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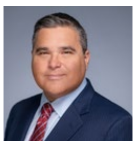
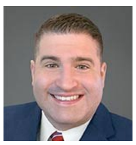
ANDERSON KILL

Climate Change & Disaster Recovery Alert

Insurance Coverage Confusion: Unraveling the Impact of "Missing" Endorsements

By Dennis J. Artese and Jason Kosek

Key points:

The intention to renew a policy with certain endorsements may create a question of fact about the scope of coverage if one of those endorsements is omitted from the policy.

Policyholders should carefully review their insurance binders and policies and ensure that all endorsements are included.

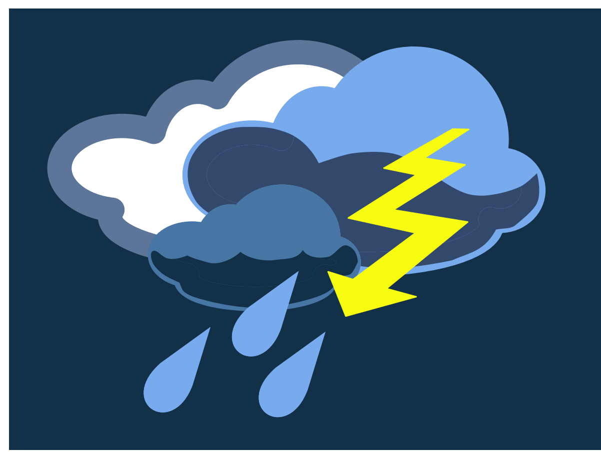
If an agreed upon endorsement is mistakenly left out, parol evidence (evidence of an agreement not contained in a written contract) may be admissible to explain an ambiguity that exists as a result of the missing endorsement.

Recently, the Court of Appeals of Georgia overturned a summary judgment decision that required Ironshore Specialty Insurance Company to provide over $26 million in property insurance limits to policyholder RPG Hospitality, LLC for losses caused by Hurricane Florence to RPG's hotel located on the North Carolina coast.

In ***Ironshore Specialty Insurance Co. v. RPG Hospitality LLC***, the court found that there were genuine issues of material fact about whether the insurance policy provided wind-driven rain coverage up to the full policy limit or up to a sublimit in an endorsement that was omitted from the policy when delivered to the policyholder. Therefore, the court remanded the case to the trial court to determine the scope of the wind-driven rain coverage under the policy.

The Policy Negotiations and Loss

In 2017, RPG procured a property insurance policy from Liberty Mutual that provided full policy coverage of $26,239,400 per incident, but coverage for damage caused by wind-driven rain was subject to a $250,000 per incident sublimit. In 2018, after a merger between Liberty and Ironshore, it was agreed between RPG and Ironshore that the policy would be renewed with the same coverage amounts. When RPG received the policy, however, several documents, including but not limited to a wind-driven rain endorsement, were not included in the policy.



Ironshore's underwriter did not notice the missing documents, nor did he remember ever reviewing the policy. Later in 2018, an Ironshore employee audited the policy and, for the first time, noticed that none of the sublimits identified on the binder made it into the policy. Ironshore realized three months *before* Hurricane Florence caused catastrophic damage to RPG's property that the Wind-Driven Rain Endorsement had not been included in the policy. However, it did not immediately inform RPG of this fact.

Subsequently, Hurricane Florence caused catastrophic damage to RPG's property, and RPG tendered notice of the claim to Ironshore. Ironshore's adjusters visited RPG's property and approved both demolition and mitigation work for millions of dollars.

After Ironshore had approved millions of dollars of demolition and mitigation work, it notified RPG that the policy was missing certain necessary documents. At this point, Ironshore provided an endorsement that contained most of the missing documents, but not the Wind-Driven Rain Endorsement. RPG agreed that the additional provisions Ironshore had sent became part of the policy, and the parties agreed that RPG now had the complete policy. Just a few days later, RPG even told Ironshore's claims adjuster that the policy contained full coverage for wind-driven rain damage.

Ten days later, and after Ironshore had approved demolition and mitigation efforts totaling more than $10 million, Ironshore attempted to include the Wind-Driven Rain Endorsement into the policy limiting the coverage to $250,000, arguing that the endorsement was mistakenly left off the policy. Naturally, RPG refused to accept this endorsement, which was never provided to it before its catastrophic loss.

The Lawsuit

RPG filed suit against Ironshore and its broker for breach of contract, negligent adjustment, and bad faith failure to settle a claim, seeking compensatory and punitive damages. Ironshore answered and asserted a counterclaim for reformation based on an alleged mutual mistake in omitting the Wind-Driven Rain Endorsement from the policy.

The trial court granted RPG's Motion for Summary Judgment, holding that Ironshore was required to pay the total policy amount for the Florence loss. The court also denied Ironshore's Motion for Summary Judgment on their counterclaim for reformation, finding that there was no mutual mistake, that the missing Wind-Driven Rain Endorsement was left off solely due to Ironshore's own negligence, and that the policyholder was reasonable to interpret the policy to cover its losses due to the fact that the Wind-Driven Rain Endorsement was not included in the policy.

On appeal, Ironshore argued that because there was an endorsement in the policy that stated "[t]he most we will pay for a loss or damage caused by Wind Driven Rain is the Wind Driven Rain Sub-Limit of Liability shown in the Sub-Limit Provision Endorsement," the loss was limited to the Sub-Limit of $250,000. The Sub-Limit Provision Endorsement, however, was not included in the policy.

The Court of Appeals found that the policy's reference to "the Sub-Limit Provision Endorsement" along with the important qualifying sentence that "[t]he most we will pay for a loss or damage caused by Wind Driven Rain is the Wind Driven Rain Sub-Limit of Liability shown in the Sub-Limit Provision Endorsement" demonstrates that the Policy is manifestly incomplete on its face without such sublimit. The court declined to apply the well-settled rule that ambiguities in insurance policies should be construed in favor of the policyholder and against the insurance company, because, according to the court, it would render agreed upon policy provisions meaningless.

Instead, the court determined that it could consider parol evidence to explain the policy's reference to a sublimit for wind-driven rain that was missing from the final policy. After consideration of the parties' competing parol evidence, the court held that there is an issue of fact as to whether the Wind-Driven Rain Endorsement formed part of the policy,

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thereby precluding summary judgment on that issue.

The court also held that summary judgment was properly granted in favor of the RPG concerning Ironshore's counterclaim for reformation. RPG showed that the endorsement was missing solely due to Ironshore's own negligence, and that RPG would be severely prejudiced by reformation. Indeed, Ironshore had approved demolition work and mitigation far in excess of the purported $250,000 sublimit. The evidence in the record established that RPG may have taken different measures in response to its hurricane loss had it known Ironshore might try to limit RPG's recovery to $250,000. The court found that Ironshore's actions were not reasonable because, when it first learned that the endorsements were missing in the policy, it failed to notify RPG. The court invoked and affirmed the equitable doctrine of laches, holding that because of Ironshore's delay in seeking to enforce the sublimit, it is no longer entitled to equitable relief. The court found that despite the delay only being several months, RPG was damaged by the delay in a way that precludes reformation of the policy.

Conclusion

The battle for coverage under RPG's property policy is not over. The trier of fact will examine the parties' parol evidence and determine whether the parties intended to include a sublimit for wind-driven rain damage. The *RPG Hospitality* case highlights the importance of attention to detail in the insurance procurement process, and the need to promptly advise of any corrections that may be needed to the policy once it is issued. The missing endorsement at issue in *RPG Hospitality* favors the insurance company by reducing the wind-driven rain coverage to a small fraction of the overall policy limit. Certainly, a more pro-policyholder approach would have been to construe the ambiguity in the policy in favor coverage, without resort to parol evidence. However, policyholders should expect a similar outcome in the event that a pro-policyholder endorsement is mistakenly omitted from the policy.

DENNIS J. ARTESE *is a shareholder in Anderson Kill's New York office and chairs the firm's Climate Change and Disaster Recovery Group. His practice concentrates on insurance recovery litigation, with an emphasis on securing insurance coverage for property and business interruption losses as well as for construction-related property losses and liability claims.*
dartese@andersonkill.com
(212) 278-1246

JASON KOSEK *is an attorney in Anderson Kill's New York office. He focuses his practice on insurance recovery, exclusively on behalf of policyholders, as well as on regulatory and white collar practice.*
jkosek@andersonkill.com
(212) 278-1028

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