



Holding an Insured to its Duties and Burdens

By: [Shannon O'Malley](#)

Once in a while, there is an insurance case that addresses numerous “common” issues and reaffirms the parties’ respective duties in supporting and adjusting claims, promptly making repairs, and mitigating loss. The recent Fifth Circuit opinion in *Matter of New York Inn, Inc.*, No. 24-10338, 2025 WL 999084, at *1 (5th Cir. Apr. 3, 2025) is such a case and provides parties and lower courts in Texas with legal guidance on a number of issues surrounding property damage claims. Ultimately, this case stands for the proposition that an insured must support its claim and comply with the terms of the policy. Otherwise, coverage is precluded.

1. Factual Background

In *Matter of New York Inn*, the insured, Viva Inn, Inc. (“Viva”), operated a motel in Arlington, Texas, which was insured by Associated Industries Insurance (“Associated”). In February 2021, Winter Storm Uri’s freezing temperatures caused a pipe to freeze and burst, causing damage in the motel. Viva’s public adjuster submitted notice of the claim to Associated, which promptly investigated and issued a payment in March 2021 for the actual cash value (“ACV”) of the loss. Associated told Viva that it could recover the depreciation hold back once Viva provided documentation to support the replacement cost value, including an itemized invoice of completed repairs.

Associated also provided a small payment for content damage and asked Viva for an itemized list of damaged personal property. In response to Viva’s request for a business interruption payment, Associated asked for profit and loss statements to support that portion of the claim.

In April 2021, Associated also noted that Viva had not started repairs to mitigate the damage. Associated urged Viva to begin the repair process “immediately to prevent additional damage” and instructed Viva to submit mitigation invoices. *Id.* at *1. Viva, in turn, requested moisture mapping, which Associated denied “because ‘it is an excessive cost, and will unnecessarily delay the mitigation process.’” *Id.*

As 2021 went on, Associated retained an accountant who also requested documents to support Viva’s business interruption claim. Viva supplied some, but not all, of the requested documents and Associated made a payment for lost income from February 2021 to the end of May 2021.

Viva eventually retained a contractor whose cost to “renovate” the hotel was over three times the amount Associated measured for repairs. Viva’s counsel sent a demand letter seeking approximately \$580,000 to cover Viva’s building repairs and loss of contents, \$400,000 for business interruption, and \$300,000 in attorneys’ fees.

Associated retained a third-party contractor, Calvary Construction (“Calvary”), to reinspect the property. Calvary estimated the repairs would cost \$236,188, excluding contents, to return Viva’s property to its pre-loss condition. Associated paid Viva the difference between its prior payment and Calvary’s estimated measure.

One of the primary differences between the two parties' measures was the cost attributable to the storm (the water damage) and the costs attributable to non-covered losses (mold damage due to Viva's failure to mitigate; outdated fire suppression system). The parties also disputed the materials used in the repair. Viva sought coverage for metal piping that was more expensive than the plastic piping in place before the loss.

Viva and its corporate affiliate, New York Inn, Inc. (collectively "Motel Owners"), brought suit against Associated seeking additional repair costs, the contents costs, and additional business interruption payments. They also sought extra-contractual damages for bad faith.

2. Concurrent Causation—What does an Insured need to show to meet its burden to segregate damage?

One of the hottest topics in Texas insurance law is the application of the concurrent causation doctrine and the burdens associated with segregating costs caused by covered and non-covered causes of loss. In *Matter of New York Inn*, the Fifth Circuit addressed this doctrine and provided guidance to courts moving forward on the parties' respective burdens.

The Fifth Circuit recognized that because "an insurer is liable only for losses covered by the policy," it is the insured who bears the burden to prove it sustained a loss "and that the loss is covered by the relevant insurance policy." *Id.* at *4. Similarly, the court recognized that "[u]nder the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril." *Id.* at *5. Based on this doctrine and the insured's duty to prove its loss, the court determined that "[t]he insured has the burden of separating the damage attributable to the risk covered by the insurance policy versus damage caused by non-covered risks." *Id.* The court recognized that an insured must provide evidence to allow a fact finder to estimate "the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy," and "failure to segregate covered and noncovered perils is fatal to recovery." *Id.*

Here, Viva submitted evidence to support its measure of the building repair costs. But the district court found that evidence did not differentiate between the repairs attributable to the storm from other repairs attributable to non-covered causes of loss. While Viva submitted invoices from its contractor and subcontractors, those invoices were not specific and did not specify "the scope of work, materials used, or where the work was completed." *Id.* at *6. Further, Viva's expert's deposition testimony and his affidavit in support of Viva's summary judgment response had material differences and inconsistencies concerning the purpose behind certain charges.

Viva conceded that the invoices it submitted included references to non-covered repair costs but argued that "'such repairs were *not included* in [Viva's] damages calculations,' and even if they were they 'can be easily deducted with mathematical certainty.'" *Id.* (emphasis in original). The Fifth Circuit rejected this argument, however, noting that "[t]he fact that the invoices do not differentiate between covered and non-covered repairs is *decisive*. [Viva] cannot provide a reasonable basis for estimating the amount of damage or proportionate damages attributable solely to the water damage (rather than the mold) with invoices that do not differentiate between those two causes." *Id.* at *7 (emphasis added).

The court specifically rejected Viva's expert's summary judgment affidavit stating that his "invoice and billing only includes work done to remediate the flood damage. Other work, such as for the roof, does not appear in Decagon's charges." *Id.* But the court noted that this statement directly conflicted with his deposition testimony, which admitted that certain costs in the invoices included charges for items unrelated to the burst pipe's water damage. The court made clear that "a party cannot create a genuine issue of material fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." *Id.*

Because Viva did not present evidence differentiating between costs to repair the covered damage from non-covered causes of loss, the court found that Associated did not owe additional payments for the damage.

3. The Insured bears the burden to mitigate and damage due to mitigation delays are not covered.

One of the primary drivers in the parties' disputed costs related to mold that grew following the pipe burst. Viva argued it was excused from segregating the mold costs from the building repair costs and that Associated should cover all its claimed costs. First, Viva provided evidence that it had difficulty securing a contractor following the loss, which delayed its mitigation efforts. Next, Viva complained that Associated's refusal to allow moisture mapping contributed to the mold growth. Finally, Viva argued that it did not have sufficient funds to make the repairs due to payment delays and disputes with Associated.

While the court sympathized with Viva, it also noted that its excuses "does not make the doctrine of concurrent causes disappear. [Viva] do[es] not provide any case law to support the proposition that an insurer's delay in issuing a payment for a claim means that any resulting damage to the property during the delay should be covered by the insurance policy." *Id.* at *6. In fact, the court recognized that the Associated policy—which mirrors many other property policies—"instructs the insured to '[t]ake all reasonable steps to protect your Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property.'" *Id.*

The court noted that "the responsibility rested" with Viva to immediately begin remediation efforts. Because Viva waited at least six weeks to start repairs, the Motel sustained additional *non-covered* damage—damage that Viva had the burden to segregate from its claim.

This portion of the opinion is critical because parties often dispute who bears the cost for failure to mitigate and insureds often comingle those added costs to their claim. By requiring the insured to not only identify increased costs due to failure to mitigate but also segregate those costs as non-covered, the Fifth Circuit has provided significant guidance for future litigants.

4. Clarification on "comparable material and quality."

Another issue that often comes up is whether the cost to use different, more expensive products to make repairs should be borne by the insurance company. The court in *Matter of New York Inn* determined the *insured* bears the burden to submit proof that its repairs were of "comparable material and quality" under the terms of the policy.

The parties disputed the cost to replace the sprinkler system and fire alarm system. There was a \$40,000 dispute based on the cost to replace the entire system with a new metal pipe. But the court recognized that “Viva did not provide proof, as required by the policy, that it replaced the Fire Suppression System with materials of comparable quality. Motel Owners do not dispute that at least one of the original plastic pipes in the sprinkler system was replaced with a metal pipe, and Diversified’s estimate confirms that the new sprinkler system used metal piping. Because Motel Owners do not offer any argument that the plastic and metal pipes are of comparable material and quality, they are not entitled to more money for the RCV payment.” *Id.* at *8.

Disputes as to the type of repair material – such as metal versus plastic piping – often come up in insurance claims. It behooves both parties to ensure the claim meets the policy requirements for comparable materials.

5. Failure to provide support for a claim precludes coverage.

Not only did Viva fail to segregate concurrent costs, the court found that it also did not appropriately support its claim for contents loss. The policy required Viva to give Associated “complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.” *Id.* But instead of providing Associated with an inventory of the damaged contents, Viva argued that the lower court “improperly placed the burden on [Viva] to support [its] request for more money.” *Id.* The Fifth Circuit disagreed.

The court reiterated that Viva’s “argument overlooks that it is the insured’s burden prove they suffered a loss and that the loss is covered by the Policy. Motel Owners did not satisfy that burden because they did not provide the required documentation to show that Associated owed them more than \$10,000 for the Contents.” *Id.*

The court specifically rejected Viva’s submittal of a 2019 valuation of the motel’s contents. But because the contents’ coverage was limited to ACV, the court found that valuation did not appropriately measure the “actual cash value at the time of loss or damage.” *Id.* And because the valuation did not depreciate the contents’ value as of 2021 and Viva did not provide any other evidence of the value, the court denied coverage for the additional contents claims.

Similarly, the court rejected Viva’s claim for lost business income. Viva argued that Associated should pay the lost income claim “based solely on what is allegedly reasonable or feasible, rather than on the text of the Policy.” *Id.* at *9. The court rejected that argument, finding the Policy’s terms defined the scope of coverage and an insured must comply with those terms when presenting a claim.

Again, the court here held the insured to its burden to actually support its claim. And it recognized that half-hearted attempts to support a claim, as opposed to following the policy’s instructions, preclude an insured from recovering from the insurer.

6. It is very difficult to maintain a bad faith claim when there is no breach of contract.

In addition to reaching a determination that Associated did not breach the policy because Viva failed to support its claims, the court also found that Associated was not liable for extra contractual

damages due to breach of the duty of good faith and fair dealing and the Texas Insurance Code (collectively “bad faith” claims).

Viva argued that a claim for bad faith is a separate cause of action from a breach of contract claim and should survive summary judgment on the contract claims. The court noted that “[w]hile this is a true statement of law, it does not paint the complete picture.” *Id.* at *9.

The court recognized that under Texas Supreme Court precedent, “[a]n insured’s claim for breach of an insurance contract is ‘distinct’ and ‘independent’ from claims that the insurer violated its extra-contractual common-law and statutory duties.” *Id.* But it also noted that “when an insured seeks to recover policy benefits as damages for an insurer’s statutory or common-law violation and ‘the issue of coverage is resolved in the insurer’s favor, extra-contractual claims,’ ... ‘do not survive.’” *Id.*

The court noted there is only one exception to this “general rule” and that is “when an insurer commits an act so extreme that it causes an injury independent of the policy claim.” *Id.* at *10. But those damages must be “‘truly independent of the insured’s right to receive policy benefits’ and the extra-contractual claims ‘are [not] predicated on [the loss] being covered under the insurance policy.’” *Id.*

Viva argued that Associated’s alleged delays in adjusting and paying the claim constituted bad faith. But the court rejected these arguments finding that the allegations did not meet the one exception given that there was no coverage for Viva’s additional claims.

7. Reformation requires mistake.

Finally, the parties disputed whether Viva’s corporate affiliate, New York Inn, should have been named an additional insured and provided coverage under the policy. New York Inn and Viva argued that before the storm, they requested Associated to add New York Inn as an additional insured. Associated added New York Inn as an additional insured but “only with respect to general liability.” *Id.* Therefore, New York Inn and Viva sought to reform the policy to include New York Inn under the property coverage section.

The court recognized that under Texas law, there are two elements to reformation of a contract: “(1) an original agreement and (2) a mutual mistake, made *after* the original agreement, in reducing the original agreement to writing.” *Id.* (emphasis in original). The court also noted that there is a unilateral mistake, courts can reform a contract “if the party that mistakenly entered into the contract ‘shows that the mistake is so great that enforcing the contract would be unconscionable, the mistake is material, the mistake would have been made regardless of the mistaken party’s exercise of ordinary care, and the circumstances are such that the parties can be returned to the status quo.’” *Id.*

To support their reformation claim, New York Inn and Viva provided notes from an Associated representative stating that Viva requested to add New York Inn as an additional insured under the policy and an email from Viva requesting that Associated add New York Inn as an additional insured. The court found that this evidence did not support a reformation claim, however.

First, the court found that there was no mutual mistake. The court held the email evidence did not show that Associated shared Viva's understanding of the request to add New York Inn as an additional insured. It also did not evidence Associated's agreement with Viva's request. Similarly, the notes did not show that Associated agreed with Viva's request to add New York Inn. Therefore, the court found that there was no mutual mistake.

Nor was there a unilateral mistake. There was no evidence presented that show Viva requested New York Inn to be added to the entire policy and certainly no evidence that Associated knew Viva's intent. The court found that "just because Associated may have been aware of New York Inn's ownership of the Motel did not mean that they knew Viva sought to add New York Inn as an additional insured to the entire Policy." *Id.* at *11.

Therefore, the court rejected Viva and New York Inn's attempt to reform the policy.

8. Conclusion

The Fifth Circuit's opinion in *Matter of New York Inn* touches on many of the disputes that commonly arise in Texas insurance claim litigation. While none of the findings by the Fifth Circuit are novel, the collective consequence of this opinion guides courts to hold insureds to their burden to support coverage. Texas law is clear that it is the obligation of the *insured* to comply with an insurance policy's terms including promptly mitigating damage, providing information supporting a claim, inventorying damage, and segregating covered and non-covered damage costs. While an insurer has a duty to investigate a claim, the insured may not use that to avoid its own responsibilities.