

Insurer May Not Intervene Into Insured's Construction Defect Trial To Seek Allocation of Damages

In *Builders Mut. Ins. Co. v. Island Pointe, LLC*, No. 27970, 2020 S.C. LEXIS 68 (May 13, 2020), the South Carolina Supreme Court clarified that insurers are not required and, absent unusual circumstances, should not be granted the right to intervene into construction defect cases to obtain an allocation of covered versus non-covered damages for any verdict rendered against their insureds. The court reaffirmed that insurers have the right and ability to contest whether a jury verdict consists of covered damages in a **subsequent declaratory judgment action**.

While the insurer and the insured are bound by the existence and amount of any jury verdict on the merits, the insurer is not prohibited from litigating the question of whether any verdict contains covered damages in a subsequent declaratory judgment action. Additionally, the court endorsed allocating damages on a percentage basis as the acceptable method where the damages cannot be precisely allocated.

FACTS

Builders Mut. Ins. Co. v. Island Pointe, LLC arises out of a construction defect action brought by Palmetto Point at Peas Island Condominium Property Owners Association, Inc. against the insured contractors. The insured contractors each had one or more applicable commercial general liability (CGL) policies. The insurers properly appointed defense counsel to defend their insureds. Three years after the action began and at the end of discovery, the insurers sought to intervene and to be allowed to submit either a special verdict form or a general verdict with special interrogatories to the jury to determine what amount of any damages awarded against their insureds might be covered. The trial court refused to allow the insurers to intervene either as a matter of right under South Carolina Rules of Civil Procedure, Rule 24(a)(2), or permissively under Rule 24(b), because to do so would create a conflict of interest for the insureds' defense counsel.

HOLDINGS

No Intervention As of Right or Permissive Intervention

The court first held that under South Carolina law, insurers were not "real parties in interest" in the underlying construction defect action, so the court examined whether permissive intervention was appropriate, but found that the conflict that permissive intervention would create for defense counsel for the various insureds prohibited intervention. The court also expressed concern that allowing the insurers to intervene would cause undue delay in the underlying trial.

The court noted that allowing permissive intervention "would: 1) unnecessarily complicate the construction defect action including altering the Association's burden of proof and possibly delaying the trial; and 2) create a conflict of interest for the insureds' counsel, who were supplied to them by the insurers." *Id.*

Subsequent Declaratory Judgment Action

Rather than allowing intervention, the South Carolina Supreme Court reaffirmed the right of the insurers to pursue a subsequent declaratory judgment action as proper method for determining what portion of any verdict rendered against the insureds in the construction defect trial would be covered under the CGL policies. In any declaratory judgment action, the insurers and the insureds can either agree on a framework for allocating damages or use the default approach of allocating damages on a percentage basis where the amount of covered and non-covered damages cannot be precisely determined.

Related Practice Areas

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CONCLUSION

Ex Parte Builders Mutual makes clear:

1. Insurers must await the outcome of the underlying construction defect case before a determination can be made as to covered versus non-covered damages;
 2. Insurers have the right to such a determination in a subsequently filed declaratory judgment action; and
 3. Absent an agreement between the parties, in those cases where covered damages cannot be precisely determined, allocation on a percentage basis is appropriate.
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