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The Prompt Payment Act: Who Owes What and When

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The Prompt Payment Act: Who Owes What and When

A. Purpose and Scope of the Prompt Payment Act.

Chapter 542 of the Texas Insurance Code requires an insurer to follow certain procedures and meet certain deadlines to fulfill its stated statutory purpose of “promot[ing] the prompt payment of insurance claims.” See Tex. Ins. Code §542.054. Subchapter B of Chapter 542, referred to as “the Prompt Payment Act,” provides an action against insurers for failure to comply with the deadlines in the Act to “promptly” pay a covered claim. The statutory purpose is enforced by assessing as damages an 18 percent interest “penalty” on the amount of policy benefits owed if an insurer is found liable for a violation. See Tex. Ins. Code §542.054.

1. Which insurers have to comply?

The Act broadly defines “insurers,” and provides a laundry list of the categories of insurers to which it applies. Specifically exempt from the Act are workers’ compensation, marine, mortgage-guaranty, and title insurance, certain guaranty associations, and fidelity, surety and guaranty bonds. See Tex. Ins. Code §542.053(a). Exempt by case law are state employee retirement plans, ERISA plans, and interstate shipper’s insurance subject to the Carmack amendment. There are also partial exemptions for health-maintenance organizations (HMOs) and preferred-provider organizations (PPOs).

2. What types of claims are covered?

To prove a prompt payment violation, the plaintiff must first establish that it made a “claim” under the insurance policy. *Allstate Ins. Co. v. Bonner*, 51 S.W.3d 289, 292 (Tex. 2001), *modified on other grnds*, 2001 WL 1412951 (Tex. June 21, 2001). A “claim” is defined by the statute as a first-party claim made by an insured, a policyholder, or a beneficiary whom the insurer must pay directly. See Tex. Ins. Code §542.051(2). A claim under a liability policy for failure to pay defense costs is a first-party claim for purposes of

Chapter 542. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007).

3. What is a day for deadline purposes?

The Act confusingly uses both the term “day” and the term “business day” when stating the deadlines under which insurers must act. Some deadlines are measured by “days” and some by “business days.” Only “business day” is defined in the statute, and means a day “other than a Saturday, Sunday, or holiday recognized by this state.” See Tex. Ins. Code §542.051(1). By default then, when the term “day” alone is used, the legislature presumably intends that all days be counted, including weekends and holidays. Eligible surplus lines insurers, which are out-of-state and non-admitted carriers, are given extended deadlines in some of the provisions, presumably because notice and other communications going by mail may take longer to reach out-of-state insurers.

B. Elements of a Chapter 542 Prompt Payment Claim.

The elements necessary to prove a chapter 542 violation are:

1. The plaintiff made a “claim” under an insurance policy;
2. The plaintiff gave proper notice of the claim to the insurer;
3. The insurer is liable for the claim;
4. The insurer has failed to follow one or more sections of the statute with respect to the claim.

See *Allstate Ins. Co. v. Bonner*, 51 S.W.3d 289, 292 (Tex. 2001), *modified on other grnds*, 2001 WL 1412951 (Tex. June 21, 2001).

1. When is “notice” of a claim given?

Notice of a claim is any written notification provided by a claimant to an insurer that reasonably apprises the insurer of the facts relating to the claim. See Tex. Ins. Code §542.051(4). Telephonic notice that damage has occurred is not sufficient. *McMillin v. State Farm*

Lloyds, 180 S.W.3d 183, 208 (Tex. App. – Austin 2005, no writ) (actual notice to the insurer evidenced by a telephone log showing a call from the insured does not meet the requirement of written notification). A claim form completed and signed by an insured together with her insurance agent or lawyer can satisfy the written notice requirement. See *Protective Life Ins. Co. v. Russell*, 119 S.W.3d 274, 288 (Tex. App. – Tyler 2003, pet. denied) (insurance agent prepared notice); *Dunn v. Southern Farm Bur. Cas. Ins.*, 991 S.W.2d 467, 473 (Tex. App. – Tyler 1999, pet. denied) (lawyer prepared notice). One court has held that the written notice requirement may be waived if the insurer begins to investigate the claim after receiving oral notice. *Daugherty v. Amer. Motorists Ins.*, 974 S.W.2d 796, 798 n.3 (Tex. App. – Houston [14th Dist.] 1998, no pet.).

2. Is the claim covered?

To recover under Chapter 542, the insured must prove that the insurer is liable for the claim. See Tex. Ins. Code §542.060; *Allstate v. Bonner*, 51 S.W.3d 289, 291 (Tex. 2001), *modified on other grounds*, 2001 WL 1412951 (Tex. June 21, 2001). If the insurer is not liable for the claim, the insured may not recover Chapter 542 damages, even if the claims-handling deadlines were not met. See *Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005); *Evergreen Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 679 (Tex. App. – Austin 2003, no pet.).

3. Has payment been refused or delayed?

To recover under Chapter 542, the insurer must wrongfully refuse to pay or delay payment of a claim within the deadline prescribed by the statute. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007); *State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799, 804 (Tex. 2007). If there is more than one claim, the insurer must timely comply with the statute's requirements as to each claim that is made. *Dunn v. Southern Farm Bur. Cas. Ins.*, 991 S.W.2d 467, 471-72 (Tex. App. – Tyler 1999, pet. denied) (separate claims made under PIP and UM coverages of auto policy).

The prompt payment statute contains two claim-handling deadlines and two payment deadlines, as follows:

- (1) acknowledge the claim, begin an investigation, and request information from the insured within 15 days of notice (§542.055);
- (2) accept or reject coverage, or extend the deadline for doing so, within 15 business days of receiving all items necessary for a final proof of loss (§542.056);
- (3) pay a claim within 5 business days after acceptance (§542.057);
- (4) pay any covered claim no later than 60 days after receiving all items reasonably requested and required under section 542.055 (§542.058).

Each of the deadlines is discussed in detail below.

C. Section 542.055 Notice and Acknowledgment Deadline.

Section 542.055 of the Prompt Payment Act addresses notice and acknowledgement of the claim, and requires the insurer to acknowledge receipt, commence investigation, and request all items necessary from the claimant within 15 days following notice of the claim. Eligible surplus lines insurers are given 30 “business” days. The provision states as follows:

Sec. 542.055. RECEIPT OF NOTICE OF CLAIM.

(a) Not later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall:

- (1) acknowledge receipt of the claim;
 - (2) commence any investigation of the claim; and
 - (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.
- (b) An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary.
- (c) If the acknowledgement of receipt of a claim is not made in writing, the insurer shall

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