



CONSTRUCTION CASE UPDATE

case in point ...

Prior Continuous Property Damage Will Trigger Policy

From the desk of Paul Sheely: Where coverage is in dispute, the courts will interpret the insurance policies to determine whether the alleged damage falls under a policy provision, whether coverage is triggered, and whether any exclusion applies. It is possible that when damage is ongoing and spans several policy periods, one insurer will be liable for the entire award.

Claims Pointer: In this case arising out of alleged property damage caused by long-term water intrusion, the Oregon Supreme Court held that an insurer litigating coverage issues after an insured is held liable cannot retry the insured's liability. The case is a significant reminder that once liability has been determined, the insurer cannot re-litigate the liability on which the claim for coverage is based. Where coverage is at issue, the courts will examine the policy language to determine whether coverage has been triggered, and if so, whether any exclusion applies.

FountainCourt Homeowners v. FountainCourt Development, LLC, et al., 360 Or 341 (September 22, 2016).

FountainCourt Homeowners' Association (FountainCourt) sued the developer and General Contractor for damage to its property caused by water intrusion. The subcontractors were brought in as third-party defendants by the developer, after which FountainCourt amended its complaint to allege direct claims of negligence against some of the subcontractors, including Sideco, Inc. (Sideco), the company that installed the siding and windows. Sideco tendered defense of the action to its insurers, including American Family Mutual Insurance Company (Am Fam). Sideco had general liability insurance policies issued by Am Fam covering the period of May 1, 2004 through May 1, 2006, and a general liability policy issued by Clarendon National Insurance Company (Clarendon) covering the period of April 15, 2003 through May 15, 2004. Both Am Fam and Clarendon accepted the tender of defense with a full reservation of rights.

At trial, the jury returned a verdict in FountainCourt's favor and allocated percentages of fault to various defendants. FountainCourt's total damages were \$2,145,156, of which 22.65 percent, or \$485,877.84, was allocated to Sideco, and the trial court entered a judgment against Sideco for that amount. FountainCourt then mailed a writ of garnishment to Sideco's insurers for the amount of its judgment against Sideco. Am Fam filed an answer asserting FountainCourt had failed to state a claim and arguing that it was not obligated to pay

the Sideco judgment either because some or all of the damages did not arise from "property damage" or an "occurrence" under the policy, or because some or all of the property damage resulted before or after the policy periods, or because one or more exclusions applied to some or all of the losses. At a garnishment hearing, the trial court determined as a matter of law that the damage was property damage and that coverage had been triggered under the policies. Because Clarendon demonstrated that an exclusion in its policy applied, judgment was entered against Am Fam only. Am Fam appealed.

On appeal, Am Fam argued that FountainCourt was required to prove that all of the damages awarded in the underlying negligence case were for property damage that occurred during its policy periods, and that because the trial court ruled that FountainCourt had shown coverage under the Clarendon policy, some part of the damage occurred during the Clarendon policy rather than the Am Fam policies. The Court of Appeals rejected those arguments and upheld the trial court, stating that "the award of damages is not tied to discrete instances of property damages along a time continuum; instead, the liability for property damage may be the same in every triggered policy period." Am Fam again appealed.

The Supreme Court framed the central issue before it as whether the trial court correctly interpreted the insurance policies to conclude that coverage had been triggered under the policies and that Am Fam was liable to FountainCourt in light of FountainCourt's verdict against Sideco in the

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underlying negligence case. The insurance policy at issue provided that Am Fam “will pay those sums that the insured becomes legally liable to pay as damages because of...‘property damage’ to which this insurance applies.” The Court determined that the sum Sideco became “legally obligated to pay as damages” in the underlying action was for “property damage” and so fell under the policy language covering “physical injury to tangible property.”

Notably, the Court did determine that an insurer is not precluded by a judgment in an underlying action from later arguing that the damages awarded are not covered under the policy. However, because the amount Sideco was “legally liable to pay as damages” was determined in the underlying action, the insurer was not permitted to retry its insured’s liability or alter the nature of the damage awarded in the subsequent proceeding. Additionally, the Court determined that although the property damage at issue began prior to the policies being in effect, and continued to occur after those policies were no longer in effect, coverage under the policies was nonetheless “triggered” because the damage was ongoing during the policy periods.

Finally, the Court determined that the trial court had properly entered judgment against Am Fam for the entire unpaid amount of the underlying judgment against Sideco rather than a prorated amount. Although some of the damage necessarily occurred during Clarendon’s policy period, and Clarendon’s policy was also triggered, Clarendon was not liable to FountainCourt because the damage fell within exclusions in Clarendon’s policy. While Oregon law provides for allocation among insurers in contribution actions—the “pro rata” approach—it does not provide a basis for reducing the insurer’s liability outside that context. Moreover, because Am Fam did not preserve the issue of whether the trial court properly applied the “all sums” approach—an approach to continuous damages that holds an insurer liable in full for damages that occurred in part during a particular policy period—the Court declined to delve further into the issue. The trial court and the Court of Appeals were both affirmed.

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