In the

AU HAIA ISUAC CA et al

Plaintiffs-Appellees,

v.

WALSH CONSTRUCTION COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:15-cv-10324 — **Virginia M. Kendall**, *Judge.*

ARGUED JANUARY 24, 2024 — DECIDED APRIL 29, 2024

Before WOOD, SCUDDER, and LEE, *Circuit Judges.*

LEE, *Circuit Judge.* In 2003, the City of Chicago contracted with Walsh Construction Company to manage the construction of a canopy and curtain wall system at O'Hare International Airport. As part of that project, Walsh entered into a contract with Carlo Steel Corporation, which in turn subcontracted with LB Steel, LLC to fabricate and install steel columns to support the wall and canopy. Per their agreement, LB Steel listed Walsh as an additional insured in its commercial

general liability (CGL) insurance policies. Several years into the project, the City discovered cracks in the welds of the steel columns and sued Walsh for breaching its contract. Walsh, in turn, sued LB Steel under its subcontract. Walsh also asked LB Steel's insurers to defend it in the City's lawsuit, but they never did. Walsh eventually secured a judgment against LB Steel, which led it to declare bankruptcy. Walsh then sued LB Steel's insurers to recover the costs of defending against the City's suit and indemnification for any resulting losses.

In this suit, LB Steel's insurers seek a declaratory judgment that LB Steel's CGL policies do not cover the expenses Walsh incurred to repair the defective columns at the City's insistence. They also seek a declaratory judgment that they did not have a duty to defend Walsh in the City's underlying suit. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of the plainti insurers on both issues. This case turns upon the question of whether, under Illinois law, the defects in the welds and columns constitute "property damage" under LB Steel's CGL policies. We conclude that they do not and a rm.

I. Background

A. The Project

In 2003, the City hired Walsh as the general contractor for the Façade and Circulation Enhancement (FACE) project at O'Hare. The FACE project involved building and installing a new canopy for Terminals 1, 2, and 3. In addition to the canopy, the project called for the construction of a steel and glass curtain wall that would be integrated with the canopy at Terminals 2 and 3. Walsh contracted with Carlo to manufacture the steel and curtain wall. Carlo, in turn, subcontracted with

LB Steel to manufacture and install the steel elements of the wall, which included steel columns, hammer heads, and box girders. The subcontract between Carlo and LB Steel included an indemnity provision that required LB Steel to indemnify Carlo and Walsh for any property damage resulting from LB Steel's negligent performance.

The City discovered cracks in welds performed by LB Steel in December 2004 and again in November 2005, leading it to question the structural integrity of the canopy system. As a result, the City required Walsh to install shoring to the columns. In February 2008, Walsh and the City entered into a limited settlement agreement in which Walsh agreed to conduct repairs to the columns at its own expense.

B. The Underlying Suit

In November 2008, the City sued Walsh in Illinois court for breach of contract and contractual indemnity to recover the costs the City incurred to investigate and remediate the defective welds. At the time, LB Steel had CGL policies in place with St. Paul Guardian Insurance Company, Travelers Property Casualty Company of America, and the Charter Oak Fire Insurance Company (Insurers). Walsh was listed as an additional insured. So, in January 2010, Walsh tendered its defense of the City's claims to the Insurers under LB Steel's policies.

The insured carries the initial burden to show that its loss falls within the terms of the policy. *St. Michael's Orthodox Cath. Church v. Preferred Risk Mut. Ins. Co.*, 496 N.E.2d 1176, 1178 (Ill. App. Ct. 1986). If an insured meets this burden, the burden shifts to the insurer to prove that a policy exclusion applies.

A. Property Damage

We begin with the question of covered damages. The In-

as intended and had yet to cause any physical injury to tangible property. *Id.* at 502. And the court recently rea rmed this reasoning in *Acuity*, 2023 IL 129087, at ¶ 37.

LB Steel's defective welds are much like the compromised plumbing systems of the chary homeowners. Both may create the potential for future damage to the property of others, but where such damage has yet to manifest, there is no "property damage" that triggers coverage under the CGL policies. Furthermore, just as the proactive homeowners did in *Eljer*, Walsh took preventative measures by retrofi ting LB Steel's defective columns before they could cause damage to other parts of the canopy system. And, just as in *Eljer*, Walsh's preventative costs are economic losses not recoverable under the policies.

Se t ing *Eljer* to the side, Walsh protests that this rule creates a "perverse outcome" because it penalizes the company for taking steps to prevent the canopy's catastrophic collapse. But there are many reasons (economic and otherwise) why a party in Walsh's shoes might take steps to prevent such a calamitous failure (avoiding millions of dollars in potential liability being just one). Remember too that LB Steel—not Walsh—is the policyholder. To find coverage here would mean that manufacturers like LB Steel could perform defective work without consequence, knowing that they could later recoup any resulting adverse judgments under their CGL policies. That can hardly be what the contracting parties intended.

Taking a slightly di erent tack, Walsh argues that there is properapTJ -0. (c)8.1 (ol)5i5 (o)-51(a)0.9 armm -0. epo.a(de) Stigh ci sanapmcgoaert1 (ol)5

N.E.2d at 1273. Here, unlike the cans in *Pi t way*, the damage to the columns did *not* require the entire canopy to be taken down and rebuilt. Indeed, Walsh restored the canopy's structural integrity by retrofi t ing the defective columns. The outcome may be di erent if physical abnormalities in the columns required Walsh to disassemble the canopy and start anew, but that was not the case.

In sum, Walsh has not su ered any covered losses because its damages were limited to LB Steel's own defective work.[1] Accordingly, the Insurers are not required to indemnify Walsh for its losses. We therefore a rm the district court's grant of summary judgment in favor of the Insurers on Count I of the Insurers' Amended Complaint. We also a rm the district court's denial of summary judgment as to coverage in Count I and the duty to indemnify in Count III of Walsh's Counterclaim.

B. Duty to Defend

The Insurers also seek a declaratory judgment that they had no duty to defend Walsh against the City's claims in the underlying suit. An insurer has a duty to defend when "the complaint's allegations fall within or potentially within the coverage provisions of the policy." *Lyons v. State Farm Fire & Cas. Co.*, 811 N.E.2d 718, 721 (Ill. App. Ct. 2005); *accord Chi. Flameproof*, 950 F.3d at 980. Because a complaint "need not allege or use language a rmatively bringing the claims within

[1] The Insurers also argue that there was no "event" or "occurrence" triggering coverage under the policies. Because we conclude that there was no "property damage" under the Insurers' policies, we need not reach the question of whether there was an "event" or "occurrence" triggering coverage.

the scope of the policy," the duty to defend is broader than the duty to indemnify. *Travelers Ins. Cos. v. Penda Corp.*, 974 F.2d 823, 827 (7th Cir. 1992) (quoting *W. Cas. & Sur. Co. v. Adams Cnty.*

(quoting *Amerisure Ins. Co. v. Microplastics, Inc.*, 622 F.3d 806, 810 (7th Cir. 2010)). As applied here, the City's allegations must somehow indicate that there might have been—or could have been—damage to parts of the canopy not supplied by LB Steel. While we must peruse the City's allegations with care, we "will not read into the complaint facts that are not there." *Id.* at 1059 (quoting *Pekin Ins. Co. v. Roszak/ADC, LLC*, 931 N.E.2d 799, 806 (Ill. App. Ct. 2010)).

Here, the City's Third Amended Complaint limits its allegations to LB Steel's defective welds and steel and the costs of repairing them. For example, the City alleged that "[n]umerous of the *welds* installed by Walsh … contain unacceptable amounts of slag, cracks and other unacceptable [ ] flaws." The City also asserts that "Walsh breached its contractual obligations by providing *welds* containing slag and other irregularities." The complaint does not give even the slightest suggestion that LB Steel's defective welds might have caused damage to other parts of the canopy system.[2]

Scanning the complaint to overcome this hurdle, Walsh points us toward the City's conclusory allegation that its damages included costs associated with "repair." For example, Walsh recites a paragraph in the complaint that lists the City's damages to include "costs associated with investigation, loss of competitive advantage, removal, *repair* and/or replacement, additional costs of construction, diminution of value, and

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[2] As we have made plain, we agree with our dissenting colleague that the City's complaint need not plead "an explicit factual allegation that the defective structural welds damaged the canopy." We only require the complaint to somehow signal that there *might have been* or *could have been* covered damages—in other words, that there was the "potential" for coverage as Illinois cases require.

complaint, we conclude that the Insurers did not have a duty to defend Walsh in the underlying action based upon Illinois's eight-

C. Section 155 Sanctions

Illinois law gives courts the authority to impose sanctions when there was "an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable." 215 Ill. Comp. Stat. 5/155(1). However, it is "neither vexatious nor unreasonable to litigate a 'bona fide dispute concerning the scope and application of insurance coverage,' let alone to deny coverage based on a position that prevails." *PQ Corp. v. Lexington Ins. Co.*, 860 F.3d 1026, 1038 (7th Cir. 2017) (quoting *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1110 (7th Cir. 2000)). Because we find that the Insurers' coverage position prevails, we agree with the district court that sanctions are not warranted. We therefore affirm the district court's grant of summary judgment for the Insurers on Count IV of Walsh's Counterclaim as well.

IV. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

SCUDDER, *Circuit Judge*, concurring in part and dissenting in part. I agree with the majority that LB Steel's defective welds did not cause "property damage" within the meaning of the St. Paul, Travelers, and Charter Oak policies. I respectfully part ways, however, with the majority's conclusion that the insurers had no duty to defend Walsh in its litigation with the City. In my opinion, the majority's reasoning stands in irreconcilable tension with a floodtide of Illinois law broadly defining the contours of the duty to defend and threatens to dilute the scope of that right in cases like this one, where the potential for coverage is in no way foreclosed by the four corners of the underlying complaint.

Under Illinois law, the duty to defend is serious business. An insurer's duty to defend is "much broader" than its duty to indemnify. *Crum & Forster Managers Corp. v. Resolution Tr. Corp.*, 620 N.E.2d 1073, 1079 (Ill. 1993). "Refusal to defend," the Illinois Supreme Court has emphasized, "is unjustifiable unless it is clear from the face of the underlying complaint that the facts alleged do not fall potentially within the policy's coverage." *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992). Put another way, "[a]n insurer can refuse to defend only if the allegations of the underlying complaint preclude *any* possibility of coverage." *Ill. Union Ins. Co. v. Medline Indus., Inc.*, 220 N.E.3d 380, 387 (Ill. App. Ct. 2022) (emphasis added).

Illinois courts assess the potential for coverage using the so-called "eight-

St. Paul, Travelers, and Charter Oak. *Id.* From there we ask whether the facts alleged in the complaint, "liberally construed in favor of" Walsh, fall at least potentially within the policies' coverage. *Outboard Marine Corp.*, 607 N.E.2d at 1220. This threshold is "low, and any doubt … [must] be resolved in [Walsh's] favor." *Pekin Ins. Co. v. AAA-1 Masonry & Tuckpointing, Inc.*, 81 N.E.3d 1040, 1045 (Ill. App. Ct. 2017).

As Illinois law's emphasis on possibility (as opposed to plausibility) suggests, these rules do not establish or amount to a pleading standard. Nowhere does Illinois law require that "the complaint allege or use language a rmatively bringing the claims within the scope of the policy" before a duty to defend will a tach. *Int'l Ins. Co. v. Rollprint Packaging Prods., Inc.*, 728 N.E.2d 680, 688 (Ill. App. Ct. 2000); see also *Empire Indemnity Ins. Co. v. Chi. Province of Soc'y of Jesus*, 990 N.E.2d 845, 854 (Ill. App. Ct. 2013) (same). To the contrary, Illinois courts have rejected such an approach because it would hinge the existence of the duty to defend "on the draftsmanship skills or whims of the plainti in the underlying action." *Rollprint Packaging Prods.*, 728 N.E.2d at 688. Recognizing the inequity of such a rule, Illinois courts have made clear that the controlling inquiry is whether there is potential for coverage, not whether that potential is plausibly alleged or described with particularity in the underlying complaint. To confuse pleading rules with duty to defend obligations is to make a legal error.

Moving to the allegations of the City's complaint in its litigation with Walsh, a couple of key points stand out. The City alleged that Walsh breached its contractual obligations in many ways, including by "performing, or causing to be performed, inadequate welds" that did not conform to

Nor is it relevant that we now know that such damage did not in fact occur. Under Illinois law, it is the complaint that controls, not hindsight. All of this leads me to conclude that the insurance companies did have a duty to defend Walsh.

In reaching a contrary conclusion, the majority applies a quasi-pleading requirement that finds li t le support in Illinois law. As it sees things, what is missing from the City's complaint is an explicit factual allegation that the defective structural welds damaged the canopy. The majority roots this requirement in both our decisions in *Lagestee-Mulder, Inc. v. Consolidated Ins. Co.*, 682 F.3d 1054 (7th Cir. 2012) and *Amerisure Mutual Ins. Co. v. Microplastics, Inc.*, 622 F.3d 806 (7th Cir. 2010) and in a functional desire to avoid defining the duty to defend so broadly that it is triggered by any complaint that lodges a general and non-particularized request for damages. Although I understand the majority's concern, I am unable to agree with its application of those decisions here.

In *Lagestee-Mulder* and *Amerisure*, we applied what e ectively amounts to an exception to the principle, repeated ad nauseum by Illinois courts, that an insurer can refuse to defend a suit "only if the allegations of the underlying complaint preclude any possibility of coverage." *Ill. Union Ins. Co.*, 220 N.E.3d at 387; see also, *e.g.*, *Fayezi v. Ill. Casualty Co.*, 58 N.E.3d 830, 846 (Ill. App. Ct. 2016); *Ill. Emcasco Ins. Co. v. Nw. Nat'l Casualty Co.*, 785 N.E.2d 905, 910 (Ill. App. Ct. 2003). The complaints there, much like the City's here, alleged defects in the insured's own work and lodged general requests for damages that did "not logically foreclose the theoretical possibility" that those defects inflicted damage to the property of others. *Amerisure*, 622 F.3d at 811–12; see also *Lagestee-Mulder*, 682 F.3d at 1058–59. Nonetheless, we held in

each case that the complaint did not trigger a duty to defend because the possibility of coverage in those cases was u t erly speculative.

The majority seems to read *Lagestee-Mulder* and *Amerisure* to require factual allegations explicitly alleging covered damages before a duty to defend will be triggered. I do not read those cases so broadly. In my view, those decisions embody a narrower rule (or perhaps an exception to a broad rule) that applies only when the possibility of coverage can be ascertained only through rank speculation. This is not such a case.

One does not have to be a civil engineer to understand the risk that defective structural welds pose to the physical integrity of the structural elements they support. Indeed, that precise consideration jumps o the page of the City's complaint: the City cared about the welding defects precisely because those defects may have compromised the structural integrity of the canopy at the O'Hare Airport. Recognizing as much, an employee in Travelers' own legal department stated in an internal memorandum that "We think we might have a duty to defend Walsh." In light of that admission, the majority's conclusion that the City's complaint did not disclose *any* possibility of covered damages is di cult to accept.

To be clear, I would not—as the majority suggests—require that the City's complaint expressly disavow the

Where I disagree with the majority is in its insistence that a potential for coverage cannot be reasonably inferred from the facts that the City did allege in its complaint. Unlike the majority, I would not require an explicit allegation of covered damages when the potential for such damage is clear as a ma t er of common sense.

We should be careful before turning *Lagestee-Mulder* and *Amerisure*'s narrow holdings into the kind of pleading requirement the Illinois courts have continuously disavowed. I worry that the majority's opinion takes a step in that direction. Construing the allegations of the City's complaint liberally in Walsh's favor, as we are required to do, I would conclude that those allegations fall at least potentially within the coverage of the St. Paul, Travelers, and Charter Oak policies. I therefore respectfully dissent from the majority's holding that St. Paul, Travelers, and Charter Oak had no duty to defend.