

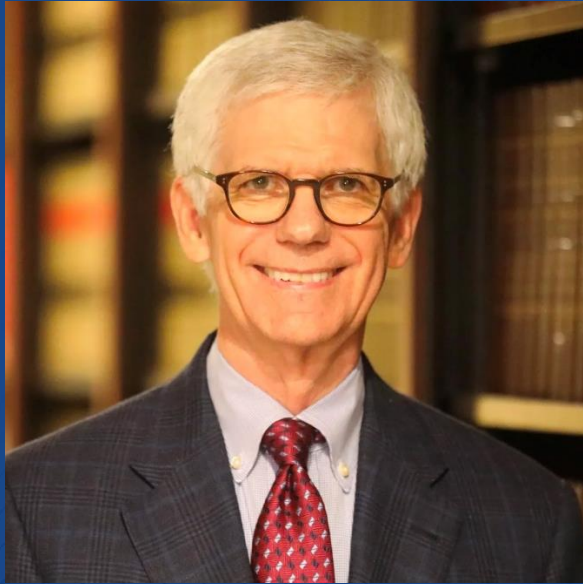
Latest First Party Issues: Appraisal, Public Adjusters, Burden of Proof/Concurrent Causation

American College of Coverage Counsel
2022 Law Symposium

Southern Methodist University, Dedman School of Law
Dallas, TX
November 11, 2022



Paper & Presentation by:



Neil Rambin

Neil Rambin Law PLLC



Marc Gravely

Gravely Attorneys and Counselors



Jake Posey

Posey Law Firm, PC

- Introduction
- Appraisal
- Public Adjusters
- Burden of Proof & Concurrent Causation
- Conclusion

APPRAISAL

Background

- Most property policies include appraisal as a means of avoiding the time/expense of litigation.
- Either party can invoke—before or after suit is filed.
- Two appraisers and, if necessary, an umpire.
- Determines the amount of the loss, and perhaps causation.

Today's Hot Topic— Attorneys' Fees Under TIC Sec. 542A.007

- An insured is typically entitled to recover attorneys' upon succeeding in a suit against the carrier for unpaid policy benefits (as well as TIC/bad faith).
- Sometimes the amount of the loss is determined by the appraisers to exceed the amount previously paid by insurer.
- In that event, the insurer can (1) litigate coverage/causation or (2) ignore any coverage issues and pay the amount of the award (minus the amount already paid).
- If the carrier timely pays the appraisal award, it is entitled to a summary judgment on contract claim and bad faith claims (it is deemed to have complied with the contract), but not Prompt Payment of Claims ("PPOC") interest—see Ortiz (Tex. 2019).
- ISSUE—upon timely payment of the award is the insured precluded from recovering attorneys' fees?

- The insured's counsel should be compensated for guiding the insured through the appraisal process and helping it to obtain the payment of additional policy proceeds.
- Such a holding would discourage insured's counsel from taking on similar claims in the future.
- Insurers will systematically attempt to avoid liability for TPPCA attorneys' fees by initially paying only a small fraction of the claim, invoking appraisal and paying the difference years later.

Insured's Position

Insurer's Position

- Section 542A.007 only provides for attorney's fees in connection with the amount "awarded in the judgment to the claimant for the claimant's claim under the insurance policy."
- Upon payment of the appraisal award there is no remaining claim under the insurance policy on which the insured can obtain a judgment. The PPOC claim is a separate statutory claim.
- This result is consistent with the fact that the insurer has not breached the contract—it fulfilled its obligations under the policy when it paid the appraisal award as provided for in the appraisal provision.
- This position incentivizes insureds to invoke appraisal before filing suit which promotes the goals of appraisal.

PUBLIC ADJUSTERS

Public Adjuster Statutory Provisions:

Under Tex. Ins. Code, “Public Insurance Adjuster” means:

- A person who, for direct, indirect, or any other compensation:
- Acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
- On behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
- A person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property.

Tex. Ins. Code - Issuance of License to Resident:

(a) The commissioner shall issue a public insurance adjuster license to an applicant on determining that the application meets the requirements of this chapter, the license application fee has been paid, and the applicant is an individual who:

- (1) is at least 18 years of age;
- (2) is a citizen of the United States or has complied with all federal laws pertaining to employment or to the transaction of business in the United States;
- (3) is a resident of this state;
- (4) is trustworthy and of a moral character that reasonably ensures that the applicant will conduct the business of a public insurance adjuster fairly and in good faith without detriment to the public;

Tex. Ins. Code - Issuance of License to Resident:

- (5) has not been convicted of a felony in the 10 years preceding filing an application under this chapter or, if convicted of a felony in the 10 years preceding filing an application under this chapter, has received a full pardon from that conviction and is otherwise relieved from any disabilities connected with that conviction;
- (6) has sufficient experience or training relating to the assessment of:
 - (A) real and personal property values; and
 - (B) physical loss of or damage to real or personal property that may be the subject of insurance and claims under insurance;
- (7) is sufficiently informed as to the terms and effects of the types of insurance contracts that provide coverage on real and personal property;

Tex. Ins. Code - Issuance of License to Resident:

(8) possesses knowledge and experience adequate to enable the applicant to engage in the business of a public insurance adjuster fairly and without injury to the public or any member of the public with whom the applicant may have business as a public insurance adjuster;

(9) has successfully passed the license examination prescribed under Section 4102.057 or is exempt from the examination requirement under this chapter;

(10) has complied with the financial responsibility requirements imposed under Section 4102.105; and

(11) has complied with any other requirements under applicable state law, including provision of a complete set of fingerprints on request, as provided by Section 4001.103.

(b) The commissioner may issue a resident public insurance adjuster license to an applicant who has been convicted of a felony 11 or more years before filing an application under this chapter if the commissioner determines that the applicant is qualified to act as a public insurance adjuster and that the circumstances surrounding the applicant's conviction do not warrant the denial of a license issued under this chapter.

1st Amendment Challenge

Facts

- In 2005, the Texas Legislature enacted provisions under the insurance code regulating “public insurance adjusting.”
- The enacted provisions provide that a public insurance adjuster must be licensed in order to adjust insurance claims on an insured's behalf. **TEX. INS. CODE ANN. § 4102.051.**
- Under these provisions, any person or entity defined as a contractor is prohibited from adjusting insurance claims for properties at which the contractor is, or will be, providing contracting services. **TEX. INS. CODE ANN. § 4102.163 (West 2009).**
- Likewise, licensed public insurance adjusters are prohibited from providing any contracting services on property at which they are, or will be, providing public insurance adjusting services. In other words, acting as a public insurance adjuster and a contractor on the same claim is a statutorily defined conflict of interest. **TEX. INS. CODE ANN. § 4102.158(a)(1).**

Facts

- Stonewater is a professional roofing company that repairs and replaces commercial and residential roofs in Texas.
- Stonewater is not licensed as a public insurance adjuster. However, Stonewater's website purportedly includes statements such as it is "highly experienced with the insurance claims process," *that it has "done thousands of roof restorations due to insurance claims over the years,"* and it *"understand[s] the supplement process required."*
- Stonewater's website has also allegedly referenced the company as a **"Trusted Roofing and Insurance Specialist"** and **"The Leader In Insurance Claim Approval,"** having "developed a system which helps our customers settle their insurance claims as quickly, painlessly and comprehensively as possible."
- Some of Stonewater's prior form agreements ostensibly contained language that "authorized" Stonewater" to negotiate on [the customer's] behalf with [the] insurance company and upon insurance approval to do the work specified."
- One of Stonewater's customers sued it, arguing these statements violated the prohibitions set forth in chapter 4102 of the Insurance Code.

Facts

- In June 2020, **Stonewater filed suit against TDI**, challenging the prohibitions as impermissible regulations of commercial speech and alleging the provisions were unconstitutionally vague.
- Stonewater requested a declaration that the prohibitions are invalid on their face and as applied under the First and Fourteenth Amendments to the United State Constitution and "corresponding provisions" of the Texas Constitution.
- TDI filed a general denial, and a Rule 91a motion to dismiss.
- TDI argued that Stonewater's constitutional challenges were **subject to dismissal because they had no basis in law**.
- The trial court held a hearing on the motion and without explanation as to the basis for its ruling, **granted TDI's motion to dismiss**. *Stonewater Roofing, Ltd. Co. v. Tex. Dep't of Ins.*, 641 S.W.3d 794, 798-99 (Tex. App.—Amarillo 2022, pet. filed)

PA Statute at Issue

- Chapter 4102 of the Texas Insurance Code (effective September 1, 2005) is a comprehensive licensing statute regulating public insurance adjusters.
- Section 4102.163(a) provides: "A contractor may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide contracting services, regardless of whether the contractor: (1) holds a [public insurance adjuster] license under this chapter; or (2) is authorized to act on behalf of the insured under a power of attorney or other agreement." TEX. INS. CODE ANN. § 4102.163(a).

Stonewater & Public Adjusters in Texas

Nature of the case: Stonewater Roofing, Ltd. Co. sued the Texas Department of Insurance and its Commissioner to invalidate two provisions of the Texas Insurance Code on grounds that the statutes violate the First and Fourteenth Amendments to the United States Constitution. TDI filed a motion to dismiss under Texas Rule of Civil Procedure 91a.

Disposition in the Trial Court: After a hearing, the trial court granted TDI's Rule 91a motion. (201st Judicial District Court, Travis County the Honorable Lora J. Livingston).

Disposition in the Court of Appeals: The court of appeals reversed the trial court's judgment and remanded the case for further proceedings. TDI filed a motion for rehearing, which was denied.

Issues: First Amendment Claim

- Stonewater argues the trial court erred as a matter of law in granting TDI's motion to dismiss its First Amendment claim.
- Stonewater argues its claim survives a Rule 91a motion to dismiss because the prohibitions in question restrict a broad range of commercial speech and facially regulate that speech on the basis of both its content and its speaker.
- Stonewater contends statutory provisions violate 1st Amendment on its face.
- Also claims statutory provisions amount to content-based restraint of free speech, are presumptively unconstitutional, and fail to pass strict scrutiny.
- Alternatively, Stonewater asserts the statutory provisions are an improper regulation of commercial speech and that they fail intermediate scrutiny.

Court Agrees with Stonewater's Position and Disagrees with TDI's Position

- Court finds “any conduct under the statute [Tex. Ins. Code. 4102.163(a)] consists of communicating.”
- The business of public insurance adjusting necessarily and inextricably involves speech.
- Therefore, case involves speech, not conduct.
- Likewise, we find the prohibitions here are both content-based, as the prohibition is dependent on the content of the communications, and speaker-based, because it is aimed specifically at roofing contractors, the speakers.
- Thus, the provisions are subject to strict scrutiny under the First Amendment.
- Accordingly, we find Stonewater sufficiently pleaded a legal and factual basis for its First Amendment claim such that the trial court erred in granting TDI's Rule 91a motion to dismiss.

Florida PA Definition:

A “public adjuster” is any person, except a duly licensed attorney at law as exempted under s. 626.860, who, for money, commission, or any other thing of value, directly or indirectly prepares, completes, or files an insurance claim for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims.

The term also includes any person who, for money, commission, or any other thing of value, directly or indirectly solicits, investigates, or adjusts such claims on behalf of a public adjuster, an insured, or a third-party claimant.

The term does not include a person who photographs or inventories damaged personal property or business personal property or a person performing duties under another professional license, if such person does not otherwise solicit, adjust, investigate, or negotiate for or attempt to effect the settlement of a claim.

BURDEN OF PROOF & CONCURRENT CAUSATION

Background on Causation Issue

- Property policy generally covers “Loss/Damage” caused by covered “Perils.”
- Sometimes both covered and uncovered Perils cause the Loss/Damage.
- How are these issues sorted out?

Concurrent Causation Doctrine

- Most states utilize the Dominant and Efficient Cause of Loss Doctrine.
- In 1971 Texas rejected this doctrine and adopted the Concurrent Causation Doctrine—*Travelers Indem. Co. v. McKillip* (Tex. 1971); This was confirmed in 1993--*Lyons v. Millers Cas. Ins. Co. of Texas* (Tex. 1993).
- Doctrine--when covered and uncovered perils combine to cause the loss, the insured must produce evidence that would afford a reasonable basis for estimating the amount of damage, or the proportionate part of the damage, solely caused by a risk covered by the insurance policy.
- Guiding principle—policy benefits are available only for losses caused solely by a covered peril.

Today's Hot Topic—Is *McKillip/Lyons* Good Law Today?

There is no dispute that the Concurrent Causation Doctrine remains intact.

Issue is who has the b/o/p on allocation between covered/uncovered loss:

- TIC Section 554.002 (previously TIC Art. 21.58) did not govern the *McKillip or Lyons* cases.
- 554.002 provides that the insurer (not the insured) has the burden to prove the application of any exclusion or exception to coverage.

Insured's Position

554.002 was enacted in response to trial court's ruling in *Lyons*.

The opinion in the leading case addressing this issue in the context of 554.002, *Wallis v. USAA* (San Antonio—1999), does not hold up to logical scrutiny.

It renders the statute meaningless and absurd.



Insurer's Position

- Various federal courts and state intermediate appellate courts have applied the doctrine, including the BOP, to preexisting damage and excluded conditions (wear & tear).
- Texas Sup. Court has not addressed the application of 554.002 to this doctrine.
- But *Wallis v. USAA* (San Antonio—1999) is a cert. denied case, as is *Kaip* (Dallas-2001).
- The concurrent causation doctrine is not premised on the application of an exclusion or exception to coverage - it embodies the basic principle that insureds are only entitled to recover for losses covered by the policy.

GRAVELY

Attorneys & Counselors

210.961.8000



Connect with Marc Gravely
mgravely@gravely.law

NEIL RAMBIN LAW PLLC

214.632.5927



Connect with Neil Rambin
neil@neilrambinlaw.com

P | L | F
— THE —
POSEY LAW FIRM
— PC —

512.646.0828



Connect with Jake Posey
jake@cposeylaw.com