ZELLE LLP

LONESTAR LOWDOWN

Dedicated to Texas First-Party Property Claims

The Zelle Lonestar Lowdown | Monday, April 21, 2025 | ISSUE 24

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. Stay tuned for more information about our next quarterly event, collaborating with some of our partners in this industry to encourage networking and discussion on the issues in our field. 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?

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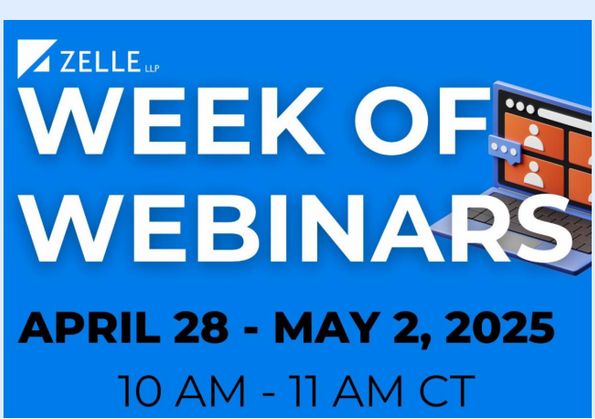
Upcoming Events

You don't want to miss this!



Monday, April 28
Helpful Rules for Applying Ensuing Loss Provisions
Presenters: Jane Warring and Kristian Smith

Tuesday, April 29
Code Enforcement in Commercial Cases
Presenters: Seth Jackson and Michael Upshaw

Wednesday, April 30
Challenges in Adjusting Time Element Losses
Presenters: James Chin and Jonathan MacBride

Thursday, May 1
Tendering Defense and Indemnity to Excess Carriers and Other Parties
Presenters: José Umbert, Hernán Cipriotti, and Bryant Green

Friday, May 2
PFAS and Climate Change: What Insurers Need to Know
Presenters: Eric Caugh and Jason Reeves

11:00 AM - 12:00 PM ET | 4:00 PM - 5:00 PM GMT

Register now!

Approved for CE credit in various states!

April 22 - Steve Badger will present "Hot Topics in CAT Claims" webinar hosted by the North Alabama Claims Association.

April 29 - Steve Badger will present "Trends in the Appraisal Process," P.L.A.N. (Property Loss Appraisal Network) Property Loss Appraiser & Umpire Certification Course in New Orleans, LA.

May 6 - Steve Badger will present “Legal Issues in Appraisal - Global Perspective,” Insurance Appraisal and Umpire Association, Inc. (IAUA) training and certification program in Denver, CO.

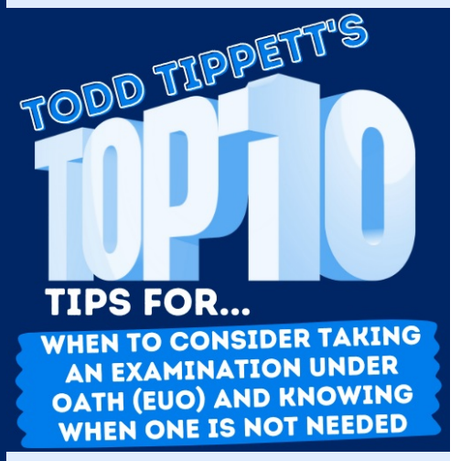
May 7 - Brandt Johnson will present "Fraud in CAT Claims" at the TASIU Gulf Coast Insurance Fraud Seminar in Pasadena, TX.

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.

June 24 – Brandt Johnson, Lindsey Davis, and Jessica Port will present at the PLRB Western Regional Adjusters Conference in Glendale, AZ.

Registration will open July 1, 2025!



1. One should consider taking an EUO when there is suspicion of Fraud or Misrepresentation in the application for insurance.

2. One should consider taking an EUO when there is suspicion of Fraud or Misrepresentation in the presentation of the claim.

3. One should consider taking an EUO when the claim involves complex issues that require clarification to

News From the Trenches

by Steven Badger

When I am asked for the highlights of my 34-year legal career, several things come to mind. Of course, at the top of the list was the day, after a decade of work, that my $1.2 billion 911 terrorist attack subrogation recovery hit our law firm bank account, ready to be distributed to our clients. That was obviously a memorable day.

But if I had to list the proudest day of my career, I would have to say it was the final day of the 2019 Texas legislative session when our “deductible bill” fully and finally passed through the Texas legislature. It is not easy to get legislation passed. There are so many steps to the process, each lined with roadblocks and landmines. Even a simple common sense bill.

We have always had a Texas statute prohibiting the waiving of insurance deductibles. But it was vague and had no enforcement mechanism. In 2016, the Roofing Contractors Association of Texas came to me and said: “Badger, our members are tired of losing jobs to deductible eaters, we need to fix this.” And I agreed. In addition to the practice being unfair to reputable roofing contractors, I knew that a lot of bogus insurance claims were filed because the insured had no skin in the game. Even if the homeowner knew it hadn’t even hailed at their home, if a contractor was going to get them “a free roof”, then why not try?

So I went to work on the legislation. I drafted proposed language. I worked with RCAT to find a bill sponsor. I testified in multiple committee hearings. I met with key legislators and lobbyists to garner their support. And on the final day of the legislative session all that was left was a final conforming vote in the House. I thought it was a done deal.

Out of nowhere, with just six hours until the session ended, the bill got killed by a House member who had been fed some misinformation about its intent. He gave a speech on the House floor that

determine coverage.

4. One should consider taking an EUO when the facts are disputed due to the insured presenting conflicting accounts or no account at all.

5. One should consider taking an EUO when it appears that Conditions within the policy have been violated, i.e., - the insured provided late notice of the claim and has not explained why that notice was tardy.

6. An EUO is not necessary when the insured is cooperative and provides the information and documentation necessary to complete the investigation and adjustment of the claim.

7. An EUO is not necessary when the facts are not in dispute and coverage is clear.

8. An EUO is never appropriate if its sole purpose it to intimidate the insured and its claim position – an EUO should only be used to gather necessary information and clear up discrepancies.

9. An EUO is not necessary when the insured has presented a reasonable settlement position.

10. An EUO is never appropriate for the sole purpose of delaying the resolution of a claim.

Feel free to contact **Todd M. Tippett** at 214-749-4261 or ttippett@zellelaw.com if you would like to discuss these Tips in more detail.

spooked some House members and caused them to vote against it. It failed passage by 7 votes. I was shocked and gutted. Almost a year of hard work wasted.

Fortunately, I had friends in the strongest lobbying group in Austin. I called in a favor. What happened next was nothing short of mind-blowing. Ten minutes later I was in a group text with the speaker of the house, the lieutenant governor, the bill sponsor, several key House members, and several of the legislators who voted against the bill. The text stated that "HB2102 is a necessary bill". Shortly thereafter, the legislation was put up for a reconsider vote and……..it passed. The governor signed the bill a few days later. Wow. What a lesson in politics.

So why tell this story?

Because I am very sad that six years later we still have deductible eaters all across Texas. While the problem is less severe than it was before, deductible waiving remains a problem. Why? Mostly because there is no enforcement. The Texas Attorney General and Texas Department of Insurance have failed to make enforcement a priority. I am working on that issue now.

But here is how all of you can help. The legislation contains this language:

"A*n insurer that issues a property insurance policy with replacement cost coverage may refuse to pay a claim for withheld recoverable depreciation or a replacement cost holdback under the policy until the insurer receives reasonable proof of payment by the policyholder of any deductible applicable to the claim. Reasonable proof of payment includes a canceled check, money order receipt, credit card statement, or copy of an executed installment plan contract or other financing arrangement that requires full payment of the deductible over time."*

We intentionally created this "private right of enforcement" so that insurance companies could help enforce the law – you don't show proof that you paid your deductible, you don't get your RCV holdback. And who loses in that situation? The roofer who ate the deductible. Because the new roof is installed. If the roofer can't get paid for all of its work, the roofer is going to stop the offending conduct.

So "Badger's Rant" today is directed at those Texas insurance companies – both residential and commercial – who are not enforcing this simple requirement. When that RCV holdback comes in, along with requesting confirmation that the work is done and proof of amount actually incurred, insurance companies must also ask for reasonable proof that the applicable deductible has been paid. And under this legislation, the insurance company can refuse to pay the RCV holdback until such proof is provided.

Shame on any Texas insurance company that is not requiring such proof. Do your part in helping us end the waiving of deductibles in Texas.

AI Update

AI Avatar Does NOT, In Fact, Please the Court

by Jennifer Gibbs

A New York Appellate Court faced an interesting situation on March 26, 2025, when a *pro se* litigant, Jerome Dewald, attempted to use an AI avatar as his counsel to argue for a reversal of the lower court's decision in an employment dispute.

Dewald apparently requested permission from the court to use an audio-video presentation as part of his oral argument, and the court granted the request. However, the court's accommodations for the *pro se* litigant were short lived when Dewald began playing a video of a much younger man (later determined to be an AI avatar) – beginning his speech with "May it please the court." (the argument starts at 19:30). After a few seconds, Justice Sallie Manzanet-Daniels recognized that the video was of an avatar and chastised Dewald, advising that she did not "appreciate being misled" – and promptly asked someone to turn off the video.

Although Dewald later apologized to the court for using an AI avatar, his case is still pending, and it is unclear whether the improper use of AI will ultimately have an impact on the outcome of the litigation.

Experts in the field of AI have opined that it was only a matter of time before someone used a synthetically-produced video to present his or her case – especially in light of the fact that Arizona's Supreme Court intentionally began using two AI-generated avatars similar to the one used by Dewald to summarize court rulings for the public (apparently to make the judicial system more publicly-accessible).

And although (for now) those seeking to use AI avatars in the courtroom will likely avoid the First Judicial Department Appellate Division of the Supreme Court of the State of New York, with the growing use of AI in nearly every profession and discipline, both litigators and justices will likely counter this unusual courtroom participant in the future.

Any is Not All and The Future is Not Now: The Contours of the Cosmetic Damage Exclusion Taking Shape

by Lindsey Bruning & Scott Keffer

In *Iyengar v. Liberty Insurance Corporation*, No. SA-21-CV-1091-FB, 2024 WL 5505300 (W.D. Tex. Dec. 13, 2024), District Judge Biery denied Plaintiffs' Motion for Clarification regarding Magistrate Judge Bemporad's interpretation of a Cosmetic Loss or Damage Exclusion, ultimately confirming there was no further need to clarify.

The Court's Report and Recommendation at issue, 2023 WL 8505692 (W.D. Tex. Oct. 24, 2023), considered the application of a cosmetic damage exclusion in a claim involving dents to metal roofing, wherein Plaintiff argued that the cosmetic damage exclusion did not apply because there was damage to the protective zinc coating of the metal roofing material. Specifically, Plaintiff claimed that the damage to the protective zinc coating satisfied policy language requiring damage to the metal roofing materials. *Id.*

But the Court disagreed, finding that to avoid application of the cosmetic damage exclusion, "there must be penetration through *all* of the metal materials—not just the protective zinc coating—in order for the exception to the cosmetic exclusion to apply." *Id.* at *4 (emphasis in original). The Court further rejected Plaintiffs' expert's contention that the damage was functional in nature as such expert testified only that "the dents prevent the metal roofing materials from keeping the element *off* the roof—not *out* of the home." *Id.* at *5 (emphasis in original). Finally, the Court rejected predictions of future damage related to ensuing rust and corrosion, holding that "[c]onjecture regarding what might happen at some unknown point in the future is not evidence that the metal materials are presently unable to perform their intended function of keeping out the elements. . . . [wherein] the problem posed by the loss in zinc coating is that the steel substrate would be exposed to the elements, subject to increased rust and corrosion. . . . [which] the Policy expressly excludes . . . ." *Id.*

Despite the foregoing, the Court ultimately denied Liberty's Motion for Summary Judgment on its claim for breach of contract, finding that Plaintiffs' evidence was sufficient to raise a genuine factual dispute as to whether the hail damage caused a leak in the roof—another basis to avoid application of the cosmetic damage exclusion. *Id.* But the Court granted summary judgment on Plaintiffs' claim for treble damage under the Texas Insurance Code, holding that Liberty did not *knowingly* violate the Texas Insurance Code. *Id.* at *8.

As noted above, District Judge Biery accepted, approved, and adopted Magistrate Judge Bemporad's factual findings and legal conclusions, and further declined to reconsider the same in the Court's December 13, 2024 Order.

The Lowdown: This case demonstrates the typical battle involving cosmetic damage exclusions. Often this involves an insured straining policy language to meet an exception to the exclusion (such as reduced function or reduced lifespan). However, following *Iyengar*, an insured would be remiss to rely on arguments involving only the zinc coating of the allegedly damaged metal roof covering, or predictions of future damage (particularly where such alleged future damage is also excluded under the policy). On the other hand, insurers must conduct reasonable investigations whenever necessary to support a claim determination that a claim falls within the parameters of a cosmetic damage endorsement.

"Occurrence" Provisions Within Excess Policies Support an Exposure Trigger Theory Application for Asbestos-Related Claims

by Alexander Masotto

Asbestos fibers, chemical fumes, environmental pollutants—what do they have in common? They all involve injuries that manifest over time and are continuously at the center of the complex exposure trigger debate.

On March 31, 2025, the United States District Court for the Northern District of Texas granted two excess insurers' motions for summary judgment in part and held that their respective excess policies were not triggered by two out of the three underlying asbestos lawsuits. Each underlying lawsuit presented distinct allegations relating to injury and exposure.

In *Berkshire Hathaway Specialty Ins. Co. v. Interstate Fire & Cas. Co., et al.* , No. 4:22-CV-01137-P, 2025 WL 963365 (N.D. Tex. Mar. 31, 2025), the dispute involved excess liability coverage for asbestos-related personal injury claims stemming from products manufactured by Murco Wall Products, Inc. sold in the 1970s and 1980s. Eventually, plaintiffs in several state-court lawsuits alleged that exposure to asbestos in Murco's products caused them to develop serious illnesses decades after exposure.

Murco's primary insurers either became insolvent or exhausted their policy limits, leading Murco to seek coverage from its excess insurers. After Berkshire Hathaway Insurance Company agreed to defend and indemnify Murco in three underlying suits, it sought contribution from the other excess insurers Canal Insurance Company and Interstate Fire & Casualty Company for their pro rata shares, arguing that their policies covered the three claims.

In response to Berkshire's pleading seeking coverage under Canal's and Interstate's policies, Canal and Interstate moved for summary judgment on the basis that none of the underlying lawsuits triggered their policies. Accordingly, Canal and Interstate argued they were not obligated to contribute to Murco's settlement or defense costs because any alleged injuries did not occur during their policy periods.

U.S. District Court Judge Mark T. Pittman carefully analyzed the occurrence-based policies to determine when the "occurrence" took place. While the Court acknowledged the existence of many trigger theories, Canal and Interstate asserted that binding Texas precedent required the court to apply an exposure theory. Under the exposure trigger theory, "occurrence-based policies only cover the insured when at least part of the asbestos exposure occurs during the policy period."

In contrast, Berkshire contended that courts approach the trigger issues on a "case-by-case basis" based on the express terms of each policy to accurately determine the appropriate trigger theory. Based on the policies at issue, Berkshire argued that an injury-in-fact theory should apply, even if the claimant's actual exposure to asbestos stopped before the inception of the Canal and Interstate policy periods. Under the injury-in-fact trigger theory, the meaning of occurrence includes "the damage that takes place in the body after a person has stopped inhaling asbestos."

Although the plaintiffs in the underlying suits were exposed before the policy periods, Berkshire provided evidence that the asbestos fibers continued to cause tissue damage long after inhalation.

After carefully considering the theories, Judge Pittman held that the exposure theory applied because: "The chronic damage caused by latent asbestos fibers may reasonably be called an 'injury,' or even a 'condition,' but it is certainly not 'exposure' to a condition. Moreover, the relevant policies defined "occurrence" as "exposure . . . which [causes or results in] personal injury."

Ultimately, the Court stated that it was adopting the same exposure trigger theory as the United States Fifth Circuit Court of Appeals in *Guaranty National Ins. Co. v. Azrock Industries* , 211 F.3d 239 (5th Cir. 2000), but with slight distinction. Specifically, the Court held that the Canal and Interstate policies "do not require the injury to take place during the policy period—**just the exposure**." In support of the decision, Judge Pittman added that this policy interpretation "favors coverage more" than the ruling in *Azrock* because mere allegations of exposure during the policy periods, not necessarily injury, are sufficient to trigger the duty to indemnify.

Applying the rules above, Judge Pittman found that two out of the three underlying lawsuits did not contain

Spotlight

Thank you!

A huge thank you to those who attended Zelle LLP, Buchanan Clarke Schlader, and US Building Consulting Group "Spread the Love" Happy Hour and contributed to donations benefiting The Bridge Homelessness Recovery Center.

If you are interested in participating in a future collaboration event, please contact us using the button below.

Contact Us

any allegations of exposure during the policy periods. However, the allegations in the other lawsuit, while vague, were sufficient to create a genuine issue of material fact.

This decision clarifies and reinforces the application of the exposure trigger theory under Texas law for occurrence-based liability policies in asbestos-related claims. It also highlights the importance of the "occurrence" policy language and ensures courts will prioritize the plain meaning of the terms when determining coverage triggers.

Concurrent Causation is Key – Fifth Circuit Holds Insured to its Causative Burden

by Hannah Motsenbocker

The United States Fifth Circuit Court of Appeals recently affirmed summary judgment granted by the bankruptcy court in favor of commercial property insurer in a Winter Storm Uri claim, holding that the insured motel owners could not provide a reasonable basis for estimating the amount of damages attributable solely to covered damage versus uncovered damage and failed to assert an injury independent of its contractual claims.

In The Matter of New York Inn, Inc. v. Associated Industries Insurance Co ., 2025 WL 999084, (5th Cir. 2025), Associated Industries Insurance Co. (Associated) issued an insurance policy to Viva Inn, Inc. (Viva) for the Viva Inn Motel in Arlington, Texas (the Motel). Following Winter Storm Uri in February 2021, Viva filed a claim for water damage to the Motel from a burst pipe. Between March 2021 and June 2022, Associated paid Viva $271,538.65 for damage to the Motel.

In May 2021, an involuntary chapter 11 bankruptcy proceeding was filed against New York Inn, a corporate affiliate of Viva and additional insured under the policy at issue, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

New York Inn and Viva (collectively the "Motel Owners") then filed a complaint in the bankruptcy proceeding against Associated alleging that Associated failed to perform under the policy by underpaying the claim. Motel Owners asserted a breach of contract claim, statutory bad faith claims, and a common law bad faith claim. Associated filed a motion to dismiss and motion to deny the request for attorney's fees as well as a motion for summary judgment. The bankruptcy court granted all three motions and Motel Owners appealed.

The U.S. District Court for the Northern District of Texas did not rule on the motion to dismiss nor the motion to deny attorney's fees, therefore the 5th Circuit remanded these motions for review, however, the district court did adopt the bankruptcy's court report and recommendation as to Associated's summary judgment, which is the subject of this 5th Circuit opinion.

On appeal, Motel Owners raised three theories of breach of contract including Associated's failure to pay the full amount owed for (1) repairs to the Motel (Building Repair), (2) contents in the Motel (Contents), and (3) interruption to the business caused by damage from the storm (Business Interruption). Motel Owners also asserted extra-contractual claims of (1) common law bad faith; (2) statutory bad faith under the Deceptive Trade Practices Act (the DTPA), and Chapter 541 of the Texas Insurance Code; and (3) statutory bad faith under Chapters 542 and 542A of the Texas Insurance Code.

A. Breach of Contract

1. Building Repair

In evaluating Motel Owners' breach of contract claim with respect to Building Repair, the Fifth Circuit assessed Motel Owners' (1) evidence of direct damage to the Motel and (2) evidence related to additional payment for the fire alarm and held both forms of evidence did not create a genuine dispute of material fact sufficient to overcome Associated' summary judgment motion.

Motel Owners provided three sources of evidence: (1) Decagon's, the renovation company, invoices, subcontractor invoices, and expert testimony from Roger Pate, owner of Decagon. The bankruptcy court concluded that Motel Owners' evidence did not differentiate between costs of Building Repairs attributable to risks covered by the Policy (i.e., the water damage from the storm) and costs attributable to risks not covered by the Policy (i.e., the mold damage due to the delay in remediating the water damage).

On appeal, Motel Owners argued that the bankruptcy court (1) improperly attributed the delay in remediation to the Motel Owners, rather than Associated, (2) did not recognize that Motel Owners sought moisture mapping before remediation, and the request was denied, and (3) did not acknowledge the scarcity of remediation contractors following the storm.

The Fifth Circuit concluded that **[a]lthough we sympathize with Motel Owners' struggle to secure a contractor following the storm and their insufficient funds to commence immediate remediation, that does not make the doctrine of concurrent causes disappear**. The Court cited to *Dallas Nat'l Ins. Co. v. Calitex Corp* ., 458 S.W.3d 210 (Tex. App. 2015), stating that "[u]nder the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril" and that it is the insured's burden to segregate covered and noncovered perils.

The Court held that Motel Owners did not provide any case law to support the proposition that an insurer's delay in issuing a payment for a claim means that any resulting damage to the property during the delay should be covered by the insurance policy. The Court also noted that Motel Owners' argument contradicted the language in the policy that instructs the insured to "[t]ake all reasonable steps to protect the Covered Property from further damage and keep a record of your expenses necessary to protect the Covered Property" as well as the claim adjuster's specific recommendation to insured's public adjuster that Motel Owners should begin water mitigation because the requested moisture mapping will unnecessarily delay the mitigation process. Based on the same, the Court concluded that the responsibility rested with Motel Owners to begin remediation efforts, but they waited at least six weeks to do so, and as a result, the Motel suffered additional, non-covered damage.

As to the Decagon and subcontractor invoices, Motel Owners conceded that the invoices included references to noncovered repairs but argued that "such repairs were *not included* in its damages calculations," and even if they were, they "can be easily deducted with mathematical certainty." The Court rejected this argument and held that Motel Owners cannot provide a reasonable basis for estimating the amount of damage or proportionate damages attributable solely to the water damage (rather than the mold) with invoices that do not differentiate between those two causes.

Regarding Associated's expert's inconsistent statements, Pate testified in his deposition that some of the line items on his invoices and the repairs he made were not done to remediate damage caused by the flood, but in his affidavit filed in January 2023, he stated that "[m]y invoice and billing only includes work done to remediate the flood damage. Other work, such as for the roof, does not appear in Decagon's charges." The Court held that Motel Owners did not provide an explanation as required under Texas law but instead simply asserted that there is no conflict. Nonetheless, the Court held that even if Motel Owner provided an explanation, Pate's statements did not create a genuine dispute of material fact as to whether Associated owed Motel Owners more money for Building Repairs because his statements did not differentiate between costs attributable to covered versus noncovered damages.

Finally, with respect to the fire suppression system, Motel Owners replaced the original plastic pipes in the sprinkler system with metal pipes. The Court held, however, that Motel Owners did not offer any argument/evidence that plastic and metal pipes are "of comparable material and quality" under the terms of the policy, therefore, Motel Owners are not entitled to more money for the RCV payment.

2. Contents

The bankruptcy court concluded that no reasonable juror could find that Motel Owners were entitled to more than $10,000 for Contents because Motel Owners had not submitted the required documentation for additional coverage, the valuation data Motel Owners pointed to was outdated, and no credible evidence existed in the record showing that Motel Owners paid more than $9,600 to replace its Contents.

On appeal, Motel Owners did not dispute that they did not submit the requested documentation but instead argued that the bankruptcy court improperly placed the burden on them to support their request for more money and that Associated's internal records showed that the Contents were valued at $175,000 during Associated's 2019 inspection of the Motel. In response, the Court again emphasized that it is the insured's burden to prove it suffered a loss and that the loss is covered by the Policy and that the valuation in 2019 does not reflect the value of the Contents at the time of the loss or damage, which occurred in 2021, because it does not account for depreciation and there was no evidence that the Contents' value has remained the same since 2019.

3. Building Interruption

Motel Owners argued that they are entitled to at least an additional $73,650.19 to compensate them for the entire duration of the Motel's restoration from February 2021 to December 2022, when the Motel reopened and that this time frame is both reasonable and feasible. However, as the Fifth Circuit, specifically pointed out, Motel Owners do not cite the record, i.e. the text of the policy, nor case law. The Court noted that the Policy does not define the duration of time for Business Interruption based on what is reasonable or feasible. Ultimately, the Fifth Circuit held that the Motel Owners abandoned their business interruption claim because they failed to adequately brief their argument that the bankruptcy court, and district court, erred in granting Associated's summary judgment. This is significant because even though the policy was ambiguous as to what is reasonable/feasible, the Court still held that Motel Owners should have cited to the policy along with case law in support.

B. Extracontractual Claims

Motel Owners argued that Associated's delays in adjustment/payment of the claim and unjustified rejection of several components of the claim clearly show bad faith. The Court, however, held that this argument fails because Motel Owners did not cite any case law or argue that such actions were so extreme as to make the injury independent of the policy claim. Likewise, the Court held that Motel Owners were not are not entitled to recover damages in the form of policy benefits for their statutory and common law claims since Associated did not breach the policy.

The Lowdown: This case is favorable to insurers and significant for many reasons. First, this claim arose out of Winter Storm Uri, at this time the entire construction, appraisal, and insurance industry were all inundated with claims and delays were expected, but the Court still emphasized the insured's responsibility to mitigate damages. Second, the Court explicitly rejected the expert's conclusory arguments that the invoices could be segregated out and inconsistent statements. Finally, the Court repeatedly emphasized the doctrine of concurrent causation, the policy's language, and the insured's burden.

BEYOND THE BLUEBONNETS

Itemized Appraisal Ordered Over Delay and Coverage Dispute Objections: A Shift in the Appraisal Enforcement Paradigm?

by Jessica Port (Washington DC Office)

In a recent decision, *Gray v. Philadelphia Contributionship*, 748 F. Supp. 3d 367 (D. Md. 2024), U.S. District Judge James K. Bredar granted a policyholders' motion to compel appraisal and stayed litigation in a diversity action involving a disputed storm damage claim. The ruling offers lessons for insurers on appraisal clauses, waiver, and litigation strategy under Maryland law.

Factual Background

On March 27, 2024, Plaintiffs Gary and Lashonda Gray filed suit against their insurer, The Philadelphia Contributionship (TPC), alleging breach of contract and bad faith. The dispute arose from a $120,158.35 valuation disagreement over storm damage to their Maryland home that occurred on May 4, 2021. On April 29, 2024—three years after the date of loss, and one month into litigation—the Grays invoked the policy's appraisal clause, which provided:

> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire.... The appraisers will separately set the amount of loss.... A decision agreed to by any two will set the amount of loss.

TPC rejected the appraisal demand "due to the passage of time between the date of loss and the date of the request." The Grays subsequently filed a motion to compel appraisal and stay the litigation.

Legal Framework and Analysis

Maryland treats appraisal clauses as analogous to arbitration agreements governed by the Maryland Uniform Arbitration Act (MUAA), Md. Code Ann., Cts. & Jud. Proc. § 3-201 et seq., which deems them valid and enforceable absent contract-revocation grounds (*id.* § 3-206(a)). *See Brethren Mut. Ins. Co. v. Filsinger*, 54 Md. App. 357 (1983). In practice, the appraisal provision governs the *process* of appraisal, while the MUAA generally governs *enforcement* of appraisal rights (*e.g.* legal action to compel appraisal, appoint an umpire, or enforce an award).[1]

Judge Bredar addressed each of the three arguments TPC raised against appraisal:

> **1. Condition Precedent**
>
> First, TPC argued that the policy's "Suit Against Us" clause—requiring "full compliance with all terms" before suit—barred the action because appraisal was not completed pre-litigation. Citing *Aetna Cas. & Sur. Co. v. Ins. Comm'r*, 293 Md. 409, 445 A.2d 14 (1982), TPC asserted appraisal was a condition precedent. Judge Bredar held that TPC waived this defense by explicitly refusing the Grays' appraisal demand, finding the refusal inconsistent with insisting on the condition: "TPC cannot

seriously expect this Court to go along with its attempt to refuse to participate in appraisal, only to then turn around and say this action is barred because there has been no appraisal. TPC cannot have it both ways."

2. Waiver by Delay

TPC contended the Grays waived their appraisal right by waiting nearly three years post-loss and filing suit before invoking appraisal, claiming prejudice due to faded evidence from intervening weather events. Judge Bredar acknowledged the delay and noted that "TPC's frustration with the delay is understandable." However, he concluded that (1) the "policy contains no time limit on when to invoke the appraisal right"; (2) the damage was not "particularly complex" such that the court would "do a better job determining the loss than the appraisers would"; (3) the suit was in its "early stages" before discovery; and (4) absent "actual prejudice" beyond speculative assertions about evidence degradation, there was no basis to find that the Grays waived their right to compel appraisal.

3. Scope of Appraisal

Finally, TPC objected that the Grays sought to recover the public adjuster's fee, which is not a category of loss covered under the policy, via appraisal. While Judge Bredar agreed that appraisal is limited to valuing covered losses, not determining coverage, he distinguished between cases where the "dispute centers on whether the insured is entitled to coverage at all" and those where "the parties disagree over one (fairly small) category of coverage." In the latter, appraisal should not be "thrown out altogether." Instead, the court implemented a practical solution. Following the lead the court in *Thompson v. Allstate Prop. & Cas. Ins. Co.* , 2024 WL 3161586 (D. Md. June 25, 2024), Judge Bredar compelled appraisal, but required itemized damage reports to "ensure that the appraisal process may promptly begin while preserving TPC's right to contest, after appraisal, whether certain categories of loss were covered by the policy."

Based on the above, the court granted the motion, ordered appraisal with itemized reporting, and stayed the case pending completion.

Three Takeaways for Insurers

This ruling carries several precise implications for insurers operating in Maryland and similar jurisdictions:

1. Coverage Disputes and Appraisal Scope: This ruling reflects a willingness to enforce appraisal with an itemized reporting requirement where *tangential* coverage disputes exist – not when coverage remains completely unresolved. *Cf. Jones v. Nationwide Mut. Fire Ins. Co.*, No. CV DKC 23-2340, 2024 WL 4534510, at *3 (D. Md. Oct. 21, 2024) ("It is evident that the parties' dispute is about more than the value of covered loss; it is whether the remainder of Mr. Jones' claimed loss is covered at all. Until the issue of coverage is determined, an appraisal is premature and the motion to compel appraisal and stay litigation pending appraisal will be denied without prejudice.")

2. Strategic Risks of Refusing Appraisal: In this case, the insurer's rejection of the insured's appraisal demand was construed as a waiver of the ability to enforce appraisal as a condition precedent. There may be instances where proceeding with appraisal subject to a reservation of rights may be warranted.

3. Burden to Prove Prejudice: To the extent a court requires actual prejudice to establish that the policyholder waived its right to demand appraisal, concrete proof will be necessary; theoretical prejudice, however likely that prejudice might be, may not be enough.

Conclusion

Gray v. Philadelphia Contributionship signals a willingness to enforce appraisal in cases where the dispute centers on the value of covered loss, even if tangential coverage disputes remain unresolved. It also reflects reluctance to find that a policyholder has waived the right to demand appraisal without concrete evidence that the insurer suffered prejudice.

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[1] George E. Reede, Jr. & Jessica E. Pak, "Is Appraisal an Arbitration? Yes and No. Maybe. Sort Of.", Zelle, LLP (n.d.). https://www.zellelaw.com/Is-an-Appraisal-an-Arbitration.

COLLABORATION CORNER

The Property & Casualty Paradox — The Pre-Loss Algorithm

by Tim Maloney (Pre-Loss)

by Tim Molony (Pre-Loss)

In *The Property & Casualty Paradox — The Pre-Loss Algorithm*, Tim Molony notes that the pre-loss condition of a property is a core issue in commercial property insurance, and not knowing that condition may lead to higher premiums and inefficiencies. He advocates for pre-loss tools to create clear asset baselines, reduce fraud, and improve claims accuracy—shifting the industry from treating symptoms to solving root problems.

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.

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