Texas Senate Bill 10 Would Adversely Affect All Insureds

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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

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

stopping allegedly abusive “storm-chasing lawyers.” Rather, it represents a potentially extraordinary windfall for insurance companies that would chill policyholder rights across the spectrum. All businesses should be concerned about its passage and should contact the Texas legislature accordingly. —By John R. Hardin and Gilbert A. Perales, K&L Gates LLP John Hardin is a partner with K&L Gates in Dallas and Houston. Gilbert Perales is an associate at the Dallas office. The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice. [1] SB 10 can be accessed at http://www.legis.state.tx.us/tlodocs/85R/billtext/html/SB00010I.htm. House Bill 1774 is the companion bill in the House: http://www.legis.state.tx.us/tlodocs/85R/billtext/html/HB01774I.htm. [2] The Feb. 13, 2017 Texas Senate press conference can be accessed at http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=11691. [3] See id. [4] Texans for Lawsuit Reform, “After Enactment of SB 10 and HB 1774, Texas Policyholders Will Maintain a Wide Array of Remedies Against Insurance Carriers,” https://www.tortreform.com/advocate/tlr-advocate-march-2017#SBHB. [5] The proposed text is: “(b) A person who brings an action against another person under this section for an act or practice in violation of Section 541.060 or 541.061 may not bring an action against that other person under Subchapter E, Chapter 17, Business & Commerce Code, that is related to the same claim.” [6] Craig B. Glidden, Esq., 4 West’s Tex. Forms, Business Litigation (2d ed.) § 12.2.4. (“Petition for violation of Chapter 541 of the Texas Insurance Code”). [7] The proposed text is: “(c) Interest awarded under Subsection (a) accrues beginning on the date the claim was required to be paid, and the interest rate applied is determined by adding three percent to the interest rate determined under Section 304.003, Finance Code.” [8] Wesley G. Johnson, esq. “THE CHECK IS IN THE MAIL? UNDERSTANDING THE TEXAS PROMPT PAYMENT OF CLAIMS STATUTE INCLUDING RECENT CASE LAW AND LEGISLATIVE UPDATE,” p . 9, 16th Annual Insurance Symposium (April 3, 2009). [9] SB 10, proposed section 542A.002(a). [10] SB 10, proposed section 542A.001(1). [11] SB 10, proposed section 542A.006(a) –(c). [12] SB 10, proposed section 542A.003(b)(3). [13] SB 10, proposed section 542A.007(a)– (c). [14] SB 10, proposed Section 542A.007(a)(3)(A). [15] SB 10, proposed Section 542A.007(b). [16] SB 10, proposed Section 542A.007(c).