

### 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.

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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](mailto:wknowles@cozen.com) or Katie M. Sluss at (206) 373-7208 or [ksluss@cozen.com](mailto:ksluss@cozen.com).



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