

Client Alert

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Insurer's Attempt to Relitigate Liability—DENIED

The Oregon Supreme Court recently rejected an insurer's attempt to separately relitigate issues of liability previously decided in an underlying lawsuit. The decision in *FountainCourt Homeowners' Ass'n v. Fountain Dev., LLC*, 360 Or. 341 (2016), reaffirms the settled liability paradigm that "an insurer cannot, in a subsequent proceeding, retry its insured's liability, or alter the nature of the damages awarded in that proceeding."

Background

From 2002 to 2004, FountainCourt, a planned multifamily housing community, obtained contractors and subcontractors to carry out construction of the housing complex. The planned community consisted of 34 condominiums and 63 townhomes. Following completion, owners of the condominiums and townhouse units subsequently experienced water intrusion that caused damage to their property.

In 2007, FountainCourt sued the community's developers and general contractors. FountainCourt later amended its pleading and alleged direct claims of negligence against various subcontractors, including Sideco, a subcontractor responsible for installing the buildings' complex's siding. FountainCourt alleged that Sideco's negligent installation of the buildings' siding, windows and other things allowed water intrusion into the buildings.

Sideco had a general liability insurance policy with American Family Mutual Insurance Company (AFM), effective from May 2004 through May 2006. AFM accepted Sideco's request for a defense of suit, subject to a full reservation of rights to challenge coverage.

At trial, the jury returned a verdict in favor of FountainCourt for \$2.1 million and allocated 23 percent fault to Sideco. The trial court accordingly entered a judgment against Sideco for \$485,877.

Subsequently, through a garnishment proceeding, FountainCourt attempted to collect payment on AFM's policies issued to Sideco to help satisfy the judgment. AFM opposed garnishment, arguing FountainCourt could not demonstrate how the jury verdict should be allocated among covered and excluded property. The trial court rejected that argument, finding that FountainCourt had met its *prima facie* burden of proving coverage by showing that Sideco's negligence caused damage to the housing complex during AFM's policy period and entered a supplemental judgment of \$434,000 against AFM.

On appeal, the Oregon Court of Appeals reaffirmed the supplemental judgment against AFM on the merits. The court rejected each one of AFM's arguments by reasoning that "because the entry of judgment triggered [AFM's] obligation to pay a covered debt, the court was called upon to determine the import of that judgment under the parties' contract as a *legal matter*."

The Court's Decision

On review, the Oregon Supreme Court denied AFM's attempt to relitigate Sideco's liability and affirmed that FountainCourt had met its burden of proof to show coverage under AFM's insurance policy.

Central to the court's decision that relitigating liability would be improper was the insurance policy's insuring agreement itself and its standard language requiring the insurer to pay the policyholder's legal liabilities arising from "bodily injury" or "property damage." The agreement, the court reasoned, must be construed from a contractual perspective in the subsequent coverage action, not from a tort perspective—which was used to construe liability in the underlying case. The court emphasized that "[w]hat the insured is legally obligated to pay as damages can be determined only by reference to the underlying action, which determined the insured's legal obligation to pay damages." Therefore, in subsequent proceedings, AFM is not entitled to "second-guess or retry" the nature of Sideco's liability.

The court clarified that preventing insurers from retrying the nature of the insured's liability in an underlying suit is different from collateral estoppel. The court explained that in subsequent proceedings, courts determine what the insured is legally required to pay as damages in the underlying suit to decide whether the policy covers those damages. Consequently, the insurer is not precluded by the underlying lawsuit from taking a position in a later coverage proceeding that the damages awarded are not covered by the insurance policy.

Moreover, the court emphasized that FountainCourt had met its burden by proving coverage under AFM's policy. FountainCourt demonstrated that Sideco had become legally obligated to pay damages because of the property damage to the housing complex and, consequently, there had been an "occurrence" under the insurance policy. Additionally, the court reinforced, as a matter of law, that FountainCourt was not required to prove the precise amount of damages that occurred during the policy period in order to demonstrate that there had been an "occurrence" in order to trigger coverage under the policy.

Insurance Implications

The Oregon Supreme Court ruling is a significant reminder that, once liability has been determined, insurers may not relitigate the liability on which a claim for coverage is based. This is particularly important in cases in which the insurer does not participate in the underlying defense, or defends under a reservation of rights, where the insurer may contend a lack of knowledge about the underlying liability. Policyholders should be prepared to resist efforts to relitigate liability postjudgment and, likewise, should resist even seemingly benign attempts to discover the underpinnings of any judgment or settlement for which coverage is being sought.

Additionally, the court reinforced the relaxed burden of proof for policyholders. Requiring FountainCourt to specifically show how much property damage occurred during the insurance policy's period, to establish that an occurrence happened during the policy, was contrary to AFM's policy language confirming that it may be required to cover damages that occurred outside of the policy period.

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