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January 10, 2013

Hurricane Damage Valuation: Texas Supreme Court Urged To Address Methodology

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While recently denying a motion for rehearing in a Hurricane Rita property damage coverage case, a Texas state appellate court, without specifically opining whether the policy was a "scheduled" or "blanket" policy, required the insurer to apply the same valuation methodology to all apartment complexes damaged by the single Rita occurrence. *Lynd Co. v. RSUI Indemnity Co.,* 2012 WL 6720202 (Tex. App.—San Antonio, Dec. 28, 2012). A sharp dissent criticized the majority's "absurd result," while a concurring opinion urged the Texas Supreme Court to take up this "important question affecting Texas jurisprudence."

The Dispute

RSUI Indemnity Company ("RSUI") issued an excess policy to Lynd which provided coverage for several apartment complexes damaged by Hurricane Rita. The adjuster initially determined the loss amount was $24.7 million and the primary insurer paid its $20 million limit. Lynd sought the remainder from RSUI. RSUI refused to pay the requested amount and instead had the adjuster recalculate the loss based on a "Scheduled Limit of Liability" endorsement ("Endorsement") to the excess policy. The Endorsement provided that RSUI's liability was determined by the "least" of: (a) the "actual adjusted amount of the loss" minus any deductible or underlying limits; (b) 115 percent of the individually stated value for each scheduled item of property, less any deductible or underlying limits; or (c) the Limit of Liability for the policy. RSUI's revised valuation applied option (a) to 12 properties and option (b) to two properties. Based on these new figures, RSUI paid Lynd just over $700,000. Lynd sued for the unpaid amount. The trial court granted summary judgment for RSUI, finding that RSUI could use the Endorsement to limit its liability.

Holding And Denial Of Rehearing En Banc

On appeal, Lynd argued that the Endorsement required RSUI to apply the same valuation method (either (a) or (b)) to all of the insured properties when the property damage arises from the same "occurrence." RSUI argued that its liability under the Endorsement was limited for each separately scheduled item of property and that selecting one option and applying it to the aggregate loss sustained by all the properties "mistakenly transforms its policy into a 'blanket' policy, when it is more appropriately characterized as a 'scheduled' policy." In the original March 28, 2012, opinion (2012 WL 103342), the three-justice panel noted that this was a case of first impression for Texas state courts and ruled that RSUI was entitled to limit its liability "to the least of [option (a) or (b)] in any one occurrence." The court also noted that the policy's use of the disjunctive "or" indicated the parties' intent to provide RSUI with a choice of only one of the available limitation options when determining

its liability for losses arising from one occurrence. Once that option was chosen, said the panel, RSUI had to apply the same limitation to all properties because all losses Lynd sustained arose from one "occurrence."

The San Antonio Court of Appeals, in a 4-3 vote, denied en banc reconsideration on December 28. A three-justice dissenting opinion called for rehearing and argued that the majority used the definition of "occurrence" to turn the "scheduled" policy into a "blanket" policy, ignoring the overwhelming majority of case law and the intent of the parties. The dissent noted that, in future cases, if some properties are minimally damaged but others are damaged in excess of 115 percent of the stated value, the insurer will have to pay 115 percent of the stated value as to all properties, even those minimally damaged. A single-justice concurring opinion supported the majority holding, but noted that the "dissent's analysis has substantial merit" and invited the Texas Supreme Court to review the opinion and resolve this "important question affecting Texas jurisprudence."

Commentary

The differing valuation methodologies in assessing property damage (whether following a hurricane or under other circumstances) will be subject to specific policy language, applicable state law and the facts of the particular claim. An insurer's ability under Texas law to utilize differing valuation methodologies where multiple properties are damaged in a single occurrence may yet be addressed by the Texas Supreme Court, as the concurring opinion urges. In the meantime, the appellate court's *Lynd* decision defines possible arguments for increasing or limiting recovery when multiple properties suffer damage but are treated as a single occurrence.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact one of the authors:

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