

DEFENDANTS' CLAIMS FOR ATTORNEY'S FEES AND COSTS UNDER THE TEXAS INSURANCE CODE AND DTPA

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Introduction

In Texas, a breach of contract claim is rarely filed as the only cause of action against insurers. Usually, these claims are accompanied with allegations of violations of the Texas Insurance Code or DTPA violations. These extra-contractual claims are brought so frequently that courts have started questioning their credibility. DTPA claims are also frequently added to non-insurance breach of contract lawsuits, even though a mere breach of contract is not a violation of the DTPA as a matter of law.¹

Recovery under the Texas Insurance Code and DTPA includes treble damages and attorney's fees. Thus, the Texas Insurance Code and DTPA can be powerful vehicles for recovery and are used as leverage against defendants. However, defendants can bring counterclaims under the Texas Insurance Code and DTPA. As discussed below, defendants need not merely "play defense" when claims under the Texas Insurance Code and DTPA are improper.

In America, parties generally bear their own attorney's fees unless a statute or other authority provides for them.² Both the Texas Insurance Code and DTPA include statutes that allow defendants to recover attorney's fees and costs. Texas Insurance Code §541.153 and Texas Business & Commerce Code §17.50(c) (the "Statutes") authorize defendants to recover attorney's fees and costs when plaintiffs assert claims that are groundless, brought in bad faith, or brought for the purpose of harassment. Subsequent case law shows that courts have declined to create a bright-line rule as to what conduct will trigger the right to relief under the Statutes. Instead, recovery under the Statutes is informed by precedent but is very fact specific.

To be clear, claims asserted under the Statutes are not "reverse bad faith." No such tort is recognized in Texas.³

The Statutes

The public policy behind the Statutes is discouraging frivolous lawsuits.⁴ The Statutes provide:

Sec. 541.153. FRIVOLOUS ACTION. A court shall award to the defendant court costs and reasonable and necessary attorney's fees if the court finds that an action under this subchapter is groundless and brought in bad faith or brought for the purpose of harassment.⁵

Sec. 17.50. RELIEF FOR CONSUMERS. (c) On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.⁶

The court in *Arizpe v. Principal Life Insurance Company* provides a helpful analysis to compare the Statutes:

Notably, while both statutes feature the same three elements, their requirements differ. While under Texas Insurance Code § 541.153 a defendant, to be entitled to Attorney's fees and court costs, must establish that the Plaintiff's claims were (1) groundless and brought in bad faith, or (2) groundless and brought for the purpose of harassment, under DTPA § 17.50(c) a defendant need only show that the plaintiff's DTPA claims were either groundless, or brought in bad faith, or brought for the purpose of harassment. Despite the slight difference

between DTPA § 17.50(c) and Texas Insurance Code § 541.153, Texas courts and federal courts interpreting these two statutory provisions have determined that "whether an action is groundless, brought in bad faith, or brought for the purpose of harassment is a question to be determined by the trial court."⁷

Therefore, the standard for recovery is easier for the defendant to meet under the DTPA. A defendant need not show that the action was groundless *and* brought in bad faith; one will suffice.⁸ Under both Statutes, it is up to the courts to decide whether there was a violation.⁹ Once the court has decided the Statutes were violated, an award of attorney's fees to the defendant is mandatory.¹⁰

Because the Statutes are so similar, claims simultaneously brought under them are often analyzed together by the reviewing court. Appellate courts will review the trial court's determinations of groundlessness, bad faith, and harassment as questions of law under an abuse of discretion standard.¹¹

What is a Groundless Claim?

"An action is 'groundless' if it 'has no basis in law or fact, and is not warranted by any good faith argument for extension, modification, or reversal of existing law.'"¹² "Groundless" under the DTPA and Texas Insurance Code has the same meaning as "groundless" under Texas Rule of Civil Procedure 13.¹³ Determining whether an action is groundless requires the court to consider whether the "totality of the tendered evidence demonstrates an arguable basis in fact or law for the [plaintiff's] claim."¹⁴ A claim that lacks supporting evidence is not automatically a groundless claim.¹⁵

What is a Claim Brought in Bad Faith?

"A suit is brought in bad faith if it is motivated by a malicious or discriminatory purpose."¹⁶ Stated another way, "bad faith is simply not bad judgment or negligence, but means the conscious doing of wrong for dishonest, discriminatory, or malicious purposes."¹⁷ Further, "malice [for the purposes of the Statutes] may be inferred from the proof that the claimant did not have a good faith belief that there was a basis for the claim."¹⁸

What is a Claim Brought for the Purpose of Harassment?

Courts have not clearly defined what constitutes actionable harassment, often blending analysis of harassment with analysis of groundlessness and bad faith.¹⁹ The dictionary definition of "harassment" is "an act or instance of harassing; torment, vexation, or intimidation."²⁰ A claim brought for the purpose of harassment must solely be brought for the purpose of harassment.²¹ A court is unlikely to find harassment if the plaintiff's claims are not found to be groundless and brought in bad faith.²² Any purpose of recovering money damages, however small, as a motivating factor will defeat a finding of harassment.²³ The case law indicates a defendant seeking to prove harassment must prove non-monetary motive.

Successful Counterclaims under the Statutes

The following are examples of successful counterclaims under the Statutes:

- The plaintiff was in possession of facts that, for a long time, precluded any further claim payments.²⁴
- The plaintiff was in possession of facts before the

lawsuit was filed demonstrating that the claimed damages were pre-existing or caused by forces other than those claimed in the lawsuit.²⁵

- The plaintiff's complaint used misleading screenshots that omitted important information.²⁶

- The plaintiff was not a DTPA consumer.²⁷

- The plaintiff's claim was excluded by the DTPA's "large transactions" exception.²⁸

- The plaintiff sued on a released claim.²⁹

- The plaintiff's claim was groundless because even a qualified inspector would not have seen the alleged termite infestation.³⁰

- The plaintiff left her claims pending for eight months after she learned facts demonstrating that the defendant had no liability.³¹



Sometimes, defendants combine claims under the Statutes with requests for sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice & Remedies Code §10.001.³² This can be an effective tactic, if justified by both law and facts. Defendants may also bring claims under the Statutes alongside a motion to dismiss or motion for summary judgment.

Unsuccessful Counterclaims under the Statutes

The following are examples of unsuccessful counterclaims under the Statutes:

- The request for attorney's fees and costs was not supported by sufficient pleading or argument.³³

- The plaintiff had a mistaken belief about scope of available coverage.³⁴

- The plaintiff had a lapse of judgment in asserting the claim.³⁵

- The plaintiff's claims were time-barred under the applicable statute of limitations, but the court found that the claimant made multiple good faith arguments for the extension of law.³⁶

- The plaintiff's alleged losses and damages lacked any expert support but were supported by at least some employee testimony.³⁷

- Penalties under the DTPA were imposed without the claimant having a meaningful opportunity to be heard.³⁸

- The plaintiff failed to convince the jury.³⁹

- The court granted summary judgment against plaintiff.⁴⁰

Courts generally do not look to prior case law when deciding on claims brought under the Statutes. Rather, courts consider the plain language of the Statutes and how other courts have defined groundlessness, bad faith, and harassment. Thus, the facts of each case remain important.

Claims Must Be Pled and Supported by Adequate Explanations

Most Texas courts have held that claims under Texas Insurance Code §541.153 and Texas Business & Commerce Code §17.50(c) constitute counterclaims, not sanctions.⁴¹ Courts will look for at least some degree of detail addressing the definitions of groundlessness, bad faith, and harassment.⁴²

Claims Must be Supported by Adequate Evidence

The defendant has the burden of proof under the Statutes. To meet this burden, the defendant must provide adequate evidence that the complained-of acts are actionable under the Statutes and entitle the defendant to relief.⁴³ The burden of proof is not met by showing the plaintiff is not entitled to relief under the Texas Insurance Code or DTPA.⁴⁴ The burden is also not met by merely questioning the motives of the plaintiff.⁴⁵

No Expert Testimony is Necessary to Make the Claims

Courts that have granted relief under the Statutes did so on the basis of their own examination of the facts. These courts did not expressly rely on expert testimony or hold that such testimony is necessary to support a defendant's recovery under the Statutes.⁴⁶ Additionally, courts that have denied relief under the Statutes have not done so because of absence of expert testimony.⁴⁷

In this way, the defendant's burden of proof is much easier than the plaintiff's burden on a bad faith claim, since the plaintiff's claims must be supported by expert testimony to establish concepts like the standard of care and claim handling procedures.⁴⁸

The Usual Rules Regarding Reasonable and Necessary Attorney's Fees Apply

The defendant must support its claim for reasonable and necessary attorney's fees with evidence, including segregating fees for prosecuting counterclaims under the Statutes from other fees.⁴⁹ Further, the defendant must request the submission of a jury issue regarding the award of reasonable and necessary

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attorney's fees, unless the disputed claims and amount of fees are resolved otherwise by motion practice.⁵⁰

Commentary

Several critics of claims brought under the Statutes ask, "Have you ever seen anyone win one of these things before?" The answer is "Yes" as shown above. Beyond "good" defense facts supporting recovery under the Statutes, successful counterclaimants can bolster their chances of success by using the following tools:

1. **Targeted admissions.** Serve requests for admissions early. Force the plaintiff to admit he or she lacks factual support for a specific statutory provision (e.g., admitting he or she never spoke to the adjuster accused of making misrepresentations). The Texas Insurance Code and DTPA contain many fine points that are often alleged but rarely, if ever, occur in real life. Targeted admissions will expose the lack of factual support for such claims and create a basis for counterclaims.
2. **The "Put Up or Shut Up" Letter.** Send a safe-harbor or conditional demand letter to opposing counsel that details the exact lack of legal or factual basis for a claim, explicitly referencing the Statutes, and giving a specific deadline to dismiss such claim voluntarily. If the plaintiff's counsel refuses, this letter serves as primary evidence of bad faith and ongoing harassment at the subsequent fee hearing.
3. **Anchor with Procedural Overlays.** Bundle counterclaims under the Statutes with requests for sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice & Remedies Code §10.001, when justified by the facts and law. Rule 13 and Chapter 10 allow the court to hold plaintiffs and their counsel jointly and severally liable for fees.⁵¹
4. **Prepare to Distinguish the "Bona Fide Coverage Dispute" Defense to Counter-Claims.** This will involve developing evidence of plaintiff's non-financial motive and frivolous factual and legal positions. A hostile or evasive plaintiff in deposition can turn a weak claim into a frivolous claim.⁵² Plaintiffs asserting a *bona fide* coverage dispute in response to a counterclaim may be putting themselves in the ironic position of undercutting their own bad faith claims.⁵³
5. **Do Not Treat Counterclaims under the Statutes as an Afterthought.** Everyone is busy and defending against the plaintiff's affirmative claims takes priority, but often counter claims under the Statutes seem to be left as afterthoughts. The case law shows that defendants are rewarded by giving serious effort to the counterclaims in oral and written discovery and their success may be enhanced by employing the techniques discussed above.

Turning to Texas' insurance regulatory scheme, Texas Insurance Code Chapter 542 does not include an analog of the Statutes, although claims of late payments are also routinely added to pleadings under the Statutes. The Texas Legislature may wish to update the insurance regulatory scheme with some recourse for a defendant if the plaintiff's claim under Chapter 542 is frivolous.

Conclusion

The Statutes have more utility than the popular misconception. While the Statutes have not discouraged frivolous lawsuits, prosecution of claims under the Statutes means that defendants can do more than "play defense," especially when claims under the Statutes are combined with requests for sanctions and dispositive motions.

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1. *Rocky Mtn. Helicopters, Inc., v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50, 53 (Tex. 1998).
2. *See, e.g., Bierscheid v. JPMorgan Chase Bank*, 606 S.W.3d 493, 545 (Tex. App.—Houston [1st Dist.] 2020, pet. denied).
3. State supreme courts in other jurisdictions have expressly declined to recognize such a tort. *See, e.g., Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.3d 203, 208 (Iowa 1995).
4. *Knoderer v. State Farm Lloyds*, 515 S.W.3d 21, 47 (Tex. App.—Texarkana 2017, pet. denied).
5. Tex. Ins. Code §541.153.
6. Tex. Bus. & Comm. Code §17.50(c).
7. *Arizpe v. Principal Life Ins. Co.*, 2019 U.S. Dist. LEXIS 151971, *4 (N.D. Tex. 2019).
8. *Owen v. Jim Allee Imports, Inc.*, 380 S.W.3d 276, 290 (Tex. App.—Dallas 2012, no pet.).
9. *Id.; Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989); *Knoderer*, 515 S.W.3d at 47; *Giacomo v. Smith*, 2006 Tex. App. LEXIS 10016, *9 (Tex. App.—Beaumont 2006, no pet.).
10. Tex. Ins. Code §541.153; Tex. Bus. & Comm. Code §17.50(c).
11. *Donwerth*, 775 S.W.2d at 637; *Rutherford v. Riata Cadillac Co.*, 809 S.W.2d 535, 539 (Tex. App.—San Antonio 1991, writ denied).
12. *Donwerth*, 775 S.W.2d at 637 (Tex. 1989); *Banion v. Geo-Vera Spec. Ins. Co.*, 2016 U.S. Dist. LEXIS 173378, *8 (S.D. Tex. 2016).
13. *Donwerth*, 775 S.W.2d at 637; *Vela v. Catlin Spec. Ins. Co.*, 2015 Tex. App. LEXIS 3743, *45 (Tex. App.—Corpus Christi 2015, pet. denied).
14. *Banion*, 2016 U.S. Dist. LEXIS at *9.
15. *Donwerth*, 775 S.W.2d 634 at 637.
16. *Banion*, 2016 U.S. Dist. LEXIS at *9.
17. *Vela*, 2015 Tex. App. LEXIS at *45.
18. *Arizpe*, 2019 U.S. Dist. LEXIS at *7.
19. *See, e.g., Med. Specialist Group, P.A. v. Radiology Assocs., L.L.P.*, 171 S.W.3d 727, 733 (Tex. App.—Corpus Christi 2005, pet. denied).
20. <https://www.dictionary.com/browse/harassment> (last accessed July 5, 2026).
21. *Arizpe*, 2019 U.S. Dist. LEXIS at *7.
22. *Id.; Rutherford*, 809 S.W.2d 535 at 539.
23. *See Donwerth*, 775 S.W.2d at 638.
24. *Mosser v. Aetna Life Ins. Co.*, 2018 U.S. Dist. LEXIS 228293, *33 (E.D. Tex. 2018); *Howard v. State Farm Lloyds*, 2005 U.S. Dist. LEXIS 48236, *20 (S.D. Tex. 2005).
25. *Giacomo*, 2006 Tex. App. LEXIS at *9.
26. *Mosser*, 2018 U.S. Dist. LEXIS at *34.
27. *McDuffie v. Blassingame*, 883 S.W.2d 329, 336 (Tex. App.—Amarillo 1994, writ denied) (when accompanied by other bad faith facts); *Alcan Aluminum Corp. v. BASF Corp.*, 133 F. Supp.2d 482 (N.D. Tex. 2001).

28. *Haynesville Shale Rentals, LLC v. Total Equip. & Serv.*, 2014 U.S. Dist. LEXIS 48478, *15 (S.D. Tex. 2014).

29. *Cypress Engine Accessories, LLC v. HDMS Ltd. Co.*, 283 F. Supp. 3d 580, 592 (S.D. Tex. 2017).

30. *Kelly v. Benedict*, 2009 Tex. App. LEXIS 3865, *11 (Tex. App.—Austin 2009, no pet.). This is a potentially important opinion for its implications on bad faith claims predicated upon allegedly unreasonable inspections.

31. *Baird v. Villegas*, 2004 Tex. App. LEXIS 2421, *16 (Tex. App.—Austin 2004, no pet.).

32. See, e.g., *Burns v. Std. Cas. Co.*, 2026 Tex. App. LEXIS 1814, *28 (Tex. App.—Houston [14th Dist.] 2026, no pet.).

33. *Barkhausen v. Craycom, Inc.*, 178 S.W.3d 413, 423 (Tex. App.—Houston [1st Dist.] 2005, pe. denied).

34. *Vela*, 2015 Tex. App. LEXIS at *42.

35. *Id.*

36. *Arizpe*, 2019 U.S. Dist. LEXIS at *4 (N.D. Tex. 2019). But cf. *Marquis v. Sadeghian*, 2024 U.S. Dist. LEXIS 56319, *4 (E.D. Tex. 2024) (time-barred claim not supported by valid arguments, therefore, defendant could recover its attorney's fees).

37. *Metro Hospitality Partners, Ltd. v. Lexington Ins. Co.*, 84 F. Supp.3d 553, 575 (S.D. Tex. 2015).

38. *Davila v. World Car Five Star*, 75 S.W.3d 537, 544 (Tex. App.—San Antonio 2002, no pet.).

39. *Rutherford*, 809 S.W.2d at 537.

40. See *Gonzales v. Am. Title Co.*, 104 S.W.3d 588, 599 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

41. *Knoderer*, 515 S.W.3d at 47; *Mosser*, 2018 U.S. Dist. LEXIS at, *32; *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs.*, 2011 U.S. Dist. LEXIS 81961, *30 (N.D. Tex. 2011).

42. *Banion*, 2016 U.S. Dist. LEXIS at *10; *Barkhausen*, 178 S.W.3d at 423.

43. *Id.*

44. *Great Am.*, 2011 U.S. Dist. LEXIS at *30.

45. *Id.*

46. See, e.g., *Mosser*, 2018 U.S. Dist. LEXIS at *32.

47. See, e.g., *Great Am.*, 2011 U.S. Dist. LEXIS at *30.

48. *Humphries v. State Farm Lloyds*, 2022 U.S. Dist. LEXIS 41466, *7 (N.D. Tex. 2022); *Nino v. State Farm Lloyds*, 2014 U.S. Dist. LEXIS 163993, *15 (S.D. Tex. 2014).

49. *Schlager v. Clements*, 939 S.W.2d 183, 191-192 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Knoderer*, 515 S.W.3d at 47; *Marquis v. Sadeghian*, 2024 U.S. Dist. LEXIS 56319, *4 (E.D. Tex. 2024).

50. *Knoderer*, 515 S.W.3d at 47; *McClung v. Wal-Mart*, 866 F. Supp. 306, 311 (N.D. Tex. 1994).

51. Tex. R. Civ. P. 13; Tex. Civ. Prac. & Rem. Code §10.004.

52. See *Namdarkhan v. Glast, Phillips & Murray, P.C.*, 2020 Tex. App. LEXIS 3499, *39 (Tex. App.—Dallas 2020, pet. denied). Relatedly, at least one court held plaintiff's counsel, rather than plaintiff himself, liable for fees under the DTPA. See *McClung*, 866 F. Supp. at 311.

53. See *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) ([A]n insurer breaches its duty of good faith and fair dealing by denying a claim when the insurer's liability has become reasonably clear. Evidence establishing only a *bona fide* coverage dispute does not demonstrate bad faith.”).