

BAD FAITH BLOG

# Prejudicially Delayed Loss Reporting Barred All Claims, Contract and Extra-Contractual

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Hamilton Properties owned the Dallas Plaza Hotel, which was insured by American Insurance Company ("AIC") when a hail storm struck Dallas in July 2009. Hail damage was covered by the policy, but losses were to be reported promptly. The District Court found that the hail loss first reported at least 19 months after the storm was prejudicially late barring coverage plus the extra-contractual damages claims. The Fifth Circuit affirmed.

*Hamilton Properties v. American Insurance Company*

The Fifth Circuit's primary analysis was whether there was a prejudicial delay between the July 2009 loss and the loss report -- February 2011 at the earliest, but possibly as late as November 2011. Texas requires prompt notice "within a reasonable time after the occurrence or the damage." Hamilton provided no excuse for waiting 19 months after one of its employees first noticed the loss. Employees "notified Hamilton several times about the damage within a couple of months after the hail storm." Because no excuse was provided for the delay, the Court concluded that the delayed notice was not prompt as a matter of law. It was prejudicial to AIC which "lost access to critical evidence, including the condition of the [area damaged] before and after the July hail storm and up until the end of the coverage period." Furthermore, plaintiff failed to mitigate the damages and to document any changes created by the July hail storm, which "limited AIC's ability to determine whether and to what extent the July hail storm damaged the property." Finally, the Court determined that even if AIC was not prejudiced by the delay, Hamilton "also failed to establish a prima facie claim for breach of contract" under Texas law. No Hamilton witnesses were able to demonstrate the extent the July 2009 hail storm damaged the hotel before the end of the policy period, September 24, 2009.

The Fifth Circuit also ruled Hamilton could not prevail on its extra-contractual claims for violations of the Texas Deceptive Trade Practices Act, the Texas Insurance Code, or common law bad faith. In order to prevail on the Insurance Code §4542 claim the insured had to show "the insurer is liable for the claim." Since Hamilton could not show that, the Insurance Code claim had to fail as a matter of law.

The other two statutory claims and common law bad faith claim were analyzed under the same standard because the statutory claims incorporated the common law bad faith standard. Texas's general rule is: "an insured does not have a bad faith claim in the absence of a breach of contract by the insurer." The exceptions are when an insurance company "commits an act so extreme that would cause injury independent of the policy claim", or if the insurance company "failed to timely investigate its insurance claims." Since Hamilton's breach of contract claim failed, Hamilton failed to show that it had any "injury independent of the policy claim," and Hamilton had not argued that "AIC failed to timely investigate its claim, Hamilton could not prevail on its extra-contractual claims."

The *Hamilton Properties* case emphasizes the duties of Texas property insureds to promptly notify their insurance companies of covered losses. Although Texas requires insurers to show they were prejudiced by the delay in the notice, waiting nearly two years to report open and obvious damage prevents the insurer from investigating and evaluating whether the loss fell within the policy period. Such evidence goes a long way toward establishing a prejudicial delay. Texas, like most other jurisdictions, generally will not allow an insured to prevail on an extra-contractual claim when there is no covered loss for which the insured can recover.