

# 542A Elections: A Sword, Shield, Or Both?



28<sup>th</sup> Annual Insurance Symposium  
April 9, 2021

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# Topics

- Overview of Chapter 542A
- The 542A Election
- Impact of 542A Elections on Removal
- Strategies regarding 542A Elections



# Texas Insurance Code

## Chapter 542A

- Chapter 542A took effect on September 1, 2017, shortly after Hurricane Harvey hit.
- Chapter 542A applies to wind and hailstorm claims for lawsuits filed on or after September 1, 2017.

# Chapter 542A

## What Claims are Included?

- Claims filed on or after September 1, 2017
- “Claim” means a first-party claim that
  - (A) is made by an insured under an insurance policy providing coverage for real property or improvements to real property;
  - (B) must be paid by the insurer directly to the insured;
  - (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 rain storm.



## Section 542A.002

### What Claims are Covered?

- (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.

# Section 542A.003

## Notice Requirements

- Notice at least 60 days before filing suit
  - 1) Statement of acts or omissions giving rise to claim
  - 2) Specific amount alleged to be owed
  - 3) Reasonable and necessary attorney's fees to date (requiring contemporaneous time records)
  - 4) A statement that a copy of the notice was provided to the claimant
- Failure to comply results in dismissal w/o prejudice



# Section 542A.003(d)

## Notice Requirement Exception

- Impracticability Exception to Notice Requirement
- Where giving notice is impracticable because 1) the claimant has a reasonable basis for believing there is insufficient time to give presuit notice before the limitation period will expire; or 2) the action is asserted as a counterclaim.
- Tough standard to meet

## Section 542A.004

### Inspection Provision

- An Insurer has the right, but not the obligation, to inspect (or reinspect) the property following appropriate notice under section 542A.003
  - Request not later than 30 days after receipt of pre-suit notice
  - If possible, completed not later than 60 days after receipt



## **Section 542A.005**

### **Abatement Provision**

- Abatement available for lack of appropriate notice under section 542A.003, or lack of reasonable opportunity to inspect under 542A.004
- Continues until 60 days after complying notice or 15 days after inspection
- The court cannot compel mediation during abatement

# **Section 542A.006**

## **Election of Responsibility – The “542A Election”**

- Allows an insurer to elect to accept whatever liability an “agent” might have to the claimant for acts or omissions related to the claim by providing written notice of such election to the claimant.
- “Agent” means an employee, agent, representative, or adjuster who performs any act on behalf of an insurer.
- Once given, a 542A Election is irrevocable.



# Section 542A.006(d)

## Election and Agent's Deposition

- Must make “agent” reasonably available for deposition
- If not, insurer will lose election and benefit of 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.

# Section 542A.007(d)

## Impact on Attorney's Fees

- No pre-suit notice = no attorney's fees
- 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 542A.007

## Impact on Attorney's Fees

- Scale when plaintiff recovers only a portion of pre-suit damages claimed:
  - At least 80% of presuit damages demand – 100% of attorney's fees recoverable
  - 20 to 79% of presuit damages demand – corresponding percent of attorney's fees recoverable
  - Recovery of less than 20% of presuit damages demand – no attorney's fees recoverable

## Back to Section 542A.006 - Timing the 542A Election

- Section 542A.006 contains no express time limits for when a 542A Election can be filed.
- Effective once written notice is provided to the claimant.
- Can be made before or after suit has been filed. However, the effects vary depending on the timing of the 542A Election.



# Section 542A.006(b)

## Pre-Suit 542A Election

- Pre-suit = “no cause of action exists”
- If an insurer makes an election...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.
- Essentially, if you make a 542A Election prior to suit being filed, you cut off a cause of action against that individual.

## Section 542A.006(c)

### Post-Suit 542A Election

- After action filed = Dismissed with Prejudice
- “If a claimant files an action to which this chapter applies against an agent and the insurer thereafter makes an election...with respect to the agent, the court shall dismiss the action against the agent with prejudice.”



## 542A.006 Election Removal and 542A Elections?

- Timing of 542A Election may negate the ability to keep a removed lawsuit in federal court.
- There is a split between the U.S. District Courts in Texas.
- Majority rule – favorable to insureded.
- Minority rule – favorable to insurerer.

# 542A.006 Election

## Majority View on Post-Suit 542A Elections

- Majority rule: 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 diversity. 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.



# 542A.006 Election

## Minority View on Post-Suit 542A Elections

- Minority rule: An election made after a suit is filed but before removal renders the agent improperly joined, which can create diversity jurisdiction at the time of removal.
- The minority rule is mostly followed by the Western district of Texas only (particularly the San Antonio division). Other districts generally follow the majority rule.
- Note: To date, there have been no 5<sup>th</sup> Circuit opinions resolving this issue, so the issue remains in flux.

# Snap Removals and 542A Elections

- What is a “snap” removal?
  - “A non-forum defendant may remove an otherwise removable case even when a named defendant who has yet to be “properly joined and served” is a citizen of the forum state.” *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, Inc.*, 955 F.3d 482, 487 (5th Cir. 2020).
  - Must occur prior to non-diverse defendants being served.
  - Can be combined with pre-removal 542A Elections of the non-diverse defendants to maximize chances to remove action to federal court.
- Limited circumstances where snap removals can apply and you must have everything timed perfectly.



# 542A Election Strategies and Considerations

- Ensure proper pre-suit notice.
  - Failure to provide pre-suit notice can preclude litigation from moving forward, and may preclude the insured's attorney from receiving attorney's fees.
  - Without pre-suit 542A notice, you should wait to make a 542A election decision.
- Ensure prompt 542A elections.
  - Try to decide on whether to make any 542A elections during the 60-day notice period.
  - 542A elections made pre-suit increase the likelihood of a successful removal.
- If you make a post-suit 542A election, try to make it prior to service on individual adjusters to create a snap removal scenario.

# QUESTIONS?

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