Oregon Adopts Covenants Not To Execute/Assignments

This past week, the Supreme Court of Oregon overturned 42 years of precedent, holding that *Stubblefield v. St. Paul Fire & Marine*, 267 Ore. 397, 517 P.2d 262 (1973) erred when it decided that a covenant not to execute given in exchange for an assignment of rights, by itself, creates a release that dissolves an insured's liability and, by extension, the insurer's liability as well. *Brownstone Homes Condo. Ass'n v. Brownstone Forest Height, LLC*, No. SC S061273 (Nov. 19, 2015).

This case arose when Brownstone Homes Condominium Association (Brownstone) discovered various construction defects and initiated a negligence action against, among others, the subcontractor A&T Siding (A&T). A&T's two insurers, Capitol Specialty Insurance Co. (Capitol) and Zurich Insurance (Zurich), initially undertook the defense, but Capitol later withdrew after concluding that A&T's policy did not cover the damage for which Brownstone sought recovery.

Brownstone eventually settled with A&T and Zurich. The settlement contained a $2 million stipulated judgment against A&T, $900,000 of which Zurich agreed to pay; an assignment to Brownstone of any claims A&T had against Capitol; a covenant by Brownstone to seek recovery of the remaining $1.1 million judgment only against Capitol, not against A&T; and an agreement to release all claims between the parties except for claims by or between Brownstone and Capitol.

Brownstone attempted to collect the remaining $1.1 million judgment from Capitol, but the trial court dismissed this action, under *Stubblefield*. The court held that the covenant not to execute released A&T from any obligation to pay Brownstone and, in the process, necessarily released Capitol as well. The Court of Appeals affirmed.

The Oregon Supreme Court reversed, however, noting the *Stubblefield* court's sparse reasoning, the inadequate attention to the court's own prior case law, and the fact that the majority of courts in other jurisdictions have held that a covenant not to execute given in the context of a settlement agreement does not, of its own force, extinguish further liability. The court did acknowledge that allowing liability to continue after a covenant not to execute is given in exchange for a stipulated or consent judgment could invite collusion, but the court stated there was no argument for collusion in this case and left that issue for "another day."

The overturning of *Stubblefield* has immediate liability implications for insurers. Oregon now joins a majority of states recognizing the validity of a covenant not to execute given in exchange for an assignment of rights.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact William F. Knowles at (206) 224-1289 or wknowles@cozen.com or Katie M. Sluss at (206) 373-7208 or ksluss@cozen.com.

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