

# Insurance Recovery:

Property Insurance Policyholder/Owners



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# Insurers Profit By Underpaying Claims

- This is the reason for the duty of “good faith & fair dealing”:
- “In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims. In addition, without such a cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed.” *Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987)
- “An insurance policy . . . is a unique type of contract because an insurer generally ‘has exclusive control over the evaluation, processing[,] and denial of claims,’ and it can easily use that control to take advantage of its insured.” *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 487 (Tex. 2018)(“

# Know your Policy

- Specific Peril v. All Risk
- Claims-Made v. Occurrence-Based
- RCV v. ACV
- Business Interruption coverage
- Deductibles
  - Variable deductibles
  - Calculating deductibles

# Covered Peril

- **Definition:** Damage to your building caused by a type of loss covered by your policy.

Fire Damage



Water Damage



Wind Damage



Hail Damage



# Know your Policy

- Concurrent Causation
- “Other Insurance” Clauses
- Policyholder Requirements
  - Mitigation of Damages
  - Notice Requirements (ex. TWIA)
  - Others

# Know your Policy – Part II

- Individual policy
- Insurance Pools
- Group policy or “scheduled” property policies
  - Multiple layers
  - Multiple coverages
  - Often a large group of owners share these layers, “first come, first served?”

# When You Have a Claim

- Document your damage
- Collect your documents
- Speak with one voice
- Watch out for vendors

# Policyholder Duties

- Provide notice of loss to carrier
- Take steps to protect property from further loss
- Cooperate with insurance company
- Submit to examination under oath if requested
- Meet all conditions precedent



# Proof of Loss

- Property policies require the insured to file a sworn proof of loss within a certain amount of time after the carrier has requested and provided a form
- The proof of loss is an itemized statement of the loss
- The insured can always file a supplemental or amended proof later if additional information arises
- The insured can file a “partial proof,” or enter into a written agreement with the carrier to extend the time for filing a proof of loss

# Unsolicited Proof of Loss

- The insured can file a proof of loss before the carrier requests the proof
- Businesses sometimes file an unsolicited proof if there has been undue delay in processing a claim
  - the purpose is to force the carrier to consider, accept and/or reject the proof as quickly as possible in order to speed up the payment of the claim

# Notice

- Notice provisions require the insured to 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

# Late Notice and Prejudice

- The question of whether the insurer can escape its obligations under the policy simply because of late notice depends on the type of policy at issue
- In the case of a property policy or an “occurrence-based” general liability policy, the carrier must prove that the failure to give notice actually prejudiced the carrier
- In the case of a “claims made and reported” policy, the carrier does not have to prove prejudice

# Appraisal

An “appraisal” is a little-understood process prescribed by the policy for arriving at the *value* of a loss where the parties disagree about the amount. There are many pitfalls, and knowing how to avoid them is the key to maximizing your insurance coverage.



# *Barbara Tech./Ortiz*

- Two recent appraisal cases argued in the Texas Supreme Court earlier this year.
- Is appraisal part of the claims handling process or is it a dispute resolution process after the parties disagree?
- Does paying an appraisal award excuse an insurer's bad faith and untimely investigation or payment of the loss (*Ortiz*) and violation of the PPCA (*Barbara Tech*)?
- Amicus filed on behalf of many commercial trade groups in support of the policyholders, including hospitals, schools, automobile dealers and the independent banks.

# Insurance Company Traps

- Proof of Loss
- Property damage policies
- Requests to the policyholder
- Contract with insurance companies
- Log notes

# Practical Tips

- Document your loss
- Document your communications
- Respond to insurance company requests
- Be proactive



# Statutory Bad Faith and DTPA

- Chapter 541.001 of the Insurance Code is the primary source of statutory bad faith claims in Texas

541.001: explains that the statute's purpose is to define and prohibit unfair or deceptive practices in the business of insurance

542.002: defines the term “knowingly”— the key to a potential trebling of damages awarded for violation of the statute

541.151: establishes a link to section 17.46(b) of the DTPA, under which policyholders also may assert claims

541.152: defines the damages that a prevailing claimant may recover, including actual damages, treble damages for a “knowing” violation (as defined) within the jury's discretion, court costs and reasonable attorney's fees

541.154: requires at least 60 days pre-suit notice

541.162: provides two-year statute of limitations, subject to the discovery rule

# The Prompt Payment of Claims Act

- Chapter 542.050 of the Texas Insurance Code provides an 8% interest per annum penalty when an insurer wrongfully denies a claim made under its policy
- Applies to “first party” claims
- Sets out a series of deadlines which the carrier must meet or incur **8%** penalty and attorney’s fees

# Claims Handling Standards

- Duties are mostly set out by statute (Ins. Code Ch. 541):
  - Conduct a “reasonable investigation” of the loss
  - Promptly pay once liability is reasonably clear
  - Explain the basis for a denial or partial denial of claims
  - No misrepresentations about the claim facts or policy terms
  - No forcing insured to release an entire claim by paying only part

# Remedies

- Breach of Contract
- Breach of the Duty of Good Faith and Fair Dealing
  - Common law
  - Statutory (Chapter 541) also allows attorneys' fees and "additional damages" for knowing conduct
- Prompt Payment of Claims Act
- Texas Deceptive Trade Practices Act

# The Litigation Process

- Case Evaluation
- Demand
- File Lawsuit
  - Consider applicable Statutes of Limitations
  - Consider independent adjusters and “reinsurers” involved in the claims handling
- Insurer May Demand Appraisal
- Court May Require Mediation



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Insurance Companies

# DON'T

Want You To Know:

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1. They have deadlines
2. You don't need to hire experts
3. There is no such thing as a supplemental claim
4. 18% - PPCA penalty for underpaid/unpaid amounts
  - Only around 10% for “forces of nature” (storms, earthquakes, wildfires, etc.) subject to new Ch. 542A.
5. They only write what they see
6. Proof of Loss

# Scenario #1

Your office building suffers hail damage. You call your insurance agent and inform her of the event.

*Is this the right way to put the carrier on notice?*



## Scenario #2

After a pipe burst, your insurance company sent out a contractor to dry out the wet property.

*Is this sufficient?*

## Scenario #3

After a hailstorm, there is no visible damage to the membrane roof.

*Given no visible damage, is a claim denial warranted?*

## Scenario #4

After a hailstorm, you put the insurance company on notice of the damage. They tell you to get three estimates for them.

*Is this proper?*

## Scenario #5

You call the agent after a pipe burst and tell him about it. He asks you if the damage is below the deductible.

*What is your next step?*

## Scenario #6

After a foundation cracks at one of your buildings, the adjuster asks you to hire an engineer to evaluate.

*Is the adjuster's request proper?*

# Scenario #7

Your are in the process of acquiring a building. There is an insurance claim pending.

*What are your options?*

## Scenario #8

You discover hail damage that probably happened 3 years ago.

*Is it too late to be paid for the loss?*

# Scenario #9

After a loss, the insurance company sends you a Proof of Loss to complete.

*What do you do?*



# Scenario #10

After a loss, the adjuster sends you a Proof of Loss already filled out with an amount?

*What do you do?*

# Scenario #11

The insurance company has not paid the full amount it owes.

*What should you do next?*

# Scenario #12

The insurance company paid the loss  
but took two deductibles.

*What do you do?*

# Scenario #13

After a loss, the insurance company will not tell you if the loss is covered.

*What do you do?*

# Scenario #14

The insurance company sent you a 15 page letter on their coverage position. You don't understand it.

*What do you do?*

# Scenario #15

The insurance adjuster refuses to send you their estimate for the loss.

*What do you do?*

# Scenario #16

The insurance company wants to bargain with you on an amount of payment.

*What do you do?*