Case No. 13-0080

IN THE SUPREME COURT OF TEXAS

RSUI INDEMNITY CO.,
Petitioner,
v.
THE LYND COMPANY,
Respondent

On appeal from the Fourth District Court of Appeals, San Antonio
Cause No. 04-11-00193

BRIEF OF AMICI CURIAE, TEXAS APARTMENT ASSOCIATION, INC. AND TEXAS HOTEL & LODGING ASSOCIATION

Brendan K. McBride
State Bar No. 24008900
MCBRIDE LAW FIRM
Of Counsel to
GRAVELY & PEARSON, LLP
425 Soledad, Suite 600
San Antonio, Texas 78205

Marc E. Gravely
State Bar No. 00787582
Matthew R. Pearson
State Bar No. 0078817
GRAVELY & PEARSON, LLP
425 Soledad, Suite 600
San Antonio, Texas 78205

William J. Chriss
State Bar No. 04222100
WILLIAM J. CHRISS, P.C.
Of Counsel to
GRAVELY & PEARSON, LLP
48 East Avenue
Austin, Texas 78701
(512) 420-2378 Telephone
(512) 590-8698 Facsimile

COUNSEL FOR AMICI CURIAE, TEXAS APARTMENT ASSOCIATION, INC. AND TEXAS HOTEL & LODGING ASSOCIATION

IDENTITY OF AMICI CURIAE AND COUNSEL

The Amici Curiae Submitting this Brief are:

Texas Apartment Association, Inc.
Texas Hotel & Lodging Association

Counsel for Amici Curiae Submitting this Brief:

Brendan K. McBride
State Bar No. 24008900
Brendan.McBride@att.net
MCBRIDE LAW FIRM
Of Counsel to GRAVELY & PEARSON, LLP
425 Soledad, Suite 600
San Antonio, Texas 78205
(210) 227-1200 Telephone
(210) 681-6752 Facsimile

William J. Chriss
State Bar No. 04222100
wjchriss@gplawfirm.com
WILLIAM J. CHRISS, P.C.
Of Counsel to GRAVELY & PEARSON, LLP
48 East Avenue
Austin, Texas 78701
(512) 420-2378 Telephone
(512) 590-8698 Facsimile

Marc E. Gravely
State Bar No. 00787582
mgravely@gplawfirm.com
Matthew R. Pearson
State Bar No. 0078817
mpearson@gplawfirm.com
GRAVELY & PEARSON, LLP
425 Soledad, Suite 600
San Antonio, Texas 78205
(210) 472-1111 Telephone
(210) 472-1110 Facsimile

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

Treatises

INTERESTS OF AMICI CURIAE

The Texas Apartment Association, Inc. ("TAA") is a non-profit trade association that has been serving the rental housing industry in Texas for more than 40 years. In that capacity, TAA represents an association comprised of landlords, managers and allied service representatives of the rental housing industry. TAA has 25 affiliated local chapters and more than 10,500 members. Through its members, TAA represents more than 1.9 million residential dwelling units that provide housing for more than 4.5 million individuals across the State of Texas, and who pay for and depend on available property insurance benefits in the event of damage and loss to their property. TAA members hold property with a market value in excess of $150 billion and pay more than $3 billion in annual property taxes to the State of Texas.

Texas Hotel & Lodging Association ("THLA") is a nonprofit trade association representing every aspect of the lodging and tourism industry. THLA membership ranges from the largest convention center hotel to the smallest bed & breakfast, full service and limited service operators, convention and visitor bureaus, chambers of commerce, and vendors who work within the hospitality industry. THLA is the largest hotel association in the nation, with over 2,800 members.

These amici curiae are particularly interested in the issues raised in this case because their members must make business risk decisions about coverage and premium costs to protect their properties, and need to be able to rely on the terms *in* their policies to make these decisions. Amici curiae file this brief to inform the Court

of the importance of upholding long-standing rules like the parol evidence rule and *contra proferentem* that bring predictability to contracts in general and insurance policies in particular – long-standing rules of law that RSUI seeks to challenge and undermine with its arguments to this Court.

No amount has been charged by the undersigned for the preparation of this brief. *See* TEX. R. APP. P. 11(c).

PRELIMINARY STATEMENT

This is an insurance coverage dispute regarding how a coverage limits endorsement in a particular policy applies when multiple properties sustain covered damages as a result of the same covered event. At the center of the case is the interpretation of an endorsement providing three alternative liability limits, and whether a court can consider evidence of industry customs or the policy "type" to vary the plain terms of the policy without violating either the parol evidence rule or the rule of *contra proferentem*.

The Policy

The policy in question is in an excess policy that provides umbrella coverage of up to $480 million per occurrence for a large number of properties that were covered under various primary commercial property policies. (RSUI BOM at 4-5) This case concerns damages to fifteen properties owned by the Lynd Company ("Lynd"), which were all damaged by Hurricane Rita and all covered under the RSUI policy. (Lynd BOM at 4)

The Endorsement

The language at issue is from a "Scheduled Limit of Liability" endorsement to the RSUI policy. It provides:

> 1. In the event of loss hereunder, liability of [RSUI] 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 . . . ; or
>
> c. The Limit of Liability as shown on the Declarations page of this policy or as endorsed on to this policy.

(RSUI BOM at 6)(hereinafter "the Limits Endorsement") The RSUI policy then defines "occurrence" as "a loss or series of losses from the perils of tornado, cyclone, *hurricane*, windstorm, hail, flood, earthquake, volcanic eruption, riot, riot attending a strike, civil commotion and vandalism and malicious mischief, *one event shall be construed to be all losses arising during a continuous period of 72 hours*." (RSUI BOM at 26, emphasis added) Thus, by definition, a series of losses caused by a single hurricane in the course of a 72-hour period would be <u>one</u> "occurrence" under the RSUI policy.

RSUI's Position –Multiple "Occurrences" Despite Contrary Policy Language

Despite this definition of "occurrence" in RSUI's policy, RSUI decided to treat the damage to each of the fifteen properties owned by Lynd as if each had been a separate occurrence, then applied the lowest of the three alternative limits under the Limits Endorsement to each property to minimize the total payout. (RSUI BOM at 8)

RSUI wants the Court to frame the issue as follows: "Is this a blanket or a scheduled policy?" (RSUI BOM at 10). The *reason* RSUI must get the Court to frame the issue in this manner is because it wants the Court to focus on how the insurance

industry uses and understands different "types" of policies rather than examine how *this* policy actually defines "occurrence" for purposes of the Limits Endorsement.

This Court should reject RSUI's invitation to construe the meaning of a contract based on its "type" rather than the words actually used in the contract. RSUI's position violates both the parol evidence rule by introducing evidence external to the contract where the contract itself is not ambiguous, and the rule of *contra proferentem*, since even *if* the policy were ambiguous and required parol evidence for its interpretation, it would have to be construed against RSUI as a matter of law. Either way, the Court of Appeals correctly construed the policy in favor of the insured as a matter of law, as it must under well-established rules of contract interpretation.

All of the concerns raised by RSUI and the amici from the insurance industry that support it in this case can be addressed simply by the Court by telling insurers like RSUI to draft their "scheduled" policies to state what they intend, instead of relying on extraneous evidence about the "type" of policy they think they have created.

ARGUMENT & AUTHORITIES

Under well-established rules of contract interpretation, an insurer's argument about the meaning and intent of a policy that it draft must begin ***and end*** with the language actually used in the policy. Put another way, if the insurer has to direct the Court's attention to anything that is not within the four corners of the policy, then the insurer simply does not have a valid legal argument. Such is the case here. RSUI's argument, and its framing of the issue, requires this Court to consider policy "types"

and extraneous evidence of trade customs among insurance companies in lieu of reading the policy as it is actually written.

As set forth herein, in order for RSUI to prevail on this argument, the Court would have to vacate not one – but two – long-standing principles of basic contract interpretation that have been well-established features of the law of contract construction both in this State and across the country for centuries.

"It is a fundamental rule of law that insurance policies are contracts and as such are controlled by rules of construction which are applicable to contracts generally." *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987); *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994). The implications of what RSUI is asking the Court to do range well beyond insurance law, or this particular policy "type." If this Court determines that extraneous evidence of alleged industry customs behind different "types" of policies can be considered to alter the terms actually stated in a contract, the Court will throw open the doors to parol evidence and undermine the predictability and certainty intended to be resolved by parties agreeing to govern their affairs by the terms of their contracts.

The court can anticipate arguments based upon "types" of leases, "types" of conveyances, "types" of sales, and a myriad of other attempts to undermine the parol evidence rule that could be raised in a wide variety of contractual disputes that would be easily resolved by leaving these established rules intact.

I. RSUI's Position Violates the Parol Evidence Rule.

The parol evidence rule has long been regarded as a *substantive* aspect of Texas contract law, and not merely an evidentiary rule. *See e.g. Hubacek v. Ennis State Bank,* 159 Tex. 166, 317 S.W.2d 30, 31 (Tex. 1958); *Gonzalez v. United Bd. of Carpenters & Joiners*, 93 S.W.3d 208, 211 (Tex. App. – Houston [14th Dist.] 2002, no pet.); *Piper, Stiles & Ladd v. Fid. & Deposit Co.*, 435 S.W.2d 934, 940 (Tex. Civ. App. – Houston [1st Dist.] 1968, writ ref'd n.r.e.). Nearly 150 years ago, this Court explained:

> When parties have reduced their contract to writing, which expresses the terms and character of it without uncertainty as to the subject or nature of the agreement, it is presumed that the writing is the repository, and contains the whole, of the agreement made between them, and hence the rule that no contemporaneous evidence is admissible to contradict or vary the terms of a valid written agreement . . . The court may read a written document in the light of surrounding circumstances, which can be proved, in order to arrive at the true meaning and intention of the parties as expressed in the words used, but will not hear parol evidence of language or words other than those used by the parties themselves in the writing.

Self v. King, 28 Tex. 552, 553-554 (Tex. 1866).

The rule exists because "written instruments would soon become of little value in the business world if they could be varied, controlled or superseded by improper parol evidence." *Casteel v. Gunning*, 402 S.W.2d 529, 535 (Tex. Civ. App. – El Paso 1966, writ ref'd n.r.e.). Thus, evidence that violates the parol evidence rule has no legal effect and "merely constitutes proof of facts that are immaterial and inoperative." *Piper, Stiles & Ladd*, 435 S.W.2d at 940.

The practical effect of the rule is that contracts must be construed and applied according to the terms contained within the four corners of the policy. *Pinnacle Anesthesia Consultants, P.A. v. St. Paul Mercury Ins. Co.*, 359 S.W.3d 389, 393 (Tex. App. – Dallas 2012, pet. denied); *TIG Ins. Co. v. N. Am. Van Lines, Inc.*, 170 S.W.3d 264, 268 (Tex. App. – Dallas 2005, no pet.). The two most notable exceptions are where the contract itself is ambiguous on its face (*see e.g. Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998)) and where it was induced by fraud (s*ee e.g. Farm Mach. Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 240 (Tex. 1957)). The latter is inapplicable here – there is no evidence or allegation of fraud by RSUI.

Rather, RSUI offers "evidence" of what it claims to be the insurance industry's intent behind a "type" of policy, and then argues that it trumps the language actually used in the policy itself to define an "occurrence." Only if the contract is deemed ambiguous – a question of law – can a party *then* introduce evidence external to the contract to construe the parties' intent. *Coker v. Coker*, 650 S.W.2d 391, 392 (Tex. 1983). However, a party cannot use parol evidence to make a contract seem ambiguous – ambiguity must be determined solely by considering the face of the contract and the circumstances of its formation. *Id.* This is because parol evidence cannot be used to change contract terms that must be given their "plain and ordinary meaning unless *the instrument* indicates the parties intended a different meaning." *Dynegy Midstream Servs., Ltd. v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009) (emphasis added); *Meyerland Cmty. Improvement Ass'n v. Temple*, 700 S.W.2d 263, 267

(Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("[I]n construing a contractual provision, it is the objective, and not the subjective, intent of the parties that must be ascertained; it is the intent expressed or apparent in the writing that controls"); *see also Iowa Mut. Ins. Co. v. Faulkner*, 157 Tex. 183, 300 S.W.2d 639, 642 (Tex. 1957).

An obvious corollary to the rule is that the unambiguous terms of a contract cannot be varied by parol evidence regarding alleged industry customs or practices that are not mentioned or incorporated into the writing. *See e.g. Prime Tree & Landscaping Servs. v. Americon Servs. Co.*, No. 01-09-00779-CV, 2011 Tex. App. LEXIS 1953, 19, 2011 WL 947004 (Tex. App. – Houston [1st Dist.] 2011, no pet.)(mem. op.). For example, in *Dynegy Midstream*, this Court held that since the court of appeals had not found a contract was ambiguous, it was legal error to consider evidence of industry custom in construing and applying it. *Id.* at 169.

In *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006), the Court refused to consider industry custom and practice regarding the interpretation and application of "ensuing loss" clauses and coverage for mold damage or the historical intent of Homeowners' "Form B" policies in lieu of the language actually contained in the policy. As it should here, the Court treated such evidence as irrelevant parol evidence. *Id.* at 747. Indeed, even in the face of broad industry consensus to the contrary as demonstrated by millions of dollars in voluntarily paid losses, and even when the Texas Department of Insurance weighed in to explain that it always construed HO-B

policies to provide coverage for mold as "ensuing loss," this Court did not consider these facts relevant to interpreting a policy it deemed unambiguous. *Id.* at 748.

This rule, of course, cuts both ways. It ensures certainty and predictability to every contacting party by foreclosing parties from creating fact issues about the meaning of contracts by use of parol evidence. There is no practical or logical reason to allow an insurer to use this long-standing rule when it seeks to enforce a contract as it was written but ignore the rule when doing so would reduce the insurer's coverage obligation. As Chief Justice Pope famously said in another context, "There is no greater inequality than the unequal treatment by the same court of things that are equal."[1]

The wording of a contract is unambiguous if it can be given a definite or certain legal meaning. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex. 1995). The first issue the Court must address, therefore, is whether the dispute about the application of *this* policy revolves around a term that cannot be given a certain meaning based on the language used in the contract. When a contract as worded can be given "a definite or certain legal meaning," then it is unambiguous as a

[1] *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 438-439 (Tex. 1984) (Pope, C.J., joined by McGee, Barrow, and Campbell, concurring and dissenting). Chief Justice Pope was understandably perplexed as to how the majority in *Duncan* could render against Cessna even though it accepted one of Cessna's contentions and changed a rule of law (proportionate fault); whereas it remanded in *Sanchez v. Schindler* where it was the plaintiff's argument for changing a rule that prevailed (the pecuniary loss rule). As the chief justice said, "Plaintiff Sanchez got the advantage of another trial when this court changed a practice rule. Although this court says defendant Cessna was right all along in this case and adopts for all future cases its contentions, Cessna loses. The rule announced by this case is a simple one to state. Under *Sanchez*, the plaintiff prevails if he wins; under *Duncan*, the plaintiff prevails if he loses. The defendant loses both ways..."

matter of law, and the Court enforces it as written. *Id.*; *see also Puckett v. United States Fire Ins. Co.,* 678 S.W.2d 936, 938 (Tex. 1984).

The RSUI policy defines "occurrence" as "a loss or series of losses from the perils of tornado, cyclone, hurricane, windstorm, hail, flood, earthquake, volcanic eruption, riot, attending a strike, civil commotion and vandalism and malicious mischief, one event shall be construed to be all losses arising during a continuous period of 72 hours." (RSUI Brief at 26) The Limits Endorsement incorporates the term "occurrence" as the basis for each of the alternative methods of calculating the limit, and does not redefine it to mean something else within the context of the Endorsement.

This is why RSUI immediately turns to parol evidence about the policy "type" and the alleged expectations and intent of the insurance industry as the substance of its argument. The contract itself says the opposite of RSUI's argument – it unambiguously states that a "loss or series of losses" from a single "hurricane" shall be construed as "one event" if the losses occur during "a continuous period of 72 hours." RSUI needs to get the Court to consider this extraneous evidence – which is itself disputed and unreliable – to create the appearance that there is another interpretation of the policy.

RSUI's briefing to this Court is full of references to facts that are not contained within the policy and on which its argument depends. RSUI argues that it seeks an interpretation consistent with the "meaning of the language in the industry" and

hinges upon getting the Court to focus on "types" of policies rather than what this policy actually says. (RSUI BOM at 2, 11-13, 20, 23-24; RSUI Reply at 2, 4-10) In short, the Court has been asked to create entirely new rules of contract interpretation based on extraneous evidence about what an industry intended by a "type" of contract rather than what the contact actually states. Or put another way, RSUI's argument depends on the Court agreeing that a party can enforce a contract the way it wishes it had written it, rather than how it actually wrote it.

RSUI essentially argues that "scheduled policy" is such a term of art, and then argues that the accepted definition of this term of art *among insurers* entirely trumps contrary language actually used in the policy. It is true in some instances that a court could receive evidence of the meaning of an industry-specific term of art relevant to the particular trade or industry to help discern the parties' mutual intent. *See Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 465 (Tex. App. -- Houston [14th Dist.] 2004, no pet.). However, this rule does not apply to the extrinsic evidence on which RSUI tries to rely.

A review of the cases in which the definition of an industry-specific term of art was considered shows that it is a reference to specialized terms used to describe the particular industry being insured, like the apartment housing industry – not the technical meaning of terms allegedly used by insurance companies. For example, in *Zurich v. Hunt Petrol.*, the court dealt with the meaning of the phrase "highly corrosive

or otherwise destructive elements" within the oil industry in applying a policy sold to an energy company. *Id.*

This rule applies when "[a] specialized industry or trade term" requires "extrinsic evidence of the commonly understood meaning of the term within a particular industry." *Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc.*, 56 S.W.3d 313, 320 (Tex. App. – Houston [1st Dist.] 2001, pet. denied)(reviewing technical definitions of a geological "formation" as it is used in the petroleum geology industry); *see also Ineos United States LLC v. Bnsf Ry. Co.*, 14-11-01006-CV, 2012 Tex. App. LEXIS 10434, 3, 2012 WL 6681804 (Tex. App. – Houston [14th Dist.] 2012, no pet.)(mem. op.)(considering extrinsic evidence of "Railway Accounting Rule 11" as used in the contract between parties in the railroad industry); *PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 542 (5th Cir. 2005)(applying the rule to the technical term "switch" as used in the railroad industry).

If RSUI were correct, then an insurer could sell a policy that says one thing, then have the Court interpret the policy according to agreements between insurers in the insurance industry, effectively imposing one party's unilateral understanding of the contract even where, as here, it contradicts the language of the contract itself. The result would be that an insured would only find out after a loss that it had bought a lot less coverage than was apparent from the language actually in its policy because the insurance industry believes the policy means something other than it says. Every

policy holder would have to consult an insurance coverage attorney before buying a policy to find out what hidden meanings might lurk behind the words in the contract.

That clearly is not the intent of the rule allowing a court to consider extrinsic evidence of specialized industry terms. Rather, the purpose is to aid the court in understanding what the parties *mutually* intended. *See Mescalero*, supra. If the insured is not in the insurance industry, and there is no evidence that is has any reason to have known about technical terms of art agreed upon between insurance companies, the insurer's unilateral understanding of the term is irrelevant to discerning what the parties mutually intended.

Moreover, even when industry specific terms are used in a contract or policy, they still cannot be used to vary the unambiguous terms of the policy. *See CBI Indus.*, 907 S.W.2d at 521-22 (refusing to consider extrinsic evidence of industry-wide discussions of a pollution exclusion because "extrinsic evidence is inadmissible to contradict or vary the meaning of the explicit language of the parties' written agreement."). Thus, even if the Court could consider extrinsic evidence of an alleged term of art, that evidence could still not be used to vary the otherwise unambiguous language in the agreement. *Id.*

As explained above, RSUI cannot create the appearance of ambiguity with such parol evidence where the terms of the contract itself do not support its interpretation. Had RSUI intended this definition to create multiple "occurrences" when a single event (such as a hurricane) damaged multiple, covered properties in the same 72-hour

period, it easily could have done so. In drafting the policy, RSUI could have substituted a different definition of "occurrence" within the Limits Endorsement that specified how it would apply differently to a "series of losses" to more than one scheduled property. But the policy – as written – supports the reasonable conclusion that multiple properties damaged by a single event in the same continuous 72-hour period constitute a single "occurrence."

There is no ambiguity on the face of the contract. RSUI points to no language in the contract itself that supports its argument that it is reasonable to construe the definition of "occurrence" to create multiple occurrences when all of the damages arise out of the same covered hurricane, and occur within the same 72-hour time period. Nor can RSUI demonstrate any language *in the policy* that renders this contract ambiguous. Rather, RSUI depends on trumped up evidence of alleged industry intent or custom to create the appearance that there is more than one interpretation.

The Court need not consider RSUI's allegations about the insurance industry's understanding of the policy "type." Consistent with the purpose of the parol evidence rule, the Court should construe the policy as drafted.

II. RSUI's Position Violates the Rule of *Contra Proferentem*.

Even for policies that are ambiguous, the Court applies the rule of *contra proferentem* – the rule that any ambiguity in the contract must be construed against the insurer. The effect of this rule is that the insured would prevail as a matter of law,

regardless of parol evidence of industry custom or intent. RSUI ignores this rule, but applying it here means the Court of Appeals' judgment is correct.

Texas law has long recognized that if a policy is susceptible to more than one reasonable interpretation, the Court must resolve the ambiguity in favor of the insured under the rule of *contra proferentem*. *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003) (*quoting Grain Dealers Mut. Ins. Co. v. McKee,* 943 S.W.2d 455, 458 (Tex. 1997)). Like the parol evidence rule, the *contra proferentem* rule is well-established in Texas law. When one party controls the drafting of the language of a contract, it bears the risk of drafting the language in a way that renders it ambiguous. *Balandran*, 972 S.W.2d at 741 n.3 (applying rule to matters of coverage exclusion). In the context of insurance policies, the rule operates so that ambiguous policy provisions are construed against the insurer and in favor of the insured. *See McKee*, 943 S.W.2d at 458; *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998).

A corollary to this rule is that if the insurer's interpretation is reasonable, the insurer *still loses as a matter of law* unless the Court determines that the insured's interpretation is unreasonable – and this is so even if the Court deems the insurer's interpretation "more reasonable" than the insured's interpretation. *Balandran*, 972 S.W.2d at 741. The effect of the rule is that if the policy interpretation offered by the insured of an ambiguous provision is reasonable, it will be adopted even if the insurer's interpretation is objectively more sensible. *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991); *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533

S.W.2d 344, 349 (Tex. 1976). Thus, the insurer loses as a matter of law "as long as [the insured's] construction is not unreasonable." *Balandran*, 972 S.W.2d at 741.

Thus, the issue truly before the Court is this: Given the policy's definition of "occurrence," is it reasonable to treat damages to several covered properties from the same covered hurricane event as a single "occurrence," where the loss or series of losses occurred in the same continuous 72-hour period?

The answer is "yes." Lynd's interpretation is reasonable given the language of the policy, as explained by the Court of Appeals, and must therefore be adopted as a matter of law. This is the same way a federal judge read this same definition of "occurrence" in an RSUI policy, concluding that whether the policy were categorized as "scheduled" or "blanket" did not change that the loss to several properties had to be aggregated under the Limits Endorsement because "any reasonable interpretation . . . must take into account these key, controlling definitions, which explicitly aggregate all losses arising from a single event." *ARM Props. Mgmt. Group v. RSUI Indem. Co.*, No. A-07-CA-718-SS, 2008 U.S. Dist. LEXIS 108624, 20, 2008 WL 5973220 (W.D. Tex. 2008).

Indeed, the rule of *contra proferentem* is especially appropriate when the party controlling the language of the contract is an insurer, as here, because this Court has long held that insurers have special duties to their insureds. *Balandran* at 741, n.1 (Noting the rule of *contra proferentem* "is also justified by the special relationship between insurers and insureds arising from the parties' unequal bargaining

power.")(*citing Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1998); Segalla, 2 COUCH ON INSURANCE § 22.14 (3d ed. 1997)("The words, 'the contract is to be construed against the insurer' comprise the most familiar expression in the reports of insurance cases.")). The Court has, as it should, specifically placed the consequences of sloppy drafting on insurers and not on the business owners (like TAA or THLA members) who have no input into these policy terms and forms.

The Court need not deviate from these established rules to address the concerns raised by RSUI or the amici from the insurance industry that support it in this case. RSUI and other insurers should be responsible for writing their policies to clearly and unambiguously read as they intend – just as they have had to do for decades under the parol evidence and *contra proferentem* rules. Expecting insureds to guess how the insurance industry generally prefers to interpret different policy "types" – when it is not clear from the face of the policy itself – undermines decades of jurisprudence behind these carefully considered rules.

III. Even If RSUI Could Avoid The Parol Evidence Rule and the Rule of *Contra Proferentem*, There Would Still Be a Fact Issue for A Jury.

Even changing or disregarding these two rules of contract interpretation would not be enough to warrant the relief RSUI requests. If the contract is ambiguous and cannot be resolved as a matter of law under the rules of contract interpretation, then the question of the parties' intent becomes a fact question for the jury. *J.M. Davidson,*

Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003); *Columbia Gas Transmission Corp. v. New Ulm Gas*, 940 S.W.2d 587, 589 (Tex. 1996); *CBI Indus.*, 907 S.W.2d at 520.

RSUI seeks to have the Court consider parol evidence to interpret the policy in RSUI's favor as a matter of law *and* affirm the trial court's summary judgment in RSUI's favor. However, so long as the insured's interpretation is at least reasonable, even if RSUI's attempt to create a competing interpretation did not violate the parol evidence and *contra proferentem* rules, the only relief RSUI could get would be a triable fact issue for the jury to consider.

Since Lynd's interpretation is at least reasonable given the definition of "occurrence" used in the policy, there are three legal conclusions the Court could reach, none of which support judgment as a matter of law in RSUI's favor.

(1) The Court decides that RSUI's proffered interpretation depends on parol evidence rather than the language of the policy itself – **affirm the court of appeals' judgment as a matter of law for Lynd**; or,

(2) The Court deems RSUI's interpretation as a second reasonable interpretation, perhaps by considering the evidence of industry custom or policy "type" despite the parol evidence rule, but applies (as it should) the *contra proferentem* rule – **affirm the court of appeals' judgment as a matter of law for Lynd**; or,

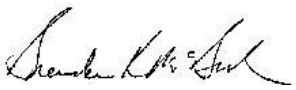
(3) The Court accepts RSUI's interpretation as reasonable, but for some reason decides not to apply *contra proferentem* to construe the policy as a matter of law against RSUI – **reverse both the trial court and court of appeals and remand the case for a trial on the fact issue of the parties' intent.**

RSUI would not be entitled to relief as a matter of law under any of these scenarios.

CONCLUSION

Amici Curiae, Texas Apartment Association, Inc. and Texas Hotel & Lodging Association, respectfully request that in deciding this issue, the Court give careful consideration to the history and purposes underlying well-established canons of contract interpretation that would ordinarily foreclose RSUI's reliance on extra-contractual evidence about a policy "type" to vary the plain meanings of the terms actually used in the policy itself and apply the rule of *contra proferentem*, if necessary. The Court should reaffirm these bedrock contractual principles on which businesses have long relied in conducting their daily affairs, and affirm the judgment of the Court of Appeals.

Respectfully submitted,



Brendan K. McBride
State Bar No. 24008900
MCBRIDE LAW FIRM
Of Counsel to GRAVELY & PEARSON, LLP
425 Soledad, Suite 620
San Antonio, Texas 78205
(210) 227-1200 Telephone
(210) 681-6752 Facsimile

William J. Chriss
State Bar No. 04222100
wjchriss@gplawfirm.com
WILLIAM J. CHRISS, P.C.

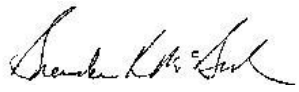
Of Counsel to GRAVELY & PEARSON, LLP
48 East Avenue
Austin, Texas 78701
(512) 420-2378 Telephone
(512) 590-8698 Facsimile

Marc E. Gravely
State Bar No. 00787582
Matthew R. Pearson
State Bar No. 0078817
Gravely & Pearson, LLP
425 Soledad, Suite 600
San Antonio, Texas 78205
(210) 472-1111 Telephone
(210) 472-1110 Facsimile

ATTORNEYS FOR AMICI CURIAE, TEXAS APARTMENT ASSOCIATION, INC. and TEXAS HOTEL & LODGING ASSOCIATION

CERTIFICATE OF SERVICE

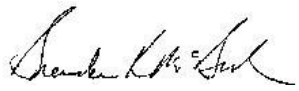
This is to certify that a true and correct copy of the above and foregoing Amici Curiae brief has been forwarded to all counsel of record via electronic service through texas.gov, on this the 28th day of July, 2014.



Brendan K. McBride

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the rules governing the length of briefs prepared by electronic means. The brief was prepared using Microsoft Word 2010. According to the software used to prepare this brief, the total word count, including footnotes, but not including those sections excluded by rule, is 5,109. The brief was prepared using "Garamond" 14-pt. font for the body, and 12-pt. font for the footnotes.



Brendan K. McBride