



# OREGON LAW UPDATE

## Insured's Settlement with Plaintiff Found to be Not Binding on Insurer

case in point ...

**From the Desk of Jeff Eberhard:** This case discusses how and when a promise by a plaintiff to seek recovery from an insurer, instead of a defendant insured, will prevent that plaintiff from doing so.

**Claims Pointer:** If a plaintiff engages in a settlement agreement with a defendant that includes a promise not to seek recovery from the defendant, the plaintiff's ability to recover from the defendant's insurer will be severely limited by what is known as "the Stubblefield Rule."

Brownstone Homes Condominium Ass'n v. Brownstone Forest Heights, LLC, et al., in the Court of Appeals of the State of Oregon, A145740 (February 27, 2013).

The plaintiff, a condominium association, filed a lawsuit against the defendant A&T, a siding subcontractor, alleging breach of contract and negligence. A&T was insured by Zurich National ("Zurich") and Capitol Specialty Insurance ("Capitol"). As part of A&T's policy with Capitol, Capitol agreed to pay for debts which A&T became "legally obligated to pay as damages." The lawsuit settled with Zurich, A&T, and the plaintiff entering into a settlement. Those parties stipulated to a judgment in favor of the plaintiff in the amount of \$2,000,000. Zurich agreed to pay the plaintiff \$900,000 on behalf of A&T, leaving a balance on the judgment of approximately \$1,100,000. As part of the settlement, the plaintiff agreed not to pursue any additional payments from Zurich or A&T. A&T assigned any claims that it would have against its other insurer, Capitol, to the plaintiff, the Condominium Association. What this means is that A&T forfeited its right to seek payment for its share of the judgment from Capitol. Instead, the plaintiff was entitled to pursue recovery directly from Capitol.

The Condominium Association then First, the Court rejected the plaintiff's

pursued the balance of the judgment by serving Capitol with a writ of garnishment. Capitol disputed payment and moved for summary judgment, arguing that the settlement agreement executed between Zurich, A&T and the plaintiff already satisfied what A&T was "legally obligated to pay," under the terms of Capitol's policy. Capitol based its arguments on what is known as the "Stubblefield Rule." In Stubblefield v. St. Paul Fire & Marine, 267 Or 397 (1973), the Court held that in a situation where a plaintiff agrees not to execute a judgment against an insured, and the insured assigns its rights under the policy to the plaintiff, the insured is no longer "legally obligated to pay" the plaintiff. Consequently, the plaintiff acquires no rights it could enforce against the insurer, including payment of the stipulated judgment.

The trial court agreed with Capitol that the facts were similar to Stubblefield, and thus the plaintiff could not recover from Capitol. Consequently, the trial court granted Capitol's motion for summary judgment.

The Court of Appeals agreed with the trial court. The Court rejected all three of the plaintiff's attempts to distinguish the instant case from Stubblefield.

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argument that the Stubblefield Rule should not apply to a garnishment proceeding, noting that there is no difference between a garnishor and an assignee of rights under an insurance policy.

Second, the Court rejected the plaintiff's argument that the Stubblefield Rule is preempted by ORS 31.825. That statute permits a defendant in a tort action against whom a judgment has been rendered to assign its rights against its own insurer to the plaintiff. The court held that ORS 31.825 only applies in situations where a judgment is entered before the assignment of rights. Here, the judgment was entered after A&T assigned its rights. Therefore, ORS 31.825 does not apply, and the Stubblefield Rule controls. It's important to note that the Court's holding does not conflict with a previous decision, Portland School Dist. v. Great American Ins. Co., 241 Or App 161 (2011), in which the Court applied ORS 31.825 to an assignment clause which was conditioned on the entry of judgment against the defendant. In that case, the parties agreed to assign the insured's rights, after a judgment had been entered, which is required in order for ORS 31.825 to apply.

Finally, the Court rejected the plaintiff's argument that the non-execution covenant did not fully extinguish A&T's duty to pay because it was qualified, requiring A&T to "reasonably cooperate" with the plaintiff in pursuing the assigned rights. The plaintiff cited Lancaster v. Royal Ins. Co. of America, 302 Or 62 (1986) for the proposition that when a plaintiff enters into an agreement with a defendant

insured which provides that the plaintiff agrees "not to execute 'personally' on a judgment against [the defendant], the term 'personally' is ambiguous. In Lancaster, the Court held that this ambiguity created a factual issue and summary judgment was not proper. However, in this case, the Court identified distinguishing language in the covenant that unequivocally barred the plaintiff from executing the judgment against A&T. Specifically, the Condominium Association agreed that "in no event will it execute upon or permit the execution of the stipulated judgment against A&T or its assets." Therefore, A&T ceased to be legally obligated to pay, triggering the Stubblefield Rule.

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