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January 9, 2007

COLORADO SUPREME COURT RESTRICTS BROWDER AND REVERSES JUDGMENT IN FAVOR OF INSURED

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On January 8, 2007, the Colorado Supreme Court reversed a division of the Court of Appeals and held that third-party purchasers need not own their homes during an applicable policy period in order to recover. The Court had 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 reversing the appellate decision on this issue, the Colorado Supreme Court essentially overturned its decision on trigger in *Browder v. United States Fidelity & Guaranty Co.*, 893 P.2d 132 (Colo. 1995). *Browder* had stood for the proposition 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.

In *Hoang*, several plaintiff-homeowners sought to collect upon a judgment entered against Monterra Homes (Powderhorn) LLC ("Monterra") for construction defects to their homes that Monterra built. Assurance Company of America ("Assurance") insured Monterra during the time period when damage to the homes occurred. One set of homeowners, the Storbakkens, did not own their home when the damage occurred during the Assurance policy period. Because a majority of the damages to the Storbakkens' home was found to have occurred during the Assurance policy, and they did not own their home during that policy period, the Court of Appeals held that they could not have suffered damage during the Assurance policy period under *Browder*.

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In holding that the proceeds of the Assurance policy were available to satisfy the Storbakkens' judgment, the Court focused on the fact that Monterra insured itself against liability for damage occurring during the policy period and that damage was found to have occurred during that period. The Court noted that the Assurance policy was an occurrence policy, which provides coverage for all occurrences, including property damage, that take place during the policy period regardless of when the claim is presented. As the Assurance policy's terms, conditions, and exclusions did not limit coverage for damages sustained to the home because of a change in the home's ownership, the Court held that such damages were recoverable under the Assurance policy even though the Storbakkens did not own their home during that policy. In other words, the critical fact for the Court was that the damage occurred during the Assurance policy period, not who owned the property at that time.

Rather than flatly overturn *Browder*, the Court distinguished it for two reasons. First, the insurance policy at issue in *Browder* was a special multi-peril policy which specifically restricted coverage to the operation of the motel on the premises and did not cover liability arising out of the negligent construction of the motel. Additionally, the Court noted that while the policy at issue in *Browder* also contained an owned-property exclusion, which excludes damages to property owned by the insured, that exclusion was applicable in that case. In *Browder*, the damage at issue occurred while the insured owned the motel. Thus, recovery for such damages was barred in *Browder*, but not in *Hoang*, because Monterra did not own the property at issue when the damage was found to have occurred. As such, the Court found its holding in *Browder* inapplicable to *Hoang*. While the Court in *Browder* explicitly stated that a claimant must have a "legally cognizable" interest in the property during the policy period for coverage to be triggered, the *Hoang* Court overruled such statements as unnecessary to its decision.

The *Hoang* decision will have a significant impact on the insurance industry as Colorado joins the majority of jurisdictions which do not require a claimant to have owned the property at issue during the policy period so long as the damages occurred during the applicable policy.

For a further analysis of the Hoang 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.