

SOLUTIONS FOR UNDERPAID OR DENIED PROPERTY INSURANCE CLAIMS

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Founder

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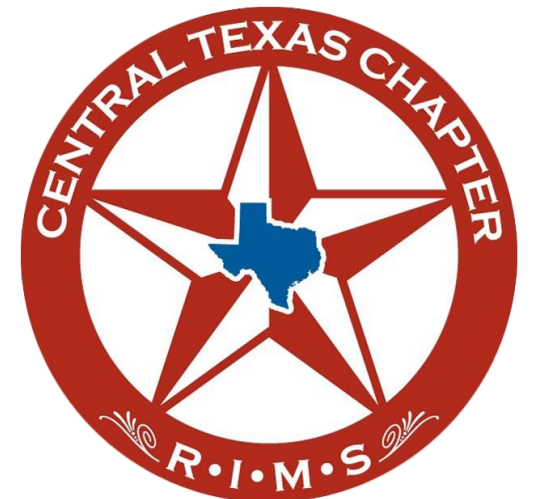
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PRESENTATION FORMAT

- Policy Considerations
- Claims Handling Trends
- Problematic Insurance Policy Provisions
- Legal Trends

Know Your Policy

- Specific Peril v. All Risk
- RCV v. ACV
- **Cosmetic Damage Exclusion**
- Deductibles

Know Your Policy – Part II

- Individual Policy
- Insurance Pools
- Group Policy
 - Multiple layers
 - Multiple carriers at each layer
 - **“Follow form” policy**

Claims Handling Trends



Claims Handling Trends

- Denials based on pre-existing damage
- Denials based on wear and tear
- Denials based on construction defects



Claims Handling Trends

- Denials based on **cosmetic damage**
 - No standard language
 - Sometimes listed as terms and conditions
- **Best Practices**
 - Know your policy
 - Contract out of the endorsement, if possible
 - Consult experts if claim is denied or underpaid

Policyholder Duties After a Loss

- “Notify” insurance company of the loss
- “Mitigate” your damages
- “Cooperate” with insurance company

Notice of Loss

- Notice provisions require the insured to *promptly* notify the insurance company of a current or potential claim, suit, or occurrence.
- The obligation to notify the carrier of a claim or suit is characterized by carriers as a “condition precedent” to coverage.

Proof of Loss

- Property policies may require a sworn proof of loss if the carrier requests one and provides a form.
- The proof of loss is an itemized statement of the loss.
- You can file a supplemental or amended proof later if additional information arises.
- You can file a “partial proof,” or enter into a written agreement with the carrier to extend the time for filing a proof of loss.

Best Practices

- Document the condition of your property
 - Before Loss
 - After Loss
- Document your communications
- Respond to insurance company requests
- Be proactive

Typical Insurance Causes of Action

- Breach of Contract
- Prompt Payment of Claims Act (PPCA)
- Duty of Good Faith and Fair Dealing or “Bad Faith”

The Prompt Payment of Claims Act

- Chapter 542.050 of the Texas Insurance Code
- Applies to “first party” claims
- Requires the carrier meet a series of deadlines
- Provides a 10% interest per annum penalty when an insurer wrongfully denies or underpays a claim
- Provides for attorney’s fees

Duty of Good Faith and Fair Dealing

- The insurer has exclusive control over the evaluation, processing and denial of claims.
- A “special relationship” arises out of the parties’ unequal bargaining power and the nature of insurance contracts.
- The Texas Insurance Code and common law guard against unscrupulous insurers who exploit their insureds’ misfortunes.
- Without a “bad faith” cause of action, insurers could arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed.

Bad Faith??



Bad Faith

- When an insurance company
 - Fails to pay a claim when liability is reasonably clear
 - Refuses to pay a claim without conducting a reasonable investigation

THE LITIGATION PROCESS

- Written Demand(s)
- File Lawsuit
 - Generally before two years after the loss
- Discovery
- Mediation/Trial

Insurance Policy Traps

- Appraisal Provisions
- Arbitration Clauses
- Choice of Venue/Choice of Law Provisions

Appraisal

If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser and notify the other of the appraiser selected within 20 days of such demand. The two appraisers will select an umpire. If they cannot within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction. Each appraiser will state the **amount of loss**. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding as to the amount of loss.

Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal:

- a. You will still retain your right to bring a legal action against us, **subject to** the provisions of the Legal Action Against Us Commercial Property Condition; and
- b. **We will still retain our right to deny the claim.**

Appraisal Issues

- Causation is an Issue
- Partial Appraisals
- Fraud, Accident or Mistake
- Policyholder Rights Post-Appraisal

Post-Appraisal Causes of Action

- No Breach of Contract
- PPCA Claims May Survive Appraisal
- Bad Faith Claims are Possible, but Limited

Recent Appraisal Case Law

- ***Barbara Technologies v. State Farm Lloyds***—Texas Supreme Court 2019
- ***Ortiz v. State Farm Lloyds***—Texas Supreme Court 2019
- ***Hinojos v. State Farm Lloyds***—Texas Supreme Court 2021

Recent Appraisal Case Law

Hinojos v. State Farm Lloyds—Texas
Supreme Court, March 2021

“Chapter 542 does not provide that a partial payment of a valid claim discharges liability for statutory interest.”

Recent Appraisal Case Law

Hinojos v. State Farm Lloyds—Texas Supreme Court,
March 2021

By requiring insurers to promptly satisfy claims that they owe in their entirety, the Legislature incentivizes insurers to resolve disputes and invoke that appraisal process sooner rather than later. Although the statute says nothing about reasonableness, a reasonable payment should roughly correspond to the amount owed on the claim. When it does not, a partial payment mitigates the damage resulting from a Chapter 542 violation. Interest accrues only on the unpaid portion of a claim.

Recent Federal Appraisal Opinions

Interprets the Hinojos Standard for PPCA liability: a reasonable timely pre-appraisal payment should “roughly correspond” to the amount owed on the claim

- ***Hinojos v. State Farm Lloyds***—Texas Supreme Court 2021
60% of the award amount > PPCA liability
- ***Randel v Travelers Lloyds of TX*** – U.S. Fifth Circuit 2021
Underpayment of \$185,000 > PPCA liability
- ***Lee v Liberty Ins. Corp.*** – U.S. District Ct, N.D. Dallas
September 2021
20% of the award amount >no PPCA liability

Recent Texas State Court Appraisal Opinions

Rejects reasonableness requirement

***First United Methodist Church v Church Mutual, Tex.App.—
Corpus Christi, August 2021***

“We reject Mutual’s argument that First United’s TPPCA claim is not viable because its initial pre-appraisal partial payment is reasonable.”

Arbitration Rationale

- Less expensive means of resolving disputes
- Faster than litigation

George Strait

OCEAN FRONT PROPERTY



DIGITAL
RECORDING



Arbitration Provisions

- Avoid the Jury System
- Carriers Know the System
- Potential for Arbitrator Bias
- Rules of Civil Procedure, Rules of Evidence, and Substantive State Law May Be Avoided
- The Expense of Arbitration Discourages the Policyholder
- No Appeal
- Secrecy

Problematic Arbitration Provisions

- Location of Arbitration
- Choice of Law
- Limitations on Damages
- Arbitration Tribunal
- Procedure
- Cost



New York City?

Arbitration/Choice of Law Provisions—Best Practices

- Be aware of provisions and endorsements
- Discuss with your clients
- Negotiate terms out of policies, if possible

Concurrent Cause Language

This Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss or damage.

Concurrent Causation

Frymire Home Services Inc., v. Ohio Security Ins. Co.
(5th Cir 2021)* – certified question to the Texas Supreme Court

- whether, under Texas law, the concurrent cause doctrine applies where there is any non-covered damage, including “wear and tear” to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs;

***The parties settled, so the case has been dismissed.**

Concurrent Causation

Frymire Home Services Inc., v. Ohio Security Ins. Co.
(5th Cir 2021) – certified question to the Texas Supreme Court

- whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss;
- whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss, that is, by implicitly attributing 100% of the loss to that peril.

Concurrent Causation

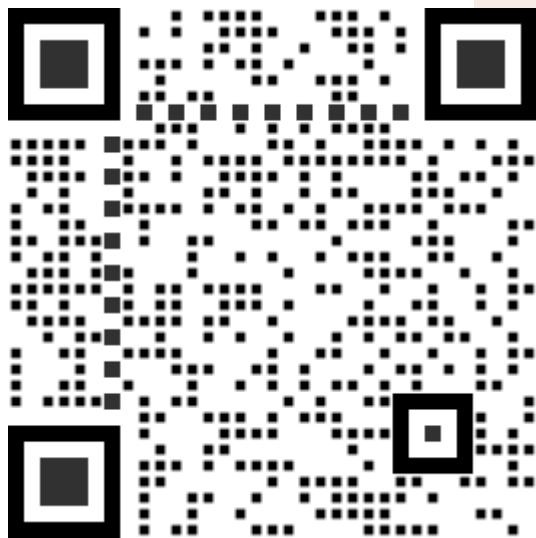
***Methodist Hospitals of Dallas v. Affiliated FM Ins. Co.,
(5th Cir December 2021)***

- Holding that a policy exclusion was triggered when the covered and non-covered perils were interdependent.
- A storm caused the power surge, the power surge caused the chillers to shut down, and the disabled chillers caused the temperature and humidity to rise.
- The concurrent causation doctrine barred recovery.

Concurrent Causation

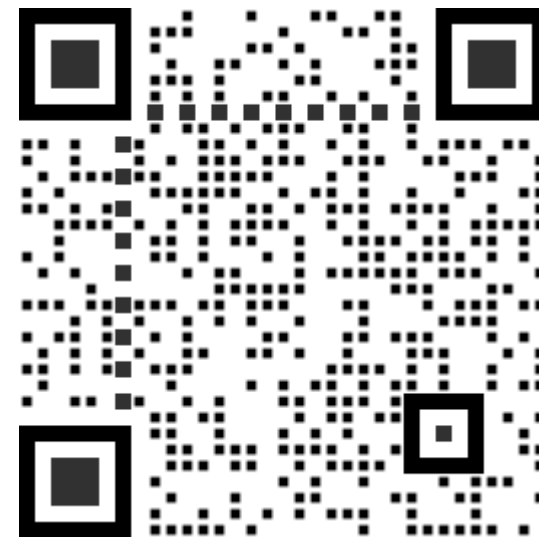
Tchakarov v. Allstate Indemnity Co., (U.S. District Ct. N.D. Dallas, October 2021)

Although an insured is not required to establish the amount of damages with mathematical precision, there must be some reasonable basis on which to allocate the damage between covered and non-covered perils.



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QUESTIONS



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