

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

PARADISE FRUITS AND  
VEGETABLES, L.P.,

Plaintiff,

v.

NATIONAL FIRE & MARINE  
MUTUAL INSURANCE, *et al.*,

Defendants.

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Civil Action No. 3:21-CV-0962-N

**ORDER**

This Order addresses Defendant State Automobile Mutual Insurance Company’s (“State Auto”) motion to strike Plaintiff Paradise Fruits and Vegetables, L.P.’s (“Paradise Produce”) claim for attorney’s fees incurred after June 22, 2021 [12]. Because Paradise Produce failed to give notice as dictated by the relevant statute and cannot demonstrate good cause, the Court grants State Auto’s motion to strike.

This case involves an insurance dispute between Paradise Produce and two of its previous property insurers. First, Paradise Produce seeks payment from defendant National Fire & Marine Mutual Insurance (“National Fire”) for that company’s allegedly wrongful refusal to cover damage that Paradise Produce claims its property sustained in two storms during spring 2019. Second, Paradise Produce asserts that its property suffered further storm damage in late summer 2020. Its new insurer, State Auto, denied the claim made related to the damage allegedly arising from the later storm.

Paradise Produce sued National Fire and State Auto in a single state court action, which was removed to this Court. State Auto answered the complaint and within thirty days filed the instant motion to strike.

Paradise Produce seeks to avail itself of certain rights created by the Texas Insurance Code, including the right to reimbursement of reasonable attorney's fees pursuant to section 542A.007. A defendant may avoid the obligation to pay a plaintiff's attorney's fees if he "pleads and proves" (1) an entitlement to presuit notice under the statute and (2) the plaintiff's failure to provide the notice. *Id.* § 542A.007(d). This provision applies only to attorney's fees incurred after the defendant has taken the steps necessary to plead and prove the deficiency. *Id.* A plaintiff must provide sixty days' notice before filing a suit under section 542A, *id.* § 542A.003(a), which applies to, with limited exceptions, actions against insurers or their agents for damage to covered property caused by rain, hail, wind, or lightning. *Id.* § 542A.002(a); *id.* § 542A.001(2)(C). Paradise Produce has sued its insurers to obtain payment on claims made for damage caused by these phenomena. The Texas Insurance Code, including the notice provision, therefore applies. Paradise Produce does not dispute that it failed to provide the requisite notice nor that State Auto timely pled and proved this deficiency.

Nevertheless, Paradise Produce contends that the Court should not strike its claim for attorney's fees. The notice provision of this chapter of the Insurance Code, section 542A.003, excuses a plaintiff's failure to provide notice where it "is impracticable because[] [the plaintiff] has a reasonable basis for believing there is insufficient time to give . . . notice before the limitations period will expire." TEX. INS. CODE § 542A.003(d).

Paradise Produce argues that providing the required notice was impracticable because its claims against National Fire were about to become time barred. The necessity of bringing suit against National Fire prevented Paradise Produce from providing State Auto presuit notice because, according to Paradise Produce, State Auto and National Fire are both necessary and indispensable parties to this action.<sup>1</sup> The Court disagrees.

“A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if[] in that person’s absence, the court cannot accord complete relief among existing parties.” FED. R. CIV. P. 19(a)(1). Paradise Produce asserts that both National Fire and State Auto “are necessary parties to this litigation as they both insured [Paradise Produce]’s premises and both have denied . . . claims” for covered losses.

The Court agrees that both defendants previously insured the property and have denied Paradise Produces insurance claims, but the necessity of joining State Auto in a suit against National Fire (or vice versa) does not follow. Under Texas law, Paradise Produce bears the burden of establishing that damage to its property occurred during the coverage period and resulted from a covered event. *N.H. Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200 (5th Cir. 1993). National Fire’s allegedly wrongful failure to compensate Paradise Produce stems from storms that purportedly occurred in March and May 2019.

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<sup>1</sup> For the sake of brevity, the Court assumes without deciding that good cause exists for Paradise Produce’s failure to provide notice to National Fire and State Auto more than sixty days before the claims against National Fire became time barred and focuses solely on whether the necessity of joining State Auto permits Paradise Produce to “bootstrap” its impracticability argument from National Fire to State Auto.

By contrast, the storm giving rise to Paradise Produce's claims against State Auto allegedly occurred in August 2020. Paradise Produce conceivably could have sued National Fire *before* August 2020, and this hypothetical litigation would have been identical to the instant action. It would bear the same burden of proof, and the universe of available evidence would be the same. The later-occurring storm and denial of a later claim by a different insurer bears no direct connection to Paradise Produce's claims against National Fire. In other words, to prevail against National Fire, Paradise Produce must show that covered loss occurred in 2019; State Auto and the August 2020 storm have nothing to do with the damage which allegedly occurred a year prior.

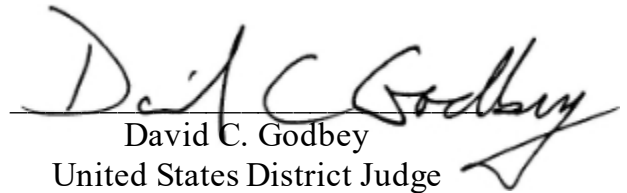
The Southern District of Texas has denied attorney's fees under remarkably similar facts. In that case, an insured attempted to invoke impracticability to excuse his failure to provide the presuit notice required by section 542A.003. *J.P. Columbus Warehousing, Inc. v. United Fire & Cas. Co.*, 2019 WL 453378, at \*3 (S.D. Tex. Jan. 14, 2019). He alleged that his insurer had wrongfully denied claims stemming from two different storms over a year apart. *Id.* at \*1–2. The insured argued that the impending expiration of the limitations period pertaining to the first storm made providing presuit notice impracticable. *Id.* at \*3. To resolve the issue of whether the plaintiff could recover attorney's fees, the court analyzed the claims related to the first and second storms separately. As to the claims arising out of the second storm, the court summarily concluded that impracticability could not excuse the failure to provide notice because the storms were unrelated and the insured could have brought a second lawsuit later after providing the insurer with the required notice. *Id.*

In this case, the failure of the impracticability argument appears even clearer than in *J.P. Columbus*. Unlike *J.P. Columbus*, this case involves two separate insurers instead of a single insurer. This distinction underscores the degree to which Paradise Produce's claims against the defendants are separate claims relating to independent occurrences. Paradise Produce could just as easily have brought suit against National Fire in March 2021 while providing State Auto with the required notice before commencing a second action after the sixty-day period had elapsed. Accordingly, the Court grants State Auto's motion to strike Paradise Produce's claim for attorney's fees.<sup>2</sup>

#### CONCLUSION

Because Paradise Produce's acknowledged failure to provide State Auto with presuit notice of its claims was not excused, the Court grants State Auto's motion to strike Paradise Produce's attorney's fees claim for all attorney's fees incurred after June 22, 2021.

Signed March 1, 2022.

  
David C. Godbey  
United States District Judge

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<sup>2</sup> Through this Order, the Court denies Paradise Produce the possibility of recovering attorney's fees incurred after the date State Auto filed its answer, but this restriction only applies to this case. As discussed, Paradise Produce's claims against State Auto are separable from its claims against National Fire, and time remains within which Paradise Produce may correct the notice deficiency before the expiration of the limitations period.