

a. If a claimant presents the vehicle to the insurer in connection with a claim for damage repair, or otherwise makes the claim in person, the written notice must be given to the claimant at that time.¹⁹³ If the claim is made in writing, including e-mail or fax, the insurer must mail the written notice to the claimant within three business days of receiving notice of the claim, unless the insurer otherwise delivers the claimant the written notice within those three business days.¹⁹⁴ If the claim is made by telephone, an insurer must: 1) mail the written notice to the claimant within three business days; or 2) give a specified "verbal notice" to the claimant at the time of the claimant's telephone call and mail the written notice to the claimant within 15 business days of receiving notice of the claim.¹⁹⁵

b. The verbal notice at a minimum must consist of the following:

BY LAW, YOU HAVE THE RIGHT TO SELECT WHERE YOUR MOTOR VEHICLE IS REPAIRED AND THE PARTS USED FOR REPAIRS. HOWEVER, AN INSURANCE COMPANY IS NOT REQUIRED TO PAY MORE THAN A REASONABLE AMOUNT FOR SUCH REPAIRS AND PARTS. YOUR RIGHTS CONCERNING MOTOR VEHICLE REPAIRS ARE EXPLAINED IN THE INSURANCE CODE §§ 1952.301-307, A COPY OF WHICH WILL BE MAILED TO YOU WITHIN 15 BUSINESS DAYS. IF YOU HAVE ANY QUESTIONS ABOUT YOUR MOTOR VEHICLE REPAIR RIGHTS, CONTACT THE TEXAS DEPARTMENT OF INSURANCE AT 1-800-252-3439.¹⁹⁶

c. The written notice must be printed in at least ten point type, with the insurer's name, mailing address, phone number, and fax number printed in bold face type. The insurer may provide an e-mail address or web address printed in bold face type. The notice must be attached to, or have printed on the reverse side, a copy of Insurance code §§ 1952.301-1952.307.¹⁹⁷ A sample notice is attached as Appendix J.

11 **PROMPT PAYMENT OF FIRST PARTY CLAIMS.** The last area of prescribed conduct by Texas Statute relating to claims handling is by far the most important and concerns the prompt payment of first party claims. While the Prompt Payment of Claims Act does not prevent an insurance company from disputing or denying a first party claim, it does require first party claims be handled in a prompt, time

¹⁹³ *Id.*

¹⁹⁴ *Id.* § 5.501©

¹⁹⁵ *Id.* § 5.501(d).

¹⁹⁶ 28 TAC § 5.501.

¹⁹⁷ 28 TAC § 5.501(h).

specific manner.¹⁹⁸ Compliance with the Act's deadlines is not only the law, but is one way an insurer can protect itself against extra-contractual liability arising out of handling first party claims. In connection with this discussion, please see Appendix F, the Texas Prompt Payment of First Party Claim Work Sheet, at the back of this publication for a practical tool to assist adjusters in responding to first party claims.

- A. **Importance of Compliance.** There are several reasons why compliance with this Act should be an insurer's primary goal in handling first party claims. First, because the requirements of the Act are objective in nature, violations tend to be obvious and easily proven. Second, although some first party claims may be preempted by ERISA, violations of the Act still subject all carriers to possible administrative disciplinary actions and fines. Third, while the purpose of the Act's deadlines is to guarantee prompt payment of claims rather than create a statutory windfall for any party,¹⁹⁹ violations provide a remedy for the insured for damages not otherwise recoverable in a properly handled first party claim. Fourth, as seen previously, these deadlines are now included in personal lines policies and in some CGL endorsements, making the time deadlines contractual obligations in addition to statutory requirements. Fifth, violations of the act can give rise to extra-contractual causes of action against the carrier, such as actions under the Texas Insurance Code and the Texas Deceptive Trade Practices Act. For example, the Chapter 541 of the Texas Insurance Code requires prompt action by an insurer with respect to settlement of claims, such as promptly settling any claim when liability has become reasonably clear, promptly providing an explanation of the denial of coverage, and affirming or denying coverage within a reasonable time.²⁰⁰ In the first party claim context, the Prompt Payment of Claims Act gives the concept of "promptly" specific statutory meaning because of its deadlines. Violations of the Act may, therefore, also give rise to claims under those sections of Chapter 541 which require prompt action, and the Texas Deceptive Trade Practices Act which also provides a cause of action for violations of Chapter 541 of the Insurance Code.²⁰¹ Therefore, violations of the Act provide the basis for an insured to not only recover greater damages than the original claim, but also subject the carrier to extra-contractual claims and possible administrative penalties as well. Conversely, and more importantly to insurers, there is no better way for an insurer to fortify its defense to an insured's extra-contractual claims, than by documenting compliance with the Act's time deadlines for every first party claim.
- B. **What Claims Are Covered?** The Act applies to first party claims, which under the statute are defined as any claim made by an insured, a policyholder, or a beneficiary named in the policy or contract, that must be

¹⁹⁸ *Dunn v. Southern Farm Bureau Cas. Ins. Co.*, 991 S.W.2d 467, 474 (Tex. App.--Tyler 1999, writ denied).

¹⁹⁹ *Daugherty v. American Motorists Ins. Co.*, 974 S.W.2d. 796, 799 (Tex. App.--Houston [1st Dist.] 1998, no writ).

²⁰⁰ TEX. INS. CODE ANN. §541.060(a) (formerly TEX. INS. CODE ANN. art. 21.21 § 4 (10)).

²⁰¹ BUS. & COM. CODE § 17.50(a)(4) (Vernon 1995).

paid by the insurer directly to the insured or beneficiary.²⁰²

- 1) The phrase, "that must be paid", limits "claim" to the amount ultimately determined to be owed, which would be net of any partial payments made by the carrier prior to that determination. This encourages insurers to pay the undisputed portion of a claim early, consistent with the statute's purpose "to obtain prompt payment of claims made pursuant to policies of insurance."²⁰³
 - a. But if the insurer's tender of partial payment of the claim is not unconditional, then it does not count as partial payment, and the penalty will apply to the full amount owed.²⁰⁴
- 2) The Act applies to all types of insurance,²⁰⁵ except for workers' compensation insurance; mortgage guaranty insurance; title insurance; fidelity, surety, or guaranty bonds; marine insurance other than inland marine insurance governed by Article 5.53 of the Insurance Code; or a guaranty association created under the Texas Title Insurance Guaranty Act.²⁰⁶ The statute applies to the Texas Property and Casualty Insurance Guaranty Association, and to the Texas Life, Accident, Health, and Hospital Service Insurance Guaranty Association. However, the damage provisions are not applicable to these guaranty associations, and they may receive an extension of the time periods under this article from a court of competent jurisdiction upon good cause shown and after reasonable notice to policyholders.²⁰⁷ The only other exception to the time deadlines is that an extension of 15 additional days is granted to the claims deadlines, in the event of a weather-related catastrophe or major natural disaster, as defined by the State Board of Insurance.²⁰⁸
- 3) More than one first party claim may arise out of a single incident. For example, an insured could file both a personal injury protection (PIP) claim, and a claim for uninsured or underinsured motorists (UM/UIM) claim because of the same accident. In such a case, the claims are considered separate first party claims because they are based on different policy coverages.²⁰⁹ Separate coverages have their own insuring agreement, exclusions, limits of liability, and other provisions applicable to that type of coverage.²¹⁰ Therefore, one of the initial steps in handling a first party claim is to match each claim made by a

²⁰² TEX. INS. CODE § 542.051(2)(formerly TEX. INS. CODE ANN. § 21.55).

²⁰³ *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d. 423, 425 (Tex. 2004).

²⁰⁴ *Id.*

²⁰⁵ *Dunn* sat 474.

²⁰⁶ TEX. INS. CODE § 542.053 (formerly TEX. INS. CODE ANN. § 21.55(5)(a).

²⁰⁷ TEX. INS. CODE § 542.053 (formerly TEX. INS. CODE ANN. § 21.55(5)(b).

²⁰⁸ TEX. INS. CODE § 542.059(b) (formerly TEX. INS. CODE ANN. § 21.55(5)(d).

²⁰⁹ *Dunn*, at 474.

²¹⁰ *Id.* at 472.

claimant to the policy coverage giving rise to the claim. Claims under different coverages, even from the same policy, are considered separate claims, and the deadlines for each claim should be tracked and handled independently.

- 4) **IMPORTANT NOTE: ACT APPLIES TO COSTS OF DEFENSE AGAINST THIRD-PARTY LAWSUITS.** In the 2007 case of *Lamar Homes v. Mid-Continent*, the Texas Supreme held that the obligation to provide a defense, i.e. defense costs, to a third-party lawsuit is itself a first party claim and subject to the prompt payment statute.²¹¹ When an insurer, who owes a defense to its insured fails to pay with the statutory deadline, the insured had a right to reasonable attorney's fees and 18% interest as specified in the statute.²¹²

- C. **Initial Response to Receipt of Claim.** An insurer's duty to respond timely under the Act is triggered when the insurer receives any **written notification** from a claimant, that reasonably apprises the insurer of the facts relating to the claim, whether that be from the claimant directly or the claimant's attorney.²¹³ A claim form completed and signed by an insured together with her insurance agent can satisfy the notice requirement.²¹⁴ Not later than the **15th day** after an insurer receives written notice of the claim, or the 30th business day if the insurer is an eligible surplus lines insurer, the insurer must: 1) acknowledge receipt of the claim; 2) commence any investigation of the claim; and 3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.²¹⁵ Additional requests may be made if during the investigation of the claim such additional requests are necessary.²¹⁶ If the insurer's acknowledgment of the claim is not made in writing, the insurer is required to make a record of the date, means, and content of the acknowledgment.²¹⁷
- D. **Deadline for Acceptance or Rejection of Claim.** After an insurer makes its initial response to the receipt of the claim, the insurer's next deadline is triggered when the claimant provides the requested items. Not later than **15 business days** after the insurer receives all items, statements, and forms required by the insurer in order to secure the final proof of loss, the insurer is required to notify the claimant **in writing** of the acceptance or rejection of the claim.²¹⁸ A business day under the statute is any day other than a Saturday, Sunday or legal holiday.²¹⁹ If the insurer has a reasonable basis

²¹¹ *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.2d 1, 17 (Tex. 2007).

²¹² *Id.* at 19.

²¹³ *Id.* at § 21.55 (1)5b); *see also* *McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 208 (Tex. App. – Austin 2005, no pet.).

²¹⁴ *Protective Life Ins. Co. v. Russell*, 119 S.W.3d 274, 288 (Tex.App.-Tyler 2003, pet. ref'd).

²¹⁵ TEX. INS. CODE § 542.055(a) (formerly TEX. INS. CODE ANN. § 21.55 (2)(a)).

²¹⁶ TEX. INS. CODE § 542.055(b) (formerly TEX. INS. CODE ANN. § 21.55 (2)(a)).

²¹⁷ TEX. INS. CODE § 542.055(c) (formerly TEX. INS. CODE ANN. § 21.55 (2)(b)).

²¹⁸ TEX. INS. CODE § 542.056(a) (formerly TEX. INS. CODE ANN. § 21.55 (3)(a)).

²¹⁹ TEX. INS. CODE § 542.051(1) (formerly TEX. INS. CODE ANN. § 21.55 (1)(2)).

to believe that the loss results from **arson, the insurer has 30 days** after the date the insurer receives all the requested items to notify the claimant in writing of the acceptance or rejection of the claim.²²⁰ If the insurer rejects the claim, the written notice provided by the insurer must state the reasons for the claim rejection.²²¹ If the insurer is unable to accept or reject the claim within this deadline, the **insurer must notify** the claimant of the **delay** and the reasons the insurer needs additional time.²²² **However, not later than 45 days after a delay notice is sent, the insurer must either accept or reject the claim.**²²³

- E. **Payment of the Claim.** If an insurer notifies a claimant that the insurer will pay a claim, or part of a claim, the insurer shall pay the claim not later than the **fifth** business day after the notice has been made. If payment of the claim or part of the claim is conditioned on the performance of an act by the claimant, the insurer shall pay the claim not later than the fifth business day after the date the act is performed. Surplus lines insurers shall pay the claim not later than the twentieth business day after the notice or date that the act is performed.²²⁴ The Texas Insurance Code does not prevent an insurer from withdrawing its notice of payment given to a claimant if the facts and circumstances known to the insurer change significantly after the notice is given but before the claim is paid.²²⁵ Facts and circumstances may also change in favor of the insured, such that a claim may have to be modified after submitted to the insurer.²²⁶

- 1) **Interpleader Actions.** Filing an interpleader action does not except the insurer from its duties under the prompt payment statute.²²⁷ Interpleader actions generally allow an innocent stakeholder when faced with rival claims to interplead the funds into the registry of the court, and be discharged from further liability.²²⁸ When insurers receive notice of adverse bona fide claims, Texas law does not require them to act as judge and jury to determine which one should be paid. Rather, if a reasonable doubt exists in law or fact as to who should be paid, an insurer should interplead the funds and let the courts decide.²²⁹ If the insurer's payment or interpleader of funds is delayed beyond the statutory deadlines, the insurer will be responsible for interest, penalties, and attorneys' fees incurred up to the time of interpleader only and not for any incurred thereafter.²³⁰ But if the

²²⁰ TEX. INS. CODE § 542.056(b) (formerly TEX. INS. CODE ANN. § 21.55 (3)(b)).

²²¹ TEX. INS. CODE § 542.056(c) (formerly TEX. INS. CODE ANN. § 21.55 (3)(c)).

²²² TEX. INS. CODE § 542.056(d) (formerly TEX. INS. CODE ANN. § 21.55 (3)(d)).

²²³ TEX. INS. CODE § 542.056(d) (formerly TEX. INS. CODE ANN. § 21.55 (3)(e)).

²²⁴ TEX. INS. CODE § 542.057(b) (formerly TEX. INS. CODE ANN. § 21.55 (4)).

²²⁵ *Daugherty v. American Motorists Ins. Co.*, at 799.

²²⁶ *Id.*

²²⁷ *State Farm Life Ins. Co. v. Wason*, 216 S.W.3d 799, 804 (Tex. 2007).

²²⁸ *Id.* at 803.

²²⁹ *Id.* at 806.

²³⁰ *Id.* at 808.

interpleader action has no basis, for example, there are no rivals claims, and the interpleader action delayed payment to the insured, then the filing of the interpleader action does not toll the statutory penalties, and the insurer is liable until the claim is actually paid to the claimant.²³¹

- F. **Penalties for violation of the Act.** When an insurer violates any requirement of the Act, in response to an appropriate claim, the insurer shall be liable to pay the claimant, in addition to the amount of the claim, **18 percent per year** of the amount of such claim as damages, together with reasonable attorney fees.²³² The amount of the claim is not the amount demanded by the claimant, but rather, is the amount the insured is legally entitled to recover and is limited to the insurer's policy limits.²³³ Any unconditional tender of partial payment on the claim will also reduce the amount ultimately owed and any applicable penalty.²³⁴ The remedies as provided in the Act are not exclusive of, but are in addition to, any other available remedies available to an insured.²³⁵ If an insurer delays payment of a claim for a period exceeding **60 days**, or any other period prescribed by an applicable statute, following receipt of all items, statements, and forms reasonably requested and required, the insurer shall pay damages.²³⁶ However, if litigation or arbitration determines the claim to be invalid and should not be paid by the insurer, the insurer is not responsible for any delay damages.²³⁷ A wrongful rejection of a claim may be considered a delay in payment for purposes of the 60 day rule.²³⁸
- G. **Recommendations about complying with the Act.** First, adjusters must be informed and trained on the Act's time deadlines, and the different policy coverages that are applicable to Texas first party claims. Second, a system should be implemented to track time deadlines in first party claims. Use of the Worksheet at the end of this publication can assist in that regard. Third, adjusters must make a habit of documenting the claim file with reference to the Act requirements. Fourth, adjusters should request all known and needed information, statements, and forms when claim is initially acknowledged. With respect to complex, difficult, or large claims involve coverage/defense counsel as early as possible in the claims process. Defense costs need to be processed as promptly as any other claim. If there is a situation of multiple rival claims for the same money, then the carrier needs to act quickly, within the time deadlines to determine if an interpleader action is appropriate.

²³¹ *Id.* at 807.

²³² TEX. INS. CODE § 542.060 (formerly TEX. INS. CODE ANN. § 21.55 (6)).

²³³ *Mid-Century Ins. Co. of Texas v. Barclay*, 880 S.W.2d 807, 811 (Tex. App. -- Austin 1994, writ denied).

²³⁴ *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 SW3d 423, 425 (Tex. 2004).

²³⁵ TEX. INS. CODE § 542.061 (formerly TEX. INS. CODE ANN. § 21.55(7)).

²³⁶ TEX. INS. CODE § 542.058(a) (formerly TEX. INS. CODE ANN. § 21.55(3)(f)).

²³⁷ TEX. INS. CODE § 542.058(b) (formerly TEX. INS. CODE ANN. § 21.55(3)(g)).

²³⁸ *Higginbotham v. State Farm Mut. Ins. Co.*, 103 F.3d 456, 461 (5th Cir. 1997); *see also Oram v. State Farm Lloyds*, 977 S.W.2d 163, 167 (Tex. App.—Austin 1998, writ ref'd).