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Fountaincourt Homeowners' Ass'n v. Fountaincourt Dev., LLC,
360 Or. 341, 380 P.3d 916 (2016)

Significance for Seminar Discussion

After an underlying trial, indemnity coverage may be determined as a matter of law by a judge, i.e., in a garnishment proceeding or on summary judgment.

Summary

The Oregon Supreme Court clarified what can, and must, be proved by the parties in a coverage action. *Fountaincourt* was a garnishment action following a jury trial, in which the trial court entered judgment against one of the insurers for the full amount of the judgment.

The court held that the insurer had no right to re-litigate the facts underpinning the insured's liability. This result was not the product of collateral estoppel but rather the policy's express terms. As the court explained, "[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." The coverage action "requires the court to evaluate—as a matter of contract law—what precisely, the insured has become legally obligated to pay as damages in the prior proceeding, in order to determine whether the policy covers those damages."

The court rejected the insurer's argument that the plaintiff judgment creditor had the burden of demonstrating that the underlying judgment was for "property damage" and not for the insured's defective work, which the insurer argued was excluded. In the underlying matter, the court observed, the jury was instructed to award damages only for "property damage" and not for "defective work." The court also clarified that "[c]ontrary to [the insurer's] urging, [Oregon case law] does not stand for the proposition that actual physical damage to property is not covered under an insurance policy merely because it may be associated with defective workmanship by an insured."

The court also rejected the insurer's argument that the plaintiff judgment creditor must demonstrate how much of the damage occurred during its policy period to trigger coverage, reaffirming the effect of *St. Paul Fire v. McCormick & Baxter Creosoting*, 324 Or. 184, 923 P.2d 1200 (1996), which it recognized as implicitly holding that "although the damage at issue [] had begun to occur before the policies were in effect, and continued to occur after the policies were

no longer in effect, coverage under those policies was nonetheless ‘triggered’ because the damage was ongoing during the policy periods.” Because the record contained evidence that damage occurred during the policy period, the trial court need not have required plaintiff “to prove the precise amount of damages that occurred during the policy period”

Finally, the court also noted that the trial court’s decision was consistent with *Cascade Corp. v. American Home Assurance Co.*, 206 Or. App. 1, 135 P.3d 450 (2006), *rev. dismissed*, 342 Or. 645, 165 P.3d 1176 (2007), which it found “indicated that, while a pro rata approach was suitable in determining allocation among insurers in contribution actions, it did not provide a basis for reducing the insurer’s liability to its insured.”