IN THE SUPREME COURT OF FLORIDA
CASE NO. SC14-897

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

L.T. Case No.: 2D11-4063

Petitioner,

vs.

AMERICAN HOME ASSURANCE COMPANY, INC.,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF A DECISION
OF THE SECOND DISTRICT COURT OF APPEAL

AMICI CURIAE BRIEF OF FLORIDA INSURANCE COUNCIL, PROPERTY CASUALTY INSURANCE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST

I. The Florida Insurance Council

The Florida Insurance Council (the "Council") was established in 1962 to represent the Florida insurance sector in legislative, regulatory, judicial and executive branch forums. The Council is now Florida's largest company trade association, representing 31 insurer groups (consisting of 236 companies) which write over $33 billion a year in premium volume and provide all lines of coverage. Council members hold more than 90 percent of the market share in Florida residential and private passenger automobile coverage.

II. The Property Casualty Insurers Association of America

The Property Casualty Insurers Association of America ("PCI") is composed of nearly 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write more than $183 billion in annual premium, and 35 percent of the nation's property casualty insurance. Member companies write 42 percent of the U.S. automobile insurance market, 27 percent of the homeowners market, 32 percent of the commercial property and liability market and 34 percent of the private workers compensation market. In Florida, PCI members write 40.7 percent of the total personal lines insurance market and 35.5 percent of the total commercial market.

III. The National Association of Mutual Insurance Companies

The National Association of Mutual Insurance Companies ("NAMIC") is the largest and most diverse national property/casualty insurance trade and political advocacy association in the United States. Organized in 1895, NAMIC's 1,400 member companies write all lines of property/casualty insurance business and include small, single-state, regional, and national carriers accounting for 50 percent of the automobile/ homeowners market and 31 percent of the business insurance market. Companies range in size from one person operating a small farm mutual company offering property insurance for wind and fire exposures to some of the world's largest insurers providing comprehensive commercial and personal lines coverages.

IV. American Insurance Association

The American Insurance Association ("AIA") is a leading national trade association representing some 300 major property and casualty insurance companies, that collectively underwrite more than $100 billion in direct, nationwide property and casualty premiums, including over $5.5 billion in premiums in this State. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public

policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files amicus curiae briefs in significant cases before federal and state courts, including this Court.

Each of the above associations, and the members that they serve, have an interest in this Court's consideration of the Second District Court of Appeal's decision, as this Court will consider whether the Efficient Proximate Cause rule or Concurrent Cause Doctrine should be applied in first-party property insurance disputes in Florida. The above associations, and the members they serve, will be directly and substantially impacted by this Court's consideration of which of these principles should be applied, and whether the applicable rule of law will remain consistent. Given their broad experience with the industry, the above associations offer a perspective on the issues that will assist this Court in its consideration of this case and the extensive reach of the issues to be considered.

SUMMARY OF ARGUMENT

The Second District Court of Appeal correctly concluded that, under Florida law, the Efficient Proximate Cause ("EPC") rule governs the analysis of multiple-peril losses in first-party insurance disputes and represents a sound rule that is most consistent with public policy and the contracting parties' expectations, as is evidenced by the fact that the vast majority of other states subscribe to the EPC rule. While the Concurrent Cause Doctrine ("CCD") applies to third-party liability

insurance disputes, applying the CCD in the first-party context effectively nullifies the exclusions from coverage that the parties to the insurance contract bargained for and creates coverage for losses far beyond the scope of what was contemplated in the contract. The EPC rule, on the other hand, gives effect to the terms of the contract and the contracting parties' expectations, providing the level of coverage that the parties agreed to when contracting for insurance.

The EPC rule and CCD as applied in the first-party context are best described not as "two prevailing theories," but as a majority rule and a minority rule. The vast majority of states to have addressed this question have determined the EPC rule to be the better reasoned rule in the context of first-party disputes, while only a handful of jurisdictions have applied CCD concepts in the context of first-party disputes.

The near-uniform concurrence of Florida's sister jurisdictions strongly suggests that the EPC doctrine is the most responsive to public policy concerns and is best-suited to analyze multiple peril first-party disputes. There is a strong public interest in the uniformity of such rules, as a divergent rule in Florida would require insurers to treat Florida as a special exception and conduct first-party property business differently in Florida than they do elsewhere in the country, including Florida's neighboring states.

In sum, application of the EPC rule in the first-party context would align Florida with the vast majority of other jurisdictions, including those neighboring Florida. Adopting the CCD would, on the other hand, place Florida outside the norm, increase insured losses, and require insurers to formulate policy language and premiums differently for Florida than they do for the majority of jurisdictions, thus creating a less predictable and more costly marketplace.

ARGUMENT

I. The Efficient Proximate Cause Rule Is Most Consistent With Public Policy And Principles Of Contract Interpretation

Contrary to the assertions made by Petitioner and its *amici*, public policy does not require application of the CCD to first-party insurance disputes, and instead supports application of the EPC rule. Applying the CCD in the first-party context does not result in construing exclusions in favor of the insured, but in many cases instead results, as the Second District Court of Appeal recognized, in valid exclusions being read out of the contract of insurance entirely and providing coverage for losses even where they have been explicitly and clearly excluded under the terms of the policy. The CCD thus does not give effect to the contractual coverage negotiated between the parties to the insurance contract.

Furthermore, the decision in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988), is not based upon "well-settled rules of construction and longstanding

Florida precedents" (Pet. Br. at 24-26), but rather upon flawed reasoning and a misinterpretation of the case law that gave rise to the CCD. Indeed, the EPC rule is *already* the law in Florida under the precedent of this Court, and the Third District Court of Appeal departed from such settled law in *Wallach*. In *Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n*, 75 So. 196 (Fla. 1917), this Court was confronted with the question of whether coverage existed under a policy covering fire but excluding losses caused by explosion. Upon concluding that the evidence demonstrated that the explosion was merely incidental to a pre-existing fire, this Court applied EPC principles and held "if the explosion is caused by fire during its progress in the building, the fire is the proximate cause of the loss, the explosion being a mere incident of the fire, and the insurer is liable." *Id*. at 198. The First District likewise applied the EPC rule in *Hartford Accident & Indemnity Co. v. Phelps*, 294 So. 2d 362 (Fla. 1st DCA 1974). Confronted with a loss caused by both a covered peril (water leakage) and an excluded peril (earth settling), the court found coverage because the covered peril was the "proximate and efficient cause of the loss." *Id*. at 364. In reaching this conclusion, the court correctly reasoned that "[i]n determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause – the one that sets others in motion – is the cause to which the loss is to be attributed, though the

other causes may follow it, and operate more immediately in producing the disaster." *Id*. (internal quotation and citation omitted).

Against this backdrop, while Petitioner and its *amici* suggest that application of the CCD is mandated by the principle that insurance policies should be construed in favor of the insured, this principle does not mandate application of the CCD. In fact, the First District implicitly recognized in *Phelps* that these principles are not in conflict when it applied the EPC rule after noting that insurance policies should be construed in favor of the insured. *Id*. Here, the Second District Court of Appeal recognized that no matter how the language of the insurance contract issued to Sebo were to be interpreted, coverage could not be extended to losses brought about by causes that are *expressly excluded* from coverage under the contract – yet that is exactly the result that application of the CCD would demand. As the court below stated:

> The covered perils in a property insurance policy determine the premium the insured will pay and the distribution of risk between the insured and the insurer. And as the *Garvey* court stated, an insured's reasonable expectations of coverage under the policy "cannot reasonably include an expectation of coverage . . . in which the efficient proximate cause of the loss is an activity expressly *excluded* under the policy."

Am. Home Assur. Co. v. Sebo, 141 So. 3d 195, 200 (Fla. 2d DCA 2013) (*quoting Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989)) (emphasis in original).

Instead, public policy demands that effect be given to the contracting parties' expectations. Florida law is clear that "an 'all-risk' policy is *not* an 'all loss' policy, and thus does not extend coverage for every conceivable loss." *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005) (emphasis added). Consistent with the public policy that the contracting parties' expectations are to be given effect, an all-risk policy provides coverage "[*u*]*nless* the policy expressly excludes the loss from coverage." *Id*. at 1085 (emphasis added). The fact that damages proximately and efficiently resulting from a risk expressly excluded from coverage under the policy would not, in fact, be covered by the policy is not a "technical encumbrance" or "hidden pitfall" for consumers, as *amici* for the Petitioner suggest. *See* Br. of Fla. Ass. of Pub. Ins. Adj. at 6, (*quoting Allen v. Metro. Life Ins. Co.*, 208 A.2d 638, 644 (N.J. 1965)). Rather it is *exactly* what the parties bargained for and expected.

Indeed, the principle of construing insurance contracts in favor of the insured is not even applicable in this context. As this Court has recently explained, "[i]n determining whether a claim is covered by an insurance policy, this Court enforces 'a clear and unambiguous' provision pursuant to its plain language

regardless of 'whether it is a basic policy provision or an exclusionary provision.'" *Morales v. Zenith Ins. Co.*, No. SC13-696, 2014 Fla. LEXIS 3555 at *6 (Fla. Dec. 4, 2014) (*quoting Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). Thus, "[o]nly if a provision is ambiguous after considering the policy as a whole will this Court construe the ambiguous provision against the insurer in favor of coverage." *Id*. (*citing Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003)). There is nothing ambiguous about the exclusionary clauses here at issue, yet Petitioner urges this Court to nevertheless adopt a general rule upending the principles of contract interpretation and requiring insurers to cover the entirety of losses proximately caused by events expressly and clearly excluded from coverage, so long as some other cause could be said to have contributed to the loss in some way, no matter how minor.[1]

[1] In arguing that general principles of insurance contract interpretation require application of the CCD, Petitioner attempts to shift the analysis, arguing that the existence of a *factual* dispute regarding the ultimate cause of a loss renders the policy ambiguous such that courts should forego the factual determination regarding causation in favor of finding coverage for the insured, even if the loss was the efficient and proximate result of clearly excluded risks. The existence of a factual dispute does *not* render ambiguous clearly stated contractual exclusions, and courts are fully capable of fulfilling their longstanding role as finders of fact and applying the clear terms of the insurance contract.

As recognized by the court below, and courts throughout the country confronted with similar questions, adopting the CCD rule would render the exclusionary clauses of a first-party insurance contract a nullity and undermine the intent and expectations of the contracting parties when contracting for and pricing insurance. *See, e.g.*, *Sebo*, 141 So. 3d at 201 ("a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy"); *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989) ("In most instances, the insured can point to some arguably covered contributing factor . . . . if the [CCD] were extended to first-party cases, the presence of such a cause, no matter how minor, would give rise to coverage."); *Warrilow v. Norrell*, 791 S.W.2d 515, 527 (Tex. Ct. App. 1989) (on rehearing) ("The [CCD] rationale is not proper in the first-party property insurance context because, in most cases, the insured can point to some arguably covered contributing factor.").[2]

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[2] The distinction between the first-party insurance context and the third-party liability insurance context, discussed at length in the opinion below, the California Supreme Court's decision in *Garvey*, and the Answer Brief filed by the Respondent, is of critical importance here. The purposes of first-party and third-party insurance differ, and while the CCD may be proper for third-party liability insurance cases, it is wholly inappropriate and serves only to defeat the contracting parties' expectations in the first-party context. This crucial distinction is not

In essence, Petitioner's argument for the adoption of the CCD boils down to the following: it would be simple to make coverage decisions in multiple-peril disputes, and would provide a great windfall for insureds, if courts were to simply ignore the exclusions in a policy and require insurers to pay for even those losses proximately caused by clearly excluded risks. Such a result would run directly counter to the public policy of this State. As the court in *Warrilow* aptly noted, the contracting parties' expectations "would not be served when the efficient and predominating cause of the loss is expressly excluded by the terms of the policy, and nevertheless, coverage is extended." *Id*.

II. The Concurrent Cause Doctrine Will Not Result In Efficiency And Predictability

Any assertion that application of the EPC rule will lead to unpredictable results ignores the reasoning of numerous courts which have found exactly the opposite, and determined that the EPC rule encourages predictability and understandability in coverage. *See, e.g., Hartford Cas. Ins. Co. v. Evansville Vanderburgh Pub. Library*, 860 N.E.2d 636, 647 (Ind. Ct. App. 2007) ("We are persuaded by the analysis and reasoning of [the] efficient proximate cause rule . . .

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recognized by the United Policyholders who, on pages 5 and 6 of their *amicus* brief, cite extensively and nearly exclusively to liability insurance cases when discussing application of the CCD by Florida courts.

and believe that it serves the end of understandable and predictable coverage in the policy at issue here and all-risk policies, in general."); *Findlay v. United Pac. Ins.*, 917 P.2d 116, 120-21 (Wash. 1996) ("the purpose of the efficient proximate cause rule is to provide a 'workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer.'"); *Garvey*, 770 P.2d at 708 (same).

The premise of Petitioners' argument that the CCD provides predictability appears to be simply that if a court *always* finds in favor of coverage, without regard for whether the loss was caused by an excluded peril or not, there is no need for fact-finding regarding what caused a loss. While such a statement is, on its most basic level, true, it does not present a compelling reason for adopting the CCD. The contractual language used in such insurance policies, and the contracting parties' expectations, cannot simply be read out of existence because it would be a simpler exercise *not* to apply them. Fact-finding is a key role of the courts, and it is a role that the courts are perfectly well suited to fill.[3]

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[3] By analogy, it would be absurd to suggest that courts should award damages for breach of contract whenever a suit is brought without regard for whether the contract had actually been breached, simply because less effort on the part of the litigants and courts would be required, and the results of the suit could be more easily predicted, if such fact-finding was instead deemed unnecessary.

Indeed, *amici* for the Petitioner all but admit that the purported "predictability" provided by the CCD is based upon little more than the premise that "the insurer always pays." At page 15 of their *amicus* brief, the Public Insurance Adjusters state that "under the concurrent cause doctrine, both insureds and insurers can readily assess their risk—both know that . . . there will be coverage for concurrently caused losses where at least one cause is covered." The suggestion that such a result somehow favors both insureds and insurers is facially absurd: if the insurer intended to write an all-loss policy and the insured intended to pay the premiums for such a policy, they would have done so. Reading the exclusions out of an all-risks policy to convert it to an all-loss policy does insurers and insureds no favors. *See Garvey*, 770 P.2d at 711 ("if the insurer is expected to cover claims that are outside the scope of the first-party property loss policy, an 'all-risk' policy would become an 'all-loss' policy."). Further, if insurers valued and would actually benefit from the certainty that comes from knowing that they will always have to pay regardless of the cause of the loss, and the benefit to insureds in having any loss covered outweighed the impact to insureds of increased losses, the market would abandon all-risk policies in favor of all-loss policies. No such shift in the marketplace has occurred, precisely because consumers benefit from appropriate exclusions (and reduced losses) in policies through reduced premiums.

The argued efficiency and predictability gains urged by Petitioner are undermined by the assertion that insurers could completely avoid the application of the CCD and return to an EPC framework merely by inserting an anti-concurrent causation clause in the insurance contract. It makes little sense to throw out the contractual language and contracting parties' expectations in favor of a CCD approach simply to force the inclusion of redundant and unnecessary contractual language in a policy that would then return the analysis to exactly where it began *before* the CCD was adopted.

If insurers and insureds desire to have all losses covered, regardless of their proximate cause, they have the ability to do so today by contracting for an all-loss policy. Where the parties have not done so, to judicially convert all of the current all-risks policies into all-loss policies whenever multiple perils arise would serve little purpose other than creating a windfall for insureds at the expense of insurers and requiring an exercise in futility whereby parties must re-draft their contracts and insert superfluous language merely to get back to the position they initially bargained for – a policy with coverage for losses not proximately caused by excluded risks.

III. There is a Strong Public Interest In Uniform Application of Rules of Policy Interpretation

The considerations detailed herein are perhaps best illustrated by the fact that the EPC rule is applied by the vast majority of states, while only a handful of jurisdictions have errantly applied the CCD to first-party property insurance. The near-uniform concurrence of Florida's sister jurisdictions strongly suggests that the EPC doctrine is the most responsive to public policy concerns and is best-suited to analyzing multiple peril first-party disputes. As illustrated by the numerous cases cited by the Respondent at pages 21 and 22 of its brief, only two states apply the CCD in the first-party context.

There is a strong public interest in ensuring uniformity of such rules across jurisdictions. If Florida were to diverge from its sister jurisdictions and apply the CCD to first-party disputes, insurers would be required to treat Florida as a special exception and conduct first-party property business differently in Florida than they do elsewhere in the country, including Florida's neighboring states. This would require, amongst other things, the formulation of policy language customized for doing business under Florida's abnormal rule, and would increase the administrative costs of doing business in Florida – which cost would then be passed on to Florida consumers (in addition to the effect of increased losses associated with providing coverage for perils the parties intended to exclude).

Rather than taking such a path, this Court should join its 38 sister states and reaffirm Florida's adherence to the EPC rule as first applied by this Court nearly a century ago in *Evansville Brewing*.

CONCLUSION

The Efficient Proximate Cause rule is the rule most consistent with the public policy of this State and best respects the plain language of the policy and contracting parties' expectations when contracting for first-party property insurance. The Court should affirm the opinion of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was written in a proportionally spaced Times New Roman 14-point font in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/S/ JAMES A. MCKEE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail to the following this 22nd day of February 2014:

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