

COMPLYING WITH CHAPTER 541 AND 542 UNDER THE TEXAS HAILSTORM BILL

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Chapter 542A. Certain Consumer Actions Related to Claim for Property Damage

Purpose:

- Limit abusive hailstorm litigation; and
- Improve transparency in the handling of hailstorm claims

DEFINITIONS

1. CLAIM

- First-party claim;
- Made by insured under a policy providing coverage for real property or improvements;
- Paid by insurer directly to insured; AND
- Arising from damage to or loss of coverage property, caused wholly or partly, by forces of nature
- Forces of nature: earthquake, earth tremor, wildfire, flood, tornado, lightening, hurricane, hail, wind, snowstorm, or rainstorm

DEFINITIONS CONT'D

2. AGENT

- An employee, agent, representative, or adjuster who performs any act on behalf of an insurer.

3. INSURER

- What you would normally think, excepting the Texas Windstorm Insurance Association
- Key is: engaged as a principal in the business of insurance and authorized or eligible to write property insurance in Texas.

APPLICABILITY

- Effective September 1, 2017
- Applies to an action on a claim against an insurer or agent
- Breach of contract, negligence, misrepresentations, fraud, breach of a common law duty, or an action under Subchapter D. of 541, Subchapter B of 542, or Subchapter E. Chapter 17 of Business & Commerce Code (DTPA)

NOTICE REQUIREMENTS

(These apply in addition to notice requirements required by law (like DTPA)

60 days notice before filing suit.

Notice must:

1. provide a statement of facts or omissions giving rise to claim
2. state the specific amount owed; and
3. state amount of reasonable and necessary attorneys' fees*

*calculated by multiplying number of hours worked by attorney as of date of notice, by an hourly rate that is customary for similar legal services. MUST have time records

NOTICE REQUIREMENTS CONT'D

If attorney or other representative gives notice, they shall:

- Provide copy of notice to claimant; AND
- Include a statement that a copy of the notice was provided to the claimant.

Notice NOT required if impracticable because:

- Insufficient time before SOL expires; or
- Action is asserted as a counterclaim

NOTICE REQUIREMENTS CONT'D

- Claimant's suit shall be dismissed without prejudice if suit filed before 61st day after notice given
- The notice is admissible in evidence in the action for which notice was given
- The notice does not provide a basis for limiting evidence of fees, damage or loss a claimant may offer at trial

RIGHT TO INSPECTION

- Carrier has right to inspect, photograph, or evaluate the subject of the claim
- Must send written request to claimant to inspect, photograph or evaluate
- Written request must be sent no later than 30 days after receipt of presuit notice
- If possible, inspection must be completed no later than 60 days after receipt of presuit notice.

ABATEMENT

Available only if:

1. No presuit notice given; OR
 2. No reasonable opportunity given to inspect, photograph, or evaluate the property after properly requested
- The Court shall abate the suit if it finds that either (1) or (2) occurred.

ABATEMENT CONT'D

Abatement is automatic 11 days after filing the Plea in Abatement if:

1. The plea is verified and alleges no notice or no opportunity to inspect; AND
2. Is not controverted by an affidavit by the claimant before the 11th day after filing the Plea in Abatement
 - Controverting affidavit must include a copy of the notice given and state the date on which notice was given

ABATEMENT CONT'D

How long does the abatement last?

The later of:

1. The 60th day after notice is finally given; OR
2. The 15th day after the requested inspection is completed

**Once abated, a Court CANNOT compel participation in an ADR until after the abatement has expired

Action Against Agent; Agent Election by Insurer

- Insurer may elect to accept liability of an agent by providing written notice to claimant
- If insurer makes election before suit is filed, no cause of action can be made against the agent. If claimant sues the agent anyway, Court shall dismiss the agent with prejudice.
- If insurer makes election after suit is filed, Court shall dismiss the agent with prejudice.

AGENT ELECTION CONT'D

If insurer fails to make agent available for deposition after receiving a notice for the deposition, the election will not apply unless the Court finds that:

1. It is impracticable for insurer due to change in circumstances arising after election; or
2. Agent whose liability was assumed would not have been a proper party to the action; or
3. Obtaining the agent's deposition is not warranted under the law.

AGENT ELECTION CONT'D

- Election is ineffective to obtain dismissal of an agent if election is conditioned in such a way that will result in the insurer avoiding liability for any claim-related damage caused by the agent's acts or omissions.
- An insurer may not revoke the election
- A Court may not nullify the election

AGENT ELECTION CONT'D

- Once election made, evidence of agent's acts or omissions may be offered at trial.
- If agent's acts or omissions are supported by evidence, trier of fact may be asked to resolve fact issues as if agent were a Defendant
- A judgment against the insurer must include any liability that would have been assessed against the agent.
- To the extent of any conflict between Chapter 33 of the CPRC, this subsection prevails.

AGENT ELECTION CONT'D

- Insurers in receivership may not make an election, and Court shall disregard any prior election made
- The insurer's election may not be made known to the jury.

CONSIDERATIONS FOR MAKING ELECTION

Positive

- Greater likelihood of ending up in Federal Court
- Less fraudulent joinder claims and expense to assert same
- Insurer controls entire defense

Negative

- Cannot revoke once election is made
- Company liable for agent's actions
- Breadth of agent's authority to bind company

ATTORNEY'S FEES

Amount awarded is the LESSER of:

1. Reasonable and necessary fees supported by sufficient evidence and determined by trier of fact to have been incurred by claimant in the action; or
2. The amount of attorney's fees that may be awarded under other applicable law; or

ATTORNEY'S FEES CONT'D

An amount calculated by:

1. dividing the amount to be awarded for damage to or loss of covered property by amount alleged to be owed on the claim in the presuit notice; and
2. Multiplying the amount calculated above by the total amount of reasonable and necessary attorney's fees supported by sufficient evidence and determined by fact finder to have been incurred in prosecution of action.

ATTORNEY'S FEES CONT'D

EXAMPLES OF CALCULATION:

- Amount awarded in judgment for damage to or loss of covered property: **\$20,000**
- Amount alleged to be owed in presuit notice: **\$40,000**
- Fees supported at trial and incurred in action: **\$50,000**

**So: $20,000 \div 40,000 = .50$
 $.50 \times 50,000 = \$25,000$**

- Amount awarded in judgment for damage to or loss of covered property: **\$40,000**
- Amount alleged to be owed in presuit notice: **\$20,000**
- Fees supported at trial and incurred in action: **\$50,000**

**So: $40,000 \div 20,000 = 2$
 $2 \times 50,000 = \$100,000$**

ATTORNEY'S FEES CONT'D

More Rules:

The Court shall award the full amount of fees supported at trial and found to have been incurred in the action if the amount awarded for property divided by the amount in presuit notice for property (Ex. $20,000 \div 40,000 = .50$) is:

1. Greater than or equal to .8;
2. Not limited by this section or another law;
and
3. Otherwise recoverable under law.

ATTORNEY'S FEES CONT'D

Even More Rules:

- The Court MAY NOT award fees if the amount calculated is less than 0.2. (Ex: $\$5,000 \div \$40,000 = .125$)
- If the Defendant pleads and proves that it was entitled to but did not receive presuit notice stating the amount alleged at least 61 days before filing suit, the Court MAY NOT award fees incurred after the Defendant files the pleading in Court.
- The pleading **MUST** be filed by 30 days after the date Defendant files its Original Answer.

INTEREST GENERALLY

- SECTION 2. Section 542.060, Insurance Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:
 - (a) Except as provided by Subsection (c), if [If] an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees. Nothing in this subsection prevents the award of prejudgment interest on the amount of the claim, as provided by law.

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INTEREST UNDER SUBSECTION (c) APPLICABLE TO 542A ACTIONS

- Simple interest on the amount of the claim as damages each year at the rate determined on the date of judgment by adding five percent to the interest rate determined under Section 304.003, Finance Code, together with reasonable and necessary attorney's fees. Nothing in this subsection prevents the award of prejudgment interest on the amount of the claim, as provided by law. Interest awarded under this subsection as damages accrues beginning on the date the claim was required to be paid.