

AN ACT

relating to actions on and liability associated with certain insurance claims.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 541.156(a), Insurance Code, is amended to read as follows:

(a) A person who receives notice provided under Section 541.154 or 542A.003 may make a settlement offer during a period beginning on the date notice under Section 541.154 or 542A.003 is received and ending on the 60th day after that date.

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 [~~f~~] 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

Chapter 542 of the Insurance Code is intended to deal with the prompt payment of claims.

interest on the amount of the claim, as provided by law.

(c) In an action to which Chapter 542A applies, 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, in addition to the amount of the claim, 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.

SECTION 3. Subtitle C, Title 5, Insurance Code, is amended by adding Chapter 542A to read as follows:

CHAPTER 542A. CERTAIN CONSUMER ACTIONS RELATED TO CLAIMS FOR PROPERTY DAMAGE

Sec. 542A.001. DEFINITIONS. In this chapter:

(1) "Agent" means an employee, agent, representative, or adjuster who performs any act on behalf of an insurer.

(2) "Claim" means a first-party claim that:

(A) is made by an insured under an insurance policy providing coverage for

This slashes the penalty for property insurers that slow pay valid nature-related claims from 18% interest to a rate currently set at just 10% (5% plus another 5%). By gutting these penalties, more property insurers will pay as little as late as possible. If insurance companies can drag out the claims process, desperate policyholders will be willing to take less than they are rightfully owed. Insurers will pocket the difference.

The prompt payment clock now starts ticking on an insurance company only at the point when they should have paid the claim, not necessarily the point in time when they should have initiated an investigation of the claim. This means insurance companies may potentially take longer to return your phone calls, reply to your mail, or send out an adjuster when you contact them about your loss.

real property or improvements to
real property;

(B) must be paid by the insurer
directly to the insured; and

(C) arises 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.

(3) "Claimant" means a person making a
claim.

(4) "Insurer" means a corporation,
association, partnership, or individual, other than
the Texas Windstorm Insurance Association, engaged
as a principal in the business of insurance and
authorized or eligible to write property insurance
in this state, including:

(A) an insurance company;

(B) a reciprocal or interinsurance
exchange;

(C) a mutual insurance company;

(D) a capital stock insurance
company;

(E) a county mutual insurance
company;

(F) a farm mutual insurance company;

(G) a Lloyd's plan;

(H) an eligible surplus lines
insurer; or

(I) the FAIR Plan Association,

The new law generally applies to building-related insurance claims, impacting homes, businesses, churches, schools, hospitals, etc. Basically, if you have a roof in the State of Texas and suffer a loss from "forces of nature," the Blue Tarp Bill will apply to your dispute.

The law has incredibly broad application, covering a wide range of "forces of nature." It is not limited to hail claims. You, of course, can't control nature. The threat posed by nature is one of the main reasons why you buy insurance in the first place. And now the insurance company will have more arrows in its quiver when nature deals you a loss.

unless a claim-related dispute resolution procedure is available to policyholders under Chapter 2211.

(5) "Person" means a corporation, association, partnership, or other legal entity or individual.

Sec. 542A.002. APPLICABILITY OF CHAPTER. (a) Except as provided by Subsection (b), this chapter applies to an action on a claim against an insurer or agent, including:

(1) an action alleging a breach of contract;

(2) an action alleging negligence, misrepresentation, fraud, or breach of a common law duty; or

(3) an action brought under:

(A) Subchapter D, Chapter 541;

(B) Subchapter B, Chapter 542; or

(C) Subchapter E, Chapter 17,

Business & Commerce Code.

(b) This chapter does not apply to an action against the Texas Windstorm Insurance Association or to an action relating to or arising from a policy ceded to an insurer by the Texas Windstorm Insurance Association under Subchapter O, Chapter 2210. This chapter applies to an action that relates to or arises from a policy renewed under Section 2210.703.

Sec. 542A.003. NOTICE REQUIRED. (a) In addition to any other notice required by law or the applicable insurance policy, not later than the

Again, the bill has broad application.

The law already required policyholders to send pre-suit notice to insurance companies under Chapter 541 of the Insurance Code and the Deceptive Trade Practices Act. Now property owners have to send yet another notice, adding cost and threatening their recovery as explained below. Keep in mind that you don't have to send pre-suit notice if someone steals money from your bank account – you can take immediate action. But if an insurance company steals policy benefits by refusing your valid claim, you have to send them pre-suit notice under this law and wait before you can take action against them. This is the power of their lobby.

61st day before the date a claimant files an action to which this chapter applies in which the claimant seeks damages from any person, the claimant must give written notice to the person in accordance with this section as a prerequisite to filing the action.

(b) The notice required under this section must provide:

(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; and

(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.

(c) If an attorney or other representative gives the notice required under this section on behalf of a claimant, the attorney or representative shall:

(1) provide a copy of the notice to the claimant; and

(2) include in the notice a statement that a copy of the notice was provided to the claimant.

(d) A presuit notice under Subsection (a)

Property owners are required to know the specific amount of their damages before the lawsuit even begins and before they have been able to engage in discovery with the insurance company. Discovery is a legal process where each side learns about the other side's case. As described below, property owners who are high on their damages will be punished. This creates risk for property owners, forcing them to start low in any negotiations with their insurance company, allowing insurers to pad their profits in the process.

Most plaintiffs do not hire attorneys on an hourly basis. Instead, they often agree to a "contingent fee," which means the lawyer will bring the suit for them and will only get paid as a percentage of the recovery, if there is a recovery. Here, government is essentially invading contracts between the property owner and their attorney, dictating an hourly fee calculation that was never contracted for. This is not the proper role of government. Freedom of contract is a long-standing form of liberty in our country. It worth nothing that the law does nothing to change how insurance companies hire and pay for their lawyers. The Blue Tarp Bill is aimed solely at the policyholder and their attorney.

is not required if giving notice is impracticable because:

(1) the claimant has a reasonable basis for believing there is insufficient time to give the presuit notice before the limitations period will expire; or

(2) the action is asserted as a counterclaim.

(e) To ensure that a claimant is not prejudiced by having given the presuit notice required by this chapter, a court shall dismiss without prejudice an action relating to the claim for which notice is given by the claimant and commenced:

(1) before the 61st day after the date the claimant provides presuit notice under Subsection (a);

(2) by a person to whom presuit notice is given under Subsection (a); and

(3) against the claimant giving the notice.

(f) A claimant who gives notice in accordance with this chapter is not relieved of the obligation to give notice under any other applicable law. Notice given under this chapter may be combined with notice given under any other law.

(g) Notice given under this chapter is admissible in evidence in a civil action or alternative dispute resolution proceeding relating to the claim for which the notice is given.

(h) The giving of a notice under this chapter

As discussed above, you must still give notice under different parts of the law if you are bringing suit under them. This adds time and expense.

does not provide a basis for limiting the evidence of attorney's fees, damage, or loss a claimant may offer at trial.

Sec. 542A.004. INSPECTION. Not later than the 30th day after receiving a presuit notice given under Section 542A.003(a), a person to whom notice is given may send a written request to the claimant to inspect, photograph, or evaluate, in a reasonable manner and at a reasonable time, the property that is the subject of the claim. If reasonably possible, the inspection, photography, and evaluation must be completed not later than the 60th day after the date the person receives the presuit notice.

Sec. 542A.005. ABATEMENT. (a) In addition to taking any other act allowed by contract or by any other law, a person against whom an action to which this chapter applies is pending may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the action is pending if the person:

(1) did not receive a presuit notice complying with Section 542A.003; or

(2) requested under Section 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property that is the subject of the claim.

(b) The court shall abate the action if the court finds that the person filing the plea in abatement:

(1) did not, for any reason, receive a

There is no penalty under the bill for an insurance company that takes too long to inspect the property. Keep in mind that insurance companies will have already been given an opportunity to inspect the property after the claim is filed. This is yet another inspection, requiring more of your time.

presuit notice complying with Section 542A.003; or

(2) requested under Section 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property that is the subject of the claim.

(c) An action is automatically abated without a court order beginning on the 11th day after the date a plea in abatement is filed if the plea:

(1) is verified and alleges that the person against whom the action is pending:

(A) did not receive a presuit notice complying with Section 542A.003; or

(B) requested under Section 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property that is the subject of the claim; and

(2) is not controverted by an affidavit filed by the claimant before the 11th day after the date the plea in abatement is filed.

(d) An affidavit described by Subsection (c) (2) controverting whether the person against whom the action is pending received a presuit notice complying with Section 542A.003 must:

(1) include as an attachment a copy of the document the claimant sent to give notice of the claimant's action; and

(2) state the date on which the notice was given.

(e) An abatement under this section continues until the later of:

(1) the 60th day after the date a notice complying with Section 542A.003 is given; or

(2) the 15th day after the date of the requested inspection, photographing, or evaluating of the property is completed.

(f) If an action is abated under this section, a court may not compel participation in an alternative dispute resolution proceeding until after the abatement period provided by Subsection (e) has expired.

Sec. 542A.006. 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.

Under this new law, insurance companies are allowed to accept the liability of their agents (defined broadly above in Sec. 542A.001(1)). This will force many cases into federal court, where it can take years to get to trial. If an insurance company from out-of-state accepts this liability, the case may now be removed to federal court if the dispute is for more than \$75,000. See 28 U.S.C. § 1332. This is the artificial creation of "diversity jurisdiction" where none should properly exist, amounting to nothing more than federal forum shopping for foreign insurers. Additional delay works to the benefit of the insurance company, which gets to hold on to your money longer, and against the property owner who has suffered a loss and is desperate to get back on their feet. Our federal courts are already understaffed and overburdened. They do not need to be clogged with state insurance cases.

(d) If an insurer makes an election under Subsection (a) but, after having been served with a notice of intent to take a deposition of the agent who is the subject of the election, fails to make that agent available at a reasonable time and place to give deposition testimony, Sections 542A.007(a), (b), and (c) do not apply to the action with respect to which the insurer made the election unless the court finds that:

(1) it is impracticable for the insurer to make the agent available due to a change in circumstances arising after the insurer made the election under Subsection (a);

(2) the agent whose liability was assumed would not have been a proper party to the action;
or

(3) obtaining the agent's deposition testimony is not warranted under the law.

(e) An insurer's election under Subsection (a) is ineffective to obtain the dismissal of an action against an agent if the insurer's election is conditioned in a way that will result in the insurer avoiding liability for any claim-related damage caused to the claimant by the agent's acts or omissions.

(f) An insurer may not revoke, and a court may not nullify, an insurer's election under Subsection (a).

(g) If an insurer makes an election under Subsection (a) and the agent is not a party to the

This decision is put beyond the reach of the court.

action, evidence of the agent's acts or omissions may be offered at trial and, if supported by sufficient evidence, the trier of fact may be asked to resolve fact issues as if the agent were a defendant, and a judgment against the insurer must include any liability that would have been assessed against the agent. To the extent there is a conflict between this subsection and Chapter 33, Civil Practice and Remedies Code, this subsection prevails.

(h) If an insurer is in receivership at the time the claimant commences an action against the insurer, the insurer may not make an election under Subsection (a), and the court shall disregard any prior election made by the insurer relating to the claimant's claim.

(i) In an action tried by a jury, an insurer's election under Subsection (a) may not be made known to the jury.

Sec. 542A.007. AWARD OF ATTORNEY'S FEES. (a) Except as otherwise provided by this section, the amount of attorney's fees that may be awarded to a claimant in an action to which this chapter applies is the lesser of:

(1) the amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action;

(2) the amount of attorney's fees that may be awarded to the claimant under other applicable

The jury is kept in the dark about the insurer's decision to assume liability for the agent.

The award of attorney's fees under the law in the past has been a deterrent to bad conduct on the part of insurance companies. This new law makes sure that the award of attorney's fees is the least amount possible. This is a gift to insurance companies who have violated the law.

law; or

(3) the amount calculated by:

(A) dividing the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy for damage to or loss of covered property by the amount alleged to be owed on the claim for that damage or loss in a notice given under this chapter; and

(B) multiplying the amount calculated under Paragraph (A) by the total amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action.

(b) Except as provided by Subsection (d), the court shall award to the claimant the full amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action if the amount calculated under Subsection (a) (3) (A) is:

(1) greater than or equal to 0.8;

This calculation may reduce the recovery of your attorney's fees, even if you win your case, as described below.

This is the part of the law that penalizes policyholders if their initial estimate of damages in the pre-suit notice ends up being off. Property owners are being required to have a crystal ball at the beginning of the dispute.

If the policyholder is off by more than 20% on the amount of damages they initially claim in the pre-suit notice, it will reduce their recovery of attorney's fees if they win at trial. For example, let's say a you suffer a big loss, evaluate your damage to the best of your ability, and submit an amount of \$100,000 in your pre-suit notice letter. You then go to court and ultimately win your case, but the court awards you \$70,000 because it finds part of the damages initially claimed weren't covered under its interpretation of the fine print in the policy. You've done the best job you can in estimating your damages, but you were forced to do so before you were in the thick of the lawsuit. You have won your case – the jury believed the insurance company cheated you – but your recovery is now going to be reduced. The \$70,000 figure above will be divided by \$100,000, yielding a figure of .7. This will then be multiplied by the attorney's fees awarded, meaning you will only recover 70% of your attorney's fees. The other 30% of their fees will then likely be taken from your total recovery under the contingent fee agreement you entered so that your attorney could bring your case without charging you an hourly fee. You have won, but your total recovery will be reduced – you will have to directly pay your attorney a portion of their fees – all because you couldn't have a crystal ball at the beginning of your dispute. This creates risk for property owners, discouraging them from initially claiming the full amount they believe, in good faith, they are owed. In doing so, it puts property owners in a position of weakness when they are forced to take on a powerful insurance company. This is yet another hurdle for property owners, who already face huge hurdles in the way appraisal clauses are being interpreted and enforced by the Supreme Court of Texas, effectively providing insurers with a get-out-of-jail-free card.

(2) not limited by this section or another law; and

(3) otherwise recoverable under law.

(c) The court may not award attorney's fees to the claimant if the amount calculated under Subsection (a) (3) (A) is less than 0.2.

(d) If a defendant in an action to which this chapter applies pleads and proves that the defendant was entitled to but was not given a presuit notice stating the specific amount alleged to be owed by the insurer under Section 542A.003(b) (2) at least 61 days before the date the action was filed by the claimant, the court may not award to the claimant any attorney's fees incurred after the date the defendant files the pleading with the court. A pleading under this subsection must be filed not later than the 30th day after the date the defendant files an original answer in the court in which the action is pending.

SECTION 4. (a) Section 541.156, Insurance Code, as amended by this Act, and Chapter 542A, Insurance Code, as added by this Act, apply only to an action filed on or after the effective date of this Act. An action that is filed before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b) Section 542.060(c), Insurance Code, as added by this Act, applies only to a claim, as

If you do not send pre-suit notice to the insurance company, you may win your case but will be denied the recovery of attorney's fees.

defined by Section 542A.001, Insurance Code, as added by this Act, made on or after the effective date of this Act. A claim made before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2017.

Claims filed before September 1, 2017, will still have the possibility of the 18% interest penalty for slow payment. Those filed on or after September 1, 2017, will be governed by the new "penalty," which currently is just 10%.