to Lose Your Case Before You Even File" at the 2025 Insurance Coverage Litigation Committee CLE Seminar in Tucson, AZ.

March 27 - As part of our 2025 DFW Insurance Industry Collaboration event series, Zelle LLP, Buchanan Clarke Schlader, and US Building Consulting Group are teaming up to host a "Spread

the Love" Happy Hour at On Rotation Brewery & Kitchen from 5:00 to 8:00 pm. In support of The Bridge Homeless Recovery Center, we invite all attendees to bring donations to assist those in need. Click here for more information on ways to contribute. Please RSVP to abannon@zellelaw.com.

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

1. Always treat the insured's interests at least equal to the interests of the insurance carrier.

2. Communicate with the insured early, often, promptly and with the intent of assisting the insured with the claim.

3. Disclose all coverages, coverage issues and time limits that may be applicable under the policy to the claim.

4. Promptly request all information and documentation necessary to complete the investigation and adjustment of the claim.

5. Conduct a full, fair and honest investigation of the claim.

6. If needed, schedule an inspection of the loss site as soon as reasonably possible. Schedule additional inspections with the insured present if disagreements exist.

7. Respond to any and all communications from the insured regarding the claim or the coverages.

8. Provide a prompt explanation of what is covered and what is not covered.

9. Pay all undisputed amounts owed on the claim.

10. Offer to discuss a reasonable resolution of the claim if disagreements exist.

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

In 2012, I had just returned from a decade working in New York City on the 911 subrogation matter. It was pretty much all I had done for an entire decade. I was seriously thinking about retiring from the practice of law and doing something entirely different.

And then our good client FM called. They said: "Badger, we hear you are back in Dallas. You used to be the roofing guy. We want you to come out and look at all these hail claims we are seeing. So I went out and looked at a few properties alleged to have hail damage. About that time we were also seeing a huge influx of lawsuits involving allegations of hail damage.

It was pretty clear what the hail was going on. Hail was the new target of litigation abuse in Texas. Hurricanes come around every decade or so. But hail was the gift that keeps on going – as it hails all across Texas every single year.

So I decided to focus my attention on this emerging area. I trademarked the phrase "What The Hail Is Going On?" and got to work. In 2014 we held our first *What The Hail?* Conference. We were excited to have around 75 people attend. We then held a second Conference in 2016, and additional conferences in 2018 and 2020. Each one was larger than the previous. Unfortunately, our 2022 conference was a victim of COVID. But we returned in 2024, with 30 sponsors and over 600 attendees. Wow! The feedback was amazing. Attendees uniformly referred to it as the best industry conference of the year. Sponsors loved the amount of traffic at their booths. Everyone said they couldn't wait for the next one.

Today, we are excited to announce that the **2026 *What The Hail?* Conference** will be held on February 12-13, 2026 at the Irving Convention Center. Same format as past conferences. We will have a welcome party on Wednesday night, all day seminar classes on Thursday, the legendary ***80's Party*** that night, and a half-day of seminar classes on Friday. The seminar format will remain the same, with fast-paced 20 minute sessions put on by various Zelle attorneys and our sponsors. We will again have the trade show, with increased space for more sponsors. The backpack drive will once again ensure that attendees visit every sponsor booth. Finally, before you even have to ask, yes, The Molly Ringwalds are returning! Along with some surprise guests direct from the 80's.

More details, including registration and sponsorship information, will be provided in the next couple months. For now, just be sure to save the dates and start looking for your best 80's attire.

Watch For Registration and Sponsorship Information in Early April

AI Update

New Lawsuit Highlights the Risks Of AI-Related Disclosures

by Jennifer Gibbs

A recent lawsuit filed in the US District Court for the Southern District of New York—*Sarria v. Telus International (Cda) Inc. et al.*, No. 1:25-cv-00889 (S.D.N.Y. Jan 30, 2025)—involves two distinct risks associated with AI-related disclosures: the dangers posed by action and inaction alike. The *Telus* lawsuit highlights not only the importance of legally compliant corporate disclosures, but also the dangers implicated by corporate transparency.

On January 30, 2025, a class action was brought against Telus International (CDA) Inc., a Canadian company, regarding allegations of failing to disclose crucial information about its AI initiatives. The lawsuit claims that Telus failed to inform stakeholders that its AI offerings required the "cannibalization" of higher-margin products, that profitability declines could result from its AI development and that the shift toward AI could exert greater pressure on company margins than had been disclosed. When these risks became reality, Telus' stock dropped suddenly, and the lawsuit followed. According to the complaint, the omissions allegedly constitute violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5.

The *Telus* lawsuit highlights potential liability for both understating and overstating AI-related risks (the latter often being referred to as "AI washing"). These risks are growing. Indeed, according to Cornerstone's recent securities class action report, the pace of AI-related securities litigation has increased, with 15 filings in 2024 after only 7 such filings in 2023.

The integration and implementation of AI into the market presents both opportunities and challenges. Corporations may wish to navigate these complexities with care, ensuring transparency in AI-related disclosures while leveraging insurance and shareholder involvement to prevent and defend against potential liabilities.

The First Houston Court of Appeals Correctly Grants Mandamus Relief to Compel Appraisal After Suit Is Filed

by Austin Taylor

In re SureChoice Underwriters Reciprocal Exch., involved a claim for hail and wind damage to the insured's ("Glasper") residence. 702 S.W.3d 876, 878 (Tex. App.—Houston [1st Dist.] 2024, no pet. h.) The carrier ("SureChoice") investigated the loss but determined the damage from the storm fell below Glasper's deductible. *Id.* Glasper subsequently retained her own adjuster who found significantly more damage from the storm which exceeded Glasper's deductible. *Id*. After being advised of these findings, SureChoice retained an engineer to reinspect Glasper's property. *Id.* The engineer affirmed SureChoice's initial opinion, finding no additional storm-related damage. *Id.* SureChoice advised Glasper of the engineer's findings and denied coverage for the additional claimed damages citing various policy exclusions. On October 24, 2023, Glasper issued a demand letter to SureChoice for the balance of her adjuster's estimate. *Id.* On November 3, 2023, SureChoice rejected Glasper's demand and invited Glasper to provide "information [that] has not been previously reviewed by the carrier for consideration." *Id.* Glasper did not provide any additional documents, opting instead to file suit on February 26, 2024. *Id.* at 880.

After the initiation of litigation, SureChoice promptly invoked appraisal. The day after suit was filed—February 27, 2024— SureChoice sent a letter to Glasper invoking and demanding appraisal under the Policy and designating its appraiser. *Id.* Glasper responded by email on March 12, 2024, stating without explanation or elaboration, "[w]e do not agree with appraisal." *Id.* SureChoice then filed an Answer and an Opposed Motion to Compel Appraisal and to Abate. Glasper filed a response arguing that because SureChoice had not invoked appraisal within the 60-day statutory notice period following her demand letter, SureChoice "effectively [had] waived its right to do so." *Id.* Glasper also argued that because "the crux of the case" involves matters of causation, and "[a]ppraisal is useful to resolve a gap between coverage positions of the two parties," an appraisal here "is simply not necessary" because "[it] does not resolve causation issues." Glasper argued that because causation issues were implicated SureChoice could simply reject the appraisal award "result[ing] in a complete waste of time and money for the parties . . . ."

The trial court denied SureChoice's Motion to Compel Appraisal. And SureChoice filed a Motion to Reconsider. *Id.* The trial court also denied the Motion to Reconsider, leading SureChoice to seek mandamus relief.

On review, the Houston First Court of Appeals concluded that **mandamus relief was an appropriate remedy**. First, the Court rejected Glasper's argument that SureChoice waived its right to invoke when it denied Glasper's claim. *Id.* at 883–885. The Court noted that the policy required any waiver to be in writing and SureChoice's communications to Glasper had always reserved its rights under the policy. *Id*. at 882. Further, at least some damages at issue (those that fell below Glasper's deductible) were covered under the policy. Accordingly, SureChoice denial was not based solely on a coverage issue and appraisal was appropriate. *Id.* at 882–883.

Next, the Court addressed Glasper's argument that SureChoice waived its rights to invoke appraisal because it did so after Glasper filed suit. The Court again rejected Glasper's argument. First, the Court noted that the Policy language allowed either party to invoke appraisal, "[t]hus, because the right of appraisal is mutual, Glasper's decision to file suit did not compromise SureChoice's contractual right to invoke *its* appraisal right." *Id.* Further, the Court acknowledged that there is no authority in Texas that requires an appraisal to be invoked prior to suit being filed. *Id.* at 885. Finally, as Glasper did not argue she was be prejudiced in any way by SureChoice's purported delay invoking appraisal till after suit was filed the record did not support a waiver by SureChoice of its appraisal rights. *Id.*

The Court of Appeal's decision to grant mandamus relief to compel appraisal was correct and well-reasoned and accurately reflects the current state of Texas law on the issue. While mandamus is an extraordinary remedy only available in a limited set of circumstances, a court's refusal to enforce an appraisal clause is such a circumstance. As the Texas Supreme Court has acknowledged the refusal to

Spotlight

Zelle LLP welcomes Hannah Motsenbocker!

Hannah will be joining Zelle's Dallas office as a Senior Associate. We're thrilled to have her on board and look forward to the expertise and insight she'll bring to our team.

enforce an appraisal clause is an abuse of discretion that cannot be remedied by appeal. *In re Universal Underwriters of Tex. Ins. Co.* . 345 S.W.3d 404, 406–07 (Tex. 2011) (orig. proceeding).

Southern District of Texas Holds Benefits-Lost Rule Inapplicable, Alleged Delay in ALE Payments Not an "Independent Injury"

by Alexander Masotto

On October 17, 2024, Judge Andrew S. Hanen in the United States District Court for the Southern District of Texas, Houston Division properly held that: (1) the Benefits-Lost rule does not apply where the insured did not allege "lost contractual rights" due to statutory violation; and (2) the insured's out-of-pocket living expenses was not an "injury independent" from the loss of policy benefits.

In 2018, the Texas Supreme Court in *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018) identified five interrelated rules that govern the relationship between contractual and extracontractual claims under Chapter 541 of the Texas Insurance Code. The five rules are:

> **(1) The General Rule:** An insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits.
>
> **(2) The Entitled to Benefits Rule:** An insured who establishes a right to receive benefits under the insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of benefits.
>
> **(3) The Benefits-Lost Rule:** Even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Texas Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right.
>
> **(4) The Independent Injury Rule:** If an insurer's statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits.
>
> **(5) The No-Recovery Rule:** An insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of an alleged right to benefits.

In *Dijkman v. AmGuard Insurance Company*, No. 4:23-cv-01430, 2024 WL 4520130, a dispute arose relating to a frozen pipe burst claim to the insured's home due to the Texas freeze in February 2021. The Insurer's adjuster inspected the property and determined that the home was uninhabitable due to the extent of the damage.

Approximately one month after the loss, the insurer began issuing Additional Living Expenses ("ALE") payments; however, did not issue Coverage A dwelling payments until awhile after. Because of the insurer's purported payment delay, the insured and her family lived in a hotel for over one year. Eventually, the insured's ALE limits exhausted, leading to the insured to pay out-of-pocket expenses for her living arrangements. After receiving additional dwelling payments, the insured made repairs to her home and moved back into her residence.

Although the insured agreed with the amounts paid by the insurer, the insured proceeded to file suit due to: (1) the insurer's delay in payment under the policy's terms and conditions; and (2) additional damages based on the insured's out-of-pocket hotel costs. Here, the insured alleged that the insurer breached the insurance contract, violated chapters 541 and 542 of the Texas Insurance Code, and breached the duty of good faith and fair dealing.

The insurer filed a motion for partial summary judgment arguing that the insured's breach of contract, Texas Insurance Code, and common law bad faith claims were precluded because the insurer made full payments under the policy. Additionally, the insurer asserted that because the insured cannot satisfy the independent-injury test, no additional damages are owed.

The Benefits-Lost Rule

Under Texas law, "the general rule is that an insurance company has no obligation to pay damages that exceed policy limits once those limits have been paid." However, as described above, the Benefits-Lost Rule provides the first exception. This rule typically applies to claims "alleging that an insurer misrepresented a policy's coverage, waived its right to deny coverage or is estopped from doing so, or committed a violation that caused the insured to lose a contractual right to benefits that it otherwise would have had."[i]

Here, the insured argued that the insurer failed to promptly pay what she is contractually owed, not that the insurer's actions and/or misrepresentations caused her to lose certain contractual rights. Accordingly, the Court correctly held that the Benefits-Lost Rule did not apply.

The Independent-Injury Rule

Regarding the second exception, the Independent-Injury Rule, the Court reiterated the rule that "An insurer's statutory violation does not permit the insured to recover *any* damages beyond policy benefits unless the violation causes an injury independent from the loss of the benefits."[ii]

Relying on *Menchaca*, the Court reasoned that an "injury is not 'independent' for the insured's right to receive policy benefits if the injury 'flows' or 'stems' from the denial of that right."[iii] Here, the insured's main argument was that an "unreasonable delay unreasonable delay was the very reason why [insured's] ALE limits were exhausted, resulting in her incurring additional out-of-pocket expenses for what would have otherwise been covered under the Policy...."

While the Court failed to make note of this, there is no interplay between Chapter 542 of the Texas Insurance Code violations (i.e. statutory interest on untimely or delayed payments) and the "independent injury rule." Rather, the Independent-Injury Rule is rooted in an "actual damages" recovery theory and only relates to alleged violations of Chapter 541 of the Texas Insurance Code.

Nonetheless, the Court properly held that the insured's out-of-pocket living expenses incurred due to the insurer's delay and after her ALE coverage was exhausted was not an injury *independent* from the underlying claim. To date, no Texas court has recognized a viable independent injury under the rule.[iv]

Lastly, the Court granted summary judgment in favor of the insurer for the insured's claim for personal property damage because the insured failed to provide competent summary judgment evidence to create a fact issue.

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[i] *Id*. at 497.
[ii] *Id*. at 500.
[iii] *Id*.
[iv] *See Menchaca*, 545 S.W.3d at 499. (The Texas Supreme Court in*Mechaca* noted that a successful "independent injury" claim would be "rare.").

Federal District Court Holds Engineer Is Qualified Enough, and His

Federal District Court Holds Engineer Is Qualified Enough, and His Methods Are Reliable Enough, to Testify to Date Wind and Hail Caused Roof Damage

by Zachary Fechter

In *Wings Platinum, LLC v. Westchester Surplus Lines Ins. Co.*, No. 3:23-CV-2145-D, 2025 WL 391388 (N.D. Tex. Feb. 4, 2025), a federal district court recently held that an engineer with one year and one month of experience inspecting roof damage was sufficiently qualified, and that his method for determining the date of wind and hail damage to a roof was sufficiently reliable, to testify as an expert under Federal Rule of Evidence 702.

Wings Platinum, LLC ("Wings") submitted a claim for property damage arising out of a wind and hailstorm, so Westchester Surplus Lines Insurance Company ("Westchester") investigated the claim by, in part, retaining engineer Robert J. Herrera of Stephens Engineering.[1] Mr. Herrera inspected the property, reviewed forensic meteorological data of wind and hailstorms in the area, and relied on his experience to conclude that fractures observed on the roof's thermoplastic membrane were caused by a wind and hailstorm occurring prior to the insurance policy's effective dates. Based in part on Mr. Herrera's conclusions, Westchester denied Wings' claim.[2] Wings then filed suit against Westchester in Texas state court for breach of contract, breach of the duty of good faith and faith dealing, and violations of the Texas Insurance Code. Westchester removed the suit to a federal court in the Northern District of Texas, Dallas Division, and named Mr. Herrera as a testifying expert.

Federal Rule of Evidence 702 governs whether a witness may testify as an expert. Under Rule 702, federal courts may admit expert testimony if the party offering it shows by a preponderance of the evidence that (1) the witness is qualified to be an expert by virtue of knowledge, skill, experience, training, or education, (2) the witness's testimony is relevant, or helpful to understanding evidence or determining a fact in issue, and (3) the witness's testimony is based on reliable principles and methods.[3]

Wings moved to strike Mr. Herrera's opinions and testimony, arguing that Westchester did not establish either his qualifications as an expert or the reliability of the methods underlying his testimony. Wings specifically argued that Mr. Herrera was not qualified to testify because he only had one year and one month of experience inspecting roofs for damage in his entire career, so he had "insufficient training" to be an expert.[4] Wings also argued that Mr. Herrera's opinions on when wind and hail caused roof damage were not reliable because they were "subjective" and lacked any "rubric, metric, or standard" by which to duplicate, test, or otherwise judge them.[5]

In a memorandum opinion and order, the court denied Wings' motion to strike Mr. Herrera's opinions and testimony. The court held that Mr. Herrera was qualified to be an expert by virtue of his on-the-job training with Stephens Engineering. The court found that Mr. Herrera had inspected around 200 buildings for storm damage by the time he first inspected Wings' property, and around 750 buildings by the time he submitted an affidavit to the court supporting his qualifications as an expert, which was sufficient experience to qualify as an expert.[6] The court also held that Mr. Herrera's testimony was based on a reliable method because past case law had already determined that the method—inspecting the property, reviewing forensic weather data, and applying his experience to the facts to reach his conclusion—was reliable.[7] As such, the court denied Wings' motion, and Westchester will be permitted to call Mr. Herrera as an expert witness to testify should the case go to trial.

This case illustrates that some arguments go to the "weight" or persuasive effect of an expert's testimony, while other arguments go to the "admissibility" of the expert's testimony in the first place. Here, Wings argued that Mr. Herrera was not "*highly* qualified," but Westchester only needed to show he was qualified, and after around 750 roof inspections in over a year, Mr. Herrera met that threshold. Additionally, the court's opinion suggests that federal courts in Texas applying Rule 702 generally regard Mr. Herrera's method for dating wind and hail damage to roofs as reliable. As a consequence, parties retaining engineers to inspect wind and/or hail damage to roofs might expect an easier time proving the reliability of element of Rule 702. Parties might also expect future motions to strike engineers as expert witnesses in cases like this to focus on the engineer's qualifications and the relevance of their opinions.

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[1] *Wings Platinum,* 2025 WL 391388 at *1.
[2] *Id.*
[3] *Id.* at *1–2.
[4] *Id.* at *3.
[5] *Id.*
[6] *Id.*
[7] *Id.* at *4 (citing *Kim v. Nationwide Mut. Ins. Co*, 614 F.Supp.3d 475, 488 (N.D. Tex. 2022);*Kahlig Auto Grp. V. Affiliated FM Ins. Co*, No. SA-19-CV-013150-DAE, 2021 WL 148056, at *4 (W.D. Tex. Jan. 15, 2021); and TBC-JP-LR, JV v. Allied Prop. & Cas. Ins. Co., No. 4:17-CV-131-Y, 2018 WL 10562785, at *4 (N.D. Tex. Sept. 28, 2018)).

Employee Theft of Electronic Data Is Not Direct Physical Damage to or Direct Physical Loss of Business Personal Property

by Christopher Edwards

In *Site Jab v. Hiscox Insurance Company, Inc.*, United States District Judge Lee H. Rosenthal recently tackled whether a business owner's insurance policy provided coverage for theft of information, including confidential client information, by the Insured's employees on a motion for summary judgment.[1]

In this case, Hiscox Insurance Company ("Hiscox") issued a business owner's insurance policy (the "Policy") to Site Jab (the "Insured") providing Business Personal Property coverage for the building and personal property at the insured location. During the applicable policy period, Site Jab alleged that some of its past and present employees colluded to collect its confidential information for the purpose of stealing its clients.[2] Site Jab alleged that it lost nearly $1 million in revenue because of the theft of its data. Accordingly, Site Jab submitted a claim to recover alleged loss of business income pursuant to the Policy. Finding no basis in the policy to support Site Jab's claim, Hiscox denied coverage. Subsequently, the Insured filed suit against Hiscox, asserting claims for breach of contract and violations of the Texas Insurance Code and Deceptive Trade Practices Act. In response, Hiscox filed a motion for summary judgment on the claim. In its motion, Hiscox alleged that the Policy did not cover the losses that the Insured alleged.

In relevant part, the Policy provided coverage for "direct physical damage to or direct physical loss of a building caused by or resulting from any covered cause of loss" during the policy period.[3] Under the Policy, the definition of "building" did not include any business personal property.[4] Moreover, "business personal property" coverage encompassed "direct physical damage to or direct physical loss of business personal property, caused by or resulting from any covered cause of loss" commencing during the policy period. In support of its motion, Hiscox argued that the theft of client information, or other similar intellectual property, fell outside the scope of coverage for "business personal property" because the theft of data did not cause physical damage or loss to covered property.[5] In response, the Insured sought refuge in the Policy's additional coverage for Business Income. The policy provision provided coverage for income loss resulting from a halt to business activities "due to damage to or loss of covered property caused by or resulting from any covered cause of loss."[6]

The court found this argument unpersuasive because (1) pursuant to the Policy's definition of a "Covered Cause of loss," the inability to continue business activities must be tied to "damage to or loss of covered property caused by or resulting from" damage or physical loss that is not otherwise excluded or limited under the Policy; and (2) pursuant to the definition of "Covered Property,"

unlike buildings and business personal property, electronic data is excluded from the scope of covered property absent certain exceptions irrelevant to this case.[7] Put simply, the court reasoned that the Insured could not show direct physical damage or loss to the covered property. The court further highlighted that even though theft of its intellectual property may have resulted in economic loss, Texas law routinely requires the loss be "physical" and result in some "distinct, demonstrable, alteration of the property."[8] Here, there was no such alteration.

The Insured argued there was coverage under the Policy's Employee Dishonest Coverage extension, which provides coverage for "direct physical damage to or loss of covered property, money, and/or securities resulting directly from theft…by any of your employees…with the manifest intent to (a) cause [the Insured] to sustain damage or loss; and (b) obtain financial benefit… for any employee or any other person or entity." The court disagreed, however. The court reiterated that business personal property, as defined by the Policy, excluded electronic data.[9] Moreover, the court reasoned that the Insured failed to plead a loss to money or securities. Because its allegations of theft of confidential client information and website files did not constitute a loss of covered property caused by a covered cause of loss under the Policy, the court determined this argument lacked merit.

Accordingly, the court granted Hiscox's motion for summary judgment on the basis that despite the Insured's alleged loss of intellectual property, it did not sustain direct physical damage to its covered property and thus could not obtain benefits for business losses under the Policy.

The Lowdown: *Jab* is a great reminder that Texas courts consistently require a showing of "physical" loss to make a plausible argument for coverage. Even though a policyholder may experience an intangible loss that very well may result in economic losses, such as losses involving intellectual property, Texas law requires some showing that the loss results in a "distinct, demonstrable, alteration" of the insured property.

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[1] *Jab v. Hiscox Ins. Co., Inc*, No. H-23-CV-3853, 2024 WL 5264705, at *1 (S.D. Tex. Dec. 31, 2024).
[2] Id.
[3] Id.
[4] Id. Per the policy, "building" is defined as a building or structure identified in the policy, including completed additions, fixtures, permanently installed machinery and equipment in or on such buildings or structures, as well as certain personal property and furniture.
[5] Id. at *2. The court noted that Hiscox's argument paralleled arguments made by carriers when the coronavirus pandemic caused businesses to close and opened the floodgates to claims seeking business interruption policy benefits. In particular, the court noted the general trend of courts ruling in favor of insurers by holding that the virus did not cause physical damage sufficient to invoke coverage.
[6] Id. at *3.
[7] Id.
[8] Id. (citing *Fines v. State Farm Lloyds*, 392 F.3d 802, 807 (5th. Cir. 2004)).
[9] Id.

Lassoing Liability

with Megan Zeller

Love (and Murder) Is in the Air: Redefining What it Means to be a "Domestic Partner"

More often than not, liability coverage and how the courts interpret insurance policies often reflect current social mores and norms. As the dynamics around domestic households and partnerships continue to evolve, who constitutes a partner and what constitutes a family or relationship will likely impact who and what can be covered or excluded under personal liability coverage for homeowner's insurance policies.

Recently, in *Safeco Ins. Co. of Indiana v. Hanson*, an insurer attempted to grapple with who constitutes a "domestic partner." Typically, homeowners insurance policies exclude coverage for bodily injuries for anyone who is considered part of a household of a residential home. Safeco, however, has a unique policy that specifically defines "domestic partner," where:

> 1. Throughout this policy, "you" and "your" refer to the "named insured" shown in the Declarations and:
>
> ***
>
> c. your domestic partner, if a resident of the same household. "Domestic partner" means a person living as a continuing partner with you and:
>
> (1) is at least 18 years of age and competent to contract;
>
> (2) is not a relative, and
>
> (3) shares with you the responsibility for each other's welfare, evidence of which includes:
>
> (a) the sharing in the domestic responsibilities for the maintenance of the household; or
>
> (b) having joint financial obligations, resources, or assets; or
>
> (c) one with whom you have made a declaration of domestic partnership or similar declaration with an employer or government entity.
>
> Domestic partner does not include more than one person, a roommate whether sharing expenses equally or not, or one who pays rent to the named insured....
>
> ***

In this case, a homeowner lived in a home with her ex-husband, where she died from a gunshot wound. The ex-husband was charged with her murder, where a grand jury indicted him for "intentionally and knowingly caus[ing] the death of an individual . . . by shooting her with a gun OR then and there, with intent to cause serious bodily injury . . .".

The homeowner's children filed a wrongful death suit against the ex-husband, where the petition alleged that the homeowner "died as a result of a gunshot wound which was negligently caused by [the ex-husband] and is the proximate cause of death." The ex-husband tendered the suit to Safeco to defend and indemnify him under the terms of the homeowner's policy.

Shortly thereafter, Safeco sought declaratory relief and argued that the ex-husband was a "domestic partner" under the policy and as a result, excluded from coverage. Specifically, Safeco argued that the homeowner and her ex-husband were "domestic partners" under the terms of the policy because "[t]hey slept in the same bedroom, mingled their financial assets, and took care of each other by cooking and doing laundry for each other."

Ultimately, this case was ruled as a default judgment due to the ex-husband's failure to respond to Safeco's pleadings. Although the court never ruled on Safeco's domestic partner argument, the argument is nonetheless a compelling issue that insurers should be aware of. It could be argued that the ex-husband was merely a roommate, and therefore covered under the terms of the policy. The extent of how future parties mingle assets, share in the household duties, or their sleeping arrangements may ultimately determine if

the parties are just roommates or "domestic partners." Importantly, these coverage issues will likely not be determined under the "eight corners" that insurers are bound by in any duty to defend analysis. As a result, courts in Texas may have to determine whether the extrinsic evidence goes solely to an issue of coverage, as required by *Monroe*. Based on how Texas courts have interpreted *Monroe* in the last three years, I suspect a "domestic partner" exclusion argument is a perfect example of how extrinsic evidence may be applied under *Monroe*. In a case examining whether parties were "domestic partner[s]," the case would review extrinsic evidence that could conclusively establish the coverage fact to be proved and would likely not overlap with the merits of liability – assuming that the extrinsic evidence didn't contradict the facts alleged in the pleadings. Accordingly, insurers should be aware that in situations like these, extrinsic evidence may play a surprisingly vital role in a domestic partner analysis.

BEYOND THE BLUEBONNETS

The Aftermath of Covid-19 – New York's Expansion of Business Interruption Coverage

by Shelby Ross (New York Office)

It is without question that Covid-19 affected the insurance industry worldwide resulting in substantial litigation commenced by insureds to recoup losses linked to government mandated shutdowns for nonessential businesses. The question that remains is how will the insurance industry and state governments respond to the Covid-19 litigation?

New York swiftly responded by signing Bill No. A10342 into law, which authorizes stand-alone business interruption coverage. Specifically, the new law allows insurers to bind business interruption insurance policies that do not require physical loss or damage prerequisite to coverage. The law went into effect, as revised, on January 12, 2025, and is codified in New York Insurance Law Section 1113(a)(35), which as discussed in detail below, eliminates the prerequisite of requiring physical property damage and addresses government shutdown orders. Although Section 1113(a)(35) is new, it raises the question of how insurers should respond to this new law and whether it will affect market presence in New York, an already high-risk market for insurers.

Traditional business interruption insurance is designed to assist insureds in recovering lost profits and income caused by a covered loss, if the loss interrupts normal business operations. Importantly, for a loss to be covered under most traditional business interruption policies there must be direct physical loss or damage to covered property.

The traditional condition that requires physical loss or damage to covered property proved fatal to insureds seeking to recover economic losses caused by Covid-19. Insurers across the nation were able to defeat Covid-19 business interruption claims by relying on the plain language of their policies, which required physical loss or damage to covered property. As outlined in many of the Covid-19 cases, the economic losses resulting from the governmentally mandated shutdowns do not constitute direct physical loss or damage to covered property and thus were not covered.

By way of example, the New York Court of Appeals, New York's highest court, held that Covid-19, a virus, did not result in physical loss or damage to the restaurants as required by the policy. *See Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 41 N.Y.3d 415, 423 (2024). Specifically, the Court held that "direct physical loss or damage requires a material alteration or a complete and persistent dispossession of insured property, which petitioner has not alleged." *Id.* In *Consolidated Restaurant Operations, Incorporated*, the insured sought coverage under its "all risk" commercial property policy which covered business interruption losses "directly resulting from direct physical loss or damage" for the ensuing loss of revenue caused by the government restrictions placed on nonessential businesses during the Covid-19 pandemic. *Id.* Invoking New York rules of contract interpretation, the Court concluded that "direct physical loss" "requires more than loss of use; it requires an actual, complete dispossession" and the direct physical loss must cause business interruption losses to be covered. *See id.* at 429. The Court further held that the temporary presence of Covid-19 at the insured location is insufficient to meet the requirements of "direct physical loss or damage", for Covid-19 to be a "direct physical loss or damage" the insured property needed to be replaced, changed, or actually damaged. *See id.* at 434.

Subsequently, New York codified New York Insurance Law Section 1113(a)(35), which authorizes insurers to remove the physical

property damage prerequisite found in traditional business interruption insurance. Section 1113(a)(35) states in the relevant part:

> (a) The kinds of insurance which may be authorized in this state, subject to other provisions of this chapter, and their scope, are set forth in the following paragraphs. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom. . . .
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> (35) "Business interruption insurance" means insurance against loss of use and occupancy, rents, and profits resulting from a business closure due to: (A) loss of or damage to insured or neighboring property; (B) an act or threatened act of violence while the perpetrator is on the business premises; or (C) a government order.

N.Y. Ins. Law § 1113(a)(35) (2025). Of particular importance, is that the law defined "business interruption insurance" to include coverage for loss of use and occupancy and profits resulting from a closure due to government orders, without requiring direct physical loss or damage.

Therefore, insurers should consider whether to continue to sell traditional business interruption coverage or elect to sell business interruption insurance that removes the physical damage prerequisite to coverage. While the physical damage requirement under traditional business interruption is a prerequisite to coverage and was a kingpin in the insurers' coverage positions during the Covid-19 litigation, offering business interruption coverage that removes the physical damage requirement may offer insurers increased revenue through higher premiums and expansion in the New York market.

Ultimately, the reality is that insurers must evaluate whether they are willing to provide business interruption coverage that does not require physical damage, and if so whether the premiums paid outweigh the risks. At present, it is unclear whether the financial gain outweighs the potential risks involved in removing the physical damage prerequisite. Nevertheless, Zelle LLP continues to monitor the developments around New York Insurance Law Section 1113(a)(35) and its effects on the market.

Smoke: the Overachiever of Combustion Drama

COLLABORATION CORNER

by Edward Bauer and Gustavo Contreras (Electrostar LLC)

It is important to identify valid claims using the chemical properties of CBP (charred building products). If there is a commonality in the chemical composition of CBP, forensic analysis can be used to differentiate legitimate fire-related damage from fraudulent claims.

1. Scientific Validation: CBP has distinct chemical markers that indicate exposure to fire-related conditions, helping to confirm the legitimacy of a claim.

2. Forensic Testing: Utilize laboratory analysis to assess chemical signatures such as carbonization levels, volatile organic compounds (VOCs), and inorganic residue to distinguish real damage from artificially induced effects.

3. Pattern Recognition: Common characteristics of CBP (such as specific molecular degradation patterns) can help identify fraudulent claims where materials may have been intentionally altered.

4. Risk Mitigation: Using this approach can assist in avoiding fraudulent payouts, leading to lower claim costs and improved underwriting accuracy.

Read the full article here

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