

# No Pay for Delay Today: Insurer's Joint Check Satisfied Prompt Payment Statute

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Property Gusma Properties owned and insured was damaged in Hurricane Ike. When the insurer demanded an appraisal, Gusma hired an attorney to assist. Following the appraisal award, the insurer tendered a check to the attorney for the full amount, all of which the attorney retained. Gusma sued the attorney and the insurer to recover its losses. Gusma claimed it was entitled to prompt payment penalties from the insurer for issuing the check jointly payable to Gusma and its counsel. The Texas Court of Appeals affirmed the trial court's ruling that Gusma was not entitled to penalties. The Court of Appeals held, on this issue of first impression, that an insurer does not "delay payment, within the meaning of the Prompt Payment provisions, when it tenders payment to the insured's authorized counsel in the form of a negotiable instrument that is made jointly payable to both insured and its counsel."

*Gusma Properties, L.P. v. Travelers Lloyds Ins. Co.*

Gusma owned five buildings which were insured by Travelers and damaged during Hurricane Ike. After Gusma filed its claim, Travelers demanded appraisal. Gusma hired the RAB Law Firm to assist in pursuing its claims. Eight days after the appraisal award for \$1,850,142.93, Travelers tendered a check for the amount jointly payable to the RAB Law Firm and Gusma. Gusma's attorney did not obtain the endorsement of Gusma Properties and negotiated the check himself, retaining all of the funds.

Gusma filed suit to recover the converted appraisal award. Its claims included suing for "delay damages under sections 542.051 through 542.061 of the Texas Insurance Code (the Prompt Payment Provisions)." Gusma's theory was that Travelers was liable for failing to make the check payable to "RAB Law Firm, P.C., in trust as attorneys for Gusma Properties, L.P." Travelers argued that it satisfied the prompt-payment provisions by tendering a check to counsel. The trial court agreed with Travelers and granted its motion for partial summary judgment.

On appeal, the Texas Court of Appeals addressed the issue of first impression of “[d]oes an insurer delay payment, within the meaning of the Prompt Payment Provisions, when it tenders payment to the insured’s authorized counsel in the form of a negotiable instrument that is made jointly payable to both the insured and its counsel?” The Texas Court of Appeals affirmed the partial summary judgment for Travelers and held that the insurer did not delay payment as a matter of law.

The court began its analysis by noting that the attorney-client relationship is generally an agency relationship. Under common law agency principles, when an agent misappropriates payments, the burden of the loss is placed on the principal; payment made to the agent is considered to have been made to the principal. The policy is that the principal gave the agent responsibility and was in the best position to avoid the agent’s wrongdoing.

The Court of Appeals then analyzed the relevance of the Texas UCC and addressed whether the Texas UCC displaced general agency principles. Gusma cited *McAllen Hospitals, L.P. v. State Farm County Mutual Ins. Co. of Texas*, 433 S.W.3d 535 (Tex. 2014) in support of its argument that it did. *McAllen* held “that the drawer of a negotiable debt instrument made jointly payable, non-alternatively to co-payees does not discharge the underlying obligation.” Gusma used this holding to argue that Gusma became entitled to prompt payment penalties when the award was converted because Travelers wrote the check jointly payable. But the court noted that Travelers correctly distinguished *McAllen* on the ground that *McAllen* did not involve an agency relationship. Under the facts of this case the Court of Appeals held that the UCC did not displace general agency principles.

Finally, the court concluded that Travelers’ constructive delivery of the full appraisal award to counsel, Gusma’s agent, tolled any prompt payment penalties. The court noted that Texas courts have never held prompt payment penalties accrued because the insured did not directly receive the payment. Further, the court referenced the importance of the attorney-client relationship and Texas courts’ historically applying agency principles to prompt payment issues. The court held that counsel and Gusma should be treated as one in regard to Travelers satisfying its prompt payment obligations. Additionally, the court found Gusma’s interpretation of the prompt payment provisions would undermine the law and would delay payments by creating concern for insurers when making payments.

With these considerations in mind, the court held an insurer does not delay payment when it tenders payment to the insured’s authorized counsel a negotiable instrument made jointly payable to both the insured and its counsel. Texas insurers can be confident when making payments to counsel for insureds that they will not face potential prompt payment penalties if the insurers follow the rules set forth in this case.