

## 7th Circuit: Damage to Property Exclusion Applies Broadly to Damage Caused by Defective Work

On December 18, 2017, the U.S. Court of Appeals for the Seventh Circuit issued a decision that will impact insurance coverage for property damage claims, especially in Illinois. In *W. Side Salvage, Inc. v. RSUI Indem. Co.*, the Seventh Circuit, applying Illinois law, held that the damage to property exclusion in a commercial general liability policy applies broadly to exclude coverage not only to the precise area on which the insured was working but also to other parts of the property damaged by the defective work.<sup>1</sup>

This was not the first time this dispute was pending before the Seventh Circuit. In 2010, ConAgra discovered a hot grain bin — a bin with rising grain temperatures that poses a risk of explosion — at its Chester, Ill., facility. ConAgra hired West Side to fix the problem, but the grain bin exploded while West Side was performing its work. The explosion caused severe injuries to three workers and damaged the grain bin. The injured workers sued West Side and ConAgra, and ConAgra filed a cross-claim against West Side for property damage to the bin.

West Side had a \$1 million primary insurance policy with Colony Insurance and an \$11 million excess insurance policy with RSUI Indemnity Company. After the parties failed to reach a settlement, a jury found West Side liable for the property damage to ConAgra's grain bin. On appeal, the Seventh Circuit affirmed the judgment against West Side on ConAgra's property-damage claim, leaving West Side facing significant liability in excess of its policy limits.

West Side had also filed a complaint in the district court against RSUI for failure to settle ConAgra's property-damage claim within policy limits. RSUI moved for summary judgment, arguing that its insurance policy did not cover the property-damage claim, in part, because the following exclusion precluded coverage for property damage to:

(5) [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations if the "property damage" arises out of those operations.

The district court, relying on out-of-state authority, interpreted this exclusion narrowly, concluding that the exclusion applied only for damage to property caused by work on that particular piece of property. Specifically, the district court noted that "a reasonable interpretation of the facts could lead to the conclusion that [West Side] [was] not doing any work on the physical structure of the grain elevator itself, but [was] instead focused solely on handling the material within the bin that caused it to be classified as a 'hot bin.'"<sup>2</sup> The district court concluded that "[w]ork on the bin itself would have fallen within the damage to property exclusion — such as work to physically repair manhole covers or to change the physical characteristics of the bin," but that "work on the contents of the bin would only fall within the damage to property exclusion to the extent the damage sought was for repair or replacement of the actual contents of the bin lost."<sup>3</sup> Here, the claim was for damage to the bin itself, not to the loss of the grain in the bin making it a "hot bin."<sup>4</sup> Accordingly, the district court denied RSUI's motion for summary judgment based on the applicability of the exclusion.

On appeal, the Seventh Circuit declined to adopt this interpretation, instead holding that the RSUI policy did not cover the grain bin at all because West Side performed its work incorrectly by failing to reduce the grain temperature in a timely manner.<sup>5</sup> In other words, even if West Side was only working on the actual grain when the explosion occurred, this was immaterial because "[t]he damage-to-property exclusion does not apply only to the precise area of the property being worked on if the work performed was poor."<sup>6</sup> The Seventh Circuit recognized that the damage-to-



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property exclusion is “premised on the theory that liability policies are not intended to provide protection against the insured’s own faulty workmanship or product, which are normal risks associated with the conduct of the insured’s business.”<sup>7</sup> Here, the damage that West Side caused was a normal risk associated with its business of remedying hot grain bins before they explode. Accordingly, the Seventh Circuit granted summary judgment to RSUI and dismissed West Side’s claims on the merits.

With this decision, the Seventh Circuit has joined the Eighth Circuit<sup>8</sup> in interpreting the damage to property exclusion to apply not only to the precise area of the property being worked on but also to other parts of the property damaged by defective work.

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**To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Melissa Brill at [mbrill@cozen.com](mailto:mbrill@cozen.com) or (212) 908-1257 or Alex Selarnick at [aselarnick@cozen.com](mailto:aselarnick@cozen.com) or (212) 453-3740.**

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<sup>1</sup> No. 16-3928, 2017 WL 6422107 (7th Cir. Dec. 18, 2017).

<sup>2</sup> *W. Side Salvage, Inc. v. RSUI Indem. Co.*, 215 F. Supp. 3d 728, 738 (S.D. Ill. 2016), *aff’d*, No. 16-3928, 2017 WL 6422107 (7th Cir. Dec. 18, 2017).

<sup>3</sup> *Id.* at 738.

<sup>4</sup> *Id.*

<sup>5</sup> *W. Side Salvage*, 2017 WL 6422107, at \*1.

<sup>6</sup> *Id.* (citing *Pekin Ins. Co. v. Willett*, 301 Ill.App.3d 1034, 704 N.E.2d 923 (1998)).

<sup>7</sup> *W. Side Salvage*, 2017 WL 6422107, at \*1.

<sup>8</sup> See *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 673 (8th Cir. 2013).