

Chapter 542A Update

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Chapter 542A Update

- Chapter 542A took effect on September 1, 2017, shortly after Hurricane Harvey hit and massive rainfall impacted at least 50 Texas counties.
- Chapter 542A applies to wind and hailstorm claims for lawsuits filed on or after September 1, 2017.

Chapter 542A:

What Claims are Covered

- 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.

- Tex. Ins. Code §542A.001(2)

Chapter 542A.002: What Claims are Covered, cont.

- (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 Requirement

- Notice at least 60 days before filing suit
 - Statement of acts or omissions giving rise to claim
 - Specific amount alleged to be owed
 - Reasonable and necessary attorney's fees to date
 - Requires contemporaneous time records
 - If given by attorney, copy to insured
 - Failure to comply results in dismissal w/o prejudice
- Exception to Notice Requirement (542.003(d))
 - 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 limitations period will expire; or 2) the action is asserted as a counterclaim.

Section 542A.004

Inspection Provision

- An insurer has the right, but not the obligation, to inspect the property following appropriate notice under section 542A.003
 - 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
- Abatement is either
 - Ordered by the court or
 - Automatic 11 days after the plea in abatement is filed if it is properly verified and not properly controverted
- Continues until 60 days after complying notice or 15 days after inspection
- The court cannot compel mediation (ADR) during abatement

Section 542A.006

Election of Responsibility

- 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.

- TEX. INS. CODE §542A.001(1)

Section 542A.006

Pre-Suit 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.

- TEX. INS. CODE §542A.006(b)

Section 542A.006

Post-Suit 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.

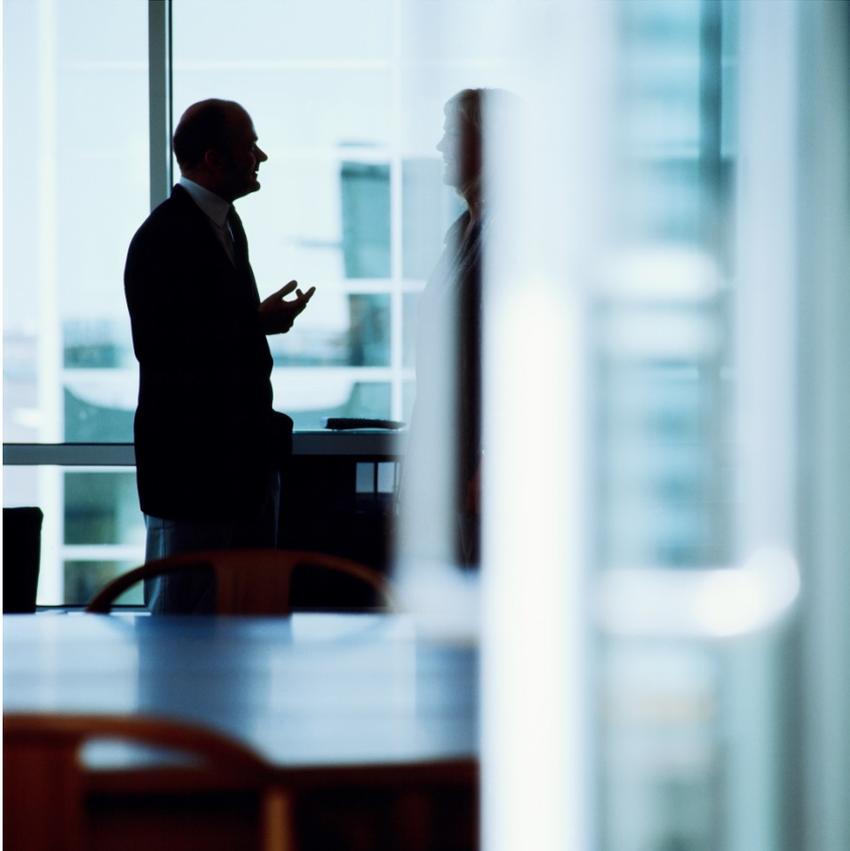
-TEX. INS. CODE §542A.006(c)

Section 542A and Removal to Federal Court

- Pre-suit election
 - *Massey v. Allstate Vehicle & Property Ins. Co.*, No. H-18-1144, 2018 WL 3017431, at *4 (S.D. Tex. June 18, 2018)
 - *Electro Grafix Corp. v. Acadia Ins. Co.*, No. SA-18-CA-589-XR, 2018 WL 3865416, at *3–*4 (W.D. Tex. Aug. 14, 2018)
- Post-suit election
 - *Flores v. Allstate Vehicle & Property Ins. Co.*, No. SA-18-CV-742-XR, 2018 WL 5695553, at *1 (W.D. Tex. Oct. 31, 2018)
 - *Stephens v. Safeco Ins. Co. of Indiana*, 4:18-CV-00595, 2019 WL 109395, at *4 (E.D. Tex. Jan. 4, 2019)

Section 542A.006

Election and Agent Deposition



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

Section 542A.007

Impact on Attorneys' Fees

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

Section 542A.007

Impact on Attorneys' Fees - Cap

- Section 542A.007 caps attorney's fees at the lesser of –
 - (1) the amount of reasonable and necessary fees found by the trier of fact, and
 - (2) that same number multiplied by the ratio of “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,” but only if that ratio is less than 0.8, and
 - (3) zero if that ratio is less than 0.2.