
# FIFTH CIRCUIT PROVIDES GUIDANCE ON POLICY NOTICE PROVISIONS AND CALCULATING PENALTY INTEREST UNDER THE TEXAS PROMPT PAYMENT OF CLAIMS ACT

Newsbrief
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Recently, the Fifth Circuit examined reporting requirements and the accrual of penalties and interest under Texas Prompt Payment of Claims Act. In *Cox Operating, L.L.C. v. St. Paul Surplus Lines Ins. Co*., No. 13-20529, 2015 WL 4590252, (5th Cir. July 30, 2015), the insured incurred substantial costs cleaning up pollution and debris after Hurricane Katrina caused damage to its oil-and-gas facilities. After reimbursing Cox for over $1.4 million of its costs, Cox's insurer filed suit in the district court, seeking a declaration that the remainder of Cox's costs were not “pollution clean-up costs” covered by the policy. After a five-week jury trial, the district court entered judgment awarding the insured damages for breach of the policy and penalty interest under the Prompt Pay Act. On appeal, St. Paul argued the damages award must be reduced (1) because it includes costs that Cox did not report to St. Paul within one year of the clean-up work and thus are not covered by the policy; and (2) the award constituted a double recovery because it includes costs that were already reimbursed by other insurers. St. Paul also argued the Prompt Pay penalty-interest award should be reduced, or eliminated entirely, because the district court calculated the amount of penalty interest based on an incorrect date when penalty interest began to accrue.

On October 17, 2005, Cox notified St. Paul that it had a pollution clean-up claim. On October 27, St. Paul hired an adjusting firm to adjust the claim, and a representative made contacts with Cox's representative to discuss it. Cox alleged that between November 8, 2005, and March 13, 2006, no adjuster or St. Paul representative communicated with any Cox representative On July 24, 2006, a request for documents and invoices was made.

In the year following St. Paul's request for documents, Cox submitted various invoices and statements of the amount of its claim. St. Paul paid the limits of the primary policy and some additional under the excess. On August 30, 2007, St. Paul delivered a letter to Cox stating that St. Paul believed it had “paid all amounts that ... are owed under the ‘Pollution Clean Up Costs’ section of the Policy.” The letter also included a copy of a complaint that St. Paul had filed in this case against Cox seeking a declaration that St. Paul was not liable for the rest of Cox's claim.

Cox counterclaimed alleging St. Paul had breached the policy; St. Paul had done so in bad faith; and, because St. Paul had failed to commence an investigation or request documents within 30 days of receiving notice of its claim, St. Paul owed penalty interest under the Texas Prompt Payment of Claims Act. At trial, the jury found St. Paul had breached the excess policy resulting in damages to Cox. The jury also found St. Paul had violated the Prompt Payment of Claims Act by not timely commencing an investigation or requesting documents. The district court entered judgment on the jury's findings awarding Cox damages for breach of the policy and penalty interest under the Act.

On appeal, St. Paul argued under the Fifth Circuit's decision in *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653 (5th Cir.1999), a notice provision appearing in a policy's "insuring language" defines the scope of coverage and is therefore nonwaivable. Thus, the one-year reporting requirement could not be waived. The Court disagreed finding that the holding in *Matador* stressed it was the parties "objective intent" that determined whether a policy's provision could be waived. In this case, because of the nature of the provision and St. Paul's actions, the court could not conclude that the parties intended the provision to be nonwaivable.

As to the "double recovery" argument, the Court found that viewing the trial evidence in the light most favorable to the verdict, a reasonable jury could have reached the result and affirmed the district court's rejection of the double recovery argument.

Finally, St. Paul challenged the district court's award of penalty interest under the Texas Prompt Payment of Claims Act, asserting that the district court incorrectly determined the date on which penalty begins to accrue. The jury found St. Paul failed to commence an investigation or request information within 30 days of that date. Consequently, the jury found St. Paul violated § 542.055 of the Act. The district court concluded that interest began accruing 60 days after Cox provided St. Paul with notice of its claim. The Court began its analysis by noting that the Texas Supreme Court has not yet explained whether, and when, an insurer's violation of § 542.055 triggers the accrual of penalty interest under § 542.060 and concluded they would have to make an *Erie* guess as to the answer. They concluded that the plain language of the Act provides that a violation of any of the Act's deadlines begins the accrual of statutory interest under § 542.060. Thus, the Court could find no reversible error in the district court's calculation of penalty interest. The district court's judgment was affirmed.