IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC02-613

SWIRE PACIFIC HOLDINGS, INC.,

Plaintiff-Appellant,

v.

ZURICH INSURANCE COMPANY,

Defendant-Appellee.

BRIEF OF SWIRE PACIFIC HOLDINGS, LTD.

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

Ronald W. Kleinman, Esq. Greenberg Traurig, LLP 800 Connecticut Avenue, N.W. Suite 500 Washington, D.C. 20006 Telephone: (202) 331-3100 Facsimile (202) 331-3101 Scott D. Greenspan, Esq. Greenberg Traurig, LLP 885 Third Avenue New York, NY 10022 Telephone: (212) 801-2100 Facsimile (212) 688-2449	Elliot H. Scherker, Esq. Florida Bar No. 202304 Marlene K. Silverman, Esq. Florida Bar No. 226947 Elliot B. Kula, Esq. Florida Bar No. 003794 Greenberg Traurig, P.A. 1221 Brickell Avenue Miami, Florida 33131 Telephone: (305) 579-0500 Facsimile: (305) 579-0723

Counsel for Swire Pacific Holdings, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

Florida Statutes

Other Authorities

INTRODUCTION

The United States Court of Appeals for the Eleventh Circuit has certified to this Court three questions of Florida insurance law, as to which neither this Court nor the district courts of appeal have spoken, which arise in a coverage dispute between Plaintiff-Appellant Swire Pacific Holdings, Inc. (Swire) and Defendant-Appellee Zurich Insurance Company (Zurich). The coverage dispute centers on the policy's Sue and Labor Clause, under which Swire is obligated to prevent and/or mitigate covered losses so as to reduce Zurich's exposure under the policy, and Zurich is obligated to reimburse Swire for expenditures made in pursuit of Swire's duty under the clause.

The federal district court, in granting summary judgment for Zurich, ruled that, while Swire was acting to prevent an indisputably-covered loss — the possible collapse of its condominium building — Zurich was not obligated to Swire under the Sue and Labor Clause because a policy exclusion, known as the Design Defect Exclusion, barred recovery for loss or damage caused by defects in design. The court ruled that, while Swire's repairs may have prevented the collapse of the building, which would have been a covered loss, the Design Defect Exclusion barred recovery under the Sue and Labor Clause.

The Eleventh Circuit has asked three questions of 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 repairing the structural deficiencies in the condominium building.

Swire Pacific Holdings, Inc. v. Zurich Ins. Co., No. 01-12597 (11th Cir. Mar. 7, 2002). Swire submits that these questions must, as a matter of Florida insurance law, be answered in favor of coverage.

STATEMENT OF THE CASE AND FACTS

1. Procedural History.

Swire instituted an action against Zurich in the United States District Court for the Southern District of Florida on October 21, 1999, seeking declaratory relief and damages for breach of contract. (R:1).

[1] The parties submitted cross-motions for summary judgment. (R:23; R:35). On April 20, 2001, the district court issued its order granting summary judgment in favor of Zurich. (R:68). The court entered final judgment for Zurich on May 1, 2001. (R:69).

On Swire's appeal to the Eleventh Circuit, that court certified to this Court three questions of state insurance law. *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.,* No. 01-12597 (11th Cir. Mar. 7, 2002).

[2]

2. The Insurance Contract.

Swire purchased a Builder's Risk Policy from Zurich, to be effective February 24, 1997, through February 24, 1999. (R:24:Ex.A). With the exception of one clause (which is not at issue in this action) that was negotiated between the parties, Zurich drafted the language of the policy. (R:41:Ex.A).

---

[1] Record references are to the district court record, as submitted to the Eleventh Circuit and transmitted to this Court upon the certification. The references are to the docket entry number and, where appropriate, internal page numbers of each entry.

[2] A copy of the Eleventh Circuit's decision is attached as an appendix to this brief.

The insured project is the Two Tequesta Point Condominium (TTP), which is located on Brickell Key in Miami, Florida. (R:24:Ex.A). The total insured value of the property is $46 million. *Id*. In exchange for a premium payment of $296,700.00, Zurich agreed to provide coverage for "[p]hysical loss or damage to the property insured, except as excluded hereunder." *Id*. at Part A.1. Among the listed exclusions is the following:

> Loss 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 (hereinafter referenced as the Design Defect Exclusion).

The policy also includes a Sue and Labor Clause:

> In case of loss or damage, it shall be lawful and necessary for [Swire] ... 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 [Swire] or [Zurich], in recovering, saving, and preserving the property ... in case of loss or damage be considered a waiver or an acceptance of abandonment. The expenses so incurred shall be borne by [Swire] and [Zurich] proportionately to the extent of their respective interests.

Id. at Part D.21 (hereinafter referenced as the Sue and Labor Clause).

3. The Basis for Swire's Claim.

The Eleventh Circuit's decision summarized the pertinent facts:

> In March of 1998, the City of Miami's Building Department informed Swire that Richard Klein, the structural engineer on the condominium project, was being investigated in connection with certain design projects for failure to comply with appropriate governmental building codes and ordinances. Swire's agent, CHM Consulting Engineers, performed a peer review of Klein's structural work on the project and the potential

> claim of damage arising from that structural work. While the peer review was underway, the City of Miami halted the issuance of a certificate of occupancy. The peer review revealed numerous errors and omissions in the project that had to be corrected.
>
> As a result of the design defects, Swire altered the plans and construction to bring the building into compliance with appropriate governmental building codes. Swire spent approximately $4.5 million in costs to correct the structural deficiencies and filed a claim with Zurich under its builder's risk policy seeking coverage for those costs. Zurich denied coverage on the ground that Swire's claim dealt "with the cost of correcting a design defect and not any physical loss or damage resulting from the defect."

Appendix (hereinafter "A") at 3-4.

4. The District Court's Ruling.

The district court granted summary judgment for Zurich, holding that the Design Defect Exclusion barred coverage under the policy's loss provisions and that the Sue and Labor Clause does not apply. (A:6). The Eleventh Circuit's opinion sets forth the district court's rationale:

> [T]he court reasoned that sue and labor expenses are reimbursable only to the extent that they are incurred for the benefit of the insurer in mitigating or preventing a covered loss. The court held that the answer to the question of whether expenses are incurred for the benefit of the insurer lies not in whether the insured's actions may potentially benefit the insurer in some way, but in whether the insured's actions "correlate to an excluded loss." Because the actions taken by Swire correlated to the excluded loss of repairing design defects, the court found that the costs incurred by Swire were not incurred for the benefit of Zurich and thus were not reimbursable under the Sue and Labor Clause. The district court stated that it was unnecessary to reach the issue of whether the Sue and Labor Clause applies only when an actual, covered loss has occurred.

Id.

5. The Eleventh Circuit's Decision.

The Eleventh Circuit first examined the Design Defect Exclusion, noting that three federal decisions, upon which Zurich relied, have held that "the cost of correcting design defects" does not constitute "physical loss" under the so-called "ensuing loss" exception to the Design Defect Exclusion, which allows for recovery for "physical loss or damage resulting from such fault, defect, error or omission in design." (A:7-8).

[3] The court noted, however, that "those decisions did not involve Florida law, and the parties have not cited, nor have we found, a decision applying Florida law to this issue." *Id.* at 9.

Addressing the Sue and Labor Clause, the court discussed authority in other jurisdictions for the proposition that the insured has a duty to prevent covered losses and that "a covered loss does not have to occur in order to invoke coverage" under the Sue and Labor Clause. (A:9-10). The court set forth the issue that arises "if the occurrence of a covered loss is not a prerequisite to application of the clause," *id.* at 11, as follows:

> If the clause does apply even when there has been no covered loss at the time the repairs are made, then what might be called a "mixed motives" issue arises. The Sue and Labor Clause provides that "[i]n case of loss or damage, it shall be lawful and necessary for [Swire] to sue, labor and travel for, in and about the defense, safeguard and recovery of the insured property hereunder." Swire contends that the Sue and Labor

---

[3] *See Laquila Constr., Inc. v. Travelers Indem. Co. of Ill.,* 66 F. Supp. 2d 543 (S.D.N.Y. 1999), *aff'd,* 216 F. 3d 1072 (2d Cir. 2000); *Schloss v. Cincinnati Ins. Co.,* 54 F. Supp. 2d 1090 (M.D. Ala. 1999), *aff'd,* 211 F.3d 131 (11th Cir. 2000); *Allianz Ins. Co. v. Impero,* 654 F. Supp 16 (E.D. Wash. 1986).

> Clause is a separate insuring agreement, and that the repair action, even if taken to correct an uncovered loss (a design defect), is covered by the clause because that action also prevented a future covered loss (the collapse of the building). Zurich, of course, disagrees.
>
> While both Swire and Zurich cite case law in support of their positions on this issue, neither points to a Florida case directly on point. In support of its position, Swire relies on a 1996 Minnesota appellate court decision, as well as a 1916 King's Bench decision. *See Witcher Const. Co. v. St. Paul Fire and Marine Ins. Co.*, 550 N.W.2d 1, 2-3, 8 (Minn. Ct. App. 1996) (where property insurance policy contained an exclusion for delay and loss of use as well as a provision similar to a sue and labor clause, the policy's exclusions for delay and loss of use did not limit the expenses that are reimbursable, provided the insured directed its efforts primarily at preventing an imminent covered loss); *Wilson Bros. Bobbin Co. v. Green*, [1917] 1 K.B. 860, 860, 864 (1916) (where policy insuring goods on board a steamship against "war risk" contained both an exclusion for "all claims arising from delay" and a sue and labor clause, the exclusion for claims arising out of delay did not affect recovery under the sue and labor clause where costs associated with delay were incurred to avoid the loss of the goods never reaching their destination). Zurich, on the other hand, points to *Southern Cal. Edison v. Harbor Ins. Co.*, 148 Cal. Rptr. 106 (Cal. Ct. App. 1978), the decision that the district court in this case relied on. In contrast to the courts in *Witcher* and *Wilson*, the court in *Edison* held that the insured could not recover under a builder's risk policy's Sue and Labor Clause for costs it claimed were incurred to mitigate and prevent a covered loss (loss to the superstructure) where the means (correcting a design defect) the insured used to mitigate and prevent the loss were excluded from recovery under the policy's exclusion for the "[c]ost of making good faulty workmanship, construction or design." *Id.* at 107, 111-13.

Id. at 11-15 (footnote omitted).

Finally, the court noted Swire's reliance on the Florida decision in *Steuart Petroleum Co., Inc. v. Certain Underwriters at Lloyd's London*, 696 So. 2d 376 (Fla. 1st DCA), *review dismissed*, 701 So. 2d 867 (Fla. 1997), in which recovery was

allowed under a Sue and Labor Clause despite conflict with another clause. (A:13). The court, however, did not find *Steuart* to be dispositive:

> [Swire] cites *Steuart* ... for the proposition that where, under Florida law, two insurance contract provisions are in conflict, the clause affording greater coverage should prevail. *Id.* at 379 (where insurance policy's Foam Loss Assumption Clause and Expenses to Reduce Loss Clause both dealt with loss reduction expenses and conflicted, the court allowed the latter clause, which afforded greater coverage, to prevail). Although *Steuart* has the advantage of being a Florida decision, it is distinguishable. In contrast to *Steuart,* only one of the provisions at issue here — the Sue and Labor Clause — specifically deals with the subject of loss reduction expenses. This is not a case where coverage is provided by two clauses. Moreover, the *Steuart* court's holding turned in part on the fact that the Expenses to Reduce Loss Clause was an endorsement, which, to the extent it was inconsistent with the body of the policy, controlled. *Id.* Here no endorsement is involved.

(A:13-14).

Unable to find definitive guidance in extant Florida law, the Eleventh Circuit certified the following three 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 repairing the structural deficiencies in the condominium building.

(A:14-15).

[4]

SUMMARY OF ARGUMENT

In answering the certified questions, the Court will be confronted with diametrically opposed interpretations of the two key clauses of the insurance contract, *i.e.*, the Sue and Labor Clause and the Design Defect Exclusion. Zurich has maintained that the Sue and Labor Clause is inapplicable to *any* efforts by an insured to *prevent* a covered loss — that is, that the clause comes into play *only after a covered loss has occurred*. Zurich further has contended that, if the Sue and Labor Clause does apply to Swire's efforts to prevent a collapse of the TTP condominium building (which would indisputably have been a covered loss), the Design Defect Exclusion disentitles Swire to recovery. Under either of these constructions, an insured may recover under the Sue and Labor Clause *only* for work performed and expenditures made *after* a covered loss has occurred.

Fundamental principles of Florida insurance law forbid this tortured reading of the insurance contract. Neither the plain language of the policy nor any reasonable interpretation thereof admits of a construction that effectively renders the Sue and Labor Clause of no effect. Yet that is precisely what Zurich is seeking by its argument that the Sue and Labor Clause may be invoked only after a covered loss has occurred — because an insured is, of course, entitled to seek coverage, at least up to the policy limits, *after* a covered loss. What Zurich is saying is that the Sue and Labor Clause actually applies only to expenditures made by an insured, following a covered loss, where the expenditures exceed the scope of coverage for a covered loss.

---

[4] The court noted that its "phrasing of the certified questions is merely suggestive," and that this Court, under established precedent, may "restate[] ... the issue or issues and the manner in which the answers are given." *Id.* at 15 (citations omitted).

This construction finds absolutely *no* support in the language of the policy. Moreover, all else aside, Zurich's interpretation of the clause is patently absurd: it essentially means that an insured should stand by and await a covered loss, instead of acting — as Swire undisputedly did — to *prevent* the covered loss. Of course, Zurich would *also* undoubtedly say that an insured who does not act to prevent a covered loss should be found to have breached its ordinary duties under the contract of insurance, thereby disentitling the insured to *any* coverage. This amounts to nothing less than a "heads-I-win-tails-you-lose" construction of the policy, which no insurer should be permitted to assert.

The *only* reasonable construction of the Sue and Labor Clause is that the clause applies to an insured's efforts to prevent a covered loss. Any other construction runs directly afoul of the established principle that, where a contract of insurance may be construed either as providing or limiting coverage, that construction which provides the greatest coverage must be adopted and the policy must be interpreted strictly *against* the insurer. Even more fundamentally, in the absence of express policy language, no contract of insurance may be given the absurd construction urged by Zurich.

With respect to the Design Defect Exclusion, it is also a fundamental Florida insurance-law precept that exclusionary clauses are interpreted most strictly against the insurer. Zurich's construction of the exclusion would accomplish the same result as its attempt to read the Sue and Labor Clause out of the policy entirely. That is, if an insured is making efforts to prevent — or, for that matter, to mitigate — a *covered* loss, Zurich would assert that *any* policy exclusion that may be invoked to deny coverage *for the work itself* can deprive the insured of its rights under the Sue and Labor Clause. This pinched reading of the contract has been rejected by the courts

of other states, and properly so.

The overarching purpose of the Sue and Labor Clause is to *encourage* an insured to act *for the benefit of the insurer* in preventing and mitigating covered losses, and an insured who does so should not be denied the benefits of the Sue and Labor Clause because *another* provision of the policy would apply if the insured had *not* been acting in accordance with the policies and provisions of the Sue and Labor Clause. Stated otherwise, because the Sue and Labor Clause primarily benefits the insurer, by limiting the insurer's exposure to liability, the insurer must be required to reimburse the insured for costs incurred in preventing or mitigating a covered loss — even if the policy would not otherwise cover *the expenses*, as opposed to the *loss* that the insured is attempting to prevent or mitigate.

In the end, both the historic purpose of the Sue and Labor Clause and Florida insurance-law principles compel a construction of the insurance contract that requires Zurich to reimburse Swire for expenses that were incurred to prevent a covered loss, ordinary policy exclusions notwithstanding. Any other construction would both eviscerate the Sue and Labor Clause of insurance contracts and, ultimately, work to the detriment of both insurers and insureds.

ARGUMENT

1. Coverage Under the Sue and Labor Clause.

a. The Sue and Labor Clause.

The Sue and Labor Clause is of ancient derivation, having first appeared in contracts for marine insurance as early as the seventeenth century. *Reliance Ins. Co. v. The Escapade*, 280 F.2d 482, 488 n.11 (5th Cir. 1960); *Zurich Ins. Co. v. Pateman*, 692 F. Supp. 371, 375 (D.N.J. 1987); *White Star S.S. Co. v. North British & Mercantile Ins. Co.*, 48 F. Supp. 808, 812-13 (E.D. Mich. 1943), and has been

described as "obscure but important." Laurence J. Eisenstein & Scott J. Levitt, *Year 2000 Insurance Recovery and the "Sue and Labor" Clause*, 602 PLI/LIT 661, 664 (Apr. 1999) (hereinafter *Year 2000 Insurance Recovery*). It is distinct from basic insurance coverage because it is "a separate insurance for the benefit of the insurer," unlike liability coverage for the benefit of the insured. *American Home Assurance Co. v. J.F. Shea Co., Inc.*, 445 F. Supp. 365, 369 (D.D.C. 1978). The separate nature of the reimbursement guaranteed under a Sue and Labor Clause is inherent in its very nature:

> The law is well settled that the sue and labor clause is a separate insurance and is supplemental to the contract of the underwriter to pay a particular sum in respect to damage sustained by the subject matter of the insurance. ... Under this clause the assured recovers the whole of the sue and labor expense which he has incurred, subject to the expense having been proper and reasonable in amount ..., and without regard to the amount of the loss or whether there has been a loss ....

White Star S.S., 48 F. Supp. at 812-13. The clause embodies the insured's duty to the insurer to protect the covered property. *Escapade*, 286 F.2d at 488.

Because the very nature of expenditures under the Sue and Labor Clause is for the benefit of the insurer, the duty imposed on the insured — and the correlative duty of the insurer to reimburse the insured — arise only when the insured is attempting to prevent or remediate a *covered* loss. *Escapade*, 286 F.2d at 488. In this respect, the Sue and Labor Clause "is tied irrevocably to the insured perils coverage." *Continental Food Prods., Inc. v. Insurance Co. of N. Am.*, 544 F.2d 834, 837 (5th Cir. 1977); *accord, e.g.*, *Escapade*, 280 F.2d at 489; *Tillery v. Hull & Co., Inc.*, 717 F. Supp. 1481, 1486 (M.D. Fla. 1988), *aff'd*, 876 F.2d 1517 (11th Cir. 1989).

b. The Sue and Labor Clause applies to an insured's efforts to prevent a covered loss under the insurance contract.

Swire spent approximately $4.5 million to correct structural deficiencies in the TTP building, after discovering those deficiencies during a peer review of the project engineer's work and was informed that the City of Miami would not issue a certificate of occupancy for the building. (A:3). "The peer review revealed numerous errors and omissions in the project that had to be corrected." *Id*. There is no dispute that the potential damage to the building as a result of the structural deficiencies — such as a total or partial collapse — would have been a covered loss under the policy. (R:24:Ex.A at Part A.1; R:67:22-24; R:68:14). The history, purpose, and very nature of the Sue and Labor Clause impel the conclusion that the clause must apply to an insured's efforts to *prevent* a covered loss, lest the clause be stripped of all meaning.

The Sue and Labor Clause, as previously noted, rests on what has been called the "clear duty" of an insured "to labour for the recovery and restitution of detained or damaged property." *Escapade,* 280 F.2d at 488 n.11 (citation omitted). "Against the background of this duty, the purpose of the cause is at least twofold," *i.e.*:

> It "is to (a) encourage and (b) bind the assured to take steps *to prevent a threatened loss* for which the underwriter would be liable if it occurred, *and* when a loss does occur to take steps to diminish the amount of the loss." Its principal ultimate aim is clear. "*Prevention of loss is the very object in view*. It contemplates the benefit of the insurers only. ..."

Id. (citations omitted; emphasis added). "An insured has the duty to exercise the care of a prudent, uninsured owner to protect insured property so as to minimize or prevent the loss from which the insurer would be liable." *Blasser Bros., Inc. v. Northern Pan-Am. Line,* 628 F.2d 376, 386 (5th Cir. 1980).

Thus, while an insured is entitled to recover monies spent "in an effort to *mitigate* damages and loss," *Blasser Bros.,* 628 F.2d at 386 (citation omitted;

emphasis added), the *very purpose* of the Sue and Labor Clause "is to encourage policyholders *to prevent imminent losses* that would be covered by a first-party policy ... thereby reducing the insurer's exposure under the policy." Walter J. Andrews & Leslie A. Platt, *The Sue and Labor Clause and Year 2000 Claims: No Basis for Insurance Coverage*, 9 COVERAGE 29 (May/June 1999) (emphasis added). As has been stated:

> The "sue and labor" clause has two functions. One is to encourage the policyholder to take reasonable measures to prevent a threatened loss for which the insurer would be liable if it happened, and when a loss does happen to take steps to minimize the amount of the loss. The other function of the cause is to provide reimbursement to the policy- holder for expenses that "are primarily for the benefit of the insurer to reduce or eliminate a covered loss." Indeed, the attempts at minimizing or avoiding losses need not even be successful to recover under this provision.
>
> * * *
>
> The "sue and labor" clause, therefore, provides coverage for efforts to "safeguard," "save," and "preserve" insured property. It will pay for the sandbags to put in front of your house to prevent the flood waters from entering....

Year 2000 Insurance Recovery, 602 PLI/LIT at 665 (footnotes omitted). It is, accordingly, an established principle that a Sue and Labor Clause "allows the insured to recover for labor and expenses incurred in order *to prevent a loss* for which the [insurer] would be responsible." *Pateman*, 692 F. Supp. at 375 (citation omitted; emphasis added); *accord*, *Blasser Bros.*, 628 F.2d at 386 & n.16; *Continental Food Prods.*, 544 F.2d at 836-37 n.1; *White Star S.S.*, 48 F. Supp. at 812-13.

As the Eleventh Circuit noted (A:10), these principles were applied by the Washington Court of Appeals in *Wolstein v. Yorkshire Ins. Co.*, 985 P.2d 400 (Wash. Ct. App. 1999), to hold that prevention costs must be reimbursed under a Sue and

Labor Clause. The overarching rule that an insured has a duty "to protect insured property in order to minimize *or prevent* the loss from the occurrence for which the underwriter would be liable," *Escapade*, 280 F.2d at 488 (emphasis added), thus dictates that an insured need not await the occurrence of a covered loss before acting with an expectation of reimbursement by the insurer. The dispute in *Wolstein* arose from the insurer's denial of coverage under a marine builder's risk policy after the boat builder had abandoned the project. 985 P.2d 403-04. The insured claimed that he had incurred sue and labor expenses in safeguarding the uncompleted vessel so that it could be preserved and ultimately built as originally planned. *Id*. at 403, 409. The insurer denied coverage because there had been no actual damage to the partially-built vessel at the time the expenses were incurred and, as here, the insurer prevailed before the trial court on summary judgment. *Id*. at 409.

The Washington court reversed for a trial on the claim for sue and labor expenses, applying the following, eminently reasonable, rationale:

> [A] covered loss does not have to occur in order to invoke coverage under the sue and labor provision. Rather, actions taken *to prevent a covered loss* will suffice to invoke coverage.
>
> * * *
>
> ... To require that a risk be imminent before coverage results would create a dilemma for the assured. *The assured would be placed in the unenviable position of determining whether there was enough evidence to support the immediacy of their action and thus allow reimbursement from their insurance policy, or whether they should refrain from acting and risk that damage will occur and that insurance coverage will be denied because they failed to act to prevent the casualty.* On the other hand, an assured should be able to determine what actions and expenses are reasonable without too much difficulty.

Id. at 409-10 (citation omitted; emphasis added).

Because, even in the absence of actual physical damage to the uncompleted vessel and, while acknowledging that "no one can say with certainty that the [vessel] would have incurred damage" had the insured not acted to safeguard it, the insurer could not secure summary judgment on the reasonableness of the insured's actions, the court reversed, finding that those actions, when viewed most favorably to the insured, were reasonable. *Id.* at 410. There is no principled distinction between the *Wolstein* decision and the present case: In both instances, the insured incurred expenses that were designed to prevent a covered loss, albeit prior to the occurrence of the covered loss.

[5]

In *Witcher Constr. Co. v. Saint Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1 (Minn. Ct. App. 1996), the pertinent provision, while "similar to a sue and labor clause," required *no action* on the part of the insured "until a covered loss *has already occurred*." *Id.* at 7-8 (emphasis added). While the insurer accordingly asserted that the insured "had no contractual obligation to mitigate because it experienced no covered loss," the court *rejected* that construction of the clause:

> [T]his does not alter either [the insured's] common law duty to prevent harm to the insured property or the insurer's corresponding obligation to reimburse [the insured] for those efforts. Thus, the trial court properly

---

[5] The other decisions noted by the Eleventh Circuit (A:9-10) do not hold to the contrary. In *Thornewell v. Indiana Lumbermens Mut. Ins. Co.*, 147 N.W.2d 317 (Wisc. 1967), the plaintiff sought to recover under a policy provision that provided: "in the event of loss hereunder, the Insured is permitted to make reasonable repairs ... provided such repairs are confined solely to the protection of the property from further damage." *Id.* at 321. Based on the express language of the policy, the court held that "[a] loss must first occur under the policy before the insured may make repairs to prevent further damage." *Id.* That clause is very different from the standard Sue and Labor Clause included in Swire's contract with Zurich.

> held the insurer accountable for its share of any reasonable and necessary cost of preventing an imminent covered loss to the insured property.

Id. at 8 (citations omitted). The holding in *Witcher* fully supports the result reached by the Washington court in *Wolstein*.

The *Wolstein* holding is also completely consistent with the Florida decision in *Steuart Petroleum Co. v. Certain Underwriters at Lloyd's London*, 696 So. 2d 376 (Fla. 1st DCA), *review dismissed*, 701 So. 2d 867 (Fla. 1997), which is, as the Eleventh Circuit noted (A:13-14), the only reported Florida decision to have spoken to the workings of a Sue and Labor Clause.

[6] In *Steuart*, the court noted that expenditures "incurred to *protect* the insured property" are "in accord with a sue and labor clause." 696 So. 2d at 378. Because the language of the Sue and Labor Clause does not admit of a restriction to *mitigation* of covered losses, the clause must be construed "in accordance with the plain language" of the policy. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000).

Finally, if any doubt were to remain as to the proper construction of the Sue and Labor Clause, the fundamental principle that "[a] reasonable interpretation of a contract is preferred to an unreasonable one," which is fully applicable to insurance contracts, controls. *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 941 (Fla. 1979) (citations omitted), controls. "The law is clear that if one interpretation of an insurance policy viewed with other provisions of the policy and its general object and scope, would lead to an absurd conclusion, that interpretation must be abandoned and one consistent with reason and probability adopted." *AAA Life Ins.*

---

[6] *Steuart* will be addressed in more detail in the discussion of the interaction between the Sue and Labor Clause and the Design Defect Exclusion in Point 2, *infra*.

Co. v. Nicolas, 603 So. 2d 622, 623 (Fla. 3d DCA 1992) (citation omitted).

[7] Here, Zurich would have the court construe the Sue and Labor Clause as providing *no* incentive on the part of an insured to pro-actively address potential covered losses, but rather to await the *occurrence* of a covered loss. As this Court has remarked, "[s]uffice it to say that insurance policies will not be construed to reach an absurd result." *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.,* 711 So. 2d 1135, 1140 (Fla. 1998) (citation omitted).

[8]

---

[7] These principles also dispose of Zurich's invocation of the Due Diligence Clause of the insurance contract as an alternative basis for denying coverage. See Brief of Appellee, Eleventh Circuit No. 01-12597-F, at 28-29. The Due Diligence Clause binds Swire to "use due diligence ... in doing all things reasonably practicable to avoid or diminish any loss or damage to the property." (R:24:Ex.A at Part D.17). In the Eleventh Circuit, Zurich asserted that this clause "requires that policy- holders like Swire avoid loss — at their own expense — where possible." Brief of Appellee, *supra,* at 28. In other words, Zurich contended that the Sue and Labor Clause is essentially dead-letter, because Swire is required to prevent and remediate *all* losses, including (but not limited to) covered losses, all at its own expense. The controlling rule, however, is that "*[e]very provision*" in a contract of insurance "should be given meaning and effect." *Excelsior Ins. Co.,* 369 So. 2d at 941 (citations omitted; emphasis added). Reconciling the Due Diligence Clause and the Sue and Labor Clause is particularly unproblematic: the Due Diligence Clause imposes a *general* duty to prevent or mitigate "*any* loss of or damage to the [insured] property" (R:24:Ex.A at Part D.17), while the Sue and Labor Clause obligates Zurich to *reimburse* for expenses actually incurred in preventing or mitigating a *covered* loss. Zurich's construction, on the other hand, is patently unacceptable because it would write the Sue and Labor Clause out of the contract.

[8] In actuality, it may be that Zurich's agenda is somewhat more pernicious. It is well established, as has been noted earlier, that the burdens imposed upon an insured by a Sue and Labor Clause are *mandatory*. *E.g., Einard LeBeck, Inc. v. Underwriters at Lloyd's of London, Eng.,* 224 F. Supp. 597, 598 (D. Ore. 1963) ("the courts have uniformly held that such language creates an unconditional obligation on the part of the

(continued...)

2. The Design Defect Exclusion Cannot Obviate Coverage Under the Sue and Labor Clause.

a. Interpreting exclusionary clauses.

"[E]xclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy." *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986) (citation omitted). While it is the general rule that "ambiguities in policies are to be strictly construed against the insurer," exclusionary clauses "are to be construed even more strictly than coverage clauses." *State Comprehensive Health Ass'n v. Carmichael*, 706 So. 2d 319, 320 (Fla. 4th DCA 1997) (citations omitted). As this Court reaffirmed in *Auto-Owners*:

> If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous. Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy. Likewise, ambiguous insurance policy exclusions are construed against the drafter and in favor of the insured. In fact, exclusionary clauses are construed even more strictly against the insurer than coverage clauses.

(...continued)
assured to take all reasonable steps to conserve the property"). At the same time, the presence of a Sue and Labor Clause may provide a basis for an insurer to assert that "the insured has forfeited its coverage by not suing and laboring to minimize a covered loss." 12 COUCH ON INSURANCE § 183:162 (3d ed. 1998). Thus, in Zurich's apparent view of this question, *all* of the obligations under the Sue and Labor Clause flow in the direction of the *insured* unless a covered loss has actually occurred. The insured is accordingly placed in the position of being *compelled* to prevent covered losses at its own expense, on pain of forfeiting its coverage under the contract of insurance. Not even the most tortured reading of the Sue and Labor Clause could countenance such a result.

756 So. 2d at 34 (citations omitted); *accord, e.g., National Auto. Ins. Ass'n v. Brumit,* 98 So. 2d 330, 332 (Fla. 1957) ("[p]rovisions of a policy of insurance which tend to limit or avoid liability are to be construed most liberally in favor of the insured and strictly against the insurer"); *Frontier Ins. Co. v. Pinecrest Preparatory School,* 658 So. 2d 601, 603 (Fla. 4th DCA) ("[a]ny ambiguity in interpreting the exclusion ... must be construed against the insurer"), *review denied,* 664 So. 2d 248 (Fla. 1995); *Harvard Farms, Inc. v. National Cas. Co.,* 555 So. 2d 1278, 1279 (Fla. 3d DCA) ("exclusionary provisions which are susceptible to more than one meaning as they apply to the given facts must be construed in favor of the insured and against the insurer who chose the language in drafting the policy"), *review denied,* 564 So. 2d 1086 (Fla. 1990); *Ceron v. Paxton Nat'l Ins. Co.,* 537 So. 2d 1090, 1091 (Fla. 3d DCA) ("if there is any ambiguity ... as to the particular exclusionary provisions," the ambiguity is construed against the insurer), *review denied,* 545 So. 2d 1368 (Fla. 1989). This principle is all the more applicable where, as here, the insurer has drafted the pertinent provisions of the policy because ambiguities in a contract of insurance must be construed most strictly *against the party that drafted the contract. E.g., Mayflower Corp. v. Davis,* 655 So. 2d 1134, 1137 (Fla. 1st DCA 1994) (ambiguities in insurance contract "should be construed against the party that drafted the written contract provision"), *review dismissed,* 652 So. 2d 817 (Fla. 1995); *Finberg v. Herald Fire Ins. Co.,* 455 So. 2d 462, 463 (Fla. 3d DCA 1984) ("doubtful language" in an insurance contract "should be interpreted most strongly against the party who selected that language").

b. The Design Defect Exclusion does not bar reimbursement under a Sue and Labor Clause for expenditures made to prevent a covered loss.

The Design Defect Exclusion provides as follows:

> Loss 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.

(R:24:Ex.A at Part B.1.c). The question is whether the Design Defect Exclusion, assuming that it could be invoked to exclude coverage under the policy's loss provisions for the actual work performed by Swire to prevent the covered loss, essentially trumps the Sue and Labor Clause

This issue, as the Eleventh Circuit noted (A:12-13), was first addressed by the King's Bench in *Wilson Bros. Bobbin Co., Ltd. v. Green*, [1917] 1 K.B. 860 (1916).[9] The policy in that case, which insured against "war risk," included a coverage exclusion for "all claims arising from delay." The insured loaded the covered property, a quantity of wood, aboard a Norwegian vessel for shipment to England during World War I. The cargo ship was intercepted by German war vessels and ordered either to return to port or be sunk. The cargo ship returned to port and the insured thereafter stored the wood in a Norwegian warehouse for several months until it succeeded in securing the cargo's shipment to England. The insurer denied coverage for the cost of storing the goods in the Norwegian warehouse, invoking the "delay" exclusion in response to the insured's request for reimbursement under the policy's Sue and Labor Clause. *Id.* at 861-62.

The court rejected the insurer's position because the insured's expenditures had been directed at preventing a covered loss, *i.e.*, the loss of the wood due to war risk. *Id.* at 862-64. The court held that the costs were "incurred in endeavoring to avert [a] loss" that would be covered under the policy and that the "delay" exclusion did not

---

[9] A copy of the decision is attached to Swire's motion for partial summary judgment. (R:23:Ex.B).

"affect[] in any way the suing and labouring clause." *Id.*

The Minnesota Court of Appeals acknowledged the continuing viability of this holding in *Witcher*. There, as in this case, the insurer issued a policy to cover losses from a construction project in a contract that included the equivalent of a Sue and Labor Clause. 550 N.W. 2d at 7. The pertinent policy exclusion provided that no coverage would be extended for "loss caused by delay." *Id.* at 5. The dispute occurred as a result of a natural gas explosion some blocks away from the project, which caused the insured to halt construction so as to determine the structural integrity of the building. Once it had been concluded that the building was safe, the insured resumed construction and sought recovery under the policy's equivalent of a Sue and Labor Clause. *Id.* at 3.

As in this case, in *Witcher* the insurer invoked a policy exclusion to defeat recovery under the Sue and Labor Clause, asserting that the "delay" exclusion barred the insured from obtaining reimbursement of its expenditures to determine the structural integrity of the building. *Id.* at 3. The Minnesota court reversed the trial court's summary judgment for the insurer, relying on the nature and purpose of the Sue and Labor Clause:

> Because this provision primarily benefits the insurer by limiting its exposure to liability, the insurer must reimburse the insured for the costs of mitigation, even if the policy would not otherwise cover those expenses....
>
> Witcher argues that 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 [loss to covered property]*.

Id. at 7-8 (citing *Wilson Bros.*, [1917] 1 K.B. at 862-63; emphasis added).

[10]

The holding in *Witcher* is faithful to the essential purpose of the Sue and Labor Clause – to encourage an insured to act to prevent a potential covered loss – and also enforces the clause's dictate that an insurer should not be permitted to reap the benefits of the insured's labor without reimbursing the insured for those benefits. Perhaps more importantly, the holding is entirely consistent with the command of Florida law that ambiguity created by possibly conflicting provisions in a contract of insurance be resolved in favor of the insured.

The First District's decision in *Steuart* addressed the interaction of the clause with other provisions in an insurance contract. The dispute arose from a massive five-day fire at a storage facility in Jacksonville. 696 So. 2d at 377. The insured used all the firefighting foam that it had maintained on the site and was required to bring in additional foam to contain the fire. *Id.* The on-site foam was covered by Steuart's policy with Lloyd's, but Lloyd's invoked the policy's "foam loss assumption" clause, under which the insurer was obligated only to pay the insured for the value of foam maintained on the premises, to refuse coverage for the additional foam. *Id.* at 377-78.

The policy also included both a Sue and Labor Clause that is virtually identical to the clause in Swire's policy, 696 So. 2d at 378 n.2, and an express limitation on the insurer's liability for expenses incurred to "reduc[e] any loss under this policy" to the amount by which the loss is reduced, *id.* at 379. The court found that the expenditure for the additional foam "was incurred to *protect* the insured property, *so it was in accord with the sue and labor clause.*" *Id.* at 378 (emphasis added). Addressing

---

[10] The court recognized that, if the insured acts to prevent a loss which is itself not covered due to an exclusionary clause, the Sue and Labor Clause would be inapplicable. *Id.* at 8 n.4.

Lloyd's argument that the "foam assumption clause" nonetheless governed, the court held:

> We conclude that both the foam loss assumption clause and the expenses to reduce loss clause deal with the subject of loss reduction expenses and that they are in conflict, therefore the clause affording greater coverage will prevail. The foam expense required to extinguish this massive five day fire was unquestionably an expense necessarily incurred to reduce loss....

Id. at 379 (citation omitted).

As the Eleventh Circuit noted (A:13-14), *Steuart* is not precisely on point with respect to the coverage dispute between Swire and Zurich. In *Steuart*, two different clauses provided coverage and one of those clauses was set forth in an endorsement, which necessarily governed over a conflicting clause in the policy body. 696 So. 2d at 379. Nonetheless, the treatment of the Sue and Labor Clause in *Steuart* is consistent with the decision in other jurisdictions that have addressed the precise question posed by the Eleventh Circuit. (A:15).

As the Eleventh Circuit noted (A:13), Zurich has relied on *Southern Cal. Edison Co. v. Harbor Ins. Co.*, 148 Cal. Rptr. 106 (Cal. Ct. App. 1978), to invoke the Design Defect Exclusion. (A:13). In *Witcher,* the Minnesota Court of Appeals analyzed *Southern Cal. Edison,* noting that the actions of the insured in that case had "simultaneously cured a more serious noncovered defect, which would have prevented [the insured] from demonstrating that it acted primarily for the insurer's benefit." *Witcher,* 550 N.W.2d at 8. For that reason, among others, the Court should not look to *Southern Cal. Edison* to interpret the relationship between the Design Defect Exclusion and the Sue and Labor Clause.

In *Southern Cal. Edison*, the pertinent exclusion was the "[c]ost of making

good faulty workmanship, construction or design." 148 Cal. Rptr. at 107-08. While Zurich's policy includes the same exclusion (R:24:Ex.A at Part B.1.b), Zurich pointedly did not rely on that exclusion in denying coverage (R:24:Ex.E at 3-4), and that exclusion played no part in the district court's decision (R:68). This distinction is, at the outset, of critical import: The "making good" exclusion in *Southern Cal. Edison* expressly excluded coverage for the *cost* incurred by an insured in correcting faulty workmanship or design; while here, the Design Defect Exclusion applies to "*[l]oss or damage* caused by fault, defect, error or omission in design, plan or specification." (R:24:Ex.A at Part B.1.b) (emphasis added). Of necessity, an insured will encounter significant difficulties in attempting to recover expenditures purportedly made to benefit the insurer by preventing future losses from faulty workmanship when the policy itself excluded the very cost of making good that very faulty workmanship.

Not surprisingly, the insurer in *Southern Cal. Edison* denied coverage for repairs (a process known as "mudjacking") to a power plant project that were necessitated by differential settling of the foundations. 148 Cal. Rptr. at 108. Following a trial, the court found that the costs were excluded from coverage under the "making good" exclusion and that "[t]he *only* loss and/or damage suffered by plaintiffs was in making good the faulty design." *Id.* at 109-10 (emphasis added). Thus, because *the means by which the insured corrected the faulty workmanship* were excluded from coverage by the "making good" exclusion, the court held that the Sue and Labor Clause could not be invoked:

> Here, damage to the superstructure, if it had occurred, would have been an insurable loss. Notwithstanding, *the means used by Edison to prevent or mitigate such damages were excluded from recovery under the policy.* 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....
>
> * * *
>
> ... Only by correcting the design defects was Edison able to prevent or mitigate loss to the superstructure. While loss to the superstructure was compensable under the policy, the correction of design defects was not. Mudjacking may have prevented or mitigated loss to the superstructure, *but at the same time it was the means by which Edison corrected the design defects.* Under this loss allocation contained in the policy, it must be said that the costs of mudjacking were not primarily for the benefit of the insurers. The benefit inuring to the insurers was only incidental ....

148 Cal. Rptr. at 112-13 (emphasis added).

The fine distinction upon which *Southern Cal. Edison* rests is thus revealed, as is Zurich's mistaken reliance on that decision for a general rule that policy exclusions will *always* trump an invocation of the Sue and Labor Clause. While the Design Defect Exclusion in Swire's policy bars recovery for loss or damage arising from design defects (with the exception of ensuing physical loss, see Point 3, *infra*), the "making good" exclusion at issue in *Southern Cal. Edison* barred recovery for the *costs of making good defective design or workmanship*. So it was that the California court saw its way to rejecting the insured's invocation of the Sue and Labor Clause: The *means* by which the insured sought to prevent future losses were *themselves* uncovered by the policy. This is a situation unlike that considered by the Minnesota court in the *Witcher* decision or, for that matter, any other reported decision interpreting a Sue and Labor Clause.

Because the holding in *Southern Cal. Edison* is both so narrow and so utterly inapposite to the determination whether the Design Defect Exclusion can bar recovery under the Sue and Labor Clause in this case, it is not necessary to reach the question

whether the analysis in that decision is either correct or in harmony with Florida law. Should that question nonetheless be addressed, in light of the Eleventh Circuit's invitation to the Court to speak to any issue "that may be lurking in the facts of this case" (A:14), the court should speedily dispatch *Southern Cal. Edison* as being inconsistent with the rules of construction, set forth in the previous subsection, that forbid a broad reading of an exclusionary clause. *E.g., Auto-Owners,* 756 So. 2d at 34-Owners Ins.*Reliance Ins. Co. v. Wiggins*

763 So. 2d 450 (Fla. 4th DCA 2000) is completely consistent with Florida law. The Minnesota court stressed the clear distinction between the Sue and Labor Clause and *coverage exclusions,* and declined to import the latter into the Sue and Labor Clause. 550 N.W.2d at 7-8. The analysis of the court in *Southern Cal. Edison* would ultimately lead to the same result — and the same unfairness — as Zurich's attempt to limit the application of the Sue and Labor Clause to actual *losses*, rather than actions by an insured to *prevent* losses. If the insurer has no obligation to reimburse the insured for work performed in an effort to *prevent* a covered loss, then the insured would be justified in simply awaiting the occurrence of the covered loss and then seeking coverage for an amount that might well be far greater than that for which the insurer would have been obligated under the Sue and Labor Clause for prevention of the covered loss. Once again, the prohibition against strained and absurd constructions of insurance contracts should bar the application of the Design Defect Exclusion to work performed by an insured to prevent a covered loss.

3. The Ambiguous Design Defect Exclusion Cannot Override the Application of the Sue and Labor Clause.

While the analysis in the previous sections shows that it is unnecessary to address the question propounded by the Eleventh Circuit with respect to application of the Design Defect Exclusion — because Swire is entitled to recover under the Sue

and Labor Clause – should the Court nonetheless reach that question (or decide that the Design Defect Exclusion can limit the application of the Sue and Labor Clause), the ambiguity in the Design Defect Exclusion would nonetheless require that the dispute be resolved in favor of coverage.

The Design Defect Exclusion purports to bar coverage for "[l]oss or damage caused by fault, defect, error or omission in design, plan or specification," but exempts, in the "ensuing loss" subclause, "*physical* loss or damage resulting from such fault, defect, error or omission in design, plan or specification." (R:24:Ex.A at Part B.1.c) (emphasis added). 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.

The failure to define a particular term in a contract of insurance does not necessarily create an ambiguity, *Deni Assocs.*, 711 So. 2d at 1139; *Pennsylvania Life Ins. Co. v. Aron*, 739 So. 2d 1171, 1173 (Fla. 3d DCA 1999), *review denied*, 753 So. 2d 563 (Fla. 2000), but such undefined terms "will be interpreted *liberally in favor of the insured*." *Pridgen*, 498 So. 2d at 1247 n.3 (citation omitted; emphasis added); *accord, e.g., Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 180 (Fla. 4th DCA 1997) ("[w]here a critical term is not defined in an exclusionary clause of the policy, it will be liberally construed in favor of an insured"), *review dismissed*, 717 So. 2d 534 (Fla. 1998). As this Court stated:

> The lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts. However, *where policy language is subject to differing interpretations*, the term should be construed liberally in favor of the insured and strictly against the insurer. In addition, "when an insurer fails to define a term in a policy, ... *the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage*

provided.'"

State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998) (citations omitted; emphasis added).

Applying this principle — and also reading the policy in its entirety, as is required by Florida law, § 627.419(1), Fla. Stat. (2000) ("[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy"); *CTC Dev.*, 720 So. 2d at 1075 (provisions of policy "should be read *in pari materia*") — the Design Defect Exclusion cannot be construed to bar reimbursement under the Sue and Labor Clause. The overall coverage provision of the policy states that coverage is provided for "[*p*]*hysical* loss or damage ... except as excluded hereunder." (R:24:Ex.A at Part A.1) (emphasis added). Coverage for pure *economic* damages appears to be barred by the first exclusionary provision. *Id.* at Part B.1.a (exclusion for "[c]onsequential loss or damage of any kind or description including loss of market or delay").

Because the Design Defect Exclusion bars recovery for "loss or damage" and the "ensuing loss" exception allows recovery for "*physical* loss or damage" arising from a design defect, the absence of any definition of those terms prevents the insurer from insisting on the most restrictive interpretation, *i.e.*, as allowing recovery only for physical damage to portions of the property that are *unaffected* by the design defect. (R:68:13-14). Particularly because exclusionary clauses must be construed strictly in favor of the insured under Florida law, the undefined terms of the Design Defect Exclusion cannot be construed to exclude all ensuing physical loss except for that which was directly caused by the design defect.

The authority upon which Zurich has relied to invoke the Design Defect

Exclusion does not support a different reading of the pertinent policy provisions. The decision in *Laquila Constr. Inc. v. Travelers Indem. Co. of Ill.*, 66 F. Supp. 2d 543 (S.D.N.Y. 1999), *aff'd*, 216 F.3d 1072 (2d Cir. 2000), involved *neither* a Design Defect Exclusion *nor* a dispute arising under a Sue and Labor Clause. Rather, the dispute in that case arose from the policy's "making good" exclusion, 66 F. Supp. 2d at 545-46, which barred recovery for the cost of "making good" faulty workmanship. The "ensuing loss" exception to the exclusion allowed recovery for "physical losses" resulting from faulty workmanship, and the court thus, quite logically, concluded that the cost of repairing the property could not fall within the "ensuing loss" provision. *Id.* at 545. While, in *Laquila*, the clear distinction between the excluded *costs* and the exception for *loss* guided the court in construing the policy against the insured, no such bright line exists in the Design Defect Exclusion from which the present dispute arises. To the same effect is *Allianz Ins. Co. v. Impero*, 654 F. Supp. 16 (E.D. Wash. 1986). (R:68:12). The decision in *Schloss v. Cincinnati Ins. Co.*, 54 F. Supp. 2d 1090 (M.D. Ala. 1999), *aff'd*, 211 F.3d 131 (11th Cir. 2000), involved an exclusion for "loss caused by rot" and, applying the same approach as *Laquila*, the court held that the "ensuing loss" exception could not be invoked to cover repairing the rot. 54 F. Supp. at 1094-96. Here, in contrast, there is the distinction between "loss" and "physical loss," as well as the controlling rule of Florida law that forbids a construction of an undefined term in favor of the insurer.

As the Eleventh Circuit correctly noted, the decisions upon which Zurich relies "did not involve Florida law." (A:9). Perhaps more significantly, none of those decisions addressed an attempt by an insurer to evade its reimbursement responsibilities under a Sue and Labor Clause based on an ambiguous policy exclusion.

[11] While neither this Court nor the district courts of appeal have passed on this precise issue, the required narrow reading of a policy exclusion and the recognized primacy of a Sue and Labor Clause in Florida law, *Steuart,* 696 So. 2d at 379, point unerringly to the correct resolution. If, as has been established, the Sue and Labor Clause is an *independent* provision of the insurance contract that requires an insured to *prevent* covered losses *and* requires the insurer to reimburse the insured for doing so, an ambiguous *coverage* exclusion cannot be read into the clause to allow the insurer to escape its responsibilities – while the insured *alone* remains bound by the clause.

CONCLUSION

Based on the foregoing, Swire requests the Court to answer the certified questions posed by the Eleventh Circuit by ruling that: (i) the policy's Sue and Labor Clause applies to an insured's attempts to prevent a covered loss; (ii) the Sue and Labor Clause covers the cost of repairs to the condominium building; and (iii) that Swire's right to reimbursement under the Sue and Labor Clause is not limited by the policy's Design Defect Exclusion.

---

[11] While the question whether the Design Defect Exclusion would support a denial of *coverage* under the loss provisions of the policy – independent of the Sue and Labor Clause – need not be reached by the Court, the analysis of the decisions in *Laquila, Allianz,* and *Schloss* set forth in text would support a refusal to allow Zurich to invoke the exclusion under any circumstances.

	Respectfully submitted, Elliot H. Scherker, Esq. Florida Bar No. 202304 Marlene K. Silverman, Esq. Florida Bar No. 226947 Elliot B. Kula, Esq. Florida Bar No. 003794 Greenberg Traurig, P.A. 1221 Brickell Avenue Miami, Florida 33131 Telephone: (305) 579-0500 Facsimile: (305) 579-0723 By: Elliot H. Scherker
Ronald W. Kleinman, Esq. Greenberg Traurig, LLP 800 Connecticut Avenue, N.W. Suite 500 Washington, D.C. 20006 Telephone: (202) 331-3100 Facsimile (202) 331-3101 Scott D. Greenspan, Esq. Greenberg Traurig, LLP 885 Third Avenue New York, NY 10022 Telephone: (212) 801-2100 Facsimile (212) 688-2449	
Counsel for Swire Pacific Holdings, Inc.	

CERTIFICATE OF SERVICE

I certify that a copy of this brief was mailed on April ___, 2002 to:

Janet L. Brown, Esq. Boehm Brown Seacrest & Fischer, P.A. 101 Southall Lane, Suite 375 Maitland, Florida 32751	Leslie A. Platt, Esq. Wiley Rein & Fielding 1776 K Street, N.W. Washington, DC 20006-2304

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

\\MIA-SRV01\SCHERKERE\1381074v01\TLN601!.DOC\4/12/02\04483.350100