ALERT
JUNE 2, 2009

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FIRST-PARTY INSURANCE: COLORADO SUPREME COURT TO ADDRESS ANTI-CONCURRENT CAUSATION PROVISION

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On May 26, 2009, the Colorado Supreme Court agreed to hear arguments as to whether an anti-concurrent causation provision applied to exclude recovery under a first-party insurance policy where a jury found that the loss was caused 90% by a covered peril and 10% by an excluded peril. *See, Colorado Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.* (Colorado Supreme Court Case No. 08SC907, May 26, 2009) ("CIRSA"). The precise question the Colorado Supreme Court agreed to hear was stated as follows:

> Whether this court's ruling in *Kane v. Royal Ins. Co.*, 768 P.2d 678 (Colo. 1989), applies to exclude recovery under an insurance policy when a jury finds that the damage was caused 90% by a covered peril (weather event) and 10% by an excluded peril (wear and tear, rust, or deterioration).

In *Kane,* the Colorado Supreme Court held that the "efficient moving cause" rule must yield to language in an insurance policy excluding loss "caused by, resulting from, *contributed to,* or *aggravated by* … flood." In that case, a dam in Rocky Mountain National Park failed due to third-party negligence causing flood waters to inundate the insureds' property. The insureds argued that the flood exclusion was inapplicable because the "efficient moving cause" of the loss was third-party negligence. The Colorado Supreme Court disagreed, finding that the "efficient moving cause" rule was a default rule that "must yield to a well-settled principle of law: namely, that courts will not rewrite a contract for the parties." The Colorado Supreme Court held that there was "no doubt that the flood 'contributed to' or 'aggravated' the insureds' loss;" therefore, the entire loss was excluded.

The *CIRSA* case involved a loss that occurred when, following a historic snowstorm, the roof over a hot springs pool failed. CIRSA, a public entity risk sharing pool, paid the loss and sought reimbursement from Northfield. Northfield's investigation revealed that the wooden trusses over the pool had deteriorated and decayed over the 20-year history of the building, and its experts opined that this deterioration and decay had caused the roof failure. Accordingly, Northfield denied coverage relying on the following exclusion:

> 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.

CIRSA filed suit challenging Northfield's denial. During trial, CIRSA argued that the sole cause of loss was the weight of snow, which exceeded the roof's design load capacity. CIRSA alternatively argued that the "efficient moving cause" of the loss was the weight of snow since the roof would not have failed from the pre-existing decayed condition alone. Northfield countered that the weight of snow did not, as CIRSA contended, exceed the roof's design load capacity, and therefore the sole cause of the loss was the decayed condition. Northfield also argued that even if the decayed condition was not the sole cause of the loss, so long as the decayed condition contributed to the loss, the entire loss was excluded based on the anti-concurrent causation language of its exclusion. The jury was

instructed to "apportion the cause or causes of the claimed property damage" between weight of snow, on the one hand, and wear and tear, rust, corrosion, decay, deterioration, and/or dampness of atmosphere, on the other. The jury determined that 90% of the loss was the result of the weight of snow and 10% was the result of wear and tear, rust, corrosion, decay, deterioration, and/or dampness of atmosphere.

Based on the jury verdict, the trial court ruled that Northfield was responsible for 90% of the claimed damages, finding that the jury's 90% apportionment to weight of snow meant that 90% of the damages were solely attributable to the weight of snow. With regard to Northfield's anti-concurrent causation argument, the trial court ruled that the words "Such loss or damage" in Northfield's exclusion meant that Northfield was not relieved of all responsibility for the loss. Instead, Northfield was relieved of responsibility only for that portion of the damage attributable to the excluded cause of loss. To hold otherwise, opined the trial court, would render coverage illusory since every building will have some degree of wear and tear or deterioration. Northfield appealed.

On appeal, the Colorado Court of Appeals reversed the trial court and held that the jury determined that the roof collapsed because of a combination of factors, including factors excluded by Northfield's policy. Relying on *Kane,* the Court of Appeals found that the language of Northfield's anti-concurrent causation clause unambiguously barred recovery whenever an excluded cause contributed to the loss, rejecting the trial court's apportionment of damages. CIRSA thereafter petitioned the Colorado Supreme Court for *certiorari*.

Based on the *certiorari* petition briefing, we expect CIRSA and amicus parties to make arguments ranging from whether the jury actually found that the causes of loss were concurrent, to whether the anti-concurrent causation language renders coverage illusory, to whether the Colorado Supreme Court should revisit and reverse *Kane.* In this regard, it is noteworthy that the current Chief Justice of the Colorado Supreme Court dissented in the *Kane* decision, believing that the "efficient moving cause" rule should override any anti-concurrent causation language.

Because the *CIRSA* case has the potential to dramatically change the landscape in Colorado where both covered and excluded causes of loss contribute to a loss, Cozen O'Connor will be monitoring the developments in *CIRSA* in order to keep our clients apprised of any changes in Colorado law.

To discuss any questions you may have regarding the CIRSA case or how it may apply to your particular circumstances, please contact any of the following at Cozen O'Connor's Denver, Colorado office:

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