STORM CLAIMS UPDATE

DAVID D. DISIERE, *Houston*
Martin Disiere Jefferson & Wisdom

BRENNAN M. KUCERA, *San Antonio*
Crowell & Kucera

RHONDA J. THOMPSON, *Dallas*
Thompson Coe Cousins & Irons

State Bar of Texas
17TH ANNUAL
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CHAPTER 4

Martin, Disiere, Jefferson & Wisdom
ATTORNEYS AT LAW

David D. Disiere
Partner
Houston Office

disiere@mdjwlaw.com

713-632-1776

713-222-0101

Martin, Disiere, Jefferson & Wisdom, L.L.P.
Niels Esperson Building
808 Travis Street
Suite 1100
Houston, Texas 77002-5718

Mr. Disiere is a leading practitioner in the area of complex insurance coverage issues and related litigation with over thirty years of experience in the field. He maintains an active practice developing and shaping Texas insurance jurisprudence involving insurance coverage, extra-contractual and first-party litigation and related issues. In addition to receiving an AV Preeminent® Rating from Martindale-Hubbell, Mr. Disiere was selected by his peers for inclusion in the 2008–2020 editions of *The Best Lawyers in America*® in the specialty of Insurance Law and has repeatedly been recognized as a Texas Super Lawyer by *Texas Monthly Magazine*. He is an Adjunct Professor of Property and Casualty Insurance Law at the University of Houston Law Center and holds an Associate in Claims (AIC) designation from the American Institute for Chartered Property Casualty Underwriters. Lastly, Mr. Disiere was recognized as one of the leading lawyers in the U.S. in the field of Insurance and Reinsurance–Natural Disasters by The Legal 500 US: Volume III (Litigation) and in *H Texas Magazine* as one of Houston's Top Lawyers in Insurance Coverage and Litigation.

Practice Areas:

- Insurance Coverage and Bad Faith Litigation
- Insurance Claim Handling Expert
- Mediator

Honors:

- Named by peers; *Best Lawyers in America – Insurance Law,* 2008–2020
- Named America's Leading Lawyers for Business by *Chambers USA,* 2011–2020
- Named "Super Lawyer" by *Texas Monthly Magazine,* 2007–2020
- Named by peers; Best Lawyers in Texas by *The Wall Street Journal,* 2016
- Named one of "Houston's Top Lawyers" by *H Texas Magazine,* 2007–2013
- Named as a top Insurance & Reinsurance Attorney by *Who's Who Legal: Texas,* 2008
- Named leading lawyer in the U.S. in the field of Insurance and Reinsurance – Natural Disasters by *The Legal 500 US: Volume III (Litigation),* 2007

Bar Admissions:

- All Texas Courts
- United States District Court, Northern, Southern, Eastern and Western Districts of Texas
- United States Court of Appeals, Fifth Circuit

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Employment:

- Martin, Disiere, Jefferson & Wisdom, L.L.P., (Founding Partner), January 2000 – present
- Assistant Counsel for State Farm, Corporate Law Department, January 1995 – January 2000
- State Farm Insurance Companies:
  - BI Claim Superintendent, Auto Company, January 1993 – December 1995
  - Division Claim Attorney, January 1992 – January 1993
  - Claim Specialist, Sr. Claim Representative, Claim Representative, Claim Rep. Trainee, January 1987 – January 1992

Education:

- University of Houston Law Center, J.D., 1992
- University of Houston, B.B.A., 1986 – *Summa Cum Laude*
- A.A. White Dispute Resolution Center – 40 Hour Basic Mediation Training, May 2005

Professional Associations:

- State Bar of Texas
- Defense Research Institute
- Houston Claim Association
- Houston Bar Association

ARTICLES AND SEMINARS

- *Presentation: Hurricane Harvey Property Claims; U of H Law Center: The People's Law School*; September 30, 2017
- *13th Annual Advanced Workers' Compensation Course*; August 11–12, 2016
- *Advanced Insurance Law Course*; June 9–10, 2016
- *Ethical Consideration: Stowers and Soriano*; Prosecuting and Defending Truck and Auto Collision Cases; November 12, 2015
- *What the Aging Attorney Needs to Know About Professional Liability; Lawyer Competency in the 21st Century*; November 21, 2014
- *18th Annual Texas Insurance Law Symposium*; South Texas College of Law; February 13, 2014
- *"Ethics Jeopardy"*; TexasBarCLE Eighth Annual Fiduciary Litigation Course; San Antonio, Texas; December 5, 2013
- "*Insurance Issues for Lawyers*"; Houston Bar Association Continuing Legal Education Committee; Houston, Texas; February 8, 2013
- "*What Every Lawyer Needs to Know About Insurance Coverage*"; HBA What the General Practitioner Needs to Know CLE; Houston, Texas; October 28, 2011
- "*The Lone Star State vs. The Sunshine State: Dueling Bad-Faith Perspectives*"; 12th Annual Windstorm Insurance Conference; Houston, Texas; January 25–26, 2011
- "*Independent Adjusters: Problems & Solutions*"; 15th Annual Texas Insurance Law Symposium; Houston, Texas; January 20, 2011
- "*Consumer Law Basics – Know the Law! (Insurance)*" The University of Houston Law Center–Center for Consumer Law; Houston, Texas; October 23, 2009
- "*Insurance Law Post-Hurricane Ike Roundtable*"; Texas Lawyer Roundtable Series; Houston, Texas; April 2, 2009
- "*Homeowner's Policies Liability and Property Coverages: Update on Key Provisions and Case Law*"; University of Houston Law Foundation Advanced Insurance and Tort Claims; April 10, 2008 (Dallas), April 17, 2008 (Houston), and May 29, 2008 (Austin)
- "*Homeowner's Litigation & Policy Update*"; South Texas College of Law 12th Annual Texas Insurance Law Symposium; Houston, Texas; January 24, 2008
- "*Homeowner's Policies Liability and Property Coverages: Update on Key Provisions*"; University of Houston Advanced Insurance and Tort Claims; June 21, 2007 (Houston) and Thursday, June 28, 2007 (Dallas)
- "*Basic Insurance*"; University of Houston People's Law School; Houston, Texas; April 7, 2007
- "*Homeowner's Policies Liability and Property Coverages: Update on Key Provisions*"; University of Houston Law Foundation Advanced Insurance and Tort Claims; March 22, 2007 (Dallas), March 29, 2007 (Houston) and April 12, 2007 (Austin)
- "*Hot Insurance Topics Impacting Texas Consumers*"; State Bar of Texas Consumer and Commercial Law Course; Dallas, Texas; October 13, 2006
- "*The Necessary Mechanics for Handling Automobile Claims*"; State Bar of Texas Insurance Law Section Annual Meeting and CLE; Austin, Texas; June 15, 2006
- "*Ethics Jeopardy*"; South Texas College of Law Texas Insurance Law Symposium; Houston, Texas; January 27, 2006
- "*Everything You Ever Wanted to Know About Discovery in Insurance Cases*"; State Bar of Texas Advanced Consumer Law Course; Houston, Texas; November 4, 2005
- "*Hot Topics in Property, Liability and Automobile Insurance*"; State Bar of Texas Annual Meeting Insurance Law Section CLE Program; Dallas, Texas; June 23, 2005
- "*Discovery–Underwriting and Beyond the Claim File; What is There, How You Get It and How and What to Use*"; The Insurance Law Section of the State Bar of Texas Second Annual Advanced Insurance Law Course; Dallas, Texas; March 31, 2005
- "*What's New in Personal Lines*"; State Bar of Texas Annual Insurance Law Section Meeting & CLE; San Antonio, Texas; June 24, 2004
- "*From Tilley to Gandy–Working in Shades of Gray*"; The Insurance Law Section of the State Bar of Texas; Dallas, Texas; June 10–11, 2004
- "*Hot Topics in Texas Insurance Law*"; State Bar of Texas Insurance Law Telephone Seminar Series; May 5, 2004
- "*Property Insurance: Annotated Homeowner's Policy*"; Ultimate Insurance Seminar 2000
- "*Commercial General Liability Policies and Other Insureds: Watch Your Language*"; Government Contracts in Texas Seminar; November, 2000
- "*Surf's Up! Insurance Resources on the Web*" Texas Insurance Law Symposium: Coverage and Litigation; South Texas College of Law; November, 2000

BRENNAN M. KUCERA

Texas (2011)
All Federal Districts of Texas

Louisiana (2012)
E.D. and W.D. of Louisiana

PROFESSIONAL EXPERIENCE

2011-Present:

Mr. Kucera has practiced in federal and state courts all over Texas and Louisiana, representing both commercial clients and individuals.

He is proud to have represented such a diverse base of clients, including: municipal governments, local and multi-national non-profit groups, religious organizations, colleges, fraternal orders, cultural and art centers, real estate investment companies, property management companies, landlords, apartment complexes, restaurants, a commercial meat production facility, a large whole-sale fruit distributor, a brewery, a fast food chain, multiple grocers, a computer and electronic refurbishing company, a chain of carpet retailers, and a furniture manufacturer.

Moreover, while his focus is commercial litigation, Mr. Kucera has been regularly called on to serve in an advisory capacity and to meet the transactional and regulatory needs of his clients.

PROFESSIONAL EXPERIENCE PRIOR TO LICENSURE

2009–2011:

- **Commercial Litigation:** Pre-Trial Disposition—TRO's, TI's, Mediation, Settlement, Summary Judgment and Response; Pre-Trial Preparation—Discovery, Pleadings, Answers, Amendments, Hearings; Trial Work— Argument Preparation, Witness Preparation, Exhibit Preparation, Bench Order Drafting; Post-Judgment Work—Discovery, Order Implementation, Attachment.

- **Instrument Drafting:** Contracts, Promissory Notes, Security Agreements, Arbitration Agreements, Special Limited Agency Agreements, EFT Authorizations and TILA Disclosures, Disclosure Statements, Conflict Of Interest Releases, Privacy Policy Statements, Credit Service Agreements, Motions, Memos, and Advisory Opinions for Client Matters

- **Causes of Action:** Fiduciary Duties; Contract Disputes; Shareholder Oppression; Suits on Sworn Account; Deceptive Trade Practice Act Violations; Derivative Suits; Corporate Formalities; Alter Ego Claims; Promissory Note Enforcement; Officer and Director Indemnification; Business Org Code Compliance

- **Finance and Taxable Entities:** Usury Laws; Credit Service Organizations and Pay Day Lending; Corporate Creation, Governance, and Compliance; Non-Profit Management and Creation

- **Governmental Relations:** Organizing and Managing Political Actions Committees; Registering Lobbyists

- **Treasurer and Reporting Work:** Treasuring and Reporting for PACs and 501(c)(3)s

OTHER LEGAL EXPERIENCE

St. Mary's University School of Law—2010 to 2011
Teaching Assistant (LR&W T.A.) to Faye Bracey, Dean and Legal Research and Writing Professor

St. Mary's University School of Law—2010 to 2011
Research Assistant (R.A.) to David Schlueter, Hardy Professor of Law and Director of Advocacy Programs

St. Mary's Law Journal—2009 to 2010
Staff Writer

EDUCATION

St. Mary's University School of Law, San Antonio, Texas
Juris Doctor, December 2010
"Dean's Scholar" scholarship recipient
"Sister Grace" scholarship recipient
"NOMADS" scholarship recipient

Universität di Innsbruck, Innsbruck, Austria
Law School & Institute on World Legal Problems
Foci: International Business Transactions and International Crime & Terrorism
Attended Courses Taught by United States Supreme Court Justice, Samuel Alito

The University of Texas, Austin, Texas
Bachelor of Arts, Major: Government; Minor: Spanish, 2007

BAR ADMISSIONS

- State Bar of Texas (2011)
  - United States District Court, Northern District of Texas (2012)
  - United States District Court, Eastern District of Texas (2012)
  - United States District Court, Southern District of Texas (2012)
  - United States District Court, Western District of Texas (2012)

- Louisiana State Bar (2012)
  - United States District Court, Eastern District of Louisiana (2013)
  - United States District Court, Western District of Louisiana (2013)

ORGANIZATIONS & MEMBERSHIPS

- San Antonio Young Lawyers Association
- San Antonio Bar Association
- Texas Trial Lawyers Association
- Louisiana State Bar Association
- Federal Bar Association
- Delta Theta Phi; International Legal Honors Fraternity
- Alpha Tau Omega

Rhonda J. Thompson

Co-Chair, Insurance Litigation & Coverage Section

rthompson@thompsoncoe.com | 214-871-8273

Co-Chair, Insurance Litigation & Coverage Section

Rhonda Thompson's practice involves trial work on behalf of insurance carriers directly as well as on behalf of their policyholders.

Rhonda directly represents insurance carriers, both commercial and personal lines, in a variety of coverage-related litigation, bad faith cases and carrier-to-carrier disputes. She regularly advises insurers on complex and unique coverage issues under commercial liability, auto, farm, and property policies as well as errors and omissions policies, directors and officers policies and tenant and homeowners' policies. Rhonda is sought after to advise on complex business interruption and civil authority matters along with additional insured issues, shared defense and indemnity obligations and contractual indemnity disputes, including litigating these issues on their behalf or on behalf of their policyholders.

Throughout her career, Rhonda has devoted a significant amount of time training insurance carriers and businesses on a wide range of topics, including claim litigation management, risk management, insurance coverage topics and general claims handling.

Representative Experience

- Obtained federal court summary judgment on behalf of CGL carrier, upheld by Fifth Circuit Court of Appeals, successfully arguing no duty to defend against alleged violations of federal trademark infringement and related claims as personal and advertising injury.
- Obtained directed verdict in federal commercial property insurance case with eventual take nothing judgment entered in favor of the insurance carrier with an award of taxable court costs.
- Lead trial counsel for commercial property hail damage case that resulted in state court jury verdict sufficiently lower than a rejected statutory offer, and allowing for offset and zeroing out the damages and fees awarded.

Services & Industries

- Insurance Litigation
- Weather-Related Catastrophe Litigation
- Gulf Coast Practice
- Commercial Litigation
- Transportation
- Governmental & Legislative Advocacy

- Obtained defense verdicts after jury trial in numerous commercial and residential lawsuits seeking damages due to breach of contract and bad faith arising out of insurance property claims for hail and other weather events.
- Obtained post-appraisal federal court summary judgment on behalf of surplus lines property insurer, dismissing all contractual and extra-contractual claims after payment of the appraisal award.
- Obtained favorable rulings in relation to various plaintiffs' motions to remand based upon the fraudulent joinder of a state, resident insurance adjuster.
- Obtained federal court summary judgment on behalf of property insurer on issue of lack of insurable and financial interest of mortgagee/lienholder not named on the policy.
- Tried Hurricane Ike lawsuit through jury verdict resulting in amicable settlement during appeal process.
- Represented insurers in judicial proceedings involving appraisal.
- Obtained state summary judgment ruling on the applicability of Named Driver Exclusion in context of an uninsured/underinsured motorist claim.
- Obtained federal court summary judgment on behalf of liability insurer on securities errors and omissions claim due to insured's failure to satisfy condition precedent to coverage.
- Obtained state summary judgment ruling on behalf of liability insurer due to claimant's failure to meet requirements of the additional insured endorsement.
- Obtained summary judgment in federal court on behalf of lawyers' professional liability insurer on issues related to whether legal services and covered damages were alleged or established.
- Obtained summary judgment state court in favor of personal property insurers on the grounds that the claimant lacked standing to assert insurance code violations for failing to include general contractor's overhead and profit in replacement cost estimates.
- Obtained summary judgment in federal court on behalf of personal liability insurer resulting in finding of no duty to defend or indemnify in case on basis of the absence of an occurrence.
- Defended excess legal liability insurer in bad faith/declaratory judgment action by advancing the application of policy's retroactive date and resulting in insurer's settlement contribution well below policy limits.
- Represented and advised various insurers in further investigating numerous personal and commercial property claims through conducting examinations under oath.
- Represented and advised various personal and commercial property insurers regarding legal issues unique to policies' appraisal clause.

Education

- Baylor University School of Law (J.D., 2001)
  - Order of Barristers
  - National Trial Competition Mock Trial Finalist & Best Overall Advocate
- University of North Texas (M.Ed., 1993)
- Oklahoma State University (B.S., 1989)

Bar Admissions

- Texas, 2001

Court Admissions

- United States District Court, Northern, Southern, Western and Eastern Districts of Texas
- United States Court of Appeals, Fifth Circuit

Professional and Community Activities

- Houston Bar Association, Member
- Dallas Bar Association, Member (2018 - Present)
- Dallas Bar Association Bench Bar Conference Committee (2018 - Present)
- Dallas Bar Association Legal Ethics Committee (2018 – Present)
- DISD, Booker T. Washington High School Performing & Visual Arts Theater Conservatory Board (2016 – Present)
- Good Shepherd Episcopal School, Parent Organization Board (2017 - Present)
- State Bar of Texas (Insurance and Litigation Sections)
- Dallas Bar Association Judiciary Committee (2014 - Present)
- Claims and Litigation Management Alliance, Premium Member
- Baylor Law School's Top Gun National Mock Trial Competition. Scoring Judge (2013 – 2018)

Speeches and Presentations

- "Emerging Risks: Insurance Coverage for COVID-19," Thompson Coe Webinar, March 24, 2020
- "Texas Appraisal Update: The Supreme Court Has Spoken", Thompson Coe Webinar, August 6, 2019
- "Marijuana, CBD, Vaping: Smoking Out Insurance!", Thompson Coe Webinar, April 16, 2019
- "Managing Millennials: Get Woke and Be Chill!", 2018 PLRB Claims Conference, April 16-18, 2018
- "Coverage Pitfalls - Three Unique Harvey Issues and How to Address Them, Thompson Coe Webinar, December 19, 2017"
- "Texas Update: Hurricane Harvey" Thompson Coe Webinar, September 5, 2017
- "Show Me the Money: Defending Against Attorneys' Fee Claims", Thompson Coe Webinar, October 25, 2016
- "Know When to Hold 'Em, Know When to Fold 'Em", 2016 CLM Atlanta Conference, May 19-20, 2016
- "Deconstructing a Repair Estimate", 16th Annual Windstorm Insurance Conference, January 29 – 22, 2015, New Orleans
- "How to Pick Your Battlefield", UT Insurance Institute Seminar, Dallas, November 13 - 14, 2014
- "Battling for the Forum: It Matters", Thompson Coe Coverage Seminar, Dallas, October 9, 2014
- "Deconstructing A Repair Estimate", Thompson Coe Webinar, June 17, 2014

- "How to Manage Appraisal and Its Aftermath" 18th Annual Insurance Law Institute, UT School of Law and The Insurance Law Section of the State Bar of Texas, November 7, 2013
- "Corporate Depositions & Discovery: This is Our Story and We're Sticking To It" Thompson Coe's 12th Seminar on Texas Insurance Law Developments, October 17, 2017
- "What the Hail?: Weather and Catastrophe Claims", Claims & Litigation Management Alliance, Dallas Chapter, June 2013
- "Earth, Wind and Fire: A Forensics Insider Webinar showcasing investigations from Superstorm Sandy, attorney advice on defending catastrophe claims, and how fire distresses concrete" Webinar for Nelson Architectural Engineers, Inc., Panelist, February 13, 2013
- "Insurable Interest: What About Me?" Thompson Coe's 11th Seminar on Texas Insurance Law Developments, October 25, 2012
- "Policy Conditions: It Takes Two To Tango" National PLRB Conference in Nashville, Tennessee, April 4 - 6, 2011
- "The Nitty Gritty of Property Policy Conditions" 12th Annual Windstorm Insurance Conference, January 26, 2011
- 2010 Dallas All Industry Day - "Ask the Experts" Panel Presentation, November 23, 2010
- "We Just Dropped In to See What Condition Our Conditions Were In" Thompson Coe's 9th Seminar on Texas Insurance Law Developments, May 6, 2010
- "Non-Compliance with Policy Conditions" National PLRB Conference in San Antonio, Texas, March 23 - 24, 2010
- "The Who, When, Why and How for Hiring Independent Counsel" North Texas Association of Insurance Counsel, December 4, 2009
- “Checking in on the Eight Corners Rule” Thompson Coe Annual Seminar on Texas Insurance Law Developments, November 6, 2008
- "So You Believe it was Arson – Now What?” Thompson Coe Annual Seminar on Texas Insurance Law Developments, November 7, 2007
- “Other Insurance Clauses and Their Impact on the Duty to Defend” Thompson Coe Annual Seminar on Texas Insurance Law Developments, December 8, 2005
- “The New Boundaries of the Eight Corners Rule” Thompson Coe Annual Seminar on Texas Insurance Law Developments, December 9, 2004
- “Selection of Independent Counsel” Dallas Bar Association's Tort & Insurance Practice Section, October 28, 2004
- “Overhead and Profit: When Do You Pay It?” Thompson Coe Annual Seminar on Texas Insurance Law Developments, December 11, 2003

Professional Recognition

- Nominated by peers to *The Best Lawyers in America*® 2020 in the field of Insurance Litigation.
- *Law & Politics* magazine's *Texas Super Lawyers® - Rising Stars* list for 2006 - 2010.
- 2017 Best Lawyers in Dallas, Insurance Law, *D Magazine*

RHONDA THOMPSON 2020 RECOGNIZED BY Best Lawyers

Publications

April 9, 2020
Texas: Business Interruption Lawsuit Filed Over Pandemic Event Endorsement

March 27, 2020
Q&A From Insurance Coverage for COVID-19 Webinar

April 13, 2018
USAA v. Menchaca: Second Time Around

December 16, 2016
Fourth Court of Appeals Affirms Post-Appraisal Summary Judgment for Insurer

December 30, 2009
Coverage News: 2009, Issue 1

October 15, 2005
Lamar Homes, Inc. v. Mid Continent Casualty Company, 2005 WL 2432029 (5th Cir. Tex., Oct. 3, 2005)

July 1, 2003
How Many Times Can A Claim Be Denied?

OVERVIEW

This paper is intended to complement the panel discussion raising legal issues specific to pre-suit and litigated matters involving weather related disputes between policyholders and their insurance carriers. While the issues discussed in this paper are common to commercial and residential property insurance policies, all contributors to this article agree that the terms of the insurance contract and the particular facts of a lawsuit could certainly impact the conclusions drawn in this paper.

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STORM CLAIMS UPDATE

I. APPRAISAL IN TEXAS AFTER BARBARA TECH AND ORTIZ

After lying dormant for over 100 years, insurance claim appraisal law suddenly erupted in 2009 when the Supreme Court of Texas released *State Farm Lloyds v. Johnson*, 290 S.W.2d 886 (Tex. 2009). In *Johnson*, the court affirmed the lower court's order compelling State Farm to proceed with appraisal, despite a pending coverage dispute over causation (hail v. wear and tear). A fissure was created, and an eruption of litigation flowed from a seemingly minor philosophical discussion that effectively dismissed the significance of causation disputes often involved disputed claims. The court simply stated: "Any appraisal necessarily includes some causation element, because setting the "amount of loss" requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else." *Id.* at 893. "Finally, if an appraisal award is flawed, that can be easily remedied by disregarding it later." *Id.* at 895. But as experience has shown, setting aside a flawed appraisal award, is not so easy and is an extremely costly and dubious venture.[1] And when combined with potential extra-contractual exposure arising from common law and statutory bad faith allegations, insurers found themselves stranded on a newly formed island.

Fortunately, several Texas courts, both state and federal, provided insurers with a way off the island, an option to avoid the cost and uncertainty of litigating a flawed appraisal award by simply paying it, and thereby eliminating any contractual and extra-contractual exposure. Most cited is an appellate court decision *Breshears v. State Farm Lloyds,* 155 S.W.3d 340 (Tex. App. – Corpus Christi 2004, pet. denied). In *Breshears*, the insured disagreed with State Farm's damage estimate and $13,502.51 claim payment and filed suit. The court abated the case while the parties entered appraisal. An umpire awarded $5,698.36 over the amount already paid. State Farm promptly paid the additional amount based on the appraisal award then moved for summary judgment on the insured's contractual and extra-contractual claims. The trial court granted State Farm's motion.

On appeal, the Corpus Christi Court of Appeals recognized that the policy provided the contractual remedy of appraisal to resolve disputes over the amount of loss. And, no grounds were asserted for setting aside the appraisal award as unauthorized or the result of fraud, accident or mistake. Accordingly, and because State Farm promptly paid the award, the court found "there was no breach of contract by State Farm, and consequently no judgment against it on which to base interest calculations, prejudgment interest cannot be awarded against State Farm." *Id.* at 344. Also noting that State Farm promptly issued payment of the additional amount within 60 days after the award, the court affirmed summary judgment in favor of State Farm on the insurance code claims under Texas Prompt Payment of Claims Act (TPPCA) seeking interest penalties and attorney fees. Numerous other Texas courts, both state and federal, applied this same rationale in granting summary judgment in favor of insurers on both contractual and extra-contractual claims after an adverse appraisal award is promptly paid.[2]

So applying the guidance offered by *Johnson*, *Breshears* and related cases, Texas insurers confronted with an adverse appraisal award, and weighing the cost and expense of challenging an award asserting coverage and causation issues, frequently opted to simply pay the award – a business decision which effectively bought their peace. On June 28, 2019, however, the Supreme Court of Texas issued two decisions significantly undermining insurers' ability to buy their peace when presented with an adverse appraisal award and opening the door for TPPCA penalty interest, attorney fee awards and potential extra-contractual damages, even when an adverse award is promptly paid. So, it is important to closely explore these two recent decisions from a claim handling perspective, noting the hazards they present and guidance they provide to insurers following an appraisal award.

II. *BARBARA TECHNOLOGIES & ORTIZ*

Two recent decisions from the Supreme Court of Texas, *Barbara Technologies Corp. v. State Farm Lloyds*[3], and *Ortiz v. State Farm Lloyds*[4], reshaped appraisal law in Texas and in certain ways add clarity to the *Johnson* decision. But they also generate new questions regarding handling of supplements, additional investigation of reopened claims and communicating claims decisions to insureds in a manner that will allow good faith claims handling and investigations to continue without potentially creating extra-contractual exposure. What follows is brief synopsis of the *Barbara Technologies* and *Ortiz* decisions and, some bullet point

[1] *See Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 252 (Tex. App. – Austin 2002) (An appraisal award made pursuant to an insurance policy is binding and enforceable unless unauthorized or the result of fraud, accident or mistake).

[2] *See also Garcia v. State Farm Lloyds,* 514 S.W. 3d 257 (Tex. App. – San Antonio 2016, pet. denied) (finding that a full and timely payment of an appraisal award precludes TPPCA damages as a matter of law).

[3] 589 S.W.3d 806 (Tex. 2019).

[4] 589 S.W.3d 127 (Tex. 2019).

takeaways to assist insurers in continuing good faith efforts to handle and resolve claims in light of these decisions.

A. *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019):

1. Factual Overview

The insured owned a commercial property which sustained wind and hail damage from a March 31, 2013, storm. Almost seven months later, on October 17, 2013, Barbara Tech filed a claim with State Farm which investigated and found $3,153.57 in covered damage, an amount less than the insured's $5,000 deductible. The court's decision indicates that State Farm "denied" the claim on November 4, 2013.[5] Barbara Tech requested a second inspection on February 21, 2014, and State Farm found no additional damage during the second inspection, which took place on March 4, 2014. Barbara Tech filed suit July 14, 2014, and State Farm invoked appraisal on January 9, 2015. On August 18, 2015, the appraisers agreed to an award of $195,345.63 and transmitted the award to State Farm the next day. Then, on August 25, 2015, State Farm paid $178,845.25 based on the award, after applying the deductible and depreciation.[6]

After State Farm paid the appraisal award, Barbara Tech amended its petition to only assert claims under Texas Insurance Code Chapter 542, Texas Prompt Payment of Claims Act (TPPCA)[7], seeking penalty interest and attorney fees under the statute. Barbara Tech then moved for summary judgment asserting that State Farm violated the TPPCA by failing to pay the claim within the sixty-day time limit (dating back to the initial investigation) and owed damages as a result. State Farm also filed summary judgment asserting that it had no liability under the TPPCA because it was not liable under the policy and it paid the appraisal award timely. Following the rationale in *Breshears,* and a long line of cases that followed, the court denied Barbara Tech's motion and granted State Farm's. This appeal followed.

2. Key Issues and Holding

The Supreme Court of Texas analyzed an insurer's duties to promptly investigate and pay covered claims timely under the TPPCA, and then addressed the issue of whether an insured can prevail on a claim for TPPCA penalty interest and attorney fees, "when it is undisputed that the insurer investigated the claim, rejected it, invoked the policy's provision for an appraisal process, and ultimately paid the insured in full in accordance with the appraisal." The court noted that for an insurer to be liable under the TPPCA, they must either 1) admit liability for the claim under the policy or 2) be adjudicated liable for the claim and, 3) violate a TPPCA deadline or requirement. Under the facts of this case, the court held that "*an insurer's payment based on the appraisal was neither an acknowledgment of liability under the policy nor an award of actual damages. Because the insured has not established that it is entitled to TPPCA prompt pay damages as a matter of law and the insurer likewise has not established that it can owe no TPPCA damages as a matter of law, we reverse the court of appeals judgment and remand the case to the trial court for further proceedings.*"

B. Claim Handling Takeaways:

1. Reserve Your Rights

Tucked away on page twenty-nine, the dissenting opinion states key coverage facts omitted from the majority opinion, which reveal significant coverage issues and policy defenses in this case. In addition to the coverage issue arising from the insured's late notice of the claim (reported almost seven months after the reported date of loss)[8], Justice Hecht reveals that the roof on the insured's small rental building was a 1,000 square foot, twenty year old, flat asphalt (modified bitumen) roof. And, that after a March 31, 2013, storm, leaks developed so the insured had most of the roof covered with an elastomeric coating and a portion covered with roof cement.

Six months after the storm and after learning that a hotel and an adjacent strip shopping center across the street were getting new roofs, the property manager decided to file a claim. Nevertheless, State Farm promptly investigated, initiating next day contact and scheduled the roof inspection. The adjuster met with the property manager and their roofer, but no roof damage was visible because of the elastomeric coating and sealant. The roofer insisted that the indentations could be felt through the coating, but the adjuster disagreed. The portion of the roof that had no sealant or coating, showed no damage. And the air conditioning units on the roof were undamaged, only showing splatter marks revealing the size of the hail. Further, during the

[5] It seems unusual to state that the claim was "denied" when in fact covered damage is found in an amount less than the insured's deductible.

[6] *Barbara Tech.* at 810.

[7] It should be noted that effective September 1, 2017, Chapter 542A now controls claims "arising from to or loss of covered property, wholly or partly, by forces of nature…" and would apply to claims presented after that date. 542A provides heightened notice standards for insureds and their attorneys, and greater protections to insurers seeking to amicably address and resolve claims.

[8] See Insured's Duties After Loss policy provisions requiring prompt notice, provide insurers an opportunity to inspect, etc.

reinspection, the roofer tried to expose dents in the roof beneath the coating but was unable to do so.[9]

Based on the facts above, it appears that the insured failed to comply with their duties after loss by failing to give prompt notice of the claim, and by making permanent repairs before allowing State Farm to inspect the property - both of which arguably prejudiced State Farm's rights under the policy. Further, the repairs may also provide a legal defense based on spoliation of evidence. And lastly, if the repairs were proper and stopped the leaks, loss payable provisions may limit recovery to the amount actually paid for the repairs. These and other policy[10] and legal defenses illustrate the importance of promptly issuing a reservation of rights as you proceed with handling a claim that may move into appraisal or litigation.

2. Accepting or Denying "Liability"

The court uses terms that claims handling personnel rarely apply to property damage claims when referencing the impact of accepting or denying "liability." It also discusses State Farm's "rejection" or "denial" of the claim, when in reality, State Farm found covered damage that was less than the insured's deductible. But in *Barbara Tech*, because the court found that State Farm reserved its rights, they also reserved their right to "contest liability." Two of the most important takeaways for claim handlers are buried in Footnotes 11[11] and 12[12] of the majority opinion. Footnote 11 emphasizes the need to reserve rights and provides sample language that the court found to be effective in allowing State Farm to pay the appraisal award without accepting "liability" for the claim. But perhaps the most important guidance provided by the court is found in Footnote 12. And adjusters handling claims must be aware of the terminology employed by the court and the negative implications of "accepting liability" for a claim. The court notes that after a claim is "rejected" or "liability" is denied, and an appraisal award is made, insurers have three options:

(1) refuse to pay the appraisal amount and maintain its denial of liability for the claim;
(2) pay the appraisal amount without accepting liability; or
(3) accept the claim, essentially admitting it was incorrect to deny liability initially, and then pay the claim in accordance with the appraisal amount.

Footnote 12 also discusses the implications of choosing options 1, 2 or 3:

> If the insurer chooses the third option, it becomes liable for the claim despite its earlier rejection of the claim, and it will be subject to TPPCA damages for failure to pay within the applicable TPPCA deadlines. *See* TEX. INS. CODE §§ 542.056(a), .057(a), .058, .060. If the insurer chooses the first option, refusing to pay an appraisal amount and continuing to deny liability, the insured could choose to pursue litigation. And if the litigation resulted in a judgment that the insurer was in fact liable

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[9] Further evidence of prejudice to the claim investigation by making permanent repairs.

[10] E.g. wear and tear, defective construction, improper maintenance, etc.

[11] "State Farm reserved its right to contest liability under the policy even after paying the appraisal. In its January 9, 2015, letter invoking the contractual appraisal process, State Farm expressly stated: "By this request, State Farm does not waive any of the policy provisions, conditions, defenses, exclusions or limitations, and in fact, intends to rely on them throughout the appraisal process. The appraisal award will be subject to the Policy's provisions, conditions, exclusions and limitations." And in the August 25, 2015, letter accompanying payment of the appraisal amount, State Farm expressly stated that with the appraisal payment: "State Farm is not waiving any of the policy coverages, limitations, exclusions or provisions, all of which are specifically reserved.""

[12] "Even after acknowledging receipt of the claim, investigating it, and then rejecting the claim (that is, denying liability), an insurer may later choose to accept the claim, admitting liability under the policy. For example, if a contractual appraisal provision such as the one in this case is invoked after the insurer has received all information requested from the claimant, conducted an investigation, and rejected the claim, the insurer may choose to: (1) refuse to pay the appraisal amount and maintain its denial of liability for the claim; (2) pay the appraisal amount without accepting liability; or (3) accept the claim, essentially admitting it was incorrect to deny liability initially, and then pay the claim in accordance with the appraisal amount. If the insurer chooses the third option, it becomes liable for the claim despite its earlier rejection of the claim, and it will be subject to TPPCA damages for failure to pay within the applicable TPPCA deadlines. *See* TEX. INS. CODE §§ 542.056(a), .057(a), .058, .060. If the insurer chooses the first option, refusing to pay an appraisal amount and continuing to deny liability, the insured could choose to pursue litigation. And if the litigation resulted in a judgment that the insurer was in fact liable on the claim, the insurer would then owe the amount of the claim, as fixed by the binding appraisal, and TPPCA damages if the insurer failed to pay the claim timely in accordance with section 542.058. *See id.* §§ 542.058, .060. This opinion addresses only the second option, as those are the facts of the case before us."

> on the claim, the insurer would then owe the amount of the claim, as fixed by the binding appraisal, and TPPCA damages if the insurer failed to pay the claim timely in accordance with section 542.058. *See id.* §§ 542.058, .060. This opinion addresses only the second option, as those are the facts of the case before us.

So in the typical appraisal situation where there is a dispute over both coverage and damages, insurers who choose to try to buy their peace by simply paying the appraisal award, should consider doing so under the second option by making payment subject to a reservation of rights and "without accepting liability." But if an insurer chooses option three, they "will be subject to TPPCA damages for failure to pay within the applicable TPPCA deadlines." The court also provides guidance for insurers who may elect to "refuse to pay the appraisal amount and maintain its denial of liability for the claim."

3. Appraisals are binding only on the amount, not "liability"

Insurer's concerns arising from *State Farm Lloyds v. Johnson*, 290 S.W.2d 886 (Tex. 2009), which suggested that an appraisal award was binding on both coverage (liability) and damages, appears to have been addressed in *Barbara Tech*. In *Johnson*, the court's statement that "any appraisal necessarily includes some causation element, because setting the "amount of loss" requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else" left insurers with the impression that once the amount of loss was established by appraisal, absent an itemized award, efforts to litigate coverage issues and segregate damages would be futile. And failing to pay an award would, and sometimes did result in a coverage / liability finding against them. But in *Barbara Tech*, the court added some clarity to *Johnson* by holding "that State Farm's payment of the appraisal value neither established liability under the policy nor foreclosed TPPCA damages under section 542.060."[13] So in those circumstances where there is a denial of coverage, and a reasonable and thorough claim investigation supports the insurer's coverage position, even in the face of an adverse appraisal award, insurers may choose to maintain their coverage position and litigate if suit is filed (option one from Footnote 12).[14]

C. *Ortiz v. State Farm Lloyds,* 589 S.W.3d 127 (Tex. 2019):

1. Factual Overview

Ortiz insured his residence with State Farm and presented a claim for wind and hail damage. Upon inspection, the adjuster found $732.53 in hail damage, which was less than the $1,000 deductible. The adjuster also noted other damage that he concluded was not caused by hail. In its correspondence to the insured, State Farm requested any estimates "related to this loss that exceed your deductible" and the insured submitted a public adjuster's estimate in the amount of $23,525.99. State Farm re-inspected the property along with the public adjuster, revised its damage estimate to $973.94 and notified the insured of their findings. The insured filed suit six weeks later alleging breach of contract, statutory and common law bad faith and TPPCA violations.

State Farm filed an answer and demanded appraisal within two months of when the suit was filed. The insured objected arguing waiver, and State Farm moved to compel appraisal which was granted by the court. The appraisal went forward and established the amount of loss at $9,447.52 for replacement cost and the actual cash value at $5,243.93. State Farm applied the insured's deductible then paid the award about seven days after receiving it. State Farm then moved for summary judgment on all claims which was ultimately granted by the trial court. The court of appeals affirmed the decision without specifically addressing the TPPCA claim and an appeal to the Supreme Court of Texas followed.

2. Key Issues and Holding

The Supreme Court of Texas was asked to address "*the effect of an insurer's payment of an appraisal award on an insured's claims for breach of contract, bad faith insurance practices, and violations of the Texas Prompt Payment of Claims Act.*" This is an important distinction from *Barbara Tech* which had amended its latest pleading to only assert claims under the TPPCA. And in *Ortiz*, the court issued three key holdings: 1) "We hold that the insurer's payment of the award bars the insured's breach of contract claim premised on failure to pay the amount of the covered loss." 2) "We further hold that the payment bars the insured's common law and statutory bad faith claims to the extent the only actual damages sought are lost policy benefits." And 3) "Finally, in accordance with our contemporaneously issued opinion in *Barbara Technologies Corp. v. State Farm Lloyds*, —— S.W.3d –

[13] *Barbara Tech* at 823.

[14] *But See Ortiz* at 132: "As explained, appraisal awards do not serve to establish a party's liability (or lack thereof). *In re Allstate Ins. Co.*, 85 S.W.3d at 195. Rather, they contractually resolve a particular type of dispute among insurers and insureds: the amount of the **covered** loss. *Id.*" (Emphasis added). This reference to "covered loss" seems to run contrary to the "liability" discussion in *Barbara Tech.*

—–, 2019 WL 2710089 (Tex. 2019), we hold that the insured may proceed on his claim under the Prompt Payment Act."[15] The supreme court affirmed the court of appeals' holdings on the breach of contract and statutory and common law bad faith claims, then remanded the case to the trial court for further proceedings on the TPPCA claims.[16]

D. Claim Handling Takeaways:

1. Reserve Your Rights

As noted in the factual overview above, the adjuster observed other damage that he concluded was not caused by hail. So, to the extent there is no coverage for the loss (e.g. loss of damage not caused by a named peril) or an exclusion applies, prompt reservation of rights or, a decision letter clearly identifying the non covered damage explaining why it falls outside of coverage, e.g. not a covered peril or referencing exclusions applicable to the "other damage" should be issued.

2. You can still "buy your peace", at least in part, by paying the appraisal award

In typical lawsuits involving property damage claims and asserting both contractual and extra-contractual causes of action, the amount of the covered loss generally represents the bulk of any actual damages sought. And once paid, following appraisal, the risk of trebled damages for a "knowing" violation of the insurance code is likewise minimized. That is what happened in this case. The court observed that "other than the amount that has already been paid, Ortiz does not seek to recover any actual damages that were "caused by" State Farm's Insurance Code violations." The court goes on to provide a few examples of what "actual damages" might be claimed, such as additional damage caused to the home by an unreasonable investigation, appraisal costs or pre-appraisal damage assessment. But, the court also states: "We express no opinion on whether such damages would be "independent from the loss of [policy] benefits" and thus recoverable under *Menchaca* and prior case law."[17] And as noted in *Barbara Tech*, TPPCA claims will be allowed to move forward.

3. Attorney's Fees are not "actual damages

The court considered and rejected the insured's effort to recover attorney's fees incurred in pursuing the claim up until the point that the appraisal award was entered. The court noted the distinction between "actual damages" and attorney's fees under Texas law and that to recover attorney's fees, the claimant must "prevail on the underlying claim *and* recover damages in order to recover attorney's fees." *Ortiz* at 135. The court observed that the only "actual damages" sought by Ortiz were policy benefits withheld and "those benefits have already been paid pursuant to the policy." Accordingly, the court rejected the request for attorney's fees along with the common law and statutory bad faith claims.

4. Claims under Texas Prompt Payment of Claims Act will be allowed to proceed despite prompt payment of an appraisal award

The TPPCA provides for 18% interest per year on claims owed until paid and allows for the recovery of attorney fees to be taxed as costs if the insured recovers. But as noted above, by paying the appraisal award, insurers can minimize the penalty interest and reasonable and necessary attorney fees incurred. And with cases often pending for years, the penalty interest

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[15] *Ortiz* at 129.

[16] *Ortiz* at 136.

[17] This is otherwise known as the "independent injury rule" requiring the plaintiff to establish distinct and independent damages in support of extra-contractual claims. In *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), the Supreme Court of Texas clarified the relationship between contractual and extra-contractual remedies under Texas Insurance Code § 541.151 by announcing five rules:

1) The General Rule: "[A]n 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: "[A]n 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 the benefits."

3) The Benefits-Lost Rule: "[E]ven if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right."

4) The Independent Injury Rule: "[I]f 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: "[A]n 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 a right to benefits."

Accordingly, if an insured has a contractual right to policy benefits, a loss of those benefits will provide the actual damages needed to recover under the Insurance Code. But even if the insured cannot establish a right to contractual benefits, if there is an independent injury and resulting damages, the insured may recover.

avoided by payment of an appraisal award can be substantial.

E. Other Legal Defenses

Claim personnel should keep in mind that common law and statutory extra-contractual claims are subject to a variety of defenses. Even the TPPCA claims, which are often discussed as being subject to "strict liability" still have statutory prerequisites that must be met in order to trigger liability under the statute. Although this paper is limited to a claims handling perspective, adjusters and managers evaluating potential exposure should keep in mind the following defenses:

1. *Bona fide* legal and factual disputes

As the Texas Supreme Court stated in *Williams*, "evidence that only shows a *bona fide* dispute about the insurer's liability on the contract does not rise the level of bad faith."[18] Texas courts have extended the *bona fide* dispute doctrine from the common-law to all extra-contractual causes of action.[19] So in those cases where legitimate coverage questions arise, the same policy defenses can serve as a legal defense to common law and statutory bad faith claims.

2. Written notice under 542 or 542A

While courts have previously refused to recognize the *bona fide* dispute defense under Chapter 542,[20] and generally apply a strict liability standard to 542 claims,[21] both 542 and 542A of the TPPCA require "written notice" of the claim so as to trigger an potential liability under the statutes.[22] Written notice is required by Section 542.055 and as defined in Section 542.051(4). And for claims resulting from forces of nature, Chapter 542A.003 also requires written notice, including a specific breakdown on attorney fees claimed including the number of hours worked in support.

3. Reasonableness of pre-appraisal payment exception to 542 liability

Although *Higginbotham* and other reported decisions refer to strict liability in the 542 TPPCA context, several decisions analyzing *Barbara Tech* since it was published, refer to a "reasonableness exception" applied to 542 TPPCA liability. In *Shin v. Allstate Texas Lloyds*, 2019 WL 4170259 (S.D. Tex. – Houston, Sept. 3, 2019), the court issued a Memorandum and Order on July 3, 2019, granting summary judgment in favor of Allstate on all claims following their prompt payment of an appraisal award, including the TPPCA claims. But after Barbara Tech was issued, the insured filed a motion to reconsider arguing that the TPPCA claims and the "reasonableness exception" survives *Barbara Technologies.*

In *Mainali Corp. v. Covington Specialty, Ins. Co*., 872 F.3d 255, 259 (5th Cir. 2017), the Fifth Circuit held that there is no statutory violation of the TPPCA if the insurer's preappraisal payment is "reasonable." In addressing Shin's motion to reconsider, the court observed: "In fact, *Barbara Technologies* cites *Mainali* with approval in support of the claim that "when an insurer complies with the TPPCA in responding to the claim, requesting necessary information, investigating, evaluating, and reaching a decision on the claim, use of the contract's appraisal process does not vitiate the insurer's earlier determination on the claim." *Barbara Tech* at 823 (citing *Mainali*, 872 F.3d at 258–59). *Mainali*'s "reasonableness" exception therefore survives *Barbara Technologies*."

The court then observed that in *Mainali*, the preappraisal damage determination was "undeniably reasonable" because it exceeded the appraisal award. But also noted that other cases have found the preappraisal amount was within the exception when the "insurer's preappraisal payment was reasonable where the appraisal award was 6.8 times the preappraisal payment, a difference of over $22,000." And in Shin, "the appraiser reached an award of $25,944.94, which was 5.6 times greater than the initial preappraisal payment of $4,616,63." The Court read "*Barbara Technologies*, in conjunction with *Mainali*, as standing for the proposition that, in order for an insurer to avoid a Prompt Payment Act claim by a plaintiff, the insurer must have made a reasonable preappraisal payment

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[18] *U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997) (*per curiam*).; *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994); *State Farm Fire & Cas. Co. v. Woods*, 925 F. Supp. 1174 (E.D. Tex. 1996).

[19] *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 67 (Tex. 1997) ("We have never intended that an insurer should be liable for tort damages simply for denying a claim in error, even if the insurer was negligent. To the contrary, we promised at the tort's inception that 'carriers will maintain the right to deny invalid or questionable claims and will not be subject to liability for an erroneous denial of a claim.'"); *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988).

[20] E.g. *Higginbotham v. State Farm Mutual Ins. Co.*, 103 F.3d 456 (5th Cir. 1997).

[21] See *Mainali* "reasonableness exception" discussed herein.

[22] *See McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 207-208, (Tex.App. – Austin, 2005, review denied) ("Because there is no evidence that the McMillins triggered the provisions of article 21.55 by providing notice in writing to State Farm of their claim, we sustain State Farm's third issue. Accordingly, the McMillins' complaint about the jury's finding of a date that fixed when the article 21.55 interest penalties began to accrue is moot because no penalties will accrue."); *Mid-Century Ins. Co. v. Barclay*, 880 S.W.2d 807, 810 n. 3 (Tex.App.-Austin 1994, writ denied).

within the statutorily-provided period. The court found that Allstate made the preappraisal payment within the required time period, applied the "reasonableness exception" and granted summary judgment in favor of Allstate, including the TPPCA claims.

It should be noted that this is a federal trial court decision and non-binding on state courts. And, it appears that plaintiff filed an appeal to the Fifth Circuit on October 4, 2019. Nevertheless, the "reasonableness exception" to TPPCA liability remains for now.[23]

Depending on the facts of the claim, there are many other policy, legal and fact-based defenses to contractual and extra-contractual exposure which should be considered both before and after suit is filed.[24]

F. Conclusion

Two recent decisions from the Supreme Court of Texas, *Barbara Technologies Corp. v. State Farm Lloyds*[25], and *Ortiz v. State Farm Lloyds*[26], have changed the landscape of appraisal law in Texas. And since their issuance, new cases continue to flow and change the appraisal landscape. Insurers are still able to buy their peace to a limited extent, but also appear to have gained the ability to dispute "liability" or coverage, when confronted with an adverse appraisal award.

III. RECENT DEVELOPMENTS REGARDING THE 542A NOTICE REQUIREMENT & ATTORNEYS' FEES

In 2017, the Texas Legislature sought to revamp the notice requirement for certain first-party insurance claims before a suit could be filed.[27] *See Gateway Plaza Condo v. Travelers Indemn. Co. of America*, Civ. A. No. 3:19-CV-01645-S, 2019 WL 7187249, at *2 (N.D. Tex. Dec. 23, 2019); *Davis v. Allstate Fire & Cas. Ins*., Civ. A. No. 4:18-CV-00075, 2018 WL 3207433, at *1 (E.D. Tex. June 29, 2018). Prior to the enactment of Chapter 542A, first-party claimants still had notice requirements they had to fulfill, but beyond mandatory abatement, failure to abide by the notice requirement really had no consequences for claimants or their attorneys. TEX. INS. CODE § 541.154; TEX. BUS. & COMM. CODE §17.505(a). This changed drastically with the passage of Chapter 542A. Now, if a claimant fails to properly notice, the claimant can be precluded from recovering his or her attorneys' fees. TEX. INS. CODE §542A.007(d).[28]

In order to avoid these harsh consequences, practitioners must adhere to Chapter 542A's four pronged, notice requirement. TEX. INS. CODE §542A.003(b)–(c). The notice must include: 1) a statement of the acts or omissions giving rise to the claim; 2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; 3) the amount of reasonable and necessary attorney's fees incurred by the claimant, calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services; and 4) a statement that a copy of the notice was provided to the claimant. *Id*.

The statute excuses the notice requirement if "the claimant has a reasonable basis for believing there is insufficient time to give the pre-suit notice before the limitations period will expire" or "the action is asserted as a counterclaim." TEX. INS. CODE §542A.003(d). One court has given this matter of avoidance the name, "the impracticability exception," presumably based on the use of the word "impracticability" in the statute. *J.P. Columbus Warehousing, Inc. v. United Fire and Cas. Co*., Civ. A. No. 5:18–cv–00100, 2019 WL 453378, *3 (Jan. 14, 2019).[29] However, practitioners should be

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[23] Note that a panel of the Fifth Circuit is not permitted to overturn a prior panel's *Erie* guess regarding state law absent a direct holding by a state supreme court. Because neither *Barbara Technologies* nor *Ortiz* considered the applicability of the "reasonableness" exception, we would not expect the Fifth Circuit to retreat from its precedent.

[24] Settlement offers under 541, Rule 167, 542 and 542A written notice compliance, abatement, limitations defenses, motions to compel mediation and offers in response to demands and following mediation, etc. Many other tools can be found in any well-equipped insurance defense litigator's toolbox.

[25] 589 S.W.3d 806 (Tex. 2019).

[26] 589 S.W.3d 127 (Tex. 2019).

[27] Only certain "claims" are subject to the statute. TEX. INS. CODE §542A.001(2). Claims that are: 1) "made by an insured under an insurance policy providing coverage for real property or improvements to real property;" 2) "must be paid by the insurer directly to the insured;" and arise "from damage to or loss of covered property caused, wholly or partly, by forces of nature, including an earthquake or earth tremor, a wildfire, a flood, a tornado, lightning, a hurricane, hail, wind, a snowstorm, or a rainstorm" are subject to Section 542A. *Id*. Note, common first-party insurance claims include pipe bursts, which usually do not arise from forces of nature, and fire claims, which also may or may not arise from a force of nature. Each claim should be judged on a case-by-case basis.

[28] The claimant can also still face a mandatory abatement for failing to provide pre-suit notice. TEX. INS. CODE §542A.005(b). This paper does not explore that remedy, and instead focuses on the preclusion of attorneys' fees. For more discussion on abatement, see *Davis v. Allstate Fire & Cas. Ins*., Civ. A. No. 4:18-CV-00075, 2018 WL 3207433, at *1 (E.D. Tex. June 29, 2018).

[29] Impracticability is also a common-law, affirmative defense in Texas. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954

wary to rely on the impracticability exception given recent case developments.

In *J.P. Columbus Warehousing*, plaintiff had two insurance claims that were denied by the insurance carrier. *J.P. Columbus Warehousing*, 2019 WL 453378, *1. The first and second claims were denied on July 5, 2016, and on September 9, 2017, respectively. *Id.* The statute of limitations as to some of plaintiff's claims was set to expire on July 4, 2018. *Id*. at *6. On November 9, 2017 (two months after the second claim was denied, and seven months before the statute of limitations expired on the first claim) a public adjuster was hired. *Id*. The public adjuster sent a letter of representation on March 26, 2018, and an attorney was hired on May 3, 2018. *Id*. The attorney's engagement was only a mere sixty-three days prior to the expiration of the statute of limitations. *Id*. Given this short time period, plaintiff did not provide pre-suit notice, and instead pled impracticability in its state-court petition, stating "Providing § 542A.003 notice is impracticable because the two-year anniversary of denial will occur before the expiration of 61 days. Insufficient time exists to give the 61-day pre-suit notice." *Id*. at *3.

After the matter was removed, defendant timely filed its motion to exclude attorneys' fees based on plaintiff's failure to provide pre-suit notice. *J.P. Columbus Warehousing*, 2019 WL 453378, *1. Plaintiff responded that:

> "[I]t had a reasonable basis for believing there was insufficient time to give the pre-suit notice before the statute of limitations expired, and thus that giving pre-suit notice was impracticable, because Plaintiff hired an attorney sixty-three days before the two-year anniversary of Defendant's denial of the first insurance claim, on July 5, 2016."

Id. at *3. Defendant countered that:

> "[T]he question of impracticability under Section 542A.007(d)(1) should not be determined solely by the fact that plaintiff waited to retain counsel until shortly before the expiration of the statute of limitations, with no further explanation by plaintiff. Plaintiff…had retained a public adjuster who communicated with Defendant long before the two-year statute of limitations expiration date."

Id. (internal citations omitted). Thus, plaintiff seemed to be arguing that given the tight timeframe upon which it hired an attorney, the attorney could not be expected to be able to put together a code-compliant letter in three short days. Defendant, on the other hand, was arguing that the mere hiring of an attorney should not be considered in isolation, especially when plaintiff had hired another representative (the public adjuster) long before the limitations period expired, who ultimately could have provided such notice. The court sided with defendant and granted the motion. *Id*. at *1.

The court quickly noted that plaintiff's impracticability argument was only made towards the first claim and not the second claim. *J.P. Columbus Warehousing*, 2019 WL 453378, at *3. Per the court's reasoning, nothing required the two claims to be part of the same suit, and given there was still ample time for pre-suit notice to be provided for the second claim,[30] the court summarily rejected the impracticability argument as to the causes of action arising from the second claim. *Id*.

The court then turned to the first claim and provided much more analysis on the impracticability argument. *J.P. Columbus Warehousing*, 2019 WL 453378, *4. The court noted that the only argument plaintiff put forward was that it retained an attorney sixty-three days prior to the expiration of the statute of limitations. *Id*. Other than that, the plaintiff offered no other evidence as to why pre-suit notice could not be provided prior to filing suit. *Id*. Based on that argument alone, the court was faced with whether the timing of hiring of an attorney supported a "reasonable basis for believing there is insufficient time to give pre-suit notice before the limitations period will expire. *Id*. (citing to Tex. Ins. Code §542A.007(d)).

The court examined other cases but found the text of Chapter 542A to be the most helpful. *J.P. Columbus Warehousing*, 2019 WL 453378, *5–6. In particular, the court acknowledged that "Chapter 542A appears to anticipate and provide for the possibility that section 542A.003's pre-suit notice may be sent on behalf of a claimant by a representative ***other than an attorney***." *Id*. at *6 (citing Tex. Ins. Code § 542A.003(c)) (emphasis added). Essentially, the court ruled that the public adjuster could have provided the pre-suit notice and waiting until sixty-three days before a limitations period expired was not reason enough to excuse the notice requirement. Moreover, the court declined to create an exception to the notice requirement for plaintiffs who wait until the eve of the limitation period to hire counsel. Per the court, this would defeat the very purpose of the notice requirement: to discourage litigation and encourage settlements of consumer complaints. *Id*. at *6; *see also Davis*, 2018 WL 3207433, at *1 (emphasizing purpose of notice requirement).

(Tex.1992) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981)).

[30] The statute of limitations for the second claim did not expire until September 8, 2019.

Since then, another federal district court has weighed in on the exclusion of attorneys' fees, and also found that the public adjuster[31] could have provided the requisite notice. *See Gateway Plaza Condo,* 2019 WL 7187249, at *2. While the defendant's motion and supporting evidence was uncontroverted, the *Gateway Plaza Condo* court still weighed in and echoed the *J.P. Columbus Warehousing* court's sentiment when it said:

> '"Plaintiff proffers no explanation for why it waited' almost two years before the date of the alleged loss 'before it hired an attorney.' This is especially troubling given that Plaintiff had retained public adjusters who provided Defendants with estimates as early as January 10, 2018, and who could have provided Defendant with the requisite notice."

Id. at *2.

Despite the harsh effects that these two opinions could have for plaintiffs and plaintiffs' attorneys alike, Defense counsel should also be wary of what these two opinions likely represent. Both the *J.P. Columbus Warehousing* opinion and the *Gateway Plaza Condo* opinion track the language of the statute when describing a defendant's burden for filing such a motion. *See Gateway Plaza Condo,* 2019 WL 7187249, at *2; *J.P. Columbus Warehousing,* 2019 WL 453378, *3. Both opinions emphasize that a defendant must "plead *and* prove" that the defendant was entitled to but was not given a pre-suit notice. *Gateway Plaza Condo,* 2019 WL 7187249, at *2 (Tex. Ins. Code § 542A.007(d)); *J.P. Columbus Warehousing,* 2019 WL 453378, *3 (same). More specifically, per the *Gateway Plaza Condo* opinion:

> "If, within 30 days of filing 'an original answer in the court in which the action is pending,' the defendant 'pleads and proves' 'that the defendant was entitled to but was not given a pre-suit notice …, the court may not award to the [plaintiff] any attorney's fees incurred after the date the defendant files the pleading with the court.'"

Gateway Plaza Condo, 2019 WL 7187249, at *2.

While this may not have been the intended effect, some attorneys and other courts may consider the court's construction of the statute to require a defendant to both "plead *and* prove" its affirmative defense **within thirty days of filing an original answer.** That is to say, it may not be enough to just file a pleading within 30 days of filing an original answer and then wait until later to proffer the evidence in support of the pleading. Instead, a practitioner may have to timely file their pleading with the corresponding proof, and some courts may even require a hearing "proving" that defendant was entitled to notice but did not receive it—all within 30 days of filing an answer.

One court has observed, "District courts that have analyzed the notice provision in §542A have found that federal courts should apply it strictly." *Davis,* 2018 WL 3207433, at *3 (citing *Perrett v. Allstate Ins. Co*., Civ. A. No. 4:18-CV-01386, 2018 WL 2864132, at *3 (S.D. Tex. June 11, 2018) and *Carrizales v. State Farm Lloyds,* Civ. A. No. 3:18-CV-0086-L, 2018 WL 1697584, at *1 (N.D. Tex. Apr. 6, 2018)). Given the penal nature of Chapter 542A for failure to provide pre-suit notice, it would not be surprising for a judge to interpret the statute to require both pleading and proof within thirty days.

On the other hand, one might argue the *Gateway Plaza Condo* court read more into the statute than just the thirty-day requirement. Section 542A.007 provides that only pre-suit notices lacking "the specific amount alleged to be owed by the insurer" can negate what are otherwise recoverable attorneys' fees. That is to say, if the notice is lacking "the specific amount alleged to be owed by the insurer," but is in other ways compliant, the claimant is still precluded from recovering his or her attorneys' fees. Conversely, if the notice has "the specific amount alleged to be owed by the insurer," but is in all other ways non-compliant, the sole remedy would be abatement. *See* TEX. INS. CODE §542A.005. This phrase is, after all, specifically singled out and included in the statute, and courts are apt to favor specificity in a statute over general wording. *See Spradlin v. Jim Walter Homes, Inc*., 34 S.W.3d 578, 580 (Tex. 2000) (reciting well known canons of construction including those to give effect to all words and phrases, and to not treat any statutory language as surplusage, or to render a provision meaningless or nugatory).

How state and federal courts continue to construe Chapter 542A is anyone's guess. One thing remains clear, the cautious plaintiffs' attorney should be mindful of the sixty-day window when taking a case, advise his or her client accordingly if timeliness is an issue, and calendar a deadline to meet the sixty-day requirement,

[31] Various questions arise as to how a public adjuster could accomplish this. For example, can a public adjuster assert that an insurance carrier violated Chapters 541 and 542 without running the risk of being accused of practicing law without a license? Moreover, how could a public adjuster state the amount of legal fees incurred when an attorney has not yet been retained? Further, as discussed below, does providing the amount owed by the carrier suffice if that is all the statute requires in order to avoid the preclusion of attorneys' fees? The answer to this latter question seems to be "no" given the court's opinion in *Gateway Plaza Condo*. *Gateway Plaza Condo*, 2019 WL 7187249, at *2 (providing estimates was not sufficient, as more notice was required).

or run the risk of not recovering the client's attorneys' fees. Likewise, a prudent Defense attorney would be better off to simultaneously file timely pleadings that both 1) describe how it was entitled to but did not receive the requisite notice, and 2) the corresponding proof in admissible form. The extra-cautious attorney should likewise seek a hearing and a ruling within thirty days of filing an answer.

IV. ELECTION OF LIABILITY & FEDERAL COURT JURISDICTION

The passage of Chapter 542A has also caused a growing body of law relating to federal court jurisdiction, and it concerns Chapter 542A's election of liability statute. This particular section of the Texas Insurance Code provides:

> **ACTION AGAINST AGENT; INSURER ELECTION OF LEGAL RESPONSIBILITY.** (a) Except as provided by Subsection (h), in an action to which this chapter applies, an insurer that is a party to the action may elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant.
> (b) If an insurer makes an election under Subsection (a) before a claimant files an action to which this chapter applies, no cause of action exists against the agent related to the claimant's claim, and, if the claimant files an action against the agent, the court shall dismiss that action with prejudice.
> (c) If a claimant files an action to which this chapter applies against an agent and the insurer thereafter makes an election under Subsection (a) with respect to the agent, the court shall dismiss the action against the agent with prejudice.

TEX. INS. CODE § 542A.006(a–c).

While an insurance carrier is free to make this election at any time, an insurance carrier is not going to *pro forma* make an election of liability following each claim determination. It naturally follows that an election would only occur once there is notice of a dispute. Practically speaking, this comes after a claimant provides the notice contemplated by section 542.003 and discussed *infra*. *Cf.* TEX. INS. CODE §542A.003; TEX. INS. CODE §542A.006. Since a carrier is only apt to make an election of liability once it is aware of dispute, many times there is a narrow window to do so—roughly sixty days. Sometimes elections are made before suit is filed, and sometimes elections are made after a suit is filed.

This has led to numerous federal courts analyzing whether or not they have subject matter jurisdiction and basing their decisions on varying factors: 1) whether an election of liability was made before or after the suit was filed in state court;[32] and 2) whether the removing-defendant argues there is diversity jurisdiction based on improper joinder or based solely on the election of liability.

The growing body of case law suggests that the timing of an election of liability is crucial to the court's analysis. In what has now become a much-cited case, the *Stephens* court aptly described how a majority of courts are deciding this matter. *Stephens v. Safeco Ins. Co. of Ind.*, Civil A. No. 4:18-cv-00595, 2019 WL 109395, at *4 (E.D. Tex. Jan. 4, 2019). In *Stephens*, the court stated the following:

> The court agrees with *Electro Grafix* in so much as it propositions that **if a diverse defendant–insurer makes the election before the insured files suit in state court, then a dismissal under Section 542A.006 is tantamount to a finding of improper joinder if a plaintiff–insured attempts to add the non-diverse adjuster to an action.** This is because the Texas Insurance Code forecloses on any ability to recover against an adjuster if an insurer makes an election. Therefore, if the election is made pre-suit, an adjuster subsequently joined is joined when state law mandates that there can be no viable claims against him. If, however, the election is made after an insured commences action, a diverse defendant–insurer cannot rely solely on the fact that the insured is now prohibited from recovering against the non-diverse adjuster. An election made after suit commences does not challenge the joinder of the non-diverse adjuster and, as a result, has no bearing on whether a plaintiff–insured asserted viable claims against the non-diverse adjuster when joining him to the action. Simply put, **if an insurer elects to accept full responsibility of an agent/adjuster after the insured commences action in state court, the insurer must prove that the non-diverse adjuster is improperly joined for reasons**

[32] As discussed below, the majority of courts are holding that an election made prior to suit renders a joinder improper, whereas an election made after suit is filed has no effect on improper joinder. *See generally Vyas v. Atain Specialty Ins. Co.*, Civil Action No. H-19-960, 2019 WL 2119733 (S.D. Tex. May 15, 2019).

> **independent of the election made under Section 542A.006 of the Texas Insurance Code.**

Stephens, 2019 WL 109395, at *5, *7 (emphasis added).

Put simply, if an election is made prior to the suit being filed, then an adjuster's inclusion in the matter or non-inclusion in the matter will have no consequence—the joinder is improper and federal court jurisdiction exists, as the parties should be completely diversely. Conversely, an election made after a suit is filed will not, in and of itself, provide the court with diversity jurisdiction. The removing defendant will still carry the heavy burden of proving improper joinder. *Hart v. Bayer Corp.*, 199 F.3d 239, 246 (5th Cir. 2000). And the removing defendant cannot rely solely on its election of liability to demonstrates the court's jurisdiction. *River of Life Assembly of God v. Church Mut. Ins. Co.*, No 1:19-CV-49-RP, 2019 WL 1767339, at *3 (W.D. Tex. Apr. 22, 2019); see also *Stephens*, 2019 WL 109395, at *5.

This is only what a majority of Texas courts are holding, however. The Western District of Texas, though in the minority, and one Southern District of Texas Court has espoused the opposite approach. In a recent opinion by Judge Xavier Rodriguez, the court noted that three judges agree a non-diverse defendant is still improperly joined following an insurer's post-suit election. *Bexar Diversified MF-1, LLC v. General Star Indemn. Co.*, Civ. A. No. SA-19-CV-00773-XR, 2019 WL 6131455 (W.D. Tex. Nov. 18, 2019) (citing to *Flores v. Allstate Vehicle & Prop. Ins. Co.*, Civ. A. No. SA-18-CV-742-XR, 2018 WL 5695553 (W.D. Tex. Oct. 31, 2018) (Rodriguez, J.); *Yan Qing Jiang v. Travelers Home & Marine Ins. Co.*, No. 1:18-CV-758-RP, 2018 WL 6201954 (W.D. Tex. Nov. 28, 2018) (Pitman, J.) (same); *Solares v. Allstate Vehicle & Prop. Ins.*, No. 5:19-CV-00027, 2019 WL 3253072 (S.D. Tex. June 11, 2019) (Saldaña, J.)).

Judge Rodriguez essentially argues that the courts in the majority are misapplying the *Smallwood* case, which should have only been applied in a narrow set of circumstances. *Bexar Diversified MF-1*, 2019 WL 6131455, at *4 (citing to *Smallwood v. Ill. Cent. R. Co.*, 385 F.3d 568 (5th Cir. 2004)). Accordingly, the focus should not be on the joinder itself or the merits of plaintiff's case, but rather on the possibility or impossibility of recovery at the time of removal. *Id.* Because the election is final and cannot be revoked, that establishes the impossibility of recovery against the non-diverse defendant "at the time of removal," which in turn makes the party improperly joined and its citizenship can be disregarded for jurisdictional purposes. *Id.* While Judge Rodriguez's seems to go against the greater weight of authority (as even Judge Pitman has since joined the majority in his approach), his authority still has everything to do with the timing of the election. In *Bexar Diversified MF-1*, the defendant made its election in its notice of removal, thereby making recovery impossible "at the time of removal" and keeping in line with Fifth Circuit precedent. *Id.* at *1.

Besides the timing issue, one other aspect changes the court's approach to whether or not an adjuster was improperly joined. This all turns on whether the removing-defendant argues there is diversity jurisdiction based on improper joinder or based solely on the election of liability.

The Southern District of Texas recognized these important distinctions last summer. In *Yarco*, the plaintiff filed suit, and after receiving service, the insurer made its election of liability for the in-state defendant. *Yarco Trading Co. v. United Fire & Cas. Co.*, 2019 WL 3024792, *1 (S.D. Tex. July 7, 2019). Judge Marmolejo observed, "Where state-court defendants have made a § 542A.006 election prior to removal [but after suit was filed], the lion's share of federal courts have applied the improper-joinder doctrine—as opposed to the voluntary-involuntary rule—to assess the election's impact on federal subject matter jurisdiction."[33] *Yarco Trading Co.*, 2019 WL 3024792, *5.[34] The *Yarco* court further explained that

[33] The improper joinder doctrine is a rule designed to prevent a plaintiff from blocking removal simply by joining a non-diverse party. *Flores v. Allstate Vehicle & Prop. Ins. Co.*, Civil Action No. SA-18-CV-742-XR, 2018 WL 5695553, at *2 (W.D. Tex. Oct. 31, 2018). The voluntary-involuntary rule, by contrast states that an action non-removable when commenced may become removable thereafter only by the voluntary act of the plaintiff." *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir.1967). The improper joinder action is an exception to voluntary-involuntary rule, otherwise plaintiffs who improperly join a party, which are later dismissed, could always claim the dismissal was "involuntary" to them.

[34] Citing to *Ewell v. Centauri Specialty Ins. Co.*, Civil Action No. H-19-1415, 2019 WL 2502016, at *1–2 (S.D. Tex. June 17, 2019) ("Because there is no reasonable basis to predict that plaintiff might be able to recover against Wiley in state court, he was improperly joined as a defendant in this suit."); *Robbins Place W. Campus, LLC v. Mid-Century Ins. Co.*, A-18-CV-875-LY, 2019 WL 2183792, at *1–3 (W.D. Tex. May 21, 2019) (analyzing whether a post-suit § 542A.006 election rendered an adjuster improperly joined); *Vyas v. Atain Specialty Ins. Co.*, Civil A. No. H-19-960, 2019 WL 2119733, at *2–4 (S.D. Tex. May 15, 2019) (applying the improper-joinder doctrine to determine whether remand to state court was appropriate given an insurer's § 542A.006 election); *Greatland Inv., Inc. v. Mt. Hawley Ins. Co.*, Civil Action H-19-1212, 2019 WL 2120854, at *2–4 (S.D. Tex. May 15, 2019) (holding that an adjuster had been improperly joined because the insurer had made a § 542A.006 election to accept liability before the plaintiff filed suit); *River of Life Assembly*

in one "outlier" situation a federal court used the "voluntary-involuntary rule" to analyze a motion to remand, and that was because the defendant-insurer did ***not*** argue the adjusters were improperly joined. [35] *Id*.

The "outlier" case was the *Massey* case. *Massey v. Allstate Vehicle & Prop. Ins. Co.*, No. H-18-1144, 2018 WL 3017431 (S.D. Tex. June 18, 2018). In *Massey*, the carrier waited until suit was filed in state court, then elected liability for its adjusters, waited until the state court dismissed the in-state adjusters, and then removed the case to federal court. *Massey v. Allstate Vehicle & Prop. Ins. Co.*, No. H-18-1144, 2018 WL 3017431, at *1 (S.D. Tex. June 18, 2018). In its briefings, the carrier admitted that the adjusters were not improperly joined, and instead simply alleged diversity jurisdiction solely off its election of liability and subsequent dismissal. *Id*. at *3. The court determined the voluntary-involuntary rule applied and ruled the carrier "could not remove the case based on the state court's dismissal of the adjusters, as that dismissal was involuntary to the Masseys." *Id*. at *3. As a result, the court granted the motion to remand. *Id*. at *1.

Since then, other courts have recognized that absent any argument the adjusters were improperly joined, the proper analytical framework is the voluntary-involuntary rule. *See Vyas v. Atain Specialty Ins. Co*., 380 F.Supp.3d 609, 613 (S.D. Tex. 2019); *Stephens v. Safeco Ins. Co. of Ind*., Civil Action No. 4:18-cv-00595, 2019 WL 109395, at *4 (E.D. Tex. Jan. 4, 2019). Practically speaking, this amounts to a technical distinction for the court: if a carrier argues there is federal court jurisdiction based on a fraudulently joined party, then the improper-joinder doctrine is the proper analytical framework; if the carrier argues there is federal court jurisdiction based simply on an election of liability, the proper analytical framework is based on the voluntary-involuntary rule.

The distinction is academic in nature, however, as it is one that the carrier can easily cure thereby changing the court's analysis. Multiple district courts have found that using the specific phrase "improper joinder" in a notice of removal is not essential to determining whether diversity jurisdiction exists. *See Flores v. Allstate Vehicle & Prop. Ins. Co., Civil Action* No. SA-18-CV-742-XR, 2018 WL 5695553, at *5 (W.D. Tex. Oct. 31, 2018); *Wormley v. S. Pac. Transp. Co*., 863 F. Supp. 382, 385 (E. D. Tex. 1994). Moreover, even if a court finds a carrier's notice of removal to be insufficient, "[a]n imperfect or defective allegation of jurisdiction" "may be amended . . . to set forth more specifically the jurisdictional grounds for removal which were imperfectly stated in the original petition [for removal]." *Wormley*, 863 F. Supp. At 385. Such amended notices of removal are sufficient to confer jurisdiction on the federal courts, even if amended outside the thirty-day period. *Id*.; *see also Firemen's Ins. Co. of Newark, J.J. v. Robbins Coal Col*, 288 F.2d 349 (5th Cir. 1961) (citing 28 U.S.C. § 1653).

In other words, a defendant can always amend its notice of removal to include an allegation of improper joinder (even if not included in the original notice and outside the thirty-day time period), and that makes the court's analytical framework the improper-joinder standard versus the voluntary-involuntary standard. This is important because an election of liability is virtually always going to be an "involuntary act" as it relates to the plaintiff.

So, in conclusion, Defense attorneys should be mindful of when their client elected liability. If the election was made before a suit was filed, then the carrier should have no problem demonstrating federal court jurisdiction (assuming there are no outstanding, non-diverse Defendants beyond the scope of the election). If on the other hand the election is made after the suit is filed, the carrier will still have the heavy burden of demonstrating improper joinder—unless they are in the few district Court in Texas who rule differently. Both sides of the bar should be mindful of these courts' particular ruling. The carrier should also not assume that their election alone creates federal court jurisdiction, and should instead specifically plead improper joiner or amend its notice of removal to include the same.

V. CONCURRENT CAUSATION

Among the few well-settled, bright line, principles relied upon to construe insurance contracts is this: To recover under an insurance policy, an insured has the burden to prove that any loss sustained is covered under the policy. In any insurance action "[a]n insured cannot

of God v. Church Mut. Ins. Co., 1:19-CV-49-RP, 2019 WL 1767339, at *3 (W.D. Tex. Apr. 22, 2019) ("[B]ecause improper joinder is an exception to the voluntary-involuntary rule, the court must first consider whether Harris was improperly joined." (internal citation omitted)); *Stephens v. Safeco Ins. Co. of Ind*., Civil A. No.. 4:18-cv-00595, 2019 WL 109395, at *4 (E.D. Tex. Jan. 4, 2019) ("courts have long excluded plaintiffs who improperly join non-diverse defendants from the protections of the voluntary-involuntary rule." (citation omitted)); *Flores*, 2018 WL 5695553, at *4 (concluding that the improper-joinder exception to the voluntary-involuntary rule applied because the state court dismissed the adjuster based on Texas Insurance Code § 542A.006).

[35] The full explanation the *Yarco* court gave was that the improper-joinder doctrine is an exception to the voluntary-involuntary rule. As a result, the one outlier case never reached the exception to the rule because the exception was never implicated or argued. *Yarco Trading Co.*, 2019 WL 3024792, *5.

recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy. In other words, a policyholder is not entitled to recover under an insurance policy unless she first proves the damages are covered by the policy. If that burden is met, then the burden shifts to the carrier to plead and prove the loss nonetheless falls within an exclusion. In the context of Storm Claims, the issue is ultimately determining what caused the damage.

In any insurance action "[a]n insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy."[36] Some storm claims are simple, "Is the observed damage caused by fire?" "Is the observed damage caused by tornado force winds." More often, though, the causation evaluation is more complex, e.g., when damages may be caused by two causes of loss. Texas common law establishes that "when 'excluded and covered events combine to cause' a loss and 'the two causes cannot be separated,' concurrent causation exists and 'the exclusion is triggered' and the insurer has no duty to provide coverage."[37]

The basic principle of concurrent causation is that insureds cannot recover under their insurance policies unless they prove the damage is covered by the policy.[38] In those situations, under Texas common law, if one cause of loss is covered and the other is not, then the insured bears the burden to segregate damages. The insured bears the burden of presenting evidence that will allow the trier-of-fact to segregate covered losses from non-covered losses.[39] Texas common law obligates a carrier to pay for the portion of damage caused solely by a covered peril.[40] However, Texas common law on concurrent causation only applies if there is no applicable, governing policy language. For example, if a policy has an anti-concurrent causation clause that bars coverage when two causes act together or in sequence, then that language will control and there is no coverage.[41]

The Texas Supreme Court, applying Texas law, upheld the validity of anti-concurrent causation clauses and noted that they bar coverage for damages if such damage is caused by a combination of covered and uncovered perils.[42] Texas Supreme Court and Fifth Circuit precedent on anti-concurrent causation clauses, holds that the only damages for which a policyholder may recover is where the policyholder can establish damages are caused exclusively by a covered peril; if the damages are caused synergistically, the clause bars coverage.[43]

Common example: Wind versus Flood. Under Texas case law, policy language containing an exclusion from coverage worded as "tidal wave, high water, or overflow, whether driven by wind or not," or something substantially similar, is interpreted as even if a covered event, such as a windstorm, causes an excluded event, such as overflow, the damage is still excluded under the policy. The Fifth Circuit examined the issue in *Tuepker v. State Farm Fire & Cas. Co.*[44] The Fifth Circuit reversed the district court's holding by ruling that State Farm Fire and Casualty Company's anti-concurrent clause is not ambiguous and operates to bar coverage if water acts in any way to cause the loss.[45]

While the Fifth Circuit in *Tuepker* applied Mississippi law, the court discusses the application of an "almost identical water damage exclusion" under Louisiana law as well.[46] The Fifth Circuit also found standard anti-concurrent causation clauses. In fact, the Court of Civil Appeals of Texas interpreted water exclusion language within American Fire & Casualty Company's policy when the appellate court affirmed the trial court's entry of a judgment notwithstanding the verdict in favor of the insurance companies.[47] In the *Wheelock* case, a windstorm destroyed a pier at Lake

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[36] *Employers Cas. Co. v. Block,* 744 S.W.2d 940, 944 (Tex. 1988), overruled in part on other grounds by *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996); *see Seger v. Yorkshire Ins. Co., Ltd*., No. 13-0673, 2016 WL 3382223,* 7 (Tex. June 17, 2016); *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App.-San Antonio 1999, pet. denied); *JAW The Pointe, L.L.C. v. Lexington Ins. Co*., 460 S.W.3d 597, 603 (Tex.2015).

[37] *Jaw The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 607-608 (Tex. 2015), quoting *Utica Nat. Ins. Co. of Tex. V. Am. Indem. Co.,* 141 S.W.3d 198, 204 (Tex.2004).

[38] *Allison v. Fire Ins. Exchange,* 98 S.W.3d 227, 258 (Tex.App.-Austin 2002).

[39] *Wallis v. United Servs. Auto Ass'n*, 2 S.W.3d 300, 302–03 (Tex.App.—San Antonio 1999, pet. denied) (citing *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex.1971)); *Lyons v. Millers Cas. Ins. Co. of Tex*., 866 S.W.2d 597, 601 (Tex.1993). *Nautilus Ins. Co. v. Country Oaks Apartments, Ltd*., 556 F.Supp.2d 611, 614 (W.D.Tex. 2008) (Hudspeth, J.), aff'd, 566 F.3d 452 (5th Cir. 2009).

[40] *All Saints Catholic Church v. United National Ins. Co.*. 257 S.W.3d 800, 802-03 (Tex.App.—Dallas 2008, no pet.).

[41] *Jaw The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 608 (Tex. 2015).

[42] *Jaw The Pointe,* 460 S.W. 3d at 607-608.

[43] *Jaw The Pointe,* 460 S.W.3d at 608.

[44] *See Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 351 (2007).

[45] *Id* at 354.

[46] *Id* at 352-354.

[47] *Wheelock v. Am. Fire & Cas. Co.*, 414 S.W.2d 61, 62-63 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

Texoma.[48] The issue in the case was whether the destruction was covered under the policy.[49] The *Wheelock* policy specifically covered damage by wind, but there was an exception from coverage for waves driven by wind.[50] The specific exclusionary language in the *Wheelock* policy was "[u]nless specifically named hereon, this company shall not be liable for loss . . . caused by . . . tidal wave, high water, or overflow, whether driven by wind or not . . . ."[51] Wheelock argued that the waves were created by high wind—a covered peril—and thus was covered under the policy.[52] The court found Wheelock's argument unpersuasive.[53] The court relied on the *Berglund* case, which is a case almost identical to *Wheelock.*[54] The Texas Supreme Court in *Berglund*, which opinion quotes with approval from *Coyle v. Palatine Ins. Co.*, states the following:

> [T]he contract expressly provided that the insurer was not to be responsible for any damage, whatever, due to the action of water caused by the wind. All part of the loss caused by water though the water's action was due to the wind, is thus eliminated.[55]

The court thereafter affirmed the Court of Civil Appeals by holding that although the policy did cover windstorm losses, the destruction of the boat dock by waves was not covered due to the high water exclusion.[56]

As mentioned above, the *Berglund* case is another example of case law interpreting an anti-concurrent causation clause. In *Berglund,* the Supreme Court of Texas reversed a decision of the Court of Civil Appeals and affirmed the trial court's judgment to award the insured $1,820 for damage not related to the excluded hazards under the policy.[57] In the *Berglund* case, a hurricane completely destroyed a boathouse.[58] At issue was whether the boathouse destroyed by a hurricane was covered under the insurance policy—was the damage covered because the cause of destruction was due to hurricane winds or was the damage excluded because the destruction was caused by waves.[59] Specifically, the *Berglund* policy states "Loss caused by or resulting from: (1) Flood, surface water, waves, tidal water or tidal wave, overflow of streams or of other bodies of water, or spray from any of the foregoing, all whether driven by wind or not . . . ."[60] The Supreme Court of Texas held that the destruction was not covered under the policy because it resulted from "flood, surface water, waves, tidal water or tidal wave, or spray from the foregoing, whether driven by wind or not."[61] In holding that the destruction was not covered under the policy, the court relied on *Coyle* and *Newark.*[62] The court specifically stated that exclusion clauses of the type involved in this suit have been used in policies for many years and since *Coyle*, the construction of the clause is settled in Texas.[63] The court found that although the policy in *Coyle* used different wording, the result is the same—the wind was the cause of the action of the water, but the contract expressly provided that the insurer was not liable for any damage due to the action of water caused by wind.[64] The Supreme Court reiterated this point by relying on *Newark*, as well. In *Newark*, the 3rd Circuit stated,

> [i]t is manifest from the terms of the contract . . . that the perils . . . expressly excepted are perils of water; and that after disclaiming liability for damage caused by such specific water force as tidal wave, high water, overflow and cloudburst, the insurance company broadly refuses to assume liability for any loss or damage caused generally by water, even when "driven by wind."[65]

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 62-63.

[51] *Id.*

[52] *Id.* at 63.

[53] *Id.*

[54] *Id.*

[55] *Id.* (citing to *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965); *see also Coyle v. Palatine Ins. Co.*, 222 S.W. 973 (Tex. Comm'n App. 1920, judgm't adopted).

[56] *Id.* at 64.

[57] *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965).

[58] *Id* at 312.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 312-13; *see also Coyle v. Palatine Ins. Co.*, 222 S.W. 973 (Tex. Comm'n App. 1920, judgm't adopted); *see also Newark Trust Co. v. Agric. Ins. Co.*, 237 F. 788 (3rd Cir. 1916).

[63] *Id.* (citing to *Coyle v. Palatine Ins. Co.*, 222 S.W. 973 (Tex. Comm'n App. 1920, judgm't adopted)).

[64] *Id.* at 312.

[65] *Newark Trust Co. v. Agric. Ins. Co.*, 237 F. 788, 792 (3rd Cir. 1916).

VI. CHALLENGING STORM EXPERTS

The chief challenges for experts in context of storm litigation are premised primarily around causation. Is the witness qualified to provide causation testimony? If so, are the witness' causation opinions reliable? A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.[66]

The court should strike expert witness testimony if (1) it will not assist the trier-of-fact to understand the evidence or to determine a fact in issue; (2) the witness is not qualified as an expert by knowledge, skill, experience, training or education; (3) the testimony is not based on sufficient facts or data; (4) the testimony is not a product of reliable principles and methods; or (5) the witness has not applied the principles and methods reliably to the facts of the case.[67] The Supreme Court has noted that once an objection to an expert's testimony is raised, the trial court must perform certain "gatekeeper" duties under Rule 702 and determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.[68] In fact, although a trial court has discretion in the manner in which the gatekeeper duty is conducted, it has no discretion regarding the fulfillment of its gatekeeper duty, which must be performed before the jury is permitted to hear the evidence.[69] Further, the trial court is required to make specific findings on the record that it performed its gatekeeper obligations and any basis for finding the testimony admissible under *Daubert*.[70]

A trial court fulfills its gatekeeper obligation by undertaking two separate inquires. First, the court must determine whether the witness is qualified to offer the opinions he or she is espousing.[71] Second, the proponent of the witness bears the burden of proving that its witness's opinions are both relevant and reliable.[72] To do so, a court should preliminarily assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.[73] A non-exclusive and flexible set of factors are used to make this assessment, which include (i) whether the theory or technique can (and has been) tested; (ii) whether the theory or technique has been subjected to peer review and publication; (iii) a consideration of the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (iv) a consideration of general acceptance of the theory or technique within the relevant scientific community.[74] The expert testimony also must be both "relevant and reliable" to be admissible.[75] A court determines if the testimony is relevant by asking whether the expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."[76] "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."[77] A party seeking to admit expert testimony must demonstrate that the expert's "findings and conclusions are based on the scientific method, and, therefore are reliable."[78] Even if proffered expert testimony is reliable and relevant under FED. R. EVID. 702, the court nonetheless should exclude it under FED. R. EVID. 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion

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[66] FED. R. EVID. 702.

[67] *Id*.

[68] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 and 592 (1993); *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) ("where [expert] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline'") (quoting *Daubert*, 509 U.S. at 592).

[69] *Mukhtar v. California State University, Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002), *amended en banc* at 319 F.3d 1073 (9th Cir. 2003); *see also Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

[70] *Goebel*, 215 F.3d at 1088-89.

[71] FED. R. EVID. 702.

[72] *Daubert*, 509 U.S. at 589-90 and 592; *Kuhmo Tire*, 526 U.S. at 141, 149 and 152 (the trial judge must determine whether the witness is qualified testimony and it must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline).

[73] *Daubert*, 509 U.S. at 593.

[74] *Id.* at 593-95.

[75] *United States v. Tucker*, 345 F.3d 320, 327 (5th Cir.2003) (quoting *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243-44 (5th Cir. 2002)); *see also Daubert*, 509 U.S. at 589.

[76] FED. R. EVID. 702; *Daubert*, 509 U.S. at 591; *Pipitone*, 288 F.3d at 245.

[77] *Daubert*, 509 U.S. at 591.

[78] *Moore v. Ashland Chemicals, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[79] In the context of Storm Claims, the principles governing the expertise and reliability of experts are the same - is the expert opinion within the person's expertise and is the opinion offered supported and reliable.

Common challenges to the reliability of a causation opinion chiefly turn on the methodology used and data relied upon by the presented expert to arrive at her opinions.[80] At issue in *Jepson-Bluhm* was the qualification of Plaintiff's expert to opine on causation. The Court ultimately excluded the causation opinions of the proffered expert but allowed the testimony of the expert on costs of construction. *International Precious Metals* case arose out of Hurricane Harvey and allegations by the policyholder it was inadequately compensated by the carrier for damages. The expert's designation included anticipated testimony about costs of repair and causation. The Court ultimately determined the FRCP 26 disclosure for the expert was deficient because it provided no reason for concluding the damage claimed was caused by a covered peril. *Id.* at *4. The Court then analyzed whether the Plaintiff could nonetheless use the causation information because the failure to properly disclose was substantially justified or harmless under FRCP 37(c)(1). The Court considered four factors including: (1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice. Citing to prior challenges to this same expert's qualification and disclosure, the Court found the noncompliance was not substantially justified or harmless and excluded the expert's causation testimony. *Id.* at *5. The expert's damage calculation was not stricken.[81]

[79] *Camp v. Lockheed Martin Corp.*, No. H-97-1938, 998 WL 966002, at *4 (S.D. Tex. Dec. 29, 1998).

[80] *Jepson-Bluhm, LLC dba International Precious Metals v. Seneca Ins. Co.*, 2020 WL 1880940 (E.D. Beaumont Division, 2020).

[81] *See also Superior Home Health Serv. LLC v. Philadelphia Indemnity Ins. Co.*, 2018 WL 8622316 at *3 (S.D. Tex. 2018)(striking causation testimony but not scope of damage testimony); *Wiggins v. State Farm*, 2017 WL 6442194 (N.D. Tex. 2017)(granting directed verdict after causation expert found not qualified to testify).