IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC02-613

SWIRE PACIFIC HOLDINGS, INC.

Plaintiff-Appellant,

v.

ZURICH INSURANCE COMPANY,

Defendant,

ZURICH AMERICAN INSURANCE COMPANY,

Defendant-Appellee.

On Certified Question From The United States
Court Of Appeals For The Eleventh Circuit
No. 01-12597-F

BRIEF OF *AMICI CURIAE*
INSURERS' TECHNOLOGY LITIGATION ROUNDTABLE, COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

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TABLE OF CONTENTS

TABLE OF CONTENTS ....

TABLE OF AUTHORITIES ....

INTEREST OF AMICI CURIAE ....

STATEMENT OF THE CASE ....

SUMMARY OF ARGUMENT ....

ARGUMENT ....

I. NO COVERED LOSS TOOK PLACE. ....

A. Coverage is Barred By the Design Defect Exclusion. ....

B. The Ensuing Loss Exception Cannot be Permitted to Swallow the Exclusion ....

II. WITHOUT A COVERED LOSS, THE SUE AND LABOR CLAUSE DOES NOT APPLY. ....

A. The Application of the Sue and Labor Clause Presupposes a Covered Loss. ....

B. The Sue and Labor Clause Does Not Override Explicit Policy Exclusions. ....

III. PERMITTING RECOVERY HERE WOULD HARM THE INSURANCE MECHANISM. ....

CONCLUSION ....

TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE

This *amici curiae* brief is submitted by the following trade organizations: the Insurers' Technology Litigation Roundtable, the Complex Insurance Claims Litigation Association, the National Association of Mutual Insurance Companies, and the National Association of Independent Insurers (collectively "The Trade Associations").

The Insurers' Technology Litigation Roundtable (the "Roundtable") is an association of 24 major United States property-casualty insurers and reinsurers that was formed in 1998 to provide education and information regarding technology-related problems and their insurance implications. The Roundtable has filed *amicus curiae* briefs in cases such as this one that address efforts to expand policy language in ways that may be relied on by those who seek unwarranted coverage for technology-related costs.[1]

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[1] The Roundtable previously has been granted leave to appear as *amicus curiae* by the Illinois Supreme Court in *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 757 N.E.2d 481 (Ill. 2001), and by the California Supreme Court in *Transportation Insurance Ltd. v. ShinMaywa Industries, Inc.,* No. S077703 (Cal.) (pending).

The Complex Insurance Claims Litigation Association ("CICLA"), formerly the Insurance Environmental Litigation Association, is a trade association of major property and casualty insurance companies. CICLA members write a substantial percentage of the property coverage written in Florida. In so doing, CICLA members have entered into property insurance contracts in Florida, as well as throughout the nation, containing provisions similar or identical to those at issue in this appeal. CICLA has participated in numerous cases throughout the country, including cases in the Florida appellate courts.[2]

The National Association of Mutual Insurance Companies ("NAMIC") is a full-service national trade association with more than 1,300 member companies underwriting 40 percent ($123.3 billion) of the property/casualty insurance premium in the United States. NAMIC's membership includes

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For example, CICLA, or its predecessor, the Insurance Environmental Litigation Association, has appeared as *amicus curiae* in the following cases in this Court: *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.*, 711 So. 2d 1135 (Fla. 1998); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Group*, 636 So. 2d 700 (Fla. 1993); *Liberty Mutual Insurance Co. v. Lone Star Industries, Inc.*, 648 So. 2d 114 (Fla. 1994).

five of the 10 largest property/casualty carriers, every size regional and national property/casualty insurer and hundreds of farm mutual insurance companies. NAMIC benefits member companies through government relations, public affairs, education and arbitration services, and insurance and employee benefit programs.

The National Association of Independent Insurers ("NAII") is a national insurance trade association representing more than 600 property and casualty insurance companies across the country. NAII member companies range in size from large national companies to regional companies to companies writing in a single state. The purposes of NAII are to promote the economic, legislative and public standing of its members and the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. NAII is headquartered in Des Plaines, Illinois and maintains three regional offices and an office in Washington D.C. NAII also retains legislative

counsel in every state.

NAII has more than 662 members whose insurance writings represent 32.9 percent of the country’s total property and casualty market. NAII's members write a significant percentage of the total property and casualty insurance business written in Florida. Given this presence in the Florida marketplace, NAII and its members has a substantial interest in the issues presented in this case.

Appellant, Swire Pacific, argues that it should obtain recovery of costs incurred to correct design defects pursuant to the “sue and labor” clause of its policy, despite the fact that the design defect exclusion bars coverage. The Trade Associations are interested in the interpretation of the “sue and labor” clause under Florida law, particularly since this case presents an issue of first impression to this Court. Because the Trade Associations’ members have issued insurance contracts in Florida containing the same or similar policy language to that at issue here, the Court’s interpretation of the contracts may directly affect the Trade Associations’ members’ interests.

As trade associations of insurers, the Trade Associations bring special expertise in, and knowledge of, disputes concerning insurance coverage for

property claims. The Trade Associations submit this brief based on their extensive experience in addressing issues of contract interpretation related to property insurance issues. Thus, the Trade Associations seek to fulfill "the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

STATEMENT OF THE CASE[3]

In this action, Swire Pacific Holdings ("Swire") seeks coverage under a Builder's Risk policy, which provides specified property insurance coverage, from Zurich American Insurance Company as successor in interest to Zurich Insurance Company, U.S. Branch ("Zurich") for the costs of correcting design errors in a high-rise condominium in south Florida.

A. The Claim

[3] The Trade Associations adopt the facts as stated in the brief submitted by Zurich, and therefore only briefly summarize those facts here.

Swire undertook a construction project called the Two Tequesta Point Condominium Project ("the Project") in Miami, Florida. Prior to completion of the Project, the City of Miami Building Code Compliance Office advised Swire that the Project's structural engineer was under investigation in connection with engineering advice rendered on other projects. Accordingly, Swire retained an independent engineering firm to review the work done by the structural engineer. The peer review revealed a number of design errors and omissions in the Project. Accordingly, the City halted issuance of a certificate of occupancy. In response to the peer review findings, Swire undertook to correct the defects, which involved removing and reconstructing certain structures to conform with new designs that complied with governmental building codes. No property damage to structures or property, other than that caused by Swire's self-initiated corrective measures, took place. Swire now asserts that it has spent $4.5 million on those corrective efforts, and is seeking to recover those amounts from its property insurer.

B. The Policy

The Builder's Risk policy at issue was entered between Zurich and

Swire in connection with the Project. The policy's "Insuring Agreement" provides:

> Subject to the limitations, exclusions, terms and conditions contained herein, this Policy insures, in respect of occurrences happening during the term of this Policy against:
> Physical loss or damage to the property insured, except as excluded hereunder.

Policy, Part A, ¶ 1.

The policy's "Exclusions and Limitations" section includes an exclusion for "Design Defects," which provides:

> This policy shall not pay for … [l]oss or damage caused by fault, defect, error or omission in design, plan or specification, but this exclusion shall not apply to physical loss or damage, resulting from such fault, defect, error or omission in design, plan or specification.

Policy, Part B, ¶ 1.c.

The policy's "Conditions" section contains a "sue and labor" clause, which provides:

> **SUE AND LABOR:**
>
> In case of loss or damage, it shall be lawful and necessary for the INSURED, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the insured property hereunder or any part thereof without prejudice to this

> insurance, nor shall the acts of the INSURED or the Company, in recovery, saving and preserving the property INSURED in case of loss or damage be considered a waiver or an acceptance of abandonment. The expenses so incurred shall be borne by the INSURED and the Company proportionately to the extent of their respective interests.
>
> Any payment made pursuant to their cause, shall not serve to increase the Limit of Liability at the project site, as stated on the Declarations Page.

Policy, Part D, ¶ 21.

Lastly, the "Conditions" section of the policy contains a provision that requires Swire to "avoid or diminish" loss to covered property:

> **DUE DILIGENCE:**
>
> The Insured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish loss of or damage to the property herein insured.

Policy, Part D, ¶ 17.

C. Procedural History

Swire filed suit against Zurich on October 21, 1999 in the United States District Court for the Southern District of Florida. On April 20, 2001, the district court granted summary judgment in favor of Zurich. On

appeal, the United States Court of Appeals for the Eleventh Circuit found no express Florida Supreme Court authority on the issues presented. Accordingly, the Eleventh Circuit certified the following questions to this Court:

> (1) Whether the design defect exclusion clause bars coverage for the costs of repairing the structural defects;
> (2) If so, whether the sue and labor clause would apply only in the case of an actual, covered loss; and
> (3) If the sue and labor clause does not restrict coverage to an actual, covered loss, whether the clause would cover the costs of repairing the structural defects.

Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 284 F.3d 1228 (11th Cir. 2002).

SUMMARY OF ARGUMENT

This case arises out of costs incurred by the policyholder to correct and rebuild its property caused by its engineer's failure to design the building correctly. The facts are not unusual in the construction context. For a variety of reasons, construction jobs go awry and require some corrective work. These costs, however, are business expenses that arise out of the builder's failure to design and implement its project correctly. Such costs have nothing to do with property insurance policies, which insure fortuitous

physical loss or damage to covered property. To conclude the costs of mitigating defective design are insured would fundamentally expand the risks covered by these policies in a manner contrary to their express language and fundamental purpose.

Not surprisingly, the policy language reinforces this general understanding. Costs incurred by a policyholder to correct design defects are barred by the clear language of the design defect exclusion, which precludes coverage for "[l]oss or damage caused by fault, defect, error or omission in design, plan or specification." Although a narrow exception to the exclusion exists for an "ensuing loss," that exception does not restore coverage for the costs of repairing the defectively designed property itself.

Nor does the sue and labor clause restore coverage for loss that is otherwise barred under a property policy. The purpose of the sue and labor clause is to provide incentive to the policyholder to mitigate damage to covered property for the benefit of the insurer. The insurer receives no benefit from mitigation of damage that is excluded under the plain language of the policy. Without the existence of a covered loss, the sue and labor clause is inapplicable. The sue and labor clause cannot – and does not

– trump policy exclusions. Where a policy exclusion applies, the sue and labor clause does not restore coverage or provide separate coverage not affected by policy exclusions.

Failing to enforce plain insurance contract language would have significant destabilizing effects in the insurance industry. Permitting coverage for unbargained for risks, or risks plainly excluded from coverage, would harm the insurance mechanism and affect underwriters' ability to price insurance in a rational manner.

ARGUMENT

The district court in this case correctly held that the Builder's Risk policy issued by Zurich to Swire does not cover costs incurred by the policyholder to correct design defects in a condominium building owned by the policyholder.

At bottom, Swire seeks to foist onto Zurich costs caused by Swire's own failure to design and build the Project correctly and in accordance with the City's building codes. Any so-called damage suffered by Swire relates to costs for demolishing and reconstructing its own faulty work. Swire's

attempt to obtain coverage for that defective design and construction is novel and dangerous.

If property insurance must respond to the policyholder's business risk of failing to construct its building correctly, then the insurer no longer serves as an insurer but as a guarantor for the work itself. That is plainly incorrect. A policyholder must remain responsible for its own business shortcomings and the cost of correcting those defects and errors. Any other conclusion would have a far-reaching effect on the nature of the relationship between builders and their insurers.

I. NO COVERED LOSS TOOK PLACE.

Florida law requires that: (1) clear insurance contract provisions be given their plain and ordinary meaning; and (2) courts refrain from rewriting the agreement. *See, e.g., Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 472 (Fla. 1993) ("[c]ourts are to give effect to the intent of the parties as expressed in the policy language"); *Rigel v. Nat'l Cas. Co.*, 76 So. 2d 285, 286 (Fla. 1954) ("if the language is plain and unambiguous, there is no occasion for the Court to construe it"); *Heritage Ins. Co. v. Cilano*, 433 So. 2d

1334, 1335 (Fla. Dist. Ct. App. 1983) ("[w]hen the terms of an insurance policy are clear and unambiguous the terms must be applied as written, the court not being free to reshape the agreement of the parties"); *see also Dimmitt Chevrolet, Inc. v. Southeastern Fid. Ins. Corp.*, 636 So. 2d 700, 706 (Fla. 1993) (Grimes, J., concurring) ("the basic rule of interpretation [is] that language should be given its plain and ordinary meaning").

It is also well-established in Florida that "insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations . . . and the courts are without the right to add or take away anything from their contracts." *France v. Liberty Mut. Ins. Co.*, 380 So. 2d 1155, 1156 (Fla. Dist. Ct. App. 1980). Through the use of exclusions, insurers limit the risks that are assumed. Thus, "the fact that coverage is described in a policy which does not apply to an insured's particular situation neither renders the policy ambiguous nor a nullity." *Dick Courteau's GMC Truck Co. v. Comancho-Colon*, 498 So. 2d 1023, 1025 (Fla. Dist. Ct. App. 1986).

As this Court held in *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.*, 711 So. 2d 1135 (Fla. 1998), "[a]s a court, we cannot

place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way." 711 So. 2d at 1139. Where, as here, the plain language of exclusion precludes coverage, a court should not interpret the policy in a way that contravenes its clear intent and allows recovery for claims that were not a part of the bargained-for coverage.

A. Coverage is Barred By the Design Defect Exclusion.

The clear language of the design defect exclusion contained in the Builder's Risk policy bars coverage for the corrective costs for which the policyholder is seeking recovery. As noted above, the exclusion precludes coverage for "[l]oss or damage caused by fault, defect, error or omission in design, plan or specification." In other words, costs incurred to repair work that had been defectively designed is excluded from coverage.

Costs incurred to correct design defects fall squarely within the design defect exclusion of the Swire policy. The plain language of the exclusion bars coverage for loss resulting from defects or errors in design, which are exactly the type of losses alleged by Swire. Swire does not dispute that the errors and omissions of its structural engineer resulted in "design defects"

within the meaning of the exclusion.

B. The Ensuing Loss Exception Cannot be Permitted to Swallow the Exclusion

Despite the clear application of the design defect exclusion, Swire argues that coverage should be restored by the ensuing loss exception. That narrow exception to the design defect exclusion applies to "physical loss or damage, resulting from such fault, defect, error or omission in design, plan or specification." Swire attempts to justify application of the exception by arguing that, in the course of correcting the design defects, certain property had to be removed and consequently was physically damaged. The trial court properly held that any damage inherent to the repair process did not fall within the ensuing loss exception. This exception is inapplicable in this case, where the losses are restricted to corrective measures relating to the design defects themselves.

Courts have repeatedly rejected the nonsensical position advocated by Swire – that the demolitions necessary to correct the design defects themselves constitute "physical loss or damage resulting from" the design defects. Adopting this position would permit the exception to swallow the

whole exclusion; a result contrary to Florida rules of contract interpretation and plain common sense.

In *Laquila Construction, Inc. v. Travelers Indemnity Co.*, 66 F. Supp. 2d 543 (S.D.N.Y. 1999), *aff'd mem.*, 216 F.3d 1072 (2d Cir. 2000), the court held that the costs of repair or replacement for losses caused by an excluded peril did not fall within the coverage of a Builder's Risk policy. In that case, the concrete used to construct concrete slabs in a high-rise building was found to be defective and had to be removed and replaced. During that process, other property was disturbed and had to be restored. The court rejected the policyholder's argument that damage to that other property caused by removing the concrete was covered under the ensuing loss exception to a faulty workmanship exclusion similar to the exclusion at issue in this case. In rejecting the application of the ensuing loss exception, the court stated: "the exception to an exclusion should not be read so broadly that the rule – the exclusion clause – is swallowed by the exception – here, the exception for ensuing loss." 66 F. Supp. 2d at 545. In order for the ensuing loss exception to apply, the court held that the loss had to be "wholly separate" from the excluded peril. *Id* at 546. Because the policyholder's claim was "no more

than an attempt to recover for the excluded cost of making good its faulty or defective workmanship," the court concluded that no coverage existed. *Id.* at 546; *see also Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, 270 Cal. Rptr. 405 (Cal. Ct. App. 1990) (ensuing loss must be separate and distinct from the excluded peril).

Similarly, in *Schloss v. Cincinnati Insurance Co.*, 54 F. Supp. 2d 1090 (M.D. Ala. 1999), *aff'd mem.*, 211 F.3d 131 (11th Cir. 2000), the court held that the costs of replacing rotten wooden studs in a roof that had been damaged by rot fell within the ensuing loss exception and were therefore covered. The court held that "the cost of repairing the rot is excluded from the policy because it is the loss caused by the rot." 54 F. Supp. 2d at 1096. In addition, the court rejected the policyholder's argument that costs incurred in tearing down portions of the home that were not damaged by the rot was covered "ensuing loss":

> [The policyholder] argues that the cost of ripping out the walls to repair and replace the home's wood framing and then rebuilding them is an "ensuing loss" to the rot damage for which the . . . .policy should provide coverage. That reading, however, strains the meaning of the policy beyond recognition . . . As was discussed above, the cost to tear down and rebuild walls in order

> to repair the rotten frame is simply part and parcel of the loss caused by the rot.

Id. at 1098 (citation omitted).

Other recent cases have similarly rejected a broad reading of the ensuing loss exception. *See, e.g., Gen. Accident Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, No. 01-50328, 2002 WL 535052 (5th Cir. April 10, 2002) (Texas law) (ensuing loss exception to wear and tear exclusion did not restore coverage for damage to property otherwise excluded by exclusion for damage to underground pipes, flues or drains; court specifically rejected policyholder's argument that costs to tear out and replace parts of the building to repair the damage to destroyed pipes was covered ensuing loss); *Montgomery v. Safeco Ins. Co.*, No. 00-02080, 2001 WL 1452776, * 4 (Cal. Ct. App. Nov. 15, 2001) (ensuing loss exception to water damage exclusion did not restore coverage for sewage damage resulting from backup of water in pipes; court held that damage cannot be an ensuing loss when it occurred at the same time as the excluded loss, and that, in any event, an otherwise excluded loss does not regain the status of a covered loss by reason of the ensuing loss exception).

Here, a finding that the ensuing loss exception restores coverage for losses clearly barred by the design defect exclusion would swallow the exclusion as a whole. This is contrary to Florida rules of contract interpretation. *See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998) ("courts [may not] rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties") (citation omitted); *City of Delray Beach, Fla. v. Agric. Ins. Co.*, 85 F.3d 1527, 1535 (11th Cir. 1996) ("no clause should be interpreted in a manner which eviscerates any other provision").

Because the costs to correct design defects, including necessary demolition to other property in order to correct the design defects, falls squarely within the design defect exclusion, coverage is barred here. Specifically, none of the costs sought by Swire are distinct from its efforts to correct design defects. This is not a case where the design defects caused a separate and distinct loss to insured property like, for example, where a retaining wall containing structural defects permitted flood waters to damage property other than the wall. Instead, Swire seeks to turn its insurance policy into a performance bond of its own work. This is not what

the ensuing loss exception was designed to cover.

II. WITHOUT A COVERED LOSS, THE SUE AND LABOR CLAUSE DOES NOT APPLY.

Under the plain language of the sue and labor provision in Swire's policy, no coverage is provided for the remedial costs incurred here.

A. The Application of the Sue and Labor Clause Presupposes a Covered Loss.

The sue and labor provision of the Swire policy provides:

> **SUE AND LABOR:**
>
> In case of loss or damage, it shall be lawful and necessary for the INSURED, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the insured property hereunder or any part thereof without prejudice to this insurance, nor shall the acts of the INSURED or the Company, in recovery, saving and preserving the property INSURED in case of loss or damage be considered a waiver or an acceptance of abandonment. The expenses so incurred shall be borne by the INSURED and the Company proportionately to the extent of their respective interests.
>
> Any payment made pursuant to their cause, shall not serve to increase the Limit of Liability at the project site, as stated on the Declarations Page.

Policy, Part D, ¶ 21.

An obvious prerequisite to recovery under the sue and labor clause is that the loss be otherwise covered under the policy. *Int'l Commodities Export Corp. v. Am. Home Assurance Co.*, 701 F. Supp. 448, 452 (S.D.N.Y. 1988), *aff'd*, 896 F.2d 543 (2d Cir. 1990) (the reimbursement provision of the sue and labor clause is intended "to encourage an insured to take measures to preserve the subject matter of the insurance policy");*White Star S.S. Co. v. N. British & Mercantile Ins. Co.*, 48 F. Supp. 808, 813 (E.D. Mich. 1943) ("Its purpose is to encourage and bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred"). If the loss falls outside of the insuring agreement, or is specifically excluded by the terms and conditions of the policy, the sue and labor clause does not apply. *Reliance Ins. Co. v. Escapade*, 280 F.2d 482, 489 (5th Cir. 1960). As the *Escapade* court noted:

> [I]t is obvious that since the clause is to reimburse the assured for expenses incurred in satisfying the assured's duty to the underwriter, there is no such duty where the policy, for one reason or another – either basic lack of coverage or an unwaived defense, forfeiture, etc. – does not apply . . ..The obligation comes into being only when the action taken is to minimize or prevent a loss for which the underwriter would be liable. If the

> underwriter would not be liable at all . . . there would be no contractual obligation to repay sue and labor.

Id. To hold otherwise would be to contravene the very nature and purpose of the clause; the policyholder's actions would not be for the benefit of the insurer if they are not taken to mitigate an otherwise covered loss. "Grounding the clause in the subject matter of the policy is necessary to prevent the clause from becoming an all-purpose indemnity clause for which the parties have not contracted." *Int'l Commodities*, 701 F. Supp. at 454.

As one court noted, the "clause is tied irrevocably to the insured perils coverage . . . [it] does not operate as enlargement of the perils underwritten against." *Cont'l Food Prods., Inc. v. Ins. Co. of N. Am.*, 544 F.2d 834, 837 (5th Cir. 1977). This requirement is implicit in the purpose of the sue and labor provision, which is to reduce potential moral hazard. A policyholder whose loss is or will be covered may lack incentive to take steps to mitigate the harm, particularly when those steps would require out-of-pocket expenditures. As one court applying the sue and labor clause recognized, "the assured might abandon the wreck and look to the insurers to

indemnify him for the loss, if he did not have assurance that he could recover the expenses which he might incur in trying to salve the wreck." *Gilchrist Transp. Co. v. Worthington & Sill*, 184 N.Y.S. 81, 83 (N.Y. App. Div. 1920) (explaining that reduction of moral hazard is "[t]he reason for the clause"); *see also Young's Market*, 481 P.2d at 820 ("There is, however, a fundamental limitation upon the insurer's duty under a 'sue and labor' clause to compensate the insured for expenses incurred in the preservation and protection of insured property: the expenses in question must be incurred to preserve the insured property From a peril insured against under the basic policy").[4]

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[4] *See also Biays v. Chesapeake Ins. Co.*, 11 U.S. (7 Cranch) 415, 419, 3 L. Ed. 389 (1813) ("[t]he parties meant to apply [the sue and labor provision] only to the case of those losses or injuries for which the assurers, if they had happened, would have been responsible"); *Am. Home Assurance Co. v. J.F. Shea Co.*, 445 F. Supp. 365, 367 (D.D.C. 1978) (if loss is precluded by a policy exclusion, no sue and labor expenses are covered); *S. Cal. Edison Co. v. Harbor Ins. Co.*, 148 Cal. Rptr. 106, 113 (Cal. Ct. App. 1978) (holding no coverage for sue and labor expenditures because "[w]hile loss to the superstructure was compensable under the policy, the correction of design defects was not"); *accord Commodities Reserve Co. v. St. Paul Fire & Marine Ins. Co.*, 879 F.2d 640 (9th Cir. 1989) (California law); *Shell Oil Co. v. Wintherthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 848 (Cal. Ct. App. 1993); *Gulf Ventures III, Inc. v. Glacier Gen. Assurance Co.*, 584 F. Supp. 882, 887 (E.D. La. 1984);

The sue and labor clause protects the insurer by requiring the policyholder to take steps to minimize loss to covered property. *Gilchrist*, 184 N.Y.S. at 83 (the sue and labor clause is "inserted for the benefit of the insurance company, to encourage the assured to make an effort to salve the wreck for the benefit of the insurance company and to prevent a total loss, if possible"). It does not provide additional coverage for the policyholder. Expenses not incurred for the benefit of the insurer are not covered. *Tillery v. Hull & Co.*, 717 F. Supp. 1481, 1486 (M.D. Fla. 1988), *aff'd*, 876 F.2d 1517 (11th Cir. 1989); *S. Cal. Edison Co. v. Harbor Ins. Co.*, 148 Cal. Rptr. 106, 113 (Cal. Ct. App. 1978) ("only mitigation expenses which are for the primary benefit of the insurer are recoverable under a sue and labor clause").[5] This

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Destin Trading Corp. v. Royal Ins. Co., No. 89-5279, 1990 WL 238988, * 1 (E.D. La. Dec. 31, 1990); *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 272, n.32 (5th Cir. 1990); *Coll. Point Drydock & Supply Co. v. Nat'l Union Fire Ins. Co.*, 392 F. Supp. 277, 279 (S.D.N.Y. 1974); *Shaver Transp. Co. v. Travelers Indem. Co.*, 481 F. Supp. 892 (D. Or. 1979); *Cont'l Ins. Co. v. Lone Eagle Shipping Ltd.*, 952 F. Supp. 1046 (S.D.N.Y. 1997), *aff'd*, 134 F.3d 103 (2d Cir. 1998).

[5] *See also Blasser Bros. v. N. Pan-Am. Line*, 628 F.2d 376, 386 (5th Cir. 1980) (Texas law) ("[t]he purpose of the sue and labor clause is to reimburse

purpose to protect the insurer is one reason why the sue and labor clause has sometimes been referred to as "separate from and supplementary to" the primary coverage agreement. *Young's Market*, 481 P.2d at 822 (sue and labor expenses must be undertaken "for the benefit of the insurer . . . rather [than] for [the policyholder's] own benefit").[6] It imposes an additional obligation on the policyholder to protect against further damage to covered losses. In exchange, the insurer agrees to pay those expenses associated with protecting the insured property.

Accordingly, a clear prerequisite to coverage under a sue and labor clause is that the expenditures be incurred to mitigate an otherwise covered loss under the policy.

B. The Sue and Labor Clause Does Not Override Explicit Policy

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. . . expenditures which are made primarily for the benefit of the insurer").

[6] For this reason, the policyholder's attempt to take these quotes out of context is inappropriate. Rather than suggesting – as the policyholder does – that this clause provides additional and independent coverage that is not limited by any exclusions, courts have emphasized that this clause further protects the insurer by requiring the policyholder to take certain actions.

Exclusions.

Inherently related to the concept that the sue and labor clause applies only to covered losses is the concept that, if an exclusion in the policy applies, no reimbursable sue and labor costs exist. In *Young's Market*, the court held that no coverage existed for alleged sue and labor expenditures "[b]ecause the peril to which plaintiff's property was subject was a peril expressly excluded from coverage under the policy." 482 P.2d at 822; *see also Am. Home Assurance Co. v. J.F. Shea Co.*, 445 F. Supp. 365, 367, n.5 (D.D.C. 1978) ("if the excessive deflection in the wall is attributable to anything within the policy's exclusionary clauses, no sue and labor compensation is required"). Specifically rejecting the argument that the sue and labor clause provides "separate" coverage not subject to policy exclusions, the *Escapade* court stated:

> The argument is initially beguiling. It seems to say that since sue and labor is treated as added supplemental coverage, the policy may be approached as though it were two contracts, not just one as in the ordinary insurance policy . . . . The trouble with this is that it ignores the history, function and purpose of the Sue and Labor Clause.

Escapade, 280 F.2d at 488.

Courts have explicitly precluded recovery for sue and labor costs where such expenses were barred by the design defect exclusion under a builder's risk policy. *See S. Cal. Edison Co. v. Harbor Ins. Co.*, 148 Cal. Rptr. 106, 113 (Cal. Ct. App. 1978) (holding no coverage for sue and labor expenditures because "[w]hile loss to the superstructure was compensable under the policy, the correction of design defects was not"). The court in *Southern California Edison* explicitly held that the sue and labor clause would not trump the design defect exclusion. The court stated:

> [The provision] excluding recovery for making good design defects stands as a specific provision taking precedence over the general clause contained in the sue and labor clause permitting reimbursement.

Id. at 112. Accordingly, where, as here, an explicit exclusion bars coverage, the sue and labor provision cannot create coverage where none otherwise exists.

Swire's reliance on *Witcher Construction Co. v. St. Paul Fire & Marine Insurance Co.*, 550 N.W.2d 1 (Minn. Ct. App. 1996), is misplaced. The *Witcher* court explicitly distinguished that case from the facts of *Southern California Edison* and those at issue here, noting that, in *Southern California*

Edison, "the insured's efforts simultaneously cured a more serious noncovered defect," and accordingly, the insured would not have been able to demonstrate "that it acted primarily for the insurer's benefit." 550 N.W.2d at 8. In addition, the exclusion at issue in *Witcher* was not a design defect exclusion, but rather precluded coverage for "loss caused by delay, loss of market, loss of use, or any indirect loss." *Id.* at 5. Therefore, under the *Witcher* court's own analysis, its finding of coverage would not apply here, because the facts of this case are substantially identical to those in *Southern California Edison*. In sum, the *Witcher* court did not address the crucial issue presented here: whether the sue and labor clause provides coverage when the policyholder allegedly prevents covered loss by correcting design defects. Accordingly, *Witcher* is distinguishable.

In sum, where the plain language of the design defect exclusion precludes coverage, Swire cannot be permitted to restore coverage through the sue and labor provision.

III. PERMITTING RECOVERY HERE WOULD HARM THE INSURANCE MECHANISM.

As demonstrated above, the district court properly held that design defect exclusion barred coverage, and that the sue and labor coverage did not restore coverage for the costs of correcting design defects. This Court should affirm that decision. Failing to enforce plain insurance contract language would have significant destabilizing effects in the insurance industry. It would affect underwriters' ability to price insurance in a rational manner.

Insurers are not "deep pocket" guarantors against the consequences of all unfortunate events. In *Deni*, this Court cautioned against improperly expanding coverage in a way that would "rewrite the contract and the basis upon which the premiums are charged." 711 So. 2d at 1140 (rejecting the application of the reasonable expectations doctrine to the interpretation of a liability policy). Insurers must have confidence that unambiguous policy language will be enforced as written, and not subjected to arbitrary interpretation. *See N. River Ins. Co. v. Cy Thompson Transp. Agency, Inc.*, 840 F.2d 139, 142 (1st Cir. 1988) (recognizing that coverage is tailored to the risks defined in the insurance policy). Moreover, insurance contracts contain conditions, exclusions, and limits — such as the design defect

exclusion and sue and labor clause — to define the scope of the coverage under the policy. *See Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 790 (N.J. 1979) ("The limitations on coverage are set forth in the exclusion clauses of the policy, whose function it is to restrict and shape the coverage otherwise afforded.") (footnote and citations omitted). As the Wisconsin Supreme Court succinctly stated:

> [t]he original risk assessment becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for by the insurer in the contract of insurance.

City of Edgerton v. Gen. Cas. Co., 517 N.W.2d 463, 477, n.26 (Wis. 1994).

Giving effect to the plain meaning of the policy language allows parties to rely on a court to implement their intentions as memorialized in the written contract. This enhances predictability. Judicial redrafting of policy language, instead of giving effect to the language as written, will ultimately result in excessive uncertainty over risk management. This Court has recognized that contracts should be enforced as written. *See Deni*, 711 So. 2d at 1139 ("[a]s a court, we cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have

been written that way"). Other Florida cases are in accord. *See Travelers Ins. Co. v. C.J. Gayfer's & Co.*, 366 So. 2d 1199 (Fla. Dist. Ct. App. 1979) (warning that courts are not permitted to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties); *Ideal Mut. Ins. Co. v. C.D.I. Constr., Inc.*, 640 F.2d 654, 658 (5th Cir. 1981) (Florida law) (same).

These concerns are particularly true here. The coverage interpretation suggested by the policyholder would undermine a builder/designers incentive to build/design construction projects correctly in the first place. The unintended consequence of permitting coverage would be to encourage builders to cut corners, knowing that if something has to be redone, their builder's risk insurance will cover the additional costs to correct a design or construction flaw that should have been done correctly in the first place.

Adopting the policyholder's interpretation would have the effect of unfairly shifting the costs of sloppy design and construction on to the insurance industry, and ultimately the public as a whole. If a builder's risk policy is interpreted to permit recovery for faulty design and construction,

in addition to casualties, the insurer would become the guarantor of the designer/contractor's performance, and the general public would suffer. As the California Supreme Court has observed, judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989). Such a result would be improper, because it would benefit a designer/contractor who failed to perform under its contract, allowing that nonperforming designer/builder to unfairly (and at the expense of the performing designers/builders) retain its profits under its construction contract.

In sum, fundamental policy considerations reinforce what Florida law already requires: that the terms of an insurance contract, like those of any other contract, be enforced according to the language contained in the policy.

CONCLUSION

For all of the foregoing reasons, with respect to the questions certified from the United States Court of Appeals for the Eleventh Circuit, the Trade Associations respectfully request that this Court hold that the costs of correcting design defects are barred by the design defect exclusion, and that the sue and labor clause does not restore coverage for an otherwise excluded loss.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).