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***Brownstone Homes Condominium Association v. Brownstone Forest Heights, LLC*, 358 Or. 223, 363 P.3d 467 (2015)**

## Significance for Seminar Discussion

When documenting a stipulated judgment/covenant-not-to-execute settlement, an unconditional covenant-not-to-execute is no longer equated with a ***release*** of the insured defendant, which means an unconditional covenant-not-to-execute no longer zaps liability for purposes of liability coverage.

## Summary

In *Brownstone Homes*, the Oregon Supreme Court recently overruled its longstanding decision in *Stubblefield v. St. Paul Fire & Marine,* 267 Or. 397, 517 P.2d 262 (1973), which had largely driven how stipulated judgment/covenant-not-to-execute settlements are documented in Oregon. In *Stubblefield*, the Oregon Supreme Court had previously held that the following settlement agreement would preclude liability coverage because the insured defendant no longer had a "legal obligation to pay": (1) a stipulated judgment would be entered against the insured defendant for purposes of allowing the underlying plaintiff to chase liability coverage, (2) the insured defendant assigned its rights under its liability policy to the underlying plaintiff, and (3) the underlying plaintiff promised unconditionally not to execute the stipulated judgment against the insured defendant. The *Stubblefield* court held that the underlying plaintiff assignee "acquired no rights which are enforceable by it" against the insurer.

In *Brownstone Homes*, the plaintiff homeowners association and the insured general contractor entered a settlement agreement that included a stipulated judgment against the contractor, a covenant by the homeowners association not to execute that judgment, and an assignment to the homeowners association of the contractor's claims against its insurer. When the homeowners association then initiated a garnishment action against the insurer, the trial court dismissed the action on the ground that, under *Stubblefield*, the covenant not to execute had released both the insured and the insurer from their obligation to satisfy the judgment.

In overruling *Stubblefield*, the court's reasoning in *Brownstone Homes* was four-fold. First, the *Stubblefield* opinion provided limited analysis and cited no supportive authority. Second, *Stubblefield* runs contrary to the court's own prior case law without addressing the applicability of that law, particularly *Groce v. Fidelity General Insurance*, 252 Or. 296, 448 P.2d

554 (1968), which specifically permitted an assignee of an insured's rights to collect against the insurer, despite the existence of a covenant not to execute. Third, from a technical standpoint, a covenant not to execute does not act to release the assignee from liability. Instead, it acts as a contract between the assignor and assignee whereby the assignee promises not to execute the judgment—a contract which, if breached, may give rise to a claim for damages. Lastly, *Stubblefield* failed to account for the ambiguity of the phrase "legally obligated to pay" as it applied to the case of a covenant not to execute, which must be interpreted against the insurer.