

Necessary Evils – Insurance Edition

February 10, 2023

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Particularly in light of increasingly frequent natural disasters, property insurance has become ever more important in commercial real estate. This article will focus on coverage and challenges in commercial property insurance.

Commercial Property Coverage Basics

Property policies typically cover real property and business personal property either on an “all risks” or a “covered perils” basis. “All risks” policies typically provide broader coverage because the policy insures “all risks” except for those specifically excluded, while “covered perils” policies typically provide narrower coverage and only insure enumerated risks (e.g. tornado, fire, etc.). Property policies can be written for locations that are owned or leased.

Property policies may also include coverage for business interruption or “time element” losses, but coverages can vary widely. Business interruption coverage is generally intended to address damages like lost profits, extra expense, losses stemming from government orders, and loss of access caused by property damage to another’s property.

The Current Commercial Property Insurance Market

In recent years, the domestic commercial property insurance market has been battered by catastrophic weather and disaster events, which have become more severe, more frequent, and harder to predict; annualized losses from unanticipated catastrophic weather have exceeded billions of dollars. For example, after 2021 Winter Storm Uri, the Texas Department of Insurance (TDI) tracked over half a million property claims filed within the state. TDI estimated over *\$10 billion* in covered losses as of summer 2021. The number of claim filings and amount at issue have, in many cases, slowed the claims handling process.

Moreover, post-pandemic inflation has resulted in higher labor and material costs, while supply-chain disruptions are increasing the time it takes to build, repair or rebuild commercial properties. As a result, many construction projects are behind schedule, and it is becoming increasingly common for builders’ risk policies to expire before a project is completed.

Aside from typical, first-party property losses, many commercial property policies also cover business interruption, extra expense, and other time element losses. Since the inception of the COVID-19 pandemic, over 2,300 lawsuits

have been filed against property insurers with policyholders hoping to recover losses incurred stemming from COVID-19 closures. Although the vast majority of these suits have resulted in the dismissal of policyholders' claims, property insurers are still spending an extraordinary amount of time and resources to fight these battles.

In an attempt to slow the hemorrhaging, carriers have been dumping unattractive risks, raising premiums, lowering limits, and tightening policy terms. Now more than ever, it's important to have a good broker (or coverage lawyer) assist you with the placement or renewal process to make sure you secure favorable terms and pricing.

The Woes of Texas Insurance Code 542A

Meanwhile, commercial property policyholders have been attempting to navigate the now five-year-old Texas Insurance Code 542A, which mandates strict statutory requirements for property claims caused by forces of nature such as flood, tornado, lightning, hurricane, hail, wind, snowstorm, rainstorm, or wildfire. Chapter 542A restricts a policyholder's ability to sue by: (1) requiring pre-suit notice of any claim, (2) limiting the amount of attorney fees and interest on delayed payments a policyholder can recover, and (3) allowing the insurer to elect to take responsibility for its agent's conduct and thus shield the agent from liability.

Chapter 542A's election provision also makes it easier for insurers to remove cases to federal court, traditionally known as a more expensive forum that tends to favor insurers. For example, the Fifth Circuit recently held that where Chapter 542A applies and a Texas policyholder has sued an out-of-state insurer and its Texas agent in state court, the insurer can invoke Chapter 542A's election provision and remove to federal court on grounds the agent was improperly joined.

Chapter 542A contains detailed pre-suit notice requirements, which courts have strictly enforced. The policyholder must state the acts or omissions giving rise to the insurance claim, the specific amount of damages owed by the insurer on the claim, and a calculation of attorney fees incurred. Unless the policyholder has a reasonable basis for believing a limitations period is about to expire or is asserting its claim as a counterclaim, the policyholder must give pre-suit notice "not later than the 61st day before the date a claimant files an action." If the notice is given by an attorney or other representative of the policyholder, the attorney or representative must provide a copy of the notice to the policyholder and include in the notice a statement that a copy of the notice was provided to the policyholder. Several courts have held pre-suit notice defective simply for lacking the statement that a copy had been provided to the policyholder.

Moreover, Chapter 542A potentially limits otherwise recoverable attorney fees. For example, if the damages to be awarded by the jury are less than 20% of the damages estimate in the policyholder's pre-suit notice, the policyholder recovers no attorney fees. The statute also bars recovery of attorney fees incurred from the date an insurer pleads and proves the policyholder failed to give pre-suit notice. Thus, policyholders should make sure to

comply with the pre-suit notice requirements and not overestimate damages. Chapter 542A also reduces the interest awarded as damages for violations of Texas prompt payment statutes.

This tricky, technical landscape has been a mine field for insureds of late and courts have taken to strictly enforcing 542A. In the event of a commercial property claim caused by forces of nature, it would be prudent for policyholders to engage a reputable coverage lawyer to ensure compliance with the statute's requirements.

What should you do if you have a property claim?

First, inventory all potentially applicable policies and give notice to the appropriate insurers in a timely manner, based on the terms of the policy. Second, make sure you are aware of contractual deadlines within the policy (*i.e.* notice, proofs of loss, deadlines to file suit) and comply with them or negotiate an extension. Third, respond to requests for information thoroughly and promptly, document your damages, and hold on to damaged property until the insurer has inspected it. Fourth, respond to inaccuracies in coverage correspondence or engage coverage counsel to do so and retain records of all communications with the adjuster.