

## **BILL ANALYSIS**

Senate Research Center

S.B. 10  
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Business & Commerce  
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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Over the last few years, various hailstorms have resulted in tens of thousands of claims filed against property and casualty insurers statewide, resulting in mass litigation. In many cases, third-party contractors, adjusters, and attorneys canvass consumers in post-event areas to solicit business and/or representation to take legal action on behalf of the policyholder against the insurer. As a result, policyholders are misinformed, contractors are circumventing statutory and policy guidelines, adjusters inflate actual damages, and attorneys are applying mass tort models to simple property damage claims.

S.B. 10 addresses this issue by eliminating the ability of an insured to sue under both the Deceptive Trade Practices Act and the Insurance Code. An insured could choose either one, but not use both. S.B. 10 also changes the interest rate applicable to late-paid claims from 18 percent to a floating rate: Prime Rate amount plus three percent. Prime Rate comes from the Office of the Consumer Credit Commission of Texas determined under Section 304.003 (Judgment Interest Rate: Interest Rate or Time Price Differential Not in Contract), Finance Code.

No attorney fees can be recovered if an insurer can prove that barratry was used to procure representation of the insured. S.B. 10 creates reporting mechanism during referral process between attorneys where a bad actor can be reported and kept from recovering attorney fees if found to have committed barratry while preserving the right of the consumer to still recover damages. If an attorney reports the barratry, they can maintain their attorney fees. If an insurer accepts responsibility for its agent or adjuster, the adjuster or agent must be dismissed from the law suit.

S.B. 10 seeks to address these issues as they relate to insurance claims and certain prohibited acts and practices in or in relation to the business of insurance.

As proposed, S.B. 10 amends current law relating to insurance claims and certain prohibited acts and practices in the business of insurance.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 17.50(a), Business & Commerce Code, to create an exception under Section 541.151, Insurance Code.

SECTION 2. Amends Section 541.151, Insurance Code, as follows:

Sec. 541.151. PRIVATE ACTION FOR DAMAGES AUTHORIZED. (a) Creates this subsection from existing text and creates an exception under Subsection (b).

(b) Prohibits a person who brings an action against another person under this section for an act or practice in violation of Section 541.060 (Unfair Settlement Practices) or 541.061 (Misrepresentation of Insurance Policy) from bringing an

action against that other person under Subchapter E (Deceptive Trade Practices and Consumer Protection), Chapter 17 (Deceptive Trade Practices), Business & Commerce Code, that is related to the same claim.

SECTION 3. Amends Section 541.156(a), Insurance Code, to include Section 542A.003, Insurance Code, in certain sections relating to a settlement offer.

SECTION 4. Amends the heading to Section 542.060, Insurance Code, to read as follows:

Sec. 542.060. LIABILITY FOR DELAY IN PAYMENT.

SECTION 5. Amends Section 542.060, Insurance Code, by amending Subsection (a) and adding Subsection (c), as follows:

(a) Provides that, if an insurer that is liable for a claim under an insurance policy delays payment of the claim in violation of Section 542.058 (Delay in Payment of Claim), the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim as damages at the rate described by Subsection (c), together with reasonable and necessary attorney's fees. Deletes existing text providing that, if an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

(c) Provides that 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 (Judgment Interest Rate: Interest Rate or Time Price Differential Not in Contract), Finance Code.

SECTION 6. Amends Subtitle C, Title 5, Insurance Code, by adding Chapter 542A, as follows:

CHAPTER 542A. CERTAIN CONSUMER ACTIONS RELATED TO CLAIMS FOR PROPERTY DAMAGE

Sec. 542A.001. DEFINITIONS. Defines "agent," "claim," and "claimant."

Sec. 542A.002. APPLICABILITY OF CHAPTER (a) Provides that this chapter applies to certain actions 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.

(b) Provides that, except as provided by Subsection (c), this chapter applies to any insurer authorized or eligible to write property insurance in this state, including certain companies and entities.

(c) Provides that this chapter does not apply to any insurer operating under Chapter 2210 (Texas Windstorm Insurance Association).

Sec. 542A.003. NOTICE REQUIRED. (a) Requires a claimant, in addition to any other notice required by law or the applicable insurance policy, as a prerequisite to filing an action seeking damages under this chapter against any person, to give written notice to the person not later than the 61st day before the date the claimant files an action to which this chapter applies.

(b) Requires the required notice to be in writing and provide certain information.

(c) Requires the claimant to calculate the amount of attorney's fees stated under Subsection (b) by multiplying the number of hours actually worked by the claimant's attorney, as of the date, the notice is given and as reflected in

contemporaneously kept time records, by an hourly rate that is customary for the same or similar legal services.

(d) Requires the attorney or other representative, if an attorney or other representative gives the required notice on behalf of a claimant, to take certain actions.

(e) Provides that a presuit notice under Subsection (a) is not required if giving notice is impracticable for certain listed reasons.

(f) Requires a claimant who does not give a presuit notice under Subsection (a) because giving notice is impracticable as described by Subsection (e)(1) to give notice in accordance with Section 542A.004.

(g) Provides that a claimant who gives notice in accordance with this chapter is not relieved of the obligation to give notice under any other applicable law. Authorizes notice given under this chapter to be combined with notice given under any other law.

(h) Provides that notice given under this chapter is admissible in evidence in a civil action or alternative dispute resolution proceeding relating to the claim for which the notice is given.

Sec. 542A.004. ABATEMENT. (a) Authorizes a person against whom an action governed by this chapter is pending who does not receive a presuit notice complying Section 542A.003 to file a plea in abatement not later than the 30th date after the date the person files an original answer in the court in which the action is pending.

(b) Requires the court to abate the action if the court finds that the person filing the plea in abatement did not receive a presuit notice complying with Section 542A.003.

(c) Provides that an action is automatically abated without a court order beginning on the 11th day after the date a plea in abatement is filed if the plea meets certain conditions.

(d) Provides that an abatement under this section continues until the 60th day after the date a notice complying with Section 542A.003 is given.

(e) Prohibits, in an action to which this chapter applies, participation in an alternative dispute resolution proceeding from being compelled by a court until after the abatement period provided by Subsection (d) has expired.

Sec. 542A.005. INSPECTION. (a) Authorizes the insurer, after a claimant gives notice to an insurer under Section 542A.003(a) and before the date the claimant files the action for which notice is given, to send a written request to the claimant to inspect, photograph, sample, or test the property that is the subject of the claim, stating a reasonable date and time for conducting the inspection, photographing, sampling, or testing.

(b) Requires a claimant to respond in writing to a request for inspection made pursuant to Subsection (a) not later than the 10th day after receipt of the request. Requires the claimant's response to provide certain information.

(c) Requires the claimant, if a claimant objects to an inspection requested by an insurer, to file a motion for protection in a district court in the county in which the property is located not later than the 10th day after making the response required by Subsection (b).

(d) Requires the trial court to hear and decide a claimant's motion for protection on or before the 10th day after the date the motion was filed. Requires the court to

sign an order for appropriate inspection, photographing, sampling, or testing on a specified date and time, unless the court finds that the request was made in bad faith or for the purpose of harassing the claimant. Requires the court, if the court finds that the request was made in bad faith or for the purpose of harassing the claimant, to state in a written order the facts supporting the court's decision.

Sec. 542A.006. ACTION AGAINST AGENT; INSURER ELECTION OF LEGAL RESPONSIBILITY. (a) Authorizes an insurer that is a party to the action, in an action to which this chapter applies, to accept whatever liability the agent might have for the agent's acts or omissions related to the claim by providing a written notice to the claimant.

(b) Prohibits the claimant, if an insurer makes the election available to it under Subsection (a) before the claimant files an action to which this chapter applies, from filing an action against the agent.

(c) Requires the action against the agent to be dismissed with prejudice if a claimant files an action to which this chapter applies against an agent and the insurer thereafter makes the election available to it under Subsection (a).

(d) Requires the election made by an insurer under Subsection (a) to be unconditional. Requires a conditional or qualified election by the insurer to be ineffective to obtain dismissal of an action against an agent if the stated qualifications would result in the insurer avoiding liability for all claim-related damages caused to the claimant by the agent's acts or omissions.

(e) Provides that an election made by an insurer under Subsection (a) does not affect an insurer's direct or vicarious liability for the agent's acts or omissions.

(f) Prohibits an insurer from revoking, and a court from nullifying, an insurer's election made under Subsection (a).

(g) Prohibits an insurer's election made under Subsection (a) from being made known to the jury in an action tried by a jury.

Sec. 542A.007. AWARD OF ATTORNEY'S FEES. (a) Provides that, except as otherwise provided by this section, the amount of attorney's fees that may be awarded to a claimant in an action to which this chapter applies is the lesser of certain amounts.

(b) Requires the court, except as provided by Subsection (d), to award to the claimant the full amount of reasonable and necessary attorney's fees incurred by the claimant in bringing the action, as determined by the trier of fact, if the amount calculated under Subsection (a)(3)(A) is greater than or equal to 0.8, supported by sufficient evidence, not limited by this section or another law, and otherwise recoverable under law; and

(c) Prohibits the court from awarding attorney's fees to the claimant if the amount calculated under Subsection (a)(3)(A) is less than 0.2.

(d) Prohibits the court from awarding attorney's fees to the claimant if a defendant in the action pleads as an affirmative defense, and proves by a preponderance of the evidence, that representation of the claimant resulted from conduct violating Section 38.12 (Barratry and Solicitation of Professional Employment), Penal Code, unless the court determines that the claimant's attorney met certain requirements.

(e) Prohibits the court, if the court finds that the defendant was entitled to, but did not, receive a presuit notice at least 61 days before the action was filed by the claimant, as required by Section 542A.003, from awarding to the claimant any attorney's fees incurred after the date a defendant files a notice of intent to seek

disallowance of fees due to the claimant's failure to provide a timely presuit notice.

SECTION 7. (a) Makes application of Section 17.50(a), Business & Commerce Code, and Section 541.151, Insurance Code, as amended by this Act, prospective.

(b) Makes application of Section 541.156(a), Insurance Code, as amended by this Act, and Chapter 542A, Insurance Code, as added by this Act, prospective.

(c) Makes application of Section 542.060, Insurance Code, as amended by this Act, prospective.

SECTION 8. Effective date: upon passage or September 1, 2017.