

Alert

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Texas Joins Modern Trend of Allowing Loss of Use Damages in Total Loss Situations

Texas very recently joined the growing trend of jurisdictions that now no longer recognize any distinction between the recoverability of loss of use damages between partial and total destruction of personal property. *J & D Towing, LLC v. American Alternative Insurance Corporation*, No. 14-0574, 478 S.W.3d 649 (Tex. 2016). Prior to *J & D Towing*, Texas was one of the few remaining jurisdictions that did not permit recovery of the loss of use damages when personal property was totally destroyed.

In *J & D Towing*, the Texas Supreme Court considered J & D Towing, LLC's (J & D) claim for loss of use damages under its underinsured motorist insurance policy, after J & D's only towing vehicle was totally destroyed in an accident. After discussing decades of Texas case law limiting loss of use damages to cases involving partial destruction, the court held that the owner of totally destroyed personal property may recover loss of use damages, in addition to the property's fair market value immediately before the injury. The court's holding reverses more than 60 years of prior case law prohibiting recovery of loss of use damages in total destruction cases, and brings Texas in line with the majority of jurisdictions.

Facts and Lower Court Rulings

J & D is a vehicle towing company located in Huntsville, Texas. On December 29, 2011, an accident with a third party rendered J & D's only truck a total loss. J & D claimed the value of the truck exceeded \$19,000, and also sought its loss of use damages based on its inability to conduct business. Although the third party's insurer offered to pay the truck's value, the third-party insurer refused to pay for any loss of use damages. After nearly two months, J & D settled its claim for the third party's policy limits of \$25,000.

J & D then sought recovery of its loss of use damages under its underinsured motorist policy. While the payment from the third party's insurer exceeded the fair market value of the old truck by \$5,500, J & D asserted that the additional \$5,500 only compensated for a small portion of its loss of use damages. J & D's underinsured motorist insurer, American Alternative Insurance Corporation (American), denied the claim, asserting the policy only provided coverage for amounts J & D was "legally entitled to recover." American argued that Texas law precluded recovery of loss of use damages when the property at issue was totally destroyed.

After American denied the claim, J & D filed suit to recover the disputed damages. At trial, American did not contest J & D's loss of use damage model, or supply its own alternative damage model, choosing instead to contest only the legal recoverability of such damages – i.e., Texas law did not permit the recovery of loss of use damages in total destruction cases. The jury awarded \$28,000 for loss of use to J & D, and the trial court reduced the award by the \$5,500 already paid by the third party's insurer. On appeal, a Waco appellate court reversed, holding that the trial court abused its discretion in submitting the loss of use instruction to the jury.

Texas Supreme Court Decision

On appeal, the Texas Supreme Court reversed and rendered judgment in the full amount of the



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underlying judgment after a lengthy analysis of the history of why Texas courts had since the time that Texas was a Republic, recognized this distinction in the law. The Texas Supreme Court noted the logical inconsistency in allowing recovery of loss of use damages when property was partially destroyed, but not when property was totally destroyed. The court also noted that limiting the remedies available in a total loss scenario hindered the general goal of providing “full and fair” compensation for an injury.

To explain the origin of the inconsistency, the court traced the history and progression of loss of use jurisprudence in the United States. After much criticism of the approach taken for more than 60 years by the majority of Texas courts — i.e., that recovery of loss of use damages is limited to partial destruction — the court cited the “sea change in both caselaw and legal treaties” on the availability of loss of use damages in total destruction cases. In its decision to now recognize the recoverability of loss of use damages in total loss situations, the Texas Supreme Court noted that the following courts have held that loss of use damages **are** available in total destruction cases:

High Courts	Lower Appellate Courts	Federal Courts
Alabama	Florida	District of Colorado
Alaska	Indiana	Third Circuit (New Jersey law)
Arkansas	Louisiana	Third Circuit (Pennsylvania law)
California	New York	Eighth Circuit (South Dakota law)
District of Columbia	Tennessee	
Hawaii	Washington	
Iowa		
Kentucky		
Maryland		
Missouri		
Montana		
Nebraska		
North Carolina		
Oklahoma		
West Virginia		

The court found persuasive the “near uniformity in the reasoning underlying these decisions.” Applying the logic in the overwhelming majority of jurisdictions, the court was unconvinced that any distinction between partially and totally destroyed personal property for loss of use purposes was warranted. It now appears that the only large state jurisdictions that have not joined this trend are Ohio, Michigan, Illinois, Minnesota, Virginia and Massachusetts. In the court’s view, property owners may incur loss of use damages just as readily in total destruction cases as partial destruction cases. Moreover, the court quoted the “guiding principle of Texas tort law: ‘*The thing to be kept in view is that the party shall be compensated for the injury done.*’” In order for this “full and fair compensation” principle to remain intact, the court held that loss of use damages must be available in both partial **and** total destruction cases. The Texas Supreme Court also noted that Section 927 of The Restatement (Second) of Torts, now recognizes the recoverability of both prejudgment interest on the fair market value of property and loss of use damages

Limitations placed upon recovery of loss of use damages

The Texas Supreme Court did, however, place some limitations on the recoverability of loss of use damages noting that “Permitting loss of use damages in total destruction cases, however, is not a license for unrestrained raids on defendants’ coffers.” Recovery of loss of use damages is not absolute, and Texas courts can (and should) consider the circumstances of each particular case in determining whether to award loss of use damages and how much loss of use damages would be warranted to provide “full and fair compensation.” Specifically, The court held that the damages must: (1) not be too remote; (2) be foreseeable; (3) directly traceable to the tortious; (4) not be speculative; (5) must rise above the level of pure conjecture; and (6) must not be for an unreasonably long period of lost use.

Lastly, the court described J & D’s truck as a “total loss,” but in discussing the law regarding loss of use damages, the court repeatedly referred to “totally destroyed” property. In a footnote, the court briefly commented on the distinction between a “total loss” vehicle and “totally destroyed” vehicle, noting that Texas law treats a total loss vehicle as “totally destroyed subject to the total-destruction measure of damages.” A vehicle is a “total loss” when it is not absolutely impossible to repair it, but the damages are so extensive that “repair would not be economically feasible.” Although not argued by American, the court opined that in a total loss scenario, the liable party may be entitled to a credit for the vehicle’s salvage value where the owner retains the vehicle.

Conclusions

Ultimately, the court in *J & D Towing* departed from a line of Texas cases limiting recovery of loss of use damages to cases involving partial destruction of property. However, the court decided the case on the narrow legal issue of whether loss of use damages were available at all, leaving for another day any decision how such damages should be measured or whether they were measured correctly in *J & D Towing*.

Finally, there are at least six lessons to be learned from the *J & D Towing* opinion:

1. This is a trend that is more likely than not to be followed in other jurisdictions that have not as of yet decided this issue.
2. This decision expands potential subrogation claims.
3. This decision expands insurers’ obligations to pay these claims promptly, or be subject to various state prompt payment statute penalties.
4. This decision expands potential bad faith exposure if these loss of use claims are either denied or not paid timely.
5. Insurers will need to determine if the underinsured claimant was overpaid in the underlying claim.
6. These claims may be good candidates for appraisal.
7. These claims may be good candidates for Examinations Under Oath to determine the pre-loss condition and value of the personal property, especially in large dollar claims.

When handling total loss cases, policyholders and insurers should consider the *J & D Towing* holding and carefully examine the facts and circumstances of each loss to determine whether and how much loss of use damages will be appropriate.
