

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

AMERICAS BEST VALUE INN	§	
VICTORIA HOSPITALITY, INC.	§	
<i>Plaintiff</i>	§	
	§	
v.	§	Civil Action No. 6:18-cv-51
	§	
PALOMAR SPECIALTY INSURANCE	§	
COMPANY	§	
<i>Defendant</i>	§	

**PLAINTIFF’S ORIGINAL COMPLAINT & JURY DEMAND**

Plaintiff AMERICAS BEST VALUE INN VICTORIA HOSPITALITY, INC. (“Americas Best” or “Plaintiff”) files this Original Complaint & Jury Demand against Defendant PALOMAR SPECIALTY INSURANCE COMPANY (“Palomar” or “Defendant”) and would respectfully show the following:

**Parties**

1. Americas Best is a domestic for-profit corporation located and operating in the State of Texas.
2. Upon information and belief Palomar is a foreign fire and casualty insurance company engaged in the business of insurance in Texas, operating for the purposes of accumulating monetary profit. Palomar regularly conducts the business of insurance in a systematic and continuous manner in the State of Texas. Palomar may be served with process by serving its registered agent certified mail, return receipt requested, to **CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3140.**

**Venue & Jurisdiction**

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) because there is

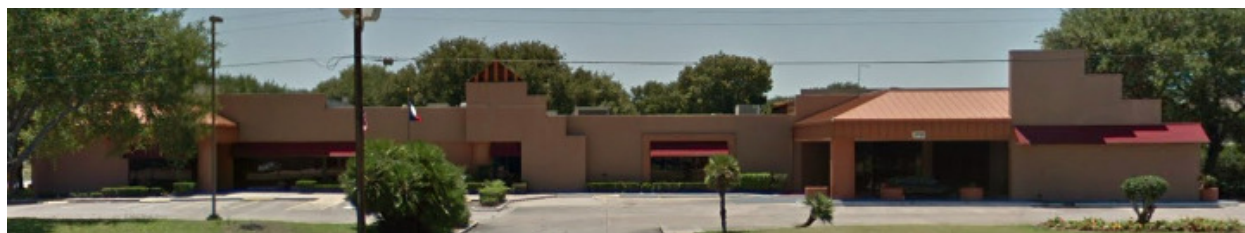
complete diversity of citizenship between Plaintiff and Defendant and the amount in controversy exceeds the sum of seventy-five thousand dollars (\$75,000.00), exclusive of interests and costs.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because this action concerns real property and a business located and operating in Victoria County, Texas, and all or a substantial part of the events giving rise to the claim described herein occurred in Victoria County, Texas. In particular, the insurance policy at issue and of which Plaintiff is a beneficiary was to be performed in Victoria County, Texas and the losses under the policy (including payments to be made to Plaintiff under the policy) were required to be made in Victoria County, Texas. Further, investigation, including communications to and from Defendant and Plaintiff (including telephone calls, mailings, and other communications to Plaintiff) occurred in Victoria County, Texas.

### **Factual Background**

#### ***The Property***

5. Americas Best owns and operates the commercial property located at 3901 Houston Hwy, Victoria, Texas 77901 in Victoria County, Texas (the “Property”).



The Property is a two-story hotel situated on 237,837 square feet of land with 49,187 square feet of interior space. The hotel has two, two-story buildings and houses a main lobby, offices, a restaurant, conference rooms and 126 hotel rooms.

**The Policy**

6. Prior to August 25, 2017, Americas Best paid \$19,357.00 in annual premiums, assessments, fees, surcharges, and taxes to Palomar in order to acquire comprehensive commercial insurance coverage for the Property and the business under Palomar’s Policy No. PAR-16-0000124-00 (the “Policy”). The Policy provides coverage for Americas Best’s business and the Property, for covered damages that occur during the Policy Period, from January 3, 2017 through January 3, 2018. In exchange for Americas Best’s premium payment, the Policy includes the following limits and coverages, in relevant part:

**DECLARATIONS**

**A. LIMITS OF INSURANCE**

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

Limit of Insurance, any one "loss occurrence": \$4,487,000

In no event will our liability exceed this limit for any one "loss occurrence", regardless of the number of coverages, causes of loss or locations involved, and regardless of any additional coverages provided under this policy.

Limit of Insurance, as respects "Earthquake Shock": \$0 / Not Applicable

Limit of Insurance, as respects "Flood": \$0 / Not Applicable

Limit of Insurance, Windstorm and/or Hail: \$4,487,000

**B. COVERAGE**

We provide the following coverage if it is marked with an "X". No coverage is provided by this policy under any item unless an "X" is inserted in the box preceding that item. Coverage is provided in accordance with the terms and conditions of this policy. Terms and conditions that apply only to individual coverage forms are set forth in those forms. This policy provides coverage on a Replacement Cost basis for Building and Contents unless Actual Cash Value is endorsed on the policy.

- X Building
- X Contents
- Stock
- Tenant's Improvements and Betterments
- X Time Element

7. As evidenced by the Declarations Page, the Policy provides coverage to the Property's physical structure on a replacement cost value basis for damages up to \$3,481,000.00 in addition to damages to business property property up to \$406,000.00 and lost business income up to \$600,000.00. *See* Ex. A, Policy, at Declarations Pages.

**E. DECLARATIONS – SCHEDULE OF LOCATIONS**

Loc / Bldg	Address	Coverages	Values
1/1	3901 HOUSTON HWY VICTORIA, TX 77901	Building	\$3,481,000
		BPP	\$406,000
		BI	\$600,000

The Policy also contains a Deductible provision that confirms coverage for damages to the interior of the Property that result from wind, hail, and named windstorm damage, including damages caused by wind driven rain:

3. Loss resulting from "Windstorm and or Hail":
  - In any one loss occurrence: 2%
  - The Deductible applies: Per Occurrence
4. Loss resulting from "Named Storm":
  - In any one loss occurrence: 2%
  - The Deductible applies: Per Occurrence

*See id.*

***Hurricane Harvey***

8. On or about August 25, 2017, Hurricane Harvey, recognized as one of the most devastating natural disasters in United States history, made landfall on the Texas coast as a Category 4 hurricane with wind speeds of up to 150 miles per hour. Hurricane Harvey's wind and rain continued to travel through the southeast part of Texas, inflicting billions of dollars in damages to private and public property in Fort Bend County and Harris County alone. The Texas

Division of Emergency Management incurred more than \$439 million in costs associated with debris removal, public property damage, and police/EMS response immediately after Harvey. Texas Governor Greg Abbott has estimated that Hurricane Harvey's damages will total an historic \$180 billion.

***Americas Best makes an insurance claim for Harvey related damage***

9. As a result of Harvey's extreme winds and rain when it hit Victoria County and specifically the Property, on or about August 25, 2017, the Property was substantially damaged. Sizeable portions of the Property's roof were compromised by wind. As a result, there was also interior damage to HVAC, ceiling, flooring, and drywall. The following photographs taken after Harvey depict some of the damage:



10. There was also significant damage to the roof and insulation:



11. The Property—specifically the roof, HVAC, drywall, and flooring—were substantially damaged by Harvey. Yet as devastating as the physical damage was, Americas Best felt fortunate to be protected by over \$4,000,000.00 in insurance coverage it had procured to insure the property from precisely this type of catastrophe. Immediately after the storm, Americas Best promptly filed a claim with Palomar, alerting them to the extensive damages. This sense of security, borne of a pricey contractual relationship, would prove illusory as Palomar began their investigation and handling of the claim.

***Americas Best works hard to document its damages for Palomar but received a denial.***

12. Palomar's claims-handling process resulted in a wrongful denial that omitted the wealth of facts, physical evidence, obvious wind damages, and meteorological data from Hurricane Harvey supporting Americas Best's claim. Palomar unreasonably pinned the loss on anything but the wind, an action designed to save Palomar hundreds of thousands of dollars in damages to the Property and the business.

13. Palomar assigned an internal adjuster, Kelly Ross, to handle the claim who was located in Indiana. Ross was unqualified and incapable of adequately assessing the damages to the Property and was the source of many delays throughout the claims process. After utilizing preferred vendor JS Held Engineering to inspect the Property in December, four months after Harvey hit, Palomar and Ross continued to delay claim resolution and ignored the insured's requests for updates. Plaintiff and its representative continued to press Palomar for updates or any estimate of damages after their inspection, but they declined and ignored the requests. Two months after the inspection and three months after the initial inspection, after Americas Best's representative continuously pressed Palomar and Ross for updates, Ross simply said that Palomar was "still reviewing" the claim with no reasonable explanation therefor.

14. Finally, Palomar ultimately denied the claim on February 26, 2018. *See* Ex. B, the "Denial Letter." According to Engineer, Chad Zielinski, who apparently works out of preferred vendor J. S. Held's office in Dallas, Texas, Americas Best's claim was denied on the remarkable basis that "winds from Hurricane Harvey had not caused any direct or indirect damage to the roof assemblies. That is, the roofs were not uplifted or torn by wind nor was there any obvious debris impact to the roof membranes or metal roof panels." *Id.* at 2. This conclusion was based on an outcome-oriented investigation aimed at denying America Best's claim from the outset. Palomar, its adjusters, and consultants ignored obvious catastrophic wind damage to the Property, and refused to consider that Harvey's historic winds were actually the source of damages. The claims adjustment process was unnecessarily lengthy, complicated, disorganized, and secretive, conducted behind closed doors until Palomar ultimately wrongfully refused to compensate its insured for any of the obvious covered damages under the Policy.

15. To this day, due to Palomar's outcome-oriented, inadequate, and haphazard investigation, Palomar has refused to pay for any covered damages under the Policy.

***Palomar ignores Americas Best's demand letter***

16. On June 1, 2017, Governor Abbott signed House Bill 1774 into law as Section 542A of the Texas Insurance Code. This new law was sponsored by approximately sixty state representatives and senators and contains important consumer protections against a variety of unscrupulous practices. Particularly, Section 542A.003 requires detailed, comprehensive presuit notice that is intended to make the claims and litigation processes more transparent and potentially even avoid unnecessary lawsuits. Upon receiving notice, an insurer has a right to conduct an inspection, and even make an offer to avoid litigation. When utilized properly, Section 542A should assist business consumers like Americas Best to avoid protracted litigation over a clear claim.

17. In compliance with Section 542A.003, Americas Best gave its pre-suit notice to Palomar on May 8, 2018. The pre-suit notice provided a comprehensive outline of Americas Best's claims and damages, quantified its loss, and even offered to waive a formal claim for attorneys' fees if the contractual amounts were paid promptly.

18. Palomar ignored the demand letter entirely.

**Count 1 – Violations of Texas Insurance Code, Section 541**

19. Americas Best re-alleges and incorporates each allegation contained in Paragraphs 1-18 of this Complaint as if fully set forth herein.

20. Palomar failed to attempt to effectuate a prompt, fair, and equitable settlement of a claim with respect to which liability has become reasonably clear, in violation of Texas Insurance Code Section 541.060 (a)(2)(A).



21. Palomar failed to adopt and implement reasonable standards for prompt investigation of the claim arising under its policy.

22. Palomar failed to provide promptly a reasonable explanation, in relation to the facts or applicable law, for the denial of a claim, in violation of Texas Insurance Code Section 541.060 (a)(3).

23. Palomar refused to pay the claim without conducting a reasonable investigation with respect to the claim, in violation of Texas Insurance Code Section 541.060 (a)(7).

24. Palomar misrepresented the insurance policy under which it affords property coverage to Americas Best, by making an untrue statement of material fact, in violation of Texas Insurance Code Section 541.061 (1). Palomar misrepresented the insurance policy to Americas Best, by making an untrue statement of material fact, in violation of Texas Insurance Code Section 541.061 (1).

25. Palomar misrepresented the insurance policy under which it affords property coverage to Americas Best by failing to state a material fact that is necessary to make other statements made not misleading, in violation of Texas Insurance Code Section 541.061 (2). Defendant misrepresented the insurance policy to Americas Best by failing to state a material fact that is necessary to make other statements made not misleading, in violation of Texas Insurance Code Section 541.061 (2).

26. Palomar misrepresented the insurance policy under which it affords property coverage to Americas Best by making a statement in such manner as to mislead a reasonably prudent person to a false conclusion of material fact, and failing to disclose a matter required by law to be disclosed, in violation of Texas Insurance Code Section 541.061 (3) and Texas Insurance Code Section 541.002 (1). Defendant misrepresented the insurance policy to Americas Best by

making a statement in such manner as to mislead a reasonably prudent person to a false conclusion of material fact, and failing to disclose a matter required by law to be disclosed, in violation of Texas Insurance Code Section 541.061 (3) and Texas Insurance Code Section 541.002 (1).

27. Palomar knowingly committed the foregoing acts, with actual knowledge of the falsity, unfairness, or deception of the foregoing acts and practices, in violation of Texas Insurance Code Section 541.002 (1).

**Count 2 – Violations of the Texas Insurance Code, Section 542**

28. Americas Best re-alleges and incorporates each allegation contained in Paragraphs 1-27 of this Complaint as if fully set forth herein.

29. Palomar failed to acknowledge receipt of the claim in violation of Texas Insurance Code Section 542.055 (a)(1).

30. Palomar failed to timely commence investigation of the claim or to request from Americas Best any additional items, statements or forms that Palomar reasonably believed to be required from Americas Best in violation of Texas Insurance Code Section 542.055 (a)(2)-(3).

31. Palomar failed to notify Americas Best in writing of the acceptance or rejection of the claim not later than the 15<sup>th</sup> business day after receipt of all items, statements and forms required by Defendants in violation of Texas Insurance Code Section 542.056(a).

32. Palomar delayed payment of Americas Best's claim in violation of Texas Insurance Code Section 542.058(a).

33. Each of the actions described herein were done "knowingly" as that term is used in the Texas Insurance Code and were a producing cause of Americas Best's damages.

**Count 3 – Statutory Interest**

34. Americas Best re-alleges and incorporates each allegation contained in Paragraphs 1-33 of the Complaint as if fully set forth herein.

35. Americas Best makes a claim for statutory interest penalties along with reasonable attorneys' fees for violation of Texas Insurance Code Subchapter B pursuant to Texas Insurance Code Section 542.060.

**Count 4 – Breach of Contract**

36. Americas Best re-alleges and incorporates each allegation contained in Paragraphs 1-35 of the Complaint as if fully set forth herein.

37. As outlined above, Palomar breached its contract with Americas Best by refusing to pay for covered damages under the Policy. As a result of Palomar's breach, Americas Best suffered legal damages.

**Count 5 – Breach of duty of good faith & fair dealing**

38. Americas Best re-alleges and incorporates each allegation contained in Paragraphs 1-37 of the Complaint as if fully set forth herein.

39. Palomar, as the property coverage insurer, had a non-delegable duty to deal fairly and in good faith with Americas Best in the processing of the claim. Palomar breached this duty by refusing to properly investigate and effectively denying insurance benefits. Palomar knew or should have known that there was no reasonable basis for denying or delaying the required benefits. As a result of Palomar's breach of these legal duties, Americas Best suffered legal damages.

**Count 6 – Punitive Damages for Bad Faith**

40. Americas Best re-alleges and incorporates each allegation contained in Paragraphs 1-39 of this Complaint as if fully set forth herein.

41. Defendant acted fraudulently and with malice (as that term is legally defined) in denying and delaying Americas Best's claim for benefits. Further, Defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of Americas Best.

**Count 7 – Violations of Texas Deceptive Trade Practices Act**

42. Americas Best re-alleges and incorporates each allegation contained in Paragraphs 1-41 of this Complaint as if fully set forth herein.

43. The Texas Deceptive Trade Practices Act (DTPA) provides additional protections to consumers who are victims of deceptive, improper, or illegal practices. Defendant's violations of the Texas Insurance Code create a cause of action under the DTPA. Defendant's violations of the Texas Insurance Code, as set forth herein, specifically violate the DTPA as well. Defendant has also acted unconscionably, as that term is defined under the DTPA.

44. Each of the actions described herein were done "knowingly" as that term is used in the DTPA and were a producing cause of Americas Best's damages.

**Resulting Legal Damages**

45. Americas Best is entitled to the actual damages resulting from the Defendant's violations of the law. These damages include the consequential damages to its economic welfare from the wrongful denial and delay of benefits including loss of the property and business; and the other actual damages permitted by law. In addition, Americas Best is entitled to exemplary damages.

46. As a result of Defendant's acts and/or omissions, Americas Best has sustained damages in excess of the minimum jurisdictional limits of this Court.

47. Americas Best is entitled under law to the recovery of prejudgment interest at the maximum legal rate.

48. Defendant's knowing violations of the Texas Insurance Code and DTPA entitle Americas Best to the attorneys' fees, treble damages, and other penalties provided by law.

49. Americas Best is entitled to statutory interest as damages under the Texas Insurance Code 542.060(c).

50. As a result of Defendant's acts and/or omissions, Americas Best has sustained damages in excess of the jurisdictional limits of this Court.

51. Americas Best is entitled under law to the recovery of prejudgment interest at the maximum legal rate.

52. Americas Best is entitled to the recovery of attorneys' fees pursuant to Tex. Civ. Prac. & Rem. Code §38.001, Texas Insurance Code 542.060(a)-(c), and Tex. Bus & Commerce Code §17.50.

### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully request that Plaintiff have a judgment against Defendant for actual damages in excess of the minimum jurisdictional limits of this Court, pre- and post-judgment interest as allowed by law, costs of suit, and all other relief, at law or in equity, to which Plaintiff may be entitled.

Respectfully submitted,

**RAIZNER SLANIA, LLP**



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**ATTORNEYS FOR PLAINTIFF**

**JURY DEMAND**

*Americas Best hereby demands a trial by jury, a right enshrined in the Constitution of the United States of America and the State of Texas and preserved by the sacrifices of many. The necessary jury fee has been paid.*



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**ANDREW P. SLANIA**