

5th Circ. Reverses Insurer's Early Win In Silo Damage Dispute

By **Jennifer Mandato**

Law360 (September 20, 2024, 6:54 PM EDT) -- The Fifth Circuit reversed an insurer's early win in a coverage dispute with an agricultural cooperative over damage to two grain silos, instead finding that questions remained about whether wind and weather damage because of faulty construction qualified as property damage under the policy.

In **an opinion Friday**, a three-judge panel overturned a Texas federal court's ruling that TIG Insurance Co. had no duty to indemnify a near \$1 million arbitration award entered in favor of Woodsboro Farmers Cooperative based on the lower court's determination that the damage to the silos wasn't property damage covered by the policy TIG issued to contractor E.F. Erwin Inc. The appellate court remanded the action for further proceedings.

The lower court held that Woodsboro wasn't entitled to indemnification from TIG as Erwin's insurer because the contractor's role "was more akin to 'defective installation' requiring repair than defective work which caused physical damage to other property." Upon appeal, however, the Fifth Circuit determined that Woodsboro "incurred repair and reconstruction costs because the wind and weather damaged the [silos' metal] parts to such an extent they became unusable."

"Although the district court's interpretation might be reasonable on the face of an arbitration decision, it failed to make all inferences in Woodsboro's favor as the nonmoving party," the panel said.

The dispute stemmed from a 2013 construction contract between Woodsboro and Erwin, under which Erwin would construct two grain silos and related equipment. Erwin subcontracted with A.J. Constructors Inc. for labor and materials, but the subcontract specified that Erwin was in sole control of the operation, filings show.

Woodsboro sued Erwin in a state court in 2014, alleging that the work was defective and not compliant with the parties' contract. In 2016, TIG denied coverage for the underlying action, and Erwin was ultimately defended by AJC's insurer as an additional insured.

Two years later, an arbitration tribunal found that the grain silos were defectively constructed, awarding Woodsboro nearly \$1 million in damages. Woodsboro later asked the court to amend the award to account for certain costs.

TIG subsequently sued Woodsboro and Erwin in a Texas federal court, seeking a determination of its obligations as Erwin's insurer. In March 2022, the lower court granted summary judgment in the insurer's favor as to its duty to defend, finding that the underlying allegations failed to show that Erwin's breaches resulted in covered property damage.

Upon appeal, Woodsboro **told the Fifth Circuit** that the lower court's ruling overlooked how the poor construction of the silos led to the structures being damaged when metal twisted in the wind. TIG argued that the law supported the insurer's understanding that poor construction can't constitute a covered claim because the arbitration panel found that the liability resulted from bins that were ill-suited, not from defects that caused physical harm to property.

In the Friday order, the court held that although the arbitration panel determined that the silos were defective "as originally constructed," that didn't mean Woodsboro's damages "were exclusive of

physical injury to the silos' parts caused by the wind and weather."

As a result, the Fifth Circuit held that summary judgment shouldn't have been granted for TIG and that there may be "a gap in the facts" necessary to determine TIG's duty to indemnify.

U.S. Circuit Judges James L. Dennis, Leslie H. Southwick and James C. Ho sat on the panel for the Fifth Circuit.

Representatives of TIG declined to comment. A representative of Woodsboro did not immediately respond to requests for comment Friday.

TIG Insurance Co. is represented by Kasi G. Schuelke and Jay R. Sever of Phelps Dunbar LLP.

Woodsboro Farmers Cooperative is represented by John Swallow of Huseman Law Firm PLLC.

The case is TIG Insurance Co. v. Woodsboro Farmers Cooperative, case number 23-40435, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Abraham Gross. Editing by Emma Brauer.