



# Client Alert

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## TEXAS HOUSE BILL 1774

House Bill 1774 was signed into law by Governor Greg Abbott on May 26, 2017 and becomes effective on September 1, 2017. The new law has three sections. The first section pertains to pre-suit notice requirements and settlement negotiations. The second section pertains to the amount of interest owed on weather-related property claims that are not promptly paid. The third section creates a new subchapter of the Texas Insurance Code, § 542A, which applies to weather-related property claims.

### ***FOR HURRICANE HARVEY:***

**This law does not apply to flood insurance policies administered by FEMA under the National Flood Insurance Program. The Fifth Circuit has held that federal law preempts state claims arising from the handling of flood insurance claims, including claims brought under the Texas Insurance Code. *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 390 (5<sup>th</sup> Cir. 2005).**

Highlights of the new law are:

- **Section 2 states that for weather-related claims, an insurer that is not in compliance with the claims-handling deadlines is liable for penalty interest on the amount of the claim. Instead of 18% interest a year as set forth in § 542.060, the amount of interest available under § 542A is 10% a year (5% plus the interest rate determined under § 304.003 of the Texas Finance Code, which is currently 5%). The 10% penalty interest is owed in addition to the amount of the claim plus reasonable and necessary attorneys' fees and prejudgment interest.**
- **Section 3 creates Texas Insurance Code § 542A. Part 6 of § 542A permits an insurer to accept liability for the acts of its agents (adjuster, TPA, Coverholder, MGA). If the insurer notifies the claimant that it accepts liability for the acts of its agents, then all claims against those agents must be dismissed with prejudice. However, subject to some exceptions discussed below, the insurer must make those agents reasonably available for properly**

noticed depositions. This provision will assist in insurers being able to remove matters to federal court that previously might not have been removable due to lack of diversity caused by the inclusion of Texas-based adjusters as defendants in the suit.

- **Part 7 of § 542A allows for a reduction in attorneys' fees awarded to the claimant if the amount of actual damages alleged in the pre-suit notice letter is greater than the amount of damages awarded by the jury at trial. Historically, the availability of attorney's fees for breach of contract claims and for breaches of §§ 541 and 542 has been the main driver of storm litigation against insurers, and this provision should serve to undermine the willingness of attorneys to pursue meritless claims or to inflate the settlement demand in the pre-suit notice letter.**

The three sections of the law and the seven parts of § 542A are explained below. Our opinions and reactions are in bold.

**Section 1:** Texas Insurance Code § 541.156(a) is amended to state that an insurer receiving a pre-suit notice letter with a settlement demand may make a settlement offer to the insured within 60 days of receipt.

**Section 2:** Texas Insurance Code § 542.060 is amended to add subsection (c), which states that for weather-related claims, when an insurer is liable for a claim and fails to comply with this subchapter, the amount of interest per year an insurer is liable for is 10% (5% plus the interest rate determined under § 304.003 of the Texas Finance Code, which is currently 5%) plus reasonable and necessary attorneys' fees and prejudgment interest.

**Section 3:** This Section creates a new Chapter of the Texas Insurance Code, Section 542A, which has seven parts. The seven parts are summarized below.

### **Section 542A - Part 1. Definitions**

§ 542A.001 defines "agent," "claim," "claimant," "insurer," and "person."

- The term "agent" is defined as "an employee, agent, representative or adjuster who performs any act on behalf of an insurer." **In our opinion, the definition of "agent" includes independent adjusters, TPAs and Coverholders.**
- The term "claim" is defined as "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."
- The term "insurer" is defined to include "an eligible surplus lines insurer."

## **Section 542A - Part 2. Applicability**

§ 542A.002 states that this statute applies to claims against an “insurer” or “agent” alleging: breach of contract, negligence, misrepresentation, fraud, breach of a common law duty (**such as the common law duty of good faith and fair dealing**) or an action brought under §§ 541/542 of the Texas Insurance Code or Chapter 17 of the Texas Business & Commerce Code (**the Deceptive Trade Practices Act or DTPA**).

## **Section 542A - Part 3. Notice Required**

§ 542A.003 states that in addition to any other notice required by the policy or another law, the claimant is required to provide written notice to the insurer at least 61 days before filing suit. The notice must include:

- “a statement of the acts or omissions giving rise to the claim”;
- “the specific amount alleged to be owed for damage to or loss of covered property”;
- “the amount of reasonable and necessary attorneys’ fees incurred by the claimant, to be “calculated by multiplying the number of hours actually worked by the claimant’s attorney, as of the date notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services”;

If written notice is sent by an attorney, a copy must be provided to the claimant and the written notice must state that the claimant has been provided with a copy of the notice.

Pre-suit notice is not required if the statute of limitations is about to expire or if claimant’s action is asserted as a counterclaim.

If the claimant provides written notice as required in § 542A.003, the court will dismiss without prejudice any lawsuit filed by an insurer against the claimant arising from the same claim if the suit is filed within the 60-day notice period. **An insurer receiving a pre-suit notice letter thus cannot preemptively file suit until the 60-day notice period is expired.**

The pre-suit notice letter is admissible in evidence in a subsequent lawsuit.

“The giving of a notice under this chapter does not provide a basis for limiting the evidence of attorney’s fees, damage, or loss a claimant may offer at trial.” **Claimant will not be limited at trial to the information provided in the pre-suit notice letter.**

## **Section 542A - Part 4. Inspection**

§ 542A.004 states that within 30 days after receiving a pre-suit notice letter, the insurer (or other person to whom the notice is directed) “may send a written request to the claimant to inspect, photograph, or evaluate” the property.

If possible, the inspection should be completed “not later than the 60<sup>th</sup> day after the date the person receives the pre-suit notice.”

**The insurer can request an inspection within 30 days of receiving the pre-suit notice letter, and the parties should try to complete the inspection within the 60-day pre-suit notice period. The adjuster or TPA or attorney requesting the inspection should document the file if delays are caused by the claimant or claimant’s attorney.**

## **Section 542A - Part 5. Abatement**

§ 542A.005 states that any person against whom a lawsuit has been filed (insurer or agent) **may** file a plea in abatement no later than the 30<sup>th</sup> day after the person files the original answer if:

- the person did not receive the pre-suit notice letter;
- an inspection was requested under Part 4 but a reasonable opportunity to inspect the property was not provided.

Abatement **shall be** entered if the court finds either of the above-listed reasons applies.

A lawsuit is automatically abated on the 11<sup>th</sup> day after a verified plea in abatement is filed. **A verified plea in abatement means that the person seeking abatement attaches a sworn affidavit stating that no pre-suit notice letter was received or a request to inspect the property was properly requested under Part 4 and no reasonable opportunity to inspect the property was provided.**

Abatement will not be automatically provided on the 11<sup>th</sup> day after the verified plea in abatement is filed if the claimant files a counter affidavit stating when the pre-suit notice letter was sent or that a reasonable opportunity to inspect the property was provided. A counter affidavit pertaining to pre-suit notice must attach the pre-suit notice letter and state the date when the pre-suit notice letter was sent.

Abatement under Part 5 continues until the **later of**:

- the 60<sup>th</sup> day after the date pre-suit notice complying with § 542A.003 is provided; or
- the 15<sup>th</sup> date after an inspection is completed.

If a lawsuit is abated under Part 5, the court may not compel mediation (or other ADR) until after the abatement period ends.

### **Section 542A - Part 6. Action Against Agent**

§ 542A.006 states that the insurer **may** elect to accept whatever liability an agent may have to the claimant by providing written notice to the claimant.

If the insurer accepts liability for the acts of an agent:

- no causes of action against the agent exist, and the court must dismiss all claims against the agent with prejudice.
- the insurer must make the agent available at a reasonable place and time to give deposition testimony if served with a properly noticed deposition request.

If the insurer fails to comply with the deposition requirement, then § 542A.007 does not apply, unless the insurer can show:

- it is impracticable for the insurer to make the agent available due to a change in circumstances arising after the insurer elects to accept the agent's liability;
- the agent would not have been a proper party; or
- obtaining the agent's deposition testimony is not warranted under the law.

**Motion practice may become necessary if the claimant's attorney unreasonably notices the depositions of every person named in the claim file, even if that person had no involvement in the adjustment of the loss.**

### **Section 542A - Part 7. Award of Attorneys' Fees**

§ 542A.007 states that the amount of attorneys' fees awarded under this section is ***the lesser of***:

- "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;
- the amount of attorney's fees that may be awarded to claimant under other applicable law; or
- the amount calculated by:
  - A. dividing the amount awarded in the judgment for damage to or loss of covered property by the amount alleged to be owed in the pre-suit notice letter; and
  - B. multiplying that amount by the total amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence.

**Example:** If the pre-suit notice letter states that claimant's damages are \$100,000 and the jury awards \$10,000 in covered damages, and the jury awards \$150,000 in reasonable and necessary attorneys' fees, then the court would divide \$10,000 by \$100,000 for a factor of 0.1. This factor would be multiplied by \$150,000 for a total of \$15,000. Thus, under this example, the attorneys' fee award would be reduced from \$150,000 to \$15,000.

This is designed to encourage claimants to claim reasonable damages in the pre-suit notice letter and to discourage meritless claims.

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