

TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT CONSTRUES COMMERCIAL SCHEDULED-VALUE POLICY IN FAVOR OF INSURED

The Supreme Court of Texas recently denied rehearing on an important opinion construing a large commercial policy insuring multiple apartment complexes in favor of the insured and imposing a \$4 million judgment on the carrier in connection with losses incurred to numerous apartment complexes during Hurricane Rita in 2005. We previously reported on *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113 (Tex. 2015) on [April 2, 2012](#) and [January 17, 2013](#) as it made its way through the appellate courts. The Supreme Court of Texas has now denied rehearing on its opinion originally issued on May 8, 2015, finalizing its holding in favor of the insured.

The policy involved was part of a tower of insurance covering over 100 apartment complexes in several states. RSUI provided excess coverage from \$20 million to \$480 million. Fifteen of the insured's apartment complexes were damaged in Hurricane Rita, and the parties agreed the total adjusted amount of loss for all fifteen properties was approximately \$24.5 million. The primary carrier paid its \$20 million policy limit, and Lynd demanded the remaining \$4.5 million from RSUI.

The RSUI policy included a "Scheduled Limit of Liability" endorsement which allowed RSUI to select the "least" from among three valuation alternatives:

1. In the event of loss hereunder, liability of the Company shall be limited to the least of the following in any one "occurrence":
 - a. The actual adjusted amount of the loss, less applicable deductibles and primary and underlying excess limits;
 - b. 115% of the individually stated value for each scheduled item of property insured at the location which had the loss as shown on the latest Statement of Values on file with this Company, less applicable deductibles and primary and underlying excess limits. If no value is shown for a scheduled item then there is no coverage for that item; or
 - c. The Limit of Liability as shown on the Declarations page of this policy or as endorsed to this policy.

The crux of the dispute between the parties was whether RSUI was entitled to choose the least of the three options for each damaged location, or whether it was required to choose one of the three methods and apply that method to all locations affected by a single occurrence. At thirteen of the damaged properties, the actual adjusted loss was the lowest of the three values. But the remaining two properties had incurred actual adjusted losses several million dollars in excess of the stated value reported by the insured.

In a detailed opinion, the Supreme Court carefully examined the policy and struggled to resolve apparently circular and interlocking definitions of "loss" and "occurrence:"

LOSS: "a loss or series of losses arising out of one event or occurrence."

OCCURRENCE: "any one loss ... or series of losses ... arising from one event."

EVENT: "all losses" in a 72-hour period.

The court ultimately concluded that because both "loss" and "occurrence" could refer to either "a loss" or a "series of losses," both parties' urged constructions were reasonable, and thus the policy was, by definition, ambiguous. Applying the time-honored "*contra proferentum*" rule of contract and policy construction, under which all ambiguities are construed against the drafter, the court declared Lynd's approach the winner, requiring RSUI to pay the remaining \$4 million, rather than the \$750,000 it had paid after applying the endorsement on a location-by-location basis.

In a stinging Scalia-esque dissent authored by Chief Justice Hecht, three justices characterized the majority's painstaking grammatical parsing approach as "excruciatingly detailed," "absorb[ed] with minutiae," "twisted," "strange," "unrealistic," "baffling," "nonsensical," "untroubled by realities and consequences," "glaring[ly] peculiar," "textual flyspecking," and, ultimately, "simply

wrong.” The dissent accused the majority of creating windfalls to insureds by converting 2 + 2 into 5 anytime more than one insured location sustains a loss.

Arguably, the dissent makes a quite cogent point regarding fortuitous recoveries by insureds. The majority’s ruling, which forces the insurer to apply a single method of loss calculation across multiple insured locations, allows Lynd, and potentially other insureds, to receive a windfall: it will either recover the full scheduled value on some locations when the actual loss was less than that amount, or it will recover payments for actual losses which it never scheduled and for which it paid no premium.

The dissent is difficult to ignore, given the fact that most insurers who issue policies with this endorsement probably thought they knew precisely what it meant, until the Supreme Court declared it ambiguous. The majority suggested this be solved by insurers at an underwriting level, but given the majority’s “textual flyspecking” approach, in which it pulled sources of ambiguity from multiple parts of the policy, it may be difficult to create a simple fix. We recommend any commercial insurer who issues scheduled-value policies containing this endorsement examine the opinion carefully and consider its options. One possibility may be a separate co-insurance provision for any individual location at which the actual loss exceeds the stated value by more than 15%. The majority opinion hints at another solution, by noting that RSUI and the amici supporting it threatened that such a ruling may cause commercial insurers to simply stop writing scheduled-value policies for multiple locations in Texas, instead requiring insureds to obtain an individual policy for each location, which would cause those insureds to lose the ability to obtain insurance at the discounts that scheduled-value policies offer.

FIFTH CIRCUIT HOLDS HAIL CLAIM WAS NOT TIMELY REPORTED AS A MATTER OF LAW

The Fifth Circuit recently affirmed summary judgment in favor of a property insurer on a hail claim that was reported nearly a year and a half after the hail storm, proving that in extreme circumstances, the duty to promptly report the claim can be effectively enforced, at least in certain courts. In *Alaniz v. Sirius Internat’l Ins. Corp.*, No. 15-40497, --- Fed. Appx. ---, 2015 WL 5316565 (5th Cir. Sep. 14, 2015), the hail storm in question occurred on March 29, 2012. The insured, owner of several rental properties in Edinburg, Texas, was aware of the storm and its severity as well as reports that it caused damage to vehicles in the area, but did not initially notice any damage to his properties or inspect them for damage.

In the summer of 2013, several of his tenants reported water leakage and wet drywall in their units. Alaniz inspected the roof of one property but did not observe any damage. He applied spackling to the wet drywall several times in an attempt to cover the problem. Later that summer, a neighbor suggested to Alaniz that the leaks might be the result of the March 2012 hailstorm. In September 2013, Alaniz consulted a lawyer and signed a representation agreement. On February 14, 2014, a little over five months after obtaining counsel, and over 17 months after the 2012 hail storm, Alaniz submitted a claim to Sirius. (It was disputed whether Sirius actually received the faxed notice of claim, but considering the record on a summary judgment standard of review, the court construed the facts in the light most favorable to the non-movant, and assumed Sirius did receive the notice of claim.)

Sirius did not respond to the claim, and Alaniz sued. Sirius moved for summary judgment based solely on Alaniz’s failure to provide “prompt notice of loss or damage” in compliance with the policy condition, and won in the trial court. On appeal, the Fifth Circuit acknowledged that when “prompt” and “as soon as possible” are not more specifically defined, the legal standard is one of reasonableness. The court then considered what was reasonable in light of the facts of this claim.

Alaniz argued that the period to be considered should not be the 17 months between the storm itself and the date he submitted his claim, but should only be the period after which he had subjective awareness of facts suggesting hail damage. Without directly answering this question, the court concluded that even if it only considered the five months after the time Alaniz consulted an attorney, that delay was not reasonable as a matter of law. The court’s opinion contains a footnote detailing examples of time periods which have been previously held to be unreasonable as a matter of law, the shortest of which is 32 days, in *Klein v. Century Lloyds*, 275 S.W.2d 95 (Tex. 1955). The court also noted that a delay without explanation is more susceptible to being held unreasonable as a matter of law.

As required under Texas law, the court also considered whether the unreasonable delay prejudiced Sirius. Sirius made cogent arguments that the delay impaired its ability to investigate the loss while the damage was fresh, and also allowed the damage to considerably worsen, but perhaps more significant was that Alaniz failed to dispute any of these arguments. Therefore, the court deemed him not to have raised a genuine issue of material fact as to prejudice.

Finally, the court confirmed the general Texas rule that extra-contractual claims cannot persist when the breach of contract claim on which they are based fails, and affirmed the summary judgment in its entirety.