2026 WL 459140 (C.A.7) (Appellate Brief)
United States Court of Appeals, Seventh Circuit.

Office of the Special Deputy Receiver, Plaintiff-Appellant,
v.
Hartford Fire Insurance Company, Defendant-Appellee.

No. 25-2309
February 17, 2026

On Appeal from the United States District Court for the Northern District of Illinois No. 1:22-cv-03709 Hon. Andrea R. Wood

Reply Brief of Appellant Office of the Special Deputy Receiver

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***1** Plaintiff-Appellant Office of the Special Deputy Receiver ("OSD") begins this Reply where Hartford Fire Insurance Company ("Hartford") ended its Appellee brief.

Given Hartford's newfound basis for disagreement, [1] OSD agrees with Hartford that this Court should remand this case to the District Court to allow that court to determine whether the Bond at issue provides OSD with coverage for losses incurred in the spear-phishing fraud. *See infra.*

Otherwise, Hartford presents no compelling arguments in defense of the District Court's order here. OSD did not waive its contract-interpretation argument. Hartford mischaracterizes and misquotes OSD's opening brief, in which OSD explains the correct reading of Riders 13 and 17 in the context of the Bond as a whole. And Hartford fails to show that the language *Hartford itself* wrote in the Bond is "unambiguous" given that it devotes almost the entirety of its argument to the issue. [2] Given the Bond's plain language, the ambiguities created by Hartford's interpretation, and Illinois law's strong *contra proferentem* doctrine, which interprets ambiguous insurance contract provisions against insurers (and which Hartford does not dispute), the ***2** District Court erred in dismissing OSD's case. This Court should reverse that judgment and remand for further proceedings.

ARGUMENT

I. OSD Did Not Waive Its Contract-Interpretation Argument That the Rider 17 Exclusion, by Its Own Language, Is Inapplicable Here.

Hartford argues that "OSD waived the argument that the Email Fraud Exclusion, by its terms, does not apply to OSD's claim" because "OSD argued below that the Email Fraud Exclusion in Rider 17 applied only to Rider 17's coverage, and thus it did not apply to the coverage in Rider 13, or that the exclusion was somehow 'hidden' such that it should not be enforced." [3] Appellee Br. at 17. [4] But Hartford's implication that the *only* argument OSD made was that the exclusion was "hidden" is incorrect. OSD also squarely made the argument below (that the plain language of the Rider 17 exclusion precludes its application) that it presents on appeal:

> If Hartford did not want to cover computer fraud accomplished via *email and outside a customer rubric* (which OSD submits would encompass a huge swath of claims, as evidenced by the case law referenced above), it could have easily directly and explicitly stated such in Computer ***3** Systems Fraud Insuring Agreement (i.e., Rider 13) of the Hartford Bond.
>
> OSD's Response to Motion to Dismiss, ECF 31 at PageID #:368 (emphasis added).

OSD has repeatedly, consistently argued both here and at the District Court that Rider 13 provides coverage, Rider 17 does not, and Rider 17's exclusion (which does not apply to emails sent *within* OSD) does not preclude coverage. *See, e.g., id.* at PageID #:357 ("Contrary to Hartford's representations, there is no 'Email Fraud' Exclusion in the Electronic Mail Initiated Transfer Fraud Insuring Agreement [Rider 17] of the Hartford Bond."); #:363 ("OSD's complaint expressly alleges that the touted exclusion in the Electronic Mail Initiated Transfer Fraud Insuring Agreement does not apply to the Computer Systems

Fraud Insuring Agreement [Rider 13]. OSD's complaint also explicitly alleges that the Hartford Bond is ambiguous in that respect.") (internal citations omitted); #:364 ("The problem with that approach is that this case is not about what the Electronic Mail Initiated Transfer Fraud Insuring Agreement (i.e., Rider 17) says; rather, it is about what the Computer Systems Fraud Insuring Agreement (i.e., Rider 13) says, or perhaps more importantly, does not say."). Repeatedly, OSD argued that the language of the exclusion in Rider 17 *does not apply* to its claim here, which seeks coverage under the applicable Rider 13.

The thrust of Hartford's waiver argument is that it prefers to respond to OSD's brief below instead of its brief here.[5] However, "[a] party has the right to refine its ***4** argument[s] on appeal," even if "they were made in a more sophisticated form on appeal than they were before the district court." *Luna Vanegas v. Signet Builders, Inc.,* 46 F.4th 636, 645 (7th Cir. 2022); *see also Fox v. Hayes,* 600 F.3d 819, 832 (7th Cir. 2010) ("Waiver is not meant as an overly technical appellate hurdle."). And if OSD were to submit that lower court brief here, this Court would reject it. *See, e.g., Fleming v. Cnty. of Kane, State of Ill.,* 855 F.2d 496, 498 (7th Cir. 1988) ("[P]arties should not adopt briefs previously filed in support of motions at the district court level [because it] 'unnecessarily confuses and diffuses the issues presented.'") (quoting *Prudential Ins. Co. of Am. v. Sipula,* 776 F.2d 157, 161 n.1 (7th Cir. 1985)); *In re Harris,* 64 F. App'x 540, 542 (7th Cir. 2003) (dismissing appeal with brief that "does not discuss the district court's judgment at all" because appellant "submitted virtually the same brief as the one she submitted to the district court").

OSD is also not limited to the precise contractual interpretation arguments it made below because the substance of that argument (the plain language of the Rider 17 exclusion does not apply) is the same here. "[A] party on appeal can refer to provisions of an underlying contract in addition to those referenced in the trial court, so long as the party makes the same *substantive* arguments in both places." *AXIS Ins. Co. v. Am. Specialty Ins. & Risk Services,* 111 F.4th 825, 832 n.1 (7th Cir. 2024) (emphasis added) (rejecting forfeiture argument when party failed to refer to a specific provision of an insurance contract in briefing below); *see also Dr. Robert L. Meinders, D.C., Ltd.,* 7 F.4th at 561; *cf. Dixon v. ATI Ladish LLC,* 667 F.3d 891, 895 (7th Cir. 2012) ("Yet a litigant does not forfeit a position just by neglecting to cite its best ***5** authority; it suffices to make the substantive argument. Defendants did that by relying on the business judgment rule, which was the subject of extensive briefing in the district court.") (citations omitted). The interpretation of the Rider 17 exclusion was *the* issue in the district court; it was the sole ground on which Hartford moved for dismissal and the subject of extensive briefing.

Hartford's supporting authorities for its waiver arguments are distinguishable because, in each, the waiving party did not make the same substantive argument on appeal that it made in the district court. The waiving plaintiff in *Wheeler v. Hronopoulos,* 891 F.3d 1072 (7th Cir. 2018), argued in the district court that it should win a civil Fourth Amendment claim because it was subject to a warrant that was based on hearsay. *Id.* at 1073. But on appeal, the plaintiff did not argue that hearsay tainted the warrant; instead, they argued that the informant (who provided the alleged hearsay) never existed at all. *Id.* In *Builders NAB LLC v. Fed. Deposit Ins. Corp.,* 922 F.3d 775 (7th Cir. 2019), this Court disallowed a party from changing its statutory cause of action on appeal from the APA to the FDIC Act. *Id.* at 777–78. And in *Fednav Int'l Ltd. v. Cont'l Ins. Co.,* 624 F.3d 834 (7th Cir. 2010), this Court prohibited a party who had sued another for breach of contract, seeking to recover attorneys' fees incurred in another action, from adding new causes of action on appeal under the "federal common law" and a general right to fees when another party acts in bad faith. *Id.* Here, OSD is not changing its cause of action or the factual predicate of the Bond's language; it is making the same substantive argument it made below on the Bond's interpretation.

***6** Finally, revealing the weakness of its waiver position, Hartford argues that it "would have been necessary" for OSD "to amend its complaint after the District Court's ruling . . . to support its new claims of ambiguity." Appellee Br. at 17. But how? Whether a contract is ambiguous is a purely legal issue. *See, e.g., Kap Holdings, LLC v. Mar-Cone Appliance Parts Co.,* 55 F.4th 517, 526 (7th Cir. 2022). OSD had already attached the Bond to its complaint and argued that it was ambiguous. How could it be proper for OSD to amend its complaint to add a supposedly missing *legal* argument, which the District Court did not invite and which Hartford would argue receives no deference? *See* Hartford's Reply Brief in Support of its Motion to Dismiss, ECF 36 at PageID #:521 ("Whether the Bond is ambiguous is a legal conclusion for the Court to reach, not a factual allegation to be accepted as true.").

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OSD did not waive its argument that Rider 17's exclusion is inapplicable to OSD's claims because, by its text, the exclusion is predicated on an email being sent "to the Insured" in a "customer framework." *See supra.*

II. Hartford's Additional Arguments in Opposition Do Not Change the Fundamental Legal Errors with the District Court's Opinion.

This Reply will not merely repeat OSD's initial arguments that address Hartford's arguments in its Appellee brief. *See Loja v. Main St. Acquisition Corp.,* 906 F.3d 680, 684 (7th Cir. 2018) (a reply is for responding to new arguments raised in appellee's brief). Hartford makes three substantive arguments requiring reply, but none should lead this Court to affirm the district court's dismissal.

*7 A. The Emails Did Not Originate from Outside OSD Simply Because the Hackers Remotely Accessed the CFO's Email Account.

Hartford argues that because the hackers accessed the CFO's email remotely, the emails they sent from that account originated outside OSD. *See* Appellee Br. at 7, 21. Therefore, Hartford concludes, even under the correct reading of the exclusion in Rider 17 (requiring emails sent "to the Insured" to come *to* OSD, not from *within* OSD), the exclusion precludes OSD's claim. But that argument is "strained [and] illogical." *Id.* at 9.

Again, under the plain language of Rider 17, its exclusion, and the Bond as a whole, coverage here turns on where the email originated. Without language specifying that internal emails are covered (such as the language in Riders 11 and 12, *see* Appellee Br. at 20), Rider 17's exclusion only applies to an external "fraudulent instruction sent to the Insured through electronic mail." Compl. Ex. 1, ECF 1-1 at PageID #:76. There is no basis to conclude that an email sent from an internal domain is external because it originated in the hacker's head and was typed by the hacker. That "strained reading" (Appellee Br. at 18) is inconsistent with a common understanding of what it means when an instruction is "sent to" an organization like OSD (defined as the "Insured" in the Bond). *See* Compl., ECF 1 at PageID #:3. The common understanding does not encompass a hacker illicitly using an OSD employee's email account to send a message to another employee within OSD.

The Bond as a whole is clear about which rider covers loss caused by a hacker who gains illicit access to OSD's information technology and uses that access to enter information into OSD's internal email service. That is Rider 13, not Rider 17.

*8 B. Hartford Is Wrong: Illinois Law Permits OSD to Use Hypotheticals to Show Multiple Reasonable Interpretations of the Rider.

Hartford incorrectly relies on this Court's recent decision in *Hammond Power Sols., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 142 F.4th 945 (7th Cir. 2025), for the proposition that OSD cannot use hypotheticals to determine if an insurance policy is ambiguous.[6] Although Hartford helpfully points out that *Hammond Power* applies Wisconsin law (Appellee Br. at 16), Hartford fails to mention that this Court expressly distinguished the Wisconsin rule applicable there from the Illinois rule applicable here: "[A] comparison of *Koloms* [Illinois insurance interpretation case] to *Connors v. Zurich American Ins. Co.* [Wisconsin insurance interpretation case] illustrates the difference between Illinois and Wisconsin law of policy interpretation." *Id* at 954. This Court read Illinois law as expressly permitting a much broader use of hypotheticals than OSD believes is necessary here. *Id.* at 953–54 (citing *Am. States Ins. Co. v. Koloms,* 177 Ill. 2d 473, 488 (1997)).

Hartford's reliance on *Ornoff v. Westfield Nat. Ins. Co.,* 2013 IL App (1st) 122728-U, is even less convincing. The Appellate Court decided that case when the Illinois Rules forbade litigants from citing unpublished decisions, even for persuasive authority.[7] Although that rule was never binding in federal court, it is questionable *9 to rely on such a decision for an account of Illinois law. And in substance, the "hypothetical" in that case was irrelevant to the facts. An insured argued that a statute of

limitations for a declaratory judgment against an insurer regarding coverage should be tolled until the insurer requests sworn proof of loss, as required by the policy at issue. *Id.* at ¶ 29. But the insured in that case *did* send sworn proof of loss, and by the date of that proof, the insured's claim was still time-barred. *Id.* at ¶¶ 1, 32. [8] The case does not stand for any general proposition as to the proper way to analyze insurance contracts for ambiguities.

Regardless, as OSD's own brief reveals, it is impossible to analyze whether language in an insurance policy is ambiguous without analyzing how that language applies to scenarios a party believes may or may not be similar to the facts at issue. *See* Appellee Br. at 12 ("OSD's proposed interpretation of the Bond . . . *would* improperly render the Email Fraud Exclusion meaningless and circular.") (emphasis added), 13 ("The exclusion *would not* apply to a computer fraud scheme that does not use email, such as a bad actor's use of an employee's login credentials to initiate a bank wire without using email, or a bad actor uploading malicious code that has the effect of diverting funds.") (emphasis added).

*10 C. Hartford Fails to Show that OSD's Interpretation Is Unreasonable, So It Cannot Show Rider 17's Exclusion Is Unambiguous.

Under Illinois law, the exclusion in Rider 17 is ambiguous if it "can have more than one reasonable meaning." *Gibson v. Country Mut. Ins. Co.,* 193 Ill. App. 3d 87, 90 (1990). This requires Hartford, analyzing the Bond as a whole, to show that OSD's interpretation of the Rider is *not* reasonable. *See Newman v. Metro. Life Ins. Co.,* 885 F.3d 992, 998 (7th Cir. 2018) (cited in Appellee Br. at 19). OSD has already provided why its interpretation of the Rider 17 exclusion is reasonable based on its text, the language of the Rider as a whole, the language Hartford used in other parts of the Bond, and its application. *See* Appellant Br. at 7–17.

Hartford's affirmative response is simply that OSD's reading is unreasonable because "[a]n average, ordinary, normal, and reasonable person would understand an email 'sent to [OSD]' to include an email sent from one OSD employee to another OSD employee." Appellee Br. at 19 (internal quotation omitted). Nothing supports this bare conclusion. And tellingly, when drafting the Bond, Hartford knew it needed to specify whether it was providing or excluding coverage for internal communications. *See* Compl. Ex. 1, ECF 1-1 at PageID #:63 (Rider 11), *Id.* at Page #:65 (Rider 12). Any reader should credit Hartford's drafting decisions *before* litigation, rather than its post-suit characterizations.

*11 CONCLUSION

This Court should reverse the District Court's judgment granting Hartford's motion to dismiss and remand for further proceedings.

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Footnotes

1 Hartford's footnote 1 in its Appellee brief, by its own admission, presents arguments regarding Rider 13 that it strategically withheld from the District Court in favor of its argument regarding the Rider 17 exclusion. *See* Appellee Br. at 8 n.1. OSD disagrees with Hartford's claim that Rider 13 is not implicated here; if Rider 13 did not provide coverage, the exclusion in Rider 17 would be irrelevant. But OSD accepts that Hartford does not agree that Rider 13 (or indeed any piece of the Bond) provides coverage here.

2 Hartford's entire argument section is approximately sixteen and a half pages. *See* Appellee Br. at 7–23. Hartford's various arguments about the supposed clarity and unambiguity of the plain language of the Bond cover about twelve of those pages. *See id.* at 7-16, 18–21.

3 OSD does not agree that there is a general "Email Fraud" exclusion. There is an exclusion for fraud originating in an email "sent to" OSD from a third party. *See* Appellant Br. at 12–15.

4 Hartford frames this as a waiver argument, not a forfeiture argument. But as this Court has repeatedly noted, it is unclear in a civil case whether there is a substantive difference between waiver and forfeiture (because there is generally no plain error review under the Federal Rules of Civil Procedure, unlike the Federal Rules of Criminal Procedure). *See Henry v. Hulett,* 969 F.3d 769, 786 (7th Cir. 2020). However, as this Court has also noted, "the forfeiture/waiver distinction has no effect on the analysis" when a party "raised in the district court the substantive argument he presses on appeal." *Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Servs., Inc.,* 7 F.4th 555, 561 n.8 (7th Cir. 2021).

5 Hartford's enthusiasm to attack OSD's brief below is further shown by its repeated quotation of the phrase "self-contained," which it attributes in one location to OSD's Appellant brief at page 15. *See* Appellee Br. at 13–14. OSD's Appellant brief does not use the phrase "self-contained" anywhere.

6 Of course, OSD's first argument is that Rider 17 is unambiguous; its plain language does not apply because no emails were sent "to the Insured." *See* Appellant Br. at 10–15.

7 *See* "Supreme Court Amends Rule 23 to Allow Citation of Unpublished Appellate Court Ruling." Administrative Office of the Illinois Courts, November 24, 2020. https://www.illinoiscourts.gov/News/975/Supreme-Court-amends-Rule-23-to-Allow-Citation-of-Unpublished-Appellate-Court-Ruling/news-detail/.; "Illinois Supreme Court Amends Rule 23 to Allow Citation of Unpublished Appellate Court Rulings." Illinois State Bar Association, November 23, 2020. https://www.isba.org/barnews/2020/11/illinoissupremecourtamendsrule23toa.

8 Also key to the *Ornoff* court's ruling regarding the statute of limitations was the insurer expressly telling the insured in a denial letter the date by which he must file suit. *Id.* ¶¶ 40-44.

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