

12-26-2019

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### Recommended Citation

Sarah G. Anderson, *When Insurance Companies Meet Their Match, The Seventh Circuit Resolves Ambiguous Replacement-Cost Policy Language*, 15 Seventh Circuit Rev. (2019).

Available at: <https://scholarship.kentlaw.iit.edu/seventhcircuitreview/vol15/iss1/8>

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**WHEN INSURANCE COMPANIES MEET  
THEIR MATCH: THE SEVENTH CIRCUIT  
RESOLVES AMBIGUOUS REPLACEMENT-COST  
POLICY LANGUAGE**

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Cite as: Sarah G. Anderson, *When Insurance Companies Meet Their Match, The Seventh Circuit Resolves Ambiguous Replacement-Cost Policy Language*, 15 SEVENTH CIRCUIT REV. 1 (2019), at <http://www.kentlaw.iit.edu/Documents/AcademicPrograms/7CR/v15/anderson.pdf>.

INTRODUCTION

If it's not "broke," don't fix it—or maybe do. In the realm of property insurance, standard replacement-cost policy language is being hotly contested, leaving many insureds wondering what their property insurance policies actually cover. The policy itself reads that the insurer will cover "direct physical loss to covered property," and yet, debate over the interpretation of this simple sentence has reached the Seventh Circuit. In cases of partial property damage, insurers seek to pay to replace only what they must—the damaged property and nothing more. Insureds, however, fear such replacements will leave them with property that is aesthetically mismatched, as the brand-new materials amid undamaged, older materials might cause their property to decrease in value. However, remedying this concern is no small matter: the price of beauty can cost insurers with this particular replacement-cost policy language millions more than perhaps what they originally bargained for.<sup>1</sup> The question then remains—should

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<sup>1</sup> According to a March 2019 analysis by State Farm, damage caused by wind and hailstorms "cost State Farm and its policyholders more than \$2.7 billion in 2018," and "Colorado was the state with the most wind/hail losses, followed by

such a property insurer be required to replace undamaged property in order to achieve aesthetic “matching”? The Seventh Circuit’s recent opinion in *Windridge of Naperville Condominium Association v. Philadelphia Indemnity Insurance Company*<sup>2</sup> answered this question in favor of coverage for the insured.

On May 20, 2014, a strong hail and wind storm greatly damaged buildings owned by Windridge of Naperville Condominium Association (“Windridge”).<sup>3</sup> Specifically, the storm directly damaged the aluminum siding on the south and west sides of Windridge’s buildings, equating to a multi-million dollar loss.<sup>4</sup> Windridge filed a claim with its insurer, Philadelphia Indemnity Insurance Company (“PIIC”), for payment to replace the aluminum siding on *all* sides of its storm-affected buildings covered by the policy.<sup>5</sup> PIIC only agreed to pay for the replacement of the damaged aluminum siding on the south and west sides of the buildings, but not the undamaged siding on the north and east sides.<sup>6</sup> According to PIIC, the relevant insurance policy only required payment for “direct physical loss to covered property,” and the siding on the north and east sides did not experience any such loss or damage.<sup>7</sup> Windridge argued that its current aluminum siding was no longer available, and thus, any replacement siding would not match the undamaged siding.<sup>8</sup> Additionally, Windridge

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Texas, Illinois, Minnesota and Missouri.” INSURANCE INFORMATION INSTITUTE, [iii.org/fact-statistic/facts-statistics-hail](http://iii.org/fact-statistic/facts-statistics-hail).

<sup>2</sup> *Windridge of Naperville Condo. Ass’n v. Phila. Indem. Ins. Co.* (“*Windridge I*”), 932 F.3d 1035, 1036 (7th Cir. 2019).

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

<sup>4</sup> *Id.* Although the insurer, Philadelphia Indemnity Insurance Company, agreed to pay \$2.1 million to Windridge for the damage to the south and west sides, Windridge sought approximately \$3.5 million in replacement costs for the siding of all four sides of all buildings in their entirety. *See* Brief for Defendant-Appellant (“PIIC Brief”) at 8, *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.*, No. 1:18-cv-2103 (7th Cir. Nov. 15, 2018).

<sup>5</sup> *Windridge II*, 932 F.3d at 1037.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1036.

<sup>8</sup> *Id.*

claimed that buildings with two elevations consisting of replacement siding and two elevations consisting of undamaged siding would result in a mismatched appearance that would not make it “whole.”<sup>9</sup>

One interpretation of Windridge’s replacement-cost policy might suggest that PIIC must pay to replace only the specific panels of siding that were damaged, while another interpretation might suggest that PIIC must pay to replace all of the siding on the affected buildings in order to restore the buildings’ uniform appearance.<sup>10</sup> Yet another interpretation might suggest that PIIC pay to replace the siding on the buildings’ affected *sides*, each side being considered separately for damage.<sup>11</sup> Ultimately, the Seventh Circuit affirmed the Northern District of Illinois’s decision, which interpreted the policy as covering replacement siding on *all four sides* of all the buildings.<sup>12</sup>

Part I of this note explores the construction of general replacement-cost policy language and the effect of its often-overwhelming ambiguity. Part II of this note provides an overview of the Seventh Circuit’s recent decision in *Windridge of Naperville Condominium Association v. Philadelphia Insurance Company*, highlighting its analysis of the particular replacement-cost policy language at issue. Part III analyzes other courts’ approaches in interpreting similar replacement-cost policy language, evaluating the strengths and weaknesses of those arguments. Finally, part IV examines the impact that the Seventh Circuit’s decision in *Windridge* will have in Illinois and throughout the country.

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1040.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1036.

## PART I: BACKGROUND

*Replacement Cost Policy Construction*

About 70 million people have homeowner's insurance.<sup>13</sup> Common to most property insurance policies is compensation for "actual cash value" of damaged property.<sup>14</sup> Actual cash value allows the insured to be compensated for the property value lost.<sup>15</sup> In Illinois, actual cash value is measured by the property's replacement value minus any depreciation,<sup>16</sup> which accounts for wear and tear costs.<sup>17</sup> Because

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<sup>13</sup> Claire Wilkinson, *How Many Homes are Insured? How Many are Uninsured?* TERMS + CONDITIONS: INS. INDUSTRY BLOG (October 17, 2019), <http://www.iii.org/insuranceindustryblog/?p=4339>.

<sup>14</sup> Randy R. Koenders, Annotation, *Construction and Effect of Property Insurance Provision Permitting Recovery of Replacement Cost of Property*, 1 A.L.R.5th 817 (1992).

<sup>15</sup> As one commentator has noted, "[a]lthough the term actual cash value is found in many property insurance policies," and the "generally-accepted meaning of the term" is replacement cost less depreciation, "it is quite common for the phrase not to be defined in [property insurance] policies." Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 WAKE FOREST L. REV. 295, 332 n.5 (1999).

<sup>16</sup> Depreciation in the insurance context refers to a decrease in the value of the property based on factors such as age, condition, and usefulness. *See Depreciation*, BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>17</sup> *Carey v. Am. Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 281 (1st Dist. 2009) (in Illinois, "in arriving at 'actual cash value' a deduction must be made from replacement cost to account for depreciation . . ."). Outside of Illinois, such as in Iowa, actual cash value is interpreted as being "fair market value." *See Gustafson v. Cent. Iowa Mut. Ins. Ass'n.*, 277 N.W.2d 609, 613 (Iowa 1979). In other states, such as New York, actual cash value is interpreted under the "broad evidence rule," which essentially allows the trier of fact to consider market value of the property at the time of the loss; however, Illinois rejects both the "fair market value" and "broad evidence rule" approaches to interpreting actual cash value. *See Carey*, 391 Ill. App. 3d at 281 ("Illinois courts have rejected both the 'market value' and the 'broad evidence' tests, instead applying the aforementioned 'replacement cost less depreciation' test in determining the actual cash value of damaged property."); *see also C.L. Maddox, Inc. v. Royal Ins. Co.*, 208 Ill. App. 3d 1042, 1055 (5th Dist. 1991) ("While we are aware that other States have adopted a 'broad evidence' rule

actual cash value causes the insured to bear the loss of depreciation, replacement-cost coverage was created to alleviate this problem.<sup>18</sup> Replacement-cost coverage allows “recovery for the actual value of the property at the time of loss, *without deduction for deterioration, obsolescence, and similar depreciation of the property’s value.*”<sup>19</sup> In other words, replacement-cost provisions allow the insured to receive an amount equal to that which would be required to replace the lost items.<sup>20</sup> Similar to actual cash value, replacement-cost coverage will apply after a certain deductible is met.<sup>21</sup> Although policy language may provide otherwise, most insurance policies only allow claims for actual cash value until repairs to the damaged property are made, at which point insurers will accept claims for replacement-cost value.<sup>22</sup>

For example, consider the insured who gets a roof that costs him \$10,000. Let us assume the insured has a \$1,000 deductible and that every year the roof depreciates in value about \$1,000. After 5 years, a hailstorm damages the insured’s roof. Using actual cash value, because the roof is 5 years old, it is now only worth \$5,000, and after paying the deductible, the insured is out about \$6,000. However, under replacement-cost coverage, assuming the insured’s met his deductible, the insured could recover the cost to build a new roof of similar quality to the \$10,000 roof. This approach only leaves the insured out \$1,000.

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which would permit the introduction of market value evidence, we decline to adopt such a rule.”) (internal citations omitted).

<sup>18</sup> See generally, Am. Jur. 2d, Insurance § 1661.

<sup>19</sup> Koenders, *supra* note 14 at pin cite. (emphasis added).

<sup>20</sup> As an example of the different amounts that can be found using different valuation methods, Windridge’s supporting memorandum shows an appraisal award for \$2,940,000.00 for replacement-cost value of the siding as opposed to of \$2,352,005.92 for actual cash value of the siding. Plaintiff-Appellee’s Suppl. Memo.at 4, *Windridge of Naperville Condo. Ass’n v. Phila. Indem. Ins. Co.*, No. 18-2103 (7th Cir. April 3, 2019), ECF No. 44.

<sup>21</sup> See Koenders, *supra* note 14 at \*7.

<sup>22</sup> *But see* Nicasastro v. New York Cent. Mut. Fire Ins. Co., 148 A.D.3d 1737, 1738 (4th Dep’t 2017) (finding that language regarding the timing of bringing replacement claims ambiguous because the policy failed to define the term “claim”).

Ironically, “[t]he difference between ‘replacement cost’ and ‘actual cash value’ may be one of the few aspects of property insurance coverage that is actually explained to consumers by insurance agents.”<sup>23</sup> Although as a general matter replacement-cost policies seem to provide better coverage, the insured’s premiums are often higher,<sup>24</sup> the policy generally requires a homeowner to insure at least 80% of the actual replacement cost of their home before getting a replacement cost settlement,<sup>25</sup> and getting the insurer to actually pay to replace damaged property is a process within itself.<sup>26</sup>

One issue involving replacement-cost policies is the timing of the replacement.<sup>27</sup> Some replacement-cost policies contain provisions that require the insured to “‘commence’ repair or replacement of the insured property within a certain timeframe [and] will generally be upheld although it will not be interpreted as requiring that the repairs be *completed* within that timeframe.”<sup>28</sup> Other policies only require that repairs or replacements be done in a “reasonable” amount of time.<sup>29</sup> Typically, the policy will have a provision stating that the insurer is not liable for more than actual cash value of the damaged property *until* the repair or replacement has taken place.<sup>30</sup> Additionally, the policy may include a provision that allows the insured the option to

<sup>23</sup> Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1274 n.39 (2011).

<sup>24</sup> See *Alessi v. Mid-Century Ins. Co.*, 464 S.W.3d 529, 532 (Mo. Ct. App. 2015).

<sup>25</sup> See *e.g.*, *Bardi v. Farmers Fire Ins. Co.*, 687 N.Y.S.2d 768, 771 (App. Div. 1999).

<sup>26</sup> See generally Koenders, *supra* note 14 (“Matching issues are frequently problematic . . .”).

<sup>27</sup> 2 JAMES L. KNOLL, *INSURING REAL PROPERTY* § 25.04 (LexisNexis Matthew Bender 2019).

<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> *Id.*

<sup>30</sup> See *Tamco Corp. v. Fed. Ins. Co.*, 216 F. Supp. 767 (N.D. Ill. 1963) (recognizing that the endorsement policy language—“any loss unless and until the damaged or destroyed property is actually repaired”—had to be met before the insurer was liable for any loss).

collect the actual cash value of the damaged property in exchange for foregoing her right to later make a claim for replacement costs.<sup>31</sup> “Due diligence” in completing repairs is usually required, which has been interpreted to cover periods anywhere from ten months to a full year.<sup>32</sup>

Another issue regarding replacement-cost policies that continues to occur involves properly determining the scope of coverage, particularly when there is only partial damage to property. In Illinois, the insured has the initial burden to prove that the loss is covered, and then the insurer will have the burden to combat such argument by asserting that a limitation or exclusion in the policy applies.<sup>33</sup>

Even as far back as 1983 in *Mastin v. Sandy & Beaver Ins. Co.*, the issue regarding scope of coverage was prevalent.<sup>34</sup> In *Mastin*, the insured’s home was damaged by a storm, which was a covered hazard under the policy, and it was necessary to cut a hole in the kitchen floor to repair the damage done to the plumbing.<sup>35</sup> After the other repairs were made, the insurer only paid to patch the kitchen floor, and the insured wanted the entire kitchen floor replaced.<sup>36</sup> The court found that the floor could not be “repaired” if such an obvious patch was left, and therefore, replacement was necessary.<sup>37</sup> In its reasoning, the court

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<sup>31</sup> See *Prudential Ins. Co. of Am. v Hartford Fire Ins. Co.*, No. 78C 3576, 1979 U.S. Dist. LEXIS 7969, \*4-5 (December 14, 1979) (applying Illinois law) (a replacement-cost policy indicated that if the full cost of repair was more than \$1,000 or more than 5 percent of the total amount of insurance covering the damaged property, the insurer was not liable until the actual repair work was completed; however, the insured’s decision to disregard this election would not affect the insured’s right to make a further claim within 180 days after the loss because the court viewed the insurer as bearing the risk of increased construction costs, including increased costs accruing during litigation concerning the meaning of that provision).

<sup>32</sup> Koenders, *supra* note 14, at \*2a, \*3.

<sup>33</sup> *Addison Ins. Co. v. Fay*, 232 Ill.2d 446, 453 (2009) (stating that “the burden in on the insured to prove that its claim falls within the coverage of an insurance policy” and “[o]nce the insured has demonstrated coverage, the burden then shifts to the insurer to prove a limitation or exclusion applies.”).

<sup>34</sup> *Mastin v. Sandy & Beaver Ins. Co.*, 432 N.E.2d 332, 332 (1983).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

placed emphasis on the fact that the insurer presumably inspected the kitchen floor, was aware that the access to the plumbing was through the kitchen floor, and knew the kitchen floor might be expensive to replace.<sup>38</sup>

Other courts have distinguished *Mastin* where damage can be limited to occurring to only a particular area.<sup>39</sup> In *St. Paul Fire & Marine Co. v. Darlak Motor Inns, Inc.*, an insured had six hotel rooms damaged as a result of a fire.<sup>40</sup> The insured wanted its insurer to cover the cost of redecorating rooms on the third floor, which were undamaged by the fire, in order for all its rooms to maintain “continuous décor.”<sup>41</sup> The court determined that in this case, the insurer was not merely “patching” a problem in a deficient manner, but rather “would have no reason to know that it would have to redecorate every room on a floor even if only one of those rooms was damaged.”<sup>42</sup> Therefore, the cost of requiring the insurer to redecorate those undamaged rooms was unwarranted.<sup>43</sup>

As these case examples demonstrate, replacement-cost policies can be unclear when partial damage to property occurs and the parties are determining how much property to replace. To eliminate unexpected costs, insurers, much like PIIC in *Windridge*, include a valuation provision that allows them to choose the least expensive replacement option.<sup>44</sup> For example, in *Windridge*, PIIC agreed to “pay for direct physical ‘loss’ to Covered Property caused by or resulting from any of the Covered Causes of Loss” and included the following valuation provision:<sup>45</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *St. Paul Fire & Marine Co v. Darlak Motor Inns, Inc.*, No. 3:97-cv-1559, 1999 U.S. Dist. LEXIS 23283, \*2-3 (March 9, 1999).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*17.

<sup>42</sup> *Id.* at \*20.

<sup>43</sup> *Id.* at \*22.

<sup>44</sup> *Windridge of Naperville Condo. Ass’n v. Phila. Indem. Ins. Co.* (“*Windridge II*”), 932 F.3d 1035, 1036-37 (7th Cir. 2019).

<sup>45</sup> Note that all words or phrases that begin with a capital letter generally indicate that such word or phrase is defined in the insurance policy itself.

## 7. Valuation

We will determine the value of Covered Property in the event of “loss” as follows:

- a. at replacement cost (without deduction for depreciation) as of the time of “loss” . . .
  1. We will not pay more for “loss” on replacement costs basis than the least of:
    - a) The Limit of Insurance applicable to the lost or damaged property;
    - b) The cost to replace the lost or damaged property with other property:
      - i. Of comparable material and quality; and
      - ii. Used for the same purpose;or
    - c) The amount you actually spend that is necessary to repair or replace the lost damaged property.<sup>46</sup>

Based on the policy language cited, PIIC agreed to either replace or pay to replace the covered property that was damaged by a covered loss, depending on which option was cheaper.

Additionally, as is typical of most replacement-cost policies, a loss payment provision is also included.<sup>47</sup> Property insurance policies generally include loss payment provisions to allow the insurer some flexibility and discretion in the process of compensating the insured for his loss. Using Windridge’s policy as an example, the loss payment provision allowed PIIC to choose the least expensive of the following four options: (1) pay the value of the damaged property; (2) pay the cost to repair or replace the damaged property; (3) take all or any part

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<sup>46</sup> *Windridge II*, 932 F.3d at 1037.

<sup>47</sup> *See id.*

of the property at an agreed or appraised value; or (4) repair, rebuild, or replace the property with other property of like kind and quality.<sup>48</sup>

Although option 4—which will repair, rebuild, or replace the property—is the only option that specifically uses the (words “like kind and quality,” the Seventh Circuit indicated, the phrase “[o]f comparable material and quality” was applicable to all the loss payment provision options.<sup>49</sup> The Seventh Circuit recognized that “regardless of which option Philadelphia Indemnity [chose], replacement property must be “[o]f comparable material and quality” and PIIC indicated as much in their valuation statement.<sup>50</sup>

Option 2, which commonly or usually requires payment for replacement of the property, is the cheapest option for insurers.<sup>51</sup> However, problems arise when computing the replacement cost amount when, as was the case in *Windridge*, materials go out of stock and become unavailable, leaving no exact or identical match on the market.<sup>52</sup> Such issues have left the parties wondering how identical of a match is required.

Many courts have determined that although an exact match may not be required, a “reasonable” match is required.<sup>53</sup> Courts around the country tend to vary in defining a reasonable match, but typically the definition involves replacement that is equal in value and virtually identical to the undamaged property.<sup>54</sup> In *Cedar Bluff Townhome*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1039.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; It is, in fact, rare for insurance companies to ever want to choose an option like (3) or (4) in the policy in *Windridge*, as these steps essentially turn the policy into a contract for repair and exposes them to potential liability to others. *See* 12A STEVEN PLITT, ET AL., COUCH ON INSURANCE §176:41 (3d. ed. 2019).

<sup>52</sup> *See id.* at 1037.

<sup>53</sup> *See Cedar Bluff Townhome Condo. Ass’n v. Am. Family Mut. Inc. Co.*, 857 N.W.2d 290 (Minn. 2014).

<sup>54</sup> *See, e.g., Alessi v. Mid-Century Ins. Co.*, 464 S.W.3d 529, 532-33 (Mo. Ct. App. June 23, 2015) (“Considering the definition in full, construed in favor of the insured to provide the broadest coverage possible, ‘equivalent’ requires that the replacement [siding] be ‘equal in value’ and ‘virtually identical’”); *Hamlet Condo.*

*Condominium Ass'n v. American Family Mut. Ins. Co.*, over 20 buildings were lightly affected by a hail storm, each building experiencing damage to less than 2% of its siding.<sup>55</sup> Like in *Windridge*, the insured in *Cedar Bluff* claimed that, pursuant to their replacement cost policy, the insurer should pay to replace the siding on all four sides of each of their twenty buildings because the current siding was eleven years old, faded, and would not match any brand new siding that would replace the damaged panels.<sup>56</sup> Interestingly, while the manufacturer of the insured's buildings' siding still made the same exact siding, the insured argued that such brand new panels would not match the color of the *faded* siding.<sup>57</sup> The Minnesota Supreme Court found that the insurer agreed to replace the panels with "comparable material and quality," and such a phrase included color concerns.<sup>58</sup> Further, the court held the insurer had to replace the siding on all twenty buildings to avoid the color mismatch.<sup>59</sup>

Minnesota is not alone in concluding that replacement-cost provisions (like in *Cedar Bluff*) do, in fact, require more than paying for a merely similar match.<sup>60</sup> In *Alessi v. Mid-Century Ins. Co.*, a hailstorm damaged the siding on the insured's house's north side.<sup>61</sup> Once again, the insured argued that the siding was no longer available and the insurer was required to recover for the cost of siding on the entire house.<sup>62</sup> The Appellate Court agreed with the insured and

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Ass'n v. Am. Family Mut. Ins. Co., No. 2016-cv-305942017, Colo. Dist. LEXIS 1433, \*17 (April 12, 2017) (stating replacement-cost policies run the risk of allowing the insured to be in a better position he was in before the loss and that a reasonable match under the relevant replacement-cost policy entitled the insured to skim-coating, which provided visually matching stucco).

<sup>55</sup> *Cedar Bluff Townhome Condo. Ass'n v. Am. Family Mut. Inc. Co.*, 857 N.W.2d at 291.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 292

<sup>58</sup> *Id.* at 295.

<sup>59</sup> *Id.* at 296.

<sup>60</sup> *Alessi*, 464 S.W.3d at 529.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 530.

interpreted the phrase “equivalent construction and use” as the replacement-cost policy calling for replacement “equal in value” and “virtually identical.”<sup>63</sup> It seemed obvious to the court that if the insured were left with mismatched siding, then the insured’s property value would have been reduced.<sup>64</sup> To the court, the insurers bore the risk that the insured might end up in a better position than he was in before the loss: failing to pay anything less than a full replacement of the siding on the entire house would violate its contractual obligation.<sup>65</sup>

In Illinois, phrases such as “of like kind or quality” mean “sufficient to restore the [property] to its pre-loss condition.”<sup>66</sup> In *Avery v. State Farm Mut. Auto Ins. Co.*, plaintiffs brought suit against their insurer for failure to replace damaged vehicle parts with non-original equipment manufacturer (“non-OEM”) parts, which allegedly breached the policy’s coverage to replace damaged property with materials of “like kind or quality.”<sup>67</sup> According to the plaintiffs, the insurer could only satisfy the policy by “requiring the exclusive use in repairs of factory-authorized or [original equipment manufacturer] parts,” as that was the plaintiffs’ original position.<sup>68</sup> The court, however, found that the policy at issue was not breached by providing the plaintiffs with non-OEM parts, and that “[c]ommon sense indicates that an item that is of ‘like kind and quality’ to another is not that very item, but rather is something of ‘like kind and quality’ to it.”<sup>69</sup> The court supported this statement by pointing to the policy language which required the insured to pay for replacements that were “better than like kind and quality,” which suggested that non-OEM parts could be used and possibly allow the insured to be put in a better

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<sup>63</sup> *Id.* at 532-33.

<sup>64</sup> *Id.* at 532.

<sup>65</sup> *See id.*

<sup>66</sup> *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 143 (2005).

<sup>67</sup> *Id.* at 112.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 140.

position than it was originally.<sup>70</sup> The court agreed with the insurer that the specific replacement with non-OEM parts did not violate the policy.<sup>71</sup>

Thus, policy language inclusive of “like kind or quality” does not impose any specific standard of part quality.<sup>72</sup> Insurers also have no obligation “to make the property better than it was before”:

[I]f an option is reserved to build or repair and the insurer elects to do so, it is bound only to put the insured building in substantially the same state as before the loss but is not bound to pull down the old walls and rebuild them entirely on account of a previously existing defect in the foundation; it is enough if, by incorporating what remains of them, the new walls are as secure as the old ones were.<sup>73</sup>

Illinois law is likewise clear that “‘like kind and quality’ means ‘sufficient to restore the [insured] to its pre-loss *condition*.’”<sup>74</sup> Replacement-cost policies in Illinois are seen as providing a “make-whole-remedy,” that “must strive to approximate the situation [the insured] would have occupied had the [covered loss] not occurred.”<sup>75</sup> Although a seemingly simple principle, it is sometimes difficult to determine what the insured’s pre-loss condition truly was when dealing with replacement of rare, unavailable (like in *Windridge*), or special property.

For example, in *FSC Paper Corp. v. Sun Ins. Co.*, a fire at FSC Paper Corporation (“FSC”), the insured’s business, burned more than

<sup>70</sup> *Id.* at 141.

<sup>71</sup> *Id.* at 144.

<sup>72</sup> 22A JOHN BORDEAU, ET AL., ILL. LAW AND PRAC. INSURANCE § 392.

<sup>73</sup> 12A STEVEN PLITT, ET AL., COUCH ON INSURANCE § 176:4 (3d. ed. 2019).

<sup>74</sup> *Avery*, 216 Ill. 2d at 117.

<sup>75</sup> *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.* (“*Windridge II*”), 932 F.3d 1035, 1039 (7th Cir. 2019) (quoting *FSC Paper Corp. v. Sun Insurance Co. of New York*, 744 F.2d 1279, 1283 (7th Cir. 1984)).

12,000 tons of newspaper known as “Special Pack.”<sup>76</sup> FSC’s insurer, Sun Insurance Company of New York (“Sun”) admittedly insured the loss of the Special Pack, but disagreed with FSC regarding the replacement cost calculation method.<sup>77</sup> The relevant policy stated: “In case of loss the basis of adjustment for all property covered under this policy . . . shall be replacement cost at the time and place of loss. . . .”<sup>78</sup> FSC argued it was insured for the historical cost of the paper, as it was required to continually report to Sun its value of the property that was at risk under the policy and FSC had continually based its reports on the historical cost of the paper.<sup>79</sup>

In *FSC*, the Seventh Circuit decided that the policy did not indicate that reported value limited the replacement, and so, depending on the market price, FSC could potentially recover more or less than the historical cost, placing the risk on Sun when it issued the policy.<sup>80</sup> The Seventh Circuit reaffirmed its goal stating: “[w]e believe that FSC’s recovery must be measured in general by the amount it was reasonably required to expend to put itself in the position it would have occupied had the fire not occurred,” and as long as FSC made commercially reasonable purchases to replace the Special Pack, Sun would be responsible to pay for such purchases.<sup>81</sup>

Measuring replacement cost can vary according to the specific language used in the policy, but as a general matter, courts, like in *FSC*, have focused on finding out the true cost of replacing the damaged property—not how the damaged property has been valued in reports, or that the replacement is now leaving the insured with property which is less in value.<sup>82</sup> The replacement cost policy asks:

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<sup>76</sup> *FSC Paper Corp.*, 744 F.2d at 1280.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1283.

<sup>81</sup> *Id.*

<sup>82</sup> See e.g., *Davis v. Allstate Ins. Co.*, 781 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 3d Dist. 2001) (Replacement cost was measured by the cost to replace the damaged structure on the same premises).

“what is the cost to replace the damaged property today?” When PIIC issued its replacement-cost policy to Windridge, it committed to restore Windridge to its pre-loss condition should any damage occur, and when PIIC selected option (2) of the loss payment provision, it committed to providing Windridge with the money to go out and replace their siding with siding similar in shape, color, and overall quality.

### *Appraisal Issues*

Typically, property insurance policies allow for an appraisal<sup>83</sup> by experts if the insurer and the insured cannot agree on the amount of loss, and an appraisal award is typically binding absent any exceptional circumstances.<sup>84</sup> In *Windridge*, there was certainly much debate over the valuation of the siding, and whether matching siding was, indeed, as unavailable as Windridge claimed.<sup>85</sup> In *Windridge*, the relevant policy included an appraisal provision, which allowed both Windridge and PIIC to select their own appraiser for valuation of the property constituting the loss where a dispute was present.<sup>86</sup> Both selected appraisers would then select an umpire, or in the case that the selected appraisers could not agree, a judge could be requested to make a determination instead.<sup>87</sup> The policy then indicated that each appraiser would submit their valuation of the property and determine the amount of loss, and, “[i]f they fail to agree, they will submit their differences to the umpire” where “[a] decision agreed to by any two will be binding.”<sup>88</sup>

<sup>83</sup> An appraisal is “the act of estimating or judging the nature of value of something or someone.” *Appraisal*, DICTIONARY.COM, <http://dictionary.com/browse/appraisal?s=t> (last visited Dec. 7, 2019).

<sup>84</sup> See *Villas at Winding Ridge v. State Farm Fire & Cas. Co.*, 942 F.3d 824, 830 (7th Cir. 2019).

<sup>85</sup> See *Windridge II*, 932 F.3d 1035, 1037 (7th Cir. 2019).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

While courts have generally determined that the amount of loss is not dependent on a coverage determination, there is some confusion as to whether an appraisal can still proceed while coverage issues continue to exist.<sup>89</sup> Windridge originally brought a motion to compel appraisal on three issues: (1) cost to replace the affected building's roof, (2) reimbursement for overhead and profit, and (3) "whether the aesthetic mismatch is so significant as to constitute 'damage', and if so, assess a loss amount."<sup>90</sup> Although the Northern District of Illinois viewed the first two issues to be appropriate for appraisal because there existed a genuine dispute of loss, the court denied arbitration for the third issue.<sup>91</sup>

Windridge argued that the interpretation of the third issue was a question of causation—did the storm actually cause an aesthetic mismatch?<sup>92</sup> For them, the cause of loss could not be separated from the amount of loss, as the issues were intertwined.<sup>93</sup> The district court, however, considered this an issue of coverage—was the alleged mismatch a "loss" that was covered under the policy?<sup>94</sup> The district court would not allow Windridge to proceed with the appraisal process on this issue until a determination as to coverage was made,<sup>95</sup> as such was the precedent in Illinois.<sup>96</sup>

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<sup>89</sup> See generally *Runaway Bay Condo. Ass'n v. Phila. Indem. Ins. Cos.*, 262 F. Supp. 3d 599, 604 (N.D. Ill. 2017).

<sup>90</sup> *Windridge of Naperville Condo. Ass'n v. Phila. Indem. Ins. Co.*, 2017 U.S. Dist. LEXIS 10598, at \*3 (N.D. Ill. Jan. 26, 2017).

<sup>91</sup> *Id.* at \*11.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Runaway Bay*, 262 F. Supp. 3d at 603 Full citation ("Thus, the question of whether the Policy requires replacement of undamaged property to achieve matching is not appropriate for appraisal.").

Other states, such as Georgia, also prohibit appraisal on “matching” to be done before a determination of coverage is made.<sup>97</sup> The rationale for such process is that appraisals can only resolve disputed value, and thus, to unnecessarily expand the scope of liability before coverage is determined is premature.<sup>98</sup> Minnesota would likewise agree that “coverage questions are not for appraisers” and while appraisers might participate in evaluating the amount of loss, “they may not construe the policy or decide whether the insurer should pay.”<sup>99</sup>

Ironically, in *Windridge*, once the district court made a determination of coverage, neither party’s counsel actually knew if there was matching siding available.<sup>100</sup> The only appraisal award, which agreed with *Windridge*’s position that no matching siding was available, was submitted *before* the district court’s opinion.<sup>101</sup> After ruling in favor of *Windridge*, the district court, however, specifically ordered a second appraisal, apparently unconvinced by the first one.<sup>102</sup> Nevertheless, PIIC seemed to have conceded at oral argument that no matching siding was available.<sup>103</sup> This admission, coupled with the district court’s assumption that no matching siding existed, led the Seventh Circuit to assume the same.<sup>104</sup>

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<sup>97</sup> See e.g., *Lam v. Allstate Indem. Co.*, 755 S.E.2d 544, 546 (Ga. App. 2014) (homeowner could not get an appraisal on matching shingles for roof until coverage determination was made).

<sup>98</sup> See generally *id.*

<sup>99</sup> *Trout Brook S. Condo. Ass’n v. Harleysville Worcester Ins. Co.*, 995 F. Supp. 2d 1035, 1041 (D. Minn. 2014) (internal quotations omitted).

<sup>100</sup> See *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.* (“*Windridge II*”), 932 F.3d 1035, 1038 n.1 (7th Cir. 2019).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*; see also *Windridge of Naperville Condo. Ass’n v. Phila. Indem. Ins. Co.*, No. 16 C 3860, 2018 U.S. Dist. LEXIS 62690, at \*14 (N.D. Ill. Apr. 13, 2018) (“*Windridge I*”) (“Now that the coverage issue has been resolved, appraisal may proceed on the siding issue”).

<sup>103</sup> *Windridge II*, 932 F.3d at 1038 n.1.

<sup>104</sup> See *id.*

However, regardless of whether matching siding was available now, PIIC actually indicated that matching siding was available to Windridge “for almost a year and a half” after the storm and that Windridge was liable for not timely taking action.<sup>105</sup> Certainly, these facts only further persuaded the Seventh Circuit that if PIIC truly wanted to litigate the fact that matching materials were, in fact, available, they had ample time to do so.<sup>106</sup>

## PART II: ANALYSIS OF *WINDRIDGE* DECISION

In reaching its conclusion, the Seventh Circuit made a few important determinations: (1) the relevant policy language was ambiguous, requiring interpretation in the favor of the insured; and (2) each building suffered a “direct physical loss,” as that was the only way the insured could properly be made whole again.<sup>107</sup> Each of these determinations will be discussed in detail below.

### *Dealing with Ambiguous Policy Language*

The *Windridge* decision came to the Seventh Circuit based on diversity jurisdiction, and as there was no contest as to choice of law, the court properly applied Illinois law, which was the forum state law.<sup>108</sup> “Under Illinois law, construction of insurance policies is a question of law” subject to contract interpretation principles.<sup>109</sup>

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<sup>105</sup> *Id.* at 1042 n.6.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.* at 1042.

<sup>108</sup> *Id.* at 1035; *see also* *Santa’s Best Craft, LLC v. St. Paul Fire and Marine Ins. Co.*, 611 F.3d 339, 345 (7th Cir. 2010) (applying forum state substantive law and federal procedural law in light of *Erie* doctrine because no party raised a choice of law issue).

<sup>109</sup> *Keystone Consol. Indus., Inc. v. Emp’r Ins. Co. of Wausau*, 456 F.3d 758, 762 (7th Cir. 2006).

Similarly to how other courts evaluate contracts, Illinois courts scrutinize insurance policies according to the policy language.<sup>110</sup> Unlike contract law, however, the remedies available to policyholders in insurance contexts are often thought to be narrower.<sup>111</sup> Scholars have indicated that policyholders often lack the resources and time to challenge denials of coverage and end up experiencing greater economic losses.<sup>112</sup> After all, “breaching insurance policies are incredibly profitable for insurance companies” and this fact alone raises concern regarding whether the insurance policy sold to the policyholder is the same policy the policyholder *thought* he purchased.<sup>113</sup>

In an effort to alleviate this concern, the *contra proferentem* rationale was born. The *contra proferentem* doctrine interprets ambiguously drafted provisions against the drafter.<sup>114</sup> Since the drafter has the power to phrase the policy, he should carry the burden of making the provisions understandable.<sup>115</sup> Insureds and courts both benefit from incentivizing drafters to write understandable policies.

Illinois courts have also justified the use of this doctrine by highlighting the purpose of insurance policies—to provide coverage to the insured.<sup>116</sup> Where insureds are thought to have reduced bargaining power, Illinois law provides an equitable remedy, as “[a]mbiguous terms are construed strictly against the drafter of the policy and in favor of coverage.”<sup>117</sup> Essentially, this well-known doctrine seeks to

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<sup>110</sup> See *Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 777-78 (7th Cir. 2015) (applying Illinois law) (internal quotations and citations omitted).

<sup>111</sup> *Id.*

<sup>112</sup> Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders’ Objectively Reasonable Expectations*, 5 CONN. INS. L.J. 335, 337 (date)

<sup>113</sup> *Id.*

<sup>114</sup> *Phillips v. Lincoln Nat’l Life Ins. Co.*, 978 F.2d 302, 306 (7th Cir. 1992).

<sup>115</sup> Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1121 (2006).

<sup>116</sup> *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 119 (1992).

<sup>117</sup> *Id.*

“meet the ends of justice” without doing any “violence to the words used.”<sup>118</sup>

In *Windridge*, the Seventh Circuit acknowledged Illinois’ use of the doctrine, although it did not name the doctrine in its opinion.<sup>119</sup> However, before applying the doctrine, the Seventh Circuit needed to establish whether the policy language was, indeed, ambiguous. The Seventh Circuit recognized that Illinois courts will consider the policy ambiguous if such language is “subject to more than one reasonable interpretation.”<sup>120</sup> The potential ambiguous terms identified by the Seventh Circuit were the phrases “direct, physical loss” and “covered property.”<sup>121</sup>

Ironically, the potentially ambiguous phrases were actually somewhat defined in the policy, but unfortunately, even the policy definitions were vague and not without their own ambiguities.<sup>122</sup> Indeed, insurers like PIIC generally provide a “Building and Personal Property Coverage Form” to specifically narrow the term’s meaning to the specific addresses listed in such form. According to the policy, “covered property” included *Windridge*’s “buildings and structures,” but whether that definition included the siding on the entire building or the individual sides of the building the court was yet to decide.<sup>123</sup>

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<sup>118</sup> See *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U.S. 132, 138 (1901) (in reading an ambiguous policy in favor of the insured, the Court merely states it “interprets the contract so as to do no violence to the words used and yet to meet the ends of justice.”).

<sup>119</sup> “Regardless, the unit of covered property to consider under the policy (each panel of siding vs. each side vs. the buildings as a whole) is ambiguous as applied to these facts, so under Illinois law, we favor the interpretation that leads to coverage.” *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.* (“*Windridge II*”), 932 F.3d 1035, 1040 (7th Cir. 2019).

<sup>120</sup> *Id.* at 1039.

<sup>121</sup> Although according to Illinois law, “the mere failure to define a term in the policy does not render that term ambiguous.” *Id.*

<sup>122</sup> *Id.* at 1039-40.

<sup>123</sup> See *id.*

Ironically, PIIC's attempt to define such language seemed to make the language even more ambiguous.<sup>124</sup>

As Windridge had pointed out, “[r]eplacement cost policies generally charge higher premiums in exchange for agreeing to repair or replace with material of like kind and quality,”<sup>125</sup> and interpreting the policy any other way would deprive Windridge of its “contractual indemnity right.”<sup>126</sup> Although PIIC previously asserted that Windridge was a “sophisticated party” that perhaps could not attempt to rely on the ambiguity rule in Illinois, PIIC failed to raise this issue in its opening brief and presented no evidence to support this contention.<sup>127</sup>

Ultimately the Seventh Circuit determined that “direct physical loss to covered property” was ambiguous as applied in the case, and due to adherence to Illinois law, was bound to favor an interpretation that lead to coverage for the insured.<sup>128</sup>

### *Direct, Physical Loss to Covered Property*

After establishing that “direct physical loss to covered property” is ambiguous as applied to the facts at hand, the Seventh Circuit in *Windridge* attempted to interpret the phrase itself. Notably, PIIC emphasized the phrase's use of “direct” and “physical” in its argument for narrow policy interpretation.<sup>129</sup> PIIC argued that even Windridge's own phrasing of the issue before the district court, “[w]hether the policy covers the need to make an aesthetic match *when only certain*

<sup>124</sup> *Id.* at 1040.

<sup>125</sup> *Id.*; *Alessi v. Mid-Century Ins. Co.*, 464 S.W.3d 529, 532 (Mo. Ct. App. June 23, 2015); *see also Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 778 (7th Cir. 2015) (when evaluating policy language, type of insurance and type of risk undertaken are important to consider).

<sup>126</sup> Brief for Plaintiff-Appellee (“Windridge Brief”) at 7, *Windridge of Naperville Condo Ass'n v. Phila. Indem. Ins. Co.*, No. 1:18-cv-2103 (7th Cir. Jan. 31, 2019).

<sup>127</sup> *Id.* at 7, n.2.

<sup>128</sup> *Windridge II*, 932 F.3d at 1039.

<sup>129</sup> *Id.*

*parts of the building sustain physical damage* and are repaired while other parts are not,”<sup>130</sup> was a blatant acknowledgment that the policy did not require matching.<sup>131</sup> According to PIIC, admitting that the north and east sides did not sustain physical damage necessarily meant that coverage for those sides was not available, because after all, the policy only covers *direct physical loss* to covered property.<sup>132</sup> As noted by PIIC, Windridge carried the burden of establishing that its “loss” fell within coverage, and if Windridge could not present evidence that these north and east sides of the buildings experienced a direct physical loss, then PIIC was not liable to pay to replace them.<sup>133</sup>

PIIC further asserted that Windridge’s demand for aesthetic matching was *not* the kind of physical damage covered by the replacement-cost policy.<sup>134</sup> PIIC highlighted several cases in the Northern District of Illinois that showed such a connection was neither “direct” nor “physical.”<sup>135</sup> One such case was *Mohr v. American Automobile Insurance Company*.<sup>136</sup> In *Mohr*, a hailstorm damaged portions of shingles on a unique and expensive cedar roof, and there was debate over whether the entire roof should be replaced or whether a patchwork effect would be sufficient.<sup>137</sup> Ultimately, the court in *Mohr* found that the insured could not prove the entire roof would need to be replaced in order to account for the hail damage (only about 5% of the shingles on the roof were damaged), as the repair job was

<sup>130</sup> Windridge Brief, *supra* note 126, at 1 (phrasing the issue as whether “‘direct physical loss’ to covered property requires an insurer to pay for matching replacement materials that *is not physically damaged*. . . .”) (Emphasis added).

<sup>131</sup> PIIC Brief, *supra* note 4, at 9.

<sup>132</sup> *See id.*

<sup>133</sup> *Id.* at 15 (“the existence of coverage is an essential element of the insured’s case and the insured has the burden of proving his loss falls within the terms of his policy.”) (quoting *St. Michael’s Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co.*, 146 Ill. App. 3d 107, 113 (1st Dist. 1986)).

<sup>134</sup> PIIC Brief, *supra* note 4, at 15.

<sup>135</sup> *Id.* at 16.

<sup>136</sup> No. 01 C 3229, 2004 U.S. Dist. LEXIS 4772, at \*2-4 (N.D. Ill. Mar. 5, 2004).

<sup>137</sup> *Id.* at \*42-43.

not so complex to make complete replacement necessary and the “contract [did] not contemplate aesthetic perfection. . . .”<sup>138</sup> PIIC argued that Windridge’s desire for aesthetic matching was likewise not contemplated in the relevant insurance policy.<sup>139</sup>

For PIIC, Windridge’s interpretation “would be unduly burdensome” as well.<sup>140</sup> If required to replace all the siding on all of Windridge’s buildings, PIIC questioned if they would be required to do the same if only *one* of Windridge’s buildings sustained siding damage—they had, after all, a total of 110 buildings.<sup>141</sup> Essentially, PIIC wondered if all the buildings’ siding would have to be replaced if only one building’s siding was damaged and could not perfectly match the others. There was also strong concern on PIIC’s part about extending a “windfall profit” to Windridge—presumably the undamaged siding on the buildings was weathered and older (since it was no longer available) at least to some extent, and such a replacement principle was feared to be never-ending in application.<sup>142</sup>

Windridge, on the other hand, addressed PIIC’s concerns with an argument that ultimately was endorsed by the Seventh Circuit and became the pinnacle of the decision itself—the direct physical loss from the hailstorm did not occur just to the siding pieces individually damaged, but rather, the direct physical loss occurred to the building as a whole.<sup>143</sup> As eloquently stated by the District Court, “[w]hile it would be correct as a matter of ordinary usage to say that the storm damaged the siding on the building’s south and west elevations, it would be just as correct to say that the storm damaged the building’s siding period.”<sup>144</sup> To Windridge, if the buildings, as a whole, were

<sup>138</sup> *Id.* at \*47.

<sup>139</sup> PIIC Brief, *supra* note 4, at 21.

<sup>140</sup> *See also* Woods Apartments, LLC v. United States Fire Insurance Co., No. 3:11-cv-00041, 2013 U.S. Dist. LEXIS 105582 (W.D. Ky. July 29, 2013).

<sup>141</sup> PIIC Brief, *supra* note 4, at 18.

<sup>142</sup> *Id.*

<sup>143</sup> Windridge Brief, *supra* note 126, at 5.

<sup>144</sup> *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.*, (“*Windridge I*”), No. 16 C 3860, 2018 U.S. Dist. LEXIS 62690, at \*10 (N.D. Ill. April 13, 2018).

listed as “covered property,” then any damage to the siding necessarily affected a direct physical loss to covered property and thus should be covered by the policy—to break coverage into applying to specific parts of the buildings, especially when dealing with different sides of buildings, seemed utterly illogical.<sup>145</sup>

PIIC fully admitted that the south and west sides experienced a direct physical loss,<sup>146</sup> and, indeed, it paid \$2.1 million for the replacement damaged *elevations*, suggesting an implicit admission that the policy at least covered more than just individually damaged pieces of siding.<sup>147</sup> This payment, then, at least covered *some* aesthetic appearance. In other words, at the very least, a physical loss to siding pieces affected the physical appearance of the *entire elevation*.

Windridge noted several cases in Illinois which also suggested that physical alteration of buildings’ appearances equated a physical injury.<sup>148</sup> In its brief, Windridge pointed to cases such as *Travelers Insurance Company v. Eljer Manufacturing, Incorporated*,<sup>149</sup> which indicated that “‘physical injury’ unambiguously connotes damage to tangible property causing *an alteration in appearance*, shape, color or in other material dimension.”<sup>150</sup> Certainly, physical injuries to property, while often impacting the usefulness of it, also tend to result in a change in appearance.<sup>151</sup> In the words of the district court, a failure to replace all of the sides of the buildings would leave Windridge with buildings “suffering from a glaring and profound flaw.”<sup>152</sup>

<sup>145</sup> Windridge Brief, *supra* note 126, at 1.

<sup>146</sup> *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.* (“*Windridge II*”), 932 F.3d 1035,1038 (7th. Cir. 2019).

<sup>147</sup> *See id.* at 1037.

<sup>148</sup> Windridge Brief, *supra* note 126, at 11.

<sup>149</sup> 757 N.E.2d 481, 502 (Ill. 2001).

<sup>150</sup> Windridge Brief, *supra* note 126, at 11.

<sup>151</sup> *See Windridge II*, 932 F.3d at 1041 (“The storm altered the appearance of the buildings such that they were damaged.”).

<sup>152</sup> *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.*, (“*Windridge I*”), No. 16 C 3860, 2018 U.S. Dist. LEXIS 62690, at \*10 (N.D. Ill. April 13, 2018).

The Seventh Circuit agreed that “the crux of the issue seems to be whether *this* policy’s coverage of damaged property refers to the smallest unit possible (an individual panel, a single shingle, a single patch of flooring) or to one larger (the entire façade, the whole roof, a continuous stretch of flooring).”<sup>153</sup> *National Presbyterian Church, Incorporated v. GuideOne Mutual Insurance Company*<sup>154</sup> appealed to the Seventh Circuit as on-point authority in aesthetic mismatch cases, as the cases that PIIC cited to involved slightly different policy language or had not determined that no materials were available to effectuate a “match.”<sup>155</sup> In *National Presbyterian*, the coverage, valuation, and loss payment provisions were nearly identical.<sup>156</sup> The court in *National Presbyterian* ultimately determined that, although only some of the church’s exterior limestone panels were damaged, the insurer was required to replace all of the limestone panels to ensure matching.<sup>157</sup> Since the Seventh Circuit, like the court in *National Presbyterian*, had already found the replacement-cost policy at issue to be ambiguous, they were looking for a way to interpret the policy as providing complete coverage.<sup>158</sup> Thus, interpreting the policy as covering the buildings “as a whole” seemed the best interpretation.

Ultimately, much like the District Court had observed, the Seventh Circuit recognized that “a replacement cost policy, by definition provides a ‘make-whole’ remedy” and therefore, this particular replacement-cost policy “must strive to approximate the situation [Windridge] would have occupied had [the hailstorm] not occurred.”<sup>159</sup> The Seventh Circuit noted Windridge’s buildings all had matching siding before disaster struck, and they only wished now to

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<sup>153</sup> *Windridge II*, 932 F.3d at 1040.

<sup>154</sup> 82 F. Supp. 3d 55, 57-58 (D.D.C. 2015).

<sup>155</sup> *Windridge II*, 932 F.3d at 1040.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* (“We face essentially the same issue under the same language and arrive at the same result.”).

<sup>159</sup> *Windridge* Brief, *supra* note 126, at 10.

have matching siding after disaster struck.<sup>160</sup> “Having mismatched siding on its buildings would not leave Windridge in the same position it was in before the loss.”<sup>161</sup> Certainly, this interpretation was “common sense” to the court.<sup>162</sup> If “no matching replacement siding is available, [PIIC] must pay to replace all of the siding on all Windridge’s buildings.”<sup>163</sup>

*Commentary on Making the Insured “Whole” Again*

In recent years, the Seventh Circuit’s position in the *Windridge* opinion is somewhat of a popular one, albeit derived using standard contract interpretation principles.<sup>164</sup> Through its logical decision, the Seventh Circuit correctly recognized the need for property insurers to make clearer the boundaries of their coverage, but it also recognized the important relationship that aesthetics have had upon property value.

Aesthetics,<sup>165</sup> to be sure, is a subjective idea that is difficult for courts to logically explain, as philosophers, architects, and particularly legal scholars have continually struggled with the significance of aesthetics in relationship to its community.<sup>166</sup> In the 1800s, Henry

<sup>160</sup> *Windridge II*, 932 F.3d at 1042.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1041.

<sup>163</sup> *Id.* at 1042.

<sup>164</sup> Considering the states that do discuss “matching” regarding relevant property insurance provisions, most courts have taken the position that matching is required. *See Windridge II*, 932 F.3d at 1040.

<sup>165</sup> Aesthetics is defined as “relating to the beautiful as distinguished from the merely pleasing, the moral, and especially the useful and utilitarian.” *Aesthetics*, WEBSTER’S NEW THIRD INTERNATIONAL DICTIONARY, <http://merriam-webster.com/dictionary/aesthetics> (last visited Dec. 8, 2019).

<sup>166</sup> Randall J. Cude, *Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreath Challenges to Municipal Aesthetic Regulations*, 6 J.L. & POL’Y 853, 853 (1998).

David Thoreau wrote about the importance of beauty in relation to neighborhood value:

Shall that dirty roll of bunting in the gun-house be all the colors a village can display? A village is not complete unless it have these trees to mark the season in it . . . A village that has them not will not be found to work well. It has a screw loose, and essential part is wanting . . . A village needs these innocent stimulants of bright and cheering prospects to keep off melancholy and superstition.<sup>167</sup>

As Thoreau pointed out long ago, aesthetics impact society in the sense that it invokes happiness, an appreciation for change, a desire for harmony or symmetry, and even an inspiration to create.<sup>168</sup> Aesthetics, then, is something valuable and worth protecting because of its ability to positively impact communities in these ways and, perhaps further, give citizens more to enjoy and live for.

Illinois courts view aesthetics as an “element of the public health safety, and welfare.”<sup>169</sup> Other courts, too, have recognized aesthetic value when posed with questions of design law or when asked to strike down a certain aesthetic regulation, statute, or ordinance, or even in recent years when asked to consider if certain aesthetic creations can become a form of speech protected under the first amendment.<sup>170</sup> However, regardless of why aesthetics should be protected, the Seventh Circuit’s decision recognized that aesthetics do, in fact, affect property values.<sup>171</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> See Nancy Perkins Spkye, *The Instrumental Value of Beauty in the Pursuit of Justice*, 40 U.S.F. L. REV. 451, 469 (2006).

<sup>169</sup> *Champaign v. Kroger Co.*, 88 Ill. App. 3d 498, 510 (4th Dist. 1980).

<sup>170</sup> See e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1721 (2018) (Thomas, J., concurring in part) (agreeing that the defendant’s creation of a custom-made wedding cake is an expressive form of free speech protected by the first amendment).

<sup>171</sup> “Early judicial decisions that upheld aesthetic regulations often did so on the theory that they preserved property values.” Spkye, *supra* note 168 at 469.

In *Berman v. Parker*, the Supreme Court recognized the harm of an aesthetic nuisance.<sup>172</sup> The Court upheld the use of eminent domain to remove existing “insanitary or unsightly” buildings and improve the relevant community’s overall appearance.<sup>173</sup> Justice Douglas, recognizing that aesthetics certainly correlate to depreciation in property value, wrote:

Miserable and disreputable housing conditions may do more than spread disease and crime and immortality. They may also suffocate the spirit by reducing the people who live there . . . They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. . . [T]he concept of public welfare is broad and inclusive. . . spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.<sup>174</sup>

In some ways, Justice Douglas seemed to promote aesthetics as a sort of political goal toward which society should strive. Whether something is beautiful or not is, after all, a subjective question,<sup>175</sup> but a question that courts have been asked to answer nonetheless.<sup>176</sup> Consider copyright, trademark, customs, and tax law—these areas of law consistently ask judges to evaluate the aesthetic value in an object and determine whether it is original, merely functional, protectable,

<sup>172</sup> 348 U.S. 26, 33-34 (1954).

<sup>173</sup> *Id.* at 33.

<sup>174</sup> *Id.* at 32-33.

<sup>175</sup> See *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Justice Scalia commenting, “[f]or the law courts to decide ‘What is Beauty’ is a novelty even by today’s standards.”).

<sup>176</sup> Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 813 (2005).

taxable, etc.<sup>177</sup> Aestheticism is so intertwined in every area of law, and it is difficult for judges to avoid questions pertaining to it altogether.

Insurance law, however, is perhaps an unexpected area of law to deal with aestheticism, as it is mostly contract interpretation that dominates. But, as Brian Soucek eloquently mentioned in his article, *Aesthetic Judgment in Law*, “[w]hen a house is sold, the contract ordinarily does not say, ‘Two thousand dollars has been marked off because the house next door is painted fuchsia.’”<sup>178</sup> Indeed, it appeared to be “common sense” to the Seventh Circuit that Windridge’s buildings would face a diminution in value if the siding was not replaced on all of the elevations.<sup>179</sup> The zebra striping would certainly be an eye sore—much like any contract for the sale of a house does not bother to say something that seems so inherently obvious—a sort of universally agreed trend of “ugliness” deters people away. Certainly, “[t]o say that property values in a neighborhood will go down if a cemetery is built nearby, or if yard signs, or green exterior paint, or Tudor architecture is allowed is to say that potential buyers will be aesthetically displeased enough by these choices that their interest in living in the neighborhood will diminish.”<sup>180</sup> The Seventh Circuit merely applied those principles to the situation at hand, and thus, replacement of all siding on all elevations of Windridge’s buildings was the proper way to make Windridge truly whole again.<sup>181</sup>

### PART III: OTHER COURTS’ APPROACHES IN INTERPRETING SIMILAR REPLACEMENT-COST POLICY LANGUAGE

<sup>177</sup> *Id.*

<sup>178</sup> Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 416-417 (2017).

<sup>179</sup> *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.* (“*Windridge II*”), 932 F.3d 1035, 1042 (7th Cir. 2019).

<sup>180</sup> *Supra* note 178 at \*417.

<sup>181</sup> *See Windridge II*, 932 F.3d at 1042.

State courts have consistently been split when addressing replacement-cost policy language.<sup>182</sup> Recently, however, there has been a trend toward interpreting ambiguous provisions to require “matching.”<sup>183</sup> In an attempt to provide some uniformity to the controversy, the National Association of Insurance Commissioners (“NAIC”) drafted a model law, entitled the “Unfair Claims Settlement Practices Act” that addresses replacement-cost policy language.<sup>184</sup> The NAIC Model Rules propose the following regulation for states to adopt:

A. When the policy provides for the adjustment and settlement of first party losses based on replacement cost, the following shall apply:

(1) When a loss requires repair or replacement of an item or part, any consequential physical damage incurred in making such repair or replacement not otherwise excluded by the policy, shall be included in the loss. The insured shall not have to pay for betterment nor any other cost except for the applicable deductible.

(2) When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all items in the area so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured shall not bear any cost over the applicable deductible, if any.<sup>185</sup>

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<sup>182</sup> *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.* (“*Windridge I*”), 2018 U.S. Dist. LEXIS 62690, at \*7; *see Windridge II*, 932 F.3d at 1040.

<sup>183</sup> *Windridge II*, 932 F.3d at 1040.

<sup>184</sup> NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 902-1, § 9 (1997).

<sup>185</sup> *Id.* (emphasis added).

The purpose of this model regulation was “to set forth minimum standards” for the investigation of replacement-cost policy claims; however, that did not include providing for a private cause of action.<sup>186</sup> To this day, most states do not have regulations in which an individual homeowner or insured could exercise a private right of action under the state’s unfair claims settlement practices act.<sup>187</sup> That being said, several states have still passed statutes and regulations in order to match the NAIC model law, including Alaska, California, Connecticut, Florida, Iowa, Ohio, and Vermont.<sup>188</sup> Of course, the specific requirements for insurers in such regulations vary from state to state.

For example, Alaska, California, and Iowa have adopted the “reasonably uniform appearance” language provided by the NAIC while other states have provided slightly different wording.<sup>189</sup> Ohio, however, would replace the relevant language with the phrase “reasonably comparable appearance,” which suggests more latitude.<sup>190</sup> In fact, in Ohio, “reasonable comparable appearance” has been interpreted to incorporate the idea of “matching within time,” in which the insured must present evidence “beyond his mere opinion” that the replacement, while not exact, would not result in a “reasonable comparable appearance” *over time*.<sup>191</sup> Additionally, the Sixth Circuit, applying Ohio law, seemed to suggest the this “reasonable comparable appearance” is actually a low threshold for insurers and a high burden

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<sup>186</sup> *Id.* at § 2.

<sup>187</sup> *Id.*

<sup>188</sup> See Alaska Admin Code tit. 3 § 26.090; Cal. Code Regs. tit. 10, § 2695.9; C.G.S.A. § 38a-316e; F.S.A. § 626.9744; I.C.A. § 191-15.44(1)(b); O.A.C. Ann. § 3901-1-54(I)(1)(b); Vermont Department of Financial Regulation Reg. I-1979-2 (Fair Claims Practices).

<sup>189</sup> See NAIC MODEL LAWS, REGULATIONS AND GUIDELINES 902-1, § 9 (1997).

<sup>190</sup> See O.A.C. Ann. § 3901-1-54.

<sup>191</sup> See *Zinser v. Auto-Owners Ins. Co.*, CA 2016-08-144, 2017 Ohio App. LEXIS 2721 (Ohio Ct. App. July 3, 2017).

for insureds.<sup>192</sup> In *Wright v. State Farm Fire & Casualty Company*, the court stated “[A]lthough unweathered shakes would not exactly match the color of weathered shakes, the roofer does not claim that replacement shakes would not match after weathering naturally. It is uncontested that unweathered replacement shakes, *after a reasonable amount of time*, would weather to match the old shakes.”<sup>193</sup> For the *Wright* court, without any evidence or expert opinion from the insured, to hold otherwise would “create an extreme blanket rule requiring the entire replacement of any damaged shake roof.”<sup>194</sup>

Other states have chosen to steer away from regulating this matter specifically, but rather, choose to rely on general contract principles. Arizona, for example, chooses to interpret replacement-cost policy language in the realm of the reasonable expectations doctrine.<sup>195</sup> “The reasonable expectations doctrine relieves an insured from “certain clauses of an agreement which he did not negotiate, probably did not read, and probably would not have understood had he read them.”<sup>196</sup> In *Trudel v. American Family Mutual Insurance Company*, the specific policy included a provision indicating that the insurance company would not pay to replace undamaged property due to mismatch between the new material and the undamaged materials, which probably was the insurer’s attempt to be proactive in the “matching” litigation world.<sup>197</sup> The District of Arizona held that such a provision remained susceptible to the reasonable expectations doctrine, which ultimately stated that “a contract term is not enforced if one party has reason to believe that the other would not have asserted to the contract if it had known of that term.”<sup>198</sup>

<sup>192</sup> See *Wright v. State Farm Fire & Cas. Co.*, 555 F. Appx. 575, 579 (6th Cir. 2014).

<sup>193</sup> *Id.* (emphasis added).

<sup>194</sup> *Id.*

<sup>195</sup> *Trudel v. Am. Family Mut. Ins. Co.*, No. CV-12-1208-PHX-SMM, 2014 WL 4053405 (D. Ariz. Aug 15, 2014).

<sup>196</sup> *State Farm Fire & Cas. In. Co. v. Grabowski*, 214 Ariz. 188, 192 (Ariz. App. 2007).

<sup>197</sup> *Trudel*, 2014 WL 4053405 at \*7.

<sup>198</sup> *Id.* at \*8.

Such an approach is similar to the Seventh Circuit's alternative support for its holding—interpretation of ambiguities should be construed in favor of the insured—but goes even farther by honoring the intent of the beneficiaries regarding the contract terms *even when* an ambiguity is not officially present.<sup>199</sup> The reasonable expectations doctrine is perhaps most beneficial for the insured's position since (1) it can be used as a support in a private cause of action and (2) it adequately sheds light on the real crux of the issue—did the insured know when they took out the replacement-cost policy that they would not be receiving full replacement coverage under the circumstances?

Indiana's approach toward interpreting the replacement-cost policy language in *Windridge* clarifies a solution to the subjectivism of aesthetic mismatch arguments.<sup>200</sup> The Indiana Appellate Court in *Erie Insurance Exchange v. Sams* held the insurer was required to fully replace undamaged shingles on a roof in order to establish an aesthetic match according to the replacement-cost policy *only after* experts testified that the mismatched shingles would, in fact, lower the property's value.<sup>201</sup>

States adopting a different analysis from the Seventh Circuit's analysis include Alabama,<sup>202</sup> Nebraska,<sup>203</sup> and Texas.<sup>204</sup> In these states, “direct physical loss to covered property” does not necessarily mean that if a building is listed as covered property, the building as a whole has not experienced a direct physical loss. For example, as recently as 2019, the Northern District of Texas found that “physical

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<sup>199</sup> See Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 827.

<sup>200</sup> See *Erie Ins. Exch. v. Sams*, 20 N.E.3d 182, 190 (Ind. Ct. App. 2014).

<sup>201</sup> *Id.*

<sup>202</sup> See *Graffeo v. State Farm Fire & Cas., Inc.*, 628 So.2d 790 (Ala. Civ. App. 1993).

<sup>203</sup> See *Eledge v. Farmers Mut. Home Ins. Co. of Hooper*, Nebraska, 571 N.W.2d 105 (Neb. App. 1997).

<sup>204</sup> See *All Saints Catholic Church v. United Nat. Ins. Co.*, 257 S.W.3d 800 (Tex. App. 2008).

loss” cannot be held to encompass a loss that is not physically damaged.<sup>205</sup> The court went on to say:

The requirement that the loss be ‘physical,’ given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by *a distinct, demonstrable, physical alteration of the property*.<sup>206</sup>

In other words, the insurer would not be required to replace admittedly undamaged property.<sup>207</sup> And, of course, for the states that have not chosen to fully endorse a “matching” regulation, insurers may still want to clarify their policies.<sup>208</sup>

<sup>205</sup> *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 WL 2929761, at \*6 (N.D. Tex. July 4, 2019).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> The states of Maine, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Virginia, Washington, Wisconsin, and Wyoming have not directly addressed “matching” arguments in the replacement-cost policy language debate present in *Windridge*. See below for a list of case citations which attempt to tackle the issue in other states, not addressed in this paper:

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| Colorado:     | <i>Hamlet Condo. Ass’n v. Am. Mut. Family Ins. Co.</i> , 2016 CV 30594 (Co. Dist. Ct., April 12, 2017).                        |
| Georgia:      | <i>Lam v. Allstate Indem. Co.</i> , 755 S.E.2d 544 (Ga. App. 2014)   |
| Kentucky:     | <i>Woods Apts., LLC v. U.S. Fire Ins. Co.</i> , 2013 U.S. Dist. LEXIS 105582 (W.D. Ky. 2013).                                  |
| Louisiana:    | <i>Holloway v. Liberty Mut. Fire Ins. Co.</i> , 290 So.2d 791 (La. App. 1st Cir. 1974).  |
| Minnesota:    | <i>Trout Brook S. Condo. Ass’n v. Harleysville Worcester Ins. Co.</i> , 995 F. Supp.2d 1035 (D. Minn. 2014).                   |
| Michigan:     | <i>Bernert v. State Farm Fire &amp; Cas. Co.</i> , No. 10- 12359, 2012 WL 1060089, at *2 (E.D. Mich. Mar. 29, 2012).           |
| Pennsylvania: | <i>Enwereji v. State Farm Fire &amp; Cas. Co.</i> , No. 10-CV4967, 2011 WL 3240866 (E.D. Pa., July 28, 2011); <i>Greene v.</i> |

PART IV: *WINDRIDGE*'S IMPACT MOVING FORWARD

The Seventh Circuit's decision in *Windridge* was, of course, one of first impression for the court, as the Illinois Supreme Court had yet to address the issue and establish controlling precedent.<sup>209</sup> As stated by *Windridge* in their brief, the Seventh Circuit's decision in this case would necessarily be "outcome determinative" and the issue would likely continue to "recur in other cases."<sup>210</sup> The Seventh Circuit's decision, reflective of the national trend in such cases,<sup>211</sup> most likely reflects what the Illinois Supreme Court would have decided and established a few good policies moving forward.

The Seventh Circuit's decision, in its logical approach to determining the specific meaning of certain policy language, promoted transparency in property insurance contracting. A common problem in insurance policy drafting has been the overabundant use of standard, boiler-plate language, which although making perfect sense to insurers, leaves policyholders seeking interpretation guidance.<sup>212</sup> The Supreme Court of Kentucky best identified the prevalent ambiguity problems, stating:

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|                | U.S. Auto. Ass'n, 936 A.2d 1178 (Pa. Super. 2007).   |
| Tennessee:     | Hutcherson v. Tenn. Farmers Mut. Ins. of Columbia, 1986 WL 9608 (Tenn. App. Ct., Sept. 3, 1986). |
| West Virginia: | D'Annunzio v. Security-Conn. Life Ins. Co., 410 S.E.2d 275 (W. Va. 1991).                        |

<sup>209</sup> See *Windridge* Brief, *supra* note 126, at 8.

<sup>210</sup> *Id.* at 29.

<sup>211</sup> See *id.* at 8 ("the clear trend is to recognize that matching is required with replacement-cost policies.").

<sup>212</sup> There is a suggestion that insurance policy drafters value boilerplate language, not because they necessarily expect to confuse consumers, but because they believe that courts will understand it and thus, ironically rely on court precedent when asking for support of ambiguous phrases. Boardman, *supra* note 115, at 1106.

Ambiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies. Most are a virtually impenetrable thicket of incomprehensible verbosity. It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered. The miracle of it all is that the English language can be subjected to such abuse and still remain an instrument of communication.<sup>213</sup>

However, the Seventh Circuit's decision reflects a fair way to interpret such ambiguity, leaving room for insurers to amend their contractual insurance policy provisions to reflect what they really want to cover, while also, in the meantime, leaving room for insureds to find full replacement under their current policy. As many courts have acknowledged, absent sophistication of the insured, when the insurer has the greater bargaining power, he should also bear the burden of clearly defining the policy's provisions.<sup>214</sup> Having the drafters bear this burden incentivizes them to write clear policies that ultimately benefit insureds and courts alike, as badly drafted insurance policies can "increase the price of contracts . . . strain business relationships, and sometimes even forfeit the financial security that the insurance requirements are meant to obtain for the contracting parties."<sup>215</sup>

Additionally, the more motivation that insurers have to steer away from such boiler-plate language, the less likely other insurers will suffer for ambiguous policy language. "After all, it is industry standard

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<sup>213</sup> *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 451 S.W.2d 616, 622–23 (Ky. 1970).

<sup>214</sup> *See e.g., Williams v. Ill. State Scholarship Comm* → if this is supposed to be "committee" otherwise spell out., 139 Ill. 2d 24, 72 (1990) ("A contractual clause that is part of a 'boilerplate' agreement . . . has its significance greatly reduced because of the inequality in the parties' bargaining power.").

<sup>215</sup> Karen Erger, *Think Before You Ink: Insurance Matters Find Out How to Draft Appropriate, Attainable Insurance Requirements in Contracts and Why Consulting the Client's Insurance Agent Before Putting Pen to Paper Can Help You Avoid Trouble*, 99 ILL. B.J. 317, 317 (2011).

to use the [Insurance Services Office or ISO] forms, not an individual decision for which the executive would be held accountable.”<sup>216</sup> Insurance drafters might certainly hesitate to “strik[e] out on [their] own,” as this could lead to more exposure to potential liability, but, as Michelle Boardman suggested:

The industry that drafts together, sticks together, not just for future drafting, but for the pooling of loss data that comes in on the first draft. From insurers, therefore, improvement will lie not in more individualized innovation, but in more industrywide redrafting. What should be discarded in the end is not the standardized policy supported by mass actuarial data, but those interpretive rules that create perverse incentives to retain weak language and create secret meaning.<sup>217</sup>

And yet, one major criticism of the Seventh Circuit’s decision in *Windridge* lies in its failure to define the boundaries of “aesthetic matching.” In other words, if we read these general replacement-cost policies as providing coverage for aesthetic matching, where do we draw the line?

The Seventh Circuit seemed to only briefly acknowledge this concern in a few sentences and a footnote.<sup>218</sup> The Seventh Circuit indicated that it was “common sense” that “[i]f one shingle at the corner of a slate roof is damaged and no matching replacement shingle is available, a building owner would not be entitled to an entire new roof.”<sup>219</sup> In the Seventh Circuit’s hypothetical scenario, *Windridge*’s particular policy would allow PIIC to merely compensate *Windridge* for the minor “decrease in value of the building due to one non-

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<sup>216</sup> Boardman, *supra* note 115, at 1128.

<sup>217</sup> *Id.*

<sup>218</sup> *Windridge of Naperville Condo. Ass’n v. Philadelphia Indem. Ins. Co.* (“*Windridge II*”), 932 F.3d 1035, 1042 (7th Cir. 2019).

<sup>219</sup> *Id.*

matching shingle.”<sup>220</sup> Perhaps the existence of this option for PIIC led the Seventh Circuit to avoid a rabbit hole of hypothetical situations inquiring as to where aesthetic matching might end. But although brief, the Seventh Circuit was correct in noting that PIIC’s policy would not allow Windridge to receive a windfall profit, as the “like kind and quality” provision does not entitle the insured to a windfall profit.

First, in Illinois, “like kind and quality” means a restoration to the pre-loss condition.<sup>221</sup> If the damage to the insured property can be easily segregated to a specific area, particularly one with notable physical boundaries, then the replacement will be confined to that area, as the “building-as-a-whole” type argument by Windridge would no longer apply.<sup>222</sup>

Additionally, the Seventh Circuit would later illustrate its conclusion in *Villas at Winding Ridge v. State Farm Fire and Casualty Company*,<sup>223</sup> which it decided just a few months after *Windridge*.<sup>224</sup> In that case, the plaintiff asserted that replacing one shingle would require replacing all shingles under its replacement-cost policy.<sup>225</sup> The Seventh Circuit disagreed.<sup>226</sup> According to the Seventh Circuit, *Gutkowski v. Oklahoma Farmers Union Mutual Insurance Company*,<sup>227</sup> which was used as support by the plaintiffs in that case, was distinguishable.<sup>228</sup> In *Gutkowski*, complete replacement was required because evidence suggested that “replacing the top layer of damaged composition shingles would necessarily damage the

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<sup>220</sup> *Id.*

<sup>221</sup> See *Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill. 2d 100, 143 (2005).

<sup>222</sup> See generally CLARK SCHIRLE, *Measuring Damage In A Megaloss If “Like Kind and Quality” Does Not Exist*, in 26 THE BRIEF 31 (2006).

<sup>223</sup> 942 F.3d 824, 833 (7th Cir. 2019).

<sup>224</sup> While *Windridge* was decided on August 7, 2019, *Villas at Winding Ridge* was decided on November 8, 2019. See *id.*; *Windridge II*, 932 F.3d at 1035.

<sup>225</sup> *Villas at Winding Ridge*, 942 F.3d at 833.

<sup>226</sup> *Id.*

<sup>227</sup> 176 P.3d 1232, 1234 (Okla. Civ. App. 2007).

<sup>228</sup> *Villas at Winding Ridge*, 942 F.3d at 833.

underlying wooden shingles.”<sup>229</sup> The plaintiff in *Villas at Winding Ridge*, could not present any such evidence, and therefore the Seventh Circuit, quoting its own opinion in *Windridge*, denied that complete replacement of the roof would be necessary in that case.<sup>230</sup> Essentially, where there is no evidence that a repair or replacement would devalue the home, the argument for complete replacement is weak and often unwarranted. While a replacement may *risk* placing insured in a slightly better position, it certainly has never been *required* to put them in a better position, and the fact-intensive analysis that considers whether or not property value has been reduced is not something that courts decide.<sup>231</sup> Essentially, the Seventh Circuit recognized the idea that, “[t]he psychology of the market place, which assigns a lesser value to an adequately and competently repaired [property], has nothing to do with the ‘quality’ of the repair itself.”<sup>232</sup>

#### CONCLUSION

Although only time will tell, the Seventh Circuit’s decision in *Windridge* will likely encourage other jurisdictions to follow a contractual approach to interpreting similar replacement-cost policy language, particularly in the states where courts have yet to directly address the issue. While Illinois might still benefit from implementing a statutory regulation to provide more clarity to the matter, the insured’s private cause of action is strengthened by the Seventh Circuit’s decision in *Windridge*. The Seventh Circuit gave the replacement-cost policy phrase “direct physical loss to covered property” a fair interpretation, and insurers would be wise to take notice—before they meet their match.

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 47.05 (2019).

<sup>232</sup> See *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 3d 355, 360 (Fla. Dist. Ct. App. 2001).