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New Texas Insurance Laws: Coming to a State Near You?

I. Why changes were needed and how did the legislative lobbying progress?

A. Massive influx of litigation following hailstorms and minor wind events.

1. Typical claims progression.

A small-but-growing group of Texas trial lawyers has started a new enterprise—storm chasing. They and their allies are aggressively soliciting clients to sue insurance companies for alleged underpayment of claims following wind and hail storms. "Sue first and gather the facts later" is their motto.

2. Notice of lawsuits with outlandish demands.

The strategy is to file as many lawsuits as they can, vastly overstating their clients' claims in every lawsuit, in a scheme to extort mass settlements. Many of their clients are recruited by unscrupulous roofers and public insurance adjusters, who work on commission to run cases. This is the biggest lawsuit abuse we have seen in Texas in years.

Since 2012, over 33,000 of these lawsuits have been filed in courthouses all over Texas, and the number keeps growing. Almost 11,000 of these lawsuits were filed in 2014 alone, compared to fewer than 400 lawsuits filed in 2007. That's a 27-fold increase, which can be attributed only to lawyer-generated activity.

3. Optional mediation and/or appraisals.

Mediation – whether court ordered or by mutual agreement has become little more than organized extortion. Plaintiff attorneys know that that Carriers are looking at the ultimate costs associated with either defending or paying the claim and so the Plaintiff attorneys attempt to inflict as much

defense costs as possible on each claim with the hope that the Carriers will simply pay that equivalent amount in mediation. This generally includes an additional amount for attorney "fees" and statutory interest for "late payment".

Appraisals have become the preferred avenue of choice by Carriers in resolving these disputes as the payment of the appraisal award eliminates all of the extra-contractual issues being claimed. (More on that issue to follow.)

4. **Lobbying game plan**.

The plaintiff lawyers argue that the Insurance Code requires the insurance company to pay their fees if the policyholder's claim was paid a day late or underpaid by a dollar. This quest to recover attorney fees is the major driver of this litigation.

The solution is to change the Texas Insurance Code to break this mass-litigation model while maintaining the right of policyholders to bring legitimate lawsuits against insurance companies who don't pay claims fully and on time.

Step 1: Require the lawyers to give the insurance company a pre-suit notice so the insurance company has a chance to resolve the claim.

Step 2: Allow the insurance company to assume 100% responsibility for their adjuster's conduct, and then dismiss the lawsuit against the adjuster.

Step 3: Limit the lawyer's fees that may be recovered when the lawyer makes an excessive demand on the insurance company on his client's behalf.

Step 4: Prohibit the lawyer from recovering his fees from the insurance company if the lawyer solicited the client in an unlawful manner.

Step 5: Make the penalty interest rate applicable to late-paid claims a market-based, floating rate (ranging from 8% to 18%), to discourage lawyers from waiting until the end of the limitations period before filing these lawsuits.

II. "*New*" Texas Insurance Law – Texas Insurance Code SS: 542A

A. Statute language:

INSURANCE CODE
TITLE 5. PROTECTION OF CONSUMER INTERESTS
SUBTITLE C. DECEPTIVE, UNFAIR, AND PROHIBITED PRACTICES
CHAPTER 542A. CERTAIN CONSUMER ACTIONS RELATED TO CLAIMS FOR PROPERTY DAMAGE

1. Effect on claim handling?

a. No legislative changes in the actual claims handling requirements and processes for investigation and payment of valid claims.
b. Balance of Chapter 542 "Prompt Payment of Claims" requirements still applicable to Carriers.

2. **Effect on litigation?**
    a. **Pre-suit notice**

        A policyholder must provide written notice to the Insurer at least 61 days prior to filing suit. The policyholder may not recover attorney's fees if the Insurer can plead and prove that the policyholder did not provide such notice.

        The pre-suit notice must state:

        1. A specific amount of damages sought, and
        2. Incurred attorney fees to date, supported by contemporaneously kept time records and based on an hourly rate that is customary for similar legal services.

    b. **Pre-suit inspections**

        Insurers may make a written request to inspect the policyholder's property within 30 days after receiving pre-suit notice. The inspection should actually occur within 60 days of receipt of pre-suit notice, if reasonably possible.

    c. **Abatement**

        The Insurer may abate a lawsuit for failure to provide pre-suit notice and/or permit inspection.

    d. **Statutory Penalty Interest**

        The penalty interest rate within Chapter 542 changes from 18% to a floating interest rate (currently set at 10%). For claims to which 542A do not apply, the rate would still be 18%.

    e. **Limits on Attorneys' Fees**

        In addition to forfeiting attorneys' fees for improper notice, the Court will adjust the amount of recoverable attorneys' fees based on a percentage of recovery, as follows:

        1. A policyholder can only recover all attorneys' fees if the judgment equals at least 80% of the pre-suit damages demand.
        2. Judgments between 20-79% of the pre-suit damages demand result in an equivalent percentage of attorneys' fees recoverable.
        3. Policyholders cannot recover any attorneys' fees for judgments less than 20% of their pre-suit demand.

    f. **Assumption of liability.**

        If Insurers elect to assume whatever liability its agents (e.g. Adjuster) might have to the policyholder, the claims against the agent must be dismissed with prejudice. This assumption of liability makes it easier for Insurers to remove cases to federal court.

III. Claims Handling Progression – Pre- and Post-Litigation Notice

1. Claims handling – defensive or pro-active?

a. **Claim file preparation** – few changes should be made from a comprehensive claim investigation and internal documentation of standards and practices.

b. **Claim handling processes** – field adjusters should be cognizant of the need to properly document ALL the damages … AND to document the areas in which NO damages are apparent. Most of the claims being made in this litigation involve areas which were NEVER claimed in the original claim submission by the Insured.

IV. Is appraisal the solution to the problem?

1. **What is the appraisal process?**

a. **The appraisal language** – multiple variations of the appraisal clause exist in different policy forms, however the principle is fairly consistent across the spectrum.

b. **The appraisal process** - if there is a dispute in the amount of damages, each party selects an independent and impartial appraiser to assess the damages. The appraisers should attempt to reach an agreement and if they can't, an umpire is brought in to "break the tie" – addressing ONLY the differences between the two appraisers.

c. **The appraisal award** – the appraisal award should reflect an itemized account of the damages to each individual item being claimed. It should also contain language that the award is subject to the policy terms and conditions.

d. **Effect on Bad Faith, Breach of Contract and DTPA claims** – an increasing number of Texas Courts (as well as the 5th Circuit) have all held that the payment of any appraisal award by the Carrier effectively precludes ALL claims for Bad Faith, Breach of Contract and DTPA claims. ***Candelaria Garcia v. State Farm Lloyds*** – No. 04-16-00209-CV, 4th Court of Appeals – San Antonio, Tx.
Mainali Corporation v. Covington Specialty Insurance; Engle Martin; Associates Incorporated; Lynn Summers – No. 10-10350, In the United States Court of Appeals for the Fifth Circuit.