

Texas' New Hailstorm Law: Five Things That Every Corporate Policyholder Should Know

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PRACTICES Insurance Recovery

On, May 27th, Governor Greg Abbott signed into law what has become known as the Texas “Hailstorm Bill.” Since a variant of this legislation was first introduced in 2015, reforming Texas’ “Prompt Payment of Claims” statute (Chapter 542 of the Texas Insurance Code) and its “Bad Faith” insurance law (Chapter 541 of the Texas Insurance Code) have been the focus of heated debate and intense lobbying by insurers and consumer and business interests alike.

Proponents of the bill argued, under the banner of “tort reform,” that reducing statutory penalties against insurers was necessary to curb abusive “hailstorm” claims, which, by some reports, insurers have spent \$340 million fighting since 2012.¹ Haynes Boone insurance partner, Ernest Martin, organized opposition from Texas businesses and provided testimony to legislative committee members warning that weakening statutory penalties will remove crucial incentives for insurers to pay first-party claims for property damage, business interruption and similar insured obligations. In the end, several significant changes were made to the legislation to accommodate policyholder concerns. The Hailstorm Bill (Senate Bill No. 10 and House Bill No. 1774) does impose limitations on claims for loss and damage resulting from so-called “forces of nature,” as well as related attorneys’ fees, but important protections remain for corporate policyholders seeking to recover other first-party claims. Here are five things that every corporate policyholder in Texas should know about what has changed and what has not in this new legislation:

- 1. Damages & Attorneys’ Fees Recoverable for “Forces of Nature” Claims.** The Hailstorm Bill creates a new section of the Texas Insurance Code (Chapter 542A), which applies to first-party claims, *i.e.*, those payable to the policyholder as opposed to any third-party, caused by “forces of nature,” including an earthquake, wildfire, flood, tornado, lightning, hurricane, hail, wind, snow or rain. For these claims, policyholders may recover interest and attorneys’ fees from insurers that do not comply with statutory deadlines for responding to and paying such claims. However, the statutory interest rate is reduced from the 18 percent recoverable under Chapter 542 to five percent above prejudgment interest rate established under Section 304.003 of the Finance Code. This rate is the prime rate published by the Federal Reserve, not to exceed 15 percent or to fall below 5 percent. Interest payable under this provision is “simple” interest, rather than compounded interest. The attorneys’ fees recoverable under the statute must be shown to be both “reasonable and necessary.” Moreover, the amount of attorneys’ fees that may be awarded against an insurer may be limited to the proportion by which the policyholder’s recovery against the insurer relates to the amount claimed in the pre-suit notice (addressed below) for the “forces of nature” claim at issue. Recovery of any attorneys’ fees under Chapter 542A may be precluded if pre-suit notice was not provided to the insurer as required by the terms of the statute.
- 2. Pre-Suit Notice & Abatement for Lawsuits over “Forces of Nature” Claims.** In addition to limiting the statutory interest recoverable for “forces of nature claims,” the Hailstorm Bill compels policyholders seeking to recover under Chapter 542A to provide 60-days prior notice to the insurer before filing suit to recover interest penalties. The notice must contain, among

other things, the damages claimed from the insurer, as well as the amount of reasonable and necessary attorneys' fees incurred by the insured claimant. The claimant's notice is expressly admissible as evidence in a lawsuit or alternative dispute resolution proceeding over the claim for which notice is given. Upon receiving notice, the insurer may request in writing the opportunity to inspect, photograph or evaluate the property that is the subject of the claim. If pre-suit notice is not timely made or a reasonable opportunity to inspect, photograph or evaluate the property was not provided by the policyholder, an insurer defending a lawsuit over a "forces of nature" claim governed by Chapter 542A may seek abatement of the suit until either the requisite notice or inspection is completed.

3. **Other First-Party Claims.** Policyholders with claims for business interruption and property damage to their own property, not caused by "forces of nature," can still seek to recover penalties under existing Chapter 542 of the Texas Insurance Code. Section 542.060(a) entitles insureds to demand eighteen percent (18 percent) interest on claims for which payment is not timely made, as well as the attorneys' fees incurred in pursuing the insurer for the unpaid claim. However, as a result of the Hailstorm Bill, like Chapter 542A, attorneys' fees recoverable under this chapter must be proven to be reasonable and "necessary."
4. **Claims Under Chapter 541 of the Texas Insurance Code.** Chapter 541 of the Texas Insurance Code authorizes a private cause of action for damages when an insurer engages in "unfair or deceptive acts or practices," including, among other things, (1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue; (2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear; (3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim; and (4) refusing to pay a claim without conducting a reasonable investigation with respect to the claim. Section 541.152 of the Texas Insurance Code authorizes an award of actual damages, plus court costs and reasonable and necessary attorneys' fees, as well as trebled damages for "knowing" violations of the statute. The actual and trebled damages otherwise recoverable under Chapter 541—whether for "forces of nature" claims or other insured loss and damage—are unaffected by the Hailstorm Bill.
5. **Effective Date & Prospective Application.** By its terms, Chapter 542A becomes effective on September 1, 2017. Claims made and actions filed prior to this date will continue to be governed by the notice and damages provisions previously applicable to "forces of nature" claims under Chapters 541 and 542 of the Texas Insurance Code.

If you have questions about the Hailstorm Bill, the damages and attorneys' fees recoverable for violations of the Texas Insurance Code or about insurance claims in general, please contact one of the Haynes Boone Insurance Coverage Practice Group partners listed below.

¹ Sanya Mansoor, [Over opposition, latest tort reform bill advancing through Legislature](#), THE TEXAS TRIBUNE (May 4, 2017).