

THOUGHT LEADERSHIP

News

COURT OF APPEALS REAFFIRMS INSURED'S DUTY TO SEGREGATE COVERED DAMAGES, EVEN AFTER INSURER MAKES PARTIAL PAYMENT

Newsbrief

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Last Friday, a Texas appellate court upheld a summary judgment in favor of a property insurer based on the “concurrent cause” doctrine because the insured had failed to segregate its allegedly covered damages from non-covered damages. *Prime Time Family Entertainment Center, Inc. V. Axis Ins. Co.*, — S.W.3d. —, No. 11-18-00241-CV, 2020 WL 6108263 (Tex. App.—Eastland Oct. 16, 2020, no pet. h.) (slip op.) involved a claim for hail damage to a commercial roof in Abilene. Prime Time made a claim after a hailstorm, and during its investigation, Axis learned there was a significant history of prior roof problems.

Axis found some covered hail damage, and paid \$245,000 for the covered damage, while holding back an additional depreciation payment, and advising Prime Time it would need to investigate further to determine whether the remainder of the roof problems were actually caused by the storm. Prime Time spent \$750,000 replacing the entire roof and sued Axis, seeking \$2 million in damages. Additional discovery turned up a history of extensive roof problems, including emails a month before the storm suggesting the roof already needed replacing.

Axis sought and won summary judgment in the trial court because Prime Time’s expert made no attempt to separate the pre-existing problems from the damage caused by the storm and quantify them. On appeal, Prime Time argued Axis had essentially waived the concurrent cause doctrine, which places the burden on the insured to prove how much of its damages are covered, by making a partial payment that was undisputed. The court of appeals relied on the well-established rule that coverage cannot be expanded beyond the policy terms by waiver or estoppel, and held Prime Time was not excused from its duty to segregate merely because Axis had made an undisputed payment for part of the damage. The court affirmed the summary judgment in favor of Axis, which included summary judgment on all of Prime Time’s extra-contractual claims as well, because it had failed to establish a breach of contract.