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SUPREME COURT, STATE OF COLORADO 2 East 14th Ave., Suite 400 Denver, CO 80203	
Colorado Court of Appeals Case No. 07CA58 Steven L. Bernard, Daniel M. Taubman and David M. Furman, JJ	
Petitioner: THE COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY **Respondent:** NORTHFIELD INSURANCE COMPANY	▲ COURT USE ONLY ▲
<u>Attorney for Amici Curiae</u>: Jean E. Dubofsky, #0880 The Dubofsky Law Firm, P.C. 1000 Rose Hill Drive Boulder, CO 80302 Phone Number: 303-447-3510 FAX Number: 303-447-2801 E-mail: jeandubofsky@comcast.net	Case Number: 08SC907

AMICUS BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF THE COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY

ISSUE

Did the court of appeals err in holding that an anti-concurrent cause exclusion precludes insurance coverage when wear and tear or deterioration to an older building exists or contributes to loss caused predominantly by a covered risk?

The petitioner Colorado Intergovernmental Risk Sharing Agency ("CIRSA"), a public entity risk-sharing pool, insures most buildings owned by municipalities in the state. Likewise, the Colorado School Districts Self Insurance Pool, an organization comparable in operation and function to CIRSA, insures school districts against loss. The Colorado Municipal League, on behalf of its 265 member municipalities, and the Colorado Association of School Boards, on behalf of its 178 member boards of education representing all of the school districts in the state, as amici urge this Court to grant certiorari review of Colorado Intergovernmental Risk Sharing Agency v. Northfield Insurance Co., 2008 WL 2837517 (Colo. App.).

CIRSA self-insures its members' property losses up to a certain amount and purchases excess coverage from Northfield Insurance Company ("Northfield"). Northfield's policy contains an anti-concurrent cause provision ("ACC"), which provides,

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> ...

3.a. Wear and tear;
b. Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

. . .

g. Dampness or dryness of atmosphere, changes in or extremes of temperature, marring or scratching.

The court of appeals interpreted this clause to mean that whenever a building has an excluded condition – such as decay or deterioration, or wear and tear -- there may be no insurance coverage for damage to the building caused by an event that otherwise would be covered. The court described the causes of the roof collapse in the instant case as "a combination of factors: the weight of the snow; and wear and tear, rust corrosion, decay, deterioration, and/or dampness of atmosphere." 2008 WL 2837517 at *3. Citing Leonard v. Nationwide Mut. Insurance Co., 499 F.3d 419, 425 (5th Cir. 2007) (Hurricane Katrina's winds (a covered peril) and flooding (an excluded peril) could be "concurrent causes"), the court described an ACC as denying "coverage whenever an excluded peril and a covered peril combine to damage a dwelling or personal property." Id. at *4. The court concluded that "the ACC unambiguously bars any recovery if an excluded cause contributed to the loss." Id.

Most of the cases addressing policy exclusions for concurrent causes involve a natural cause that is excluded from coverage. The excluded cause typically is

flooding, a landslide or earth movement, and the policy holders live in areas where they should buy additional insurance (if available) for damage caused by a flood or earth movement. See, e.g., Tuepker v. State Farm Fire & Casualty Co., 507 F.3d 346 (5th Cir. 2007) (hurricane and flood-prone coastal region); Leonard, 499 F.3d 419 (same); In re Katrina Canal Breaches Litigation, 495 F.3d 191 (5th Cir. 2005) (same); TNT Speed & Sport Center, Inc. v. American States Ins. Co., 114 F.3d 731 (8th Cir. 1997) (flood-prone area near river); Western National Mutual Insurance Co. v. University of North Dakota, 643 N.W.2d 4 (N.D. 2002) (same); State Farm Fire & Casualty Co. v. Bongen, 925 P.2d 1042 (Alaska 1996) (rain-induced landslide in mountainous area); Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903 (Cal. 2005) (same); Safeco Insurance Co. v. Hirschmann, 773 P.2d 413 (Wash. 1989) (same); Murray v. State Farm Fire and Casualty Co., 509 S.E.2d 1 (W.Va. 1998) (rockfall from nearby quarry); see also Schroeder v. State Farm Fire & Casualty Co., 770 F.Supp. 558 (D.Nev. 1991) (earth subsidence caused by broken pipe, non-natural cause); Alf v. State Farm Fire & Casualty Co., 850 P.2d 1272 (Utah 1993) (earth erosion caused by broken pipe, non-natural cause).[1]

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[1] The cases cited in this paragraph are the out-of-state cases cited by the court of appeals. Three of the cited cases that support the court's reasoning arose out of Hurricane Katrina. The remaining cases reflect the split of authority interpreting exclusions from coverage where there are concurrent causes of loss.

Kane v. Royal Insurance Co., 768 P.2d 678 (Colo. 1989), involved a flood-prone area near a river and "established the principle" that the court of appeals applied here. 2008 WL 2837517 at *3. Kane, however, did not involve an exclusion for concurrent causes, an ACC. Rather, the insurer in Kane excluded coverage for damage from flooding and thus did not have to pay for damage to property along the Fall River when the Lawn Lake Dam in Rocky Mountain National Park failed. The court's discussion about "a concurrency of different causes" arose because damages from negligent maintenance of the dam by a third-party were covered under the property owners' all-risk policies, and the owners argued that negligence leading to failure of the dam was the "efficient moving cause" of their loss.[2] Kane rejected application of the "efficient moving cause" rule because the policies excluded damage caused by flooding, and the "efficient

[2] The owners relied on the following language from Koncilja v. Trinity Universal Insurance Co., 528 P.2d 939, 940-41 (Colo. App. 1974) (leakage from broken water pipe (covered peril) caused ground beneath house to subside (damages from earth movement excluded), which, in turn caused house to settle and crack):

> [I]n determining whether a loss is within an exception in a policy, where there is a concurrency 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.

moving cause" rule "must yield to a well-settled principle of law: namely, that courts will not rewrite a contract for the parties." 768 P.2d at 685.

Three members of this Court dissented in Kane. They found no reason to reject the "efficient proximate cause" rule when the "precipitating cause is not itself excluded from coverage." 768 P.2d at 688 (Lohr, J. dissenting). The dissent noted that there are "public policy concerns over attempts to exclude losses connected with certain perils regardless of the importance of these perils in causing the loss." Id. at n.1.

Those public policy concerns are manifest in the court of appeals' resolution of the instant case. The jury here was asked to apportion loss, and it did so: 90% to the covered loss (from heavy snow) and 10% to the excluded loss (from deterioration in some of the beams). Enforcing the ACC here means that a peril that was relatively unimportant in causing the damage, deterioration of beams, allows the insurer to escape without paying for a loss predominantly caused by a covered peril. Indeed, the

> better-reasoned approach to concurrent causation issues in insurance coverage disputes, in order to validate both the insurer's contractual rights and obligations as well as the insured's reasonable expectations of coverage, would be to require the finding of a covered dominant or predominant efficient cause in any concurrent causation controversy.

P. N. Swisher, "Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation 'Riddles'," 43 Tort Trial & Insurance Practice Journal, 1, 26 (2007).

This case is the opposite of the hurricane and landslide cases, where insureds may pay extra to insure buildings in areas prone to particular types of natural disasters. Salida is a mountain community, where snows may be heavy, yet Northfield's policies do not exclude loss from heavy snowfall. Instead, Northfield's ACC excludes wear and tear and deterioration[3] that contribute to damage "concurrently or in any sequence." Insurance policies typically exclude wear and tear or deterioration, and insureds do not reasonably expect to recover for damage from normal wear and tear alone. What insureds would not expect, however, is that a concurrent cause exclusion like the ACC here would mean that they could not recover damages from included perils if wear and tear or deterioration could be said to have contributed to the damage in any way.

Exclusionary language that conflicts with an insured's objectively reasonable expectations is not enforceable. State Farm Mutual Automobile

[3] This brief uses the term "deterioration" to refer to paragraphs 3b and 3g in Northfield's policy. Paragraph 3b excludes coverage for rust, corrosion, fungus, decay, deterioration, and hidden or latent defect. Paragraph 3g excludes coverage for dampness or dryness of atmosphere, changes in or extremes of temperature, marring or scratching.

Insurance Co. v. Nissen, 851 P.2d 165, 167-68 (Colo. 1993). A common sense analysis of insurance contracts is particularly appropriate because insurance policies are sold to consumers who are not expected to be highly sophisticated in the art of reading them. Id. at 167. When an anti-concurrent cause exclusion like the one at issue here "conflicts with the reasonable expectations of the parties, it should be construed to allow coverage for losses proximately caused by a covered risk, and deny coverage only when an excepted risk is the efficient proximate cause of the loss." Murray, 509 S.E.2d at 15; see also Julian, 110 P.3d 907 (by focusing on the most important cause of a loss, "the efficient proximate cause doctrine creates a 'workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer'"). When an anti-concurrent cause exclusion operates as the court of appeals allowed the ACC to operate here, insureds will have no way of knowing whether they have purchased first-party insurance that will be there when they need it.

In this case, the sole, proximate or predominant cause of Salida's loss should have been heavy snowfall; the building would not have collapsed but for the weight of the snow, and damage from snow was not excluded from coverage. Compare Katrina Canal Breaches, 495 F.3d at 223 (court rejected "any attempt on the plaintiffs' part to avoid the operation of the flood exclusion by recharacterizing

the flood as negligence" in construction and maintenance of levees). Kane is like Katrina Canal Breaches, where the flood can be viewed as the sole cause of the losses. Also compare University of North Dakota, 643 N.W.2d at 7 ("an insurer may not contractually exclude coverage when a covered peril [sewer backup] is the efficient proximate cause of damage, even though an excluded peril [flood] may have contributed to the damage.").

Kane should either not be applied for public policy reasons when wear and tear or deterioration are the excluded concurrent causes (and they are not the predominant causes), or Kane should be revisited and the dissent's approach adopted. The dissent observed that the "efficient moving cause" rule was consistent with the rule applied in the majority of jurisdictions when both a covered risk and an excluded risk contribute to the claimed loss."[4] 768 P.2d at 688; see Katrina Canal Breaches, 495 F.3d at 221-22; Murray, 509 S.E.2d at 11 ("causes which are incidental are not proximate, even though they may be nearer the loss in both time and place"). This approach would allow for coverage to be excluded if deterioration, for example, were the efficient moving cause of damage.

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[4] The approach taken by at least one court whenever the term "cause" appears in an exclusion clause is to read it as "efficient proximate cause." Safeco Insurance Co., 773 P.2d at 417.

Another approach is the one taken by the trial court in the instant case: apportion damages between the covered and excluded causes. The district court determined that the inclusion of the language "such loss of damage" in Northfield's ACC means that the insurer is not liable for the portion of the damage caused by deterioration of the roof because deterioration is a specified excluded risk. Dist. Ct. on motion for pretrial determination, 1/10/06. The insurer remains liable for the portion of damage resulting from a covered cause. Id. The court of appeals overturned the district court's common sense approach, ruling that the ACC bars any recovery if wear and tear or deterioration contribute to a loss.

The district court here observed that Northfield's interpretation of the contract – the interpretation adopted by the court of appeals – would render policy coverage illusory because the insurer could always deny coverage. Order on motions to alter or amend judgment, 11/27/06. All-risk policies that allow an insurer to deny coverage whenever there is an arguably excluded contributing factor become "no-risk" policies. Julian, 110 P.3d at 908; Murray, 509 S.E.2d at 14-15. And the coverage purchased under a policy where the insurer assumes no risk is illusory, making the ACC as interpreted by the court of appeals a violation of public policy. Terms of an insurance contract that are in violation of public

policy are void. Aetna Casualty & Surety Co. v. McMichael, 906 P.2d 92, 100 (Colo. 1995).

CONCLUSION

The amici represent municipalities and school districts that own numerous older buildings.[5] The court of appeals' interpretation of the ACC in policies that cover their buildings leaves them with far less coverage than they reasonably thought they had purchased. The instant case gives this Court an opportunity to review a prior decision that should not be applied to the facts here; to select a different rule from decisions in other states and federal courts that have considered the issue; and to interpret language in insurance policies in a manner that is consistent with the public interest.

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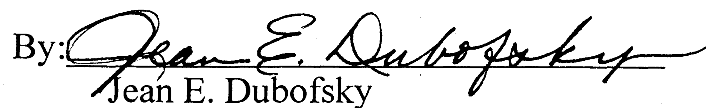
[5] CIRSA insures 8,681 properties, most of which are owned by municipalities in Colorado. Eight thousand one hundred nineteen of the properties were built before 2004.

Dated this 10th day of December, 2008.

Respectfully submitted,

THE DUBOFSKY LAW FIRM, P.C.

By: 
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CERTIFICATE OF MAILING

I hereby certify that on this 10th day of December, 2008, a true and correct copy of the foregoing amicus brief was served by placing the same in the United States Mail, postage prepaid, addressed as follows:

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