UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Freiheit Investoren LLC d/b/a Round Rock Mini Storage,	§	
Plaintiff,	§	
v.	§	Case No. 1-24-CV-00677-JRN
Allied World Assurance Company (U.S.) Inc.,	§	
Defendant.	§	

ORDER

Before the Court is Defendant's motion to preclude attorney's fees pursuant to Section 542A.007(d) of the Texas Insurance Code. Dkt. 10, at 1. After considering the parties' arguments and the relevant law, the Court finds that the motion should be **GRANTED.**

I. Background

This case involves a dispute about insurance coverage. In the fall of 2023, a hailstorm hit the Round Rock, Texas area. Dkt. 11-1, at 2–3. The hail damaged storage buildings at two properties that belong to Freiheit Investoren LLC (Freiheit). Dkt. 11-5, at 2. Freiheit has an insurance policy that covers the properties, so it reported the hail damage to its insurance carrier, Allied World Assurance Company (Allied). Dkt. 4-2, at 15; Dkt. 11-5 at 1–2.

Allied assigned an independent adjuster to investigate the claim. Dkt. 11-4, at 1; Dkt. 11-5, at 2. The adjuster inspected the properties with Freiheit's roofer, during which they discussed the extent of the hail damage. Dkt. 11-1, at 3; Dkt. 11-5, at 2. Freiheit's roofer claims that the adjuster "agreed with the amounts specified in [his] estimates for both properties" and that the adjuster "agreed on the scope of the damages in [his] estimates." Dkt. 11-1, at 3. Freiheit's roofer claims that he prepared his estimate on the day of the inspection and that he subsequently provided it to the adjuster. *Id.* at 2.

After the inspection, the adjuster reported his findings to Allied and recommended that an engineer evaluate one of the properties. Dkt. 11-4, at 1; Dkt. 11-5, at 2. So Allied retained an engineer to further investigate the damage to that property. Dkt. 11-5, at 2. The engineer found that there were "no open/separated seams consistent with hail impact"; that hail impact had not "affected the functionality, performance, or service life of the mental panel roofing"; and that "the reported water intrusion [was] . . . unrelated to hail impact." *Id.* at 3.

In February 2024, the adjuster prepared a statement of loss on the claim. Dkt. 11-3, at 1–3. The statement shows a much lower claim amount for the property that the engineer evaluated than what is shown in the roofer's estimate—$133,703.95 compared to $616,906.68. *Compare* Dkt. 11-2, at 8, *with* Dkt. 11-3, at 2. The roofer claims that the adjuster said he could not obtain approval for the roofer's estimate as to that property due to a cosmetic damage exclusion in the insurance policy. Dkt. 11-1, at 3.

Freiheit's counsel emailed Allied a presuit notice letter the following month. Dkt. 11-6, at 2. The letter accuses Allied of underpaying Freiheit's claim, it specifies the amount that Allied owes on the claim, and it states the amount of attorney's fees that Freiheit incurred up to that point. *Id.* at 2–4. The letter also states that "if you are interested in resolving the claims discussed herein, please call and we will be happy to engage in settlement negotiations." *Id.* at 5. Freiheit waited four days and then sued Allied in state court for breach of contract and multiple violations of the Insurance Code. Dkt. 1-6, at 1, 3–5.

A few months later, Allied sent a coverage decision letter to Freiheit. Dkt. 11-5, at 1.[1] The letter states that "[c]overage has been extended for the hail damage observed which was determined to have caused functional damage to the roof surfacing at both locations." *Id.* at 6. But the letter states that Allied would not extend coverage for certain damage to the property that the engineer inspected based on a cosmetic damage limitation and other exclusions in the policy. *Id.* Shortly after Allied sent this letter, it removed Freiheit's action to this Court based on diversity jurisdiction. Dkt. 1, at 1–2.

Allied now moves to preclude Freiheit from recovering its attorney's fees. Dkt. 10, at 1. Allied argues that Freiheit violated a notice requirement in the Insurance Code by filing suit less than sixty days after sending its presuit notice letter. *See id.* Allied argues that this failure to provide timely notice entitles it to an order precluding Freiheit from recovering its attorney's fees. *See id.* at 1–2. Freiheit argues

[1] The letter was sent by a third-party administrator for Allied called Athens Program Insurance Services, LLC. *See* Dkt. 11-5, at 1.

in response that the estimate its roofer gave the adjuster about four months before Freiheit filed suit satisfies the notice requirement. Dkt. 11, at 12–13.

II. Legal Standard

Sometimes the law requires you to notify someone before you sue them. That is the case when an insured files an action seeking damages from their insurer "to which [Chapter 542A of the Texas Insurance Code] applies." TEX. INS. CODE § 542A.003(a).[2] Before an insured files this kind of action—sixty-one days before to be exact—they must give their insurer written notice. *Id.* That notice must include three things: "(1) a statement of the acts or omissions giving rise to the claim; (2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; and (3) the amount of reasonable and necessary attorney's fees incurred by the claimant." TEX. INS. CODE § 542A.003(b).

An insured faces consequences for not giving the required notice. If an insurer does not receive a "presuit notice complying with Section 542A.003," they can ask the court to abate the action. TEX. INS. CODE § 542A.005 (a). And if an insurer pleads and proves that they were entitled to but were not given "a presuit notice stating the specific amount alleged to be owed by the insurer under Section 542A.003(b)(2) . . . , the court may not award to the claimant any attorney's fees incurred after the date the [insurer] files the pleading with the court." TEX. INS. CODE § 542A.007(d). Courts have observed that the notice requirement discourages litigation and encourages

[2] The parties do not dispute that Freiheit's action against Allied is one to which Chapter 542A applies.

settlements. *See, e.g.*, *Perrett v. Allstate Ins. Co.*, 354 F. Supp. 3d 755, 757 (S.D. Tex. 2018).

III. Analysis

Allied does not seek an abatement but instead moves to preclude Freiheit from recovering its attorney's fees. To succeed on this motion, Allied must prove that it did not receive "a presuit notice stating the specific amount alleged to be owed by the insurer under Section 542A.003(b)(2)" at least sixty-one days before Freiheit filed suit. TEX. INS. CODE § 542A.007(d).[3] Allied has shown that Freiheit's presuit notice letter did not provide the required notice because Freiheit sent the letter only four days before filing suit. *See* Dkt. 4, at ¶ 30. So the question is whether the estimate that Freiheit's roofer gave to the adjuster provided adequate notice.

The parties take different positions on what information the estimate needed to include for Freiheit to remain eligible for attorney's fees. Freiheit argues that the estimate needed only to include the information required by § 542A.003(b)(2)—"the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property." Dkt. 11, at 7, 8, 13. Whereas Allied argues that the estimate needed to also include the information required by § 542A.003(b)(1) and (b)(3)—"a statement of the acts or omissions giving rise to the claim" and "the amount of reasonable and necessary attorney's fees incurred by the claimant." Dkt. 12, at 4, 6.

Both parties cite cases in their favor. Some courts have held that "an insured need only comply with § 542A.003(b)(2), providing notice of the specific loss amount

[3] Allied must also "plead" that it did not receive the required notice. *See* TEX. INS. CODE § 542A.007(d). Allied did so in its answer to Freiheit's petition. *See* Dkt. 4, at ¶ 30.

alleged, for the insured to remain eligible for attorney's fees." *Compound S., LLC v. State Auto. Mut. Ins. Co.*, No. 5:23-CV-070-H-BQ, 2024 WL 858011, at *6 (N.D. Tex. Jan. 31, 2024).[4] But other courts have held that an insured must satisfy all three of the requirements in § 542A.003(b) to remain eligible for attorney's fees. *Jordan Indus., LLC v. Travelers Indem. Co. of Am.*, No. 7:21-CV-00114-O, 2022 WL 2719630, at *5–6. (N.D. Tex. Apr. 12, 2022).[5]

This Court need not weigh in on the issue because the roofer's estimate failed to provide notice either way. Freiheit's roofer does not state precisely when he gave his estimate to the adjuster. Dkt. 11-1, at 2. Nor does Freiheit provide an exact date for when this occurred. Dkt. 11, at 12. Freiheit instead suggests that the roofer gave his estimate to the adjuster "*approximately* four months before Freiheit filed suit."

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[4] *See also Burke v. Liberty Mut. Ins. Co.*, No. 4:23-CV-1839, 2024 WL 197639, at *2 (S.D. Tex. Jan. 18, 2024) ("Only compliance with Section 542A.003(b)(2)'s presuit notice of the specific amount alleged by the claimant is required under Section 542A.007(d) for the claimant to remain eligible for attorney's fees."); *Mumtaz v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:22-CV-00542, 2023 WL 137461, at *3 (E.D. Tex. Jan. 9, 2023) (noting that § 542A.007(d) "only limits fees if the claimant did not provide notice 'stating the specific amount alleged to be *owed by the insurer under Section 542A.003(b)(2)*'"); *Nisha Hosp. LLC v. Scottsdale Ins. Co.*, No. 3:22-CV-1811-X, 2022 WL 17417995, at *2 (N.D. Tex. Dec. 2, 2022) (noting that the requirement in § 542A.003(b)(2) "is the only requirement Chapter 542A states will result in no further attorney's fees if violated"); *Mount Canaan Missionary Baptist Church v. Westchester Surplus Lines Ins. Co.*, No. 4:19-CV-00660, 2019 WL 13114309, at *4 (S.D. Tex. Aug. 13, 2019) (holding that "only compliance with Section 542A.003(b)(2)'s presuit notice of the specific amount alleged by the claimant is required under Section 542A.007(d) in order for the claimant to remain eligible for attorney's fees").

[5] *See also In re N.Y. Inn Inc.*, No. 21-30958, 2023 WL 2920450, at *7 (Bankr. N.D. Tex. Apr. 12, 2023) (concluding that "all of the notice requirements of section 542A.0003(b) apply to the 'presuit notice' required by section 542A.007(d)"); *Sarwar v. Gen. Star Indem. Co.*, No. 3:22-CV-0941-G, 2023 WL 36073, at *3 (N.D. Tex. Jan. 3, 2023) (precluding insured from recovering attorney's fees when they did not include the acts or omissions giving rise to their claim in an email they sent to their insurer before filing suit); *Pemberton v. Unitrin Preferred Ins. Co.*, No. 1:21-CV-00452-RP, 2022 WL 2763160, at *2–3 (W.D. Tex. Jan. 6, 2022) (concluding that insured should not recover attorney's fees when they failed to identify any communication describing the amount of reasonable and necessary attorney's fees).

Id. (emphasis added). This vague statement offers the Court little help in determining whether the adjuster received the estimate at least sixty-one days before Freiheit filed suit.

Even if the adjuster received the estimate when Freiheit suggests, that would have been before the adjuster prepared his statement of loss that did not cover the full replacement cost, *see* Dkt 11-3, at 3, and that would have been long before Allied partially denied coverage. Dkt. 11-5, at 1. "Courts in this Circuit have held that estimates submitted prior to an insurer's final denial of coverage cannot operate as presuit notice." *H5R, LLC v. Scottsdale Ins. Co.*, No. 3:23-CV-1197-K, 2023 WL 8244299, at *2 (N.D. Tex. Nov. 28, 2023); *see Baker v. Am. Econ. Ins. Co.*, No. CV H-24-1145, 2024 WL 3070193, at *2 (S.D. Tex. June 20, 2024) (noting that the trading of estimates during the adjustment process does not satisfy the "specific amount alleged to be owed" requirement).[6] Accordingly, the Court is not persuaded by Freiheit's argument that the estimate provided adequate notice.

[6] *See also Compound S., LLC v. State Auto. Mut. Ins. Co.*, No. 5:23-CV-070-H-BQ, 2024 WL 858011, at *9 (N.D. Tex. Jan. 31, 2024) (finding the fact that the insured provided an estimate and proof of loss *after* the insurer denied its claim "further establishes that the documents satisfy § 542A.003(b)(2)") (emphasis added); *Henry v. Nationwide Prop.*, No. CV H-23-2488, 2023 WL 6049519, at *2 (S.D. Tex. Sept. 15, 2023) (recognizing that "[t]he court has previously held that a damage estimate sent prior to an insurer's final coverage decision does not serve as presuit notice"); *Gilbane Bldg. Co., Inc. v. Swiss Re Corp. Sols. Elite Ins. Co.*, No. CV H-22-2369, 2023 WL 2021014, at *2 (S.D. Tex. Feb. 15, 2023) (noting that "[a]t least one court has held that a pre-decision cost estimate cannot serve as presuit notice since an insured's legal claim generally arises when coverage is denied."); *Tadeo as Tr. of John E. Milbauer Tr. v. Great N. Ins. Co.*, No. 3:20-CV-00147-G, 2020 WL 4284710, at *9 (N.D. Tex. July 27, 2020) (finding that correspondence during the adjustment period, before the insurer denied the insured's claim, could not have provided presuit notice); *Kiwi Hosp. – Hous., LLC v. Mt. Hawley Inurance Co.*, No. CV H-19-3173, 2020 WL 6278694, at *2 (S.D. Tex. May 7, 2020) (finding that an adjusting firm's estimate, sent before the insurer's claim decision, did not constitute presuit notice); *see generally In re Lubbock Indep. Sch. Dist.*, 700 S.W.3d 426, 427 n.2 (Tex. 2024) (noting that "some courts have held that providing an estimate to the

IV. Conclusion

Because Allied did not receive the required notice, it is **ORDERED** that Allied's motion to preclude attorney's fees pursuant to Section 542A.007(d) of the Texas Insurance Code is **GRANTED**. It is further **ORDERED** that Freiheit shall not be awarded its attorney's fees incurred in this action after June 26, 2024.[7]

SIGNED on January 21, 2025.

JAMES R. NOWLIN
SENIOR U.S. DISTRICT JUDGE

insurer before the insurer makes a coverage decision does not qualify as a pre-suit notice because the insured's legal claim does not arise until the insurer denies coverage").

[7] The Court "may not award [Freiheit] any attorney's fees incurred after the date [Allied] file[d] the pleading with the court." TEX. INS. CODE§ 542A.007. Allied filed its answer raising the lack of notice on June 26, 2024. Dkt. 4, at ¶ 30. That is why the Court orders that Freiheit shall not be awarded attorney's fees after June 26, 2024.