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June 27, 2006

COLORADO COURT OF APPEALS REFUSES TO FOLLOW *BROWDER* AND AFFIRMS JUDGMENT IN FAVOR OF INSURED

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In March of this year, the Colorado Supreme Court granted the Petitioners-Plaintiffs' *Petition for Writ of Certiorari* in *Hoang v. Monterra Homes (Powderhorn)*, 129 P.3d 1028 (Colo. App. 2005) (*cert. granted* Mar. 20, 2006) on the issue of whether liability insurance coverage for property damage is voided if the damage occurs while a claimant's predecessor-in-interest owns the damaged property. By granting *certiorari* on this issue, the Colorado Supreme Court indicated that it is prepared to review, overturn or severely restrict its decision on trigger in *Browder v. United States Fidelity & Guaranty Co.*, 893 P.2d 132 (Colo. 1995).

By its decision in *Village Homes of Colorado, Inc. v. Travelers Casualty and Surety Co.*, 04CA1396 (Colo. App. June 15, 2006), however, the Colorado Court of Appeals essentially rejected *Browder's* holding that third-party claimants must have a legally cognizable interest in the property during the policy period to trigger coverage. *Browder*, 893 P.2d at 135. Because a division of the appellate court in *Hoang* specifically relied upon *Browder*, the *Village Homes* Court specifically declined to follow that decision despite the fact that the Colorado Supreme Court granted *certiorari* on the same issue. While the decision rendered in *Village Homes* involves an issue that will likely have significant consequences in Colorado for the insurance industry, it will not be resolved until the Colorado Supreme Court renders its critical decision in *Hoang*. In the meantime, however, the *Village Homes* decision will provide ammunition to claimants who do not satisfy *Browder's* requirements and may provide insight as to how the Colorado Supreme Court might restrict *Browder's* reach.

In *Village Homes*, four homeowners sued their home builder for construction defects related to expansive soils. The builder's tender of the defense to its insurer, Travelers, was ostensibly denied because

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it was undisputed that each of the homeowners had purchased the homes after Travelers' commercial general liability (CGL) policy period. After settling the underlying litigation, the builder sued Travelers, alleging that it was obligated for indemnity of a portion of the underlying settlement amount. After receiving the case on stipulated facts, the trial court held that Travelers was obligated to indemnify the builder in the amount of \$200,000. In affirming the judgment in favor of the builder, the Court of Appeals relied on the parties' stipulations, in which it was agreed that:

- * there was "property damage" to the four homes;
- * the "property damage" resulted from an "occurrence";
- * the "occurrence" was during the policy period; and
- * the "property damage" to the homes during the policy period was \$200,000.

In holding that the Travelers policy had been triggered, the Court noted that it was an occurrence policy, which provides coverage for all occurrences, including property damage, that take place during the policy period. Thus, the Court of Appeals concluded that Travelers stipulated to all conditions necessary to trigger coverage, reasoning that the determination of whether coverage is triggered is based on the application of the policy terms to the facts. Travelers argued that its stipulation as to property damage resulting from an occurrence during the policy period had no operative effect because the policy could not have been triggered under *Browder*. Specifically, Travelers relied upon *Browder* for the proposition that "any liability [the builder] may have had for damages to the [homeowners] would not have been triggered until the policy was *no longer in effect*." *Browder*, 893 P.2d at 135 (emphasis added). In rejecting Travelers' argument, the Court held that the phrase "no longer in effect" refers to the fact that the seller's liability arose after coverage had been transferred, and did not refer to the end of the policy period. The Court's strained reasoning appears to be directly contrary to *Browder's* basic holding that a claimant must have a "legally cognizable" interest in the property during the policy period for coverage to be triggered.

The Court also relied upon *Browder* for the proposition that a basic tenet of liability insurance is that "a third party must suffer actual damage within the policy period [for the insured] to recover under a liability policy." *Browder*, 893 P.2d at 134. The Court seemingly concluded that this "basic tenet" was satisfied if *any* third party suffered actual damage during the policy period, not necessarily the claimants seeking to recover in the lawsuit. The Court reasoned that *Browder* did not overrule any cases in which it had held that insurance contracts are to be enforced as written, giving the policy's words and phrases their plain and ordinary meaning, and applying them to the facts of the case at issue. A careful reading of the *Village Homes* decision reveals that the Court was determined to apply the policy as written, and because the policy did not expressly require a claimant to own the property during the policy period, the Court was forced to provide specious reasoning to distinguish *Browder*.



As noted in the dissenting opinion, however, the *Browder* court itself recognized that the policy at issue in that case likewise did not require that a claimant own the property during the policy period and that other jurisdictions afforded relief to claimants in similar situations. This evidences the Court of Appeals' strained reasoning to distinguish *Browder* and to apply the stipulated facts to the policy as written. While the Colorado Supreme Court may very well overturn or severely limit the *Browder* decision in *Hoang*, it is abundantly clear that the court in *Village Homes* ignored binding precedent by allowing recovery under the Travelers policy when the claimants had no interest in the subject property during the Travelers policy period.

For a further analysis of the Village Homes decision and its impact on construction industry insurers, please contact Joe Bermudez, Chris Clemenson or Jason Melichar of Cozen O'Connor's Denver, Colorado office. Cozen O'Connor is a nationally recognized leader in representing the insurance industry in all coverage areas, including construction defect claims.

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