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BEFORE THE IOWA SUPREME COURT

No. 23-0321

WATERLOO COMMUNITY SCHOOL DISTRICT,

Plaintiff/Appellant,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY

HON. JEFFREY D. BERT

PLAINTIFF/APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

Both the District Court's ruling and EMC's arguments ignore and distort the language of the Policy. The District has interpreted the Policy in a way that is faithful to the Policy language, takes account of all parts of the Policy, and makes sense given the purpose of the ordinance and law ("OL") coverage provision and the expectations of a reasonable policyholder. EMC and the District Court, on the other hand, have read provisions into the Policy, read provisions out of the Policy, and generally rewritten the Policy the way EMC wishes it had been written. The effect of all of these improper changes to the Policy language is to eviscerate the very broad OL coverage provision that the District paid for and relied upon.

EMC also has disregarded the overwhelming weight of applicable authority. The District has cited numerous cases extending OL coverage outside the specific area of damage when a covered cause of loss (1) revealed that the conditions that led to the covered loss existed throughout the building and (2) triggered the duty to repair those conditions under the building code. Indeed, the District Court appears to be the only court that has denied OL coverage under such circumstances.

EMC and the District Court likewise have misstated the Policy, the record, and the law regarding the Policy's exclusions. The exclusion for

preexisting code violations does not apply because, as the Waterloo Building Official testified and EMC admitted, the District did not "fail to comply" with any code provisions prior to the collapse. The District's duty to repair any vintage materials or construction methods did not arise until after the collapse. Until then, such materials and methods were "grandfathered in," as multiple courts have held.

The deterioration and collapse exclusions likewise do not apply because the District's obligation to comply with the Code is at least one proximate cause of the cost of the repairs outside the area of collapse. It is also the dominant cause of such costs.

The District should not be denied the very broad OL coverage for which it paid. The Policy should not be rewritten because EMC or the District Court does not like the result. The District Court's decision should be overturned and the District should be granted summary judgment in its favor.

I. EMC's Argument that the District Lacks OL Coverage Outside the Specific Area of Collapse Conflicts with the Policy Language and the Weight of Authority.

The District's interpretation of the Policy is consistent with all Policy provisions. The interpretation of the Policy that EMC and the District Court have adopted—which adds, subtracts, ignores, distorts, and contravenes

Policy language—is not. Moreover, even if the OL provision did contain a causation requirement, highly analogous cases show that requirement has been satisfied. EMC has yet to cite a single case denying OL coverage where the covered loss revealed that the same condition resulting in the covered loss existed in undamaged parts of the building and needed to be repaired to prevent future losses.

A. EMC Has Not Shown Any Way in Which the District's Interpretation Is Inconsistent with Any Policy Language.

In contrast to EMC's convoluted efforts to twist the Policy's language to mean what EMC wishes it said, the District's interpretation of the Policy gives effect to all parts of the Policy and explains how those parts fit together to create a cohesive coverage picture. EMC has not identified a single Policy provision that is even in tension with, let alone conflicts with, the District's interpretation. EMC also has not addressed the fact that the District's interpretation is the only one that makes sense given the purpose of the OL coverage provision, which is to provide additional coverage to policyholders, such as the District, when they are suddenly faced with large costs for code compliance after a covered loss occurs.

The District agrees with both the District Court and EMC that there must be a covered loss before the OL coverage provision is triggered. In other words, the causation requirement in the Policy's primary grant of

coverage in Section A must be met. Policy at A (Appx. 144) (providing coverage for "direct physical loss of or damage to Covered Property … caused by or resulting from any Covered Cause of Loss"). There is no dispute that the collapse at Lowell was a covered loss: a covered cause of loss (the collapse) caused direct physical loss of or damage to the covered property (Lowell).

If a covered loss occurred, as it did here, then the additional OL coverage applies if there is also a law that "affects the repair or rebuilding of the lost or damaged building." *Id.* at A.4.e(1) (Appx. 147). Again, there is no dispute that there was a law that affected the repair or rebuilding of the lost or damaged building (Lowell). Namely, after the collapse, the Waterloo building code required the District to make Lowell safe and structurally sound.[1]

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[1] EMC notes that the experts disagree whether the collapse met the definition of "substantial structural damage" ("SSD") under the Waterloo building code. *See* EMC Br. at 16. That dispute is irrelevant to the resolution of this appeal, because regardless of whether there was SSD, the parties are in agreement that Lowell was unsafe and could not be occupied after the collapse, and that the Waterloo building code obligated the District to do whatever was necessary to make Lowell safe and structurally sound, including making repairs outside the specific area of collapse. Accordingly, there was at least one law that "affects the repair or rebuilding of the lost or damaged building."

Accordingly, EMC is obligated to pay the increased costs of complying with the law and making Lowell safe and structurally sound, including the costs of repairing the deteriorated walls outside the specific area of collapse.

The District's interpretation also takes account of the OL exclusion. That exclusion expressly states that it "does not apply" to the extent that there is OL coverage. *Id.* at B.1.a (Appx. 158). The OL coverage provision likewise states it is "not subject to" the OL exclusion. *Id.* at A.4.e(4) (Appx. 147). Because the Policy affords OL coverage, the OL exclusion does not apply.

The District's reading of the OL exclusion is faithful to its plain language and does not render it "superfluous." EMC Br. at 26. If there were no OL coverage—e.g., if there had been no covered loss and a building inspector had discovered a code violation during a routine inspection—the District agrees that the OL exclusion would preclude coverage. But that is not what happened here.

B. The District Court and EMC Ignore and Contradict the Language of the Policy.

EMC failed to address the many ways in which the District Court's interpretation of the Policy disregards, distorts, or conflicts with the Policy language.

First, EMC and the District Court outright admit that they have inserted a phantom causation requirement into the OL coverage provision that is simply not there. *See* MSJ Order at 11-12 (Appx. 1124-25). Importantly, EMC knew how to include a causation requirement in an additional coverage provision when it wanted to. Multiple additional coverages in the Policy explicitly state that the coverage applies only if the expense at issue "is caused by or results from a Covered Cause of Loss." *See, e.g.*, Policy at A.4.a(1) ("Debris Removal") (Appx. 146); Policy at A.4.d ("Pollutant Clean-up And Removal") (Appx. 147). That language is nowhere to be found in the OL coverage provision. EMC does not explain or even acknowledge this key distinction between the OL coverage provision and other additional coverage provisions.

EMC likewise does not acknowledge that the lack of a causation requirement in the OL coverage provision distinguishes this case from the primary cases on which EMC and the District Court rely. For example, in *Chattanooga Bank Associates v. Fidelity & Deposit Co. of Maryland*, the policy provided coverage only "[i]n the event of loss or damage under this coverage part <u>that causes</u> the enforcement of any law or ordinance regulating the construction or repair of damaged facilities." 301 F. Supp. 2d 774, 776-77 (E.D. Tenn. 2004) (emphasis added). In *MarkWest Hydrocarbon, Inc. v.*

Liberty Mutual Insurance Co., the policy likewise provided coverage only "[i]n the event of loss or damage by an insured peril under this policy that causes the enforcement of any law or ordinance regulating the construction or repair [of] damaged facilities." 558 F.3d 1184, 1188 (10th Cir. 2009) (emphasis added). Like the insurers in those cases, EMC could have included a causation requirement in the OL coverage provision, but chose not to do so. EMC should not be allowed to rewrite the Policy now because EMC does not like the result of its decision.

Second, EMC and the District Court treat the primary grant of coverage in Section A as if it states that coverage is provided only for physical loss or damage caused by a covered cause of loss. That is not what Section A says; there is no "only" there. Policy at A (Appx. 144).

Third, and relatedly, EMC and the District Court ignore that the OL coverage provision that the District purchased is supposed to be "additional" coverage on top of the coverage granted in Section A. If the District Court's reading of the Policy as covering only physical loss or damage caused by a covered cause of loss were correct, the OL additional coverage provision would not be adding anything new to the coverage Section A already provides.

Fourth, EMC and the District Court improperly read portions of the OL coverage provision out of the Policy. Specifically, the OL coverage provision states that EMC will pay for loss of "damaged and undamaged" portions of the building. *Id.* at A.4.e(1) (Appx. 147) (emphasis added). The inclusion of "and undamaged" demonstrates that OL coverage extends beyond the specific area of damage.[2] Pursuant to the District Court's interpretation of the Policy, however, there could never be coverage for loss of any "undamaged" portion of the building because OL coverage would be limited to repair of physical damage caused by a covered cause of loss. This result violates the maxim that every word in an insurance policy should be given effect.[3]

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[2] Indeed, EMC's admission that OL coverage was triggered inside the specific area of collapse is fatal to EMC's argument that it need not pay for increased costs outside the specific area of collapse, because the OL coverage provision explicitly expands coverage to undamaged areas of the building. EMC argues that the "repair provision" of the OL coverage provision does not mention "damaged and undamaged" portions of the building. EMC Br. at 33. The District is not sure what "repair provision" EMC is referencing, but the OL provision says (1) that it applies when there is a law that affects the repair of the "lost or damaged building," not just the damaged portion of the building, and (2) that if there is such a law, EMC will pay for the "loss" of "damaged and undamaged" portions of the building and the increased cost to repair the "building," not just the damaged portion of the building. EMC has conceded that there is a law that affected the repair of Lowell, and thus must pay for the loss of undamaged portions of Lowell and the increased cost of repairing Lowell as a whole.

[3] *See Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 502 (Iowa 2013) ("We will not interpret an insurance policy to render any part

The Eighth Circuit made a similar point in *Cincinnati Insurance Co. v. Rymer Companies, LLC*, 41 F.4th 1026 (8th Cir. 2022). In *Rymer*, the Eighth Circuit held that a policy's OL coverage provision covered replacement of an entire roof that suffered only localized damage from a tornado (the covered cause of loss). The Eighth Circuit reasoned that the fact that the OL coverage provision covered costs to "reconstruct or remodel *undamaged* portions" of the building "assumes the additional covered costs are for parts of the building not physically damaged by the covered cause of loss." *Id.* at 1030-31 (emphasis in original). The same is true here.

C. EMC Cannot Distinguish the District's Highly Analogous Cases.

EMC fails to distinguish the District's cases, which involve policies and fact patterns very similar to those here.

For example, EMC's discussion of *City of Elmira v. Selective Insurance Co. of New York*, *see* EMC Br. at 44-46, only underscores the close resemblance between that case and this one. 83 A.D.3d 1262, 1264, 921 N.Y.S.2d 662 (2011). Like the OL coverage provision here, the OL

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superfluous, unless doing so is reasonable and necessary to preserve the structure and format of the provision.") (citation omitted); *The Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 822 (S.D. Iowa 2015) (courts avoid "interpreting the policy in such a way as to render parts of a contract 'surplusage'") (citing *Fashion Fabrics of Iowa, Inc. v. Retail Inv'rs Corp.*, 266 N.W.2d 22, 26 (Iowa 1978)).

coverage provision in *City of Elmira* did not require that the covered loss cause the enforcement of a law. *Id.* A wall collapse revealed that the same deterioration that led to the collapse existed in other areas of the armory, and the code official determined that the armory could not be occupied until all the walls were repaired. *Id.* at 1262-63. The court found OL coverage for demolishing and rebuilding the armory, including undamaged areas, because there had been a covered loss <u>and</u> enforcement of a law resulted in increased costs. *Id.* at 1265. The court also noted that the insurer could have inserted a causation requirement into the OL coverage provision if the insurer had wished to limit coverage to situations where a covered loss causes the code enforcement. *Id.* The court's analysis was in no way "cursory." *See* EMC Br. at 47.

EMC attempts to distinguish *City of Elmira* by saying the court in that case did not consider the "insuring agreement," but it plainly did consider the insuring agreement when it concluded that OL coverage was not triggered unless there was a "Covered Cause of Loss" under the policy. Like the Policy here, after the existence of a covered cause of loss <u>and</u> code compliance costs were established, the OL coverage provision required no further causal analysis.

EMC appears to miss the point of other cases that the District cites. Those cases demonstrate that even if the Policy's OL provision did contain a causation requirement, the District still would be entitled to coverage outside the area of collapse because any such causation requirement would be met. The collapse at Lowell (the covered loss) resulted in the requirement that the District repair or rebuild the walls outside the area of collapse. The discovery of the condition that led to the collapse led to the need for further repair and rebuilding throughout the school to prevent future collapses caused by precisely the same condition. Courts uniformly hold that OL coverage is available in such circumstances.

For example, EMC's discussion of *DEB Associates v. Greater New York Mutual Insurance Co.*, *see* EMC Br. at 40-42, again highlights the similarities between that case and this one. 407 N.J. Super. 287, 970 A.2d 1074, 1075 (App. Div. 2009). In *DEB*, a wall collapse on one floor caused building officials to discover that walls in "separate, undamaged" portions of the building were unstable and needed to be repaired. *Id.* Exactly the same problem affecting the wall that collapsed (a lack of angle irons) was present on other floors. *Id.* The court held there was OL coverage because the policyholder had demonstrated "a clear causal connection between the collapse of the seventh floor wall and the code official's mandate that

plaintiff bring the remaining floors into compliance to prevent them from collapsing." *Id.* at 1082. Here too there is a "clear causal connection" between the classroom collapse and the requirement that the District repair or rebuild other walls of Lowell to prevent them from collapsing.

EMC's attempts to distinguish *DEB* miss the mark. EMC is simply wrong when it asserts that the repairs inside the specific area of collapse at Lowell "are governed by a different code provision" than the repairs outside the specific area of collapse. *See* EMC Br. at 42-43. The building code required the District to make the areas both inside and outside the area of collapse safe and structurally sound. *See* District's Opening Br. at 19-20 (citing IBC 116.1; IEBC 115.1; IPMC 304.1, 304.1.1, 304.4). Furthermore, as discussed below, EMC is also wrong when it argues that the exclusion for preexisting code violations or the deterioration exclusion precludes coverage. Indeed, also as discussed below, *DEB* shows that the fact that a building theoretically may have been unsafe the day before a covered loss does not mean that the exclusion for preexisting code violations applies to defeat OL coverage.

The "strong causal connection" between the collapse and the repairs outside the area of collapse shows that the District is not trying to transform the Policy into a "maintenance contract." *See* EMC Br. at 32. The District

is not asking EMC to pay for random unrelated maintenance work throughout the school. Rather, the District is asking EMC to pay for the costs of correcting the same structural problem that caused the covered loss and was discovered only as a result of the covered loss.

D. EMC Has Not Cited a Single Case Denying OL Coverage Where the Same Condition that Caused the Covered Loss Existed in Other Parts of the Building.

Neither EMC nor the District Court cites a single case denying OL coverage where the covered loss revealed that the same condition that caused the covered loss existed in other parts of the building and needed to be repaired to prevent future losses. Rather, the cases EMC and the District Court cite are distinguishable because they deal with situations where a covered loss led to the discovery of unrelated code violations. For example:

- In *Chattanooga Bank Associates*, the court found no coverage for a host of unrelated building code violations that local inspectors happened to notice when they came to survey damage from a fire. 301 F. Supp. 2d at 780-81.

- In *MarkWest Hydrocarbon*, the court found no coverage for testing 65 miles of pipeline for corrosion after a regulator investigated an isolated valve failure unrelated to corrosion. 558 F.3d at 1189.

- In *CV Ice Co., Inc. v. Golden Eagle Insurance Co.*, the court found no coverage for replacing corroded pipes discovered during an unrelated health inspection. No. CV 14-121 PSG SPX, 2015 WL 72313, at *1-2, *12 (C.D. Cal. Jan. 6, 2015).

- In *Tocci Building Corp. v. Zurich American Insurance Co.*, the court found no coverage for grouting a retaining wall when a storm that caused damage to a small portion of the wall "was merely the event which brought the retaining wall to the inspector's attention." 659 F. Supp. 2d 251, 260 (D. Mass. 2009).

- In *Sanderson v. First Liberty Insurance Corp.*, the court found no coverage for "wholly unrelated" shoddy electrical work "caught" by inspectors during the process of repairing water damage from a burst pipe. No. 8:16-CV-644, 2019 WL 2009332, at *4, *6 (N.D.N.Y. May 7, 2019).

- In *St. Paul Fire & Marine Insurance Co. v. Darlak Motor Inns, Inc.*, the court found no coverage for code upgrades to elevators, air handlers, emergency generators, and other unrelated systems when the covered fire damage was limited to six hotel rooms. No. 3:97-CV-1559 TIV, 1999 WL 33755848, at *1 (M.D. Pa. Mar. 9, 1999).

Indeed, EMC ignores that courts have made precisely that distinction. While there may not be OL coverage for "fortuitous" discoveries of a

"latent, unrelated problem" that "bore no relationship" to the covered loss, courts uniformly have found OL coverage for repairing the same kind of conditions that led to the covered loss. *See St. George Tower v. Insurance Co. of Greater New York*, 139 A.D.3d 200, 206, 30 N.Y.S.3d 60, 64 (N.Y. App. Div. 2016) (contrasting the facts in that case to those in *DEB*).

II. EMC's Argument that the Preexisting Code Violation Exclusion Bars OL Coverage is Contrary to the Policy, the Record, and Applicable Law.

EMC has not come close to meeting its burden of establishing that the preexisting code violation exclusion (or any other exclusion) precludes coverage. *See Boelman*, 826 N.W.2d at 502; *Brammer v. Allied Mut. Ins. Co.*, 182 N.W.2d 169, 174 (Iowa 1970). EMC's argument regarding the preexisting code violation contradicts the Policy, the record, and applicable law. That exclusion does not apply here because—as the Waterloo Building Official testified—there were no code provisions the District "failed to comply" with prior to the collapse. As in *DEB*, the District's duty to make repairs arose only after the collapse revealed the need for repairs for the first time, and the hypothetical existence of unsafe conditions prior to the collapse does not mean that the District "failed to comply" with any code provision.

A. EMC's Assertion that the District Failed to Comply with a Code Provision Prior to the Collapse Contradicts the Record.

EMC, like the District Court, simply assumes that the District was in violation of the code prior to the collapse. *See* EMC Br. at 37. That assertion is not consistent with the record. There is no evidence that the District "failed to comply" with any code provision before the collapse. As noted in the District's opening brief, Lowell was not deemed unsafe or structurally unsound prior to the collapse. The Waterloo Building Official testified, and EMC admitted, that the Waterloo Building Department had not cited the District for any code violations prior to the collapse. Oct. 5, 2021 Ahlhelm Dep. Tr. at 65:12-23 (Appx. 692); EMC Response to Statement of Undisputed Facts ¶ 17 (Appx. 1076).

Importantly, as discussed in the District's opening brief, the Building Official did not stop there. He also specifically testified that—even now, after having learned as a result of the collapse that the building was unsafe—he was not aware of any code provision with which the District was not in compliance prior to the collapse. Oct. 5, 2021 Ahlhelm Dep. Tr. at 65:16-23 (Appx. 692). The Building Official—whose job is to enforce the code—thus

rejected the argument that the District "failed to comply" with any code provision before the collapse.[4] EMC does not respond to this point.

One reason that the District was not in violation of any code provision before the collapse is that—as the District Court acknowledged, *see* MSJ Order at 4 (Appx. 1117)—the code does not require property owners to open up their walls to check for damage or go looking for problems. Nor does the code require property owners to update vintage materials or construction methods so that they meet current code standards. *See* IBC 102.6 (Appx. 966); IEBC 101.4.2 (Appx. 1012). All such materials and methods are "grandfathered in" unless an event—such as the collapse—occurs that requires them to be changed.

The District's argument also does not turn on whether the District "knew about" a code violation prior to the collapse. *See* EMC Br. at 38-40. Rather, the District's argument is based on the plain language of the preexisting code violation exclusion, which applies only if the District "failed to comply" with a code provision before the collapse. As explained above, the District and the City of Waterloo Building Official agree that

[4] Not surprisingly, the Building Official also testified that if he had known that Lowell was unsafe prior to the collapse, he would have required the District to remediate that condition. *See* EMC Br. at 17. However, he did not testify that the District failed to comply with any code provision before the collapse. As noted, he testified the opposite.

there is no code provision the District "failed to comply" with before the collapse.[5]

EMC's acknowledgment of OL coverage within the area of collapse confirms that there is no code provision the District "failed to comply" with prior to the collapse. If there was no failure of compliance within the area of collapse, there also was no failure of compliance outside the area of collapse, since the same conditions were present throughout the older area of the building.

Although the District believes that its interpretation of the preexisting code violation provision is the only reasonable one, EMC also has not addressed the fundamental principle that, to the extent the term "failed to comply" (or any other term in the Policy) is ambiguous, the Court must resolve all ambiguities in favor of the District. *Boelman*, 826 N.W.2d at 502; *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 536 (Iowa 2002); *Cincinnati Ins. Co. v. Hopkins Sporting Goods, Inc.*, 522 N.W.2d 837, 839 (Iowa 1994).

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[5] As noted in the District's opening brief, the inability of EMC and the District Court to show a specific code provision with which the District actually "failed to comply" distinguishes this case from *Celebrate Windsor, Inc. v. Harleysville Worcester Ins. Co.*, No. 3:05CV282 (MRK), 2006 WL 1169816 (D. Conn. May 2, 2006), the lone case the District Court or EMC cited where the preexisting code violation exclusion barred coverage.

B. The Court in *DEB* Explicitly Rejected EMC's Argument Regarding the Preexisting Code Violation Exclusion.

The court in *DEB* explicitly rejected the argument that the hypothetical existence of an unsafe condition prior to a catastrophic event is sufficient to defeat coverage. The policy in *DEB* included the same preexisting code violation exclusion as the Policy here. *See* 970 A.2d at 1076 n.2. The court ruled the exclusion was not implicated, because *DEB*, like this case, did not involve "improvements made to correct pre-existing code violations." *Id.* at 1076. Thus, even though the building in *DEB* theoretically was unsafe for days or weeks before the wall collapse, there were no code violations prior to the collapse and the preexisting code violation exclusion did not apply. It was only after one wall collapsed that "the condition of the other walls was reasonably perceived as posing a danger to human life and safety." *Id.* at 1082.

EMC tries to distinguish *DEB* by arguing that the lack of angle irons in *DEB* "had grandfathered status," but the deterioration at Lowell did not. *See* EMC Br. at 42. That argument is incorrect. As noted above, like the unsafe conditions in *DEB*, the deterioration at Lowell was "grandfathered in" until the collapse triggered the District's duty to update the vintage materials and construction materials used at Lowell.

EMC's lengthy hypothetical from *CV Ice* also supports the District's position, not EMC's position. *See* EMC Br. at 30-31 (quoting *CV Ice*, 2015 WL 72313, at *11). Just as the hypothetical cost of expanding the bathroom at the back of the store would be covered because the car crash triggered the requirement to make the bathroom wheelchair accessible, the cost of making repairs to the walls outside the area of collapse at Lowell should be covered because the collapse triggered the requirement to make such repairs. There was no obligation to undertake either set of repairs until the covered cause of loss occurred.

C. EMC Did Not Respond to the District's Argument that Its Interpretation of the Preexisting Code Violation Provision Is Consistent with the Expectations of a Reasonable Policyholder.

EMC did not respond to the District's argument that its interpretation of the preexisting code violation is the only interpretation consistent with the expectations of a reasonable policyholder. The obvious purpose of the exclusion is to eliminate coverage for delinquent policyholders who know they have a code violation but do nothing to correct it, and then try to shift to the insurer the cost of making fixes that should have been made prior to the loss. *See Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 911 (W.D. Tenn. 2001). The exclusion should not be interpreted to preclude coverage for policyholders, like the District, who are

suddenly faced with a massive bill when a covered loss triggers the enforcement of code provisions that no one enforced or had any reason to enforce before the loss.

III. EMC's Argument that the Deterioration or Collapse Exclusions Preclude OL Coverage Misstates the Law and the Facts.

A. The Concurrent Causation Doctrine Applies Here.

Pursuant to well-established Iowa law, EMC's argument that the concurrent causation doctrine does not apply here is wrong.

As an initial matter, EMC's discussion of anti-concurrent causation provisions is irrelevant and misleading. *See* EMC Br. at 51. There is no anti-concurrent causation language that applies to the deterioration exclusion or the collapse exclusion, which are located in Section B.2 of the Policy. *See* Policy at B.2.d, k (Appx. 159-60). Although the Policy contains anti-concurrent causation language before the exclusions in Section B.1 of the Policy, *see id.* at B.1 (Appx. 157), there is no such language before the exclusions in Section B.2 of the Policy. *Id.* at B.2 (Appx. 159).[6] As the

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[6] *See S. Ins. Co. v. CJG Enterprises, Inc.*, No. 315CV00131RGESBJ, 2017 WL 3453369, at *9 (S.D. Iowa Feb. 10, 2017) ("The inclusion of a clear anticoncurrent-cause provision in the policies' first exclusion section and its absence from the second exclusion section…. demonstrates the drafters understood how to contract out of coverage for multiple causes through an anticoncurrent-cause provision and chose to do so only in a specific section of the policies.").

District noted in its opening brief, the District Court's attempt to add anti-concurrent causation language to exclusions where it does not exist is clear error. *See* MSJ Order at 15 (Appx. 1128).[7]

EMC also asserts that Iowa applies the concurrent causation rule in third-party liability cases, and the "efficient proximate cause rule" in first-party property cases. *See* EMC Br. at 51-52. However, EMC does not cite a single Iowa case contradicting the Supreme Court of Iowa's clear statement of law that:

> If a proximate cause of an injury is within the included coverage of an insurance policy, the included coverage is not voided merely because an additional proximate cause of the injury is a cause which is excluded under the policy. Thus, in order for an injury to be excluded from coverage under an insurance policy, the injury must have been caused solely by a proximate cause which is excluded under the policy.

Kalell v. Mut. Fire & Auto. Ins. Co., 471 N.W.2d 865, 868 (Iowa 1991) (emphasis added; internal quotation marks and citation omitted). The Supreme Court of Iowa did not in any way distinguish between first-party

[7] The absence of anti-concurrent cause language in the Policy also distinguishes this case from *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 604 (Tex. 2015). *See* EMC Br. at 50. In the other case EMC cites, *Houston Specialty Ins. Co. v. Meadows W. Condo Ass'n*, 640 F. App'x 267, 273 (5th Cir. 2016), the court did not address the concurrent causation doctrine, did not undertake a comparative causation analysis, and did not actually decide whether the faulty workmanship exclusion applied.

and third-party claims. Indeed, multiple cases that EMC cites apply the concurrent causation doctrine under Iowa law in first-party property damage cases. *See Joseph J. Henderson & Sons, Inc. v. Travelers Prop. Cas. Ins. Co. of Am.*, 956 F.3d 992, 999 (8th Cir. 2020) (finding coverage in first-party property damage case when covered windstorm and excluded faulty workmanship "operated in tandem to cause the resulting damage"); *see also Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 241 (Iowa 2015) (applying concurrent causation doctrine in first-party property damage case, but concluding that anti-concurrent cause language was enforceable).

EMC does not cite a single Iowa case holding or even suggesting that the concurrent causation doctrine does not apply in first-party property damage cases. Rather, the first-party property damage cases EMC cites, *see* EMC Br. at 52 n.8, stand for the unremarkable proposition that <u>at least one</u> proximate cause of the loss must be covered. "Under Iowa law, of course, more than one proximate cause may exist." *Kalell*, 471 N.W.2d at 868.

Ultimately, it may not matter whether the concurrent cause doctrine or the efficient proximate cause doctrine governs here. EMC's description of the efficient proximate cause doctrine as applying "when two or more causes, at least one covered by an insurance policy and at least one excluded,

contribute to a loss," EMC Br. at 53, sounds extremely similar to the concurrent cause doctrine. As discussed below, the District's duty to comply with the code is both a proximate cause of the cost of the repairs outside the area of collapse and the dominate cause of the cost of such repairs.

B. EMC Ignores that the District's Obligation to Comply with the Code Caused the District to Incur the Cost of Repairs.

EMC disregards the fact that the requirement that the District comply with the code is at least one proximate cause of the cost of making repairs outside the area of collapse. It is also the dominant cause of such costs. As even the District Court recognized, *see* MSJ Order at 16 (Appx. 1129), the need for the District to undertake repairs outside the area of collapse was directly caused by the District's duty to comply with the code. The District was required to repair the walls because it was determined that the school would be unsafe and structurally unsound without them. Absent the triggering of the code, the District would not have been required to make the repairs. Furthermore, there is no intervening cause between the enforcement of the code and the repair costs. The code enforcement thus is fundamentally different from the squirrel in *City of West Liberty v. Employers Mutual Casualty Co.*, who caused the arcing that led to the loss. 922 N.W.2d 876 (Iowa 2019).

The District certainly did not repair the walls solely because of hidden deterioration. The District did not base its claim on losses caused by such hidden deterioration. Rather, the District has made a claim for the costs of repairing and rebuilding Lowell in accordance with the Code. Even if hidden deterioration "operated in tandem" with code enforcement to cause the District to incur those costs, they are still covered. *See Joseph J. Henderson & Sons, Inc.*, 956 F.3d at 999.

EMC's concession that the deterioration exclusion does not preclude coverage inside the area of collapse means that the deterioration exclusion also does not preclude coverage outside the area of collapse. EMC has not explained why the exclusion should apply to one area but not the other when the collapse revealed the walls in both areas were in the same physical condition and in need of the same repairs. Nor did EMC respond to the District's argument that if EMC and the District Court are correct that the deterioration exclusion bars OL coverage, OL coverage would be rendered illusory. It will almost always be the case that code enforcement addresses a condition encompassed by a policy exclusion, such as deterioration. If such a condition were sufficient to defeat OL coverage, OL coverage would virtually never apply.

C. The Collapse Exclusion Does Not Apply by Its Own Terms.

Although the District Court did not base its decision on the collapse exclusion, EMC argues that the collapse exclusion also precludes OL coverage. That argument is incorrect for the same reasons that EMC's arguments regarding the deterioration exclusion are incorrect—the District's duty to comply with the code is at least one proximate cause, and also the dominant proximate cause, of the cost of the repairs outside the area of collapse. At most, the collapse "operated in tandem" with code enforcement to result in repair costs, especially with respect to repair costs outside the area of collapse as opposed to inside the area of collapse.

In addition, the collapse exclusion explicitly states that "if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss." Policy at B.2.k (Appx. 160). In other words, if there is an intervening covered cause of loss, the collapse exclusion does not disturb coverage of damage resulting from that intervening covered cause of loss. Here, the collapse did result in an intervening covered cause of loss—the enforcement of a law that "affects the repair or rebuilding of the lost or damaged building," which triggered the OL coverage provision and led in turn to increased repair costs. Accordingly,

pursuant to its own terms, the collapse exclusion does not preclude coverage for such increased repair costs.

CONCLUSION

The District Court's ruling contradicts the language of the OL coverage provision and is in conflict with the weight of applicable authority. The ruling should be reversed. The District's motion for summary judgment should be granted and EMC's motion for summary judgment should be denied.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 6,140 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

/s/ Shelli L. Calland

CERTIFICATE OF SERVICE

I hereby certify on the 10th day of January, 2024, I electronically filed the foregoing Appellant's Proof Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following parties:

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