ZELLE LLP LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Wednesday, March 19, 2025 | ISSUE 23

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.

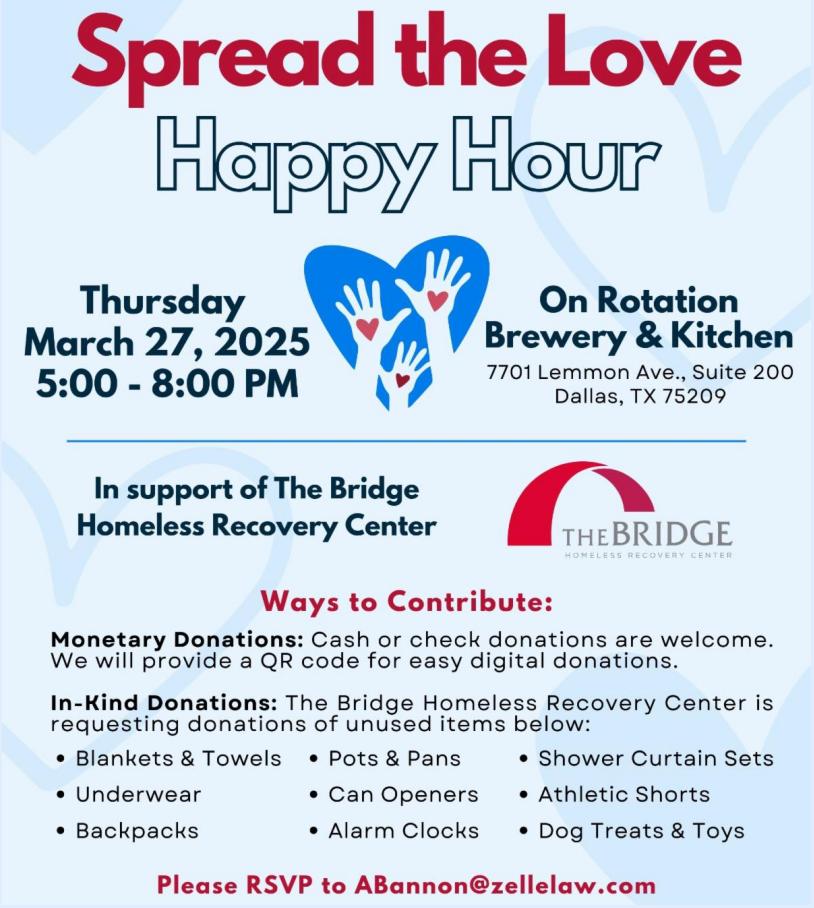
ZELLE LLP WHAT THE HAIL?

INSIDE THIS ISSUE

Upcoming Events

You don't want to miss this!

USBCG BCS Buchanan Clarke Schlader LLP ZELLE LLP



March 25 - Steve Badger will speak at the IAUA Appraiser/Umpire Certification Training in Houston, TX.

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

April 1 – Steve Badger will appear as a guest to discuss Preferred Contractor Networks at the Accuserve Booth at the PLRB 2025 Claims Conference in Indianapolis, IN from 3:00 pm - 5:00 pm.

April 2 – Eric Caugh will participate in a panel discussion on PFAS Liability Coverage Issues at the 3rd Annual PLI Property Casualty Insurance Law CLE in New York, NY.

April 8 – Steve Badger will present "What The Hail Is Going On? Update From The Trenches" at the Wisconsin Claims Association Conference in Fond du Lac, WI.

April 9 – Steve Badger will co-present "Effective Use of Forensic Meteorology" at the CLM Annual Conference in Grapevine, TX.

April 10 - Lindsey Davis will present "How Policy Wordings Can Respond to Common Property Claim Abuses" at the Western Loss Association Spring Seminar in Schaumberg, IL.

April 15 – Jonathan MacBride will present "Strategies for Working with Public Adjusters and Other Claims Advocates" at the Pennsylvania Association of Mutual Insurance Companies (PAMIC) Claims Conference in Lancaster, PA.

April 16 – Steve Badger will present "Hot Topics and Emerging Trends in Weather Claims" on the NAMIC Industry Trends Webinar Series from 2:00 pm - 3:00 pm ET.

April 17 – Steve Badger will appear as a guest on the Adjuster Hour Podcast.

May 8 – Jennifer Gibbs will participate in the panel discussion "Ethically Leveraging AI to Boost Productivity?" at the ABA TIPS Spring Conference in Washington, D.C.

May 21 – Todd Tippett will present "Dealing with Public Adjusters, Contractors, and Storm Chasers in Challenging Situations" at the NAMIC Farm Mutual Forum in Minneapolis, MN.

Watch For Registration and Sponsorship Information in Early April

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1. Hire a Professional Forensic Meteorologist

2. Corelogic (https://www.wvs.corelogic.com/wvs-ui/)

3. National Oceanic and Atmospheric Association (www.noaa.gov)

4. AccuWeather (www.accuweather.com)

News From the Trenches

by Steven Badger

The Texas Legislature has already been in session for two months. Less than three months remain in the 2025 session.

Numerous bills relating to first-party property insurance have been filed. Here is a summary of the important ones…

1. Appraisal
I have previously written about the proposed appraisal legislation. I remain opposed to legislating appraisal. Appraisal is a creature of contract. It exists because it is in our insurance policies. If there are problems in the appraisal process, they should be fixed through better appraisal language, not broad statutory schemes. With that said, I do not oppose legislation mandating appraisal clauses in all policies (except commercial surplus lines policies where form freedom exists). Appraisal is a prompt amicable method of resolving disputed claims.

2. 542A
Competing bills have been filed to modify the "Hail Bill". Two bills have been filed seeking to clarify that the pre-suit notice letter must contain a "specific amount alleged to be owed" that can be accepted by the insurance company to end the dispute. This was the obvious intent of the statute when passed in 2017. We need to end the abuse by certain policyholder attorneys who state a lowball specific amount in their pre-suit notice letter, but then state that it cannot be accepted. Conversely, a policyholder-friendly bill has been filed which would negate the *Rodriguez decision* and require insurance companies to pay attorneys' post-appraisal in 542A matters. Obviously, I support the former legislation and oppose the latter. Clearly, the latter is driven by policyholder attorneys who want to dump all their cases in appraisal, do as little work as possible, and then file lawsuits just to collect attorney's fees. It's shameful. It's also, in my opinion, a violation of Rule 1.04

5. Local News Outlets and weather personel have historical weather information

6. Weather Underground (www.wunderground.com)

7. National Weather Service (www.weather.gov)

8. National Center for Environmental Information (www.ncei.noaa.gov)

9. Storm Prediction Center (www.spc.noaa.gov)

10. And finally, Social Media Sites. People take pictures of weather-related events all the time.

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.

of the TDRPC to dump a matter into appraisal and collect a contingency fee. And that will undoubtedly become the norm if the bill passes. I will definitely be in Austin advocating for (and against) these bills.

3. Roofing Contractor Licensing
Groundhog day. A well-written consumer friendly bill that makes perfect sense. It is DOA in Austin.

4. RCV/Depreciation
This one is goofy. It limits depreciation to 20% of the claim amount. Why? Why does it even matter? If the insured does the work and incurs the holdback, they will get the entire claim amount. There is no rational justification for this bill other than to limit depreciation so people can collect as much ACV as possible without being required to do any work. That's not good for anyone. Well, except for the public adjusters and policyholder attorneys who want as much cash as possible to bleed into their pockets. And mark my words. If this bill passes you will see more insurers getting away from the concept of ACV payments and going instead to pure indemnity insurance – you incur the cost and we will send you a payment.

5. Anti-Public Adjuster Endorsements
Certain insurers still want to be able to use anti-public adjuster endorsements in their policies. My position remains the same. An insured should have the option to retain a public adjuster.

6. Foreign Arbitration Clauses
This legislation would prohibit policy provisions requiring arbitration in a foreign jurisdiction. I can understand the concern for individuals, small businesses, and Texas political bodies. But big businesses represented by sophisticated brokers in the insurance procurement process should have the freedom to purchase policies requiring arbitration wherever the parties agree.

7. Risk Pools
A large percentage of Texas school districts obtain property damage coverage through statutorily created risk pools. Under current Texas law, these risk pools are not subject to the Texas Insurance Code. So all the usual bad faith remedies, including statutory interest and attorneys fees, are not available in their matters. So it should come as no surprise that public adjusters and policyholder attorneys are trying to change that law. Imagine that. Texas school districts are already having a hard time buying property insurance. And lawsuit abuse is one of the contributing factors. At least one risk pool has closed. Private market insurers won't take the risk. Passing this legislation will only make things worse for our Texas school districts. This legislation is good for policyholder attorneys and bad for everyone else.

We will keep you posted on this and other legislation as the session progresses. Keep an eye on my LinkedIn page for periodic updates on any legislation that appears to be gaining traction.

AI Update

AI-Driven Parametric Insurer Launches in Bermuda and Texas

by Jennifer Gibbs

There's a new insurer in town – an artificial intelligence-driven parametric insurer, Mythen.

Founded by insurance technology veteran Sandra DeSilva, Mythen "combines advanced AI, machine learning, and remote sensing to provide liquidity and coverage for hard-to-insure risks." Mythen aims to alter the underwriting and management of natural catastrophe risks.

Mythen's WindSpeed™ product offers up to $500,000 in coverage for named storms, including hurricanes. This type of insurance product has been gaining traction around the world in recent years, and some view parametric insurance as an attractive alternative to some traditional indemnity policies.

Parametric insurance is a type of policy that covers a predetermined set of conditions -- instead of the actual loss sustained. Once an agreed-upon triggering event occurs, the insurer would then tender payment to the policyholder.

As risks evolve and policyholders look for more innovative and efficient ways to transfer risk, parametric insurance products are expected to gain more traction in the future.

Time will tell whether parametric insurance is the wave of the future, or merely an emerging trend, but until then: Welcome to the insurance party, Mythen!

Another One Strikes the Dust: Presuit Notice to Third-Party Adjuster Does Not Comply with Section 542A.003(a) of the Texas Insurance Code

by Alexander Masotto

As a question of first impression, the United States District Court for the Northern District of Texas analyzed whether issuing pre-suit notice to a third-party adjuster satisfies Section 542A.003(a) of the Texas

Insurance Code. Section 542A.003(a) states:

> In addition to any other notice required by law or the applicable insurance policy, not later than the 61st day before the date a claimant files an action to which this chapter applies in which the claimant seeks damages from any person, the claimant must give written notice ***to the person*** in accordance with this section as a prerequisite to filing the action.

Section 542A.001(5) defines a "Person" as a corporation, association, partnership or other legal entity or individual.

In *Devindra Investments v. Wesco Ins. Co*., No. 2:24-CV-097-Z-BR, 2025 WL 553071 (N.D. Tex. Feb. 19, 2025), the insured submitted an insurance claim under its commercial property policy for alleged damage due to a hailstorm. In response, the insurer retained a third-party adjuster to assist with the claim investigation. A dispute arose, the insured retained counsel, and insured's counsel issued a presuit notice letter to the third-party adjuster only.

After the insured filed suit, the insurer moved to strike the insured's claim for attorneys' fees under Section 542A.007(d). Based on the statute above, the insurer argued that notice needs to be directly provided to the insurer ("the person") because the insured is seeking damages from the same. The insurer added that Section 542A.003(a) does not mention service to any type of independent adjuster or agent, while other sections do (i.e. Section 542A.006).

In response, the insured contended that the adjuster is "the functional equivalent of a claims employee," handled the majority of communications with the insured, and had a "continuous and close relationship" with the insurer. Further, Plaintiff asserted that the Texas Insurance Code fails to distinguish between in-house and third-party / independent adjusters retained during a claim. However, the insured only pointed to an email from the third-party adjuster stating he would provide the notice to his legal department as evidence that the insurer was given and/or received that same notice.

Acknowledging the complexity of the present issue, the Court noted that: "The difficulty of this case stems from the fact that [the insured] attempted to discharge its duty under the statute, but [the insurer] appears not to have enjoyed the correlated right."

Despite the difficulties, the Court properly looked to the legislative intent of the Texas Insurance Code, the plain meaning of the language, and held that serving presuit notice on the third-party adjuster did not adequately put the insurer on notice under Section 542A.003(a). Accordingly, the Court granted the insurer's motion.

Moving forward, it is crucial that insurers continue to carefully discern when and to whom presuit notice is provided. Although not mentioned in *Devindra Investments*, insurers should also continue to check whether the underlying policy contains specific notice requirements in the event that a claim dispute ensues.

Spotlight

Zelle LLP welcomes Scott Keffer!

Scott will be joining Zelle's Dallas office as an Associate. We're excited to welcome him to the team and look forward to the valuable expertise and insights he'll contribute.

Court Enforces Pleading Standards and Dismisses Bad Faith Allegations

by Zachary Fechter

In *Fif Engineering, LLC v. Pacific Employers Ins. Co.* , No. 24-665, 2025 WL 593384 (S.D. Tex. Feb. 24, 2025), a United States District Court for the Southern District of Texas, Houston Division, granted an insurer's motion to dismiss all causes of action in an insured's second amended complaint, except breach of contract, and refused to allow the insured to further amend its complaint, because—on three different occasions—the insured did not sufficiently plead its causes of action under the Federal Rules of Civil Procedure.

Fif Engineering, LLC ("Fif") submitted a claim to its insurer Pacific Employers Insurance Company ("Pacific") after of one Fif's former employees reportedly stole company property. Fif alleged the theft caused $1,440,700 in damages, so when Pacific issued payment in the amount of $4,690.37, Fif filed suit in a Texas state court. In its original petition, Fif alleged breach of contract, breach of the duty of good faith and fair dealing, violations of the Deceptive Trade Practices Act ("DTPA"), violations of chapters 541 and 542 of the Texas Insurance Code, fraud, and ongoing conspiracy to commit illegal acts. After removing the case to federal court, Pacific

filed a motion to dismiss the causes of action alleged in Fif's original petition.

Under Fed. R. Civ. P. 12(b)(6), a party can move to dismiss causes of action it if the alleging party fails "to state a claim upon which relief can be granted." Courts apply two different standards when determining whether a complaint properly states a claim upon which relief can be granted. Under Fed. R. Civ. P. 8(a) and federal case law, a complaint generally must state a "short and plain statement of the claim showing that the pleader is entitled to relief," and the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Basically, a party must allege at least enough facts to "raise a right to relief above the speculative level." *Cicalese v. Univ. Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (citations omitted).

But when a party alleges fraud, the "heightened" pleading standard under Fed. R. Civ. P. 9(b) applies, which requires the party "to state with particularly the circumstances constituting fraud or mistake," including facts demonstrating the "who, what, when, where, and how" of the fraud. *Benchmark Elec., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (citations omitted). A motion to dismiss under 12(b)(6) is thus an argument that a party has failed to sufficiently plead its causes of action under Rules 8(a) and/or 9(b).

Based on the federal rules and pleading standards, the court granted Pacific's first motion to dismiss all of Fif's causes of action in the original petition, but allowed Fif to amend its complaint to satisfy the pleading standards. After Fif filed its first amended complaint, Pacific filed another motion to dismiss under 12(b)(6), which the court granted. The court again let Fif amend its complaint.

After Fif filed its second amended complaint, Pacific again filed a motion to dismiss all of Fif's causes of action, except breach of contract, under 12(b)(6). Applying Rule 8(a), the court ruled that Fif's cause of action for breach of the duty of good faith and fair dealing was essentially the same as in its two prior pleadings, so the court held that Fif's cause of action was not plausible and dismissed it. Moving to Fif's cause of action under Tex. Ins. Code Chapter 542, Fif conceded to the court that it misstated the deadline for payment under the statute, and Fif did not allege when or if Pacific notified Fif that it would pay the claim. Therefore, the court dismissed this cause of action.

The court then applied the heightened pleading standard in 9(b) to Fif's causes of action under Tex. Ins. Code Chapter 541 and the DTPA because Fif alleged Pacific fraudulently misrepresented the terms of the policy in violation of both statutes. The court determined that Fif failed to identify who made any alleged misrepresentation, Fif alleged it purchased the policy before any of Pacific's alleged misrepresentations, and Fif did not allege that Pacific's reported representation about theft coverage under the policy was false. As such, the court found that Fif did not satisfy the heightened pleading standard and dismissed these claims. Ultimately, the court dismissed all of Fif's causes of action except breach of contract. And because the court determined that providing Fif with another opportunity to amend its complaint would be futile, Fif could not amend its complaint, so only the breach of contract cause of action survived.

The court's holding in *Fif Engineering* should empower insurers to use the Federal Rules of Civil Procedure as a defense against "boilerplate" allegations lacking any factual detail. Insurers facing causes of action from their insureds, especially causes of action sounding in fraud, can dispose of baseless claims with relatively little expense by filing these Rule 12(b)(6) motions early.

When a Plaintiff's Counsel Thinks His Client is Dead and then Alive Again – Believe Him but Seek Sanctions

By Scott Keffer

In *Michael Mitchell v. USAA General Indemnity Company*, No. 09-23-00042-CV, 2025 WL 635235 (Tex. App.—Beaumont Feb. 27, 2025, no pet.), the appellate court affirmed dismissal of all Plaintiff's claims with prejudice, finding that Plaintiff failed to preserve error for appellate review in Plaintiff's suit for additional compensation related to his claim for property damage caused by explosions at a nearby chemical plant in Port Neches, Texas.[1]

Michael Mitchell ("Mitchell") submitted a claim for damage to his dwelling arising from the explosion to his carrier, USAA. On August 24, 2020, Mitchell's counsel Eric Dick of the Dick Law Firm ("Dick") issued a letter of representation and invoked appraisal. On October 13, 2020, Dick issued a demand letter seeking $39,182.25, including $29,182.25 in actual damages, and again invoking the policy's appraisal provision.[2] In contrast, USAA's adjuster prepared an estimate for $4,367.11 and paid $3,367.11 after application of the $1,000 deductible.[3]

USAA denied Dick's demand for appraisal, explaining appraisal would not resolve coverage issues raised by questions concerning the true cause of the claimed damage. Nevertheless, USAA retained an engineer to assess the difference between the parties' scope of damage and determine the cause of the claimed damage. That engineer found that except for minor interior damage consisting of two displaced doors, Mitchell's property was not damaged by the explosion. Instead, the discrete cracks in walls and ceilings and gaps in crown moldings were unrelated. Based on the engineer's conclusion, USAA denied the remainder of the claim but expressed that it would not ask for return of the prior claim payment. The claim denial also cited policy exclusions for damage caused by wear/tear, marring, deterioration, and cracking of walls and ceilings.

On April 13, 2021, four days after the claim denial was issued, Mitchell filed suit alleging breach of contract and breach of the common law duty of good faith and fair dealing, as well as fraud and violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act.[4] Attached to the petition, Mitchell designated a number of experts including himself. Mitchell also moved to compel appraisal, arguing that an appraisal was necessary to assess the amount of loss. Though USAA objected, the court compelled appraisal. During the appraisal process, both appraisers tried numerous times to visit the home to assess the damage. But neither Mitchell nor Dick responded to the appraisers' and umpire's requests for access. Because the appraisal could not move forward without access to the property, USAA filed a

motion to vacate the trial's order compelling appraisal.

At the June 24, 2022 hearing, Dick opposed USAA's motion to vacate and argued that Mitchell "passed away suddenly," which undercut USAA's argument that Mitchell intentionally tried to avoid the appraisal process.[5] The court reset the hearing so the parties could determine next steps given Dick's assertion that Mitchell had died. The day before the reset hearing, Dick retracted his "Suggestion of Death", stating that Mitchell was "actually very much alive and has new contact information."[6] Dick then stated the appraisers were in contact with Mitchell and the inspection could move forward. The court, though, granted USAA's motion to vacate the order compelling appraisal.

USAA issued discovery to Mitchell, seeking information to support the parties' difference in the scope of loss. Upon Mitchell's failure to respond to that discovery, USAA moved to compel. A hearing on USAA's motion to compel was set for November 3, 2022. At that hearing, Dick sought excuse from discovery because he alleged that Mitchell died. The court reset the hearing for two weeks later. In the interim, USAA sought sanctions against Mitchell for his failure to provide timely discovery responses, some responses were contradictory, and due to Dick's reassertion that Mitchell was deceased despite his prior retraction. In particular, USAA noted that Dick asserted Mitchell was dead on the same date that Dick signed unverified discovery responses that claimed Mitchell "answered the requests or provided information to answer the requests."[7] USAA argued that either the response to USAA's motion to compel was groundless when Dick affirmatively stated that Mitchell had died or the responses to interrogatories were groundless when Dick affirmatively stated Mitchell had answered the requests.

Ultimately, the trial court dismissed the case with prejudice, finding that "Plaintiff completely failed to serve his answers and responses as required by TEX. R. CIV. P. 197.2(a). . . ." and questioned how "[w]ithin hours of Plaintiff's counsel re-asserting Plaintiff's Suggestion of Death, Plaintiff's counsel served discovery responses, including answers to Interrogatories, purportedly answered by Plaintiff. . . ." [8] The trial court concluded that "Plaintiff has completely failed to fulfill discovery obligations and has abused the discovery process. . . . [i]n addition, counsel for Plaintiff violated TEX. R. CIV. P. 13 by signing and filing pleadings that were groundless, brought in bad faith, or brought for the purpose of harassment. . . ."[9] Finally, the trial court confirmed that it considered lesser sanctions relative to the severe death penalty dismissal sanction; however, due to Plaintiff's "multiple violations of the Texas Rules of Civil Procedure and violations of this Court's orders, there are no lesser sanctions that would fully promote compliance."[10] Mitchell moved for a new trial and for reconsideration of the trial court's dismissal order wherein he represented that his discovery failures were the result of communication difficulties and that an appraisal award had been issued but rejected by USAA (a point that USAA denied and was later abandoned in Mitchell's amended motion). The trial court denied Mitchell's motions as they lacked specific arguments regarding why the death penalty sanction disposing of Plaintiff's suit was unwarranted.

On appeal, Mitchell advanced similar arguments that the trial court erred by imposing the death penalty dismissal sanction. The appellate court agreed with USAA and also found that Mitchell's arguments lacked the requisite specificity to support his contentions.[11] Therefore, the appellate court affirmed the trial court's dismissal with prejudice.

The Lowdown: This case illustrates the importance of aggressively pursuing and protecting the insurers' rights, especially in light of an insured's failure to cooperate under the policy and applicable law. Here, the amount in controversy was relatively low, and it's likely that the attorneys' work and fees exceeded the amount at issue. But the insured's and plaintiff's counsel's misconduct was so egregious that standing firm and fighting to enforce the policy terms and law was the right and best approach.

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[1] *Mitchell*, 2025 WL 635235 at *10-*12.
[2] *Id.* at *3.
[3] *Id.*
[4] *Id.* at *5.
[5] *Id.* at *6.
[6] *Id.*
[7] *Id.* at *7.
[8] *Id.* at *8.
[9] *Id.* at *9.
[10] *Id.* at *10.

[11] *Id.* at *11-*12.

BEYOND THE BLUEBONNETS

Balancing Discovery and Protecting the Attorney-Client Privilege In the

Insurance Coverage Context

by Meredith C. Schilling (Philadelphia Office)

A recent case out of Colorado highlights the continued attack on the attorney-client privilege during the claim adjustment process. In *In re: Hill Hotel Owner, LLC v. Hanover Insurance Company*, 557 P.3d 798 (Colo. Oct. 29, 2024), the District Court issued an order requiring the insurer defendant to turn over all communications between two structural engineers and outside counsel. Ultimately, the Colorado Supreme Court returned the case to the District Court to reconsider its order after the District Court acknowledged an error in its analysis. While the case has been remanded, it still raises significant concerns about how courts view communications with outside counsel during the claim adjustment process.

Background of Underlying Case

In the underlying case, Hill Hotel Owner, LLC constructed a hotel in Boulder, Colorado, including a basement parking garage with a thick concrete slab floor. *See* Original Proceeding (District Court, Denver County, Case No. 23CV31492). In 2022, damage to the concrete slab floor was discovered. Hill Hotel claimed rain caused the damage and filed a claim with Hanover Insurance Company under its Builder's Risk Policy seeking to recover remediation costs.

During the adjustment, Hanover retained a structural engineer who concluded that the cause of the loss was due to faulty workmanship not covered by the Builder's Risk Policy. Hanover hired a second structural engineer to review the findings and provide additional insight. Hanover's outside counsel consulted with the structural engineers for guidance on the technical matters related to the construction. These communications became the focal point of a privilege dispute after Hanover denied coverage and Hill Hotel sued for breach of contract and bad faith.

Hanover claimed that the communications were protected by the attorney-client privilege because its outside counsel was providing legal advice, but Hill Hotel disagreed, arguing the attorneys were involved in an ordinary factual investigation with third-party engineers. The District Court agreed with Hill Hotel and granted its motion to compel, finding that the communications were not protected by either work-product or attorney-client privilege because they were not prepared in anticipation of litigation. *See* April 12, 2024 Order re: March 21, 2024 Discovery Dispute (Dorancy, J.).

Appeal to Colorado Supreme Court

Hanover filed a Petition for Rule to Show Cause to the Colorado Supreme Court. Having made no finding that the privilege had been waived or that any other recognized exception to the privilege applied, Hanover argued that the District Court ignored longstanding case law and made a critical legal error by imposing an anticipation-of-litigation element on Colorado's attorney-client privilege. "The District Court's rule conditioning the attorney-client privilege on anticipation of litigation imperils virtually all of Hanover's pre-litigation privileged communication with outside counsel and threatens to make counsel for both sides witnesses." *See* April 22, 2024 Petition for Rule to Show Cause under C.A.R. 21 (Supreme Court Case No. 2024SA113). Relying on *Alliance Construction Solutions v. Department of Corrections*, 54 P.3d 861 (Colo. 2002), Hanover also argued that the District Court failed to address the context and purpose of the communications in question, which were created for the purpose of Hanover obtaining legal

assistance. *Id.* at 869-87 (providing the elements of the attorney-client privilege and citing the Restatement (Third) of the Law Governing Lawyers § 68). Hanover requested an order vacating the District Court's ruling and remanding the case with instructions to apply the "legal assistance" test for privilege. *See* Petition.

On appeal to the Supreme Court, the parties, and several other entities filing amicus briefs, argued the issue of whether claims adjustment communications with an insurer's experts and outside counsel are privileged. Their approach to the issue was unequivocal: either it's always privileged or it's always discoverable. The policyholder side argued that courts consistently "confer great weight upon the purported objectivity of experts retained during a claim investigation." *See In Re Hotel Owner, LLC v. Hanover Ins. Co*., 2024 WL 4678370, at *9 (Corrected Brief of Amicus Curiae the Colorado Trial Lawyers Association). Extending the attorney-client and work product privileges to outside counsel conducting routine claims investigations lets insurers abuse the privileges to hide bad faith claims handling activities by "shopping" for attorneys and hiring multiple investigators to develop "alternative reports and theories" that support a bad faith position, all of which will be hidden from policyholders. *See e.g. In Re Hotel Owner, LLC v. Hanover Ins. Co*., 2024 WL 4678369, at *16 (Brief of Amicus Curiae United Policyholders in Support of Respondent).

The District Court then unexpectedly admitted that the rationale used in ordering disclosure of the communications was wrong. *See In Re Hotel Owner, LLC v. Hanover Ins. Co*., 2024 WL 4678373, at *8 (Denver County District Court's Response to the Petition to Show Cause) ("The District Court agrees that the test for attorney-client privilege does not hinge on whether litigation was anticipated and that its April 12 Order was incorrect in ruling otherwise."). Notwithstanding the District Court's admission, Hanover asked the Supreme Court to issue a decision on appeal to clarify questions about the correct standard. The Supreme Court declined to revisit existing precedent and instead issued an order directing the District Court to reevaluate the privileged nature of the communications. *See In Re Hotel Owner, LLC v. Hanover Ins. Co.* , 557 P.3d 798 (Colo. Oct. 29, 2024).

Comment

While the ultimate outcome in this case is unknown, it highlights the ongoing attack on the traditional protections provided by the attorney-client privilege when those communications occur as part of a claim adjustment. Policyholders and their advocates have been increasingly seeking to discover communications between insurers and their attorneys made during claim investigations, like the policyholder did in *Hill.* It can no longer be presumed that by simply hiring outside counsel during the claim adjustment, communications with counsel will be protected. Courts are increasingly finding that if those communications are part of the adjustment process, as opposed to seeking legal advice, they are not protected. When hiring outside counsel and involving an expert, it is important to understand that not all communications will be protected by the attorney-client privilege. Delineating that the communications are intended to be part of the legal advice counsel was hired to provide supports the argument that they should be protected.

Builder's Risk: Complexities in Insuring Existing Property

by Jonathon Held (J.S. Held)

Builder's risk policies and time element coverages for renovation projects can be more complex than those for new construction.

In this article, J.S. Held CEO Jonathon Held shares a hypothetical case study illustrating unique considerations in insuring a renovation project under a builder's risk policy and strategies for avoiding confusion and contention following a loss.

COLLABORATION CORNER

Read the full article here

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.

Visit our Website

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

Contact Us!

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