

FIRST TO THE PARTY

TEXAS INSURANCE CODE & FIRST-PARTY INSURANCE CLAIMS



30th Annual Insurance Symposium

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TOPICS

- Overview of 541, 542, and 542A
- Similarities & differences of 541 and 542A
- Case law updates

WHAT IS FIRST-PARTY?

- A first-party insurance claim is between the policyholder and the insurance company.
- Third-party/outside adjusters can be involved in or be named parties to a lawsuit on a first-party insurance claim as a result of the work being done on behalf of a insurance company.

FIRST PARTY CAUSES OF ACTION

- In a first-party lawsuit typical claims include:
 - Breach of Contract
 - Duty of Good Faith and Fair Dealing
 - Violation of Insurance Code Chapter 541 (Unfair or Deceptive Acts or Practices)
 - Violation of Insurance Code Chapter 542 (Unfair Claim Settlement Practices & Prompt Payment of Claims)

CHAPTER 541: UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES

- Purpose: The purpose of Chapter 541 is to regulate trade practices in the business of insurance by:
 - (1) defining or providing for the determination of trade practices in this state that are unfair methods of competition or unfair or deceptive acts or practices; and
 - (2) prohibiting those trade practices

CHAPTER 541 APPLIES TO WHOM?

- Any person or entity engaged in the business of insurance.
- Under 541, “person” means an individual, corporation, association, partnership, reciprocal, or interinsurance exchange, Lloyd’s plan, fraternal benefit society, or other legal entity engaged in the business of insurance, including an agent, broker, adjuster, or life and health insurance counselor.

CHAPTER 542 – UNFAIR CLAIM SETTLEMENT PRACTICES & PROMPT PAY

- Provides requirements, including deadlines, an insurer must complete during the adjustment of a claim.
- A “claim” means a first-party claim that:
 - (A) is made by an insured or policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract; and
 - (B) must be paid by the insurer directly to the insured or beneficiary

CHAPTER 542 APPLIES TO WHOM?

- Any insurer authorized to engage in business as an insurance company or to provide insurance in this state, include (but not limited to):
 - A stock life, health, or accident insurance company;
 - A mutual life, health, or accident insurance company;
 - A stock fire or casualty insurance company;
 - A mutual fire or casualty insurance company;
 - A Mexican casualty insurance company;
 - A Lloyd's plan;
 - An eligible surplus lines insurer

542 – TIME FRAME

- “Notice of claim” means any written notification provided by a person making a claim to an insurer that reasonably apprises the insurer of the facts relating to the claim.
- Within 15 days (30 business days for eligible surplus lines insurer) after receipt of notice of claim the insurer MUST:
 - (1) acknowledge receipt of the claim;
 - (2) commence investigation of the claim; and
 - (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at the time, will be required
- Additional request can be made during investigation if necessary.
- If acknowledgement of claim is not in writing, insurer MUST make a record of the date, manner, and content of acknowledgement

542 – TIME FRAME

- Not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss the insurer MUST notify the claimant in writing of acceptance or rejection of a claim
- Unless, the insurer has a reasonable basis to believe the loss resulted from arson. In that case, not later than the 30th day.
- The notice MUST state the reasons for the rejection
- IF unable to accept or reject the claim within the above specified time, the insurer, within the same period, shall notify the claimant of the reasons additional time is needed.
- Insurer MUST accept or reject the claim within 45 days after notice for additional time

542 – TIME FRAME

- Once an insurer notifies a claimant it will pay a claim or part of claim, the insurer **MUST** pay the claim not later than the 5th business day after the date of notice.
- If payment is conditioned on the performance of an act by the claimant, the insurer **MUST** pay the claim not later than the 5th business day after the act is performed.
- If the insurer is an eligible surplus lines insurer, the insurer **MUST** pay the claim not later than the 20th business day after the notice or the date the act is performed.

542 – TIME FRAME

- If payment is delayed for more than 60 days after receiving all items, statements, and forms reasonably requested and required under 542.055, an insurer MUST pay damages under 542.060
- These deadlines can be extended:
 - By a court on a showing of good cause
 - By 15 days in the event of a weather-related catastrophe or major natural disaster, as defined by the commissioner

542 – LIABILITY FOR VIOLATION

- (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 additional 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.

WHY DO WE HAVE 542A?

- 542A went into effect for any claim filed on or after September 1, 2017.
- The Texas Legislature enacted 542A to combat the growing number of first-party claims brought as the result of forces of nature.

CHAPTER 542A: WHAT TYPE OF CLAIMS?

- A “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; 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

542A: APPLIES TO WHICH CLAIMS?

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

“Agent” means an employee, agent, representative or adjuster who performs an act on behalf of an insurer.

NOTICE

542A.003

- Not later than the 61st day before claimant files action
- *Written notice 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;
- (4) if an attorney or other representative gives notice,
- (A) provide a copy of the notice to the claimant; and
- (B) include in the notice a statement that a copy of the notice was provided to claimant.

541.154

- Not later than the 61st day before the date the action is filed
- *Written notice must advise the other person of:*
- (1) the specific complaint; and
- (2) the amount of actual damages and expenses, including attorney's fees reasonably incurred in asserting the claim against the other person.

NOTICE

542A.003(d)

- (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.

541.154(c)

- (1) Must be filed to prevent the statute of limitation from expiring; or
- (2) Is asserted as a counterclaim.

Difficult burden to meet

542A.004 – INSPECTION

- After a 542A.003 notice is received by a carrier MAY send 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.
- The written request must be made not later than the 30th day after receiving the presuit notice.
- If reasonably possible, the inspection, photography, and evaluation must be completed not later than the 60th day after the date the presuit notice is received.

ABATEMENT

542A.005

- If a carrier or agent is entitled to but did not receive notice complying with 542A.003; or
- Requested but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property
- The carrier or agent may file a plea in abatement not later than the 30th day after the date the carrier or agent files an original answer.

541.155

- If a carrier or agent is entitled to but did not receive notice required by 541.154
- The carrier or agent may file a plea in abatement not later than the 30th day after the date the carrier or agent files an original answer.

ABATEMENT

542A.005

- Must be abated if the court finds the carrier or agent filing the plea:
- 1) did not, for any reason, receive a presuit notice complying with 542A.003; or
- 2) requested under 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property.
- Abatement is automatic after 11 days if:
- (1) the plea in abatement is verified and alleges the carrier or agent:
- (A) did not receive notice complying with 542A.003; or
- (B) requested under 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property.
- (2) Is not controverted by an affidavit filed by the claimant before the 11th day after the plea in abatement is filed.

541.155

- Must be abated if, after a hearing the judge finds the claimant did not provide the notice required by 541.154.
- Abatement is automatic after 11 days if:
- 1) The plea in abatement is verified and alleges the carrier or agent did not receive notice required by 541.154; and
- 2) Is not controverted by an affidavit filed by the claimant before the 11th day after the plea in abatement is filed.

ABATEMENT

542A.005

- Affidavit controverting must:
- Include as an attachment a copy of the document the claimant sent to give notice of the claimant's action; and
- State the date on which notice was given
- Abatement continues until the later of
- (1) 60th day after the date a notice complying with 542A.003 is given; or
- (2) The 15th day after the date of the requested inspection, photographing, or evaluating of the property is completed.

541.155

- Continues for 60 days after notice complying with 541.154 is provided
- Does not apply if 154.154(c) applies

542.006 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 an act on behalf of an insurer.
- Once given, a 542A Election is irrevocable.
- Texas Courts were split between the timing of a carrier could make a 542A Election.
 - 1) prior to suit being filed; or
 - 2) prior to removal

542A ELECTION: OLD vs NEW

Old Rule(s)

- Majority – Favorable to the policy holder
- Minority – Favorable to the carrier

New Rule

- Election must be made prior to removal
- *Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F.4th 469 (5th Cir. 2022)

542A.007 – ATTORNEY’S FEES

- No pre-suit notice = no attorney’s fees
- If a defendant in 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 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.

WHAT IS REQUIRED FOR A PRESUIT NOTICE UNDER 542A.007(d)?

- 542A is still within its statutory infancy and the case law is minimal and not consistent.
- Courts generally fall into one of two groups:
 - (1) only 542.003**(b)(2)** is required
 - (2) all elements under 542.003 is required.

- (1) *Mumtaz v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:22-CV-00542, 2023 WL 137461, (E.D. Tex. Jan. 9, 2023); *Koncak v. American Security Insurance Company*, No. 3:22-CV-1160, 2023 WL 51035, (N.D. Tex. Jan. 3, 2023); *Mount Canaan Missionary Baptist Church v. Westchester Surplus Lines Ins. Co.*, No. 4:19-CV-00660, 2019 WL 13114309, (S.D. Tex. Aug. 13, 2019); *Nisha Hosp. LLC v. Scottsdale Ins. Co.*, No. 3:22-CV-1811-X, 2022 WL 17417995, at *1 (N.D. Tex. Dec. 2, 2022)
- (2) *In re: New York Inn Inc. d/b/a Viva Inn Motel Debtor. New York Inn Inc. d/b/a Viva Inn Motel, & Viva Inn, Inc. Plaintiffs, v. Associated Indus. Ins. Co., Inc. Defendant.*, No. 21-30958, 2023 WL 2920450, (Bankr. N.D. Tex. Apr. 12, 2023); *Perrett v. Allstate Ins. Co.*, 354 F. Supp. 3d 755, 758 (S.D. Tex. 2018); *Sarwar v. Gen. Star Indem. Co.*, No. 3:22-CV-0941-G, 2023 WL 36073, (N.D. Tex. Jan. 3, 2023); *S&H Jerrypat, Inc. v. Acceptance Indem. Ins. Co.*, No. 7:22-CV-00274, 2022 WL 17342821, (S.D. Tex. Nov. 30, 2022)

QUESTIONS?

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