Alert

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COZEN O'CONNOR

Implied Coinsured? Subrogation Actions Against Condominium Tenants

When considering a claim's subrogation potential, insurance carriers are often confronted with contractual waivers of subrogation that potentially bar the claim. One of the most common waivers carriers face are those involving property damage claims in condominium buildings. In a recent decision, the Virginia Supreme Court held that in the absence of specific language otherwise, a tenant in a condominium unit is not an implied coinsured under the association's insurance policy.

In *Erie Ins. Exchange v. Alba et al*, (Record No. 190389, decided May 28, 2020), Erie Insurance Exchange (Erie) brought a subrogation action against Alba as subrogee of the Chimney Hill Condominium Association. In 2015, Alba was a tenant in a unit owned by John Sailsman. Erie alleged that a fire occurred at the property in February 2015 as the result of improper disposal of a cigarette by Alba or a guest. Erie satisfied the association's claim and filed an action against Alba.

The association's governing documents contained a waiver of subrogation provision in favor of "Unit Owners and the Association, their respective servants, agents and guests." The Erie policy named "each individual unit owner of the insured condominium" as additional insureds. Alba argued that, as a tenant, she stepped into the shoes of owner Sailsman and the waiver of subrogation should therefore apply to Erie's claim against her as well. The trial court agreed, holding that because the association's governing documents bound Alba to all the requirements of a unit owner, she should receive the benefit of the subrogation waiver provision in the documents as well.

In reversing the trial court, the Virginia Supreme Court held that the language of the insurance policy, rather than the condominium documents, was the true source of any potential waiver. In clear and unambiguous language, the policy named the unit owners as additional insureds but made no reference to owners' tenants or guests. The court held that Alba could not qualify as an implied coinsured because, in addition to the policy language above, there was no contractual agreement between Alba and the association that intended to relieve her common law obligation with respect to negligence.[1]

When evaluating similar claims in Virginia, subrogation professionals should look to the clear language of the policy, not the condominium documents, to determine whether a waiver of subrogation provision is likely to apply. In the absence of direct language applying the provision to tenants, the *Alba* case should act as strong precedent against an overreaching interpretation of the policy language to include potential targets not explicitly named in the provision.

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[1] In *Pacific Indemnity Company v. Deming*, 2016 WL 3607028, 2016 U.S. App. LEXIS 12374, a case handled by Cozen O'Connor, the U.S. Court of Appeals for the First Circuit, predicting Massachusetts law, similarly held that a provision in the condominium association's bylaws requiring unit owners' property insurance policies to contain a "waiver of subrogation" (without specifying who the waiver was supposed to protect) did not preclude a unit owner's insurer from pursuing a subrogation claim against another unit owner's tenant. The court deemed it significant that the requirement in the bylaws that the association's master property policy only required the subrogation waiver in the master policy to protect the association and unit owners and "their respective agents, employees and guests",

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and did not expressly include tenants. Also holding to the same effect is *Community Association Underwriters v. McGillick*, 2010 WL 5467673 (D.N.J. 2010).