

TEXAS INSURANCE LAW NEWSBRIEF

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ATTORNEY FEE CLAIM REJECTED DUE TO FAILURE TO GIVE PRE-SUIT NOTICE

Last week, a federal judge in McAllen granted an insurer's motion to preclude the policyholders' claim for attorney fees because the policyholders did not give the required 60-day pre-suit notice before filing suit. In *Casas v. Travelers Personal Ins.*, No. 7:22-CV-00260, 2022 WL 4596308 (S.D. Tex. Sept. 30, 2022), the policyholders sued Travelers, alleging failure to properly pay storm damage to their Edinburg property resulting from Hurricane Hanna in July 2020. (Because the adjuster who was individually sued was not a Texas resident, Travelers was able to remove the case to federal court without a jurisdictional battle.)

Because the pleadings clearly admitted the policyholders did not give notice before filing suit, and because they did not oppose Travelers' motion, Travelers' motion to preclude their attorney fee claim was granted almost summarily. The court noted the forfeiture of fees dates only from the time the motion is filed, not the beginning of the suit, but because this type of motion must be filed within 30 days after the defendant's answer, this should make relatively little difference to the overall effect of the forfeiture.

Editor's note: Texas Insurance Code Chapters 541 and 542 have long required claimants to give 60 days' pre-suit notice to an insurance carrier before filing suit. The Insurance Code provides insurers two remedies for failure to give the required notice: (1) the traditional remedy of abatement of the lawsuit for 60 days after the proper notice is given, and/or (2) since 2017, forfeiture of attorney fees incurred by the policyholder after the insurer's motion is filed.

Since the promulgation of Insurance Code Chapter 542A in 2017, Texas law has been in flux on the issue of policyholders suing in-state adjusters and the ability of insurers to accept responsibility for those adjusters, thus gaining the adjusters early dismissal from the lawsuit. Due to nuances of federal procedural law, the contours of that legal battle have focused heavily on an insurer's ability to accept responsibility for the adjuster *before* the lawsuit is actually filed, bringing pre-suit notice into sharper focus.

Some policyholder attorneys have long ignored the pre-suit notice requirement, and only have more motivation to ignore it when doing so allows them to keep the individual adjuster in the lawsuit. For many of those policyholder attorneys, the existing 60-day abatement remedy was no deterrent at all. However, the fee forfeiture approach taken here, under the relatively new Chapter 542A, is likely to see more use and may be significantly more effective as a deterrent. Notably, the fee forfeiture clause in §542A.007(d) applies to "any" attorney fees.

COVID-19 CLAIM DISMISSED FOR FAILURE TO ALLEGE "PHYSICAL LOSS OR DAMAGE"

Last week, a federal judge in Houston joined the ever-growing number of courts to reject business interruption claims resulting from COVID-19 shutdowns in 2020. *LNy 5003 LLC v. Zurich Am. Ins. Co.*, No. 4:20-CV-2992, 2022 WL 4543196 (S.D. Tex. Sept. 28, 2022) involved 17 restaurants owned by local restaurant mogul Tillman Fertitta. Following existing Fifth Circuit authority, the court held, on a Rule 12(b)(6) dismissal standard, that the complaint did not allege "direct physical loss or damage" as required to make a prima facie case that the claim was covered.

The court also rejected a "civil commotion" argument, rejecting the idea that a prevailing state of public fear about COVID-19 fell within the common meaning of the phrase "riot or civil commotion" used in the policy.

Editor's note: We have been following this case since it made Texas insurance news earlier in its life: <https://www.mdjwlaw.com/newsroom-news-TIN-20210928-Item9.html>

Notwithstanding a recent \$48.5 million jury verdict in a COVID-19 case in a Houston state court, this opinion holding that the presence of a virus is not "physical loss or damage" and that a pleading making those allegations does not allege a covered claim joins the large majority of results from courts in Texas.