

Client Alert

August 30, 2017

Key Points

- Action Item #1: Insureds should try to report claims for all property damage, including those caused by Hurricane Harvey, **by no later than August 31, 2017**, in order to avail themselves of the opportunity for an 18 percent interest recovery on any litigated late-paid claims.
- Action Item #2: Insureds having a ripened existing claim dispute with an insurer before **September 1, 2017**, should promptly file a lawsuit, but by no later than **August 31, 2017**, to avoid the additional notice and reporting requirements and the potential limitations on recovery of attorney's fees under the new law. If an insured cannot commence "an action" before September 1, 2017, certain steps are advised during the claim process to preserve and not waive the right to avoid Chapter 542A's notice requirements, and to seek the broader recovery of attorney's fees permitted under the law as in existence prior to September 1, 2017



HB 1774's "Hail Bill" and Hurricane Harvey-Time for Action

Akin Gump understands that the epic flooding caused by Hurricane Harvey invokes many human emotions, including fear of loss and dread of having to rebuild. We'd like to extend our sincere thoughts and concern for those in the affected areas. As a firm, we understand that the safety of our neighbors is the first priority this week. We will stand up and do whatever we can to support those who have suffered losses during the storm and assist in their recovery.

As the tragedy and suffering caused by Hurricane Harvey continue to unfold, our clients' attention should also be focused on certain changes in Texas state law that are scheduled to take effect at the end of this week and that could directly impact many of the same unfortunate victims who are suffering, or will suffer, property loss. On September 1, 2017 (this Friday), a new Texas law, House Bill 1774 ("HB 1774") will affect all Texans, including those Texans suffering from this unprecedented storm. Alternatively referred to as the "Hail Bill" or "Blue Tarp Bill," HB 1774 adds Chapter 542A, which applies to first-party claims for damage or loss of real property or improvements to real property "caused wholly or partly, by forces of

nature, including . . . a flood,¹ a tornado, lightning, a hurricane, hail, wind,² a snowstorm, or a rainstorm.” The new law effectively does two things:

- lowers the interest rate that insureds may recover from so-called “forces of nature” litigated claims against late-paying insurers from 18 percent to a lower statutorily mandated rate of interest (which, at current market rates, would approximate 10 percent).
- heightens the notice and reporting requirements imposed on insureds while imposing limitations and caps on recoverable attorney’s fees.

In order for an insured to preserve an argument that the law as in effect prior to September 1 would apply to maximize a recovery and avoid the limitations imposed by the looming Blue Tarp Bill, insureds should act promptly before Friday, September 1, 2017.

Action Item #1: Insureds should try to report claims for all property damage, including those caused by Hurricane Harvey, **by no later than August 31, 2017**, in order to avail themselves of the opportunity for an 18 percent interest recovery on any litigated late-paid claims.

A timely made claim may provide a powerful stick for an insurance company to expedite the claims-paying process and avoid the pre-September 1 statutory rate on damages of 18 percent, while a 10 percent penalty may not provide a commensurate motivation. Moreover, insurance companies may develop internal processes that would move them to “prioritize” the resolution of any pre-September 1 claims first. While it may not be practically possible at this early stage for an insured to embark on a detailed damage assessment caused by Hurricane Harvey, effort should be made to comply fully with the terms of the insured’s applicable insurance policy or policies, and any terms of applicable financing documents, in order to at least provide the necessary written notice and preservation of such claims. At this point, consideration should be given that any notice might be preferable than no notice.

As mentioned above, Chapter 542A potentially negatively affects policyholders seeking to recover attorney’s fees and also imposes a layer of additional pre-suit notice requirements for these “forces of nature” type claims. Specifically, there is a 60-day advance notice requirement, which must contain certain statutorily prescribed information and a detail of the damages claimed against the insurer, as a prerequisite to filing suit to recover the interest penalties from late-paying insurers. Importantly, the attorney’s fees that may be recovered by an insured are limited as described in the statute, with the ultimate limitation (and risk) that the claim for attorney’s fees could be barred completely if the required pre-suit notice is not provided as set forth in the statute.

¹ Most homeowners’ and property owners’ policies in Texas do not cover flooding. For those that do, the policies are often with the National Flood Insurance Program through the Federal Emergency Management Agency, which are not subject to state regulations.

² HB 1774 does not apply to actions against the Texas Windstorm Insurance Association.

Unfortunately, these restrictions would apply for “[a]n action that is filed on or after the [September 1, 2017] effective date” of the new law. An “action” filed before September 1, 2017, would preserve the claimant’s ability to operate under the less-onerous notice requirements and recovery of attorney’s fees under pre-existing law.

Action Item #2: Insureds having a ripened existing claim dispute with an insurer **before September 1, 2017**, should promptly file a lawsuit, but by **no later than August 31, 2017**, to avoid the additional notice and reporting requirements and the potential limitations on recovery of attorney’s fees under the new law. If an insured cannot commence “an action” before September 1, 2017, certain steps are advised during the claim process to preserve and not waive the right to avoid Chapter 542A’s notice requirements, and to seek the broader recovery of attorney’s fees permitted under the law as in existence prior to September 1, 2017.

Note: An insured does not lose any rights under the new law to file a valid insurance claim or to bring a lawsuit for an insurance claim that is not being timely paid. These rights will continue to exist just as they did prior to September 1, 2017, although the process will be somewhat more tedious and the amounts recoverable as interest and attorney’s fees may be limited.

Conclusion

It is truly an unfortunate coincidence that the tragedy of Hurricane Harvey and the effectiveness of HB 1774 are so close in time as to present those particularly affected in the coastal areas with an unfortunate decision to make at this critical juncture. While short-term dispensation by the courts or the Texas legislature could occur, no one should rely on the actions of an applicable governmental or judicial authority to step in to clarify these uncertainties or to provide any relief to those who have no chance to avail themselves of this opportunity. The truth is that there is an opportunity, however slight, to protect themselves and their statutory rights.

To view Akin Gump’s full statement on Hurricane Harvey, click [here](#).

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