IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC02-613

SWIRE PACIFIC HOLDINGS, INC.,

Plaintiff-Appellant,

v.

ZURICH INSURANCE COMPANY,

Defendant-Appellee.

REPLY BRIEF OF SWIRE PACIFIC HOLDINGS, LTD.

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

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ARGUMENT

1. Coverage under the Sue and Labor Clause. Zurich completely misstates Swire's position. It insinuates that Swire is seeking coverage under the Sue and Labor Clause to prevent a loss that would *not* have been covered under the policy and flatly says that Swire is arguing that the Sue and Labor Clause is "a stand-alone insurance contract with a single term" that is completely independent of other provisions of the policy. Brief for Defendant-Appellee Zurich Insurance Company (Zurich Brief) at 25-28. Even a cursory review of Swire's brief shows this mischaracterization for what it is. See Brief of Swire Pacific Holdings, Ltd. (Swire Brief) at 10-13. Swire fully recognizes that an insurer's duty to reimburse an insured under a Sue and Labor Clause "arise[s] only when the insured is attempting to prevent or remediate a *covered* loss" and that the Sue and Labor Clause is indeed "tied irrevocably to the insured perils coverage." Swire Brief at 11 (citations omitted).

The parties disagree, however, on whether the Sue and Labor Clause covers an insured's efforts to *prevent* a covered loss. See Zurich Brief at 39-49; Swire Brief at 11-17. Zurich says that, because the Sue and Labor Clause in Swire's policy begins with the words, "[i]n case of loss or damage" (R24:Ex.A at Part D.21), the Court should hold that the clause applies "only to circumstances where a covered loss has

occurred — not where loss is merely foreseen." Zurich Brief at 39. Zurich thus commits the error of which it so freely accuses Swire, Zurich Brief at *e.g.,* 9, 23, 30, that is, Zurich *ignores* the express language of the contract of insurance. The Sue and Labor Clause, read in its entirety, as it *must* be read under Florida law, *e.g., Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla. 2000) ("courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect") (citations omitted), states:

> 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, ... 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....

(R:24:Ex.A at Part D.21) (emphasis added). Read in its entirety, the Sue and Labor Clause plainly contemplates *preserving* the insured property against loss. No "linguistic reverse-engineering" Zurich Brief at 41, is required to reach that obvious conclusion.

While Zurich cites decisions in which the courts construed similar clauses that also included specific references to "imminent loss," *e.g., American Home Assurance Co. v. J.F. Shea Co., Inc.,* 445 F. Supp. 365, 369 (D.D.C. 1978), Zurich Brief at 39-40,

Zurich cites *no* authority for the proposition that such language is a *prerequisite* to recovery under a Sue and Labor Clause when an insured exercises its duty to preserve the property against such imminent loss. *Id.* at 39-43. In *Reliance Ins. Co. v. The Escapade,* 280 F.2d 482 (5th Cir. 1960), which both Swire and Zurich recognize as a touchstone decision on the meaning of the Sue and Labor Clause, Swire Brief at 10-12; Zurich Brief at 27-28, 42, the court, construing a Sue and Labor Clause that applied, as here, "[i]n case of any loss or misfortune," 280 F. 2d at 484 n.4, interpreted the clause to include expenditures by an insured to prevent a covered loss:

> Since an assured has the duty toward his underwriter to exercise the care of a prudent uninsured owner to protect insured property in order *to minimize or prevent* the loss ... for which the underwriter would be liable under the policy, the clause undertakes to reimburse the assured for *these expenditures* which are made primarily for the benefit of the underwriter *either to reduce or eliminate a covered loss altogether*.

Id. at 488 (emphasis added). To the same effect are *Blasser Bros., Inc. v. Northern Pan-Am. Line,* 628 F.2d 376 (5th Cir. 1980), in which the Sue and Labor Clause similarly applied "[i]n case of any loss or misfortune" *id.* at 386 & n.16, and *Continental Food Prods., Inc. v. Insurance Co. of N. Am.,* 544 F.2d 834, 836-37 &

n.1 (5th Cir. 1977).[1] There is simply no doctrinal basis for Zurich's attempt to limit the Sue and Labor Clause into nonexistence.[2]

Swire has relied on the decision in *Wolstein v. Yorkshire, Ins. Co.,* 985 P.2d 400 (Wash. Ct. App. 1999), for the proposition that a Sue and Labor Clause entitles an insured to recover prevention costs. Swire Brief at 13-15. The best that Zurich can say is that, because the *Wolstein* decision cited to an earlier decision that involved a claim for recovery of mitigation costs, the Washington court "applied law clearly inapplicable to the facts before it." Zurich Brief at 42-43. The careful analysis in the *Wolstein* decision belies such a facile dismissal. See Swire Brief at 14.[3] Zurich's attempt to have the Court ignore the decision in *Witcher Constr.*

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[1] *Young's Market Co. v. American Home Assurance Co.,* 4 Cal. 3d 309, 481 P.2d 817 (1971), upon which Zurich relies for its "imminence" argument, Zurich Brief at 40, not only does not hold that express language is required for a Sue and Labor Clause to apply to an insured's efforts to prevent damage to the insured property, but quotes both *Escapade* and the earlier decision in *White Star S.S. Co. v. North British & Mercantile Ins. Co.,* 48 F. Supp. 808 (E.D. Mich. 1943), upon which Swire has relied, Swire Brief at 10-11, 13, in holding that a Sue and Labor Clause applies "without regard to the amount of the loss *or whether there has been a loss*." 481 P.2d at 820. Nothing in the decision even suggests that the quoted principle applies only when the clause expressly includes the word "imminent."

[2] Indeed, if Zurich's analysis is correct, there would have been no need for the Eleventh Circuit to have certified the question to this Court. The Eleventh Circuit recognized the case law upon which Swire has relied and that this precedent "state[s] generally that, under a sue and labor clause, the insured has a duty to minimize *or prevent* covered losses." (A:10-11) (citations omitted). That court, of course, is fully capable of applying the general principles that govern the interpretation of insurance policies under Florida law. *E.g., City of Delray Beach, Fla. v. Agricultural Ins. Co.,* 85 F.3d 1527, 1535 (11th Cir. 1996). As the cited cases indicate, however, the construction of a Sue and Labor Clause, the absence of an express provision regarding "imminent loss" notwithstanding, is a question of contractual interpretation and not one that should be answered by parsing the terms of a particular clause.

[3] As the court noted in *Wolstein,* "[t]o require that a risk be imminent before coverage results would create a dilemma" for an insured, because the insured "would be placed in the unenviable position of determining whether there was enough evidence to support the immediacy of their action ... or

Co. v. St. Paul Fire & Marine Ins. Co., 550 N.W.2d 1 (Minn. Ct. App. 1996), see Swire Brief at 15, because the insurance contract in *Witcher* "did not even contain a sue and labor clause," Zurich Brief at 43, is equally unavailing. As Swire noted in its careful discussion of that decision, the only difference between the clause involved in that case and a traditional Sue and Labor Clause is that the insured had no duty to act until a covered loss occurred, and the court held that *both* the insured and the insurer nonetheless had obligations when an *imminent* loss was threatened. Swire Brief at 15.

So it is that the *only* precedent on this issue fully supports Swire's position with regard to the obligations imposed under the Sue and Labor Clause.[4] Zurich cites to *no* principle of Florida

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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." 985 P.2d at 409-10. See Swire Brief at 14. Zurich, however, continues to maintain that the interaction of the Due Diligence Clause of the insurance contract and the Sue and Labor Clause *require* that an insured be put to precisely such a "Hobson's choice." Zurich Brief at 45-48. The *proper* interaction of the two clauses is addressed by Swire in its opening brief. See Swire Brief at 16 n.7. In response to Zurich's unpleasant rhetoric, Zurich Brief at 46-47, it suffices to say that the Due Diligence Clause, unlike the Sue and Labor Clause, is *not limited to covered losses*. (R:24:Ex.A at Part D.17). An insured has *no* expectation of compensation for the prevention of *uncovered* losses, although it has a duty to prevent such losses. The Sue and Labor Clause, in contrast, applies *only* to covered losses. The Due Diligence Clause is thus of absolutely *no* assistance to Zurich in its attempt to write the Sue and Labor Clause our of the insurance contract.

[4] Swire noted that the holdings in *Wolstein* and *Witcher* are consistent with the only Florida decision that touches on the application of a Sue and Labor Clause, *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). Swire Brief at 15-16. As the Eleventh Circuit observed, Swire has always recognized that *Steuart* "is not on all fours with this case." (A:13). Zurich nonetheless sets up a "straw man" argument on the unposed question whether coverage under the Sue and Labor Clause is required by *Steuart*. Zurich Brief at 35-36, 43-44.

insurance law that is in any way inconsistent with those well-reasoned decisions. Swire should not be accused of an "attempt to reach into deep pockets other than its own" or of seeking a "windfall" recovery. Zurich Brief at 47, 49. Rather, having undertaken expensive efforts to prevent a covered loss — for the benefit of both itself and the insurer, as required under the contract of insurance — Swire merely seeks appropriate reimbursement in accordance with the Sue and Labor Clause. The result urged upon the Court by Zurich is inconsistent with both the language and the purpose of the clause, and would create precisely the uncertainty on the part of an insured that has led the courts of other states to eschew the strained and unreasonable interpretation propounded by Zurich.

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

Zurich does not dispute that exclusionary clauses are to be construed strictly against the insurer, particularly where, as here, the insurer has drafted the contract of insurance. See Swire Brief at 18-19; Zurich Brief at 21-22. As will be set forth below, Swire is hardly asking the Court to disregard *any* plain language in the insurance contract, much less to engage in what Zurich claims is "judicial legislation." Zurich Brief at 22.

The interplay of a policy exclusion and the Sue and Labor Clause was, as Zurich concedes, Zurich Brief at 37-38, addressed by the Minnesota Court of Appeals in the *Witcher* decision. See Swire Brief at 20-21; Zurich Brief at 37-38.[5] Zurich attempts to distinguish *Witcher* because the policy exclusion at issue in that case excluded loss occasioned by delay, not by design defect, as here. Zurich Brief at 37-38. That distinction, of course, would render completely inapposite *all* of the decisions upon which Zurich chiefly relies. *Southern Cal. Edison Co. v. Harbor Ins. Co.,* 148 Cal. Rptr. 106 (Cal. Ct. App. 1978) (construing a "making good" exclusion and a Sue and Labor Clause); *Laquila Constr. Inc. v. Travelers Indem. Co. of Ill.,* 66 F. Supp. 2d 543 (S.D.N.Y. 1999) (construing "making good" exclusion), *aff'd,* 216 F.3d 1072 (2d Cir. 2000); *Schloss v. Cincinnati Ins. Co.,* 54 F. Supp. 2d 1090 (M.D. Ala. 1999) (construing exclusion for "loss caused by rot"), *aff'd,* 211 F.3d 131 (11th Cir. 2000). Zurich Brief at 15-19, 30-34. Indeed, Zurich ultimately argues that any distinction based on the particular exclusion in a given contract "is a distinction without a difference." Zurich Brief at

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[5] Zurich indulges itself in yet additional colorful rhetoric in criticizing the Minnesota court's reliance on *Wilson Bros. Bobbin Co., Ltd. v. Green,* [1917] 1KB 860 (1916) (R:23:Ex.B). Zurich Brief at 38. That rhetoric, however, is of no assistance to the Court in resolving the issue of contract interpretation presented here, and which the Minnesota court resolved in a manner entirely consistent with Swire's interpretation of the contract.

18-19. There is, accordingly no basis for Zurich's argument that the holding in *Witcher* is, in any respect, inconsistent with Florida law.[6]

That leaves only *Southern California Edison* as purported support for Zurich's position. Zurich Brief at 31-35. Swire's opening brief addresses the inapplicability of *Southern California Edison*, and in particular notes that the opinion focuses on the applicability of a "making good" exclusion, rather than an exclusion that is the equivalent of the Design Defect Exclusion upon which Zurich relies here. Swire Brief at 23-26.

In response, Zurich completely misinterprets Swire's argument and answers an argument that Swire has never made, *i.e.,* 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.'" Zurich Brief at 33-34. What Swire

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[6] Zurich's reliance on *Fireman's Fund Ins. Co. v. Cramer,* 178 So. 2d 581 (Fla. 1965), Zurich Brief at 20, serves to show only the lack of any Florida-law basis for the fundamental premises of its argument. The issue addressed in *Cramer* was whether an exclusionary clause that barred coverage for "mechanical or electrical breakdown" relieved the insurer of liability when the insured's automobile engine overheated due to a malfunctioning thermostat and the engine was destroyed. 178 So. 2d 582-83. Zurich does not explain how the *Cramer* decision is of any assistance in determining whether the Design Defect Exclusion applies to the Sue and Labor Clause. Zurich Brief at 20.

actually has said is that *Southern California Edison* stands for nothing more than the proposition that, where recovery is barred by an exclusionary clause for the costs of making good defective design or workmanship, the Sue and Labor Clause does not apply to the costs of making good the defective design or workmanship. Swire Brief at 25. The *only* exclusion invoked by Zurich in the present case is the Design Defect Exclusion, which does not bar recovery for the cost of making good defective design or workmanship, but rather bars recovery for "*physical loss or damage* resulting from ... fault, defect, error or omission in design, plan or specification." (R:24:Ex.A at Part B.1.c) (emphasis added).

Zurich insists that the exclusion applied in *Southern California Edison* is a "design defect exclusion," Zurich Brief at 32-33, when the opinion itself reflects that the exclusion was for the "[c]ost of making good faulty workmanship, construction or design." 148 Cal. Rptr. 107-08. And, in a paradigm of understatement, Zurich says that "the specific language" in the *Southern California Edison* exclusion "differs slightly from that at issue here." Zurich Brief at 33. The exclusionary clause differs in a *dispositive* respect: the Design Defect Exclusion bars recovery for *loss or*

damage caused by design defects, while the "making good" exclusion at issue in *Southern California Edison* barred recovery for the "cost" of making good defective design or workmanship. Zurich, which repeatedly demands that the Court apply the precise words of the insurance contract, Zurich Brief at, *e.g.,* 22-23, 33, cannot shoehorn the Design Defect Exclusion into the "making good" exclusion in *Southern California Edison*.

Southern California Edison simply cannot be stretched to read that *all* policy exclusions limit reimbursement under a Sue and Labor Clause, even when the insured has been working to prevent a covered loss. Because of the dispositive difference between the effect of a "making good" exclusion on the Sue and Labor Clause and the Design Defect Exclusion at issue here, *Southern California Edison* does not support allowing Zurich to escape payment for Swire's efforts to prevent the collapse of the insured building.

3. The Ensuing Loss Provision Cannot Override the Application of the Design Defect Exclusion

opening brief at 27-30. Zurich persists in overlooking that the "ensuing loss" decisions upon which it relies *do not address* the right to reimbursement under a Sue and Labor Clause. Zurich Brief at 15-18. Contrary to Zurich's attempt to blur this critical distinction, Swire does not assert that the "ensuing loss" provision of the Design Defect Exclusion overrides *the exclusion itself*. Rather, based on ambiguity in the two components of the clause, Swire has asserted that the clause cannot be construed to exclude all ensuing physical loss except for that which was *directly* caused by the design defect. Swire Brief at 28. Because of that ambiguity, the Design Defect Exclusion cannot be invoked to defeat recovery under the Sue and Labor Clause — even if the exclusion could be invoked in the first instance.

Swire has no quarrel with the proposition cited by Zurich, *i.e.,* that, as exemplified by this Court's decision in *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.,* 711 So. 2d 1135, 1138 (Fla. 1998), contractual interpretation is appropriate "[o]nly when a genuine inconsistency, uncertainty or ambiguity in meaning remains after resort to the ordinary rules of construction." Zurich Brief at 21-22. But Zurich bases its argument *solely* on the "ensuing loss" provision of the Design Defect Exclusion, asserting that the provision is not ambiguous. Zurich Brief

at 23-24. This misapprehends Swire's argument, which is that the ambiguity is caused by the language of the *exclusion, i.e.,* that coverage is barred for "[l]oss or damage caused by fault, defect, error or omission in design, plan or specification," *and* the simultaneous *allowance* in the "ensuing loss" clause of recovery for "*physical* loss or damage." (R:24:Ex.A at Part B.1.c). This ambiguity is made worse by the overall coverage provision of the contract, which states that coverage is provided for "[p]hysical loss or damage ... except as excluded hereunder." *Id.* at Part A.1.

Thus, the Design Defect Clause excludes coverage for "loss or damage" and the "ensuing loss" provision *allows* recovery for *physical* loss arising from a design defect. Moreover, there is no definition of "physical loss" in the contract of insurance, which, taken together with the ambiguity in the exclusionary provision itself, prohibits a restrictive interpretation in favor of the insurer. *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072, 1076 (Fla. 1998). See Swire Brief at 27-28.[7]

[7] Swire has not asserted that the mere absence of a definition of "physical loss or damage" renders the policy ambiguous. Swire Brief at 27-30. Zurich's argument that "physical loss or damage" has "a clear and understood meaning," Zurich Brief at 23 n.5, is thus of no moment. Rather, it is the difference in terms within the Design Defect Exclusion *and* the absence of a definition that, taken together, forbids a restrictive interpretation in Zurich's favor.

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.

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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.

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