

Case Alert



Oregon Supreme Court Prohibits Insurer's Attempt to Relitigate Insured's Liability

In September 2016, the Oregon Supreme Court unanimously held that an insurer cannot attempt to relitigate its insured's liability or alter the nature of damages awarded in an underlying action.

In *FountainCourt Homeowners' Ass'n v. FountainCourt Dev., LLC*, 360 Ore. 341 (2016), FountainCourt Homeowners' Association sued the developers, contractors, and subcontractors involved in the construction of a multifamily housing complex after many owners experienced damage to their properties due to water intrusion. FountainCourt alleged that the siding subcontractor, Sideco, improperly installed siding and windows, allowing the water intrusion to take place.

Sideco tendered defense to its insurers, including its general liability insurer, American Family Mutual Insurance Company (AFM). AFM agreed to defend Sideco, subject to a full reservation of rights to later challenge coverage.

At trial, a jury awarded \$2.1 million to FountainCourt and allocated 22.65% of the fault to Sideco. Accordingly, the trial court entered a judgment against Sideco in the amount of \$485,877.84. Sideco failed to pay FountainCourt, and FountainCourt attempted to garnish the AFM policy to satisfy the unpaid judgment. At the garnishment hearing, the judge held that FountainCourt had met its burden of proving coverage under the policies by showing that Sideco's negligent work caused damage to the FountainCourt buildings during the policy period.

AFM argued that FountainCourt could not collect on the policies because it had not shown what portion of the judgment represented the cost of repairing other parts of the buildings besides Sideco's own work. Any costs associated with repair of Sideco's own work would be excluded by the "your work" exclusion in the AFM policy. However, the court ruled that AFM had not met its burden of showing what part of the damages, if any, represented the cost of repairing damage to Sideco's own work.

AFM also argued that FountainCourt could not collect because it could not demonstrate what portion of the judgment represented damage that occurred during the policy period. The court also rejected this argument, again holding that the burden of proof was on AFM to show that the jury award included damages that fell outside the policy period.

AFM appealed the decision, arguing that FountainCourt should be required to prove which damages were covered by the policy. The Oregon Court of Appeals upheld the lower court's ruling and AFM appealed to the Oregon Supreme Court.

Before the Oregon Supreme Court, AFM argued that because its interests conflicted with Sideco's with respect to coverage, it should not be bound by the factual findings of the lower court. It again argued that FountainCourt should have the burden of showing which portion of the jury verdict represented damages to property besides Sideco's own work that occurred while the AFM policy was in place.

The court rejected these arguments, pointing out that the jury was specifically instructed that it could not award damages for Sideco's own faulty workmanship. The court ruled that AFM should not be allowed to reclassify the nature of the damages awarded in the underlying litigation. The court also held that FountainCourt should not be required to show exactly what percent of the property damage happened during the AFM policy period. The policy language, as well as Oregon case law, indicated that AFM may be required to cover damages that took place outside of the policy period as long as at least a portion of the loss occurred while the AFM policy was in place.

Policyholders should be aware that in coverage cases, insurers are free to argue that the damages awarded in the underlying litigation fall under a policy exclusion. However, in Oregon at least, the insurer cannot try to relitigate and reclassify the nature of the damages.

For more information about this case, or for questions about other "faulty workmanship" rulings, please contact Austin D. Moody at adm@sdvlaw.com or 203-287-2120, or Tracy Alan Saxe, at tas@sdvlaw.com or 203-287-2101.