IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC 02-613

SWIRE PACIFIC HOLDINGS, INC.,

Plaintiff-Appellant,

v.

ZURICH INSURANCE COMPANY,

Defendant,

ZURICH AMERICAN INSURANCE COMPANY,

Defendant-Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR DEFENDANT-APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an insurance coverage dispute between Swire Pacific Holdings ("Swire"), the owner and developer of a high-rise condominium in South Florida, and Zurich American Insurance Company as successor in interest to Zurich Insurance Company, U.S. Branch ("Zurich"), under a Builder''s Risk insurance contract, a type of commercial property insurance. Swire seeks recovery under the policy for the costs of correcting design errors in its condominium. On appeal from the federal district court decision awarding Zurich summary judgment, the United States Court of Appeals for the Eleventh Circuit has certified questions to this Court for resolution. *See Swire Pacific Holdings Inc. v. Zurich Ins. Co.*, 284 F.3d 1228 (11th Cir. 2002).

I. Statement of Facts

A. Swire''s Condominium Construction Project

This dispute concerns Swire''s request for reimbursement under the Builder''s Risk contract for expenses Swire incurred to correct certain design defects in its Two Tequesta Point Condominium Project ("the Project") in Miami, Florida.

During construction of the Project, the City of Miami Building Code Compliance Office informed Swire that the Project''s structural engineer, Richard Klein, was under investigation in connection with engineering advice he had provided on other construction projects. R1-11 at 3; *see also* 284 F.3d at 1229. That Office also was investigating Mr. Klein''s work on Swire''s Project, and it recommended that Swire retain an independent structural engineer to review the Project plans. R1-11 at 3-4. Swire eventually learned that Mr. Klein had been indicted for failing to comply with Dade County construction requirements; as a result, "adverse publicity [wa]s a concern" to Swire. R1-24-Ex. C.

Swire followed the Code Compliance Office''s recommendation and retained an independent engineering firm to conduct a "peer review" of Mr. Klein''s engineering advice. R1-11 at 3-4. The peer review revealed a number of design errors and omissions in the Project. *Id*. at 4. In response, Swire corrected the

errors and omissions in the Project in order to satisfy the applicable building codes. *Id.*; R2-68 at 4. Swire asserts that it spent $4.5 million on those efforts, which consisted of dismantling and replacing substandard work done in accordance with Klein''s specifications. R1-11 at 3-4.

The parties'' February 11, 2000 Joint Status Report (R1-11), the foundation of the federal district court''s summary judgment ruling, set forth the foregoing facts as follows:

> II. SUMMARY OF UNCONTESTED FACTS OR FACTS WHICH CAN BE STIPULATED TO WIT[H]OUT DISCOVERY.
>
> . . . .
>
> 8. In March 1998, Swire was contacted by the City of Miami Building Department concerning Richard B. Klein, the structural engineer on the Condominium Project. At that time, Swire learned that Klein was being investigated in connection with certain of his previous design projects. Swire''s agent, CHM Consulting Engineers, Inc. convened a peer review process ("the Peer Review") to evaluate the structural work completed at the Condominium Project and the potential claim or damage arising from that structural work.
>
> 9. The Peer Review revealed numerous errors and omissions with the Condominium Project.
>
> 10. Swire initiated efforts to correct the errors and omissions with the Condominium Project identified in the Peer Review.
>
> 11. Swire has claimed in excess of $4.5 million for the corrective efforts necessitated by the Peer Review.

R1-11 at 3-4.

B. The Swire-Zurich Insurance Contract

To protect itself from unforeseen accidents during construction of the Project, Swire purchased a Builder''s Risk insurance contract from Zurich. R1-1-Ex. A at Declarations ¶¶ 6; *see also* R1-24-Ex. A at Declarations ¶¶ 6.

The policy has four main "sections": Coverage (R1-1-Ex. A at Part A); Exclusions and Limitations (*Id.* at Part B); Definitions (*Id.* at Part C); and Conditions (*Id.* at Part D).

The policy''s Coverage section sets forth the "Insuring Agreement":

> 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.

Id. at Part A, ¶¶ 1. The Coverage section also describes the property insured under the policy, explains how the limits and deductible apply, provides for the termination of the policy, and sets forth two additional types of coverage not directly implicated here: Debris Removal and Testing. *Id.* at Part A.

The policy''s "Exclusions and Limitations" section includes the "Design Defect" exclusion at issue:

> 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.

Id. at Part B, ¶¶ 1.c.

The policy''s "Conditions" section contains the "sue and labor" clause at issue:

> **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 recovering, 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.

Id. at Part D, ¶¶ 21.

The policy also contains a "Condition" 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 any loss of or damage to the property herein insured.

Id. at Part D, ¶¶ 17.

II. The Federal Court Proceedings

Swire filed suit against Zurich on October 21, 1999. R1-1. Zurich answered the complaint on January 10, 2000. R1-6. On February 11, 2000, the parties submitted a Joint Status Report (R1-11) which, among other things, set forth a "SUMMARY OF UNCONTESTED FACTS OR FACTS WHICH CAN BE STIPULATED TO WIT[H]OUT DISCOVERY." R1-11 at 3-5.

As generally anticipated in the Joint Status Report (R1-11), in May 2000, Swire moved for partial summary judgment. R1-23 and R1-24. In June 2000, Zurich cross-moved for summary judgment. R1-31. The district court heard argument on January 10, 2001 (R2-66), and on April 20, 2001, granted Zurich''s motion and denied Swire''s. R2-68. The district court held first that the design defect exclusion unambiguously precluded coverage for the expenses claimed by Swire. *Id.* at 9-10. In so ruling, the court rejected Swire''s argument that the "ensuing loss" exception rendered the exclusion ambiguous. *Id.* at 10-14. The court then rejected Swire''s alternate position, ruling that the design defect exclusion applies to the sue and labor clause and holding that Swire''s claim was barred because Swire''s efforts "were made directly and primarily to correct design defects in the building, . . . which are excluded under the terms of the policy." *Id.* at 20. The district court entered final judgment for Zurich on May 1, 2001. R2-69.

Swire appealed, R2-70, and after oral argument, the United States Court of Appeals issued its opinion on March 7, 2002. *Swire Pacific Holdings Inc. v. Zurich Ins. Co.*, 284 F.3d 1228 (11th Cir. 2002). The court observed that several federal decisions supported the district court''s conclusion that the design defect exclusion unambiguously precludes coverage for Swire''s claim. *Id.* at 1231. The court noted, however, that "those decisions did not involve Florida law." *Id.* Similarly, the court noted that the authorities conflict as to whether the sue and labor clause can be invoked in the absence of an actual, covered loss and that "none of the decisions applied Florida law." *Id.* at 1232. Finally, the court addressed the issue of whether the design defect exclusion barred coverage even if the sue and labor clause may be triggered in the absence of an actual loss. Again, the court reviewed the conflicting authorities and specifically distinguished the lone Florida decision cited by Swire. *Id.* at 1233-34. In lieu of predicting the likely course of Florida law on these points, the court certified the following questions to this Court:

> 1. Whether the policy''s Design Defect Exclusion Clause bars coverage for the cost of repairing the structural deficiencies in the condominium building;
>
> 2. If the first question is answered in the affirmative, whether the policy''s Sue and Labor Clause applies only in the case of an actual, covered loss;
>
> 3. If the second question is answered in the negative, whether the policy''s Sue and Labor Clause covers the cost of the repairing the structural deficiencies in the condominium building.

Id. at 1234.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Swire Pacific Holdings continues in this Court its attempt to bring about a radical expansion of common insurance contracting language that Swire itself traces back to the year 1613. Swire asks this Court to transform an insurance policy condition, the "sue and labor" clause, into a warranty for the faulty work of its (apparently inadequately insured) structural engineer. But as the federal district court recognized, sustaining Swire''s contention would effect an end-run around clear, unambiguous, and bargained-for terms of the Swire-Zurich contract.

Swire, the U.S. real estate unit of a huge Hong Kong-based multinational, bought a Builder''s Risk Insurance Policy, R1-11 at 1, 3, a routine step for a sophisticated real estate developer. That policy protected Swire against the risk of a fortuitous event during the period that its large scale Two Tequesta Point Condominium Project ("the Project") was under construction. R1-1-Ex. A. Swire Pacific did not buy, and did not pay the premium for, the type of warranty of soundness that would protect it from the full range of commercial risks implicit in developing a complex real estate project. Such coverage——which is subject to rigorous underwriting standards and comes with high premiums——was available in the insurance market five years ago and is today.

Swire''s present claim results from a structural engineer''s substandard work, which required correction before the building could satisfy the applicable municipal building code. *See* R1-11 at 3-4. Swire does not dispute that the engineer was responsible for those defects. Swire could have required the engineer to carry professional liability insurance sufficient to protect it from such risks. It did not, and now seeks to shift the costs of remedying that substandard work to Zurich. That proposition is unavailing.

For at least three reasons, that contract provides no coverage here. *First*, as a threshold matter, in contrast to some sue and labor provisions, which apply "in the event of actual or *imminent* loss," the provision at issue here is limited to circumstances in which a loss has occurred or is underway. Because there was no such loss here, the clause is not implicated and Swire''s claim must fail. Swire''s response is to endlessly assert the purported "purpose" and "nature" of such clauses generally and insist that the Swire-Zurich policy must be co-extensive with some "archetypical" sue and labor clause. Neither effort to deviate from the express contract language is permissible under Florida law. Moreover, Swire''s alteration of the contract clause effectively renders another contract term meaningless. Florida law equally does not permit that result.

Second, even assuming that the policy''s sue and labor clause applies in the absence of actual loss, the "design defect" exclusion applies and bars coverage here. Swire concedes, as it must, that it seeks reimbursement from Zurich for the costs it incurred to correct structural deficiencies in the Project. Those deficiencies constitute "fault[s], defect[s], error[s] or omission[s] in design, plan, or specification"——and therefore are explicitly excluded from coverage.

Finally, the "sue and labor" policy condition does not restore coverage where the design defect exclusion bars coverage. Swire''s position is that the design defect exclusion does not apply at all to the sue and labor clause because the sue and labor clause is a "separate grant" of coverage. The face of the Policy belies Swire''s position: The sue and labor clause is clearly set forth as a Condition, and not "Coverage," which is listed in a separate section. Nothing in the policy remotely suggests that the sue and labor condition is insulated from the effect of policy exclusions.

Under Florida law, "[a]n unambiguous contract of insurance does not require construction, and must be given effect as written." *Universal Underwriters Ins. Co. v. Fallaro*, 597 So. 2d 818, 819 (Fla. 3d DCA 1992) (per curiam). Applying that principle here, it is clear that there is no coverage under the policy for Swire''s claim because, even assuming that the sue and labor clause that Swire purchased was applicable to "imminent" losses, *and* that Swire prevented a loss that otherwise would have been covered, Swire did so by correcting design defects—— which are expressly excluded under the policy. Therefore, there is no coverage for Swire''s claim. This analysis gives effect to all of the insurance contract''s terms and conditions and is consistent not only with Florida law but with insurance law nationwide.

Nowhere in its Brief does Swire address the most fundamental flaw in its argument——that permitting recovery of the expenses sought under the guise of the sue and labor clause would gut the policy''s express exclusions. Swire''s resort to what amounts to a "public policy" rationale, its citation of a London trial court''s 1917 decision concerning the response of a ship captain early in World War I to the demands of the Imperial German Navy as central support for its position, and its rote recitation (*sans* application) of canons of contract interpretation all tip its hand as to how far-fetched its novel theory is. Swire would have this Court up-end the bargain it struck with its insurer, give it a free ride for its sloppiness, upset the settled understanding of important insurance concepts embodied in Swire''s policy (as well as many others), and reject judicial precedent from Florida and nationwide. Were the Court to accept Swire''s invitation to play tennis without a net, companies would be free to avoid the ordinary business consequences of their poor performance of their construction work.

Here, Swire, a global behemoth engaged in a large real estate venture, selected an inadequate engineer and failed to insist that he have sufficient malpractice insurance.

It undertook remedial action in order to protect its investment, not to benefit its insurer. If this Court were to provide coverage under such circumstances, the result would be to permit numerous businesses to externalize the costs of fixing inadequate work that they would then have little incentive to avoid, and Zurich would be transformed from an insurer protecting against fortuitous events into a guarantor of the design and construction of the project, even if faulty design doomed the Project from its inception. The Swire-Zurich policy understandably provides no such sweeping guarantees against the potential need to fix inadequate work.

For these reasons, this Court must reject Swire''s belated attempts to re-write its insurance policy and answer the certified questions to preclude coverage here.

ARGUMENT

I. the design defect exclusion bars coverage for swire''s claim.

Swire stipulated in the federal district court that it seeks from Zurich the costs it incurred for the "corrective efforts" made necessary by its engineer''s inadequate design. R1-11 at 3-4. Both the policy and case law make plain that such costs are not covered, and Swire''s claim must fail.

A. The Design Defect Exclusion Precludes Coverage For Swire''s Claim.

The Policy''s design defect exclusion 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.

R1-1-Ex. A at Part B, ¶¶ 1.c (emphasis added). There are two "prongs" of the exclusion. The first provides that "loss or damage caused by fault, defect, error or omission in design, plan or specification" is not covered under the policy. The second——often referred to as an "ensuing loss" provision——provides that the exclusion does not apply to "physical loss or damage resulting from such fault, defect, error or omission in design, plan or specification." In other words, design defects themselves are excluded from coverage; however, if other physical loss or

damage results from excluded design defects, that resulting loss could be covered.

There is no dispute that Swire''s claim arises out of errors and omissions in design by the structural engineer retained by Swire. R1-11 at 3-4. Swire also does not seriously dispute that the expenses it seeks fall within the first part of the exclusion——"loss or damage caused by . . . error or omission in design . . . ." Indeed, the Eleventh Circuit at least implicitly dismissed any suggestion to the contrary. *See* 284 F.3d at 1229 ("Swire sued Zurich seeking to recover under the policy the costs it had incurred in *correcting design defects* in the condominium." (emphasis added)); *see also id.* ("As a result of the *design defects*, Swire altered the plans and construction to bring the building into compliance with appropriate governmental building codes." (emphasis added)); Swire Br. at 4.

B. The "Ensuing Loss" Exception Is Not Ambiguous And Does Not Apply Here.

Thus, the only real question becomes whether the exclusion''s second prong, the "ensuing loss" provision, applies here. Swire contends that the provision is ambiguous and therefore the sue and labor condition should be given precedence over the design defect exclusion. But Swire all but ignores the numerous cases that have applied similar exclusions on similar facts without even suggesting any ambiguity. Moreover, Swire does not offer a reasonable, alternative interpretation of the exclusion''s exception, a precondition to contending that it is ambiguous. Swire''s argument must fail.

1. Courts Nationwide Have Found The Ensuing Loss Provision Inapplicable In Like Circumstances.

Numerous courts contradict the notion that ensuing loss exceptions are ambiguous. They have applied exclusions with ensuing loss exceptions similar to that here at issue, to facts similar to those here at issue, and have had no trouble granting summary judgment for insurers, as the federal district court did here.

Laquila Construction, Inc. v. Travelers Indemnity Co. of Illinois, 66 F. Supp. 2d 543 (S.D.N.Y. 1999), *aff''d*, 216 F.3d 1072 (2d Cir. 2000) (table), is one such recent case that is very similar to this one. There, the Builder''s Risk policy provided:

> 1. PERILS EXCLUDED
>
> . . . .

> (b) Cost of making good faulty or defective workmanship or material, but this exclusion shall not apply to physical damage resulting from such faulty or defective workmanship or material.

Id. at 544. The issue was whether the costs required to remove and replace a defective concrete slab fell within the "ensuing loss" provision. The policyholder contended that because the defective slab damaged the larger structure and "could only be removed at a cost," the ensuing loss provision applied. *Id.* at 545.

The court rejected the policyholder''s argument:

> [T]he 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.

Id. at 545. The court further reasoned that an ensuing loss had to be "wholly separate" from the excluded peril, and "Laquila''s claim for coverage here is no more than an attempt to recover for the excluded costs of making good its faulty or defective workmanship." *Id*. at 546. The Second Circuit affirmed without opinion. *Laquila Constr. Corp. v. Travelers Indem. Co.*, 216 F.3d 1072 (2d Cir. 2000) (table). There is no suggestion of ambiguity in the court''s analysis.

Another instructive case was recently affirmed by the Eleventh Circuit. *Schloss v. Cincinnati Ins. Co.*, 54 F. Supp. 2d 1090 (M.D. Ala. 1999), *aff''d*, 211 F.3d 131 (11th Cir. 2000), involved a homeowner''s claim under policies that excluded "rot," subject to an ensuing loss provision. The homeowner sought coverage for the costs of replacing rotten wooden studs in his roof, contending that those costs fell within the ensuing loss provision and were covered under the policies. The district court rejected the argument. *Id*. at 1094-95.

Citing a prominent federal decision construing Florida law on insurance contract interpretation, the district court concluded that "[t]he cost of repairing the rot is excluded from the policy because it is the loss caused by the rot." *Id*. at 1096. The court continued:

> [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). The Eleventh Circuit affirmed without opinion. *Schloss v. Cincinnati Ins. Co.*, 211 F.3d 131 (11th Cir. 2000). *See also Allianz Ins. Co. v. Impero*, 654 F. Supp. 16, 18 (E.D. Wash. 1986) ("when a contractor assumes the obligation of completing a structure in accordance with plans and specifications and fails to perform properly, he cannot recover under the all-risk policy for the cost of making good his faulty work. Clearly, such a result is not contemplated by the policy and is clearly within the exclusion . . . . I do not believe any reasonable person could read it otherwise.")

What is true of these cases——and particularly *Laquila*——is true of Swire''s claim. The peer review process "revealed numerous errors and omissions in the structural design of the project." R1-11 at 4. Coverage for the cost of correcting those errors and omissions is barred by the exclusion for loss or damage caused by "fault, defect, error or omission in design, plan or specification." Although the "ensuing loss" provisions in *Laquila* and here both provide coverage for physical loss or damage resulting from the excluded cause, neither is applicable because the cost of correcting the defects is "part and parcel" of the defects. *Laquila* is directly on point and requires denial of Swire''s claim.

Swire attempts to distinguish these authorities on the ground that none involved a design defect exclusion. Swire Br. at 29. That is a distinction without a difference. These cases all concern the cost of correcting certain errors, defects or faults that are expressly excluded by the policies at issue. In each, the policyholders contended——and the courts rejected——that corrective efforts were covered "ensuing losses."

The ensuing loss provisions in the cited cases and here are identical for all practical purposes; what is important is the courts'' application of the ensuing loss provisions when recovery is sought for the cost of correcting an excluded peril. In *Laquila*, for example, the policyholder characterized damage to structural concrete elements necessary to correct faulty workmanship as covered ensuing loss. The same is true here: Swire asserted that, "in order to remedy the design defect, Swire necessarily undertook the structural remediation," and that the "structural remediation . . . resulted in destruction and damage to portions of the insured property," the concrete work that had to be torn out to make the repairs. R1-23 at 9. *Laquila* held that such costs and "damage" did not fall within the ensuing loss

provision, and the same is true of Swire''s claim.

Swire''s interpretation finds no support in nationwide insurance law.

2. Florida Law Is In Accord With Nationwide Case Law.

Although Florida courts have yet to squarely address the specific issue resolved in *Laquila*, *Schloss*, and *Impero*, the principles on which those decisions are based are established in Florida, and their outcomes are consistent with established Florida precedent.

Most prominently, in *Fireman''s Fund Insurance Co. v. Cramer*, 178 So. 2d 581 (Fla. 1965), the policyholder sought coverage for the destruction of an engine due to the failure of the engine''s thermostat. The policy covered "loss caused other than by collision," but excluded coverage for "damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy." *Id.* at 582.

This Court held that the engine damage was excluded from coverage because the loss "appear[ed] to have been caused by ''mechanical or electrical breakdown'' and to have been confined thereto." 178 So. 2d at 583. In other words, the failure of the thermostat led to engine damage.

Although the *Cramer* exclusion has a different textual structure than that at issue here, both limit the exclusion''s application to loss or damage attributable solely to the excluded peril; therefore, the analysis is identical. As in *Cramer*, the purported physical damage asserted by Swire was caused solely by the design defects. The correction of design defects is not an ensuing loss that triggers coverage. Under this Florida law, the exception to the design defect exclusion is not applicable.

Accordingly, under principles of Florida law, the design defect exclusion bars coverage for the cost of repairing structural defects.

3. The Design Defect Exclusion Is Not Ambiguous.

Before the Eleventh Circuit, and again before this Court, Swire emphasizes a purported "ambiguity" in the policy. Swire''s basic proposition seems to be that because the precise language used in the Swire-Zurich contract differs in some perceptible but insignificant way from the language used in these litigated cases, the provisions here at issue must be deemed to be ambiguous. But Swire never articulates how the language in its policy is ambiguous as applied to *these facts*. It

also does not suggest a reasonable alternate reading of the exclusion——and indeed cannot in light of the overwhelming weight to the contrary.

Swire has not and cannot cite any case that holds that the costs of repairing or replacing property because of excluded "fault, defect, error or omission in design plan or specification" is covered "physical loss or damage resulting from such fault, defect, error or omission in design plan or specification." Instead, Swire makes much of certain highly general Florida rules of contract interpretation in its Brief, arguing repeatedly but woodenly that the policy must be construed in favor of the insured. Swire Br. at 27-28. Swire asks this Court to transform that assertion into a rule that policyholders automatically win all disputes about the interpretation of insurance contracts. Swire glosses over the crucial prerequisite for application of its cited principle: "Only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998).

These rules apply with full force to the construction of exclusions. "Where a policy provision is clear and unambiguous, it should be enforced according to its terms, whether it is a basic policy provision or an exclusionary provision." *Alligator Enters., Inc. v. Gen. Agent''s Ins. Co.*, 773 So. 2d 94, 95 (Fla. 5th DCA 2000); *see also Deni Assocs.*, 711 So. 2d at 1139 (interpreting a pollution exclusion; "[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."). "In the absence of statutory provisions to the contrary, insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations, not inconsistent with public policy and the courts are without the right to add to or take away anything from their contracts." *France v. Liberty Mut. Ins. Co.*, 380 So. 2d 1155, 1156 (Fla. 3d DCA 1980).

To the extent Swire''s opposition is not simply a plea for judicial legislation, the argument boils down to a contention that the "absence of a definition of these terms, while not necessarily creating a *per se* ambiguity in the policy, forbids a restrictive interpretation in Zurich''s favor." Swire Br. at 27. Swire contends that because the phrases "loss or damage" and "physical loss or damage" are both used but not explicitly defined in the policy, they must be deemed to be ambiguous. Swire then concludes that "the undefined terms of the Design Defect Exclusion

cannot be construed to exclude all ensuing physical loss except that which was directly caused by the design defect." Swire Br. at 28.

Aside from misstating the policy, and misapprehending the law in Florida and nationwide, Swire nowhere articulates what the purported ambiguity is, nor does it explain what are the alternative, *reasonable*, interpretations of the allegedly ambiguous clause. Tugging hard on its bootstraps, Swire baldly asserts that because the clause is somehow ambiguous, it must be construed harshly against the insurer. This vague and unspecified assertion of "ambiguity" should be rejected. Indeed, although virtually identical exclusions appear in most modern American commercial first-party policies, Swire cannot cite a single decision finding such "ensuing loss" provisions ambiguous. Certainly, it has cited none decided under Florida law. Elsewhere, courts have flatly rejected these arguments. *See, e.g., City of Burlington v. Hartford Steam Boiler Insp. and Ins. Co.*, 190 F. Supp. 2d 663, 669-74 (D. Vt. 2002) (coverage not available under either of two policies, one that excluded both "errors in design [or] faulty workmanship" as well as "[t]he cost of making good any faulty workmanship . . . or design," and one that excluded only "faulty workmanship"; terms "physical loss or damage" and "loss or damage" both were used but not defined).

This Court should reject Swire''s argument as well.

Accordingly, this Court should join the other jurisdictions that have construed similar policy exclusions and answer the first certified question in the affirmative.

II. THE EXISTENCE OF the sue and labor clause DOES NOT alter THE OUTCOME HERE.

As shown above, the "design defect" exclusion bars coverage for Swire''s claim. Swire, however, asserts that the sue and labor clause somehow neutralizes the design defect exclusion and requires coverage for its claim. Swire principally contends that policy exclusions do not limit the type of expenses recoverable under a policy''s sue and labor clause. Swire further contends that, if policy exclusions do generally limit such recovery, the design defect exclusion does not bar coverage for its claim. Assuming that the Court reaches the third certified question, it must reject Swire''s contentions.

A. Recovery Under The Sue and Labor Clause Is Limited By Other Policy Terms.

1. The Sue And Labor Clause Has An Important, But Limited, Purpose.

In broad terms, subject to the specific language of each policy, sue and labor provisions impose an important *condition* on the policyholder. As described below, the sue and labor clause in the Swire-Zurich policy requires Swire to take appropriate steps to diminish the amount of damage after actual covered loss has taken place:

> In case of loss or damage, it shall be lawful and necessary for the INSURED . . . to sue, labor and travel for, in and about the defense, safeguard and recovery of the insured property hereunder . . . .

R1-1-Ex. A at Part D, ¶¶ 21. In other words, the provision requires the policyholder to take certain measures——"sue, labor and travel"——in order to mitigate covered loss to covered property——"for, in and about the defense, safeguard and recovery of the insured property hereunder." Equitably, most modern sue and labor clauses provide that the insurer will reimburse, at least in part, the policyholder''s legitimate sue and labor expenses.

Not surprisingly, sue and labor clauses are not the equivalent of blank checks; the insurance contracts in which they are contained impose crucial limits on the expenses that can be recovered. As the federal district court recognized, the rationale for such limitations is clear: sue and labor provisions protect the insurer from the possibility that the policyholder would otherwise allow a covered loss to grow worse and reimburse the policyholder for its reasonable expenses in avoiding that result. Where the mitigated loss would not itself have been covered, there is no need for such a clause, because the policyholder has every incentive to contain the loss. Equally, in that situation there is no justification for insurer reimbursement of the policyholder''s expenses because the insurer receives no benefit if the mitigated loss would not have been covered. *See, e.g.*, *Reliance Ins. Co. v. The Escapade,* 280 F.2d 482, 489 (5th Cir. 1960) (emphasis added) ("If the underwriter would not be liable at all . . . there would be no contractual obligation to repay sue and labor. The sue and labor ''coverage'' is therefore *tied irrevocably to* the insured perils coverage."). Such authorities establish that reimbursement under the sue and labor clause is dependent on——"tied irrevocably to"——the other terms of the policy. *See, e.g., Young''s Market Co. v. Am. Home Assurance Co.*, 481 P.2d 817, 821 (Cal. 1971) (no coverage because property was being protected from a peril——government seizure——not covered under the policy).

2. The Sue and Labor Clause Is A Condition of Coverage.

Hoping to avoid the natural consequences of these authorities, Swire contends that sue and labor is separate coverage——essentially a stand-alone insurance contract with a single term. In support of its position, Swire cites a misleading excerpt of *Reliance Insurance Co. v. The Escapade*, a prominent decision of the pre-split Fifth Circuit that describes the history and purpose of the sue and labor clause. Swire Br. at 12. In fact, the court rejected a proposition identical in material respects to that asserted by Swire:

> 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 the ordinary insurance policy . . . . The trouble with this is that it ignores the history, function and purpose of the Sue and Labor Clause.

Reliance Ins. Co., 280 F.2d at 488. The court continued:

> While it is frequently said that "the sue and labor clause is a separate insurance and is supplementary to the contract of the underwriter to pay a particular sum in respect to damage sustained," . . . [i]t is ‘‘separate,’’ of course, in the sense that the reimbursement to the assured is in addition to, and over and beyond, *the amount payable under or the dollar limits of*, the named perils coverage. ‘‘Under this clause the assured recovers the whole of the sue and labor expense which he has incurred . . . and without regard to the dollar amount of the loss or whether there has been a loss or whether there is salvage, and even though the underwriter may have paid a total loss under the main policy.’’

Id. at 488 n.11 (citing *White Star S.S. Co. v. N. British & Mercantile Ins. Co.*, 48 F. Supp. 808, 813 (E.D. Mich. 1943)) (emphasis added).

Thus, *Reliance* provides no support for Swire’’s position. The sue and labor clause is *not* a separate insurance contract: recovery under it is "irrevocably tied" to the policy’’s other terms and conditions.

3. The Policy Structure Reinforces That The Sue and Labor Clause Does Not "Trump" Policy Exclusions.

The position urged by Swire is further betrayed by the Swire-Zurich policy''s structure. The policy has four main "parts": Coverage (R1-1-Ex. A at Part A); Exclusions and Limitations (*Id.* at Part B); Definitions (*Id.* at Part C); and Conditions (*Id.* at Part D).

The "Coverage" part contains the insuring agreement, extending coverage for "[p]hysical loss or damage to the property insured, except as excluded hereunder," describes the property insured, explains how the limits and deductible apply, provides for the termination of the policy, and *sets forth two additional types of coverage: Debris Removal, and Testing. Id.* at Part A.

The sue and labor provision does not appear in the "Coverage" section but instead is one of the clearly designated "Conditions." *Id.* at Part D. It is fundamentally unlike the supplemental coverages set forth in the "Coverage" part for Debris Removal and Testing. There is no hint in the text of the sue and labor provision that it is a separate grant of coverage that is both independent from the policy''s main coverage and exempt from policy exclusions, as Swire asserts. In fact, the structure of the Policy demands the opposite conclusion——that the sue and labor clause like any other term is subject to every other policy provision.

Swire''s contention that a policy condition (clearly and prominently denominated as such) somehow "trumps" a policy exclusion (again, clearly and prominently labeled as such) in the sense of creating additional coverage is not supportable.

Thus, Swire''s argument——that the sue and labor clause is ***not*** subject to policy exclusions——must be rejected.

B. The Design Defect Exclusion Applies and Bars Coverage For Swire''s Sue And Labor Claim.

As shown in section I above, the design defect exclusion in the Swire-Zurich contract bars coverage for Swire''s claim. Swire contends that, notwithstanding the clear application of the exclusion, the sue and labor condition in the policy somehow revives coverage. Specifically, Swire asserts that costs incurred to correct an "error or omission in design, plan or specification" are covered if they prevented hypothetical, covered loss to covered property.

Swire''s proposed "construction" of the contract reads out of existence the first prong of the design defect exclusion, and should be rejected. Under Swire''s

theory, the sue and labor clause swallows and renders meaningless the design defect exclusion——and indeed all exclusions with ensuing loss exceptions. In other words, if a business can conjure up a hypothetical future calamity that might arise if it didn''t make a repair to correct a design defect, it can dump the cost of that repair on its insurer. The same "logic" would apply to wear and tear and faulty workmanship exclusions, since exclusions for those problems are equally subject to ensuing loss provisions. The district court correctly rejected Swire''s position as an end-run around clear, unambiguous policy provisions.

1. *Southern California Edison* Supports the Decision Below

Swire''s position is insupportable, as both case law and the terms of the contract make clear. Only one other decision of which Zurich is aware has addressed head-on the argument Swire asserts here. In a well-reasoned, comprehensive opinion on very similar facts, that decision *rejected* that argument.

Southern California Edison Co. v. Harbor Insurance Co., 148 Cal. Rptr. 106 (Ct. App. 1978) involved an electric generating plant. During construction, the plant''s foundation began to settle because the plant had been designed and constructed improperly. The policyholder then took measures to raise the foundation to its original, intended elevation, and sought reimbursement under the sue and labor clause in its Builder''s Risk policy for the costs of doing so.

The policy excluded the "[c]ost of making good faulty workmanship, construction or design," but also provided that "this exclusion shall not apply to damage resulting from such faulty workmenship [sic], construction or design." *Id.* at 107-08.

The court held that the costs incurred by the policyholder were not covered under the policy because the sue and labor clause "does not extend or create coverage." *Id.* at 112. The court acknowledged that had the design defects led to damage to the structure, that resulting damage would have been covered, but the court reasoned that the policy terms and exclusions placed limits on the types of expenses recoverable under the sue and labor clause:

> *Edison has not cited, and our research has not disclosed, authority for the proposition that expenses excluded under the basic insurance policy are nonetheless recoverable under the sue and labor clause.*

> The dependence of the sue and labor clause on the underlying insurance policy would suggest that Edison''s claim should be rejected; the established rules for the construction of insurance policies dictate that result.

Id. at 112 (emphasis added).

Looking to rules of construction identical to those applied in Florida, the court concluded that "in plain and explicit language, the insurers refused to assume liability for making good defects in design. Such intent must be respected, and not circumvented." *Id.* at 113.

Here, as in *Southern California Edison*, Swire seeks reimbursement of expenses plainly excluded from the policy. Although Swire''s actions "may have prevented or mitigated loss to the" condominium project, "at the same time [they were] the means by which [Swire] corrected the design defects." *Id.*

2. The Undisputed Facts Here Are Virtually Identical To Those In *Southern California Edison.*

Swire''s attempt to distinguish *Southern California Edison* is not persuasive. Swire takes issue with the case because there, the policyholder "cured a more serious noncovered defect," but that is *precisely* the case here: Swire admits that it seeks recovery of the amount it spent to "correct the errors and omissions" in its condominium construction project. R-11 at 3-5.

Swire''s other issues with *Southern California Edison* are likewise non-starters. The court in fact applied "well settled" rules of construction in its analysis——rules identical to those applied by Florida courts. The *Southern California Edison* court declined to apply the rule of *contra proferentum* to construe the contract mechanistically in a way favored by the policyholder for the same reason the Court should decline to do so here: the policy language is not ambiguous.

Second, although the specific language used in the design defect exclusion in *Southern California Edison* differs slightly from that at issue here, the exclusion in the Swire-Zurich policy is actually broader and clearly excludes coverage for correcting design defects——"the cost of making good" a defect ***is*** loss or damage "caused by" the design defect. The interpretation apparently urged by Swire——that a policy that excludes coverage for "loss or damage caused by . . . error or omission in design, plan or specification" nevertheless provides coverage

for the "cost of making good" such "error[s] or omission[s] in design, plan or specification"—— is nonsensical and wholly inconsistent with Florida insurance contract construction law. *See, e.g., Deni Assocs.*, 711 So. 2d at 1140 ("insurance policies will not be construed to reach an absurd result."); *see also City of Burlington*, 190 F. Supp. 2d at 669-74 (implicitly rejecting similar argument). It must fail.

Finally, and most importantly, a contract''s terms must govern its interpretation. The *Southern California Edison* court specifically held that there, as here, "in plain and explicit language, the insurers refused to assume liability for making good defects in design. Such intent must be respected, and not circumvented." 148 Cal. Rptr. at 113. This is hardly a controversial proposition. *See, e.g., Deni Assocs.*, 711 So. 2d at 1139 ("As 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."). Swire''s general and abstract assertions about the supposed "purpose" of the sue and labor clause fly in the face of the policy''s "plain and explicit language."

3. *Steuart Petroleum, Witcher, and Wilson Bros.* Are Inapposite

The case law cited by Swire is inapposite. *Steuart Petroleum Co. v. Certain Underwriters at Lloyd''s London*, 696 So. 2d 376 (Fla. 1st DCA 1997), is apparently the centerpiece of Swire''s argument that the sue and labor clause vitiates the design defect exclusion.

That case is utterly irrelevant. Swire represents that *Steuart* stands for the proposition that sue and labor clauses provide coverage for expenses incurred solely to prevent a loss. Swire Br. at 15-16. While the *Steuart* court quoted the sue and labor clause contained in the policy at issue because it was invoked as an alternate basis for coverage, 696 So. 2d at 378 n.2, the court''s resolution of the case did not in any way implicate that provision. Furthermore, the language misleadingly quoted by Swire appears in the court''s recapitulation of the parties'' positions, not the court''s analysis of the issues. *Id.* at 378. *Steuart* in no way endorses the conclusion Swire wishes to impute to it.

Moreover, as the Eleventh Circuit observed, the two central predicates of *Steuart''*s analysis are entirely lacking here. First, the court there held that the two provisions at issue "deal with the same subject matter"——"the subject of loss

reduction expenses"——a circumstance that the court there held triggered Florida''s contract construction principle that "when two provisions in an insurance policy deal with the same subject matter, the one affording greater coverage will prevail." *Id.* at 378-79. Here, the design defect exclusion and the sue and labor clause do not both deal with "the subject of loss reduction expenses," only the sue and labor clause does. The exclusion limits the scope of the policy''s basic insuring obligation. That is the point of an exclusion. *See, e.g., Newbern Distrib. Co. v. Canal Ins. Co.*, 124 So. 2d 721, 724 (Fla. 2d DCA 1960) ("Except where controlled by statutes or public policy, an insurance company is free to insert exemption clauses in its liability policy as it deems necessary or proper; and an insurance company is not responsible under its liability policy for risks or causes which have been excepted . . . .").

Second, the *Steuart* court''s analysis turned on the fact that one of the conflicting clauses was added by *endorsement* to the policy. The court held that, under Florida law, policy terms in endorsements supersede inconsistent terms in the body of the policy. *Steuart*, 696 So. 2d at 379. The court''s holding reflects the common sense conclusion that a provision specially added to a contract is likely to be a more important indication of the parties'' contracting intent than a provision in the main text of their agreement (which may be a printed form).

That circumstance is not present here: both the sue and labor clause and the design defect exclusion are in the body of the policy. No endorsement is at issue. Once the *Steuart* court determined that the clause added by endorsement took precedence, it eliminated the need to reconcile the exclusion with the coverage provision in the same policy document, as must be done here.

The other authorities Swire cites are similarly unavailing. In fact, one—— *Witcher Construction Co. v. St. Paul Fire & Marine Insurance Co.*, 550 N.W.2d 1, 8 (Minn. Ct. App. 1996)——actually distinguishes the facts of that case from those in *Southern California Edison* and here, where "the insured''s efforts simultaneously cured a more serious noncovered defect, which would have prevented it from demonstrating that it acted primarily for the insurer''s benefit."

Other differences are also crucial. The exclusion at issue in *Witcher* excluded coverage for "loss caused by delay, loss of market, loss of use, or any indirect loss," *id.* at 5, not design defect. Therefore, the court''s analysis did not address the crux of the issue here: whether the sue and labor clause provides coverage when the policyholder allegedly prevents covered loss by correcting excluded design

defects. The court''s analysis is set forth in its entirety below:

> Witcher argues the trial court erred by applying the policy''s exclusion to its claim for reimbursement of mitigation costs. We agree that the policy''s exclusions do not limit the form of expenses that are reimbursable, provided the insured directs its efforts primarily at preventing an imminent covered loss.

Id. at 8. This bare conclusion also runs counter to Florida''s well established rules that the plain, unambiguous terms of a contract must be enforced as written. *Witcher* is inapposite.

Swire also cites to *Wilson Bros. Bobbin Co. v. Green*, 1 K.B. 860, 862-63 (1917), *available at* 1917 WL 18352, an 84-year old foreign trial court decision involving a marine insurance policy issued during World War I. As noted in the Summary, the obscurity and antiquity of this authority is itself telling concerning the flabbiness of Swire''s theory. But even if it were viable precedent, like *Witcher*, *Wilson Bros.* involved an exclusion for "delay," rather than for design defect, contained even thinner analysis than that in *Witcher*, and did not address the issue presented here.

Although sue and labor clauses have been construed by courts many times, Swire can offer no authority for the radical propositions that sue and labor provisions are "separate" insurance of the sweeping character it asserts and that they are uniquely immune from policy exclusions.

III. the sue and labor clause at issue applies only to actual, covered loss or damage.

A. The Plain Language of the Clause at Issue Controls

On the most basic level, the clear language of Swire''s sue and labor clause extends only to circumstances where a covered loss has occurred——not where loss is merely foreseen. In contrast to many such clauses in other policies, Swire Pacific''s clause has no application where a loss has not yet actually taken place. Rather, it comes into play only where there is actual loss. This restriction in scope is sensible in the context of a Builder''s Risk policy that covers construction projects where "mid-stream" correction of substandard work is commonplace. The express limitation parallels the overall thrust of the policy''s terms and structure in precluding reimbursement for mere anticipatory repair expenses.

The sue and labor clause in Swire''s policy provides:

> *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 . . . .

R1-1-Ex. A at Part D, ¶¶ 21 (emphasis added). By contrast, many sue and labor clauses expressly apply to costs incurred *prior to* imminent loss. *See, e.g., Am. Home Assurance Co. v. J.F. Shea Co.*, 445 F. Supp. 365, 369 (D.D.C. 1978) (sue and labor clause applied "[i]n case of actual or imminent loss or damage"); *Young''s Market Co.*, 481 P.2d at 818 (same). The Swire-Zurich clause does not. It applies *only* "[i]n case of loss or damage." The absence of the "imminence" concept is fatal to Swire''s theory.

Indeed, the Swire Pacific policy does address loss prevention efforts elsewhere, but in terms that do not reimburse Swire''s claimed expenses. Paragraph 17 of the policy provides:

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

R1-1-Ex. A at Part D, ¶¶ 17 (emphasis added). This provision is broader than the sue and labor provision in that it encompasses loss prevention as well as loss mitigation. It illustrates that policy provisions intended to apply to potential loss do so expressly. The provision expressly requires that policyholders like Swire avoid loss——at their own expense——where possible.

Here, even under Swire''s theory, any actual loss at the project took place *as a consequence of* Swire''s efforts to correct the design defects. Swire does not even contend that any actual loss or damage took place before it incurred the expenditures it now seeks to recover under the sue and labor clause. By its own terms, the sue and labor clause in the Swire-Zurich contract does not apply.

Undeterred by the clear, specific language contained in its insurance policy, Swire engages in a remarkable demonstration of linguistic reverse-engineering. Instead of proffering an explanation as to how a clause that applies only "[i]n case of loss or damage" can actually mean "in case of foreseeable loss or damage," Swire

constructs an ideal "Sue and Labor Clause" from which it deduces the meaning of the sue and labor clause actually contained in its contract. Repeatedly, Swire invokes the "purpose" and "nature" of this conceptual fabrication rather than engage in any analysis of the provision at issue. *See, e.g.*, Swire Br. at 9 ("overarching purpose"), 10 ("historic purpose"), 11 ("history, purpose, and very nature"), 12 ("*very purpose*"). The central flaw in this syllogistic approach is readily apparent: Swire utterly disregards the plain language of the policy in contravention of well-established Florida law.

Swire cites inapposite cases. For instance, Swire asserts that the Fifth Circuit and other courts have held that the language in Swire''s policy covers prevention costs. *See* Swire Br. at 12-13. In reality, these decisions involve mitigation claims where loss took place before any expenses were incurred. *See Reliance Ins. Co.*, 280 F.2d at 484 (case grew "out of the substantial damage sustained by the Yacht Escapade"); *Blasser Bros. v. N. Pan-American Line*, 628 F.2d 376, 378 (5th Cir. 1980) ("[t]his case involves a claim for damaged cargo"); *Cont''l Food Prods., Inc. v. Insurance Co. of N. Am.*, 544 F.2d 834, 835 (5th Cir. 1977) (frozen meat sustained "substantial damage"); *White Star S.S. Co. v. N. British & Mercantile Ins. Co.*, 48 F. Supp. 808, 810 (E.D. Mich. 1943) (vessel "settled on the river bottom"). What Swire characterizes as "holdings" are actually passing characterizations of sue and labor clauses generally in cases where no prevention expenses were at issue.

Similarly, the parties in *Wolstein v. Yorkshire Insurance Co.*, 985 P.2d 400 (Wash. Ct. App. 1999) apparently did not raise the issue whether the clause covered costs incurred to prevent loss. To the extent that the *Wolstein* decision purportedly embraces that issue, that court relied solely upon *White Star S.S. Co.*, which, as noted above, involved only claims for mitigation costs incurred after a covered loss was already in progress. 985 P.2d at 409. Accordingly, the *Wolstein* court applied law clearly inapplicable to the facts before it.

Even more misplaced is Swire''s reliance on *Witcher Construction Company v. St. Paul Fire & Marine Insurance Co.*, 550 N.W.2d 1 (Minn. Ct. App. 1996). The policy at issue in *Witcher* did not even contain a sue and labor clause. Moreover, the provision did not provide for reimbursement of the policyholder for prevention expenses. The court predicated its conclusion that the insurer nonetheless had such an obligation not on the policy language, but on common law duties divorced from the text of the contract. 550 N.W.2d at 7-8. Swire does not explain why the

Witcher court''s single sentence discussion of legal principles not at issue in this case should compel this Court to abandon "the basic legal principle in Florida that the scope and extent of insurance coverage is defined by the language and terms of the policy." *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 359 (Fla. 4th DCA 2001).

Finally, Swire once again cites *Steuart Petroleum Co. v. Certain Underwriters at Lloyd''s London*, 696 So. 2d 376 (Fla. 1st DCA 1997). As noted above, Swire''s statement that "[t]he court found" that the claimed expenditure was "*in accord with*" the clause, Swire Br. at 22 (Swire''s emphasis), in fact quotes from the court''s summary of the policyholder''s arguments, and is not the court''s own reasoning. *See* 696 So. 2d at 378. The District Court of Appeal in no way opined as to the application of the sue and labor clause.

B. Swire''s Policy Construction Arguments are Unavailing

Once again, Swire invokes purported generalized principles of contract construction to fill the gaps in its argument. This Court must ignore the clear and undisputed language of the policy, Swire contends, because the result would be "unreasonable." The result that follows from adherence to the contractual language is not unreasonable; it is simply not favorable to Swire. The purported unfairness described by Swire lies in the claimed absence of an "incentive on the part of an insured to pro-actively address potential covered losses." Swire Br. at 17.

The policy does furnish such an incentive——the due diligence clause, which conditions coverage on the policyholder''s "doing all things reasonably practicable to avoid or diminish any loss." The moral imperative of correcting structural deficiencies that could potentially result in harm to the Project''s residents, and the concomitant potential legal liability, also provide powerful incentives. Swire essentially argues that it is Zurich''s obligation not only to indemnify Swire for covered losses, but also to ensure, through extra-contractual subsidies, that Swire conducts its business responsibly. However, "[i]t is sound judicial practice not to develop, on public policy grounds, additional bases for legal liability when preexisting reasons suffice to encourage the desired activity." *McNeilab, Inc. v. N. River Ins. Co.*, 645 F. Supp. 525, 556 (D.N.J. 1986) (rejecting policyholder''s claim for mitigation expenses related to Tylenol recall under general liability policy in light of "strong moral reasons" and "strong business reasons" prompting recall), *aff''d*, 831 F.2d 287 (3d Cir. 1987) (table).

Moreover, Swire''s repeated assertion that it would have been in a better position had it not undertaken to correct the design defects uncovered in the Peer Review is simply disingenuous. Swire Br. at 8, 16-17, 26. As Swire itself insists, the purpose of the sue and labor clause is to "act *for the benefit of the insurer*." Swire Br. at 9 (Swire''s emphasis); *id.* at 26. The commercial realities attending construction of the Project compelled Swire to remedy the defects, not any motivation to benefit Zurich. Any assertion to the contrary is disingenuous. Given the City of Miami''s investigation of the Project, Swire had no choice but to initiate the Peer Review and take remedial action. Without such action, it is inconceivable that the City would have permitted the Project to be occupied. Furthermore, how could Swire hope to sell up-scale condominiums without fixing known defects? Swire had no choice but to correct the design defects; the potential impact on its Builder''s Risk insurer clearly did not factor into its decision making. Indeed, Swire acknowledged this in informing Zurich that it commenced the Peer Review "[t]o protect Swire" because "adverse publicity [wa]s a concern." R1-24-Ex. C. In the face of such obvious commercial and legal incentives, Swire''s ominous warnings of the need to create new ones simply ring hollow. Swire acted consistently with its own self interest: corrective action permitted it to proceed with construction, avoid adverse publicity, and protect its investment.

It is neither unreasonable nor absurd that the sue and labor clause contained in the contract does not reimburse Swire for fulfilling its contractual obligations under the due diligence clause and imposed by law. The allocation of responsibility, and the corresponding allocation of reimbursement duties, contained in the policy ensure that the coverage cannot be transformed into a performance bond. Swire selected the structural engineer for the project. Swire''s recourse lies with him, not Zurich. The clear policy language simply reinforces the commonsense proposition that a business must bear the costs for its business decisions.

Swire seeks to evade the result mandated by the clear policy language by imputing to Zurich a "pernicious" agenda. Swire Br. at 17 n.8. Swire seems to argue that the Court cannot enforce the sue and labor clause according to its terms because doing so would enable an insurer to invoke the sue and labor clause to deny coverage without compelling it to reimburse prevention costs. This argument, which, predictably, focuses on the sue and labor clause to the exclusion of the other terms and conditions of the policy, misses the import of the policy''s due diligence clause: the policy expressly requires Swire to take steps to *prevent or mitigate* a

covered loss (via the due diligence clause) but expressly provides for reimbursement *only* for costs incurred to *mitigate* a covered loss (via the sue and labor clause).

The due diligence clause does not "eviscerate" the sue and labor clause. Rather, it is another strong signal that the sue and labor clause in the Swire policy should not be expanded beyond its terms. The more likely candidate for the "somewhat more pernicious" agenda at work is Swire''s attempt to reach into deep pockets other than its own to ameliorate the consequences of its own business decision. *See State Farm Fire & Cas. Co. v. Oliveras*, 441 So. 2d 175, 178 (Fla. 4th DCA 1983) (citation omitted) ("The rule that ambiguities in insurance contracts are to be construed in favor of the insured is not license for our raiding the deep pocket.").

Finally, Swire''s passing suggestion that if the sue and labor clause applies only once loss has occurred, then the clause is implicated only when mitigation costs exceed the limit of the policy, Swire Br. at 8, demonstrates a profound misconception of the sue and labor clause. Swire''s argument is premised on the mistaken assumption that any sums incurred once loss has occurred are ineluctably indemnified as part of the damage to insured property. That is not so.

The point of the sue and labor clause is to require the policyholder to take steps to *minimize* covered loss. Necessarily, successful sue and labor efforts *reduce* the amount recoverable for damage to insured property. That is where the sue and labor clause comes in. Those expenses incurred for loss mitigation efforts such as to secure damaged, insured property, *cf. Wolstein*, 985 P.2d at 408, or for operations to salvage damaged, insured property, *Reliance Ins. Co.*, 280 F.2d 482, were not recoverable under the insuring agreement, but were recoverable under the sue and labor clause. In other words, in the absence of a sue and labor clause, such mitigation expenses would not have been recoverable and, therefore, the clause is anything but redundant, as Swire seems to suggest.

For all of these reasons, this Court should adhere to its long-standing practice of construing insurance policies according to their express terms and answer the second certified question in the negative.

Swire is not entitled to insurance reimbursement for the costs of correcting defects when such costs are expressly and unambiguously excluded under the policy. *So. Cal. Edison*, 148 Cal. Rptr. at 112-13; *cf. Wolstein*, 985 P.2d at 408 ("the sue and labor clause covers only those expenses reasonably incurred in an effort to prevent

or mitigate a covered loss. *The builder''s risk policy was not a performance bond*, and it is unreasonable to infer that the parties intended for the policy to cover the cost of completing the vessel." (emphasis added)).

It should not be surprising that Builder''s Risk policies such as that purchased by Swire do not provide coverage for the costs of correcting design defects, faulty workmanship, and the like. That is not what Builder''s Risk policies are about. *See, e.g., Trinity Indus., Inc. v. Insurance Co. of N. Am.*, 916 F.2d 267, 269 (5th Cir. 1990) ("We have trouble with the notion that a Builder''s Risk policy covers the cost incurred by the policyholder to correct faulty workmanship."). Rather, such policies cover the damage resulting from "discrete event[s] that a reasonable person would call an accident." *Id.* at 270 (collecting cases).

Southern California Edison is the only decision that addresses foursquare the issue presented here. Its analysis is rigorous and thorough, consistent both with Florida law and the broader principles enunciated in controlling case law, and therefore persuasive: the policy exclusions limit and define the expenses reimbursable under the sue and labor clause. The opposite conclusion would vastly and illogically expand the scope of sue and labor clauses and provide Swire with a multi-million dollar windfall. That result essentially eviscerates policy exclusions and provides Swire with coverage that it neither bargained nor paid for. The policy is clear: loss or damage "caused by . . . errors or omission in design" is not covered under the policy——period.

CONCLUSION

The federal trial court correctly held that recovery under the sue and labor clause in the Swire-Zurich policy is subject to policy exclusions and, under the undisputed facts here, is precluded. Any other result reads out of existence the express terms of the policy, and improperly converts the insurance contract into a warranty of soundness, *see, e.g., Mellon v. Federal Insurance Co.*, 14 F.2d 997, 1002 (S.D.N.Y. 1926) ("[i]t must always be borne in mind that the policies are of insurance and not of warranty of soundness . . . the perils [to be] insured against are risks.")——protection that Swire plainly never purchased. That is impermissible under Florida law. Accordingly, this Court should answer the certified questions so as to enforce the unambiguous terms of the policy and reject Swire''s claim.

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).

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