

# Construction-Related Property Damage/Insurance Coverage: Federal Appellate Court Addresses Silica Dust Exclusion



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

05/23/2022

The United States Court of Appeals for the Eighth Circuit (“Eighth Circuit”) addressed in a May 18th Opinion whether an insurance policy addressed certain alleged dust-related property damage. See *Grinnell Mutual Reinsurance Co. v. Dingmann Brothers Construction of Richmond, Inc., et al.*, No. 21-2712.

The question considered was whether two insurance policy exclusions unambiguously foreclosed coverage because of the presence of silica in the dust.

MNDKK, LLC (“MNDKK”) hired Dingmann Brothers Construction (“DBC”) to install a garage door in its building. DBC’s subcontractor dry cut the wall without using dust protection. As result, the inside of the building and its contents were covered by dust.

The wall from which the garage door was cut tested positive for silica.

MNDKK submitted a claim for clean-up costs and property damage to its insurer, Great Lakes Insurance (“GLI”). GLI paid the claim and its assignee sent a subrogation demand to DBC. DBC’s insurer (Grinnell Mutual Reinsurance Company [“Grinnell”]) refused to indemnify DBC arguing that two exclusions in the policy applied due to the presence of silica in the dust.

The two exclusions cited in the Eighth Circuit Opinion include:

- Silica-Related Dust Exclusion
- Asbestos, Lead, and Silica or Silica-Related Dust Exclusion

Both exclusions define silica-related dust as a:

. . . mixture or combination of silica and other dust or particles.

The United States District Court granted summary judgment to Grinnell holding that the exclusions unambiguously applied due to the presence of silica.

The Eighth Circuit in analyzing the potential application of the exclusions noted that the first question was whether there was a genuine issue of material fact as to whether the dust contained silica. It held that based on testing that had been conducted and absence of testing by Grinnell that there was no genuine dispute of material fact.

The Eighth Circuit also addressed DBC's argument that the exclusions were not applicable because the damage was due to silica or silica-related dust (as opposed to its effects). This argument was based on the placement of a comma with Grinnell contending that:

. . . the relevant portion of the provision applies only to cleaning up the effects of silica or silica-related dust, removing the effects of silica or silica-related dust, and otherwise responding to or assessing the effects of silica or silica-related dust.

The Eighth Circuit rejected this argument noting that such an interpretation would be problematic due to the difficulty in separating losses from silica as opposed to losses from the effects of silica.

The Eighth Circuit also rejected the argument that the property-damage provision was inapplicable because it overlapped with the other exclusion. It concludes that such an argument:

. . . assumes that there is a conflict whenever multiple exclusions may apply to the same claim.

An issue would arise only if there was a conflict between an exclusion and a specific grant of coverage.

Finally, the Eighth Circuit also addressed the claim that there was no causal connection between the existence of silica and the damages therefore rendering the exclusions inapplicable. The Eighth Circuit rejected this argument stating that there was a causal connection noting:

. . . the property damage claimed by the defendants is the "loss of use" that arose out of "the actual . . . contact with, . . . or presence of, . . . 'silica- related dust.'" And the resulting clean up of "silica-related dust" arose out of the "actual . . . contact with, . . . or presence of, . . . 'silica-related dust.'"

A copy of the Opinion can be downloaded [here](#).