No. 130242

In the

# Supreme Court of Illinois

ZURICH AMERICAN INSURANCE COMPANY, as subrogee of Community College District No. 508 d/b/a/ City Colleges of Chicago and CMO, a Joint Venture,

*Plaintiff-Appellee,*

v.

INFRASTRUCTURE ENGINEERING, INC.,

*Defendant-Appellant.*

On Leave to Appeal from the Illinois Appellate Court,
First Judicial District, No. 1-23-0147.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 16 L 12712.
The Honorable **Patrick Sherlock**, Judge Presiding.

## *AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS IN SUPPORT OF PLAINTIFF-APPELLEE

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## AND STATEMENT OF POINTS AND AUTHORITIES

NOW COMES the National Association of Subrogation Professionals, and in support of Plaintiff-Appellee hereby submit the following *Amicus Curiae* brief in the above-listed matter.

The questions presented before the Court are: (1) whether City Colleges sustained a loss that Zurich paid under the subject Builders Risk Policy; and (2) whether Zurich can pursue a contractual subrogation claim as City College's subrogee based on a loss solely sustained by, claimed by, and paid to CMO, a different insured (yet also a named subrogor in this lawsuit) under the Builders Risk Policy.

## INTEREST AND IDENTITY OF AMICUS CURIAE

NASP respectfully submits this *amicus curiae* brief to support Zurich's position and the Appellate Court's decision. The undersigned prepared this brief on a pro-bono basis.

NASP believes its submission of an *amicus* brief will assist this Court in deciding this matter, which NASP believes will shape all future litigation involving Builder's Risk policies. Such polies are commonly issued in connection with nearly any residential or commercial construction project.

NASP's unique and specialized perspective on subrogation and the insurance industry generally may help the Court assess the effect of this Court's decision on future owners, developers, insurers, and courts. NASP has identified the issues presented here as having a potentially detrimental impact on the continued financial viability of Builder's Risk Policies as an offered in Illinois, and across the county. NASP wishes to express its concern that this Court's adoption of IEI's position has the potential to exacerbate that owners and developers will have to absorb when they take on a new project, including the potential to reduce or delay coverage on Builder's Risk policies, or in the form of increased premiums as subrogation becomes less viable for carriers.

## RELEVANT HISTORY OF NASP

The National Association of Subrogation Professionals ("NASP") was formed as a non-profit trade association in 1998 to serve the interests of professionals of insurance subrogation. Before NASP was established, subrogation professionals had no formalized means of networking, sharing ideas and knowledge, or working together to enhance their abilities. NASP consists of insurance claims personnel, attorneys, experts, collection agencies, and other vendors who provide valuable services to the industry. NASP's mission is to enhance the stature and effectiveness of subrogation and recovery professionals through education, training, and the exchange of information. See www.subrogation.org. NASP has approximately 4,000 members, representing more than 475 insurance companies and self-funded entities. NASP aims to "create a national forum for the education, training, networking, and sharing of information and, ultimately, the most effective pursuit of subrogation on an industrywide basis." NASP has become the "voice of subrogation" for the industry, the public, and legislative bodies around the country. The members of NASP recover billions of dollars in subrogation interests along all lines of insurance, including commercial property, auto, health, and many others. Every year, subrogation and recovery practices reduce premiums for businesses and the public.

## STATEMENT OF THE CASE

Plaintiff Zurich issued a Builder's Risk insurance policy to insure against physical loss to a building during construction. The alleged negligence of Defendant Infrastructure Engineering ("IEI") caused flooding in the building's basement, leading to significant damage, and resulting in a sizable claim against the Zurich policy.

Zurich paid out nearly three million dollars to its Named Insured, the general contractor CMO. The insurance policy included a right of subrogation. As a subrogee of

CMO and the building owner (City Colleges, an additional named insured under the Zurich policy), Zurich sued defendant IEI, for the damages it caused.

Defendant moved for summary judgment, arguing Zurich was not entitled to subrogate a breach of contract claim on behalf of the building owner, with whom the Defendant is in privity of contract. Defendant argues that because the Zurich claim was handled and physically paid to the general contractor, that City Colleges did not suffer a loss as a result of the flooding.

The trial court granted judgment in defendant's favor. Zurich appealed, arguing that the insurance policy entitles it to exercise its right of subrogation under these circumstances. Zurich contends that City Colleges, named as an additional insured, is a third-party beneficiary of the subcontract between IEI and Moody Nolan, enabling Zurich to stand in City Colleges' shoes and pursue subrogation. The appellate court agreed with Zurich, and Defendant filed a petition for leave to appeal, which was granted by this Court.

**ISSUES PRESENTED FOR REVIEW**

1. Did City Colleges sustain a loss that Zurich paid under the Builders Risk Policy?
2. Whether Zurich can pursue a contractual subrogation claim as City Colleges' subrogee based on a loss solely sustained by, claimed by, and paid to CMO by a different insured under the Builders Risk Policy.

**SUBROGATION IN FOCUS: Safeguarding Societal Interests Through Insurance Recovery**

Before turning to the particulars of the parties' dispute, NASP wants to underscore the significant wider-reaching benefits of subrogation generally, and of enforcing clear contractual language in Builder's Risk policies specifically.

"Builder's risk insurance only covers projects under construction, renovation, or repair. The policy covers an accidental loss, damage, or destruction of property not excluded under the policy for which there is an identifiable, insurable risk." Franco & Patton, 24 Ill. Prac., Illinois Construction Law Manual § 12:14 Builder's Risk Insurance (2024 ed.). "Builder's risk insurance only covers property in which the insured has an insurable interest." *Id*. "The coverage is limited to reimbursement for property damage, loss, and occurrences specifically covered in the policy of insurance." "A person has an 'insurable interest in property by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property.'" *Id*. (quoting *Lititz Mut. Ins. Co. v. Lengacher*, 248 F.2d 850, 853 (7th Cir. 1957) (quoting *Womble v. Dubuque Fire & Marine Ins. Co*., 310 Mass. 142, 37 N.E.2d 263, 265 (1941)).

Put simply, in nearly all residential or commercial construction projects, whether because of a government regulation, contractual obligation, financial surety requirements, or simply common sense, a Builder's Risk policy is taken out on the progressing structure. This is a first-party policy, meaning that, unlike liability insurance, coverage does not depend on a finding of liability of the insured. *See generally* Patin, Douglas L., 4 Law and Prac. of Ins. Coverage Litig. § 45:25 Builder's Risk Coverage. Instead, coverage is triggered by some event like a fire or flood, and the policy provides what is needed to repair

the damage so the project can continue. While one entity, often a landowner or general contractor, is the "named" or primary insured on such policies, a standard Builder's Risk policy, and the policy at issue here, will cover a much wider range of individuals and companies.

That is of course because "the parties who might conceivably have 'an insurable interest' in a property under construction are generally much greater in number that is the case with existing structures. Contractors, subcontractors, and materialmen all potentially have an interest in a construction project." *Selective Way Ins. Co. v. Nat'l Fire Ins. Co. of Hartford*, 988 F. Supp. 2d 530, 534 (D. Md. 2013) (quoting Bruner & O'Connor Construction Law § 11:21). While there can be multiple Builder's Risk policies written on a single building, it is common within the industry for a project to have a single policy, and the various entities with an insurable interest will contract to become additional named insureds within the existing policy as they are brought into the project.

Ultimately limiting the number of policies on a single structure has significant benefits. The insurer, owner, and general contractor have clearly defined, high level points of contact should a claim arise, and time and resources can be spent adjudicating the claim, rather than sifting through relative liabilities for the loss at the outset, or coordinating coverage between multiple insurers before repairs can be funded and the project can get back on track.

While these policies provide significant benefit and security to those within the construction industry, claims can be quite costly. Claims are also commonly made against the policy for events that are ultimately determined to result from tortious conduct, such as negligence or product liability. Clear, enforceable subrogation terms ensure that carriers

can recoup payments that are advanced early, which allow insureds to move on with their projects while liability can be worked out between the carrier and tortfeasor after the fact, as in this case.

Subrogation is important for self-insured parties and carriers alike, because any risk insured against is in the future. While a carrier will attempt to make what predictions it can, the actual risk is unknown, the costs of administering the risk (including possible litigation against third parties) are also unknown, and the premium paid toward these uncertain events represents a payment to address probable, not actual, expense amounts. *See* DuBray, Joseph F., A Response To The Anti-Subrogation Argument: What Really Emerged From Pandora's Box, 41 S.D. L. Rev. 264 at 273 (1996). Because of these unknowns, there is no known margin between the risks or losses that have been insured against and the premiums that have been collected to address the actual costs of paying the (potentially significant) loss to come. Gary Wickert, The Societal Benefits Of Subrogation, Matthiesen, Wickert & Lehrer, S.C.[1]

DuBray points out that revenue gained by the insurer, whether through subrogation collection, premium collection, or otherwise, is applied toward responding to the actual risk that is required to be paid by the insurer under the contract or policy. *See* DuBray, *infra*, at 273 (1996). In the end, only experience will reveal whether the collected premiums, subrogation recovered, and revenue from other sources will sufficiently cover the actual risks and expenses. "[A]s a source of revenue, subrogation operates to reduce

[1] *available at* https://www.mwl-law.com/helpful-resources/defending-subrogation/ (2007).

the actual past cost total used in the calculation of probable future insurance risk or loss on which future premiums will be based." *Id*.

**ARGUMENT**

"It is a fact of life that there are many occasions where the injuries and damages exceed the coverage afforded by insurance. That does not make the insurers automatic insurers of that excess." *Helmbolt v. LeMars Mut. Ins. Co*., 404 N.W.2d 55 (S.D. 1987). And that is where subrogation steps in on many claims, including those paid out under Builder's Risk. Subrogation allows a carrier to issue an early payment that will restore the project to schedule, but then ensures that the carrier is not left holding the bag where the loss is truly the responsibility of a third party.

In this case, per the terms of the Builder's Risk policy, Zurich, never intended to insure the Architect or Engineer (Defendants in this case) for any loss or damage arising out of their deficient performance of professional services. Those parties negotiated neither for a waiver of subrogation as a part of this project, nor to be included themselves on the Builder's Risk policy. This Court should not permit parties like IEI, sophisticated and recurring entities in negotiating construction contracts,[2] to turn traditional and clearly-articulated subrogation principles on their heads as they seek to do here. The arguments advanced by the defense here rely on overly-technical readings of fragments of both the policy and caselaw, ignoring broader context and common sense, even setting aside policy

[2] As is typical for contractors and subcontractors in construction projects. *See American Country Ins. Co. v. Cline*, 309 Ill.App.3d 501, 511 (Ill.App. 6 Dist.1999) ("Therefore, since both Hinsdale and Pepper were sophisticated businesses that often executed subcontracts, it is reasonable for us to assume that any questions as to coverage could have been negotiated prior to execution of the subcontract.").

considerations related to the administrability of both insurance claims and judicial proceedings.

To adopt the Defense's position in this appeal opens the door to litigating every course of construction policy loss despite the clearest contract provisions. IEI's primary argument, that City Colleges did not sustain a "loss" that triggered coverage and resulting subrogation rights for Zurich, relies primarily on standard policy provisions that call for the named insured, here, CMO not City Colleges, to handle the general administration of an insurance claim against the policy for all those impacted. This argument defeats significant benefits of the way the Builder's Risk insurance market has developed – that many owners, contractors, subcontractors, etc., can rely on the protection of a single policy without the need for an immediate investigation into fault.

But if Zurich's subrogation rights here turn on which of its many insureds it physically cut the check to, then carriers in the future will know that in the state of Illinois that they must determine the rights and obligation of each individual impacted insured before proceeding on a claim, or else they will be rendered incapable of recouping significant losses and holding the proper parties accountable for their tortious conduct. Courts would then be put in the position in every case of balancing the equitable prerequisites, regardless of the clarity of contractual subrogation terms. This is a result NASP urges the Court to reject.

## I. The Distinction between Loss vs. Insurable Interest is Not Outcome Determinative.

IEI maintains that the Appellate Court erred by not appreciating the distinction between an "insurable interest" and a "loss." This argument is a red herring at best. Below, the Appellate Court correctly concluded that an "insurable interest," standing alone, is the

functional equivalent of a "loss" for the purposes of this action, which allows Zurich to proceed in enforcement of its subrogation rights. *Zurich American Insurance Company v. Infrastructure Engineering, Inc*., 226 N.E.3d 1276, 1291, 470 Ill.Dec. 480, 495, 2023 IL App (1st) 230147, ¶ 45 (Ill.App. 1 Dist., 2023).

IEI's confusion seems to rest on what should be unremarkable facts –that the payments were cut to CMO, the general contractor and Named Insured, rather than City Colleges, the owner and "Additional Named Insured." But the comparative benefit of being named an additional insured under a single policy rather than forming a string of contractual indemnification obligations *is* that administrative convenience that can streamline the processing of a claim right when the project has been knocked off track. Was City Colleges' property damaged by the flooding Zurich alleges IEI caused? Of course it was. As an additional insured, could City Colleges have asserted a claim under the Builder's Risk policy directly? Yes. If CMO had failed in its obligations either to handle the repairs or coordinate with Zurich, might City Colleges have had more personal involvement in the claim handling? Probably. But that CMO handled the paperwork when a claim arose should have no impact whatsoever on Zurich and City College's rights against IEI.

IEI points to a number of questionably relevant cases in support of its argument. First, *Scheckler v. Auto-Owners Ins. Co.,* 2022 IL 128012 (Ill., 2022). *Scheckler* is a coverage decision, focused on an *insurer's* duty to defend against a contribution action asserted in connection with an ancillary subrogation claim. *Id.* at ¶1. In *Scheckler,* the issue on appeal was "whether an insurer's duty to defend or indemnify extends to the tenants of

an insured property against a third-party negligence contribution claim when the tenants are not identified as persons insured under the policy." *Id.*

Despite this distinction, IEI points to *Scheckler* for the "axiomatic" proposition that an insurer pursuing a subrogation claim must first demonstrate that its subrogor sustained a "loss" for which the insurer is entitled to recover as subrogee against a third party. In support, IEI cites ¶ 39 of the *Scheckler* decision: "When put into context, subrogation is defined as **"[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."** While *Schekler* is factually distinguishable, this unremarkable pronouncement does nothing to advance IEI's position.

IEI also cites *State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 2013 IL App (1st) 121388, 987 N.E. 2d 896 (Ill.App. 1 Dist., 2013) to further support its position that whether an "insurable interest" exists and whether there has been a "loss" are two separate inquiries. In *Rodriguez*, police suddenly seized the defendants' cars after discovering a thief had purchased them. *Rodriguez* at 898. Those vehicles were stolen, and the defendants argued for coverage based on their insurable interests as good-faith owners. Id. at ¶ 10. The defendants filed insurance claims for the loss, and their insurance carrier denied the claims and filed declaratory judgment actions. *Id*.

What IEI fails to mention is that *Rodriguez* was a coverage dispute. There was no question of an "insurable interest," merely of whether a specific policy exclusion would exclude coverage for the loss as it occurred. Indeed, in granting the declaratory relief sought by the insurer (State Farm), the Court stated that seizure of the vehicle does constitute

damage to the defendants, but it was not a damage to the vehicle itself under State Farm's policy for coverage. *Id*. at ¶ 2. Here, there is no question that Zurich has paid a covered loss under the policy – merely of how that loss should be thought of given the multiple insureds that could have brought the same claim under the policy for the damages that occurred here.

Similarly, IEI points to the 1940 decision of *Beman v. Springfield Fire & Marine Ins. Co.*, 303 Ill.App. 554 (Ill.App. 1 Dist. 1940). This case again involved a question of whether coverage existed under a policy at all. In *Beman,* plaintiffs were former mortgagors who conveyed their interest to their mortgagor holder, Chicago Title & Trust Company, with an option to repurchase land. Based on that option, they purchased a fire policy on the premises located on the land. *Id*. at ¶555. The mortgagee, Chicago Title & Trust Company, also purchased an insurance policy to protect its interest. *Id.* After the underlying fire, repairs were made by Chicago Title & Trust Company, which Chicago Title's insurer subsequently reimbursed. *Id.* at ¶ 556. At this time, plaintiffs did not exercise their option to purchase the property and did not do so until about one month after the repairs from the underlying fire were already made. *Id.* At this time, plaintiffs found a willing purchaser of the property and received from said purchaser the same amount as the buyer had the fire never occurred.

The *Beman* plaintiffs then argued that their policy was to pay them a sum certain upon the occurrence of the fire, and that liability was fixed under the policy once the event had occurred. Furthermore, they asserted that liability was not extinguished by repairing the damages by a third party, which could not destroy their right to recover. *Id.* Critically, the court noted that the parties had *stipulated*, at the same time as plaintiffs exercising their

option to repurchase, that repair of the fire damage was already completed without cost or expense to plaintiffs. *Id.* at 562. Consequently, the *Beman* plaintiffs could not secure first-party benefits for the underlying loss.

Again, this case involves a different scenario: a third party's liability in tort rather than a contractual right to first-party benefits in a coverage dispute. IEI likens this case to *Beman* by pointing out that multiple parties had an insurable interest and that only one party sustained a loss. In *Beman,* the plaintiffs seeking first-party benefits did not own the property at the time of the underlying fire but instead held only an option to purchase, which was not exercised until after the fire occurred and its resulting damages were remediated. That is vastly different from the circumstances here, where City Colleges owned the property before, at the time, of, and after the flooding occurred.

IEI goes on to state that the Appellate Court's opinion "turns the holding in *Beman* on its head by reaching the exact opposite conclusion: that the mere existence of an "insurable interest" in damaged property is the equivalent of a "loss." This statement is not an accurate depiction of the Appellate Court's holding. The Appellate Court held:

(1) City Colleges meets the policy's definition of an insured because City Colleges was "required by contract" to be insured under the policy, and City Colleges had an insurable interest in the project. *Id.* at ¶ 43;

(2) The general rule in construction cases is that the owner *and* the general contractor have insurable interests in the property until construction is complete. *Id.* at ¶ 45; and

(3) As the owner of the property under construction, City Colleges had a tangible, insurable interest in the insured property at all times and it suffered a "loss" due to the flooding damage. City Colleges suffered a further loss as a result of the delays occasioned by the flooding. *Id.* at ¶ 45.

*Zurich American Insurance Company v. Infrastructure Engineering, Inc.*, 2023 IL App (1st) 230147 (Ill.App. 1 Dist., 2023)

The final point above distinguishes between this matter and *Beman* clear because, unlike *Beman*, *both* CMO and City Colleges held an insurable interest *and* sustained a loss. If there were multiple insurance policies to cover the losses of CMO and City Colleges, those policies would have to coordinate among each other to determine a priority of coverage, but here CMO and City Colleges arranged in advance to have a single policy and avoid that administrative hassle should a loss occur. Conversely, the *Beman* plaintiffs were not the owners of the property at the time of the loss and only obtained their ownership interest after the loss occurred and was fully remediated, and thus had no provable loss of its own, especially since it came to court having already arranged for the sale of its interest in the property.

IEI further distorts the appellate court's holding by suggesting that: "whenever a claim is paid under an insurance policy, every single insured or additional insured under the policy would be deemed to have sustained a "loss" and deemed to have received an insurance payment from the carrier, even if the insured in fact had no loss and received no benefit whatsoever." IEI claims this puts it in the bizarre position of defending against a claim brought on behalf of one party but predicated on a loss sustained by another party. (IEI Brief, p. 23). This statement ignores the reality that a principal and additional insured can both sustain a "loss," thus giving rise to a right of subrogation, as occurred here.

In the end, the pertinent question is whether CMO or City Colleagues could have directly filed suit against IEI had no insurance benefits been paid. The clear answer is yes. IEI is attempting to diminish its own liability by equating these payments by Zurich, which

benefit both the named and additional insured, to a hold-harmless agreement favoring IEI on behalf of both the named and additional insured, merely because Zurich listed its Named Insured as the payee on the check. This nonsensical result undermines the public policy favoring subrogation, and therefore IEI's arguments concerning the distinction between a loss and insurable interest should be rejected.

## II. General Subrogation Equitable Prerequisites Do Not Apply to These Facts

NASP fully supports the Appellate Court's decision and urges the Supreme Court of Illinois to determine once and for all and make the clearest of distinction that contractual subrogation does not require the same prerequisite elements as equitable subrogation, an issue that has been the subject of "evolving, and sometimes inconsistent, case law in Illinois." *James River Insurance Co. v. Canal Insurance Co.*, 534 F. Supp. 3d 962, 967-70 (N.D. Ill. 2021).

The NASP agrees with the lower court that the *James River* decision offers a robust and accurate assessment of the history of this issue within the state, and deals clearly and effectively with authorities like *SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill. App. 3d 80, 105, 334 Ill.Dec. 47, 916 N.E.2d 80, 101 (2009), on which IEI relies. "In equating the requirements for equitable and contractual subrogation, the *SwedishAmerican* court did not advert to, much less discuss, the question of whether the requirements for equitable subrogation also apply to contractual subrogation[.]" *James River Insurance Co. v. Canal Insurance Co.*, 534 F. Supp. 3d 962, 968 (N.D. Ill. 2021)

IEI also looks to the decision of *Trogub v. Robinson* to support its position that subrogation universally requires the satisfaction of three prerequisites of equitable subrogation. 366 Ill.App.3d 838 (Ill.App. 1 Dist. 2006). *Trogub* also involved a first-party

dispute over the reimbursement interest of the insurer, Geico, which paid benefits. This is once again a departure from the issue at hand concerning the liability of a third party for the underlying loss.[3] That said, the *Trogub* court stated that two of the principles relevant to the appeal were that:

1. "Subrogation rights originated in common law to prevent unjust or unearned enrichment of one party at the expense of another but may also be created by statute or contract." *Id.* at 842 (*citing Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill.App.3d 700, 706-07, 248 Ill.Dec. 565, 734 N.E.2d 493 (2000)); and

2. "When an insurance contract gives the insurer the right to subrogate to the extent of its payment, the contract will be enforced as written and the insurer will receive full subrogation, even if the insured's losses exceed the amount it recovers from the tortfeasor and the insurer. *Id.* (*citing* Capitol Indemnity Corp. v. Strike Zone, S.S.B. & B. Corp., 269 Ill.App.3d 594, 596–97, 206 Ill.Dec. 943, 646 N.E.2d 310 (1995); *Eddy v. Sybert*, 335 Ill.App.3d 1136, 1139, 270 Ill.Dec. 531, 783 N.E.2d 106 (2003)).

*Trogub*, therefore, recognized that many avenues for subrogation potential may exist, and the overarching purchase is to "prevent unjust or unearned enrichment of one party at the expense of another."

Furthermore, while this Court has yet to issue an authoritative decision on the issue, Seventh Circuit concluded in *Mutual Service Casualty Insurance Co. v. Elizabeth State Bank that*, under Illinois law, "[w]here the right is created by an enforceable subrogation clause ... the contract terms, rather than common law or equitable principles, control." 265

[3] In fact, the tortfeasor in *Trogub* took no position as to the policy dispute between the insurer and plaintiff. *Trogub v. Robinson*, 853 N.E.2d 59, 61, 304 Ill.Dec. 527, 529, 366 Ill.App.3d 838, 839 (Ill.App. 1 Dist.,2006). Here, no disputes between CMO, City Colleges, and Zurich are before the Court.

F.3d 601, 627 (7th Cir. 2001) (*quoting Benge v. State Farm Mutual Auto. Ins. Co.*, 297 Ill. App. 3d 1062, 1071, 232 Ill.Dec. 172, 697 N.E.2d 914, 920 (1st Dist. 1998)).[4]

NASP would urge the Court to similarly reject the proposition that a defense to equitable subrogation could defeat a contractual subrogation claim. By providing unequivocal guidance on this matter, the Court can eliminate ambiguity and ensure consistency in legal interpretation going forward, thereby fostering a more transparent and predictable legal landscape for parties engaged in contractual agreements and subrogation proceedings, as well as promoting judicial economy in future disputes. This clarification will streamline the resolution of disputes and uphold the integrity of contractual relationships, reinforcing the principles of fairness and certainty within Illinois law.

The foregoing provides a simple result that would have saved the parties untold amounts of time and resources. This analysis requires only reviewing and interpreting the litigating Builder's Risk policy, Prime Agreement, and relevant subcontractor agreements. Taken together, the result becomes obvious, making it unnecessary for this Court to address whether, based solely on the Builder's Risk Policy, a property owner (City Colleges) sustained a "loss" that was paid by Zurich under the subject Builder's Risk Policy, and whether Zurich can pursue a contractual subrogation claim as the subrogee of City Colleges

[4] *See also Endurance Am. Specialty Ins. v. Victory Park Capital Advisors*, No. 18 C 08399, 2019 WL 2121118, at *5 (N.D. Ill. May 15, 2019) ("Illinois courts consistently uphold contractual subrogation clauses and do not generally consider equitable subrogation principles when dealing with contractual subrogation agreements."); *Elec. Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 346 F. Supp. 2d 958, 963 (N.D. Ill. 2004) ("The right of an insurer to subrogation is measured by and depends solely on the terms of the subrogation provisions in the contract.") (quoting *Hack v. Multimedia Cablevision, Inc.*, 297 Ill. App. 3d 255, 231 Ill.Dec. 398, 696 N.E.2d 694, 696 (1998)).

based on a loss claimed by an additional insured, and not the Named Insured as defined by that policy.

## III. IEI Attacks Selected Provisions of Builder's Risk Policy When Policy terms Provide Zurich with the Unambiguous Right to Subrogate on Behalf of City Colleges

IEI next attacks isolated and often out of context portions of the Builder's Risk policy itself, ignoring significant established Illinois caselaw concerning the requirement that Courts read policies as a whole, and will not adopt a strained interpretation.[5] Furthermore, if the language is unambiguous, the policy provisions will be applied as written in the absence of serious public policy concerns not present here. *Id.* A policy must be construed as a whole, giving words their plain, ordinary, and popular meaning while also striving to fulfill the parties' intent. *United States Fire Ins. v. Hartford Ins. Co.,* 312 Ill. App. 3d 153, 155 (Ill. App. Ct. 2000). Courts will not adopt a strained, forced, unnatural, or unreasonable construction or one which would lead to an absurd result. *Id.*

The relevant Builder's Risk policy provisions are clear as to who is insured, what constitutes a loss, and fully documents claim and payee provisions:

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[5] Our primary function is to ascertain and give effect to the intention of the parties, as expressed in the policy language. If the language is unambiguous, the provision will be applied as written, unless it contravenes public policy. The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage only applies where the provision is ambiguous. A policy provision is not rendered ambiguous simply because the parties disagree as to its meaning. Rather, an ambiguity will be found where the policy language is susceptible to more than one reasonable interpretation. While we will not strain to find an ambiguity where none exists, neither will we adopt an interpretation which rests on 'gossamer distinctions' that the average person, for whom the policy is written, cannot be expected to understand.

*Cont'l Cas. Co. v. Hennessy Indus., Inc.*, 2019 IL App (1st) 180183, ¶ 18, 131 N.E.3d 568, 573–74

> **12. SUBROGATION**
>
> If the Company pays a claim under this Policy, they will be subrogated, to the extent of such payment, **to all the Insured's** rights of recovery from other persons, organizations and entities. The Insured will execute and deliver instruments and papers and do whatever else is necessary to secure such rights.
>
> The Company will have no rights of subrogation against:
>
> **A.** Any person or entity, which is a Named Insured or an Additional Named Insured;
>
> **B.** Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss;
>
> It is a condition of this Policy that the **Company shall be subrogated to all** the Insured's unwaived rights of recovery, if any, **against any** third party Architect or **Engineer**, **whether named as an Insured or not**, for any **loss or damage** arising out of the performance of professional services in their capacity as such and caused by any error, omission, deficiency or act of the third party Architect or Engineer, by any person employed by them or by any others for whose acts they are legally liable. (emphasis added)
>
> Notwithstanding the foregoing, it is a condition of this Policy that the Company shall be subrogated to **all the Insured's rights of recover**y against any manufacturer or supplier of machinery, equipment or other property, whether named as an Insured or not, for the cost of making good any loss or damage which said party has agreed to make good under a guarantee or warranty, whether expressed or implied.
>
> The Insured will act in concert with the Company and all other interest concerned in the exercise of such rights of recovery. The Insured will do nothing after a loss to prejudice such rights of subrogation.
>
> If any amount is recovered as a result of such proceedings, the net amount recovered after deducting the costs of recovery, will accrue first to the Company up to the amount of loss paid. Any excess of this amount will be remitted to the Insured. If there is no recovery, the interests instituting the proceedings will bear the expense of the proceedings proportionately

(C. 10597 V7 – 10598 V7) (emphases added).

When read in conjunction with the Declarations, it presents a comprehensive view of the contract terms that have controlled the parties' actions.

> B. ADDITIONAL NAMED INSURED(S)
>
> All **owners**, all contractors and subcontractors of every tier, and tenants at the project location, except as named in A. above, as required by any contract, subcontract or oral agreement for the INSURED PROJECT*, and then only as their respective interests may appear are recognized as Additional Named Insureds hereunder. **As respects architects, engineers, manufacturers and suppliers, their interest is limited to their site activities only.** Additional Named Insureds as provided above, may be endorsed to this Policy or shown on ACORD Certificates of Insurance (or equivalent) issued by Construction Risk Partners, LLC, copies of which will be forwarded, if requested, to the Company.
>
> The first **Named Insured** shown in A. above **shall be deemed the sole and irrevocable agent** of **each and every Insured** hereunder **for the purpose of giving and receiving** notices to/from the Company, giving instruction to or agreeing with the Company as respects Policy alteration, **for making or receiving payments of premium** or adjustments to premium, **and as respects the payment for claims.**
>
> (C530) (emphases added)
>
> 11. LOSS PAYEE(S) AND MORTGAGE HOLDERS(S)
> Loss, if any, shall be adjusted with and **made payable to the first Named Insured** and designated Loss Payees and/or Mortgage Holders, as scheduled below or as endorsed to this Policy, **or as per order of the first Named Insured**. Receipt of payment by the first **Named Insured** shall constitute a release in full of all liability under this Policy with respect to such loss.

(C533) (emphases added)

Stated simply, Section 12 taken with the Risk Policy Declarations and ensuing provisions states unequivocally that City Colleges, as a building owner, has an insurable interest in the building(s) owned, because in the event of loss or tangible physical damage to the property, that in fact occurred, a financial loss is actually incurred affecting the value of the property in its damaged state, and the insurable interest is in replacing or rebuilding what has been physically damaged or destroyed.

The damage, as to CMO, is simply a blip in the project they were hired to build and to complete, and because of the tangible physical damage caused by IEI, CMO was obviously, as the general contractor, and pursuant the terms of the policy, the "Named Insured" designated to make a claim and repair the damage. The insureds, which includes both City Colleges and CMO, have insured interests in the project at every phase and Zurich is entitled to seek repayment, on behalf of its insureds, from the liable party for the amounts it paid to compensate multiple insureds for the losses they suffered, separately and, as in this case, collectively.

A flooded basement and electrical work represent tangible physical damage to the building that the owner/City Colleges owns. City Colleges, at the time of the damage, is in possession of and owns damaged property. Yes, as an administrative matter, CMO handled much of the Zurich insurance claim, and continued its work as general contractor to physically remedy the damage and keep the projection on schedule. But City College ultimately paid the premiums on the Zurich policy, and should not be said to have not suffered a loss at all merely because it had the forethought to be prepared and insured for a potential adverse event during construction.

As stated in the policy, CMO, as the specifically designated Named Insured, was also designated per the policy as the sole and irrevocable agent of each and every Insured. CMO was therefore *required* per the terms of the Builder's Risk policy to give claim notice to Zurich, to make and receive payments of premiums, handle the payment of claims, and generally act as the agent for other insureds that may be involved in losses covered by the policy.

**8. DUTIES IN CASE OF LOSS**

**A. Notice of Loss**
The **Named Insured** will report in writing to the Company every loss OCCURRENCE* which may give rise to a claim under this Policy as soon as practicable, but not later than thirty (30) days, after it becomes known to the **Named Insured**.

**B. Proof of Loss**
The **Named Insured** will file with the Company a signed and sworn detailed proof of loss as soon as practicable, but not later than sixty (60) days following the Company's request.

**C. Payment of Loss**
All adjusted claims, including partial payments thereon, will be due and payable no later than sixty (60) days after presentation and acceptance of proof of loss or partial proof of loss, as the case may be, by this Company or its appointed representative.

**9. PROTECTION OF PROPERTY AFTER LOSS**
When Covered Property has sustained direct physical loss or damage by an insured peril, the **Named Insured** will take reasonable steps to protect, recover or save the damaged property and minimize any further loss or damage.

The acts of the **Named Insured** or the Company in protecting, recovering or saving the damaged property will not be considered a waiver or an acceptance of abandonment. The Named Insured and the Company will bear the expense incurred proportionate to their respective interests.

The foregoing shall not serve to increase the Limit(s) of Liability stated in the Policy and shall be subject to the deductible provisions of the Policy to which these Conditions are attached.

**10. ASSISTANCE AND COOPERATION OF THE INSURED**
The **Named Insured** shall cooperate with the Company and upon the Company's request and expense, shall attend hearings and trials and shall assist in effecting settlements, in securing and giving evidence, in obtaining the attendance of witnesses, and in conducting suits.

(C548).

IEI's arguments that Zurich's claims of subrogation create a scenario in which every time a claim is submitted, the claim-submitting party is a de facto agent of every

potential insured under an insurance policy each and every time a claim is submitted or paid should be discounted as the hyperbole it is. (IEI Br., p. 24.) At best, the argument is premature, as City Colleges is not some ancillary potential insured here, they are the building owner on a major damage claim.

Any attempt to deviate from the express contract provisions or to allow a court to expand or limit them is not only unwarranted but also contradicts the fundamental principles of contract law that Illinois insurers, businesses, contractors, etc., rely on for consistent application of their contractual duties and rights.

By providing unequivocal guidance on this matter, the Court can eliminate ambiguity and ensure consistency in legal interpretation, thereby fostering a more transparent and predictable legal landscape for parties engaged in contractual agreements and subrogation proceedings. This clarification will not only streamline the resolution of disputes but also uphold the integrity of contractual relationships, reinforcing the principles of fairness and certainty within the realm of Illinois law.

## CONCLUSION

For these reasons, *amicus curiae* National Association of Subrogation Professionals respectfully request that this Court affirm the Appellate Court's decision and reverse the summary judgment entered in favor of defendant IEI by the circuit court and remand for further proceedings.

Respectfully submitted,

*/s/ Stephen A. Smith*
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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a), (b), Rule 315(h) and 345. The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 23 pages.

*/s/ Stephen A. Smith*
Stephen A. Smith

**NOTICE OF FILING and PROOF OF SERVICE**

In the Supreme Court of Illinois

| | | |
|---|---|---|
| ZURICH AMERICAN INSURANCE COMPANY, as subrogee of Community College District No. 508, d/b/a City Colleges of Chicago and CMO, a Joint Venture, | ) | |
| *Plaintiff-Appellee,* | ) | |
| v. | ) | No. 130242 |
| INFRASTRUCTURE ENGINEERING, INC., | ) | |
| *Defendant-Appellant.* | ) | |

The undersigned, being first duly sworn, deposes and states that on April 15, 2024, there was electronically filed and served upon the Clerk of the above court the amended *Amicus Curiae* Brief of National Association of Subrogation Professionals in Support of Plaintiff-Appellee. On April 15, 2024, service of the Brief will be accomplished through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

*/s/ Stephen A. Smith*
Stephen A. Smith

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

*/s/ Stephen A. Smith*
Stephen A. Smith