Texas Senate Bill 10 Would Adversely Affect All Insureds

All Texas businesses should be concerned about the potential passage of Senate Bill 10 (SB 10). While several lawmakers tout SB 10 as tailored legislation to curb “hailstorm lawsuit abuse,” SB 10 is much broader and impacts all policyholders. Indeed, SB 10 fails to reference “hail” or “hailstorm,” much less limit its impact to claims for hailstorm damage. SB 10 would meaningfully and adversely impact the rights of all Texas policyholders, and it deserves the immediate attention of every Texas business. On Feb. 13, 2017, Senate Business and Commerce Committee Chair Kelly Hancock, of North Richland Hills, filed SB 10.[1] In a press conference with Lt. Governor Dan Patrick, Senator Hancock stated that hailstorm litigation in Texas has “spiraled out of control” over the past several years, primarily because of a small group of trial lawyers “who abuse the system.”[2] These “bad actors,” according to Senator Hancock, made “legislative enactment … necessary.”[3] Texans for Lawsuit Reform characterized SB 10 as “common-sense reforms to stop storm-chasing lawyers from exploiting the Insurance Code, while preserving the right of Texas policyholders to sue their insurance companies when they act slowly, unfairly, negligently or in bad faith.”[4] The bill misses the mark. SB 10 would negatively affect all policyholder claims, including those of Texas businesses. Indeed, SB 10 would adversely impact Texas businesses in three profound ways. First, SB 10 would preclude policyholders from combining a claim for breach of Texas Insurance Code Sections 541.060 or 541.061 with a claim for violation of the Texas Deceptive Trade Practices Act (the “DTPA”).[5] A policyholder’s ability to combine these two claims “provides attorneys with a formidable tool with which to battle unfair and deceptive acts or practices in the insurance industry.”[6] SB 10, however, would eliminate that “formidable tool” for every type of policy and claim. Second, SB 10 would reduce the statutory interest imposed under the prompt payment statute from 18 percent to the prime rate plus 3 percent.[7] “Considering that claims may remain in litigation for years following a denial of coverage, the prospect of recovery of 18% per annum penalties is a formidable weapon in the policyholder’s arsenal.”[8] Such a drastic reduction would eliminate the penalty aspect of the prompt payment statute, specifically Section 542.060. Again, there is no limitation
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on the applicability of this revision; it would impact all policyholders and every claim. Third, SB 10 creates a new Chapter 542A that would apply “to an action brought by a claimant relating to or arising from the insured’s claim for damage to or loss of covered property under an insurance policy providing coverage against damage to or loss of improvements to real property ...”[9] The application of the proposed Chapter 542A is much broader than merely claims for “hailstorm damages.” Any first-party claim filed under a property policy — including, for example, a business interruption claim — would fall under the proposed Chapter 542A. The proposed Chapter 542A adds requirements that benefit only the insurance industry. There are numerous requirements that relate to presuit notice, inspection, attorney’s fees and abatement, but three requirements deserve highlighting. First, the proposed Chapter 542A grants insurers the ability to “accept whatever liability the agent (which includes ‘an employee, agent, representative, or adjuster who performs any act on behalf of an insurer’ [10]) might have for the agent’s acts or omissions related to the claim” and requires that person’s dismissal from the lawsuit.[11] The practical effect is that it would give the defendant insurance company the power to eliminate nondiverse defendants and remove to federal court cases that normally could not be removed. Second, the proposed Chapter 542A requires presuit notice with “the specific amount alleged to be owed on the claim by the insurer.”[12] That amount is later compared to the damages awarded at trial to determine if the policyholder is even entitled to attorney’s fees.[13] Specifically, the court is to divide “the amount awarded in the judgment ... by the amount alleged” in the presuit demand.[14] If that equation equals 0.8 or higher, then the policyholder is eligible to recover its attorney’s fees.[15] If, however, that equation equals 0.2 or less, the policyholder is barred from recovering any attorney’s fees.[16] Many claims remain fluid for an extended amount of time or are partially resolved before trial. For example, a policyholder may be forced to file suit in a business interruption claim early to secure funds to make the initial repairs and begin operating. Any presuit demand in this scenario would include the entire amount of potential damages still outstanding. But, during the lawsuit, carriers and policyholders often narrow and resolve issues, meaning that the dispute presented to the jury is only a fraction of the presuit demand. As such, a policyholder would be placed in the untenable position of resolving issues along the way at the risk (or certainty) of being unable to recover its attorney’s fees. Third, and perhaps the most troubling, the proposed Chapter 542A allows a defendant to plead an affirmative defense of barratry (the improper solicitation by a lawyer of a client) for an alleged violation of Texas Penal Code Section 38.12. It is very easy to envision the potential gamesmanship that would occur as insurance carriers allege barratry and then seek communications, including privilege communications, between policyholders and their lawyers at the initial stages when parties are trying to determine what occurred and what rights they have under their policies to effectuate a cheaper settlement. SB 10 is not about hailstorms or