

2016 IL App (2d) 150517-U
No. 2-15-0517
Order filed May 18, 2016

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE ROBERTSON PARTNERSHIP,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 13-MR-1643
)	
ERIE INSURANCE EXCHANGE,)	Honorable
)	Diane E. Winter,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court correctly granted summary judgment for Erie and denied summary judgment for Robertson, as the insurance policy required repair or replacement of the building in order for Robertson to receive payment on a functional replacement cost basis.

¶ 2

¶ 3 After a building owned by the Robertson Partnership (Robertson) burned down, Robertson sought coverage on a functional replacement cost basis under its insurance policy with Erie Insurance Exchange (Erie). Erie instead paid Robertson on an actual cash value basis, taking the position that Robertson was not entitled to payment on a functional replacement cost basis because Robertson did not meet the policy requirement to repair or replace its building.

The parties filed cross-motions for summary judgment, and the trial court granted summary judgment for Erie and denied summary judgment for Robertson. We affirm.

¶ 4

I. BACKGROUND

¶ 5 Robertson owned a building located at 235 East Oak Street in Coal City. A fire occurred at the building on March 13, 2013, resulting in a total loss. The building was insured through a policy with Erie, with a coverage limit of \$3,028,009. The policy stated that Erie had the option to pay the value of the part of the property that was damaged, based on actual cash value; pay the cost to repair or replace the part of the property that was damaged; take all or part of the damaged property at an agreed or appraised value; or repair or replace the damaged part of the property. Under Section VIII of the policy, entitled “**A. Extensions of Coverage**,” the policy stated:

“We will pay the following ‘losses’ at your option. Payments under these Extensions are not an additional amount of insurance and will not increase the total amount of insurance available for the coverage involved.”

The policy went on to state, in relevant part:

“[1] 7. **Replacement Cost Coverage.** After a covered ‘loss’ to your *Building* – Coverage 1, or *Business Personal Property or Personal Property of Others* – Coverage 2, you have the option of choosing a replacement cost settlement instead of an actual cash value settlement, thereby eliminating any deduction for depreciation. When you select replacement cost, the Coinsurance Clause (Condition 3) shall apply as a percentage of the replacement cost rather than the actual cash value of the property.

[2] When adjustment is on a replacement cost basis, we will pay the smallest of the following:

- a. The amount of insurance applicable to the damaged or destroyed property.
- b. The cost of replacement on the same premises with material of like kind and quality and intended for the same use; or
- c. The amount actually spent in repairing or replacing the property.

[3] We will not pay on a replacement cost basis for any ‘loss’ or damage:

- a. *Until the lost or damaged property is actually repaired or replaced;* or
- b. Unless the repairs or replacement are made as soon as reasonably possible after the ‘loss’ or damage.

[4] We will not pay for ‘loss’ under this Replacement Cost Coverage extension:

- a. Due to any ordinance or law regulating the construction or repair of buildings;
[or]
- b. *Unless and until the damaged or destroyed property is repaired or replaced as soon as practicable;*

* * *

[5] If the cost of repair or replacement is less than \$2,500 for any one ‘loss’ to the covered property, we will waive the coinsurance requirement and pay the replacement cost for the ‘loss’ or damaged property. ***

[6] If you choose an actual cash value settlement, you can still select a replacement cost settlement if the property is repaired or replaced within 6 months of loss. If you choose a replacement cost settlement, the coinsurance requirement applies on a replacement cost basis.” (Emphases added.).

¶ 6 The policy also contained a “FUNCTIONAL REPLACEMENT COST” endorsement which stated:

“A. *The first paragraph* of Paragraph **A.7. Replacement Cost Coverage of Section VIII – Extensions of Coverage** is replaced by the following:

After a covered ‘loss’ to your *business personal property or personal property of others* under Coverage 2, you have the option of choosing a replacement cost settlement, instead of an actual cash value settlement, thereby eliminating any deduction for depreciation. When you select replacement cost, the Coinsurance Clause (see Condition 3) shall apply as a percentage of the replacement cost rather than the actual cash value of the property. (This percentage requirement for coinsurance is waived when the cost of repair or replacements is less than \$2,500 for any one ‘loss’.) [.]

B. The following is added to Paragraph **A.7. Replacement Cost Coverage of Section VII – Extensions of Coverage**:

After a covered ‘loss’ to your Building(s) under Coverage 1, our payments will be on a functional replacement cost basis instead of on a replacement cost basis or actual cash value basis. Payment will not exceed the limits of insurance shown in the ‘Declarations.’

In the event of a total loss, we will pay the smallest of the following:

1. The cost to replace the building on the same site (or on a different site within the state) with a less costly building that is functionally equivalent to the damaged building; or
2. The amount of insurance applicable to the damaged or destroyed building at the time of the ‘loss.’

In the event of a partial loss, we will pay the smallest of the following:

1. The cost to repair or replace the damaged portion of the building with less costly material, if available, in the architectural style that existed before the ‘loss’ or damage occurred; or
2. The amount of insurance applicable to the damaged or destroyed building at the time of the ‘loss.’

If you do not make a claim under the Functional Replacement Cost coverage, we will pay the smallest of the following:

1. The ‘market value’ of the damaged building, exclusive of the land value, at the time of ‘loss’;
2. The amount it would cost to repair or replace the damaged building on the same site (or on a different site within the state), with less costly material in the architectural style that existed before the loss or damage occurred, less allowance for physical deterioration and depreciation; or
3. The amount of insurance applicable to the damaged or destroyed building at the time of the ‘loss.’

C. Paragraph 3. Coinsurance Clause of Section X Commercial Property Conditions does not apply to Building(s) – Coverage A.” (Emphases added.).

¶ 7 On September 4, 2013, Robertson filed a complaint for a declaratory judgment, alleging as follows. Following the fire, it submitted a claim to Erie, and on April 29, 2013, it submitted an estimate to “repair/replace the damage” to the building. It advised Erie that because the fire was a total loss, payment was owed on a functional replacement cost basis instead of on a replacement cost basis or actual cash value basis. The functional replacement cost of the building was \$4,290,025, so Erie owed it the insurance policy limit of \$3,028,009. However,

although Erie agreed that Robertson sustained a covered total loss based on its own estimate of \$3,955,850.31, it alleged that it owed only the actual cash value of the fire loss, which it determined was \$1,795,628.08.

¶ 8 Robertson sought a declaration as to the proper application of the Functional Replacement Cost Endorsement (Functional Replacement Cost Endorsement or Endorsement) to its loss. It stated that its position was that it was entitled to the lesser of the limit of insurance or the cost to replace the building on the same site with a less costly building that was functionally equivalent to the damaged building, and here the lesser amount was the insurance limit. Robertson stated that Erie took the position that the Functional Replacement Cost Endorsement did not apply unless and until the building was actually repaired or replaced, and that its liability for the fire loss was therefore limited to the actual cash value of the loss.

¶ 9 On February 11, 2014, Erie filed a counterclaim for a declaratory judgment in its favor. It argued that the policy language was clear that Robertson had the option of choosing a replacement cost settlement instead of an actual cash value settlement. However, it argued that the language further stated that it was not obligated to pay on a replacement cost basis until the property was actually repaired or replaced, or unless the repairs or replacement were made as soon as reasonably possible. It sought a declaration to this effect and that Robertson's acceptance of the actual cash value payment of \$1,794,628.08 was an election of the actual cash value settlement. Further, it sought a declaration that if Robertson did not timely advise Erie of its intent to proceed with repairing and replacing its building, Erie could pay the lesser of (1) the market value of the building, exclusive of the land, at the time of the loss; (2) the amount it would cost to repair or replace the building on the same or different site with less costly material;

or (3) the amount of insurance applicable to the damaged or destroyed building at the time of the loss.

¶ 10 On September 2, 2014, the parties each filed motions for summary judgment. On December 31, 2014, the trial court granted summary judgment for Erie, ruling that Robertson was not entitled to the functional replacement cost under the policy. We summarize its memorandum order. The insurance policy provided for the actual cash value at the time of the loss, unless otherwise provided elsewhere in the policy. One such exception was the Replacement Cost Coverage Extension (Replacement Cost Coverage Extension or Extension), which provided for payment on a replacement cost basis for some losses. The policy also contained a Functional Replacement Cost Endorsement, which provided for payment on a functional replacement cost basis in some circumstances. Robertson submitted an estimate to Erie for the functional replacement cost of the building, which it estimated at \$4,290,025. As that amount was higher than the policy limit of \$3,028,090, Robertson claimed that it was entitled to the policy limit. Erie determined the actual cash value of the loss to be \$1,795,628.08. Erie paid Robertson this amount, minus Robertson's \$1,000 cash deductible, because the building was not repaired or replaced. The parties agreed that: the building was a total loss, as replacement would cost more than the policy limit; the building had not been repaired or replaced; and there were no disputed issues of material fact.

¶ 11 The policy's Replacement Cost Coverage Extension (Section VIII. A.7.) allowed the insured to choose to obtain the replacement cost for certain losses, as opposed to the actual cash value of the property. The introductory paragraph explained the replacement cost coverage, and the second through sixth paragraphs contained limitations on the coverage. See *supra* ¶ 3. The policy also contained a Functional Replacement Cost Endorsement, which amended the

Extension by adding the Endorsement to paragraph A.7. The parties' dispute centered on the applicability of the second through sixth paragraphs of the Extension to the Endorsement. Specifically, Robertson argued that because Section B of the Endorsement did not say where it should be added to section A.7. of the Extension, it must be added to the end. Robertson argued that, as a result, the prior paragraphs in section A.7. requiring repair or replacement would not apply to the newly-added, subsequent paragraphs concerning buildings. If this were true, all building claims would then be paid on a functional replacement cost basis, without condition. However, the third through sixth paragraphs of the Replacement Cost Coverage Extension did not contain any limiting terms indicating that they applied only to personal property, but, to the contrary, the fourth paragraph referred specifically to buildings. The exact placement of section B within the Replacement Cost Coverage Extension did not affect the applicability of the paragraphs containing the requirement of repair or replacement.

¶ 12 The third paragraph of the Replacement Cost Coverage Extension stated that Erie would “not pay on a replacement cost basis for any ‘loss’ or damage” until the lost property was actually repaired or replaced, or unless the repairs or replacement was made as soon as reasonably possible. See *supra* ¶ 3. Robertson argued that “replacement cost” and “functional replacement cost” were two different concepts under the policy, and that the paragraph did not specifically say that it applied to a claim for functional replacement cost. Those two terms were not defined by the policy, so they were to be given their ordinary and plain meanings. “Replacement” meant to provide a substitute for. The policy described the payment to be made under the Functional Replacement Cost Endorsement as “[t]he cost to replace the building on the same site *** with a less costly building that is functionally equivalent to the damaged building.” See *supra* ¶ 4. Because the calculation of the function replacement cost was based on “ ‘the cost

to replace the building,’ ” it was therefore a payment “ ‘on a replacement cost basis’ ” under the third paragraph of section A.7. and was subject to the requirement that the building be repaired or replaced.

¶ 13 Moreover, the last paragraph of the Functional Replacement Cost Endorsement stated that if the insured did not make a claim under the endorsement, Erie would pay the smallest of: (1) the market value of the damaged building, exclusive of the land value; (2) the amount it would cost to repair or replace the damaged building with less costly material; or (3) the amount of insurance applicable to the damaged building. It was clear that one could not make a claim under the Functional Replacement Cost Endorsement without meeting the requirements of the Replacement Cost Coverage Extension, because otherwise this paragraph would be rendered meaningless, as all building claims would be paid on a functional replacement cost basis.

¶ 14 The parties’ intent as derived from looking at the policy as a whole supported the position that replacement or repair of the property was required for the replacement cost to be triggered, as nothing in the endorsement amended that requirement. Also, Robertson’s independent adjuster, Howard Mishne, testified at his deposition that the purpose of a functional replacement cost endorsement was to permit the use of less expensive materials in the replacement building, and that premiums for such coverage are lower than for policies that do not allow for payment of the functional replacement cost. This perspective supported the position that the intent in adding the Functional Replacement Cost Endorsement was not to expand the amount potentially payable to the insured nor to eliminate the requirement to repair or replace the building in order to recover based on the functional replacement cost. The only reasonable conclusion was that section B of the Endorsement was added to ensure that only the functional replacement cost would be allowed for buildings while traditional replacement cost would continue to be allowed

at the election of the insured for personal property, as long as in all cases the property was actually repaired or replaced.

¶ 15 The trial court concluded:

“The language of the Extension, providing that Defendant Erie will not pay ‘under this Replacement Cost Coverage extension’ unless the insured property is repaired or replaced, is clear and unambiguous. It is clear from the plain reading of the policy language that losses will be paid based on actual cash value unless the insured complies with the Replacement Cost Coverage Extension, including the requirement that the property be repaired or replaced. The location of Section B of the Endorsement within the extension does not affect the applicability of the repair or replace paragraphs in the Extension. The repair or replace requirement also applies to a claim for functional replacement cost. Because section B of the Endorsement is expressly added to and made a part of the Extension (Section A.7), a payment under section B for a Building loss is necessarily a payment under the Extension. Thus, the plain language of this fourth paragraph of section A.7 requires repair or replacement before a building loss will be paid under the Functional Replacement Cost Endorsement.”

¶ 16 On January 22, 2015, Robertson sought leave to file an amended complaint. The next day, it filed a motion to reconsider. On May 6, 2015, the trial court denied Robertson leave to file an amended complaint and denied its motion to reconsider. Robertson timely appealed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, Robertson argues that the trial court erred in granting summary judgment for Erie and denying Robertson’s motion for summary judgment. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the

light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. When parties file cross-motions for summary judgment, they mutually concede that only a question of law is involved. *Id.* We review *de novo* an order granting summary judgment. *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, ¶ 20.

¶ 19 The construction of an insurance policy is a question of law that can be appropriately disposed of through summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). We construe an insurance policy by ascertaining and giving effect to the parties' intent, as expressed in the policy language. *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177, 184 (2010). We must construe the policy as a whole, giving effect to every provision (*id.*) and taking into account the type of insurance purchased, the nature of the risks involved, and the contract's overall purpose (*Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 456 (2010)). We give unambiguous words in the policy their plain, ordinary, and popular meanings. *Id.* If the policy's terms are susceptible to more than one meaning, they are ambiguous and will be construed strictly against the insurer who drafted the policy. *Id.* Also, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. *Id.*

¶ 20

A. Robertson's Arguments

¶ 21 Robertson argues that the trial court erred in granting Erie's motion for summary judgment and denying its motion for summary judgment because: (1) the trial court's interpretation, that Robertson's recovery for the total loss of its building is limited to its actual cash value unless and until the building is replaced, ignored the clear and unambiguous language

of the Functional Replacement Cost Endorsement, which did not require replacement as a condition to receiving payment on a functional replacement cost basis; (2) the trial court's interpretation cannot be squared with the fundamental tenants of insurance policy interpretation; and; (3) alternatively, the policy is susceptible to more than one reasonable interpretation, making it ambiguous and requiring that it be construed against the drafter, Erie.

¶ 22

1. Endorsement's Language

¶ 23 With regards to its first argument, Robertson argues as follows. Paragraph B of the Functional Replacement Cost Endorsement clearly and unambiguously provides that if a functional replacement cost claim is made, Erie's payments for a covered loss to a building will be on a functional replacement cost basis, and if a total loss occurred, as in the situation here, Erie's payment will be the lesser of the policy limit or the estimated functional replacement cost. Nothing in the Endorsement requires replacement as a condition to receiving a functional replacement cost endorsement. The trial court found that Robertson did not "make a claim" under the Functional Replacement Cost Endorsement because it did not meet the condition of replacement of the building set forth in the Replacement Cost Extension. As the term "claim" is not defined in the policy, it must be given its plain, ordinary, and popular meaning, and the dictionary defines this term as a "demand for money." See Black's Law Dictionary 240 (7th ed. 1999). Here, it is undisputed that Robertson demanded monetary payment on a functional replacement cost basis, and Robertson therefore made a claim.

¶ 24 The trial court stated in its memorandum that to interpret the term "claim" as not requiring building replacement would render the last paragraph of paragraph B of the Endorsement meaningless, as all building claims would be paid on a replacement cost basis, with no choice by the insured and without regard to whether the insured replaced the building.

However, the policy language expressly stated, “After a covered ‘loss’ to your Building(s) under Coverage 1, our payments will be on a functional replacement cost basis instead of on a replacement cost basis or actual cash value basis.” The insured also had a choice, in that it could decide not to make a claim or demand for payment under the Functional Replacement Cost Endorsement and instead receive a payment on an actual cash value or market value basis. Under the clear and unambiguous language of the Endorsement as applied to the undisputed facts here, Robertson was entitled to the policy limit of insurance.

¶ 25 2. Principles of Insurance Policy Interpretation and Construction

¶ 26 Robertson next argues that the trial court’s interpretation of the policy is unreasonable and flawed because it cannot be squared with fundamental tenets of insurance policy interpretation and construction. We summarize its lengthy argument on this point, which is divided into four subsections. Robertson argues as follows.

¶ 27 First, the trial court’s ruling did not take into account paragraph A of the endorsement. The first paragraph of the original Replacement Cost Extension stated that it applied to a building loss, business personal property loss, or personal property of others loss. On the other hand, the paragraph that replaced it through the Functional Replacement Cost Endorsement stated that it applied only to a business personal property loss or a personal property loss, and it did not mention a building loss. The significance of this change is that every provision in the Replacement Cost Extension which followed the replaced first paragraph would also apply only to a business personal property loss or a personal property loss of others. Accordingly, there was no replacement condition applicable to the Functional Replacement Cost Endorsement. The trial court noted that all of the conditions outlined in paragraphs three through six of the Replacement Cost Extension had the potential applicability to a building claim. However, every provision in

an insurance policy should serve a purpose, so paragraph A of the endorsement must also serve a purpose. If paragraph 3 through 6 applied to building losses, there would be no reason for paragraph A to replace the first paragraph of the Replacement Cost Extension, as that paragraph already included building losses. Robertson's interpretation also gave meaning and effect to the use of the letters "A" and "B" in the Endorsement as separate, unrelated provisions. Its interpretation did not render meaningless the phrase in the fourth paragraph of the Replacement Cost Coverage Extension: "We will not pay for 'loss' under this Replacement Cost Coverage extension: a. Due to any ordinance or law regulating the construction or repair of buildings." This was the only reference to "buildings" in the Extension once paragraph A of the Endorsement replaced the first paragraph of the Extension. The phrase could be reasonably and liberally construed in Robertson's favor (see *National Union Fire Insurance Co. v. Glenview Park District*, 158 Ill. 2d 116, 122 (1994) (provisions that limit or exclude coverage are to be liberally construed in the insured's favor and strongly against the insurer)) to mean that Erie would not pay for a business personal property or property of others loss if, for example, there was an ordinance or law regulating construction or repair that prevented a damaged building from being repaired such that demolition was required, and during the demolition, business personal property or property of others inside the building was damaged or destroyed.

¶ 28 Second, the trial court found that replacement cost and functional replacement cost meant the same thing, but they were distinct terms under the policy. Paragraph three of the Replacement Cost Extension stated that Erie would not pay on a "replacement cost basis" for any loss or damage until the lost or damaged property was actually repaired or replaced, while paragraph B of the Functional Replacement Cost Endorsement provided for a "functional replacement cost basis *instead of on a replacement cost basis or actual cash value basis*"

(emphasis added) if a claim was made under the functional replacement cost coverage of the Endorsement. This distinction precluded the terms from being given an identical meaning. If the terms were the same, there would be no reason for the Functional Replacement Cost Endorsement. Also, if they meant the same thing, the coinsurance requirement of the sixth subparagraph of the Extension would apply, but paragraph C of the endorsement stated that the coinsurance clause does not apply to buildings.

¶ 29 Third, the parties disagreed about the placement of paragraph B of the Endorsement in the Extension. Erie's senior property claim specialist Trevor Rittich testified in his deposition that it could be added anywhere in the Replacement Cost Extension, and he would put it between the second and third paragraphs of the Extension. Mishne, in contrast, testified in his deposition that he would put it at the end of the Extension, as it was a separate, stand-alone provision unrelated to the Extension's other provisions. Even if it was inserted between the second and third paragraphs of the Extension such that every provision that follows applies to a building loss, including the replacement condition, paragraph B of the Endorsement modified the Extension by changing the adjustment, valuation, and payment basis for a building loss from replacement cost to functional replacement cost. Erie's interpretation, which the trial court adopted, would be reasonable only if the words "functional replacement cost" were substituted in place of the words "replacement cost" in the Extension, but that would go against the expressed policy language. It would have been easy for Erie to include limiting language in the Endorsement, but it did not, and provisions that purport to exclude or limit coverage will be applied only where the terms are clear, definite, and specific. The trial court stated that the exact placement of section B within the Extension did not affect the applicability of the Extension's paragraphs requiring replacement or repair. However, if it were placed at the end of the

Extension, the effect would be to limit the repair or replacement condition to business personal property and personal property of others losses. In contrast, if section B could be placed anywhere, there would have been no reason to replace the first paragraph of the Extension, as it already applied to building losses. That is, the Endorsement's purpose was to differentiate between building losses and business personal property and personal property of others losses.

¶ 30 Fourth, as to the Endorsement's intent, the trial court stated that the intent was not to expand the amount potentially payable to the insured, and that construing the Endorsement as Robertson asserted would be an absurd result because Robertson would get a greater recovery than if it had received replacement cost coverage. However, the trial court ignored evidence that even if the loss were adjusted on a replacement cost basis, Robertson would have been entitled to the \$3,028,090 policy limit.

¶ 31 3. Ambiguity

¶ 32 Last, Robertson alternatively argues that the policy is ambiguous as to whether recovery under the Endorsement for a total loss to a building is limited to actual cash value unless and until the building is replaced. Robertson argues that Rittich's deposition testimony that paragraph B of the Endorsement could be added anywhere in the Extension underscores the ambiguity of whether Robertson must replace its building to recover functional replacement cost benefits. Robertson argues that even if, *arguendo*, Erie's interpretation is reasonable, Robertson's interpretation is reasonable as well, making the language ambiguous and requiring that it be construed in its favor, as the insured. Robertson argues that paragraph B is a separate, stand-alone provision unrelated to the other provisions in the Extension; it is to be added at the end of the Extension; and the Extension's replacement conditions do not apply to paragraph B to limit Robertson to an actual cash value recovery for the total loss to its building.

¶ 33

B. Erie's Arguments

¶ 34 Erie argues that the trial court correctly entered summary judgment in its favor, because Robertson did not comply with the policy's condition to repair or replace its building and was therefore not entitled to the functional replacement cost. We summarize its arguments in turn.

¶ 35

1. Repair or Replacement was a Necessary Policy Condition

¶ 36 Erie argues as follows. Section B of the Endorsement allows the insured “to *replace the building* on the same site (or on a different site within the state) with a less costly building that is functionally equivalent to the damaged building.” (Emphasis added.). The language is “added” to the language of the Extension, and it is therefore clearly to be read in conjunction with paragraphs two through six in the extension, which conditioned payment by Erie on the repair or replacement of the damaged building. The Endorsement amends that section only as to the method for calculating replacement cost under a functional replacement cost valuation.

¶ 37 Robertson maintains that the plain meaning of “claim” under the policy is a demand for money, which it made, but Robertson forfeited this argument by not raising it in the trial court. Moreover, if every demand for money equated to making a claim, all building claims would be payable on a functional replacement cost basis instead of a cash value basis, which is not reasonable because it does not account for the policy language stating, “If you do not make a claim under the Functional Replacement Cost coverage, we will pay the smallest of the following.” Also, policy conditions beyond a demand for money are required for coverage under the Endorsement. It is undisputed that Robertson had taken no steps toward replacing the building, so it is undisputed that it did not meet the policy condition to timely replace its building.

¶ 38

2. Placement of Section B of the Endorsement

¶ 39 Erie next argues as follows. Under Robertson’s view, since section B of the Endorsement does not say where it is to be added to the Extension, it should be added to the end, which would mean that the prior subparagraphs of section A.7. requiring repair or replacement would not apply to the newly added language of section B concerning buildings. However, Robertson cites no case law supporting its position that language added to the end of a section can be read as a stand-alone provision. To the contrary, insurance contracts are to be construed as a whole, without viewing a clause or provision in isolation. See *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). Nor does Robertson cite case law stating that an endorsement that does not specify exactly where it is to be added to another provision makes the language ambiguous. Robertson’s interpretation is not reasonable because the Extension’s subparagraphs contain no terms indicating that they are limited to personal property, but rather the fourth subparagraph specifically refers to “buildings,” clearly showing that building claims are contemplated within the purview of the conditions.

¶ 40 Robertson argues for the first time in its brief that the language that Erie would not pay for any loss under the Extension “[d]ue to any ordinance or law regulating the construction or repair of buildings” to refer to property inside the building damaged during a mandated demolition. Robertson forfeited this argument by not previously raising it, and the proposed interpretation is also an impermissible re-writing of the policy.

¶ 41 Robertson asserts another strained argument that the trial court ignored evidence that even if its loss was adjusted on a replacement cost basis, it would have been entitled to the \$3,028,090 policy limit. However, Robertson relies on Erie’s early estimate of \$7,000,000, but this number contradicts Robertson’s own prior claimed amount of \$4,290,025, and Robertson cannot now challenge the actual cash value amount. Its argument also does not negate the

absurd result that Robertson is attempting to obtain a full policy payment under the functional replacement cost coverage, where no such payment would be had under the more costly replacement cost coverage, unless the condition of replacing the building was met. Rather, the only reasonable interpretation of the policy is that section B of the Endorsement was added to allow a functional replacement cost valuation subject to the same conditions in the Extension, including the condition requiring that property be repaired or replaced before payment will be made beyond actual cash value.

¶ 42 3. Phrases “Replacement Cost” and “Functional Replacement Cost”

¶ 43 Erie next argues that although Robertson argues that “replacement cost” and “functional replacement cost” are different concepts under the policy, the trial court properly looked at the ordinary and plain meanings of the phrases and concluded that they were the same for this limited purpose. Erie argues that because the calculation of functional replacement cost is based on “the cost to replace the building,” it is therefore a payment “on a replacement cost basis” under the third subparagraph of Paragraph A.7., and is, therefore, subject to the condition that the building be repaired or replaced.

¶ 44 4. Policy’s Intent and Purpose

¶ 45 Erie argues that the interpretation of “functional replacement” cost coverage as a more limited version of replacement cost coverage also comports with the risk undertaken and purpose of the insurance policy. It argues that Robertson’s assertion that Erie could have drafted the Endorsement to include the condition of repair or replacement with the Endorsement language itself is irrelevant, as only when a contract is ambiguous would a court look to an industry’s custom and practice. See *Gray v. Mundelein College*, 296 Ill. App. 3d 795, 805 (1998).

¶ 46 Erie cites *Fidelity & Casualty Co. of New York v. Mobay Chemical Corp.*, 252 Ill. App. 3d 992, 1002 (1992), where the court stated that an endorsement should not be construed more broadly than the fair imports of its terms considered in connection with the policy as a whole. The court further stated that because the endorsement at issue did not contain any coverage limitations but also did not provide for unlimited coverage, it was “only reasonable to turn to the underlying policy and construe the endorsement with the whole of the policy and apply the coverage limitations contained therein.” *Id.* Erie argues that similarly, here the Endorsement did not contain the condition of repair or replacement of the building, but it also did not have language providing for unlimited coverage, so the only reasonable interpretation was to construe the Endorsement with the policy as a whole and apply the coverage limitations contained in the Extension.

¶ 47 Erie further argues that, like most replacement cost policies, the Extension requires repair or replacement of the damaged property as a condition precedent to recovery because there is a moral hazard that the insured could otherwise intentionally destroy the property in order to gain from the loss. See *D&S Realty, Inc. v. Markel Insurance Co.*, 816 N.W.2d 1, 15 (Neb. 2012).

¶ 48 Erie additionally argues that Mishne’s deposition testimony that functional replacement cost endorsements were typically added to policies to reduce premiums supported the trial court’s conclusion that the intent in adding the Endorsement was not to expand the amount potentially payable to an insured, nor eliminate the requirement to repair or replace the building, but rather to provide a more reasonable and less costly alternative to replacement cost coverage. Erie argues that the only reasonable interpretation is that section B of the Endorsement was added to ensure that functional replacement cost would be allowed for buildings, while

traditional replacement cost would continue to be allowed at the election of the insured for personal property, so long as in all cases the property was actually repaired or replaced.

¶ 49 5. Advisory Opinion

¶ 50 Last, Erie argues that it raised an additional reason to deny Robertson's motion for summary judgment, in that it argued below that Robertson's complaint for a declaratory judgment impermissibly sought an advisory opinion. Erie argues that throughout its motion for summary judgment, Robertson repeatedly stated that "if" a functional replacement cost claim was made, it should receive payment on that basis irrespective of whether the building was repaired. Erie argues that such statements reaffirmed the fact that Robertson had not decided whether it would rebuild.

¶ 51 C. Resolution

¶ 52 We first address Erie's contentions of forfeiture and conclude that Robertson adequately preserved all of the arguments it now raises on appeal. We also conclude that Robertson did not seek an advisory opinion, as it sought a declaration that the Endorsement applied and that it was entitled to the insurance policy limit. Moreover, while Robertson used the word "if" in its motion for summary judgment, it clarified its language by stating that "if, *as in this case*, a functional replacement cost claim is made" (emphasis added), it was entitled to a payment in the amount of the policy limit, regardless of whether it replaced the building. Therefore, Robertson sought a resolution of the issues present in this case, rather than an advisory opinion.

¶ 53 We now set forth the policy language of the Extension, as amended by the Endorsement. As Erie takes the position that section B of the Endorsement may be added anywhere, we place it at the end of the Extension, where Robertson asserts that it belongs.

"SECTION VII – EXTENSIONS OF COVERAGE

A. Extensions of Coverage

We will pay the following 'losses' at your option. Payments under these Extensions are not an additional amount of insurance and will not increase the total amount of insurance available for the coverage involved.

* * *

[1] 7. **Replacement Cost Coverage.** After a covered 'loss' to your *business personal property or personal property of others* under Coverage 2, you have the option of choosing a replacement cost settlement, instead of an actual cash value settlement, thereby eliminating any deduction for depreciation. When you select replacement cost, the Coinsurance Clause (see Condition 3) shall apply as a percentage of the replacement cost rather than the actual cash value of the property. (This percentage requirement for coinsurance is waived when the cost of repair or replacements is less than \$2,500 for any one 'loss'.) [.]

[2] When adjustment is on a replacement costs basis, we will pay the smallest of the following:

- a. The amount of insurance applicable to the damaged or destroyed property.
- b. The cost of replacement on the same premises with material of like kind and quality and intended for the same use; or
- c. The amount actually spent in repairing or replacing the property.

[3] We will not pay on a replacement cost basis for any 'loss' or damage:

- a. *Until the lost or damaged property is actually repaired or replaced;* or
- b. Unless the repairs or replacement are made as soon as reasonably possible after the 'loss' or damage.

[4] We will not pay for 'loss' under this Replacement Cost Coverage extension:

- a. *Due to any ordinance or law regulating the construction or repair of buildings; [or]*
- b. *Unless and until the damaged or destroyed property is repaired or replaced as soon as practicable;*

* * *

[5] If the cost of repair or replacement is less than \$2,500 for any one 'loss' to the covered property, we will waive the coinsurance requirement and pay the replacement cost for the 'loss' or damaged property. ***

[6] If you choose an actual cash value settlement, you can still select a replacement cost settlement if the property is repaired or replaced within 6 months of loss. If you choose a replacement cost settlement, the coinsurance requirement applies on a replacement cost basis.

[7] *After a covered 'loss' to your Building(s) under Coverage 1, our payments will be on a functional replacement cost basis instead of on a replacement cost basis or actual cash value basis. Payment will not exceed the limits of insurance shown in the 'Declarations.'*

[8] In the event of a total loss, we will pay the smallest of the following:

1. The cost to replace the building on the same site (or on a different site within the state) with a less costly building that is functionally equivalent to the damaged building; or
2. The amount of insurance applicable to the damaged or destroyed building at the time of the 'loss.'

[9] In the event of a partial loss, we will pay the smallest of the following:

1. The cost to repair or replace the damaged portion of the building with less costly material, if available, in the architectural style that existed before the 'loss' or damage occurred; or
2. The amount of insurance applicable to the damaged or destroyed building at the time of the 'loss.'

[10] If you do not make a claim under the Functional Replacement Cost coverage, we will pay the smallest of the following:

1. The 'market value' of the damaged building, exclusive of the land value, at the time of 'loss';
2. The amount it would cost to repair or replace the damaged building on the same site (or on a different site within the state), with less costly material in the architectural style that existed before the loss or damage occurred, less allowance for physical deterioration and depreciation; or
3. The amount of insurance applicable to the damaged or destroyed building at the time of the 'loss.' ” (Emphases added.).

¶ 54 It is clear from the record that Robertson requested coverage on a functional replacement cost basis, but Robertson would obviously have to meet any policy requirements in order to be entitled to payment on a functional replacement cost basis. While we agree with Robertson that nothing in the Endorsement, viewed in isolation, requires repair or replacement of the building in order to receive payment on a functional replacement cost basis, Robertson cannot get around the fact that the Endorsement adds its language to the Extension (the Endorsement states that the

language was “added to Paragraph A.7. Replacement Cost Coverage of Section VIII – Extensions of Coverages”), rather than creating a stand-alone provision for buildings.

¶ 55 Paragraph A of the Endorsement replaced the prior first paragraph of the Extension, which previously allowed for recovery on a replacement cost basis for buildings. See *supra* ¶ 3. Under subparagraph 2¹ of the Extension (see *supra* ¶ 53), a replacement cost basis is defined as the smallest of (1) the amount of insurance applicable to the damaged or destroyed property; (2) the costs of replacement on the same land with material of like kind and quality and intended for the same use; or (3) the amount actually spent in repairing or replacing the building. With the amendments under the Endorsement, under subparagraph 7, payments to covered losses to buildings are “on a functional replacement cost basis instead of on a replacement cost basis or actual cost value basis.” For a total loss to a building, the functional replacement cost is defined in subparagraph 8 as the smaller of the costs to replace the building on the same site, or on a different site within the same state, with a less costly building that is functionally equivalent to the damaged building, or the amount of applicable insurance at the time of the loss. Thus, we agree with Robertson that payment on a replacement cost basis and on a functional replacement cost basis are not identical. Further, we see no inherent conflict in subparagraph one discussing payment on a replacement cost basis for business personal property and personal property of others and subparagraph 7 discussing payment on a functional replacement cost basis for buildings.

¶ 56 The central issue in this case is whether the requirements of repair or replacement contained in subparagraphs 3 and 4 apply to buildings. Subparagraph 3 states that Erie “will not pay on a replacement cost basis for any ‘loss’ or damage *** [u]ntil the lost or damaged property

¹ We refer to our inserted paragraph numbers.

is actually repaired or replaced.” As payment on a replacement cost basis, as opposed to a functional replacement cost basis, applies to business personal property or personal property of others, it is arguable that subparagraph 3 does not apply to buildings. However, subparagraph 4 states that Erie “will not pay for ‘loss’ *under this Replacement Cost Coverage extension*: a. Due to any ordinance or law regulating the construction or repair of buildings; [and] b. Unless and until the damaged or destroyed property is repaired or replaced as soon as practicable.” (Emphasis added.). The whole section is the Replacement Cost Coverage Extension, including the language regarding the functional replacement cost coverage for buildings, so we conclude that the requirements of subparagraph 4 unambiguously apply to buildings as well. This is reinforced by the statement in subparagraph 4 that Erie will not pay under the Extension as a result of any ordinance or law regulating the construction or repair of buildings, as it explicitly references buildings. Robertson argues that this language could be construed to mean to provide coverage for business personal property or property of others that was left inside a damaged building that was required to be demolished by ordinance. This is an extremely strained and unreasonable interpretation of the language, and we will not adopt an interpretation of an insurance policy that is strained, forced, unnatural, or unreasonable, or one that leads to an absurd result. *Bohner v. Ace American Insurance Co.*, 359 Ill. App. 3d 621, 623 (2005). Rather, a reasonable interpretation of the provision is that Erie will not pay for any loss that arises from any ordinance or law regulating the construction or repair of the buildings themselves. Correspondingly, the requirement in subparagraph 4 that the damaged or destroyed property is repaired or replaced as soon as practicable also applies to buildings, in addition to business personal property and personal property of others.

¶ 57 Additionally, as the trial court and Erie observed, construing the language of the Extension, as amended, to require repair or replacement of the building as a precursor to a functional replacement cost payment corresponds to Mishne’s deposition testimony that the purpose of functional replacement cost endorsements are to allow the use of less expensive materials in the replacement buildings, and that premiums for coverage allowing functional replacement cost are lower than for policies that do not allow for functional replacement cost. That is, if a functional replacement endorsement serves to allow the insurer to save money through the use of less expensive materials, and the insured to in turn pay decreased premiums, it would not be logical to eliminate the requirement of repair or replacement of the building. Moreover, as Erie points out, insurance companies typically require repair or replacement of damaged property before the insured is entitled to recover to address the moral hazard that the insured could otherwise have an additional incentive to intentionally destroy the property to financially gain from the loss. See *D&S Realty, Inc.*, 816 N.W.2d at 15.

¶ 58 In sum, the plain, unambiguous language of the policy adds the language of the Endorsement regarding functional replacement cost basis payments for buildings to the language of section 7 of the Extension, and subparagraph 4 of the Extension states that Erie will not pay for “loss” under the Extension unless and until the damaged or destroyed property is repaired or replaced. It is undisputed that Robertson did not repair or replace its building, so it is not entitled to receive payment on a functional replacement cost basis. Accordingly, the trial court did not err in denying Robertson’s motion granted summary judgment and granting summary judgment for Erie.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the judgment of the Lake County circuit court.

¶ 61 Affirmed.