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IN THE SUPREME COURT OF FLORIDA

JOHN ROBERT SEBO, individually and as Trustee under a Revocable Trust Agreement of John Robert Sebo dated November 4, 2004, et. al.,

Petitioner,

v.

AMERICAN HOME ASSURANCE COMPANY, INC.,

Respondent.

Case No.:	SC14-897
App. Case No.:	2D11-4063
L.T. Case No.:	07-0054 CA
consolidated with	07-1539 CA

THE FLORIDA ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS' AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Association of Public Insurance Adjusters ("FAPIA") is a non-profit organization formed in 1993, immediately following Hurricane Andrew, for the purposes of: 1) organizing the Public Insurance Adjusters of the State of Florida in order to better serve the interests of insureds; 2) facilitating the expeditious and proper handling of insurance losses and claims; and 3) studying and assisting in carrying out all laws and regulations pertaining to Public Insurance Adjusters. With nearly 400 members and associates, FAPIA is the largest regional association for public adjusters in the nation and frequently serves as a source of consultation on industry issues for the Florida Department of Insurance.

The issue raised in this case is whether the long-standing "concurrent cause doctrine" should be abolished in favor of the pro-insurer "efficient proximate cause doctrine" in first-party insurance cases involving multiple independent perils—one or more of which is covered, and one or more of which is not. This matter will have a substantial impact on insurance carriers and policyholders. Because FAPIA regularly assists insureds in the adjustment of claims and losses involving multiple perils, FAPIA's perspective should provide assistance in analyzing the broad implications of the Second District Court of Appeal's ruling.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal improperly rejected the long-standing concurrent cause doctrine in favor of the pro-insurer efficient proximate cause doctrine. The concurrent cause doctrine, however, is not only completely consistent with Florida's public policy and the long-standing rules of construction based thereon, but it has also proven to be a workable, predictable, and entirely fair solution for determining coverage in the relatively rare situations where multiple independent perils combine to cause a loss.

If the Second District Court of Appeal's ruling were upheld, it would potentially result in homeowner's insurance policyholders being deprived of the full coverage upon which their insurance premiums were based and paid, in contravention of well-established Florida law requiring that insurance policies be construed in favor of finding coverage wherever a reasonable interpretation allows it. Moreover, the Second District Court of Appeal's decision would engender unnecessary and costly litigation, which is prevalent in jurisdictions using the unpredictable and highly subjective efficient proximate cause standard.

ARGUMENT

I. PUBLIC POLICY REQUIRES THE APPLICATION OF SPECIFIC RULES OF CONSTRUCTION, WHICH FAVOR THE INSURED PUBLIC

a. *Insurance is a business coupled with a public interest*

The financial security insurance policies provide (or purport to provide) is critical to our modern economy. Indeed, today, it is virtually impossible to own property of any kind without obtaining insurance. As explained by one commentator, it is precisely this "mandatory" nature of insurance and the resultant high degree of interaction between insurance companies and the relatively vulnerable consuming public that has led courts and legislatures to treat insurance contracts differently from any other commercial contracts:

> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a business affected with a public interest, as reflected in legislative and judicial decisions.
>
> State laws restrict contractual rights for insurers in the public interest. For example, insurers cannot consider an applicant's race or religion in determining acceptability or rate classification. Many jurisdictions have adopted legislation limiting the insurers' rights to reject, cancel, or refuse to renew certain types of insurance….

James J. Lorimer, *The Legal Environment of Insurance* 179, 180 (4th ed. 1993).

Other commentators have similarly recognized the public policy rationale for distinguishing insurance policies from other types commercial contracts. As explained by Professor Henderson of the University of Arizona College of Law:

> Disruptive losses to society, as well as to the individual, are obviated or minimized by private agreements among similarly situated people. In this way, the insurance industry plays a very important institutional role by providing the level of predictability requisite for the planning and execution that leads to further development. Without effective planning and execution, a society cannot progress.
>
> This perceived social significance has set apart insurance contracts from most other contracts in the eyes of the law. Insurance is purchased routinely and has become pervasive in our society. It protects against losses that otherwise would disrupt our lives, individually and collectively. The public interest, as well as the individual interests of millions of insureds, is at stake. This is the foundation for the general judicial conclusion that the business of insurance is cloaked with a public purpose or interest. This perception also explains the extensive regulation of the insurance industry in the United States, not just through legislative and administrative processes, but also through the judicial process.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. Mich. J.L. Reform 1, 10-11 (1992) (citations omitted).

Similar sentiments were echoed by Professor Susan Randall of the University of Alabama School of Law in her oft-cited article, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*:

> As the United States Supreme Court has long recognized, insurance is business coupled with a public interest. Consumers invest substantial sums in insurance coverage in advance, but the value of the insurance lies in the future performance of the various contingent obligations. Because the interests protected are so important—including an individual's future ability to provide for dependents in case of death or injury, to retire, to obtain necessary medical treatment, to replace

> damaged or destroyed property—regulation of the industry furthers public welfare.

26 Fla. St. U. L. Rev. 625, 637 (1999) (citing *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411-15 (1914)).

Recognizing these unique policy considerations, courts and legislators nationwide have promulgated a specialized field of common law and numerous rules, statutes, and regulations to provide protection to consumers.

b. *Insurance policies are complicated contracts of adhesion, which are rarely understood by insureds*

If the pervasive and often mandatory nature of insurance were not reason enough to impose safeguards for the protection of the consuming public, courts and legislatures have further recognized that insurance contracts are complicated contracts of adhesion, which the insureds, who are required to purchase them, rarely understand. As noted by this Court, "insurance policies, which are prepared by experts in a very complex area and involving the intricate interplay of the various provisions of a given policy, are difficult for a layman to understand." *Nixon v. U. S. Fid. & Guar. Co.*, 290 So. 2d 26, 29 (Fla. 1973).

Discussing the extreme level of difficulty associated with interpreting insurance policies, one commentator noted:

> A state insurance department study of the readability of insurance policies measured the standard automobile policy by the Flesch Readability Scale. This scale assesses the readability of written documents by assigning point values for length and complexity of

> sentence structure. The higher the total score, the more readable the document. For the passage selected for this particular study, the Bible received a readability score of 66.97, and Einstein's Theory of Relativity scored 17.72. Both scored higher as to readability then the standard automobile policy at 10.31.

Lorimer, *The Legal Environment of Insurance*, at 176-77.

Thus, as succinctly summed up by the Supreme Court of Nevada:

> … an insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured. . . . The parties are not similarly situated. The company and its representatives are expert in the field; the applicant is not. ***A court should not be unaware of this reality and subordinate its significance to strict legal doctrine***.

Prudential Ins. Co. of Am. v. Lamme, 425 P.2d 346, 347 (Nev. 1967) (emphasis added); *see also Allen v. Metro. Life Ins. Co.*, 208 A.2d 638, 644 (N.J. 1965) ("When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow.") (Quoting *Kievit v. Loyal Protect Life Ins. Co.*, 170 A.2d 22 (N.J. 1961)).

c. *Florida's long-standing rules of construction for insurance contracts attempt to address the inequities between insurer and insured*

Given the significant public policy considerations at stake, for more than a century, this Court has employed rules of construction that afford coverage wherever

a reasonable interpretation allows it. *See L'Engle v. Scottish Union & Nat. Fire Ins. Co.*, 37 So. 462, 467 (Fla. 1904) ("In all cases, the policy must be liberally construed in favor of the insured so as not to defeat without plain necessity his claim to the indemnity, which in making the insurance it was his object to secure.").

Just last year, this Court re-affirmed these long-standing, pro-insured tenets of Florida insurance law:

> "It has long been a tenet of Florida insurance law that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer." Thus where, as here, one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted.

Washington Nat. Ins. Corp. v. Ruderman, 117 So. 3d 943, 950 (Fla. 2013) (quoting *Berkshire Life Insurance Co. v. Adelberg*, 698 So. 2d 828, 830 (Fla.1997)).

Consistent with the general principal that, wherever possible, insurance policies should be construed in a manner that provides coverage, Florida courts have further held that "[w]hen dealing with grants of coverage, the courts should interpret the policy language broadly in favor of the existence of insurance, while limitations or exclusions should be interpreted narrowly against the insurer." *Progressive Ins. Co. v. Estate of Wesley*, 702 So. 2d 513, 515 (Fla. 2d DCA 1997) (citation omitted).

Of course, such rules of construction are entirely reasonable given that the insurer is in all instances the party drafting the policy, and if the insurer intended to exclude coverage, it could have (and should have) done so in an unambiguous

manner. *See Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998). Conversely, the insured is rarely in a position to discuss, much less negotiate or clarify the terms of the insurance policy it purchases.

II. THE SECOND DISTRICT COURT OF APPEAL'S ATTEMPT TO ABOLISH THE CONCURRENT CAUSE DOCTRINE IN FAVOR OF THE PRO-INSURER EFFICIENT PROXIMATE CAUSE DOCTRINE IS INCONSISTENT WITH PUBLIC POLICY AND DISREGARDS FLORIDA'S RULES OF CONSTRUCTION

a. *Florida Law on Multiple Peril Losses*

As accurately explained by the Second District Court of Appeal in this case, under the concurrent cause doctrine, which was expressly adopted in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988), "when multiple perils act in concert to cause a loss, and at least one of the perils is insured and is a concurrent cause of the loss, even if not the prime or efficient cause, the loss is covered." *Am. Home Assur. Co., Inc. v. Sebo*, 141 So. 3d 195, 197 (Fla. 2d DCA 2013).

In the United States, this is one of two prevailing theories used to decide what coverage is afforded where multiple, independent perils act in concert to cause a loss. The other one is the efficient proximate cause doctrine. "Under it, the finder of fact, usually the jury, determines which peril was the most substantial or responsible factor in the loss. If the policy insures against that peril, coverage is provided. If the policy excludes that peril, there is no coverage." *Id*. at 198.

More than a quarter century ago, the *Wallach* court rejected the efficient proximate cause doctrine, which the Second District Court now seeks to adopt, explaining:

> The appellants' second contention is that where concurrent causes join to produce a loss and one of the causes is a risk excluded under the policy, then no coverage is available to the insured. We reject that theory and adopt what we think is a better view—that the jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where "the insured risk [is] not ... the prime or efficient cause of the accident." 11 G. Couch, *Couch on Insurance 2d* § 44:268 (rev. ed. 1982).

Wallach, 527 So. 2d at 1387.

Applying what has been described as "sound reasoning," *see Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1319 (M.D. Fla. 2002), the *Wallach* court went on to note that the efficient proximate cause doctrine "offers little analytical support where it can be said that but for the joinder of two independent causes the loss would not have occurred." *Id.* at 1388. For instance, where, as in this case, "weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." *Id.*

Of course, this reasoning is not only "sound," it is also entirely consistent with long-standing Florida insurance law, which dictates that "where, as here, one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted." *Ruderman*, 117 So. 3d at 950.

Moreover, this reasoning is especially applicable where, as here, the policy is an "all-risk" policy. As explained in *Wallach*:

> The term *all-risk* is given a broad and comprehensive meaning. An all-risk policy provides "a special type of coverage extending to risks not usually covered under other insurance" and coverage is available for all loss not resulting from the insured's willful misconduct or fraud unless the policy contains "a specific provision expressly excluding the loss from coverage."

527 So. 2d at 1388 (quoting *Phoenix Ins. Co. v. Branch,* 234 So.2d 396, 398 (Fla. 4th DCA 1970)). Thus, "once the insured establishes a loss that appears to be within the terms of the all-risk policy, ***the burden is on the insurer to prove that the loss was caused by an excluded risk***." *Id*. (quoting *Hudson v. Prudential Property & Casualty Ins. Co.,* 450 So. 2d 565, 568 (Fla. 2d DCA 1984)).

b. *The Second District Court of Appeal's decision ignores Florida's well established rules of construction, which are intended to benefit the insured*

In rejecting the concurrent cause doctrine in favor of the pro-insurer efficient proximate cause doctrine, the Second District ignored the long standing rules of construction that underpinned adoption of the concurrent cause doctrine in the first place. Indeed, the Second District's rationale, that: "taken to its extreme, the concurrent causation theory might have this policy cover flood damage in a hurricane when only a minor portion of the damages was cause by the covered peril of rain," turns public policy on its head. *Sebo*, 141 So. 3d at 201.

As an initial matter, such "extreme" results are unlikely because extreme examples are, by their very nature, rare. Given the choice, however, between two extreme examples—one in which, due to unusual circumstances, the insurer is forced to cover a loss that it did not contemplate covering but did not unambiguously exclude, and one in which the insured is deprived of all benefits of the policy for which he paid premiums even though his loss was 49.9% "caused" by the precise type of loss his policy was intended to cover—there can be little doubt that the windfall (if it can even be described as one), should go to the insured.

This is especially true given that the insurer, as the drafter of the policy, could have, should have, and usually does, include anti-concurrent clause language if it does not intend to cover losses caused by multiple perils. Indeed, as noted in the Second District Court's opinion below, Sebo's policy *did* include "specific anti-concurrent cause language" in other exclusions not at issue in this case. *Id*. at 202. In other words, the insurer always has the ability to control any exposure created by the concurrent cause doctrine by using anti-concurrent cause language. In this case, the insurer clearly knew how to use such language, and in some instances did, but chose not to with respect to the exclusion at issue. Presumably, that decision was reflected in the premiums Sebo paid.

Thus, the concurrent cause doctrine properly places the burden on the insurer to clearly set forth what damages are excluded from coverage under the terms of the

policy, and in no way restricts the insurer's ability to do so. *See Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005) ("the insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy.").

III. THE EFFICIENT PROXIMATE CAUSE DOCTRINE IS UNDESIRABLE BECAUSE IT LEADS TO UNPREDICTABLE RESULTS

Admittedly, taken to their extremes, *both* the concurrent cause doctrine and the efficient proximate cause doctrine are imperfect and may, in some rare instances, lead to inequitable results. Putting aside for the moment that the insurer is in a far better position to prepare for and contract around any potential inequities, the reality is that the efficient proximate cause doctrine suffers from an even greater and more practical problem—uncertainty.

As noted by one commentator, "[c]oncurrent causation cases are the most costly, inefficient, tortured and unpredictable of insurance cases. They also appear remarkably frequently in the litigation system." Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 Ala. L. Rev. 957, 978 (2010). This is due, in large part, to the fact that the majority of states employ the efficient proximate cause doctrine; "[y]et this approach is also the most responsible for the haphazard, unpredictable jurisprudence surrounding concurrent causation in insurance. The reason is simple: choosing one cause in a causal chain of events as

the dominant cause often invites equity-based 'justice' concerns to creep in and affect predictability of the result." *Id*. at 974.

Because courts "are not consistent in choosing a dominant cause," "there is little consistency among jurisdictions and even among the same courts with similar fact patterns in cases over time. This has created a tortured pattern of litigation because litigants cannot reliably predict coverage in concurrent causation cases where the dominant cause approach will be applied." *Id*. at 975-76 (comparing *Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127 (Okla. Civ. App. 2005) ("earth movement" exclusion clause ambiguous and not triggered when dominant cause of loss was erosion of sand fill under house) with *Davis-Travis v. State Farm Fire & Cas. Co*., 336 Fed. App'x. 770 (10th Cir. 2009) ("earth movement" exclusion clause unambiguously triggered when dominant cause of loss is movement of subgrade earth under home)).

Moreover, application of the efficient proximate cause doctrine is costly. If litigants must establish an "efficient proximate cause," "expert evidence often becomes necessary in order to determine the cause and effect of various causal factors acting together to produce the loss. Often, experts will have to disentangle causal factors in forensic fashion. This is expensive." *Id*. at 979.

The efficient proximate cause doctrine therefore creates both unpredictability, which discourages settlement, and inefficient market effects, which increase premiums. As succinctly stated by one commentator, where it is applied,

> [the efficient proximate cause doctrine] has resulted in increased information expenses, increased administrative and complexity costs, and very high error costs. The end result is unfairness in this particular doctrinal rule's operation. The rule does provide artificial solace in that choosing a "responsible" cause as the dominant cause can create the perception that justice is being done. But the dyadic nature of the "one or the other" effect of the dominant cause approach ignores the whole problem of a concurrently caused loss: there is more than one cause at work. Choosing one cause over another in a case where the loss is caused by reciprocal concurrent causes where each is necessary to cause the ensuing loss is akin to being wrong one hundred percent of the time. The dominant cause approach is, for all these reasons, the most inefficient of the four possible approaches to concurrent causation in insurance.

Id. at 982.

By contrast, the concurrent cause doctrine is relatively simple to apply and relatively predictable in its results. Indeed, even the Second District Court of Appeal noted the "surprising" lack of Florida cases addressing coverage when multiple perils cause a loss.[1] *Sebo*, 141 So. 3d at 200, n.3. This is almost certainly because

[1] Mississippi and Louisiana, which the Second District Court noted addressed these issues with "frequency" after Hurricane Katrina caused widespread damage, both use the efficient proximate cause doctrine. *See Evana Plantation, Inc. v. Yorkshire Ins. Co.*, 58 So. 2d 797, 798 (Miss. 1952); *Roach-Strayhan-Holland Post No. 20, Am. Legion Club v. Continental Ins. Co.*, 112 So. 2d 680, 683 (La. 1959).

the concurrent cause doctrine encourages settlement due to the predictability of its results. Knutsen, *supra* at 1013 (noting that the concurrent cause doctrine is "a simple, predictable legal rule that saves information, administrative, and consistency costs unlike any of the other approaches.").

Indeed, under the concurrent cause doctrine, both insureds and insurers can readily assess their risk—both know that absent anti-concurrent cause language, there will be coverage for concurrently caused losses where at least one cause is covered. "The certainty in that, while prompting greater incidences of payouts by insurers, results in an overall cost savings for the insurers who are repeat players in the insurance system." *Id*. at 1014-15. Specifically, actuarial evidence of concurrently caused losses under the concurrent cause doctrine is more reliable, and "can actually help insurers better predict and underwrite such risks, and then charge corresponding premiums." *Id*.

CONCLUSION

The Court should grant the relief advocated by the Petitioner. The Court should quash the opinion of the Second District Court of Appeal, and the Court should follow the analysis of the Third District Court of Appeal in *Wallach* on the issue of the concurrent cause doctrine in first-party insurance disputes involving multiple independent perils.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2014, pursuant to Fla. R. Jud. Admin. 2.516, a true and correct copy of the foregoing was served via E-filing Portal to:

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I HEREBY CERTIFY compliance with Florida Rule of Appellate Procedure 9.210(a)(2), and state that the font used in this brief is Times New Roman, 14 Point.

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