

# Texas Measure of Damages For First- Party Property Losses

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# Q & A

## Partial Loss vs. Total Loss

### Facts:

The insured's home was damaged by a fire. The remaining portions were leaning and barely standing, the roof was burned in two and would have to be replaced. Rafters, interior wall coverings, sheetrock and ceilings would have to be replaced, and the only salvageable remnants were the aluminum windows and steel siding. A contractor testified that when a fire damaged house is rebuilt, an odor created by the scorched materials can remain. The insurer argued that since one half of the property could be used in rebuilding, it was not a total loss.

# Q & A

## **Question:**

Do the policyholders have an insurable interest in the property when the date of loss was after they lost ownership of the property as a result of a foreclosure sale?

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## Answer:

Yes. The test for whether a structure is a total loss is whether a reasonably prudent owner, uninsured, desiring a structure like the one in question before the fire, would use the remnants of the structure to rebuild.” *Hochheim Prairie Farm Mutual Insurance Association v. Burnett*, 698 S.W.2d 271, 275 (Tex. App. 1985). The mere fact that some of the charred structure might have been used in the new construction does not make the loss partial. *Id.*

# Q & A

## Partial Loss vs. Total Loss

### Facts:

After suffering fire damage to their home (where only the foundation and about 85% of the garage remained) the policyholders solicited two reconstruction bids. The bids stated that the garage and slab foundation would be used in reconstruction. However, the original builder's bid stated it would not guarantee the slab. An independent adjuster originally hired by the policyholder concluded that the cost of reconstructing the home would exceed the policy limits.

# Q & A

## Question:

Is the structure a “total loss”?

# Q & A

## Answer:

No. Even if a reasonably prudent owner would not rebuild a house with a foundation that could not be guaranteed, these facts show that the evidence was undisputed that the garage would be used in reconstruction, so the home was not a total loss. *State Farm Fire & Cas. Co. v. Mower*, 917 S.W.2d 2 (Tex. 1995)

# Q & A

## Partial Loss vs. Total Loss

### Facts:

A city building inspector determined that a building was damaged more than 50% by fire and should therefore be razed in accordance with city ordinances requiring razing of property damaged more than 50% by fire. Evidence was conflicting with respect to whether damage exceeded 50 percent. The policyholder sued its insurer for the policy limits.



# Q & A

## Question:

Based on the city ordinances will the policyholder recover under a theory of “constructive total loss”?

# Q & A

## Answer:

No. A loss may be a “constructive total loss” if it does not fall within the definition of total loss but is damaged by fire to such an extent that the city ordinances would require its destruction. *Glen Falls Ins. Co. v. Peters*, 386 S.W.2d 529, 531 (Tex. 1965); *Scanlan v. Home Ins. Co.*, 79 S.W.2d 186, 188 (Tex. App. 1935).

# Q & A

## Ordinance or Law

### Facts:

A windstorm caused a portion of the insured's building to collapse. Engineers concluded the collapse was caused by hidden deterioration of mortar which weakened the wall and left it unable to withstand gusting winds. Similar conditions existed throughout the building, making it hazardous to occupants and the public. The code enforcement officer concluded the building violated state building codes and determined it must be repaired or demolished.

### The policy's Ordinance or Law provision provided:

(1) If a Covered Cause of Loss occurs to covered Building property, we will pay:

(a) For Loss or damage caused by enforcement of any ordinance or law that:

(i) Requires the demolition of parts of the same property not damaged by a Covered Cause of Loss; . . .

(c) The cost to demolish and clear the site of undamaged parts of the property caused by enforcement of the building, zoning or land use ordinance or law.

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## Question:

If the insured chooses to demolish the building rather than repair it, does the insurer have to pay the costs of demolishing the undamaged portions of the building?

# Q & A

## Answer:

Yes. In *City of Elmira v Selective Ins. Co. of N.Y.*, 83 A.D.3d 1262 (SCNY 2011), the court rejected the insurer's argument that the Ordinance or Law provision did not cover the cost of demolishing the building because the windstorm did not cause the enforcement of the New York Property Maintenance Code. The court explained the only causal link required by the Ordinance or Law provision is that the costs to demolish the undamaged portions of the building are caused by enforcement of an ordinance or law. The provision did not exclude coverage when preexisting property damage contributes to enforcement of an ordinance or law.

# Q & A

## Ordinance or Law

### Facts:

The insured suffered a loss when a rainstorm caused extensive damage to a multi-tiered retaining wall separating elevated portions of its hotel construction site from a turnpike. Less than 100 feet of the 1200 foot wall was damaged, but the city issued a stop work order and declared the wall unsafe as a result of the damage. Repairs were made, but upon inspection, the city concluded that the retaining wall had not been built according to the approved plans and notified the insured contractor that the wall must be reconstructed or fortified.

### The policy provided:

If a Covered Cause of Loss occurs to covered Building property shown in the Schedule above, we will pay for loss to the undamaged portion of the building caused by enforcement of any ordinance or law that:

- a. Requires the demolition of parts of the same property not damaged by a Covered Cause of Loss;
- b. Regulates the construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and
- c. Is in force at the time of loss.

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# Q & A

## Question:

Is the insurer required to pay the costs of reconstructing or fortifying the retaining wall?

# Q & A

## Answer:

No. In *Tocci Building Corp. v. Zurich American Ins. Co.*, 659 F.Supp.2d 251 (D.Mass. 2009), the court held that the loss was not covered. There was no “covered cause of loss” because there was no “direct physical damage” to the wall which necessitated the repair. The result in this case differs from *City of Elmira* because it was a design defect or faulty workmanship, not deterioration, which caused the code enforcement. The benefit of replacement cost coverage is that it protects an insured from loss caused by deterioration when a covered loss causes physical damage; most property and builders risk policies exclude design defect and faulty workmanship as covered causes of loss.



# Q & A

## Matching and Uniform Repair

### Facts:

A leaking drain pipe caused water damage to the carpet in the master bedroom and adjacent hallway. The insured's interior decorator was qualified as an expert witness and testified it was impossible to replace the damaged carpeting without replacing all of the carpeting in the bedroom wing because the color and pattern of the damaged carpeting had been discontinued. Further, even if the same carpeting could be obtained, replacing only the damaged portions of the carpet "would result in unsightly seams at the juncture point." The contrast between the old and new carpeting would be obvious. A realtor also testified that the market value of the house would diminish if the carpeting of the house's entire bedroom wing was not of the same texture and color.

# Q & A

## Question:

Assuming the loss is covered, must the insurer pay the cost of replacing all the carpet in the bedroom wing or just the cost of replacing the carpet in the master bedroom and adjacent hallway?

# Q & A

## Answer:

The insurer must replace all of the carpet in the bedroom wing. Relying on the expert testimony of the interior decorator and realtor, in *Holloway v. Liberty Mut. Fire Ins. Co.*, 290 So. 2d 791 (La. Ct. App. 1st Cir. 1974), the court affirmed a lower court judgment awarding insured homeowners the cost of replacing carpet in the entire bedroom wing.

# Q & A

## Question:

If the insurer presented competent evidence that the same carpet was available and repairs could be made seamlessly, would it still have to pay to replace all of the carpet in the bedroom wing?

# Q & A

## Answer:

No. In *Eledge v. Farmers Mut. Home Ins. Co. of Hooper*, 571 N.W. 2d 105 (Neb. Ct. App. 1997), the parties presented conflicting expert testimony regarding the repair of a 10 x 10 portion of the insured's roof. Choosing to credit the insurer's expert testimony, the court rejected the insured's argument that the insurer should replace the entire roof, holding a "plain reading of the provision does not require the replacement of the whole when it is factually shown that the whole can be satisfactorily repaired by replacement of a part; so long as the building is returned to 'like construction and use' as a result." The Court commented it would be an unreasonable interpretation to require replacement of an entire roof when only a 10 x 10 foot portion of shingles is damaged, matching replacements can be found, and the repair will not damage the rest of the roof.

# Q & A

## Investigation Costs

### Facts:

The policyholder's home was damaged by a sinkhole that caused its foundation to shift. The policyholder hired an engineer, who removed the drywall and insulation from one side of each interior wall to inspect the wiring, plumbing, and nails within the walls to determine whether they were damaged or compromised by the shifting foundation. The insurer denied the policyholder's claim for the costs of the investigation and repair to the walls.

# Q & A

## Question:

Is the insurer liable for costs associated with the investigation?

# Q & A

## Answer:

Yes. In *Nationwide Mut. Ins. Co. v. Chillura*, 952 So.2d 547 (Fla. 2d DCA 2007), the court affirmed a jury award for such costs based on expert testimony that because the foundations of four buildings were displaced, the interior walls would have moved or would have been placed under stress by the restraint on the movement created by the roof and other portions of the structures, so it was necessary to remove the drywall and insulation from at least one side of each interior wall to determine whether they were damaged or compromised. Whether there was coverage under a given set of facts is a jury question, and there was competent, substantial evidence presented to the jury to support the award.



# Q & A

## Question:

If the loss was caused by mold, which was not a covered cause of loss under the policy, could the insurer be liable for the costs to investigate potential damage?

# Q & A

## Answer:

No. In *Benavides v. State Farm General Ins. Co.*, (2006) 136 Cal.App.4th 124139 Cal.Rptr.3d 650, the policyholder filed suit alleging negligent claim investigation after State Farm denied her claim for the costs of investigating water and mold damage to her home. The jury found State Farm negligently investigated the claim and awarded her damages. The appellate court reversed the award, holding State Farm could not be liable in tort for failure to investigate because the loss was caused by mold, which was not a covered cause of loss.