

that opinion to deny the claim. If the insured decides to challenge the denial of the claim, they usually find an engineer that will say the opposite and attribute the foundation movement to a covered peril such as a plumbing leak. When these claims go to trial, it is the insured that prevails most of the time on the coverage issue, and the insured recovers the costs of repair, attorneys' fees, costs, plus the penalties under article 21.55 of the Texas Insurance Code. On some occasions, Plaintiffs even obtain judgments against the carrier for knowing violations of the Insurance Code and DTPA, and recover treble and mental anguish damages.

- 3) **Recommendations.** Carriers should strive to do a thorough and objective investigation of every first party claim. Carriers need to be aware of the use and overuse of experts in the determination of coverage issues. Carriers should not give all of their investigation work to the same engineer, but should actively try to retain multiple independent and competent engineers in a particular area. Insurers need to make sure that their retained engineers and experts have the skill and experience necessary to render an opinion on the matter, and should be suspect of engineers, who routinely provide reports that are not objectively based. If an expert loses his objectivity on claims issues, the expert should not be used.

- C. **Good Faith Duty to Insureds For Third-party Liability Claims.** Courts employ an objective standard to determine whether a reasonable insurer under similar circumstances would have delayed or denied payment of the claim.⁸¹ An insurer will be liable if the insurer knew or should have known that it was reasonably clear that the claim was covered.⁸² In the third-party claim context, liability may not be imposed against an insurer, and an insurer's liability is not reasonably clear unless it is shown that: 1) the policy covers the claim; 2) the insured's liability is reasonably clear; (3) the claimant has made a proper settlement demand within policy limits; and (4) the demand's terms are such that an ordinarily prudent insurer would accept it.⁸³ In establishing these guidelines for liability in this context, the Texas Supreme Court linked to, and borrowed from, the common law requirements to establish a Stowers claim, which is discussed later in this publication.⁸⁴

- 9 **PROSCRIBED CONDUCT UNDER THE TEXAS INSURANCE CODE.** This section discusses conduct relating to claims handling that is specifically required of insurers by Texas Statute.

- A. **Records of Complaints.** An insurer is required to maintain a complete record of all complaints received by the insurer during the preceding three years or since the date of the insurer's last examination by the department, whichever period is shorter. The

⁸¹ See *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex.1988); *Vandeventer v. All Am. Life & Cas. Co.*, 101 S.W.3d 703, 722 (Tex. App.-Fort Worth 2003, no pet.).

⁸² See *Universe Life Ins. Co. v. Giles*, 950 S.W.2d at 56; *Vandeventer*, 101 S.W.3d at 722.

⁸³ See *Rocor Int'l Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 261, 262 (Tex. 2002)

⁸⁴ See *id.*

record must indicate: 1) the total number of complaints; 2) the classification of complaints by line of insurance; 3) the nature of each complaint; 4) the disposition of the complaints; and 5) the time spent processing each complaint.⁸⁵ A "complaint" means any written communication primarily expressing a grievance.⁸⁶

B. Providing Claim Information on Request.

- 1) **Providing Liability Claim Information on Request.** On the written request, within six months of date of disposition of claim, by a named insured under a liability insurance policy, the insurer that wrote the policy shall provide to the insured information relating to the disposition of a claim filed under the policy. The information must include: 1) the name of each claimant; 2) details relating to the amount paid on the claim; settlement of the claim; or judgment on the claim; 3) details as to how the claim, settlement, or judgment is to be paid; and 4) any other information required by rule of the commissioner that the commissioner considers necessary to adequately inform an insured with regard to any claim under a liability insurance policy.⁸⁷ "Liability insurance" means general liability insurance, professional liability insurance including medical professional liability insurance, commercial automobile liability insurance, and the liability portion of commercial multi peril insurance.⁸⁸
- 2) **Request by Policyholder Under Property and Casualty Insurance Policy.** On written request of a policyholder, an insurer that writes property and casualty insurance in Texas shall provide the policyholder with a list of claims charged against the policy and payments made on each claim.⁸⁹ This does not apply to a workers' compensation insurance policy.
- 3) **Deadline to Respond 30 days.** An insurer is required to provide this requested information in writing not later than the 30th day after the date the insurer receives the request for the information. Information is considered to be provided on the date the information is deposited with the United States Postal Service or is personally delivered.⁹⁰

C. Provide Written Notice of Offer or Settlement on Casualty Policy Claim. Not later than the 10th day after the date an initial offer to settle a claim against a named insured under a casualty insurance policy issued to the insured is made, the insurer shall notify the insured in writing of the offer. Not later than the 30th day after the date a claim against a named insured under a casualty insurance policy issued to the insured is settled, the insurer shall notify the insured in writing of the settlement.⁹¹

⁸⁵ See TEX. INS. CODE ANN. Art. 21.21-2 § 2(b) (effective April 1, 2005 TEX. INS CODE ANN. 542.005).

⁸⁶ See *id.*

⁸⁷ See TEX. INS. CODE ANN. Art. 21.59 (effective April 1, 2005 TEX. INS CODE ANN. 542.101).

⁸⁸ See *id.*

⁸⁹ See TEX. INS. CODE ANN. Art. 21.59 (effective April 1, 2005 TEX. INS CODE ANN. 542.102).

⁹⁰ See TEX. INS. CODE ANN. Art. 21.59 (effective April 1, 2005 TEX. INS CODE ANN. 542.103).

⁹¹ See TEX. INS. CODE ANN. Art. 21.56 (effective April 1, 2005 TEX. INS CODE ANN. 542.153).

This applies to any casualty insurance policy that is delivered, issued for delivery, or renewed in Texas, but does not apply to a casualty insurance policy that requires the insured's consent to settle a claim against the insured; fidelity, surety, or guaranty bonds; or marine insurance other than inland marine insurance governed by Article 5.53 of the Insurance Code.⁹²

D. **Action to Recover Deductible under certain Auto Insurance.** If an insurer is liable to an insured for a claim that is subject to a deductible payable by the insured and a third party may be liable to the insurer or the insured for the amount of the deductible, the insurer shall: 1) take action to recover the deductible against the third party not later than the first anniversary of the date the insured's claim is paid; or 2) pay the amount of the deductible to the insured.⁹³ **But an insurer is not required to take action or pay the amount of the deductible, if not later than the earlier of the first anniversary of the date the insured's claim is paid or the 90th day before the date the statute of limitations for a negligence action expires, the insurer: 1) notifies the insured in writing that the insurer does not intend to take further collection actions against the third party; and 2) authorizes the insured to take further collection actions.**⁹⁴ This requirement applies to every insurer that issues a private passenger automobile insurance policy⁹⁵ and regardless of whether the third party who may be liable for the amount of the deductible is insured or uninsured.⁹⁶ "Action" as used in this section means taking various actions such as reasonable and diligent collection efforts, mediation, arbitration, and litigation against a responsible third party or the third party's insurer.⁹⁷ Obviously, the intent of this legislation is to encourage insurers to take appropriate and necessary steps to collect a deductible from third-parties or their insurers.⁹⁸

E. **Special Notice Requirements for claimants regarding Motor Vehicle Repairs.** An insurer may not, directly or indirectly, limit its coverage under a policy covering damage to a motor vehicle by specifying the brand, type, kind, age, vendor, supplier, or condition of parts or products that may be used to repair the vehicle or by limiting the beneficiary of the policy from selecting a repair person or facility to repair damage to the motor vehicle covered under the policy.⁹⁹ This prohibition also applies to third-party claimants.¹⁰⁰

1) The insurer may not: 1) solicit or accept a referral fee or gratuity in exchange for referring a beneficiary or third-party claimant to a repair person or facility to repair the damage; 2) state or suggest, either orally or in writing, to a beneficiary that a specific repair person or facility or a repair person or

⁹² See TEX. INS. CODE ANN. Art. 21.56 (effective April 1, 2005 TEX. INS CODE ANN. 542.151-152).

⁹³ See TEX. INS. CODE ANN. Art. 21.79G (effective April 1, 2005 TEX. INS CODE ANN. 542.204).

⁹⁴ See *id.*

⁹⁵ See TEX. INS. CODE ANN. Art. 21.79G (effective April 1, 2005 TEX. INS CODE ANN. 542.203).

⁹⁶ See TEX. INS. CODE ANN. Art. 21.79G (effective April 1, 2005 TEX. INS CODE ANN. 542.204 (c)).

⁹⁷ See TEX. INS. CODE ANN. Art. 21.79G (effective April 1, 2005 TEX. INS CODE ANN. 542.202).

⁹⁸ See TEX. INS. CODE ANN. Art. 21.79G (effective April 1, 2005 TEX. INS CODE ANN. 542.201).

⁹⁹ See TEX. INS. CODE ANN. Art. 5.07-1(a).

¹⁰⁰ See TEX. INS. CODE ANN. Art. 5.07-1(g)

facility identified on a preferred list compiled by an insurer must be used by a beneficiary in order for the damage repair or parts replacement to be covered by the policy; or 3) restrict a beneficiary's or third-party claimant's right to choose a repair person or facility by requiring the beneficiary or third-party claimant to travel an unreasonable distance to repair the damage.¹⁰¹ Please refer to Appendix J for sample notice form.

- 2) **At the time the vehicle is presented to an insurer or an insurance adjuster in connection with a claim for damage repair, the insurer or insurance adjuster must provide to the claimant notice of the provisions of this article 5.07-1 of the Texas Insurance Code.**¹⁰²
- 3) **Under rules set by the Commissioner of Insurance, an insurer is required to give a specific written notice to any insured or third-party claimant who makes a claim regarding damage to a vehicle.**¹⁰³

- 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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

- 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, ARTICLE 5.07-1, 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 1-800-252-3439.¹⁰⁷

¹⁰¹ See TEX. INS. CODE ANN. Art. 5.07-1(c).

¹⁰² See TEX. INS. CODE ANN. Art. 5.07-1(e)

¹⁰³ See 28 TAC § 5.501(b).

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* § 5.501(c)

¹⁰⁶ See *id.* § 5.501(d)

¹⁰⁷ See 28 TAC § 5.501.

- c. The written notice must be printed in at least ten point type, must be attached to, or printed on the reverse side of, a copy of the Insurance Code, Article 5.07-1, and must read as follows:

THIS NOTICE IS REQUIRED BY LAW. IT DOES NOT CONSTITUTE AN ADMISSION OF LIABILITY BY THE INSURANCE COMPANY.

REQUIRED NOTICE TO INSURANCE CLAIMANTS FOR MOTOR VEHICLE REPAIRS

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 REGARDING MOTOR VEHICLE REPAIRS ARE EXPLAINED IN THE COPY OF THE INSURANCE CODE, ARTICLE 5.07-1, PRINTED ON THE REVERSE SIDE OF THIS NOTICE OR ATTACHED TO THIS NOTICE. IF YOU ARE INSURED BY THE COMPANY FOR THE DAMAGE, YOUR RIGHTS ARE EXPLAINED IN MORE DETAIL IN YOUR INSURANCE POLICY.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR MOTOR VEHICLE REPAIR RIGHTS, CONTACT THE TEXAS DEPARTMENT OF INSURANCE AT:

TELEPHONE: 1-800-252-3439

MAILING ADDRESS: TEXAS DEPARTMENT OF INSURANCE
P.O. BOX 149091
AUSTIN, TX 78714-9091

FAX NUMBER: 512-475-1771

WEB ADDRESS: <http://www.tdi.state.tx.us>

- 10 **PROMPT PAYMENT OF FIRST PARTY CLAIMS.** The last area of proscribed 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 specific manner.¹⁰⁸ 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 the 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

¹⁰⁸ See *Dunn v. Southern Farm Bureau Cas. Ins. Co.*, 991 S.W.2d 467, 474 (Tex. App.—Tyler 1999, writ denied).